

BUSINESS ENTERTAINMENT

“TEXAS STYLE” HERE AND ABROAD

What You Need to Know

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We Texans pride ourselves on our hospitality, and rightly so. We generously extend dinner invitations and when invited to someone else’s home, we ask what we can bring. When dining out, we compete with each other to grab the check. We serve large portions, send large bouquets, and leave large tips. What could be wrong with that? Nothing, unless the circumstances of the gift or entertainment violate one of the many U.S. and foreign laws that prohibit illegal gratuities and bribes.

Many business people are familiar with the U.S. Foreign Corrupt Practices Act (FCPA),¹ which concerns payments made to non-U.S. public officials. Other less-familiar federal statutes, such as the Travel Act, may apply to gifts and entertainment. In addition, many U.S. states, including Texas, have enacted laws covering certain types of payments. Finally, there are many foreign jurisdictions with laws that address gifts and entertainment. A company seeking to extend hospitality to third parties in the United States or internationally will need to understand the laws that determine whether a gift will be considered a permissible business expense or an illegal bribe.

FCPA

Only the Brazos Should Be Crooked ...

The FCPA applies to (1) any individual who is a citizen, national, or resident of the United States; (2) any entity having a principal place of business in the United States or organized under U.S. law; (3) companies that have securities registered in the country or that are required to file periodic reports with the Securities and Exchange Commission (SEC); (4) any person located in the United States; and (5) agents or other representatives of the foregoing. The FCPA prohibits corrupt payments or offers of payment (whether direct or through a third party) to foreign (non-U.S.) officials in order to obtain or retain business. This prohibition is commonly referred to as the anti-bribery provisions of the FCPA. The term “foreign official” has been broadly construed by U.S. enforcement authorities to include any person acting in any official capacity for any non-U.S. governmental body, foreign state-owned entity, or non-U.S. political party.

“Payments” prohibited by the FCPA can take many forms other than cash, including gifts, travel, meals, and entertainment. For convenience, these types of payments are referred to in this article as gifts and entertainment. The FCPA imposes liability for direct payments and for indirect payments where payment is made to a third party “knowing” that the payment will go to a foreign official.

A U.S. company doing business abroad may face many challenges in trying to comply with the FCPA, especially in countries where gift giving is a long-standing business and cultural expectation. Providing gifts and entertainment to foreign officials is not always illegal under the FCPA. It may not always be clear whether hospitality will be considered a legitimate business expense or a bribe.

Companies have paid millions of dollars to settle U.S. government enforcement actions involving many types of gifts and entertainment, including cash, travel, entertainment, computers, cars, even expensive shoes and wine. In general, gifts and entertainment provided to foreign officials are permitted under the FCPA if the expense is reasonable and bona fide, and if it is for the purpose of demonstrating or promoting capabilities, products, or services or in connection with fulfilling legitimate contractual obligations, such as an obligation to provide training. In addition, all gifts and entertainment must be accurately recorded in the books and records of publicly traded companies. While what is commonly referred to as the books and records provisions of the FCPA are not applicable to private companies, private companies should nevertheless require proper recordation of all gifts and entertainment to ensure effective and transparent compliance with the anti-bribery provisions of the Act.

OTHER U.S. FEDERAL LAWS

More Than One Way to Skin a Cat ...

Other federal laws may apply to certain types of gifts and entertainment. The Travel Act² was enacted in 1961 to combat organized crime and racketeering. It generally prohibits traveling between states or using an interstate facility in aid of any “unlawful activity,” including bribery in violation of federal or state laws. The U.S. Department of Justice (DOJ) has been increasingly aggressive in using the Travel Act to prosecute companies for bribing private persons not employed by a foreign government or state-owned entity or who would not otherwise qualify as a foreign official (referred to as “commercial bribery”). In those types of cases, the FCPA does not apply, since no foreign official is involved. A single interstate or inter-

national telephone call or email can trigger application of the Travel Act, which carries a prison sentence of up to five years for most violations.

