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## “EASING OUT” THE FCPA FACILITATION PAYMENT EXCEPTION

*Emily N. Strauss*\*

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\* J.D. Candidate, Boston University School of Law, 2013, M.A. Candidate, International Relations, Boston University, 2013. Thanks to all the *Boston University Law Review* editors for their help in producing this Note, particularly Mike Lezaja, Tim Powell, and Beau Barnes. Thanks also to Professors Robert Sloane, Jay Wexler, and Virginia Greiman for their insight and guidance. Lastly, thanks to my family for their love and support.

## INTRODUCTION

In 1977, shocked by a series of corruption scandals involving American companies, Congress hastily passed the Foreign Corrupt Practices Act (FCPA).<sup>1</sup> The world's first statute regulating bribing of foreign officials, the FCPA was meant to relieve the public conscience by holding American corporations to higher standards, and signaled the beginning of a movement to crack down on corruption.<sup>2</sup> Recognizing the realities that many corporations faced doing business abroad, however, Congress included a facilitation payment exception, also called a grease payment exception, in the FCPA, allowing corporations to make payments to foreign officials to perform tasks that are part of their normal duties.<sup>3</sup> Meanwhile, the United States has continued for many years to be a vocal proponent of developing anti-corruption regimes, and currently enforces upwards of seventy percent of the foreign bribery actions in the world.<sup>4</sup>

Global response was not immediate, but in the last several years, the amendment of the Organisation for Economic Cooperation and Development (OECD) convention against bribery<sup>5</sup> and the passage of new national foreign bribery acts, such as those of the United Kingdom and China,<sup>6</sup> signal that the trend toward a more comprehensive set of anti-bribery regimes is gathering momentum. These more recent statutes and treaties, however, contain no exception analogous to the facilitation payment exception.<sup>7</sup> Moreover, recent

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<sup>1</sup> Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 648 n.2 (2010) (citing a 1976 SEC report which found that 400 U.S. corporations had paid over \$300 million in bribes).

<sup>2</sup> S. REP. NO. 95-114, at 1-2 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4099.

<sup>3</sup> H.R. REP. NO. 95-640, at 8 (1977) ("While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.").

<sup>4</sup> TRACE INT'L, INC., GLOBAL ENFORCEMENT REPORT 2011, at 3 (2011) [hereinafter TRACE GLOBAL ENFORCEMENT REPORT 2011], available at [https://secure.traceinternational.org/data/public/documents/Global\\_Enforcement\\_Report\\_2011-67720-1.pdf](https://secure.traceinternational.org/data/public/documents/Global_Enforcement_Report_2011-67720-1.pdf).

<sup>5</sup> Organisation for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 [hereinafter OECD Convention].

<sup>6</sup> See Zhonghua Renmin Gongheguo Xing Fa Xiu Zheng An (8) (中华人民共和国刑法修正案(八)) [Amendments to the Criminal Law of the People's Republic of China (VIII)] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011), available at [http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content\\_1625618.htm](http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content_1625618.htm);

Bribery Act, 2010, c. 23, § 6 (U.K.).

<sup>7</sup> See, e.g., Bribery Act, c. 23, § 6.

enforcement actions by the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) signal that the exception is increasingly unreliable, and many American companies have banned such payments altogether.<sup>8</sup> Nonetheless, many corporations argue that the exception is important because it enables them to do business in environments where demands for such payments are frequent and extortionate.<sup>9</sup>

While arguments for retaining the exception are compelling, global intolerance of such payments is unlikely to reverse. Moreover, corporations making such payments would be exposed to liability under the domestic and foreign bribery laws of other countries, even if these payments qualify as facilitation payments under the FCPA.<sup>10</sup> This Note argues that Congress should eliminate the statutory facilitation payment exception. Demands for such payments are often flatly extortionate, however, and American companies are more likely than others to face enforcement actions.<sup>11</sup> This Note also argues that there should be a clear rule or policy statement promulgated by the prosecuting agencies, which lessens culpability and mitigates penalties for facilitation payments made in extortionate circumstances.

Part I outlines the statutory provisions of the FCPA, including the anti-bribery provisions, the accounting provisions, the facilitation payment exception, and the statute’s affirmative defenses. Part II details the legislative history of the FCPA. Part III describes the OECD anti-bribery convention and the evolving stance of the OECD on facilitation payments. Part IV tracks recent trends in SEC and DOJ treatment of the facilitation payment exception, and examines corporate responses to these trends. Part V develops economic, moral, and coherence arguments for and against the abolition of the facilitation payment exception. Finally, Part VI examines proposed solutions to the problems posed by the exception. It then advocates the solution of statutory abolition of the exception combined with its practical “easing out,” using agency guidance to mitigate penalties for such payments.

## I. STATUTORY PROVISIONS OF THE FCPA

Congress passed the FCPA in 1977,<sup>12</sup> initially as an amendment to the Securities Exchange Act of 1934.<sup>13</sup> Upon being amended in 1998,<sup>14</sup> the FCPA came to comprise both accounting provisions and anti-bribery provisions.<sup>15</sup>

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<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Part V.A.

<sup>10</sup> See *infra* Part V.C.

<sup>11</sup> See *infra* Part V.A, V.C.

<sup>12</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

<sup>13</sup> Baker, *supra* note 1, at 647-48.

<sup>14</sup> CRIMINAL DIV. U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV. U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 (2012) [hereinafter FCPA RESOURCE GUIDE], available at [www.justice.gov/criminal/fraud/fcpa](http://www.justice.gov/criminal/fraud/fcpa).

A. *Anti-Bribery Provisions*

The meat of the FCPA, its anti-bribery provisions, criminalizes the offering of bribes by a corporation to a foreign official in order to acquire or retain business.<sup>16</sup> The elements of a violation are:

1) [A]n issuer, domestic concern or any other person while in the territory of the United States; 2) makes use of the mails or any other means or instrumentality of interstate commerce, 3) corruptly, 4) to offer, pay, promise to pay, or authorize the payment of money or anything of value; 5) to any foreign official, political party or candidate for political office or any other person while knowing that some payment will be passed on to such parties; 6) to influence any act or decision, inducing unlawful action or inducing action to influence any act of a government or instrumentality to secure any improper advantage; and 7) to obtain, retain or direct business to any person.<sup>17</sup>

The FCPA can apply to individuals and firms, as well as to any officer, director, employee, agent, or stockholder acting on behalf of a firm.<sup>18</sup> Under the FCPA, a firm is also responsible for the actions of foreign subsidiaries, and may thus be liable if it orders, authorizes, or assists the activity of a subsidiary incorporated abroad which violates the FCPA.<sup>19</sup> Such individuals or firms may also be liable for conspiracy to violate the provisions, or for ordering, authorizing, or assisting someone else in their violation. Companies are liable if they make a payment “knowing” that any part of it will ultimately be used to bribe a foreign official.<sup>20</sup>

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<sup>15</sup> 15 U.S.C. §§ 78dd-1 to 78dd-3, 78m(b) (2006).

<sup>16</sup> 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006); *see also* FCPA RESOURCE GUIDE, *supra* note 14, at 10 (“In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.”).

<sup>17</sup> Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS: INT’L TRADE L.J. 3, 4-5 (2008) (footnotes omitted).

<sup>18</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 10.

<sup>19</sup> *Id.* at 27-29.

<sup>20</sup> *Id.* at 34. Companies should therefore be alert to warning signs that their agents, employees, subsidiaries, joint venturers, and so forth, might be making illicit payments. Colleen P. Mahoney et al., *The United States Foreign Corrupt Practices Act: Enforcement Trends, in THE FOREIGN CORRUPT PRACTICES ACT 2011*, at 103, 110 (PLI Corp. L. & Practice, Course Handbook Ser. No. 29082, 2011) (commenting that “red flags” for companies include, among other things, “[r]umors of improper payments or other unethical business practices; [u]nusually large or frequent political contributions to a person or political party in a position to direct business to the company; . . . [f]amily or business ties with government or political officials; and [b]usiness in a country with bribery problems”).

Importantly, the violation need not take place in the United States to subject individuals or firms to liability.<sup>21</sup> While foreign companies and nationals were not covered by the FCPA prior to 1998, the 1998 amendment expanded the scope of the statute to provide for territorial jurisdiction over foreign companies and individuals.<sup>22</sup> A foreign company or individual may therefore be liable under the act if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.<sup>23</sup> While the bribe offered must satisfy a nexus to interstate commerce to constitute an FCPA violation,<sup>24</sup> the nexus requirement has been interpreted very broadly, and “can be as slight as a single letter, fax, cable, phone call, airline ticket, etc., in furtherance of the effort to make a prohibited payment.”<sup>25</sup> Similarly, an improper benefit under the statute is defined broadly as “anything of value.”<sup>26</sup>

In 1998 Congress also broadened the category of foreign officials whose receipt of a bribe constitutes an FCPA violation. Such recipients originally included not only foreign government officials, political candidates, and political parties, but also “[p]art-time employees, the lowest employees of state-owned enterprises, government consultants, and even people with largely honorary titles.”<sup>27</sup> The 1998 Amendment adopted the OECD’s definition of “foreign official,” broadening the term even further to include “officials of public international organizations,” such as the United Nations, World Bank, International Monetary Fund, and World Trade Organization.<sup>28</sup> In 2011 a U.S. District Court for the Central District of California found that officers and employees of state-owned corporations may also qualify as “foreign officials” for purposes of FCPA liability.<sup>29</sup> In addition to direct bribes, the FCPA criminalizes the bribing of foreign officials through third-party intermediaries, where the issuer “know[s]” that the payment or a portion of it will constitute a

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<sup>21</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 11 (“The FCPA’s anti-bribery provisions can apply to conduct both inside and outside the United States.”).

<sup>22</sup> *Id.* at 4, 11-12.

<sup>23</sup> *Id.*

<sup>24</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006) (constituting the anti-bribery provisions of the FCPA, which criminalize making “use of the mails or any means or instrumentality of interstate commerce” in furtherance of foreign bribery).

<sup>25</sup> 1 FOREIGN CORRUPT PRACTICES ACT REPORTER § 1:13 (2d ed. 2012).

<sup>26</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 14 (“An improper benefit can take many forms.”).

<sup>27</sup> FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 25, § 1:4.

<sup>28</sup> *Id.*

<sup>29</sup> *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011) (“[A] state-owned corporation . . . may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be ‘foreign officials’ within the meaning of the FCPA.”).

bribe.<sup>30</sup> The statute imposes liability “not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge.”<sup>31</sup>

To be liable under the FCPA, a firm or individual must offer a bribe “corruptly.” While this intent is not defined in the statute, courts, in accordance with legislative history, generally read “corruptly” to mean “that the offer, payment or gift ‘must be intended to induce the recipient to misuse his official position.’”<sup>32</sup> Whether an offer or payment qualifies as “corrupt” hinges solely on intent; the offer or payment need not achieve its purpose to trigger liability under the FCPA.<sup>33</sup>

Finally, to be liable under the FCPA, a firm or individual must have made a corrupt payment to a foreign official specifically in order to “assist such [firm or individual] in obtaining or retaining business for or with, or directing business to, any person.”<sup>34</sup> The DOJ has interpreted this provision broadly as “prohibit[ing] a range of payments wider than only those that directly influence the acquisition or retention of government contracts.”<sup>35</sup>

#### B. *Accounting Provisions*

To create the accounting provisions, Congress amended the 1934 Securities Exchange Act to include bookkeeping and internal-controls requirements.<sup>36</sup> These provisions apply to all companies that issue stock, regardless of “whether or not the issuer actually engages in foreign operations or whether a particular transaction is a bribe.”<sup>37</sup> The accounting provisions first require companies, as well as their affiliates and subsidiaries, to keep records that “accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”<sup>38</sup>

The accounting provisions further require companies to implement internal controls to make sure that records accurately reflect transactions made.<sup>39</sup> Such controls must ensure that transactions are executed only with the specific authorization of management and that they are recorded in conformity with “generally accepted accounting principles.”<sup>40</sup> The internal controls must

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<sup>30</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 21.

