

## 2A.V Gifts, meals and entertainment

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### “Approving expensive gifts and lavish hospitality can be symptomatic of weak internal controls.”

*Rules prohibiting bribes to Government officials are straightforward. Most companies have little trouble recognizing the risk inherent in wiring money to a foreign official's numbered bank account in order to secure a large Government contract. Written policies, employee training, internal hotlines and remedial action all contribute to greater transparency and less risk to reputation and shareholder value. Guidelines on gifts and entertainment for Government officials, however, are far less clear.*

Are fruit baskets and other perishables appropriate and defensible gestures of goodwill? Is it appropriate to give a gift of higher value if the item carries the company's logo? Cash isn't ever an acceptable gift for a foreign official, of course. Or is it? If local custom is a reliable guide, China's New Year tradition of *hong bao*—giving little red envelopes containing small amounts of cash—remains widespread. Extravagant gifts to a foreign official should be easy to spot, but “extravagant” may be interpreted differently by a highly compensated executive of a major multinational travelling on an expense account and a foreign official living locally on a modest salary.

Meals provide another area of risk with even less guidance. Few would find any impropriety in a working lunch provided at company facilities, but what about a lavish dinner with spouses at a top London restaurant? If you lose control of the wine list, the bill can quickly exceed the

monthly salary of some Government officials. Enforcement authorities usually stop short of declaring that all hospitality is suspect, but their admonition that it be “reasonable” under the circumstances is of little help.

Companies addressing the issue must consider not only the laws of their home country, but also the local laws of the foreign official's country, where the law may be unclear and the risk of reputational damage is often greatest. Many countries have enacted laws forbidding their Government officials to accept anything of value from any supplier or potential supplier; some of these laws expressly include gifts, meals, entertainment and travel. It is corrosive of good governance to permit employees to ignore these laws, but it's simply not feasible to expect a Government official to pay for his own coffee. Risk analysis may dictate that no company will be prosecuted for a modest meal, but recent prosecutions have highlighted patterns of hospitality as evidence of weak internal controls.

Earlier this year, TRACE undertook a review of more than 80 corporate policies addressing the question of whether or under what circumstances business people should provide gifts, meals, and entertainment to foreign Government officials. Almost all companies surveyed during this research agreed with the nine principles that have been adopted as TRACE guidelines on this issue.

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## TRACE gifts and hospitality guidelines

All benefits provided to a foreign official should:

- Be reasonable and customary under the circumstances;
- Not be motivated by a desire to influence the foreign official inappropriately;
- Be tasteful and commensurate with generally accepted standards for professional courtesy in the country where the company has its headquarters;
- Be provided openly and transparently;
- Be given in good faith and without expectation of reciprocity;
- Be provided in connection with a recognized gift-giving holiday or event in the case of gifts;
- Be provided in connection with a bona fide and legitimate business purpose in the case of hospitality and travel;
- Not be provided to any foreign official or group of foreign officials with such regularity or frequency as to create an appearance of impropriety or undermine the purpose of this policy;
- Comply with the local laws and regulations that apply to the foreign official.

## Company policies on gifts, meals and entertainment

Companies may choose to take a generally rules-based approach, providing strict dollar thresholds for gifts and

meals. This approach is particularly popular with companies based in the United States. Or, companies may take a values-based approach, counselling employees that no gift, meal, or entertainment may be provided with corrupt intent, but that reasonable and customary gifts and meals may be provided at the employee's discretion. Regardless of the approach taken, internal conflicts can arise as companies balance the interests of their business development groups, tasked with customer relations and the development of goodwill, against the concerns of their legal and compliance organizations.

When capturing either approach in their compliance programmes, TRACE research indicates that companies tend to approach the question of gifts, meals, and entertainment in one of three ways. Companies fall fairly evenly into two of these categories, regardless of industry or region; the exception is the third category, which includes US companies almost exclusively.

**1. Employee discretion:** Gifts, meals and entertainment may be provided at the employees' discretion, subject typically to budget restraints and an overriding code of ethics.

**2. Fixed monetary threshold:** All gifts, meals and entertainment under a financial threshold, which varies from US\$20 to US\$250, are permitted. All expenditures over the threshold are either prohibited or permitted only with additional internal approvals. These thresholds may vary:

- a. By country or region;
- b. By seniority of employee; or
- c. By seniority of recipient.

**3. Management approval:** All gifts and hospitality over a low minimum threshold require approval of a compliance officer or the legal department.

## “Simply dismissing the issue of local law as low-risk is no longer advisable.”

Of the companies that TRACE interviewed, those that use monetary thresholds typically use a similar model for receipt by employees of gifts, meals and entertainment from suppliers. This was widely described as an intuitive and consistent approach that was easily understood by employees. Of the companies relying on employee discretion, there was generally a high level of confidence that the company’s broad code of conduct would minimize abuses.

