

ETHICS, COMPLIANCE & THIRD-PARTY INTEGRITY RELATED RISKS MANAGEMENT



hello

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TEİD 
Etik ve İtibar Derneği
Ethics & Reputation Society


 **TICE**
Turkish Integrity Center of Excellence by TEİD

Plan

- Comparative Anti-Bribery Legislation (with Turkish practice)
- Analysis on Corruption & Fraud
- Coffee Break
- Third party integrity risk management
- Implementation of third party integrity risk management program



Integrity, Ethics and Compliance



Integrity is
doing the right thing,
even if nobody
is watching.



**Ethics is knowing the difference
between what you have a right to
do and what is right to do.**

Potter Stewart

Compliance is a Culture, Not Just a Policy !

Brent Snyder, U.S. Department of Justice

Rüşvet kavramı

TDK: Yaptırılmak istenen bir işte yasa dışı kolaylık ve çabukluk sağlanması için bir kimseye mal veya para olarak sağlanan çıkar.

Türk Ceza Kanunu madde 252: Görevinin ifasıyla ilgili bir işi yapması veya yapmaması için, doğrudan veya aracılar vasıtasıyla, bir kamu görevlisine veya göstereceği bir başka kişiye menfaat sağlanması

YABANCI LİTERATÜRDE KULLANILAN BAZI KAVRAMLAR

- Bribery – Rüşvet
- Kickback – komisyon rüşveti (örnek: ana şirkete hizmet veren tedarikçinin şirkete kestiği fatura üzerinden ana şirket çalışanının komisyon adıyla rüşvet alması)
- Payoff – rüşvet alma
- Facilitation payment (grease payment) - kolaylaştırıcı ödeme
- Extortion – irtikap (memurun zorlama ve benzeri hallerle karşı tarafın zor durumundan yararlanıp çıkar elde etmesi)

Global Yolsuzlukla Mücadele Yasaları

- **ABD Foreign Corrupt Practices Act (FCPA), 1977**
- **UK BRIBERY ACT 2010**
- **BREZİLYA Clean Company Act 2014**
- **FRANSA - LOI SAPIN II 2016**
- **ALMANYA Law on Fighting Corruption 2015**
- **G. AFRIKA Prevention and Combating of Corrupt Activities Act, 2004**
- **KARADAĞ Law on Prevention of Corruption 2016**
- **Rusya Federal Anti-Corruption Law No:273 - 2013**



FCPA -Foreign Corrupt Practices Act

(ABD Yabancı Yolsuzluk Uygulamaları Kanunu 1977 (revizyon 1988 – 1998))

- **Uluslararası etki:** Kapsam içindeki şirketlerin kurulduğu yere ve rüşvetin verildiği ülkeye bakılmaksızın cezaya tabi tutulduğu geniş etkisi olan bir kanundur.
- **Kapsam:** ABD şirketleri, ABD borsasına kote olan yabancı şirketler, ABD vatandaşları veya ABD ile bağlantısı olmasa bile rüşvet ödemesinin ABD topraklarında veya ABD ödeme vasıtaları ile (dolar transferiyle) yapılması
- **Uygulayıcıları:** DOJ ve SEC



FCPA ve Amerikan hukukuna esas bazı kavramlar

- Şikayetçi(whistleblower) koruması ve şikayetçilere ödül verilmesi
- Soruşturmanın ertelenmesi sözleşmesi, soruşturmanın bitmesi sözleşmesi ve kendiliğinden ifşa (Deferred prosecution agreement, Non-prosecution agreement & self disclosure)
- Yolsuzlukla elde edilen karların iadesi (Disgorgement)
- Aktif Rüşvet



FCPA ve Amerikan hukukuna esas bazı kavramlar

- **Kolaylaştırıcı ödeme istisnası:** memurun zaten yapacağı bir işlemi hızlandırmak ve sonuç almayı kolaylaştırmak yabancı ülkede rutin devlet uygulaması ise ve aşağıdaki durumlarda sınırlı olarak uygulanır)
 - yabancı bir ülkede iş yapmak için izin, lisans alınması;
 - vize ve iş emirleri gibi hükümet belgelerinin işlenmesi;
 - sözleşme performansı ile ilgili denetimleri veya malların ülke geneline geçişi ile ilgili teftişleri sağlamak;
 - telefon hizmeti, güç ve su temini, yükleme ve boşaltma veya bozulabilir ürünleri veya malları bozulmadan korumak; veya v) benzer nitelikteki eylemler.
- Yerel Hukuk Savunması
- İyi niyetli ve makul iş geliştirme Harcaması Savunması
- Pasif Rüşvet suç kapsamında değil
- Sadece yabancı kamu görevlilerine rüşvet bu kanun kapsamında

FPCA en yüksek bedel ödeyen ilk on şirket:*

- 1. Telia Company AB (Sweden): \$965 million in 2017.
- 2. Siemens (Germany): \$800 million in 2008.
- 3. VimpelCom (Holland) \$795 million in 2016.
- 4. Alstom (France): \$772 million in 2014.
- 5. KBR / Halliburton (United States): \$579 million in 2009.
- 6. Teva Pharmaceutical (Israel): \$519 million in 2016.
- 7. Keppel Offshore & Marine Ltd.(Singapore): \$422 million in 2017.
- 8. Och-Ziff (United States): \$412 million in 2016.
- 9. BAE (UK): \$400 million in 2010.
- 10. Total SA (France) \$398 million in 2013.

*kaynak: <http://www.fcpablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html>

Rüşvet verilen ülkeler arasında Türkiye'nin de geçtiği FCPA soruşturmalarında DPA imzalayan şirketler:

- Smith & Wesson (2014)
- Tyco International (2012)
- Daimler AG (2010)
- York International Corp. (2007)
- Delta & Pine Land Co. (2007)
- Micrus Corp. (2005)

Şikayetçilerin bildirdiği Türkiye'deki rüşvet iddiaları üzerine ABD otoritelerine kendiliğinden ifşa yapan bazı şirketler:

- 3M (2010)
- Novartis (2016)
- Teradata (2017)

Son dönem FCPA uygulamaları

Dialysis provider reserves \$245 million for FCPA settlement

By **Richard L. Cassin** | Tuesday, February 27, 2018 at 9:28AM



Fresenius Medical Care AG said in a securities filing Tuesday that it has set aside €200 million (\$245 million) for a potential FCPA resolution with the DOJ and SEC.

Fresenius, based in Homburg, Germany, said the money "represents an estimate from a range of potential outcomes."

It said negotiations with the DOJ and SEC are continuing but haven't "yet achieved an agreement-in-principle."

Panasonic pays \$280 million to resolve FCPA offenses

By **Richard L. Cassin** | Monday, April 30, 2018 at 2:28PM



Panasonic agreed Monday to pay \$280 million to resolve FCPA offenses for payments to consultants of its U.S. in-flight-entertainment unit in the Middle East and Asia.