<sup>31</sup> *Id.* at 22.

<sup>32</sup> *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) (quoting S. REP. NO. 94-114, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108).

<sup>33</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 14.

<sup>34</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

<sup>35</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 13.

<sup>36</sup> Taylor, *supra* note 17, at 4.

<sup>37</sup> *Id.*

<sup>38</sup> 15 U.S.C. § 78m(b) (2006).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

further provide for periodic audits to ensure that the recorded and existing assets of the company match up, and require appropriate action to be taken if they do not.<sup>41</sup> Violations of the accounting provisions are generally subject only to civil enforcement actions.<sup>42</sup> Anyone who “knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account described” in the accounting provisions is, however, subject to criminal liability.<sup>43</sup>

### C. *Exception and Affirmative Defenses*

#### 1. The Facilitation Payment Exception

The FCPA exempts from criminal liability “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”<sup>44</sup> Such payments are designed to facilitate the execution of clerical or ministerial government tasks, including “basic things such as the provision of telephone, water, and power services; police protection; mail delivery; business permits; and inspections for contract performance and shipment of goods.”<sup>45</sup> Significantly, such “routine” tasks should not be those in which the foreign official exercises official discretion.<sup>46</sup> The DOJ specifically asserts that “[r]outine government action does *not* include a decision to award new business or to continue business with a particular party.”<sup>47</sup> Further guidance by courts and prosecuting agencies has been remarkably vague. The amount of the bribe, however, is generally considered in determining whether or not it is a facilitation payment; the larger the amount, the less likely the payment is to fall within the exception.<sup>48</sup>

There is little caselaw squarely addressing the facilitation payment exception. A 2004 case, *United States v. Giffen*,<sup>49</sup> skirts the exception. The defendant in *Giffen* paid \$78 million to foreign officials in Kazakhstan “for the sole purpose of obtaining and retaining business for [the defendant’s company,] Mercator.”<sup>50</sup> The defendant did not challenge the facts alleged in the indictment, and did not submit that the payment fell within the facilitation payment exception. The court nonetheless addressed the exception and

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

<sup>45</sup> FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 25, § 1:15.

<sup>46</sup> *Id.*

<sup>47</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 25.

<sup>48</sup> FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 25, § 1:15.

<sup>49</sup> 326 F. Supp. 2d 497 (S.D.N.Y. 2004).

<sup>50</sup> *Id.* at 501.

concluded that “the alleged payments [could not] be characterized as ‘facilitating’ a routine governmental action because, as alleged in the indictment, they were primarily intended to influence the senior Kazakh officials to award new business to Mercator.”<sup>51</sup>

*United States v. Kay*<sup>52</sup> provides further guidance, albeit in dicta. The defendants in *Kay* were accused of bribing Haitian officials to understate customs duties and sales taxes on rice that the defendants’ company shipped into Haiti.<sup>53</sup> Such an understatement, according to the prosecution, would serve to obtain or retain Haitian business for the company.<sup>54</sup> The district court granted the defendants’ motion to dismiss for failure to state a claim, concluding that “as a matter of law, an indictment alleging illicit payments to foreign officials for the purpose of avoiding substantial portions of customs duties and sales taxes to obtain or retain business are not the kind of bribes that the FCPA criminalizes.”<sup>55</sup>

The Fifth Circuit disagreed, however, and held that “such bribes *could* (but do not necessarily) come within the ambit of the statute.”<sup>56</sup> The court ultimately concluded that although Congress understood the “pragmatic need” for a facilitation payment exception, legislative history indicated an intention to interpret the exception narrowly: “[B]y narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.”<sup>57</sup> The language in *Kay* is helpful in determining what types of payments do *not* fall under the facilitation payment exception: those intended to “obtain or retain business.”<sup>58</sup> Using these cases to determine what payments might fall within the scope of the facilitation payment exception, however, has proven a slippery task.<sup>59</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> 359 F.3d 738 (5th Cir. 2004).

<sup>53</sup> *Id.* at 740.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 756.

<sup>58</sup> See Richard W. Grime & Sara S. Zdeb, *The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and the U.K. Bribery Act*, in THE FOREIGN CORRUPT PRACTICES ACT 2011, *supra* note 20, at 377, 388.

<sup>59</sup> See *id.* (“In the *Summers* settlement, however, the SEC left entirely unexplained how securing overdue payments for services already rendered helped Pride to obtain or retain business. To the complete contrary, *Summers*’ conduct appears to be exactly the type of case expressly identified by the Fifth Circuit [in *Kay*] as *not* violating the FCPA’s anti-bribery provisions.”).



## 2. Affirmative Defenses

The affirmative defenses to an FCPA action focus on whether the payment was in some form legitimate. The first affirmative defense is the legality of the payment under the laws of the country where the payment was made.<sup>60</sup> The second is that the payment was a "bona fide expenditure" incurred by or on behalf of the foreign official.<sup>61</sup>

The first affirmative defense to an FCPA violation applies if the payment, when made, "was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country."<sup>62</sup> Issuers must be cautious, however, in ascertaining that the payment is in fact lawful, and not merely "traditional," "usual," or generally unenforced.<sup>63</sup> Since these terms are often conflated with legality in countries where bribery is common, local counsel are not always reliable in determining whether a certain payment is lawful.<sup>64</sup> The FCPA does not mitigate liability on this basis, however, because the "DOJ is well aware that companies may seek to hide behind local counsel, and so discussions with local counsel may require special care."<sup>65</sup>

The most recent case to address this defense was *United States v. Kozeny*.<sup>66</sup> Kozeny made payments to encourage the privatization of an Azerbaijan oil company, and to participate in that privatization.<sup>67</sup> The defendant argued that the payment was lawful under Azeri law because any criminality associated with the payments was excused when he reported them to the President of Azerbaijan, citing a provision of the Azerbaijan Criminal Code: "A person who has given a bribe shall be *free* from criminal responsibility if with respect to him there was extortion of the bribe or if that person after giving the bribe voluntarily made a report of that occurrence."<sup>68</sup> The court ruled that there was no immunity under the FCPA if the defendant violated the foreign law, but prosecution was barred as the result of some other provision. The court stated: "The ACC relieves the payer of a bribe from criminal liability if the bribe is properly reported not because such an action retroactively erases the stain of criminality, but because the state has a strong interest in prosecuting the government official who received the bribe."<sup>69</sup> Thus, the court ruled that "at

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<sup>60</sup> 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> FOREIGN CORRUPT PRACTICES ACT REPORTER, *supra* note 25, § 1:16.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

<sup>67</sup> *Id.* at 536-37.

<sup>68</sup> *Id.* at 538 (quoting Declaration of Professor Paul B. Stephan at ¶ 3, *Kozeny*, 582 F. Supp. 2d 535 (No. 05-CR-518)).

<sup>69</sup> *Id.* at 539.

the moment that an individual pays a bribe, the individual has violated” the foreign law, and is therefore liable under the FCPA.<sup>70</sup>

Notably, the *Kozeny* court also drew on legislative history to rule that the defendant was not entitled to a jury instruction on extortion. The court concluded that the circumstances under which the defendant made the payment did not constitute “true extortion” for the purposes of the FCPA:

The legislative history of the FCPA makes clear that “true extortion situations would not be covered by this provision.” Thus, while the FCPA would apply to a situation in which a “payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,” it would not apply to one in which payment is made to an official “to keep an oil rig from being dynamited,” an example of “true extortion.” The reason is that in the former situation, the bribe payer cannot argue that he lacked the intent to bribe the official because he made the “conscious decision” to pay the official. In other words, in the first example, the payer could have turned his back and walked away – in the latter example, he could not.<sup>71</sup>

The second affirmative defense, known as the “bona fide expenditure defense,” applies where the payment was a “reasonable and bona fide expenditure . . . incurred by or on behalf of a foreign official . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”<sup>72</sup> Many early releases from the DOJ outlined the scope of this exception, providing examples of conduct that the DOJ did not intend to prosecute. Some such examples include the plan of a company to extend a foreign official and his wife’s vacation by ten days to include promotional tours of a joint venture<sup>73</sup> and an all-expenses paid trip for a group of French officials to inspect a joint-venture site in Philadelphia.<sup>74</sup>

## II. LEGISLATIVE HISTORY OF THE FCPA

The impetus for the FCPA arose from several sources. The Watergate Scandal sensitized Americans to the corruption of public figures, and a series

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 540 (alteration in original) (footnotes omitted) (quoting S. REP. NO. 95-114, at 10-11 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108).

<sup>72</sup> 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2006).

<sup>73</sup> FRAUD SECTION, CRIMINAL DIV., DEP’T OF JUSTICE, REVIEW PROCEDURE RELEASE NO. 83-02 (1983), available at <http://www.justice.gov/criminal/fraud/fcpa/review/1983/r8302.pdf>.

<sup>74</sup> FRAUD SECTION, CRIMINAL DIV., DEP’T OF JUSTICE, REVIEW PROCEDURE RELEASE NO. 85-01 (1985), available at <http://www.justice.gov/criminal/fraud/fcpa/review/1985/r8501.pdf>.

of bribery schemes uncovered around the same time rattled public confidence in corporate integrity.<sup>75</sup> These schemes included scandals involving Bell Helicopter, Exxon, General Tire and Rubber, Gulf Oil, and Lockheed Martin.<sup>76</sup>

This scandal-sensitive public climate ultimately led the SEC to promulgate a "Report on Questionable and Illegal Corporate Payments and Practices."<sup>77</sup> The Senate Committee on Banking, Housing, and Urban Affairs received the report in May 1976.<sup>78</sup> The report documented the SEC's initial discovery and subsequent investigations of various misuses of corporate funds.<sup>79</sup> In the report, the SEC "discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas."<sup>80</sup>

These expenditures varied in nature: the SEC reported that "companies were using secret 'slush funds' to make illegal campaign contributions in the United States and corrupt payments to foreign officials abroad and were falsifying their corporate financial records to conceal the payments."<sup>81</sup> The SEC report also included the public filings of eighty-nine corporations that had made questionable payments, six special reports from SEC enforcement actions, and allegations from eight additional cases in which the SEC had obtained some form of judicial relief.<sup>82</sup> Finally, the report contained the Commission's recommendations for remedy, including the level of corporate disclosure required, and possible amendments to the existing statutory framework.<sup>83</sup>

The Commission ultimately found that the illicit corporate expenditures "were indeed widespread," and represented "a serious breach . . . in public confidence in the integrity of the system of capital formation."<sup>84</sup> Just over one month later, the committee reported S. 3664, a bill that incorporated the SEC's recommendations, as well as an explicit prohibition against the bribing of foreign officials by U.S. businesses.<sup>85</sup> The bill passed unanimously in September 1976 by a vote of eighty-six to zero.<sup>86</sup>

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<sup>75</sup> Baker, *supra* note 1, at 648 n.2.

<sup>76</sup> *Id.* at 648 n.3.

<sup>77</sup> S. REP. NO. 95-114, at 1-2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099 (describing the SEC report, which "traced the history of the Commission's discovery of conduct involving the misuse of corporate funds" and the corresponding decline "in public confidence in the integrity of the system of capital formation").

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.* at 1-2.

<sup>80</sup> FCPA RESOURCE GUIDE, *supra* note 14, at 3.

