

## **GIFTS AND BUSINESS ENTERTAINMENT UNDER THE FCPA**

The application of the Foreign Corrupt Practices Act (FCPA) to gifts and business entertainment expenditures to foreign officials is an area open to vagueness. There are no clear guidelines in the FCPA itself or the legislative history. While prohibiting payment of any money or thing of value to foreign officials to obtain or retain business, the FCPA arguably permits incurring certain expenses on behalf of these same officials. Under the FCPA, the following affirmative defense regarding the payment of expenses exists:

[it] shall be an affirmative defense [that] the payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to...the promotion, demonstration, or explanation of products or services; or...the execution or performance of a contract with a foreign government or agency thereof. *15 U.S.C. § 78dd-1(c)(2)(A)-(B)*.

There is no *de minimis* provision. The presentation of a gift or business entertainment expense can constitute a violation of the FCPA if this is coupled with the corrupt intent to obtain or retain business.

### **A. GIFTS TO GOVERNMENTAL OFFICIALS**

#### **1. FCPA Guidance and Release Opinions.**

The permissibility of a gift turns on whether it was provided with corrupt intent; that is if there will be an official action in exchange for the gift and not simply the desire to foster an overall favorable business climate. A gift of nominal value provided to a foreign official as courtesy, token of friendship or expression of gratitude, made in accordance

with the laws and customs of the country in question, lacks the *quid pro quo* element prohibited under the FCPA.

A reasonable and bona-fide gift of a nominal value directly related to a promotion, demonstration or explanation of a product appears to be within the scope of permissible acts of the FCPA. However the problem is both the potential for abuse and the lack of any clear statutory guidelines. A course of conduct providing frequent gifts to governmental officials in conjunction with a pattern of favorable governmental actions would provide evidence of corrupt intent even if no particular gift could be tied to a specific act.

The Department of Justice (DOJ) has provided three Release Opinions which provide some guidance on gifts. In Release Opinion 82-01, the DOJ approved the gift of cheese samples given to Mexican governmental officials from the Department of Agriculture of the State of Missouri to promote the state of Missouri's agricultural products. However the value of the cheese to be presented was not included in the Release Opinion. In Release Opinion 81-02, the DOJ approved a gift from the Iowa Beef Packers, Inc. to officials of the Soviet Ministry of Foreign Trade of its packaged beef products. The total value of all the samples presented was estimated to be less than \$2,000 and the Iowa Beef Packers, Inc. averred that the individual sample packages would not exceed \$250 in value.

The final Release Opinion relating to gifts is Release Opinion 81-01. In its request to the DOJ, Bechtel sought approval to use the SGV Group, a multinational organization headquartered in the Republic of the Philippines and comprised of separate member firms in ten Asian nations and Saudi Arabia which provide auditing, management consulting, project management and tax advisory services. The SGV Group desired to solicit business on behalf of Bechtel and Bechtel had proposed to reimburse the SGV Group for gift expenses incurred in this business solicitation. Regarding the reimbursement of gift expenses by Bechtel to the SGV Group the DOJ stated:

(d) Expenses for gifts or tangible objects of any kind incurred without Bechtel's prior written approval will be reimbursed only where such expenditures are permitted under the local laws, the ceremonial value of the item exceeds its intrinsic value, the cost of the gift does not exceed \$500 per person, and the expense is commensurate with the legitimate and generally accepted local custom for such expenses by private business persons in the country.

## **2. Compliance Policy Recommendations.**

Based upon the FCPA language and relevant Release Opinions, a Company can provide gifts up to an amount of value of \$250. Below are the guidelines which the Release Opinions would suggest that the Compliance Policy follow regarding gifts:

- The gift should be provided as a token of esteem, courtesy or in return for hospitality.
- The gift should be of nominal value but in no case greater than \$250.
- No gifts in cash.
- The gift shall be permitted under both local law and the guidelines of the employer/governmental agency.
- The gift should be a value which is customary for country involved and appropriate for the occasion.
- The gift should be for official use rather than personal use.
- The gift should showcase the company's products or contain the company logo.
- The gift should be presented openly with complete transparency.
- The expense for the gift should be correctly recorded on the company's books and records.

## **B. BUSINESS ENTERTAINMENT OF GOVERNMENTAL OFFICIALS**

### **1. FCPA Guidance and Release Opinions.**

Business entertainment presents an even more slippery slope than that of gifts as the reasonableness of such expenditures in a commercial setting is less clear. Therefore such expenditures are subject to greater abuse. The same analysis used for gifts applies to business entertainment. Business entertainment expenses provided for a *quid pro quo* to induce a governmental official to favor a Company violates the FCPA. However business entertainment provided with the generalized hope of creating a better business relationship with a customer lacks this *quid pro quo* element and therefore does not violate the FCPA. Further, reasonable and bona fide business expenses related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract are within the affirmative defenses set forth at the beginning of this article. The affirmative defense, however, is notoriously risky, mainly because no one is quite sure what reasonable and bona fide really means.

