HOGAN & HARTSON

MEMORANDUM

To: Global Financial Integrity

From: T. Clark Weymouth
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Date: May 2, 2008

Re: Facilitation payments in global anti-bribery laws

Facilitation payments – small payments made to low-level government officials to expedite or secure performance of routine non-discretionary government actions – are a topic of increasing discussion as countries implement and enforce laws designed to combat corruption of public officials. It is often difficult to distinguish between facilitation payments and outright bribes. Moreover, the treatment of facilitation payments varies widely: the anti-bribery provisions of the U.S. Foreign Corrupt Practices Act (FCPA) contain an exception for facilitation payments, while the anti-bribery laws of the United Kingdom, among other countries, contain no such exception. Especially in instances where the anti-corruption laws of more than one country apply simultaneously to specific interactions with a public official, making facilitation payments carries significant risks for companies and individuals alike.

This memorandum discusses the treatment of facilitation payments under the FCPA as well as other national anti-bribery laws and multilateral initiatives, and assesses the risks associated with making such payments in the current enforcement climate.

I. Introduction and executive summary

The FCPA's "facilitation payments" exception was adopted as a compromise in recognition of the practical reality of doing business overseas; at that time, non-U.S. companies were not subject to the same anti-bribery prohibitions as U.S. companies. In response to pressure from the United States, other countries subsequently have enacted and implemented laws designed to combat corruption. However, the treatment of facilitation payments in these laws is far from uniform. Our research indicates that only ten countries have excepted facilitation payments from their anti-bribery prohibitions; most countries' laws treat such payments as illegal bribes.

Companies that make payments in reliance on the "facilitation payments" exception do so at some risk. While the statute itself specifies certain situations in which facilitation payments

are deemed to be acceptable, enforcement authorities have not specifically endorsed any particular set of circumstances in which the exception is deemed to apply; moreover, recent enforcement actions suggest that U.S. enforcement authorities interpret the exception narrowly. In addition, while to date other countries have not aggressively enforced their own prohibitions against facilitation payments, that could change as countries come under more pressure to implement and enforce effective anti-bribery laws.

It also can be difficult to monitor when individuals acting on behalf of a company make questionable payments under the "facilitation payments" exception. Companies that expressly allow facilitation payments in their anti-bribery policies and procedures without requiring pre-approval of such payments run the risk that those acting on the companies' behalf may interpret the exception in an overbroad manner. Moreover, there may be pressure to call such payments something other than what they are, creating risk of violating the FCPA's accounting and recordkeeping provisions as well.

While it is unrealistic to expect all companies and countries to abolish the practice of making facilitation payments, the better course would be not to except such payments from the general anti-bribery prohibitions. Other countries' adoption and enforcement of their own anti-bribery laws, most of which do not contain a facilitation payments exception, obviate the need for, and effectiveness of ,the exception in the FCPA and other national laws. While some countries may not seek to enforce penalties with respect to true "facilitation payments", removing the exception as a defense likely would lead to fewer payments in reliance thereon, thereby reducing tolerance of such practices.

II. Historical review of the "facilitation payments" exception

Based on our research, only ten countries, including the United States, have anti-bribery laws that contain an explicit exception for facilitation payments. The FCPA was the first statute to except these payments from its anti-bribery provisions. After pressure from the United States on other nations to pass similar measures, various international conventions were enacted to combat corruption, and a number of countries passed laws to implement these conventions. These laws are not uniform in their approach to facilitation payments, as some explicitly permit these payments, some expressly prohibit the payments, and others do not mention facilitation payments at all.

A. The Foreign Corrupt Practices Act

The FCPA was the first anti-bribery statute to contain an explicit exception for facilitation payments. The statute is enforced jointly by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). While the FCPA contains an explicit exception for facilitation payments, the U.S. Government has construed this exception narrowly and has taken a number of enforcement actions against companies for payments that arguably fell within the exception.

