



Foreign Corrupt Practices Act

A Practical Resource
for Managers and
Executives

Aaron G. Murphy

Praise for Foreign Corrupt Practices Act: A Practical Resource for Managers and Executives

“Aaron Murphy’s book is absolutely fantastic. As a seasoned lawyer and compliance professional, having worked for Fortune 100 companies with global operations for many years and being an FCPA expert myself, I have never come across a more detailed yet easy to read book on FCPA. It contains practical advice and provides examples that are put into context, that the reader can easily relate to and that take into consideration different cultures and customs. A must-read for any individual/organization doing business abroad.”

—Fabiana Lacera-Allen, Senior Vice President & Chief Compliance Officer, Elan Drug Technologies

“This book is essential reading for anyone conducting business outside U.S. borders. Executives, managers, sales, marketing, finance, and legal professionals will find sound practical advice to protect themselves and their companies from FCPA violations when operating globally. Much more than a general survey, this book offers scores of real-world examples and serves as an easy-to-read, how-to resource for employees at all levels of a company. It will be a valuable reference tool for many years to come.”

—Jeff Taylor, former U.S. Attorney for the District of Columbia and former counselor to Attorneys General John Ashcroft and Alberto Gonzales

“If you are a manager involved in any kind of international dealings—which is to say, if you work for any major firm in today’s global marketplace—you need to study Aaron Murphy’s comprehensive, precise, and highly readable analysis of life under the Foreign Corrupt Practices Act (FCPA). Few FCPA violations are intentional, yet the consequences even of unwitting violations can be drastic for you, your colleagues, and your firm. Murphy’s book shows why business practices perfectly acceptable at home are federal crimes in other settings, how to think your way through ambiguous situations, and—perhaps most important—when to get expert advice. It is a field guide to a

world where authority and discretion are all too often up for sale, and a resource that will help you avoid trouble—and even succeed—within the bounds of this crucial yet little-understood legislation.”

—**Michael Johnston, Charles A. Dana Professor of Political Science, Colgate University**

“Every businessperson working in the emerging markets should read and understand the way in which their actions and behaviour may fall subject to the FCPA. This book is a great practical guide to a complex law.”

—**Scott Lane, Principal and CEO, The Red Flag Group**

“Most business managers have heard of the FCPA, but few truly understand the breadth of the FCPA as applied to real-world scenarios. Murphy, an FCPA practitioner with extensive real-world experience, provides an easy-to-read FCPA handbook for business managers. This book is essential reading for business managers looking to develop and implement risk management policies and procedures in this era of aggressive FCPA enforcement.”

—**Professor Mike Koehler, Butler University, Editor-FCPA Professor Blog**

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*A Practical Resource for
Managers and Executives*

AARON G. MURPHY



WILEY

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For Jennifer, Max, and Viv.
This book represents many hours
away from home.
I intend to make it up to each of you.

Disclaimer

This book does not provide legal advice, nor does it create an attorney–client relationship between the author or the author’s firm and anyone owning, possessing, or reading this book. The examples used in this book either come from published cases or are based on amalgamations from the author’s own experience, modified for illustrative purposes. Any similarities between examples used herein and any actual events are purely coincidental. Because the resolution of legal questions is always fact-specific, always consult your own legal counsel about your particular situation.

Contents

<i>Foreword</i>		<i>ix</i>
<i>Acknowledgments</i>		<i>xii</i>
<i>Introduction: Who Is This Book For?</i>		<i>xiii</i>
CHAPTER 1	Basics of the Foreign Corrupt Practices Act	1
CHAPTER 2	What's the Big Deal? Billion-Dollar Fines and Jail Time	23
CHAPTER 3	You Do More with the Government Than You Think	37
CHAPTER 4	Know Your Customers and Suppliers: The Dangers of State-Owned Entities	61
CHAPTER 5	Guess Who's Coming to Dinner? The Dangers of Meals and Entertainment	79
CHAPTER 6	Ensuring That Business Trips Really Are for Business	93
CHAPTER 7	Gifts That Give Back	107
CHAPTER 8	Know Your Agents and Consultants	121

