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A MEASURED APPROACH TO BUSINESS COURTESIES

The appropriate relationship between private businesses and government customers, including state-controlled companies, remains unclear in the international context. Neither the Department of Justice ("DOJ") nor the Securities and Exchange Commission ("SEC") has provided clear guidance to companies regarding appropriate entertainment and business courtesies for government-related customers. And while the United Kingdom's Bribery Act 2010 promises formal guidance on the applicability of bribery laws to corporate hospitality, that guidance has not yet been issued, and the level of detail and clarity it will contain is not yet known.

Accordingly, one question persists for businesses operating in markets with substantial government involvement: How should an ethical and law-abiding company treat employees of foreign state-controlled enterprises with whom it does business, particularly when those companies resemble a private company in all respects except their sovereign ownership? Meals, travel, golf, and other benefits are an expected and accepted part of doing private business around the world, but providing such benefits to a public official, as defined by the Foreign Corrupt Practices Act ("FCPA"), can be considered a crime. This distinction raises a host of difficult problems to which there is no self-evident solution.

Rather than abandon the notion of treating state-controlled entities as customers with respect to business courtesies, companies should consider adopting a measured approach. That is, in lieu of an outright ban, company policy could establish guidelines sufficient to ensure that courtesies and hospitality provided to customers are not furnished with a corrupt purpose but are, instead, reasonable in amount, transparent in nature, and consistent with applicable rules or laws.

TRADITIONAL APPROACH TO PUBLIC OFFICIALS AND BUSINESS PARTNERS

Leaving aside the issue of state-controlled enterprises, U.S. and other Western businesses historically have treated public officials quite differently from business partners. The former are, generally speaking, kept at arm's length under modern notions of ethical conduct. Even when lobbying legislators or other officials, a company typically will engage

in very limited entertainment, recognizing the danger that any benefit provided to the official could be interpreted as a "corrupt" payment. To the extent that a company provides any entertainment or other courtesies to a public official, that exchange almost certainly is heavily regulated by detailed rules governing the official's conduct.

Contrast this with the relationship between and among employees of private businesses, whether they be customers, suppliers, clients, or other associates. In that context, entertainment, hospitality, and courtesies are an accepted practice. Unless internal policies prohibit it, an employee of a private business is generally free to accept various forms of courtesies that would be clearly inappropriate for a public official to receive. Thus, it is both legal and acceptable to pay for meals, travel, golf, and other perquisites when seeking to obtain or retain business from a private company.

A LOOK AT GOVERNMENT CONTRACTORS AND THE HEALTH CARE MARKET

Years ago, the line between the private and public sectors was blurred in the United States for government contractors, for whom a typical customer is a government agency. The same is true in the U.S. health care market, where physicians and other purchasers of pharmaceuticals, medical devices, and supplies are treated as quasi-officials under the Anti-Kickback Statute and the Stark Law.

In both of those contexts, however, businesses have rules to which they can refer in deciding what sort of business courtesies can be extended to their customers. U.S. government agencies set forth detailed rules about what their employees can accept, permitting, for example, the provision of coffee and soda at a meeting while requiring the employee to pay for any food he or she receives. Likewise, in the U.S. health care context, the Department of Health & Human Services Office of Inspector General has promulgated guidelines for appropriate customer relationships, and industry groups such as PhRMA and AdvaMed have developed detailed codes of ethics. As a result, businesses operating in these industries enjoy a degree of predictability in ordering their affairs and structuring their relationship with potential customers.

SOVEREIGN ENTITIES IN THE PRIVATE MARKETPLACE

The entry of sovereign entities into the private marketplace, however, has created unique problems for multinational businesses, and guidance in connection with customer relationships is not as readily available. With countries such as China investing in and controlling large portions of their economy, the number of potential state-controlled entities has exploded in the last decade. Despite their sovereign ownership, however, these companies often act, for all practical purposes, exactly like their purely private competitors. Indeed, unlike the government agencies described above, these state-controlled companies offer and receive business courtesies in the same manner as their private counterparts. That is, they will provide courtesies to their potential customers and clients even as they permit employees to receive courtesies from companies on the other end of the equation.

