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IDENTIFYING AND AVOIDING COMPLIANCE RISK IN INTERNATIONAL AVIATION OPERATIONS

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Introduction: Greased Palms Can Create Big Headaches

The goal of a business flight department, charter operator or other fractional program manager is the ability to move employees and customers around the world swiftly, safely and efficiently. However, in certain areas of the world, pilots and agents can face compliance challenges. For example, a local airport official may expect or demand a cash payment to expedite clearances. While making such “grease” payments may appear to be the most expeditious way to complete the mission, such payments may violate anti-bribery laws and your own company’s code of conduct.

This resource provides some general guidance on such compliance risks and possible ways to mitigate them. It is not intended to be legal advice, and should you encounter such risks, we recommend you reach out to your company’s general counsel or compliance officer.

Anti-Corruption Laws

Corruption is a global problem, and virtually every country in the world prohibits bribing of government officials, as well as bribery in commercial transactions. However, cultural norms and practices differ in many parts of the world, so bribery persists. For U.S. companies, the principal anti-corruption law is the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA bribery provisions prohibit payments to a foreign official for the purpose of securing an improper advantage or obtaining or retaining business. Companies traded publically on U.S. stock markets are also subject to certain “accounting provisions,” requiring companies to keep accurate books and records (i.e., not have off-book accounts), and to have adequate accounting controls to prevent bribery.

WHAT CONSTITUTES BRIBERY UNDER THE FCPA?

A bribe is any direct or indirect offer of anything of value by persons covered by the FCPA to a foreign official for the purposes of influencing that foreign official to obtain or retain business or secure an unfair advantage. To unpack this:

- **Persons covered** by the FCPA include U.S. citizens and companies wherever located, and foreign persons where there is a U.S. nexus. For example, a foreign company that is publically traded on U.S. stock markets, or a foreign subsidiary of a U.S. company has a U.S. nexus. Similarly, a U.S. nexus is created when some act related to the bribery occurs in the U.S. (such as a wire transfer) and the FCPA may apply.
- **Foreign officials** include both high- and low-ranking foreign government officials, as well as officers, directors and employees of foreign government-owned or controlled entities. Hence, this covers not only customs officials, but also may cover employees of airport authorities or foreign airlines (if they are government-owned or controlled).
- Payment need not be “cash” but can be **anything of value**, such as goods or services. For example, some entities have paid large penalties for creating internship programs targeting children of foreign officials in order to improperly influence those officials. Even a promise to pay is considered a violation.
- Using an **agent or third party** to make payments is typically not a defense, as a company or individual could violate the FCPA without expressly authorizing an agent to pay bribes, if a company or individual knew its agent was likely paying bribes. In fact, liability from agents and other third parties make up a disproportionate number of a major FCPA cases. **Simply stated, a company cannot outsource their corruption to agents or third parties.**

CRIMINAL STATUTES/PENALTIES

Violation of the FCPA is a criminal rather than civil offense, and companies have paid hundreds of millions of dollars to settle cases with the U.S. Department of Justice and other agencies. Further, even in relatively small cases, the cost of responding to a federal investigation and conducting internal investigations can be expensive to the company and career-ending for those involved. (The U.S. Government may also prosecute the individual employees involved).

GREASE PAYMENTS

A “grease payment” is a payment made to a foreign government employee to expedite or facilitate non-discretionary acts. One example would be a modest payment to a customs official to speed up the processing of properly filed entry papers. Pilots and planners may be asked to make such payments to expedite processing of landing permits, import and export documentation, etc.

While the FCPA contains a narrow exception for such grease payments, most companies’ codes of ethics forbid such grease payments. Moreover, there may be difficulty proving intent in the foregoing situation (i.e., did you intend to expedite the processing, or did you intend to bribe the official because your documentation was improperly completed or a visa was expired?). Therefore, you should properly document all situations where grease payments are made. Further, in virtually every country it is illegal to tender a bribe to an official and illegal for the official to accept such bribe. Improperly recording/expensing a grease payment as a legitimate business expense may also cause the company to breach accounting provisions of the FCPA or tax laws. In addition, no exemption would apply where the approval by the foreign official is discretionary. For example, paying an airport official to waive mandatory landing fees would be considered a bribe.

EXTORTION/DURESS

A payment made on threat of physical harm or safety would not be a violation of the FCPA (as there would be no corrupt intent by the person under duress). However, economic duress would not be excused. For example, a threat by an official that he/she might detain the aircraft unless a bribe is paid would be economic duress. In such circumstances, you should notify your compliance/legal department and keep accurate records.

