

## **FCPA Gifts, Entertainment and Hospitality: Surviving DOJ and SEC Enforcement**

Understanding the Risks, Avoiding Common Pitfalls, and  
Strengthening Compliance Programs to Meet FCPA Requirements

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# Foreign Corrupt Practices Act Compliance - Gifts & Hospitality

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# Foreign Corrupt Practices Act Compliance - Provisions Related to Gifts & Hospitality

# FCPA – Overview

- Federal securities statute (15 U.S.C. §78dd-1, et. seq.)
- Enacted in 1977 to prevent corporate bribery of foreign officials by US companies
- Anti-bribery provision is main focus
- Other provisions: books & records; internal controls
- Main U.S. government enforcement:
  - Department of Justice
  - Securities and Exchange Commission

# FCPA – Who Must Comply

15 U.S.C. §§ 78dd-1; 78dd-2

- Issuers – Selling securities on a U.S. market; filing reports with the SEC
- Domestic Concerns – Organized under U.S. laws or principle place of business in the U.S.
- Officers, directors, employees, shareholders
- Alternative Jurisdiction - Any organization or individual who furthers the illegal conduct whether in the U.S. or not
  - ✓ Phone calls
  - ✓ Emails
  - ✓ Attending meetings
  - ✓ Aid/abet/conspire



# FCPA- Definition of Government Officials

15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2)

- Non-US government official or employee -regardless of position or rank in the organization
- Management and employees of state owned enterprises
- Officials and employees of public international organizations
  - -World Bank; UN; Red Cross etc.
- Person acting in an official capacity for or on behalf of a non-US government organization or public international organization
  - honorary or ceremonial positions
  - consultants acting for an organization
- Political party members, party officials, or political candidates
- Government official's family members and business associates

# FCPA - Prohibited Transactions

15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)

Offering, promising, authorizing anything of value for the purpose of obtaining or retaining business or to gain a government advantage:

- Influencing a non-US official's official act or official decision
- Inducing non-US official to do or omit to do any act contrary to their lawful duty
- Securing any improper advantage from a non-US official
- Inducing a non-US official to use influence with a foreign government to influence the government's act or decision
- More expansive than just securing a contract or sale
- Includes – impacting tax liability; import/export costs; obtaining permits/licenses; beneficial interpretation of laws/regulations; non-public procurement information; extension of time to submit a bid; etc.

# FCPA- Intent Requirements

- Corrupt Intent – Purpose of the action is to have the government officially misuse their government position
- Willfully – Person undertaking the act must “know” their behavior is illegal
- But – does not require precise knowledge that their behavior is illegal just need to act with wrongful intent
- Organization does not have to act “willfully” – engaging in the act is sufficient for liability
- Success is not required – recipient need not know of illegal payment; recipient need not ask for the bribe; recipient need not actually receive the bribe.

# FCPA- Facilitating Payments

15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)

Facilitating or expediting payments made to:

- Secure routine government action
- Government action is not discretionary

Applies to routine government actions such as:

- Obtaining permits, licenses, or other official documents
- Police protection, mail, or scheduling inspections;
- Telephone service or other utilities

**Note:** Gifts & hospitality not natural fit here.

# FCPA- Affirmative Defenses

15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c)

**Lawful Under Local Law:** the payment, gift, offer, or promise of anything of value was lawful under the written laws and regulations of the foreign country, at the time of the expenditure

- Local laws are not always written, not always clear

**Reasonable Business Expense:** the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide business expense directly related to:

- promoting, demonstrating, or explaining products or services; or
- executing or performing a contract

# FCPA- Accounting Requirements

## 15 U.S.C. §§ 78m

- Accurately record transactions with enough detail to identify the transactions
- Create and maintain an accounting system with controls that provide reasonable assurances that:
  - transactions are executed as management has authorized
  - transactions are recorded to assure financial statements conform with generally accepted accounting principles or any other applicable criteria for the statements,
  - assets must be accounted for
  - access to assets is permitted consistent with management's authorization
  - recorded transactions are compared with the existing assets at reasonable intervals and appropriate action is taken if differences are identified

