

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

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I. INTRODUCTION

On October 15, 2010, the Organisation for Economic Co-operation and Development (“OECD”), the leading economic organization of the world, issued a report on the United States criticizing its foreign anti-bribery policies regarding facilitation payments.¹ Facilitation or “grease” payments, small bribes designed to expedite the performance of routine governmental actions, have always been allowed under the United States’ foreign anti-bribery statute, the Foreign Corrupt Practices Act

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1. Org. for Econ. Co-operation and Dev. [OECD], *United States: Phase 3, Report on 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*, at 22-24, (Oct. 15, 2010) [hereinafter Phase 3 Report], available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf>. The Organisation for Economic Co-operation and Development (“OECD”) is an international organization consisting of thirty-three member countries with the mission of coordinating domestic and international policies in furtherance of providing a better world economy, promoting economic growth and development, and contributing to world trade. Information about the OECD, including its mission with respect to the world economy, is available at <http://www.oecd.org>.

(“FCPA”).² The OECD has also always allowed for “small” facilitation payments in its foreign anti-bribery treaty, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention” or “Convention”).³ But in November 2009, the OECD changed its tune and called on all signatory nations to the Convention to end the permissibility of “corrosive” facilitation payments in its Recommendation for Further Combating Bribery of Foreign Officials (“OECD Recommendation”).⁴ This call by the OECD placed it in disagreement with the United States over the issue of facilitation payments, and these divergent views came to a head in October 2010 when the OECD criticized the United States for its policies on facilitation payments in a report on the country’s implementation of the OECD Recommendation.⁵

The OECD’s recent actions, as well as other international non-governmental calls for ending facilitation payments, have put the United States under strong international pressure to change its policies regarding facilitation payments. This would require amending the FCPA to change or eliminate its controversial facilitation payments exception, a difficult

2. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78(a), (dd), (ff), (m) (2010)) [hereinafter FCPA]. See 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2010) (providing exceptions to the FCPA’s otherwise stringent prohibitions for “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 . . .”). Legislators and others often refer to small bribes acting as facilitation payments as “grease” payments as such payments are intended to “lubricate” the “wheels” that “bureaucratic friction would otherwise grind to a halt.” 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); see also H.R. REP. NO. 95-640, at 4 (1977) (explaining that the Unlawful Corporate Payments Act of 1977 did not extend its coverage to “so-called grease or facilitating payments”).

3. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997 (entered into force Feb. 15, 1999), 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention or Convention], at Commentary 9. The OECD adopted the OECD Anti-Bribery Convention in 1997. The Convention obligates signatory countries to enact domestic anti-bribery laws, similar to the FCPA, that criminalize the bribery of foreign officials. *Id.*, at art. 1.

4. See OECD Working Grp. on Bribery of Foreign Pub. Officials in Int’l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at 4 (Nov. 26, 2009) (amended Feb. 18, 2010) [hereinafter OECD Recommendation], available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C\(2009\)159/REV1/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(2009)159/REV1/FINAL&docLanguage=En) (recommending that “Member countries . . . undertake to periodically review their policies and approach on small facilitation payments . . . [and] encourage companies to prohibit or discourage the use of [such] payments . . .”).

5. Phase 3 Report, *supra* note 1, at 22-24.

task that would require congressional legislation at the very least.⁶ Nevertheless, a growing distaste for facilitation payments, both domestically and internationally, in the modern-day anti-bribery era has signaled that the time may be ripe for the United States to revisit seriously the facilitation payments exception and consider eliminating it.

This article will give a basic outline of the FCPA and the facilitation payments exception. The article will then explore the history behind the exception. The article will discuss the United States' pursuit of an international agreement prohibiting foreign bribery and the resulting OECD Anti-Bribery Convention. The article will then focus on international and domestic disdain over the issue of facilitation payments during the first decade of the Convention. Next, the article will consider the recent OECD Recommendation calling on the prohibition of facilitation payments and the OECD's recent criticisms of the United States with respect to its policies on facilitation payments. The author will then give his prediction that the facilitation payments exception will be eliminated. Finally, the author will provide his recommendation that domestic companies prohibit the use of facilitation payments in the current global anti-bribery environment.

II. THE FCPA

The FCPA was created in 1977 in response to findings by the United States Securities and Exchange Commission ("SEC") that numerous public companies had engaged in questionable payments overseas and falsified their accounting entries with respect to those payments in their books and records.⁷ The FCPA imposes civil and criminal liability for the bribery of foreign government officials, political party officials, and candidates for political office, in order to obtain or retain business.⁸ It also mandates certain accounting requirements for domestic and certain foreign

6. See *infra* note 223 and accompanying discussion.

7. See FCPA, *supra* note 2; see also H.R. REP. NO. 95-640, at 6-7 (1977) (noting that legislative proposals leading up to the passing of the Unlawful Corporate Payments Act of 1977 were based on an "extensive [report] . . . issued by the SEC on May 12, 1976 . . . [that] revealed the widespread nature of the practice of questionable corporate foreign payments."); S. REP. NO. 95-114, at 1-2 (1977) (indicating that the Unlawful Corporate Payments Act of 1977 was introduced at the request of the SEC, after it presented its findings of "widespread" payments that were "questionable or illegal"); see also SEC, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976) (submitted to the Senate Comm. on Banking, Hous., and Urban Affairs), at 2-3, 54-56 (describing how illegal corporate payments were first uncovered during the investigations of the Watergate Special Prosecutor in 1973, leading to the SEC's involvement, and concluding that "while the problem of [such] payments is both serious and widespread, it can be controlled . . .").

8. 15 U.S.C. § 78dd-1(a), -2(a), -2(g), -3(a), -3(e) (2010).

companies with securities publicly-traded in the United States, and requires them to report illicit payments.⁹ The FCPA was amended in 1988 to clarify some of its provisions in response to criticisms over the original statute.¹⁰ It was amended again in 1998 to conform to the OECD Anti-Bribery Convention.¹¹

The FCPA's provisions cover certain accounting requirements and anti-bribery prohibitions. The accounting provisions impose recordkeeping and internal controls requirements for companies that have a class of securities registered with the SEC or that are required to file reports with the SEC.¹² The anti-bribery provisions outlaw the bribery of foreign government officials for the purposes of obtaining or retaining business, directing business to another person, or securing any improper advantage.¹³

A. *The Accounting Provisions*

The FCPA's accounting provisions require that issuers, which are companies that have a class of securities registered with the SEC or that are required to file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls.¹⁴ The recordkeeping provision

9. 15 U.S.C. § 78m(b)(2) (2010).

10. The FCPA was amended as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, 102 Stat. 1107 (1988) [hereinafter 1988 Amendments]. This was signed into law on August 23, 1988.

11. The International Anti-Bribery and Fair Competition Act of 1998, signed into law on November 10, 1998, amended the FCPA to conform its provisions to the Convention. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) [hereinafter 1998 Amendments].

12. 15 U.S.C. § 78m(b)(2) (2010).

13. 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2010). The FCPA is both a civil and criminal statute, and part of it has been incorporated into the federal securities laws. As a result, the United States Department of Justice ("DOJ") is responsible for criminal enforcement of the FCPA and for civil enforcement of the anti-bribery provisions against non-issuers, and the SEC is responsible for all civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 395-96 (2010) (describing the DOJ's responsibility "for all criminal enforcement" of the statute and civil enforcement of the anti-bribery provisions against non-issuers subject to the FCPA, as well as the SEC's role in regulating issuers).

14. 15 U.S.C. § 78m(b)(2) (2010). "Issuers" are those companies that have a class of securities registered with the SEC or that are required to file reports with the SEC. 15 U.S.C. § 78(l)(g), (o)(d) (2010). This includes foreign companies that list American Depository Receipts ("ADRs") on a stock exchange. Section 13(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act") requires every issuer to keep accurate books and records and establish and maintain a system of internal accounting controls. 15 U.S.C. § 78m(b)(2) (2010). Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)"

requires that all issuers “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”¹⁵ The internal controls provision requires that issuers create a system of internal accounting controls that provide “reasonable assurances” that transactions are executed in “accordance with management’s general or specific authorization.”¹⁶ Civil liability will be found with respect to violations of these provisions, and criminal liability will also attach under these provisions when a person “knowingly” circumvents or fails to implement a system of internal accounting controls or “knowingly” falsifies the books and records.¹⁷

B. *The Anti-Bribery Provisions*

The FCPA anti-bribery provisions prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business, directing business to other persons, or securing any improper advantage.¹⁸ Specifically, the FCPA anti-bribery provisions prohibit: any issuer, domestic concern, or any person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing from using any means or instrumentality of U.S. commerce “corruptly” in furtherance of an offer, payment, or promise to pay, or authorization of the payment of anything of value to any “foreign official,” any foreign political party or party official, any candidate for foreign political office, any public international organization official, or any other person while “knowing” that the payment or promise to pay will be given to any of the foregoing for the purpose of influencing any act or decision of

of the Exchange Act. 17 C.F.R. § 240.13b2-1. Rule 13b2-2 “prohibits a director or officer of an issuer from making or causing to be made any materially false or misleading statement or omission in connection with any audit.” 17 C.F.R. § 240.13b2-2.

15. 15 U.S.C. § 78m(b)(2)(A) (2010). All transactions by issuers are covered under the recordkeeping provision, not just transactions that raise FCPA concerns.

16. 15 U.S.C. § 78m(b)(2)(B) (2010). The provision specifically requires that issuers “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; [and] (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.” *Id.*

17. 15 U.S.C. § 78m(b)(4), (5) (2010). Criminal liability will not flow from a violation of the accounting provisions absent this “knowingly” standard. *Id.*

18. 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2010).

that person in his or her official capacity, inducing that person to do or omit to do any act in violation of his lawful duty, securing any improper advantage, or inducing that person to use his influence with a foreign government to affect or influence any government act or decision; in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining business, or directing business to any person.¹⁹ The definition of “issuer” is the same as that under the FCPA accounting provisions.²⁰ The definition of “domestic concern” means any U.S. citizen, national or resident, as well as any corporation, partnership or association, regardless of whether they issue securities, which has its principal place of business in the United States or that is incorporated in the United States.²¹

There are two affirmative defenses to the FCPA anti-bribery provisions for certain types of payments. The first affirmative defense is when the payment at issue is lawful under the written laws of the relevant foreign officials’ country.²² The second affirmative defense allows for certain payments made for “reasonable and bona fide” expenditures.²³ Reasonable and bona fide expenditures include things such as travel and lodging expenses incurred by the foreign official and must be directly related to “the promotion, demonstration, or explanation of products or services,” or “the execution or performance of a contract with a foreign government or agency.”²⁴

III. THE FACILITATION PAYMENTS EXCEPTION

A. *Statutory Language of the Facilitation Payments Exception*

Of relevance to the subject matter of this article is the fact that there is

19. 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2010). There is both criminal and civil liability for violations of the anti-bribery provisions and the provisions have been incorporated into the federal securities laws as Section 30A of the Exchange Act. 15 U.S.C. § 78dd-1(a). The term “foreign official” means “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.” 15 U.S.C. § 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2010).

20. 15 U.S.C. § 78(l)(g) (2010); *see also supra* note 14 and accompanying discussion.

21. 15 U.S.C. § 78dd-2(h)(1) (2010). The FCPA’s anti-bribery provisions do not generally apply to foreign corporations unless some action in furtherance of the bribe occurs within the territory of the United States. *Dooley v. United Tech. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992).

22. 15 U.S.C. § 78dd-1(c)(1), -2(c)(1), -3(c)(1) (2010).

23. 15 U.S.C. § 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2010).

24. *Id.*

an exception to the FCPA anti-bribery provisions that permits so-called “facilitation” or “grease” payments to foreign officials for the purposes of expediting or securing the performance of a “routine governmental action.”²⁵ The term “routine governmental action” means any action that is ordinarily and commonly performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services.²⁶ More specifically, the statute itself defines “routine governmental action” as:

[A]n 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 contract performance or inspections related to transit of goods across the 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.²⁷

Payments made to expedite any of the basic services listed above or “of a similar nature,” are not considered violative payments prohibited by the FCPA.²⁸ However, what constitutes “actions of a similar nature” beyond the specific definition of the exception itself is uncertain. What is certain is that such actions cannot be related to the awarding of new business or continued business.²⁹ The FCPA specifically provides that:

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 to continue business with a particular party.³⁰

25. 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2010).

26. 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A) (2010).

