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ALERT MEMORANDUM

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11th Circuit Confirms that Bribes Paid to Employees of State-Owned or Controlled Companies Violate the U.S. Foreign Corrupt Practices Act

The anti-bribery provisions of the U.S. Foreign Corrupt Practices Act ("FCPA") prohibit payments to "foreign officials" (i.e., non-U.S. government officials), which includes employees of a foreign government or an "instrumentality" of a foreign government. On May 16, 2014, in a widely-anticipated decision, the Eleventh Circuit largely adopted the government's longstanding position that a state-owned enterprise (in this case, a telecommunications company) may be such an "instrumentality" and consequently, corrupt payments to employees of such an enterprise were illegal bribes under the FCPA. This case is the first significant appellate decision to define who is a "foreign official" for purposes of FCPA liability, and makes clear that employees of a range of state-owned or controlled companies can be "foreign officials" so long as the company is both controlled by the state and performs a function that the state in question views as governmental. The decision provides some guidance as to both of these questions, but unsurprisingly leaves much to a case-by-case (and country specific) factual analysis of the relationship between the government and the state-linked entity.

In the case, *United States v. Joel Esquenazi,* the defendants were convicted of bribing officials of Telecommunications D'Haiti, S.A.M. ("Haiti Teleco").[1] At trial, the U.S. Department of Justice ("DOJ") introduced evidence that the company had a monopoly on telecommunications services, it was 97% owned by Haiti's national bank, it had significant tax advantages, the government appointed all board members and its top officer, employees of Haiti Teleco had disclosed their assets under an anticorruption law, and the company was eventually privatized after the events in question.[2] Under these facts, the court had little trouble concluding that Haiti Teleco was an instrumentality of a foreign government, and therefore that bribes paid to Haiti Teleco employees violated the FCPA. Ultimately, the court affirmed the convictions and sentences of the defendants, including the lead defendant, Joel Esquenazi, who received a 15-year sentence – the longest jail term ever imposed in an FCPA case.[3]

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1 *United States v. Joel Esquenazi and Carlos Rodriguez*, No. 11-15331-C (11th Cir. May 16, 2014).
2 *Id.* at 3-5.
3 Press Release, U.S. Department of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (October 25, 2011), available at http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html.

In doing so, the court drew a distinction between companies set up and run by governments to serve a public function and those in which the government was, in effect, a mere investor. Specifically, the court described an "instrumentality" as an entity that (i) is "controlled by a foreign government," and (ii) "performs a function the controlling government treats as its own."[4] Whether a particular entity satisfied these characteristics were "fact-bound questions," for which the court provided a non-exclusive list of common-sense factors.[5] For example, factors relevant to the question of government control include:

- Whether the government formally designates the entity as a state company;
- 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 go directly to the government;
- The extent to which the government funds the entity if it loses money; and
- How long these indicia have existed.[6]

Likewise, factors relevant to whether "the government treats [the company's function] as its own," include:

- Whether the entity is a monopoly;
- Whether the government subsidizes the entity;
- Whether the entity provides services to the public at large; and
- Whether the public and the government perceive the entity to be performing a governmental function.[7]

Notwithstanding the guidance from the court, this latter question is the more difficult one to answer, and the court acknowledged that the criteria are not rigid and depend on the foreign state's own view of what may constitute a state function.[8] The definition is thus to some extent a subjective one evaluated from the perspective of the foreign state. Telephone service is a familiar example (a private function in the United States but a public function in many countries), but the application of the analysis to state-linked companies engaged in commercial activity will remain a fluid, fact-based determination, and potentially uncertain, particularly in countries where some sectors of

[4] *Id.* at 20.
[5] *Id.* at 21-23.
[6] *Id.* at 21.
[7] *Id.* at 22-23.
[8] *Id.*; *see also id.*, p. 20.

the economy that may not generally be considered state functions have few entirely private competitors.[9]

The actual question before the Eleventh Circuit – whether Haiti Teleco was in fact such an instrumentality – was fairly straightforward, given the overwhelming evidence of government control and the public character of telephone service in the Haitian context.[10] While the court attempted to provide a framework for analyzing future claims that state-linked companies are "instrumentalities" of the state, that framework is quite general and leaves significant room for uncertainty regarding the treatment of such companies, particularly where they are engaged in commercial activities. The prudent approach is, of course, to treat any company that may be state-controlled as a potential "instrumentality" of the state falling within the scope of the FCPA, but more difficult questions (for example, whether state-linked industrial companies competing in international markets or with multiple other state-linked companies are "instrumentalities") will have to await future cases.

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If you have any questions concerning this memorandum, please feel free to contact any of our partners and counsel listed under "White-Collar Defense, Securities Enforcement and Internal Investigations" under the "Practices/Areas of Law" section of our website at www.cgsh.com, or any of your regular contacts at the firm.

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9 The *Esquenazi* factors for defining "instrumentality" are similar but not identical to the factors cited in the two lower courts that addressed this issue. Those two courts themselves used similar but not identical factors to define "instrumentality" and they also generally supported the government's position that state-owned or controlled companies are "instrumentalities." *See United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *3-4 (C.D.C.A. May 18, 2011) (order denying defendant's motion to dismiss); *United States v. Lindsey*, 783 F. Supp. 2d 1108, 1115(C.D.C.A. 2011) (ordering denying defendant's motion to dismiss).

10 The court also concluded that the defendants had the requisite knowledge that bribe payments were ultimately going to an instrumentality of the government. Evidence established that defendants knew Haiti Teleco had a state-sanctioned telecommunications monopoly, represented in both written and oral communications that the company was a "government-owned entity" and "instrumentality of the Haitian government," and attempted to obtain political-risk insurance, which is only available to parties contracting with foreign governments. See *Esquenazi*, No. 11-15331-C, at 34-35.

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