

---

## Eleventh Circuit Adopts Broad Definition of Government "Instrumentality" Under FCPA

MAY 22, 2014

On May 16, 2014, in the first appellate decision of its kind, *United States v. Esquenazi*,<sup>1</sup> the Eleventh Circuit affirmed a broad definition of "instrumentality" of a foreign government, as the term is used in the Foreign Corrupt Practices Act (FCPA) to define who qualifies as a "foreign official" under the statute,<sup>2</sup> and upheld the longest prison sentence ever imposed in an FCPA case. The decision generally supported the position that the US government has advanced on this issue. The court provided a two-part definition of "instrumentality" as (1) "an entity controlled by the government of a foreign country" that (2) "performs a function the controlling government treats as its own." The court also laid out a non-exhaustive list of factors to consider in applying each part of the test. In addition to the main issues decided by the court, the court also touched on a number of other ancillary issues involving the FCPA.

### Background

In August 2011, a Miami jury found Joel Esquenazi and Carlos Rodriguez guilty of bribing officials at the state-owned Telecommunications D'Haiti between November 2001 and March 2005. They were convicted of one count of conspiracy to violate the FCPA and wire fraud, seven substantive FCPA counts, one count of money laundering conspiracy, and 12 counts of money laundering. Esquenazi was sentenced to 15 years in prison, and Rodriguez, seven years.

The FCPA prohibits companies that trade on US exchanges and companies incorporated in the US, as well as officers, directors, employees, stockholders and agents of such companies, and US citizens and residents, from making or offering corrupt payments to foreign government officials. The FCPA defines "foreign official" to include "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof."<sup>3</sup> On appeal, Esquenazi and Rodriguez challenged the district court's jury instructions, arguing that the definitions of "instrumentality" and "foreign official" in the instructions were overbroad.

Esquenazi and Rodriguez co-owned Terra Telecommunications Corp., a Florida company that purchased telephone time from foreign vendors and resold that time to customers in the United States. Telecommunications D'Haiti, S.A.M. (Teleco) was one of Terra's primary vendors. The district court heard testimony indicating that Teleco was owned by the Haitian Government at the time that

Terra was doing business with Teleco. When Teleco was formed in 1968, it was given a monopoly on telecommunication services. Beginning in the early 1970s, the National Bank of Haiti took on a 97 percent ownership of Teleco. At the relevant time, the Haitian President appointed all of Teleco's board members. The government also produced evidence that the defendants considered Teleco to be a state-controlled entity: they sought political risk insurance on their contracts with Teleco, which "applies only when a foreign government is party to an agreement," and a Terra executive assured the insurer that Teleco was "an instrumentality of the Haitian Government."<sup>4</sup> Finally, a 2008 Haitian anti-corruption law listed Teleco as a public administration of the government. Teleco was later privatized. Five days after the jury convicted Esquenazi and Rodriguez, Haitian Prime Minister Jean Max Bellerive sent a declaration to the defense team noting that "Teleco has never been and until now is not a State enterprise."<sup>5</sup> He followed that up with a second declaration that clarified "[t]he only legal point that should stand out in this statement is that there exists no law specifically designating Teleco as a public institution."<sup>6</sup>

## The Opinion

In the opinion, the Eleventh Circuit defined "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."<sup>7</sup> The court went on to hold that determining what constitutes control over the entity and whether the function of the entity is treated as its own by the government are "fact-bound questions" that must be answered on a case-by-case basis, because "[i]t would be unwise and likely impossible to exhaustively answer them in the abstract."<sup>8</sup>

### *Definition of "Instrumentality"*

At the time of the appeal, only two other district courts had outlined factors describing what constitutes an "instrumentality" under the FCPA. In *United States v. Noriega*, the district court applied a five-factor test: 1) the entity provides a service to its citizens; 2) the primary officers are appointed by government officials; 3) the entity is largely financed through government appropriations; 4) the entity is vested with controlling power; and 5) the entity is understood to be performing official functions.<sup>9</sup> One month later, the district court in *United States v. Carson* offered a six-factor test: 1) the government's characterization of the entity; 2) the government's degree of control; 3) the purpose of the entity's activities; 4) the entity's obligations under the law, including whether it holds a monopoly; 5) the circumstances of the entity's creation; and 6) the government's ownership interest, including ongoing financial support.<sup>10</sup>

The Eleventh Circuit clarified the test and, taking the facts of *Esquenazi* as its foundation, offered a non-exhaustive list of factors to consider in assessing whether an entity is an "instrumentality" under the FCPA.