# Gifts, Hospitality & Entertainment Laws Beyond the FCPA

# Global Commitments to Combat Corruption

**United Nations:** "Corruption strangles people, communities and nations. It weakens education and health, undermines electoral processes and reinforces injustices by perverting criminal justice systems and the rule of law. By diverting domestic and foreign funds, corruption wrecks economic and social development and increases poverty. It harms everyone, but the poor and vulnerable suffer most. " *Ban -Ki Moon, 2016 Anti-Corruption Day*

**The Coca Cola Company:** "We continue our efforts to root out corruption in partnership with governments whenever possible." [T]he Coca-Cola Company was the first company to sign a Memorandum of Understanding (MOU) with the Anti-Corruption Unit of the Cambodian government. The hope is that this opportunity to publicly show commitment to ethical business practices will gain momentum. Our commitment helps us build trust with our stakeholders in Cambodia, and provides clear direction to our workforce in the country. As a result, The Coca-Cola Company was named the Best Group Trader by the General Department of Customs and Excise of Cambodia." [The Coca Cola Company Anti-Corruption Website](#)



# Local Laws

- Many countries have updated or introduced laws and regulations regarding receipt of gifts, hospitality and other benefits by officials
- Others have created or extended their own FCPA-equivalents (OECD countries, China)
- Some emphasize reporting, and penalize lack of reporting above certain thresholds (e.g., Mexico, Indonesia)
- Some have issued codes of conduct for officials (Brazil)

# UK Bribery Act - British FCPA

- Unlike FCPA – prohibits commercial bribery
- Unlike FCPA – has offense of “failure to prevent bribery”
- Defense – adequate procedures to prevent bribery
- Broad jurisdiction
- Objective standard:
  1. Was there intent to influence?
  2. Was there intent to obtain, retain or get business advantage?
  3. Payment or advantage not permitted

# Sapin II - France's New Anti-Corruption Law

- Passed November 2016
- Power to investigate French nationals outside of territory of France
- Created French Anti-Corruption Agency (ACA) with broad prosecutorial power
- Robust corporate compliance program requirements for companies with at least 500 employees and revenue of at least €100M
- Strengthened internal and external reporting of whistleblower complaints for companies with 50 employees or more
- Introduced a French version of the Deferred Prosecution Agreement

# Republic of Korean New Anti-Corruption Law

- The “Kim Young-ran law” effective September 2016
- Covers four million public servants and employees, including civil servants, teachers, and media company employees
- No need to prove explicit quid pro quo to violate law
- Both parties to the transaction may be prosecuted
- Relevant provisions:
  - Public officials banned from accepting gifts worth more than \$45 or meals valued at more than \$27
  - Donations are capped at \$90
  - Critics claim will hurt small businesses and undercut the business culture in South Korea surrounding jeopdae - the exchange of gifts for business entertainment purposes

# U.S. Federal, State and Local Laws Regulate Gifts and Entertainment

- **18 U.S.C. §201**
- **Federal Regulations: FAR 52.203-3:** Prohibition on gratuities to Federal Government officials and employees
- **E.G. State Law: Iowa Code 68B.22:**
  - Public officials, employees or candidate, or their immediate family shall not, directly or indirectly, accept or receive or solicit any from a restricted donor.
  - Restricted Donor: Seeking state action

# FCPA Compliance: Gifts, Entertainment and Hospitality

## FCPA Resource Guide and Opinion Releases

May 17, 2017

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# Sources of FCPA Guidance

- Historical sources of FCPA guidance
  - Statute and its legislative history (no regulations)
  - Government enforcement manuals
  - DOJ Opinion Procedure Releases (OPRs)
  - Settled dispositions
  - Court cases
- Many key FCPA issues remain untested in court
- Increasing level and number of questions about transparency and consistency in FCPA enforcement practices
- Agency response: FCPA Resource Guide (Nov. 2012)

