

8-1-2016

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Amy Lynn Soto, *United States v. Esquenazi: Injecting Clarity or Confusion into the Foreign Corrupt Practices Act*, 47 U. Miami Inter-Am. L. Rev. 383 ()

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United States v. Esquenazi: Injecting Clarity or Confusion into the Foreign Corrupt Practices Act

Amy Lynn Soto*

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 to criminalize the bribing of foreign officials in order to obtain or retain business. In recent years, there has been an increase in bribery investigations and prosecutions by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). This increase in enforcement co-exists with an ambiguity regarding the scope of the FCPA.

The scope of the FCPA hinges on the determination of who is a foreign official. The FCPA defines a 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.” However, the word “instrumentality” is undefined. Consequently, the DOJ and SEC have taken great liberties in interpreting the FCPA and expanding its scope.

In 2014, the Eleventh Circuit became the first appellate court in the United States to define the ambiguous term in United States v. Esquenazi. Unfortunately, instead of clarifying the issue, the court defined an instrumentality as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” In addition, the court proffered a two-prong test with nine non-dispositive factors and no guidance on how the factors should be applied.

* J.D., University of Miami School of Law, 2016; B.A and B.B.A., Florida International University, 2006. I dedicate this note to my mother, Mercy. Thank you for believing in me, even when I did not. Your unconditional love and support has been the true constant in my life. To Rick, who provided the inspiration for this note, thank you for loving me. You were my rock throughout my law school journey, and I could not have done it without you.

This note argues that the court's approach has broadened the scope of the FCPA beyond Congress' intent and has resulted in a great deal of uncertainty in interpreting the statute. As a result of the lack of guidance, individuals and corporations engaging in international business are operating in a largely uncertain world. This uncertainty inevitably yields a chilling effect on international business.

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I. INTRODUCTION

It is estimated that over \$1,000,000,000,000 per year is exchanged in bribe payments paid in rich *and* developing countries.¹ This equates to over \$273,000 per day and over \$11,000 per hour paid in bribes. As shocking as it may be, this estimate is exclusive of the embezzlement of public funds or theft of public assets.² Given the increase in globalization and pervasiveness of corruption around the globe, many countries have enacted anti-corruption legislation to combat the ills of bribery—including the United States.

In 1977, the United States Congress enacted the Foreign Corrupt Practices Act (FCPA) in an effort to remedy the corruption stemming from American individuals and businesses overseas.³ The FCPA essentially criminalizes the bribing of foreign government officials by American citizens, permanent residents, businesses (both private and public), and certain non-American individuals and entities in order to obtain or retain business; in other words, the FCPA set the lofty goal of eliminating “pay to play” practices overseas by persons with the requisite American nexus. However, the FCPA is rather aspirational and casts a wide net of enforcement. So wide a net, in fact, that it borders on being, or is simply in certain instances, so vague as to be constitutionally defective in its application to certain situations that are increasingly prevalent overseas.

A crucial question requiring an answer prior to the application of the FCPA to a specific situation is who exactly is a foreign official? That is the question that individuals and professionals engaging in international business have been asking themselves for years. The FCPA does not proscribe payments made to employees of a

¹ *The Costs of Corruption*, THE WORLD BANK (Apr. 8, 2004), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187%7EmenuPK:34457%7EpagePK:34370%7EpiPK:34424%7EtheSitePK:4607,00.html> (last visited May 1, 2016).

² *See id.*

³ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff, 78m(b), (d)(1), (g)-(h) (2006 & Supp. 2010), *amended by* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1 to -3, 78ff (2006)) and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1 to -3, 78ff (2012)).

commercial enterprise, but it is also silent as to whether employees of a state-owned or state-controlled business entity constitute foreign officials.

The FCPA defines a 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.⁴

At first blush, the statute seems to have a rather broad scope. Further, combing through the various components of the Act shows that the word “instrumentality” is not defined at all.

The ambiguity is compounded by the fact that the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have taken the liberty to enforce the statute as they see fit. The DOJ and SEC have upped the ante in intensifying their focus on enforcement. Because most prosecutions settle due to the high stakes and risk of a potentially lengthy incarceration, courts rarely have the chance to hear cases pertaining to the FCPA, and as such, the statute has avoided judicial scrutiny for the most part. This judicial vacuum has allowed the DOJ and SEC to administratively define the scope of the FCPA. The Eleventh Circuit, the first appellate court to address the issue, had the opportunity to remedy the vagueness associated with the scope of the FCPA; however, it failed to do so.⁵

The court had the opportunity to clarify the ambiguity hovering over the definition of a foreign official in *United States v. Esquenazi*.⁶ Instead, the court punted and did not provide a framework to determine what an “instrumentality” means under the auspices of the FCPA and thus, failed to clarify for once and for all who is a

⁴ 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

⁵ *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

⁶ *Id.*

foreign official.⁷ Rather, it proffered two tests with nine non-dispositive factors to help determine whether an entity is an instrumentality under the FCPA.⁸

The nine factors fail to provide any concrete guidance on an issue of fact that ought to be considered a matter of law. Under the Eleventh Circuit's decision, just about any set of facts or circumstances would result in a foreign government being deemed in "control" of a commercial enterprise, and thus, such an enterprise would be deemed to be an "instrumentality" of the foreign government. While there are a number of entities that do, indeed, possess varying degrees of governmental control, the Congress that enacted and amended the FCPA did not intend that some, and not total, control of a business enterprise by a foreign government would render the enterprise an "instrumentality" under the FCPA, as the Eleventh Circuit has effectively decided in *Esquenazi*. The only way to properly give effect to Congress' intent is to abandon *Esquenazi*.

This note will address the FCPA and the practical implications of *Esquenazi* on compliance. The note will begin by providing the historical basis for the enactment of the FCPA, followed by an explanation of the existence of a judicial vacuum of interpretation of the FCPA and an examination of the limited case law on the "instrumentality" component of the federal statute. The note will respectfully discuss how, in the author's opinion, the Eleventh Circuit erred under an analysis of the text, legislative history, and ultimate purpose of the FCPA. The note will conclude with a discussion of the potentially deleterious effect of the broadened interpretation of the FCPA under *Esquenazi* and what Congress, or the courts, can do to remedy what may very well be an unintended interpretation of the FCPA.

⁷ *Id.*

⁸ *Id.*

II. BACKGROUND

A. History

The FCPA was enacted as a result of the political and corporate abuses revealed by the Watergate scandal.⁹ The Watergate investigations revealed that American corporations had used slush funds to make illegal contributions to political campaigns.¹⁰ The SEC initiated a broad investigation of corporate business practices, which ultimately revealed that over 400 American companies admitted to making improper payments abroad.¹¹ The companies included over 117 Fortune 500 companies, and it was estimated that more than \$300 million had been paid in bribes to foreign officials.¹² The American public and the international community were outraged.

American legislators believed that the payment of bribes to influence the acts of foreign government officials was not only unethical but also threatened American businesses and created foreign policy concerns.¹³ Senator William Proxmire said, “Bribery undermines fair competition between American firms. Price and quality no longer control the market. The growth, profitability and employment levels of firms operating in such circumstances are distorted.”¹⁴ It was also argued that the payment of bribes placed the United States in a precarious foreign policy position. Bribery payments embarrassed friendly governments and damaged America’s public image.¹⁵ In a particularly egregious example, Lockheed Corporation paid Japan’s Prime Minister \$1.8 million to secure a contract for the sale of aircraft and, ultimately, resulted in the Prime Minister’s arrest and conviction for securities fraud.¹⁶

⁹ Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 499 (2011).

¹⁰ See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT’L L. 360, 380 (2013) (discussing the history and events leading up to the enactment of the FCPA).

¹¹ Westbrook, *supra* note 9, at 499-500.

¹² H.R. REP. NO. 95-640, at 4 (1977) (Comm. Rep).

¹³ See *id.* at 4-5.

¹⁴ GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT* 60 (1982).

