

INTERFACE, INC. Anti-Corruption and Anti-Bribery Policy Statement

Interface's business practices are governed by the Interface Code of Business Conduct and Ethics ("Code"), which is signed by every Interface associate worldwide. It states: "Obeying the law, both in letter and spirit, is one of the foundations on which our ethical policies are built." Following the law is not only a legal requirement, but an internal company policy as well. This means that any conduct contrary to law may be subjected to Interface's disciplinary procedures, up to and including termination, whether or not law enforcement authorities have taken action. No one in the company has the authority to authorize conduct that is contrary to law.¹ This applies to all applicable laws in the countries where you live and work. It also extends to company policies that arise from the United States' Foreign Corrupt Practices Act ("FCPA"), and, where applicable, the United Kingdom's Bribery Act.

Given the recent global increase in the enforcement of anti-corruption and anti-bribery laws concerning payments to public officials, we believe it is timely to further expand on and clarify the legal requirements and company policies on this subject. This policy statement describes in more detail what is prohibited and what is permitted. However, if anything in this policy statement conflicts with a law where you live and work, the applicable law will supersede this policy. Attached at the end of this policy is a set of hypothetical examples that illustrate certain types of acts which are permitted and acts which are not permitted.

THE POLICY

The essence of Interface's anti-corruption policy is very simple. Any bribe to a public official, made directly or indirectly, to influence that official to use his or her position to assist in obtaining or retaining business for Interface is prohibited. A "bribe" under this policy is

- 1) an offer, promise, or authorization of a payment, or a payment,
- 2) to a public official
- 3) that is made corruptly.

The word "corruptly" means it was done with an intent or desire to wrongfully influence the recipient. This includes any offer, promise, payment, or gift intended to induce the recipient to misuse his official position – for example, to wrongfully direct business to Interface, to obtain preferential legislation or regulations, or to wrongfully fail to perform an official function. The following is a non-exhaustive list of actions for which a payment that meets the foregoing standards is prohibited:

- Winning a contract
- Improperly influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid tender information
- Evading taxes or penalties

¹ Section 9 of the Code makes reference to waivers of provisions of the Code. This applies only to elements of the code that relate strictly to internal company policies (e.g., conflict of interest, use of company property, etc.). *Absolutely no waivers may be granted under the Code for conduct contrary to law.*

- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination
- Evading customs duties on imported goods
- Improperly expediting the importation of goods and equipment
- Extending contracts and lowering tax assessments
- Obtaining false documentation related to temporary import permits
- Improperly enabling the release of goods from customs officials

“Anything of Value”

This policy recognizes that bribes can come in many forms and schemes, and so it prohibits not only the corrupt payment of cash, but also the corrupt offer, promise to pay, payment, or authorization of the payment of any money, gift, or **anything of value** to a public official. The most obvious cases involve corrupt payments of cash (sometimes in the guise of “consulting fees” or “commissions” given through intermediaries). Other examples might involve tickets for holiday travel expenses, and expensive gifts. This policy does not contain a minimum threshold monetary amount for corrupt gifts or payments. Indeed, what might be considered a modest payment in one country could be considered a larger and much more significant amount in another country.

Regardless of size, for a gift or other payment to violate this policy the payor must have corrupt intent – that is, the intent to improperly influence the government official. This “corrupt intent” requirement allows the ordinary and legitimate promotion of our business while prohibiting conduct that seeks to improperly induce officials into misusing their positions. It is difficult to envision any way in which giving cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent. (However, even modest gifts may be prohibited if they appear to constitute part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.) These assessments are necessarily fact specific. If you have questions about particular situations, you should contact the Legal Department *before* paying or giving anything to a public official.

What Is Permitted

Gifts, Travel, Entertainment, and Other Things of Value

Gifts. A small gift or token of esteem or gratitude often is an appropriate way for business people to display respect for each other. Some hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the company’s books and records, provided only to reflect esteem or gratitude, and permitted under local law. Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items are unlikely to improperly influence an official, and, as a result, are not items that should result in a violation of the Code. The larger or more extravagant the gift, however, the more likely it was given with an improper purpose. Obvious violations would involve cases where there were single instances of large, extravagant gift-giving (such as a sports car, fur coat, country club membership, or other luxury item), as well as repeated or widespread gifts of smaller value items as part of a pattern of bribes.

