

**WHEN DOES AN ENTITY AMOUNT TO AN “INSTRUMENTALITY OF A FOREIGN
GOVERNMENT” UNDER THE FOREIGN CORRUPT PRACTICES ACT?:
EMERGING JUDICIAL GUIDELINES**

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INTRODUCTION

Payments or offers of payments to foreign officials for the purpose of obtaining or retaining business violate the Foreign Corrupt Practices Act (FCPA),¹ which defines the term “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”² In their enforcement actions, the U.S. Securities Exchange Commission (SEC)³ and the Department of Justice (DOJ)⁴ regard all employees of any state-owned enterprise (SOE) as “foreign officials” because they maintain that such an entity amounts to an “instrumentality” of a foreign government under the FCPA. The DOJ and SEC assert this position even when a state-owned company engages in business and commercial activities that would be regarded as private sector, non-governmental functions in the United States. In many parts of the world, SOEs routinely conduct business in such industries as aerospace, banking, telecommunications, hospitals and electric power generation; nonetheless, government ownership interests or other forms of government influence make their employees foreign officials with respect to the anti-bribery provisions of the FCPA in the eyes of the SEC and DOJ.

¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, (1977), 91 Stat. 1494 (1977) (codified as amended in various sections of 15 U.S.C.).

² 15 U.S.C. § 78dd-2(h)(2)(A) (1998).

³ *SEC Enforcement Actions: FCPA Cases 2012*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last modified Dec. 16, 2014) [hereinafter *FCPA Cases 2012*].

⁴ CRIMINAL DIV., U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

Until 2010, these SEC and DOJ interpretations had gone largely unchallenged as investigations and indictments were resolved through negotiated settlements. In recent litigation, however, some FCPA defendants have begun to argue for a narrower interpretation of SOEs as government instrumentalities, contending that not every officer or employee of an SOE amounts to a foreign official under the FCPA.

This paper describes how courts have responded to these defenses and sets forth the emerging judicial standards for determining when employees of a state-owned-enterprise amount to “foreign officials” under the FCPA.

I. FCPA ORIGINS AND PURPOSES

Congress passed the FCPA in the wake of the Watergate hearings that revealed fraudulent accounting practices used to conceal illegal corporate contributions to Richard Nixon’s 1976 presidential re-election campaign.⁵ During the course of that investigation, Stanley Sporkin, then Director of the SEC’s Division of Enforcement, discovered that corporations making illegal campaign contributions used the same accounting procedures to hide bribes paid to foreign government officials.⁶ Public exposure of such payments had diplomatic repercussions abroad in Japan, where the Prime Minister had to resign, as well as in Italy and the Netherlands.⁷

⁵ Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT’L L. & BUS. 269, 271 (1998)..

⁶ *Id.* at 271–272.

⁷ Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 785–786 (2011).

The ensuing statute therefore addressed two Congressional concerns. The first had to do with how overseas bribery would distort the free market system within the U.S. by rewarding corruption and eroding “public confidence in the integrity of the free market system.”⁸ The second was the negative impact upon U.S. foreign relations that resulted from the revelations of bribes paid to foreign government officials by American businesses seeking government contracts abroad.⁹

II. “FOREIGN OFFICIALS” AND “INSTRUMENTALITIES” UNDER THE FCPA

The FCPA makes it illegal for a U.S. organization or individual to offer money, gifts or anything of value to a “foreign official” for the purpose of obtaining or retaining business.¹⁰

The act defines “foreign official” as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.¹¹

The statute itself, however, does not provide any additional information about when an entity amounts to an “instrumentality” of a foreign government, beyond the obvious implication that an instrumentality is something other than a government department or agency. The SEC and DOJ take the position that any state-owned entity, regardless of the extent of state

⁸ United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991).

⁹ *Id.* at 834.

¹⁰ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a) (1998).

¹¹ *Id.* at -2(h)(2)(A).

ownership, and even some privatized companies, may constitute “instrumentalities” of a foreign government.¹²

Thus, the DOJ maintains that a broad range of employees in state-owned enterprises may be “foreign officials” under the FCPA. In a speech to pharmaceutical executives former Assistant Attorney General Lanny Breuer elaborated:

Some [foreign officials] are obvious, like health ministry and customs officials of other countries. But some others may not be, such as the doctors, pharmacists, lab technicians and other health professionals who are employed by state-owned facilities. Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a “foreign official” within the meaning of the FCPA.¹³

III. DEPARTMENT OF JUSTICE GUIDANCE ON “INSTRUMENTALITIES”

A. *The DOJ Guide to the FCPA*

The DOJ and SEC have produced a document that provides an explanation of how it will enforce the FCPA.¹⁴ It notes that many governments operate state-owned and state-controlled entities that may amount to an instrumentality of such a government, making the entity’s officers

¹² Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 *Bus. Lawyer* 1243, 1244 (2008). Lanny A. Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice, Keynote Address at the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009) at 2 *available at* <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf>.

¹³ ~~Lanny A. Breuer~~, Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice, Keynote Address at the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009) at 2 -

¹⁴ FCPA RESOURCE GUIDE, *supra* note 4.

and employee “foreign officials” for FCPA purposes. The determination of instrumentality status, according to this guide, relies upon “a fact-specific analysis of an entity’s ownership.”¹⁵ The Resource Guide lists numerous factors that courts have considered and advises companies to take them into account when assessing risks of FCPA violations and compliance programs.¹⁶ In general, the DOJ and SEC focus upon the ownership, control, status and function of the entity.¹⁷

B. *The DOJ Opinion Release Procedure*

The DOJ will provide specific guidance to any firm that has concerns about whether a prospective transaction would violate the FCPA. Through its Opinion Release Procedure, a company can request that the U.S. Attorney General, or a representative of that office, give an opinion regarding its intentions to bring an enforcement action in response to an inquiry about a particular undertaking. The act requires the Attorney General to respond within 30 days. The DOJ posts these Opinion Releases on its website,¹⁸ although a firm that wants to protect sensitive information may ask the DOJ not to reveal either its name or specified propriety information. A rebuttable presumption of legality arises if the opinion provides that the proposed action conforms to current enforcement policies.¹⁹ A review of these Opinion Releases gives both individuals and

¹⁵ *Id.* at 20.

