

FCPA: DOJ AND SEC GUIDANCE (PART 4) PROHIBITED AND PERMITTED GIFT-GIVING

INTRODUCTION

In this fourth part of our client alert series on the Foreign Corrupt Practices Act (“FCPA”), we focus on which gifts are prohibited or permitted under the FCPA. As in the first three parts of the series, the presentation is based on “*A Resource Guide to the U.S. Foreign Corrupt Practices Act*” (the “Guide”), recently issued by the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”).¹

WHAT IS PROHIBITED?

The FCPA’s anti-bribery provisions prohibit issuers,² domestic concerns,³ and foreign individuals and businesses acting in the territory of the United States, as well as the officers, directors, employees, or agents of such entities, from making any “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of *anything of value*” to a foreign official⁴ for the purpose of influencing the official’s actions or

decision-making.⁵ Prohibited conduct “can take many forms,” including the transfer of cash, payment of travel expenses, or giving gifts.⁶ While the FCPA does not define the phrase “anything of value,” the Guide points out that an identical phrase under the domestic bribery statute⁷ has been broadly construed to include both tangible and intangible benefits.⁸

SIZE OF GIFT OR PAYMENT

The FCPA contains no minimal threshold amount for prohibited gifts or payments.⁹ However, “for a gift or other payment to violate the statute, the payor must have corrupt intent – that is, the intent to improperly influence the government official.”¹⁰ Therefore, as the Guide points out, “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, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct.”¹¹ The Guide indicates that the DOJ and SEC have focused on small payments and gifts “only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.”¹² On the other hand, the larger

¹ CRIM. DIV., U.S. DOJ & ENFORCEMENT DIV., U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012). In Part 1 of our series, we addressed the FCPA’s jurisdictional reach as reflected in the Guide. In Part 2, we addressed FCPA liability under principles of parent-subsidiary and successor liability. In Part 3, we addressed who constitutes a “foreign official” under the FCPA.

² “Issuers” refer to U.S. and foreign public companies listed on U.S. stock exchanges or required to file periodic reports with the SEC. See 15 U.S.C. § 78dd-1(a).

³ “Domestic concerns” refer to U.S. persons and businesses. See 15 U.S.C. § 78dd-2(h)(1).

⁴ For a detailed discussion on who constitutes a “foreign official” under the FCPA, see our client alert, FCPA: DOJ and SEC Guidance (Part 3): Who is a “Foreign Official”?, available at <http://www.curtis.com/siteFiles/Publications/FCPA%20DOJ%20and%20SEC%20Guidance%20Part%203.pdf>.

⁵ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); 78dd-3(a) (emphasis added).

⁶ See Guide, supra note 1, at 14.

⁷ 18 U.S.C. § 201.

⁸ Guide, supra note 1, at 108 n.86 (citing United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (value includes sex), and United States v. Gorman, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (value includes loans and promises of future employment)).

⁹ Guide, supra note 1, at 15.

¹⁰ Guide, supra note 1, at 15.

¹¹ Guide, supra note 1, at 15.

¹² Guide, supra note 1, at 15.

or more extravagant the gift, the more likely the DOJ and SEC will take enforcement action, as such gifts are “more likely given with an improper purpose.”¹³

PERMITTED PAYMENTS AND GIFTS

A. Reasonable and Bona Fide Expenditures

The FCPA explicitly provides as an affirmative defense that “the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to . . . (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”¹⁴ Thus, the DOJ

has opined that the following types of expenditures on behalf of foreign officials did not warrant FCPA enforcement action:

- travel and expenses in connection with visiting company facilities or operations;
- travel and expenses in connection with attending seminars and educational programs; and
- product demonstration or promotional activities, including travel and expenses in connection with attending meetings.¹⁵

For example, the Guide’s hypotheticals indicate that the FCPA does not prohibit companies from promoting their businesses by providing free products of nominal value containing company logos (e.g., pens, hats, t-shirts).¹⁶ Likewise, if executives from a foreign state-owned entity wish to inspect facilities in the United States to ensure the proper execution or performance of its contract, the FCPA would not be violated by the provision of airfare, hotel, and transportation costs.¹⁷ On the other hand, absent a legitimate business purpose, providing an all-expense, week-long trip to Hawaii (especially if there are no business facilities there) would not be a reasonable expenditure, would evince a corrupt intent, and would likely violate the FCPA.¹⁸

