

FCPA Compliance: A Primer

This primer is intended to give a brief overview of the U.S. Foreign Corrupt Practices Act (FCPA) by discussing who is covered by the FCPA and what the FCPA forbids (and permits).

1. Who is subject to or covered by the FCPA?

a. The FCPA is broadly written to cover not just U.S. citizens and companies but certain Non-U.S. persons and companies as well. More importantly, a U.S. company may be liable for corrupt payments made by its foreign agents and representatives, so U.S. companies, like MIQ Logistics, typically require their foreign agents, representatives and employees to comply fully with the FCPA. Even where the FCPA might not cover a Non-U.S. individual or company, other U.S. criminal statutes, which prohibit conspiracy, aiding and abetting and/or money laundering, for example, may be violated by Non-U.S. persons that pay or receive bribes on behalf of U.S. persons and companies.

2. What activities constitute violations of the FCPA?

In short, the FCPA prohibits (a) the payment or offer to pay (b) anything of value to (c) a government employee or official (d) for the purpose of improperly influencing that official (e) to assist in obtaining or retaining business.

a. Payment - The statute not only forbids actual payment of bribes but, significantly, forbids an offer to pay. Thus, even if the payment is never made, and no official action by a government official has actually been improperly influenced, an offer to make such a payment for such improper purpose is sufficient to constitute a violation of the Act.

b. Anything of value - The FCPA does not just cover offers of cash payments to government officials, but covers "anything of value," a term which is broadly interpreted. In addition to cash payments it covers gifts, travel, meals, entertainment, lodging, offers of employment to the official's family members or friends, and offers of future employment to the government official. Even making charitable contributions to a charity directed by the government official can be a thing of value to that official.

"*But it's a small payment?*" Please note, there is no minimum threshold that would exclude payment of very small amounts. If a payment, no matter how small, is intended to corruptly influence official action it is forbidden. Keep in mind that neither the amount of an illicit payment nor the volume of business it helps secure has to be material for liability to arise. Of course, the size of the payment may well be a factor in considering the purpose of the payment. Buying a government official a cup of coffee is unlikely intended to influence the official. On the other hand, buying a \$400 bottle of wine would be another matter.

c. Foreign Official / Government Official - A foreign or government official is any officer or employee of any (non-U.S.) government or agency thereof. Just as there is no payment too small to be covered, there is no employee of a non-U.S. government so lowly as to be excluded from the definition. The FCPA also covers, although not included in the definition of "foreign officials", all candidates for foreign political office and all officers of foreign political parties.

d. Improper purpose - The FCPA requirement of an improper purpose is met where the thing of value is given as a *quid pro quo* (or in exchange for a service provided by the government employee or employee of a state-owned company). Cash payments in any amount should not be given because of the likely inference of improper purpose.

The failure of the bribe is not a defense. For example, if a person subject to the FCPA gives a car to a government official with the understanding that the government would award a contract to the company, it does not matter if the government ultimately awards the contract to someone else.

e. To obtain or retain business - This element is broadly interpreted. It is not limited to payments made to obtain or retain business from the government of the bribed official. Cases have held that payments made to obtain a competitive advantage satisfy this element. For example, payments made to reduce taxes, reduce custom duties, or obtain

favorable legislation or regulatory rulings would be covered. Furthermore, payments made to government officials in order to receive faster treatment than others would also be considered a payment made to obtain or retain business.

3. What is permitted under the FCPA? Please note, there are a few exceptions to the FCPA.

a. Promotion and Training - The FCPA permits reasonable and bona fide payment of expenses to government officials incurred by those officials directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract. This exception would not normally cover payments made by agents or distributors but would normally only cover reimbursement payments made by the manufacturer or represented company itself.

b. Payments permissible under local law - This exception has been narrowly interpreted to mean payments that are affirmatively permitted pursuant to *written laws* of the country where the payment is made. Please note that there must be an explicit written provision permitting the payment in question to the official such as a local law requiring or permitting the direct payment to officials of set fees or specified expenses incurred by the official in performing certain services. Needless to say, this is almost never the case. This exception is not met simply because there is no local law prohibiting bribery or the particular payment at issue

But everyone is doing it (making such payments)? While such payments may be common in the country you work in, or that's how it's always been done, they still may be both a violation of the FCPA and a violation of local law. While everybody may be doing it, many are getting caught and facing substantial penalties and substantial prison time.