National Association of College and University Attorneys

DISCUSSION:

I. Overview of the FCPA

The FCPA was enacted in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies.[3] Passage of the FCPA was viewed as critical to stopping corporate bribery, which Congress believed had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hindered the proper functioning of markets.

The FCPA contains two main components: (1) the anti-bribery provisions and (2) the accounting provisions. In general, the anti-bribery provisions prohibit the offering of anything of value to foreign officials in order to assist in obtaining or retaining business. The accounting provisions require "issuers" of stock registered with the U.S. Securities and Exchange Commission ("SEC") to maintain accurate books and records and a system of internal accounting controls. The accounting provisions are not generally applicable to

1. Elements of Offense

A violation of the anti-bribery provisions requires the following elements:[11]

1. Any offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give or authorization of the giving of anything of value;
2. To a foreign official;
3. For the purpose of obtaining or retaining business, or securing improper advantage, and
4. With corrupt intent.

The first element, requiring the offer or payment of "anything of value," includes a broad range of tangible and intangible payments or benefits.[12] Anything of value is not limited to cash payments and importantly, there is no *de minimis* exception.[13]

The second element requires that the offer or payment be made to a "foreign official."[14] The term "foreign official" has been interpreted broadly by federal courts and enforcement agencies, and the term may include individuals who are not obvious government officials. Whether employees of an entity qualify as foreign officials depends on whether the entity is considered an "instrumentality" of a foreign government based on a fact-specific analysis of the entity's ownership, control, status and function.[15] Foreign officials include traditional public officials, such as government ministers, military officers, police officers, officials of political parties, elected officials, judges, etc. In addition, employees of businesses and institutions that are partially or wholly state-owned or controlled may also qualify as foreign officials. This may include employees of government-controlled utility companies, health care facilities, and educational institutions.

The third element, also known as the business purpose test, requires that payments be made for the purpose of obtaining or retaining business or securing an improper advantage. Federal courts have interpreted this requirement broadly to include a wide range of efforts to obtain any economic benefit.[16] Examples of conduct that satisfy the business purpose test include obtaining or retaining government contracts, securing favorable tax treatment, reducing customs duties, obtaining licenses or permits, and other efforts to obtain any type of business advantage.[17]

The fourth element requires that the offer or payment be made "corruptly" with intent to wrongfully influence the recipient to misuse his or her official position.[18] Even attempted actions may violate the FCPA. Furthermore, a payor may act corruptly even when a foreign official does not actually solicit, accept, or receive a corrupt payment.

A willful act is not necessary to establish corporate criminal liability or civil liability. However, in order for an individual defendant to be held criminally liable under the FCPA, the individual must act willfully.[19] To establish a willful state of mind, the government must prove that the defendant acted with knowledge that the conduct was unlawful, although the individual need not know that the conduct specifically violates the FCPA.

Individuals and entities may also be held liable for the actions of third-party intermediaries who act on their behalf. In such cases, it is not necessary for the individual or entity to have actual knowledge of the corrupt actions of a third party. A conscious disregard of or willful blindness to circumstances that would alert a reasonable person to the fact that improper offers or payments are likely being made will likely be sufficient to establish requisite knowledge to establish liability for the actions of a third party under the FCPA.[20]

The accounting provisions are divided into two main sections: (1) the books and records provisions and (2) the internal controls provisions.[29] The books and records provisions require issuers to "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[30] The internal controls provisions require issuers to "devise and maintain a system of internal accounting controls sufficient to" ensure management's control, authority, and responsibility over the company's assets.[31]

II. FCPA Risks in Higher Education

Several opinion letters issued by the DOJ have confirmed that non-profit institutions in the United States qualify as domestic concerns under the FCPA.[32] As of this writing, there are no publicly known FCPA enforcement actions against institutions of higher education.[33] Nevertheless, recent enforcement trends in other industries, particularly the healthcare industry, highlight potential FCPA risks that may be present in similar business relationships in higher education. The following sections provide an overview of some particular FCPA risks that institutions of higher education should be mindful of when conducting business in the United States and abroad. Of course, FCPA risks may manifest in a wide-variety of ways, and this overview of risk is not intended to be exhaustive.

