

April 2015

U.S. v. Esquenazi: U.S. Appellate Court Defines “Instrumentality” Under the Foreign Corrupt Practices Act for the First Time

Jon Jordan

Follow this and additional works at: <https://scholarship.law.wm.edu/wmblr>



Part of the [Business Organizations Law Commons](#), and the [International Law Commons](#)

Repository Citation

Jon Jordan, *U.S. v. Esquenazi: U.S. Appellate Court Defines “Instrumentality” Under the Foreign Corrupt Practices Act for the First Time*, 6 Wm. & Mary Bus. L. Rev. 663 (2015),
<https://scholarship.law.wm.edu/wmblr/vol6/iss2/7>

Copyright c 2015 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmblr>

U.S. V. ESQUENAZI: U.S. APPELLATE COURT DEFINES
“INSTRUMENTALITY” UNDER THE FOREIGN CORRUPT
PRACTICES ACT FOR THE FIRST TIME

JON JORDAN*

TABLE OF CONTENTS

INTRODUCTION	664
I. THE FCPA	665
<i>A. General Statute</i>	666
<i>B. Definition of a “Foreign Official”</i>	668
II. PREVIOUS INTERPRETATIONS OF “INSTRUMENTALITY” UNDER THE FCPA	669
<i>A. Federal Court Opinions on Instrumentality</i>	669
1. <i>United States v. Aguilar (Lindsey Manufacturing)</i>	669
2. <i>United States v. Carson</i>	671
<i>B. FCPA Resource Guide</i>	672
III. <i>U.S. vs. ESQUENAZI</i>	675
<i>A. Court’s Analysis</i>	676
<i>B. Definition of “Instrumentality” Under the FCPA</i>	678
1. <i>Government Control Element</i>	678
2. <i>Government Function Element</i>	679
IV. COMMENTARY ON <i>ESQUENAZI</i> DECISION	680
V. BEST PRACTICES IN LIGHT OF DECISION	682
CONCLUSION	684

* Mr. Jordan is a Senior Investigations Counsel with the Foreign Corrupt Practices Unit of the United States Securities and Exchange Commission (“SEC”). Mr. Jordan has held various positions in both the SEC’s Miami and Washington D.C. offices. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein, including views regarding the FCPA Unit and the Commission’s FCPA program, are those of the author and do not necessarily reflect the views of the Commission, the Commission’s FCPA Unit, or of the author’s colleagues upon the staff of the Commission.

INTRODUCTION

On May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit issued a landmark decision in *United States v. Esquenazi* in which an appellate court defined for the first time the term “instrumentality” of a foreign government as it is used in the definition of a “foreign official” under the Foreign Corrupt Practices Act (FCPA).¹ The decision set out a new two-part test and list of factors for determining what constitutes an “instrumentality” of a foreign government under the FCPA and provided much needed clarity as to the meaning of a “foreign official” under the statute.² The decision also affirmed an interpretation by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) that state-owned and state-controlled entities could be considered “instrumentalities” of a foreign government subject to the FCPA, an interpretation that was sometimes challenged by defendants charged with FCPA violations.³ In this respect, *Esquenazi* has been viewed as settling an open question of law as to whether officers and employees of state-owned and state-controlled entities are indeed “foreign officials” prohibited from receiving bribes under the FCPA.⁴

Companies operating on an international basis should carefully review the *Esquenazi* decision and adopt certain best practices in light of the decision. This would include reviewing and modifying their existing compliance programs to make sure that they address the two-part test and list of factors that the court provided in determining whether an entity constitutes an

¹ 752 F.3d 912, 920, 925 (11th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014); Samuel Rubinfeld, *U.S. Appeals Court Defines ‘Instrumentality’ Under the FCPA for First Time*, WALL ST. J. BLOGS (May 16, 2014, 3:33 PM) <http://blogs.wsj.com/riskandcompliance/2014/05/16/u-s-appeals-court-defines-instrumentality-under-the-fcpa-for-first-time/>, archived at <http://perma.cc/55G9-DZDG?type=pdf>; see generally Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78(a), (m), (dd), (ff), (2012)).

² See *Esquenazi*, 752 F.3d at 920, 925–26.

³ See Criminal Division of the U.S. Department of Justice and Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 20 (Nov. 4, 2012), available at <http://perma.cc/64PX-W55B> [hereinafter *Resource Guide*]; see also Order Denying Motion to Dismiss, *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011) (illustrating a case where the defendants challenged this interpretation); Order Denying Defendants’ Motion to Dismiss Counts 1 through 10 of the Indictment, *United States v. Carson*, No. SACR 9-00077-JVS, 2011 WL 5101701, at *1 (C.D. Cal. May 18, 2011) (illustrating a case where the defendants challenged this interpretation).

⁴ Tara K. Giunta et al., *Appellate Court Clarifies FCPA ‘Instrumentality’ Definition*, PAUL HASTINGS (May 2014), available at <http://perma.cc/WGG2-K898>; Roger M. Witten et al., *Eleventh Circuit Adopts Broad Definition of Government ‘Instrumentality’ Under FCPA*, WILMERHALE (May 22, 2014), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179872427>, archived at <http://perma.cc/H9TV-7CFL>.

“instrumentality” under the FCPA. Companies that take such proactive steps will find themselves better prepared to stay in compliance in a post-*Esquenazi* compliance environment.

This Article will provide a basic outline of the FCPA and emphasize the definitions of “instrumentality” and “foreign official” as those terms are used in the statute. The Article will then look at federal court interpretations prior to *Esquenazi* as to when an entity, and more specifically a state-owned entity, could be considered an “instrumentality” of a foreign government so as to qualify individuals under that entity as being “foreign officials” under the FCPA. The Article will explore additional DOJ and SEC guidance in the area. The *Esquenazi* decision and its two-part test for when an entity constitutes an “instrumentality” of a foreign government under the FCPA will then be discussed. Finally, this Article will give its recommendations as to certain best practices and modifications to compliance programs that companies should consider adopting in light of the *Esquenazi* decision.

