



**DON'T BECOME A HEADLINE!
INTRODUCTION TO THE FOREIGN
CORRUPT PRACTICES ACT (FCPA)**

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Who is subject to the FCPA? 1977 Act

- (1) “Issuers” (and their agents)
 - Securities registered in U.S.
 - Required to file SEC reports
- (2) “Domestic Concerns” (and their agents)
 - Citizen, national or resident of the United States
 - Any type of corporate entity headquartered or organized in the United States

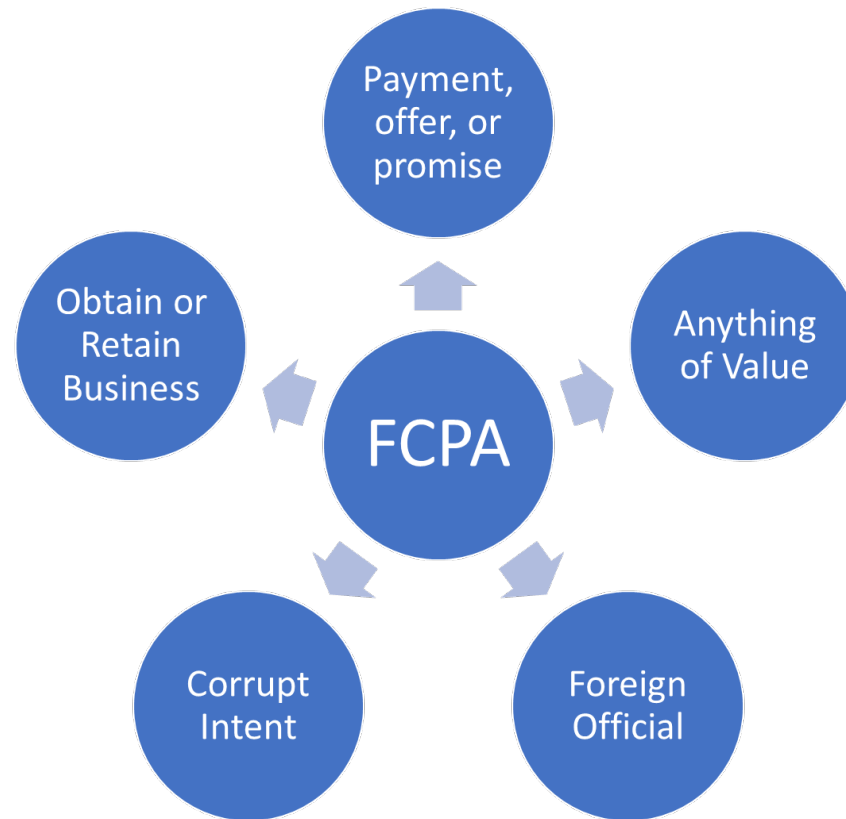
Who is subject to the FCPA? 1998 Amendment

- (3) Foreign nationals or businesses who take any action in furtherance of a corrupt payment while within the territory of the United States
 - Implementation of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions

Who is subject to the FCPA? 1998 Amendment

- 1998 Amendment covers corrupt foreign payments outside the United States by U.S. persons without any link to interstate commerce
 - U.S. “issuers” and “domestic concerns” liable for actions of overseas employees and agents, even if no money was transferred from the United States and even if no U.S. person participated in any way in the foreign bribery

FCPA ELEMENTS



How to violate the FCPA? FCPA Anti-Bribery Elements

- Element 1: A payment, **offer**, authorization, or **promise** to pay money or anything of value, directly or through a third party
 - Note: no bribe payment necessary
 - Note: “anything of value” includes information, testimony of a witness, promises of school enrollment or employment
 - No “de minimis” exception

How to violate the FCPA?

FCPA Anti-Bribery Elements

- Element 2: To
 - (a) any foreign official,
 - Note: Normally includes employees of state-owned enterprises
 - (b) any foreign political party or party official,
 - Note: Potential problem when donating to foreign campaigns
 - (c) any candidate for foreign political office,
 - (d) any employee or official of a public international organization, or
 - (e) any other person while “knowing” that the payment or promise to pay will be passed on to one of the above.
 - identity not required: fake official? “pay whoever you need to”?
- Note: a person may be liable on the basis of constructive knowledge (e.g., willful blindness, deliberate ignorance, head-in-the sand)
- Note: FCPA does not permit prosecution of the recipients.

