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ILLUMINATING CORRUPTION PATHWAYS: MODIFYING THE FCPA’S "GREASE PAYMENT” EXCEPTION TO GALVANIZE ANTI-CORRUPTION MOVEMENTS IN DEVELOPING NATIONS

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ILLUMINATING CORRUPTION PATHWAYS: MODIFYING THE FCPA’S “GREASE PAYMENT” EXCEPTION TO GALVANIZE ANTI-CORRUPTION MOVEMENTS IN DEVELOPING NATIONS

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Abstract

The Article proposes a new web-based reporting and publication system for “grease” or “facilitating” payments under the Foreign Corrupt Practices Act (“FCPA”). The FCPA penalizes the bribery of foreign government officials, but contains an exception for facilitating payments, made to expedite “routine governmental actions” such as mail or telephone services. Noting the ambiguities within the exception, many commentators and practitioners have called for its abolition. The Article proposes a different solution: entities making facilitating payments should be required to report these payments to the Department of Justice (“DOJ”). Then, the DOJ would publish this information on a website, with graphics displaying the number, amount, and purpose of payments, and the public-sector agencies around the world receiving them. By illuminating these ordinarily secretive transactions, the program would seek to inspire, galvanize, and focus anti-corruption efforts within developing nations, and to highlight the U.S. Government’s participation in the international struggle against corruption.

Introduction

The Foreign Corrupt Practices Act (the “FCPA” or the “Act”) is generally seen as a tool to combat global corruption, and specifically, as an effort to counteract the incentives for U.S. companies to bribe foreign officials. By reducing or eliminating bribery on the “supply side,” it is thought, the FCPA promotes the twin goals of cleaning up domestic corporate culture while minimizing the burdens of corruption, especially in developing nations. But there is a third (and frequently overlooked) goal of the FCPA: it was originally designed to bolster the global image of the United States, to strengthen relationships with our allies, and ultimately, to help the United States prevail in the Cold War. This “national interest” dimension of the FCPA receives relatively little attention in

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legal scholarship, but arguably, the national interest implications and role of the FCPA should guide the current legal debate over possible reforms to the Act.

This Article argues that the national interest aspect of the FCPA is at least as critical now as it was in 1977, when the Act was passed, and that it remains imperative for the United States to improve domestic corporate behavior, to strengthen the global movement against corruption, and to be seen by people around the world as the leading edge of the movement for honest, transparent, non-rapacious, and lawful governance. To this end, the Article proposes a modification of the FCPA’s exception for “grease” or “facilitating” payments, which will yield greater dividends in all three areas.

Currently, the FCPA allows payments made to “expedite or secure the performance of a routine governmental action,” such as providing permits and licenses, processing papers, providing police protection, providing mail or phone services, providing power and water supply, and “actions of a similar nature.”\(^2\) The basic concept was to exclude payments which merely hastened inevitable or non-discretionary governmental action, while outlawing bribes designed to “obtain or retain business.”\(^3\)

Commentators routinely note that the grease payment exception is riddled with vagueness and ambiguity, but they offer strikingly different solutions. Some call for outlawing grease payments altogether,\(^4\) while others argue that the exception should be clarified and strengthened, so that businesses can pursue opportunities abroad with

greater legal certitude. These arguments, however, are detached from the “national interest” dimension of the FCPA. Many legal scholars and commentators neglect this geopolitical image-making function of the FCPA, and essentially take the announced objectives of the Act (creating better corporate citizens and reducing global corruption) at face value. But deep concerns over U.S. prestige and popularity helped motivate passage of the FCPA in the first place, and these concerns should help guide the debate over the future of the Act.

If we analyze the FCPA as an important tool for positioning the United States at the forefront of the global anti-corruption movement, and thereby reaping grass-roots goodwill, a better solution to the “grease payment” conundrum emerges. Rather than banning grease payments altogether, or simply providing clarity for its own sake, this Article contends that Congress should modify the FCPA so that it illuminates pathways of corruption in foreign countries. Specifically, companies and individuals should be required to disclose any “facilitating payments” to the Department of Justice (“DOJ”). By publishing data about grease payments on the DOJ website, the U.S. Government can help citizens, NGOs, activists, and political leaders investigate and reduce corruption within their own bureaucracies. This would not only optimize the power of the FCPA to combat systemic corruption in developing nations, it would do so in a way that burnishes the image of the United States in the global “street.”

This Article is organized into five parts. Part I discusses the historical background and purpose of the FCPA, and the “grease payment” exception in particular.

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5 Weinograd, supra note __, passim.
6 E.g., Weinograd, supra note __, at 513 (“With these provisions, Congress attempted to stifle widespread bribery, mitigate its international consequences, and ‘restore public confidence in the integrity of the American business system.’”).
Part II examines the ambiguity of the “grease payment” exception, and highlights the difficulties this ambiguity creates for compliance with the FCPA. Part III places U.S. policy in comparative context, showing that there is a rising tide of anti-corruption efforts, and that the grease exception is now an outlier that fails to harmonize with other countries’ anti-bribery laws. Part IV argues that global anticorruption efforts constitute a top U.S. national security priority—both as a matter of substantively pursuing this goal, as well as communicating the U.S. commitment in ways that are readily visible, understandable, and concrete. Part V proposes a new solution to the grease payment quandary, which is to publish information about all such payments on the DOJ website, and thereby help citizens, leaders, NGOs, journalists, and many other local actors combat corruption within their own bureaucracies and political systems.

Part I. Historical Background and Purpose of the FCPA

In 1977, Congress unanimously passed the FCPA, thereby criminalizing the bribery of foreign officials by U.S. companies and individuals conducting business abroad.\(^7\) The FCPA was the first of its kind in the world.\(^8\) (The United States spent years trying to persuade other countries to adopt similar legislation,\(^9\) and in 1997, 34 nations signed an agreement [the “OECD Convention”] which requires its parties to criminalize

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\(^7\) Koch, \textit{supra} note \_, at 382.

\(^8\) \textit{MATTHEW BENDER \& CO., 6 SECURITIES LAW TECHNIQUES § 82.01(1) (2006).}

\(^9\) Koch, \textit{supra} note \_, at 386-87.
the bribery of foreign officials.\textsuperscript{10} The FCPA was amended in 1988, and again in 1998 in response to the OECD Convention.\textsuperscript{11}

The FCPA originally emerged in the wake of the Watergate scandal.\textsuperscript{12} Stanley Sporkin, Director of the SEC’s Division of Enforcement, followed the Congressional hearings into the Watergate affair with great interest.\textsuperscript{13} Sporkin found the testimony of corporate officials regarding payments to President Nixon’s re-election campaign particularly interesting.\textsuperscript{14} Upon looking into the matter, he found that the corporations had set up offshore slush funds that were used for many other kinds of illicit payments, including bribes for high-ranking officials of foreign governments.\textsuperscript{15} His inquiry soon became a formal SEC investigation, which ultimately revealed that many of America’s largest companies had paid over $300 million in questionable or illegal payments to foreign officials and politicians.\textsuperscript{16} Sporkin found that such payments were always disguised in the corporation’s books.\textsuperscript{17} Moreover, he was astounded to find that publicly traded corporations, unlike financial institutions, were not required to maintain honest books and records.\textsuperscript{18} Sporkin wondered if all that was needed was “a simple law that would require corporations to keep accurate books and records,” since bribery is generally a crime in foreign countries.\textsuperscript{19} Requiring disclosure, he thought, might

\textsuperscript{10} \textbf{MATTHEW BENDER \& CO., 6 SECURITIES LAW TECHNIQUES} § 82.01(1) (2006).
\textsuperscript{11} \textit{Id.}
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.} at 272.
\textsuperscript{16} \textit{Id.} As Sporkin reports, the legal basis for the SEC’s civil lawsuits at the time was that the bribery payments were required to be disclosed to shareholders as “material facts” under the Supreme Court’s standard in \textit{TSC Indus., Inc. v. Northway, Inc.}, 426 U.S. 438 (1976). \textit{Id.} at 274 & n.18.
\textsuperscript{17} \textit{Id.} at 274.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
foreclose the bribery option.\textsuperscript{20} Sporkin advised Senator William Proxmire, who introduced the legislation that ultimately became the FCPA.\textsuperscript{21} As adopted, the FCPA included explicit anti-bribery provisions, and applied to private as well as to publicly-traded corporations.\textsuperscript{22}

The larger political context giving rise to the FCPA, however, involved the United States’ relationships with allies and developing nations during the Cold War.\textsuperscript{23} The SEC investigation launched by Sporkin publicly revealed many embarrassing bribes paid to high-ranking officials in countries allied with the United States.\textsuperscript{24} For example, Bell Helicopter had made payments in Ghana and Iran; Gulf Oil paid $4 million to the ruling political party in South Korea; Exxon had made $19 million in payments in Italy alone; and Lockheed Aircraft had paid Japanese Prime Minister Tanaka Kakuei $2 million to influence All Nippon Airways in their purchasing.\textsuperscript{25} In the wake of the American failure to win “hearts and minds” in Vietnam, this massive corruption seemed to present American capitalism in the worst possible light. It also strengthened the rhetorical arsenal of America’s opponents in developing nations, enabling them to argue that local corruption was the result of American influence.\textsuperscript{26} A variety of motives, then, including

\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 275; see also S. REP. NO. 95-114, at 1-2 (1977).
\item \textsuperscript{22} Sporkin, supra note ___, at 275.
\item \textsuperscript{24} Schroth, supra note ___, at 595-96.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} The House Committee Report stated that bribery “[w]as counter to the moral expectations and values of the American public,” “erode[d] public confidence in the integrity of the free market system,” rewarded inefficiency, lowered ethical standards, tended to “embarrass friendly governments,” “[l]ower[ed] the esteem for the United States among the citizens of foreign nations,” and lent “credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.” On the last point, the House Committee cited recent scandals faced by the governments of Japan, the Netherlands, and Italy. H.R. REP. NO. 95-640, at 4-5 (1977).
\end{itemize}
morality, economic efficiency, a concern for honest financial reporting by American companies, and U.S. foreign policy interests led Congress to enact the FCPA in 1977.

The original 1977 version of the law included an exception for grease payments that focused on the status of the recipient. If a foreign government employee merely performed “ministerial” or “clerical” functions, that person was not considered a “foreign official,” and the payment was legal under the FCPA.\(^27\) Congress amended the FCPA in 1988 in response to corporate pressure,\(^28\) adding two affirmative defenses, instructing the executive branch to urge other countries to adopt similar laws, and expanding and clarifying the grease payment exception.\(^29\) One affirmative defense, under the 1988 amendments, is that the payment, gift, or offer of payment was “lawful under the written laws and regulations” of the foreign country involved.\(^30\) Another affirmative defense is that the payment was a “reasonable and bona fide expenditure” that was “directly related” to marketing activities or the performance of a contract.\(^31\)

Congress also altered the grease payment exception, shifting the focus from the status of the official to the purpose of the payment.\(^32\) Under the amended FCPA, “facilitating or expediting” payments are acceptable when their purpose is to “expedite or


\^28\ Koch, supra note ___, at 383.

