



Combating Corruption

Class 8
25 March 2020

University of Latvia Faculty of Law
Shawn N. Sullivan

A photograph showing three students sitting at a desk in a classroom, focused on their work. The student in the foreground is a young woman with long blonde hair, wearing a dark and light striped shirt, holding a yellow pencil. Behind her, a young man with dark hair is looking down at his work, and another student is partially visible in the background. The setting appears to be a bright, well-lit classroom with large windows in the background.

Preliminary Matters: Mid-Term Exam

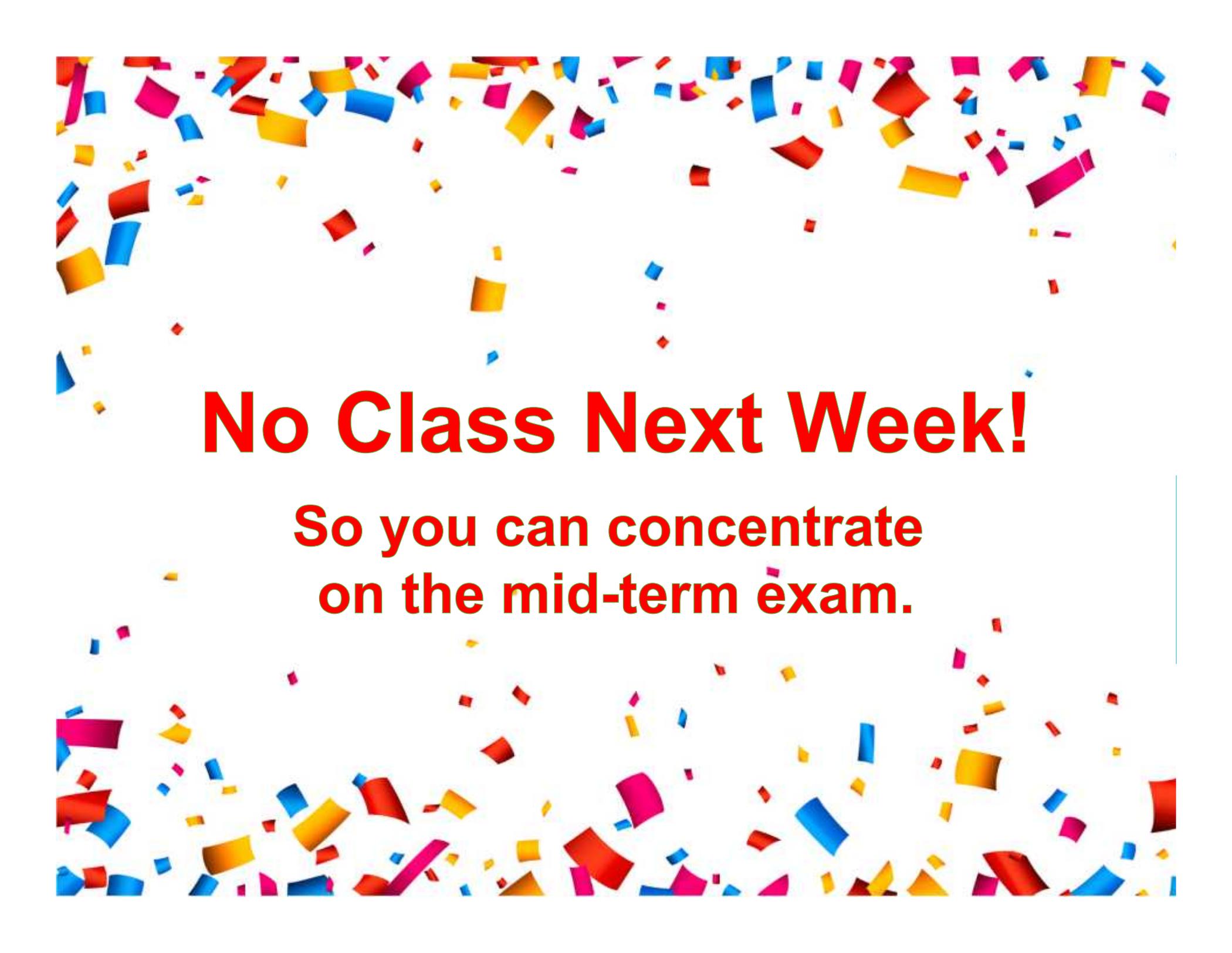
The Mid-Term Exam will be made available for download from the course website on Tuesday, 31 March 2020. If possible, I will also have the exam e-mailed to you on the same day.

