

Supreme Court Petition Threatens FCPA Crackdown

By **Max Stendahl**

Law360, New York (August 15, 2014, 6:26 PM ET) -- A U.S. Supreme Court petition to limit the scope of the Foreign Corrupt Practices Act marks the most serious challenge yet to government's anything-goes approach to bribery prosecutions, former top Department of Justice officials told Law360 on Friday.

Attorneys for two former Terra Telecommunications Corp. executives convicted of bribery filed a petition Thursday urging the Supreme Court to clarify a key provision of the FCPA, a 1977 law that bars payments to foreign officials in exchange for business. The law defines a foreign official as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." At issue in the Terra Telecommunications case is how to define "instrumentality."

U.S. criminal and civil prosecutors, often using a broad definition of that term, have secured billions of dollars in corporate FCPA settlements in recent years while also levying criminal charges against individuals. Few defendants have put the government to its burden of proof, so significant parts of the the law remain murky.

Thursday's petition aims to change that. Rita Glavin, a partner at Seward & Kissel LLP who previously served as head of the DOJ's criminal division, called it "tremendously significant."

"The definition of what constitutes a foreign official has been expanding into the abyss," Glavin said. "That's a real problem for companies. Instrumentality pretty much becomes whatever the DOJ says it is."

Glavin compared the expansion of the foreign official provision to that of the "honest services fraud" statute — a provision that served for years as a blunt legal instrument in public corruption cases but was curtailed in the Supreme Court's 2010 decision in *Skilling v. United States*.

"The government was pushing that statute in cases where people could not have comfort as to where the line was drawn and conduct crossed into criminality," Glavin said. "The Supreme Court finally put a stop to it."

Morgan Lewis & Bockius LLP partner George Terwilliger, who served as a top Justice Department official under presidents Ronald Reagan and George H.W. Bush, noted that companies have spent large sums of money policing activities that fall into a legal gray area under the FCPA. He said a ruling on the instrumentality language would provide helpful guidance.

"To have a statute of this scope and geographical reach, where some of the key terms remain subject to legitimate debate among legal experts, is unconscionable," said Terwilliger, who co-chairs Morgan Lewis' white collar litigation and government investigations practice. "It's not an appropriate way to administer the law."

The petitioners, Joel Esquenazi and Carlos Rodriguez, were charged with authorizing bribe payments to officials at Haiti Teleco, a telecommunications company described by the DOJ as “state-owned.”

The defendants were convicted in August 2011. Esquenazi was later sentenced to 15 years in prison, the longest sentence ever in an FCPA case, while Rodriguez received a seven-year jail term.

The Eleventh Circuit upheld the convictions in May 2014, ruling that Haiti Teleco qualified as an instrumentality under the FCPA. The appeals court defined instrumentality as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” The court listed some factors to help determine whether a certain entity counts as an instrumentality, but noted that the list was not exhaustive.

In Thursday’s petition, counsel for Esquenazi and Rodriguez said a clearer definition was needed. They proposed that courts should simply ask “whether the entity is part of the government itself, or whether the entity performs traditional, core government functions.”

“Prosecutorial discretion is one thing, but permitting the government to take a ‘we-know-it-when-we-see-it’ approach to FCPA enforcement violates basic constitutional protections,” the defense wrote.

Of course, the defendants’ proposal may require further clarification, including a definition for “core government functions.” It’s also far from certain that the Supreme Court will agree to hear the case. There is no clear circuit split on the “instrumentality” issue and relatively little FCPA case law generally.

What’s more, the Eleventh Circuit wrote in its opinion that Haiti Teleco “would qualify as a Haitian instrumentality under almost any definition we could craft,” suggesting the appeals court did not believe the case presented a close question of fact. A more ideal case for Supreme Court review would involve an entity with weaker ties to a foreign government, legal experts said.

Larry Urgenson, a partner at Mayer Brown LLP, nonetheless called Thursday’s petition “a useful landmark” for FCPA attorneys. He previously served in several leadership positions at the DOJ, including as acting deputy assistant attorney general and chief of the FCPA unit.

“It is very important in terms of whether the government is properly executing its prosecutorial powers to the right subjects and the right targets,” Urgenson said.

Counsel information for the government was not immediately available.

Esquenazi is represented by Markus Funk and Michael Sink of Perkins Coie LLP, and Michael Rosen PA. Rodriguez is represented by Christopher Kise, David Simon, Lauren Valiente and James Cirincione of Foley & Lardner LLP.

The case is Esquenazi et al. v. USA, in the U.S. Supreme Court. A case number was not immediately available.

--Additional reporting by Jeff Sistrunk. Editing by Sarah Golin and Philip Shea.