27. *Id.*

28. *Id.*

29. 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B) (2010).

30. 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B) (2010) (internal quotations omitted). The DOJ has stated that “a determination of whether or not a payment is for ‘facilitation’ or is made with corrupt intent hinges upon whether the payment is made to obtain or retain business and whether it is routine in nature (such as connecting a phone) or discretionary (such as assessing a customs duty).” OECD Working Group on Bribery,

There are several important things to note about the facilitation payments exception and the exception's practical application under both domestic and foreign law. First, the facilitation payments exception applies only to the FCPA's anti-bribery provisions and not to the accounting provisions.³¹ Therefore, issuers that make facilitation payments, but do not properly record such payments in their books and records, will still be liable under the FCPA's accounting provisions.³²

Second, almost every country in the world, including the United States, outlaws facilitation payments under their respective domestic bribery laws.³³ This poses a unique problem since corporations making facilitation payments may be very hesitant to properly record such payments, because doing so would be essentially tantamount to confessing to bribes in violation of a relevant foreign jurisdiction's domestic bribery law. The making of facilitation payments thus creates a strong inducement for companies to conceal or falsify the true purpose of such payments in violation of the FCPA's accounting provisions. This leaves issuers who make facilitation payments with a Catch-22 every time that they do so. On the one hand, the issuers could properly record the payments in their books and records and run the risk of criminal liability under a relevant foreign jurisdiction's domestic bribery law. On the other, they could conceal or falsely record the payments in their books and records and run the risk of violating the FCPA's accounting provisions. Either way, it is a lose-lose situation.

Another important aspect of the facilitation payments exception is that

Response of the United States, Questions Concerning Phase 3, at 25 (May 3, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>. If a payment is made "to secure something to which the payor is entitled, as opposed to an act that is discretionary, it is more likely to lack the necessary *mens rea* to be a violation" of the FCPA. *Id.*

31. Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711, 725 (2008).

32. *Id.*

33. See Thomas Fox, *End of Grease Payments Coming*, CORP. COMPLIANCE INSIGHTS, Apr. 5, 2010, at 3 (reiterating that facilitation payments are illegal in all countries in which they occur); Melissa Aguilar, *New OECD Stance on Facilitation Payments*, COMPLIANCE WEEK, Dec. 18, 2009 (noting that facilitation payments "are illegal under local law in all of the countries in which they're paid"); TRACE, TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (2009) [hereinafter TRACE SURVEY] (describing how TRACE represents itself to be a non-profit, non-voting membership association "that pools resources to provide practical and cost-effective anti-bribery compliance for multinational companies"); see also www.traceinternational.org/about (indicating that TRACE is funded by membership fees from "member companies" (multinational corporations) and "member intermediaries" (commercial intermediaries used by multinational corporations such as agents, sales representatives, consultants or dealers)).

it is somewhat unique to the United States and the FCPA, and is not an exception under most foreign anti-bribery laws.³⁴ Only five countries in the world, including the United States, provide an exception for facilitation payments under their relevant foreign anti-bribery laws.³⁵ Therefore, domestic companies that make and properly record facilitation payments in compliance with the FCPA can still find themselves liable for such payments under some other country's foreign anti-bribery law.

B. History Behind the Facilitation Payments Exception

To understand the purpose of the facilitation payments exception and why it was created when it was, one needs to look at the legislative history behind the exception and the era in which it was created. In today's global anti-bribery environment, where few countries allow for facilitation payments, it is hard to understand why the United States created the exception in the first place. However, when one looks back at the international business climate during the time of the drafting of the FCPA, it is easy to understand why the exception was included and desired as part of the original statute.

1. Congress Creates the Facilitation Payments Exception in the Original FCPA

The original version of the FCPA enacted in 1977 provided an exception for facilitation payments, but it was very different from the exception as it exists today.³⁶ At the time, the exception existed through a combination of statutory language and legislative history indicating Congress's intent to specifically carve out an exception for so-called "grease" payments through the definition of a "foreign official."³⁷

a. The Facilitation Payments Exception's Original Existence under the Definition of a "Foreign Official"

In the original version of the FCPA, the facilitation payments exception existed through the definition of a "foreign official."³⁸ The

34. Low, Bonheimer & Katirai, *supra* note 31, at 725.

35. TRACE SURVEY, *supra* note 33, at 2.

36. H.R. REP. NO. 95-640, at 4 (1977); S. REP. NO. 95-114, at 10 (1977).

37. H.R. REP. NO. 95-640, at 4 (1977); *see also* Weinograd, *supra* note 2, at 517 (explaining that Congress created a legislative exception, distinguishing facilitating payments from bribes).

38. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL 30079, FOREIGN CORRUPT

definition of a “foreign official” at the time excluded those employees of a foreign government whose “duties” were essentially “ministerial or clerical.”³⁹ Thus, payments made to an official whose duties were “ministerial or clerical” would not be considered improper payments made to a “foreign official,” as prohibited by the FCPA.⁴⁰

The legislative history behind the drafting of the FCPA reveals that Congress intended to carve out an exception for facilitation payments through the definition of a “foreign official.”⁴¹ The House of Representatives’ Report into the legislation creating the FCPA (“House Report”) stated that the “bill’s coverage” did “not extend to so-called grease or facilitating payments.”⁴² To this end, the House Report stated that the bill’s language was “deliberately” drafted in a way, through the definition of a “foreign official,” so as to “differentiate” between payments prohibited by the FCPA and “grease payments” allowed under the statute.⁴³ The Senate Report on the original FCPA also indicated the same.⁴⁴ The Senate Report stated that the FCPA was supposed to cover “payments made to foreign officials for the purposes of obtaining business” and not to “cover so-called ‘grease payments.’”⁴⁵

PRACTICES ACT 2 (1999).

39. *Id.*

40. *Id.*; see also James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 5266, 1995) (noting the ministerial or clerical exception to the FCPA’s grease payment policy).

41. H.R. REP. NO. 95-640, at 4 (1977); S. REP. NO. 95-114, at 10 (1977).

42. H.R. REP. NO. 95-640, at 4 (1977).

43. *Id.* The House Report stated that by using the word “corruptly” in the FCPA, Congress had intended to “distinguish between payments which cause an official to exercise other than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.” *Id.* at 8. The House Report noted that through the definition of “foreign official” that Congress “emphasize[d] this crucial distinction” by excluding from the definition of a “foreign official” those government employees whose duties were of a “ministerial or clerical” nature. *Id.* The House Report stated that “[f]or example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill” and that it would also not reach “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.” *Id.*

44. S. REP. NO. 95-114, at 10 (1977).

45. *Id.* The Senate Report stated in this respect that the FCPA did not “cover so-called ‘grease payments’ such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.” *Id.*

*b. Congress's Acquiescence Towards "Reprehensible"
Facilitation Payments*

The legislative history behind the enactment of the FCPA provides an interesting glimpse into a Congress that created the exception for facilitation payments, despite its view that facilitation payments were "reprehensible."⁴⁶ Congress was concerned during the time of the drafting of the FCPA in the late seventies that facilitation payments appeared to be a part of doing business internationally and that unilaterally prohibiting domestic companies from making them, on top of the restrictions already imposed by the FCPA, would place them at a competitive disadvantage in the global marketplace.⁴⁷ This concern by Congress is best revealed in the following passage from a House Report:

While payments made to assure or to speed the proper performance of a foreign official's duties may be *reprehensible* in the United States, the [Congress] recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt *unilaterally* to eradicate all such payments.⁴⁸

This passage clearly indicates Congress's disdain for facilitation payments during the drafting of the FCPA, while also revealing its recognition that "unilaterally" prohibiting them would have harmed domestic companies and their ability to compete in the international marketplace.⁴⁹ In this respect, Congress appeared to acquiesce to the necessary evil of allowing for facilitation payments, given the burden already imposed on domestic companies as a result of the FCPA.⁵⁰

2. The 1988 Amendments Call on the United States Government to Pursue an International Anti-Bribery Agreement through the OECD

The FCPA was the subject of much criticism after the passage of the new statute.⁵¹ Many in the business community complained that the FCPA had put domestic companies at a disadvantage to their foreign competitors, since domestic companies could no longer pay the bribes often necessary to

46. H.R. REP. NO. 95-640, at 8 (1977).

47. *Id.*

48. *Id.* (emphasis by this author). The House Report then stated "[a]s a result, the [Congress] has not attempted to reach such payments." *Id.*

49. *Id.*

50. *Id.*

51. Weinograd, *supra* note 2, at 517.

land lucrative government contracts that their foreign counterparts could.⁵² Some also argued that this disadvantage resulted in a downturn in profitability for many domestic companies.⁵³ This led some critics to call for an international agreement with the world's industrialized countries that would impose on foreign companies the same kind of prohibitions that domestic companies were facing under the FCPA.⁵⁴ The idea was that if foreign companies were under the same kind of anti-bribery laws as domestic companies were, the playing field would be more level and foreign competitors would no longer have an unfair advantage.⁵⁵

Outside of the adverse competitive effects of the FCPA, critics also complained that the language within the FCPA was vague, especially with respect to the facilitation payments exception.⁵⁶ These critics argued that the FCPA did not specifically spell out, by their purpose, what permissible grease payments were, as legislative history had suggested, but instead focused on the recipient's position and whether the recipient's duties were "ministerial or clerical."⁵⁷ These critics argued that the vagueness in the exception, along with other parts of the FCPA, had created a chilling effect in the export trade market for many domestic companies, since many companies had stopped dealing in the market altogether due to the uncertainties of complying with the FCPA.⁵⁸ These critics contended that the FCPA needed more specific guidelines, including better language in the facilitation payments exception.⁵⁹

a. Clarification of the Facilitation Payments Exception

As a result of the criticisms, for several years Congress considered amending the FCPA.⁶⁰ Congress recognized that it had intended to create an exception for facilitation payments, but that the practical application of the exception, as spelled out within the statute, was unworkable.⁶¹ After

52. *Id.*

53. See Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN ST. INT'L L. REV. 251, 256 (2006) (suggesting that critics believed the FCPA posed a major competitive burden to American businesses, placing them at a disadvantage to corrupt foreign competitors).

54. SEITZINGER, *supra* note 38, at 3.

55. *Id.*

56. Weinograd, *supra* note 2, at 517.

57. *Id.* at 518.

58. SEITZINGER, *supra* note 38, at 3. Some of the critics of the FCPA, as originally enacted, have estimated that its provisions cost as much as one billion dollars annually in eliminated export trade. *Id.*

59. *Id.*

60. *Id.*

61. See H.R. REP. NO. 100-40, pt. 2, at 77 (1987) ("However, there has been some

many hearings and debates spanning three different Congresses, the FCPA was finally amended in 1988 to clarify several provisions within the statute, including the facilitation payments exception.⁶²

Through the 1988 Amendments, Congress codified the exception into its present day form by allowing domestic corporations to make payments for the purposes of expediting a “routine governmental action.”⁶³ In doing so, the amendments changed the exception’s focus from the status of a payment recipient and shifted it to the purpose of the payment itself.⁶⁴

b. A Call to Pursue an International Anti-Bribery Agreement through the OECD

It is important to note that in the 1988 Amendments, Congress recognized the criticisms that domestic companies were at a disadvantage in comparison to foreign companies as a result of the FCPA, and called on the United States government to pursue an international agreement to prohibit foreign bribery.⁶⁵ The 1988 Amendments specifically called on the President of the United States to pursue the international agreement through the OECD.⁶⁶ Specifically, the 1988 Amendments stated:

Negotiations. It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the [O]rganization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and

criticism that the current statutory language does not clearly reflect Congressional intent and the boundaries of prohibited conduct.”); *see also* Weinograd, *supra* note 2, at 518 (citing S. REP. NO. 100-85, at 53 (1987)) (“Notwithstanding the intent to exempt facilitating payments from the FCPA’s bribery prohibition, the method chosen by Congress in 1977 to accomplish this has been difficult to apply in practice.”).

62. 1988 Amendments, *supra* note 10; SEITZINGER, *supra* note 38, at 3; Hines, *supra* note 40, at 4.

63. Weinograd, *supra* note 2, at 518; 1988 Amendments, *supra* note 10.

64. 15 U.S.C. § 78dd-1(b), -1(f)(3)(A), -2(b), -2(h)(4)(A), -3(b), -3(f)(4)(A) (2010); 1988 Amendments, *supra* note 10.

65. 1988 Amendments, *supra* note 10; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424 (1988).

