

CLIENT ALERT

Compliance in Focus: DOJ Issues First FCPA Advisory Opinion in Six Years - A Note of Caution and Practical Takeaways

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In an August 14, 2020 FCPA Opinion Release, DOJ confirmed that it would not prosecute a company for commercially reasonable payments made to a state-owned service provider in return for legitimate services rendered where there was no corrupt intent or diversion of money to any individual. The guidance arises from an inquiry by a U.S.-based investment advisor. The investment advisor sought to purchase assets from a subsidiary of a majority state-owned foreign investment bank. In connection with this transaction, the investment advisor received assistance from a different subsidiary of the state-owned investment bank, which sought compensation for its assistance with the successful purchase. DOJ confirmed that it did not intend to take enforcement action in relation to the payment under these circumstances, highlighting three factors key to its conclusion: (1) the payment would be made to a state-owned entity and not to any individual “foreign official”; (2) there were no red flags suggesting the payment would be diverted to any individual “foreign official”; and (3) the payment would be made in exchange for “specific, legitimate services” and is “commercially reasonable” in light of the services provided.

This guidance makes a critical distinction between payments to a state-owned entity and payments to a “foreign official,” but the application of this distinction is highly fact-specific. Companies should therefore be careful not to overinterpret this guidance and conclude that payments to government entities are less likely to result in enforcement action than before. In the discussion below, we highlight our take-aways as to how this most recent FCPA Opinion Release should be interpreted in practice.

Take-Away 1: Payments to State-Owned Entities Are Not Risk-Free

While payments to state-owned counterparties may not technically violate the anti-bribery provisions of the FCPA, U.S. authorities have taken enforcement action in relation to such payments under other provisions of the FCPA and federal criminal law. In addition, there is an inherent risk that a state-owned entity may divert funds to individual foreign officials. For this reason, such payments continue to raise significant corruption risks and should be carefully vetted and monitored.

Take-Away 2: Vetting the Commerciality of Third-Party Relationships Remains Critical

DOJ’s guidance did not turn entirely on the fact that the counterparty receiving the payment was state-owned. DOJ also highlighted the absence of evidence of corrupt intent and the fact that legitimate and valuable services were provided in exchange for a commercially reasonable payment. This guidance should serve as a reminder that, beyond reputational diligence and screening, companies must carefully vet the commercial terms of proposed relationships with third parties - including state-owned counterparties - to ensure that payment terms are commercially reasonable and that payments are made only in exchange for legitimate goods/services received.

Take-Away 3: The FCPA Opinion Release Procedure Remains a Valuable Tool

In the context of a fast-paced transaction, the substantial lag time between requesting an FCPA Opinion Release and receiving guidance can make an advisory opinion useless. Nevertheless, unlike the broader guidance available through the [2012 Resource Guide to the U.S. Foreign Corrupt Practices Act](#) (“FCPA Guide”) (updated in July 2020), an FCPA Opinion Release creates a rebuttable presumption that the conduct does not violate the FCPA if it is consistent with that guidance. The specificity and binding nature of an opinion release provides comfort not available through any other avenue. Thus, while the FCPA Opinion Release procedure has not been used frequently in recent years, it remains a valuable tool for assessing enforcement risk when confronted with novel and complex fact patterns in high-risk circumstances.

In summary, while the FCPA Opinion Release procedure seems to have fallen out of fashion with the advent of the FCPA Guide, it remains a useful resource for individuals and companies facing novel and complex circumstances that raise significant corruption risks. However, the guidance offered through this procedure should be construed narrowly. In that regard, this most recent guidance should be interpreted in practice as reinforcing the varied risks raised by commercial relationships with state-owned counterparties and the value of robustly vetting such relationships to ensure that they are commercially reasonable and otherwise free of any indicia of corruption.

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