

FCPA: Facilitating Payments v. Unlawful Bribes

The facilitating payments exception

The facilitating payments exception of the Foreign Corrupt Practices Act (“FCPA”) permits payment to foreign officials “[t]o expedite or to secure the performance of a routine governmental action” 15 U.S.C. §§ 78dd-1(b) and (f)(3) [Section 30A of the Securities & Exchange Act of 1934]. The statute provides the following examples of a “routine governmental action,” defined as “an action which is ordinarily and commonly performed by a foreign official”:

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visa and work orders;
- (iii) providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature. 15 U.S.C. §§ 78dd-1 (f)(3) [Section 30A of the Securities & Exchange Act of 1934].

The legislative history of the FCPA indicates that Congress and the

Securities and Exchange Commission (“SEC”) viewed permissible “facilitating payments” as “essentially ministerial actions that merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action,”¹ or, in other words, “payments to persuade low-level governmental officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated.”² In short, permissible facilitating payments are those made simply to persuade a governmental official to do a job he or she is already obligated to do.

The facilitating payments exception is very narrow, and payments made to speed up government action that is not already pending likely do not fall within it. For example, in November 2009 DynCorp International LLC (“DynCorp”), a defense contractor, disclosed that it had reported possible violations of the FCPA to the US Department of Justice and the SEC based on approximately US\$300,000 in payments it made to “expedite the issuance of a limited number of visas and licenses from foreign government agencies” that “were made to sub-contractors in connection with servicing a single existing task order that [DynCorp] has with a U.S. government agency.”³ These payments may be impermissible if

Key issues

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- Size of payments is irrelevant
- Local customs brokers: a special risk
- Conclusion

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¹ United States v. Kay, No. 02-20588, at 18 (5th Cir. Feb. 4, 2004) (citing H.R. Rep. No. 95-640 at 8) (internal quotations omitted).

² Id. at 19 (citing Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976).

³ DynCorp International LLC, Form 10-K, Nov. 12, 2009, <http://ir.dyn-intl.com/secfiling.cfm?filingID=950123-09-61879>.

they were made to induce government officials to do more than simply process the visas and permits at their ordinary speed and in their ordinary sequence. Similarly, payments made to persuade foreign officials to ignore or violate foreign law do not fall within the exception. For example, in August 2008, Con-way Inc., a California-based global freight forwarder, paid a US\$300,000 penalty and accepted a cease and desist order to settle SEC allegations that it violated the books and records and internal controls provisions of the FCPA through Emery Transnational (“Emery”), a Philippine based firm. The SEC alleged that Emery made “hundreds of small payments totalling at least US\$417,000 to Philippine customs officials and to officials of numerous majority foreign state-owned airlines.”⁴ The SEC alleged that these payments induced foreign officials to “violate customs regulations by allowing Emery to store shipments longer than otherwise permitted” and “improperly settle Emery’s disputes with the Philippines Bureau of Customs, or to reduce or not enforce otherwise legitimate fines for administrative violations.”⁵ These payments did not fall within the facilitating payment exception because violating customs regulations, improperly settling customs disputes and selectively enforcing administrative fines are not actions “ordinarily and commonly performed by a foreign official.”

Size of payments is irrelevant

Companies have been prosecuted for what may seem like negligible gifts to foreign officials, demonstrating that any payments or gifts made to influence a

foreign official are prohibited, no matter how small. Publicly, DOJ has stated that there is no internal threshold or minimum dollar value for prosecution, but rather each case had to be taken on its own merits.⁶

A recent example of just how small the “anything of value” can be arose in June 2010, when Veraz Networks, Inc., a San Jose California-based telecommunications company, agreed to pay US\$300,000 to settle charges that it violated books and records and internal controls provisions of the FCPA by improperly accounting for gifts provided to Chinese and Vietnamese government officials.⁷ Referred to internally as the “gift scheme,” the payments were made to influence the awarding or maintaining of contracts. The SEC alleged that Veraz approved, inter alia, expenses for gifts and entertainment for officials of a telecommunications company controlled by the Vietnamese government, including flowers for the wife of the company’s CEO.⁸

This was not the first time the government has prosecuted FCPA violations based on seemingly small gifts. In late 2009, UTStarcom Inc. (“UTSI”) agreed to US\$1.5 million in penalties to the SEC to settle charges that it violated the anti-bribery, books and records, and internal controls provisions of the FCPA.⁹ The SEC’s charges included the allegation that UTSI’s general manager in Thailand gave bottles of wine to agents of the government customer, albeit rare wine that in some instances cost as much as US\$600 each.¹⁰

Local customs brokers: a special risk

Companies should ensure that local customs brokers contracted to effect customs transactions do not provide improper payments, disguised as facilitating payments, to customs officials. Companies should be aware that such improper payments may be invoiced to the company under innocuous titles like “customs processing.”