# Legal Status of FCPA Resource Guide

- Key language behind cover page
- FCPA Guide is "non-binding, informal, and summary"
  - "does not constitute rules or regulations"
  - would have little legal authority if cited in court
  - “not intended to substitute for the advice of legal counsel on specific issues related to the FCPA” or as a definitive guide on “specific prospective conduct”
- However, agency representatives have stated publicly that statements in Guide may reasonably be relied on and cited when negotiating with the agencies, which intend to abide by the Guide’s terms
- Guide builds on and cites prior OPRs and dispositions



# Key Factors for Consideration

- DOJ Opinions have determined whether gifts, entertainment or travel expenses are reasonable and *bona fide* by considering several factors:
  - Purpose of the expenditure (must be articulated and permissible *business*-related purpose)
  - Whether the expense complies with local law
  - Whether the value of each expenditure is reasonable
  - Whether the method of selecting recipients is reasonable and transparent
  - Whether payment for travel and entertainment is made directly to foreign official or third party service providers
  - Whether the expenditures are accurately recorded in the company's books and records

# Purpose of Expenditure

Gifts	Travel and Entertainment
<ul style="list-style-type: none"><li>• Product sample provided for inspection or testing purposes (see Opinion 81-02)</li><li>• Gifts of nominal value that are given in connection with business promotional activities, such as souvenir items imprinted with company logos. (see Opinion 09-01)</li></ul>	<ul style="list-style-type: none"><li>• Travel expenses paid for “promotion, demonstration, or explanation of products or services” (see Opinions 08-03, 12-02)</li><li>• The term “explanation of services” has been interpreted to include expenses given for educational, instructional, and training purposes.</li><li>• No “non-routine business” pending before recipient officials (see Opinion 11-01)</li></ul>
<ul style="list-style-type: none"><li>• Gifts given with corrupt intent are neither reasonable nor <i>bona fide</i> and thus, potentially violate the FCPA</li></ul>	<ul style="list-style-type: none"><li>• Payment of entertainment and travel expenses for purely sightseeing, entertainment and leisure purposes has been found to violate the FCPA.</li></ul>

# Local Law

- All relevant DOJ Opinions have included a local law analysis in determining the appropriateness of the gift, entertainment or travel for an official
- Most have cited written assurance, sometimes from an “established international law firm” of local law compliance as important
- DOJ places little to no weight on consistency of such expenditures with social norms or local business practices; emphasis is on compliance with applicable laws and regulations (see Opinion 08-03)

# “Reasonable” Value of Expenditure

Gifts	Travel and Entertainment
<ul style="list-style-type: none"><li>• Gifts are reasonable if “nominal” value (see Opinion 11-01)</li><li>• Souvenirs (see Opinion 08-03)</li><li>• No guidance on “reasonableness” beyond very small value items</li></ul>	<ul style="list-style-type: none"><li>• “Moderate” value</li><li>• Avoid lavish meals or travel arrangements – (e.g., first class tickets)</li><li>• Strict limits on leisure side-trips</li><li>• Avoid cash and equivalents (e.g., gift cards), if possible</li><li>• If cash stipend (such as a <i>per diem</i>), must be reasonable approximation of legitimate expenses (Opinion 08-03)</li></ul>

# Selecting Recipients

- Is there pending, current or potential business with government officials or agencies involved?
- Absence of direct power over key business goals minimizes the appearance of *quid pro quo* element of the expenditures (see Opinion 04-03)
- Allow the government to select the recipients of the benefit (see Opinions 07-01, 04-03, 12-02); otherwise provide transparency to agency/superiors of recipients
- Do not pay expenses for spouses, family or other guests of the officials (see Opinions 07-01, 12-02)

# Recipient of Funds: Paying Third Party Service Providers

- For travel/hospitality, a key safeguard can be directing payments for expenses such as airlines, hotels, car services, etc. to the vendors themselves, rather than to officials (see Opinion 11-01)
- Officials still considered to receive a benefit, but cannot divert cash
- Enhances transparency and ease of record-keeping

