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Retaking the Helm against International Bribery- The Facilitating Payments Exception and Sovereign Dominance

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RETAKING THE HELM AGAINST
INTERNATIONAL BRIBERY: THE FACILITATING
PAYMENTS EXCEPTION AND SOVEREIGN
DOMINANCE

*Tanya Rolo**

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INTRODUCTION

Even while Colonel Muammar Qaddafi’s body was still on public display in Libya, the popular business networking site, LinkedIn, became abuzz with companies exploring opportunities in the country.¹ One man, Mabruk Swayah, a self-

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identified Libyan businessman wrote: “Hi friends you all are welcome to Libya. Just make sure you go through the proper channels for your work contracts and don’t get involved in bribes, inducements or sweeteners to officials. Remember we have free media now.”²

In emerging markets such as Libya, businesses see many opportunities for profit.³ These businesses may seek to use any advantage within their means to obtain a lucrative contract, including paying bribes to government officials.⁴ In fact, in some countries, paying a bribe to a government official is an expected and necessary cost of doing business.⁵ In countries such as India, bribes infect everyday life.⁶ A new website created in India titled “I Paid a Bribe,” provides a forum for citizens to share tales of

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1. See Scott Shane, *West Sees Libya as Ripe as Last for Businesses*, N.Y. TIMES, Oct. 29, 2011, at A-1 (discussing how Western companies seek profit-making opportunities in Libya); see also Hammond: *Libya 'Holds Business Opportunities' for UK*, BBC (Oct. 21, 2011), <http://www.bbc.co.uk/news/15403458> [hereinafter Hammond] (mentioning the UK business opportunities in Libya, particularly in oil).

2. See Shane, *supra* note 1.

3. See Hammond, *supra* note 1 (providing an example of the United Kingdom looking to Libya for business opportunities).

4. See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129, 130 (2010) (noting how a significant problem for many states is that officials seek bribes on government goods).

5. See Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 291 (1994) (listing countries that drive economic forces in their geographical regions such as China and Indonesia and emphasizing that, among these countries, many are among the most corrupt, where bribery and “grease” payments are *de rigeur* in international business negotiations); see also Beverly Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L.J., 483, 512 (2000) (noting that Europe, Asia, and the Americas are not immune from the “bribe tax” that afflicts Eastern Europe, the Baltic States, and the Commonwealth of Independent States).

6. See Stephanie Strom, *Web Sites Shine Light on Petty Bribery Worldwide*, N.Y. TIMES, Mar. 6, 2012, at B1, (noting the prevalence of petty bribery in India); see also TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 3 (2010), http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (ranking India as the 87th most corrupt country out of 178 countries; Somalia is ranked the most corrupt).

petty bribery.⁷ Of more than 400,000 reports, about eighty percent detail stories of officials and bureaucrats seeking illicit payments to provide routine services or to process paperwork.⁸ In addition to this cost, corruption is discouraged in principle.⁹ However, such active discouragement was not always present.¹⁰ Beginning in the 1970s, the United States led the crusade to fight corruption in international business transactions by enacting the Foreign Corrupt Practices Act (“FCPA”).¹¹ The FCPA, however, provides an “[e]xception for routine governmental action,” (the “Exception”).¹² The Exception permits “facilitating or expediting payment[s]” to foreign officials for services they are legally obligated to perform.¹³ The purpose behind the Exception is to make it possible to expedite a necessary service, and not to influence a government decision in awarding a contract or business opportunity.¹⁴ The US Congress included the Exception to help US companies compete in a global marketplace still ruled by rampant

7. See I PAID A BRIBE, <http://www.ipaidabribe.com> (last visited Nov. 3, 2012) (providing a forum for victims of corrupt officials demanding bribes to tell their stories); see also Strom, *supra* note 6 (discussing the website’s purpose).

8. See Strom, *supra* note 6 (citing this statistic that demonstrates the prevalence of petty bribery in India).

9. See Carrington, *supra* note 4, at 142 (observing the “sincere efforts” of those countries that have ratified anti-corruption conventions while still questioning whether those nations have been effective in deterring corruption, describing these efforts as more of a “hollow commitment”). Carrington emphasizes the weakness of the global resolve to punish corrupt practices by providing examples from Lesotho and the United Kingdom, before the passage of the Bribery Act. *Id.* at 143–45.

10. See Carrington, *supra* note 4, at 131–32 (mentioning the prevalence of bribery in American firms before the passage of the Foreign Corrupt Practices Act (“FCPA”).

11. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (1977) [hereinafter FCPA].

12. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (excepting application of the FCPA’s anti-bribery 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 by a foreign official, political party, or party official”).

13. *Id.*

14. See 15 U.S.C. §§ 78dd-1(f)(3)(A)-(B), 78dd-2(h)(4)(A)-(B), 78dd-3 (f)(4)(A)-(B) (“The term ‘routine governmental action’ means only an action which is ordinarily and commonly performed by a foreign official . . . [it] does not include any decision by a foreign official . . . to award new business to or to continue business with a particular party.”).

corruption.¹⁵ Subsequently, the US Department of Justice (“DOJ”) wrote the Lay Person’s Guide to the FCPA as a general reference document to assist US companies and personnel in understanding and complying with the statute.¹⁶

These anti-corruption efforts led US officials to work with the Organisation of Economic Co-operation and Development (“OECD”) to develop global anti-corruption standards.¹⁷ Ultimately, these efforts culminated in the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”).¹⁸ The OECD Convention establishes legally binding standards to criminalize the bribery of foreign public officials in international business transactions.¹⁹ While the OECD Convention permits the use of small facilitating payments, the OECD now discourages the use of all facilitating payments.²⁰

15. See H.R. REP. NO. 95-640, at 8 (1977) (discussing the competitive disadvantage the United States would face in business transactions if Congress prohibited all bribes); see also Earle, *supra* note 5, at 487 (detailing how US businesses complained that corruption was an economic reality and that FCPA limitations placed US firms at a competitive disadvantage).

16. See generally LAY PERSON’S GUIDE TO THE FCPA, U.S. DEP’T OF JUSTICE, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Nov. 29, 2011) [hereinafter LAY PERSON’S GUIDE].

17. See Earle, *supra* note 5, at 487–88 (discussing former President Bill Clinton’s charge to work through the Organization for Economic Co-operation and Development (“OECD”) to level the international playing field for US companies, culminating in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”)); see also Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act - 1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 98–100 (2010) (noting the United States’ encouragement for the OECD to enact the OECD Convention and detailing its provisions generally along with US compliance).

18. See Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, 7 [hereinafter OECD Convention]; see also LAY PERSON’S GUIDE, *supra* note 16 (noting the US executive branch’s negotiations with the OECD).

19. See OECD Convention, *supra* note 18, at 7–8 (noting the purpose of the OECD Convention).

20. 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), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf> [hereinafter OECD Recommendation] (“[The OECD] [r]ecommends, in view of the corrosive effect of small facilitation payments . . . that Member countries

Thirty-four OECD member countries and four non-member countries have ratified the OECD Convention and have enacted some form of domestic legislation prohibiting bribes.²¹ The global trend against corruption and the increased prosecution of companies under the FCPA has led commentators to question whether the United States should maintain the Exception in the FCPA.²² The increase in enforcement actions in particular has led to closer examination of the statute's anti-bribery provisions.²³

The global trend in preventing corruption is especially apparent with the recent passage of the United Kingdom's Bribery Act 2010 ("Bribery Act").²⁴ The Bribery Act has brought

should encourage companies to prohibit or discourage the use of small facilitating payments.”). The Exception in the Foreign Corrupt Practices Act, on the other hand, permits facilitating payments to be any amount, in theory. *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1977) (delineating no limitation to the amount of facilitating payments permitted to be paid).

21. *See Implementing the Convention, Country by Country*, OECD, <http://www.oecd.org/daf/ briberyininternationalbusiness/anti-briberyconvention/oecdanti-briberyconventionnationalimplementinglegislation.htm> (last visited Oct. 22, 2012) (noting each member countries' implementation of the Convention). The thirty-four OECD member countries are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. The four non-member countries are Argentina, Brazil, Bulgaria, and South Africa. *Id.*

22. *See, e.g.*, DAVID KENNEDY & DAN DANIELSEN, OPEN SOC'Y FOUND., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5 (2011), available at <http://www.opensocietyfoundations.org/sites/default/files/Busting%2520Bribery2011September.pdf> (writing in response to the US Chamber of Commerce position and declaring the Chamber's position to be one of promoting bribery); ANDREW WEISSMANN & ALIXANDRA SMITH, US CHAMBER INST. LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 5 (2010) (discussing the harm the FCPA has caused to US business interests and recommending amendments to the FCPA to make it more “business friendly”).

23. *See generally* KENNEDY & DANIELSEN, *supra* note 22 (examining the FCPA's provisions in light of the U.S. Chamber of Commerce's proposals to amend the FCPA); WEISSMANN & SMITH, *supra* note 22 (proposing various amendments to the FCPA).

24. *See* Eric Engle, *I Get by with a Little Help from My Friends? Understanding the UK Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1188 (2010) (observing that the Bribery Act raises international standards by effectively forcing corporations to institute effective procedures to prevent bribery); *see also* Lee G. Dunst et al., *Hot Off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act*, 12 BUS. L. INT'L 257, 262 (2011)

increased attention to the FCPA's provisions as a point of comparison.²⁵ It does not explicitly provide an exception for facilitating payments.²⁶ Moreover, the Bribery Act is broader than the FCPA in application and extraterritorial reach.²⁷ This difference may have serious implications for US businesses that may be subject to the Bribery Act's provisions.²⁸

Recently, there has been considerable debate and scholarship regarding the FCPA's provisions. Numerous blogs dedicated to studying FCPA reform and Securities and Exchange Commission ("SEC") enforcement actions under the FCPA have sprung up.²⁹ Some commentators have proposed amending the statute to remedy the provisions that create a perceived competitive disadvantage. Others have countered this position by arguing that a more permissive statute would destroy US efforts in curbing corruption. This Note evaluates two approaches to amending the FCPA: 1) one to create a more aggressive statute and 2) to establish a more business friendly statute. In this discussion of the FCPA, many scholars and practitioners have centered their criticism and discussion on the usefulness of the Exception. This Note argues that the United

(discussing the Bribery Act as taking "centre stage" as legal practitioners prepare for its application).

25. See Dunst et al., *supra* note 24, at 262 ("The impact that the Bribery Act has on multinational corporations will largely be determined by how it differs from the incumbent anti-corruption regime for the multinational corporate community, which has up until now largely been the FCPA."); see also F. Joseph Warin et al., *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L J. 1, 7 (2011) (noting that the impact of the Bribery Act "will be, at least in part, determined by how it differs from the FCPA").

26. See Bribery Act, 2010, c. 23 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (facilitating payments are not discussed in the statute).

27. Compare Bribery Act, 2010, c. 23, § 12(5) (U.K.) (containing a broader extraterritorial application than the FCPA), with 15 U.S.C. § 78dd-1(g) (2006) (detailing the FCPA's extraterritorial reach).

28. See *infra* notes 184-93 (highlighting the potential implications for US companies that may be subject to the Bribery Act).

29. See THE INVESTOR'S ADVOCATE: HOW THE SEC PROTECTS INVESTORS, MAINTAINS MARKET INTEGRITY, AND FACILITATES CAPITAL FORMATION, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/about/whatwedo.shtml> (last visited Aug. 13, 2012) [hereinafter *SEC Guide*] (describing how the Securities and Exchange Commission regulates US securities exchanges to protect investors and promote efficient markets and capital formation.).

States should repeal the Exception, thus creating a more aggressive anti-corruption statute. It emphasizes the disadvantages of employing the Exception, and in light of the Bribery Act, urges the United States to once again lead the fight to curb global corruption. Part I discusses the history and specific provisions of both the FCPA and Bribery Act while highlighting the United States' historical lead in enacting anti-bribery legislation by encouraging the creation of the OECD Convention. Part II details two different approaches to amend the FCPA. Part III concludes by emphasizing that the global trend disfavors the use of facilitating payments, arguing that repealing the Exception would resolve the risks associated with facilitating payments, and noting the importance of re-establishing US dominance in fighting corruption.

I. *BACKGROUND AND STATUTORY PROVISIONS*

To justify the repeal of the Exception, the history behind the FCPA's passage and the original justification for the Exception's inclusion must be considered. Its history explains the United States' rationale for creating an Exception. The current international stance towards the Exception, however, discourages and largely prohibits its use. Part I examines the history behind the enactment of the FCPA and the prevalent international stance regarding the facilitating payments exception. Part I.A begins by discussing the events that led the US Congress to enact the FCPA and reviews the important provisions of the statute. Part I.B. examines the United States' role as a leader in combating bribery abroad and surveys the development of the OECD Convention modeled after the FCPA. Part I.C details the prevalent international stance towards facilitating payments with a focus on the OECD and Bribery Act.

A. *History of the FCPA*

Prior to the 1970s, the payment of bribes was not illegal and thus, there were a significant number of bribes paid overseas by

US businessmen.³⁰ The 1972 Watergate scandal alerted Congress and the press to endemic corruption in US business and politics.³¹ As part of the investigation into the Watergate wiretapping, a Watergate special prosecutor uncovered corporate slush funds that US companies had used to make questionable international payments.³² A subsequent “SEC” investigation revealed widespread use of false accounting methods to conceal bribes paid to foreign officials.³³ The SEC feared a crisis in the self-reporting system.³⁴ This self-reporting system requires US companies to provide full and accurate disclosure in SEC filings of the use of corporate funds.³⁵ The

30. See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 84 (2007) (noting how the FCPA was the first legislation in the world to recognize and seek to curb the contribution of companies to foreign corruption).

31. See Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done With the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433 (1987) (reviewing the origins of the FCPA). The Watergate scandal involved the arrest of burglars in the Democratic National Committee office commissioned by individuals in former President Nixon's reelection committee. The subsequent investigation uncovered widespread political corruption and led the US government to initiate official investigations. See *The Watergate Story*, WASH. POST, Jan. 3, 2011, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html> (“So began the chain of events that would convulse Washington for two years, lead to the first resignation of a US president and change American politics forever.”).

32. See MIRIAM F. WEISMANN, *CRIME, INCORPORATED: LEGAL AND FINANCIAL IMPLICATIONS OF CORPORATE MISCONDUCT* 94 (2009) (discussing the events that led to the discovery of illicit funds); see also H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 241 (2001) (noting the subsequent investigations and discoveries made after the Watergate scandal).

33. See WEISMANN, *supra* note 32, at 94 (noting the most famous case that involved Gulf Oil and its Vice President, Claude C. Wilde where SEC investigators discovered that from 1960 to 1973, Gulf Oil spent more than US\$10 million dollars on illegal political activities and in business transactions abroad); see also Carrington, *supra* note 4, at 132 (discussing the role of the SEC after the Watergate scandal findings).