<sup>81</sup> *Id.*

<sup>82</sup> S. REP. NO. 95-114, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

In the House of Representatives, the response to the SEC report was even more pronounced. In its September 1977 report, a majority of the House Committee on Interstate and Foreign Commerce emphatically denounced the payment of foreign bribes by American companies as “counter to the moral expectations and values of the American public.”<sup>87</sup> The Committee contended that such bribery was not only unethical, but economically damaging to U.S. companies: “[Bribery] erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality, or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products.”<sup>88</sup> A majority of the Committee concluded that such illicit payments further damaged the American corporate environment by putting “pressure on ethical enterprises to lower their standards or risk losing business.”<sup>89</sup>

Significantly, the Committee also reported lengthy findings that corporate bribery was not only morally reprehensible, but unnecessary. The report referred to testimony by SEC Chairman Roderick M. Hills that “in every industry where bribes have been revealed . . . companies of equal size are proclaiming that they see no need to engage in such practices.”<sup>90</sup> Further testimony stated that such bribes did not function to the advantage of U.S. companies in a global context, but rather to “outcompete” U.S. competitors.<sup>91</sup> The Committee also reported the repercussions of foreign bribery on U.S. foreign policy, specifically discussing the Lockheed, Exxon, and Mobil Oil scandals, and their damaging effect on U.S. relations with its NATO alliance partners.<sup>92</sup>

With respect to the facilitation payment exception, the Committee clearly intended the provision to exclude “payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”<sup>93</sup> The Committee further meant to exclude from the definition of “foreign official,” “government employees whose duties are

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<sup>87</sup> H.R. REP. NO. 95-640, at 4 (1977).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 5.

<sup>90</sup> *Id.* (quotations omitted).

<sup>91</sup> *Id.* (quoting the former SEC Chairman as stating that “in many cases, the resulting adverse competitive affects [of outlawing foreign bribes] are entirely domestic”).

<sup>92</sup> *Id.* (“In Italy, alleged payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian Government eroded public support for that Government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.”).

<sup>93</sup> *Id.* at 8.

essentially ministerial or clerical.”<sup>94</sup> In explaining the reasoning behind the exception, the Committee stated:

While payments made to assure or to speed the proper performance of a foreign official’s duties may be reprehensible in the United States . . . they are not necessarily so viewed elsewhere in the world and [] it is not feasible for the United States to attempt unilaterally to eradicate all such payments.<sup>95</sup>

### III. OECD ANTI-BRIBERY CONVENTION

For many years following 1977, the United States was the only country with a comprehensive outgoing anti-corruption regime. Accordingly, from 1977 onward, the United States “pushed hard for an international anti-bribery regime so that it would no longer be isolated in the fight against foreign bribery that left its domestic companies at an unfair disadvantage when competing in the global marketplace.”<sup>96</sup> In 1997 the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), finally rewarding these efforts.<sup>97</sup> The OECD Convention requires each member state to “take such measures as may be necessary to establish that it is a criminal offence under its law” to bribe foreign officials,<sup>98</sup> contributing to the rise of national anti-bribery laws.

The preamble to the Convention asserts that bribery is a widespread and serious issue, “undermin[ing] good governance and economic development, and distort[ing] international competitive conditions,” which all countries share the responsibility to combat.<sup>99</sup> Accordingly, the Convention requires that member states criminalize the bribery of foreign officials and impose “proportionate and dissuasive criminal penalties” for the offense.<sup>100</sup> The Convention also includes an accounting provision that corresponds to the FCPA’s books-and-records requirement.<sup>101</sup>

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<sup>94</sup> *Id.* The Committee specifically intended the statute to exclude payments to “speed the processing of a customs document . . . [or] to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which of necessity must be performed in any event.” *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Jon Jordan, *The OECD’s Call for an End to “Corrosive” Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 925 (2011).

<sup>97</sup> See OECD Convention, *supra* note 5. The thirty-four OECD member countries, including the United States, and four non-member countries (Argentina, Brazil, Bulgaria, and South Africa) are party to the Convention. *Id.*

<sup>98</sup> *Id.* at 7.

<sup>99</sup> *Id.* at 6.

<sup>100</sup> *Id.* at 7-8.

<sup>101</sup> Compare Foreign Corrupt Practices Act, 15 U.S.C. § 78m(b)(2) (2006) (requiring that issuers keep books and records that “accurately and fairly reflect the transactions and

In the 1997 version of the Convention, however, the accompanying commentary includes an analog to the FCPA facilitation payments exception. The commentary states:

Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.<sup>102</sup>

Twelve years later, however, citing the need for “vigorous and comprehensive” enforcement of the Convention, the OECD reversed this pragmatic stance.<sup>103</sup> The OECD took the view that facilitation payments were “corrosive” of rule of law and sustainable development, particularly in developing countries.<sup>104</sup> Accordingly, the OECD urged its member countries to

- i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon; [and]
- ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records.<sup>105</sup>

The OECD further urged “all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments.”<sup>106</sup> Consistent with this stance, some member and nonmember countries have recently established or revised anti-bribery regimes that do not contain an exception for

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dispositions of the assets of the issuer,” and maintain “internal accounting controls”), *with* OECD Convention, *supra* note 5, at 9 (“[E]ach Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit [activities undertaken] . . . for the purpose of bribing foreign public officials or of hiding such bribery.”).

<sup>102</sup> OECD Convention, *supra* note 5, at 15.

<sup>103</sup> *Id.* at 20.

<sup>104</sup> *Id.* at 22.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

facilitation payments.<sup>107</sup> The OECD subsequently directed its Working Group in International Bribery and Business Transactions to implement a systemic monitoring program to track, evaluate, and promote compliance with the Convention.<sup>108</sup> While the United States was the first country to volunteer for monitoring,<sup>109</sup> it emphasized the difficulties of full compliance with the OECD recommendation.<sup>110</sup> Specifically, eliminating the facilitation payment exception from the FCPA would require congressional approval.<sup>111</sup> Nonetheless, the Working Group on Bribery ultimately praised the United States for discouraging corporate use of facilitation payments.<sup>112</sup> Such discouragement has doubtless impacted recent enforcement trends, as well as the business practices corporations have consequently adopted.

#### IV. RECENT ENFORCEMENT TRENDS

Enforcement of the FCPA has increased considerably in the last four years, with an increased number of enforcement actions, increased penalties, and a broader range of enforcement tools. In 2004 there were only seven FCPA prosecutions underway between the SEC and the DOJ.<sup>113</sup> In 2005 the number increased to sixteen, then slightly decreased to thirteen in 2006, before ballooning to thirty in 2007.<sup>114</sup> Currently, it is estimated that the SEC and DOJ have over 100 FCPA enforcement actions in progress “at any given time.”<sup>115</sup>

Penalties for FCPA violations have also spiked in recent years. The statute provides for fines of up to \$25 million for companies that violate the accounting provisions of the FCPA, and \$2 million for those that violate the anti-bribery provisions.<sup>116</sup> Alternatively, a company may be fined for twice the

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<sup>107</sup> See, e.g., Zhonghua Renmin Gongheguo Xing Fa Xiu Zheng An (8) (中华人民共和国刑法修正案(八)) [Amendments to the Criminal Law of the People’s Republic of China (VIII)] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011), available at [http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content\\_162](http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content_162)

5618.htm; Bribery Act, 2010, c. 23, § 6 (U.K.) (including no references to “facilitation,” nor any other relevant exceptions).

<sup>108</sup> OECD Convention, *supra* note 5, at 26.

<sup>109</sup> Jordan, *supra* note 96, at 917 n.198.

<sup>110</sup> *Id.* at 922 n.223.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 918-19.

<sup>113</sup> Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, in THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 742 (PLI Corp. L. & Practice, Course Handbook Ser. No. 13908, 2008).

<sup>114</sup> *Id.*

<sup>115</sup> Mahoney et al., *supra* note 20, at 114.

<sup>116</sup> *Id.*

amount it sought to gain by paying the bribe.<sup>117</sup> Individuals may be fined \$250,000 and face up to five years imprisonment for violating the anti-bribery provisions, and up to \$5 million and twenty years imprisonment for violating the accounting provisions.<sup>118</sup> Civil remedies include further fines, disgorgement, injunctions, and debarment.<sup>119</sup> In large part because the penalties for violation are so high, companies prefer to settle with the SEC and DOJ rather than risk the enormous fines that would result from losing a lawsuit.<sup>120</sup> Very recently, however, the DOJ was embarrassed when a series of prosecutions did go to trial and suffered a well-publicized collapse, culminating in the DOJ's motions to dismiss charges against several defendants.<sup>121</sup> These incidents may encourage more targets of FCPA enforcement actions to bring their cases to trial; for the moment, however, caselaw on FCPA enforcement trends, specifically with regard to the facilitation payment, is limited.

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Grime & Zdeb, *supra* note 58, at 382 (“But because the vast majority of enforcement actions are resolved through deferred prosecution agreements, non-prosecution agreements, and other settlement devices, these cases never make it to trial.”); Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 825 (2011) (“FCPA litigation continues to be rare and there are few reported FCPA judicial opinions. The potential monetary and reputational consequences that would follow from an FCPA indictment or guilty verdict at trial generally leave firms with no realistic option other than to seek settlement on the most favorable terms possible. For individual defendants, this typically means entering a guilty plea. For firms, it means agreeing to a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA).”).

<sup>121</sup> See generally Mike Koehler, *What Percentage of DOJ FCPA Losses is Acceptable?*, 90 CRIM. L. REP. 823 (2012) (discussing the “Africa Sting” cases, which involved the prosecution of an FCPA violation conspiracy promoted by the FBI against a company allegedly trying to win a military contract in Gabon). The sting operation was heralded as a “turning point” in FCPA enforcement tactics. Mike Koehler, *Africa Sting – Caldwell and Godsey Not Guilty – Jury Still Out as to Other Defendants*, FCPA Professor (Jan. 30, 2012), <http://www.fcprofessor.com/africa-sting-caldwell-and-godsey-not-guilty-jury-still-out-as-to-other-defendants>. Subsequently, however, a U.S. District Court for the District of Columbia dismissed several substantive FCPA charges, and declared mistrials as to several more. Upon retrial, a jury acquitted two defendants, and was hung as to the remaining three defendants. Two weeks later, the DOJ moved to dismiss the charges against those remaining three defendants. See Government’s Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a), *United States v. Goncalves*, No. 09-CR-335 (D.D.C. Feb. 21, 2012); Christopher M. Matthews, *U.S. Asks to Drop FCPA Convictions*, WALL ST. J. (Mar. 27, 2012, 10:00 PM), <http://online.wsj.com/article/SB10001424052702303816504577308222606331972.html>.



A. *A Vanishing Exception?*

As discussed above, there is little judicial guidance to aid firms and individuals in interpreting the facilitation payment exception. Several recent SEC and DOJ enforcement actions indicate, however, that the agencies take an increasingly dim view of the exception.<sup>122</sup> The SEC and DOJ have prosecuted corporations for conduct which ostensibly falls under the exception, either by prosecuting payments that were not properly recorded under the accounting provisions, or by expanding the scope of *Kay*'s "obtain or retain business" requirement.<sup>123</sup> The following Sections provide examples of DOJ enforcement actions that have been pursued in such a manner in recent years.

1. Dow Chemical Company

In 2007 the SEC settled with the Dow Chemical Company over the actions of DE-Nocil Crop Protection Group, a fifth-tier subsidiary of Dow.<sup>124</sup> Indian government officials required this subsidiary to register and license its agro-chemical products with federal and state entities in the Indian government before marketing the products in India.<sup>125</sup> Key members of the registration and licensing committees, however, demanded payments in order to process the registration and licensure in a timely and accurate manner.<sup>126</sup> DE-Nocil accordingly developed a practice of making such payments "through the use of consultants and unrelated companies."<sup>127</sup>

While these payments arguably fell squarely under the facilitation payment exception, the SEC declined to comment at all on their potential legality in its cease-and-desist order. This may have been "because the jurisdictional requirements were not met, because the payments were recognized to be facilitation payments, because the SEC chose to settle the case on lesser charges to reward the company's self-reporting and cooperation, or because of

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<sup>122</sup> For further discussion of several of these enforcement actions and their implications for the facilitation payment exception, see generally Grime & Zdeb, *supra* note 58.