CHAPTER 9	So What <i>Can</i> You Do? Facilitating Payments and Other Exceptions	145
CHAPTER 10	Keeping Good Records and Maintaining Good Procedures	161
CHAPTER 11	Are You Buying a Problem? Due Diligence in Acquisitions and Government Contracts	183
CHAPTER 12	Time Off for Good Behavior: Why Compliance Matters	195
APPENDIX 1	Anti-Bribery, Record-Keeping, and Internal Controls Provisions of the Foreign Corrupt Practices Act	209
APPENDIX 2	Relevant Provisions of the Principles of Federal Prosecution of Business Organizations	241
APPENDIX 3	Excerpts from the Federal Sentencing Guidelines Manual	245
	<i>About the Author</i>	267
	<i>Index</i>	269

Foreword

Aaron Murphy has written a marvelous book on the increasingly complex and difficult challenges posed by the Foreign Corrupt Practices Act (FCPA). The FCPA, enacted in 1977, was a revolutionary statute that outlawed corrupt payments to foreign government officials at a time when such bribery was all too common and, indeed, not prohibited (and indeed in many cases facilitated by tax laws) in the home countries of many corporations, like Germany and Japan.

Over time, that landscape has slowly changed. Many governments, notably in the OECD, have enacted laws forbidding bribery. And just as importantly, some governments have significantly increased their enforcement efforts. For example, prosecutors in Germany led the way in pursuing the landmark case against Siemens, something that would have been unthinkable ten years earlier. Just this year, the United Kingdom enacted a new and broader anti-corruption law that it has promised to vigorously enforce. Both strong laws and vigorous enforcement are critical to ensuring continued progress against improper payments.

As Aaron vividly describes, the United States—through both the Department of Justice and the Securities and Exchange Commission—has led the way in ramping up its enforcement efforts. The number of recent FCPA prosecutions and the penalties imposed (including lengthy prison sentences for company executives) eclipse the figures seen in previous decades. This is one of many good reasons to read Aaron's excellent book.

The FCPA is at one level deceptively simple, prohibiting corrupt payments to non-U.S. government officials and requiring accurate books and records and a system of sufficient internal controls. But that simplicity masks a host of complex issues—as does the increasingly aggressive enforcement of the FCPA. This is particularly so with the books and records and controls provisions of the FCPA. The resulting dilemmas, as Aaron discusses, can involve everything from mooncakes to charitable contributions to a bribe demand at 1 A.M. on a lonely highway in a faraway place. Aaron leads the reader through the thicket of issues raised by the FCPA and its enforcement in a practical and lively way—with more than a sprinkle of provocative (and, I might say, justified) controversy over some of the enforcement actions (or rather, settlements) Aaron discusses.

What I love most about Aaron's book, however, is its emphasis on culture, leadership, and process in addressing FCPA risk. As Aaron puts it, "it is poor recordkeeping and lack of procedures and controls that get most people in trouble." Put succinctly, "[t]he single best way [to keep your company out of trouble] is to ensure that your company has the best compliance program possible." That requires a focus on prevention, detection of potential issues and strong response—for no company is perfect and none is composed of 100 percent perfect employees, much less perfect agents, distributors, and other third parties. To translate these strategies into practice, companies must establish a forceful tone at the top (and in the middle), strong processes and procedures around FCPA (and other) risks, good mechanisms to detect issues (like an ombuds program), and no-nonsense response when an issue arises.

The FCPA has been a tremendous force for fair competition and the rule of law in the thirty-three years of its life. But it is not an easy law to understand or to keep abreast of in all its complexity. Aaron's book is an ideal and interesting walk through that landscape. It will be helpful to specialists, and even

more so to business leaders and managers in doing what the overwhelming majority of those leaders and managers strive to do—lead with integrity.

Brackett Denniston
Senior Vice President and General Counsel
General Electric Company
August 2010

Acknowledgments

Writing a book is a lonely affair, but I have the very good fortune of being married to Jennifer Gully, a wonderful woman who is not merely supportive but also a talented lawyer and author in her own right. Without her insights, critical eye, and willingness to put up with my interminable talk about this project, I would never have finished it, and it wouldn't have been any good even if I had.

