

Small Bribes

# BUY BIG

By Alexandra Wrage and Matthew Vega



# PROBLEMS



**T**he United States leads the world in fines, jail terms, and other penalties for the payment of bribes overseas. An aggressive prosecutorial climate, fuelled by reporting requirements under Sarbanes-Oxley, has moved this issue to center stage for in-house counsel and compliance officers. Companies spend a fortune vetting their third party intermediaries and reviewing any gifts or meals provided to foreign government officials lest the latter be deemed an “inappropriate payment.” Yet, the United States is also one of the few countries that raises no objection to the payment of what it euphemistically calls a “facilitating payment” overseas. These are typically small payments to prompt a low-level government official to do what he or she is supposed to do anyway: stamp your passport, provide police protection, clear your goods through customs, or hook up your phone. The US

anti-bribery law, the Foreign Corrupt Practices Act (FCPA) expressly carves out these payments as an exception to its otherwise onerous anti-bribery law. A relic from the days when companies thought there wasn’t much they could do to avoid paying these bribes, these payments linger on in a sort of legal limbo. The enforcement authorities now lag behind many US corporations which have abolished these payments. Companies are beginning to see facilitating payments for what they are: a violation of foreign law (no country permits you to bribe their officials regardless of what the bribe is called), an invitation to books and record violations (few employees can bring themselves to record these bribes accurately), and corrosive of good governance more generally (companies are uncomfortable leaving definitions of permissible versus impermissible bribes in the hands of their employees).

Most multinational companies have made progress toward eliminating traditional bribes from their business practices. They have done this by implementing comprehensive compliance programs, by training local and foreign employees and business intermediaries, and by rigorous internal enforcement. Now some of these companies are taking steps to eliminate “facilitating payments” from their business practices as well. These small bribes, permitted under the FCPA, are made to foreign government officials to encourage them to perform or expedite routine, nondiscretionary governmental tasks.

In this article, we will illustrate how making “facilitating payments” leads to problems, and provide suggestions on how companies can implement and enforce their own internal policy against bribes of any kind, both large and small. Much of the following guidance was developed from a recent TRACE survey in which 42 companies engaged in international business were interviewed to learn how they have stopped paying small bribes to government officials. Many of the companies interviewed have found that it is possible—occasionally even easy—to refuse to participate in bribery schemes. There are certain techniques that work and certain practices to avoid.

## The Problem

In many companies, a distinction has long been drawn between major bribes and mere “facilitating payments.” The distinction has been confusing. Bribes and “facilitating payments” are both payments, gifts to, or favors for, government officials—in their personal capacity—in exchange for a desired outcome or relief from an undesirable situation. The legal distinction under the FCPA is supposed to be whether the benefit bestowed was within the official’s discretion to grant or whether it was due to the payer as a matter of course. The fact remains, however, the company is almost always seeking better treatment than a non-paying company would expect to receive. If companies make these payments willingly, they are bribes. If companies pay them because they believe they have no choice, they are a form of extortion.

“A corporate policy allowing facilitating payments, except where prohibited by local law, doesn’t really work for a global company with global employees. There are



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The views expressed in this article are the authors’ own and are not being expressed on behalf of their companies.

so many local prohibitions that the overall policy becomes like Swiss cheese. Add to that the agony of explaining to employees that big bribes are bad but little bribes are okay. End result—“the employees are confused and anxious and are distracted from doing their real job,” said Rebecca (Riv) Goldman, VP, commercial law, Rockwell Automation.

## Double Standard

Of the handful of countries that permit these small bribes overseas, none permits them at home. A Canadian or American who makes a “grease payment” to a foreign customs official would face criminal penalties for making the same payment to an official at home. Permitting the citizens of one country to violate the laws of another on the grounds that it is “how they do business there,” corrodes international legal standards that otherwise benefit multinational corporations. “The cost to businesses of making facilitating payments in emerging markets is more than a nominal fee when such payments undermine the rule of law and good corporate governance,” said Susan M. Ringler, senior counsel for international compliance, ITT Corporation.

## A Slippery Slope

The mixed message of permissible small bribes versus impermissible large bribes creates a risky arena for business activities. Many companies interviewed complained that small bribes involving routine governmental tasks are both difficult to define and impossible to control. They found that some employees,

responding to pressure to ensure timely contract performance, paid bribes for distinctly non-routine services. Furthermore, it is difficult to convey to employees that the payment of large bribes to foreign government officials is likely to cost the employee his job and possibly his freedom, but that the payment of small bribes is acceptable.

