

Working Abroad:  
What Nonprofits  
Need to Know  
About  
Anti-Bribery Laws



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Joel W. Rogers

Assoc. General Counsel  
The Home Depot  
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# Mission of Pro Bono Partnership of Atlanta

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To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

# Client Criteria

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In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

Visit our website at [www.pbpatl.org](http://www.pbpatl.org) to apply.

# PBPA Learning Center for Georgia Nonprofits

[www.pbpatla.org/resources](http://www.pbpatla.org/resources)

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# Legal Information

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This webinar presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

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# Agenda

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- FCPA - Background and the Basics
  - *What is the FCPA and why is it important?*
  - *What is prohibited by the FCPA and what is not?*
- FCPA Issues Specific to Nonprofits
  - *What are examples of FCPA issues regarding nonprofits?*
  - *How do I spot possible FCPA issues?*
- Effective FCPA Compliance Programs
  - *What steps should a nonprofit take to comply?*

# Background

## What is the FCPA?

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Foreign Corrupt Practices Act: a US law with two key sets of provisions:

- (1) **Anti-bribery prohibitions** – it is illegal for a “US person” or their agent to offer or give anything of value to a “foreign official” to obtain or retain business; and
- (2) **Accounting and recordkeeping provisions** – “US companies” must keep accurate books and establish controls to ensure transactions are recorded properly



Both described in more detail on the next slide.

# Background – FCPA (cont.)

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- Enacted in 1977
- Enforced by two agencies:
  - U.S. Department of Justice (DOJ) and
  - The Securities and Exchange Commission (SEC)
- Little or no enforcement in first 20 years after the enactment
- Since the late 1990's, however, has been an enforcement focus
- Penalties can be massive; also impacts reputation



# Who Is Covered?

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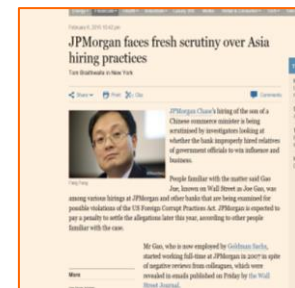
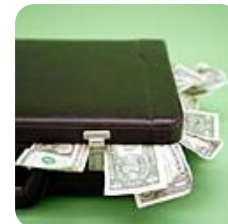
- U.S. companies, citizens, resident aliens – anywhere
- U.S. companies, for accounting failings of their foreign subsidiaries
- Foreign subsidiaries of U.S. companies
- Foreign nationals acting for U.S. companies
- Others

**No exceptions for Nonprofits or their personnel**

# FCPA - Anti-Bribery Prohibitions

## The FCPA prohibits:

- The offer, promise, or payment of money or anything of value
  - Includes gift cards, gifts, entertainment, travel, job, etc.
- Either directly or indirectly
  - Includes improper payments by agents or third parties made on company's behalf
- To a government official
  - Includes payments to employee of state-owned enterprises (SOEs), to family members of government official, etc.
- To obtain or retain business or improper advantage
  - Very broadly interpreted



# Exception: Facilitating Payments

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- Small amounts
- To expedite or secure “routine governmental action”
  - Secure basic services (telephone, water, mail)
  - Schedule (but not pass!!) inspections
  - Process paperwork
- Official action must be non-discretionary, i.e., official has no legal basis to refuse to provide the service
- ALL payments must be accurately recorded as such

# Affirmative Defenses

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- **Local Law**

- Payments must be permitted under the *written laws and regulations* of the host country
- Violation of local law evidence of corrupt intent

- **Promotional Expenditures**

- Must be bona fide and reasonable business expenses
- Directly related to promoting or demonstrating products or services, or contract execution

- **Note:** Extortion is not bribery

- Payments made to protect immediate health or safety are not violations but must then be accurately reported in the books and records

# Issues Specific to Nonprofits

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- **Political Activity** - One big difference between for profits and nonprofits with FCPA involves political activity
  - Political donations are permissible in certain situations under the FPCA
  - They are **not permitted** for nonprofits organized under 501(c)(3) of the Internal Revenue Code

#### 4. Political and Charitable Contributions.

As a section 501(c)(3) organization, Organization is prohibited from engaging in political campaign activities.

When making charitable contributions and committing to or entering into other social responsibility engagements, Organization should conduct due diligence to ensure that the recipient is a legitimate organization and is not improperly related to a Foreign Official.

