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## FCPA NEWS ARTICLE

### MOST COMMON FCPA MYTHS

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#### *The FCPA doesn't apply to conduct that takes place entirely outside of the United States without U.S. parent company involvement*

**False.** The harsh reality is that turning a “blind eye” to business operations in the far corners of the globe is a sure-fire way to invite FCPA non-compliance and regulatory scrutiny.

The 1998 amendments to the FCPA expanded the jurisdictional reach of the statute to include an alternative nationality test. Whereas, prior to the amendments, “use of the mails or any means of instrumentality of interstate commerce in furtherance of” an improper payment was needed for the FCPA to apply, under the alternative nationality test, the FCPA applies to improper payments made by U.S. companies and citizens that take place wholly outside of the United States without regard to whether “the mails or any of other means of instrumentality of interstate commerce” were used in furtherance of the improper payment.

Thus, proof of a U.S. territorial nexus is not required for the FCPA to be implicated and FCPA violations can, and often do, occur even if the prohibited activity takes places entirely outside of the United States.

Indeed, many recent FCPA enforcement actions concern business activity by U.S. companies that occur in foreign countries without the knowledge or involvement of any U.S.-based employee.

#### *The FCPA applies only to public companies – not private companies*

**False.** While it is true that the FCPA's books and records and internal control provisions apply only to “issuers” (companies with securities traded on a U.S. stock exchange or otherwise required to file periodic reports with the SEC) the FCPA's anti-bribery provisions apply to issuers as well as “domestic concerns,” a term which includes “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship” with a principal place of business in the United States or organized under U.S. law. Thus, the international business activity of private U.S. companies falls under the FCPA as well and several recent FCPA enforcement actions concern foreign business activities by private U.S. companies.

#### *FCPA compliance risks are present only in emerging third-world markets*

**False.** A common FCPA myth is that only companies operating in “third world” markets need to be concerned about FCPA compliance. While it is true that “third-world” countries fare the worst on Transparency International's Corruption Perception Index (“CPI”) (a ranking of countries in terms of the degree to which corruption is perceived to exist among its public officials and politicians), FCPA non-compliance can just as easily occur in more mature and transparent markets. Indeed, a substantial number of recent FCPA enforcement actions have concerned business activity in China, a country which can no longer be relegated to “third-world” status given its fast-growing and maturing economy.



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### *The FCPA applies only when doing business with foreign government customers*

**False.** This myth concerns the “obtain or retain business” element of an FCPA anti-bribery violation and the wide misunderstanding among business leaders that the FCPA applies only to improper payments to secure foreign government contracts or business. Left unchecked, this misperception can result in a host of FCPA compliance issues. In *United States v. Kay*, 359 F.3d 738, 743-56 (5th Cir. 2004) the court held that making improper payments to a foreign official to lower corporate taxes and custom duties could satisfy the “obtain or retain business” element of an FCPA anti-bribery violation by providing an unfair advantage to the payor over competitors. The court concluded that there was “little difference” between this type of improper payment and an improper payment to a foreign official to award a government contract.

Since the *Kay* decision, there have been several FCPA enforcement matters where the improper payment to a foreign official was not alleged to have influenced any government contract or business, but rather to have provided the company an improper advantage (in the general sense) compared to competitors doing business in the foreign country.

### *The FCPA applies only to interaction with foreign government officials*

**False.** This myth concerns the foreign official element of an FCPA antibribery violation. The FCPA defines the term foreign official to include “any officer or employee of a foreign government or any department, agency, or instrumentality thereof [...] or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality...”

Generally, a foreign national can be classified as a foreign official under the FCPA in one of two ways. First, an employee of a foreign company can be deemed a foreign official directly in his or her own right by virtue of a parallel position or appointment he or she may have with a government entity. Second, and much more a risk for the unwary, an employee of a foreign company can be deemed a foreign official under the FCPA when his or her employer is an “instrumentality” of a foreign government (a term not defined in the FCPA or delineated in the FCPA’s legislative history). Once a foreign company is deemed an “instrumentality” of a foreign government, every single employee, from the lowest ranking employee to the chairman of the board, will be considered a foreign official for purposes of the FCPA.

Recent FCPA enforcement actions demonstrate that the enforcement agencies consider employees of state-owned or state-controlled entities (“SOEs”) to be “foreign officials” under the FCPA’s anti-bribery provisions. In this regard, China has emerged as a high-risk FCPA country because of the prevalence of SOEs in that country.

