

Executive Summary

Strategies for Minimizing Bribery & FCPA Risks

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Introduction

What often makes the Foreign Corrupt Practices Association (FCPA) and related compliance issues tricky for organizations is the underlying conduct which gives rise to scrutiny and enforcement of what may be normal business activity. However, when gifts, corporate hospitality, or other things of value are directed to a specific type of customer or prospective customer, the U.S. government may label the conduct as “bribery” and expose the organization to lengthy and expensive scrutiny and enforcement. Accordingly, individuals who oversee or manage corporate hospitality expenses in business organizations, need to be aware about how corporate hospitality can morph into problematic conduct so that steps can be taken to minimize risk.

As we dive deeper into this topic, be prepared to collaborate cross-functionally with your anti-bribery and finance teams through asking each other these questions:

1. How do we automate the reviewal and approval process of a request to entertain foreign officials and comply with FCPA?
2. How do we tie the request to the actual expense activities?
3. How do we report compliance of these activities?
4. Can we utilize our current system(s) or do we need to purchase a different system?



About the Author

Professor Koehler is the founder and editor of the FCPA Professor website. His expertise and views are informed by a decade of FCPA practice and experience at a leading international law firm during which he conducted FCPA investigations around the world, negotiated resolutions to FCPA enforcement actions with government enforcement agencies, and advised clients on FCPA compliance and risk assessment.

The Expansive Interpretation of “Bribery”

Since the FCPA is about bribery (and because bribery is bad) some people think that FCPA compliance is easy – you just don’t bribe! But that begs the question, what does “bribery” mean? To be sure, there is some conduct that occurs in the global marketplace that all reasonable minds would agree constitutes bribery. For instance, providing a suitcase full of cash to a president or prime minister to obtain a government contract is bribery.

Yet, few FCPA enforcement actions involve this type of conduct and therefore this is not the reason why FCPA compliance is a top concern for business organizations across a variety of industries. Generally speaking, the FCPA’s anti-bribery provisions capture providing or offering “anything of value” to a “foreign official” to “obtain or retain business.”

“Anything of value” means just that – considering foreign officials, like the rest of us, can be influenced in many different ways besides cash payments. Several FCPA enforcement actions have been based on allegations or findings which concerned travel, meals, gifts, entertainment and other “fun” activities. For instance, recent enforcement actions have involved companies for providing gift cards, spa services, sightseeing tours, shopping excursions, national park excursions, and tickets to attend sporting events. In one enforcement action, the government alleged that a corporate event was held at a luxury resort and that after daily half-hour business meetings, participants engaged in leisure events such as “golf,



“The FCPA’s anti-bribery provisions capture **providing or offering anything of value to a foreign official** to obtain or retain business.”

scuba diving, snorkeling cruises, horseback riding, ocean kayaking, surfing lessons, as well as cocktail and luau dinner receptions.”

There is of course nothing inherently illegal or unethical about dinner receptions or attending a sporting event – in fact it’s often labeled as an effective sales and marketing and/or rapport building with the prospective customer. However, when such things of value are provided, directly or indirectly to a “foreign official,” the U.S. government may call it “bribery.”

While we all recognize that bona fide, traditional government officials (such as Presidents and Prime Ministers) are “foreign officials,” most enforcement actions, including those involving corporate hospitality, do not involve such individuals. Rather, the alleged “foreign official” is an employee of an alleged state-owned or state-controlled enterprise (SOE). SOE’s are common throughout the world in a wide variety of industry sectors and have many attributes of private business such as publicly traded stock, doing business outside of its borders, and employing nationals and non-nationals alike. However, a foreign government may own a portion of the SOE meaning, in the eyes of the government, all employees of the SOE (regardless of rank, title or position) are “foreign officials” on par with Presidents and Prime Ministers.

Another prominent enforcement theory used in several corporate hospitality cases is that individuals such as physicians or lab personnel employed by certain foreign healthcare systems constitute “foreign officials.”



