



403 - Anatomy of a Bribe

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Foreign Corrupt Practices Act – Bribery Strategies and Forensic Accounting Procedures

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Audit, Tax, Consulting, Financial Advisory.

Agenda

Bribery Strategies

- Recent FCPA Enforcements
-

Forensic Accounting Procedures

- General lessons learned
 - FCPA high risk areas
 - FCPA red flags
-

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Bribery Strategies: Examples of FCPA Enforcements



Recent FCPA Enforcements

Baker Hughes International (2007):

- Baker Hughes recently concluded FCPA case with \$44.1 million penalty. Baker was also charged with violating 2001 SEC cease-&-desist order.
- Cash advance to employees who then made cash/wire payments to consultants in Kazakhstan.
- Commission payments to an agent who was a brother of a high official in Angola.
 - Approval of commission payments whereas the agreement with the agent was not approved by legal
- Payments to a customs broker to "intervene" in disputes with Nigerian customs.

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Recent FCPA Enforcements

Vetco International (2007):

- Vetco International and its subsidiaries paid Nigerian customs officials (via an international freight forwarding company) \$2.1 million from September 2002 to April 2005 to win avoid tariffs and expedite the flow of machinery into Nigeria.
- A major international customs clearing and freight forwarding company, identified in the DOJ pleadings as "Agent A," made the payments on behalf of Vetco.
- Agent A variously described its services on its invoices.
 - "express courier service," "interventions," and "evacuations."
- The guilty plea was announced after General Electric confirmed it was acquiring the Vetco Gray subsidiary for \$1.9bn
- Vetco Gray agreed to pay \$26 million under criminal plea agreements

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Recent FCPA Enforcements

Statoil ASA (2006):

- Statoil paid \$5.2 million in consulting fee to a small consulting firm in Turks & Caicos (near the Bahamas) to provide payments to an Iranian official, the son of a former President. The consulting firm was owned by a third party in London
- Statoil sought to secure a contract in 2002 to develop the South Pars oil and gas field (one of the largest in the world)
- In the SEC proceeding, Statoil has consented to a cease and desist order and to pay \$10.5 million in disgorgement and to retain a compliance monitor for three years
- In the DOJ proceeding, Statoil entered a three-year deferred prosecution agreement and agreed to pay a \$10.5 million penalty

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Recent FCPA Enforcements

Titan (2005):

- Titan paid \$3.5 million in “fees” to its Benin agent which were passed on to the re-election campaign of the President of Benin. Payments were made to obtain an increased management fee for its telecommunications project in Benin
- Titan voluntarily disclosed to DOJ and SEC and cooperated with investigation
- \$28.5 million in criminal and civil fines
- Lockheed's deal to acquire Titan cancelled as a result.

Recent FCPA Enforcements

Schering Plough (2004):

- Schering Plough Pharmaceutical company entered into a settlement with the SEC over an alleged FCPA violation (2004)
- Polish subsidiary paid approximately \$76,000 to a Polish charitable organization headed by a government official, purportedly for the purpose of influencing the official's decision to purchase the company's products
- Agreed to pay a \$500,000 civil penalty, retain a consultant to review the company's FCPA policies and procedures, and to follow the consultant's recommendations

Forensic accounting strategies used to identify suspicious payments



FCPA – general lessons learned

- Frequently, foreign subsidiary management is not adequately trained and supervised by the corporate office
- Significant decisions are often made locally without corporate office consultation
- Often a significant lack of appreciation of corruption risk by local management
- Any aspect of the business that touches government is at risk of corruption (e.g., tax, customs)
- Vendor/agent due diligence and training are critical
- Create and update FCPA Compliance Program - times have changed
- Immediately investigate when red flags/allegations arise
- Regularly audit policies, controls, and records

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FCPA high risk areas

- Agent Payments:
 - Payments in excess of stated commission rate
 - Payment to agents for goods that were never delivered to ultimate customer or paid for by the customer
 - Payment to agents for goods that were returned by the customer
 - Expense reimbursements for agent expenses that lack proper documentation or for inappropriate items
 - Transactions that seem to lack substance such as consultant payments to get new work
- Consultant Payments:
 - Often a large dollar amount and one-time payment
 - Payments to consultants, lobbyists, or professional service providers including attorneys and accountants
 - Lack substance or have very little supporting documentation

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FCPA high risk areas (Cont'd)

- Employee Expenses:
 - Travel advances never offset against actual expenditures
 - Airline ticket cancellations that never get repaid to Company
 - Lack of documentation for large expenses
 - ATM receipts or credit card statements used as support
 - Gifts purchased for customers, duty free purchases
 - Hotels paid for other guests
 - Extravagant entertainment
 - Large “facilitation” payments
 - Phony receipts or invoices
- Facilitation Payments:
 - Expediting permits, licenses, and visa
 - Could be a violation of local laws

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FCPA high risk areas (Cont'd)

- Contributions to charitable or political organizations:
 - Directly or indirectly owned or operated by government officials or their relatives
- Direct payments or reimbursements to foreign officials:
 - Hotel expenses or airline tickets:
 - Travel for government officials or their family
 - The supporting documentation may be minimal or completely lacking in such circumstances
 - Education or healthcare reimbursement—payments can be made on behalf of foreign officials or their relatives in attempt to gain favor
- Logistics and shipping expenses:
 - Payments to expedite shipments or reduce duties or taxes
 - Could be inappropriately recorded as excessive shipping or processing charges

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How to identify FCPA red flags

- One-time payments to vendors (vendor often not officially set up and cleared through AP)
- Large round-dollar payments (surprising how common)
- Sequential or same invoice numbers from same vendor (only customer, fictitious vendor)
- Duplicate invoice paid twice (common way to facilitate an extra payment)
- Payments to countries where company does no business
- Payments made to vendors with same bank account as employee
- Payments to politically exposed persons
- Payments made to invalid addresses or P.O. boxes
- Invalid business addresses or phone number

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How to identify FCPA red flags (Cont'd)

- General ledger tests run on accounts payable data and selected general ledger accounts such as:
 - Gifts
 - Charitable and political organizations (charities owned or operated by government officials)
 - Travel and expense (especially advance accounts)
 - Employee bonuses (we have seen bonuses paid to employees for same amount of bribe paid - need to compare to historical norm)
 - Entertainment (items that may have gone through accounts payable)
 - Marketing (watch for consulting payments)
 - Commission (identify additional agents and consultants not previously identified)
 - Education (reimbursement of U.S. and foreign education for foreign officials)

How to identify FCPA red flags (Cont'd)

- General ledger tests run on accounts payable data and selected general ledger accounts such as:
 - Health care for foreign officials or their relatives
 - Rebates (often can disguise a bribe as a rebate with a different payee than original purchaser)
 - Sales promotions
 - Logistics and shipping (tough area to pinpoint suspicious transactions but easy avenue to exploit)
 - Rent (above market paid to agent or government official)

Commercial Practices and the Opportunity for Corruption



ACC Annual Meeting Chicago 2007
Stephen Clayton
Senior Director, Anticorruption Compliance
Sun Microsystems, Inc.

Commercial Practices and Corruption

- Corruption = Greed + Opportunity

Commercial Practices and Corruption

- The Key Question:
- “Is it possible for this intermediary, which is dealing with my products, to pay a bribe to obtain or retain business or gain an unfair advantage for my company's products or services?”

Commercial Practices and Corruption

- Reduce the Opportunity for Corruption:
 - > 1. Transparency
 - > 2. Due Diligence and Reputation
 - > 3. Training
 - > 4. Showing up
 - > 5. Process and Programs
 - > 6. Audits and Investigations
 - > 7. Courage

Commercial Practices and Corruption

- Specific commercial activities to watch:
 - > Bids and tenders
 - > Exclusive arrangements
 - > Who writes the requirements?

Commercial Practices and Corruption

- Structure your organization to make it less susceptible to corruption:
 - > Examine your particular risks
 - > Determine how you can modify processes to reduce the opportunity for corruption.
 - > Implement and institutionalize your program.