Osaka, Japan-based Panasonic Corporation will pay \$143 million in disgorgement to the Securities and

Exchange Commission.

SocGen pays \$585 million to resolve Libya FCPA offenses

By **Richard L. Cassin** | Monday, June 4, 2018 at 1:08PM



In the first coordinated enforcement action by the DOJ and French authorities in an overseas corruption case, a Paris-based bank agreed Monday to settle charges that it paid over \$90 million in bribes to officials in Libya during the Qaddafi regime.

In the United States, Société Générale S.A. (or SocGen) entered into a deferred prosecution with the DOJ.

Credit Suisse pays DOJ \$47 million to end Asia princeling investigation

By **Richard L. Cassin** | Wednesday, June 6, 2018 at 8:28AM



Banking giant Credit Suisse Group AG said Wednesday it has agreed to pay a \$47 million penalty to the Justice Department to end an FCPA investigation into hiring practices in Asia.

In a statement posted on the group's website, Credit Suisse's Hong Kong unit said it reached a non-prosecution agreement with the DOJ regarding recruitment practices in Asia between 2007 and 2013.

UK BRIBERY ACT – Birleşik Krallık Rüşvet Yasası 2010

- **Kapsam:** İngiliz şirketleri veya İngiltere’de operasyonu bulunan yabancı şirketlere uygulanıyor.
- **Cezalar:** Kişiler için 10 yıla kadar hapis ve şirketler için rüşvetin boyutuna göre ağır para cezaları düzenlenmiş
- **Uygulacıyı:** Serious Fraud Office
- Soruşturmanın ertelenmesi sözleşmesi imkanı
- FCPA’dan Farklı Hükümler:
 - Özelden Özele rüşvet de kanun kapsamında
 - Kolaylaştırma ödemesi istisnası yok
 - Rüşveti önlemede başarısızlık” (failure to prevent bribery) suç kapsamında sayılmış



Rolls Royce vakası

- **Toplam ceza** ABD, İngiltere ve Brezilya hükümetlerine toplamda **800 milyon dolar para cezası** ödemeyi kabul etti.
- Serious Fraud Office, 4 yıl boyunca soruşturma yaptı, 30 milyon doküman incelendi ve 200 kişi sorgulanıyor
- 1989 -2013 döneminde yabancı hükümet yetkililerine kamu ihaleleri karşılığında 35 milyon dolar rüşvet verdiği ortaya çıkarıldı.
- Rolls Royce'un suçlamaları kabul ettiği ifade edilen açıklamada, Çin, Tayland, Brezilya, Hindistan, Rusya, Kazakistan, Azerbaycan, Angola, Malezya, Nijerya ve Iraklı hükümet yetkililerinin şirketten rüşvet aldığı kaydedildi.
- Şirket şubat 2017 de 4.6 bn Sterlin ile tarihinin en büyük zararını açıkladı



Clean Company Act

Brezilya Temiz Şirket Yasası 2014

- Şirket sorumluluğu bakımından en ağır yasa
- Kolaylaştırıcı ödeme istisnası yok
- Şirketin yıllık cirosunun %20 sine kadar kesilebilen cezalar
- Kasıt aranmıyor; kusursuz sorumluluk benzeri bir hal



Petrobras



Brezilya'da devlete ait petrol şirketi. 78 bin çalışanıyla ülkede en fazla istihdam sağlayan firmalardan. Petrobras, 3 yıldır ülkeyi sallayan yolsuzluk skandalının merkezinde bulunuyor. Petrobras, yolsuzluklar nedeniyle 2015 yılında 2 milyar dolar zarara uğradığını açıkladı.

Petrobras'ın eski üst düzey yöneticileri uzun hapis cezalarına mahkûm oldular ve şu anda hapisteler.

Odebrecht



Brezilya merkezli inşaat devi Odebrecht, Latin Amerika kıtasının en büyük inşaat şirketi. Şirket, Brezilya'daki ve bölgedeki diğer ülkelerdeki sözleşmelerini sağlama almak için yetkililere rüşvet verdiğini itiraf etti. 3,5 milyon dolar ceza ödemeyi kabul etti.

Şirketin eski CEO'su Marcelo Odebrecht yolsuzluktan 19 yıl hapse mahkeme oldu ve hali hazırda hapiste bulunuyor.

Marcelo Odebrecht, Petrobras yetkililerine 30 milyon dolardan fazla rüşvet vermekle suçlanıyor. O ve 76 şirket yetkilisi, dava kapsamında ceza indiriminden yararlanmak için ellerindeki bilgileri mahkemeye paylaştı.

Loi Sapin II – Fransız Yolsuzlukla Mücadele Yasası 2016

- **Kapsam:** Fransa’da operasyonu bulunan, çalışan sayısı 500’den fazla ve en az ortalama yıllık 100mn-Avro üstünde geliri olan tüm şirketlerin Fransa ve diğer ülkelerde yaptığı yolsuzluklara karşı uygulanır.
- **Cezalar:** kişiler için 10 yıla varan hapis cezası ve işletmeler için 5 milyon Avro’ya varan para cezası - Uyum programı oluşturması gerekirken buna aykırı davranan şirket yöneticileri 200 bin Avro ve şirket ise 1 milyon Avro’ya kadar ceza.
- Şikayetçilerin korunması sistemi ve şikayet hatlarının kurulması zorunlu olması
- Kolaylaştırıcı ödeme istisnası yok, özelden özele rüşvet de suç kapsamında
- Soruşturmanın ertelenmesi sözleşmesi imkanı



Almanya **Yolsuzlukla Mücadele Yasası 2015**

Gesetz zur Bekämpfung der Korruption

- **Amacı:** Uluslararası mevzuat elementlerini iç hukukta yansıtmak. Yabancı kamu görevlileri
- **Kapsam:** Yolsuzluk ve Kara Para Aklama. Şirketleri de kapsayan model
- Aktif ve Pasif rüşvet suç kapsamında
- Özel rüşvet: Rekabetden - İşveren Modeline- Geschäftsherrenmodell
- Ceza Kanunu (Strafgesetzbuch) – 10 yıla kadar ceza. FP istisnası yok
- İdari İşlemler Yasası - (Ordnungswidrigkeitengesetz) – 10mn Euroya kadar ceza
- Ayrı bir otorite yok – savcılık
- 2016 – Sağlık sektörü için özel düzenleme - (Gesetz zur Bekämpfung der Korruption im Gesundheitswesen)



Türkiye'deki durum

Özel bir rüşvetle mücadele yasası yok!

