Are Facilitating Payments Legal?

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INTRODUCTION

Facilitating payments are bribes paid to obtain nondiscretionary acts from government bureaucrats. These bribes are usually small in size, and might seem inconsequential. The United States' Foreign Corrupt Practices Act does not even include facilitating payments among the actions that it deems criminal. Indeed, even though facilitating payments are bribes, they

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2. See infra pp. 131–35 (describing and discussing the exception from the Foreign Corrupt
have been described as “legal” by scholars, and even the crowd-sourced repository of common wisdom, Wikipedia.

Although seemingly inconsequential, the purported legality of facilitating payments provides a useful tour of the legal control of corruption. Persons or entities subject to the law of the United States who pay bribes to foreign government officials are not only bound by the laws of the United States, but are also bound by the laws of the polity in which they pay those bribes. The notion that certain bribes might be acceptable in some places raises questions about the de facto legality of bribes. A person or entity subject to the laws of the United States might be subject to the laws of other jurisdictions as well. Finally, the international community is calling for the elimination of exceptions for facilitating payments, in part because facilitating payments inflict the same sort of moral and structural damage on societies as do other forms of bribery.


This article examines facilitating payments from the perspective of the Foreign Corrupt Practices Act. Because this Act applies to entities with a connection to the United States, this article also adopts the perspective of a business connected to the United States. The article first examines the exception within the Act, and the definitions of the types of bribes that would fall within that exception and thus are not punishable by the Act. The article then asks whether these payments are illegal under local law, and concludes that in most cases the answer is yes. The article then returns to U.S. law, finding that even though these payments are excepted by the Foreign Corrupt Practices Act, they could be found criminal under other statutes. Going beyond U.S. law, the article finds that many U.S. persons and entities are subject to similar laws in other jurisdictions that do not except facilitating payments. The article concludes that facilitating payments are not legal.

I. FACILITATING PAYMENTS AND THE FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act generally criminalizes the payment of bribes to foreign government officials for the purpose of obtaining or retaining business. More specifically, the Act prohibits

the willful use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

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The Act also imposes strict accounting provisions on publicly-traded corporations, which are intended to prevent the creation of hidden funds that might be used to pay bribes.\(^8\)

The Foreign Corrupt Practices Act was enacted in 1977, following a period of tumultuous political revelations known collectively as “Watergate.”\(^9\) Investigation into the crimes committed by persons in or connected to the federal government revealed not only domestic corruption, but also widespread bribery of foreign government officials by prominent U.S. businesses.\(^10\) The investigation also revealed that many large businesses maintained “slush funds” for the purpose of bribing domestic and foreign officials.\(^11\) The legislative deliberations concluded that bribery by U.S. businesses “serious[ly] breach[ed] . . . public confidence in the integrity of the system of capital formation.”\(^12\) Moreover, foreign bribery “short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products.”\(^13\) At a time when the nation was particularly sensitive to ethical offenses involving governance, bribery was also considered morally repugnant.\(^14\) The combined concerns over

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\(^8\) 15 U.S.C. § 78m. Those requirements constitute a very important part of the Act, but are not pertinent to the issues discussed in this article. See Peter W. Schroth, The United States and the International Bribery Conventions, 50 AM. J. COMP. L. 593, 600 n.34 (2002) (arguing that the accounting provisions have affected business behavior).


\(^11\) See SEC. & EXCH. COMM., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2–3 (1976) (discussing secret funds used to pay millions of dollars in bribes).

\(^12\) S. REP. NO. 95-114, at 2 (1977).


erosion of trust, degradation of business quality, and normative values led to relatively quick adoption of the Act.\(^{15}\)

Congress has twice amended the Foreign Corrupt Practices Act. In 1988, Congress amended the Act so as to create affirmative defenses, including the facilitating payment exception described in the next section, and to encourage other governments to criminalize transnational bribery.\(^{16}\) In 1998, Congress increased the jurisdictional reach of the Act and made minor adjustments as called for by the nascent international corruption regime, which is described later in this article.\(^{17}\)

A. The Statutory Exception for Facilitating Payments

The Congress that enacted the original Foreign Corrupt Practices Act clearly indicated that it did not intend for the Act to prohibit what it called “grease payments.”\(^{18}\) Rather than creating an exception for such payments, however, Congress instead circumscribed the description of foreign government officials so as not to include officials with “ministerial or clerical” responsibilities.\(^{19}\) Bribes paid to such persons were exempt from prosecution under the Foreign Corrupt Practices Act because such conduct did not fulfill the requirement that the bribe be paid to a

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\(^{18}\) See H.R. REP. NO. 95-640, at 4 (1977) (stating that the law “does not extend to so-called grease or facilitating payments”); S. REP. NO. 95-114, at 10 (1977) (stating that the law does not “cover so-called ‘grease payments’ such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties”).

government official. While technically workable, this mechanism did not provide businesspeople sufficient certainty with respect to criminal liability for paying facilitating bribes.

In hearings for the 1988 amendments to the Act, businesses argued that prohibitions on facilitating payments could disadvantage them when competing with businesses not constrained by similar rules. Congress responded by creating an affirmative defense, excepting certain payments from the jurisdiction of the Act in place of the more cumbersome definitional approach. The exception provides that the criminal provisions of the Foreign Corrupt Practices Act do “not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action.” Bribes falling within this exception have been given the generic appellation “facilitating payments” or “facilitating bribes.” Regardless of the appellation, these bribes have been explained conceptually and defined judicially.

B. Conceptual Understanding

Conceptually, facilitating payments are bribes paid to secure, from a government official, something that is due to the bribe payer, the conference of which does not require discretion on the part of the bribed official. Thus, a bribe paid to procure the routine processing of a travel visa would be considered a facilitating payment. Similarly, a bribe paid to secure routine mail delivery, or the provision of electrical power in a way similar to other users, or standard police protection, might each be considered a facilitating payment. Although conceptually the size of the bribe has nothing to do with its purpose, facilitating payments tend to be small, and fall below an informal ceiling of US $1,000.

