

## **Opinion Release 10-02 and Charitable Donations under the FCPA**

What is a company to do if, in order to obtain a contract with a foreign government, they must agree to invest a percentage of the proceeds of the transaction into the community in which it operates as a “charitable donation”? This is negotiated with the foreign government and can include cash or in-kind contributions of computers, equipment or appliances to schools, communities or organizations.

While not a payment to a governmental official, it is still a payment to a governmental entity for the purpose of securing a lucrative contract and requires careful consideration. This spectra is currently required in some countries by law and these payments have generated some questions with regard to compliance with the Foreign Corrupt Practices Act (FCPA) as such donations could be interpreted as corruptly giving or offering anything of value to any “foreign official” in order to assist “in obtaining or retaining business for or with, or directing any business to, any person . . . .” 15 U.S.C. § 78dd-2(a)(1).

This past week the Department of Justice (DOJ) published its second FCPA Opinion Procedure Release of 2010, 10-02. The release dealt with a US based micro financial institution (MFI) operating in an unnamed Eurasian country. This MFI desired to convert its local operations from a “humanitarian status” to a commercial status. The relevant government licensing authority in the country in question required that as a condition precedent to obtaining this commercial license, the MFI would be required to make a substantial grant to some other local MFIs, providing a list of one or more that the US MFI could choose. The US MFI was concerned that by making such a donation a condition precedent and specifying the list of local MFIs to which the donation could be made, the US MFI could run afoul of the FCPA’s proscription of “corruptly giving or offering anything of value to any foreign official” in order to assist “in obtaining or retaining business for or with, or directing any business to, any person . . . .”

In stating that the DOJ “does not intend to take any enforcement action with regard to the proposed transaction” the Opinion Release specified the three levels of due diligence that the US MFI had engaged in on the proposed locals MFIs which were listed as eligible to receive the funding. The DOJ noted that [it] “is satisfied, however, that the Requestor has done appropriate due diligence and that the controls that it plans to institute are sufficient to prevent FCPA violations. As noted above, the Requestor [US MFI] conducted three rounds of due diligence. The controls that the Requestor proposes would ensure with reasonable certainty that the grant money from the Eurasian Subsidiary would not be transferred to officials of the Eurasian country.”

In addition to the specific discussion of the due diligence performed by the US MFI and noting the controls it had put in place after the funding was scheduled to be made the DOJ also listed several of the due diligence and/or controls that it had previously set forth in prior Opinion Releases relating to charitable donations. These included:

- certifications by the recipient that it will comply with the requirements of the FCPA;
- due diligence to confirm that none of the recipient's officers or directors are affiliated with the foreign government at issue;
- a requirement that the recipient provide audited financial statements;
- a written agreement with the recipient restricting the use of funds to humanitarian or charitable purposes only;
- steps to ensure that the funds were transferred to a valid bank account;
- confirmation that contemplated activities had occurred before funds were disbursed; and
- ongoing auditing and monitoring of the efficacy of the program.

Opinion Release 10-02 provides a wealth of information to the FCPA practitioner and compliance counsel. It gives specific guidance on the levels of due diligence that a US company should go through when investigating a charitable institution selected, or suggested by a foreign governmental official, to be the recipient of a company's charitable donations. Further it lists the controls that a US company can and should put in place, should it determine that a charitable donation is to be made. In short Opinion Release 10-02 gives significant guidance in pre-donation due diligence investigation, evaluation and post donation monitoring going forward to manage the process. Opinion Release 10-02 is a very large and helpful educational tool in the FCPA compliance arena. We welcome its release.

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