1. Overview of the FCPA

The FCPA contains both anti-bribery provisions and accounting and recordkeeping provisions. The anti-bribery provisions generally prohibit covered companies, as well as their officers, directors, employees and agents, from making corrupt payments to non-U.S. public officials for the purpose of obtaining or retaining business or other commercial advantage. 1/ The anti-bribery provisions apply to U.S. persons, certain non-U.S. issuers of securities, and all non-U.S. firms and persons that take any act in furtherance of a corrupt payment while in the United States. The accounting and recordkeeping provisions generally require companies to establish internal accounting controls and to maintain books and records that accurately reflect all transactions. These accounting and recordkeeping provisions apply to "issuers," defined to include entities whose securities are registered in the United States pursuant to the Securities and Exchange Act of 1934.

Violations of the FCPA may lead to substantial civil and criminal penalties. Under the anti-bribery provisions, companies may be subject to a criminal fine of up to $2 million per violation, while individuals may face criminal fines of up to $100,000 per violation and five years' imprisonment. Under the accounting and recordkeeping provisions, companies may be subject to criminal fines of up to $25 million per violation, while individuals may face criminal fines of up to $5 million per violation and 20 years' imprisonment. In addition, the SEC may seek to impose civil penalties of up to $10,000 per violation and, under the Alternative Fines Act, the actual fine may be up to twice the benefit that the defendant sought to obtain from making the corrupt payment. Additional penalties may include injunctions, forfeiture of assets, disgorgement of profits, and suspension (or in some cases debarment) from doing business with the U.S. Government.

2. Development of the "facilitation payments" exception

The original version of the FCPA enacted in 1977 contained an exception for payments made to non-U.S. officials who performed duties that were "essentially ministerial or clerical." 2/ After the enactment of the law, companies and individuals experienced difficulty in discerning a clear line between prohibited bribes and payments permitted under this exception. 3/ U.S. businesses also complained that they were suffering a competitive disadvantage with their non-U.S. competitors that were not subject to laws prohibiting bribery in international markets. 4/

1/ 15 U.S.C. §§ 78dd-1(b) and (f)(3). Congress emphasized that the language prohibiting payments made to obtain or retain business was:

> not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988) 918, reprinted in 1988 U.S.C.C.A.N. 1547, 1951.

2/ See 15 U.S.C. § 78dd-1(b) (Supp. V 1981).

3/ See United States v. Kay, 359 F.3d 738 (5th Cir. 2004), quoting S. Rep. No. 100-85, at 53 (1987).

4/ Walter Perkel, Foreign Corrupt Practices Act, 40 Am. Crim. L. Rev. 683, 684 (2003).

In 1988 Congress responded by amending the FCPA under the Omnibus Trade and Competitiveness Act to clarify the scope of the FCPA's prohibitions on bribery, including the scope of permitted facilitation payments. The House and Senate versions of the proposed 1988 amendments addressing facilitation payments differed slightly. The House bill created a defense for "routine governmental action," which was defined as one "ordinarily and commonly performed" by a non-U.S. government official and explicitly including the processing of governmental papers, loading and unloading cargoes, scheduling inspections associated with contract performance, and "actions of a similar nature." 5/ The Senate version of the amendment created an exception for similar action, but included the additional "routine governmental action" categories of protecting perishable products or commodities from deterioration and obtaining licenses, permits, or "other governmental approvals" to qualify a person to do business in another country. 6/ After conference, this expanded definition of "routine governmental action" was included in the final version of the bill, reflecting the intent of Congress that the exception apply only to the performance of duties listed in the subcategories of the statute and actions of a similar nature. 7/ Congress also meant to make clear that "'ordinarily and commonly performed' actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of 'obtaining or retaining business for or with, or directing business to, any person.'" 8/

While Congress intended to permit small payments for the listed actions, neither it nor any other government agencies has provided guidance regarding the acceptable monetary value of permissible payments. During the development of the FCPA, a limit of the dollar amount of facilitation payments was discussed, including suggestions that the payment cannot exceed either a certain value or a set percentage of the recipient country's per capita income. 9/ An explicit limit on the payments never materialized because Congress felt that the legality of a facilitation payment should be determined based on the nature and purpose underlying the payment rather than the value of the payment. 10/

5/ See H.R. Conf. Rep. No. 576, supra note 1, at 921.