# FCPA Guide: Gifts & Hospitality

- Confirms that FCPA has no minimum threshold value for corrupt gifts or payments, but dismisses notion that modest gifts and hospitality could give rise to an enforcement action:
  - Violations require a corrupt intent, and *“it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent”*
  - The DOJ and SEC use discretion – smaller gifts are mentioned in FCPA cases only where they are part of a pattern of more egregious conduct
- Notes that effective compliance programs do not:
  - Put “too much focus on low risk...transactions”
  - Devote “a disproportionate amount of time policing modest entertainment and gift-giving”

# FCPA Guide: Gifts & Hospitality (cont'd)

- Hypotheticals reinforce that minor gifts and hospitality generally are not FCPA issues, and more substantial items may be appropriate under appropriate circumstances:
  - Booth at trade show – pens, hats, t-shirts, and other similar promotional items with logos, coffee and snacks
  - Drinks following trade show – moderate bar tab
  - Wedding gift for general manager of state-owned enterprise – moderately priced crystal vase
  - Appropriate inspection and training visit – business class airfare, moderate dinner, tickets to baseball game and theater
- However, Guide positions do not eliminate need to consider questions of line-drawing and reasonableness of gifts and entertainment



# FCPA Compliance: Gifts, Entertainment and Hospitality

## Lessons from Recent Enforcement Actions and Investigations

# FCPA Dispositions – *FLIR Systems* (Apr. 2015)

- One-day inspection and equipment testing visit to FLIR facilities in Massachusetts for Saudi officials
- On same trip, officials spent 20 nights in luxury hotels in Casablanca, Paris, Dubai, Beirut and New York
- Also provided five watches worth total of \$7,000 to officials, plus other trips for New Years celebrations
- Reimbursement to partner company for 14 days' travel to Paris/Sweden for Egyptian officials based on cursory invoices
- No company policies/controls specific to foreign travel, and controls weaknesses that allowed for reimbursements despite questionable explanations and false documentation
- \$9.5 million in penalties and disgorgement to SEC

# FCPA Dispositions – *BHP Billiton* (May 2015)

- Hospitality packages for 2008 Beijing Olympics offered to over 170 officials – each worth \$12,000-16,000 (event tickets, sightseeing excursions, luxury hotel accommodations, meals and business-class airfare for officials and guests)
- Several recipients directly involved in or in a position to influence negotiations to obtain access rights, regulatory actions or business dealings
- Failure of compliance structures established to address risks -- incomplete forms, failure to disclose pending negotiations/deals, inadequate training and review
- \$25 million penalty with SEC for inadequate internal controls and inaccurate books and records

# FCPA Dispositions – *SciClone* (Feb. 2016)

- Trips, classes, meals, gifts, and entertainment to Chinese health-care providers (HCPs) to obtain pharmaceutical sales
- “VIP” HCPs received added benefits, such as family vacations
- Managed by sale representatives and identified in reports to managers
- “Regulatory specialist” attempted to arrange for licensing officials’ trip to conference in Greece; when visas were not granted, paid officials “lavish gifts” worth \$8,600
- Issues with conferences/trips arranged by third party travel agents
- \$12.8 million (including \$9.4 million in disgorgement) penalty from SEC, plus self-reporting on compliance remediation
- Similar activities alleged: *GSK, AstraZeneca, Novartis* (all 2016)

# FCPA Dispositions – PTC (Feb. 2016)

- Officials in Chinese state-owned companies traveled to US for training, but trips also included up to two weeks of recreational travel to destinations such as Las Vegas and Hawaii
- Paid for by “business partners” sometimes selected by officials through grossed up contract prices and commissions
- Also gifts of small electronics, gifts cards, wine and clothing, ranging from \$50 to \$600 per occurrence and totaling approximately \$250,000
- “Vague” compliance policies allowing for consideration of “customary business standards” not sufficiently risk-tailored for China market
- Over \$28 million penalty by company and two affiliates

