

FCPA FAQs

What is the Foreign Corrupt Practices Act and how does it apply?

The Foreign Corrupt Practices Act (FCPA) is a law that Congress passed in 1977 to punish bribery intended to influence the decisions of foreign officials. It is punishable by criminal and civil penalties that can be applied against both companies and individuals.

What are the elements of bribery under the FCPA?

The FCPA makes it a crime to: 1) make a payment of, offer or promise to pay, or authorize a payment of money or anything of value, directly or indirectly; 2) to any foreign official, politician, party official, candidate for office; 3) with a corrupt intent; 4) for the purpose of influencing one of these person's official acts or decisions in violation of his or her lawful duty; 5) in order to assist in obtaining or retaining business.

Does the FCPA apply only when money is given to a foreign official?

No. The notion that the anti-bribery laws prohibit only a "suitcase full of cash" type of scenario is misguided because these laws apply to a host of other improper payment arrangements that you must be able to recognize. The term "anything of value" in the FCPA has been broadly construed to include not only cash or a cash equivalent, but also, among other things, discounts; gifts; use of materials, facilities or equipment; training and education; entertainment; meals and drinks; transportation; lodging, insurance benefits; promises of future employment; and forgiveness (or cancellation) of debt. Further, there is *no de minimis* threshold; rather, the perception of the recipient and the subjective valuation of the thing conveyed is often a key factor in determining whether "anything of value" has been given to a foreign official. For example, if the Company has a preferred or discounted arrangement with a luxury or first class hotel (e.g., Ritz Carlton), the actual cost to the Company for the hotel room will likely not be determinative of value. Rather, the perception of the foreign official as to that hotel room and the subjective value of it (which will be higher than the actual cost) will be the determining factor.

How is "foreign official" defined under the FCPA?

"Foreign official" is defined very broadly under the FCPA. It includes all employees of non-U.S. national, state, provincial, and local governments and all their departments and agencies, from high-level officials to the low-level employees. But the term also covers employees of state-owned or state-controlled entities (SOEs) – that is, employees of companies and organizations that may not explicitly be a part of the government but that are owned or controlled by the government. Examples of SOE employees who were deemed to be "foreign officials" in recent enforcement actions include pharmacists, doctors, administrators at public hospitals, and university officials, as well as employees of telecommunications companies, electric utilities, and state-supported oil firms.

What constitutes a “state-owned entity” under the FCPA?

A state-owned entity (SOE) is a company or organization that is owned or controlled by a non-U.S. government. Identifying whether an entity may be an SOE is important, as SOE employees are treated as “foreign official” for purposes of the FCPA.

It is not always easy to determine if an entity is an SOE. Courts have endorsed a multi-factor analysis based on (i) control (whether the foreign government has a significant ownership interest, has the ability to hire and fire the entity’s principals, receives a portion of the entity’s profits); and (ii) function (whether the entity has a monopoly over the function it carries out, serves the public at large, is viewed as performing a governmental function, and whether the government subsidizes the services provided by the entity). Common examples of SOEs include utilities, port authorities, railroads, airlines, defense contractors, oil companies, mining operations, telecommunications providers, banks, health care companies, and universities. In some countries, governments may have direct and/or indirect interests in a much wider variety of industries and entities, and special attention should be paid to evaluating potential governmental ties for business partners/customers in these countries.

How is “obtain or retain business” interpreted under the FCPA?

“Obtain or retain business” is interpreted broadly, and includes payments related to the renewal of contracts, the execution or performance of contracts, the retention of existing business and the ability to continue operating. Recent examples from FCPA enforcement actions include winning a contract, influencing the procurement process, circumventing import rules, gaining access to non-public bid tenders, evading or minimizing taxes or penalties, influencing enforcement actions or litigation, obtaining exceptions to regulations, and avoiding contract termination.

What constitutes a “third-party intermediary” under the FCPA?

Third-party intermediaries should be viewed broadly as any individual, company, or entity that performs services for or acts on behalf of a company. Examples include agents, brokers, consultants, sales representatives, distributors, attorneys, accountants, tax or custom advisors, travel agents, and any other business or joint-venture partner. Under the FCPA, companies can be held liable for the actions of (or ineffective oversight of) third-party intermediaries--what a company cannot do directly, it cannot do indirectly through a third-party acting on its behalf. Indeed, the majority of FCPA enforcement actions result from conduct not by company employees directly, but by actions taken by third-party intermediaries.