¹⁶ *Id.*

¹⁷ *See, generally*, FCPA RESOURCE GUIDE, *supra* note 4.

¹⁸ *FCPA Opinions: Opinion Procedure Releases*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Dec. 20, 2014).

¹⁹ Foreign Corrupt Practices Act Opinion Procedure, 28 C.F. R. Part 80, (1999), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf>.

organizations additional insight into how the DOJ interprets and applies FCPA standards.

IV. FCPA ENFORCEMENT ACTIVITY

The DOJ and SEC have steadily increased FCPA enforcement over the past decade. They brought only four such actions during 2002, but initiated 16 in 2007.²⁰ They had begun 55 investigations by 2008²¹ and by 2009; the SEC and DOJ together initiated an additional 74 actions in 2010.²²

The use of criminal penalties, both fines and imprisonment, has thus increased significantly from an earlier period when some regarded the FCPA as a “slumbering statute.”²³ In 2004, the DOJ brought only two criminal charges against individuals and levied some \$11 million in fines. In 2009 – 2010, the DOJ brought over 50 individual criminal charges and collected almost \$2 billion in fines. Criminal fines from 2010 through mid-2011 amounted to approximately \$1.5 billion.²⁴

²⁰ *Press Release, Fact Sheet: the Department of Justice Public Corruption Efforts*, U.S. DEPT. OF JUSTICE (Mar. 27, 2008), http://www.justice.gov/opa/pr/2008/March/08_ag_246.html.

²¹ Alexandra Wrage, *Today, No Bribe is Too Small*, LEGAL TIMES (Mar. 25, 2008), <http://www.nationallawjournal.com/id=900005506288?keywords=Today,+No+Bribe+is+Too+Small&publication=Legal+Times>.

²² Gibson, Dunn & Crutcher LLP, *2012 Year-End FCPA Update*, (2013), *available at* <http://www.gibsondunn.com/publications/Documents/2012YearEndFCPAUpdate.pdf>.

²³ Lanny Breuer, Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice, Assistant Attorney General Lanny A. Breuer of the Criminal Division Speaks at the 3rd Russia and Commonwealth of Independent States Summit on Anti-corruption (Mar. 16, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110316.html>.

²⁴ Joe Palazzolo, *Company Self-Disclosures Account for Half of DOJ FCPA Cases Since 2010*, WALL ST. J. RISK & COMPLIANCE BLOG (June 23, 2011, 12:43 PM), <http://blogs.wsj.com/corruption-currents/2011/06/23/company-self-disclosures-accounted-for-half-of-doj-fcpa-cases-since-2010/?cb=logged0.039160195414571164>.

Significant settlements of FCPA charges during the 2012 calendar year include the following:

- Eli Lilly's payment of more than \$29 million to settle charges of improper payments to foreign government officials in Russia, China, Brazil and Poland.
- Pfizer's payments of \$45 million to settle SEC and DOJ charges of illegal payments to foreign officials in Bulgaria, China, Croatia, the Czech Republic, Italy, Kazakhstan, Russia and Serbia.
- Tyco's agreement to pay \$26 million to settle charges of FCPA violations in more than a dozen countries.²⁵

The SEC has brought 41 enforcement actions from 2011 through 2014.²⁶ These include settlements of charges against Avon Products for \$135 million, Hewlett-Packard for \$108 million, and Weatherford International for \$250 million.²⁷ (Such settlements often resolve parallel charges in cases brought by other government agencies.)

The Department of Justice, the other federal agency responsible for FCPA enforcement, has obtained convictions against 47 individuals in FCPA and FCPA-related cases. It has collected approximately \$3 billion in penalties and forfeitures from 55 companies since 2009,²⁸ an amount that includes \$790 million from 25 individuals and 10 corporations since 2013.²⁹

²⁵ *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>, (last visited March 17, 2013) [hereinafter *SEC Enforcement Actions*].

²⁶ *SEC Enforcement Actions: FCPA Cases*, available at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>, last visited 1/3/2015.

²⁷ *Id.*

²⁸ Remarks by Deputy Assistant Attorney General for the Criminal Division David A. O'Neil at the Southeastern White Collar Crime Institute, Braselton, GA (September 12, 2014), available at <http://www.justice.gov/opa/speech/remarks-deputy-assistant-attorney-general-criminal-division-david-oneil-southeastern>.

²⁹ *Id.*

The DOJ maintains that criminal prosecutions of individuals send a strong message. According to Mark Mendelsohn, former deputy chief of the DOJ fraud section, “To really achieve the kind of deterrent effect we’re shooting for, you have to prosecute individuals.”³⁰ He went on to say, “If the only sanctions out there are monetary, penalties against companies could be interpreted as the cost of doing business. But when people’s liberty is at stake, it resonates in new ways.”³¹

A further indication of the increased intensity behind FCPA enforcement is illustrated in a speech by Charles McKenna, Chief of the Criminal Division of the U.S. Attorney’s Office for the District of New Jersey. In an address to an American Bar Association conference in 2010, he declared that the DOJ regarded the FCPA as its main priority, “second only to terrorism.”³²

U.S. firms that operate internationally have responded to this increased enforcement activity by both stepping up their compliance measures and self-reporting violations before the DOJ uncovers them. Such self-disclosures have accounted for approximately half of the DOJ foreign bribery cases since 2010.³³ Other sources of FCPA investigations include tips and leads from Dodd-Frank whistleblowers, target-specific whistleblowers, and the FCPA inbox.³⁴

³⁰ Dionne Searcey, *To Combat Overseas Bribery, Authorities Make It Personal*, WALL ST. J., Oct. 8, 2009, <http://www.wsj.com/articles/SB125495862894771979>.

