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FOUR KEY TAKEAWAYS FROM DOJ ADVISORY OPINION CLARIFYING EXTORTION EXCEPTION TO FCPA

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In a rare Foreign Corrupt Practices Act [advisory opinion](#), the Department of Justice recently clarified that a payment made by a U.S. company to a foreign country through a third-party intermediary in response to an extortionary demand does not necessarily violate the statute. While the specifics of this situation are unique, both the details of DOJ's opinion and the way in which DOJ handled the request may be instructive for compliance officers, in-house counsel, and the FCPA bar.

The facts according to DOJ are as follows. In October 2021, a maritime vessel owned by a U.S. company inadvertently sailed into the territorial waters of Country A while in the process of anchoring outside a port in Country B. Apparently, the vessel's captain had received incorrect anchoring coordinates which led to the error. Upon the vessel's entry in Country A's waters, it was intercepted by a Country A naval vessel and was directed to a port in Country A where the captain was taken ashore and jailed. Compounding the situation was the fact that the captain was, at the time, suffering from serious medical conditions that were exacerbated by the circumstances and created a significant risk to his well-being.

Shortly after the captain's detention, a third-party purporting to be acting on behalf of Country A contacted the company that owned the vessel and demanded a monetary payment to secure the release of the captain and allow the vessel to leave Country A. To engage with this third-party, the company retained the services of an agent with whom the company had worked previously after conducting appropriate due diligence. Despite repeated requests by the agent to the third-party for an invoice or other documentation detailing the reason for the payment, none was provided. Although the third-party represented that the demanded payment would be an official payment to Country A, the totality of the circumstances caused the company to seek an opinion from DOJ as to whether it would be inclined to bring an enforcement action under the FCPA's anti-bribery provisions against the company if it were to make the demanded payment.

The company's request to DOJ was apparently submitted on October 19 and 20 and by October 21, DOJ responded with a short preliminary opinion that based on the facts and circumstances presented it did not presently intend to pursue an enforcement action. This preliminary opinion apparently caused the company to make the payment thus leading to the release of the captain and the vessel from Country A.

Subsequently, following its evaluation of additional information supplied by the company, DOJ issued its formal Opinion Procedure Release (OPR) (No. 22-1) on January 21, 2022. Basically, the OPR explained that the subject payment by the company would not trigger an enforcement action because the payment was not made with a corrupt intent to obtain or retain business from Country A, and

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thus did not violate the FCPA. The OPR further explained that the facts presented demonstrated that the payment was made with the intent to avoid imminent and potentially serious harm to the vessel's captain and crew, and specifically advises that "an individual who is forced to make payment on threat of injury or death would not be liable under the FCPA." Citing to the recently updated DOJ/SEC FCPA Resource Guide, the OPR noted that federal criminal law provides that actions taken under duress do not ordinarily constitute crimes.

Among the key takeaways from this unique situation are the following:

First, the OPR seems to emphasize that DOJ recognized and appreciated that the company promptly notified DOJ of the situation in accordance with the best practices articulated in the Resource Guide. This suggests that DOJ is willing to entertain such requests, something the FCPA Unit has made clear in the past. And, for its part, DOJ's rapid response to a clearly exigent circumstance was impressive and suggests that such requests will be met with a timely response.

Second, the OPR confirms that only corrupt payments violate the FCPA. While this may seem obvious, the dearth of reported cases in this area can make interpreting the definition "corrupt" somewhat challenging. Here, DOJ recognized that the obvious purpose of the subject payment was to avoid imminent harm to a company employee and was therefore clearly not corrupt. Moreover, the OPR clearly confirms language in the FCPA Resource Guide—that situations involving extortion or duress will not give rise to FCPA liability.

Third, the OPR clarified that the "business purpose" test of the FCPA is not satisfied where the payor has no ongoing or desired business relationship with the subject country, which was clearly the case here. The OPR explained that the company has no ongoing or anticipated business with Country A and that the entire episode seemed to be the result of an error. DOJ concluded that based on the facts presented, there simply was not a sufficient business purpose associated with the payment such that the FCPA was implicated.

Fourth, the fact that the exigent circumstance presented included an imminent threat to an individual's health and safety seems to have been a key factor in DOJ's analysis. Indeed, the OPR specifically explains that "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." This finer point seems to follow past DOJ precedent including enforcement actions where the only threat was economic in nature.

In summary, while the result in this unique situation may seem obvious in light of the both the facts and the FCPA Resource Guide's advice concerning such factual scenarios, this OPR is important as an example of DOJ's ability and willingness to act very quickly in response to emergency situations that call for real-time advice to companies and their counsel. DOJ's incredibly quick response to this request should be commended and suggests that the opinion process which DOJ touts as a "valuable mechanism" in the 2020 FCPA Resource Guide, really does work and should be utilized more often by counsel seeking to expertly advise clients in this area.