

# are you exposed to corruption risk?

## FREQUENTLY ASKED QUESTIONS & ANSWERS ABOUT THE FOREIGN CORRUPT PRACTICES ACT

### Q 1. WHAT IS THE FOREIGN CORRUPT PRACTICES ACT ("FCPA")?

Congress enacted the FCPA in 1977 to bring a halt to the rampant bribery of foreign government officials. The FCPA has two main areas of focus:

- **Anti-Bribery Provisions:** Prohibits the offering or paying of a bribe or anything else of value to a foreign government or political party official in order to obtain or retain business or secure any improper advantage.
- **Books and Records Provisions:** Requires companies that trade on U.S. exchanges to make and keep accurate books, records and accounts of all payments, and to devise and maintain reasonable internal accounting controls for preventing and detecting FCPA violations.

### Q 2. DOES THE FCPA APPLY TO ME?

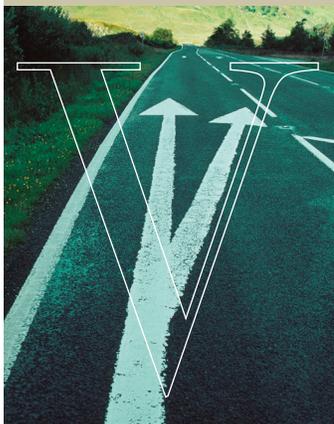
The FCPA applies to U.S. companies conducting business abroad, most foreign subsidiaries of U.S. companies, and U.S. subsidiaries of foreign companies. Even non-U.S. companies with securities that trade on U.S. exchanges are subject to the FCPA. The FCPA also applies to all U.S. citizens and any resident aliens. Even if none of the above applies, any U.S. nexus to a corrupt payment, such as an e-mail or phone call to the U.S. or even a dollar-denominated banking transaction, may be enough to confer jurisdiction.

The scope of the anti-bribery provisions of the FCPA is broad. What many would consider normal business entertainment or accommodations may run afoul of the statute. Furthermore, the acts of independent sales representatives, consultants, other agents, joint venture partners and the like that violate the FCPA will be attributed to any company that falls under the statute's jurisdiction. And, surprisingly, companies acquiring another company, even minority positions, are expected to perform FCPA due diligence or face potential liability. In a very real sense, you can buy another company's FCPA problem.

### Q 3. WHY SHOULD I BE CONCERNED?

Over the last several years, there has been a dramatic increase in FCPA enforcement activity. Since 2005, the U.S. Department of Justice ("DOJ") has brought more than 80 corporate actions, and over 100 individuals have been criminally charged – more than the number of prosecutions brought between the FCPA's enactment in 1977 and 2005. In 2009 and 2010, DOJ and the SEC reached record high enforcement numbers against corporations and individuals. In a prolific 2010, DOJ brought 38 new actions and the SEC brought 26. Total monetary penalties collected in 2010 exceeded \$1.7 billion, a record high. Additionally, the number of individuals being charged has steadily increased. In 2009, 38 individuals were criminally charged, and 10 were charged in 2010. Significant prison sentences have been imposed in many cases. There has also been an intentional increase in the number of enforcement actions against non-U.S. corporations, which amounted to roughly half of the corporate actions settled in 2010. Penalties against non-U.S. companies, however, represented more than \$1.1 billion of the \$1.7 billion collected.

DOJ and the SEC have recently increased the number of attorneys and investigators dedicated to FCPA enforcement, with their targets set on industries such as defense, logistics, tobacco, health care, financial service, and "life sciences." Additionally, the whistleblower provisions of the 2010 Dodd-Frank Act provide large monetary incentives for individuals to report suspected FCPA violations by public companies. Given enhanced resources, record high fines and new monetary incentives for whistleblowers, FCPA enforcement will certainly remain vigorous in 2011 and beyond.



**FOR MORE INFORMATION ABOUT THE FCPA, CONTACT US TODAY.**

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## Q 4. WHAT SHOULD I BE LOOKING FOR?

The issues below do not automatically mean there is an FCPA problem, but they do indicate areas of heightened concern that need to be examined closely.

- The transaction is in, or involves, a country known for corrupt payments, such as China, India, Iraq, Afghanistan and Nigeria;
- Government officials or their relatives are being entertained;
- Unusual contract terms or payment arrangements, such as requests for payment in cash, bearer instruments or “upfront payments;”
- The use of shell or holding companies;
- Your sales representative or agent is requesting an unusually high commission or fee;
- The customer’s insistence on the use of a particular agent; and/or
- When the role or function of an agent, consultant or middleman is not clear.

## Q 5. WHAT CAN I DO TO PROTECT MY ORGANIZATION?

**Implement a comprehensive and vigorous compliance program.** Corporations can be found criminally or civilly liable through the acts of an employee or agent, even if that person is acting against company policy. Because any corporation may find itself with a rogue employee or agent, the most effective way for a corporation to avoid or mitigate liability is through a comprehensive and vigorous compliance program. Any corporation that conducts business abroad or with non-U.S. governmental entities should input an FCPA specific compliance module into its compliance program for both its U.S. and non-U.S. operations.

An effective compliance program is far more than policies in a binder. Effective controls must be designed and maintained. The organization must track, vet and appropriately monitor such things as promotional accounts, charitable giving, entertainment expenses and the use of and payments to middlemen, consultants, agents and distributors. All relevant managers, employees and agents, such as independent sales representatives, must receive regular training. Contracts and other agreements, where appropriate, should contain FCPA clauses and certifications. Periodic FCPA audits must be conducted, and any violations of the policy or the law should be dealt with appropriately. Finally, a senior manager should have direct responsibility over the program.

## Q 6. WHAT SHOULD I DO IF A POTENTIAL FCPA VIOLATION SURFACES?

An organization’s response must be swift. Retain counsel, stop the conduct in question, preserve all electronic data, ensure that no hard copies of documents are destroyed and conduct a thorough inquiry. If you discover the potential violation before the government does, you must consider the benefits of voluntary disclosure. Although the FCPA does not mandate disclosure of violations, voluntary disclosures frequently enable the corporation to either avoid prosecution or obtain significant mitigation of civil and criminal penalties. Before a corporation self reports, however, it is crucial that you seek advice of counsel expert in the FCPA.

*Venable’s FCPA, SEC/White-Collar Defense and International Trade practices combine our knowledge in white collar crime and high-stakes litigation with an in-depth understanding of, and experience with, the regulatory and business issues facing corporations engaged in international trade. We provide clients with an aggressive, coordinated approach focused on preventing regulatory inquiries from becoming criminal matters, avoiding prosecution and reaching as quick a resolution as practicable. For matters of foreign law that might impact our international investigations, Venable maintains long-established relationships with attorneys throughout the world to assist us.*

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