U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

No.: 14-01

Date: March 17, 2014

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department reviewed the Foreign Corrupt Practices Act ("FCPA") Opinion request of a United States financial services company and investment bank (the "Requestor") submitted on July 8, 2013 and supplemented on February 13, 2014 (the "Request").[1] Requestor is an "issuer" of securities within the meaning of 15 U.S.C. §§ 78c(a)(8) and 78dd-l. Requestor, the majority shareholder of a foreign financial services company ("Foreign Company A"), has contracted to purchase the remaining minority interest from a foreign businessman ("Foreign Shareholder"), who was appointed to, and now holds, a senior government position in Foreign Country. Requestor seeks an Opinion stating the Department's lack of enforcement intent relating to the proposed transaction.

Background

In March 2007, Requestor, through a wholly owned subsidiary ("Subsidiary"), purchased a majority interest in Foreign Company A, which was founded and owned by Foreign Shareholder, several special purpose vehicles under his control, and another businessman. To guarantee Foreign Shareholder's participation, the parties' agreement (the "2007 Agreement") contained a five-year lock-in period that prohibited Foreign Shareholder from selling his interest prior to January 1, 2012. The 2007 Agreement did, however, allow Foreign Shareholder to leave Foreign Company A before the end of the five-year period if he were appointed to a minister-level position or higher in Foreign Country's government. The 2007 Agreement also provided for Subsidiary's buyout of Foreign Shareholder's shares and contained a formula for the purchase price. That formula was based on a multiple of Foreign Company A's average net income for the two years preceding the buyout.

Foreign Company A offers investment banking, sales and trading, and wealth management services. Since 2007, Foreign Shareholder has served as chairman and, later, also as chief executive officer ("CEO") of Foreign Company A. In his roles as chairman and CEO,

[1] Following Requestor's initial submission, the Department sent Requestor a letter seeking additional information on July 25, 2013. Requestor provided a partial response by letter on September 19, 2013, which was accompanied by significant backup documentation. Thereafter, the Department and counsel for Requestor had several follow up discussions to clarify certain issues. On February 13, 2014, Requestor provided a final submission that addressed the last outstanding issues raised by the Department.

Foreign Shareholder received a substantial salary, bonus, pension contributions, and other employment benefits commensurate with his position and level of seniority at Foreign Company A. From 2008 to 2011, Foreign Company A experienced yearly operating losses. Requestor cites the 2008 global financial crisis as the most significant factor for these losses.

In December 2011, Foreign Shareholder was appointed to serve as a high-level official at Foreign Country's central monetary and banking agency ("Foreign Agency"). Foreign Agency is responsible for bank and financial industry regulation and monetary policy. By virtue of his appointment, Foreign Shareholder became a "foreign official" within the meaning of the FCPA. Upon his appointment, Foreign Shareholder ceased to have any role or function at Foreign Company A, other than as a passive shareholder. Moreover, in his role at Foreign Agency, Foreign Shareholder has recused himself from any decision concerning the award of business to Requestor, Foreign Company A, or their affiliates (collectively, the "Recusal Entities") by Foreign Agency or Foreign Country's government and has not involved himself in any supervisory or regulatory matters with respect to any of the Recusal Entities.

Foreign Company A is not directly regulated by Foreign Agency, but Foreign Agency has been a client of Requestor for more than 20 years, and Requestor has provided asset management and investment banking services to Foreign Agency. Requestor represents that the individuals at Foreign Agency with whom it regularly conducts business are several levels beneath Foreign Shareholder, although Requestor occasionally interacts with one of Foreign Shareholder's direct subordinates.

In early 2012, Requestor and Foreign Shareholder commenced negotiations for Subsidiary to buy out Foreign Shareholder's minority interest (the "Shares"). As part of Foreign Shareholder's separation from Foreign Company A, Requestor paid Foreign Shareholder a bonus for 2011, severance, and accrued pension contributions. Requestor represents that the bonus was in accordance with standard compensation policies and comparable to the amount received by eight individuals holding similar roles in other offices of Requestor. The bonus was tied to the overall performance of Requestor and equal to the bonus paid to Foreign Shareholder for the years 2009 and 2010.

With respect to Subsidiary's purchase of the Shares, the parties agreed not to use the valuation formula set forth in the 2007 Agreement. Because Foreign Company A experienced net losses each year from 2008 through 2011, the formula dictated that the Shares had no value. Requestor explains that this result, due in significant part to the unanticipated 2008 financial crisis, was not the "commercial intention of the parties," as the Shares have substantial value. Requestor contends that any attempt to enforce the 2007 Agreement as written would likely have led to litigation or Foreign Shareholder selling the Shares to a third party. Requestor explains that having an unknown third party own more than one-third of this closely held financial services firm carries substantial risks to Foreign Company A's operations and profitability—whether due to the third party lacking business acumen, having an incompatible business style or vision, or otherwise. The parties, therefore, agreed that they would instead ask an accounting firm to make an independent and binding determination of the Shares' value.

