

Opinion Release 11-01: A Good Reason to Do Some Research

The first Opinion Release of 2011 is out, No. 11-01 and it certainly may leave compliance practitioners scratching their heads. However this collective head scratching is not because the Opinion Release is so difficult to understand, has no application to the everyday business of compliance but for a polar opposite reason – the question posed to the Department of Justice is so straight-forward and has been previously asked and answered, that it is difficult to understand how any first year compliance practitioner did not know the answer to it. So while I generally try not to skewer such matters the way my ‘*This Week in the FCPA*’ colleague Howard Sklar occasionally does, I do have to admit as to some befuddlement.

The background facts are as follows: a US company wants to bring some foreign governmental officials over the US to learn more about the US company in question. The foreign government selected the officials to travel, the travel was economy class and it involved no WAGs (wives and girlfriends). The trip was scheduled to be for two days and the US company would pay all the vendors, airlines, hotels, local transportation providers and food service providers directly. No cash would be provided to the traveling officials. The only gifts would be branded and of nominal value.

Based upon all of these representations the DOJ indicated that it would take no enforcement action. So why am befuddled by all this? As Howard Sklar noted in his blog posting entitled, “*Gifts and Opinion Release*” that “*any reasonably competent anti-corruption compliance officer could have given them [the answer] on day 1. This tells me that the Company does not have reasonably competent compliance personnel. This is a question that should never have gone to the DOJ.*”

With my befuddlement in mind, I decided to review the underlying Opinion Releases discussed in 11-01. Based upon re-reading these underlying Opinion Releases I thought it might provide a good opportunity to discuss this area of a compliance program.

A. 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. Both Opinion Releases laid out the specific representations made to the DOJ, which led to the Department approving the travel to the US by the foreign governmental officials. These facts provided strong guidance to any company which seeks to bring such governmental officials to the US for a legitimate business purpose. 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. 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).

B. Travel and Lodging for Governmental Officials

What can one glean from these two 2007 Opinion Releases? Based upon them, it would seem that a US company can 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 program 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.

It is always good to review the parameters of your compliance program. However, whoever the compliance officer is at the US company which requested Opinion Release 11-01, next time do some research. If you do not know how to research DOJ Opinion Releases, it is a straightforward exercise. You can go to the DOJ, Fraud Section, FCPA website and look for “***Opinion Procedure Releases***”. If the answer is already out there, do not waste your company’s money and the DOJ’s time by asking a question to which every compliance practitioner knows the answer to or is readily accessible in the public domain.

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