“Facilitating payments are often a ‘slippery slope’ toward outright bribery. In addition to being an unnecessary expense, even when de minimus, these payments are seldom declared by the recipients and thus frequently misrepresented in the books of the providers. In all respects, they can create a non-transparent business environment, particularly when encouraging preferential treatment. We are encouraged to see that international

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conventions and private sector firms have started to take a hard line against this practice,” said Suzanne Rich Folsom, counselor to the president and director of institutional integrity, The World Bank Group.

*Loss of Local Community’s Confidence*

It is difficult to maintain a good reputation within a local business community when your company is believed to buy its way past the administrative obstacles that local citizens and companies must endure. When a bureaucratic delay is legitimate, rather than trumped-up by the bribe-taker, purchasing preferential treatment for your company bumps others further down the waiting list.

*Inherent Illegality*

Every bribe of a government official—regardless of size—breaks the law of at least one country. The host country outlaws payments to its government officials in any amount and for any purpose. Of course, regardless of the statutory language, the interpretation and enforcement of the law varies widely from country to country. Local officials often have inside knowledge about the correct fees, or have the authority to change them locally, giving the officials improper leverage to extract bribes. This legal landscape is further complicated by the fact that officials in many countries are poorly paid and a gratuity is treated as an informal but integral part of

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**“It is simpler to do the right thing—to get the response right—on the small issues and, by so doing, to set the tone for the issues that carry the greatest risk for the company.”**

their salary. Regardless, there is no country anywhere with a written law expressly permitting the bribery of its officials. A lack of resources, political will or interest has meant violations are rarely prosecuted, but that is changing. Countries, like China, that are eager to be seen to be combating corruption, are prosecuting the payment of small bribes with increased frequency.

As a result, there is widespread concern amongst the companies that TRACE interviewed that small bribes could lead to costly legal complications. “The fact that facilitating payments are permitted under US law doesn’t make them a good idea. These payments are inherently risky and a willingness to make them can be an indication of larger problems with internal controls,” according to Deborah Gramiccioni, vice president, TRACE, and former assistant chief of the fraud section at the US Department of Justice.

#### *Accounting Dilemma*

The laws of countries that permit the payment of these bribes abroad also require companies to maintain detailed and accurate records of each transaction. Many businesspeople interviewed expressed reluctance to record on company books a “payment to government official for routine task”—creating a record of a violation of local law. Yet failure to keep accurate records of the expense violates US law even if the underlying payment does not. Consequently, companies making these payments must choose between falsifying their records in violation of their own laws or recording the payment accurately and documenting a violation of local law.

#### *Foreign Subsidiaries*

With the implementation in many countries of new laws criminalizing the payment of bribes to foreign gov-

ernments, there is also an increasing risk that a multinational company with foreign subsidiaries will violate the laws of the country where the subsidiary is based. Companies with offices in more than one country expressed concern that if they do not abolish the use of small bribes altogether, they must undertake different compliance programs based not only upon the location of each office, but the citizenship of the people working there.

#### *International Security*

In addition to the legal issues, there is a growing concern regarding national security. One US company reported that the terrorist attacks of September 2001, put a new face on the practice of paying small bribes. That company had routinely paid foreign officials for processing work permits and visas, but is now very uncomfortable promoting corruption in this area. If visas can be bought, borders won’t be safe. The practice of bribing immigration officials can lead to serious entanglements with the enhanced security laws of the company’s home country.

#### *Bad for Business*

Paying small bribes is poor legal practice, but more to the point, it is bad business practice. Widespread small bribes set a permissive tone, which invites more and greater demands. Every company that TRACE interviewed expressed dissatisfaction with these small bribes. They told us that they amount to a hidden tax on business, they tend to proliferate, they buy an uncertain, unenforceable advantage and—the most common complaint—they are simply irritating. Well-run businesses seek clear, dependable terms and enforceable contracts. Small bribes introduce uncertainty, risk, and delay.

#### *Reputation as a “Soft Touch”*

The standard argument in defense of bribery is that it is impossible to conduct business successfully overseas without paying bribes to ease the bureaucratic and regulatory burden. If true, business should be more efficient for companies paying bribes, but this argument is not supported by research or anecdote.

