KIRKLAND **ALERT**

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FCPA Developments: The Eleventh Circuit Ruling in *U.S. v. Esquenazi*

On May 16, the Eleventh Circuit's ruling in *U.S. v. Esquenazi* defined the term "government instrumentality" as used in the FCPA; specifically, the Court stated that a "government instrumentality" is "an entity *controlled* by the government of a foreign country that performs a *function* the controlling government treats as its own." The decision was a victory for the government, which argued that state-owned and state-controlled businesses performing functions that are not traditional government roles can be considered "government instrumentalities," but appears to have left open the possibility that some partially government-owned entities — perhaps even some that are majority government-owned — may be outside the Court's definition and therefore not be "government instrumentalities" under the FCPA.

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Case Background

The case involved two former telecom executives who were convicted in 2011 of bribing officials at Haiti Telco, a 97% state-owned company. On appeal, the defendants argued that the District Court's jury instructions erroneously defined the term "instrumentality," arguing that under the FCPA the term should be limited to entities that perform "traditional, core government functions.

Holding

The Court disagreed, holding that, as noted above, a "government instrumentality" is "an entity *controlled* by the government of a foreign country that performs a *function* the controlling government treats as its own."

In explaining its ruling, the Court emphasized that both prongs are fact-specific inquiries and provided a non-exhaustive list of factors to guide courts and juries in considering this question.

1. To determine the first element of "control," courts and juries should consider:

    - 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 [or treasury]…

- the extent to which the government funds the entity if it fails to break even; and
- the length of time these indicia have existed.

2. To determine the second element of "function," courts and juries should consider:
   - 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.

Esquenazi may indicate that there are some limiting factors companies can use in considering the status of partially owned entities that participate in the market on an equal footing with private sector competitors.

Implications for the Global Business Community

The ruling itself was not particularly a surprise, as most observers expected that Haiti Telco would be considered a government instrumentality. However, the decision leaves open the possibility that some entities that have significant government ownership could still be outside the Court's definition, as majority ownership is only one consideration, albeit one that is likely to be accorded significant weight. For example, in the energy and automotive industries, there are a number of joint ventures between foreign governments and private sector companies, in which the joint venture operates in most respects as another participant in a diverse marketplace, and where the government involvement in the business appears largely limited to ownership (i.e., the entity bears its own losses/ keeps its own profits, does not have a monopoly in the area, and for the most part does not take orders from the government with regard to its operations). *Esquenazi* seems to leave open the possibility that an entity of this type may not be a "government instrumentality" even if majority-owned; if true, this would be a significant development in FCPA jurisprudence, which has to date been largely limited to the contents of settlements between the U.S. DOJ and SEC, and therefore without much judicial limitation. Although a victory for the government right now, *Esquenazi* may also indicate that there are some limiting factors companies can use in considering the status of partially owned entities that participate in the market on an equal footing with private sector competitors.

It is also worth noting that liability may still accrue for payments to non-government entities; for example, the SEC may still be able to argue that books and records violations have occurred, and the DOJ has previously used alternate charging theories to deal with improper payments to non-government recipients. That

said, a narrower definition of "government instrumentality" (if that is in fact what *Esquenazi* portends) would place those cases outside the bribery portion of the FCPA, and therefore perhaps on a different footing.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Brigham Q. Cannon
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/bcannon
+1 (202) 879-5977

Chris Colbridge
Kirkland & Ellis International LLP
30 St Mary Axe
London EC3A 8AF
United Kingdom
www.kirkland.com/ccolbridge
+44 20 7469 2010

Henry J. DePippo
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/hdepippo
+1 (212) 446-4780

Mark Filip, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/mfilip
+1 (312) 862-2192

Michael J. Garcia
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/mgarcia
+1 (212) 446-4810

Robert Khuzami
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/rkhuzami
+1 (202) 879-5055

William J. Stuckwisch
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/wstuckwisch
+1 (202) 879-5023

Satnam Tumani
Kirkland & Ellis International LLP
30 St Mary Axe
London EC3A 8AF
United Kingdom
www.kirkland.com/stumani
+44 20 7469 2390

Samuel G. Williamson
Kirkland & Ellis International LLP
11th Floor, HSBC Building, Shanghai IFC
8 Century Avenue, Pudong New District
200120 Shanghai
China
www.kirkland.com/sgwilliamson
+8621-3857-6300

Tiana Zhang
Kirkland & Ellis International LLP
11th Floor, HSBC Building, Shanghai IFC
8 Century Avenue, Pudong New District
200120 Shanghai
China
www.kirkland.com/tzhang
+8621-3857-6305