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PERSPECTIVE

A first-of-its-kind ruling on the FCPA

By Debra Wong Yang and Poonam Kumar

Court interpretations and analyses of the Foreign Corrupt Practices Act are few and far between notwithstanding the increasing penalties, some well over the $100 million mark, imposed on companies and individuals. As corporations continue to expand globally, the risk of violating the FCPA is ever present. And so, any interpretation of the FCPA has great meaning and import.

On May 16, the 11th U.S. Circuit Court of Appeals issued its much-anticipated decision in the appeal of Joel Esquenazi and Carlos Rodriguez. *United States v. Esquenazi,* 11-15331. In 2011, Esquenazi and Rodriguez were convicted of 21 criminal charges, including seven substantive violations of the FCPA and one count of conspiracy to violate the FCPA. The charges stemmed from allegations that Esquenazi and Rodriguez, co-owners of Terra Telecommunications Corp., made payments through shell companies to officials at Telecommunications D'Haiti, S.A.M. ("Teleco"), a company the Haitian government had given a monopoly on telecommunication services in 1968. Following conviction, Esquenazi was sentenced to 180 months in prison, the longest prison term ever imposed for FCPA violations, and Rodriguez was sentenced to 84 months.

The FCPA prohibits giving or offering anything of value to a "foreign official," which includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." 15 U.S.C. Sections 78dd-1(f)(1), 78dd-2(h)(2)(A). Accordingly, the 11th Circuit had to determine whether Teleco was an instrumentality of the Haitian government. In its 50-page opinion, the 11th Circuit rejected the defendants' arguments. In a unanimous decision, the court's three-member panel largely adopted the Department of Justice's expansive view of the term and promulgated two fact-intensive tests to determine what qualifies as an instrumentality.

The court rejected the contention that an instrumentality must be an "actual part of the government," but agreed that an instrumentality "must be doing the business of the government." The parties could not agree, however, on what specific functions would suffice. Specifically, the court disagreed with the contention that the provision of a commercial service precludes an entity's qualification as an instrumentality.

Thus, the court held, an instrumentality is as 'an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.'

The court looked to two places — first, to the text of the statute. The FCPA's "facilitating payments exception" permits payments to foreign officials to expedite or perform a "routine governmental action." This exception, the court reasoned, would be meaningless if the defendant's narrow interpretation of the statute was correct. Indeed, the express inclusion of a facilitating payment exception necessarily assumed that certain "routine" action would have otherwise qualified the acting entity as an instrumentality. Put another way, "[i]f an entity involved in providing phone service could never be a foreign official so as to fall under the FCPA's substantive prohibition, there would be no need to provide an express exclusion for payments to such an entity."

Second, the court looked to the obligations of the U.S. under the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions for guidance — relying heavily on its definition of "public official." The commentary to the convention says that provision of a commercial function could, under certain circumstances, bring an entity under the convention's purview. The 11th Circuit held that because the U.S. was obligated to implement the convention and the FCPA had, in fact, been amended to ensure such implementation, the two must be interpreted consistently — i.e., by not excluding an entity because of its commercial function. Similarly, the court found that the convention barred the defendants' arguments that only "entities that perform traditional, core government functions" could be instrumentalities. In fact, the court found that, to interpret the FCPA in the manner advocated by the defendants, the U.S. would be in violation of its obligations under the convention.

Thus, the court held, an instrumentality is as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." Recognizing that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions," the court identified a non-exhaustive list of factors.

The court listed six factors to determine whether a government exerts control over an entity: "[1] the foreign government's formal designation of that 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, if any, go directly into the governmental fisc, [5] and, by the same token, the extent to which the government funds the entity if it fails to break even; and [6] the length of time these indicia have existed."

With regards to the second prong of the analysis — whether the foreign government treats the function at issue as its own — the court listed four factors: "[1] whether the entity has a monopoly over the function it exists to carry out; [2] whether the government subsidizes the costs associated with the entity providing services; [3] whether the entity provides services to the public at large in the foreign country; and [4] whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function."

Ultimately, there was sufficient evidence for the court to find that Teleco was an instrumentality of the Haitian government. In fact, the court held that Teleco was likely an instrumentality "under almost any definition we could craft."

Esquenazi largely affirmed the DOJ's expansive approach to the definition of a foreign official under the FCPA. The court's holding makes plain that not every state-owned or state-controlled entity is an instrumentality. However, it likewise makes clear that many entities could be. As FCPA practitioners have long been advising clients, *Esquenazi* confirms that there is no bright line test, such as percentage of government ownership, to use to determine whether an entity qualifies as an instrumentality. Rather, the inquiry is fact-intensive and requires the balancing of various factors, not all of which are enumerated in the court's decision in *Esquenazi*. This will continue to make it difficult for corporations to navigate through these issues.

Finally, the court's analysis necessarily shows that each court may very well come to a different conclusion subject to the particular facts, thus rendering the test itself less useful to those looking for clearer guidance. As such, while it may have been the first federal appellate opinion of its kind, *Esquenazi* solidified our previous understanding rather than charting a different course for the FCPA.

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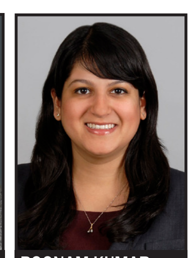

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