The guiding principle should be one of reasonableness under the totality of circumstances. Expenditures should be permitted under local law, the regulations and guidelines of the government agency in question and be in line with local custom. Finally, as with gifts, any expenditure must be properly recorded in the company's books and records.

Unfortunately, unlike the area of gifts, there are no Release Opinions from which guidance can be gleaned. Further the bona fide business purpose appears to be quite narrowly construed. If a company ventures outside these guidelines the consequences can be severe. In December, 2007 Lucent Technologies Inc. settled FCPA charges with the DOJ and the Securities and Exchange Commission (SEC) for \$2.5 million. The settlement includes a \$1 million criminal fine and \$1.5 million in civil penalties. Lucent's violations involved promotional expenses for Chinese government officials.

In a Press Release dated December 21, 2007, the DOJ reported that from at least 2000 to 2003, Lucent, a global communications company that became part of Alcatel SA in November 2006 after the violations occurred, spent millions of dollars on approximately 315 trips for Chinese government officials that included primarily sightseeing, entertainment and leisure. These trips were requested and approved with the consent and knowledge of the most senior Lucent Chinese officials and with the logistical and administrative assistance of Lucent employees in the United States, including at corporate headquarters in Murray Hill, N.J. Lucent improperly recorded expenses for these trips in its books and records and failed to provide adequate internal controls to monitor the provision of travel and other things of value to Chinese government officials. Many of Lucent's payments, however, were not directly related to legitimate business purposes and were not recorded accurately in its books and records.

## **2. Compliance Policy Recommendations.**

Based upon the FCPA language and relevant Release Opinions cited in the section on Gifts above, there is support that a Company can establish a value for business entertainment of up to the amount of \$250. However this must be tempered with clear guidelines incorporated into the business expenditure component of a Compliance Policy, which should include the following:

- A reasonable balance must exist for bona fide business entertainment during an official business trip.
- All business entertainment expenses must be reasonable.
- The business entertainment expenses must be permitted under (1) local law and (2) customer guidelines.
- The business entertainment expense must be commensurate with local custom and practice.
- The business entertainment expense must avoid the appearance of impropriety.
- The business entertainment expense must be supported by appropriate documentation and properly recorded on the company's book and records.

### **C. TRAVEL and LODGING FOR GOVERNMENTAL OFFICIALS**

#### **1. FCPA Guidance and Release Opinions.**

The final area which has proven difficult for US companies is travel by foreign officials to the United States for business purposes. As noted by the Lucent case above, a company can find itself in considerable FCPA trouble in this area. Once again the principle guiding the analysis in this area is reasonableness.

In 2007, the DOJ issued two Release Opinions which offer guidance to companies considering whether and, if so, how to incur travel and lodging expenses for government officials. Release Opinions 07-01 and 07-02 describe a list of steps companies may follow to avoid FCPA liability. First, companies should not select the officials who will travel. Having the foreign agency nominate the officials for travel demonstrates

transparency between the company and the foreign government. Second, the travel must directly relate to “promotion, demonstration, or explanation of products or services.” Minor souvenirs are allowed. Similarly, modest “educational or promotional” tours are permitted, but side trips to places like Disney World or Las Vegas will pose a problem. Third, the DOJ Opinions stress moderation, mentioning that travel should be economy airfare and any per diem should be modest (\$35/day). Of course, companies must accurately record the expenses in their books and records. Further, travel will more likely comply with the FCPA when the travelers have no authority to award business to the company and when no contracts are pending before the officials’ agencies. In short, while the FCPA does not prohibit the provision of travel and lodging to foreign officials in practice, the scope of this affirmative defense is more narrowly drawn than that for gifts or business entertainment such as dinners.

Based upon this narrow exception, any payment for travel and lodging by a Company for governmental officials should be approved in advance by a Company’s Chief Compliance Officer. There should be no exceptions for this requirement for payment of travel and lodging.

## **2. Compliance Policy Recommendations.**

A Company should be able to bring foreign officials into the United States for legitimate business purposes. Once again, a key component is guidelines clearly articulated in a

Compliance Policy. Based upon the FCPA Opinion Releases the following should be incorporated into a Compliance Policy regarding travel and lodging:

- Any reimburse 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 its 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.

The incorporation of these concepts into a Company's 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 a Company's Compliance Policy, but also on the corporate and individual consequences that may arise if the FCPA is violated regarding gifts and entertainment.

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*Editor's Note-this article is one of a series of articles by the author on the nuts and bolts of a Compliance Policy.*

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