- Türk Ceza Kanununda kişilerin ceza ehliyeti var şirketlere sadece güvenlik tedbirleri uygulanıyor,
- TCK 252 kamu görevlisine rüşvet alma ve verme suçu 4yıldan 12 yıla kadar hapis. (Halka Açık Anonim Şirketler adına hareket eden kişilere de uygulanır)
- Kabahatler Kanunu 43/A – şirketlere idari para cezası (3,7mnTLye kadar)
- Kamu görevlisinin Hediye alma yasağı – 657sayılı Kanun ve Kamu Görevlileri Etik Davranış İlkeleri Yönetmeliği



Global Yolsuzlukla Mücadele yasalarının getirdikleri

- Proaktif ve önleyici yaklaşım
- Şirkete, sektöre, ülkeye, bölgeye özel uyum programları
- Etik ve Uyum Yönetiminin bir meslek olarak gelişmesi
- Etik Kültüre dair değişim programları – Eğitim ve Farkındalık
- Üst ve Orta Yönetim Desteği
- Konuşma (Dile Getirme) Kültürü
- Risk Analizi ve Ölçme
- İç denetim & sürekli gelişim programlarının değer kazanması





ANALYSIS ON CORRUPTION & FRAUD AND TURKEY'S POSITION

TWO NGO & TWO SURVEYS

**TRANSPARENCY
INTERNATIONAL**

2017 Corruption Perception Index

www.transparency.org



**ASSOCIATION OF CERTIFIED
FRAUD EXAMINERS**

2018 Report to the Nations on
Occupational Fraud and Abuse

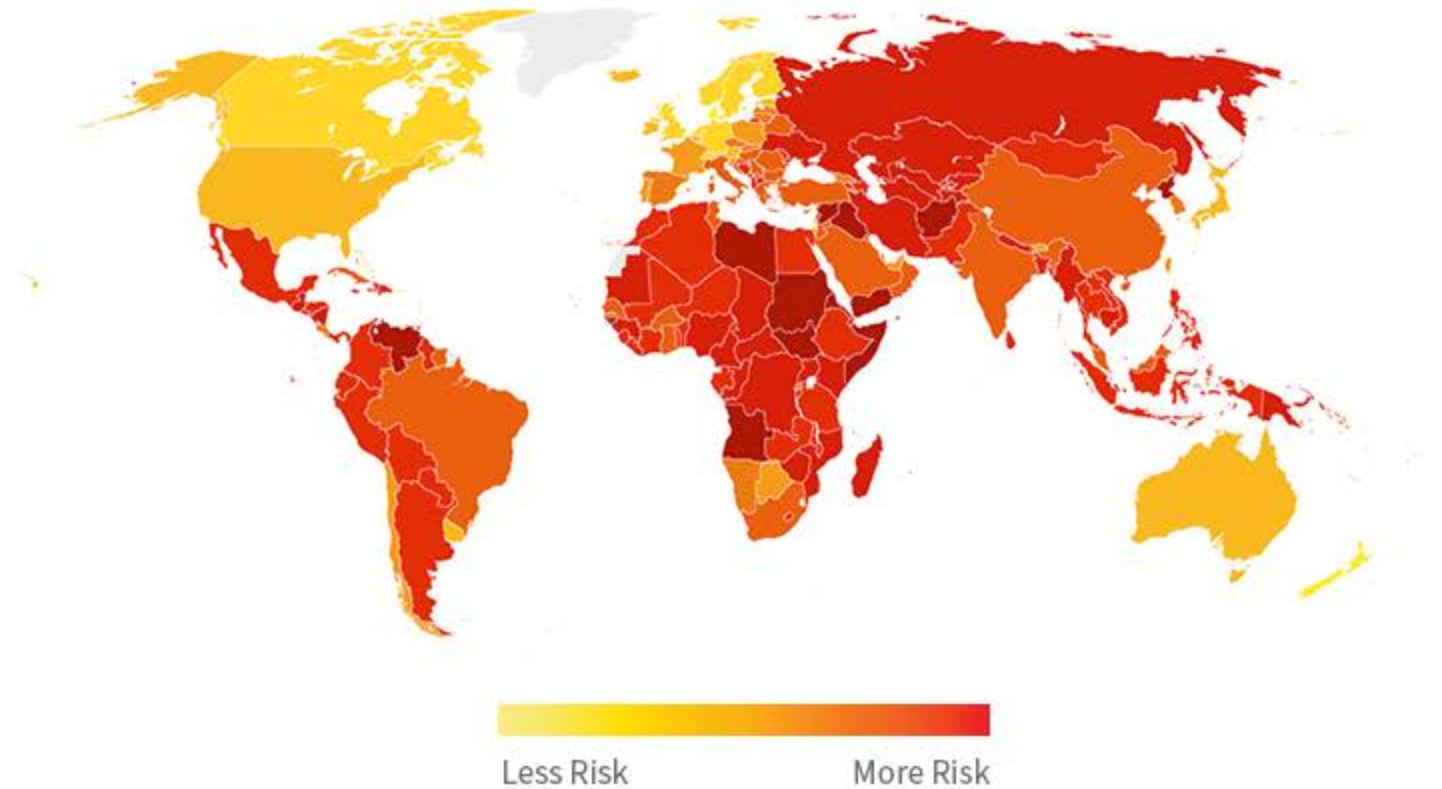
www.acfe.com



2017 CORRUPTION PERCEPTION INDEX

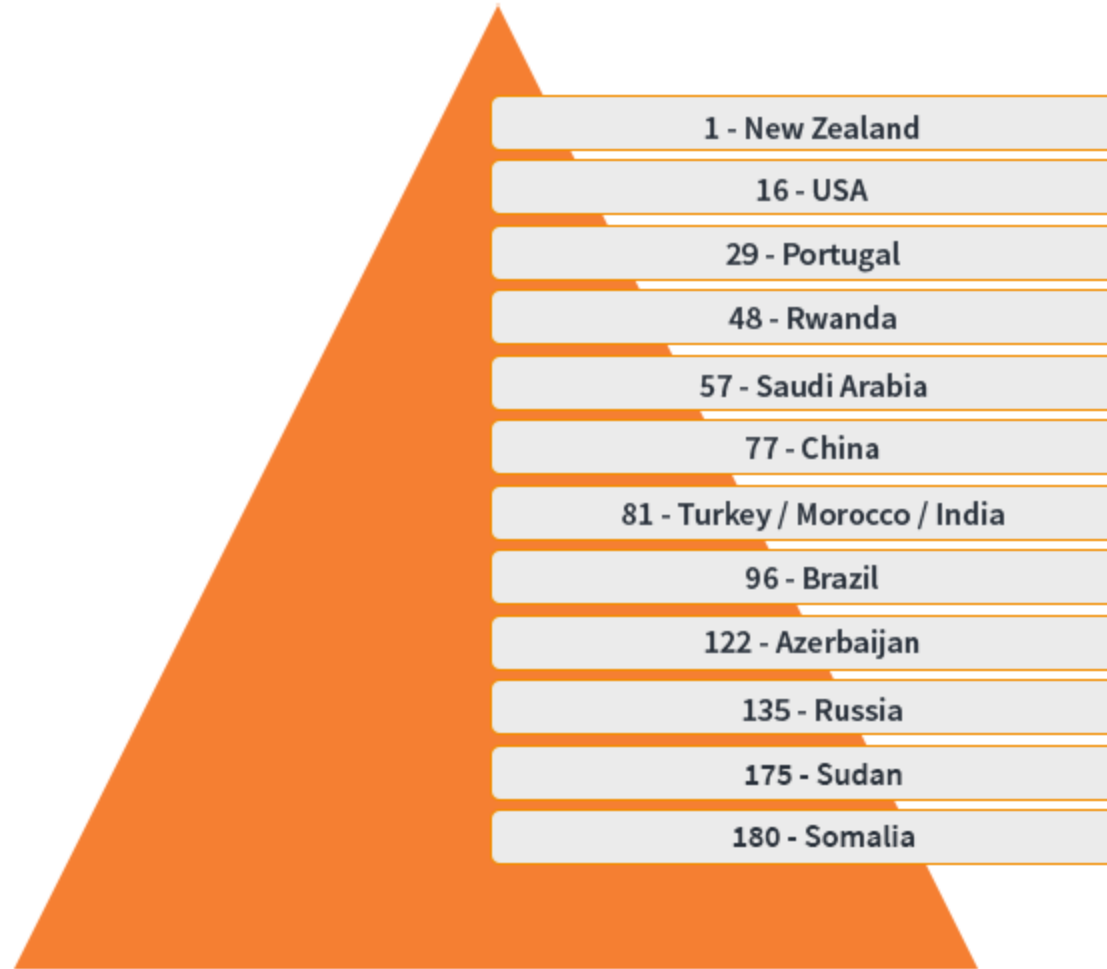


CORRUPTION PERCEPTIONS INDEX 2017



The index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. This year, the index found that more than two-thirds of countries score below 50, with an average score of 43. Unfortunately, compared to recent years, this poor performance is nothing new.

2017 CORRUPTION PERCEPTION INDEX RANKING




Turkey's extremely poor performance in the index in recent years continued well into 2017, too. In 2017 Turkey dropped to the 81st place from 75th place in 2016. Unfortunately, Turkey is among the five worst-performing countries in corruption perceptions index from 2012 to 2107.

Since the Corruption Perceptions Index measures the public's corruption perception, naturally, the state of public sector in Turkey affects our position in the index. Possible circumstances that may have affected this tendency can be summarized as follows:

- For the last 19 months, Turkey has been in a state of emergency and governed by decree
- More than. 40% of public purchases (tenders) are not subject to Public Procurement Law and 28% of those subject to this law are not conducted in an open tender
- The negative impression regarding the pressure on freedom of the press and civil society

2018 REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE



To help measure the financial damage caused by fraud, CFES are asked to provide with their best estimate, based on their experience, of what percentage of revenues the typical organization loses in a given year as a result of fraud. The median estimate was that fraud costs organizations 5%.

CFES ESTIMATE THE TYPICAL ORGANIZATION LOSES 5% OF ANNUAL REVENUES TO FRAUD

SIMPLE CALCULATION !

(Billion USD Dolar)