¹⁵ H.R. REP. NO. 95-640, *supra* note 12, at 5.

¹⁶ Magnuson, *supra* note 10, at 380.

Given the public outcry and threat to America's foreign policy position, the federal government was under intense pressure to take action in an effort to restore America's public image abroad and its relations with other nations.¹⁷ On December 19, 1977, President Jimmy Carter signed the FCPA, after it was approved by the Senate in a voice vote and passed unanimously by the House of Representatives.¹⁸ The FCPA would serve as a warning sign to American businesses and the international community that the United States would not tolerate corrupt practices by its corporations.

B. *The Statute*

The purpose of enacting the FCPA was to criminalize the payment of bribes to a foreign official in order to obtain or retain business. The FCPA is part of the Securities Exchange Act of 1934, and it is both a civil statute and a criminal statute.¹⁹ As such, the DOJ and SEC have enforcement authority.²⁰ The statute addresses foreign corruption through two means: (1) the anti-bribery provisions and (2) the accounting provisions.²¹

1. Anti-Bribery Provisions

The anti-bribery provisions apply to three categories of persons and entities: (1) "issuers";²² (2) "any domestic concern," which includes citizens, nationals, or residents of the United States and business entities, including corporations, organized in the United States or having their principal places of business in the United States;²³ and (3) "persons other than issuers or domestic concerns," including the officers, directors, employees or agents, acting on behalf of an issuer, domestic concern, or person.²⁴

¹⁷ GREANIAS, *supra* note 14, at 59.

¹⁸ *Id.* at 63.

¹⁹ Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395 (2010).

²⁰ *Id.* at 395.

²¹ DEP'T OF JUSTICE & SEC. EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [hereinafter RESOURCE GUIDE].

²² 15 U.S.C. § 78dd-1 (2012).

²³ *Id.* § 78dd-2.

²⁴ *Id.* § 78dd-3.

The anti-bribery provisions prohibit a domestic concern “from mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance” of a bribe “to any foreign official” for the purpose of “influencing any act or decision of such official in his official capacity . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to any person”²⁵

The FCPA applies only to payments intended to influence a foreign official to use their position to obtain or retain business.²⁶ This business purpose test includes the payment of bribes to win a contract, influence the procurement process, gain access to non-public bid tender information, etc.²⁷ To violate the FCPA, the act of bribery must be made with an intent or desire to wrongly influence the recipient.²⁸ Because the FCPA focuses on the intent, there is no requirement that the corrupt act succeed in its purpose or that the foreign official solicit the bribe in order to be held criminally liable.²⁹ For an individual defendant, criminal liability attaches only if he or she acted “willfully,” with a bad purpose, and with knowledge that the conduct was unlawful.³⁰

The FCPA, however, permits three types of payments to foreign officials: (1) facilitating, or grease, payments; (2) lawful payments under the laws and regulations of the foreign official’s country; and (3) promotional expenses.³¹

Facilitating payments do not come within the ambit of the FCPA if made to a foreign official for the purpose of facilitating or expediting the performance of a routine government action.³² However, routine government action excludes the decision of awarding new

²⁵ *Id.* § 78dd-1(a)(1) (for issuers); *id.* § 78dd-2(a)(1) (for domestic concerns); *id.* § 78dd-3(a)(1) (for persons other than issuers or domestic concerns).

²⁶ RESOURCE GUIDE, *supra* note 21, at 12.

²⁷ *See id.* at 13.

²⁸ *Id.* at 14.

²⁹ *Id.*

³⁰ *Id.* (noting that the government need not prove that the defendant was aware and had knowledge of the FCPA).

³¹ Jared Chaykin, Note, *U.S. v. Aguilar and the Foreign Corrupt Practices Act: Sending an S.O.S. to Congress*, 44 U. MIAMI INTER-AM. L. REV. 63, 65 (2012).

³² 15 U.S.C. § 78dd-2(b).

business or continued business with a party.³³ Examples of routine governmental action include obtaining permits or licenses, processing governmental papers, or providing police protection.³⁴

Payments that are legal in the foreign official's country may be allowed. In using the affirmative defense that a payment is lawful in the foreign country, it must be established that the law or regulation is written—it is not enough to show that bribes are not prosecuted under local law.³⁵

Promotional expenses may also be paid for reasonable and bona fide expenditures on behalf of a foreign official made for the purpose of promoting, demonstrating, or explaining products or services.³⁶ Bona fide expenditures may include travel and lodging expenses for an official's visit to company facilities, training, etc.³⁷ However, promotional expenses do not include expenses for trips that are primarily for personal entertainment purposes, and family members and spouses cannot attend any of the trips for free.³⁸

Bribes come in many forms. A bribe may be disguised as a “consulting fee,” an internship opportunity for a child in college, or a trip primarily for touristic purposes. The FCPA does not have a *de minimis* threshold because what may be a modest payment in the United States might be a more substantial gift in a foreign country.³⁹ Regardless of the size of the gift, the influencing party must have the corrupt intent to influence the foreign official.⁴⁰ This protects the person making the gift from liability for providing items of nominal value or small tokens of esteem or gratitude.⁴¹

³³ *Id.* § 78dd-1(f)(3)(B).

³⁴ RESOURCE GUIDE, *supra* note 21, at 25.

³⁵ *Id.* at 23.

³⁶ 15 U.S.C. § 78dd-2(c)(2)(A).

³⁷ FCPA Op. Release 07-02 (Dep't of Justice Sep. 11, 2007); FCPA Op. Release 07-01 (Dep't of Justice Jul. 24, 2007); FCPA Op. Release 04-01 (Dep't of Justice Jan. 6, 2004); RESOURCE GUIDE, *supra* note 21, at 24.

³⁸ *See generally* FCPA Op. Release 07-02 (Dep't of Justice Sep. 11, 2007); FCPA Op. Release 07-01 (Dep't of Justice Jul. 24, 2007).

³⁹ RESOURCE GUIDE, *supra* note 21, at 15.

⁴⁰ *Id.*

⁴¹ *Id.*

2. Accounting Provisions

Congress enacted the FCPA's accounting provisions as an additional layer of protection against bribery because American companies are able to conceal most of their illicit bribes in their corporate books.⁴² The FCPA's accounting provisions apply to every issuer under the Exchange Act that has a class of securities registered pursuant to Section 12 or that is required to file periodic reports pursuant to Section 15(d).⁴³ These provisions apply to any issuer that trades in a national securities exchange in the United States; however, they do not apply to private companies.⁴⁴ The accounting provisions have two components: the record keeping requirement⁴⁵ and the internal controls requirement.⁴⁶

The record keeping element requires all issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer"⁴⁷ Under the record-keeping requirement, liability would attach, even if all the elements of the anti-bribery provisions were not met, if improper payments are not accurately recorded.⁴⁸ Bribes are often mischaracterized as commissions or royalties, consulting fees, travel and entertainment expenses, write-offs, etc.⁴⁹ As such, the record keeping requirement serves three purposes: it (1) ensures that illegal transactions are recorded; (2) prevents the falsification of records to conceal illegal transactions; and (3) promotes the proper characterization of transactions.⁵⁰

The internal control element requires that issuers

⁴² See Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 610 n.16 (2007) (discussing the accounting and anti-bribery provisions of the FCPA as well as the penalties for their violations).

⁴³ RESOURCE GUIDE, *supra* note 21, at 42-43.

⁴⁴ *Id.*

⁴⁵ 15 U.S.C. § 78m(b)(2)(A) (2012).

⁴⁶ *Id.* § 78m(b)(2)(B).

⁴⁷ *Id.* § 78m(b)(2)(A).

⁴⁸ RESOURCE GUIDE, *supra* note 21, at 39.

⁴⁹ *See id.*

⁵⁰ Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1270-71 (2014) (examining the elements of the accounting provisions).

