



world compliance

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**Navigating Through the FCPA Minefield,  
Debunking Myths, and Addressing Red Flags**

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## FOREIGN CORRUPT PRACTICES ACT

### *Contents*

Navigating Through the FCPA Minefield .....	1
FCPA's Anti-Bribery Provisions .....	3
Who is covered .....	3
Penalties .....	6
Accounting Provisions.....	6
Most Common Myths .....	8
Red Flags .....	13
General Red Flags .....	13
Transaction-Specific Red Flags for Intermediaries.....	14
Control-Based Red Flags for Intermediaries.. .....	15
Payment Requests by Intermediaries .....	15
Corporate Self-Assessment .....	16
Conclusion .....	17
Michael Volkov Profile.....	18
A World in Compliance .....	19



## **Navigating Through the FCPA Minefield, Debunking Myths, and Addressing Red Flags**

Thirty years after its enactment in 1977, the Foreign Corrupt Practices Act (FCPA)<sup>1</sup> is experiencing the most aggressive enforcement level ever by the Department of Justice (DOJ)<sup>2</sup> and the Securities Exchange Commission (SEC). A tremendous upswing in enforcement activities in the past several years has been marked by aggressive law enforcement techniques such as search warrants, undercover officers, confidential informants, wiretaps and other strategies typically reserved for investigations of violent gangs and drug trafficking organizations.

The government's FCPA enforcement strategy has resulted in large corporate fines and criminal penalties for individuals. The Obama Administration has made it clear to the business community that FCPA enforcement will be a high priority and focused on new industries – pharmaceutical and financial institutions – while additional resources are being assigned to carry out this enhanced effort.

The anti-bribery provisions prohibit a domestic concern (a U.S. person or corporate entity) from making corrupt payments or promises to pay foreign officials for the purpose of obtaining or retaining business. Definitions of certain terms, including domestic concern and foreign official, are intentionally expansive to encompass as much business activity as possible. The FCPA's accounting controls include record keeping and internal control mechanisms, which apply to corporations that either file regular reports or have securities registered with the Securities Exchange Commission (SEC). These companies must maintain accurate records to account for certain expenditures, as well as regular accounting methods to verify access and use of assets.

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1 Foreign Corrupt Practices Act of 1977, codified as amended at 15 U. S. C. §§ 78m, 78dd, and 78ff.

2 Department of Justice, Criminal Division Presidential Budget Request available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-crm-justification.pdf>.



## FCPA Enforcement Has Dramatically Increased, Resulting In Corporate Mega Fines and Increased Scrutiny of Individuals

The numbers tell the story — year after year, the numbers of enforcement actions are up. Recent enforcement actions and prosecutions have increased fivefold since 2004; in 2008, DOJ and the SEC assessed fines and penalties of approximately \$2.8 billion against 36 corporations and 64 individuals for FCPA violations. Of the 36 enforcement actions against companies, several have resulted in blockbuster corporate fines:

- **December 2008:** Siemens, AG and three subsidiaries pled guilty to alleged FCPA violations and agreed to pay **\$1.6 billion in fines** to U.S. and foreign authorities.<sup>3</sup>
- **February 2009:** Kellogg, Brown and Root pled guilty to a bribery scheme in Nigeria and agree to pay **\$402 million in criminal fines**, and **\$177 million in disgorged profits**.<sup>4</sup>
- **February 2010:** BAE Systems plc ends a ten plus year bribery ring involving Mid-East countries and agreed to pay **\$400 million in fines**.<sup>5</sup>
- **June 2010:** Technip S.A. agreed to pay a **\$240 million criminal penalty** and agreed to disgorge **\$98 million in disgorged profits**.

Additional evidence of this growing enforcement trend exists in the prosecution rates of individuals over just the past two years. In 2009, 46 individuals were prosecuted for FCPA violations, up from just 16 in 2008.