For example, in July 2009, Helmerich & Payne Inc. (“H&P”), an oil and gas driller, entered into a deferred prosecution agreement with the Department of Justice to resolve improper payments made by H&P to customs officials in Argentina and Venezuela.¹¹ H&P was alleged to have made approximately US\$185,673 in improper payments “with the purpose and effect of avoiding potential delays typically associated with the international transport of drilling parts.”¹² The SEC alleged that H&P “made most of these improper payments indirectly through customs brokers.”¹³ The brokers allegedly invoiced H&P for these improper payments as charges for “additional assessments,” “extra costs,” “urgent processing” or “customs processing.”¹⁴ Based on these payments, the SEC claimed H&P violated the books and records and internal control provisions of the FCPA¹⁵, and rejected a facilitating payments defense.

Undocumented improper payments made to customs brokers can also be problematic. For example, in July 2009 Nature’s Sunshine Products, Inc. (“NSP”), a manufacturer of nutritional products, agreed to pay US\$600,000 to settle

⁴ Compl., SEC v. Con-way Inc., No. 1:08-cv-01478, at 1 (D.D.C. Aug. 27, 2008), <http://www.sec.gov/litigation/complaints/2008/comp20690.pdf>.

⁵ Id. at 4.

⁶ April 8 Webcast: FCPA & International Anticorruption Enforcement-Trends in 2010, reported in Compliance Week: Insights on Bribe Thresholds and Facilitating Payments (April 9, 2010), <http://www.complianceweek.com/blog/carton/2010/04/09/insights-on-bribe-thresholds-and-facilitating-payments/>.

⁷ See U.S. Securities and Exchange Commission, Litigation Release No. 21581 / June 29, 2010, <http://www.sec.gov/litigation/litreleases/2010/lr21581.htm>; Compl., SEC v. Veraz Networks, Inc., No. 10-cv-2849, at 4 (N.D. Cal. June 29, 2010), <http://www.sec.gov/litigation/complaints/2010/comp21581.pdf>.

⁸ Id.

⁹ UTStarcom Inc., Litigation Release No. 21357 (Dec. 31, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr21357.htm>.

¹⁰ Compl., SEC v. UTStarcom Inc., No. 09-cv-6094, at 5 (N.D. Cal. Dec. 31, 2009).

¹¹ See Department of Justice, Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America, <http://www.justice.gov/opa/pr/2009/July/09-crm-741.html>.

¹² In re Helmerich & Payne, Inc., Exchange Act Release No. 60400 at 2 (July 30, 2009).

¹³ Id. at 3.

¹⁴ Id. at 3-4.

¹⁵ Id. at 5.

charges by the SEC that it made improper cash payments to customs brokers in Brazil in 2000 and 2001.¹⁶ NSP was charged with making over US\$1 million in cash payments to customs brokers in order to facilitate the importation of unregistered products into Brazil.¹⁷ According to the SEC complaint, NSP's internal books did not contain supporting documentation for these charges and NSP ultimately purchased fictitious supporting documentation for them.¹⁸ Based on these payments, the SEC charged that NSP violated, *inter alia*, the anti-bribery, internal controls and books and records provisions of the FCPA.¹⁹

Conclusion

Facilitating payments are a challenge for compliance-minded companies. While payments are clearly allowed if kept within the bounds of the exception, meandering outside the bounds provides clear grounds for enforcement action. Best practices include requiring approval from senior compliance officials for all such payments or banning them completely. It is a matter of weighing the risks.

¹⁶ SEC, Litigation Release No. 21162 (July 31, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr21162.htm>.

¹⁷ Compl., SEC v. Nature's Sunshine Prods., Inc., No. 2:09-cv-0672, at 4 (D. Utah July 31, 2009). The complaint also asserted claims against the company's former COO and CFO. See *id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 9-12.

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