

# 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 official 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, most 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 likely be attributed to any company that falls under the statute's jurisdiction. And, companies acquiring another company, even minority positions, are expected to perform specific 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") and the Securities and Exchange Commission ("SEC") have brought more than 250 enforcement actions against corporations and individuals—more than the total number of enforcement actions brought between the FCPA's enactment in 1977 and 2004. In 2010 and 2011, DOJ and the SEC reached record-high enforcement numbers. 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. While the number of new enforcement actions was lower in 2011, it was still the second highest year on record. In 2012, enforcement activity lagged somewhat, with DOJ bringing only 13 enforcement actions, and the SEC bringing only 12. Total monetary penalties in 2012 were over \$260 million. Despite these decreases, however, there is no reason to think that DOJ and the SEC are losing their zeal for enforcement. Rather, it is likely that DOJ and the SEC are juggling the approximately 150 open investigations and were distracted by the drafting of their comprehensive FCPA Resource Guide, which was released in November 2012, as well as several trials.

The number of individuals being criminally charged has steadily increased since 2005. Ten were charged in 2010, and eight were charged in 2011. Significant prison sentences have been imposed in many cases. In 2011, the longest prison term in FCPA history—15 years—was handed down. In 2012, the average prison sentence was just over 23 months.

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 both 2010 and 2011.

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, engineering and construction, technology/telecommunications, tobacco, and health care and "life sciences." Further, the whistleblower provisions of the 2010 Dodd-Frank Act provide large monetary incentives for individuals to report suspected FCPA violations by public companies. And, internationally, the United Kingdom, with its Bribery Act going into effect in July 2011, and several other countries have jumped firmly into the arena of international anti-corruption enforcement.

1.888.VENABLE  
www.Venable.com



FOR MORE INFORMATION ABOUT THE FCPA, CONTACT US TODAY.

**LINDSAY B. MEYER**

Co-Chair  
lbmeyer@Venable.com  
202.344.4829

**WILLIAM (WIDGE) DEVANEY**

Co-Chair  
whdevaney@Venable.com  
212.983.8204

**JAN LAWRENCE HANDZLIK**

Co-Chair  
jlhandzlik@Venable.com  
310.229.0378

**KARL RACINE**

kracine@Venable.com  
202.344.8322

**ASHLEY W. CRAIG**

awcraig@Venable.com  
202.344.4351

**GEOFFREY R. GARINTHER**

ggarinther@Venable.com  
410.494.6212

**W. WARREN HAMEL**

wwhamel@Venable.com  
410.244.7563

**KOSTAS D. KATSIRIS**

kdkatsiris@Venable.com  
212.370.6272

**THOMAS J. KELLY, JR.**

tjkelly@Venable.com  
202.344.4889

**DOREEN S. MARTIN**

dsmartin@Venable.com  
212.983.1179

**SETH A. ROSENTHAL**

sarosenthal@Venable.com  
202.344.4741

**MICHAEL SCHATZOW**

mschatzow@Venable.com  
410.244.7592

**MICHAEL D. SHERMAN**

mdsherman@Venable.com  
202.344.4558

**RAYMOND V. SHEPHERD, III**

rvshepherd@Venable.com  
202.344.4745

**WINIFRED M. WEITSEN**

wmweitsen@Venable.com  
202.344.8224

**D. EDWARD WILSON**

dewilson@Venable.com  
203.344.4819

**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, Russia, 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, a fact demonstrated by DOJ’s and the SEC’s very public declination of prosecution/enforcement against Morgan Stanley in 2012. Accordingly, 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. While 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.*



This publication is produced by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.