6/ Id.

7/ Id.

8/ Id.

9/ See Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. and Monetary Policy of the Senate Comm. on Banking, Hous., and Urban Affairs, 97th Cong. 438 (1977) (prepared statement of Wallace L. Timmeny suggesting that a dollar limit should be set for facilitation payments); see also Hearings Before the Subcomm. on Consumer Protection and Fin. of the House Comm. on Interstate and Foreign Commerce, 95th Cong. 44 (1977) (comment of Rep. Krueger suggesting that permissible payments should be limited to a set percentage of the recipient country's per capita income).

10/ Rebecca Koch, The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance, 28 B.C. Int'l & Comp. L. Rev. 379, 398 (2005); see also Business Accounting Hearings, supra note 9, at 443.

The FCPA now contains an explicit exception to the bribery prohibition for any "facilitation or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." 11/ "Routine government action" does not include any decision by a public official to award new business or continue existing business with a particular party. The statute lists examples of what is considered a routine governmental action, including:

- obtaining permits, licenses, or other official documents to qualify a person to do business in a country;
- processing government papers, such as visas or work orders;
- providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products from deterioration; and
- actions of a similar nature.

There is no monetary threshold for determining when a payment crosses the line between a facilitation payment and a bribe. The accounting provisions of the FCPA require that facilitation payments must be accurately reflected in an issuer's books and records, even if the payment itself is permissible under the anti-bribery provisions of the law.

3. U.S. enforcement examples

While the FCPA contains an exception for facilitation payments for "routine governmental action," companies and individuals relying on this exception should exercise caution. Recent U.S. Government enforcement actions demonstrate that U.S. enforcement officials construe the exception narrowly. In February 2007, Vetco International Ltd., a U.K.-based oil and natural gas equipment and services provider, and three of its subsidiaries settled an investigation for $26 million in connection with payments paid to Nigerian officials to gain preferential treatment during the customs process. 12/ Vetco authorized an agent to make at least 378 payments totaling approximately $2.1 million to Nigerian customs officials during a two and a half year span. While these payments arguably were made to facilitate routine governmental action, Vetco entered into a plea agreement acknowledging that the payments were made for the corrupt purpose of inducing Nigerian officials to ignore improper importations, improper or incomplete documentation, failure to post sufficient bonds or pay customs duties, and other infractions of Nigerian law.

11/ 15 U.S.C. § 78dd-1(b) and (f)(3).

12/ Department of Justice Release 07-075, Feb. 6, 2007, available at <http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html>.

In connection with the Vetco settlement, Panalpina World Transport Holding, Ltd. was asked to produce documents relating to activities involving payments to Nigerian officials in connection with customs clearance. 13/ The U.S. Government expanded the scope of its inquiry to include several Panalpina customers in Nigeria, Kazakhstan and Saudi Arabia. In its 2007 annual report, Royal Dutch Shell plc disclosed that its U.S. subsidiary, Shell Oil, was contacted by the DOJ regarding "Shell's use of the freight forwarding firm Panalpina, Inc. and potential violations of the U.S. Foreign Corrupt Practices Act (FCPA) as a result of such use. Shell has started an internal investigation and is cooperating with the U.S. Department of Justice and the United States Securities and Exchange Commission investigations." 14/ It has been widely reported that a large number of Panalpina's customers have been contacted by the DOJ in this regard. 15/

The Fifth Circuit has held that payments made to public officials in order to reduce a company's tax burden and customs duties constitutes a violation of the FCPA. 16/ The defendants in that case were senior officials of American Rice, Inc., a Texas-based publicly traded corporation that exports rice. RCH, a Haitian subsidiary of American Rice, was charged with purchasing certain licenses to reduce customs duties and taxes on rice imports and making payments to officials to accept the underreporting of imports. The defendants put forth a number of defenses, including that the payments lacked a sufficient business nexus to the obtaining or retaining of business, and that the payments were facilitation payments allowed under the FCPA.

