

## Election Day - Just Who is a Foreign Government Official?

Today is a monumental day for the United States - Election 2012. I am writing this blog on Monday, October 22, and as such, have no idea who will actually be elected as the next president of the United States. However, regardless of whom you voted for or whether they won or lost - it is always important to keep in mind that we as a nation are blessed to be a democracy. Let us never lose sight of the importance of freedom of speech, and the concomitant duty that freedom imposes upon us all, to speak up for what we believe is right or wrong. Speaking of which, this leads me to today's topic - the Haiti Telecom case.

In 2009 the Department of Justice charged Juan Diaz with conspiracy to make corrupt payments to Haitian officials for the purpose of securing business advantages from Haiti's state-owned telecommunications company. In October 2011, Joel Esquenazi and Carlos Rodriguez, the former president and vice president of Terra Telecommunications, were sentenced for their roles in a scheme to bribe officials in Haiti's state-owned telecom company. Esquenazi received 15 years, the longest sentence imposed in the history of the FCPA and Rodriguez received 7 years behind bars.

Both men have appealed their convictions, and one of the key issues on appeal is "Whether Esquenazi (Rodriguez) is entitled to an acquittal because employees of Haiti Teleco were not "foreign officials" within the meaning of FCPA simply because the National Bank of Haiti owned shares of Haiti Teleco and the Haitian government appoints board members and directors".

The Brief filed by Appellant, *United States v. Joel Esquenazi*, No 11-15331 (7th Cir, May 9, 2010) poses the following argument " Esquenazi is also entitled to an acquittal on all FCPA-based counts because the term "instrumentality" in the FCPA should be construed to encompass only foreign entities performing governmental functions similar to departments or agencies. Here, the Government failed to establish that Haiti Teleco performed a governmental function. Despite the Government's continued reliance on the premise that state-ownership or state-control of a business entity makes that entity and "instrumentality" of the government under the FCPA, that theory was explicitly considered by the drafters of the FCPA, but not included in the statute, and is inconsistent with the language of the statute as drafted. Because so many individuals and companies prosecuted by the Government prefer to resolve their cases prior to trial, the validity of the Government's theory has seldom been tested in court, and never before by a United States Court of Appeals. This case presents an opportunity to review the Government's aggressive enforcement of a less-than-clear federal statute and properly limit its scope to corrupt payments made to "foreign officials," including employees of "instrumentalities" that perform governmental functions similar to governmental departments and agencies". I have no reason to doubt that all of the above is absolutely true - but do you want to spend millions of dollars defending your actions and trying to keep your CEO out of jail based upon the meaning of the term "instrumentality"?

**The practical pointer for today's blog is this - doesn't it make more sense for companies to prohibit all forms of bribery both commercial bribery (improper payment made with the corrupt intent to a private, rather than a governmental, person, company, or other entity in order to receive a business advantage) and governmental bribery?** The U.K. Bribery Act takes this stance by prohibiting bribery in the private sector. Furthermore, the U.K. Act doesn't just limit the criminal offense to bribing foreign officials, but also prohibits both the offer and the acceptance of a bribe. I am not advocating that the

United States expand the reach of the Foreign Corrupt Practices Act to include international bribery of private entities or individuals. However, from a practical perspective - doesn't it make sense, and send a more unified message to your employees when you say "We do not permit bribes in any way, shape or form. Period, Full Stop"?

Consider the following Policy Statement:

It is Company policy to comply with all applicable anti-bribery laws, including but not limited to the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act, and all applicable local laws where Company operates, and to accurately reflect all transactions on Company's books and records. It is also Company's policy to require those agents, consultants and business partners who work on Company's behalf to comply with these same laws and practices. Bribery is a criminal offense in most countries in which we operate and corrupt acts expose the Company and our employees to the risk of prosecution, fines and imprisonment as well as endangering the Company's reputation. Fines assessed against individuals may and will not be reimbursed by the Company.

This policy prohibits all forms of bribery. As such, all Company employees, and all those acting for or on the Company's behalf, are strictly prohibited from offering, paying, soliciting or accepting bribes or kick-backs, including facilitation payments to any person or entity for the purpose of obtaining or retaining business or gaining any improper business advantage, regardless of whether or not the person or entity is governmental or private. Third parties, contractors, agents, representatives and intermediaries who act on behalf of the foundation must comply with these anti-bribery provisions. This policy also requires due diligence of Business Partners, internal approvals, books and records entries, and it imposes records retention requirements in key risk areas related to Government Officials and Business Partners. It requires audits to help ensure compliance, as well as appropriate scrutiny of acquisition and joint venture target companies for compliance with this policy, particularly where the target companies have had government sales and other significant governmental interaction.

Like other facets of a Company's operations, its anti-corruption policy and/or Code of Conduct should be tailored to meet its particular business needs, policies, and procedures. However, when drafting your code of conduct you should ask yourself: What do you want your company to stand for?

In 1919, King George the V dedicated November 7<sup>th</sup> as a day of remembrance for members of the armed forces who were killed during World War I. The joint venture by the U.S. and Great Britain to defeat the enemy in both World Wars is an excellent segue to discuss the risks and rewards of Foreign Joint Ventures. Stay tuned.

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