

DOJ RELEASES FCPA OPINION ON PROMOTIONAL EXPENSES TO BE PAID TO JOURNALISTS OF STATE-OWNED MEDIA OUTLETS

The United States Department of Justice (“DOJ”) recently issued an opinion procedure release regarding the permissibility of certain payments to journalists employed by state-owned media outlets under the Foreign Corrupt Practices Act (the “FCPA”).

Under DOJ’s advisory opinion procedures, organizations subject to the FCPA are permitted to obtain an opinion from the Department as to whether a proposed transaction or course of conduct would “for purposes of the Department of Justice’s present enforcement policy” violate the anti-bribery provisions of the FCPA. A favorable response from DOJ establishes a rebuttable presumption that the requestor’s conduct is in compliance with the FCPA.

The FCPA generally prohibits the payment (or offer, promise, or authorization) of money or anything of value to a foreign government official, directly or indirectly, for the purpose of influencing such official or securing any improper advantage in order to assist in obtaining or retaining business. As relevant to DOJ’s recent opinion procedure release, the FCPA has an affirmative defense for “reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . directly related to the promotion, demonstration, or explanation of products and services.”

In Opinion Procedure Release No. 08-03,¹ issued on July 11, 2008, DOJ considered a request by TRACE International, Inc. (“TRACE”), a nonprofit membership organization specializing in anti-bribery compliance initiatives and a “domestic concern” within the meaning of the FCPA. TRACE proposed to pay certain expenses of journalists employed by media outlets in the People’s Republic of China (the “PRC”) to enable them to attend a press conference to be held by TRACE in Shanghai. Most of the media outlets were wholly-owned by the government of the PRC. The press conference was scheduled to coincide with an international anti-corruption conference taking place at the same Shanghai hotel as the press conference. TRACE stated that the purpose of the press conference was to increase its membership, enhance its reputation, promote its initiatives, and promote commercial transparency worldwide.

TRACE intended to pay cash stipends of approximately \$28 to cover local transportation costs, one meal, and incidental expenses of local journalists based in Shanghai. Journalists traveling from outside Shanghai would receive a larger stipend (approximately \$62) in order to cover those same types of expenses, plus two additional meals. These cash stipends were to be paid openly to each journalist upon signing in for the press conference. Journalists from outside Shanghai would also be reimbursed by TRACE, upon the submission of a receipt, for the cost of domestic, economy-class transportation. Additionally, TRACE would provide one night’s lodging at the hotel in which the press conference was held, paid directly by TRACE to the hotel.

In its request to DOJ, TRACE also represented the following: the stipends would be equally available to all journalists who attended the event, regardless of whether press coverage was provided or the nature of the coverage; the suggested stipends were reasonable approximations of likely costs; letters would be sent to the journalists’ employers in advance of the press conference, advising them that the stipend would be paid and explaining its purpose; TRACE had no business

¹ Available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0803.html>.

pending with any PRC government agency; TRACE had received written assurance from a law firm that the stipends were not contrary to PRC law; TRACE would accurately record the payments in its own books and records; and members of state-owned PRC media are not typically reimbursed by their employers for such work-related travel expenses.

DOJ stated that it does not presently intend to take any enforcement action. DOJ found that, based on TRACE's representations, the stipend and expenses to be paid to the journalists were reasonable under the circumstances and directly related to "the promotion, demonstration, or explanation of [TRACE's] products or services" and were therefore consistent with the FCPA's promotional expenses affirmative defense.

This release is noteworthy in at least four respects. First, DOJ considered journalists employed by state-owned media outlets to be government officials, reinforcing the Department's traditionally broad view of "foreign officials" under the FCPA. Second, DOJ approved three different methods of paying permissible promotional expenses, depending on the size and nature of the expenses -- cash stipends, paid transparently, to cover small expenses like lunch, local transportation, and meals; reimbursement, upon submission of a receipt, directly to individual officials for larger transportation expenses; and direct payment to a service provider (here, a hotel) where practicable. Third, consistent with past pronouncements related to the promotional expense affirmative defense, the factors DOJ cited in its opinion suggest that it considers measures designed to ensure transparency and avoid "double-dipping" by foreign officials important in establishing the bona fide, non-corrupt nature of the payments. Finally, DOJ specifically stated that in reaching its determination that the expenses came within the affirmative defense, it placed no weight on the fact that it may be a common practice for companies in the PRC to provide such benefits to journalists. This serves as a reminder that, in considering whether payments to foreign officials come within the FCPA's affirmative defense for promotional expenses, companies should consider the payments carefully on their merits and not be lulled into relying on the perception, or fact, that the practice is customary or that "everybody else is doing it."

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