The court accepted that these payments constituted "business as usual" in Haiti during the 1990s, as "the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid." 17/ Nevertheless, the conviction of the defendants for violating the anti-bribery provisions of the FCPA was upheld. Analyzing the intended scope of the "facilitation payments" exception, the court stated that "routine governmental action does not include the issuance of every official document or every inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection - very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries." 18/

Payments made to collect on money owed by a government entity to an American corporation were also not considered to be payments to secure a routine governmental action within the facilitation payments exception of the FCPA. In United States v. Vitusa Corp, 19/ the

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13/ "Panalpina launches internal bribery inquiry, after US requests documents," Forbes (July 25, 2007), available at <http://www.forbes.com/business/feeds/afx/2007/07/25/afx3948674.html>.

14/ Royal Dutch Shell plc, Annual Report (Form 10-K), at 15 (Mar. 17, 2008).

15/ "Oil firms get U.S. letters in bribery probe: report," Reuters (July 24, 2007), available at <http://www.reuters.com/article/ousiv/idUSN2421467720070725>.

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

17/ Id. at 739.

18/ Id. at 751.

19/ Cr. No. 93-253 (D.N.J. 1994), reprinted in 3 For. Corrupt Prac. Act Rep. (Bus. Laws, Inc.) 699.155.

DOJ prosecuted and successfully reached a plea agreement with Vitusa Corporation for payments of approximately $20,000 to a Dominican official to secure the payment of a $163,000 debt owed to the company. After previous attempts to collect the debt, an official suggested that a "service fee" to a senior official would expedite payment to the company. Despite the FCPA exception for payments "to expedite or to secure the performance of a routine governmental action," the DOJ alleged that the collection of money is part of obtaining or retaining business, and a payment to achieve that end is not a facilitation payment. Vitusa Corporation was fined $20,000, while the president of the company was fined $5,000 and sentenced to probation for two years.

These cases demonstrate the uncertainty endemic in relying on the "facilitation payments" exception. As the cases suggest, payments made to low-level officials to perform arguably-routine functions may still lead to prosecution, negative headlines and significant penalties.

B. The OECD Anti-Bribery Convention

Some U.S. businesses viewed the FCPA as a major burden when facing non-U.S. competitors that were not prohibited from making corrupt payments. Mickey Cantor, a U.S. Trade Representative under President Clinton, estimated that from 1994 to 1995 the U.S. Government had learned of approximately 100 cases in which bribes by non-U.S. competitors undercut the ability of U.S. firms to win contracts estimated at $45 billion. 20/ In order to protect U.S. businesses and to fight corruption more effectively, the U.S. Government began pressuring other countries to adopt their own anti-bribery laws similar to the FCPA. 21/

The signing of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) in February 1999 represented the most significant victory for U.S. efforts to encourage other countries to adopt and implement anti-bribery measures. The Anti-Bribery Convention is a binding international agreement aimed at reducing corruption by criminalizing the bribery of public officials by prohibiting the offer, promise or giving of any pecuniary or other advantage to a public official in order to obtain or retain business or other improper advantage in the conduct of international business. 22/ The Convention encourages member countries to adopt and implement national legislation that

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20/ See Marlise Simons, U.S. Enlists Rich Nations in Move to End Business Bribes, N.Y. Times, Apr. 12, 1996, at A10.

21/ The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 5003(d), 102 Stat. 1107, 1424 (1988) 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.

22/ OECD Convention on Combating Bribery of Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1, art 1.1.

combats bribery. To date, the 30 member countries of the OECD (including the United Kingdom, Germany, and France, as well as Japan and South Korea) and seven other countries (including Argentina and South Africa) have ratified the Anti-Bribery Convention.