Small Bribes

BUY BIG

By Alexandra Wrage and Matthew Vega

PROBLEMS

The United States leads the world in fines, jail terms, and other penalties for the payment of bribes overseas. An aggressive prosecutorial climate, fuelled by reporting requirements under Sarbanes-Oxley, has moved this issue to center stage for in-house counsel and compliance officers. Companies spend a fortune vetting their third party intermediaries and reviewing any gifts or meals provided to foreign government officials lest the latter be deemed an "inappropriate payment." Yet, the United States is also one of the few countries that raises no objection to the payment of what it euphemistically calls a "facilitating payment" overseas. These are typically small payments to prompt a low-level government official to do what he or she is supposed to do anyway: stamp your passport, provide police protection, clear your goods through customs, or hook up your phone. The US

anti-bribery law, the Foreign Corrupt Practices Act (FCPA) expressly carves out these payments as an exception to its otherwise onerous anti-bribery law. A relic from the days when companies thought there wasn't much they could do to avoid paying these bribes, these payments linger on in a sort of legal limbo. The enforcement authorities now lag behind many US corporations which have abolished these payments. Companies are beginning to see facilitating payments for what they are: a violation of foreign law (no country permits you to bribe their officials regardless of what the bribe is called), an invitation to books and record violations (few employees can bring themselves to record these bribes accurately), and corrosive of good governance more generally (companies are uncomfortable leaving definitions of permissible versus impermissible bribes in the hands of their employees).

Most multinational companies have made progress toward eliminating traditional bribes from their business practices. They have done this by implementing comprehensive compliance programs, by training local and foreign employees and business intermediaries, and by rigorous internal enforcement. Now some of these companies are taking steps to eliminate "facilitating payments" from their business practices as well. These small bribes, permitted under the FCPA, are made to foreign government officials to encourage them to perform or expedite routine, nondiscretionary governmental tasks.

In this article, we will illustrate how making "facilitating payments" leads to problems, and provide suggestions on how companies can implement and enforce their own internal policy against bribes of any kind, both large and small. Much of the following guidance was developed from a recent TRACE survey in which 42 companies engaged in international business were interviewed to learn how they have stopped paying small bribes to government officials. Many of the companies interviewed have found that it is possible—occasionally even easy—to refuse to participate in bribery schemes. There are certain techniques that work and certain practices to avoid.

The Problem

In many companies, a distinction has long been drawn between major bribes and mere "facilitating payments." The distinction has been confusing. Bribes and "facilitating payments" are both payments, gifts to, or favors for, government officials—in their personal capacity—in exchange for a desired outcome or relief from an undesirable situation. The legal distinction under the FCPA is supposed to be whether the benefit bestowed was within the official's discretion to grant or whether it was due to the payer as a matter of course. The fact remains, however, the company is almost always seeking better treatment than a non-paying company would expect to receive. If companies make these payments willingly, they are bribes. If companies pay them because they believe they have no choice, they are a form of extortion.

"A corporate policy allowing facilitating payments, except where prohibited by local law, doesn't really work for a global company with global employees. There are



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The views expressed in this article are the authors' own and are not being expressed on behalf of their companies.

so many local prohibitions that the overall policy becomes like Swiss cheese. Add to that the agony of explaining to employees that big bribes are bad but little bribes are okay. End result—"the employees are confused and anxious and are distracted from doing their real job," said Rebecca (Riv) Goldman, VP, commercial law, Rockwell Automation.

Double Standard

Of the handful of countries that permit these small bribes overseas, none permits them at home. A Canadian or American who makes a "grease payment" to a foreign customs official would face criminal penalties for making the same payment to an official at home. Permitting the citizens of one country to violate the laws of another on the grounds that it is "how they do business there," corrodes international legal standards that otherwise benefit multinational corporations. "The cost to businesses of making facilitating payments in emerging markets is more than a nominal fee when such payments undermine the rule of law and good corporate governance," said Susan M. Ringler, senior counsel for international compliance, ITT Corporation.

A Slippery Slope

The mixed message of permissible small bribes versus impermissible large bribes creates a risky arena for business activities. Many companies interviewed complained that small bribes involving routine governmental tasks are both difficult to define and impossible to control. They found that some employees,

responding to pressure to ensure timely contract performance, paid bribes for distinctly non-routine services. Furthermore, it is difficult to convey to employees that the payment of large bribes to foreign government officials is likely to cost the employee his job and possibly his freedom, but that the payment of small bribes is acceptable.

"Facilitating payments are often a 'slippery slope' toward outright bribery. In addition to being an unnecessary expense, even when de minimus, these payments are seldom declared by the recipients and thus frequently misrepresented in the books of the providers. In all respects, they can create a non-transparent business environment, particularly when encouraging preferential treatment. We are encouraged to see that international

It is difficult to maintain a good reputation within a local business community when your company is believed to buy its way past the administrative obstacles that local citizens and companies must endure.

conventions and private sector firms have started to take a hard line against this practice," said Suzanne Rich Folsom, counselor to the president and director of institutional integrity, The World Bank Group.

Loss of Local Community's Confidence

It is difficult to maintain a good reputation within a local business community when your company is believed to buy its way past the administrative obstacles that local citizens and companies must endure. When a bureaucratic delay is legitimate, rather than trumped-up by the bribe-taker, purchasing preferential treatment for your company bumps others further down the waiting list.

Inherent Illegality

Every bribe of a government official—regardless of size—breaks the law of at least one country. The host country outlaws payments to its government officials in any amount and for any purpose. Of course, regardless of the statutory language, the interpretation and enforcement of the law varies widely from country to country. Local officials often have inside knowledge about the correct fees, or have the authority to change them locally, giving the officials improper leverage to extract bribes. This legal landscape is further complicated by the fact that officials in many countries are poorly paid and a gratuity is treated as an informal but integral part of

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"It is simpler to do the right thing—to get the response right—on the small issues and, by so doing, to set the tone for the issues that carry the greatest risk for the company."

their salary. Regardless, there is no country anywhere with a written law expressly permitting the bribery of its officials. A lack of resources, political will or interest has meant violations are rarely prosecuted, but that is changing. Countries, like China, that are eager to be seen to be combating corruption, are prosecuting the payment of small bribes with increased frequency.

As a result, there is widespread concern amongst the companies that TRACE interviewed that small bribes could lead to costly legal complications. "The fact that facilitating payments are permitted under US law doesn't make them a good idea. These payments are inherently risky and a willingness to make them can be an indication of larger problems with internal controls," according to Deborah Gramiccioni, vice president, TRACE, and former assistant chief of the fraud section at the US Department of Justice.

Accounting Dilemma

The laws of countries that permit the payment of these bribes abroad also require companies to maintain detailed and accurate records of each transaction. Many businesspeople interviewed expressed reluctance to record on company books a "payment to government official for routine task"—creating a record of a violation of local law. Yet failure to keep accurate records of the expense violates US law even if the underlying payment does not. Consequently, companies making these payments must choose between falsifying their records in violation of their own laws or recording the payment accurately and documenting a violation of local law.

Foreign Subsidiaries

With the implementation in many countries of new laws criminalizing the payment of bribes to foreign gov-

ernments, there is also an increasing risk that a multinational company with foreign subsidiaries will violate the laws of the country where the subsidiary is based. Companies with offices in more than one country expressed concern that if they do not abolish the use of small bribes altogether, they must undertake different compliance programs based not only upon the location of each office, but the citizenship of the people working there.

International Security

In addition to the legal issues, there is a growing concern regarding national security. One US company reported that the terrorist attacks of September 2001, put a new face on the practice of paying small bribes. That company had routinely paid foreign officials for processing work permits and visas, but is now very uncomfortable promoting corruption in this area. If visas can be bought, borders won't be safe. The practice of bribing immigration officials can lead to serious entanglements with the enhanced security laws of the company's home country.

Bad for Business

Paying small bribes is poor legal practice, but more to the point, it is bad business practice. Widespread small bribes set a permissive tone, which invites more and greater demands. Every company that TRACE interviewed expressed dissatisfaction with these small bribes. They told us that they amount to a hidden tax on business, they tend to proliferate, they buy an uncertain, unenforceable advantage and—the most common complaint—they are simply irritating. Well-run businesses seek clear, dependable terms and enforceable contracts. Small bribes introduce uncertainty, risk, and delay.

Reputation as a "Soft Touch"

The standard argument in defense of bribery is that it is impossible to conduct business successfully overseas without paying bribes to ease the bureaucratic and regulatory burden. If true, business should be more efficient for companies paying bribes, but this argument is not supported by research or anecdote.

