

OPEN AIR BLOG

I've mentioned facilitation payments [before](#). For some reason, they've become a hot topic. I've seen recent missives by such luminaries as [Tom Fox](#) and [Scott Peeler](#) ([who](#), together with [Oliver Armas](#), both at Chadbourne, I inexplicably left off my post on great FCPA attorneys...even I can have a brain freeze every once in a while; I hope Scott and Ollie forgive me), and I just saw the one [published the other day](#) by the wonderful folks at The Bribery Act (an absolute must-read blog).

Facilitation payments are a false flag. A red herring. Misdirection. I don't care about them, and neither should you.

Except for that you should.

Let me explain myself. Everything I read says that facilitation payments are tough to define. I really don't think they are. I think they're actually very easy to define. When someone asks me whether a payment is a facilitation payment, I ask only one question: what are you trying to get? If what you're trying to get is a decision, it's a bribe. If you're trying to get something you're legally entitled to (processing an application, for example), it's a facilitation payment. Ah, you say, but what about *this*? What about this payment, or that payment? Same answer. If you can answer the simple question, "am I entitled to what I'm trying to get through the payment?" then you have answered your question.

More on that in a little bit.

The reason I call facilitation payments a misdirection is this. If you're concerned about the definition of facilitation payment, you've already lost, in at least two ways.

First, let's speak plainly with one another: the distinction between a facilitation payment and a bribe is artificial at best. Let me make this clear: **a facilitation payment is a bribe**. You're breaking the law. You're just not violating the FCPA.

Except for that you are, and I'll cover that one in a minute too.

Every country in the world has a law that says you can't bribe local officials. That's called, in anti-corruption parlance, a "domestic bribery" statute. If you're in Angola, you can't bribe Angolan officials. Well, guess what, if you pay a government official a so-called "facilitation payment," it's almost certainly a violation of the local law. That violation being called, in technical jargon, "a bribe." In every training or speech I give, I always call the FCPA the "gift that keeps on giving," because violations of the FCPA lead to so many other violations (AML laws, Sec. 1005, Tax code violations, customs law violations etc; and hey, what about a violation of section 5 of the FTC Act, because your company policy says you obey local law...check, I bet it does...and you're violating your own company policy. It could be just like privacy that way: it's "deceptive" to say your company does one thing, and then do something else). This includes local law violations. Now, when we talk about domestic bribery statutes,

we relegate them to some supposed sub-status of law which we almost dismissively refer to as “local law.” But explain to me why it is that violating, say, Italian law, by making a facilitation payment, is okay as long as you’re not violating the FCPA?

Even without bringing local law into it, committing bribery locally opens the company up to extortive bribery: the government electricity company turning off your lights, or the phone company “accidentally” turning off your phone service. Or, with one company, the police ticketing every car parked outside of the building. Once you start paying, it’s tough to stop. The best practice (and I just saw a Bulletproof [video of Jeremy Zucker](#) from Hogan Lovells say this) is to not pay. You’ll feel some short-term pain, but in the long run, you’ll be much happier. The bribe requests will eventually stop, and you’ll just be known in the market as someone that won’t do it.

And oh, by the way? **If you pay facilitation payments, you’re also violating the FCPA.** Because while the FCPA’s *anti-bribery* provisions make an exception for facilitation payments, there is no such exception within the *books and records* provisions. I made a little joke below that Manny Alas always talks about the company’s “chart of accounts.” It’s a rare compliance officer indeed who can even tell you what that is. Manny is right to always talk about that. It’s crucial to a successful FCPA program that your FCPA person know the process by which payments get recorded into certain accounts. And unless your company has an account for “legal facilitation payments,” you’re recording the payment in the wrong place. And I’m willing to bet good money that your compliance people have no idea what the finance controls are around proper recording of expenses. So your company is making facilitation payments, they’re just not recording them as facilitation payments.

That violates the FCPA. Both the books and records provisions and the internal controls provisions.