[D]evise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles . . . and to maintain accountability for assets⁵¹

The FCPA does not specify what controls a company must implement, and this allows for the flexibility to develop controls that are appropriate to the company's needs and circumstances.⁵² Internal controls may include the tone set by management regarding ethics, risk assessments, control measures that cover policies and procedures, and monitoring.⁵³

C. *Judicial Interpretation*

The Sarbanes-Oxley Act and its internal investigations requirement have resulted in an increase in the number of FCPA violations that have been discovered.⁵⁴ In addition, the DOJ and SEC have increased the number of individuals prosecuted under the FCPA and held corporate officers accountable in an effort to deter foreign bribery.⁵⁵ Mark Mendelsohn, the DOJ's chief FCPA prosecutor stated,

The number of individual prosecutions has risen – and that's not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to

⁵¹ 15 U.S.C. §§ 78m(2)(B)(i)-(ii).

⁵² RESOURCE GUIDE, *supra* note 21, at 40.

⁵³ *Id.*

⁵⁴ Chaykin, *supra* note 31, at 67.

⁵⁵ *Id.*; Koehler, *supra* note 19, at 404 (noting that the DOJ, operating under the belief that an individual who loses his or her liberty is a far greater deterrent than a corporation paying a hefty fine, has made the prosecution of individual FCPA violators the cornerstone of its enforcement strategy).

jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.⁵⁶

Critics of the FCPA contend that the Act is vague and too wide in scope.⁵⁷ Arguably, the greatest source of contention is determining who constitutes a “foreign official.” The difficulty in identifying a “foreign official” stems from the fact that it requires defining the term “instrumentality.” Although the FCPA defines the term “public international organization,”⁵⁸ it does not contain a definition for “instrumentality.” In the absence of a definition, the DOJ and SEC have interpreted the term “foreign official” broadly to include not only government officials and agents but also employees of foreign state-owned or controlled corporations.⁵⁹ The DOJ and SEC have deemed such individuals, regardless of rank or title or classification under the local foreign law, to be “foreign officials” because their employers are an “instrumentality” of a foreign government and irrespective of the fact that the employer is a company with publicly traded stock or has characteristics of a private enterprise.⁶⁰ This element singlehandedly determines the scope of enforcement of the statute.

In light of the increase in enforcement of the FCPA, individuals and corporations argue that there is a lack of guidance from the agencies and the courts.⁶¹ The DOJ has generally been reluctant to issue advisory opinions, and since 1993, it has only issued thirty-eight advisory opinions concerning the FCPA.⁶² The lack of guidance is compounded further by the fact that courts have played a minimal role in interpreting the FCPA.⁶³ The dearth of case law is rooted in the fact that every large entity that has faced FCPA proceedings has entered into a settlement agreement with the government to include non-prosecution agreements, deferred prosecution

⁵⁶ Richard L. Cassin, *The FCPA Isn't Fun and Games*, THE FCPA BLOG (Sept. 16, 2008, 7:28 PM), <http://www.fcpablog.com/blog/2008/9/16/the-fcpa-isnt-fun-and-games.html>.

⁵⁷ Chaykin, *supra* note 31, at 68.

⁵⁸ 15 U.S.C. § 78dd-2(h)(2)(B).

⁵⁹ Bartle, *supra* note 50, at 1280; Koehler, *supra* note 19, at 391.

⁶⁰ Koehler, *supra* note 19, at 391-92.

⁶¹ Chaykin, *supra* note 31, at 69.

⁶² *See Opinion Procedure Releases*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last updated June 17, 2015).

⁶³ Chaykin, *supra* note 31, at 70.

agreements, and other settlements that are not subject to scrutiny by the judiciary.⁶⁴ For obvious reasons, a business would rather pay substantial fees than face the negative consequences that it could encounter upon losing a FCPA challenge.⁶⁵ As a result, the courts have rarely been given the opportunity to interpret the FCPA, and the DOJ and SEC have been given *carte blanche* to define its scope and enforce at will.⁶⁶

The increase in individual prosecutions has yielded a variety of, albeit a few, statutory interpretation arguments to determine whether a state owned or controlled entity is an instrumentality under the FCPA. Such arguments have attempted to discern the FCPA's meaning of an "instrumentality" through the statutory text, legislative history, and the purpose of the statute.

In *United States v. Nguyen*, four individuals and a company, Nexus Technologies, Inc., were charged with bribing various Vietnamese government officials in exchange for contracts to supply government agencies with equipment and technology.⁶⁷ Over the course of the scheme, the defendants paid upwards of \$150,000 in bribes to Vietnamese officials.⁶⁸ The defendants negotiated contracts and bribes with the officials of the Vietnamese government, negotiated with vendors in the United States, and arranged for the transfer of funds for a wide variety of equipment and technology—including underwater mapping equipment, bomb containment equipment, and helicopter parts.⁶⁹

In *United States v. Carson*, the DOJ charged six executives with conspiracy to secure contracts by paying bribes to officials of for-

⁶⁴ Brief of Amicus Curiae Professor Michael J. Koehler in Support of Petitioners at 4, *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014) (No. 14-189).

⁶⁵ Brief of Washington Legal Foundation and the Independence Institute as Amici Curiae in Support of Petitioners at 7, *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014) (No. 14-189).

⁶⁶ *See id.*

⁶⁷ Press Release, Dep't of Justice, Philadelphia Export Company and Employees Indicted for Paying Bribes to Foreign Officials (Sept. 5, 2008), available at <http://www.justice.gov/archive/opa/pr/2008/September/08-crm-782.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

eign state-owned energy companies as well as officers and employees of foreign and domestic private companies.⁷⁰ From 2003 through 2007, the defendants paid \$4.9 million in bribes to officials of foreign state-owned corporations.⁷¹ The payments were made to officials of state-owned entities in China, Malaysia, Korea, and the United Arab Emirates in the form of lavish vacations, tuition payments, and expensive gifts for the purpose of securing business.⁷²

In *United States v. Aguilar*, the defendants were indicted for their roles in a conspiracy to pay bribes to Mexican government officials at the Comisión Federal de Electricidad (CFE), a state-owned utility company.⁷³ Angela and Enrique Aguilar were hired by Lindsey Manufacturing Company to be sales representatives in Mexico; in compensation, the company would allegedly pay a 30 percent commission based on the revenue realized as a result of its contracts with CFE.⁷⁴ As part of the agreement, the government alleged that all or part of the commission would be used to pay bribes to CFE officials in exchange for awarding Lindsey Manufacturing contracts.⁷⁵ In an interesting turn of events, in December 2011, after a jury trial that resulted in the conviction of the defendants, the Honorable A. Howard Matz granted the defense's motion to vacate the defendants' convictions and dismissed the indictment on the grounds of prosecutorial misconduct.⁷⁶

⁷⁰ Press Release, Dep't of Justice, Six Former Executives of California Valve Company Charged in \$46 Million Foreign Bribery Conspiracy (Apr. 8, 2009), available at <http://www.justice.gov/opa/pr/six-former-executives-california-valve-company-charged-46-million-foreign-bribery-conspiracy>.

⁷¹ *Id.*

⁷² Indictment at 6-7, *United States v. Carson*, No. SACR 09-0077 (C.D. Cal. Apr. 8, 2009), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/06/04-08-09carson-indict.pdf>.

⁷³ Press Release, Dep't of Justice, Two Intermediaries Indicted for Their Alleged Participation in Scheme To Bribe Officials at State-Owned Electrical Utility in Mexico (Sept. 15, 2010), available at <http://www.justice.gov/opa/pr/two-intermediaries-indicted-their-alleged-participation-scheme-bribe-officials-state-owned>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Order Granting Motion to Dismiss, *United States v. Aguilar*, No. CR 10-01031(A)-AHM (C.D. Cal. Dec. 1, 2011), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/25/2011-12-01-aguilare-order-granting-motion-to-dismiss.pdf>.

