

OPEN AIR BLOG

Tom [is starting from the front](#) of the Guidance, the Quick Start Guide. I'll start from the rear, the Case Studies.

Case Study #1: Facilitation Payments

As we're all aware, painfully aware, the UK Bribery Act makes facilitation payments illegal. Actually, it doesn't "make" them illegal; they already were illegal. The first case study identifies a medium size company that has signed a new customer through a sales agent. The geography is risky, call it Bribeistan. Company A is worried because importing goods into Bribeistan sometimes requires "inspection fees" at the ports before the inspectors will issue a certification and clear the goods.

The Guidance suggests any or all of the following for Company A

1. Communicate its policy of non-payment of facilitation payments to its sales agent (the one who will actually be paying the "inspection fee.")
2. Seek local-law advice to determine if this is actually a bribe.
3. Have the business adjust the timeline to accommodate the delay
4. Request that the agent company train its staff on resisting facilitation payments
5. Include contract provisions with the agent that include one or more of the following: questioning the legitimacy of demands, requesting receipts, escalate to senior officials, don't pay in cash or directly to the official, tell the official that if the payment is made, Company A might be violating the UK Bribery Act, and tell the official that you're going to tell on him.
6. Maintain a close relationship with the agent company so you can know about local developments that may solve your problem, and
7. Use UK diplomatic channels to apply pressure.

I'm reminded of an FCPA breakfast I once attended where a CEO of a company in India told us about an experience he had. He was told that there was a shipment on the docks that was being delayed because the port official wouldn't clear the goods without a grease payment. The CEO had just gone through FCPA training, and knew what to do. He called his friend, the Minister of Transportation. The Minister himself came down to the port, with the CEO, and they held a joint press conference about clearing goods through customs and how you don't need to bribe. The port official pulled the CEO aside and said, "you have stuff coming through this port every day. I'm here every day. How many times do you think you can get the Minister to come down here?"

Ouch.

Let me comment on some of the "guidance" above.

On point 1: water is wet, thanks. Yes, of course you need to a) have a policy and b) communicate it to your local agent. Maybe if you've never heard of anti-corruption before, this is news.

On point 2: does the MOJ have any idea how expensive this is? Maybe not here, but how many countries does Company A operate in? Multiply that number by \$5,000 minimum.

On point 3: What if the timeline is "never?" Perishable goods, for example. Or if the port official just turns the goods away. Plus, companies ship in order to fulfill orders. Sometimes those orders are for goods needed for further processing. You're not just changing your timeline, you're changing your purchaser's timeline. Plus, you're going to get 6 kinds of hell from the business when you try to put this through. This will come back to haunt you somewhere down the line.

On point 4: The optics on this are good, but really, this will have no effect. The agent has every reason to pay the fee, and every reason to pay lip service to requests not to pay.

On point 5: Not paying directly to the official is good. Keep that. Telling the port authority agent you're going to report him...good luck with that. I would really like to be a fly on the wall when you tell the official that if you pay, you'd be causing Company A to violate the Act. He'll pull out the smallest violin in the world and play "My Heart Bleeds For You." After laughing hysterically. Plus, you have to get these contract provisions into the contract. What are you giving up to do that. It's called contract "negotiation" for a reason, you know.

On point 6: Go ahead and do this. I would suggest holding your breath while you wait for this mysterious solution to appear...I'm sure it'll be here at any moment.

On point 7: Go to town. This might actually work. I doubt it, but you never know.

If a company wants to stop paying facilitation payments, it need only tell its employees—and then back it up by action—that if business is lost because of refusal to pay a facilitation payment, there will be credit given for that business on the salesperson's metrics. *That* would be tone from the top. Companies generally have two forms of policies for facilitation payments: "no" and "no, but." The problem is, companies should not have policies it doesn't monitor and enforce. And I haven't seen a company that has an effective facilitation payments monitoring program, and I've never even heard of a company disciplining an employee for paying a facilitation payment that succeeds in getting the service. Paper programs do no good for anyone, and the regulators in the US hate them. The other type of policy, "no, but" means that the company takes a position that they don't like facilitation payments, but allows them under certain circumstances, generally revolving around some onerous approval process (most I've seen require sign-off by the General Counsel or Chief Compliance Officer). I have only one question for those companies: how many times has the

escalation process been used? I'll bet all the money in my pocket that the answer is "never." Does that mean that no facilitation payments have been paid? Or does it mean that no one follows the policy? I'm guessing the latter.

If you're entering a new market, my suggestion is to not pay facilitation payments. Take a stand and take the consequences like a man. You might feel some short-term pain, but it'll level off as the market adjusts, and you won't get extortive requests. If you're already in a market, I'd concentrate on making sure you're aware of what facilitation payments you're making, and making sure you're recording them correctly. The most dangerous thing is if you're in a risky market and don't know where you're paying. Because in a risky market, believe me, someone is paying facilitation payments. If you're getting silence from the market, it's not because the payments aren't happening; you're just not hearing about them.

Also, pay close attention to point 2. Because that's where the really tricky stuff comes in. I tend to think that if you pay this port official to let your goods enter Bribeistan, it's NOT a facilitation payment. My supposition is that it's a bribe. I would think that a port official has the authority to turn goods away. That means that letting something into the country is NOT a ministerial or administrative act that can be expedited through a payment. It's a decision that the port official needs to make, and you're paying him to make one decision, in your favor and to your benefit. By any definition, that's a bribe. Frankly, I'd be extremely suspicious of a legal opinion that said otherwise.

UPDATE: I've just read the SFO Guidance (different from the MOJ main guidance) and its section on facilitation payments. I just had to relate one "factor tending against prosecution": "A single small payment likely to result in only a nominal penalty." Are they serious? Has anyone ever made just one facilitation payment? For guidance that can be fairly criticized as overly business friendly, it is significantly detached from reality.