GDP

74,160
800

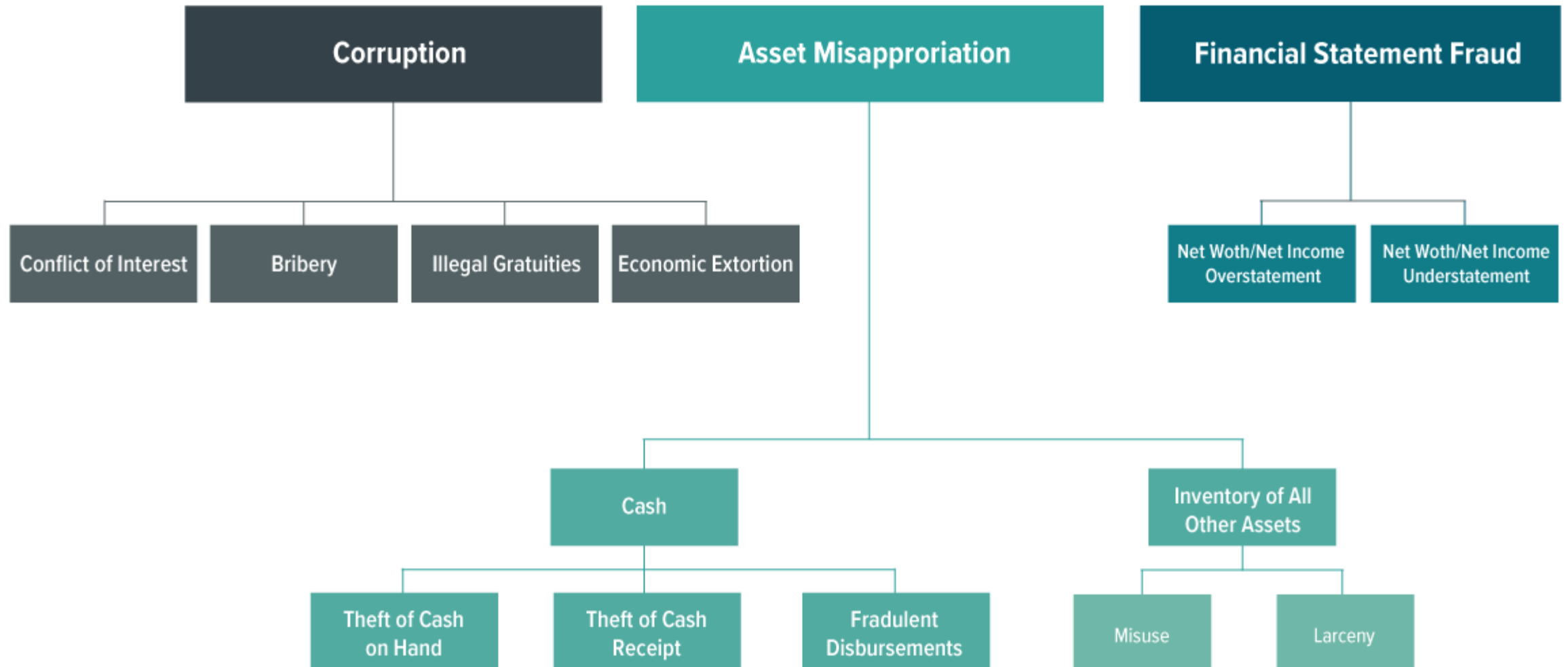


FRAUD LOSS

3,708
40

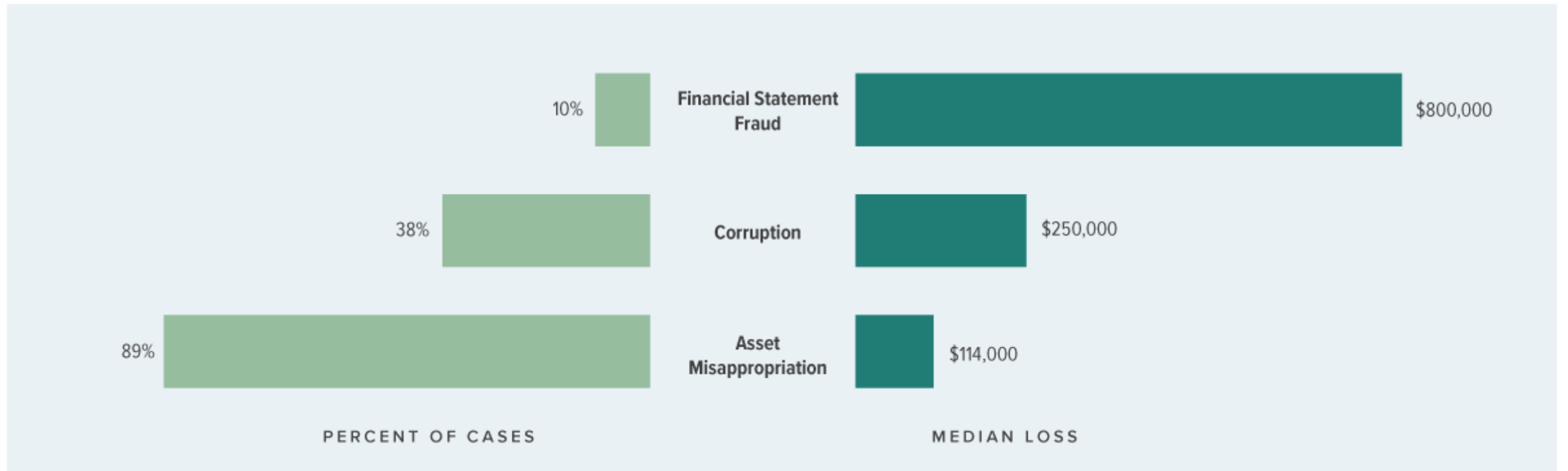
Each Turkish Citizen
Pays Roughly
500 USD (2.400 TL)
for Fraud Loss

FRAUD AND ABUSE CLASSIFICATION SYSTEM (FRAUD TREE)



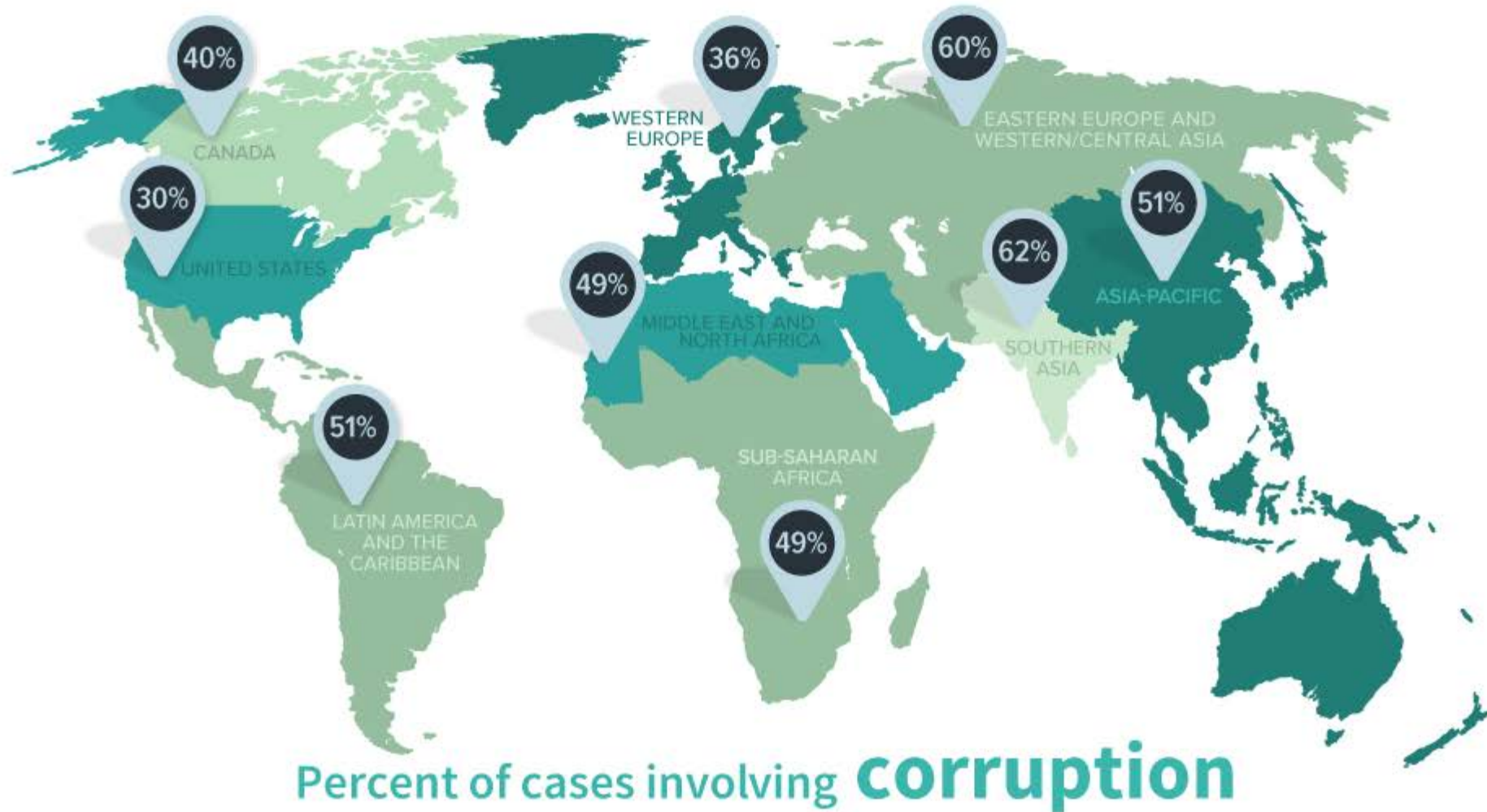
HOW IS OCCUPATIONAL FRAUD COMMITTED?

