

ethikos Volume 33, Number 1. January 31, 2019

An unintentional act of bribery

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Why were the bribery and corruption laws created? In simple words, they are rules for dealing with people who have influenced or attempted to influence decision makers who manage positions of power (e.g., public officials) for their personal motives. Influence can range from direct cash to favors for the period of now to future. Some laws penalize the giver and some penalize both the giver and receiver.

An investigator needs to prove the following elements in order to prove a bribe or corruption has taken place:

- Did the offering (“gift”) involve receiving or soliciting?
- Was the act committed directly or indirectly (i.e., directly paid or paid through an intermediary)?
- Was the offering anything of value? This is a tricky one. Was it anything besides money and/or goods to gain tangible benefits with corrupt intent (e.g., donation to charitable organization, lease deeds, study tours for the receivers’ children)?
- Was the “favor” offered to improperly influence with corrupt intent? This element can be proven circumstantially by when the favor was exchanged (e.g., was it during a bidding process?). Intent is difficult to prove if no circumstances can be proven.
- What were the further actions of another party, basically what was the benefit or ripe fruit? Did the proceedings go through?

Dutch telecom provider VimpelCom Ltd. (now known as VEON Ltd.) paid \$795 million (USD) to settle charges associated with bribing a government official in Uzbekistan.^[1] Half of the settlement went to two U.S. agencies—the Securities and Exchange Commission and the Department of Justice—for violations of the Foreign Corrupt Practices Act (FCPA), while the other half went to Dutch authorities.

Two critical factors should be noted here. First is the involvement of the U.S. in its application of the FCPA to a non-U.S. company. By having its securities registered for sale in the U.S., VimpelCom falls under the FCPA. In addition, some of the funds used to pay bribes passed through U.S. banks prior to arriving in European institutions (Dutch bank ING Groep NV was later penalized by Dutch prosecutors for failing to spot money laundering), and some of the communications used e-mail accounts on U.S.-based servers. The second factor is that intent was proven through a significant amount of circumstantial evidence. For example, the perpetrator

was aware of the FCPA but proceeded with the transactions. Further, the bribed individual was a relative of the President of Uzbekistan and had influence over the Uzbek telecommunications regulator. They enjoyed their honeymoon from 2006 (when VimpelCom was still based in Russia) to 2012.

In another case, California based Sun-Diamond Growers were charged with bribery for giving gifts to Agriculture Secretary, Mike Espy.^[2] In his defense, Secretary Espy said since he got the gifts from his friend and lobbyist Richard Douglas, he assumed the gifts were acts of personal friendship. He also said he was not even aware that the gifts were paid for by Sun-Diamond.

The Supreme Court ruled that giving gifts to officials does not amount to bribery unless there is an “official act” in return for the gifts and overturned conviction in the case.

All factors were in place except for intent. An *intent* is “a state of mind while committing the act.” This requires a lot of circumstantial evidence to prove the same. The defense used by Espy is one of the two famous ones; the other one being the “It was all needed, or it was a normal process, or no deviation was associated with it.”

Although “corrupt intent” while giving or receiving rewards of any kind is an important element to obtain conviction under the FCPA, unintentional acts of bribery can also attract penalties, as in the VimpelCom case.

Even when the receiver or the payee is unaware of any actual corrupt activity, he/she is liable for the corrupt actions of any agent.

Intent: Key element in bribery

Intent is a key element that needs to be established for proof of crime under bribery acts. Generally, corrupt intent, with regard to making or receiving payment in return for a beneficial act favoring the payee, has to be proven to obtain conviction. Whether the official or individual actually accepted the bribe or became corrupt because of it does not matter as far as conviction is concerned. Also, even if only one of the parties involved had corrupt intentions in mind, it is enough for a conviction.

The Hobbs Act^[3] also addresses public corruption and applies to an official who obtains payment while knowing such payment is in return for official favors or acts.

A case in point for “honest fraud” is when Bob McDonnell, former Governor of Virginia was convicted in 2014 on bribery charges. He was charged with accepting US\$175,000 worth gifts, loans, and benefits in return for organizing meetings and promotional events for the payee. The Supreme Court, however, overturned this conviction in 2016, holding that organizing meetings or events without doing anything else does not amount to an official act for conviction under 18 USC Sections. The Court also stated that for a conviction, the corrupt act must be a formal exercise of power by the official.^[4]

Legal and ethical actions for unintentional bribery

What happens when there are instances of unintentional bribery where an individual or an organization is unaware of the serious consequences?

Legal actions

Bribery is a punishable offence under FCPA, a federal law in the United States formed to ensure transparency under the Securities Exchange Act of 1934 and covers “bribery of foreign officials.” When an act of misconduct has occurred, an individual must disclose the details voluntarily as soon as they become aware of the misconduct.