A foreign official has suggested that he would like to visit the Company to inspect its operations prior to approval of a permit. Are we allowed to pay for his trip under the FCPA?

It depends. Under the FCPA, it is permissible to pay for a foreign official to make a bona fide trip of this nature. But extreme care must be taken with regard to the itinerary, how the expenses are paid and how much is paid. When trips like this are involved, the Company should, wherever possible, make all payments directly to the airline and hotel, impose restrictions on the amount of expenses that can be paid and obtain assurances that the foreign government is aware of the trip. Also, the amount of outside entertaining should be strictly limited and related to the business purpose of the trip.

Why are government procurement contracts an FCPA risk?

Payments relating to procurement contracts with foreign governments or their subdivisions are another common theme of FCPA enforcement actions. The risk of corruption is high for several reasons. First, government contracts often involve big-ticket projects, such as building infrastructure, improving agriculture, developing computer networks, supplying healthcare services, or extracting minerals. Second, foreign officials often have some discretion in awarding such contracts. And, third, companies often have extensive interactions with those foreign officials throughout the procurement process. Any payments that are made in furtherance of a bid to win a government contract, or to keep such a contract, should thus be carefully scrutinized for compliance with the FCPA's anti-bribery provisions. Recent examples of enforcement actions involving government contracts run the gamut from bribes paid to influence the setting of bid terms, to viewing confidential competitor bids, to hiring consultants as a means to facilitate bribe payments, to more straightforward attempts to influence decision makers through cash payments. Indeed, the largest FCPA cases by settlement amount almost invariably involve government procurement contracts.

It is also worth noting that public procurement is often highly regulated under local laws and/or by other authorities (e.g., projects funded by the World Bank), which may impose further restrictions on what a company can and cannot do.

Why are meals and entertainment an FCPA risk?

The FCPA does not prohibit a company from paying for the meals and other entertainment of foreign officials so long as the meals and entertainment are reasonable, directly related to a legitimate business purpose, and not provided for the purpose of improperly influencing the foreign officials. However, from the perspective of FCPA regulators, "excessive" entertainment evinces an intent to corrupt or improperly influence a foreign official. While the FCPA itself does not establish a bright-line rule for what is reasonable, the FCPA Guidance published by the SEC and DOJ includes several (admittedly clear) examples of what is not: (i) \$10,000 spent on dinner, drinks, and entertainment for a government official; (ii) business trips consisting primarily of sightseeing and "pocket money" for foreign officials; and (iii) business meeting consisting primarily of tourist activities for a foreign official and his wife.

The level of entertainment should be in accordance with generally accepted business standards. And, to this end, many companies have developed policies addressing the provision of gifts, meals, and entertainment. These policies should be consulted, as they may set specific monetary limits for entertainment or amounts at which additional approval may be required.

In addition to setting reasonable limits on entertainment, companies should also consider these best practices.

- Business activities should predominate over entertainment, and itineraries should be prepared outlining the business events associated with the entertainment.
- Company personnel must be in attendance to support the business justification of relationship-building.
- The company should determine the entertainment and pay for it directly (a salesman who offers to provide entertainment "on his own dime" does not shield the company from FCPA liability).

- The company should not reimburse foreign officials for “personal activities” or entertainment that they may choose to engage in while visiting.
- No “pocket money,” spending cash for souvenirs, per diems, or other cash equivalent should be provided.
- Entertainment activities should be limited only to those individuals who have a legitimate business purpose for attending; the company should not pay for or reimburse expenses for spouses, family members, or other friends not directly involved in the business relationship.
- The company should record all entertainment expenses accurately.

Finally, the company should be certain that there is no quid pro quo involved. If the entertainment is intended as an inducement to obtain or retain business or to influence a decision of the foreign official, or to reward past favors, then the entertainment should not be provided.

Why are charitable donations an FCPA risk?

Charitable donations fall within the broad definition of “things of value” that, if provided for the improper purpose of influencing a foreign official, could result in an FCPA enforcement action.