1. Textual Arguments and Analysis

In its motion to dismiss, the defense in *Carson* argued that in the absence of an express definition, the court must give the word its ordinary meaning.⁷⁷ Arguing that a dictionary definition of “instrumentality” does not help to ascertain the word’s ordinary meaning, the court must consider the word as it is used in the statute.⁷⁸ In doing so, the defense concluded that the term “instrumentality” does not include state-owned enterprises; instead, the term includes governmental units and subdivisions like boards, commissions, and other similar governmental entities.⁷⁹

In *Aguilar*, the defendants contended in their motion to dismiss that under the two canons of construction—*noscitur a sociis* and *ejusdem generis*—an instrumentality of the government is an entity used by the government to set forth and administer public policy or exercise political authority.⁸⁰ Under the canon of *noscitur a sociis*, words are to be judged by their context and words in a series are to be understood by neighboring words in the series.⁸¹ Under *ejusdem generis*, general words that follow specific words are to be construed to embrace objects that are similar to those objects enumerated by the preceding specific words⁸² As such, the defendants argued that the term “instrumentality” was limited to the characteristics of a “department” or “agency.”⁸³

In addition, the *Carson* defendants argued that where Congress has intended the term “instrumentality” to include state-owned enterprises, it has explicitly done so and required substantial or majority ownership.⁸⁴ For example, in the Foreign Sovereign Immunities

⁷⁷ Defendants’ Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment; Memorandum of Points and Authorities in Support Thereof at 11, *Carson*, No. SACR 09-0077 (C.D. Cal. Feb. 21, 2011) [hereinafter *Carson* Motion to Dismiss].

⁷⁸ *Id.* at 11-12.

⁷⁹ *Id.* at 2, 12.

⁸⁰ Defendants’ Notice of Motion and Motion to Dismiss the First Superseding Indictment; Memorandum of Points and Authorities; [Proposed] Order (Filed Under Separate Cover) at 8-9, *Aguilar*, No. CR 10-01031(A)-AHM (C.D. Cal. Feb. 28, 2011) [hereinafter *Aguilar* Motion to Dismiss].

⁸¹ *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1113 n.5 (C.D. Cal. 2011).

⁸² *Id.*

⁸³ *Id.* at 9.

⁸⁴ *Carson* Motion to Dismiss, *supra* note 77, at 30.

Act (FSIA), “agency or instrumentality of a foreign state means any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”⁸⁵ In the Economic Espionage Act, “the term ‘foreign instrumentality’ means any agency, bureau, ministry, component, institution, association, or any legal commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.”⁸⁶

In *Nguyen*, the defense argued in its motion to dismiss that if the anti-bribery provisions were to apply to certain entities by virtue of government control, the requirement would have been included as an explicit criterion—as is included in the accounting provision.⁸⁷ The defendants contended that the accounting provision of the FCPA includes a criterion to determine the concept of control and liability for corporate owners.⁸⁸ Under the accounting provision, “where an issuer . . . holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, . . . the issuer [shall] proceed in good faith to use its influence to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls.”⁸⁹ While there is an explicit control element in the accounting provision, no such control element exists for the anti-bribery provision. Consequently, the existence of an explicit control element in the accounting provision is indicative of the fact that the FCPA is to apply to certain foreign entities by virtue of governmental control.⁹⁰

2. Congressional Intent Arguments and Analysis

In *Carson*, the defendants argued that Congress did not intend to enact statutory language that it had previously rejected.⁹¹ In 1976,

⁸⁵ *Id.*; 28 U.S.C. § 1603 (2012).

⁸⁶ Carson Motion to Dismiss, *supra* note 77, at 31; 18 U.S.C. § 1839.

⁸⁷ Motion to Dismiss Superseding Indictment for Failure to State a Criminal Offense and for Vagueness at 16, United States v. Nguyen, No. 08-522 (E.D. Pa. Nov. 9, 2009) [hereinafter Nguyen Motion to Dismiss].

⁸⁸ *Id.*

⁸⁹ 15 U.S.C. § 78m(b)(6).

⁹⁰ Nguyen Motion to Dismiss, *supra* note 87, at 16.

⁹¹ Carson Motion to Dismiss, *supra* note 77, at 27.

S. 3741 was introduced in the Senate by Senator Warren Magnuson and H.R. 15149 was introduced in the House by Representative Harley Staggers to address foreign corporate payments.⁹² In each bill, “foreign government” was defined to include, among other things, “a corporation or other legal entity established or owned by, and subject to control by, a foreign government.”⁹³ The American Bar Association advised Representative John Murphy, Chairman of the House Subcommittee on Consumer Protection and Finance, who was holding hearings on S. 3741 and H.R. 15149, that the portion of the “foreign government” definition referring to “a corporation or other legal entity established or owned by, and subject to control by, a foreign government” was ambiguous and suggested a more precise alternative: “a legal entity which a foreign government owns or controls as though an owner.”⁹⁴

Further, in 1977, Representative Frederick Rooney introduced H.R. 7543.⁹⁵ Similarly, “foreign government” was defined to include “a corporation or other legal entity established, owned, or subject to managerial control by a foreign government.”⁹⁶ In 1977, Congress passed S. 305, the bill that ultimately became the FCPA.⁹⁷ S. 305 did not include a definition that included mention of state-owned enterprises, and by extension, Congress did not intend *sub silentio* to enact statutory language that it had discarded earlier in favor of other language.⁹⁸

In *Nguyen* and *Aguilar*, the defendants argued that Congress amended the FCPA in 1998 to bring it into compliance with the Or-

⁹² *Id.* at 26; Declaration of Professor Michael J. Koehler in Support of Defendants’ Motion to Dismiss Counts One Through Ten of the Indictment at 53, *United States v. Carson*, No. SACR 09-0077 (C.D. Cal. Feb. 21, 2011) [hereinafter Koehler Declaration]; S. 3741, 94th Cong. § 2(e) (1976); H.R. 15149, 94th Cong. §§ 2(e) & (h) (1976).

⁹³ Carson Motion to Dismiss, *supra* note 77, at 26; Koehler Declaration, *supra* note 92, at 6.

⁹⁴ Carson Motion to Dismiss, *supra* note 77, at 27; Koehler Declaration, *supra* note 92, at 59-60.

⁹⁵ Carson Motion to Dismiss, *supra* note 77, at 26; Koehler Declaration, *supra* note 92, at 79.

⁹⁶ Carson Motion to Dismiss, *supra* note 77, at 26-27; Koehler Declaration, *supra* note 92, at 79.

⁹⁷ Carson Motion to Dismiss, *supra* note 77, at 27.

⁹⁸ *Id.*

ganization for Economic Co-Operation Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions.⁹⁹ The Convention defines a “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 organisation.¹⁰⁰

The Commentaries on the Convention explicitly define “public enterprise” as

any enterprise, regardless of its legal form, over which a government, or governments, may directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the enterprise’s administrative or managerial body or supervisory board.¹⁰¹

As included in the OECD Convention, Congress expanded the definition of a foreign official to include “public international organizations.”¹⁰² However, Congress did not expand the definition to include employees of entities that are controlled or indirectly owned by a government—also included in the OECD Convention.¹⁰³ Despite all the amendments Congress made to the FCPA, Congress did

⁹⁹ Aguilar Motion to Dismiss, *supra* note 80, at 19; Nguyen Motion to Dismiss, *supra* note 84, at 14.

¹⁰⁰ Convention on Combating Bribery of Foreign Officials in International Business Transactions, art. I, ¶ 4(a), Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

¹⁰¹ *Id.* at Commentaries, ¶ 14.

¹⁰² Aguilar Motion to Dismiss, *supra* note 80, at 20; Nguyen Motion to Dismiss, *supra* note 87, at 14.