# FCPA Lessons Learned

- Inadequate policies, procedures and controls increase risks, and recent cases show what agencies expect
- Vital to be able to demonstrate employees have taken training and made certifications
- Internal audit and review of expenses is necessary to detect improper payments
- Gifts/entertainment/hospitality continue to be a common method to influence government persons
- Improper payments are often not for a contract but for influencing government actions
- Third parties continue to be a common challenge

# FCPA Compliance: Gifts, Entertainment and Hospitality

## Benchmarking

# Benchmarking – Sources on Best Practices

- UK Bribery Act – SFO Guidance
- Local Laws
- U.S. Government Agencies
- UN
- OECD
- Industry Guidance
- Internal Policy of Potential Beneficiaries



# UK Bribery Act – SFO Guidance

- Hospitality and promotional expenses must be:
  - Reasonable
  - Proportionate and
  - Made in good faith
- Avoid “lavish” hospitality or expenditures (Olympics versus “private island” vacation); suggests a higher value than current FCPA-related guidance from DOJ/SEC
- To form the basis of offenses, there must be:
  - an element of “improper performance” and
  - intent to influence the foreign public official so as to obtain or retain business, or an advantage in the conduct of business.

# Benchmarking – Sources on Best Practices

## **Department of State, Office of Commercial & Business Affairs:**

- Country Commercial Guides prepared by US embassies for businesses – include economic, political and market analysis;
- Embassy Commercial Officers & Country Desk Officers
- Platinum Key Service program

## **Department of Commerce, International Trade Administration**

- Business Ethics Manual
- International Country Profile

**OECD:** Guidelines for Multinational Enterprises

**UN:** Strategy for Safeguarding Against Corruption at Major Public Events

# Industry Practice & Internal Policies

- **Industry Practice**

- ***Pharmaceutical Industry-- PhRMA Code***

- ❖ Occasional, modest meals in conjunction with a presentation of scientific or educational value; limited to in-office or in-hospital settings
    - ❖ No entertainment and recreational benefits
      - E.g. no tickets to sporting or theatre events, sporting equipment or vacation trips
      - Prohibited regardless of value
      - Prohibited regardless of whether the company engaged the healthcare professional as a speaker or a consultant

- **Company (SOE) Internal Policies**

- ***PetroChina – Code of Ethics for Senior Management***

- ❖ The exchange of limited non-cash business courtesies by the Senior Management in business activities may be acceptable, however, such exchange shall not improperly influence the decisions of any business partner of the Company.

# Foreign Corrupt Practices Act Compliance - Establishing Controls Related to Gifts & Hospitality

# Framework for Managing Gifts, Hospitality & Entertainment

## How does client interact with government?

- Building Relationships –
  - Obtain or retain business
  - Influence policy
  - Supporting candidates
- Complying with laws and regulations
  - Influence policy
  - Respond to government requests (subpoenas)
- Accessing Talent – Recruiting and Hiring
- Socializing – Personal Relationships
- Executing Government Contracts

# Framework for Managing Gifts, Hospitality & Entertainment

## What Processes Are In Place To....

- Build Relationships with government?
- Respond to requests for proposals?
- Lobby/influence policy?
- Support a candidate?
- Respond to government regulatory or investigative requests?
- Accessing talent from government?
- Manage conflicts of interest – organizational and personal
- Comply with government contract requirements

# Establishing Controls – Leadership Commitment

## Leaders Must:

- Create and resource organizational structure to assure defined ownership and proper accountable
- Be educated on the risk and controls
- Establish policy - compliance directives
- Establish expectation for integrity
- Receive regular reports on activities and controls
- Review and improve controls in response to:
  - ✓ Changing legal/regulatory environment
  - ✓ Changing business practices – new products or new markets
  - ✓ Information from internal audit & helpline

# Establishing Controls – Anti-Corruption Ownership

## Strategic Owner

- Empowered to establish cohesive anti-corruption program
- Responsible for effectiveness and responsiveness of the program
- Knowledgeable on laws, regulations and compliance requirements
- Able to make sound judgments and assure consistency
- Adequately resourced to enable the program
- Authorized to make decisions
- Access to leaders and internal audit
- Oversee and manage receipt and processing of concerns and questions related to anti-corruption