In one recent sting operation conducted over a two year period, the DOJ aggressively employed more traditional law enforcement techniques including undercover agents, wiretaps and search warrants. In January 2010, the sting operation culminated in the arrest of twenty two arms and weapons dealers in Las Vegas, Nevada. An undercover informant posed as a broker for the Minister of Defense from an African nation.<sup>6</sup> The undercover informant wore a body wire, recorded hundreds of conversations with

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3 **See:** <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

4 **See:** <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>.

5 **See:** <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

6 **See:** <http://www.mainjustice.com/2010/04/05/fcpa-sting-case-why-gabon/>; **see also** [http://www.fbi.gov/page2/jan10/fcpa\\_012610.html](http://www.fbi.gov/page2/jan10/fcpa_012610.html).



the 22 individual targets, and worked closely with an undercover FBI agent who posed as a “middle-man” needed to facilitate “commissions” payable to the Minister of Defense. According to the DOJ’s press release on the day of the arrest:

***In connection with these indictments, approximately 150 FBI agents executed 14 search warrants in locations across the country and seven search warrants were executed by City of London Police in the United Kingdom.<sup>7</sup>***

All told, the arrests and indictments stemming from the Las Vegas raid represent the single most expansive investigation and enforcement action by the DOJ. It is a foreshadowing of the enforcement to come.

### **The FCPA’s Anti-Bribery Provisions**

The Las Vegas raid provides a textbook study of the FCPA in action and enforcement of its anti-bribery provisions. The indicted individuals were part of an alleged conspiracy to pay “commissions” to the Minister of Defense in exchange for securing several arms deals. In FCPA lingo, (1) **domestic concerns** (the individuals); (2) **corruptly paid something of value** (cash commissions); (3) **to a foreign official** (Minister of Defense and his intermediary); (4) for the purpose of obtaining business (military contracts). What follows is a thorough explanation of the numbered elements.

### **Who is covered?**

The FCPA’s anti-bribery provisions apply to three types of individuals and corporate entities: (1) Issuers. An “issuer” is any company whose security is registered with the SEC or who files regular reports with the SEC,<sup>8</sup> this includes foreign companies whose securities are traded on domestic stock exchanges through the use of ADRs, and extends to subsidiaries of the issuer. (2) Domestic concerns. Domestic concerns are U.S. citizens, nationals, residents and any business or partnership whose principal place of business is in the United States.<sup>9</sup> (3) Any person other than an issuer or domestic concern include foreign nationals or businesses within the territory of the United States.<sup>10</sup>

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7 **See:** <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

8 15 U.S.C. § 78dd-1(a).

9 15 U.S.C. § 78dd-2(h)(1).

10 15 U.S.C. § 78dd-3(f)..



**“Corrupt payment” must be for purpose of obtaining or retaining business.** The payment or promise of payment made by one of the above three subjects must be made “knowingly” the payment would influence a foreign official “in order to assist . . . in obtaining or retaining business”, i.e. the “conduct”.<sup>11</sup> For purposes of the statute, “knowing” is either actual knowledge or being aware the conduct is taking place. It is enough if the person has a “firm belief” the circumstances (i.e. a corrupt payment is being made for the purpose of obtaining or retaining business) exist or the result is “substantially certain to occur.”<sup>12</sup> The “firm belief” standard has an expansive, catch-all scope.

“Willful blindness” is not sufficient to avoid FCPA liability. As set forth in the Conference Report: In clarifying the existing foreign anti-bribery standard of liability under the Act as passed in 1977, the Conferees agreed that “simple negligence” or “mere foolishness” should not be the basis for liability. However, the Conferees also agreed that the so called “head-in-the-sand” problem – variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance” – should be covered so that management officials could not take refuge from the act’s prohibition by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.<sup>13</sup> Conscious disregard or purposefully avoiding learning the truth will be sufficient knowledge. If a subject knows or has enough information available to believe circumstances exist for a violation to occur, they must act to stop the potential violation and cannot “look the other way”.

