NACUA NOTES
National Association of College and University Attorneys May 18, 2017 | Vol. 15 No. 9

TOPIC:

FOREIGN CORRUPT PRACTICES ACT

AUTHORS[1]:

Alyssa Greenwald, Associate General Counsel, Yale University
Daniel Munsch, Assistant General Counsel, Carnegie Mellon University

INTRODUCTION:

Over the last decade there has been a significant increase in the number of prosecutions and the size of penalties and settlements under the Foreign Corrupt Practices Act ("FCPA").[2] During this time, many institutions of higher education have expanded their international activities, thereby increasing exposure to potential FCPA investigations and violations.

Creating and implementing effective FCPA compliance programs can present a challenge for institutions of higher education because enforcement of the FCPA, and related guidance on FCPA compliance, has historically focused on for-profit multinational companies. Furthermore, the FCPA's focus on obtaining improper business advantages can sometimes be difficult to translate to an academic environment. Nonetheless, in an increasingly globalized world, the daily activities of a university, both on campus and abroad, can implicate the FCPA (and other foreign anti-corruption laws) often in unexpected ways. This NACUANOTE briefly summarizes the regulatory landscape of the FCPA, identifies potential areas of risks for institutions of higher education, and discusses key considerations and best practices for university compliance programs.

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 institutions of higher education that do not qualify as "issuers."

Enforcement authority for the anti-bribery and accounting provisions of the FCPA is shared between the SEC and the U.S. Department of Justice ("DOJ"). The SEC is responsible for civil enforcement of the FCPA over issuers of securities. The DOJ has criminal FCPA enforcement authority over issuers, domestic concerns, and others in the territorial jurisdiction of the U.S. Within the DOJ, the Fraud Section of the Criminal Division has primary responsibility for FCPA enforcement.

Corporations and other business entities may be subject to fines of up to $2 million and individuals may be subject to fines of up to $250,000 and imprisonment for up to five years for each violation of the anti-bribery provisions.[4] For violations of the accounting provisions, corporations may be fined up to $25 million and individuals may be fined up to $5 million and imprisoned for up to 20 years.[5] In addition, an FCPA conviction or settlement may result in disgorgement of any ill-gotten profits, debarment from federal awards, and/or loss of export licenses. DOJ and SEC also have authority to pursue civil claims under the FCPA with civil fines of up to $20,111 per violation.[6] The costs of investigating and defending FCPA claims can also be extremely expensive, sometimes far exceeding the amount of the final sanctions or settlements.[7]

A. The Anti-Bribery Provisions

In general, the anti-bribery provisions prohibit offers or payments of anything of value to foreign officials in order to assist in obtaining or retaining business. The anti-bribery provisions apply broadly to three categories of persons and entities: "domestic concerns,"[8] "issuers,"[9] and other persons acting within the territorial jurisdiction of the United States.[10] All institutions of higher education operating in the U.S. are subject to the anti-bribery provisions of the FCPA under one of these three categories. Most colleges and universities in the United States are considered "domestic concerns," although some for-profit institutions of higher education that issue stock may be covered as "issuers." Other institutions of higher education, including foreign institutions, may be covered by the FCPA if the institution operates in the territorial jurisdiction of the U.S. or makes use of an instrumentality of interstate commerce.

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]

2. Affirmative Defenses

The FCPA includes two affirmative defenses to violations of the anti-bribery provisions: (1) the local law defense and (2) reasonable and bona fide promotional expenses.

The first affirmative defense is that the allegedly improper payment was "lawful under the written laws and regulations" of the country at the time of the offense.[21] It is not sufficient that local laws are silent regarding bribery or that violations of local bribery laws are not prosecuted. In practice, the local law defense is extremely rare as few, if any, countries have written laws that specifically authorize improper payments to their officials.

The second affirmative defense allows companies to provide reasonable and bona fide travel and lodging expenses to a foreign official that are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency.[22] In relying on this affirmative defense, however, care should be taken to ensure that the expenses do not encompass activities that are not directly related to the promotion of products or services or the performance of a contract. For example, paying the travel expenses of a foreign official to inspect a campus laboratory in connection with a research contract would likely be covered by this defense. But luxurious side trips primarily for the purpose of entertainment, tourism, shopping, etc. would not fall under this defense.[23] Similarly, even where there is a legitimate basis to pay the travel expenses of a foreign official, paying the travel expenses for the official's spouse and children generally is not covered by this defense.