¹⁰³ Aguilar Motion to Dismiss, *supra* note 80, at 20; Nguyen Motion to Dismiss, *supra* note 87, at 14.

not bring the FCPA into strict conformity with the Convention.¹⁰⁴ Because Congress had never expressly included state-operated corporations as part of the FCPA, and Congress did not intend to include employees of businesses that were controlled or indirectly owned by a foreign government as a foreign official, Congress never intended to criminalize payments to state-owned corporations.¹⁰⁵

3. Purposive Arguments and Analysis

The defendants in *Nguyen* argued that the purpose of the FCPA was to criminalize the payment of bribes to public officials, politicians, and political parties.¹⁰⁶ The defense argued that under the FCPA, an instrumentality must perform a government or public function, rather than a commercial one.¹⁰⁷ The illicit payments were made to employees of Vietnamese entities, which included a Vietnamese airline, an aviation industry business, and several petroleum industry companies.¹⁰⁸ Consequently, the defendants urged that the entities employing the Vietnamese officials did not employ foreign officials under the FCPA because the entities were commercial and something more than ultimate ownership or control by the government was required.¹⁰⁹ To conclude otherwise would yield overbroad results and would not be in accordance with the purpose of the statute.¹¹⁰ In countries where government ownership and control is pervasive, such as in communist countries, a definition without a government function requirement would result in an entire nation populated by “foreign officials.”¹¹¹ In the United States, companies such as AIG, Lockheed Martin, and General Motors would be instrumentalities of the United States’ government—a result that would be inconsistent with the purpose of criminalizing public bribery under the FCPA.¹¹²

¹⁰⁴ *Id.*

¹⁰⁵ Aguilar Motion to Dismiss, *supra* note 80, at 20; Nguyen Motion to Dismiss, *supra* note 87, at 14.

¹⁰⁶ Nguyen Motion to Dismiss, *supra* note 87, at 8.

¹⁰⁷ *Id.* at 9.

¹⁰⁸ *Id.* at 6, n.1.

¹⁰⁹ *Id.* at 9.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 9-10.

¹¹² *Id.* at 10.

Ultimately, the *Nguyen* court denied the defendants' motion in one sentence and failed to provide any analysis.¹¹³ The *Carson* court concluded that "the statutory language of the FCPA is clear, that the statutory scheme is coherent and consistent, and the resort to the legislative history of the FCPA is unnecessary."¹¹⁴ It also proposed several non-exclusive, non-dispositive factors that bear on the question of whether a business entity is a government instrumentality:

The foreign state's characterization of the entity and its employees; [t]he foreign state's degree of control over the entity; [t]he purpose of the entity's activities; [t]he 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; [t]he circumstances surrounding the entity's creation; and [t]he 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).¹¹⁵

Similarly, the *Aguilar* court rejected the defendants' argument and instead, posited broad characteristics held by government agencies and departments that qualify as instrumentalities: (1) entity provides a service to the citizens; (2) key officers and directors of the entity are, or are appointed by, government officials; (3) entity is predominantly financed by the government fisc; (4) entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (5) entity is widely perceived to perform official government functions.¹¹⁶

III. UNITED STATES V. ESQUENAZI

In December 2009, Joel Esquenazi and Carlos Rodriguez were indicted on twenty-one counts for their participation in a scheme to commit foreign bribery and money laundering from November 2001

¹¹³ Order, *United States v. Nguyen*, No. 08-522 (E.D. Pa. Dec. 30, 2009).

¹¹⁴ *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *8 (C.D. Cal. May 18, 2011).

¹¹⁵ *Id.* at *3-4.

¹¹⁶ *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

through March 2005.¹¹⁷ Esquenazi and Rodriguez owned Terra Telecommunications, which purchased phone minutes from foreign vendors and then sold those minutes to customers in the United States; Telecommunications D'Haiti was one of Terra Telecommunications' main vendors.¹¹⁸ In 2001, Terra Telecommunications executed a contract to buy minutes directly from Telecommunications D'Haiti, whose Director General was Patrick Joseph (appointed by Haiti's then President Jean-Bertrand Aristide) and Director of International Relations was Robert Antoine.¹¹⁹ By October 2011, Terra Telecommunications owed Telecommunications D'Haiti over \$400,000, so Esquenazi negotiated a deal with Antoine that provided side payments in exchange for reducing Terra Telecommunications' debt.¹²⁰

In April 2003, following a change in management by President Aristide, Jean Rene Duperval succeeded to Antoine's position. Esquenazi formed a shell company, Telecom Consulting Services, to funnel side payments to Duperval.¹²¹ The shell company's president was Duperval's sister, Margurite Grandison, and Terra Telecommunications made seven payments totaling \$75,000 to Telecom Consulting Services.¹²² Esquenazi and Rodriguez pled not guilty to all twenty-one counts.¹²³

In Esquenazi's motion to dismiss, he argued that the FCPA does not apply to an employee of an entity merely because the entity is controlled by a department, agency, or instrumentality of a foreign government or is partially owned by a foreign government.¹²⁴ Esquenazi argued that the statute was ambiguous because it failed to

¹¹⁷ Press Release, Dep't of Justice, Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (Dec. 7, 2009), *available at* <http://www.justice.gov/opa/pr/two-florida-executives-one-florida-intermediary-and-two-former-haitian-government-officials>.

¹¹⁸ *United States v. Esquenazi*, 752 F.3d 912, 917 (11th Cir. 2014).

¹¹⁹ *Id.* at 918.

¹²⁰ *Id.*

¹²¹ *Id.* at 919.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 2, *United States v. Esquenazi*, No. 09-CR-21010-JEM (S.D. Fla. Nov. 2, 2010) [hereinafter *Esquenazi Motion to Dismiss*].

define an instrumentality.¹²⁵ He further argued that when a statute is unclear, courts should use canons of statutory construction to determine Congress' intent and give it effect.¹²⁶

Analyzing the statute's plain text, Esquenazi reasoned that a definition of the term "instrumentality" which included an entity controlled or partially owned by a department, agency, or instrumentality, would run afoul with the ordinary meaning and ultimate purpose of the statute; instead, a definition of the term "instrumentality" should include an element of performance of a government function.¹²⁷ Because the text of the statute was less than instructive, Esquenazi argued that the court should look to Congress' intent.¹²⁸

The defense contended that Congress' purpose in enacting the FCPA was to criminalize corporate bribery of foreign officials, politicians, and political parties.¹²⁹ By looking at the "mischief and defect" the statute was meant to remedy, a definition of "instrumentality" that would best give the statute the effect intended by Congress would be to include a concept of government function.¹³⁰ The defense repurposed the argument used in *Nguyen*, which analyzed the use of "instrumentality" in similar statutes such as the FSIA and the Employee Retirement Income Security Act of 1974 (ERISA).¹³¹ Using the FSIA, the defense argued that a majority ownership by a foreign state is the benchmark of instrumentality status.¹³² Using ERISA, the defense argued that whether an entity is an instrumentality hinges on whether the entity performs a governmental function rather than involving primarily private interests.¹³³ Accordingly, the FSIA and ERISA characterize instrumentalities as entities that serve a public function.¹³⁴

Esquenazi argued that mere control by a foreign government is insufficient to extend the ambit of the FCPA.¹³⁵ Again, repurposing

¹²⁵ *Id.* at 5.

¹²⁶ *Id.* at 2, 5.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.* at 5-6.

¹²⁹ *Id.* at 6.

¹³⁰ *Id.*

¹³¹ *Id.* at 8-9.

¹³² *Id.* at 8.

¹³³ *Id.* at 9.

¹³⁴ *Id.* at 10.

