

## **Case Study: Bribery emboldened: U.S. Foreign Corrupt Practices Act (FCPA)**

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### **ABSTRACT**

The Foreign Corrupt Practices Act (FCPA) is a United States law passed in 1977 that prohibits Americans from paying bribes to foreign officials in furtherance of a business deal. FCPA places no “de minimus” for bribes underscoring how seriously the U.S. government deals with cases of bribery of government officials.

The case study will explore how one anonymized U.S. company believed that it had deftly sidestepped the restrictions of the FCPA by working effectively through its close alliances with third-party foreign-partner companies to enjoy the bounty of doing business in a number of emerging markets.

Upon completing the case study, students will have gained the necessary the insights and ability to identify potential “red flags” of actions by companies and individuals that may be in violation of the FCPA.

Keywords: FCPA, foreign corrupt practices act, bribery, corruption, anti-bribery, anti-corruption, government bribery, government corruption

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## INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) is a United States law enacted in 1977 prohibiting U.S. firms and U.S. persons from paying bribes to foreign officials in furtherance of a business deal (Department of Justice, 2017). There is no minimum amount for punishment of payments of bribes stated that underscores how seriously the U.S. government deals with cases of bribery of foreign government officials.

Much of the business growth of the previous three decades came from outside the U.S. and other industrialized markets generated mostly by emerging markets, i.e., countries in Latin and South America, Central and Eastern Europe, Africa, and Asia whose economies were either undeveloped or under-developed.

With tremendous business opportunities coming from these new markets, pressures mounted for companies to pay bribes to foreign government officials accustomed to being compensated for deciding in favor of companies paying the highest bribes. U.S. companies were perceived to be at a noticeable disadvantage competing against foreign competitors that were unconstrained by anti-corruption laws. In 2018, foreign bribery was a factor for over half of the world's US\$ 19.48 trillion global trade (World Trade Organization, 2019).

The case study will explore how one anonymized U.S. company may have, or believed that it had, deftly sidestepped the restrictions of the FCPA, while at the same time enjoying the bounty of doing substantial business in a number of emerging markets by working effectively through its close alliances with third-party foreign-partner companies.

Upon completing the case study, students will have gained the necessary the insights and ability to identify potential “red flags” of actions by companies and individuals that may be in violation of the FCPA. Furthermore, by understanding what seemingly appears to be permitted behavior when dealing with foreign government officials are, in fact, prohibited by the FCPA, students and companies for whom they may work will be better able to avoid becoming subject to criminal and civil penalties.

## BACKGROUND TO FCPA AND GOVERNMENT BRIBERY

### Introduction to Government Bribery

For many U.S. companies much of their business growth over the previous three decades has come from outside the U.S., and most of that growth has been generated in emerging markets, i.e., countries in Latin and South America, Central and Eastern Europe, Africa and Asia whose economies were either undeveloped or under-developed. Largely marked by the combination of China opening its economy to the West that began in earnest in the late 1980s, coupled with the fall of the Soviet Union in 1991, the global economy grew at breakneck pace for most of the next three decades. According to the International Monetary Fund, adjusted for exchange rates the global economic output swelled by US\$11.5 trillion from 1980 to 1990, then grew by US\$10.4 trillion from 1990 to 2000, and then by US\$32.0 trillion from 2000 to 2010 (International Monetary Fund, 2012).

With tremendous never before seen business opportunities coming from these newly-opened markets, pressures mounted on companies worldwide to pay bribes to foreign government officials who have been historically well-accustomed to being compensated for deciding in favor of the companies paying bribes and oftentimes the highest bribes. U.S.

companies have historically been at a distinct disadvantage as they are increasingly competing against foreign competitors who have been largely unconstrained by such strict bribery and anti-corruption laws as the FCPA.

The Organization for Economic Cooperation and Development (OECD) reports the typical cost of corruption is ten percent of contract value and can easily rise to twenty percent or more to win the contract award (Transparency International, 2018). In many cases, an additional two percent to five percent of contract value is frequently added to ensure that a company's invoices are paid in a timely manner (U4Brief, 2007). This means that a company has to work that much harder to make a profit. At the same time, in many of the world's countries if bribes are not paid, companies cannot effectively compete to be able to win government contracts.

Forty countries that make up about two-thirds of the world's exports and approximately ninety percent of foreign direct investment (FDI) have adopted similar FCPA laws to combat bribery of foreign public officials (FCPA Professor, 2016). However, such anti-bribery laws are unenforced or amount to a mere "slap on the wrist", at most requiring violators to pay minor fines. These "punishments" have little to no impact on dissuading companies and individuals from actively engaging in corruption and the bribery of government officials (FCPA Professor, 2016). In fact, in most of the world's 195 countries, such laws are non-existent. Not surprisingly, in 2018 bribery of government officials ensued largely unabated in more than half of the world's US\$19.48 trillion total global trade (World Trade Organization, 2019).

In addition to the direct financial cost of government corruption, corruption hinders economic growth by draining public assets away from vital government priorities such as education, health and infrastructure. It further undermines democratic values and public accountability weakening the rule of law, which threatens stability and security by facilitating criminal activity within and across countries' borders (A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012.).

Bribes are typically not paid directly, but in fact payments are made indirectly through third party intermediaries or agents. Such payments are also often paid off-shore or via joint ventures. Quite often, bribe payments involve multiple diverse schemes (FCPA Professor, 2016). The instrumentality and methods to steer bribes to their intended beneficiaries are oftentimes quite complex and almost always done discreetly.

### **Background of the U.S. Foreign Corruption Practices Act (FCPA)**

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), was enacted to make it unlawful for U.S. companies and U.S. persons to make payments to foreign government officials to facilitate in obtaining government business or retaining government business (Department of Justice, 2017).

The FCPA's anti-bribery provisions prohibit the intentional use any means of interstate commerce to facilitate any payment, offer or promise to pay, or any authorization of payment of money or anything of value to any person with knowledge that any such money or any such thing of value will be offered, given or promised, directly or indirectly, to a foreign government official to influence him/her in his/her official capacity in furtherance of closing a business deal (Department of Justice, 2017).

The FCPA extends to any U.S. corporations, partnerships, trusts, associations, or sole proprietorships with its principal place of business in the U.S., or any entity organized under U.S. law, and to their officers, directors, employees, stockholders, and agents. Agents include

consultants, distributors, joint-venture partners, and other third parties (U.S. Securities and Exchange Commission, 2017).

The FCPA's anti-bribery provisions are also applied to certain foreign "issuers" of securities anywhere in the world (Department of Justice, 2017). An "issuer" is typically a foreign company that has a class of securities traded on a U.S. securities exchange or a foreign entity that is otherwise required to file reports with the U.S. Securities and Exchange Commission.

The anti-bribery provisions also apply to foreign companies and foreign persons who cause, directly or indirectly through agents, an act in furtherance of such corrupt payments to take place within the territory of the United States (Department of Justice, 2017).

The FCPA also requires any and all companies that has securities publicly listed on any U.S. securities exchange to comply with accounting transparency provisions created to operate alongside with the FCPA's anti-bribery provisions (Department of Justice, 2017). Private companies – U.S. or foreign – are not subject to FCPA's accounting transparency provisions. These provisions require any and all companies publicly listed on any U.S. securities exchange to: (a) keep books and records that accurately and reflect the transactions of the company and, (b) maintain an adequate system of internal accounting controls (Department of Justice, 2017).