For example, in July 2009, Control Components, Inc. (CCI) reached a settlement with the DOJ for allegations involving both public bribery under the FCPA and commercial bribery in violation of the Travel Act (based on violation of California commercial bribery law). CCI pleaded guilty to violating both statutes in connection with securing contracts in approximately 36 countries by bribing employees of foreign state-owned companies and private companies. The DOJ alleged that between 2003 and 2007, CCI paid approximately \$4.9 million in bribes to officials of foreign government-owned companies and another approximately \$1.95 million in bribes to employees of private companies. The bribes included expensive gifts, trips to vacation destinations under the guise of inspection or training trips, and paying children's college tuition for at least two executives of CCI's customers. CCI was ordered to pay a criminal fine of \$18.2 million.³

In addition, the federal Bribery Statute prohibits corruptly (with intent to engage in a quid pro quo) giving or promising a public official anything of value in order to influence that official.⁴ There is also a federal Illegal Gratuity Statute that prohibits giving or promising a public official anything of value for or because of an official act, other than as provided by law.⁵ The Illegal Gratuity Statute was found to have been violated when a contractor gave a Titleist driver and 3-wood golf clubs to a government employee and the following year the gift-giver sought favorable treatment from that employee, mentioning the earlier gift.⁶

Other federal statutes that could apply to certain types of gifts and entertainment include the Racketeer Influenced and Corrupt Organizations statute (RICO) ("pattern" of bribery based on federal or state bribery laws);⁷ the Robinson-Patman Act (bribes between a buyer and seller hidden as discounts, commissions, etc.);⁸ the Hobbs Act (acceptance of bribes that affect interstate commerce);⁹ the Federal Bank Bribery Law (bribes in connection with business with a financial institution);¹⁰ and 18 U.S.C. §666 (bribes by federally funded programs and companies). In addition, the Federal Gift Statute prohibits members of the executive, legislative, or judicial branch from soliciting or accepting gifts from someone whose interests may be substantially affected by the federal employee's performance or nonperformance of duties, except as permitted by law.¹¹



UK BRIBERY ACT AND OTHER FOREIGN LAWS

Over Yonder ...

Texas companies conducting business in the United Kingdom are subject to the UK Bribery Act (Bribery Act), which became effective on



July 1, 2011.¹² The Bribery Act prohibits both giving and receiving bribes, either directly or through a third party. It covers bribery of private individuals (commercial bribery), as well as bribery of public officials, whether domestic or foreign. A company may be liable under the Bribery Act for failing to prevent bribery by persons who perform services on its behalf. A defense is provided if the company can show that it had “adequate procedures” in place to prevent the bribery. The Bribery Act does not specify a maximum penalty that can be imposed on an individual or corporation. An individual found guilty of an offense may be subject to a jail sentence of up to 10 years.

Fortunately, the UK government has published Guidance for the Bribery Act, including information regarding how the government will view expenditures relating to business hospitality.¹³ The Guidance confirms that the Bribery Act does not prohibit reasonable and proportionate hospitality and promotional expenditures made in good faith. In fact, the Director of the UK Serious Fraud Office speaking recently in China about the propriety of giving gifts in that country, said: “Giving a gift to somebody in these circumstances is a mark of respect for them and is part of what is due to them because of the relationship that you have or want to have with them. I myself bring gifts when I come to China.”¹⁴

The Guidance further explains that authorities will consider the level and type of expenditure, the manner and form in which it was provided, and the level of influence of the recipient with respect to the business decision in question. Generally, the more lavish the hospitality or the higher the expenditure, then the greater the inference will be that it is a bribe intended to influence the recipient to grant some advantage in return.¹⁵

Other countries have laws prohibiting bribery. Companies doing business internationally should educate themselves about the local laws in all relevant jurisdictions. For example, Russia enacted enhanced anti-corruption legislation effective January 2009 prohibiting a wide range of corruption, including public and commercial bribery.¹⁶ China prohibits offering money or property, including benefits such as travel, to state personnel in exchange for illegal benefits, and public officials cannot accept gifts likely to affect the performance of their duties. In addition, commercial bribery is prohibited in China.¹⁷

TEXAS BRIBERY LAWS

Our Own Stompin’ Grounds ...

