

11th Circuit Defines Government “Instrumentality” Under FCPA’s Anti-Bribery Provisions – Maintains Broad Reach of Statute, But Clarifies that It Does Not Apply to All Government-Controlled Entities

The United States Court of Appeals for the Eleventh Circuit recently issued a rare and important decision interpreting the U.S. Foreign Corrupt Practices Act (“FCPA”). In *U.S. v. Esquenazi*, the Court held that a telecommunications company founded, owned and controlled by the Government of Haiti, subject to Haiti’s anti-public-corruption statutes, and granted a public monopoly, was a government “instrumentality” under the FCPA. The decision is the first to define what constitutes a government “instrumentality” as that term is used in the FCPA’s anti-bribery provisions, which prohibit bribing officers or employees of foreign governments and their instrumentalities.

The defendants had been convicted of bribing a “foreign official,” which is defined in the FCPA as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.” On appeal, the Court rejected the defendants’ argument that only an actual part of the government should be considered a government instrumentality, and held instead that an “instrumentality” is any “entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” The decision is significant because it clarifies that the FCPA bars certain conduct, not just with respect to the officers or employees of a foreign government itself, but also with respect to the officers or employees of foreign-government-controlled entities that perform a function the foreign government considers its own.

Background on the FCPA’s Anti-Bribery Provisions and Definition of Foreign Government Official

The FCPA’s anti-bribery provisions prohibit U.S. persons from bribing, offering to bribe, or authorizing a bribe to, a foreign official, either directly or indirectly. A bribe includes paying or providing anything of value to influence a foreign official in his or her official capacity, or to cause a foreign official to act in violation of a lawful duty, in order to obtain or retain business or gain a business advantage.

The FCPA is relevant to U.S. and non-U.S. companies alike because it may apply to conduct outside the U.S., and to non-U.S. entities with certain U.S. ties. The FCPA applies to entities organized under U.S. law, U.S. citizens, non-U.S. entities

Contents

Background on the FCPA’s Anti-Bribery Provisions and Definition of Foreign Government Official.....	1
<i>U.S. v. Esquenazi</i> – A Challenge to the DOJ’s Interpretation of “Foreign Government Official”	2
Conclusion	4

listed on U.S. exchanges, and any person or entity who commits any prohibited acts within U.S. territory.

The statute defines a foreign official as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

Notably, the FCPA does not define “instrumentality” as used in this provision. In its 2012 Resource Guide to the FCPA, the DOJ took an expansive view of the term, stating that it considers the FCPA’s definition of “foreign official” to include officers and employees of state-owned and controlled entities “in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life science, energy and extractive industries, telecommunications, and transportation.” As evidenced by various enforcement actions it has brought, the DOJ has adopted the view that any government-controlled entity falls within the ambit of the FCPA, irrespective of the entity’s function. Because very few targets of FCPA enforcement proceedings litigate their charges in court, U.S. courts have addressed remarkably few elements of the FCPA, including, prior to the Eleventh Circuit’s decision, the definition of “foreign official.”

Prior to *Esquenazi*, a number of district courts, including the district court in *Esquenazi*, had issued jury instructions on the meaning of “foreign official,” which suggested that what constitutes an “instrumentality” is a fact-specific inquiry dependent on various factors to be considered by the jury. These jury instructions were not, however, based on any guidance from the Circuit Courts.

***U.S. v. Esquenazi* – A Challenge to the DOJ’s Interpretation of “Foreign Government Official”**

In *Esquenazi*, the U.S. government prosecuted two defendants, who purchased telephone minutes from a Haitian telecommunications company for resale in the U.S., for bribing a company official to reduce what the defendants owed for the minutes. The defendants were convicted of violating the FCPA’s anti-bribery provisions, but challenged the district court’s jury instructions for misconstruing the term “instrumentality.” Specifically, the defendants asserted that the district court erred in not requiring the jury to determine that the government-owned entity at issue actually performed a governmental function.

