

Preparing for the End of Facilitation Payments

In an article published in the July issue of the Compliance Week magazine, entitled “*The UK Bribery Act*”, authors Jonathan Feig and Richard Thomas discuss how companies can mitigate their risks of prosecution for making facilitation payments under the Bribery Act. This is an area that many US companies may have exposure to as the Foreign Corrupt Practices Act (FCPA) has an exception for facilitation payments but there is no corresponding exception or exemption under the Bribery Act.

Richard Alderman, Director of the Serious Fraud Office (SFO), was recently quoted in *thebriberyact.com* regarding facilitation payments as saying:

“...I do not expect facilitation payments to end the moment the Bribery Act comes into force. What I do expect though is for corporates who do not yet have a zero tolerance approach to these payments, to commit themselves to such an approach and to work on how to eliminate these payments over a period of time. I have also said that these corporates should come and talk to the SFO about these issues so that we can understand that their commitment is real. This also gives the corporate the opportunity to talk to us about the problems that they face in carrying on business in the areas in which they trade. It is important for us to know this in order to discuss with the corporate what is a **sensible process**.” [emphasis mine]

As a lawyer, you might well seek further clarification on what the “sensible approach” might be and how one could advise a client on such a term. Fortunately that is exactly what my colleagues who run the site, *thebriberyact.com*, did. Richard Kovalevsky Q.C. and Barry Vitou, sought further guidance from the SFO and reported that the SFO will be “looking to see” the following:

1. Whether the company has a clear issued policy regarding such payments;
2. Whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments;
3. Whether such procedures are being followed by employees;
4. If there is evidence that all such payments are being recorded by the company;
5. If there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded;
6. Whether the company is taking what practical steps it can to curtail the making of such payments.

If the answers to these questions are satisfactory then the corporate should be shielded from prosecution. The Feig and Thomas article would seem to speak to this final Point 6, what

practical steps is your company taking “to curtail the making of such [facilitation] payments”? They lay out a 5 step process to help curtail the making of facilitation payments.

I. Revisit the Anti-Corruption Policy

Your company should have a plan to phase out facilitation payments made by both company employees and those working on your behalf such as agents, resellers, distributor and other foreign business partners.

II. Understand How Operations Have Changed Since the Ban on Facilitation Payments

Your company should consider key areas where facilitation payments occur to make certain that they are not being paid in another form. For instance, do employees wait in line like everyone else to go through customs or do they now use an agent to shuffle them through in groups. If your company has engaged in such a customs representative, has this agent been vetted through your due diligence program and if so has this agent been audited.

III. Understand How Employees Manage Situations Where They are Pressured to Make Facilitation Payments

The key here is listening. Your company needs to listen to key employees who travel overseas to high risk areas about situations that they face where a bribe is solicited. Your company also needs an understanding of areas where what employees face is not solicitation of bribes but really extortion because their life, liberty or health and safety is in immediate peril. Your company will back them up if they are required to pay monies to extricate themselves from such a situation.

IV. Update Training and Internal Communications for Facilitation Payments

Your company must update your training to make clear that facilitation payments will no longer be allowed under your compliance program. The information that your company obtains from listening to your employee, as set out above will enable your company to develop information that they will need for situations where a bribe is demanded. Incorporating the likely scenarios that employees will face into your training is important so that your company can present responses which can be used by employees. This way an employee is not left out in the cold or in the dark about what might happen and what he or she can do about it.

V. Update Your Anti-Corruption Monitoring Program

Your company should update its anti-corruption monitoring program to ensure that it captures the identification of facilitation payments. If any such payments are identified, they should be elevated to the compliance department. These controls need to be tested to ascertain their effectiveness. Lastly such controls need to be extended to your foreign business partners.

As I have previously written, the end of facilitation payments is coming. The OECD recommends that they be done away with and the Bribery Act provides no exemption for them. Perhaps a Republican Congress would feel that by removing the facilitation payment exemption it would somehow hurt US businesses overseas. But this feeling would not last for long. So if your company does business in the UK or has a UK subsidiary, you need to start preparing for the end of facilitation payments. You would do well to regularly read *thebriberyact.com* and to follow the steps laid out by Feig and Thomas in the Compliance Week magazine.

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