Criminal penalties for violations of the FCPA's anti-bribery provisions include imprisonment for up to five years for individuals who are held criminally liable (BakerHostetler, 2012). Criminal actions are brought by the U.S. Department of Justice ("DOJ"). Criminal penalties also include fines for both private and publicly traded companies, and their officers, directors, stockholders, employees and agents. Penalties may be increased up to two times the benefit the company or the individual sought to obtain by making a corrupt payment. Finally, fines imposed upon individuals for the SEC or DOJ cannot be paid by their employer (BakerHostetler, 2012).

Civil penalties include fines against any U.S. private company and U.S. persons, as well as any and all companies traded on any and all U.S. securities exchanges, as well as its officers, directors, employees, stockholders or agents acting upon behalf of the company who violates the anti-bribery provisions (BakerHostetler, 2012). Civil actions are brought by the U.S. Securities and Exchange Commission ("SEC"). Supplemental civil penalties may also be imposed by the court ranging from the greater amount of (i) the gross amount of the financial gain the company or individual sought as a result of the violation, or (ii) a dollar amount specified by the court against any company or individual (BakerHostetler, 2012).

In addition to charging criminal and civil fines and penalties, the DOJ and the SEC may seek to enjoin any act or practice of a company if it appears the company, its officers, directors, employees, agents or stockholders were acting on behalf of the company have violated any FCPA anti-bribery provisions (BakerHostetler, 2012).

### **Corrupt Intent and Bribery**

Are all gifts or items of material value provided to foreign government officials considered bribery? No, it is appropriate and permissible to provide reasonable gifts as tokens of esteem or gratitude to foreign officials. At the same time, such gifts or items of material value must be made openly and transparently, properly recorded in a company's books and records, and given only where appropriate under local law, customary and normal where given, and reasonable for the occasion (A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012.)

Notwithstanding a gift or an item of material value that are customary and normal and otherwise are permissible, a bribe often turns on the individual's state of mind (FCPA Professor, 2016). An individual's state of mind is a required element to many criminal offenses. Did the individual act with corrupt intent? In many cases, prosecutors have strong evidence of corrupt intent, whereas in other cases prosecutors hope the evidence they have will be sufficient enough to persuade a jury that the individual acted with the requisite corrupt intent (Volkov, 2019).

In FCPA context, corrupt intent is defined as seeking to influence or persuade a foreign official to act or fail to act contrary to the official's established duty (Volkov, 2019). In other words, a company, individual acting alone, or individual acting on behalf of a company fall under these parameters. If any of these parties pay, or offer to pay, money or something of value to a government official on behalf of a company it is acting against the legal procedures set in place to award government contracts, most commonly known as a publicly disclosed competitive bid process. By paying such money to a government official, the individual is acting with scienter, i.e., legal lexicon for conscience intent or knowledge of intentional wrongdoing.

Even when there is evidence surrounding an individual's state of mind, i.e., scienter, there can be significant nuances to an individual's intention (Volkov, 2019). Sometimes the evidence is more ambiguous, which makes it open to more than one interpretation. The individual may not make a definitive statement or may not leave a clear email or paper trail. Instead, the individual may act from an unarticulated understanding based upon statements that usually involve inferences from the company's or individual's conduct (Volkov, 2019). This is when scienter becomes elusive and difficult to prove.

In some cases, the facts themselves may be evidence proof of the intent. For example, consider if a prospective company's agent takes a foreign government official to dinner who is responsible for deciding a winning bid for a government contract. The agent spends an excessive amount of money on the dinner for the two of them, and then proceeds to give the official keys to a brand-new car. It is reasonable to presume that the company's agent acted with the 'corrupt intent' to improperly influence the official to act in the company's favor. In reality, however, there are various shades of grey that occur when doing business in markets where government officials routinely accept, and often demand bribes.

To that point, the requisite proof of improper influence required for an FCPA violation can be difficult to prove if the method of payment is ambiguous (IACRC, 2019). For example, a payment by a company or its agent into a country's political, social, or humanitarian charity, or a fund where there's no timely connection between such payments and the alleged influence, may be difficult to prove. In many markets, contributions to charities or funds are viewed as prerequisites for prospective government contractors to be even considered for government contracts, especially when these governments claim that contributions supporting their country's humanitarian initiatives are no different than the U.S. providing "foreign aid" to countries to exert the U.S.'s political influence.

Inasmuch as it is a flagrant and obvious form of paying bribes, bribes are often consummated as cash payments. Frequently, in addition to or in place of cash payments, are payments in-kind goods or services such as providing luxury goods or holiday travel to the intended beneficiaries (Volkov, 2019).

In countries with predominately cash-driven economies cash is the most direct means of bribe-paying. Moreover, the way cash bribes is transmitted may be intricate and convoluted, as well as involve several intermediate transitional steps as illustrated in the following examples\*:

**Example One:** Taking a short-cut to achieve a target is always preferred

- Importer accepts a delayed consignment of seasonal products to subsequently export and seeks to assist the importer to retain the business of a supermarket customer.
- Importer's products have a limited shelf life and expiry date that requires permits from three ministries in the importing country, i.e., Ministries of Food, Exports and Customs.
- Obtaining the required permits normally takes eight to twelve weeks, which is too long for the shelf life of the goods as all are perishable within four weeks.
- A local intermediary agent learns of the problem and offers to expedite the process for the importer for a fee of US\$6,000.
- Such a large payment would substantially reduce the profit margin for the consignment, at the same time it will help to retain the Importer's long-term relationship with its customer, so the Importer pays the "expedite fee" to the intermediary agent who pays a cash bribe to government officials who issue the required permits.

**Example Two:** Bribery on retainer as regular payment to retain a contract

- A Western European consultant won business from the government energy agency in an Eastern European country.
- One-hundred and eighty days into the project, upon the scheduled contract review date, the government energy agency threatens to terminate the contracts blaming the unsatisfactory progress being made by the Western European consultant.
- At the same time, some of the government's energy agency's officials communicate to the Western European consultant's executives that the contracts could be extended for five more years provided that key executives from the Western European consultant begin to demonstrate a greater commitment to the Eastern European energy agency.
- To retain its business, the Western European consultant's project manager begins to transfer cash payments of US\$5,000 each month to each of the five senior executives of the government energy agency. The project manager enters into separate three-year contracts with each of the five senior government agency executives stating that each senior executive provides local "laws and customs" advice involved in doing business.
- The consultant rationalized the monthly expenditure of US\$25,000 as a cost of doing business to ensure the continuation of several hundreds of thousands of U.S. dollars in monthly revenues, and accordingly recorded the expenditure as 'advisory service' fees.

**Example Three:** Hospitality services provided despite being in violation of company policy

- A major U.S. cosmetics company relies upon its salesforce to market its products door-to-door to enter into and expand in a large emerging market in Asia. Direct door-to-door sales are strictly regulated through licenses in this Asian country.
- Licenses to sell door-to-door typically take one year to get approved. The cosmetics company's top in-country executive has been able to secure an 'interim' license from a senior government official in the local Asia country.
- To avoid time-consuming and complicated inspections needed to obtain official licenses, the company's top in-country executive tells his salespeople to "treat" local government inspectors to free company merchandise in return for "leniency" giving each of his salespeople US\$1,000 worth of merchandise to distribute to the government's inspectors.

