



U.S. Department of Justice

Criminal Division

No. 13-01

Date: December 19, 2013

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department of Justice (the “Department”) has reviewed the Foreign Corrupt Practices Act (“FCPA”) Opinion Procedure Request of a U.S. national (“Requestor”) that was submitted on October 15, 2013, as well as supplemental information that was submitted by Requestor on November 12, 2013, and November 25, 2013. Requestor is a “domestic concern” under 15 U.S.C. § 78dd-2(h)(1)(B) and, thus, eligible to request an Opinion of the U.S. Attorney General, pursuant to 28 C.F.R. § 80.4, regarding whether certain specified, prospective—not hypothetical—conduct conforms with the Department’s present enforcement policy regarding the anti-bribery provisions of the FCPA.

Relevant Facts and Circumstances

Requestor is a partner with a U.S. law firm (the “Law Firm”). Requestor and other attorneys with the Law Firm have represented Foreign Country A in various international arbitrations. Requestor presently represents Foreign Country A in two international arbitrations for which the Law Firm receives payment. In the past 18 months, the Law Firm has billed fees to Foreign Country A of over \$2 million, and Requestor anticipates that in 2014, the fees on matters for Foreign Country A will exceed \$2 million.

Over the past several years of these representations, Requestor has become a personal friend of Foreign Official, who works in Foreign Country A’s Office of the Attorney General (the “OAG”). The OAG is responsible for selecting and contracting with international counsel on behalf of Foreign Country A. According to Requestor, however, Foreign Official has not had and will not have in the future any role in the selection of Requestor or the Law Firm as counsel for Foreign Country A. Requestor is not the Law Firm’s “primary relationship attorney,” “originating attorney,” or “lead attorney” for the OAG or the government of Foreign Country A, but has participated in the selection or pitch processes for new business with OAG and/or the government of Foreign Country A, and would expect to do so with regard to future business from these clients.

Requestor proposes to pay the medical expenses of Foreign Official’s daughter, who suffers from a severe medical condition that cannot effectively be treated in Foreign Country A

or anywhere in the region. The physicians treating Foreign Official's daughter have recommended that she receive inpatient care at a specialized facility located in Foreign Country B. Requestor reports that the treatment will cost between approximately \$13,500 and \$20,500 and that Foreign Official lacks financial means to pay for this treatment for his daughter.

In addition to the above representations, Requestor has further represented that among other things:

- Requestor's intention in paying for the medical treatment of Foreign Official's daughter is purely humanitarian, with no intent to influence the decision of any foreign official in Foreign Country A with regard to engaging the services of the Law Firm, Requestor, or any third person.
- The funds used to pay for the medical treatment will be Requestor's own personal funds. Requestor will neither seek nor receive reimbursement from the Law Firm for such payments.
- Requestor will make all payments directly to the facility where Foreign Official's daughter will receive treatment in Foreign Country B. Foreign Official will pay for the costs of his daughter's related travel.
- Foreign Country A is expected to retain the Law Firm to work on one new matter in the near future. Requestor is presently unaware of any additional, potential matters as to which Foreign Country A might retain the Law Firm. However, if such a matter develops, Requestor anticipates that Foreign Country A would likely retain the Law Firm given its successful track record and their strong relationship.
- Under the law for Foreign Country A, any government agency such as OAG that hires an outside law firm must publicly publish a reasoned decision justifying the engagement. It is a crime punishable by imprisonment under the penal code of Foreign Country A for any civil servant or public employee to engage in corrupt behavior in connection with public contracting.

In addition, Foreign Official and Requestor have discussed this matter transparently with their respective employers. The government of Foreign Country A and the leadership of the Law Firm have expressly indicated that they have no objection to the proposed payment of medical expenses. Indeed, Requestor has provided a certified letter from the Attorney General of Foreign Country A that represents the following:

- The decision by Requestor to pay for or not to pay for this medical treatment will have no impact on any current or future decisions of the OAG in deciding on the hiring of international legal counsel.
- In the opinion of the Attorney General, the payment of medical expenses for Foreign Official's daughter under these circumstances would not violate any provision of the laws of Foreign Country A.