GIFTS/ENTERTAINMENT/TRAVEL

Most companies have policies concerning the giving of gifts, entertainment and travel to third parties. For example, policies may require advance approval for gifts over a nominal value. This is because there is an ill-defined line between legitimate and reasonable marketing efforts and what might constitute a bribe under the FCPA or anti-corruption laws of another country.

- **Reasonable business expenses** may include: taking a foreign official out to dinner after business meetings; giving a foreign official a hat, bag or pen with the company’s logo as a courtesy; or hosting a happy hour for current/prospective customers that may include foreign government officials.
- **Unreasonable business expenses** would include: giving cash to a foreign official, or agreeing to provide a free flight to a foreign government official and his family for vacation purposes.

Note: Government officials may be prohibited from accepting gifts or meals from companies, even of nominal value.

WARNING SIGNS OF CORRUPTION

The following are some potential red flags of possible corruption that should be vetted through your compliance/legal office:

- An invoice for services contains “miscellaneous” or other unexplainable charges
- Requests for payments in cash
- Major increases in fees with no forewarning
- A third-party agent asks for excessively high commission or wants to keep the relationship a “secret”
- A request to wire funds to a personal account
- The agent/broker has no experience in the industry or no obvious means of getting the job done
- Statements that only this person can make the deal happen because of his/her connections with government officials

Company Customer (KYC) Processes

Most U.S. companies operating internationally have Know Your Customer (KYC) procedures to vet potential counterparties to transactions. While these KYC processes may not apply to local flight-related fees, they almost certainly apply when engaging an agent, buying/selling aircraft or engaging in repairs of aircraft abroad. Basically, such programs seek to ensure that the company does not do business with prohibited persons or entities that present an unacceptable risk to the company. For example:

- U.S. persons generally cannot engage in transactions with persons from sanctioned countries (like Iran, Syria or North Korea) or persons designated by the U.S. Government as Specially Designated Nationals (“SDN”) for their involvement in drug trafficking or terrorism.
- Based on KYC, a company may determine that doing business with certain companies presents too high a risk because of a history of corruption or money laundering.
- KYC procedures seek to identify the beneficial owners of counterparties who may be fronts for persons from sanctioned countries or SDNs.
- The sale or transfer of U.S. civil aircraft, engines or parts is prohibited to certain sanctioned countries and entities, unless licensed.

Company Code of Conduct

Most U.S. companies have adopted codes of conduct that require employees to conduct transactions in compliance with all laws, including anti-corruption laws. However, these codes typically cover many areas of compliance, including:

- Placing limits on gifts and entertainment that an employee can accept from third parties. For example, accepting a meal may be fine, but accepting an expensive watch from a vendor may require prior approval.
- Avoiding potential conflicts of interest (i.e., where your individual interest may differ from the best interests of the company), such as choosing a particular vendor because there is some personal advantage to you, rather than solely based on the vendor’s merits.
- Requiring that all funds expended be properly accounted for, with no unrecorded or misleading recording of expenditures.
- Protecting company confidential business information.
- Avoiding anti-competitive behavior (such as colluding on pricing with a competitor).

How to Reduce Risk When Operating Abroad?

There are a number of things you can do to reduce risk while operating abroad.

- When planning international trips, use known/vetted vendors and agents to arrange logistics.
- If conducting significant transactions abroad (such as buying or selling an aircraft, or engaging in major repairs), follow KYC procedures to ensure that you are not engaging in a transaction with a prohibited person, or that the goods may be diverted to an unlawful destination. For example, you would want to take steps to ensure that you are not selling an aircraft to a broker who intends to “flip” it to a sanctioned person or destination.
- When using a broker or agent, be on the lookout for expense items that are not explainable. Ask for an estimate, back up invoices and question charges that raise red flags.
- If you get a suspicious request, or have concerns as to whether a gift is legal or not, use common sense and best judgment. If you have company procedures, follow those procedures and reach out to your compliance or legal team for advice.



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ABOUT NBAA

Founded in 1947 and based in Washington, DC, the National Business Aviation Association (NBAA) is the leading organization for companies that rely on general aviation aircraft to help make their businesses more efficient, productive and successful. Contact NBAA at 800-FYI-NBAA or info@nbaa.org. Not a member? Join today by visiting www.nbaa.org/join.