U.S. Insight: DOJ Advisory Opinion Reaffirms Lack of FCPA Prohibition on Bona Fide Payments Made to Foreign Governmental Instrumentalities

On August 14, 2020, for the first time in six years, the Department of Justice (DOJ) issued a Foreign Corrupt Practices Act advisory opinion, formally called an "Opinion Procedure Release," which concluded that payments made to a subsidiary of a foreign government instrumentality did not warrant FCPA enforcement.[1]

Overview of FCPA

The Foreign Corrupt Practices Act (FCPA)[2] was enacted in 1977 to combat international corruption in two ways: (1) the anti-bribery provisions, which prohibit the bribing of foreign government officials, and (2) the accounting provisions, which impose certain record keeping and internal control requirements. Specifically, the anti-bribery provisions prohibit the payment of money or anything of value to a foreign official in his or her official capacity to secure any improper advantage in order to obtain or retain business.[3]

Under the FCPA, a foreign official is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[4]

The FCPA does not define a government "instrumentality." The term has been the subject of judicial interpretation. The July 2020 edition of the FCPA Resource Guide[5] discusses the Eleventh Circuit's test in *United States v. Esquenazi*[6] for determining whether an entity is a government "instrumentality," and notes that the court there defined it as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[7] The test is fact-intensive, and takes into

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[1] U.S. Dept. of Justice, FCPA Op. Release 20-01 (Aug. 14, 2020) ("Release"), *available at* https://www.justice.gov/criminal-fraud/file/1304941/download.
[2] 15 U.S.C. §§ 78dd-1, *et seq*.
[3] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).
[4] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).
[5] U.S. Dept. of Justice, and U.S. Securities and Exchange Comm., *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2d ed. 2020) ("FPCA Resource Guide"), p. 20, *available at* https://www.justice.gov/criminal-fraud/file/1292051/download.
[6] *United States v. Esquenazi,* 752 F.3d 912, 920-33 (11th Cir. 2014).
[7] FCPA Resource Guide, p. 20 (quoting *Esquenazi*, 752 F.3d at 925).

account factors that include the foreign government's formal designation of the entity, and whether the government has a majority interest in the entity.[8]

The FCPA's anti-bribery provisions apply to issuers of U.S.-listed securities ("issuers"),[9] U.S.-based companies ("domestic concerns"),[10] and certain foreign persons and businesses while acting in the territory of the U.S. ("territorial jurisdiction").[11]

Notably, the FCPA Resource Guide expressly states that "[t]he FCPA prohibits payments to foreign *officials*, not to foreign *governments*."[12]

The August 14, 2020 DOJ Advisory Opinion

In 2017, an investment advisory firm (the "Firm") headquartered in the U.S. sought to purchase a portfolio of shares from a foreign subsidiary of a foreign investment bank (the "Bank"). The Bank is indirectly majority-owned by a foreign government, and most of the shares in the portfolio were owned by that government. In order to purchase the shares, the Firm sought and retained the services of a second foreign subsidiary of the Bank. When the Firm completed the purchase of the shares from the first subsidiary, the second subsidiary sought payment from the Firm for the services it had rendered.

Before making any payment, the Firm requested an advisory opinion from the DOJ[13] as to the lawfulness of such a payment under the FCPA. The DOJ concluded, on the facts provided, that the payment would not violate the FCPA.

Noting that "[t]he FCPA does not prohibit payments to foreign governments or foreign government instrumentalities,"[14] the DOJ cited three essential facts in support of its opinion that the payment did not warrant enforcement action:

1. The payment would be made to a subsidiary of the instrumentality, not to an individual.[15]
2. There was no indication that the payment was intended for, or would be diverted to, an individual, that it would be transferred to another entity, or that it was intended to corruptly influence a foreign official. To the

[8] *Id.*
[9] 15 U.S.C. § 78dd-1.
[10] 15 U.S.C. § 78dd-2.
[11] 15 U.S.C. § 78dd-3.
[12] FCPA Resource Guide, p. 19 (emphasis in original).
[13] *See* 28 C.F.R. §§ 80.1 *et seq.* (July 1, 1999).
[14] Release at p. 2.
[15] Release at p. 3.

contrary, the subsidiary had certified that the payment would remain with it and would be used for its general corporate purposes.[16]

3. The services provided by the subsidiary were specific and legitimate, and the payment was commercially reasonable, and commensurate with the services provided.[17]

Analysis

The DOJ noted that the opinion "has no binding application to any party other than" the requesting company. Nevertheless, the opinion is helpful in identifying the factors the DOJ considers relevant under the FCPA when U.S. domestic concerns and issuers engage in commercial activities with affiliates of instrumentalities of foreign governments. This information should be helpful not only to U.S. domestic concerns and issuers, but also to instrumentalities of foreign governments that may have to convince U.S. domestic concerns and issuers that, by agreeing to certain commercial terms, they are not running afoul of the FCPA.

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[16] *Id.*
[17] *Id.*

Please feel free to contact any of the persons listed below if you have any questions on this important development:

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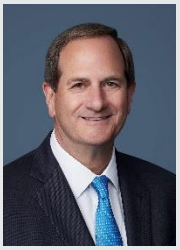

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