

Resources

Eleventh Circuit Defines “Instrumentality” Under the FCPA

May 30, 2014

On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit issued the first appellate court decision defining the term “instrumentality” as it is used in the Foreign Corrupt Practices Act (FCPA). In this landmark decision, the Court agreed with an expansive interpretation of the U.S. Department of Justice (DOJ) to define “instrumentality” to include state-owned companies.

This decision arose from the prosecution, *United States v. Esquenazi*, where former executives of the Florida company, Terra Telecommunications Corp., were convicted of bribing officials at a Haitian state-owned telecom company. One of the executives, Mr. Esquenazi, faces 15 years in jail—the longest sentence ever imposed under the FCPA.

While the FCPA defines “foreign official”, it does not define the term “instrumentality” of a foreign government. This absence of any definition has prompted much debate over the scope of the term. The defendants in *Esquenazi* argued that the term “instrumentality” is limited only to entities that perform “traditional, core government functions” and that the Haitian state-owned company should not qualify as an instrumentality of Haiti’s government.

The Eleventh Circuit rejected that argument, ruling that executives of companies with relationships to foreign governments may be considered “foreign officials” under the FCPA. The Court provided its own definition of instrumentality as an entity 1) controlled by the government of a foreign country that 2) performs a function the controlling government treats as its own.

The Court recognized that each case would be different, but it enumerated factors to consider in deciding if a government “controls” any entity. They include 1) the foreign government’s formal designation of the entity; 2) whether the government has a majority interest in the entity; 3) the government’s ability to hire and fire the entity’s principals; 4) the extent to which the entity’s profits go directly to the government or to which the government funds the entity; and 5) whether the entity has a monopoly over the function; and 6) whether the entity provides service to the public.

The Eleventh Circuit’s decision endorses the DOJ’s broad and long-standing reading of the FCPA, as reflected in the DOJ’s FCPA Reference Guide (2012). It is likely to promote further expansion of FCPA prosecutions. The ruling also serves as a reminder to companies to ensure that their policies are FCPA-compliant and that their officers and employees are aware of the steps to be taken to do business abroad in accordance with the FCPA.

For more information on this appellate court decision, please contact the co-authors of this alert, **Jonathan Feld** at 312-627-5680 (Chicago) or 202-906-8716 (Washington D.C.), or **Kara Murphy** at 312-627-5658, or any of the attorneys listed to the left.

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