

Anti-Corruption Compliance: Special Considerations for Charitable Contributions by Company Giving Programs and Foundations

Many organizations are active supporters of a variety of charitable causes and organizations around the world. When charitable donations are made outside the United States by persons subject to US jurisdiction, they must be vetted carefully to avoid liability under the US Foreign Corrupt Practices Act (FCPA).¹ The FCPA prohibits making any “payment” (which term includes “anything of value”) to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Issues may arise, for example, where foreign officials have a direct or indirect financial or other interest in a particular charitable donation or have asked that a contribution be made to a particular charity. When something of “value” such as a charitable contribution is provided and a government official receives a direct or indirect benefit, there is risk that the FCPA is violated. The US government’s dramatically increased enforcement of the FCPA and other anti-corruption laws in recent years has enhanced the profile and risk of such donations. This risk applies to all charitable activities, whether by nonprofit or for-profit entities, as long as the entity falls within the ambit of the FCPA. This Advisory outlines the key considerations in implementing an appropriate review procedure for charitable contributions and grants to avoid undue risk.

Anti-Corruption Laws at Home and Abroad

The FCPA, enacted in 1977, prohibits making—or offering to make—a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. It applies to a broad range of persons and businesses, including US citizens and resident aliens, businesses organized under US law or having a principal place of business in the US and their officers, directors, employees, and agents (regardless of their citizenship). These provisions also apply to foreign persons and organizations that take any action in furtherance of such a corrupt payment while in the United States,

¹ 15 U.S.C. §§ 78dd-1, et seq. (1977).

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as well as third parties that act on behalf of any person or organization covered by the FCPA.²

In recent years, the government has stepped up its enforcement of FCPA violations. The Criminal Division of the Department of Justice (DOJ) has substantially increased its FCPA enforcement staff and the US Securities and Exchange Commission (SEC) has created a new, specialized enforcement unit, both of which have played a major role in significantly more vigilant FCPA enforcement. Over the past two years, the DOJ has “charged more than 50 individuals with FCPA-related offenses and collected nearly \$2 billion in FCPA-related fines and penalties---by far the most people charged and penalties imposed in any similar period.”³

In addition to the FCPA, charitable giving where government officials have an interest could also be subject to anti-bribery laws enacted by other countries, such as local laws in the place where the donation occurs and laws of other countries (such as the UK) that have international implications. A notable example of another statute with broad extraterritorial reach is the UK Bribery Act,⁴ which will become effective

on July 1, 2011.⁵ Although the Bribery Act has yet to come into force, many indications point to vigorous enforcement by the UK similar to that of the FCPA.

How Anti-Corruption Risks Arise in Charitable Contributions and Grantmaking

Charitable contributions and grants are squarely covered under the FCPA and UK Bribery Act, if made or offered in order to obtain or retain business. Charitable contributions that could fall under either act could include activities such as the following, if they are offered or made with the intent to influence a government official improperly to obtain new or retain ongoing business to the donor:

- Direct or indirect payments in support of a charitable organization, whether in the form of a donation or a grant;
- Corporate sponsorships;
- Product donations (e.g., product samples used for fundraising or distribution for disaster relief);
- Donation of office space;
- Work performed by company or foundation employees for a non-US charity during paid work hours;
- Purchase of tickets to fundraising events; or
- Payment for advertisements, printing, product donations, or other expenses on behalf of charities.

Choosing Charitable Partners and Donee Organizations in Ways to Minimize Anti-Corruption Risks

Anti-corruption concerns might arise whenever a charitable contribution or grant is given to a charity from which a government official may derive a personal benefit. In such cases, the FCPA and other anti-corruption laws could be implicated because the charitable contribution might provide

² The FCPA also requires issuers on US exchanges to comply with its provisions on recordkeeping and internal accounting controls. Books and records of covered entities must accurately and fairly reflect transactions (including the purposes of an organization's transactions) and covered entities must devise and maintain an adequate system of internal accounting controls. Even though a charitable foundation is not subject to the FCPA's recordkeeping requirements, it is advisable for such foundations to follow the basic requirements and make sure that financial transactions and grants are accurately recorded.

³ Speech given by DOJ Criminal Division Assistant Attorney General Lanny A. Breuer on January 26, 2011, *available at*: <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.