The Code does not prohibit gift-giving. Rather, it prohibits the payments of bribes, including those disguised as gifts. For example, the following types of payments have been found improper under the FCPA, and are prohibited under the Code:

- A \$12,000 birthday trip for a government decision-maker from Mexico that included dinners and visits to wineries.
- \$10,000 spent on dinners, drinks, and entertainment for a government official.
- A trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in “pocket money” for each official.
- A trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle.

Travel. Reasonable and bona fide expenditures for business-related travel and lodging are permitted under the Code for public officials, unless otherwise prohibited by law. Such an expense is business related if it is 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. These would include:

- travel and expenses to visit company facilities or operations;
- travel and expenses for training; and
- product demonstration or promotional activities, including travel and expenses for meetings.

Trips that are primarily for personal entertainment purposes, however, are **not** bona fide business expenses and may violate the Code’s anti-bribery provisions. Below is a non-exhaustive list of safeguards that may be helpful in avoiding the appearance that particular travel expenditures for public official are inappropriate under the Code:

- Do not select the particular officials who will participate in the party’s proposed trip or program, or else select them based on predetermined, merit-based criteria.
- Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.
- Do not advance funds or pay for reimbursements in cash.
- Ensure that any stipends are reasonable approximations of costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable.
- Ensure the expenditures are transparent, both within the company and to the government.
- Do not condition payment of expenses on any action (or inaction) by the public official.
- Obtain written confirmation that payment of the expenses is not contrary to local law.
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.
- Ensure that costs and expenses on behalf of the public officials will be accurately recorded in the company’s books and records.

Charitable Contributions

The Code does not prohibit charitable contributions or prevent Interface from acting as a good corporate citizen. But, the Code does not permit using the pretense of charitable contributions as a way to funnel bribes to public officials. The following five questions should be considered before deciding to make a charitable donation that relates to a public official:

- What is the purpose of the payment?
- Is the payment consistent with the company's internal guidelines on charitable giving?
- Is the payment at the request of a foreign official?
- Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
- Is the payment conditioned upon receiving business or other benefits?

Payments Permitted under Local Law

Payments to public officials are permitted under the Code if they are expressly permitted under local law. For this to apply, the payment, gift, offer, or promise of anything of value that was made, must be expressly lawful under the **written** laws and regulations of the foreign official's country at the time it was made. If the local law is silent on such payments or if it is the custom that corrupt payments are not prosecuted under local law, the Code's prohibition against payment still applies. The written laws and regulations of countries rarely, if ever, permit corrupt payments, so this exception will rarely, if ever apply. Before such a payment is made, the Legal Department should be consulted.

Facilitating or Expediting Payments

Facilitating payments are permitted under the FCPA, and are permitted by the Code (except with respect to our employees based in the UK or having a sufficient nexus to the UK to be governed by the UK Bribery Act, which prohibits facilitating payments). The Code's exception for "facilitating or expediting payments" made in furtherance of routine governmental action is narrow. The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts that are ordinarily and commonly performed by a public official. Examples of such "routine governmental actions" for which a facilitating payment may be allowed are:

- obtaining permits, licenses, or other official documents to qualify a person to do business;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; and
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration.

Although such actions and actions of a similar nature are permissible under the FCPA and the Code, they may still subject the Company or individual to sanctions if they are not properly recorded in the Company's books and records. Labeling a bribe as a "facilitating payment" in the company's books and records does not make it one. (See "Accounting Requirements" below.)

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. Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the Code's anti-bribery provisions more generally, the facilitating payments exception focuses on the purpose of the payment rather than its value.

Who Is a "Public Official" Under the Code?

The Code's anti-bribery provisions apply to corrupt payments made to

- any public official;
- any political party or official thereof;
- any candidate for foreign political office; or
- any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of the previous three categories.

The term "public official" generally refers to an individual falling within any of these categories, and would include any officer or employee of a government (including its departments, agencies or instrumentalities), or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. Thus, the Code broadly applies to corrupt payments to "any" officer or employee of a government and to those acting on the government's behalf. The Code covers corrupt payments to low-ranking employees and high-level officials alike.

Department, Agency, or Instrumentality of a Government

As stated, public officials under the Code include officers or employees of a department, agency, or instrumentality of a foreign government. When a government is organized in a fashion similar to a U.S. or Western European system, what constitutes a government department or agency is typically clear (e.g., a ministry of energy, national security agency, or transportation authority). However, governments can be organized in very different ways. Many operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation. By including officers or employees of agencies and instrumentalities within the definition of "public official," the Code accounts for this variability.