Two World Bank researchers studied the premise that small bribes reduce red tape and found that “contrary to the ‘efficient grease’ theory, ...firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations and face higher, not lower, cost of capital.”<sup>1</sup>

#### **Decide and Commit**

“It is simpler to do the right thing—to get the response right—on the small issues and, by so doing, to set the tone

for the issues that carry the greatest risk for the company,” according to the compliance officer of one British oil and gas company.

Several companies reported that the most difficult part of eliminating the practice of paying small bribes was actually focusing attention on the issue and committing to stop. Once a company decides that it wants to eliminate the practice, it must commit itself to spending the time and money needed to carry out its goal through:

- a clear written policy;
- an internal audit;
- training employees and intermediaries;
- a robust internal reporting program; and
- enforcement.

It is crucial that the decision to eliminate the practice have the full support of and formal endorsement by the highest level of management in the company.

### **Adopt a Clear Policy**

The essential core of any successful anti-bribery strategy is a clear and consistent message to employees, intermedi-

aries, and bribe-takers that bribes of any kind will not be paid. “The direct or indirect offer, payment, soliciting, or acceptance of bribes in any form is unacceptable. Facilitating payments are also bribes and should not be made,” The Shell General Business Principles. Such a message is most effectively conveyed through a clear written policy that includes assurances that no employee or intermediary will be penalized for delayed performance that can be directly tied to his or her refusal to pay bribes. If corruption is widespread in your industry or in the countries in which you operate, it is also critical to establish a clear mechanism for reporting demands for bribes to senior management so that appropriate countermeasures can be developed to alleviate the pressure on employees in the field.

### *Medical and Safety Emergency Exception*

Employees of multinational companies are occasionally asked to travel and live abroad in countries where the standard of living is lower than their own country and the risks to health and safety are higher. Many companies currently rely on the good judgment of their employees in these situations,

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but some have created a formal medical and safety emergency exception. The situation should be a true emergency and the payment should be accounted for appropriately and reported through management channels both to conform to books and records requirements, and to ensure that management is apprised of and can track the risks to personnel in that country.

## ACC Extras on... Bribery

### ACC Docket

- *Bribes, Borders, and Bottom Lines: Why a Strong Antibribery Policy Is Essential* (2006). US authorities are tirelessly pursuing companies that break antibribery laws, and the rest of the world is not far behind. Develop an antibribery program before your company is forced to pay millions or adopt extensive reparatory measures. Find out how to reduce your company's risk. [www.acc.com/resource/v7523](http://www.acc.com/resource/v7523)
- *Business Ethics—Awaken the Zombies!* (2006). There are few cures for insomnia more potent than a good old-fashioned compliance and ethics training session. Mind-numbingly boring topics like antitrust, bribery, labor laws, and SEC regulations anesthetize all but the most caffeinated. Even the hearty souls who manage to keep their eyes open soon become inattentive zombies with glazed looks and wandering minds. [www.acc.com/resource/v7316](http://www.acc.com/resource/v7316)

### Sample Forms and Policies

- *Antibribery and Foreign Corrupt Practices Act—Employee Guideline* (2002). Provides guidance on situations involving international sales or international operations, assuring compliance with the Foreign Corrupt Practices Act. [www.acc.com/resource/v3642](http://www.acc.com/resource/v3642)
- *Prohibited Practices Under Foreign Corrupt Practices Act* (2003). The FCPA has been codified as Section 30A of the Securities Exchange Act of 1934, and prohibits companies and their executives from paying bribes to foreign government officials. This checklist provides an outline of what the antibribery rules are, what penalties are involved for violating the rules, and defenses to a bribery accusation. [www.acc.com/resource/v3457](http://www.acc.com/resource/v3457)
- *Recognising Improper Payments* (2001). Violations are most likely to occur in countries with a wide spread history of corruption. Learn more about how Middle Eastern, Latin American, Asian, and Former Soviet Union countries have traditionally been the leading candidates for antibribery rules violations. [www.acc.com/resource/v3201](http://www.acc.com/resource/v3201)

### Assess

A comprehensive inventory of past payments will enable companies to address each risk area appropriately. This assessment should include a review of the company's areas of operation that pose a high risk of exposure, any past legal or ethical problems, existing policies, procedures and compliance efforts, and all relevant laws and regulations.

A key aspect of the internal assessment is the employee interview. It is crucial that those conducting the assessment speak to the right people. The companies that TRACE interviewed stressed this point more emphatically than any other. Employees in the field understand the local challenges better than the head office; their participation in a change of policy will be critical to its success. They can identify situations for which a small bribe has been useful, help devise alternative approaches, and can tell when a small bribe is not necessary.