- The company's top in-country executive then decides to take care of the government's senior inspectors and licensing officials via a "special hospitality program" that he's developed that includes dinner invitations to exclusive restaurants in the local market.
- Despite his company's widely-known and detailed policy prohibiting gift-giving and providing hospitality to government officials, the company's top in-country executive nevertheless proceeds forward with the special hospitality program and orders his salespeople to assist in implementing the program.

**Example Four:** Gifts offered to influence favorable decision-making by government officials

- Through its local in-country subsidiary, a global U.S. company that sells power generation equipment participates in the bid process to secure supply contracts from the Energy Ministry of a Central American emerging market.
- In this country competition amongst foreign power generation equipment suppliers is intense, which prompts the subsidiary's local in-country manager to secure the advice of the subsidiary's local 'fixer' to make 'suitable' gifts to Energy Ministry top government officials to provide confidential information on the U.S. company's competitors' bids.
- The local fixer informs the subsidiary's local in-country manager that this is how business is done in this market, and the rival companies will be doing the same thing.
- Through the fixer, the local subsidiary's in-country management arranges a "gift" in form of the latest iPad to be provided to each of the Energy Ministry's key officials.
- The U.S. company's local subsidiary then receives confidential information on the contract bids of its competitors and proceeds to submit a bid with "better" specifications.<sup>1</sup>

**Case Study: Occidental United Construction Holdings, Inc.**

One U.S. company confronted with pressure to do business in countries requiring varying forms of "contributions" is the anonymized U.S. company whose employees and local in-country agents may lack scienter, i.e., corrupt intent, and who otherwise may still be "unknowingly" engaging in bribe-paying of foreign government officials. The Occidental United Construction Holdings, Inc. ("OUCH") has seemingly sidestepped the FCPA's anti-corruption and anti-bribery provision violations for decades to pursue the company's business by largely working in close, trusted alliances with the company's third-party foreign alliance partner companies.

OUCH is a large U.S. engineering and construction company founded soon after World War II as a general contracting company in the construction industry, specializing large public and private sector infrastructure projects, including mining, oil and gas, municipal infrastructure, railroads, and road and highway construction.

Over the next several decades, OUCH's rapid growth kept pace with the growth of the U.S. economy's growth as America expanded rapidly westward beyond the U.S.'s Midwest. As the company grew, so did its business outside the U.S. to become one of the most successful U.S. engineering and construction companies worldwide, developing a particular expertise doing business in many of the world's most challenging emerging economies, including countries in

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<sup>1</sup> \*Source: "How to Bribe a Typology of Bribe-Paying and How to Stop It" prepared by Transparency International U.K., Published January 2014, ISBN 978-0-9573410-5-0©2013. Transparency International U.K. is the U.K. chapter of Transparency International, the world's leading non-governmental anti-corruption organization with over 100 chapters worldwide

Latin and South America, Eastern Europe and Russia, Middle East, Africa, Central Asia, India, China and Asia Pacific.

In addition to having offices in more than sixty countries worldwide, in each of these countries OUCH has local in-country alliance partners with whom they contract either as a subcontractor or, in some instances, as general contractor for projects that OUCH undertakes in its alliance partners' countries. Virtually all of the company's alliance partners have worked closely with OUCH for ten or more years, with some partner relationships spanning more than twenty-five years. The profile of the individuals who have founded or lead OUCH's alliance partners constitute some of the most respected and successful – and wealthy – families in each of these countries.

Given the basic nature of emerging markets, it is typical that a relatively small number of people and a few families wield tremendous influence and power throughout the country in both the public and private sectors. OUCH's alliance partners and their families are routinely listed in each country's top five wealthiest families. Such treasured alliance partners in these countries provide OUCH with proprietary access to the countries' top government and business leaders.

### **Case Study Situational Analysis**

The following section presents four factual business situations in which OUCH and its alliance partners have encountered in a variety of emerging and developing markets around the world. In each circumstance, either or both OUCH and its alliance partners were confronted with real world business problems that one or both sought to resolve that involved the expenditure of money to either foreign governments directly or to government employees or agents. While some payments of money were ostensibly innocuous, some payments presented challenges to the parties – and potentially to government oversight agencies – to identify actual bribery of government officials, which may be present.

Following the four fact-based business scenarios is a compendium of “red flags” that often indicate behaviors that may be deemed bribery of foreign government officials, including those involving scienter, i.e., willful corrupt intent [See Appendix One]. By applying these symptomatic “red flags” of corruption and bribery to what on the surface appear to be legitimate business behaviors, students should then be able to “peer under the bonnet” or “under the hood” of a variety of fact situations to identify prohibited behaviors of bribery of foreign government officials pursuant to the provisions of the FCPA.

#### **Case Study Scenario 1:**

##### **One-time payment by third-party agent to secure an import permit to benefit its principal**

In one Central Asian country where OUCH has provided its project management services in the oil and gas sector for over twenty years, OUCH relies on its local alliance partner to import spare parts for its well drilling equipment. Without having ready access to essential spare parts, OUCH's well drilling rigs faces may be forced to shut down at a cost of tens of thousands of dollars per day per drilling rig. OUCH's local alliance partner was always mindful of the issue with the spare parts permits putting ‘fixes’ in place in advance, so spare parts were rarely ever held up in the country's customs department.

OUCH pays its local alliance partner a fixed percentage of the contract's value that OUCH secures for each project from each government ministry. OUCH records these fixed



payments as ‘local project management fees. As OUCH’s local alliance partner is a completely separate company, OUCH has no access or control over its local alliance partner’s company operations, including any costs its local alliance partner may incur in the course of its business with OUCH.

A local customs official refuses to release the essential and urgently needed spare component parts for OUCH’s well drilling rigs, saying that the alliance partner company’s license only authorizes temporary imports on specific component parts, and that the spare component part in question is classified as a “permanent import” under new import guidelines issued by the local country’s Ministry of Customs. This is the first time OUCH’s alliance partner had heard of the new import guideline, as it had no previous issues with importing these specific parts.

Still, the customs official on-site assures the local alliance company that he can provide the required import license, but to process it would take five weeks unless he works overtime processing the required paperwork, although he is not authorized to receive overtime pay for such additional duties.

Any such delay would mean that OUCH fails to complete the well drilling project on time, and moreover that OUCH would incur significant delay penalties amounting to tens of thousands of dollars as well as facing additional storage charges for the spare parts.

Aware of the cost and inconvenience of any delay to OUCH, the local alliance partner offers to make a cash payment to the official to compensate him for the additional work needed to process the needed permits, and it does so without notifying OUCH of the potential delay to clear the spare parts or the need for it to undertake any remedial actions.