The FCPA also contains a narrow exception for "facilitating . . . payments."[24] This exception allows for payments to foreign officials when the purpose is to expedite or secure the performance of a routine, non-discretionary government action.[25] In addition to the "non-discretionary" action limitation, this exception is generally limited to payments of small denominations.[26] Examples of facilitating payments include obtaining copies of documents, expediting the processing of governmental papers, obtaining police protection, delivering the mail, and providing utility service.[27] It is important to note that other foreign anti-bribery laws, such as the United Kingdom Bribery Act of 2010,[28] do not contain an exception for facilitating payments. Furthermore, most countries do not legally permit their officials to accept corrupt payments of any kind. Thus, even if not prohibited by the FCPA, such payments may still run afoul of anti-bribery laws in the local jurisdiction, as well as other jurisdictions with expansive anti-bribery laws, such as the United Kingdom. Some notable foreign anti-bribery laws are discussed in greater detail in Section IV of this Note.

B. The Accounting Provisions

Unlike the anti-bribery provisions, the accounting provisions of the FCPA only apply to "issuers" of securities under the Securities and Exchange Act. Since most institutions of higher education are not "issuers" of securities, they are not covered by the accounting provisions of the FCPA and this Note does not discuss these regulations in detail. Nonetheless, it is important for institutions of higher education to adopt sound accounting principles and internal financial controls in order to comply with various other laws and to satisfy the expectations of external accountants and auditors. Many requirements of the FCPA accounting provisions are similar to generally accepted accounting principles (GAAP) and other best practices for financial controls. As discussed below, financial controls are critical to an effective FCPA compliance program by helping institutions prevent, identify, and defend potential violations of the anti-bribery provisions of the FCPA.

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 United States. Most foreign collaborations and overseas business operations require some interaction with foreign officials. In addition to foreign academics, discussed above, international collaborations may require licenses, contracts, immigration visas, and various other governmental approvals that bring universities in contact

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-size-fits-all program . . . . Compliance programs that employ a 'check-the-box' approach may be inefficient and more importantly ineffective."[47] While the Guide emphasizes the importance of customizing compliance programs to a company's individual risks, DOJ and SEC elaborated on the criteria they generally consider when evaluating compliance programs (the "Hallmarks of Effective Compliance Programs" or "Hallmarks").[48]

This section provides an overview of these "Hallmarks" tailored to institutions of higher education. Some of these Hallmarks may seem ill-fitted to colleges and universities, while other Hallmarks are generic standards that one would expect to find in any institutional compliance program. Nevertheless, this Section will briefly touch on all of DOJ's and SEC's Hallmarks so as to provide a complete picture of what these enforcement authorities evaluate.

Finally, while this Section's focus is on building an FPCA/anti-corruption program, many colleges and universities may be able to integrate their anti-corruption compliance efforts into existing university compliance programs for activities such as trade sanctions and export controls. Several FCPA enforcement cases have involved violations of both the FCPA and export control/sanction laws.[49] Many institutions already use transactional screening programs to identify sanctioned persons or entities, and these programs often also contain mechanisms to identify parties that present a high corruption risk.

A. Culture of Compliance; Code of Conduct and Compliance Policies and Procedures; Oversight, Autonomy, and Resources

The first three "Hallmarks" or aspects of compliance programs that DOJ and SEC assess are: 1) culture of compliance; 2) code of conduct and compliance policies and procedures; and 3) oversight, autonomy, and resources.

There is perhaps no more important part of any compliance program than establishing a "culture of compliance." In a recent memorandum, DOJ listed "culture of compliance" as the first criteria it considers when evaluating an FCPA compliance program, which it defined in part as "an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated."[50]

To address this element, it is important that anti-corruption principles be explicitly included in colleges' and universities' ethics and compliance messaging, as faculty and staff at these institutions tend to be less familiar with the requirements than employees at for-profit companies where FCPA training has been the norm for many years. As DOJ recently noted, general awareness about ethical and compliant conduct is not enough; senior leaders must create awareness among all faculty and staff that corruption, specifically, will not be tolerated.[51]

Related to building a culture of compliance, the second Hallmark DOJ and SEC consider is an institution's code of conduct and compliance policies and procedures. As the Guide notes, "A company's code of conduct is often the foundation upon which an effective compliance program is built."[52] The code should be clear, concise, easily accessible, and kept up to date.

In addition to a general code of conduct, institutions must make sure that their policies and procedures specifically address compliance with anti-corruption laws. At a minimum, such policies and procedures should address gifts, travel, meals, political contributions, charitable donations, and entertainment expenses for non-employees, including but not limited to foreign officials. These policies and procedures should articulate whether any of the foregoing expenditures are allowable and under what conditions; set clear financial limits; identify when prior approval is necessary; describe the approval process, including documentation requirements; and describe disciplinary consequences for violations.

