



KORDANT PHILANTHROPY ADVISORS



The Foreign Corrupt Practices Act:

What Companies Need to Know

As companies seek to be good corporate citizens in the international areas where they do business, philanthropic projects conducted outside the United States continue to rise. Unfortunately, even with the best of intentions, giving to charities and philanthropic projects across borders can result in violations of U.S. and foreign country anti-corruption laws. Thus, companies (and the donor community at large) must include anti-corruption due diligence as an integral part of cross-border giving.

The U.S. Foreign Corrupt Practices Act (FCPA) was passed by Congress in 1977 in response to U.S. corporations bribing foreign government officials. While originally enacted to restore confidence in U.S. businesses acting abroad, the FCPA also applies to charitable contributions, grantmaking intermediaries, and nonprofit organizations.

The FCPA contains two main provisions: the Books and Records Provision and the Anti-Bribery Provision. Jointly enforced by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC), these provisions often work in tandem.

BOOKS AND RECORDS PROVISION

The Books and Records Provision requires publicly traded companies to keep books and records that accurately reflect business transactions, keep accounts of all payments, and maintain effective internal controls for preventing and detecting FCPA violations. It applies to any company required to file reports with the SEC and includes foreign companies publicly traded on a U.S. stock exchange.

A FCPA violation occurs when a person knowingly falsifies a book, record, or account, or fails to implement a system of internal accounting controls. The provision applies with equal force when recording or keeping accounts of charitable contributions and in-kind donations.

ANTI-BRIBERY PROVISION

The Anti-Bribery Provision prohibits paying or offering to pay anything of value to a foreign government official to obtain or retain business. A violation occurs when all of the following four elements are satisfied:

- Corruptly* paying, offering or promising to pay, or authorizing another to do so;
- Anything of value, directly or indirectly;
- To a foreign official, political party, or political candidate;
- To influence an official act, induce a violation of law, secure an improper advantage, or obtain or retain business.

*“Corruptly” means performing the bribe knowingly, i.e., with the intent to wrongfully influence the recipient. Willful blindness does not circumvent the law.

WHO IS AFFECTED BY THE FCPA

The FCPA applies to all U.S. persons and companies conducting business in the United States; most non-U.S. subsidiaries of U.S. companies; and U.S. subsidiaries of foreign companies. The DOJ and SEC take a very broad view of their jurisdiction. Therefore, the FCPA can apply to any contact with the United States in furtherance of an attempted bribe—no matter how sparse—such as e-mails, telephone calls, or the use of U.S. bank accounts.

FCPA FINES AND PUNISHMENTS

Punishments for FCPA violations are severe. Costly civil law suits often follow on the heels of SEC or DOJ-brought FCPA charges. For corporations, fines range up to \$2 million per violation or twice the pecuniary gain received as a result of the violation, whichever is higher. For individuals and corporate officers, directors, stockholders, employees and agents, fines range up to \$100,000 and imprisonment for up to five years.

HOW THE FCPA AFFECTS CHARITABLE CONTRIBUTIONS

Donors should avoid even the slightest hint of impropriety when giving anything of value abroad and should screen all transactions and downstream relationships for potential FCPA violations. This includes having all second and third parties in the giving process sign certifications that the charitable contribution will not violate the FCPA or the anti-bribery laws of any country.

For corporations, in addition to the above, general FCPA compliance involves, at minimum, having an internal anti-corruption policy in place; conducting employee, staff, director, and officer trainings on the FCPA; and having a compliance officer on staff to address corruption and FCPA issues.

In November of 2012, the DOJ and the SEC released *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. In addition to

providing detailed advice on FCPA compliance and examples of impermissible conduct, the guide outlines due diligence measures for cross-border charitable contributions.

CONSIDERATIONS FOR GRANTMAKERS

When making a charitable contribution, donors should ask the following questions:

- What is the purpose of the contribution?
- Is the contribution consistent with the company's internal giving guidelines or the donor's giving history?
- Is the contribution at the request of a foreign official?
- Is the contribution conditioned upon receiving business or other benefits?
- Is a foreign official associated with the recipient and, if so, what decisions does that official make regarding the donor's business in the country?

In addition to asking the above questions, donors must exercise proper due diligence procedures when giving overseas, including, but not limited to:

- Researching and investigating intermediaries, grantees, and beneficiaries for reputation and/or to ensure no one affiliated with the grantee is a government official
- Using written agreements with intermediaries and grantees restricting the use of funds to charitable purposes only
- Requiring anti-corruption and FCPA compliance certifications from all intermediaries and grantees
- Ensuring the funds were transferred to a valid bank account
- Requiring audited financial statements from the grantees showing exactly how charitable contributions will be used
- Conducting beginning-to-end monitoring of the grantee's use of charitable funds

Ultimately, responsibility is on the donor to ensure transactions and charitable contributions are free from bribery and in compliance with the FCPA.

Every donor that gives abroad should be concerned about the FCPA. While donors cannot insulate themselves completely from the FCPA, with proper due diligence measures in place, they can substantially limit their exposure to FCPA liability. More importantly, donors can ensure that charitable contributions go to their intended philanthropic purposes.

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We would like to thank Charles R. Ostertag, Special Counsel to Kordant Philanthropy Advisors, for this guide.

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