66. 1988 Amendments, *supra* note 10. The House of Representatives’ bill related to the 1988 Amendments originally stated that the President should pursue the negotiation of an international agreement “among the largest possible number of countries” to “govern acts” prohibited by the FCPA. H.R. CONFERENCE REP. NO. 100-576, at 924 (1988). The Senate bill contained no such provision. 1988 Amendments, *supra* note 10, at 1424. After a conference agreement on the legislation, the Senate ended up conceding to the House, with an amendment that an international agreement be pursued with the member countries of the OECD. *Id.*

domestic concerns by the amendments made by this section.⁶⁷

Thus, the 1988 Amendments created a mandate for the United States to push other countries to enact similar foreign anti-bribery laws similar to those of the FCPA, so that the United States would no longer be alone in fighting foreign bribery throughout the world.⁶⁸ Interestingly, the 1988 Amendments chose the OECD as the avenue through which to pursue this goal.⁶⁹

IV. THE OECD ANTI-BRIBERY CONVENTION

With the congressional direction in the 1998 Amendments to go through the OECD in encouraging other countries to enter into an international anti-bribery agreement, the United States got to work.⁷⁰ In 1989, the United States began pushing OECD member countries to enact an international agreement with prohibitions similar to that of the FCPA.⁷¹ These efforts led to the OECD's adoption of a non-binding package of recommendations in 1994 concerning foreign bribery which, among other things, recommended that member countries "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."⁷² A few years later, in 1997, the OECD evaluated the measures implemented by member countries in following the recommendations and at that time the United States delegation to the OECD pushed harder for an international anti-bribery agreement.⁷³

A. *The OECD Anti-Bribery Convention's Prohibitions*

Ultimately, the United States' efforts led to the OECD's adoption of

67. 1988 Amendments, *supra* note 10; Omnibus Trade and Competiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424 (1988). The passage then goes on to state that "[s]uch international agreement should include a process by which problems and conflicts associated with such acts could be resolved." 1988 Amendments, *supra* note 10.

68. *Id.*

69. *Id.*

70. S. REP. NO. 105-277, at 2 (1998).

71. H. REP. NO. 105-802, at 13 (1998); Rebecca Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379, 387 (2005).

72. OECD, *Recommendation of the Council on Bribery in International Business Transactions*, at 3 (adopted on May 27, 1994), available at <http://www.oecd.org/dataoecd/9/52/1952622.pdf>.

73. Koch, *supra* note 71, at 387.

the OECD Anti-Bribery Convention in 1997.⁷⁴ The Convention is an international agreement that requires signatory countries to enact laws in conformity with its provisions designed to criminalize the bribery of foreign officials.⁷⁵ On December 17, 1997, thirty countries signed the Convention, and on February 15, 1999, the Convention officially entered into force.⁷⁶ Today, the Convention has been signed and ratified by thirty-eight countries, consisting of the leading business and trading nations in the world.⁷⁷

The Preamble to the OECD Anti-Bribery Convention states that “bribery is a widespread phenomenon in international business transactions” which “raises serious moral and political concerns, undermines good governance and economic development, and distorts competitive conditions.”⁷⁸ The Preamble then declares that “all countries share a responsibility” in combating “bribery in international business transactions.”⁷⁹

The core anti-bribery provisions in the Convention are contained in Article 1.⁸⁰ Specifically, Article 1 of the Convention, entitled “The Offence

74. OECD Anti-Bribery Convention, *supra* note 3.

75. *Id.* During the twenty-year time frame from the United States’ enactment of the FCPA to the time of the adoption of the OECD Anti-Bribery Convention, the United States was practically alone in “criminalizing foreign bribery.” H. REP. NO. 105-802, at 11 (1998). In 1998 the United States amended the FCPA to confirm its provisions to the Convention through the 1998 Amendments. 1998 Amendments, *supra* note 11. In signing the 1998 Amendments, President Bill Clinton stated that “[s]ince the enactment in 1977 of the Foreign Corrupt Practices Act, U.S. business have faced criminal penalties if they engaged in business-related bribery of foreign public officials” while their “foreign competitors . . . did not have similar restrictions and could engage in their corrupt activity without fear of penalty.” Statement by President William J. Clinton, Nov. 10, 1998. He stated that “as a result, U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at \$30 billion per year.” *Id.*

76. H. REP. NO. 105-802, at 13 (1998); Press Release, OECD, OECD Anti-Bribery Convention: Entry into Force of the Convention, *available at* http://www.oecd.org/document/12/0,3343,en_2649_34859_2057484_1_1_1_1,00.html.

77. The OECD Anti-Bribery Convention has been ratified by all thirty-three OECD member countries. OECD Convention on Combating Bribery of Foreign Public Officials in International Public Transactions, Ratification Status as of March 2009, *available at* <http://www.oecd.org/dataoecd/59/13/40272933.pdf>. Five countries that are not members of the OECD have also agreed to sign the document. These countries include Argentina, Brazil, Bulgaria, Estonia, and South Africa. *Id.* Noteworthy countries that have yet to sign the Convention are China, India, Indonesia, Thailand, and Russia. *Id.* However efforts have been undertaken by the OECD to encourage these nations to join the Convention. OECD, *OECD Working Group on Bribery Annual Report 2009*, at 11, (2009) [hereinafter OCED 2009 Report], *available at* http://www.oecd.org/document/46/0,3746,en_2649_34857_44271086_1_1_1_1,00.html.

78. OECD Anti-Bribery Convention, *supra* note 3, at Preamble.

79. *Id.*

80. *Id.* at art. 1.

of Bribery of Foreign Public Officials,” requires that:

Each [p]arty shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.⁸¹

Article 1 also states that “[e]ach [p]arty shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.”⁸² Thus, Article 1 obligates signatory countries to enact laws, in conformity with the prohibitions contained in the Convention, designed to specifically prohibit and criminalize the bribery of foreign public officials.⁸³

B. The OECD Anti-Bribery Convention’s Permissibility of “Small” Facilitation Payments

The articles within the OECD Anti-Bribery Convention are silent as to the issue of facilitation payments.⁸⁴ Nevertheless, Commentary 9 to the Convention, relevant to the application and interpretation of Article 1, provides an exception for “small” facilitation payments.⁸⁵ Specifically, the first sentence of Commentary 9 provides that:

[S]mall “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within

81. *Id.* It is worth noting that the 1998 Amendments had to add the “improper advantage” language to the FCPA to conform it to the Convention. 1998 Amendments, *supra* note 11.

82. OECD Anti-Bribery Convention, *supra* note 3, at art. 1. Article 1 furthermore provides that “[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.” *Id.*

83. *Id.*

84. *Id.* This is likely because the FCPA’s exception for facilitation payments attracted international criticism of the exception during the implementation of the Convention. Koch, *supra* note 71, at 393.

85. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9. Commentaries to the Convention were adopted by the Negotiating Conference on November 21, 1997. *Id.*

the meaning of paragraph 1 [of Article 1] and, accordingly, are also not an offence.⁸⁶

The Convention therefore allows an exception for “small” facilitation payments from the relevant anti-bribery prohibitions.⁸⁷ Despite allowing for the exception, the rest of Commentary 9 then goes on to criticize facilitation payments.⁸⁸ Calling facilitation payments a “corrosive phenomenon,” the commentary stresses the need to address such payments through good corporate governance programs.⁸⁹ The commentary then ironically stops short of calling for the criminalization of such payments.⁹⁰ In this respect, the remainder of Commentary 9 provides:

Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.⁹¹

It is important to note several things regarding Commentary 9. First, from the beginning the OECD did not have a favorable view of facilitation payments when it originally drafted the Convention, calling them a “corrosive phenomenon.”⁹² Nevertheless, the OECD opted to tackle the problem through calling on signatory countries to support good governance programs, rather than necessarily criminalizing the payments themselves.⁹³ This action, in a way, mirrored the United States and its behavior when it enacted the FCPA, where Congress viewed facilitation payments as “reprehensible,” yet provided an exception for these payments anyway.⁹⁴

In addition, it is worth observing that the OECD specifically used the word “small” when referring to facilitation payments under the relevant commentary.⁹⁵ While arguably all facilitation payments could be considered “small” in nature, the term itself could be open to interpretation, and in fact later did become a repetitive issue between the OECD and the United States concerning the scope of the FCPA’s facilitation payments

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See H.R. REP. NO. 95-640, at 8 (1977) (calling facilitation payments reprehensible in the United States); see also *supra* notes 46 through 50 and accompanying discussion.

95. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9.

exception.⁹⁶

It is also worth noting that the OECD Anti-Bribery Convention is the only international agreement to recognize facilitation payments, to date.⁹⁷ Amazingly, all of the other major international treaties governing foreign bribery have been completely silent on the issue of facilitation payments.⁹⁸ Presumably, this could mean that these other treaties do not provide for an exception for facilitation payments.

V. INTERNATIONAL DISDAIN FOR FACILITATION PAYMENTS IN THE FIRST DECADE OF THE OECD ANTI-BRIBERY CONVENTION

The first decade of the Convention saw ever-growing scrutiny and criticism of facilitation payments. The United States had finally gotten what it wanted—an international network of countries banning the bribery of foreign public officials—yet the avenue of doing so, through the Convention, resulted in uninvited criticism of the facilitation payments exception.

A. *Building OECD Criticism of the Facilitation Payments Exception*

As noted before, signatories to the OECD Anti-Bribery Convention were required to take measures to enact domestic laws prohibiting foreign bribery, to comply with the relevant provisions of the Convention.⁹⁹ And while all of the signatory countries did so, only five had foreign anti-bribery laws allowing for facilitation payments, with these countries being Canada, Australia, New Zealand, South Korea, and the United States.¹⁰⁰

96. See *infra* notes 112 and 202 and accompanying discussion (describing the problem of using the word “small” when discussing facilitation payments).

97. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9.

98. The Organization of American States Inter-American Convention Against Corruption, the first multilateral anti-corruption treaty in the world when it was adopted in 1996, makes no reference to facilitation payments. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724. Likewise, two major international anti-bribery treaties adopted after the Convention are also silent with respect to facilitation payments. The United Nations Convention against Corruption, adopted in 2003, says nothing about facilitation payments. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/422 (Oct. 31, 2003). Additionally, the African Union Convention on Preventing and Combating Corruption, also adopted in 2003, is silent on the issue of facilitation payments. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (the AU Corruption Convention entered into force on Aug. 5, 2006). The OECD Anti-Bribery Convention therefore appears to be the only global or multilateral treaty that addresses and allows for an exception for facilitation payments within its provisions. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9.

99. OECD Anti-Bribery Convention, *supra* note 3, at art. 1.

100. TRACE SURVEY, *supra* note 33, at 2; Claudius O. Sokenu, *FCPA News and Insights*,

Some might consider the small number of countries allowing for facilitation payments odd, given that the Convention specifically allowed for an exception.¹⁰¹ However, the limited number may not be so odd when taking into account that almost every domestic bribery law in the world outlaws the making of facilitation payments.¹⁰²

Following the passage of the Convention, the OECD began to monitor how countries implemented and enforced the relevant domestic legislations implementing the Convention's prohibitions. This monitoring was done by the OECD Working Group on Bribery ("OECD Working Group" or "Working Group") and involved several different phases.¹⁰³ Phase 1 of the monitoring involved an evaluation of whether signatory countries had adequately implemented the Convention under their own domestic legislations.¹⁰⁴ Phase 2 of the review then assessed whether signatory

An Update on Recent Foreign Corrupt Practices Act and Global Anti-Corruption Enforcement, Litigation, and Compliance Developments, 1814 PLI/CORP 641, 652 (2010); Fox, *supra* note 33, at 3.

101. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9. While the United States, Canada, Australia, New Zealand and South Korea explicitly provided for the facilitation payment exception in their own laws, the countries of Denmark, Slovakia, Sweden, Norway and Switzerland recognized Commentary 9 to the Convention by expressing, through interpretations of their own relevant foreign anti-bribery laws or otherwise, that small facilitation payments may not fall within the prohibitions of their relevant foreign anti-bribery laws. Zervos, *supra* note 53, at 252 n. 8.

102. See, e.g., TRACE SURVEY, *supra* note 33, at 2 (explaining that only a few jurisdictions allow grease payments).

103. OECD Directorate for Financial and Enterprise Affairs, Country Monitoring of the OECD Anti-Bribery Convention, *available at* http://www.oecd.org/document/12/0,3343,en_2649_34859_35692940_1_1_1_1,00.html.

