

U.S. FOREIGN CORRUPT PRACTICES ACT



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FCPA ANTI-BRIBERY OVERVIEW

Jurisdiction

Companies

- Stock traded publicly in U.S.
- Principal place of business in the U.S.
- Organized under the laws of a U.S. state
- Foreign company taking any act in furtherance of a corrupt payment while within U.S. territory

FCPA ANTI-BRIBERY OVERVIEW

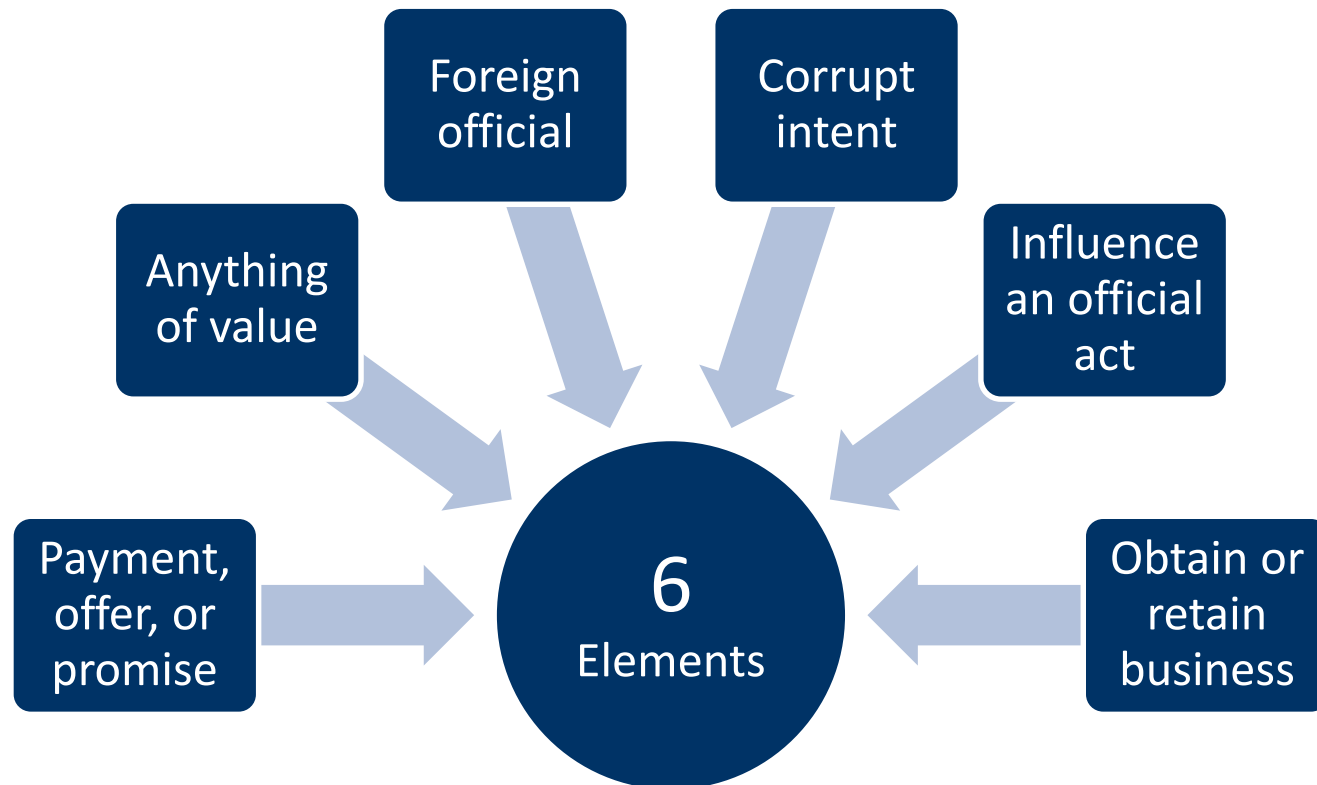
Jurisdiction

Individuals

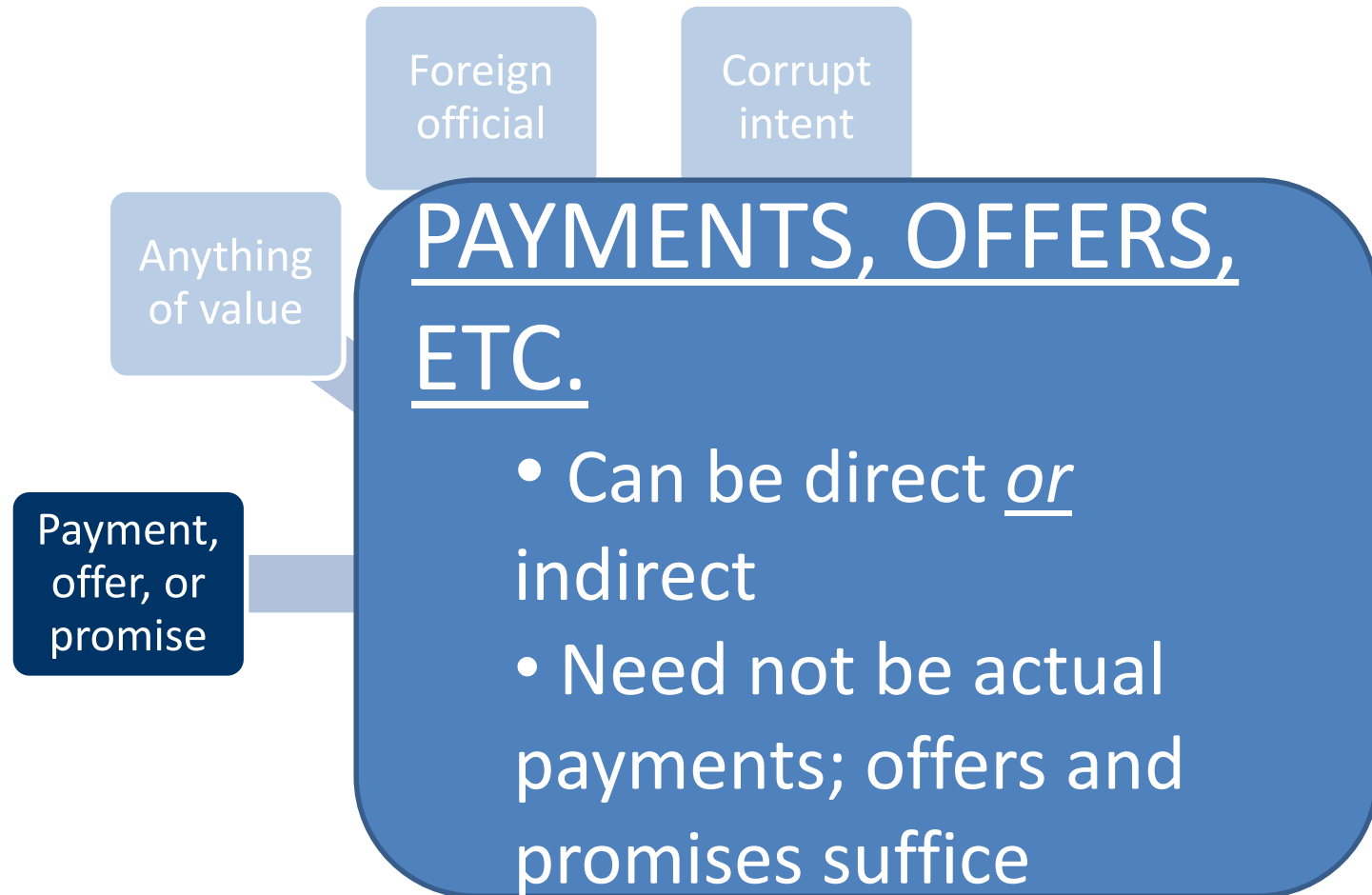
- U.S. citizens, nationals, or residents
- Any person taking any act in furtherance of a corrupt payment while within U.S. territory

