CHAPTER 1

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 crosses 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

the course of the negotiations, the salesperson tells the official how committed your company is to the official's country and building a strong relationship with the local community and, as part of that, your company would like to make arrangements to refund 5 percent of the contract price back to the community, perhaps through the official himself to distribute however he sees fit. And, at the mere mention of such thing, the official blanches and tells the salesperson to leave immediately. This is still a violation. Just making the offer is a crime.

This is one area that makes a manager's oversight so difficult. Even if the company has the best policies and procedures in place such that they will stop an improper payment from being made, by the time the payment is stopped, the FCPA violation has already occurred. This is why training is so essential to any FCPA compliance program. You want to keep the offers from being made or agreed to when proposed. You want to stop the violations before they happen.

It Doesn't Matter if the Bribe Works: The Focus Is on the Intent of the Giver, Not the Effect on the Recipient

This is merely a twist on the prior discussion, but the point is worth making on its own. The offer does not need to yield any actual business or other improper benefit or advantage to the company. If the offeror *intends* the offer to yield business or an improper advantage, that is all that matters. To circle back to where we began, if the offer is made with the requisite *corrupt motive*, it does not matter in the least if the offer is accepted or if any benefit is actually derived.

This distinction sets up a whole collection of difficult questions because it is quite possible to make an offer of something of value but without any intent that it induce any official to do anything. One common area where this distinction matters is

with travel, entertainment, and meals. As discussed, you cannot give an SEC enforcement attorney a sandwich because of this very problem.

We will discuss the issue in more detail in the chapters on travel (Chapter 6), entertainment (Chapter 5), and gifts (Chapter 7), but for now, remember that even failed efforts can be violations. Even total miscommunications can be violations. Imagine the oblivious official—perhaps so used to being lavishly wined and dined that he views your largess as an entitlement, clearly nothing that would warrant special treatment—who accepts your hospitality without even recognizing the clear intent of your marketing people to influence him. It does not matter. If your marketing people have a corrupt motive, this is still a violation.

The FCPA Applies to All U.S. Citizens—Anytime, Anywhere

The ability of a nation to regulate it citizens regardless of whether they are physically within its borders is a very old and well-established rule of international law. There are limits to this power (e.g., a nation cannot require its citizens to do something in another country that is illegal in that country), but these limits are of little practical concern for the average law-abiding citizen. At the end of the day, it really is a crime for a U.S. citizen to buy and smoke a Cuban cigar when he's in Hong Kong, even though they are perfectly legal there. U.S. companies and their employees are bound by many U.S. laws even when they are not in the United States.

That you are subject to the FCPA anywhere in the world is especially important to keep in mind if you are a U.S. citizen, national, or lawful permanent resident who has taken a job abroad for a privately held foreign company. You are still subject to the FCPA even if your employer is not.

The FCPA Requires Accurate Record Keeping and Strong Internal Controls

The FCPA's "books and records" and "internal accounting controls" provisions are perhaps the broadest, most far-reaching, and most dangerous of all U.S. securities laws. The fact of the matter is that these provisions apply to *all* books and records and *all* internal controls—not just those dealing with bribery. Thus, a company with poor books and records can be held in violation of the FCPA even when there are no allegations of foreign bribery, and regardless of whether it does any business overseas at all.

These provisions require companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets." The statute goes on to specify that "reasonable detail" means "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." Thus, if you would be more careful with and keep better records of your own assets, you may be running afoul of the record keeping and internal controls provisions of the FCPA.

The FCPA requires companies to keep accurate accounting records to prevent the concealment of bribes. That is, the books and records should clearly state what the company's assets are, and one should easily be able to figure out where and how a company spent its money.

This is easier said than done. It should go without saying that the creation of a completely false invoice used to mask the true nature of an expense (i.e., using an invoice for office supplies to support what was really a withdrawal from petty cash used to pay off a tax inspector) is a books and records violation. Yet difficult questions frequently arise in connection with much more mundane, and possibly innocent, books and records problems.

For example, expenses for any large organization have to be rolled up under broad descriptive categories for accounting purposes simply because there would be no other meaningful way to assess the organization's expenditures. My experience is that most finance or accounting people recognize that, at the margins, certain expenses theoretically could be categorized in a number of ways and that fine distinctions between these categorizations do not matter all that much. Thus, whether a gift to a potential customer is booked as a "promotional expense," a "marketing expense," or as "business development" makes no meaningful difference. On a macro level, the accounting will be accurate enough if any of the three categories are used.

But let's return to the hypothetical with the Indian customs broker from above. After you have paid the customs broker, who miraculously shepherded your equipment through customs in an hour, when you were told it would take two weeks, you return to your office with an invoice from the broker. Not surprisingly, the invoice states that it is for customs brokerage services and contains some form of cryptic description like "customs interference" or "express clearance." You send the invoice to the accounting department, where it is recorded wherever customs-related expenses are normally booked.