The term "instrumentality" is broad and can include state-owned or state-controlled entities. Whether a particular entity constitutes an "instrumentality" under the Code requires a fact-specific analysis of an entity's ownership, control, status, and function. The following is a non-exclusive list of factors courts have used in considering this issue:

- The state's extent of ownership of the entity;
- the state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- the state's characterization of the entity and its employees;

- the circumstances surrounding the entity's creation;
- the purpose of the entity's activities;
- the entity's obligations and privileges under the state's law;
- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support by the state (including subsidies, special tax treatment, government-mandated fees, and loans);
- the entity's provision of services to the jurisdiction's residents;
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the government; and
- the general perception that the entity is performing official or governmental functions.

While no one factor is necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares, unless there is some other factor that would grant the government an unusual amount of influence over that entity.

Public International Organizations

The definition of "public official" under the Code includes employees and representatives of public international organizations. Currently, public international organizations include entities such as the World Bank, the International Monetary Fund, the World Intellectual Property Organization, the World Trade Organization, the Organization for Economic Cooperation and Development, the Organization of American States, and numerous others. A comprehensive list of organizations designated as "public international organizations" can be found on the U.S. Government Printing Office website at <http://www.gpo.gov/fdsys/>.

Payments Through Third Parties

Under the Code, you cannot do indirectly what you cannot do directly. It is prohibited to knowingly make a payment to a third party that would enable a corrupt payment to a public official. The Code prohibits corrupt payments made through third parties or intermediaries. Specifically, it covers 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 a public official. Although agents in other countries may provide entirely legitimate advice regarding local customs and procedures and may help facilitate business transactions, we must remain aware of the risks involved in engaging third-party agents or intermediaries. The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil liability, and could constitute a violation of the Code.

This covers both those with actual knowledge of wrongdoing, and also those who purposefully avoid actual knowledge. The so-called "head-in-the-sand" approach —variously described as "conscious disregard," "willful blindness" or "deliberate ignorance"— is not an excuse under the FCPA or the Code where unwarranted obliviousness to any action (or inaction), language or other "signaling device" should reasonably alert associates of a "high probability" of a violation. Common red flags associated with third party payments include:

- excessive commissions to third-party agents or consultants;

- unreasonably large discounts to third-party distributors;
- third-party “consulting agreements” that include only vaguely described services;
- the third-party consultant is in a different line of business than that for which it has been engaged;
- the third party is related to or closely associated with the foreign official;
- the third party became part of the transaction at the express request or insistence of the public official;
- the third party is merely a shell company incorporated in an offshore jurisdiction; and
- the third party requests payment to offshore bank accounts.

ACCOUNTING REQUIREMENTS

The Code operates in tandem with Interface’s other legal and regulatory obligations with regard to its anti-corruption requirements. This includes accounting requirements that forbid misleading or fraudulent bookkeeping, and prohibit “off-the-books” accounting. These accounting provisions consist of two primary components. First, Interface must make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect its transactions and dispositions of its assets. Second, Interface must devise and maintain a system of internal accounting controls sufficient to assure management’s control, authority, and responsibility over the company’s assets. Accordingly,

- Any payment or provision of anything of value made to, at the request of, or for the benefit of any public official or related to any public business (e.g., travel, entertainment, gifts, charitable contributions, facilitating payments, etc.), whether made directly or indirectly, must be approved in advance in accordance with company procedures, and must be openly and accurately entered in Interface’s books.
- No cash payments should be made to or on behalf of public officials, either directly or indirectly, if at all possible.

HYPOTHETICAL EXAMPLES

The following hypothetical situations illustrate the application of the Code’s policies concerning bribery and corruption. They were drafted by the United States Department of Justice and the U.S. Securities and Exchange Commission to provide guidance in interpreting the FCPA. Because the Code tracks the requirements of the FCPA, these hypotheticals also will give good guidance on what is permitted under Interface’s policy.

Hypotheticals: Gifts, Travel, and Entertainment

Company A is a large U.S. engineering company with global operations in more than 50 countries, including a number that have a high risk of corruption, such as Foreign Country X. Company A’s stock is listed on a national U.S. stock exchange. In conducting its business internationally, Company A’s officers and employees come into regular contact with foreign officials, including officials in various ministries and

state-owned entities. At a trade show, Company A has a booth at which it offers free pens, hats, t-shirts, and other similar promotional items with Company A's logo. Company A also serves free coffee, other beverages, and snacks at the booth. Some of the visitors to the booth are foreign officials.

Is Company A in violation of the FCPA?