“... in the eyes of the government, **all employees of the SOE are ‘foreign officials’** on par with Presidents and Prime Ministers.”

At first blush, one might respond to this broad interpretation of “foreign official” by saying “just don’t bribe.” However, as highlighted above the “b” word is often used in connection with normal corporate hospitality when directed to a “foreign official.” Thus, one basic aspect of FCPA and related compliance is for a diverse group of professionals to understand this expansive enforcement theory.

Even if your business organization does not actually do business per se with a foreign government or the broad categories of entities considered to be part of a foreign government by the enforcement agencies, FCPA risk still lurks because of the expansive interpretation of “obtain or retain” business to include any point of contact a business organization may have with a foreign official in the global marketplace. Points of contact giving rise to scrutiny and enforcement often involve licensing, permitting or other regulatory officials in a foreign country in connection with manufacturing facilities, product testing or approvals, or customs officials.

How to re-engineer your SAP® Concur® policies and workflows to proactively address FCPA



Attendee Configuration

Since requesting a form within a word document often makes it difficult to standardize, **create an attendee type for Foreign Officials instead.** This way, changes can't be made as it cycles through review.

“Reasonable” Corporate Hospitality That Is “Directly Related” to a Business Purpose

The FCPA's anti-bribery provisions contain an affirmative defense to the extent the thing of value provided or offered to a “foreign official” was a “reasonable and bona fide expenditure, such as travel and lodging expenses” that was “directly related to: the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract ...” As an affirmative defense, a business organization will have the burden of establishing concepts such as “reasonable,” “bona fide,” and “directly related” should it become the subject of FCPA scrutiny.

Even if a business organization is able to satisfy these concepts as to certain aspects of corporate hospitality, without adequate internal controls allowable corporate hospitality can easily morph into problematic conduct. To best demonstrate this key point, consider a version of the game “green light, red light” using actual FCPA enforcement actions.

In one enforcement action, alleged foreign officials traveled to a company's U.S. facility to inspect equipment. Assuming the “foreign officials” did not travel first class or stay in a five-star penthouse suite, there is nothing wrong with spending corporate money for this purpose and thus this conduct can be “green lighted.” However, this conduct then morphed and the “foreign officials” were treated to twenty nights of travel with luxury hotel accommodations in various destinations – conduct that would certainly be “red lighted.”



“... **without adequate internal controls,** allowable corporate hospitality can easily morph into problematic conduct.”

In another enforcement action, alleged foreign officials traveled to a company's U.S. research and development facility for a site visit. Subject to the same qualifications mentioned above, this conduct can be "green lighted." However, once again, if this conduct is morphed and the "foreign officials" spent over two weeks traveling to other destinations while being entertained by company personnel, then this conduct would certainly be "red lighted."

In construing the FCPA's affirmative defense for "reasonable" and "bona fide" expenses "directly related" to a business purpose, the FCPA enforcement agencies have suggested that the following items will seldomly – if ever – be reasonable and bona fide or directly related to a business purpose:

- First-class airfare
- Five-star hotels
- Expensive food and drink
- Lavish entertainment
- Per diem spending money
- Inclusion of spouses or children

How to re-engineer your SAP Concur policies & workflows to proactively address FCPA



Expense Categories

Remove manual expense workflows, as they can get lost in transition and bi-pass the proper approvals needed. Look to **create specific expense categories for foreign and government officials** instead.

Risk Management

So what's a business organization to do? On one level, an organization can prohibit corporate hospitality altogether, but that is not prudent nor practical.

Rather, business organizations should:

- **Train employees and third parties** to recognize that their job function presents some risks because of broad FCPA interpretations highlighted above.
- **Adopt specific policies and procedures**, written in plain English, so that those involved in corporate hospitality are all on the same page in terms of what they can and can't do and what approvals are needed before planning events.
- **Require adequate monitoring and oversight** of corporate hospitality not just by legal or compliance counsel, but also by finance and audit personnel who also have a meaningful role to play in FCPA compliance.