³¹ *Id.*

³² Bridget M. Rohde & Steve Ganis, *The DOJ’s FCPA Crackdown on the Pharmaceutical and Medical Devices Industry*, MINTZ LEVIN (Sept. 23, 2010), <http://www.mintz.com/newsletter/2010/Advisories/0665-0910-NAT-WC/web.html>.

³³ Palazzolo, *supra* note **Error! Bookmark not defined.**

³⁴ Ralph J. Caccia & Brandon J. Moss, *New FCPA Head Patrick Stokes: Expect Continued FCPA Emphasis*, WILEY REIN LLP (Mar. 28, 2014), <http://www.wileyrein.com/publications.cfm?sp=articles&id=9560>.

As previously noted, the DOJ and SEC view all state-owned enterprises as “instrumentalities of foreign governments,” regardless of the degree of state ownership, and their employees as “foreign government officials” for purposes of the anti-bribery provisions.³⁵

Until recently, these government interpretations went unchallenged. For example, U.S. firms have agreed to settlements, without going to trial, of FCPA charges alleging illegal payments to employees of a Malaysian telecommunications company with 43% government ownership; employees of an oil company with 49% ownership by the Nigerian government;³⁶ and publicly-employed health care providers in Argentina, Brazil, China,³⁷ Greece.³⁸ ~~Poland and Romania~~ . There could be a better transition from this paragraph to the next section.

The reluctance of FCPA defendants to pursue litigation all the way through trial as a practical matter left intact the broad interpretations of “instrumentalities of foreign governments” by government prosecutors. Commentators and critics began to suggest alternative views that would narrow the scope of the statute.³⁹

³⁵ See *FCPA Cases 2012*, *supra* note 3; FCPA RESOURCE GUIDE, *supra* note 4, and text accompanying notes 3 and 4.

³⁶ Yockey, *supra* note 7, at 821–822.

³⁷ Press Release, SEC Charges Medical Device Company Biomet with Foreign Bribery, Securities and Exchange Commission, (March 26, 2012) <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487958#.VKgmrnfTmM8>

³⁸ Press Release, SEC Charges Smith & Nephew PLC with Foreign Bribery, Securities and Exchange Commission, (February 6, 2012), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171486478#.VKgmSmfTmM9>

³⁹ Stephen Hagenbuch, *Taming “Instrumentality”: The FCPA’s Legislative History Requires Proof of Government Control*, 2012 UNIV. CHI. LEGAL F. 351, 370 - 372 (2012); ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, 6 - 7 (2010), available at <http://www.instituteforlegalreform.com/sites/default/files/restoringbalancefcpa.pdf>.

V. CRITICISMS FOR “AMBIGUITY” IN FCPA PROVISIONS REGARDING “FOREIGN OFFICIALS”

Many FCPA critics attack the statute on the grounds of purported ambiguity; one goes so far as to claim that “[v]agueness and ambiguity are the DNA of the FCPA.”⁴⁰ A favorite target is the section that includes as “foreign officials” those employees who work for an “instrumentality” of a foreign government.⁴¹ Some commentators interpret the legislative history of the act to infer such ~~find~~ ambiguity ~~in due to~~ based upon the lack of any statutory provision that draws a distinction between “government-influenced entities” and fully privatized companies.⁴²

The United States Chamber of Commerce emphasizes this concern with respect to doing business in China, most companies have some degree of state ownership or control.⁴³ Other critics have called for a definition of “instrumentality” according to the percentage of government ownership or the extent of government control over the entity.⁴⁴

⁴⁰ James R. Doty, *Toward a Regulated FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 BUS. LAW. 1233, 1238–1239 (2007).

⁴¹ Amy Dean Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 531–37 (2011); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 413 (2010); Yockey, *supra* note 7, at 820–21.

⁴² Stephen Hagenbuch, *Taming “Instrumentality”: The FCPA’s Legislative History Requires Proof of Government Control*, 2012 UNIV. CHI. LEGAL F. 351, 353 (2012).

⁴³ ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 27 (2010), *available at* <http://www.institute forlegalreform.com/sites/default/files/restoringbalancefcpa.pdf>.

⁴⁴ Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT’L BUS. & L. 351, 370 (2012).

In its call to amend the FCPA, the U.S. Chamber of Commerce, contends that it is unclear what types of entities are “instrumentalit[ies]” of a foreign government such that their employees will be considered “foreign officials” for purposes of the FCPA.⁴⁵ The Chamber particularly dislikes the fact that the statute as currently written allows the government to prosecute U.S. companies that make illegal payments to any employee of a state-owned or state-controlled company, rather than restricting liability to government officials and employees of government agencies and departments.⁴⁶

Other critics focus more upon the latitude that the current language gives the SEC and DOJ to enforce the anti-bribery prohibitions rather than upon any inherent ambiguity in the statute itself.⁴⁷ “The DOJ and SEC have interpreted the definition of ‘foreign official’ broadly and have not defined clearly the contours of its application to employees of foreign government-owned or controlled companies.”⁴⁸ This suggests that the critics’ real complaint is about vigorous enforcement of the FCPA.

VI. FCPA ENFORCEMENT LITIGATION

Until 2011, almost all companies under investigation or indictment for FCPA violations resolved those charges through negotiated settlements with the SEC and DOJ; only two went to

⁴⁵ WEISSMANN & SMITH, *supra* note 43, at 25.

