

# **FCPA Gifts, Travel & Expenses**

Compliance Considerations

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## Panel

**Joseph Moan**, Associate General Counsel and Chief Ethics and Compliance Officer, The Coca Cola Company

**Kimberly Murphy**, Chief Global Competition Counsel, Kimberly-Clark

**Brooke Hopkins**, Managing Director, AlixPartners LLP

## Polling Question

How many of you have direct oversight of your Anti-Corruption and Compliance program?

## Polling Question

How many of you have direct oversight of your Travel & Expense program?

# Guides, Statutes, and Prohibited Transactions

## A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012)

- By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission
  - It endeavors to provide helpful information to enterprises of all shapes and sizes — from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world.
  - Non-binding, informal, and summary in nature; does not constitute rules or regulations

## Federal securities statute - 15 U.S.C. §78dd-1, et. seq.

Enacted in 1977 to prevent corporate bribery of foreign officials by US companies

# Guides, Statutes, and Prohibited Transactions (cont'd)

## 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.

# Intent Requirements

- Corrupt Intent – Purpose of the action is to have the government officially misuse their government position
- Willfully – “Willfully” means that the act was committed voluntarily and purposely, with the intent to do something that the law forbids
- Note: the person does not need to be aware of the specific law or regulation that his/her conduct is violating, just that he/she knows he is doing an act that is wrong.
- Also does not require precise knowledge that their behavior is illegal just that the action is 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.

# Accounting Requirements (15 U.S.C. §§ 78m)

## Key Factors for Consideration (for compliance) – Gifts, Travel & Entertainment

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

## Polling Question

What areas do you consider your highest risk for travel, gifts and entertainment?

1. Travel by employees, distributors, and agents to foreign countries with high Corruption Perception Index (CPI)
2. High use of third parties
3. Inadequate travel, gifts and entertainment policies and procedures
4. Inadequate training to employees, distributors and agents
5. Lack of internal audits on payments

# Areas of High Risk

## **Inadequate policies, procedures and controls increase risks**

- Manual controls rather than system controls
- Insufficient employee training

## **Use of Third-Party Service Providers**

- No due diligence
- Lack of transparency in their use of sub-contractors

## **Countries that have a high risk of corruption**

- Foreign countries such as China, India, and Mexico

## Polling Question

What controls do you use to mitigate the risks with travel, gifts, and entertainment?

1. Training for employees
2. Training for distributors and agents
3. Policies and procedures
4. System payment controls
5. Internal audits

# Tools and Best Practices

- **Training for employees**
- **Covered in Code of Conduct AND stand-alone policy with clear guidelines/process**
- **Appropriate certifications**
- **Sources of Best Practices**
  - Local Laws
  - U.S. Government Agencies
  - UN
  - Industry Guidance
  - Internal Policy of Potential Beneficiaries

# Control Considerations

- **Assess risk of non-compliance – review procedures**
  
- **Review policies, procedures and internal controls**

## Gift / Event / Hospitality Questionnaires

Invitations

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List of invitees

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Itinerary

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Budget

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Purpose of the event

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Description of the event

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May be automated or paper

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Relationship with recipients

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## Expense Documentation

Nature and reason for travel; meals; gifts; hospitality

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Recipients' names, positions, duties

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Actual cost per person

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## **Control Considerations (cont'd)**

- **Certifications**
- **Training**
- **Communication**
- **Responsibility & Ownership**
- **Audit Plan**

# Polling - Case Studies

## Polling Question

Three years ago, Company A won a long-term contract to supply goods and services to a state-owned Commission in a Foreign Country. Company A provides training to the Commission employees at a facility in Florida. Because it is a lengthy international flight, Company A agrees to pay for business class airfare, to which its own employees are entitled for lengthy flights. The foreign officials visit Florida for several days, during which an appropriate inspection is performed by the senior officials. Company A executives take the officials to a moderately priced dinner, a hockey game, and a play.

**Do any of these actions violate the FCPA?**

## Polling Answer

**No.**

Neither the costs associated with training the employees nor the trip for the senior officials to the Company's facilities in order to inspect them violates the FCPA. Reasonable and bona fide promotional expenditures do not violate the FCPA. Here, Company A is providing training to the Commission's employees and is hosting the Commission senior officials. Their review of the execution and performance of the contract is a legitimate business purpose. Even the provision of business class airfare is reasonable under the circumstances, as are the meals and entertainment, which are only a small component of the business trip.

## Polling Question

**Would this analysis be different** if Company A instead paid for the senior officials to travel first-class with their spouses for an all-expenses-paid, week-long trip to New York, where Company A has no facilities?

## Polling Answer

**Yes.**

This conduct almost certainly violates the FCPA because it indicates a corrupt intent. Here, the trip does not appear to be designed for any legitimate business purpose, is extravagant, includes expenses for the officials' spouses, and therefore appears to be designed to corruptly curry favor with the foreign government officials. Moreover, if the trip were booked as a legitimate business expense—such as the provision of training at its facilities—Company A would also be in violation of the FCPA's accounting provisions. Furthermore, this conduct suggests deficiencies in Company A's internal controls.

## Polling Question

Company B is a global ride-hailing and carpooling company with operations in more than 60 countries, including a number that have a high risk of corruption, such as Foreign Country.

Company B's stock is listed on a national U.S. stock exchange. In conducting its business internationally, Company B's officers and employees come into regular contact with foreign officials, including officials in various ministries and state-owned entities. At a trade show, Company B has a booth at which it offers free pens, hats, t-shirts, and other similar promotional items with Company B's logo. Company B also serves free coffee, other beverages, and snacks at the booth. Some of the visitors to the booth are foreign officials.

**Is Company B in violation of the FCPA?**

## Polling Answer

**No.**

These are legitimate, bona fide expenditures made in connection with the promotion, demonstration, or explanation of Company B's products or services. There is nothing to suggest corrupt intent here. The FCPA does not prevent companies from promoting their businesses in this way or providing legitimate hospitality, including to foreign officials.

Offering promotional items with company logos or free drinks and snacks as set forth above is a reasonable means of providing hospitality and promoting business.

## Polling Question

### **Would the following be permissible under the FCPA by the DOJ and SEC?**

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

## Polling Answer

**No.**

Each of these hypotheticals are used to illustrate the types of gifts and expenses that would be deemed impermissible under the FCPA. Irrespective of whether a company properly accounted for these types of activities, 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.

These types of “excessive” activities and expenses, from the government’s perspective, show intent to corrupt or improperly influence a foreign official.

**Thank you!**