Please e-mail me your Mid-Term Exam answers to me at sullivan@sullivanlaw.net by Tuesday, 7 April 2020.

Your Mid-Term Exam answers should include your name and student ID number on the first page and in the document header.

Please submit your answers in Microsoft Word, RTF, or PDF format.

Please do your own work, and do not “collaborate” on your answers with other students.

A background of colorful confetti in shades of red, blue, yellow, and pink, scattered across the white page.

No Class Next Week!

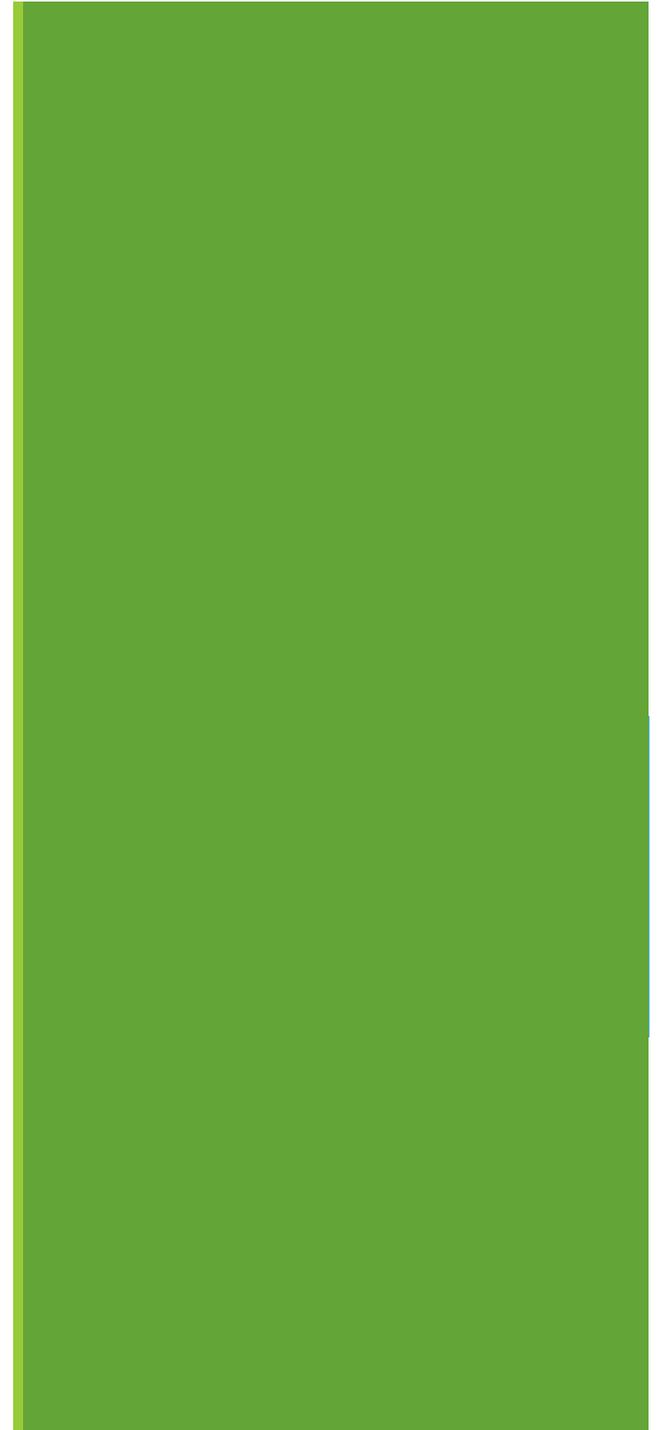
**So you can concentrate
on the mid-term exam.**

Review of FCPA

(U.S. Foreign Corrupt
Practices Act)



Who is
subject to the
FCPA?