Two World Bank researchers studied the premise that small bribes reduce red tape and found that "contrary to the 'efficient grease' theory, ...firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations and face higher, not lower, cost of capital."¹

Decide and Commit

"It is simpler to do the right thing—to get the response right—on the small issues and, by so doing, to set the tone

for the issues that carry the greatest risk for the company," according to the compliance officer of one British oil and gas company.

Several companies reported that the most difficult part of eliminating the practice of paying small bribes was actually focusing attention on the issue and committing to stop. Once a company decides that it wants to eliminate the practice, it must commit itself to spending the time and money needed to carry out its goal through:

- a clear written policy;
- an internal audit;
- training employees and intermediaries;
- a robust internal reporting program; and
- enforcement.

It is crucial that the decision to eliminate the practice have the full support of and formal endorsement by the highest level of management in the company.

Adopt a Clear Policy

The essential core of any successful anti-bribery strategy is a clear and consistent message to employees, intermedi-

aries, and bribe-takers that bribes of any kind will not be paid. "The direct or indirect offer, payment, soliciting, or acceptance of bribes in any form is unacceptable. Facilitating payments are also bribes and should not be made." The Shell General Business Principles. Such a message is most effectively conveyed through a clear written policy that includes assurances that no employee or intermediary will be penalized for delayed performance that can be directly tied to his or her refusal to pay bribes. If corruption is widespread in your industry or in the countries in which you operate, it is also critical to establish a clear mechanism for reporting demands for bribes to senior management so that appropriate countermeasures can be developed to alleviate the pressure on employees in the field.

Medical and Safety Emergency Exception

Employees of multinational companies are occasionally asked to travel and live abroad in countries where the standard of living is lower than their own country and the risks to health and safety are higher. Many companies currently rely on the good judgment of their employees in these situations,

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but some have created a formal medical and safety emergency exception. The situation should be a true emergency and the payment should be accounted for appropriately and reported through management channels both to conform to books and records requirements, and to ensure that management is apprised of and can track the risks to personnel in that country.

ACC Extras on... Bribery

ACC Docket

- *Bribes, Borders, and Bottom Lines: Why a Strong Antibribery Policy Is Essential* (2006). US authorities are tirelessly pursuing companies that break antibribery laws, and the rest of the world is not far behind. Develop an antibribery program before your company is forced to pay millions or adopt extensive reparatory measures. Find out how to reduce your company's risk. www.acc.com/resource/v7523
- *Business Ethics—Awaken the Zombies!* (2006). There are few cures for insomnia more potent than a good old-fashioned compliance and ethics training session. Mind-numbingly boring topics like antitrust, bribery, labor laws, and SEC regulations anesthetize all but the most caffeinated. Even the hearty souls who manage to keep their eyes open soon become inattentive zombies with glazed looks and wandering minds. www.acc.com/resource/v7316

Sample Forms and Policies

- *Antibribery and Foreign Corrupt Practices Act—Employee Guideline* (2002). Provides guidance on situations involving international sales or international operations, assuring compliance with the Foreign Corrupt Practices Act. www.acc.com/resource/v3642
- *Prohibited Practices Under Foreign Corrupt Practices Act* (2003). The FCPA has been codified as Section 30A of the Securities Exchange Act of 1934, and prohibits companies and their executives from paying bribes to foreign government officials. This checklist provides an outline of what the antibribery rules are, what penalties are involved for violating the rules, and defenses to a bribery accusation. www.acc.com/resource/v3457
- *Recognizing Improper Payments* (2001). Violations are most likely to occur in countries with a wide spread history of corruption. Learn more about how Middle Eastern, Latin American, Asian, and Former Soviet Union countries have traditionally been the leading candidates for antibribery rules violations. www.acc.com/resource/v3261

Assess

A comprehensive inventory of past payments will enable companies to address each risk area appropriately. This assessment should include a review of the company's areas of operation that pose a high risk of exposure, any past legal or ethical problems, existing policies, procedures and compliance efforts, and all relevant laws and regulations.

A key aspect of the internal assessment is the employee interview. It is crucial that those conducting the assessment speak to the right people. The companies that TRACE interviewed stressed this point more emphatically than any other. Employees in the field understand the local challenges better than the head office; their participation in a change of policy will be critical to its success. They can identify situations for which a small bribe has been useful, help devise alternative approaches, and can tell when a small bribe is not necessary.

The last point is important. Most of the people interviewed recounted stories of employees, new to a foreign assignment and primed with rumors about corruption in the local business community, thrusting money at a government official at the first mention of delay. Employees will be part of the company's solution and report this information only if they are given clear guidance and training in advance and only if they believe they'll be supported if a refusal to pay results in delays or administrative obstacles.

Types of Payments

Payments identified during the assessment are likely to fall into one of four categories and a different response may be required for each.

Traditional Commercial Bribes are payments to obtain an improper business advantage and are not permitted under any legal exception for small bribes. The suggested response to a traditional commercial bribe:

- If a bribe is paid in order to obtain an improper business advantage, the employee involved should be sanctioned and the company protected from the consequences to the extent possible by prompt remedial action. The company's broader policy on bribery of foreign government officials should be invoked to address these situations.


Expediting Payments are usually demanded by entrepreneurial government officials who threaten delay and red tape if they are not paid small amounts at regular intervals. This category includes payments to secure licenses, to overcome unwarranted delays at customs, to resolve disputes over inflated taxation, and to end harassment by local police or military. Suggested responses to demands

for expediting payments include:

- Meet with the individual in question and explain the change in policy.
- Avoid the embarrassment of including superiors in discussions unless it is clear that it is necessary or that they are a part of the problem. If the junior official has been required to funnel a portion of the bribes he collects to a superior, the superior will have to be included in the conversation. The superior official is often more receptive to offers to provide needed technical and financial assistance to the government in lieu of unlawful payments to the individual officials. For example, one TRACE member has worked with a number of governments to help automate customs functions and thus remove many opportunities for corruption. Whenever possible, these automated systems are configured in such a way as to minimize the opportunity for the inappropriate exercise of official discretion, face-to-face contact between the government officials and company employees and the physical handling and transfer of funds. Automation or computerization can also increase the level of accountability and provide an

audit trail for later monitoring and review of administrative decisions and the exercise of official discretion.

- Acknowledge that small payments have been a part of the business relationship until now, but that these will no longer be made. Again, explain the change in company policy. In order to avoid having their efforts undermined by competitors continuing to make the payments in question, one TRACE member invites its competitors to participate in the discussions with officials. This approach has successfully achieved industry-wide change in Vietnam, Thailand, and India.
- Prepare to reject suggestions on how things might be structured to reach the same end by different means such as re-characterizing the payment or channeling payments through third parties.
- Prioritize shipments or administrative tasks where possible so that the least urgent requests are presented immediately after a change in company policy.
- Maintain records of additional expense resulting from a refusal to make payments and provide copies to senior officials of the relevant government ministry. If the gov-





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ernment is either a partner or the customer, pass along a portion of the cost of refusing the bribe, together with a detailed explanation. Companies that have done this report a significant reduction in demands for bribes.

Additional Services Charges are generally made for a legitimate service that is being purchased through inappropriate channels. Services may include overtime work, work during local holidays, or duties outside the scope of the official's job description. It is important that real value be provided and that these payments do not simply become a way to legitimize bribery. Suggested responses to requests for additional services include:

- Assess the value of the service that has been provided and formalize the relationship. One company stopped paying overtime directly to border guards and began working through the border guard office, requesting a formal agreement and invoices. The result was the same service at the same price, but with new control and transparency.
- Recognize that in some countries, certain government officials receive no pay at all from their government. Instead, they are expected to create their own income—and supplement their superiors' income—through corruption. By formalizing and documenting the arrangement with the responsible ministry, the official is paid for his service, but the haggling and secrecy are brought to an end.
- Seek the approval of the official's superior, where feasible, to hire him under a separate agreement. In some countries, government officials are permitted to hold second jobs. The goal is not to impoverish already badly paid officials.

Extortion Payments amount to clear, criminal extortion—for example, an employee held at a security checkpoint and released only upon payment. Things to consider when an extortionate demand is made:

- If a demand is clearly extortionate and criminal, the employee's safety must be the paramount consideration.
- Once an emergency has passed, companies should advise their embassy and ask that it pursue the matter at the responsible level of government.
- These situations are of real concern, but the embarrassment they can generate for the host country can result in unexpected leverage for companies. Most companies agree that the best response is to manage the situation in the short term and publicize it in the long term.