Any payment or offer to pay must be made “corruptly.” One court has defined corruptly as: [t]he offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to

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11 15 U.S.C. § 78dd-3(f).

12 15 U. S. C. § 78 dd-1(a) and (f).

13 1977 Legislative History – House Report, available at <http://10.173.2.10/criminal/fraud/fcpa/history/1988/tradeact.html>.



influence someone else to do so . . . an act is “corruptly” done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result or a lawful end or result by some unlawful method or means.<sup>14</sup>

The corrupt payment or offer to pay must be made for the purpose of “influencing,” “inducing” or securing an “improper advantage” in “obtaining or retaining business.”<sup>15</sup> The FCPA applies to more than payments of a “suitcase full of cash” to foreign government leaders to secure a government contract. The term “anything of value” has been broadly construed to include not only cash or a cash equivalent, but also, among other things, discounts; gifts; use of materials, facilities or equipment; entertainment; drinks; meals; transportation; lodging; insurance benefits; and promise of future employment. There is no minimum value associated with the “anything of value” element, and the perception of the recipient and the subjective valuation of the thing conveyed is often a key factor considered by the enforcement agencies in determining whether “anything of value” has been given to a foreign official.

For example, a vice-president of a military supplier was convicted of violating the FCPA when he paid for airline tickets for the cousin of a foreign official because, despite the cousin’s testimony that he considered the tickets to be a personal “gift,” the payment was made shortly before a contract was approved and the official had a close relationship with his cousin.<sup>16</sup> Something which might be common practice or custom in a country, such as bribes to custom officials, will also run afoul of the FCPA if the stated purpose of the bribe is to assist companies to obtain and retain business.<sup>17</sup> Thus, in *United States v. Kay*, two executives of an American rice exporter were convicted under the FCPA for payments to Haitian custom officials that the Court acknowledged were “the standard practice” and “business as usual” in Haiti.

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14 *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

15 18 U.S.C. § 78dd-1(a).

16 *Liebo, supra* at 1312.

17 See *United States v. Kay*, 513 F.3d 461, 464-466 (5th Cir. 2007), *aff’g* 359 F.3d 738 (5th Cir. 2004).



### Penalties

Wide ranging civil and criminal penalties for violations add to the potency of the FCPA. On the civil side, the DOJ can avail itself of injunctive relief if it believes an individual or domestic concern is engaged in illegal conduct.<sup>18</sup> Although corporations and their executives and employees can be subject to civil fines of up to \$2 million and up to \$100,000, respectively, civil penalties in either case cannot exceed \$10,000.<sup>19</sup> On the criminal side, executives and employees may be fined and imprisoned up to five years.<sup>20</sup>

### Accounting Provisions - Record Keeping and Internal Controls Intended To Improve Compliance

The rationale behind the record keeping and internal controls provisions is simple: require companies to keep accurate records of their business activity and institute internal controls that will identify and preclude the proscribed activity. Former federal judge Stanley Sporkin, who is often considered to be the father of the FCPA, explains the origin of the accounting provisions as follows:

“Most of all, I was amazed that there was no requirement that publicly traded corporations maintain honest books and records. My research of the various laws did reveal that such a “books and records” requirement was included in the laws governing this nation’s financial institutions. It occurred to me that if such a requirement was good enough for this nation’s brokerage and banking institutions, why not for its industrial concerns? I became convinced that what was necessary was a simple law that would require corporations to keep accurate books and records. In my view, a corporation would think twice before it recorded a bribe for what it was. Since bribery is generally considered a crime, it would be virtually untenable for someone to admit in writing that the corporation is engaging in such activities on an ongoing basis. Bribery needs secrecy in order to flourish. Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.”<sup>21</sup>

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18 See 15 U.S.C. § 78dd-2(d).

