

Eleventh Circuit Opinion Extends Reach of the Foreign Corrupt Practices Act

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In a decision with broad implications for any company doing business overseas, the U.S. Court of Appeals for the Eleventh Circuit has become the first U.S. appeals court to attempt to define the term “instrumentality” of a foreign government under the Foreign Corrupt Practices Act (FCPA). In *United States v. Esquenazi*, a three-judge panel of the court adopted a broad, fact-based definition of “instrumentality” as it is used in the FCPA. The court held that, in order to be deemed an “instrumentality” of a foreign government, an entity must satisfy both prongs of a two-part analysis, i.e. (1) the entity is controlled by a foreign government and (2) performs a function that the foreign government “treats as its own.”

While the court emphasized that, “...what constitutes control and what constitutes a function the government treats as its own are fact-bound questions,” it also set forth several critical, but not exhaustive, factors that should be considered in determining whether an entity meets both prongs of the test.

Under the first prong, whether an entity is controlled by a foreign government, the court listed the following factors:

- the foreign government's formal designation of that entity;
- 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, 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
- the length of time these indicia have existed.

In the second prong of the test, the court looked to factors that may help determine whether an entity performs a function that the foreign government treats “as its own”:

- whether the entity has a monopoly over the function it exists to carry 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.

The court's opinion relied heavily upon the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and derived the factors noted in its test directly from the OECD Convention and its Commentary.

The *Esquenazi* opinion represents something of a victory for the Justice Department, which has long advocated a broader interpretation of “instrumentality” in its pursuit of FCPA cases. Going forward, companies that do business overseas should proceed with caution and exercise due diligence when dealing with any entities controlled or owned, even in part, by a foreign government lest they run afoul of the newly broadened interpretation of “instrumentality.” Due diligence would include, at a minimum, an assessment of the entity and its principals based on the two-pronged test and factors set forth in *Esquenazi*.

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