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22. FCPA Amendments of 1988, supra note 16.

23. 15 U.S.C. § 78dd-1; see Barta & Chapman, supra note 7, at 842–43 (describing the exception).


26. Id.

27. See Barta & Chapman, supra note 7, at 842 (stating that excepted payments are small); Arthur F. Matthews, Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigation: The Triton Energy/Indonesia SEC Consent Decree Settlements, 18 Nw. J. Int’l L. & Bus. 303,
A bribe paid to secure a government contract, on the other hand, could not constitute a facilitating payment even if the bribe payer presented a qualified bid, because the act of evaluating bids and selecting a winner involves discretion. Interestingly, one of the most frequently given examples of a “facilitating payment” by scholars does not in fact represent a facilitating payment: a bribe paid to a customs agent to secure expedited or preferential treatment would not constitute a facilitating payment because it would confer on the bribe giver an advantage — faster or better treatment — not due in the normal discharge of the customs officials’ duties.

The Department of Justice and the Securities and Exchange Commission, each charged with enforcement of the Foreign Corrupt Practices Act, have together released guidelines that, among other things, suggest the parameters of excepted facilitating payments. Although the business community anxiously anticipated the release of the Resource Guide, it provides little new guidance with respect to the definition of facilitating payments. The Resource Guide notes that the exception is “narrow” and “applies only when a payment is made to further ‘routine governmental action’ that involves non-discretionary acts.”

C. Judicial Interpretation

Very few courts have parsed the definition of facilitating payments. In United States v. Kay, the Fifth Circuit Court of Appeals turned to an extensive review of the legislative history of the Foreign Corrupt Practices Act to determine the boundaries of the facilitating payments exception. The court found that “[t]he extent to which the exception for” facilitating

315 (1998) (noting that allowed facilitating payments have never exceeded US $1,000 in size).


29. See DON ZARBIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 5-1 (1995) (using this example); Pacini, supra note 7, at 570 (using this example); Tamara Adler, Comment, Amending the Foreign Corrupt Practices Act of 1977: A Step Toward Clarification and Consolidation, 73 J. CRIM. L. & CRIMINOLOGY 1740, 1752 (1982) (suggesting that facilitating payments “could include bribes to customs officials to obtain lower-than-normal duties”).

30. See Dugan & Lechman, supra note 25, at 380.


34. RESOURCE GUIDE, supra note 31, at 25.

payments “is narrowly drawn reasonably suggests that Congress was carving out very limited categories of permissible payments from an otherwise broad statutory prohibition.”36 The “broad statutory prohibition” that the Fifth Circuit found in the legislative history included “bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement.”37 The court concluded that “by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.”38

The District Court for the Southern District of Texas had cause to continue the Fifth Circuit’s analysis in SEC v. Jackson.39 The District Court, as did the Fifth Circuit, thoroughly reviewed the legislative history of the facilitating payments exception.40 The court acknowledged Kay and explained that “[t]he facilitating payments exception is best understood as a threshold requirement to pleading that a defendant acted ‘corruptly.’”41 The government’s burden in meeting this threshold, however, is not onerous because the exception only excludes a “narrow” and “limited” group of bribes paid to obtain routine, non-discretionary acts that are due to the bribe payer.42 All bribes beyond that threshold are actionable as corrupt.43 Thus, in the case before the District Court, a bribe paid simply to expedite the routine approval of a permit might fall within the facilitating payments exception and below the actionable threshold, whereas a bribe paid to obtain approval of a permit based on false paperwork would not fall within the exception and would be actionable.44

Read in even the most limited manner, the Kay and Jackson decisions indicate that the definition of facilitating payments is tightly circumscribed.45 A reasonable interpretation of the Jackson court’s

37. Kay, 359 F.3d at 750.
38. Id. at 756.
40. Id. at 857–58.
41. Id. at 857.
42. Id. at 857–58 (quoting Kay, 359 F.3d at 750–51).
43. Id.
44. Id. at 858.
emphasis on “corruptly” suggests that very few payments could fall within this exception, since bribes inherently involve misconduct on the part of a government official.46 The definition of a bribe that falls within the exception created by the Foreign Corrupt Practices Act seems narrow. Nonetheless, such bribes arguably exist. The question remains, therefore, as to whether such bribes are legal.

II. LOCAL LAW

The Foreign Corrupt Practices Act addresses conduct that largely occurs outside of the territory of the United States — the bribery of foreign government officials.47 Almost by definition that conduct will be subject to local law.48 Ascertaining the legality of facilitating payments, therefore, must include a consideration of local law. The question of local law, in turn, raises an interesting question: whether inclusion of such bribes within the language of a statute actually means that facilitating payments are considered illegal by the people who live within that legal system.

A. Positive Law

No country allows the bribery of its own government officials.49 From Afghanistan50 to Zimbabwe,51 bribery is universally criminalized. Generally,
facilitating payments would seem to be illegal under local law.52 At a surface level, the question of local legality appears uninteresting.53

Bribery occurs, however, in many forms, and so too do laws controlling bribery.54 For example, one can distinguish between bribes that are freely offered and bribes that are demanded through extortion.55 The Foreign Corrupt Practices Act does not make such a distinction; bribes freely offered and bribes paid in response to venal extortive demands are equally actionable.56 Arguably, however, a local law could criminalize the offering of a facilitating payment but not the payment of a bribe in response to an extortive demand.57 In that case, a facilitating payment given in response to an extortive demand would be excepted from prosecution under the Foreign Corrupt Practices Act and would be outside of the reach of the local law. It would, under the rules considered so far, be legal.

