

OSCE-WCO
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Caucasus

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Minimizing Companies' Liability for Corruptive Practices Associated with Your Customs Clearance Operations

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ICC Commission on Corporate Responsibility and Anti-
Corruption

1.- ICC on Anti-corruption

- Since 1977 (and 1996) at the cutting edge of anti-corruption
- Rules and Recommendations on Extortion and Bribery
- The “world business organisation” has taken since the inception of its anti-corruption work a firm stance on all forms of corruptive practices
- Right from the start, customs practice has been at the core of ICC’s concerns

2.- Self-Regulatory Approach

- ICC believes that enterprises need
 - The letter:
Good international anti-corruption legal instruments and national implementation legislation
 - OECD Convention
 - UNCAC
 - The spirit:
 - Strong corporate self regulatory instruments for achieving integrity practices
 - The engagement
 - Building a coherent and systematic integrity program

3.- Our Products

- ICC Rules of Conduct and Recommendations on Combating Extortion and Bribery (2005 edition)
- “Fighting Corruption” International Corporate Integrity Handbook (2008 edition)
 - Chapter 13 “Overcoming Corruption on Customs” by Sandy Merber and John Raven, pages 195-208
- Resisting Extortion and Solicitation in International Transactions, A company tool for employee training (with TI, Global Compact and WEF/PACI)
- Draft Guidelines on use of Third Parties

4.- Two sides of one coin

- ICC is equally determined to combat the supply side as the demand side
- We have accepted however that the combat against corruption has really started for good once the supply side was tackled and we hope more efforts will be done against the demand side
 - FCPA
 - OECD Convention
 - Council of Europe instruments
 - European Union instruments

5.- Liabilities

- Liability of physical persons
- Liability of legal persons
 - Civil, administrative or criminal
 - Art 2 OECD
 - Art 26 UNCAC
 - Art 18 (1) CoE Criminal convention
 - Art 3 (1) Second Protocol EU financial interests
 - Art 5 (1) Framework decision EU
 - Liability for lack of preventive measures
 - Art 18 (2) CoE Criminal convention
 - Art 3 (2) Second Protocol EU financial interests
 - Art 5 (1) Framework decision EU

6.- The biggest concerns

- Make (and regularly renew) risk assessment in relation with integrity in customs clearance
- Facilitation payments
- The selection, designation, renewal and remuneration of agents or other intermediaries (third parties)
- Evaluation and classification
- Resistance to solicitation

7.- No improvisation

- Have a clear, written and explicit policy on the each integrity theme
- Follow a same logic throughout
- Project an image of consistence and clarity
- Make no exceptions, save in cases of danger for physical integrity

8.- Facilitation payments (I)

- Are only accepted in a limited number of jurisdictions
- Jurisdictions which do not allow them, do not necessarily prosecute
- Where they are tolerated, their payment is subject to quite strict obligations
- ICC's position has changed over time
 - First facilitation payments considered as a fact of life,
 - Second, as a minor priority
 - Finally, as not acceptable, but if considered unavoidable (and legal), permissible with management's consent

9.- Facilitation payments (II)

- More and more large companies among our membership tell us that they have made the step not to allow facilitation payments at all anymore
- UNCAC does not allow any exception for facilitation payments
- OECD Convention allows it but recommends (February 18, 2010) to have provisions in an ethics and compliance programme on the subject matter

10.- Third parties (I)

- Article 2 of the ICC Rules
 - No payment to agent more than appropriate remuneration for legitimate services
 - No part of remuneration passed on as bribe
 - Agents agree explicitly not to pay bribes
 - Right of termination
 - Keeping a record

11.- Third parties (II)

- Selecting a due diligence process
- Scope of due diligence
- Sponsoring Department and Reviewing Department
- Collection of information
- Anti-bribery red flags
- The content of the third party agreement
- Raising awareness with and about third parties
- Monitoring third parties
- Payments to third parties and record keeping

12.- Evaluation and classification

- In customs practice, the question is often raised of the proper evaluation and classification of goods
- The problem can be either a wrong evaluation or classification by the trader or an inappropriate behaviour by a customs official who wants to exact illegitimate income
- ICC recommends
 - Automation
 - Risk assessment
 - Simplified procedures, but also
 - Integrity in books and records

13.- Resistance to solicitation

- Corporate integrity policies
 - Training of employees
- Support by international and national agencies and administration
- Support by business organisations
- Corporate collective action

14.- Conclusion

- Customs clearance is the first line
- That is the place where we will win or lose the battle