

Amending the Foreign Corrupt Practices Act: Repealing the Exemption for “Routine Government Action” Payments

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Abstract: The Foreign Corrupt Practices Act (FCPA) exempts small scale payments for “routine government action” from its reach. This article suggests that the FCPA be amended in order to forbid these payments as well. As currently formulated, the FCPA does not address the very real damage caused by low-level corruption. Amending it to include small scale bribes would lead symbolic and practical benefits that outweigh potential objections. This is particularly the case if the change is accompanied with a modified enforcement and penalty scheme.

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Section I: Introduction

Current narratives about corruption cast it as a significant challenge to both the international community and individual countries, especially developing ones. Corruption is linked to reductions in domestic and international investment; increases and skewing of government investment as budget items are manipulated to provide bribes and diverted towards areas where bribes are more easily obtained; increases in income inequality; and various other negative impacts.¹ Given the damage caused by corruption, efforts to encourage economic development, improve governance and create dynamic civil society institutions have increasingly focused on ways to eliminate it.² Developed countries have undertaken significant legal reforms to aid this effort. But the legal framework that addresses this problem in the United States and other developed countries suggests a more complicated understanding of how harmful corruption is than these countries' rhetoric at first suggests. This "nuanced" understanding places a great emphasis on large-scale corruption, related to extra-ordinary events like the awarding of government contracts. The everyday corruption that directly affects the texture of daily life—small payments to corrupt officials to do the job they are supposed to do—appears to spark much less concern.

The archetypical example of this dichotomy is the United States' Foreign Corrupt Practices Act (FCPA). The FCPA, passed in 1977, criminalizes bribery outside the United States by US citizens, corporations and their foreign subsidiaries.³ Though groundbreaking at the time it was passed, US pressure has meant that the FCPA's

¹ See, e.g., Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 JOURNAL OF ECONOMIC LITERATURE 1320 (1997); Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* 8-14 (World Bank Working Paper, 1998);

² See e.g., Daniel Kaufmann, *Governance and Corruption*, in THE QUALITY OF GROWTH (2000).

³ 15 U.S.C. 78dd-1, 2 (1977).

provisions were basically copied and extended by an OECD anti-corruption convention—with the result that numerous industrialized countries have changed their laws to criminalize bribery of foreign officials by their citizens and corporations.⁴ Once a unique national effort, the general framework of the FCPA is now an important template for global anti-corruption efforts. This globalization of the FCPA’s policy priorities is positive in many respects. However, the generally uncompromising FCPA framework explicitly exempts payments meant to secure the performance of “routine government action” (“grease” money) from its scope.⁵ This exemption has been adopted by the OECD anti-corruption convention’s commentaries and has thus been standardized in many global anti-corruption frameworks.⁶

⁴ See, e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, art. 1, 37 *I.L.M. 1 (1998)* [hereinafter OECD Convention]; Nora Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 *AM. U. INT’L L. REV.* 257 (1998). In countries where “legal persons” are not subject to criminal sanctions, the treaty calls for non-criminal sanctions to be imposed.

⁵ 15 *U.S.C. § 78dd-1(b)* (2000).

⁶ OECD Convention, *supra* note 4 at Commentaries para. 9. The Commentaries incorporation are not required in implementing legislation, but ten of the thirty five countries signing the OECD treaty have explicitly incorporated the exemption for low level administrative payments—the United States plus South Korea, OECD, KOREA: PHASE 2 REPORT 29 (2004). (“Article 3.2.b of the FBPA provides a defense where a “small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official’s business”. This defense is intended to implement Commentary 9 on the Convention concerning “small facilitation payments”); Denmark, OECD, DENMARK: PHASE 1 REPORT 3 (2000) (“Denmark explains that [it means] to exclude “small facilitation payments” as contemplated in Commentary 9 on the Convention”); Canada, OECD, CANADA: PHASE 1 REPORT 6 (1999) (“Subsection 3(4) exempts from the ambit of the offence payments, etc. that are made “to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official’s duties or functions...”); Slovakia, OECD, SLOVAK REPUBLIC: PHASE 1 REPORT 4 (2003) (“The Slovak authorities confirm that “gifts of very small value” are meant to cover facilitation payments as defined in paragraph 9 of the Commentaries.”); Sweden, OECD: SWEDEN: PHASE 1 REPORT 4 (1999) (“In addition, in accordance with Commentary 9, “small facilitation payments” do not constitute “improper reward”); Norway, OECD, NORWAY: PHASE 1 REPORT 3-4 (1999) (“The Norwegian authorities confirm that the word “illegally” would give the prosecution discretion to not prosecute the giving of facilitation payments”); New Zealand, OECD, NEW ZEALAND: PHASE 1 REPORT 8 (2002) (Section 105 C subsection 3 paragraphs a) and b) of the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 provides a defence in relation to an act committed for the sole purpose of ensuring or expediting the performance by a foreign public official of a “routine government action” where the benefit is ‘small’); Australia, OECD, AUSTRALIA: PHASE 1 REPORT 6 (1999) (“Section 70.4 of the Criminal Code amendments provides a defence to the offence under section 70.2 in relation to “facilitation payments”, which must be raised and argued by the defendant”);

The FCPA exemption is important to consider because of the significant negative impact it has on the campaign to reduce global corruption. As this paper discusses, the FCPA exemption can make US and global rhetoric about the importance of eliminating corruption seem hypocritical, inward looking and self-interested. In addition, the propagation of the exemption for administrative bribery has the potential of convincing other countries and decision makers seeking to learn from the US and OECD examples that suppressing administrative bribery should not be a significant priority. But as this paper will discuss, administrative corruption causes serious damage to the economy and investment climate and thus should not be left in the backwaters of policy priorities. Recent studies have documented high costs (in terms of both time and money) to the firms subjected to bribe demands and identified significant negative impacts from administrative bribery on general business environments. Administrative bribes are also not essential to conduct business in countries outside the United States. Especially given the broad ranging bribery ban currently in place, the administrative bribe exemption is of limited practical benefit to foreign investors.

Switzerland, OECD: SWITZERLAND, PHASE 1 REPORT 5 (2000) (“Article 322 of the Criminal Code provides the offence of bribery ‘for the commission or omission of any act in relation to [the] official activity [of the official] contrary to his duties or in the exercise of his discretionary powers’. Pursuant to this provision, it seems that the implementing legislation does not apply to all cases where the undue advantage is offered, promised or given to foreign public officials in order that they carry out the duties of their functions. In the opinion of the Swiss authorities...it is in conformity with Commentar[y]... 9 (on small ‘facilitation’ payments) of the Convention”). Other countries allow exemptions based on the Convention text but without specific statutory provision. *See, e.g.*, OECD, GREECE: PHASE 1 REPORT 3 (1999). Other signatories, like France, ban all bribes, including facilitation payments. *See*, OECD: FRANCE: PHASE 1 REPORT 6 (2000). While the exemption for administrative bribes is not universal among OECD countries, the portion of countries adopting the exemption is sufficient as to constitute a significant and worrying trend, especially as many of them are home to important multinationals.

Given the negative impact of administrative corruption, the relatively limited practical benefit of the exemption for “grease” money and the great symbolic disadvantage the exemption creates, this paper suggests that the United States repeal the FCPA exemption for administrative corruption and lobby for understandings of the OECD convention to be amended accordingly.⁷ This could create significant losses and inconvenience for US companies—including losses of business to foreign competitors as well as reduced efficiency of current operations. US authorities will also need to consider whether focusing on this type of corruption is the best use of the scarce resources they can devote to this issue. But the potential global benefits are significant enough to outweigh these concerns. Eliminating the exemption for low-level administrative payments in the FCPA, and having the US lobby for changes on a global level could mark the start of a new crackdown on administrative corruption and an increase in efforts to fight corruption at all levels. Passage of the FCPA eventually led to a significant increase in international efforts to fight corruption. Amending the FCPA to make it more coherent and effective is a logical and necessary extension of this effort.

This paper is divided into a number of sections. Section II describes the history of the FCPA, discusses the law’s structure and provides a brief survey of academic work dissecting and responding to it. Section III examines the practical impact of the FCPA—both in terms of actual criminal prosecutions and the symbolic support that it provides to anti-corruption efforts, in order to understand what its actual function is. Section IV focuses specifically on administrative corruption and the harm that it causes. While

⁷ In section V of the paper, the potential of sub-dividing the administrative bribery currently allowed by the FCPA is discussed. But analysis of most plausible sub-divisions of these payments quickly reveals that they are either too difficult to actually employ, or that the sub-division would not help isolate more and less harmful payment types. Section V’s analysis suggests that attempts to simply amend the scope of the FCPA’s current exemption would not be effective at reducing the harmful effects of these payments.

administrative corruption does not exactly fit the formal exemption contained in the FCPA, it is sufficiently related as to be a good rough guide to the damage caused by bribes like those exempted from US criminal prosecution by the FCPA. Section V considers whether it is possible to further sub-divide the low-level administrative payments currently allowed by the FCPA in a way that would differentiate between more and less harmful corruption—and concludes that there is not. Section VI proposes amending the FCPA to eliminate the exemption for low-level facilitation payments, briefly surveying the benefits this could bring as well as reviewing potential objections to removing the exemption. Section VII considers ways in which low-level administrative bribes differ from other types of corruption, and outlines penalty and enforcement schemes that specifically address these unique characteristics. Finally, Section VIII provides some concluding thoughts on how amending the FCPA relates to broader issues surrounding this type of law making.

II: The FCPA's History and Operation

a. History

The FCPA was originally passed by the US Congress in 1977 in response to a number of scandals involving US corporations bribing foreign government officials in order to secure government contracts and other benefits to themselves.⁸ It aims to both criminalize bribery of foreign officials by US corporations and to require certain accounting standards and internal controls from these corporations. Initially, the FCPA (created as part of the 1934 Securities Exchange Act)⁹ was limited to securities issuers and “domestic concerns”¹⁰ and required a “territorial nexus” with the United States.¹¹ From its passage, the FCPA included an exemption for “grease” payments,¹² and in 1988 it was amended to provide additional structural protections to US businesses.¹³ Subsequent amendments in 1998 broadened the scope of the Act, removing the need for a territorial nexus with the United States (and thus increasing the ability to prosecute subsidiaries of domestic firms) as well as criminalizing the act of bribery “by any person” rather than just issuers and “domestic concerns”.¹⁴

⁸ These incidents of bribery came to light after investigations of corporate corruption following the Watergate scandal. *See generally* Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 349-55 (2000); Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 17 (2003); Tamara Adler, Comment, *Amending the Foreign Corrupt Practices Act of 1977: A Step Toward Clarification and Consolidation*, 73 J. CRIM. L. & CRIMINOLOGY 1740 (1982).

⁹ Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 683 (2003); 15 U.S.C. § 78dd-1 (1977).

¹⁰ § 78 dd-1.

¹¹ *Id.*

¹² *See* Adler, *supra* note 8, at 1751-52.

¹³ These added affirmative defenses and included a call for the US government to pressure trading partners to adopt similar laws. *See, e.g.*, Perkel, *supra* note 9, at 683-85. These allow payments as long as they are in line with written laws and/or are not given for a “corrupt purpose”. *Id.* at 697-98. In addition, the exception for “grease” payments was changed so that the wording referred to “routine government actions”—a change that expanded the range of possible bribes. James Hines, *Forbidden Payment: Foreign Bribery and American Business after 1977* at 5, 21 (NBER, Working Paper 5266, 1995).

¹⁴ 15 U.S.C. § 78dd-1(g) (2000) (for issuers). 15 U.S.C. § 78dd-2(i) (2000) (for domestic concerns).

