

Related Practices

- White Collar and Corporate Litigation
- Anti-Corruption
- Internal Investigations and Corporate Compliance
- Whistleblower Claims and FCA Cases

A legal update from Dechert LLP

U.S. Department of Justice Releases First FCPA Advisory Opinion of 2011

In its first Foreign Corrupt Practices Act (“FCPA”) Advisory Opinion of 2011, the U.S. Department of Justice (“DOJ”) has addressed an issue of perennial concern for covered corporations and individuals—what is the scope of the FCPA’s “promotional expenses” exemption under the FCPA?¹ Advisory Opinion 11-01, dated June 30, 2011, reviews the request of a U.S. “domestic concern” (the “Requestor”), which sought to pay for the travel of representatives from two foreign agencies to learn about the adoption services provided by the Requestor, and clarifies the circumstances under which companies can benefit from an exception to FCPA liability for payment of the reasonable travel, food, and entertainment expenses of “foreign officials.”

In its relatively brief Advisory Opinion, the DOJ announced—consistent with the Advisory Opinions it has issued to date—that it does not presently intend to take any enforcement action against the Requestor. This was because the proposed expenses were “reasonable” under the circumstances described by the Requestor, consistent with the nature of similarly approved expenses in past Advisory Opinions, and within the so-called “promotional expenses” exception to the FCPA’s anti-bribery provisions. Advisory Opinion 11-01 provides a useful opportunity for corporations and corporate officers to

review what the DOJ considers to be the trademark features of *bona fide* “promotional expenses” under the FCPA.

Below we offer a summary of the Advisory Opinion’s analysis. We also provide lessons learned from our own experience in regularly advising corporations on proper promotional expenses payments under the FCPA, as well as from successfully seeking and obtaining an Advisory Opinion for a client regarding such promotional expenses issues.

The Promotional Expenses Exception to FCPA Bribery Liability

The so-called “promotional expenses” exception creates an affirmative defense to liability under the FCPA’s anti-bribery provisions. It permits covered entities to provide foreign officials with a “payment, gift, offer, or promise of anything of value” that might otherwise be prohibited under the anti-bribery provisions, if the expense incurred is “a reasonable and bona fide expenditure, such as travel and lodging expenses,” that is “directly related to . . . the promotion, demonstration, or explanation of products or services.”² Importantly, this exception offers no defense to liability under the so-called “accounting provisions” of the FCPA, which require that issuers keep and maintain accurate books and records, and also ensure that they have adequate “internal accounting

¹ See U.S. Dep’t of Justice, Foreign Corrupt Practices Act Opinion Procedure Release 11-01 (June 30, 2011) (hereafter, “Advisory Opinion 11-01”), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf> (last visited Aug. 2, 2011).

² 15 U.S.C. §§ 78dd-1(c)(2)(A), 78dd-2(c)(2)(A), 78dd-3(c)(2)(A).

controls.”³ Consequently, even *bona fide* promotional expenses must be accurately recorded, and companies must still have in place adequate internal controls to ensure proper handling and treatment of such expenses.

In the case of Advisory Opinion 11-01, the DOJ noted the following salient features of the Requestor’s planned sponsorship of foreign officials:

- The Requestor did not have “non-routine” business (such as licensing or accreditation) before the foreign agency employing the foreign representatives;
- The routine business the Requestor did have before the foreign agency consisted of seeking approval for adoptions, a process the Advisory Opinion noted is subject to “international treaty and administrative rules with identified standards;”
- The foreign agency, rather than the Requestor, would select the visiting foreign representatives;
- The Requestor would not host the family of the foreign representatives;
- The Requestor’s payment of funds would be made directly to vendors, and not via the foreign representatives;
- To the extent souvenirs would be provided to the foreign representatives, these would contain the Requestor’s business logo and be of nominal value;
- The foreign representatives would receive no stipend or spending money from the Requestor, nor would they be compensated for the trip;
- The Requestor would not “fund, organize, or host any other entertainment, side trips, or leisure activities for the” foreign representatives;
- The visit would last for a two-day period (exclusive of travel);
- The costs incurred by the Requestor would be only those reasonable and necessary to demonstrate to the foreign representatives the services that U.S. adoption services providers offers;

³ 15 U.S.C. § 78m(b)(2).