No. These are legitimate, bona fide expenditures made in connection with the promotion, demonstration, or explanation of Company A'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. Providing promotional items with company logos or free snacks as set forth above is an appropriate means of providing hospitality and promoting business. Such conduct has never formed the basis for an FCPA enforcement action.

At the trade show, Company A 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 under the FCPA.

Is Company A in violation of the FCPA?

No. Again, the FCPA was not designed to prohibit all forms of hospitality to foreign officials. While the cost here may be more substantial than the beverages, snacks, and promotional items provided at the booth, and the invitees specifically selected, there is still nothing to suggest corrupt intent.

Two years ago, Company A won a long-term contract to supply goods and services to the state-owned Electricity Commission in Foreign Country X. The Electricity Commission is 100% owned, controlled, and operated by the government of Foreign Country X, and employees of the Electricity Commission are subject to the Foreign Country's domestic bribery laws. Some Company A executives are in Foreign Country X for meetings with officials of the Electricity Commission. The General Manager of the Electricity Commission was recently married, and during the trip Company A executives present a moderately priced crystal vase to the General Manager as a wedding gift and token of esteem.

Is Company A in violation of the FCPA?

No. It is appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude. It is important that such gifts be made openly and transparently, properly recorded in a company's books and records, and given only where appropriate under local law, customary where given, and reasonable for the occasion.

During the course of the contract described above, Company A periodically provides training to Electricity Commission employees at its facilities in Michigan. The training is paid for by the Electricity Commission as part of the contract. Senior officials of the Electricity Commission inform Company A that they want to inspect the facilities to ensure that the training is working well. Company A pays for the airfare, hotel, and transportation for the Electricity Commission senior officials to travel to Michigan to inspect Company A's facilities. Because it is a lengthy international flight, Company A agrees to pay for business class airfare, to which its own employees are entitled for lengthy flights. The foreign officials visit Michigan for several days, during which the senior officials perform an appropriate inspection. Company A executives take the officials to a moderately priced dinner, a baseball game, and a play. Do any of these actions violate the FCPA?

No. Neither the costs associated with training the employees nor the trip for the senior officials to the Company's facilities in order to inspect them violates the FCPA. Reasonable and bona fide promotional

expenditures do not violate the FCPA. Here, Company A is providing training to the Electricity Commission's employees and is hosting the Electricity Commission senior officials. Their 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

Would this analysis be different if Company A instead paid for the senior officials to travel first-class with their spouses for an all-expenses-paid, week-long trip to Las Vegas, where Company A has no facilities?

Yes. This conduct almost certainly violates the FCPA because it evinces a corrupt intent. Here, the trip does not appear to be designed for any legitimate business purpose, is extravagant, includes expenses for the officials' spouses, and therefore appears to be designed to corruptly curry favor with the foreign government officials. Moreover, if the Las Vegas trip were booked as a legitimate business expense—such as the provision of training at its facilities (of which there are none in Las Vegas)—Company A would also be in violation of the FCPA's accounting provisions. Furthermore, this conduct suggests deficiencies in Company A's internal controls.

Company A's contract with the Electricity Commission is going to expire, and the Electricity Commission is offering the next contract through its tender process. An employee of the Electricity Commission contacts Company A and offers to provide Company A with confidential, non-public bid information from Company A's competitors if Company A will pay for a vacation to Paris for him and his girlfriend. Employees of Company A accede to the official's request, pay for the vacation, receive the confidential bid information, and yet still do not win the contract. Has Company A violated the FCPA?

Yes. Company A 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 Company A ultimately was not successful in winning the contract. This conduct would also violate the FCPA's accounting provisions if the trip were booked as a legitimate business expense, and suggests deficiencies in Company A's internal controls.

Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country X, where it recently identified a significant new ore deposit. It has ready buyers for the new ore, but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country X to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A's vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this "grease" payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment. A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A \$1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of the Foreign Country's Department of Natural Resources and that it would only take a modest cash payment to the director and

the “problem would go away.” The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

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

No. 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 Company A 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 is still possible that it could violate other laws (in the Foreign Country and elsewhere). In addition, if the payment is not accurately recorded, it could violate the FCPA’s books and records provision.

Was the payment to the director a violation of the FCPA?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe.