I. THE FCPA

The FCPA establishes civil and criminal liability for the bribery of foreign government officials in order to obtain or retain business.⁵ The anti-bribery law can be divided into accounting and anti-bribery prohibitions.⁶

⁵ See 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012). The FCPA became law in 1977 and was created in response to a report issued by the SEC in 1976 that found that many public companies had engaged in questionable payments overseas and falsified their accounting with respect to such payments in their books and records. See S. REP. NO. 95-114, at 1–2 (1977); H.R. REP. NO. 95-640, at 1–2 (1977); see generally S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, 94TH CONG., REP. OF THE SEC. & EXCH. COMM’N ON QUESTIONABLE & ILLEGAL CORP. PAYMENTS & PRACTICES (Comm. Print 1976). Prior to the FCPA, there were no domestic laws prohibiting domestic companies from paying bribes to foreign government officials nor specific provisions in the federal securities laws explicitly prohibiting such payments of, or disclosure of, bribes to foreign officials. See DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* 1 (2d ed. 1999). The FCPA is both a civil and criminal statute, and the DOJ is responsible for criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions against non-issuers, and the SEC is responsible for civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395–96 (2010).

⁶ See §§ 78m(b)(2), 78dd-1(a), -2(a), -3(a). The FCPA was amended in 1988 to revise and clarify several of its provisions in response to criticisms of the original statute. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–25 (1988) (codified at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff). The statute was amended again in 1998 to conform its provisions to the OECD Anti-Bribery

A. General Statute

The FCPA accounting provisions require that domestic and foreign companies with securities publicly traded in the United States properly report the transactions and dispositions of the assets of the issuer.⁷ More specifically, the accounting provisions require that issuers, companies that have a class of securities registered with the SEC or that are required to file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls.⁸ The recordkeeping standard requires that issuers “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.”⁹ The internal controls provision requires that issuers create a system of internal accounting controls that provide “reasonable assurances” that transactions are executed in “accordance with management’s general or specific authorization.”¹⁰

Convention. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff).

⁷ See § 78m(b)(2).

⁸ See *id.* The FCPA applies to any issuer which has a class of securities registered under section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”) or which is required to file reports under section 15(d) of the Exchange Act as well as to any officer, director, employee, or agent of such an issuer or any stockholder acting on behalf of such issuer. *Id.* § 78dd-1(a). This would include certain foreign companies that list stock on a U.S. securities exchange and their relevant personnel. *Id.* The relevant accounting provisions can be found in section 13(b)(2) of the Exchange Act, which specifically require issuers to keep accurate books and records and establish and maintain a system of internal accounting controls. *Id.* § 78m(b)(2). In addition, the SEC has adopted two rules related to the accounting provisions. Rule 13b2-1 provides that “[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)” of the Exchange Act. 17 C.F.R. § 240.13b2-1 (2014). Rule 13b2-2 prohibits a director or officer of an issuer from making or causing to be made any materially false or misleading statement or omission in connection with any audit. *Id.* § 240.13b2-2.

⁹ See § 78m(b)(2)(A). The term “reasonable detail” is defined to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” *Id.* § 78(m)(b)(7).

¹⁰ *Id.* § 78m(b)(2)(B). The provision specifically requires that issuers:

devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that- (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences

The FCPA anti-bribery provisions prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business for or with, or directing business to, any person.¹¹ More specifically, the FCPA anti-bribery provisions prohibit: (1) any issuer, domestic concern, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing; (2) from using any means or instrumentality of interstate commerce “corruptly” in furtherance of; (3) an offer, payment, or promise to pay, or authorization of the payment of anything of value; (4) to (a) any “foreign official,” (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person while “knowing” that the payment or promise to pay will be given to any of the foregoing; (5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining business, or directing business to any person.¹²

There are two affirmative defenses to the FCPA anti-bribery provisions.¹³ The first affirmative defense applies when the payment at issue is lawful under the written laws of a relevant foreign official’s country.¹⁴ The second affirmative defense allows for payments that are considered “reasonable and bona fide” expenditures “such as travel and lodging expenses” incurred by foreign officials directly related to “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency ...”¹⁵ There is also an exception to the anti-bribery provisions that allows for so-called “facilitation” or “grease payments” to foreign officials for the purposes of expediting or securing the

Id. Civil liability may be found with respect to violations of the accounting provisions, and criminal liability may also be found under the accounting provisions when a person “knowingly” circumvents or fails to implement a system of internal accounting controls or “knowingly” falsifies the books and records. *See id.* § 78m(b)(2), (5).

¹¹ *See id.* §§ 78dd-1(a), -2(a), -3(a).

¹² *Id.* §§ 78dd-1(a), -2(a), -3(a). There is both criminal and civil liability for violations of the anti-bribery provisions and the provisions have been incorporated into the federal securities laws as section 30A of the Exchange Act. *See id.* § 78dd-1(a). Issuers subject to the anti-bribery provisions are the same as the relevant issuers subject to the accounting provisions. *Id.*; *see also supra* note 8 and accompanying discussion.

¹³ *See id.* §§ 78dd-1(c), -2(c), -3(c).

¹⁴ *See id.* §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).

¹⁵ *Id.* §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

performance of a “routine governmental action” such as obtaining permits or processing visas.¹⁶

B. Definition of a “Foreign Official”

Of relevance to this Article is the fact that the FCPA anti-bribery provisions prohibit bribes paid to “foreign official[s].”¹⁷ The statute specifically 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.¹⁸

Under the definition of a “foreign official” it is clear that an individual officer or employee of a foreign government, or department or agency of a foreign government, would be considered a “foreign official” for purposes of the FCPA.¹⁹ What is not so clear is when an individual officer or employee would be deemed to be working for an “instrumentality” of a foreign

¹⁶ *Id.* §§ 78dd-1(b), -2(b), -3(b). The term “routine governmental action” means any action which is ordinarily and commonly performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services. *Id.* §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A). Specifically, the FCPA defines “routine governmental action” as:

an action which is ordinarily and commonly performed by a foreign official in— (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Id. Payments made to expedite any of the basic services listed above or “of a similar nature,” are not considered payments prohibited by the FCPA. *Id.* §§ 78dd-1(b), -2(b), -3(b). The facilitation payments exception is an exception only to the FCPA’s anti-bribery provisions and is not an exception to the accounting provisions. *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711, 724–25 (2008). Issuers that make facilitation payments are required to properly record such payments in their books and records under the accounting provisions. *Id.*; § 78m(b)(2).

¹⁷ *See id.* §§ 78dd-1(a), -2(a), -3(a).

¹⁸ *See id.* §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A).