While the Anti-Bribery Convention itself does not contain an explicit exemption for facilitation payments, the Commentaries to the Convention state that "small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 [of the Convention] and, accordingly, are also not an offence."23/ There is no guidance as to what size payment is considered "small." Facilitation payments, according to the Commentaries, are those "which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits." 24/ The OECD suggests that other countries should and can address this "corrosive phenomenon" by making these payments illegal in order to support programs of good governance. These Commentaries state that the best way to address facilitation payments is for countries to make laws prohibiting facilitation payments in their own countries, stating that "criminalization by other countries does not seem an effective or practical effective complementary action."

There is significant variation in the treatment of the facilitation payments exception by countries that have enacted legislation to implement the Anti-Bribery Convention. At least ten of these countries have explicitly incorporated the exception for low-level administrative payments. 25/ Canada's legislation, for example, discusses permitted facilitation payments at a level of detail equal to that of the FCPA. 26/ Korea's anti-bribery law likewise permits "small pecuniary or other advantage … to a foreign official … in order to facilitate the legitimate performance of the official's business." 27/ Other signatories, such as France, prohibit all bribes with no exception for facilitation payments. 28/

23/ Commentaries on the Convention of Combating Bribery of Foreign Public Officials in International Business Transactions, at art. 1 (1997), available at <www.osec.doc.gov/ogc/occic/oecdct.html>.

24/ Id.

25/ Countries whose anti-bribery laws explicitly incorporate a "facilitation payments" exception include Australia, Canada, Denmark, Korea, New Zealand, Norway, Slovakia, Sweden, Switzerland and the United States. See Alexandros Zervos, Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments, 25 Penn. St. Int'l L. Rev. 251, 252 fn. 8 (2006) (citing the relevant OECD Phase Reports for each of these countries).

26/ Corruption of Foreign Public Officials Act, 10 Dec. 1998, 1998 S.C. ch. 34, section 3(4) (Canada).

27/ Act on Preventing Bribery of Foreign Officials in International Business Transactions, art. 3, sec. 2.b. (Korea).

28/ Law No. 2000-595, 30 June 2000 (France) (modifying the penal code and procedure to implement the OECD Anti-Bribery Convention).

C. National laws implementing the OECD Anti-Bribery Convention

The anti-bribery laws of three countries, two prohibiting facilitation payments (the United Kingdom and Brazil) and one allowing them (Australia), are discussed below.

1. United Kingdom

The United Kingdom Anti-Terrorism, Crime and Security Act of 2001 addresses bribery and corruption, allowing U.K. companies and nationals to be prosecuted in the United Kingdom for acts of bribery committed wholly overseas. 29/ The law does not make any exceptions for facilitation payments. According to the U.K. Department for Trade and Investment (DTI), these payments are not excluded because it is not desirable for U.K. law to apply differently overseas from the way it applies in the United Kingdom (i.e., facilitation payments to U.K. officials also are not permitted). 30/ However, DTI softens this tough stance against facilitation payments by stating that "it is difficult to envisage circumstances in which the making of a small 'facilitation' payment, extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK." 31/

2. Brazil

In 2002 Brazil (which is not an OECD member country) enacted legislation implementing the OECD Anti-Bribery Convention. 32/ The law prohibits "promising, offering or giving, directly or indirectly, an improper advantage to a foreign public official or to a third person, in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transaction." 33/ There is no explicit reference in the law to facilitation payments. 34/ To explain why Brazil has not created such an exception in either the implementing law or in other domestic law, a Brazilian court stated that even if the amount of such a payment is low, it represents a crime against the public administration and that "the injury to morality, the credibility, and the efficiency of the public services remains." 35/

29/ Anti-terrorism, Crime and Security Act 2001, c. 24 (United Kingdom).

30/ U.K. Department of Trade and Investment, "Frequently Asked Questions on the Anti-Terrorism, Crime and Security Act of 2001, available at <https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/home> (search for "Corruption Overseas").

31/ Id.