“Issuers” & Related Persons

“Issuers” and their officers, directors, employees, agents, and shareholders.

An “issuer” is a company:

- That is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or
- Whose stock trades in the over-the-counter market in the United States and is required to file SEC reports.

“Domestic Concerns”



Any individual who is a citizen, national, or resident of the United States;

AND

Any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States;

AND

Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies.



Foreign persons who commit acts while in the U.S.

Foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.

Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions.

Foreign nationals who conspire to violate the FCPA

CONSPIRACY

Some U.S. courts have held that even non-U.S. entities and individuals who are not agents or officers of domestic concerns and not physically present in the U.S. can be convicted of **conspiring to violate** the FCPA anti-bribery provision if the foreign person has conspired with persons who **are** subject to the FCPA *See, e.g., United States v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019). Other courts have held that such a person cannot be convicted for conspiracy to violate the FCPA unless that person is an agent, employee, officer, director, or shareholder of an American issuer or domestic concern. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).



Elements of FCPA Offenses



Elements of the Foreign Bribery Offense under the FCPA (let's break this into 7 elements)

The FCPA prohibits corrupt payments or bribes.

The elements of a corrupt payment are:

1. The gift of, or offer, promise or authorization to give;
2. Anything of value;
3. To a foreign official;
4. For the purpose of influencing or inducing the official to misuse his or her position;
5. In order to obtain, retain or direct business;
6. Corrupt payments is made directly or indirectly; and
7. With "knowledge" that the payments will be made to a foreign official.





FCPA Anti-Bribery Provision Doesn't Apply to...

Facilitating or “grease” payments.

This exception applies only when a payment is made to further “routine governmental action” that involves non-discretionary acts.

Examples of “routine governmental actions” include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water.

Routine government action does not include a decision to award new business or to continue business with a particular party. Nor does it include acts that are within an official’s discretion or that would constitute misuse of an official’s office.

VIDEO



An FCPA video exercise (with real actors!) created by your instructor for a different university.

Video on Our FCPA Page



Defenses to FCPA Anti-Bribery Offense

- Written local law permits the payment.
- Reasonable and bona fide expenses: bona fide travel and lodging expenses to a foreign official, and it is an affirmative defense where expenses are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency.



Elements of FCPA Accounting Offenses

EITHER

A public corporation (i.e., an “issuer”) failed to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;”

OR

An issuer failed to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that transactions are executed in accordance with authorization from management, recorded appropriately, and audited at reasonable intervals.



Third Party Due Diligence



RED FLAGS

(I.E., WARNING
SIGNS THAT
SHOULD PUT US
ON OUR GUARD)