A. Foreign Academics as Foreign Officials

In order to properly control and mitigate potential FCPA risk, it is important for institutions to identify areas of interaction with foreign officials. Given the broad definition of foreign officials under the FCPA, many institutions of higher education likely interact with foreign officials on a daily basis. Contact with foreign officials may include common or routine collaborations between faculty and staff and their counterparts at foreign state-controlled institutions.

In many foreign countries, institutions of higher education are commonly owned or controlled by the government, such that the institution qualifies as an "instrumentality" of the government, and the employees of the institution are considered "foreign officials." Therefore, professors and administrators at foreign state-controlled educational institutions could be deemed to be foreign officials under the FCPA. This is analogous to the healthcare industry, where numerous companies have been prosecuted for FCPA violations involving doctors and/or administrative staff at foreign hospitals that are owned or controlled by the government. For example, in 2012 the SEC charged Smith and Nephew PLC with FCPA violations related to illicit payments made to doctors in public hospitals in Greece.[34] Also in 2012, the DOJ entered into a deferred prosecution agreement with Pfizer HCP Corp. related to, among other things, alleged bribes paid to foreign hospital administrators, hospital purchasing committees, and other healthcare professionals.[35] In addition, the foregoing examples suggest that institutions of higher education with owned or affiliated health care entities should be particularly cognizant of the FCPA risks of interactions with foreign government-controlled healthcare systems.

B. International Collaborations

Institutions of higher education should also be mindful of potential FCPA risks related to international collaborations, such as foreign campuses, study abroad programs, joint-degree programs, and research outside the 0 1 482.5 136.7 Tm0 Tf1 0 0 1 4Tm0 gm0 g0 G[(-)] TJETQq0.00000912 0

with foreign officials. In such cases, universities should scrutinize payments made to these foreign officials, which may be challenging in countries where it may be common to make payments to officials that could violate the FCPA. As mentioned above, the FCPA broadly covers "anything of value" offered to foreign officials and is not limited to monetary payments. Institutions should also be wary of any other favorable treatment or benefits that may be offered to foreign officials, such as preferential consideration for the admission of relatives into academic programs.

C. Third-Party Intermediaries

Many organizations doing business in foreign countries retain a local consultant with knowledge of local rules and customs. While such consultants may provide entirely legitimate services, colleges and universities should be aware of the risks related to third-party intermediaries. The FCPA specifically prohibits payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to a foreign official.[36] Simply put, outsourcing improper payments to a third-party will not insulate an organization from liability under the FCPA. Moreover, an institution may be liable for the acts of third-party intermediaries if it knows or should have known that improper payments were likely to be made, even if the institution does not have actual knowledge of the actions of the third party.[37] Thus, even where an institution does not have actual knowledge of an act of bribery, the institution can still be liable for bribery committed by a third-party intermediary if the institution was aware of the high probability that such circumstances exist.[38] In Section 3 below, we will discuss ways to address the risks posed by third-party intermediaries.

D. International Commerce

In an increasingly globalized world, many institutions of higher education, particularly those with foreign campuses and research sites, may routinely ship various goods back and forth to foreign countries. Even routine aspects of international commerce and shipping may present FCPA risks. The transit of goods between countries and the clearing of goods through customs often involves interactions with government officials through the use of third-party intermediaries. As such, it is a common focus of FCPA enforcement actions.

