



FREQUENTLY ASKED QUESTIONS: FOREIGN CORRUPT PRACTICES ACT (FCPA)

General Questions:

What is the FCPA?

⇒ The Foreign Corrupt Practices Act or FCPA is a U.S. federal law, enacted in 1977 and amended in 1988, designed to prohibit corrupt practices by both U.S. and foreign companies and individuals. It contains two main categories of provisions: (1) the Anti-Bribery Provisions; and (2) the Accounting Provisions (books and records; and internal controls).

What obligations are imposed by the FCPA?

⇒ Anti-Bribery Provisions: It is a federal crime to *knowingly* make, or offer to make any *payment or promise of payment* to any *Foreign Official* in order to influence an official act or decision of that official, to influence that official to act or omit to do an act in violation of a lawful duty, or to induce that official to use their influence over a foreign government to affect or influence any governmental act or decision, for the purpose of obtaining or retaining *business*, or for directing business to any person.

- “*Payment*”: This term is also defined broadly, and includes money or ANYTHING OF VALUE (*i.e.*, gifts, services, travel, entertainment or accommodations). Nothing of value needs to change hands to be in violation, because the violation occurs when the offer is made. There is NO MINIMUM PAYMENT OR PROMISE under the FCPA, so even a very small payment can be a violation. Payment to a Foreign Official can be direct or indirect, including payments to family members or others which may benefit the Foreign Official, or payments to third parties who may later pay the Foreign Official, or keep the money for themselves.
- “*Knowingly*”: This term is defined broadly, and includes: actual knowledge, a firm belief that a prohibited payment is substantially certain to occur, or awareness of a high probability of a prohibited payment. In addition, “knowing” can be proved by circumstantial evidence such as ignoring warning signs, conscious disregard, or turning a blind eye to red flags.
- “*Foreign Official*”: Includes any officer or employee of any department, agency or instrumentality of a foreign government; any foreign political party; any candidate for foreign political office; any person acting in an official capacity on behalf of a foreign government or government instrumentality; or any consultants or agents who are connected with a foreign government. The government official

need not be a high level official. Indeed, it can be a relatively low-level employee. This would extend to: government-owned entities, members of royal families, publicly-funded organizations, public international organizations (World Bank, IMF, WHO, UN, OECD, etc.), officials of a political party, and candidates for political office.

- “*Business*”: This does NOT have to be government business, and the business does NOT have to be directed to the person making payment or promise. In other words, directing business to a third party would also violate the FCPA.

⇒ Accounting Provisions: The FCPA requires U.S. companies to: (1) accurately and reasonably describe all expenditures on their books and records; and (2) have internal controls to ensure that all expenditures are authorized.

Who is covered by the FCPA?

⇒ Those with formal ties to the U.S., including: (1) Any U.S. company, including its employees, officers, directors, foreign subsidiaries, agents and consultants; (2) any U.S. citizen or resident; (3) any company or person in the U.S.; or (4) any foreign company listed on a U.S. exchange.

⇒ Those whose conduct is in furtherance of a violation in the U.S., including: Non-U.S. nationals or companies if their conduct in some way touches the U.S.

Who enforces the FCPA?

⇒ U.S. Department of Justice (DOJ): The DOJ is the primary enforcement agency of the FCPA, and handles all criminal enforcement, as well as civil enforcement with respect to domestic concerns and foreign companies/nationals.

(<http://www.usdoj.gov/criminal/fraud/fcpa/>)

⇒ U.S. Securities and Exchange Commission (SEC): Oversees civil enforcement of the Anti-bribery Provisions with respect to issuers, and violations of the Accounting Provisions. (www.sec.gov)

⇒ U.S. Department of Commerce (DOC): The DOC answers general questions from U.S. exporters concerning the basic requirements of the FCPA and its constraints.

(www.ita.doc.gov/legal)

What are the consequences to companies for violating the FCPA?