⁴⁶ *Id.*

⁴⁷ *See, generally*, Joel M. Cohen, Michael P. Holland, & Adam P. Wolf, *Under the FCPA, Who is a Foreign Official Anyway?* 63 BUS. LAW. 1243 (August, 2008), available at <http://business.highbeam.com/127/article-1G1-186268771/under-fcpa-foreign-official-anyway> (concluding that the FCPA, courts, and regulators have not provided sufficient guidance regarding the factors that determine instrumentality status under the statute).

⁴⁸ *See id.* at 1250 (analyzing DOJ and SEC’s “broad” definition of a “foreign official”).

trial.⁴⁹ One case resulted in a judgment of acquittal before the defendant presented its case;⁵⁰ in the other, a conviction was subsequently overturned on the grounds of prosecutorial misconduct.⁵¹ Resolutions in the other cases ranged from guilty pleas to non-prosecution agreements or deferred-prosecution agreements. Beginning in 2011, however, a few other defendants elected to continue litigating through trial.⁵² ~~with litigation instead.~~

A. *Pre-Trial Challenges to the Government’s Interpretations of “Agencies,” “Instrumentalities,” and “Foreign Officials” Based Upon Statutory Construction and Legislative History*

None of the defendants in such FCPA actions had undertaken a court challenge of the DOJ’s position on either the meaning of “instrumentalities of foreign governments” or of the classification of their employees as “foreign officials” until an individual defendant filed a motion to dismiss criminal charges in the Telecommunications D’Haiti (Haiti Teleco) litigation, *United States v. Esquenazi*.⁵³ This beginning sentence might read better by starting with: Before *United States v. Esquenazi*, no individual defendant in FCPA actions had undertaken to

⁴⁹ Philip Urofsky, Hee Won (Marina) Moon, & Jennifer Rimm, How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don’t Break What Isn’t Broken – The Fallacies of Reform, 73 Ohio St. L.J. 1145, 1169 (2012).

⁵⁰ FCPA Professor, One Win, One Loss, (March 16, 2011), available at <http://www.fcpaprofessor.com/one-win-one-loss>

⁵¹ USA v. Enrique Faustino Aguilar Noriega, et al. 831 F. Supp. 2d. (C.D. Cal. 2011)1180, 1185.

⁵² See *infra* pages ___ - ___.

⁵³ Order Denying Defendant Joel Esquenazi’s (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, *United States vs. Esquenazi*, (S.D. Fla. 2010) (No. 09-21010-CR-MARTINEZ-BROWN), 2010 U.S. Dist. LEXIS 143572 (D.E. No. 283), conviction *aff’d*, 752 F.3d 912 (11th Cir. 2014) *cert. denied*, 574 U.S. ___ (2014), No. 14-189 (Oct. 6, 2014).

challenge the DOJ's position on the meaning..... then begin to describe the specific facts In his motion to dismiss, defendant Joel Esquenazi raised several issues with respect to the proper scope of the terms "instrumentalities of foreign governments" and "foreign governmental officials." His arguments rested upon statutory construction , including the legislative history of the FCPA, and an assertion of unconstitutional vagueness of the statutory terms.⁵⁴ In a very short opinion with virtually no analysis, the court stated that the alleged recipients of the defendant's bribes, employees of Telecommunications D'Haiti, could be "foreign officials" under the FCPA.⁵⁵ The court concluded that both the plain language of the statute and the plain meaning of the term showed that a company could amount to an "instrumentality." The defendants could present any factual arguments on these questions at trial.⁵⁶

Reported opinions in two subsequent cases involved the same question of statutory construction, *United States v. Aguilar*⁵⁷ and *United States vs. Carson*.⁵⁸ (Another such challenge was rejected without a written opinion)⁵⁹ In these two reported cases, the defendants made the same arguments with respect to the proper scope of the terms "instrumentalities of foreign governments" and "foreign government officials." As in *Esquenazi*, they based their defenses

⁵⁴ *Id.* at 3–4.

⁵⁵ *Id.* at 4–5.

⁵⁶ *Id.* at 4.

⁵⁷ *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

⁵⁸ *United States vs. Carson*, No. SACR 09-00077-JVS, 2011 U.S. Dist. LEXIS 88853 (C.D. Cal. May 18, 2011).

⁵⁹ *United States vs. O'Shea*, No. 11:09-cr-629 (S.D. Texas 2011).

upon statutory construction of the FCPA, including its legislative history.⁶⁰ ~~and in~~ Defendants in the latter case also alleged unconstitutional vagueness of the statutory terms.⁶¹

In *United States v. Aguilar*⁶², the government prosecuted the defendants for making arrangements for illegal payments to two employees of Comisión Federal de Electricidad (CFE), an electric utility company wholly owned by the Mexican government.⁶³ The DOJ charged the defendants with conspiracy to violate the FCPA by using an intermediary to offer bribes to two CFE executives, whom prosecutors described as “foreign officials” because CFE, as a state-owned, corporation amounted to a government “instrumentality.”⁶⁴

The defendants conceded that the Mexican Constitution provides:

It is exclusively a function of the general Nation to conduct, transform, distribute, and supply electric power which is to be used for public service. No concessions for this purpose will be granted to private persons and the Nation will make use of the property and natural resources which are required for these ends.⁶⁵

Nor did the defendants contest the fact that the Mexican statute creating CFE had defined that entity as “a decentralized public entity with legal personality and its own patrimony.”⁶⁶ Instead, they claimed that as a matter of law, no state-owned enterprise is an “instrumentality of a foreign government” and therefore its employees cannot be “foreign officials” under the

⁶⁰ *Aguilar*, 783 F. Supp. 2d 1108, 1113 - 1115; *Carson*, 2011 U.S. Dist. LEXIS 88853, *23 - *25.

⁶¹ *Carson*, 2011 U.S. Dist. LEXIS 88853, *37 - *38.

⁶² *Aguilar*, 783 F. Supp. 2d 1108.

⁶³ *Aguilar*, 783 F. Supp. 2d 1108, 1109.

