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Worth the Wait? DOJ's First FCPA Opinion in Six Years Finds that Payment to Government-Owned Entity Does Not Violate the FCPA

On August 14, 2020, the U.S. Department of Justice (“DOJ”) released its first Foreign Corrupt Practices Act (“FCPA”) Opinion Procedure Release (“OPR”) in six years, advising that the DOJ would not bring an enforcement action against a U.S.-based, multinational investment firm that sought to pay fees in exchange for legitimate services to an entity indirectly owned by a foreign government.¹ The DOJ’s decision focused largely on the fact that the proposed payment would be made to a foreign government entity rather than to an individual foreign government official.² While the FCPA Opinion Procedure process is useful in theory – it has remained unused in recent years, and it is perhaps not hard to see why – the firm had to wait over nine months (since November 2019) for the OPR. At the time of its request, the firm had already closed the transaction, but the length of time to receive an opinion may be prohibitive where payment may be necessary to close a transaction.

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The Opinion Procedure

The DOJ’s FCPA Opinion Procedure is set out in the Code of Federal Regulations³ and further explained in the DOJ and Security and Exchange Commission’s (“SEC”) *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (first released in 2012 and updated in July 2020 (the “Resource Guide”)).⁴ The process allows a requestor to seek the DOJ’s opinion on specific, prospective actions, as opposed to purely historical or hypothetical conduct. A requestor must disclose “all relevant and material information bearing on the conduct” in question, and the DOJ “may request whatever additional information or documents it deems necessary.” The Regulations require that the DOJ conclude its review within 30 days of receiving a completed request or any supplemental information the DOJ seeks. The DOJ’s determination in an OPR applies only to the party or parties that submit the request; therefore, other parties cannot specifically rely upon it. Although the SEC does not have a comparable process, its position is to follow the DOJ’s determination in an OPR.⁵

The DOJ views the Opinion Procedure as an important but underutilized tool. Indeed, until now, the Opinion Procedure has not been used since 2014; prior to that, since 1993, the longest previous gap between OPRs had been two years. In 2018 remarks, then-Deputy Assistant Attorney General Matthew Miner lamented that companies were not using the Opinion Procedure enough.⁶ And the 2020 Resource Guide reiterates that “DOJ’s opinion procedure remains a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by DOJ under the FCPA.”⁷

¹ FCPA Opinion Procedure Release No. 20-01 (August 14, 2020), <https://www.justice.gov/criminal-fraud/file/1304941/download>.

² The DOJ assumed for purposes of the OPR that the entity in question is an instrumentality of a foreign government and that its employees are foreign officials.

³ 28 C.F.R. part 80.

⁴ A copy of the 2020 Resource Guide is available on DOJ’s website and can be accessed through the following [link](#). A copy of the 2012 Resource Guide can be accessed through the following [link](#).

⁵ SEC Release No. 34-17099 (Aug. 29, 1980), available at <http://www.sec.gov/news/digest/1980/dig082980.pdf>; SEC Release. No. 34-18255 (Nov. 13, 1981), available at <http://www.sec.gov/news/digest/1981/dig111381.pdf>.

⁶ Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets, DOJ Release (July 25, 2018), <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th>.

⁷ 2020 Resource Guide at 84.

First OPR in Six Years

In the latest OPR, a U.S. investment firm purchased a portfolio of assets in Country A from a subsidiary of a foreign investment bank that is indirectly majority-owned by a foreign government. To help it acquire the assets, the U.S. firm engaged the services of a different subsidiary in Country B of the same foreign investment bank. Although the U.S. firm and the Country B subsidiary never executed an agreement, a draft agreement called for the U.S. firm to pay a fee of 0.5% of the assets, approximately \$237,500, for the Country B subsidiary's services. After a year, the U.S. firm engaged the additional help of an unaffiliated third party in Country A, while the Country B subsidiary continued its efforts, and the firm succeeded in acquiring the assets in February 2019. Once the transaction concluded, the Country B subsidiary sought payment for its services. The DOJ ultimately concluded that it would not take any enforcement action related to the contemplated fee to the Country B subsidiary.

According to the U.S. firm, the contemplated payment is to an entity, the subsidiary in Country B, not an individual; the Country B subsidiary provided specific, legitimate services in connection with the transaction; and the fee is justified and commercially reasonable. The DOJ observed that, "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." Furthermore, the Chief Compliance Officer of the Country B subsidiary certified to the firm that the fee would be paid to the company's corporate bank account, used solely for the company's benefit, and not forwarded to any other entity. Finally, the firm represented that it received specific, legitimate services from the Country B subsidiary, and the subsidiary's Chief Compliance Officer similarly certified that the fee is commercially reasonable and commensurate with the services provided.