⁴ 2010 UK Bribery Act, *available at*: http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf. For a detailed analysis of the law, see: Arnold & Porter LLP, “Advisory: UK Government Issues Guidance on the Bribery Act,” (March 2011) *available at*: http://www.arnoldporter.com/public_document.cfm?id=17392&key=10C0; and Arnold & Porter LLP, “Advisory: UK Bribery Act 2010: An In-Depth Analysis,” (May 2010) *available at*: http://www.arnoldporter.com/public_document.cfm?id=15833&key=23D1. The Bribery Act prohibits both bribery of officials and bribery of commercial parties in order to obtain or retain business or obtain an advantage in the conduct of business.

⁵ Arnold & Porter LLP, “Advisory: UK Government Issues Guidance on the Bribery Act,” (March 2011) *available at*: http://www.arnoldporter.com/public_document.cfm?id=17392&key=10C0.

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something of value to a government official. Issues can arise, for example, if the charitable entity is connected to a government official (e.g., through a family member) or is of particular personal interest to the official.

In order to mitigate risks related to charitable donations, philanthropic giving must be undertaken under a well-structured and supervised set of policies and system of internal controls. In conducting due diligence to avoid anti-corruption problems, some corruption warning signs to look for include:

- The non-US charity refuses to provide adequate documentation or suggests that the donation may only be made anonymously;
- The donation is directed to a bank account in a third country (other than a country where a grantee is based or carrying out activities);
- An officer, director, or employee of the charity has family or other ties to foreign government officials;
- A foreign government official designates the donation amount or intended recipient, or directly or indirectly requests the donation;
- The donation is made on the suggestion or understanding that it could influence government action or improperly lead a foreign official to look more favorably on the donor;
- The charity is providing gifts or travel, lodging, meals, or entertainment to foreign government officials in connection with its charitable activities; and
- The donation will be used, in whole or in part, to hire third parties who have connections to government officials or who have been identified or suggested by government officials.

Areas Where Anti-Corruption Risks Arise: Engaging Third Parties

One area for special caution in connection with charitable giving is the use of third parties, such as local persons, companies, agents, business partners, and consultants.

Companies and foundations may be held liable for the acts of third parties acting on their behalf, when they knew or should have known of the corrupt acts. Thus, for example, the actions of a third-party intermediary vis-a-vis foreign government officials could lead to liability under the FCPA or UK Bribery Act if the third party seeks to influence foreign government officials improperly in connection with philanthropic activities.

The best way to minimize the risk of working with third parties is to develop and implement a rigorous review process of potential third parties.⁶ Some of the elements of such a due diligence review might include the following elements:

- Questionnaire completed by the third party, including seeking information about the qualifications and history of the third party in connection with the work proposed to be performed;
- Satisfactory reference check, and an electronic internet or database search for any past corruption;
- Written approval of the company personnel seeking to engage the services of the third party and those having approval authority, including by reviewers (lawyers and otherwise) who are trained to detect warning signs of corruption;
- Inclusion of model anti-corruption clauses in all contracts between the third party and the company;
- A check of the third party's potential connections—family or business—to government officials; and
- Ongoing compliance certifications and on-going review of transactions for warning signs, such as requests for unusual payments or fees that exceed market value.

While the presence of any one or more of these elements may not preclude working with a particular third party, they should trigger a more thorough review by the potential donor's compliance team.

⁶ For a more in-depth analysis of third-party due diligence, see Keith M. Korenchuk, Samuel M. Witten, and Dawn Y. Yamane Hewett, Arnold & Porter LLP, "Advisory: Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties," (April 2011) available at: http://www.arnoldporter.com/public_document.cfm?id=17444&key=3E0.

