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Shipping Companies Deliver FCPA Compliance

By Michael E. Burke

It's no secret that shipping companies have significant risk exposure related to violations of the Foreign Corrupt Practices Act (FCPA), the U.S. statute that prohibits bribery of foreign government officials. The U.S. Department of Justice recently concluded an enhanced FCPA review of companies in the shipping industry—including Ann Arbor, Mich.-based Con-way Inc. and Swiss carrier Panalpina World Transport—and FCPA risk still impacts the industry.

Two trends heighten exposure to FCPA infractions: one is the increase and evolution of services offered to shipping customers; and the second is an expansion of the jurisdictions in which such services are offered. How can shipping companies mitigate their FCPA risk and remain competitive?

The most important safeguard shipping companies can take to prevent FCPA violations is to establish and further a culture of compliance. This culture has to come from the top of the shipping company. That means the senior executive team must make clear to all employees and agents that the company will strictly observe the FCPA's prohibitions, and that the company shall not engage in bribery.

A shipping company should have a written FCPA compliance policy and procedure, and make it required reading for relevant employees and agents. A written policy provides a tangible measure of a company's anti-bribery culture, and should be translated into the local language or languages of each jurisdiction in which the company operates.

As part of the compliance program's upkeep, the shipping company should provide annual training on the FCPA and the company's obligations, clearly documenting and communicating to employees the attendance and certification requirements. Further, a shipping company should conduct realistic risk assessments that consider a jurisdiction's bribery reputation, the company's operations in that jurisdiction, and the nature and frequency of interactions with defined foreign officials in that jurisdiction.

The FCPA focuses on offers and payments to "foreign officials," a term that U.S. regulators define broadly and flexibly. Government administrators and ministers such as those within a country's customs agency fit squarely within the FCPA's definition of foreign official. Identifying other foreign officials within the scope of the FCPA, however, can be a challenge.

The Justice Department looks at the degree to which an entity is controlled by a foreign government, not whether the entity provides a traditional government service. In the Justice Department's view, for example, professionals at state-owned facilities are foreign officials. The Justice Department also takes the view that the term "foreign official" applies to any employee of a state-owned facility, regardless of seniority or rank.

A shipping company's operations involving affiliates, agents and other third parties can expand its FCPA exposure. Under the statute, a company may be held liable for the actions of others, even without actual knowledge of the violation. The relevant standard includes actions taken with actual knowledge of the intended results, as well as actions a principal takes with a conscious disregard or "willful blindness" to circumstances that would reasonably alert someone to violations of the FCPA by the agent.

For example, payments made to foreign officials through third parties violate the FCPA in the same manner as direct payments by a company employee. Therefore, a shipping company must monitor the actions of every affiliate, agent and third party providing services to or for the company. Comprehensive due diligence in the contracting process, insistence upon compliance with the FCPA's requirements and the shipping company's FCPA compliance program, and ongoing training and certification are crucial to mitigating this kind of FCPA risk.

Shipping companies also should develop and rigorously adhere to standardized documentation and contractual terms for foreign agents, representatives, consultants, distributors, and clinical research organizations. Those terms should include affirmations that the third parties agree to comply with the FCPA's obligations.

Prior to engaging any third party, and on an ongoing basis thereafter, the company should conduct thorough due diligence of each potential agent or representative. Effective diligence should include in-person interviews and background checks, as well as frequent audits of the third party's expenditures—particularly for gifts and entertainment expenses that involve foreign officials or seem to be larger than expected.

Finally, shipping companies should create confidential reporting mechanisms that employees and other individuals can safely use to report FCPA issues. Managers must investigate thoroughly, and in a timely manner, any FCPA-related issues that come to their attention, especially when those issues are referred by company employees. Preventing FCPA exposure is the key to a successful compliance program, and the preceding tips should help shipping companies minimize their FCPA risk exposure.

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