It is also possible that, despite the universal criminalization of bribery in general, the laws of some jurisdictions do not criminalize some facilitating payments. In 1998, for example, Timothy Martin reported that facilitating payments in Nigeria could fall within the authority of several laws, in particular the Criminal Code and the Code of Conduct for Public Officers, which is attached as a schedule to Nigeria’s Constitution.58 The Code of Conduct criminalized the giving of bribes to induce a bureaucrat to

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52. See RESOURCE GUIDE, supra note 31, at 25 (warning that facilitating payments are probably illegal in the country in which they are paid).

53. See Melissa Aguilar, New OECD Stance on Facilitation Payments, COMPLIANCE WEEK (Dec. 18, 2009), http://www.complianceweek.com/new-oecd-stance-on-facilitation-payments/printarticle/187306/ (claiming that facilitation payments “are illegal under local law in all of the countries in which they're paid”).


perform his or her duty, but Martin claimed it was riddled by exceptions related to Nigerian custom.\textsuperscript{59} Martin also claimed that the Criminal Code was interpreted by Nigerian courts as not criminalizing bribes paid to government officials to induce them to perform their duties.\textsuperscript{60} Martin concluded that “[f]acilitating payments for routine governmental action are acceptable under Nigerian law, as long as they satisfy [particular] requirements.”\textsuperscript{61} In other words, Martin claimed that facilitating payments were legal.

An analysis of Nigeria cannot, however, stop with observations made in 1998. Since that time, a civilian government has replaced the military rulers, and that government has expressed a commitment to rooting out corruption. A new constitution and new bribery laws have also been enacted.\textsuperscript{62} Of particular importance, the new legislation “removes all litigation immunities for every citizen, including government officials of any rank.”\textsuperscript{63} Nigeria’s reform efforts have largely failed, but observers attribute the failure to a lack of political will rather than an absence of laws that criminalize the payment of bribes.\textsuperscript{64} Even though facilitating payments continue to be made, it would be difficult to continue to argue the legality of those payments.

China also demonstrates the complexity of trying to determine whether facilitating payments might be legal in a particular jurisdiction. China, of course, criminalizes bribery in general.\textsuperscript{65} Chinese criminal law, however, often designates a level of seriousness that an act must rise above in order to be prosecuted as a criminal act.\textsuperscript{66} In general, the payment of bribes

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\item 59. Martin, \textit{supra} note 58, at 442.
\item 60. \textit{Id}.
\item 61. \textit{Id}.
\item 63. Opara, \textit{supra} note 62, at 82.
\item 64. \textit{See} Aigbovo & Atsegbua, \textit{supra} note 62, at 65–66 (reviewing thoroughly the effects of reform and attributing failure to a lack of political will); \textit{see also} Osita Nnamani Ogbu, \textit{Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions, and the Political Will}, 14 \textit{ANN. SURV. INT’L & COMP. L} 99, 149 (2008) (reviewing the reform structures and attributing failure to a lack of political will).
\item 65. \textit{See} Kiklon Ko & Cui Fen Weng, \textit{Structural Changes in Chinese Corruption}, 211 \textit{CHINA Q.} 718, 719 (2012) (”[T]he Chinese government has actively implemented more than a thousand anti-corruption regulations and laws, and major anti-corruption policies”).
\item 66. Acts that fall below the designated level of seriousness are handled administratively by the
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from an individual to a single government official smaller in value than RMB 10,000 is not prosecuted as a criminal act. At the time this article was written, RMB 10,000 was equal in value to about US $1,600 — in other words, the threshold for criminal prosecution in China is actually higher than the informal US $1,000 ceiling on the size of facilitating payments excepted under the United States’ Foreign Corrupt Practices Act. Thus, it would seem that a facilitating bribe paid in China might not fall within the criminal jurisdiction of either China or the Foreign Corrupt Practices Act.

Two aspects of Chinese law, however, render this determination difficult. First, the cumulative amount of bribes paid to an individual or to an office may count toward the threshold amount, and once that threshold is met, each bribe — both those paid after the threshold is met and those paid before — constitutes a criminal act. Second, extenuating factors can lead to criminal prosecution even if the size of the bribe falls below the threshold amount; those factors include payment of the bribe to more than three recipients, significant damage to China, or payment of the bribe to members of the Communist Party or to an organ of the Party. The latter factor creates the most difficulty in determining the legality of a facilitating payment. “Almost all government officials in China at any level are members of the Communist Party.” Whether the government chooses to prosecute is a matter of internal political consideration rather
than a simple application of law.\textsuperscript{72} While this system may seem arbitrary to observers accustomed to the rule of law, the Chinese legal system is structured to accommodate matters involving the Party in a manner not accounted for in the United States’ system.\textsuperscript{73} These differences, the opacity of the system, and the likelihood that small facilitating payments would over time exceed the threshold amount, render assessment of the legality of any particular facilitating payment very difficult.

When evaluating the legality of facilitating bribes pursuant to local law, it should be noted that some legitimate bureaucratic processes allow for differential treatment based on differential payment of fees. In India, for example, passengers can reserve trains on a \textit{tatkaal} basis, similar to a rush, by paying a premium over the usual reservation fee.\textsuperscript{74} In the United Kingdom an adult can obtain a passport one day after applying, as opposed to three weeks, by paying a fee that is greater than the normal fee.\textsuperscript{75} The Chinese Consulate in Canada offers three different levels of visa service, each costing a different amount.\textsuperscript{76} In each of these examples, a foreign business person could pay a greater amount than normal in exchange for faster delivery of service than would be obtained by paying normal fees.