### Addressing foreign law

In addition to the laws of the country in which a company has its headquarters, it is possible that local laws of foreign countries in which the company operates may regulate or prohibit nationals from receiving this sort of benefit. TRACE research shows that the codes of conduct of most companies operating internationally state that the companies will comply with all local laws. Most companies, however, are not familiar with the local laws governing gifts and hospitality. Those that do spend enormous sums keeping their information on numerous countries up to date. The written laws of some Gulf States, for example, prohibit all gifts and hospitality to Government officials. This is problematic in part because the practice of dining out is widespread and expected and in part because it isn’t always clear who fits the definition of a Government official in countries where members of the royal family may hold honorary or paid positions within quasi-Governmental enterprises. To address the question of local law, TRACE has worked with more than 50 law firms worldwide to develop an on-line matrix of local regulations, addressing the black letter law as well as providing comments on local custom.

Simply dismissing the issue of local law as low-risk is no longer advisable. Recent cases and investigations in Europe and the United States demonstrate that the media and enforcement agencies are paying attention to corporate practices in this area and that both liability and reputational damage can result.

## Case stories: Dilemma situations

Due to the uncertainty of the law in this area and an increasingly aggressive enforcement climate, we have provided a series of case studies without attribution to specific companies. Despite the difficulty of the decisions facing these companies, it was encouraging to see the level of interest in this issue and the commitment to provide resources to work toward solutions that balanced the need to support internal marketing efforts with the company’s need to proceed in a transparent and ethical manner.

### Surprise spouse

Company A complained of an event that was planned far in advance for two employees and four Government officials. Local law provided only vague guidance that Government officials should not accept anything that might influence them unduly. The Company in question had a policy with strict monetary limits and the restaurant had been chosen with care in order to ensure that those limits were observed. On the evening of the dinner, the four Government officials arrived with their four spouses and the sister of one of the spouses, for a total of five guests. They ordered expansively, including several bottles of expensive wine.

Many company policies prohibit gifts, meals, and entertainment for the spouses of Government officials on the premise that there is no business purpose for them to attend. Others require that the value of anything provided to the spouse of a Government official be added to the value of what is provided to the official himself, for purposes of monetary thresholds.

In this case, the employees had taken the appropriate steps to ensure compliance with the company’s policy, but nevertheless ended up with a violation. The short-term response was to inform management that the policy violation was inadvertent and to account for the expense accurately in their books and records. The long-term response was the creation of an informal policy to favour business

lunches over dinners, except in exceptional circumstances. Lunches are often less expensive than dinners, and spouses are far less likely to arrive unexpectedly.

### **Signing ceremonies**

Company B described a signing ceremony for an important and long-term contract. It was to be the third major contract signed with the same senior Government official. For each ceremony, the Company executive was expected to present his pen to the Government official after the signing and to accept the Government official's pen in return. This was a long-standing tradition and it launched the project with goodwill and positive publicity. The Company expressed concern, however, that the Government official had made clear the brand of pen he expected, going so far as to encourage the executive to buy it at the tax-free shop at the airport; it was determined that the cost of each pen was over US\$300. The pen provided by the Government official in return was of little or no value, but that probably wasn't relevant to a bribery risk assessment, as it was the Government official who held decision-making authority over the contract. What may have been relevant was that US\$300 was only slightly less than a mid-level Government official's monthly salary in the country in question and that this was the third pen presented in two years.

In this case, the Company determined that: (1) there was no tactful way to provide a less prestigious pen than the brand that had been requested; (2) no local laws prohibited a gift of this kind; (3) the nature of the event was sufficiently transparent to mitigate the high relative value of the item given; and (4) the contract had been awarded already and no immediate procurement decisions were before the Government official in question. Based on this analysis, the expenditure was approved.

### **Involuntary entertainment**

Company C described repeated requests by Government officials that fell outside permitted corporate entertainment policy thresholds. In one case, the Government officials were travelling to corporate headquarters for three

days of meetings at the Company's expense. The trip was approved in accordance with the Company's policy, which required review and approval by the legal department. Shortly before their arrival, the Government officials indicated that they wanted to stay over for the weekend and visit local attractions. They asked to be escorted and made it clear that they expected the Company to pay for the weekend excursion.

The Company concluded that the weekend activities were outside the scope of the trip's legitimate business purpose and therefore could not be approved. Their compromise was to offer to book—but not pay for—a rental car for the Government officials for the weekend. When the Government officials realized that they would have to pay for the excursion themselves, they departed after the meetings as originally planned. The Company's response illustrates careful and diplomatic application of the Company's policy, although some within the Company believe that this response soured business relations with these important customers. Addressing gifts or hospitality requested by Government officials is among the greatest challenges to a robust anti-bribery compliance programme. Training employees to decline inappropriate requests is more difficult than training them not to offer inappropriate gifts or hospitality.

