

No.: 07-03

Date: December 21, 2007

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has reviewed the FCPA Opinion Request (the "Request") of a lawful permanent resident of the United States (the "Requestor"). The person is a "domestic concern" within meaning of the FCPA. The Requestor proposes to make a payment required by a family court judge in an Asian country to cover certain litigation-related costs.

The Requestor is a party to disputed judicial proceedings in the Asian country relating to the disposition of real and personal property in a deceased relative's estate. One of the Requestor's family members has defacto control over the assets of the estate, a portion of which the Requestor believes she legally owns. The estimated value of the estate is equivalent to roughly \$600,000, consisting of approximately 30.4% in foreign securities, 40.6% in bank and postal accounts, and 29.0% in real estate. In connection with the judicial proceedings, the Requestor submitted an application for the court to appoint an estate administrator pending the court's decision on the disposition of the estate assets. The court then requested an advance payment equivalent to approximately \$9,000 to cover expenses related to the court-appointed administrator and other miscellaneous court costs. Due to misgivings about the legality of such a payment under the FCPA, the Requestor withdrew the application for appointment of an administrator. In the coming months, if this Opinion Request results in a favorable response, the Requestor plans to renew such application and comply with the court's payment requirement. The Requestor has asked for a determination of the Department's present enforcement intention under the FCPA.

The Requestor has represented, among other things, that:

- the Requestor has not yet made the advance payment ordered by the foreign judge because she has withdrawn her request for the appointment of an estate administrator; [\(1\)](#)
- nothing in the Requestor's communications with the foreign court indicated that the requested payment was sought for the purpose of influencing the court, misusing the judge's official position, or inducing the judge or the estate administrator to do anything improper;
- the Requestor has obtained written assurance, a copy of which has been provided to the Department of Justice, from a lawyer who received law degrees in both the U.S. and the foreign country, and who is a member of an established law firm, that the Requestor's proposed payment described in the request is not contrary to, and is in fact explicitly lawful under, the written law of the foreign country (the "legal opinion");
- the proposed payment would be made to the clerk's office of the family court, not to the individual judge presiding over the dispute;
- the Requestor would request an official receipt and an accounting of how the funds are spent, both of which, according to the legal opinion, are discretionary, but often granted upon request; and
- the Requestor would request that the court refund her any remaining amount of the payment not spent in the proceedings, as the legal opinion states is required under foreign law.

In addition, the Requestor has provided copies (and translations) of the relevant provisions of written foreign law and regulation that: (a) authorize a court, in connection with the administration of an estate, to "take necessary measures to preserve the estate;" and (b)

govern family law proceedings and grant courts the authority to require parties to make advance payments to cover necessary expenses.

The FCPA Opinion procedure enables a domestic concern "to obtain an opinion of the Attorney General as to whether certain specified, prospective - not hypothetical - conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practice Act." 28 C.F.R. § 80.1.

The FCPA's antibribery provisions are implicated when a payment is made in order to obtain or retain business for or with, or to direct business to, any person. See 15 U.S.C. § 78dd-2(a). In this instance, in order to provide the Requestor with the guidance she seeks, the Department will assume that the proposed payment could be reasonably understood to relate to the Requestor's efforts "in obtaining or retaining business for or with, or directing business to, any person." *Id.* Thus, based on this assumption, the transaction sufficiently implicates the FCPA's antibribery provisions and is appropriately the subject of an FCPA Opinion.

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 proposal described in this Request for two reasons. First, based on the Requestor's representations and consistent with the FCPA, the payment will be made to a government entity, the court clerk's office, rather than a foreign official. *Cf.* 15 U.S.C. § 78dd-2(a)(1) (emphasis added) ("It shall be unlawful to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment...to any *foreign official*..."); 15 U.S.C. § 78dd-2(h)(2)(A) ("The term 'foreign official' means any officer or employee or a foreign government..."). Moreover, there is nothing to suggest that the presiding judge or the estate administrator will personally benefit from the funds after they are paid into the government account belonging to the court clerk's office. Second, consistent with the FCPA's law affirmative defense, the contemplated payment is "lawful under the written laws and regulations" of the foreign country according to an experienced attorney retained by the Requestor in the Asian country. 15 U.S.C. § 78dd-2(c)(1).

The FCPA Opinion Letter referred to herein, 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 the Request is accurate and complete and continues to accurately and completely reflect such facts and circumstances.

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(1) If this Opinion Request results in a favorable response, the Requestor intends to reapply for the appointment of an estate administrator and comply with the court's request for the advance payment.