This monitoring was provided for under Article 12 of the Convention. OECD Anti-Bribery Convention, *supra* note 3, at art. 12. The Working Group is made up of representatives from the signatory countries that are parties to the Convention, and the group meets four times a year in Paris. OECD Directorate for Financial and Enterprise Affairs, OECD Working Group on Bribery in International Business Transactions, *available at* http://www.oecd.org/document/5/0,3343,en_2649_34859_35430021_1_1_1_1,00.html.

The Working Group publishes its country monitoring reports online through the OECD website. For an outline of issues concerning country monitoring as agreed to by the Working Group on Bribery, see the OECD Directorate for Financial and Enterprise Affairs, Country Monitoring Principles for the OECD Anti-Bribery Convention, [hereinafter Country Monitoring of the OECD Anti-Bribery Convention], *available at* http://www.oecd.org/document/45/0,3343,en_2649_34859_44976877_1_1_1_1,00.html.

104. Country Monitoring of the OECD Anti-Bribery Convention, *supra* note 103. This phase entailed looking at the written legislative text implementing the Convention and the relevant elements of the signatory countries' legal systems in evaluating and determining whether the Convention had been adequately implemented within the signatory countries' domestic legal frameworks. OECD Directorate for Financial and Enterprise Affairs, Phase 1 Country Monitoring of the OECD Anti-Bribery Convention, *available at* http://www.oecd.org/document/21/0,3343,en_2649_34859_2022613_1_1_1_1,00.html.

countries had applied the implementing legislations effectively.¹⁰⁵

1. OECD Phase 1 Report of the United States

In April 1999, the OECD published its Phase 1 Report on the United States' implementation of the Convention.¹⁰⁶ In the Phase 1 Report, the OECD Working Group expressed concern over the FCPA's definition of "routine governmental action," in that the definition contained a list of specific payments that could be excepted from the FCPA's prohibitions.¹⁰⁷ The Working Group felt that the list of specific payments under the definition was "not sufficiently qualified, for example by reference to the size of the payment, and the discretionary nature and the legality of the reciprocal act."¹⁰⁸ In this regard, the Working Group remarked that the definition and the exception were "potentially subject to misuse."¹⁰⁹

2. OECD Phase 2 Report of the United States

A little over three years later, in October 2002, the OECD published its Phase 2 Report on the United States' application of the Convention.¹¹⁰ In the Phase 2 Report, the OECD Working Group again criticized the facilitation payments exception.¹¹¹ This time, the Working Group criticized the wording of the exception for not being limited to "small" facilitation

105. Country Monitoring of the OECD Anti-Bribery Convention, *supra* note 103. This phase looked into the enforcement structures designed to enforce the relevant laws implementing the OECD Anti-Bribery Convention "and to assess their application in practice." OECD Directorate for Financial and Enterprise Affairs, Phase 2 Country Monitoring of the OECD Anti-Bribery Convention, *available at* http://www.oecd.org/document/27/0,3343,en_2649_34859_2022939_1_1_1_1,00.html. In 2009, the Working Group adopted a new Phase 3 round of monitoring which involved, among other things, looking at the signatory countries' enforcement of the Convention and how these countries had implemented recommendations by the Working Group made in the first two phases of monitoring. *See infra* notes 183-86 and accompanying discussion. The Phase 3 monitoring process also looked into how countries were responding and implementing the OECD Recommendation. *Id.*

106. OECD, *United States, Review of Implementation of the Convention and 1997 Recommendation*, (Apr. 1999) [hereinafter Phase 1 Report], *available at* <http://www.oecd.org/dataoecd/16/50/2390377.pdf>.

107. *Id.* at 22.

108. *Id.*

109. *Id.*

110. OECD, *United States: Phase 2, Report on Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, (Oct. 2002) [hereinafter Phase 2 Report].

111. *Id.* at 34.

payments, as provided for in the Convention.¹¹² The Working Group also criticized the United States for having an exception for facilitation payments under the FCPA when there was no exception under its own domestic bribery statute.¹¹³ The Working Group then stated that “[t]o the extent” that the exception was “open to interpretation,” it “may be regarded as an area of risk and . . . misuse,” as previously noted in the Phase 1 Report.¹¹⁴

The Working Group also criticized the United States for what it perceived to be an “absence of any clear, published guidance” with respect to the exception.¹¹⁵ The Working Group was concerned that there was not a “*per se* limit on the size of the payment” in the exception and that the exception instead focused exclusively on the “purpose” of the payment.¹¹⁶ The Working Group then suggested “that there may be a case for guidance to be issued by the U.S. Department of Justice (“DOJ”)” in explaining how it interpreted the exception. The Working Group formally recommended, among other things, that the United States “[c]onsider developing” such “specific guidance.”¹¹⁷

112. *Id.*

113. *Id.* (citing 18 U.S.C. § 201).

114. *Id.*

115. *Id.*

116. *Id.* In this regard the Working Group noted that “[n]o court has interpreted the application of this exception and there are no settled cases to assist in delineating the boundary between acceptable and unacceptable payments.” *Id.* The Working Group also stated that there were “also no relevant DOJ Opinions.” *Id.* The report stated that “[i]f a company asks the DOJ for informal advice or reports a payment, the lead examiners were told that the DOJ will sometimes determine straight away, on the basis of judgment and experience, whether it falls within the exception and if so, take no further action.” *Id.* The Working Group felt that this operated “as a sort of informal, undocumented ‘*de minimis*’ rule.” *Id.*

117. *Id.* at 34, 38. The Working Group stated that “[a]lternatively consideration should be given to amending the wording” of the FCPA “to clarify, for the benefit of all, that only minor payments are allowable.” *Id.* at 34. On February 20, 2005, the United States addressed the OECD Working Group’s recommendations contained in the Phase 2 Report. OECD, *United States: Phase 2, Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 5-23 (June 1, 2005) [hereinafter Phase 2 Follow-up Report]. In response to the Working Group’s recommendation that the United States provide specific guidance on the facilitation payments exception, the United States responded that “[w]e presently believe that the language of the FCPA, including its definition of ‘facilitating or expediting payments,’ is sufficient guidance.” *Id.* at 9. The United States also noted that the DOJ had an opinion procedure in place that “permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA,” including conduct related to facilitation payments, and stated that the DOJ “does not presently intend to offer any additional specific guidance outside of the Opinion Procedures.” *Id.* The Working Group in turn responded in a follow-up report concerning its Phase 2 recommendations on June 1,

B. International Non-Governmental Organizations calling for an End to Facilitation Payments

While the OECD accepted, yet criticized, the use of facilitation payments during the first decade of the Convention, certain other international non-governmental organizations viewed these payments as bribes and refused to accept them as permissible under any kind of law.

1. Transparency International

Transparency International has been the most active and vocal international non-governmental organization on the issue of foreign bribery since the enactment of the Convention. It has also been a leading international organization in the fight against corruption and is primarily known for its “Corruptions Perception Index,” which rates countries based on how corrupt people perceive them to be.¹¹⁸

2005, that it still held “the view that, in the continuous absence of authoritative guidance, the existing exception for facilitation payments . . . may lead to uncertainty into the interpretation of the FCPA.” *Id.* at 4. In this regard, the Phase 2 Follow Report concluded, among other things, that the Working Group’s recommendation of specific guidance in relation to the facilitation payments exception still required “further consideration from the United States.” *Id.* On May 22, 2006, the OECD released its Mid-Term Study of Phase 2 Reports, which contained an analysis on the application of the OECD Anti-Bribery Convention by all of the signatory countries. OECD, *Mid-Term Study of Phase 2 Reports, Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, (May 22, 2006) [hereinafter Mid-Term Study]. In the Mid-Term Study the Working Group noted that it had recommended that the “United States consider developing guidance in relation to the facilitation payments exception” and that the United States had responded that it felt that the FCPA’s language was “sufficient guidance” in itself. *Id.* at 21. Perhaps foreshadowing a wind of change by the OECD on the issue of facilitation payments, the Working Group then stated that it might “undertake a mid- to long-term analysis about whether the exception for ‘small facilitation payments’ in Commentary 9” was “too vague to implement in practice.” *Id.* at 147.

118. See *About Us*, TRANSPARENCY INT’L, (Mar. 16, 2011), http://www.transparency.org/about_us. Transparency International’s “mission” is a “world free of corruption.” *Id.* Transparency International was founded in 1993 and has a network of more than ninety chapters throughout the world and an official international “secretariat” based in Berlin, Germany. See TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR, at i (2009), available at http://www.transparency.org/publications/gcr/gcr_2009. Transparency International’s Corruption Perceptions Index ranks 178 countries throughout the world. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2010, at 2 (2010), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010. The 2010 Corruption Perceptions Index listed Denmark, New Zealand, Singapore, Finland, and Sweden as the five least corrupt countries in the world. *Id.* On the opposite side of the spectrum, the index listed Somalia, Myanmar, Afghanistan, Iraq, and Sudan as the five most

Transparency International was a strong opponent of facilitation payments during the first decade of the Convention, and during that time took several steps to condemn and call for the elimination of facilitation payments.¹¹⁹ In 2003, Transparency International published its *Business Principles for Countering Bribery*, designed to help companies develop and implement effective compliance programs geared towards the prevention of bribery.¹²⁰ The *Business Principles*, which stated that companies should prohibit bribery “in any form,” and implement a compliance program designed to do so, specifically recommended that companies develop a compliance program that would, among other things, prohibit the use of facilitation payments.¹²¹

A year later in a “Guidance Document” to the Business Principles, Transparency International again spoke out against facilitation payments and called on all companies to “eliminate facilitation payments” in all “jurisdictions in which they operate.”¹²² In calling for this elimination of facilitation payments, the organization stated that the “corrupting influence of pervasive facilitation payments” was something it considered to be “insidious” and “part of a wider climate of systemic corruption.”¹²³

corrupt countries in the world. *Id.* at 3. The United States was ranked twenty-second. *Id.* at 2.

119. It is worth noting, however, that in January 2003, Beth Aub, one of the founding members of Transparency International, resigned her membership with Transparency International for, among other things, its toleration of facilitation payments at the time. See Bolaji Abdullahi, *Bribery Scandal Rocks Transparency International*, THISDAYONLINE (Jan. 14, 2003), <http://www.thisdayonline.com/archive/2003/01/14/20030114news03.html> (reporting on the bribery scandal) (link no longer active). Aub claimed that Transparency International at the time had “repeatedly defended the practice” of facilitation payments which she found to be wrong. *Id.*

120. TRANSPARENCY INTERNATIONAL, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY 5 (2d ed. 2009), available at http://www.transparency.org/global_priorities/private_sector/business_principles.

121. *Id.* at 5-6. The Business Principles specifically stated that “[t]he enterprise shall prohibit bribery in any form whether direct or indirect” and “[t]he enterprise shall commit to implementing a Programme to counter bribery.” *Id.* at 6. The Business Principles also stated that, “recognizing that facilitation payments are bribes,” companies should strive to “identify and eliminate them.” *Id.* at 8.

122. TRANSPARENCY INTERNATIONAL, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: GUIDANCE DOCUMENT 23 (2004), available at http://www.transparency.org/content/download/573/3493/file/bpcb_ti_guidance_doc_november_%202004.pdf. The guidance was designed to assist companies looking to implement anti-bribery compliance programs or review their current compliance programs. *Id.* at 4.

123. *Id.* at 23. In this respect, Transparency International stated that “there should be no distinction . . . between the approaches to countering petty and grand bribery.” *Id.* The guidance document then went on to state that where an official makes a demand for a facilitation payment that, absent a situation where life or health is threatened, that companies should not make the payment. *Id.* at 23-24. It is worth noting that in July 2005,

The calls by Transparency International for an end to facilitation payments grew louder than ever in 2007, when it adopted a resolution specifically calling for an end to facilitation payments.¹²⁴ The “Resolution on Facilitation Payments” adopted by Transparency International at its annual membership meeting in October 28, 2007, noted that it had “been the long standing policy” of Transparency International “to oppose the use of facilitation payments” and called on all “companies to cease making such payments immediately.”¹²⁵ The resolution also stated that Transparency International would engage in a campaign to revise all of the relevant international treaties and conventions that permitted facilitation payments and would also “advocate, where appropriate, for revisions of national and international laws” with respect to the permissibility of such payments.¹²⁶ Thus, the resolution did more than just call for the cessation of facilitation payments. It also launched a new offensive plan for Transparency International to change the laws throughout the world with the goal of ending permissible facilitation payments.¹²⁷

2. World Economic Forum

World Economic Forum was another international non-governmental

Transparency International also published a “Six Step Process” for implementing a compliance program pursuant to the Business Principles. *See* TRANSPARENCY INTERNATIONAL, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: TI SIX STEP PROCESS (2005), *available at* http://www.transparency.org/global_priorities/private_sector/business_principles/six_step_implementation_process. This publication, designed to provide practical advice on developing an effective compliance program, specifically noted that companies needed to analyze “the prevalence and use” of their employees’ facilitating payments so that the company could work to implement a compliance program designed to specifically “eliminate” them. *Id.* at 9.

