

Understanding the FCPA

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Introduction: A Robust Enforcement Climate

- U.S. Foreign Corrupt Practices Act (“FCPA”) enacted in 1977
- Three-fold increase in enforcement activity at DOJ since 2004
 - Increased numbers of FCPA-dedicated attorneys in Fraud Section
 - Approx. 50 FBI agents working on FCPA matters
- 2007 a landmark year
 - Largest number of DOJ & SEC enforcement actions (38)
 - Largest combined settlement to date (\$44 million) – likely to soon be eclipsed
 - Largest criminal penalty to date (\$26 million)
 - Approx. 100 companies believed to be under investigation at year end

Introduction: A Robust Enforcement Climate (*cont.*)

- “Just the tip of the iceberg,” says Mark F. Mendelsohn, DOJ Deputy Chief of Fraud Section.
- “A full-court press on FCPA investigations,” promised by Frederic D. Firestone, SEC Associate Director of Enforcement Division.

Introduction: A Robust Enforcement Climate (*cont.*)

- Not just in U.S. – international enforcement on the rise
- Parallel Enforcement Proceedings:
 - U.K.: Serious Fraud Office (“SFO”)/Serious Organized Crime Agency (“SOCA”)
 - China: Central Commission for Discipline Inspection (“CCDI”) identified corruption as the biggest threat to the Communist Party
 - Germany: telecommunications giant pays \$284 million in fines to end investigation plus \$253 million in back taxes due to improper deductions taken from illegal payments
 - Inter-agency & international cooperation
 - SFO, DOJ, and Swiss authorities investigate defense contractor
 - DOJ and French magistrate investigate international construction contractor

Understanding the FCPA

FCPA Overview

- Two Distinct But Complementary Sets of Provisions:
 - **Anti-Bribery**: Prohibiting bribery of foreign public officials
 - **Books & Records**: Requiring internal controls and imposing accounting standards for publicly-traded companies

FCPA Anti-Bribery Provisions

- The FCPA Foreign Payments Provisions
- Commonly referred to as the “Anti-Bribery Provisions”
- Apply to:
 - U.S. and foreign companies with registered securities or who file with SEC
 - Their directors, officers, employees and agents
 - U.S. citizens, residents, and entities organized under U.S. law or with principal business location in U.S.
 - Foreign nationals and entities who commit a violation while in the U.S.
- Enforced by the Department of Justice, Criminal Fraud Section

FCPA Anti-Bribery Provisions – Elements

The FCPA's anti-bribery provisions prohibit –

- any “**knowing**” act in support of
- a **payment**, an **offer to pay** or an **authorization to pay**
- money or “**anything of value**”
- **directly or indirectly** (e.g., through any agent, consultant, or third-party)
- to any **foreign government official**, foreign political party or party official, foreign political candidate, or officers of a public international organization (“foreign officials”); *or*
- to a third person “**knowing**” it will be passed on to a foreign official

FCPA Anti-Bribery Provisions – Elements (*cont.*)

- **“Corruptly”**
 - An intent to wrongfully influence the recipient
 - Does not require that the act be fully consummated or succeed in producing the desired outcome
- In order to **obtain or retain business** or to direct business to any person, or
- Otherwise secure **“any improper advantage.”**

FCPA Anti-Bribery Provisions - Definitions

- “Knowing”
 - Having **actual knowledge**
 - Having **reason to know**
 - Acting with **deliberate indifference**
 - Acting with **reckless disregard**
- **UPSHOT**: You cannot deliberately insulate yourself or be willfully blind and you must know your foreign business partners.
- **UPSHOT**: For all practical purposes, a duty has been imposed.

