

Facilitating Payments Under the FCPA: *Questions You Must Ask to Avoid Liability*

Every international business faces the issue of what to do when a foreign bureaucrat demands “a little something extra” for doing his job in a timely manner. While one might simply consider this a cost of doing business in a different culture, it would be a mistake to make such payments without considering the substantial risks that may be involved – risks that are well illustrated by a recent SEC enforcement action. In *SEC v. Delta & Pine Land Company*, a US-based seed company and its operating subsidiary in Turkey settled charges that they had violated the Foreign Corrupt Practices Act (FCPA) by making payments to agricultural inspectors in securing inspections and obtaining certifications required to sell or export cottonseed. See SEC Litigation Release No. 20,214 (July 26, 2007). Despite the fact that these payments were relatively small in amount (\$43,000 over a five-year period, averaging \$8,600 per year), Delta & Pine paid a \$300,000 fine and agreed to retain an independent monitor to evaluate the company’s compliance programs.

In view of these risks, particularly given increasingly vigorous enforcement of the FCPA, many companies employ strict review procedures to control such payments, while other companies have decided to prohibit such payments entirely. In considering how to address whether and, if so, when, to make facilitating payments, legal counsel and compliance officers should ask the following questions.

1. Is the payment really permitted under the FCPA?

Not every “facilitating” payment will be viewed that way by law enforcement authorities. The FCPA allows payments to government officials for “routine government action,” which is very narrowly defined to include things such as

obtaining mail delivery or police protection, processing governmental papers, and “actions of a similar nature.” This class of permitted payments involves services that one is entitled to receive, and as to which the government official has no discretion – other than as to when such service will be provided.

But in an instance where payment is made to an official with any discretion beyond the mere timing of his performance, the payment may appear to be an effort to influence him to do something that he should not do at all – and such a payment might violate the FCPA. In the Delta & Pine case, inspectors received payments and then sometimes failed to conduct inspections properly or even at all, but provided paperwork

certifying that they had done so. In considering whether such a payment is permitted under the FCPA, then, one must ask: is this payment to assure the timely inspection of a product? Or might it seem to be made to assure that the inspection is passed? Is a payment to customs officials for the purpose of getting the product into the country promptly? Or might it be viewed as an effort to obtain a lower rate of duty than should be levied? If a payment can be characterized as influencing an official to breach his responsibilities, the SEC or the Department of Justice may seek to do just that.

2. Is the company willing to violate local law?

Almost every facilitating payment,

whether or not permitted by the FCPA, violates the law of the country in which it is made. Such laws may be rarely or never enforced, and the company may determine to make the payment anyway. But if a decision is made to act in a way that may violate local law, at least two further questions should be asked to assure a full consideration of the potential consequences.

- **Is the company's ability to conduct its business in that country dependent upon making these payments?**

Even if the company is willing to take the risk of violating local law, it should evaluate the potential consequences of enforcement action in that country. If the company is found to have violated the law there, is there a risk that the company would no longer be able to conduct its business, or do so profitably? While not every such risk requires disclosure, public companies should consider whether disclosure might be required.

- **Will the payment be properly recorded?**

Even if the consequences of local law enforcement pose no significant concern, there may be unanticipated problems due to the fact that local laws are often more vigorously enforced against the government officials who accept improper payments. While that may not be the company's direct

concern, proper recording of the payment may be complicated by this fact. Local records may be subject to government inspection, and as a result, there may be considerable reluctance in the local country to accurately record the payment. Yet for public companies, the FCPA requires accurate recording of all transactions, even those that are not material, and the failure to do so, even for facilitating payments permitted by the FCPA, can give rise to SEC enforcement action. *See SEC v. Dow Chemical Co.*, SEC Litigation Release No. 20,000 (Feb. 13, 2007) (failure to accurately record payments to government officials in India in connection with inspection and registration of insecticide products).

3. Who will have the authority to approve facilitating payments made by the company?

Given the complexities associated with these payments, if a company decides to permit certain facilitating payments, consideration should be given to how such payments will be approved. Some companies simply advise their personnel that such payments are permitted under the FCPA, and leave it to local managers to figure out. But the FCPA's standards are far from intuitive, and are easily misunderstood, particularly by those working in different business environments around the world. Controlling the risks posed by such payments can be accomplished

by centralized corporate review, where consistent decisions can be made based upon appropriate legal and business judgment.

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