

White Paper: University and College Compliance With The Foreign Corrupt Practices Act in Connection With Foreign Academic Programs

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An increasing number of U.S. colleges and universities are making plans to expand their involvement in academic programs in foreign countries. In some instances, such involvement is limited to the American educational institution participating in a previously existing program offered either by a foreign institution or by another American institution. In other cases, the American college or university is more heavily involved, owning and operating its own branch campus on foreign soil.

To the extent that the American institution is responsible for the operation of the foreign academic program, it is critical that the participating college or university be aware that it is subject to at least some of the provisions of the Foreign Corrupt Practices Act (“FCPA”). As we explain below in greater detail, the participating American institution can comply with the Act by adopting a written internal Compliance Policy, and by including in its contracts with employees and vendors of the foreign program language certifying the compliance of all such persons and entities with the FCPA.

The FCPA and Its Enforcement **The FCPA**

The FCPA was enacted as a post-Watergate anti-corruption measure. The Act has two major components: an anti-bribery provision, which prohibits corrupt payments, and a record-keeping provision, which applies only to publicly traded commercial businesses (and is inapplicable to not for profit institutions of higher learning).

The FCPA’s anti-bribery provision prohibits an entity or individual from *corruptly* (i.e., intending to induce the recipient to misuse his official position) offering, making, or authorizing the payment of *anything of value* (including cash, gifts, services, charitable donations, political contributions, loans, travel expense reimbursements, sports or entertainment outings, or hiring) to *any person* (i.e., not only the official himself, but also any intermediary) *knowing* (including acting under circumstances where it should have been known) that the payment will be offered to a *foreign official* (broadly defined to include all kinds at all levels, including candidates for office,) for the purpose of *obtaining or retaining business* (including obtaining permits, licenses, construction approvals or visas, reducing custom duties or expediting custom clearances, lowering tax burdens or closing audits, or increasing quota for expatriate workers.)

Penalties

An entity that is found to have violated the FCPA’s anti-bribery provisions is subject to civil penalties of up to \$10,000 per bribery violation as well as non-monetary remedies. Individuals

may be *personally* liable for criminal fines of up to \$100,000, imprisonment for up to five (5) years, or both. Individuals may also be subject to civil penalties of up to \$10,000 per violation. Significantly, U.S. law enforcement authorities may prove such personal liability without showing the principal had actual knowledge of the bribery activity; rather, such individuals are typically charged as “control persons” under Section 20(a) of the Securities Exchange act of 1934, which imposes liability on executives with supervisory authority over those subordinates who violate the law. The FCPA also provides for criminal sanctions.

Enforcement

Enforcement of the FCPA has increased radically with respect to the activities of U.S.- based entities in all geographic regions. From 2005 to 2010, enforcement actions increased almost ten-fold.

This escalation in enforcement is most prevalent in rapidly emerging markets, particularly those with a history and culture of commercial and political corruption. In recent years, U.S. entities with operations in China, Russia, India and Brazil have been targets for FCPA enforcement efforts.

Effective Compliance Program

In most respects, the exposure of a not-for-profit institution of higher education under the FCPA is less than that of most U.S.-based entities with operations overseas. Such institutions are entirely exempt from the FCPA’s accounting and reporting obligations, which apply only to commercial entities. Even as to the FCPA’s anti-bribery provisions, a not-for-profit educational institution’s responsibilities are limited in that the institution will presumably have no interaction with foreign government officials concerning the activities that most commonly cause FCPA problems for American businesses, such as the importing and exporting of goods.

With respect to the anti-bribery provisions, however, the American college or university may have significant FCPA exposure. Depending on the particular circumstances of the foreign program and the involvement of the American institution, the employees of the college or university could encounter local officials in a variety of situations, such as immigration, licensing, obtaining building permits, constructing facilities, maintaining premises in accordance with local laws, obtaining and maintaining work visas, maintaining safety and health regulations, and through routine law enforcement. Thus, there may be occasions when college or university employees make payments to or through such foreign officials. Whenever money is paid to a foreign official, particular care must be taken to document the transaction, including specification of the goods or services provided, detailed invoicing, and payment to the appropriate vendor, so that the paper trail confirms that the transaction was bona fide in all respects and was not a bribe to the foreign government official for the unlawful purpose of gaining some improper advantage.

