

REMOVING THE FCPA FACILITATION PAYMENTS EXCEPTION: ENFORCEMENT TOOLS FOR A CLEANER BUSINESS AS USUAL

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I. INTRODUCTION

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.¹

This statement issued by Kenneth Clarke, the United Kingdom's Secretary of State for Justice, is a good reminder regarding who loses out when corrupt payments are permitted as a part of doing business.² We all do.³

Bribery of government officials is an issue the United States did not address with legislation until after 1852.⁴ Indeed, it wasn't until Theodore Roosevelt's administration started prosecuting a small number of Congressmen for taking bribes and kickbacks that national rancor over government corruption was finally met with action.⁵ The increasingly suspicious attitude toward domestic government officials carried forward through the 1970s and Watergate, and eventually culminated in the world's first major piece of international anti-corruption legislation, the Foreign Corrupt Practices Act (FCPA), in 1977.⁶

1. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING 2 (2010) [hereinafter MINISTRY OF JUSTICE], *available at* <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

2. *Id.* at 2–3.

3. *Id.*

4. JOHN T. NOONAN, JR., BRIBES 601 (1984).

5. *Id.* at 601–02.

6. *See id.* at 604 (explaining how U.S. society leading up to the 1970s was “drenched in the antibribery ethic,” making translation of tough domestic enforcement into internationally-focused legislation possible); Foreign Corrupt Practices Act of 1977,

The FCPA was a clear statement of leadership for the United States in the international fight against corrupt payments to government officials.⁷ Reflecting back on the passage of the FCPA, Andrew Pincus, General Counsel of the Department of Commerce, testified that:

[In 1977], the United States Congress passed the Foreign Corrupt Practices Act, becoming the first country to make it a crime for its citizens and companies to bribe the officials of another country. This was a courageous and farsighted action for our country to take, and one that reaffirmed our leadership in the regulation of international business practices.⁸

Despite the potential of the FCPA, it had “little to no effect in its first twenty-five years of existence.”⁹ This has changed dramatically, however, in the past decade.¹⁰ FCPA enforcement is rising significantly in terms of prosecutions, magnitude of fines, and number of deferred prosecution agreements (DPAs) entered into.¹¹

Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. § 78) [hereinafter FCPA].

7. See Eric Engle, *I Get By With a Little Help From My Friends? Understanding the U.K. Anti-Bribery Statute, By Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1176 (2010) (describing the FCPA as the most important legislation in the field of international bribery).

8. *The International Antibribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the Subcomm. on Finance and Hazardous Materials of the H. Commerce Comm.*, 105th Cong. 1 (1998) (testimony of Andrew J. Pincus, Gen. Counsel of the Dep't of Commerce).

9. Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439 (2010).

10. See Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 563 (2011) (charting general trend of ten DPAs per year in 2005 to an average of more than twenty through 2010); Thomas, *supra* note 9, at 449–50 (listing a rise in open FCPA investigations from three in 2002 to eighty-four by the end of 2007, along with a doubling of prosecutions from 2006 to 2007); BRUCE ZAGARIS, INTERNATIONAL WHITE COLLAR CRIME: CASES AND MATERIALS 114 (2010) (reporting more than one hundred open FCPA investigations by the end of 2007); Deferred Prosecution Agreement for U.S. v. Siemens Aktiengesellschaft, 08-CR-367-RJL (D.C. Cir. 2008), U.S. Dep't of Justice, (Aug. 28, 2012, 5:26 PM), <http://www.justice.gov/opa/documents/siemens.pdf> (including over \$448 million in criminal fines for FCPA violations).

11. Thomas, *supra* note 9, at 449 (listing a rise in open FCPA investigations from three in 2002 to eighty-four by the end of 2007, along with a doubling of prosecutions

Even though this is a step in the right direction with regard to prosecuting and preventing high value transactions “influencing any act or decision of a foreign official,” “small” or “routine” facilitation payments are still overlooked.¹² This is because an exception in the FCPA expressly allows for these.¹³ The United States has lost some of its global anti-corruption leadership status because of this exception, and it is time for an amendment to the FCPA removing it.¹⁴

Section II of this comment will address and explain facilitation payments and why it is no longer acceptable to regard them as a normal part of doing business. Section III briefly compares the FCPA’s facilitation payments exception with the conscious lack thereof in the U.K. Bribery Act 2010.¹⁵ It also reviews how the OECD has played a role in elevating this topic for debate with the Department of Justice and the public in general.¹⁶ Section IV looks at the current practical and theoretical arguments being made for and against allowing facilitation payments under the FCPA and advocates for prohibiting them. Most importantly, it analyzes the practical implications involved with enforcing a prohibition of facilitation payments under the FCPA and makes four recommendations which would aid in making a prohibition of facilitation payments under the FCPA more effective. Finally, the Conclusion to this Comment briefly compares the likely costs of anti-facilitation payment enforcement efforts with the benefits that stamping them out would achieve.

from 2006 to 2007).

12. 15 U.S.C. §§ 78dd-1(a-b), -2(a-b), -3(a-b) (2012).

13. *Id.*

14. 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).

15. See Bribery Act, 2010, 59 Eliz. 2, c. 23, § 6 (U.K.) (containing no exception for small or routine payments to low level foreign public officials) [hereinafter U.K. Bribery Act].

16. OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 50–52 (2010) [hereinafter OECD PHASE 3 REPORT].

II. FACILITATION PAYMENTS: THEORY AND PRACTICE

A. *Greasing the Wheels of Industry*

Facilitation, expediting, or so-called grease payments are payments made to government officials for the purpose of securing routine service.¹⁷ Such routine services are generally regarded as “ministerial,” or those for which the government official has no discretion.¹⁸ At bottom, though, these labels are nothing more than euphemisms for what they really are: bribery.¹⁹

“Facilitation payments are legal bribes—I mean it walks like a bribe, it talks like a bribe and it quacks like a bribe. Calling it something else does not mean it is not a bribe.”²⁰ Literally the only difference between these so-called “grease payments” and other bribes made to foreign officials is the fact that they are made in exchange for routine services that a foreign official is obligated to perform.²¹ The OECD has characterized the practice of making facilitation payments as “corrosive” for more than a decade now.²² Presumably this language is being used because facilitation payments undermine the effectiveness of anti-corruption measures aimed at other, larger corrupt payments. The “corrosive” buzzword has carried itself beyond the pages of the OECD convention now, with the United Kingdom’s former Director of the Serious Fraud Office (SFO)

17. See 15 U.S.C. §§ 78dd-1(a-b), -2(a-b), -3(a-b) (tying the identification of facilitation payments to performance of routine government action, a term defined in the Act and explored in this Comment.)

18. Kevin J. Harnisch et. al, *The Disappearing Exception for Facilitating Payments*, N.Y.L.J., Feb. 11, 2013, <http://www.friedfrank.com/siteFiles/Publications/NYJ%20-%20Harnisch-Witzel-Roth%20Feb%202013.pdf>.

19. Michael Volkov, *Facilitation Payments: Are They Legal Bribery?*, JD SUPRA LAW NEWS (July 20, 2012), <http://www.jdsupra.com/legalnews/facilitation-payments-are-they-legal-br-80864>.

20. *Id.*

21. See 15 U.S.C. §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A) (defining “routine governmental action” to include activities such as obtaining permits or licenses, processing visas or papers, and scheduling inspections).

22. OECD, Commentaries on Convention on Combating Bribery of Foreign Public Officials in Int’l Bus. Transactions, Art. 1, Nov. 21, 1997 [hereinafter OECD Commentaries].

