

White Collar Defense and Investigations



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Decoding AFA's Guide: A Comparison of Sponsorship and Charitable Donations in France, the US and the UK

On March 26, 2024, the French Anti-Corruption Agency (AFA) published a guide on how to engage in corporate sponsorship and charitable donation activities while appropriately mitigating corruption risks (the Guide)¹.

The Guide discusses the risks associated with charitable donations and sponsorship operations and provides recommendations on how to prevent such risks². In particular, the Guide recommends corporate compliance measures that companies involved in these activities should consider implementing to avoid engaging in conduct that could lead to criminal exposure. These measures include policies and procedures, written agreements, training and internal controls.

In this alert, we summarize the key compliance measures recommended by the AFA to address corruption risks associated with charitable donations and sponsorships, and compare them with US and UK standards.

Background

As the Guide sets out, companies can improve their image by demonstrating their commitment to the values of the projects and/or organizations that they support through sponsorship or charitable donations.

The AFA defines sponsorship as the support provided by a legal entity (sponsor) to an event, person, product or organization of a philanthropic, educational, scientific, social, humanitarian, sporting, family, cultural, artistic or environmental nature (beneficiary). The operation is a mutually beneficial partnership in which the sponsor provides financial or in-kind support to the beneficiary in exchange for proportionate benefits, such as marketing or promotional benefits. Sponsorship activities in France are subject to certain legal restrictions. For example, French companies cannot donate to political parties, including through sponsorship activities.

Charitable donations are defined by the French tax administration as material or financial support given without direct or indirect consideration to a charitable organization or legal entity to carry out activities of general interest.

¹ AFA, "Sécuriser les Opérations de Parrainage et de Mécénat des Entreprises" March 2024.

² These risks were already outlined by the AFA. "The French Anti-Corruption Agency Guidelines" January 12, 2021.

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Though sponsorship transactions and charitable donations are subject to strict legal and tax rules in France, they may be diverted from their original purpose with fraudulent intent, or give rise to conflicts of interest or violations of public procurement rules. As such, they can put donating companies and beneficiary organizations alike at risk.

The Guide presents examples of situations and risk factors to which companies may be exposed during sponsorship programs or charitable donations and proposes specific prevention and detection measures to control these risks in line with the AFA's general anti-corruption guidelines.

In the US, the Securities and Exchange Commission (SEC) and the Department of Justice's (DOJ) resource guide to the Foreign Corrupt Practices Act (FCPA) (the FCPA Resource Guide) similarly provides guidance on charitable contributions³. The Resource Guide notes that, although the FCPA does not prohibit charitable contributions, companies "cannot use the pretense of charitable contributions as a way to funnel bribes to government officials".

In the UK, the Ministry of Justice's (MOJ's) guidance (MOJ Guidance) on the UK Bribery Act 2010 (Bribery Act)⁴ also outlines how companies can navigate the risks posed by charitable donations. Specifically, a bribe under the Bribery Act is drafted broadly to refer to "a financial or other advantage" which can include charitable donations.

Do companies have an obligation to implement sponsorship and charitable donation policies and procedures? What should they contain?

France

In France, while it is not legally required for companies to establish sponsorship and charitable donation policies and procedures, doing so is strongly recommended by the AFA as part of good governance practices. Indeed, having clear policies in place can help mitigate risks related to potential conflicts of interest or misuse of company resources.

According to the Guide, a comprehensive sponsorship and charitable donation policy should include several key elements.

³ DOJ Criminal Division and SEC Enforcement Division, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" Second Edition.

⁴ MOJ, "The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place To Prevent Persons Associated With Them From Bribing (Section 9 of the Bribery Act 2010)".

The policy must:

- Present the promotional benefits of sponsorship to the company for the company, and the need for charitable donations to serve public interest goals (this description may be used to verify compliance with applicable tax provisions).
- Identify how the projects or beneficiaries align with the strategic objectives of the organization. Similarly, underscore the importance of beneficiaries' adherence to the company's core values.
- Explicitly mention compliance with applicable laws and regulations (including foreign laws) governing sponsorship or charitable activities.
- Specify, when appropriate, the nature of the contributions: monetary, in-kind or skills (*i.e.*, time, technology, products, loan of equipment or office space, etc.).
- Prohibit the launch of a sponsorship program or charitable donations while the company is awaiting an important decision involving the beneficiary (for example, the award of a contract by the beneficiary or a related entity, or the renegotiation of an existing contract).
- Be aligned with the company's other policies (*e.g.*, on gifts and entertainment⁵) to ensure that any sponsorship transactions or charitable donations made on behalf of the company are consistent with those policies.
- Require employees to follow all company procedures relating to anti-corruption when engaging in these activities.