### **Case Study Scenario 2:**

#### **Regular payments made to ensure operations are handled more quickly than competitors’**

In one large Eastern European country, for the past ten years OUCH has provided facilities management services in the transportation sector, and specifically for the maintenance of the country’s state-run national railroad. The country’s Ministry of Transportation requires that the manufacturing facilities for companies supplying component parts for its trains that are sourced from foreign manufactures (vs local manufacturers, of which there are virtually none) must be inspected by an inspector from the Ministry of Transportation. The Ministry issues formal invoices to OUCH for each on-site inspection for US\$6,500 plus travel expenses averaging US\$3,500 per visit for a single inspector from the country’s Ministry of Transportation to make monthly one-day inspection visits to a component parts manufacturer with whom OUCH subcontracts the brake block parts business under its master contract with the Ministry.

To fulfill its contract with the Ministry of Transportation, OUCH subcontracts with a number of its component parts suppliers, one of which is a U.S.-based railway component parts manufacturer for the trains’ wagon brake blocks. This subcontractor ships out brake blocks to the Ministry of Transportation worth more than \$US50,000 each month to comply with the contract the railroad brake blocks manufacturer has with OUCH.

As part of OUCH’s negotiation of the maintenance contract with the Ministry of Transportation, the Ministry mandated such monthly shipments of the brake blocks (vs quarterly, semi-annual or annual inspection visits). Before the brake blocks can be shipped, Ministry of Transportation inspectors must inspect and certify each supply of wagon’s brake blocks for

compliance with its country's safety standards. Inspections are conducted at the brake blocks manufacturer's production facility in the U.S. Midwest.

The Ministry's inspectors have a long-established reputation for being slow to perform inspections and to misfile compliance certificates. To ensure that the Ministry's inspectors conduct the inspections regularly, accurately and file compliance certificates on time, the manufacturer pays the Ministry's inspector US\$2,000 each month, unbeknownst to OUCH.

Making such payments helps the railroad brake block manufacturer in multiple ways that promotes the manufacturer's business, which enables the manufacture to justify such payments. Firstly, making such payments helps the manufacturer to retain its reputation for reliability and high quality with both OUCH and the Ministry of Transportation. Secondly, it helps to secure the manufacturer's future position as the preferred sole-source supplier of railroad wagon brake blocks to OUCH and OUCH's client, i.e., the Ministry of Transportation. Thirdly, making such payments ensures timely payment of its invoices by OUCH each month.

### **Case Study Scenario 3:**

#### **Charitable donations made into a country's humanitarian fund to comply with contract**

In one Middle Eastern country OUCH secured a 10-year government contract worth US\$5.5 billion with the Ministry of Transportation to construct 3,000 km of highways, plus service areas that include petrol stations, auto/truck repair stations, hotels and restaurants.

As mandated in the master construction contract (and also mandated in all government contracts with foreign companies, all of which are public documents, OUCH itself and each of OUCH's foreign subcontractors (vs local in-country companies) with whom OUCH contracts for products and services under the contract it has with the government are each required to make annual charitable donation payments to a locally-registered nonprofit agency to support the country's humanitarian, poverty abatement and education initiatives.

Annual charitable donations must be paid by OUCH on the 15<sup>th</sup> day of each January over the 10-year term of the contract. Each annual charitable donation is a yearly 'fixed amount' over the 10-year contract term totaling US\$30 million, which amounts to approximately five percent of the total contract value for each year of the 10-year contract.

OUCH's contract with the Ministry of Transportation further states that the Ministry of Transportation has the right to provide an "overall assessment of OUCH's the overall performance" by the 31<sup>st</sup> day of each January during the term of the 10-year contract. Further, if the Ministry deems OUCH's and/or its subcontractors' performance is less than satisfactory – the assessment process is fully detailed in the contract – that the Ministry has the right to assess 'financial penalties' against OUCH for any 'degradation in the quality of services' provided.

Now in the fourth year of the 10-year contract, by each January 15<sup>th</sup> OUCH has made the required charitable donation and by each January 31<sup>st</sup> the Ministry's assessment of OUCH's performance is deemed to be 'favorable' with zero financial penalties levied against OUCH.

### **Case Study Scenario 4:**

#### **Third party agent funding government officials' travel to ensure its principal wins contract**

In recent years OUCH sought to enter into a new emerging market in Southeast Asia, where one of its long-time, trusted local alliance partners in an adjacent country in the region has developed personal relationships with key executives in the new market's Prime Ministry.

The new market has just entered into a treaty with the United States that has a key provision stating that the U.S. will lift trade restrictions between the two countries that have been in place for several decades, which will enable the Southeast Asian country for the first time to build a market economy enabling it to begin to thrive economically. OUCH seeks to be the first U.S. general construction company to enter into the previously closed market where billions of dollars will be spent on desperately needed infrastructure construction projects.

After months of negotiations with the Prime Minister's staff that included both key executives from OUCH and its adjacent market alliance partner's managing director, the negotiations stall. Asked by OUCH to re-initiate meetings with the Prime Ministry, OUCH's adjacent market alliance partner meets separately with Prime Ministry key executives. In the meeting it becomes clear to OUCH's alliance partner that the Prime Ministry wants any contract into which the parties may enter to include a two-week visit to the U.S. for ten Prime Ministry key executives and their families wherein the Prime Ministry's key executive will engage in joint planning meetings with OUCH's key executives that will be scheduled over three of the fourteen days of the executive's visit to the U.S.

OUCH's key executives are now informed that their adjacent market alliance partner has broken the negotiation's logjam. Pleased with its alliance partner's success, OUCH asks its alliance partner to arrange a formal contract signing ceremony with the Prime Minister himself. The alliance partner arranges the meeting. No mention of the two-week visit to the U.S. by the Prime Ministry's key executives and their families is ever discussed at the signing ceremony.

Unbeknownst to OUCH, its alliance partner enters into in a separate contract with the Prime Ministry under which, at the alliance partner's own expense, the alliance partner will bring the ten officials and their families to the U.S. Without addressing the specific reasons for the Prime Ministry's change of heart and its willingness to now enter into contract with OUCH, at the same time based upon subtle ambiguous overtures made by its alliance partner's managing director, OUCH executives anticipate its alliance partner's desire to negotiate a sizable increase in the upcoming year's contract that OUCH and its alliance partner the will negotiate.

Upon signing the contract, the ten Prime Ministry key executives and their families are formally invited to the U.S. by OUCH at the suggestion of OUCH's alliance partner.

Under the impression that the Prime Ministry has funded its ten executives extended visit to the U.S., over the next fourteen days, OUCH executives and their families host a variety of social events for the Prime Ministry executives and their families that includes its adjacent market alliance partner's managing director and his spouse who has joined him on this trip.

In addition to OUCH's alliance partner incurring the travel expenses for the Prime Ministry's ten key executives and their families, each Prime Ministry executive is given a per diem allowance of US\$500 by the alliance partner to cover 'out of pocket expenses'.

### **Case Study Conclusion**

The facts presented in the above case study represent just a few of the scenarios and their attendant issues that businesses routinely confront every day doing business around the world. It is both customary and normal that successful companies doing business in foreign countries have close alliances with local companies – and typically long-term multi-year alliances – who represent and support their foreign principals' interests locally. Such partnering arrangements have taken place for hundreds of years that are prompted by the need for foreign companies to both know the nuances and customs of the local foreign market as an "insider" would, and to

develop the close relationships with local foreign countries' top officials in government and business that have been heretofore essential to doing business around the world.