⁶⁴ *Id.* at 1111.

⁶⁵ *Id.* at 1112.

⁶⁶ *Id.*

FCPA.. The defendants relied largely upon statutory construction arguments to support their position.⁶⁷

The court disagreed, based upon the plain meaning of the statutory provision and "... the structure of the statute as a whole, including its object and policy."⁶⁸ As to the latter, the court accepted the government's argument that the 1998 amendments to the FCPA meant to conform it to the terms of the Organization for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Officials in International Business Transactions.⁶⁹ In so doing, the court invoked the Charming Betsy doctrine,⁷⁰ which requires that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁷¹ It also cited a more contemporary expression of this rule that states, "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."⁷² The court therefore looked to the OECD Convention for further guidance as to the meaning of "foreign official."

As a party to the OECD Convention, the court observed, the United States has agreed to the following provision that requires each party signatory to:

take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue

⁶⁷ *Id.* at ~~1112-13~~, 1113 – 1116.

⁶⁸ *Id.* at 1115.

⁶⁹ *Id.* at 1116 (citing S. REP. NO. 105-2177, at 2); ORG. FOR ECON. CO-OPERATION AND DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2010), available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

⁷⁰ *Aguilar*, 783 F. Supp. 2d at 1116.

⁷¹ *Murray vs. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁷² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.⁷³

In doing so, the court relied on a provision in the convention that defined the term “foreign public official” as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.”⁷⁴

The court also relied on language in the commentaries to the Convention that defined “[a] ‘public enterprise’” as “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence.” The court cited the following examples of government activities that would signify such influence: “hold[ing] the majority of the enterprise’s subscribed capital, control[ling] the majority of votes attaching to shares issued by the enterprise or [having the power to] appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board”.⁷⁵

Nonetheless, the *Aguilar* defendants argued in the trial court that other aspects of the FCPA’s legislative history showed that Congress did not intend for the FCPA to prohibit bribes offered to employees of state-owned enterprises.⁷⁶ The court ultimately found the legislative

⁷³ ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 69, at 7.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.*

⁷⁶ *Aguilar*, 783 F. Supp. 2d at 1117.

history to be inconclusive, however, deciding that Congress neither intended to include all state-owned corporations within the ambit of the FCPA nor meant to exclude them all.⁷⁷

The *Aguilar* court therefore denied the defendants' motion to dismiss, holding that a state-owned corporation may be an "instrumentality" of a foreign government within the meaning of the FCPA, and that officers of such a state-owned corporation may be "foreign officials" within the meaning of the FCPA.⁷⁸ The court held that such determinations amounted to questions of fact, requiring resolution at trial, rather than issues of law appropriate for a motion to dismiss.

Another District Court reached similar conclusions regarding statutory construction of the term "instrumentality." In *United States vs. Carson*⁷⁹ A federal grand jury had indicted the defendants for allegedly paying bribes to obtain contracts for sales of control valves used in nuclear, oil and gas, and electric power generation to SOEs in China, Korea, Malaysia and the United Arab Emirates.⁸⁰ The court noted that the FCPA does not define "instrumentality" and therefore examined dictionary definitions to ascertain its ordinary meaning.⁸¹ It agreed with the government that "instrumentality" should be understood within the act as a whole.⁸² Thus, it found that "... the term 'instrumentality' was intended to capture entities that are not 'departments' or 'agencies' of a foreign government, but nevertheless carry out governmental

⁷⁷ *Id.* at 1119.

⁷⁸ *Id.* at 1110.

⁷⁹ *Carson*, 2011 U.S. Dist. LEXIS 88853.

⁸⁰ *Id.* at *4.

⁸¹ *Id.* at *13.

⁸² *Id.* at *16.

functions or objectives.”⁸³

Moreover, the court made the following observation:

[A] mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental “instrumentality.”⁸⁴

The *Carson* court also pointed out that the United States historically used privately owned corporations to carry out government objectives, which demonstrate that state-owned companies can serve as government “instrumentalities.”⁸⁵ It cited as examples, the Panama Railroad Company, the Federal Deposit Insurance Corporation and the Tennessee Valley Authority. In noting a “long history” of such practices, the court described as a “false dichotomy” the idea that a single entity cannot simultaneously engage in both governmental and commercial action.⁸⁶ The court further noted that other statutes, such as the Foreign Sovereign Immunities Act, passed a year before the FCPA, defined “instrumentality” to include state-owned enterprises.⁸⁷

Concluding that the FCPA language was clear and unambiguous, and that the statutory scheme was coherent and consistent, the *Carson* court therefore found it unnecessary to consider the legislative history of the act.⁸⁸ It ultimately held that some business entities could amount to

⁸³ *Id.*

⁸⁴ *Id.* at *17.

⁸⁵ *Id.* at *20–21 (citing *Lebron vs. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 386–391 (1995)).

⁸⁶ *Id.* at *21–23.

⁸⁷ *Id.* at *26.

⁸⁸ *Id.* at *29.

an “instrumentality,” but that determination would hinge upon a fact-specific inquiry regarding their nature and characteristics.⁸⁹ It therefore denied the defendants’ pre-trial motions to dismiss.⁹⁰

Thus, the District Courts in all three reported opinions on the defendants’ pre-trial motions to dismiss held that the issues of whether a business entity constitutes an “instrumentality” of a foreign government and its employees are therefore “foreign officials” under the FCPA amount to questions of fact.⁹¹ Transition here?

B. Pre-Trial Challenges for Unconstitutional Vagueness of FCPA Terms

In their pre-trial motions, the defendants in both the *Carson* and *Esquenazi* cases also contended that the statutory terms “department, agency or instrumentality” were unconstitutionally vague as applied to them, thereby depriving them of their due process rights.⁹² Both courts disagreed, finding that ordinary persons of common intelligence would understand what the FCPA prohibited.⁹³

⁸⁹ *Id.* at *30.