<sup>123</sup> *United States v. Kay*, 359 F.3d 738, 741 (5th Cir. 2004).

<sup>124</sup> Dow Chem. Co., Exchange Act Release No. 55281, 2007 WL 460872, at \*1 (Feb. 13, 2007).

<sup>125</sup> *Id.* at \*2.

<sup>126</sup> *Id.* at \*3 ("A key member of the Registration Committee . . . held considerable influence within the Committee. He was able to determine if and when a company's agricultural chemical product would be registered and, in fact, the [Central Insecticides Board] Official would refuse or delay registrations unless he received financial payments."). The licensure officials in this case were state officials "who could prevent the sale of a product by drawing samples and falsely claiming that the samples were misbranded or mislabeled. Misbranding or mislabeling carried significant potential penalties. Companies could challenge accusations of misbranding or mislabeling in court. Rather than face a suspension in sales of products caused by the false accusations, however, companies would make petty cash payments to state inspectors." *Id.*

<sup>127</sup> *Id.*

some other unstated reason.”<sup>128</sup> Instead, the SEC enforcement action focused on the fact that none of the numerous payments, totaling an estimated \$200,000,<sup>129</sup> were recorded in Dow’s books pursuant to the accounting provisions of the FCPA.<sup>130</sup> Without admitting or denying the SEC’s allegations, Dow agreed to a civil penalty of \$325,000.<sup>131</sup>

## 2. Wabtec Corp.

In 2008 the SEC prosecuted Pioneer, an Indian subsidiary of Wabtec, for making improper payments to the Indian government.<sup>132</sup> An arm of the Indian government runs the national railway system in India, and solicits bids for railway construction.<sup>133</sup> Indian officials solicited improper payments from Pioneer to consider the company’s bids and approve its contract prices.<sup>134</sup> Pioneer paid Indian officials approximately \$85,000 between 2001 and 2004, and an additional \$21,217 in 2005, and made additional payments to avoid going through a new bidding process.<sup>135</sup> Pioneer did not keep track of the payments in the company’s official records, but recorded them in a separate set of books, which it subsequently destroyed.<sup>136</sup> Accordingly, the SEC charged Wabtec with violating of the accounting provisions and failing to establish internal accounting controls.<sup>137</sup> The SEC also charged Wabtec with violating the anti-bribery provisions by “corruptly pay[ing] money to officials of a foreign authority for the purposes of influencing their official decisions and inducing them to use their influence to assist Pioneer in obtaining or retaining business.”<sup>138</sup> If the Indian government was obligated to consider Pioneer’s bids, the payment would seem to fall within the facilitation payment exception, although such a payment would ultimately help the company obtain or retain business. Alternatively, the payment may fall in the ambit of *Kay*, which

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<sup>128</sup> Grime & Zdeb, *supra* note 58, at 383.

<sup>129</sup> *Dow Chem. Co.*, 2007 WL 460872, at \*3.

<sup>130</sup> *Id.* at \*5 (“DE-Nocil failed to take steps to ensure that its employees and consultants complied with the FCPA and to ensure that the payments it made to Indian government officials were accurately reflected on its books and records.”).

<sup>131</sup> *Id.* at \*1 n.1.

<sup>132</sup> Complaint at 2-3, *SEC v. Westinghouse Air Brake Tech. Corp.*, No. 08-706 (E.D. Pa. filed Feb. 14, 2008), available at <http://www.sec.gov/litigation/complaints/2008/comp20457.pdf>.

<sup>133</sup> *Id.* at 3.

<sup>134</sup> *Id.* at 4.

<sup>135</sup> *Id.* at 3-4.

<sup>136</sup> *Id.* at 5.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> *Id.* at 7.

construes "obtaining or retaining business" broadly, and the exception very narrowly.<sup>139</sup>

Interestingly, in its non-prosecution agreement, the DOJ characterized several payments that seem to fall even more squarely under the exception as illicit. Pioneer made payments to two different agencies that inspected its products. While Pioneer paid one inspection agency approximately \$33,603 throughout 2005, it paid the other agency only \$2175 during that time, providing payment in installments averaging between \$67 and \$358 per inspection.<sup>140</sup> The DOJ agreement further references \$4386 in payments made to receive certificates "issued upon delivery of conforming products," which Wabtec was contractually required to obtain.<sup>141</sup> If the products were indeed "conforming," such payments would also seem to qualify as grease payments under the FCPA. Finally, the Indian Customs and Excise Board, responsible for collecting value-added excise taxes on all products that Pioneer sold in India, conducted what Pioneer considered to be "excessive" audits. Pioneer forestalled this behavior with monthly payments of \$31.50. The relatively low amounts of these payments, as well as their purpose, suggests that Pioneer intended them to facilitate routine, non-discretionary government action. The DOJ does not explain in the agreement "why [the payments] were not permitted facilitation payments, even though 'processing governmental papers,' 'scheduling inspections associated with contract performance,' and 'actions of a similar nature' expressly fall within the FCPA's exception."<sup>142</sup>

### 3. Helmerich & Payne

In July 2009 the SEC accepted the settlement offer of Helmerich & Payne for the FCPA violations of its Argentinean and Venezuelan subsidiaries.<sup>143</sup> According to the company's own internal investigation, these subsidiaries made payments totaling \$185,673 to customs officials in order to facilitate the shipment of drilling equipment into and out of Latin America.<sup>144</sup> The SEC complaint asserted that the "payments were made with the purpose and effect of avoiding potential delays typically associated with the international transport of drilling parts," and that "H&P avoided costs in the estimated amount of approximately \$320,604, as a direct result of the improper payments

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<sup>139</sup> See *supra* Part I.C.1.

<sup>140</sup> Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div., Dep't of Justice, to Eric A. Dubelier, Reed Smith LLP, app. A at 3-4 (Feb. 8, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> Grime & Zdeb, *supra* note 58, at 384 (quoting 15 U.S.C. § 78dd-1(f)(3) (2006)).

<sup>143</sup> Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009) (cease and desist order).

<sup>144</sup> *Id.* at \*3.

by its subsidiaries.”<sup>145</sup> In the corresponding enforcement action, the DOJ acknowledged in a non-prosecution agreement that the company made some of these payments to “Argentine and Venezuelan customs officials to facilitate the performance of routine government action,”<sup>146</sup> language that directly implicates the facilitation payment exception. The DOJ concluded, however, that H&P labeled the payments in a misleading manner in its accounts – some labels for the payments included “extra” or “extraordinary expenses,” “urgent processing,” “urgent dispatch,” “customs processing,” and “customs facilitation”<sup>147</sup> – and therefore the payments violated the accounting provisions of the FCPA. By repeating the exact language of the statute, the DOJ implied that facilitation payments must be recorded in sufficient detail to determine that they do indeed fall under the exception, and are what the company purports them to be.<sup>148</sup> The DOJ agreed not to prosecute in this instance because of H&P’s prompt and voluntary disclosure and extensive remedial measures, but did impose a \$1,000,000 penalty.<sup>149</sup> The SEC required the Company to pay disgorgement plus prejudgment interest totaling over \$350,000.<sup>150</sup>

#### 4. Pride International and Summers

In 2010 the SEC prosecuted Joe Summers, an employee of the global drilling company Pride International, for various illicit payments made to Venezuelan government officials in response to their threats to block the renewal of certain drilling contracts.<sup>151</sup> “Accompanying those relatively run-of-the-mill FCPA allegations was an allegation that seemingly implicated the

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<sup>145</sup> *Id.* at \*1.

<sup>146</sup> Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div., Dep’t of Justice, to Kimberly A. Parker, Wilmer Cutler Pickering Hale and Dorr LLP, app. A at 4 (July 29, 2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/helmerich-payne/06-29-09helmerich-agree.pdf>.

<sup>147</sup> *Id.*

<sup>148</sup> *Cf.* Grime & Zdeb, *supra* note 58, at 386 (“[A]sserting that [the] payments . . . were improperly recorded begs the question whether those payments were truly facilitating payments – seemingly, they could have been – and were simply recorded with too little detail, or whether they were not facilitating payments at all, and should have been recorded as bribes. If the latter were true, then the DOJ’s characterization of the payments as ‘payments to facilitate the performance of routine government action’ – reciting the exact text of the statute – seems curious.”).

<sup>149</sup> Letter from Steven A. Tyrrell to Kimberly A. Parker, *supra* note 146, at 2.

<sup>150</sup> Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649, at \*4 (July 30, 2009) (cease and desist order).

<sup>151</sup> Complaint at 1, SEC v. Summers, No. 10-02786 (S.D. Tex. Aug. 5, 2010) [hereinafter Summers Complaint], *available at* <http://www.sec.gov/litigation/complaints/2010/comp21617.pdf>.

statute’s facilitating payments exception.”<sup>152</sup> Summers paid \$30,000 in order to secure outstanding payments from a Venezuelan government employee who was blocking the payments in the aftermath of strikes and civil unrest.<sup>153</sup> The SEC charged Summers with violation of the FCPA anti-bribery provisions. This stands in contrast with previous cases, where, when conduct arguably fell within the facilitation payment exception, the SEC chose to charge only accounting-provision violations for failure to adequately or accurately record the payments. In so doing, “the SEC seemed to be stretching” *Kay*’s conception of what constitutes a payment to obtain or retain business.<sup>154</sup>

#### 5. Noble Corp., Ruehlen, and Jackson

In 2010, in the course of an industry-wide “sweep” of oil corporations in West Africa, the SEC and DOJ prosecuted Noble Corp. for multiple bribes paid in relation to various customs violations. Nigeria allows oilrigs to operate duty free in its waters with temporary import permits (TIPs).<sup>155</sup> The Nigeria Customs Service (NCS) could extend such permits three times for six-month periods after their initial expiration, after which the rig had to leave Nigerian waters, and then reenter them.<sup>156</sup> Several of Noble Nigeria’s executive employees, in particular Ruehlen and Jackson, paid various customs agents to procure permit extensions.<sup>157</sup> When NCS had extended a rig’s TIP three times, those employees paid customs agents to acquire additional extensions. This often involved procuring paperwork from port authorities indicating that the rig had left and returned to Nigerian waters, when in fact, the rig had never left.<sup>158</sup> Noble’s company policy was to make facilitation payments, as defined by the FCPA, only with the authorization of the CFO, and to explicitly record them as such.<sup>159</sup> Ruehlen and Jackson reported many of the payments made to procure TIPs and TIP extensions as facilitation payments.<sup>160</sup>

The DOJ settled with Noble Corporation in 2010.<sup>161</sup> In its non-prosecution agreement, the DOJ explicitly commented that none of the payments to procure the TIPs or TIP extensions could qualify as facilitation payments

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<sup>152</sup> Grime & Zdeb, *supra* note 58, at 386-87.

<sup>153</sup> Summers Complaint, *supra* note 151, at 5.

<sup>154</sup> Grime & Zdeb, *supra* note 58, at 387.

<sup>155</sup> Complaint at 5-6, SEC v. Jackson, No. 12-00563 (S.D. Tex. filed Feb. 24, 2012) [hereinafter Jackson & Ruehlen Complaint], available at <http://sec.gov/litigation/complaints/2012/comp-pr2012-32-2.pdf>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 6-8.

<sup>158</sup> *Id.*

<sup>159</sup> Letter from Denis J. McInerney, Chief, Fraud Section, Criminal Div., Dep’t of Justice, to Mary C. Spearing, Baker Botts L.L.P., app. A at A-9 to A-12 (Nov. 4, 2010), available at <http://www.justice.gov/opa/documents/noble-mpa.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1-4.

within the meaning of the FCPA, although it seems unclear whether payments made to procure the initial TIPs might fall under the exception.<sup>162</sup> Commentators opine that the DOJ repeatedly denied that Noble's payments were facilitation payments under the FCPA because the sweep generated new interest in the exception,<sup>163</sup> possibly as a means of challenging enforcement actions. The SEC brought individual complaints against Jackson and Ruehlen in early 2012.<sup>164</sup> Interestingly, and perhaps as the result of the recent DOJ failures in the Africa Sting prosecutions,<sup>165</sup> neither defendant plans to settle with the SEC,<sup>166</sup> and either defendant may make use of the facilitation payment exception in response to the SEC complaint.