(tasked with anti-bribery enforcement like the U.S. Department of Justice and Securities and Exchange Commission) using this word in speeches to attorneys about the subject.²³ He has stated: “These payments have a corrosive effect . . . Corruption becomes systematic and endemic in the society [in which facilitation payments are paid] and produces a culture in which others look for much larger bribes as well . . .”²⁴ Beyond the moral decay that facilitation payments cause among the front lines of government, law enforcement, and industry, is the other meaning of the word corrosive—that companies, taxpayers, and citizens can expect to pay more and more for the same government service they are already entitled to as long as grease payments are made.²⁵

Michael Volkov, a prominent attorney and frequent commentator in the area of corporate compliance, has said that nobody could argue against such an “idealistic goal” as “international prohibition of facilitation payments.”²⁶ Unfortunately, it is not that simple.²⁷ Apparently Volkov knows this, because he actually expresses the opinion that an outright prohibition of facilitation payments just is not enforceable.²⁸

By definition, facilitation payments are small, routine, and made to the likes of customs officials, police officers, inspectors, and other low-level government agents.²⁹ The practice of making routine payments is engrained in many cultures as a requirement to “lubricate the wheels that bureaucratic friction

23. GARY COLEMAN, BRIBERY ACT 2010 (2012), *available at* http://www.iaa.org.uk/media/82915/bribery_act_2010_-_g_coleman_-_feb_2012.pdf (quoting the former Director, Richard Alderman, using the word corrosive in reference to facilitation payments).

24. *Id.*

25. *See, e.g.*, TRANSPARENCY INT’L, ANNUAL REPORT 2011, 36, 39 (2011) [hereinafter TRANSPARENCY INT’L], *available at* <http://www.transparency.org/annualreport/2011> (describing how corrupt payments divert aid from the hands of the poor to the pockets of the powerful).

26. Volkov, *supra* note 19.

27. *See id.* (explaining that the ability to differentiate between discretionary and nondiscretionary decisions under the FCPA’s exception for facilitation payments is nearly impossible).

28. *Id.*

29. 15 U.S.C. §§78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A) (2012).

would otherwise grind to a halt.”³⁰ This is why finding ways to eliminate facilitation payments, while keeping the “wheels” of industry moving without grease, is such a challenge.³¹

B. Reasons Why Supplying Facilitation Payments Has Been Viewed as Necessary

When the FCPA was originally enacted in 1977, the U.S. government did not contemplate the degree to which American businesses would be placed at a disadvantage by its unique payment transparency requirements.³² Notably, most nations did not have comparable laws at the time and some even suggested that foreign bribes “be considered ordinary and necessary business expenses which received tax deductions.”³³ This early posture of international anti-corruption legislation highlights the fact that doing business in certain countries, without the ability to make facilitation payments was, and in some cases still is, viewed as impossible.³⁴

Two economists have grappled with what has come to be known as the “efficient grease” hypothesis, which deals with this line of thinking.³⁵ The major premise of this hypothesis is that “corruption can improve economic efficiency and that fighting bribery would be counter-productive.”³⁶ One economic study based on industry survey results and formulated to test this theory gives a somewhat surprising answer.³⁷ It found that

30. See Jordan, *supra* note 14, at 882 (quoting Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L L. 509, 517 (2010)).

31. *Id.*

32. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 507–08 (2d ed. 2001).

33. *Id.*

34. See generally Barry Vitou & Richard Kovalevsky, *The F Word*, THEBRIBERYACT.COM (Apr. 13, 2011), <http://thebriberyact.com/2011/04/13/the-f-word> (stating that Transparency International chapters expressed their concerns regarding the impossibility of a business situation where bribes are not allowed).

35. Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 7093, 1999), available at <http://www.nber.org/papers/w7093>.

36. *Id.*

37. *Id.* at 9–13, 15.

companies that pay bribes are actually faced with more, not less, costs and red tape associated with managing their business activity and relationships with foreign officials.³⁸

Despite facilitation payments being pronounced and proven theoretically inefficient in academic circles, it is likely that they will still appear very expedient to, for example, a project manager trying to unload crates of equipment at a foreign port or an executive trying to clear customs at a tiny third-world airport.³⁹ Indeed, among those nations that have already made the decision to prohibit facilitation payments in their anti-bribery legislation, there is recognition that enforcement and actual elimination of the practice will take a considerable amount of time and “sustained commitment to the rule of law.”⁴⁰

C. Companies Are Leading Governments

A benchmarking survey of seventy-six companies from around the globe, run by TRACE International, showcases some fascinating trends in the corporate attitude regarding facilitation payments.⁴¹ The findings of this survey reveal that seventy-six percent of responding companies believe “it is possible to do business successfully without making facilitation payments given sufficient management support and careful planning.”⁴² Furthermore, ninety-three percent of these respondents indicated that their jobs would actually “be easier, or at least no different, if facilitation payments were prohibited in every country.”⁴³ Nearly forty-four percent of the respondents

38. *Id.*

39. The expedience of making facilitation payments is evidenced in part by the need felt by many multinational corporations to address them explicitly in case studies and codes of conduct. *See, e.g.*, BP Global, *BP Code of Conduct*, 66 (2011), http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/C/Code_of_Conduct_2011.pdf (“Our employees or anyone acting for us must never offer, solicit, promise, give or accept a bribe, kickback or any other improper payment—including ‘facilitation’ payments.”).

40. MINISTRY OF JUSTICE, *supra* note 1, at 18.

41. TRACE, TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (2009) [hereinafter TRACE survey], *available at* <https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf>.

42. *Id.*

43. *Id.*

indicated that their corporation prohibits facilitation payments.⁴⁴ Perhaps these corporations are effectively implementing changes that legislators have failed to follow through on. Oil & gas companies are highly represented on this list,⁴⁵ which is noteworthy because, as one might suspect, the oil & gas industry carries the highest risk for anti-corruption scrutiny.⁴⁶ Corporate stances such as these, which prohibit making facilitation payments outright, are a step ahead of what the FCPA currently requires.⁴⁷

Jon Jordan, Senior Investigations Counsel with the FCPA Unit of the Securities and Exchange Commission (“SEC”), recently described how leaving the facilitation payments exceptions in the Act puts U.S.-based companies in an awkward position.⁴⁸ In particular, the fact that only five countries, including the United States, currently allow facilitation payments to foreign officials means that these corporations will risk facing prosecution for violations of either the host country’s laws, or laws of another country with extra-territorial jurisdiction, such as the United Kingdom.⁴⁹ The main thrust of Jordan’s conclusion is that if corporations continue to prohibit facilitation payments, as a practical matter, this part of the FCPA will be a “dinosaur remnant of a bygone era” and the United States will have lost its leadership position in combating foreign bribery.⁵⁰ Indeed, the fact that multinational corporations are gaining a reputation as the principal instrument in the struggle to eliminate facilitation payments is very positive.⁵¹ Nevertheless, it is still disconcerting that the FCPA, which started out challenging U.S.-based corporations in

44. *Id.*

45. *Id.* at 5.

46. See Colin R. Jennings, *Avoiding Criminal Liability for Corrupt Practices Abroad Through Effective Corporate Compliance*, 2011 WL 6740787, at *6 (reporting that the oil and gas sector alone has accounted for eighteen percent of all FCPA prosecutions so far).

47. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2012).

48. Jordan, *supra* note 14, at 881–82, 923–25.

49. *Id.* at 922–24.

50. *Id.* at 925.