The Master List of Third Party Corruption Red Flags

2.04.2014

Author: Matteson Ellis

English | Español | Português

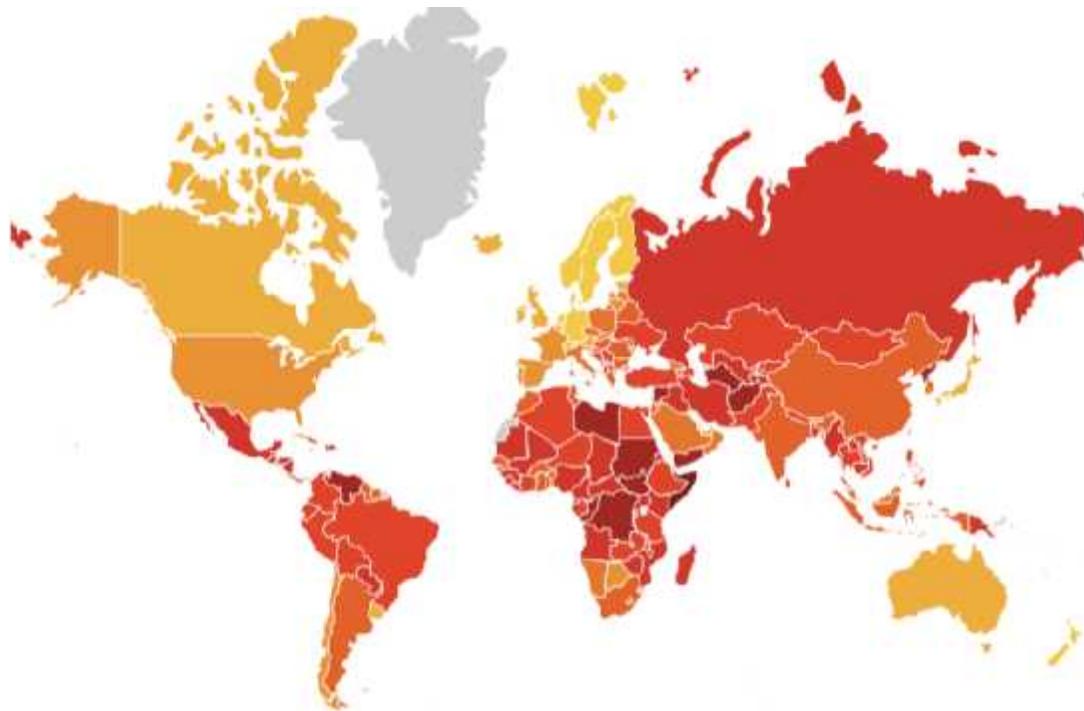


Under the FCPA, companies and individuals can be liable for the bribes that their agents, consultants, sales representatives, distributors, lawyers, accountants, brokers, and other third party intermediaries make to foreign officials on their behalf. Specifically, the FCPA applies to "indirect" payments as well as "direct" ones.

To mitigate this risk, companies are expected to

Skim this short article linked to our FCPA page.

<https://fcpamericas.com/english/anti-corruption-compliance/master-list-party-corruption-red-flags/#>



Country Culture

When working with a company in an international transaction, be aware that some countries pose higher risks of corruption than others.

Refer to TI Corruption Perceptions Index & other risk assessment tools as part of due diligence.



Hypothetical FCPA Problems



Glossary

DOJ: US Department of Justice.

Domestic concern: For purposes of the FCPA, a domestic concern includes US citizens, nationals and residents, and any US entity organized under US law or with a principal place of business in the US.

FCPA: Foreign Corrupt Practices Act of 1977.

Issuer: For purposes of the FCPA, an issuer is any company (US or foreign) with securities registered in the US (for example, the New York Stock Exchange (NYSE) or NASDAQ) or that files reports with the SEC.

SEC: US Securities and Exchange Commission.



ABC Engineering Company (ABC) is a US company with global operations that is listed on the New York Stock Exchange.

At a trade show in Myanmar, ABC has a booth at which it offers free pens, hats, t-shirts and other similar promotional items with ABC's logo. ABC also serves free coffee, soda and snacks at the booth. Some of the visitors to the booth are foreign officials.

Has ABC violated the FCPA by providing gifts and snacks at its booth?



Gifts, Travel and Entertainment: Hypothetical 1

Gifts, Travel and Entertainment: Answer to Hypothetical 1

No. These are legitimate, bona fide expenses paid in connection with the promotion, demonstration, or explanation of ABC's products or services.

There is nothing to suggest corrupt intent here. The FCPA does not prevent companies from promoting their businesses in this way or providing **legitimate hospitality**, including to foreign officials. The offer of promotional items with company logos or free snacks in this scenario is an appropriate means of providing hospitality and promoting business. This conduct alone has not formed the basis for an FCPA enforcement action by the DOJ or SEC.





Gifts, Travel and Entertainment: Hypothetical 2

ABC Engineering Company (ABC) is a US company with global operations that is listed on the NYSE.

At a trade show in Myanmar, ABC invites a dozen current and prospective customers out for drinks, and pays the moderate bar tab. Some of the current and prospective customers are foreign officials.

Has ABC violated the FCPA by paying for drinks?



Gifts, Travel and Entertainment: Answer to Hypothetical 2



Not a violation. The FCPA was not designed to prohibit all forms of hospitality to foreign officials.



While the cost of a bar tab may be more substantial than, for example, merely providing beverages, snacks and promotional items at a trade show booth, and the invitees included foreign officials, there is still nothing to suggest corrupt intent here.