Given the broad interpretation of the “Foreign Official” element by the enforcement agencies, it is imperative that business leaders “know their customer” in every foreign country and inquire whether any customers are considered SOEs. If they are, the FCPA applies to interactions with employees of these customers even though the employees are not traditional government officials.



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### ***The FCPA doesn't apply because the company does business in a foreign country indirectly through agents, representatives and distributors***

**False.** U.S. companies are not insulated from FCPA risks by doing business in foreign countries through third parties such as agents or distributors. Rather, U.S. companies are responsible for ensuring that improper payments are not made indirectly through others because FCPA antibribery violations can be based on the wrongful acts of others under the FCPA's third-party payment provisions, which prohibit improper payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly to any foreign official." Like other elements of the FCPA, the "knowledge" requirement is broad and can be satisfied by "willful blindness" even if a company does not have actual knowledge that an improper payment has been made to a foreign official.

Given the FCPA's broad third-party payment provisions, business leaders are wise to fully understand the company's "go-to-market" strategy in every foreign country. If foreign agents or distributors are part of that strategy, appropriate FCPA due diligence should be conducted on the third party prior to engagement.

### ***The FCPA applies only when money is given to a foreign official***

**False.** The notion that the FCPA prohibits only a "suitcase full of cash" type of scenario is misguided because the FCPA applies to a host of other, potentially limitless, improper payment arrangements that business leaders must be able to recognize.

The term "anything of value" is not defined in the FCPA, and it has been broadly construed to include not only cash or a cash equivalent, but also, among other things, discounts; gifts; use of materials, facilities or equipment; entertainment; meals and drinks; transportation; lodging, insurance benefits; and promises of future employment. Further, there is no de minimis threshold; rather, the perception of the recipient and the subjective valuation of the thing conveyed is often a key factor in determining whether "anything of value" has been given to a foreign official.

The FCPA contains an affirmative defense for expenditures relating to the "promotion, demonstration, or explanation of products or services" or the "execution or performance of a contract." However, in order to meet the affirmative defense, a company must show that the expenses are both "reasonable" and "bona fide" and "directly related" to a business purpose. As explained below in connection with foreign official travel, it is improper for a company to fund even portions of non-business travel to the United States.

### ***The FCPA doesn't apply when foreign officials travel to the United States if the predominate purpose of the travel is business-related***

**False.** Included in the broad definition of "anything of value" is travel expenses not connected to a legitimate business purpose. Thus, while it is perfectly acceptable, and FCPA-compliant, for a U.S. company to pay for the travel expenses of SOE customers or other foreign officials to travel to the United States to meet company personnel, to inspect products or a manufacturing facility, or to execute a contract, it is not acceptable, and not FCPA-compliant, for the company to fund any non-business portions of the trip to the United States.



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Ensuring that travel expenses are reasonable and bona fide expenditures directly related to a business purpose can be a challenge for business leaders because the task of arranging travel details is often left to a different corporate department or even an outside travel agency. In many cases, business leaders know only that the SOE customer or foreign official is arriving at the plant “on a Tuesday,” but does not know where the individual has been before or after the plant visit. Yet, such “before” or “after” travel often lacks a business purpose, and, if paid for by the company, is not FCPA-compliant.

For this reason, it is imperative that business leaders maintain a degree of control over all SOE customer and foreign official travel and ensure that travel arrangements are not left solely to individual foreign sales representatives. Non-business sightseeing travel, even if in connection with a predominate and legitimate business trip, is not FCPA-compliant if paid for by the company.

### **About the Author**

Mr. Volkov is a litigation partner who focuses on trial practice, white collar defense and complex internal investigations.

He was a federal prosecutor for 17 years; a Chief Counsel on the Senate Judiciary Committee and the House Judiciary Committee; a Deputy Assistant Attorney General in the Department of Justice; and a trial attorney in the Antitrust Division. He has practiced in the District of Columbia for nearly 30 years. Mr. Volkov has extensive criminal trial practice — over 75 criminal jury trials.

Given his broad range of experience and expertise, Mr. Volkov handles a variety of matters for clients — Foreign Corrupt Practices Act, Fraud, Corruption, Export-Import, Office of Foreign Asset Control, Asset Forfeiture and Money Laundering, False Claims Act, Antitrust violations, Food and Drug Administration enforcement matters, professional disciplinary proceedings, and securities enforcement.

With his extensive contacts in Washington, D.C., Mr. Volkov brings a unique problem solving approach to clients — solutions to complex problems may involve a coordinated approach, including the design and implementation of an internal investigation, contacts with key policymakers on Capitol Hill, or negotiation of solutions in the Department of Justice or a specific US Attorney’s Office.