\^29\ MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES § 82.01(1) (2006).

\^30\ 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2010); MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES § 82.02(11)(a) (2006). Because this affirmative defense requires a written authorization for the payment within the laws of the country—not simply a lack of prohibition—it has been called “virtually unusable.” Steven R. Salbu, Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act, 54 WASH. & LEE L. REV. 229, 247 (1997).

\^31\ 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2010); MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES § 82.02(11)(b) (2010).

\^32\ Koch, supra note ___, at 385; see also DONALD B. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 20 (2nd ed. 1999).
secure the performance of a routine governmental action." Furthermore, the statute defines “routine governmental action” as an action which is “ordinarily and commonly performed by a foreign official” and provides a laundry list of possible actions that would be considered “routine.” These include providing permits and licenses, processing papers, providing police protection, providing mail or phone services, providing power and water supply, and “actions of a similar nature.” The statute furthermore provides that a “routine governmental action” cannot apply to a decision to award or continue business with a particular party.

Congress again amended the FCPA in 1998 in order to implement the 1997 OECD Convention. Following the 1998 amendments, the requirement of a connection to interstate commerce was removed, such that the FCPA covers all Americans abroad by virtue of their nationality. The act was also amended such that any person, whether a foreigner or U.S. citizen, who performs an “act in furtherance” of an illegal foreign bribery while in U.S. territory is in violation. The definition of “public official” expanded to include officials of international organizations. Lastly, the Act was expanded to ban payments to acquire “any improper advantage,” rather than simply to acquire or retain business.

33 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2010); MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES § 82.02(10) (2010).
34 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2010).
36 Id.
38 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2010); Ashe, supra note ___, at 2902.
39 15 U.S.C. § 78dd-3(a); Ashe, supra note ___, at 2902.
42 Ashe, supra note ___, at 2902.
In 1977, many in Congress assumed that other countries would eagerly join the anti-corruption bandwagon. In fact, this took twenty years, and required persistent advocacy, especially by the Clinton Administration. It also helped that the end of the Cold War ushered in democratic transitions and increasing globalization, and that global corruption and inefficiencies were becoming more visible as a result. Non-governmental organizations like Transparency International appeared, and quickly gained prominence in the fight against corruption. By the 1990s, development economists were condemning corruption as a serious impediment to economic growth and democratic accountability. More importantly, perhaps, highly-publicized bribery scandals in Italy, Japan, South Korea, Spain, France, and Belgium helped win support for the OECD Convention, showing that corruption could be a serious problem in developed nations as well. The Organization of American States (OAS) called for action against corruption; new democracies in Latin America suggested that developed countries were complicit in corruption to the extent that they failed to counteract the bribery of their multinational corporations. This anti-corruption momentum culminated in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on February 15, 1999.

43 Ashe, supra note ___, at 2903.
44 Ashe, supra note ___, at 2911-13.
47 Ashe, supra note ___, at 2910-11.
48 Tarullo, supra note ___, at 679.
In the U.S., the number of prosecutions under the FCPA has risen sharply over the past fifteen years. During the first twenty years of the FCPA, the Department of Justice (“DOJ”) prosecuted thirty cases of international bribery, while the SEC brought three civil cases. At a rate of 1.5 criminal prosecutions per year, this was “surely a drop in the ocean,” as The Economist noted in 2002. However, both the DOJ and the SEC have been increasing their enforcement activities. Contributing factors to this heightened stringency include corporate scandals like Enron and WorldCom, the passage of the Sarbanes-Oxley Act in 2002, higher scrutiny of international transactions under the USA Patriot Act, and the economic rise of China (creating many more opportunities and incentives for bribing Chinese officials). Increasingly, commercial litigants see

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50 M. SCOTT PEELE & J. CARSON PULLEY, INTERNATIONALIZING THE FCPA: ENDING THE FACILITATION PAYMENTS EXCEPTION AND U.S. ANTI-CORRUPTION HYPOCRISY 4, INTERNATIONAL BRIBERY: FCPA UPDATE 2011 (Thomson Reuters, 2011) (“The Justice Department and SEC, along with the FBI, have continued to devote more and more resources to FCPA enforcement. As a consequence of these trends, U.S. and foreign businesses are expending unprecedented resources of their own in overhauling their anti-corruption compliance programs, conducting internal investigations, training personnel, and generally responding to palpable and overwhelming pressure to purge corrupt business practices both from within their companies and from the international business community at large.”).


53 Id.; Faucett, supra note ___, at 214.

54 Faucett, supra note ___, at 214; Michael T. Burr, Litigants See the FCPA as a Potential Weapon They Can Use to Force a Settlement, CORP. LEGAL TIMES, Nov. 2005, at 22-25.


56 Burr, supra note ___, at 22.

57 Bixby, supra note ___, at 115-16 (“the emergence of China and other nations as global economic powers appear to have had a significant influence on the increase in the number of FCPA cases in recent years”); Peter S. Goodman, Common in China, Kickbacks Create Trouble for U.S. Companies at Home, THE WASHINGTON POST (Aug. 22, 2005) p. A-1 (“In interviews, China-based executives, sales agents and distributors for nine U.S. multinational companies acknowledged that their firms routinely win sales by paying what could be considered bribes or kickbacks — often in the form of extravagant entertainment and travel expenses — to purchasing agents at government offices and state-owned businesses.”).
FCPA violations as a weapon they can brandish in negotiation settlements.\textsuperscript{58} Between 2001 and 2005, there were about 4.6 prosecutions of FCPA violations per year by the DOJ and the SEC; from 2006 to 2009, this rate increased to 18.75 prosecutions per year.\textsuperscript{59} From 2006 through the middle of 2010, the U.S. government brought 162 cases, which is more than the entire number of prosecutions between 1977 and 2005.\textsuperscript{60}

The U.S. has also been expanding its arsenal of enforcement tools for FCPA violations.\textsuperscript{61} The first known DOJ “sting” operation for FCPA violations came to light in January 2010, when 22 corporate officers in the arms industry were arrested, most of them while attending an industry event in Las Vegas.\textsuperscript{62} The indictments charged that these corporate officers had agreed to pay “commissions” for arms sales to an undercover FBI agent, who pretended to be representing the Minister of Defense for an African nation.\textsuperscript{63} In addition, U.S. officials responsible for FCPA enforcement have announced

\textsuperscript{58} Burr, \textit{supra} note \textsuperscript{___}, at 22.


\textsuperscript{60} F. Joseph Warin, Charles Falconer & Michael S. Diamant, \textit{The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight Against Corruption}, 46 TEX. INT’L L.J. 1, 69 (2010); see also Michael B. Bixby, \textit{The Lion Awakens: The Foreign Corrupt Practices Act – 1977 to 2010}, 12 SAN DIEGO INT’L L.J. 89, 104 (2010) (“In the current post-Enron, Sarbanes-Oxley Act (SOX) era, the SEC and the DOJ have dramatically increased civil and criminal enforcement of the FCPA, compared with the previous twenty-five years. Not only are these agencies bringing many more cases, but the DOJ is also starting to utilize novel theories of liability to prevent corrupt corporations from avoiding prosecution. . . . Since 2004 . . . both the SEC and DOJ have begun to aggressively enforce the law. The SEC hired hundreds of employees to enforce corporate compliance cases, the DOJ hired two attorneys to focus only on FCPA cases, and the FBI created a new four-person unit which handles only FCPA investigations. Government officials publicly announced that they will be monitoring companies for FCPA violations more carefully than they have before.”); \textit{id.} at 104-08 (discussing how a variety of individual and corporate entities have become the subject of FCPA investigations).

\textsuperscript{61} \textit{PEELER} \& \textit{PULLEY}, \textit{supra} note \textsuperscript{___}, at 3.


\textsuperscript{63} \textit{id.}
new initiatives, including “targeted sweeps” or “industry-wide sweeps” of specific

Even before the recent spike in prosecutions, a consensus had developed that the
FCPA had significantly impacted U.S. business practices.\footnote{E.g., Lee C. Buchheit & Ralph Reisner, Why Has the FCPA Prospered?, 18 NW. J. INT’L L. & BUS. 263, 266 (1998) (“The FCPA has been remarkably effective in altering corporate behavior. Many large multinational corporations have instituted ‘compliance programs’ designed to deter and uncover activities that could, at the least, embarrass the company and, at the worst, subject it to civil or criminal penalties.”); Thomas Catan & Joshua Chaffin, Bribery Has Long Been Used to Land International Contracts: New Laws Will Make that Tougher, FINANCIAL TIMES (London), May 8, 2003, at 19 (noting that prosecuted cases have acted as a “powerful deterrent”); but see Michael Skapinker, Time to Come Clean: If the Menace of Corruption is to be Wiped Out, Bribe Must Be Stopped at Their Source, FINANCIAL TIMES (Jan. 30, 2002) p. 13 (noting a 1999 survey showing that U.S. companies were perceived as more likely to pay bribes than their competitors from eight other industrialized countries); The US Anticorruption Record in Principle and Practice, OIL & GAS JOURNAL (Aug. 26, 2002) p. 28 (citing 2002 survey ranking the United States as 13\textsuperscript{th} on the list of countries whose companies were least likely to pay bribes).} Criminal and civil penalties
are available for violations of the accounting or anti-bribery portions of the FCPA.\footnote{Marika Maris & Erika Singer, Foreign Corrupt Practices Act, 43 AM. CRIM. L. REV. 575, 591-94 (2006).} For
a corporation or individual, these penalties include the possible suspension or revocation
of all business with a U.S. agency.\footnote{Id. at 591.} The (now advisory) U.S. Sentencing Guidelines
provide that an individual who willfully violates the anti-bribery provisions of the FCPA
can receive up to a $100,000 fine and a prison sentence of five years.\footnote{Id. at 592.} For a corporation,
a willful breach of the FCPA accounting provisions can result in a fine of up to
$25,000,000, and a willful breach of the anti-bribery provisions can result in a fine of
$2,000,000.\footnote{Id. at 592-94.} Aggressive combined SEC and DOJ prosecutions, however, have resulted
in significant fines, including a $20 million fine against Lockheed Martin in 2002.\footnote{Id. at 593.}
Titan Corporation agreed to pay $28.5 million in fines in 2005. The longest prison terms in FCPA cases have included 87 months without possibility of parole (for bribing Panamanian government officials relating to contracts awarded for maintaining lighthouses and buoys along Panamanian waterways), as well as 63 months and 37 months (for paying a Haitian official in connection with obtaining a tax refund from the Haitian government).