34. See WEISMANN, *supra* note 32, at 94 (noting the SEC response to the mounting evidence of corruption). The SEC is the American government agency responsible for overseeing the key participants in the securities world by enforcing US securities laws and regulating the industry. See SEC GUIDE, *supra* note 29” (providing a general description of the mission of the SEC).

35. See SEC GUIDE, *supra* note 29 (declaring that the laws and rules that govern the US securities industry derive from the concept that all investors should have access to certain basic facts about an investment; thus, the SEC requires public companies to disclose meaningful financial and other information to the public); see also WEISMANN, *supra* note 32, at 94 (describing the self-reporting system and its importance).

SEC recognized that widespread corruption could impede the self-regulatory system of corporate responsibility.³⁶ To ascertain the extent of corruption, the SEC implemented a voluntary disclosure program that allowed US companies to self-report wrongdoing to the SEC while avoiding punishment.³⁷

In 1977, the SEC issued a report detailing the results of this voluntary disclosure program.³⁸ The results were alarming.³⁹ More than 400 companies admitted to making questionable payments.⁴⁰ These payments exceeded US\$300 million in corporate slush funds to non-US officials or politicians.⁴¹ Over 117 of the self-reporting companies ranked in the top Fortune 500 companies.⁴² As a result, during the summer and fall of 1975, the US House of Representatives held hearings on the activities of US multinational corporations.⁴³ After two and a half years of congressional hearings, US President Jimmy Carter signed the Foreign Corrupt Practices and Investment Disclosure

36. See WEISMANN, *supra* note 32, at 94 (discussing the SEC's concern over the extent of corruption); see also Bixby, *supra* note 17, at 92-93 (noting how the discovery of illegal contributions made by corporate executives to Nixon's reelection campaign prompted former SEC enforcement chief, Stanley Sporkin, to conduct an investigation examining the financial reports of these corporations with the purpose of determining how the illegal payments were recorded on corporate books).

37. See WEISMANN, *supra* note 32, at 95 (noting the purpose behind the SEC's report); see also Longobardi, *supra* note 31, at 433-34 (highlighting the SEC's formal investigation).

38. See S. Comm. on Banking, Hous. & Urban Affairs, 95th Cong., Rep. of the SEC on Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976) [hereinafter SEC REPORT]; see also Brown, *supra* note 32, at 241, 243 (discussing the impact of the SEC Report); Krever, *supra* note 30, at 87 (stating that the US Congress passed the FCPA, in part, as a response to the SEC report).

39. See Brown, *supra* note 32, at 241, 243 (discussing the results of the report and subsequent reaction); see also Krever, *supra* note 30, at 87 (highlighting the results of the report).

40. See SEC REPORT, *supra* note 38 (listing the results of the self-disclosure survey); see also H.R. REP. NO. 95-640, at 4 (1977) (stating the results of the report).

41. See SEC REPORT, *supra* note 38 (listing the results of the SEC self-disclosure survey); see also H.R. REP. NO. 95-640, at 4 (1977) (acknowledging the results of the SEC Report).

42. See H.R. REP. NO. 95-640, at 4 (1977) (noting the prevalence of corruption in highly-regarded US companies); see also WEISMANN, *supra* note 32, at 95 (observing the caliber of companies involved in corruption).

43. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 912 (2010) (discussing the congressional hearings held in the summer and fall of 1975).

Bill (“FCPA”) into law on December 20, 1977.⁴⁴ One reason behind the creation of the FCPA was to demonstrate the United States’ commitment to the rule of law in international business.⁴⁵

Specifically, the FCPA makes it a crime for any issuer of a class of securities, domestic concern, or person to “make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money” to a foreign official, non-US political party, or person who may offer money to a foreign official.⁴⁶ The FCPA includes two main portions: the anti-bribery provisions and the books, records, and internal control provisions (“accounting” provisions).⁴⁷ The anti-bribery provisions apply to all companies, whether publicly traded or privately owned.⁴⁸ These provisions prohibit US companies and its personnel from paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value to a foreign official in order to obtain or retain business.⁴⁹ The accounting provisions, on the other hand, only apply to issuers of securities—in other words, only to publicly traded companies.⁵⁰ They require US companies and their personnel to keep accurate records of transactions conducted abroad.⁵¹ The SEC is responsible for enforcing the

44. See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2006). See also Koehler, *supra* note 43, at 912 (discussing the hearings leading to President Carter signing the FCPA).

45. See Engle, *supra* note 24, at 1176 (mentioning the intent behind the creation of the FCPA); see also Presidential Statement on Signing S. 305 into Law, 2 PUB. PAPERS 2155 (Dec. 20, 1977) (“I share Congress [sic] belief that bribery is ethically repugnant and competitively unnecessary . . . Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.”).

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

47. See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m(b)(2)(A)-(B); see also Koehler, *supra* note 43, at 913, 921–22 (detailing the two main provisions of the FCPA).

48. See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-2 (applying the FCPA’s anti-bribery provisions to all issuers, any domestic concern, and any person other than an issuer).

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

50. See 15 U.S.C. §§ 78m(b)(2)(A)-(B) (applying the FCPA’s accounting provisions only to issuers).

51. See *id.* (detailing the accounting provisions of the FCPA). The books and records provisions require issuers to “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.” The internal control provisions require issuers to “devise and maintain a system of internal accounting controls sufficient to provide

accounting provisions, and both the SEC and DOJ are responsible for enforcing violations of the anti-bribery provisions.⁵²

In addition to enforcing the FCPA's anti-bribery provisions, the DOJ oversees a mechanism called the Opinion Procedure that allows US companies to obtain an advance ruling about whether a particular course of conduct would violate the FCPA.⁵³ The purpose of this mechanism is to assist US companies in navigating the ambiguities of the FCPA's provisions.⁵⁴ A US firm obtains this advance ruling by providing information on an "actual- not a hypothetical- transaction" based upon "full and true disclosure" of all relevant facts.⁵⁵ The DOJ must issue an opinion within thirty days after the request is deemed complete.⁵⁶ The advance ruling does not conclude that a proposed course of conduct violates the law.⁵⁷ Instead, the DOJ determines whether certain prospective conduct would conform to the DOJ's present enforcement policy under the FCPA's anti-bribery provisions.⁵⁸

reasonable assurances" that transactions are recorded according to management's authorization for accountability purposes. *Id.*

52. See Krever, *supra* note 30, at 89 (explaining the division of responsibility among the government enforcement agencies). See, see also Brown, *supra* note 32, at 258 (mentioning the enforcement agencies' respective responsibilities).

53. Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80 (1999); see also JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSNATIONAL ECONOMIES* 57 (1997) (discussing the Opinion Procedure generally).

54. See Foreign Corrupt Practices Act Opinion Procedure, *supra* note 53, § 80.1 ("These procedures enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective- not hypothetical- conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions.").

55. See *id.* §§ 80.1, 80.6 (detailing the general requirements that are necessary to obtain an SEC opinion regarding a proposed transaction).

56. See *id.* § 80.8 (stating the general timeline of an opinion procedure request). The US Department of Justice ("DOJ"), however, may extend the thirty-day requirement if they request additional information. *Id.*

57. See *id.* (discussing the response expected of the Attorney General).

58. See *id.* ("The Attorney General or his designee shall, within 30 days after receiving a request that complies with the foregoing procedure, respond to the request by issuing an opinion that states whether the prospective conduct, would, for purposes of the DOJ's present enforcement policy, violate 15 U.S.C. 78dd-1 and 78dd-2.").

One particular area of ambiguity has been the Exception.⁵⁹ The 1977 version of the FCPA statute included an exception to the rule against bribing foreign officials.⁶⁰ Congress incorporated this exception in the statute's definition of "foreign official."⁶¹ The definition indicated that an individual whose duties were "essentially ministerial or clerical" would not constitute a "foreign official" for the purposes of this Act.⁶² Congress viewed this exception as a "necessary evil."⁶³ A September 28, 1977 House Report contemplated the Exception's purpose and commented:

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.⁶⁴

In spite of congressional reluctance to permit facilitating payments, both US congressmen and businessmen viewed the Exception as necessary to maintain a competitive business edge

59. See Bixby, *supra* note 17, at 110 (noting how the ambiguity of the Exception has created problems in determining the amount allowed to be made in the form of facilitating payments); see also 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, 399 (2005) (observing that the Department of Justice has identified several factors that increase prosecution but has not provided sufficient clarification to facilitate decision-making).

60. See Foreign Corrupt Practices Act of 1977, § 30A(a)(3)(b), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1, *et seq.* (2006)) (demonstrating Congress's initial steps towards what later became the Exception by showing that the original unacted version provided an exception within the term "foreign official" for payments to these officials).

61. See *id.*

62. See *id.* ("Such term [foreign official] does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.").

63. See H.R. REP. NO. 95-640, at 8 (1977) (detailing Congress's views towards facilitating payments); see also Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 891 (2011) (discussing Congress's concession to business interests when agreeing to permit facilitating payments).

64. H.R. REP. NO. 95-640, at 8 (emphasis added). See also Jordan, *supra* note 63, at 891 ("This passage clearly indicates Congress's disdain for facilitation payments during the drafting of the FCPA.").

abroad.⁶⁵ US businessmen, however, continued to demand further assistance for US companies while transacting abroad.⁶⁶

These demands culminated in 1988 when the US Congress amended the FCPA in an attempt to eliminate ambiguities in the FCPA's provisions.⁶⁷ The amendment delineated a clearer exception to the rule against bribery payments.⁶⁸ Congress added an explicit "facilitating payments" exception.⁶⁹ This statute provides an exception for "routine governmental action" and indicates that the prohibition against paying foreign officials "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official."⁷⁰ The statute attempts to clarify the meaning of "routine governmental

65. See Jordan, *supra* note 63, at 891 ("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."); see also Earle, *supra* note 5, at 487 (mentioning how other countries did not have analogous legislation to the FCPA at the time).

66. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 243 (1997) (noting how in the 1980s, critics began calling for modification for the FCPA); see also Bixby, *supra* note 17, at 97 (discussing how the 1988 amendment was in response to slumping foreign trade between the United States and international firms); Earle, *supra* note 5, at 487 (noting how the FCPA limitations placed on US companies placed US firms at a competitive disadvantage).

67. See Earle, *supra* note 5, at 487 (discussing how bribery and corruption were economic realities spurring Congress to amend the FCPA in 1988 to make it easier for companies to comply with the FCPA); Krever, *supra* note 30, at 88 ("The 1988 amendment was largely in response to complaints by U.S. corporations that the original Act was too vague and wide in scope.").

68. See Krever, *supra* note 30, at 88–89 (explaining how the 1988 amendment clarified the Exception); see also Bixby, *supra* note 17, at 97–98 (observing how the effort to eliminate some obstacles resulting from the statute's ambiguity led to the 1988 amendment).

69. Compare Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 30A(a)(3)(b), 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1, *et seq.* (2006)), with 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006) (providing a specific exception for facilitating payments). See also Krever, *supra* note 30, at 89 (noting how originally, facilitating payments were allowed for duties that were ministerial or clerical, but that the 1988 amendments permitted facilitating payments to expedite or secure performance of a "routine governmental action").

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

action” by providing a list of actions that are “ordinarily and commonly performed by a foreign official.”⁷¹ These actions include obtaining permits and licenses, processing governmental papers, providing police protection, phone service, power and water supply, and “actions of a similar nature.”⁷² The statute is clear that “routine governmental action” does not cover actions that induce foreign official to award new business or to continue business.⁷³

B. The United States Takes the Lead in Combating International Corruption

For more than three decades, the United States has been a global leader in the fight against corruption.⁷⁴ Following the passage of the FCPA, Congress became concerned that American companies were operating at a disadvantage compared to other countries that permitted the payment of bribes.⁷⁵ As a result, in 1988, Congress directed the Executive Branch to begin negotiations with the OECD to obtain an agreement with the United States’ major trading partners to enact legislation similar to the FCPA.⁷⁶ The thirty member countries of the OECD signed the OECD Convention in 1997 as

71. See 15 U.S.C. §§ 78dd-1(3)(A)(i)-(v), 78dd-2(4)(A)(i)-(v), 78dd-3(4)(A)(i)-(v) (listing what may qualify as a “routine governmental action”).

72. See *id.*

73. See *id.* at §§ 78dd-1(f)(3)(B), 78dd-2(f)(4)(B), 78dd-3(f)(4)(B) (“The term ‘routine governmental action’ does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.”).

74. See KENNEDY & DANIELSEN, *supra* note 22, at 5 (noting US dominance in anti-corruption efforts); see also Bixby, *supra* note 17, at 98, 100 (mentioning the United States’ encouraging in enacting the OECD Convention).

75. See LAY PERSON’S GUIDE, *supra* note 16 (expressing Congress’s concerns of a competitive disadvantage). In fact, some countries permitted companies to deduct the cost of bribes as business expenses on their taxes. See *id.*; see also Earle, *supra* note 5, at 485–87 (detailing the history of corruption before the passage of the FCPA).

76. See LAY PERSON’S GUIDE, *supra* note 16 (mentioning the purpose behind US negotiations with the OECD); see also John Gibbaut, *Battling Bribery Abroad*, 93 A.B.A.J. 48, 50 (2007) (discussing how the United States in 1998 persuaded the thirty industrialized nations belonging to the OECD to sign a treaty agreeing to adopt similar anti-corruption laws).

a result of these efforts.⁷⁷ In principle, the adoption of the OECD Convention by signatory nations marked an emergence of an international commitment to enforcing bribery prohibitions.⁷⁸

Many of these countries modeled their domestic anti-bribery provisions after the FCPA's provisions, evidence of the international commitment to enforce anti-bribery measures.⁷⁹ Beginning with the OECD Convention, the FCPA became the model for the global proliferation of national anti-corruption legislation.⁸⁰ In the years since, most countries have adopted domestic legislation criminalizing corrupt international business practices.⁸¹ Additionally, a number of multilateral treaties setting global anti-corruption standards now exist.⁸²

77. See Gibeaut, *supra* note 78, at 50 (mentioning the US joint effort with the OECD and the results of these efforts); see also OECD Convention, *supra* note 18; LAY PERSON'S GUIDE, *supra* note 16 (noting the results of US efforts in working with the OECD).

78. See Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 *FLA. L. REV.* 351, 353–54 (2010) (observing the rise in international commitment against corruption in business transactions). Spalding notes, however, that this commitment, while international, is not universal. See *id.*; see also Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 33 *WEEKLY COMP. PRES. DOC.* 2290 (Nov. 10, 1998) (“Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions.”).

