

To Give or Not To Give and If So How, Under the FCPA

Give or not to give? That is certainly a question but it may also include the question of the value of the gift. Under the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act gifts and entertainment continue to bedevil compliance practitioners, business unit personnel and compliance programs in general. Yesterday at the Dow Jones Global Compliance Symposium there was a panel discussion on gifts that raised some interesting approaches.

Rules Based Approach

One company had a fairly typical US rules based approach which set the dollar value of gifts and entertainment in two general categories; they are gifts and entertainment for foreign governmental officials and gifts and entertainment for non-foreign governmental officials. Interestingly the company also had a third category which was gifts and entertainment that its own employees could accept. The limits were lower for the foreign governmental official than the non-governmental official. If an employee desired to go over the specified limit, then Compliance Department approval is required. However, the Compliance Officer said that if the gift or entertainment request was reasonably detailed and a clear business purpose was articulated in the request, she would usually approve the request if the amount of money did not appear to be unreasonable.

The compliance officer reported some numbers from her company's Ethics' Helpline from the past year. Almost one-third of the calls which came into the Helpline were categorized as inquiries rather than reports of issues which were investigated. Of this group of inquiries, the largest single group, almost 25%, were questions about gifts and entertainment issues. So even with this rules based-bright line approach there were still many questions from the employee base on gifts and entertainment.

Values Based Approach

The second company took a different approach. Although it is a US company, it took a more European-centric, values based approach. It allowed the regions to set their own top end values to gifts and entertainment, based upon the nuances and risks of the geographic area. There was not the trichotomy of categories as listed above. The company compliance representative said that in their values based system, there was greater monitoring of employee gifts and entertainment by the compliance department and that they engaged in more training for employees on gifts and entertainment issues.

This monitoring was more extensive than in the rules based company. If an employee went above the overall company limit, the matter was investigated through an independent review of the amount spent; who it was spent on and the business purpose. This was then all written up and the independent investigator made a determination if a compliance issue violation had arisen.

While this post-event work seems costly and disruptive to the business, the company representative said that it worked for her company.

Proportionality

One of the interesting discussions was on the issue of proportionality. Proportionality in the context of gifts and entertainment in anti-corruption compliance programs generally relates to the types of gifts or entertainment appropriate to be provided to a high level company official. One rule of thumb mentioned was if the entertainment provided was typical for a company executive and that executive could routinely pay for it, this was indicia that it was reasonable if provided from one senior level executive to another. There was mention of another company which had one gifts and entertainment policy for high level company officials and another policy for regular employees. All of this means that it may well be acceptable for your company President to entertain another company President at Wimbledon or other similar event.

Warning

Another panelist cautioned the audience to remember who would be reviewing gifts or entertainment in an investigation. He said that the view of Department of Justice (DOJ) attorneys, who might review such information in the context of a FCPA investigation, as to what is reasonable or even 'modest' is usually very different than the view of sales persons. Lastly, there was caution suggested about raising the limits of your gifts and entertainment policies if they are under review at this time. The panel believed that that current enforcement atmosphere makes such a move problematic at best.

The panel was quite good in setting out the parameters and types of gifts and entertainment policies. The message to me seemed to be the following: decide on a policy which works for your company and then follow it. But verify and verify. And finally, document, document and document.

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