

Capital Link Cyprus Shipping Forum

Foreign Corrupt Practices Act: Overview, Industry Risks & Recent Developments

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Overview of the FCPA

Overview

The FCPA imposes three distinct requirements:

- **Anti-Bribery**: Prohibits giving, offering, or promising anything of value, directly or indirectly, to a foreign official for the corrupt purpose of obtaining or retaining business.
- **Books and Records**: Public companies must keep books and records in reasonable detail that fairly and accurately reflect the transactions and circumstances of the company.
- **Internal Controls**: Public companies must devise and maintain a system of internal controls that provides reasonable assurance of accurate books and records and GAAP compliant financial statements.

Who is Subject to the FCPA?

- **All U.S. companies**
- **All U.S. citizens and residents (anywhere in the world, regardless of employer)**
- **All public companies**
- **Foreign companies with a presence in the U.S.**
- **Non-resident aliens and foreign entities that act or use U.S. mails or wires while in the United States**
- **Officers, directors, employees or agents, in the U.S. or abroad, of any of the above**
 - **U.S. and non-U.S. companies can be liable for the acts of foreign subsidiaries, JV partners, and other parties deemed to be acting as agents**
 - **Agents can also be liable for their acts on behalf of their clients**

FCPA Anti-Bribery Provisions

- **The Anti-Bribery provisions prohibit:**
 - **Giving *or* offering *or* promising *or* authorizing**
 - **Directly *or* indirectly**
 - **Anything of value**
 - **To any foreign official**
 - **Corruptly**
 - **In order to obtain *or* retain business, *or* otherwise gain an unfair advantage**

FCPA Anti-Bribery Provisions

- **Giving, Offering, Promising, or Authorizing:**
 - The crime is complete with the corrupt offer
 - A payment does not need to actually occur
 - A benefit does not need to actually be provided
 - *Conspiracy/agreement to make a corrupt offer is a crime*

FCPA Anti-Bribery Provisions

- **Directly or Indirectly:**
 - The FCPA prohibits *direct* payments to foreign officials.
 - The FCPA also prohibits *indirect* corrupt payments through agents and intermediaries such as consultants, independent contractors, agents, lobbyists, and distributors.
 - A company is liable if it:
 - Authorized the payment by the agent; or
 - Knew or consciously disregarded a high probability that the illicit payment would be made by its local agent (“willful blindness”).

FCPA Anti-Bribery Provisions

- **Anything of Value:**
 - **Covers cash, gifts, or other valuable benefits**
 - **Includes intangibles: employment, travel, education, and entertainment**
 - **China Princelings Investigation (2016): JP Morgan agreed to pay \$264 million to U.S. regulators to settle charges that the bank hired approximately 100 children and other friends and relations of Chinese officials (“princelings”) to help win business**
 - **No *de minimis* exception: potential liability even for very small payments**

FCPA Anti-Bribery Provisions

- **Foreign Official – Defined *very broadly***
 - Officers or employees of a foreign government
 - Officers or employees of state-owned or controlled enterprises (e.g., PdVSA, CNPC)
 - Individuals or entities performing government functions (e.g., government contractor performing Customs work)
 - Members of a royal family or military
 - Foreign political parties, their officials, and candidates for foreign political office
 - Officers and employees of public international organizations (e.g., Interpol, IMF, UN)

FCPA Anti-Bribery Provisions

- **Corruptly:**
 - Giver had intent/desire to *improperly* influence the foreign official's exercise of discretion or the performance of his official functions
 - No requirement that the act (e.g., the bribe) succeed in its purpose
- **Obtain or Retain Business:**
 - Broadly interpreted requirement
 - Includes all payments intended to win or retain business
 - Also encompasses all payments intended to gain a *business advantage*, such as
 - Payments to gain favorable tax treatment
 - Payments to circumvent a licensing or permit requirement
 - Payments to prevent competitors from entering a market

FCPA Anti-Bribery – Gifts & Entertainment

- **Reasonable and bona fide expenditures do not violate the FCPA because there is no corrupt intent. Those expenditures can include:**
 - **“travel and lodging expenses, incurred by or on behalf of a foreign official, directly related to:**
 - **the promotion, demonstration, or explanation of products or services; or**
 - **the execution or performance of a contract with a foreign government or agency”**
 - **Gifts, so long as the expenditures are reasonable and have a legitimate purpose (e.g., customary in culture; related to demonstration of product)**
- **Such expenditures still must be legal in the relevant country, customary to the relevant country, made transparently, and accurately reflected in the company’s books and records**