79. See KENNEDY & DANIELSEN, *supra* note 22, at 20 (observing the FCPA's influence on other nations' anti-bribery statutes); see also Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for “Routine Government Act” Payments*, 25 *PENN ST. INT'L L. REV.* 251, 252 (2006) (“Once a unique national effort, the general framework of the FCPA is now an important template for global anti-corruption efforts.”).

80. See KENNEDY & DANIELSEN, *supra* note 22, at 28 (discussing FCPA's contribution to anti-corruption efforts worldwide); see also Engle, *supra* note 24, at 1188 (noting US efforts that enabled the FCPA to become a worldwide model for anti-corruption statutes).

81. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INFORMATION SHEET ON THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 8, available at <http://www.oecd.org/dataoecd/52/24/2406452.pdf> (listing the countries that have implemented legislation criminalizing corrupt international business practices including Argentina, Austria, and Portugal); KENNEDY & DANIELSEN, *supra* note 22, at 5 (mentioning the globalization of anti-corruption standards); see also Zervos, *supra* note 79, at 252 (discussing the proliferation of the FCPA's policies).

82. See, e.g., United Nations Convention Against Corruption, Oct. 31, 2003, 2349 *U.N.T.S.* 41; Criminal Law Convention on Corruption, Jan. 27, 1999, *E.T.S. No.* 173;

While an international commitment against corruption exists, this commitment has not always been supported by effective enforcement measures, even in the United States.⁸³ Initially, the DOJ effectively ignored the FCPA as an enforcement tool.⁸⁴ Over the last decade, however, the United States has increased its enforcement activity.⁸⁵ In fact, FCPA enforcement has risen substantially.⁸⁶ Between 2004 and 2009, the United States commenced 143 enforcement actions against companies and individuals.⁸⁷ The DOJ also levied substantial

Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724; *see also* KENNEDY & DANIELSEN, *supra* note 22, at 5 (“In the years since, largely at the behest of the United States, dozens of leading trading partners have adopted domestic legislation criminalizing corrupt foreign business practices in conformity with a number of multilateral treaties setting global anti-corruption standards.”). *See generally* Course Material, Cecil Hunt, *Recent Multilateral Measures to Combat Corruption*, ALI-ABA Going Int’l: Fundamentals of Int’l Bus. Transactions (Dec. 7–9, 2006), 1–2, available at <http://www.wiltshiregrannis.com/siteFiles/News/91D74E64CC06AB01C129A5B50E9721D8.pdf> (listing key international anti-corruption agreements).

83. *See* Carrington, *supra* note 4, at 130 (“Laws made in the last decade to address this longstanding global problem [of transnational corrupt practices] have not been effectively enforced.”); *see also* Bixby, *supra* note 17, at 103 (noting that during the first quarter century FCPA enforcement was “minimal, at best”).

84. *See* M. Scott Peeler & J. Carson Pulley, *Internationalizing the FCPA: Ending the Facilitation Payments Exception and U.S. Anti-Corruption Hypocrisy 4*, INTERNATIONAL BRIBERY: FCPA Update 2011 (on file with author) (observing the United States’ recent enforcement actions, while comparing the previous lack of enforcement); *see also* Krever, *supra* note 30, at 93 (discussing the limited impact of the FCPA as a result of the lack of initial enforcement).

85. *See* KENNEDY & DANIELSEN, *supra* note 22, at 10 (noting what the authors deem the “third phase” of the United States’ fight against corruption: careful enforcement); *see also* John K. Carroll & Lisa K. Marino, *The Incredible Shrinking FCPA Facilitation Payment Exception*, 241 N.Y. L.J. S6 (2009) (“In the last few years, the number of investigations opened by these two agencies has increased from a handful to several dozen a year.”).

86. *See Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. 77–86 (2010) (statement of Andrew Weissmann, Partner, Jenner & Block LLP) [hereinafter Enforcement Hearing] (“While there were only three open FCPA investigations in 2002, there were one hundred and twenty such investigations pending at the end of 2009—a forty-fold increase.”); *see also* Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle: Prosecutions Climb on Tougher Laws Aimed at Businesses*, WALL ST. J., Sept. 12, 2008, at B-1 (noting the dramatic increase in US enforcement actions, in line with growing international cooperation in curbing corruption).

87. *See* Peeler & Pulley, *supra* note 84, at 3 (detailing the number of US enforcement actions against companies and individuals). Additionally, the DOJ is investigating over 140 companies and individuals for potential FCPA violations as of

fines against companies.⁸⁸ For example, it ordered Siemens AG to pay US\$450 million for FCPA violations.⁸⁹ More recently, in the FBI-led African Sting Case investigating corruption in Gabon, fifty-eight companies paid US\$3.74 billion in settlements to the US government.⁹⁰ This dramatic increase in FCPA penalties and settlements demonstrates the United States' continuing commitment to curb corruption.⁹¹ The DOJ has even prosecuted individuals for violations of the FCPA anti-bribery provisions.⁹² In the DOJ's prosecution of Siemens AG, six former executives were charged with conspiracy to violate the FCPA,

2011. *See id.*; *see also* 2010 Year-End FCPA Update, GIBSON DUNN (Jan. 3, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx> [hereinafter GIBSON DUNN] (depicting a graph demonstrating the increase from 2004 to 2009 and observing that the level of enforcement activity has been rising steadily over the past seven years with a recent substantial increase in 2010, marking an eighty-five percent increase in enforcement actions over 2009.)

88. *See* Press Release, U.S. Dep't. of Just., Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html> [hereinafter DOJ Press Release] (discussing the penalties levied against Siemens AG); *see also* Bixby, *supra* note 17, at 109, 129–40 (referring to data from cases in Tables 6 through 8 in his article to declare that the total amount of fines, fees, penalties, and disgorged profits of FCPA enforcement actions totals US\$2,421,681,799 between 2002 and 2010, and clarifying that these tables do not represent a complete list of FCPA prosecutions since 2002).

89. *See* DOJ Press Release, *supra* note 88 (noting the penalties against Siemens AG); *see also* Leslie Wayne, *Bribery Case Falls Apart, and Tactics Are Doubted*, N.Y. TIMES, Feb. 23, 2012, at B1 (noting settlements paid to the United States from the African Sting Case investigation).

90. *See* Wayne, *supra* note 89 (listing the amounts paid by fifty-eight companies).

91. *See* Krever, *supra* note 30, at 94 (“Enforcement actions by domestic agencies appear to be on the increase and the prosecutions undertaken in the last few years suggest that the SEC and DOJ are becoming serious about tackling overseas bribery.”); *see also* Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 *FORDHAM J. CORP. & FIN. L.* 285, 287 (2007) (“[T]he Department of Justice has demonstrated, both through prosecutions and public statements, a commitment to aggressively prosecute corporate bribery.”).

92. *See* Joe Palazzolo, *Ex-Siemens Execs Charged with Bribery in Latest FCPA Blockbuster*, WALL ST. J. L. BLOG, (Dec. 13, 2011, 11:44 AM), <http://blogs.wsj.com/law/2011/12/13/ex-siemens-execs-charged-with-bribery-in-latest-fcpa-blockbuster/> [hereinafter Palazzolo, *FCPA Blockbuster*] (discussing the DOJ's announcement that six former executives of Siemens and two alleged intermediaries have now been charged with conspiracy to violate the FCPA in light of criticism for failing to charge individuals in the “headline cases”); *see also* Peeler & Pulley, *supra* note 84, at 4 (mentioning a corporate officer's sentence of eighty-seven months with no possibility of parole).

and in the African Sting Case, twenty-two business executives were arrested.⁹³ Notably, however, Federal District Judge Richard J. Leon for the District of Columbia granted the DOJ's motion to dismiss the indictments against the defendants in the African Sting trial, a significant setback for FCPA enforcement.⁹⁴

These statistics are significant because they highlight the DOJ's resolve to fight corruption aggressively.⁹⁵ The SEC and the Federal Bureau of Investigation ("FBI") have also devoted substantial resources to FCPA enforcement.⁹⁶

C. *The International Stance Toward Legal Bribes*

The Exception is a unique feature of the FCPA, since only four other countries in the world permit the use of facilitating payments.⁹⁷ These four nations are Australia, Canada, New

93. See Wayne, *supra* note 89 (mentioning the charges levied against the business executives).

94. See Wayne, *supra* note 89 (highlighting how the African Sting Case fell apart and drew Judge Leon's ire at the DOJ's tactics in prosecuting and investigating cases for violations of the FCPA); see also *Africa Sting—In the Words of Judge Leon*, FCPAPROFESSOR.COM, (Feb. 23, 2012), <http://www.fcpaprofessor.com/africa-sting-in-the-words-of-judge-leon> (providing Judge Leon's statement criticizing the DOJ's tactics).

95. See Peeler & Pulley, *supra* note 84, at 4; see also Joe Palazzolo, *Does the Mighty FCPA Need Reining In?*, WALL ST. J. L. BLOG (Nov. 28, 2011, 9:42 AM), <http://blogs.wsj.com/law/2011/11/28/does-the-mighty-fcpa-need-reining-in> [hereinafter Palazzolo, *Mighty FCPA*] (citing Lanny Breuer, head of the DOJ's Criminal Division, "This is precisely the wrong moment in history to weaken the FCPA There is no argument for becoming more permissive when it comes to corruption.").

96. See Peeler & Pulley, *supra* note 84, at 4 ("The Justice Department and SEC, along with the FBI, have continued to devote more and more resources along with the FBI, to FCPA enforcement."); see also Claudius O. Sokenu, *FCPA Enforcement after United States v. Kay: SEC and DOJ Team Up to Increase Consequences of FCPA Violation*, 1619 PLL/Corp. 189, 23–24 (2007) (noting generally the increased cooperation between the SEC and DOJ in enforcing the FCPA). The Federal Bureau of Investigation ("FBI") is a national security and law enforcement organization that protects the United States from terrorist threats and enforces US criminal laws. See THE FBI: FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/quick-facts> (last visited Jan. 3, 2012).

97. See Jordan, *supra* note 63, at 888–89 (noting this unique feature of the FCPA); see also Peeler & Pulley, *supra* note 84, at 5 (observing that other nations' anti-bribery statutes have "evolved and matured" since they do not feature a facilitating payment exception).

Zealand, and South Korea.⁹⁸ Australia is currently reviewing its use of facilitating payments.⁹⁹ By maintaining the Exception, the United States does not adhere to current international standards as evidenced by recent OECD actions and the Bribery Act.¹⁰⁰

The OECD Convention permits “small” facilitation payments, but the OECD now takes a strong stance against facilitating payments.¹⁰¹ The OECD Convention established a monitoring system carried out by the OECD Working Group on Bribery to ensure the thorough implementation of the international obligations taken on under the Convention.¹⁰² In

98. See *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* div 70.4 (Austl.); *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34(4)–(5) (Can.); Section 105C(3) of the *Crimes Act 1961*, as inserted by section 8 of the *Crimes (Bribery of Foreign Public Officials) Amendment Act 2001* (N.Z.); *Act on Preventing Bribery of Foreign Public Officials in International Business Transactions*, Act. No. 5588, Dec. 28, 1998, art. 3(2) (S. Kor.), translated in 1 *STATUTES OF THE REPUBLIC OF KOREA* 9 (Korea Legislation Research Inst. 2012); see also Peeler & Pulley, *supra* note 84, at 5 (listing these four countries as the only other nations outside the United States that permit facilitating payments).

99. See Public Consultation Paper, *Assessing the “Facilitation Payments” Defence to the Foreign Bribery Offence and Other Measures*, Australian Government: Attorney-General’s Department, 1 (2011) [hereinafter Consultation Paper] (discussing how the Australian government is currently reviewing the treatment of facilitation payments under Australian law).

100. See Peeler & Pulley, *supra* note 84, at 1 (“The facilitation payments exception no longer has any reasonable justification in the modern global anti-corruption climate.”); see also *Preparing for the End of Facilitation Payments*, FCPA COMPLIANCE & ETHICS BLOG (Sept. 15, 2011, 6:50 AM), <http://www.tfoxlaw.wordpress.com/2011/09/15/preparing-for-the-end-of-facilitation-payments> (noting Richard Alderman’s belief that corporations that do not yet have a zero tolerance approach to facilitating payments will begin to commit themselves to this approach and work to eliminate these payments as a result of the Bribery Act). Richard Alderman is the Director of the UK Serious Fraud Office (“SFO”). The SFO is an independent government department that investigates fraud and corruption in England, Northern Ireland, and Wales. See *Who We Are*, SERIOUS FRAUD OFF., <http://www.sfo.gov.uk/about-us/who-we-are.aspx> (last visited Dec. 28, 2011) (detailing the SFO’s responsibilities).

101. See OECD Convention, *supra* note 18, at 15, n.9. (“Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence.”). The rest of Commentary 9, however, criticizes facilitation payments as a “corrosive phenomenon.” *Id.* See OECD Recommendation, *supra* note 20 (discouraging the use of all facilitating payments); see also Jordan, *supra* note 63, at 900-01 (reviewing OECD Phase 1 and 2 Reports criticizing the Exception).

102. See OECD Convention, *supra* note 18 (detailing the monitoring system to assist the implementation process).

monitoring the United States' implementing legislation of the OECD Convention and its effectiveness, the OECD issued a report in three phases criticizing the use of the Exception.¹⁰³ The Phase 1 Report, reviewing the legislation implementing the OECD Convention in the United States, expressed the OECD's concern over the FCPA's definition of "routine governmental action."¹⁰⁴ While the FCPA definition contained a list of specific payments that are permitted, the OECD noted that the list was "not sufficiently qualified" and should reference the size of the payment and the discretionary nature of the act.¹⁰⁵

Phase 2 of the OECD Report assessed the effectiveness of the legislation's application in the US and again criticized the Exception, finding issue with its wording.¹⁰⁶ The report noted that the statute's language does not limit the Exception to "small" facilitation payments, does not apply to the US domestic bribery statute, and does not apply outside the "purpose" of the payment.¹⁰⁷ In its 2009 Recommendation for Further Combating Bribery of Foreign Officials, the OECD urged all signatory nations to end the use of "corrosive" facilitation payments.¹⁰⁸ The OECD's decision to prohibit facilitation payments continues the evolution of what Transparency International has called the "diminishing tolerance for facilitation payments."¹⁰⁹

103. See generally, *United States: Review of Implementation of the Convention and 1997 Recommendations*, OECD (Apr. 1999), <http://www.oecd.org/dataoecd/16/50/2390377.pdf> [hereinafter OECD Phase 1 Report]; *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*, OECD (Oct. 2002), <http://www.oecd.org/dataoecd/52/19/1962084.pdf> [hereinafter OECD Phase 2 Report]; see also Jordan, *supra* note 63, at 900–01 (discussing the OECD Phase 1 and 2 Reports of the United States' application of the OECD Convention and the OECD's criticisms toward the Exception).