The advisory U.S. Sentencing Guidelines provide that, with respect to the sentencing of organizations, the sentence should be based partly upon the “culpability of the organization.” Organizational culpability depends upon “the steps taken by the organization prior to the offense to prevent and detect criminal conduct” and the “level and extent of involvement in or tolerance of the offense by certain personnel.” As a result, many companies have implemented FCPA compliance programs, both to help prevent FCPA violations, and to minimize their penalties if they are prosecuted.

The effectiveness of the FCPA in altering the behavior of U.S. companies might also be gauged by the degree to which it has cost them business. The competitive disadvantage of U.S. firms, operating in a world market in which only they are barred from bribing foreign officials, has been one of the strongest arguments against the FCPA since its passage in 1977. It is difficult to measure the exact extent of the harm to U.S.

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71 Benjamin Norris, Don’t Ignore the FCPA, J. OF COM., Feb. 27, 2006, at 42.
73 Norris, supra note ___, at 42.
75 U.S. SENTENCING GUIDELINES MANUAL § 8 intro. cmt. (1997).
76 PEELER & PULLEY, supra note ___, at 4.
77 See Salbu, supra note ___, at 261-71.
businesses—because bribery is usually secretive, and it’s impossible to know which contracts would have been awarded to U.S. companies had they been equally free to bribe. In general, bribery is estimated to affect overseas contracts worth billions of dollars per year. Some commentators have doubted that the FCPA truly harms U.S. business interests. On the other hand, one study suggested that U.S. companies lost $45 billion in business in 1994 alone to overseas competitors who paid bribes. U.S. Secretary of Commerce Ron Brown testified in 1995 that U.S. exporters lost half the sales, totaling $25 billion, in two hundred cases of bribery studied. The US Trade Compliance Center reported that U.S. firms may have lost 9 contracts to bribery of foreign officials, worth $6 billion, during a 1-year period in 2001-02. These costs, however, must also be balanced against the savings to U.S. companies, in that the FCPA provides a face-saving way to avoid making illicit payments.

In theory, the FCPA’s costs to U.S. businesses should be diminishing as other countries, following the 1997 OECD Convention, adopt similar laws against the bribery of foreign officials. However, other nations have been much slower to initiate systematic prosecutions. By 2005, aside from the United States, only two other OECD Convention Members (Sweden and South Korea) had successfully prosecuted foreign bribery cases.

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80 Amy Borrus, A World of Greased Palms: Inside the Dirty War for Global Business, BUS. Wk., Nov. 6, 1995, at 36, 36; Salbu, supra note ___, at 256. This figure is an outlier on the very high end of estimates, however, and it is impossible to know how much of the $45 billion would have gone to U.S. firms in the absence of the FCPA.
81 Salbu, supra note ___, at 256. It is unclear how many years the bribery cases covered, however. And again, it is impossible to know how much of the $25 billion in sales would have gone to U.S. firms anyway.
82 The US Anticorruption Record in Principle and Practice, OIL & GAS J., Aug. 26, 2002, at 28. U.S. firms may have lost $6 billion in contracts affected by bribery, but again, it is unclear how many of them would have been won in the absence of the FCPA.
84 Ashe, supra note ___, at 2915 & n.130.
Only four other countries had even launched investigations or legal actions: Canada, France, Italy, and Norway.85 As long as the U.S. remains the strongest enforcer of its anti-bribery laws, U.S. firms will likely suffer some comparative disadvantage.

For twenty years, the FCPA was a unique law, and the United States remains the most stringent enforcer of laws against bribing foreign officials.86 Has this made U.S. firms the “cleanest” in the world, in terms of bribing foreign officials? Apparently, it has not. A 2011 survey by Transparency International (TI) shows that executives in emerging markets ranked nine other countries higher than the U.S., in terms of their companies’ unwillingness to pay bribes.87 (Switzerland, the Netherlands, and Belgium were deemed the least likely to pay bribes.88) This result, however, may have been influenced by the industries and geographic locations in which the various nations’ companies do business. U.S. oil companies, for example, may be under much greater pressure to bribe foreign officials than Swiss banks. Perceptions of U.S. business practices, moreover, would probably be far worse without the FCPA.

Congress included the grease payment exception for several reasons. Because of the prevalence of grease payments in many countries, and because such payments may often be seen as acceptable or permissible, it was felt to be impossible for the U.S. to unilaterally eradicate them.89 Given their prevalence worldwide, a total ban on grease

85 Id. at 2915 & nn.131-132.
88 Id.
89 See H.R. REP. NO. 95-640, at 8 (1977) (noting that “it is not feasible for the United States to attempt unilaterally to eradicate all such payments”).
payments would likely involve enforcement difficulties,\textsuperscript{90} and could impose a serious competitive disadvantage upon U.S. businesses.\textsuperscript{91} (Of course, the latter argument is somewhat diminished by the passage of the OECD Convention, and the adoption of strict anti-bribery laws—without grease payment exceptions—in many other countries. Still, as long as U.S. enforcement remains more systematic, the specter of competitive disadvantage looms.) Congress did not set a dollar limit on the grease payments (even though some witnesses advocated for one\textsuperscript{92}) because it did not want to set a minimum price for U.S. firms to conduct business overseas, and felt that the focus should be on the purpose of the payment, rather than the amount.\textsuperscript{93}

\section*{Part II. The Ambiguity of Grease}

Many commentators criticize the essential ambiguity of the “grease” or “facilitating payment” exception, and argue that distinguishing acceptable “grease payments” from illegal “bribes” can be extremely difficult.\textsuperscript{94} Steven Salbu analyzes three

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\textsuperscript{90} Koch, \emph{supra} note \_, at 396.
\textsuperscript{91} Koch, \emph{supra} note \_, at 395; \textit{The Foreign Trade Practices Act: Hearings Before the Subcomm. on Int’l Econ. Pol’y & Trade of the H. Comm. on Foreign Affairs, 98\textsuperscript{th} Cong. 217, 217 (1983).} See also Christopher F. Dugan & Vladimir Lechtman, \textit{The FCPA in Russia and Other Former Communist Countries, 91 AM. J. INT’L L. 378, 380 (1997)} (“Congress introduced [the grease payment] exception out of concern that U.S. companies could lose business in countries where facilitating payments are a prevalent way of doing business.”).
\textsuperscript{92} See, e.g., \textit{Business Acc’tg & Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Sec. & the Subcomm. on Int’l Fin. & Monetary Pol’y of the S. Comm. on Banking, Hous., & Urban Affairs, 97th Cong. 438 (1977)} (prepared statement of Wallace L. Timmeny, Kutak Rock & Huie) (suggesting a dollar limit on grease payments). But see Bixby, \emph{supra} note \_, at 110 (“[A]lthough nothing in the law sets any limit, in practice, there appears to be a maximum ceiling of about $1,000 for grease payments.”)
\textsuperscript{93} \textit{The Foreign Trade Practices Act, Hearings Before the Subcomm. on Int’l Econ. Pol’y & Trade of the H. Comm. on Foreign Affairs, 98\textsuperscript{th} Cong. 217, 285 (1983); Koch, \emph{supra} note \_, at 398.}
\textsuperscript{94} E.g., Warin et al., \emph{supra} note \_, at 13-14 (“distinguishing true facilitating payments from those that influence an official’s discretion proves quite difficult”); Weinograd, \emph{supra} note \_, at 514-15 (“Practitioners, academics, and courts have struggled to delineate facilitating payments from unlawful bribes. Though the canons of statutory interpretation require a threshold analysis of the FCPA’s plain language, sections 78dd-1(b) and 78dd-1(f)(3)(A) are riddled with vagueness.”); \textit{PEELER & PULLEY, supra}}
levels of ambiguity facing a prospective payer: the exception requires the payer to analogize their payment to the “routine governmental actions” listed in the statute, the payer must understand the nature of the payment (which can be difficult in a foreign environment), and the payer must assess whether a request for a payment to “expedite” a decision is actually asking for a bribe that could determine the award of business.95

The definition of “routine” is particularly problematic; it could be interpreted to mean either “frequent” or “ordinary,” and it is unclear just how frequent or ordinary the action has to be.96 One hypothetical situation illustrates this ambiguity and the problems it raises for U.S. companies. If a foreign government official offers to expedite a lawful tax refund for a percentage of that refund, this transaction would appear to meet the statutory requirement for a “routine government action.”97 A DOJ official, however, has declared that the DOJ would probably not consider this payment as falling within the grease payment exception, because that official was exercising discretion in determining which refunds to process first.98 U.S. businesses are thus left to puzzle the ambiguities of this statutory language whenever confronting a request for an “expediting” payment.99

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95 Salbu, supra note ___, at 266-67. As Salbu notes, “[i]mplications concerning what expediting payments really entail may be communicated by a glance or tone of voice.” Id. 96 Koch, supra note ___, at 389-90. 97 Compare U.S. v. Vitusa, 3 FCPA Rep. 699.155 (1994) (DOJ implicitly deems a payment made to speed a foreign government’s payment of an undisputed debt was not covered by the “facilitating” payment exception when the payment was made to a senior official of the Dominican Republic using his influence to have the payment made) with SEC v. Triton, 4 FCPA Rep. 699.471 (1997) (SEC implicitly deems payments to low-level tax clerks made to expedite undisputed payments from the Indonesian government covered by the “facilitating” payments exception); see also Weinograd, supra note ___, at 521-25. 98 Koch, supra note ___, at 390-91. 99 Id.
As noted above, the 1988 amendments to the FCPA attempted to clarify the grease payment exception, by shifting the focus from the status of the recipient to the purpose of the payment. Rather than allowing payments to officials whose duties were essentially “ministerial” or “clerical,” the statute now allows payments made to “expedite or secure the performance of a routine governmental action.” 100 There are a variety of competing views on how to understand this language, and how to comply with it. Some observers interpret the exception to cover almost every commonly performed governmental action, aside from actions involving an official’s discretion over whether to continue or award new business to a particular party. 101 At the same time, some businesses have prohibited all payments to foreign officials because of the vagueness of the statute. 102

Another way that businesses have dealt with this ambiguity is to simply flag the issue as problematic, and have their legal departments make determinations on a case-by-case basis. The FMC Corporation, a global chemical company, has explicitly recognized the need for grease payments in its “Business Conduct Guidelines.” 103 At the same time, FMC Corporation has instituted a “hierarchy of control” over grease payments, such that any grease payment over $5,000 requires advance approval by the General Counsel and the Chief Financial Officer. 104

100 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006); MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES § 82.02(10) (2006). One commentator argues that the “purported clarifications” of the 1988 Amendments may be “partially or completely illusory.” Salbu, supra note ___, at 265.
101 Salbu, supra note ___, at 258-59.
102 Id. at 259.
103 Patrick J. Head, The Development of Compliance Programs: One Company’s Experience, 18 NW. J. INT’L L. & BUS. 535, 542 (1998). From the Business Conduct Guidelines: “In some countries where the company operates, required administrative action or procedural assistance, not involving obtaining or retaining business, can be obtained in a timely fashion only through the payment of modest gratuities to government officials or employees.” Id.
104 Id.; see also Goelzer, supra note ___, at 300 (noting that a “methodology for obtaining approval . . . may be desirable in situations in which such payments are common”).
One FCPA lawyer advises that reliance upon the grease payment exception should be “limited,” because it can be “difficult to determine whether a particular action is ‘ordinarily and commonly performed’ or whether it could be deemed part of the ‘decision-making processes.’" The facilitating payment exception has been called “slippery,” but also a realistic recognition that “US businesses operate in many countries that are not Switzerland.” According to one corruption expert, the grease exception is “understandable” but “ultimately unhelpful,” because it “creates more problems than it solves.” The Department of Trade and Industry in Britain has stated that there is no clear definition of facilitating payments or their distinction from bribes.

