

OUTSIDE COUNSEL

BY MICHAEL J. GILBERT AND WILLIAM GIBSON

FCPA 'Opinion Requests' Key in Enforcement Barrage

Early this year, a Fortune 500 company headquartered in the United States faced a dilemma that is becoming more common in the world of mergers and acquisitions as the globalization of the economy continues.

The company was considering acquiring a controlling position in a foreign company. In the course of careful due diligence, the company became concerned that, instead of acquiring a profitable business, it might be “buying” a significant problem under the U.S. Foreign Corrupt Practices Act (FCPA).¹

Instead of cancelling the transaction (or moving forward and assuming the risk), however, the company utilized an important, but often overlooked, provision of the FCPA. It obtained an “Opinion Release” from the Department of Justice (DOJ), stating that, based on the facts presented, DOJ did not intend to pursue an FCPA case. Remarkably, the company was able to obtain the comfort of this “Opinion Release” within days of requesting it, even though the facts presented were quite complex. This allowed the company to move forward with the transaction.

The Dilemma

The company, or, in the parlance of the FCPA, the Requestor, intended to purchase a majority position in the foreign company



Michael J. Gilbert

William Gibson

(the Target), which was partially owned by a foreign government. In order to complete the acquisition, the Requestor would need to pay a significant “control premium” to the Target’s minority owner (hereinafter, Foreign Company Owner). The Foreign Company Owner, at the time of the planned transaction, was the General Manager of the Target. The Requestor believed that, because the Foreign Company Owner was the General Manager of a government-majority-owned business, the Foreign Company Owner would be considered a “foreign official” under the FCPA, and that any payment to the Foreign Company Owner (particularly, the “control premium”) could violate the FCPA.

Foreign Corruption Still a Priority

The FCPA, enacted in 1977, outlaws bribery of foreign officials by U.S. persons or companies, foreign companies whose shares are traded on U.S. exchanges and foreign businesses if the bribery is directed by U.S. persons² or any act in furtherance of the bribery takes place in the United States. The act makes it a crime to “corruptly” offer any payment to a foreign official “in order to assist...in obtaining or retaining business.”³

It also contains a “books and records” provision—applicable to U.S. “issuers” that requires a company’s books and records to reflect accurately and fairly transactions and dispositions of assets, and requires adequate internal accounting controls.⁴

Recent years have been the most active in the history of FCPA enforcement. The current high-water mark for FCPA penalties is a combined \$44 million penalty announced in April 2007 against oil-field services company Baker Hughes Inc. (and a subsidiary company) in connection with bribery of government officials in Kazakhstan.⁵

Enforcement activity is likely to continue to increase. The DOJ has recently assigned a group of FBI agents to work exclusively on FCPA matters. Recent investigations have been notable for the level of cooperation between U.S. law enforcement and foreign prosecutors. In addition, civil lawsuits focusing on FCPA violations have been filed with more frequency.

FCPA Opinion Procedure Releases

• **An Increasingly Attractive Option.** Although the opinion process receives little attention, the FCPA permits any person or company subject to the FCPA to ask the DOJ, in advance, whether it would prosecute proposed conduct. “The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the [FCPA anti-bribery provisions].”⁶ The statute provides that “there shall be a rebuttable presumption that conduct, which is specified in the request by an

Michael J. Gilbert is a partner in the litigation department of Dechert and a member of Dechert’s white-collar litigation group.

William Gibson is an associate in Dechert’s white collar and securities litigation group.

issuer and which the attorney general has issued an opinion that such conduct is in conformity with [the DOJ's] present enforcement policy, is in compliance with [the FCPA]."⁷

The procedure for obtaining an Opinion Release is spelled out in the Code of Federal Regulations. It is important to note that the DOJ requires that the proposed transaction "must be an actual, not a hypothetical, transaction."⁸ The requestor is required to provide all relevant and material information bearing on the proposed conduct "including background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings."⁹ Crucially, the requestor "is under an affirmative obligation to make full and true disclosure with respect to the conduct for which an opinion is requested."¹⁰

While the effort involved in obtaining an Opinion Release should not be minimized—a requestor (or its counsel) will likely be required to review documents, interview key players, perform an extensive background check on relevant entities and persons, and familiarize itself with applicable local law—the clarity provided by an Opinion Release can allow a company to move forward with a tricky transaction with confidence.

Dilemma Resolved

In the case described above, after engaging in extensive due diligence (including several meetings with foreign government agencies to ensure that they approved of the transaction) the Requestor decided that the risk was sufficient to justify an application for an Opinion Release. Due to tight deadlines imposed by the foreign government, time was of the essence. The Requestor submitted its request on Jan. 2, 2008, seeking an expedited review. The DOJ, moving with admirable speed, completed its review and issued Opinion Release No. 08-01 just 13 days later, on Jan. 15.

The Opinion Release stated that the

DOJ did not intend to take any action if the Requestor followed through with its planned transaction. The DOJ gave the following reasons for its view: the extensive due diligence, with specific focus on FCPA compliance, conducted by the Requestor; the transaction was fully vetted by the foreign government; the Requestor would obtain FCPA-specific warranties from the Foreign Company Owner regarding anti-corruption compliance; and the Requestor, as part of the acquisition contract, will maintain the right to terminate its agreement if FCPA violations are discovered post-closing.

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Lessons

While the DOJ's blessing of a proposed transaction is only binding on the requesting party, Opinion Release No. 08-01 presents several useful lessons for any company engaged in transactions overseas. First, the timeliness of the DOJ's response seems to indicate a willingness on the part of the department to work with companies that approach it before a transaction has closed. Second, the DOJ clearly approved of the remarkable level of due diligence conducted by the Requestor. Third, the DOJ apparently agreed with the Requestor's view (and disagreed with the foreign government's view) that the Foreign Company Owner, as General Manager of an entity majority-owned by a government, was himself

a "government official" under the FCPA. Finally, the opinion's description of the contract executing the transaction, with its warranties and remedial provisions in the event of compliance problems, may serve as a useful guide for other companies entering transactions that pose similar problems.

FCPA issues can be complicated and lead to significant uncertainty. Too often companies and their counsel, faced with a potentially problematic transaction, take on themselves the unnecessary burden of predicting the government's eventual view of the situation. Instead, they should consider simply asking.

1. See Foreign Corrupt Practices Opinion Release No. 08-01, available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf>.

2. 15 U.S.C. §78dd.

3. 15 U.S.C. §78dd-1(a).

4. 15 U.S.C. §78m(b)(2).

5. *United States v. Baker Hughes* (S.D. Tex. 2007) (Deferred Prosecution Agreement of April 11, 2007); *SEC v. Baker Hughes Incorporated and Fearnley*, Case No. H-07-cv-1408 (S.D. Tex.) (Complaint filed April 26, 2007).

6. 15 U.S.C. §78dd-1(e).

7. *Id.*

8. 20 C.F.R. 80.3.

9. 20 C.F.R. 80.6.

10. *Id.*