As objective and impartial as many would believe business transactions should be to ensure fairness, relationships – including government and business relationships – in all markets around the world are inescapable and essential. Ultimately and notwithstanding doing business exclusively online business, it always comes down to people do business with people, and whenever people are introduced into the decision-making calculus, bias and partiality leading to corruption and bribery are ever-present.

Nevertheless, and notwithstanding the deeply embedded culture of paid-for inducements to government officials that permeates business transactions with a number of governments around the world, there are compelling reasons for all countries to continue to wage battle against corruption and bribery, which is oftentimes characterized as a 'cancer' in business.

Ultimately, bribes paid by suppliers and contractors to government officials to win government business are invariably paid by the citizenry in every market around the world. Both as experienced leaders and students aspiring to become future business leaders, all must be aware of the prevalence of corruption and bribery in business and to do what one is able to do to shine light upon it, call it for what it is, and to do all that one is able to do to root it out of one's business.

### **Case Study Questions**

Students undertaking the FCPA Case Study are required to answer the following questions:

- 1) Is it fair to require U.S. companies (and companies from countries having enacted and enforcing FCPA-similar laws) to compete against companies unrestricted by anti-corruption laws in countries where doing business with the governments requires companies to engage in payment of bribes to secure government business (yes or no)?  
Once answered, provide: (i) a full analysis and the reasons supporting the position taken, and (ii) then also provide a full analysis and the reasons supporting the counter-position.
- 2) In each of the four scenarios presented in the case study, identify possible incidents and/or behaviors by both the company and the company's local market agent that could be considered to be in non-compliance with the provisions of the FCPA.
- 3) For each incident and/or behavior identified in #2 above with both the company and the company's local market agent that may be in non-compliance with the FCPA, present and defend any possible solutions in which the company and/or the company's local market agent may engage to achieve their intended business goals without violating any provisions of the FCPA.

**APPENDIX ONE****Compendium of “Red Flags” of Corruption and Bribery\*****EXCESSIVE HOSPITALITY AS BRIBERY**

Some ‘Red Flags’

- Is the hospitality consistent with company policy?
- What is the position held in government by the person being offered hospitality?
- Likelihood that the hospitality offered may influence the official to favor the offeror?
- Will the official have to take the work day off to accept the offered hospitality?
- Will offered hospitality be perceived as a bribe by competitors, offeror company, government officials and regulators, the media, etc.?

**GIFT-GIVING AS BRIBERY**

Some ‘Red Flags’

- Might the gift(s) be perceived as being excessive in value?
- Is the gift giving consistent with the offering company’s policy?
- Is the gift recipient a foreign government official?
- Likelihood that the gift(s) offered may influence the official to favor the offeror?
- Will offered gift(s) offered be perceived as a bribe by competitors, offeror company, government officials and regulators, the media, etc.?
- Likelihood that the timing of the gift given will be perceived as intended to influence a favorable outcome in the government’s award of a contract with the offeror’s business?
- Presence of any intermediaries involved in the gift-giving directly or indirectly on behalf of the offeror’s business?
- Is gift giving culturally customary in the country where the official is the gift recipient?
- If gift giving is culturally customary, will the value of the gift given be consistent with the offering company’s gift giving policies?

**IN-KIND BENEFITS AS BRIBERY**

Some ‘Red Flags’:

- Is there a quid pro quo between the foreign government official and the company seeking to do business with the foreign government that provides anything of value to the foreign government official, his/her family, friends or others associated with the foreign official?
- Is there a customary regulated selection process that is circumvented by exchange of favors or any in-kind benefits received by the foreign government official?
- Is a business decision being made without regard to merit in the relationship between the foreign government official and the company that is seeking to do business with the foreign government?
- Is there any privileged or non-customary access being offered to a particular service or information through a foreign government official’s connections or status, where it is clear foreign government official is exploiting his/her power and/or authority?
- A person related to one of the parties to the relationship between the foreign government official and the company seeking to do business with the foreign government agents or employees seeks a contract provision or specification explicitly favoring the company in return for providing anything of value to the foreign government official, his/her family or friends or others associated with the foreign government official.

### DIRECT CASH PAYMENTS AS BRIBERY

Some 'Red Flags':

- Is a payment being made or requested, either directly or indirectly, to expedite, facilitate or perform a service to which there is a legal entitlement or may be considered an action performed in the routine course of business by the foreign government?
- Is the company seeking to do business with the foreign government gaining any advantage, benefit or preferential treatment, vis a vis, the company making any payment?
- Is any payment to the foreign government or any foreign government official that may appear to be unofficial or contrary to the foreign government's customary procedures?
- Is any payment being made to a foreign government or to a foreign government official that is higher than what the foreign government charges over and above the standard fee?

### BRIBES DISGUISED AS CHARITABLE / POLITICAL DONATIONS

Some 'Red Flags':

- Are full and accurate disclosures being made for all charitable contributions made to the foreign government or to one of its designated or directed charities?
- Will a donation appear as it is done to influence a foreign government official?
- Are there clear, rational and reasonable policies and criteria for political contributions, established by the foreign government and the company seeking to do business with the foreign government that includes a definition of a political contribution?
- Does the foreign government or the company have established policies not to make contributions and are there procedures in place to prevent such contributions being made?
- Where the company has a policy to make political or charitable contributions to a foreign government or an agency directed by the foreign government, has the company secured board of director approval to make such a contribution that the company seeks to make?
- Will a contribution and/or donation to a foreign country's political party, its politicians and/or candidates for office, be perceived as the company's attempt to gain an advantage?
- Has the company's contribution and/or donation to a foreign government or the foreign government's official(s) been duly approved by the company's executive management?
- Are any agents or intermediaries acting upon the behalf of the company seeking to do business with a foreign government aware of and are acting within the company's guidelines on making political donations and/or contributions?
- Are the company's political donations and/or contributions to a foreign government and/or to foreign government officials or to lobbyists, associations, etc., promoting the company's interests transparent, and fully and publicly disclosed and made in accordance with company policy?

### BRIBERY MASKED AS PAYMENT OF COMMISSIONS

Some 'Red Flags':

- Are any payments or requests for payment of higher than customary commissions to agents, intermediaries or advisors who claim they are able to secure any business advantage being made?
- Do any agreements that require the payment of commissions state maximum commission rates, including a description of services rendered by the service provider and does that agreement explicitly state that payments to foreign government officials are prohibited?
- Have payments for large commission been determined to be compliant with all relevant legislation, regulation, industry codes or standards?

**BRIBERY THROUGH MIDDLEMEN, AGENTS, INTRODUCERS, I.E., INTERMEDIARIES****Guidance – Minimize and Manage Risk with the Use of Intermediaries**

- Due diligence related to any intermediaries is conducted to identify and avoid dealing with disreputable third parties and other questionable individuals and companies.
- Due diligence is conducted to additionally identify any risks associated with any intermediaries, e.g., pay particular attention to ownership of companies and organizations to ensure that intermediaries are not also acting as conduits to foreign government officials or any persons having any conflicts of interest.
- Key red flags include, i) whether an intermediary is resistant to formal written agreements, ii) the intermediary is able to avoid or otherwise bypass legal requirements more easily than others, or iii) charges fees well above customary levels.
- Communicate the company's anti-corruption standards and international regulations in writing to ensure the intermediary is contractually required to abide by these standards.
- Conduct due diligence to establish the market rate for the intermediary's services, and that the intermediary delivers all and only services for which the intermediary is paid.
- If an intermediary is proven to paying bribes or is even suspected of paying bribes, it is prudent to end the relationship with the intermediary and commence an investigation.
- When employing foreign government officials in any capacity, additional care should be taken to ensure that the service is legitimate and appropriate, and that all payments are properly recorded and disclosed, including publicly if required.
- Any appointment of an intermediary and especially of a foreign government official should be permissible under the foreign government's regulations and guidelines.
- All services provided by any intermediary should be written in detail and duly recorded.