The grease exception was meant to cover modest payments, but there is no numerical cutoff in the statute for what can and cannot constitute a grease payment. There is wide disagreement over the question of “how much is too much” to count as a grease payment. No court has yet provided an interpretation of the grease payment exception. In practice, grease payments have reached as high as tens of thousands of dollars. At the same time, the lowest bribes for which there have been FCPA prosecutions have involved tens of thousands of dollars. The typical bribery prosecutions involve payments of hundreds of thousands to millions of dollars.

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105 Goelzer, supra note ___, at 286; see also Moyer, supra note ___, at 41 (noting that many FCPA provisions, including the grease payment exception, remain “undefined and ambiguous”).
107 Catan & Chaffin, supra note ___, at 19.
108 ECONOMIST, supra note ___.
109 Koch, supra note ___, at 397.
110 Weinograd, supra note ___, at 519 (“No judicial or administrative opinion directly addresses the routine governmental action exception.”); Koch, supra note ___, at 386; Maris & Singer, supra note ___, at 587 (“[t]here have been no court decisions interpreting this exception”).
111 Id., Timothy Ashby, Steering Clear of the FCPA, 45 ORANGE CTY. LAW. 10, 11 (2003). But see Maris & Singer, supra note ___, at 587 (“There is no statutory cap on the amount of grease payments to public officials, although all those allowed have been less than $1,000.”)
112 Ashe, supra note ___, at 2932.
113 Id. at 2931-32.
rule of thumb for many major corporations (such as the FMC Corporation) is that any payment under $5,000 is legal.\textsuperscript{114} On the other hand, Matthew Bender recommends that grease payments should “ordinarily” be kept to no more than $100.\textsuperscript{115} Clearly, no bright line exists to help companies remain within the boundaries of the grease payment exception.

While the courts have not yet interpreted the grease payment exception, the reasoning in some decisions on other aspects of the FCPA could potentially apply to grease payments. In \textit{United States v. Kay}, a federal district court in the Southern District of Texas determined that two executives from American Rice, Inc. did not violate the FCPA in making payments to Haitian government officials, because the payments were intended to secure reductions in customs duties and sales taxes, not to assist the executives in “obtaining or retaining business.”\textsuperscript{116} However, the Fifth Circuit Court of Appeals overturned this decision, reasoning that “avoiding or lowering taxes reduces operating costs and thus increases profit margins,” enabling a company to gain an “unfair advantage over competitors,” and thereby assisting that company in obtaining or retaining business.\textsuperscript{117} The appellate court ruled that if the bribes were intended to lower American Rice’s costs of doing business in Haiti “enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations,” then the bribes would fall under the FCPA, and remanded that issue to the district court.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 2905 n.53.
\item \textsuperscript{115} \textit{MATTHEW BENDER & CO., 6 SECURITIES LAW TECHNIQUES} § 82.02(10) (2006).
\item \textsuperscript{117} \textit{United States v. Kay}, 359 F. 3d 738, 749 (2004).
\item \textsuperscript{118} \textit{Id.}
\end{itemize}
indictment was sufficient, the appellate court determined that the “obtaining or retaining business” element, while important, did not go to the FCPA’s “core of criminality.”\footnote{\textit{Id.} at 761 ("When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner. The business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business, just as the ‘grease’ provisions eschew applicability of the FCPA to payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters.").}

But if the statutory language of “obtaining or retaining business” can be understood to cover any illicit payment that helps business by reducing costs, could the statutory language of the grease payment exception face a similar interpretation? For example, if the purpose of a payment was to 1) expedite a routine governmental action and 2) make local officials happy, such that they proved generally helpful so as to reduce business costs generally, then arguably the Fifth Circuit’s logic in \textit{United States v. Kay} could dictate that the payment did not fall under the grease payment exception. The Fifth Circuit, after all, interpreted a payment to lower a company’s customs and sales tax burden as a payment to “obtain or retain business”—not an obvious interpretation of the FCPA’s language. By similarly construing the statutory language against a defendant, a court might insist that a payment with multiple purposes, as described above, might not fall within the grease payment exception—especially if there was evidence that the conduct of business became easier or cheaper generally after the facilitating payments were made. But if this is the case, then what is left of the grease payment exception? Many such payments are probably not made with just a single objective; they may demonstrate a willingness to be cooperative, they may secure a general favor and goodwill, and they may, in practical terms, waive future procedures or obstacles that might otherwise hamper or increase costs for the conduct of that business.
In dicta—because *Kay* was not about grease payments specifically—the Fifth Circuit expressed narrow views concerning the applicability of the grease payment exception. In particular, the Fifth Circuit equated grease payments with “payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters.” Cutting through red tape—though nowhere mentioned in the statutory language—is probably a narrower category than “expediting or securing the performance of a routine governmental action.” Cutting red tape implies a purely expediting action, whereas the statutory language of “securing” includes those actions which, while being routine, might well never happen at all, in the absence of the grease payment.

Clearly, the grease payment exception is riddled with uncertainties and ambiguities. These problems have probably played a significant role in other countries’ decisions not to include a grease payment exception in their laws prohibiting bribery of foreign officials.

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120 *E.g.*, id. at 745 (“The extent to which the exception for routine governmental action (‘facilitating payments’ or ‘grease’) is narrowly drawn reasonably suggests that Congress was carving out very limited categories of permissible payments from an otherwise broad statutory prohibition.”); id. at 746 (“In its bill, the House intended ‘broadly [to] prohibit[] transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official . . . .’”); id. at 749 n.40 (“Congress enacted amendments in 1988 in an effort to reflect just how limited it envisioned the grease exception to be.”); id. at 749-50 (“Congress explicitly excluded facilitating payments (the grease exception). In thus limiting the exceptions to the type of bribery covered by the FCPA to this narrow category, Congress’s intention to cast an otherwise wide net over foreign bribery suggests that Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person.”); id. at 750-51 (“A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. . . . routine governmental action does not include the issuance of every official document or every inspection, but only . . . very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries. In contrast, the FCPA uses broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business . . . ”).

121 *Id.* at 761.

122 Some commentators have urged that many aspects of the FCPA, including the grease payment exception, require clarification. See, e.g., Dugan & Lechtman, *supra* note ___, at 388 (“How to analyze FCPA liability in transitional countries is a trying subject, filled with ambiguities in both the law and commercial realities. The U.S. business community would be well served by any government policy that clarified the situation, whether through legislative, regulatory or DOJ opinions.”).
Since 1977, there has been a rising tide of international initiatives to combat bribery and governmental corruption generally. The European Union, the Council of Europe, the European Bank for Reconstruction and Development, the International Monetary Fund, the World Bank, the WTO, the Inter-American Development Bank, and the Asian Development Bank have all instituted anti-corruption programs.

The United Nations General Assembly adopted anti-corruption declarations in 1996 and 1998, urging the criminalization of foreign bribery and the development of anti-corruption programs. The Organization of American States adopted the Inter-American Convention Against Corruption in 1996; this convention prohibits the solicitation of illicit payments by government officials, requires signatories to criminalize the payment and receipt of bribes, and even requires member states to make an official’s “unexplainable significant increase in wealth” illegal. There is no exception for grease payments in the Inter-American Convention Against Corruption; Article VIII criminalizes all payments made “in connection with any economic or commercial transaction, including facilitating payments.”

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123 Koch, supra note ___, at 386.
125 Koch, supra note ___, at 388; Weinstein, supra note ___, at 355-56.
126 Koch, supra note ___, at 388-89.
The United Nations Convention Against Corruption entered into force in December 2005.\textsuperscript{128} So far, it has been signed by 140 countries, including the United States.\textsuperscript{129} Parties to this agreement have agreed to criminalize the “promise, offering or giving, to a public official . . . of an undue advantage . . . in order that the official act or refrain from acting in the exercise of his or her official duties.”\textsuperscript{130} Read literally, this convention mandates the criminalization of “grease” or facilitating payments as well.\textsuperscript{131}

The 1988 amendments to the FCPA, which urged the executive branch to persuade other countries to adopt similar laws, ultimately bore fruit. In 1997, the Organisation for Economic Co-operation and Development (“OECD”) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”).\textsuperscript{132} Signatories to the OECD Convention obliged themselves to criminalize the bribery of foreign officials by December 31, 1999.\textsuperscript{133} Parties have committed themselves to criminalizing complicity with such bribery, the attempt to bribe, and the conspiracy to commit such bribery.\textsuperscript{134} The OECD Convention defines bribery as “[t]o offer, promise or give any undue . . . advantage . . . to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper

\textsuperscript{130} United Nations Convention Against Corruption art 15(a), Dec. 11, 2003, 43 I.L.M. 37, 46.
\textsuperscript{131} Koch, \textit{supra} note \textsuperscript{___}, at 394.
\textsuperscript{132} Koch, \textit{supra} note \textsuperscript{___}, at 386-88; see also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 [hereinafter “OECD Convention”].
\textsuperscript{133} Koch, \textit{supra} note \textsuperscript{___}, at 387.
\textsuperscript{134} \textit{Id}. 