The Eleventh Circuit affirmed the convictions. In order to consider the defendants’ challenges to the jury instructions regarding the meaning of “instrumentality,” the Court began by defining the term as it is used in the FCPA. The Court recognized that no Court of Appeals had previously considered the issue. Accordingly, the Court considered a number of factors to construct a meaning of “instrumentality,”

including dictionary definitions of the term, the meaning of the term in other federal statutes, and the context in which the term is used within the FCPA itself. The Court concluded that “instrumentality,” as used in the FCPA, means an entity “controlled by the government of a foreign country that performs a function the controlling government treats as its own.”¹

This definition is significant because it rejected the defendants’ contention that an entity should be considered an “instrumentality” only if it performs a “core government function.” The Eleventh Circuit held that nothing in the FCPA imposed such a limitation, and noted that what constitutes a core government function has changed over time and varies from nation to nation. The Court thus held that the key consideration is whether the relevant foreign government itself considers the entity in question to be performing a governmental function.

The Eleventh Circuit’s definition and factor-based approach permits a broad understanding of what constitutes a government instrumentality. Because it is the only appellate level guidance on this issue, the DOJ likely will maintain its expansive view of the FCPA’s anti-bribery provisions.

The exact reach of the FCPA’s anti-bribery provisions remains, however, a case-by-case determination; only time will tell exactly how the government and defendants will interpret the Eleventh Circuit’s definition, and how other courts will apply it. Indeed, because the test is fact-specific, it could lead to different results for different types of entities. For example, a public hospital or university owned and controlled by a foreign government may perform “a function the government considers its own,” while a sovereign wealth fund might or might not perform “a function the government considers its own.” And the test could lead to different results even for similar types of entities in different countries; for example, one country might consider its state-owned telecommunications company to carry out a governmental function, while another might consider its state-owned telecommunications company to carry out non-governmental functions. Indeed, the prosecution and defense in *Esquenazi* submitted conflicting evidence as to whether the government of Haiti considered the company at issue in that case to be performing a governmental function.

¹ The Court instructed that in determining whether an entity is under government control, courts could consider certain non-exclusive factors, including: the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed.

The Court also listed the following non-exclusive factors to be considered in determining whether the entity performs a function “the government treats as its own”: 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 in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

Conclusion

The Eleventh Circuit in *Esquenazi* adopted a broad definition of “instrumentality,” and clarified that the FCPA applies to bribes, not just of governmental officials themselves, but also of officials or employees of a broad range of state-owned enterprises, provided only that those entities carry out a function that the foreign government considers to be a governmental one. The breadth of the Eleventh Circuit’s definition of “instrumentality” reflects a broad understanding of the FCPA, and is unlikely to alter DOJ enforcement activities. The case highlights the importance of maintaining rigorous policies and controls to protect against conduct that might be deemed to violate the FCPA.

Authors: Lance Croffoot-Suede, Paul Hessler, Jim Warnot, Brenda DiLuigi, Nathan Carle and Kate Machan

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All rights reserved 2014.

Linklaters in the U.S. provides leading global financial organizations and corporations with legal advice on a wide range of domestic and cross-border deals and cases. Our offices are located at 1345 Avenue of the Americas, New York, New York 10105.

Linklaters LLP is a multinational limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com.

Please refer to www.linklaters.com/regulation for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at marketing.database@linklaters.com.

Contacts

For further information please contact:

Lance Croffoot-Suede
Partner

+1 212 903 9261

lance.croffoot-suede@linklaters.com

Paul Hessler
Partner

+1 212 903 9132

paul.hessler@linklaters.com

Jim Warnot
Partner

+1 212 903 9028

jim.warnot@linklaters.com

Brenda DiLuigi
Counsel

+1 212 903 9080

brenda.diluigi@linklaters.com

Nathan Carle
Associate

+1 212 903 9340

nathan.carle@linklaters.com

Kate Machan
Associate

+1 212 903 9289

kate.machan@linklaters.com

1345 Avenue of the Americas
New York, NY 10105

Telephone +1 212 903 9000

Facsimile +1 212 903 9100

Linklaters.com