FCPA Anti-Bribery Provisions – Definitions (*cont.*)

Knowledge – FCPA “Red Flags”

- A history of corruption in the country
- Any family relationships between participants and government officials
- Unusual payment patterns or financial arrangements
- Unusually high commissions
- Lack of transparency in expenses and accounting records
- Refusal by a foreign joint venture partner or agent to provide a representation that it will abide by the FCPA
- Recommendation of the joint venture partner or agent by a government official
- Apparent lack of qualifications on the part of the agent to perform services
- Any misrepresentations in connection with a proposed transaction

FCPA Anti-Bribery Provisions – Definitions (*cont.*)

- “Payment” or “anything of value,” including –
 - Stock or other interest in or profits from a business
 - Improvements in real property
 - Personal property
 - Personal favors
 - In-kind services
 - Entertainment
 - Discounts on products or services not readily available to the public
 - Assumption or forgiveness of debt

NOTE: THERE IS NO MATERIALITY STANDARD

FCPA Anti-Bribery Provisions – Definitions (*cont.*)

- **“Foreign government official”**
 - Any officer, employee, or person acting in an official capacity on behalf of
 - a foreign government
 - any department, agency, or instrumentality of the foreign government
 - a public international organization (e.g., the U.N.)
 - a foreign political party
 - Examples
 - members of royal families who maintain ownership or managerial interests in government industries or government-controlled companies.
 - any entity hired to review and accept bids for a government agency
 - officers and employees of public utilities
 - officers and employees of government owned businesses
 - managers and employees of government instrumentalities (e.g., hospitals, schools, etc.)

FCPA Anti-Bribery Provisions – Definitions (*cont.*)

- **“Obtaining, Retaining or Directing Business”**
 - Obtaining or retaining contracts
 - Securing necessary government approvals, such as licenses or permits, that involve the exercise of government discretion
 - Obtaining favorable tax or customs rulings
- **UPSHOT**: Any payment intended to influence a government decision that might favorably affect business will likely be considered a violation, subject to investigation, fines, and jail terms.

FCPA Anti-Bribery Provisions

Exceptions & Defenses: The FCPA does not prohibit –

- “Grease” or “facilitating” payments, e.g.
 - To obtain permits, licenses or other official documents in order to qualify to do business in a foreign country
 - To process governmental papers such as visas and work orders
 - To secure police protection, mail pick-up and delivery or scheduling of inspections related to contract performance or transit of goods
 - To obtain telephone service, power and water supply, loading and unloading cargo, or protection of perishable products or commodities
 - Clerical duties that do not involve the exercise of discretion
- Reasonable, *bona fide* expenditures associated with the promotion, demonstration, or explanation of a product or performance of a contract, e.g., travel and entertainment
- Payments expressly permitted under the **written** laws of the foreign country

Summary of FCPA Anti-Bribery Provisions

- Making a bribe or promising to give anything of value in an attempt to influence the action or inaction of a foreign official is strictly prohibited
- This includes payments to consultants, agents, or any other intermediary or representative when the party making the payment knows or has reason to believe that some part of the payment will be used to bribe or influence a foreign official
- Severe penalties may be imposed for violations of the FCPA, both against individuals and companies

FCPA Books & Records Provisions

- **Two Sets of Requirements:**
 - Accuracy of books and records
 - Internal accounting controls
- Apply to publicly traded companies and their employees and agents
- Enforced by the SEC

FCPA Books & Records Provisions

Accuracy of Books & Records

- Books and records must be kept in “**reasonable detail**” so that they “**accurately reflect**” the company’s transactions and the use of its assets
 - Any off-book transaction with respect to foreign governments or their agents is a violation
 - Incomplete or inaccurate recording of transactions is sufficient to support a books and records violation, even if no corrupt transaction is proven
 - The SEC is currently enforcing books and records violations that do not even involve sales to foreign governments
 - **WHY?** Because such inaccuracies could be the result of attempts by employees and agents to **disguise bribe payments** and **create “slush funds”** for such payments.