104. OECD Phase 1 Report, *supra* note 103, at 22 (discussing the issue that specific payments can be excepted from the FCPA's prohibitions).

105. OECD Phase 1 Report, *supra* note 103, at 22 (offering recommendations to solve this possible exception to the FCPA's prohibition of bribery payments).

106. See OECD Phase 2 Report, *supra* note 103, at 34 (criticizing the language of the statute).

107. *Id.* (providing further criticism of the FCPA's provisions).

108. OECD Recommendation, *supra* note 20 (urging all nations to prohibit inducements such as facilitation payments).

109. Cheryl A. Krause & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception?*, 2 FIN. FRAUD L. REP. 730, 732. Transparency International is a global organization that created a network of more than ninety

The OECD's recent actions, along with other international calls for ending facilitation payments, have put the United States under strong international pressure to change its policies.¹¹⁰

The Bribery Act places even stronger international pressure on the United States.¹¹¹ The UK Parliament enacted a new comprehensive statute to replace the formerly fragmented and complex common law bribery offenses previously employed to combat bribery.¹¹² The United Kingdom's Bribery Bill received Royal Assent on April 8, 2010, thus becoming the Bribery Act of 2010.¹¹³ The Bribery Act entered into force on July 1, 2011.¹¹⁴ Notably, the Bribery Act has greater extraterritorial reach.¹¹⁵ The FCPA's jurisdiction covers acts of non-US individuals and entities, relying on the territorial principle of jurisdiction.¹¹⁶ Its jurisdiction also encompasses acts of US persons abroad, relying on the nationality principle that provides for jurisdiction over

locally established chapters to fight domestic corruption. *See About Us*, TRANSPARENCY INT'L, http://www.transparency.org/about_us (last visited Dec. 28, 2011) (describing the organization's goals to fight corruption on the ground, as well as through global and regional initiatives).

110. *See* Jordan, *supra* note 63, at 882–83 (discussing the recent OECD actions along with other international non-governmental calls for ending facilitation payments); *see also* Peeler & Pulley, *supra* note 84, at 6 (noting that commentators have emphasized that the main problem with the facilitation payments exception is that it is no longer consistent with anti-corruption laws in almost every other nation).

111. *See* Dunst et al., *supra* note 24, at 274 (warning that US companies, in allowing facilitating payments, or in not prohibiting them, may undermine efforts to establish an affirmative defense under the Bribery Act); *see also* Engle, *supra* note 24, at 1188 (discussing how the Bribery Act has raised international standards).

112. *See Acts: Bribery Act 2010*, U.K. MINISTRY OF JUST., <http://www.justice.gov.uk/legislation/bills-and-acts/acts/bribery-act-2010> (last visited Dec. 29, 2011) (describing the background and purpose of the UK Bribery Act).

113. Bribery Act, 2010, c. 23 (U.K.), *available at* http://www.opsi.gov.uk/acts2010/pdf.ukpga_20100023_en.pdf.

114. *See Acts: Bribery Act 2010*, *supra* note 112 (“It was also announced that the Act will come into force on 1 July 2011.”).

115. *Compare* Bribery Act, 2010, c. 23, § 12(5) (U.K.), *with* FCPA, 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-388 (2006).

116. *See* 15 U.S.C. § 78dd-1(g) (“It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States . . . or for any United States person.”); *see also* Brown, *supra* note 32, at 300–02 (describing the bases of jurisdiction for the FCPA's extraterritorial reach).

US citizens even while they are abroad.¹¹⁷ The Bribery Act, in comparison, has broader extraterritorial reach because it reaches companies that do business with a UK citizen or company.¹¹⁸ Section 7 of the Bribery Act, in particular, may have serious implications for multinational corporations doing business with the United Kingdom.¹¹⁹ This Section makes it a criminal offense for a commercial organization to fail to prevent bribery.¹²⁰ The statute defines “commercial organisation” broadly and, therefore, reaches virtually all major multinational corporations.¹²¹

Further, the Bribery Act is silent as to whether it prohibits facilitation payments.¹²² In September 2010, the UK Ministry of Justice published a consulting paper that provided some guidance as to the Act’s stance on facilitation payments.¹²³ The UK Ministry of Justice noted that the OECD recognizes the

117. See 15 U.S.C. § 78dd-2(i) (“It shall also be unlawful for any United States person”); see also Brown, *supra* note 32, at 300-02 (detailing the bases of jurisdiction under the FCPA).

118. See Bribery Act, 2010, § 12 (U.K.); see also Enforcement Hearing, *supra* note 87, at 23 (noting that, in England, the Bribery Act encompasses persons without a principle place of business); see also Warin, *supra* note 25, at 28 (observing how the Bribery Act, under section 7, in many ways exceeds the aggressive jurisdictional claims of the FCPA).

119. See Bribery Act, 2010, § 7 (U.K.); see also Warin et al., *supra* note 25, at 15 (“In practice, however, section 7’s far more liberal jurisdictional requirements for a business’s failure to prevent bribery could have a profound impact on multinational corporations.”).

120. See Bribery Act, 2010, § 7 (U.K.) (making it an offense for a commercial organization to fail to prevent bribery).

121. See *id.* (including partnerships and corporate bodies that carry on a business, or are part of a business, in any part of the United Kingdom in the definition of “relevant commercial organisation”); see also Warin et al., *supra* note 25, at 28 (“The inclusion of the second and fourth groups as ‘relevant commercial organisations’ seemingly sweeps into the Bribery Act’s ambit virtually all major multinational corporations—the vast majority of which conduct some business in the United Kingdom.”).

122. See Bribery Act, 2010, § 7, (U.K.) (refraining from providing an exception to bribe payments).

123. See U.K. MINISTRY OF JUST., CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010), 2010, CP11/10, at 22–23 (U.K.), available at <http://www.justice.gov.uk/downloads/consultations/bribery-act-guidance-consultation1.pdf> [hereinafter UK CONSULTATION] (detailing the UK view on facilitating payments); see also Peeler & Pulley, *supra* note 84, at 5 (noting the significance of the consulting paper).

corrosive effects of facilitation payments and indicated that this form of payment is likely to trigger an offense under the Bribery Act.¹²⁴ The Ministry further explained that exemptions create “artificial distinctions” that are ultimately difficult to enforce and may be abused.¹²⁵ In October 2010, the director of the United Kingdom’s Serious Fraud Office, Richard Alderman, indicated that a “safe harbor” such as facilitation payments is concerning because its boundaries will be tested.¹²⁶ Practitioners have also noted that with the passage of the Bribery Act, the trend toward zero tolerance of facilitation payments will continue.¹²⁷

II. TWO APPROACHES TO AMENDING THE FCPA

Many commentators advocate a change to the FCPA and point to the recent trend in enacting more aggressive anti-corruption statutes.¹²⁸ Others claim that the FCPA harms US business interests, and they instead advocate for amendments that would render the statute more “business friendly.”¹²⁹ Part II

124. UK CONSULTATION, *supra* note 123, at 23.

125. UK CONSULTATION, *supra* note 123, at 23.

126. Christopher M. Mathews, *SFO Director: No ‘Safe Harbor’ Under New U.K. Bribery Law*, MAINJUSTICE.COM (Oct. 20, 2010, 12:58 PM), <http://www.mainjustice.com/justanticorruption/2010/10/20/sfo-director-no-safe-harbor-under-new-u-k-bribery-law> (“It’s not long before the boundaries of the safe harbor are starting to be tested.”).

127. *See* Peeler & Pulley, *supra* note 84, at 6 (noting how with the passage of the Bribery Act, the zero tolerance trend toward facilitation payments will likely escalate); *see also* KENNEDY & DANIELSEN, *supra* note 22, at 11 (observing the significance of several recent national statutes, including those in the United Kingdom and Italy, which go beyond what the FCPA requires and hold businesses to stricter standards).

128. *See generally* Jordan, *supra* note 63 (describing the international and domestic disdain toward facilitation payments with particular reference to the OECD’s stance); Peeler & Pulley, *supra* note 84, at 2–3 (noting the current international trend against facilitation payments and specifically referencing the Bribery Act in this discussion). The DOJ, on the other hand, argues that the statute should remain the same. *See* Joe Palazzolo, *New FCPA Guidance . . . Coming Right Up!*, WALL ST. J. L. BLOG (Nov. 8, 2011, 4:44 PM), <http://blogs.wsj.com/law/2011/11/08/new-fcpa-guidance-coming-right-up> [hereinafter Palazzolo, *FCPA Guidance*] (noting US Assistant Attorney General Lanny Breuer’s emphasis on the need to maintain a strong FCPA by preventing any amendments that would make the FCPA more permissive).

129. *See* WEISSMANN & SMITH, *supra* note 22, at 5–7 (noting the FCPA’s impact on business and proposing several amendments to the FCPA); *see also* George J. Terwilliger III, *Can the FCPA be Good for Business?*, WHITE & CASE 1 (Sept. 2011), <http://www.whitecase.com/alerts-09012011/> (follow “Download PDF” hyperlink)

details the two movements for change to the FCPA: one advocating for a more aggressive statute and the other advocating for a more “business friendly” FCPA. Part II.A describes the arguments in favor of removing the facilitating payments exception in order to adhere to recent international norms in favor of rendering the statute more aggressive. This Part emphasizes the lack of clarity regarding the Exception’s scope, the criticism of hypocrisy leveled against the United States, and how this hypocrisy may lead to a culture of corruption in US companies. Part II.B discusses the arguments to amend the FCPA to make it more “business friendly”.¹³⁰ This Part details the position that the FCPA harms US business interests, especially in emerging markets and how eliminating the Exception would not fix the problems associated with the FCPA.

A. *Creating a More Aggressive Statute*

Many commentators argue that the Exception should be eliminated to clarify what is and is not a violation of the FCPA’s anti-bribery provision.¹³¹ An OECD working group received commentary from private sector representatives on the OECD’s

(*[O]n the horizon is an initiative to reform the FCPA and to advocate for enforcement policies that, by serving the statute’s fundamental objectives, would render the FCPA far more business-friendly than is now the case.”).

130. See Terwilliger, *supra* note 129, at 1 (noting the argument that the FCPA provisions need to be examined to determine whether their purposes are worthwhile, especially if they only serve as impediments to a recovering economy); *see also* Zervos, *supra* note 79, at 259 (mentioning the view of some commentators’ that the FCPA does little to curb corruption, but, rather, does much to harm business interests).

131. *See* Koch, *supra* note 59, at 399 (noting how the DOJ has failed to provide any further clarification to facilitate decision making by US businesses); Palazzolo, *Mighty FCPA*, *supra* note 95 (commenting that companies do not know how to comply with the law because they do not know where the line between a legitimate business expense and a bribe falls); Salbu, *supra* note 66, at 259 (indicating that in spite of Congress’ attempt to clarify the Exception through the 1988 amendment, some companies have barred all facilitating payments because of continuing concerns about statutory vagueness); *see also* Mike Koehler, *House Hearing—Overview and Observations*, FCPA PROFESSOR (June 14, 2011), <http://fcpaprofessor.blogspot.com/2011/06/house-hearing-overview-and-observations.html> [hereinafter *House Hearing*] (noting Congressman Louie Gohmert’s observation that those subject to the FCPA should have clear instructions as to what is or is not a bribe).

study of anti-corruption measures abroad.¹³² These representatives almost unanimously called for further guidance concerning the scope of the Exception.¹³³ The statute's broad and uncertain scope creates significant liability risks for US companies doing business abroad.¹³⁴ Notably, the value of what is paid is not necessarily determinative.¹³⁵ Unlike the OECD Convention, the FCPA does not limit the Exception to "small" payments.¹³⁶ The FCPA does not indicate whether a facilitating payment is required to be below a certain dollar amount.¹³⁷

132. *United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Oct. 2010), <http://www.oecd.org/dataoecd/10/49/46213841.pdf> [hereinafter OECD PHASE 3 REPORT]. These representatives included government experts from Argentina, the United Kingdom, and the OECD Secretariat, who were tasked with evaluating and making recommendations on implementation by the United States and enforcement of the OECD Convention. *See id.* at para. 6; *see* Peeler & Pulley, *supra* note 84, at 5 (discussing the recommendations of the private sector representatives).

133. OECD PHASE 3 REPORT, *supra* note 132 at para. 76 ("Representatives from all the business sectors involved in the panel discussions at the on-site visit were of the opinion that the scope of the exception for facilitation payments is unclear, particularly what kinds of decision-making are discretionary and non-discretionary.") The Phase 3 Report recalled the OECD's Phase 2 Report recommending specific guidance as to the application of the Exception. The United States published the "Lay Person's Guide to the Foreign Corrupt Practices Act" in lieu of formal guidelines. The Report criticizes the Lay Person's Guide as essentially a reproduction of the text of the Exception. *See id.* at paras. 72-73.

134. *See* BIALOS & HUSISIAN, *supra* note 53, at 26 (commenting on the liability risks); *see also* Richard W. Grime & Sara S. Zdeb, *The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and the U.K. Bribery Act*, SEC. L. PRAC. CENTER (May 10, 2011), <http://seclawcenter.pli.edu/wp-content/uploads/2011/05/Grime-Risks-Posed-by-Ongoing-FCPA.pdf> ("[N]or does the statute provide any additional guidance about where a facilitating payment ends and a corrupt payment begins.").

135. *See* STUART H. DEMING, INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 23-24 (2d ed. 2010) (emphasizing the need for caution in using facilitating payments because of the difficulty in determining what constitutes such a payment and because these payments are seldom permitted by the written law of a host country); *see also* Koch, *supra* note 59, at 399 ("Although the size of the payment or transaction is an escalating factor, the [DOJ]'s 1979] statement fails to provide any further clarification to facilitate decision-making by US businesses.").

136. *Compare* FCPA, 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006), with OECD Convention, *supra* note 18, at 15 (permitting only small payments).

137. *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006); *see also* DEMING, *supra* note 139, at 23 ("Typically, expediting payments are *de minimis* in terms of value.

Consequently, the dividing line between illegal bribes and facilitation payments is unclear.¹³⁸

Judicial scrutiny is “virtually non-existent” because most FCPA enforcement actions result in a settlement.¹³⁹ As a result, there is an absence of judicial opinions interpreting the scope of the Exception further preventing necessary clarification of the the Exception’s application.¹⁴⁰ Practitioners and scholars observe how the absence of judicial scrutiny on FCPA enforcement actions forces US companies to view settlement negotiations as case law.¹⁴¹

In light of these concerns, the DOJ provides the Opinion Procedure mechanism as a tool in ascertaining whether proposed conduct would violate the FCPA’s anti-bribery provisions.¹⁴² Commentators, however, have identified disadvantages to this mechanism including time constraints and

In theory, a large amount of money could still be determined to be an expending payment.”); Grime & Zdeb, *supra* note 134, at 2 (noting the lack of clarity regarding the Exception’s outer limits with reference to the lack of guidance regarding a proscribed amount).

