

CLIENT ALERT

FEBRUARY 7, 2022

DOJ Issues FCPA Advisory Opinion on Payments Made Under Duress

On January 21, 2022, the US Department of Justice (DOJ or Department) issued a Foreign Corrupt Practices Act (FCPA) advisory opinion regarding a crisis in which the naval forces of an unnamed country had detained the captain and crew of a vessel owned by a US-based company. Their release hinged on the company's provision of a substantial cash payment to an intermediary who was, at least potentially, working on behalf of one or more government officials.¹ The opinion concluded that a ransom-like payment to a third party to facilitate the release of an unlawfully detained ship captain is not considered a bribe under the FCPA because of "unusual and exigent circumstances."²

Overview of FCPA

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* (FCPA Resource Guide).⁴ Pursuant to the governing regulations, the DOJ must provide an opinion procedure release (OPR) at the request of anyone subject to the FCPA (Requestor), indicating whether certain prospective conduct violates the anti-bribery provisions of the statute.⁵ The DOJ's determination in an OPR has no binding application to any party that did not submit the request.⁶ Nevertheless, the opinions provide insight into the Department's approach to questions of interpretation.⁷

The FCPA contains anti-bribery provisions as well as books and records provisions. The anti-bribery provisions make it illegal for individuals and companies within the FCPA's purview to corruptly offer or provide money or anything else of value to officials of foreign governments, foreign political parties or public international organizations with the

¹ U.S. Dep't of Justice, FCPA Opinion Procedure Release No. 22-1 (Jan. 21, 2022) ("FCPA Release"), <https://www.justice.gov/criminal-fraud/page/file/1466596/download>.

² FCPA Release at 1.

³ FCPA Opinion Procedure, 28 C.F.R. §§ 80.1 *et seq.* (July 1, 1999).

⁴ U.S. DEP'T OF JUSTICE & U.S. SECS. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2d ed. 2020) ("FCPA Resource Guide"), <https://www.justice.gov/criminal-fraud/file/1292051/download>. See generally 132 CONG. REC. H2977-01 (daily ed. May 20, 1986) (joint statement of Rep. John D. Dingell & Rep. Timothy E. Wirth) (discussing the purpose, proposed practice and intentions behind the DOJ FCPA opinion procedure).

⁵ FCPA Opinion Procedure, 28 C.F.R. §§ 80.1 *et seq.* (July 1, 1999).

⁶ *Id.*

⁷ See generally *Opinion Releases Index*, U.S. DEP'T OF JUSTICE FRAUD SEC., <https://www.justice.gov/criminal-fraud/opinion-releases-index> (last visited Feb. 6, 2022) (providing all relevant DOJ FCPA Opinion Releases divided by topic).

intent to obtain or retain business.⁸ The FCPA's anti-bribery provisions apply to US-based companies ("domestic concerns"),⁹ US-listed securities ("issuers")¹⁰ and certain foreign persons and businesses while acting in the territory of the US ("territorial jurisdiction").¹¹

The January 21, 2022 DOJ Advisory Opinion

The DOJ issued its recent opinion in response to a request submitted on October 19 and 20, 2021, to determine if the Department would perceive any potential FCPA violations from the actions a Requestor was intending to take concerning a payment to a third-party intermediary who claimed to be able to secure the release of the Requestor's maritime vessel, captain and crew, all of whom were detained after the vessel had anchored inadvertently in an unnamed country's (Country A) waters.¹²

The Requestor, a US-based company, is an operator of maritime vessels. One of the Requestor's vessels was seeking to anchor in international waters while awaiting entry into the port of another unnamed country (Country B) for mandatory maintenance and renewal of technical maritime certificates.¹³ When the vessel arrived in Country B, one of the company's shipping agents advised the captain that Country B's ports were fully occupied, and that the vessel would need to anchor for two weeks outside of Country B.¹⁴ According to the Requestor, Country A's navy detained the officers and crew after the shipping agent in Country B gave incorrect anchoring coordinates to the captain, causing the vessel to anchor accidentally in Country A's waters.¹⁵ In an incident report, Country A's navy noted that the vessel was in its territorial waters "in violation of various laws and treaties."¹⁶

Country A's navy intercepted the vessel and directed it into Country A's harbor, where Country A's navy confiscated the vessel's "logbook and officers' and crew's documents and told the captain he would be detained for questioning ashore, while the crew members and officers were ordered to remain on board the ship."¹⁷ Once onshore, "the captain was detained in jail without being questioned or provided any documentation authorizing his arrest or detention."¹⁸ At that time, the captain was suffering from a serious medical

⁸ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

⁹ 15 U.S.C. § 78dd-2.

