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Gifts, Hospitality & the Government Contractor

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Recommended Citation

Briefing Papers No. 14-7, June 2014

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BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

GIFTS, HOSPITALITY & THE GOVERNMENT CONTRACTOR

By Jessica Tillipman

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.

This policy, articulated in the Federal Acquisition Regulation (FAR),¹ makes clear that the government procurement process demands the highest commitment to ethical and unbiased conduct. To ensure that the individuals involved in the procurement process adhere to these standards, government entities in nearly all jurisdictions around the world have enacted codes of conduct, ethical restrictions, and anti-corruption laws designed to protect the integrity of government and ensure that government officials² act impartially and do not give preferential treatment to any private organization or individual.³ To further these goals, most jurisdictions have enacted restrictions on the gifts and

hospitality⁴ that government officials may accept from individuals and organizations that sell goods and services to the government.

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While gifts and hospitality play an important role in facilitating and strengthening business relationships in the private sector, in the public sector, common business courtesies may appear as an attempt to influence a government official and the procurement process. This concern is not unfounded. Most public corruption cases involving government contractors include

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references to the offering of lavish gifts, meals, travel, or entertainment to government officials. Moreover, nearly all governmental bodies have enacted ethical restrictions that limit the gifts and hospitality that may be accepted by government officials—even in the absence of intent to influence a government official. Indeed, these restrictions are often even more stringent for government procurement officials.

Ethics and anti-corruption laws vary dramatically depending on the jurisdiction. Consequently, determining the applicable rules for a particular government entity can be incredibly challenging. To assist contractors with this process, Part I of this BRIEFING PAPER provides an overview of the laws and policies that restrict the offering or giving of gifts and hospitality to government officials. Part II addresses the severe consequences that may result when contractors offer or give gifts and hospitality to influence an official action. Part III offers practical suggestions regarding the policies and procedures that a government contractor may implement to reduce the risk of violating these laws.

Part I: Government Ethics Restrictions On Gifts & Hospitality

All individuals or companies that interact with government officials must be aware of the strict ethics rules that often govern the parties' interactions. These rules seek to ensure that government officials perform their duties impartially and do not wrongfully use their public positions for private gain. Most of the laws target the relationship between contractors and government officials to ensure that the parties' interactions are free from corruption or from even the appearance of

impropriety. Most jurisdictions, whether in the United States or abroad, have enacted laws or requirements that restrict the gifts and hospitality that government contractors may provide to government officials.

Contractors that work in a variety of jurisdictions have the unenviable task of determining the ethics rules applicable to the government officials in each specific jurisdiction. Not surprisingly, the ethics rules vary dramatically depending on the jurisdiction, making the task even more difficult for contractor compliance officers and contractor employees who interact with government officials. While some companies simplify this task with across-the-board prohibitions against giving gifts or hospitality to government officials, other contractors consider a flat prohibition to be unworkable (or unrealistic).

■ U.S. Federal Ethics Requirements

The U.S. Federal Government has strict rules prohibiting government officials from accepting gifts, hospitality, and other business courtesies that are common in the private sector. As a result, companies that do business with the Federal Government must be aware of and provide training to their employees regarding federal ethics restrictions. While the federal gift restrictions focus exclusively on government officials, contractors must be cognizant of the requirements and vigilant about compliance. Indeed, offering a prohibited gift or hospitality to a government official is not only improper, but demonstrates a lack of sophistication regarding government protocols—a misstep that could not only place the government official in an awkward position, but raises questions about the contractor's integrity and responsibility.⁵

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The Office of Government Ethics (OGE) maintains a user-friendly website that summarizes the relevant laws and provides detailed guidance and training materials about the ethics restrictions applicable to Federal Government officials.⁶ The rules relating to gifts from outside sources reflect concerns regarding gifts provided by contractors or entities that do business with or seek an official action from the government. They are designed to guard against the mere appearance that a Federal Government official is providing favorable treatment in exchange for the gifts or hospitality. In recent decades, the complex federal ethics requirements have been further complicated by the continued rise in government outsourcing. Indeed, compliance with ethics requirements has become even more challenging as an increasing number of contractor-employees work side-by-side with government officials in government agencies. Common office traditions, such as birthdays, retirement celebrations, and holiday parties, create unique ethical issues due to an increasingly blended workforce.⁷

Although the policies underlying federal gift restrictions are straightforward, the rules are fairly complicated and riddled with exceptions and nuance. As a general rule, government employees are prohibited from (directly or indirectly) soliciting or accepting “gifts” (1) from a “prohibited source” or (2) given because of the employee’s official position.⁸ Companies that contract with (or seek to contract with) the Federal Government fall within the definition of “prohibited source,” which includes persons or organizations who (a) seek an official action or to do business with the federal employee’s agency, (b) conduct business or activities with or are regulated by the employee’s agency, or (c) have interests that may be affected by the performance or nonperformance of the federal employee’s official duties.⁹ A gift is deemed to be given because of a Federal Government employee’s official position if a gift would not have been offered or given if the employee was not working for the government.¹⁰

The definition of “gift” includes hospitality, as well as any other item of monetary value.¹¹ Excluded from this definition are items of little intrinsic value, such as modest refreshments (that

do not constitute a meal), plaques, discounts available to the public, and honorary degrees.¹² The broad definition of “gift” also includes many business courtesies that are quite common in the private sector, such as meals, entertainment and transportation.¹³ For companies entering the public procurement market, these restrictions are often the most jarring.

If an item is not excluded from the definition of “gift,” it is likely prohibited unless a limited exception applies. Notably, the exceptions are not broad loopholes that may be exploited to ply government officials with lavish meals and vacations. They are purposefully narrow and designed to balance the need to protect the government with the realities of contemporary business interactions. Unless a gift falls neatly within one of the following exclusions or exceptions, “the safest course of action is to assume the gift is prohibited.”¹⁴

(1) *The “20/50 Rule”*—A contractor may offer noncash gifts with an aggregate market value of \$20 or less per occasion, so long as the aggregate market value of the gifts does not exceed \$50 in a calendar year.¹⁵ The monetary limit applies to an entire organization, not its individual employees.¹⁶ Consequently, a contractor must ensure that it accurately tracks the gifts and hospitality provided to each government official to ensure that the company does not exceed the cap. In addition, contractors cannot offer or give gifts or hospitality that exceed the cap by allowing the government official to pay the difference between the fair market value of the item and the gift cap. Thus, for example, a contractor may not buy a government official’s lunch, valued at \$40, even if the government official pays the \$20 difference.¹⁷

(2) *Gifts Based on a Personal Relationship*—An individual employee of a government contractor may provide a gift to a government official if it is clear that the gift is “motivated by a family relationship or personal friendship rather than the position of the employee.”¹⁸ To qualify for this exception, several factors are relevant, including who paid for the gift, the origin of the friendship, and the history of gift-giving between the parties. The OGE has made clear in its guidance that all of the factors must demonstrate that the gifts and

hospitality were motivated by the personal friendship, not the government official's position. The OGE is particularly suspicious of "friendships" that have developed on the job or gifts that have been purchased with company funds.¹⁹

(3) *Gifts From a Spouse's Employer*—Similar to the previous exception, gifts or hospitality may be extended to a government official if it is based on a spousal relationship. For example, if a contractor-employee is married to a government official, under limited circumstances, the contractor may provide meals, lodging, transportation and other benefits if offered because of the spousal relationship—not because of the government official's position.²⁰ Thus, if a government contractor hosts a lavish holiday party for all employees and their significant others, the government official may attend as long as the invitation is extended to all significant others.

(4) *Gifts in Connection with Bona Fide Employment Discussions*—If a government contractor wants to engage in bona fide employment discussions with a government official, it may provide meals, transportation, and lodging in connection with the discussions as long as the government official has first complied with the government ethics requirements applicable to employment discussions.²¹ Although beyond the scope of this BRIEFING PAPER, contractors must keep in mind that the rules relating to employment discussions with government officials are complex and require significant caution.²² Consequently, before a government contractor considers offering gifts or hospitality under this exception, it is critical that it complies with all other requirements relating to employment discussions.²³

(5) *Widely Attended Gatherings*—Government contractors may generally offer government officials free attendance at a widely attended gathering as long as the event is legitimately widely attended and attendance by the government official is in the agency's interest (a determination made by the agency, not the contractor).²⁴ "Free attendance" is defined as including a waiver of all or part of the fees associated with the conference, including "food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event."²⁵ It does not include

expenses for transportation and lodging or for "entertainment collateral to the event, or meals taken other than in a group setting with all other attendees."²⁶ This is a complicated exception and contractors should be certain that the event qualifies as a widely attended gathering before offering free attendance to a government official.

Even if one of the aforementioned exclusions applies, contractors should not offer gifts so frequently that a reasonable person may believe that they are being offered for an improper purpose. Indeed, the applicable regulations expressly state: "it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position."²⁷ A contractor analyzing the frequency of its gift-giving should consider the following: if you saw a competitor doing this, would you think it was an attempt to obtain an unfair competitive advantage? If so, then the gift or hospitality should not be extended.

There are several other key areas of gift and hospitality compliance that are of particular relevance to government contractors. For example, contractors may find themselves in a position where they may be able to offer transportation to a government official. It is critical that contractors understand that the definition of "gift" for purposes of the federal ethics rules expressly includes "transportation" (which also includes "local travel").²⁸ The line between permissible and impermissible transportation depends on the purpose of the transportation. If transportation is offered by the contractor in connection with the government official's duties, it is deemed a gift to the agency and, therefore, may be offered.²⁹ Conversely, if the transportation is for the "personal benefit" of the government official, it is a "gift" and may not be provided unless it qualifies under one of the above-mentioned exceptions.³⁰

Because this is a common occurrence, the OGE's examples are instructive to this analysis.³¹ A contractor providing "travel between two work sites during official site visits" does not implicate ethics restrictions because the benefit is to the agency. On the other hand, if a "contractor offers to allow [a government official] to use the contractor's shuttle bus as part of his daily commute to the office," it would benefit the government

official personally and would constitute a gift. The latter would only be permitted if it met an exception (for example, if the shuttle ride was valued at less than \$20).³²

Government contractors that consider offering gifts or hospitality to a government official must keep in mind that the restrictions apply not only to gifts provided directly to the government official, but also to those provided indirectly. Examples of indirect gifts that trigger the federal ethics rules include (a) gifts given with the government employee's knowledge and consent to a member of his immediate family (or dependent relative) because of the family member's relationship to the government official or (b) given to any other person or organization (including charities) "on the basis of designation, recommendation, or other specification" by the government official.³³ This rule prevents outside sources from evading gift restrictions by funneling gifts through an intermediary or seeking the enrichment of a family member (or any other designated person or entity) of the government official.³⁴ Contractors analyzing their compliance with this requirement should keep the following rule of thumb in mind: if a gift may not be provided directly to the government official without violating the ethics restrictions, it may not be offered to or through another person or entity.

Finally, although the gift restrictions focus exclusively on government officials, contractors may face severe consequences for causing or inducing a government official to violate the federal gift restrictions, such as suspension or debarment or other contractual remedies. Moreover, the penalties may be even more severe if it is determined that a gift has been offered or given in an attempt to obtain a contract or favorable treatment from government procurement officials.³⁵ Gifts or hospitality offered in an attempt to influence government officials are discussed in Section II of this BRIEFING PAPER.

■ State & Local Ethics Restrictions

Many contractors view the federal ethics regime as complicated and difficult to navigate. While this may be true in certain instances, the federal regime is practically a walk in the park compared

to state and local ethics restrictions. While the federal rules are available on a user-friendly website (along with detailed and helpful training materials), tracking down applicable state and local ethics rules, particularly for government contractors working in numerous different jurisdictions, can be a Herculean task.

Any contractor seeking to locate the applicable gift and hospitality restrictions in a particular jurisdiction will quickly note that they are often very difficult to find. Moreover, the restrictions vary greatly from jurisdiction to jurisdiction, which can make compliance with the laws quite challenging. In addition, unlike the laws of the federal regime, many of the state and local ethics laws focus on both government officials and the outside source providing the gift, which means that any violation will not only harm a contractor's reputation—it could also implicate its bottom line.

While it is beyond the scope of this BRIEFING PAPER to summarize the gift and hospitality laws of all 50 states, some examples are provided below. The National Conference of State Legislatures (NCSL)³⁶ has helpfully grouped state ethics laws by certain shared characteristics. It is important to note that the examples below are designed to highlight the wide variety of general gift and hospitality restrictions that a contractor may encounter in various states and cities. The examples are not, however, a complete summary of the restrictions applicable to state or local government officials, as many states and cities employ more restrictive gift and hospitality laws for specific government agencies and officials. Moreover, many jurisdictions have enacted restrictive gift and hospitality rules for government officials involved in the procurement process. Given the drastic differences in rules between jurisdictions and specific agencies, it is critical that government contractors always review the rules applicable to each government agency and official before extending a gift or hospitality.