To be sure, the FCPA does not prohibit charitable donations to foreign organizations. The FCPA Guidance acknowledges the importance of good corporate citizenship and corporate contributions to communities in which companies do business. But charitable contributions should be closely vetted and subsequently monitored, as the DOJ and SEC have identified an emerging trend of charitable donations being used by companies as a means to funnel bribes to foreign officials.

Adding to this risk is that many companies may encounter political or business pressure, especially in economically challenged regions, to contribute to local development efforts. For example, a company may be asked by local officials to construct a school using certain suppliers or builders, or may be asked to contribute to a community improvement fund or project organized or supervised by local officials.

The U.S. regulators' concern in these types of situations is that the donation could be made as a quid pro quo for granting licenses, obtaining utility services, or, more generally, getting business support from the local officials.

Companies should carefully evaluate potential charitable donations to foreign entities for FCPA risk, including asking (and answering) several key questions: What is the purpose of the contribution? Was the donation requested by a foreign official? Is a foreign official with whom the company may have pending business associated with the recipient charity? Have there been any conditions or requirements placed on the donation? Is there any expectation of a quid pro quo for making the donation?

The purpose of the donation, the due diligence process and findings, and the payment itself should be thoroughly documented.

Why are political contributions an FCPA risk?

Political contributions, by their nature, are made by companies for the purpose of supporting a particular political cause or outcome that would benefit the company. Political contributions – whether made as direct payments or as expenditures in support a candidate (such as a fundraising event) – are thus a high-risk activity from an FCPA perspective, as there often is a perception that contributions are made with

some expectation of a quid quo pro. In one recent FCPA enforcement action, for example, U.S. regulators deemed a donation made to a Nigerian political party had been paid to influence the award of a government contract.

Moreover, the provision of political contributions by foreign entities is a highly regulated activity in many countries and, indeed, may be entirely prohibited under local law. For this reason, too, companies should be extremely cautious and seek legal counsel when deciding whether to involve themselves in foreign politics. As with all expenditures, political contributions should be fully and accurately documented.

Why are travel and per diems an FCPA risk?

In some circumstances, it may be appropriate for a company to make reasonable and *bona fide* expenditures for a foreign official's travel and lodging if these expenditures are directly related to the promotion, demonstration, or explanation of the company's products or services or to the negotiation, execution, or performance of a contract. However, the provision of travel and lodging to foreign officials should be closely monitored, as numerous recent enforcement actions have alleged that companies intended to improperly influence foreign officials through lavish or non-business related travel.

A company that plans to pay for a foreign official's travel and lodging can take steps to help mitigate FCPA risk.

- Clearly document the business purpose for the trip and prepare an itinerary detailing business meetings and other activities. "Side trips," such as to Disney World or Las Vegas, should never be paid for by the company or its agents.
- Inform the government/SOE of the business trip, and confirm that the trip is permissible under local laws.
- Travel and lodging accommodations should be reasonable and consistent with any internal company travel policies (e.g., coach-class for domestic flights; business-class for international flights).
- It is preferable if the company does not pick which foreign officials should take the business trip, but rather the foreign officials should be selected by the government agency or SOE.
- The company should only pay for those foreign officials selected to attend (and who have a business reason to attend), and not pay for spouses, relatives, or other guests who might be accompanying the foreign official.
- The company should pay the service providers (e.g., airlines, hotels) directly, rather than reimburse foreign officials.
- Cash (i.e., per diems, spending cash) should never be provided.

As always, the company should accurately record all expenses associated with the business trip and any other business courtesies provided to foreign officials.

Why is engaging third-party intermediaries a risk under the FCPA?

The FCPA prohibits not only bribes paid directly by a company to a foreign official, but also bribes paid indirectly through third-party intermediaries. Indeed, the vast majority of FCPA enforcement actions have involved, in some way, improper conduct by third parties acting on behalf of the targeted companies. Third parties performing work on behalf of the company should thus be fully vetted and continually monitored for FCPA red flags.

The degree of third-party vetting will depend on the services provided, the amount of expected government interaction, and the jurisdictions in which the third party will be operating. At a minimum, pre-engagement due diligence should be conducted, anti-bribery and anti-corruption language should be incorporated into contracts, and a FCPA acknowledgment letter should be provided and returned. Third parties that pose a higher risk should be subject to more intensive due diligence, and may be additionally required to complete a FCPA questionnaire, provide periodic certifications, and, in some cases, agree to perform anti-corruption training.