Given the firm's apparently unequivocal representations that the payment was for legitimate services and would not be diverted to any individual, it is difficult to speculate why the U.S. firm sought an OPR. However, it is possible that the company wanted additional comfort because it had not executed the agreement with the Country B subsidiary in advance and feared that the payment could be viewed as a success fee, a factor the DOJ has warned is a red flag that requires additional due diligence.⁸

Latest OPR Is Consistent with Prior Guidance

Although noteworthy as the first OPR in six years, the latest OPR otherwise remains consistent with previous Opinion Releases and the 2020 Resource Guide. For instance, the 2020 Resource Guide emphasizes that "[t]he FCPA prohibits payments to foreign officials, not to foreign governments." It continues, however, cautioning, "companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials." It also notes the importance of clearly defined and documented business relationships, noting, "[c]ommon red flags associated with third parties include . . . 'consulting agreements' that include only vaguely described services."

The DOJ has also previously found that payments to government entities – as opposed to individuals – would not violate the FCPA. For instance, in a 1983 OPR, the requestor, a U.S. company, sought to contract with a Sudanese company that was run independently from the government, but whose head was selected by the Sudanese President.⁹ Under the proposed agreement, the U.S. company would pay the Sudanese company a commission based on a percentage of sales it made. The DOJ explained that it did not intend to take enforcement action in part because the payment would be made

⁸ 2020 Resource Guide at 63. Though hard to gauge from the limited facts disclosed in the OPR, the U.S. firm may have also been concerned that payment to the Country B subsidiary could appear illegitimate or unreasonable because it also had engaged another unaffiliated local partner to help close the transaction.

⁹ FCPA Review Procedure Release No. 1983-01 (May 12, 1983),

<https://www.justice.gov/criminal/fraud/fcpa/review/1983/r8301.pdf>. Prior to 1993, OPRs were known as Review Procedure Releases.

directly to the Sudanese corporation, rather than to any individual, and no government official was expected to benefit personally from the agency relationship.

In a 1998 OPR, the DOJ highlighted the importance to its analysis that payments be made to entities rather than individuals to avoid investigation under the FCPA. The requestor, a U.S.-based company, was fined by a Nigerian government agency for the cleanup of environmental contamination at a site formerly leased by a company subsidiary.¹⁰ The company retained a Nigerian contractor recommended by Nigerian Federal Environmental Protection Agency (“FEPA”) officials to resolve this liability. The contractor advised the company that (1) the company would need to pay the \$50,000 fine through the contractor and (2) \$30,000 of the contractor’s fees represented “community compensation and modalities for officials of the Nigerian FEPA and Nigerian Ports Authority.” The DOJ stated that if the company proceeded with the payments for the “fine” and the “modalities,” it would commence a criminal investigation on the basis that “under these circumstances, the requestor has reasonably concluded that all or a portion of the ‘fine’ and ‘modalities’ will be paid, in fact, to Nigerian Government officials.” The DOJ advised that it would reconsider this conclusion if (1) the company paid the fine directly to the official account of the appropriate Nigerian government agency and (2) the contractor was paid its fee (minus the amounts for “modalities”) by the government and only after environmental cleanup was complete.

Opinion Procedure Setbacks for Companies

Although technically inapplicable to other parties not involved in them, OPRs provide helpful guidance on how the DOJ may view certain facts. However, as discussed above, the Opinion Procedure remains sparsely utilized. There are several potential reasons for this – (1) OPRs are public and therefore may reveal information about business operations or a prospective business relationship, even though anonymized, and (2) companies may not wish to invite regulatory scrutiny if they are unsure if a transaction would in fact be a violation.

One of the other reasons – already mentioned above – is that the process can be lengthy, which often is not practical in business transactions. Of the ten OPRs issued over the past decade, the shortest took 36 days to complete, while the most recent OPR took the longest, at over nine months. The average length was approximately four and a half months. The time is in part due to the DOJ’s need to seek additional information; in nine of the ten most recent OPRs, the DOJ required the requestor to submit additional information at least once.

More optimistically, companies may find sufficient guidance in the DOJ and SEC’s Resource Guide since its initial release in 2012. Although the DOJ has helpfully indexed OPRs by topic,¹¹ the Resource Guide aggregates key recommendations from multiple OPRs in addition to comprehensive guidance on the FCPA.

Takeaways

The key substantive takeaway, in line with previous OPRs and guidance, is that enforcement is unlikely where payments are made to foreign government entities and not individuals. Parties should, however, continue to ensure that the payments are justified, commercially reasonable, and seek comfort that they are not intended to corruptly influence, or will be diverted to, a foreign official. When conducting business with government entities, companies should therefore apply heightened due diligence and thoroughly document the reasons for government entity involvement and for payments. Agreements should be written and clearly define the services to be performed, and compensation should be transparent, commercially reasonable, and tied to specific deliverables or services. Companies should also consider appropriate anti-bribery and anti-corruption compliance provisions such as representations and warranties or forward-looking covenants.

¹⁰ FCPA Opinion Procedure Release No. 1998-01 (February 23, 1998), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9801.pdf>.

¹¹ Available at <https://www.justice.gov/criminal-fraud/opinion-releases-index>.