FCPA Books & Records Provisions

Internal Accounting Controls

- Requires the company to maintain a system of internal accounting controls adequate to ensure that –
 - Assets are used as **authorized by company management** (*i.e.*, access to assets is generally restricted)
 - Expenditures and assets are recorded in accordance with **generally accepted accounting principles**
 - Assets are examined periodically – conduct routine audits
 - Accounts are kept in a way that will **reveal any discrepancies so that appropriate remedial measures may be undertaken**

FCPA Books & Records Provisions

Application to Subsidiaries

- **Wholly-owned and majority-owned** subsidiaries must comply
- Issuers must make good faith efforts to have subsidiaries owned fifty percent or less comply
- **Actual control** renders parent responsible for compliance of subsidiary

Summary of FCPA Books & Records Provisions

The FCPA requires that –

1. The true nature and amount of all payments should be recorded, regardless of the nature or size of the payment (e.g., a \$20 facilitating payment must be recorded as such)
2. All original documents relating to the transaction should be maintained (such as invoices, receipts, or expense reports)
3. All books and records entries should accurately reflect the amount, date, purpose, and identity of the recipient of the payment

FCPA Penalties Are Severe

FCPA Criminal Penalties

- Up to \$2 million per violation for issuers and domestic concerns
- Up to \$250,000 fine and/or 5 years in prison for individuals
- Disgorgement of profits resulting from illegal conduct
- Willful books and records violations—
 - Up to \$25 million for issuers and domestic concerns
 - Up to \$5 million and/or 20 years in prison for individuals
- Alternative fines of equal to twice the amount of the total gain or loss
- Corporation cannot indemnify individuals

FCPA Civil Penalties

- Injunctions against future violations of the FCPA
- Civil monetary penalties – \$10,000 per violation
- Forfeiture
- Disgorgement of profits resulting from illegal conduct
- “Collateral consequences” such as debarment – *e.g.*, from doing business with U.S. government
- Denial of export licenses
- Tax consequences, *e.g.*, disallowance of deductions and treating payments by subsidiaries as taxable income to U.S. parent company

FCPA Compliance

FCPA Compliance

Three Elements:

- Robust corporate compliance program
- Due diligence for particular transactions and relationships
- Prompt response to violations, or indications of a violation

The government will consider each of these elements in evaluating whether or not to bring an enforcement action

FCPA Compliance

Compliance Program Essentials

- A clearly defined **corporate policy**, including **conduct codes** and **internal procedures**
- Dissemination of policy to all employees
- Periodic **training** and emphasis on the requirements of the policy and associated controls and procedures
- Periodic **certifications of compliance** from personnel
 - Management
 - Finance
 - Sales
- **Due diligence** concerning intermediaries and business partners
- Robust **anticorruption provisions in contracts**
- **Audit testing** of all business locations with particular emphasis on high-risk areas and new acquisitions

FCPA Compliance

What Should Due Diligence Include?

- **Know the compliance climate of the foreign country by consulting:**
 - State Department
 - Commerce Department
 - Relevant U.S. Embassy (commercial desk)
 - Transparency International
 - Private sources including:
 - Law firms
 - Banking institutions
 - Private investigators
 - Auditing firms

FCPA Compliance

What Should Due Diligence Include?

Know your business partners –

- Evaluate the competence and expertise of joint venture partners, agents and intermediaries
- Inquire about the relationships they may have with government officials
- Examine or audit books of business partners

FCPA Compliance

What Should Due Diligence Include?

- Joint Venture Partners, agents, and other intermediaries—
 - Private parties to a joint venture can create FCPA headaches if there is indirect ownership or control by foreign officials or by a foreign government
 - The DOJ tends to assume a flow-through of benefits in such circumstances
 - Conduct due diligence in advance
 - Obtain representation to abide by FCPA
 - Include walk-away provision for suspected FCPA violations
 - Particularly important for minority owners in JV context

FCPA Compliance

What Should Due Diligence Include?

Know the market and proceed with caution –

- Examine the reasonableness of proposed compensation – *i.e.*, is it reasonable in relation to the services provided?
- Carefully scrutinize “success fees” or other payments
- Obtain legal opinions concerning compliance with local law
- Apply a common sense “smell test”
- **Maintain records of all due diligence and compliance activities conducted**

FCPA Enforcement Trends

Emerging Enforcement Trends

Six aspects of recent enforcement action show the expanding and developing nature of FCPA enforcement activities –

- First, government emphasis on the importance of implementing robust and effective FCPA compliance program
- Second, significant number of FCPA matters arise in two key contexts:
 - Payments made to and actions taken by third-party sales advisers
 - Liabilities obtained through, or discovered while performing due diligence for, corporate acquisitions

Emerging Enforcement Trends (cont.)