¹⁹ *Id.*

government so as to make such an individual a “foreign official” under the FCPA. This is because “instrumentality” of a foreign government has not been defined within the FCPA. Instead, the term has been left open to interpretation by the DOJ and SEC through FCPA enforcement actions and the courts.²⁰ And at least until the *Esquenazi* decision, the meaning of the term “instrumentality,” and whether individual officers and employees of state-owned entities could be considered “foreign officials” under the FCPA, was considered by some to be an open question of law.²¹

II. PREVIOUS INTERPRETATIONS OF “INSTRUMENTALITY” UNDER THE FCPA

Prior to the Eleventh Circuit decision in *Esquenazi*, there were two decisions in the Central District of California that looked into the issue as to when an entity, more specifically a state-owned entity, could be considered an “instrumentality” of a foreign government so as to qualify individuals under that entity as being “foreign officials” under the FCPA.²² The DOJ and SEC, in recent FCPA guidance, also provided their interpretation of the term “instrumentality.”²³

A. Federal Court Opinions on Instrumentality

Prior to the *Esquenazi* decision, there were at least two decisions in the Central District of California that included interpretations of the term “instrumentality” involving cases brought by the DOJ concerning alleged violations of the FCPA.²⁴

1. United States v. Aguilar (*Lindsey Manufacturing*)

In 2011, a federal court addressed the issue as to when a state-owned enterprise could be considered an “instrumentality” of a foreign government in a detailed order denying the defendants’ motion to dismiss in *United States v. Aguilar, et al.* (“*Lindsey*”).²⁵ In *Lindsey*, the DOJ filed a case against Lindsey

²⁰ See *infra* notes 25–53 and accompanying discussion.

²¹ See Giunta et al., *supra* note 4, at 5; Roger M. Witten et al., *supra* note 4, at 5.

²² See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110–17 (C.D. Cal. 2011); *United States v. Carson*, No. SACR 9-00077-JVS, 2011 WL 5101701, at *1–8 (C.D. Cal. 2011).

²³ *Resource Guide*, *supra* note 3, at 20–21.

²⁴ See *Aguilar*, 783 F. Supp. 2d at 1110–17; *Carson*, 2011 WL 5101701, at *1–8.

²⁵ See *Aguilar*, 783 F. Supp. 2d at 1110. It should be noted that the issue as to the meaning of “instrumentality” was litigated in the case of *United States v. Nam Quoc Nguyen*; however, there was no written federal court opinion directly providing any kind of interpretation on this issue other than a simple order denying the relevant defendants’ motion to dismiss. See *Order Denying Motion to Dismiss, United States v. Nam Quoc Nguyen*, No. 08-CR-522-TJS (E.D. Pa. Dec. 30, 2009). The government’s pleadings in the *Nguyen* case, including

Manufacturing Company and two of its executives for alleged FCPA violations in the United States District Court for the Central District of California.²⁶ In the case, the DOJ alleged that the company and its employees paid bribes to two high-ranking employees of the Comisión Federal de Electricidad (“CFE”), an electric utility company wholly owned by the government of Mexico.²⁷ The defendants moved to dismiss the case and raised the issue as to “whether an officer or employee of a state-owned corporation can be a ‘foreign official’ for purposes of FCPA liability.”²⁸ The defendants argued that “under no circumstances” can an officer or employee of a state-owned corporation be considered a foreign official “because under no circumstances can a state-owned corporation be a department, agency or instrumentality of a foreign government.”²⁹

On April 20, 2011, the court denied the defendants’ motion to dismiss, ruling that a state-owned enterprise having attributes of the CFE may be an “instrumentality” of a foreign government under the FCPA, and therefore officers and employees of such an entity may be “foreign officials” within the meaning of the FCPA.³⁰ In making its decision, the court provided a “non-exclusive” list of “various characteristics of government agencies and departments that fall within” the description of “instrumentality.”³¹ The “non-exclusive” list included the following characteristics:

the order denying the defendants’ motion to dismiss, can be found on the DOJ’s website. *FCPA and Related Enforcement Actions: United States v. Nam Quoc Nguyen*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/nguyenn.html> (last visited Mar. 26, 2015), archived at <http://perma.cc/3BX9-998T>.

²⁶ See *Aguilar*, 783 F. Supp. 2d at 1109. It should be noted that Lindsey Manufacturing was the first company to be tried and convicted of FCPA violations. See Samuel Rubinfeld, *Lindsey Manufacturing Defendants Convicted on all Counts*, Corruption Currents, WALL ST. J. BLOGS (May 10, 2011, 3:24 PM), <http://blogs.wsj.com/corruption-currents/2011/05/10/lindsey-manufacturing-defendants-convicted-on-all-counts/>, archived at <http://perma.cc/FB8Z-2MSJ>. The company executives were convicted at trial as well. *Id.* However, the convictions were vacated, and indictment dismissed, after a federal court judge ruled that the prosecution had engaged in misconduct. Order Granting Motion to Dismiss, *United States v. Aguilar*, No. CR 10-01031(A)-AHM (C.D. Cal. Dec. 1, 2011); Christopher M. Matthews, *Judge Dismisses Landmark Bribery Conviction, Rips DOJ*, WALL ST. J. BLOGS (Dec. 1, 2011, 6:57 PM), <http://blogs.wsj.com/corruption-currents/2011/12/01/judge-dismisses-landmark-bribery-conviction-rips-doj/>, archived at <http://perma.cc/L55A-CCGQ>. The DOJ voluntarily dismissed the case in May 2012. Ellen Podgor, *Government Dismisses Lindsey Manufacturing Case Appeal*, WHITE COLLAR CRIME PROF BLOG (May 25, 2012), http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/05/government-dismisses-lindsey-manufacturing-case-appeal.html, archived at <http://perma.cc/WW22-7CPR>.

²⁷ See *Aguilar*, 783 F. Supp. 2d at 1109.

²⁸ *Id.* at 1110.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1115.