124. *See* TRANSPARENCY INTERNATIONAL, RESOLUTION ON FACILITATION PAYMENTS: ADOPTED BY THE TRANSPARENCY INTERNATIONAL ANNUAL MEMBERSHIP MEETING: BALI, INDONESIA, 28 OCTOBER 2007 (voicing Transparency International’s opposition to facilitation payments).

125. *Id.*

126. *Id.*

127. *Id.* In a subsequent press release by Transparency International in November 2007, the organization stated that “[c]orporations should . . . act immediately to end the practice of ‘grease payments’ or so-called facilitation payments that are outright bribes.” Press Release, Transparency Int’l, Transparency Int’l Calls for Action to Enforce the OECD Anti-Bribery Convention (Nov. 20, 2007), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_11_21_ti_call_for_action_oecd. And, most recently, in its annual *Global Corruption Report for 2009*, Transparency International again criticized facilitation payments and noted that there was a “diminishing tolerance” for such payments in the world. GLOBAL CORRUPTION REPORT 2009: CORRUPTION AND THE PRIVATE SECTOR, *supra* note 118, at 120-21.

organization that called for an end to facilitation payments.¹²⁸ In 2004, the World Economic Forum, an international organization focusing on corporate governance, launched a “Partnering Against Corruption Initiative” designed to develop principles for the purposes of providing “a competitive level playing field.”¹²⁹ In 2005 the Initiative came out with its “Principles for Countering Bribery” (“PACI Principles”) which, like the Business Principles, stated that companies should follow a policy of prohibiting bribery “in any form,” and implement that policy through an internal compliance program.¹³⁰ The PACI Principles then specifically recommended that the internal compliance program support the elimination of facilitation payments.¹³¹ In recommending the elimination of facilitation payments, the PACI Principles stressed that facilitation payments were prohibited in almost every country in the world.¹³²

C. *TRACE Survey: International Private Sector's Limited Use of Facilitation Payments*

The building international storm over the issue of facilitation payments also impacted the international private sector's perception and use of these payments. In October 2009, TRACE, a non-profit organization that focuses on anti-bribery compliance for multinational companies, published a global survey which revealed that many international companies had avoided or prohibited the use of facilitation

128. The World Economic Forum is “an independent, international organization” that is “striving towards a world-class corporate governance system where values are as important a basis as rules.” *About Us*, WORLD ECON. FORUM, (Apr. 19, 2011), available at <http://www.weforum.org/content/leadership-team>. Its motto is “entrepreneurship in the global public interest.” *Id.*

129. *Partnering Against Corruption Initiative*, WORLD ECON. FORUM, (Apr. 19, 2011), available at <http://www.weforum.org/issues>. As a result of the initiative, more than 110 companies throughout the world have certified that they have taken steps to make sure that they and no persons on their behalf will commit bribery. See Gail Dutton, *Do Strong Ethics Hurt U.S. Global Competitiveness?*, WORLD TRADE (Mar. 2, 2008), http://www.worldtrademag.com/Articles/Feature_Article/BNP_GUID_9-5-2006_A_1000000000000274420 (reporting on initiatives to prevent corporate bribery).

130. WORLD ECON. FORUM, PARTNERING AGAINST CORRUPTION – PRINCIPLES FOR COUNTERING BRIBERY 11 (2005) [hereinafter PACI PRINCIPLES]. The Principles were the product of a task force of companies of the World Economic Forum “in partnership with Transparency International and the Basel Institute on Governance.” *Id.* at 7.

131. *Id.* at 13; see also PACI PRINCIPLES, *supra* note 130, at 13; F. Joseph Warin, Michael S. Diamant & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. REV. 33, 65 (2010) (stating that the PACI Principles recommended the elimination of facilitating payments).

132. *Id.*

payments.¹³³ The TRACE Survey, a survey of corporations located throughout the world, examined how facilitation payments were “perceived in the international business community” and whether they were permitted by corporations. The TRACE Survey came out with several major findings.¹³⁴ The most significant finding was that over seventy percent of those surveyed believed that their company “never, or only rarely” made facilitation payments, even when company policies permitted them.¹³⁵ In addition, seventy-six percent of international corporations felt that it was possible to successfully do business without having to make facilitation payments, “given sufficient management support and careful planning.”¹³⁶ Further, ninety-three percent of those surveyed stated that their jobs would be “easier, or at least no different, if facilitation payments were prohibited in every country” in the world.¹³⁷

The TRACE Survey results were significant because they exposed a trend among the international corporations that responded to the survey to avoid using facilitation payments.¹³⁸ The survey also revealed a clear “awareness” by these international corporations of the “added risk” and difficulties associated with making these payments.¹³⁹ To this end, these international corporations overwhelmingly favored an ideal business environment where facilitation payments were banned in every country throughout the world.¹⁴⁰

VI. DIMINISHING DOMESTIC ACCEPTANCE FOR FACILITATION PAYMENTS DURING THE FIRST DECADE OF THE OECD ANTI-BRIBERY CONVENTION

The growing unpopularity of facilitation payments was not limited to the international stage during the first decade of the Convention, unpopularity grew domestically as well. Several commentators have remarked that the scope of the facilitation payments exception has

133. See TRACE SURVEY, *supra* note 33, at 2 (reporting on corporate bribery prevention); see also News Release, TRACE, TRACE Releases the Results of Facilitation Payments Survey (Oct. 15, 2009), available at <https://www.traceinternational.org/news/TRACEFacilitationPaymentsSurveyResults.asp> (reporting on corporate policies on facilitation payments).

134. TRACE SURVEY, *supra* note 33, at 2.

135. *Id.* Forty-four percent of those surveyed stated that their company prohibited facilitation payments or did “not address them” because such payments were “prohibited together with other forms of bribery.” *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

narrowed over time.¹⁴¹ Recent surveys have also revealed that domestic businesses, like their foreign counterparts, have increasingly prohibited the use of facilitation payments within their operations.¹⁴²

A. *Perceived Narrowing of the Facilitation Payments Exception*

Several commentators have expressed their belief that there has been a trend within the United States and enforcement of the FCPA that has led to a narrowing in the scope of the facilitation payments exception.¹⁴³ These commentators have argued that the relevant regulatory authorities enforcing the FCPA, the DOJ and SEC, have construed, and will continue to construe, the exception more narrowly over time.¹⁴⁴

In *United States v. Kay*, the United States Court of Appeals for the Fifth Circuit was one of the first major courts to look at the facilitation payments exception since the Convention was ratified.¹⁴⁵ In that case the Fifth Circuit agreed with the United States government's argument that the facilitation payments exception was a very limited exception to the otherwise broad sweep of the FCPA.¹⁴⁶ The court reviewed the statutory language of the FCPA, including the legislative history behind it, and found that Congress had indeed intended to make the facilitation exception a very limited one.¹⁴⁷ The court noted that:

A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes "obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country," and "scheduling inspections associated with contract performance or inspections related to transit of goods across the country." Therefore, routine governmental action does not include the issuance of *every* official document or *every* inspection but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow

141. David M. Howard & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?*, DECHERTONPOINT, Apr. 2010, at 2; see also Fox, *supra* note 33, at 3.

142. See *infra* notes 156-60 and accompanying discussion.

143. Patricia Brown Holmes & Valarie Hays, *Grease Payments are a Thing of the Past as the Reach of the FCPA Continues to Expand*, 3 BLOOMBERG L. REP. 1 (2010); see also Howard & Wiygul, *supra* note 141, at 1; Fox, *supra* note 33, at 3.

144. Holmes & Hays, *supra* note 143, at 1; Howard and Wiygul, *supra* note 141, at 1; Fox, *supra* note 33, at 3.

145. *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

146. *Id.* at 745.

147. *Id.* at 750.

categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.¹⁴⁸

In finding that the exception was to be interpreted on a very narrow basis, the court noted that “in contrast” with these provisions, the FCPA contained broad language prohibiting bribery, instead of detailed language like that of the exception.¹⁴⁹

Some commentators have argued that since *Kay*, government regulators have continued to narrow the scope of the facilitation payments exception.¹⁵⁰ These commentators believe that government regulators have begun to bring enforcement actions concerning payments that are not clearly facilitation payments.¹⁵¹ For example, some commentators were concerned over the settled enforcement action in *Helmerich & Payne* in that they perceived the action to involve facilitation payments not necessarily forbidden by the FCPA.¹⁵² In this regard, some commentators have expressed concerns that the exception will continue to be interpreted in a narrow fashion and, as a result, the exception will continue to remain a gray area in the law.¹⁵³

148. *Id.* at 750-51 (emphasis by the court).

149. *Id.* at 751. For an in depth analysis on *United States v. Kay*, see Hector Gonzalez & Claudius Sokenu, *Scope of Foreign Corrupt Practices Act's Bribery Provisions Set*, 231 N.Y. L.J. 1 (2005) (discussing *Kay* and how that case officially set the scope of the FCPA); see also Claudius O. Sokenu, *FCPA Enforcement after United States v. Kay: SEC and DOJ Team Up to Increase Consequences of FCPA Violations*, 1619 PLI/CORP 189 (2007) (examining enforcement of the FCPA post-*Kay*).

150. John K. Carroll & Lisa K. Marino, *The Incredible Shrinking FCPA Facilitation Payment Exception*, 241 N.Y. L.J. S6 (2009).

151. *Id.*; see also Holmes & Hays, *supra* note 143, at 1-2.

152. See Howard & Wiygul, *supra* note 141, at 3-4. The commentators expressed their concerns that the case involved payments made to customs authorities for “avoiding potential delays” associated with the transportation of parts, payments these commentators believed could be considered facilitation payments. *Id.*; see also Press Release 09-741, 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>. The company had entered into a two-year deferred or non-prosecution agreement with the DOJ. See *id.* The SEC’s settled action with the company involved allegations that the company had violated the FCPA’s accounting provisions. *Helmerich & Payne, Inc.*, SEC Adm. Proc. File No. 3-13565, at 4-5 (July 30, 2009); SEC News Digest, Issue 2009-145, July 30, 2009. As noted before, the facilitation payment exception does not apply to the FCPA’s accounting provisions. See *supra* notes 31-32, and accompanying discussion. Thus, if a company records certain relevant payments improperly, as alleged in this particular case, it can still be liable under the FCPA’s accounting provisions, notwithstanding whether the payments actually constituted facilitation payments. *Id.*

153. Carroll & Marino, *supra* note 150, at S6; Holmes & Hays, *supra* note 143, at 1-2.

B. Domestic Companies' Avoidance of Facilitation Payments

Like their international counterparts, most domestic companies now prohibit the use of facilitation payments.¹⁵⁴ This may be for several reasons, such as the growing unpopularity of facilitation payments overseas, or the apparent complexities involved in complying with the gray area of the exception itself. Whatever the reason, most domestic companies have affirmatively sought to ban or narrow the use of facilitation payments within their operations.¹⁵⁵

1. Surveys Reveal that Most Domestic Companies Prohibit the Use of Facilitation Payments

A 2008 survey by the law firm of Fulbright & Jaworski concerning facilitation payments (“Fulbright Survey”) found that eighty percent of companies in the United States prohibited the use of facilitation payments.¹⁵⁶ The survey also found that nearly two-thirds of domestic companies had policies expressly prohibiting the making of facilitation payments.¹⁵⁷ The survey further revealed that a majority of domestic companies felt that it was better to ban facilitation payments altogether than “explore a gray area inviting costly and embarrassing investigations for FCPA violations.”¹⁵⁸

Around the same time as the Fulbright Survey, the accounting firm KPMG conducted a survey of executives at United States multinational corporations and came out with similar findings.¹⁵⁹ In the KPMG survey,

154. Fulbright & Jaworski, *2008 Litigation Trends Survey shows U.S. Companies Preparing for Rise in Litigation Following Two Years of Declines*, BUS. WIRE, Oct. 14, 2008, at 8 [hereinafter Fulbright Survey].