**FALSE OR INFLATED INVOICING AND PRODUCT PRICING****Guidance – Minimize and Manage Risk with the Use of Invoicing**

- Take care to provide sufficiently detailed information for invoices to all intermediaries.
- Conduct due diligence and investigations, including audits as may be necessary for payments not sufficiently detailed and/or may be suspicious.
- Require all company executive, managers and employees to forecasts any and all costs associated with future business, especially in markets known for bribery, including provision to require special investigations into any allowing any expenditures not foreseen in the budget, especially in markets known for bribery.
- Require regular and routine audits, including random audits to monitor accounting practices paying specific attention to any irregular expenditures, and expenditures and contract renewals in markets known for bribery.

**OFF-SHORE ARRANGEMENTS AND OFF BALANCE-SHEET PAYMENTS****Guidance – Minimize and Manage Risk with the Use of Off-Shore Accounts**

- Payment of bribes to intermediaries often utilize off-shore accounts, so special care should be taken when appointing and making payments to any intermediaries, especially those who are facilitating business in markets known for bribery.
- Monitor the past and current performance of intermediaries, as many have been tied to bribery and corruption. Be wary if intermediaries request payments be made via companies in markets known to tax havens.
- Be wary and investigate payment made via tax havens to ensure they are legitimate.

## JOINT VENTURES

### Guidance – Minimize and Manage Risk with the Use of Joint Ventures

- Ensure that companies have detailed due diligence policies and appropriate processes established – and used – regarding all intermediaries and other third parties before entering into any joint ventures, alliances or consortia.
- Ensure that all joint venture, alliance partners and other third parties with whom your company enters into any consortia all have established anti-corruption and anti-bribery policies that are consistent with your company's and that such policies are employed.
- Have procedures and processes established to evaluate the performance, including contract provisions terminating the relationship, with any joint venture partner, alliance partner or any third parties with whom your company may enter into a consortia to conduct business, paying particular attention in business the consortia pursues in markets known for bribery.

## TRAINING COURSES

### Guidance – Minimize and Manage Risk with the Use of Training

- Establish special monitoring and evaluation procedures, including registered workshop attendees and daily registration confirmations, regarding funds allocated and incurred on training and workshops, especially in markets known for bribery.
- Establish multi-level approval procedures for training courses especially for training participants and/or pursuing business in markets known for bribery.
- Establish routine audits, including random audits of all training expenditures and especially when training participants in pursuit of business in markets known for bribery.
- Establish and publish guidelines regarding conducting of training courses and workshops especially when training participants in pursuit of business in markets known for bribery.
- Be especially wary of overseas training unless there is a clear and justifiable business rationale for both the trainees involved and the location of the training.
- Be wary of any request to pay larger than customary per diems to cover routine expenses.
- Establish requirements for the publicizing post-training reports to verify the training location and training attendees.

## PER DIEMS AND EXPENSES

### Guidance – Minimize and Manage Risk with the Use of Per Diems & Expenses

- If at all possible, payment of cash per diems are to be avoided, at the same time if they are paid, such payments should be of low value. Any larger per diems that are deemed necessary should be strictly limited and monitored – for example:
- Confirm that any per diem paid is consistent with the local laws and company policies.

## REBATES AND DISCOUNTS AND KICKBACKS

### Guidance – Minimize and Manage Risk with the Use of Rebates, Discounts and Kickbacks

- Make it abundantly clear that any schemes that may be suspected as bribes are strictly prohibited in the company including loss of employment of any employment deemed to be facilitating any payments of bribes either directly or indirectly.
- Be wary of paying rebates, discounts, and refunds as they are often vehicles of bribery.
- Be wary of potential business partners or intermediaries of offers or requests for exclusive benefits or payment of fees in return for rendering business decisions.
- Establish company guidelines for dealing with rebates and discounts in advance.



## EMPLOYMENT CONTRACTS AND CONSULTING AGREEMENTS

### Guidance – Minimize and Manage Risk with Employment Contracts and Consulting Agreements

- Ensure that any and all employment contracts or consulting agreements are consistent with company guidelines that are lawful, reasonable and transparent within the company.
- Oftentimes employment of an unqualified person is offered a position with the company seeking to do business with a foreign government in return for favorable treatment by a foreign government official, so take special notice and care that any prospective employee has the requisite skills and experience for the position, especially when in pursuit of business in markets known for bribery.
- Establish, publicize and subsequently enforce policies to monitor and evaluate work performance of employees, and moreover that such policies are equally and fairly applied throughout the company, and especially when with any employees when pursuing of business in markets known for bribery.
- Any payments or compensation to any third parties associated with company clients and/or foreign government officials should be consistent with payments to others in similar positions in relevant markets.
- Those individuals or any third parties associated with company clients and/or foreign government officials who are employed or compensated by the company should be separated and recused from the business that deals with his/her highly-placed relatives and/or friends, especially in markets known for bribery and corruption.
- Publicly confirm that employees will not be punished in any way for refusing to pay a bribe or to in any way whatsoever to favor colleagues' connections with business, and at the same time that such payment of bribes or such favorable treatment may cause termination of an employee's employment with the company.<sup>2</sup>

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<sup>2</sup> \*Source: "How to Bribe a Typology of Bribe-Paying and How to Stop It" prepared by Transparency International U.K., Published January 2014, ISBN 978-0-9573410-5-0©2013. Transparency International U.K. is the U.K. chapter of Transparency International, the world's leading non-governmental anti-corruption organization with over 100 chapters worldwide.

**APPENDIX TWO****Various Bribery Terminology Used Around the World\***

<b>Language/Country</b>	<b>Bribery Jargon</b>
Argentina	cohecho; soborno; coima; cometa
Angola	gaseoso
Brazil	propina; jetto; jetinho; caixinha; graxa; troco; nota; acerto
Bulgaria	rusvet
Cambodia	tea money
China	huilu; chaqian; zou hou mien
Croatia	mitto; podmititi (v.)
East Africa	chai
Egypt	baksheesh; shay; ashaan ad-dukhaan
France	pot-de-vin; arroser (v.); graisser (v.)
Gambia	maslaha
Germany	shmiergeld; spicken
Greece	bakssissi; fakelaki
Hausa (West Africa)	toshiyar-baki
Honduras	pajada
Hong Kong	hactzien
Hungary	megvesztegetes; kezet fogni (v.); keno penz; lekenyerezni
India	rishwat; baksheesh; ghos; hafta; chai-pani
Indonesia	suap; pungli; uang sogok
Iran	roshveh
Italy	tangento; omaggi; spintarella; bustarella
Japan	on; wairo; kuroi kiri
Kiswahili (East Africa and DRC)	kutu-kidogo
Malaysia	suap; duit kopi
Mexico	soborno; mordida; gratificaci; dinero por debajo de la mesa
Mozambique	gaseoso
Nigeria	kola; egunje; dash
Pakistan	rishvat
Peru	coima
Philippines	lagay; kotong; suhol;
Romania	rasplata
Russia	vzyatka; otkat; dat' na lapu (v.)
Serbia	mitto; podmititi (v.)
South Korea	noemul; gum eun don; dŷ don; noemul; gum eun don
Southeast Asia	kumshaw