E. Gifts, Meals, Entertainment, and Travel

A violation of the anti-bribery provisions requires that there be an offer or payment of "anything of value" to a foreign official, which may include non-cash items or benefits such as gifts, meals, entertainment, travel, and other things of value. The FCPA does not prohibit the giving of gifts, meals entertainment, or travel, except to the extent that such items are intended to corruptly influence a foreign official.[39] The DOJ and SEC have acknowledged that small items given as a token of gratitude or respect may be an appropriate gift.[40] The DOJ and SEC have also acknowledged that items of nominal value (e.g., reasonable meals and entertainment expenses, gifts of company promotional items, cab fare, etc.) are unlikely to result in FCPA prosecutions because such gifts likely will not actually improperly influence a foreign official.[41] Nonetheless, a series of small gifts provided with corrupt intent can still constitute a violation. Larger and more extravagant gifts are more difficult to justify and support an assumption that the purpose of the gift is to corruptly influence the foreign official in order to obtain an improper advantage.[42] FCPA enforcement actions have included both single instances of an extravagant gift[43] as well as systemic patterns of small gifts.[44]

III. University FCPA Compliance Programs

In 2012, DOJ and SEC jointly issued an FCPA resource guide (the "Guide").[45] The Guide sets forth nine factors that DOJ and SEC consider when deciding whether to charge a company, and one key factor is the effectiveness of the company's pre-existing compliance program.[46] When discussing compliance programs in the Guide, DOJ and SEC noted, "When it comes to compliance, there is no one

a government commission. The commission service may be sufficient to make this person a foreign official under the FCPA and, therefore, the university has just entered into a direct business relationship with a foreign official that should be carefully monitored.

It is important not to focus only on contracts, as many FCPA violations arise outside contract negotiations. For example, Wal-Mart allegedly paid bribes in India and Mexico to speed up licensing and obtain permits for Wal-Mart's new stores.[58] Colleges and universities are similarly exposed to risk when applying for licenses, visas, and other governmental approvals (e.g., use permits, export licenses). A risk assessment should focus not only on the institution's activities abroad but also interactions in the United States as described above.

Moreover, the review should not be restricted to academic departments. Administrative departments, such as human resources, may also interact with foreign officials. For example, a foreign official may suggest (perhaps through a subordinate) that the foreign official would look favorably upon a university if the university were to hire her son for a job. Favorable treatment in hiring could give rise to an FCPA violation as it could be perceived as giving something of value to a foreign official. In a recent case, BNY Mellon agreed to pay nearly $15 million to settle allegations that it violated the FCPA when it provided student internships to family members of foreign officials.[59] Similarly, in November 2016, JP Morgan agreed to pay $264 million to settle an FCPA investigation involving allegations that it made preferential hiring decisions regarding friends and family of senior Chinese leaders in order to gain influence in China.[60] Colleges and universities may consider specialized training for HR departments/specialists on how to handle such hiring requests. Specifically, they should be trained to elevate such requests to the relevant administrator for anti-corruption compliance review.

Admissions is another high-risk area as many relatives of foreign officials attend U.S. colleges and universities. Favorable treatment in admissions could also give rise to an FCPA violation, as noted above. As with the hiring issue described above, institutions should provide specialized training to admissions personnel on how to handle requests regarding foreign officials' relatives and friends. Specifically, these personnel should be trained to elevate such requests to the relevant administrator for anti-corruption compliance review. Often times these requests come to departments other than admissions and, therefore, institutions may consider including this information in the standard University-wide training.

C. Training and Continuing Advice

Colleges and universities should incorporate anti-corruption principles into their training programs, focusing on those individuals or departments most likely to be subject to potential FCPA risks. The goal of the training should be to raise general awareness of what anti-corruption laws prohibit, how these laws apply in the higher education context, the consequences of non-compliance, tips for identifying red flags (described in Section III(e) below), relevant internal policies including anti-retaliation policies, and how to internally report a potential violation or seek further advice.

Institutions should consider whether any non-employees should be included in the training, particularly those with whom an agency relationship could be interpreted. From a resource perspective, it is likely not possible to include all foreign partners or agents, but institutions should try to include high-risk non-employees in trainings, or contractually require the third party to conduct its own training.

D. Incentives and Disciplinary Measures

Any effective compliance program must have incentives to encourage ethical conduct and appropriate disciplinary procedures to address violations. Keep in mind, however, that the disciplinary process for staff or faculty who are hired in foreign countries and based in these countries full-time may need to be different due to local laws that may limit or affect disciplinary options. Therefore, be sure to consult with local counsel before taking any disciplinary actions against foreign-hired employees.

