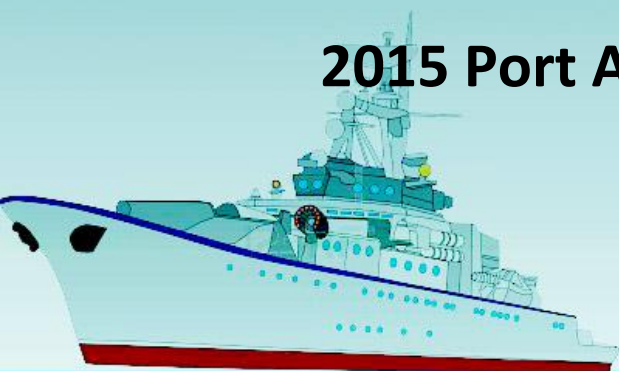


# ***What Maritime Lawyers Need to Know about the Foreign Corrupt Practices Act (FCPA) and other anti-corruption laws?***

**Presented by Evelyn M. Suarez & Jim Barratt**  
**2015 Port Administration & Legal Issues Seminar**



**April 9, 2015**





## ***What are RealBiz Shorts?***

RealBiz Shorts, developed by The Second City Works and distributed by NYSE Governance Services, is a subscription of short, entertaining videos that help an organization improve training, communication and its compliance culture. Second City Works is the B2B arm of the world famous, improv comedy institution. The Ethics & Compliance portfolio includes more than 85 videos with more coming each year.

### **The Value of RealBiz Shorts**

**Attention** – Marketing for your training AND compliance program

**Retention** – Shorter, more frequent and more positive communications that help keep important topics top of mind throughout the year

**Engagement** – Blending entertainment with education improves learning and opens the door to more open and informal dialogue between the compliance office and the employee base.

**How can I get RealBiz Shorts?** To learn more, please contact:

**Ronnie Feldman:** [rfeldman@secondcity.com](mailto:rfeldman@secondcity.com) 312.475.3568

**Susan Cortese:** [scortese@nyse.com](mailto:scortese@nyse.com) 434.981.5712

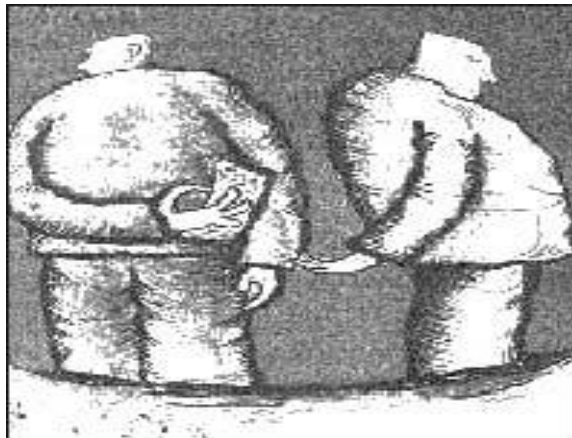


## *So what is the FCPA?*

- Law intended to deter bribery of foreign officials to obtain an improper business advantage
- Two Parts:
  - Anti-Bribery provisions (enforced by DOJ)
  - Accounting provisions (impose books & records and internal accounting controls requirements) applicable to publicly traded companies (enforced by SEC)

## ***Anti-bribery Provisions***

- Apply to:
  - “Issuers” and their officers, directors, employees, agents, and shareholders
  - **Domestic concerns**
    - **Any US citizen, resident or company**
  - Other persons who take any act in furtherance of a corrupt payment while within the territory of the US



## ***Anti-bribery Elements***

Anti-bribery violation— five elements:

1. An offer, authorization, promise to pay, or payment of money or **anything of value**, directly or indirectly;
2. to any **foreign official**, politician or candidate for a political office or officials of international organizations such as the UN;
3. with **corrupt intent**;
4. for the purpose of **influencing** an official act or decision, **inducing** a violation of lawful duty, or **securing** any improper advantage;
5. in order to assist the company in **obtaining or retaining business** or in directing business to any person or to secure an improper advantage.

## ***Severe Ramifications for Violations***

- Corporate penalties of \$2 million per act, plus additional Federal Sentencing Guideline factors
- Potential individual incarceration plus fines
- Disgorgement of corporate profits
- Appointment of Monitor
- Loss of export privileges
- Suspension from procurement  
(i.e., defense contracts and subcontracts)
- Intangible Losses:
  - Lost time associated with investigations
  - Loss of shareholder value
  - Reputational damage



## ***Enforcement Trends***

- Multi-jurisdictional: cooperation and partnering of countries
- Pursuit of Individuals: charge those “in control”
- Intent and knowledge: no tolerance of “willful blindness”
- Increased penalties:
  - Siemens: \$800 m
  - Alstom: \$772 m
  - Alcoa: \$384 m
  - Weatherford: \$153 m (with export control and sanction program violations penalties totaled \$252 m)
- Voluntary disclosures: involves internal investigations
- Industry sweeps
- Tag on investigations, e.g., antitrust
- Monitors



