

President Obama and 'Dr No'

*Do robust corporate hospitality policies mean that all fun is cancelled, or are there ethical, lawful ways for a compliance officer to navigate between being a 'Yes Man' and 'Dr No'? **Joshua Domb** explores a case study.*

*"Without exception, we avoided scandal. I'd made clear at the start of my administration that I'd have zero tolerance for ethical lapses, and people who had a problem with that didn't join us in the first place." – President Obama – *A Promised Land* (Chapter 22)*

"If it sounds fun, you can't go." – Norm Eisen, Presidential Special Counsel – AKA 'Dr No'

In 1962, the late Sean Connery made his first outing as the iconic British secret agent '007' (or, to give him his full name, "Bond. James Bond"). Based on the 1958 novel of the same name by Ian Fleming, Bond's first villain and the title character of the movie, 'Dr No', is an evil scientist with prosthetic metal hands and an agent of the criminal organisation SPECTRE, seeking to disrupt the American space programme.



Maybe a non-vintage...?

While reading my way through Part 1 of President Obama's memoir *A Promised Land*, I was amused to learn that Obama had a colleague working alongside him in the White House who was also referred to by the administration's staffers as 'Dr No'. Far from being an evil scientist, Obama's Dr No was a former Harvard Law School classmate by the name of Norm Eisen, who Obama appointed as 'Special Counsel to the President for Ethics and Government Reform' "*just to keep everybody – including me – on track*".

Obama describes Eisen as "*Cheerful and punctilious, with sharp features and the wide, unblinking eyes of a zealot, Norm was perfect for the job – the kind of guy who relished the well-earned nickname 'Dr No'.*" And Dr No had a particularly succinct and pointed approach to certain aspects of his job.

"When asked once what sorts of out-of-town conferences were okay for administration officials to attend, his response was short and to the point: 'If it sounds fun, you can't go.'"

Reading about this particularly conservative approach to what we can broadly call 'Compliance' reminded me of an incident that I dealt with many years ago as a junior associate. At the time, I was seconded into the Compliance and Investigations function of the United Kingdom office of a major American company that was under some enhanced regulatory scrutiny following a recently agreed Deferred Prosecution Agreement.

It was early one afternoon when a particularly senior manager, who I had only had the briefest of dealings with, came rushing into my office, speaking rapidly and clearly in some distress. He explained that someone in his team had been invited by a supplier to a conference in Las Vegas. However, he had already decided that it was "*probably inappropriate*" and the colleague shouldn't go. After observing that, as a starting point, there was no blanket prohibition in the company's policies or procedures that would prohibit the invitation from being accepted, I invited him to sit down so that we could discuss the matter.

- What was the value of a ticket to the conference? *About US\$1,500.*
- What was the rough value of the business we directed to this supplier each year? *Several million dollars.*
- Were we going to cover travel and accommodation for our colleague, or had this been offered by the supplier also? *Costs would be covered by the company and no offer of travel or expenses had been made by the supplier.*
- Were there any tenders coming up in which this particular supplier would be invited to participate? *Yes, in a few months' time.*
- Would the colleague we were proposing to send to this conference have any involvement in determining the outcome of that tender? *No, they would not.*
- Would there be useful learning for the benefit of the business that could be taken from the conference? *Yes, there would, and the colleague we were proposing to send would be happy to prepare a memo for the relevant team and present on his learnings after he had attended.*
- Had we ever had any concerns about the conduct of the proposed attendee? *Absolutely not, he was a highly rated and well trusted member of the team.*
- Was there anything else that might call into question whether the supplier had any inappropriate motive in extending the invitation? *No.*

I enjoyed watching my colleague's shoulders relax and the frown on his face soften. I explained that, based upon what we had discussed, there was nothing in the company's policies and procedures that would prevent us from accepting the invitation. I suggested that, if we did decide to permit this colleague to attend, he should be sent a gentle email reminder regarding the relevant portions of the company's Code of Conduct and advised that, if at any point he felt the hospitality on offer was becoming excessive, he should politely remove himself from the situation.

A few observations

To those of us who work in ethics and compliance, I suspect that the story above (or a version of it) is not particularly uncommon. And while, quite rightly, we sometimes need to play the role of 'Dr No', particularly in less established and more entrepreneurial businesses where the culture of compliance is not yet fully matured, the best compliance officers are able to cultivate a safe framework within which normal business activities (such as attending events, taking clients out for a meal and even occasional gifts) can be offered and accepted in an entirely appropriate, ethical and fully legal way.

Though matters will always need to be considered properly in the light of their own facts and circumstances, when dealing with offers of hospitality, gifts or other such benefits, there are a few universal framework considerations that can be used to guide the discussion. The value of whatever has been offered can provide an immediate, instinctive guide as to how accepting the offer might be perceived by a regulator or third party. This is obviously not to suggest that there is any *de minimis* value for a bribe, but the value of the offer being made is often the most quantifiable element of the information upon which a decision can be taken in accordance with a company's policies and procedures.

The proposed recipient and their ability to impact the business relationship can also help compliance officers form a view on whether there might be an inappropriate motive behind the offer being made, and whether any precautions may need to be taken to guard against such a risk. (For instance, advising that a recipient of a gift or hospitality not be involved in considering an upcoming tender in relation to which the party who has provided the gift or hospitality intends to bid). Considering and properly documenting the business rationale for accepting an offer of the type described above can also help mitigate the risk that the acceptance might later be suggested to have been inappropriate. If no respectable rationale can be recorded, accepting whatever has been offered may be more difficult to justify if it becomes subject to scrutiny further down the line.

It is important to remind ourselves that neither the law nor related guidance in the UK or United States seeks to criminalise "*bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations*" that is recognised as an "*established and important part of doing business*". [1] It is the role of a company's compliance officers to enable these entirely proper activities within the framework provided for by their company's policies and procedures – subject, as needed, to appropriately documented decision-making and records.

While compliance officers are always more likely to be viewed by the businesses they support as an adversarial 'Dr No', rather than a suave and charming secret agent, it is important to remind ourselves that we are not supporting the equivalent of a presidential administration, which is constantly being watched by any number of enemies across the globe and which, therefore, has very particular sensitivities about things that might call its integrity into question.

Though there are times that we do need to rein in our more enthusiastic colleagues, compliance officers don't always need to invoke a response quite as succinct as "*If it sounds fun, you can't go.*" Effective and memorable, but not very 007.

Note

1. The Bribery Act 2010 – Guidance: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

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