The FCPA has been characterized as a major burden to US businesses facing corrupt foreign competitors. Mickey Cantor, a US Trade Representative under President Clinton, estimated that complying with the FCPA's anti-bribery provisions cost US firms upwards of \$45 billion in one year alone.¹⁵ Other commentators also argued that the FCPA constituted a significant drag on US firms profitability.¹⁶ In response to these pressures, the US amended the FCPA in 1988 to include certain affirmative defenses against bribery sanctions.¹⁷ In addition, the US government became a major sponsor of attempts to punish bribery by firms based in other countries.¹⁸

US efforts to have other countries copy its efforts were successful, and it was rewarded when a new OECD anti-bribery convention came into effect on February 15, 1999.¹⁹ This convention marked the culmination of strong US lobbying efforts, and coincided with an upswing in attacks on corruption. Pressured by NGOs like

¹⁵ Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10. While the actual estimates quoted in official speeches are subject to dispute, the size of damage Cantor discussed indicates official concern about the issue. More detailed estimates have tried to identify the impact of the FCPA on US exports in particular industries. In the aircraft sector, one study suggested that sales in high corruption countries dropped 21.2%, significantly more than the 6.4% drop in low corruption countries in the years immediately following passage of the FCPA. See Hines, *supra* note 13, at 17.

¹⁶ See, e.g., Robert S. Levy, *The Anti-Bribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really As Valuable as we Think They Are?*, 10 DEL. J. CORP. L. 71, 78-83 (1985); John W. Duncan, Comment, *Modifying The Foreign Corrupt Practices Act: The Search for a Common Standard*, 4 NW. J. INT'L L. & BUS. 203, 206-09 (1982); Adler, *supra* note 8 at 1746.

¹⁷ 15 U.S.C. § 78dd-1(c) (2000) (for issuers); 15 U.S.C. § 78dd-2(c) (1994) (for domestic concerns); 15 U.S.C. § 78dd-3(c) (2000) (for "any person").

¹⁸ See, e.g., Simons, *supra* note 15; The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 5003(d), 102 Stat. 1107, 1424, provides:

(1) Negotiations. It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.

This effort meant making significant changes to accepted ways of doing business. Swiss firms, for example, were for many years able to write off foreign bribes as business expenses on their tax returns. See Elizabeth Olson, *Swiss Toughen Anti-Laundering Effort*, N.Y. TIMES, Mar. 30, 2000 at C4.

¹⁹ See William M. Daley, *Bribery: No Longer Business as Usual*, FINANCIAL TIMES, Feb. 15, 1999 at 10.

Transparency International (TI) as well as the US government, IOs like the World Bank began to both fund increasing numbers of anti-corruption programs and to consider levels of corruption when making more general funding decisions.²⁰ Importantly, almost all OECD governments rapidly ratified the anti-corruption convention.²¹ Compliance with anti-corruption requirements was said to vary significantly,²² but even countries that provided very significant tax benefits to corporate bribers appeared to take a harder line in at least some cases.²³

While on an international level the OECD convention has gained importance, the FCPA continues to be significant both practically and symbolically. Practically, its provisions govern the behavior of US companies, whose activities constitute a significant portion of global foreign investment.²⁴ Even more importantly, as the forerunner and inspiration for the OECD convention, the FCPA serves as both a benchmark for other countries and an indicator of the anti-corruption priorities of the United States.

b. Practical Impact

The practical and symbolic importance of the FCPA makes it important to understand its provisions—both what it covers and what it does not. There has also been significant academic commentary about the FCPA. While much commentary discusses its impact

²⁰ See Rubin, *supra* note 4 at 276-77, 280; *West Africa: Corruption in Chad-Cameroon Pipeline to be Monitored by TI and Non-profit Body*, AFRICA NEWS, Mar. 10, 2003.

²¹ See Perkel, *supra* note 9 at n.6.

²² See, e.g., David L. Heifetz, Comment, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective Than the U.S. Foreign Corrupt Practices Act*, 11 PAC. RIM. L. & POL'Y 209 (2002).

²³ See Olson, *supra* note 18; Suzanne Daley, *French Oil Executive Calls Commissions Routine*, N.Y. TIMES, May 19, 2001 at A6.

²⁴ In 2003, US outward Foreign Direct Investment (FDI) flows constituted about 25% of the global total. See UNCTAD, COUNTRY FACT SHEET: UNITED STATES (2004), available at <http://www.unctad.org/Templates/Page.asp?intItemID=3198&lang=1>.

on business, other pieces have suggested changing specific aspects to make it more effective.

The FCPA as it currently stands deals with two major areas: Requirements include specified accounting/reporting/internal control standards²⁵ and the prohibition on the provision of bribes to foreign “official(s)”, “political part(ies)” and/or third persons who will pass on bribes to these entities, for the purposes of “influencing” them in any way or securing “improper advantage”.²⁶ These prohibitions are absolute within US territory and apply to all US nationals outside the United States.²⁷ Firms and individuals can face criminal prosecution and civil actions from the Department of Justice (DOJ) (in the case of firms not registered under the Exchange Act) and civil action for violating these rules from the Securities and Exchange Commission (SEC) (SEC enforcement applies only to companies registered under the Exchange Act).²⁸

The FCPA also provides that gifts/payments that are considered legal under the written laws of foreign countries, or which meet a bona fide non corrupt purpose. To help firms navigate these areas, the FCPA requires the DOJ to issue advisory opinions on the legality of certain payments (and in some cases encourages firms to seek these, especially in the case of bona fide payments).²⁹

The FCPA’s provisions are genuinely tough—individual violators can face fines of up to \$1,000,000 along with many years in jail.³⁰ But the FCPA does have significant omissions. One of these is the fact that there is no private right of action—generally only

²⁵ 15 U.S.C. § § 78m(a), 78m(b) (2004).

²⁶ 15 U.S.C. § 78dd 1(A)(3)(Ai).

²⁷ See Perkel, *supra* note 9 at 694.

²⁸ *Id.* at 699-700.

²⁹ 15 U.S.C. § 78dd 1(d).

³⁰ See Perkel, *supra* note 9 at 701-04.

the DOJ can initiate criminal prosecutions, so individuals and organizations with evidence of corrupt activity must provide their information to the DOJ if there is to be any enforcement.³¹ Given that there have been relatively few prosecutions for FCPA violations since its inception (with many firms investigated settling rather than going to trial), this leaves open the risk that many violators escape without prosecution.³²

A second omission, and the focus of this paper, is a specific “[e]xception for routine government action”. This exempts “facilitating” or “expediting” payments meant to “expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”³³ Though the statute includes no mention of any caps on payments, these have in practice been limited to \$1000 or less when actually reviewed.³⁴ At its core, this text explicitly states that certain types of bribery will not cause the payer legal problems in the United States.

c. Critical Responses to the FCPA

Academic literature dealing with the legalities of the FCPA extends from critiques about its impact on business and general effectiveness to more specific critiques of specific individual provisions and suggestions for change. Some commentators complain that the act (and its ambiguities) do little to curb corruption but much to chill business

³¹ *Id.* at 699-700; There are some limited circumstances where private rights of action are available. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231 (1997).

³² See, e.g., Salbu *supra* note 31 at 236; Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT'L L. & BUS. 305, 305 (1998); Leslie Eaton, *Triton Energy Settles Indonesia Bribery Case for \$300,000*, N.Y. TIMES, Feb. 28, 1997 at D2.

³³ 15 U.S.C. § 78dd-1(b) (2000) (for issuers); 15 U.S.C. § 78dd-2(b) (2000) (for domestic concerns); 15 U.S.C. § 78dd-3(b) (2000) (for any person).

³⁴ See Perkel, *supra* note 9 at 697.

and/or to steer it to non-US competitors.³⁵ Others question whether the ban on payments is culturally imperialist.³⁶ The 1988 amendments, which specifically allowed payments permitted by written laws in the jurisdictions where they are made, addressed some of these concerns.³⁷ More recent articles have examined actual enforcement of the FCPA,³⁸ and the implementation of the OECD convention, commenting specifically about problems of differential enforcement by countries for whom corruption outside national borders is not a major concern.³⁹

Certain critiques have recommended specific changes to the FCPA—like incorporating a private right of action into the law.⁴⁰ Other reviews have been more general, including some summary discussion of the FCPA's exception for facilitation payments. A particular focus of general criticism and specifically of the facilitation payment exception is its ambiguous nature. It is not clear exactly which payments would qualify as facilitation payments and which would be held to contravene the FCPA for reasons of size or actual purpose. These types of critiques generally suggest clarifying the FCPA rather than completely eliminating the facilitation payments exception.⁴¹

³⁵ See, e.g., Salbu, *supra* note 31 at 261-71; Jennifer Dawn Taylor, Note, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 868-81;

³⁶ See, e.g., Salbu *supra* note 31 at 275-79; Christopher J. Duncan, Comment, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1 ASIAN-PACIFIC L. & POL'Y J. 14 (2000).

³⁷ See Perkel, *supra* note 9 at 683, 697.

³⁸ See, e.g., Mathews, *supra* note 32; Salbu *supra* note 31; Agnieszka Klich, Note, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 123-24 (1996).

³⁹ See, e.g., Barbara C. George et. al, *The 1998 OECD Convention: An Impetus in Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L. J. 485, 515-24 (2000); Haifetz, *supra* note 22.

⁴⁰ See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185 (1994). Other commentators suggest various other solutions. See, e.g., Salbu *supra* note 31 at 280-87; Taylor *supra* note 35 at 881-86.

⁴¹ See, e.g., Taylor *supra* note 35 at 874-77, 881-86.

III: Impact of the FCPA

In order to understand the impact and actual operation of the FCPA, it is important to review some cases in which this law has played a role. While they are not numerous, the actions against business executives accused of bribery outside the US provide a useful guide to the types of behavior that actually lead (or do not lead) to legal sanctions, to the problems in implementing this legislation and to FCPA provisions that address these problems. More substantially, they carry significant symbolic content—as both a deterrent to other companies and an example to other countries and companies. Full court cases with guilty verdicts constitute only part of the FCPA enforcement narrative (many companies plead guilty to avoid the extra sanctions of a guilty verdict)—its also important to consider settlements and investigations, which provide additional insight into both investigator motivation and company priorities.

a. Legal Choices and Actual Prosecutions

SEC and DOJ enforcement of the FCPA has been uneven, with FCPA enforcement appearing to be a relatively low priority for certain administrations in particular.⁴² The reasons for this lack of enforcement could include a desire by various administrations to avoid creating extra obstacles for American business expansion abroad and the difficulties in assigning responsibility for activities conducted abroad. Many of the cases discussed below illustrate different ways the FCPA attempts to deal with these problems—and thus underscore the problems' existence. The relatively small number of cases brought also underscores the importance of the FCPA's symbolic dimensions.

⁴² See Mathews, *supra* note 32 at 305; Eaton *supra* note 32 at D2.

One way the FCPA attempts to address the problems of proving actual bribery abroad is a relatively extensive set of accounting regulations⁴³ which focus not so much on the act of bribery as on efforts to conceal it. Prosecutors use companies' attempts to hide bribes through dubious accounting to punish bribery attempts they would otherwise have difficulty proving.⁴⁴ This technique means that on first examination, many of the cases involve seemingly mundane misallocation or awkward contortions of accounting categories.⁴⁵ For example, in *United States v. Rathrock*, the Vice President of the Cooper Division of the Allied Products Corporation pleaded guilty to preparing a "false invoice". This mundane sounding offense actually involved bribing a Russian firm to buy his company's products in a complicated transaction involving Swiss companies and a non-existent marketing study.⁴⁶ A significant portion of the FCPA cases that are brought rely on accounting provisions like those involved in the *Rathrock* case.

A second tool of the FCPA, when attempting to overcome the challenges of proving violations by US companies, is to hold parent corporations directly responsible for the actions of their subsidiaries. A good example of this liability was the SEC's seeking civil injunctive and civil penalty enforcement against Triton Energy, on the basis of actions by its subsidiary, Triton Indonesia. Unusually invoking the anti-bribery as well as the accounting provisions of the FCPA, the SEC held Triton Energy responsible for the decisions of two Triton Indonesia executives to authorize payments to an agent who then would go on to bribe Indonesian government officials to lower its tax bill and

⁴³ 15 U.S.C. § 78m(a), 78m(b) (2004).