¹³ See Guide, *supra* note 1, at 15; see also Compl., SEC v. RAE Sys. Inc., No. 10-cv-2093 (D.D.C. Dec. 10, 2010) (alleging FCPA violations where foreign officials were provided with fur coats, jade, kitchen appliances, suits, and high-priced liquor), available at <http://www.sec.gov/litigation/complaints/2010/comp21770.pdf>; Non-Pros. Agreement, In re RAE Sys. Inc. (Dec. 10, 2010) (alleging the same underlying facts as the SEC complaint), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rae-systems.pdf>; Compl., SEC v. Daimler AG, No. 10-cv-473 (D.D.C. Apr. 1, 2010) (alleging FCPA violations where foreign official was provided with armored vehicles worth at least €50,000); Criminal Information, United States v. Daimler AG, No. 10-cr-63 (D.D.C. Mar. 22, 2010) (alleging similar facts to those alleged in the SEC complaint).

¹⁴ See 15 U.S.C. §§ 78dd-1(c), 78dd-2(c); 78dd-3(c). The FCPA also provides the affirmative defense that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.” 15 U.S.C. §§ 78dd-1(c), 78dd-2(c); 78dd-3(c). Importantly, the “local law” defense only applies if the conduct that “otherwise

falls within the scope of the FCPA’s anti-bribery provisions” is lawful under the *written* local law of the host country. See Guide, *supra* note 1, at 23. The defense is not applicable if the FCPA-prohibited conduct is merely permitted under local custom. Thus, in practice, the local law defense arises infrequently, as the *written* laws and regulations of countries rarely, if ever, affirmatively permit the provision of payments or gifts to foreign officials. See Guide, *supra* note 1, at 23.

¹⁵ Guide, *supra* note 1, at 24.

¹⁶ See Guide, *supra* note 1, at 17.

¹⁷ See Guide, *supra* note 1, at 18. The Guide notes that a foreign official’s “review of the execution and performance of [a] contract is a legitimate business purpose.” *Id.*

¹⁸ See Guide, *supra* note 1, at 18.

Determining whether a payment qualifies as a bona fide expenditure requires a fact-specific analysis. The Guide provides the following non-exhaustive list of “safeguards,” compiled from various DOJ opinion releases, which “may be helpful to businesses in evaluating whether a particular expenditure is appropriate or may risk violating the FCPA”:

- Do not select the particular officials who will participate in the party’s proposed trip or program; if you must do so, be sure to select them based on pre-determined, merit-based criteria.
- Pay all costs directly to travel and lodging vendors, and reimburse costs only upon presentation of a receipt.
- Do not use cash to advance funds or to pay reimbursements.
- Ensure that any advances are reasonable approximations of costs likely to be incurred and that expenses are limited to those that are necessary and reasonable.
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for expenses actually incurred.
- Ensure that expenditures are transparent, both within the company and to the foreign government.
- Do not condition payment of expenses on any action by the foreign official.
- Obtain written confirmation that payment of expenses is not contrary to local law.
- Ensure that costs and expenses on behalf of the foreign officials are accurately recorded in the company’s books and records.¹⁹

¹⁹ Guide, supra note 1, at 24, 111 nn. 146-57 (citing numerous DOJ opinion releases).

In sum, the Guide states that expenditures “will not give rise to prosecution if they are (1) reasonable, (2) bona fide, and (3) directly related to (4) the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.”²⁰

B. Hospitality

The FCPA does not prohibit companies from “providing legitimate hospitality” to foreign officials.²¹ For example, the Guide’s hypotheticals indicate that taking foreign officials out for drinks and paying a moderate bar tab would not violate the FCPA.²² The Guide does not identify the point at which permissible “hospitality” morphs into illegal bribery. It does, however, provide by way of example that spending \$10,000 on dinners, drinks, and entertainment for a foreign official would be improper.²³ Such an expenditure would likely suggest a corrupt intent – an intent to improperly influence the government official.²⁴

C. Tokens of Esteem or Gratitude

The Guide states that it is “appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude.”²⁵ For example, providing a foreign official with a moderately priced crystal vase as a wedding gift and token of esteem would not result in FCPA enforcement action.²⁶ In

²⁰ Guide, supra note 1, at 24.