⁹⁰ *Id.* at *40.

⁹¹ *Esquenazi*, 2010 U.S. Dist. LEXIS 143572, at *4; *Aguilar*, 783 F. Supp. 2d 1108, at 1110; *Carson*, 2011 U.S. Dist. LEXIS 88853, at *11.

⁹² *Esquenazi*, 2010 U.S. Dist. LEXIS 143572, at *4; *Carson*, 2011 U.S. Dist. LEXIS 88853, at *3; *35 - 36.

⁹³ *Esquenazi*, 2010 U.S. Dist. LEXIS 143572, at *5; *Carson*, 2011 U.S. Dist. LEXIS 88853, at *39.

C. *Trial Court Opinions Regarding “Instrumentality” and “Foreign Official” Under the FCPA*

The *Carson* court offered a list of several possible factors, no one of which it saw as dispositive, to consider:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and,
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).⁹⁴

The *Aguilar* court likewise provided a non-exclusive list of factors to weigh in determining whether an entity might constitute an “instrumentality” for FCPA purposes if:

- The entity provides a service to the citizens — indeed, in many cases to all the inhabitants — of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.

⁹⁴ *Carson*, 2011 U.S. Dist. LEXIS 88853, at *11–12.

- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.⁹⁵

These pre-trial holdings do not fully support the position taken by the DOJ that all state-owned business entities, even those in which the government has less than a 100% interest, amount to government “instrumentalities” as a matter of law. Defendants who choose to take a case to trial on this issue would have an opportunity to convince a court otherwise.

D. Jury Trial Challenges to the Government’s Interpretations of “Agencies,” “Instrumentalities,” and “Foreign Officials”

The *Aguilar* defendants went to trial before a jury, which subsequently returned a guilty verdict.⁹⁶ In a post-trial motion, however, the court vacated the convictions on grounds of prosecutorial misconduct.⁹⁷

The defendants in the *Esquenazi* case also went to trial. Their defense included the argument that the recipients of their alleged bribes were not “foreign officials” because their employer, Telecommunications D’Haiti (Haiti Teleco), was not a government “instrumentality.”⁹⁸

⁹⁵ *Aguilar*, 783 F. Supp. 2d at 1115.

⁹⁶ *United States vs. Noriega*, 831 F. Supp. 2d 1180, 1185 (C.D. Cal. 2011).

⁹⁷ *Id.* at 1210.

⁹⁸ Order Denying Defendants’ Motion for Acquittal or New Trial at 12, *Esquenazi*, (S. D. Fla. Oct. 12, 2012) (No. 1:09-cr-21010-JEM).

The evidence showed that the firm began as a private company in 1968, but the state-owned National Bank of the Republic of Haiti (BNRH) had acquired 97% of the shares in Haiti Teleco around 1971 – 72.⁹⁹

The state-owned Bank of the Republic of Haiti (BRH), successor to BNRH, controlled Haiti Teleco during the period of the charged FCPA violations. The President of Haiti, the Prime Minister and other government ministers had appointed the company's board of director and a general director. Employees working under these appointees were considered "public agents" employed by a "public administration." Haitian tax laws granted special treatment to the firm, while BRH controlled its revenues.¹⁰⁰

Against this background, the *Esquenazi* trial court gave the following jury instructions regarding "foreign official" and "instrumentality" of a foreign government:

The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

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. To decide whether [Haiti Telecom] is an instrumentality of the government of Haiti, you may consider factors including but not limited to:

- (1) whether it provides services to the citizens and inhabitants of Haiti;
- (2) whether its key officers and directors are government officials or are appointed by government officials;
- (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans or revenue from government-mandated fees;

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.* at 6–7.

- (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and,
- (5) whether Teleco is widely perceived and understood to be performing official or government functions.

These factors are not exclusive, and no single factor will determine whether [Teleco] is an instrumentality of a foreign government. In addition, you do not need to find that all the factors listed above weigh in favor of Teleco being an instrumentality in order to find that Teleco is an instrumentality.¹⁰¹

After a two-and-a-half-week trial, followed by five hours of deliberation, a jury convicted Joel Esquenazi and his co-defendant Carlos Rodriguez on seven counts of FCPA violations, along with other related charges. The judge subsequently sentenced Esquenazi to 15 years in prison, the longest sentence to date for an FCPA violation.¹⁰²

In denying the defendants' post-trial Motion for Judgment of Acquittal or New Trial, the District Court Judge cited testimony that established Haiti Teleco as a public entity:

- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- Haiti Teleco was founded as private firm in 1968.
- The state-owned National Bank of Haiti [BNRH] acquired 97% of its shares "around 1971-72."
- The Bank of the Republic of Haiti [BRH], state-owned successor to BNRH, "100%" controlled Haiti Teleco during the time of the charged offenses.
- The entire Board of Directors and General Director was appointed by executive order signed by Haiti's President, Prime Minister and other government ministers.
- Teleco received special treatment under tax laws.

¹⁰¹ Court's Final Instructions to the Jury at 23–24, *Esquenazi*, (S.D. Fla. Aug. 8, 2011), (No. 1:09-cr-21010-JEM).

¹⁰² Press Release, Office of Pub. Affairs, *Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti*, U.S. DEP'T OF JUSTICE (Oct. 25, 2011), <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>.