51. *Id.* at 909.

the 1970s with the highest anti-bribery standards in the world, is now nearly irrelevant on the subject of facilitation payments.⁵²

III. A RECENT TIMELINE OF LEGISLATIVE APPROACHES

A. *The FCPA and its Exception Allowing for Facilitation Payments*

From its inception, the FCPA was drafted to strike a balance between cracking down on corrupt payments made to foreign officials aimed at securing business, while at the same time allowing small payments to foreign officials whose duties are “routine.”⁵³ The language of the exception reads as follows:

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to 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.⁵⁴

The definition of “routine governmental action” appears in section (f)(A–B):

(3)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with

52. Compare FOLSOM ET AL., *supra* note 32, at 506–07 (recounting the competitive disadvantage U.S. corporations originally faced upon enactment of the FCPA in 1977), with Jordan, *supra* note 14, at 925 (closing with the ironic fact that the United States is now “awkwardly criticized by the rest of the world” for not prohibiting facilitating payments in the FCPA).

53. 15 U.S.C. §§ 78dd-1(b), -1(f)(3)(A-B), -2(b), -2(h)(4)(A-B), -3(b), -3(f)(4)(A-B).

54. *Id.* §§ 78dd-1(b), -2(b), -3(b) (emphasis added).

contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.⁵⁵

One expert on international business transactions described this compromise with the simple remark: “how to write such law?”⁵⁶ How indeed? No definition or dollar threshold has been provided in the FCPA to guide what constitutes a facilitation or expediting payment outside of the new or continuing business description in (3)(B).⁵⁷ This line is blurry at best and not much help to corporate agents in practice.⁵⁸

The fact that the FCPA originally included an exception for facilitation payments is not nearly as noteworthy as the United States’ current status as one of only five countries that currently permits them.⁵⁹ This fact is especially ironic given the Congressional intent behind this exception as it was originally drafted.⁶⁰ Congress chose to distinguish grease payments from

55. *Id.* §§ 78dd-1(f)(3)(A-B), -2(h)(4)(A-B), -3(f)(4)(A-B).

56. FOLSOM ET AL., *supra* note 32, at 509.

57. 15 U.S.C. § 78dd-1(f)(3)(B).

58. *See* Volkov, *supra* note 19 (“The difference between a discretionary and a non-discretionary decision is almost impossible to define”).

59. Jordan, *supra* note 14, at 889; *see also* Thomas R. Fox, *The End of the FCPA Facilitation Payment Exception?*, FCPA COMPLIANCE AND ETHICS BLOG (Nov. 11, 2010, 9:26 PM), <http://tfoxlaw.wordpress.com/2010/11/11/the-end-of-the-fcpa-facilitation-payment-exception> [hereinafter Fox, *End of FCPA Facilitation Payment Exception*] (noting that although the United States, Canada, Australia, New Zealand, and South Korea permit facilitation payments, they are actually “illegal in every country in which they are paid”).

60. *See* Jordan, *supra* note 14, at 889–91 (describing how Congress deliberately distinguished facilitation payments from bribes through the original definition of “foreign official,” despite regarding facilitation payments as reprehensible).

bribes, rather than find a way to tackle the issue together with other corrupt payments.⁶¹

The FCPA has already been amended twice so far in its existence; first in 1988 to change certain definitions and add two affirmative defenses,⁶² and then in 1998 to harmonize it with the recommendations of the OECD Convention.⁶³ U.S. government employees, interest groups, and prominent attorneys in the corporate compliance arena have rightly raised the point that it is time for another amendment to the FCPA removing the exception for facilitation payments.⁶⁴ Australia, one of only four countries besides the United States that currently permits facilitation payments, is currently undergoing this same debate regarding its anti-bribery law.⁶⁵ The consultation paper that the Australian Government has launched shows a receptive attitude towards making this change.⁶⁶ By contrast, the U.S. government has shown just the opposite as of 2010.⁶⁷ Simply amending the FCPA to match

61. *Id.*

62. *Id.* at 884; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1416–19 (1988).

63. Jordan, *supra* note 14, at 884; International Anti-Bribery & Fair Competition Act, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

64. *See* Jordan, *supra* note 14, at 881, 922 (providing an insider's view and prediction as an attorney for the SEC, that the facilitation payments exception will soon be removed); Thomas R. Fox, *The End is Nigh for Facilitation Payments—Get Ahead of the Breeze*, FCPA COMPLIANCE AND ETHICS BLOG (Jan. 6, 2012, 1:31 AM), <http://tfoxlaw.wordpress.com/2012/01/06/the-end-is-nigh-for-facilitation-payments-get-ahead-of-the-breeze> [hereinafter Fox, *End is Nigh for Facilitation Payments*] (stating that one doesn't need to be a weatherman “to know which way the wind blows and the direction of that breeze you feel at your back about now is clearly running against allowing facilitation payments to continue”).

65. Fox, *End of FCPA Facilitation Payment Exception*, *supra* note 59; Public Consultation Paper, Australian Government Attorney-General's Department Criminal Justice Division, Assessing the 'Facilitation Payments' Defence to the Foreign Bribery Offence and Other Measures 1 (Nov. 15, 2011), <http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx> [hereinafter Public Consultation Paper].

66. Public Consultation Paper, *supra* note 65, at 1, 3–4.

67. *See* U.S. DEP'T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY 25 (2012) [hereinafter DOJ RESPONSE TO OECD], *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf> (announcing the United States' intention to maintain its facilitation

what the rest of the world's governments are doing is not the endgame, though. Most certainly, an amendment is a necessary step towards effective prevention of facilitation payments through enforcement and deterrence, but it is only a first step.

B. The OECD and the Global Attitude Shift Against Facilitation Payments

Originally, the Organisation for Economic Co-Operation and Development's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business was heavily influenced by the United States and closely tracked the policy goals of the FCPA.⁶⁸ Commentary 8 on the OECD Convention is a salient example of this.⁶⁹ It declares, with regards to facilitation payments:

Small facilitation payments do not constitute payments made 'to obtain or retain business or other improper advantage' [thus not a criminal offence under Art. 1 paragraph 1] . . . Such payments . . . are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. *However, criminalization by other countries does not seem a practical or effective complementary action.*⁷⁰

Perhaps this stance makes more sense when looking at how the OECD became more involved in the international anti-bribery scene in the 1990s.⁷¹ After passing the FCPA, the United States sought out partners in the international battle against corruption via the United Nations and was met with resistance.⁷² The OECD, however, was an ideal platform for the United States to partner with during this time, because it

payments exception despite the OECD's recommendations).

68. Engle, *supra* note 7, at 1178.

69. OECD Commentaries, *supra* note 22, § 8.

70. *Id.* (emphasis added).

71. See ZAGARIS, *supra* note 10, at 114–15 (explaining how the United States used the OECD as its vehicle to expand anti-bribery efforts to other countries after being rebuffed by the United Nations).

72. *Id.* (explaining that the FCPA was enacted in 1977, and that disagreements with developing nations precluded an agreement in 1981).

consisted of a smaller subset of like-minded countries, compared to the United Nations.⁷³ It is natural and expected then, that the OECD's earlier efforts would bear the marks of American policy influence, including an exception for facilitation payments.⁷⁴

There has been a drastic change in attitude and action against foreign bribery and corruption in the decade since the OECD Convention was passed.⁷⁵ Having an exception for facilitation payments or not addressing them at all may have been the norm in 1997, but as the likes of compliance practitioners, such as Jon Jordan, Thomas Fox, and TRACE International have pointed out, that is certainly not the case anymore.⁷⁶

In 2009, the OECD officially changed its stance and issued a set of recommendations to its member nations, urging them to review their anti-bribery legislation with an aim to combat facilitation payments.⁷⁷ Paragraph VI of the Recommendation is more aggressive than the original Comment 8 to the 1997 Convention.⁷⁸ Specifically, it states:

73. *Id.* at 115.

74. *Id.* at 116 (noting that the OECD Commentaries show that "small facilitation payments are not proscribed").

