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Bribe

What payments do not constitute a bribe under the
FCPA?



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Payments Not Considered A Bribe

- **Facilitation or Expediting Payments**
 - Payment to a foreign official, political party, or party official for the purpose of which is to expedite or to secure the performance of a routine governmental action
- **Gifts & Entertainment**
 - Payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
 - The payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--
 - ✓ the promotion, demonstration, or explanation of products or services;
 - ✓ the execution or performance of a contract with a foreign government or agency thereof.



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Payments Not Considered A Bribe

- Duress Payments
 - Requires the threat of (or perceived threat of) or use of physical force sufficient to cause death or serious bodily injury
- Extortion Payments
 - “true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purposes.”
- Payments made without corrupt intent



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Common FCPA Related Questions



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3rd Party Due Diligence

To: Pauly Delvecchio, Due Diligence coordinator
From: Michael Sorrentino, Managing Director, Sales
Re: Due diligence on the Jersey Shore

Pauly, We have a situation here. We contracted with a 3rd Party, Snooki, Inc., to market our tanning booths, sun tan lotion, alcohol, and laundry detergent throughout Europe and the Isle of Jersey. Snooki, Inc. passed our 3rd party due diligence with no red flags.

I just visited Snooki, Inc's office on the Riviera and the employees all seem bizarre. How could this company pass your due diligence when they seem incapable of passing a drivers test. I'm not worried about them bribing somebody...I'm worried about them bribing everybody!!!

1. What level of due diligence does the DOJ expect us to do on our 3rd parties?
2. How frequently should due diligence be conducted? I am asking because with this group, every week may not be frequent enough.
3. And when it comes to 3rd parties, where does our liability for 3rd party behavior begin and end?



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Facilitation Payments

To: Billy Bean, Chief Compliance officer
From: Peter Brand, Asst Director, Operations
RE: Project Moneyball

Billy, we had several problems during the exhibition tour of South America.

- 1) At one border crossing, the guard demanded a “crossing fee” of \$50 from Art Howe. Howe refused to pay cash and instead offered the guard Hattberg because he can’t play first anyway. The guard demanded Pena instead. I told the guard that we could not give him Pena because Pena plays for the Cubs now. Since all Howe’s paperwork was in good order, I told him to pay the \$50 and you would put it in the books as a facilitation payment. Is that correct?**
- 2) Another guard confiscated Miguel Tejada’s glove claiming it should have been listed on the customs declaration. Tejada told me he was under duress because, and I quote, “mi guante es mi vida”. So Tejada paid the guard \$100 and the glove was returned. Was this a duress payment?**



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Facilitation Payments (and the UKBA)

- 3) The third incident involved Jeremy Giambi. He was stopped for speeding outside of Seilandia. The police officer asked for a “pagamento café” which literally means coffee payment, so the officer wanted just \$5. Jeremy refused, citing our policy, and the officer told him he would be held in the local jail “for a day or two” until the judge could hear his case. The officer said the jails were co-ed and Jeremy said “Great”. I met Jeremy at the jail and to his disappointment, I paid the \$5. Is this a duress payment? What if Jeremy’s wife was with him, would it be a duress payment for her?
- 4) I just learned that while we were gone, you sold the entire team to the city of Liverpool, England and we are now subject to the UK bribery act? Does that change any of your answers to these questions?



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Travel & Entertainment

To: Michael Scott

From: Dwight Schrute

Re: Dunder-Mifflin Canadian subsidiaries - Health & Safety Inspection

Michael,

I proudly report that Andy Bernard and I overcame the uncooperative behavior of Jim Halpert to successfully complete this assignment. We met the Canadian Health & Safety inspectors in Winnipeg and escorted them on a tour of the Winnipeg paper mill and then flew them to the paper mill in Moose Jaw. We paid for all three inspectors' meals, lodging and airfare for both locations.

Total costs were \$198 for meals, \$135 for hotel (all three inspectors shared one room), and \$1200 for airfare. Divided by three inspectors, the costs averaged \$33/inspector/day for meals, \$45/inspector lodging and \$400/inspector airfare. They will not issue the results of the inspection until their department head approves the report. It should take three weeks. The inspection was required as part of our contract with the government.

I add that Jim Halpert should be severely disciplined since he continually mocked my authority and accused Andy and me of violating the FCPA.

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Charities

From: Alexandra King - V.P. King Resorts, inc.

To: Matt King - President and General Counsel, King Resorts, Inc.

