

The Complete Compliance and Ethics Manual 2023

Gifts and Entertainment Compliance

By Rebecca Walker, Esq.^[1]

Gifts and entertainment can be a challenging compliance area for organizations. While traditional wisdom holds that gifts and entertainment can help foster business relationships—and experience suggests that this can indeed be true—gifts and entertainment can also create inappropriate influences as well as compliance risks in a number of other areas, such as bribery of government officials, commercial bribery, violations of procurement and anti-kickback laws and regulations, and violations of the policies of third parties. This article will first discuss compliance and ethics policies and procedures in the area of gifts and entertainment, and then will provide an overview of a few of the more salient areas of law and regulation in this area, including laws and regulations governing dealings with government officials and commercial bribery.

Gifts and Entertainment Compliance Programs

In formulating their compliance procedures governing gifts and entertainment, organizations should be aware of a variety of risks—from conflicts of interest to bribery to regulations governing interactions with certain customers (e.g., governments) or that impact specific industries (such as the pharmaceutical industry). They should also be alert to the fact that both their suppliers and customers likely have gifts and entertainment policies of their own.

The design of a gifts and entertainment compliance system should be based on the organization's risks in light of the relevant governing laws and regulations.

Risk Assessment

As in other areas of compliance and ethics, organizations should generally begin their implementation of a gifts and entertainment compliance system with a risk assessment, or a thorough assessment of the types of gifts and entertainment issues that are most likely to arise at their organizations and the types of harm most likely to result. The risks created by gifts and entertainment differ depending on whether the company employee is the recipient or the provider of gifts and entertainment. With respect to receipt, the primary concern is typically the potential that the receipt of gifts and entertainment may influence the judgment of employees—that, for example, employees may choose supplier A over supplier B not because supplier A is better, but because supplier A has offered or provided nicer gifts. Research in the area of behavioral ethics has demonstrated that even small gifts can impact the decision-making of the recipient.^[2] Thus, gifts and entertainment create a conflict of interest, where the employee's judgment on behalf of the organization is affected by receipt of gifts or entertainment.

Conflicts of interest created by gifts and entertainment can also create a perception of unfairness at organizations and erode trust, both of which can harm the culture of compliance. Gifts and entertainment can cause employees to question the fairness of decision-making in dealings with business partners and can also cause business partners to question the fairness of a company decision.

With respect to the provision of gifts and entertainment, the risks created include bribery of government

officials, commercial bribery, and violation of regulations that specifically govern gifts and entertainment in particular industries. (These are discussed later.) Gifts and entertainment also create the risk of violating the policies of an organization's customers and other business partners. With respect to both giving and receiving gifts and entertainment, there are also risks of reputational harm, in particular, when extravagant or inappropriate gifts or entertainment are involved.

In attempting to understand the risks related to gifts and entertainment, it is helpful to consider how different types of risks arise for different categories of employees. As a general matter, risks related to gifts and entertainment tend to be higher for higher-level employees, those who have responsibility for procurement, those in sales, and those employees or agents who deal with government officials. In other words, those employees who create the greatest risks in this area are those who have the discretion to make decisions on behalf of the company (decisions that could be influenced by gifts and entertainment) and those who could violate criminal laws, regulations, or the policies of business partners in the provision of gifts and entertainment.

Gifts and Entertainment Policies

Written policies in the area of gifts and entertainment can be especially important because the harm caused by gifts and entertainment may not be immediately obvious to employees, and the rules in this area are seldom intuitive. Written policies typically include the following elements:

- An introduction explaining why gifts and entertainment are acceptable (if they are, under company policy) and why it is important to place limits on them;
- A discussion of the types of gifts and entertainment that are acceptable (e.g., commonly accepted business courtesies);
- A discussion of the types of gifts and entertainment that are unacceptable (e.g., cash);
- Dollar limits and approval requirements, including a discussion of gift registers and how to use them, if they are used in the organization;
- More stringent rules applicable to employees in particular functions, as appropriate;
- A mention or discussion of different rules applicable when dealing with government officials; and
- References to other policies.

Introduction. Many gifts and entertainment policies begin with an explanation of why gifts and entertainment can be helpful to an organization and so are acceptable within limits (assuming, of course, that the company permits gifts and entertainment). For example, the policy may begin by stating that the exchange of business courtesies can help enhance business relationships. Other examples of explanations as to why gifts and entertainment may be acceptable in the business context include that they:

- Can encourage social interaction and thereby develop business relationships;
- Can help cultivate business relationships with others;
- May be an expected social courtesy; and
- Can help keep simple humanity in business dealings.

Policies often include an explanation of why gifts and entertainment can be problematic to an organization and

what the principal risks in this area are. For example, policies may explain that, while gifts and entertainment can be helpful in some ways, receiving or providing entertainment or gifts that are excessive or inappropriate can harm a company's reputation, create conflicts of interest, and harm the company's relationships with business partners. Policies may also explain that business courtesies can affect the judgment of employees and, just as importantly, can be viewed by others as attempts to impact the performance of duties. These general explanations for the existence of gifts and entertainment policies can help employees understand the importance of what might otherwise seem like unnecessary restrictions on their conduct.