Spain	untar (v.); soborno; mordida
Sweden	muta
Syria	rashwah; finjaan Ôahwa
Thailand	sin bone; tea money
Turkey	rusvet
Ukraine	habar; oplata
USA	bribe; kickback, payola; sweetener; hush money; grease
Zaire	tarif de verre

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## CASE STUDY LEARNING OBJECTIVES AND IMPLEMENTATION GUIDANCE

### Case Study Learning Objectives

Students will learn how to identify the ‘red flags’ of corruption and bribe paying to foreign government officials from the actions of companies and individuals subject to the Foreign Corrupt Practices Act (FCPA).

Students will additionally be able to understand how these same companies and individuals who would be otherwise under the jurisdiction of anti-corruption and anti-bribery laws such as the FCPA, may be able to lawfully conduct business in countries known to be engaging in, or require the payment of bribes.

Students will further learn how companies and individuals alike are required to comply with the FCPA (i) consistent with the literal written provisions of the FCPA, and (ii) consistent with the spirit in which the U.S. government intended the FCPA is to be interpreted.

Finally, students will learn how to use the tools needed to identify corruption and bribery embodied in the following two Appendices:

Appendix One provides students with a compendium of ‘red flags’ and ‘guidance’ designed to alert business people where there may be evidence of possible corruption and bribery.

Appendix Two provides students with a list of the common, vernacular words frequently used as ‘code words’ for bribery around the world, which enables students traveling to various countries to identify possible incidents of bribery and corruption.

Students completing this assignment should be able to:

1. understand the key prohibitions and compliance provisions of the FCPA,
2. understand the requirement of corrupt intent in the actions of companies and individuals,
3. understand the consequences for companies and individuals for FCPA non-compliance,
4. understand the authorities and responsibilities of the U.S. agencies enforcing the FCPA,
5. identify the ‘red flags’ of corruption and bribery.

### Implementation Guidance

The case has been designed to provide students with a concise summary of the U.S. Foreign Corrupt Act (FCPA) that includes examples of how various forms of bribery occur,

<sup>3</sup> \*Source: “A Bribe by Any Other Name” by James G. Tillen Sonia M. Delman, May 28, 2010. James G. Tillen is a member at Washington, D.C. (USA) law firm Miller & Chevalier Chartered, where he chairs the firm’s FCPA and Anti-Corruption Practice Group. Sonia M. Delman is an associate with Miller & Chevalier Chartered’s International Practice Group.

which will enable students to have a basic, fundamental understanding of the FCPA's key anti-corruption and anti-bribery provisions. Further, students will be exposed to a summary of the key indicators or 'red flags' that may evidence corruption and bribery of government officials and guidance to help minimize and manage risk in certain high-risk areas [See Appendix One].

Students will then be presented with a list of questions challenging students to apply their learning from the case study to address a variety of possible corruption cases. Students will then practice their ability to identify the 'red flags' of company and individual behaviors in various fact situations that may point to potential bribery of government officials.

Students will also be provided a list of the common, vernacular words that are frequently used as 'code words' for bribery around the world, so when students travel to various countries they are able to identify possible incidents of bribery and corruption [See Appendix Two].

## CASE STUDY TEACHING NOTES

Teaching notes are provided to help instructors effectively present the case study, facilitate discussion, administer the case study questions and confirm assurance of learning.

1. The case study assignment is designed to be assigned to: (i) upper-level undergraduate and graduate-level students in international business courses, (ii) upper-level undergraduate and graduate-level criminal justice, criminology, ethics and political science students (iii) upper-level undergraduate pre-law and graduate-level law students.
2. The case study assignment is designed to be completed as an individual project or as a group project: (i) during class, or (ii) outside the classroom, or (iii) online, and either in part or in total. Past results show that individual students and student groups spend approximately one to two to hours to satisfactorily complete all case study questions.
3. Suggested discussion points for Scenario 1:

It is permissible for OUCH to pay any third party to supply the third party's services to assist OUCH to conduct its business in a more effective or efficient manner in any market provided what is being asked is legal conduct.

In this scenario the local market agent is paid a fee that is calculated as a percentage of the OUCH's contract that it has with its government client to manage the customs clearance process locally. Provided that OUCH has specifically stated in its contract with the local market agent that the local market agent is prohibited from engaging in any illegal or prohibited behavior (the more detailed the list of prohibited behavior the better), then OUCH is in full compliance with the provisions of FCPA.

At the same time, OUCH and its employees must further be unaware of or may not suspect any wrong-doing by the local market agent to remain in FCPA compliance. If OUCH in any way ignores any known or any suspected non-compliant behavior by local market agent, then OUCH has 'scienter' or willful knowledge of its local market agent's corrupt behavior, at which point OUCH is no longer in compliance with the provisions for the FCPA.

Regarding the local market agent's behavior, the local market agent's payment of money (or any item of value) to the government-employed customs agent to compensate him separately for the additional time required for him to file the necessary paperwork to accelerate the customs clearance of OUCH's parts entering the country, that behavior is in violation of FCPA anti-corruption provisions.

One possible solution for the local market agent to achieve OUCH's business objective is to present a proposal to the government ministry that ministry formally offer a separate

“expedited” customs clearance option for an extra fee to accelerate customs clearance of OUCH’s parts. To be compliant with the provisions of the FCPA, any such payment for an expedited customs clearance option must be formally paid to the ministry itself and not separately to any ministry employee or agent. Any such expedite option must be applied to all such suppliers to the government, and not to only those suppliers who “win” the government’s contracts, otherwise it may be considered as a bribery payment paid by the local market agent to win the contract.

#### 4. Suggested discussion points for Scenario 2

As in Scenario 1, it is permissible for the company subcontract to any third party to supply any or all of the third party’s goods or services – provided they are known to the company to be legal goods and services – to enable the company to fulfill its contractual obligations with its own clients, including when a third party with whom the company’s subcontracted ships its goods or provide its services directly to the company’s clients.

In this scenario OUCH pays the government’s Ministry of Transportation a fee for the ministry’s employee or agent to provide the required on-site inspection of the subcontractor’s goods. OUCH has chosen to pay for such inspection directly or it could have negotiated with the subcontractor brake parts manufacturer to make such payments directly to the Ministry of Transportation. The direction of who makes such payments is negotiated between OUCH and the Ministry of Transportation, which is permissible and wholly compliant with FCPA provisions.

Further, the requirement to make such a payment for the on-site inspection fees must be applied to all such suppliers to the Ministry of Transportation for designated parts, and not to only those suppliers who “win” the government’s contracts, otherwise it may be considered as a bribery payment paid by OUCH to win the contract.

