

GUARDING AGAINST ANTI-CORRUPTION PROBLEMS IN OVERSEAS PHILANTHROPIC ACTIVITIES

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Many tax-exempt organizations and taxable corporations or persons acting on their behalf actively support charitable causes and organizations around the world. In addition, many such organizations or persons acting on their behalf operate directly in foreign countries and interact with foreign officials in connection with philanthropic activities.

When operating outside the United States, those subject to U.S. jurisdiction must be careful to avoid liability under the U.S. Foreign Corrupt Practices Act (FCPA).¹ The FCPA prohibits paying, giving, offering, promising, or authorizing 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. The scope of the FCPA is not limited to persons engaged in for-profit businesses, and would include any effort to improperly influence foreign officials in ways that violate the statute.

The U.S. government’s dramatically increased enforcement of the FCPA and other anti-corruption laws in recent years has en-

hanced 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.

Anti-corruption laws are being enforced vigorously

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 U.S. citizens and resident aliens; businesses organized under U.S. law or having a principal place of business in the U.S.; 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, as well as third parties that act on behalf of any person or organization covered by the FCPA.²

In recent years, the U.S. 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 U.S. Securities

A robust compliance program is essential for any foundation operating internationally.

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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

indirect benefit, there is risk that the FCPA is violated.

Anti-corruption issues may also arise in the operations of tax-exempt organizations when they or persons acting on their behalf operate in overseas markets and interact with foreign officials, such as regulatory authorities, customs or taxation officials, and any other government employee, such as an employee of a state-controlled business or other entity (including, for example, medical personnel in a state-controlled hospital or public health service). The foreign official's rank is not significant, since anti-corruption laws apply to interactions with junior as well as senior government officials. The focus is on whether the payment's purpose is corrupt rather than the duties of the party receiving them.

Notably, concerns could arise in connection with conduct that is common in many overseas cultures and might be expected by foreign officials. For example, corruption issues may be raised whenever travel, lodging, meals, or entertainment is provided for foreign officials, such as in connection with visits to facilities, meetings, and other business-related activities. Because the FCPA imputes liability to U.S. or other persons covered by the FCPA for conduct of third parties acting on their behalf, the scope of liability is inherently broad and compliance requires vigilance.

In this connection, some improper payments made by charitable organizations to influence foreign officials could still implicate the FCPA. For example, if payments are made to influence a government policy, such a payment would not be in furtherance of a for-profit business, but U.S. prosecutors

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of other countries that have international implications. A notable example of another statute with broad extraterritorial reach is the United Kingdom's Bribery Act,⁴ which came into force 7/1/11. U.K. authorities are expected to enforce the Bribery Act vigorously.

Contexts for anti-corruption concerns in philanthropy

Anti-corruption issues may arise in the tax-exempt world, 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

¹ 15 U.S.C. § § 78dd-1, et seq. (1977). The FCPA prohibits a broad range of persons and businesses, including U.S. and foreign issuers of securities registered in the United States, from making a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. These provisions also apply to foreign persons and companies that take any act in furtherance of such a corrupt payment while in the United States.

² The FCPA also requires issuers on U.S. 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 1/26/11, available at:

www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html.

⁴ 2010 UK Bribery Act, available at 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 www.arnoldporter.com/public_document.cfm?id=17392&key=10C0; Arnold & Porter LLP, "Advisory: UK Bribery Act 2010: An In-Depth Analysis," (May 2010) available at: www.arnoldporter.com/public_document.cfm?id=15833&key=23D1. The Bribery Act prohibits both bribery of officials and bribery of commercial parties to obtain or retain business or obtain an advantage in the conduct of business.

⁵ For a more in-depth analysis of third-party due diligence, see Korenchuk, Witten, and Yamane Hewett, Arnold & Porter LLP, "Advisory: Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties," (April 2011) available at: www.arnoldporter.com/public_document.cfm?id=17444&key=3E0.

could still contend such payments were in furtherance of the business of the charitable organization. Even if these payments do not give rise to liability under the FCPA, such illicit conduct could still violate local anti-corruption laws, other applicable foreign laws, or even other U.S. criminal laws such as those addressing money-laundering. Anti-corruption vigilance is therefore required outside of for-profit business situations.

Particular risks in charitable contributions and grantmaking

Charitable contributions and grants are squarely covered under the FCPA and U.K. 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 foundation or company employees for a non-U.S. charity during paid work hours.
- Purchase of tickets to fundraising events.
- Payment for advertisements, printing, product donations, or other expenses on behalf of charities.

Choosing charitable partners and donee organizations 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 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-U.S. 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.
- 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.

Engaging third parties to minimize anti-corruption risks

One area for special caution in connection with both charitable giving and interactions with foreign government is the use of third parties, such as local companies, agents, business partners, and consultants. Foundations and companies 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 U.K. 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.⁵ Some of the elements of such a due diligence review might include the following elements:

- A questionnaire completed by the third party seeking, among other things, information

about the qualifications and history of the third party in connection with the work proposed to be performed.

- A 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.
- Ongoing compliance certifications and ongoing reviews 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.

Relevant guidance from U.S. authorities for charitable donations

In a well-known FCPA case involving a charitable contribution with corruption implications, the SEC levied a \$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 pur-

chase 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 and avoiding company policies on internal controls for contributions approvals. 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 U.S. parent knew about the improper payments by the local subsidiary. Nonetheless, the SEC held the U.S. parent liable for its subsidiary's actions.⁶

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 nonprofits and companies subject to jurisdiction of the FCPA.⁷ 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 \$10 million donation by a U.S. company to a U.S. 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 the company's representation 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-U.S. government representatives twice in opinion procedure releases. In one such release, the DOJ approved a payment by TRACE, a mem-

⁶ SEC Release No. 49838, 6/9/04, available at www.sec.gov/litigation/admin/34-49838.htm.

⁷ The Foreign Corrupt Practices Act contemplates that the Justice Department may from time to time provide responses to specific inquiries by persons covered by the statute concerning conformance of their conduct with the DOJ's present enforcement policy on the substantive provisions of the FCPA. See, e.g., 15 U.S.C. § 78dd-1(e).

⁸ Department of Justice Opinion Procedure Release No. 95-01, 1/11/95, available at www.justice.gov/criminal/fraud/fcpa/opinion/1995/9501.pdf.

⁹ Department of Justice Opinion Procedure Release No. 08-03, 7/11/08, citing 15 U.S.C. § 78dd-2(c)(2)(A), available at www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf.

¹⁰ Department of Justice Opinion Procedure Release No. 96-01, 11/25/96 available at www.justice.gov/criminal/fraud/fcpa/opinion/1996/9601.pdf.

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

bership 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, the 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 U.S. 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 minimize 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 \$100,000 donation to construct an elementary school in Asia, because the money would be given directly to a govern-

ment 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 U.K. Bribery Act would be wise to develop and implement anti-corruption compliance programs that address their charitable activities. ■