⁴⁴ This roundabout route to law enforcement is not a new technique—Al Capone, for example, was convicted not for violating laws restricting the consumption of alcohol but for not paying taxes on these profits. See Symposium, Jeffrey Rosen, *Security, Technology and Individual Rights: 2003*, 2 GEO. J.L. & PUB. POL'Y 17, 27 (2003).

⁴⁵ See Stuart H. Deming, *The Foreign Corrupt Practices Act: The Accounting and Record-Keeping Provisions*, 2002 A.B.A. SEC. INT'L LAW & PRAC. 1, available at WL N02FCPB ABA-LGLED C-1

⁴⁶ See *id.*.

deal with other regulatory problems the business was facing.⁴⁷ The SEC prosecuted despite its admission that Triton Energy officials had never given explicit authorization for the payment of the bribe money—all the negotiations were conducted via Triton Indonesia, with all of its assets and people found outside the United States.⁴⁸ Triton Energy and its employees eventually consented to permanent injunctive relief and civil monetary penalties.⁴⁹ This approach is certainly useful, and a strong encouragement to companies considering toughening internal audit and compliance rules. But it still requires that the SEC or DOJ collect evidence about the actions of the subsidiaries before bringing a case to court (the Triton investigation itself took several years to complete and the case began in 1997—about six years after the last bribe involved in the case was paid).⁵⁰

A second notable aspect of the Triton case was that the SEC had evidence that Triton Indonesia had engaged in long-term “greasing” of low level individuals to ensure the timely processing of monthly crude oil invoices. The SEC did not prosecute Triton for these payments (presumably because they were covered by the “routine administrative action” exception) thought it did add additional charges dealing with Triton’s attempts to hide the payments through improper accounting.⁵¹ These “grease” payments had occurred immediately before and during the period where the major bribery investigation began (the end of the 1980s and early 1990s)⁵²—demonstrating that

⁴⁷ See SEC v. Triton Energy Corp., (Keever and McAdoo), [1996-1997 Transfer Binder] *Fed. Sec. L. Rep. (CCH)* P 74,405 (D.D.C. Feb. 27, 1997); Mathews, *supra* note 32 at 357-70.

⁴⁸ Mathews, *supra* note 32, at 357-58, 366-67.

⁴⁹ *Id.* at 366-67.

⁵⁰ *Id.* at 366.

⁵¹ *Id.* at 365-66.

⁵² *Id.*

the corrupt culture of Triton Indonesia clearly extended to corruption at all levels, and challenging the idea that high level and administrative bribery are distinct.

b. Symbolic Impact

The relative rarity of enforcement actions under the FCPA,⁵³ the difficulties in enforcement which even the law's structure betrays,⁵⁴ and the indignant context in which it was passed⁵⁵ all underscore the fact that one of the major purposes of the FCPA's prohibitions on bribery is to serve as a symbolic articulation of anti-corruption norms—rather than a simple additional tool in the crime fighting arsenal.

As previously outline, violations of the FCPA result in real prosecutions. But even these can be seen as part of an effort to spread the fundamental symbolic message implied by the FCPA, rather than to significantly decrease the level of corruption one prosecution at a time. The overall message implied by the emphasis on accounting information, on holding parent companies responsible for the actions of their subsidiaries, and even of structures like DOJ pre-opinions on the legality of certain payments,⁵⁶ is one of deterrence. The FCPA is designed to encourage companies to monitor their global activities closely and to articulate and enforce strong anti-corruption norms through internal compliance systems. The criminal prosecutions that do occur serve as an additional stick by which to convince companies of the advisability of adopting these measures.

When considering whether to eliminate the FCPA's "grease" payments exemption, the actual role of the FCPA is of primary importance. The most important question that

⁵³ See Eaton, *supra* note 32; Mathews, *supra* note 32, at 305.

⁵⁴ See discussion in section IIIa.

⁵⁵ See Posadas, *supra* note 8, at 349-55.

⁵⁶ 15 USC 78dd-1 (e)(1) (2004).

needs to be answered is not whether facilitation payments can be eliminated through individual prosecutions by US authorities, but rather whether these payments are actually harmful and, if they are, whether the level of harm is high enough to justify including them in the anti-corruption norm that the FCPA expresses.

IV. Impact of Exemption

There are two major negative impacts from the exclusion of “grease” money from the FCPA. First, the exclusion encourages additional use of administrative bribes by major corporations. Second, it carries important symbolic connotations—that the United States (and developed countries in general) cares only about certain types of bribery in developing countries, either for reasons of national interest or because “small scale” bribery is not destructive. Before considering these effects though, it is necessary to outline the destructive impact that many economists assign to “small scale” bribery. Only then is the full damage caused by the exclusion of “grease” money from the FCPA appreciable.

a. Economic Impact of Grease Money

The exclusion of “grease” money/administrative payments from the FCPA was adopted as a way of improving the competitiveness of US firms abroad that had been handicapped by the inability to respond to foreign firms’ bribery and/or improve their ability to make other countries’ bureaucracies move faster.⁵⁷ But the presence of the exemption strongly suggests that administrative corruption and small-scale payments are also not considered on the same scale as the large payments that are banned by the FCPA. This is in line with the views of certain academics who have suggested that small scale bribery is not a very important concern, or may indeed simply be a cultural practice not familiar to western businesses and thus needlessly categorized as harmful.⁵⁸ But the

⁵⁷ See 123 CONG. REC. 38604-02, 38778, 36304 (statements of Senator Tower, Congressman Devine, and Congressman Eckhardt, respectively); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure Hearings on S. 305 Before the Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977).

⁵⁸ See, e.g., Lui’s argument that in some cases bribery can mean the most efficient allocation of resources (e.g. to those who need them most). Frances Lui, *An Equilibrium Queuing Model of Bribery*, 93 JOURNAL OF POLITICAL ECONOMY 760 (1985). From a practitioners standpoint, George Moody-Stuart suggests that

majority of economic and development experts who have reviewed the subject do not agree.⁵⁹ These experts argue that “small scale” bribery is extremely harmful, with some firms’ payment of “greasing” money increasing the pressure on other firms to pay them—with the result that all firms waste additional time engaging with bureaucrats as part of the bribery payment and avoidance dance. Additional studies have argued that these administrative payments do not actually increase firm growth, but are rather a result of pressure from bureaucrats. Some economists go further than this—they argue that administrative corruption at a low level may be even more harmful than concentrated, high level corruption. While these studies do not establish the exact relation between “grease” payments and other forms of corruption, they do refute the implication that the “grease” payments authorized by the FCPA are relatively harmless.

One key study of administrative corruption, co-authored by the head of the World Bank’s governance programs, relevantly considers whether “Grease Money Speeds Up the Wheels of Commerce?”⁶⁰ This study, using surveys of global corporations, found a positive correlation between bribe payments and official harassment (e.g. time wasted with bureaucracy, regulatory burden etc.)—suggesting that overall, paying bribes did not decrease the level of official harassment for firms on an economy-wide basis.⁶¹ Rather, the authors suggest that bureaucrats can use the willingness of firms to pay bribes to

“small gifts” (generally defined as 2% of the value of a contract or \$20,000, whichever is less), should be allowed without question. See George Moody-Stuart, GRAND CORRUPTION 59-60 (1997).

⁵⁹ Generally, these studies discuss issues like “grease money”, small scale corruption and administrative corruption rather than sticking to the exact language of the FCPA and its subsequent interpretations. But the general category of payment being discussed is the same, making the use of these studies valid for considering the general issue of “grease money”.

⁶⁰ Daniel Kauffman and Shang-Jin Wei, *Does Grease Money Speed Up the Wheels of Commerce?*, (World Bank, 1998). Amusingly, the paper makes approving reference to the FCPA’s general prohibition on corruption in discussing its conclusion that administrative payments are harmful...the exact category of bribes which the FCPA is less stringent in enforcing.

⁶¹ *Id.*, at 8-12, 15-16.

extract an even higher level of rents than they would otherwise be able to.⁶² This low level harassment and time-wasting is exactly the type of burden that the FCPA's exemptions on "grease" money seems designed to avoid. On an individual level, firms' decisions to pay bribes can make sense. On an economy wide level, the ability/willingness of firms to pay small scale bribes contributes to a large-scale problem where the entire economy's growth rate is reduced by additional resources spent engaging and satisfying the bureaucracy. The study's authors conclude that "the business community as a whole can benefit from international laws that strengthen their ability to credibly commit to no-bribery...[s]uch laws may not only reduce bribe payment, but may also reduce the actual harassment firms face in equilibrium".⁶³

The problematic nature of administrative bribery is also demonstrated by a more extensive study of state capture conducted by the World Bank. Examining the results of a major survey in Eastern Europe, the World Bank experts on governance and corruption found that firms which paid high levels of administrative action bribes (e.g. bribes to "get things done" as opposed to influencing the formation of regulatory and legislative frameworks) suffered from lower levels of growth and invested less money into their businesses.⁶⁴ While the causes of this correlation are acknowledged as complex, the authors' argue that "[a]dministrative corruption...would appear...to impose considerable costs to the firm without any measurable benefits".⁶⁵ The same study found that other forms of corruption could, in certain cases, have significant benefits to the firms that

⁶² *Id.* at 15.

⁶³ *Id.* at 16.

⁶⁴ Joel S. Hellman et al., "Seize the State, Seize the Day": *State Capture, Corruption, and Influence in Transition* 19 (World Bank, Policy Research Working Paper 2444, 2000).

⁶⁵ *Id.*

engaged in them. Administrative corruption, on the other hand, seemed to benefit only the bureaucrats who extracted rents.⁶⁶

Other economists have suggested that low-level type bribes can, under certain conditions, be more costly and destructive than the centralized, high level bribes targeted by the FCPA.⁶⁷ While those making this argument admit that corruption is determined by a large number of variables, they argue that high-level corruption, combined with a reasonably compliant and paid civil service, can in certain cases produce less of an impact than uncontrolled corruption at all levels.⁶⁸ This insight into the nature of corruption is confirmed by other researchers, who discuss differences between India and Suharto-era Indonesia.⁶⁹ While the total level of corruption in both countries was relatively similar, growth rates were much lower in India. This may have been because corruption in India was more anarchic and non-centralized, and thus less predictable and more time consuming for firms.⁷⁰ In some ways, it can be less costly to firms to make a few dependable, large scale payments to top officials than to deal with the constant demand for small scale bribes by low level officials.⁷¹

These economic studies, like all others, are not all-encompassing. The formal economic models they contain are premised on large numbers of assumptions, and the large surveys used for statistical information are not specifically focused on the exact

⁶⁶ *Id.* at 17-19. This study included both foreign and domestic firms in the countries studied. But the same authors have debunked the idea that foreign firms might be more “virtuous” than domestic ones, and thus not subject to the survey’s conclusions. In a companion paper, they found that foreign firms were just as likely to engage in administrative corruption as domestic firms. Joel Hellman et. al, *Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?*, TRANSITION, May-June-July 2000, at 3.

⁶⁷ Christopher J. Waller et. al, *Corruption: Top Down or Bottom Up?*, 40 ECONOMIC INQUIRY 688 (2002).

⁶⁸ *Id.* at 688, 699-702.

⁶⁹ Bardhan, *supra* note 1.

⁷⁰ *Id.* at 1325.

