

## Reading a Crystal Ball? Guidance on Instrumentality under the FCPA-Part II

In Part I of *Reading a Crystal Ball? Guidance on Instrumentality under the FCPA*, we listed the factors which the three federal district courts have set forth for the determination of whether an entity is an instrumentality under the Foreign Corrupt Practices Act (FCPA). In Part II, we will review these factors to see if there is any pattern which we can suggest to the compliance practitioner or indeed the US Chamber of Commerce, which desires to bring some ‘clarity’ to this question, all of which might help an understanding of when the FCPA applies to a transaction or business partner. The chart below consolidates the factors raised by the courts and

<i>Factor</i>	<i>Lindsey</i>	<i>Carson</i>	<i>Esquenazi</i>
1	Entity provides services to citizens, in many cases all in country	Foreign states characterization of the entity and its employees	Does the entity provides services to citizens and inhabitants of country
2	Are key officers/directors government employees or appointed by government employees	Foreign State’s control over the entity	Are key officers/directors government employees or appointed by government employees
3	Is entity financed by or in large measure by government appropriations or through government mandates	Purpose of the entity’s activities	Extent of government ownership or does government provide financial support
4	Is entity vested with or does it exercise exclusive/controlling power to administer its designated functions	The Entity’s obligations and privileges under country’s laws, including whether it exercises exclusive/controlling power to administer its designated functions	Extent of obligations and privileges under its country’s laws, including whether it exercises exclusive/controlling power to administer its designated functions
5	Is entity widely perceived and understood to be providing official functions	Circumstances around the entities creation	Is entity widely perceived and understood to be providing official functions
6		The foreign state’s extent of ownership of the entity, including the level of financial support by the state	

are set out for reference:

### I. Overlap?

There is clear overlap in the Lindsey and Esquenazi factors.

- A. **Identical** - does the government appoint the officers/directors and is the entity understood to be owned by or an agency of the government in the home country? In Lindsey and Esquenazi, the courts agree on factors (2) Are key officers/directors government employees or appointed by government employees; and (5) Is the entity widely perceived and understood to be providing official functions?
- B. **Similar** - are the services provided by the entity available to all citizens of the home country? In Lindsey and Esquenazi, the similar factors are (1) Does the entity provide services to the inhabitants of the country?
- C. **Related** - does the government finance the entity in question and does it own the entity? Does it exercise exclusive/controlling power to administer its designated functions and the extent of obligations and privileges under its country's laws? In Lindsey and Esquenazi, two courts had nearly similar factors, but the Esquenazi court added an additional component. In factor (3) The Lindsey court inquired 'is the entity financed by or in large measure by government appropriations or through government mandates' and the Esquenazi court added to this inquiry 'the extent of government ownership.' In factor (4) the Lindsey court inquired, 'Is entity vested with or does it exercise exclusive/controlling power to administer its designated functions' and the Esquenazi court added the factor of 'Extent of obligations and privileges under its country's laws'.

## II. **Compare and Contrast**

At first blush it may appear that the Carson court takes a slightly different approach. If one examines the Carson factors in detail they are not significantly different from Lindsey and Esquenazi. One clear factor that Carson has in common with Lindsey and Esquenazi is the factor of the entity's obligations and privileges under its country's laws, including whether it exercises exclusive/controlling power to administer its designated functions. Carson combines two of the Esquenazi factor of the extent of government ownership and financial support by said government. While Lindsey does not speak to financial ownership it does have the factor of government financing and government appointment of officers and directors. Carson speaks to the entity's purpose while Lindsey and Esquenazi list the factor of providing services to the country's citizens. Indeed the only factor included in Carson and not found in Lindsey and Esquenazi is the following: the circumstances around the entity's creation. It is incumbent to note that both the Lindsey and Carson court opinions and the Esquenazi jury instructions all have language that indicates these factors are not exclusive, and no single factor will determine whether an entity is an instrumentality of a foreign government.

## III. **Reading the Crystal Ball**

With all this information in mind what inferences can be drawn by a compliance officer, or indeed the US Chamber of Commerce, for guidance on whether a business is an instrumentality

under the FCPA? Reviewing the foregoing, the factors can be distilled down to a manageable list, which I believe is as follows:

1. **Ownership/Financial Control** - There is no percentage amount listed but the inclusion of financial control would clearly indicate that anything over 50% would be a significant factor.
2. **Actual control** is key in all three court decisions. In Lindsey and Esquenazi, it is characterized as the government's right to appoint key officers and directors. In Carson, it is called government control. But this means that if actual control is exercised by the government in question, it may trump the 50% guidance stated above.
3. **Privileges and Obligations** are also mentioned in all three. Does the entity have the right to control its own functions?
4. **Financing** – Is the entity a for-profit entity, financed through its own revenues or does it depend on financing by its government?
5. **Perception is Reality** - André Agassi's immortal words appear again. If it is widely perceived to be providing an official function, then it is an instrumentality under the FCPA.

That leaves Carson factor 5, the circumstances around the entity's creation. While I believe this could well be the last factor in your analysis, it can be one which is ascertained. Most government entities will disclose how they were formed; this information can be found on their website or within their company history. If you cannot determine how a business was formed perhaps you need to think hard about doing business with them.

So that is my reading of the Crystal Ball. You may have a different reading but for my money the information is out there to be read and indeed it may not be all that difficult.

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