

Federal Appellate Court Adopts Broad Definition Of “Instrumentality” As Used In The Foreign Corrupt Practices Act

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In a ground-breaking decision, the United States Court of Appeals for the Eleventh Circuit has defined “instrumentality” under the Foreign Corrupt Practices Act (FCPA). Until now no federal appellate court had weighed in on a definition of “instrumentality,” leaving individuals and entities only the government’s interpretation of the statute for guidance. Not surprisingly, the government’s interpretation of what constitutes an “instrumentality” of the state for purposes of a bribe to one of its officials or employees included state-owned or state-controlled entities.[1] The Eleventh Circuit’s decision in *United States v. Esquenazi*, No. 11-15331 (May 16, 2014), in large part adopted the government’s interpretation, defining an “instrumentality” as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” Thus, according to the Eleventh Circuit, the definition of instrumentality has two elements: (a) control by the state, and (b) performance of a state function. To guide a determination of the element of control, the appellate court offered a series of non-exhaustive factors, including: (a) the foreign government’s formal designation of that entity; (b) whether the government has a majority interest in the entity; (c) the foreign government’s ability to hire and fire the entity’s principals; (d) 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 (e) the length of time these indicia have existed. To guide a determination of whether the entity performs a function the foreign government treats as its own, the court said it would consider: (a) whether the entity has a monopoly over the function it exists to carry out; (b) whether the foreign government subsidizes the costs associated with the entity providing services; (c) whether the entity provides services to the public at large in the foreign country; and (d) whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function. Like the government, the Eleventh Circuit emphasized that both elements are fact-intensive questions. The appellate court’s refusal to establish a bright-line rule with respect to state-controlled or state-operated entities is disappointing, but not surprising. The *Esquenazi* case involved Haiti Teleco, an entity that the court recognized would be considered an instrumentality by almost any definition. However, the definition does leave some room for interpretation in a case in which the ownership is not as clear or the function not closely tied to a traditional government function. In-house anti-corruption policies will not require significant revision in light of *Esquenazi*, assuming they were adopted or revised with reference to the DOJ/SEC guide. However, companies should revisit their policies in light of this case, to ensure that it is clear that state-owned or state-operated entities do fall within the ambit of the FCPA. [1] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* at 20 (November 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

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