First, courts and juries should determine whether the government "controls" the entity,<sup>11</sup> by considering the following factors:

- the foreign government's formal designation of that entity;
- whether the foreign government has a majority interest in the entity;

- the foreign government's ability to hire and fire the entity's principals;
- the extent to which the government profits from or subsidizes the entity; and
- the length of time that these indicia have existed.

Second, courts and juries should assess whether "the entity performs a function the government treats as its own" by examining the following factors:<sup>12</sup>

- whether the entity has a monopoly over the function it exists to carry out;
- whether the government subsidizes the costs associated with the entity providing services;
- whether the entity provides services to the public at large; and
- whether the public and government generally perceive the entity to be performing a governmental function.

The court went on to say that "it will be relatively easy to decide what functions a government treats as its own" by looking at objective factors, including "control, exclusivity, governmental authority to hire and fire, subsidization, and whether an entity's finances are treated as part of the public fisc."<sup>13</sup> The court said that courts and businesses "have readily at hand the tools to conduct that inquiry."<sup>14</sup> In practice, this analysis may be more difficult than the court allows because information on these factors is not always publicly available or easy to discern.

Applying these principles, the court held that Teleco was an "instrumentality" of Haiti. The court noted that throughout the years that the defendants were involved with Teleco, it was 97 percent owned by the government; the company's Director General was chosen by the Haitian president with the consent of the Prime Minister and two other government ministers; and the Haitian President appointed all of its board members.

#### *Government-Owned "Instrumentalities" May be Commercial in Nature*

The government and the defense agreed that an "instrumentality must perform a government function at the government's behest" but disagreed as to "what functions count as the government's business."<sup>15</sup> The defendants argued that a foreign government entity can only be considered an instrumentality under the FCPA if the entity performs "traditional, core government functions."<sup>16</sup>

In rejecting this argument, the Eleventh Circuit considered the broader context of the FCPA. According to the court, "[Th]at a government-controlled entity provides a commercial service does not automatically mean that it is not an instrumentality. In fact, the statute expressly contemplates that in some instances it would."<sup>17</sup> Specifically, the court noted that the FCPA allows "grease payments" to expedite performance of routine governmental actions, and that the FCPA in fact includes, as an example of such a routine action, "providing phone service."<sup>18</sup> Accordingly, the court concluded that if a company providing telecommunication service could never be an instrumentality of a foreign government, this statement in the FCPA's statutory exclusion would be meaningless. The court's conclusion on this point did not seem to take into account that the defendants' argument would not necessarily categorically exclude an entity that provides phone service. Rather, a phone service provider might be a government instrumentality in one country in which the service is provided by a public utility, but not in another country in which the service is provided by a private or

partially privatized telecommunications company.

The court also noted that Congress amended the FCPA in 1998 to implement the requirements of the Organization for Economic Cooperation and Development's (OECD) anti-bribery convention. The OECD convention states that a "foreign public official" includes agents of entities that are not operating on a "normal commercial basis in the relevant market" while performing public functions.<sup>19</sup> Importantly, the commentary to the convention explains that in order to be excluded from the definition of "foreign public official," the entity for which the official works must not receive preferential subsidies or other privileges from the foreign government. Because the 1998 FCPA amendments did not address this definition, the Eleventh Circuit concluded that Congress believed that the FCPA already covered officials and entities encompassed therein.

### *Convictions and Sentences Affirmed*

In addition to its historic ruling on the definition of instrumentality, the Eleventh Circuit addressed other arguments raised in the appeal. It rejected the argument that the FCPA is unconstitutionally vague, and it affirmed the jury instructions on whether the defendants had knowledge that payments would ultimately go to foreign officials. The appeals court noted that the district court should not have instructed the jury on "deliberate ignorance" when the evidence either pointed to actual knowledge or no knowledge at all. The court stated that an instruction on deliberate indifference is only appropriate if there is evidence showing that a defendant "purposely contrived to avoid learning the truth."<sup>20</sup> In light of the overwhelming evidence demonstrating the defendants' actual knowledge, the Eleventh Circuit concluded, however, that this error was harmless. In the context of this discussion, the court reiterated a key aspect of the FCPA—that "knowledge" under the statute includes not only actual knowledge, but a "firm belief" that a circumstance exists or that a result is "substantially certain" to occur.<sup>21</sup>

The 15-year sentence for Esquenazi, the former president of Terra, was affirmed. Among other things, the Eleventh Circuit affirmed the sentence enhancement based on Esquenazi's leadership role in the bribery scheme. The seven-year sentence for Rodriguez, a former vice president of Terra, also was affirmed. The court also affirmed the application of sentencing enhancements for the "value of the benefit received," calculating the amount to be the value of the total benefit that the *company* received, not the value received by an individual. Esquenazi and Rodriguez were ordered to forfeit, jointly and severally, \$3 million.

