

When Does a Grease Payment Become a Bribe Under the FCPA?

One of the more vexing questions under the Foreign Corrupt Practices Act (FCPA) is when does a facilitation payment become a bribe? It is not uncommon to hear stories about demand for payments in some of the following areas:

- Customs clearance
- Immigration services
- Border crossings
- Work permits
- Security/police protection
- Vehicle registration

But the question still remains for the FCPA Practitioner who must provide concrete guidance to the field personnel, when does a facilitation payment become something illegal under the FCPA?

I. The Cases

The FCPA landscape is littered with companies which sustained FCPA violations due to payments which did not fall into the facilitation payment exception. In 2008, the global freight forwarder Con-way paid a \$300,000 penalty for making hundreds of relatively small payments to Customs Official in the Philippines. Unfortunately these payments totaled \$244,000 and were made to induce the officials to violate customs regulations, settle customs disputes, and reduce or not enforce otherwise legitimate fines for administrative violations.

In 2009, Helmerich and Payne paid a penalty and disgorgement fee of \$1.3 million for payments which were made to secure customs clearances in Argentina and Venezuela. The payments ranged from \$2,000 to \$5,000 but were not properly recorded and were made to import/export goods that were not within the respective country's regulations; to import goods that could not lawfully be imported; and to evade higher duties and taxes on the goods.

Then there is the DynCorp investigation matter. As reported in the FCPA Blog and others, it is related to some \$300,000 in payments made by subcontractors who wished to speed up their visa processing and expedite receipt of certain license on behalf of DynCorp.

Finally, there is the Panalpina enforcement action. As reported in the FCPA Blog, this matter was partly resolved last year with the payment by Panalpina and six of its customers of over \$257 million in fines and penalties. Panalpina, acting as freight forwarder for its customers, made payments to circumvent import laws, reduce customs duties and tax assessments and to obtain preferential treatment for importing certain equipment into various countries but primarily in West Africa.

II. The Statute and Other Responses

Interestingly, when the FCPA was initially passed in 1977, the facilitating payment exception was found under the definition of foreign official. However, with the 1988 Amendments, a more explicit exception was written into the statute making it clear that the anti-bribery provisions “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action . . .” The statute itself provided a list of examples of facilitation payments in the definition of routine governmental actions. It included the following:

- Obtaining permits, licenses, or other official documents;
- Processing governmental papers such as visas and work orders;
- Providing police protection, mail services, scheduling inspections;
- Providing utilities, cargo handling; or
- Actions of a similar nature.

It is important to note that the language of the FCPA makes it clear that a facilitation payment is not an affirmative defense but an exception to the general FCPA proscription against bribery and corruption. Unfortunately for the FCPA Practitioner there is no dollar limit articulated in the FCPA regarding facilitation payments. Even this limited exception has come under increasing criticism. The Organization for Economic Cooperation and Development (OECD) studied the issue and, in November 2009, recommended that member countries encourage their corporations to not allow the making of facilitating payments. Additionally the recently enacted, but not yet implemented, UK Bribery Act does not contain an exception for facilitating payments and the Director of the UK Serious Fraud (its Fraud not Frauds) Office (SFO) has warned companies about making a practice of making such payments.

III. Some Guidance

So what does Department of Justice (DOJ) look at when it reviews a company’s FCPA compliance program with regards to facilitation payment? Initially if there is a pattern of such small payments, it would raise a Red Flag and cause additional investigation, but this would not be the end of the inquiry. There are several other factors which the DOJ could look towards in making a final determination on this issue. The line of inquiry the DOJ would take is as follows:

1. **Size of payment** - Is there an outer limit? No there is no outer limit but there is some line where the perception shifts. If a facilitating payment is over \$100 you are arguing from a point of weakness. The presumption of good faith is against you. You might be able to persuade the government at an amount over \$100. But anything over this amount and the

government may well make further inquiries. So for instance, the DOJ might say that all facilitation payments should be accumulated together and this would be a pattern and practice of bribery.

2. **What is a routine governmental action?** Are we entitled to this action, have we met all of our actions or are we asking the government official to look the other way on some requirement. Are we asking the government official to give us a break? So the key question here is whether you are entitled to the action otherwise.
3. **Does the seniority of the governmental official matter?** This is significant because it changes the presumption of whether something is truly discretionary. The higher the level of the governmental official involved, the greater chance his decision is discretionary.
4. **Does the action have to be non-discretionary?** Yes, because if it is discretionary, then a payment made will appear to obtaining some advantage that is not available to others.
5. **What approvals should be required?** A facilitation payment is something that must be done with an appropriate process. The process should have thought and the decision made by people who are the experts within the company on such matters.
6. **Risk of facilitation payments and third parties?** Whatever policy you have, it must be carried over to third parties acting on your behalf or at your direction. If a third party cannot control this issue, the better compliance practice would be to end the business relationship.
7. **How should facilitation payments be recorded?** Facilitation payments must be recorded accurately. You should have a category entitled, "Facilitation Payments" in your company's internal accounting system. The labeling should quite clear. It is critical to any audit trail so recording them is quite significant.
8. **Monitoring programs?** There must always be ongoing monitoring programs to review your company's internal controls, policies and procedures regarding facilitation payments.

IV. Extortion

How does one deal with the issue of whether something is an extortion payment or facilitation payment? There is no personal safety exception written into the FCPA, however, most compliance programs do recognize an exception if an employee's personal health, safety or freedom are at immediate issue. In a prior job, this author was confronted with the situation where an employee, upon exiting a West African country, was told that "his shot card was not in order" and that he would have to immediately be administered a yellow fever shot. However, his shot card could be put in order for the payment of \$100. He was then taken in a room; a syringe with an unknown liquid pulled out filled and put in front of him. He was told to roll up his sleeve immediately for the shot. He decided to pay the \$100. The key to this situation was that the employee's personal health was at immediate risk. Moreover, he reported the incident to the Chief Compliance Officer upon his return to the home office. The employee provided a full written description of the event and it was properly recorded and filed with the facilitation

payment records. It should also be noted that Richard Alderman, head of the UK SFO, has publicly stated that payments made for personal safety will not be prosecuted under the UK Bribery Act.

In the FCPA enforcement arena is the NATCO enforcement matter. In this case, the company claimed that certain foreign governmental officials extorted payment from the company. Probably the first thing to note about his case is that it was filed by the Securities and Exchange Commission (SEC). This means that it was a civil matter as it was not prosecuted criminally by the DOJ. Nevertheless, even the SEC admitted it was extortion as it acknowledged that the company's employees were threatened with fines, jail or deportation and that they believed these threats to be genuine. Nevertheless, the SEC found that the company had not properly recorded these payments and this led to a fine for NATCO of \$65,000 for books and records and internal controls violation. The key here would appear to be the lack of proper recording by the Company.

So we return to the question of when does a grease payment become a bribe? There is no clear line of demarcation. The test seems to turn on the amount of money involved, to whom it is paid and the frequency of the payments. Additionally, accurate books and records are a must. And for the person in the audience who wonders what the payments should be recorded as, the answer is "Facilitation Payments".

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