FCPA Books & Records / Internal Controls

- **Per the SEC, the objectives of these provisions “are that assets be safeguarded from unauthorized use, that corporate transactions conform to managerial authorizations and that records are accurate.”**
- **U.S. public companies must:**
 - **Keep books in reasonable detail, to “accurately and fairly reflect the transactions and dispositions of the assets of the [company].” Securities Exchange Act of 1934, Section 13(b)(2)(A)**
 - **Not “knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account.” Securities Exchange Act of 1934, Section 13(b)(5)**
 - **Devise and maintain a system of internal accounting controls to provide reasonable assurances that the company has accurate books and records and GAAP-compliant financial statements. Securities Exchange Act of 1934, Section 13(b)(2)(B)**
- ***All transactions must be accurately recorded. There is no materiality requirement.***
- **Different requirements for majority and minority-owned subsidiaries.**

FCPA Penalties








- **Criminal Penalties (Department of Justice)**
 - Each violation of the anti-bribery provision can result in a maximum fine of \$2 million for a company and \$100,000 + 5 years imprisonment for individuals.
 - Each violation of accounting provisions can result in maximum fine of \$25 million for a company and \$5 million + 20 years imprisonment for individuals.
 - In certain circumstances, the Alternative Fines Act allows courts to impose higher fines, up to twice the benefit obtained by making the corrupt payment, but only in cases where jury criminally convicts the defendant or guilt is admitted in a plea.
- **Civil Penalties (Securities & Exchange Commission)**
 - Injunctive relief, cease-and-desist orders, penalties, and disgorgement.
 - No scienter requirement for public company liability.

FCPA Collateral Consequences

- **Criminal and civil fines / imposition of an independent monitor**
- **Parallel law enforcement and regulatory actions (e.g., OFAC, IRS)**
- **Criminal actions against executives and employees**
- **Civil litigation (shareholder class action suits; competitor suits challenging corruptly awarded contracts)**
- **Reputational damage**
- **Disclosure of possible violation and enforcement action in public filings**
- **Decline in stock price**
- **Legal fees**