E. Third-Party Due Diligence and Payments

An effective FCPA compliance program must consider the risks raised through association with third parties. In a majority of the FCPA cases, U.S. and foreign companies have been held liable for the actions of third parties, not of their own employees. Colleges and universities therefore need an effective due diligence process for assessing third parties such as representatives, agents, consultants, or other intermediaries. This third-party due diligence process will be considered by DOJ and SEC when evaluating the effectiveness of the compliance program.

An effective third-party due diligence process should be carefully tailored to address the risks. For example, the due diligence conducted on a foreign agent working in Canada for the institution for over a decade necessarily will be different than that exhibited toward a new consultant in a high-risk country who will be paid a high fee to assist in a research project that is government-funded. In terms of tailoring the process, the Guide states that the "degree of scrutiny should increase as red flags surface."[61] The existence of a red flag by itself does not necessarily mean that the transaction violates the FCPA. Rather, the presence of red flags in a transaction should serve as a trigger for additional diligence.

Examples of red flags associated with third parties are listed below:[62]

- Was recommended by a foreign official;
- Has a close relationship with a foreign official;
- There is an apparent lack of qualifications or resources to perform the task;

continuously monitored.[66] Addressing red flags at the onset of the relationship is an important but insufficient step. For example, although the payment terms in the agreement may seem reasonable, the relationship should be monitored to ensure the third party is actually performing the work for which it is being paid. This may seem like an obvious concept but is often overlooked. The institution's employees who work directly with the third party must be instructed to continue to look out for red flags and raise concerns promptly with the appropriate administrator.

In addition, DOJ and SEC will consider whether institutions tried to mitigate third-party risk by incorporating representations in the agreement that the third party will comply with all relevant anti-corruption laws. Merely stating that the third party will comply with relevant laws is not sufficient; anti-corruption laws should be explicitly included. High-risk relationships may require more detailed contract provisions such as requiring periodic certifications of compliance; opinions of U.S. and foreign counsel that the actions contemplated under the agreement do not violate the FCPA and/or local law; termination and claw-back provisions; and anti-corruption training requirements. Institutions also should consider securing audit rights to the third party's books and records; however, such a contract provision can be a double-edged sword. On the one hand, if the institution suspects an anti-corruption issue, it is important to have the right to audit; but on the other hand, if the institution has the right to audit the third party and fails to invoke this right during the course of the contract, this omission could be used against the institution in the following way: if the third party does violate an anti-corruption law and the violation could have been detected by the institution in an audit, the SEC and DOJ could determine that the institution is liable for the violation even when the institution had no actual knowledge. Therefore, institutions may want to consider securing audit rights only for the highest-risk relationships so that the institution has adequate resources to actually conduct these audits. [67]

F. Confidential Reporting and Internal Investigation

Most colleges and universities have a confidential internal reporting system such as an anonymous hotline or an ombudsman whose existence is widely advertised to the campus community. For institutions with foreign campuses or offices with locally-hired faculty or staff, such reporting systems should have sufficient translation resources, often through an outside vendor. Note that some countries, such as France, have restrictions on confidential reporting by employees.[68] Other countries may have restrictions on how a company can investigate allegations. Be sure to consult with local counsel on any restrictions on reporting or internal investigations when setting up a foreign office and hiring local nationals.

Finally, the Guide recommends that institutions have a procedure for investigating allegations promptly and ensuring that the investigation and outcome, including any disciplinary actions, are thoroughly documented. Again, this requirement is standard for any institutional compliance program. However, institutions should understand that anti-corruption investigations usually are more difficult for many reasons, including that the investigation may cross borders and involve foreign third party agents or partners over whom the institution has less control.

G. Continuous Improvement: Periodic Testing and Review

Institutions should continuously review and update their FCPA compliance programs. As noted in the Guide, "[A] good compliance program should constantly evolve."

section of departments to test the culture of compliance, evaluate new risk areas, and address deficiencies uncovered in investigations or audits.