Hypothetical: Third-Party Vetting

Part 1: Consultants

Company A, a U.S. entity headquartered in Delaware, wants to start doing business in Foreign Country X that poses high risks of corruption. Company A learns about a potential \$50 million contract with the Foreign Country’s Ministry of Immigration. This is a very attractive opportunity to Company A, both for its profitability and to open the door to future projects with the government. At the suggestion of the company’s senior vice president of international sales (Sales Executive), Company A hires a local businessman who assures them that he has strong ties to political and government leaders in the Foreign Country and can help them win the contract. Company A enters into a consulting contract with the local businessman (Consultant). The agreement requires Consultant to use his best efforts to help the company win the business, and provides for Consultant to receive a significant monthly retainer as well as a success fee of 3% of the value of any contract the company wins.

What steps should Company A consider taking before hiring Consultant?

There are several factors here that might lead Company A to perform heightened FCPA-related due diligence prior to retaining Consultant: (1) the market (high-risk country); (2) the size and significance of the deal to the company; (3) the company’s first time use of this particular consultant; (4) the consultant’s strong ties to political and government leaders; (5) the success fee structure of the contract; and (6) the vaguely-defined services to be provided. In order to minimize the likelihood of incurring FCPA liability, Company A should carefully vet Consultant and his role in the transaction, including close scrutiny of the relationship between Consultant and any Ministry of Immigration officials or other government officials. Although there is nothing inherently illegal about contracting with a third party that has close connections to politicians and government officials to perform legitimate services on a transaction, this type of relationship can be susceptible to corruption. Among other things, Company A may consider conducting due diligence on Consultant, including background and reference checks; ensuring that the contract spells out exactly what services and deliverables (such as written status reports or other documentation) Consultant is providing; providing information to Consultant on the FCPA and other anti-corruption laws;

requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights); and ensuring that payments requested by Consultant have the proper supporting documentation before they are approved for payment.

Part 2: Distributors and Local Partners

Assume the following alternative facts:

Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A's products to the Ministry of Immigration. In negotiating the pricing structure, Distributor claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or in the alternative, a contribution to its marketing efforts, either in the form of a lump sum or a percentage of the total contract. The requested discount/allowance is significantly larger than usual, although there is precedent at Company A for granting this level of discount in unique circumstances. Distributor further advises Company A that the Ministry's procurement officials responsible for awarding the contract have expressed a strong preference for including a particular local company (Local Partner) in the transaction as a subcontractor of Company A to perform installation, training, and other services that would normally have been performed by Distributor or Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.

What additional compliance considerations do these alternative facts raise?

As with Consultant in the first scenario above, Company A should carefully vet Distributor and Local Partner and their roles in the transaction in order to minimize the likelihood of incurring FCPA liability. While Company A has an established relationship with Distributor, the fact that Distributor has requested an additional discount warrants further inquiry into the economic justification for the change, particularly where, as here, the proposed transaction structure contemplates paying Local Partner to provide many of the same services that Distributor would otherwise provide. In many cases, it may be appropriate for distributors to receive larger discounts to account for unique circumstances in particular transactions. That said, a common mechanism to create additional margin for bribe payments is through excessive discounts or rebates to distributors, so transaction-specific due diligence could be in order.

Company A should carefully consider the relationship among Local Partner, Distributor, and Ministry of Immigration officials. While there is nothing inherently illegal about contracting with a third party that is recommended by the end-user, or even hiring a government official to perform legitimate services on a transaction unrelated to his or her government job, these facts raise additional red flags that warrant significant consideration. Among other things, Company A would be well-advised to require Principal 1 to verify that he will have no role in the Ministry of Immigration's decision to award the contract to Company A, notify the Ministry of Immigration and his own ministry of his proposed involvement in the transaction, and confirm that he will abide by the FCPA and other anti-corruption laws and that his involvement in the transaction is permitted under local law.

Assume the following additional facts:

Under its company policy for a government transaction of this size (\$50 million), Company A requires both finance and compliance approval. The finance officer is concerned that the discounts to Distributor are significantly larger than what they have approved for similar work and will cut too deeply into Company A's profit margin. The finance officer is also skeptical about including Local Partner to perform