32/ Crimes committed by individuals against a foreign public administration, Penal Code, Sec. XI, Ch. II-A, added by Law. No. 10,467, 11 June 2002 (Brazil).

33/ Id. at art. 337-B.

34/ Brazil: Phase 1, Review of Implementation of the Convention and 1997 Recommendation, OECD, at 1.19 (Aug. 31, 2004).

35/ Federal Regional Court of the 4th Region, Rapporteur Fabio Bittencourt da Rosa, in Rivista dos Tribunais 769, page 729 (Brazil).

3. Australia

To implement the Anti-Bribery Convention, Australia enacted the Criminal Code Amendment (Bribery of Foreign Officials) Act of 1999, which added anti-bribery provisions to the federal Criminal Code. 36/ A person is guilty of bribery if he or she promises, offers or makes a benefit to another person with the intention of influencing the actions of a public official in the exercise of his/her duties to obtain business or a business advantage. 37/ An exemption was created for facilitation payments, stating that a person is not guilty of a bribery offense if the: (1) value of the benefit was of a minor nature, (2) the sole or dominant purpose of the conduct was to expedite or secure the performance of a routine government action of a minor nature, and (3) the person made a record of the conduct as soon as practicable after the conduct occurred. 38/

The definition of "routine government action" in the Australian statute is similar to that of the FCPA: an action must be ordinarily and commonly performed by the official and not involve making or encouraging a decision to continue or award new business. 39/ The following examples are provided in the statute:

- granting a permit, license or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
- processing government papers such as a visa or work permit;
- providing police protection or mail collection or delivery;
- scheduling inspections associated with contract performance or related to the transit of goods;
- providing telecommunications services, power or water;
- loading and unloading cargo;
- protecting perishable products, or commodities, from deterioration; and
- any other action of a similar nature.

The Criminal Code does not specify a value of a benefit considered to be "of a minor nature." When the amendment was first presented to the Australian Parliament, there were two different versions of the "facilitation payment" defense: the first provided for a fixed maximum sum, while the other specified that the payment be of a "small value." 40/ The latter was adopted

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36/ Criminal Code Amendment (Bribery of Foreign Public officials) Act 1999 (Cth), Schs 1 (Australia).

37/ Id. at § 70.2(1) (Australia).

38/ Id. at § 70.4(1).

39/ Id. at § 70.4(2).

40/ Buckley, Ross and Danielson, Mark, Facilitation Payments in International Business: A Proposal to Make Section 70.4 of the Criminal Code Workable, Austrl. L. J., p. 11 (Feb. 2008), available at <http://law.bepress.com/unswwps/flrps08/art2>.

into law in order to lessen the unpredictable effects of exchange rate fluctuations and impact of a payment in different countries. 41/

D. The United Nations Convention Against Corruption and the Inter-American Convention Against Corruption

In addition to the OECD Anti-Bribery Convention, there are two other major international agreements to combat corruption: the United Nations Convention Against Corruption (UNCAC) and the Inter-American Convention Against Corruption (Inter-American Convention). In contrast to the FCPA and OECD Anti-Bribery Convention, the Inter-American Convention does not mention an exception for facilitation payments to government officials. 42/ Instead, it prohibits all payments to a foreign official "in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions." 43/ There are no exceptions to this rule.

The UNCAC seeks to prevent corruption in both the private and public sectors. 44/ To date, the agreement has 140 signatories and has been ratified by 116 countries. The UNCAC covers a wide range of offenses in addition to domestic and foreign bribery, including embezzlement and money laundering. While the UNCAC does not contain a specific exception or affirmative defense for facilitation payments, it does state that the domestic law of a State party governs applicable defenses for the offenses covered by the Convention. 45/ As such, the UNCAC permits signatories (such as the United States) to implement domestic laws containing "facilitation payments" exceptions and/or defenses to bribery charges, but can also be read to support local laws that prohibit facilitation payments.