Some institutions may develop a specific policy on anti-corruption compliance while others may integrate these requirements into existing gift or travel policies.[53] Institutions that have foreign campuses or offices with locally-hired faculty or staff should translate the code of conduct and anti-corruption policies and procedures into local languages and consult with local counsel as to whether the code and/or the policies and procedures need to be adapted to meet any local law requirements.

Finally, the third Hallmark is "Oversight, Autonomy, and Resources." As the Guide describes, when evaluating a compliance program, DOJ and SEC will consider whether the institution has devoted "adequate staffing and resources to the compliance program given the size, structure, and risk profile."[54] Certainly, this Hallmark is not unique to anti-corruption compliance, as any good compliance program requires sufficient oversight, autonomy and resources. However, for institutions that do not have a university-wide compliance office, it may be less clear where anti-corruption compliance responsibility should be housed. Considering the close nexus between anti-corruption and export controls/trade sanctions compliance programs, one recommendation is for the same individual to have responsibility for both.

B. Risk Assessment

As DOJ and SEC explained in the Guide, "Assessment of risk is fundamental to developing a strong compliance program."[55] An institution's risk assessment will vary depending on the countries in which it is conducting activities, since some countries generally have a higher risk of corruption than others. For example, China is a high-risk location. In the first few months of 2016 alone, 50% of the FCPA settlements alleged improper activity in China.[56] Therefore, institutions must first identify the countries in which they are conducting activities and evaluate whether these countries are high-risk. Fortunately, Transparency International publishes an annual ranking of country corruption known as the Corruptions Perceptions Index (CPI), which can help institutions identify whether they are operating in high-risk countries.[57]

Next, institutions should evaluate the nature and frequency of interactions with foreign officials, keeping in mind the broad definition of foreign official discussed above in Section I(a)(i). For example, institutions may overlook that they are interacting with foreign officials in research collaborations or exchange programs because they fail to remember that faculty and staff of foreign stated-owned institutions may be considered foreign officials under the FCPA. Generally, these interactions are low-risk but could become higher risk depending on the country. Other institutions may be engaging in higher risk activities such as entering into fee for service agreements directly with foreign ministries of education or health or hiring foreign officials as consultants. Many of DOJ's FCPA investigations have involved companies bidding on government contracts and, therefore, institutions of higher education need to be alert when receiving direct foreign government contracts. And while it may be unusual or impossible, depending on local laws, for an institution to hire a foreign elected official as a consultant, a university may hire a full-time faculty member at a private foreign university who also serves on

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;
- Has a reputation for unethical or suspicious business practices;
- There is evidence of past violations of local law or policy;
- Demands unusually high commissions or fees;
- Requests false invoices or other documentation;
- Demands payment in cash;
- Politically active;
- Provides incomplete or inaccurate information;
- Unwilling to enter into a written agreement;
- Refuses to certify compliance with anti-corruption laws;
- Fails to create transparency in expenses and records.

Although the Guide endorses this risk-tailored approach, the Guide also sets forth three key principles that should "always apply."[63] The first principle is that institutions should understand the qualifications and relationships of the third party.[64] Does the third party, for example, have close ties with foreign officials? Second, institutions should evaluate whether there is an adequate business rationale for engaging the third party and should ensure that the agreement with the third party specifically describes the services to be provided and appropriate payment terms for this type of service.[65] Finally, third-party relationships should be

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."[69] Institutions should regularly review training programs, test internal controls with targeted audits, meet with a cross-

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:

[1] Alyssa B. Greenwald is an Associate General Counsel at Yale University. Her work focuses primarily in the practice areas of Corporate Governance, International & Immigration Law, Health Law, Research, and General Contracts. Prior to Yale, Ms. Greenwald conducted internal investigations and advised clients in Foreign Corrupt Practice Act Matters, including voluntary disclosures to the U.S. Department of Justice and the U.S. Securities and Exchange Commission.

Daniel J. Munsch is an Assistant General Counsel at Carnegie Mellon University. He routinely advises the university on wide variety of legal matters, with a particular focus on litigation, labor and employment, and student affairs issues.

[2] 15 U.S.C. §§ 78dd-1 *et seq*.

[3] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (Nov. 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[4] 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fines).

[5] *Id*. § 78ff(a).

[6] *Id.* §§ 78ff(c)(1)(B); 17 C.F.R. § 201.1001; *see also* U.S. SEC. & EXCH. COMM'N, INFLATION ADJUSTMENTS TO THE CIVIL MONETARY PENALTIES ADMINISTERED BY THE SECURITIES AND EXCHANGE COMMISSION (Jan. 18, 2017), https://www.sec.gov/enforce/civil-penalties-inflation-adjustments-pdf.pdf (providing adjustments for inflation).