⁷¹ See Andrew MacIntyre, *Funny Money: Fiscal Policy, Rent-seeking and Economic Performance in Indonesia*, in RENTS, RENT-SEEKING AND ECONOMIC DEVELOPMENT 249 (Mushtaq H. Khan and Jomo Kwame Sundaram eds., 2000).

conditions contained in the FCPA. But the overall message of these surveys, and many other, more general reviews of corruption,⁷² suggest that small scale payments do have a significant cost—for the individual firms that pay them, for the general business environment and for society as a whole. This absolute cost is an argument for amending the FCPA to include a ban on “grease” payments, regardless of whether other types of bribes are more or less destructive on a comparative basis.

b. Symbolic Impact

The symbolic impact of the FPCA’s exception for “grease” payments may be even more significant than the additional administrative payments that result because they are exempted from coverage under the act. As discussed earlier, the FCPA has been a model and a standard against which anti-corruption campaigners have measured themselves (or been pressured to do so by a powerful United States). In this context, many of the major possible explanations for the current FCPA exemption for grease payments are destructive. One would be that the United States doesn’t consider grease payments particularly problematic, and thus that developed countries need not take the fight against them seriously either. A second explanation would be that the inconvenience of avoiding low level corruption is so great that it outweighs any negative impact on other countries’ economies and societies. A related argument is that the United States feels that engaging in higher level corruption has problematic impacts on its own firms (and country), whereas lower level corruption would not do that—impacting only other countries. These explanations are overlapping and complementary, united in detracting from efforts to fight administrative corruption and in reinforcing negative views of the United States.

⁷² See, e.g., Wei *supra* note 1; Paolo Mauro, *Corruption and Growth*, 110 QUARTERLY JOURNAL OF ECONOMICS 681 (1995).

The first explanation for the FCPA’s exemption of “grease payments”—that the United States doesn’t consider “grease” payments particularly problematic—is supported by both the history of the FCPA and the language of the exemption and its implementation. The FCPA was passed in response to high level corruption by US companies, mostly in order to secure contracts with foreign governments.⁷³ Coming in the wake of the Watergate scandals that had forced President Nixon to resign, the investigations into corporate malfeasance focused on the corruption of the very highest public officials and the damage this did to confidence in the United States business system.⁷⁴ In this context, low level administrative payments and their destructive impact were not very relevant to the legislators’ actions. This view is supported by reviewing the language of the exemption and its implementation. It stops enforcement of the FCPA’s provisions while expediting or securing “routine governmental action”⁷⁵— basically distinguishing between firms getting government officials to do “what they are supposed to do” and other types of corruption.

The rationales behind the distinctions that the FCPA makes are appealing at first glance. But as the studies outlined in the previous sub-section make clear, the “grease” money that the FCPA privileges is actually highly destructive to both the business environment and the successful operation of the actual firms involved. By allowing its legislation to make the case that administrative corruption is not a serious (or as serious) a problem as other types of bribery, the United States plays a destructive role in anti-

⁷³ U.S. DEP’T OF JUSTICE, *Foreign Corrupt Practices Act Antibribery Provisions* (discussing background of the FCPA), available at <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm> (last updated March 15, 2002); Klich, *supra* note 38 at 123-24.

⁷⁴ U.S. DEP’T OF JUSTICE, *Foreign Corrupt Practices Act Antibribery Provisions* (discussing background of the FCPA), available at <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm> (last updated March 15, 2002).

⁷⁵ 15 U.S.C. 78dd-1(b), 2(b) (as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107).

corruption efforts in other countries and at an international level. While it is doubtful that those wishing to engage in bribery would directly point to the United States for justification, it is very possible that laws to combat corruption would borrow from the FCPA—and include the laxer treatment of administrative corruption. The real possibility of this was illustrated by the fact that the OECD treaty on corruption adopted the same exemption to administrative payments as the FCPA.⁷⁶ More generally, the United States role as a leader in the anti-corruption movement means that its legal system is widely studied by anti-corruption experts from other countries, particularly developing ones.⁷⁷ Given its relevance to the international community, the FCPA’s prescriptions and value judgments are likely to be particularly studied—and thus the exemption for “grease” payments particularly destructive.

A second possible explanation of the FCPA exemption reinforces the idea of the United States as a hypocrite. Those trying to protect corruption (and/or attack the United States) can point to the exemption and claim that it reveals a self-interested and selfish United States that values the convenience of its own firms rather than the smooth functioning of other countries societies. In this scenario (supported by the text of the FCPA’s exemption, with its discussion of “routine governmental action”)⁷⁸ the United States refuses to place its firms in the (undoubtedly, sometimes inconvenient position) of having to accept the official channels and delays that normal, law-abiding members of the public must. While petty bribery is certainly a fact of life in many countries,⁷⁹ the

⁷⁶ See OECD Convention, *supra* note 4.

⁷⁷ See, e.g., *Govt Studying Steps to Avoid Bribery of University Staff*, THE DAILY YOMIURI, Jun. 1, 1999 at 3; *Ethiopia Participates in Global Forum to Fight Corruption*, ADDIS TRIBUNE, Mar. 5, 1999; Michael Sun, *Scholar Lauds anti-graft Academy Move*, NEW STRAITS TIMES, Dec. 21, 2003 at 12.

⁷⁸ 15 U.S.C. 78dd-1(b).

⁷⁹ See, e.g., Klich, *supra* note 38, at 131-32.

specifically articulated exception for United States bribers has the potential to aggravate feelings already made raw by United States actions after the September 11 terrorist attacks.⁸⁰

A third, related argument, is that the FCPA exception reflects a United States that cares only about its domestic affairs. Under this line of criticism, the FCPA was passed at a time when the United States was worried about high level corruption domestically⁸¹—and that the FCPA was meant to stop large US companies from becoming accustomed to high level bribery abroad. Under this view, the FCPA exemption would simply exclude types of bribery not held to be particularly dangerous to the US domestically.

Neither of the last two lines of attack would be as effective if the United States was quietly content to focus on its internal affairs—after all, many European countries until recently allowed tax deductions on bribery abroad. 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 in regards 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 and correct than the rest of the world. In this context, issues like the FCPA exemption have the capacity to severely undermine the effectiveness of US foreign policy.⁸² At least in the case of corruption, this would be problematic not just for the

⁸⁰ Ranging from the Iraq war to tightening visa restrictions.

⁸¹ See, e.g., Klich, *supra* note 38, at 123-24; Adler *supra* note 8 at 1740-41.

⁸² For example, President Clinton, on signing amendments to the FCPA, stated that: “The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development.” William J. Clinton, *Statement by the President*, (Nov. 10, 1998) available at <http://www.usdoj.gov/criminal/fraud/fcpa/signing.htm>.

United States, but also from the rest of the world, which would benefit from anti-corruption standards equal to those US rhetoric lauds.

[hereinafter Clinton Speech]; Simons, *supra* note 15; Bill Brock, *Prohibit Bribery-Not Exports*, CHR. SCI. MON., Sep. 9, 1981 at 22. (“Congress acted in a typically courageous and American fashion when it passed the Foreign Corrupt Practices Act (FCPA) in December 1977”). The FCPA’s scope for undermining US rhetoric is particularly strong given the fact that other major trading powers—like France and Japan—choose not to protect their firms with a facilitation payment exclusion, despite being allowed to by the OECD convention. *See*, OECD, FRANCE: PHASE 1 REPORT 6 (2000); OECD, JAPAN: PHASE 1 REPORT 3 (2002). While this legal framework does not mean that all prosecutors don’t turn a blind eye, the legal principle claimed has significant symbolic and rhetorical value.

V. Classifying Low-Level Administrative Corruption

Corruption is notoriously difficult to define.⁸³ Similarly, it is difficult to identify the exact parameters of low-level administrative corruption.⁸⁴ Beyond the vague outlines sketched by the FCPA and the OECD convention, little attention has been given to systematically classifying these low-level bribes. While it could be argued that the small amounts involved in low-level corruption render any classification attempt low value, it is important to conduct such an exercise before considering a complete ban, as this paper does. Thinking systematically about the various categories these low-level payments might be classified under helps to determine whether a total ban on payments is warranted or whether only some facilitation payments create the serious harms that have been associated with this type of bribe. More broadly, this exercise can further illustrate the various ways in which low-level “facilitation” payments can lead to significant harms that a repeal of the FCPA exemption would begin to prevent.

In terms of exemptions from prosecution, the FCPA’s text refers to an “[e]xception for routine government action”, while the commentary of the OECD convention exempts “facilitation payments...made to induce public officials to perform their functions”.⁸⁵ The FCPA’s exemption has been interpreted to cover only amounts less than \$1000, though this is not stated in the statute’s text.⁸⁶ But beyond these vague parameters there are very few definitions. Using the parameters provided by the OECD and the FCPA, a first classification attempt of payments to facilitate routine government action would probably focus on the amounts involved, and/or the frequency of bribery, as well as the

⁸³ See, e.g., Arvind K. Jain, *Corruption: A Review*, 15 JOURNAL OF ECONOMIC SURVEYS, 71, 73 (2001).

⁸⁴ Indeed, this has been one source of criticism of the FCPA—that its definitions, including those related to the facilitation payment exemption, are too vague. See, e.g., Taylor *supra* note 35 at 874-77.

⁸⁵ OECD Convention, *supra* note 4 at Commentaries, para. 9.

⁸⁶ See Perkel, *supra* note 9 at 697.

exact definition of what payments for “routine government action” actually constitute. More sophisticated classifications might focus on the “moral” wrong of various payments, the type of activity regulated, the amounts involved and the possibility that low level administrative bribery will lead to additional corruption. All of these potential classification systems need to be judged on two distinct factors: how easily they would allow corrupt payments to be distinguished from each other, and how useful the resulting classifications would be.

Before beginning to consider how to sub-divide the different types of payments that would be affected by amending the FCPA, it is important to outline what payments are currently covered by the exemption for “routine governmental action”.⁸⁷ While this is a vague term, it is generally held to cover activities that foreign officials would normally perform during the course of their duties, and over which they theoretically do not exercise much discretion over. This could include activities like issuing permits and other documents necessary to do business; providing/arranging for utility provision; processing requests, and other basic bureaucratic procedures. Routine governmental action would not include performing tasks not included as part of an everyday job description—e.g. waiving mandatory fees or (especially) approving contracts for new business.⁸⁸ The lines between routine governmental action and new/impermissible business are not always clear-cut. For example, VAT repayments a US company was legally entitled to would seem to fall within the scope of the exemption. But Justice Department lawyers have indicated that they would consider this kind of payment problematic—probably because the payment might be seen as a way of retaining business

⁸⁷ 15 U.S.C. § 78dd-1(b) (2000).

⁸⁸ See H.R. CONF. REP. NO. 100-579, at 921 (1988) (describing routine governmental action exception); 15 U.S.C. § 78f-3(a) (2000); Mathews, *supra* note 32 at 314.

and possibly because the official would exercise discretion in deciding which company's payments would be processed first.⁸⁹

In addition to qualitative descriptions of permitted activities, the FCPA exemption has an unwritten quantitative limitation as well. Payments over \$1000 are generally considered to be highly problematic at best, and will almost certainly attract close attention during any investigation. Though there is no textual support for this limitation in the statute, most practitioners accept that this limitation exists.⁹⁰ While these parameters are not iron clad, they do allow a general view of the types of payments included under the FCPA exemption, and permit some discussion of different ways to classify and consider the different payments currently allowed.

A first approach to sub-dividing different types of FCPA allowed payments would focus on which payments were “moral” and which were not. The attractiveness of this general approach is simple—as long as no specifics are mentioned, it permits all who consider this classification to stigmatize only those payments they see as harmful. For example, businesspeople could imagine this classification tolerating payments in cases where perishable goods would rot unless a corrupt official was given a small payment to allow the goods ashore—while frowning on those who delay everyone else's visa applications by monopolizing an official's time with their own employees' issues. In a more general sense, the moral differentiation would often give a free pass to bribe payers who otherwise face significant losses through no fault of their own (e.g. officials who refuse to work as they are supposed to until they are bribed) while punishing those whose

⁸⁹ Mathews, *supra* note 32 at 315. Mathews points out that speeding processing of certain applicants almost inevitably leads to discretionary choices about whose documents should be processed first—and disagrees with the rationale of the DOJ lawyers who responded to this hypothetical. This disagreement illustrates the continuing confusion that the FCPA exemption can cause.

⁹⁰ Compare 15 U.S.C. § 78dd-1(b) (2000) with Mathews *supra* note 32 at 315 n.22.

bribes have negative consequences for others (e.g. monopolizing an official's time and thus slowing down document processing for everyone else). In theory, this kind of differentiation is very justifiable—punishing those who try to improve conditions at the expense of others, while giving a free pass to those who are simply trying to do business in a difficult environment and face significant losses if they don't conform to local expectations.

