

Does Wal-Mart Have a Facilitation Payment Exception to the FCPA?

In an article entitled “*Many Of The Bribery Allegations Against Wal-Mart May Not Be Illegal*” Forbes reporter Nathan Vardi wrote that “many of the allegations reported in the New York Times could reasonably be interpreted as falling under the so-called “facilitating payments” exception.” I wondered what defense might be available to Wal-Mart where bribes of up to \$244,000 could be construed as an exception to prosecution for bribery of foreign government official under the Foreign Corrupt Practices Act (FCPA). In this post we will visit the text of the FCPA and other Department of Justice (DOJ) commentary, look at some enforcement actions; one open investigation involving alleged facilitation payments and offer some guidance to the compliance practitioner on what may or may not constitute a facilitation payment under the FCPA.

I. The Statute and Other Guidance

A. The Statute

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

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

It is important to note that the language of the FCPA makes it clear that a facilitation payment is not an affirmative defense but an exception to the general FCPA proscription against bribery and corruption. Unfortunately for the FCPA Practitioner there is no dollar limit articulated in the FCPA regarding facilitation payments. Even this limited exception has come under increasing criticism. The Organization for Economic Cooperation and Development (OECD) studied the issue and, in November 2009, recommended that member countries encourage their corporations to not allow the making of facilitating payments.

B. Lay Person’s Guide to the FCPA

In the Lay Person’s Guide to the FCPA is a brochure by the DOJ which is their “general explanation of the FCPA.” Within in this guidance the DOJ states:

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described in the guide on p. 10 and below:

"Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.

II. Enforcement Actions

A. Con-way

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

B. Helmerich and Payne

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

C. Panalpina

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

obtain preferential treatment for importing certain equipment into various countries but primarily in West Africa.

D. DynCorp

Then there is the DynCorp investigation matter. As reported in the FCPA Blog and others, it is related to some \$300,000 in payments made by subcontractors who wished to speed up their visa processing and expedite receipt of certain licenses on behalf of DynCorp. This investigation has been going on for several years and there is no anticipated conclusion date at this time.

III. Some Guidance

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

1. **Size of payment** - Is there an outer limit? No, there is no outer limit but there is some line where the perception shifts. If a facilitating payment is over \$100 you are arguing from a point of weakness. The presumption of good faith is against you. You might be able to persuade the government at an amount under \$100. But anything over this amount and the government may well make further inquiries. So, for instance, the DOJ might say that all facilitation payments should be accumulated together and this would be a pattern and practice of bribery.
2. **What is a routine governmental action?** Are we entitled to this action, have we met all of our actions or are we asking the government official to look the other way on some requirement? Are we asking the government official to give us a break? The key question here is whether you are entitled to the action otherwise.
3. **Does the seniority of the governmental official matter?** This is significant because it changes the presumption of whether something is truly discretionary. The higher the level of the governmental official involved, the greater chance his decision is discretionary.
4. **Does the action have to be non-discretionary?** Yes, because if it is discretionary, then a payment made will appear to obtaining some advantage that is not available to others.
5. **What approvals should be required?** A facilitation payment is something that must be done with an appropriate process. The process should have thought and the decision made by people who are the experts within the company on such matters.
6. **Risk of facilitation payments and third parties?** Whatever policy you have, it must be carried over to third parties acting on your behalf or at your direction. If a third party cannot control this issue, the better compliance practice would be to end the business relationship.

7. **How should facilitation payments be recorded?** Facilitation payments must be recorded accurately. You should have a category entitled “Facilitation Payments” in your company’s internal accounting system. The labeling should be quite clear and they are critical to any audit trail so recording them is quite significant.
8. **Monitoring programs?** There must always be ongoing monitoring programs to review your company’s internal controls, policies and procedures regarding facilitation payments.

So we return to the question of when does a grease payment become a bribe? There is no clear line of demarcation. The test seems to turn on the amount of money involved, to whom it is paid and the frequency of the payments. Do Wal-Mart’s alleged payments to speed up the process qualify as facilitation payments or does an aggregate of over \$24 million paid constitute something else?

Additionally, accurate books and records are a must. At this point it is not apparent if Wal-Mart accurately recorded these payments. If Wal-Mart really believed they were facilitation payments, why didn’t they just record them as such?

Also remember that the defense of facilitation payments is an exception to the FCPA prohibition against bribery. Any defendant which wishes to avail itself of this exception at trial would have to proffer credible evidence to support its position, but at the end of the day, it would be the trier of fact which would decide. So much like any compliance defense, the exception is only available if you use it at trial and it would be difficult to imagine that Wal-Mart will want this matter to ever see the light of a courtroom.

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