# Department of Justice

**FOR IMMEDIATE RELEASE:**

**CRM**

MONDAY, APRIL 19, 2010

Web Address: [WWW.DOJ.GOV](http://WWW.DOJ.GOV)

(202) 514-2007

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**VIRGINIA RESIDENT SENTENCED TO 87 MONTHS IN PRISON**  
**FOR BRIBING FOREIGN GOVERNMENT OFFICIALS**

***Longest Prison Sentence Ever Imposed Related to Foreign Corrupt Practices Act (FCPA) Violations***

WASHINGTON – Charles Paul Edward Jumet of Fluvanna County, Va., was sentenced today to 87 months in prison for paying bribes to former Panamanian government officials to secure maritime contracts, in violation of the Foreign Corrupt Practices Act (FCPA), and for making a false statement to federal agents. In addition to the prison term, U.S. District Court Judge Henry E. Hudson for the Eastern District of Virginia ordered Jumet to pay a \$15,000 fine and to serve three years of supervised release following the prison term. The 87-month sentence is the longest prison term imposed against an individual for violating the FCPA.



## *Guidance*

[http://www.justice.gov/  
criminal/fraud/fcpa/  
guidance/guide.pdf](http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf)

## ***UK Bribery Act***

- Comprehensive framework covering domestic and foreign bribery (July 1, 2011)
- Implications for all companies with “close connections” to the UK
- Created a corporate offense of failure to *prevent* bribery
- “Adequate procedures” affirmative defense
- Notes and Distinctions from FCPA:
  - Jurisdictional reach
  - Prohibition against commercial bribery
  - No Facilitation Payments exception
  - Public procurement debarment
- Might be subject to FCPA & UK Bribery Act



## ***It's All About Risk***

- **Enterprise risk:**
  - Certain industries traditionally at risk, especially government procurement and regulated industries
  - Recent cases against non-traditional industries such as logistics providers and retail industry
  - Lesson: all industries at risk
- **Country: Emerging Markets**
  - Transparency International's Corruption Perception Index (limitations of this tool)
- **Third parties such as agents, distributors, even lawyers!**



## ***Risk Assessment done by Port of Houston***

- Assessment of Risk done at least biennially
- Two major risk areas identified:
  - (1) The choices made by shippers and carriers to use Port Authority facilities; and
  - (2) The purchase of cranes from foreign manufacturers
- Some reasons why FCPA should be of concern
  - Foreign shippers, carriers and crane manufacturers are, in some cases, owned partially or wholly by foreign governments, and thus transactions with these entities should be monitored to ensure FCPA compliance
  - Port authorities engage in business development trips and receptions
  - Port authorities' independent contractor representatives in foreign countries promote and develop business for the Port Authority's facilities and terminals



## Key Business Risk Areas

| Tendering Process                                                                                                   | Vendors                                                                                                                                                                                              | Gift, Entertainment & Travel                                                                                                                                      | M&A/Joint Ventures                                                                                                                      |
|---------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| <b>Pre-qualification RFPs</b><br><b>Bid evaluation</b><br><b>Local content</b><br><b>Royalties, revenue sharing</b> | <b>Local agents</b><br><b>Unauthorized use of bank accounts</b><br>- Marketing<br>- Customs<br>- Visa<br>- Logistics<br><b>Suppliers</b><br>- Goods and staffing<br><b>Legal and Tax consultants</b> | <b>G, E &amp; T — the obvious ones</b><br><b>Promotions Sponsorships</b><br><b>Donations</b><br><b>Political</b><br><b>Local community</b><br><b>Free samples</b> | <b>Vicarious liability</b> <b>Successor liability</b> <b>Local JV partners</b>                                                          |
| Tax/Customs                                                                                                         | Regulatory                                                                                                                                                                                           | Financial Controls                                                                                                                                                | Government support                                                                                                                      |
| <b>Customs clearance</b> <b>Customs assessment</b><br><b>Tax (Corp, payroll) assessment</b>                         | <b>Permits - customs related, chemicals, explosives etc.</b><br><b>Environmental</b><br><b>Employment/rights, visas</b><br><b>Financial &amp; exchange controls</b><br><b>Audits (Customs, tax)</b>  | <b>Cash</b><br><b>Payment</b><br><b>Vendor adoption</b> <b>Account coding</b>                                                                                     | <b>Government built</b><br><b>Government funding</b><br>- Sovereign funds<br>- loans<br><b>Government official sitting on the Board</b> |

## *Third Party Payments*

- Common red flags:
  - excessive commissions to third-party agents or consultants
  - unreasonably large discounts to third-party distributors
  - vaguely described services
  - third-party consultant in different line of business than for that engaged
  - familial relationship to foreign official
  - third party became part of the transaction at the request of a foreign official
  - third party is a shell company
  - third party asks for payments to offshore bank accounts.
- Little guidance on how to manage third-party risk.
- Substantial majority of recent enforcement actions have involved third-party intermediaries
- Can mitigate risk by ongoing monitoring, auditing and periodic diligence updates.