I also have to thank my colleagues David Schindler, Doug Greenburg, and Dan Seltzer for their thoughts and comments, both on this book and in general over the many thousands of hours we have worked together. In addition, my friends at Ernst & Young who reviewed the manuscript and offered critiques and insight also warrant mention here, particularly Amanda Mas-succi, Jonathan Feig, Richard Sibery, Brian Loughman, Chris Richardson, and Jeff Taylor.

And finally, this would not be a book at all were it not for Tim Burgard at John Wiley & Sons. His enthusiasm for this project meant the difference between a manuscript that sits in a desk drawer and the book in your hand. I could not have asked for better luck than I had when this project founds its way to his desk.

Introduction

Who Is This Book For?

This book is for managers.

Primarily, it is for managers in U.S. companies or companies listed on a U.S. stock exchange. And if you are a U.S. citizen (or national, or lawful permanent resident) working abroad, even for a non-U.S. company, this book is for you, too.

In either case, you are subject to the Foreign Corrupt Practices Act—more commonly called the FCPA. The FCPA is the United States' foreign anti-bribery law and, regardless of whether you work in a sales, marketing, business development, operations, or financial capacity, it governs your conduct anywhere in the world, any time.

Even if you are not on the ground in a foreign country right now, odds are that you will be one day or at least will be involved with foreign aspects of a company's business during the course of your career. Globalization being what it is, most U.S. businesses of any significant size have, or soon will have, operations abroad. In all such cases, FCPA compliance is mandatory.

I handle FCPA matters all around the world, and over the years I've seen the same scenario time and time again: Despite the existence of a corporate compliance program, despite having sat through a PowerPoint presentation about the basic elements of the FCPA, despite the best intentions of everyone, many managers still do not see real live FCPA problems until it's too late

(if they see them at all). Later, when the internal or external auditors find them, or a call registers on the company's whistleblower hotline, or an in-house attorney is asked to consult on a transaction and learns about some suspicious activities that have already occurred, a lot of hard questions are asked and careers can be damaged or ruined. The goal of this book is to stop that from happening.

In my experience, almost no manager—whether young and looking ahead to a long and successful career, or very senior and looking ahead to a long and relaxing retirement—ever actually intends to violate the FCPA. (I've seen intentional violations, but they are rare.) Far more common is that a lower-level employee intends to get ahead (by boosting sales, landing a big account, or simply playing big shot by hobnobbing with important government officials) and the manager fails to catch it. When the post mortem is done months or even years later, by lawyers and forensic accountants, the red flags and warning signs seem to be everywhere. I've had many discussions with in-house lawyers and audit committee members where, when the facts are laid out, they all shake their heads and say, "What were they thinking? How could our managers have missed this?"

You don't want to be one of those managers.

As you might imagine, it's often the lower-level managers who get in the most trouble because they are the ones closest to the problem. In what may be the cruelest irony of all, those with the least experience doing business abroad are often the ones expected to spot all of the potential problems and raise questions to the appropriate people (their supervisors, the in-house legal department, compliance officer, etc.), and to do so while they are trying to get their hands around a new assignment in a new and often disorienting country and business culture.

This book is not intended to be an exhaustive course on the FCPA. As a manager, you have a business to run. If you wanted to become an expert in a highly nuanced legal specialty, you'd

have gone to law school. Instead, this book is intended to be a discussion of what I see as the most common problem areas where managers get themselves into FCPA trouble. The impetus for this book was my conclusion that, although many companies have compliance and training programs, most materials that I have reviewed do not have examples from the real world. Managers walk out of trainings with a sense that it is all academic and that bribery could never happen on their watch. But bribery does happen, all the time.

Much of the education managers receive about the FCPA does not give them any sense of how violations often occur. Everyone understands that they can't trade money for a government contract, but very few understand that donating money to a perfectly legitimate charity that happens to be a pet project of a government official may also violate the FCPA. Or worse, that the supposedly fancy mooncakes you approved as Chinese New Year gifts might not be mooncakes at all, but gift certificates that are fully redeemable for cash.

