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Introduction

► International Activities:

► Negotiating and entering into contracts with foreign entities or individuals;

► Conducting research and attending or organizing conferences overseas;

► Offering courses, training, goods or services overseas;

► Establishing academic programs overseas; and

► Co-authoring or co-publishing scholarly articles or journals with faculty at foreign academic and research institutions.
Introduction

► Location of “Active” Relationships
  ▶ China, Japan, Mongolia, South Korea, Taiwan, India, Indonesia, Malaysia, Singapore, Thailand, Vietnam, Australia, Israel, Egypt, Ghana, Kenya, Liberia, South Africa, Croatia, Hungary, Macedonia, Poland, Romania, Russia, Turkey, Germany, Italy, Spain, Chile, Brazil, Mexico

► Location of other affiliation and exchange agreements
  ▶ Afghanistan, Belgium, Botswana, Costa Rica, Ecuador, France, Hong Kong, Iran, Mali, Nepal, Netherlands, New Zealand, Nigeria, Sweden, Uganda, United Arab Emirates, United Kingdom, Tanzania
Introduction

The top areas of confusion are:

- Use of agents or subsidiaries to perform acts the U.S. entity cannot perform
- No system for managing consultants, agents, trustees & officers
- Inaccurate understanding of permitted payments
- Inaccurate understanding of who a “foreign official” is interpreted to be
Trends: Number of FCPA Actions

Total Resolved FCPA Enforcement Actions (DOJ and SEC)
1977 through 2011

Graph showing the number of FCPA actions resolved from 1977 to 2011, with a significant increase in the last two years.
Trends: Size of Penalties for FCPA Violations

Average Combined Corporate Penalty/Disgorgement (DOJ and SEC) 1977 through 2011
Trends: Prosecutions of Individuals

Resolved FCPA Enforcement Actions Against Individuals (DOJ and SEC)
1977 through first quarter 2012
FCPA Prohibitions

► The FCPA prohibits U.S. persons and foreign persons acting in the U.S. from:
  ▶ Offering or paying of any thing of value;
  ▶ To any foreign official, foreign political party or official, or candidate;
  ▶ For the purpose of improperly influencing any act or decision by them;
  ▶ In order to obtain or retain business.

► Requires adequate internal controls and accurate recordkeeping

► Exceptions: Facilitating payments for routine governmental action

► Affirmative Defense: Bona fide business expenses for promotion of business
Liability for Foreign Persons

► When can a U.S. university or its trustees and officers be held liable for bribery actually committed by a foreign affiliate, agent or contractor?

▷ The U.S. university controls the activities of the foreign person.

▷ U.S. trustees, officers or employees participate in the activities of the foreign person.

▷ U.S. trustees or officers ratify or approve acts or omissions of the foreign person.

▷ U.S. trustees, officers or employees facilitate actions of the foreign person.

▷ For public companies, the foreign affiliate fails to maintain accurate books and records or adequate internal controls.
Liability for Foreign Persons

The FCPA anti-corruption provisions apply to U.S. persons acting anywhere in the world and their foreign branches. It also applies to foreign persons acting on U.S. soil.

The FCPA also prohibits:

- Making a payment to a third party, “knowing” that person will use some of that payment to make a prohibited payment to a foreign official
- “Knowing” includes conscious disregard or deliberate ignorance

Implication: Partners, agents, consultants cannot pay bribes on a U.S. university’s behalf or with the U.S. university’s “knowledge”.

Examples
- Maxwell Technologies; Panalpina
Example: Nature’s Sunshine Products

In 2009, the SEC charged a U.S. parent, Nature’s Sunshine Products, with violating the FCPA’s anti-bribery, books and records, and internal controls provisions based on payments by its Brazilian subsidiary to customs brokers.

The SEC also charged two executives of Nature’s Sunshine Products based on their positions as “control persons” even though the SEC did not allege that these executives had personal knowledge of the payments.

Point: U.S. executives may be charged with FCPA violations for failure to supervise adequately employees responsible for maintaining the company’s books and records and internal controls.
The Latest Wrinkle: The Travel Act

The Travel Act prohibits the use of communications or travel facilities (e.g. flying, making a telephone call or wire transfer) to “promote,” “carry on,” or “facilitate” any “unlawful activity”.

Unlawful activity is defined to include bribery in violation of the laws of the State in which the act is committed or of the United States.

The Travel Act covers both federal and state laws on bribery.