- BRH controlled Haiti Teleco’s revenues.
- A DOJ expert testified that the people who work under these political appointees were considered to be "public agents" working for the "public administration," which he defined as "the entities that the state uses to perform and to give services to the people living in Haiti" and "as an instrument . . . for the state to reach its missions and objectives and goals."
- Other testimony by former Haiti Teleco employees to the effect that they were employees of a state-owned company.¹⁰³

In their appeal to the Eleventh Circuit, the *Esquenazi* defendants challenged the FCPA convictions on several grounds, including the definition of “instrumentality” in the jury instructions¹⁰⁴ and whether employees of Haiti Teleco were “foreign officials” under the FCPA merely because the National Bank of Haiti owned shares of Haiti Teleco and the Haitian Government appointed board members and directors.¹⁰⁵ *Esquenazi* also asserted that the statute as applied to him was unconstitutionally vague and therefore violated his Fifth Amendment right to due process.¹⁰⁶

VII. THE ELEVENTH CIRCUIT RULING IN *UNITED STATES V. ESQUENAZI*

The Eleventh Circuit Court of Appeals became the first appellate court to rule on the issue of when an entity amounts to an “instrumentality of a foreign government” under the FCPA when it handed down its opinion in *United States v. Esquenazi*.¹⁰⁷ In addition to upholding the

¹⁰³ Order Denying Motion for Acquittal, *supra* note 98, at 5–7).

¹⁰⁴ Reply Brief of Appellant Carlos Rodriguez at 5, *Esquenazi*, (11th Cir. Oct. 4, 2012) (No. 11-15331-C).

¹⁰⁵ Brief of Appellant Joel Esquenazi at 19, *Esquenazi*, (11th Cir. May 9, 2012) (No. 11-15331-C).

¹⁰⁶ *Id.* at 41.

¹⁰⁷ *Esquenazi*, (No. 11-15331), 2014 U.S. App. LEXIS 9096, *38 – 40..

expansive view of “instrumentality” advocated by the SEC and DOJ, the court found sufficient evidence in the trial record to conclude that Haiti Teleco was a Haitian government instrumentality¹⁰⁸ and rejected Esquenazi’s constitutional challenge to the statute on the grounds of vagueness.¹⁰⁹

The court defined “instrumentality” under the FCPA as, “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”¹¹⁰ It further held that whether a given entity satisfies each of these elements is a question of fact.¹¹¹

With respect to the first element in the Eleventh Circuit definition, control by the foreign government, courts and juries need to consider 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.¹¹²

The second element, whether an entity performs a function that the government treats as its own, requires examination of the following factors:

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.¹¹³

¹⁰⁸ *Esquenazi*, (No. 11-15331), 2014 U.S. App. LEXIS 9096 at *38.

¹⁰⁹ *Id.* at *40.

¹¹⁰ *Id.* at *28.

¹¹¹ *Id.* at *30.

¹¹² *Id.* at *29.

¹¹³ *Id.* at *31.

The defendants had objected vigorously to the DOJ's position regarding instrumentality that the district court had included in its jury instructions. Esquenazi contended that the term should apply only to government departments and agencies,¹¹⁴ *i.e.*, political, public, or governmental actors, and not to state-owned enterprises that do not perform a political, public, or governmental function."¹¹⁵I think there is a missing beginning quotation...perhaps?

Recognizing that the FCPA did not define the term, the appellate court undertook an extensive exercise in statutory construction¹¹⁶ that followed much the same path and ultimately reached the same conclusion as the district courts in *Aguilar*, *Carson*, and the *Esquenazi*.¹¹⁷

The Eleventh Circuit therefore ~~Thus, the appellate court~~ rejected the defendants' argument that "instrumentality" can only apply to "... entities performing traditional, core government functions."¹¹⁸ Instead, it held that in determining whether an entity performs a governmental function, a court should defer to the judgment of whether that foreign government considers the entity to be performing a governmental function.¹¹⁹ Moreover, "... the concept of a usual or proper government function changes over time and varies from nation to nation."¹²⁰

Thus, in reviewing the district court's jury instructions on the definition of "instrumentality," the circuit court observed that they closely followed the factors to consider

¹¹⁴ Brief of Appellant Joel Esquenazi at 30, *Esquenazi*, (No. 11-15331-C).

¹¹⁵ *Id.* at 31.

¹¹⁶ *Id.* at 12–26.

¹¹⁷ See *supra* Section VI.

¹¹⁸ *Esquenazi*, (No. 11-15331-C), 2014 U.S. App. LEXIS 9096, at *25.

¹¹⁹ *Id.* at *26.

¹²⁰ *Id.* at *25, (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.27 (1983)).

under its own test, concluding that, "... we find no error in these instructions. Indeed, they substantially cover the factors we previously outlined."¹²¹

In holding that sufficient evidence existed to establish that Teleco was an instrumentality of the Haitian government, the appellate court found ample support in the trial record. It noted that Haiti had granted Haiti Teleco a monopoly over telecommunications service at its founding, along with various tax advantages. At the time of the defendants' involvement, Haiti's national bank owned 97% of the entity; moreover, the Haitian government appointed the Director General of the company and all of the board of directors. And, an expert witness for the DOJ testified that Teleco belonged "totally to the state" and was "considered a public entity."¹²²

The court likewise relied upon the facts in the record for denying Esquenazi's constitutional challenge based upon vagueness. The court stated:

Mr. Esquenazi's only contention, however, is that the statute would be vague if we interpreted "instrumentality" to include state-owned enterprises that do not perform a governmental function. But we have not. Our definition of "instrumentality" requires that the entity perform a function the government treats as its own." [emphasis in original] ... Because the entity to which Mr. Esquenazi funneled bribes was overwhelmingly majority-owned by the state, had no fisc independent of the state, had a state-sanctioned monopoly for its activities, and was controlled by a board filled exclusively with government-appointed individuals, the FCPA is not vague as applied to his conduct [citation omitted].¹²³

¹²¹ *Id.* at *37.

¹²² *Id.* at *37–*38.

¹²³ *Id.* at *39–40.