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advantage in the conduct of international business.” The OECD Convention does not include an explicit exemption for grease payments. The Commentaries on the OECD Convention, though, note that “small facilitation payments” are not an offense, because they are not made in order to “obtain or retain business or other improper advantage.” Thus, a party to the OECD Convention—such as the United States—that chooses to maintain an explicit exception for grease payments can argue strongly that it is nonetheless fully complying with the agreement. Thus far, 39 countries—mostly in Europe, but also including Argentina, Australia, Brazil, Canada, Chile, Israel, Japan, South Korea, Mexico, New Zealand, Russia, South Africa, Turkey, and the United States—have ratified the OECD Convention and adopted implementing legislation.

Most countries that have adopted legislation criminalizing foreign bribery, pursuant to the OECD Convention, make no exception for “grease” or “facilitating” payments. In France, for example, an amendment to the Criminal Code (Title III, Chapter V, Article 453-3) criminalizes the act of proposing any advantages to a foreign public official, whatsoever at any time, without right, in order to obtain or retain business or other improper advantage. The new British anti-corruption law, called the Bribery Act, makes no exception for facilitating payments (although British authorities have

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135 OECD Convention, supra note ___, art. 1 § 1.
136 Koch, supra note ___, at 393.
137 Id.; OECD Convention, supra note ___, comment., art. 1, para. 9.
139 Koch, supra note ___, at 380, 393.
stated that do not intend to pursue many prosecutions against such payments). In Germany, the implementing legislation (the Act on Combating International Bribery) went into effect in 1999. There is no *de minimis* rule concerning bribery in Germany, because where a breach of duty is concerned, there is no possibility of excluding small gifts. Brazil’s implementing legislation criminalizes “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.” As long as the advantage is not expressly authorized under the written laws of the official’s country, any kind of advantage whatsoever will be deemed improper. Japan’s Unfair Competition Prevention Law, implemented pursuant to the OECD Convention, similarly makes no exception for small facilitation payments. Australia, following the U.S. example, does exclude facilitation payments made to secure a routine government action—as long as the payment was “minor,” and the payer’s sole or dominant objective was to secure the routine government action.

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141 Warin et al., *supra* note ___, at 20-21; see also PEELE & PULLEY, *supra* note ___, at 4 (noting that the U.K.’s Bribery Act, which became fully effective in April 2011, creates broad prohibitions on public sector and commercial bribery for “essentially any company or person with a connection to the U.K.”).


143 Id. at 2.


145 Id. at 4-5.


the grease payment exception as contrary to international norms, given the proliferation
of international agreements and domestic laws against foreign bribery which make no
such exception.\textsuperscript{148}

\textbf{Part IV. Anticorruption and U.S. Foreign Policy}

This Part contends that U.S. foreign policy interests dictate an aggressive
campaign against global corruption, and that reform of the grease payment exception to
the FCPA plays an important role within that effort. Specifically, we should consider the
FCPA in general, and the grease payment exception in particular, as elements of a broad
and robust U.S. anticorruption policy. This anticorruption policy has two basic features:
(1) developing policy instruments to reduce governmental corruption around the world;
and (2) ensuring that the U.S. commitment to anticorruption is effectively communicated
in ways that are readily visible, understandable, and concrete, so that the U.S. reaps
maximum public-relations benefit.

The FCPA was passed in 1977 amidst grave concerns over U.S. foreign relations
during the Cold War, when American companies had been caught bribing leading

\textsuperscript{148} See, e.g., Peeler & Pulley, \textit{supra} note ___ , at 6 (“It is time for Congress to recognize that, largely
because of the United States’ enforcement efforts, other countries’ laws have in fact ‘evolved and matured’
with exceptional speed. The 1988 justifications for the [facilitating payment] exception are long gone, and
it is high time to eliminate the FCPA’s unworkable facilitation payments exception”); Thomas R. Fox,
“The End of the FCPA Facilitation Payment Exception?” FCPA Compliance and Ethics Blog (Nov. 11,
exception/(last visited July 1, 2012); Koch, \textit{supra} note ___, at 394 (“It is plausible that the international
community has expressed a consensus that facilitating payments constitute bribery, and thus, the FCPA
places the United States in opposition to norms expressed by the international community.”); M. McCary,
\textit{Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective}, 35 TEX. INT’L L.J. 289,
314 (2000) (“Although greasing payments are considered to be acceptable in certain foreign locales, the
international community has recently expressed a consensus that such payments constitute bribery.”)
officials of allied governments.\textsuperscript{149} This corruption, it was thought, was alienating our allies, embarrassing friendly governments, and strengthening our opponents. In this case, the larger foreign policy goals—strengthening our alliances against the Soviet Union—trumped concerns about a competitive disadvantage for U.S. companies, operating in a global market where the FCPA stood alone.\textsuperscript{150}

Since 1977, the FCPA and other anticorruption initiatives appear to have had some success: the great scandals of the 1970s involving large American bribes to senior government officials in allied countries (such as Italy and Japan) have not been repeated.\textsuperscript{151} U.S. alliances with its NATO partners and other western democracies held firm during the 1980s, and the Cold War ended in the early 1990s. Despite certain areas of disagreement—such as over the Iraq invasion of 2003—the Western military alliance remains in place.

The primary national-security threat faced by the United States today is no longer the Soviet Union, but radical terrorist groups. Still, the foreign-policy imperative to

\textsuperscript{149} See supra notes ___-___ and accompanying text.
\textsuperscript{150} See supra notes ___-___ and accompanying text.
\textsuperscript{151} Some commentators, however, have questioned the efficacy of the FCPA. See, e.g., Walter Perkel, \textit{Foreign Corrupt Practices Act}, 40 AM. CRIM. L. REV. 683, 686 (2003) (positing that the FCPA has not had a significant impact upon corruption); Salbu, supra note ___, at 272 (suggesting that “the FCPA has . . . made few incursions into the widespread custom of paying bribes”); \textit{id.} at 273 (suggesting that the FCPA has been “largely ineffectual”); \textit{id.} at 282 (“The FCPA appears to have had little effect in eliminating or reducing corrupt practices throughout the world.”). Neither Perkel nor Salbu present much evidence for their assertions, however. Salbu’s footnote to the last assertion, in fact, simply acknowledges that “the effects of legislation such as the FCPA are difficult to measure,” and goes on to state that “bribery remains a widespread practice despite the efforts of the FCPA.” \textit{Id.} at 282 n. 343. In the absence of good data on the prevalence of international bribery by U.S. companies, before and after the FCPA, we must rely on reasonable inferences regarding the effect of criminalization and criminal enforcement. As noted above, there is a general consensus that the FCPA has had a significant impact on U.S. business practices. See supra notes ___-___ and accompanying text. With increasing globalization, FCPA compliance programs have been spreading across the American corporate landscape. Moreover, the evidence that the FCPA has cost U.S. firms significant amounts of business—although just how much remains unclear—presents conclusive evidence that the FCPA has significantly lowered the willingness of U.S. firms to bribe foreign officials. See supra notes ___-___ and accompanying text.
remain on the right side of global anticorruption efforts remains critical. Arguably, it is even more important now for the United States to play a strong anticorruption role—and to be perceived as playing a strong anticorruption role—than it was when the FCPA passed in 1977. The foreign-policy rationale for U.S. anticorruption efforts today is no longer about preserving the Western democratic alliance, in the face of corporate slush-fund payments to friendly government leaders. Instead, it is about convincing broad majorities of people, within the Islamic world and elsewhere, that the United States stands with them, against unjust, illegal, and oppressive actions by their own government leaders and officials.

This argument breaks down into two separate components. First, U.S. interests (and the interests of the international community more generally) are promoted by a reduction in corruption (in Islamic countries and elsewhere) whether or not the U.S. or other international actors are credited for this improvement in governance. (We might call this the “substantive” aspect of the argument.) Second, U.S. interests are promoted by positioning the United States at the forefront of a global anticorruption movement, whether or not the movement actually succeeds in reducing corruption levels. (We might call this the “reputational” prong of the argument.)

Substantively reducing corruption levels around the world serves U.S. interests in three major ways: (1) corruption presents a threat to effective anti-terror operations, because it weakens state capacity and allows terror networks to “flip” government

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152 This discussion focuses on the role of U.S. anticorruption efforts in confronting the threat from terrorist groups, but this is not to suggest that this is the only context in which anticorruption policies will serve U.S. interests. For example, the image of the United States in the eyes of the Chinese population will be enhanced if the Chinese public perceives the U.S. as actively undermining the predatory and corrupt behavior of Chinese officials, and helping to effectuate change. While this posture may have ambiguous or uncertain consequences with respect to U.S.-Chinese relations while the Chinese Communist Party remains in power, it will surely serve the U.S. well if there is a democratic revolution in China.
officials over to their side, or at least encourages government actors to adopt a lax and non-rigorous posture;¹⁵³ (2) corruption dampens economic productivity, reducing opportunities and increasing levels of frustration;¹⁵⁴ and (3) corruption appears incompatible with stable democratic governance.¹⁵⁵

First, governmental corruption works at cross-purposes with any effective and systematic policy, including policies aimed at suppressing, deterring, investigating, and prosecuting militant and/or terrorist organizations. The effort against terror networks is a global police operation¹⁵⁶ that requires extensive cooperation between sophisticated, dedicated, and professional law enforcement and intelligence organizations around the world.¹⁵⁷ For this global effort to be effective, each link in the chain must be strong. In ways that were unimaginable during the Cold War, American security depends upon the activities of Pakistani, Saudi Arabian, and Egyptian security forces, among many others.¹⁵⁸ Therefore, it is critical that those organizations act in a coherent, united, and purposeful manner—without divided loyalties or independent power bases within them. At best, official corruption in such settings relaxes anti-terrorism efforts; at worst, it

¹⁵³ See infra notes ___-___.
¹⁵⁴ See infra notes ___-___.
¹⁵⁵ See infra notes ___-___.
¹⁵⁶ Describing the antiterrorism effort as a “global police operation” does not mean that only police officials, as opposed to military forces, are involved. Functionally, however, antiterrorism efforts largely revolve around investigating criminal activity and tracking down suspects.
shields or actively assists terrorist groups. In many instances, therefore, the struggle against terrorism requires effective policies against corruption.

There is strong evidence linking governmental corruption with terrorist organizations and activities. The Pakistani Inter-Services Intelligence (ISI), for example, has been closely linked to the Taliban in Afghanistan and to militant extremists in Kashmir, and these relationships have involved covert drug profiteering. Pakistani policy was openly supportive of the Afghani mujahideen, and then of the Taliban regime, until shortly after September 11, 2001. Much funding for the ISI’s war effort, however, did not come from official Pakistani governmental spending, but from covert and illicit activities, especially involving poppy cultivation. In Iraq, massive levels of corruption within Iraqi ministries, particularly the oil ministry, financed the insurgency against U.S. forces. In Afghanistan, there has long been a close relationship between the Taliban

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159 E.g., AZAR GAT, VICTORIOUS AND VULNERABLE: WHY DEMOCRACY WON IN THE 20TH CENTURY AND HOW IT IS STILL IMPERILED 171 (2010) (“Not only can terrorists find a safe haven for their activities in militant or failed states; these countries are also a source for dangerous materials and weapons, because of their low security standards and high levels of corruption.”).