- This includes the FCPA.
- Also includes state bribery laws – roughly three-fifths of states (including CA & NY) criminalize bribery even where no government official involved.

Implications:

- DOJ could add Travel Act charges to FCPA charges.
- Even if no foreign official is involved, DOJ could bring Travel Act charges.
# The U.K. Bribery Act

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<tr>
<th>Requirement</th>
<th>FCPA</th>
<th>UK Bribery Act</th>
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<tbody>
<tr>
<td>Applicable to Indiana University?</td>
<td>Yes – applicable to U.S. Universities like IU and their worldwide activities</td>
<td>Applicable only to organizations that conduct some part of their business in England and their subsidiaries worldwide</td>
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<td>Limited to bribery of “foreign official”?</td>
<td>Yes – prohibits only bribery of “foreign officials”</td>
<td>No – prohibits bribery of both government officials and private business employees</td>
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<td>Limited to giving bribes?</td>
<td>Yes – prohibits “offer, promise, or authorization” of a bribe</td>
<td>No – prohibits both giving and accepting a bribe</td>
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<td>Liability for internal control failures?</td>
<td>Yes – liability for failure to maintain adequate internal controls (if public co.)</td>
<td>Yes – liability for the failure to prevent bribery</td>
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Local and International Anti-Corruption Law

► OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

► Local Anti-Corruption Law
  ▶ Not identical to the FCPA
  ▶ Example:
    ▶ The FCPA provides an exception for “any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action.”
    ▶ UK Anti-Bribery Act does not contain a “facilitating payment” exception.
The definition of a “foreign official” is broad. It includes:

- Government agents and representatives
- Individuals holding political office
- Representatives of a political party
- Officers or employees of government-owned businesses
- Officers or employees of quasi-government agencies
- Individuals with influence over a government agency or entity
- Individuals with extensive experience dealing with the government

Examples of recent enforcement action “foreign officials” – healthcare providers, veterinarians, etc. (mainly employees of SOEs!)
The FCPA provides an exception for “any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action.”

“Routine governmental action” is defined to be an action ordinarily or commonly performed by a foreign official including (i) obtaining permits, licenses, etc. and (ii) processing government papers, such as visas.

The DOJ and SEC have taken a narrow view of this exception.

- In re Helmerich & Payne, Inc.
- Nature’s Sunshine Products, Inc.
Improper Use of “Reasonable and Bona Fide” Expenses Defense

► The FCPA allows payments to foreign officials for expenses related directly to “the promotion, demonstration, or explanation of products or services” if those expenses are “reasonable and bona fide.”

► In practice, it can be hard to determine what is “reasonable and bona fide.”

▷ Clear case - Lucent Technologies
Improper Use of “Reasonable and Bona Fide” Expenses Defense

► What are expenses related directly to “the promotion, demonstration, or explanation of products or services”?
  ▶ Opinion Releases 04-01, 07-01, 07-02 and 11-01
  ▶ Large grey area

► Representations in Releases are specific to the situation presented, and the facts of one case can seldom be duplicated to another case; therefore, caution should be employed when it comes to relying on Opinion Releases.
More Guidance: DOJ Opinion Releases

Themes:
- Conferences
- Training Courses
- Seminar
- “Study Tour”
- Promotion of Facilities

Issues:
- Airfare
- Dinners
- Souvenirs
- Honorarium
A U.S. hospital (“USHOSP”) affiliated with a U.S. university wishes to establish a joint venture to provide medical services in Kenya.

Sound familiar? Since 1989, the Indiana University School of Medicine and Moi University School of Medicine in Kenya have worked in partnership to develop leaders in health care for both the US and Africa.

What are some of the bribery-related risks for USHOSP?

How can USHOSP minimize these risks?
Practical Suggestions for Anti-Corruption Compliance

► Set the “Tone At The Top”
  ▶ Management should provide consistent reminders to employees that Indiana University is committed to maintaining the highest level of ethical standards in the conduct of its business.

► Provide training for relevant personnel

► Monitor expense reporting and use of petty cash

► Watch out for “red flags”; for example:
  ▶ Allegations of unethical conduct (such as against an intermediary)
  ▶ Extravagant entertainment expenses
  ▶ Lack of accuracy or detail in expense reporting
  ▶ Use of unauthorized financial accounts
  ▶ Payments or financial arrangements that prevent expense tracking or accounting such as cash payments
Who can I talk to with questions or concerns?

► Please contact Jackie Simmons at the Office of the Vice President and General Counsel at 812-855-9739 with any questions or concerns.