



NEWS & KNOWLEDGE

Editorial: Appellate Court Weighs Critical Enforcement Provision of the FCPA

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Enacted in 1977, the Foreign Corrupt Practices Act is the tool the Justice Department and Securities and Exchange Commission ("SEC") uses to fight corruption around the world. Generally, the law criminalizes paying bribes to "foreign officials." The FCPA defines that term as "any foreign officer or employee of a foreign government or any department, agency, or instrumentality thereof."

When a foreign government is organized in a manner similar to the U.S. government, determining what constitutes an instrumentality of the foreign government is typically straightforward. However, foreign governments can be organized in myriad ways. Many foreign governments operate through state-owned and state-controlled entities, particularly in areas such as telecommunications. By including officers and employees of "agencies or instrumentalities" within the definition of "foreign official," the FCPA attempts to account for this variation.

The FCPA does not prohibit commercial bribery, only foreign public corruption. But the Justice Department has historically construed the term "instrumentality" broadly to enable it to capture transactions that might otherwise fall outside the FCPA's reach because they typically arise in the commercial context and do not involve traditional government actors. This interpretation has been the bedrock of the Justice Department's FCPA enforcement actions to date.

Last week, a three-judge panel of the Eleventh Circuit Court of Appeals heard argument in a corruption case, *United States v. Esquenazi*, which will undoubtedly shape how the FCPA is enforced in the future. The case involves two former executives of Terra Telecommunications Corp., an international long-distance telecommunications company based in Miami. The executives—Terra's president and vice president—were found guilty of bribing officials at Haiti's state-owned telecommunications company, Haiti Teleco, and sentenced to some of the longest FCPA prison terms in history. The central question in the case on appeal: Who (or what) qualifies as a "foreign official" under the FCPA?

At oral argument, lawyers for the two Terra executives argued in favor of a narrower definition of "instrumentality." According to their definition, an instrumentality has to be directly part of the government and perform a "core" function traditionally undertaken by government. And, because Haiti Teleco does not perform a governmental function but instead provides services more akin to a private enterprise, it should not qualify as an

instrumentality under the FCPA.

Consistent with the Justice Department and SEC's traditional interpretation—i.e., state-owned or state-controlled companies are "instrumentalities" under the FCPA—prosecutors shot back that Haiti's government, through its national bank, owned 97 percent of Haiti Teleco's shares. Haiti Teleco also holds a state-sponsored monopoly to provide phone service for the country. They argued that in determining whether a company is an instrumentality, courts must look beyond mere ownership and consider who runs the company, who appoints the company's directors, and who is entitled to the profits. If the answer to these questions is "the foreign government," then the company should be treated as an "instrumentality."

Regardless of the outcome, the case is significant because it is the first time an appellate court will consider a challenge to the Justice Department's definition of "foreign official." The questions from the bench suggest that the Justice Department's aggressive definition of "foreign official" and "instrumentality of a foreign state" are receiving a thorough and critical review.

The Esquenazi appeal also comes at a time of expanding FCPA enforcement. After the outsized FCPA settlements of the last decade, the Justice Department and SEC have begun using new prosecution theories to push the boundaries of the decades-old law. This includes bringing money laundering and Travel Act charges against would-be bribers to boost potential sentences and capture otherwise exempted conduct. Even bribe-taking government officials, who traditionally are excepted from the FCPA's reach, including the Haiti Teleco official the Terra executives allegedly bribed, have recently been charged under these theories. That approach is currently subject to its own challenge in various courts.

Regardless of what happens in those cases, a victory for the Terra executives in Esquenazi would deal a significant blow to the government. In the short term, it would stymie FCPA enforcement efforts and, in the long term, force the Justice Department and SEC to work with Congress to draft and pass legislation that better defines what is prohibited under the FCPA. Given the reach of recent anti-corruption legislation in other countries, most notably the United Kingdom and Brazil, an extension of FCPA to include commercial bribery should not be ruled out. On the other hand, a ruling in favor of the government may embolden the Justice Department and SEC to broaden the application of what it means to be a foreign official, resulting in increased prosecutions for what may be in substance non-actionable conduct.

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