



Q&A IN RELATION TO BRIBERY OFFENCES IN THE US

**Content Provided by DLA Piper
Published June 2019**

1 Q&A In Relation to bribery offences in the US

1. Legal Framework

What is the legal framework governing bribery in the US?

- The US Foreign Corrupt Practices Act of 1977, as amended, (the FCPA) is a criminal statute that prohibits individuals and companies from directly or indirectly offering or providing corrupt payments or other things of value to non-US government officials, employees of certain types of state-owned entities, political candidates, political parties, and officials of public international organizations like the UN or the World Bank. US authorities have held companies responsible for FCPA violations in a variety of cases, including where bribes were allegedly paid in exchange for government contracts, business, regulatory approvals, favorable tax determinations, confidential information, or other improper advantages.
- The US has a variety of federal and state laws that address corruption in addition to the FCPA. The FCPA is primarily a “foreign” bribery statute. The FCPA’s anti-bribery provisions do not cover officials and employees of US state and federal government. Instead, the main federal domestic bribery statute appears in 18 U.S.C. § 201. This law shares similarities with and was a model for the FCPA. In addition, each US state has its own laws that prohibit bribes paid to its officials. Furthermore, bribes paid to state officials that use the means of interstate commerce may be elevated to US federal violations under the US Travel Act. In certain cases, enforcement agencies have also used the US Travel Act to prosecute commercial/private sector bribery that occurred outside the US. Finally, there is potential for even the FCPA’s accounting provisions (discussed below) to play a role in policing US domestic bribery. Companies that pay bribes to US officials and fail to record them accurately as such in their books and records may be viewed by enforcement authorities as committing FCPA accounting violations notwithstanding the domestic nature of the payments and the lack of any “foreign” element.
- Given the significant amount of attention paid to the FCPA by US enforcement agencies, the following sections focus on the FCPA.

2. What Constitutes a Bribe?

What constitutes a bribe?

A bribe is defined under the FCPA as:

- offering, paying, promising, or authorizing,
- with a corrupt intent,
- money or the provision of anything of value to
- a foreign official, foreign political party (or an official thereof), or any candidate for foreign political office
- or any other person while knowing that all or a portion of that thing of value will be offered or provided to the foregoing persons
- with the purpose of (i) influencing any official act or decision of the recipient; (ii) inducing the recipient to do or omit to do any act in violation of his or her lawful duty; (iii) securing any improper advantage; or (iv) inducing the recipient to use his or her influence with a non-US government to affect or influence any government act or decision
- in order to obtain, retain, or direct business (including government regulatory approvals or advantages).

What are the principal offences under this legal framework?

- The FCPA consists of both anti-bribery provisions and certain accounting provisions. The FCPA’s anti-bribery offence is described above.
- Separate from the anti-bribery provisions, the FCPA requires publicly traded companies and other issuers

(companies subject to certain reporting requirements under US securities laws) to comply with the following accounting standards: (i) make and keep accurate books and records and (ii) devise and maintain a system of effective internal controls.

- The FCPA's accounting provisions are very broad. The US government has held companies that pay bribes liable not only under the FCPA's anti-bribery provisions, but also under the accounting provisions if those companies conceal those bribes in their books and records and/or if their internal controls were insufficient to prevent those bribes. In certain cases, the US government has held companies liable under the accounting provisions of the FCPA even if there is no evidence of a bribe.

3. Jurisdictional Reach

What is the jurisdictional reach of the legal framework?

- US enforcement agencies have broadly interpreted their jurisdiction to prosecute companies and individuals with respect to alleged FCPA violations that occur either in or outside the US. In addition, US authorities have claimed FCPA jurisdiction over non-US companies and individuals in certain cases. A recent appellate decision in *United States v. Hoskins* has restricted the scope of the US government's extra-territorial jurisdiction with respect to FCPA matters; however, US authorities may decide to interpret that decision narrowly and continue to assert jurisdiction over non-US persons using alternative theories.

4. Who may be liable?

Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

- The FCPA applies to both companies and individuals subject to US jurisdiction. This means that company directors, officers, employees and agents can face personal liability for violating the FCPA's anti-bribery and/or accounting provisions.
- The FCPA does *not* apply to government officials that solicit and/or receive bribes. Instead, US enforcement authorities seek ways to prosecute those public-sector recipients for money laundering offences under other statutes.