NOTE: Applies to officers, directors, employees, agents, and shareholders

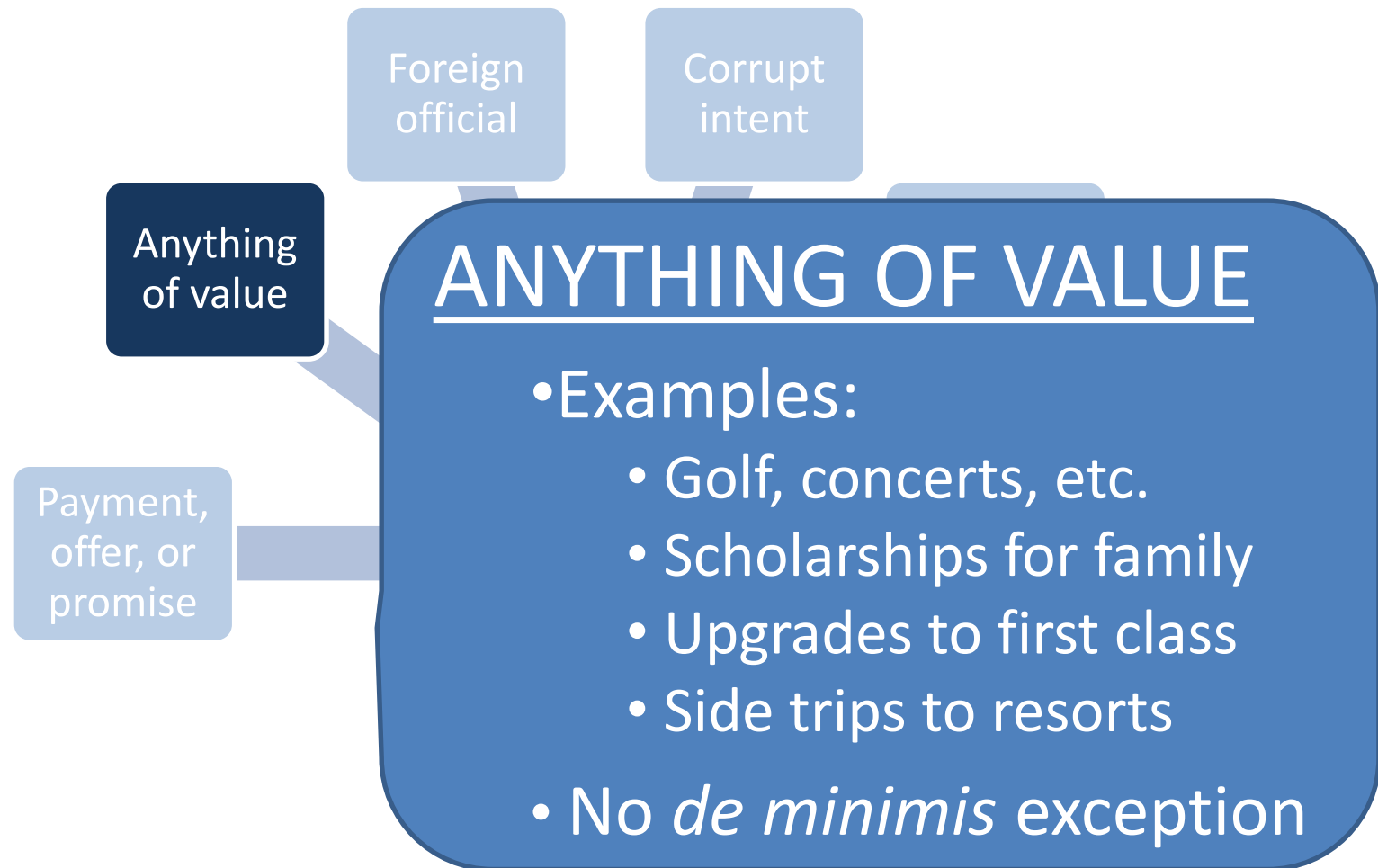
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Foreign
official