The problem with the moral approach is two fold—in the first place, there will be strong disagreements about what is “moral” in the first place. Some commentators would argue that contributing to a culture of corruption is immoral in the first place, in essence eliminating all bribes. Other groups might consider the intentions of those paying and receiving the bribes. Less ambitious planners would only punish actions that had a direct negative impact on others, whatever the impact on an overall culture. But even if this disagreement were resolved in favor of the last category, it would be enormously difficult to distinguish which payments had the negative consequences the law targeted. For example, in the case of payments for expedited document processing, it would be hard to determine whether an official was slowing the processing of others' documents or simply putting in extra work. In some senses, the FCPA exemption's current emphasis on “routine governmental action” already tries to make this “moral” distinction between officials choosing one applicant over another and simply “doing their job”. Continuing ambiguity over what can be counted in this category underscores the fact that any kind of “moral” distinction between facilitation payments would be very hard to codify or enforce.

A different approach to differentiating the payments currently allowed by the FCPA would concentrate on more concrete issues than morality—making distinctions between the different categories of service for which facilitation payments are made. The attractiveness of this approach is that the apparently distinct nature of service categories theoretically permits clearer guidance about which payments are allowed (and clearer debate about what circumstances deserve an exemption and which do not). One way of considering different categories of action is using the four basic categories of “routine governmental action” identified by the FCPA: obtaining permits and similar documents; processing government papers like visas; providing services like police protection, mail delivery and the like; and providing utilities, loading/unloading cargo and protecting perishable goods.⁹¹

It could be argued that the latter two categories in the FCPA definition are very different from the two former ones. Police protection and utility provision can be crucial to the health and safety of affected businesses’ employees, and the delays of one corrupt official who refuses to protect perishable goods can lead to entire shipments being ruined, with serious economic consequences. In addition, in theory at least, providing utilities and police protection doesn’t directly harm other potential beneficiaries...since the resources would have to be allocated in some way anyway. Under this view, the payments’ contribution to a culture of corruption are the only real negatives—and this is a problem best dealt with at a level that does not endanger health/safety or current shipments of melting chocolates. On the contrary, some delays in issuing permits do not directly endanger the health/safety of individuals or cause immediate economic damage.

⁹¹ 15 U.S.C. § 78f-3(a) (2000). The distinctiveness of these categories could be disputed. It would be easy to sketch a scenario where utility provision and police protection are intimately connected with the processing of government papers and issuance of appropriate permits.

But these distinctions hold true only some of the time. Utility provision, for example, is not an infinite resource and providing it to foreign investors and the like can often mean that other (often poorer and more vulnerable) consumers receive less. Thus choosing to provide electric power to the district where foreign investors have their houses and offices can mean that poorer regions of the city are provided with less power. In the case of perishable goods, providing facilities to one shipment can mean that another shipment does not receive the protection it needs—meaning that some goods perish anyway. Additionally, utilities and security can be privately provided for those with economic power (e.g. buying an electric generator or hiring a security guard) while documents like visas and export permits cannot be replicated by the private sector (unless serious crimes like document fraud are committed). Delays in issuing documents and permits can also cause significant economic losses if they mean that machinery or other assets sit idle for lack of spare parts, personnel or permission to operate—losses that could be greater than the loss of a vegetable shipment.

The overall problem with trying to distinguish broad categories of government service as more or less appropriate to facilitation payments is that there are plausible counter-narratives to virtually any classification. The specifics of any situation where bribes are paid are so diverse that generalizations can fall flat on their face. While defining different categories of “routine governmental action” is easier than classifying these actions’ “moral” consequences, it is very difficult to justify a conclusion that facilitation payments are generally appropriate to a category or not.

A third potential way of classifying facilitation payments does away with any attempt to differentiate between different categories of payment. Instead, it focuses

purely on the amount paid—allowing payments under a certain amount or percentage of a contract’s value and forbidding those over this amount.⁹² This proposal would in effect expand the FCPA’s exemption in at least some ways, in the name of establishing clear boundaries of what behavior would be allowed and what would not. The clarity of this type of exemption seems preferable to the current ambiguity concerning which payments are allowed and which are not. But this differentiation ignores the large number of negative impacts that even small-scale corruption can have—as detailed in Section IV and the previous discussion in this Section. In this sense, the easier classification would be awarded at the expense of potentially increasing the scope of activities where bribery would be allowed.

Beyond the immediate moral and practical difficulties caused by expanding the range of unpunished corruption, establishing either a dollar or percentage of contract limit could have perverse side effects. In both cases, it could lead to implicit international recognition of “permissible” bribe levels—potentially increasing the predictability of bribe costs but also making it much harder to eliminate in the long run (and risking the spread of the new “standard”). A dollar limit risks holding large business contracts to more stringent standards than smaller ones (as a dollar limit would be a higher percentage of smaller contracts than larger ones). This might be seen as a benefit (as larger investors theoretically can resist pressure to bribe more easily than smaller

⁹² This classification has been proposed by a number of commentators. *See, e.g.*, Moody-Stuart, *supra* note 58 at 59-60 (suggesting amounts of \$20,000 or less); Mathews, *supra* note 32 at 315 n.22 (quoting a Congressman who unsuccessfully proposed a \$5000 or \$10,000 limit).

investors) but is a broad policy choice whose consequences and potential side effects require serious consideration.⁹³

A final potential classification would attempt to differentiate between small-scale bribes on the basis of the likelihood that this type of corruption would lead to larger scale corruption. Thus bribes that would lead to demands for larger payments or demands for payments from others would be banned, whereas small facilitation payments that simply maintained the status quo would be allowed. Obviously, bribes that cause additional losses to other investors are more harmful than bribes that simply contribute to the maintenance of a given level of corruption.

The major challenge to classifying bribes that lead to additional corruption is not in the use of the category but in its derivation. It would be very hard to prove in a court (or even outside a court) whether a bribe maintained the status quo. Theoretically, bribes that were higher than average or provided in a sector not known for bribery would be the main targets. But identifying the average bribe for a comparable transaction is a very specific data point. While general testimony on this subject might be obtainable, it would be hard to corroborate. The same holds true when defining sectors where corruption existed or did not. Given the difficulties encountered in proving corruption abroad anyway, sub-dividing corrupt payments by potential to harm seems like a lost cause—and anyway ignores culpability for supporting a corrupt status quo. The general principle that the harm caused by bribes should be considered can of course be one factor taken into account—but the place for this consideration is probably a prosecutor’s office, when decisions about which cases to devote resources to are made.

⁹³ Theoretically, this could push private companies to engage in only low level/low value contracts in developing countries in order to decrease the probability of legal liability for bribery—or alternatively channel multiple bribes just under the FCPA’s new limits...

Most potential sub-divisions of the low-level administrative bribery currently permitted by the FCPA are either relatively easy to classify bribes into or would be useful categories to consider—but none actually meet both criteria. Categories that would be particularly useful in amending the FCPA’s current exemption for low-level administrative payments—like the degree to which a given bribe might encourage additional corruption—are particularly subjective and difficult to assess. Categories marked by relatively clear boundaries—like the type of service purchased—are not clearly differentiated in terms of the harm they cause. In this sense, it seems more efficient and fairer to ban all administrative bribery, given the fact that there are some negative consequences associated with all these payments. Prosecutors could then use their discretion to address the most egregious cases—whatever form they presented themselves in.⁹⁴

⁹⁴ Giving prosecutors discretion brings up additional issues relating to their potential biases. But as the discussion in this section indicates, the most harmful kinds of corruption can be found scattered across any of the categories low-level administrative corruption could realistically be sub-divided into. Criminalizing only some of these categories would be a relatively random attack that would reach only some of the most harmful corruption. Ensuring that prosecutorial discretion is widely used is a broader challenge for society that goes beyond the specifics of this proposal.

VI. Amending the FCPA

Given both the corrosive impact of administrative corruption, its deleterious impact on the United States' role as an anti-corruption crusader, and the difficulties inherent in trying to separate out less harmful low-level administrative payments, the FCPA's exemption for "grease" payments should be eliminated. The United States should also take a lead in lobbying for the OECD anti-corruption treaty to be amended in a similar fashion. This proposal will almost certainly help to reduce the amount of administrative corruption in countries outside the United States. On an immediate level, general corporate compliance policies will almost certainly be changed to reflect the new legal framework. Though this will certainly not solve the problem, it will be a significant step in changing practices surrounding administrative corruption. More broadly, the attack on administrative corruption could be the basis of renewed efforts to attack corruption in general. The United States' effort to have other countries sign the OECD anti-corruption convention helped to spur the increasing disapproval of corruption exemplified by the work of Transparency International and the World Bank's increased emphasis on tackling corruption in the countries it supports. US firms will certainly lobby their government to pressure other countries to take similar steps to crack down on administrative corruption. Freed from the shackles of its current hypocritical laws, US rhetoric and pressure might be even more effective, and could eventually help lead to large reductions in administrative corruption on a global level.

Removing the FCPA exemption for "grease" payments will lead to tangible benefits. Most directly, it will provide US companies operating abroad with a weighty reason for refusing to pay administrative bribes, providing additional assistance in

avoiding payments that World Bank research suggests have little or no benefit in the long term for private corporations.⁹⁵ Broader international action on the issue could provide an impetus for reducing the leeway of bureaucrats everywhere to exert pressure for additional rents from firms. Removing the clause from the FCPA will also increase pressure on the US government to become even more involved in reducing corruption worldwide while improving its effectiveness at the task.

Of course, removing the exemption for “grease” payments will lead to real inconveniences for US companies, especially in the short term. Additional concerns that will need to be addressed include questions about how bans on low level payments can be enforced, whether this type of rule will deflect US investors from “high bribe” countries; whether this type of ban is so sweeping as to ignore non-western cultural traditions; and whether the ban would in other ways skew current bribery patterns in a way that made it even more harmful than currently. Some of the objections—especially those centered on short-term business impairment and enforceability—are valid and problematic, but they can be addressed in a way that reduces some of the negative impact. More broadly however, these objections are not sufficient to outweigh the tangible, long-term benefits of removing the “grease” money exception from the FCPA.

a. Benefits

One of the most immediate benefits of eliminating the FCPA exemption clause will be reduced administrative bribery on the part of US companies. The FCPA exemption will provide additional support for corporate “no bribery” policies and also provide a reasonable explanation for refusing to engage in administrative bribery both externally and internally. Externally, companies will be able to provide a comprehensible

⁹⁵ Hellman, *supra* note 64 at 19.

explanation to corrupt bureaucrats about why they refuse to provide administrative bribes. Instead of referring to obviously ill-enforced written domestic laws or corporate level policies, they will be able to refer to the danger of prosecution by the United States. Given the fact that bureaucrats opportunistically engage in rent seeking behavior that maximizes returns rather than responding to firm level pressure for changes, possessing an excuse for not bribing may decrease the overall level of bribe collection somewhat. More broadly, any leeway still available in internal policies written to comply with external laws will be removed, making official company policies even more stringently opposed to corruption.

A second positive impact of removing the FCPA exemption will be to empower employees of large companies to actively refuse participation in administrative corruption. Whereas previously they might be cowed by explanations of “local tradition” and the fact that the bribes are not illegal under US law, removing the exemption will provide them with a concrete reason to refuse participation in this type of administrative corruption: it could expose them to criminal prosecution in the United States. Providing rationales like these might be a relatively artificial construct for reducing bribery, but each additional rationale that helps companies and individuals refuse to participate in bribery can make the difference in reducing at least some administrative corruption.