These differential processes should not be confused with facilitating payments. An unthinking observer might consider them to be the same: paying additional money procures better service. There are, however, at least three aspects that distinguish facilitating payments from these types of payments. First, these transactions occur openly and transparently — indeed, each of the examples described above is posted on the internet, whereas facilitating payments usually have some element of secrecy.\textsuperscript{77} Second, these payments accrue service above that to which the payor would normally be due, whereas facilitating payments by definition are payments that accrue service to which the payor normally is entitled.\textsuperscript{78} Third, these payments go to the government fisc, whereas facilitating

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\item \footnote{72. \textit{Id.} at 1026–27; Griffith \& Wang, \textit{supra} note 67, at 11.}
\item \footnote{73. See \textit{Chow, supra} note 71, at 1026 ("T\text{he Communist Party considers itself to be above the law and outside of the legal system." (citing SUSAN V. LAWRENCE \& MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, UNDERSTANDING CHINA’S POLITICAL SYSTEM 14 (2012), available at http://www.fas.org/sgp/erw/r41007.pdf)).}
\item \footnote{74. See \textit{Indian Railways Passenger Reservation Enquiry}, INDIANRAIL.GOV.IN (last visited Aug. 4, 2013), http://www.indianrail.gov.in/tatkal_Scheme.html (describing tatkaal system).
\item \footnote{77. See Argandoña, \textit{supra} note 24, at 253–54.
\item \footnote{78. See Dukan \& Lechtman, \textit{supra} note 25, at 380.}
payments enrich an individual bureaucrat. These types of payments should not be construed as facilitating payments in need of exception from the Foreign Corrupt Practices Act; rather, these are different fees legally paid for different services. Blake Puckett points out that the Foreign Corrupt Practices Act contains a distinct exception for payments that are legal pursuant to local law. “If such payments were permitted under local law, then they would fall under one of the affirmative defenses of the FCPA and would not need to be considered facilitating payments.”

Ascertaining the legality of facilitating payments under local law presents difficulties. A strong argument exists, however, that facilitating payments are not legal under local law.

B. The Realist Answer

Many acts violate positive law, but are treated as “legal” in everyday practice. The United States is replete with examples. Most states and municipalities prohibit jaywalking, but in many jurisdictions, jaywalking is the norm. A majority of teenaged persons have consumed alcohol, often in an easily detectable manner, but few are prosecuted even though each state criminalizes the possession of alcohol by persons not yet twenty-one years of age. “Blue laws” that impose religious-based strictures on sexual and commercial behaviors are widely ignored. Acts that are criminal according to the written law are often considered normal practice by the people who live under the rule of that law. It is possible, therefore, that a facilitating payment — while de jure illegal — might be considered de facto legal by the persons who live in a particular jurisdiction.

It is true that in some jurisdictions, laws against facilitating payments are rarely enforced. There is good reason, however, to suspect that the

79. See Argandoña, supra note 24, at 254; Chinese Visa Application, supra note 76 (stating that all money paid goes to the Chinese Consulate).
80. Carried to extremes, of course, such practices can raise ethical questions. See Juan M. Elegido, The Ethics of Price Discrimination, 21 BUS. ETHICS Q. 633 (2011).
81. See, e.g., Puckett, supra note 56, at 851; 15 U.S.C. § 78dd-1(c)(1) (excepting payments that are legal under local law).
82. Puckett, supra note 56, at 851 n.132.
83. See Thomas Fox, End of Grease Payments Coming, CORP COMPLIANCE INSIGHTS, Apr. 5, 2010, at 3 (stating that facilitating payments are illegal in all countries in which they are paid).
87. See Argandoña, supra note 24, at 254.
payment of facilitating bribes might not be considered de facto legal by local persons. The laws described in the preceding paragraph often are unenforced because they no longer, or never did, align with underlying social norms. Because the transaction costs that would be incurred by removing these unenforced laws exceed the burden imposed on the public by leaving these laws in the statutes, these statutes remain in criminal codes. Prosecutorial discretion aligns the lack of enforcement with extant social norms, which minimizes the pressure to repeal these laws.

The opposite is true of bribery laws. Rather than functioning to accurately reflect extant norms, the lack of enforcement of bribery laws occurs because of a malfunction in the legal process. Bribery is deeply unpopular and the failure to enforce corruption laws is perceived as a problem. The non-enforcement of bribery laws, therefore, occurs due to a malfunction of the process of law; malfunction of law, however, does not render facilitating payments legal.

Commentators occasionally suggest that facilitating payments constitute a “normal way of doing business” in some countries. This line of reasoning confuses the actions of a few for the culture of many: “merely because bribery is commonplace among officials does not mean that it is accepted by the majority of a country’s citizens.” Moreover, even if a

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89. Donald Boudreaux and A.C. Pritchard succinctly make this point: Economics explains this fact. Repealing statutes has its costs. These costs might be very low when a statute forbids widely practiced behavior generally regarded as harmless to society. But the benefits of repealing these statutes are nonexistent. Such statutes remain on the books by default, bothering few, if any, people. Donald J. Boudreaux & A.C. Pritchard, The Price of Prohibition, 36 ARIZ. L. REV. 1, 9 (1994).
93. Facilitating Payment, INVESTOPEDIA, http://www.investopedia.com/terms/f/facilitating-payment.asp (last visited Nov. 9, 2013) (stating that “[i]n some countries, these payments are considered normal”); see also Dugan & Lechtman, supra note 25, at 380 (“Congress introduced this exception out of concern that U.S. companies could lose business in countries where facilitating payments are a prevalent way of doing business.”); Duong, supra note 3, at 1188 n.30 (“‘grease payments’ . . . are considered part of the custom of doing business in certain foreign countries”).
94. Amanda Boote & Anne H. Dechter, Slipped Up: Model Rule 2.1 and Counseling Clients on the
majority of people within a community are forced to resort to the payment of facilitating bribes, that does not mean that the community culturally embraces the payment of those bribes.\textsuperscript{95} Surveys in endemically corrupt countries indicate that people despise facilitating payments to the same extent that they despise other forms of bribery.\textsuperscript{96}

De facto legalization does not confer de jure legality. Inquiries into social attitudes toward facilitating payments satisfy only intellectual curiosity. Nonetheless, arguments for de facto legalization of facilitating payments must avoid using a small, biased sample to extrapolate the attitude of an entire society. The empirical evidence that does exist suggests that societies do not consider facilitating payments to be acceptable.

