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Expert Analysis

Internationalizing the FCPA: Ending The Facilitation Payments Exception And U.S. Anti-Corruption Hypocrisy

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The Foreign Corrupt Practices Act's "facilitation payments" exception has moved the FCPA further away from current international standards that almost universally prohibit acceptance of such payments. The facilitation payments exception no longer has any reasonable justification in the modern global anti-corruption climate. Instead, it puts the United States in a hypocritical position in which it arguably leads the world in anti-corruption enforcement efforts yet allows vaguely defined "facilitation payments" — which by all characteristics resemble the payments that the law prohibits — and thereby undermines those very enforcement efforts and the moral high ground the U.S. has otherwise achieved to date.

The FCPA should be amended to eliminate the exception entirely in order to clarify the statute and U.S. enforcement policies and to bring the FCPA in line with international anti-corruption norms.

THE ORIGIN OF THE FACILITATION PAYMENTS EXCEPTION

In 1988, amid pressure from U.S. businesses complaining that they were disadvantaged and unable to compete in a global market in which their competitors were not subject to (or simply ignored) anti-bribery laws, Congress amended the then 11-year-old FCPA to permit certain payments to foreign (non-U.S.) government officials in connection with "routine governmental action." These statutorily excepted bribes are known formally as "facilitation payments" and are often described more anecdotally as "grease payments." With the 1988 amendment, Congress codified the only exception to bribery of a foreign government official under the FCPA.

Much has changed in the intervening 22 years. The 1980s business landscape, where foreign corporations were able to operate with impunity and in which the facilitation payments exception was (at least) arguably justified, is unrecognizable today.

Since 1988, and particularly since the emergence of the digital age, the world has undergone an incredible transformation in which business has become truly globalized and companies operate seamlessly in multiple nations in every continent around the world. As a consequence, within the past decade, this globalization of the world's businesses has required that nations join forces to combat increasingly obvious and rampant corruption.

As part of the global backlash against ubiquitous corruption, since the late 1990s, several international anti-corruption conventions were signed and ratified by dozens of nations, domestic anti-bribery laws were promulgated in nations in some of the world's most corrupt regions, and serious enforcement efforts rapidly escalated on an international scale.

The United States quickly distinguished itself through its rabid enforcement of the FCPA, and while it is still the clear leader in today's anti-corruption enforcement charge, the underlying hypocrisy of the facilitation payments exception, shed by the overwhelming majority of laws around the globe and the recently enacted U.K. Bribery Act 2010, threatens to undermine much of that hard-fought status.

There can be no question that the facilitation payments exception compromises U.S. anti-corruption efforts and deprives the FCPA of both consistency and coherence. The only real solution is for Congress to excise the facilitation payments exception and bring the FCPA into compliance with current international anti-corruption standards.

OVERVIEW OF THE FCPA

After the Watergate scandal in the early 1970s, a number of U.S. companies were accused of regularly making illegal domestic campaign contributions. Further investigations by the Securities and Exchange Commission revealed that U.S. companies were also paying large sums of money to foreign government officials in return for their assistance in obtaining or retaining government business or getting other favorable treatment. The FCPA was the U.S. government's response to these corrupt practices.

Generally, the law makes it a federal criminal offense for any U.S. person, issuer or domestic concern, or any foreign person while in the United States, directly or indirectly, to make a corrupt payment to any foreign government official to obtain or retain any business advantage.¹ The FCPA also requires companies with securities registered under the Securities Exchange Act of 1934 to make and keep appropriate books and records and to maintain a system of adequate internal controls.²

THE BIRTH OF THE FACILITATION PAYMENTS EXCEPTION

When the FCPA was passed in 1977, it contained an exception that permitted payments to foreign government officials who occupied positions that were "essentially ministerial or clerical."³ However, it was difficult, if not impossible, for companies

to be certain that a particular official occupied a qualifying “ministerial or clerical” position, and thus the exception was of limited use (if any at all).

