

UNRAVELLING ONE STRAND OF THE FCPA

Unravelling one strand of the FCPA: When it really counts, companies can pay for travel and lodging for key government official decision makers – or – When's a jolly not a jolly?

What's it all about:

This afternoon, I mentioned the title of this article to a teenager who immediately said, 'That's easy; it has to be about real business.' Dead-on - this could be a very short article. Here's the scoop in a nutshell: feeling hounded by requests to approve paying for proposed travel and lodging hospitality for foreign (non-US) government officials? Fear not - the goal of this article is to provide a ray of hope to my fellow beleaguered legal and compliance professionals: you may now be able to go forth and confidently approve, subject to appropriate conditions of course, that next request to pay for the airfare and lodging for the Chief Inspector of the Kingdom of Xanadu to come view your company's Shangri-La operations. Get ready for the counter-intuitive twist: one of the two key pillars supporting your ability to issue that approval will be that your company actually does want to influence a decision of that Chief Inspector in his or her official capacity, a decision that may have significant financial impact on the company, and you're going to carefully document that desire in the file. The other pillar supporting your ability to approve the proposed hospitality will be that the Chief Inspector will be able to learn something material, in the real world, viewing your Shangri-La operations that will help inform his or her ability to make the official decision at issue, something that could not be transmitted as effectively with a Power-Point presentation back in Xanadu. Boys and girls, when it comes to paying for government officials' travel and lodging, leave the stand-alone classroom training, 'relationship building' and heaven forbid 'gestures of gratitude' at the door. The teenager was right – this is about real business - cool.

Here's some relevant actual law - please don't fall asleep at the wheel – this part matters:

The Affirmative Defenses

[A few words on] The Local Law Defense:

'[T]he payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.' 15 U.S.C. § 78dd-1(c)(1).

The local law defense, a 1988 amendment to the FCPA, requires express authorization in the written law. '[T]he absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense.' H.R. Conf. Rep. No. 100-576, at 922 (1991). This defense is strictly construed. In *United States v Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008), the judge ruled in relevant part that there is no immunity from prosecution under the FCPA just because person could not have been prosecuted in the foreign country due to a technicality of foreign law, e.g., time-barred, or because a provision in the foreign law 'relieves' a person of criminal responsibility, for example by reporting the bribe to the authorities after the fact.

The [main event] Promotional Expenses Defense:

[T]he 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).

The promotional expenses defense, also a 1988 amendment to the FCPA, is the real world business defense. It's worth repeating: You can, subject to appropriate conditions discussed below, confidently approve 'reasonable and bona fide expenditures, such as travel and lodging expenses [for a] foreign official [that are] 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.' Id.

The keys to this defense are the words 'reasonable and bona fide' and 'directly related'. There must be a legitimate nexus between the specific expense and its promotional, demonstrative, or explanatory purpose, a real world business purpose. In other words, there must be a very clear link between the official's function and a business related rationale for the trip. For example paying for the reasonable travel and lodging expenses of bringing a foreign official to the US to inspect the company's manufacturing facilities before approving the building of facilities of a similar nature in the official's country (where that official has discretionary authority related to that approval) would be appropriate, subject of course to the laundry list of conditions outlined below. Before approving, reflect on whether the purpose could be accomplished as well by showing the official a PowerPoint presentation in his or her country – if the answer is yes, don't approve the trip.

Let's say you want to build production facilities in the Kingdom of Xanadu - note the beauty of being able to legitimately and transparently bring relevant Kingdom of Xanadu official decision-makers to your existing production facilities for the real world 'see-it-for-yourself hands-on' purpose of educating them on how expert your company is at doing what you are proposing to do in the officials' country. The key is that you are inviting officials with discretionary authority to approve or disapprove various aspects of your planned expansion into Xanadu – e.g. building plans, workers health and safety plans, environmental impact mitigation plans etc. It may also be appropriate to bring senior government official decision-makers (including executives of government owned commercial enterprises who are deemed government officials under the FCPA) who are unfamiliar with your company for the simple purpose of viewing your operations and meeting your senior executives in order to establish your organization's bona fides. Don't abuse this one – make sure it's real. See U.S. Department of Justice (DOJ) Opinion Procedure Release 07-01 (July 24, 2007) (The DOJ would take no action where '[t]he stated purpose of the trip [wa]s to familiarize the delegates with the nature and extent of the requestor's operations and capabilities and to help establish the requestor's business credibility.'). <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf>. Contrast these scenarios with inviting and paying for Xanadu Finance Ministry officials to come to your international operations headquarters in Paris to see a slide show on capital markets regulatory principles – might not pass the PowerPoint test.