19 See 15 U.S.C. § 78dd-2(g).

20 *Id.*

21 Stanley Sporkin, *The Worldwide Banning of Schmiergeld, A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 Nw.J. Int’l Bus. 269, 274 (1998) (citations omitted).



Together the record keeping and internal controls provisions operate as one of the most effective means for enforcement by governmental agencies. In all practical respects, the accounting provisions are extensions of requirements under the 1934 Securities Act, as amended, requiring companies whose stocks are registered with the SEC or who must file regular reports with the SEC to implement appropriate record keeping and internal accounting controls.

The record keeping provisions require that books, records and accounts depicting (fairly) transactions and use of assets in “reasonable detail.” Reasonable detail means a “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”<sup>22</sup> The record keeping provision extends to majority owned (i.e. 50% or more) foreign subsidiaries.<sup>23</sup> However, an issuer that owns 50% or less of a firm and “demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).”<sup>24</sup> The FCPA’s internal control provisions closely adhere to and parallel common accounting practices. They require implementation of accounting procedures and controls to “provide reasonable assurance” that company procedure is followed, transactions are recorded, and access to and accountability of assets is controlled and regularly monitored.<sup>25</sup> Accordingly, a company that improperly records payments to foreign officials as, for example, “incidental fees” will be subject to liability for violation of the FCPA’s record keeping provisions.<sup>26</sup>

### Global Industries Are At the Greatest Risk

The most likely targets of FCPA enforcement actions are multi-national corporations who seek entry into foreign markets where the reward of globalization also poses the greatest risk. Growth of a business on an international level poses inherent compliance challenges because acquisitions, engagement of third-party agents,

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22 15 U. S. C. § 78m (b) (7).

23 **See: SEC v. Int’l Business Machs. Corp.**, SEC Litig. Release No. 16, 839 (12/21/00).

24 15 U. S. C. § 78m (b) (6).

25 **See:** 15 U. S. C. § 78m (b) (2).

26 **United States v. O’Hara**, 960 F.2d 11 (2d Cir. 1992); see also Liebo, 923 F.2d at 1312 (indicating that the defendant’s classification of airline tickets purchased for a foreign official’s cousin as a “commission payment” was evidence of a violation of the FCPA).



and intrusive foreign government oversight and regulations may not be thoroughly known or due diligence incomplete. Businesses are strictly liable for crimes committed by their employees under the legal doctrine of respondeat superior.

Certain industries are naturally at greater risk because their businesses are naturally drawn to less developed regions of the world where potential growth is unlimited. It is these same less developed regions where bribery of government officials is the norm. Between 2002 through 2008, telecommunications, energy, industrial/technology companies, health care and financial services accounted for the vast majority of settlements and penalties.<sup>27</sup> Certain industries, such as energy, telecommunications and medical devices, are a regular target because these businesses often must work hand in hand with government regulatory divisions. The financial services industry is another at-risk business segment because it commonly interacts with foreign governments on a variety of levels ranging from providing financial services to setting up new businesses. The area of global expansion and acquisition of new businesses poses the greatest amount of risk for multi-national corporations.

### **MOST COMMON FCPA MYTHS**

#### **The FCPA doesn't apply to conduct that takes place entirely outside of the United States without U.S. parent company involvement**

**False** — The harsh reality is that turning a “blind eye” to business operations in the far corners of the globe is a sure-fire way to invite FCPA non-compliance and regulatory scrutiny.

The 1998 amendments to the FCPA expanded the jurisdictional reach of the statute to include an alternative nationality test. Whereas, prior to the amendments, “use of the mails or any means of instrumentality of interstate commerce in furtherance of” an improper payment was needed for the FCPA to apply, under the alternative nationality test, the FCPA applies to improper payments made by U.S. companies

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27 PriceWaterhouse Coopers, *Corruption Crackdown*, July 2009 at 15.



and citizens that take place wholly outside of the United States without regard to whether “the mails or any of other means of instrumentality of interstate commerce” were used in furtherance of the improper payment.