155. *Id.*

156. *Id.* The survey involved a poll of corporate law departments. *Id.*; see also Joel M. Cohen & Adam P. Wolf, *Narrow, Don't Abolish, FCPA Facilitating Payments Exception*, 244 N.Y. L.J. 1 (2010); Roger M. Witten, *Recent Developments in FCPA and Global Anti-bribery Enforcement*, 1814 PLI/CORP 901 (2010).

157. Fulbright Survey, *supra* note 154, at 8.

158. *Id.* The survey noted that twenty percent of the billion dollar companies polled had undertaken a bribery or corruption investigation in the past year. *Id.* The survey also found that twenty-three percent of United States companies had “made the decision to walk away from doing business in a country based on the perceived degree of local corruption.” *Id.*; see also *FCPA Takes Bite into Company Activities*, COMPLIANCE REPORTER, Oct. 17, 2008 (explaining the effect of the FCPA exception on companies and that companies have reassessed whether to do “business in a country based on the perceived degree of local corruption.”).

159. *KPMG Survey Finds Most Global U.S. Companies Face Challenges with their Anti-Bribery, Anti-Corruption Programs and Activities*, PR NEWSWIRE, Nov. 3, 2008. The KPMG Survey was a poll of 103 executives from multinational United States companies. *Id.*

only twenty-five percent of executives surveyed stated that their companies still allowed facilitation payments.¹⁶⁰

These surveys suggest that domestic companies would rather ban the use of facilitation payments than make these kinds of payments and deal with the adverse consequences. Many of these companies have probably learned that making such payments will enter them into the complex realm of conflicting domestic and international laws regarding the legality of such payments. So, they have simply avoided making them altogether. As one FCPA expert has stated, many companies have decided to ban facilitations payments entirely because it is “an easier, simpler line to draw.”¹⁶¹

2. The Higher Cost of Facilitation Payments

Many domestic companies have discovered that making facilitation payments can be a very costly endeavor.¹⁶² Government officials seeking bribes target the companies that they know will pay them, and this in turn leads to higher costs imposed on those companies that choose to engage in this kind of activity.¹⁶³ As one commentator put it, paying a facilitation payment or any kind of bribe is equivalent to “putting a bull’s eye on your company’s forehead.”¹⁶⁴ Those companies that pay them will be targeted and will be expected to continue making such payments in the future.¹⁶⁵

A study by TRACE in 2003 entitled “The High Cost of Small Bribes” supports the position that facilitation payments can be quite costly to companies over the long run.¹⁶⁶ The study found that “[w]idespread small bribes set a permissive tone, which invites more and greater demands.”¹⁶⁷ In this respect, the study revealed that “entrepreneurial bribe-takers learn to focus their demands on companies that have paid bribes before” and therefore will continue to expect these payments well into the future.¹⁶⁸

160. *Id.*

161. Melissa Klein Aguilar, *Facilitation Payments still leave Companies Vexed*, COMPLIANCE WEEK, Dec. 2009, at 12 (quoting Lucinda Low, a partner in the law firm of Steptoe & Johnson and expert in the FCPA).

162. Dutton, *supra* note 129.

163. *Id.*

164. *Id.* Alexandra Wrage, president of TRACE, warned that companies paying bribes often make themselves a target to foreign officials for the payment of more bribes. *Id.*

165. *Id.* One senior executive equated facilitation payments and “small-time corruption” to be like “low-level cancer” in that “[e]ventually it will kill you.” *Id.* (quoting Tom McCoy, executive vice president and chief administrative officer of Advanced Micro Devices).

166. TRACE, THE HIGH COST OF SMALL BRIBES (2009), available at <https://www.traceinternational.org/documents/TheHighCostofSmallBribes.pdf>.

167. *Id.* at 7.

168. *Id.*

The study also concluded that it makes “better business sense” to end the practice of making facilitation payments, rather than continuing to making such payments.¹⁶⁹

Whichever their reasons, whether for compliance, regulatory, or simply business motivations, companies in the United States have increasingly refrained from making facilitation payments, notwithstanding the fact that the FCPA still allows for them. This domestic undercurrent against facilitation payments, flowing parallel to the growing international disdain for them, will soon lead the issue into the spotlight on the international stage, through actions taken by the OECD.

VII. OECD CALLS ON SIGNATORY COUNTRIES TO COMBAT AND PROHIBIT FACILITATION PAYMENTS

In late 2009, the OECD changed its stance with respect to its view on facilitation payments through the OECD Recommendation.¹⁷⁰ Rather than condemning facilitation payments and calling for their elimination through corporate governance programs as it had done before, the OECD instead, through the OECD Recommendation, called on countries to directly combat facilitation payments and encourage companies under their jurisdiction to prohibit them.¹⁷¹

A. *OECD Recommendation*

On November 26, 2009, the OECD adopted the OECD Recommendation.¹⁷² The OECD Recommendation is an agreement by the OECD member countries, and eight other countries that signed the OECD Anti-Bribery Convention, to “put in place new measures” designed to “reinforce their efforts to prevent, detect and investigate foreign bribery.”¹⁷³

169. *Id.*

170. OECD Recommendation, *supra* note 4, at 4.

171. *Id.*

172. *Id.* at 2.

173. OECD, *Governments Agree to Step Up Fight Against Bribery*, (Dec. 9, 2009), available at http://www.oecd.org/document/34/0,3746,en_21571361_44315115_44232739_1_1_1_1,00.html; OECD Recommendation, *supra* note 4, at 3. The thirty OECD member countries and eight other countries that signed the Convention, or thirty-eight nations overall, “make up the vast majority of international business deals, accounting for roughly two-thirds of world exports and nearly ninety percent of global outward flows of foreign direct investment.” OECD 2009 Report, *supra* note 77, at 4. The OECD Recommendation was the product of a review of various OECD anti-bribery measures as well as consultations with legal experts, international organizations, prosecutors, private-sector representatives, and individuals in the accounting and auditing profession. *Id.* at 7. One of the consultation sessions that took

December 9, 2009, marked the tenth anniversary of the Convention's entry into force, and on that day the OECD, at a Transparency International event marking "International Anti-Corruption Day," announced the release of the OECD Recommendation.¹⁷⁴

One of the key announcements in the OECD Recommendation was that the OECD was now calling for an end to permissible facilitation payments.¹⁷⁵ Specifically, the relevant provision in the OECD Recommendation dealing with facilitation payments stated that the OECD:

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.¹⁷⁶

This recommendation represented a stronger and more aggressive position taken from the OECD against facilitation payments, because it called on both governments and companies to prohibit and end the use of facilitation payments.¹⁷⁷ As it applied to governments, the OECD Recommendation stated that signatory countries, including the United States, should review their policies and approach on "corrosive" facilitation payments in order to "effectively combat the phenomenon" of facilitation

place in October 2009 specifically focused on the issue of facilitation payments. *Id.* at 83.

174. *Governments Agree to Step Up Fight Against Bribery*, *supra* note 173; *Good News at Today's OECD Celebration*, TRACEBLOG (Dec. 9, 2009, 2:21 PM), available at <http://traceblog.org/2009/12/09/good-news-at-todays-oecd-celebration/>. The day was marked with great fanfare and involved OECD Secretary-General Angel Gurría and U.S. Secretary of Commerce Gary Locke jointly unveiling the OECD Recommendation via video from Washington D.C. *Id.* Video-recorded remarks from U.S. Secretary of State Hillary Clinton marked the opening of the celebration. *Id.*

175. OECD Recommendation, *supra* note 4, at 4; R. Christopher Cook & Stephanie L. Connor, *United States: OECD Calls for an End to Facilitating Payments Exception*, MONDAQ (Dec. 22, 2009), available at <http://www.mondaq.com/unitedstates/article.asp?articleid=91384>. On this day, the OECD also launched a so-called "Initiative to Raise Global Awareness of Foreign Bribery," which is a three-year initiative designed to engage the public and "convince them that foreign bribery carries a heavy price, that it is a serious crime and that it is no longer a part of business as usual." OECD 2009 Report, *supra* note 77, at 12-13.

176. OECD Recommendation, *supra* note 4, at 4.

177. *Id.*

payments.¹⁷⁸ One could perceive this as a call on all five countries that have laws permitting the use of facilitation payments overseas, including the United States, to review their policies and laws relevant to these payments with a view towards prohibiting them.¹⁷⁹ And as it pertains to the United States, one could perceive this to mean that the United States should review its policies regarding facilitation payments, and the FCPA's exception for them, with a view towards changing those policies, and potentially amending the FCPA, to effectively "combat" the use of them.¹⁸⁰

The OECD Recommendation also called on signatory countries to encourage companies within their jurisdictions to prohibit or discourage the use of facilitation payments through their internal controls, ethics and compliance programs.¹⁸¹ With respect to the United States, this would mean that the United States government would have to "encourage" domestic companies to prohibit the use of facilitation payments, through their internal company controls, ethics and compliance programs, even though such facilitation payments might still be allowable under the FCPA.¹⁸²

The OECD Recommendation's provisions regarding facilitation payments present an interesting irony with respect to the United States and the FCPA. While the OECD Recommendation calls on the United States to review its approach towards facilitation payments in the FCPA with a view towards combating and prohibiting them, and calls on the United States to encourage domestic corporations to prohibit such payments through internal controls and compliance programs, what will happen if the United States delays or takes no action with respect to the FCPA's facilitation payments exception? Is it still obligated to "encourage" companies to prohibit facilitation payments? Even though the FCPA still allows for them? Policy-wise, the United States could still "encourage" domestic companies to prohibit the use of facilitation payments, while still allowing for them under the FCPA, knowing how such activity can be harmful to

178. *Id.* It is interesting that the OECD expressed its disdain for facilitation payments by including strong language about the "corrosive effect" of such payments—language that is similar to the "corrosive phenomenon" language previously used by it in describing facilitation payments in the Convention. *Id.*; see also OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9.

179. See OECD Recommendation, *supra* note 4, at 4.

180. *Id.*

181. *Id.*

182. *Id.* Another relevant provision relating to facilitation payments in the OECD Recommendation stated that the OECD "[urges] all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments." *Id.* This provision appeared to be directed to countries where public officials receive facilitation payments and seeks to repress the demand-side of facilitation payments. *Id.*

domestic companies given that most foreign countries' domestic laws prohibit them. This would be analogous to the United States government encouraging its citizens not to smoke, while still allowing them to legally do so, despite knowledge that smoking can be detrimental to their health. Whether the United States will take such an approach, or legally prohibit the permissible use of facilitation payments altogether within the FCPA, remains to be seen.

B. New Phase 3 OECD Monitoring

Coinciding with the announcement of the OECD Recommendation, the OECD Working Group adopted a new third round of monitoring related to the Convention in December 2009.¹⁸³ The Phase 3 monitoring, which began in 2010, focused on enforcement of the Convention and any outstanding recommendations made during the first two phases of monitoring.¹⁸⁴ With respect to the United States and the issue of facilitation payments, Phase 3 monitoring also focused on how countries had been implementing the OECD Recommendation.¹⁸⁵ Like the previous two phases of monitoring, the Working Group planned to publish its recommendations with respect to its evaluation at the end of the monitoring process.¹⁸⁶

C. Good Practice Guidance

A few months after the OECD Recommendation, on February 18, 2010, the OECD adopted and published, as part of the OECD Recommendation, its Good Practice Guidance on Internal Controls, Ethics, and Compliance ("Good Practice Guidance").¹⁸⁷ The Good Practice Guidance, a set of standards for companies to follow in establishing effective internal controls and compliance programs designed to detect and

183. OECD 2009 Report, *supra* note 77, at 14.

184. *Id.* at 14-15.

185. *Id.* at 14.