III. Risks associated with relying on the "facilitation payments" exception

Facilitation payments carry legal risks even if they are permitted under the anti-bribery laws of a particular country. In the United States enforcement agencies have taken a narrow view of the exception and have successfully prosecuted FCPA violations stemming from payments that could arguably be considered permissible facilitation payments. Violations of the accounting and recordkeeping provisions of the FCPA are also more likely when a company makes facilitation payments. Abroad, countries are increasingly enforcing domestic bribery laws that prohibit such payments. Companies that allow facilitation payments face a slippery slope to educate their employees on the nuances of permissible payments in order to avoid prosecution for prohibited bribes.

41/ Australia: Review of the Implementation of the Convention and 1997 Recommendation (2000), Organization for Economic Co-operation and Development, 1.1.9, available at <http://www.oecd.org/dataoecd/0/29/2378916.pdf>.

42/ Inter-American Convention Against Corruption, 39 I.L.M. 966 (Mar. 29, 1996).

43/ Id. at art. VII.

44/ United Nations Convention Against Corruption, U.N. Doc. A/58/422 (2005).

45/ Id. at art. 30, para. 9.

A. U.S. enforcement authorities construe the exception narrowly

Other than as discussed above in Section II, there is no definitive guidance on circumstances in which the facilitation payments exception applies. U.S. enforcement agencies have successfully prosecuted certain payments that arguably qualified for facilitation payments in the cases discussed in Section I.A.3 above. There may be less risk of enforcement by U.S. authorities in cases involving bona fide facilitation payments that are made specifically for one of the purposes enumerated in the FCPA. However, companies still face the risk of at least facing a governmental inquiry to explain the circumstances surrounding the payments, possibly resulting in penalties based on an unanticipated restrictive interpretation of the exception.

B. Potential non-compliance with the FCPA's accounting and recordkeeping provisions

While the anti-bribery provisions of the FCPA permit facilitation payments, the accounting and recordkeeping provisions of the law nevertheless require companies making such payments to accurately record them in their books and records. Companies or individuals may be reluctant to properly record such payments, as it shows some semblance of impropriety and effectively creates a permanent record of a violation of local law. 46/ However, failure to properly record such expenditures may result in prosecution by the SEC even if the underlying payments themselves are permissible.

One example of prosecution resulting from the misreporting of seemingly permissible facilitation payments involves Triton Energy Corporation, which settled an investigation by the SEC involving multiple alleged FCPA violations, including the misrecording of facilitation payments. 47/ An Indonesian subsidiary of the company had been making monthly payments of approximately $1,000 to low-level employees of a state-owned oil company in order to assure the timely processing of monthly crude oil revenues. The SEC did not charge that these payments violated the anti-bribery provisions of the FCPA; however, these payments were misrecorded in corporate books and therefore found to violate the FCPA's accounting and recordkeeping provisions. Triton Energy consented to an injunction against future violations of the FCPA and was fined $300,000.

C. Increased enforcement of non-U.S. laws that do not recognize an exception for facilitation payments

While the FCPA and certain other national anti-bribery laws contain exceptions for facilitation payments, such payments typically are considered illegal in the country in which they are made; we are not aware of any country in which facilitation payments to public officials of that country are permitted under the written law of the recipient's country. Accordingly, even if a particular facilitation payment qualifies for an exception of the FCPA, it nevertheless likely constitutes a violation of local law – as well as under anti-bribery laws of other countries that

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46/ Alexandra Wrage and Matthew Vega, Small Bribes Buy Big Problems, Center for International Private Enterprise, at 3 (Sept. 20, 2007), available at <http://www.cipe.org/publications/fs/pdf/092107.pdf>.