FREQUENCY AND MEDIAN LOSS



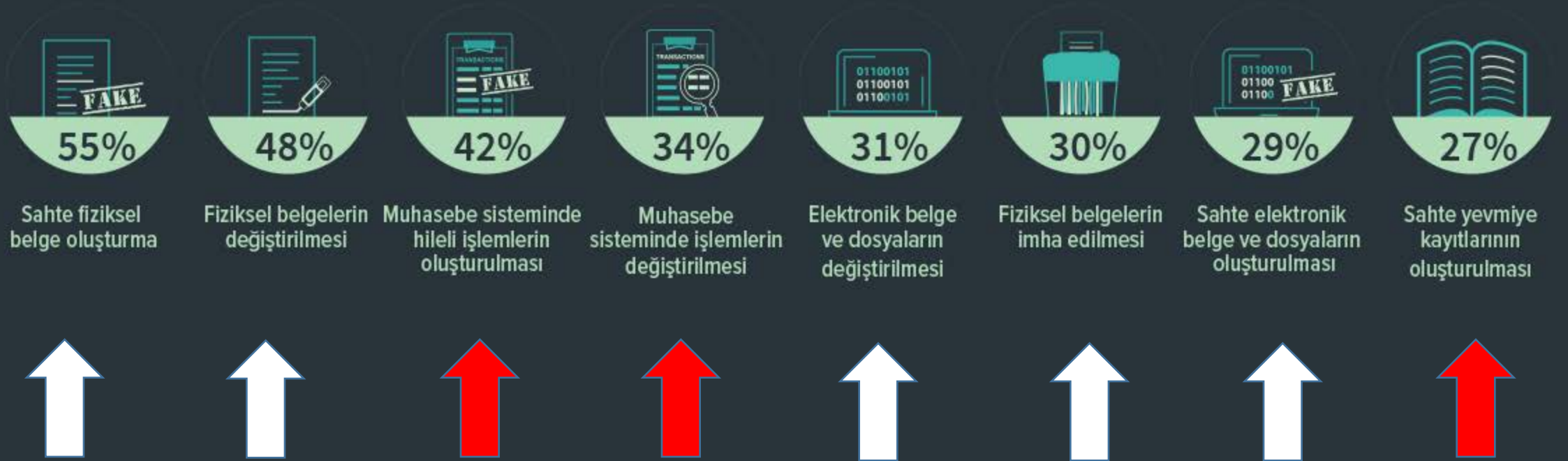
CORRUPTION

Corruption represents one of the most significant fraud risks for organizations in many industries and regions. Understanding the specific factors involved in corruption schemes can help organizations effectively prevent, detect, and investigate them.