# FCPA – Accounting Requirements

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- Maintain books, records, and accounts that, in reasonable detail, accurately reflect transactions and the disposition of assets
- Maintain a system of internal accounting controls sufficient to reasonably assure that transactions are:
  - Consistent with management authorizations
  - Recorded so that financials conform with accounting requirements



## Watch Out for **Warning Signs**- Examples:

- Vague or unapproved expenses
  - “Miscellaneous handling fees”
- Payee name does not match actual service provider

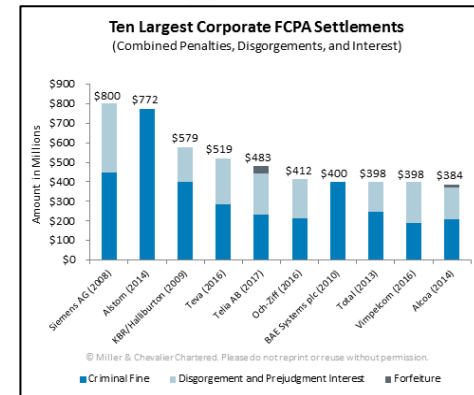
# Beyond the FCPA

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- There are other provisions covering anti-bribery as well:
  - **Multilateral conventions** prohibit same activity
    - UN Convention Against Corruption
    - OECD
  - **Local laws** - Most foreign countries now also have their own laws prohibiting bribery and many are begging to rigorously enforce
    - U.K. Antibribery Act
    - Brazil, China and others

# FCPA – Penalties

- **Corporate penalties:** Criminal and civil fines, disgorgement of profits, prejudgment interest, imposition of monitorship or reporting requirements
- Potential for **individual incarceration:** Individuals can be independently charged
- Conspiracy, aiding and abetting, money laundering
- **Parallel foreign enforcement**



**Walmart pays \$282 million for FCPA resolution**  
Thursday, June 20, 2019 at 2:28PM  
Harry Cassin in Brazil, China, India, Mexico, Walmart

Walmart Inc. agreed Thursday to pay the DOJ and SEC \$282 million to settle allegations that it violated the Foreign Corrupt Practices Act by paying an intermediary in Brazil to help obtaining construction permits and having weak anti-corruption internal controls in Brazil, China, India, and Mexico.

In the criminal action, Walmart paid penalties of \$138 million. Its Brazil subsidiary, WMT Brasilia S.a.r.l., agreed to plead guilty to violating the FCPA's accounting standards.



# FCPA Issues Specific to Nonprofits

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- **Enforcement against Nonprofits** – No nonprofits have been publicly prosecuted BUT:
    - Individuals employed by non-profits have been prosecuted & nonprofits have been investigated
- Paul, Weiss Achieves Favorable Resolution in Unique FCPA Investigation of Nonprofit Organization

CLIENT NEWS | JULY 25, 2011
- Law firm reported representing a large nonprofit that “provides humanitarian relief and assistance overseas in a Justice Dept investigation into potential FCPA violations in multiple countries
  - Nonprofits have been sanctioned - **Academy for Educational Development (AED)**, a large and well-respected non-profit, was suspended as a USAID contractor due to “serious corporate misconduct (and) mismanagement”
    - AED is now out of business

# FCPA Compliance Programs

The Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) released in 2012 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. The guide provides a detailed analysis of the U.S. Foreign Corrupt Practices Act (FCPA), closely examines the DOJ and SEC's approach to FCPA enforcement and provides the below "Hallmarks of an Effective Compliance Program."



# FCPA Compliance for Nonprofits

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- **Key Elements for Nonprofits**

- Tone at the Top – Management Commitment
- Implement an **FCPA/Anti-Bribery Policy**
- Training – Management & Staff
- Conduct Due Diligence on Third Party Agents and Intermediaries and sign contracts containing FCPA safeguards

- **Other Elements to Consider**

- **Risk assessments** – Should you conduct an **annual risk assessment** to identify emerging risks/changing landscapes
- **Auditing** – Should you include an FCPA/Anti-Bribery element in the audit work performed on your nonprofit or consider a stand-alone audit?

Corruption isn't good for any society, and nonprofits shouldn't be participating in practices that tolerate corruption and bribery, whether overseas or here at home. –Rick Cohen

Questions?

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[rla@pbpatl.org](mailto:rla@pbpatl.org)