Can a parent company be liable for its subsidiary's involvement in bribery?

- Enforcement agencies have held US parent companies responsible for FCPA violations caused by their domestic or foreign subsidiaries.
- In certain cases, a target company in an M&A transaction that has a history of corruption may cause the acquiring company to face successor liability. US authorities have claimed that this can be a concern in cases where an acquiring company allows the target company's corrupt activities to continue post-acquisition. The US government has observed that due diligence, contract language, and effective compliance programs are important tools to counter these risks.

5. High Risk Areas

Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

- Facilitating or grease payments can raise concerns in certain cases.
- The FCPA's anti-bribery provisions specifically exempt facilitating payments made to expedite or to secure the performance of a routine governmental action. However, the term routine governmental action is interpreted narrowly and does not include decisions to award new business or continue business with a particular party.

3 Q&A In Relation to bribery offences in the US

- Furthermore, US enforcement authorities may hold publicly traded companies liable under the FCPA's accounting provisions if such companies allow their employees to make facilitating payments, but fail to accurately record them in their books as facilitating payments. US enforcement authorities have determined that the exemption for facilitating payments under the FCPA's anti-bribery provisions does not exempt public companies from the requirement of reporting those payments accurately.

Does the legal framework restrict political and charitable contributions?

- Such contributions will be assessed in the manner described in this note. There have been cases where corrupt political or charitable contributions have resulted in FCPA violations or enforcement settlements.

Does the legal framework place restrictions on corporate hospitality?

- The FCPA itself does not contain a specific cap on corporate hospitality. Instead, the FCPA anti-bribery provisions focus on corrupt intention. The more lavish the hospitality, the greater the risk that an enforcement authority may interpret it as corrupt. In an effort to avoid receiving enforcement scrutiny, many companies seek to take advantage of the reasonable and bona fide affirmative defense discussed below.

6. Legal Defences

Are there any defenses for bribery offences?

- The FCPA contains two affirmative defenses to its anti-bribery prohibitions as follows: (i) payments permitted under written law, and (ii) reasonable and bona fide expenses.
- Companies hardly ever rely upon the first affirmative defense above because it is very narrow in nature. Specifically, that defense requires the company to demonstrate that the provision of the payment or thing of value was lawful under the written laws of the recipient official's country. The fact that a country lacks written laws that prohibit the payment or thing of value is not sufficient to qualify for the local law defense. Also, one cannot invoke this defense due to the fact that a foreign country may not actively enforce its anti-corruption laws.
- The second affirmative defense mentioned above permits persons to incur travel and lodging expenditures for the benefit of foreign officials if those expenses are (i) reasonable, (ii) bona fide, and (iii) directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a non-US government or agency.

7. Regulatory and Enforcement Bodies

What are the key regulatory or enforcement bodies with regard to bribery?

- The principal government agencies responsible for FCPA enforcement are the US Department of Justice and the Securities and Exchange Commission. The Federal Bureau of Investigation provides significant support with respect to investigating FCPA violations. In a recent case, the Criminal Investigations Office of the Internal Revenue Service supported an FCPA investigation.

8. Legal Consequences

What are the legal consequences of being found guilty of bribery offences?

- Violations can result in large fines, penalties, profit disgorgement, imprisonment, suspension/debarment from government contracting, the loss of export privileges, the appointment of compliance monitors, and other consequences.
- Many companies have had to pay hundreds of millions of dollars in penalties, and senior executives have been

sentenced to prison for FCPA violations.

- In FCPA cases, US prosecutors have also been known to charge defendants for fraud, money laundering, sanctions, Sarbanes-Oxley, and related violations.
- Company shareholders may attempt to bring derivative suits on the basis of an FCPA violation.

9. Deferred Prosecution Agreements

Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- Yes, bribery offences are capable of being settled by way of a non-prosecution agreement (NPA) or a DPA.

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Transparency International UK

10 Queen Street Place,
London,
EC4R 1BE

www.transparency.org.uk
twitter.com/transparencyuk

Content Correct as of June 2019.

Cover Image: Transparency International Corruptions Perception Index 2018