\section*{III. U.S. LAW}

Given the lack of enforcement of laws against facilitating payments in some polities, a business in the United States might choose to ignore those laws and consider only the laws of the United States. Such a position, of course, is reprehensible.\textsuperscript{97} Even from such a perspective, however, the Foreign Corrupt Practices Act serves only as a starting point. The Foreign Corrupt Practices Act does not affirmatively legalize facilitating payments; instead, it merely excepts them from its own jurisdiction. This leaves open the possibility that other rules within the corpus of U.S. laws could criminalize facilitating payments. At least three sets of laws could be applied.

\textsuperscript{95} See Michael H. Wiehen, Corruption in International Business Relations: Problems and Solutions, in ETHICS IN INTERNATIONAL MANAGEMENT 183, 185 (Brij Nino Kumar & Horst Steinmann eds., 1998) (“Petty corruption and facilitation payments have been a part of life in many countries, but that does not make them part of the ‘culture.’”); see also Andrew Spicer, The Normalization of Corrupt Business Practices: Implications for Integrative Social Contracts Theory (ISCT), 88 J. Bus. Ethics 833, 837–38 (2009) (noting that, within communities, corruption is behavioral and aspirational norms still condemn corruption).


A. Wire Fraud

Federal prosecutors often use wire fraud laws to prosecute acts of bribery.98 Successful prosecution of a wire fraud charge requires proof of “(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme and (3) a specific intent to deceive or defraud.”99 The wire fraud statute makes very clear that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”100 The United States Supreme Court strictly circumscribed the boundaries of “honest services” in Skilling v United States, holding that in order to avoid unconstitutional vagueness, “honest services” must be limited to cases involving bribes or kickbacks.101

Facilitating payments are, by definition, bribes and therefore constitute conduct that survives Skilling’s stricter definition. The question remains, however, whether facilitating payments deprive a constituent body of honest services by managers who pay those bribes. A clue may be found in the derivative lawsuits brought by shareholders against Wal-Mart Stores, Inc. At the time that this article was written, credible accusations were made that Wal-Mart, one of the world’s largest retail chains, paid bribes while expanding its business in Mexico and elsewhere.102 Ironically, one of Wal-Mart’s responses has been that any bribes paid could plausibly be described as facilitating payments.103

Shareholders of Wal-Mart responded to the payment of bribes by Wal-Mart quite negatively. CalSTRS, the California State Teachers Retirement System, has filed a derivative suit on behalf of Wal-Mart against directors and executives, claiming a gross failure on the parts of those managers.104 In particular, CalSTRS chief executive argued that such a suit was

101. Skilling v. United States, 130 S. Ct. 2896, 2931 (2010); see Elizabeth R. Sheyn, Criminalizing the Denial of Honest Services After Skilling, 2011 WIS. L. REV. 27, 28 (describing the decision as “the latest in a series of blows” to the intangible right to honest services).
103. Barstow, supra note 102, at A9; see also Michael Koehler, Understanding Wal-Mart, FCPA PROFESSOR (May 1, 2012), http://www.fcpaprofessor.com/understanding-wal-mart (arguing that Wal-Mart’s facilitating payment claim has little validity).
necessary to “ensur[e] that there is a responsible board of directors representing our interests day in and day out, overseeing compliance, overseeing a code of ethics . . . [w]e all need to understand . . . what was going on in the corporate culture.”\(^{105}\) Professor Charles Elson suggests that the filing of a derivative lawsuit by CalSTRS, which usually eschews the use of lawsuits in its interactions with issuers, “signals that they’re very upset.”\(^{106}\) At least nine other shareholder groups have filed similar suits.\(^{107}\)

The payment of facilitating bribes conceivably deprives shareholders of honest services, and thus constitutes wire fraud. This construct, of course, would only apply to publicly-traded corporations — a subset of all businesses that might ask whether facilitating payments are legal. Money laundering, on the other hand, applies to all persons and businesses subject to the laws of the United States.

**B. Money Laundering**

“Money laundering is ‘the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.’”\(^{108}\) The money laundering statute lists as predicate crimes “an offense against a foreign nation involving . . . bribery of a public official.”\(^{109}\) The statute does not except facilitating payments. When applied to bribery, money-laundering statutes are most often used to prosecute government officials who do not identify money as that which they received through bribes.\(^{110}\) Nonetheless, the Department of Justice’s Charles Blau believes “there is a very clear-cut money-laundering violation when you transfer the funds into the bank for the purposes of paying a bribe or funding a bribe that has already been paid.”\(^{111}\)


\(^{106}\) Id. (quoting Charles M. Elson, Professor of Law and Director of the John L. Weinberg Center for Corporate Governance, University of Delaware).


Almost all of the criminalized behaviors that constitute money laundering occur after the predicate crime has been committed: transactions with or the transportation of the proceeds of criminal activity. One section of the money laundering laws, however, criminalizes actions that occur before the predicate crime is committed, and that section accurately describes a facilitating payment.

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity has committed the crime of money laundering. This section specifically does not require that the transported money be the proceeds of criminal activity. A business that sends any money outside of the United States for the purpose of paying a facilitating bribe is criminally liable for money laundering.