¹³⁵ *Id.*

a *Nguyen* argument, the defense argued that the accounting provision included a control test for establishing liability of corporate owners; however, no such test existed for the establishment of an instrumentality, which is indicative of Congress' intent to provide a control element to one portion of the statute and not to the other.¹³⁶ If Congress intended for the determination of an "instrumentality" to be determined by the mere existence of control, it would have included a control test like the one found in the accounting provision.¹³⁷

It was further argued that the FCPA was amended to conform to the OECD Convention, which defines a "foreign public official" as "any person exercising a public function for a foreign country."¹³⁸ Congress, however, did not amend the FCPA to include application to employees of government-controlled enterprises.¹³⁹ Congress' decision not to revise the meaning of "instrumentality" while implementing the Convention is indicative of Congress' intent to require more than government control to establish FCPA liability.¹⁴⁰

Also borrowing from *Nguyen*, Esquenazi argued that under the doctrine of *ejusdem generis*, an "instrumentality," which follows "agency" and "department" in the statute, must perform a function similar to functions performed by a government agency or department.¹⁴¹ Unfortunately, the court disagreed with Esquenazi's arguments, and it denied his motion to dismiss.¹⁴² In its order, the court found that the United States successfully alleged that Antoine and Duperval were foreign officials of state-owned Haiti Teleco.¹⁴³ Without any substantiation or reasoning, the court concluded that it disagreed with Esquenazi's contention that Haiti Teleco could not be an instrumentality under the FCPA's definition of a "foreign official" because the plain language and plain meaning of the statute

¹³⁶ *Id.* at 11.

¹³⁷ *Id.*

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 13.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 14.

¹⁴² Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness at 3, *United States v. Esquenazi*, No. 09-CR-21010-JEM (S.D. Fla. Nov. 19, 2010).

¹⁴³ *Id.* at 2.

showed that as alleged in the indictment, Haiti Teleco could be an instrumentality of the Haitian government.¹⁴⁴

During trial, the United States successfully presented evidence to establish that Telecommunications D'Haiti had significant ties to the government of Haiti. An expert witness, Luis Gary Lissade, testified that Telecommunications D'Haiti was formed in 1968, and at its inception, the government appointed two members of its board of directors.¹⁴⁵ The expert further testified that during the 1970s, the National Bank of Haiti acquired 97% ownership of Telecommunications D'Haiti, and afterwards, the Haitian President appointed all of its board of directors.¹⁴⁶ In the expert's ultimate opinion, Telecommunications D'Haiti belonged "totally to the state" and "was considered . . . a public entity."¹⁴⁷

A jury found Esquenazi and Rodriguez guilty on all counts.¹⁴⁸ Esquenazi and Rodriguez appealed their conviction to the Eleventh Circuit arguing that Telecommunications D'Haiti was not an instrumentality of the Haitian government because it did not provide traditional, core government functions and that the FCPA was unconstitutionally vague.¹⁴⁹ The central question in the appeal was whether Telecommunications D'Haiti was an instrumentality of the government of Haiti under the FCPA. The Eleventh Circuit responded in the affirmative.¹⁵⁰

In the first appellate decision to address the meaning of "instrumentality," the Eleventh Circuit defined "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."¹⁵¹ In terms of plain meaning, the Eleventh Circuit noted that the word "instrumentality" is subject to multiple meanings.¹⁵² As such, the court

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *United States v. Esquenazi*, 752 F.3d 912, 917 (11th Cir. 2014).

¹⁴⁶ *Id.* at 918.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 919.

¹⁴⁹ Corrected Brief of Appellant at 27, *United States v. Esquenazi*, No. 11-15331-C (11th Cir. May 31, 2012).

¹⁵⁰ *Esquenazi*, 752 F.3d at 917.

¹⁵¹ *Id.* at 925.

¹⁵² *Id.* at 921.

turned to other methods of statutory construction—including *noscitur a sociis*.¹⁵³ Using the *noscitur a sociis* doctrine, the court gleaned that an instrumentality must be under the control or dominion of the government and must be doing the business of the government to qualify as an “instrumentality” under the FCPA.¹⁵⁴

In an examination of another portion of the FCPA, the court looked at the “grease payment” exception to FCPA liability.¹⁵⁵ The court noted that the FCPA’s definition of “routine governmental action” explicitly included the provision of phone service, rejecting Esquenazi’s and Rodriguez’s contention that a government-controlled entity engaged in a commercial service cannot be an instrumentality under the FCPA.¹⁵⁶

Turning to an analysis of the 1998 amendment to the FCPA, the court examined the United States’ ratification of the OECD Convention and the subsequent FCPA amendment.¹⁵⁷ The court noted that the OECD Convention defines a “foreign public official” as including “any person exercising a public function for a foreign country, including for a . . . public enterprise” as well as to agents of “any public international organization.”¹⁵⁸ However, Congress only added the “public international organization” component to the FCPA.¹⁵⁹ To that, the court deduced that Congress must have felt that the pre-existing definition of a foreign official already covered a government-controlled enterprise.¹⁶⁰ Any other interpretation, the court concluded, would find the United States in conflict with our treaty obligations—in contradiction of the *Charming Betsy* doctrine, which requires that federal statutes be interpreted so as to avoid conflict with international law.¹⁶¹

The appellate court noted that a “usual” or “proper” government function changes over time and varies from one country to the next.¹⁶² To offer guidance, the court defined an “instrumentality”

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 922.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 922-23.

¹⁵⁷ *Id.* at 923.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 924.

¹⁶² *Id.*

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.”¹⁶³ The court elaborated on what constitutes “control” with five factors to consider:

[1] the foreign government’s formal designation of that entity; [2] whether the government has a majority interest in the entity; [3] the government’s ability to hire and fire the entity’s principals; [4] the extent to which the entity’s profits, if any, go directly into the government’s fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; [5] the length of time these indicia have existed.¹⁶⁴

The court also elaborated as to what constitutes “a function the controlling government treats as its own” with four factors to consider:

[1] whether the entity has a monopoly over the function it exists to carry out; [2] whether the government subsidizes the costs associated with the entity providing services; [3] whether the entity provides services to the public at large in the foreign country; [4] and whether the public and the government of that foreign country generally perceive the entity to be performing a government function.¹⁶⁵

Both sets of factors are not meant to be exhaustive, but are to be considered by the courts when engaging in a fact-based inquiry.¹⁶⁶

Esquenazi and Rodriguez appealed the Eleventh Circuit’s decision to the Supreme Court.¹⁶⁷ The Supreme Court denied Esquenazi and Rodriguez’s petition.¹⁶⁸ The Eleventh Circuit’s decision will

¹⁶³ *Id.* at 925.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 926.

¹⁶⁶ *Id.* at 928, n.9.

¹⁶⁷ *Esquenazi v. United States*, 752 F.3d 912 (11th Cir. 2014), *petition for cert. filed* (Aug. 14, 2014) (No. 14-189).

¹⁶⁸ *Esquenazi v. United States*, 752 F.3d 912 (11th Cir. 2014), *cert. denied* (Oct. 6, 2014) (No. 14-189).

have a significant impact on how business is transacted around the world and with businesses that have varying degrees of governmental control. All in all, the court proposed nine factors to be considered and weighed.

IV. ANALYSIS

The Eleventh Circuit in *Esquenazi* stepped up to the challenge of clarifying the “foreign official” element of the FCPA: is a state-owned enterprise an instrumentality for the purpose of delineating the scope of the statute? Unfortunately, the court fell into a trap that lower courts have fallen into. Rather than dealing with the issue of whether a state-owned enterprise constitutes an “instrumentality” head on, the court dwelled on the fact that the determination is an issue of fact. In its opinion, the court propounded a multi-factor test. Actually, as if the issue were not sufficiently complicated, it propounded *two* multi-factor tests. One was to determine if the foreign government exerted control over the entity. The other was to determine if the entity provided a function that the foreign government treated as its own. All in all, the court propounded nine non-dispositive factors and zero guidance on how the factors should be applied.

Although *Esquenazi* was a major victory for the DOJ, this totality of the circumstances approach further muddles the issue. *Esquenazi* has also broadened the scope greatly—even beyond what the enacting Congress intended. The broadened scope is critically important because it affects businesses and individuals that engage in international commerce. However, the case provides little guidance to the business community, failing to provide any notice as to when their interaction with a state-owned entity would run afoul of the FCPA. As a result, businesses and individuals transacting business in the international arena must curtail their legitimate business activities or implement extreme prophylactic measures in an overabundance of caution to inoculate themselves against FCPA liability.