The last point is important. Most of the people interviewed recounted stories of employees, new to a foreign assignment and primed with rumors about corruption in the local business community, thrusting money at a government official at the first mention of delay. Employees will be part of the company's solution and report this information only if they are given clear guidance and training in advance and only if they believe they'll be supported if a refusal to pay results in delays or administrative obstacles.

### Types of Payments

Payments identified during the assessment are likely to fall into one of four categories and a different response may be required for each.

*Traditional Commercial Bribes* are payments to obtain an improper business advantage and are not permitted under any legal exception for small bribes. The suggested response to a traditional commercial bribe:

- If a bribe is paid in order to obtain an improper business advantage, the employee involved should be sanctioned and the company protected from the consequences to the extent possible by prompt remedial action. The company's broader policy on bribery of foreign government officials should be invoked to address these situations.

*Expediting Payments* are usually demanded by entrepreneurial government officials who threaten delay and red tape if they are not paid small amounts at regular intervals. This category includes payments to secure licenses, to overcome unwarranted delays at customs, to resolve disputes over inflated taxation, and to end harassment by local police or military. Suggested responses to demands

for expediting payments include:

- Meet with the individual in question and explain the change in policy.
  - Avoid the embarrassment of including superiors in discussions unless it is clear that it is necessary or that they are a part of the problem. If the junior official has been required to funnel a portion of the bribes he collects to a superior, the superior will have to be included in the conversation. The superior official is often more receptive to offers to provide needed technical and financial assistance to the government in lieu of unlawful payments to the individual officials. For example, one TRACE member has worked with a number of governments to help automate customs functions and thus remove many opportunities for corruption. Whenever possible, these automated systems are configured in such a way as to minimize the opportunity for the inappropriate exercise of official discretion, face-to-face contact between the government officials and company employees and the physical handling and transfer of funds. Automation or computerization can also increase the level of accountability and provide an
- audit trail for later monitoring and review of administrative decisions and the exercise of official discretion.
  - Acknowledge that small payments have been a part of the business relationship until now, but that these will no longer be made. Again, explain the change in company policy. In order to avoid having their efforts undermined by competitors continuing to make the payments in question, one TRACE member invites its competitors to participate in the discussions with officials. This approach has successfully achieved industry-wide change in Vietnam, Thailand, and India.
  - Prepare to reject suggestions on how things might be structured to reach the same end by different means such as re-characterizing the payment or channeling payments through third parties.
  - Prioritize shipments or administrative tasks where possible so that the least urgent requests are presented immediately after a change in company policy.
  - Maintain records of additional expense resulting from a refusal to make payments and provide copies to senior officials of the relevant government ministry. If the gov-



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ernment is either a partner or the customer, pass along a portion of the cost of refusing the bribe, together with a detailed explanation. Companies that have done this report a significant reduction in demands for bribes.

*Additional Services Charges* are generally made for a legitimate service that is being purchased through inappropriate channels. Services may include overtime work, work during local holidays, or duties outside the scope of the official's job description. It is important that real value be provided and that these payments do not simply become a way to legitimize bribery. Suggested responses to requests for additional services include:

- Assess the value of the service that has been provided and formalize the relationship. One company stopped paying overtime directly to border guards and began working through the border guard office, requesting a formal agreement and invoices. The result was the same service at the same price, but with new control and transparency.
- Recognize that in some countries, certain government officials receive no pay at all from their government. Instead, they are expected to create their own income—and supplement their superiors' income—through corruption. By formalizing and documenting the arrangement with the responsible ministry, the official is paid for his service, but the haggling and secrecy are brought to an end.
- Seek the approval of the official's superior, where feasible, to hire him under a separate agreement. In some countries, government officials are permitted to hold second jobs. The goal is not to impoverish already badly paid officials.

*Extortion Payments* amount to clear, criminal extortion—for example, an employee held at a security checkpoint and released only upon payment. Things to consider when an extortionate demand is made:

- If a demand is clearly extortionate and criminal, the employee's safety must be the paramount consideration.
- Once an emergency has passed, companies should advise their embassy and ask that it pursue the matter at the responsible level of government.
- These situations are of real concern, but the embarrassment they can generate for the host country can result in unexpected leverage for companies. Most companies agree that the best response is to manage the situation in the short term and publicize it in the long term.

## Train

After management commitment, training is the most critical step in abolishing small bribes. An effective anti-bribery

policy must include comprehensive training for employees. Employees should also be required to sign a statement verifying that they have participated in the training and that they will comply with the company's anti-bribery policy.

