Client Alert

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Broad Definition of 'Instrumentality' Under the FCPA Offers Little Clarification

The Foreign Corrupt Practices Act ("FCPA") makes it unlawful to, among other things, make payments to any officer or employee of an "instrumentality" of a foreign government for purposes of securing or gaining an improper advantage in business. Because many foreign governments are involved in enterprises normally reserved for the private sector in the United States, including such enterprises in the definition of "instrumentality" can dramatically expand the scope of the FCPA. The statute, however, does not define the term "instrumentality." Until recently, no court had defined the term, leaving it to the Department of Justice and the Securities and Exchange Commission to adopt an expansive definition that extended to virtually every state-run enterprise. We have seen a number of issues recently in connection with proposed transactions, third-party contracting and compliance that relate directly to this important issue. Please let us know if you or any of your clients have questions regarding this development or any matter involving the FCPA.

Recently, in *United States v. Esquenazi* (11th Cir. May 16, 2014), the 11th Circuit upheld the convictions of two individuals convicted of bribing officials of a Haitian telephone company, Telecommunications D'Haiti, S.A.M. ("Teleco"), by defining an "instrumentality" of a foreign government broadly. The court defined that term to mean an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own. In order to determine whether an entity is controlled by a foreign government, the court listed factors such as the government's formal designation of the entity; whether the government has a majority ownership interest in the entity; the government's ability to hire and fire the principals; and whether the government reaps the profits or subsidizes the losses of the entity. Factors that weigh on whether the entity is "performing a function the government treats as its own" include whether the entity has a monopoly over the functions it carries out; whether the government subsidizes the entity; whether the entity provides services to the public at large; and whether the public and government generally perceive the entity to be performing a governmental function.

The 11th Circuit observed that these questions require a fact-intensive analysis, and several of the factors identified by the court are largely subjective. Indeed, the 11th Circuit upheld the conviction even in light of a declaration by the Haitian prime minister noting that there was no Haitian law designating Teleco as a "public institution" or a "State enterprise."

In *Esquenazi*, the defendants, Esquenazi and Rodriguez, were convicted of bribing Teleco officials through the use of consulting agreements in order to lower fees owed by their company to Teleco. Teleco is a corporation created by the Haitian government to provide telecommunications services, and, at the time of the bribes, was given a monopoly on telecommunications services within Haiti. The government had appointed Teleco's directors and owned 97 percent of its stock. Esquenazi admitted at his trial that he bribed Teleco officials, but pleaded not guilty based on the theory that Teleco was not an "instrumentality" of the government of Haiti. Applying its new definition to these facts, the court rejected this argument and upheld the convictions.

The Department of Justice and the Securities and Exchange Commission have long considered foreign state-run monopolies to be "instrumentalities" within the meaning of the FCPA. This is the case even where those entities are performing functions ordinarily thought of as belonging in the private sector, such

as the purchase or processing of tobacco or the construction of resort facilities. With this ruling, it appears that the 11th Circuit has agreed that virtually any entity controlled by a foreign government can fall within the FCPA's definition of "instrumentality," the key limitation being that it must perform a function that the government "treats as its own." It is unclear, however, whether this limitation will prove meaningful. Rather, the Department of Justice and Securities and Exchange Commission can be expected to argue that virtually any function performed by a government is one that it "treats as its own."

Entities and individuals doing business in countries whose governments play an active role in what elsewhere would constitute private enterprise should be on notice of the breadth of this definition and the corresponding breadth of the coverage of the FCPA.

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