



**2015 Commissioners Seminar**  
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*Legal Issues*  
*For Ports and Commissioners*

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# Disclaimer!



## This presentation:

- does **not** include numerous legal liability issues facing ports and members of their governing boards
- does **not** constitute the work, conclusions or opinions of AAPA, the Port of Houston Authority or anyone other than the author
- does **not** constitute legal advice or risk management advice
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**Consult your legal counsel & insurance/risk manager for specific situations you may encounter!**

# Issues We'll Discuss Today

- Part One: Laws and Policies Governing Commissioners' Conduct
- Part Two: Some Issues with Legal Consequences That Are Facing Ports

# Duties of Commissioners

## From Port of Houston Authority Bylaws:

The responsibility for the management, control, and operation of the Port Authority is vested in the Port Commission. The Port Commission has responsibilities that include:

- a. Framing and adoption of matters of policy including but not limited to budget, goals, vision, and plans;
- b. ...
- c. The sole authority to select, retain, and remove an Executive Director.
- d. The authority to monitor the performance of the Executive Director for compliance with laws, the Port Authority's budget, and with the Port Commission's expectations of his performance, policies, vision, goals, and plans;
- e. The authority to approve the selection of consultants...
- f. Acting as ambassadors on behalf of the Port Authority, envoys who represent the Port Authority and articulate its vision, mission, and goals to the communities and stakeholders it works with and serves; and
- g. By exercising such powers and duties reserved to it under the laws of the State of Texas.

# Commissioners

- What should you do?

Ask the Port's General Counsel for a letter indicating what requirements (state and local as well as port-approved policies) apply to Commissioners and what you need to do to achieve compliance.

After doing what you need to do, ask for a letter indicating you are in compliance.

# Commissioner Liability

## Remember the Basics

- Indemnity – Does the Port have an approved written indemnity in favor of Commissioners?
- Public Officials' (Directors and Officers, or Errors & Admissions) Insurance
- Reliance on Legal Counsel (check statutes)

# Commissioner Liability

## Insurance & Indemnity in Favor of Commissioners:

### Port of Houston Authority By-Laws:

- It is the intent of the Port Authority to protect its Port Commissioners from defense expense and legal liability through the purchase of appropriate public officials liability insurance, and such other liability insurance as the Port Authority obtains and maintains in force and effect.
- ....It is the express intent of the Port Authority to indemnify its Port Commissioners to the fullest extent allowed by Texas law for liabilities or legal expense arising from conduct (including acts or omissions) that reasonably appears to be within the scope of a Port Commissioner's authority as such.
- ....A...Commissioner's legal expense related to a civil or criminal action, proceeding, subpoena, investigation or demand is intended to be funded on a current basis.

# Legal Issues Facing Commissioners

## Takeaway:

Have General Counsel Give You A List of and Training  
on Compliance Statutes and Policies and An Opinion  
That You Are in Compliance

Review Port Indemnification of, and Insurance  
Coverage for, Commissioners



# Part Two: Some Issues with Legal Consequences That Are Facing Ports

Cyber Security

Employment Issues

FCPA

OFAC

SAFETY Act

SSI

Drones

# Cyber Security

## Cyber Security Breaches:

1. Of concern in the Maritime Industry
2. Result in bad publicity, investigations and lawsuits against corporations AND their governing boards

# Cyber Security

What to do?

Have a Plan!

- Cyber Security Assessment
- Formulate and Implement Cyber Security Plan
  - Follow Industry (e.g., NIST) Standards and Guidelines

# Cyber Security

## 2. Have a Team!

- Director of Administration
- High level Information Technology Officer
- Outside Consultant
- IT Manager
- Counsel – in-house; outside
- Insurance/Risk Manager; outside insurance consultant

# Cyber Security

- Check Your Insurance Carefully – does it cover damages and injuries from cyber events?
  - Directors and Officers (E&O)
  - General Commercial Liability
  - Cyber Security
- Vendors and Tenants – Remember Target Corporation – Hacking Can Happen Indirectly through a Vendor or Other Third Party
- Information Technology; Cyber Security.

Service Provider shall not have access or connect to PHA's computers, computer system, computer networks without the express prior authorized written consent of PHA. Service Provider shall at all times maintain cyber security in accordance with industry standards and all applicable laws, and shall not allow, through its systems or otherwise, unauthorized access to PHA's computer systems, notify PHA of any data breach of which is has knowledge on its own or PHA's computer systems in which any data or information may be at risk belonging or otherwise pertaining to PHA, its commissioners, officers, directors, agents, employees, or any others related to this Agreement.

