

Debate

To comply with FCPA or not to comply with FCPA

- You own a construction company that is headquartered in Albuquerque, NM. Your company employs 250 New Mexicans and they are spread across 4 different areas of the state.
- Business has been slowing down and you are close to laying off about 100 of your employees (expected to happen within the next 1-2 months).
- You have an opportunity to expand your business to Mexico City, Mexico.
- You can get a contract that can guarantee work for your employees for at least five years with a potential value of \$3 - \$5 million/year. This may lead to additional work in other cities in and around Mexico City and beyond. Not only will you not have to layoff anyone, you are likely to hire more workers.
- The only way to get this contract in Mexico is to “grease the skids” (pay bribes) with a foreign official in Mexico City.
- The Foreign Corrupt Practices Act (FCPA) prohibits this course of action.
- Many of your competitors are known to have paid bribes in the past and you expect that they will do so again in order to secure this contract. Whether they are doing so legally (i.e., where doing so is not explicitly prohibited by law) is not your concern.
- If you don’t get this contract, your company will likely go bankrupt in 2-3 years and all of your remaining employees (the 150 who have not been laid off already) will lose their jobs and many communities across New Mexico will suffer financial hardships.

You have two main options:

1. Pay the bribe and have money available to pay potential resulting fines if you are caught. If you get the contract, this will save the jobs of your workers.
2. Do not pay the bribe and let the chips fall where they may.

Assignment:

Given this information, half of the class is assigned the “against compliance” position (pay the bribe) while the other half is assigned the “for compliance” (do not pay the bribe) position. What is the “right” answer? This debate illustrates that actions involving the FCPA can have both negative and positive repercussions for a firm and recognizes that legal issues and ethical issues may not always lead to the same answer and/or produce the same results.

Faculty Guide*

Against Compliance/Pay the Bribe:

- If others are doing it, why shouldn't I?
- The FCPA puts the company at a competitive disadvantage in countries where bribes by local companies are the norm or where there is no agreement not to engage in bribery, but the company has an obligation to perform for its stakeholders.
- The costs associated with compliance for the FCPA can be quite large, causing the company to have a high opportunity cost and to not be able to provide for its stakeholders.
- Compliance with FCPA can create barriers to entry into foreign markets, causing the foreign economies to stall (not increasing standards in that country). The company has a responsibility to take care of its employees, and paying the bribe ensures gainful employment which, in turn, ensures their well-being. In an impoverished country, an American company's inability to do business there hinders that country's development rather than helping promote a more stable economy.
- Just because something is a law doesn't make it ethical. A company must weigh the ethics of the situation and do what is best for them.

For Compliance/Do Not Pay the Bribe:

- Firms that comply with regulations are seen as ethical and can secure additional business through repetitive business dealings with those who value ethics.
- Violations can result in individual fines, company penalties, jail time and a tarnished reputation, therefore the long-term cost of not complying may be more than the cost of complying. The cost of an investigation into violations can be high, causing the company to not have the ability to invest in itself and benefit its stakeholders.
- The company has a responsibility to follow the laws of the communities where it conducts business as well as any U.S. laws that are applicable.
- Paying bribes will likely lead to paying more bribes, thus creating further ethical, as well as legal issues, for the company.

*Students are likely to come up with other arguments

Supplemental Information

An example of an FCPA violation in Mexico: Walmart wanted to expand its operating in Mexico, but a new zoning map would not allow them to build near the Mayan pyramids. Walmart de Mexico bribed a local government official to restructure a zoning map that would allow Walmart to build.

<https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html>

Note that the Walmart case is just one example of an FCPA violation. See the following for some more recent examples:

<http://www.fcpablog.com/blog/2018/7/2/fcpa-enforcement-report-for-q2-2018.html>

<https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>

<https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>

Additional sources

FCPA Ethical debate:

<https://www.complianceweek.com/blogs/patricia-harned/solving-an-fcpa-ethical-dilemma#.W3yclC2ZPBI>

<https://ethicalboardroom.com/a-better-approach-to-fcpa-compliance/>

<https://publicpolicy.wharton.upenn.edu/live/news/1335-does-the-foreign-corrupt-practices-act-work>

<https://www.csmonitor.com/Commentary/the-monitors-view/2017/0124/Why-anti-bribery-laws-help-global-business> https://lcarrollsbusinessclasses.weebly.com/uploads/6/1/1/4/61143071/global-walmart_rev.pdf

<https://www.csmonitor.com/Commentary/the-monitors-view/2017/0124/Why-anti-bribery-laws-help-global-business> <https://qz.com/927217/one-of-the-worlds-best-weapons-against-bribery-and-corruption-is-under-threat-from-trump/> http://www.hofstralawreview.org/wp-content/uploads/2017/10/CC.3.Smith_.pdf

<https://www.csmonitor.com/Commentary/the-monitors-view/2017/0124/Why-anti-bribery-laws-help-global-business> <https://qz.com/927217/one-of-the-worlds-best-weapons-against-bribery-and-corruption-is-under-threat-from-trump/> http://www.hofstralawreview.org/wp-content/uploads/2017/10/CC.3.Smith_.pdf

Average penalty by year:

<http://fcpa.stanford.edu/chart-penalties.html>