

**No. 22-1**

**Date: January 21, 2022**

**Foreign Corrupt Practices Act Review**

**Opinion Procedure Release**

The Department reviewed the Foreign Corrupt Practices Act (“FCPA”) Opinion request of a U.S.-based company (“Requestor”). The Request was submitted on October 19 and 20, 2021 (the “Request”). In light of the unusual and exigent circumstances presented by this Request, including the risk of imminent harm to the health and well-being of the individuals noted in the Request, the Department provided Requestor with a short preliminary opinion on October 21, 2021.<sup>1</sup> On November 19 and December 21, 2021, Requestor provided additional information in response to questions from the Department.

Requestor is a “domestic concern” under 15 U.S.C. § 78dd-2(h)(1) and therefore is eligible to request an Opinion of the U.S. Attorney General, pursuant to 28 C.F.R. § 80.4, regarding whether certain specified, prospective — not hypothetical — conduct conforms with the Department’s present enforcement policy regarding the anti-bribery provisions of the FCPA.

### **Background**

The facts at issue in this Request arose from the detention by Country A naval forces of the captain and crew of a maritime vessel owned by Requestor (the “Requestor vessel”). The Requestor vessel was seeking to anchor in international waters while awaiting entry into the port of Country B in order to undergo required maintenance and to renew technical maritime certificates. When the Requestor vessel arrived in Country B, one of Requestor’s shipping agents advised the captain that the Country B ports were fully occupied and the Requestor vessel would need to anchor outside of Country B for two weeks. The shipping agent gave incorrect anchoring coordinates to the captain, which led the captain to anchor in Country A’s waters inadvertently.

The Country A Navy intercepted the Requestor vessel and directed it into a Country A harbor, where the Country A Navy confiscated the Requestor vessel’s logbook and officers’ and crew’s documents and told the captain that he would be detained for questioning ashore, while the crew members and officers were ordered to remain on board the ship. Once onshore, the captain

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<sup>1</sup> The preliminary opinion stated: The Department of Justice (the “Department”) has received the Foreign Corrupt Practices Act (“FCPA”) Opinion request of [Requestor], submitted on October 19 and 20, 2021 (the “Request”). Due to the highly unusual and exigent circumstances identified in the Request, including the risk of imminent harm to the health and well-being of the individuals noted therein, the Department provides this preliminary response in complete reliance upon the accuracy of representations made by [Requestor] and its agents. Based upon all of the facts and circumstances, as represented by [Requestor] in the Request, the Department does not presently intend to take an enforcement action under the FCPA’s anti-bribery provisions in response to the contemplated payment referenced in the Request. A full response to the Request will be forthcoming in accordance with the FCPA Opinion Procedure, 28 C.F.R. part 80, following further evaluation of additional information and responses to requests for information that were sent to you on October 20, 2021, as well as possible additional questions and requests, all of which you have committed to providing.

was detained in jail without being questioned or provided any documentation authorizing his arrest or detention. An incident report by the Country A Navy notes that the Requestor vessel was in Country A waters in violation of various laws and treaties. Requestor has provided information and documentation showing that the captain was at that time suffering from serious medical conditions that would be significantly exacerbated by the circumstances and conditions of his detention and created a significant risk to his life and well-being.

Shortly following the detention of the captain onshore and of the crew onboard the Requestor vessel, a third party purporting to act on behalf of the Country A Navy (the “Third-Party Intermediary”) approached Requestor and demanded a financial payment to release the captain and to permit the crew and the vessel to leave Country A waters.

To engage with the Third-Party Intermediary, Requestor retained the services of an agent (“Requestor Agent”) with which Requestor was familiar from previous work and on which Requestor had recently conducted due diligence. Requestor and Requestor Agent repeatedly asked the Third-Party Intermediary to provide a formal basis for the payment — such as an invoice or other documentation setting forth charges or an enumerated fine amount — to ensure that the payment would be made pursuant to a fine or other penalty resulting from a legal or regulatory violation, if any. This request was repeatedly rejected by the Third-Party Intermediary. Requestor also sought the assistance from other agencies within the U.S. government to end the captain’s detention and permit the Requestor vessel and its crew to leave Country A expeditiously. Requestor also requested that those agencies notify relevant Country A authorities of the detention of the captain and crew, and the confiscation of the Requestor vessel.

None of those avenues bore fruit. Instead, the Third-Party Intermediary told Requestor Agent and Requestor that to resolve the matter expeditiously and obtain the release of the captain, the vessel, and the crew, Requestor needed to make a payment in cash of \$175,000 to the Third-Party Intermediary imminently; otherwise the captain and the crew members would be detained for a longer period of time and the vessel would be seized.

