

# **Bribery Investigations: From the FCPA to OFAC and Back**

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How to Handle an Emerging FCPA and  
OFAC Crisis –  
A Hypothetical Scenario

Although inspired in part by a true incident, the following scenario is fictional and does not depict any actual persons or events.

# FCPA Crisis Scenario: Super-Stuff Inc.

## About Super-Stuff Inc. (“SSI”)

- Big-box discount retailer
  - Groceries, entertainment products, hard goods, apparel, and home goods
- Delaware corporation listed on the NASDAQ
- Retail operations in 30 states and approximately 20 countries throughout Latin America, China and Southeast Asia, and Middle East
- Operates in different retail formats, including stores, membership-based savings club, and e-commerce business segment
- Company motto: “We sell super stuff, super cheap”

# FCPA Crisis Scenario: Super-Stuff Inc.

## About Cosas Mejores de Mexico (“CMM”)

- Mexican subsidiary of SSI
- Oversees approximately 2,000 retail locations in Mexico
- Following an aggressive SSI growth strategy from 2002-2012 to expand Latin American operations, CMM now accounts for one-tenth of SSI’s annual revenue
- Now one of the largest employers in the state of Guadalajara, with a presence throughout Mexico.

# FCPA Crisis Scenario: Super-Stuff Inc.

## ***SSI Dramatis Personae***

- Mary Doright
  - SSI Chief Compliance Officer, reports to:
- John Barrister
  - SSI General Counsel, reports to:
- Al Damoney
  - SSI President/CEO
- Hector Kickback
  - CMM President/CEO
- Max Deepdiver
  - SSI Staff Compliance Attorney
- Whistleblower
  - Alleged former CMM mid-level manager

# FCPA Crisis Scenario: Super-Stuff Inc.

## Background: CMM flourishes thanks to Kickback efforts

- Ambitious expansion plan to obtain licenses and permits to build stores in areas of Mexico not previously served by big-box retailers
- Stores built so quickly that competitors lack time to move in, enabling CMM to gain market dominance
- Pleased by bottom-line results, Damoney gives Kickback latitude to run CMM with little corporate oversight

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 1: Guadalajara, we have a problem

- Whistleblower files complaint with Doright
  - “CMM treated me poorly – they never appreciated all my hard work”
  - “And they mistreat female sales associates”
  - “Oh, and if you want to know why CMM grew so successfully so fast, you should look into how Kickback arranged kickbacks through intermediaries to local and state officials to get those licenses and permits fast – been doing it for years now....”



# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 1, continued: a red flag south of the border

- Having recently attended FCPA training, Dorigt knows a potential bribery problem when she sees one
- Dorigt dispatches Deepdiver and team to Mexico to interview whistleblower

**STOP – DISCUSS**

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 10: Deepdiver returns with news

- Deepdiver briefs Doright
  - Whistleblower seems credible
  - Had some documentation to back up his claims
  - Bottom line: credible evidence of payments to Mexican officials to obtain licenses and permits

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 10, continued: Deepdive describes due diligence

- Evidence suggests payments totaling
  - At least \$10,000 (scenario 1)
  - At least \$100,000 (scenario 2)
  - At least \$1,000,000 (scenario 3)
- Deepdive has not yet written up his findings

### QUESTIONS

- What should Doright do next?
- Is the amount in question relevant?

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 14: Deepdiver drafts preliminary report

- CMM lawyers used third parties—*gestores*— to pay officials to facilitate speedy approval to open new stores
- Whistleblower provided copies of what appeared to be internal emails reflecting Kickback's knowledge and authorization of these payments

# FCPA Crisis Scenario: Super-Stuff Inc.

## Questions

- In Doright's shoes, with whom would you share report?
- What recommendations would you make for next steps?
- What additional facts would you need?
- At what point would you consider notifying the Audit Committee?  
CEO Damoney?
- When, if at all, do you bring in external legal counsel to manage an internal investigation?
- When do you consider making a voluntary disclosure to the SEC and the DOJ?

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 30: Dorigt presents written report to GC Barrister

- Recommends conducting an in-depth internal investigation
  - Managed by outside counsel working with SSI compliance team
- Notes that matter is a high priority and recommends briefing CEO Damoney

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 45: GC Barrister describes proposed strategy to Doright

- Following discussions with CEO Damoney
  - CMM's General Counsel will conduct an internal investigation
  - Under Kickback's supervision

### QUESTION

- What should Doright do next?

# FCPA Crisis Scenario: Super-Stuff Inc.

## Day 90: Dorigt's dilemma

- Despite making several inquiries with Barrister, Dorigt has heard little news about investigation
- Audit Committee never notified
- No disclosures made to the SEC or DOJ
- New York Times reporter calls Dorigt asking questions about CMM, implying knowledge of alleged bribes

### QUESTION

- What now?



# OFAC Crisis Scenario: Super-Stuff Inc.

## Day 3, revisited: Deepdiver's discovery

- While in Mexico to interview the FCPA whistleblower, Deepdiver buys spare undershirts at the local CMM store
- He notices the undershirts are “hecho en Cuba”
- He reports to Dorigt, who tasks him to add OFAC sanctions to his investigative agenda
- He raises issue with appropriate CMM personnel during impromptu interviews
- He is assured there is no problem because
  - Cuban undershirts are made from the highest quality cotton
  - CMM is not a U.S. company and therefore not subject to U.S. embargo against Cuba – “we checked into it....”

# OFAC Crisis Scenario: Super-Stuff Inc.

## Day 10, revisited: the Cuban undershirt crisis

- Deepdiver reports his findings
  - CMM buys over \$1,000,000 worth of Cuban undershirts a year
  - Margins are great because the shirts are cheaper than the rest
  - CMM's General Counsel, a U.S. citizen, identified a potential issue, but Barrister assured him it was OK because the Cuban embargo only applies to U.S. companies
  - Barrister further instructed CMM to procure them from that longtime distributor in Honduras, just to avoid "bad optics"
  - Later that day, Barrister asks Doright to help with an issue...a \$5,000 wire payment from CMM to SSI was apparently blocked by SSI's bank in New York because of a reference: "shared service invoice – Cuban undershirt legal/business advice"

# OFAC Crisis Scenario: Super-Stuff Inc.

## Day 10, revisited:

- Barrister to Doright
  - “Call the bank and tell them there’s a mistake because we buy the shirts from a distributor in Honduras”
  - “The distributor ‘white labels’ the shirts so no one will make a fuss about Cuba – remind me to tell CMM not to mention Cuba next time”
  - “Besides, CMM is not a U.S. company, so it doesn’t matter anyway....”

### QUESTIONS

- What issues do you identify?
- What should Doright do next?