- The Requestor invited another adoption service provider to participate.⁴

In light of the facts set forth above, and comparison to other recent DOJ Advisory Opinions—specifically, Advisory Opinions 07-02 and 07-01—the DOJ concluded that the Requestor’s planned sponsorship of the foreign representatives’ travel was “reasonable under the circumstances,” and within the FCPA’s promotional expenses exception.⁵

Lessons Learned

By tradition and practice, the DOJ’s FCPA Advisory Opinions—in the language of the standard disclaimer—have “no binding application to any party which did not join in the request.”⁶ Notwithstanding this disclaimer, however, the growing number of FCPA Advisory Opinions have become a useful source of guidance for FCPA counsel and their clients on various aspects of FCPA enforcement, particularly given the relative dearth of FCPA-related case law until quite recently.⁷ Through our review of these Advisory Opinions, we have compiled the following index to illustrative DOJ travel-related FCPA opinions, with key indicia of non-corrupt purpose highlighted. Sponsored foreign travel that is deemed within the scope of the promotional expenses exception will invariably contain many, if not all of the indicia of non-corrupt purpose illustrated in the following chart.

⁴ Advisory Opinion 11-01 at 1-2.

⁵ *Id.* at 2.

⁶ *Id.* at 2-3.

⁷ There are now 56 DOJ opinions. The first 22—called “Review Procedure Releases”—were issued between 1980 and 1992. The remaining 34 opinions issued between 1993 and the present are known as “Opinion Procedure Releases.” For convenience, all DOJ opinions—whether Review Procedure Releases, or Opinion Procedure Releases—are referred to here as “Advisory Opinions.” They are available at the FCPA webpage on the DOJ’s Fraud Section website. See <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Aug. 2, 2011).

Indicia of Non-Corrupt Purpose	Explanation	Illustrative Advisory Opinions
Selection of foreign officials by foreign entity only	DOJ views the selection of foreign officials by the foreign governmental entity that employs the officials as a more reliable indication that the corporate sponsor is not seeking to influence particular foreign officials. It is therefore advisable for corporate sponsors of foreign travel to play no role in the selection of the particular foreign officials.	DOJ Advisory Ops. 11-01; 07-02; 07-01; 04-04
Payment not made to foreign officials	DOJ views payments directly to foreign officials with suspicion. Payments made directly to vendors helps to avoid the transfer of monies to foreign officials.	DOJ Advisory Ops. 11-01; 07-02; 07-01
No current or planned work before foreign officials or entity	Advisory Opinions differ on this issue, with the most recent opinion suggesting that merely not having any “non-routine” business before the foreign agency should suffice. At a minimum, however, sponsors of foreign travel should ensure that the particular foreign officials participating in the trip are not (and will not be) decision makers with respect to any current (or planned) business before the foreign entity.	DOJ Advisory Ops. 11-01; 07-01; 04-04
Trip has legitimate business purpose	To ensure that a <i>bona fide</i> business trip is not perceived as a junket, corporate sponsors of foreign travel should ensure that modest meals and entertainment are provided, that side-trips are not sponsored, and that the foreign officials do not extend their trips to include personal or vacation time.	DOJ Advisory Op. 07-01
Nominal value of gifts (with company branding)	To the extent gifts are provided to visiting foreign officials, these should be souvenirs of nominal value with the corporate sponsor’s logo or branding.	DOJ Advisory Ops. 11-01; 07-02; 07-01
No travel for family or friends	To avoid the appearance of attempting to improperly influence foreign officials, corporate sponsors should not sponsor the travel, meals, or entertainment of the family or friends of foreign officials whose presence is not strictly necessary for the business purpose of the visit.	DOJ Advisory Ops. 11-01; 07-02; 07-01
Reasonable duration of trip	In most cases, a visit of reasonable duration is more likely to serve <i>bona fide</i> business purposes than an extended stay.	DOJ Advisory Ops. 11-01 (2 days, excluding travel); 07-02 (six days); 07-01 (four days); 04-04 (nine days); 85-01 (one week); 83-02 (ten days)

