

Promotional Expenses Defense under the FCPA

I. The Problem

So what is the problem with a US company paying for travel, room and board for foreign governmental officials to travel to the United States? The problem is that payment for such travel, lodging and expenses may run afoul of the prohibition against corrupt payments (or promises of them) made to obtain or retain business. The Foreign Corrupt Practices Act (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.

In his recent post on the FCPA Blog, UCLA student Kyle Sheahen, explored this issue in his discussion of his upcoming publication, entitled “*I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*”. In his paper, he sets forth his proposition that FCPA enforcement actions provide “uneven indicators or what conduct the government considers covered by the defense. Consequently, in the absence of authoritative judicial interpretation or clear regulatory guidance, corporate managers are required to make educated guesses as to whether contemplated payments will qualify as “bona fide” promotional expenses.”; he cites the following cases:

PROMOTIONAL EXPENSE ENFORCEMENT BOX SCORE

Company	Trip Locations	Trip Costs & Perks	Company Facilities Present
Lucent Technologies	Disneyworld, Hawaii, Las Vegas, Grand Canyon, Niagara Falls, Universal Studios, NYC	-\$10 million in trips for 1000 Chinese governmental officials, including \$34,000 for five days of sightseeing	None of the travel destinations
Ingersoll-Rand	Trip to Florence after trip to company facility in Vignate, Italy	\$1000 ‘pocket money’ per attendee	Facilities in Vignate but not in Florence
Metcaf & Eddy	First trip-Boston, Washington, D.C., Chicago and Orlando. Second trip-travel to Paris, Boston and San Diego.	First Class Travel and trip expenses for Egyptian governmental official and his family. Cash payments prior to trips of 150% of estimated daily	Wakefield Mass not in Washington DC, Chicago, Paris or Disney World (Orlando)

		expenses.	
Titan Corporation		Reference in company books and records of \$20,000 for promotional travel expenses. Not clear if ever funded (Remember a promise to pay=making a payment under the FCPA)	
Not cited in Sheahen Paper			
UTStarcom	Hawaii, Las Vegas and New York City	Up to \$7 million on gifts and all expense paid trips to US	None of the travel destinations

While the Department of Justice (DOJ) and/or the Securities and Exchange Commission (SEC) brought enforcement actions against the above companies, this author believes that the facts of each enforcement action demonstrate that the expenses incurred by the companies were neither reasonable nor *bona fide* as required under the FCPA. These cases do not require a FCPA compliance professional to guess, educated or otherwise, as to whether the travel, lodging and expense payments listed above violated the FCPA. The payment amounts noted above in the Box Score are so beyond the pale of reasonableness to be *prima facie* evidence of corrupt intent. Of course, it really does not help your case with the DOJ if you do not have company facilities in Disney World.

II. Opinion Releases

In addition to detailing the above enforcement actions, Mr. Sheahen also discusses guidance that may be gleaned from DOJ Opinion Releases on the Promotional Expenses defense. Here he points to substantive guidance for the FCPA practitioner. In 2007, the DOJ issued two FCPA Opinion Releases which offered guidance to companies considering whether to and, if so how to, incur travel, lodging and expenses for government officials. In Opinion Release 07-01, the Requestor Company 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.

Opinion Release 07-01 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.

For 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 Requestor 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 sightseeing 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).

III. Travel, Lodging and Expenses for Governmental Officials

What can one glean from these two Opinion Releases? In light of the facts 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.

We commend Mr. Sheahen for his upcoming publication, in which he thoroughly discusses the “Local Law” defense under the FCPA in addition to the “Promotional Expenses” defense. His work will add to the discussion of these two affirmative defenses and assist companies in crafting their FCPA compliance program.

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