⇒ Company Consequences: A violation can result in imprisonment, fines (criminal fines up to \$2 million; for willful violations of Accounting Provisions, up to \$25 million), suspension of rights to do business with government institutions, private lawsuits by competitors and shareholders, revocation or denial of export licenses, harm to Company’s ethical reputation, and disruption to business. Examples from recent cases and settlements:

- *Baker Hughes (2007)*: Agreed to pay the largest ever FCPA penalty, which totaled \$44 million. A Baker Hughes subsidiary paid an additional \$10 million fine. Both were fined for bribes paid to receive a favorable recommendation from Kazakh oil officials in order to obtain a large oil contract. http://www.usdoj.gov/opa/pr/2007/April07/crm_296.html.
- *Tyco (2006)*: Final judgment ordered Tyco to pay \$1 million in disgorgement and a \$50 million civil penalty. Tyco was accused of making payments to Brazilian officials in order to obtain contracts relating to water, sewage and irrigation systems. <http://www.sec.gov/litigation/litreleases/2006/lr19657.htm>
- *Titan Corporation (2005)*: Agreed to pay FCPA penalty, totaling \$28.5 million in criminal and civil penalties. Titan made payments to the business advisor of the President of Benin, Africa, to assist the company in its development of a telecommunications project, and to obtain government consent to increase Titan's project management fees.
- *Diagnostics Products Corporation (2005)*: Settled with the SEC and DOJ in an aggregate of \$4.8 million in civil and criminal penalties. The violation involved payment of approximately \$1.6 million in bribes in the form of illegal "commissions" to physicians and laboratory personnel employed by government-owned hospitals in China. http://www.usdoj.gov/opa/pr/2005/May/05/crm_282.htm.
- *ABB Ltd. (2004)*: Agreed to pay \$10.5 million in civil penalties, and an additional \$5.9 million in disgorgement and prejudgment interest. ABB was fined for bribes paid to a Nigerian government agency to obtain confidential bid information and favorable recommendations in connection with oil and gas construction contracts in Nigeria. http://www.usdoj.gov/opa/pr/2004/July/04/crm_465.htm.
- *InVision Technology (2004)*: Paid \$1.3 million in fines and \$589,000 in disgorgement. InVision's sales agents and distributors made payments to public officials in Thailand, China and the Philippines in an effort to secure business for the company. <http://www.sec.gov/litigation/litreleases/lr19078.htm>.

What are the consequences to individuals for violating the FCPA?

⇒ Individual Consequences: Individual employees who violate the FCPA can face criminal penalties of up to five years in prison per bribe and \$250,000 in fines, or twice the gross gain or gross loss caused by the offense, whichever is greatest. For willful violations of the Accounting Provisions, they can face up to 20 years in jail and fines up to \$5 million. FINES CANNOT BE PAID BY THE EMPLOYER. Additionally, individuals face loss of job, disbarment from operating a U.S.-listed company, and harm to one's reputation. Examples from recent cases and settlements are:

- Since 1990, the DOJ has brought over twice as many prosecutions against individuals as it has against corporations.
- In 2006, individual defendants in *ABB Ltd.*, including the former regional sales manager for West Africa, the former senior vice president of operations, the former vice president of finance, and the former vice president of sales, settled an SEC investigation for their payment of bribes to Nigerian public officials to secure a \$180 million contract for providing equipment for an offshore oil field in Nigeria. One defendant paid penalties and disgorgement totaling over \$100,000, and the other three paid civil penalties of \$40,000 each.
- In 2006, a translator working for a U.S. contractor in Iraq admitted to offering a \$60,000 bribe to a senior Iraqi police official in order to induce the official to purchase 1,000 armored vests and a map printer. He was sentenced in 2007 to three years in prison for violating the anti-bribery provisions of the FCPA. (*U.S. v. Faheem Mousa Salem*).
- In June 2005, individual defendants in *U.S. v. David Kay and David Murphy* received prison sentences of up to 63 months (5.3 years) for payments made to Haitian officials to reduce customs duties and sales taxes.
- In 2004, Lucent Technologies fired its president, chief operating officer, a marketing executive, and a finance manager of its China operations for violations of the FCPA.