## *Facilitating Payments*

- FCPA exception for “facilitating or expediting payments”.
- They are payments to a foreign official in order to expedite or secure the performance of routine governmental actions ordinarily and commonly performed by a foreign official.
- “Grease” payment to ensure that a file clerk “files and stamps permit applications expeditiously” is okay.
- “A modest cash payment” to a high-ranking government official to make an environmental issue go away is not okay.
- No clear test.
- May violate local laws and contra to OECD recommendations and UK Bribery Act.
- Exception may not be viable any more.

## ***Gifts, Entertainment and Travel***

- Prohibits the corrupt offer, promise or payment of “anything of value” to a foreign official.
- No minimum threshold amounts
- Permits reasonable gifts, travel and entertainment when there is a bona fide business purpose

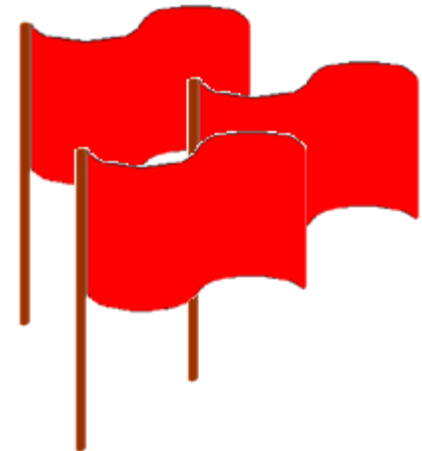
## *Three Important Investigations Involving Bribery of Customs Officials*

- **American Rice:** Established that bribery of Customs officials considered to be FCPA violation
- **Panalpina:** Customs brokers/ freight forwarders are agents
- **Ralph Lauren:** Compliance matters to DOJ and SEC



## *Red Flags*

- Excessive fees and/ or commissions for agents/ distributors
- Questionable or incomplete invoices and/ other documents
- Familial relations with foreign official or royal family
- Industry has a reputation for corruption
- Country or region has historical bribery problem
- Improperly executed authorizations and approvals
- Unusual cash disbursements, e.g., round figures
- Override of company procedure or policy



## ***Due Diligence***

- No requirement to perform due diligence under the FCPA
- However, DOJ takes the position that under the FCPA, US companies can be charged with violations based on knowledge or even willful blindness
- To prevent violations, perform effective due diligence
- Identify red flags and investigate potential violations

