

No.: 06-01

Date: October 16, 2006

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has reviewed the FCPA Opinion Procedure request of a Delaware corporation with headquarters in Switzerland (hereinafter the "Requestor"). The Requestor seeks to contribute \$25,000 to a regional Customs department or the Ministry of Finance (collectively, the "Counterparty") in an African country as part of a pilot project to improve local enforcement of anti-counterfeiting laws. The Requestor seeks to make the monetary contribution to the Counterparty in order for the agency to fund incentive awards to local customs officials to improve local enforcement relating to seizures of counterfeit products bearing the trademarks of the Requestor and its competitors.

The letter of request states that counterfeiting has become "a serious issue" for manufacturers such as the Requestor and the issue "is often not a major priority for Customs authorities (particularly in developing countries)[.]" According to the Requestor, the African country selected for this "anti-counterfeiting coalition" serves as a major transit point for illicit trade in counterfeit products, including the products of the Requestor and its competitors. The Requestor states that currently a transit tax is collected on all goods transiting the country, even those that are contraband or counterfeit. The Requestor notes that the salaries of local customs officials include a small percentage of any transit tax they collect - again, whether on authentic or counterfeit products. Thus, there is a financial disincentive for thorough inspection by local customs officials of goods for counterfeit products. The Requestor asks for a determination of the Department's present enforcement intention under the FCPA with respect to the proposed \$25,000 contribution.

The Requestor represents, among other things, that in connection with its proposed \$25,000 contribution, it would execute a formal memorandum of understanding (hereinafter "MOU") with the Counterparty in the African country to:

- encourage the mutual exchange of information related to the trade of counterfeit products bearing the trademarks of the Requestor and its competitors;
- establish procedures for an incentive compensation fund for the payment of awards to local Customs officials who detain, seize and destroy counterfeit products ("Award Candidates");
- establish eligibility criteria for the calculation of awards and the methods and frequency of distribution; and
- provide that the awards be given to Award Candidates directly by the Counterparty or given to local customs offices to distribute to their qualified Award Candidates.

The Requestor further represents that it would establish "a number of procedural safeguards designed to assure that the funds made available by the [Requestor's] contribution were, in fact, going to provide incentives to local customs officials for the purposes intended." The Requestor will ensure that the Ministry of Justice in the African country is aware of the pilot program and that all aspects of the program are consistent with local laws, including but not limited to the following procedural safeguards:

- First, the Requestor will make its contribution to the incentive compensation fund by electronic transfer to an official government bank account in the African country controlled by and in the name of the Counterparty, and will require written confirmation that the account is a valid government account, subject to periodic internal audit by the relevant government authorities.

- Second, the Requestor will be notified, upon a seizure of suspected counterfeit items by local customs officials, and will examine the suspect goods to confirm they are in fact counterfeit. The Requestor further represents that payments to Award Candidates will not be distributed unless and until destruction of the counterfeit goods is confirmed by delivery of a destruction certificate to the Counterparty (a copy of which would be sent to the Requestor).
- Third, the Requestor will have no part in choosing the Award Candidates, and the Counterparty will have sole control over, and full responsibility for, the appropriate distribution of funds. The Requestor, however, will require written evidence that its entire contribution was used only to pay identified Award Candidates and that the awards were based upon a predetermined award eligibility criteria and calculation method.
- Fourth, the Requestor will monitor the efficacy of the incentive program and discuss with the Counterparty during periodic reviews whether changes or refinements are necessary. As part of its monitoring effort, the Requestor will monitor the number of notices received from local Customs officials relating to relevant seizures during each six-month period and follow the progression of such seizures.
- Fifth, the Requestor will require as part of its MOU with the Counterparty that the Counterparty will retain for five years the records of the distribution and receipt of funds, and shall permit inspection of such records by the Requestor upon request during the life of the pilot project and for three years thereafter.

The Requestor states in its letter of request that its pending business activities in the African country are relatively small and "entirely unrelated to the current request for an advisory opinion." The Requestor further states that its future business in the African country is not dependent upon the existence of the proposed incentive program, and that the program is not intended to influence any foreign official to obtain or retain business. Finally, the Requestor states that if the program were successful, the Requestor would continue to fund the central account on an as-needed basis to ensure that there would be no interruption in merited awards to local customs officials, and that the Requestor would seek, both initially and over time, to encourage its competitors to contribute funds to the effort as well. Based upon all of the facts and circumstances, as represented by the Requestor, the Department does not presently intend to take any enforcement action with respect to the proposed \$25,000 payment described in this request.

This Opinion, however, is subject to the following important caveats:

- The Department's Opinion should not be deemed to endorse the proposed language of the MOU or the methodology for selection of the proposed Award Candidates and distribution of funds, as neither the language of the MOU nor any proposed methodology were submitted to the Department. This Opinion likewise should not be deemed to address any possible expansion of the program within or outside the African country. Rather, this Opinion is limited to consideration of the \$25,000 contribution to the particular African country set forth in the letter of request.
- This Opinion does not apply to any monetary payments made by the Requestor for purposes other than those expressed in the letter of request; nor does it apply to any individuals involved in authorizing or distributing the monetary awards to the Award Candidates.

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