Train

After management commitment, training is the most critical step in abolishing small bribes. An effective anti-bribery

policy must include comprehensive training for employees. Employees should also be required to sign a statement verifying that they have participated in the training and that they will comply with the company's anti-bribery policy.

Business Intermediaries

A company can be held responsible for the actions of its business intermediaries—sales agents, consultants, suppliers, contractors, and local partners. Consequently, intermediaries should receive the same rigorous anti-bribery training and a copy of the company's anti-bribery policy. Their contract should include a requirement that they comply with the company's policy.

Employees should also be required to sign a statement verifying that they have participated in the training and that they will comply with the company's anti-bribery policy.

General Training Guidelines

The points that follow apply regardless of the type of bribery being addressed:

- The anti-bribery policy should be disseminated to every employee and business intermediary.
- Employees and intermediaries should be assured that they will not be penalized for diminished productivity directly attributable to their refusal to pay bribes.
- Employees who are posted overseas or whose jobs require frequent travel should receive training on the company policy and on how to deal with demands for bribes. This training should include an opportunity to meet with employees who have worked in the territory to which they will be sent.
- Employees affected most directly—those in the international sector, marketing, operations and finance—should have an opportunity to ask specific questions about the situations they expect to face.
- Company auditors should be alerted to the possibility that rogue employees and intermediaries may attempt to circumvent the new policy by mischaracterizing small bribes as permitted expenses.

- Auditors, in-house lawyers or compliance officers should ensure that payments made under the medical and safety emergency exception are reviewed for potential abuse.

Robust Internal Reporting Program

Although this issue has become quite controversial in light of concerns about privacy and “big brother” tactics, a well-organized, secure means by which to report problems within a company when all other channels of communication fail is essential to a sound anti-bribery program. The reporting program should:

- be accessible to all employees;
- provide for either anonymous or confidential reports, as appropriate, to protect the reporting employee;
- include screening by a neutral party to safeguard against frivolous or malicious reports; and
- permit collection and tracking of data over time for reporting to senior management.

A well-run reporting program, where permitted under local law, will assist management in its assessment of the success of its anti-bribery policy and will identify the points at which the program is breaking-down.

Addressing all forms of business corruption at the same time with a single, coherent message is preferable to laboring under an equivocal policy and waiting until some future ideal time to tackle small bribes.

Enforce and Follow-up

It is important for management to stay focused during the implementation and transition period. Anticipated difficulties have proven to be short-lived. Dire warnings that profitability will plummet and business will grind to a halt are not supported by the experiences of any of the companies interviewed. Most of the 42 companies that TRACE interviewed reported delays and unusual additional bureaucratic steps in the first 30 to 60 days after abolishing small bribes. After this period, business “more or less returned to normal.”

Relief is on the Way

The private sector is working to reduce the payment of facilitating payments, but too little attention is being paid to demand-side bribery. There is currently little cost to the government officials who extort payments as an illegal tax on business.

Real transparency would be enhanced by an international hotline through which corporations could report these demands anonymously. Companies know where many of the problems lie. Within every government, there are officials who are notorious for demanding their share and wreaking havoc if it isn't forthcoming. Currently, companies do nothing with this information. They may decline to pay, but they're unlikely to risk alienating the government officials who are their customers.

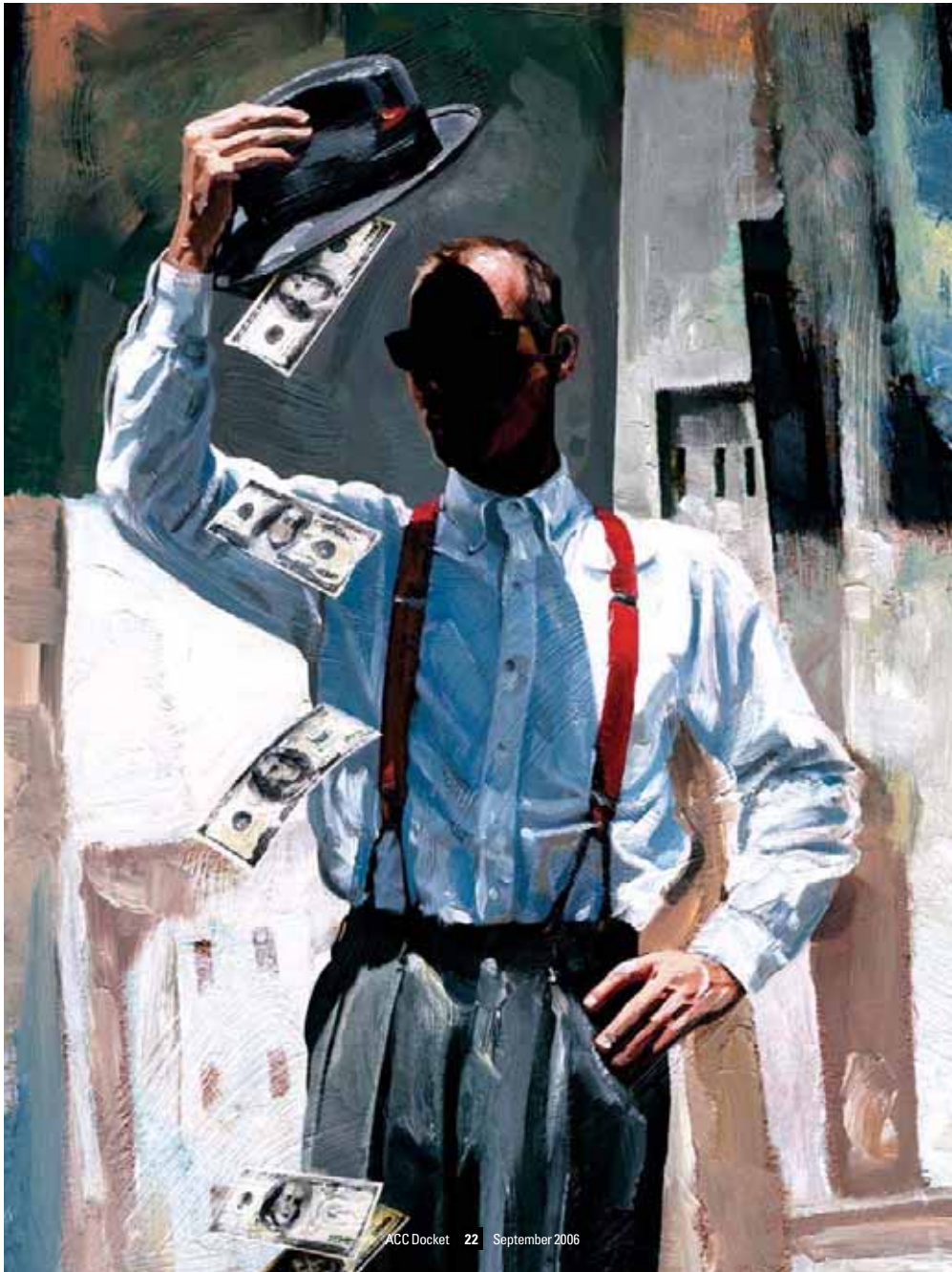
BRIBELINE (www.bribeline.org), launched earlier this year, is just such a hotline—publicly available and free of charge—through which companies can report demands, voluntarily and anonymously. The information will not be used for prosecution. It will simply be collated and reported in the aggregate, by country and by government department: customs, defense, health, transportation, mining, etc. When these reports are published annually, they will alert government officials that their demands are being tracked, and will reinforce the idea that these demands are illegitimate. The information will not be used to intervene in individual transactions, but instead will be provided to the public at large, encouraging governments to pursue remedial action, alerting civil society to troubling trends, and providing companies an additional tool in support of efforts to assess risk accurately.

Addressing all forms of business corruption at the same time with a single, coherent message is preferable to laboring under an equivocal policy and waiting until some future ideal time to tackle small bribes. Many companies have adopted strong policies against the payment of small bribes and the consensus has been that the transition has been simpler, faster, and less painful than was expected. The short-term result for many of the companies interviewed has been relief from constant demands for small bribes; the long-term results will be reduced bureaucracy, enhanced predictability, and a more stable business environment. ☒

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1. Daniel Kaufmann and Shan-jin Wei, “Does ‘Grease Money’ Speed up the Wheels of Commerce?” Paper presented at the American Economic Association Meeting, Chicago, IL, 1998.



