

FCPA Best Practices: Gifts, Meals, and Entertainment

The exchange of business courtesies, such as gifts, meals, and entertainment, is a well-established practice which, when used appropriately, can help strengthen existing relationships, foster new opportunities, and convey respect and appreciation for business partners.

But, in an environment of heightened anti-corruption enforcement – which has led to billions of dollars of fines and penalties over the last few years – companies run the risk of triggering anti-corruption laws if their marketing and entertainment expenditures cross a line into conduct that could be characterized as bribery. In particular, companies need to understand the potential risks when providing things of value, such as company gifts, tickets to sporting events, and sightseeing excursions on business trips, to both domestic and foreign government officials, to employees of state-owned enterprises, and even to purely private, commercial customers.

Although there are no bright-line rules, in general such business courtesies are allowed, provided that 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. It is likewise important that the provision or receipt of business courtesies not cloud business or official judgments or, more practically, give the appearance of such a conflict of interest.

Therefore, while companies may continue to entertain clients, they need to take affirmative steps to ensure that corporate travel, meals, entertainment, gifts, and other business courtesies are given in a way that does not implicate global anti-corruption laws.

FOREIGN CORRUPT PRACTICES ACT: KEY TERMS

The Foreign Corrupt Practices Act of 1977 (FCPA), as amended, governs the worldwide activities of U.S. companies and their employees. In general, the FCPA prohibits offering, paying, promising to pay, or authorizing payment of money, gifts, or anything of value to a foreign official: (i) to influence any act or decision by the official; (ii) to induce the official to use his or her influence to affect any act or decision; or (iii) to seek any improper advantage to assist the company in obtaining or retaining business. The FCPA covers payments made directly or indirectly, including those made through third parties while knowing that all or part of the payment would be passed on to a foreign official.

FOR MORE INFORMATION

In today's ever-evolving regulatory environment, can your company really afford not to have the right internal controls in place? Foley is here to help. Contact Foley Partner **David Simon** at 414.297.5519 or dsimon@foley.com today.

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“Anything of value” includes much more than just cash or cash equivalents. It can include the payment of travel expenses, providing services, outings, or other entertainment not customary to a particular business transaction, assumption or forgiveness of debt, personal favors, offers of employment, and even charitable donations. Normal business entertainment expenses directly related to a bona fide business purpose, as well as nominal gifts such as small gifts with a corporate logo, are generally acceptable under the FCPA. However, as discussed below, excessive marketing expenses, including lavish entertainment and travel given in return for obtaining or retaining business, might violate the FCPA, as well as other anti-corruption laws.

DOJ AND SEC GUIDANCE: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT

On November 14, 2012, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) issued A Resource Guide on the U.S. Foreign Corrupt Practices Act (Guide). The DOJ and SEC comment that the Guide is “non-binding, informal, and a summary in nature,” and it does not provide clearly stated, bright-line rules that many legal practitioners and businesses had hoped would be provided.

Nonetheless, the Guide does put in place some guideposts – most notably through the use of hypotheticals – for evaluating the appropriateness of gifts, meals, and entertainment expenses. On one end of the spectrum are nominal gifts, given openly and recorded transparently in the company’s books and records, that the DOJ and SEC state are permitted under the FCPA. The hypotheticals of permissible gifts, entertainment expenses, and business courtesies include the following:

- **Trade Show Hypothetical:** Foreign officials are provided promotional items (e.g., pens, hats, t-shirts) and free snacks and beverages by a company at a trade show. Afterwards,

the company entertains a dozen current and prospective clients at a bar, paying for a moderate bar tab and taxi fares.

- **Wedding Hypothetical:** A company provides a reasonable gift (e.g., a moderately priced crystal vase) to the general manager of a government-owned entity as a wedding gift.
- **Facilities Inspection Hypothetical:** A company pays for airfare, hotel, and transportation for foreign officials for the purpose of inspecting a facility. The foreign officials travel business class, which the company’s own employees are entitled to when flying internationally. An appropriate inspection takes place and, afterwards, the foreign officials are treated to a moderately priced dinner, a baseball game, and a play.

Each of these hypotheticals assumes that the company has recorded the transactions above in a transparent and appropriate manner.

