Updates
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Rare DOJ Opinion Offers Anti-Bribery Lessons for Transactions Involving Foreign Government-Owned Assets

The U.S. Department of Justice (DOJ) has issued an opinion letter (catalogued as FCPA Opinion No. 20-01) stating that it does not intend to take enforcement action under the Foreign Corrupt Practices Act (FCPA) against a U.S.-based investment advisor planning to pay something akin to a "finder's fee" to a foreign state-owned investment bank. This opinion, issued on August 14, 2020, marks the first time in six years that the DOJ has issued guidance under the FCPA Opinion Procedure Regulations, a process by which companies can request the DOJ's formal opinion as to whether certain conduct conforms with its FCPA anti-bribery enforcement policies.

The opinion is noteworthy not only because it offers a rare insight into how the DOJ interprets business transactions with foreign government entities, but also because there are compliance takeaways that can be gleaned for other companies contemplating merger or acquisition activity involving assets owned by a foreign government.

Background

The investment advisor who requested the DOJ's opinion in this instance sought to purchase a portfolio of assets from the subsidiary of a majority foreign state-owned investment bank. The opinion refers to the subsidiary as "Country A Office." To help facilitate this acquisition, the U.S.-based investment advisor obtained assistance from another subsidiary of the foreign state-owned investment bank, "Country B Office." As described in the opinion, Country B Office provided various "legitimate and commercially valuable services" from approximately early 2017 until the acquisition was completed in February 2019. Once the acquisition closed, Country B Office sought a fee from the investment advisor, totaling 0.5% of the face value of the assets—$237,500—as compensation for its services.

Thus far, the transaction sounds like a typical acquisition, with the added wrinkle that a foreign government entity has an ownership interest in the targeted assets. But the opinion enumerates a couple of other nuances in the contemplated transaction that could have led to bumps in the road. First, the investment advisor never actually executed a contract with Country B Office agreeing to pay for its matchmaking services. Rather, the opinion footnotes the existence of a "non-binding draft agreement" that envisioned a fee for Country B Office of 0.5% of the face value of the assets. Second, after negotiations with Country A Office stalled out about a year into the discussions, the investment advisor engaged a local finance company, identified as the "Local Partner." It was the Local Partner who ultimately succeeded in closing the deal, not Country B Office.

Anti-Bribery Analysis

While there were some potential red flags with this transaction, it remained unclear to the investment advisor whether the contemplated payment to Country B Office would violate the FCPA. The investment advisor then decided to seek a formal opinion from the DOJ under the DOJ's FCPA Opinion Procedure, which enables "issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective--not hypothetical--conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act." *See* DOJ FCPA Opinion Procedure, Sec. 80.1 Purpose. In turn, the DOJ determined that this specific set of facts did not have the makings of a violation of the FCPA's anti-bribery provisions for at least three reasons:

1. The investment advisor planned to make a payment to Country B Office, and not to an individual. The FCPA's anti-bribery provisions prohibit U.S. companies from giving or offering anything of value to foreign government officials to obtain or retain business. But here, the planned payment was being made directly to Country Office B, rather than any individual officer or employee of a department, agency, or instrumentality of a foreign government.
2. The investment advisor represented to the DOJ that there was no indication that the payment would be diverted to a foreign government official or was intended to corruptly influence a foreign official.
3. The investment advisor represented that it received legitimate services from Country B Office and that the chief compliance officer of Country B Office had certified that the planned payment was commensurate with the service Country B Office had provided and was otherwise commercially reasonable.

Based upon the investment advisor's representations, the DOJ opined that it does not intend to take enforcement action in response to the investment advisor making the planned payment to Country B Office. Of course, the opinion has no weight of authority for other parties and can only be relied upon by the investment advisor to the extent that it provided accurate and complete factual representations to the DOJ.

Key Compliance Takeaways

While the DOJ opined that the investment advisor's contemplated payments do not violate the FCPA's anti-bribery provisions, the fact pattern provides the opportunity to examine best practices in transactions involving foreign government-owned assets, including the following:

- **Third-Party Due Diligence:** While not referenced in the opinion, third-party due diligence is an integral part of avoiding potential FCPA violations, especially when dealing with state-owned enterprises (SOEs). Transactions involving SOEs, whether as vendors (i.e., Country Office B) or counterparties (i.e., Country A Office), should undergo the highest level of due diligence to vet for potential red flags and bribery concerns.
- **Interdisciplinary Deal Teams:** Ensure there is an interdisciplinary deal team as part of cross-border M&A. The deal team should include compliance/white collar professionals to flag anti-bribery and corruption risks and to create deal checklists that capture appropriate compliance considerations.
- **Contractual Documentation:** After completing the due diligence process, third parties should be engaged to provide services on behalf of a company pursuant to a written, executed contract that includes key terms, such as the scope of work, payment terms, and duration of contract. Here, the opinion notes that the investment advisor had a draft, non-binding, agreement with Country B Office, but from a compliance perspective, that is not an ideal position to be operating from. The lack of a formal agreement with Country B Office may have been the cause of consternation that led to the investment advisor's perceived need to obtain a DOJ opinion. It is a best practice to keep track of deal documentation and signature hygiene throughout the deal lifecycle. Liability for broker relationships can attach from conversations alone. In scenarios such as this one, the compliance posture hinged on a preexisting agreement that could be documented.
- **SEC Compliance:** Public companies should be mindful of the Sarbanes Oxley Act of 2002 (SOX) implications with respect to the disclosure of their policies on cross-border transactions. For example, pursuant to Section 406 of the SOX, the SEC has adopted rules requiring annual disclosure of an investment company's code of ethics applicable to its principal executive, principal financial, and principal accounting officers. As these are the officers who are typically involved in the highest level M&A

discussions, the policies on cross-border transactions should be included in the code of ethics as applicable to these officers.

- **Payment Recipient:** The opinion notes that the investment advisor's contemplated payment was to Country B Office rather than any individual foreign government official. That fact—coupled with the investment advisor's representations that the payment was not being made for a corrupt purpose—were the key underpinnings of the DOJ's opinion. However, it is important to note that the recipient of the payment is not always outcome determinative. For instance, in 2004, Schering-Plough consented to a cease-and-desist order with the U.S. Securities and Exchange Commission (SEC) for FCPA books and records and internal controls violations stemming from purported charitable contributions made to a Polish foundation. In that case, the SEC alleged the donations were made to curry favor with a government official who served as the president of the foundation. Notably, the DOJ's opinion here to the investment advisor would not bind the SEC should it have cause to pursue a book and records violation related to the payment to Country B Office. *See* DOJ FCPA Opinion Procedure, 80.11, Effect of FCPA Opinion ("an FCPA Opinion will not bind or obligate any agency other than the Department of Justice").

A strong compliance program with effective internal controls is integral to avoiding potential FCPA violations. Companies engaging in cross-border M&A should review internal ethics policies to make sure that they address their applicability in such transactions. While the DOJ ultimately declined to find that the contemplated payment would violate the anti-bribery provisions of the FCPA under the fact pattern provided by the investment advisor here, the circumstances serve as a timely reminder to review existing compliance programs. An effective compliance program will evaluate FCPA risks, as well as the propriety of transactions and potential third-party agents before they act on behalf of the company, especially where the third party is a government agency or a state-owned enterprise. Companies contemplating merger or acquisition transactions involving foreign government-owned assets should be prepared for an additional level of scrutiny, as underscored by this opinion.

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