I use these and many other examples from real cases that I have either seen myself or that are part of the FCPA literature, and I try to boil it all down into something that you can actually use in your day-to-day life.

To write this book, I asked myself what I would tell a mid-level manager about the FCPA during a two-hour dinner. My hope is that you have already seen the movies available on your twentieth flight to Hong Kong, Singapore, Dubai, or wherever it is you're headed next, and will find this book in your bag, crack it open, and be better prepared to deal with FCPA issues when you land than when you left.

And you'll know what you can and cannot do when that customs agent looks down at your passport, shakes his head, rubs his thumb and index finger together, and says with a grin: "This could take awhile."

Basics of the Foreign Corrupt Practices Act

In its most basic formulation, the Foreign Corrupt Practices Act (FCPA) prohibits bribery of foreign government officials. But, as with most things legal, it is far more complex than that.

The notion of foreign bribery conjures up an image of a briefcase full of cash being handed off at the edge of a dusty airstrip in some vaguely tropical locale, or handing over a passport with a folded sheaf of bills tucked inside to an armed member of a militia or police organization that may or may not have any real authority. In truth, the vast majority of foreign bribes are far more mundane (although I once was held at gunpoint in Indonesia, resulting in a payment that will be discussed in Chapter 9).

Under the FCPA, a “bribe” is the offer or promise of anything of value, made to a foreign official, with the intent to obtain or retain business or to secure an unfair business advantage. As you will see, that sentence is far more complex than you might imagine. We’ll go over all of these concepts in great detail in this book, but at the outset let’s focus on the idea of obtaining or retaining business or securing an advantage. When you think about it, virtually everything you do in your business life is intended to obtain or retain business or an advantage of some kind. Everything. The implications of this can be startling.

What this means is that FCPA violations often involve actions that, in a private commercial context, are not only permissible but commonplace. You take your best customer out for an expensive dinner, complete with a nice bottle of wine and port for dessert, just to hammer out the final details of a new contract. You fly potential customers to a resort for a company conference to talk about your latest products and, between rounds of golf and spa treatments, you try to convince them that your product is better than your competitor's. You give a donation to the favorite charity of the CEO of a huge potential customer, just to build a relationship that may bear fruit in the future. You remember to send customers cases of wine during the holidays, anniversary presents, tokens of congratulations upon the graduation or wedding of their children. Use of the company's skybox during the playoffs. Concert tickets. The list goes on and on. The only reason you do any of these things is to obtain or retain business.

All of these things, done in the normal course of business with regular customers, can be crimes if done with foreign government officials under the right conditions. They are not always FCPA violations, but they certainly could be, depending on the circumstances. The point of this book is not to conclusively resolve whether specific examples are violations—leave that analysis (and the liability for getting it wrong) to your legal or corporate compliance departments. The point of this book is to ensure that you see the potential problems before it is too late and get the help you need.

“Anything of Value” Can Be Considered a Bribe

Under the FCPA, you cannot give foreign government officials “anything of value” if you intend to influence them in connection with obtaining or retaining business. If you do, it might be a bribe under the FCPA.

A bribe can take many forms. Cash is obvious, concert tickets less obvious, a meal that's perhaps a little too nice even less obvious, and a slightly excessive salary to an employee who is the spouse of a government official who might help your business cross the line in a way that very few managers would spot.

Beyond these kinds of direct payments and gifts, there is the whole universe of payments made by third-party consultants and advisors. Ask yourself if you really know where all the money went that you paid the consultant who helped you get the permits and business licenses you needed for your new factory; or the local tax advisor who managed to straighten out the issue you had with the local authorities; or your freight forwarder and customs agent who told you about a special permit that would miraculously allow your goods to clear customs within a day of arrival (or without being subject to the normal, time-consuming inspections).

Think about every line item on every invoice from every third-party service provider, every expense approved for reimbursement to your sales team, and every use of petty cash, and ask yourself if you really understand what those charges and expenses were and where the money went. Do that and you will have a sense of the endless places FCPA violations can hide.