Thus, proof of a U.S. territorial nexus is not required for the FCPA to be implicated and FCPA violations can, and often do, occur even if the prohibited activity takes places entirely outside of the United States.

Indeed, many recent FCPA enforcement actions concern business activity by U.S. companies that occur in foreign countries without the knowledge or involvement of any U.S.-based employee.

#### **The FCPA applies only to public companies – not private companies**

**False** — While it is true that the FCPA’s books and records and internal control provisions apply only to “issuers” (companies with securities traded on a U.S. stock exchange or otherwise required to file periodic reports with the SEC) the FCPA’s anti-bribery provisions apply to issuers as well as “domestic concerns,” a term which includes “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship” with a principal place of business in the United States or organized under U.S. law. Thus, the international business activity of private U.S. companies falls under the FCPA as well and several recent FCPA enforcement actions concern foreign business activities by private U.S. companies.

#### **FCPA compliance risks are present only in emerging third-world markets**

**False** — A common FCPA myth is that only companies operating in “third world” markets need to be concerned about FCPA compliance. While it is true that “third-world” countries fare the worst on Transparency International’s Corruption Perception Index (“CPI”) (a ranking of countries in terms of the degree to which corruption is perceived to exist among its public officials and politicians), FCPA non-compliance can just as easily occur in more mature and transparent markets. Indeed, a substantial number of recent FCPA enforcement actions have concerned business activity in China, a country which can no longer be relegated to “third-world” status given its fast-growing and maturing economy.



### **The FCPA applies only when doing business with foreign government customers**

**False** — This myth concerns the “obtain or retain business” element of an FCPA anti-bribery violation and the wide misunderstanding among business leaders that the FCPA applies only to improper payments to secure foreign government contracts or business. Left unchecked, this misperception can result in a host of FCPA compliance issues. In *United States v. Kay*, 359 F.3d 738, 743-56 (5th Cir. 2004) the court held that making improper payments to a foreign official to lower corporate taxes and custom duties could satisfy the “obtain or retain business” element of an FCPA anti-bribery violation by providing an unfair advantage to the payer over competitors. The court concluded that there was “little difference” between this type of improper payment and an improper payment to a foreign official to award a government contract.

Since the Kay decision, there have been several FCPA enforcement matters where the improper payment to a foreign official was not alleged to have influenced any government contract or business, but rather to have provided the company an improper advantage (in the general sense) compared to competitors doing business in the foreign country.

### **The FCPA applies only to interaction with foreign government officials**

**False** — This myth concerns the foreign official element of an FCPA anti-bribery violation. The FCPA defines the term foreign official to include “any officer or employee of a foreign government or any department, agency, or instrumentality thereof [...] or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality...”

Generally, a foreign national can be classified as a foreign official under the FCPA in one of two ways. First, an employee of a foreign company can be deemed a foreign official directly in his or her own right by virtue of a parallel position or appointment he or she may have with a government entity. Second, and much more a risk for the unwary, an employee of a foreign company can be deemed a foreign official under the FCPA when his or her employer is an “instrumentality” of a foreign government (a term not defined in the FCPA or delineated in the FCPA’s legislative history). Once a foreign company is deemed an “instrumentality” of a foreign government, every single employee, from the lowest ranking employee to the chairman of the board, will be considered a foreign official for purposes of the FCPA.



Recent FCPA enforcement actions demonstrate that the enforcement agencies consider employees of state-owned or state-controlled entities (“SOEs”) to be “foreign officials” under the FCPA’s anti-bribery provisions. In this regard, China has emerged as a high-risk FCPA country because of the prevalence of SOEs in that country.

Given the broad interpretation of the “Foreign Official” element by the enforcement agencies, it is imperative that business leaders “know their customer” in every foreign country and inquire whether any customers are considered SOEs. If they are, the FCPA applies to interactions with employees of these customers even though the employees are not traditional government officials.