138. See 15 U.S.C. §§ 78dd-1(a)(3)-(b), 78dd-2(a)(4)-(b), 78dd-3(a)(4)-(b). While the FCPA enumerates examples of what constitutes a facilitating payment, this list is non-exhaustive as evidenced by the “catch-all” provision, “actions of a similar nature.” *Id.* § 78dd-1(f)(3)(A)(v); see also Jordan, *supra* note 63, at 887 (“[W]hat constitutes ‘actions of a similar nature’ beyond the specific definition of the exception itself is uncertain.”).

139. See Kochler, *supra* note 43, at 909 (observing that most enforcement actions result in DOJ non-prosecution agreements, deferred prosecution agreements, pleas, or SEC settlements rather than case law); see also Koch, *supra* note 60, at 399 (noting the “scant body” of case law).

140. See WEISMANN, *supra* note 32, at 96-97 (discussing how the dividing line between bribe payments and facilitating payments remains “somewhat unclear” because of an absence of case law stemming from the prior non-existent enforcement of the FCPA); see also Grime & Zdeb, *supra* note 134, at 2 (“Federal courts have not squarely confronted the issue To the contrary, only a small handful of decisions even mention the facilitating payments exception, and those that do provide little clarity about the exception’s outer limits.”).

141. See Kochler, *supra* note 43, at 910 (“[Enforcement agencies] urge those subject to the FCPA to view these privately-negotiated agreements as de facto case law and to conform conduct to the[se] foggy legal signposts.”); see also Marceau, *supra* note 91, at 287 (criticizing how the unwillingness of corporate defendants to challenge the DOJ in court has left prosecutors with an almost unchecked authority to define the scope of FCPA liability).

142. See BIALOS & HUSISIAN, *supra* note 53, at 57 (discussing the effectiveness of the Opinion Procedure mechanism); see also Koch, *supra* note 59, at 399-400 (detailing the role of the DOJ in writing opinion procedures for proposed conduct).

inherent risks associated with employing this mechanism.¹⁴³ Companies entering into negotiations or transactions are usually under varying deadlines that cannot wait until the DOJ issues a favorable ruling.¹⁴⁴ Moreover, employing the mechanism exposes a company to risk.¹⁴⁵ The DOJ rulings are not binding on other federal agencies, thus exposing a company to further liability.¹⁴⁶ The Opinion Procedure mechanism is infrequently used by US companies because of these disadvantages.¹⁴⁷

The lack of clarity regarding the Exception's scope has led to excessive compliance by US companies.¹⁴⁸ US Congressman Louie Gohmert of Texas, in the 2010 Foreign Corrupt Practices Act congressional hearing, observed that the FCPA allows for a "young prosecutor" or an "FBI agent seeking to make a name

143. See Robert W. Tarun, *Conducting a Foreign Corrupt Practices Act Internal Investigation*, [in THE ANNUAL NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT B-1, B-8 (2008) (discussing the disadvantages of using the Opinion Procedure due to the nature of international business transactions); see also Salbu, *supra* note 66, at 263–64 (noting potential significant limitations of the review process and that few US businesses perceive the review procedures as a valuable tool for assessing the ambiguities of the FCPA).

144. See Tarun, *supra* note 143, at B-8 (noting that other governments vary considerably in the manner and timing of offering investment opportunities resulting in multinational companies rushing to meet deadlines due to the uncertainty of the process); see also Salbu, *supra* note 66, at 263 (detailing other disadvantages of using the Opinion Procedure such as nonbinding nature of DOJ review letters and the DOJ's refusal to grant review letters precedential effect).

145. See BIALOS & HUSISIAN, *supra* note 53, at 58–59 (listing the array of benefits, costs and risks associating with filing an opinion request); see also Koch, *supra* note 59, at 400 (mentioning the ambiguities in the review procedure and drawbacks associated with its use).

146. See BIALOS & HUSISIAN, *supra* note 53, at 58 (observing that while the SEC has stipulated that the agency will not prosecute firms who obtained favorable advance rulings, a company can still face liability under US domestic law and other federal agencies); see also Salbu, *supra* note 66, at 263 (mentioning the DOJ's refusal to grant review letters with precedential effect).

147. See BIALOS & HUSISIAN, *supra* note 53, at 58 (noting the infrequent use of the Opinion Procedure); see also Koch, *supra* note 59, at 400 ("However, due to the ambiguities in the review procedure and drawbacks associated with its use, businesses infrequently rely upon this source."); Salbu, *supra* note 66, at 263–64 (mentioning that US businesses do not view the procedure as useful).

148. See Kochler, *supra* note 43, at 907 (emphasizing how the lack of judicial scrutiny over the FCPA's provisions breeds inefficient over-compliance); see also 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, 527 (2010) ("One dramatic consequence of statutory equivocation is over-deterrence.").

for himself” the opportunity to pursue “all sorts” of enforcement actions.¹⁴⁹ The statute’s ambiguity, coupled with the DOJ’s increased FCPA enforcement, has increased concerns in US companies of unintentionally violating the FCPA leading to inefficient and costly compliance programs.¹⁵⁰ These compliance measures are ineffective because companies do not know how to comply with the law.¹⁵¹ Additionally, a US multinational firm cannot adequately protect itself from liability with only a general policy against bribery.¹⁵² Instead, a company must have an effective compliance program against bribery or risk liability for negligence or condoning illegal activity.¹⁵³

US companies also employ law firms to provide companies with compliance programs, further compounding the costs of adhering to the FCPA.¹⁵⁴ When a corporation is caught in a government investigation, the legal fees can quickly exceed

149. See *House Hearing, supra* note 131 (noting Congressman Gohmert’s observation of a consequence resulting from the FCPA’s ambiguities); see also Dan Froomkin, *US Chamber of Commerce Battles Anti-Bribery Statute*, HUFFINGTON POST (Aug. 12, 2011, 9:00 AM), http://www.huffingtonpost.com/2011/08/12/chamber-of-commerce-foreign-corrupt-practices-act_n_919617.html (discussing the relationship between unaccountable prosecutors and beleaguered corporations).

150. See generally Koehler, *supra* note 44 (noting how the current FCPA enforcement regime leads to inefficient over-compliance); see also *House Hearing, supra* note 131 (highlighting Congressman Gohmert’s criticism that Congress should define bribery so that companies “can have a clear line” and not have to spend US\$200,000 to figure out whether a payment violates the FCPA); Gibeau, *supra* note 77, at 52 (discussing how Lockheed Martin Corporation expends “considerable time and money” maintaining an effective compliance program).

151. Palazzolo, *FCPA Guidance, supra* note 128.

152. See Danforth Newcomb & Philip Urofsky, *Eyes on Your Bribe*, 74 EURO. LAW. 48, 50 (2008) (remarking that general prohibitions against bribery need to be supported by effective procedures and controls); see also Erin Reilly Lewis, *Training for Avoidance of Potential Future Criminal Liabilities*, in PUNISHING CORPORATE CRIME: LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 91, 92 (2009) (“The best way to avoid being scrutinized by a team of hostile federal agents is to operate ethically ‘above suspicion.’”).

153. See Newcomb & Urofsky, *supra* note 152, at 50 (stating that a weak compliance program has been described as an “invitation to prosecution”); see also Sokenu, *supra* note 98, at 29 (noting that the SEC looks to the effectiveness of compliance procedures in determining whether a company has fully cooperated with an SEC investigation).

154. See WEISSMANN, *supra* note 32, at 93 (noting how companies employ law firms to help navigate the intricacies of global commerce); see also WEISSMANN & SMITH, *supra* note 22, at 5–6 (discussing the costs to US businesses as a result of the current FCPA enforcement environment).

US\$100 million before the lawsuit even begins.¹⁵⁵ Recently, Avon Products disclosed that it spent about US\$93.3 million in 2011 on an internal investigation of a possible violation of the FCPA.¹⁵⁶ As a result, the current FCPA enforcement environment has been costly to business.¹⁵⁷ The costs of investigating FCPA violations are borne by the company, and any resulting fines or penalties accrue entirely to the government.¹⁵⁸ Accordingly, eighty percent of US companies have now banned facilitating payments entirely.¹⁵⁹ These disadvantages have led government agencies to narrowly interpret the Exception, rendering the Exception practically illusory in US business practice.¹⁶⁰

155. See Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. TIMES DEALBOOK BLOG (Mar. 5, 2012, 11:07 AM), <http://www.dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations> (discussing the ever-increasing costs of internal investigations instigated by the government filing charges); see also Avon Prods., Inc., Annual Report (Form 10-K), at 12–13, 28 (Feb. 29, 2012) [hereinafter Avon Form 10-K] (detailing the costs of an internal investigation after the DOJ filed charges for a possible violation of the FCPA).

156. See Avon Form 10-K, *supra* note 155, at 28 (surveying the cost of investigating the possible FCPA violation); see also Henning, *supra* note 155 (detailing several companies' respective costs incurred from internal investigations while noting that Siemens AG reportedly incurred costs of more than US\$1 billion).

157. See WEISSMANN & SMITH, *supra* note 22, at 5–6 (noting how the FCPA has been costly to business); see also Lanny A. Breuer, Assistant Atty Gen., Crim. Div., Prepared Address at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/specches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf> [hereinafter Breuer Address] (“We recognize the issue of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption. Those costs are significant and we are very aware of that fact. The cost of not being FCPA compliant, however, can be far higher.”).

158. See WEISSMANN & SMITH, *supra* note 22, at 6 (discussing how US companies, and not the US government, incur all the costs of FCPA investigations); see also Thomas Fox, *What is the Cost of FCPA Compliance (or Non-Compliance)?*, CORP. COMPLIANCE INSIGHTS (June 3, 2010), <http://www.corporatecomplianceinsights.com/fcpa-compliance-costs> (discussing how the cost for companies to defend themselves in FCPA investigations can cost as much as hundreds of millions of dollars).

159. Richard L. Cassin, *Surveying FCPA Compliance*, FCPA BLOG (Oct. 14, 2008, 8:04PM), <http://www.fcpablog.com/blog/2008/10/15/surveying-fcpa-compliance.html>; Krause & Wiggul, *supra* note 109, at 4 (noting that while numbers vary, some surveys show that seventy-five percent to eighty percent of US companies have internal policies that ban or limit the use of facilitating payments).

160. See Jordan, *supra* note 63, at 906–07 (remarking how several commentators have discussed the narrowing of the Exception's scope over time).

Not only is the Exception seldom employed, but practitioners also argue that maintaining it is hypocritical.¹⁶¹ The United States leads the world in anti-corruption efforts, yet allows a vaguely defined exception for legal bribes.¹⁶² The facilitation payments exception decreases the positive impact created by the United States' strong enforcement policies under the FCPA.¹⁶³ As a result, the United States undermines its own enforcement efforts and its moral status against corruption.¹⁶⁴ Practitioners have noted that the underlying hypocrisy of the Exception threatens to undermine this hard-fought status.¹⁶⁵

Critics of the Exception argue that allowing these payments foster a "culture of corruption."¹⁶⁶ A company may risk losing future business if it gains a reputation for paying bribes.¹⁶⁷

161. See Peeler & Pulley, *supra* note 84, at 2 (emphasizing the US anti-corruption hypocrisy of permitting facilitating payments); see also Koch, *supra* note 60, at 392 (inferring how facilitating payments are still bribes).

162. See Peeler & Pulley, *supra* note 84, at 1 (criticizing the dichotomy between the US lead in anti-corruption efforts while permitting a bribe payments); see also Koch, *supra* note 59, at 392 (noting that a grease payment is still a bribe).

163. See Peeler & Pulley, *supra* note 84, at 6 (describing how the Exception impacts the United States' image to support the authors' argument of eliminating the Exception); see also Koch, *supra* note 59, at 392 ("Whether a payment to a government official is to expedite a routine government action or to obtain a contract for construction of a hospital, the payment constitutes a bribe with several potential deleterious effects.").

164. See Peeler & Pulley, *supra* note 84, at 1 (observing the effect of the United States anti-corruption hypocrisy); see also Zervos, *supra* note 79, at 253 (discussing how the FCPA exception can make US—and global—rhetoric about eliminating corruption seem hypocritical).

165. See Peeler & Pulley, *supra* note 84, at 2 (detailing the evolution of US anti-corruption efforts); see also Zervos, *supra* note 79, at 268 ("The difference is that US foreign policy rhetoric consistently aspires to much higher standards for the United States. Given its claims to be a city on the hill," especially with regard to corruption, the United States is much more vulnerable to accusations of hypocrisy than other countries. The moralistic rhetoric surrounding corruption implicitly and explicitly boasts that the United States is more ethical than the rest of the world.").

166. See Krause & Wiygul, *supra* note 109, at 3 (discussing international enforcement activity and noting how opponents of facilitating payments argue that these payments foster a culture of corruption); see also Richard L. Cassin, *Clinton Blasts Facilitating Payments Exception*, FCPA BLOG (June 13, 2011, 5:32 AM), <http://www.fcpablog.com/blog/2011/6/13/clinton-blasts-facilitating-payments.html> (discussing the negative effects of bribery on business, governments, and democracy).

167. See BIALOS & HUSISIAN, *supra* note 53, at 116 (discussing how an advantage enjoyed by US firms is that many non-US officials already know that US firms are bound by the FCPA and noting that once a company earns a reputation of paying

Commentators note that a more aggressive FCPA is essential because a weak FCPA would undermine the crucial role the FCPA plays in helping US companies resist demands for bribes abroad as the price of access to international markets and opportunities.¹⁶⁸ A company that clearly and publicly declines to pay bribes will find that, in time, bribes are no longer demanded.¹⁶⁹ If officials face zero tolerance for bribery in even the smallest demands, then a culture of corruption will not easily flourish.¹⁷⁰

To assist in further combating corruption, practitioners emphasize the importance of maintaining a culture of integrity within a company.¹⁷¹ This culture is essential to avoid legal or

bribes, the number of bribe requests inevitably snowballs); *see also* Zervos, *supra* note 79, at 264 (discussing how some experts view even “small scale” bribery as “extremely harmful” to business).

168. *See generally* KENNEDY & DANIELSEN, *supra* note 22, at 27–28 (discussing how amending the FCPA to make it more “business friendly” would undermine thirty years of US anti-corruption efforts); *see also* Daniel Kaufman & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?*, (World Bank Policy Research Inst., Working Paper No. 2254, 1999) (demonstrating that bribe takers focus their demands on companies that have paid bribes before therefore increasing transaction costs).

