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What Higher Education Needs to Know About the US Foreign Corrupt Practices Act (FCPA)

Anti-Corruption Provisions. The FCPA is a criminal statute that prohibits individuals, entities and institutions, potentially including certain universities, from directly or indirectly offering or providing corrupt payments or things of value to employees, officials or representatives of *non-US* governments, state-owned entities, public hospitals or universities, sovereign wealth funds, political parties or public international organizations like the UN, the World Health Organization or the International Food Policy Research Institute. The FCPA prohibits *public sector* bribery of non-US officials. In addition, there are other US laws that prohibit *domestic bribery* of US state or federal officials as well as *private sector* bribery within or outside the United States. In the case of all of the above laws, including the FCPA, bribery can take the form of cash or tangible or intangible benefits, such as an improper gift or favor. All of these laws are actively enforced and in some cases can result in serious consequences for individuals and organizations alike.

How is the FCPA relevant to universities? Universities and other post-secondary institutions frequently engage in international initiatives that may raise FCPA risk and necessitate appropriate compliance measures. FCPA risks can arise from the following common international activities:

- Engaging representatives to recruit students abroad, especially if those students attend, or those recruiting efforts involve support from, non-US state schools
- Retaining agents or other partners to assist with accreditation, licensing or other regulatory approvals for the opening of international branch campuses or the provision of online courses
- Engaging in international technology or other royalty license arrangements with non-US government-affiliated universities
- Providing gifts, meals, entertainment, expense-paid conference invitations, other travel benefits or per diems to faculty members or officials of non-US public universities, education ministries or other government agencies
- Engaging in joint ventures with (i) non-US public universities or research institutions or (ii) non-US private sector entities that must fulfill regulatory approval requirements with respect to such joint ventures

- Paying a clerk to secure or expedite receipt of a permit required for conducting field research when all conditions of the permit issuance have not been satisfied
- Seeking grants or donations from foreign governments, government-affiliated organizations or officials
- Awarding grants, sponsorships, donations or scholarships to individuals or organizations that are non-US government officials or related to/affiliated with such persons

Please note that the above list is illustrative in nature and is not intended to constitute an exhaustive summary of enhanced-risk scenarios. Also, the above list does not mean that an automatic violation of the FCPA has occurred. Instead, an FCPA analysis of the facts and circumstances of each case must be performed to assess its significance from a legal compliance perspective.

Accounting Provisions. The FCPA imposes certain accounting standards which require the maintenance of accurate books and records and a system of effective internal controls. Violations of these requirements may occur in a variety of circumstances, including if an organization conceals bribes or fraudulent activity in its books, maintains slush funds or allows unauthorized expenses.

The FCPA applies the above accounting standards to publicly traded companies and certain other organizations that have securities-related reporting requirements. Nonprofit universities are not subject to the FCPA's accounting requirements. However, universities that fail to observe strong accounting practices may find themselves in breach of their charter documents, certain third-party contracts (including US government contracts) and/or their IRS reporting or other regulatory obligations.

Enforcement and Consequences. The US Justice Department, the FBI and other enforcement agencies both within and outside the United States are devoting substantial resources to investigate corruption violations and have significantly increased enforcement activity over the past decade. Violations can result in significant fines, penalties, profit disgorgements, imprisonment, debarment from government contracting, the loss of export privileges and other consequences. In certain circumstances, it may be possible for senior administration and governing board

members to be held personally accountable for authorizing, directing or overseeing FCPA or other anti-corruption violations committed by subordinates.

What are Best Practices for Compliance?

- **Investigations/Disclosures.** The US government expects organizations to investigate and disclose FCPA violations. Organizations that turn a blind eye could be viewed as authorizing corruption in their ranks. The US government claims that organizations that voluntarily disclose concerns may qualify for leniency.
- **Compliance Programs.** The US government has stated that an organization with international activities should implement a risk-based compliance program. Such programs involve, among other measures, adopting appropriate policies and procedures, appointing independent compliance officers, providing compliance training to relevant persons (which in the case of universities would mean certain members of the

faculty and staff) and responding to reports of suspected violations.

- **Due Diligence.** It is possible that an institution may face FCPA/anti-corruption liability if its consultants, representatives, agents or joint venture or other partners make improper payments. This can occur even if the institution did not have actual knowledge of the corruption. Many enforcement cases involve the use of corrupt third parties. Organizations must perform anti-corruption specific due diligence before retaining such third parties and insert appropriate anti-corruption compliance language in their agreements. In addition, the US government expects organizations to monitor their relationships with such third parties.

Please contact **Shannon MacMichael** at (202) 728-7069 or smacmichael@cooley.com, if you require further assistance.