Relevant Guidance from US Authorities

In a well-known FCPA case involving a charitable contribution with corruption implications, the SEC levied a US\$500,000 civil penalty against Schering-Plough in 2004 relating to its charitable activities in Poland. The SEC alleged that Schering-Plough, through a local subsidiary, made payments to a Polish charitable organization designed to persuade the head of the charity—who was a government official—to influence the purchase of Schering-Plough's products in Poland. The facts also indicated that the employees of the Schering-Plough subsidiary tried to cover up the purposes of the payments by creating false justifications for the contributions. In this case, the charity was bona fide and not set up by a government official as a conduit for bribery. As a result, simple due diligence on the charitable organization itself would not have been sufficient to mitigate the foreign bribery risk. Had the company had procedures to vet the relevant charity and the purpose of the donation, the corrupt intent might have been detected. Finally, it is worth noting that the SEC did not allege that the US parent knew about the improper payments by the local subsidiary. Nonetheless, the SEC held the US parent liable for its subsidiary's actions.⁷

Guidance on the FCPA implications of charitable contributions also comes from opinion procedure releases that the DOJ has issued in response to specific concerns raised by companies and nonprofits subject to jurisdiction of the FCPA. Although each opinion procedure release is explicitly confined to the facts presented in the opinion, the principles discussed are instructive for companies and their foundations in connection with international charitable giving.

For example, the DOJ approved a US\$10 million donation by a US company to a US charitable organization and a public limited liability company in South Asia for the construction of a medical facility in the South Asian country. The seemingly dispositive facts in the DOJ's approval were that the company represented that it would require certifications that "none of the funds would be used, promised, or offered in violation

of the FCPA," "that none of the persons employed by or acting, on behalf of the charitable organization or the limited liability company are affiliated with the foreign government," and that it would "require audited financial reports from the U.S. charitable organization, accurately detailing the disposition of the donated funds."⁸ This demonstrates that implementing safeguards and conducting due diligence on a donee organization are good ways of minimizing the risk of FCPA violations.

The DOJ has also considered the provision of funding for training or travel to non-US government representatives twice in opinion procedure releases. In one such release, the DOJ approved a payment by TRACE, a membership organization specializing in anti-bribery initiatives, to journalists from the People's Republic of China to enable them to attend a TRACE-sponsored press conference in Shanghai. In this case, the DOJ noted that the payments for travel expenses fell "within the FCPA's promotional expenses affirmative defense in that the expenses [were] reasonable under the circumstances and directly relate to 'the promotion, demonstration, or explanation of [TRACE's] products or services.'"⁹ In another opinion procedure release, DOJ did not find any issue with an environmental nonprofit organization providing travel, lodging, and meal expenses for government representatives from regional countries to attend training courses in the US. The key fact appeared to be that the nonprofit did not seek to obtain or retain business with the regional governments.¹⁰

Finally, another way to avoid FCPA risks is to provide the funding directly to a government entity, rather than to an individual government official or a charity designated or suggested by such government official. In one specific case, the DOJ stated that the FCPA did not apply to a US\$100,000 donation to construct an elementary school in Asia, because

⁷ Securities and Exchange Commission, Release No. 49838, June 9, 2004, available at: <http://www.sec.gov/litigation/admin/34-49838.htm>.

⁸ Department of Justice Opinion Procedure Release, No. 95-01, January 11, 1995, available at: <http://www.justice.gov/criminal/fraud/fcpa/opinion/1995/9501.pdf>.

⁹ Department of Justice Opinion Procedure Release, No. 08-03, July 11, 2008, citing 15 U.S.C. § 78dd-2(c)(2)(A), available at: <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf>.

¹⁰ Department of Justice Opinion Procedure Release, No. 96-01, November 25, 1996, available at: <http://www.justice.gov/criminal/fraud/fcpa/opinion/1996/9601.pdf>.

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the money would be given directly to a government entity (as opposed to an official of that government).¹¹

Conclusion

FCPA violations can arise in any company or foundation, big or small, in all industries, involving business within virtually any country, including in connection with charitable giving. A robust compliance program that seeks to mitigate corruption risks is therefore essential, for any corporate giving program and foundation operating internationally, to prevent corrupt payments from taking place. In addition to preventing future FCPA and other anti-corruption violations from occurring, a compliance program can help companies and organizations keep better track of their program expenditures, ensure accountability among their employees, and mitigate the possibility of other control problems arising within the company or foundation. In this era of heightened scrutiny and enforcement, it is too costly not to be proactive. Companies and their foundations subject to the FCPA and UK Bribery Act would be wise to develop and implement anti-corruption compliance programs that address their charitable activities.

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¹¹ Department of Justice Opinion Procedure Release, No. 97-02, November 5, 1997, available at: <http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf>.

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