Requestor and Foreign Shareholder retained a leading, highly regarded, global accounting firm (the "Firm") to determine the Shares' value. In May 2013, the Firm determined the value of the Shares as of December 31, 2012. Requestor recently provided to the Department additional financial information relating to Foreign Company A's 2013 performance, which showed it approximately nine percent ahead of the estimated total revenues that the Firm had relied on to value the Shares.

Requestor will seek approval of the transaction from a certain U.S. regulator (the "U.S. Regulator"), and indicates that it will also seek necessary approvals from Foreign Country's securities regulator and its foreign investment authority. Requestor will also notify another Foreign Country agency as part of perfecting the transfer of the Shares.

Requestor seeks an opinion that the Department will not initiate any enforcement action if Requestor consummates the purchase of the Shares for the appraised value. Along with its Request, Requestor offered the following representations and warranties relating to the purchase of the Shares:

- Foreign Shareholder has represented and warranted that, since his appointment at Foreign Agency, he has recused himself from, and has not influenced or sought to influence, any decisions by Foreign Agency, Foreign Country's government, or any third party with respect to the Recusal Entities. Foreign Shareholder also has recused himself from, and has not influenced or sought to influence, any supervisory or regulatory matters with respect to any of the Recusal Entities. Foreign Shareholder will continue to so recuse himself until after completion of the buyout of the Shares.

- Foreign Shareholder has represented and warranted that before he has any involvement in any business or matter between Foreign Agency and the Recusal Entities, he will first determine whether the business or matter was under negotiation, proposed, or anticipated at the time of, or prior to, the payment for the Shares. If so, Foreign Shareholder will continue to recuse himself from, and avoid influencing Foreign Agency with respect to, such business or matter, so long as Foreign Shareholder retains any position at Foreign Agency.

- Requestor has represented and warranted that for any business or matter between the Recusal Entities and Foreign Agency in which Foreign Shareholder is or becomes involved, Requestor will first determine whether such business or matter was under negotiation, proposed, or anticipated at the time of, or prior to, the payment for the Shares. If so, Requestor will then take steps to avoid contact, discussion, or dealing with Foreign Shareholder, and will take reasonable steps to ensure that Foreign Shareholder's recusal representations and warranties are honored.

- Subsidiary distributed an official communication to senior employees of Requestor who have contact with Foreign Shareholder notifying them of his governmental position and explaining that he is prohibited from participating in

any discussion, consideration, or decision, or otherwise influencing any decision relating to the award of business to the Recusal Entities until after completion of the buyout of the Shares. Requestor further represents that, post-closing, it will notify senior employees of the Recusal Entities who have contact with Foreign Shareholder about his ongoing recusal obligations.

- Requestor obtained a representation from Foreign Shareholder that he has disclosed his ownership interest and the proposed sale of the Shares in Foreign Company A to the relevant government authorities of Foreign Country and the relevant department at Foreign Agency, and the relevant government authorities have informed him that they approve or do not object to the sale of the Shares.

- Since his appointment, Foreign Shareholder has not received any payments from the Recusal Entities, other than the amount paid in early 2012 for his 2011 bonus, severance, and accrued pension contributions.

- Foreign Shareholder has warranted in writing that any payment to him to purchase the Shares will be made to him solely as consideration for the Shares, not in his official capacity or in exchange for any present or expected future official action.

- Foreign Company A has received written assurance from local counsel in Foreign Country that the purchase of the Shares is lawful in Foreign Country.

Analysis

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 buyout arrangement described in the Request.

The FCPA prohibits an issuer, such as Requestor, from corruptly giving or offering anything of value to any "foreign official" 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)(1). "[T]he FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials." Opinion Release 2010-03, at 3 (Sept. 1, 2010). Where such an arrangement exists, "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.*

With respect to indicia of corrupt intent, the proffered purpose of the payment is to sever the parties' existing financial relationship, which began before the Foreign Shareholder held an official position. Doing so would also avoid what would otherwise be an ongoing conflict of interest. The decision by the parties to employ an alternative valuation formula appears reasonable given the facts presently known. Requestor has represented that unforeseen market circumstances, as well as legitimate business considerations, prompted and justified the

renegotiation of the buyout formula contained in the 2007 Agreement. Foreign Company A is a viable, going concern that is reasonably expected to generate significant, future profits. Additionally, Foreign Company A's forecasted revenues for 2013 are estimated to be nine percent higher than the figures on which the Firm relied to generate its valuation. As a result, attempting to hold Foreign Shareholder to the terms of the 2007 Agreement and pay little or nothing for the Shares presents commercial and legal risks to Requestor. Foreign Shareholder could institute litigation, and Requestor would face litigation costs and bear the risk of having to pay an even greater amount to Foreign Shareholder. Alternatively, Foreign Shareholder is not obligated to sell the Shares back to the Subsidiary and could sell them to a third party, potentially resulting in an undesirable or disadvantageous partnership.

