



Meeting CSR Objectives – Without Inadvertently Violating Anti-Corruption Laws

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WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

- No universally agreed-upon definition
- 2 different concepts of CSR:
 - Project-based
 - Guiding Principles

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

- Core principles:
 - Companies should avoid infringing on human rights, and should address human rights impacts
 - Companies should have in place:
 - Policy commitments to respect human rights
 - Human rights diligence processes to identify, prevent and mitigate adverse human rights impacts caused/contributed to by company
- Widely endorsed internationally

WHY IS CSR INCREASINGLY IMPORTANT?

- Increase in related national legislation, for instance:
 - Conflict minerals laws
 - New CSR disclosure obligations
 - New Indian *Companies Act*, requiring CSR investment for all companies operating in India

WHY IS CSR INCREASINGLY IMPORTANT?

- Increasing risks of ignoring CSR standards:
 - Reputational damage
 - Loss of business opportunities
 - Security risks from failure to obtain “social license” to operate
 - Denial of access to financing
 - Litigation risk

RELATIONSHIP BETWEEN CSR/ANTI-CORRUPTION EFFORTS

- Anti-corruption efforts are one aspect of CSR
- Corruption negatively affects the economic, social and environmental impacts of a company's operations
- Some CSR initiatives can lead to corruption risk

CORRUPTION AND CSR

- Corruption risk may be significant with project-based CSR
- Guiding Principles approach to CSR should reduce corruption risk – can integrate company’s human rights and corruption compliance processes:
 - Policies
 - Due diligence
 - Prevention

CANADA AND U.S. BRIBERY PROHIBITIONS

CFPOA Prohibition:

- **3. (1)** Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
 - (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
 - (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

FCPA Prohibition:

- Similarly, the FCPA prohibits an “offer, gift, promise to give, or authorization of the giving of anything of value” to, among others, any foreign official, any foreign political party or any candidate for foreign political office for the purpose of influencing that person or entity into using their influence to secure improper advantage

GOVERNMENT GUIDANCE RELATING TO CSR AND CORRUPTION

- **Canada**

- “for the benefit of a foreign public official” is intended to cover the situation where a foreign public official might not receive the benefit himself or herself, but instead direct that the benefit be given to a family member, **to a political party association**, or to any other person for the benefit of the official

- **United States**

- Resource Guide to U.S. Foreign Corrupt Practices Act:
 - “Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.”
 - FCPA prohibits payments to foreign officials not to foreign governments

EXAMPLE: BLACKFIRE EXPLORATION

- RCMP allege Blackfire paid Chiapas mayor \$20,000 in bribes to “keep the peace”, mayor used funds personally and increased demands
- Blackfire stated it believed money was paid to benefit citizens of small town
- No systems in place to track how funds spent after funds directed to mayor
- Company investigated for corruption, no charges apparently laid

FCPA SETTLEMENTS RE. CSR INITIATIVES

- SEC allege Schering-Plough paid funds to bona fine Polish castle restoration charity to influence purchase of their products in Poland
- Head of charity:
 - Polish official
 - Had authority to approve purchase
 - No allegations that he personally took funds

FCPA SETTLEMENTS RE. CSR INITIATIVES

- SEC viewed payments as improper:
 - Foreign official had special interest in success of charity;
 - Nearly all of Schering-Plough’s donation budget was used by donations; and
 - Donations were structured to allow subsidiary to exceed authorized donation limit.
- Settlement on similar facts with Eli Lilly
- SEC takes broad view of “benefit”

U.S. DOJ OPINION PROCEDURE RELEASE

95-01

- Company proposed \$10 million to construct medical facility in South Asia
- Donation to be made through charitable organization in the U.S.
- Passed afterward to public company in host country

U.S. DOJ OPINION RELEASE 95-1

- U.S. DOJ said would not take action because:
 - Officers of charity and company were to be required to certify that funds not to be used in violation of FCPA;
 - Company represented that no individuals affiliated with charity and recipient company would be affiliated with foreign government; and
 - Company would require audited financial reports from charity showing use of funds

U.S. DOJ OPINION RELEASE

97-12

- U.S.-based company proposed to donate \$100,000 toward construction of a school in an Asian country
- Donation to be made directly to responsible government entity
- U.S. company stated:
 - It would require written certification that funds only used for school construction
 - Government would agree to conditions to ensure school built, staffed and appropriately used

U.S. DOJ OPINION RELEASE

97-12

- U.S. DOJ approved the donation:
 - Contribution made directly to a government entity
 - Therefore FCPA provisions did not seem to apply

U.S. DOJ OPINION RELEASE

06-01

- U.S. company proposed to donate \$25,000 to a fund to incentivize officials who vigorously enforced anti-counterfeit laws in an African country
- Reward would be distributed by the African country's government with safeguards in place

U.S. DOJ OPINION RELEASE 06-01

Proposed safeguards:

- Payment of funds by electronic transfer
- Written confirmation from the African state that the funds were received in a legitimate account
- The U.S. company would not take part in choosing agents to receive the financial reward, but would use predetermined criteria to ensure the funds were used for the designated purpose and given only to eligible agents
- The U.S. company would monitor the incentive program and discuss periodic refinements with the African government
- The African government would keep records relating to the funds for 5 years and would allow the U.S. company to access those records.

OPINION RELEASE

09-01

- U.S. company sought to donate \$1.9 million in medical devices to foreign government, who requested donation
- U.S. company had controls in place to ensure donated devices would be provided to candidates via a predetermined, subsidized medical device program

U.S. DOJ OPINION RELEASE 09-01

- U.S. DOJ allowed donation:
 - In part due to controls;
 - Also noted there was no reason to believe a foreign official would personally benefit; and
 - Donated products were being given to the foreign government, not to specific foreign officials therefore falling outside FCPA.

U.S. DOJ OPINION RELEASE 10-02

- U.S. based non-profit sought to grant \$1.42 million to a local microfinance institution in a Eurasian country
- Grant was required by local authorities
- Recipient institution was to be chosen from a short list of institutions provided by local regulators
- A foreign official sat on the board of the local institution that was selected as recipient of funds

U.S. DOJ OPINION RELEASE 10-02

- DOJ endorsed proposal, noting that based on prior due diligence and the following controls it was unlikely the payment would result in corrupt giving of anything of value to public officials:
 - The company would retain an independent monitor to audit the donated funds on an ongoing basis;
 - The recipient would institute an anti-corruption compliance program;
 - Staggered payment of grant funds; and
 - Prohibition on compensation of local board members.