47/ SEC v. Triton Energy Corp., et al. (Civil Action No. 1:97CV00401 (RMU) (D.D.C. Feb. 29, 1997)).

also might apply simultaneously – and thus exposes the payer, his employer and/or related parties to prosecution in one or more jurisdictions. While enforcement to date in this area has been limited, increased global attention to corruption makes future action more likely. Countries that are eager to be seen as combating corruption are prosecuting the payment of small bribes with greater frequency. 48/

D. Corporate approaches to facilitation payments may exceed the legitimate scope and applicability of the exception

Companies struggle with how to address the "facilitation payments" exception in their compliance policy and procedures, if the subject is covered at all. Businesses should be wary of allowing employees to decide on their own whether a particular payment is permissible. Unless such payments are barred completely or each payment is subject to pre-approval (which in many cases would be unrealistic (e.g., passport control)), there is always the risk that an employee, agent or other person whose actions may be attributed to the company will make a payment in reliance on the exception when in fact the exception does not apply. In addition, the temptation to improperly record otherwise-permissible facilitation payments has been discussed above.

Certain industries are more likely to encounter requests for facilitation payments. For example, companies in the oil and gas exploration sector generally have large multinational operations encompassing numerous small-time activities that require approval from numerous public officials, such as importing necessary equipment and securing licenses and other approvals for exploration, drilling or other tasks. These multinational operations involve a high risk of improper payments that some employees may think are permissible due to the "facilitation payments" exception. As discussed in Section II.A.3 above, the U.S. Government has recently focused on the oil and gas exploration sector through its inquiries into Panalpina's activities, underscoring the need for companies in this and other global industries to be wary of the pitfalls of relying on the "facilitation payments" exception.

Increased enforcement of the FCPA has caused multinational companies to recognize that they must have an effective compliance policy in order to avoid the large penalties and negative publicity resulting from violations. In addition to revamping their internal policies and procedures, companies increasingly are focusing on training for employees, agents, joint venture partners and other related parties in order to underscore the importance of compliance with all applicable anti-bribery laws. Companies also are implementing more effective internal monitoring and reporting mechanisms to search for and address suspected instances of prohibited bribery. Without an unambiguous policy prohibiting facilitation payments, companies with global operations may encounter problems resulting from misinterpretation of permissible facilitation payments under the FCPA and other anti-bribery laws.

48/ See Wrage, supra note 46, at 3.

IV. Conclusion

The general justification for permitting facilitation payments is that such payments are an unavoidable cost of doing business in many countries. However, this rationale encourages bad business practice in countries by setting a permissive tone for corruption generally. Public officials accustomed to receiving bribes for so-called "routine governmental actions" may come to expect bribes in circumstances well outside the scope of the facilitation context. Companies that have made such payments in the past will be hard-pressed to refuse such demands in the future.

Transparency International (TI), a leading anti-corruption non-government organization, opposes excepting facilitation payments from the anti-bribery prohibitions. 49/ According to TI, exempting facilitation payments from the OECD Convention should be re-examined for three main reasons. First, facilitation payments are a major problem in developing countries and place a heavy burden on its poorest citizens. Allowing facilitation payments encourages a culture of corruption in countries without strongly enforced anti-bribery laws, which is harmful to both multinational companies and to the future of commerce in the country itself. Second, such payments are often not isolated incidents involving only low-level officials, but instead are part of a widespread extortion scheme organized from the top down. Third, it is often difficult to draw a line between facilitation payments and prohibited bribes, and making questionable payments can lead to severe penalties from increasingly aggressive enforcement agencies.

Facilitation payments constitute a gray area in the developing world of anti-bribery law and will remain so until there is a uniform approach endorsed by all major anti-bribery measures. Even when expressly permitted, making such payments entails significant legal and public relations risk for companies. Despite these risks, some companies continue to view facilitation payments as a necessary and integral part of doing business in many countries. Recent U.S. enforcement of the FCPA demonstrates that, notwithstanding an exception for facilitation payments in the law, this exception is construed narrowly. Ambiguity remains regarding what constitutes facilitation payments. The lack of guidance on this issue from enforcement authorities, coupled with increased worldwide enforcement of anti-bribery laws, may expose a company that believes it is acting within the scope of the law to prosecution, significant penalties and negative publicity.

49/ TI Recommendations of Enforcement, Transparency International (2007), available at <http://www.transparency.org/content/download/21633/314978/file/TI_recommendations_OECD2007.pdf>.