A. Broadened Scope

In interpreting a statute, courts should start with the text of a statute and ask what the text would mean to an ordinary speaker of

the language.¹⁶⁹ The use of textual sources to aid in the discernment of a word's ordinary meaning is admissible and includes dictionaries, grammar books, surveys of linguistic practice, and the interpreter's own sense of ordinary usage.¹⁷⁰ Using dictionaries as tools, the court analyzed *Black's Law Dictionary*¹⁷¹ and *Webster's Third New International Dictionary*.¹⁷² However, the court ultimately concluded that the dictionary definitions did not provide a complete answer.¹⁷³ As a matter of fact, the court had previously acknowledged that "instrumentality" was susceptible to multiple meanings.¹⁷⁴

The court then turned to the *noscitur a sociis* canon of statutory construction. Under this canon of statutory construction, when words are grouped together and ordinarily have similar meanings, then general words are limited and qualified by the special words in the group.¹⁷⁵ The FCPA prohibits any payments to an "officer or employee of a foreign government or any department, agency, or instrumentality thereof . . ."¹⁷⁶ Here, using *noscitur a sociis*, "department" and "agency" are the special words, and "instrumentality" is the general word. It is highly likely that Congress intended for instrumentalities to consist of entities more similar to regulatory bodies, like the Federal Emergency Management Agency, or entities that provide unique governmental functions, like the Department of the Treasury. By extension, Congress likely intended for instrumentalities to include independent entities with a body of governance, like the National Labor Review Board.

¹⁶⁹ WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 257 (2d ed. 2006).

¹⁷⁰ *Id.*

¹⁷¹ BLACK'S LAW DICTIONARY 870 (9th ed. 2009) ("1. A thing used to achieve an end or purpose. 2. A means or agency through which a function of another entity is accomplished, such as a branch of a governing body.").

¹⁷² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1172 (3d ed. 1993) ("something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body.").

¹⁷³ *United States v. Esquenazi*, 752 F.3d 912, 921 (11th Cir. 2014).

¹⁷⁴ *Id.* (recognizing in *Edison v. Doublerly*, 604 F.3d 1307, 1309 (11th Cir. 2010) "instrumentality" is "a word susceptible of more than one meaning" (citing *Green v. New York*, 465 F.3d 65, 79 (2d Cir. 2006))).

¹⁷⁵ ESKRIDGE, JR. ET AL., *supra* note 169, at 261.

¹⁷⁶ 15 U.S.C. § 78dd-1(f)(1)(A) (2012).

Instead, in its analysis, the Eleventh Circuit determined that because departments and agencies are under the control of the government and conduct the business of the government, then an instrumentality must likewise be under the control or dominion of the government and engage in the business of the government to be an instrumentality under the FCPA.¹⁷⁷ The court's superficial analysis lends itself to a number of similar, and equally as faulty, conclusions. The court did not quantify how much control or what functions were necessary to constitute an "instrumentality." The nine factors promoted by the court do not offer any guidance.

In furthering its analysis, the court analyzed the grease payment provision, which specifically provides for the inclusion of phone service as a "routine governmental action."¹⁷⁸ Using this provision, the court rejected the defendants' contention that a government-controlled entity that provides a commercial service cannot automatically be an instrumentality. The court's conclusion ignores the fact that Congress may have intended for there to be a threshold for the inclusion of an enterprise as an instrumentality. Would Congress have included a phone service provider that is 1% owned by the government? It would certainly be government-controlled and would be carrying on in the business of the government. What about 10% or 51% share of control by the government?

Further, the court declined to engage in an analysis under the *ejusdem generis* canon of statutory construction, explaining that the canon does not apply when the term at issue is not a general term following a list of specific items.¹⁷⁹ The court relied on the fact that the word preceding "instrumentality" is "any" rather than "other," which, in its opinion, does not make the term a generalized catchall.

The court's reliance is flawed. In its explanation, the court compares the statutory language of 42 U.S.C. § 12131(1)(B) to that of 15 U.S.C. § 78dd-2(a)(1)(B). In both statutes, the word "any" precedes the word "instrumentality." While the word "other" also precedes the word instrumentality in 42 U.S.C. § 12131(1)(B), and not in the FCPA provision in question, the reasoning for not giving due consideration to the doctrine of *ejusdem generis* is baseless. Had *ejusdem generis* been considered, the court would have come to the

¹⁷⁷ *Esquenazi*, 752 F.3d at 922.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 922, n.6.

conclusion that “instrumentality” embraces the same entities as those in a “department” or “agency.”

The court proceeded to engage in an analysis of the legislative history. Curiously, however, the court begins its analysis with the 1998 amendment to the FCPA. It completely disregarded the legislative history of the FCPA’s enactment, which is quite instructive.

In 1977, after several years of investigations and hearings, Congress passed the FCPA and enacted a statute that prohibited corrupt payments to public officials overseas. Prior to that, some of the bills introduced before the enactment of the FCPA explicitly included state-owned enterprises under the ambit of the FCPA. Two bills in particular defined “foreign government” to include “a corporation or other legal entity established or owned by, and subject to control by, a foreign government.”¹⁸⁰ Later, in June 1977, a bill was introduced in the House, and it defined “foreign government” to include “a corporation or other legal entity established, owned, or subject to managerial control by a foreign government.”¹⁸¹ From the bills that were proposed, it is evident that Congress was aware of the existence of government-controlled enterprises and their possible role in foreign corruption; however, Congress did not act.

In 1998, in an effort to conform the FCPA to the OECD Convention, Congress passed an amendment to the FCPA. Unfortunately, Congress fell short yet again. Although it is relatively well known that subsequent legislative history is less authoritative than committee reports and rejected bills, the Eleventh Circuit relied almost exclusively on the 1998 Amendment. The OECD Convention defines a “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 organisation”¹⁸²

In the 1998 Amendment, Congress amended the FCPA to include the “public organisation” component of the OECD Convention, making it explicitly clear that public organizations were within the scope of the statute. However, it would be a gross overstatement

¹⁸⁰ S. 3741, 94th Cong. (1976); H.R. 15149, 94th Cong. (1976).

¹⁸¹ H.R. 7543, 95th Cong. (1977).

¹⁸² OECD Convention, *supra* note 100.

to say that the 1998 amendment brought the FCPA into strict conformance with the OECD Convention. The OECD Convention is not a self-executing treaty, as it requires legislative action to be given effect in the United States. If it was Congress' intent to include government-owned enterprises under the ambit of the FCPA, it should have explicitly included such language into the amendment as it did for international public organizations. Congress had the opportunity to do so in 1977 and again in 1998. To assume and draw inferences where there are none takes away from intent of the enacting Congress.

The court also failed to look to other statutes where the word "instrumentality" was used for guidance. Had the court looked to statutes such as the FSIA,¹⁸³ it would have applied a narrower interpretation than what it established. Enacted one year before the FCPA, the FSIA defines "an agency or instrumentality of a foreign state" as an entity that is "a separate legal person or otherwise" and "which is an organ of a foreign state or political subdivision thereof, or a *majority of whose shares or other ownership interest is owned by a foreign or political subdivision thereof.*"¹⁸⁴

The court had an opportunity to properly quash the issue by establishing a bright-line rule, which would require a certain percentage of ownership or control, or, in the alternative, refuse to apply the government's argument absent the clear language present in the OECD Convention. This is particularly so given the judicial vacuum that exists by the very nature of the FCPA's enforcement. Under the court's interpretation, just about any circumstance would allow for a foreign government to control and treat any commercial enterprise as its own; any percentage of governmental ownership would bring a state-owned entity under the ambit of the FCPA.

Given the doctrines of statutory construction and the legislative history of the FCPA, it is evident that the Eleventh Circuit has expanded the scope of the statute beyond its intended basis. Absent any evidence or support that Congress intended to include government-controlled enterprises, the courts should err on the side of caution and interpret the statute narrowly. The factors proffered by the

¹⁸³ 28 U.S.C. §§ 1602-1611 (2012).

