

## **Mickey, Donald and the FCPA**

The Foreign Corrupt Practices Act (FCPA) enforcement arena is scattered with US companies which have gone many miles past the extra mile in providing travel and entertainment. Most practitioners will recall the Lucent Technologies 2007 enforcement action. Between 2001 and 2003 Lucent provided trips consisting primarily or entirely of sightseeing to locations such as Disneyland, Universal Studios, the Grand Canyon and in cities such as Los Angeles, San Francisco, Las Vegas, Washington, DC, and New York City, and typically lasted 14 days each and cost between \$25,000 and \$55,000 per trip. These trips were provided to Chinese governmental representatives. To close out 2009, the Department of Justice (DOJ) announced a resolution of an enforcement action against UTStarcom which had arranged and paid for travel by Chinese governmental representatives to tourist destinations in the United States, including Hawaii, Las Vegas and New York City, when such trips were recorded as training expenses at UTStarcom facilities. These trips included a cash allowance of between \$800 and \$3,000 per person. The thing about these trips was that UTStarcom had no facilities in these areas.

### **A. The FCPA**

So what is the problem with paying for travel to the US for foreign governmental officials? Is it a Chinese issue? Should US companies only allow travel to places where they actually *have* a facility (well, that's a good start). The FCPA does not prohibit all payments to foreign officials, it is not that broad. What it does prohibit are corrupt payments (or promises of them) made to obtain or retain business. The FCPA allows payments to foreign officials for expenses related directly to "the promotion, demonstration, or explanation of products or services" that are "reasonable and bona fide" 15 U.S.C. §§ 78dd-1(c)(2)(A) and 78dd-2(c)(2)(A). This affirmative defense, however, is notoriously hard to use (and easy to abuse), mainly because no one is quite sure what *reasonable* and *bona fide* really mean.

### **B. Opinion Releases**

In 2007, the DOJ issued two FCPA Opinion Releases which offered guidance to companies considering whether to and, if so how to, incur travel and lodging expenses for government officials. In Opinion Release 07-01, the Company was desired to cover the domestic expenses for a trip to the United States by a six-person delegation of the government of an Asian country for an educational and promotional tour of one of the requestor's US operations sites.

Both Opinion Releases laid out the specific representations made to the DOJ which led to the DOJ approving the travel to the US by the foreign governmental officials. These facts can provide good guidance to any company which seeks to bring such officials to the US for a legitimate business purpose. In Opinion Release 07-01 the representations made to the DOJ were as follows:

- A legal opinion from an established US law firm, with offices in the foreign country, stating that the payment of expenses by the US Company for the travel of the foreign governmental representatives did not violate the laws of the country involved;
- The US Company did not select the foreign governmental officials who would come to the US for the training program.
- The delegates who came to the US did not have direct authority over the decisions relating to the US Company's products or services.
- The US Company would not pay the expenses of anyone other than the selected official.
- The officials would not receive any entertainment, other than room and board from the US Company.
- All expenses incurred by the US Company would be accurately reflected in this Company's books and records.

Based upon these representations, the DOJ noted, "Based upon all of the facts and circumstances, as represented by the requestor, the Department does not presently intend to take any enforcement action with respect to the proposal described in this request. This is because, based on the requestor's representations, consistent with the FCPA's promotional expenses affirmative defense, the expenses contemplated are reasonable under the circumstances and directly relate to "the promotion, demonstration, or explanation of [the requestor's] products or services."

In Opinion Release 07-02 the Company desired to pay certain domestic expenses for a trip within the United States by approximately six junior to mid-level officials of a foreign government for an educational program at the Requestor's US headquarters prior to the delegates attendance at an annual six-week long internship program for foreign insurance regulators sponsored by the National Association of Insurance Commissioners ("NAIC").

In Opinion Release 07-02 the representations made to the DOJ were as follows:

- The US Company would not pay the travel expenses or fees for participation in the NAIC program.
- The US Company had no "non-routine" business in front of the foreign governmental agency.
- The routine business it did have before the foreign governmental agency was guided by administrative rules with identified standards.
- The US Company would not select the delegates for the training program.
- The US Company would only host the delegates and not their families.
- The US Company would pay all costs incurred directly to the US service providers and only a modest daily minimum to the foreign governmental officials based upon a properly presented receipt.

- Any souvenirs presented would be of modest value, with the US Company's logo.
- There would be one four-hour sight seeing trip in the city where the US Company is located.
- The total expenses of the trip are reasonable for such a trip and the training which would be provided at the home offices of the US Company.

As with Opinion Release 07-01, the DOJ ended this Opinion Release by stating, "Based upon all of the facts and circumstances, as represented by the Requestor, the Department does not presently intend to take any enforcement action with respect to the planned educational program and proposed payments described in this request. This is because, based on the Requestor's representations, consistent with the FCPA's promotional expenses affirmative defense, the expenses contemplated are reasonable under the circumstances and directly relate to "the promotion, demonstration, or explanation of [the Requestor's] products or services." 15 U.S.C. § 78dd-2(c)(2)(A).

### **C. Travel and Lodging for Governmental Officials**

What can one glean from these two Opinion Releases? Based upon them, it would seem that a US Company should be able to bring foreign officials into the United States for legitimate business purposes. A key component is that the guidelines are clearly articulated in a Compliance Policy. Based upon Releases Opinions 07-01 and 07-02, the following should be incorporated into a Compliance Policy regarding travel and lodging:

- Any reimbursement for air fare will be for economy class.
- Do not select the particular officials who will travel. That decision will be made solely by the foreign government.
- Only host the designated officials and not their spouses or family members.
- Pay all costs directly to the service providers; in the event that an expense requires reimbursement, you may do so, up to a modest daily minimum (e.g., \$35), upon presentation of a written receipt.
- Any souvenirs you provide the visiting officials should reflect the business and/or logo and would be of nominal value, e.g., shirts or tote bags.
- Apart from the expenses identified above, do not compensate the foreign government or the officials for their visit, do not fund, organize, or host any other entertainment, side trips, or leisure activities for the officials, or provide the officials with any stipend or spending money.
- The training costs and expenses will be only those necessary and reasonable to educate the visiting officials about the operation of your company.

Incorporation of these concepts into a Compliance Policy is a good first step towards preventing any FCPA violations from arising, but it must be emphasized that they are only a first step. These guidelines must be coupled with active training of all personnel, not only on the Compliance Policy, but also on the corporate and individual consequences that may arise if the FCPA is violated regarding gifts and entertainment.

Lastly, it is imperative that all such gifts and entertainment are properly recorded, as required by the books and records component of the FCPA. One of the FCPA violations alleged against UTStarcom was that it falsely recorded these trips as 'training' expenses, while the true purpose for providing these trips was to obtain and retain lucrative telecommunications contracts. All business gifts, entertainment and expenses must be properly recorded.

So the visit with Mickey and Donald will just have to wait until the foreign governmental official comes back with his family on his own nickel and not that of your Company.

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