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Sweating the Small Stuff on Bribery and Facilitation Payments

Jaclyn Jaeger | September 9, 2014

Faced with a global crackdown on corruption, more companies are putting zero-tolerance policies in place for bribery. Eliminating small bribes and facilitation payments throughout the organization, however, can be a difficult undertaking.

Part of the problem is that small payments are sometimes requested in urgent situations, in which employees are forced to make crucial judgments on the fly, and sometimes even in threatening situations. And refusing to pay even a small bribe can result in delays in moving goods through customs or holding up entire shipments at ports and canals, bringing a company's operations to a grinding halt.

On the demand side of the equation, requests for small bribes are often woven into the fabric of many cultures. Local employees in high-risk jurisdictions who may be used to paying bribes in every aspect of their personal life may not understand why it's unacceptable from a corporate policy perspective. "It's very difficult in some cultures to try to force that distinction," says Julian Glass, managing director for the forensic and litigation consulting practice of FTI Consulting.

Distinguishing between permissible facilitation payments and illegal bribes can also prove maddeningly difficult to navigate, especially when contending with a complex web of global anti-corruption laws. "There is a very thin line between facilitation payments and bribes," says Julia Bailey, a managing director and compliance practice leader with BDO Consulting. "A lot of people get tripped up on that."

Companies that adopt a zero-tolerance policy on paying small bribes hope that they can eliminate the expectation from government officials in countries where they do business. "They are starting to find that their reputation for not paying bribes means they are no longer asked; whereas those that pay small bribes can be subject to an ever-increasing spiral of demands," notes a recent report from Transparency International that provides guidance to companies on countering small bribes.

Facilitation payments—also called "grease payments"—are small sums given to foreign officials to expedite normal business transactions, such as clearing goods through customs. They differ from bribes, which are typically meant to entice foreign officials to commit acts they might otherwise *not* do, such as awarding a contract. “In many cultures, if not most, small grease payments are not considered bribes at all, but more like what tipping in a restaurant would be for us,” Bailey says.

Where to draw the line between bribes and facilitation payments can be tricky. For example, if you regularly pay a customs official to get goods over the border, and expect preferred treatment because of the payment, “it’s no longer a facilitation payment,” Bailey says. “It’s a bribe.”

No-Bribe Policies

Not until passage of the U.K. Bribery Act in 2011, which imposed a blanket ban on bribes and facilitation payments paid to government and non-government officials, did many multinational companies really begin to assess their policies on facilitation payments. “More companies are adopting a no-bribe policy for their global operations that include no facilitation payments,” says Joseph Spinelli, managing director in the global investigations and compliance practice at Navigant Consulting.

The only exception some companies are willing to make is for the physical safety of employees. According to global bank HSBC’s anti-bribery policy, for example, “all forms of bribery, including facilitation payments—except in order to protect against loss of life, limb, or liberty—are prohibited, whether they take place directly or indirectly through another party.”

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Aluminum producer Alcoa has in place a similar anti-corruption policy. Adopted in May 2012, it states: “Should a person covered by this policy encounter a situation that presents an imminent and serious safety risk to personnel or company facilities if a payment demand is not met, such a payment would not be a prohibited bribe under this policy.”

‘Small Bribe’ Defined

Other companies are becoming increasingly explicit about what constitutes a small bribe. Cisco, for examples, spells out in its anti-bribery policy a long list of items that may constitute a bribe.

“A bribe is not just cash in an envelope passed under a table,” Cisco’s policy states. “International laws and Cisco policy define a bribe as ‘anything of value,’ such as gift cards, home repairs, tickets to a theater or sporting event, guest passes to a private club, a no-bid contract, a summer job for a teenage family member, free limo or courtesy car service rides, and more.”

Rockwell Automation offers its employees a list of acceptable and unacceptable gifts. “Common examples of acceptable gifts include: flowers, food baskets, pens, or notebooks,” the policy states. “Examples of unacceptable gifts in a business context may include jewelry, a cruise, limousine ride, a spa treatment, or even securing admission for a customer’s child at a school or university.”

What constitutes a small bribe is also relative to the jurisdiction where the company operates. In Western culture, for example, a $5 or $10 bribe might be considered insignificant, while in other parts of the world such an amount could equal a person’s entire weekly wage, Glass says.

Another common caution about paying small, seemingly insignificant sums is that they add up. Many small bribes, taken together, can quickly amount to large-scale bribery. “You could pay a small bribe once, but what happens if you pay it a multitude of times? Then the small bribes become one large amount,” Spinelli says. “That’s where companies constantly get themselves in trouble.”

Mitigating Measures

The foundation for eliminating small bribes, Spinelli says, begins with a proper risk assessment to identify where the problematic areas are in your business: What employees are most likely in a position of paying small bribes and facilitation payments? What factors are causing those payments to be made? What controls should the company put in place to mitigate them?

If employees have to pay a small bribe for whatever reason, the company should ensure these payments are recorded, Glass advises. That way, senior management can better assess where potential issues exist, and then they can try to address those issues, he says.

Travel and entertainment expenses are an especially common source of small bribes. Companies may want to consider having a policy in which receipts are required for cash payments over a certain amount, such as $20 or $50, Bailey says, “and ensure that people write a description of what the business purpose was for that payment.”

Provide communication and training to employees to make clear the company’s policy regarding small bribes and facilitation payments, what to do if they encounter such a situation to pay a bribe, and how to identify what constitutes a bribe. “People may not recognize when something relatively small is a bribe, because what constitutes a bribe can vary depending on the specific circumstances,” Bailey says.

“With hindsight, most people will clearly recognize a request for a bribe, but often these things happen very quickly in a high-pressure situation,” says Kevin Braine, managing director and head of EMEA for the compliance practice at Kroll. “That’s the danger. People have already handed over the $20 before they stop and really think about the consequences.”

Principles for Countering Small Bribes

Below Transparency International outlines several principles for tackling the issue of small bribes.

Effective countering of small bribes, including facilitation payments, should be based on the following principles.

A supporting culture of integrity: A corporate commitment to ethics and integrity provides an enabling environment for countering small bribes and will include integrity expressed in ‘tone-from-the-top,’ a policy of prohibition of bribery in any form and an effective over-arching anti-bribery program.

Corporate commitment to eliminate small bribes: The company commits to a policy of prohibition of small bribes and a strategy for their elimination through a program of internal controls and collaborative action.

Risk assessment as the basis for designing the strategy and program: The company identifies and assesses the risks that small bribes are demanded or paid in its activities and operations, and the factors that cause them.

Communication and training: As part of the program, communications and training make clear the company’s policy of prohibition of small bribes and give requisite information and advice to employees on how to anticipate and resist demands, seek advice and to report concerns or instances of small bribes.

Third-party due diligence: As part of the program, the company has in place appropriate procedures for third parties including due diligence, contract terms, communication, training and monitoring.

Internal accounting controls designed specifically to counter small bribes: As part of the program, the company’s internal accounting controls are modified and extended to counter small bribes.

Appropriate actions taken in the event small bribes are detected: As part of the program, the company has a procedure to deal with any incidents including investigation and review, disciplinary action and consideration of reporting the incident to the relevant authorities.

Monitoring the effectiveness of the compliance program to counter small bribes: The program for countering small bribes is regularly monitored and reviewed.

Source: Transparency International.