- Third, widening scope of industries under DOJ/SEC/FBI scrutiny for FCPA violations
- Fourth, investigating world-wide activities of single companies, not just isolated incidents involving a specific country, official, subsidiary, or employee
- Fifth, recent enforcement actions even when no illegal bribe has been paid –
 - Books and records violations
 - Lack of internal controls
- Sixth, penalties for violations of the FCPA continue to increase
 - 2007 saw the largest combined penalty and disgorgement ever paid under the FCPA, a total of \$44 million
 - Public disclosures by companies regarding ongoing investigations make it probably that that amount will soon be eclipsed.

2008 FCPA Enforcement Activity

- Wabtec Corp.
 - Non Prosecution Agreement (“NPA”)
 - Settlement with DOJ evidences a dim and narrow view of the facilitating payments exception
 - \$30 - \$60
 - Compliance monitor/Disgorgement plus prejudgment interest
- Flowserve Corp.
 - Deferred Prosecution Agreement (“DPA”)
 - Books & Records and Internal Controls violations for conduct of French and Dutch subsidiaries
 - Disgorgement plus prejudgment interest
 - DOJ settlement for French subsidiary conduct only
 - \$10.5 million combined penalty

2008 FCPA Enforcement Activity (cont.)

- Willbros Group, Inc.
 - DPA
 - Payment to influence tax assessment and judicial process, along with retention of business
 - Civil settlement for company and four employees
 - Criminal settlement for company
 - \$32.8 million combined penalty
 - Compliance monitor/Disgorgement plus prejudgment interest
 - Criminal books & records prosecution unrelated to corrupt payments
 - Compliance monitor/Disgorgement plus prejudgment interest
 - Allegations stemming from Willbros's Bolivian tax fraud scheme are predicated on the company's falsification of its accounts to avoid tax liability
 - Potentially foreshadows a broad expansion of the DOJ's FCPA enforcement practice

2008 FCPA Enforcement Activity (cont.)

- AGA Medical Corp.
 - DPA
 - Payment by company's distributor to physicians at state-owned hospital and to China Patent Office
 - Compliance monitor
- Faro Technologies, Inc.
 - NPA
 - Conduct of wholly-owned Chinese subsidiary, China country manager, and Asia-Pacific sales manager
 - Compliance monitor/Disgorgement plus prejudgment interest

FCPA Quiz

FCPA Quiz

HYPOTHETICAL 1:

The local manager of a U.S. energy company's subsidiary in the Middle East is providing off-the-book payments to officials in the country's finance ministry to obtain relief on disputed tax issues. Senior officials at the U.S. parent company conduct an audit and learn of these payments.

QUESTION: How should the parent company's executives respond to this situation?

1. **True or False:** Officials of a parent company in the U.S. have no duty under the FCPA to supervise and monitor the activities of their foreign subsidiary with respect to potential bribes.
2. **True or False:** If executives of a U.S. parent company learn of potential violations of the FCPA by officials in their Middle Eastern subsidiary, they have a duty to immediately take steps to terminate the illegal activity.

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Answer: True.

FCPA Quiz

HYPOTHETICAL 2:

A U.S. technology company is seeking to secure the approval of the Chinese government to provide the country's first wireless network. The Minister of Communications requests that a subordinate be permitted to visit the company's headquarters in Sunnyvale, California to view a demonstration of the technology.

QUESTION: How should the company respond to this request?

1. **True or False:** It is illegal under the FCPA to provide travel expenses to a government official to view a product demonstration in the U.S.
2. **True or False:** If a governmental official requests a visit to view a product demonstration in the U.S. and insists that company also pay for the travel expenses of his family so they can visit Las Vegas after the demonstration, the payment of these expenses would constitute an illegal bribe under the FCPA.

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Answer: False. International travel should, however, be approved with caution.

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2. **True or False:** If a governmental official requests a visit to view a product demonstration in the U.S. and insists that company also pay for the travel expenses of his family so they can visit Las Vegas after the demonstration, the payment of these expenses would constitute an illegal bribe under the FCPA.