¹⁰ 15 U.S.C. § 78dd-1.

¹¹ 15 U.S.C. § 78dd-3.

¹² FCPA Release at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 1-2.

condition “that would be significantly exacerbated by the circumstances and conditions of his detention and created a significant risk to his life and well-being.”¹⁹

Following the detention, a third-party intermediary approached the Requestor and demanded payment in the amount of \$175,000 for the release of the captain and crew, and to permit the vessel to leave Country A’s waters, asserting that this would constitute an official payment to the government of Country A.²⁰ To engage with the intermediary, the Requestor designated a trusted business agent with whom the Requestor had previously worked, and on whom the Requestor had recently conducted due diligence.²¹ The Requestor also informed Country A’s government of the captain’s health concerns.²² In addition, the Requestor “sought assistance from other agencies with the U.S. government to end the captain’s detention and permit the Requestor vessel and its crew to leave Country A expeditiously.”²³

Despite asserting that the demand was for an authorized payment to the government of Country A, the intermediary refused to provide official validation “to ensure that the payment would be made pursuant to a fine or other penalty resulting from a legal or regulatory violation, if any.”²⁴ As such, “the nature of the demand and the manner of payment raised concerns for Requestor that the payment was intended for one or more Country A government officials.”²⁵

The DOJ concluded, based on these facts, that the payment would not trigger an enforcement action under the anti-bribery provisions of the FCPA because the US-based company would not be making the payment “corruptly” or to “obtain or retain business.”²⁶

To be considered a corrupt payment under the FCPA, a payment must be made with “an intent or desire to wrongfully influence the recipient.”²⁷ The facts demonstrated that the proposed payment would not be made with corrupt intent, given that the “primary reason for the payment was to avoid imminent and potentially serious harm to the captain and crew of the Requestor vessel.”²⁸

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3.

²¹ *Id.* at 2.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (defining formal basis for a payment as “an invoice or other documentation setting forth charges or an enumerated fine amount”).

²⁵ *Id.*

²⁶ *Id.*

²⁷ FCPA Resource Guide at 14 (citing H.R. Rep. No. 95-640, at 7 (1977), and S. Rep. No. 95-114, at 10 (1977)); *see also United States v. Kozeny*, 67 F.3d 122, 135 (2d Cir. 2011) (explaining that the term *corruptly* “is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position”).

²⁸ FCPA Release at 3.

The “business purpose” test of the FCPA is met “where the purpose or offer is to assist in obtaining and retaining business.”²⁹ In this case, the DOJ found that the proposed payment did not meet the FCPA’s “business purpose” test, as it did not assist in obtaining or retaining business.³⁰ As the DOJ noted, “Requestor has no ongoing or anticipated business with Country A, and the entire episode appears to be the result of an error, emanating from the incorrect advice Requestor received about where to anchor its ship while waiting for the port of Country B to carry out mandatory repairs.”³¹ In addition, rather than attempting to conceal the payment demand, the Requestor had “engaged with various US government personnel and requested proper documentation from the Country A government setting forth the alleged violation and appropriate fine.”³²

Key Takeaways

In sum, the DOJ found as follows:

- There was no corrupt intent.³³
- There was no sufficient business purpose associated with the proposed payment.³⁴
- The detention of the captain created a serious and imminent threat to his health, safety and well-being.³⁵
- The company engaged with multiple US government personnel and agencies.³⁶
- The company repeatedly asked for formal documentation relating to the payment.³⁷
- The situation differs from “other situations in which a company is threatened with severe economic or financial consequences in the absence of a payment.”³⁸

The factual situation is *sui generis*. Failure to make the demanded payment would have resulted in continued detention of the captain, crew and vessel. One may fairly wonder whether the opinion would have been different if only the vessel—not the captain and crew—had been detained. Regardless, the company acted prudently in invoking the Opinion Procedure under crisis conditions.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See id.* at 3 n.4 (concluding that in “contacting appropriate U.S. government authorities in Country A in connection with the payment demand, Requestor acted in accordance with the recommendation in the FCPA [Resource] Guide”); *see also* FCPA Resource Guide at 28 (“If such a situation [of imminent threats to health or safety of its employees] arises, and to ensure the safety of its employees, companies should immediately contact the appropriate U.S. embassy for assistance.”).

³³ FCPA Release at 3.

³⁴ *Id.* at 4.

³⁵ *Id.* at 3.

³⁶ *Id.* at 2-3.

³⁷ *Id.* at 2.

³⁸ *Id.* at 4.

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