Gifts, Travel and Entertainment: Hypothetical 3

ABC Engineering Company (ABC) is a US company with global operations that is listed on the NYSE. ABC has a contract to supply services to the Zimbabwe Electric Power Enterprise (ZEPE). ZEPE is 100% owned, controlled and operated by the Zimbabwe government.

Some ABC executives are in Zimbabwe for meetings with officials of the Ministry of Electric Power, which oversees ZEPE. A senior official of ZEPE was recently married, and during the trip ABC executives present a moderately priced crystal vase to the official as a wedding gift and token of esteem.

Has ABC violated the FCPA by giving the moderately priced crystal vase to the official?



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Dreamstime.com

ZIMBABWE

Corruption
Perceptions
Index 2019

Rank ⓘ
158 / 180

Score ⓘ
24 / 100

When doing business in a new country, check its TI Corruption Perceptions Index score.



Gifts, Travel and Entertainment: Answer to Hypothetical 3

Not an FCPA violation. It can be appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude.

It is important that these gifts be:

- Made **openly** and **transparently**.
- **Properly recorded** in the books and records of the giver's company.
- Given only where **appropriate under local law, customary** where given and **reasonable** for the occasion.
- **Permitted by the recipient's organization**.



Gifts, Travel and Entertainment: Hypothetical 4

ABC Engineering Company (ABC) is a US company with global operations that is listed on the NYSE. ABC has a contract to supply services to the Zimbabwe Electric Power Enterprise (ZEPE). ZEPE is 100% owned, controlled and operated by the Zimbabwe government.

As part of its contract, ABC provides training to ZEPE employees at ABC's facilities in Texas. ZEPE senior officials inform ABC that they want to inspect ABC's facilities and evaluate the training.





Gifts, Travel and Entertainment: Hypothetical 4 (cont'd)

ABC pays for the hotel and transportation for ZEPE officials to travel to Texas to inspect ABC's facilities. ABC pays for business class airfare, to which its own employees are entitled for lengthy flights. The officials visit Texas for several days and perform an appropriate inspection. While ZEPE officials are in Texas, ABC executives take the officials to a moderately priced dinner, a baseball game and a play.



Do any of these actions violate the FCPA?

Gifts, Travel and Entertainment: Answer to Hypothetical 4

Not an FCPA violation. Neither the costs associated with training ZEPE employees nor the inspection trip for ZEPE senior officials to ABC's facilities violates the FCPA.

Reasonable and bona fide promotional expenses do not violate the FCPA. Here, ABC is providing training to ZEPE's employees and is hosting ZEPE senior officials. ZEPE's review of the execution and performance of the contract is a **legitimate business purpose**. Even the provision of business class airfare is **reasonable under the circumstances**, as are the meals and entertainment, which are only a **small component** of the business trip.



Gifts, Travel and Entertainment: Hypothetical 5

ABC Engineering Company (ABC) is a US company with global operations that is listed on the NYSE. ABC has a contract to supply services to the Zimbabwe Electric Power Enterprise (MEPE). ZEPE is 100% owned, controlled and operated by the Zimbabwe government.

As part of its contract, ABC provides training to ZEPE employees at ABC's facilities in Texas. ZEPE senior officials inform ABC that they want to inspect ABC's facilities and evaluate the training.

ABC pays for the senior officials to travel first-class with their spouses to the Texas facilities, and then for an all-expenses-paid, week-long trip to Las Vegas, where ABC has no facilities.

Do any of these actions violate the FCPA?



Gifts, Travel and Entertainment: Answer to Hypothetical 5

Yes. This conduct almost certainly violates the FCPA because it demonstrates a corrupt intent.

Here, the trip does not appear to be designed just for a legitimate business purpose. It is **extravagant**, includes expenses for the officials' spouses, and therefore appears to be **designed to corruptly curry favor** with the foreign officials.

Moreover, if the entire trip is booked as a legitimate business expense (e.g., as training at its facilities), ABC would also be in **violation of the FCPA's accounting provisions**. Furthermore, this conduct suggests **deficiencies in ABC's internal controls**.