Over the years, this phenomenon has placed multinational companies in a difficult position under the FCPA. The safest approach would be to treat the employees of these state-controlled companies as public officials, providing virtually no business courtesies at all or limiting entertainment to *de minimis* amounts. That is, the multinational would have one (restrictive) set of values for state-controlled customers and another for private customers. Such a policy, however, may put the business at a disadvantage, as the employees of these state-controlled companies may not view themselves as public officials. Unlike government agency employees, who recognize that their suppliers cannot take them to dinner or golf, employees of state-controlled companies may be offended if they are not treated the same as their private counterparts.

Nor is it always an answer to suggest that business courtesies to all customers be limited to *de minimis* amounts. Private companies are free to decide the extent to which their employees may accept business courtesies. While many erect strict limits on entertainment and other perquisites, there is no reason to believe that government policy should compel all companies to adopt such an approach. More importantly, any multinational that attempts unilaterally to dictate such a restrictive policy to its customers may risk serious damage to its good will and customer relations.

THE U.K. BRIBERY ACT

Similar considerations regarding corporate hospitality are playing out in the United Kingdom as well. On April 8, 2010, the United Kingdom enacted the Bribery Act 2010 (the "Bribery Act"), with implementation expected later this year. Unlike the FCPA, the Bribery Act prohibits commercial bribery between private parties, as well as payments to foreign government officials that are intended to influence the official improperly. The broadly drafted provisions of the Bribery Act are capable of attaching to any level of corporate hospitality if it is intended to induce improper performance by the recipient. The business community in the U.K. has expressed significant concern that legitimate entertainment expenses might be deemed to violate the Bribery Act. Even more alarming, the Bribery Act creates a strict liability offense of failing to prevent bribery by or on behalf of a business or organization, such that a good faith defense (*i.e.*, lack of corrupt intent) would not apply as it does under the FCPA. Indeed, under the Bribery Act, businesses must proactively implement "adequate procedures" to prevent bribery if they are to avoid liability for the acts of their agents and employees.

Unlike the FCPA, however, the Bribery Act specifically contemplates guidance on what constitutes "adequate procedures" to prevent bribery. The United Kingdom's Ministry of Justice ("MoJ") is obligated to provide such guidance before implementation of the Act and, in September 2010, issued a draft for comment. Among other things, the draft guidance indicates that whether a particular expenditure constitutes a bribe will depend "on all the surrounding circumstances" but recognizes that "reasonable and proportionate" business courtesies that seek "to improve the image" of a business, "present products and services," or "establish cordial relations" are an established and important part of doing business.

The MoJ has delayed three times the issuance of this formal guidance on "adequate procedures" and, therefore, the implementation of the Bribery Act. While the sentiments expressed in the MoJ's draft guidance are helpful, the clear message from affected businesses is that the draft falls well short of a clear prescription for "adequate procedures" on what business courtesies are allowed or prohibited under the new U.K. law. It is anticipated that the MoJ will use the latest delay to produce more detailed guidance on some of the most complex issues arising under the Bribery Act, including corporate hospitality. Assuming more comprehensive guidance is made available addressing business courtesies, this may provide a compliance benchmark against which companies in the U.S. also can measure their policies. Until that time, however, companies remain without clear rules.

RECOMMENDATIONS

In the absence of clear guidance from the DOJ, SEC, or MoJ regarding appropriate entertainment and business courtesies for government-related customers, multinationals doing business with state-controlled companies are left to fashion their own policies through internal compliance and ethics programs. While the precise details of such a program will vary from one company to another, an appropriate approach to business courtesies should consider some broad principles. One reasonable formulation of such a policy would permit business courtesies to employees of a state-controlled entity if:

- The courtesy is not provided as a *quid pro quo* for any action by the individual receiving the benefit or that person's employer.
- The benefit to be provided is permitted under all applicable laws, codes of conduct, or other rules governing the provider and the recipient.
- All aspects of the courtesy are known to the supervisor of the recipient and are not disguised in any way from the recipient's employer.
- The value and nature of the courtesy are consistent with those provided to private companies.
- The cost of the courtesy is not so extravagant as to be unreasonable.

Such a policy would draw an appropriate distinction between the dual roles played by employees of state-controlled entities. When acting as a customer or participant in the business community, employees would be free to offer and accept business courtesies just as would any other business, without fear that regular business conduct would be interpreted as corruption. At the same time, however, truly corrupt activity would remain prohibited.

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