Indicia of Non-Corrupt Purpose	Explanation	Illustrative Advisory Opinions
Compliance with foreign country's law	Corporate sponsors of foreign officials' travel can support an inference of non-corrupt purpose by demonstrating that the opinion of foreign legal counsel has been sought and obtained, and that such opinion advises that there is no prohibition, under applicable foreign law, of the sponsorship of the travel.	DOJ Advisory Ops. 07-01; 85-01
Accurate books and records maintained	As noted above, even a <i>bona fide</i> promotional expense will provide no defense against an improper accounting treatment. Accordingly, corporate sponsors must accurately account for the travel-related costs incurred, and identify clearly the foreign officials for whom the costs were incurred.	See 15 U.S.C. § 78m(b)(2)

Enforcement Efforts and Consequences of Non-Compliance

A number of prominent recent FCPA enforcement actions with a travel-related component underscore the importance of close attention to, and proper handling of, foreign officials' travel. For example, on July 27, 2011, the SEC announced the settlement of an enforcement action against Diageo, plc, the owner of a number of famous drink brands including Guinness, Johnny Walker, and others. In announcing the settlement the SEC noted that "Diageo . . . paid over \$100,000 in travel and entertainment expenses for South Korean customs and other government officials involved in . . . tax negotiations"⁸ to secure favorable tax rebates for Diageo.

In another recent enforcement action against International Business Machines ("IBM"), the SEC alleged that IBM paid for the travel and entertainment of South Korean and Chinese foreign officials.⁹ For example, the SEC's complaint states that IBM's Korean subsidiary paid the equivalent of roughly \$38,000 to a business partner who retained about \$6,000 and returned the remainder to an IBM sales manager. The sales manager then kept the returned amount in his personal bank account and used it to pay for gifts and entertainment for South Korean officials. In addition, the

⁸ *In re Diageo, plc*, SEC Release No. 64978 (July 27, 2011).

⁹ *SEC v. Int'l Bus. Machs. Corp.*, No. 1:11-cv-00563 (D.D.C. 2011).

sales manager paid for the travel expenses of officials in a South Korean government entity in order to induce their purchase of IBM products.

As for the Chinese officials' travel, the complaint alleged particularly egregious conduct, including:

at least 114 instances in which (1) IBM-China employees and its local travel agency worked together to create fake invoices to match approved [travel requests]; (2) trips were not connected to any [of those requests]; (3) trips involved unapproved sightseeing itineraries for Chinese government employees; (4) trips had little or no business content; (5) trips involved one or more deviations from the approved [travel request]; and (6) trips where per diem payments and gifts were provided to Chinese government officials.¹⁰

In addition, "IBM-China personnel also used its official travel agency in China to funnel money that was approved for legitimate business trips to fund unapproved trips," and "IBM-China personnel utilized the company's procurement process to designate its preferred travel agents as 'authorized training providers.' IBM-China personnel then submitted fraudulent purchase requests for 'training services' from these 'authorized training providers' and caused IBM-China to pay these vendors. The money paid to these

¹⁰ *Id.*

vendors was used to pay for unapproved trips by Chinese government employees.”¹¹

for foreign officials falls appropriately within the promotional expenses carve-out.

Ultimately, robust precautions in this, as in other areas of FCPA compliance, will ensure that sponsored travel



¹¹ *Id.*

This update was authored by Cheryl A. Krause and Justin C. Danilewitz.

Practice group contact

If you have questions regarding the information in this legal update, please contact the attorney listed below or the Dechert attorney with whom you regularly work. Visit us at www.dechert.com/white_collar.

Hector Gonzalez
New York
+1 212 698 3621
hector.gonzalez@dechert.com

Robert J. Jossen
New York
+1 212 698 3639
robert.jossen@dechert.com

Cheryl A. Krause
Philadelphia
+1 215 994 2139
cheryl.krause@dechert.com

Benjamin E. Rosenberg
New York
+1 212 698 3606
benjamin.rosenberg@dechert.com

If you would like to receive any of our other *DechertOnPoints*, please [click here](#).