ACC Docket 22 September 2006

BRIBES
BORDERS
 {and}
BOTTOM
LINES
 Why a Strong
 Antibribery
 Policy Is
 Essential
 By Alexandra A. Wrage and C. David Morris

In 2005, San Diego-based Titan Corporation settled with the Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) for violations of the US Foreign Corrupt Practices Act (FCPA). The alleged wrongdoing, which was neither confirmed nor denied by Titan, included the payment of bribes by Titan agents to African and Asian government officials, falsified books and records, and a failure to maintain an effective system of internal controls to deter and detect FCPA violations. The settlement included the highest fine to date for a violation of the FCPA — over \$28 million. When Titan was slow to resolve its bribery allegations, Lockheed Martin walked away from the proposed \$1.6 billion acquisition, leaving Titan with a dramatically reduced share price, an onerous compliance program, and no buyer.

This case is far from unique. US authorities are zealously pursuing companies and individuals who violate the country's antibribery laws. As a result, planned acquisitions are being derailed and senior executives are going to jail. Companies are being slapped with millions of dollars in fines, and they are being forced to adopt expensive and far-reaching remedial measures. And that's just the beginning. Now other countries are starting to crack down on corporate bribery.

All these enforcement efforts have prompted some companies with international operations to develop creative antibribery programs. These programs aim to reduce the risk that the company's employees and commercial intermediaries may be paying bribes overseas and falsifying records to conceal such violations. If your company doesn't already have such a program — or if you haven't updated your program recently — then find out how you might go about creating an effective antibribery program that can both protect your company and bolster its bottom line.

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The Broad Reach of the FCPA

In the US, the 1977 FCPA criminalized the bribery of foreign government officials. It prohibits, among other things, US companies and their subsidiaries, officers, and employees from offering or paying bribes to foreign government officials, directly or through commercial intermediaries, in order to obtain or retain business. The law is broadly drafted. Bribes can be "anything of value." Foreign government officials include anyone acting in an official capacity on behalf of a foreign government, foreign political parties, party officials or candidates, employees of foreign state-owned companies, employees of public international organizations, and members of the armed forces. The FCPA is enforced jointly by the SEC and the DOJ.

The FCPA does have exceptions and affirmative defenses. For example, "facilitating payments" made to expedite the performance of a routine governmental action are not prohibited by the FCPA. (See "Facilitating Payments," on p. 26.) In addition, there is an affirmative defense for payments for reasonable travel and lodging expenses to promote or demonstrate products or associated with the performance of a contract. This hospitality defense can create more problems than it resolves, however, when companies have to make decisions about what constitutes reasonable travel expenses for government officials in far-flung locations. The expectations of foreign government officials often exceed Western standards of business travel.

In addition to the antibribery provisions, the FCPA requires US companies to keep their books, records, and accounts in reasonable detail, in order to accurately reflect their transactions and disposition of assets. Companies must have a system of internal accounting controls which provide reasonable assurance that:

- transactions are executed with management's authorization;
- transactions are recorded, permitting preparation of financial statements that conform to generally accepted accounting principles (GAAP) and ensure accountability for assets; and
- at reasonable intervals, the company compares its recorded assets with existing assets, and takes appropriate action with respect to any differences.

Inconsistent International Conventions

Early in the 1990s, international antibribery conventions came into vogue, and a plethora of inconsistent



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conventions and initiatives followed. The first of these, the Inter-American Convention Against Corruption, was adopted in 1996 and ratified by all 34 members of the Organization of American States (OAS), as well as Cuba (which is not an OAS member). Soon after, there were conventions promulgated by the Organization of Economic Cooperation and Development in 1997, the Council of Europe in 1999, and, most recently, the United Nations Convention Against Corruption, which came into force in December of 2005. The African Union Convention was adopted in Maputo in 2003, but the ratification process has not yet begun.

The result has been a spider web of regulations that vary across borders, subjecting multinational companies to conflicting standards and possible multiple prosecutions for the same acts. For example, both France and the US are investigating the Halliburton joint venture, TSKJ, for alleged inappropriate payments in Nigeria. At the same time, Nigeria, Japan, and the United Kingdom are considering enforcement activity for the same actions.

Companies operating across borders who are subject to multiple antibribery rules are left with two options: either implement different compliance standards for each jurisdiction or work to a single high standard across all locations. The former is usually too unwieldy to be

feasible. The latter requires a state-of-the-art compliance program.

Internal Antibribery Practices

At the center of any company's successful antibribery program is a clear message to employees, third-party intermediaries, and bribe-takers: The company will not tolerate bribery. A surprising number of small- and medium-sized companies still have no policy expressly prohibiting bribery. They rely instead on more general statements that the company will comply with all applicable laws. By so doing, these companies assume that employees are fully conversant with foreign laws and miss an opportunity to educate employees on the specific behavior prohibited. There is no substitute for an explicit policy. Your policy should:

- define prohibited payments;
- direct employees to appropriate sources for additional information when they are in doubt; and
- set forth sanctions for violations.

There is admittedly some disagreement about whether a written policy can effectively deter criminal activity, but without such a policy, it is hard to claim that your company has an effective compliance program. Even a very brief antibribery policy can be effective.

Your company's policy may provide its antibribery message briefly in broad principles, or it may provide detailed rules and guidelines with corresponding sign-off authority. The former offers employees greater flexibility to respond to local challenges and different cultural approaches, but carries greater risk of violations by rogue employees. The latter ensures a more centralized "command and control" approach which can be more robust, but may also be more bureaucratic and may, if too rigid, encourage frustrated employees to circumvent the system.

Support Your Policy with Funding and Training

In order for an antibribery policy to be taken seriously, it must receive strong and conspicuous support from top management. One US software company, for instance, launched its antibribery program with a supportive message from the president to all employees. Another corporation, an oil and gas company operating in some of the most challenging markets, disseminates quarterly progress reports that address issues relevant to its employees. This ongoing effort highlights risk areas for employees and reflects the importance that management places on preventing bribes. These reports have developed into a series of internal case studies that make internal training more relevant.

Everyone in your company should receive, or know where to find, a copy of the company's antibribery policy. In addition, your client may want to join the growing

Facilitating Payments

Under the FCPA, there are bribes and then there are "facilitating payments." The latter are payments made to foreign government officials in order to encourage them to perform or expedite routine, nondiscretionary governmental tasks. Such payments are not prohibited under the FCPA and are thus perfectly legal under US law. All countries, however, prohibit these payments to their own government officials. So, while facilitating payments don't run afoul of US law, they will violate the law of the country in which they are made. Examples of routine, nondiscretionary tasks to which the facilitating payment exception might apply include: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection or mail pick-up and delivery; providing phone service, power, and water; loading and unloading cargo; and scheduling inspections associated with contract performance or transit of goods across country.

You may want to think twice about allowing your employees to make such payments. Allowing facilitating payments can send an inconsistent message to employees that some forms of bribes are permitted while others are not. Employees are often unclear on the distinction between bribes and facilitating payments. Moreover, employees may be tempted to mischaracterize these payments in their books rather than identify them for what they are. Such mischaracterizations would violate the record-keeping provisions of the FCPA, putting the company in legal jeopardy. Finally, there is the risk that making facilitating payments can backfire. Many compa-

nies report that such payments often lead to more frequent and greater demands by entrepreneurial bribe-takers. Because of all this, many companies prohibit their employees from making these payments, even if they are permissible under the FCPA.

Preventing your employees from making these payments, however, is no easy task. An executive at one European multinational company put it this way: "It takes patience and stamina, but it is possible." Determination is crucial to success in this area. If bribe-takers believe the effort to stop facilitating payments is half-hearted, they will respond with more and greater delays.

A coherent policy implementation is also vital to success. A new policy against facilitating payments can be implemented most effectively if there is a single corporate message, providing notice and an explanation of the change in policy. One French company engaged in business in Africa stated that it was difficult to control facilitating payments initially, but that "it became easier as the word spread."