On November 29, 2017, Rod Rosenstein, then Deputy Attorney General, announced the FCPA Corporate Enforcement Policy, formalizing the “pilot program” of 2016.^[5] Companies or individuals who voluntarily disclose violations of FCPA and fully cooperate with investigations, apart from initiating appropriate and timely remedial measures, will not be prosecuted by the Department of Justice (DOJ). The policy encourages voluntary self-disclosure of misconduct to the appropriate enforcement authorities:

- A company or individual who has voluntarily disclosed misconduct can get up to a 50% reduction in penalties in case of a criminal resolution. When a company does not voluntarily disclose but fully cooperates with the investigation later, it can benefit from a 25% reduction in fine. To become eligible for these credits: The disclosure should occur before an imminent government investigation or a threat of disclosure.
- The disclosure should be made promptly as soon as the violation is discovered or the company or individual becomes aware of the same.
- Disclosure is made of all facts and individuals involved in the violation.

A case in point is when New York-based apparel company Ralph Lauren Corporation voluntarily disclosed misconduct within two weeks of the company discovering illegal payments that were made to government officials in Argentina. By doing so, the company avoided prosecution.^[6]

Ethical actions (an honest mistake)

The risks of being penalized are high even when a payment or gift is received or offered without any corrupt intent. It can be difficult to prove lack of intent, and as already said above, the principal is liable for an agent's actions. Ideally, it is important to avoid involvement with any such corrupt situation. If unwittingly part of such misconduct, withdrawing from it as soon as an individual or company becomes aware of the nature of conduct is crucial.

If a person can jump through all the aforementioned hoops (i.e., the elements required to be proven for bribery) in order to be proven guilty by the investigator before the case is handed over to a local prosecutor, then it clearly shows that there was enough deviance in the mind of the “innocent” person to have intentionally committed the act, even after knowing all the odds.

An honest mistake is a proverb and is no excuse in the legal world. If the prosecutor is unable to prove the direct evidence of an intent, then negligence or gross misconduct, which is also actions behind the words of “an honest mistake,” is also an action which can be used by prosecutors.

Ethics is knowing not only what the compliance policies say, but also the journey between one check post to another. And when you deal with a senior role or a government official or an agent, trust me, there are multiple check posts.

A test of “reasonability” sometimes helps to sway one’s deviant intentions to good ones. Always ask: “Would a nice, reasonable person in my place do this?” You would always know from within if you have good principles in your life.

Anti-bribery and self-disclosure in USA, UK, and UAE

Although the critical factors needed to prove bribery remain the same, there are elements that either reduce the burden of a prosecutor or increase it, depending on the type of jurisdiction a lawyer/prosecutor is operating

within in. Following are the anti-bribery and corruptions laws focusing on selected jurisdictions.

USA

In the U.S., Section 201(b)(1) of the FCPA deals with proof of a transaction involving something of value that must be provided by the government to secure conviction of the briber. Similarly, there should be proof that a public official received, agreed to, or solicited something of value in exchange for being influenced in his performance of official duties. A gratuities conviction requires a knowing or willful offer or receipt of something of value. Along with "intent," it has to be proven that the act of bribery influenced and resulted in an official act.

Under the voluntary disclosure pilot program, a company can earn credits with the following ethics and compliance measures:

- Establishing a culture of compliance
- Instituting awareness programs among employees about misconduct
- Ensuring adequate resources are deployed for compliance
- Performing risk assessment on compliance
- Auditing to ensure effectiveness of compliance

Many times voluntary self-disclosure involves legal matters in other jurisdictions; and in many U.S. jurisdictions, no recognized mechanism exists for companies for voluntary self-disclosure.

UK

The Bribery Act of 2010 is a stringent legislation on bribery, similar to FCPA, but has a wider scope as compared to the U.S. legislation. The Act prohibits receiving bribes or passive bribery. The jail term and penalties are more stringent in the U.K. Voluntary self-disclosure is termed "self-reporting" in the U.K and is found in these sources:

- Serious Fraud Office's (SFO) guidance with respect to Corporate Self-Reporting (the SFO Guidance): According to these, corporate management has to adopt a "genuinely proactive approach" while reporting violations, but there is no guarantee that prosecution can be avoided by self-reporting.^[7]
- Code of Practice laid down by Deferred Prosecution Agreements (DPA) or the DPA Code: The Deferred Prosecution Agreement (DPA) is an agreement carried out between a company and a prosecutor with defined terms on compensation, financial penalty, compliance, cooperation with investigating agencies, and disgorgement of profit. While giving "considerable weightage" to proactive approaches, a DPA does not lay down the actual benefits or credits for self-reporting, unlike the FCPA Pilot Program.

The very first DPA was offered to Standard Bank by the SFO on Nov. 30 of 2015. The Bank self-reported payment of \$6 million in 2013 by a sister concern. Voluntary self-disclosure and a proactive approach were cited as reasons by Lord Justice Leveson to approve the DPA.^[8]

Brand-Rex, a network cabling entity in Scotland made a voluntary self-disclosure regarding the benefits received from an incentive scheme in UK. Brand-Rex was required to pay £212,800 (i.e., the amount of profit accrued from the incentive scheme) and by cooperating fully with SFO, avoided indictment.^[9]

Middle East

At both Emirates and at the Federal level, a broad range of bribery legislation encompasses cabinet resolutions and regulations. The primary sources of anti-corruption laws are:

- The UAE Federal Penal Code – Articles 234–239 of Federal Law No.3/1987
- Individual Emirates penal codes such as:
 - Dubai Penal Law (1970) – The Dubai Penal Code
 - Abu Dhabi Law No.1/1970– Abu Dhabi Penal Code
- Dubai Financial Fraud Law (Law on Procedures for the Recovery of Illegally Obtained Public and Private Funds)

The definition of bribery is the same in UAE, but absence of “corrupt intent” means no offence has been committed. However, in the Dubai Penal Code, even if there is no corrupt intention by either the giver or the receiver, the act of offering or receiving gifts is a criminal offence. Anonymous reporting of violations can be done through the reporting website of the State Audit Institution (SAI). Although confession of bribery can result in exemption from punishment, no procedures are defined for time frame, manner, or process of such disclosure.