Answer: True. Also, requests by an individual for travel (as opposed to travel by government officials at the direction of superiors) should be approved with caution.

FCPA Quiz

HYPOTHETICAL 3:

A U.S. company engages a local consultant in Indonesia who indicates that he will make sure a government-owned oil company will purchase their drilling bits. To that end, he requests that the company forward his payments to a bank account outside of Indonesia. The consultant also refuses to sign an agreement that contains FCPA compliance provisions.

QUESTION: Should the U.S. company engage this consultant?

1. **True or False:** A classic “red flag” regarding an unethical foreign consultant is the consultant’s request for payments to be made to a bank account outside of the country where the consultant is performing services.
2. **True or False:** A U.S. company would be well advised to avoid the services of a foreign consultant who refuses to sign a consulting agreement with FCPA compliance provisions

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Answer: True.

FCPA Quiz

HYPOTHETICAL 4:

A U.S. executive meets in New York with a senior officer of a multi-lateral development bank. The bank officer tells the executive that he can arrange for the U.S. company to be the lead contractor for a large infrastructure project the bank is funding in Latin America, but he needs a personal \$500,000 “cash advance” before he can secure the company’s role.

QUESTION: How should the U.S. company respond to this request?

1. **True or False:** The FCPA covers bribes made to officials of public international organizations, like the World Bank and the United Nations.
2. **True or False:** The FCPA applies to any person who commits an act in furtherance of a foreign bribe while in the U.S.

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Answer: True.

2. **True or False:** The FCPA applies to any person who commits an act in furtherance of a foreign bribe while in the U.S.

Answer: True.

FCPA Quiz

HYPOTHETICAL 5:

John is in charge of setting up a U.S. technology company's chip factory in Taiwan. A representative of the government-owned telephone company tells John that he cannot get telephone service for the plant for 6 months but will get it within a month if he pays the representative a standard \$1,000 "expediting fee."

QUESTION: Should the company pay the "expediting fee"?

1. True or False: Such an "expediting fee" would definitely be considered an illegal bribe under the FCPA.

FCPA Quiz

HYPOTHETICAL 5:

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QUESTION: Should the company pay the "expediting fee"?

1. **True or False:** Such an "expediting fee" would definitely be considered an illegal bribe under the FCPA.

Answer: False. Payment of expediting fees should, however, be done with extreme caution and advance approval from the legal department.

FCPA Quiz

HYPOTHETICAL 6:

Barry works in the accounting division of a public U.S. multi-national energy company. While preparing consolidated financial statements based on information contained in the financial records of the company's Korean subsidiary, he discovers that bribes are being paid to government officials in Korea to secure contracts to build power plants. Barry's boss tells him to record the payments in the consolidated financial statements as "training expenses."

QUESTION: What are the consequences if Barry follows the boss' instructions?

1. **True or False:** The instruction of Barry's boss would subject the boss (and Barry, if he complied) to individual liability under the FCPA.

FCPA Quiz

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QUESTION: What are the consequences if Barry follows the boss' instructions?

1. **True or False:** The instruction of Barry's boss would subject the boss (and Barry, if he complied) to individual liability under the FCPA.

Answer: True. Further, there can be serious additional severe penalties under the Exchange Act of 1934.

FCPA Quiz

HYPOTHETICAL 7:

John is a lawyer who represents a U.S. construction company that is bidding on a large mass-transit project in Kazakhstan. John's client asks him to deliver a suitcase containing \$500,000 in cash to the head of the government ministry charged with the selection of the contractor.

QUESTION: If John agrees, will he be subject to individual liability under the FCPA?

1. **True or False:** Even though John is only acting as a messenger, his conduct would subject him to liability under the FCPA.

FCPA Quiz

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QUESTION: If John agrees, will he be subject to individual liability under the FCPA?

1. **True or False:** Even though John is only acting as a messenger, his conduct would subject him to liability under the FCPA.

Answer: True. Any act in furtherance of a violation of the Act is itself a violation.

FCPA Quiz

HYPOTHETICAL 8:

Lisa is the head of sales for Latin America for a large U.S. food company. She asks for a meeting with the Minister of Commerce of Peru while he has a stopover in Miami. At the meeting she suggests that if the Minister would waive certain import duties on her company's products, the company could arrange for a large payment to be made to him via an offshore bank account.