some of the same services that Company A is paying Distributor to perform. Unsatisfied with Sales Executive's explanation, she requests a meeting with Distributor and Principal 1. At the meeting, Distributor and Principal 1 offer vague and inconsistent justifications for the payments and fail to provide any supporting analysis, and Principal 1 seems to have no real expertise in the industry. During a coffee break, Distributor comments to Sales Executive that the finance officer is naïve about "how business is done in my country." Following the meeting, Sales Executive dismisses the finance officer's concerns, assuring her that the proposed transaction structure is reasonable and legitimate. Sales Executive also reminds the finance officer that "the deal is important to their growth in the industry." The compliance officer focuses his due diligence on vetting Distributor and Local Partner and hires a business investigative firm to conduct a background check. Distributor appears reputable, capable, and financially stable and is willing to take on real risk in the project, financial and otherwise. However, the compliance officer learns that Distributor has established an off-shore bank account for the transaction. The compliance officer further learns that Local Partner's business was organized two years ago and appears financially stable but has no expertise in the industry and has established an off-shore shell company and bank account to conduct this transaction. The background check also reveals that Principal 1 is a former college roommate of a senior official of the Ministry of Immigration. The Sales Executive dismisses the compliance officer's concerns, commenting that what Local Partner does with its payments "isn't our problem." Sales Executive also strongly objects to the compliance officer's request to meet with Principal 1 to discuss the off-shore company and account, assuring him that it was done for legitimate tax purposes and complaining that if Company A continues to "harass" Local Partner and Distributor, they would partner with Company A's chief competitor. The compliance officer and the finance officer discuss their concerns with each other but ultimately sign off on the deal even though their questions had not been answered. Their decision is motivated in large part by their conversation with Sales Executive, who told them that this was the region's most important contract and that the detailed FCPA questionnaires and anti-corruption representations in the contracts placed the burden on Distributor and Local Partner to act ethically.

Company A goes forward with the Distributor and Local Partner agreements and wins the contract after six months. The finance officer approves Company A's payments to Local Partner via the offshore account, even though Local Partner's invoices did not contain supporting detail or documentation of any services provided. Company A recorded the payments as legitimate operational expenses on its books and records. Sales Executive received a large year-end bonus due to the award of the contract. In fact, Local Partner and Distributor used part of the payments and discount margin, respectively, to funnel bribe payments to several Ministry of Immigration officials, including Principal 1's former college roommate, in exchange for awarding the contract to Company A. Thousands of dollars are also wired to the personal offshore bank account of Sales Executive.

How would DOJ and SEC evaluate the potential FCPA liability of Company A and its employees?

This is not the case of a single "rogue employee" circumventing an otherwise robust compliance program. Although Company A's finance and compliance officers had the correct instincts to scrutinize the structure and economics of the transaction and the role of the third parties, their due diligence was incomplete. When the initial inquiry identified significant red flags, they approved the transaction despite knowing that their concerns were unanswered or the answers they received raised additional concerns and red flags. Relying on due diligence questionnaires and anti-corruption representations in this case is insufficient, particularly when the risks are readily apparent. Nor can Company A or its employees shield themselves from liability because it was Distributor and Local Partner—rather than Company A directly—that made the payments. The facts suggest that Sales Executive had actual knowledge of or was willfully blind to the third party's payment of the bribes. He also personally profited from the scheme (both from the kickback and from the bonus he received from the company) and intentionally discouraged the finance and

compliance officers from learning the full story. Sales Executive is therefore subject to liability under the anti-bribery, books and records, and internal controls provisions of the FCPA, and others may be as well. Company A may also be liable for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA given the number and significance of red flags that established a high probability of bribery and the role of employees and agents acting on the company's behalf.

Hypothetical: FCPA Jurisdiction

Company A, a Delaware company with its principal place of business in New York, is a large energy company that operates globally, including in a number of countries that have a high risk of corruption, such as Foreign Country X. Company A's shares are listed on a national U.S. stock exchange. Company A enters into an agreement with a European company (EuroCo) to submit a joint bid to the Oil Ministry to build a refinery in Foreign Country X. EuroCo is not an issuer. Executives of Company A and EuroCo meet in New York to discuss how to win the bid and decide to hire a purported third-party consultant (Intermediary) and have him use part of his "commission" to bribe high-ranking officials within the Oil Ministry. Intermediary meets with executives at Company A and EuroCo in New York to finalize the scheme. Eventually, millions of dollars in bribes are funneled from the United States and Europe through Intermediary to high-ranking officials at the Oil Ministry, and Company A and EuroCo win the contract. A few years later, a front page article alleging that the contract was procured through bribery appears in Foreign Country X, and the DOJ and SEC begin investigating whether the FCPA was violated.

Based on these facts, which entities fall within the FCPA's jurisdiction?

All of the entities easily fall within the FCPA's jurisdiction. Company A is both an "issuer" and a "domestic concern" under the FCPA, and Intermediary is an "agent" of Company A. EuroCo and Intermediary are also subject to the FCPA's territorial jurisdiction provision based on their conduct while in the United States. Moreover, even if EuroCo and Intermediary had never taken any actions in the territory of the United States, they can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under "Pinkerton liability", namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.