## Tactical Owners

- Reviews and approves requests for gifts and hospitality
- Current on new laws, regulations, opinions, industry standards
- Properly resourced, trained, appropriate language skills
- Accessible to employee, third parties and outsiders
- Located in business units or in country



# Establishing Controls – Policies & Procedures

**FIRST:** Assess risk of non-compliance – review procedures

**SECOND:** Review policies, procedures and internal controls

**THIRD:** Obtain management support and approval

**THEN:**

- Develop overarching policy that prohibits corruption
- Create discrete procedures for all areas of possible “bribery” or “corruption”
- Execute as management has authorized
- Defined documentation for lobbying, gifts, hiring, campaign contributions, etc.

**HINT: Employees prefer more detailed procedures – leaves nothing to the imagination**

# Controls – Policies

- Guidance and direction on gifts/travel/hospitality
- Direct and proscriptive easiest to manage and easiest for employees
- Nature and type of accepted gifts/travel/hospitality
- Appearance/reputation/ethics should be addressed
- Consistent with U.S. and local laws, regulations and customs
- Defined approval process – tie to dollar limits
- Consider including acceptable dollar limits
- Defined process for discipline in instances of non-compliance
- Make sure it translates internationally
- Obtain expert translation of policies
- No retaliation when genuine concerns are raised
- Business relationship with the recipient

# Controls – Procedures and Documentation

## Tracking Requests – Searchable Database

- Requestor
- Recipient
- Ability to aggregate if needed
- Date

## Gift/Event/Hospitality Questionnaires

- Invitations
- List of invitees
- Itinerary
- Budget
- Purpose of the event
- Description of the event
- May be automated or paper
- Relationship with recipients

## Expense Documentation

- Nature and reason for travel; meals; gifts; hospitality
- Recipients' names, positions, duties
- Actual cost per person

# Controls – Expense Policies

- Develop explicit detailed expense policies
- Execute as management has authorized
- Accurately record transactions
- Defined documentation for all expenses
- Approvals for expenses should be consistent
- Approved expense must be adequately described:
  - Nature and reason for gifts, hospitality or travel
  - Recipients' names, positions, duties
  - Actual cost per person

**HINT: Assure there is a way to “follow” the money**

# Controls – Communication & Training

## Certifications

- Across the organization - target toward high risk groups - should be electronic and traceable
- Reach 100% completion
- Establishes employees understood policies and procedures
- For leaders, requires some due diligence to make the certification for area under their responsibility
- Unrecorded or improperly documented expenses - should certifier know or should know?
- Review and close out

## Training

- Must regularly train on policy and in identifying red flags
- Must regularly train on ethical expectations
- Training may be targeted based on duties and exposure to risk
- Must be informed about approval process and reporting process

## Communication

- Consistent, regular, direct
- Targeted in response to specific changes in business/laws/or incidents

# Establishing Controls – Working With Business Partners

- Flow down disclosures, certifications, clauses as needed
- Review flow downs you receive for accuracy
- Have a plan to comply with the contract requirements
- Conduct due diligence on the certifications
- Evaluate whether you are required to disclose sensitive business information
- Account for cost of compliance when bidding
- Review and understand the audit requirements
- Protect “intellectual property” non-disclosure agreements needed!

HINT: Negotiate reps, certs, disclosures & clauses

# Establishing Controls – Internal Audit

## Responsibility & Ownership

- Leads and execute audits
- Properly resourced and trained to review for improper payments
- Expertise in conducting audits and reviews
- Authorized to verify controls, approval process and documentation
- Should not report to business leaders or country leaders
- Consider if should be done under privilege

## Audit Plan

- Plan for reviewing for improper payments should be documented
- Define and document escalation process when improper payments or expenses contrary to policy identified
- Define methods to close gaps or improper payments/expenses
- Method to review how expenses are recorded
- Method to reconcile transactions
- Define plan to assess adequacy of procedures and controls
- Automate reviews for certain types of expenses
- Look for patterns of expenses
- Ongoing and periodic reviews