75. See generally TRANSPARENCY INT'L, <http://www.transparency.org> (last visited Jan. 8, 2014) (a non-profit watchdog and monitoring tool); TRACE INT'L, <http://www.traceinternational.org/Trace/about-trace.html> (last visited Jan. 8, 2014); WORLD-CHECK, <http://www.world-check.com> (last visited Jan. 8, 2014) (advancing anti-corruption efforts globally at the grassroots and corporate levels).

76. Jordan, *supra* note 14, at 920–21 (declaring "[m]ost of the civilized world no longer condones facilitation payments"); Fox, *End of FCPA Facilitation Payment Exception*, *supra* note 59, at 1–2; *Facilitation Payments: No Longer Business as Usual*, TRACE BLOG (Oct. 3, 2012), <http://traceblog.org/2012/10/03/facilitation-payments-no-longer-business-as-usual>.

77. OECD WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, IV–VII (2009) [hereinafter OECD WORKING GROUP ON BRIBERY], available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44176910.pdf>.

78. Compare OECD Commentaries, *supra* note 22 (providing that "[s]mall facilitation payments . . . are also not an offence"), with OECD WORKING GROUP ON BRIBERY, *supra* note 77 (encouraging companies to "prohibit or discourage the use of small facilitation payments").

RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

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.⁷⁹

The OECD ratcheted up the pressure once more in 2010, when it issued its "Phase 3 Reports" to member nations, including the United States.⁸⁰ This report makes specific recommendations regarding what each member country can do to improve the effectiveness of its fight against foreign bribery, including facilitation payments.⁸¹ The report to the United States was based on site visits.⁸² Once the site visits were completed, the report was issued to the DOJ, SEC, and FBI.⁸³ The more aggressive tone of the report appears in Paragraphs 72 and 73, where the OECD criticizes the DOJ guidance regarding what is and is not considered a facilitation payment under the FCPA, as simply "reproduc[ing] the text of the exception in the FCPA and the definition of a 'routine governmental action.'"⁸⁴

The DOJ largely ignored this criticism in its response to the report.⁸⁵ As a result, Jon Jordan and others have predicted a

79. OECD WORKING GROUP ON BRIBERY, *supra* note 77, at VI.

80. See OECD PHASE 3 REPORT, *supra* note 16, at 10 (noting that the report focuses on previous recommendations that have not been fully implemented and provides commentaries on matters that warrant further action).

81. *Id.* at 5.

82. *Id.* at 6.

83. See *id.* at 7, 10 (explaining that the three bodies participated in the visit, and that the report contains further recommendations for the United States).

84. *Id.* at 24.

85. See DOJ RESPONSE TO OECD, *supra* note 67, at 24–26 (reiterating examples of

tense standoff of sorts between the United States and the OECD.⁸⁶ The likely outcome would be either that the United States relents and removes the exception, or the OECD repeals Comment 9 to the Convention, effectively forcing the United States to drop out.⁸⁷

C. The U.K. Bribery Act 2010

The U.K.'s Bribery Act 2010 was passed on April 8, 2010, and officially went into effect in July of 2011.⁸⁸ It was the direct result of strong criticism aimed at the U.K.'s Serious Fraud Office in the wake of two recent events.⁸⁹ The first of those events was the eventual \$400 million (approx. £250 million) settlement entered into between BAE Systems, PLC and the U.K. and U.S. governments in 2010 for corruption charges in connection with securing defense contracts in Saudi Arabia.⁹⁰ The embarrassment behind this result was that the SFO decided to drop its investigation of BAE Systems (a British company) back in 2006, while the DOJ continued with seeing the matter through to a guilty plea.⁹¹

The other main catalyst behind the passage of the U.K. Bribery Act was the continuous barrage of criticism the U.K. received from the OECD over its previous patchwork of anti-bribery legislation.⁹² In contrast to the OECD's praise for the DOJ's enforcement efforts (facilitation payments exception notwithstanding), the corresponding OECD report to the United Kingdom, published in 2008, excoriated the British Government for "continued failure" to address and enforce its previous

"routine governmental action" and citing to the FCPA for guidance on the meaning of "routine governmental action").

86. Jordan, *supra* note 14, at 920.

87. *Id.*

88. Bribery Act, 2010, 59 Eliz. 2, (U.K.); Lee G. Dunst et al., *Hot Off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT'L 257, 261 (2011).

89. F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 3-4 (2010).

90. *Id.* at 3.

91. *Id.*

92. *Id.* at 3-4.

anti-bribery laws.⁹³

The U.K.'s response to these criticisms in the form of the U.K. Bribery Act is now widely regarded as the toughest piece of international anti-bribery and corruption legislation on the books today.⁹⁴ The main reasons why it is regarded as such are because it contains extensive extraterritorial jurisdiction provisions,⁹⁵ fewer affirmative defenses,⁹⁶ no exception for facilitation payments,⁹⁷ as well as treatment of even "passive" commercial bribery.⁹⁸ Lobbyists and commentators "quickly recognised that this law resembled the FCPA, but 'on steroids'" during the period leading up to the U.K. Bribery Act's effective date.⁹⁹

At the date of this writing, however, the U.K. Bribery Act has yet to land its first major conviction, and observers are already starting to express impatience, and even diminishing faith, in the SFO.¹⁰⁰ It is important to keep in mind, however, that the FCPA has been in place for thirty-five years, while the U.K Bribery Act has been effective for less than two.¹⁰¹ Waiting

93. Compare OECD PHASE 3 REPORT, *supra* note 16, at 5 (commending the United States for its fight against the bribery of foreign public officials), with Warin, Falconer & Diamant, *supra* note 89, at 5 (noting the OECD's heavy criticism of the United Kingdom's efforts).

94. See generally Mike Koehler, *The SFO Speaks*, FCPA PROFESSOR: A FORUM DEVOTED TO THE FOREIGN CORRUPT PRACTICES ACT (Oct. 15, 2010, 12:38 AM), <http://fcpprofessor.blogspot.com/2010/10/sfo-speaks.html> (providing excerpts from Richard Alderman's speech on the Bribery Act, including a promise that the Act will be "the toughest bribery legislation in the world, and it will be vigorously enforced"); Dunst et al., *supra* note 88 (describing the U.K. Bribery Act as the "highest common denominator" in anti-corruption regulation across the globe").

95. Dunst et al., *supra* note 88, at 260.

96. *Id.* at 260.

97. *Id.* at 272-73.

98. *Id.* at 260.

99. *Id.*

100. See, e.g., Volkov, *supra* note 19 (mocking the U.K. Bribery Act's "dormant existence" and describing its enforcement as being in a "moribund state"); Patricia Lee, *UK Bribery Act Sees No Prosecution One Year On But Compliance Efforts Heighten*, THOMSON REUTERS FOUND. (June 20, 2012, 12:45 PM), <http://www.trust.org/trustlaw/news/uk-bribery-act-sees-no-prosecution-one-year-on-but-compliance-efforts-heighten> (describing the promulgation of the U.K. Bribery Act as an "anti-climax" with no prosecution of individuals or corporations as of January, 2012).

101. The FCPA was passed in 1977. *Foreign Corrupt Practices Act: An Overview*,

for the SFO to start turning in the kind of results that have been achieved by the DOJ over the past decade under the FCPA leads to a very important comparison.¹⁰² Namely, that the U.K. Bribery Act is now regarded as the toughest piece of anti-bribery legislation in the world with a short, and so far toothless, enforcement record.¹⁰³ Meanwhile, the FCPA has been overtaken in legislative leadership, but has turned in an unsurpassed history of anti-corruption enforcement that even the OECD applauds.¹⁰⁴

It is this very comparison that leads the Author to advocate not only for a legislative amendment to the FCPA to prohibit facilitation payments, but also for an enhanced enforcement strategy to go along with it.

