

# Foreign Corrupt Practices Act

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Let's talk about an opportunity.



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## Anti-bribery provisions

Prohibit offering or giving anything of value to a public official or political candidate, directly or indirectly, to obtain or retain business.

## Books and record provisions

Require that public companies maintain proper internal books and records that reasonably reflect all transactions and dispositions of assets.

Mandate internal accounting controls to assure that expenditures are authorized.

# Who is subject to the FCPA?



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## Anti-bribery provisions

Every US citizen or US resident alien (whether in the US or not).

US companies (including non-US subsidiaries).

Foreign companies with employees in the US.

Foreign nationals acting for US companies.

Third parties hired by the above (agents, consultants, representatives, distributors, etc.).

## Who is subject to the FCPA? (cont.)



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### **Books and record provisions**

Only applies to US and foreign companies with registered securities and companies that are otherwise required to file reports with the SEC.

Can also apply to foreign subsidiaries and affiliates of the above.

## Anti-bribery provisions: Defining an illegal bribe



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**A payment, offer, authorization, or promise to pay money or anything of value to any:**

Foreign official.

Foreign political party or party official.

Candidate for foreign political office.

Other person “knowing” that the payment or promise to pay will be passed on to one of the above.

## Anti-bribery provisions: Defining an illegal bribe (cont.)



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### **For the corrupt purpose of:**

Influencing an official act or decision of that person.

Inducing that person to do or omit to do any act in violation of his or her lawful duty.

Inducing that person to use his or her influence with a foreign government or influence any government act or decision.

Securing any improper advantage.

## Anti-bribery provisions: Defining an illegal bribe (cont.)



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**To assist the company to obtain or retain business or direct business to any person.**

**For the corrupt purpose of:**

Includes offers, promises and authorization of a corrupt payment.

Includes money or “anything of value.”

“Anything of value” includes expensive gifts and entertainment, non-essential travel and improper campaign contributions.

Payment does not have to be actually made and the bribery does not have to be successful.

## Anti-bribery provisions: Defining an illegal bribe (cont.)



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### Foreign official:

“Any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of any such public international organization.”

Includes executive branch employees, elected legislators or parliamentarians, managers of state-owned enterprises and officials of quasi-governmental entities.

Also includes the spouse, dependent, or other relative of such officials.

## Anti-bribery provisions: Defining an illegal bribe (cont.)



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### Knowledge

Does not require proof of actual knowledge; knowledge can be imputed.

May be liable if a reasonable person under similar circumstances would know that a violation is highly probable.

## **What are companies required to do?**

Make and keep books, records, and accounts that accurately and fairly reflect in reasonable detail the transactions and dispositions of the company.

“Reasonable detail” means a level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.

Books and records must be both quantitatively and qualitatively accurate:

- > Quantitative accuracy: the financial facts of the transaction
- > Qualitative accuracy: other information that may be important for a reviewer to know about a possible violation

## **Internal accounting controls sufficient to provide reasonable assurance that:**

Transactions are executed according to management's general or specific authorization.

Transactions are recorded as necessary to permit preparation of financial statements according to generally accepted standards and to maintain accountability for assets.

Access to assets is permitted only in accordance with management's general or specific authorization.

The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

## **Internal accounting controls sufficient to provide reasonable assurance that:**

FCPA violations are categorized as a type of fraud and trigger Sarbanes-Oxley Act (“SOX”) violations.

The application of SOX can affect a company’s decisions regarding disclosure of FCPA violations.

Section 302 (certification of financial statements by CEOs and CFOs): Mandates auditors and the board of directors to disclose any fraud (material or immaterial) involving persons with a significant role in corporate internal control.

Section 404 (internal control procedures): Requires reporting on internal controls with respect to all consolidated subsidiaries, including minority-owned subsidiaries.

### Record keeping violations generally include:

Records that fail to record improper transactions at all (e.g., “off-the-books” transactions such as bribes and kickbacks).

Records that are falsified to disguise aspects of improper transactions otherwise recorded correctly.

Records that set forth the financial facts, but fail to include qualitative aspects such as the true purpose of the payment.

## Anti-bribery provisions: Permissible payments



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### Permissible payments include:

Small payments to low-level foreign officials that serve only to expedite or secure “routine governmental action.”

- > Can include securing basic services such as telephone, water and mail, processing visas, obtaining permits
- > Must be accurately recorded

Payments permitted by local law.

- > Be aware that all local laws prohibit bribery
- > Local law defense has never been applied in US courts

“Reasonable and bona fide” business expense payments to foreign officials.