QUESTION: Is seeking a waiver of import duties covered under the Act?

1. True or False: Seeking a waiver of import duties is among the kinds of conduct the Act is looking to prevent.

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QUESTION: Is seeking a waiver of import duties covered under the Act?

1. **True or False:** Seeking a waiver of import duties is among the kinds of conduct the Act is looking to prevent.

Answer: True. Any act or omission by a foreign government official that results in a business advantage or has a business nexus will likely be viewed as proscribed under the Act—not just retaining or obtaining business.

FCPA Quiz

HYPOTHETICAL 9:

A wholly-owned foreign subsidiary of a U.S. pharmaceuticals company makes a \$75,000 donation to a charitable foundation in China. The foundation is run by the Director of one of sixteen regional state-run health authorities which provide funding for the purchase of drugs and supplies for hospitals in the country.

QUESTION: Is the charitable donation a violation of the FCPA?

1. True or False: Charitable donations are always permissible under the FCPA.

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QUESTION: Is the charitable donation a violation of the FCPA?

1. **True or False:** Charitable donations are always permissible under the FCPA.
Answer: False. If there is a quid pro quo for a charitable donation, then it is a violation of the FCPA.

FCPA Quiz

HYPOTHETICAL 10:

The financial records of a U.S. construction company's subsidiary in Angola are audited by an external auditor. In the closing meeting, the auditor informs the company that certain transactions were insufficiently documented. The auditor notes that it will not be a problem this time, but that it could lead to a negative outcome for the next audit. The auditor recommends a financial services company the auditor thinks will help correct the problems. When the company contacts the financial services company, it learns that the financial company's owner is the brother of the country's Minister of Interior.

QUESTION: Should the financial services company be engaged?

1. **True or False:** A U.S. company can never do business with a company owned by the relative of a government official because it is a violation of the FCPA.

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QUESTION: Should the financial services company be engaged?

1. **True or False:** A U.S. company can never do business with a company owned by the relative of a government official because it is a violation of the FCPA.

Answer: False. It depends on the business relationships, if any, among the U.S. Company, the foreign company and the government official.

FCPA Quiz

HYPOTHETICAL 11:

A U.S. public company's subsidiary makes cash payments to doctors employed at public hospitals in China. The payments are recorded in the subsidiary's books and records as "advertising and promotional" expenses. These records are included in the parent company's financial statements filed with the SEC.

QUESTION: Do the practices of the subsidiary have FCPA consequences for the parent company's officers?

1. **True or False:** The parent company's financial officers may be found individually liable under the FCPA for books and records violations.

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QUESTION: Do the practices of the subsidiary have FCPA consequences for the parent company's officers?

1. **True or False:** The parent company's financial officers may be found individually liable under the FCPA for books and records violations.

Answer: True. If the parent company's financial officers are deemed to be in a position to ensure compliance with the FCPA, then they will likely be held individually liable for improper recording of payments and a lack of sufficient internal controls.

FCPA Quiz

HYPOTHETICAL 12:

A U.S. oil and gas company's foreign subsidiary makes payments to government officials in Nigeria through its Nigerian affiliate. The purpose of the payments is to reduce expatriate employment taxes, saving the company \$1 million. A new CFO for the parent company discovers the improper payments.

QUESTION: What should the new CFO do?

1. **True or False:** Conducting a thorough internal investigation, taking aggressive remedial measures (including implementing robust internal controls), and self-reporting and cooperating with government investigators may result in no financial penalties for a company.

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Answer: True. The SEC and DOJ have, in limited instances (including under facts and circumstances similar to those in this hypothetical), cited these kinds of factors when deciding not to levy a financial penalty against a company.

FCPA Quiz

HYPOTHETICAL 13:

A Norwegian public company with no U.S. operations, but with American Depository Shares traded on the NYSE, made corrupt payments to Iranian government officials to obtain a competitive advantage in competing for gas field development projects.

QUESTION: Does the Norwegian company have to worry that U.S. authorities will, in addition to Norwegian authorities, investigate its conduct?