The broader and more general benefit of removing the FCPA exemption will be the possibility of reinforcing current anti-corruption activities at a global level. As discussed previously, the United States and the FCPA in particular have been leaders in the anti-corruption struggle. Their ability to be more effective against the whole range of corruption should not be underestimated. More specifically, the United States will almost

certainly pressure other countries to both amend the OECD convention to remove the exemption for administrative corruption contained there and lobby other countries individually to stop their firms from paying “grease” money. US firms, as they did in the case of the OECD convention,⁹⁶ will certainly pressure their government to engage in this type of lobbying. With full United States engagement, there is a real opportunity that other governments and international institutions will join in a crack down on administrative corruption. Given the significant absence of long-term benefits found by economic surveys,⁹⁷ any reductions in corruption would be a significant global benefit to all parties except corrupt civil servants.

The benefits of cracking down on administrative corruption may not be limited to this type of payment. Legally demanding a wholesale ban on any corrupt payments, rather than creeping around painstaking exemptions (“grease” payments under \$1000 for example...) could create a more robust anti-corruption culture on the part of both governments and international institutions. Anti-corruption rhetoric and action is particularly steeped in moral disapproval,⁹⁸ which makes any deviation particularly noticeable. Anti-corruption messages backed by coherent legal frameworks should be much more convincing when it is not littered with caveats and exemptions. Thus, eliminating the exemption could improve not just the effectiveness of campaigns against low-level administrative bribes but also reduce all types of corruption, including the high level payments originally targeted by those who passed the FCPA.

⁹⁶ See, e.g., George, *supra* note 39 at 495-96; David E. Sanger, *Business Bribes to Foreigners to be Banned by End of 1998*, NY TIMES, May 24, 1997 at 33.

⁹⁷ See, e.g., Wei *supra* note 1.

⁹⁸ See, e.g., Clinton Speech, *supra* note 82; Brock, *supra* note 82.

A final potential positive impact of eliminating the FCPA exemption clause is the possibility that US companies will work harder to eliminate administrative corruption in countries where they operate. Under current regulations, un- or under-enforced local corruption laws can be ignored in the case of low-level administrative bribes, with low-level administrative corruption tolerated as a simple “additional cost” of doing business. If US companies suddenly find that the potential costs of paying these “low-level” bribes increases, they will have additional incentives to work towards eliminative administrative corruption. Especially in countries where US multinationals have a significant presence, they can use their influence to encourage the adoption and enforcement of anti-corruption programs—helping to level any uneven playing field created when foreign rivals are subject to less stringent OECD convention regulations.⁹⁹ While the companies’ direct interest may be limited to reducing demands for payments on themselves, many actions they could take to reduce this pressure would have positive benefits on other government service users. This is especially the case in situations where US multinationals are significant actors in specific economies.¹⁰⁰

b. Immediate Challenges

The most significant challenge to efforts to curb administrative bribery of the sort covered by the FCPA exemption is that it will prove impossible or extremely difficult to operate in countries within which petty corruption is endemic. The potential reduction in investment might hurt not only US investors and businesses but also developing countries

⁹⁹ Hopefully, this imbalance will swiftly be ended by amendment to the OECD convention. But at least in the short term, the imbalance will be an extra spur to US companies encouraging the development of programs that target small scale administrative corruption.

¹⁰⁰ There is also the possibility that this kind of pressure will simply lead to additional payment demands being leveled on foreign investors facing less restrictive laws in their own home countries. But any such pressure may lead to these same companies supporting legislative reform to criminalize the payment of even low-level administrative bribes—a positive side effect to a side effect....

whose economic development may be slowed by a reduction in foreign investment. It is undoubtedly true that US companies and their employees will face significant inconvenience in the short and medium term when complying with the newly stringent regulation. There is also the question of what will happen in extreme circumstances where employees are faced with death or serious injury unless they make a payment. But as will be discussed below, the inconvenience facing US companies from ending administrative bribes of \$1000 or less is a significant but not insurmountable obstacle, and one that doesn't outweigh the real benefit flowing to both corporations and individual societies from an eventual reduction in administrative corruption.

While administrative delays can be frustrating and inconvenient, it is unlikely that a large number of projects/business deals would be destroyed by the criminalization of payments currently covered by the FCPA exemption. The exemption for "grease" payments is generally considered to apply only to payment of \$1000 or less.¹⁰¹ While this can be a large amount of money in some developing countries, it is not likely to be a large sum relative to the size of most American business deals abroad. Given the size of most business deals involving US companies outside the United States, most are unlikely to be completely cancelled simply because of the delays a \$1,000 bribe would have prevented. If the project really is dependent on such a slim reed, its problems probably are based on much more than administrative delays resulting from a refusal to pay small amounts of "grease" money.

Increased frustration, delays and monetary losses to certain investors are the more likely result of the repeal of the FCPA exemption. In some cases, the sum total of these will be so great that projects will be cancelled. But this type of cancellation seems much

¹⁰¹ See Avi-Yonah *supra* note 8 at 315.

less likely than cancellations resulting from the ban on large-scale bribery of foreign government officials. Not paying millions of dollars to win a bid for government procurement is more detrimental to a project's chances than a refusal to pay an occasional customs bribe. In many senses, the United States has already made the decision that it is willing to risk real short-term losses to its firms by ending most types of bribes. Extending this to the more minor consequences resulting from a failure to pay small bribes is only consistent.¹⁰²

Additionally, firms that develop reputations for not bribing often find that they are less pressured to make corrupt payments than would otherwise be the case.¹⁰³ While in the short term, US corporations and their employees will certainly be inconvenienced by not abiding by local bribe paying norms, they may eventually benefit from a reduction in pressure to pay bribes if they adhere to the new FCPA consistently. This obviously benefits larger investors with repeated investor patterns more than smaller, newer investors, but is still a significant potential benefit.

A potential objection to the payment of small bribes is the possibility that those who pay them may face explicit or implicit threats of death or injury unless they make small payments at roadblocks etc. in developing countries. But in a situation like this, where there is a threat of physical violence, the payment is not actually a bribe—rather, it is robbery. Additionally, the SEC and Justice department are unlikely to prosecute

¹⁰² This does not mean that, in the short term, those adhering to these policies will not face major aggravation. Everything from setting up utilities to getting permits will take extra time. But aggravation and delays for US citizens and their employees in the short term seems an acceptable price to pay for the benefits of reducing corruption.

¹⁰³ For example, Texaco has developed such a strong reputation in West Africa for refusing to bribe that its jeeps are routinely waved through border crossings at which other vehicles are stopped and pressured for bribes. See Philip M. Nichols, *Bribery and Other Types of Corruption Threaten the Global Marketplace* (U. of Pennsylvania,), at <http://www.ameinfo.com/news/Detailed/24835.html>.

payments like these, especially if the circumstances are carefully documented and honestly represented.

A second set of concerns about eliminating the FCPA exemption centers on enforcement issues—especially focused on how the United States could ever hope to track or punish low-level payments in diverse foreign countries by individuals who may be employed very indirectly by US companies.¹⁰⁴ The answer to this is that the vast number of infractions probably will go unpunished. But it is definitely possible that the ban on administrative payments would at least in some cases be enforceable. The US government has in the past amassed information about routine administrative bribery by its companies and their subsidiaries,¹⁰⁵ and numerous routes for obtaining additional evidence could be imagined, including disgruntled employees, tax and accounting audits and the like.¹⁰⁶

It is also important to keep in mind that the actual enforcement of a ban on administrative bribery is not the only standard by which the FCPA's reform should be

¹⁰⁴ Peter Clarke, formally responsible for FCPA prosecutions at the DOJ, has rhetorically asked: "Do you really believe that our limited federal criminal enforcement resources should be deployed to against his kind of corruption?", Email Message from Peter Clarke to Alexandros Zervos, *Re: Question*, Feb. 2, 2005. This skepticism about the feasibility/desirability of these prosecutions is however addressed in the sections examining the damage caused by facilitation payments and the negative symbolic and practical impact of the FCPA exemption. Clarke also questions whether any national government would accept that these types of small payments constitute a bribe worth punishing—and is answered by Luxembourg's government, which explained that "The new articles of the Criminal Code relating to bribery do not include the term "undue" contained in the OECD Convention. The result, according to the Luxembourg authorities, is to make so-called "facilitation" payments an offence under Luxembourg law. The Luxembourg authorities considered that including the word "undue" in its domestic legislation would mean that facilitation payments or petty gifts were tolerated. Instead of fighting bribery more effectively, the law would in fact be looking on it more indulgently, since it would accept that certain practices, though harmful, would no longer fall within the scope of the law. Luxembourg considers that this would be a step backward in the fight against bribery and how it is perceived. In the opinion of the *Conseil d'Etat*, 'it would be inconsistent to tolerate facilitation payments while at the same time criminalising other payments because they involved larger sums of money'" (citation omitted). OECD, LUXEMBOURG: PHASE I REPORT 5 (2001).

¹⁰⁵ See Mathews, *supra* note 32 at 365-66.

¹⁰⁶ Many of the techniques currently used to detect bribery could be extended to cover the low level administrative bribes covered by the FCPA exemption. See, e.g., Mathews, *supra* note 32.

measured. As discussed in section VI. a., one of the major benefits of the change in the FCPA is the symbolic power of the move, and the potential that it will spur further action against corruption on a global level. The relatively sparse enforcement of this rule would also be in line with the rest of the FCPA's provisions, which have not been frequently invoked by the US government.¹⁰⁷ Beyond the bribery sphere, the United States has types of legislation dealing with other behaviors occurring abroad where evidence is difficult to obtain, but the general moral point is considered to be sufficiently important to justify the legislation.¹⁰⁸ Given the harm caused by corruption in general and administrative bribery in particular, removing the FCPA exemption seems to qualify for this type of moral gesture.

A third area of concern around removing the FCPA exemption focuses on the possibility that foreign investment will be deflected from countries with high levels of administrative bribery to ones with lower levels, in order to reduce both aggravation and bureaucratic delays for companies and their employees. It is certainly true that countries with high levels of corruption see a reduction in their foreign investment.¹⁰⁹ But the proposed change to the FCPA, as discussed above, is not so radical that it is likely to be a deciding factor in choices about where to target investment. It is more likely that the high level of administrative corruption, and the extra losses in terms of time and energy this causes,¹¹⁰ will deflect companies from investing in countries with high levels of administrative corruption. The practical impact of the change in the FCPA rules is unlikely to be a central cause of any deflection.

¹⁰⁷ See Mathews, *supra* note 32 at 305.

¹⁰⁸ Karene Jullien, *The Recent International Effort to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT'L L. & POL'Y 579, 580 (2003).

¹⁰⁹ See Wei *supra* note 1 at 9.

¹¹⁰ See Hellman *supra* note 64 at 19.

A fourth set of concerns triggered by amending the FCPA focuses on the possibility that the change will in some sense be culturally imperialist or an imposition of western values/ways of doing business on other countries. Under this scenario, the high level bribes banned by the FCPA could be considered to be corrupt from any perspective, while the low-level bribes currently exempted are much more closely related to some traditions of gift giving and the like. Forcing US companies to comply with the FCPA on this scenario would be that their local subsidiaries and business partners in other countries would be forced to change their traditional business ways to suit US moral crusading.

While avoiding cultural imperialism is important, the concern about the cultural imperialism inherent in action against bribery is misplaced, even in the case of small scale payments. Numerous authors, looking at all sorts of corruption, have documented that perceptions of corruption are remarkably similar across cultures and regions, with the line between bribery and gift giving much clearer than might be supposed.¹¹¹ More specifically, the FCPA applies specifically to payments that contravene written local laws in other countries.¹¹² While it might be argued that these laws may not reflect traditional ways of doing business or common cultural understandings, it is both complicated and potentially presumptuous for US politicians or businesspeople to differentiate which local laws they will choose to respect. Instead, it is appropriate to respect other countries' official determinations of which types of payments constitute corruption and which do not.

¹¹¹ See, e.g., Wei, *supra* note 1 at 14-16.

¹¹² 15 U.S.C. § 78dd-1(c)(1) (2000) (for issuers); 15 U.S.C. § 78dd-2(c)(1) (2000) (for domestic concerns); 15 U.S.C. § 78dd-3(c)(1) (2000) (for "any person").