Re: Descendents Resort Properties --- Pitcairn Island acquisition

Aloha Dad, Sid and I tried to close the deal to buy the Pitcairn Island property, but when we met with the zoning officer, he said that we had to donate \$10,000 to his wife's charity called "Save the Bolo". Dad, the Bolo is a poisonous snake. I mean really Dad, that's Gross!! We didn't know what to do, and since you didn't answer your phone, I talked to Cousin Hugh, Cousin Ralph, Cousin Hal, Cousin Milo, Cousin Stan, Cousin Six, Cousin Wink, Cousin Connie, and Cousin Dave. They all said to sign the papers. But I didn't and the zoning officer punched Sid in the face.

Then we found another zoning official who said that corporations buying property on the island typically donate to the Pitcairn Cancer Society, Pitcairn Hospital Project, or similar charity on the list of publicly audited charities. If we donate \$10,000, the charities will list us as a sponsor at all their events. The administrator said nobody cares which charity but it should be one from the list.

And one more thing. While we were here, Sid and I got married and adopted a child from a nearby island. To complete the adoption we had to write a check for \$10,000 to the tribal chief. So we wrote the check and now you have a grandson. Will this get the company in trouble?

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Gifts to public officials

From: Gil Pender - President
To: Gertrude Stein - CEO
Re: Midnight in Paris Art Corporation

Gertrude, we are having a great deal of trouble with our “no cash or cash equivalent” policy concerning gifts to public officials. Since the Louvre, a French Government institution, hired Picasso, Dali, and Man Ray as buyers, we have to treat them as foreign public officials. That means no free champagne, and cash or cash equivalent gifts! I know it is difficult because they are a bunch of freeloaders.

I spoke to Hemmingway about the no cash or cash equivalent policy and he said **“There is no lonelier man in death, except the suicide, than that man who has lived many years with a good wife and then outlived her. If two people love each other there can be no happy end to it.”** And in the next breath he says “if Picasso dies, we must comply with common cultural practice and give his wife an envelope containing from \$100 to \$400 US” Apparently the amount varies depending on his status in society and whether anyone understand his paintings. But I am not sure and think that violates the FCPA.

Then he says **“Never go on trips with anyone you do not love,** and that if Dali takes Adriana on a trip and marries her, we are expected to give them an envelope with at least \$300 US.”

We may have to give gifts for births too. Hemmingway said **“To be a successful father... there's one absolute rule: when you have a kid, don't look at it for the first two years”.** So if Man Ray has a little Ray Man, we must give Mrs. Man Ray an envelope with at least \$300 US.” I told him he was completely wrong but he said it is codified in French law. (I meant about not looking at the kid, but he meant the \$300.)

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SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud

Morgan Stanley not charged

Is this a trend for the future?



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Industry Wide Investigation

From: Houz, Tolly
Sent: Fri, 12 Jun 2009 21:25:45 GMT
To: Monsieur, Cookie
Subject: Urgent – Feds Investigating Chocolate Supplier

I'm forwarding this information to our compliance department. Stand by for further direction.

-----Original Message-----

From: Monsieur, Cookie
Sent: Fri, 12 Jun 2009 17:12:45 GMT
To: Houz, Tolly
Subject: Urgent – Feds Investigating Chocolate Supplier

I just heard that WooHoo Chocolate Supplier is under investigation for allegedly paying bribes to export chocolate from the Country of Almond. What should we do?



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Industry Wide FCPA Investigation

- **Oil Services Industry**

- Began with the FCPA investigation of Vetco Gray
 - ✓ Allegations that Vetco Gray paid bribes to Nigerian Customs Service using a 3rd party freight forwarding company
 - ❖ Vetco Gray cooperated providing documents and facilitating employee interviews
 - ✓ On 02/06/2007, three subsidiaries plead guilty to violating the anti-bribery provisions of the FCPA and paid \$26M criminal fine. The parent company entered into a DPA



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Tidewater, Inc

Tidewater Announces Internal Investigation into Nigerian Operations NEW ORLEANS--(BUSINESS WIRE)--April 26, 2007--
Tidewater Inc. (NYSE:TDW) announced today that it is conducting an internal investigation of its Nigerian operations, focusing on the legality, under the U.S. Foreign Corrupt Practices Act (FCPA) and local laws, of its Nigerian affiliate's reimbursement of certain expenses incurred by a customs agent in connection with the temporary importation of its vessels into Nigeria, particularly the obtaining of certain permits that are necessary for the Company's vessels to operate in Nigerian offshore waters. The Audit Committee of the Company's Board of Directors has engaged the law firm of Steptoe & Johnson of Washington, D.C., a leading international law firm with significant experience in investigating and advising upon FCPA matters, to lead the investigation.