IV. RECOMMENDATIONS FOR AMENDING THE FCPA AND ENFORCING A PROHIBITION OF FACILITATION PAYMENTS

A. *Lex Non Curat De Minimis*

“*Lex non curat de minimis*, [t]he law pays no attention to

U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa> (last visited Jan. 8, 2014). The U.K. Bribery Act went into effect in July 2011. Dunst et al., *supra* note 88, at 261.

102. Compare U.S. DEP'T OF JUSTICE, U.S. RESPONSE TO PHASE 3 QUESTIONNAIRE, APP. B: U.S. FOREIGN BRIBERY ENFORCEMENT STATISTICS (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-b.pdf> (detailing the number of recent prosecutions under the FCPA), with Dunst et al., *supra* note 88, at 261 (describing the Bribery Act as the “highest common denominator” in anti-corruption regulation), and Volkov, *supra* note 19 (describing the “dormant existence” of the Bribery Act), and Lee, *supra* note 100 (comparing the differences in enforcement between the FCPA and the Bribery Act).

103. See Dunst et al., *supra* note 88, at 261 (describing the Bribery Act as the “highest common denominator” in anti-corruption regulation); Lee, *supra* note 100.

104. See McConnell, *supra* note 10, at 563 (charting general trend of ten DPAs per year in 2005 to an average of more than twenty through 2010); Thomas, *supra* note 9, at 449 (listing a rise in open FCPA investigations from three in 2002 to eighty-four by the end of 2007, along with a doubling of prosecutions from 2006 to 2007); Jordan, *supra* note 14, at 925 (concluding with the point that much of the world is now criticizing the FCPA as having lost its leadership position in legislative anti-bribery efforts); OECD PHASE 3 REPORT, *supra* note 16, at 5 (“The Working Group commends the United States for its visible and high level of support for the fight against the bribery of foreign public officials, including engagement with the private sector, substantial enforcement, and stated commitment by the highest echelon of the Government.”).

trifles,” runs the old adage.¹⁰⁵ This ancient, yet still prevalent attitude towards minor infractions, underscores a significant challenge behind any enforcement effort aimed at stamping out facilitation payments and other small bribes.¹⁰⁶ That challenge is proving, in economic terms at least, that making payments to government officials in exchange for services actually harms citizens or markets.¹⁰⁷ The “efficient grease” theory discussed *supra* is one modern manifestation of this challenge that has been disputed by academics.¹⁰⁸

Nevertheless, in the real world there is a dearth of sources that attempt to quantify the actual harm and effects of facilitation payments and other small bribes.¹⁰⁹ It is easy to pronounce the moral repugnancy of such payments in speeches, statements, or public relations materials.¹¹⁰ It is far more difficult, however, to make a case for dedicating time and resources to enforcing anti-bribery laws with hard facts and figures.¹¹¹ Because they are paid in cash to individual government officials, facilitation payments do not show up on financial statements unless voluntarily reported, and are otherwise very difficult to track.¹¹²

105. NOONAN, *supra* note 4, at 692.

106. *Id.* at 692–93 (explaining that in the absence of demonstrable harm, a small increase in the cost of government is legally insignificant).

107. *Id.* at 692–93.

108. See Kaufmann & Wei, *supra* note 35, at 1–2 (characterizing the “efficient grease” theory and noting that others have suggested similar theories).

109. See, e.g., NOONAN, *supra* note 4, at 692–93 (describing the harms of bribery in abstract terms, such as “defraud[ing] the people of honest government” and also asserting that in terms of what can actually be measured, “no one has ever demonstrated that a country with all kinds of reciprocal exchanges with officeholders, such as the United States, has had less goods and service distributed than a country such as—”); see TRANSPARENCY INT’L, *supra* note 25, at 70–73 (showing a selected list of bribery statistics for various countries including estimated number of people paying or accepting bribes, but no aggregate figures for market impact or other economic harm).

110. See, e.g., MINISTRY OF JUSTICE, *supra* note 1, at 2 (declaring that bribery blights lives, but providing no figures to show the magnitude of the problem).

111. See, e.g., DOJ RESPONSE TO OECD, *supra* note 67, at 20 (listing a variety of traditional and non-traditional sources that the DOJ uses to commence anti-bribery investigations, which does not include any mention of documented or perceived harms, or published statistics).

112. See John Rupp & Suzanne Siu, *Facilitating Payments: The Conundrum of International Anti-bribery Enforcement*, BREAKBULK, Jan.–Feb. 2013, at 42, 44, 46

None of these challenges should discourage Congress from joining the rest of the world by undertaking to prohibit facilitation payments and enforcing that prohibition.¹¹³ The DOJ has already demonstrated that it does not refuse to investigate corrupt payments because they are considered too small.¹¹⁴ The DOJ has also expressed in its response to the OECD Phase 3 Report that it does not rely solely on voluntary disclosures to initiate FCPA investigations.¹¹⁵

Investigations come to the attention of law enforcement from a wide variety of sources, including, but not limited to: corporate securities filings; suspicious activity reports from financial institutions; the media, including key word searches of the Internet; whistleblower complaints, including those pursuant to the Sarbanes-Oxley Act; *qui tam* and civil complaints; direct reporting to law enforcement by employees, customers, competitors, agents, and others; referral from other U.S. government agencies and their employees, including the various Inspectorates General; referral from state, local, and foreign law enforcement; referrals from international financial institutions such as the World Bank; reports through the “hotline” email address that allows reporting directly to the FCPA Unit

(noting that facilitation payments are made to government officials and that most facilitation payments are made in cash); *see also* DOJ RESPONSE TO OECD, *supra* note 67 (counting on companies to self-report facilitation payments in order for them to meet the facilitation payments exception, which implies that the DOJ would not otherwise have visibility of these transactions); *see generally* 15 U.S.C. § 78m(b)(2-5) (2012) (requiring issuers to accurately record all transactions, and imposing criminal liability for circumventing internal accounting control measures).

113. *Cf. Jordan*, *supra* note 14, at 907–08 (using two recent actions, *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004), and a deferred prosecution agreement with onshore drilling rig company Helmerich & Payne in 2009, discussed *infra* note 133, to show that the U.S. government already applies a very narrow view of what qualifies for the facilitation payments exception, against a broad overarching view of what constitutes a corrupt payment).

114. *See* DOJ RESPONSE TO OECD, *supra* note 67, at 25 (stating that “[s]mall payments, where they have been made to influence a discretionary action, have been prosecuted in the United States, as there is no minimum amount a bribe must reach in order to be within the purview of the FCPA” and then citing the *Helmerich & Payne* settlement as a prime example of this).

115. *Id.* at 20.

of the Fraud Section; *voluntary disclosures from companies*; and investigations derived from traditional law enforcement methods, including sting operations *The majority of investigations initiated by Department and the SEC were not the result of voluntary disclosures, but rather one of the other sources listed above.*¹¹⁶

The cases and tactics above demonstrate a track record of successful U.S. enforcement against small corrupt payments using information and evidence from sources outside of corporate self-reporting.¹¹⁷ It is also a strong indication that the U.S. government already has the enforcement tools necessary to close the narrow gap between the current view of the facilitation payments exception and outright prohibition by removing the exception.¹¹⁸ The Author's view is that the key is to prepare enforcement philosophies and resources in advance of such an amendment to the FCPA so that it is effective from the start.¹¹⁹

B. A Brief Look at Global Enforcement Philosophies

Before moving straight into a discussion of tangible actions the U.S. government can take to prevent facilitation payments, it is worth visiting some of the philosophical differences that differentiate the American approach to enforcing international law from its counterparts.¹²⁰ Observing these differences will help place enforcement recommendations within the context of mutual legal assistance, which is critical for obtaining evidence

116. DOJ RESPONSE TO OECD, *supra* note 67, at 20 (emphasis added).

117. See Jordan, *supra* note 14, at 907–08 (noting that both *United States v. Kay* and *Helmerich & Payne* concerned small payments that were originally thought to be facilitation payments); DOJ RESPONSE TO OECD, *supra* note 67, at 20.