- 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.
- The entity is widely perceived and understood to be performing official (i.e., governmental) functions.³²

The court then applied the factors above and found that the CFE had all of the characteristics of an instrumentality and therefore that officers and employees of the CFE could be considered “foreign officials” under the FCPA.³³

2. United States v. Carson

In *United States v. Carson*, a different judge in the same federal district court where *Lindsey* was decided also looked at the issue as to whether employees of state-owned companies can be “foreign officials” under the FCPA.³⁴ In *Carson*, the DOJ alleged that the defendants paid bribes to officers and employees of multiple foreign state-owned customers of their company between 2003 and 2007.³⁵ Like the defendants in *Lindsey*, the defendants in *Carson* moved to dismiss certain counts of the indictment arguing that employees of state-owned companies can never be “foreign officials” under the FCPA.³⁶ In this respect, the defendants argued that “state-owned companies are not departments, agencies, or instrumentalities of a foreign government,” and therefore any bribes paid to employees of them would not be bribes paid to “foreign officials” under the FCPA.³⁷

In a May 18, 2011 ruling, the *Carson* court denied the defendants’ motion to dismiss concluding “that the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.”³⁸ In

³² *Id.*

³³ *See id.*

³⁴ *See* United States v. Carson, No. SACR 9-00077-JVS, 2011 WL 5101701, at *1 (C.D. Cal. May 18, 2011).

³⁵ *Id.* at *1–2.

³⁶ *Id.* at *1.

³⁷ *Id.*

³⁸ *Id.* at *3.

this respect the court stated that “simply assuming that a company is wholly owned by the state is insufficient for the court to determine as a matter of law whether the company constitutes a government ‘instrumentality.’”³⁹ Instead, the court said that “several factors bear on the question of whether a business entity constitutes a government instrumentality.”⁴⁰ The court then listed the following factors as bearing on the question of whether a business entity constitutes a government instrumentality:

- 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).⁴¹

In providing the above factors, the court noted that these factors were “not exclusive” and that “no single factor” was “dispositive.”⁴² The court stated that the factors’ “chief utility” was “simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an ‘instrumentality’ under the FCPA—with state ownership being only one of several considerations.”⁴³

B. FCPA Resource Guide

Another source of guidance prior to *Esquenazi* as to the definition of a foreign official, and what constitutes an instrumentality of a foreign government, came from the DOJ and SEC in a “Resource Guide” to the FCPA

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *3–4.

⁴² *Id.* at *4.

⁴³ *Id.* The court clarified that “a mere monetary investment in a business entity by the government may not be sufficient” in itself “to transform that entity into a governmental instrumentality.” *Id.* at *5. However it noted that “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.” *Id.*

published in November 2012.⁴⁴ The FCPA Resource Guide, intended to help companies comply with the FCPA, is significant in that it came out after the *Lindsey* and *Carson* decisions, cited to those decisions in providing guidance on the definition of a foreign official, and was written by the two agencies in charge of enforcing the FCPA.⁴⁵

The FCPA Resource Guide (“Guide”) stated that what constitutes a government department or agency, for purposes of the definition of a foreign official, is “typically clear” when foreign governments are organized in a way similar to the United States government.⁴⁶ The Guide noted, however, that governments could be organized in many different ways and that “many operate through state-owned and state-controlled entities”⁴⁷ To this extent, the Guide stated that “[b]y including officers or employees of agencies and instrumentalities within the definition of ‘foreign official,’” the FCPA accounted “for this variability.”⁴⁸

As to the meaning of the term “instrumentality,” the Guide stated that the term was “broad” and could “include state-owned or state-controlled entities.”⁴⁹ The Guide, citing to *Lindsey* and *Carson* among other cases, then stated, “[w]hether a particular entity constitutes an ‘instrumentality’ under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.”⁵⁰ The Guide noted that “a number of courts have approved final jury instructions” providing factors to be considered when determining whether an entity is an “instrumentality” and then listed the following non-exclusive list of relevant factors:

- the foreign state’s extent of ownership of the entity;
- the foreign state’s degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);

⁴⁴ See *Resource Guide*, *supra* note 3, at 19–21.

⁴⁵ See *id.* at Foreword, 19–21, 109 n.119.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.* The FCPA Resource Guide stated that many governments operate through state-owned and state-controlled entities “particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.” *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 20, 109 n.119 (citing, among other cases, *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011); and, *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *1 (C.D. Cal. May 18, 2011)); Order Denying Motion to Dismiss, *United States v. Nam Quoc Nguyen*, No. 08-CR-522-TJS (E.D. Pa. Dec. 30, 2009). The Guide noted that the relevant federal court decisions were “consistent with the acceptance by district courts around the country of over 35 guilty pleas by individuals who admitted to violating the FCPA by bribing officials of state-owned or state-controlled entities.” *Resource Guide*, *supra* note 3, at 109 n.119.

- the foreign state’s characterization of the entity and its employees;
- the circumstances surrounding the entity’s creation;
- the purpose of the entity’s activities;
- the entity’s obligations and privileges under the foreign state’s law;
- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);
- the entity’s provisions of services to the jurisdiction’s residents;
- whether the government end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions.⁵¹

The FCPA Resource Guide stressed that “[c]ompanies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs.”⁵² The Guide also stated that the DOJ and SEC have “long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.”⁵³

⁵¹ *Resource Guide*, *supra* note 3, at 20, 109 n.120 (citing Jury Instructions, *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014); Order at 5 and Jury Instructions, *Carson*, 2011 WL 5101701; and Jury Instructions, *Aguilar*, 783 F. Supp. 2d 1108).

⁵² *Resource Guide*, *supra* note 3, at 20.

⁵³ *Id.* at 20–21, 109 nn.121–22 (citing Criminal Information, *United States v. C.E. Miller Corp.*, No. 82-cr-788 (C.D. Cal. Sept. 17, 1982); Complaint, *SEC v. Sam P. Wallace Co.*, No. 81-cv-1915 (D.D.C. Aug. 31, 1982); Criminal Information, *United States v. Sam P. Wallace Co.*, No. 83-cr-34 (D.P.R. Feb. 23, 1983)). The Guide stated that the “DOJ and SEC continue to regularly bring FCPA cases involving bribes paid to employees of agencies and instrumentalities of foreign governments” and cited to recent cases where they charged bribes paid to state-owned and controlled entities. *Resource Guide*, *supra* note 3, at 21, 110 nn.123–24 (citing Complaint, *SEC v. ABB, Ltd.*, No-10-cv-1648 (D.D.C. Sept. 29, 2010); Criminal Information at 3, *United States v. ABB Inc.*, No. 10-cr-664 (S.D. Tex. Sept. 29, 2010); Indictment at 2, *United States v. Esquenazi*, No. 09-cr-21010 (S.D. Fla. Dec. 4, 2009)). The Guide also noted that “[w]hile no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.” *Resource Guide*, *supra* note 3, at 21. However, the Guide cautioned that there were “circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership,” which was “reflected in the limited number of