Furthermore, Requestor's decision to engage the Firm to serve as the independent and binding arbiter of the value of the Shares provides additional assurance that the payment reflects the fair market value of the Shares, rather than an attempt to overpay Foreign Shareholder for a corrupt purpose. Neither Requestor nor Foreign Shareholder requested or obtained conditions or limitations on the valuation or the valuation formula prior to engaging the Firm, and the valuation was carried out strictly in accord with the terms of the engagement. There is no indication of either party requesting a minimum or specific valuation from the Firm or attempting to improperly influence the valuation.

Requestor also has demonstrated that appropriate and meaningful disclosure of the parties' relationships will occur before the sale closes. *See* Opinion Release 2010-03, at 4 (highlighting that consulting arrangement between requestor and consultant would be disclosed to the ministry of finance of the foreign government with which consultant had other contracts); Opinion Release 2008-01, at 12 (Jan. 15, 2008) ("[T]he Requestor required and obtained transparency through adequate disclosures to the relevant government entities of the anticipated purchase at a significant premium . . . ."). Foreign Shareholder has already notified the relevant government authorities of Foreign Country and the relevant department at Foreign Agency, and the relevant government authorities have informed him that they approve or do not object to the sale of the Shares. By the time of the sale, Requestor will also have notified and obtained approval from the Department, the U.S. Regulator, Foreign Country's securities regulator, and Foreign Country's foreign investment authority. Requestor has also received written assurance of the legality of the purchase under local law.

Turning to appropriate safeguards, only one prior opinion release dealt directly with severing an existing business relationship with a person who was becoming a foreign official. *See* Opinion Release 2000-01 (Mar. 29, 2000). That opinion release, which involved a partner at a U.S. law firm taking a leave of absence from the firm to serve as a high-ranking foreign official, highlighted the very strict recusal and conflict-of-interest-avoidance measures that were put in place during the period when the former partner would be a foreign official to prevent him from assisting the requestor in obtaining or retaining business.

Requestor has represented that it has taken and will continue to take similarly strict measures to prevent Foreign Shareholder from assisting Requestor in obtaining or retaining business. Foreign Shareholder has recused himself from any decision or discussion concerning the award of business to the Recusal Entities by Foreign Agency or Foreign Country's

government. Foreign Shareholder also will not involve himself in any supervisory or regulatory matters with respect to any of the Recusal Entities until after completion of the buyout of the Shares. Even then, Foreign Shareholder will continue to recuse himself from, and not attempt to influence, any business or matter between Foreign Agency and the Recusal Entities that was under negotiation, proposed, or anticipated at the time of, or prior to, the payment for the Shares. Requestor will, with respect to such business or matter, also ensure that it does not interact with or seek assistance from Foreign Shareholder and take reasonable steps to ensure that Foreign Shareholder honors his recusal obligations. Subsidiary, for its part, distributed an official communication to senior employees of Requestor who have contact with Foreign Shareholder notifying them of his governmental position and explaining that he is prohibited from participating in any discussion, consideration, or decision, or otherwise influencing any decision, relating to the award of business to the Recusal Entities. Requestor further represents that, post-closing, it will notify senior employees of the Recusal Entities who have contact with Foreign Shareholder about his ongoing recusal obligations. Moreover, unlike the circumstances presented in Opinion Release 2000-01, after the purchase of the Shares, Foreign Shareholder will no longer have a financial incentive to assist Requestor in obtaining or retaining business, as the purchase will sever the parties' financial relationship. Foreign Shareholder will receive the payment regardless of any of the Recusal Entities' actual future performance.

Accordingly, because the facts, representations, and warranties described in the Request demonstrate at present that the only purpose of the payment to Foreign Shareholder is consideration for the Shares, the Department does not presently intend to take any enforcement action. The Department notes, however, this Opinion does not foreclose future enforcement action should facts indicative of corrupt intent (such as an implied understanding that Foreign Shareholder would direct business to Requestor or inflated earnings projections being used to induce Foreign Shareholder to act on Requestor's behalf) later become known.

This FCPA Opinion Release has no binding application to any party that did not join in the Request, 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. The Department's lack of enforcement intent is further conditioned on Requestor and Foreign Shareholder making all required notifications and obtaining all required approvals (or non-objections), including those described above.