

United States Foreign Corrupt Practices Act (FCPA)

The University of Chicago's (FCPA) Policy

Objectives

- What is the United States Foreign Corrupt Practices Act (FCPA)?
 - Key elements
 - Definitions
 - Penalties for non-compliance
- Understanding the University's FCPA policy
- Frequently Asked Questions regarding the Policy
- Where you can go to ask for guidance
- Reporting suspected violations

Foreign Corrupt Practices Act (“FCPA”)

U.S. Federal Corrupt Practices Act (“FCPA”) Two Main Provisions

- **Anti-Bribery Provisions**
 - Enforced by the US Department of Justice (DOJ)
 - Prohibits bribery of foreign officials
- **Accounting and Internal Controls Provision**
 - Enforced by US Securities and Exchange Commission (SEC)
 - Not applicable to universities, however, appropriate internal controls/financial policies are vital to ensure FCPA compliance

Penalties for FCPA Violations

Civil and Criminal Penalties

➤ Corporations

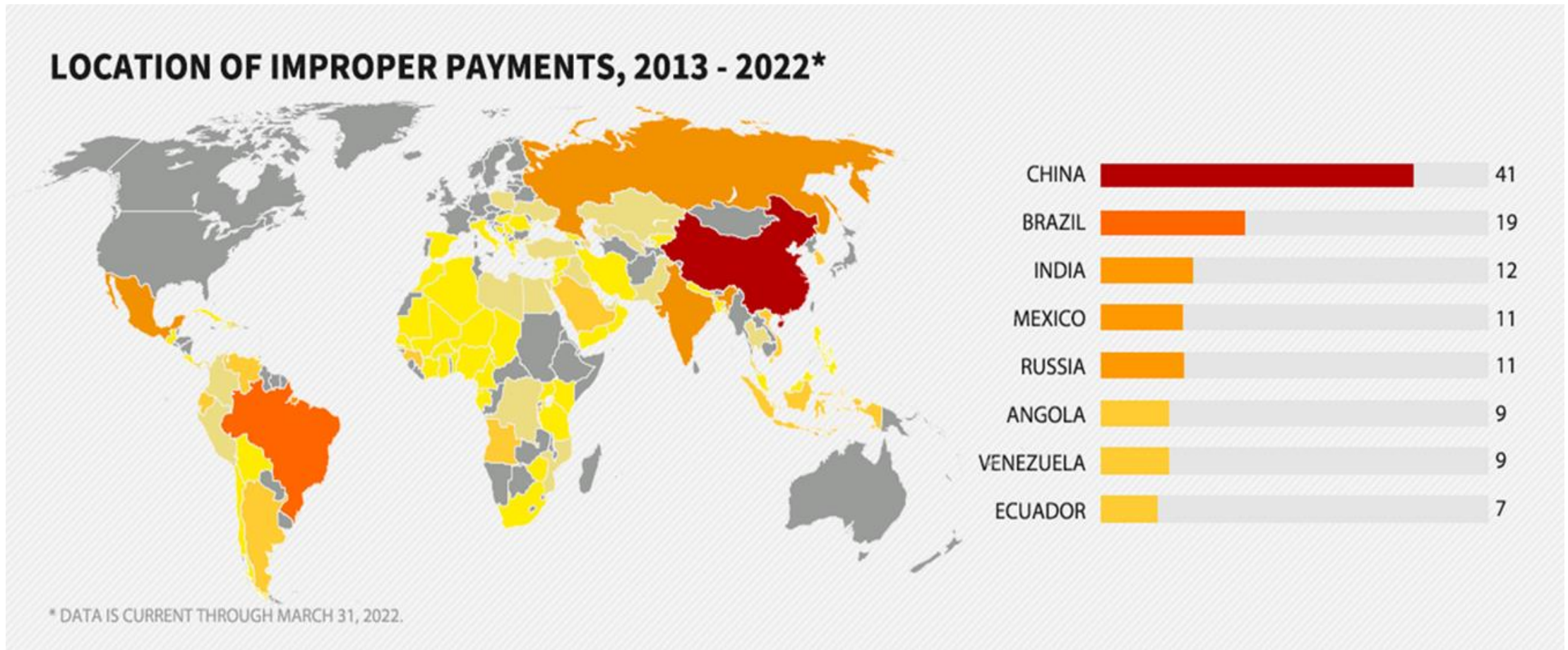
- Criminal Fines up to \$2 million per violation
- Disgorgement of ill-gotten profits
- Debarment from US federal contracting or US Federal grants
- Civil penalties

➤ Individuals

- Criminal fines of up to \$250,000
- Imprisonment up to 5 years

The Stanford Law School Foreign Corrupt Practices Act Clearinghouse in collaboration with Sullivan & Cromwell LLP maintains a database of statistical information regarding all FCPA sanctions. Total sanctions since the inception of FCPA in 1977 are 442 for the Department of Justice and 253 for the Securities Exchange Commission for a total dollar value of \$27,435,886,732.