As noted above, state gift and hospitality restrictions vary greatly depending on the jurisdiction. For example, some states maintain policies that are practically "zero tolerance" when it comes to gifts and hospitality (often referred by NCSL as "no cup of coffee" states).³⁷ New Jersey, for

example, has what has been described as one of the strictest ethics regimes in the country. Despite its reputation for corruption, the State Integrity Project (a partnership of the Center for Public Integrity, Global Integrity, and Public Radio International)³⁸ ranked New Jersey No. 1 for transparency and accountability in state government because, among other reasons, it has the “toughest ethics and anti-corruption laws in the nation.”³⁹

The New Jersey Uniform Ethics Code states that “No State officer or employee or special State officer or employee shall accept any gift, favor, service or other thing of value related in any way to the State official’s public duties.”⁴⁰ While there are a few minimal exceptions to this policy (i.e., gifts of trivial value or items offered under the same terms and conditions as to the general public), contractors should assume that most things of value are prohibited.⁴¹ New Jersey also requires contractors to certify compliance with the state Conflicts of Interest law,⁴² which contains additional gift and hospitality restrictions, and to follow the “guiding principles” outlined in the state “Business Ethics Guide.”⁴³ Notably, under this law, willfully inducing or attempting to induce a state employee to violate the Conflicts of Interest law may result in a fine of \$500 and/or up to six months in prison.⁴⁴ In addition, unlike some ethics regimes in the United States, the New Jersey Ethics Commission has been characterized as effective in its enforcement of the state’s ethics laws.⁴⁵

At the other end of the spectrum are states that place no monetary restrictions on the giving of gifts and hospitality to government officials. These states only prohibit gifts or hospitality that are designed to improperly influence an official action—a topic discussed in Part II of this BRIEFING PAPER.⁴⁶ For example, South Dakota has no restrictions on the gifts or hospitality that may be provided to a government official. Absent a contrary directive from a specific agency or institution, gift-giving in South Dakota is virtually limitless.⁴⁷

Other states have similarly permissive gift and hospitality rules, but the landscape is changing. For example, although Virginia has been

criticized in recent years for its notoriously “lax” ethics restrictions,⁴⁸ recent scandals, like the indictment of the former Governor and First Lady Bob and Maureen McDonnell for violating federal bribery laws, has prompted lawmakers to propose “reforms” to the Commonwealth’s ethics laws.⁴⁹ Specifically, in 2014, Governor Terry McAuliffe, who campaigned on a platform that included ethics reform, issued an Executive Order that imposes a \$100 gift cap on executive branch officers and employees.⁵⁰ Notably, the Virginia legislature has failed to follow suit with similarly restrictive ethics reforms, resulting in a legislative proposal that has been described by THE WASHINGTON POST as a bill “so slack it would be disingenuous to refer to it as ‘reform.’”⁵¹ The legislature has proposed a modest \$250 cap on individual “tangible” gifts to officials and their immediate family members—excluding travel, meals, entertainment and other “intangibles” from the cap.⁵² Moreover, it places no cap on the “cumulative dollar value” of gifts that a legislator may accept.⁵³

Although Virginia’s ethics rules are lax compared to many other state and local ethics regimes, the gift and hospitality restrictions applicable to procurement transactions in the Commonwealth are fairly robust. The Virginia Public Procurement Act prohibits bidders, offerors, contractors, and subcontractors from conferring “upon any public employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services or *anything of more than nominal value*, present or promised, unless consideration of substantially equal or greater value is exchanged.”⁵⁴ Moreover, the Commonwealth of Virginia Vendor’s Manual provides additional clarification:⁵⁵

No vendor shall offer any gift, gratuity, favor, or advantage to *any state employee* who exercises official procurement responsibility, develops procurement requirements, or otherwise influences procurement decisions. State employees may attend vendor-sponsored seminars or trade shows where the buying staffs will benefit from receiving product information and learning of new techniques and trends. Food, drinks, and give-away items offered to all participants at such functions may be accepted by state employees attending.

Virginia's complex and diversified ethics regime serves as a warning to contractors that the applicable ethics laws may vary dramatically depending on the duties and responsibilities of the particular government official.

Somewhere between the “zero tolerance” states and “no limit” states are those states that impose monetary thresholds on the gifts and hospitality that outside sources may offer to most government officials. These are the most common restrictions in the United States and are the most similar to the Federal Government's ethics regime (though the dollar thresholds vary greatly). Moreover, similar to the federal requirements, state and local ethics rules are riddled with exclusions and exceptions. For example, in Illinois, government officials may not accept gifts from prohibited sources (i.e., government contractors), nor may prohibited sources offer gifts, though the law exempts certain items, including any “item or items from any one prohibited source during any calendar year having a cumulative total value of less than \$100.”⁵⁶ In Rhode Island, gifts or other things of value are capped at \$25 dollars per day or \$75 per calendar year.⁵⁷ The State of Washington's gift limit is \$50 per year, but excludes items such as floral arrangements and food and beverages consumed at certain events and receptions.⁵⁸ Although this is just a small sample of state gift and hospitality restrictions, it shows that the monetary thresholds and applicable exemptions vary dramatically from state to state.

Assuming a contractor is able to locate the relevant state gift or hospitality restrictions, it must also consider whether there are more stringent rules applicable to its specific agency customer. Similarly, a contractor must also be cognizant of any local gift or hospitality restrictions that may govern the relationship. For example, in San Francisco, city officers or employees may not accept gifts unless they are “non-cash gifts worth \$25 or less, up to 4 times per year” or “gifts of food or drink to be shared in office.”⁵⁹ In Philadelphia, contractors are prohibited from offering or giving, among other things, gifts, gratuities, favors, invitations, food, and drinks to city executive department officials and employees and members of boards and commissions.⁶⁰ There are some exclusions from the general prohibition, including gifts

from friends or relatives, widely offered discounts or nominal tokens of appreciation, though this category of items is quite narrow. Philadelphia also requires city employees to report offers of prohibited gifts to the city's Chief Integrity Officer and to the Inspector General. As such, gift and hospitality restrictions applicable to city officials and employees in Philadelphia are actually far more restrictive than the requirements applicable to state government officials in Pennsylvania.⁶¹

A contractor may face severe consequences for violating state and local gift and hospitality restrictions. For example, in Washington, a contractor may be debarred for violating the limitation on gifts to state officers or employees.⁶² In Virginia, a contractor may be debarred for “[c]onferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of a state agency who exercises any ‘official responsibility’ for a ‘procurement transaction.’ ... *It is not necessary that the offer be accepted by the employee, or that the offer be made with intent to influence the employee in an official act.*”⁶³ Similarly, in cities like Philadelphia, offering a prohibited gift to a city employee may result in sanctions, up to and including debarment.⁶⁴

■ Foreign Ethics Restrictions

Contractors that do business with governments outside of the United States may have the most difficult task locating other countries' gift and hospitality restrictions. Not only is it challenging to locate the ethics laws of a foreign country online, some requirements may not be available in English. Frustrated by this process, many companies now hire local counsel or use commercial services to ensure compliance with all local gift and hospitality laws.

Many gift and hospitality restrictions in other countries are notably less stringent and less refined than U.S. federal ethics restrictions. Because these foreign laws are comparatively newer, they are not as well developed or well enforced as those in the United States. Although enforcement of these laws may be less than rigorous, it is still critical that contractors remain vigilant about compliance with these requirements. This BRIEFING PAPER provides several examples

of general gift and hospitality restrictions that may be found abroad. Contractors should note, however, that these examples are not exhaustive and the countries listed below may have enacted more rigorous gifts and hospitality restrictions depending on the particular government agency or public official involved.

In the *Philippines*, gift and hospitality restrictions are fairly broad and restrictive. Gifts and hospitality are generally governed by the “Code of Conduct and Ethical Standards for Public Officials and Employees”⁶⁵ and the Anti-Graft and Corrupt Practices Act (Republic Act 019).⁶⁶ Section 7(d) of the Code states that “Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.”⁶⁷ In addition, the implementing rules state that the “propriety or impropriety” of a gift will be “determined by its value, kinship or relationship between giver and receiver and the motivation.”⁶⁸ The law exempts unsolicited gifts of “nominal or insignificant value,” gifts from family members, gifts from persons that do not have any transactions with the government official’s agency, “humanitarian and altruistic” donations, and donations from other government entities, so long as there is no expectation of pecuniary gain or benefit.⁶⁹ Additionally, section 3 of the Philippines Anti-Graft and Corrupt Practices Act prohibits, among other things, public officials from, directly or indirectly, receiving any gift, present or benefit in connection with a government contract or transaction under the public officer’s authority.⁷⁰ Notably, the gift restrictions prohibit the “[r]eceiving of any gift” if the value of the gift is “manifestly excessive.”⁷¹ As the term “manifestly excessive” is not defined, contractors should exercise caution before extending gifts to government officials in the Philippines.

In *Hong Kong*, gifts and hospitality are regulated by Chapter 201 of the “Prevention of Bribery Ordinance,” the “Acceptance of Advantages (Chief Executive’s Permission) Notice 2010,” and the “Civil Servants Guide to Good Practices.”⁷²

Hong Kong’s gift and hospitality restrictions are straightforward, very well-developed, and are printed in a user-friendly guide that is available online.⁷³ Generally, government officials are prohibited from accepting “gifts, discounts, loans of money or passages” from “contacts” that have “official dealings” with the government official.⁷⁴ Presumably, any contractor seeking to do business with the government of Hong Kong will have “official dealings” with the government official. Consequently, this is a general prohibition, but the following exceptions are also likely to apply:

- (1) Gifts available on equal terms to non-civil servants,
- (2) Gifts from relatives,
- (3) On occasions when gifts are traditionally given, gifts not exceeding HK\$3000 (US\$387) from “close personal friends” or gifts not exceeding HK\$1500 (US\$193) from any other person,
- (4) On other occasions (presumably when gifts are not traditionally given), gifts not exceeding HK\$500 (US\$64) from a “close personal friend” or HK \$250 (US\$32) from any other person, and
- (5) Loans from a “close personal friend” not exceeding HK\$3000 (US\$387) or from any other person not exceeding HK\$1500 (US\$193), as long as it is repaid within 30 days.⁷⁵

The laws also expressly prohibit “lavish or unreasonably generous or frequent entertainment that may lead to embarrassment in performing official duties or bring the public service into disrepute.”⁷⁶

In the *United Arab Emirates* (UAE), gift and hospitality restrictions are found in Article 70 of the Federal Law Decree 11 of 2008 relating to Human Resources in the Federal Government (the Decree) and the Code of Ethics and Professional Conduct issued on June 12, 2010.⁷⁷ The Decree prohibits the acceptance of gifts unless they have a symbolic, promotional, or advertisement purpose (they have a logo) and also comply with the rules of the particular Ministry.⁷⁸ Article IV of the Code of Ethics and Professional Conduct

prohibits public servants and their family members “up to the fourth degree” from accepting any “gifts, hospitality or services from whomsoever” if it will affect the official’s objectivity or their decisionmaking or obligate the official to engage in a particular undertaking as a result of its acceptance.⁷⁹

In *Kenya*, the acceptance of gifts and hospitality by government officials is governed by the Public Officer Ethics Act, Chapter 183, Revised Edition 2009 (2003).⁸⁰ The law has numerous references to gifts, including the following proscriptions and exceptions:

- (a) Public officers are prohibited from accepting gifts or favors from persons that have an interest that may be affected by the carrying out or not carrying out of the official’s duties, have a contractual (or similar) relationship with the official’s organization, or are regulated by the official’s organization.⁸¹
- (b) Public officials may accept gifts from relatives or friends given on a “special occasion recognized by custom.”⁸²
- (c) A public officer may accept a gift given to him in his official capacity so long as it is nonmonetary and does not exceed 20,000 shillings (US\$231). If the gift exceeds this cap, it will be deemed a gift to the official’s organization.⁸³

The same law also contains specific regulations for the different agencies of the Kenyan government (e.g., national security officials, military, ethics commission officials, judiciary, etc.).⁸⁴

Even this small sampling of foreign gift and hospitality restrictions demonstrates how diverse the ethics restrictions are across the globe. Local custom, the use of third parties, and interactions with government officials who may be unaware of or willing to violate the applicable legal requirements further complicate the landscape. For contractors seeking to expand their government business to new jurisdictions, foreign gift and hospitality restrictions present a compliance challenge that must be managed accordingly (and is discussed in Part III of this BRIEFING PAPER).

Part II: Blowing Past The Grey Line: When Is A Gift Or Hospitality A Bribe?

While government contractors must ensure compliance with the myriad ethics restrictions that may apply to the employees of their government customers, they must remain even more vigilant in ensuring that gifts or hospitality are not offered:

- (1) to influence the government official to perform an official act,
- (2) to a government official that has solicited or coerced the offering of the gift, or
- (3) so frequently “that a reasonable person would be led to believe the employee is using his public office for private gain.”⁸⁵

Providing a gift in violation of any of these provisions could potentially trigger significant criminal liability. Unfortunately, there is no bright line test for contractors seeking to comply with the law. Indeed, the line between gifts, bribes and illegal gratuities can often become blurred depending on the specific facts and circumstances.