169. *See* Alexandra Wrage, *Bribery’s Broken Windows*, *ETHISPHERE*, Q1 2008, at 47–48 (analogizing petty bribery to the “broken windows” theory advanced by James Wilson and George Kelling). The theory states that once one broken window is not repaired, the rest of the windows will eventually be broken. *Id.* Failing to repair the first window is a sign to the world that no one cares about the state of that window. *Id.* By analogy, this theory suggests that facilitating payments should be targeted as aggressively as higher-level corruption. *Id.*; *see also* Koch, *supra* note 59, at 392 (elaborating on the application of the “broken windows hypothesis” to facilitation payments by suggesting that due to the Exception’s “potentially infectious nature,” the ability of lower-level officials to accept bribes encourages higher-level officials to take more substantial bribes). Ms. Wrage is President of TRACE International, an association that pools together member resources to provide anti-bribery compliance solutions for multinational companies. *See About TRACE*, TRACE INT’L, https://secure.traceinternational.org/Trace/about-trace/Trace_International.html (last visited Dec. 29, 2011).

170. *See* Wrage, *supra* note 168 at 392 (discussing how eliminating petty bribery will help curb high-level corruption); *see also* TRACE INT’L, *THE HIGH COST OF SMALL BRIBES* 3 (2009), *available at* https://secure.traceinternational.org/data/public/The_High_Cost_of_Small_Bribes_2-65416-1.pdf [hereinafter *HIGH COST*] (discussing generally how bribery is bad for business).

171. *See* Lewis, *supra* note 153, at 92 (discussing the advantages of fostering a culture of integrity); *see also* *HIGH COST*, *supra* note 170, at 3 (noting how companies that operate abroad report that corruption fosters a permissive atmosphere for other business crimes, undermines employee confidence in management, and puts a company’s value and reputation at risk).

criminal risks because a potential violator will feel that his action is also against firm culture, further inducing compliant behavior.¹⁷² Practitioners observe that “embedded” principles that are part of the firm culture will outlast short-term profit motives.¹⁷³ Almost every country in the world outlaws the use of facilitation payments under its domestic bribery laws.¹⁷⁴ Additionally, the Exception only applies to the FCPA’s anti-bribery provisions and not to the accounting provisions.¹⁷⁵ For example, an employee who fails to properly record a payment made in a non-US jurisdiction that does not permit facilitating payments of any sort, may result in unintended but detrimental consequences.¹⁷⁶ Essentially, an employee who accurately accounts for a facilitating payment is admitting criminal liability.¹⁷⁷ This moral conundrum creates a strong incentive for employees to conceal or falsify the use of facilitation payments.¹⁷⁸ US employees thus lose either way.¹⁷⁹ On the one

172. See Lewis, *supra* note 152, at 92 (detailing a beneficial consequence of maintaining a culture that does not permit corruption); see also High Cost, *supra* note 170, at 3 (discussing generally how corruption undermines employee confidence).

173. See Lewis, *supra* note 152, at 92 (observing that principles last longer than profits); see also Zervos, *supra* note 79, at 254 (noting the benefits of eliminating the Exception in spite of the possibility of “significant losses and inconveniences”).

174. See Jordan, *supra* note 64, at 888 (discussing the Exception’s practical application under domestic law); see also Peeler & Pulley, *supra* note 84, at 5 (detailing the international trend against facilitation payments).

175. See FCPA, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006); see also Jordan, *supra* note 63, at 888 (noting the Exception’s limited application even within the FCPA).

176. See Jordan, *supra* note 64, at 888 (mentioning the potential for unintended consequences); see also Patricia Brown Holmes & Valarie Hays, *Grease Payments are a Thing of the Past as the Reach of the FCPA Continues to Expand*, BLOOMBERG L. REPS.: RISK & COMPLIANCE, Mar. 2010, at 1, 1 (“[I]f a US corporation makes a payment that does in fact fall within the narrow facilitation payment exception, the corporation and its officials may still be subjected to criminal prosecution or civil liability if the corporation does not properly record these payments. The failure to properly record these payments is a common temptation because recording them creates evidence of a local law violation.”).

177. See Holmes & Hays, *supra* note 176, at 2 (remarking that failure to properly record facilitating payments is a common temptation because they create evidence of violating local law); see also Richard L. Cassin, *Another Look at Facilitating Payments*, FCPA BLOG (Sept. 11, 2007, 7:14 PM), <http://www.fcpablog.com/blog/2007/9/11/another-look-at-facilitating-payments.html> (noting the risks associated with use of facilitating payments).

178. See Holmes & Hays, *supra* note 176, at 2 (referring to the failure to accurately record facilitating payments as a “common temptation”); see also Jordan, *supra* note 64,

hand, an employee can choose to properly record the payments and run the risk of criminal liability under another country's foreign bribery law.¹⁸⁰ On the other hand, an employee can choose to conceal or falsely record the payments and run the risk of violating the FCPA's accounting provisions.¹⁸¹

Additionally, as a result of the passage of the Bribery Act, US companies are now forced to closely evaluate their anti-corruption measures.¹⁸² In 2011, the United Kingdom began enforcing its new Bribery Act, referred to as "the FCPA on steroids."¹⁸³ The Bribery Act creates serious implications for US companies and people operating in the United Kingdom.¹⁸⁴ The enactment of the Bribery Act has caused many companies to re-

at 888 (describing the strong inducement to conceal the true purpose of facilitating payments).

179. See Jordan, *supra* note 63, at 888 (referring to the situation as a "Catch-22"); see also HOLMES & HAYS, *supra* note 176, at 2 (noting generally this accounting conundrum faced by US employees overseas).

180. See Jordan, *supra* note 63, at 888-89 (noting how domestic US companies that make and properly record facilitation payments in compliance with the FCPA can still find themselves liable for corruption charges under some other country's foreign anti-bribery law); see also HOLMES & HAYS, *supra* note 176, at 2 (discussing how there is no parallel exception under the accounting provisions thereby exposing US companies and their officials to liability).

181. See Jordan, *supra* note 63, at 888 (detailing the "Catch-22" faced by US companies that use the Exception); see also HOLMES & HAYS, *supra* note 176, at 2 (mentioning the alternative option to facing liability, improperly recording payments).

182. See Engle, *supra* note 24, at 1188 ("But, for now at least, companies are under the strongest pressure to institute procedures and standards so as to have the defense of adequate procedures in the event one of their employees breaks the law and should recast any requested facilitation payment contractually."); see also Dunst et al., *supra* note 24, at 286 ("In an increasingly global marketplace, it is important that multinational corporations keenly observe the regulatory landscape to identify possible new risks, including extraterritorial anti-corruption legislation, such as the UK Bribery Act.").

183. See *Acts: Bribery Act 2010*, *supra* note 112 (stating that the Bribery Act came into force July 1, 2011); see also Froomkin, *supra* note 149 (mentioning the nickname for the Bribery Act).

184. See generally David Foster et al., *New Bribery Act Creates Additional Liability Risk for Corporations Doing Business in the U.K.*, O'MELVENY & MYERS LLP (2010), available at <http://www.omm.com/fcwsite/abc.aspx?url=newsroom%2fpcnPDF.aspx%3fpub%3d980> (discussing the liability risks for corporations doing business in the United Kingdom); see also Grime & Zbed, *supra* note 134, at 10 ("Because of its broad territorial reach, the Bribery Act's prohibition of facilitating payments poses risks for a large number of businesses – regardless of any hoped-for exercise of prosecutorial discretion.")

evaluate their anti-corruption efforts, even if they have extensive policies and procedures to comply with legislation such as the FCPA.¹⁸⁵ A group of panelists from the American Bar Association (“ABA”) agreed that aggressive enforcement of bribery statutes is an international trend not limited to the United States.¹⁸⁶ The FCPA is no longer the most restrictive national statute that imposes anti-corruption standards on businesses.¹⁸⁷ The existence of a more stringent anti-corruption law in the United Kingdom has led to speculation that US enforcement authorities will apply even more pressure to companies through the FCPA so as “not to be outdone” in this area of traditional US dominance.¹⁸⁸ The adoption of a more “business friendly” statute may displace US leadership in the articulation of global anti-corruption norms.¹⁸⁹

185. See DELOITTE FORENSIC CTR., ANTI-CORRUPTION PRACTICES SURVEY 2011: CLOUDY WITH A CHANCE OF PROSECUTION? 3 (2011), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_dfc_fcpa%20compliance%20survey%20report_090711.pdf; see also Engle, *supra* note 24, at 1188 (“[The Bribery Act] raise[s] international standards because it effectively forces corporations to institute effective procedures to prevent bribery.”).

186. See Juliet S. Sorenson, *The Globalization of Anti-Corruption Law*, FCPA PROFESSOR (Aug 16, 2011), <http://www.fcpaprofessor.com/the-globalization-of-anti-corruption-law> (discussing the panelists’ consensus at the annual meeting of the American Bar Association in Toronto titled “The Globalization of Anti-Corruption Law”). The American Bar Association is a professional association that provides law school accreditation, continuing legal education, and programs to assist legal practitioners. See *Overview: About the ABA*, AM. BAR ASS’N, http://www.americanbar.org/utility/about_the_aba.html (last visited Jan. 3, 2011) (discussing the ABA’s work in serving members of the legal community and acting as a national representative of the legal profession).

187. See KENNEDY & DANIELSEN, *supra* note 22, at 23 (observing that several national statutes prohibit activities not addressed by the FCPA rendering the FCPA no longer the most restrictive national statutes); see also WEISSMANN & SMITH, *supra* note 22, at 5 (noting the passage of the Bribery Act and the view that it is more “far-reaching” than the FCPA in several key ways).

188. See WEISSMANN & SMITH, *supra* note 22, at 5 (“It will take time to determine whether fears of competitive enforcement policies are prescient or unfounded.”); see also GIBSON DUNN, *supra* note 88, at 30–31 (detailing how the passage of the Bribery Act moved the United Kingdom to the forefront of the global fight against corruption and warning that FCPA compliance does not necessary ensure compliance with the Bribery Act’s provisions).

189. See KENNEDY & DANIELSEN, *supra* note 22, at 28 (highlighting this potential consequence of adopting amendments proposed by the US Chamber of Commerce which would render the FCPA more “business friendly”); see also Zervos, *supra* note 79,

B. *Creating A More “Business Friendly” FCPA*

Commentators opposed to making the FCPA a more aggressive statute argue in favor of amending the statute to make it more “business-friendly.”¹⁹⁰ These critics argue that the FCPA in its current form harms US business interests abroad, and that the focus should be on improving the enforcement regimes of other nations.¹⁹¹

The primary theme throughout the 2010 Foreign Corrupt Practices Act congressional hearing was that the current state of FCPA enforcement might harm US business interests.¹⁹² American companies involved in international business continue to perceive corruption as a significant obstacle to business.¹⁹³ In a 2008 survey of more than 2,700 business executives in twenty-six countries, Transparency International found that international officials in public institutions demanded a bribe payment from nearly forty percent of the business executives polled.¹⁹⁴ In many countries, bribery is still part of the ordinary course of business.¹⁹⁵ Evidence supports the

at 253, 268 (noting US hypocrisy for articulating a strong anti-corruption stance while permitting petty bribes).

190. See WEISSMANN & SMITH, *supra* note 22, at 5 (proposing five potential reforms in light of the FCPA’s harm to business). *But see* KENNEDY & DANIELSEN, *supra* note 22, at 5 (opposing Weissmann & Smith’s proposed amendments).

191. See Enforcement Hearing, *supra* note 87, at 18 (emphasizing the need to focus on helping other countries improve their enforcement programs); *see also* Dionne Searcey, *In Antibribery Law, Some Fear Inadvertent Chill on Business*, WALL ST. J., Aug. 6, 2009, at A9 (noting in particular the scholarship discussing the fear of chilling business in emerging markets).

192. See generally House Hearing, *supra* note 131 (noting this theme that was present throughout the hearing).

193. See KENNEDY & DANIELSEN, *supra* note 22, at 18 (highlighting a 2009 survey by Ernst & Young, a global accounting firm, that found that one in four respondents reported that their company had experienced an incident of bribery or corruption over the course of 2007 and 2008, and eighteen percent knew their company had lost business to a competitor who had paid a bribe).

194. TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT xxv (2009), *available at* <http://www.transparency.org/publications/gcr> (follow “Click here to download the report” hyperlink and select the report in the appropriate language); *see also* KENNEDY & DANIELSEN, *supra* note 22, at 19 (interpreting the Transparency International survey to demonstrate that the challenges that led to the passage of the FCPA still exist).

195. See WEISSMANN, *supra* note 32, at 93 (“In many countries, bribery is the ordinary course of business and even tax deductible.”); *see also* Press Release, Regional Anti-Corruption Initiative, 2nd India Summit on Anti-Corruption – Oct. 17–18, 2011 –

idea that the FCPA has made US business less competitive than their international counterparts who do not have significant FCPA exposure.¹⁹⁶ A 1999 Congressional Research Service report to Congress referenced an estimate that the FCPA's anti-bribery provisions had lost up to one billion dollars annually in US export trade.¹⁹⁷ Between May 1, 2003 and April 30, 2004, the US Department of Commerce has estimated that the bribery of non-US officials may have affected competition for forty-seven contracts worth US\$18 billion.¹⁹⁸ Of these forty-seven contracts, US firms lost at least eight contracts worth US\$3 billion.¹⁹⁹ Notably, about thirty percent of respondent companies have decided against doing business in countries where the perceived risk of non-compliance was too high.²⁰⁰

Anecdotal evidence indicates that the demand for illicit payments has significantly increased in recent years as new markets have permitted international investment and procurement.²⁰¹ James R. Hines, Jr., formerly of the John F.

Mumbai, India, <http://www.rai-sec.org/events/upcoming-events/988-2nd-india-summit-on-anti-corruption-october-17-18-2011-mumbai-india.html> (last visited Dec. 1, 2011) ("Recent corruption scandals including the telecoms case make it clear that corruption remains a serious problem in India.").

196. See MICHAEL V. SEITZINGER ET AL., CONG. RESEARCH SERV., RL 30079, FOREIGN CORRUPT PRACTICES ACT (1999); DEP'T OF COMMERCE, ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY & FAIR COMPETITION vi, 22–24 (2004), available at http://www.usinfo.org/enus/government/forpolicy/docs/exp_000951.pdf (expressing concern that a number of countries that have ratified the OECD Convention still do not have specific legislative provisions to fulfill obligations under the OECD Convention and further comparing enforcement practices of other nations noting that some countries, particularly those whose firms are very active in export markets, have been slow to apply enforce resources).

197. See SEITZINGER ET AL., *supra* note 196 (listing the estimated losses sustained in export trade as a result of the FCPA).

