

# Foreign Corrupt Practices Act

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# What is the FCPA?

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- **An anti-bribery statute**
- **A “books and records” statute**
- **Federal statute passed by post-Watergate Congress in 1977 to prohibit bribery of foreign government officials for the purpose of obtaining or retaining business**

# FCPA - Enforcement

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- **Department of Justice**
  - Criminal and civil enforcement of bribery provisions
  - Some criminal enforcement of accounting provisions
- **Securities & Exchange Commission**
  - Criminal & Civil enforcement of accounting
  - Civil injunctive authority, fines + disgorgement of profits

# Why You Should Care – Industries Involved

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- **Not just Aerospace and Defense**
  - Health care
    - Government owned hospitals and charitable foundations
    - Health care professionals outside US are often public officials.
  - Energy projects
    - Pipeline and refinery development
  - Telecom
    - Mobile phone systems
  - Agricultural products
    - Favorable legislation

# Bribery - Who Is Covered?

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- **Issuers (15 U.S.C. § 78dd-1)**
  - Also subject to Books & Records requirements (§ 78m)
- **Domestic Concerns (§ 78dd-2)**
- **Foreign Persons (§ 78dd-3)**
  - who – while in the territory of the U.S. – use instrumentality of interstate commerce in furtherance of scheme
- **U.S. Persons (§§ 78dd-1(g) and 78dd-2(i))**
  - Anywhere in the world

# The Elements - Bribery Offense

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- ***Corruptly* offering or paying;**
- **a thing of value**
- **to a “foreign government official;”**
- **directly, or**
- **indirectly, with knowledge;**
- **for purpose of influencing an official act or omission, or securing an improper advantage;**

# Bribery - *Corruptly*

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- **Borrowed from U.S. domestic bribery statute**
- **Government views this broadly**
- **requires a *quid pro quo***
  - not just gratuities or favors

# Bribery - To Offer/Give Value

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- **An offer or promise is enough**
  - Don't need to actually *provide* value
- **Authorization is enough**
  - Doesn't matter who *actually* makes the offer or payment
- **Result does not matter**
  - Failure is no defense



# Bribery - “Thing of Value”

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- **Cash**
- **Travel/entertainment**
- **Favorable loans**
- **Charitable donations**
- **Political contributions**
- **Discounts**
- **Scholarships**
- **Rebates/commissions**
- **Overpayments**
- **Favorable loans**
- **Job offers**
- **Investments**

# Bribery - Which Officials?

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- **Foreign Government Official includes employee or person acting on behalf of :**
  - Instrumentality of foreign government
    - “Instrumentality” is undefined (Cf. Foreign Sovereign Immunities Act definition of foreign state)
  - foreign political party, official or candidate
  - now covers “public international organizations”
    - defined by statute or by Exec. Order
    - Includes European Union entities

**Doctors employed by state owned hospitals and clinics.  
Pharmacists employed by state owned entities.**

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# Bribery - Payments

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- **Direct Payments, but also**
- **Payment to any person *knowing* that some or all will go to a foreign official for improper purpose**
- ***Knowing* defined as awareness or belief:**
  - that circumstances likely to exist, or
  - result is substantially certain to occur
- **Reckless Disregard or Willful Blindness**

# Bribery - Purpose

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- **Payment is:**
  - to influence an act or omission, or
  - to secure an improper advantage
- **To obtain or retain business**
  - There must be a nexus between bribe and improvement of business
- **Does *not* include lobbying**

# To “Obtain” or “Retain” Business - Examples

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- **Payment to obtain favorable duty treatment (Kay & American Rice)**
- **Payment to settle tax audit (Chiquita Banana & Baker Hughes)**
- **Payment to settle concession fee liability (Triton Energy)**
- **Payment by to obtain repeal of decree restricting sale of genetically modified seed (Monsanto)**
- **Purchase of T-shirts with President’s picture (Titan)**
- **Payment to facilitate product registration (Dow)**

# Bribery Exceptions -“Grease Payments”

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- **Routine Governmental Action**
  - license, permit or other document to qualify to do business;
  - application processing
  - police protection, mail delivery, inspections
  - utility services
  - similar actions
- **A Test - Is it a ministerial action that is devoid of discretion?**
  - 5th Cir: “Congress principally concerned about payments that prompt an official to deviate from his official duty” 359 F.3d at 749 n.40
  - Timing vs. competitive advantage?

