

Cultural Considerations and the FCPA

Part I: Enforcement

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Do considerations of culture have a place in the FCPA? Yes and no – it depends on the context. Part 1 of this article discusses culture’s role in *enforcement*. Part 2 discusses its role in *compliance*.

Part I. Enforcement.

In FCPA enforcement, cultural norms are irrelevant. It does not matter to law enforcement whether corrupt acts – like paying “commissions” to sales agents in Brazil (*see, e.g., [Universal Corp.](#)*) or making small payments to regulatory officials in Turkey (*see, e.g. [Delta & Pine Land](#)*) – are standard practice in a certain country.

It is true that the FCPA provides an affirmative defense for activity that is lawful under *written* local laws or regulations. But we have yet to see a written local law that legalizes bribery, even petty corruption.

In this sense, as FCPA attorneys and compliance officers, we are required to ignore cultural considerations. We are also sometimes forced to respond to arguments in favor of making exceptions to anti-bribery rules based on local culture. Consider these three.

1. *“In cultures where bribery is accepted, it is justified.”* This argument implies that some cultures are inherently more corrupt than others. Not surprisingly, this view is frequently offensive to people from the “more corrupt” cultures, and the argument is further weakened by the difficulty of measuring and defining corruption. Is the United States free from corruption? Ask the people of the State of Illinois. Their former governor just received a 14 year sentence for attempting to sell a U.S. Senate seat. How about France? A French court just found former President Jacques Chirac guilty of corruption.

The view also suggests that tolerating bribery equates to implicit approval or acceptance by a country’s people. If you were to ask people on the streets of Buenos Aires or Guayaquil if they approve of officials who accept bribes, you would get few, if any, “yeses”. People in countries with high corruption understand the personal impact of procurement officials who select low quality goods like poorly constructed roads and bridges in exchange for kickbacks, inspectors who ignore food safety concerns because they are getting a cut from the food producer, or city clerks who only issue drivers licenses to those who give “tips.”

2. *“In some countries, bribery is built into the economy.”* In other words, the system itself expects bribery. The tax collector must demand bribes because she is not paid enough to live on. The police officer must do so to feed his family.

I have some sympathy for this perspective because I have seen the human side of these scenarios first-hand while conducting corruption investigations in challenging parts of the world. I can

recall the tattered uniform of the traffic police officer who asked me for a bribe in Tajikistan. I remember the desperate look of the immigration official who asked me to give him my local currency when I was departing the People's Republic of the Congo. They certainly did not seem to be supporting a basic livelihood with much ease.

But, even considering these human dimensions, corruption is still criminal. The plight of low-level officials highlights, not the need for more bribes, but the need for improved state systems. If a company wants to change such systems to improve the business environment, there are ways to do this short of bribery. For example, it can work with the government entity to fund and oversee a program that better trains and equips the police force to perform its duties. The [DOJ's Opinion Procedure No. 06-01](#) permitted a company to provide financial support to the customs department of an African Country as part of a pilot project to improve the effectiveness of law enforcement of local officials. The officials were trained to better identify and prevent counterfeit goods, which, in turn, helped the company address its own immediate market threat. In contrast, direct payments to the officials themselves would likely have constituted FCPA violations.

3. *"Bribes make an economy more efficient."* Some argue that bribes make economies work better by, for example, streamlining bureaucracies (*see, e.g.,* [Acemoglu and Verdier](#); [Francis Lui](#)). But, in practice, the opposite is generally true. When corruption is tolerated, bureaucrats have an incentive to create more choke points from which they can extract even more benefits. Miller & Chevalier attorney Kate Atkinson [has warned](#) that, when making such payments to customs officials, the business person runs the risk of "Feeding the Bears." A one-step process suddenly becomes a four-step process. The officials who start asking for payments do not stop.

4. *"These are not bribes, they are something else."* One of the trickiest areas for FCPA compliance is determining when a gift, entertainment, or something else of value that is acceptable in one culture is actually a bribe under the FCPA. Rice cakes are common gifts in the South Korean tradition. They were bribes in the [Diageo enforcement action](#). Personally, I remember business people who would regularly take high-ranking public officials to expensive dinners in Argentina while I was working there for a multi-national corporation. It was the way things were done. But was it legal?

Complicated matters like these must be decided on a case-to-case basis with the participation and judgment of a compliance officer, attorney, and other qualified management. They should be decided with careful consideration of the company's own compliance program, acceptable standards in the industry, and law enforcement's guidance in previous actions, opinion releases, public statements, and other sources of authority.

The next article will discuss times when consideration of culture does matter to the FCPA. In that context, consideration of culture is not only relevant, it can be essential to officers who wish to implement effective global compliance programs.

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