H. Additional FCPA Compliance Considerations

Although FCPA accounting provisions apply only to issuers, an institution of higher education will be unable to effectively prevent and detect FCPA violations (and other financial improprieties for that matter) if it does not have strong financial controls (e.g., effective reimbursement and petty cash policies and procedures).

Institutions should consider how high-risk transactions can be identified in the financial systems and routed to the proper administrators for review and approval before the transaction can proceed. All high-risk transactions should be thoroughly documented (e.g., detailed invoices and receipts) to show that the transaction was bona fide and not inappropriate in any way.

IV. Other Anti-Corruption Laws

A full review of anti-corruption laws around the world would require several NACUANOTES. Therefore, this NACUANOTE will focus on foreign anti-corruption regimes in two countries: the UK and China. Hopefully, the brief summary of the relevant UK and PRC laws will adequately demonstrate the importance of reviewing local anti-corruption laws whenever conducting activities abroad and consulting with local counsel as needed, as local laws may differ in significant ways.

Institutions with activities in the PRC or UK should be mindful of the broader scope of these anti-corruption laws and adjust their internal controls accordingly. At a minimum, institutions entering into agreements covering activities in either country should ensure that these agreements have anti-corruption provisions that cover not only bribes to foreign officials but also commercial bribery.

A. UK Bribery Act

The UK Bribery Act of 2010 (the "Bribery Act") is among the strictest bribery laws in the world. The Bribery Act adopts an expansive view of jurisdiction and applies to any conduct within the UK or outside the UK by persons or entities with a "close connection" with the UK.[70] In short, US academic institutions registered to do business in the UK, or who have a UK charity that they provide services through, may be prosecuted under the Bribery Act for violations even if the underlying activities occurred in a third country such as India.

While similar to the FCPA, the Bribery Act differs in several key ways. First, the Bribery Act prohibits bribery of foreign officials as well bribery of private persons (i.e., commercial bribery). Second, the Bribery Act punishes both the giver as well as the recipient of the bribe.[71] Third, the Bribery Act does not require evidence of a corrupt intent for bribes given to foreign officials, although it does require intent for bribes given to private persons. Fourth, as mentioned above, the Bribery Act has no facilitating payments exception and no affirmative defense for promotional expenses.

B. Anti-Corruption Laws in China

China has recently strengthened its anti-corruption laws and ramped up anti-corruption enforcement. Among China's new anti-corruption enforcement initiatives is a new mobile phone application to allow whistleblowers to more easily send in tips about corruption.[72] The

Chinese government has also engaged in a highly-publicized global fox hunt to track down corrupt Chinese officials and their relatives who have fled overseas.[73] China's ramped up anti-corruption efforts may in turn lead to more FCPA enforcement, as China's actions may tip off U.S. authorities to potential FCPA issues. The Chinese government also has shown a willingness to prosecute foreigners, most notably in the GlaxoSmithKline case.[74]

The primary anti-corruption laws in China are the Anti-Unfair Competition Law of the PRC and the Criminal Law of the PRC. Like the Bribery Act, these laws address both commercial bribery and bribery of foreign officials, and punish both the giver and the recipient of the bribe.

CONCLUSION:

Due to expanding federal enforcement and increased globalization, compliance with the FCPA and other anti-corruption laws is a critical, although sometimes overlooked, compliance area for many institutions of higher education. The high costs of defending an FCPA investigation, even if ultimately successful, illustrate the importance of avoiding even the appearance of impropriety in relationships with foreign officials. Colleges and universities should be mindful of potential interactions with foreign officials and adopt compliance training as well as appropriate internal controls to review transactions and other business relationships for FCPA concerns.

END NOTES:

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[25] *Id*.

[26] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 25.

[27] *Id*. at 26.

[28] *See* Bribery Act 2010, c.23 (UK),

[60] Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), https://www.sec.gov/news/pressrelease/2016-241.html .

[61] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 60.

[62] For additional red flags, see *id.* at 22-23.

[63] *Id.* at 60.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] It may be diffi

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