How to violate the FCPA? FCPA Anti-Bribery Elements

- Element 3: By
 - Using an instrumentality of interstate commerce (such as telephone, telex, email, or the mail) by any person (whether U.S. or foreign), or
 - An act outside of the United States by a domestic concern or U.S. person, or
 - An act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay

How to violate the FCPA? FCPA Anti-Bribery Elements

- Element 4: For the **corrupt purpose** of
 - (a) influencing an official act or decision of that person,
 - (b) inducing that person to do or omit doing any act in violation of his or her lawful duty,
 - (c) securing an improper advantage, or
 - (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision,
- Note: “corruptly”?
 - “voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result, or a lawful result by some unlawful method or means”?
 - personal benefit?

How to violate the FCPA? FCPA Anti-Bribery Elements

- Element 5: In order to assist the person or company in obtaining or **retaining** business for or with any person or directing business to any person.
 - Note: “any improper advantage”

Recap: Five Elements

1. Paying or promising to pay money, gifts, or something of value.
2. To foreign officials or agents.
3. Via interstate commerce, foreign persons in U.S., or U.S. actors in foreign jurisdictions
4. With an intentionally corrupt motive.
5. For the purpose of influencing, inducing, or securing an improper advantage in helping to obtain or retain business.

Exception: Facilitating / Expediting / Grease Payments



Exception: Facilitating / Expediting / Grease Payments

- Exception permits payment of small sums to facilitate routine, non-discretionary government functions.
- Examples:
 - Process permits, licenses, visas, work orders, or official documents
 - Provide police protection, power and water supply, cargo handling, or protection of perishable products
 - Schedule inspections related to contract performance or transportation of goods
- Note: this does not include any award for new business or to retain business
- Note: the UK Bribery Act prohibits facilitating payments

Affirmative Defense: Written Laws of Foreign Country

- Show that payment, gift, offer, or promise was lawful under laws and regs of foreign official's country.
 - Note: No country's laws expressly permit bribery
 - Note: absence of written laws in a foreign official's country would not by itself be sufficient.



Affirmative Defense: Reasonable and Bona Fide Expenditures



Affirmative Defense: Reasonable and Bona Fide Expenditures

- FCPA allows companies to provide reasonable and bona fide expenditures directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.
- Trips primarily for personal entertainment purposes are not bona fide business expenses and may violate FCPA anti-bribery provisions.
- This is a fact specific analysis.
- Make sure to properly characterize in your books and records and follow adequate internal controls or you risk violating the accounting provision in the FCPA.

Affirmative Defense: Reasonable and Bona Fide Expenditures

DOJ opined that the following do not violate FCPA

- Travel and expenses to visit company facilities or operations
- Travel and expenses for training
- Product demonstrations or promotional activities, including travel and expenses for meetings

Affirmative Defense: Reasonable and Bona Fide Expenditures

Helpful Guidance

- Do not select the officials; use merit-based criteria
- Require receipts
- Do not advance funds
- Do not pay for reimbursements in cash
- Necessary and reasonable stipends
- Transparent expenditures
- Do not condition payment on action by officials
- Confirm payment not contrary to local law.
- Provide no additional compensation, stipends, or spending money
- ACCURATELY RECORD IN BOOKS AND RECORDS

FCPA Components

Anti-Bribery Provisions

- Prohibit Bribery
- Non-routine payments for foreign officials

Record Keeping and Internal Controls

- Maintaining books and records
- Financial internal controls
- Provide reasonable assurance of accuracy of financial records and demonstrate compliance

Other Related U.S. Laws

- Travel Act- 18 U.S.C. § 1952 Prohibits travel, or use of mail or other facility in interstate/foreign commerce with intent to distribute proceeds of unlawful activity or to promote, manage, establish or carryon unlawful activity.
- Money Laundering- Many FCPA violations involve concealing and disguise of proceeds and violate money laundering statute.
- Mail and Wire Fraud- Wiring or mailing bribes
- Tax Violations
- Certification and Reporting Violations – Violations of the Arms Export Control Act or ITAR require reporting.

International Traffic in Arms (ITAR) Part 130

- ITAR Part 130 applies to the sale of defense articles and defense services valued at \$500K or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization.
- Applicants and Suppliers under the ITAR must notify the Directorate of Defense Trade Controls (DDTC) of the payment of fees and commissions in an aggregate amount of \$100K or more paid to representatives and consultants for the solicitation or promotion of defense articles.
- There are strict deadlines for the reporting of fees and commissions.



FCPA Enforcement Authority

Department of Justice

- Criminal Enforcement
- Civil Actions (except those against issuers)



Securities and Exchange Commission

- Civil Actions (against issuers and their officers, directors, employees, agents, or stockholders acting on issuer's behalf.)