Whatever position your company takes on facilitating payments, your employees in a foreign country should expressly be permitted to make such payments when their health or safety is in jeopardy. The situation should be a true emergency, however. Any such emergency payment should be accounted for appropriately and reported through management channels, both to conform to books and records requirements and to ensure that management is apprised of the risks to personnel in that country.

number of companies that are disseminating their policies, often in summary form, to their commercial intermediaries and suppliers. As companies are increasingly held accountable for the actions of their third-party intermediaries, it is important to minimize this risk by ensuring that these third parties are aware of the company policy, together with the penalties for violations.

In order for your client's antibribery compliance program to be successful, it must receive adequate funding. This means that the employees heading the program will need to create budgets based on objective data in order to support funding requests for qualified staff, training programs, due diligence, record-keeping, travel, and internal investigations.

Some companies house the antibribery function within the ethics department, but most task the legal department with compliance, in light of the criminal sanctions involved. The head of the program should provide senior management with regular reports about antibribery activities and issues.

To train employees on antibribery issues, most companies use a combination of methods. One aerospace and defense company supplements in-person antibribery training with on-line training, while another insists on annual in-person training for those working in its international division. A French company holds a seminar for all new employees every three months and provides half-day modules, including case studies, for senior managers. Current best practices tailor the frequency and sophistication of training to the audience, with those in international marketing and operations receiving the greatest resources.

Third-party Antibribery Policies

It isn't enough to have an ironclad policy against bribery that applies to your own employees. The FCPA makes clear that bribes cannot be paid to foreign government officials either directly or indirectly. Any payment to a third party is prohibited if the payor knows or should know that the third party is likely to forward any part of the payment to a foreign government official. Willful ignorance on the part of a payor is no excuse: Your company can be held liable if it fails to make a reasonable inquiry into the reputation and activities of its commercial intermediaries, including sales agents, consultants, and distributors.

To avoid problems, your company should engage in a systematic, consistent, and well-documented process for selecting and vetting its commercial intermediaries. The person most familiar with your company's local business strategy should undertake the initial review, but the relationship with the intermediary should be approved by management elsewhere to ensure impartiality. Although intermediaries may resist the due diligence process, you

can usually convince the intermediary to cooperate by explaining that this is an essential part of your company's worldwide compliance program and it is not directed at any one country or region.

We benchmarked the due diligence practices of 70 companies and found that most apply a single standard of review to all commercial intermediaries worldwide. Any red flags regarding a company's reputation disclosed during this vetting process should be investigated and resolved. These may include refusal to disclose ownership, requests for payment to a numbered account or a third party, payment outside the territory of the sale or service, or close family ties to high-ranking government officials or other decision-makers.

As part of the review process, the business justification for the proposed relationship should be documented in a detailed memorandum, written by the person proposing the intermediary. This individual should also indicate in writing that s/he is aware of no reputational, business, or other reason that would render the intermediary unsuitable to represent the company's interests. (See "Vetting Your Intermediaries," on p. 28.)

In general, relationships with all intermediaries should be governed by written contracts. The contract should:

- expressly prohibit behavior that would violate US or local antibribery laws;
- prohibit the assignment of the contract or use of a third party without prior approval; and
- allow for unilateral termination for cause or upon credible belief of a violation of US or local law.

Most companies with robust internal due diligence processes also require intermediaries to sign antibribery certifications, either at the time the contract is executed, annually, or at the time of each payment. These certifications typically state that the responsible representative of the intermediary has read and understands the applicable antibribery law, will not engage in any activities it prohibits, and will maintain accurate books and records.

After the intermediary has been retained, its activities should be monitored to ensure that there is no breach of US law, of local law, or of your company's compliance policy. One US defense company has stated that a representative of its law department meets annually with each of the company's intermediaries to review the FCPA's requirements. Other companies in the same industry state that they meet only with those intermediaries that reach a stated dollar threshold in generated commissions.

Relationships with intermediaries should be reviewed at regular intervals. Relationships that are no longer productive should be terminated, so any future wrongdoing by the intermediary does not reflect negatively on the com-

pany. During one such review, a company we spoke with found that they had renewed a contract with an individual who had died two years earlier, calling into question the currency of their due diligence files.

Wining and Dining Foreign Officials

Providing meals, gifts, and travel to government officials can violate the FCPA. Although the FCPA offers an affirmative defense which permits reasonable hospitality in relation to a product demonstration or in the performance of a contract, it provides no guidance on what is "reasonable."

Vetting Your Intermediaries

FCPA restrictions on indirect bribery of foreign officials make it vital that you carefully vet all of your commercial intermediaries. Research into best practices indicates that any such review should include, at a minimum:

- the intermediary company's legal name, address, and structure;
- the beneficial ownership of the intermediary;
- literature from the intermediary company demonstrating that it has appropriate professional skills for the contract;
- names of and resumes for key employees of the intermediary;
- a screening of key individuals and employees against the US Department of the Treasury's Office of Foreign Asset Control list of parties with whom transactions are prohibited;
- financial records of, or a financial reference for, the intermediary;
- evidence that the intermediary has complied with local law requirements, including mandatory registrations;
- business references for the intermediary;
- inquiries into prior bankruptcies, criminal investigations, antitrust violations, and civil litigation concerning the intermediary;
- where and how the intermediary wishes to be paid;
- a broad media search of the intermediary company, its owners, and key employees in order to uncover any adverse information;
- an examination of the compensation to be paid to the intermediary under the proposed contract, and the total compensation flowing to the intermediary across all contracts (in order to determine whether such compensation is reasonable); and the intermediary's adoption of a written code of conduct addressing bribery.

In addition, although the FCPA has no express exception for gifts, gift-giving is a longstanding and expected practice in many business communities. It seems unlikely that an FCPA investigation would focus exclusively on occasional noncash benefits. However, in the past, once other allegations have been made, patterns of lavish gift-giving and hospitality have been used as evidence of inadequate internal controls.

Further complicating the issue for well-intentioned companies is the fact that even one small gift or a single lavish dinner can, under the wrong circumstances, violate the law, because the FCPA has no dollar thresholds for alleged bribes. And even if the total dollar amounts are low, recent FCPA enforcement actions demonstrate that the risks, if these practices are uncontrolled, can be high. For example, in the 2004 parallel DOJ and SEC proceedings against ABB, Ltd. and its subsidiaries, although there were allegations of significant cash bribes, references to pedicures for the wives of government officials received great attention.

One particularly problematic benefit is a per diem allowance for government officials traveling to your company headquarters on legitimate business. An excessive per diem can, in and of itself, be deemed a bribe. A per diem is especially questionable if your company is already covering the cost of the officials' trip, or reimbursing such costs after the fact. In such situations, there is little business justification for a per diem — your company has already picked up the tabs, and the per diem becomes simply a gratuitous financial benefit to the official.

In formulating policies to deal with this conundrum, US companies tend to take a rule-based approach for gifts and meals, providing strict dollar thresholds on what can be spent. European companies often favor a values-based approach, permitting reasonable and customary gifts and hospitality at the employee's discretion. But despite this difference, almost all of the 70 companies asked agreed with the following nine principles — that all benefits provided to foreign officials should:

- be reasonable and customary under the circumstances;
- not be motivated by a desire to influence the foreign official inappropriately;
- be tasteful and commensurate with generally accepted standards for professional courtesy in the country where provided and in the country where the company has its headquarters;
- be provided openly and transparently;
- be given in good faith and without expectation of reciprocity;
- be provided in connection with a recognized gift-giving holiday or event, in the case of gifts;
- be provided in connection with a legitimate business

purpose, in the case of hospitality and travel:

- not be provided to any foreign official or group of foreign officials with such regularity or frequency as to create an appearance of impropriety or undermine the purpose of this policy; and
- comply with local laws and regulations that apply to the foreign official.

These guidelines help companies ensure that their gifts and hospitality do not run afoul of antibribery laws and that companies can minimize the reputational damage that may accompany media accounts of any inappropriate spending.

Charitable Contributions

The FCPA does not prohibit charitable contributions, but your company should be careful about how it makes such contributions. In 2004, Schering-Plough Corporation paid \$500,000 to settle with the SEC for violations of the

books and records provisions after disclosing contributions by its Polish subsidiary to a charity led by a Polish government official. The amount, recipient, location, and timing of contributions should be closely managed not only to ensure that your company complies with the FCPA and local law, but also to avoid any appearance of impropriety.