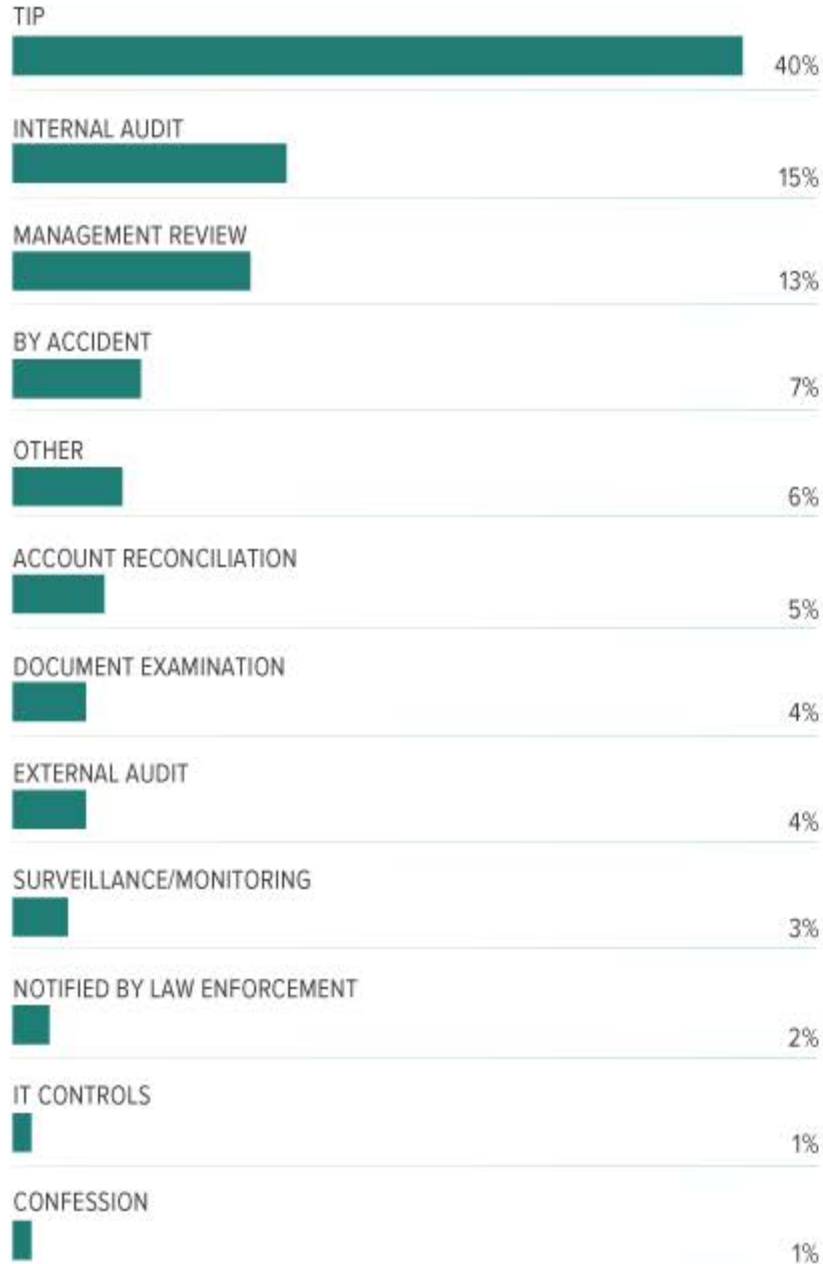


SUİSTİMALİN SAKLANMASI

SUİSTİMALCI TARAFINDAN EN SIK UYGULANAN İLK 8 GİZLEME YÖNTEMİ



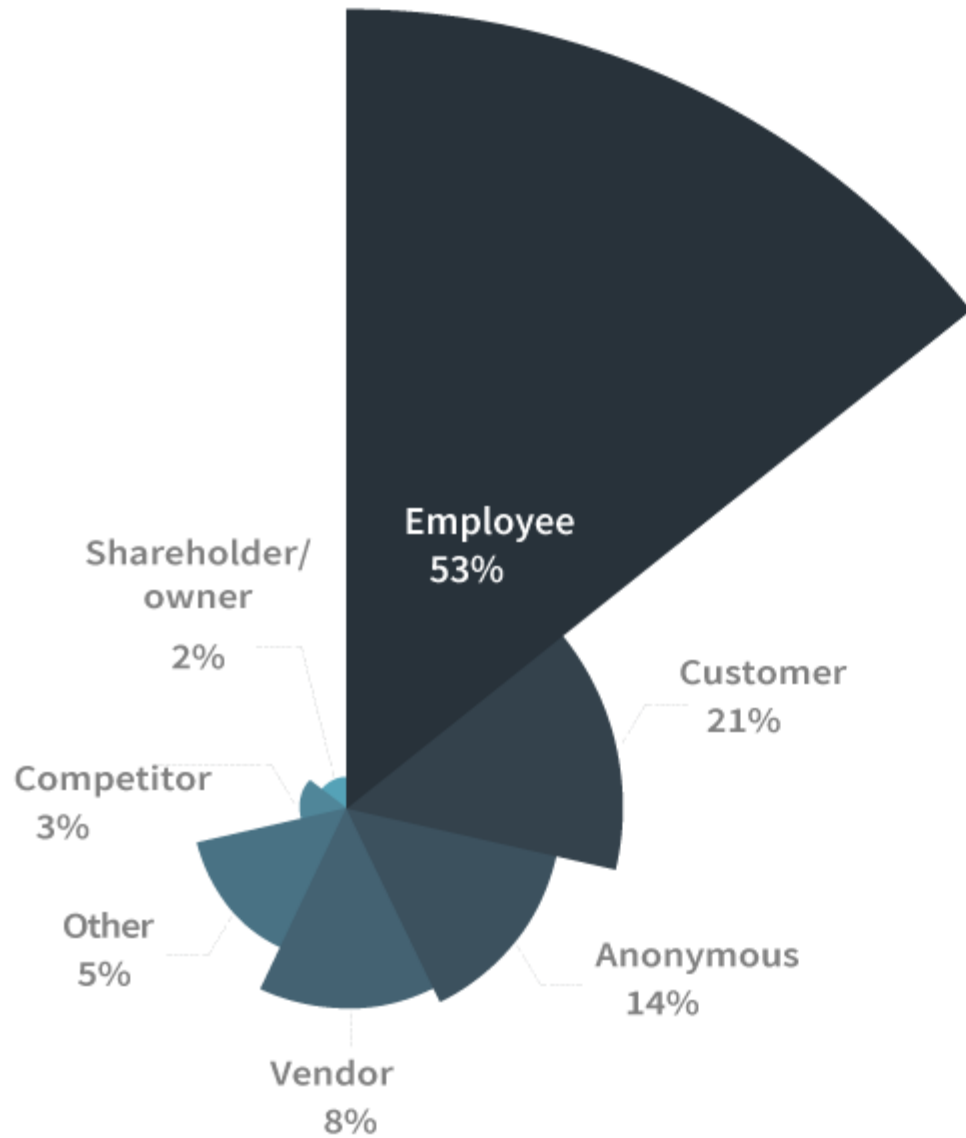
HOW IS OCCUPATIONAL FRAUD INITIALLY DETECTED?



THE MOST COMMON DETECTION METHOD



WHO REPORTS OCCUPATIONAL FRAUD?



**MORE THAN 40 % OF THE TIPS
THAT LED TO FRAUD DETECTION
CAME FROM PEOPLE OUTSIDE
THE ORGANIZATION**

Coffee Break





THIRD PARTY INTEGRITY RISK MANAGEMENT

An aerial photograph of a large port facility. Several large container ships are docked at the pier, with their decks covered in stacks of colorful shipping containers. Numerous gantry cranes are positioned along the docks, some with their arms extended over the ships. The water is dark and calm. In the background, more port infrastructure and distant city buildings are visible under a clear sky.

Third parties are critical to companies. The modern global enterprise is an extended enterprise - the creator and hub of a complex and symbiotic network of third parties. By using the skills and resources of third parties a company can grow its business, access new markets and harness innovation and resources.

CRITICAL ROLE OF THIRD PARTIES FOR MULTINATIONAL COMPANIES



THIRD PARTY UNIVERSE

- Vendors/suppliers
- Distributors/resellers
- Joint venture partners/consortium partners
- Advisors and consultants (tax, legal, nancial, business)
- Service providers (logistics, supply chain management, storage, maintenance, processing)
- Contractors/subcontractors
- Lobbyists
- Marketing and sales agents
- Customs or visa agents
- Other Intermediaries

PARTIES

1. Party
(Company
itself)

3. Party
(Supplier/
Service
Provider)

4. Party
(Sub-contractor)

?

2. Party
(Customer)

MOVEMENT OF GOODS AND
SERVICES FROM VENDORS
TO CUSTOMERS

SUPPLY CHAIN

WHERE IS THE SOURCE OF ANTI-BRIBERY RISK?

Originated
within the
company
itself?



Originated
with third
parties?

BRIBERY INSTIGATED FROM WITHIN COMPANY & CHANNELED THROUGH THIRD PARTIES

Bribery and fraudulent activity is triggered (motivation, rationalization, opportunity)