The Attorney General further confirms that while Foreign Official handles aspects of the cases on which the Law Firm and Requestor work, Foreign Official has not taken part in any decisions regarding the Firm's retention for any matter, nor would Foreign Official have such a role in any possible future decision regarding contracting outside counsel, as such decisions are outside of Foreign Official's responsibilities.

Finally, Foreign Official has represented and warranted in writing that he has not had, does not have, and will not have any influence in the contracting of international lawyers to represent Foreign Country A; he will not attempt to assist Requestor or the Law Firm in the award of future work; and he would not get involved in any decision that the OAG might make in the future in this regard.

Analysis

Based upon all of the facts and circumstances, as represented by Requestor, the Attorney General, and Foreign Official, the Department does not presently intend to take any enforcement action with respect to the proposed payment of approximately \$13,500 to \$20,500 described in the Request.

A person may violate the FCPA by making a payment or gift to a foreign official's family member as an indirect way of corruptly influencing that foreign official. *See United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991). However, "the FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials." FCPA Opinion Release 10-03 at 3 (Sept. 1, 2010). Rather "the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal." *Id.*

Although no previous opinion release addresses the precise facts at issue here, the Department has previously expressed its lack of enforcement intent in matters where the requestor provided adequate assurances that the proposed benefit to the foreign official would have no impact on the requestor's present or future business operations. *See, e.g.*, FCPA Opinion Release 10-03 (Sept. 1, 2010) (indicating lack of enforcement intent regarding requestor's proposed hiring of third-party consultant who also performed work for a foreign government where consultant had no ability to bind the foreign government in future contracts and could not "act[] on behalf of the foreign government" in working with the requestor); FCPA Opinion Release 01-02 (July 18, 2001) (indicating lack of enforcement intent regarding planned

partnership between a foreign official's company and an American company to bid on a contract in that official's country because, *inter alia*, the official held no duties with respect to awarding the contract and the contracting procedures gave the official no role in influencing the process).

This is not to say that paying the medical expenses, or any other expenses, of a foreign official's family member could never violate the FCPA. The payment of such expenses would certainly violate the FCPA if intended corruptly to influence a foreign official to use his or her position "in order to assist ... in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). For example, the Department prosecuted and secured a conviction of an individual who paid personal bills and provided airline tickets to a cousin and close friend of a foreign official whose influence the defendant sought in obtaining contracts. *See Liebo*, 923 F.2d at 1311 (finding, *inter alia*, sufficient evidence of corrupt intent and that airline tickets were given to foreign official's cousin and close friend to obtain or retain business, where (i) contracts at issue would not be approved without the official's recommendation; (ii) defendant promised to "make gestures" to the official before first contract was approved and after second and third contracts were approved; and (iii) the official recommended approval of third contract and contract was approved a few weeks after tickets were provided).

Here, however, the facts represented suggest an absence of corrupt intent and provide adequate assurances that the proposed benefit to Foreign Official's daughter will have no impact on Requestor's or Requestor's Law Firm's present or future business with Foreign Country A. As noted above, Foreign Official does not and will not play any role in the decision to award Foreign Country A's legal business to Requestor's Law Firm. Requestor and Foreign Official have informed their respective employers of the proposed gift and neither has objected. Indeed, the Attorney General of Foreign Country A has expressly stated that the proposed gift will not affect the decision to award work to Requestor's Law Firm and, under the circumstances presented, is not illegal under Foreign Country A's laws. This is further reinforced by Foreign Country A's public contracting laws, which require transparent reasoning in contracting for legal work and criminally punish corrupt behavior. Finally, Requestor intends to reimburse the medical provider directly, ensuring that the payments will not be improperly diverted to Foreign Official. Accordingly, based on the representations made in the Request, including those described above, the Department does not presently intend to take enforcement action.

The FCPA Opinion Letter and this release have no binding application to any party that did not join in the Request and can be relied upon by Requestor only to the extent that the disclosure of facts and circumstances in the Request is accurate and complete and remains accurate and complete.