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Two primary methods of narrowing the facilitation payment exception emerge from these cases. First, both the SEC and DOJ charge violations of the accounting provisions, including the internal control requirement, for grease payments that are not recorded accurately or in sufficient detail.<sup>167</sup> While this is a fairly straightforward problem, it cannot be solved without reference to the second means of narrowing the exception: broadening the definition of "obtaining or retaining business."<sup>168</sup> Companies may be reasonably wary about recording what they perceive to be payments facilitating "routine government action" when, as in the H&P and Summers enforcement actions, the contours of "routine government action" are hazy in caselaw, and patrolled with increasing rigidity by enforcement agencies.<sup>169</sup> Many government actions for which grease payments are helpful or even necessary – such as mandatory government consideration of a bid, correct calculation of taxes, and accurate licensure and registration inspections – arguably are "routine government actions" that nonetheless help a company "obtain or retain business."<sup>170</sup> The absence of caselaw or legislative guidance on this point has led to a vacuum in which the SEC and DOJ may define the boundaries of the exception with

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<sup>162</sup> *Id.* at app. A-12.

<sup>163</sup> Mike Koehler, *Will the SEC Be Put to Its Burden of Proof in the Jackson and Ruehlen Enforcement Action?*, FCPA PROFESSOR (Feb. 28, 2012), <http://www.fcprofessor.com/wil-l-the-sec-be-put-to-its-burden-of-proof-in-the-jackson-and-ruehlen-enforcement-action>.

<sup>164</sup> See Jackson & Ruehlen Complaint, *supra* note 155.

<sup>165</sup> See *supra* note 121.

<sup>166</sup> Koehler, *supra* note 163 ("Unlike the vast majority of FCPA defendants (corporate and individual) charged in an SEC enforcement action, Jackson and Ruehlen appear poised to launch a defense.").

<sup>167</sup> Grime & Zdeb, *supra* note 58, at 382.

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* Part IV.A.3-4.

<sup>170</sup> Grime & Zdeb, *supra* note 58, at 382.

relative immunity, and in which companies are increasingly unsure of how to avoid breaking the law.

B. *How Corporations Handle the Facilitation Payment Exception*

The lack of clear guidance on facilitation payments, combined with the rigorous prosecution and stiff penalties for FCPA violations, means that companies are increasingly reluctant to avail themselves of the exception, even though demands for such payments are common, and the exception is still on the books. Further exacerbating the problem, grease payments are illegal in many of the countries where they are frequently demanded.<sup>171</sup> Many companies categorically prohibit facilitation payments because they "do not want to take the risk that an employee or intermediary will misunderstand the difference between bribes and facilitating payments, or make decisions where incomplete facts lead to later changes in understanding."<sup>172</sup> Such companies further wish to avoid the accounting provision violations that may result from vaguely reported payments.<sup>173</sup> A Trace International survey on facilitation payments conducted in 2009 revealed that, of the companies surveyed, 34.7% had outright bans on grease payments, 9.3% were silent on facilitation payments because they considered such payments to be "prohibited together with other forms of bribery," and an additional 34.7% permitted such payments only if the situation presented a "risk to the health or safety of employee(s)."<sup>174</sup> None of the survey participants completely lacked any company policy on facilitation payments.<sup>175</sup> Of the companies surveyed, 35.2% reported that they judged a government investigation "moderately likely" as a result of facilitation payments, and 16.9% judged that a government investigation would be "highly likely."<sup>176</sup> Among the key findings of the survey were that:

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<sup>171</sup> BRYAN SCHILLINGER, ERNST & YOUNG LLP, A PRACTICAL GUIDE FOR REDUCING FCPA RISK IN ENERGY SECTOR GLOBAL LOGISTICS OPERATIONS 13 (2010).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> TRACE INT'L, INC., TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 8 (2009) [hereinafter TRACE BENCHMARKING SURVEY], available at <https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf>.

<sup>175</sup> *Id.* The survey further found that 33.3% of companies permitted facilitation payments with prior approval, 29.3% permitted but discouraged such payments, 22.7% permitted payments except where prohibited by local law, and 10.7% permitted payments subject to a monetary cap. *Id.* A mere 5.3% of companies surveyed allowed employees to use discretion in making facilitation payments. *Id.*

<sup>176</sup> *Id.* at 14. Interestingly, companies estimated that their likelihood of facing government investigation in the country where the bribe was paid was identical to the likelihood that such an investigation would be carried out in the country in which the company was headquartered (71.6% of companies were headquartered in North America). *Id.* at 3, 14.

- 76% of survey respondents believe it is possible to do business successfully without making facilitation payments given sufficient management support and careful planning.
- Over 70% of respondents believe that employees of their company either never, or only rarely, make facilitation payments, even if their corporate policy permits facilitation payments.
- Over 93% of survey respondents revealed that their job would be easier, or at least no different, if facilitation payments were prohibited in every country.<sup>177</sup>

Many companies are reluctant, however, to categorically ban facilitation payments, and view such payments pragmatically as a necessary evil. Particularly in the customs context, facilitation payments are “commonplace virtually worldwide.”<sup>178</sup> Furthermore, refusal to make a grease payment in some countries can cause delays of many weeks, which are particularly problematic with regard to the transport of perishable goods, or any sort of emergency requiring a speedy customs process.<sup>179</sup> In such countries, government officials are “practicing organized extortion: pay a facilitation payment or we will not perform our job at all.”<sup>180</sup>

#### V. SHOULD THE FACILITATION PAYMENT EXCEPTION BE ABOLISHED?

Whether the facilitation payment exception should continue as part of the FCPA is a contentious issue, and because of the massive penalties involved in enforcement actions, the courts are unlikely to settle this question. What follow are some of the primary arguments for and against eliminating the grease payment exception. Arguments over whether the exception should be abolished tend to fall into three different categories: economic arguments, moral arguments, and arguments about the coherence of global anti-corruption legislation.

This Note asserts that while there ultimately should be a per se ban on facilitation payments, such a ban in the immediate future would create serious problems for corporations, which undeniably face extortionate demands for such payments when doing business abroad. This Note therefore argues that, while the exception should be written out of the FCPA, facilitation payments should be flexibly “eased out” in practice as a matter of agency policy, which would mitigate or eliminate penalties for facilitation payments made under extortionate circumstances. Such policy, however, must be clear and promulgated according to a transparent process in which industries have input

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<sup>177</sup> *Id.* at 2.

<sup>178</sup> SCHILLINGER, *supra* note 171, at 13.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*



as to what circumstances should qualify as extortionate for the purposes of such payments.

A. *Economic Arguments*

Regardless of one's ethical stance on bribery or whether facilitation payments even constitute bribery, such payments have undeniable effects on the economic functions of corporations and countries. This Section explores some of those effects, and analyzes their implications for the continued existence of the exception.

First, despite numerous economic theories that would assert the contrary,<sup>181</sup> this Note takes the position that bribery is ultimately economically inefficient. Though perhaps morally distinct from outright bribes, grease payments are economically identical in effect to any other form of corruption: they are "abuse of public power for private benefit,"<sup>182</sup> and result in distortion of market forces. Corruption of this kind reduces economic growth by diminishing both volume and efficiency of investment.<sup>183</sup> In environments where corruption is endemic, public officials will likely seek to maximize their own welfare by pursuing bribes, which often renders them "unable or unwilling to maximize [public] welfare."<sup>184</sup> As a result of these misaligned incentives, contracts and deals executed in such a corrupt environment are likely to be those that yield the highest bribe income to the official, rather than those that are most efficient and yield the greatest value to the public. Ultimately, such pursuit of personal rather than public gain on behalf of government officials seriously damages the government's credibility both with its own citizens and with potential foreign investors, thus undermining its "credible commitment to effective policies."<sup>185</sup>

Some classical economic scholarship holds that corruption is often efficient, and sometimes "essential to keep the economy going," particularly in situations where regulation or bureaucracy seriously restricts markets.<sup>186</sup> Economists have argued that bribes can reduce transaction costs by running around cumbersome regulation, commoditizing resources (speed of visa processing, for example), and efficiently allocating those resources to those

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<sup>181</sup> See *infra* notes 184-85 and accompanying text.

<sup>182</sup> Hiren Sarkar & M. Aynul Hasan, *Impact of Corruption on the Efficiency of Investment: Evidence from a Cross-Country Analysis*, 8 ASIA-PAC. DEV. J. 111, 111 (2001).

<sup>183</sup> *Id.*

<sup>184</sup> Johann Graf Lambsdorff, *How Corruption in Government Affects Public Welfare: A Review of Theories 1* (Ctr. for Globalization & Europeanization of the Econ., Discussion Paper No. 9, 2001), available at [http://www.icgg.org/downloads/contribution08\\_lambsdorff.pdf](http://www.icgg.org/downloads/contribution08_lambsdorff.pdf).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 3 (quoting Theodore Morgan, *The Theory of Error in Centrally-Directed Economic Systems*, 78 Q.J. ECON. 395, 414 (1964)).

who are willing to pay.<sup>187</sup> Studies have suggested, however, that rather than more efficiently allocating resources, bribery may in fact cause some bureaucrats to create delays in order to create more opportunities for illicit payment.<sup>188</sup> Similarly, other scholars have suggested that bribe-taking bureaucrats are “monopolists who profit from increasing prices by creating scarcity.”<sup>189</sup> Facilitation payments are as vulnerable to these criticisms as any other kind of bribe. Moreover, since facilitation payments involve no discretion on the part of the bribed official, who is paid solely for what he or she is supposed to do in the normal course of his or her duties anyway, the argument that such a payment would reduce transaction costs is even less compelling than for other kinds of bribery.

A further argument for abolishing the facilitation payment exception is that allowing American companies to make facilitation payments may result in entrepreneurial bribe-taking on the part of foreign government officials.<sup>190</sup> Such officials learn to “focus their demands on companies that have paid bribes before,”<sup>191</sup> and those companies face increased demands for illicit payments.<sup>192</sup> Furthermore, bribe-taking officials expect that a company that has made facilitation payments in the past will continue to do so, and therefore, demands for such payments will likely continue into the future.<sup>193</sup>

Some commentators argue, however, that abolishing the facilitation payment exception will open the door to entrepreneurial bribe-making on the part of companies competing with American corporations.<sup>194</sup> Such “black

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing 2 GUNNAR MYRDAL, *ASIAN DRAMA* 952-53 (1968)). This is likely to be even truer for facilitation payments, since the actions they buy require no discretion, merely the performance of an official’s already-existing duty. See Elizabeth Spahn, *Nobody Gets Hurt?*, 41 *GEO. J. INT’L L.* 861, 866 (2010) (“What does a rational, self-interest-maximizing (and now corrupt) government official who has just been bribed to reduce regulation do? He looks for economic opportunities to maximize his economic self-interest – that is, how to get more and bigger bribes.”).

<sup>189</sup> Lambsdorff, *supra* note 184, at 3.

<sup>190</sup> Jordan, *supra* note 96, at 910-11.

<sup>191</sup> TRACE INT’L, INC., *THE HIGH COST OF SMALL BRIBES* 7 (2009) [hereinafter TRACE, *THE HIGH COST OF SMALL BRIBES*], available at [https://secure.traceinternational.org/data/public/The\\_High\\_Cost\\_of\\_Small\\_Bribes\\_2-65416-1.pdf](https://secure.traceinternational.org/data/public/The_High_Cost_of_Small_Bribes_2-65416-1.pdf).

