

Eleventh Circuit Addresses Scope of FCPA Coverage of Activity Involving State-Controlled Business Enterprises

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On May 16, 2014, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit provided the first appellate court interpretation of the reach of the U.S. Foreign Corrupt Practices Act (FCPA) to conduct involving state-controlled business entities. Affirming two FCPA convictions, the court largely agreed with the position of the U.S. Department of Justice (DOJ), holding that an employee of a state-controlled business enterprise qualifies as a “foreign official” under the FCPA if the business performs a function that the controlling government treats “as its own.”

Background

In August 2011, Joel Esquenazi and Carlos Rodriguez were convicted by a federal jury for their alleged roles in paying bribes to employees of Telecommunications D’Haiti, S.A.M. (Teleco). Esquenazi and Rodriguez were co-owners of Terra Telecommunications Corp. (Terra), a company that bought phone time from foreign vendors and resold that time to U.S.-based customers. One of Terra’s main vendors was Teleco, a company that had a state-sanctioned monopoly on telecommunications services in Haiti, and which evidence at trial indicated was owned and controlled by the government of Haiti.

The DOJ argued at trial that Teleco employees qualified as “foreign officials” under the FCPA, which are defined, in relevant part, as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.” The district court instructed the jury: “An instrumentality of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition.” The district court provided the jury with factors to consider in determining whether Teleco qualified as an “instrumentality” of the government, including whether its officers and directors are Haitian government officials or were appointed by government officials, the extent of Haiti’s ownership or control of Teleco, and whether Teleco is widely perceived and understood to be performing official or government functions.

After a two-and-one-half-week trial, the jury deliberated for five hours and reached its verdict, convicting Esquenazi and Rodriguez of FCPA violations. The district court sentenced Esquenazi to 15 years in prison and Rodriguez to seven years in prison. The defendants appealed their convictions and sentences, challenging, among other things, the district court’s jury instruction regarding the definition of “instrumentality.”

The Eleventh Circuit’s Analysis

In examining the meaning of “instrumentality” under the FCPA, the Eleventh Circuit reviewed the statutory text, the obligations the United States undertook when Congress ratified the Organisation for Economic Co-operation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), and the 1998 amendments to the FCPA that Congress adopted to comply with the treaty obligations. The court observed that the OECD Anti-Bribery Convention defines a “foreign public official” as “any person exercising a public function for a foreign country, including for a . . . public enterprise,” and that

the commentaries to the OECD Anti-Bribery Convention explain that a “‘public enterprise’ is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.” The court also observed that Congress, in adopting the 1998 amendments to the FCPA, did not clarify whether a “foreign official” includes employees of state-owned or state-controlled entities, noting that this “seems to demonstrate that Congress considered its preexisting definition already to cover” such circumstances.¹

Given this background, the court determined that it must “interpret ‘instrumentality’ under the FCPA so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Anti-Bribery Convention.” The court concluded that “[a]n ‘instrumentality’ under section 78dd-2(h)(2)(A) of the FCPA is an entity *controlled* by the government of a foreign country that performs *a function the controlling government treats as its own*” (emphasis added). The court recognized that “what constitutes control and what constitutes a function the government treats as its own are fact-bound questions,” and, relying on commentary to the OECD Anti-Bribery Convention and relevant case law, the court provided non-exhaustive factors for courts and juries to consider when analyzing each of these questions.

With regard to whether a government “controls” an entity, the Eleventh Circuit stated that courts and juries should look to:

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.

With regard to whether an entity performs a function the government treats as its own, the court stated that courts and juries should examine:

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.

Using this definition of “instrumentality,” the court rejected the defendants’ argument that the district court’s jury instructions allowed the jury to convict them “based only on the fact that Teleco was a government-owned entity that performed a service, without any determination that the service it performed was a governmental function.” The court found no error in the district court’s jury instructions, concluding the instructions “neither misstated the law nor prejudicially misled the jury regarding the definition of ‘instrumentality.’” The court also rejected the defendants’ other arguments on appeal, affirming their convictions and sentences.

¹ After the defendants’ convictions, the prime minister of Haiti issued a declaration indicating that Teleco was not a state enterprise of Haiti. Despite the declaration, the Eleventh Circuit noted that “we believe Teleco would qualify as a Haitian instrumentality under almost any definition we could craft.”

Implications

The Eleventh Circuit’s decision is largely consistent with the broad view articulated by the DOJ and the SEC in the resource guide to the FCPA that they jointly published in 2012, supporting their continued focus on bringing FCPA cases involving the alleged bribery of employees of state-owned or state-controlled entities. Given the breadth of the DOJ’s and SEC’s view of state instrumentalities, and the continued operation of such entities in the commercial sector, the decision is a significant confirmation of entities and individuals caught within the FCPA.

Accordingly, the Eleventh Circuit’s decision reinforces the need for companies to closely examine their FCPA-related policies and procedures to protect against potential liability under the statute. The fact-intensive nature of the inquiry that would be necessary to support a conclusion that employees of entities with significant governmental involvement are not “instrumentalities,” and their employees therefore are not “foreign officials,” means it is impractical to attempt to distinguish such entities from formal organs of government from a compliance perspective.

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