When does a “thing of value” cross over the line from a “gift” to a criminal bribe or gratuity? The burden of distinguishing between the two falls on the contractor, as does the responsibility of ensuring that gifts and hospitality not only comply with the law, but also cannot be misconstrued or even viewed as criminal misconduct. Should the contractor fail, the consequences can be devastating.

U.S. Domestic Public Corruption Statutes

All 50 states and the U.S. Federal Government prohibit the bribery of a government official. While the language may differ depending on the jurisdiction and applicable statute, the goals of these statutes remain the same: ensuring that government officials do not accept anything of value in exchange for influencing the government official’s judgment or an official act (such as the award of a government contract). In short, these laws are designed to ensure that government officials do not use their official positions for private gain and to ensure that governments operate ethically, transparently, and without favoritism toward particular individuals or entities.

These goals are even more critical when government contracts are involved, especially when considerable dollar values are at stake. As discussed below, the consequences of giving and accepting bribes or illegal gratuities in the government procurement sphere are staggering.

■ Bribery & Gratuities

Referred to as the “centerpiece” of federal public corruption law, 18 U.S.C.A. § 201 prohibits two offenses: bribery and gratuities.⁸⁶ Unlike the federal ethics regulations discussed in Part I of this BRIEFING PAPER, the offenses are applicable to both the government official *and* the offeror of the bribe or gratuity. In other words, the crimes are applicable to “both sides of a corrupt transaction: those who pay a bribe [or gratuity] are equally as guilty as the public official who accepts it.”⁸⁷

The first offense of bribery under 18 U.S.C.A. § 201(b) “prohibits the giving or accepting of anything of value to or by a public official, if the thing is given ‘with intent to influence’ an official act, or if it is received by the official ‘in return for being influenced.’”⁸⁸ To establish the offense of bribery, a *quid pro quo* is required—or specific intent to “receive something of value *in exchange* for an official act.”⁸⁹ Under 18 U.S.C.A. § 201(b), bribery is punishable by, among other penalties, up to 15 years in prison, along with fines and disqualification.⁹⁰

The recent indictment of a government contractor in Georgia demonstrates the type of scheme that can trigger a violation of this law. In January 2014, the government indicted Christopher Whitman, the co-owner of United Industrial of Georgia Inc.—a trucking company and freight transportation broker that contracts with the Federal Government—on 43 counts of money, property, and honest services wire fraud, five counts of bribery, and one count of theft of government property.⁹¹ Two employees of the Marine Corps Logistics Base in Albany, Georgia were also indicted.⁹² The indictment alleged that, among other things, Whitman paid nearly \$1 million in bribes to government officials to obtain contracts from the government. While the alleged scheme also involved inflated billing rates or “unnecessary

premium-priced requirements,” Whitman also purportedly corrupted public officials by “offering and providing things of value, including money, rare coins, collectible items, automobiles, firearms, home improvements, housing, and meals” to public officials in exchange for, among other things, awarding freight transportation orders.⁹³ Moreover, two government officials were also indicted and several others have pleaded guilty in connection with the corruption schemes outlined in the indictment.⁹⁴

The second offense prohibited by 18 U.S.C.A. § 201 is referred to as “illegal gratuities,” despite the fact that the term is not found in the statute. Specifically, 18 U.S.C.A. § 201(c) prohibits public officials from accepting anything of value, “for or because of” any official act, “and prohibits anyone from giving any such thing [to the public official] for such a reason.”⁹⁵ Unlike bribery, the gratuities section of the statute does not require proof of a *quid pro quo*, which translates into a “lesser connection” between the payment and the official act.⁹⁶ The two crimes also differ in the length of their sentences: a violation of 18 U.S.C.A. § 201(c) only carries a maximum prison sentence of two years.⁹⁷

For example, a jury convicted Russell Hoffman, vice president at Surdex Corporation, of providing illegal gratuities to William Schwening, an employee of the U.S. Army Corps of Engineers.⁹⁸ The Corps awarded Surdex a three-year contract in 1999 and Schwening was responsible for completing Surdex’s performance evaluation report pursuant to FAR 42.1502.⁹⁹ Hoffman and Schwening had frequent “social and professional contact” throughout the performance of the Surdex contract.¹⁰⁰ After the completion of the contract, Hoffman sent multiple emails to Schwening asking him to complete the performance evaluation. Soon thereafter, Schwening sent an email to Hoffman which included “small talk” about golf clubs. The next day, Hoffman purchased clubs for Schwening using Surdex funds.¹⁰¹ After Schwening received the clubs, he sent the following email to Hoffman: “Hey buddy do you need ANYTHING. I hit the [clubs] last night straight outta the box awesome.”¹⁰² After a year passed and Schwening still had not completed the performance evaluation, Hoffman sent

another email to Schwening reminding him to complete the evaluation and asked: “Oh, by the way, how is your golf game since you got those new woods?”¹⁰³ Schwening never completed the performance evaluation.¹⁰⁴ While both Schwening and Hoffman were indicted for violating the gratuities statute, the jury convicted Hoffman, but acquitted Schwening on all counts.¹⁰⁵ After Hoffman appealed to the U.S. Court of Appeals for Eighth Circuit, the court affirmed his conviction noting that the gratuities statute merely requires the government to establish that a gift was given with the intent to induce or reward an official action, regardless of whether that act occurs.¹⁰⁶ The court also rejected Hoffman’s argument that the clubs were given as a “treat” to his “friend,” pointing to the fact that the clubs were actually purchased with Surdex funds and given for a business purpose—not because of a friendship.¹⁰⁷

The distinction between a bribe and gratuity has been described as “vague at best”¹⁰⁸ since difficulty can arise in distinguishing the absence or presence of corrupt intent. While bribery requires a “specific intent to give or receive something of value *in exchange for* an official act,”¹⁰⁹ illegal gratuities are generally given as a “reward for a past official act” or in “hope of obtaining general goodwill.”¹¹⁰ As the U.S. Attorneys’ Manual explains, “[a]n aphorism sometimes used to sum up the distinction between a bribe and a gratuity is that a bribe says ‘please’ and a gratuity says ‘thank you.’” It is, however, critical to remember that a gratuity can still “precede the official act that prompted it.”¹¹¹

18 U.S.C.A. § 201 does not prohibit commercial bribery; it is limited to “public officials,” which are defined by the statute as including all officers and employees of any department, agency, or branch of the United States, including the District of Columbia, as well as private individuals who are acting for or on behalf of the United States.¹¹² This broad definition could create significant liability for government contractors, which often act for or on behalf of the Federal Government. For example, in one case, the Fifth Circuit confirmed that the defendant’s role as contractor for the U.S. Army Corps of Engineers qualified him as “public official” for purposes of

the bribery statute, because contractors act “on behalf of the United States under the authority of a federal agency” that has contracted with a particular company.¹¹³ Similarly, in another case, the contractor was deemed a “public official” who was in a position of public trust when, as an employee of a defense contractor, he provided information that “was relied upon by officers of the Air Force in making decisions pertaining to the procurement of equipment.”¹¹⁴ Given that a contractor’s role and authority may qualify an individual as a “public official,” contractor employees must be careful when accepting gifts and hospitality or any other item of value that could be perceived as an improper influence.

While the bribery and illegal gratuities schemes prosecuted under 18 U.S.C.A. § 201 are often egregious (i.e., involving large sums of money and/or extravagant gifts), contractors must keep in mind that bribery and illegal gratuities schemes do not always involve secretive wire transfers to offshore bank accounts or briefcases stuffed with cash. To the contrary, many of the cases involve gifts and hospitality that could be viewed as a perfectly acceptable business courtesy in the private sector. The term “thing of value” “has been broadly construed to focus on the worth attached to the bribe by [the government official] rather than its commercial value.”¹¹⁵ Thus, anything viewed as valuable by the public official, whether tangible or intangible, could potentially trigger liability if viewed as an attempt to improperly influence a government official to obtain a contract or favorable treatment.

■ Other Domestic “Public Corruption” Statutes

In addition to the bribery and illegal gratuities statute located at 18 U.S.C.A. § 201, the Federal Government has many other statutes that it can use to prosecute public corruption. Indeed, the Federal Government has an enormous statutory toolbox at its disposal, in addition to the panoply of state criminal statutes that similarly aim to punish and deter the corruption of government officials. Contractors doing business in numerous different jurisdictions must be aware of and remain in compliance with the full arsenal of anti-corruption laws that are available for prosecuting the improper influence of government officials.

The first commonly used tool is honest services fraud. Indeed, many “bribery” cases will also include this charge, located at 18 U.S.C.A. § 1346.¹¹⁶ The statute is designed to protect the “intangible right to honest services” in the government.¹¹⁷ It does this by allowing for the prosecution of actions that defraud citizens of their right to the honest and faithful services of a public official¹¹⁸ and criminalizes “schemes to defraud” that involve bribery or kickbacks.¹¹⁹

Government contractors that have sought to improperly influence government officials to obtain contracts have been charged and convicted of honest services fraud. For example, in 2007, a jury found Brent Wilkes guilty on thirteen counts: one count of conspiracy, ten counts of honest services wire fraud, one count of bribery of a public official, and one count of money laundering.¹²⁰ For years, Wilkes plied then-Congressman Randy “Duke” Cunningham with, “expensive meals, lavish trips, a houseboat in Washington, D.C., and mortgage payments for [Cunningham’s] multi-million dollar home in San Diego County” in exchange for lucrative defense contracts (obtained through Cunningham’s influence and assistance).¹²¹ For nearly a decade, Wilkes provided gifts and payments totaling over \$700,000 in exchange for more than \$80 million in defense contracts directed by Cunningham.¹²² A judge sentenced Wilkes to 12 years in prison and ordered him to pay a \$636,116 criminal forfeiture or a \$500,000 fine.¹²³ On appeal, the 9th Circuit affirmed Wilkes’s honest services fraud convictions, noting that the “government presented substantial evidence that Wilkes engaged ‘in a course of conduct of favors and gifts’ in exchange for benefits and support from Cunningham.”¹²⁴ The case not only demonstrates the substantial risks that may stem from a contractor offering gifts or hospitality to a government official who can influence contract awards, but also the vast number and variety of charges that the Department of Justice (DOJ) will often include when prosecuting public corruption.

Another tool used for battling federal public corruption is 18 U.S.C.A. § 666, a statute designed to “extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds.”¹²⁵ 18 U.S.C.A.

§ 666 criminalizes the solicitation or demand for anything of value from anyone “intending to be influenced or rewarded in connection with any” business or transaction, or anyone who offers or agrees to give “anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.”¹²⁶ The \$5000 statutory minimum is triggered by a single transaction of \$5000 or multiple transactions of lesser amounts (totaling at least \$5000) as long as they are part of a single plan or scheme.¹²⁷ The statute is applicable to any state, local or Indian tribal governments (or any of their agencies) that receive in any one year period, “benefits” exceeding \$10,000 “under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.”¹²⁸ For example, a jury convicted Larry Jennings, Sr., a housing repair contractor, of three counts of violating 18 U.S.C.A. § 666, for giving cash payments, totaling more than \$5000, to Charles Morris, the administrator of the Housing Authority of Baltimore City contracting program.¹²⁹ In return, Morris placed Jennings on a list of contractors eligible for “no-bid” contracts and awarded contracts to Jennings’s company.¹³⁰ The Fourth Circuit affirmed the conviction stating that “a reasonable juror could have found that Jennings’s payments to Morris were bribes, that is, gifts made with the corrupt intent to induce Morris to engage in, or to reward him for engaging in, official actions on behalf of Jennings’s companies.”¹³¹

Although the Federal Government has additional substantive statutes¹³² that it may use to prosecute public corruption, contractors should also be aware of two additional statutes that are frequently employed in these prosecutions. The most commonly alleged crime in a public corruption case is conspiracy.¹³³ In short, conspiracy may be charged where two or more persons agree to conspire to commit an offense against the United States or to defraud the United States with knowledge and intent to commit an overt act. In a bribery prosecution, as applicable to the offeror, conspiracy may be charged where two or more

persons offer a bribe, rendering the conspiracy a distinct offense from the substantive charge of bribery.¹³⁴ For example, in 2013, a jury convicted Robert Ehnw, the owner and resident of defense contractor L&N Industrial Tool & Supply Inc., Centerline Industrial Inc. (a defense contractor), and Joanne Loehr, the owner and operator of Centerline, with “conspiracy and bribery in connection with a fraud and corruption scheme at Naval Air Station (NAS) North Island, in Coronado, California.”¹³⁵ The government charged the defendants with one count of engaging in a conspiracy to commit wire fraud, bribery, and money laundering and with additional counts of bribery.¹³⁶ At trial, the government presented evidence showing that as “part of the conspiracy, defense contractors provided U.S. Navy officials with a wide range of personal benefits, including cash, checks, retail gift cards, flat screen television sets, luxury massage chairs, bicycles costing thousands of dollars, model airplanes, and other items. In return, the [N]avy officials placed millions of dollars in government orders with the defense contractors.”¹³⁷ To cover the cost of the bribes, the defendants submitted fraudulent invoices to the Department of Defense that included the cost of bribes provided to the government officials. In addition, the defendants also routinely charged a markup on the fraudulent invoices.¹³⁸

