

First DOJ FCPA Opinion in Six Years

The Department of Justice issued its first FCPA opinion in six years on August 14, 2020. Foreign Corrupt Practices Act Review, Opinion Procedure Release, No.: 20-01. The opinion process provides a mechanism by which a question regarding FCPA enforcement can be submitted to the Department requesting a no-action letter. While the mechanism has long been available and is mentioned in the *Guide* that was recently updated, the process has seldom been used. One reason is the time. The recently issued response took nine months, a point cited by FCPA Professor Mike Koehler in his FCPA Professor Blog ([here](#)) and on the FCPA Blog ([here](#)). Another is the lack of confidentiality.

The request

The question presented centered on a transaction between a multinational U.S. based firm called Requestor and the foreign subsidiary (Country A Office) of an investment bank that is majority owned by a foreign government. The transaction involved the purchase of a portfolio of assets from Country Office A.

Requestor sought and secured the assistance of another subsidiary of the foreign investment bank called Country B Office. There was no agreement between Requestor and Country B Office. There was, however, an unexecuted agreement which provided in part that Country B Office would be paid 0.5% of the face value of the assets by Requestor.

The transaction began in 2017 but stalled. About one year after the transaction began Requestor sought assistance from a local finance company. In February 2019 a transaction was finally consummated. Country B Office then requested a fee in accord with the unexecuted agreement which is \$237,500. The fee would be paid to the foreign subsidiary, Country B Office.

Determination

Related Capabilities

- Securities & Financial Services Litigation & Enforcement

The Department concluded that it “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 . . .”

In reaching its conclusion, the Department assumed that Country B Office is an instrumentality of a foreign government. It also assumed that the employees of that instrumentality are “foreign officials” within the meaning of the FCPA. Based on the facts detailed above, and the two assumptions stated, three points support the Department’s conclusion:

First, the payment will be made by the Requestor to Country B Office, not an individual, according to the representations. *See, e.g., U.S. v. Esquenazi*, 752 F. 3d 912, 925 (11th Cir. 2014) (discussing term instrumentality in FCPA).

Second, there is no evidence that the payment is intended to corruptly influence a foreign official. To the contrary, representations which are confirmed and certified by the Chief Compliance Officer of the Country B Office, establish that the money will be put in Country B Office’s corporate bank account and “will only be used for the benefit of Country B Office . . . and will not be forwarded to any other entity.” *See, e.g., U.S. v. Kozeny*, 667 F. 3d 122, 135-36 (2nd Cir. 2011) (jury instructions re acting corruptly and intentionally with improper motive in context of FCPA).

Finally, Requestor sought and received specific, legitimate services from the Country B Office. The payment is for services the Country B Office provided during the two-year period in which the deal was pursued. This fact is certified by the Chief Compliance Officer of the Country B Office. *See, e.g., U.S. Dept. of Justice, FCPA Op. Release 09-01* (Aug. 3, 2009) (declining enforcement action in part since value provided to foreign government and not government officials).

In view of these factors, the Department will not at this time recommend an enforcement action.