**The FCPA doesn’t apply because the company does business in a foreign country indirectly through agents, representatives and distributors**

**False** — U.S. companies are not insulated from FCPA risks by doing business in foreign countries through third parties such as agents or distributors. Rather, U.S. companies are responsible for ensuring that improper payments are not made indirectly through others because FCPA anti bribery violations can be based on the wrongful acts of others under the FCPA’s third-party payment provisions, which prohibit improper 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 any foreign official.” Like other elements of the FCPA, the “knowledge” requirement is broad and can be satisfied by “willful blindness” even if a company does not have actual knowledge that an improper payment has been made to a foreign official.

Given the FCPA’s broad third-party payment provisions, business leaders are wise to fully understand the company’s “go-to-market” strategy in every foreign country. If foreign agents or distributors are part of that strategy, appropriate FCPA due diligence should be conducted on the third party prior to engagement.



### **The FCPA applies only when money is given to a foreign official**

**False** — The notion that the FCPA prohibits only a “suitcase full of cash” type of scenario is misguided because the FCPA applies to a host of other, potentially limitless, improper payment arrangements that business leaders must be able to recognize.

The term “anything of value” is not defined in the FCPA, and it has been broadly construed to include not only cash or a cash equivalent, but also, among other things, discounts; gifts; use of materials, facilities or equipment; entertainment; meals and drinks; transportation; lodging, insurance benefits; and promises of future employment. Further, there is no de minimis threshold; rather, the perception of the recipient and the subjective valuation of the thing conveyed is often a key factor in determining whether “anything of value” has been given to a foreign official.

The FCPA contains an affirmative defense for expenditures relating to the “promotion, demonstration, or explanation of products or services” or the “execution or performance of a contract.” However, in order to meet the affirmative defense, a company must show that the expenses are both “reasonable” and “bona fide” and “directly related” to a business purpose. As explained below in connection with foreign official travel, it is improper for a company to fund even portions of non-business travel to the United States.

### **The FCPA doesn’t apply when foreign officials travel to the United States if the predominate purpose of the travel is business-related**

**False** — Included in the broad definition of “anything of value” is travel expenses not connected to a legitimate business purpose. Thus, while it is perfectly acceptable, and FCPA-compliant, for a U.S. company to pay for the travel expenses of SOE customers or other foreign officials to travel to the United States to meet company personnel, to inspect products or a manufacturing facility, or to execute a contract, it is not acceptable, and not FCPA-compliant, for the company to fund any non-business portions of the trip to the United States.

Ensuring that travel expenses are reasonable and bona fide expenditures directly related to a business purpose can be a challenge for business leaders because the task of arranging travel details is often left to a different corporate department or



even an outside travel agency. In many cases, business leaders know only that the SOE customer or foreign official is arriving at the plant “on a Tuesday,” but does not know where the individual has been before or after the plant visit. Yet, such “before” or “after” travel often lacks a business purpose, and, if paid for by the company, is not FCPA-compliant.

For this reason, it is imperative that business leaders maintain a degree of control over all SOE customer and foreign official travel and ensure that travel arrangements are not left solely to individual foreign sales representatives. Non-business sightseeing travel, even if in connection with a predominant and legitimate business trip, is not FCPA-compliant if paid for by the company.

### **Red Flags**

The concept of “red flags” is straightforward — facts and circumstances that raise serious questions of an FCPA violation. Companies which ignore red flags, or identify them but fail to inquire further, run the risk of FCPA enforcement actions, criminal fines and the need for costly remedial measures.

The definition of red flags, and the specific circumstances which raise concerns, need to be examined carefully. A red flag is not a violation but identifies situations which require further investigation. The identification of a red flag does not mean that a transaction should not occur, and the absence of a red flag does not mean that a transaction is free of FCPA issues.

Once the red flags have been resolved—whether through determination that they are not relevant, gathering of additional facts that indicate that the situation does not raise FCPA concerns, or through other means—then they have served their purpose of sensitizing the relevant employees to the types of situations where further inquiry is needed.