Many public corruption cases also contain a charge of “aiding and abetting,”¹³⁹ which, unlike conspiracy, is not alleged as separate offense from the substantive bribery charge.¹⁴⁰ Under the statute, “the acts of the perpetrator become the acts of the aider and abettor and the latter can be charged with having done the acts himself” even if she or she was not present at the time the bribe was given.¹⁴¹ Thus, an individual or company convicted of aiding or abetting a crime is “as guilty as if they had directly committed the offense themselves.”¹⁴² Because aiding and abetting is not an independent crime, the government must prove that the defendant committed the underlying bribery offense.¹⁴³

In addition to federal public corruption statutes, contractors that operate at the state and local level must also be aware of the myriad state and local laws that prohibit the bribery or improper influence of government officials. While statutes such as 18

U.S.C.A. § 666 allow the Federal Government to prosecute corruption at the state and local level, contractors should not forget that every state has its own laws prohibiting the bribery of government officials. Although the specific prohibitions and consequences vary from state to state, most share similar characteristics, including (1) broad applicability to government officials, employees, and other individuals acting in a governmental capacity; (2) broadly defining what constitutes a “thing of value” or “benefit” under the statute; (3) a requirement that the bribe be offered to the government official with the intent to influence a decision, judgment, or action, and (4) liability for both the bribe-giver and bribe recipient. Contractors should be aware of the public corruption laws in every state in which they do business with government entities or have contact with government officials. While each state code should be consulted, the NCSL has crafted a helpful chart that outlines the “Penalties for Violations of State Ethics and Public Corruption Laws” for all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.¹⁴⁴ This is a useful launching point for anyone researching these laws, although as the organization cautions, the chart “is intended to provide general information and does not necessarily address all aspects of [the] topic. Because the facts of each situation may vary, [the] information [in the chart] may need to be supplemented by consulting legal advisors.”¹⁴⁵

■ Additional Consequences For Government Contractors

Contractors that violate criminal statutes relating to bribery or illegal gratuities have additional requirements and potentially face additional penalties if the misconduct involves a federal contract. For example, FAR 52.203-3 grants the Federal Government the authority to terminate the contract if it is determined (after notice and hearing) that the contractor or its agent/representative “(1) [o]ffered or gave a gratuity (e.g., an entertainment or a gift) to an officer, official, or employee of the Government; and (2) [i]ntended, by the gratuity, to obtain a contract or favorable treatment under a contract.”¹⁴⁶ Violation of this clause may result in additional consequences beyond termination, including debarment, suspension, or exemplary damages.¹⁴⁷

Even if the misconduct does not involve a federally funded contract, a government contractor's business with the Federal Government may be negatively affected. For example, when Science Applications International Corporation (SAIC) entered into a deferred prosecution agreement to resolve allegations of fraud and kickbacks relating to its CityTime contract with New York City, it faced potential suspension and debarment by the Federal Government.¹⁴⁸ While SAIC was not ultimately excluded from future federal contracting opportunities, it did enter into a five-year administrative agreement with the U.S. Army where it was required, among other things, to maintain a contractor responsibility program, retain an independent monitor, and submit reports to the Army.¹⁴⁹

Moreover, the FAR places additional reporting requirements on certain government contractors to ensure that potential violations of these laws are timely reported to the government. Specifically, FAR 52.203-13 requires a contractor to, among other things, "timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of [the] contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed...[a] violation of Federal criminal law involving fraud, conflict of interest, *bribery*, or *gratuity* violations found in Title 18 of the United States Code."¹⁵⁰ Under this "Mandatory Disclosure Rule," the knowing failure to timely disclose credible evidence of any of these violations creates an independent basis for suspension or debarment under FAR 9.4.¹⁵¹

Foreign Public Corruption Statutes

Contractors that do business with government entities outside the United States face a multitude of challenges in addition to those they must grapple with domestically. For the past decade, increasing U.S. enforcement of the Foreign Corrupt Practice Act (FCPA)¹⁵² has made clear to companies operating in foreign countries that prior questionable business practices abroad will be prosecuted, and arguments about a foreign

country's culture or customary business practices will not serve as a valid defense. Moreover, as the United States has placed pressure on other countries to enforce their foreign bribery statutes, contractors must not only worry about compliance with the FCPA, but also be cognizant of the contours of other countries' anti-corruption statutes. Finally, contractors must continue to be aware of domestic anti-corruption laws in other countries that prohibit the bribery of their government officials. Although other countries may not enforce their domestic anti-corruption statutes as actively as the United States, increasing pressure from other countries (as well as international treaty obligations) has influenced many countries to begin ramping up their enforcement efforts.

■ U.S. Foreign Corrupt Practices Act

Generally, the FCPA prohibits the bribery of foreign government officials and requires covered persons and entities to maintain accurate books and records and an adequate system of internal accounting controls.¹⁵³ The two components of the FCPA, often referred to as the "anti-bribery prohibitions" and the "books and records provisions" were designed to work in tandem to prevent companies from hiding bribes and other improper transactions in off-book accounts and slush funds to conceal their misconduct.¹⁵⁴ There is, however, no requirement that the accounting provisions be linked to the bribery of a foreign official. Consequently, the Government may prosecute a company for violating the accounting provisions, even in the absence of a separate violation of the anti-bribery prohibitions.¹⁵⁵

The FCPA is famous for its incredibly broad jurisdiction, much to the dismay (and often, surprise) of non-U.S. companies that have found themselves ensnared by the statute's expansive jurisdictional provisions.¹⁵⁶ The FCPA applies to companies and persons based on either (a) the country in which the improper activity occurred (territorial-based jurisdiction) or (b) the origin of the party committing the act (nationality-based jurisdiction). Territorial jurisdiction covers persons or companies that commit an act within the territory of the United States "in furtherance of" a corrupt payment or offer of payment, using the U.S. mails or other means or instrumentalities

of interstate commerce. In addition, since 1998, the “in furtherance of” requirement has been expanded as applied to foreign companies and persons, covering *any* act taken within the United States that furthers the improper payment.¹⁵⁷ Under this standard, liability is triggered merely by conduct that facilitates or carries forward the prohibited activity. Territorial jurisdiction applies to “issuers,”¹⁵⁸ “domestic concerns,”¹⁵⁹ and foreign companies and persons.¹⁶⁰ Nationality-based jurisdiction, applicable to domestic concerns and U.S. issuers, may be triggered by an act that takes place entirely outside the United States, as long as the act is in furtherance of the improper payment or offer, regardless of whether the U.S. mails or other means or instrumentalities of interstate commerce are used.¹⁶¹

The anti-bribery prohibitions of the FCPA prohibit the “offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.”¹⁶² Similar to the U.S. domestic bribery statute, the term “anything of value” is construed very broadly, depends on the subjective value attached by the foreign official-recipient and does not impose a minimum dollar threshold on the improper gift or payment.¹⁶³ Equally important is the requirement that the thing of value be provided with “corrupt intent”—requiring the improper gift or payment to be made with the intent to secure an improper advantage or to improperly influence a government official. Moreover, there must be a “business purpose” to the payment; it must have been given to obtain or retain a business advantage.¹⁶⁴ While bribing a foreign government official to obtain a contract will undoubtedly satisfy this standard, the business purpose test is far broader, encompassing bribery payments provided to avoid things like customs duties, licensing, zoning approvals, avoiding inspections, or reducing tax liabilities.

The statute’s knowledge standard is incredibly broad and is designed to ensure that companies do not hide behind their agents or other third parties to avoid liability for the bribery of foreign government officials. Specifically, the statute

“covers payments made to ‘any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly’ to a foreign official.”¹⁶⁵ Given the significant liability that may result from the activities of third parties, companies must be extremely careful in their selection and oversight of agents or intermediaries hired to assist them in foreign countries. Indeed, the vast majority of FCPA cases have been the direct result of third parties bribing government officials on behalf of a particular company.¹⁶⁶ As the government has made clear, liability may be imposed “not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge.”¹⁶⁷ To reduce the risk of liability that may result from the actions of an agent or other intermediary, companies must implement an effective compliance program, including robust due diligence and oversight procedures for the selection and monitoring of third party activities. Companies that ignore bribery “red flags” in the vetting or monitoring of third parties proceed at their own peril.¹⁶⁸

The FCPA provides one limited exception to the anti-bribery prohibitions as well as two affirmative defenses. The facilitating payment exception states that the anti-bribery prohibitions do not apply “to any facilitating payment or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action.”¹⁶⁹ This *extremely* limited exception is designed to permit payments used to expedite “non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”¹⁷⁰ The exception is so limited and rarely invoked properly that it is often called “illusory.”¹⁷¹

Indeed, the landscape surrounding facilitating payments has become so murky that many companies no longer include the facilitating payment exception in their anti-corruption policies. One reason for this is the dwindling number of countries that make an exception for facilitating payments in their foreign anti-bribery statutes. Indeed, most countries, including the United Kingdom, prohibit them. Another reason is that even if the payment technically qualifies under

the exception, it could create liability in other areas. For example, while the payment may be excluded from the anti-bribery prohibitions, a company must still ensure that it records the payment properly in its books and records. There are countless examples of companies that have run afoul of the books and records prohibitions by failing to properly record a facilitating payment.¹⁷² In addition, even if the payment meets the definition of “facilitating payment” and is properly recorded, it is still likely to be illegal in the country in which has been paid. By attempting to comply with the books and records provisions of the FCPA, a company may effectively create a record of its violation of the local anti-bribery law.

Of the two FCPA affirmative defenses, one is useful to companies while the other is obsolete. The latter provides a defense to liability under the anti-bribery prohibitions for payments or gifts to foreign officials if they are lawful under the written laws and regulations of the foreign official’s country.¹⁷³ Given the unlikelihood that a country’s laws permit the bribery of its government officials, it is hard to imagine a situation in which this affirmative defense could be successfully invoked.

The second affirmative defense is tremendously important to companies and government contractors, as it permits companies to pay a foreign official’s “reasonable and bona fide” expenses as long as they are directly related to the promotion or demonstration of a product or to the performance of a government contract.¹⁷⁴ This affirmative defense is critical to government contractors due to a genuine need to cover a foreign official’s travel and hospitality expenses for a variety of legitimate business reasons, including the performance of a contract. To qualify for the affirmative defense, expenditures must be modest, reasonable, and closely related to the contours of the defense.¹⁷⁵ In addition, under the books and records provisions of the FCPA, all gifts must be properly accounted for and accurately recorded.¹⁷⁶

Over the years, the U.S. Government has provided the public with detailed guidance regarding its expectations relating to hospitality and promotional expenditures under this defense.

Through its enforcement actions, Opinion Procedure Releases, and comprehensive publication, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,”¹⁷⁷ issued jointly by the DOJ and the Securities and Exchange Commission (SEC), the government is not hiding the ball with regards to its expectations for company gift and hospitality policies. While detailed gift and hospitality compliance guidance will be provided in Section III of this BRIEFING PAPER, some important lessons may be drawn from these resources.