In order to operate a foreign academic program in compliance with the FCPA, the American college or university should take the following steps:

1. **Adopt a written set of standards and procedures** applicable to all administrators, employees, and outside vendors and contractors with whom the college or university does business in connection with the foreign program. The key elements in the drafting and implementation of such a policy are as follows:

- o The policy must be clear and easily comprehensible, articulating institutional policy, identifying prohibitions and requirements, and providing contact information for administrators charged with compliance. The policy should also explain how suspected violations are to be reported, and the consequences of such violations.

- o The policy should be widely distributed among employees involved in the foreign program, including making it available online.

- o In order to ensure the policy is comprehensible to employees native to the host country, it should be made available in the language of that host country.

- o The policy should provide for the appropriate and prompt internal investigation of any allegations of bribery violations.

Having a robust compliance program such as this may not insulate the American college or university from penalties under the FCPA, but the Department of Justice has historically given considerable weight to the entity's efforts at compliance in determining whether to impose penalties and the nature and severity of such penalties.

2. **Allocate compliance responsibility at a high level of authority.** Commercial enterprises generally place responsibility for FCPA compliance with their Chief Financial Officer. A college or university should place ultimate responsibility with a similarly highly placed financial officer at the main U.S. campus, and that officer should be accountable to the Board with respect to any FCPA compliance issue that might arise. On-site responsibility should be allocated to the institution's chief financial administrator at the foreign campus. It may also be advisable to establish a procedure to ensure there is regular communication between the chief compliance officer in the U.S. and the designated compliance administrator at the foreign campus to discuss FCPA compliance and determine whether any additional internal controls are necessary or appropriate.

3. **Conduct thorough due diligence on all agents and vendors.** The Department of Justice has focused its FCPA enforcement efforts on U.S.-based entities that violate the FCPA, intentionally or otherwise, by failing to screen out agents and vendors to make sure those persons and entities were not engaged in bribery. Over the history of FCPA enforcement, almost 65% of enforcement actions have arisen out of the corrupt activities of third parties acting on behalf of U.S.-based entities. Such middlemen may include local attorneys, tax advisors, accountants, consultants, lobbyists, real estate brokers, joint venture partners, contractors or subcontractors, suppliers, and immigration service providers.

The Department of Justice has identified several "red flags" that should cause a U.S.-based entity conducting overseas operations to be particularly suspicious that a vendor or agent might be engaged in bribery:

- o *Involvement by government officials, or people with close ties to such officials.*
- o *A history of corruption in the country.*
- o *A request by an agent or vendor for an unusually high payment or commission.*
- o *Invoicing with inadequate clarity, or non-standard invoicing.*
- o *Requests for payments in cash or bearer instrument.*
- o *Requests for payment to third party, or to out-of-country destination.*
- o *Agent or vendor recommended by government official.*

Beyond being mindful of such “red flags”, the institution should avail itself of readily available investigative tools – including the State Department and Commerce Department, the commercial representatives at the local U.S. Embassy, and of course the internet -- in researching the history, activities and reputation of its prospective agents and vendors.

Finally, the participating American college or university should maintain a file of its due diligence review so that it can readily demonstrate its good faith efforts in the event of a FCPA investigation.

4. Require all agents and vendors to certify FCPA compliance. The institution should require any contracts or purchase orders it enters into with foreign agents or vendors to contain assurances by the agent or vendor not only as to compliance with the FCPA and all local anti-bribery laws, but also as to appropriate methods of billing and payment and maintenance of accurate books and records.

5. Require all of the institution’s employees at the foreign campus to certify FCPA compliance.

6. In the event an internal investigation reveals an instance of a possible FCPA violation, consider self-disclosure to the U.S. law enforcement authorities. As with the compliance program, self-disclosure will not prevent the Department of Justice from commencing an enforcement action, but the Department will likely take such self-disclosure into account in determining whether to impose penalties and the nature and severity of any such penalties. The decision whether to self-disclose in a particular instance is a difficult one, and should be made in close consultation with counsel.

If the American institution’s foreign program expands substantially, then it may become appropriate to consider the following additional compliance measures:

- **Train employees who act as contacts with agents and vendors.**
- **Set up a hotline or other mechanism for the anonymous reporting of suspected bribery activity.**
- **Conduct periodic audits of agents and vendors to ensure continuing compliance with the FCPA.**

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The foregoing provides a general outline of the FCPA exposure faced by American colleges and universities arising out their operation of academic programs overseas. The precise nature and extent of such exposure will depend on the details of the program. An institution of higher education conducting foreign programs should seek legal counsel with respect to the applicability of the FCPA to its particular programs.