A business that pays facilitating bribes could also violate money-laundering provisions that involve the proceeds of criminal activity. The arguments of those advocating for a facilitating payment exception ineluctably leads to the conclusion that facilitating bribes often result in proceeds. Facilitating payments have a business purpose. Advocates of a facilitating payment exception argue that facilitating payments are necessary to conduct business, at least in some locations. The hypothetical necessity of facilitating payments implies that business could

113. See Peter J. Kacarab, An In-Depth Analysis of the New Money Laundering Statutes, 8 AKRON TAX J. 1, 30 (1991).
114. The Foreign Corrupt Practices Act concerns itself only with bribes that have a business purpose. See supra notes 6–7 and accompanying text; Pines, supra note 16, at 196. Facilitating payments are an excepted type of bribe within the universe of bribes that fall within the ambit of the Act. See supra notes 22–24 and accompanying text. Therefore, facilitating payments have a business purpose. There are, of course, other petty bribes and payments that do not have a business purpose.
115. See supra note 21 and accompanying text. The author of this paper vigorously disagrees with the assertion that facilitating bribes are necessary. At a conference held in St. Petersburg, Russia, Geoff Edwards, the European Logistics Director of Motrans Ltd., strongly opined that most problems with Russian customs agents are created through the lack of attention to detail by foreign businesses, and that when managed properly, goods can easily enter Russia without the payment of bribes. Geoff Edwards, European Logistics Director, Motrans Ltd., Presentation at the Conference on Business Ethics and Models of National Behavior (Apr. 5, 2013) (on file with the author). In a survey of business managers conducted by a corruption management organization, more than three-quarters of respondents also agreed that business can be conducted without making facilitating payments. TRACE, TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 17 (2009), available at http://traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf.
not be effectuated without those payments. If that is true, then the proceeds of the transaction can be attributed to the facilitating bribe, the payment of which violates the laws of almost every host country.

Money-laundering laws prohibit transactions involving the proceeds of criminal activities in any amount for the purpose of engaging in further criminal activity, evading taxes, disguising the source or control of the proceeds, or avoiding federal reporting requirements.\footnote{116} Far more importantly, money-laundering laws prohibit knowingly engaging in any transaction involving the proceeds of criminal activity in an amount greater than US $10,000.\footnote{117} It seems unlikely that an otherwise law-abiding business would incur the costs associated with separating the proceeds of the transaction into increments smaller than US $10,000 in size.\footnote{118} Thus, the simple act of repatriating the proceeds of a transaction that involved the payment of a facilitating bribe would in almost every case be illegal.

C. Failure to Disclose

Criminal liability might attach to the payment of facilitating payments not because of the payment of the bribe itself, but instead if the payment of the facilitating bribe is not disclosed. The Sarbanes–Oxley Act and its corresponding regulations would be one source of criminal liability.\footnote{119} The Sarbanes–Oxley Act was not enacted as a response to bribery, but instead to corporate misconduct in general.\footnote{120} Its strictures, nonetheless, could apply to facilitating bribes.\footnote{121}

The means by which the Sarbanes–Oxley regulations would impose liability for failure to report payment of facilitating bribes are very straightforward and do not require substantial explication of a fairly complex act.\footnote{122} Among many other provisions, the regulations issued by

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\item[116] Ngai, supra note 108, at 1016–17.
\item[122] See Donald C. Langevoort, Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law’s
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the Securities and Exchange Commission require corporations to issue periodic statements certified by its principal officers that accurately describe the financial condition of the corporation in all material aspects. These regulations are often referred to as the Section 302 certification requirement. Voluntary disclosure of bribes paid by corporations has risen substantially since the promulgation of the Section 302 certification requirement. Indeed, the Securities and Exchange Commission, which administers these regulations, contends that “illicit payments [are] material regardless of the amount of the bribe or the financial size of the corporation.” Thus, the relatively small size of facilitating bribes would not render them immaterial. Failure to disclose these material payments, therefore, would expose executives of a corporation to criminal liability.

Ironically, the Foreign Corrupt Practices Act itself would impose criminal liability on a corporation for failure to accurately record facilitating payments, even though the anti-bribery provisions of the Act except payment of those bribes. The accounting provisions of the Act require that the publicly-available records of a corporation clearly identify all transactions. There is no materiality standard with respect to the clear and accurate recording of facilitation payments.

The Department of Justice has emphasized that “[f]ailure to accurately record facilitation payments in corporate books and records would constitute a violation of”


123. See Vega, supra note 69, at 438–39.


129. 15 U.S.C. § 78m.

130. Martin, supra note 58, at 423.
these rules.\textsuperscript{131} Failure to record facilitating payments accurately accrues criminal liability.

IV. THE LAWS OF OTHER POLITIES

At one time local law and the Foreign Corrupt Practices Act presented the only laws that might criminalize the payment of a facilitating bribe. Sweden also enacted a law criminalizing transnational bribery in the 1970s, but Sweden's law applied only to an extremely limited number of actors.\textsuperscript{132} Now, however, the universe of applicable laws includes at least fifty jurisdictions, and applies to myriad actors.\textsuperscript{133} Thus, a business subject to the Foreign Corrupt Practices Act can no longer ask only whether the strictures of U.S. law criminalize facilitating payments, but must also ask how the body of laws treats such payments.

The United States enacted the Foreign Corrupt Practices Act of its own volition, largely as a response to popular revulsion toward corruption as revealed by the investigations into President Nixon's involvement in political misconduct.\textsuperscript{134} Since then, however, much of the impetus for the adoption of similar laws has occurred through negotiations within international organizations. The Organization of American States, comprised of almost every country in the Western Hemisphere,\textsuperscript{135} first


\textsuperscript{132} See Michael Bogdan, International Trade and the New Swedish Provisions on Corruption, 27 AM. J. COMP. L. 665 (1979) (discussing LAG OM ANDRING I BROTTSBALKEN (Svensk författningssamling [SFS] 1977:103) (Swed.)); The Swedish law required the employer of the bribed government official to report the bribe to the Swedish government with the intention that the Swedish government proseute the Swedish bribe-payer. See id. at 673. The law also applied only to bribes paid to public officials in countries that prohibited its residents from bribing Swedish officials — which at the time consisted only of the United States. See David R. Slade, Comment, Foreign Corrupt Payments: Enforcing a Multilateral Agreement, 22 HARV. INT'L L. J. 117, 122 n.22 (1981) (noting that the laws of the foreign country “must be perfectly reciprocal” with Sweden’s law).