186. OECD 2009 Report, *supra* note 77.

187. OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, (Feb. 18, 2010) [hereinafter Good Practice Guidance]. The Good Practice Guidance was adopted as an "integral part" of the Recommendation and became Annex II to the Recommendation itself. *Id.*; OECD Recommendation, *supra* note 4, at 1. OECD Secretary-General Angel Gurría announced the Good Practice Guidance on March 3, 2010, as "the most comprehensive guidance ever provided to companies and business organisations by an international organization" on the issue of anti-bribery internal controls and compliance programs. Press Release, OECD, OECD Calls on Businesses to Step Up Their Fight Against Bribery (Mar. 3, 2010) (quoting OECD Secretary-General Angel Gurría).

prevent foreign bribery, was the first time a set of international anti-bribery compliance standards had been endorsed by multiple governments.¹⁸⁸

On the issue of facilitation payments, the Good Practice Guidance called on companies to adopt compliance programs or measures designed to address facilitation payments.¹⁸⁹ More specifically, the Good Practice Guidance recommended that companies consider “ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control” in the area of “facilitation payments.”¹⁹⁰

D. Initial Domestic Response to the OECD's Call for an End to Facilitation Payments

The OECD's new position in calling for an end to facilitation payments represented an important development in the international anti-bribery arena. While the OECD Recommendation is not technically a part of the Convention, and the OECD does not have any power to force the new legislation or laws of any relevant country as a result of its

188. *Id.*; Good Practice Guidance, *supra* note 187, at 2. The Good Practices Guidance, among other things, essentially called on companies to adopt a “clear and visible” policy on anti-bribery, ensure compliance with such policy “at all levels” within their organizations, and provide “regular communication and training” on the issue of foreign bribery to both employees and “business partners.” OECD Calls on Businesses to Step Up their Fight Against Bribery, *supra* note 187.

189. Good Practice Guidance, *supra* note 187, at 3.

190. *Id.* The Good Practice Guidance appeared to have received the endorsement of the DOJ at the time that it came out. See David Heckler, ‘Roided Up Enforcement: DOJ Unit that Prosecutes FCPA to Bulk up ‘Substantially,’ CORPORATE COUNSEL, Feb. 25, 2010 (suggesting the DOJ's endorsement of the Good Practice Guidance). Mark Mendelsohn, the Deputy Chief of the Fraud Section at the DOJ's Criminal Division in February 2010, was reported to have stated in a speech at the time that the OECD would be publishing its Good Practice Guidance and that such guidance would arrive with the approval of the DOJ. *Id.* Mendelsohn provided the comments during a speaking engagement at the Global Ethics Summit 2010 in New York City. *Id.*; see also Melissa Klein Aguilar, *OECD Anti-Bribery Guide as Path to FCPA Compliance*, COMPLIANCE WEEK, Mar. 30, 2010 (stating that Mendelsohn announced the DOJ's approval of the OECD guidance at a February 2010 anti-corruption conference). A DOJ spokesman declined to make Mendelsohn available for further comment at the time. *Id.* Mendelsohn has since moved on to the private sector. In a recent interview, Mendelsohn described the Good Practice Guidance as a “high-water mark” as far as best practices for preventing and detecting bribery and said that his role in the drafting and adoption of the Good Practice Guidance was “one of the things” that he was the “most proud of” from his time at the DOJ. *Recent Top DOJ Official Shares Insights into FCPA Policies, Enforcement Strategies, Public-Private Cooperation and Role of the OECD*, METROPOLITAN CORP. COUNSEL, Aug. 2, 2010 (quoting Mark F. Mendelsohn of Paul, Weiss, Rifkind, Wharton & Garrison LLP).

recommendations, any message or recommendation from the OECD still carries tremendous weight.¹⁹¹ One would imagine that it would be very difficult for the United States, the country who approached the OECD as a means for seeking an international agreement against foreign bribery, to ignore the OECD's calls. The United States has not appeared to have done so—at least not yet.¹⁹²

Between the time of the OECD Recommendation and the OECD's Phase 3 Report on the United States, there were no legislative or regulatory developments to change or eliminate the facilitation payments exception. However there was a lot of talk on the issue. At least one commentator expressed an opinion that there would likely be an effort by the United States to amend the FCPA to eliminate the exception.¹⁹³ In addition, a couple of senior DOJ officials also weighed in on the issue. On April 8, 2010, Charles Duross, an Assistant Chief with the Fraud Section at the DOJ's Criminal Division, indicated during a panel discussion that the DOJ was "not encouraging" facilitation payments.¹⁹⁴ And on May 26, 2010, Lanny Breuer, the Assistant Attorney General for the DOJ's Criminal Division, indicated during a conference that the DOJ was open to revisiting the exception.¹⁹⁵ In his remarks, Breuer stated that revisiting the exception was something "worth discussing" and that he did not necessarily "rule . . . out" such a revisit happening.¹⁹⁶

191. See Cook & Connor, *supra* note 175 (stating that "[a]lthough the OECD has no power to enact legislation, the organization has been the primary force behind the promulgation of anticorruption laws").

192. Indeed, U.S. Secretary of Commerce Gary Locke and U.S. Secretary of State Hillary Clinton provided positive remarks during the OECD's announcement of the OECD Recommendation. See Governments Agree to Step Up Fight Against Bribery, *supra* note 173. In her remarks, U.S. Secretary of State Hillary Clinton stated that "the United States fully supports the OECD's anti-corruption agenda." *Id.*

193. *A Fresh Look at the FCPA*, METROPOLITAN CORP. COUNSEL, Feb. 1, 2010 (Interview of R. Christopher Cook of Jones Day).

194. Christopher M. Matthews, *Compliance Monitors are Here to Stay*, MAIN JUSTICE, Apr. 8, 2010 (quoting Charles Duross, Assistant Chief, Fraud Section, Criminal Division, Department of Justice). The comments were made at an event entitled "Foreign Corrupt Practices Act: What you Need to Know," hosted by the Council on Foreign Relations on April 8, 2010. *Id.*

195. Christopher M. Matthews, *Breuer: Facilitating Payments Worth Discussing*, MAIN JUSTICE, May 26, 2010. The comments were made at the Compliance Week Fifth Annual Conference. *Id.*

196. *Id.* (quoting Lanny Breuer, Assistant Attorney General, Department of Justice). Breuer also noted that while he was "not currently aware of any real movement to make that change" in the United States, that he thought that "as other countries[] laws evolve and mature . . . I suspect over time, we too will be modifying our law." *Id.*

VIII. OECD APPLIES PRESSURE ON THE UNITED STATES IN THE OECD
PHASE 3 REPORT

On October 15, 2010, the OECD Working Group came out with its Phase 3 Report on the United States.¹⁹⁷ The Phase 3 review, designed to look at both the outstanding recommendations made during the first two phases of monitoring, as well as how the United States was putting the OECD Recommendation into action, marked the first time the United States and the FCPA had faced a review by the OECD since the OECD's initial call for the elimination of facilitation payments in the OECD Recommendation.¹⁹⁸

A. *OECD Phase 3 Report on the United States*

The OECD Phase 3 Report criticized the United States for its policies on facilitation payments, yet praised the country for encouraging domestic companies to prohibit the use of facilitation payments in their operations.¹⁹⁹

1. Criticism of the United States over its Policies and Approach on
Facilitation Payments

With respect to the first key recommendation in the OECD Recommendation that "in view of the corrosive effect of small facilitation payments," member countries "undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon," the OECD once again criticized the United States for what it perceived to be a lack of guidance on the FCPA's facilitation payments exception.²⁰⁰ On this issue, the OECD noted that it had previously recommended that the United States consider developing

197. Phase 3 Report, *supra* note 1.

198. *See id.* at 6. Interestingly, the United States did not shy away from the Phase 3 review, and the challenges that would come under it, but volunteered to be one of the first countries to come under the review. Press Release, OECD, U.S. 1 of First 2 Volunteers to Undergo Rigorous Phase 3 Peer Review, United States Mission to the OECD, Oct. 13, 2010, available at <http://usoecd.usmission.gov/antibribery-phase-3.html>. In volunteering for the review, U.S. Ambassador to the OECD Karen Kornbluth stated that "[w]e were pleased to be among the first countries to go under the magnifying glass of peer scrutiny at the OECD Phase 3 review." *Id.* (quoting U.S. Ambassador to the OECD Karen Kornbluth). She stated that "[a]s one of the first two volunteers to be reviewed, the U.S. is setting a high standard for the 'race to the top' expected of all Convention signatories." *Id.*

199. *See* Phase 3 Report, *supra* note 1, at 22-24.

200. *Id.*; OECD Recommendation, *supra* note 4, at 4. This was a criticism previously noted in the second phases of review. *See supra* notes 115 through 117 and accompanying discussion.

“specific guidance on the application” of the exception but that the United States had not done so.²⁰¹ The OECD also repeated its criticism of the exception for failing to limit it to “small” payments, as provided under Commentary 9 to the Convention.²⁰²

Of particular interest in the Phase 3 Report is its indication that the United States would continue to review its policies on facilitation payments.²⁰³ Specifically, the Working Group stated that DOJ Assistant Attorney General Breuer had told them during a welcoming address that the exception would continue to come under United States review, as recommended by the OECD Recommendation.²⁰⁴ To this end, the Working Group suggested that the United States consider comments by compliance experts and the private sector in any such continued review, noting that most of the compliance experts and private sector representatives that they had spoken with had felt that the exception was unclear or needed further guidance.²⁰⁵

2. Praise for United States Encouragement of Companies to Prohibit or Discourage Facilitation Payments

Unlike the criticism of the United States for its policies on facilitation payments, the Phase 3 Report praised the United States for steps taken to comply with the second core part of the OECD Recommendation—that the United States “encourage companies to prohibit or discourage the use of

201. Phase 3 Report, *supra* note 1, at 22-24. The OECD noted, however, that the DOJ had responded to its concerns in this area by noting that no one from the private sector had ever submitted a “request for an Opinion Procedure Release on the application of the exception” and therefore it believed that there was sufficient guidance out in the public concerning the exception. *Id.* at 23. The United States had also stated that the defense bar “rarely” raised the exception during enforcement actions and therefore that the FCPA bar understood the exception and found it to be “clear.” *Id.* at 23.

202. *Id.* at 23-24; OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9. This was another criticism previously noted in the second phase of review. *See supra* note 112 and accompanying discussion.

203. *See id.* at 24 (“[T]he exception for facilitation payments will continue to come under review . . .”); *see also* OECD Recommendation, *supra* note 4, at 4.

204. Phase 3 Report, *supra* note 1, at 24.

205. *See id.* The Working Group noted that all of the representatives from the business sectors that they had spoken with had the opinion “that the scope” of the facilitation payment exception was “unclear.” *Id.* The Working Group also noted that all but one of the compliance experts that they had spoken with believed that further guidance was necessary. *Id.* The Phase 3 Report specifically recommended that the “the United States, in its periodic review of facilitation payment pursuant to the OECD Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the ‘grey’ areas identified by them.” *Id.*

small facilitation payments.²⁰⁶ The United States, in response to questions from the Phase 3 review, noted several steps that it had undertaken to be proactive in encouraging companies to prohibit or discourage the use of facilitation payments.²⁰⁷ The United States stated that the SEC's Division of Enforcement had been "instrumental in encouraging companies to prohibit or discourage the use of small facilitation payments and ensure that, where they are made, they are accurately accounted for in companies' books and financial records by instituting actions against public companies that fail in this regard."²⁰⁸ The United States also noted that DOJ, SEC and United States Department of Commerce officials had spoken at numerous anti-bribery conferences where these officials "encouraged companies to prohibit or discourage the use of small facilitation payments."²⁰⁹ The Phase 3 Report stated that "civil society . . . welcomed recent public statements by the United States government that ma[d]e it very clear that [facilitation] payments are not condoned and that companies should take steps to eliminate them."²¹⁰ The report then noted that the evaluators commended the United States for "recent steps taken in line" with the OECD Recommendation "to encourage companies to prohibit or discourage the use of facilitation payments."²¹¹

The Phase 3 Report that came out in October 2010 was not the end of the Phase 3 review. In fact, the Phase 3 review is scheduled to go on for at least another two years, during which time the OECD will continue to apply pressure on the United States to review its policies on facilitation payments. The United States is scheduled to do an oral report to follow up on its implementation of key recommendations made by the Working Group after one year of the Phase 3 Report.²¹² The United States will next be required to submit a written report on these issues within two years of the report, which will then be the subject of a publicly available evaluation by the Working Group concerning its implementation of the relevant recommendations.²¹³

206. *Id.*; see also OECD Recommendation, *supra* note 4, at 4.

207. OECD Working Group on Bribery, *Response of the United States Questions Concerning Phase 3*, at 42-43 (May 3, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

208. *Id.* at 42.

209. *Id.* at 43.

210. Phase 3 Report, *supra* note 1, at 24.

211. *Id.*

212. Press Release, OECD, United States: OECD Recognizes Anti-Bribery Enforcement and Recommends Enhancement (Oct. 20, 2010).