III. *U.S. vs. ESQUENAZI*

On May 16, 2014, the Court of Appeals for the Eleventh Circuit issued its decision in *Esquenazi*, which defined the term “instrumentality” of a foreign government as the term is used in the FCPA’s definition of a “foreign official.”⁵⁴ The decision was the first time a federal appellate court had defined what constituted an “instrumentality” of a foreign government under the statute.⁵⁵

In *Esquenazi*, the two defendant appellants in the case, Joel Esquenazi and Carlos Rodriquez, were convicted by a federal jury for their alleged roles in paying bribes in violation of the FCPA to employees of Telecommunications D’Haiti, S.A.M. (Teleco).⁵⁶ The two defendants co-owned a company that purchased phone time from international vendors and then resold the minutes to United States customers.⁵⁷ One of the company’s main vendors was Teleco, a company that had a state-sanctioned monopoly on telecommunications services in Haiti, which was owned by the Haitian government, as indicated by evidence produced at trial.⁵⁸ More specifically, testimony heard by the district court revealed that the Haitian government gave Teleco a monopoly on telecommunication services when Teleco was formed in 1968, that the National Bank of Haiti took on a 97 percent ownership of Teleco in the early 1970s, and that the Haitian President appointed all

DOJ or SEC enforcement actions brought in such situations.” *Id.* As an example the Guide cited to a case in which a French issuer’s subsidiaries were convicted of paying bribes to employees of a Malaysian telecommunications company that was only 43 percent owned by Malaysia’s Ministry of Finance but was substantially controlled by the Malaysian government. *Id.* at 21, 110 n.125 (citing Criminal Information at 30–31, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010)).

⁵⁴ See *United States v. Esquenazi*, 752 F.3d 912, 920, 925 (11th Cir. 2014).

⁵⁵ See *U.S. v. Esquenazi: The Eleventh Circuit Broadly Defines “Foreign Official” under the FCPA*, FCPA Update, SIDLEY AUSTIN LLP (May 20, 2014), available at <http://www.sidley.com/US-v-Esquenazi-The-Eleventh-Circuit-Broadly-Defines-Foreign-Official-Under-the-FCPA-05-20-2014/>, archived at <http://perma.cc/N3AD-63YJ>; *Eleventh Circuit Issues much Anticipated Opinion Defining “Foreign Official” under the FCPA*, Client Memorandum, CLIFFORD CHANCE (May 2014) at 1, available at http://www.cliffordchance.com/briefings/2014/05/eleventh_circuitissuesmuchanticipatedopinio.html; Rubinfeld, *supra* note 1.

⁵⁶ See *Esquenazi*, 752 F.3d at 917. Esquenazi was sentenced to fifteen years in prison and Rodriquez was sentenced to seven years in prison. *Id.* at 920. The fifteen-year sentence for Esquenazi is significant in that it is, to date, the longest prison sentence ever imposed for violations of the FCPA. See *Federal Appellate Court Rules that the FCPA Prohibits Corrupt Payments to Certain Foreign Government-Owned Businesses*, JONES DAY (May 2014), available at <http://www.jonesday.com/federal-appellate-court-rules-that-the-fcpa-prohibits-corrupt-payments-to-certain-foreign-government-owned-businesses-05-23-2014/>.

⁵⁷ See *Esquenazi*, 752 F.3d at 917.

⁵⁸ See *id.* at 917–19.

of Teleco's board members during the relevant time.⁵⁹ In addition, evidence indicated that the defendants considered Teleco to be a state-controlled entity in that they sought "political-risk insurance" on their contracts with Teleco, a type of insurance coverage that applies only when a foreign government is a party to an agreement.⁶⁰

On appeal, the defendants argued, among other things, that Teleco was not an instrumentality of a foreign government so as to make employees of it "foreign officials" under the FCPA.⁶¹ They argued that the term "instrumentality" did not encompass state-controlled identities that do not perform governmental functions.⁶² They also argued that the term instrumentality should be limited to only include entities that perform public functions traditionally carried out by the government.⁶³

A. Court's Analysis

In rendering its decision, the court stated that the "central question" before it was what the term "instrumentality" meant.⁶⁴ The court stated that the FCPA did not define the term and that no court of appeals had previously provided a definition for it.⁶⁵ It therefore took on the task of defining "instrumentality" for purposes of the FCPA.⁶⁶

In construing the statutory text for the meaning of the word "instrumentality," the court looked at various sources for providing a definition.⁶⁷ The court considered the plain meaning of the word as defined under Black's Law Dictionary and Webster's Third New International Dictionary.⁶⁸ The court also looked for interpretation of the term under the "commonsense canon of *noscitur a sociis*[,] which means "a word is known by the company it keeps."⁶⁹ In this regard, the court noted that the company that the term "instrumentality" kept in the statute was "agency" and "department," which were "entities through which the government performs its functions

⁵⁹ See *id.* at 913.

⁶⁰ *Id.* at 914.

⁶¹ *Id.* at 921–22.

⁶² See *id.* at 922, 925, 935–36.

⁶³ See *id.* at 929, 935–36.

⁶⁴ *Id.* at 920 (citing 15 U.S.C. §§ 78dd-2(h)(2)(a) (2012)).

⁶⁵ See *id.* at 933–34.

⁶⁶ See *id.* at 920.

⁶⁷ See generally *infra* notes 68–71 and accompanying text.

⁶⁸ See *Esquenazi*, 752 F.3d at 921.