### **Conclusion and Significance of the Esquenazi Case**

This decision provides a clear definition of the term "instrumentality," within the context of the FCPA, and provides guidance on what factors to consider when deciding how to treat employees of entities that are partially owned by foreign governments. This case will make it more difficult for defendants to argue that the definition of "instrumentality" is an open question of law, and enforcement authorities are likely to treat the issue as settled, even in cases outside the Eleventh Circuit. From a compliance perspective, companies would therefore be wise to proceed under the assumption that the FCPA prohibits payments to government-owned and -controlled entities, even if those entities operate in a commercial arena. In practice, this has been the standard in compliance programs for

some time given that the enforcement agencies have pressed this view for many years, even memorializing it in their 2012 *Resource Guide to the US Foreign Corrupt Practices Act*.<sup>22</sup>

Whether or not the recipient of a payment is a "foreign official," however, may be becoming less significant from a compliance perspective. The Department of Justice and Securities and Exchange Commission have pursued numerous cases involving commercial bribery with no connection to a government, under the Travel Act or the accounting provisions of the FCPA. Relatedly, the anti-bribery laws of many other countries, such as the UK Bribery Act, prohibit commercial bribery. Thus, the analysis in *Esquenazi* is a key pronouncement regarding an important statute that has historically had few judicial interpretations, but its practical significance may be limited, particularly for global companies seeking to maintain clear compliance standards across jurisdictions.

All that said, given the dominant role of the government in this case, the outcome certainly could be different in other contested cases, for example in cases where the government may own less than a majority stake, or the function of the entity may be more tangential to the government. Thus, the court's fact-specific inquiry will be important in fully analyzing potential liability under the statute in cases to come.

---

<sup>1</sup>*United States v. Esquenazi*, No. 11-15331, 2014 U.S. App. LEXIS 9096 (2d Cir. May 16, 2014), available at <http://www.ca11.uscourts.gov/opinions/ops/201115331.pdf>.

<sup>2</sup> 15 U.S.C. § 78dd-2.

<sup>3</sup>*Id.* §78dd-2(h)(2)(A) (emphasis added).

<sup>4</sup>*Esquenazi*, No. 11-15331 at 3.

<sup>5</sup>*Id.* at 8.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 20.

<sup>8</sup>*Id.* at 20.

<sup>9</sup> Minutes in Chamber Order at 9, *United States v. Noriega*, No. 10-01031 (C.D. Cal. Apr. 20, 2011).

<sup>10</sup>*United States v. Carson*, No. 09-77, 2011 WL 5101701 at \*3-4 (C.D. Cal. May 18, 2011).

<sup>11</sup>*Esquenazi*, No. 11-15331 at 20.

<sup>12</sup>*Id.* at 22-23.

<sup>13</sup>*Id.* at 19-20 n.8.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 11, 13.

<sup>16</sup>*Id.* at 18.

<sup>17</sup>*Id.* at 14.

<sup>18</sup> 15 U.S.C. § 78dd-2(h)(4)(A).

<sup>19</sup>*Esquenazi*, No. 11-15331 at 23.

<sup>20</sup>*Id.* at 32.

<sup>21</sup>*Id.* at 30 n.12.

<sup>22</sup> A Resource Guide on the US Foreign Corrupt Practices Act, at 20-21 (2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

---

## Authors



**Roger M. Witten**

SENIOR COUNSEL

✉ [roger.witten@wilmerhale.com](mailto:roger.witten@wilmerhale.com)

☎ +1 212 230 8850



**Kimberly A. Parker**

PARTNER

Vice Chair,  
Litigation/Controversy  
Department

Co-Chair, White Collar Defense  
and Investigations Practice

✉ [kimberly.parker@wilmerhale.com](mailto:kimberly.parker@wilmerhale.com)

☎ +1 202 663 6987



**Jay Holtmeier**

PARTNER

✉ [jay.holtmeier@wilmerhale.com](mailto:jay.holtmeier@wilmerhale.com)

☎ +1 212 295 6413



**Erin G.H. Sloane**

PARTNER

✉ [erin.sloane@wilmerhale.com](mailto:erin.sloane@wilmerhale.com)

☎ +1 212 295 6458