Unless there is an indication by the train brake blocks subcontractor that it is paying an “extra fee” directly to the ministry’s parts inspector, there may be no need for OUCH to specifically state in its contract with the train brake blocks subcontractor that manufacturer is prohibited from engaging in any illegal or prohibited behavior, especially as the manufacturer is performing on its subcontracted supply contract wholly within the U.S., which would not reasonably raise any suspicions by OUCH.

At the same time, if OUCH or its employees are aware of or even suspect any payment of an extra fee by the subcontracting train brake blocks manufacturer, then OUCH is in violation of anti-bribery provisions of the FCPA.

Moreover, if OUCH ignores any known or suspected “extra” payments being made by the train brake blocks manufacturer, then OUCH has ‘scienter’ of its subcontractor’s non-compliant behavior, at which point OUCH is no longer in compliance with the provisions for the FCPA.

In such a scenario the train brake blocks manufacturer may go to great lengths not to reveal to OUCH that it is paying the extra fee for fear of losing its contract with the company based upon the following: (i) the manufacturer would reveal itself to OUCH as a company that would compromise its ethical standards by its willingness to pay a bribe, (ii) for the manufacturer’s payment of a relatively small amount of bribe money (US\$2000) to secure the much higher monthly contract amount (\$50,000), and (iii) because the manufacturer has likely already built-in the amount of the extra fee into its cost of doing business under its contract with OUCH would mean that OUCH is unknowingly indirectly paying the extra fee, which would likely upset OUCH.

Regarding the train brake blocks manufacturer behavior, there is no legal justification nor is there any defense for its payment of money (or any item of value) to the ministry's inspector to ensure that the inspector would follow through and perform the task that his employer, i.e., the ministry, has tasked him to do. Consequently, the manufacturer's behavior is in clear violation of FCPA anti-corruption provisions.

Given the high risk, i.e., loss of the company's US\$50,000 monthly subcontracted business to the manufacturer and its reputation, there appears no practical solution for the manufacturer to both begin to perform in compliance within the provisions of FCPA, while at the same time still being able to retain its business with OUCH.

#### 5. Suggested discussion points for Scenario 3

On the surface, there appears to be no violation by OUCH of any provisions of the FCPA because: (i) the mandated charitable donation provision in the ministry's contracts apply equally to all foreign contractors and subcontractors, (ii) the contracts entered into between the ministry and the foreign contractors are all made available for public inspection, (iii) the percentage of the contracts' value that represents the mandated amount of the charitable donations is fixed, and (iv) the ministry's right to engage in "overall assessment process" is fully detailed in the contracts.

On the other hand, the timing of the payment of the mandated charitable contributions by OUCH (and by all contractors and subcontractors) coming just weeks before the scheduling of the overall assessment process may indicate that if OUCH or any other contractors or subcontractors fail to make full payment of their mandated charitable contributions, then the ministry may find reasons for non-compliance, which would enable the ministry to apply penalties.

Whereas OUCH and other foreign contractors do not have the right to inspect the books of the in-country nonprofit foundation to determine the disbursements of any of the charitable donations that would evidence any payment of bribes to government officials, proving corruption and bribery by the ministry or the nonprofit is difficult.

Notwithstanding proof positive that the ministry has the requisite scienter to solicit bribes via the mandated charitable contributions and likewise, if notwithstanding proof that OUCH or any other foreign contractor or subcontractor has the requisite scienter to pay bribes to secure the government contracts, then it is difficult to assert the existence of any corruption or bribery under the FCPA.

#### 6. Suggested discussion points for Scenario 4

As in Scenario 1 and Scenario 2, it is permissible for the company subcontract to any third party to supply any or all of the third party's goods or services – provided they are known to the company to be legal goods and services – to enable the company to fulfill its contractual obligations with its own clients, including when a third party with whom the company engages to manage some of its local in-market activities.

In this scenario OUCH pays its long-time, trusted local alliance partner in an adjacent country in the region who has developed personal relationships with key executives in the new market's Prime Ministry to act as an intermediary to help OUCH secure meetings with the new market's Prime Ministry and to help negotiate any contracts for OUCH. OUCH pays its local alliance partner a fixed fee (and likely the alliance partners travel expenses) for these intermediary services. In such a situation, OUCH informs its alliance partner of its objectives and the two agree upon the strategy in which the alliance partner will engage to help OUCH achieve its objectives, which is permissible and wholly compliant with FCPA provisions.

OUCH and its alliance partner are separate companies, so they operate as separate businesses. In this scenario, the alliance partner purposely withheld information from OUCH regarding some of its discussions and agreements with the new market's Prime Ministry executives. Unless OUCH knows specifically or has reason to suspect its alliance partner is engaging in actions that may be prohibited by provisions of the FCPA, OUCH is itself not in violation in any FCPA anti-corruption provisions.

In such markets, relationships often are key to getting things done, so when OUCH was unable to secure an agreement in its early meetings with the executives from the new market's Prime Ministry, it was not unusual for the local alliance partner to secure an agreement for its client, OUCH. To secure the meeting, the local alliance partner did not reveal the separate contract into which it entered with the Prime Ministry for its executives and their families to travel to the U.S. for meetings with OUCH. Again, the ability for a local company or individual to secure what the foreigner is unable to secure is more the norm vs the exception.

At the same time, if OUCH or its employees are aware of or even suspects any separate agreement was entered into by its local alliance partner with the Prime Ministry to secure its agreement with the Prime Ministry, then OUCH may be in violation for anti-corruption provisions of the FCPA.

Regarding the alliance partner's behavior, there is no legal justification nor is there any defense for its payment of any item of value, i.e., the travel expenses and that "spending money" to the Prime Ministry and its ten executives. In such a scenario the local alliance partner is certainly acting in violation of the anti-corruption provisions of the FCPA. Simply, the alliance partner paid a bribe to the new market's Prime Ministry to induce them to enter into agreement with OUCH. Consequently, the local alliance partner's behavior is in clear violation of FCPA anti-corruption provisions by making such payments to induce the Prime Ministry's agreement.

If during any subsequent negotiations between OUCH and its local alliance partner, an additional unexplained or unjustified increase is requested by the local alliance partner, then this may give rise to OUCH's suspicion that its local alliance partner is attempting to receive "reimbursement" for past expenses that were not agreed. Under such a circumstance, OUCH is obligated to pursue discussions with its local alliance partner in an attempt to reveal any wrongful actions by the local alliance partner.

Finally, the fact that OUCH has hosted the Prime Ministry's ten executives and their families to their homes and to dinner in OUCH's home city after the agreement has been executed and after their joint business meetings, does not on its face create a situation of bribery of a foreign government official to enter into any agreement for the benefit of OUCH. It is permissible to provide reasonable gifts as tokens of esteem or gratitude to foreign officials, such as hosting the Prime Ministry's ten executives and their families to dinner, assuming that the dinners and other tokens of appreciation were made openly and transparently, were properly recorded in OUCH's company's books and records, and were given only where appropriate under local law, customary and normal where given, and reasonable for the occasion.

Notwithstanding any OUCH company prohibitions for hosting foreign government officials or any of the new market's government prohibitions for accepting any "gifts" regardless of size or amount, OUCH has not violated any provisions of the FCPA.

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