⁶⁹ *Id.* at 921 (citing *United States v. Williams*, 553 U.S. 285, 294 (2008); *Edison v. Doublerly*, 604 F.3d 1307, 1309 (11th Cir. 2010) (quoting *Green v. City of New York*, 465 F.3d 65, 79 (2d Cir. 2006) (quoting, in turn, *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))))).

and that are controlled by the government.”⁷⁰ It then gleaned from this context that for an entity to qualify as an “instrumentality,” it “must be under the control or dominion of the government” and it “must be doing the business of the government.”⁷¹

The court’s analysis then turned on what activities constitute “doing the business of the government.”⁷² The defendants had argued that because Teleco provided the commercial service of phone service, that it was not performing a governmental function and therefore could not be an instrumentality.⁷³ But the court rejected that argument, noting that the FCPA “expressly contemplates” that in “some instances” commercial activity would be a government function.⁷⁴ In this respect, the court looked at the FCPA’s facilitation payments exception and noted that the definition of “routine governmental action” as used in the exception includes “providing phone service.”⁷⁵ In this respect, the court stated that it could not determine entities engaged in commercial activities to be precluded from being an “instrumentality” because to do so “would render meaningless” the relevant portions of the FCPA’s facilitation payments exception.⁷⁶

The court also looked at a statement by the Supreme Court that “the concept of a ‘usual’ or a ‘proper’ government function changes over time and varies from nation to nation” and felt that this “principle” should guide its construction of the term “instrumentality.”⁷⁷ In this respect, the court stated that “to decide in a given case whether a foreign entity to which a domestic concern makes a payment is an instrumentality of that foreign government, we ought to look to whether that foreign government considered the entity to be performing a government function.”⁷⁸ The court felt that “the most objective way to make that decision is to examine the foreign sovereign’s actions, namely, whether it *treats* the function the foreign entity performs as its own.”⁷⁹

⁷⁰ *Esquenazi*, 752 F.3d at 922.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.* at 926.

⁷⁴ *Id.* at 922–23.

⁷⁵ *Id.* at 922 (citing 15 U.S.C. §§ 78dd-2(b), -2(h)(4)(A) (2012)).

⁷⁶ *Id.* at 922. As part of its analysis the court also reviewed the United States’ obligation under the OECD Convention, and the relevant 1998 amendments to the FCPA to implement the Convention, and determined that a broad array of activities could qualify as government functions for purposes of the FCPA. *Id.* at 922–25 (citing to OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Feb. 15, 1999), at arts. 1.1, 1.4(a), art. 1.4 cmt. 14 and 15; and 1998 FCPA Amendments, *supra* note 6).

⁷⁷ *Esquenazi*, 752 F.3d at 924–25 (citing to *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 42 U.S. 611, 634 n. 27 (1983)).

⁷⁸ *Esquenazi*, 752 F.3d at 924–25.

⁷⁹ *Id.*

B. Definition of “Instrumentality” Under the FCPA

The court stated that “[a]lthough we believe Teleco would qualify as a Haitian instrumentality under almost any definition we could craft, we are mindful of the needs of both corporations and the government for *ex ante* direction about what an instrumentality is.”⁸⁰ With this guidance, and based on its analysis, the court then set out a two-part test for when an entity constitutes an “instrumentality” for purposes of the FCPA and formally 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.”⁸¹

The court then stressed that “what constitutes control and what constitutes a function the government treats as its own are fact-bound questions.”⁸² Nevertheless, it provided non-exhaustive lists of factors for courts and juries to consider in determining whether one or both parts of the “instrumentality” definition are met.⁸³

1. Government Control Element

In order to determine whether a government “controls” an entity, the *Esquenazi* court said that courts and juries should 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.⁸⁴

⁸⁰ *Id.* at 925.

⁸¹ *Id.* The court was specifically addressing the term “instrumentality” as used under section 78dd-2(h)(2)(A) which applies to “domestic concerns.” *Id.* However there is no reason why this definition would not also apply to the term “instrumentality” as used in section 30A 78dd-1 of the FCPA which applies to issuers. *Id.*

⁸² *Id.* In this respect it stated that “[i]t would be unwise and likely impossible to exhaustively answer them in the abstract.” *Id.*

⁸³ *Id.* The court stated that “[b]ecause we only have this case before us, we do not purport to list all of the factors that might prove relevant in deciding whether an entity is an instrumentality of a foreign government.” *Id.*

⁸⁴ *Id.* The court stated that “[w]e do not cut these factors from whole cloth” but “[r]ather, they are informed by commentary to the OECD Convention the United States

2. *Government Function Element*

In order to determine whether an entity at issue “performs a function the government treats as its own,” the *Esquenazi* court said that courts and juries should consider 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.⁸⁵

As applied to the facts of the case, the court then looked at its construction of the term “instrumentality” and found “little difficulty” in concluding that the evidence supported the jury’s finding that Teleco was an instrumentality of Haiti.⁸⁶

ratified” and “are consistent with the approach the Supreme Court has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts.” *Id.* at 925–26 (citing OECD Convention, *supra* note 76, at art. 1.4, cmt. 14; *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 394, 497–99 (1995); *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946); and *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941)).

⁸⁵ *Esquenazi*, 752 F.3d at 913. Like for the government control element, the court noted that it drew up the factors for the government function element based in part from the OECD Convention and Supreme Court cases that discussed “what entities properly can be considered carrying out governmental functions.” *Id.* (citing to OECD Convention, *supra* note 76, at art. 1.4, cmt. 15; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295–97 (2001); *Reconstruction Fin. Corp.*, 312 U.S. at 83; and *Cherry Cotton Mills, Inc.*, 327 U.S. at 539).

⁸⁶ *Esquenazi*, 752 F.3d at 928. The court noted that since Teleco’s creation Haiti had granted the “company a monopoly over telecommunications service and gave it various tax advantages.” *Id.* at 929. It also noted that starting in the early 1970s and during the time that the defendants were involved that Teleco was 97 percent owned by Haiti’s national bank. *Id.* at 929. It further noted that Teleco’s Director General was chosen by the Haitian President and with the consent of the Haitian Prime Minister and ministers of public works and economic finance and that the President of Haiti appointed all of the board members of Teleco. *Id.* at 928. Finally the court noted that the DOJ’s expert testified that Teleco belonged “totally to the state” and that it was considered a “public entity.” *Id.* at 918. Based on these facts, and “[c]onstrued in the light most favorable to the jury’s verdict,” the court felt “that evidence was sufficient to show Teleco was controlled by the Haitian government and performed a function Haiti treated as its own, namely, nationalized telecommunication services.” *Id.* at 929.

IV. COMMENTARY ON *ESQUENAZI* DECISION

Following the *Esquenazi* decision, there were many commentaries and opinions expressed by professionals in the FCPA field on what the decision stood for and how it would affect future compliance and enforcement efforts. Many commenters shared the same views.