A final area of concern involves potential unwanted side effects from amending the FCPA to eliminate low-level administrative bribes. Theoretically, the elimination of the “grace zone” for low-level bribes might motivate those firms that choose to break the law to provide larger and/or more frequent bribes. In this view, by extending criminalization to acts that many consider legitimate, the US government would lessen the inhibitions against pursuing broader ranges of criminal activity. But while this impact is certainly important to consider, the FCPA’s ban on payments that are already illegal in the country in which they are made means that those actors affected have already chosen to break the law in at least one jurisdiction. Once this decision is made, the impact of additional enforcement by US authorities does not seem so great as to invalidate the real benefits that amending the FCPA to exclude low-level administrative payments would bring.

c. Broader Challenges

Beyond the immediate challenges to eliminating the FCPA exemption, a broader conceptual concern involves the allocation of resources to this effort. Many critics feel that the FCPA’s overall impact has been very modest at best—with few indications that US firms are less engaged in bribery of foreign officials than those of other developed countries.¹¹³ Any proposal to tighten the FCPA further must address the accusation that this initiative will at best be “more of the same”—and at worst divert precious resources from more effective anti-corruption efforts to meaningless moral posturing. Countering this criticism requires consideration of the FCPA’s current impact, its potential impact should it be amended, and the resources required for the amendment proposal to succeed.

¹¹³ See, e.g., Hellman, *supra* note 64 at 6.

The most fundamental criticism of attempts to eliminate the FCPA exemption for administrative bribery is that this effort is an ineffective use of anti-corruption resources. This critique does not necessarily question the negative impact of bribery in general or administrative payments in particular. Instead, it focuses on the current perceived failures of the FCPA—both its relatively light enforcement,¹¹⁴ and its (potentially linked) alleged lack of success in making US firms less corrupt than their competitors. This critique might outline other anti-corruption projects more deserving of campaigners time and energy—such as providing additional education and support to foreign officials drafting local anti bribery laws, and voluntary guidelines for multinational corporations.¹¹⁵

Criticism of the FCPA is fair in suggesting it has not led to as much of a reduction in bribery of foreign officials as might have been hoped. But the legislation has certainly had an impact in changing at least some behavior by US businesses—a fact slyly acknowledged by critics who list “increased costs to US business” as one of their main concerns.¹¹⁶ More broadly, the global adoption of the OECD convention is concrete proof of both the FCPA’s attractiveness as a global standard, and the US government’s lobbying power when it seeks to “level the playing field” for US corporations. These facts suggest that both the practical and symbolic benefits of the FCPA are greater than the critics would suggest.

Devoting additional energies to amending the FCPA would definitely require significant time and attention from the anti-corruption community. But the benefits of this amendment would not be limited to changes in the law’s text alone. A new

¹¹⁴ See Mathews, *supra* note 32 at 305; Eaton *supra* note 32 at D2.

¹¹⁵ See, e.g., Salbu, *supra* note 31 at 286.

¹¹⁶ See Salbu, *supra* note 31; Hines, *supra* note 13 at 17.

campaign advocating the repeal of the FCPA's exemption for administrative bribery could increase the public profile of anti-corruption efforts, putting additional pressure on national governments to emulate the US action or at least enforce their existing laws more seriously. As discussed in section VII, a well thought out penalty scheme for low level administrative payments could result in increased enforcement of the FCPA—again increasing the public profile of anti-corruption efforts. Most broadly, campaigns that highlight anti-corruption activity aren't necessarily a zero sum game. Instead, a campaign to change the FCPA could help global anti-corruption efforts by persuading governments and other organizations to increase anti-corruption funding and activities. Repealing the FCPA exemption is hardly a panacea for all the world's corruption problems, but the potential practical and symbolic benefits of the repeal justify the resources anti-corruption campaigners would need to devote to achieve this legislative change.

VII. Creating an Effective Penalty and Enforcement Mechanism

The conclusion that low-level administrative bribes should be criminalized in line with other types of bribery outside the United States does not mean that the penalty schemes in all cases should be identical. In fact, given the very real problems with current FCPA enforcement and impact currently documented,¹¹⁷ a different enforcement approach to low level administrative bribes is appropriate. Considering the differences between large and small-scale bribery, a graduated system that encourages voluntary compliance and higher awareness by senior company officials is most appropriate. Domestic US efforts to halt bribery in corrupt labor unions provides one model on which these awareness and voluntary compliance efforts might be based. All these different penalty approaches need to be combined with a variety of enforcement means to overcome the difficulties of monitoring criminal behavior outside the United States.

a. Distinct Characteristics of Small Scale Administrative Bribery

As the current FCPA exemption suggests, low-level administrative bribery is not like other types of bribes. While their negative impact is difficult to dispute, these bribes have several characteristics that are different from the high level international bribery originally targeted by the FCPA. By definition, low-level administrative bribery involves only small amounts of money per transaction—so that it is much easier (e.g. cheaper) to pay a large number of these bribes. Again on its own terms, the FCPA’s exemption covers bribes to promote routine government action—which suggests that the actions are repetitive (more so, at least, than one-off events like contracts for items like purchases of military equipment), and thus that these bribes are as well. In short, small-scale

¹¹⁷ See, e.g., Salbu, *supra* note 31.

administrative bribery involves a large number of discrete “minor” acts, rather than a few large scale and/or one-off payments.

The relative prevalence and relatively low importance (in monetary terms) of individual acts of administrative bribery have several consequences. There is a higher likelihood that an act of actual bribery will be observed by parties outside the transaction—because of the larger number of parties involved and the large number of discrete acts that run the risk of being observed. Conversely, individual low level bribes are much easier to hide within larger accounting items—the small size of the bribes makes the accounting discrepancies much more minor. Explicit authorization for low-level bribery is likely to come at lower levels in companies than larger bribes would—because the individual impact of specific payments is much lower—and thus may be harder to monitor centrally. Overall, it is the cumulative effects of low-level administrative bribery are the primary reason for banning the practice. Individual payments of small amounts of grease money are less harmful than individual payments of large structural bribes.

b. Appropriate Penalties for Low Level Bribery

Currently, potential criminal penalties for individuals convicted of bribery under the FCPA include the possibility of a prison sentence of up to five years and fines of up to \$100,000. Corporations have received fines in excess of \$2,000,000.¹¹⁸ The structural differences when compared to large-scale bribery suggest that low level administrative bribes should be punished by a different type of penalty scheme—focusing on the cumulative harm caused by repeated provision of small bribes. Especially given that policies on low-level corruption would be criminalizing previously legal behavior, a

¹¹⁸ Perkel, *supra* note 9, at 702.

penalty scheme that provides a “safe harbor” incentive for declaring and remedying past practices should be considered. In addition, first offenses should be treated lightly, perhaps with a probation/monitoring scheme similar to that adopted for some American labor unions facing corruption charges. In the long term however, repeated violations of the law should trigger penalties just as harsh as those punishing large individual payments. Finally, lax policies/multiple convictions for low-level administrative bribery should be explicitly identified as an indicator of broader corporate honesty problems—and automatically trigger additional investigations/supervision. While this differential scheme runs the risk of lessening the symbolic message of making low-level administrative bribes illegal, the potential benefits outweigh the risks.

A graduated penalty scheme that allows high level private sector executives to uncover and change low-level bribe giving practices would probably be the most effective means of reducing this type of corruption rapidly (at least when relying on an FCPA style law). This type of incentive would ideally be conducted in two stages: a voluntary pre-enforcement one, and a stricter one after a first violation is discovered. The experience of US prosecutors using RICO statutes to force changes in corrupt labor unions, and some current efforts by US companies to investigate criminal behavior by their employees, are instructive with regard to the types of oversight programs that might be implemented.

As discussed in sub-section VII.a., one of the characteristics of low-level administrative bribery is that approval for small bribes can be given at lower levels of authority and hidden relatively easily in accounting systems. In some cases, top executives may thus be genuinely ignorant about bribery, or at minimum unclear about its

extent. Any criminalization low-level administrative bribery should provide a period during which companies can conduct internal investigations of low-level bribery practices, identify where they occur, and adopt plans to combat the problem. If these investigations are recorded and reported to the DOJ, a “safe harbor” provision should protect these companies from prosecution. This safe harbor provision will encourage fuller investigation and accounting of low level bribery (saving DOJ resources); make the changing legislation more palatable for companies, and easier to implement (because they can conduct internal investigations without worrying about unpleasant findings); and even provide useful information about where low level bribery typically occurs (useful for monitoring future low-level bribery in all companies).

Even if companies don’t take advantage of the safe harbor provision, first offences (or evidence of potential first offences) should be used to encourage full internal investigations and confessions rather than simply leading to application of full penalties. Internal investigations undertaken in lieu of prosecution under the FCPA would of course be more stringent, potentially involving FBI/outside monitor participation rather than relying on self-reporting. The results could also lead to symbolic fines, depending on circumstances. But again, the overall goal should be to establish strong, internal anti-bribery systems in companies, ensuring that top executives are able to monitor and end the practice.

Monitoring of corrupt labor unions provides an example of the success that these kinds of internal and external monitoring mechanisms can have. Though unions are very different from commercial companies, they share certain characteristics which makes the comparison useful. Most notably, they can be large organizations where top-level

executives are not always aware about wrong-doing at lower levels. They also faced a new legal environment when the RICO statutes began to be applied to union corruption, proving additional incentives to cooperate with federal prosecutors in stamping out corruption.

One good example of success in efforts to clean up corruption—which might parallel efforts to comply with a safe harbor provision-- is provided by the internal reform efforts of the Laborers Union International of North America (LIUNA). In 1995, facing the possibility of a civil racketeering lawsuit accusing it of being influenced by organized crime, the union agreed with federal prosecutors to conduct its own cleanup effort.¹¹⁹ This involved hiring a former prosecutor and former inspector general to oversee internal anti-corruption efforts,¹²⁰ as well as the removal of hundreds of officials for corruption or links with organized crime.¹²¹ This type of internal effort at organizational change may be more effective than simply punishing the organization as a whole—it involves top officials (even ones with unclear ties to the corruption) making real efforts to reform an organization in order to avoid the costs associated with criminal prosecution. LIUNA's effort was enough to convince federal prosecutors to give up the option of taking over the union.¹²²

The Teamsters are a second good example of monitoring/oversight. While the LIUNA case parallels potential efforts to meet a safe harbor requirement, the Teamsters' case is a good example of efforts in lieu of conviction for an actual offense. The

¹¹⁹ Steven Greenhouse, *Union Cleanup Praised*, NY TIMES, Jan. 21, 2000 at A20 [hereinafter UNION CLEANUP].

¹²⁰ Steven Greenhouse, *Republicans Questioning Federal Deal with Union*, NY TIMES, Jul. 14, 1996 at A14.

¹²¹ See UNION CLEANUP, *supra* note 119 at A20.

¹²² *Id.*

Teamsters accepted external monitoring in 1989 to settle a federal racketeering lawsuit. This external monitoring included paying for a government investigations officer and dozens of investigators to go through the union and uncover instances of corruption.¹²³ While the extent and length of this supervision (which continues today) would not be applied in anti-corruption cases, the successes of this external supervision in reducing Teamster corruption suggests the potential for similar achievements when monitoring businesses subject to prosecution for a first offense.

These types of internal and external investigations are not limited to labor unions. Private companies routinely use lawyers and others to investigate and report internal wrongdoing. For example, UBS appointed a law firm to investigate illegal activity by lower level Swiss employees involving shipments of US currency to Iran and other countries facing sanctions. While UBS received a hefty fine, it did not have to face criminal penalties because of its internal investigations, which involved tracing and reporting all illegal activity to federal authorities.¹²⁴ In addition to outside consultants, companies with pre-existing structures for reporting and stopping bribery could extend these to low-level bribes (if they were not already covered).

After a first offense or “safe harbor period”, penalties for repeat offenders would need to be just as high or higher than the current ones targeting large-scale bribery. This “stick” would be essential for the success of (and participation in) self-change programs on the part of affected companies. The labor union and UBS examples previously discussed were impelled by the fear of federal prosecution—and the high penalties that

¹²³ Steven Greenhouse, *Teamsters Push to End Decade of Supervision*, NY TIMES, Aug. 14, 1999 at A5.