Company and Situation Specific Questions:

Does the FCPA apply to CommScope, CommScope' employees, and any future affiliates/subsidiaries?

⇒ CommScope: Yes. CommScope is an issuer listed on the New York Stock Exchange.

⇒ Employees: Yes. Employees, officers, directors, consultants, sales agents, representations, and sponsors of CommScope are all covered by the FCPA, regardless of whether they work in or out of the U.S. They can be held individually liable in addition to CommScope as a company being liable.

⇒ Affiliates and Subsidiaries: Yes. Both can be held liable under the FCPA. Non-U.S. affiliates can also be held liable even if the alleged violation takes place outside of the U.S., so long as it benefits CommScope, or touches the U.S.

I know I cannot give cash to a foreign official, but what other types of payments are prohibited?

⇒ ANYTHING OF VALUE, when paid for the purpose of obtaining or retaining business. Examples include:

- *Certain Excessive Travel Payments*: Anything of value that goes beyond the legitimate purpose of the business trip, or exceeds CommScope' travel/entertainment expense policies. For example: material side trips (e.g., Disneyland); excessive gifts that also exceed CommScope' gift giving policy limits; use of vacation hours; expenses for official's spouse, significant other/family members travel costs; upgraded flights to business/first class or lodgings; and extended stays beyond the business visit.
- *Contributions to a Relative, Friend, or Associate of a Foreign Official*: The FCPA covers payments to the relative, friend or associate of a foreign official, because it is a payment of something of value. This would extend to helping secure a scholarship for a relative, or aiding admission of a relative into a university.
- *Payment of Extraordinary Commissions or Commission Rates*. There is no bright line acceptable commission rates. It will depend on the expertise, services to be provided, prior experience, faculties and other facts and circumstances.

What does knowledge mean under the FCPA, particularly where I am not positive something has been paid by someone else to a government official?

⇒ The FCPA prohibits corrupt payments through intermediaries. Intermediaries may include joint venture partners or agents.

Gifts:

What if I am presented a gift unexpectedly at an event whose value exceeds a reasonable amount?

⇒ While it may be rude to reject a gift, you should return the gift to the donor or give it to a charitable organization. You should promptly notify the CommScope Legal Department of the facts, circumstances and disposition of the gift.

What size gift is inappropriate?

⇒ Ask yourself whether you would be uncomfortable if all the circumstances of this gift were published in tomorrow's newspaper.

- ⇒ Consider whether a reasonable person would conclude that the gift could cause the recipient foreign official to act in a way to award business to CommScope or an affiliate.
_____.
- ⇒ Consider whether the proposed gift violates the policy of the company/government of the employee receiving the gift.

What if I receive an unexpected invitation to a social event and learn it is customary to give a government official a gift and, as a result, buy a relatively expensive gift for that person?

- ⇒ You should report it in writing within 48 hours to the CommScope Legal Department.

But aren't there any exceptions under the FCPA?

- ⇒ Yes. There are several exceptions and affirmative defenses in the FCPA. If in doubt, please contact the CommScope' Legal Department.

Facilitating payments for routine governmental actions.

- ⇒ There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.
- ⇒ "Routine governmental action" does *not* include any decision by a foreign official to award new business or to continue business with a particular party.
- ⇒ The rules surrounding this exception are very complex. You should contact the CommScope Legal Department before making any payment in reliance on an exception to the FCPA.

Affirmative Defenses.

- ⇒ A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.
- ⇒ Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. It may be legal to contribute to a foreign political party or candidate depending on the business purpose, the recipient's influence and the written laws of the foreign country.

I know that the FCPA prohibits certain payments to foreign officials, but do I violate the FCPA when I conduct business in a country where paying officials is common and done every day?