\textsuperscript{133} See Nichols, Business Case, supra note 92, at 362 (listing more than fifty politics that criminalize transnational bribery); see also Elizabeth K. Spahn, Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention, 53 VA. INT'L L. 1, 49–52 (2013) (describing a network of laws and prosecutions of transnational bribery).


\textsuperscript{135} See MÓNICA HERZ, THE ORGANIZATION OF AMERICAN STATES (OAS) 5 (2011)
successfully negotiated a requirement that its members criminalize the bribery of foreign government officials.\textsuperscript{136} Venezuela acted as the principal advocate of a treaty on bribery, motivated to do so by the corruption-abetted failures of several large Venezuelan banks.\textsuperscript{137} In 1996, the Organization promulgated the Inter-American Convention Against Corruption.\textsuperscript{138} The treaty requires signatories — to the extent their laws allow — to criminalize the bribery of foreign officials in connection with a business transaction.\textsuperscript{139}

The Inter-American Convention Against Corruption does not provide for the exception of facilitating payments.\textsuperscript{140} A narrow reading of the Convention, which imputes “improper” with respect to the government action obtained through bribery, might except facilitating payments that are used to obtain routine government acts.\textsuperscript{141} Read literally, however, the Convention would seem to require that facilitating payments not be excepted.\textsuperscript{142}

The Organization for Economic Cooperation and Development, more commonly known by its acronym OECD, soon followed the Organization of American States in requiring its members to criminalize transnational bribery.\textsuperscript{143} The action by the Organization of American States was

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\textit{\textsuperscript{136} See Vega, supra note 49, at 406 (stating that the Convention was the first such multilateral treaty).}
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\textit{\textsuperscript{139} See Inter-American Convention, supra note 138, art. 8; see also Lucinda A. Low et al., \textit{The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act}, 38 Va. J. Int’l L. 243, 247–49 (1998) (discussing the requirement); Schrot, supra note 8, at 615–16 (discussing the Convention).}
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\textit{\textsuperscript{140} See Duane Windsor & Kathleen A. Getz, \textit{Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values}, 33 \textit{Cornell Int’l L.J.} 731, 763 (2000).}
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\textit{\textsuperscript{141} See David A. Gantz, \textit{Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus}, 18 \textit{NW. Int’l L. & Bus.} 457, 480 (1998) (suggesting a narrow reading of the treaty, which would not include the criminalization of facilitating payments); Vega, supra note 69, at 453 n.193 (suggesting that the report accompanying the Convention implies an exception for facilitating payments).}
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\textit{\textsuperscript{142} See Shaw, supra note 7, at 698. Article 8 of the Convention requires members to criminalize bribes to foreign officials “in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official’s public functions.” Inter-American Convention, supra note 138, art. 8 [emphasis added].}
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\textit{\textsuperscript{143} ORG. FOR ECON. CO-OPERATION & DEVE. [OECD], \textit{Convention on Combating Bribery of

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groundbreaking; the action by the OECD was earthshaking.\textsuperscript{144} Whereas the Organization of American States is a regional organization, the OECD consists of large and wealthy market-oriented economies throughout the world.\textsuperscript{145} More than two-thirds of international trade transactions and ninety percent of foreign investments involve at least one member of the OECD.\textsuperscript{146}

The members of the OECD debated the propriety of exempting facilitating payments.\textsuperscript{147} Ultimately, the members drafted a treaty that simply does not address facilitating payments.\textsuperscript{148} The explanatory commentaries to the treaty, however, state that “[s]mall ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of” the treaty and therefore members are not required to criminalize them.\textsuperscript{149} The United States seized on this commentary to justify its continued exception of facilitating payments.\textsuperscript{150} A handful of members mimicked the United States by excepting facilitating payments from prosecution; the majority, however, simply did not mention facilitating payments when drafting laws that criminalized bribes paid to foreign officials.\textsuperscript{151} Their ambivalence has since

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\item[(144)] See Hess & Dunfee, supra note 49, at 602 (“The most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation is the [OECD Convention]”); Jong Bum Kim, Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption, 17 UCLA PAC. BASIN I.J. 245, 254 (2000) (“The OECD Bribery Convention has built the most significant multilateral instrument in the fight against bribery and corruption”); Nii Lante Wallace-Bruce, Corruption and Competitiveness in Global Business: The Dawn of a New Era, 24 MELB. U. L. REV. 349, 368 (2000) (“Perhaps the most significant step in the efforts to combat corruption in global business was taken on 17 December 1997 in Paris, when members of the OECD signed the [OECD Convention].”).
\item[(146)] See, e.g., Mike Kochler, The Changing Role and Nature of In-House and General Counsel: Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012 Wis. L. REV. 609, 636.
\item[(147)] See Peter J. Henning, Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law, 18 ARIZ. J. INT’L & COMP. L. 793, 819–21 (2001) (discussing the creation of the OECD’s requirements on facilitating payments).
\item[(150)] See Schroot, supra note 8, at 606 n.68 (describing the United States’ argument).
\item[(151)] Id. at 613; see also Ivan Perkins, Illuminating Corruption Pathways: Modifying the FCPA’s “Grease
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morphed into an active movement within the OECD to adopt a much stricter position with respect to facilitating payments. In particular, the OECD recognized the “corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law.”

The United Nations has promulgated its own Convention Against Corruption. As with OECD obligations, the United Nations’ Convention requires signatories to criminalize the payment of bribes to foreign officials. The Convention does not include an exception for facilitating payments and, if read literally, in fact requires inclusion of facilitating payments among the criminalized bribes. More than 140 countries have signed the Convention.

The global community’s hostility toward facilitating payments is understandable. Facilitating payments engender substantial harm and are at least as morally reprehensible as other forms of bribery. The harms produced by corruption in general have been thoroughly described elsewhere and will only be briefly discussed here.