118. See Jordan, *supra* note 14, at 907–08 (explaining the perceived narrowing of the facilitation payments exception and concerns that narrow interpretations of the exception will continue).

119. Cf. *supra* note 100 and accompanying discussion (relating to the fact that the U.K. Bribery Act with its outright prohibition of all bribes, including facilitation payments, has yet to see a successful prosecution more than a year after the law went into effect).

120. For a summary of how the American attitude (instrumentalism) towards enforcing international law differs significantly from other models, such as the European (normative) view, see ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 226–27 (2009).

and cooperation during international criminal proceedings.¹²¹

Painting with a broad brush, the historical approach to enforcement of international law from the American perspective has been characterized as “instrumentalism” or “positivism.”¹²² This philosophy views international law as a mode of cooperation between nations, not as authoritative law binding sovereigns.¹²³ On the opposite side of the spectrum are Europeans, who tend to view international law through more of a “normative” lens.¹²⁴ The normative philosophy regards international law as “constitutional,” or comprising certain values like human rights, which transcend interests of any home country.¹²⁵ This difference in philosophy is relevant in the context of anti-bribery enforcement because it explains, in part, why U.S. positions on transnational matters, including anti-bribery policy, tend to be different or unique.¹²⁶

Again, there is a not-so-subtle irony behind the fact that other nations have legislatively surpassed the United States in terms of prohibiting facilitation payments.¹²⁷ Comparing the relative effectiveness of U.S. enforcement measures against the lack of results obtained so far under the U.K. Bribery Act or the OECD’s recommendations compounds this irony.¹²⁸

121. See JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 830–31 (2d ed. 2005) (outlining the process by which the U.S. Attorney’s office handles letters rogatory, the discretion courts have to order testimony, and recognition of depositions and other forms of evidence obtained abroad under circumstances that may differ from those prescribed by state or federal rules of procedure).

122. POSNER, *supra* note 120, at 226.

123. *Id.* at 226.

124. *Id.* at 227.

125. *Id.* at 227.

126. See *id.* at 228 (predicting that the United States will continue to avoid being “constrain[ed] by . . . international legal norms, believing that it needs freedom of action in order to protect its interests and advance liberty and democracy around the world”).

127. See Jordan, *supra* note 14, at 925 (noting that U.S. efforts to establish an international anti-bribery regime have left it “awkwardly criticized by the rest of the world for its own anti-bribery deficiencies inherent in the facilitation payments exception”).

128. Compare *supra* note 10 and accompanying discussion (describing the enforcement track record of the FCPA and the upward trend in DPAs and investigations over the last decade), with Lee, *supra* note 100 (highlighting the fact that no prosecutions for facilitation payments or any other corrupt payments have been

Practitioners are already predicting that the United States will follow suit in prohibiting facilitation payments.¹²⁹ Despite its venerable history of enforcement, an amended FCPA will likely run into the same challenges in trying to stamp out facilitation payments that the U.K Bribery Act has so far.¹³⁰ That is why such an amendment to the FCPA must be accompanied by thoughtful, practical, and instrumental approaches to enforcement in order to be an improvement over the *status quo*.¹³¹ It is the Author's hope that real, measurable, progress in the area of preventing corruption down to the level of facilitation payments will come after this occurs.

C. A Practical Framework for Facilitation Payments Enforcement

This section of the comment contains four policy recommendations posited for use as anti-facilitation payment enforcement mechanisms. The first of these is to provide methods and incentives for companies to report individuals (foreign officials, political parties, or party officials) who request or demand facilitation payments.¹³² The second is to focus on the frequency of payments, as opposed to simply their monetary value.¹³³ Thirdly, prior to passing an amendment to the FCPA

completed yet under the U.K. Bribery Act), and DOJ RESPONSE TO OECD, *supra* note 67 (rejecting OECD's call to remove the FCPA's exception for facilitation payments).

129. Fox, *End of FCPA Facilitation Payment Exception*, *supra* note 59; Jordan, *supra* note 14, at 883, 920–22.

130. The Ministry of Justice has broadly addressed the challenges the U.K. Bribery Act has encountered. *See, e.g.*, MINISTRY OF JUSTICE, *supra* note 1, at 18 (equivocating about the difficulty that a prohibition of facilitation payments would impose “in some parts of the world and in certain sectors” and also expressing the view of the SFO that the eradication of facilitation payments is a “long term objective” that will require international cooperation between government officials, nations, businesses, and lobbies).

131. *Cf.* Volkov, *supra* note 19 (describing the current exception to facilitation payments as “almost unenforceable”); DOJ RESPONSE TO OECD, *supra* note 67 (differentiating excepted facilitation payments and illegal payments under the FCPA by whether or not a company has reported them—but if companies are not reporting these small cash payments, then how would the DOJ have visibility of them?).

132. This terminology follows that found in the FCPA for those who demand facilitation payments. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2012).

133. The DOJ has already indicated that “there is no minimum amount a bribe

that removes the facilitation payments exception, the DOJ and SEC should add investigators to their enforcement units who specialize in aiding companies that are confronted with demands for facilitation payments.¹³⁴ Lastly, the DOJ, the SEC, and the public should be reminded that a greater number of investigations would serve as a preventative measure, even if the majority of them do not result in prosecutions, DPAs, or fines.

First, as to avenues and incentives for reporting facilitation payment demands, the basic elements of self-reporting of bribery are already in place and can be adapted to self-reporting of facilitation payments.¹³⁵ It is questionable, however, whether the current passive reporting methods,¹³⁶ would work effectively for companies with personnel being put on the spot by armed

must reach in order to be within the purview of the FCPA". See DOJ RESPONSE TO OECD, *supra* note 67 (citing *Helmerich & Payne* to illustrate that penalization for even small payments is possible); see also Press Release, Dep't of Justice, *Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America* (July 30, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-741.html> (highlighting \$1 million settlement reached with drilling contractor *Helmerich & Payne* for making payments to Argentine and Venezuelan customs officials in order to pass non-regulation materials through customs and to reduce taxes and duties).

134. The SEC has already added a specialized unit for civil enforcement of the FCPA's accounting provisions. Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010) [hereinafter SEC Press Release], available at <http://www.sec.gov/news/press/2010/2010-5.htm>. The Fraud Section of the DOJ's Criminal Division handles criminal enforcement of the FCPA. 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 DOJ CRIMINAL DIVISION, FRAUD SECTION], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>; see also The U.S. Dep't of Justice, *Foreign Corrupt Practices Act: An Overview*, <http://www.justice.gov/criminal/fraud/fcpa> (last visited Jan. 8, 2014).

135. See U.S. Sec. & Exch. Comm'n, *Enforcement Tips and Complaints*, <http://www.sec.gov/complaint/tipscomplaint.shtml> (last modified May 12, 2011) [hereinafter SEC Enforcement Portal] (providing would-be whistleblowers with a "Tips, Complaints and Referrals Portal" which lists "Bribery of, or improper payments to, foreign officials" among other reportable offenses); see also DOJ CRIMINAL DIVISION, FRAUD SECTION, *supra* note 134 (posting a much more understated invitation to "Report a FCPA Violation via email to FCPA.Fraud@usdoj.gov" at the bottom of its website).