### **Meetings prolonged for legitimate reasons**

Unlike the previous example, Company D planned a business trip for foreign Government officials that was prolonged for legitimate reasons, raising the question of entertaining the Government officials over the weekend. This is largely uncharted water under anti-bribery laws, and companies must apply a standard of reasonableness. The Company in this case made arrangements for the weekend, but largely at the customer's expense. There was a major attraction nearby. The Company chose to provide transportation to and from the site, but it required the Government officials to bear their own costs once inside.

### Just between friends

Company E's policy on gifts for Government officials includes monetary thresholds of US\$50 which cannot be exceeded without the prior approval of the legal department. An employee who had lived in-country for many years was invited to his primary customer's house for dinner to celebrate a local holiday. The employee decided to bring a more lavish gift than Company policy permitted, worth approximately US\$120. He submitted the expense falsely, recording it as two gifts given on two separate occasions; he then paid the remaining US\$20 himself. The Company had several reasons for concern, including deliberate circumvention of Company policy and a books and record violation. When the Company met with the employee to discuss the situation, he indicated that the Government official was a personal friend and that he would have been happy to pay the additional amount himself.

This situation arises quite frequently when employees live overseas for long periods and develop friendships within the business community. Nevertheless, there was a breakdown in the policy that the Company needed to address. They revised their internal guidelines by: (1) limiting the frequency with which gifts can be given to Government officials to one major gift-giving holiday per year; (2) prohibiting employees from paying their own money for gifts for Government officials that are not permitted under Company policy (unless prior approval has been obtained); and (3) requiring more rigorous audits of expenditures on gifts, meals and entertainment.

Some may find this level of compliance needlessly restrictive, and for some industries and regions it may be. However, most companies that TRACE interviewed preferred a comprehensive global approach to this issue over a regional approach or fact-specific analysis.

### Per diem

Payment of a *per diem* for travel expenses has long been thought a reasonable approach to managing legitimate expenses. Company F used an international table to determine an appropriate rate of per diem for a Government

official's multi-city tour of the Company's facilities and then paid it in advance to ensure the official had sufficient funds upon arrival. The Government official then permitted the Company to pay for almost all meals and even some hotel rooms as these expenses arose. As a result, the Government official received double payment of his expenses. This was a violation of the Company's policy and probably of US law, which applied in this case.

The Company has since revised its policy. Now, in all cases where per diem payments will be made, the policy dictates that the per diem amount must be disclosed to the superiors of the Government official (as a part of the initial invitation) and that the amount should be paid in part upon arrival in the country and at appropriate intervals thereafter. In addition, rather than trying to monitor who would pay for each meal, the per diem was set at such a level as to anticipate that it would cover only lodging and those meals that the Government official ate alone. There are frequent stories of customers sharing hotel rooms in order to save a portion of their per diem, but there is little that companies can reasonably be expected to do to police this sort of behaviour.

### Widely attended events

Company G sponsors frequent seminars, conferences and trade shows to promote its products internationally. Elaborate refreshments and gifts bearing the Company's logo are typically provided at these events. The Company has been concerned in the past that they cannot monitor attendance, restrict participation by spouses, or assess the value of hospitality and gifts flowing to any one Government official.

Many companies struggle with different approaches to hospitality provided to Government officials at widely-attended events. Accurately tracking attendance is not possible for companies hosting events of this kind. One event may flow into another, and Government officials may attend multiple events but stay only briefly at each one.

To address this problem, TRACE researched how its member companies deal with this situation and pro-

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vided a proposed model policy with criteria that, if met, would exempt an event from the Company’s usual policy on gifts, meals, and entertainment. Company G adopted this policy with the criteria set forth below:

- No corrupt intent;
- More than 25 participants;
- Nationals of more than two countries, such that a country-by-country legal analysis would be impracticable;
- Reasonable and customary for the country in which the event is held;
- Per person cost of event not to exceed (monetary threshold to be determined by Company, in this case US\$125).

### Conclusion

Regardless of which approach a company takes when establishing and enforcing its gifts, meals and entertainment policy, the issue should be addressed clearly and consistently. A consistent approach will make oversight easier and will reduce both employee confusion and the compliance or legal resources otherwise required to address this issue on an ad hoc basis.

While approving expensive gifts and lavish hospitality is less likely to undermine a company’s culture of compliance than the payment of a traditional bribe, it can be symptomatic of weak internal controls. In addition, details of lavish gift-giving are often featured in media accounts of anti-bribery enforcement actions. One recent US enforcement action involved large cash transactions, but the enforcement agency nevertheless decided to include in its summary details of pedicures provided to the spouses of Government officials. The relative value of these items is often very small, but the reputational damage they can cause is extraordinary.