Legal Sidebar

Eleventh Circuit Provides Guidance for the Definition of "Foreign Official" under the FCPA

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On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) issued its opinion in *United States v. Esquenazi* , a case important for being the first federal appellate court decision to provide guidance for and flesh out the definition of the term "foreign official" under the Foreign Corrupt Practices Act (FCPA or Act). The FCPA, first enacted in 1977 and significantly amended in 1988 (with an additional amendment in 1998 to implement the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), was enacted principally to prevent the bribery of foreign officials. It has three major parts: 1. Requires corporations to keep accurate books, records, and accounts; 2. Requires issuers registered with the Securities and Exchange Commission to maintain a responsible internal accounting control system; and 3. Prohibits bribery by American corporations of foreign officials. (For additional information on the FCPA, *see* CRS Report R41466: *The Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement*.)

Esquenazi and Rodriguez owned Terra Telecommunications (Terra), a Florida company that purchased phone time from foreign vendors and resold the minutes to U.S. customers. One of Terra's main vendors was Telecommunications D'Haiti (Teleco). By 2001, Terra owed Teleco more than $400,000, and Esquenazi and Rodriguez contacted Teleco officials to negotiate an amortization agreement or, alternatively, to offer a "side payment." A side payment deal was worked out, and the arrangement resulted in payments to Teleco officials in exchange for debt reduction of Terra's bills. Esquenazi and Rodriguez were charged with violations of conspiracy, money laundering, and, what is important in this sidebar, the FCPA. The U.S. District Court for the Southern District of Florida found them guilty, and they appealed.

The Eleventh Circuit affirmed. The court began its analysis by quoting the bribery provision of the FCPA and the definition of "foreign official."

> The FCPA prohibits "any domestic concern" from "mak[ing] use of the mails or any means...of interstate commerce corruptly in furtherance of" a bribe to "any foreign official," or to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official," for the purpose of "influencing any act or decision of such foreign official...in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person...." A "foreign official" is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."

The court considered what the word "instrumentality" means in the definition of "foreign official" and whether Teleco qualifies as an instrumentality. For purpose of the FCPA, the court defined "instrumentality" as an "entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." According to the court, there are two elements in deciding whether an entity is an instrumentality for purposes of the FCPA: whether the foreign government controls the entity and whether the entity performs a function that the government treats as its own. Using language from the above-mentioned OECD Convention, the court listed factors relevant to the first element as including 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 go directly into the government fisc; the extent to which the government funds the entity if it fails to break even; and the length of time these factors have existed. Factors of the second element, also from OECD Convention language, include whether the entity has a monopoly over the function it carries 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.

Based on witness testimony and its own analysis, the court found that Teleco is an instrumentality of the Haitian government. The court noted such characteristics of Teleco as its monopoly over telecommunications services, its tax advantages, and the Haitian president's choosing its director general and all of its board members. Since Teleco is an instrumentality of a foreign government, its employees are, according to the court, foreign officials under the FCPA. Esquenazi and Rodriguez had a payment arrangement with Teleco officials in return for a reduction of their debt to Teleco. By making payments to Teleco officials, Esquenazi and Rodriguez were, according to the court, bribing foreign officials and, therefore, violating the FCPA.

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