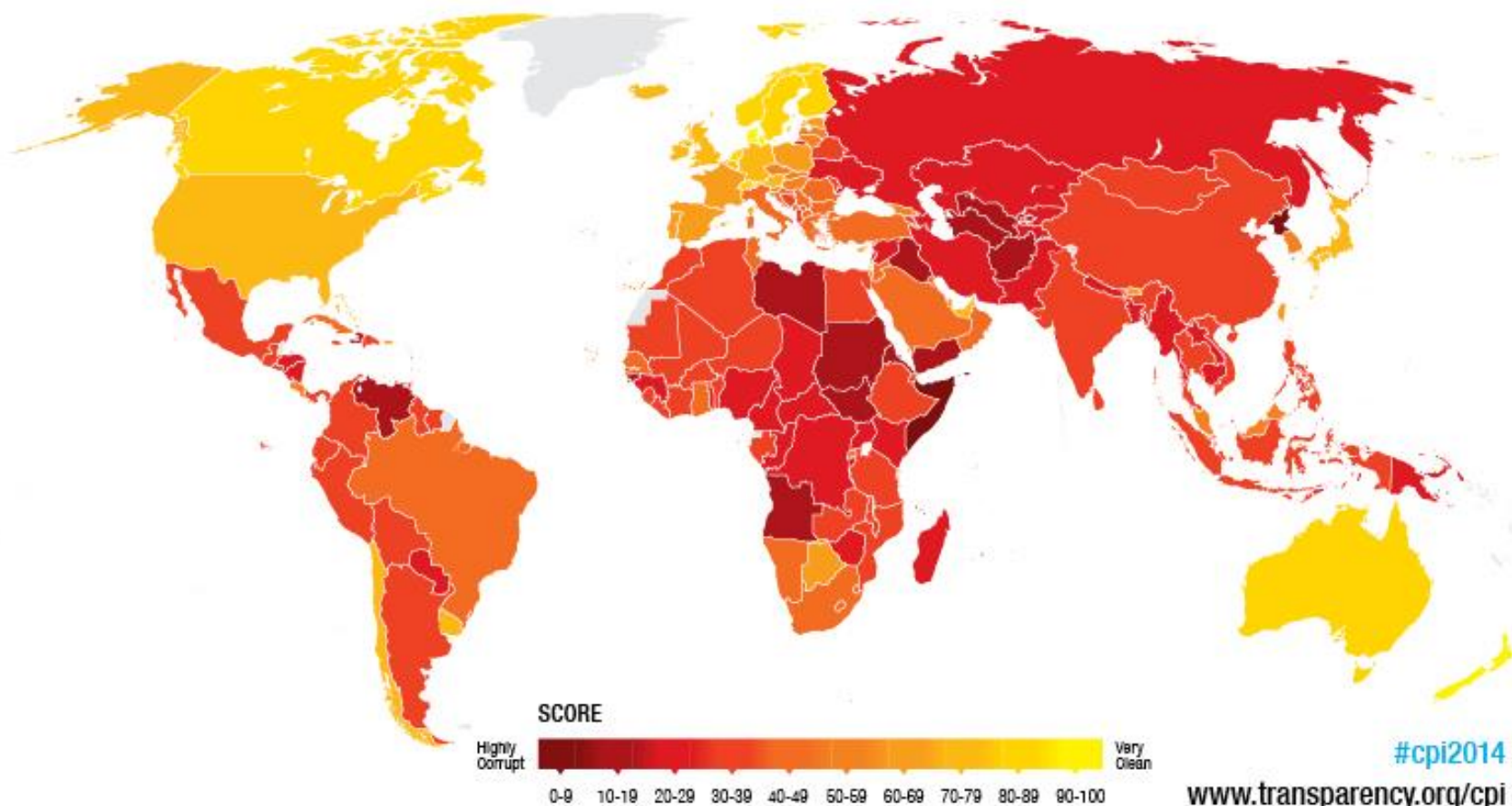


Goddard Cartoon ©PharmaVentures; all rights reserved



"We need to disguise these numbers.  
Take this down to accounts receivable."

## *Transparency International's Corruption Perception Index*



## *TRACE Maritime Initiatives*

- **DA-Desk** (<http://www.da-desk.com/>): TRACE Partnership with DA-Desk, the world's largest independent port cost management service provider, to assist agents and suppliers of vessel operating companies with anti-bribery compliance efforts. Enables port agents and suppliers registered with DA-Desk to differentiate themselves with *TRACEcertification*, a comprehensive due diligence review, analysis and approval process that provides them with a verified compliance report.
- **Rightship** ([www.rightship.com](http://www.rightship.com)): TRACE to launch a partnership with RightShip, an Australian entity owned by Rio Tinto, BHP Billiton and Cargill that offers a Ship Vetting Information System to add a compliance component to their vetting platform. This joint initiative will result in a compliance certification and rating system for individual ship owners (entities and individuals) that should decrease corruption at ports.



## ***Maritime Anti-Corruption Network (MACN)***

- MACN is a global business network working towards the vision of a maritime industry free of corruption that enables fair trade to the benefit of society at large
- Mission: To promote **good corporate practice** in the maritime industry for tackling bribes, facilitation payments and other forms of corruption by **developing and sharing best practice**, creating awareness of the **challenges and collaborating** with key stakeholders to develop sustainable solutions.
- More information about MACN:  
<http://www.maritime-acn.org> or [www.bsr.org/macn](http://www.bsr.org/macn)



# MACN Members 2015 – Over 50 Participating Organizations

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## ***Key Components of a Compliance Program***

1. Risk Assessment
2. Written Program Addressing Risks
3. “Tone at the Top” Communication
4. Training
5. Reporting and Investigative Mechanisms (Escalation Protocols)
6. Third Parties and Joint Venture Partners – Due Diligence, Certification with audit rights and Training
7. Dedicated Resources
8. Disciplinary Actions
9. Program Auditing/ Monitoring
10. Periodic Re-assessment

## *Compliance Testing*



An effective compliance and ethics program requires a company to establish **monitoring, auditing, and reporting systems** to ensure compliance with its policies and procedures and to help identify and remediate any issues as they arise.

## *Why prosecutors decline to prosecute?*

- Best in Class Compliance
- Morgan Stanley example:
  - Strong compliance program (comprehensive and effective)
  - Immediate internal investigation
  - Voluntary disclosure
  - Immediate program enhancements
- Deferred Prosecution Agreements sometimes provide guidance, e.g, Weatherford International Deferred Prosecution Attachment C (Corporate Compliance Program):  
<http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-DPA.pdf>

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*Questions/Discussion*