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Industry Wide FCPA Investigation

- Government began investigation into Panalpina's customs clearing and other business practices in Nigeria based on evidence obtained from Vetco Gray
- Investigation expanded to include customers of Panalpina
- Panalpina cooperates and the investigation expands from Nigeria into other countries



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November 2010

- Initial round of settlements include 7 entities resulting in \$236.5 million of criminal and civil penalties
- DOJ declines prosecution of several entities

Panalpina :

Parent – DPA

US Subsidiary – Plea

\$70.5 million penalty

\$11.3 million disgorgement

Global SantaFe:

Criminal settlement included with
Transocean (successor company)

\$5.9 million civil penalty



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Transocean DPA

Calculated fine range:
\$16.8 to \$33.6 Million

Actual Fine
\$13.4 Million
(20% below)

Disgorgement
\$7.2 Million

FACTORS

- Internal investigation
- Investigation expanded beyond Nigeria
- New compliance officer
- Specific FCPA Audit team
- Revised policy, training, and 3rd party review
- Cooperation with DOJ
- Continued cooperation and reporting



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Tidewater DPA

Calculated fine range

\$10.5 to \$21 Million

Actual Fine

\$7.35 Million
(30% below)

Disgorgement

\$8.3 Million

Factors

- **Internal investigation after learning about Panalpina**
- **Voluntary disclosure to DOJ**
- **Voluntary expansion of investigation outside Nigeria**
- **Hired GC with compliance experience and made him CCO with corporate compliance committee**
- **Enhanced compliance policy, training and 3rd party vetting**
- **Full cooperation with DOJ**



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Pride DPA

Fine Range

\$72.5 to \$145 Million

Actual Fine

\$32.625 Million
(55% below)

Disgorgement

\$23.5 Million

Factors

- Early, voluntary disclosure to DOJ
- Extensive cooperation with investigation including providing relevant documents
- Substantial assistance in other investigations in Venezuela, Mexico,
- Expansive investigation of improper activity in Nigeria, Saudi Arabia, India, Angola, Brazil, Kazakhstan, Libya, Nigeria, and Republic of the Congo
- Remedial efforts and implementing compliance program



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Noble NPA

Actual Fine

\$2.6 Million

Disgorgement

\$5.6 Million

Factors

- **Discovered violations through own internal investigation**
- **Timely, voluntary, complete disclosure**
- **Extensive cooperation with DOJ**
- **Voluntary investigation of business operations throughout world**
- **Pre-existing compliance program**
- **Efforts by Audit Committee to detect and prevent conduct**
- **Remedial efforts & enhancements**
- **Continued cooperation with, and reporting to, DOJ**



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Beneficial Behaviors

- Discovery of violations through internal investigation.
- Expansion of investigation to other areas where misconduct was not known or suspected.
- Timely, voluntary and complete disclosure.
- Cooperation with DOJ and SEC.
- Pre-existing effective compliance program and efforts to detect and prevent improper conduct.
- Remedial efforts to enhance compliance program.
- Agreements to continue cooperation with DOJ.



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How Compliance Departments Assisted in the Industry Wide Investigation

- Complete cooperation with the Government.
- Upon hearing rumors that 3rd party was paying bribes to officials, CCO hired outside counsel and undertook internal investigation.
- Documentation that CCO's robust compliance program and strong internal controls identified the red flags on the 3rd party charges long before the DOJ announcement regarding the 3rd party.
- Compliance program had already provided specific training to employees in areas of concern. Provided documentation of training provided and logs identifying those who attended training.
- Provided Emails from company employees questioning the 3rd party charges and demanded supporting receipts.
- Documentation that company refused to pay any 3rd party charges not supported by a receipt.
- Company officials sought a meeting with 3rd party senior executives to advise of company policy, understand the nature of the charges, and resolve outstanding balances not related to bribery.



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How Compliance Departments Assisted in the Industry Wide Investigation

- Provided 3rd party contracts from several years earlier which contained FCPA language .
- Described audit controls with FCPA focus that were in effect for several years.
- Emails from the audit director, written after scheme reported, advising all area employees that the company would not pay any vendor for any goods or services not ordered through an approved purchase order.
- Emails from audit directors and CCOs identifying schemes as they are discovered or revealed elsewhere and prohibiting similar payments.
- Emails from the CCO, immediately after the discovery of a scheme advising all employees it was a violation of the FCPA, that a thorough investigation would be undertaken, routine email and document destruction must cease, and that all documentation must be secured.
- Instituted an emergency invoice review process on the entire project.
- Instituted remedial and additional compliance training
- Disclosed all communications between CCO and the 3rd party documenting the issue and efforts to address it.



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Questions?

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