Coming clean with voluntary self-disclosure

Prosecutors and lawyers emphasize voluntary disclosure of any corporate or individual wrongdoing in good faith and in a timely fashion to maximize credits and to avoid harsh penalties. Such a disclosure is in the organizations' best interests, because it can help avoid prosecution, bankruptcy, and loss of trust of its customers.

What should companies do?

Voluntary self-disclosure is the ideal way to come clean and avoid stringent penalties. Where failure to report a known act of corruption is a criminal offence, but the employees or the company itself are not implicated, the company can act to comply with the regulation. Reporting corruption when employees or the organization are implicated in the said corruption puts the company in a difficult position. By reporting, a company can risk incriminating its employees or itself, but failure to report is a more serious criminal offence. The key considerations and benefits of reporting misconduct include:

- Immunity from prosecution
- Mitigation of criminal penalty
- Mitigation of penalties such as debarment or cancellation
- Avoidance of consequential offences stemming from the fraud, including tax offence or money laundering

Companies can avoid prosecution and preserve public image by:

- Appointing a compliance officer
- Making their employees available for investigations and interviews
- Making voluntary disclosures with documents

- Conducting risk assessment worldwide
- Conducting thorough internal investigations
- Making presentations to the DOJ regarding findings of internal investigation and status of risk assessment
- Conducting extensive training for all employees on FCPA regulations
- Strengthening company's anti-bribery policy, Implementing a gift-and-entertainment policy
- Enhancing protocols for due diligence of vendors, suppliers, distributors, or other third-party associates
- Terminating third-party agents/vendors or employees after thorough investigation
- Instituting a non-retaliation policy for whistleblowers and introducing a hotline
- Protecting confidentiality of whistleblowers
- Hiring a specialized attorney

What should individuals do?

If there is any unreasonable offer or demand from anyone in return for official favors, an individual can:

- Politely refuse to accept or pay a bribe.
- If the demand persists, inform the person of your company policy regarding bribes and that you would have to report to your manager or employer, who will then contact enforcement agencies.
- If a government official is making the demand for bribe, refer them to particular government procedures in your jurisdiction. Report the demand to concerned officials. Use the company hotline or the government website to report the violation.
- If there is no resolution, talk to senior management officials.
- Consult a lawyer, if you are unable to get help from your company.
- If possible, document the evidence of corruption and maintain all records and eye-witness statements. Make copies of these and hand them over to your manager/employer or to concerned authorities.
- Ask for documentary evidence and proof of any payments requested or made.

Conclusion

Although the government has been taking various steps to encourage voluntary self-disclosure with enhanced whistleblower incentives, individual accountability remains the key element when it comes to prevention of bribery.

Improved cooperation and increasing focus on investigations around the world amp up the need for voluntary disclosure in a timely manner. As societies' tolerance for misconduct steadily decreases, countries including the U.S. Europe, Japan, China, and Australia are ramping up enforcement capabilities, strengthening anti-corruption regulations, and focusing on coordinated raids.

- 1** U.S. Securities and Exchange Commission press release, “VimpelCom to Pay \$795 Million in Global Settlement for FCPA Violations” February 18, 2016. <http://bit.ly/2UO5FuO>
- 2** United States v. Sun-Diamond Growers of California, decided April 27, 1999. 526 US 398 (1999). <http://bit.ly/2PAAcZ9>
- 3** Hobbs Act (18 USC Section 1951 – Interference with commerce by threats or violence) <http://bit.ly/2CacoJr>
- 4** CNN: “Supreme Court vacates former Virginia gov. Bob McDonnell’s conviction.” June 27, 2016. <https://cnn.it/2Bkk2oH>
- 5** Foreign Corrupt Practices Act Corporate Enforcement Policy 2016. <http://1.usa.gov/1MyaeTU>
- 6** Reuters Business News: “Ralph Lauren to pay \$1.6 million to resolve Argentine bribery case” April 22, 2013. <https://reut.rs/2RYd4Wr>
- 7** Serious Fraud Office (SFO) Guidance on Bribery Act. <http://bit.ly/2aKooCD>
- 8** SFO: SFO agrees to first UK DPA with Standard Bank. November 30, 2015. <http://bit.ly/2MNrp5Y>
- 9** Dan Smith and James Fagan: “The UK’s First Civil Settlement for Failing to Prevent Bribery” October 22, 2015. <http://bit.ly/2PBRpBg>

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