### *Business Intermediaries*

A company can be held responsible for the actions of its business intermediaries—sales agents, consultants, suppliers, contractors, and local partners. Consequently, intermediaries should receive the same rigorous anti-bribery training and a copy of the company's anti-bribery policy. Their contract should include a requirement that they comply with the company's policy.

**Employees should also be required to sign a statement verifying that they have participated in the training and that they will comply with the company's anti-bribery policy.**

### *General Training Guidelines*

The points that follow apply regardless of the type of bribery being addressed:

- The anti-bribery policy should be disseminated to every employee and business intermediary.
- Employees and intermediaries should be assured that they will not be penalized for diminished productivity directly attributable to their refusal to pay bribes.
- Employees who are posted overseas or whose jobs require frequent travel should receive training on the company policy and on how to deal with demands for bribes. This training should include an opportunity to meet with employees who have worked in the territory to which they will be sent.
- Employees affected most directly—those in the international sector, marketing, operations and finance—should have an opportunity to ask specific questions about the situations they expect to face.
- Company auditors should be alerted to the possibility that rogue employees and intermediaries may attempt to circumvent the new policy by mischaracterizing small bribes as permitted expenses.

- Auditors, in-house lawyers or compliance officers should ensure that payments made under the medical and safety emergency exception are reviewed for potential abuse.

### Robust Internal Reporting Program

Although this issue has become quite controversial in light of concerns about privacy and “big brother” tactics, a well-organized, secure means by which to report problems within a company when all other channels of communication fail is essential to a sound anti-bribery program. The reporting program should:

- be accessible to all employees;
- provide for either anonymous or confidential reports, as appropriate, to protect the reporting employee;
- include screening by a neutral party to safeguard against frivolous or malicious reports; and
- permit collection and tracking of data over time for reporting to senior management.

A well-run reporting program, where permitted under local law, will assist management in its assessment of the success of its anti-bribery policy and will identify the points at which the program is breaking-down.

**Addressing all forms of business corruption at the same time with a single, coherent message is preferable to laboring under an equivocal policy and waiting until some future ideal time to tackle small bribes.**

### Enforce and Follow-up


It is important for management to stay focused during the implementation and transition period. Anticipated difficulties have proven to be short-lived. Dire warnings that profitability will plummet and business will grind to a halt are not supported by the experiences of any of the companies interviewed. Most of the 42 companies that TRACE interviewed reported delays and unusual additional bureaucratic steps in the first 30 to 60 days after abolishing small bribes. After this period, business “more or less returned to normal.”

### Relief is on the Way

The private sector is working to reduce the payment of facilitating payments, but too little attention is being paid to demand-side bribery. There is currently little cost to the government officials who extort payments as an illegal tax on business.

Real transparency would be enhanced by an international hotline through which corporations could report these demands anonymously. Companies know where many of the problems lie. Within every government, there are officials who are notorious for demanding their share and wreaking havoc if it isn’t forthcoming. Currently, companies do nothing with this information. They may decline to pay, but they’re unlikely to risk alienating the government officials who are their customers.

BRIBELine ([www.bribeline.org](http://www.bribeline.org)), launched earlier this year, is just such a hotline—publicly available and free of charge—through which companies can report demands, voluntarily and anonymously. The information will not be used for prosecution. It will simply be collated and reported in the aggregate, by country and by government department: customs, defense, health, transportation, mining, etc. When these reports are published annually, they will alert government officials that their demands are being tracked, and will reinforce the idea that these demands are illegitimate. The information will not be used to intervene in individual transactions, but instead will be provided to the public at large, encouraging governments to pursue remedial action, alerting civil society to troubling trends, and providing companies an additional tool in support of efforts to assess risk accurately.

Addressing all forms of business corruption at the same time with a single, coherent message is preferable to laboring under an equivocal policy and waiting until some future ideal time to tackle small bribes. Many companies have adopted strong policies against the payment of small bribes and the consensus has been that the transition has been simpler, faster, and less painful than was expected. The short-term result for many of the companies interviewed has been relief from constant demands for small bribes; the long-term results will be reduced bureaucracy, enhanced predictability, and a more stable business environment. 

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### NOTES

1. Daniel Kaufmann and Shan-Jin Wei, “Does ‘Grease Money’ Speed up the Wheels of Commerce?” Paper presented at the American Economic Association Meeting, Chicago, IL, 1998.