Some organizations follow systematic, planned giving programs whereby charitable contributions are managed and budgeted for the next year. As an example, some companies encourage employees to contribute to tax-exempt Section 501(c)(3) or equivalently qualified organizations via predetermined payroll deductions. The company's contribution comes in the form of administering the program at its own expense and matching all or some portion of its employees' contributions.

For unplanned events (such as the South Asia tsunami or hurricanes Katrina and Rita) your company may con-

tribute money, goods, or other relief to affected victims directly, minimizing the risk of an appearance of corrupt intent. If contributions are made to a government relief organization, your company should avoid contributing to an entity with which it does, or seeks to do, business or which is otherwise closely linked to such an organization.

Political Contributions

There are good reasons why, as a matter of policy, many companies avoid all political contributions to candidates in foreign countries. For starters, the FCPA prohibits giving (or promising to give) anything of value to a foreign political party or official thereof, or any candidate for foreign political office, to obtain or retain business. Moreover, political contributions are also often negatively reported upon by the media, creating an appearance (rightly or wrongly) of buying influence. Then, as a more

practical matter, some companies seek to avoid antagonizing an opposing political party.

Other companies, however, take the view that political contributions are an exercise of their right to participate in the political process. If your internal clients share this view, your company should have a clear policy and systematic process in place for vetting such contributions. Each country has its own laws and procedures governing contribution limits, frequency of contributions, and reporting requirements. Since this is a fertile area for FCPA and local law concerns, consultation with US and local counsel is necessary to ensure contributions are made transparently and in accordance with US and local law.

Records and Audits

A robust antibribery policy should emphasize sound accounting principles. It should require all employees and

TRACE Model Code of Conduct (Version for Small- and Medium-sized Entities)

The Principals of [Company] have adopted the following Code of Conduct with respect to all of their commercial transactions, whether local or international:

LOCAL AND FOREIGN LAWS: No officer, employee, or representative of [Company] may, directly or indirectly, break or seek to evade the laws or regulations of any country in, through or with which it seeks to do business. That an illegal act is a "customary business practice" in any country is not sufficient justification for violation of this provision.

BRIBERY AND FACILITATING PAYMENTS: No officer, employee or representative of [Company] may, directly or indirectly, offer or provide a bribe and all demands for bribes must be expressly rejected.

Bribery includes any offer, promise, or gift of any pecuniary or other advantage, whether directly or through intermediaries, to a public official, political party, political candidate or party official or any private sector employee, in order that the official or employee act or refrain from acting in relation to the performance of their duties, in order to obtain or retain business or other business advantage.

[Company] and its officers, employees, and representatives shall not offer or make facilitating payments to government officials in order to encourage them to expedite a routine governmental task that they are otherwise required to undertake. [Company] shall have discretion to deviate from

this prohibition if the government action sought is an urgent matter concerning health or safety. [Company] recognizes that extortion is widespread and that participation by the business community increases demand for facilitating payments.

KICKBACKS: No officer, employee, or representative of [Company] may "kickback" any portion of a contract payment to employees of other parties to a contract or use other vehicles such as subcontracts, purchase orders, or consulting agreements to channel payments to government officials, political candidates, employees of other parties to a contract, their relatives or business associates.

A "kickback" is a particular form of bribe which takes place when a person entrusted by an employer or public function has some responsibility for the granting of a benefit and does so in a way that secures a return (kickback) of some of the value of that transaction or benefit for that person without the knowledge or authorization of the employer or public body to which the person is accountable.

CONFLICTS OF INTEREST: Each officer, employee, and representative of [Company] shall avoid any relationship or activity that might impair, or appear to impair, his or her ability to render objective and appropriate business decisions in the performance of his or her job.

POLITICAL CONTRIBUTIONS: Neither [Company] nor any of

its officers, employees, or representatives may make a political contribution in order to obtain an unlawful business advantage. [Company] shall comply with all public disclosure requirements.

PHILANTHROPIC CONTRIBUTIONS: [Company] and its officers, employees, and representatives may make contributions only for bona fide charitable purposes and only where permitted by the laws of the country in which the contribution is made. Contributions made in order to obtain an unlawful business advantage are prohibited.

EXTORTION: [Company] and its officers, employees, and representatives shall reject any direct or indirect request by a public official, political party, party official, or private sector employee for undue pecuniary or other advantage, to act or refrain from acting in relation to his or her duties.

GIFTS, HOSPITALITY AND ENTERTAINMENT: [Company] and its officers, employees, and representatives shall avoid the offer or receipt of gifts, meals, entertainment, hospitality, or payment of expenses whenever these could materially affect the outcome of business transactions, are not reasonable and bona fide expenditures, or are in violation of the laws of the country of the recipient.

REPORTING REQUIREMENT: Officers, employees, and representatives of [Company] who find themselves subjected

to any form of extortion or who are asked to participate in any way in a bribery scheme shall promptly report these occurrences to senior corporate management, without fear that their employment will be adversely affected.

COMPANY RESPONSE: No employee will suffer demotion, penalty, or other adverse consequences for not paying bribes even when [Company] may lose business as a result of the employee's refusal to do so. Employees are encouraged to report alleged violations of this Code of Conduct to senior management and no employee will suffer demotion, penalty, or adverse consequences for reporting.

[Company] will, where appropriate, sanction employees, suppliers or business partners for violations of this Code of Conduct.

COMPANY ACCOUNTS: [Company] shall maintain complete and accurate financial records, ensuring that all transactions are properly, accurately, and fairly recorded in a single set of books.

COMMUNICATIONS AND TRAINING: [Company] will make annual antibribery training available for all principals, key employees involved in sales, marketing, and procurement.

(Signature)
(Printed or Typed Name)
(Title)
(Date)

appropriate commercial intermediaries to maintain detailed books and records which accurately reflect transactions. It is particularly important that the terms and timing of contingent payments — generally believed to be the most common source of funding for bribes to government customers — should be clearly stated.

Books and records should be regularly audited. The auditors should receive specific training on how unscrupulous employees and intermediaries may attempt to circumvent company policy by mischaracterizing bribes as permitted expenses.

Due diligence files also should be readily accessible to auditors, and these files should be updated at regular intervals, typically annually or biannually.

One controversial measure is for companies to contract for the right to audit their commercial intermediaries' books and records. A growing number of companies are demanding this right, but few seem to exercise it.

Aiding Whistleblowers

In order for your company to effectively enforce its anti-bribery policy, it is essential to put in place a well-organized, confidential reporting program. Such a program can assist management in assessing the strength of its anti-bribery policy and procedures and can help identify the points at which the program is breaking down. It also allows management to get wind of any possible bribes — and to take remedial measures — before the alleged wrongdoing is brought to the attention of the news media or enforcement authorities.

The reporting program should be accessible to all employees. It should provide for either anonymous or confidential reports, as appropriate, to protect the report-

ing employee both during employment and after leaving the company. It should also include screening by a neutral party to safeguard against frivolous or malicious reports. And it should permit collection and tracking of data over time for reporting to senior management.

An increasing number of companies are making their reporting hotlines available to outsiders, hoping that suppliers and other third parties will bring their concerns to the company first. This is generally thought to be a "best practice," but carries the risk of a higher number of frivolous complaints, which must nevertheless be investigated.

European companies, however, have been less than enthusiastic about confidential reporting programs, fearing that they undermine trust among employees. One Italian company argues that these programs make it impossible to adequately investigate the underlying facts of a potential violation. It can be difficult to undertake a rigorous investigation if the source of facts and the identity of witnesses must be obscured. Moreover, some European governments have held that unless these programs are carefully created and implemented, they may violate employees' legal rights, including their right to privacy.

Stand by Your Policy

Even the best policies and programs are of little value if the penalties for violations are so insignificant that they fail to deter employees from further wrongdoing. A company policy that is not enforced — firmly, transparently, and consistently — can be more corrosive of good business practices than no policy at all, as it breeds cynicism and undermines employees who support honest business practices.

How tough should your company be on employees who seek to skirt its anti-bribery policy? You may want to follow the lead of one telecommunications company, where any attempt to evade the anti-bribery policy (even if there has been no violation of law) will result in severe consequences, including possible dismissal and referral to outside enforcement authorities.