The U.S. government would likely take the position that this is a books and records violation under the FCPA, even though the invoice says it is for customs brokerage, and even though it is recorded that way. The government would likely say that the underlying transaction was a bribe (for the same reasons discussed earlier) and, as a result, the description in the books and records is inaccurate. The proper description would be "bribe," not "customs expense."

Most managers laugh at the idea of openly recording something as a bribe, but that is exactly the position the government

takes. But because almost no company ever does so, nearly every violation of the FCPA's anti-bribery provisions also results in a corresponding violation of the books and records provisions. As discussed in Chapter 2 on fines and penalties, this becomes significant both for purposes of calculating fines and for creating a means to resolve FCPA cases in a noncriminal manner.

Companies must also maintain appropriate internal controls that allow for the preparation of accurate financial statements and ensure the proper use of corporate assets. Generally, books and records and internal controls problems go hand in hand. Where one is found, the other is usually nearby. I often think of internal controls as a set of policies and procedures designed to keep the fox from guarding the henhouse.

There is no one set of comprehensive internal controls that will fit all companies in all situations. Best practice guidelines are widely available, and every company needs to consult them and implement a set of internal controls that makes sense for its organization. These should include, at minimum, procedures for entering into contracts, hiring agents or consultants, conducting due diligence on potential acquisitions and joint venture partners, policies governing employee reimbursements; policies for gifts, meals, travel, and entertainment; policies relating to marketing and promotional expenses; policies and procedures governing the use of cash and access to cash; structural separation within the organization ensuring that reimbursements and cash requests are overseen by individuals or departments that do not report to the individuals making the requests; in certain countries, such as China, ensuring that access to the company chop—which is necessary for entering into formal contracts—is restricted to appropriate personnel; as well as many other more nuanced policies, procedures, and controls.

"Defenses" That Don't Work

There are a number of common "defenses" I hear in the course of investigating FCPA allegations. These are not really defenses so much as a common set of complaints or outrages shared by a large number of managers and executives when they learn that some relatively common activity in one of their foreign business units might violate the FCPA. I address some of them here just to get them out of the way before we move on to chapters on specific types of activity that can get you into trouble.

"Everyone else does it. What are we supposed to do—just shut down our business?"

The simple answer may be: "Yes." I hear complaints along these lines all the time. There is a reformulated version of this complaint that I actually like as a defense, at least on a theoretical level. The reformulated version goes something like this: "Every competitor pays bribes just to be able to bid or have a fair shot at getting business. And if everyone pays, how is it that I am getting an 'unfair advantage' as required by the FCPA?" Said another way, "I'm not getting an advantage; I'm just leveling the playing field. Keeping up with the Joneses." Clever perhaps, but probably too cute by half. This "defense" is undercut by the old counterargument that "two wrongs don't make a right."

Indeed, one of the leading FCPA cases states: "The fact that other companies were guilty of similar bribery ... does not excuse [the company's] actions; multiple violations of a law do not make those violations legal or create vagueness in the law."

The whole purpose of the FCPA is to fight international corruption. Using the fact of systemic corruption as a basis to excuse compliance with the FCPA turns the law on its head. The fact

of the matter is, bribery remains illegal under the local laws of even the most corrupt nations. Thus, the presumed competitor that one is hypothetically gaining an "unfair advantage" over is the *law-abiding* competitor. Thus, the "everyone else does it" excuse will always fall on deaf ears with the U.S. Government. The FCPA does not account for the very real possibility that a law-abiding competitor may in fact be only hypothetical and impossible to find in certain parts of the real world.

"But we've always done it that way. I assumed someone must have signed off on it."

This is the excuse generally offered by the new manager who arrives overseas to find a system already in place. When the system (for bidding, for getting approvals, or for whatever else) turns out to be an FCPA problem, the manager simply says she was just following the protocol already set up when she got there. But failing to cast a critical eye on processes and procedures that predate you generally will not keep you out of trouble.

Under this scenario, the best a manager can hope for is that she will be seen as negligent or ignorant of the business and the law in such a way as to excuse her from personal responsibility. But being viewed this way—that is, as a negligent manager—generally does not do a lot for a manager's long-term career prospects. Worst-case scenario is that the manager's excuse will fall on deaf ears and be viewed by her bosses, the company's board or audit committee, or, worst of all, the government as what is known as "willful blindness."

Willful blindness is the careful—essentially intentional—avoidance of information that would confirm what you suspected was the case all along. Whenever you hear someone say something like "Sure, XYZ country is corrupt. People must

pay bribes all the time. But I never saw it. No one ever told me. I didn't know about it and I didn't want to know about it," you are getting awfully close to willful blindness.

Willful blindness is equated with intent for FCPA purposes. Maintaining plausible deniability by refusing to "learn" the last fact or two that would confirm that an illegal act is occurring will not insulate you from liability. This behavior is treated as knowledge in an FCPA prosecution. Bottom line: Be critical, even of processes and procedures that predate you.