The OECD Anti-Bribery Convention

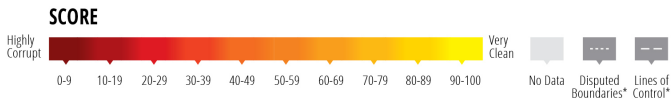
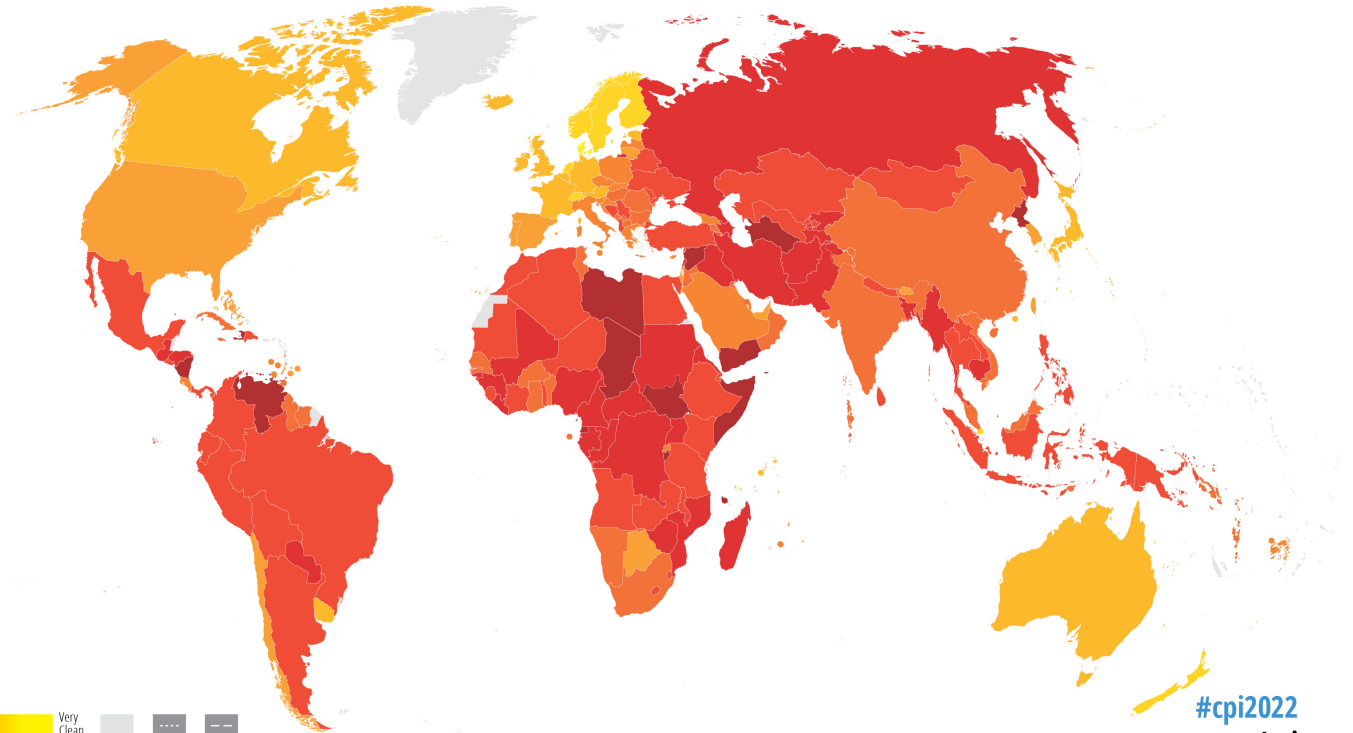
The Convention of Combating Bribery of Foreign Public Officials in International Business Transaction.

- Legally binding international agreement
- 45 countries have ratified or acceded to the convention
- Signed 12/17/1997 and came into force on 2/15/1999
- Parties to the Convention agree to:
 - Establish bribery of foreign public officials as a criminal offence
 - Investigate, prosecute and sanction this offence
- Focused on “supply side” of bribery (person offering bribe)
- The OECD Working Group on Bribery monitors countries' implementation of the Anti-Bribery Convention and ensures they uphold their obligations



CORRUPTION PERCEPTIONS INDEX 2022

The perceived levels of public sector corruption in 180 countries/territories around the world.



*The designations employed and the presentation of material on this map follow the UN practice to the best of our knowledge and as of January 2023. They do not imply the expression of any opinion on the part of Transparency International concerning the legal status of any country, territory, city or area or of its authorities or concerning the delimitation of its frontiers or boundaries.