160 TRACE, an international non-profit organization that fights corruption in business transactions, has also recognized a national-security dimension to foreign corruption. TRACE International, The High Cost of Small Bribes, at 8 (2003) (“One U.S. company reported that the terrorist attacks of September 2001 put a new face on the practice of paying small bribes. That company had routinely paid foreign officials for processing work permits and visas but is now very uncomfortable promoting corruption in this area. If visas can be bought, borders won’t be safe.”); Jane Stromseth, David Wippman, & Rosa Brooks, Can Might Make Rights? Building the Rule of Law After Military Interventions 7 (2006) (describing threats to “global peace and security” arising because of the absence of rule-of-law institutions).


162 Veena Kukreja, CONTEMPORARY PAKISTAN: POLITICAL PROCESSES, CONFLICTS AND CRISES 197 (2003) (noting that the ISI gave tribes supporting the anti-Soviet mujahideen insurgency a “free hand to indulge in various activities ranging from gun-running to drug trafficking”); id. at 200-01 (noting that Muhammad Ayub Afridi, described as the “biggest drug baron in Pakistan,” worked with the ISI to arm the Afghan mujahideen); id. at 208-09 (“The genesis of this unholy nexus of narcotics drugs, army and ISI goes back to 1979 when the US government launched its combat mission against the Soviet invasion of Afghanistan.”)

163 Kukreja, supra note ___, at 197-209.

164 THOMAS E. RICKS, THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006-2008 216 (2009) (“A study done at the U.S. embassy [in 2007] concluded that corruption was ‘the norm’ in many of the ministries in the Iraqi government . . . Leakage at the oil agency was said to be ‘massive,’ with much of the money going to the insurgency, the report alleged.” (216)
insurgency and the heroin trade, and corruption is generally described as “rampant” within government of Afghan President Hamid Karzai.

For governments nominally aligned with the United States, it should be no surprise that anti-U.S. terrorist activities feed upon official corruption. Without corruption, an official in Hamid Karzai’s Afghanistan would be expected to dutifully (perhaps zealously) pursue Taliban fighters, or at least inhibit their illegal activities. By bribing that official (with drug profits, for example), the Taliban effectively creates a new Taliban agent, at least temporarily. This problem led former U.S. Attorney General John Ashcroft to describe corruption as a “sanctuary to the forces of terror.” This issue, moreover, is endemic in all anti-terrorism efforts. The suicide bombing of two Russian airplanes in August 2004, for example, was facilitated by bribes to Russian government

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165 Elizabeth Rubin, *In the Land of the Taliban*, N.Y. TIMES MAG., Oct. 22, 2006, at 91; Ahmed Rashid, *Descent Into Chaos: The United States and the Failure of Nation Building in Pakistan, Afghanistan, and Central Asia* 317-18 (2008) ("The Taliban resurgence, al Qaeda’s reorganization, and the restarting of its training camps for international terrorist groups after the U.S. invasion would have been impossible without the explosion in heroin production. . . . [T]he attempts of the Afghan government and the international community to rebuild state institutions, curb warlordism, and create a viable legal economy were heavily imperiled by the illicit cash generated by drug traffickers . . . . The flood of money to tribesmen on both sides of the border led to the spread of Talibanization. In short, one of the major reasons for the failure of nation building in Afghanistan and Pakistan was the failure to deal with the issue of drugs.").


168 Louise I. Shelley, *Organized Crime, Terrorism and Cybercrime, in SECURITY SECTOR REFORM: INSTITUTIONS, SOCIETY AND GOOD GOVERNANCE* 304 (Alan Bryden & Philippe Fluri eds., 2003), available at http://www.american.edu/traccc/resources/publications/shelle31.pdf (last visited Nov. 5, 2006) (“The widespread problem of corruption in many developing countries allows the proliferation of transnational organized crime and terrorism. The official corruption facilitating this activity may assume many different forms . . . [t]op government officials provide falsified documents to smuggled criminals and terrorists, restrain law enforcement from acting against suspicious groups and provide them a safe place to operate.”)
Corruption in Kenya has made it easier for Islamic terrorists to operate there. Second, corruption creates economic inefficiency, reduces government revenue, and harms transparency for investment purposes. Development economists view corruption as a principle impediment to economic growth. Corruption tends to prove especially damaging in developing countries, where the human costs are higher. For these reasons alone, we should expect that corruption helps generate pools of disaffected young men, susceptible to militant and extremist movements.

Third, corruption probably helps sustain authoritarian regimes, because it provides regime leaders with financial support unrelated to their performance, and because it provides existing regime members with incentives to maintain the status quo. If many elites are implicated in corruption, they may not want to risk exposure under a new, democratically-elected government. As a result, they may support a dictatorial regime’s continued grip on power. At the same time, corruption can engender great

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170 *No End to the Problem: Ever More Reasons to Worry About Endemic Corruption*, ECONOMIST, Nov. 18, 2006, at 49 (noting that “[s]mall bribes at remote border posts and larger bribes at Kenya’s domestic airports are enough to make Somalis invisible to Kenya’s security services”).
171 Salbu, *supra* note ___, at 249-54.
172 *Ashe, supra* note ___, at 2910. *See also* Tarullo, *supra* note ___, at 675 (“Instead of regarding bribery as a means for getting things done in rigid bureaucracies, by the 1990s, development economists were characterizing corruption as one of the principle impediments to both economic growth and democratic accountability.”); Rose-Ackerman, *supra* note ___, at 31; Schroth, *supra* note ___, at 619-20.
173 Salbu, *supra* note ___, at 252 (“Warped political processes that drain resources have a pronounced effect in places where scarcity magnifies the harm of dissipating or misdirecting funds. Bribery payments that convince public officials to invest in marginal rather than necessary projects or to award contracts on the basis of kickbacks rather than the overall quality of a bid’s value waste assets in developing countries that can ill afford to have them squandered.”) (citations omitted).
174 Patrice Hill, *Studies Say Elites Spurred to Terror*, THE WASHINGTON TIMES, Nov. 20, 2002, p. C-10 (studies show that young men in nations like Egypt, Saudi Arabia, and Pakistan turn to terrorism because they abhor corruption, and because of stalled economic progress).
175 Salbu, *supra* note ___, at 252.
176 Rose-Ackerman, *supra* note ___, at 45.
social resentment, and provide the rhetorical basis for a military coup.\textsuperscript{177} Either way, high levels of corruption are not associated with stable democratic governance.\textsuperscript{178}

Beyond the substantive advantages involved in reducing corruption levels, the U.S. has strong incentives to be \textit{perceived} as the leading edge in the global anti-corruption campaign. The campaign for “hearts and minds” in the Islamic world can only succeed if people in Muslim countries can actually see U.S. policies working in visible, concrete, and practical ways to address corruption problems and inequities affecting their own lives. If the United States fails to effectively communicate its anti-corruption efforts and position, many Muslims may assume that the U.S. essentially sides with entrenched and corrupt elites, against their own interests, and may embrace puritanical Islamist visions of the just society as the only solution.\textsuperscript{179}

This tension—between perceiving the United States as a force for democracy, accountability, and humane government, and as a force for preserving a corrupt and unjust status quo—has been particularly apparent during the recent revolutionary turmoil

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\textsuperscript{177} Rose-Ackerman, supra note \textsuperscript{__}, at 45.
\textsuperscript{179} E.g., Rashid, supra note \textsuperscript{__}, at 362-63 (describing how the Taliban has gained momentum in Afghanistan by providing law and order: “On several counts the Taliban began to provide the Pashtuns in the south the semblance of an alternative government. The absence of justice had become one of the primary recruiting tools for the Taliban, who carried out a primitive ‘justice on the spot’ system, according to their interpretation of Sharia law. Their system was brutally harsh but effective, compared with that of the existing courts, which were riddled with corruption and long delays. People did not necessarily prefer Sharia law, but they were comparing it with the absence of any other kind of law. Crime dropped dramatically in areas where the Taliban provided such services. The public also took note when Mullah Omar issued a thirty-point rule book for Taliban fighters to improve their performance in governance and behavior.”).
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across the Middle East known as the “Arab Spring.” Many Egyptian protesters, for example, denounced the United States for supporting President Hosni Mubarak, even as the United States was distancing itself from the Mubarak regime and calling for a democratic transition. Even if the Egyptian transition to democracy proceeds relatively smoothly, for example, many Egyptians will remain wary of the U.S. role in their country, and many will expect the United States to provide strong support for building a more humane, more accountable, and less corrupt system of government. If the United States fails to do so, as it has so far failed in Afghanistan, the resulting disappointment, not only in Egypt but across the region, could prove dangerous for U.S. interests.

By criminalizing the bribery activities of our own businesses, and thus creating a competitive disadvantage for ourselves, the U.S. anti-corruption effort gains credibility because it involves some American sacrifice. The more our anti-bribery laws are thorough, and the more they are systematically enforced, the greater the potential reputational gain. Still, the problem remains of how to make the extensive U.S.

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180 See, e.g., Leila Fadel, More Egyptian Protesters Demand that White House Condemn Mubarak, THE WASHINGTON POST (Jan. 30, 2011) (quoting an Egyptian protester: “We believe America is against us. Until now, Obama didn’t talk to the Egyptian people. He didn’t support the Egyptian people.”); Egyptian Protesters are Conflicted Over US Role, Associated Press (Jan. 31, 2011) (“Hostility toward the United States is widespread among the crowds in Cairo’s streets, who feel Washington’s alliance with Egypt—along with billions of dollars in military aid through the years—has helped Mubarak’s authoritarian regime keep its grip on power for nearly three decades.”).

181 E.g., Rashid, supra note __, passim; Thomas Barfield, Afghanistan: A Cultural and Political History 304 (2010) (“In [Afghanistan under President Hamid Karzai], personal relationships determined everything from who would amass personal wealth to who would be thrown in jail. Karzai did not use the assets of the state to centralize power so much as he used them to create a patronage network of personal clients bound to him.”).

182 See, e.g., Egyptian Protesters are Conflicted Over US Role, Associated Press (Jan. 31, 2011) (quoting an Egyptian protester: “America is worried about instability in Egypt, so they’ll try to find a new leader they like and anoint him to work for their interests . . . . They will keep stepping on our heads.”).