In addition, U.S. companies expressed frustration with their inability to compete with foreign companies that were not similarly restricted by anti-corruption laws. Thus, to alleviate these concerns, Congress passed the 1988 amendment, which created the “facilitation payments” exception as it exists today.⁴

The FCPA expressly immunizes from prosecution any “facilitating or expediting payment to a foreign government 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.”⁵ The exception only applies when the payment has no impact on a discretionary decision by the recipient to award new business or continue existing business.⁶

In an attempt to provide some guidance, the statute includes a list of examples of “routine governmental actions” that are “ordinarily and commonly performed by a foreign official” in:

- Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country.
- Processing governmental papers, such as visas and work orders.
- Providing policing protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country.
- Providing phone service, power and water supplies, loading and unloading cargo, or protecting perishable products or commodities from deterioration.
- Actions of a similar nature.⁷

The sparse case law precedent addressing the scope of the facilitation payments exception has made it clear that the exception is extremely narrow. In *United States v. Kay*, the 5th U.S. Circuit Court of Appeals agreed with the U.S. Justice Department’s position that the exception was limited, holding that qualifying payments fell into “very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.”⁸

THE RECENT ANTI-CORRUPTION REVOLUTION

Although the FCPA had been virtually ignored as a meaningful enforcement tool since its enactment in 1977, today the United States has pursued more anti-corruption prosecutions than any other nation. Between 2004 and 2009, the U.S. commenced 143 enforcement actions against companies and individuals, and there are presently over 140 open investigations of companies and individuals for potential FCPA violations.⁹

The U.S. government’s enforcement tactics continue to expand. In January 2010, for example, the first known undercover FCPA sting operation resulted in the arrests of 22 corporate officers of various companies in the arms industry.¹⁰

The enforcement of anti-corruption laws generally, and of the FCPA in particular, has had a real and tangible impact on global business practices. The U.S. government

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imposed well over \$2.9 billion in penalties, fines and forfeitures in FCPA enforcement actions in the last three years alone.¹¹ Moreover, corporate officers are being charged for these crimes and sentenced to longer and longer prison terms. In one recent case, the offender was sentenced to 87 months behind bars with no possibility of parole.¹²

The Justice Department and SEC, along with the FBI, have continued to devote more and more resources to FCPA enforcement. As a consequence of these trends, U.S. and foreign businesses are expending unprecedented resources of their own in overhauling their anti-corruption compliance programs, conducting internal investigations, training personnel, and generally responding to palpable and overwhelming pressure to purge corrupt business practices both from within their companies and from the international business community at large.

Whether from a deep moral conviction or a desire to share in favorable headlines and vast financial recoveries, other nations with long-standing anti-bribery statutes have passed new laws that surpass the FCPA in both scale and scope.

Most notably, last year the British Parliament passed the Bribery Act, which will become fully effective and enforceable in April. The law constitutes a sweeping revision and expansion of the United Kingdom's anti-corruption legislation. It creates broad prohibitions on both public sector and commercial bribery for essentially any company or person with a connection to the U.K.¹³ Not surprisingly, among other differences with the FCPA, the Bribery Act does *not* recognize a "facilitation payments" exception.

Consistent with this trend, in October the anti-bribery working group of the Organization for Economic Cooperation and Development published its report on the United States' anti-corruption enforcement efforts under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹⁴

Although the report generally praised America's efforts, it specifically recommended that the U.S. government consider the views of private sector commentators who have criticized the lack of clarity and guidance with regard to the facilitation payments exception.

This suggestion follows on the heels of the OECD's November 2009 recommendation that noted the "corrosive effect" of facilitation payments, encouraged companies to prohibit such practices in their internal policies and urged all countries to raise awareness of their bribery laws in order to stop facilitation payments entirely.¹⁵

U.S. RESPONSE AND THE INHERENT DANGER OF MAINTAINING THE STATUS QUO

In May 2010 Assistant U.S. Attorney General Lanny A. Breuer, the head of the Justice Department's Criminal Division, said the facilitation payments exception was "worth discussing."¹⁶

"Facilitation payments — obviously this area is dynamic — so I don't rule that out," he added. "I'm not currently aware of any real movement to make that change here. I think as other countries' laws evolve and mature, ... I suspect over time, we too will be modifying our law."¹⁷

Of course, Breuer's comments ignore that other countries' laws have *already* evolved and matured. The only nations with statutes that specifically permit facilitation payments to foreign government officials are the United States, Canada, Australia, New Zealand and South Korea. No nation, however, expressly allows its *own* government officials to accept facilitation payments.¹⁸ Thus, the FCPA promotes a practice that is banned by the countries in which the practice would take place.

