



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

No.: 12-02

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Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department of Justice (the "Department") has reviewed the Foreign Corrupt Practices Act ("FCPA") Opinion Procedure Request from 19 non-profit adoption agencies headquartered in the United States (the "Requestors") submitted on August 21, 2012, as well as supplemental information submitted by the Requestors, most recently on September 24, 2012. Each Requestor is a "domestic concern" under 15 U.S.C. § 78dd-2(h)(1)(B) and thus eligible to request an Opinion of the Attorney General, pursuant to 28 C.F.R. § 80.4, regarding whether certain specified, prospective – not hypothetical – conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions of the FCPA. The Requestors represent that the facts and circumstances are as set forth below.

The Requestors seek an opinion related to their proposal to host 18 government officials from a foreign country (the "Foreign Country") during visits to the United States. Of those officials, 13 are from the government ministry in the Foreign Country that oversees adoptions (the "Adoption Ministry"), and one is the presiding judge of the court in the Foreign Country that ultimately approves or disapproves adoption requests (the "Adoption Court"). The Adoption Ministry exercises discretion in determining whether to issue an opinion approving of an adoption, and the Adoption Court exercises similar discretion in ultimately approving or rejecting adoptions. The remaining officials are the director of the Foreign Country's agency that oversees orphanages, a minister in the Office of the Foreign Country's head of government, and two members of the Foreign Country's legislature. The head of government and legislature play no direct role in the adoption process but can affect the process by appointing and confirming the Minister in charge of the Adoption Ministry and passing adoption-related legislation.

The Requestors represent that the purpose of the trip is to allow government officials from the Foreign Country to learn more about the Requestors' work, which includes processing adoptions in the Foreign Country. During the trip, the government officials will interview the Requestors' staff members, inspect the Requestors' files, and meet with families who adopted children from the Foreign Country.

Based on the Department's review of the Request and additional information received from the Requestors, it is the Department's opinion that the Requestors' proposed funding of the trip to the United States by the government officials from the Foreign Country is a reasonable and bona fide expenditure that is directly related to the promotion, demonstration, or explanation

of the Requestors' products or services. Therefore, the Requestors' proposed funding of the trip may go forward without enforcement action.

Background

I. The Adoption Process in the Foreign Country

The Requestors represent that the Foreign Country's adoption process is as follows. The first step is opening a court file at the Adoption Court. That court requires an opinion from the Adoption Ministry stating whether the adoption is in the best interests of the adoptive child. A positive opinion from the Adoption Ministry is generally, but not always, necessary to obtain the court's approval of the adoption. To render its opinion, the Adoption Ministry reviews profiles of the adoptive child and the adoptive family and considers the child's history, reason for living in an orphanage, legal guardianship, and overall condition, and the adoptive family's personal, social, health, and financial information. Although bound by the Foreign Country's law and the Adoption Ministry's own internal guidelines, the Adoption Ministry's officials exercise discretion in determining whether adoption is in the best interests of the child and whether the adoptive parents have the capability and are appropriate to adopt a child from the Foreign Country.

If the Adoption Court approves the adoption, the Adoption Ministry remains involved in the adoption process by facilitating the passport process for the adopted child and by monitoring the placement of the adopted children. The Requestors are required to submit annual post-adoption reports to the Adoption Ministry regarding the status of children who have been placed for adoption until the child reaches 18 years of age.

II. The Proposed Trip

According to the Requestors, the purpose of the visit will be to demonstrate the Requestors' work to the government officials listed above so that the government officials can see how adopted children from the Foreign Country have adjusted to life in the United States and to help the Requestors learn how they can ensure that they provide the Foreign Country's government with appropriate information during the adoption process. The Requestors will allow the government officials to meet with the Requestors' employees and to inspect the Requestors' offices and case files from previous adoptions. The Foreign Country's government officials will also meet with families who have adopted children from the Foreign Country and learn more about the Requestors' work.

The trip will consist of approximately two days of meetings for each set of government officials (plus travel). Two of the officials will attend two trips, meaning that they will spend approximately four days in the United States (plus travel). The Requestors will pay for the following:

- Business class airfare on international portions of flights for ministers, members of the legislature, and the director of the Orphanage Agency; coach airfare for

international portions of flights for all other government officials; and coach airfare for domestic portions of flights for all government officials;

- Two or three nights hotel stay at a business-class hotel;
- Meals during the officials' stays; and
- Transportation between agencies and local transportation.