First, companies should not sweat the small stuff. The DOJ has made clear that modest meals and hospitality, reasonable cab fare, and even company promotional items (usually with logos) “are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC.”¹⁷⁸ The government has, however, noted that the more extravagant the gift or hospitality, the more likely it will trigger liability. Specifically, the government explained that enforcement actions have resulted from “single instances of large, extravagant gift-giving (such as sports cars, fur coats, and other luxury items) as well as widespread gifts of smaller items as part of a pattern of bribes.”¹⁷⁹

For example, UTStarcom Inc.’s (UTSI) 2009 FCPA enforcement action illustrates what *not* to do with respect to gifts and hospitality under the FCPA. In an attempt to obtain and retain telecommunications contracts from state-owned telecommunications firms in China, the company arranged and paid for employees of the state-owned firms to travel to “popular tourist destinations in the United States, including Hawaii, Las Vegas and New York City.”¹⁸⁰ While the company disguised the trips as training in its facilities (falsely recording the trips as “training” expenses in its books and records), the company had no facilities in those locations and conducted no training.¹⁸¹ In addition, while UTSI’s bid for a contract with a government-controlled telecommunications entity in Thailand was under consideration, “UTSI’s general manager in Thailand spent nearly \$10,000 on French wine as a gift to agents of the government customer, including rare bottles that cost more than \$600 each. The manager also spent \$13,000 for entertainment

expenses for the same customer in an attempt to secure the contract.”¹⁸² UTSI paid \$3 million to settle its FCPA enforcement action with the DOJ and SEC.¹⁸³

The consequences of violating the FCPA can be staggering, sometimes resulting in hundreds of millions of dollars in fines and penalties.¹⁸⁴ In addition to these costs, many companies find themselves spending millions on internal investigations once alleged FCPA violations are brought to light. As of February 2014, Wal-Mart Stores, Inc. has spent over \$300 million on its investigation into bribery allegations in Mexico, India, and China, and estimates that it will spend another \$200 to \$240 million on FCPA-related matters and compliance expenditures in fiscal year 2015.¹⁸⁵ The government has also continued the trend of prosecuting responsible individuals and seeking lengthy prison sentences as a means of deterring and punishing offenders. As Mark Mendelsohn, the former Deputy Chief of the DOJ’s FCPA Division, once explained: “The number of individual prosecutions has risen—and that’s not an accident....That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.”¹⁸⁶

In addition to the consequences faced by most companies subject to the FCPA’s jurisdiction, government contractors must also be aware of additional consequences that may stem from violations of the FCPA, including but not limited to, suspension or debarment (in the United States or other countries), loss of licenses or clearances, inability to receive loans, loss of commercial business, and severe reputational damage.¹⁸⁷

■ Other Foreign Anti-Bribery Laws

Due, in part, to the decades-long effort by the United States to convince other countries to enact foreign anti-bribery prohibitions similar to the FCPA, contractors that conduct business outside the United States may find themselves within the jurisdictional reach of the criminal anti-bribery laws of other countries. Multilateral commitments, such as the Organisation for Economic Co-operation and Development (OECD)

Anti-Bribery Convention and the United Nations Convention Against Corruption (UNCAC) have spawned implementing legislation across the globe designed to, among other things, combat bribery in international business.¹⁸⁸

The most famous and feared example is the UK Bribery Act, often referred to as the “FCPA on steroids.” Jurisdiction is triggered by any act or omission that forms part of the offense that takes place in the UK or an act committed outside the UK by a party that has a “close connection” with the UK.¹⁸⁹ Individuals or entities deemed to have a close connection” with the UK include, but are not limited to, British citizens, British overseas territories citizens, British Nationals (Overseas), individuals “ordinarily resident” in the UK, and bodies “incorporated under the law of any part of the United Kingdom.”¹⁹⁰ Similar to the FCPA, the UK Bribery Act prohibits the bribery of foreign officials, but it also prohibits commercial bribery and the acceptance of bribes (often referred to as “passive” or “demand side” bribery).¹⁹¹ The Bribery Act also creates a strict liability offense for the failure of a commercial organization to prevent bribery.¹⁹² To avoid liability under this section, a company must be able to demonstrate that it has “adequate procedures” in place to prevent bribery.¹⁹³

In addition, further distinguishing itself from the FCPA, the Bribery Act does not provide an exception for facilitating payments or an affirmative defense for hospitality payments. The Serious Fraud Office (SFO), a UK government department tasked with prosecuting and investigating fraud and corruption, has clarified that the prosecution of matters involving facilitating payments and/or hospitality expenditures depends on a variety of factors, including the sufficiency of the evidence and whether a prosecution is in the public interest.¹⁹⁴

While the lack of an affirmative defense for hospitality expenditures may be discomfoting to companies, the UK Ministry of Justice has been clear that the Bribery Act does not “prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes.”¹⁹⁵ The Ministry of Justice’s guidance on the Bribery Act explains, however, that there are instances in which “hospitality and

promotional or other similar business expenditure can be employed as bribes,” in violation of the Act. Whether a violation has occurred turns on the “connection between the advantage and the intention to influence and secure business or a business advantage.”¹⁹⁶ Factors that the SFO will consider in making this analysis include (1) the type and level of hospitality or “advantage” offered (the more lavish or expensive, the more suspect), (2) the manner and form in which it is provided, and (3) the level of influence the particular foreign public official has over awarding the business.¹⁹⁷ Still, companies must keep in mind that the SFO will not consider these expenditures in a vacuum and prosecutions will be constrained by resources. As the SFO has declared, it is not the “serious champagne office.”¹⁹⁸

Canada’s legislation, the Corruption of Foreign Public Officials Act (CFPOA), came into force in 1999.¹⁹⁹ This was quite a development considering that bribes were tax deductible in Canada until the 1990s.²⁰⁰ The CFPOA is far more similar to the FCPA than the UK Bribery Act, as the anti-bribery prohibitions are limited to foreign government officials and do not cover commercial or passive bribery. It also shares the FCPA’s affirmative defenses regarding local laws and reasonable expenses relating to the promotion of a company’s products or services or performance of the contract.²⁰¹ While facilitating payments are currently excluded under the CFPOA, legislators have indicated that this is likely to change so that Canada joins the majority of countries that prohibit facilitating payments.²⁰² Jurisdiction is generally triggered by a “real and substantial” link between the alleged offence and Canada or the alleged offence is committed by a Canadian citizen, permanent resident, or organization incorporated, formed, or otherwise organized under the laws of Canada or a province.²⁰³

Criticized by the OECD as recently as 2011 for its lagging enforcement,²⁰⁴ Canada has since ramped up its enforcement efforts and amended the CFPOA to, among other things, expand its jurisdiction, strengthen penalties, and broaden the range of conduct prohibited by the legislation.²⁰⁵ It has also successfully prosecuted several high profile cases, including Niko Resources Ltd., a publicly traded oil and gas company based in

Calgary. The corporation pleaded guilty to bribing a Bangladeshi minister with, among other things, a luxury SUV (Toyota Land Cruiser), and a trip to New York and Calgary.²⁰⁶ The company paid a fine of C\$9.5 million (US\$9.7 million) and agreed to three years of probation.²⁰⁷ Niko also spent over \$900,000 investigating the allegations internally.²⁰⁸

There are many other examples of similar legislation in other countries, creating a growing web of potential liability for companies that do business abroad.²⁰⁹ While enforcement varies dramatically by country (the United States is still the enforcement leader, pursuing “approximately two formal foreign bribery actions for every formal foreign bribery action pursued by all other countries in the world combined since 2002²¹⁰), many countries are increasingly pursuing foreign bribery enforcement actions. The latest Global Enforcement Report released by TRACE International indicates that the number of formal foreign bribery actions by countries other than the United States increased by 71% between 2012 and 2013.²¹¹

There has also been a dramatic increase in domestic bribery prosecutions in other countries, as many of them have been ramping up efforts to prosecute cases involving the corruption of their own public officials. Similar to the United States, the domestic public corruption laws are designed to ensure that government officials do not exploit their government positions for private gain. While enforcement of these domestic statutes has lagged in many countries for decades, there has been an uptick in prosecutions in certain countries—fueled by embarrassing global media coverage, changes in leadership and obligations under international treaties. For example, China recently announced one of the broadest Chinese anti-corruption campaigns in history.²¹² While this crackdown has targeted dozens of Chinese businesspersons and government officials, it has also ensnared foreign companies and individuals (including local employees and subsidiaries of foreign companies) that have bribed Chinese officials. According to TRACE International, the latter has positioned China as a leader (excluding the United States) of countries prosecuting the bribery of their own government officials.²¹³

Government contractors doing business in countries with robust or increasingly robust enforcement of domestic bribery statutes must be conscious of the multitude of anti-corruption laws applicable to their activities abroad. Indeed, a bribe paid to a Chinese government official by a company incorporated in the United Kingdom, with securities listed on a U.S. exchange, could result in liability in China, the United Kingdom, and the United States. Furthermore, if the corrupt activity also takes place in other countries, it could trigger prosecutions by additional jurisdictions.

These scenarios are neither academic nor speculative. The rise in both domestic and foreign anti-bribery enforcement actions has led to a confluence of multi-jurisdictional prosecutions for the same or related conduct. Alstom, a French multinational energy and transportation company, is a prime example of this trend. Authorities in numerous countries have been investigating allegations that Alstom (and certain Alstom employees and subsidiaries) have, among other things, engaged in money laundering and the bribery of government officials in Singapore, Indonesia, Venezuela, Brazil, Italy, Zambia, Poland, Mexico, Latvia, Tunisia, and Malaysia.²¹⁴ As a result, enforcement agencies in the United States, Switzerland, Italy, France, Brazil, Mexico, and Slovenia have launched formal proceedings or are (as of April 2014) still investigating the allegations of corruption. In addition, among other related consequences, the company and several of its subsidiaries were debarred from contracting with the World Bank and the Mexican Government.²¹⁵

Countries are also increasingly cooperating with each other pursuant to international treaty obligations, including the sharing of information relating to international bribery investigations.²¹⁶ Companies can no longer assume that what happens in one country stays in that country. Moreover, companies often find that their improper activity is rarely limited to one country. When a company's commitment to ethics and compliance is viewed by its officers and employees as less important than profit, the "profit driven" culture permeates all aspects of the company, driving corrupt activities across numerous borders. This is why many FCPA enforcement actions involve

corruption in multiple jurisdictions, such as the Alstom case discussed above. After a company completes a thorough internal investigation and the dust finally settles, it often finds that employees across the globe have been obtaining and retaining business through illicit means.

Part III: Gift & Hospitality Compliance Policies

As the previous sections of this BRIEFING PAPER demonstrate, ethics and anti-corruption laws can be complicated, difficult to find, and even challenging to interpret. These problems are exacerbated for government contractors that do business in numerous different jurisdictions. While finding the applicable gift and hospitality laws in a particular jurisdiction can be incredibly challenging, implementing policies to ensure that contractor-employees do not run afoul of the restrictions demands significant resources and attention. How does a government contractor ensure compliance with the law when the same activity—the giving of gifts and hospitality—is subject to dozens (or even hundreds) of different laws and standards? While no company is immune from employee misconduct, contractors should take steps to mitigate the risk of violating applicable laws through the implementation of a robust, effective, and risk-based compliance program.

Compliance policies and procedures have always been critical for U.S. government contractors given the innumerable laws applicable to their government procurement activities. In the past decade, however, the robust compliance landscape has expanded to the private sector, as governmental authorities in the United States and other countries have made clear that an effective compliance program and stringent internal controls are the linchpin of corporate ethics and compliance.

As government regulators and enforcement agencies increasingly expect companies to develop and implement effective ethics and compliance programs, they have issued guidance about their baseline expectations for compliance policies and procedures. For example, the DOJ and SEC's "A Resource Guide to the U.S. Foreign Corrupt

Practices Act” outlines the “Hallmarks of an Effective Compliance Program” in Chapter 5.²¹⁷ Similarly, the UK Ministry of Justice has published guidance regarding the six principles that should inform companies’ anti-bribery procedures.²¹⁸ Additionally, international organizations, such as the OECD, United Nations Office on Drugs and Crime (UNODC), and the World Bank have also released similar guidance regarding integrity and compliance best practices.²¹⁹

While these resources may provide companies with “guidance” and “suggested best practices,” for government contractors that do business with the Federal Government, an effective ethics and compliance program is not optional: it is a legal requirement. Indeed, FAR 52.203-13 requires contractors to implement a “Contractor Code of Business Ethics and Conduct.”²²⁰ The clause is designed to ensure that contractors “conduct themselves with the highest degree of integrity and honesty” and maintain a written code of business ethics and conduct.²²¹ The FAR clause also outlines the types of policies, procedures, and internal controls that Federal Government contractors are expected to implement.²²²

In light of the resources now available to companies regarding compliance best practices, government regulators and enforcement agencies have little sympathy for companies that claim ignorance about the necessity of an effective compliance program. They are equally harsh with companies that do compliance “on the cheap,” such as downloading and adopting the policies and codes of conduct found on the internet, dedicating little to no resources to compliance activities, failing to provide ethics and compliance training to employees, or ignoring red flags of corruption or unethical behavior. A contractor that maintains a “paper” compliance program will eventually run afoul of a law—resulting in huge fines, penalties, investigative costs, reputational damage, and other related consequences. As former U.S. Deputy Attorney General Paul McNulty once said: “If you think compliance is expensive, try non-compliance.”²²³

■ Gift & Hospitality Policies & Procedures

One of the most critical aspects of an effective compliance program is robust gift and hospital-

ity policies and procedures. Developing effective policies and procedures is often difficult for companies, especially for those that operate in numerous jurisdictions. Crafting a one-size-fits-all policy is often impossible given the variety of laws that regulate this activity. Instead, policies and procedures must be narrowly tailored to address the variations found in the applicable laws. They must also be customized to address a company’s business practices, areas of risk, and designated compliance resources.

In general, gifts and hospitality policies and procedures must be clear, in writing, and made available to everyone covered by the policy. They should also be translated into various languages for overseas employees and, when necessary, third parties. The policies and procedures should also, at a minimum, address the following issues:

- (1) Who is offering the gift or hospitality?
- (2) What is the nature and monetary value of the gift or hospitality?
- (3) Who is the recipient?
- (4) What is the recipient’s title and what are the recipient’s duties?
- (5) Is there a business purpose associated with the gift or hospitality?
- (6) Does the recipient have the ability to make decisions that could help or hinder the company’s business?
- (7) Does the recipient have a relationship with someone that has decisionmaking authority that could affect the company’s business?
- (8) Does the company have any current or anticipated business with, or decisions coming before, the recipient’s organization or agency?
- (9) Is the gift or hospitality consistent with applicable laws, the company gift and hospitality policies, and the recipient’s ethics code and compliance policies?
- (10) Who approves requests to provide gifts and hospitality?