<sup>192</sup> *Id.*

<sup>193</sup> Jordan, *supra* note 96, at 910.

<sup>194</sup> See, e.g., Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 *FLA. L. REV.* 351, 397 (2010) (“As investment opportunities continue to develop in higher-risk countries, at least some capital-rich countries may neglect, or even refuse, to ratify and enforce anti-bribery legislation. In sanctions terminology, these ‘black knights’ will move in to fill the void created by the economic withdrawal of countries that are enforcing the OECD convention.”); Charles B. Weinograd, Note, *Clarifying Grease: Mitigating the Threat of*

knight” competitors are likely to be capital-rich and resource-poor; the most prominent current example is China, which continues to systematically pour investment capital into African and Latin American countries where bribery of foreign officials is the norm.<sup>195</sup> While this argument makes perfect economic sense, it is important not to undervalue the reputational consequences of violating international anti-bribery agreements, particularly for China, which greatly values its place as a rising power in politics and the world economy. It is perhaps this premium on reputation and a response to world trends, discussed below, that recently motivated China to pass its own foreign-bribery statute, analogous to the FCPA.<sup>196</sup> The provision is quite vague, and it is currently unclear how the Chinese judiciary will interpret and enforce it.<sup>197</sup> Some commentators view it as opportunistic legislation likely to be enforced only against non-Chinese companies.<sup>198</sup> Others believe, however, that the new statute represents a serious attempt to grapple with the domestic and foreign bribery problem that has caused the Chinese government significant embarrassment in recent years.<sup>199</sup> There is currently scant information on enforcement actions under this new statute. A general trend toward increased reporting of bribery over the past several years suggests, however, that, at a minimum, both the government and the public see a need for increased

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*Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT’L L. 509, 534 (2010) (“Corporations whose hands are not bound by the FCPA could fill the void left by retreating U.S. companies. If unchecked by any anti-corruption convention, these new actors could readily engage in grand bribery.”).

<sup>195</sup> See Spalding, *supra* note 194, at 397.

<sup>196</sup> See Zhonghua Renmin Gongheguo Xing Fa Xiu Zheng An (8) (中华人民共和国刑法修正案(八)) [Amendments to the Criminal Law of the People’s Republic of China (VIII)] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective May 1, 2011), available at [http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content\\_1625618.htm](http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content_1625618.htm)

m (amending the Chinese bribery statute to include “illicit payments to foreign officials”); WHITE & CASE, CHINA’S NEW ANTI-CORRUPTION LAW GOES INTO EFFECT MAY 1, 2011, at 1 (2011), available at [http://www.whitecase.com/files/Publication/49f8553b-00b9-4573-bf24-741b0614e08c/Presentation/PublicationAttachment/d0253a48-813b-42cd-81d5-7d9e241e2dd4/Alert\\_Chinas\\_New\\_Anti-Corruption\\_Law\\_Goes\\_into\\_Effect\\_May\\_1\\_2011.pdf](http://www.whitecase.com/files/Publication/49f8553b-00b9-4573-bf24-741b0614e08c/Presentation/PublicationAttachment/d0253a48-813b-42cd-81d5-7d9e241e2dd4/Alert_Chinas_New_Anti-Corruption_Law_Goes_into_Effect_May_1_2011.pdf).

<sup>197</sup> WHITE & CASE, *supra* note 196, at 1-2.

<sup>198</sup> *Id.* at 2.

<sup>199</sup> *Id.* (commenting that “while enforcement has sometimes appeared somewhat arbitrary, we believe the Chinese government is engaged in a serious effort to increase its anti-corruption enforcement” and remarking that Premier Wen Jiabao “identified dealing with corruption by principal officials as a ‘primary task in 2011’” (quoting An Lu, *Chinese Premier Renews Call for Fight Against Corruption*, GOV.CN (Mar. 25, 2011), [http://english.gov.cn/2011-03/25/content\\_1831956.htm](http://english.gov.cn/2011-03/25/content_1831956.htm))).

enforcement in China.<sup>200</sup> Notably, this new statute lacks a facilitation payment exception.<sup>201</sup>

In addition to worries about black-knight competitors, proponents of retaining the facilitation payment exception argue that demands for such payments are often flatly extortionate and that inability to make such payments would completely prevent U.S. corporations from doing business in many countries.<sup>202</sup> To the extent that the TRACE survey data is accurate, it greatly undermines this claim.<sup>203</sup> The direness of the circumstance, however, is likely to increase the odds that a bribe is demanded and paid; a foreign official is far more likely to demand a payment when he or she knows that a hapless businessperson has no alternative but to comply, as would be the case with perishable goods, medical or political emergencies, and countless other circumstances.<sup>204</sup> The “extortion exception” to the FCPA outlined in *Kozeny* is

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<sup>200</sup> See TRACE INT’L, INC., BRIBELINE CHINA REPORT PROVIDES NEW DETAILS ON BRIBERY 1 (2008), available at [https://secure.traceinternational.org/data/public/documents/China\\_PR\\_and\\_Report-64652-1.pdf](https://secure.traceinternational.org/data/public/documents/China_PR_and_Report-64652-1.pdf) (declaring that bribery reports from TRACE International’s initial 2008 reporting hotline represent “an important step toward improved bribe reporting in China, and as an indication that here, as elsewhere, there are increasing numbers of individuals willing to shine a light into the dark corners of commerce where bribery and extortion often thrive”); Eric Carlsen, *China’s Overseas Bribery Law One Year On*, FCPA BLOG (May 29, 2012, 3:28 AM), <http://www.fcablog.com/blog/2012/5/29/china-s-overseas-bribery-law-one-year-on.html> (commenting that despite the lack of judicial decisions under the amended law, recent developments “suggest at least some focus by Chinese officials on giving effect to the Amendment. . . . [A]ll local Chinese employees should at least be on notice that China, like a growing number of countries, prohibits its citizens and companies from paying bribes overseas and may well take steps to ensure that the new law is more than the proverbial ‘paper tiger.’”).

<sup>201</sup> See Amendments to the Criminal Law of the People’s Republic of China (VIII) (containing no exception for facilitation payments).

<sup>202</sup> See Joel M. Cohen & Adam P. Wolf, *Narrow, Don’t Abolish, FCPA Facilitating Payments Exception*, 244 N.Y. L.J. 1 (2010); Weinograd, *supra* note 194, at 534.

<sup>203</sup> See TRACE BENCHMARKING SURVEY, *supra* note 174, at 2 (finding that “76% of survey respondents believe it is possible to do business successfully without making facilitation payments given sufficient management support and careful planning”).

<sup>204</sup> For a hair-raising account of such a circumstance, see Thomas Fox, *When Does a Grease Payment Become a Bribe Under the FCPA?*, FCPA COMPLIANCE & ETHICS BLOG (Feb. 2, 2011, 9:41 AM), <http://tfoxlaw.wordpress.com/2011/02/02/when-does-a-grease-payment-become-a-bribe-under-the-fcpa/> (describing a situation where “an employee, upon exiting a West African country, was told that ‘his shot card was not in order’ and that he would have to immediately be administered a yellow fever shot. However, his shot card could be put in order for the payment of \$100. He was then taken in a room; a syringe with an unknown liquid pulled out, filled, and put in front of him. He was told to roll up his sleeve immediately for the shot. He decided to pay the \$100.”) The SEC, in the ensuing enforcement action, recognized that the payment was made under extortionate circumstances but nonetheless fined the corporation \$65,000 for violating the accounting

narrow, and is unlikely to cover many or most of the coercive demands that businesses face. Extortion of this kind might well force a corporation out of a country; allowing corporations to continue to cave to extortionate demands, however, will only increase such demands. Ultimately, the only solution to such a problem is a truly global anti-corruption regime in which companies that do not cave to extortionate bribe demands cannot be supplanted by those that do. In the short term, however, any revision of the facilitation payment exception must recognize the difficulties posed by such extortionate demands, discussed subsequently.<sup>205</sup>

One final economic argument for abolishing the facilitation payment exception is that U.S. corporations generally neither avail themselves of it, nor feel that they need to in order to do business abroad.<sup>206</sup> This may be a valid argument from the perspective that abolishing the exception would not harm American companies economically. U.S. corporations, however, likely do not generally make facilitation payments because, given recent enforcement patterns,<sup>207</sup> they perceive the exception as being unreliable. Furthermore, the data available on this question was compiled by TRACE, an organization dedicated to the abolition of bribery and corruption worldwide;<sup>208</sup> thus, the source of the surveys may have induced those corporate representatives surveyed to respond in a less-than-forthright manner.

#### B. *Moral Arguments*

Anti-bribery legislation as such is based on the foundational assumption that bribery is immoral. This Section examines that assumption, how it may or may not be held in some non-Western cultures, and the implications of these arguments for whether or not to abolish the facilitation payment exception.

While it seems clear that bribery is immoral from a mainstream ethical standpoint, it is important to examine the reasons why this is so. Reduced to its essence, bribery is comprised of paying for an advantage that one ought not to have. Ultimately, the fundamental moral virtue violated is equality: the theory that all people are equals in human dignity “demands that each stands as an equal before the government they have joined to create . . . . Bribery asks that that principle be violated, and that some persons be allowed to stand ahead of

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provisions of the FCPA. *Id.*

<sup>205</sup> See *infra* Part VI.B (proposing “easing out” the facilitation payment exception with administrative guidance).

<sup>206</sup> See *supra* Part IV.B.

<sup>207</sup> See *supra* Part IV.

<sup>208</sup> See *About TRACE*, TRACE INT’L, [https://secure.traceinternational.org/Trace/about-trace/Trace\\_International.html](https://secure.traceinternational.org/Trace/about-trace/Trace_International.html) (last visited Nov. 13, 2012) (“TRACE International, Inc. is a non-profit membership association that pools resources to provide practical and cost-effective anti-bribery compliance solutions for multinational companies and their commercial intermediaries . . .”).

others, that like cases not be treated alike, and that some persons be preferred.”<sup>209</sup>

Some commentators counter this argument by contending that such principles of equality are not universal.<sup>210</sup> Even if they were, critics claim, there are many cultures in which bribery is viewed as not violating such principles, or as merely violating them to a lesser extent.<sup>211</sup> The practice of “gifting” to induce a certain course of action is widely maintained throughout the world, they assert, and efforts by (mostly) developed countries to force (mostly) developing countries to conform to this “universal” ethical standard are nothing short of moral imperialism.<sup>212</sup>

There is clearly some merit to the argument that different cultures have different ethical tolerances for bribes, including facilitation payments. The “moral imperialist” critics, however, do not address the fact that facilitation payments, and almost all other forms of bribery, are illegal in the countries in which they are made.<sup>213</sup> This indicates that even where bribes are a part of life, the normative ideal, as created by the independent government of a country and manifested in its laws, is to do away with such payments.<sup>214</sup>

Finally, an examination of the legislative history of the FCPA reveals a surprisingly narrow objective: to improve the reputation and ethical practices of American corporations.<sup>215</sup> While representatives do characterize facilitation

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<sup>209</sup> Scott Turow, *What’s Wrong with Bribery?*, 4 J. BUS. ETHICS 249, 250 (1985).

<sup>210</sup> Maria Konnikova, *Collectivism and Bribery: Diffusion of Responsibility Leads to Immoral Action*, BIGTHINK (July 7, 2011, 11:00 AM), <http://bigthink.com/ideas/39104> (“As it turns out, one factor in its enduring presence is collectivism: the more collectivist a culture, the more likely someone is to engage in bribery.”).

<sup>211</sup> See, e.g., *id.* (arguing that in collectivist cultures, responsibility for individual actions is diffused throughout the group, creating a higher tolerance for immoral acts such as bribery).

<sup>212</sup> See, e.g., Weinograd, *supra* note 194, at 533, 540.

<sup>213</sup> See Jordan, *supra* note 96, at 899.