183 Although effective policing by friendly regimes would be the primary rationale behind strong U.S. anticorruption policies, these reputational benefits are also important. At least anecdotally, there are strong indications that official corruption not only assists Islamic-extremist insurgencies in practical ways, but contributes to the rage that they use in recruitment. See, e.g., Elizabeth Rubin, Taking the Fight to the Taliban, N.Y. TIMES MAG., Oct. 29, 2006, at 61-62 (“With a corrupt justice system, young Afghan men on the receiving end of injustice have often felt their honor could only be restored through acts of revenge.”).
enforcement activities under the FCPA more visible, apparent, and concrete in the lives of ordinary citizens around the world, so that the U.S. may reap greater reputational benefits for the anti-corruption efforts (and sacrifices) that it is already making.

Part V. Proposal: Publication of Grease Payments on the DOJ Website

This Part argues that a simple reform of the “grease payment” exception can simultaneously strengthen the international campaign against corruption, clarify legal ambiguities surrounding that provision, provide greater security to U.S. companies pursuing international business opportunities, and most importantly, help render U.S. anticorruption efforts under the FCPA more visible, concrete, and salient to people around the world.

There are a variety of ways for Congress to proceed on grease payments. The simplest option would be to repeal the grease payment exception entirely.\textsuperscript{184} This would solve the ambiguity of grease, clarify the law, harmonize U.S. law with the laws of most other parties to the OECD Convention, and take a firm stand against any and all complicity by U.S. companies with foreign corruption. It would also strengthen the U.S. anticorruption campaign with respect to other governments. On the other hand, this could raise serious enforcement problems (i.e., companies might decide to disobey the law, in order to do business in certain locations), and compliance could conceivably cost U.S. firms significant amounts of business. Another possibility would be for Congress to

\textsuperscript{184} See Koch, supra note ___, at 380 (“repeal of the statutory exception would provide a quick solution to the troubles associated with grease payments”).
establish a monetary ceiling on grease payments.\textsuperscript{185} This would help clarify the law, while retaining some ambiguity because a payment could be below the ceiling, yet still not be considered facilitating a “routine governmental action.” By outlawing relatively large grease payments, this step would arguably help bring U.S. law closer to international norms, and make a stronger anti-corruption statement.

These solutions, however, ignore the most important U.S. foreign policy objective: to help other countries police their own officials, and root out endemic patterns of corruption within their own bureaucracies. Can we use American criminal law in creative ways to facilitate that process? Rather than outlawing grease payments altogether—thus driving them completely underground—the U.S. could use the FCPA as leverage to render them visible to the global community. With greater visibility and transparency, prosecutors, investigating judges, NGOs, the media, and other actors in foreign states could use that information to mobilize and target anti-corruption efforts.

A. Reporting and Web Publication System

The following presents a brief overview of a program that would replace the current exception for “facilitation payments.”

To use the facilitation payments exception, an entity (whether it be a corporation, partnership, LLC, individual, etc.) would be required to report any facilitation payment within 30 days of making such a payment to the U.S. Department of Justice (“DOJ”). The DOJ would provide a secure web-based system for making these reports. The paying entity would provide the following information:

\textsuperscript{185} See Koch, supra note ___, at 396-99.
• the name of the entity making the payment (i.e., The Shell Petroleum Development Company of Nigeria Ltd.);
• the entity’s ultimate parent company (i.e., Royal Dutch Shell plc);
• the receiving country plus the governmental department or agency, down to the particular bureaucratic sub-entity or office (i.e., Nigeria, Ministry of Petroleum Resources, Department of Petroleum Resources, Corporate Services Division);
• the date the payment was made;
• the amount of the payment;
• the purpose of the payment (i.e. what “routine governmental action” was provided in return for the payment); and
• the contact information of the person responsible for filing the report on behalf of the entity making the payment.

Entities that made a timely report would be allowed to use the facilitation payment exception with respect to that payment. In addition, their payment—perhaps as long as it was below a certain ceiling—would be treated as presumptively fitting the exception. (This presumption could still be reversed by evidence showing that the payment did not meet the required elements for a facilitating payment.) Finally, if an entity reported facilitating payments as required, this would be considered a mitigating factor in all aspects of criminal sentencing and civil penalties under the FCPA, while failure to do so would be considered an aggravating factor.

Next, the DOJ would briefly review incoming reports, and determine whether they appeared to be legitimate. (This would be done, in part, to avoid the danger of
corrupt officials swamping the system with false reports, in order to hide their own activities amidst thousands or millions of payments.) As part of this process, a DOJ employee might verify the essential details of the payment with the contact person identified in the report. To further prevent the possibility of false reports, it could be a separate and independent felony to knowingly make a false report, or to knowingly make a false statement in connection with verifying a report.

Next, the DOJ would publish, on a special website, vivid, easy-to-use maps, charts, and graphs depicting the reported facilitating payments. The website would display the data in many different ways. For example, there could be a map of the world, with nation-states color coded by the number and/or total dollar amount of facilitating payments reported within a particular period of time. There might also be graphics indicating the locations of entities making facilitating payments. The user might also click on a specific country, and see charts or graphs indicating which agencies and departments received facilitating payments, the purposes of the payments, and other information received by the DOJ. The contact information of the person reporting the payment, however, would not be provided. (To protect the legitimate privacy interests of such persons, and to encourage reporting under this system, personal contact information should also be shielded from disclosure under the Freedom of Information Act.)

As noted below, this may be advisable only to the extent that many of these entities are non-U.S.-based companies. This is likely, however, because the FCPA applies to foreign companies or persons whenever they cause, directly or through their agents, any “act in furtherance” of an FCPA violation to take place within U.S. territory. 15 U.S.C. § 78dd-3(a); U.S. Dep’t of Justice, Foreign Corrupt Practices Act, available at http://www.justice.gov/criminal/fraud/fcpa/ (last visited July 21, 2012). Because of the interconnected nature of the global economy, such “acts in furtherance” within U.S. territory are necessarily common. Of the top ten civil settlements that have been reached with the U.S. Government under the FCPA, eight involve foreign-based companies. Richard L. Cassin, “In New Top Ten, Eight Are Foreign,” The FCPA Blog, Nov. 5, 2010, available at http://www.fcpablog.com/blog/2010/11/5/in-new-top-ten-eight-are-foreign.html; see also Press Release, U.S. Dep’t of Justice, “Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), available at http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html (last visited July 21, 2012).
The purpose of the website would be to illuminate patterns of dubious “facilitation payments” around the world, and to allow as many people as possible to understand, largely through imagery rather than through verbal or numerical analyses, exactly which governmental agencies are involved in collecting these payments. The larger objective is to generate political pressure against corruption around the world, by bringing otherwise hidden and secretive transactions into the light, and to make the United States Government a key instigator and partner of such reform efforts.

B. Objections to Web Publication System

(1) Harm to U.S. Image

One argument against this proposal would be that by exposing U.S. companies’ complicity with petty corruption, the DOJ website would actually tarnish the anticorruption reputation of the United States, rather than enhance it. This is a relevant concern, but for the following reasons, it should not stand in the way of implementing this proposal, at least on an experimental basis.

First of all, as noted above, the data will almost certainly demonstrate that companies from all over the developed world—not just U.S.-based companies—are complicit in making facilitation payments. Among the ten largest civil settlements that the U.S. Government has reached with FCPA violators, eight involve foreign companies. These include Siemens and Daimler AG (German firms), Panalpina and ABB Ltd (Swiss

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*187 See supra notes ___-___ and accompanying text.*
companies), Shell (a British/Dutch company), and Technip S.A. (a French firm).\textsuperscript{188} If, for whatever reason, the reported data on facilitation payments is heavily skewed towards U.S.-based entities, the DOJ should have the discretion to present the data in a way that obscures this pattern. The DOJ would be directed to highlight the global nature of corruption, and specifically, to demonstrate that entities from all over the world (and especially from the industrialized nations) participate in making dubious or corrupt payments to government officials (largely in the developing world).

The DOJ should also display the data in ways that help defuse any notion (espoused by radical Islamists, for example) that corruption is a \textit{moral failing or contagion} that spreads from the U.S. to developing nations. Instead, the website will accurately present corruption as the natural result of two objective conditions: (1) the weakness of “rule of law” systems for policing the behavior of government officials throughout much of the developing world; and (2) the overwhelming financial leverage held by multinational companies with respect to wealth and income levels in developing nations. In other words, the website would demonstrate that international corruption is largely a function of the fact that rich companies can offer a lot of money to low-paid officials in developing countries, and for various reasons, these officials are frequently able to get away with taking bribes.

Moreover, the United States is \textit{already} seen as complicit with official corruption in many countries, and therefore should consider new methods for making its anti-corruption position and actions clearer and more salient. Within the Islamic world, for example, the U.S. is widely associated with highly corrupt regimes and leaders. These U.S. clients include former dictators Hosni Mubarak of Egypt, Zine el-Abidine ben Ali of

\textsuperscript{188} Cassin, \textit{supra} note ___.

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Tunisia, and Ali Abdullah Saleh of Yemen. The U.S. has supported the notably corrupt Palestinian Fatah party against their cleaner and more ideological HAMAS opponents. The current governments of Iraq and Afghanistan exhibit outrageous levels of corruption, and of course, the United States put both governments in power. Many radical Islamist parties—including Hezbollah, HAMAS, and the Afghan Taliban—make honesty, probity, and efficiency a centerpiece of their appeal.

Moreover, people around the world are already aware of the patterns of official corruption within their countries. People in highly corrupt states readily understand, for example, that to obtain ordinary government permits, licenses, and services, they must frequently pay off the relevant officials, or at least, they must have a connection with someone in government. When they see foreign enterprises operating within their communities, and obtaining government permits, licenses, and services, therefore, an entirely natural presumption is that those enterprises paid off the “right people.”

Despite the FCPA and other dimensions of U.S. leadership against international corruption, then, the United States Government and American business enterprises are actually viewed as complicit with corruption, to the detriment of ordinary people around the world. Therefore, the U.S. should take steps to change this narrative, especially by playing a “facilitating” or “partnering” role with local anticorruption efforts and actors.

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191 Nozar Alaolmolki, Militant Islamists: Terrorists without Frontiers 112 (2009) (“Hizbullah and HAMAS have earned the reputation of being honest and efficient in delivering numerous services to their constituents.”); Rashid, supra note ___, at 362-63 (the return of the Afghan Taliban is due in part to their provision of a semblance of honest and efficient governance in areas they control).
With this internet publication system in place, many people would immediately begin interacting with a U.S. government website, and in so doing, they could not fail to note the American government’s participation on their side of the political struggle. It would render the U.S. anticorruption effort far more practical and concrete in the minds of many people. The website would likely be popular, as one of the few (or only) methods for bringing corrupt activities to light. By pinpointing the exact agencies and departments receiving dubious payments, by identifying the services “purchased” by these payments, and by tracking trends over time, the website stands a good chance of catalyzing and focusing anti-corruption movements in many countries. In addition, the DOJ would be empowered to develop the website further, such as by providing discussion forums and other corruption-fighting resources.

