OFFICE OF GENERAL COUNSEL MEMORANDUM

U.S. AND INTERNATIONAL ANTI-BRIBERY LAWS, INCLUDING THE U.S. FOREIGN CORRUPT PRACTICES ACT ("FCPA")

Do you plan to host a dinner for foreign officials, or present them with gifts, in connection with a proposed program (e.g., NYU Abu Dhabi or NYU Shanghai)?

Are you organizing a trip to the U.S. for professors or doctors from a state-owned foreign hospital or university?

Have you been asked by an official in a foreign country for a payment to process a student's visa, which the student is legally entitled to obtain without such payment?

If you answered “yes” to any of the above questions or are engaging or planning to engage in other activities involving providing anything of value to government officials, you may be subject to the U.S. Foreign Corrupt Practices Act (the “FCPA”) or other anti-bribery laws. The summary below provides basic information on U.S. and international anti-bribery laws.

Background

As the University and its affiliates expand and develop as a Global Network University, the University is subject to a variety of laws prohibiting corrupt payments to government officials and others, including the FCPA. Applicable international laws governing anti-bribery can be, and often are, more expansive than U.S. law, as further detailed below. In addition, please note that the University maintains a policy on Interaction with Government Officials, which, among other things, prohibits the provision of gifts and meals to U.S., state and local government officials in connection with University matters, without permission of the Office of Government Affairs and Civic Engagement.
**FCPA Overview**

In addition to U.S. federal and state laws prohibiting bribery in the U.S., the FCPA is a federal law that prohibits bribery in an international context. The FCPA contains anti-bribery provisions prohibiting U.S. persons and organizations (as well as certain foreign persons and organizations) from directly or indirectly offering to pay money or anything of value to a foreign official in his or her official capacity for the purpose of inducing the official to do any act in violation of his or her lawful duty or to secure any improper advantage in order to assist the payer in obtaining or retaining business or gaining an unfair advantage.

**Important FCPA Definitions**

While the phrase “anything of value” is not defined in the FCPA, it has been interpreted broadly to include a wide range of tangible and intangible benefits. This includes not only cash or cash equivalents but anything that may be of subjective value to the official, including, for example entertainment, meals and lodging, discounts, use of facilities or equipment, information or a promise of future employment.

The definition of “foreign official” is significantly broad as well and includes more people than one might initially expect. For example, an employee of a commercial entity may be considered a foreign official if the entity is majority-owned or controlled by a foreign government. The definition of “foreign official” could include any of the following, in addition to others:

- members, officers and employees of a foreign government and its various departments;
- agencies and instrumentalities of a foreign government and its personnel;
- political candidates, as well as members, officers and employees of political parties;
- physicians working at state-owned hospitals;
- persons working at state-owned schools, colleges and universities; and
- journalists working for state-run media outlets.

**Application of FCPA to Entities and Individuals**

The FCPA applies to all U.S. organizations and their foreign subsidiaries, as well as persons acting on their behalf such as officers, directors, employees and agents, including foreign persons working in such capacities. The FCPA also prohibits payments to third parties, including to foreign entities and individuals, when the organization has authorized the payment, or has knowledge that the payment will be used, for an improper purpose. This could include, for example, payments to a local
tax auditor, a customs agent or a joint venture partner, when it is known that the recipient will make an illegal payment with the funds. Entities and individuals are deemed to have knowledge of such payments if there is a high probability for them to occur. Therefore, ignoring red flags can and will lead to a finding of knowledge under the anti-bribery provisions.

**FCPA Enforcement**
FCPA compliance is now one of the top law enforcement priorities at the U.S. Department of Justice (the “DOJ”), which pursues both criminal and civil penalties for FCPA violations, including fines of up to $2,000,000 and imprisonment. The DOJ's significant increase in enforcement efforts in recent years underscores the importance of understanding the FCPA and complying with it in all aspects of University operations.

**FCPA Exception for Routine Governmental Actions**
One exception under the FCPA that may apply to University operations in limited circumstances is for a payment to a foreign official in order to expedite or secure a "routine governmental action," often referred to as a “facilitating” or "grease” payment. This applies to non-discretionary actions by a foreign official, such as issuing a visa or providing for mail pick-up, and does not include a decision by a foreign official to award new business or continue business with a particular entity. Because this exception is narrowly construed, it is of limited application.

**FCPA Affirmative Defenses**
There also are two affirmative defenses to the FCPA that may apply to University operations in limited circumstances. The first permits a payment or gift that is “lawful under the written laws and regulations” of the foreign country. This exception is extremely narrow because in order to qualify under it, the foreign law must expressly allow the specific payment or gift, which is exceedingly rare. The second allows for payment of "a reasonable and bona fide expenditure," such as travel and lodging expenses directly related to the promotion, demonstration or explanation of the University's services or the execution or performance of a contract.

**Anti-Bribery Laws in Other Countries**
The University is subject to the laws in each of the jurisdictions where it acts or operates, including anti-bribery laws. Most of the countries where NYU maintains study-away sites, including Argentina, Australia, the Czech Republic, France, Germany, Israel, Italy, Spain and the United Kingdom, have adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), which requires participating counties to ensure that their national parliaments approve the Convention and pass legislation to implement it into national law.

The anti-bribery laws in non-U.S jurisdictions can be more expansive than the FCPA, such as the anti-bribery laws in the United Kingdom and China. The UK Bribery Act 2010 is considered to be one of the toughest anti-bribery statutes in the world. For
example, it prohibits not only the paying and receiving of bribes, but also the failure of a commercial organization to prevent bribery. In addition, the Act has a broad jurisdictional reach that extends to actions taken by any organization that has a “business presence” in the UK, regardless of where the bribe is paid. “Facilitating” payments, while acceptable under the FCPA, are not permitted under the UK Bribery Act.

Unlike the FCPA, which only applies to bribes offered to government officials, the Chinese criminal law also criminalizes bribes offered to non-state foreign actors.

While we encourage you to utilize this summary as a guide, determining compliance with U.S. and international anti-bribery laws requires a detailed examination of facts and circumstances.

Further Resources

If you have legal questions about Anti-Bribery Laws or FCPA, you can find a member of the Office of General Counsel who practices in this area by visiting our practice areas page and scrolling to “Global Compliance”.