Corrupt
intent

FOREIGN OFFICIAL

- Officer/employee of foreign government;
- Officer/employee of public int'l organization;
- Any person acting on behalf of the above two;
- Foreign political parties, officials, or candidates;
- Any person, while knowing the thing of value will be offered, given, or promised to foreign official

FCPA ANTI-BRIBERY OVERVIEW

OFFICER/EMPLOYEE OF FOREIGN GOVERNMENT

- Covers department, agency, or instrumentality of foreign gov't
- DOJ applies very broadly: state-owned or controlled enterprises are “instrumentalities,” thus their employees are “foreign officials”
- DOJ refuses to provide further guidance re “instrumentality”
 - Degree of ownership required?
 - Method of determining degree of *de facto* control?
 - Russia example (private entities “loyal” to Kremlin)
- Rarely tested in court. Recent settlement (Alcatel-Lucent in 2010) based instrumentality allegation on 43% state ownership

Foreign
official

FCPA ANTI-BRIBERY OVERVIEW

OFFICER/EMPLOYEE OF FOREIGN GOVERNMENT

- Factors to consider
 - Hold governmental roles?
 - Have rights and privileges of government positions?
 - Capable of exerting influence on the government?
 - Foreign state's own characterization
 - Purpose of the enterprise
 - Degree of control exercised by the foreign government
- Difficult to determine, for example, in rapidly privatizing countries (Russia, China, African countries)