Employee or bribe taker collects money

Employee at victim company designs fraud scheme

Employee and corrupt vendor form conspiracy

Vendor issues inflated or fictitious invoice to victim company

Payment is made to vendor by the authorisation of employee

Slush fund is accumulated at vendor

Bribes is paid by vendor, either to employee or bribe taker.

IMPLEMENTATION OF THIRD PARTY RISK MANAGEMENT PROGRAM

*The OECD 2014 Foreign Bribery Report found that intermediaries -- agents, distributors, brokers, subsidiaries, shell companies -- were involved in **three out of four** of successful bribery prosecutions.*



First: Act Like A Photographer!

«Learn and analyze the dynamics of the company»

Some questions worth to consider:

- What is the business Dynamics? SWOT analyze, what are the main drivers for revenue and expenses
- Is there a procurement department and process designed?
- Which departmants are working with which third parties? Detailed info on contracts
- Which services are taken and are they in line with the scope of the business of the company?
- Is it really necessary to use the third party?



Compliance program analysis

- Is there a compliance department and how is it positioned within the company?
- Is there a pre-designed compliance program and what are the elements of it? (Anti-Bribery, Code of Conduct, Conflict of Interest, AML, Sanctions, Data Privacy, Third Parties, Speak up and etc...)
- Is there a compliance training and communication program? How are the trainings monitored?
- Is there an effective speak up program and hotlines?
- Tone at the top and middle?
- Risk assessment & monitoring?



Take a glance to third party risk management

- How is the third party selection process designed?
- Is there an effective due diligence process defined?
- Do the third parties use vendors?
- Do the third parties have an access to whistleblowing lines?(hotlines)
- Do we have effective contracts with third parties?
(compliance provisions, data privacy, right to audit and etc..)