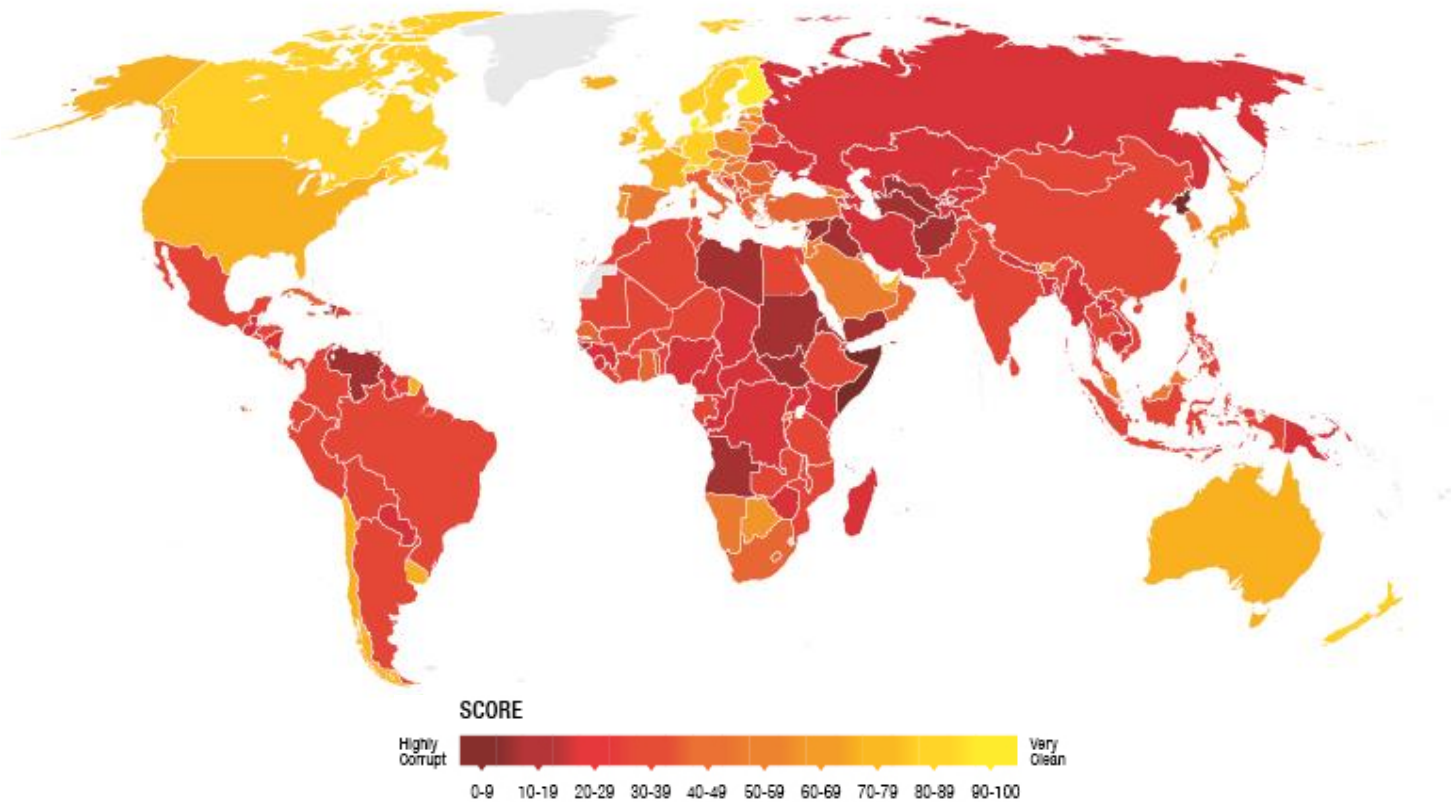
Other Anti-Corruption Laws

- **UK Bribery Act (2010)** 
 - Criminalizes bribery by UK firms, whether committed directly or indirectly, in the UK or overseas
 - Creates strict liability offense for a company's failure to prevent bribery
 - Broad jurisdictional reach covers non-UK companies that carry on any part of their business in the UK
 - Criminalizes commercial bribery, as well as government corruption (unlike FCPA)
 - No exception for facilitation payments (unlike FCPA)
- **Brazil – Clean Company Act (2013)** 
 - Strict liability (civil and administrative) on Brazilian and international companies for domestic and foreign bribery
- **Canada – Corruption of Foreign Public Officials Act (1999)** 
 - Criminalizes bribery of foreign public officials when the offense is committed in whole or in part in Canadian territory
 - Recently has been more actively enforced
- **China – Various Anti-Corruption Laws** 
 - Increased enforcement actions
- **OECD Convention on Combating Bribery of Foreign Public Officials (1997)** 
 - 39 Signatories, including Canada, Switzerland, Japan, Turkey
 - All signatories have enacted domestic laws similar to the FCPA

Industry Risks

Country Risk

- Shipping companies operate across the globe, including in many jurisdictions identified as high risk for corruption.



Source: Transparency International Corruption Perceptions Index 2015

Business Risk

- **Direct Interactions with Government Officials**

- **Shipping companies frequently interact with foreign government officials, including:**

- **Customs officials**
- **Port authorities**
- **Marine surveyors (vessel inspection)**
- **Import / export licensing officials**
- **Product safety certification and standards officials**
- **State-owned companies also may provide other services, such as bunkering and piloting.**

- **These interactions carry corruption risk because they are frequent and involve repeated payments (e.g., customs duties, port charges).**

- **Payments to customs officials and others involved in the import process have been the frequent subject of FCPA enforcement actions.**

- **The OECD estimates that customs officials are among the top recipients of bribe payments.**
- **Among all industries, the transportation and storage sector accounts for the second-most bribery cases (15% of all cases).**




Business Risk

- **Third Parties**



- **Third party business partners also may interact with government officials, exposing shippers and their customers to potential liability.**
 - **Port agents**
 - **Customs brokers**
 - **Local transportation sub-contractors**
- **Third parties are responsible for a range of activities involving contact with government officials, including:**
 - **Payment of customs duties and managing customs disputes**
 - **Document processing**
 - **Permitting**
 - **Inspections and certifications**
 - **Berthing**
 - **Storage**
 - **In-country road shipments**
- **According to the OECD, 3 out of 4 bribery cases involve third party intermediaries.**

Business Risk

- **Key Red Flags** 
 - **When your company interacts with government officials:**
 - Dealing with agencies that have a history of corruption
 - Frequent or unusual cash disbursements (e.g., round numbers)
 - Vague or incomplete payment documentation (T&E and other expenses)
 - Excessive meals, gifts or entertainment
 - Employees unfamiliar with anti-bribery policies
 - **When third parties act on your behalf:**
 - Invoices with vaguely described services
 - Lack of back-up documentation for services provided
 - Excessive commissions or fees
 - Unexplained profit margins in high-risk markets
 - Cash payments and/or payments in round number amounts
 - Payments to offshore bank accounts
 - Relationship to government official, or third party recommended by government official
 - Refusal to cooperate with due diligence or agree to standard contract terms

