

DOING BUSINESS IN CHINA UNDER THE FOREIGN CORRUPT PRACTICES ACT

**J.T. NORRIS, M. ACCT. & MICHAEL FORREST, M.S., J.D.
UNIVERSITY OF THE INCARNATE WORD
SAN ANTONIO, TEXAS**

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OVERVIEW OF THE FCPA

- **1. If you are a person, real or corporate, don't bribe foreign officials**
- **2. If you are a publicly-held corporation registered under the Securities Exchange Act of 1934, keep accurate books and records**
- **3. Have internal controls in place to assure compliance with 1 and 2**



HISTORICAL BACKGROUND

Blame Nixon, Watergate, and the era of corporate scandal in the '70s

Investigations by the SEC showed that 117 Fortune 500 companies paid huge bribes to foreign officials

The public was in the mood to respond to these scandals



HISTORICAL BACKGROUND

President Jimmy Carter signed the FCPA into law in 1977

Targeted “**issuers**” of registered securities who
“corruptly” engaged in bribery

Amended in 1988

Refined what “knowingly” meant with regard to
corrupt intent

“Awareness” of the bribe enough for a
violation

No head-in-the-sand defense

Willful blindness = knowledge

Amended in 1998

Expanded parties to whom the anti-bribery
provisions applied to “**any person**”



THE LAW

15 U.S.C. § 78dd-1 [Section 30A of the Securities & Exchange Act of 1934]

- Prohibits illegal foreign trade practices by “issuers”

15 U.S.C. § 78dd-2

- Prohibits illegal foreign trade practices by “domestic concerns”

15 U.S.C. § 78dd-3

- Prohibits illegal foreign trade practices by persons other than issuers or domestic concerns



IN CANTONESE

§ 78dd-1 [1934年证券交易法第 30A条].

发行者的禁止的海外交易

(a) 禁止

按照本篇第78I条登记的一类证券的发行者或按照本篇第78o (d) 条规定提出报告的发行者，或该发行者的管理人员、董事、职员或代理人或代表该发行者行事的股东，如果利用邮件或州际商业的任何工具或腐败手段来继续进行提供、支付、支付的允诺，或授权支付任何金钱或提供、礼物、给予的允诺，或授权提供任何财物给以下这些人，都是违法行为--

§ 78dd-2. 国内业务所禁止的海外贸易行为

(a) 禁止

本篇第 78dd-1条所述发行者以外的任何国内业务，或该国内业务的管理人员、董事、职员或代理人或代表该国内业务行事的股东，如果利用邮件或州际商业的任何工具或腐败手段来继续提供、支付、支付的允诺，或授权支付任何金钱或提供、礼物、给予的允诺，或授权提供任何财物给以下这些人，都是违法行为。这些人包括--

§ 78dd-3. 发行者或国内业务以外的人的被禁止的海外贸易行为

(a) 禁止

1934年《证券交易法》第30A条所述发行者或该法第104条所述国内业务以外的任何人、或该人的任何管理人员、董事、职员或代理人或代表该人行事的任何股东，如果在美国境内利用邮件或州际商业的任何工具或腐败手段或采取任何手段来继续提供、支付、支付的允诺，或授权支付任何金钱或提供、礼物、给予的允诺，或授权提供任何财物给以下这些人都是违法行为--



IN MANDARIN

§ 78dd-1 [1934 年证券交易法第30A 条].

禁止发行者采取的海外贸易做法

(a) 禁令

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JUSTICE DEPARTMENT SITE

<http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>

The screenshot shows a web browser window displaying the USDOJ website. The page title is "USDOJ: CRM: FRAUD: Foreign Corrupt Practices Act (FCPA): Statutes and Regulations - Mozilla Firefox". The address bar shows the URL: www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html. The page features the Department of Justice logo and the motto "THE COMMON LAW IS THE WILL OF Mankind ISSUING FROM THE Life OF THE People". The main content area is titled "STATUTE AND REGULATIONS" and focuses on the "Foreign Corrupt Practices Act of 1977". It includes a search bar, a "Printer Friendly" link, and a "GENERAL INFORMATION FRAUD SECTION" box containing leadership and contact information for Denis J. McInerney, Chief of the Fraud Section. A "STAY CONNECTED" box offers options to sign up for e-mail updates and subscribe to news feeds. The page also lists various international language versions of the FCPA statute and provides a link to report a violation.



1ST ELEMENT OF THE LAW

Covered parties

Applies to individuals or companies who violate the law, authorize a violation, or assist another in violation

- Issuers of stock who must file SEC reports
- Domestic concerns, doing business in the U.S., including foreign subsidiaries outside of the U.S.
- Any person



2ND ELEMENT OF THE LAW

Corrupt intent

The DOJ lay-person's guide to the FCPA explains that “[t]he payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person.”