198. DEP'T OF COMMERCE, *supra* note 196, at vi (noting the US Department of Commerce's estimate regarding the FCPA's financial impact to US business acquisition abroad).

199. DEP'T OF COMMERCE, *supra* note 196, at vi (detailing precisely how many contract US businesses lost).

200. FULBRIGHT & JAWORSKI LLP, FIFTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS: DIRECTION AND DYNAMICS, 34 (2008), available at <http://www.fulbright.com/mediaroom/files/2008/Fulbright-FifthLitTrends.pdf>.

201. See BIALOS & HUSISIAN, *supra* note 53, at 13 (observing how this type of corruption is most prevalent in post-communist states where the rule of law is largely undeveloped); see also Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 304–05

Kennedy School of Government at Harvard University, analyzed the impact of the FCPA on US investment in emerging markets through four indicators of US business activity: federal direct investment, capital-to-labor ratios, joint venture activity, and aircraft exports.²⁰² Hines concluded that all four indicators decreased after the passage of the FCPA in 1977.²⁰³ As a result, he posited that anti-bribery legislation deterred investment in countries where bribery is perceived to be relatively prevalent.²⁰⁴ Hines observed that while US business activity decreased in corrupt countries, no evidence suggested that total international business activity decreased.²⁰⁵ He suggested that multinational firms, unconstrained by anti-bribery legislation, might have replaced US activity.²⁰⁶

Commentators and practitioners have subsequently argued that the present FCPA enforcement regime ultimately deters US investment from emerging markets.²⁰⁷ Andrew Spalding, visiting

(1994) (bemoaning that the countries that often provide the most dynamic markets for US businesses are also those most fraught with corruption).

202. See James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977*, 15–19 (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), available at <http://www.nber.org/papers/w5266.org> (analyzing the behavior of US firms before and after the passage of the FCPA to draw indirect inferences about the effects of this legislation on US business activity); see also Scarcey, *supra* note 191 (noting that the view that fighting bribery is “detrimental to investment in emerging markets has been around for awhile citing both Mr. Hines’s research and Dr. Andrew Brady Spalding’s subsequent research”).

203. See Hines, *supra* note 202, at 19 (noting the significant effect of US anti-bribery legislation on business operations in corrupt countries); see also Scarcey, *supra* note 191 (recognizing some commentators’ arguments that the FCPA harms business interests).

204. See Hines, *supra* note 202, at 19–20 (interpreting the results on the four dimensions of behavior of US firms); see also Weinograd, *supra* note 152, at 527 (“When operating in a country where facilitation payments are the norm, such a policy might even encourage a corporation to divest.”).

205. See Hines, *supra* note 202, at 19 (noting this effect on US business activity compared to the opposite effect on international business); see also Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done With the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT’L L. 431, 447 (1987) (discussing the deleterious impact on US business abroad).

206. See Hines, *supra* note 202, at 19–20 (detailing what may have led international business activity to remain the same while US business activity declined).

207. See Spalding, *supra* note 78, at 351 (emphasizing this deterrence from emerging markets); see also Weinograd, *supra* note 152, at 527 (observing how the present FCPA enforcement regime has led some companies to routinely err on the side of caution and noting that this policy might encourage a corporation to divest).

professor at the Chicago-Kent College of Law, emphasized how this effect is contrary to the FCPA's purpose to build economic and political alliances by promoting ethical overseas investment.²⁰⁸ These commentators posit that capital-rich countries that are not committed to effectively enforcing anti-bribery measures fill the resulting foreign direct investment void.²⁰⁹ Companies that are subject to anti-bribery legislation are now investing less in countries where bribery is perceived to be more prevalent.²¹⁰ The decrease in investment results from a company evaluating the risks of engaging in decision-making in uncertain conditions where a risk of corruption exists.²¹¹ Spalding posits that the US Congress's tacit purpose was to force all countries to adopt FCPA-like regulations.²¹² As a result, these regulations have induced international investors to reduce their investments in corrupt countries.²¹³

As a result of this void, practitioners and government officials point to the need to increase enforcement of domestic anti-bribery statutes abroad to eliminate competitive disadvantages.²¹⁴ The United States is the undisputed leader in enforcement actions by quickly distinguishing itself through its

208. Spalding, *supra* note 78, at 351 (observing how the present enforcement regime is contrary to the FCPA's legislative historical purpose).

209. *See id.*, at 351 (discussing how these unintended sanctions on emerging markets result in these countries filling the foreign direct investment void).

210. *See id.*; *see also* Spalding, *supra* note 78, at 355 (noting how the FCPA's impact has led to this additional and more problematic outcome); *see also* Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 634 (2008) (observing how legislation to punish bribery is not effective in countries with high corruption).

211. *See* BIALOS & HUSISIAN, *supra* note 53, at 74–76 (discussing the decisions made by management in emerging markets that revolve around the inevitability that “some risk” of a corrupt payment exists).

212. *See* Spalding, *supra* note 78, at 356 (arguing that enforcement agencies intend the current enforcement levels to force other nations to adopt similar regimes).

213. *See id.* (noting the consequence of the proliferation of FCPA-like regulations); *see also* Weinograd, *supra* note 152, at 528 (observing how companies are unwilling to engage in certain international transactions when facing weighty financial penalties, the stigma attached to criminal liability, and potential ineligibility for future government contracts).

214. *See* Enforcement Hearing, *supra* note 86, at 18 (arguing in favor of encouraging the increase of anti-corruption enforcement worldwide); *see also* Carrington, *supra* note 4, at 142–43 (noting that enforcement must be “re-energized”).

“rabid enforcement” of the FCPA.²¹⁵ Markedly, the United States has pursued more anti-corruption prosecutions than any other nation.²¹⁶ Members of the US Congress as well as practitioners observe that international efforts against bribery need to increase because the United States cannot be the only enforcer.²¹⁷ These practitioners emphasize the need to assist other countries in improving their enforcement regimes.²¹⁸ While all countries have laws that punish bribery to reduce the demand for bribes by politicians and other government officials, not all countries are equal to the United States in terms of number of prosecutions.²¹⁹ Relatively few countries other than the United States have initiated prosecutions or even serious investigations of bribery involving non-US officials.²²⁰

215. See Peeler & Pulley, *supra* note 84, at 2 (emphasizing that the United States is still the clear leader in today’s anti-corruption enforcement charge); see also Hon. Dick Thornburgh, *Foreword* to HECTOR GONZALEZ & CLAUDIUS O. SOKENU, FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT AFTER *U.S. v. KAY*, at ii (2006) (“[F]or no nation over the past several years has enforced its anticorruption laws as vigorously as the United States.”).

216. See Peeler & Pulley, *supra* note 84, at 3 (noting the United States’ lead in enforcement actions); see also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY: 2010 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 6 (2010), available at <http://www.oecd.org/dataoecd/47/39/47637707.pdf> (detailing an OECD enforcement study that reported approximately two hundred and sixty ongoing investigations in fifteen parties to the OECD Convention with 150 investigations stemming from one country, the United States).

217. See Enforcement Hearing, *supra* note 88, at 18 (“You cannot be the only enforcer in the world and expect to clean up the world. That is not [the United States’] role.”); see also Searcey, *supra* note 196 (discussing the need to improve enforcement worldwide).

218. See Enforcement Hearing, *supra* note 86, at 18 (noting the emphasis placed by Michael Volkov, partner at US law firm Mayer Brown, on the need to improve other nations’ enforcement regimes); see also Searcey, *supra* note 191 (citing Nancy Boswell, President of Transparency International-USA, who stated “The FCPA is the benchmark for where we think other governments should be What’s essential is consistent, concerted action by all exporting nations to enforce bribery prohibition.”).

219. See Sorenson, *supra* note 186 (decerning the United States the “undisputed leader” in aggressive enforcement of bribery statutes); see also Cuervo-Cazurra, *supra* note 210, at 634 (observing that legislation to curb bribery is not effective in countries with high corruption).

220. See FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT’L, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 11 (3d ed. 2010), available at http://www.transparency.org/publications/publications/conventions/oecd_report_2010 (discussing findings of comparative enforcement programs); see also Marceau, *supra* note 91, at 287 (noting the United States’ commitment to aggressively prosecute FCPA violations).

Significantly, Transparency International identifies only six other countries besides the United States that qualify as “active” in their prosecution of overseas bribery.²²¹ Such legislation, however, is not always effective especially in countries with high corruption, where judges may be open to accept a bribe in exchange for altering the application of anti-corruption law within their jurisdiction.²²²

III. REPEAL THE FACILITATING PAYMENTS EXCEPTION

Eliminating the Exception follows the trend of establishing more aggressive international standards that prohibit facilitating payments. Amending the statute to take a more forceful stance would also ideologically align the FCPA with the DOJ’s desire to have a strong position against corruption. Part III emphasizes the potential advantages US businesses stand to gain with the elimination of the Exception. Part III.A discusses how eliminating the Exception dismisses the accusations of hypocrisy and prevents US companies from falling prey to the “slippery slope” of bribe demands. Part III.B details how a bright line rule against all forms of corruption helps remove the inherent problems and risks associated with use of the Exception. Finally, Part III.C emphasizes the importance of the United States being able to reestablish its leadership role for aggressively fighting corruption abroad.

A. *Conforming to the New International Norm*

The purpose behind the Exception’s inclusion in the FCPA is now obsolete. The prohibition against corruption is no longer limited to the developed world.²²³ Only five countries, including the United States, permit legal bribes.²²⁴ Notably, the Australian

221. See HEIMANN & DELL, *supra* note 220, at 11. The six other countries are Denmark, Germany, Italy, Norway, Switzerland, and the United Kingdom. *Id.*

222. See Cuervo-Cazurra, *supra* note 210, at 634 (noting the ineffectiveness of legislation that prosecutes overseas bribery); see also Carrington, *supra* note 4, at 130 (discussing generally the problem of officials who seek bribes).

223. See *supra* notes 78–84 and accompanying text (discussing the United States’ successful efforts to encourage global anti-corruption efforts).

224. See *supra* note 101 and accompanying text (listing the four other countries that permit facilitating payments: Australia, Canada, New Zealand, and South Korea).

government, one of the five countries that permit facilitating payments, is currently considering eliminating the Exception.²²⁵ At the time of the Exception's enactment, Congress noted its corrosive effects and adopted the Exception as a "necessary evil."²²⁶ The global business climate was rife with corruption and American corporations, subject to the FCPA, were at a significant disadvantage.²²⁷ The passage of the OECD Convention along with the subsequent enactments of anti-corruption statutes by the OECD signatory nations evidences the prevailing global anti-corruption climate.²²⁸ The United States is no longer at a competitive disadvantage because US companies transact and compete with nations that now have similar anti-corruption statutes in place.²²⁹ As a result, the underlying reasoning behind the need for the facilitating payments exception no longer exists. The majority of the international community prohibits the use of facilitating payments.²³⁰ The OECD actively discourages the use of facilitating payments and the Bribery Act prohibits its use.²³¹ It is clear that the United States is no longer fighting alone to end corruption in international business transactions.

Notably, eighty percent of US companies do not even permit use of the facilitating payments exception as part of their corporate policy.²³² As a result of the statute's ambiguity, US companies are weary of allowing their employees to pay

225. See *supra* note 102 and accompanying text (noting the Australian government's current position vis-à-vis its statute's facilitating payments exception).

226. See *supra* notes 64-67 and accompanying text (detailing Congress's view toward facilitating payments at the time of the FCPA's passage).

227. See *supra* note 76 and accompanying text (mentioning the concern of a competitive disadvantage that drove the creation of the Exception).

228. See *supra* notes 78-79 and accompanying text (noting the passage of the OECD and subsequent acceptance by its signatory nations).

229. See *supra* notes 80-83 and accompanying text (noting the FCPA's influence on the proliferation of anti-bribery statutes worldwide).

230. See *supra* note 101 and accompanying text (observing that only four countries outside the United States permit the use of facilitating payments).

231. See *supra* Part I.C (discussing the OECD and Bribery Act's stance on facilitating payments and their influence in international standard setting).

232. See *supra* note 207 and accompanying text (detailing the infrequent use of the Exception by US companies to evade prosecution).

facilitating payments for fear of prosecution.²³³ With the advent of the Bribery Act, US companies will use the Exception even more sparingly, rendering it virtually useless. The Exception still harms business interests, however, despite its infrequent use.

B. Eliminating the Problems Associated with the Exception's Use

The Exception harms US business interests as a result of its ambiguity, with no clear delineation as to its scope. In particular, the definition of “routine governmental action” is an example of how the scope of the Exception is unclear.²³⁴ The US Congress attempted to clarify the meaning of “routine governmental action” by delineating actions that fall under its definition.²³⁵ Despite this clarification, the definition’s “catch-all” provision for “actions of a similar nature” renders the statute ultimately vague.²³⁶ The list is therefore non-exhaustive and does not provide the requisite clarity as to the Exception’s outer limits.

The Exception’s scope is especially unclear because the FCPA does not delineate a limit to the amount that may be legally paid under the Exception.²³⁷ The facilitating payment need not be *de minimis*.²³⁸ The United States does not limit facilitating payments to “small” payments, unlike the OECD.²³⁹ This difference is significant because a facilitating payment may

233. *See supra* notes 139, 163–64 and accompanying text (discussing US companies’ fears of prosecution as a result of the Exception’s ambiguity regarding its scope).

234. *See supra* notes 72–73 and accompanying text (noting the Exception’s language generally and in particular noting “actions of a similar nature” which is the final example of “routine governmental action”).

235. *See supra* note 30 and accompanying text (listing potential actions listed in the FCPA that may be permitted for facilitating payments).

236. *See supra* note 73 and accompanying text (detailing the Exception’s language with regard to the definitions listed for “routine governmental action”).

237. *See supra* note 71 and accompanying text (detailing the Exception’s plain language which provides no limitation to facilitating payments).

238. *See supra* note 71 and accompanying text (reviewing the Exception’s language).

239. *See supra* notes 104, 140–43 and accompanying text (reviewing how the OECD explicitly provides for “small” payments in contrast to the US’ position which does not have a specific delineation); *see also, supra* note 72 and accompanying text (noting the OECD’s limitation on facilitating payments while the United States has no similar limitation and the significance of this difference).

potentially be a large sum of money.²⁴⁰ While legal under the statute's "plain" language, this transaction would immediately be suspect and subject to DOJ inquiries.²⁴¹ A US company would then be forced to defend itself by expending more resources in employing their legal team to handle any potential DOJ investigation.²⁴²

This ambiguity has created substantial financial difficulties for US businesses, most notably in compliance. US companies have spent substantial amounts of money in creating overzealous compliance programs.²⁴³ Repealing the Exception would provide a bright line rule for all US companies to adhere to: all bribes are illegal. A clearer rule remedies the ambiguity of the statute and enables lawyers and practitioners to more easily comply with the FCPA while transacting abroad.²⁴⁴

The DOJ attempts to compensate for the ambiguity of the Exception with the Lay Person's Guide and the Opinion Procedure mechanism.²⁴⁵ These attempts, however, are ineffective. The Lay Person's Guide provides scant clarification while the Opinion Procedure tool is too time-consuming. While abroad, US companies are subject to cultural and political pressures that dictate timelines that force decisions to be made within a short period of time.²⁴⁶ Companies cannot afford to wait

240. *See supra* notes 140–43 and accompanying text (mentioning that inherent problems associated with no limitation on facilitating payments).