¹²⁴ Timothy L. O’Brien, *Lockboxes, Iraqi Loot and a Trail to the Fed*, NY TIMES, Jun. 6, 2004 at Business 1.

would entail. Without this fear, it is unlikely that a sense of good citizenship alone would impel companies to route out and report their legal infractions.

Instituting a legally binding penalty system that encourages internal change would bring a number of benefits. The “internal reform” offered in response to evidence of a first infraction would shield both the FCPA and lawmakers from the allegation that they were jailing individuals and disrupting developing country economies over a few tiny, one-off payments. Repeat offenders—with a public track record of illegality—would be much less sympathetic defendants. More practically, the grace period for payments would allow companies to transition into the new bribery framework without delaying the symbolic benefit of criminalizing low-level administrative bribery. Those companies that found themselves discussing first infractions of the law with the DOJ would have strong incentives to tighten their corporate compliance systems in order to avoid the higher penalties levied on repeat offenders.

On an operational level, a gradually increasing system of penalties would provide incentives for actors across the spectrum to cooperate in enforcing the FCPA more vigorously. Though these operational reactions would be hard to legally enforce, an appropriate penalty system might lead to more enforcement than is currently the case. This is especially the case for individuals who observe low-level administrative bribery and those in the DOJ and SEC responsible for prosecuting under the FCPA. As discussed above, low-level administrative bribes are more likely to be observed than other types of bribes because of their frequency. Individuals who observe these may be reluctant to report them to US authorities if prison sentences or serious fines could result—not just out of concern for individuals paying bribes, but also because of the impact these

penalties would have on continued local operations of affected companies.¹²⁵ If they were assured that first offences resulted in corporate cleanup efforts rather than fines/jail, they might be more willing to provide information.

Lower penalty levels might also encourage US officials in charge of implementing the FCPA to be more aggressive in bringing prosecutions. If officials were assured that any initial prosecutions would not have ruinous effects on those prosecuted, they might be less reluctant to bring additional cases—especially if provided with additional information from NGO workers and other sources abroad. An increase in prosecutions for low-level administrative bribery might also provide the DOJ with additional resources for attacking other types of bribery—by allowing investigations of affected firms, and providing an indication of which firms might have a more general problem with bribery. In this sense, low-level administrative bribery would function as a “canary in the coal mine”—providing first indications that there might be broader bribery issues to watch for in specific firms.

The benefits of this alternative sentencing would obviously need to be weighed against the possibility that codifying lower penalties for some individual acts of administrative bribery could send the message that they are “less important” than other types of bribery. While this is definitely a possibility, the fact that all types of bribery will be criminalized would still be the primary message of removing the FCPA exemption. Any parties examining details like sentencing differentials would almost

¹²⁵ This concern would not be ill founded—after passage of the FCPA, US companies reduced business contacts with areas that had reputations for high levels of bribery. *See* Hines, *supra* note 13, at 17. This withdrawal of business could result in negative consequences for local economies, particularly in developing countries—making NGO workers and others reluctant to pass on rumors or other verifiable information about low level bribery.

certainly also understand that repeated administrative bribery was punished just as harshly as other types of bribes. This overall message—that the cumulative impact of administrative bribery is even more significant than a sum of the individual acts of low-level administrative bribery—very accurately reflects the corrosive effect of “grease money”.

c. Enforcement

In addition to codifying graduated penalty systems, making an amended FCPA most useful will require special enforcement efforts—taking into account the difficulties of enforcing restrictions on behavior outside the United States and the limited nature of the target group. Most basically, the DOJ would need to make greater use of tools it currently has for reducing corruption. More broadly, the DOJ and FBI will need to consider adding work on anti-corruption to the remit of FBI agents stationed overseas. Finally, the DOJ should consider a more active campaign to encourage whistleblowers—both within enterprises engaging in corruption and from NGOs, IOs and other private companies operating abroad. This combination of measures might seem chaotic, but their overall weight could prove significantly more effective at enforcing a revised FCPA than current efforts have been.

Any effort to enforce an amended (or indeed the current) FCPA must take into account the unique nature of the crimes being committed. Because the FCPA criminalizes bribery conducted entirely outside the United States, US enforcement agencies have much less freedom to operate than they otherwise would. Many actions easily accomplished in the United States—like wire tapping—are much more difficult to arrange overseas. In addition, unlike bribery statutes within the United States, only those

paying the bribes—not those receiving them—are subject to penalties. These limits on the scope of both the legislation and the means of enforcement inevitably reduce the ability of the DOJ to enforce the FCPA.

These difficulties may be a partial explanation for the relatively low levels of FCPA enforcement. Nonetheless, good use of current FCPA enforcement tools can lead to prosecutions. As discussed, the accounting violations component of the legislation makes it easier to identify and penalize bribery abroad. Though it may be harder to pinpoint individual low-level bribes in company accounts, their repeated nature may make identification easier. Additionally, the DOJ already conducts activities overseas. It stations FBI agents in embassies all over the world, focusing on cooperation with local law enforcement and following up foreign leads in domestic cases. While these agents tend to focus on high profile issues like counter-terrorism,¹²⁶ their remit could certainly be expanded if the DOJ placed sufficient priority on anti-corruption efforts. Using existing links with foreign security and police services, FBI agents stationed overseas could certainly gather evidence in at least some instances of low (and high level for that matter) bribery.

Beyond using existing resources and techniques,¹²⁷ the DOJ would also need to consider broader efforts to encourage witnesses to low-level bribery to come forward.¹²⁸ The repeated nature of these actions suggests a higher probability that at least some of them will be observed, and these witnesses could be a key part of an anti-bribery arsenal.

¹²⁶ See, e.g., Eric Eckholm, *US Official Praises China for its Cooperation in Rooting Out Bin Laden's Terror Network*, NY TIMES, Dec. 7, 2001 at B5.

¹²⁷ In its report to the OECD, the US focuses almost solely on information provided directly by other governments and on mutual assistance treaties. OECD, UNITED STATES: PHASE 2 REPORT 28 (2002).

¹²⁸ This is already done to a certain extent by some countries. See, e.g., OECD, SWITZERLAND: PHASE 2 REPORT 13-22 (2005) (including descriptions of prosecutions based on whistleblowers, media reports).

As discussed in subsection VII.b, the graduated penalty scheme could encourage additional witnesses to come forward, secure in the knowledge that they would not do multinationals major economic damage. In addition, the DOJ could consider providing useful whistleblowers and other witnesses with reward payments similar to those given for suspected terrorists. These payments have been effective in encouraging informers for other types of crimes and could be useful for attacking corruption as well.¹²⁹

These ideas for expanding enforcement of an amended FCPA assume real interest on the part of an administration in eliminating low-level bribes of foreign officials. The damage that this kind of bribery causes to both developing countries and US companies in the long run seems to be sufficient evidence to justify this increase in enforcement activity. But given the rush of other priorities (and short term opposition from businesses), any campaign for an amendment to the FCPA would need to include efforts to monitor enforcement of the amended act, to ensure that innovative penalty systems and additional enforcement options are actually used.

¹²⁹ See, e.g, Raymond Bonner, *A Scramble in Bangkok for a \$10 Million Reward*, NY TIMES Sept. 15, 2003 at A11.

VIII. Conclusion

As the previous sections discuss, there are strong reasons for amending the FCPA to eliminate the exemption for administrative payments. This action not only addresses some of the concerns about the FCPA's alleged ambiguities¹³⁰ but also improves the strength and consistency of the United States' global anti-corruption message. Beyond the specifics of the FCPA, a number of larger questions remain about broader legislation along the FCPA model. But these concerns are not sufficient to override the need to amend the act, at least in the current legislative context.

When considering the strength of global rhetoric about the evils of corruption, it is surprising that exemptions like those found in the FCPA and OECD conventions have persisted as long as they have. As discussed in Section IV, the myth that low-level grease payments are less significant has been put to rest by recent economic studies—as have the broader arguments that attacks on corruption constitute cultural imperialism.¹³¹ The immediate rationale for amending the FCPA to remove the exemption for low-level facilitation payments is strong and convincing.

On a macro level, three major questions hang over attempts to make the FCPA stricter: whether corruption is the most important focus of international resources; whether criminal legislation passed mostly for its symbolic value is appropriate; and whether the US and other developing countries should thrust “pet” initiatives like this one onto developing countries. The first challenge focuses on the broad range of international problems, and the limited resources available to tackle them (money, time etc.). Rules mostly involving the business climate don't appear to immediately address pressing

¹³⁰ See, e.g., Taylor, *supra* note 35, at 874-77.

¹³¹ Discussed in Section VI.

issues like the AIDS crisis and the like. But the economic costs of corruption, identified in numerous studies, points to the major flaw in this criticism. Corruption's toll on developing country economies and the poor who live there mean that it is a drag on almost any type of international humanitarian effort—and that attempts to reduce this corruption will positively impact all other programs. Though the FCPA is focused on private businesses, the reductions in overall corruption its amendment could achieve justify significant a significant investment of resources.

A second macro question is whether criminal legislation passed mostly for the symbolic value rather than as an effort to provide practical tools to law enforcement is the right way to craft a system of legal sanctions. Passing rarely enforced laws, that are used for exemplary purposes, against only a few parties, carries the potential for abuse, illegitimate targeting of political enemies and the like. There are two responses to this challenge. Most immediately, it could be argued that the challenges of gathering evidence abroad means that practical, rather than political considerations result in limited prosecutions, reducing the scope for abuse of power. More generally though, the decision to make use of symbolic laws has already been made. From the FCPA as it currently stands to rules about speed limits, US society already possesses a culture where laws are only selectively enforced and are passed more for their symbolic purpose than their practical impact. Given this context, the harm that low-level administrative corruption causes, and the very real possibility that amending the FCPA will help change global laws and attitudes towards low-level corruption, extending the scope of symbolic lawmaking in this way seems both legitimate and useful.

A final question is whether developed countries like the United States should even try to pass legislation basically aimed at “supporting” pet initiatives in foreign countries (often developing ones). This effort could be interpreted as patronizing, suggesting that other countries can’t enforce their laws and that United States companies and individuals are answerable only to their own government. In the extreme, it could be taken as a suggestion that US companies need only follow local laws that the US government supports through specific legislation like the FCPA. But though this macro level concern is important, the harm caused by administrative corruption, and its prevalence despite local laws in certain countries, provides at least partial justification for laws like the FCPA. Additionally, it could be argued that the United States has a right to regulate the behavior of its representatives abroad, and that requiring extra respect for some types of local laws is a domestically focused policy rather than an imperialist effort.¹³² Finally, as is the case with the second macro level objection, the United States has already made the policy choice to regulate its citizens’ and firms’ activities abroad. Given that the policy choice to use this tool has been made, focusing on reducing administrative corruption seems a particularly defensible decision given its deleterious impact on the global community.

The decision to amend the FCPA to make it fully consistent with US and international rhetoric and best practice involves bidding a final farewell to well-worn clichés about how things “get done” in developing countries. The FCPA as it currently stands is an important marker of the gradual understanding that changing a culture of corruption involves not just reforming bureaucrats but also consumers—businesses and

¹³² Given the origins of the FCPA in US outrage at domestic corporate corruption, this seems a particularly convincing argument. *See Posadas supra* note 8 at 349-55.

individuals. Through the FCPA, the United States has made active its desire that it and its businesses take a lead in changing cultures of corruption. Happily for the rest of the world, eliminating corruption is an area where the United States' efforts to raise others to its own aspired standards are beneficial. Amending the FCPA to remove the exemption for "grease" money would mark the completion of the conceptual revolution that the FCPA's passage began—affirming that no bribery, no matter in what amount or for what purpose is acceptable for US corporations. Making current developed world rhetoric about corruption consistent with its laws will in no way immediately solve this problem. But it does have the potential to re-energize global anti-corruption efforts while making them broader and more effective.