Improper Payments aka Bribes



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Anti-Bribery Provision

Prohibits

- **“DOMESTIC CONCERNS”** and **INDIVIDUALS** acting on their behalf from making
- Any offer, payment, promise to pay, or authorization of payment, or offer, gift, promise to give or authorization of giving **ANYTHING of VALUE**
- To a **FOREIGN OFFICIAL**
- For the **PURPOSE of OBTAINING** or **RETAINING BUSINESS** or otherwise
- With **CORRUPT INTENT** and **KNOWLEDGE** of unlawful conduct.

Elements of an Anti-Bribery Provision Offense

1. Covered Persons;
2. Anything of Value;
3. Foreign Official;
4. Business Purpose;
5. Corrupt Intent and Knowledge

Covered Persons

- U.S.- based organizations, whether the conduct occurs within or outside of the U.S.;
- Non-U.S.- based organizations and foreign nationals that engage in acts in furtherance of a corrupt payment while in the U.S.;
- Their respective shareholders, directors, officers, employees, and agents/contractors

For purposes of the University FCPA Policy, the prohibitions of FCPA are deemed to apply to the University (including its affiliates) and members of the University community, whether conducting activities in the U.S. or abroad

Anything of Value

- Payment, offer, promise to pay money or “anything of value”
 - “Anything of value” is broadly defined and includes gifts, services, and other cash and non-cash benefits
 - Includes making promises/offers, even if the promise is never fulfilled or the offer is not accepted
- Payments/Offers can be made directly or indirectly
 - Examples of “indirect payments”
 - Payments to an official’s family member or family-owned company;
 - Offers of admission/internships to official’s child;
 - Payments made by agents/contractors acting on behalf of a company
 - Outsourcing improper payments to a third party will **NOT** insulate an organization or individual from liability under the FCPA
- There is no de minimis exception

Anything of Value

- Examples of common forms of payments or benefits that may constitute a bribe (if coupled with corrupt intent):
 - Unreasonable gifts, meals, entertainment, travel expenses or other hospitality to the official or their family member;
 - Charitable contributions to organizations owned or recommended by a foreign official or owned by their family members;
 - Contributions to a foreign political party or candidate for political office at the request of a third party;
 - Uncompensated use of University services or facilities; and
 - Promises of admission to or employment by the University with respect to the foreign official or their family member.
- *Should assume any transfer/offer of value (if coupled with other elements of FCPA) can be construed as an improper payment*

Foreign Official

- Foreign officials can be:
 - Administrators and faculty at government-owned or controlled universities;
 - Advisors to ministries, government agencies or government officials;
 - Members of government committees or panels;
 - Healthcare professionals at government-owned or controlled hospitals/health care facilities;
 - Members of a royal family;
 - Police officers;
 - Customs officials; and
 - Employees of public international organizations (e.g., the World Bank, U.N.)

- *FCPA applies to any foreign official, or government employee, regardless of rank or position*

Business Purpose

- Payments made to assist a covered person in obtaining, or retaining business for or with or directing business to, any person, to secure an improper advantage
 - Examples of “business purpose”
 - ❖ obtaining a contract
 - ❖ obtaining exceptions to regulations
 - ❖ obtaining permits and licenses required to conduct business
 - ❖ reducing customs and tax payments
- The business relationship does not have to be with a foreign government or instrumentality
- *University activities (research, teaching, clinical care, etc.) qualify as “business” under the FCPA*

Corrupt Intent and Knowledge

- Corrupt Intent: intent to induce the Foreign Official to misuse their official position
- Individual criminal liability also requires proof of “knowledge” that all or part of the payment will be passed to a foreign official.
 - Actual knowledge
 - Awareness of high probability that prohibited/improper payment will occur
 - Arises often with third party agents
 - Can be proved by circumstantial evidence (ignoring obvious warning signs, conscious disregard, willful blindness)
- *Corrupt intent and willful blindness can be inferred from the circumstances, so bestowing lavish gifts or ignoring red flags can satisfy this requirement*

The University of Chicago FCPA Policy

- Applies to University community
 - Faculty, Staff, OAAs, Post-Docs, Students, Volunteers
 - Third party agents, vendors, consultants
 - University affiliates and international centers
- Absolute prohibition of bribery of foreign officials
- Facilitating payments are not permitted, unless
 - Necessary to prevent risk of injury/harm to yourself or others; or
 - Office of Legal Counsel has determined the specific payment is permissible
- Must report actual or suspected violations
- Additional Guidance in Policy FAQs
- Copy of the Policy available at website [1011 - U.S. Foreign Corrupt Practices Act \(FCPA\) Policy | The University of Chicago \(uchicago.edu\)](https://www.uchicago.edu/1011-FCPA-Policy)