136. See SEC Enforcement Portal, *supra* note 135 (encouraging, but not soliciting, individuals to report fraudulent activity); DOJ CRIMINAL DIVISION, FRAUD SECTION, *supra* note 134 (offering, in a single sentence, the option to report FCPA violations).

officials demanding to get their palms greased in exchange for customs clearance, or even “protection” for people and assets.¹³⁷ What the Author proposes here goes beyond the current accounting provisions in the FCPA, which simply require companies to report transactions, including facilitation payments, to the SEC,¹³⁸ and which only apply to publicly traded companies (“issuers”).¹³⁹ Instead, this recommendation is for the SEC and DOJ to set up a reporting mechanism aimed at listing the identity of the foreign officials involved, in addition to the transaction itself.¹⁴⁰ Clearly, this goal would require significant cooperation between the DOJ, SEC, and foreign

137. See, e.g., Howard Sklar, *A Shell Game: When Reality Meets Bribery*, FORBES (Sept. 21, 2012, 4:03 PM), <http://www.forbes.com/sites/howardsklar/2012/09/21/a-shell-game-when-reality-meets-bribery> (using vivid examples like Colombian terrorists threatening to burn Chiquita’s banana fields, Niger Delta warlords threatening destroy Shell’s oil pipeline, or a Sudanese police officer with one hand on his gun and the other stretched out to illustrate that current bribery reporting methods to the SEC are not curtailing this practice, and could even be considered understandable in situations such as these).

138. See 15 U.S.C. § 78m(a), (b)(2) (2012) (requiring that accurate and fair reflections of transactions and dispositions of assets be reported to the SEC).

139. See DOJ CRIMINAL DIVISION, FRAUD SECTION, *supra* note 134, at 11 (“[A]ny company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer.”); 15 U.S.C. § 70m(b)(2).

140. The DOJ has recently signaled its intention of focusing on and prosecuting individuals after facing criticism from Congress for only pursuing corporate entities on FCPA violation charges. See Gibson Dunn, *2011 Year-End FCPA Update* 3 (Jan. 3, 2012), <http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf> (“[I]ndividual enforcement actions made good on promises that senior DOJ officials made to Congress in response to pointed criticism that DOJ was not doing enough to hold individuals accountable for FCPA violations . . .”). An attendant focus on the individuals receiving those bribes would be a natural extension of such efforts. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 4 (2010) [hereinafter Senate FCPA Enforcement Hearing] (statement of Greg Andres, Acting Deputy Assistant Att’y Gen., Criminal Div., Dep’t of Justice) (emphasizing that the DOJ is “also vigorously pursuing individual defendants who violate the FCPA, and we do not hesitate to seek jail terms for these offenders, when appropriate. The department has made the prosecution of individuals a critical part of its FCPA enforcement strategy. We understand well that it is an important and effective deterrent.”).

governments.¹⁴¹ Where feasible, the idea behind this suggestion is to have the SEC or DOJ collect complaints which identify officials by name from companies accosted for facilitation payments, and have them approach that official's government employer with the report.¹⁴² In those situations where it is feasible for a company to provide a positive identification of such a foreign official, this method of reporting would provide companies with another course of action besides simply paying the facilitation payment and tracking it in a separate account for the SEC.¹⁴³ The end goal is to work with foreign governments to secure punishment of the foreign officials requesting or demanding facilitation payments, as opposed to simply prosecuting the corporations or individuals making the payments.¹⁴⁴

The next suggestion that Congress, the DOJ, and the SEC should consider is working to track facilitation payments using

141. The DOJ and SEC already have a track record of working with foreign authorities on transnational anti-bribery enforcement, which could serve as a platform from which to launch this effort. *See, e.g.*, DOJ RESPONSE TO OECD, *supra* note 67, at 50 (describing the extent to which the DOJ already cooperates with other international authorities in terms of extraditions and mutual legal assistance); Senate FCPA Enforcement Hearing, *supra* note 140, at 9 (responding to questions about the level of cooperation with allies on "very large transnational [bribery] cases" and about how much success the United States has achieved in urging allies to step up their own enforcement efforts).

142. Presumably, this would take place through evidence sharing provisions in multilateral and bilateral agreements, tools the SEC already uses. DOJ RESPONSE TO OECD, *supra* note 67, at 50. *But see* Senate FCPA Enforcement Hearing, *supra*, note 140, at 20 (statement of Michael Volkov, Partner, Mayer Brown) (questioning the amount of cooperation and results currently being obtained through mutual legal assistance and treaties).

143. *See* Sklar, *supra* note 137 (advising companies confronted with potential safety concerns at the hands of foreign officials demanding facilitation payments to simply "make the payment" and keep a separate "extorted payments" account for reporting purposes).

144. This goal stems from the FCPA's blindness to the demand side of the bribery equation to date. *See* Bruce Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, FCPA PROFESSOR (Aug. 27, 2012), <http://www.fcpaprofessor.com/a-new-strategy-for-preventing-bribery-and-extortion-in-international-business-transactions> (making, among other more radical suggestions, a recommendation that "Congress should expand extraterritorial U.S. jurisdiction under the FCPA to prosecute foreign officials who solicit or demand unwilling payments if foreign governments are unwilling or unable to do so").

patterns such as frequency, rather than transaction value.¹⁴⁵ The DOJ has already signaled that it views facilitation payments to be “small,” and construes the language of the exception very narrowly.¹⁴⁶ Cases such as *United States v. Kay* have shown that transaction value is not the right distinction for defining a facilitation payment, even though it provides an example of how the DOJ would go about prosecuting them.¹⁴⁷ Monitoring transaction value alone can also lead to an over-reliance on voluntary self-reporting in order to maintain visibility of where corruption is happening.¹⁴⁸

Evidence obtained from self-reporting needs to be augmented by other enforcement techniques.¹⁴⁹ These techniques might include deploying agents to certain high risk areas, cooperative training with foreign governments to raise awareness of the issue, applying pressure on foreign governments when it is evident that non-discretionary services are being withheld, or “traditional law enforcement methods, including sting operations,” among others.¹⁵⁰ Admittedly, the challenge of gaining visibility of small routine facilitation payments is not easily dismissed.¹⁵¹ Nevertheless, an integrated

145. The definition of “routine government action” in the FCPA’s facilitation payments exception itself shows that Congress knows where and how these payments take place. 15 U.S.C. § 78dd-1(f)(3).

146. DOJ RESPONSE TO OECD, *supra* note 67, at app. H 1.; Jordan, *supra* note 14, at 907.

147. The Fifth Circuit held that the routine government action exception applied to only certain categories, such as scheduling an inspection or documentation required to do business. *See* Jordan, *supra* note 14, at 907–08 (citing *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004)).

148. *See* Senate FCPA Enforcement Hearing, *supra* note 140, at 8 (statement of Greg Andres) (noting that “many of [the DOJ’s] cases rely on self-disclosure and cooperation of corporations, and we encourage that”). *But see id.* at 16–18 (statement of Michael Volkov) (highlighting the negative impact that lack of clarity is having in the corporate world, and how that leads to a constraint in the amount of self-reporting that takes place).

149. *See* DOJ RESPONSE TO OECD, *supra* note 67, at 20 (presenting a list of enforcement methods that appears to be highly biased towards receiving reports from various sources, even if not a voluntary self-disclosure).

150. *Id.*

151. *See* Volkov, *supra* note 19 (reminding readers that the current facilitation payment exception in the FCPA is “almost unenforceable”, which is noteworthy given this exception requires self-reporting in order to be available as a defense).

approach involving ground-level enforcement work,¹⁵² cooperation from foreign governments,¹⁵³ and a growing list of corporate heavyweights becoming increasingly hostile towards having to make facilitation payments,¹⁵⁴ is bound to make a material impact in the fight to reduce and eliminate the practice.¹⁵⁵

Third, the DOJ and SEC need to prepare for the passage of an amendment to the FCPA removing the facilitation payments exception by setting up a facilitation payments task force in advance.¹⁵⁶ Failure to support these new enforcement efforts with dedicated resources could easily render such an amendment largely symbolic and ineffective until the matter is fully addressed later on.