241. *See supra* note 142 and accompanying text ("However, the greater the value of an expediting payment, the more likely enforcement officials will view the payment as being suspect and not a legitimate expediting payment."); *see also supra* notes 20, 105 and accompanying text (observing how the amount of the facilitating payment is not limited nor specified).

242. *See supra* notes 162–63 and accompanying text (describing the expenses borne by US companies in investigating potential FCPA violations).

243. *See supra* notes 162–63 and accompanying text (observing that inefficient compliance programs are a result of the Exception's ambiguity).

244. *See supra* note 156 and accompanying text (noting how government has not provided enough guidance to companies to enable them to effectively comply with the FCPA).

245. *See supra* notes 16, 54–59 and accompanying text (describing the Lay Person's Guide and Opinion Procedure mechanism).

246. *See supra* note 149 and accompanying text (discussing the time and political pressures involved in negotiating overseas).

for an advance ruling before proceeding with a business transaction.²⁴⁷

Moreover, merely employing the Opinion Procedure mechanism may subject a US company or employee to liability. Use of the mechanism amounts to a written admission of a bribe especially since the proposed transaction must be described in detail.²⁴⁸ This detailed admission may serve to implicate a company of violating the FCPA. In the event of an unfavorable ruling, the DOJ may subsequently heavily scrutinize the conduct of the US company in question leading to further compliance costs.²⁴⁹ As a result of these flaws, most companies do not even employ the Opinion Procedure mechanism, thus rendering it even more ineffective.²⁵⁰

Even if the US Congress further clarifies the Exception, all forms of bribery should be prohibited. Simply stated: bribery is bad for business. Once a company earns a reputation for paying bribes, international officials will demand more bribes with each subsequent business transaction.²⁵¹ This, in turn, increases the costs of doing business abroad for American companies.²⁵² As the number of officials requesting bribes increase, ultimately, these expediting payments may evolve to become improper payments.²⁵³ Moreover, a bribe is not a guarantee that the job will be performed, and awards a foreign official leverage over US companies. Once a bribe is paid, a US company becomes subject to a foreign official's whim because the company cannot seek legal recourse. A corporate policy that permits the payment of

247. See *supra* note 57 and accompanying text (noting the thirty-day timeline, with the possibility of an extension, to receive an Opinion Procedure ruling).

248. See *supra* note 56 and accompanying text (describing what the DOJ requires of a company before it provides a ruling).

249. See *supra* notes 162–63 and accompanying text (mentioning the compliance costs that US companies face).

250. See *supra* note 152 and accompanying text (noting how the mechanism is rarely used by most US companies).

251. See *supra* notes 172–74 and accompanying text (detailing the “slippery slope” of bribery payments).

252. See *supra* note 170 and accompanying text (noting how this incorporated tax increases transactions costs generally).

253. See *supra* notes 172–74 and accompanying text (discussing how the increasing demand for facilitating payments leads to a “slippery slope” that may lead to illegal bribes).

bribes breeds further corruption that increases both financial and transactional costs for US businesses in the long run.²⁵⁴ US companies would not fall prey to this “slippery slope” of corruption if the Exception is repealed.²⁵⁵

Furthermore, permitting legal bribes while promoting a culture against corruption is contradictory and hypocritical. Repealing the Exception permits US companies to effectively promote a culture of integrity. This culture is essential to avoid legal and criminal risks in business transactions by ensuring compliance to anti-corruption policies.²⁵⁶ The potential violator must feel that her action is not only illegal but also against company conscience.²⁵⁷ Failure to install active measures against corruption permits “employees and third parties to rationalize stealing from the company.”²⁵⁸ Eliminating the Exception will enable US companies to consistently decline all bribes so that, in time, bribes are no longer demanded.²⁵⁹

Consistently declining bribes allows US companies to build a strong anti-corruption policy and be forthcoming about their expectations in business transactions.²⁶⁰ The FCPA will effectively become a shield against less scrupulous foreign officials seeking to take advantage of US business interests.²⁶¹ By

254. *See supra* note 173 and accompanying text (discussing the increased costs in the long run).

255. *See supra* note 174 and accompanying text (noting the benefits of repealing the Exception).

256. *See supra* note 176 and accompanying text (detailing the importance of a culture of integrity).

257. *See supra* note 176 and accompanying text (suggesting that the importance stems from creating a corporate culture against corruption so that an employee feels not only morally against corruption but also feels that he is in violation of well-settled corporate policy).

258. *See supra* note 22 and accompanying text (noting how a corporate culture that permits facilitating payments creates a permissive atmosphere where employees feel that they may do other illegal acts).

259. *See supra* notes 171–73 and accompanying text (detailing how, in time, bribes would no longer be demanded of a country that consistently refrains from paying bribes).

260. *See supra* note 175 and accompanying text (observing the benefits of a strong anti-corruption policy).

261. *See supra* notes 171–73 and accompanying text (noting how the FCPA would become a shield to defend against corruption in US business transactions abroad).

eliminating the Exception, US companies will foster a culture of integrity free of corrupt outside influence.

The companies that do permit the use of facilitating payments do so at the risk of setting conflicting standards.²⁶² While facilitating payments are permitted under US law, these payments are prohibited domestically in every nation.²⁶³ Thus, US employees required to properly account for all facilitating payments made abroad must either abide by US law or protect themselves from liability under local law.²⁶⁴ US employees are effectively between Scylla and Charybdis, compelled to choose which “monster” to face.

As a result, US employees are forced to effectively document a bribe and face FCPA liability if the facilitating payment falls outside the scope of the Exception.²⁶⁵ This documentation further amounts to a signed confession of wrongdoing in the host country exposing the US employee to liability under local law.²⁶⁶ Abiding by local law, therefore, forces an employee to creatively account for the legal bribe.²⁶⁷ If the payment is improperly recorded, the issuer is subject to SEC enforcement.²⁶⁸ In a company that emphasizes a culture of integrity, use of the Exception directly contradicts this culture. Repealing the Exception thus removes the significant risks involved with the Exception’s use and helps promote a corporate culture firmly against corruption.

262. *See supra* note 170 and accompanying text (discussing the hypocrisy of voicing an aggressive anti-corruption stance while permitting bribes in the form of facilitating payments).

263. *See supra* note 181 and accompanying text (noting the conundrum US employees face as a result of the illegality of facilitating payments under local domestic law).

264. *See supra* note 52 and accompanying text (observing the difficult choice US employees face when accounting for facilitating payments).

265. *See supra* notes 182–83 and accompanying text (discussing the consequence of accurately recording a facilitating payment).

266. *See supra* note 182 and accompanying text (observing how a proper record of facilitating payment amounts to a confession of paying a bribe).

267. *See supra* notes 182, 185 and accompanying text (noting the alternate choice faced by US employees when accounting for facilitating payments).

268. *See supra* note 185 and accompanying text (observing the penalty for improperly recording payments).

Concededly, corrupt governments and companies may not want to negotiate with US businesses as a result of eliminating the Exception, transacting instead with countries that have weaker enforcement regimes. Obtaining contracts in particularly corrupt countries may virtually cease as a result of eliminating the Exception. Particularly in emerging markets, countries with strong anti-bribery enforcement may be at a disadvantage compared to countries with weaker enforcement provisions.²⁶⁹ A void of American influence in certain emerging markets is not in the United States' best interests. The Exception assists US companies in overcoming this hurdle.

These initial obstacles, however, may not be as daunting as perceived given the current international anti-corruption climate. As practitioners accurately note, rhetoric is meaningless when countries do not enforce their respective anti-corruption statutes.²⁷⁰ The current reality is that other countries do not enforce their respective anti-corruption statutes as aggressively as the United States.²⁷¹ The United States is effectively leveling the playing field by enforcing the FCPA's provisions worldwide. Significantly, the United States has recently increased FCPA enforcement actions substantially.²⁷² Without these efforts, international companies under weaker anti-corruption regimes are able to pay bribes without fear of penalty.²⁷³ The global anti-bribery trend, however, will lead to greater enforcement actions worldwide, especially if current US enforcement levels continue and the United Kingdom begins enforcing the Bribery Act's provisions.²⁷⁴

269. *See supra* notes 214, 217 and accompanying text (noting the potential competitive disadvantage where two countries may have differing enforcement policies).

270. *See supra* notes 85, 201, 219–27 and accompanying text (discussing the US lead in anti-corruption enforcement and the competitive disadvantage that exists when other nations fail to enforce their anti-corruption statutes).

271. *See supra* notes 224–26 and accompanying text (comparing other countries' enforcement activities to the United States' enforcement).

272. *See supra* notes 87–94 and accompanying text (observing the United States' recent increased enforcement of violations of the FCPA).

273. *See supra* note 227 and accompanying text (noting a consequence of being the leader in enforcement activity).

274. *See supra* notes 115–22 and accompanying text (detailing the Bribery Act's greater extraterritorial reach relative to the FCPA and its significance).

The more appropriate response lies in encouraging stronger enforcement regimes abroad—as the United States has been demonstrating. The Bribery Act, with its broader extraterritorial reach, will induce global businesses to reconsider their own policies regarding bribes.²⁷⁵ The United Kingdom and United States are major trading partners and big players in international business. Commentators have posited that this increase in enforcement is a means for the United States to encourage anti-corruption enforcement in countries with weaker enforcement procedures or internal controls.²⁷⁶ Enforcing the FCPA provisions against non-US businesses alerts other nations to the need to enforce their domestic anti-bribery provisions.²⁷⁷

With the prevalence of increased enforcement and international anti-corruption cooperation, other nations will feel pressure to comply with higher standards. Free media and other markers of transparency are important players in the global marketplace. The importance of maintaining a good reputation is more important than ever.²⁷⁸ The cost to a company of reputational damage due to revelations of corruption can be far higher than “the financial cost of investigation.”²⁷⁹ Just as the United States pushed for the advent of a global anti-corruption climate in the 1980s and 1990s, the United States is now pushing for stronger enforcement procedures worldwide.²⁸⁰

275. See *supra* note 185 and accompanying text (noting the potential effect of the Bribery Act’s passage on global business policies).

276. See *supra* note 217 and accompanying text (discussing the argument that the recent increase in US enforcement is a means to induce other nations to similarly increase their enforcement activities).

277. See *supra* note 218 and accompanying text (noting the effect of the United States’ increased enforcement efforts).

278. See *supra* note 178 and accompanying text (noting how reputations outlast profits).

279. See *supra* note 22 and accompanying text (observing the consequences of a damaged reputation).

280. See *supra* Part I.B (chronicling the United States’ role as a leader in combating bribery abroad beginning in the 1970s); see also *supra* notes 223–25 and accompanying text (detailing the United States’ lead in combating international corruption through its work with the OECD and comparing other countries’ enforcement measures to the United States’ recent increase in enforcement activity).

C. Re-Establishing the United States as a Leader Against Corruption

Although the United States began the crusade against global corruption in the 1970s, it has now fallen behind.²⁸¹ The UK's Bribery Act is more aggressive and does not permit the use of facilitation payments.²⁸² Moreover, the OECD now actively discourages the use of facilitation payments and openly criticizes the United States for maintaining this Exception.²⁸³ Once the leader, the United States now lags behind the global trend toward an increasingly aggressive position towards all forms of corruption.²⁸⁴ While the United States leads the world in anti-corruption enforcement measures, it has fallen behind in instituting a more aggressive statute. The US stance against corruption thus borders on hypocrisy.²⁸⁵ US rhetoric calls for strong measures to combat corruption abroad but enables US companies to pay bribes to government officials for certain services. If the United States is going to push for other countries to increase enforcement of their respective anti-corruption statutes, the United States should itself lead by example. Eliminating the Exception for facilitating payments would facilitate this result.

The United States should lead by example by amending the FCPA to align with the Bribery Act. This alignment is important in part because of the Bribery Act's greater extraterritorial reach. US companies now may be subject to enforcement actions under the Bribery Act.²⁸⁶ Eliminating the facilitating payments exception ensures that US companies do not violate the Bribery Act. Further, eliminating the facilitating payments

281. *See supra* notes 75–79 and accompanying text (detailing the United States' efforts beginning the 1970s to fight corruption abroad).

282. *See supra* notes 119–31 and accompanying text (detailing both the FCPA and the Bribery Act's provisions).

283. *See supra* Part I.C (noting the OECD's current stance toward facilitating payments).

284. *See supra* notes 113, 131 and accompanying text (emphasizing the international stance against facilitating payments).

285. *See supra* notes 165–71 and accompanying text (highlighting the hypocrisy involved with maintaining an Exception that permits bribes while enforcing anti-corruption violations aggressively).

286. *See supra* notes 119–22 and accompanying text (detailing the Bribery Act's extraterritorial reach and its significance in comparison to the FCPA).

exception ensures that the United States is upholding the global trend. The Exception should be recognized for what it is: a bribe that is illegal in every country's domestic anti-corruption statute and prohibited from use in business transactions by most international players.²⁸⁷ Repealing the Exception would signal to the international community that the United States is a true leader in the fight against corruption in international business transactions.

CONCLUSION

Ultimately, the facilitating payments exception poses more problems than benefits to US companies. Eliminating the facilitating payments exception will enable companies to enact more effective compliance programs and also provide clearer guidance for engaging in international business transactions. The global trend to eliminate the facilitating payments exception is significant. The trend signals that the United States is no longer the only country fighting corruption in business transactions. This trend also demonstrates how the United States has fallen behind as the leader against corruption in business transactions. In spite of the United States remaining the leader in enforcement actions, it no longer has the most powerful anti-corruption statute on the books. Significantly, the UK's Bribery Act is now in force and its provisions are more aggressive than the FCPA. The United States should eliminate the Exception in order to regain its position as the lead crusader against corruption. Instead of increasing enforcement of a weaker and ambiguous statute, the US Congress should amend the FCPA so that US companies and global businesses adhere to its standards.

287. See *supra* notes 100–03, 167, 179 and accompanying text (discussing the international stance against the Exception and the international community's prohibition against the Exception in domestic statutes).

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