Moreover, although the OECD Convention still technically permits "small" facilitation payments, as noted above, the working group has now established a clear policy against the practice and actively promotes efforts to achieve its elimination.¹⁹ Other significant international conventions, including the United Nations Convention Against Corruption and the Inter-American Convention Against Corruption, provide no facilitation payments exception.²⁰

In September 2010 the U.K. Ministry of Justice published a "consultation paper" seeking public commentary about its Bribery Act. With the paper, the Ministry of Justice provided preliminary guidance about various aspects of the law. Noting that the OECD now recognizes the corrosive effects of facilitation payments, the paper stated:

Small bribes paid to facilitate routine government action — otherwise called "facilitation payments" *are likely to trigger the section 6 offence and the section 7 offence* (where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper).²¹

Taking dead aim at the FCPA, the Ministry of Justice further explained that "[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and business partners, and have the potential to be abused."²²

Echoing this comment, in October Richard Alderman, the director of the U.K.'s Serious Fraud Office (which will be responsible for enforcement of the Bribery Act), said "safe harbors" such as facilitation payments are worrisome because "[i]t's not long before the boundaries of the safe harbor are starting to be tested."²³

CORPORATE COMPLIANCE IMPLICATIONS AND TRENDS

The sea-swell of antagonism toward the facilitation payments exception does not end with governmental organizations and international bodies such as the OECD. Ironically, real frustration and criticism are now being voiced by the original intended beneficiaries of the exception: corporations operating abroad.

Despite the detail provided in the FCPA itself and the presence of case law warning that the exception is to be narrowly applied, the OECD working group recommended in its report that the U.S. government provide more guidance to assist the private sector by "clarifying the 'grey' areas ..., including what kinds of decision-making are discretionary and non-discretionary."²⁴

This recommendation was fueled by commentary that the working group received from private sector representatives who almost unanimously called for further guidance concerning the scope of the exception. According to the group's report, these pleas for guidance contrast sharply with the Justice Department's position that the scope of the exception is clear.²⁵

Although the FCPA suffers from vagueness and a lack of guidance with respect to the facilitation payments exception, the core problem is that the exception is simply no longer consistent with anti-corruption laws in almost every nation in the world. The conflict between the FCPA's facilitation payments exception and every nation's domestic anti-corruption laws has led more and more companies to implement "zero tolerance" policies against facilitation payments. Indeed, an October 2009 benchmarking survey by TRACE International found a "clear trend by corporations to ban facilitation payments, coupled with an awareness by survey respondents of the added risk and complexity presented by facilitation payments."²⁶

With the passage of the U.K. Bribery Act, the trend toward zero tolerance of facilitation payments in corporate policies will continue and likely escalate. As one example, in October Howard O. Weissman, vice president and associate general counsel for aircraft and defense manufacturing giant Lockheed Martin Corp., advised that in the wake of the Bribery Act, the company is "moving in the direction of a flat prohibition on facilitating payments, but continuing to make an exception for personal safety payments, where somebody's life or safety is endangered."²⁷

He added, "We want our people to be complying with the law everywhere. The facilitating payment exception has been narrowed over the years, and we want to go in the direction of the law."²⁸

THE FACILITATION PAYMENTS EXCEPTION SHOULD BE STRICKEN

Like Lockheed and other forward-thinking corporations, the United States must "go in the direction of the law" everywhere and repeal the facilitation payments exception. As both a signatory to the OECD Convention and a world leader in anti-corruption enforcement, the U.S. can no longer ignore the hypocrisy inherent in the continued presence of an exception that the OECD itself has deemed "corrosive" and that no nation tolerates for its own respective officials.

The facilitation payments exception causes actual harm and confusion in the public and private sectors without providing any real protection for companies doing business internationally. It also diminishes the positive impact that the FCPA and the United States' aggressive enforcement policy have otherwise had on corrupt business practices around the world.

It is time for Congress to recognize that, largely because of the United States' enforcement efforts, other countries' laws have in fact "evolved and matured" with exceptional speed. The 1988 justifications for the exception are long gone, and it is high time to eliminate the FCPA's unworkable facilitation payments exception. By doing so, the United States' anti-corruption crusade will be unencumbered by the weight of this outdated, largely unwanted and hypocritical law.