It is not enough, however, for your company to be tough on violators. Your company must display how tough it is. One method of doing this, which been quite successful for companies on both sides of the Atlantic, is publishing reports on how any wrongdoing was resolved. Such internal company reports do not identify the wrongdoer, but they outline the behavior and sanction with enough specificity to make clear to employees that the company will not tolerate violations of its anti-bribery policy.

When Things Go Wrong

The FCPA does not require a company to voluntarily disclose FCPA violations. However, the SEC and DOJ encourage self-disclosure by mitigating civil and criminal penalties

for companies that do disclose. Historically, the assumption that voluntary disclosure will result in more lenient treatment has been sufficient to bring companies to the DOJ and SEC, but many of the companies we surveyed have begun to question the value of voluntary disclosure in light of recent consent orders, two of which have included fines of over \$16 million and \$28 million respectively. If voluntary disclosure and full cooperation net companies the largest fines in the statute's history, it is difficult to sell internally the idea that the company will be better off if it discloses. Of course, Sarbanes-Oxley disclosure requirements may reduce the discretion that companies have in this respect.

If your company does decide to voluntarily disclose the wrongful action, the US government will expect such disclosure to be prompt and complete. The government will also demand your company's full cooperation in any subsequent investigation.

Remedial Measures

If the SEC or the DOJ determines that a company lacks either an effective FCPA compliance program or the ability to implement its policy, the agency may impose stiff remedial measures. Companies may be required to:

- appoint a special, senior-level compliance officer;
- have the company's compliance program be managed by either the company's law department or its board of directors;
- establish comprehensive company-wide training programs and periodic refresher courses;
- establish compliance hotlines, where employees and commercial intermediaries are encouraged to confidentially report issues for internal investigation; and
- implement special accounting and reporting procedures, in order to ensure accurate bookkeeping.

In the US, it has become commonplace for a consent order to require the company involved to retain an outside compliance monitor, who is responsible for supervising and reporting on the company's compliance function. Such a monitor can play an important oversight role for the enforcement agencies, but the scope of the monitor's responsibilities is often unclear. Companies facing this situation should therefore invest resources at the outset to ensure that the settlement agreement specifies the monitor's scope of inquiry, the monitor's remuneration, and the mechanism for addressing differences of opinion. Without a mechanism for resolving disputes between the company and its compliance monitor, a company's only recourse is to return to the enforcement agency and ask for relief from an overreaching monitor. Many in-house counsel believe that the enforcement agencies would be unsympathetic to companies that have disclosed prior wrongdoing and later complain about the oppressive demands of a compliance monitor.

ACC Resources on . . . The FCPA

Committee:

- More information about ACC's International Legal Affairs Committee is available on ACC Online™ at www.acca.com/networks/committee.php, or you can contact Staff Attorney and Committee Manager Jacqueline Windley at 202.293.4103, ext. 314, or jwindley@acca.com.

Docket Article:

- Alan Greenwood and Steven Lauer, "The Global Compliance Landscape: A Resource File," *ACC Docket* 23, no. 9 (October 2005): 32–48. www.acca.com/protected/pubs/docket/oct05/scratch.pdf.

InfoPAK:

- Doing Business Internationally (2006). www.acca.com/resource/v6087.

Webcasts:

- Directors and Officers Coverage: Potentials and Pitfalls (2005). <http://www.acca.com/resource/v5877>.

Annual Meeting Course Materials:

- Lori Shapiro and Philip Weis, *803: Codes of Conduct for Multinational Corporations*, ACC 2004 Annual Meeting course material. www.acca.com/em/04/cm/803.pdf.

Leading Practice Profile:

- Codes of Business Conduct and Ethics (2003). www.acca.com/resource/v5895.

Virtual Library Sample Forms and Policies:

- Sample forms and policies available via ACC's Virtual Library™ (www.acca.com/vl) include the following:
 - Code of Business Conduct and Ethics (2004). www.acca.com/resource/v5521.
 - Large Company Policy for Compliance with FCPA (2005). www.acca.com/resource/v7048.

For more information on this topic, see ACC's Compliance Portal at www.acca.com/practice/compliance/index.php, which features topics that include Records Management and International Trade.

For Additional Information

- Stuart H. Deming, *International Practitioner's Deskbook Series: The Foreign Corrupt Practices Act and the New International Norms*, ABA Section of International Law, May 2005.
- United Nations Chapter Global Compact, *Business Against Corruption: Case Stories and Examples*, April 2006.
- US Department of Justice website: www.usdoj.gov/criminal/fraud/fcpa.html.
- Alexandra A. Wraga, *The TRACE Standard*, TRACE International, Inc., 2002.
- Alexandra A. Wraga, *The High Cost of Small Bribes*, TRACE International, Inc., 2003.

Other Penalties

Violations of the FCPA may carry civil penalties (SEC and DOJ) or criminal penalties (DOJ), or both, at the discretion of the enforcement agencies. Companies that criminally contravene the FCPA can be fined up to \$2 million per violation. Individuals, such as officers, directors, employees, and agents acting on behalf of the company, can be fined as much as \$100,000 for each criminal violation; this fine may not be paid by the company. Individuals implicated in

these violations may also be imprisoned for up to five years. In addition, civil penalties of up to \$10,000 per violation may be imposed against companies and any officer, director, employee, or agent acting on behalf of the company.

Whether the violation is criminal, civil, or both, an errant company can be fined in proportion to its illegally obtained profits, can be barred from government contracts, and can have its export privileges suspended. Those are just the penalties under US law. Foreign countries may also impose their own penalties for violations of their local antibribery laws: In several countries the sentence for bribery is the death penalty.

TRACE Model Antibribery Language for Agreements with Third Parties

Intermediary [or representative, agent, supplier, etc.] agrees that neither it, nor anyone acting on its behalf, will violate any antibribery laws or international antibribery standards, regardless of their technical applicability to the Intermediary. Specifically, Intermediary agrees that it will not, directly or indirectly, pay, promise or offer to pay, or authorize the payment of any money or anything of value to:

- a. an officer, employee, agent, or representative of any government, including any department, agency or instrumentality of any government or any government-owned or government-controlled entity or any person acting in an official capacity on behalf thereof; or
- b. a candidate for political office, any political party, or any official of a political party; or
- c. any other person or entity while knowing or having reason to believe that some portion or all of the payment or thing of value will be offered, given or promised, directly or indirectly, to any person or entity described above for the purpose of influencing any act or decision of such government official, political party, party official, or candidate in his or its official capacity, including a decision to do or omit to do any act in violation of the lawful duty of such person or entity, or inducing such person or entity to use his or its influence with the government or instrumentality thereof to affect or influence any act or decision, in order to assist [Company] or Intermediary in the promotion, marketing or sale of Products and Services [defined term] under this Agreement.

In addition, no payment shall be made to anyone for any reason on behalf of or for the benefit of [Company] which is not properly and accurately recorded in the Intermediary's books and records, including amount, purpose and recipient, all of which shall be maintained with supporting documentation.

Antibribery Programs Improve Your Bottom Line

It is not always easy to stay on the right side of the FCPA. The statute is broadly written and expansively applied. Moreover, the SEC and the DOJ have offered little guidance on what constitutes an acceptable antibribery program. For many companies, their best hope is to benchmark the programs of companies of similar size and marketing strategy to ensure they remain squarely within corporate best practices.

However, at a minimum, your company's antibribery program should have:

- a well-written policy that is disseminated systematically to all employees and appropriate commercial intermediaries;
- periodic antibribery training;
- strong internal controls and record-keeping; and
- an internal reporting mechanism by which employees can ask difficult questions.

A robust antibribery program also offers a number of benefits beyond mere compliance. For example, if your company should become involved in a bribery scheme, your program could help convince the authorities that the wrongdoing was an isolated event caused by a rogue individual — and that should help to minimize any penalties against the company and its innocent managers. In addition, bribes are expensive and, if paid, bribe demands often continue over the life of a contract.

In short, an antibribery program can be good for your company's bottom line. If the program is robust, backed by management, and rigorously enforced, it will send the message to employees — and to would-be bribe-takers — that it is no longer business as usual, even in the most challenging markets. ☒

Don't let your company get into a questionable position. Learn the law you need now in order to properly counsel your client. Join us at the ACC 2006 Annual Meeting, October 23-25 in San Diego, and make sure to register for session 103: *Leading the Effort Against Corrupt Practices in the Global Arena*. For more information, go to www.acca.com/am/06.