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SCORE COUNTRY/TERRITORY

90	Denmark
87	Finland
87	New Zealand
84	Norway
83	Singapore
83	Sweden
82	Switzerland
80	Netherlands
79	Germany
77	Ireland
77	Luxembourg
76	Hong Kong
75	Australia
74	Canada
74	Estonia
74	Iceland
74	Uruguay
73	Belgium
73	Japan
73	United Kingdom
72	France
71	Austria
70	Seychelles
69	United States of America
68	Bhutan
68	Taiwan

67	Chile
67	United Arab Emirates
65	Barbados
64	Bahamas
63	Israel
63	Korea, South
62	Lithuania
62	Portugal
60	Botswana
60	Cabo Verde
60	Saint Vincent and the Grenadines
60	Spain
59	Latvia
58	Qatar
56	Czechia
56	Georgia
56	Italy
56	Slovenia
55	Dominica
55	Poland
55	Saint Lucia
54	Costa Rica
53	Fiji
53	Slovakia
52	Cyprus
52	Greece

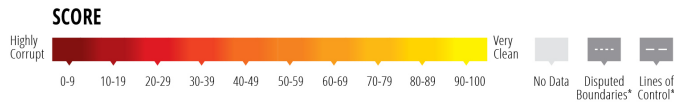
52	Grenada
51	Malta
51	Rwanda
51	Saudi Arabia
50	Croatia
50	Mauritius
49	Namibia
48	Vanuatu
47	Jordan
47	Malaysia
46	Armenia
46	Romania
45	China
45	Cuba
45	Montenegro
45	Sao Tome and Principe
44	Bahrain
44	Jamaica
44	Oman
43	Benin
43	Bulgaria
43	Ghana
43	Senegal
43	South Africa
42	Burkina Faso
42	Hungary
42	Kuwait

42	Solomon Islands
42	Timor-Leste
42	Trinidad and Tobago
42	Vietnam
41	Kosovo
40	Guyana
40	India
40	Maldives
40	North Macedonia
40	Suriname
40	Tunisia
39	Belarus
39	Colombia
39	Moldova
38	Argentina
38	Brazil
38	Ethiopia
38	Morocco
38	Tanzania
37	Cote d'Ivoire
37	Lesotho
36	Albania
36	Ecuador
36	Kazakhstan
36	Panama
36	Peru
36	Serbia

36	Sri Lanka
36	Thailand
36	Turkey
34	Bosnia and Herzegovina
34	Gambia
34	Indonesia
34	Malawi
34	Nepal
34	Sierra Leone
33	Algeria
33	Angola
33	El Salvador
33	Mongolia
33	Philippines
33	Ukraine
33	Zambia
32	Dominican Republic
32	Kenya
32	Niger
31	Bolivia
31	Laos
31	Mexico
31	Uzbekistan
30	Djibouti
30	Egypt
30	Eswatini

30	Mauritania
30	Papua New Guinea
30	Togo
29	Gabon
28	Mali
28	Paraguay
28	Russia
27	Kyrgyzstan
27	Pakistan
26	Cameroon
26	Liberia
26	Madagascar
26	Mozambique
26	Uganda
25	Bangladesh
25	Guinea
25	Iran
24	Afghanistan
24	Cambodia
24	Central African Republic
24	Guatemala
24	Lebanon
24	Nigeria
24	Tajikistan
23	Azerbaijan
23	Honduras

23	Iraq
23	Myanmar
23	Zimbabwe
22	Eritrea
22	Sudan
21	Congo
21	Guinea Bissau
20	Democratic Republic of the Congo
19	Chad
19	Comoros
19	Nicaragua
19	Turkmenistan
17	Burundi
17	Equatorial Guinea
17	Haiti
17	Korea, North
17	Libya
16	Yemen
14	Venezuela
13	South Sudan
13	Syria
12	Somalia



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Penalties, Fines, Sanctions

- Criminal Statute, subject to U.S. Sentencing Guidelines:
 - Anti-Bribery Violations:
 - Individuals \$250k per violation / 5 yrs
 - Corporations \$2 M per violation
 - Accounting Violations:
 - Individuals: \$5 M / 20 yrs
 - Corporations: \$25 M
- Alternative Fines Act permits greater fines
- SEC disgorgement of profits
- Other civil and government penalties