History of Enforcement

- **Panalpina – Oil & Gas / Freight Forwarding Industry Sweep**
 - Freight forwarding company Panalpina was central to allegations surrounding DOJ and SEC settlements with multiple oil services and other energy companies in 2010.
 - Panalpina provided customers with shipping, freight forwarding, and logistics services, including customs and importation services and ground shipment services.
 - Panalpina World Transport (Holding) Ltd. (“PWT”) and its U.S.-based subsidiary admitted to paying, on behalf of customers, at least \$27 million in bribes to foreign officials in at least 7 countries.
 - Payments were made to assist customers in obtaining preferential customs, duties, and import treatment.
 - Panalpina invoices inaccurately referred to payments as “local processing,” “special intervention,” “special handling,” and other ostensibly legitimate fees.
 - Panalpina entities, including its global holding company based in Switzerland, were charged with violating, conspiring to violate, and aiding and abetting violations of the FCPA as agents of U.S. issuers and other companies.
 - PWT and its U.S.-based subsidiary agreed to pay a criminal fine of \$70.56 million and \$11.33 million in disgorgement to settle criminal and civil charges.

History of Enforcement

- **Con-way – Cargo Space and Customs Payments**
 - **Philippines-based air freight company allegedly made at least \$173,000 in improper payments intended to:**
 - **Induce officials at majority state-owned airlines to improperly reserve cargo space for the company; and**
 - **Falsify weight and other shipping details, resulting in lower shipping charges.**
 - **The company also allegedly paid at least \$244,000 to Philippines customs officials in order to:**
 - **Improperly allow shipments to be stored for longer than allowed under customs regulations; and**
 - **Obtain lax enforcement of customs regulations.**
 - **In 2008, the company's former majority owner, U.S.-based Con-way Inc., agreed to pay a \$300,000 civil penalty to resolve the SEC's charges against it.**

Recent Developments

Recent Developments

- **International Cooperation**
 - Non-U.S. regulators have become more experienced and active in pursuing corruption cases.
 - Internationally, regulators increasingly are sharing information across jurisdictions and conducting parallel investigations.
 - A number of settlements announced in 2016 illustrate the growing international cooperation.
 - **VimpelCom**: Over a dozen jurisdictions investigated allegations of at least \$114 million in bribe payments to a government official in Uzbekistan on behalf the telecommunications company; resulted in a \$795 million resolution split between regulators in the U.S. and the Netherlands.
 - **Odebrecht / Braskem**: To settle bribery allegations in Brazil and other countries, the firms agreed to pay at least \$3.6 billion in the U.S., Brazil and Switzerland.
 - **Embraer**: Authorities in the U.S., Brazil and other countries investigated alleged bribes paid by the aircraft manufacturer; settled for \$205 million in the U.S. and \$18.5 million in Brazil.

Recent Developments

- **Self-Disclosure and Cooperation**
 - **U.S. and foreign regulators have stressed the benefits of voluntarily reporting foreign bribery issues and cooperating with law enforcement:**
 - **Regulators may decide to take no action / issue declination letter;**
 - **Companies are more likely to receive Non-Prosecution or Deferred Prosecution Agreements (NPAs and DPAs);**
 - **If penalties are imposed, “cooperation credit” may result in reduced settlement amounts.**
- **Focus on Individuals**
 - **The DOJ has made clear that “providing information about individual wrongdoers is a threshold requirement for any corporate cooperation – without it, no cooperation credit is available.” [2015 Yates Memo]**
 - **Och-Ziff: In 2016, the CEO of Och-Ziff Capital Management Group agreed to pay \$2.2 million to settle SEC charges that he knew of substantial corruption risks and red flags but nevertheless permitted allegedly illicit transactions to proceed in certain African countries.**

Final Thoughts

- **Lessons from FCPA Enforcement Actions**
 - **Local sub-contractors must be carefully selected, trained and monitored.**
 - **Diligence and controls are necessary when retaining and paying agents and consultants, and to ensure that those payments are properly recorded.**
 - **Executives / Employees can be liable for failure to act; not only for authorization of payments.**
 - **Heightened controls are necessary in high-risk jurisdictions.**
 - **Enhanced procedures and controls should be used when doing business with state-owned entities.**