Additionally, the Guide recommends that, when resources allow, companies designate an employee not involved in decision-making concerning the sponsorship and charitable contribution requests to process and monitor them. Whenever possible, companies should prioritize collegial decision-making by establishing a dedicated committee. The AFA also suggests implementing, in addition to standard approval procedures, expedited procedures to quickly address urgent charity needs, for example in response to natural disasters.

The sponsorship or charitable donation procedure may also refer to the company's policy for managing conflicts of interest⁶ and, in particular, provide for specific measures applicable to members of the management body and employees responsible for evaluating and selecting operations. For example, companies may decide to implement a declaration and recusal policy for employees with relevant ties to the beneficiaries that could create

⁵ AFA, "Gifts and Hospitality Policy in Private and Public Sector Corporations and Non-Profits" 2020.

⁶ AFA, "Preventing Conflicts of Interest in the Private Sector" 2021.

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apparent or actual conflicts of interest. The framework should also allow for the tracking of contributions, including in-kind contributions, and filing of related documentation.

United States

By way of comparison, US authorities expect that companies will conduct proper due diligence and have in place risk-based procedures and internal controls adequately designed to identify and prevent potential misconduct with respect to charitable contributions or political donations.

The FCPA Resource Guide lists five questions companies should consider when making charitable payments outside the United States:

- What is the purpose of the payment?
- Is the payment consistent with the company's internal guidelines on charitable giving?
- Is the payment made at the request of a "foreign official"?
- Is the charity affiliated with a "foreign official" and, if so, can the foreign official make decisions regarding your business in that country?
- Is the payment conditioned on the receipt of business or other benefits?

DOJ opinion releases have pointed to the following measures that can help minimize the likelihood of an FCPA violation:

- Obtaining a certification by the donation recipient regarding compliance with the FCPA.
- Conducting due diligence to confirm that none of the recipient's officers are affiliated with the foreign government at issue.
- Requiring that the recipient provide audited financial statements.
- Executing a written agreement with the recipient restricting the use of funds.
- Taking steps to ensure that the funds are transferred to a valid bank account.
- Obtaining confirmation that the charity's commitments were met before funds were disbursed.
- Monitoring charitable contributions on an ongoing basis.

⁷ The FCPA defines "foreign official" to include any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organization.

It is also best practice for companies subject to the FCPA to require written preapproval of the donation from senior management or compliance officers, and to prohibit donations in cash.

As with charitable contributions, companies should have in place policies and procedures that specifically address whether, when and how political donations are permitted. Where companies permit political donations, they should take steps to ensure that the funds are not used for corrupt purposes, such as the personal benefit of individual foreign officials.

United Kingdom

As in France, the UK does not create a legal obligation for companies to have in place policies and procedures addressing charitable donations. However, the Bribery Act creates a corporate offence of "failure to prevent bribery", where the only defence available to a company is to demonstrate that it has "adequate procedures" in place to prevent bribery⁸. In outlining how companies may rely on this defence, the MOJ Guidance refers specifically to prevention policies governing how charitable donations are addressed within the company. A case study on charitable donations provides a list of considerations for assessing potential bribery risks, including:

- Conducting due diligence.
- Adopting policies and procedures about the selection of charitable projects/initiatives which should be informed by appropriate risk assessments.
- Training and support to employees.
- Monitoring/periodic review of anti-bribery procedures.

Should sponsoring or charitable donation activities be formalized in a written agreement signed by the donating company and the beneficiary?

France

In France, while there is no legal requirement for parties involved in a sponsorship or charitable donation to formalize the transaction in a written agreement, it is strongly recommended by the AFA. Agreements must set forth the terms and conditions of the sponsorship or charitable donation activity and outline the rights, obligations and expectations for both parties.

⁸ Section 7 of the Bribery Act 2010.

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In particular, the Guide recommends including in such contracts anti-corruption commitments by the beneficiary (zero-tolerance policy, implementation of a prevention and detection system, mutual acceptance of codes of conduct, etc.) and a clause providing for the termination of the contract in the event of a breach of such commitments or the involvement of one of the parties in misconduct.

United States

Charitable contributions and sponsorships should be documented in written agreements that contain provisions restricting the use of funds and requiring anti-corruption compliance. It is also a best practice to include audit rights and termination provisions.