NOTES

- ¹ See 15 U.S.C. § 78dd-1(a); 15 U.S.C. § 78dd-2(a); 15 U.S.C. § 78dd-3(a).
- ² See 15 U.S.C. § 78m(b)(2)(A).
- ³ See *United States v. Kay*, 359 F.3d 738, 747 n.32 (5th Cir. 2004).
- ⁴ See generally *Kay*, 359 F.3d at 746-53 (discussing the legislative history of the FCPA and the 1988 amendment).
- ⁵ 15 U.S.C. § 78dd-1(b) and (f)(3).
- ⁶ 15 U.S.C. § 78dd-1(f)(3)(B).
- ⁷ 15 U.S.C. § 78dd-1(f)(3). Notably, although a payment that qualifies as a facilitation payment will be exempt from prosecution as an illegal bribe under the FCPA, companies that are issuers and subject to the accounting provisions nevertheless face liability if they fail to accurately record such payments in their books and records. See 15 U.S.C. § 78m.
- ⁸ *Kay*, 359 F.3d at 751.
- ⁹ Carrie Johnson, U.S. sends a message by stepping up crackdown on foreign business bribes, WASH. POST, Feb. 8, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/07/AR2010020702506.html>.
- ¹⁰ Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.
- ¹¹ In New Top Ten, Eight Are Foreign, <http://www.fcpablog.com/blog/2010/11/5/in-new-top-ten-eight-are-foreign.html> (Nov. 5, 2010).
- ¹² Press Release, U.S. Dep't of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>.
- ¹³ U.K. Bribery Act 2010 (c. 23), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.
- ¹⁴ Org. for Econ. Cooperation & Dev., Directorate for Fin. & Enter. Affairs, United States: Phase 3: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions (Oct. 15, 2010), available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf?contentId=46213842>.
- ¹⁵ See OECD Working Group on Bribery in Int'l Bus. Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, §§ VI, VII (Nov. 26, 2009, adopted Feb. 18, 2010 with amendments), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.
- ¹⁶ Christopher M. Mathews, *Breuer: FCPA Facilitating Payments Worth Discussing*, MAINJUSTICE.COM (May 26, 2010).
- ¹⁷ *Id.*
- ¹⁸ TRACE Int'l, TRACE Facilitation Payments Benchmarking Survey 2 (October 2009), available at <https://www.traceinternational.org/documents/FacilitationPaymentsSurveyResults.pdf>.
- ¹⁹ OECD, Directorate for Fin., Fiscal & Enter. Affairs, Convention on Combating Bribery of Officials in International Business Transactions, OECD Doc. DAF/IME/BR(97)20, Comment 9 (Dec. 17, 1997), available at <http://www.oecd.org/dataoecd/5/48/39360623.pdf>. Although Comment 9 of the OECD Convention Commentaries provides that such small payments do not constitute a violation, it also describes such payments as causing a "corrosive phenomenon" and suggests that domestic laws make such payments illegal.
- ²⁰ United Nations General Assembly, United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 31, 2003), available at <http://www.unhcr.org/refworld/docid/4374b9524.html>; Org. of Am. States, Dep't of Int'l Law, Inter-American Convention Against Corruption (Mar. 29, 1996), available at <http://www.oas.org/juridico/english/treaties/b-58.html>.
- ²¹ U.K. Ministry of Justice, Consultation on guidance about commercial organizations preventing bribery (section 9 of the Bribery Act 2010), CP11/10, 22-23 (Sept. 14, 2010), available at <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf> (emphasis added.). The consultation period ended Nov. 8, 2010.
- ²² *Id.* Facilitation payments were also prohibited under the United Kingdom's previous anti-bribery laws.

²³ Christopher M. Mathews, *SFO Director: No 'Safe Harbor' Under New U.K. Bribery Law*, MAINJUSTICE.COM (Oct. 20, 2010).

²⁴ OECD Phase 3 Report, Commentary, 24.

²⁵ *Id.*, para. 76.

²⁶ TRACE Survey, Introduction, 2.

²⁷ Aruna Viswanatha, *Lockheed Considers Ban on Facilitating Payments*, MAINJUSTICE.COM (Oct. 6, 2010).

²⁸ *Id.*



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