The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) was enacted by Congress in 1977 to bring a halt to the bribery of foreign officials. Bribes to foreign officials do not have to be cash payments and may not always seem like a bribe. It might be socially acceptable and even an everyday practice to make “facilitating payments” to a foreign official, but those payments may be illegal under the FCPA. When traveling internationally one must be mindful of different cultural practices and norms, and at the same time realize that the laws of the United States and other countries still apply regardless of cultural practices. Any facilitating payments must be discussed in advance with University Counsel.

The Foreign Corrupt Practices Act (FCPA) and International Travel:

* **Summary of the FCPA**
  + Congress enacted the FCPA in 1977
  + The FCPA was amended in 1998 to incorporate the anti-bribery provisions of the Organization for Economic Co-operation and Development (OECD) Convention
    - The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.
* **Who The FCPA Applies to**
  + The anti-bribery provisions of the FCPA make it unlawful for:
    - A U.S. person, including the University to bribe a foreign official for the purpose of:
      * Obtaining or retaining business
      * Or directing business to any person
      * Or for the purpose of otherwise securing an improper advantage.
* **What Constitutes a Bribe**
  + Bribes are not limited to payments of money, the FCPA also prohibits favors and other inducements that are of value to the recipient
    - Examples include: Lavish or inappropriate gifts and entertainment
  + Both Direct and Indirect bribes to a foreign official are prohibited
    - Indirect bribes made through a third party such as a consultant or other agent are also prohibited
* **Elements of a Violation**
  + The Actor is the University, University Employees, or any member of the University community conducting University business overseas
  + The individual being bribed is a “foreign official” which means any:
    - Officer or employee of a foreign government or of a public international organization or any department or agency thereof, or any person acting in an official capacity
    - or executives and other employees of state-owned or -controlled businesses or enterprises such as
      * the president of state-owned company
      * or, a professor at a state-run university
* **Types of bribes**
  + Donations to a charity favored by the foreign official
  + Uncompensated use of University facilities or property
  + Favors such as hiring a family member or a certain vendor
* **Business Purpose Test *(The purpose of the payment is more important than the particular duties of the official receiving the payment)***
  + Payments are prohibited if they are made in order to assist the University in obtaining or retaining business for or with, or directing business to, any person
  + Corrupt Intent *(person making/authorizing payment must have a corrupt intent)*
    - **Payment must be intended to induce the recipient to misuse his or her official position to direct business wrongfully to, or to secure an improper advantage for, the payor or to any other person**
    - The bribe need not succeed, the attempt itself is a crime
  + Knowledge, the payment must be made knowingly
    - Knowingly means the payor is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
* **Permissible Payments and Affirmative Defenses**
  + Facilitating payments for “routine government action” are allowable
  + “Routing government action” DOES NOT INCLUDE DISCRETIONARY actions or decisions by government officials.
    - Discretionary Actions or Decisions include any decision by a foreign official to award new business or to continue business with a particular party
* **Facilitating payments may be made only if**
  + The proposed payment is legal and customary in the foreign country;
  + No reasonable alternative to making the payment exists; and
  + You discuss the situation in advance with University Counsel