Gifts, Travel and Entertainment: Hypothetical No. 6

ABC Engineering Company (ABC) is a US company with global operations that is listed on the NYSE. ABC is bidding for a contract to supply services to the Zimbabwe Electric Power Enterprise (MEPE). ZEPE is 100% owned, controlled and operated by the Zimbabwe government.

A ZEPE employee offers to provide ABC with confidential, non-public bid information from ABC's competitors if ABC will pay for his family's vacation to Paris. Employees of ABC pay for the vacation, receive the confidential bid information, and yet still do not win the contract.

Has ABC violated the FCPA?





Gifts, Travel and Entertainment: Answer to Hypothetical 6

Yes. This is almost certainly an FCPA violation.

ABC has provided things of value to a foreign official for the purpose of **inducing the official to misuse his office** and to **gain an improper advantage**.



It does not matter that it was the foreign official who first suggested the illegal conduct or that ABC ultimately was not successful in winning the contract.

This conduct would also **violate the FCPA's accounting provisions** if the trip is booked as a legitimate business expense. This conduct also suggests **deficiencies in ABC's internal controls**.

Facilitating or “Grease” Payments: Hypothetical 7

ABC Mining Company (ABC), a US company, needs to build a new road in Brazil to transport iron ore from its facility to the port. ABC retains an agent in Brazil to obtain the required permits, including an environmental permit, to build the road.

The agent wants to make a one-time small cash payment to a government clerk to ensure that the clerk stamps and files the permit applications promptly, as there may be long delays without this "grease" payment. The clerk has no discretion about whether to stamp and file the permit applications once the filing fee has been paid. ABC's vice president authorizes the payment.

Is the payment to the clerk a violation of the FCPA?



Facilitating or “Grease” Payments: Answer to Hypothetical 7

Not an FCPA violation. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a **routine, non-discretionary governmental service** that ABC is **entitled to receive** (i.e., the stamping and filing of the permit application).

However, while the payment may qualify as an exception to the FCPA's anti-bribery provisions, it **may violate other laws**, both in Brazil and elsewhere.

In addition, if the payment is not accurately recorded, it **could violate the FCPA's accounting provisions**.



Facilitating or “Grease” Payments: Hypothetical 8

ABC Mining Company (ABC), a US company, needs to build a new road in Brazil to transport iron ore from its facility to the port. ABC retains an agent in Brazil to obtain the required permits, including an environmental permit, to build the road.

ABC has trouble obtaining the environmental permit, because the new road would adversely impact a protected wetland. The agent tells ABC’s vice president that it would only take a modest cash payment to a senior official of Brazil’s Ministry of the Environment for “the problem to go away.” ABC’s vice president authorizes the payment. After receiving the payment, the official issues the permit, and ABC builds its new road.

Does the payment to the senior official violate the FCPA?

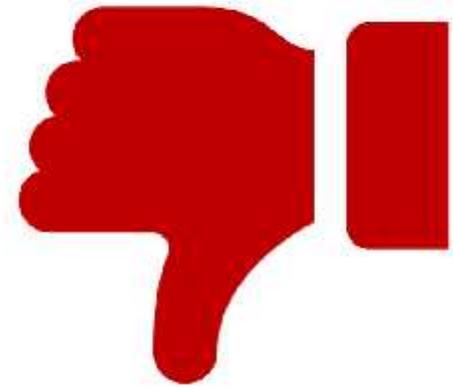


Facilitating Payments: Answer to Hypothetical 8

Yes. The payment to the senior official of the Ministry of the Environment clearly violates the FCPA, since it was **designed to corruptly influence a foreign official to improperly approve a permit.**

The issuance of the environmental permit was a discretionary act, and ABC should not have received it under this fact pattern.

ABC, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe.