Prohibitions. Many policies prohibit the receipt or provision of cash gifts or "cash equivalents," such as securities or gift cards. However, some organizations permit employees to give or receive gift cards of nominal value for items such as coffee or frozen yogurt. Most policies also prohibit soliciting gifts, entertainment, or any other business courtesies from people doing business with the company. Some companies' policies prohibit a third party from paying for major travel expenses, such as airfare and lodging, or require disclosure and preapproval for those types of expenses. In addition, many policies specify that even moderately priced or otherwise acceptable gifts and entertainment may only be accepted infrequently. In other words, these policies contain a general rule of aggregation of gift values from a single source. And some policies include a specific dollar threshold that must not be exceeded when aggregating the value of gifts and/or entertaining, such as, "You may not accept gifts or entertainment from a single source with an aggregate value of more than \$200 per year." Some organizations also create specific limits on the number of times per year that employees may provide or receive gifts and entertainment from a single source (e.g., four times per year).

Many policies also contain an admonition against inappropriate entertainment or gifts. For example, a policy may provide that "any gifts or entertainment given or received should be in good taste. Use good judgment and consider that the type of entertainment offered or received is a reflection on the company. Inappropriate entertainment, such as trips to 'strip clubs,' is prohibited."

What is acceptable. Many policies contain a general, high-level standard delineating the types of gifts and entertainment that are acceptable. For example, a policy may provide that employees may accept business courtesies, including meals and entertainment, so long as they are customary and commonly accepted business courtesies; not excessive in value; and given and accepted without an express or implied understanding that the employees are in any way obligated by acceptance of the gifts.

Policies may also specify certain types of gifts and entertainment that are usually acceptable, such as small promotional items like T-shirts, pens, notepads, or coffee cups bearing another company's logo or a moderately priced meal shared with a business partner.

Dollar values. Policies often include specific dollar limits for acceptable gifts or for acceptable gifts and entertainment, beyond which entertainment and gifts may be prohibited, or the policy may require disclosure and approval. A policy might provide, for example, that "gifts that have a value of more than \$50 should not be accepted without the written approval of a supervisor or member of the compliance and ethics department." Policies may also contain a general prohibition against accepting or providing "extravagant or inappropriate gifts and entertainment."

Third-party policies. Many policies contain an admonition that employees should respect the gifts and entertainment policies of the company's customers and suppliers. Such policies may provide, for example, that "it is likely that our business partners have gift and entertainment policies of their own. Be careful not to provide a gift or entertainment that violates a business partner's policy."

Rules regarding government officials. Policies may also inform employees that the rules governing offering or giving gifts or entertainment to government officials or employees are much more stringent than the rules

governing employees of commercial enterprises. Such language may provide, for example, that “what is acceptable in the commercial business environment may be entirely unacceptable in dealings with US or other government officials. In the US and in other countries, there are strict laws that govern providing gifts, including meals and entertainment, to government officials and employees. Make sure that you understand applicable law and relevant company policies before you provide anything of value to government officials.”

Particular functions. Some companies apply more stringent rules to employees in particular functions, such as those employees who are charged with procurement responsibilities, employees in the legal department, and employees in the compliance and ethics department. Such employees may be prohibited from accepting any gifts and entertainment or may be permitted to accept only entertainment (but not gifts) or only items of low value.

Q&As. It can be exceedingly helpful to include a number of questions and answers in written policies, in particular depicting real-life scenarios, as these learning tools can help employees better understand the policy’s parameters and how to apply the policy in practice.

Regional variations. In order to account for local law and cultural norms, some organizations have different gifts and entertainment policies for different regions or even for different business units within a particular region.

Gift register. Some organizations have adopted automated systems to assist in implementation of their gifts and entertainment policy. If so, the policy typically includes information on what types of gifts and entertainment should be disclosed in the registry and how employees can do so.

Other information. While not typical, some organizations include provisions in their policies governing employees’ providing gifts to their supervisors or other leaders.

Given the overlap between the two subject-matter areas, some organizations choose to include their gifts and entertainment policies within their conflicts of interest policies. (We note, however, that while gifts and entertainment can cause conflicts-of-interest concerns, the two risk areas do not completely overlap.) In addition, many organizations’ codes of conduct also contain a section on gifts and entertainment.

Of course, written policies should also provide employees with information regarding where they can go with questions and how to report suspected violations of the policy.

While this article discusses the contents of typical gifts and entertainment policies, a company’s policy should be tailored to the specific organization, including the particular industry, types of customers, types of employees, and areas of operation.

