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Keeping COVID-19 Charitable Giving Compliant: Taking Steps Now Can Avoid Legal Risk Later

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As the COVID-19 pandemic continues to spread crisis conditions around the globe, governments have turned to the private sector for financial and other philanthropic support. Many companies are meeting public needs through charitable giving, including donating personal protective equipment (“PPE”), such as gloves, masks, and hand sanitizer. Some companies are manufacturing PPE for the very first time in order to meet the overwhelming need. This activity is laudable, but the desire to provide quick help to countries in need can lead to compliance failures. Such failures could subject companies to criminal investigation and prosecution, as well as civil liability. Although well intentioned, even charitable giving can create corruption risk and potential exposure under anti-corruption laws such as the Foreign Corrupt Practices Act (“FCPA”). The Department of Justice (“DOJ”) has made clear that it is prioritizing the prosecution of COVID-19-related crime, and there is every reason to expect that this will include anti-bribery enforcement efforts. Companies must therefore remain vigilant in maintaining strong compliance measures against corruption.

The risks companies face can arise in a variety of contexts, including:

- procuring PPE or other products from foreign governments and state-owned entities;



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Related Practices

- when using third-party intermediaries and brokers;
- dealing with customs officials overseeing imports and exports;
- when donating money, products, or anything else of value to foreign charities with ties to foreign government officials; and
- when donating directly to foreign governments.

Minimizing risks at each of these touchpoints through robust compliance practices will protect companies that engage in this charitable activity.

The FCPA Risks of Charitable Giving

The FCPA prohibits providing — or even promising — “anything of value” to a foreign official (a broad term that includes employees at all levels of non-US governments, state-owned or state-controlled commercial enterprises and non-US political parties and candidates) if the goal is to gain an improper advantage. In the context of charitable donations, the donation of funds as well as goods can present risks if the donations are intended to influence any act or decision of a foreign official that would lead to an improper business advantage for the donor. Companies should keep in mind that the FCPA has no *de minimis* exception—even small payments can be prosecuted as crimes. And, even where there is no sufficient US nexus to corrupt activity to trigger applicability of the FCPA, domestic anti-corruption laws will likely apply.

The following are some contexts in which corruption risks can arise related to COVID-19 charitable giving:

- **Procurement from a State-Owned or Controlled Entity**
Companies face potential FCPA risks procuring PPE or other goods if purchased from a foreign government or a state-owned entity. For example, overpayments to a seller for the purpose of jumping the queue, or payments to individual employees to speed up an order could potentially be viewed as corrupt payments to gain an improper advantage.
- **Government Regulation of Imports and Exports**
Goods exported to the United States or imported into a foreign country will need to clear customs. Recognizing the urgent need for such goods, foreign customs officials may seek improper payments to enable or to avoid preventing the import/export of the goods.
- **Third-Party Intermediaries**
Companies often rely on third-party intermediaries, such as brokers, in foreign countries to handle procurement and dealings with customs officials or other government regulators. That reliance can present risks if third-party intermediaries make payments on behalf of companies, particularly if those payments are expected by local customs officials, but prohibited by the FCPA or other applicable anti-corruption laws.
- **Donations to Foreign Charities**
Charities that are associated with foreign government officials can present risks if the donations are made to influence the official’s actions

related to the company's business. When donating to a charitable foundation or organization, companies should ensure the purpose of the donation is not to influence or curry favor with a foreign official and that a foreign official is not requesting the donation in exchange for some type of *quid pro quo*.

- **Donations to Foreign Governments**

Donations of PPE and other critical equipment to governments in the midst of the COVID crisis are not illegal under the FCPA, but companies should ensure that no foreign official (particularly one that is in a position to take positive action or inaction vis-à-vis the company) is in a position to personally gain from such a donation.

Steps to Avoid Corruption Risk

Companies can take the following steps to reduce the risk of FCPA violations in connection with COVID-19 charitable giving:

- **Emphasize and re-emphasize the importance of compliance to employees involved in charitable giving:** Companies should conduct training on applicable laws for employees involved with the procurement and distribution of goods and donations, including testing their reporting procedures in responding to suspicious activity. Companies that have changed their business models to respond to the pandemic should take particular time to ensure that they have adequate anti-corruption policies and procedures in place. Companies that do not have a charitable giving policy in place should also promptly establish proper procedures that are cognizant of FCPA risks to vet charitable giving.
- **Conduct due-diligence on third-party intermediaries:** Even where time is of the essence in making COVID-19 related charitable contributions, companies still need to conduct rigorous due-diligence on new third-party intermediaries and to ensure that third-party intermediaries are in alignment regarding the need to comply with the FCPA in their own actions. Using reputable transport companies such as UPS or DHL for transporting goods across international borders is one way to limit the risks of dealing with foreign governments during the customs process.
- **Request and maintain documentation:** Companies should keep updated and accurate written records that document all company actions related to COVID-19 charitable giving, including correspondence related to donations.

While global supply chains are tightening and the pressure to provide life-saving goods as quickly as possible is high, companies should be mindful that such urgency can lead to cutting corners on compliance, which could lead to liability given the DOJ's particular focus on COVID-19 related crime.

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