Worse yet, imagine what you would say to someone like me—a very cynical lawyer—who questioned you, two, three, or five years later, about a certain line item on a certain invoice that you (or your staff) approved. I have had a hundred of these conversations, and they are all pretty much the same: The description on the invoice is vague and the amount fairly large, the managers do not remember anything about it, although they plainly see their initials or signature on the approval line. Yes, they attended an FCPA training, but it never occurred to them that this could be a problem. They trusted their people. “Hey, I rely on my finance guy to check this stuff.” But the audit

committee always has the same reaction: “Why didn’t they catch this? It’s obvious.”

The problem is that the FCPA is all-inclusive. The actual text of the statute uses the phrase “anything of value,” and it truly means *anything*. Any economic benefit of any kind whatsoever whether paid directly or through an agent on the company’s behalf. Anything. Any amount, no matter how small.

In the United States, many government agencies have strict ethics rules that forbid their employees from receiving even the most minimal gifts. In fact, when I have met with lawyers from the Securities and Exchange Commission (SEC) at my office, I generally schedule the meetings so they do not overlap with lunch. The reason is to avoid the uncomfortable situation where the SEC lawyers try to pay for the sandwiches that are often ordered for lunch meetings. The SEC has strict rules prohibiting its staff from accepting almost anything. The sandwiches are obviously of trivial value, and I would never think for a second that the SEC would have mercy on my client because we gave them a turkey sandwich (were it only that easy!), but they decline them nonetheless.

I tell you this only because I find that many managers simply cannot believe that providing something as small as a meal or a few cocktails could possibly constitute a federal crime. But if the SEC honestly believes that a mediocre conference room sandwich worth, at most, a couple of dollars might compromise the ethics of its own agents, you’d better believe it will take the view that a steak dinner at the Four Seasons in Hong Kong or a spot of 25-year Macallan could compromise the integrity of a Chinese government employee who makes only a few hundred dollars per month.

I often hear clients tell me that a particular expense was “reasonable” or “modest,” or that it was not “unreasonable,” as if such a determination resolves the question of whether the FCPA has been violated. I am not sure how those concepts made their

way into so many heads, but they gloss over the realities of the FCPA. Anything means anything. The statute's focus is not on the value of the gift but the intent of the giver.

The Corrupt Motive Problem: Don't Assume—Run It Up the Chain

To violate the FCPA, offers or gifts of anything of value must be made “corruptly.” This “corrupt motive” requirement—generally understood to mean a payment made with the intent to influence the government official in some way—should not cause too much heartburn. When an issue arises, a prudent manager should raise it to the appropriate personnel and let them deal with the difficult questions surrounding corrupt motive. As I discuss later on in Chapter 10 about books and records, this is rarely a stumbling block for the government, and it shouldn't be for a manager either.

When clients use a term like “reasonable” or “unreasonable” to describe the size of a gift or payment, they use it as a proxy for a much more complex set of concepts: knowledge and intent. If the value is small, they seem to be saying, it couldn't possibly be intended as a bribe. That *may* be true (certainly the low value of the gift or payment could be *evidence* of lack of corrupt intent on the part of the giver), but it is not conclusive.

As discussed, giving a sandwich to an SEC lawyer is extremely unlikely to be seen as a bribe by any reasonable person, but the SEC's flat prohibition on such “gifts” is designed to avoid any difficult questions asked after the fact. That is really how a manager should think about the concepts of knowledge and intent. Avoid the appearance of impropriety. If something looks bad, it is assumed to be bad, and explaining it away after the fact can be extremely challenging.

Although the FCPA requires the “corrupt motive” to exist in the mind of the giver, the more important notion of corruption

is often in the mind of the beholder. What would the company's compliance officer, general counsel, or audit committee members think the gift or payment was for? How would the company's outside counsel view it? How would the Department of Justice (DOJ) view it?