Oversight

Oversight of compliance with gifts and entertainment policies is important to ensuring consistency in policy enforcement, which helps create a perception of fairness in this area. Organizations should consider with whom to vest oversight of the formulation of, and revisions to, the written policy, including responsibility for determining the various parameters of the policy. This responsibility might be vested in a compliance and ethics committee or a senior leadership team. Organizations should also consider designating specific individuals (i) to have responsibility for the content and dissemination of gifts and entertainment training and other communications; (ii) to be a resource for responding to gifts and entertainment questions; (iii) to handle the collection and response to gifts and entertainment registers, questionnaires, or certifications; and (iv) to oversee audits in this area. Oversight of these activities may be delegated to a subject matter expert, the compliance and ethics function, or to other functions such as the internal audit department.

Approvals and Exceptions

Many organizations formulate processes for employees to obtain preapproval (or after-the-fact approval) of particular gifts and entertainment and to seek exceptions to the gifts and entertainment policies. Creating a centralized method of approval can increase the level of independence of such decisions and create greater consistency in decision-making, which can be helpful to promoting a sense of fairness in this area. On the other hand, for multinational organizations in particular, permitting supervisors or other local management to make decisions regarding approvals and exceptions allows the gifts and entertainment policy to be interpreted in accordance with local laws and customs (which may or may not be considered an advantage). Where organizations have adopted different gifts and entertainment policies for different geographic regions, it may be more efficient to vest local leaders with decision-making authority.

Where organizations vest local managers or local leadership with oversight or interpretation responsibilities for the gifts and entertainment policy, organizations should also consider providing management with training and guidance regarding how to interpret the policy, along with resources that managers can contact with questions or for assistance with “close calls.” Organizations should also consider requiring requests and responses to requests to be in writing.

Training

Many organizations provide training on gifts and entertainment policies along with training on conflicts of interest or other subject matter areas, such as bribery or dealings with government officials. Organizations may also include gifts and entertainment training in their general code of conduct training. Just as with written policies, it can be very helpful to include real-life scenarios in gifts and entertainment training.

Many organizations also disseminate less formal communications to employees regarding gifts and entertainment on a periodic basis, including reminders during the holiday season regarding both giving and receiving gifts and entertainment. These communications can be as simple as an email reminding employees of company policy.

Auditing

As with any area of compliance, it is important periodically to audit for compliance with the organization’s gifts and entertainment policy. Review of travel and entertainment expense reports and of company credit card statements can be exceedingly helpful in this area. Indeed, some organizations include travel and entertainment audits in every audit cycle, rotating the business units or categories of employees who are audited each cycle.

Organizations may also use expense trend reviews, by which they are able to catch significant upticks in employee expenses. Other strategies include auditing those employees with the highest expense reporting or in riskier areas (such as high-risk locations overseas or salespeople who handle the biggest or highest-risk clients).

Monitoring

One form of monitoring employee behavior in the area of gifts and entertainment is through requiring employees to submit travel and entertainment reports, which typically require disclosure regarding funds expended on behalf of the company, including with respect to providing entertainment and gifts to third parties. These are typically reviewed by supervisors or centrally as part of an approval process. In addition, regular review of company credit card statements is another form of continuous monitoring.

Some organizations disseminate gifts and entertainment questionnaires, which employees must complete and return every quarter or every year, on which they are required to disclose all gifts and entertainment received or gifts and entertainment over some dollar threshold value. Organizations that use gift registers—which require employees to enter information about gifts provided or received—can also monitor such registers on a real-time basis.

Seeking Guidance and Reporting Misconduct

As with any area of compliance, organizations should provide employees with resources to seek guidance on the gifts and entertainment policy and to report suspected violations. Many companies have hotlines or helplines for employees and others to report concerns. Organizations also typically provide employees with a variety of other reporting options, including supervisors, the compliance and ethics department, and the legal department.

Investigation, Discipline, and Enforcement

As with any area of compliance, consistent enforcement of gifts and entertainment policies is critical. While many organizations continue to ask supervisors to determine discipline for compliance violations, it is helpful if the compliance and ethics department provides supervisors with precedent, or information regarding how past violations have been disciplined. Given the personal nature of gifts and entertainment, consistent enforcement can be particularly important.

Third Parties

When conducting the gifts and entertainment risk assessment and designing compliance controls, organizations should consider the risks posed by third parties and appropriate third-party compliance efforts. Because gifts and entertainment issues typically involve third parties (meaning the third parties offer and provide the gifts and entertainment to employees), many organizations extend certain aspects of their gifts and entertainment compliance programs to third parties. Companies may disseminate communications regarding their gifts and entertainment policies to suppliers and other third parties. For example, it is common for companies in certain industries (such as the retail industry) to send letters to suppliers reminding them of their policies regarding gifts and entertainment, which are typically disseminated before the holidays.

Organizations may also ask third parties to certify to compliance with their gifts and entertainment policies. For example, companies that use third parties in dealings with government officials often require those third parties to certify to compliance with anti-bribery laws, including the prohibitions and limitations on gifts and entertainment in those laws.

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