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The Eleventh Circuit Defines "Instrumentality" of a Foreign Government under the Foreign Corrupt Practices Act

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On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions of Joel Esquenazi and Carlos Rodriguez, former executives for Terra Communications, convicted of paying bribes to officials of Haiti Teleco, Haiti's state-owned telecommunications company. Esquenazi and Rodriguez had argued on appeal that the trial court erred in its instruction to the jury on the definition of "instrumentality" of a foreign government.

The FCPA prohibits paying, offering, or promising something of value to officials of foreign governments in order to obtain or retain business. The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or **instrumentality** thereof." 15 U.S.C. § 78dd-2(h)(2) (A) (emphasis added). The precise definition of what constitutes an "instrumentality" of a foreign government has been a matter of much debate, with no guidance at the appellate level.

Esquenazi and Rodriguez contended that instrumentalities of a foreign government must be direct parts of a government or perform a core government function. The government argued that the term "instrumentality" is broad, and can include state-controlled entities, even if they are engaged in commercial activities like telecommunications. This argument is consistent with DOJ's and the SEC's "[Resource Guide to the U.S. Foreign Corrupt Practices Act](#)," published in 2012. See Venable's [analysis](#) of the Resource Guide.

The Eleventh Circuit rejected the defendants' arguments, and adopted a definition largely in line with the government's. While stating that the question of whether Haiti Teleco was an instrumentality of the Haitian government was not a close decision "under almost any definition we could craft," the court nevertheless opined:

An "instrumentality" under...the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.

By way of providing additional guidance, the court provided a non-exclusive list of factors, including "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," "whether the entity has a monopoly over the function it exists to carry out," and "whether the government subsidizes the costs associated with the entity providing services."

As such, the Eleventh Circuit left open the possibility that an entity could be controlled or owned by a foreign government but not necessarily be an instrumentality within the meaning of the FCPA, where the activity engaged in by the entity is purely commercial and it operates in the market essentially as a private enterprise. However, the court clearly rejected the defendants' contention that a government controlled-entity that provides a commercial service automatically falls outside the statute.

While the Eleventh Circuit's definition might provide defense counsel with some room to maneuver given the right facts, the court did not dramatically change the current enforcement landscape. Nevertheless, given this more certain definition of an instrumentality of a foreign government, companies operating internationally would be well advised to review their roster of customers and other business partners to determine if any fit this definition. If so, companies should ensure that they have taken appropriate anti-corruption compliance steps with respect to their businesses and especially "instrumentality" customers or partners.

If you have any questions concerning the FCPA or how to protect your business against possible corruption liability, please contact the authors or other attorneys in Venable's [Foreign Corrupt Practices Act and Anti-Corruption Group](#).