[7] Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J., Oct. 2, 2012; *see also* Jaclyn Jaeger, *Walmart FCPA Costs Reach $675 Million*, COMPLIANCE WK., Aug. 19, 2015,

https://www.complianceweek.com/blogs/enforcement-action/walmart-fcpa-costs-reach-675-million#.V5kGb6LK4pU.

[8] Domestic Concern is defined as "any individual who is a citizen, national, or resident of the United States," or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1).

[9] Issuer is defined as a company that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or that is required to file periodic and other reports with the SEC under Section 15(d) of the Exchange Act. *See Id*. § 78dd-1.

[10] The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns who, while in the territory of the U.S., corruptly makes use of the mails or any instrumentality of commerce. *See id*. § 78dd-3.

[11] *See* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

[12] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 14–15.

[13] *Id*. at 15.

[14] The FCPA defines "foreign official as "[a]ny 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." *See* 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[15] *See United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014); *see also* U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 20.

[16] See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

[17] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 12–13.

[18] *Id.* at 14.

[19] *See* 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

[20] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 22–23; *see also United States v. Kozeny*, 667 F.3d 122 (2nd Cir. 2011) (upholding jury instructions regarding conscious avoidance).

[21] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

[22] *Id*. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

[23] Complaint, *SEC v. Lucent Techs. Inc.*, No. 07-cv-2301 (D.D.C. Dec. 21, 2007), ECF No. 1, http://www.sec.gov/litigation/complaints/2007/comp20414.pdf (alleging that travel expenses for foreign officials to tourist destinations such as New York, Hawaii and Las Vegas falsely characterized as business travel); Complaint, *SEC v. UTStatcom, Inc.*, No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), ECF No. 1, http://www.sec.gov/litigation/complaints/2009/comp21357.pdf (alleging that travel expenses of foreign officials to popular U.S. tourist destinations characterized as training expenses). *See also* hypothetical gift, travel and entertainment scenarios at U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 17–18.

[24] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

[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), http://www.legislation.gov.uk/ukpga/2010/23/contents.

[29] 15 U.S.C. § 78m(b)(2)(A), 78m(b)(2)(B).

[30] *Id*. § 78m(b)(2)(A).

[31] *Id*. § 78m(b)(2)(B).

[32] U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE Release No. 12-02 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/10/25/1202.pdf.

[33] In December 2016, Laureate Education, Inc., an operator of for-profit higher education schools, disclosed that it is investigating an $18 million charitable donation in Turkey for possible violations of the FCPA and Turkish law. *See* Richard L. Cassin, *Laureate Education Probes $18 Million Donation to Turkish Charity*, FCPA BLOG (Dec. 19, 2016, 10:08 AM), http://www.fcpablog.com/blog/2016/12/19/laureate-education-probes-18-million-donation-to-turkish-cha.html. As of this writing, neither the DOJ nor SEC have announced any FCPA enforcement against Laureate Education, Inc. Although there are no publicly known FCPA enforcement actions against institutions of higher education, the Department of Justice brought an FCPA enforcement action against Richard Novak, an individual who was operating several diploma mills that falsely purported to be institutions of higher education. *See* Plea Agreement, *United States v. Novak*, No. 05-cr-00180-LRS-3 (E.D. Wash. Mar. 20, 2006), ECF No. 150.

[34] Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Smith & Nephew PLC with Foreign Bribery (Mar. 26, 2012), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487958.

[35] Press Release, U.S. Dep't of Justice, Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 2012), https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation.

[36] 15 U.S.C. § 78dd-1(a)(3); *id*. §§ 78dd-2(a)(3), 78dd-3(a)(3).

[37] *Id*. § 78dd-1(f)(2)(B); *id*. §§ 78dd-2(h)(3)(B), 78dd-3(f)(3)(B).

[38] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 22.

[39] *Id.* at 15.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 15–16; *see also* Complaint, *SEC v. RAE Sys. Inc.*, No. 10-cv-2093 (D.D.C. Dec. 10, 2010), ECF No. 1 (fur coat, among other extravagant gifts), http://www.sec.gov/litigation/complaints/2010/comp21770.pdf; Complaint, *SEC v. Daimler AG*, No. 10-cv-473 (D.D.C. Apr. 1, 2010), ECF No. 1 (armored Mercedes Benz worth $600,000), http://sec.gov/litigation/complaints/2010/comp-pr2010-51.pdf.