### **General Red Flags**

The following are the top 30 warning signs - which require further investigation. The existence of these facts do not, in and of themselves, indicate specific liability risks with respect to a particular transaction but indicate the need for further investigation.



**Flag 1:** Your Company has received an “improper payment” audit in the past five years.

**Flag 2:** A payment in a country with widespread corruption or history of FCPA violations occurring in that country. Countries that are considered to fit this category include some Middle Eastern and Asian countries, and much of the former Soviet Union and Africa.

**Flag 3:** Widespread news accounts of payoffs, bribes, or kickbacks.

**Flag 4:** The industry involved has a history of FCPA violations. These industries include defense, aircraft, energy, pharmaceutical/life sciences, and construction services.

### Transaction-Specific Red Flags for Intermediaries

**Flag 5:** An agent, distributor, or joint venture partner refuses to provide confirmation of willingness to abide by the FCPA.

**Flag 6:** Family or business ties of an intermediary with a government official.

**Flag 7:** Bad reputation of the agent or rumors of prior improper payments or other unethical business practices by the intermediary. This is a key flag, and parties should document the good reputation and experience of the intermediaries they hire.

**Flag 8:** Listing of agent on databases listing known corruption risks like the World Bank List of Debarred Firms or a database of corruption profiles.

**Flag 9:** The intermediary requires that its identity not be disclosed.

**Flag 10:** The potential foreign government customer recommends the intermediary. This could suggest a coordinated scheme to divide a payoff.

**Flag 11:** The intermediary lacks the facilities and staff to perform the required services. This could suggest that the intermediary may be performing its job through corrupt payments rather than hard work.

**Flag 12:** The intermediary has violated local law, even if the violation is not related to bribery.

**Flag 13:** The intermediary wishes to use anonymous subcontractors.

**Flag 14:** Unusually large or frequent political contributions to a person or political party by the intermediary, which could suggest an arrangement for the direction of business to the intermediary.

**Flag 15:** Insistence on the involvement of third parties who provide no value-added to the transaction.

**Flag 16:** A proposed foreign partner is owned by a key government official or a close relative or linked to a state owned enterprise.

**Flag 17:** Rumors of a silent partner in a joint venture, distributor, or agent that is not disclosed by the intermediary.



**Flag 18:** The proposed relationship is not in accordance with local laws or regulations, including rules dictating when a government official can be involved in a business relationship.

**Flag 19:** The intermediary attempts to assign its rights or obligations to another party.

**Flag 20:** The intermediary has an unexplained breakup with another company, which could suggest the discovery of illegal conduct in that relationship.

#### **Control-Based Red Flags for Intermediaries**

**Flag 21:** A joint venture partner insists on maintaining two sets of books for tax or other purposes.

**Flag 22:** An intermediary refuses to allow auditing of its books.

**Flag 23:** An intermediary requests payment of inadequately documented or entirely undocumented expenses.

#### **Payment Requests by Intermediaries**

**Flag 24:** Payment of a commission that is at a level substantially above the going rate for agency work in a particular country. An excessive commission might suggest that a portion of the funds is going to a foreign official. Then again, your agent might just be greedy.

**Flag 25:** Payment through convoluted means. If your agent asks for payment to a numbered account in the Bahamas, the DOJ or SEC could consider this failure to investigate culpable conduct under the FCPA.

**Flag 26:** Over-invoicing (i.e., the intermediary asks you to cut a check for more than the actual amount of expenses).

**Flag 27:** Requests that checks be made out to “cash” or “bearer,” that payments be made in cash, or that bills be paid in some other anonymous form.

**Flag 28:** Requests that payments be made to a third party.

**Flag 29:** Payment in a third country, which suggests a plan to divide the commission in the third country away from government scrutiny.