On the other end of the spectrum, the Guide provides various hypotheticals (many of which are taken from prior prosecutions) illustrating types of gifts and expenses that would be deemed impermissible under the FCPA:

- A \$12,000 birthday trip for a government decision-maker from Mexico that included dinners and visits to wineries
- \$10,000 spent on dinners, drinks, and entertainment for a government official
- A trip to Italy for eight government officials that consisted primarily of sightseeing and included \$1,000 in “pocket money” for each official
- A trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle

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- **Facilities Inspection Hypothetical Extended:**
Foreign officials and their spouses are flown first class to Las Vegas, where the company does not have a facility, and are treated to an all-expense paid, week-long trip
- A company pays for a foreign official to take a vacation to Paris with his girlfriend

Irrespective of whether a company properly accounted for these types of activities (which, if not done or done improperly, would lead to additional legal exposure if the company is publicly traded), the DOJ and SEC take the position that these types of activities would violate the FCPA, either because the expenses are not reasonable, because they are disconnected from a legitimate business purpose, or both. Rather, these types of “excessive” activities and expenses, from the government’s perspective, evince intent to corrupt or improperly influence a foreign official.

The hypotheticals outlined in the Guide are useful in that they provide a general sense for the level of gift giving and entertainment expenses the DOJ and SEC would deem permissible or impermissible. Yet, unsurprisingly, the Guide’s hypotheticals fall on the relative extreme ends of the spectrum, and, as noted above, the Guide offers no bright lines to distinguish safely between acceptable client entertainment and those payments that could be construed as violating the FCPA or other anti-corruption laws. This leaves open the question of how the DOJ and SEC will view activities that fall somewhere in between the hypotheticals and, in turn, how companies should structure their business operations to minimize the risk of crossing over into impermissible conduct.

U.K. ANTI-BRIBERY LAW

Anti-bribery laws in numerous other countries around the globe can also apply to U.S. companies. A relatively recent and important addition to these is the U.K. Anti-Bribery Act, enacted in 2010.

The provisions of the Act made headlines in 2012 as business leaders complained that uncertainty regarding the application of the Act’s provisions to corporate hospitality had a dampening effect on business support and participation in major U.K. events such as the 2012 Summer Olympics and Wimbledon.

In response to these concerns, the Director of the U.K.’s Serious Fraud Office (SFO), which is tasked with enforcement of the Act, commented in September 2012, “We are not interested in [ordinary corporate gifts, meals, and entertainment]. We are interested in hearing that a large company has mysteriously come in second in bidding for a big contract. The sort of bribery we would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the ‘serious champagne office.’”

On October 9, 2012, however, the SFO issued revised guidance relating to corporate hospitality. While recognizing, as the SFO Director implicitly did, that bona fide hospitality or other legitimate business expenditure is an established and important part of doing business, the guidance makes clear that the SFO is aware otherwise legitimate channels of business expenditure can be abused to disguise bribes. The revised guidance leaves no doubt that the SFO will potentially prosecute if there is sufficient evidence and it is in the public interest to do so.

The Anti-Bribery Act is broader in scope than the FCPA insofar as Section 1 of the Act makes it an offense for a person to offer, promise, or give a financial or other advantage to any person – and not just a foreign public official – to reward or bring about improper performance. Although the SFO’s guidance regarding hospitality expenditures has arisen in the context of discussing Section 6 of the Act, which deals with payments to foreign public officials, liability for hospitality expenditure abuses is not expressly limited to expenditures to or on behalf of such officials.

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The SFO has not seen fit to provide more specific detail about the kinds of situations in which it believes it is in the public interest to prosecute or about the kind of volume of evidence it is looking for. Thus, as with the FCPA, there is no bright-line rule over which business hospitality expenditures might cross into bribery. However, the new guidance is undoubtedly a change in tone.

To avoid the Anti-Bribery Act, as with the FCPA or any other potentially applicable anti-bribery law, companies should continue to ensure that any hospitality or promotional expenditure be proportionate and properly documented.

BEST PRACTICES

Below are several best practices that companies should consider following when providing gifts, meals, entertainment, and travel to clients or prospective clients who might arguably constitute foreign officials:

Demonstrated and Internally Visible Corporate Commitment to Strict Compliance

- Conduct a general bribery risk assessment relating to the company's dealings with business partners and foreign public officials and the provision of gifts, entertainment, and other hospitality and promotional expenditures.
- Publish a policy statement expressing the company's commitment to a transparent, proportionate, reasonable, and bona fide approach to business expenditures on gifts, entertainment, and other hospitality.
- Pursue a plan of regular, documented internal monitoring and review of compliance with company hospitality expenditure policy and procedures.