¹⁸⁴ *Id.* § 1603(b)(2) (emphasis added).

Eleventh Circuit are of little assistance as they do not help the individuals and businesses engaging in international trade gauge their risk in transactions. Using the court's factors and analysis, it is hard to think of an enterprise that a foreign government is involved with that would not fall under the scope of the FCPA as interpreted by the Eleventh Circuit.

B. *Effects of Ambiguity*

We are living in an increasingly globalized world. The Internet has greatly expanded the possibility of engaging in business between nations and continents. To that end, however, the FCPA has created an unbearable level of uncertainty for individuals and businesses transacting business overseas. Leaving aside the possible due process violations, attempting to abide by the unknown restrictions of the FCPA has led to parties conducting business in an overabundance of caution to avoid prosecution. *Esquenazi* has done little to ameliorate the ambiguity of the FCPA. In fact, the court's interpretation of the statute has greatly expanded the scope of the statute and will likely lead to an increase in prosecution—all with little guidance for individuals and businesses.

Many individuals and businesses have implemented anti-corruption programs to thwart the effects of the broadly interpreted statute. However, an effective anti-corruption program does not come without significant costs. In a survey of 358 American and English companies, it was reported that 80% of U.S. companies have banned facilitating payments entirely.¹⁸⁵ Twenty-three percent of U.S. companies said that they made the decision to walk away from doing business in a country perceived to have a high rate of local corruption.¹⁸⁶ An effective anti-corruption program can be the difference between a fine and an aggressive prosecution. A growing number of multinational companies have established anti-corruption programs that have led to leverage when plea-bargaining. It is important to note that it is not enough to simply have an anti-corruption pro-

¹⁸⁵ Richard L. Cassin, *Surveying FCPA Compliance*, THE FCPA BLOG (Oct. 14, 2008, 8:04 PM), <http://www.fcpablog.com/blog/2008/10/15/surveying-fcpa-compliance.html>.

¹⁸⁶ *Id.*

gram—a compliance culture must permeate the organization in order to effectively demonstrate to the DOJ its commitment to compliance.

An effective anti-corruption program consists of various components. The first of which is a clear anti-corruption policy. The organization must have written standards and procedures to identify and prevent acts that violate the FCPA.¹⁸⁷ This usually includes a code of conduct as well as oversight from high-level personnel. To be successful, management must be committed to compliance.

Risk assessments are another vital component of an anti-corruption program. Assessments help companies determine whether they have adequate compliance measures in place.¹⁸⁸ A risk assessment allows a company to evaluate the compliance roles and activities of directors, officers, and audit staff.¹⁸⁹ The assessment also reviews international operations, contracts, hiring/employment practices, and due diligence in mergers and/or acquisitions.¹⁹⁰

Hiring and employment practices are essential to promoting compliance within the organization. Training of employees allows the compliance program to infiltrate every layer of the organization, making everyone aware of general ethics regulations. For those who interact frequently with foreign officials, comprehensive training pertaining to facilitating-payment exceptions is undertaken to debunk common myths. Additionally, confidential reporting removes barriers that may exist in alerting upper management of possible FCPA violations. Providing incentives for whistleblowing encourages employees to approach upper management or, if it exists, an independent anti-corruption board committee.

One of the greatest risks companies face arises when merging with or acquiring another company. Successor liability removes the defense that the acquiring company does not assume the past sins of the newly acquired company.¹⁹¹ Due diligence is pivotal in reducing

¹⁸⁷ RICHARD L. CASSIN, *BRIBERY ABROAD: LESSONS FROM THE FOREIGN CORRUPT PRACTICES* 25 (2008).

¹⁸⁸ ROBERT W. TARUM, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR FOR MULTI-NATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 98-99 (3d ed. 2013).

¹⁸⁹ *Id.* at 99.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 138.

the risk of prosecution under the FCPA subsequent to a merger or acquisition. Among other things, the acquiring company should review documents and files of the target company in search of contracts with foreign governments, “gifts,” and lapses in internal controls.¹⁹² If at all possible, the acquiring company should obtain an indemnification agreement to limit its liability after the acquisition. If FCPA issues are revealed during the acquiring company’s due diligence, it is important to establish a compliance program for the newly acquired company at the outset.

In the event of a serious corruption charge, companies may initiate an internal investigation. If the allegation is sufficiently egregious, a company’s management may choose to hire outside counsel to conduct its internal investigation or represent the company in a DOJ investigation.¹⁹³ The decision to conduct its own investigation versus using outside counsel depends on the seriousness of the allegation, level of FCPA experience required, financial resources, or who is involved.

How much does compliance cost? In 2013, Wal-Mart reported that it had spent \$73 million on FCPA-related expenses during the first quarter.¹⁹⁴ During the previous fiscal year, Wal-Mart had spent \$157 million dollars on FCPA matters.¹⁹⁵ In the midst of an FCPA investigation resulting from self-disclosure, Avon reportedly spent \$280 million on FCPA compliance.¹⁹⁶ These figures do not include subsequent criminal or civil fines. In 2014, Alcoa World Alumina LLC pled guilty to one count of violating the FCPA and agreed to

¹⁹² *Id.* at 142.

¹⁹³ *Id.* at 95.

¹⁹⁴ Richard L. Cassin, *Wal-Mart busts its FCA budget*, THE FCPA BLOG (Oct. 14, 2008, 8:04 PM), <http://www.fcpablog.com/blog/2008/10/15/surveying-fcpa-compliance.html>.

¹⁹⁵ *Id.*

¹⁹⁶ Richard L. Cassin, *Avon Keeps No Secrets From the Feds*, THE FCPA BLOG (Nov. 2, 2008, 7:38 AM), <http://www.fcpablog.com/blog/2012/11/2/avon-keeps-no-secrets-from-the-feds.html>.

pay \$384 million in criminal and civil fines as well as profit disgorgement to the SEC and DOJ.¹⁹⁷ In 2011, engineering firm Kellogg Brown & Root LLC (KBR) plead guilty to four substantive counts of violating the FCPA and agreed to pay a \$402 million penalty.¹⁹⁸

All in all, the cost of enforcement is quite exorbitant. Sadly, it is required to safely engage in business overseas. Given the costs, it is very unfair to have individuals and businesses take on the expense of a robust compliance program to err on the side of caution simply because the businesses cannot discern what a “foreign official” is within the nine factors propounded by the Eleventh Circuit. When taken in conjunction with the fact that companies are choosing to abstain from doing business in certain countries, it is an unbearable cost for individuals and businesses.

V. CONCLUSION

Without a doubt, the FCPA’s definition of a foreign official is ambiguous. Because the statute is criminal in nature and has the authority to implement lengthy prison sentences, it should be narrowly construed. The Eleventh Circuit had the opportunity to clarify the inherent ambiguity. However, it failed to do so. On the contrary, it magnified the ambiguity with a number of factors to consider—none of which are dispositive.

The Supreme Court has declined to hear Esquenazi’s or Rodriguez’s appeal. The proper scope of the FCPA remains unclear. The only option that remains is legislative action. Individuals and companies simply cannot operate in a state of uncertainty given the prospect of imprisonment or fines.

¹⁹⁷ Julie DiMauro, *Alcoa Settles FCPA Charge, Pays \$384Million to DOJ, SEC*, THE FCPA BLOG (Jan. 9, 2014, 8:28 PM), <http://www.fcpa-blog.com/blog/2014/1/9/alcoa-settles-fcpa-charge-pays-384-million-to-doj-sec.html>.

¹⁹⁸ Richard L. Cassin, *KBR and Halliburton Resolve Charges*, THE FCPA BLOG (Feb. 11, 2009, 7:08 PM), <http://www.fcpa-blog.com/blog/2009/2/12/kbr-and-halliburton-resolve-charges.html>.