Third Party Due Diligence (dd)



Process Engineering

- Who will be the owner of the process?
- Who will conduct the dd?
- When will a dd be renewed?
- Who will communicate with the third party??
- How will the dd process be imposed on third parties? What will be the outcome for the ones who do not will to participate?



Risk Based Approach

- Risk mapping and risk assessment of the company and the related industry.
- Classification of third parties based on risks (high, medium, low as an example)
- Considering to deep dive over sub-vendors, board members and shareholders of third parties



Preparation for DD

DD checklist/questionnaire

History of the third party

Reference check

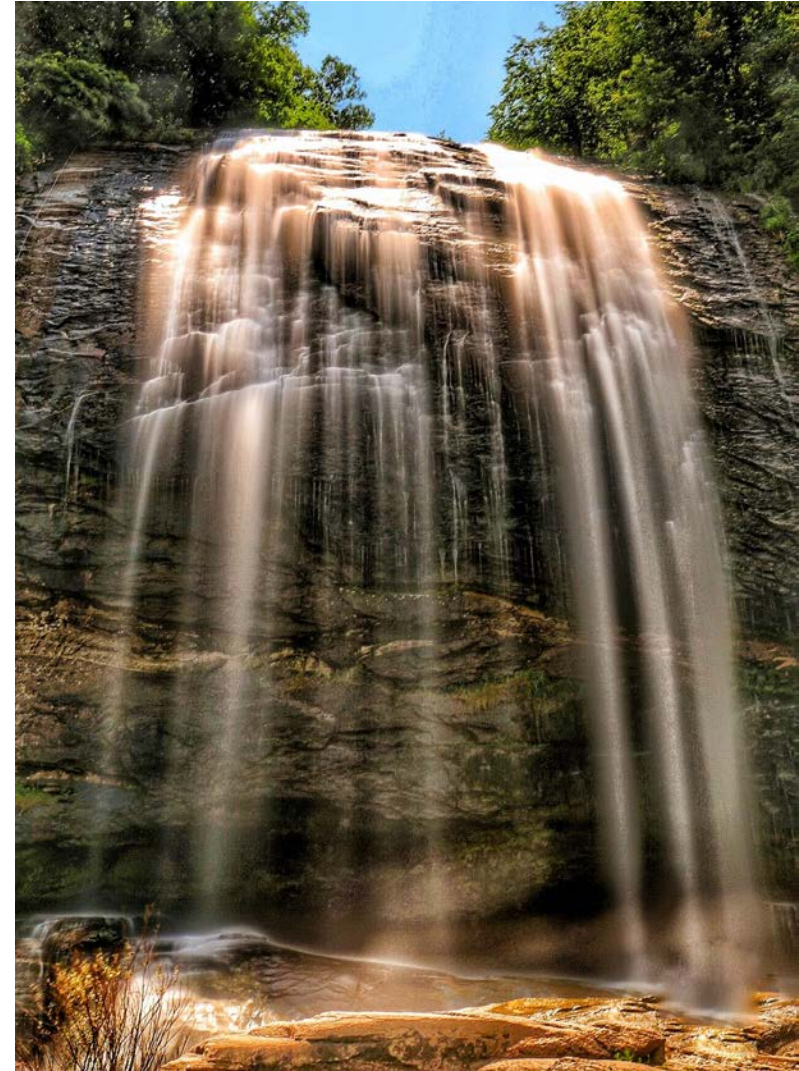
Documentation requests

- Trade Registry documents
- Financial Data
- Important Litigation and sanction process
- Compliance culture and program



On site visit

- Facility on site check
- Interviews with key stakeholders
- Additional documentation review on site
 - Books and records
 - Cash and bank flow data
 - Grants and donations
 - Travel, entertainment and hospitality expenses
 - Contracts with sub-vendors
 - Quality certificates and audit reports
 - Similar documentation previously aligned with third party
 - Expense



Some examples to Red Flags

LESSONS LEARNED FROM UNAOIL CASE:

- Third parties that do business in high-risk regions of the world, have ties to foreign government officials, or that have a low or shady profile.
- Refusal to provide requested information;
- Refusal to disclose beneficial owners;
- Credible, corroborated, negative media reports;
- Inclusion on a sanctions list or Politically Exposed Person (PEP) list;
- Material misrepresentations during the due diligence process;
- A history of bribery and corruption; or
- An ongoing criminal investigation.
- if the service the third party provides is unclear, “which would deserve extra scrutiny,



LESSONS LEARNED FROM MONDELEZ CASE

From a compliance program perspective, **no third party representative can ever be hired without appropriate due diligence.** If there is some level of due diligence that is less than standard, there must be an appropriate level of compliance review, coupled with senior management and, perhaps, even Board oversight.

All contracts must be in writing with clearly specified terms. Right to audit and right for termination.

All invoices must be in writing, with sufficient specificity to enable a regulator (or auditor) looking at it years later to determine what services were delivered that were compensated by the company.



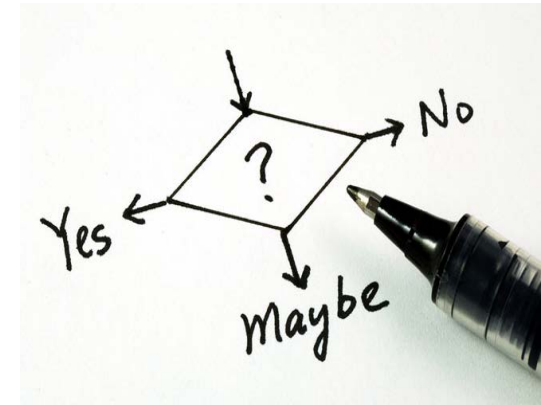
DD report and contract process

A report with additional assessment on risk areas (red flags) needs to be prepared and shared with the decision makers.

Decision:

Approve, **approve with conditions** or **reject**

- Assessment and remediation of red flags
- Contract process with effective compliance provisions
- Communication of the outcome with third party
- Renewal of the process
- Annual certification signed by third party



Quality of the due diligence

- Considering to implement automated process and AI for a efficient and fast assessment (especially for high volume of third parties)
- Ask for outsource help when needed
- Effective communication with third parties



US DOJ Guidelines for an effective compliance program – questions to consider for an effective third party risk management

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?
- **Appropriate Controls** – What was the business rationale for the use of the third parties in question? What mechanisms have existed to ensure that the contract terms specifically described the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?



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- **Management of Relationships** – How has the company considered and analyzed the third party's incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them? How has the company incentivized compliance and ethical behavior by third parties?
- **Real Actions and Consequences** – Were red flags identified from the due diligence of the third parties involved in the misconduct and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues? How has the company monitored these actions (e.g., ensuring that the vendor is not used again in case of termination)?



**"If you think compliance is expensive,
try non-compliance."**

Former Deputy U.S. Attorney General Paul McNulty

thank you

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