<sup>214</sup> A particularly staunch moral-imperialist critic might respond that those laws were heavily influenced by the governance structures of colonial powers. This is beyond the scope of this Note, however, which holds independent governments – previously colonized or otherwise – responsible for the laws they have on their books, and treats such laws as freely made and facially valid.

<sup>215</sup> See S. REP. NO. 95-114, at 1-2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099 (“[The SEC’s ‘Report on Questionable and Illegal Corporate Payments and Practices’] traced the history of the Commission’s discovery of conduct involving the misuse of corporate funds and the commencement of investigations which subsequently revealed that instances of undisclosed questionable or illegal corporate payments were indeed widespread and represented a serious breach in the operation of the Commission’s system of corporate disclosure and, correspondingly, in public confidence in the integrity of the system of capital formation.”); H.R. REP. NO. 95-640, at 5 (1977) (“The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign

payments as "reprehensible,"<sup>216</sup> not once in the legislative record is it suggested that the purpose of the statute is to force other countries to comply with American notions of morality. The purpose of the statute, in the wake of a series of scandals that shook public confidence, was to force American companies to comply with American notions of morality.<sup>217</sup> While the global sweep of anti-corruption legislation that followed may be imputed to have wider objectives, the FCPA is still concerned with American corporations, not with imposing western ethics on the developing world.

### C. *Coherence Arguments*

With the advent of the OECD Convention and the numerous foreign bribery statutes recently enacted by other countries, it seems that the world is moving increasingly in the direction of a harmonized body of anti-corruption law.<sup>218</sup> This Section discusses the advantages and disadvantages to a globally coherent body of anti-bribery legislation – which the continued existence of the facilitation payment exception challenges.

One disadvantage to continuing the exception despite the global trend is that it enables many of the economic issues previously addressed.<sup>219</sup> Entrepreneurial bribe-making and entrepreneurial bribe-seeking are only practicable due to legislative or practical gaps in different countries' anti-bribery regimes. A universal anti-bribery code, or different codes that were globally harmonized to illegalize facilitation payments, would mean that no corporation could legally offer such payments. To the extent that corporations complied with these laws, they could not engage in entrepreneurial bribe-making; furthermore, foreign officials could not engage in entrepreneurial bribe-seeking because no corporation could pay the bribes.<sup>220</sup>

Moreover, even if facilitation payments continue to be legal under the FCPA, corporations making them may be subject to a slew of negative legal consequences. First, as previously discussed, facilitation payments are

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political office is unethical.").

<sup>216</sup> See H.R. REP. NO. 95-640, at 8.

<sup>217</sup> See *id.* at 5 ("Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.").

<sup>218</sup> See Jordan, *supra* note 96, at 921 ("The world caught up to the United States on the bribery front. But on the issue of facilitation payments, the world continued to move forward as well."). Currently, the only countries that have facilitation payment exceptions in their outgoing anti-bribery statutes are the United States, Canada, Australia, New Zealand, and South Korea. See Thomas Fox, *The End of the FCPA Facilitation Payment Exception?*, FCPA COMPLIANCE & ETHICS BLOG (Nov. 11, 2010, 9:26 PM), <http://tfoxlaw.wordpress.com/2010/11/11/the-end-of-the-fcpa-facilitation-payment-exception/>

n/. None of these countries, however, permit facilitation payments of their own domestic officials. See TRACE, THE HIGH COST OF SMALL BRIBES, *supra* note 191, at 4.

<sup>219</sup> See *supra* Part V.A.

<sup>220</sup> See *supra* Part V.A.

generally illegal in the countries in which they are made.<sup>221</sup> Furthermore, recent surveys indicate that the countries in which most bribery occurs are increasingly enforcing their own domestic anti-bribery laws.<sup>222</sup> This indicates that American companies making facilitation payments are increasingly likely to face prosecution in the countries in which they make illicit payments, even if those payments technically fall within the facilitation payment exception under the FCPA.<sup>223</sup> Moreover, in attempt to avoid prosecution under foreign bribery laws, a corporation may try to hide the payment by failing to record it, creating a violation of the accounting provisions of the FCPA (even if, as discussed, the actual payment falls within the exception).<sup>224</sup> This creates a “Catch-22 problem” in which the “company making the facilitation payment stands to lose and faces legal liability, no matter what it does.”<sup>225</sup> Furthermore, most foreign bribery acts in other jurisdictions lack a facilitation payment exception, creating problems for joint ventures and corporate subsidiaries of American companies.<sup>226</sup>

Finally, when the FCPA was passed, the United States was the lone enforcer, but nonetheless was interested in setting an aspirational norm. The United States worked for many years to bring about more global anti-corruption efforts. In recent years such efforts have become even more ambitious in scope than the FCPA, as they no longer contain the pragmatic facilitation payment exception; given the United States’ consistent involvement in global anti-bribery efforts, it is important that the United States align with these more stringent global standards.

Despite the numerous disadvantages of maintaining a facilitation payment exception in the face of a global trend which increasingly opposes it, nearly

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<sup>221</sup> See *supra* note 213 and accompanying text.

<sup>222</sup> See TRACE GLOBAL ENFORCEMENT REPORT 2011, *supra* note 4, at 8 (finding that China, Iraq, Nigeria and India are the countries where most bribery of foreign officials takes place. The study further finds that Nigeria is currently the leading country enforcing its own domestic bribery laws, China follows as the fourth, with India as the seventh).

<sup>223</sup> See, e.g., Jackson and Ruehlen Complaint, *supra* note 155, at 10 (commenting that Noble-Nigeria faced large penalties from a Nigerian Customs Panel of Inquiry as a result of the same conduct that prompted SEC and DOJ prosecutions); TRACE BENCHMARKING SURVEY, *supra* note 174, at 14 (commenting that American corporations estimate the likelihood of prosecution by the country where the company is headquartered to be the same as the probability of prosecution by the country in which the bribe was paid).

<sup>224</sup> See Jordan, *supra* note 96, at 923.

<sup>225</sup> *Id.*

<sup>226</sup> See Bribery Act, 2010, c. 23, §§ 1-9 (U.K.) (providing no exception for facilitation payments); Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 441 (2011) (commenting that the U.K. anti-bribery statute applies to any person ordinarily residing in the U.K., even if the act took place elsewhere, and that the “corporate offense . . . applies if the company conducts any business in the U.K.”).



three-fourths of the foreign bribery enforcement actions undertaken worldwide occur in the United States.<sup>227</sup> There is a compelling argument that the United States therefore needs the facilitation payment exception because it allows us to bridge the gap between the aspirational norm of total intolerance for bribery, and the operational code in the field that actually determines how business gets done. Countries that enforce less can better afford to ignore this gap. This Note argues, however, that since the United States *is* the chief enforcer, it is even more important that its laws actually align with the aspirational norm it wishes to achieve, or the gap between norm and practice will not narrow.

#### VI. PROPOSED SOLUTION: “EASING OUT” FACILITATION PAYMENTS WITH ADMINISTRATIVE GUIDELINES

This Part examines several proposed solutions to the question of whether to abolish the facilitation payment exception. Ultimately, this Note takes the position that a total statutory ban is appropriate. To address concerns of companies doing business in countries where demands for facilitation payments are extortionate, however, the SEC and DOJ should promulgate a specific sentencing scheme that greatly mitigates penalties for payments made under such circumstances.

##### A. *Alternative Proposed Solutions*

While a *per se* ban on facilitation payments is certainly most in tune with the global trend in anti-bribery legislation, as well as normatively ideal, such a solution does not adequately account for the extortionate nature of some demands for illicit payment.<sup>228</sup> Furthermore, such a ban does not take into account the special situation of the United States as the chief foreign-bribery enforcer globally; as American corporations are more exposed to investigations and prosecutions than other corporations, there is a need for additional flexibility.<sup>229</sup>

One proposed solution is for Congress to narrow the statutory exception such that facilitation payments made under threat of extortion – which could be defined as “the use of threats of injury to person or property to obtain any thing of value from a victim,” and thus broader than the *Kozeny* definition – are not prohibited by the statute.<sup>230</sup> In the long run, however, maintaining the statutory exception will encourage entrepreneurial bribe-seeking in the form of further extortionate demands. The permanence of the exception in this context is problematic; even as global practice changes, there will be no way to eliminate the exception short of a cumbersome Congressional procedure.

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<sup>227</sup> See TRACE GLOBAL ENFORCEMENT REPORT 2011, *supra* note 4, at 3 (finding that the United States undertakes 74.1% of the world’s outbound bribery enforcement actions).

<sup>228</sup> See generally Cohen & Wolf, *supra* note 202, at 1.

<sup>229</sup> See *id.*

<sup>230</sup> *Id.* at 1-2.

Another alternative would be to simply replace the facilitation payment exception with a defined monetary cap, up to which companies would be able to pay foreign officials with impunity.<sup>231</sup> Such a practice, however, would effectively create a “floor price for doing business abroad,” and give foreign officials incentive to demand up to the exact amount of the cap.<sup>232</sup> For this reason, Congress has considered and rejected imposing caps on facilitation payments.<sup>233</sup>

A variation on this solution is to create monetary caps on payments for each region, but to retain the “to obtain or retain business” requirement.<sup>234</sup> Payments over the cap would be presumptively outside the exception, unless the party making them could affirmatively prove that they were not intended to obtain or retain business.<sup>235</sup> The monetary cap would be set and monitored by a special congressional task force according to the per capita wealth and the local “gifting” practices of the region in question.<sup>236</sup>

This solution does help mitigate the setting of a “price floor,” since even payments below the capped amount could not be made to obtain or retain business. The setting of the cap, however, is nonetheless problematic. First, amassing the expertise to effectively take into account all of the factors relevant to calculating such a local cap would require incredible resource expenditure. More important, such expenditures would have to be practically ongoing, as the cap would have to change as often as dictated by flux in currencies and attitudes. Second, the cap could not be changed short of a long, drawn-out Congressional procedure, making it next to impossible for statutory requirements to mirror the circumstances out in the regulated field.<sup>237</sup> Greater flexibility is necessary.

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<sup>231</sup> See, e.g., *Foreign Trade Practices Act of 1983: Hearing on H.R. 2157 Before the Subcomm. on Int'l Econ. Policy & Trade of the H. Comm. on Foreign Affairs*, 98th Cong. 211, 285 (1983).

<sup>232</sup> Weinograd, *supra* note 194, at 545-49.

<sup>233</sup> *Id.* at 545; see also *Foreign Trade Practices Act of 1983: Hearing on H.R. 2157*, at 285 (statements of Rep. Howard L. Berman, Member, H. Comm. on Foreign Affairs, and Stephen J. Brogan, Deputy Assistant Att’y Gen.). Representative Berman proposed that Congress simply set a ceiling, below which payments would not be considered a bribe: “By definition, if you pay less than \$10,000 or \$5,000, it is not a bribe. If you pay more, it is.” *Id.* In response, Mr. Brogan argued: “We ought not to have to say well, \$10,000 is OK, but \$10,001 isn’t OK. I wouldn’t be surprised to see that become a toll.” *Id.* He further opined, “You are expressly legalizing \$10,000, if you want to do business. If I was an unscrupulous agent abroad, that would be an automatic.” *Id.*

<sup>234</sup> See Weinograd, *supra* note 194, at 536-38.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 540, 542-43.

<sup>237</sup> While Congress could delegate the duty of setting a monetary cap to a special task force, even proponents of a monetary cap acknowledge that “[c]reating and maintaining a taskforce will likely prove costly.” *Id.* at 543.