- (11) Is there a monetary threshold that triggers an approval process?
- (12) Is this the first time the recipient has received a gift or hospitality from the company? If not, what is the frequency and timing of the gifts and hospitality?

■ Common Gift & Hospitality Policies & Procedures

(a) *Defining the Purpose, Scope and Relevant Terminology*—The introductory statements found in most gifts and hospitality policies inform covered individuals of the reason for the policies and procedures, describe which individuals are covered by the policy, and define key terms. The introduction may also clarify that any gift or hospitality must comply with all relevant, applicable laws and the contractor’s policies and procedures. In addition, it should remind covered individuals that the policies trump any “customary” practices that may be encountered in certain jurisdictions—particularly those that are less rigorous.

An effective policy will describe who is covered by the policy, such as employees, directors, executives and, where appropriate, third parties. Moreover, the introduction should indicate whether it is limited to interactions with government officials or also covers gift-giving between private parties. It should also define key terms so that all covered individuals understand the conduct, activities, and individuals covered by the policy. Critical terms that must be defined include “third parties” (or “intermediaries”), “gift,” “hospitality,” and “government official.” The terms should be defined broadly, though make clear that they are not exhaustive. The policy should also point individuals in the direction of resources that are available to address issues that may not be covered by the policy.

(b) *General Policies and Prohibitions*—The policies should provide, at a minimum, a brief statement that makes clear to covered individuals that the company competes solely on the merits of its products and services and that it does not offer gifts or hospitality in an attempt to obtain or retain an improper business advantage from government officials or other individuals that

have the authority to help or hinder the business. The policies should also remind individuals that gifts and hospitality must be provided openly and transparently.

(c) *Prohibited Gifts and Hospitality*—An effective policy will provide guidance regarding the categories of gifts and hospitality that will never be approved under any circumstance. This generally covers items such as cash or cash equivalents (i.e., travelers’ checks or gift cards), per diem payments, loans, or other similar things of value that are unlikely to have a justifiable business purpose and look like bribes. Other items that are often strictly prohibited by contractors include gifts or hospitality that violate applicable laws and policies and those that have the appearance of illegality. To ensure that gifts comply with local laws, many companies consult with local counsel about the relevant gift or hospitality restrictions. It is also prudent to obtain written verification that the potential gifts or hospitality are consistent with local laws and policies.

In addition to the list of “strictly prohibited” items, policies should warn covered individuals that certain gifts, while not illegal, may raise the appearance of impropriety, which may cause significant damage to the company’s reputation (such as gifts or hospitality given so frequently that they could be perceived as an attempt to influence the recipient). Similarly, it is a best practice to prohibit gifts or hospitality that are disproportionate to the recipient’s income or those that are considered distasteful or could embarrass the company.

(d) *Monetary Caps*—Generally, gifts or hospitality should be modest and tasteful. The more extravagant or lavish the gift or hospitality, the more likely it will be viewed by government authorities as improper. Companies should also keep in mind that the definition of “lavish” or “extravagant” will differ depending on the recipient. To limit the risk associated with the offering of gifts and hospitality, many government contractors establish limits on the monetary value of gifts or hospitality that may be extended. Given the dramatic differences in applicable laws, contractors have several options. Some may prohibit covered individuals from extending any gifts or hospitality without the prior, written approval of

a designated approval authority²²⁴—regardless of dollar value. Other contractors may establish a variety of predetermined caps that apply depending on the situation.

For example, contractors that do business with the Federal Government may establish a cap consistent with the “20/50 rule.”²²⁵ Contractors should be careful, however, as the cap applies to the entire company, not individual employees. Consequently, additional controls must be established to ensure that a contractor does not inadvertently exceed the cap if gifts and hospitality are extended to the same government official by multiple employees of the same company. In light of the risks associated with violations of the federal ethics regulations, many contractors simply prohibit the offering or giving of any gifts or hospitality to Federal Government officials.

Contractors that do business with multiple state and local jurisdictions face a different problem: the incredibly diverse gift and hospitality laws applicable to state or local government officials. Indeed, a gift may be consistent with the laws of Washington, but run afoul of the laws of New Jersey. To be safe, it is advisable for companies to simply prohibit gifts or hospitality to state or local government officials or require the advanced, written approval before any gifts or hospitality may be extended in these jurisdictions.

Although the gift and hospitality rules in foreign countries are often the most permissive, contractors should always research the laws of a particular jurisdiction before extending gifts to foreign government officials—regardless of local custom or practice. Failure to do so may not only result in a violation of local laws, but foreign anti-corruption laws, like the FCPA or UK Bribery Act.

(e) *Government Officials vs. Private Parties*—Given the stringent laws that govern government officials’ acceptance of gifts and hospitality, it is critical that government contractors tailor their gift and hospitality policies to this unique risk. In comparison, while there are risks associated with gift-giving and hospitality in the private sector, the rules are generally more permissive. Consequently, some contractors may create separate policies and procedures for the different recipients. Others may cover both regimes

in the same policy, but tailor their policies to the most stringent regime. Still, other contractors may only have one policy, but create numerous different rules and caps depending on the recipient of the gift or hospitality. Regardless of the approach, it is critical that policies address the unique risks associated with the offering of gifts and hospitality in the public sector and ensure covered individuals handle these transactions with care.

(f) *Spouses, Relatives and Friends*—Generally, policies should prohibit the offering of gifts or hospitality to the spouse, relatives, or other individuals close to the government official. While there may be rare instances in which it is appropriate to cover the expenses of these individuals, extending gifts or hospitality to the spouse or family member of a government official is often viewed as inappropriate by government enforcement agencies as these expenditures rarely have a legitimate business purpose.²²⁶

(g) *Personal Funds*—Policies must be clear that covered individuals may not use personal funds to extend gifts or hospitality that are prohibited by the company’s policy (regardless of whether reimbursement is sought). This is designed to ensure that individuals do not evade company policies by purchasing gifts and hospitality with their own money.

(h) *Travel and Hospitality Expenditures for Government Officials*—Travel and hospitality expenditures for government officials present a unique compliance risk—especially for contractors that must invite government officials to their facilities for inspections, tours or training, or even pursuant to the terms of a government contract. As such, travel and hospitality expenditures have provided fertile ground for government enforcement activity under the FCPA. This has resulted in significant liability for companies that have used the cover of a facility tour to disguise lavish trips and hospitality for government officials.²²⁷ As a result, it is recommended that contractors craft and implement policies designed to ensure that these expenditures are modest and directly related to a legitimate business purpose. In addition, contractors should also consider implementing these additional best practices:

- (1) The company will only approve travel and hospitality expenditures that are

reasonable and necessary to educate the government official about the contractor's business operations (or pursuant to a contract). Contractors should confirm in advance that the training or promotional events are genuine and fully document the activities. Under no circumstances should travel or hospitality be extended for reasons that are not directly related to business.

- (2) The contractor should have no role in the selection of the particular government official that will travel—the decision must reside with the official's agency. Contractors should also consider mandating the advanced, written approval of the expenditures by the government official's supervisor before approving the expenses internally.
- (3) All expenditures must be accurately recorded in the company's books and records. Expenditures will not be reimbursed without proper documentation and preauthorization signatures.
- (4) All travel and hospitality expenditures should be paid directly to vendors that have been vetted in advance and provide the company with itemized statements. If this arrangement is not possible, reimbursement shall only be available if modest and supported by itemized receipts. Furthermore, reimbursement should only be provided to the government official's agency—not the government official. As a general rule, advancement of these expenditures should not be extended.
- (5) Generally, transportation and lodging should be economy or business class. First-class travel and lodging expenditures should be prohibited.
- (6) The government officials should not be compensated for their visits.
- (7) Contractors should not pay for the travel or hospitality expenditures of a government official's spouse, relatives, or significant others.
- (8) Entertainment or leisure activities (such as a sight-seeing tour) should be extremely modest or avoided.
- (9) Souvenirs should be of nominal value and contain the company logo.
- (10) Overnight side trips should be prohibited.
 - (i) *Acceptance of Gifts*—In addition to implementing policies and procedures that address the giving of gifts and hospitality, contractors should maintain policies that address the acceptance of gifts and hospitality. Indeed, the failure to regulate and monitor these interactions could create significant liability under commercial bribery laws, among other criminal statutes.²²⁸ Moreover, government contractors must be particularly careful given potential exposure under the Anti-Kickback Act, as the acceptance of gifts or hospitality from subcontractors or vendors could be viewed as a kickback.²²⁹ Indeed, the FAR also expressly requires contractors to maintain internal controls designed to detect and prevent kickbacks.²³⁰ Equally important, robust policies and internal controls will also detect and possibly prevent other crimes that may be committed against the company by its employees, such as fraud or embezzlement.

Contractors will often set monetary thresholds for the acceptance of most categories of gifts and hospitality, while expressly prohibiting the most problematic categories of gifts and hospitality, such as cash or cash equivalents, lavish or extravagant gifts or hospitality, or those gifts or hospitality that may be viewed as offensive and embarrassing. Moreover, many contractors will also implement more stringent requirements for individuals with procurement duties (i.e., individuals responsible for procuring goods and services on behalf of the company). Because companies want to ensure that the selection of vendors and subcontractors is based on criteria such as price and quality, not because the employee was influenced by gifts or hospitality, it is advisable to require employees with procurement duties to comply with more stringent standards. In fact, in light of the heightened risk associated with these employees, many contractors either implement an across-the-board prohibition on the acceptance of gifts and hospitality by these

employees or limit acceptance to logo items or gifts of de minimis value.

Companies should also consider offering guidance regarding how employees may politely refuse or return gifts or hospitality that run afoul of the policy. It is prudent to address this issue up front rather than leave employees to manage these challenging situations on their own. In addition, companies should consider clearly outlining procedures regarding the disposal of gifts that may not be returned, such as food or floral arrangements.

■ Approval Procedures & Internal Controls

To ensure that covered individuals comply with the company's gift and hospitality policies, contractors should also develop robust internal controls that establish approval processes, required documentation, and monitoring/oversight procedures. Not only do well-defined procedures help to identify red flags, such as improper expenditures or patterns of gift-giving, they also help the contractor to identify and remedy compliance failures. Similar to the policies mentioned above, the following procedures and internal controls will vary depending on the structure of the company and resources dedicated to compliance functions.

(a) *Gift & Hospitality Request Form*—Contractors should create a detailed approval process for requests to provide gifts or hospitality. At a minimum, the approval procedures should require requestors to complete a standard “gift and hospitality request” form that calls for, at a minimum, the following information:

- (1) The recipient's name;
- (2) The recipient's title and duties;
- (3) A description of pending or anticipated business with the recipient's organization;
- (4) Any information that will shed light on the recipient's ability to make decisions that will affect, positively or negatively, the contractor's business;
- (5) The timing of the gift or hospitality (the closer to a contract award, the more likely it will be perceived as improper);

- (6) The nature and monetary value of the gift or hospitality;
- (7) For travel requests, the reason for the selection of the particular venue;
- (8) A detailed accounting of any other gifts or hospitality that may have been previously extended to the recipient;
- (9) The business purpose of the gift or hospitality (including any information relating to contract requirements which may call for the travel or hospitality); and
- (10) Any other relevant information relating to the proposed expenditures.

In addition, the form should require the requester to certify that the form is accurate and complete and should contain the signatures of the designated approval authority. Companies should consider requiring the prior, written approval of the designated approval authority before a gift or hospitality may be extended to a government official. In some instances, companies will establish tiered approval authorities depending on the monetary value of the gift and recipient.

(b) *Approval Authority*—Designating an employee responsible for approving gift and hospitality requests may also be a challenge. Contractors with greater compliance resources will naturally designate the company compliance officer or a member of the company's compliance staff to handle this process—often requiring a higher-level of approval depending on the nature of the gift and/or the recipient. Other contractors may not have a designated compliance officer and will assign this responsibility to the general counsel or other legal staff. Regardless of the particular arrangement, it is critical that the approval authority be empowered to deny requests that are improper—even if it may result in the loss of business.

(c) *Procedures To Address Red Flags*—Identifying gift and hospitality red flags is a critical component of an effective gift and hospitality policy. Identification, however, is just the first step. Companies must have procedures in place to ensure red flags are thoroughly investigated

and to prevent the company from violating applicable ethics or anti-corruption laws.²³¹

(d) *Itemized Receipts Required*—Many companies require requestors to provide itemized receipts and documentation demonstrating the prior, written approval of the gift or hospitality before they will reimburse any expenditures.

(e) *Recording in Books & Records*—Companies should record all gifts and hospitality timely and accurately in their books and records, along with the following information (at a minimum) in reasonable detail: the date, name, title, and employer of the recipient, name and title of the individual extending the gifts or hospitality, description and monetary value of the gift or hospitality, and business purpose.