The amount that the Requestors spend on hotels and meals will not exceed General Services Administration ("GSA") rates.¹ The Requestors will pay for business class airfare for high-ranking officials, which, as proposed, is permitted by the Foreign Country's government. The Requestors will pay all expenses directly to the providers and will not give any money, including per diems, directly to the government officials. If some of the trips require staying over a weekend, the Requestors will pay for hotels and meals during those periods, subject to the same limitations above. The Requestors will share the costs of the trips.

The Requestors have also represented, among other things, that:

- The Requestors plan to organize entertainment events that will be of nominal cost and will involve families who have adopted children from the Foreign Country. The Requestors are not planning to fund, organize, or host any other entertainment, side trips, or leisure activities for the officials.
- The Requestors will not have a role in selecting the particular government officials who will travel. That decision will be made solely by the Foreign Country's government.
- The Requestors will host only the designated government officials and not their spouses or family members.
- Any souvenirs that a Requestor gives the visiting officials will reflect a Requestor's business or logo and will be of nominal value.
- Apart from the expenses identified above, the Requestors will not compensate the officials for their visit and will not provide the officials with any stipend or spending money.
- Costs and expenses will be only those necessary and reasonable to educate the visiting officials about the operations and services of U.S. adoption service providers.
- The Requestors will not pay any additional money to the Foreign Country's government or any other entity in connection with this trip.

Analysis

The FCPA prohibits any domestic concern from corruptly giving or offering anything of value to any "foreign official" to assist "in obtaining or retaining business for or with, or directing any business to, any person" 15 U.S.C. § 78dd-2(a)(1). Because each Requestor is organized under the laws of a U.S. state and has its principal place of business in the United

¹ The GSA determines daily allowances for lodging and meals within the continental United States. Those allowances vary by location and are available at <http://www.gsa.gov/portal/category/21287>.

States, it is a “domestic concern” within the definition of 15 U.S.C. § 78dd-2(h)(1)(B) and is, therefore, subject to the anti-bribery provisions of the FCPA. The officials whom the Requestors will sponsor, as officers or employees of the Foreign Country’s government, are “foreign officials” under the FCPA. 15 U.S.C. § 78dd-2(h)(2)(A). Additionally, the FCPA contains an affirmative defense covering “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 or services” 15 U.S.C. § 78dd-2(c)(2)(A).

In other instances, with appropriate protections, the Department has recently issued favorable Opinion Releases with respect to sponsoring travel and related expenses for foreign officials. In FCPA Opinion Release 11-01, the Department issued an opinion in response to a request from an adoption service provider, declining to take enforcement action if the company proceeded with sponsoring expenses for a trip, including international airfare to the United States, by one official from each of two foreign agencies of a Central American government. In FCPA Opinion Releases 07-02 and 07-01, the Department issued opinions in response to requests from private companies in the United States, declining to take enforcement action if the companies proceeded with paying domestic expenses for trips by officials from Asian governments. In all three FCPA Opinion Releases, the requestors made representations and took corresponding measures to ensure that the proposed trips met the criteria of the affirmative defense covering reasonable and bona fide expenditures under 15 U.S.C. § 78dd-2(c)(2)(A).

Based on their representations and proposed safeguards, the payments that the Requestors propose to make here fall within the same affirmative defense. First, the expenses described above are reasonable under the circumstances. This includes the provision of business class airfare for high-ranking officials, which, as proposed, is permitted by the Foreign Country. Second, the expenses are directly related to the promotion, demonstration, and explanation of the Requestors’ services. The Requestors represent that the purpose of the trip is to demonstrate the Requestors’ work to the government officials by allowing the government officials to interview the Requestors’ staff members, to inspect the Requestors’ files, and to meet with families who have adopted children from the Foreign Country. The proposed itineraries are consistent with this purpose.

Based upon all of the facts and circumstances, as represented by the Requestors, including additional information received from the Requestors and consistent with the prior opinions discussed above, the proposed expenses reflect no corrupt intent and appear to be bona fide promotional expenses. *See* 15 U.S.C. § 78dd-2(c)(2)(A). The expenses contemplated are reasonable under the circumstances and directly relate to “the promotion, demonstration, or explanation of [the Requestors’] products or services.” *Id.*

Accordingly, with respect to the trips that the Requestors propose paying for, based on the representations made in the Request, including those recited above, as well as the Department’s review of supplemental materials submitted by the Requestors, the Department does not presently intend to take enforcement action.

This FCPA Opinion Release has no binding application to any party that did not join in the Request, and can be relied upon by the Requestors only to the extent that the disclosure of facts and circumstances in their Request is accurate and complete.