

Compelled Giving and the FCPA

Our recent post on charitable donations under the FCPA and Opinion Release 10-02 brought an interesting dialogue with our blog colleague, the FCPA Professor. The FCPA Professor raised the issue of “*compelled giving*” disguised as a requirement that a US company doing business overseas make a charitable donation with the implicit understanding that such requirement is mandated to obtain or retain business by a foreign governmental official and how such payments would be viewed under the FCPA. We believe that the underlying facts of Opinion Release demonstrate that the Department of Justice (DOJ) has recognized that *compelled giving* is a situation that is faced by US companies doing business overseas, if not on a regular basis, certainly one that is not unknown.

In Venezuela energy service contracts with PDVSA, the national oil company, requires that the foreign company must agree to invest an established set percentage of the profits from each contract into the community in which it operates. This is negotiated with the Venezuelan government and can include cash or in-kind contributions of computers, equipment or appliances to schools, communities or organizations. This requirement may also be present in contracts for infrastructure opportunities including communications and transportation.

Although it is legal and a practice required in Venezuela by law, these payments have generated some questions with regard to compliance with the FCPA and similar laws of other countries. While not a payment to a governmental official, it is still a payment to a governmental entity for the purpose of securing a contract. It may also be that a governmental official sits on the Board of the local charity in question. Such issues require careful consideration.

There appears to be only one FCPA enforcement action based entirely upon charitable giving. It is the case of Schering-Plough Poland which paid a \$500,000 civil penalty assessed by the Securities and Exchange Commission (SEC) in 2008. As reported in the FCPA Blog, the Company’s Polish subsidiary made improper payments to a charitable organization named the Chudow Castle Foundation, which was headed by an individual who was the Director of the Silesian Health Fund during the time period in question. Schering-Plough is a pharmaceutical company and the Director of the Health Fund provided money for the purchase of products manufactured by Schering-Plough as well as influencing medical institutions, such as hospitals, in their purchase of pharmaceutical products through the allocation of health fund resources. In addition to the above, the SEC found that Schering-Plough did not accurately record these charitable donations on the company’s books and records.

The FCPA Blog further reported that then Deputy Chief of the Criminal Division’s Fraud Section at the Department of Justice, Mark Mendelsohn, when asked about the guidelines regarding requests for charitable giving and the FCPA, said that any such request must be evaluated on its own merits. He advocated a “common sense” approach in identifying and clearing *Red Flags*. This would include determining if a governmental

decision maker held a position of authority at the charity to which the donation would be made, whether the donation was consistent with a company's overall pattern of charitable giving, who made the request for the donation and how was it made.

The series of *Red Flags* was raised and cleared by the US company which was the subject of Opinion Release 10-02. After initially listing the 3 levels of due diligence in which the US company had engaged prior to finalizing its choice of local entity to receive the donation in question; the DOJ noted that the donation 'requested' of the US company would be subject to the following controls:

1. Payments of the donations would be staggered over a period of eight quarters rather than in one lump sum.
2. Ongoing monitoring and auditing of the funds use for a period of five years. .
3. The donations would be specifically utilized for the building of infrastructure.
4. The funds would not be paid to the parent of the organization receiving the grant and there was an absolute prohibition on compensating Board Members.
5. The proposed grant agreement under which the funds would be donated had significant anti-corruption provisions which included a requirement that the local organization receiving the funds adopt an anti-corruption policy and that US company making the donation receive full access to the local organization's books and records.

Both the underlying due diligence and the controls noted above led the DOJ to state, "The Department 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."

In addition to the specific factors presented by the requesting US company in Opinion Release 10-02, 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.

We believe that Opinion Release 10-02 addresses some of the concerns of US companies in the area of *compelled giving*; particularly in view of the enforcement action involving Schering-Plough. The DOJ once again, has indicated that extensive due diligence, coupled with the best practices in compliance management going forward after the contract is executed, appear to be critical in its analysis. We also wish to thank our blog colleague the FCPA Professor for his timely and pointed questions which raised our further interest in this area.