Of course, it is also important to know the laws that govern hospitality at home in Texas. Like most states, Texas restricts gifts given to public officials. The Texas Anti-Bribery Statute prohibits furnishing a benefit to a public servant with intent to influence his or her official duties.¹⁸ For example, the Texas Ethics Commission has stated that a \$160 deer rifle would be a bribe if given with intent to influence a public servant in exercising his discretion.¹⁹

In addition, Texas has an Impermissible Gift Statute prohibiting a person from offering a public servant a benefit that

the person knows the servant is not permitted to accept.²⁰ Certain exceptions are provided, including gifts on account of a personal or kinship relationship and items (excluding cash or negotiable instrument) worth less than \$50.²¹

The Texas Penal Code also prohibits commercial bribery.²² A person violates the Texas Commercial Bribery Statute if he offers, confers, or agrees to confer a benefit to a fiduciary in order to influence the conduct of the fiduciary with respect to the affairs of his beneficiary, without the consent of the beneficiary. In addition, a fiduciary violates the statute if he solicits, accepts, or agrees to accept a benefit under those circumstances. The term “fiduciary” includes an agent or employee, as well as officers, directors, and other participants in the direction of a company’s affairs.

Additional Texas statutes impose ethics rules upon certain professionals and office holders that could affect whether they may accept gifts and entertainment. In addition, other states have their own regulations on the subject. Depending upon the size of a company and the nature of its business, there may be numerous regulatory regimes applicable to business hospitality.

BEST PRACTICES

Circle the Wagons ...

Companies should consider implementing a written policy regarding gifts and entertainment, prepared with the assistance of experienced compliance counsel. The policy should cover recipients in both the public and private sectors and be designed to satisfy the legal requirements of all jurisdictions in which the company conducts business. It is also important to establish procedures to ensure that the policy is followed. The following are some general guidelines to keep in mind:

- Gifts should only be a token of esteem, not given in exchange for an anticipated benefit;
- Modest gifts bearing the company logo (hats, pens, etc.) are normally permitted;
- Meals, travel, etc. should be reasonable, not lavish (e.g., economy, not first class);
- Generally, cash, gift cards, and other cash equivalents should not be given;
- Adult entertainment, gambling, etc. should not be given;
- Gifts and entertainment should comply with all laws and ethics rules governing the recipient;
- Generally, it is reasonable to provide travel for a legitimate business purpose (e.g., visiting company facilities to see products); however, it is not generally justifiable to pay for travel of family members, nor to pay for side-trips to vacation destinations;
- It is usually preferable to pay providers of services directly, or reimburse the person’s employer, rather than paying the employee directly;
- It is usually not a good idea to provide gifts, entertainment, or travel when the company has non-routine business pending before the recipient’s employer; and

- All gifts, travel, and entertainment must be properly recorded in the company’s books and records.

Happy Trails

Texans need not become Scrooges when it comes to business entertainment. An understanding of the relevant laws, together with appropriate company policies and procedures, will go a long way toward ensuring that well-intentioned Southern hospitality does not two-step out of bounds.

NOTES

1. 15 U.S.C. §78dd-1, *et seq.*
2. 18 U.S.C. §1952.
3. *United States of America v. Control Components, Inc.*, No. 09-162, Plea Agreement (July 24, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/control-inc/07-24-09cci-plea-agree.pdf>.
4. 18 U.S.C. §201(b).
5. 18 U.S.C. §201(c).
6. *U.S. v. Hoffman*, 2006 U.S. Dist. Lexis 75409 (D.C. Neb. Oct. 16, 2006).
7. 18 U.S.C. §§1961–1968.
8. 15 U.S.C. §13.
9. 18 U.S.C. §1951.
10. 18 U.S.C. §215.
11. 5 U.S.C. §7353.
12. Available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.
13. Ministry of Justice, Bribery Act 2010 Guidance, available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

14. “19th Session of the China Business Leaders Forum — The UK Bribery Act and its Implications for Business in China,” speech by Richard Alderman, Director Serious Fraud Office, UK, (Feb. 7, 2012), available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/the-uk-bribery-act-and-its-implications-for-business-in-china--19th-session-of-the-cblf.aspx>.
15. Ministry of Justice, Bribery Act 2010 Guidance, at ¶28.
16. Crim. Code of Russian Federation, arts. 204, 290–291.; and Russian Admin. Code, art. 19.28.
17. Crim. Law of the People’s Republic of China, art. 164
18. Tex. Penal Code Ann. §36.02 (Vernon 1994).
19. Tex. Ethics Comm’n Op. No. 60 (1992).
20. Tex. Penal Code Ann. §36.09 (Vernon 1994).
21. Tex. Penal Code Ann. §36.10 (Vernon 1994).
22. Tex. Penal Code Ann. §32.43 (Vernon 1994).

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