

# Complete Healthcare Compliance Manual 2024

## Foreign Corrupt Practices Act

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### Fast Facts

**Title of law:** The Foreign Corrupt Practices Act (FCPA), Prohibited foreign trade practices by issuers

**Categories:**

- Accounting and financial reporting
- International law
- Fraud and abuse
- Political activity
- Trade regulation

**U.S. Code:** 15 U.S.C. § 78dd-1, et seq.

**Year enacted:** 1977

**Major amendments:**

- Foreign Corrupt Practices Act Amendments of 1988
- International Anti-Bribery and Fair Competition Act of 1998

**Enforcement agencies:** U.S. Department of Justice (DOJ), U.S. Securities and Exchange Commission (SEC)

**Link to full text of law:** <https://www.govinfo.gov/content/pkg/USCODE-2010-title15/pdf/USCODE-2010-title15-chap2B-sec78dd-1.pdf>

**Applies to:** US healthcare companies working with foreign government agencies, officials, and healthcare systems

## What Is the Foreign Corrupt Practices Act?

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The Foreign Corrupt Practices Act (FCPA) prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business.<sup>[6]</sup> It requires publicly held corporations to keep accurate books and records and establish accounting controls to prevent activity that formerly disguised corporate bribes. The anti-bribery provision prohibits the willful use of mail or any other form of interstate commerce to deliver “any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.”<sup>[7]</sup>

The FCPA also requires that all companies whose securities are listed in the United States to meet its accounting provisions. The accounting provisions require corporations to maintain books and records that accurately and fairly reflect a corporation’s transactions and create and maintain an adequate system of internal accounting controls.<sup>[8]</sup>

The FCPA was the first global law to criminalize the payment of bribes in foreign countries. The increased globalization of healthcare has created serious potential FCPA compliance risks. US healthcare organizations are at a particularly high risk of violating the FCPA because of an increase in government owned or controlled health systems, which may be instrumentalities of a foreign government.

## History

The FCPA was enacted in 1977 as an amendment to the Securities Exchange Act of 1934. The FCPA legislation resulted from an SEC investigation into undisclosed payments to domestic and foreign officials triggered by the Watergate scandal, as well as the negative effects foreign bribery had on the United States during the Cold War. Investigations following the Watergate scandal revealed that corporations had made illegal political contributions to foreign officials that were concealed in secret slush funds. This raised concerns that companies were inaccurately reporting their financials in their SEC filings.<sup>[9]</sup>

Congressional hearings leading up to the passage of the FCPA focused on wanting to renew moral leadership and emphasized the United States’ obligation to set integrity standards in domestic and foreign business relations.

In 1988, Congress amended the FCPA to add two affirmative defenses: the local law defense and the reasonable and bona fide promotional expense defense. They also requested that the president negotiate an international treaty with members of the Organisation for Economic Co-Operation and Development (OECD) to prohibit bribery in international business transactions by many major trading partners of the United States. In 1998, the law was amended by the International Anti-Bribery and Fair Competition Act to expand the FCPA’s scope and conform to the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

## Related Laws

### The Travel Act: 18 U.S.C. § 1952

Prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activities. “Unlawful activity” includes violations of not only the FCPA, but also state commercial bribery laws. Thus, bribery between private commercial enterprises may, in some circumstances, be covered by the Travel Act.<sup>[10]</sup>

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## **Sarbanes-Oxley Act of 2002: Pub. L. 107-204, 116 Stat. 745**

This act implemented new rules for corporations in response to a series of accounting scandals involving US companies. The act strengthened accounting requirements for issuers. All issuers must comply with Sarbanes-Oxley requirements, several of which have FCPA implications. Some requirements under this act include:

- Section 302 requiring every public company to file periodic financial reports with the SEC;
- Section 404 requiring all annual financial reports to include an internal control report;
- Section 409 requiring companies to disclose any material changes in financial condition or operations; and
- Section 802 imposing civil and criminal liability for falsifying records or documents.<sup>[11]</sup>

## **Bribery in the First Degree: New York Penal Code § 200.04**

A person is guilty of bribery in the first degree when the person confers, or offers or agrees to confer, “any benefit upon a public servant upon an agreement or understanding that such public servant’s vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced in the investigation, arrest, detention, prosecution or incarceration of any person for the commission or alleged commission of a class A felony . . . .”<sup>[12]</sup>

## **Commercial Bribery: Texas Penal Code § 32.43**

“A person who is a fiduciary commits an offense if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts, or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary.” Section 32.43(a)(2)(C) includes physicians as fiduciaries.<sup>[13]</sup>

## **Commercial Bribery: Fla. Stat. Ann § 838.16**

“A person commits the crime of commercial bribery if, knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty, the person confers, offers to confer, or agrees to confer a benefit on the other.”<sup>[14]</sup>

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