- ⇒ Yes. Although it may be a widespread local practice or custom, it is a violation of the FCPA to engage in any form of bribery of a foreign official, practice or custom in a foreign country is NOT a defense. While there may be an exception for certain types of payments, it is necessary to first contact the CommScope Legal Department.
- ⇒ For a list of countries with a high Corruption “Perception Risk,” see Transparency International’s website, which indexes 163 countries’ perceived level of corruption. (http://www.transparency.org/policy_research/surveys_indices/cpi/2006)

How does the Transparency International Index impact us?

- ⇒ We have to be extra vigilant in conducting business in countries with high Corruption Perception Indices (e.g., less than 5.0). See Transparency International’s website noted above.
- ⇒ Is the FCPA just a scare tactic?
- ⇒ No. The DOJ and the SEC aggressively enforce the FCPA. There is no minimum amount that must be offered or paid to be considered a bribe. Both agencies are obligated to investigate any possible violation.

Outside of the FCPA, do I need to worry about similar laws in other countries?

- ⇒ Yes. Over the last few years, many countries, and unions of countries have begun to adopt similar anti-corruption laws with penalties that can apply to U.S. and other foreign companies. CommScope, its employees, and agents can be liable under multiple laws at the same time.
- ⇒ International Conventions include: OECD Anti-Bribery Convention; African Union Convention on Preventing and Combating Corruption; Inter-American Convention Against Corruption; United Nations Convention Against Corruption; and many others.
- ⇒ Individual Country Anti-Corruption laws: Many individual countries also have anti-corruption/anti-bribery laws in effect. Many of these laws can be found through Transparency International’s website, or the websites of the individual countries. (<http://www.transparency.org>).

What if I think the laws of one country conflict with the U.S. law?

⇒ Consult the CommScope Legal Department.

What can I do to help CommScope avoid these potential problems and how should I deal with suspected violations?

⇒ React Immediately: All law enforcement agencies have a “Zero Tolerance” approach to FCPA violations. Companies that fail to properly supervise internal actions often face much harsher penalties.

⇒ Report Suspected Violations Immediately: If you suspect that there may be a violation of the FCPA, there are several available avenues for immediately reporting the matter via: (1) CommScope’ General Counsel or another member of the Legal Department; (2) the Regional Compliance Officer; or (3) the CommScope Audit Committee.

⇒ By reporting potential violations to the CommScope Legal Department early, you can help reduce potential liability.

Obstruction of Justice:

⇒ Do NOT Obstruct Justice: This can include destroying documents, making false statements to the government, or otherwise interfering/tampering with an investigation. Obstruction will harm our credibility and increase potential consequences for the Company and individuals alike.

Books and Records:

How accurate or detailed do our books and records have to be?

⇒ The FCPA accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. It is important to be transparent in the company’s books and records.

What if I make a mistake in recording an expense? Am I subject to criminal prosecution?

⇒ No. You will not be prosecuted for an accidental mistake.

Political Contributions:

Foreign Political Campaign or Candidate Contributions

What can I give to a foreign political campaign or candidate?

- ⇒ Such contributions have become an increased focus of the Department of Justice and the Securities and Exchange Commission. Examples include:
- *Political Contributions:* Individual employees and departments should refrain from making any political contributions on behalf of, or at the encouragement of any foreign official. For example, something as small as providing t-shirts for a foreign official's campaign for reelection would be a violation. (*Titan Corp.*)
 - *Charitable Contributions:* Individual employees and departments should refrain from making any contributions to charities on behalf of any foreign official. All donations should be clear and properly documented in close co-ordination with CommScope's Legal Department. Be careful of contributing to an organization where a government official's relative may work. (*Schering Plough*)
- ⇒ You should carefully examine any business purpose in making such a contribution. Under no circumstances should you make a contribution – cash or any other kind of payment – to the foreign political party or candidate without the *prior* approval of the CommScope Legal Department.