Compliance Clearance

- Avoid entertaining or providing gifts to government officials (and employees of state-owned entities). Many companies simply prohibit any such entertainment, which is obviously the lowest-risk approach.
- When they do entertain or provide gifts to government officials and employees of state-owned enterprises, companies should have pre-determined levels, set forth in a compliance policy, beyond which entertaining expenses will receive special scrutiny. This might include requiring approval by the company's compliance officer or legal department for expenses beyond the threshold amounts.
- Although the expenditure level should vary depending upon the particular market at issue, as a general matter, any expected benefits valued above \$200 should receive this heightened level of scrutiny. Similarly, a heightened level of scrutiny should be given to a series of benefits provided to a single individual that reach a particular amount in aggregate (e.g., \$500) within a certain time period (e.g., six months, one year), even if the individual benefits themselves are each below the \$200 amount.
- Similar procedures should also be in place for business courtesies extended to private customers. Entertainment and gift giving provided to private customers pose a lower risk than providing these benefits to government officials, so higher dollar threshold levels may be acceptable. Nonetheless, companies should still take measures to ensure that such payments are intended to build general goodwill and not to secure the award of specific business.

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- By way of reference, Fortune 500 companies have been surveyed about monetary limitations placed on gift-giving and entertainment expenses. Of those surveyed companies that included specific spending limitations for gift giving – as opposed to general guidance, e.g., “nominal” or “modest” value, “reasonable and customary,” “not excessive in value” – more than 90 percent set gift limits at \$250 or less, with more than 65 percent reporting gift limits of \$100 or less. With respect to entertainment expenses, more than 80 percent have spending limits of \$250 or less, with approximately 35 percent of surveyed companies limiting entertainment expenses to less than \$100.
- Any event involving paid-for travel by government officials and employees of state-owned entities should be subject to prescreening by compliance.
- The government agency, or state-owned entity, should be notified of any entertaining that is occurring.
- It is important for companies to create a detailed paper trail, documenting the purpose of the corporate hospitality, the officials entertained, the amount and nature of the expenditure (see below), and, most important, the internal compliance process.

Accounting for Activities

- Companies should establish procedures to ensure the accurate tracking and identification of all business-related gifts, meals, entertainment, and travel payments and expenses. Companies should have in place procedures requiring the accurate reporting of all disbursements and reimbursements associated with business courtesies.

- For business trips, factory tours, and similar on-site visits, companies should not only detail the gifts, meals, and entertainment provided, but should also outline the itinerary of business events and/or meetings associated with the visit.
- The company should have some mechanism for flagging gifts, meals, entertainment, and travel expenses repeatedly given to the same person.

Gifts, meals, and entertainment expenses

- The level of entertainment or gift giving should be in accordance with generally accepted business standards.
- Business activities should predominate over entertainment or personal activities when planning site visits or business trips. The location of such activities should have a nexus to the company (i.e., location of factory, offices, logical “half-way” point).
- Company personnel should be in attendance at company-sponsored events to support the business justification of relationship-building.
- The company should have control over aspects of entertainment activities, and should not pay per diems or reimburse “personal activities” that a foreign official might choose to engage in while on a business trip or site visit.
- Entertainment activities should be limited to only those individuals who have a legitimate business purpose for making a trip or site visit. Companies should not pay for or reimburse expenses for spouses, family members, or other acquaintances who do not have a direct relationship to the state-owned client or prospective client.
- Travel accommodations for foreign officials should be consistent with those offered to employees of the company (e.g., business class for international flights, coach for domestic flights).

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- Paid-for travel should be restricted to travel to and from places of business. Companies should not pay for or reimburse itineraries that include side trips that are of a personal benefit (i.e., Chicago to China via Las Vegas). As a general matter, it is better if any entertainment is one in which at least one employee of the U.S. company is present, since it is harder to provide a business justification for entertainment that is attended only by the foreign official.
- Gifts should be reasonable for the circumstances, of moderate value, and, preferably, include the company's logo. Luxury items should not be provided. A good rule of thumb is whether one would reasonably expect a particular type of gift to include a corporate logo. If not, the gift is likely more than a "token" and may be viewed as excessive.
- Companies should avoid giving: (i) per diems, cash, or cash equivalents, such as gift cards; (ii) gifts or entertainment specifically requested by the recipient; and (iii) gifts or entertainment provided in the expectation of, or as a reward for, the provision of business or other favorable official action.

Training

- Train agents and consultants authorized to act on the company's behalf regarding the anti-corruption requirements, and monitor its business-generating and entertainment activities to ensure that they are not stepping over the line.

The adoption of practices and policies such as these cannot eliminate the risk of a potentially suspect benefit, especially for companies operating in countries that have a reputation for corruption. Nonetheless, well thought-out procedures, tailored to the company's operations and produced in writing, are essential for companies that provide valuable business courtesies to their state-owned or operated customers. Some variation of these procedures may help mitigate the risk that a company's business entertainment could be construed as violating the global anti-corruption laws, the increasingly aggressive enforcement of which has become a hallmark of operating within a global marketplace.