Placing specialized facilitation payment teams in the SEC Division of Enforcement and the Fraud Section of the DOJ's Criminal Division would help focus attention on this problem.¹⁵⁷

152. This would include deployed agents or sting operations. DOJ RESPONSE TO OECD, *supra* note 67, at 20.

153. There is an opportunity to take advantage of the recent cooperative momentum gained in anti-bribery enforcement in "very large transnational cases" such as *BAE Systems* or *Siemens*, and seek to apply it in the area of facilitation payments, especially since the OECD is already urging the United States to do just that. Senate FCPA Enforcement Hearing, *supra* note 140, at 9 (statement of Greg Andres); OECD PHASE 3 REPORT, *supra* note 16, at 51.

154. See TRACE Survey, *supra* note 41, at 2, 8, 16 (displaying survey data concerning companies policies towards facilitation payments); Jordan, *supra* note 14, at 922–24 (noting that eighty percent of domestic companies have banned facilitation payments, and providing reasons why more may soon follow suit).

155. Authorities have already publicly stated that the "eradication of facilitation payments" is indeed a "long term objective" requiring extensive collaboration, rather than an instant or total solution. MINISTRY OF JUSTICE, *supra* note 1, at 18.

156. It stands to reason that a transition from the DOJ issuing guidance on the facilitation payments exception as an affirmative defense to the public, to actually focusing on making facilitation payments a crime, will require special and focused effort. DEPT OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 25–26 (2012), <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

157. Looking at the lists of publicly released DOJ and SEC investigations show two main things. First, that a majority of these cases carry multi-million dollar fines, and second, that they have greatly ramped up within the past ten years, showing significant results. See, e.g., McConnell et al., *supra* note 10, at 560–61 (providing a long list of companies that have entered into deferred prosecution agreements from 2005 to 2010 due to increased enforcement effort); see also Dunn, *supra* note 140 (charting marked increase in DOJ and SEC enforcement activity and highlighting several high dollar

The need for this kind of focused attention is readily apparent when considering that more “egregious” forms of headline-grabbing corruption aimed at securing business advantage are the top priority for these agencies.¹⁵⁸ The DOJ has proven that it is able to track small facilitation payment activity,¹⁵⁹ so there is hope for credible results if and when this actually does become a priority.

Lastly, the DOJ, the SEC, and the public should be reminded as part of an FCPA amendment effort, that a greater number of investigations would serve as a powerful deterrent.¹⁶⁰ The OECD Phase 3 Reports, U.K. Bribery Act, other recent pieces of international legislation, and recent corporate compliance surveys collectively demonstrate that there is a pronounced anti-bribery culture change in the works.¹⁶¹ This culture change includes prohibiting facilitation payments as a centerpiece, even though the United States has chosen not to do so yet.¹⁶²

Logically, augmenting current enforcement efforts with a high number of facilitation payment investigations would serve other purposes besides deterrence.¹⁶³ It would also provide greater incentive for companies to begin presenting a more uniform face of rejection to those officials who demand

headline-grabbing investigations).

158. See Dunn, *supra* note 140, at 1–4 (discussing the outstanding 2011 enforcement statistics and the current enforcement trends).

159. DOJ RESPONSE TO OECD, *supra* note 67, at app. H.

160. The specter of looming investigations is particularly important with regard to potential prosecution of individuals, in addition to corporate fines. Senate FCPA Enforcement Hearing, *supra* note 140, at 4–5 (statement of Greg Andres).

161. See, e.g., Jordan, *supra* note 14, at 898–919 (providing a chronological summary of how these entities have all contributed to clamping down on international bribery); *Facilitation Payments*, SERIOUS FRAUD OFF. (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx> (describing the Bribery Act).

162. In recent years, the United States has been moving towards limiting or removing altogether the FCPA exceptions, but for the time being, its exceptions allow facilitation payments to continue. See Jordan, *supra* note 14, at 916–18.

163. Besides deterrence, U.S. policy also includes freezing assets acquired in corrupt transactions, fostering corporate compliance programs, multilateral engagement, and disabling “kleptocrats,” among other goals, all of which start with investigations. DOJ RESPONSE TO OECD, *supra* note 67, at 15–16.

facilitation payments.¹⁶⁴ At bottom, the goal is to place companies in a position where rejecting facilitation payments is not only feasible, but is also preferable to the current procedure of seeking advisory opinions or trying to fit transactions within a “very narrow” exception.¹⁶⁵

V. CONCLUSION

Facilitation payments are a previously ignored subset of the more than \$1 trillion in bribes made globally each year, representing a staggering three percent of the world’s economy.¹⁶⁶ Though facilitation payments are an undefined subset of this sum, their curtailment represents a huge prize in the global fight against corruption.¹⁶⁷ The Author joins other voices who are advocating for and predicting an amendment to the FCPA that removes the facilitation payments exception.¹⁶⁸ More importantly, however, Congress needs to make sure that the DOJ and the SEC are adequately prepared to start policing facilitation payments in order for such an amendment to be meaningful.

When commenting on the phenomenal growth in FCPA enforcement in the past decade during a Senate hearing, Assistant Professor of Business Law, Mike Koehler of Butler University attributed this success in large part to one man:

The individual perhaps most qualified to answer the question of why we are in a new era of FCPA enforcement and why FCPA enforcement has materially

164. See Jordan, *supra* note 14, at 922–25 (providing advice to companies to put policies and procedures in place for outlawing facilitation payments in advance of a predicted FCPA amendment and enforcement actions).

165. See *id.* (listing reasons why under current rules and practices, it is becoming impractical to use the FCPA exception); Volkov, *supra* note 19 (advising companies to do the opposite of what other anti-corruption law practitioners urge, and continue making facilitation payments due to the vague and “almost unenforceable” nature of the current facilitation payments exception in the FCPA).

166. See Senate FCPA Enforcement Hearing, *supra* note 140, at 4 (citing World Bank estimates on bribery statistics).

167. *Id.* Although small facilitation payments made in cash are difficult to track and report, nearly any fraction of \$1 trillion amounts to a very significant sum.

168. Fox, *End of FCPA Facilitation Payment Exception*, *supra* note 59; Fox, *End is Nigh for Facilitation Payments*, *supra* note 64; Jordan, *supra* note 14, at 920–22.

changed during the past six years is Mark Mendelsohn. Between 2005 and April 2010, Mendelsohn was the Deputy Chief of the DOJ Fraud Section and the person “responsible for overseeing all DOJ investigations and prosecutions under the FCPA” during the period of its resurgence . . . In a recent interview with “The Boardroom Channel” Mendelsohn was asked about the increase in FCPA enforcement actions and candidly stated that “*what’s really changed is not so much the legislation, but the enforcement and approach to enforcement by U.S. authorities.*”¹⁶⁹

In conclusion, another such “period of resurgence” is needed for the FCPA in regards to facilitation payments. Mr. Mendelsohn’s remark states loud and clear that enforcement action is what it takes to achieve new results against international bribery, not just legislative amendments.¹⁷⁰ Enforcing a prohibition on facilitation payments will take a tremendous and worthwhile investment in time and resources from Congress, the DOJ, the SEC, foreign governments, executive boards, and corporate personnel from end to end on the supply chains they manage—all the way down to the freight forwarder and the customs official. Making this effort would show the rest of the world that business as usual does not need to include grease payments. The end result should be an integrated and distinctly American approach to putting a stop to facilitation payments with no weak links, supported from the very top.

169. Senate FCPA Enforcement Hearing, *supra* note 140, at 57 (emphasis added).

170. *Id.*