(f) *Gift and Hospitality Database*—Recording all gifts and hospitality in a database that is regularly monitored will ensure compliance with relevant laws and catch any unusual trends, such as widespread patterns of gift-giving or hospitality to certain government officials. Similarly, an effective database will help companies to identify patterns in timing, including gifts or hospitality offered suspiciously close to a contract award or other activity that may affect the company's business.

(g) *Routine Audits*—Companies should routinely audit gift and hospitality expenditures and procedures to ensure compliance with applicable laws and policies and to identify weaknesses in internal controls. This includes audits of the gift and hospitality database as well as the approval processes. In addition, internal auditors should “periodically review customer travel expenses, including adherence to protocols, requisite approvals, side trips policies or reimbursement, extravagant entertainment, and travel agency relationships.”²³²

Policies and procedures are also likely to vary depending on the recipient of the gift. For example, extending gifts and hospitality to private individuals may require less stringent protocols, though baseline internal controls must still be enforced to avoid triggering liability under commercial bribery and anti-kickback statutes. Similarly, procedures relating to the acceptance of gifts and hospitality may be decidedly less stringent, though precautionary measures must be

enforced—particularly with regard to employees with procurement duties.

Most importantly, a company's gift and hospitality policies will only be as effective as the overarching compliance regime. Indeed, without a competent and independent compliance team, any gift or hospitality approval requirements will be meaningless.²³³ Consequently, it is critical that contractors take steps to implement other ethics and compliance best practices into their compliance programs—instead of focusing on gifts and hospitality policies in a vacuum.

■ Supplemental Guidance & Training

In addition to written policies, contractors should provide annual anti-corruption and compliance training to covered individuals that are most likely to encounter issues relating to gifts and hospitality. While the training structure will vary depending on the make-up of the company and resources dedicated to compliance, at a minimum, employees most likely to encounter gift and hospitality issues should receive training, such as the sales team, financial officers, procurement professionals, internal auditors, accounting personnel, individuals with supervisory or management duties, third parties, and any other individuals that interface with government officials. While live training is considered to be the gold standard, online training may also be effective if it is interactive, engaging, and provides trainees with opportunities to ask questions and receive additional guidance.

Training should, at a minimum, address the relevant ethics and anti-corruption laws and the company's gift and hospitality policies and procedures and provide trainees with guidance regarding common scenarios that may trigger gift and hospitality concerns. Companies may also consider dividing employees into groups and offering separate training sessions tailored to the attendees' duties, level of risk, interactions with government officials, procurement responsibilities, and supervisory or management roles. The training sessions will not only be instructive, but offer individuals a forum to ask questions and raise compliance concerns.

Contractors will also often issue supplemental guidance around the time of the holidays

or other traditions that involve gift-giving. The supplemental guidance is designed not only to reinforce company policies, but to offer instructive advice relating to common gift-giving (or receiving) scenarios. Moreover, companies will also often provide guidance in advance of major sporting events, such as the Olympics or Super Bowl to reduce the corruption risks associated with these events.

■ Other Provisions

A gift and hospitality policy should state clearly that all covered individuals must comply with the policies and procedures and outline the consequences for the failure to do so. Consequences may include disciplinary action or even termination. The policy should also inform

covered individuals that they have a duty to report any violations or suspected violations of the policy.

To ensure that individuals know where to obtain additional information or clarification regarding the policies and procedures, the policy should provide covered individuals with a point of contact responsible for providing gift and hospitality guidance, including a confidential hotline or the company compliance officer.

Companies must keep in mind that the development of compliance policies and procedures is an ongoing and iterative process. Companies should periodically review the effectiveness of policies and procedures and obtain feedback through regular training and internal monitoring.

GUIDELINES

These *Guidelines* are intended to assist government contractors in understanding and mitigating the risks of violating the complex laws, rules, and policies that restrict the offering or giving of gifts and hospitality to government officials. They are not, however, a substitute for professional representation in any specific situation.

1. Recognize that gifts, hospitality, and other common business courtesies that are customary in the private sector may be improper or even illegal in the public sector.

2. Be aware that most jurisdictions, whether in the United States or abroad, have enacted laws or requirements that restrict the gifts and hospitality that government contractors may provide to government officials.

3. Be cautious before offering a gift or hospitality to a Federal Government official. The federal rules are very strict and a misstep could raise questions about a government contractor's integrity and responsibility.

4. Bear in mind that in addition to adhering to monetary limits, contractors should not offer gifts to a Federal Government employee so frequently that a reasonable person may believe that they are being offered for an improper purpose. A contractor analyzing the frequency of its

gift-giving should consider the following: if you saw a competitor doing this, would you think it was an attempt to obtain an unfair competitive advantage? If so, then the gift or hospitality should not be extended.

5. Remember that if a gift or hospitality may not be provided directly to the government official without violating the ethics restrictions, it may not be offered to or through another person or entity.

6. Keep in mind that unlike the federal ethics regime, many state and local ethics laws apply equally to government officials and outside sources, triggering significant consequences for both parties if the laws are violated.

7. Recognize that state and local ethics laws vary greatly depending on the jurisdiction, relevant government agency and government official. Companies must always review all applicable laws before extending a gift to a state or local government official

8. Remember that in addition to U.S. laws, contractors doing business abroad must also comply with the ethics and anti-corruption laws of the foreign country. Given the challenges contractors may face trying to locate and comply with these laws; many companies now hire local

counsel or utilize commercial services to assist them with this process.

9. Bear in mind that many criminal bribery cases involve gifts and hospitality that could be viewed as a perfectly acceptable business courtesy in the private sector. Anything viewed as valuable by the public official, whether tangible or intangible, could potentially trigger liability if viewed as an attempt to improperly influence a government official.

10. Be aware that as countries around the world increasingly enforce their domestic and foreign anti-bribery laws, there has been an uptick in multi-jurisdictional prosecutions for the same or related conduct.

11. Mitigate the risk of violating applicable ethics and anti-corruption laws through the implementation of a risk-based compliance program. Contractors should also implement robust gift and hospitality policies and procedures.

★ REFERENCES ★

- 1/ FAR 3.101-1. The Federal Acquisition Regulations System, consisting of the FAR and agency supplemental acquisition regulations, is a robust set of rules and requirements governing the U.S. Government's procurement process. It is located in Title 48 of the U.S. Code of Federal Regulations.
- 2/ For purposes of this Briefing Paper, any officer, employee, or elected or appointed official of a government or its instrumentalities will be referred to as a "government official" or "public official."
- 3/ See 5 CFR § 2635.101(b).
- 4/ For purposes of this Briefing Paper, the term "gift" is defined as any gratuity, favor, discount, benefit, commission, loan, forbearance, services, employment, or other tangible or intangible items having monetary value. "Hospitality" is defined as entertainment, meals, refreshments, travel expenses (e.g., transportation, lodging, and meals), and social events (e.g., golf outings, parties, sporting events, and receptions). Neither definition is exhaustive.
- 5/ See generally FAR subpt. 9.4.
- 6/ OGE, Gifts & Payments, <http://www.oge.gov/Topics/Gifts-and-Payments/Gifts--Payments/>.
- 7/ See, e.g., Federal Emergency Management Agency Office of Chief Counsel, Holiday guidance on gifts, contractors, holiday parties, <http://www.fema.gov/employee-news-and-announcements/holiday-guidance-gifts-contractors-holiday-parties>.
- 8/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 3 (Feb. 2011) (citing 5 C.F.R. § 2635.202(a)).
- 9/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 4 (Feb. 2011) (citing 5 C.F.R. § 2635.203(d)).
- 10/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 4 (Feb. 2011) (citing 5 C.F.R. § 2635.203(e)).
- 11/ 5 C.F.R. § 2635.203(b) ("Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.").
- 12/ For the full list of exclusions, see 5 C.F.R. § 2635.203(b)(1) through (9); see also 5 C.F.R. § 2635.204(d) ("Awards and honorary degrees").
- 13/ 5 C.F.R. § 2635.203(b).
- 14/ Irwin, "Ethics in Government Procurement/ Edition III," Briefing Papers No. 99-8, at 5 (July 1999); See also 5 C.F.R. § 3601.103 for additional exceptions involving Department of Defense employees.
- 15/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 4 (Feb. 2011) (citing 5 C.F.R. § 2635.204(a)).
- 16/ 5 C.F.R. § 2635.204(a).
- 17/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 4 (Feb. 2011) (citing 5 C.F.R. § 2635.204(a)).
- 18/ 5 C.F.R. § 2635.204 (b).
- 19/ 5 C.F.R. § 2635.204 (b).
- 20/ 5 C.F.R. § 2635.204(e)(1).
- 21/ 5 C.F.R. § 2635.204(e)(3).
- 22/ See 18 U.S.C.A. § 208; 5 C.F.R. § 2635.601.
- 23/ See 18 U.S.C.A. § 208; 5 C.F.R. § 2635.601. Additionally, the Procurement Integrity Act may apply to interactions between government officials and contractor employees. See 41 U.S.C.A. § 2101 et seq.; FAR 3.104. See generally Irwin & Ryan, "Leveraging the Human Resources Function in Government Contractor Compliance," Briefing Papers No. 08-12 (Nov. 2008); Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003).
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- 27/ 5 C.F.R. § 2635.204.
- 28/ 5 C.F.R. § 2635.203(b).
- 29/ OGE Advisory 98x8: Accepting Transportation from Government Contractor (June 25, 1998), <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2147483811>.
- 30/ OGE Advisory 98x8: Accepting Transportation from Government Contractor (June 25, 1998), <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=2147483811>.
- 31/ OGE, Ethics and Working with Contractors—Questions and Answers, http://www.oge.gov/OGE-Advisories/Legal-Advisories/Attachment-to-DO-06-023--Ethics-and-Working-with-Contractors-%E2%80%94-Questions-and-Answers/#answer_3.
- 32/ OGE, Ethics and Working with Contractors: Questions and Answers, Question No. 24, http://www.oge.gov/OGE-Advisories/Legal-Advisories/Attachment-to-DO-06-023--Ethics-and-Working-with-Contractors-%E2%80%94-Questions-and-Answers/#answer_3.
- 33/ 5 C.F.R. § 2365.203(f).
- 34/ Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 4 (Feb. 2011).
- 35/ See, e.g., FAR 3.202, 52.203-3 (implementing 10 U.S.C.A. § 2207).
- 36/ NCSL, Gift Restrictions, <http://www.ncsl.org/research/ethics/gift-restrictions.aspx>.
- 37/ NCSL, Gift Restrictions, <http://www.ncsl.org/research/ethics/gift-restrictions.aspx>.
- 38/ State Integrity Investigation, <http://www.stateintegrity.org/>.

