

Alert | White Collar Defense & Special Investigations



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New DOJ Opinion Procedure Release Is Notable, But Not for Reasons One Would Expect

On Aug. 14, 2020, the Department of Justice (DOJ) released its first Foreign Corrupt Practices Act (FCPA) Opinion Procedure Release (DOJ Opinion) in nearly six years. The DOJ Opinion process allows parties to submit information related to “specified, prospective – not hypothetical – conduct” and receive an opinion from the DOJ regarding whether the proposed conduct would be prosecuted under the FCPA. DOJ Opinions provide guidance to companies when dealing with real-world issues related to conducting business overseas.

What is most notable about this new **DOJ Opinion** is that it was actually released. Given that nearly six years had elapsed without a release, many FCPA observers wondered whether DOJ Opinions would continue to be released. Since 1992, two years had been the longest previous interval between DOJ Opinions.

Highlights of the DOJ Opinion

The DOJ Opinion was requested by a U.S.-based multinational investment advisor serving institutional investors (the Requestor) and was therefore a domestic concern under the FCPA. Starting in 2017, the Requestor was seeking to acquire assets from a foreign subsidiary (called “Country A Office” in the DOJ Opinion) of a foreign investment bank (the Bank). A foreign government indirectly held a majority (50% plus one share) of the Bank’s shares.

To assist with acquiring the assets, the Requestor engaged two third parties: a different foreign subsidiary of the Bank (called “Country B Office” in the DOJ Opinion) and a local investment firm. The transaction closed in February 2019. Shortly thereafter, Country B Office asked the Requestor to pay a fee of \$237,500 for services provided in the effort to obtain assets from the Country A Office.

The proposed fee equaled 0.5% of the face value of the purchased assets. There was no contract between the Requestor and Country B Office. However, a draft agreement between the parties called for a fee to be calculated at that percentage. The Requestor sought an opinion as to whether DOJ would bring an enforcement action if the Requestor paid the fee. The DOJ Opinion states that on the facts presented, the “Department does not presently intend to take any enforcement action” based on payment of the fee.

The Department’s reasoning is straightforward. As a threshold matter, the DOJ Opinion assumes but does not decide that the Country B Office is an instrumentality of a foreign government, and that its employees are therefore government officials within the meaning of the FCPA.

The DOJ Opinion notes first that Requestor’s payment will be made to a government entity, rather than to an individual. As the Department has stated here and in prior opinion releases, the FCPA does not apply to payments to government entities. *See U.S. Dept. of Justice, FCPA Op. Release 07-03 (Dec. 21, 2007).*

In addition, the DOJ Opinion asserts that there is no indication that the funds paid to the Country B Office would be diverted to one or more individual government officials, or to any other entity. In doing so, the DOJ opinion relies in part on a certification to that effect from the Chief Compliance Officer of the Country B Office.

Finally, the DOJ Opinion relies on the fact that the Requestor sought and the Country B Office provided legitimate services, for which the proposed compensation was commercially reasonable. Here again, the DOJ Opinion relies on a certification from the Chief Compliance Officer of the Country B Office.

Compliance Considerations

Although payments to state-owned or state-controlled entities are not covered by the FCPA, there is a risk that money paid to the entity will be diverted to an individual government official. The Requestor obtained a certification from the Country B Office’s Chief Compliance Officer, indicating that the payment would be used only for general corporate purposes. Certifications or contract language with third parties can be leveraged to obtain written assurance that payments will not be used for corrupt purposes. Thus, the DOJ Opinion demonstrates the importance of documenting efforts made to mitigate corruption risks.

Second, a company should know and document the business rationale for using a third party that is interacting with government entities. These third parties should have a fully executed contract with a clear scope of work and payment terms before the third-party begins work. There was only a draft agreement between the Requestor and the Country B Office. An executed contract along with the certifications from the Country B Office may have provided enough support for the transaction to obviate the need to ask the DOJ for an opinion.

The DOJ Opinion is a reminder of U.S. government expectations, which are already enumerated in various guidance like the DOJ Evaluation of Corporate Compliance Programs. First, companies need to perform pre-acquisition due diligence on potential targets. Sometimes it can be difficult to determine the extent of government ownership and government control of an entity. The U.S. government takes a broad view of state-owned and state-controlled entities, because there is no definition under the FCPA. The DOJ

Opinion, like the DOJ and SEC Resource Guide, references *United States v. Esquenazi* for a definition of “instrumentality.” Due diligence and thoughtful analysis are key.

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