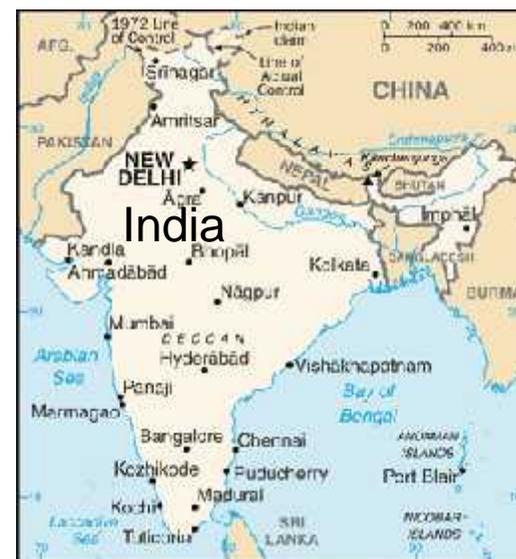
Parent-Subsidiary Liability: Hypothetical 9

Frank works in the accounting division of ABC Drug Company (ABC), a US pharmaceutical company with operations worldwide. While reviewing the financial records of ABC's subsidiary in India, he discovers that bribes are being paid to Indian government officials to secure contracts to supply drugs to state-owned hospitals.

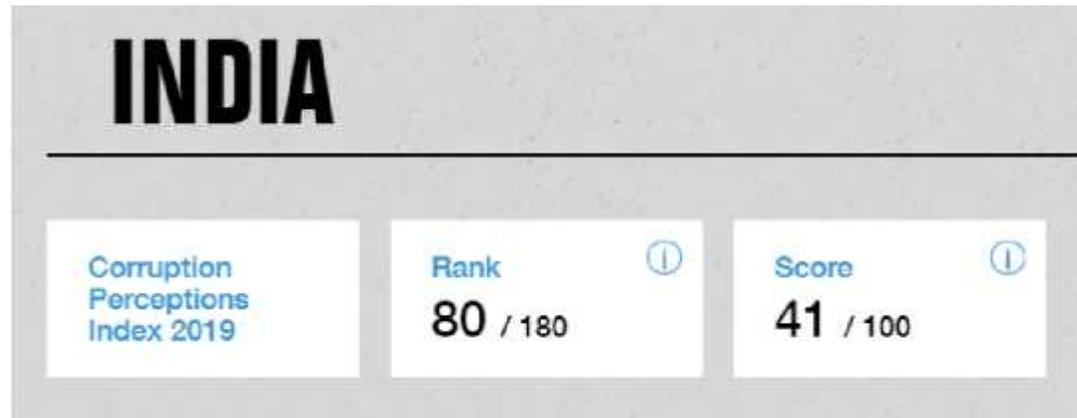
Frank's manager tells him to record the payments in ABC's consolidated financial statements as marketing expenses.

What should Frank do?

What should ABC do to mitigate its liability under the FCPA?



Parent-Subsidiary Liability: Answer to Hypothetical 9



Frank should **report** the issue to ABC's Legal Department. If Frank follows his manager's instructions, both Frank and his manager could be subject to **individual liability** for violations of the FCPA's accounting provisions.

ABC should:

- Take immediate steps to **stop the illegal payments**;
- Conduct a thorough **investigation**.
- Take aggressive **remedial measures** (including implementing **robust internal controls** and **anti-corruption training**) at the Indian subsidiary.
- **Self-report and cooperate** with government investigators.
- Take steps to **discipline** Frank's manager and the subsidiary employees responsible for the illegal payments, which may include termination.

Successor Liability: Hypothetical 10

ABC Oil Company (ABC) is a US company listed on NASDAQ. ABC wants to acquire XYZ Company (XYZ), an Algerian company that is not an issuer or domestic concern, and has no activities within the US.

ABC engages in extensive due diligence of XYZ, including:

- Reviewing XYZ's sales and financial data, its customer contracts, and its third-party and distributor agreements.

- Performing a risk-based analysis of XYZ's customer base.

- Performing an audit of selected transactions engaged in by XYZ.

- Engaging in discussions with XYZ's executive team regarding all corruption risks, compliance efforts and any other corruption-related issues that have surfaced at XYZ over the past ten years.





Successor Liability: Hypothetical 10 (cont'd)

During its due diligence, ABC learns that XYZ has paid bribes to a government official at the Algerian Ministry of Petroleum through commissions to third-party agents.

ABC acquires XYZ, which becomes a subsidiary of ABC. Immediately after the acquisition, ABC:

- Discloses the conduct to the DOJ and SEC.