- Watch for US Coast Guard regulations and NVICs

# Cyber Security

## Takeaways:

### Implement a Cyber Security Plan, including:

- Conduct a Cyber Security Assessment of your Port's IT computer network system
- Implement Improvements based on the vulnerabilities found in the assessment, and on national industry standards (see, e.g., the National Institute of Standards and Technology (NIST) standards)
- Review the recently published DOJ Cyber Security Guidelines on best practices for companies before, during and after a cyber attack. However, these are guidelines only; consult with your counsel to make sure you are not sharing information without immunity from suit – check laws
- Have an ongoing Cyber Security Team with managerial, technological and legal expertise; watch for developments in state and federal law on data breach reporting and information sharing
- Remember the Target experience – your vendors' and other third parties' IT systems are important too

# Employment Matters

Employment Law is Exploding!

EEOC Aggressively Pursuing Discrimination

- “Traditional forms” -- Sex, Race, Ethnicity
- Current Hot Areas
  - Retaliation
  - ADA/FMLA
  - Hiring Practices
  - Criminal Background Checks

# Employment Matters

- Rights of LGBT Workers under Title VII
  - All eyes on Pending U.S. Supreme Court Decision
- EEOC Challenges to Wellness Programs
- Required Accommodations Involving Religion
- Challenges to Releases and Arbitration Programs
- Public Employees' First Amendment Rights



# Employment Matters

## Takeaways

- Commissioners: Be careful and avoid getting involved in employment decisions – that's the Executive Director's responsibility
- Executive Director/Managing Director – knows HR law and procedures; great people person; generates a compassion and sensitivity towards port employees
- HR Director – experienced, knowledgeable, great people person, knows the law and the EEOC and DOL
- Employment Counsel:
  - General Counsel with knowledge of HR law
  - Outside Counsel – knowledgeable AND available on short notice! Problems arise quickly and need prompt expert review
- Conduct Anti-Harassment Training! Commissioners, Management, Staff, Vendors, Tenants, All Who Frequent Port Facilities

# FCPA and OFAC – International Transactions

FCPA: Foreign Corrupt Practices Act

- Prevention of Corruption in International Business Transactions
- Prohibits Certain Payment to Foreign Officials

# FCPA and OFAC – International Transactions

FCPA: Foreign Corrupt Practices Act

Takeaways:

- Do you purchase anything from foreign corporations owned by foreign governments?
- Do you have market development staff and/or agents working with foreign government officials?

If so, consider TRAINING on the FCPA, review the DOJ Guidelines and consider adopting an FCPA Policy

# FCPA and OFAC – International Transactions

OFAC: Department of the Treasury's Office of Foreign Assets Control

- OFAC maintains lists of both Nations and Individuals who are considered risks for terrorism
- Don't confuse OFAC with Department of State's List of Nations that Support Terrorism

# FCPA and OFAC – International Transactions

Takeaway:

Before you do business or sign any contract with a foreign port, check the OFAC list

Consider adopting an OFAC Policy

# SAFETY Act

The Support Anti-terrorism by Fostering Effective Technologies Act of 2002, also known as:

**The SAFETY Act.**

The Department of Homeland Security (DHS), which administers the SAFETY Act program, says:

“The SAFETY Act provides important legal liability protections for providers of Qualified Anti-Terrorism Technologies – whether they are products or services. The goal of the SAFETY Act is to encourage the development and employment of effective anti-terrorism products and services by providing liability protections.”

# SAFETY Act

Takeaway:

Talk to your Security Chief or Facility Security Officer and See If Your Port's Facility Security Plan and other Components of Security at Your Port Have Been Certified by the DHS under the SAFETY Act

# Sensitive Security Information

## Takeaways:

Don't discuss SSI with anyone other than  
Executive Director, FSOs

Review 49 USC 1520 with General Counsel,  
FSO's



# Unmanned Aerial Vehicles (UAVs) a/k/a Drones

Drones:  
In Your Port's  
Future?



# DRONES

## Takeaways:

Educate Yourself on the World of Drones and How They May Benefit Your Port

Have Counsel Advise You on the Pending FAA Regulations Governing the Use of Drones and on the Special Certification Programs for Government Entities

Also, Check for State and Local Laws and Ordinances Governing Drones



QUESTIONS?