B. *Proposed Solution: “Easing Out” the Facilitation Payment Exception with Administrative Guidance*

Maintaining a statutory facilitation payment exception cements the acceptability of these small-time bribes,<sup>238</sup> which is contrary to the aspirations of the global climate that began with the FCPA, and that the United States has played a pivotal role in creating. As previously discussed, however, the United States, as chief enforcer, needs the flexibility to deal with the extortion that American corporations will inevitably encounter as the gap between aspiration and practice narrows. In order to conform to the global trend and promote an ideal that the United States helped shape, this Note proposes a statutory elimination of the exception. Since extortionate demands for such payments will only decrease with time and increasingly rigorous enforcement, however, this Note proposes “easing out” the exception in practice by providing administrative guidance in mitigating or eliminating penalties for payments made under extortionate circumstances, and broadening the *Kozeny* articulation of “extortion.” As previously discussed, modification by Congress short of an outright ban is likely impractical, as changing policy quickly enough to reflect actual business conditions would likely prove impossible. Administrative guidance is a more flexible solution, by which the guidelines for companies could be changed quickly enough to reflect the situations corporations face on the ground.<sup>239</sup>

Requests for administrative guidance on FCPA enforcement are not new. In the 1988 amendments to the statute, Congress explicitly stated that the DOJ, after consultation with the SEC and other agencies, should conduct notice-and-comment procedures and issue guidelines describing conduct that would conform to the newly revised FCPA, including the facilitation payment provision.<sup>240</sup> The DOJ did subsequently initiate notice-and-comment procedures, but in July 1990, issued a notice of its finding that “no guidelines

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<sup>238</sup> See TRACE, THE HIGH COST OF SMALL BRIBES, *supra* note 191, at 3 (defining facilitation payments as small bribes, and discussing the difficulties of corporate governance with respect to such payments).

<sup>239</sup> It is important to note that this solution targets the supply side of the bribery transaction. In addition to a statutory ban and regulatory guidance, alternative measures could be taken to reduce the demand for bribes on the part of foreign officials. See United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, 149-50 (requiring signatories to “consider . . . establishing measures and systems to facilitate the reporting by public officials of acts of corruption” and further urging, but not requiring, signatories to take “disciplinary or other measures against public officials who violate codes or standards established in accordance with this article”); Yockey, *supra* note 120, at 835-38 (suggesting that measures to reduce demands for bribes could include disgorgement proceedings, the use of other criminal laws to target extortionate foreign officials, increased international collaboration, and a greater role for NGOs).

<sup>240</sup> Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1415-25 (codified as amended in scattered sections of 15 U.S.C.).

are necessary.”<sup>241</sup> The OECD Phase 1 Report notes that this finding was the result of only five comments being received in the notice-and-comment period, three of which were to the effect that no guidelines were needed.<sup>242</sup>

In light of recent enforcement trends, however, industries are far more interested in a DOJ statement clarifying and interpreting what conduct it will prosecute, and what defenses are available. A recent hearing before a House of Representatives subcommittee indicated serious frustration with the unpredictability of FCPA enforcement<sup>243</sup> and provided a forum for the promotion of specific proposals for statutory amendment.<sup>244</sup> In what was likely a response to the hearing and general industry frustration, Assistant Attorney General Lanny Breuer gave a speech in November 2011, promising that “in 2012, in what . . . will be a useful and transparent aid, we expect to release detailed new guidance on the Act’s criminal and civil enforcement provisions.”<sup>245</sup> While the response to this promise in academic literature and industry lobbying has been electric,<sup>246</sup> no guidelines or procedural moves toward them have appeared as of this writing.<sup>247</sup>

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<sup>241</sup> Department of Justice Anti-Bribery Provisions Notice, 55 Fed. Reg. 28,694, 28,694 (July 12, 1990).

<sup>242</sup> OECD, UNITED STATES: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 15 (1999), available at <http://www.oecd.org/dataoecd/16/50/2390377.pdf>.

<sup>243</sup> See *Foreign Corrupt Practices Act: Hearing Before the H. Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) [hereinafter *2011 FCPA Hearing*] (statement of Rep. James Sensenbrenner, Chairman, Subcomm. on Crime, Terrorism, & Homeland Sec.).

<sup>244</sup> *Id.* at 3 (statement of Rep. Bobby Scott, Member, Subcomm. on Crime, Terrorism, & Homeland Sec.) (“[R]ecommendations for amending the law include having the ability to cite a company’s compliance program as an affirmative defense against criminal liability.”).

<sup>245</sup> Lanny A. Breuer, Assistant Att’y Gen., Address at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) (transcript available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>).

<sup>246</sup> See, e.g., Letter from U.S. Chamber of Commerce et al., to Lanny A. Breuer, Assistant Att’y Gen., and Robert Khuzami, Dir. of Enforcement, SEC (Feb. 21, 2012), available at [http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12\\_4\\_.pdf](http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12_4_.pdf) (outlining specific areas for FCPA reform on behalf of over “three million businesses and organizations”); Mike Koehler, *DOJ Guidance – Better Late Than Never, but Will It Matter?*, FCPA PROFESSOR (Nov. 10, 2011), <http://www.fcraprofessor.com/doj-guidance-better-late-than-never-but-will-it-matter>; Michael Volkov, *FCPA Guidance: Asking DOJ for the Impossible?*, JD SUPRA (Mar. 22, 2012), <http://www.jdsupra.com/post/documentViewer.aspx?fid=bfca1f31-0862-4ee0-9c08-eed1a1b83f19>.

<sup>247</sup> In November 2012, the DOJ and SEC together finally issued new FCPA guidance. See FCPA RESOURCE GUIDE, *supra* note 14. This guidance document, while helpful, retains the articulation of the facilitation payment exception previously discussed in this paper. See *id.* at 25-26. It also retains the *Kozeny* standard for extortion. See *id.* at 27. Accordingly,

In determining fines and settlement offers, the SEC and DOJ currently look to the Federal Sentencing Guidelines for mitigating factors.<sup>248</sup> The Guidelines use a point system, and contemplate increased or reduced culpability depending on certain types of conduct.<sup>249</sup> For example, if a corporation’s high-level personnel were aware or willfully ignorant of the conduct, an increased penalty is warranted.<sup>250</sup> Conversely, if a company has an effective compliance program, and if it self-reports, cooperates, and accepts responsibility for its actions, points will be subtracted from the culpability score, and the penalty reduced.<sup>251</sup> The guidelines do provide some scope for corporations in structuring and reporting general FCPA compliance, but the code applies to a gamut of federal crimes, and provides no guidance at all on what specific conduct comes within the FCPA, including the facilitation payment exception. This Note proposes that the SEC and DOJ, as part of their forthcoming guidance and ideally after the statutory elimination of the exception, create a penalty scheme specifically tailored to FCPA violations, including a mitigation scheme for facilitation payments made under the threat of extortion. The guidelines should further feature a detailed description of conduct that constitutes “extortion” for the purposes of such payments.

To be sure, enforcement agencies almost certainly have some internal understanding of whether and how the size and circumstances of facilitation payments should be considered for purposes of prosecution and plea negotiations. Relegating the issue solely to the prosecutorial discretion of enforcement agencies, however, creates serious transparency problems, which are a major motivating factor behind calls for reform.<sup>252</sup> For this reason, this Note takes the position that the most important feature to the forthcoming guidelines, particularly regarding the facilitation payment exception, is that they be transparent.

There are two alternatives to handling the issuing of such guidelines. First, the guidelines could be promulgated as rules pursuant to § 553 of the Administrative Procedure Act (APA).<sup>253</sup> Alternatively, the DOJ could issue

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the recommendations of this Note are still valid.

<sup>248</sup> See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2010); Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT’L L. & BUS. 303, 340 (1998).

<sup>249</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 248, § 8C2.5.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See, e.g., *2011 FCPA Hearing*, *supra* note 243, at 2 (complaining that “[b]usinesses that are trying to comply with the FCPA assert that the law is being enforced in a vague and impenetrable manner,” and commenting that “the absence of case law interpreting the breadth and scope of the FCPA inflates the [DOJ]’s prosecutorial discretion and confounds industries’ ability to conform to the law”).

<sup>253</sup> 5 U.S.C. § 553 (1946) (outlining the procedure for agency rulemaking, including a

such guidelines as non-binding administrative policy statements. The critical feature of either method, however, would be the involvement of regulated industries in the interpretation and clarification of what conduct constitutes extortion for purposes of mitigating penalties for illicit payments.

The most straightforward method of industry inclusion would be the promulgation of rules pursuant to § 553. The notice-and-comment procedure required by the APA would give interested industries and other parties ample opportunity to provide useful input as to what constitutes extortion, such that illicit payments may be necessary. A further advantage to notice-and-comment rulemaking from the industries' perspective is that the resulting guidance would be binding, and could not be repealed or amended short of another notice-and-comment period.<sup>254</sup> This would provide predictability in agency enforcement and limit prosecutorial discretion. From the perspective of the enforcement agencies, however, such rigidity might prove undesirable, as it hampers the agencies' capacity to adapt quickly to changing circumstances. Proponents of quickly and completely eliminating any form of illicit payment might similarly object to the binding nature of such a mitigation scheme. While the notice and comment procedure might limit the flexibility of the DOJ and SEC, however, it is nowhere near as cumbersome as creating full and multiple congressional amendments to the statute, and therefore constitutes a viable method for mitigating penalties assessed for payments made in extortionate circumstances, and clarifying the scope of such circumstances.

An alternative method for creating such guidelines would be for the DOJ and SEC to issue a policy statement describing the mitigated penalty scheme. Such a statement would not be binding, and would therefore provide enforcement agencies with greater latitude to react to changing circumstances in the global anti-bribery landscape. Due to the transparency concerns previously discussed,<sup>255</sup> however, it would be a mistake for the enforcement agencies to create such a statement unilaterally, without input from the regulated industries and other interested parties. To remedy this, the DOJ and SEC could conduct a notice-and-comment period outside the confines of § 553. Alternatively, the agencies could make use of other less formal but equally effective methods of soliciting industry input and making the guidelines a more collaborative project.<sup>256</sup> The advantage of promulgating such

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notice-and-comment-period requirement).

<sup>254</sup> See *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (explaining that "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" by § 553 notice and comment procedures).

<sup>255</sup> See *supra* note 252 and accompanying text.

<sup>256</sup> See, e.g., *Proposed Revisions to the Green Guides*, FED. TRADE COMMISSION, [http://www.ftc.gov/bcp/edu/microsites/energy/about\\_guides.shtml](http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.shtml) (last visited Dec. 23, 2012). The FTC's proposed revisions "were developed using information collected from three public workshops, public comments, and a study of how consumers understand certain

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guidelines as policy statements is increased flexibility; the agencies would not have to retract or amend a binding rule as the anti-bribery landscape changes.

Regardless of which method enforcement agencies choose to promulgate guidance in the absence of a statutory facilitation payment exception, transparency and flexibility are critical in easing out the exception, and putting the United States in a position to move forward with the rest of the world with the goal of ultimately eliminating such payments.

#### CONCLUSION

The advantages to the statutory elimination of the facilitation payment exception combined with agency mitigation are two-fold. First, the FCPA and the corporations bound by it would benefit from cohesion with the increasing number of anti-bribery regimes that lack a facilitation payment exception. On a broader normative level, the United States would no longer be sending the message that such payments are acceptable, in clear violation not only of current global legal trends, but the intent of the FCPA itself. Moreover, eliminating the statutory exception would mitigate the economic harms that result from facilitation payments, and ultimately diminish the demand for such payments.

Administrative guidelines will allow needed flexibility to American companies doing business in environments where demands for such payments may be extortionate. Allowing the agencies to promulgate such guidelines enables faster reaction to both global and corporate trends that would be impossible if a congressional amendment to the statute were necessary every time circumstances changed. Furthermore, inclusion of regulated industries and other interested parties in constructing the penalty mitigation scheme and defining what conduct is extortionate for the purposes of such payments will provide corporations with much-needed clarity, and increase the likelihood of creating an anti-bribery regime corporations can actually live with. Ultimately, such a scheme would increase compliance, reduce demands for payments, and promote a more effective global framework for fighting corruption.