3RD ELEMENT OF THE LAW

Payment of “anything of value”

Money

Gifts

“Commissions”

Travel expenses

Charitable donations

Tax benefits

Insurance benefits

Promise of future employment

Discounts

Entertainment

Scholarships

Favors

Information



4TH ELEMENT OF THE LAW

To a “foreign official”

Officers or employees of foreign government or government-owned business

Instrumentalities of the government

Persons acting in an official capacity for or on behalf of the government

Party officials

Candidates

Third party intermediaries (who would pass along the benefit to the foreign official)



5TH ELEMENT OF THE LAW

To “obtain or retain business”

More than reward or renewal of a contract

Special tax treatment

Customs treatment

Permits and licenses

Gaining improper advantage over competitors



EXCEPTIONS AND AFFIRMATIVE DEFENSES

1. Routine governmental actions

Grease payments

Non-discretionary actions

Approval of permits and licenses

Routine services

Mail service, phone and water, police services

2. Lawful payments under the “written” law of the country

3. Bona fide business expenditure

Promotes, demonstrates, or explains the product



ANTI-BRIBERY PENALTIES

Corporate fines

Up to \$2 million per violation

Individual criminal penalties

Up to \$250,000 per violation + 5 years imprisonment

Loss of government contracts (debarment)

Loss of company profits (disgorgement)

Criminal sanctions, including imprisonment

Expense of hiring an independent compliance monitor

Reputational damage

Loss of eligibility for export licenses

Loss of research grants

Risk of SEC fraud or RICO actions



BOOKS AND RECORDKEEPING

Applies only to “issuers” who report to the SEC

Must keep books, records and accounts in:

**Reasonable detail to accurately reflect
transactions and disposition of assets**

Must have a system of internal accounting controls

**Assurances that transactions are properly
authorized by management**

Do: Report payments to foreign officials accurately

**Don't: Falsely characterize payments as
“miscellaneous” or “commissions”**



BOOKS AND RECORDKEEPING PENALTIES

Corporate fines

Up to \$25 million per violation

Individual criminal penalties

Up to \$5 million per violation + 20 years imprisonment



CHINESE CULTURE

Three primary philosophies:

- Confucianism
- Taoism
- Buddhism



CONFUCIANISM

Confucian cluster (China, Hong Kong, Japan, South Korea, Taiwan, Thailand) emphasizes:

- Family orientation
- Moral cultivation
- Importance of interpersonal relationships
- Respect for seniority and hierarchy
- Pursuit of harmony and avoidance of conflict
- The concept of face

Schwartz, S.H., 2009. Culture matters: National values, sources, and consequences. In R.S. Wyer, Chiu & Y. Hong, eds. *Understanding Culture: Theory, research, and application*. New York: Psychology Press. Ch. 7.

GUANXI

The principles of reciprocity, trust, and hierarchy espoused in Confucianism have manifested in the practice and concept of Guanxi.

Termed a second currency that pervades through the economic systems

Trust is guaranteed via the potential damage to one's face (mainzi) that would result from failing to honor an exchange obligation.



GUANXI

The preservation of one's face and the gathering of favors owed (renqing) are the basis of the concept of Guanxi.

This differs from the Western practice of networking mainly by this focus on the utilitarian reciprocation of favors and an emphasis of fulfilling role obligations instead of solely pursuing one's own self-interest



TAOISM

Taoism is best understood through its three key tenets: Tao, Wu Wei, and Yin Yang. Tao or Way refers to the universal laws of nature, while Wu Wei translates to “noninterference” or “letting-go”

Yin Yang is one of the most distinctive icons of Chinese culture and represents the quintessential Taoist principle of dualism or interacting opposites. Yin and Yang are not opposing forces, rather they complement each other so that events are created, developed, and maintained in a harmonious manner



YIN YANG



The quintessential Taoist principle of dualism or interaction opposites

- Events are created, developed, and maintained in a harmonious manner.
- The dots in the opposites area suggests that opposing elements can contain the seeds of the other within themselves.
- This provides insight into the capitalistic forces flourishing with a communistic society



PITFALLS OF DOING BUSINESS IN CHINA

Nascent legal system by Western standards

Prevailing business culture in China fosters corruption at nearly all levels

Corruption in China estimated to be between 13% to 16% of the country's GDP (Boyd, 2005)

Fees of up to \$10,000 to meet with officials, such as the mayor of a big city

In lieu of cash payments, lavish trips are paid for



CULTURAL DIFFERENCES BETWEEN EAST AND WEST

Moon Festival and the exchange of mooncakes

No one actually eats the mooncakes these days

Packaged in elaborate containers containing cell phones and gold coins

Building relationships

Centuries old culture of exchanging favors and gifts

Inconsistent with the FCPA



CHINESE REFORM EFFORTS

Passage of a blacklisting law to ban contractors convicted of corruption from working on public construction projects in certain provincial areas

Creation of an open bidding system for public contracts

Passage of a law in 2003 that required transparency in issuance of administrative permits



FCPA ENFORCEMENT ACTIONS IN CHINA

Little appetite in China to go after foreign companies

U.S. officials, however, have increased prosecutions of the U.S. companies doing business in China



FCPA ENFORCEMENT ACTIONS IN CHINA

**Chinese government has broad ownership
of commercial enterprises**

**Much of the workforce considered
“foreign officials”**

**Multiplies the risk that the person
being bribed falls with the FCPA**



LIABILITY UNDER THE FCPA BOOKS-AND-RECORD PROVISION

No foreign official involvement needed to prosecute for commercial bribery, if bookkeeping not accurate

No corrupt intent needed to enforce a civil penalty by the SEC



RECENT HISTORY OF FCPA PROSECUTIONS IN CHINA

2004 the DOJ and SEC brought a combined total of only five FCPA actions

2008 they brought 33 actions

2009 they brought 40 actions, and according to data from the DOJ's Criminal Fraud Division, at least 120 companies are under investigation for potential FCPA violations as of May 2009 (Warin, 2010)



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QUESTIONS?