1. True or False: Foreign companies with no U.S. operations are not subject to the FCPA.

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1. True or False: Foreign companies with no U.S. operations are not subject to the FCPA.

Answer: False. The DOJ and SEC have jurisdiction over the Norwegian company under the Act because it avails itself of U.S. financial markets.

FCPA Quiz

HYPOTHETICAL 14:

The wholly-owned U.S. subsidiary of a U.K. upstream oil and gas products and services public company arranges for its freight forwarder and customs clearance company to make improper payments to employees of the Nigerian Customs Service to secure preferential treatment during the customs process.

QUESTION: Has the U.S. subsidiary violated the FCPA?

1. **True or False:** U.S. companies owned by foreign parents are not subject to the FCPA unless the company is directly involved in an act of bribery in the U.S.
2. **True or False:** Making improper payments through an agent or other intermediary—including a business partner—is a violation of the FCPA.

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1. **True or False:** U.S. companies owned by foreign parents are not subject to the FCPA unless the company is directly involved in an act of bribery in the U.S.
Answer: False. Any U.S. “domestic concern”—whether or not owned by a foreign parent—is subject to the FCPA.
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Answer: True.

FCPA Quiz

HYPOTHETICAL 15:

The Indonesian affiliate companies of a U.S. public company that genetically engineers crops in various locations around the world paid a local Indonesian government official to induce the official to repeal a government decree requiring the U.S. company to conduct an environmental impact study before harvesting its crops. The payment was not made in connection with any specific contract or because the company would not pass the study. The official took the money but took no steps to have the decree repealed.

QUESTION: Are bribery payments that are unrelated to a contract or any specific business permissible under the FCPA?

1. **True or False:** As long as there is some “business nexus” to the improper payment, the DOJ will view it as an FCPA violation.
2. **True or False:** Since the government official did nothing, the U.S. company has a defense under the FCPA.

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FCPA Quiz

HYPOTHETICAL 16:

At the direction of a senior official of a U.S. defense contractor, the company made contributions to the re-election campaign of Benin's incumbent president to assist in his re-election and thereby enable the company to win a contract in Benin.

QUESTION: Can U.S. companies make political contributions to campaigns of foreign government officials?

1. True or False: As long as the contribution falls within the local country's guidelines for political contributions, then such contributions are permissible under the FCPA.

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Answer: False. If there is a quid pro quo for the campaign contribution, then it is a violation of the FCPA.

FCPA Quiz

HYPOTHETICAL 17:

A New York-based merchant banker representing Kazakhstan in the sale of interests in Kazakh oil fields and pipelines arranged for millions of dollars of bribes to be paid to Kazakh government officials in exchange for their business. A Virginia-based attorney (with knowledge of the bribes) negotiated a transaction for a U.S. oil and gas production company by which it would acquire an interest in one of the Kazakh oil fields. In return, the attorney received a kickback.

QUESTION: Is the attorney liable under the FCPA?

1. True or False: The attorney, while guilty of other crimes in receiving the kickback, is not liable under the FCPA and will therefore not be sentenced to prison.

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QUESTION: Is the attorney liable under the FCPA?

1. **True or False:** The attorney, while guilty of other crimes in receiving the kickback, is not liable under the FCPA and will therefore not be sentenced to prison.

Answer: False. The attorney conspired to violate the FCPA, which is a criminal statute.

FCPA Quiz

HYPOTHETICAL 18:

The vice-president of a special fund created by the U.S. Congress for the development of the private sector in Central Asia inflated development grants to generate funds to divert kickbacks to himself and pay bribes to a British government official. With the help of the government official, he transmitted confidential bid information to a British company that would permit the company to under bid its competitors for a contract in Turkmenistan.

QUESTION: Does the vice-president's conduct constitute an FCPA violation?

1. **True or False:** The vice-president, a U.S. person, is guilty of violating the FCPA's anti-bribery provisions because he bribed a British government official and secured an improper advantage for the British company.

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Answer: True. He paid the largest individual fine levied under the Act at the time and was sentenced to one year in prison.

Conclusions / Q & A