

## The FCPA Super Bowl

October 8, 2014

Lost amongst the news of the Supreme Court's recent refusal to take up the same-sex marriage issue was the Court's decision not to consider an appeal in a rare Foreign Corrupt Practices (FCPA) case. To the very dedicated FCPA bar, the denial was a noteworthy, if unsurprising result.

The case itself was a rare appellate case centering on the infamous anti-bribery statute because FCPA cases are seldom litigated; defendants, both individual and corporate, so often plead guilty before ever contesting any issues or going to trial. As a result, courts have had very few opportunities to comment on the statute's most controversial provisions, including several fundamental questions that govern the scope and breadth of the statute. The absence of judicial intervention means the Government's interpretation of the FCPA, for better or worse, continues to drive the resolution of prosecutions.

But here, for once, there was a trial and contested legal issues that were ruled on by the trial court and then a federal appellate court. And with the hopes and dreams of every FCPA practitioner and academic pinned to the defendants' cert. petition, there was a very, very, very slim chance that the Supreme Court would weigh in. After the Solicitor General waived its right to respond to the cert. petition and the Court declined to request a response, the case was dead on arrival at the Justices' September 29 conference. Boo!

The Court's ultimate decision not to grant the petition for merits review is hardly surprising in light of the long odds against any party seeking certiorari – the Court grants around one percent of all cert. petitions that come before it – and the complete absence of any circuit split in the courts below on the question raised here. The case was remarkable precisely because it was one of the first federal appellate decisions on the FCPA, not because of any circuit split.

The case, *Esquenazi et al. v. United States*, came to the Supreme Court on appeal from the U.S. Court of Appeals for the Eleventh Circuit. In simplest terms, the FCPA prohibits bribes to foreign officials to gain a business advantage. Joel Esquenazi and Carlos Rodriguez, former executives at Terra Telecommunications Corp., were convicted of violating the FCPA and sentenced to 15 years in prison (Esquenazi) and 7 years in prison (Rodriguez).

A "foreign official" under the statute is defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. 78dd-1(f)(1)(A). The issue for Esquenazi and Rodriguez was how to define "instrumentality." The defendants were found to have bribed members of Haiti's Teleco in order to lower Terra's debts to Teleco. Teleco had ties to the Haitian government, including having been given a monopoly over telecommunications services in the 1960s and later having all of its board members appointed by the Haitian President. Nonetheless, the defendants argued that Teleco was not an

instrumentality of the Haitian government and advocated for a definition of “instrumentality” that supported their position; i.e., that “instrumentality” should be limited to entities that perform traditional government functions. The trial court and Eleventh Circuit adopted the government’s broad reading of the term to include Teleco.

Putting aside the substance of the defendants’ arguments, what was most notable about the recent proceedings was one of the defendants’ arguments for granting cert. in the absence of a circuit split: specifically, the argument that there is not likely to be a circuit split any time soon, which in their view weighed in favor of deciding this case now.

With the specter of an indictment or – heaven forbid! – felony conviction hanging over corporate defendants (who make up the bulk of FCPA targets), dispositions short of trial are the norm. As such, nitty-gritty details like “what the words of the statute mean” are typically not tested by the parties before federal courts. Until another defendant challenges his/her/its prosecution and, more specifically, challenges the definition of an “instrumentality” of a foreign government, the issue will remain unresolved, at least from the perspective of the defense bar. It’s as if the FCPA Super Bowl just ended in a tie.