²¹ See Guide, supra note 1, at 17.

²² Guide, supra note 1, at 17.

²³ Guide, supra note 1, at 16.

²⁴ See Guide, supra note 1, at 15, 17. However, if a company could show that the \$10,000 dinner and entertainment expenditure was reasonable under the circumstances, bona fide, and directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract, it would have an affirmative defense to an FCPA enforcement action. See 15 U.S.C. §§ 78dd-1(c), 78dd-2(c); 78dd-3(c); see also supra pp. 2-3.

²⁵ Guide, supra note 1, at 17.

²⁶ Guide, supra note 1, at 17.

contrast, providing a foreign official with a luxury car as a wedding gift would be viewed as unreasonable and prohibited under the FCPA.²⁷

The Guide indicates that some “important” hallmarks of appropriate gift-giving include the gift being:

- given openly and transparently;
- properly recorded in the giver’s books and records;
- provided only to reflect esteem or gratitude;
- permitted under local law;
- customary where given; and
- reasonable for the occasion.²⁸

Gifts containing these hallmarks do not evince a corrupt intent. Thus, such gift-giving is unlikely to result in FCPA enforcement action.

GIFTS TO THIRD PARTIES

The Guide states that companies violate the FCPA “if they give payments or gifts to third parties, like an official’s family members, as an *indirect* way of corruptly influencing a foreign official.”²⁹ The Guide gives an example of a case in which a defendant was convicted for providing airline tickets to a cousin and close friend of a foreign official whose influence the defendant sought in obtaining contracts.³⁰ In that case, a few weeks after the defendant’s company supplied airline tickets for the cousin’s honeymoon, the company

²⁷ See Compl., SEC v. Daimler AG, No. 10-cv-473 (D.D.C. Apr. 1, 2010) (alleging FCPA violations where foreign official was provided with armored vehicles worth at least €550,000).

²⁸ See Guide, supra note 1, at 15, 17.

²⁹ Guide, supra note 1, at 16 (emphasis added).

³⁰ Guide, supra note 1, at 16. See also United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991); Judgment, United States v. Liebo, No. 89-cr-76 (D. Minn. Jan. 31, 1992), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/liebor/1992-01-31-liebor-judgment.pdf>.

was awarded a contract.³¹ On appeal from the conviction, the U.S. Court of Appeals for the Eight Circuit held that the relationship between the recipient and the foreign official, along with the timing of the gift, could allow a reasonable jury to infer that the defendant made the gift intending to influence the foreign official in getting the contract approved.³²

The Guide does not provide additional insight into when the FCPA is violated by the giving of payments or gifts to third parties “as an indirect way of corruptly influencing a foreign official.”³³

CHARITABLE GIVING

The FCPA does not prohibit charitable contributions to foreign entities, but such contributions cannot be used as a pretense for making corrupt payments to foreign officials.³⁴ The Guide gives an example in which the SEC alleged violations of the FCPA’s accounting provisions³⁵ where a pharmaceutical company

³¹ See United States v. Liebo, 923 F.2d 1308, 1311-12 (8th Cir. 1991).

³² See id. The court remanded the case for a new trial because evidence came to light, post-conviction, that the defendant’s supervisor had approved the charge of the airline tickets to a company card. See id. at 1314. The court reasoned that, given the circumstances of the case, the jury could have found that the defendant “acted at his supervisor’s direction and therefore, did not act ‘corruptly’ by giving the tickets” to the recipient. See id. On retrial, the defendant was again convicted. See Judgment, United States v. Liebo, No. 89-cr-76 (D. Minn. Jan. 31, 1992), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/liebor/1992-01-31-liebor-judgment.pdf>.

³³ Guide, supra note 1, at 16.

³⁴ See Guide, supra note 1, at 15.