Enforcement Policies

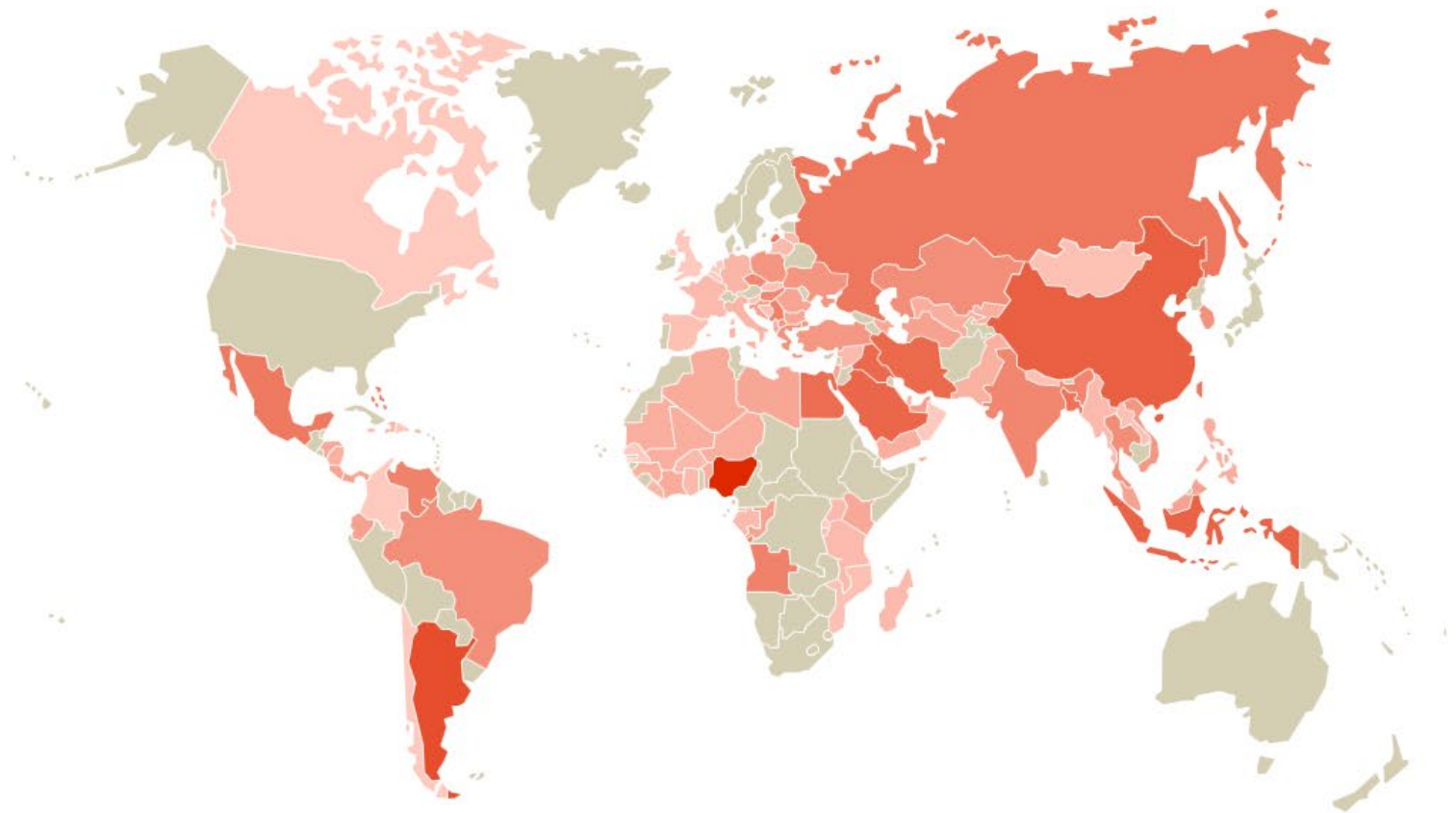
- Discretion to Prosecute
 - Plea Agreements
 - Deferred Prosecution Agreements
 - Declinations
 - Will consider: nature and seriousness of offense, pervasiveness of wrongdoing, corporation's history, willingness to cooperate with investigation, adequacy and effectiveness of compliance program, timely and voluntary disclosure, and remedial actions.
- DOJ Policy on self-reporting is to recommend a 50% reduction in fines and no monitoring

Significant Enforcement Activity

- Airbus: \$3.9 Billion Worldwide
- Goldman Sachs: \$3.3 Billion
- Pfizer: \$15 Million
- 3M: \$6.5 Million
- Nu Skin: \$765,000

FCPA Enforcement Worldwide

fcpamap.com





QUESTIONS?



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