United Kingdom

As in France, the UK does not create a legal obligation for companies to have written agreements governing charitable donations. However, in order to demonstrate adequate procedures and rely on the defence against the corporate offence of failure to prevent bribery, it is strongly recommended that companies put in place such agreements.

Are there financial limits for sponsorship and charitable donation operations?

France

Regarding the contribution given to the beneficiary

There is no financial limit to contributions. However, under French criminal law, a sponsorship or charitable donation transaction must meet three conditions:

- the amount of sponsorship or charitable donation expenditure should be proportionate to the sponsoring company's capabilities and should not exceed them⁹;
- the transaction must not be carried out for the personal benefit of senior management¹⁰; and
- the transaction must be assessed and approved in light of the expected benefits for the company¹¹.

Therefore, disproportionate sponsorship or charitable donations must be closely examined to ensure that they were not carried out to conceal an offence.

⁹ See ruling by the Criminal Division of the Cour de Cassation, 4 February 1985, n° 84-91.581.

¹⁰ See ruling by the Criminal Division of the Cour de Cassation, 5 March 2014, n° 13-80.350 and 22 February 2017, n° 16-87.262.

¹¹ See ruling by the Conseil d'État, 9 May 2018, n° 388209.

Regarding the compensation given to the donating company or sponsor

A charitable contribution is a donation to a nonprofit organization to carry out its activities without expecting anything in return. However, it is acceptable for a beneficiary organization to offer some form of reciprocity when there is a marked disproportion between the support provided by the company and the value of the benefit provided by the beneficiary organization, such as naming a museum wing after a donating company.

The beneficiary organization may provide compensation in different forms, but such compensation is only acceptable if the value does not exceed one-fourth of the initial donation amount¹².

As to sponsorships, the Guide emphasizes the importance of ensuring that the benefits received by the sponsoring company are reasonable and commensurate with the sponsorship contributions. While the Guide does not establish specific financial limits to contributions, companies should exercise discretion to prevent excessive or inappropriate benefits that could compromise the integrity of the sponsorship relationship.

United States and United Kingdom

Although they contain no financial limits, US/UK guidelines call for having a bona fide business rationale for engaging in charitable donations or sponsorships.

Does the donating company need to carry out controls?

The Guide recommends that donating companies establish accounting controls related to sponsorship and charitable contributions, in particular with respect to the financial and nonfinancial flows between the donating company and beneficiary organizations¹³.

In the US, the FCPA requires "issuers" and those acting on their behalf to make and keep accurate books and records that, in reasonable detail, reflect the issuer's transactions and disposition of assets. Issuers must also maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Accordingly, donation and sponsorship amounts should be accurately recorded in a company's books and records along with appropriate documentation such as written agreements, receipts, approvals and any other documentation supporting the payment.

¹² For more information, visit the French Ministry of Culture's [website on the general tax regime for charitable donations](#).

¹³ AFA, "Corporate Anti-Corruption Accounting Controls" April 2022.

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Additionally, the AFA recommends monitoring the actual use of the donations by the beneficiary organizations, which may include field visits to obtain tangible evidence of the activities undertaken. This allows donating companies to ensure that the funds they provided are not used in a way that would engage the company's civil or criminal liability (*e.g.*, bribing a public official to obtain a public contract). This approach is also a best practice in the US and UK, where authorities expect companies to have in place internal controls adequately designed to prevent and identify potential FCPA and/or Bribery Act violations. Internal controls should be used to monitor and update compliance programs on an ongoing basis.

Also, donating companies should regularly perform internal audits to ensure proper application of sponsorship and charitable donation procedures and remediate any deficiencies.

What about training?

Donating companies should offer to include beneficiary entities in their training programs.

According to the AFA, it is essential for both parties in a sponsoring or charitable contribution relationship to receive training on ethical standards, compliance requirements and whistleblower

procedures. This will equip employees and stakeholders in both organizations to understand their responsibilities, identify potential ethical dilemmas and effectively report any concerns or suspicions.

Although not required, providing tailored anti-corruption training to third parties, including donation or sponsorship recipients, is considered a best practice in the US and UK.

What other recommendations does the AFA provide?

The AFA recommends that whistleblowing procedures of donating companies be opened to beneficiary entities and their employees. This ensures that all parties involved in sponsorship or charitable donation activities have mechanisms in place to report any suspected wrongdoing, ethical concerns or policy violations.

In addition, the Guide recommends that the risk scenarios associated with sponsorship and charitable donation activities be included in the corruption risk assessments of donating companies.

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