**Flag 30:** Requests for unusual bonuses, one-time success fees, or extraordinary payments.

In combination or on their own, any one of these red flags should be enough to raise serious concerns about FCPA compliance. As stated in a recent conference, by Denis McNerney of the Department of Justice, due diligence is not a onetime event and a process that is marked by a “burst of energy” at the beginning of a new relationship,



instead the due diligence process should be thought of as a continuous process. Due diligence, as it relates to FCPA, is performed at the beginning of the process against the following data sets:

- A database of persons or companies already linked to corruption convictions or a current investigation by the Department of Justice or the Securities and Exchange Commission, or foreign governments
- A proven database consisting of Foreign Officials, which should include not only the officials and their family members and known business associates, but also executives of State Owned Enterprises. In addition to performing this due diligence at the onset of a relationship, called initial due diligence, organizations need to set up an ongoing due diligence process, periodically, to find links between current 3rd Party relationships, such as agents, and illicit behavior or new ties to foreign governments.

### **Corporate Self-Assessment**

Corporations have begun to institute a proactive approach to compliance. Annually corporations assess their corporate governance and compliance programs. A multinational corporation will take a variety of steps to implement a sustainable anticorruption program, including training and communication programs, transaction testing, and disciplinary mechanisms that are embedded within their business model to help mitigate areas of risk:

- Develop consistent employee recruitment background due diligence and screening procedures.
- Develop third-party acceptance and retention policies and procedures, including compliance contract clauses and maintaining contracts in a central location.
- Create a database of all third-parties in foreign countries that can be periodically vetted to recognize risks as they come to fruition (wording?)
- Implement a robust monitoring, detection, and auditing process for high risk locations, business partners, and activities, including the transactions associated with such relationships.
- Enhance compliance and accounting policies and procedures surrounding government-related activities, implement controls surrounding cash transactions, and delegate appropriate levels of approval requiring pre-approval of high-risk transactions.



- Institute corporate level and company-wide ethics and business conduct policies and procedures.
- Provide additional compliance resources within high risk locations and training to key employees and third parties.
- Implement a disciplinary mechanism and response plan for instances where potential violations are noted. Preventing corruption is a sound long-term business strategy, helping to establish that corporations act in a responsible and ethical manner while enhancing shareholder value. Every corporation should become engaged and embrace a proactive compliance strategy, so that it can better manage the risks of operating globally and to demonstrate its strong commitment to stakeholders, business partners, and regulatory agencies.

### **Conclusion**

The DOJ and SEC have announced and are pursuing an increased and aggressive level of enforcement activity under the FCPA. Businesses must act now to identify potential compliance and internal control weaknesses, as well as potential violations. Corporations should also develop and execute stand alone anti-corruption compliance audit modules, and monitor their compliance culture within joint venture operations and subsidiaries.



### Michael Volkov Profile

Mr. Volkov is a litigation partner who focuses on trial practice, white collar defense and complex internal investigations. He was a federal prosecutor for 17 years; a Chief Counsel on the Senate Judiciary

Committee and the House Judiciary Committee; a Deputy Assistant Attorney General in the Department of Justice; and a trial attorney in the Antitrust Division. He has practiced in the District of Columbia for nearly 30 years. Mr. Volkov has extensive criminal trial practice — over 75 criminal jury trials.

Given his broad range of experience and expertise, Mr. Volkov handles a variety of matters for clients — Foreign Corrupt Practices Act, Fraud, Corruption, Export-Import, Office of Foreign Asset Control, Asset Forfeiture and Money Laundering, False Claims Act, Antitrust violations, Food and Drug Administration enforcement matters, professional disciplinary proceedings, and securities enforcement. With his extensive contacts in Washington, D.C., Mr. Volkov brings a unique problem solving approach to clients — solutions to complex problems may involve a coordinated approach, including the design and implementation of an internal investigation, contacts with key policy makers on Capitol Hill, or negotiation of solutions in the Department of Justice or a specific US Attorney's Office.

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