213. *Id.*

IX. POTENTIAL FUTURE EFFORTS BY THE OECD TO END FACILITATION PAYMENTS

It will be interesting to see what the United States will do with respect to facilitation payments given the continued pressure by the OECD. If nothing is done by the end of the Phase 3 review, it would not be surprising if the OECD considered a repeal of Commentary 9 to the Convention.²¹⁴ After all, it seems hypocritical for the OECD to call for an end to facilitation payments, and criticize the United States and the FCPA's exception for them, when the OECD and the Convention itself still allows for such payments.²¹⁵

It is therefore this author's prediction that if the United States does not address and end the facilitation payments exception during the OECD's Phase 3 review, that the OECD may repeal, or at least seriously consider a repeal of, Commentary 9 to the Convention. This would place the OECD in a high-stakes game against the United States, since such a repeal would potentially force the United States to either eliminate the facilitation payments exception as a means for complying with the Convention, or drop out of the Convention altogether. The OECD may be hesitant to pose such a challenge on the United States. However, given the OECD's call for an end to facilitation payments, it will be hard for the OECD to continue to allow Commentary 9 to be a part of the Convention.

X. PREDICTION THAT THE FCPA'S FACILITATION PAYMENTS EXCEPTION WILL EVENTUALLY BE ELIMINATED

The United States, through the enactment of the FCPA, was the first country to address the problems of foreign bribery and global corruption. In doing so, it placed domestic companies at a competitive disadvantage to their foreign counterparts as a result of the FCPA. The legislators thus provided a facilitation payments exception as a means for easing the burden on domestic companies.²¹⁶ At the time, at least during the creation of the FCPA, it seemed like the reasonable thing to do. Yet, when the United States originally provided for the facilitation payments exception, it never truly accepted the morality of such facilitation payments, viewing such payments as "reprehensible," and only allowing for them because they were "not necessarily" viewed reprehensible "elsewhere in the world."²¹⁷

Things are different now. Most of the civilized world no longer

214. OECD Anti-Bribery Convention, *supra* note 3, at Commentary 9.

215. *Id.*

216. *See supra* notes 46-50 and accompanying discussion.

217. H.R. REP. NO. 95-640, at 8 (1977).

condones facilitation payments.²¹⁸ The 1988 Amendments, calling on the United States government to pursue an international anti-bribery treaty through the OECD, set in motion an ever-growing snowball against facilitation payments.²¹⁹ The United States approached the OECD for an international anti-bribery treaty, the OECD followed up with the Convention, countries implemented the Convention into their own foreign anti-bribery laws, and now most of the civilized world has laws outlawing foreign bribery.²²⁰ The world caught up to the United States on the foreign bribery front. But on the issue of facilitation payments, the world continued to move forward as well. As a result, the FCPA, the first and premier foreign anti-bribery law, has been left behind with respect to its permissibility for facilitation payments. And while the FCPA contains several core provisions that will always withstand the test of time, the facilitation payments exception is out of date in this modern-day era of commerce and sensibility.

It is therefore this author's opinion that the FCPA will be amended to end the facilitation payments exception. The United States will do so mainly because of the international pressure, including that from the OECD, to eliminate the exception. And while the United States will not necessarily have to bend to international pressure, it is doubtful that it will fight such pressure in defending an unpopular exception for an activity that it considers "reprehensible" and is "encouraging" domestic companies to avoid.²²¹ Instead, the United States, as the leading nation in pursuing foreign bribery, will eliminate the facilitation payments exception so that it can catch up with the rest of the world in banning such payments, instead of trailing or lagging behind.²²²

This author also believes that, while we are eventually headed down a path towards the elimination of the facilitation payments exception, such an elimination will not happen in the near future. The facilitation payments exception became law through the relevant statute of the FCPA and the very act of repealing that law will require legislative amendments to the FCPA, a difficult and time-consuming process.²²³ Furthermore, without a

218. See TRACE SURVEY, *supra* note 33, at 2; Aguilar, *supra* note 33; Fox, *supra* note 33, at 3.

219. See 1988 Amendments, *supra* note 10.

220. See OECD Anti-Bribery Convention, *supra* note 3; TRACE SURVEY, *supra* note 33, at 2.

221. H.R. REP. NO. 95-640, at 8 (1977); *Response of the United States Questions Concerning Phase 3 OECD Working Group on Bribery*, *supra* note 207, at 42-43. In addition, eighty percent of domestic companies have already prohibited the practice of making facilitation payments. See Fulbright Survey, *supra* note 154, at 8.

222. Sokenu, *supra* note 100, at 651-52.

223. See *Response of the United States Questions Concerning Phase 3 OECD Working*

strong mandate to amend the FCPA, such as the criticisms that preceded the 1988 Amendments and the Convention that preceded the 1998 Amendments, there may not be an impetus strong enough to get Congress to amend the FCPA in the very near future.²²⁴ Therefore, it may be years before the exception will be eliminated. Nevertheless, this author believes that the exception will eventually be eliminated.

XI. COMPANIES SHOULD PROHIBIT FACILITATION PAYMENTS AS A BEST PRACTICE NOW

As a best practice, companies should ban facilitation payments altogether. Not because they necessarily have to under the FCPA, or because the relevant domestic regulatory authorities are encouraging them to end the practice, but because it is a best practice that will save them time, money, and energy, now and in the future.

Eighty percent of domestic companies have already banned facilitation payments for good reason.²²⁵ But for those that have not, this author recommends that they do so, especially as this global anti-bribery environment becomes increasingly hostile to facilitation payments. Banning facilitation payments from their operations will allow companies to avoid legal liability and the higher costs associated with making such payments. It will also allow them to stay ahead of the regulatory landscape that will likely completely prohibit facilitation payments in the near future.

A. *Avoid Potential Domestic and Foreign Legal Liability Involved in Making Facilitation Payments*

Companies should prohibit facilitation payments from their operations

Group on Bribery, supra note 207, at Appendix H. In an interesting survey done in May 2009 by the OECD Working Group, the Working Group asked the United States whether it was in favor of repealing or maintaining the exception for “small” facilitation payments as provided for in Commentary 9. *Id.* In its response, the United States stated that it was in favor of maintaining Commentary 9 but then went into the difficulties involved if it would be required to change its exception. *Id.* In the response, the United States stated, “[w]e would like to reiterate that the Commentary to the Convention was included in the transmittal package sent to the U.S. Senate for approval as part of the Convention ratification process and emphasize that such a change would require at a minimum consultations with the Senate.” *Id.* It then stated that “such a change would require an amendment to our criminal statute, which would necessitate approval by both houses of Congress.” *Id.*

224. See *supra* notes 51-59, 74-83 and accompanying discussion. Nevertheless, any change to the Convention, such as the elimination of Commentary 9 or otherwise, could force the legislators to act and amend the FCPA accordingly.

225. Fulbright Survey, *supra* note 154, at 8.

to avoid facing potential adverse legal consequences. Facilitation payments are considered small-time bribes illegal under almost every domestic bribery law in the world.²²⁶ Thus, every time a company condones and makes a facilitation payment in an overseas jurisdiction, it runs the risk of getting caught and prosecuted under a foreign jurisdiction's domestic bribery law. In addition, most countries' foreign anti-bribery laws criminalize such payments. For example, the new United Kingdom Bribery Act criminalizes foreign bribery and does not provide an exception for facilitation payments.²²⁷ And while the FCPA itself still provides an exception for facilitation payments, the exception itself is arguably becoming a more gray area of the law and one subject to narrowing interpretation.²²⁸ Thus, even under the FCPA, the making of a facilitation payment will oftentimes be a very dangerous endeavor.

There is also the Catch-22 problem that every time a domestic company makes a facilitation payment that is legal under the FCPA, it may be illegal under a relevant foreign jurisdiction's domestic bribery law. The company could either conceal the payment in violation of the FCPA's accounting provisions, or properly record the payment and confess to making a bribe in violation of a relevant foreign jurisdiction's domestic bribery law. Either way, it is a no-win situation. The domestic company making a facilitation payment thus stands to lose and faces legal liability, no matter what it does. This practice just does not make sense, at least not from a legal point of view.

B. Avoid Higher Costs Involved in Making Facilitation Payments

Another reason why companies should prohibit facilitation payments within their operations is that they are very costly. There is a complex matrix of domestic and foreign anti-bribery laws that companies must navigate when making facilitation payments, and steering through that matrix can be a compliance nightmare and a costly legal undertaking. The costs involved in making facilitation payments are likely to overwhelm any benefits that companies might receive from making them.²²⁹

Moreover, studies have shown that making facilitation payments, regardless of legality, can be very costly for companies from a business

226. TRACE SURVEY, *supra* note 33, at 2.

227. Bribery Act 2010, 2010, c. 23 (Eng.) [hereinafter UK Bribery Act]. The UK Bribery Act will come into force on July 1, 2011.

228. See *supra* notes 143-53 and accompanying discussion.

229. It is for this reason that eighty percent of domestic companies have decided that it was better to ban making facilitation payments altogether than to continue making them. See Fulbright Survey, *supra* note 154, at 8.

expense perspective.²³⁰ Companies making facilitation payments place bullseyes on their foreheads that can be seen by “entrepreneurial bribe-takers” who will expect further payments in the future and will make even greater demands.²³¹ These costs on companies can be much higher than anticipated and can be a burdensome expense that may forever haunt them.

Another cost that might be incurred by companies making facilitation payments is the cost of dealing with potential government investigations and regulatory matters, domestic or foreign, as a result of making such payments. As noted before, companies making facilitation payments are likely violating some kind of law, whether it be domestic or foreign, and these companies will need to deal with the costly legal expense of defending themselves from potential charges, not to mention penalties and fines that might be imposed on them, should they be found guilty of any violations.²³²

C. *Stay Ahead of a Future Legal Horizon That May Completely Outlaw Facilitation Payments*

A third reason why companies should prohibit making facilitation payments is that the legal avenue for making such payments is quickly fading away. The building international criticism and regulatory frameworks banning facilitation payments have made it increasingly difficult or impossible to make facilitation payments without violating some kind of law. Furthermore, the legal permissibility gap that existed for facilitation payments back when the FCPA was enacted in 1977 is virtually nonexistent today.

Although five countries currently allow for facilitation payments under their foreign anti-bribery laws, the OECD’s recent calls for an end to these payments will likely put pressure on all OECD countries to amend and change their laws to eliminate their allowance. It is this author’s view that the OECD’s calls will also put pressure on non-signatory nations to the Convention to eliminate their allowance as many of these nations may want to become signatories to the Convention in the future. Therefore, most, if not all, countries in the world will eventually prohibit the use of facilitation payments. In this respect, the few domestic companies that still engage in making facilitation payments should stay ahead of the game and eliminate

230. TRACE, THE HIGH COST OF SMALL BRIBES, *supra* note 166, at 8-9; Dutton, *supra* note 129.

231. *Id.*

232. See Thomas Fox, *What is the Cost of FCPA Compliance (or Non-Compliance)?*, CORP. COMPLIANCE INSIGHTS, Jun. 3, 2010. The cost for companies to defend themselves in FCPA investigations can easily run in the tens or hundreds of millions of dollars. *Id.*

the practice now so that they will be ready for a potential future regulatory landscape that may one day universally prohibit facilitation payments.

XII. CONCLUSION

The facilitation payments exception has become a dinosaur remnant of a bygone era, a part of a foreign anti-bribery statute in the FCPA that was enacted during a time in the 1970s when corruption was prevalent and no international treaty existed to prohibit foreign bribery. It was reasonable for the United States to provide an exception for facilitation payments at the time, when the main provisions of the FCPA already placed a difficult burden on domestic companies, and the elimination of facilitation payments would have made the burden much more difficult. But times have changed.

The United States pushed hard for an international anti-bribery regime so that it would no longer be isolated in the fight against foreign bribery that left its domestic companies at an unfair disadvantage when competing in the global marketplace. These efforts have been tremendously successful and have led to an international anti-bribery environment that continues to develop and mature to this very day. However, these efforts have also backfired on the United States, as it now finds itself awkwardly criticized by the rest of the world for its own anti-bribery deficiencies inherent in the facilitation payments exception. Rather than fight the criticisms, the United States should embrace them and consider eliminating the exception once and for all. That way, the United States can join the rest of the world in condemning facilitation payments and fulfill its leadership role in the fight against foreign bribery.