Although the Third-Party Intermediary represented the payment to be an official payment to the government of Country A, 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. The Request seeks an Opinion as to whether the Department, based on the facts and representations provided by Requestor regarding the demanded cash payment, would presently intend to bring an enforcement action under the FCPA’s anti-bribery provisions against Requestor if the Company were to make such payment to the Third-Party Intermediary.

### **Analysis**

Based on the specific facts presented by Requestor, the proposed payment would not trigger an enforcement action under the anti-bribery provisions of the FCPA because Requestor would not be making the payment “corruptly” or to “obtain or retain business.” The FCPA prohibits, *inter alia*, any domestic concern from corruptly giving or offering anything of value to any “foreign official” to assist “in obtaining or retaining business for or with, or directing business to, any person.” 15 U.S.C. § 78dd-2(a). “Corruptly” means an intent or desire to wrongfully

influence the recipient. The “business purpose” test of the FCPA is met where the purpose of the payment or offer is to assist in obtaining and retaining business.<sup>2</sup>

The facts presented by Requestor demonstrate that the proposed payment would not be made with corrupt intent. Based on the information from Requestor, the primary reason for the payment was to avoid imminent and potentially serious harm to the captain and the crew of the Requestor vessel.<sup>3</sup> Under the FCPA, “[a] person acts corruptly if he acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result or a lawful result by some unlawful method or means. The term ‘corruptly’ is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position.” *United States v. Kozeny*, 667 F.3d 122, 135 (2d Cir. 2011). Conversely, “an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA. Federal criminal law provides that actions taken under duress do not ordinarily constitute crimes.” *United States v. Kozeny*, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008); *see also* Crim. Div. of the U.S. Dept. of Justice and the Enf’t Div. of the U.S. Sec. and Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 27 (2d ed. 2020), available at <https://www.justice.gov/criminal-fraud/file/1292051/download> (hereinafter, “Resource Guide”) (“Situations involving extortion or duress will not give rise to FCPA liability because a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business.”).

Moreover, based upon the information provided, the payment is not motivated by an intent to obtain or retain business. 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. In so doing, it is possible that Requestor inadvertently violated Country A, and perhaps other, regulations and laws governing shipping routes and anchoring locations. It is this error that triggered the payment demand by the Third-Party Intermediary. Rather than conceal the payment demand, Requestor engaged with various U.S. government personnel and requested proper documentation from the Country A government setting forth the alleged violation and appropriate fine.<sup>4</sup> Only when none of these efforts bore fruit, and Requestor was told that the only way to secure the safe and prompt release of the captain and crew was through a payment of \$175,000 in cash, did Requestor consider making such payment and submit the FCPA Opinion

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<sup>2</sup> *See* H.R. Rep. No. 100-576, at 1951-52 (In amending the FCPA in 1988, Congress noted on the business purpose of the FCPA that “the reference to corrupt payments for ‘retaining business’ in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.”).

<sup>3</sup> Among other things, Requestor described the conditions of the captain’s detention, including the lack of medical treatment and medical equipment necessary to manage the captain’s serious medical condition, thus creating a serious and imminent threat to his health, safety, and well-being.

<sup>4</sup> 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 Guide. *See* p. 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.”).

Request. Put simply, under the specific facts presented by Requestor, there does not appear to be a sufficient business purpose associated with the payment — and relatedly, there is a lack of a corrupt intent under the FCPA.

The situation at hand is thus readily distinguishable from other situations in which a company is threatened with severe economic or financial consequences in the absence of a payment. As noted in the Resource Guide, when enacting the FCPA, Congress explained that “[t]he defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe.” *Resource Guide* at 27-28, quoting S. Rep. No. 95-114, at 10-11. The fact that the payment was “first proposed by the recipient...does not alter the corrupt purpose on the part of the person paying the bribe.” *Id.* In contrast, payments under circumstances that companies may perceive as economically coercive, especially in countries in which they are in historical, pending, ongoing, anticipated, or sought after business relationships with government actors may well give rise to liability under the FCPA.

Finally, this Opinion is limited to an analysis of whether the payment at issue would trigger an enforcement action under the FCPA’s anti-bribery provisions. Beyond this narrow analysis, the Department offers no view on the permissibility or legality of the payment under any other laws, including the laws of Country A.

This FCPA Opinion Release has no binding application to any party other than Requestor and can be relied on by Requestor only to the extent that the disclosure of facts and circumstances in its Request and supplemental information is accurate and complete.