No.: 20-01

Date: August 14, 2020

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department reviewed the Foreign Corrupt Practices Act ("FCPA") Opinion request of an investment advisor that manages private funds serving institutional investors (the "Requestor"). Requestor initially submitted its request on November 5, 2019 (the "Request") and provided supplemental information on January 15, 2020, February 10, 2020, June 18, 2020, and July 17, 2020. Requestor is a "domestic concern" under 15 U.S.C. § 78dd-2(h)(1) and therefore is 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.

Requestor is a multinational firm headquartered in the United States. In early 2017, Requestor sought to purchase a portfolio of assets from a foreign investment bank's foreign subsidiary (the "Country A Office"). A majority of shares of the foreign investment bank is indirectly owned by a foreign government. Requestor sought and received assistance from a different foreign subsidiary of the same investment bank (the "Country B Office") in connection with the purchase.[1] After about a year, Requestor also engaged a local finance company to approach the Country A Office regarding the potential purchase (the "Local Partner"). In February 2019, Requestor succeeded in purchasing the assets from the Country A Office. The following month, the Country B Office sought from Requestor a fee to compensate for the work the Country B Office had performed. Requestor represents that the contemplated payment is justified and commercially reasonable.

Requestor seeks an Opinion as to whether the Department, based on the facts and representations provided by Requestor regarding payment of the fee sought by the Country B Office, would presently intend to bring an FCPA enforcement action against Requestor if it made such payment to the Country B Office.

Background

Requestor intends to pay $237,500 to the Country B Office as compensation for services the Country B Office provided during the two-year period in which Requestor sought to and ultimately did acquire a portfolio of assets from the Country A Office.

[1] The foreign government indirectly owns 50% + 1 share of the investment bank's shares. Both the Country A Office and the Country B Office are wholly owned subsidiaries of the investment bank.

As described by Requestor, beginning in 2017 the Country B Office provided various legitimate and commercially valuable services during the relevant time period. After failing to agree on a price for the assets, in May 2018, Requestor decided to engage the Local Partner to approach the Country A Office, even while the Country B Office continued its efforts on behalf of Requestor. After several delays, in February 2019, Requestor ultimately succeeded in purchasing the assets from the Country A Office. The transaction was closed with the assistance of the Local Partner.

In early March 2019, the Country B Office sought from Requestor a fee equaling 0.5% of the face value of the assets — $237,500 — to compensate the Country B Office for certain enumerated analytical and advisory tasks it had performed on Requestor's behalf.[2]

Analysis

Based upon all of the facts and circumstances, as represented by Requestor, the Department does not presently intend to take any enforcement action in response to the fee Requestor intends to pay the Country B Office. This is because there is no information evincing a corrupt intent to offer, promise, or pay anything of value to a "foreign official" in connection with the contemplated payment to the Country B Office.

The FCPA prohibits, *inter alia*, any domestic concern from corruptly giving or offering anything of value to any "foreign official" to assist "in obtaining or retaining business for or with, or directing any business to, any person …."[3] "Corruptly" means an intent or desire to wrongfully influence the recipient.[4] The FCPA does not prohibit payments to foreign governments or foreign government instrumentalities.[5]

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[2] Though Requestor and the Country B Office did not have an executed agreement covering this work, a non-binding draft agreement included a fee for the Country B Office of 0.5% of the face value of the assets.

[3] 15 U.S.C. § 78dd-2(a)(1).

[4] *See, e.g.*, *United States v. Kozeny*, 667 F.3d 122, 135-36 (2d Cir. 2011) (upholding jury instructions that stated: "A person acts corruptly if he acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result or a lawful result by some unlawful method or means. The term 'corruptly' is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position").

[5] *See, e.g.*, U.S. Dept. of Justice, FCPA Op. Release 09-01 (Aug. 3, 2009) (declining to take any enforcement action, in part, because the thing of value would be "provided to the foreign government, as opposed to individual government officials"); U.S. Dept. of Justice FCPA Op. Release 97-02 (Nov. 5, 1997) (declining to take any enforcement action where the donation would "be made directly to a government entity — and not to any foreign government official"); U.S. Dept. of Justice Review Procedure Release 83-01 (May 12, 1983) (declining to take any enforcement action where the payment would be "made directly to the Sudanese corporation, and not to any individual" and there was "no expectation that any individual Sudanese government official w[ould] personally benefit").

Assuming for purposes of this Opinion that the Country B Office is an instrumentality of a foreign government and that employees of the Country B Office are "foreign officials" as defined in the FCPA,[6] the facts and circumstances, as represented by Requestor, show a payment to a foreign government instrumentality, not a foreign official, and do not reflect a corrupt intent to influence a foreign official.

First, based on the representations of Requestor, the payment is to the Country B Office, not to an individual.

Second, based on the representations of Requestor, there is no indication that Requestor intends or believes the money will be diverted to any individual, and there is no indication that the money will, in fact, be diverted to any individual. The payment is transparent to the Country B Office and its management. Indeed, the Chief Compliance Officer of the Country B Office has certified to Requestor that the payment into the Country B Office's corporate bank account will only be used for the benefit of the Country B Office, for general corporate purposes of the Country B Office, and will not be forwarded to any other entity. Even though the Country B Office is a wholly owned subsidiary of the foreign investment bank that, in turn, is indirectly majority owned by a foreign government, there are no indicia that Requestor's payment to the Country B Office is intended to corruptly influence a foreign official. Moreover, the Requestor represents that there have been no corrupt offers, promises, or payments of anything of value, directly or indirectly, to any individual in connection with this transaction.

Finally, Requestor sought and received specific, legitimate services from the Country B Office, and Requestor has represented, and the Chief Compliance Officer of the Country B Office has certified, that the intended payment to the Country B Office is commensurate with the services the Country B Office provided and is commercially reasonable.

Thus, based on Requestor's representations, the Department does not presently intend to take any enforcement action in response to the fee Requestor intends to pay the Country B Office.

This FCPA Opinion Release has no binding application to any party other than Requestor and can be relied on by Requestor only to the extent that the disclosure of facts and circumstances in its Request and supplements is accurate and complete.

[6] Foreign officials under the FCPA include officers or employees of a department, agency, or instrumentality of a foreign government. The term "instrumentality" can include state-owned or state-controlled entities. *See, e.g.*, *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (holding that an "instrumentality" under the FCPA is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own").