"The [foreign] government knew what was going on and approved it. How can that be a violation of U.S. law?"

This is a loose corollary to actions that are actually permitted by the FCPA. The FCPA allows any act permitted under the written laws of the country where the act occurs. As discussed much later in Chapter 9, this defense is of almost no real value because no country has written laws that permit bribery. It should go without saying that if the actual exclusion written into the statute is of no practical value, its much looser, unwritten cousin is of even less value.

The idea that a bribe is legal because a foreign official accepted a payment overlooks the fundamental nature of bribery transactions: It takes two to tango.

You cannot have a successful bribery transaction without a government official accepting the bribe, but the fact that the official accepted does not mitigate your liability for the bribe. In addition, the excuse conflates the corrupt official with the foreign government writ large. Officials who accept a bribe are not making an official policy statement on behalf of their government in doing so. Indeed, in most cases what the officials are doing is illegal in their country too, and they know it. The fact that they may not get caught, or that such transactions

are widespread in their country, does not render them any less illegal.

"It wasn't bribery—it was extortion!"

This excuse is usually offered up when the request for a bribe is accompanied by a threat of harm if the bribe is not paid. The harm may be explicit, implied, or merely perceived by the potential payer. Generally, the threat involves some kind of business harm and rarely involves a threat to the personal safety or health of the employee.

Traditionally, extortion involves three elements: (1) the coercion of some act (2) through a threat to do something illegal, accompanied by the perceived means to carry through on the threat, that (3) results in the transfer of property (typically money) from the victim to the one doing the threatening. Extortion is similar to robbery (where property is taken directly from a person through the use or threat of immediate force) and is distinguished from blackmail (where the threat is to do something that is perfectly legal, like exposing a fraud or informing someone's spouse of an affair).

When people claim they were extorted in the bribery context, they borrow the concept in an effort to paint themselves as a victim of a foreign official's criminal conduct ("He told me we wouldn't win the contract without paying him. I had no choice!"). But in doing so, they confuse the crime of extortion with the more general criminal defense of "duress." In almost all FCPA cases, neither extortion nor duress will work as defenses.

The idea behind these defenses is that people generally are not held criminally responsible for doing things that were not voluntary. To use either extortion or duress as a defense in an FCPA case, the bribe payer would have to show that the threat from the government official was so significant that the payment amounted to an *involuntary act*. That will never be easy to do.

The defense of duress will almost never be available for bribery because it requires the threat or use of physical force sufficient to cause death or serious bodily injury. This is why the bank teller who unlocks the safe when there is a gun to her head and allows the bank robber to escape with the money is not herself guilty of bank robbery. The teller's actions were made under duress—that is, without free will—and she cannot be held responsible for them. Similar facts will rarely arise in the bribery context.

Similarly, few threats in the extortion context will be so severe or immediate that they will operate to excuse bribery. Put another way, you may well be the victim of some mild form of extortion by a government official, but that fact alone does not excuse you from your own criminal act of violating the FCPA.

Perceived "extortion" for a bribe payment can happen in any number of ways. Perhaps you already have a contract to sell goods to a foreign government and just before the contract comes up for renewal, an official comes to you and says he will choose your competitor unless you agree to refund 3 percent of the contract price to him. (He may even suggest that you can raise your prices by 3 percent to offset this cost.) Or perhaps your factory is having tax problems and a local tax official tells you that your tax problems will be dealt with informally (rather than being elevated to the enforcement bureau in the capital), but only if you agree to purchase certain raw materials from a business she (or her relative) happens to own (often at an inflated price). "Otherwise," she says, "your tax problems may become very serious. If headquarters gets involved, I won't be able to help you."

It should be clear that neither example involves a threat of sufficient immediacy and severity that a payment to either official could be described as *involuntary*. Moreover, in both examples, *you* are not extorted because you can simply walk

away. There might be a business consequence to your company if you walk away, but there is no consequence to *you*.

This distinction is important because the FCPA can be enforced against individuals and companies. Thus, paying a bribe to avoid some threatened harm to your company can mean criminal charges not only for the company but also for you.

The only historical example I know of where extortion is even discussed in the FCPA context is in the original legislative history of the FCPA. In that example, a foreign military unit threatens to blow up an oil rig unless it is paid off. Setting aside questions about whether such a scenario even implicates the FCPA (after all, the payment is not to obtain or retain business), the extreme nature of the example makes it clear that it is a little-used defense. Most bribes are not paid on an oil rig faced with dynamite.

As a manager, you will almost always have a choice about whether to pay a bribe. If you do not pay the bribe, there may be no consequence at all or, at most, some minor impact on your career because you fail to secure a contract. I would hope that any such impact could be mitigated by a candid conversation with your boss about why you walked away from a potential business deal.

In all but the most extreme cases, individual managers will never be able to show that a decision to commit a criminal FCPA violation was *involuntary* and, therefore, *not actionable*. In most cases, a foreign government official can make threats all day long, and most managers can simply get on a plane and go home.