- Terminates the employees and the third-party agents responsible for the bribes.

- Stops the illegal payments.



Successor Liability: Hypothetical 10 (cont'd)

ABC also:



Quickly integrates XYZ into ABC's internal controls and anti-corruption policies.

Trains XYZ employees on these policies through required online and in-person training in the local language.

Requires XYZ's third-party agents to sign anti-corruption certifications, complete training, and sign new contracts with anti-corruption representations and warranties and audit rights.



Based on these facts, do you think the DOJ or SEC would or should prosecute ABC for XYZ's misconduct?

Successor Liability: Answer to Hypothetical 10

Not an FCPA violation. Although the DOJ and SEC have jurisdiction over ABC because it is an issuer, neither could pursue ABC for conduct that occurred prior to its acquisition of XYZ. As XYZ was neither an issuer nor a domestic concern and had no activities within the US, the DOJ and SEC have no jurisdiction over its pre-acquisition misconduct. The acquisition of a company does not create jurisdiction where none existed before.

Importantly, ABC's extensive pre-acquisition due diligence allowed it to **identify and halt the corruption**. As there was **no continuing misconduct post-acquisition**, the FCPA was not violated.





Third-Party Engagements: Hypothetical 11

ABC Technology Company (ABC), a US issuer headquartered in Wyoming, wants to do business in Moldova, a country with a high risk of corruption. ABC learns about a potential \$50 million contract with Moldova's Ministry of Defense, a large deal that could open the door to future projects with the government.

ABC's vice president of sales suggests that ABC hire Consultant, a local businessman with strong ties to government leaders in Moldova who can help ABC win the contract.

Third-Party Engagements: Hypothetical 11 (cont'd)

ABC enters into a consulting contract with Consultant. The contract requires Consultant to use his best efforts to help ABC win the business. In return, ABC will pay Consultant a significant monthly retainer as well as a success fee of 3% of the value of any contract ABC wins.

What are the red flags in this scenario?

What steps should ABC consider to minimize the likelihood of incurring FCPA liability?





Third-Party Engagements: Answer to Hypothetical 11

ABC should identify the following red flags:



- ❗ Moldova is a high-risk country with a **reputation for public corruption**.
- ❗ The large **size** and **significance** of the deal to ABC.
- ❗ ABC has **never worked with Consultant** before.
- ❗ Consultant has **strong ties to government leaders**.
- ❗ The **success fee** structure of the contract.
- ❗ **Vaguely-defined services** to be provided.

Third-Party Engagements: Hypothetical 12

ABC Munitions Company (ABC), a US issuer, wants to do business in Greece, a country with a high risk of corruption. ABC learns about a potential \$50 million contract with Greece's Ministry of Defense, a large deal that could open the door to projects with the government.

ABC retains its usual distributor (Distributor) to help bid for the contract and sell ABC's products. Distributor requests a greater discount than usual from ABC, stating that the standard discount creates insufficient margin for Distributor to cover its costs in this transaction.

Ministry officials have requested that ABC include a specific local company (Local Partner) as a subcontractor in ABC's bid. One of the principals (Principal) of Local Partner is an official in another government ministry.

What steps should ABC consider to minimize the likelihood of incurring FCPA liability?



Third-Party Engagements: Answer to Hypothetical 12



ABC should:

- Perform **heightened FCPA-related due diligence** on Distributor, Local Partner and Principal, including background and reference checks and scrutiny of their relationships with Ministry officials.
- Evaluate the **economic justification for the additional discount**, particularly when the transaction would involve many of the same services that Distributor normally provides. A common means of making bribe payments is through excessive discounts or rebates to distributors.
- Conduct **transaction-specific due diligence**, including an analysis of payment terms to confirm that the payment is commensurate with the work being performed.

Third-Party Engagements: Answer to Hypothetical 12 (cont'd)

ABC should also consider requiring Principal to:

- Verify that he will have **no role in the Ministry of Defense's decision to award the contract to ABC.**
- **Notify the Ministry of Defense and his own ministry of his proposed involvement** in the transaction.
- **Certify that he will abide by anti-corruption laws.**
- **Certify that his involvement in the transaction is permitted under local law.**