VIII. JUDICIAL STANDARDS FOR DETERMINING “INSTRUMENTALITY” STATUS IN THE WAKE OF THE ELEVENTH CIRCUIT *ESQUENAZI* OPINION

The Eleventh Circuit decision that gave the DOJ an unequivocal victory in *Esquenazi* provides a simple and straightforward basis for determining when an entity constitutes an “instrumentality” of a foreign government under the FCPA that makes its employees “foreign officials” with respect to that act. Under this standard, the fact-based inquiry must focus upon control by the foreign government and whether that entity performs a function that the government treats as its own.¹²⁴

The court provided a non-exhaustive list of factors to consider regarding whether a foreign government exercises sufficient over an entity sufficient to satisfy the instrumentality test. That list includes the 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 government shares in profits and losses of the entity; and, the length of time these indicia have existed.¹²⁵

On the question of whether the entity performs a function that the government treats as its own, the court will look to evidence of the following: whether the entity has a monopoly whether the government shares in its profits or subsidizes its operating costs whether the entity

¹²⁴ *Id.* at *28.

¹²⁵ *Id.* at *29.

provides services to the public at large and whether the public and the government of that foreign country generally regard the entity as performing a governmental function.¹²⁶

Although this approach clarifies and simplifies the task of determining instrumentality status, it does not amount to a rejection of the factors that the district courts had considered in their earlier decisions. Their approaches, although consistent with the appellate court's standards, are comparatively unwieldy. Unanimous in their conclusions, that instrumentality status was a question of fact rather than one of law, they likewise deemed their lists of factors to consider as exemplary but not exhaustive. Those criteria readily fit into the two major elements set forth by the Eleventh Circuit opinion in *Esquenazi*.

The Eleventh Circuit standard for determining instrumentality does not reduce the scope of relevant factors as compared to lower court decisions. Instead, it provides a more coherent, though no less comprehensive, test for instrumentality that ultimately rests upon a totality of the circumstances approach to carrying out a fact-based inquiry in determining when employees of a foreign entity with government control or influence amount to foreign officials under the FCPA.

This standard also includes a degree of flexibility that takes into account how the nature of an entity as an instrumentality may change over time, as the court noted that "...the concept of a 'usual' or a 'proper' governmental function changes over time and varies from nation to nation [citation omitted]."¹²⁷ Thus, an enterprise that begins as a private, non-governmental entity may subsequently become an instrumentality of its government as the foreign government's relationship to that entity changes.¹²⁸

¹²⁶ *Id.* at *31.

¹²⁷ *Id.* at *25.

¹²⁸ *Id.* at *26.

CONCLUSION

The Eleventh Circuit is the first court of appeals to rule on the question of when an entity constitutes an “instrumentality of a foreign government” under the FCPA,¹²⁹ handing down an opinion that fully substantiates the SEC and DOJ view that employees in a broad range of SOEs may amount to foreign officials under the FCPA. It has articulated a straightforward approach to conducting a factual inquiry into whether a particular entity amounts to an instrumentality of a foreign government that makes its employees foreign officials under the FCPA. That inquiry focuses upon two key factors: 1) ownership or control by the foreign government; and,) 2 whether the foreign government treats the entity as its own.

This appellate opinion consolidates and clarifies the earlier lower court opinions, all of which held that, depending upon the facts and circumstances, a state-owned-enterprise may constitute an “instrumentality” of a foreign government, thereby rendering its employees “foreign government officials” under the FCPA. The court explicitly stated that it did not intend for the criteria it set out in *Esquenazi* to be regarded as an exhaustive list of considerations and that no one of them was dispositive. Nor did the appellate court reject as inappropriate any of the factors considered in any prior lower court opinion.

In upholding the definition of instrumentality that the SEC and DOJ have used in prosecuting FCPA cases, the appellate court rejected the views of critics who claimed ambiguity in the statutory language and therefore criticized current enforcement of the anti-bribery

¹²⁹ *Id.* at *12.

provisions as overzealous. Instead, the court endorsed the interpretation used by the government to extend the anti-bribery provisions of the act to potentially any SOE employee.

A close examination of the ambiguity arguments suggests that the underlying concerns of the critics involve both the statutory breadth of the anti-bribery prohibitions and the government's determination to enforce them accordingly. Most such objections either implicitly or explicitly contend that the statute should not apply as extensively as its plain language indicates. On the other hand, if Congress had meant for a more restrictive interpretation, it could easily have said so by drafting additional provisions to exclude categorically employees of state-owned-enterprises with specific characteristics, *e.g.*, those with less than 50% government ownership. Thus, the ambiguities and uncertainties lie less in the statutory language than in the panoply of relationships between governments and the entities that supply goods and services around the world. No statutory language could possibly capture every such government-to-entity relationship worldwide. Each situation must therefore be evaluated on its own merits by SEC and DOJ prosecutors, subject of course to judicial review should a U.S. firm choose to litigate any subsequent charges.

Moreover, the judicial guidance from recent opinions speaks directly to those ambiguity objections motivated by legitimate concerns *i.e.*, reducing uncertainties for companies that genuinely seek to comply with the FCPA. The DOJ Opinion Release Procedure also offers clarification for those firms that have genuine uncertainty as to whether a proposed transaction involves an entity whose employees might be considered foreign officials.¹³⁰

The appellate court opinion vindicates the aggressive approach taken by the SEC and DOJ to FCPA enforcement over the past decade and supports the continuing investigations, civil

¹³⁰ See *supra* Section VIII.B.VIII.B

complaints, criminal indictments and pretrial settlements undertaken by the government. In a recent address to the American Bar Association White Collar Crime Institute, Patrick Stokes, Deputy Chief of the DOJ Foreign Corrupt Practices Act (FCPA) unit, stated that vigorous enforcement would continue. He also acknowledged that the DOJ “...largely shapes FCPA jurisprudence through its press releases and resolutions.”¹³¹ This is likely to continue, given the Eleventh Circuit’s implicit endorsement of that “prosecutorial jurisprudence” in *Esquenazi*.

¹³¹ Caccia & Moss, *supra* note 34.