

**Risky Business:
The Unexpectedly Broad Application of the FCPA's Business Purpose Element**

<http://mattesonellislaw.com/fcpamericas/>

January 19, 2012

Companies and individuals subject to the U.S. Foreign Corrupt Practices Act (FCPA) often misunderstand the scope of subject activity. They assume that bribes are illegal only if they relate to a company's core business.

As a result, they might focus anti-corruption compliance efforts in areas like public procurement (see [an earlier post on the FCPAmericas Blog](#) about corruption in procurements). But they might not think it necessary to do so in other areas of their business, like managing tax liabilities or setting up business registrations in new markets. By ignoring these areas, they expose themselves to important risk.

Broad Interpretation. The "business purpose" element of the FCPA is interpreted broadly. Any payment that benefits the operations of the payor's business can satisfy this element. Payments to reduce tax liabilities in Indonesia ([KPMG-SSH and Harsono](#)), gain beneficial transfer pricing tax formulas in South Korea ([Diageo](#)), avoid customs-related costs in Argentina and Venezuela ([Helmerich & Payne](#)), and collect a debt legally owned to the payor by the government in the Dominican Republic ([Vitusa](#)) have all been sufficient to create FCPA liability for companies and individuals operating abroad.

Court Review. A challenge to this broad scope was rejected by the Fifth Circuit in *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (reversing and remanding 200 F. Supp. 2d 681 (S.D. Tex. 2002)), a case where the payments at issue were for tax and customs audit and levy benefits. The court held that the FCPA does not merely cover payments to obtain or renew business contracts.

Implications. What does this mean for companies operating abroad? Your compliance programs must reach every segment of your company where you, or your third party intermediaries, interact with government officials. In addition, it is essential to conduct risk assessments to understand your company's risk profile.

Latin America. What does this mean for companies operating in Latin America? In the region, businesses or their agents might be required to interact with government officials in ways they might not initially expect. In Brazil, a company will likely need to rely on a *despachante* at some point, a professional who navigates the confusing set of business registrations, permits, and licenses (see more details [here](#)). In Argentina, your non-Argentine employees might be required to obtain work permits from a complicated immigration regime, a process that can easily be held

up if not handled by experienced professionals. Realities like these make it essential to match compliance efforts to risk. They also make it essential to use experts who are intimately familiar with the region.

This article is reprinted from the FCPAméricas Blog. It is not intended to provide legal advice to its readers. Blog entries and posts include only the thoughts, ideas, and impressions of the authors and contributors, and should be considered general information only about the Americas, anti-corruption laws including the U.S. Foreign Corrupt Practices Act, issues related to anti-corruption compliance, and any other matters addressed. Nothing in this publication should be interpreted to constitute legal advice or services of any kind. Furthermore, information found on this blog should not be used as the basis for decisions or actions that may affect your business; instead, companies and businesspeople should seek legal counsel from qualified lawyers regarding anti-corruption laws or any other legal issue. The Editor and the contributors to this blog shall not be responsible for any losses incurred by a reader or a company as a result of information provided in this publication. For more information, please contact Info@MattesonEllisLaw.com.

The author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author.

@2012 Matteson Ellis Law, PLLC