By providing an important tool to strengthen anticorruption efforts, the amended FCPA can weaken one of the strongest pillars of radical Islamic rhetoric—that only the Islamists embody public rectitude, against the endlessly frustrating, invidious, and immoral corruption of American-backed governments. The DOJ website would make it far more clear, apparent, and obvious that the United States is taking strong action to fight corruption in developing nations.

(2) Legitimizes Improper Conduct

Another argument against this proposal would contend that by allowing “facilitation” payments if they are reported, and then by publishing them on the DOJ website, the U.S. Government would be legitimizing this type of corruption. If such
payments are legalized, and even publicized, a natural assumption might be that they constitute a valid means of conducting international business. By banning facilitation payments outright (as many other countries have), this argument might go, the U.S. would send a clearer message that facilitation payments constitute improper bribery.

First of all, just because this program does not ban facilitation payments does not mean that it validates or legitimizes them. While facilitation payments would not constitute unlawful conduct under the FCPA (assuming they met all the required elements), that is far from treating them as legitimate. Simply by collecting this information, and publishing it on a website, the DOJ would treat these payments as a “suspect” category, and subject them to a high level of scrutiny. The DOJ could make it clear that such payments are only allowed because the value of using them to learn about corruption patterns, and thereby to focus reform efforts, is greater than the value of banning facilitation payments outright. Because of the vagueness of the facilitation payments exception, any entities reporting facilitation payments to the DOJ would recognize that errors on their part could subject them to FCPA liability. A web publication system hardly constitutes a ringing endorsement of this type of payment.

Second, law enforcement agencies frequently allow “bad” activities to go forward, simply because they can thereby glean more information about the activities in

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192 In other words, the justification for this web publication system would be exactly the same rationale that is routinely employed in the field of diagnostic nuclear medicine. In this practice, radioactive isotopes are injected into a person’s body, which then serve (through scanning techniques) to illuminate internal phenomena such as cancer. Under current international guidelines, it is assumed that any dose of radiation, however small, presents a small risk of inducing cancer itself. However, because the radiation doses are generally so small, and because the medical benefits of acquiring critical information (such as learning the size, location, etc. of cancerous tumors) are so great, such techniques are largely non-controversial. See News Medical, “Nuclear Medicine Concerns,” available at http://www.news-medical.net/health/Nuclear-Medicine-Concerns.aspx (last visited August 1, 2012). Assuming that the web publication system proves helpful to anti-corruption reform efforts—and the DOJ should be empowered to curtail the system if it does not—the benefits of acquiring critical information on corruption patterns could vastly outweigh the downside risks of continuing to allow facilitation payments under the FCPA.
question, and ultimately repress them more effectively. One example would be a surveillance operation where some unlawful activities are observed, but officials simply decide to wait until greater crimes are committed, or until a greater number of suspects, or more high-profile targets, are implicated. Under these circumstances, it may often make far more sense to wait, rather than to make arrests at the first possible moment.  

(3) Exposing Petty Corruption Ineffective Against Grand Corruption

Another line of argument against the proposal in this Article might contend that it does little good to illuminate “petty” corruption patterns, when grand bribery schemes are different in kind, and are more deleterious for national development.

There are several reasons why so-called “grease payments” are important in the overall effort against corruption. As many have argued, if officials are taking grease payments, they are more likely to engage in other forms of corrupt behavior. In fact, officials who demand and receive grease payments will probably find more and more

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193 In certain situations, decisions to “wait” rather than step in earlier can admittedly be controversial. For example, the recent “gunwalking” scandals, including the notorious “Fast and Furious” program, involved decisions by officers within the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to allow gun sales to be completed by suspected straw purchasers, who were believed to be channeling guns to Mexican drug cartels. When those same guns were later implicated in violent crimes and the deaths of Mexican civilians and U.S. agents, the decisions to allow gun sales to go forward were subjected to withering scrutiny and criticism. E.g., Sharyl Attkisson, A Primer on the “Fast and Furious” Scandal, CBS News, (June 26, 2012), available at http://www.cbsnews.com/8301-31727_162-57461204-10391695/a-primer-on-the-fast-and-furious-scandal/ (last visited July 6, 2012). The proposal put forward in this Article shares none of the major defects of “Fast and Furious,” however, because: (1) the object of surveillance is simply money, rather than deadly weapons; (2) the recipients are foreign agencies and bureaucrats, rather than criminal drug cartels; and (3) the entire program would be subject to public scrutiny from the beginning, unlike a secretive law-enforcement operation.

194 Amanda Boote & Anne H. Dechter, Slipped Up: Model Rule 2.1 and Counseling Clients on the ‘Grease Payments’ Exception to the Foreign Corrupt Practices Act, 23 GEO. J. LEGAL ETHICS 471, 478-479 (2010) (noting arguments relating to the “broken windows” hypothesis, including that “low-level grease payments can spread to upper levels of government when corrupt officials are promoted”).
burdens and obstacles to impose—so as to enhance their grease payment income.195 They can also stretch the ethical boundaries of their conduct, such that grease payments grow into outright bribes.196

Perhaps the strongest arguments against grease payments, however, do not revolve around the ethical considerations of a single official, but recognize the social nature of corruption. When one’s peers are all engaging in an activity, that activity can seem “right” and less ethically problematic. Moreover, some of those peers will push the boundaries, and if they reap significant benefits, others will feel the pain of relative deprivation—until they too step up their level of corruption.197

Furthermore, corruption flourishes by building closed groups of “insiders.” For example, when customs officials accept bribes from drug smugglers (an obvious temptation and a common problem), they are committing serious crimes. In order to avoid criminal prosecution in turn, corrupt officials may need to share the proceeds with coworkers, supervisors, or law enforcement agents.198 Offering a bribe—especially to an

195 Rose-Ackerman, supra note ___, at 56 (“if bribes are paid to avoid burdens, it does not take too much cleverness on the part of officials to recognize that their returns may increase if they threaten to impose additional burdens or promise to award specialized benefits to bribe payers”); TRACE International, supra note ___, at 9 (noting that the “efficient grease” theory has been questioned by empirical research, because “entrepreneurial bribe-takers learn to focus their demands on companies that have paid bribes before,” and that “the level of harassment for small bribes actually increased with the rate at which they were paid”).

196 Rose-Ackerman, supra note ___, at 56 (“If not vigorously attacked, small-scale, facilitating bribes can feed on themselves. . . . officials might begin by limiting themselves to bribes that facilitate private business without imposing costs on the rest of society. . . . [but] it seems unlikely that they will limit themselves to such relatively benevolent forms of corruption.”).

197 See, e.g., Dan Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 604 (1996) (“Empirical studies show that the willingness of persons to obey various laws is endogenous to their beliefs about whether others view the law as worthy of obedience: if compliance is perceived to be widespread, persons generally desire to obey; but if they believe that disobedience is rampant, their commitment to following the law diminishes. Even a strong propensity to obey the law, in other words, can be undercut by a person’s ‘desire not to be suckered.’”) (citations omitted).

198 Arias, supra note ___, at 44 (“Police who make money from criminals and can deliver better pay-offs to corrupt superiors may be more likely to obtain promotions to powerful positions in the security hierarchy.”); id. at 185 (“Frequently, [Mexican] police take payment from traffickers in order to fulfill their bribe ‘quota’ to higher-ranking officers.”); PAUL CHEVIGNY, THE EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 233-36 (1995); Stanley Pimentel, The Nexus of Organized Crime and Politics in Mexico, in
unfamiliar party—is risky. The other party can report the incident or demand more.

Once a regular pattern of sharing illicit dividends arises, though, the danger ebbs, because each partner has exposed himself to criminal sanctions. At this point, the “insiders” share a common danger and purpose, and try to keep “outsiders” at bay.\textsuperscript{199}

Because mild corruption can build the social infrastructure necessary for more extreme forms, small bribes can be highly consequential. Illuminating small-scale “facilitation” payments can thereby help developing nations curb corruption at all levels.

Conclusion

Beginning with the original FCPA in 1977, many efforts have been developed to attack corruption by rendering financial transactions and governmental decisions more transparent. For example, the “Publish What You Pay” campaign, made up of a coalition of NGOs led by George Soros, is seeking to have all oil, gas, and mining companies publish all their payments to governments.\textsuperscript{200} The World Bank has banned many companies and individuals from doing business under World Bank financing because of corrupt practices; the list is publicly available on the World Bank’s website.\textsuperscript{201}

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\textsuperscript{199} ERIC M. USLANER, CORRUPTION, INEQUALITY, AND THE RULE OF LAW 49-50 (2008) (‘Corruption, of course, depends upon trust – or ‘honor among thieves.’ . . . Entrance into a corruption network is not easy. Members of a conspiracy of graft cannot simply assume that others are trustworthy . . . . [C]orruption thrives on particularized trust, where people only have faith in their own kind (or their own small circle of malefactors). . . . Clientelism reinforces strong in-group ties and hostility toward out-groups, paving the way for corruption.’); see also Johan Graf Lambsdorff, What Nurtures Corrupt Deals? On the Role of Confidence and Transaction Costs, in CORRUPT EXCHANGES 20, 20-36 (Donatella Della Porta & Susan Rose-Ackerman eds., 2002).
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Transparency International helps media outlets in developing nations publicize official corruption. An unusual application of this publicity principle is a Latvian finance minister’s decision to place a web camera in his office to facilitate public oversight. The proposal in this article would contribute to this burgeoning movement, and would use the FCPA’s substantial leverage to promote it.

This Article proposes to update the FCPA to fit current U.S. foreign policy interests, and at the same time, to solve problems regarding the ambiguity of the “grease payment” exception. (The proposal does not curtail ambiguity within the grease payment exception; rather, it harnesses the law’s ambiguity to spur compliance with the new reporting requirement.) By publishing a breakdown of petty corruption within foreign bureaucracies, as experienced by American companies, the U.S. may exert a far greater global anticorruption effect than the FCPA ever could in its current form.

Real progress against public-sector corruption around the world can only be made by aggressive reform movements within corrupt states—not from U.S. laws or international agreements. But a modified FCPA can help inspire, generate, mobilize, and focus those reform movements in the first place, and do so in a way that bolsters the prestige of the United States within the global community.

\footnote{Landers, supra note ___, at 1D.}
\footnote{Michael Skapinker, Time to Come Clean: If the Menace of Corruption Is to Be Wiped Out, Bribes Must Be Stopped at Their Source, FINANCIAL TIMES (London), Jan. 30, 2002, at 13.}