**NOTE: All exceptions should be read and applied narrowly and carefully.**

## Criminal penalties (enforced by the department of justice):

### Anti-bribery provisions:

#### > **Individuals**

Fines up to \$100,000 per violation and imprisonment up to five years

#### > **Entities**

Fines up to \$2,000,000 per violation (or more under alternative fine rules)

### Books and records provisions:

#### > **Individuals**

Fines up to \$5,000,000 per violation and imprisonment up to 20 years

#### > **Entities**

Fines up to \$25,000,000 per violation (or more under alternative fine rules)

## Civil penalties (enforced by the SEC, and for privately held companies, the DOJ):

Anti-bribery provisions:

> **Officers, directors, employees, and agents**

Fines up to \$10,000 per violation for any willful violation

> **Entities**

Fines up to \$10,000 per violation and injunctions

The SEC may seek an additional fine of up to \$500,000 on the gain obtained as a result of the violation

# Risk considerations: Geographical hot spots

# 2007 TI Corruption Perception Index



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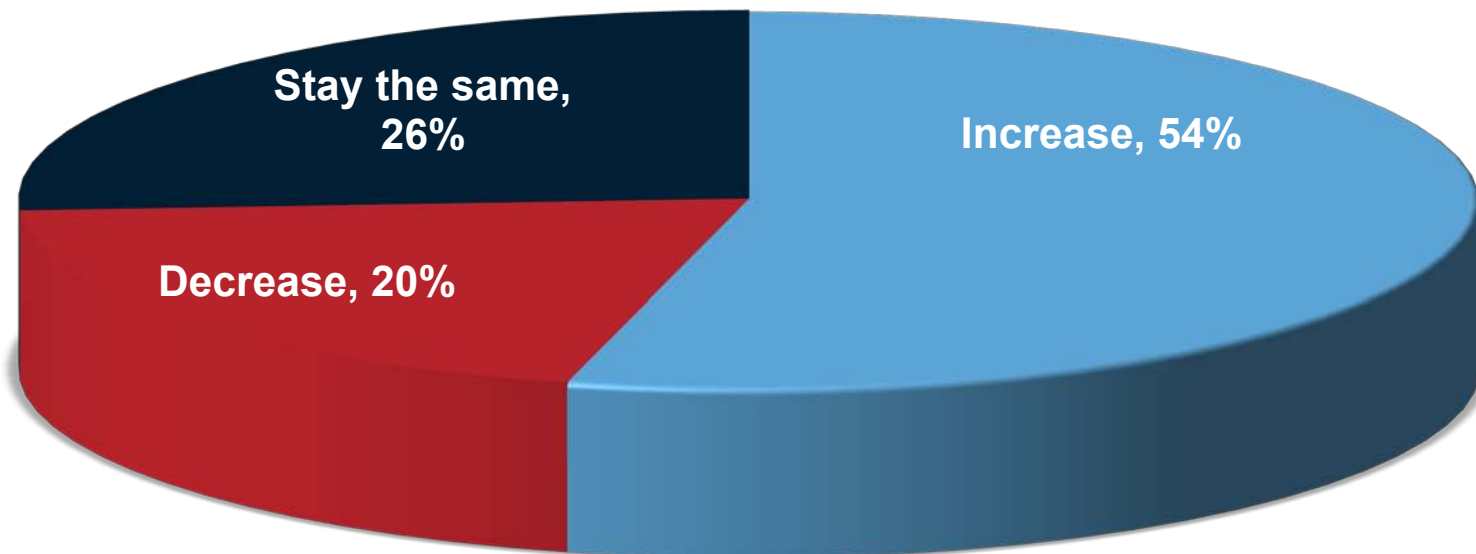
- > The Transparency International (TI) Corruption Perceptions Index (CPI) ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians.
- > The score ranges between 10 (highly clean) and 0 (highly corrupt). Therefore, the country with the lowest score is perceived to be the most corrupt of those included in the index.
- > In 2007, the CPI ranked 179 countries.

2007 Rank	Country	2007 Score
4	Singapore	9.3
16	Germany	7.8
17	Japan	7.5
20	USA	7.2
30	Israel	6.1
43	South Africa	5.1
60	Kuwait	4.3
T-72	China	3.5
T-72	India	3.5
T-72	Mexico	3.5
T-72	Brazil	3.5
79	Saudi Arabia	3.4
105	Argentina	2.9
T-143	Indonesia	2.3
T-143	Russia	2.3

## Percentage of respondents reporting that in three years corruption will...



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Source: Transparency International Global Corruption Barometer 2007. Percentages are weighted.

## FCPA actions 2000-2006



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<b>Region</b>	<b>Total</b>
Africa	8
Asia	21
Europe	6
Latin America	13
Middle East	5
Other	24
Grand Total	77

Source: Kroll Global Fraud Report

## FCPA actions by sector



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<b>Sector</b>	<b>Total</b>
Energy	17
Other	15
Technology	11
Telecoms	9
Medical and pharmacy	9
Food and agriculture	8
Metals, mining, and minerals	3
Construction	3
Chemicals	2
Grand total	77

Source: Kroll Global Fraud Report

### **About 50 companies disclosed pending government investigations relating to the FCPA.**

30 enforcement actions against companies.