Viewing even innocuous transactions through hindsight complicates the analysis because these issues do not arise in isolation. Small payments, gifts, meals, and the like tend to occur in clusters or patterns. When resolving a regulatory issue, making a large sale, or getting the necessary licenses, certifications, or permitting issues resolved, there is generally a series of meetings. When those meetings include meals, entertainment, or small gifts, and the end result is favorable to the company, the entire series of transactions can look suspicious. While it is true that the U.S. government is unlikely to bring a criminal case over a single steak dinner, there is rarely a single instance.

The fundamental question for FCPA purposes—whether these gifts, meals, and so on—were made with a corrupt motive becomes a nearly impossible question to resolve. Of course the employees in question will always say they never intended to influence anyone. Yet, when asked why the meeting took place in a nice restaurant instead of a conference room at the office, they will just as often say that they need to “maintain a good relationship” with the government officials in question. So what exactly was the motive, and was some or all of it corrupt? Hard to say.

As the value of what is given increases, the question generally gets easier to resolve. Having the business meeting on the company yacht over a long weekend is more problematic than drinks at a club. Flying the official and his family to the United States to attend the meeting and then footing the bill for them all to take a weeklong vacation is even more problematic. But even relatively small amounts pose thorny questions that can

be time consuming and expensive to address once they come under the microscope.

Detailed examples of these gift and entertainment problems are discussed in their own chapters later in this book. But for now, the basic message is this: Don't be fooled by small amounts. There is no exception for "reasonable" expenses, and you often won't be able to see the larger pattern of gifts and expenses that may exist because those generally only come out after the lawyers or accountants start digging through your books.

Be cynical and assume a corrupt motive unless you have a compelling reason not to. Don't assume the responsibility for deciding that a small transaction is fine. Transactions always look worse later when the context is lost and all that remains is the cryptic language on a receipt and a reimbursement form. There are people in your company whose job it is to make these judgment calls. Let them do it.

Foreign Officials and Discretionary Authority

The FCPA outlaws payments to foreign officials that are intended to get them to do (or not do) some official act that is within their discretion.

Acts that are not within their discretion (like stamping your passport at the airport when there is no legitimate reason not to) are the kind that may be "facilitated" by a payment, which leads to the much-overused and little-understood FCPA exception for "facilitating" payments. Facilitating payments are discussed in detail in Chapter 9, but the bottom line is that extremely few payments are actually facilitating payments, and no manager should make that call on his or her own.

The FCPA is further complicated by the fact that it defines foreign official in the broadest possible terms, such that it

can be difficult to figure out who counts as one. Specifically, the FCPA defines “foreign official” as any employee of a foreign government “or instrumentality thereof.” This extremely broad language brings employees at what are commonly called state-owned enterprises under the reach of the law. Thus, the purchasing manager at a state-owned shipping company in China would be a foreign official under the FCPA. So would a doctor at a state-owned hospital in Poland.

To make matters worse, the state-owned entity need not be fully owned by the foreign government. Indeed, I have heard DOJ prosecutors say that it is not official ownership that they care about but rather the degree of control exerted by the government over the entity in question. Thus, a fully privatized entity in the Kazakhstan oil industry that *used* to be a government entity could still be a state-owned entity for FCPA purposes. This is especially true if the government still appoints the board or effectively runs the company even though it is technically owned by a private citizen (often a retired or former government official who still has close ties to the government). These are difficult, if not outright impossible, relationships to uncover. The incestuous and often extremely opaque nature of commerce in many foreign countries means that a U.S. business can never really be certain about the nature of its customers, consultants, or business partners in certain parts of the world.

The payments to this very broad and ill-defined group that are prohibited are those intended to get the officials to exercise authority in your favor. That is, to do or refrain from doing, something that is within their discretion as part of their official capacity. This is a slippery definition because, in truth, very little that a foreign official does falls *outside* of this definition. As the next examples show, there are relatively few things a foreign official does that are fully and clearly nondiscretionary in nature.

Consider this: A foreign official in charge of awarding a contract for a major new public works project issues a request for

proposals that are not subject to a public bid process. During the bid period, he calls you into his office and informs you that if you will agree to refund 5 percent of the contract price to him, he can guarantee that you will be awarded the contract. You agree and, sure enough, you are awarded the contract.

