

Gift giving in corporate Japan: US Foreign Corrupt Practices Act considerations

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Japanese television personality Christel Takigawa famously referenced Japan's spirit of *omotenashi* (ie, hospitality) when promoting Tokyo's 2020 Olympic bid. This philosophy encompasses many aspects of Japanese culture and etiquette, including the practice of gift giving. This update briefly explores Japanese gift-giving practices in the context of business relationships and the potential risks therein under international anti-corruption legislation, particularly the US Foreign Corrupt Practices Act.

Gift giving in Japanese business culture

When describing Japanese business practices, the importance of relationships is often mentioned. Japanese companies generally place a great deal of importance on their relationships with business partners and often take the view that long-term relationships facilitate and encourage business opportunities.⁽¹⁾ In order to develop these relationships, many Japanese companies invest heavily in nurturing long-term business partners, including by offering seasonal gifts, dinners or sponsorship funding (for the purposes of this update, such practices have been broadly referred to as 'gifts'). As such, the practice of giving gifts to business partners is a relatively common and generally accepted aspect of Japanese business culture.

US Foreign Corrupt Practices Act

The US Foreign Corrupt Practices Act can apply to conduct that occurs worldwide, including in Japan, and generally aims to prohibit bribery and ensure that subject entities appropriately maintain their books and records.

The act's anti-bribery provisions broadly prohibit parties from paying, offering or promising to pay or authorising the payment of money or the provision of anything of value to a foreign official in order to:

- influence an act or decision of the foreign official in his or her official capacity; or
- secure an improper advantage in order to obtain or retain business.⁽²⁾

Further, the act's accounting provisions prescribe certain record-keeping requirements to promote the appropriate documentation of transactions and support corporate accountability.

Application of act in Japan

The act of gift giving is by no means prohibited under the US Foreign Corrupt Practices Act and companies doing business in Japan should feel that they can comply with local gift-giving customs. However, companies must be aware of the act and consider its application in determining the appropriateness of gifts.

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A Japanese entity's compliance policies must satisfy the requirements of the act, while also being workable from the perspective of local norms. In this respect, simply translating the policies of a US affiliate into Japanese and imposing them as they are on the Japanese entity may create some challenges. Employees may resist or seek to circumvent policies that are inconsistent with business realities, which may give rise to significant compliance issues. As such, the Japanese entity's policies should acknowledge local business practices, such as the occasional giving of gifts, and provide procedures so that such practices may be carried out in compliance with the act.

In preparing gift-giving policies and procedures for a Japanese entity, particular attention should be paid to the following.

Foreign officials

The term 'foreign official', as used in the US Foreign Corrupt Practices Act, applies to:

- officers and employees of a foreign government, including political parties; and
- departments, agencies or instrumentalities thereof.

As such, the term extends to employees of state-owned and state-controlled enterprises, such as doctors that are employed at state-owned hospitals and professors at public universities. Further, the position, rank or actual influence of any particular foreign official is irrelevant – the act's anti-bribery provisions apply equally to low-level employees and senior officials. It is therefore important for any compliance policy to assess whether any potential recipient may be a foreign official for the purposes of the act.

The importance of assessing whether a particular individual may be a foreign official is particularly relevant in the context of Japan, where the scope of individuals that could be classified as foreign officials is particularly broad due to the significant influence and integration of the government and its various agencies across the economy. Further, the government often engages experts for official advisory purposes, such as sitting on advisory committees, to obtain their guidance on particularly complex matters, which can further complicate this assessment. As such, entities in Japan should take extra care to assess and consider whether a particular business partner may be a foreign official under the act.

'Anything of value' and 'corrupt intent'

The improper payments prohibited by the US Foreign Corrupt Practices Act's anti-bribery provisions include not only cash and cash equivalents, but also 'anything of value'. The term 'anything of value' is intentionally broad in order to encompass the many forms that an improper payment may take, such as travel expenses, meals, internships and charitable donations and payments to third parties. Notably, this concept has no minimum value threshold; therefore, even gifts of minimal value could result in a violation of the act if it is determined that they were made with 'corrupt intent' (ie, an intention to induce the recipient to misuse his or her official position).⁽³⁾

A determination that a gift was made to a foreign official with corrupt intent, such as to influence decision making or retain business, is sufficient to constitute a violation of the US Foreign Corrupt Practices Act. The act's anti-bribery provisions require no actual benefit to be received or obtained by the party that gave the gift in order to constitute a violation.

The fact that a gift, regardless of its actual value, could give rise to an issue under the act has particular relevance in the context of Japan, where the offering of gifts to business partners is generally accepted. It is reasonable to expect local employees to identify compliance issues with respect to gifts that are either outside of accepted norms or of significant monetary value. However, this is not necessarily the case with respect to traditional or customary gifts or gifts of nominal value. From the perspective of local staff, it may be clear that such gifts are being made without any corrupt intent and that they may thus consider it unnecessary to document such gifts in a detailed manner. However, this approach can give rise to significant compliance issues.

First, it is not a defence under the act to claim that a particular gift-giving practice is an accepted custom; in order to prevail of such a defence, the practice must be explicitly permitted under the laws of that jurisdiction. Second, regulators may infer a corrupt intention to exist, notwithstanding a

lack of evidence, where a gift is not made in compliance with the company's procedures or properly accounted for.⁽⁴⁾ Thus, even if a customary gift is given with no corrupt intent, it may require a great deal of research and explanation in order to dissuade the regulators of this inference and convince them that such gift was not improper or in violation of the act. Finally, notwithstanding that the regulators may ultimately concur that a particular gift was not improper, they may still determine that such conduct – in particular, the failure to properly document such gifts – constitutes a violation of the act's accounting provisions.

Appropriate procedures should be established so that the compliance function can assess the appropriateness of all gifts, regardless of local practice or value. If it is necessary to deviate from or amend any approved procedures, for whatever reason, these reasons should be carefully documented and recorded in order to rebut any negative inference that the regulators may draw.

Education of local staff – training and awareness

Companies should offer regular education and training sessions to their employees in Japan in order to foster an awareness and appreciation of the Foreign Corrupt Practices Act and its application. Employees should be encouraged to consult with and seek guidance from their company's compliance function, or other specified staff, should they have questions regarding the act's application, the company's internal rules and policies or what constitutes appropriate conduct so that issues can be addressed at an early stage. Similarly, the compliance function should continue to monitor the policies and their effectiveness and amend them as necessary.

Comment

Companies in Japan must operate not only in accordance with the cultural norms of the Japanese business community, but also in compliance with the requirements of the US Foreign Corrupt Practices Act. To achieve this balance, companies should be proactive in their approach to compliance. Companies are advised to:

- implement thorough, well thought-out internal procedures and rules that consider the act's requirements and practical business realities; and
- ensure that their employees are properly trained on the application of such policies and respect the importance of compliance in carrying out their business activities.

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Endnotes

(1) "Japan has a 'high-context' society: relationships trump transactions", Eurotechnology Japan (Japan M&A) (2013).

(2) A Resource Guide to the US Foreign Corrupt Practices Act, Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission (updated November 2 2015).

(3) HR Rep 95-640 (1977), available [here](#).

(4) *United States v Sociedad Quimica Y Minera De Chile*, Docket 17-CR-00013-TSC.

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