In fact, that violation is worse. First, there’s no scienter requirement for a books and records violation. If the payment is misrecorded by accident, it doesn’t matter. Also, read [SAB 99](#), which defines “materiality.” (And while your SEC compliance guy probably knows what SAB 99 is, ask your FCPA compliance person if he or she knows. I’ll bet all the money in my pocket that you get a blank stare back.) Let me quote the relevant parts:

Among the considerations that may well render material a qualitatively small misstatement of a financial statement item are

- whether the misstatement affects the registrant’s compliance with regulatory requirements, and
- whether the misstatement involves concealment of an unlawful transaction

And now we’re off to the races. If you pay a facilitation payment, and misrecord it (which you have, because you’ve never heard of a chart of accounts, and because your company doesn’t have an account for facilitation payments), you’ve arguably not only violated the FCPA, but it’s possibly a *material* misstatement in your books and records, which means you need to file a restatement. I call that a “stock price event.” Plus there are the inevitable shareholder derivative suits which follow a restatement. Plus the embarrassment of having to file an 8-K saying, “we bribed someone.” When you file that 8-K, go ahead and call the DOJ and call

Cheryl at the SEC, they're going to want to talk to you. Plus, you're also in store for an...interesting...conversation with the local authorities.

Here's the second reason you're screwed: while facilitation payments are easy to define, they're next to impossible to control. Defining facilitation payments is an interesting exercise...from a legal perspective. And profitable. Because remember up there when I said that defining it is easy? I lied. Well, not exactly lied. I just left out that it's going to cost you. Because whether something is discretionary is going to be a function of local administrative law. For example, paying a customs official in Azerbaijan to stamp your passport...facilitation payment? Ask my question: are you trying to get a decision, or are you entitled to what you're paying to get? Well, that decision is going to reside in Azeri Customs law. Do you know what the Azeri customs regulations are? I don't. Neither does your New York-based outside counsel. So you're going to pay your NY outside counsel to coordinate with an Azeri lawyer to research customs law in Azerbaijan.

Good luck with that. Even if you get an answer, how much confidence do you have in it? Enough to bet a material misstatement? I didn't think so.

Also, from a compliance perspective, you can't control for facilitation payments. Most companies control for facilitation payments in one of two ways: either they straight out prohibit them, or they make the approval process so draconian that no one wants to bother. I've seen policies that say that the General Counsel has to approve. Give me a break. No sales associate in Greece is going to call the GC and ask "can I pay 3 drachmas to the mail carrier so I can get the mail delivered to the office?"

But does that mean that the 3 drachmas don't get paid? Of course not. If I tell them "just say no," do you think that's it? That they'll just stop? If the policy says "no," and you don't hear constant complaints about it, your people are making the payments. The question then is, are they seeking reimbursement? And because you don't have any real finance controls around facilitation payments (and don't feel bad...no one does), the payments can get reimbursed as something else, which brings you back to the violation. And ask the DOJ how much they like policies that everyone ignores, and which lead to no disciplinary procedures. Can you say "paper program?"

So what's the answer?

There are two answers. First, you decide as a company that it's not worth the cost of compliance, and you're going to make the payments. I don't agree with it, but fine. If you're going to do that, create an account for "legal facilitation payments," and start training your people about how to account for facilitation payments. You then have to pray that everyone understands the difference between a facilitation payment and a bribe (difficult, since there is no real difference), and that only legitimate facilitation payments get booked that way. I would also have a separate control to verify and approve anything that gets charged into that account.

Or, you can say that the company really means it when it says that it's a good corporate citizen, and we're not going to pay facilitation payments. And if that means we hire a lawyer to fight all those parking tickets, so be it. And we get senior leaders of all business units to publicly buy in, and say that they're willing to live with one time adjustments to revenue targets if there's a disruption caused by the company's unwillingness to engage in any bribery at any level

anywhere. I can't emphasize, from a compliance perspective, how important it is to have senior leaders buy in. Not just the CEO telling me something in a video. I mean the VPs and SVPs actually adjusting revenue targets on the fly because of anti-bribery compliance. That's real tone at the top.

So I say that I don't care about facilitation payments, which is true, because I strongly advise companies I've worked with to just not make them, and do what's necessary to make that stick.

Post Script: once again, I feel forced to warn you about the obvious. This is a blog, not an opinion letter written to you by your lawyer. You and I do not enjoy an attorney-client relationship, and I'm not giving you legal advice. I'm offering commentary. How informed the commentary is can be the subject of reasonable debate, and opinions will vary. In any case, if you have a legal question about facilitation payments, leave a comment saying you need legal advice, and you'll probably have lawyers lining within the hour. But if you're relying on this column—or any blog, for that matter—for legal advice, the only number you're going to need is 202-514-2000, which is the main switchboard at the Department of Justice. Need I say more?

Howard@OpenAir
www.openairblog.com