No.: 10-03

Date: September 1, 2010

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has reviewed the Foreign Corrupt Practices Act ("FCPA") Opinion request of a U.S. limited partnership (the "Requestor") that was submitted on March 9, 2010, along with supplemental information submitted by the Requestor, most recently on August 2, 2010. The partnership is a "domestic concern" within the meaning of the FCPA and thus eligible to request an Opinion of the U.S. Attorney General, pursuant to 28 C.F.R. Section 80.4, regarding whether certain specified, prospective — not hypothetical — conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the FCPA. The Requestor represents that the facts and circumstances are as follows.

Relevant Facts and Circumstances

The Requestor, a limited partnership established under U.S. law and headquartered in the United States, is a "domestic concern" within the meaning of the FCPA and is engaged in development of natural resources trading and infrastructure. The Requestor is pursuing an initiative with a foreign government regarding a novel approach to particular natural resource infrastructure development. Because the approach is relatively novel and the market is dominated by a consortium of established companies, the Requestor determined that it required assistance in entering into discussions with the foreign government.

The Requestor plans to contract with a consultant (referred to herein as the "Consultant") and its sole owner to assist it. Consultant is a U.S. partnership, and its owner is a U.S. citizen. The Consultant, which has extensive contacts in the business community and the government in the foreign country, has previously and currently holds contracts to represent the foreign government and act on its behalf, including performing marketing on behalf of the Ministry of Finance, and lobbying efforts in the United States. The Consultant is a registered agent of a foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq*. ("FARA"). The Consultant has represented ministries of the foreign government that will play a role in discussions of the Requestor's initiative. The Consultant will be paid a signing bonus by the Requestor at the time the consulting contract is signed, but the bulk of any payment by the Requestor to the Consultant under the contract will come in the form of success fees, should the Consultant's efforts result in the foreign government entering into a business relationship with the Requestor.

In light of the Consultant's prior role in representing the foreign government, and because the Consultant will continue to represent the foreign government subsequent to becoming a

consultant for the Requestor, the following safeguards have been put in place to ensure that no conflict of interest would arise between the Consultant's representation of the Requestor and the Consultant's separate and unrelated representation of the foreign government:

- For the duration of the consultancy, the owner of the Consultant will cease to lobby on behalf of the foreign government, although other employees of the Consultant will continue to represent the foreign government in the United States under FARA;

- Those working on lobbying efforts for the foreign government will be walled off from the representation of the Requestor;

- Neither the Consultant nor its owner represents the foreign government in any respect beyond the current contractual arrangements between the Consultant and the foreign government already disclosed to the Requestor, nor will any additional representation of the foreign government be undertaken for the duration of the consultancy;

- Neither the owner nor the Consultant have any decision-making authority on behalf of the foreign government;

- As a matter of local law, the Consultant and its employees are not employees or otherwise officials of the foreign government, and the Requestor has secured a local law opinion that it is permissible for the Consultant to represent both the foreign government and the Requestor at the same time;

- The proposed contract requires that the Consultant confirm that none of its employees or other individuals affiliated with the Consultant are foreign officials and that no employee or associated individual will become a foreign official during the term of the agreement;

- The arrangement will be disclosed to the Ministry of Finance of the foreign government;

- The Consultant and its owner will be required to secure the Requestor's written advance approval to contact or take other material action with respect to the foreign government's officials; and

- The Consultant and its owner will commit that they will not represent or have any other business relationship with the foreign government in connection with the project, nor will the Consultant and its owner work or communicate with the foreign government in any respect that is outside the scope of the services that they are providing to the Requestor under the agreement, with the exception of those communications related to the ongoing representation of the foreign government discussed above.

Analysis

The Department does not intend to take any enforcement action with regard to payments made to the Consultant under the proposed consultancy arrangement, as amended, for the reasons that follow.

The Department has in the past considered proposed business arrangements with individuals who act on behalf of foreign governments under the Opinion Procedure. Notably, the FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials. In such cases, the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal.

In the following instances, with appropriate protections, the Department issued favorable Opinion Releases with respect to business arrangements with foreign officials:

- In FCPA Opinion Release 80-02 (Oct. 29, 1980), the Department stated its lack of enforcement intent with regard to an employee of a foreign subsidiary of a U.S. corporation who planned to run for political office, because the employee would fully disclose his continuing relationship with the corporation to his political party, the electorate, and the government, and the employee would refrain from participating in any legislative matter or other governmental action that would affect the corporation.

- In FCPA Opinion Release 82-02 (Feb. 18, 1982), the Department stated its lack of enforcement intent when a U.S. firm proposed paying a "finder's fee" to a Nigerian citizen who was employed in Nigeria's foreign consulate because, among other things, the work to be performed for the firm was in no way related to the Nigerian citizen's governmental duties, and the contract between the firm and the Nigerian citizen contained adequate FCPA safeguards under the circumstances.

- In FCPA Opinion Release 86-01 (July 18, 1986), the Department stated its lack of enforcement intent in response to three requests from U.S. corporations that sought to employ foreign Members of Parliament ("MPs"), because the MPs agreed to fully disclose their representation relationships, not to vote or conduct any other legislative activity for the benefit of the corporations, and not to use their influence as MPs to benefit the corporations.

- In FCPA Opinion Release 94-01 (May 13, 1994), the Department stated its lack of enforcement intent regarding a U.S. company's proposal to hire a foreign official to provide consulting assistance, because, among other things, the official disclosed the proposed consulting activities to his state employer, agreed to abide by all applicable

reporting and disclosure laws, and agreed to several measures designed to prevent him from using his official influence to benefit the U.S. company.

The FCPA defines the term "foreign official" 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 an 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." 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added). In the instant case, because the Consultant is an agent of the foreign government, there are situations in which the Consultant has and will act *on behalf of* the foreign government, which could in certain circumstances render the Consultant and its employees "foreign officials" for purposes of the FCPA. However, in the circumstances described above, the Department is satisfied that for purposes of the contract with the Requestor, the Consultant and its owner are not acting on behalf of the foreign government and therefore are not foreign officials. The steps taken to wall off the employees working on the various representations from each other, the full disclosure of the relationships to the relevant parties, the permissibility of the relationships under local law, and the contractual obligations to limit further representation of the foreign government by the Consultant are sufficient to ensure that the Consultant will not be acting on behalf of the foreign government in performing the consulting contract with the Requestor. Thus, the Consultant is not a foreign official as defined by the FCPA, 15 U.S.C. § 78dd-2, and the Department would not take enforcement action based solely on payments to the Consultant.

Based on the representations made by the Requestor in its request and recited above, as well as the Department's review of supplemental materials submitted by the Requestor, the Department does not presently intend to take enforcement action with respect to the proposed payments to the Consultant described in this request. However, the Department notes that its opinion is limited to the narrow question of whether the Consultant would be a "foreign official" for purposes of the payments under the consulting contract. The Department does not opine on any other aspect of the proposed contract or any other prospective conduct involved in the Request. Indeed, while the Consultant is not a foreign official for FCPA purposes under the limited facts and circumstances described by the Requestor, the proposed relationship increases the risk of potential FCPA violations. This opinion does not foreclose the Department from taking enforcement action should an FCPA violation occur during the execution of the consultancy.

This FCPA Opinion Release has no binding application to any party that did not join in the request, and can be relied upon by the Requestor only to the extent that the disclosure of facts and circumstances in its request is accurate and complete.