Additional Guidance - Prevention/Risk Mitigation

- Assess the risk of bribery in the international activities
- Train employees and other third parties concerning the FCPA Policy
- Conduct appropriate due diligence before engaging third party vendors, agents or partners
- Ensure that contracts contain anti-bribery and compliance with law provisions
- Remember that in addition to the FCPA, anti-bribery laws of other jurisdictions may also apply, many of which are broader than FCPA
 - For example, the UK Bribery Act prohibits bribing any person, not just foreign officials
- Request guidance from the Office of Legal Counsel before expanding operations into a new geographic location

Strategies for Dealing with Foreign Officials

- Gifts should be presented openly with transparency, and they should not be in the form of cash
- When providing reasonable lodging or meals for a foreign official, pay the costs directly to vendors - do not give cash directly to the foreign official
- Ensure that stipends are reasonable estimates of expected costs
- All payments should be made in accordance with existing University policies to demonstrate they are reasonable/bona fide expenditures
 - Financial Services and Procurement Policies
 - Gifts to Non-employees (\$100 or less)
 - Gifts to Other Not-for-Profit and Charitable Organizations
 - When in doubt, look to University's Code of Business Conduct

Strategies for Dealing with Third Parties

➤ Due Diligence

- ensure that the third party does not have a history of violations of anti-bribery laws
- provide them with a copy of the FCPA Policy

➤ Oversight

- regularly audit their activities to ensure ongoing compliance
- Any agreements with these types of third parties should include provisions that they will comply with the FCPA and all other applicable local anti-bribery laws.
 - A sample agreement provision is included in the policy

➤ Do not ignore red flags

- Requests for unusually large payment or for cash payment
- Requests for payments to another third party/person
- Requests for false invoices or documentation

Test Your Knowledge

Situations may arise during day-to-day business operations therefore it is extremely important to understand what should be done to ensure compliance with the University of Chicago's FCPA Policy.

Example 1

The University sent 100 books to China entitled “The University of Chicago: A History” by Dean Boyer.

- The books were sent via UPS and were expected to arrive about 1 week later.
 - The delivery was held by customs.
 - We were asked to pay a large sum of money for the books to be released by the customs official.
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- Is this permissible?

Answer 1

No, if we had made a payment to the customs official to release the books, it would be considered a violation of FCPA as a corrupt payment.

Payment to any foreign official regardless of rank is not allowed under FCPA.

Example 2

Each year the University of Chicago hosts the Consular Corps reception, the Consul Generals from countries all over the world attend. The program for the evening includes highlights of various units throughout the University with speakers and short programs. Beverages and hors d'oeuvres are served. A small gift bag with a UChicago mug, note paper and a book are given to everyone as they leave the reception. Each gift is under \$100.

Is this permissible?

Answer 2

Yes, reasonable gifts are permissible. Small tokens of appreciation are allowed if they are given transparently, of limited value and follows University policy “Gifts to Non-employees” (\$100 or less). We should never give gifts in the form of cash.

However, if you are in doubt, contact the Office of Legal Counsel.

Example 3

- Two University students who are studying abroad are stopped by airport security in Turkey, asked to move into a small windowless area, and informed that they are not permitted to leave the airport without paying a \$500 cash payment.
- Security does not provide them with any justification for this demand.
- Fearful for their personal safety, the students agree, pool all of their cash, and provide the security official with the requested \$500 in cash.
- *Permissible?*

Answer 3

Yes. Under the University's FCPA Policy, where a payment is necessary to prevent risk of injury or harm to oneself or another person, it may be made, but the students should contact their University study abroad administrator to tell them exactly what transpired.

Example 4

- The University is seeking to create a partnership with a university in Egypt to give University archaeologists the rare opportunity to study newly-discovered Egyptian mummies.
- A leading professor at the Egyptian university and expert in the area would like to visit the University's Hyde Park campus to explore the possibility of this exciting collaboration.
- She plans to visit the University for several days but would also like the University to pay for first-class airfare and a side trip for her and her husband to spend several days in NYC where she will attend a Broadway musical, all at the University's expense.
- The total cost of the proposed trip would be in excess of \$15,000.
- *Permissible?*

Answer 4

No. While it may be permissible for the University to reimburse for actual travel expenses for the Professor while discussing University business, the side trip to NYC, as well as the husband's travel, would likely violate the FCPA, the University's gifts policy, the University's travel policy and the University's FCPA policy.

Questions & Reporting Concerns

- For further information regarding the FCPA Policy, contact the Office of Legal Counsel at (773) 702-7237
- Known or suspected violations of this Policy must be reported to
 - the “Point of Contact” or Hotline (800-971-4317 within the U.S.; 770-776-5641 outside the U.S.) in accordance with the University Whistleblower Policy, [103 - Whistleblower | The University of Chicago \(uchicago.edu\)](#) or
 - directly to the Office of Legal Counsel.