

CLIENT ALERT

Eleventh Circuit Endorses Broad Definition of 'Foreign Official' Under the FCPA

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On May 16, 2014, the Eleventh Circuit became the first federal appeals court to define "instrumentality" as it is used in the Foreign Corrupt Practices Act's definition of "foreign official." In upholding the convictions of two individuals, the Eleventh Circuit held that any entity can qualify as an "instrumentality" of a foreign government – making its employees "foreign officials" to whom the Act prohibits payments – so long as the entity is (1) "controlled by the government of a foreign country" and (2) "performs a function the controlling government treats as its own." *United States v. Esquenazi*, No. 11-15331 (11th Cir. May 16, 2014). The court rejected the defendants' arguments that only entities that perform "traditional, core government functions" can qualify as instrumentalities, and agreed with the government that even companies performing commercial services can qualify as instrumentalities.

With respect to the "control" element, the Eleventh Circuit provided a non-exclusive list of factors to consider:

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, and, by the same token, the extent to which the government funds the entity if it fails to break even.
5. The length of time these indicia have existed.

With respect to the "functional" element, the Eleventh Circuit suggested that companies, courts and juries should weigh:

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.
4. Whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.

The Eleventh Circuit stated that the company at issue in *Esquenazi*, a Haitian telephone company known as Telecommunications D'Haiti, S.A.M. (Teleco), would qualify as an "instrumentality" of the Republic of Haiti under any definition it could craft. It noted in particular testimony that during the time period in question: (a) the Haitian president appointed the chief executive and all of the board members, (b) the equivalent of the central bank of Haiti owned a majority of the shares, and (c) Teleco was generally considered a public entity.

As a practical matter, strong anti-corruption compliance programs seek to prevent any bribery whether of a foreign official or an employee of a private foreign company. Accordingly, whether an entity is an "instrumentality" under the FCPA is most often a concern when businesses are considering entering into commercial relationships with employees of such entities, or entities

owned or controlled by such employees (or their family members). However, given U.S. and multinational enforcement priorities, the risks of doing any business with such persons increases dramatically if they could be considered "foreign officials."

In *Esquenazi*, the Eleventh Circuit blithely suggested that consideration of the "objective factors" it listed should make it "relatively easy" for U.S. companies doing business abroad to assess whether an entity is an "instrumentality" – particularly in light of the Advisory Opinion process. But even if a particular transaction could await an Advisory Opinion, any resulting Opinion would be expressly conditioned on the accuracy and completeness of the information provided. Those experienced in international business understand how difficult it remains to obtain reliable ownership and similar information in many foreign countries.

Companies will need to continue to be cautious in dealing with employees of any entities that have some level of foreign government control or ownership, and it remains to be seen whether the Eleventh Circuit's "objective factors" will alleviate or only aggravate the confusion about which persons are "foreign officials" under the FCPA.

For more on the definition of "foreign official" under the FCPA:

- ["Who Is a Foreign Official? The Individual Element of the Definition and the Significance of the Business Context," ABA's 27th Annual National Institute on White Collar Crime \(2013\).](#) Co-Authors: Janet Levine, Ann Mason Rigby, and Dalal Hasan.
- ["Are Members of Royalty 'Foreign Officials'" Under the FCPA? Not Always, But Tread Carefully in the Arabian Gulf States,"](#) (November 20, 2012). Contacts: Thomas A. Hanusik, Alan W. H. Gourley, Ann Mason Rigby, Dalal Hasan, Kelly T. Currie, Daniel L. Zelenko, Janet Levine, Jeffrey H. Rutherford.

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