

The Foreign Corrupt Practices Act (FCPA): Guidance for Faculty & Staff

What is the Foreign Corrupt Practices Act?

The Foreign Corrupt Practices Act (FCPA) is a U.S. federal law that prohibits the exchange of “anything of value” to a foreign official for the purpose of “securing any improper advantage” in obtaining, retaining or directing business (e.g. – decision to award a contract to Harvard). It is important to note that “anything of value” may extend past cash payments to include gifts and other consideration. There are several examples below that will provide further detail and guidance.

The FCPA is enforced by two agencies: the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The DOJ enforces the FCPA for all domestic concerns, including non-profits, universities and individuals, while the SEC enforces FCPA provisions with respect to for-profit entities.

What constitutes a violation of the FCPA?

The FCPA prohibits the offer, promise, authorization and/or payment of money or other items of value for *a corrupt purpose*: attempting to influence the acts or decision making of foreign government officials either directly or indirectly to secure an improper advantage.

Items of value encompasses both monetary and non-monetary exchanges, such as travel and entertainment or training, scholarships or employment opportunities (e.g. employing the child of a foreign official to curry favor). It is also important to emphasize that there is no monetary threshold, any exchange of value constitutes a violation of the FCPA.

The FCPA also states that the University is responsible for the actions of its contractors, agents and employees. For example: if the University had a contractor facilitating the development of an overseas campus and the contractor offered a bribe to a foreign official without the University’s knowledge, the University would still be responsible for the acts of the contractor.

It is worth noting that the FCPA provides an exception for facilitating payments, such as expediting a visa application, much like one may pay to have a passport application expedited here in the United States. For clarity, it is not permissible for a payment to be made for an approval. It is never allowable to provide payment to obtain a favorable decision. Caution should be exercised when contemplating a facilitating payment. Please consult with the Office of Academic & Research Integrity.

How is this applicable to universities?

In an increasingly global society, universities are not only engaging in research collaborations with international partners, they are also engaging in study abroad programs, opening international locations and engaging in other business operations overseas.



When working overseas or engaging with foreign collaborators, it is important to remember that foreign government officials are not just an employee or agent of a government agency (e.g. an agency analogous to the Department of Health and Human Services), they may also be:

- An administrator or staff member at a state-run university
- Doctors or other healthcare professionals at a state-run hospital or other medical facility
- Employees of international agencies such as the United Nations
- Advisors or consultants to a foreign government
- Royalty

May I pay a foreign official for legitimate services, such as consulting on a project?

Yes, payments for legitimate services, such as consulting on a project are permissible. It is best practice to follow University procurement policies and ensure there is robust documentation, including justification for the payment, by clearly tying the work of the foreign official to the goals of the project.

When engaging a foreign official, keep in mind that the University must substantiate that the purpose was bona fide. Adhering to University policies and maintaining detailed back up ensures research and business operations are above reproach.

What about third parties or agents doing work in country on my behalf?

As indicated above, the FCPA states that the University is responsible for the actions of its contractors, agents and employees. If a third party, independent contractor is employed to perform work on the University's behalf in a foreign country; the University is liable for any violations of the FCPA they may perpetrate in conducting their work for the University, irrespective of the University's foreknowledge of that violation.

It is in the University's best interest to ensure that all agents and third-parties conducting work under University agreements of any stripe (including subcontracts, vendor and consulting agreements) are vetted for any red flags, such as being included on U.S. Government issued debarment lists. The Office of Academic & Research Integrity is able to check of the name of any individual or corporation.

Examples:

Example 1:

You would like to enter into a collaborative research agreement with a foreign state-controlled institution because of their outstanding faculty in your field and because the institution is ideally situated for the particular research. Officials at the foreign institution are on the fence about the collaboration but would like to visit you in the United States to discuss it. You advise them that you have made reservations and arranged payment for them and their spouses (who are not affiliated with the institution) at the Waldorf Astoria in Manhattan, a driver and limousine to transport them to campus, and tickets for them to attend a Yankee game while in town.

Analysis of Example 1:

In determining whether the arrangements you have made may violate the FCPA, you should consider whether: (1) A payment or something of value is offered, promised, or given (2) to a foreign official (3) for a corrupt purpose. In this case, (1) and (2) seems to be met. Even if you were to deny that you had a corrupt motive of offering the items of value, your motive may be determined from a consideration of the circumstances. Under these facts, someone could conclude that the stay at the Waldorf Astoria, the limousine and the Yankee tickets were extravagant and not reasonably related to the purpose of the visit and therefore must have been offered in order or to improperly induce the foreign officials from the state-controlled university to enter into the agreement. The arrangement appears even less reasonable because expenses for the officials' spouses are also being covered and yet their presence is unrelated to the business purpose of the trip.

Example 2:

As part of your planning to conduct field research next month, you learn that each member of the research team must obtain a research permit from the government of the foreign country where the research is to be performed. Each of you has completed the application process, submitted the required documents and paid the necessary fees. However, as a result of a backlog at the permitting office, you learn that your permits will not be issued for several months. You have contacted an agent in the foreign country and he advises that he can make a one-time small cash payment to a clerk in the permitting office to ensure that the clerk files and stamps the research permit applications for expeditious review. The clerk has no discretion about whether to file and stamp the research permit applications once the requisite filing fees have been paid. A week later, you receive a call from the agent, who tells you that the applications are being reviewed, and the government officials have grave concerns about the research in light of its potential environmental impact. The agent tells you that he is good friends with the director of the permitting office and it would only take a modest cash payment to the director and the "problem would go away." You authorize the payment and the research permits are issued without delay.

Analysis of Example 2:

Was the payment to the clerk a violation of the FCPA? Probably not. Under these circumstances, the payment to the clerk would likely qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that you are 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 the foreign country and elsewhere. ***Was the payment to the director a violation of the FCPA?*** Yes. The payment to the director of the permitting office violates the FCPA, since it was designed to corruptly influence a foreign official



into improperly approving a permit. The issuance of the research permit was a discretionary act, and one that the government had serious concerns about granting.¹

Other Harvard policies and procedures that support compliance with FCPA:

- [Travel Policy](#)
- [Honoraria and Reimbursements for Foreign Nationals](#)
- [Sponsored Expenditure Guidelines](#)
- [Business Expense Reimbursements Policy](#)
- [Responsibilities of Purchasers, Preparers and Approvers \(ROPPA\)](#)
- [Nonresident Alien Tax Compliance](#)

What resources are available?

Training or individual consultations are available either through the Office for Academic & Research Integrity or through Global Support Services.

Office for Academic & Research Integrity: ari@hms.harvard.edu or Amanda Humphrey, Assistant Director of Research Compliance: Amanda_humphrey@hms.harvard.edu / 617-432-1617

If you wish to report a concern anonymously, please use the HMS Helpline: 617-432-5555 or the Harvard University Compliance Helpline: 877-694-2ASK

¹ Thank you to the Princeton University Office of General Counsel for permitting us to use their examples. To view the Princeton FAQs on the FCPA go to: <https://www.princeton.edu/ogc/resources-1/FCPA-FAQs.pdf>