

Improper Payments

The Organization for Economic Co-operation and Development (“OECD”) describes the bribery of public officials as a “widespread phenomenon in international business transactions, including trade and investment. . . .” OECD estimates that bribery caused honest competitors to lose 77 of 294 international contracts awarded from 1994 through 1997. This corruption undermines free and fair trade.

Thirty-four countries (including the United States and its largest trading partners) have adopted the OECD’s “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (“the Convention”). The Convention requires each country to enact laws prohibiting bribery in international business dealings and to mandate accounting changes making it easier to detect such corrupt activities.

In the United States, restrictions on improper payments have been in place since 1977, when the U.S. enacted the Foreign Corrupt Practices Act (“FCPA”). In 1998, the FCPA was amended to incorporate the requirements of the Convention.

Although UTC demands adherence to U.S. and foreign laws, our *Code of Ethics* contains broader ethical considerations. Our policy is that each UTC operating unit will market and sell its products and services honestly, based upon their merits.

This brochure is intended to help you understand and apply the requirements of U.S. and foreign laws and UTC’s *Code of Ethics*.

The FCPA and the Convention are broad and far-reaching. U.S. and other countries’ laws implementing the Convention and the FCPA apply to UTC, its subsidiaries and affiliates, and their employees. In addition, UTC and its employees may be accountable when a third party, such as a sales representative or distributor, violates the law.

Persons and corporations incorporated or doing business in countries outside the U.S. may be subject to the FCPA if they engage in acts “in furtherance” of a prohibited activity. The Convention requires foreign countries to adopt laws regulating the actions of their citizens and of individuals or corporations of any nationality that take place within or outside that country.

Therefore, all subsidiaries and employees of UTC may be subject to Convention and FCPA restrictions, regardless of where they reside or transact business.

The Convention and FCPA both address improper payments to a “foreign public official.”

This includes any person who (1) holds an elected or appointed legislative, administrative, or judicial office in a national or local government organization in a foreign country; (2) exercises a public function, either for a government or private enterprise (e.g., an official of a nationalized airline or other company); (3) is an official or agent of a public international organization (e.g., World Bank, International Monetary Fund); (4) is an officer or agent of a foreign political party; or (5) is a candidate for political office.

This includes persons who are not employed by a government but are merely acting “for or on behalf of” a government, including private architects, engineers, or consultants retained by a government to assist with specific projects or contracts.

Note that the Convention and FCPA do not apply to payments made to a public official within your home country. However, these payments usually are treated as “bribes” and are illegal in all jurisdictions. UTC will not make such payments.

The FCPA and the Convention prohibit —

- Making or promising to make any payment or giving any other pecuniary benefit to a foreign public official . . .
- So that the official will act or refrain from acting in relation to the performance of his/her official duties . . .
- If the official’s action or inaction may result in obtaining or retaining business, or . . .
- Cause the payor to gain an improper advantage in the conduct of business (i.e., something to which the company clearly is not entitled).

A few cautions —

- You don’t have to make a payment to be in violation — offering, promising, or authorizing an improper payment or other non-cash benefit is enough.
- The improper payment can be money or anything of value, such as purchase of a public official’s property or services at inflated prices, extravagant entertainment, or payment to a third party if the ultimate beneficiary of the payment will be a public official.

“Corrupt intent” is required. The purpose of the payment must be to obtain or retain business or gain an improper advantage in the conduct of business.

“Obtaining or retaining business” or “improper advantage” include any governmental action that is discretionary and affects the company’s business. For example, payments to a foreign official to obtain his/her approval of a price increase, issue an elevator inspection certificate, or certify the airworthiness of a helicopter or engine, are prohibited.

This can include situations where you “should have known,” and you are at risk if information available to you would cause a reasonable person to make further inquiry. For example, you are obligated to inquire into an extra commission demanded by a sales representative on the day before an announcement of a contract. If you don’t conduct this inquiry and the sales representative made or promised an improper payment to secure the sale, you may be in violation.

There are other “red flags.” Examples:

- Unusually large commissions;
- Requests for “up front” money;
- Requests that commissions be paid to third parties;
- Refusals to certify compliance with UTC’s *Code of Ethics* or other policies;
- Cash payments;
- Unusual secrecy; or
- Suspicious demands for bonuses or reimbursements.

Bottom line: If it “feels funny,” inquire further. Consult your Business Practices/Compliance Officer or Counsel. Don’t act until you are confident improper payments won’t be made.

Under the Convention and the FCPA, some payments to a foreign public official may be acceptable if the purpose of the payment is to expedite or secure the performance of a routine (i.e., nondiscretionary) government action. These are called “facilitating” or “expediting” payments.

Routine government action includes issuing permits, licenses or the like to transact business, processing visas and work orders, obtaining services such as police protection, mail pick-up, utilities, loading and unloading of cargo, protection of perishable products, and the like. They do not involve discretionary acts such as final inspections or favorable decisions affecting UTC’s business.

Expenditures incurred on behalf of a foreign public official that are related to promoting, demonstrating, explaining, or certifying UTC’s products or services, or that are related to executing or performing a contract with a foreign government, can be proper. Thus, it is permissible to pay the expenses of foreign public officials who travel to the United States for plant tours, product demonstrations, business meetings, or to conduct certification or acceptance tests and the like. Reimbursed expenses may include the reasonable cost of an official’s transportation, meals and lodging.

CAUTION: Although a small “facilitating” payment may not violate the Convention or the FCPA, payments of any kind to any government official may violate local laws. The range of proper facilitating payments is very narrow and varies by country. Therefore, it is critical that any proposed payment to a foreign public official be reviewed in advance by your Business Practices/Compliance Officer and Counsel. Proposed payments must be evaluated in light of the FCPA, the Convention, local laws, and our *Code of Ethics*.

Many violations by corporations involve payments made through third persons such as sales representatives or consultants.

UTC has a long-standing policy that no improper payments will be made by or on behalf of the company and that all payments will be accurately and properly recorded. UTC, its employees and agents will not make improper payments to or through a third party if all or part of the payment will be given to a prohibited payee. The reason is simple: UTC, its employees and agents will not do indirectly what they are prohibited from doing directly.

Our policy on using sales representatives outside the U.S. is published in Section 29 of the *Corporate Policy Manual*. There are detailed procedures for selecting, investigating, negotiating with, approving, contracting with and paying these representatives. A Unit Representative at each operating unit is responsible for ensuring compliance with these procedures and with UTC's *Code of Ethics* and legal requirements.

The FCPA and the Convention require that all books and records, financial statements, and disclosures accurately identify payments to foreign public officials. "Off-book" accounts and false or fictitious documents for the purpose of mischaracterizing the true nature of these payments are prohibited.

Violations of the FCPA and other laws implementing the Convention can result in severe criminal and civil sanctions for UTC and the individuals involved, including fines and imprisonment. UTC cannot pay fines imposed on individuals.

Violations of UTC's *Code of Ethics* and other policies and procedures will result in disciplinary action that can include termination of employment.

UTC maintains a compliance program that includes due diligence reviews of proposed representatives, intermediaries and business partners; periodic audit/review of procedures for making payments; and training for individuals and third parties who engage in transactions covered by the FCPA and the Convention's implementing laws.

Additional information and training are available from your Business Practices/Compliance Officer or Counsel.

Beyond the requirements of the law, it is UTC's policy to compete fairly. We want to win business because of the quality and competitiveness of our products and services. We will not attempt to win on any other basis.



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