[44] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 15; *see also* Complaint, *SEC v. Veraz Networks*, Inc., No. 1-cv-2849 (N.D. Cal. June 29, 2010), ECF No. 1 (involving improper gifts and entertainment to a Vietnamese telecommunications company, including flowers for the wife of the CEO).

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

[46] *Id*. at 56.

[47] *Id*. at 57.

[48] *Id*.

[49] *See, e.g*., Press Release, U.S. Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us; Press Release, U.S. Dep't of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), https://www.justice.gov/opa/pr/three-subsidiaries-weatherford-international-limited-agree-plead-guilty-fcpa-and-export; Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine, (Mar. 1, 2010), https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine; Press Release, U.S. Dep't of Justice, Virginia Physicist Sentenced to 51 Months in Prison for Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials (Apr. 7, 2009), https://www.justice.gov/opa/pr/virginia-physicist-sentenced-51-months-prison-illegally-exporting-space-launch-data-china-and;

[50] U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 7 (Apr. 2016), https://www.justice.gov/opa/file/838386/download.

[51] *Id*.

[52] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 57.

[53] Institutions may also want to consider amending their hiring and admissions policies to address foreign officials.

[54] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *supra* note 3, at 58.

[55] *Id*.

[56] For a list of DOJ and SEC settlements in 2016, see U.S. DEP'T OF JUSTICE, RELATED ENFORCEMENT ACTIONS: 2016 (Feb. 27, 2017), https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2016, and U.S. SEC. & EXCH. COMM'N, SEC ENFORCEMENT ACTIONS: FCPA CASES (Feb. 9,. 2017), https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[57] The 2015 CPI is available at TRANSPARENCY INT'L, CORRUPTIONS PERCEPTIONS INDEX 2015, http://www.transparency.org/cpi2015.

[58] Aruna Viswanatha & Devlin Barrett, *Wal-Mart Bribery Probe Finds Little Misconduct in Mexico*, WALL ST. J., Oct. 19, 2015, http://www.wsj.com/articles/wal-mart-bribery-probe-finds-little-misconduct-in-mexico-1445215737.

[59] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charge BNY with FCPA Violations (Aug. 18, 2015), https://www.sec.gov/news/pressrelease/2015-170.html; *see also* Press Release, U.S. Sec. & Exch. Comm'n, Qualcomm Hired Relatives of Chinese Officials to Obtain Business (Mar. 1, 2016), https://www.sec.gov/news/pressrelease/2016-36.html.

[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 difficult to convince a foreign third party to allow an institution's chosen auditors to audit the third party's books and records. The parties could agree instead to a neutral third party chosen by both parties. While this may seem burdensome, for high-risk relationships, this may be a better solution than foregoing audit rights completely.

[68] For a discussion of the limitations on whistleblowing and anonymous reporting in France, see Lionel de Souza, *French Data Protection Authority Broadens the Scope of Its Whistleblowing Authorization,* HL CHRONICLE OF DATA PROTECTION (Feb. 28, 2014), http://www.hoganlovells.com/en/blogs/hldataprotection/french-data-protection-authority-broadens-the-scope-of-its-whistleblowing-authorization.

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

[70] Bribery Act 2010, c. 23, § 12(2–4) (UK).

[71] Another difference between the Bribery Act and the FCPA is that the Bribery Act has a strict-liability offense of failure by a company to prevent bribery. In order words, an institution can be found to be liable even if the company has no knowledge of the underlying conduct. While violations of the FCPA are not strict liability offenses, an institution can nevertheless be held vicariously liable for the negligent acts or omissions of its employees. Under the Bribery Act, evidence of "adequate procedures" to prevent bribery is a defense to this strict liability offense. While the FCPA does not provide for such a defense, DOJ and SEC have declined to pursue charges in several cases and, on one occasion, DOJ publicly attributed the decision not to pursue charges to the company's effective compliance program. *See* Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.

[72] Adrian Wan, *China Upgrades Anti-Graft App so Whistleblowers Can Send Images of Officials Caught Red-Handed*, SOUTH CHINA MORNING POST (June 19, 2015), http://www.scmp.com/tech/apps-gaming/article/1823789/china-upgrades-anti-graft-app-so-whistleblowers-can-send-images.

[73] Tom Mitchell & Christian Shepherd, China Steps up 'Fox Hunt' Campaign, FIN. TIMES (Jan. 28, 2016), https://www.ft.com/content/f6a1c75c-c573-11e5-808f-8231cd71622e.

[74] For a discussion of the GlaxoSmithKline case, see Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, Wall St. J. (Sept. 19, 2014), http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817.

NACUANOTES Copyright Notice and Disclaimer