Consult Local law

# The Elements - Books & Records

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- **Make and keep records, “which, in reasonable detail, accurately and fairly reflect the transactions . . .”**
- **Devise and maintain “system of internal accounting controls” to assure, *inter alia*:**
  - Transactions executed in accordance with management’s authorization
  - Transactions recorded in accordance with GAAP

# Books & Records - Coverage

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- **Applies to publicly traded companies and their subsidiaries (including foreign)**
  - Includes those foreign companies with American Depository Receipts (ADRs)
  - Does not include privately held companies



# Current Enforcement Environment?

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- **US Government paying much more attention to FCPA**
  - October 2006 Speeches
    - Assistant US Attorney General Alice Fisher
      - US Government adding resources to prosecute and investigate violations
    - Chief of FBI Public Corruption Unit Michael Anderson
      - FCPA second only to counter-terrorism and counter-intelligence
  - Many new cases (and more on the way)

# Penalties

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- **Bribery Violations**

- Individuals go to jail!

- Growing trend

- Up to 5 years for bribery; up to 20 years for books and records violation

- And pay fines up to \$100,000

- Corporations may be fined up to \$2 million per violation (or twice the pecuniary gain) + collateral consequences

- **Books & Records Violations**

- Sarbanes-Oxley significantly increased potential fines (up to \$25 million for willful criminal violations)

# Recent Enforcement

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- **April 2007- *Baker Hughes***
    - Largest sanction ever imposed in FCPA case
    - Combined \$44 million in fines and penalties.
    - Deferred prosecution agreement and compliance monitor for 3 years.
  - **February 2007- *Vetco***
    - \$26 million fine + Deferred prosecution
    - After July 2004 settlement where ABB Ltd paid \$5.9 million (disgorgement) and subsidiaries pled guilty and paid \$10.5 million (aggregate)
  - **February 2007 – *Dow Chemical***
    - \$325K + cease & desist order
    - Bribes paid by 5th tier Indian subsidiary
  - **October 2006 – *Statoil, ASA***
    - \$21 million fine (aggregate) + Deferred prosecution
  - **October 2006 - *Schnitzer Steel***
    - \$15.2 million fine (aggregate) + Guilty plea by subsidiary+ Deferred prosecution
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# Recent Enforcement

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- **May 2005 - *Diagnostic Products***
  - \$4.8 million fine + Guilty plea by subsidiary
- **March 2, 2005 – *Micrus Corp.***
  - \$450,000 fine + Deferred prosecution
- **March 1, 2005 – *Titan Corp.***
  - Criminal plea + \$13 million fine
  - SEC settlement for additional \$12.6 million + \$2.9 million in pre-judgment interest
- **January 6, 2005 – *Monsanto Co.***
  - Deferred prosecution + \$1 million fine
  - SEC settlement for \$500,000

# Health Care and Pharmaceutical Companies

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- **Face complex FCPA compliance challenges**
  - Numerous physicians and customers employed by public health care systems (qualify as “public officials”)
  - What could be considered a “bribe”
    - Payments or benefits concerning product registration
    - Reimbursement
    - Pricing
    - Clinical trial outcomes
    - Treatment protocols
    - Writing of prescriptions

# Compliance Programs

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- **To minimize FCPA risks, it is critical that companies adopt and maintain effective FCPA compliance programs**
  - Management involvement
  - Established procedures for assessing business information from a compliance perspective
  - Documented vetting of sales personnel, agents, distributors and other business partners
  - Proactive training for management and other relevant employees
  - Provide industry and market specific guidance on dealing with government officials
  - An internal review process that includes regular compliance audits.

# Conclusion