15 enforcement actions against individuals.

# International business relationships

## Due diligence:

- > Owners, officers, and employees
- > Experience and reputation
- > Compensation
- > Books and records/transparency
- > Representations and warranties
- > “Smell test”
- > Documentation

Payment policy (avoid cash transactions).

Representation that agent or employees are not government officials.

Warranties on any prior convictions, investigation, etc.

Include a termination clause for violation of US or foreign laws.

Prohibit agent to employ subagent or subcontractor without prior approval.

Require the agent maintain accurate books and records, FCPA training, audit, etc.

### Red flags

- > Questionable reputation of agent
- > Agent rates above standard rates
- > Offer “to good to be true”
- > Request to have invoices in excess of the actual sales price for the goods supplied
- > Refusal of agent to provide representation relating to FCPA violations.
- > Significant cash transactions
- > Transaction lacking proper documentation
- > Unusual bonuses
- > Unusual payment patterns or financial arrangements.

### Joint venture partners

Perform FCPA-related due diligence.

Representations and warranties.

Structure considerations:

- > Substantial control – Must impose internal controls and compliance programs
- > Minority shareholder – Recommend best effort to ensure internal controls and compliance programs

### High risk areas:

- > Promotional expenses
- > Travel and entertainment
- > Facilitating payments
- > Donations
- > Lobbying expenses
- > Third parties (agents, vendors, consultants, joint venture partners)
- > Other

### Best practices

- > Compliance program
- > Risk assessments
- > Internal controls
- > Monitoring

- > Written policy
- > Code of conduct, books and records policies, dealing with agents, payment policies, etc.
- > Commitment and ownership by senior management (board over-sight)
- > Policy should address key issues relating to FCPA (travel and entertainment, lobbying, third party agents, etc.)
- > Communication, training, and education (include agents)
- > Certification
- > Violation reporting mechanism
- > “Teeth” – discipline violations
- > Monitoring

- > Geographic markets
- > Company size/complexity
- > Industries/activities
- > Operational structure; centralized vs. decentralized
- > Market channels (J.V., agents, foreign subsidiaries, etc.)
- > Government interaction
- > Entity control and compliance environment
- > History of past compliance issues
- > Legal and regulatory environment/risks
- > Other?

Majority of companies fined or under investigation for violations actually have FCPA policies in place. However:

- > Lacked the internal controls and programs to ensure compliance
- > Lacked proper training for employees/contractors
- > Failed to implement effective monitoring system
- > Failed to include FCPA compliance clauses in their contracts with outside service providers

What to ask?

When?

How?

Potential consequences of findings:

> Sell-side verses buy-side

# FCPA investigation



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- > Crisis management
- > Scope and process
- > Internal team/external advisors
- > Managing internal pressures

# Case examples

## **\$2.1 Million in payments over a two-year period to Nigerian government officials.**

Paid through a major international freight forwarding and customs clearance company to employees of the Nigerian Customs Services to provide Vetco with preferential treatment during the customs process.

\$26 million fine (largest fine to date by DOJ).

**Allegedly paid \$5.5 million in illegal surcharge payments to Iraq in connection with purchases of crude oil from third parties under the U.N. oil for food program.**

Charged with violation of books and records and internal controls.

\$5.5 million and \$2.5 million civil fine with SEC and entered a non-prosecution agreement with DOJ on OFAC and wire fraud charges.

### **Subsidiary in Poland made improper payments (\$76,000) to a charitable organization (Chudow Castle Foundation).**

Foundation was headed by the director of the Health Fund (Polish governmental body, and who could influence purchase of pharmaceutical products).

Fined \$500,000 and agreed to appoint an FCPA monitor.

**Allegedly paid \$3.5 million over a 3 year time span to an agent of the President of the African country of Benin.**

Payments were to support President's election and effort to secure a telecom contract.

Fined \$13 million and disgorged \$15.5 million and hire an independent compliance consultant.

Derailed plans to be acquired by Lockheed Martin.

**Dow Agro-sciences JV in India allegedly paid \$200,000 in bribes to government officials to get approval of and right to distribute products.**

Alleged violation of books and records, and internal controls.

Settled with SEC for \$325,000 civil penalty.

**From 1991 through 2002 routinely made improper commission payments totaling about \$1.6 million to doctors and laboratory employees who controlled purchasing decisions at state-owned hospitals.**

Most of payments were in cash and recorded as sales expenses.

Fines of \$2 million and disgorgement of \$2.7 million.

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