Importantly, companies should maintain due diligence files on third-party intermediaries, which should be periodically reviewed and updated to ensure FCPA compliance.

Why is the giving of gifts an FCPA risk?

The provision of gifts to foreign officials is a recurring issue in many FCPA enforcement actions. The distinction between an acceptable gift and a potential bribe lies in the intent of the giver. In the appropriate circumstances, a modest gift to a foreign official may be permissible if the intent is to reflect esteem, to express gratitude and appreciation for business partners, or to strengthen existing relationships. But even a modest gift should never be provided for the purpose, or with the expectation, of receiving something in return (or if giving such a gift would create even the appearance of *aquid quo pro* arrangement).

Enforcement agencies will often look at the timing and the value of the gift (to the recipient – not the provider) as a way of assessing the provider's intent. A gift provided to a foreign official around the time of a major deal or decision involving the foreign official and the company would be viewed more suspiciously than a gift provided in connection with, for example, a trade show or a wedding. Similarly, the larger or more extravagant the gift, the more likely DOJ and SEC will suspect it was given with an improper purpose. Enforcement cases have involved both single instances of large, extravagant gift-giving, as well as a pattern of smaller gifts, such as the liquor and household items. Other examples of illicit gift giving have involved, among other things, a country club membership fee, a generator, watches, household maintenance expenses, payment of cell phone bills, and limousine services.

We generally discourage gifts as a mode of business hospitality. Gifts are much riskier than other forms of relationship building, like, for example, dinners or entertainment where company officials are interacting with foreign officials. Gifts are not, however, per se violative of the FCPA and can be acceptable if they are of modest value, reasonable in scope, and not given or received in expectation of, or as an award for, obtaining or retaining business, or as a means of inducing a breach of trust or impartiality on the part of the recipient. Gifts of cash or cash equivalents (such as gift cards) are almost always problematic, as are any gifts specifically requested by the recipient.

Gift should always be properly recorded in the company's books and records. Companies should also be sure to always check local laws and internal policies, which may be more specific in regard to the amount and types of gifts (if any) that foreign officials are permitted to accept. For example, India's Service Conduct Rules limit the value of gifts and other corporate hospitalities that public servants may accept, which, depending on rank and service classification, may be as low as 500 Rupees (approximately US \$8).

Why is the hiring of friends or relatives of a foreign official an FCPA risk?

FCPA regulators have heightened their scrutiny of company employment decisions – specifically, the hiring of the relatives or friends of foreign officials for jobs or internships. The concern here is that companies are not hiring based on merit (or need), but instead are hiring friends or relatives as a “favor” to a foreign official or to influence or reward a government official.

Some examples of hiring red flags include: (i) job created specifically for applicant; (ii) applicant hired without going through standard hiring procedures; (iii) applicant lacks the necessary skills, experience, or education for the position; (iv) applicant’s salary not commensurate with other employees with similar skills, experience, or education; (v) job or internship hiring requested by foreign official; (vi) job or internship in business area in which foreign official has some oversight or authority; (vii) job created despite any perceived business need; and (viii) applicant would receive (or receives) extra benefits not provided to other employees.

Even in situations in which a company makes a bona fide decision to hire a friend or relative of a foreign official based on merit, the company should periodically review the employment relationship to ensure that the new employee does not receive favored treatment or benefits not provided to other similarly situated employees.

Why is the payment of government fees an FCPA risk?

Governments sometimes require companies to pay fees, assessments, charges, and taxes for a myriad of legitimate reasons relating to the administration of governmental services, whether it be to obtain bid packets, secure utilities, obtain regulatory licenses and certifications, import or export products, or process and file business registration forms. However, the payment of such fees creates an environment ripe for bribery, as bribes improperly characterized as fees (and bribes paid to avoid such fees) are a relatively common feature of FCPA enforcement actions.

Before paying fees, companies should confirm both (i) that the fee is authorized by the government agency and paid to and (ii) that the fee request is in the proper amount. To the extent possible, companies should document the fee authorization, whether it be an agency rule or regulation, statute, ordinance, or other governmental order. In addition, companies should make payments out directly to the government bodies, departments, or agencies, and not to individual foreign officials. Cash payments should be avoided, and receipts should be requested.

All fees should be properly recorded in the company’s books and records.

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