- 39/ O'Dea, "New Jersey: The Story Behind The Score," State Integrity Investigation, http://www.stateintegrity.org/newjersey_story_subpage.
- 40/ State of New Jersey, Uniform Ethics Code, Section III, <http://www.state.nj.us/ethics/docs/ethics/uniformcode.pdf>.
- 41/ There are separate rules relating to government employees' attendance at events sponsored by an "interested party" (a term that includes contractors). See N.J.A.C. § 19:61-6.4.
- 42/ N.J.S.A. §§ 52:13D-12 to -28.
- 43/ See N.J.S.A. §§ 52:13D-14, 52:13D-23, 52:13D-24; see also State of New Jersey Dep't of the Treasury, Business Ethics Guide: A Plain Language Guide to Ethical Business Conduct for Companies Transacting Business with the State of New Jersey, Its Institutions, and Agencies, http://www.state.nj.us/treasury/purchase/ethics_guide.shtml (stating that contractors are not to "wine and dine" state employees).
- 44/ N.J.S.A. § 52:13D-26; see State of New Jersey, Uniform Ethics Code 19, <http://www.state.nj.us/ethics/docs/ethics/uniformcode.pdf>.
- 45/ State Integrity Investigation, New Jersey Corruption Risk Report Card, http://www.stateintegrity.org/new_jersey.
- 46/ NCSL, Gift Restrictions, <http://www.ncsl.org/research/ethics/gift-restrictions.aspx>.
- 47/ But see S.D.C.L. § 22-12A-6 (Bribery of a Public Officer—Felony). The South Dakota Bureau of Human Resources also prohibits state employees from accepting "gratuities, money, or any type of gift or service from a company that does business or that actively aspires to do business with the state of South Dakota," but this policy guidance does not derive from statute or regulation. South Dakota Bureau of Human Resources, State Employment Policies, <http://www.bhr.sd.gov/forms/policies/default.aspx>.
- 48/ Lithwick, "Virginia Is Corrupt," Slate, July 19, 2013, http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/mcdonnell_cuccinelli_star_scientific_virginia_s_lax_ethics_laws_let_politicians.html ("The word "lax" is used to modify the words "Virginia Ethics Laws" so often in news accounts that you could not be faulted for believing "Lax Virginia Ethics Laws" to be the official title of the statute.").
- 49/ Tillipman, "Dear Virginia: Do Better," The FCPA Blog, Mar. 31, 2014, <http://www.fcpablog.com/blog/2014/3/31/dear-virginia-do-better.html> (McDonnell and his wife, Maureen, have been charged with accepting gifts, vacations, and large loans from a businessman seeking special treatment from the Virginia state government).
- 50/ EO-2: Personnel Directive Prohibiting the Receipt of Certain Gifts; Establishment of Executive Branch Ethics Commission (Jan. 12, 2014), available at <https://governor.virginia.gov/policy/executive-orders/eo-2-personnel-directive-prohibiting-the-receipt-of-certain-gifts-establishment-of-executive-branch-ethics-commission/>.
- 51/ Editorial Board, "Virginia's Ethics Bill Won't Rein in Richmond's Common Excesses," Wash. Post., Feb. 27, 2014, http://www.washingtonpost.com/opinions/virginias-ethics-bill-wont-rein-in-richmonds-common-excesses/2014/02/27/8913913a-9f31-11e3-a050-dc3322a94fa7_story.html; see also Kusnetz, "Virginia's Move Toward Ethics Reform Leaves Many Unimpressed," State Integrity Investigation State Integrity Blog, Mar. 11, 2014, http://www.stateintegrity.org/virginia_s_move_toward_ethics_reform_leaves_many_unimpressed (stating that critics view Virginia's new ethics legislation as "little more than a gesture").
- 52/ Tillipman, "Dear Virginia: Do Better," The FCPA Blog, Mar. 31, 2014, <http://www.fcpablog.com/blog/2014/3/31/dear-virginia-do-better.html>.
- 53/ Tillipman, "Dear Virginia: Do Better," The FCPA Blog, Mar. 31, 2014, <http://www.fcpablog.com/blog/2014/3/31/dear-virginia-do-better.html>.
- 54/ Va. Code Ann. § 2.2-4371 (emphasis added).
- 55/ Commonwealth of Virginia, Vendors Manual § 3.5, available at <http://www.nvcc.edu/omm/VENDOR98.pdf>.
- 56/ 5 I.L.C.S. § 430/10-10; 5 I.L.C.S. § 430/10-15(12) (Illinois State Officials and Employees Ethics Act). The Illinois Legislature has issued proposed amendments to the "Gift Ban," including the elimination of certain exemptions and increased penalties for violations. See 2013 Illinois House Bill No. 2964, Illinois Ninety-Eighth General Assembly—First Regular Session (Feb. 26, 2013), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2964&GAID=12&DocTypeID=HB&LegID=74812&SessionID=85&GA=98>.
- 57/ R.I. Admin. Code 26-1-12:1, Reg. 36-14-5009; see <http://www.ethics.ri.gov/code/#gifts>.
- 58/ RCW 42.52.150.
- 59/ San Francisco Ethics Commission, Summary of Gift Rules—March 2013, <http://www.sfethics.org/ethics/2013/01/summary-of-gift-rules-march-2013.html>.
- 60/ Executive Order No. 3-11, Prohibition of Acceptance of Gifts by City Officers and Employees, available at http://www.phila.gov/ExecutiveOrders/Executive%20Orders/2011_EO03-11.pdf; Integrity-Works: City of Philadelphia, Resources for Employees & Officials, http://www.phila.gov/integrityworks/E_gift.html.
- 61/ See 65 Pa. Cons. Stat. Ann. § 1103 (prohibiting gifts that are offered to influence the government official); 65 Pa. Cons. Stat. Ann. § 1105 (requiring the public disclosure of gifts valued at more than \$250 and hospitality valued at more than \$650). Notably, the Pennsylvania State Senate recently passed a bill that makes it illegal for government officials to accept cash gifts worth more than \$250; the bill does not address noncash gifts. See Levy, Pennsylvania Senate Passes Bill Banning Cash Gifts, Wash. Times, Apr. 9, 2014, <http://www.washingtontimes.com/news/2014/apr/9/pennsylvania-senate-passes-bill-banning-cash-gifts/>.
- 62/ Washington State Dep't of Enterprise Services, Frequently Asked Questions About Vendor Debarment, <http://www.des.wa.gov/SiteCollectionDocuments/ContractingPurchasing/debarment/DebarmentReferralFAQs2013-08-02.docx>.
- 63/ Commonwealth of Virginia, Vendors Manual, § 7.20(e), available at <http://www.nvcc.edu/omm/VENDOR98.pdf> (emphasis added).
- 64/ Executive Order No. 3-11, Prohibition of Acceptance of Gifts by City Officers and Employees, Sec. 4, available at http://www.phila.gov/ExecutiveOrders/Executive%20Orders/2011_EO03-11.pdf; Integrity-Works: City of Philadelphia, Resources for Employees & Officials, http://www.phila.gov/integrityworks/E_gift.html.
- 65/ Republic Act No. 6713, Section 7, available at http://www.ombudsman.gov.ph/docs/republicacts/Republic_Act_No_6713.pdf.
- 66/ Republic Act No. 3019, Sections 2–3, <http://www.ncda.gov.ph/integrity-development-action-plan/related-idap-laws/republic-act-no-3019/>.
- 67/ Republic Act No. 6713, Section 7(d), available at http://www.ombudsman.gov.ph/docs/republicacts/Republic_Act_No_6713.pdf.
- 68/ Rules Implementing the Code of Conduct and Ethical Standards for Public Officials and Employees, Rule X, Section 1(f), <http://www.bir.gov.ph/acl.htm>.
- 69/ Rules Implementing the Code of Conduct and Ethical Standards for Public Officials and Employees, Rule X, Section 1(f), <http://www.bir.gov.ph/acl.htm>.
- 70/ Republic Act No. 3019, Section 3, <http://www.ncda.gov.ph/integrity-development-action-plan/related-idap-laws/republic-act-no-3019/>.
- 71/ Republic Act No. 3019, Section 2, <http://www.ncda.gov.ph/integrity-development-action-plan/related-idap-laws/republic-act-no-3019/>.
- 72/ See The FCPA Blog, "Hong Kong's Gift-Giving Rules," May 30, 2012, <http://www.fcpablog.com/blog/2012/5/30/hong-kongs-gift-giving-rules.html> (citing Chapter 201: Prevention of Bribery Ordinance, available at [http://www.legislation.gov.hk/blis.pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/\\$FILE/CAP_201_e_b5.pdf](http://www.legislation.gov.hk/blis.pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf), Acceptance of Advantages (Chief Ex-

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- 85/** General Standards, 5 C.F.R. § 2635.202(c) (1)–(3).
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- 87/** Eliason, "Surgery With A Meat Axe: Using Honest Services Fraud To Prosecute Federal Corruption," 99 J. Crim. L. & Criminology 929, 934–35 (2009).
- 88/** See U.S. Attorneys' Manual 9-85.101; Criminal Resource Manual at 2041, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02041.htm (citing 18 USC § 201(b)).
- 89/** Tillipman & Mahini, "Government Lawyering," Briefing Papers No. 11-3, at 6 n.46 (Feb. 2011) (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999)).
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- 98/** United States v. Hoffmann, No. 8:05CR282, 2006 WL 3390736 (D. Neb. Nov. 22, 2006) aff'd, 556 F.3d 871 (8th Cir. 2009).
- 99/** United States v. Hoffmann, 556 F.3d at 872.
- 100/** United States v. Hoffmann, 556 F.3d at 872–73.
- 101/** United States v. Hoffmann, 556 F.3d at 873–74.
- 102/** United States v. Hoffmann, 556 F.3d at 874.
- 103/** United States v. Hoffmann, 556 F.3d at 877 (The court noted that "[a] reasonable juror could conclude that Hoffmann gave the clubs intending to induce future performance.... [T]he email could be viewed as a reminder of the gift to prod Schwening to take action.").
- 104/** United States v. Hoffmann, 556 F.3d at 874.
- 105/** See United States v. Hoffmann, 2006 WL 3390736, at *5 ("The government acknowledges that it is difficult to reconcile the acquittal of Mr. Schwening and the conviction of Mr. Hoffmann.").
- 106/** United States v. Hoffmann, 556 F.3d at 877–78.
- 107/** United States v. Hoffmann, 556 F.3d at 878.
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- 109/** United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404 (1999).
- 110/** United States v. Alfisi, 308 F.3d 144, 149 (2d Cir. 2002) (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. at 405).
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- 118/** Bourdeau, "Deprivation of Property or Services," 62 Am. Jur. 2d Post Office § 131 (2014) (citing United States v. Blumeyer, 114 F.3d 758 (8th Cir. 1997)) ("The...statute protects the intangible right to honest government through allowing prosecution for defrauding citizens of their right to the honest and faithful services of a public official.").
- 119/** Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

- 120/ United States v. Wilkes, 662 F.3d 524, 531 (9th Cir. 2011).
- 121/ United States v. Wilkes, 662 F.3d at 530.
- 122/ Johnston & Kirkpatrick, "Deal Maker Details the Art of Greasing the Palm," N.Y. Times, Aug. 6, 2006, <http://www.nytimes.com/2006/08/06/washington/06wilkes.html?pagewanted=all>.
- 123/ United States v. Wilkes, 662 F.3d at 531; Eggen, "Defense Contractor Sentenced to 12 Years for Bribery," Wash. Post, Feb. 20, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/19/AR2008021902456.html>.
- 124/ United States v. Wilkes, 662 F.3d at 544 (citing United States v. Kincaid-Chauncey, 556 F.3d 923, 943 (9th Cir. 2009) ("bribery violation's requisite quid pro quo satisfied by 'a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor'")).
- 125/ Farrell, "Federal Statutory Provisions—Concerning Entities Receiving Federal Funds," 12 Am. Jur. 2d Bribery § 3 (2014).
- 126/ 18 U.S.C.A. § 666; see also Farrell, "Federal Statutory Provisions—Concerning Entities Receiving Federal Funds," 12 Am. Jur. 2d Bribery § 3 (2014) (citing 18 U.S.C.A. § 666(a)(2)).
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- 128/ 18 U.S.C.A. § 666(b).
- 129/ United States v. Jennings, 160 F.3d 1006, 1010 (4th Cir. 1998).
- 130/ United States v. Jennings, 160 F.3d at 1017.
- 131/ United States v. Jennings, 160 F.3d at 1018.
- 132/ See, e.g., 18 U.S.C.A. § 1341 (mail fraud); 18 U.S.C.A. § 1962 (RICO); 18 U.S.C.A. § 208 (personal financial interest); 18 U.S.C.A. § 641 (embezzlement of public money); 18 U.S.C.A. § 1951 (Hobbs Act); 18 U.S.C.A. § 1952 (Travel Act); 18 U.S.C.A. § 203 (Compensation to Members of Congress, et al.); 18 U.S.C.A. § 209 (Salary of Government officials and employees payable only by United States). Some of the aforementioned statutes are applicable only to the government official, but may nevertheless have negative consequences for a contractor that causes or is connected to a government official that violates one of the statutes.
- 133/ See 18 U.S.C.A. § 371 (Conspiracy to commit offense or to defraud United States).
- 134/ Farrell, "Conspiracy," 12 Am. Jur. 2d Bribery § 20 (2014).
- 135/ FBI Press Release, San Diego Jury Finds Defense Contractors Guilty in North Island Bribery Case (Mar. 4, 2013), <http://www.fbi.gov/sandiego/press-releases/2013/san-diego-jury-finds-defense-contractors-guilty-in-north-island-bribery-case>.
- 136/ "[T]he jury returned verdicts of guilty for each defendant as to the conspiracy count and as to one or more bribery counts. The jury also returned verdicts of not guilty as to each defendant on one or more bribery counts." FBI Press Release, San Diego Jury Finds Defense Contractors Guilty in North Island Bribery Case (Mar. 4, 2013), <http://www.fbi.gov/sandiego/press-releases/2013/san-diego-jury-finds-defense-contractors-guilty-in-north-island-bribery-case>.
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- 140/ See U.S. Attorneys' Manual; Criminal Resource Manual at 2476, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02476.htm.
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- 146/ FAR 52.203-3(a).
- 147/ FAR 3.204(c).
- 148/ Administrative Agreement Between the U.S. Army and Science Applications International Corporation (Aug. 21, 2012), available at <http://www.sec.gov/Archives/edgar/data/353394/000119312512363682/d400068dex101.htm>.
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- 153/ 15 U.S.C.A. §§ 78dd-1, et seq.; 15 U.S.C.A. § 78m.
- 154/ Tillipman, "The Foreign Corrupt Practices Act & Government Contracts: Compliance Trends & Collateral Consequences," Briefing Papers No. 11-9, at 8 (Aug. 2011).
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- 157/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers 08-10, at 4 (Sept. 2008) (citing 15 U.S.C.A. § 78dd-3(a)).
- 158/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008) (citing 15 U.S.C.A. § 78dd-1). An "issuer" is a U.S. or foreign company, or an officer, employee, agent or stockholder thereof, that either issues securities (or American Depositary Receipts) or must file reports with the SEC. See 15 U.S.C.A. § 78dd-1(a).
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- 169/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
- 170/ *United States v. Kay*, 359 F.3d 738, 751 (5th Cir. 2004).
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