It goes without saying that provision of hospitality to government official[s] should be limited to reasonable expenses that are specifically necessary to conduct the promotion or demonstration at issue. Here are additional conditions:

Ensure that the proposed hospitality is allowed under local law and any guidelines or work rules of the official's government agency - it must not only be legal for you to extend the hospitality, it must also be legal and allowed under the relevant agency work rules for the recipient to accept the hospitality.

Ensure that the local government is on notice. It is best to obtain a clearance letter from a superior of the official, a superior who will not be attending, or a senior level agency legal department or human resources official, reciting the itinerary and purpose of the trip and confirming that the official may attend. Note: if there is any doubt as to the strength of the link between the invitee official's function and the business related rationale for the trip, or the appropriateness of the official accepting the hospitality as a matter of his or her relevant work rules, the clearance letter should be required;

If practical, the attending official[s] should be selected by local government (by a senior official who is not attending);

Payments should be made directly to service providers and other vendors by your company, no reimbursements to officials unless absolutely necessary and then only against proper receipts;

No side trips (to Disneyland or the like – stick to business), no per diem payments;

No spouses, other family members or other guests of the officials; and

Souvenirs for the official[s] bearing your company's logo are acceptable, but should not be made of gold ;-). They need to be reasonable - lavish is bad.

See, e.g., id.; U.S. DOJ Opinion Release 04-03 (June 14, 2004) (The DOJ would take no action in relation to proposed sponsorship of a 10 day three city trip to the United States for 12 Chinese government officials 'to meet primarily with U.S. public-sector officials to discuss . . . 'U.S. regulation [and resolution] of employment issues . . . ' where the government Ministry selected the attending officials and confirmed the sponsorship did not violate PRC law)

<http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0403.pdf>; U.S. DOJ Opinion Release 04-01 (Jan. 6, 2004) (The Department would take no action in relation to proposed payment of travel and lodging for Chinese government officials to attend a legal compliance seminar in Beijing where the government Ministry selected the attending officials and confirmed the sponsorship did not violate PRC law) <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0401.pdf>. See also U.S. DOJ Opinion Procedure Release 07-02 (Sept. 11, 2007) (The Department would take no action in relation to a proposed itinerary that included 'a modest four hour city sightseeing tour for the [government] officials') <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf>.

The Books and Records Provisions or Mother Does Know Best Provisions

The books-and-records provisions require in relevant part that any issuer:

- (A) Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- (B) Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –
 - (i) transactions are executed in accordance with management’s general or specific authorization; [and]
 - (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements[.]. . . 15 U.S.C. § 78m(b)(2).

Embedding consistent full compliance with the books and records provisions is the key to a good night’s sleep each and every night. You worry that someday you may make a good faith judgment call approving a particular request related to government official hospitality that might be second-guessed in hindsight by government investigators. Transparent and accurate recording of the related expenditure in the company’s books and records, including evidence of your review and approval, will almost certainly save the day. Ducking and weaving definitely will not. Even and maybe especially in the FCPA arena, stomach justice generally prevails. See, e.g., SEC Litigation Release 20414 (December 21, 2007) <http://www.sec.gov/litigation/litreleases/2007/lr20414.htm> and SEC v. Lucent Technologies, Inc. Civ. Act. No 1:07-cv-02301 (D.D.C.) (RBW) (filed December 21, 2007) (Wholesale mischaracterization of government official hospitality in the company’s books and records) <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf>. If one is shown to have concealed or lied, one generally goes down. Don’t conceal, don’t lie; make documented good faith decisions and ensure your people are transparently and accurately recording the related expenditures. Mom was right. I call it the FCPA Sunshine Cure. I like the books and records provisions.

Keep it real, reasonable, transparent and documented – and sleep well!

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