This is an obvious example of a prohibited transaction. The decision to award the contract rests solely within the discretion of the official, and the official has asked for a direct quid pro quo. You give him 5 percent; he gives you the contract. Enough said.

But what about this: You plan a business trip to Indonesia to negotiate a new contract with your distributor there. You request and receive a proper business visa from the Indonesian consulate in the United States. Yet, when you arrive at the airport in Jakarta, the customs officer inspects your passport, looks you over, spends a several minutes at the computer, asks you a few questions about the purpose of your visit, and generally seems to drag out the process. Finally, she tells you there are some issues with your papers that must be resolved before you can enter the country, and she takes you to a small room. Once inside, she tells you that the official who can resolve the issues is not there, and that you might have a long wait. Perhaps you ask if there is anyone else who can resolve it. Perhaps you just sit a little while. But eventually she tells you that she may be able to expedite things for \$20.

Variations on this one are common. Here you have a low-level official who is simply refusing to do her job in the hope of shaking you down. You have a properly issued visa from the Indonesian government obtained before you left the United States. You know it and she knows it. Her job is merely to ensure that everyone entering the country has proper paperwork; if they do, she is supposed to stamp their passports and let them in. She has no discretionary authority to determine whether to stamp a properly presented passport containing a proper visa.

Under this scenario, if you pay her the \$20, it is not considered a bribe under the FCPA.

There is a big gap between these two examples, but almost every example that falls into that gap is a potential FCPA violation because it contains some element of discretion on the part of the foreign official.

Try this common problem: A key piece of equipment is broken in your factory in India, effectively shutting down production. The equipment is large and heavy and expensive to ship, but the cost of a two-week shutdown outweighs the cost of air freight, so you pay an outrageous sum to have new equipment flown overnight to Bangalore.

In the rush to get the equipment there right away, certain customs paperwork was not properly filled out and filed. When the equipment arrives at the airport, you are told it will take two weeks to clear customs while the paperwork is properly routed through the various offices and the necessary inspections are performed. You rant and rave to the customs officer, who then takes you aside and tells you that there is a way to expedite clearance, but it's expensive. He tells you that a special permit, or "intervention," "evacuation," or some other official sounding thing can be arranged. "It's common in these situations," he tells you. "It ensures you same-day processing." You ask him about the paperwork that you were told would take two weeks to straighten out. "This is different paperwork," he says. "So that doesn't matter anymore." He names a price. It's absurd, but you decide to pay it. After all, you're already in for the shipping costs, and you don't want the downtime too. The customs officer then refers you to a customs broker who, he says, specializes in these transactions. The broker, of course, is very nearby. Magically, your equipment is through customs in an hour, you have paid the broker, and you return to your office with your new equipment and a receipt for the broker's services that gets filed away somewhere in your accounting department.

Problem? Probably.

I frequently see issues like this. The most common refrain in defense of the payment is that it was purely to facilitate processing. That is, it was merely a payment to skip to the front of the line and nothing more. Setting aside the question of whether skipping to the front of the line is a permissible payment (it can be, but that is a question for Chapter 9), that's not really an accurate description of what happened. Under this scenario, you had equipment that was subject to certain paperwork and inspection requirements. Sure you were skipping to the front of the line, but you were also skipping the paperwork and inspection. The U.S. government may view that as a payment to secure an improper exercise of the customs officer's discretionary authority.

The lesson, then, is that only the most ministerial of acts can possibly fall into the "nondiscretionary" category and hence be truly outside of the FCPA.

You Don't Need to Make the Payment—A Mere Offer or Promise Is Good Enough

Let's go back to the first hypothetical above and change it slightly. Let's say the government official asks for a 5 percent kickback in exchange for awarding your company the contract. You agree, and yet, when the contract is formally awarded sometime later, one of your competitors is given the business.

The common response to questions about these arrangements is that the company never made any payments and never received any business. No harm, no foul, no FCPA violation. But that is wrong. This is still a violation because the FCPA makes it a crime to merely offer a payment.

In fact, we can change the hypothetical even more. Let's say that the 5 percent kickback proposal was your idea (or, more likely, the idea of one of your new, aggressive salespeople). If, in