How to re-engineer your SAP Concur policies & workflows to proactively address FCPA



Integrate Concur® Request

Getting employees to **spend within budgets and stick to policies is a constant challenge.**

Concur Request allows managers to:

- Repurpose travel request forms
- Customize specific fields as needed
- Create lists for data integrity
- Automate workflow routing for review

In fact, compliance personnel at publicly traded companies need to understand how corporate hospitality can present issues under the FCPA's internal controls provisions as well. Accordingly, companies should track corporate hospitality expenditures including implementing criteria for oversight and supervision of expenses.

For instance, in a recent enforcement action, the government alleged that the problematic travel was approved internally "with little or no required review" or that when a review took place there was a failure to "note basic red flags such as travel to tourist destinations." In resolving FCPA enforcement actions, the government often commends the remedial actions a company engaged in that then often serve as a "best practice" for other companies to model. For instance, in a recent enforcement action the government positively cited that the company instituted "compliance oversight across a broad category of business expenditures" and in another enforcement action the government noted that the company now requires "pre-approval for third-party gifts, travel and entertainment, channel partner marketing expenses, and even certain operating expenses in high risk markets."

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Utilize Audit Rules

Instead of having managers approve expenses for reimbursement, **utilize audit rules to alternate workflows for attendees that are Foreign Officials**. This way you can direct it over to AP and Compliance teams for approvals and send out warning messages to users.

What's the Cost of Turning a Blind Eye?

The failure to be FCPA compliant when it comes to corporate hospitality (or the myriad other ways scrutiny can arise) may result in several negative financial consequences for business organizations and it's not just the risk of resolving an actual FCPA enforcement action brought by the U.S. government. Rather, companies under FCPA scrutiny typically spend multiples of an FCPA enforcement action settlement amount in pre-enforcement action professional fees and expenses. FCPA scrutiny and enforcement can also result in a host of other negatives consequences such as a hit to market capitalization, and increase in the cost of capital, and lost or delayed business opportunities.

In 2019, FCPA enforcement set an all-time record as the U.S. government collected approximately \$2.65 billion in corporate settlement amounts against business organizations large and small, across industry sectors. Certain of these enforcement actions involved, in whole or in part, corporate hospitality events and this issue remains on the radar screen of the FCPA enforcement agencies.



“**\$2.65 billion** in corporate settlement amounts against business organizations that are large, small, and across industry sectors.”

How SAP Concur Can Help

To mitigate risk, tech-savvy companies understand that their travel and expense areas, business rules, and policies must continue and evolve in order to stay relevant within the business. Through using SAP Concur solutions, our experts can assist your organization when it comes times to re-engineering its policies and workflows, aligning more closely with today's best practices.

Webinar attendees voted as follows:

Who in your organization oversees the bribery prevention programs in your organization?



64%
compliance
department



22%
legal counsel



7%
finance
department

Does your organization mitigate bribery risks by reconfiguring your expense processes, procedures, or tools?



42%
yes, but we could do
more.



41%
no or don't know.



17%
yes, we are pretty
advanced in this area.

Learn More

Would you like to learn more about how to optimize your T&E program for bribery controls and compliance in 2020?



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About SAP Concur

SAP® Concur is the world's leading brand for integrated travel, expense, and invoice management solutions, driven by a relentless pursuit to simplify and automate these everyday processes. The top-rated SAP Concur mobile app guides employees through every trip, charges are effortlessly populated into expense reports, and invoice approvals are automated. By integrating near real-time data and using AI to audit 100% of transactions, businesses can see exactly what they're spending without worrying about blind spots in the budget. SAP Concur solutions eliminate yesterday's tedious tasks, make today's work easier, and help businesses run at their best every day. Learn more at concur.com or at the SAP Concur [blog](#).

SAP Concur would like to thank our partner for their participation in this event:

- [Deloitte Consulting](#)

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