Foreign
official

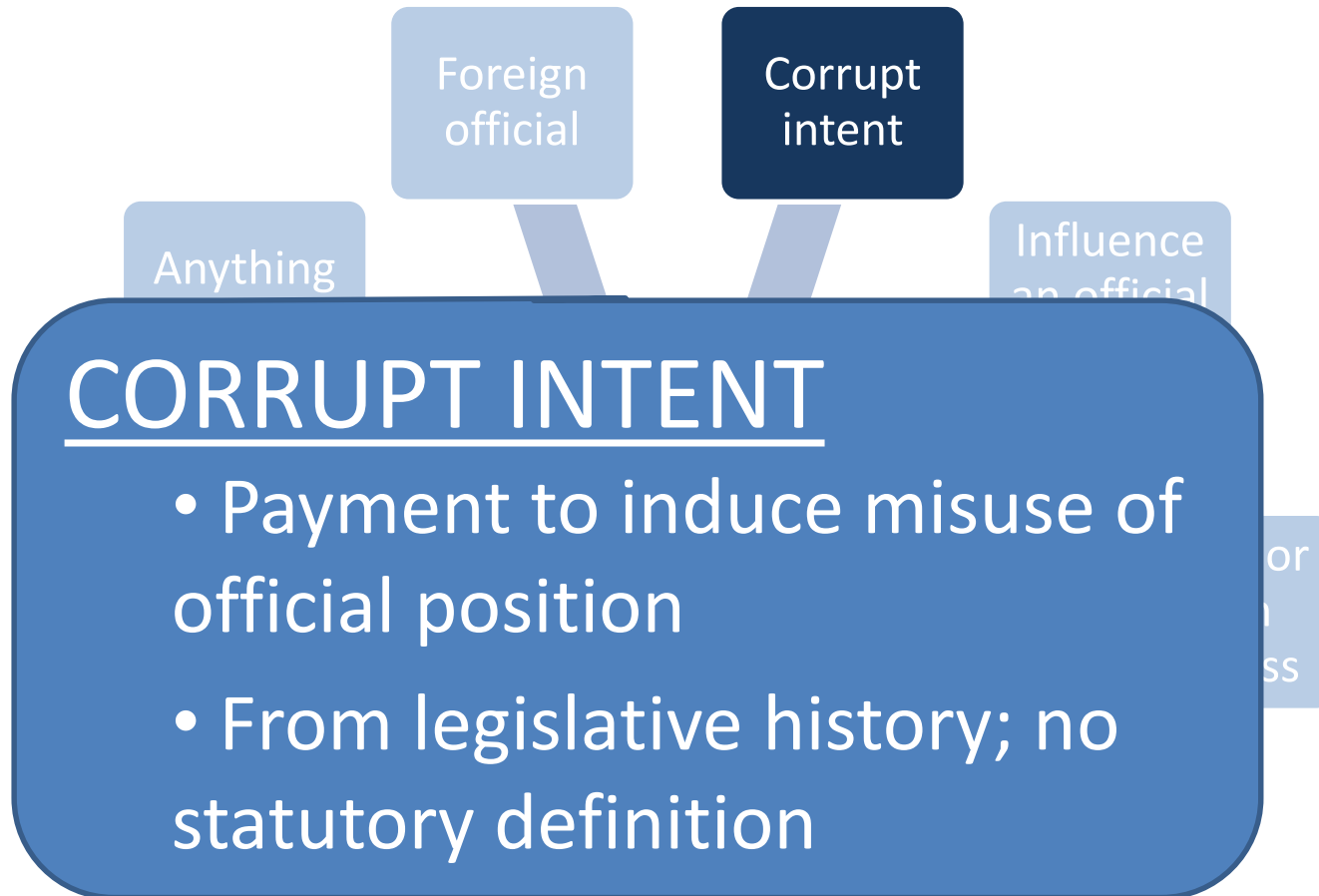
FCPA ANTI-BRIBERY OVERVIEW

OFFICER/EMPLOYEE OF FOREIGN GOVERNMENT

- OECD Convention provides clearer definition
 - Includes official of a “public enterprise”
 - Defined as an enterprise over which government may, directly or indirectly, exercise a dominant influence, such as:
 - Holding a majority of shares
 - Controlling majority of votes
 - Appointing majority of managerial board
- Many countries adopting form of OECD definition
- No apparent impetus for DOJ to clarify

Foreign
official

FCPA ANTI-BRIBERY OVERVIEW



FCPA ANTI-BRIBERY OVERVIEW



FCPA ANTI-BRIBERY OVERVIEW

Foreign
official

Corrupt
intent

Influence
on official
act

Obtain or
retain
business

MAKING IT EASIER TO:

- Do business;
- Circumvent quotas;
- Bypass licensing requirements;
- Obtain concessions; or
- Reduce taxes

FCPA ANTI-BRIBERY OVERVIEW

Exception

— Payment was for the purpose of facilitating or securing performance of routine governmental action

Defined by statute to include only:

- (i) Obtaining licenses, permits, etc.;
- (ii) Processing governmental papers;
- (iii) Police or mail service, schedule inspections;
- (iv) Phone, power, water, and cargo service;
- (v) Actions of a similar nature

FCPA ANTI-BRIBERY OVERVIEW

Exception

— Payment was for the purpose of facilitating or securing performance of routine governmental action

Does not permit payments relating to governmental action that involves foreign official's decision-making authority or discretion.

DOJ discourages facilitating payments, and most countries prohibit them

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Affirmative Defenses

— Payment was lawful under the foreign country's written laws and regulations

Custom, tradition, courtesy, practice, etc., do not suffice. It must be written law.

Must be affirmatively lawful. Not enough that conduct is not prohibited or that foreign law somehow relieves otherwise criminal liability.

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Affirmative Defenses

- Reasonable and bona fide expenditures related to:
 - the promotion, demonstration, or explanation of products or services, or
 - the execution or performance of the contract

Travel and lodging expressly identified in statute as acceptable expenditures.

But still must be reasonable. First class airfare, lavish hotels, etc., are viewed as unreasonable.

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Examples of Approved Expenditures

- Payments made directly to service provider, not government official
- Economy domestic airline travel
- No per-diem stipend
- Incidental daily expenses, with receipts
- Nominal souvenirs
- No expenses for family members
- Modest tours

FCPA ANTI-BRIBERY OVERVIEW

Maximum Penalties

Companies

- Criminal: \$2,000,000 fine per violation
- Civil: \$10,000 penalty per violation
- Bar from government contracting

Individuals

- Criminal: 5 years imprisonment and/or \$100,000 fine per violation
- Civil: \$10,000 penalty per violation

Questions?

Thank you!