Agent Liability under the FCPA: Freight Forwarders and Express Delivery Services

I. The Problem

The Foreign Corrupt Practices Act (FCPA) world is littered with cases involving freight forwarders, brokers and agents in the shipping and express delivery arena. Both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have aggressively pursued third party business relationships where bribery and corruption have been found. This is particularly true where companies are required to deliver goods into a foreign country through the assistance of a freight forwarder or express delivery service. There are several major risk points. These include:

- Location, location, location;
- Customs and other governmental agencies;
- Aviation and postal regulators;
- Business promotion expenditures for governmental officials;
- Agents and sub-agents; and
- Government accounts are a major part of express shipper customers so must analyze this as well.

Under the FCPA a company (or individual) can put itself at risk under three different knowledge standards:

- Knowing - The situation where a company or person authorizes an agent to make an improper payment or making a payment to an agent knowing some or all of the payment will go to a foreign governmental official.
- Knowledge of a high probability - Where the facts and circumstances surrounding a party, transaction or geographic location should put the reasonable person on notice to make further inquiries.
- Conscious indifference - As was the basis of the guilty verdict finding against Frederick Bourke.

The Panalpina enforcement action involved both the actions of the agent (Panalpina) and five of its energy customers. As noted by the FCPA Blog in "*Making history today for the most companies to simultaneously settle FCPA-related violations*", this enforcement action levied fines and penalties of approximately $236.5 million. Additionally, all settling defendants agreed to Deferred Prosecution Agreements (DPA's), with the exception of one which was given a Non-Prosecution Agreement (NPA).

The freight forwarded itself, Panalpina, paid over $80 million in fines and penalties. Panalpina admitted to three main illegal activities, these were: (1) customs clearance for its customers despite non-compliance or circumvention of customs formalities; (2) illegally obtaining a government contract for itself; and (3) obtaining unwarranted favorable tax treatment for its customers.

II. The Response

How can a company respond to protect itself or at least reduce its potential FCPA risk with regarding to a logistics company, freight forwarder or express delivery company? Obviously having a thorough risk assessment program and due diligence program are critical. After determining risk, move to perform due diligence based upon this risk. However, there are some general questions that you should ask, both internally and to your prospective vendor.

1. **Relationship.** What is your relationship with the third party? Is it purely arms-length? Is it sales agent making a solicitation? Is it a consortium, which may be a lower risk? Is it partnership of JV, if so what is your control? Is it subcontractor or supplier? All of these have different risk levels.
2. **Business Formation.** What is the character of the third party? Is it a US based company, is it subject to a robust national compliance law? Is it private/public? Who else do they represent? Length of time in business? Who are the principals and are they governmental officials?
3. **Compensation.** How do you compensate the third party? Is it bonus-based paid at the conclusion of a transaction? Will the representative have an expense account? If so how is it given to them, for instance will you pay on a lump sum v. verified expenditures? How will they be paid, local currency into a bank account, cash or check? What is the level of compensation? Are you over-compensating based upon the market; you are taking a chance that the third party could share it with others.
4. **Location**. What is the geographic location and is it one of the usual suspects on the TI Corruptions Index?
5. **Industry**. What is the industry or sector that you are engaged? This can be significant because certain industries/sectors such as infrastructure, medical industry, defense contractors are facing increased DOJ/SEC scrutiny.
6. **Process.** What is the process by which the business opportunity arose? What is the bidding process? Who invited you? Is it an open bid? Did you respond to an RFP? Did you compromise you own standards to bid? Is there a mandated partner assigned by the foreign government?

After you ask some of these questions, investigate your risks and evaluate them; you should incorporate these findings into a contract with appropriate FPCA compliance terms and conditions. This contract should announce to your to third party freight forwarder/express supplier of your expectations regarding their compliance program. Your contract should also allow for management of the compliance relationship. Your contract should require training and certification by verified provider or by your company. A new *best practice* has been to require a company funded Business Monitor whose job is to ensure compliance with your company's compliance program.

RISK MANAGEMENT: The Min Model

James Min, Vice President, Int'l Trade Affairs & Compliance at DHL Express (USA) Inc., developed a risk matrix for the freight forwarders/express delivery industry. In this Min analyzes risks by multiplying factors noted herein and thus scoring. This model shows that location should not be the sole criteria for risk. The factors in the Min Model are the performance of your company's customers clearance brokers and how far that performance varies from the norm your company normally receives. In the below chart, +1.00 equals average clearance time. >1.0 equals faster than average and <1 means slower than average.

The Min Model

Country	TI CPI	Customs Clearance Performance	Variance from Average Performance	Risk Score	Risk Rank
A	55	.93	1.21	61.9	1
B	20	.76	0.89	13.5	3
C	54	.29	1.00	15.6	2
D	88	.12	0.7.	7.39	4

Min presented his model at the ACI FCPA Bootcamp, recently held in Houston, TX. He graciously allowed us to present this risk analysis model. The key in this approach is how often the Customs Broker/Express Delivery Service varies above the average for customs clearance times. If the percentage of customs clearance performance is so great that your vendors variance is above 100% most of the time, this could be a Red Flag that bribery or corruption is involved. This should lead to further investigation, due diligence, or asking of questions of your vendor.

Almost every business transaction engaged in by a freight forwarder, express delivery service or customs broker, outside the US involves a foreign governmental official. Every time your company sends raw materials into, or brings them out of, a country there is an interaction with a foreign governmental official in the form of a Customs Official. Every customs transaction involves a payment to a foreign government and every transaction involves some form of a foreign governmental regulatory process. While the individual payment per transaction can be small, the amount of total transactions can be quite high, if a large volume of goods are being imported into a foreign country.

Conversely interacting with international tax authorities can present problems similar to those with customs officials, but the stakes can often be much higher since tax transactions may be less in frequency but higher in financial risk. These types of risks include the valuation of raw materials for VAT purposes before such materials are incorporated into a final product, or the lack of segregation between goods to be sold on the foreign country's domestic market as opposed to those which may be shipped through a free trade zone for sale outside that country's domestic market.

If you utilize the services of a third party for any of the transactions listed above, that company's actions will go a long way in determining your company's FCPA liability. You must have a thoughtful process and document that process.