A prevailing opinion shared by many commenters was that the *Esquenazi* decision validated the DOJ and SEC's broad interpretation of who qualifies as a "foreign official."⁸⁷ Some commenters noted that the DOJ and SEC had brought many cases concerning corrupt practices involving state-owned entities.⁸⁸ They also noted that the DOJ and SEC confirmed their broad interpretation of "instrumentality" in the FCPA Resource Guide when the Guide stated that the term could "include state-owned and state-controlled entities" and advocated a fact-intensive test for determining what constitutes an instrumentality.⁸⁹ In this respect, many concluded that the *Esquenazi* court validated the DOJ and SEC's broad interpretation of who qualifies as a foreign official and sided with the DOJ and SEC in articulating a fact-intensive test for what constitutes an instrumentality.⁹⁰

⁸⁷ See *SEC Update: Federal Appeals Court Upholds Enforcement Agencies' Broad Interpretation of Government "Instrumentality" under FCPA*, HOGAN LOVELLS (May 30, 2014), available at <http://www.hoganlovells.com/federal-appeals-court-upholds-enforcement-agencies-broad-interpretation-of-government-instrumentality-under-fcpa-05-30-2014/>, archived at <http://perma.cc/4CQF-EGVX>. In this respect, these commenters noted that in some cases, such as *Lindsey*, "defense lawyers have countered that such broad definitions cannot apply where a company acts as a commercial participant in a country's economy." *Id.*

⁸⁸ *Id.*

⁸⁹ *U.S. Appellate Court Defines Government "Instrumentality" under the FCPA*, FCPA Update, DEBEVOISE & PLIMPTON LLP, May 2014, vol. 5, no. 10, at 5 (citing to Resource Guide, *supra* note 3, at 20–21), available at <http://perma.cc/WV4C-ZC67>. The FCPA Resource Guide has stated "[w]hether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function." *Resource Guide*, *supra* note 3, at 20; see also *supra* note 51, and accompanying discussion.

⁹⁰ See DEBEVOISE, *supra* note 89, at 5; Charles E. Duross, *Court of Appeals Hands Down Landmark FCPA Ruling Defining the Term "Instrumentality"*, Client Alert, MORRISON FOERSTER, May 22, 2014, at 1, archived at <http://perma.cc/S9AW-3422>; *Eleventh Circuit Addresses Scope of FCPA Coverage of Activity Involving State-Controlled Business Enterprises*, SKADDEN (May 20, 2014), archived at <http://perma.cc/6ZSN-XBDH>; *FCPA Jurisprudence: U.S. Court of Appeals (11th Circuit) Defines "Instrumentality" under the FCPA, Adopts Government's View*, Client Memorandum, DAVIS POLK (May 21, 2014) at 2, available at http://www.davispolk.com/resources/all?nid=56034&field_pb_publication_type_tid_1=5898, archived at <http://perma.cc/68LA-KWVD>; HOGAN LOVELLS, *supra* note 87, at 1, 3; Martin Weinstein et al., *Client Memorandum: Landmark Decision Issued on the Scope of the Terms "Foreign Official" and "Instrumentality" under the Foreign Corrupt Practices Act*, WILLKIE FARR & GALLAGHER LLP (May 20, 2014) at 2, archived at <http://perma.cc/9XKZ-E6S9>.

In light of the view that the *Esquenazi* decision affirmed the DOJ and SEC’s broad interpretation of who qualifies as a foreign official, some viewed *Esquenazi* as a victory for the government and saw the decision as emboldening the DOJ and SEC in their FCPA enforcement efforts in that they now had the backing of an appellate court.⁹¹ In this respect, some felt that the decision would make it more difficult for defense counsel to argue that the term “instrumentality” was still an “open question” of the law, as had been done prior to the decision.⁹² Some also felt that the government was likely to treat the issue over the definition of instrumentality as “settled,” even for cases outside of the Eleventh Circuit.⁹³

Another prevailing view among commenters was that, while the *Esquenazi* decision provided clarity to the term “instrumentality,” it did not provide the type of bright-line rule that businesses long have sought.⁹⁴ In this respect, some stated that entities hoping for additional clarity in the form of a “bright-line rule” or “clearly defined test” would be disappointed by the court’s decision.⁹⁵

Some commenters also noted that the *Esquenazi* court provided additional factors beyond what the courts and the FCPA Resource Guide had previously provided but failed to provide any kind of detail or guidance on them.⁹⁶ Along these lines, some felt that the court did not do enough to elaborate on the application or relative weight that should be rendered to the factors, and whether any one particular factor should be accorded greater weight than another when conducting an analysis.⁹⁷

⁹¹ See Raymond Banoun et al., Cadwalader FCPA Advisor: *Eleventh Circuit Defines “Instrumentality” Broadly Under the FCPA*, CADWALADER (May 2014), archived at <http://perma.cc/LEC3-7B7P>; DAVIS POLK, *supra* note 90, at 1; JONES DAY, *supra* note 56, at 2; Lucinda A. Low et al., *Eleventh Circuit Issues Long-awaited Decision in Haiti Teleco Case: Eschews Bright-line Test for FCPA “Instrumentalities”*, STEPTOE (May 27, 2014), archived at <http://perma.cc/KRD3-KW4Y>. Some also noted that the case was a victory for the government in that it affirmed the largest prison sentence in an FCPA case. See JONES DAY, *supra* note 56, at 2.

⁹² Witten et al., *supra* note 4. Some felt that “companies will face even stronger headwinds than previously if they attempt to avoid prosecution based on an argument that the government body at issue did not perform ‘core’ governmental functions.” *In First Ruling by a Court of Appeals, Eleventh Circuit Adopts Broad Definition of “Foreign Instrumentality” under the FCPA*, OnPoint, DECHERT LLP (May 2014), archived at <http://perma.cc/C9YJ-BHE9>.

⁹³ Witten et al., *supra* note 4; see also Giunta et al., *supra* note 4. In this respect, some noted that “although the Court has jurisdiction over only three states, this decision is likely to be influential because it is the first appellate decision to address this crucial definition.” DECHERT, *supra* note 92.

⁹⁴ See Duross, *supra* note 90, at 1; Giunta et al., *supra* note 4; Witten et al., *supra* note 4.

⁹⁵ Duross, *supra* note 90, at 1.

⁹⁶ See DEBEVOISE *supra* note 89, at 5; Giunta et al., *supra* note 4.

