

Opinion Release 11-01: Lessons Learned on the Opinion Release Procedure

As most of the readers of this blog will recall, I recently discussed the substance of Opinion Release 11-01 and had some additional comments regarding the relative ease by which a lawyer or compliance office should have been able to research the question posed. I also opined that the issue posed in Opinion Release 11-01 was not a question which needed to be submitted to the Department of Justice (DOJ) for comment upon, as it was a waste of the DOJ's resources and no doubt had a high cost in time and/or dollars for either an in-house lawyer or outside counsel to formulate and submit.

However my "*This Week in the FCPA*" colleague, Howard Sklar, speaking in our Episode 12, suggested that there might be another aspect to this specific Opinion Release that I had not considered. While I had discussed the above points from the perspective of an outside counsel, in-house lawyer or compliance office who specialized in FCPA compliance work; the Opinion Release Procedure is designed so that any person or company may submit a query to the DOJ. Howard suggested that the Opinion Release Procedure could be utilized by a company which does not have either an in-house compliance practitioner or even a General Counsel. A question can be submitted to the DOJ as straight forwardly as with a one page document setting forth the information required under the Opinion Release Procedure.

In his testimony before the House Judiciary Committee, DOJ Representative Greg Andres spoke about the Opinion Release Procedure as one of the mechanisms by which the DOJ can not only bring transparency to the area of information relating to Foreign Corrupt Practices Act (FCPA) but also can allow businesses with substantive questions seek and receive specific answers to queries regarding factual scenarios which they may face. So what are the requirements under the Opinion Release Procedure? Initially I would note that DOJ has posted on its website, the Foreign Corrupt Procedures Opinion Procedure, (28 C.F.R. part 8).

The stated purpose of the Opinion Procedures is "*These procedures enable 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 [FCPA]*" (§80.1). The requirements of the Opinion Release Procedure are (1) the submission must be in writing; (2) an original and copies must be provided; and (3) must be sent to address provided. (§80.2) In addition to these specific requirements there are certain general requirements listed. (§80.6) They include that complete copies of all operative documents and detailed statements of all collateral or oral understandings. The request must be signed by an appropriate senior officer.

While there is additional language in the Opinion Release Procedure that it only relates to the query submitted to the DOJ, does not bind any other agency or department and can change if different facts occur or that the DOJ can ask for additional information from the party making the request, it is required under the terms of the Opinion Request Procedure "*within 30 days after*

receiving a request that complies with the foregoing procedure, respond to the request by issuing an opinion that states whether the prospective conduct, would, for purposes of the DOJ's present enforcement policy, [violate the FCPA]." (§80.8)

So there may be an addition Lesson Learned from Opinion 11-01. This lesson is that the Opinion Release Procedure can be straight forward. The DOJ can be available to assist in interpreting the FCPA based upon the facts and circumstances which a company faces in the real world. I have argued for greater transparency by the DOJ in providing information for companies and the compliance practitioner and the Opinion Release Procedure is one of the mechanisms by the DOJ does provide transparency and information.

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