³⁵ The FCPA’s accounting provisions consist of two primary components: a “books and records” provision and an “internal controls” provision. The “books and records” provision requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” 15 U.S.C. §

classified payments its subsidiary made to a charitable organization that restored castles in Poland as “donations” in its books and records, despite the fact that the payments were intended to influence the organization’s president in his other role as the director of a Polish government health authority.³⁶ The evidence indicated that the payments were (1) viewed internally by the subsidiary as “dues” that were required to be paid for the director’s assistance, (2) significantly greater than payments to any other recipient of the subsidiary’s charitable donations, (3) falsely represented to the company’s finance department as having medical justifications, and (4) not in compliance with the company’s internal policies.³⁷

The government could allege violations of the FCPA’s accounting provisions if it has reason to believe that a contribution to a bona fide charity, recorded as such on the company’s books and records, was actually made to influence a foreign official. An accounting charge can be brought

even absent any allegation that the FCPA’s anti-bribery provisions were violated.

To reduce the likelihood of FCPA liability, the Guide suggests that companies consider the following five questions before making charitable payments in a foreign country:

- What is the purpose of the payment?
- Is the payment consistent with the company’s internal guidelines on charitable giving?
- Is the payment being made at the request of a foreign official?
- Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
- Is the payment conditioned upon receiving business or other benefits?

Additionally, the Guide cautions that proper due diligence and controls “are critical for charitable giving.”³⁸ Citing various DOJ opinion releases, the Guide indicates that the DOJ has approved charitable-type grants or donations, based on due diligence measures and controls such as:

- certifications by the recipient regarding compliance with the FCPA;
- due diligence to confirm that none of the recipient’s officers are affiliated with the foreign government at issue;
- a requirement that the recipient provide audited financial statements;
- a written agreement with the recipient restricting the use of the funds;
- steps to ensure that the funds are transferred to a valid bank account; and
- ongoing monitoring of the efficacy of the program.³⁹

78m(b)(2)(A). The term “reasonable detail” is defined as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” § 78m(b)(7). The “internal controls” provision requires issuers to “devise and maintain a system of internal accounting controls sufficient to assure management’s control, authority, and responsibility over the firm’s assets.” Guide, *supra* note 1, at 38; see also § 78m(b)(2)(B).

³⁶ See Guide, *supra* note 1, at 17-19. Interestingly, the government made no allegations that the FCPA’s anti-bribery provisions were violated. See Complaint, SEC v. Schering-Plough Corp., No. 04-cv-945 (D.D.C. June 9, 2004), available at <http://www.sec.gov/litigation/complaints/comp18740.pdf>; Admin. Proceeding Order, In the Matter of Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, 2004) (finding that company violated FCPA accounting provisions and imposing \$500,000 civil monetary penalty), available at <http://www.sec.gov/litigation/admin/34-49838.htm>.

³⁷ See Complaint, SEC v. Schering-Plough Corp., No. 04-cv-945 (D.D.C. June 9, 2004).

³⁸ Guide, *supra* note 1, at 19.

³⁹ Guide, *supra* note 1, at 19 (citing numerous DOJ opinion releases).

Companies making donations to foreign charitable organizations should implement such due diligence measures to reduce the likelihood that their charitable giving will be viewed by the U.S. government as a device for making corrupt payments to foreign officials in violation of the FCPA.

CONCLUSION

The Guide indicates that gifts of nominal value given to foreign officials are unlikely to result in FCPA violations, since such gifts, generally, do not evince a corrupt intent. Thus, companies are unlikely to face FCPA enforcement action for the following conduct:

- paying reasonable and bona fide travel expenditures on behalf of foreign officials;
- providing legitimate hospitality to foreign officials; and
- providing foreign officials with reasonable gifts as tokens of esteem or gratitude.

Additionally, the Guide cautions that charitable contributions should not be used as a pretense for making corrupt payments to foreign officials. Companies can reduce the likelihood of FCPA enforcement action by implementing appropriate due diligence measures and controls.

Finally, in order to avoid violating the FCPA's accounting provisions, companies must ensure that *all* payments and gifts are properly recorded and described on the companies' books and records.

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