⁹⁷ See DEBEVOISE *supra* note 89, at 5; Giunta et al., *supra* note 4; Michelle Shapiro et al., *11th Cir. Leaves Room for Debate over FCPA ‘Instrumentality’*, LAW360 (May 20,

Some commenters also opined that gathering information for some of the factors may be difficult to do.⁹⁸ They noted that the *Esquenazi* court stated that it would be “relatively easy to decide what functions a government treats as its own” in that both courts and businesses “have readily at hand the tools to conduct that inquiry.”⁹⁹ However, some commenters disagreed with the court’s opinion that gathering such information would be “relatively easy,” noting that some companies have found gathering the type of relevant information to be both time consuming and expensive.¹⁰⁰ These commenters also noted that it is often difficult for companies to “determine the level of actual control a government has over” what would sometimes be considered a purely commercial operation.¹⁰¹

Finally, there was a widely held belief among commenters that the *Esquenazi* decision would do little to change the current FCPA enforcement landscape.¹⁰² In this regard, many noted that since the *Esquenazi* decision basically affirmed the broad view that regulators had already taken, there would not likely be major changes to the DOJ and SEC’s enforcement program because of the decision.¹⁰³

V. BEST PRACTICES IN LIGHT OF DECISION

It is this author’s opinion that the *Esquenazi* decision, and the court’s broad interpretation of the term “instrumentality,” will likely be the prevailing law in the area for a long time to come.¹⁰⁴ Therefore, this author believes

2014). One commenter felt that even as to the specific facts of the *Esquenazi* case, the opinion did not go into a detailed discussion of how the factors apply and whether certain factors are more significant than others in the analysis. *Id.*

⁹⁸ Giunta et al., *supra* note 4.

⁹⁹ *Id.* (quoting *United States v. Esquenazi*, 752 F.3d 912, 925 n.8 (11th Cir. 2014)).

¹⁰⁰ Giunta et al., *supra* note 4.

¹⁰¹ *Id.*

¹⁰² See Richard Craig Smith, et al., *11th Circuit Decision Defines ‘Foreign Official’*, NORTON ROSE FULBRIGHT (May 2014), archived at <http://perma.cc/ZVD8-7M9T>; and Steven A. Tyrell et al., *FCPA Alert: Appellate Court Ruling Largely Affirms DOJ and SECF’s Interpretation of a Foreign State “Instrumentality” under the FCPA*, WEIL, GOTSHAL & MANGES LLP 2 (May 22, 2014), available at http://www.weil.com/~media/files/pdfs/White_Collar_Defense_Alert_May_2014.pdf.

¹⁰³ See Smith, *supra* note 102; WEIL, GOTSHAL & MANGES LLP, *supra* note 102, at 2.

¹⁰⁴ Several commenters also appear to agree with this author’s opinion. Some commenters opined that the decision will make it more difficult for defendants and companies to argue that the definition of “instrumentality” is still an open question of law, as enforcement authorities are likely to treat the issue as settled and “courts may have little patience for further challenges to the definition of” the term. Giunta et al., *supra* note 4; Witten et al., *supra* note 4. In this respect, some commenters have noted that “[w]hile future litigants may be able to tinker at the margins of the definition, the *Esquenazi*

that companies should consider adopting certain best practices and modifications to their compliance programs in light of the decision.

Probably the most important practice that companies should consider taking in light of *Esquenazi* is to review their current compliance programs to make sure that they address the factors laid out by the court in the decision. The compliance programs should identify when entities are instrumentalities under the factors laid out in *Esquenazi* and then prohibit payments to agents and employees of such entities.¹⁰⁵ In this regard, companies should review and modify their compliance programs accordingly to make sure that their programs are structured to sufficiently evaluate whether the entities that they are conducting business with meet the two-part test under *Esquenazi* of being under the control of a foreign government and performing a government function.¹⁰⁶ The modifications to the compliance programs should then prohibit any payments made to agents, officers, or employees of entities that meet the two-part test. The compliance programs should also call for particular scrutiny over entities that hold, or may hold, a monopoly over a service in a foreign country.¹⁰⁷

In addition, companies should review and potentially modify their anti-bribery training procedures to ensure that company employees are aware that the FCPA covers dealings with a broad spectrum of entities, including a variety of state-owned entities. The training provided about compliance programs should also ensure that company employees, as well as third parties acting on behalf of the company, are aware of who is a foreign official under the factors articulated in *Esquenazi*.¹⁰⁸

Companies should also take proactive steps to research and review their existing business relationships with entities in order to determine whether any of the relevant entities may be considered instrumentalities under the factors provided in *Esquenazi*.¹⁰⁹ Companies should particularly scrutinize their relationships with third parties that interact with state-owned entities that could be considered instrumentalities. Companies should further conduct due diligence on future business relationships in order to determine whether potential entities that they may be dealing with may be considered instrumentalities. Finally, transactions with entities that may have any degree

decision has made clear that the definition of ‘instrumentality’ is broad enough that the FCPA prohibits bribes paid to certain state-owned entities.” Giunta et al., *supra* note 4.

¹⁰⁵ See *United States v. Esquenazi*, 752 F.3d 912, 925–26 (11th Cir. 2014).

¹⁰⁶ See *id.* at 928.

¹⁰⁷ See *id.* This is because Teleco’s monopoly over telecommunications services in Haiti appeared to be an important factor in the *Esquenazi* court’s decision that Teleco performed a government function. *Id.*

¹⁰⁸ See *id.* at 925–26.

¹⁰⁹ See *id.*

of involvement with a foreign state should be carefully reviewed to identify whether such entities may be considered “instrumentalities” under the *Esquenazi* decision.¹¹⁰

CONCLUSION

Esquenazi was a landmark decision in that it was the first time that an appellate court defined the term “instrumentality” under the FCPA.¹¹¹ It affirmed federal regulators’ long-held interpretation that the FCPA applied to state-owned and state-controlled entities.¹¹² It also may have closed a contentious and open question of law as to whether state-owned and state-controlled entities constitute “instrumentalities” of foreign governments under the FCPA.¹¹³

The *Esquenazi* decision’s two-part test and expansive list of factors for when an entity may be considered an “instrumentality” should be carefully reviewed and followed. Companies should adopt certain best practices and modifications to their compliance programs to take into account the two-part test and list of factors. Companies should also adjust their current compliance and training programs accordingly in order to make sure that they are in compliance with the law. Those that take such proactive steps will be better prepared to stay in compliance with the FCPA in a post-*Esquenazi* compliance environment.

¹¹⁰ *See id.* at 912.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*