Corruption reduces economic growth, retards long-term domestic and foreign investments, enhances inflation, depreciates national currency, reduces expenditures for education and health, increases military expenditures, misallocates talent to rent-seeking activities, pushes firms underground, distorts markets and the allocation of resources, increases income inequality and poverty, reduces tax revenues, increases child and infant mortality rates, distorts the fundamental role of government (on enforcement of contracts and protection of property rights), and undermines the legitimacy of government and of the market economy.
It does so by, among other things, subverting institutions, creating distortive incentives, and undermining trust.159 Facilitating payments, as a subset of corruption, have the same distortive effects.160

Years ago some scholars argued that facilitation payments increase overall welfare by allowing businesses to mitigate the burdens imposed by excessive regulation.161 That argument, which treated bribery as a static phenomenon, is still parroted by people not familiar with more current dynamic analyses of bribery.162 Dynamic analysis takes into account that bureaucracy and regulation are not exogenous to the relationship between the bribe payer and the bureaucrat, but are in fact created by the bureaucrat for the purpose of extracting bribes.163 As bureaucrats seek to “earn” more, they increase the regulatory burden and then ask for larger bribes.164 Inevitably, the costs ratchet upward, imposing significant costs and distortions on individual actors and entire economies.165

With respect to the moral reprehensibility of facilitating payments, most business ethicists agree that bribery constitutes a wrong, although they do not necessarily agree on the moral framework that supports such a conclusion.166 For consequentialists, the consequences of a single bribe,

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162. See, e.g., Charles B. Weinograd, Note, Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception, 50 VT. INT’L L. 509, 517 (2010) (“[T]hey are intended merely to lubricate wheels that bureaucratic friction would otherwise grind to a halt.”).


including a facilitating bribe, are difficult to forecast.167 As a rule, however, the harms described above far outweigh any beneficial consequences.168 Deontological frameworks condemn bribery for violating hosts of rights and breaching attendant duties, including rights to equality, political participation, social and cultural rights, and basic necessities.169 The size of the bribe has little bearing on whether or not it violates rights or abrogates duties.170 Social contract theorists suggest that bribery violates fundamental rules of social efficiency or social participation.171

The application of moral frameworks to bribery deserves far more attention than is given in the preceding paragraph.172 The point of this discussion is not to determine the validity of any particular moral basis for condemning bribery. Rather the point is that the international community is justified in finding no moral distinction between facilitating payments and other forms of bribery.173

Within the entirety of the international community, only five countries at this time include an exception for facilitating payments in their anti-bribery laws; the vast bulk of the corpus of anti-bribery laws applies with equal force to all forms of bribery, including facilitating bribes.174 The jurisdictional reach of those anti-bribery laws equals or exceeds that of the Foreign Corrupt Practices Act.175 This has resulted in an interlocking web of anticorruption laws, with "multiple and overlapping jurisdictions."176

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170. See Boote & Dechter, supra note 94, at 478.
172. For a more extensive analysis of the application of social contract theory to bribery, see Philip M. Nichols, Multiple Communities and Controlling Corruption, 88 J. BUS. ETHICS 805, 807–11 (2009).
173. See Zervos, supra note 160, at 271–73 (discussing the difficulty in finding a moral distinction between facilitating payments and other forms of bribery).
175. See Nichols, Business Case, supra note 92, at 563–65 (discussing the breadth of jurisdictional reach of anticorruption laws).
176. Spahn, supra note 133, at 44. Some commentators have criticized the jurisdictional reach of the Foreign Corrupt Practices Act. See, e.g., Brown, supra note 126, at 240 ("[T]he enlargement of the
The particular countries that may extend jurisdiction over any given facilitating bribe will of course depend on the facts surrounding the payment of that bribe, but a U.S. actor should assume that the payment of that bribe is subject to prosecution according to the laws of several countries.\(^{177}\)

As one example, the United Kingdom’s Bribery Act claims jurisdiction over any entity that “carri[es] on a business, or part of a business, in any part of the United Kingdom.”\(^{178}\) The Bribery Act does not except facilitating payments and in fact “criminalizes the sorts of common payments currently permitted under the” Foreign Corrupt Practices Act.\(^{179}\) The United Kingdom’s Serious Fraud Office has stated that it does not currently intend to prosecute small bribes, but as Joseph Warin, Charles Falconer and Michael Diamant observe, “this is cold comfort to companies subject to the Bribery Act” because the United Kingdom “expect[s] companies to adopt a ‘zero tolerance’ policy toward such expenditures.”\(^{180}\) Indeed, the Bribery Act “has been viewed as a broader and tougher foreign anti-bribery law than its United States’ counterpart.”\(^{181}\) Nor is the Bribery Act an anomaly: none of the German,\(^{182}\) Japanese,\(^{183}\) or Mexican\(^{184}\) anti-bribery laws contain an extraterritorial effect of the Act’s antibribery provisions may prove to be the most significant and challenging foray by the United States into the regulation of international business”).

177. See Nichols, Business Case, supra note 92, at 366 (working through the jurisdictional claims over a bribe by a hypothetical U.S. actor); Spahn, supra note 133, at 45 (discussing the grounds for multiple claims of jurisdiction).


179. Warin, Falconer & Diamant, supra note 178, at 20; see also Jordan, supra note 20, at 923 (“[T]he new United Kingdom Bribery Act criminalizes foreign bribery and does not provide an exception for facilitation payments”).


184. Código Penal Federal [CPF] [Federal Criminal Code], as amended, art. 222, Diario Oficial de la Federación [DO], 24 de Octubre de 2011 (Mex.), translated in OECD WORKING GROUP ON BRIBERY, MEXICO PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY.
exception for facilitating payments. Businesses that are active in these or other large markets cannot claim that facilitating payments are legal.

CONCLUSION

This paper addresses a persistent claim that facilitating payments are legal. This claim possibly flows from the fact that facilitating payments are excepted from criminal prosecution under the Foreign Corrupt Practices Act. Exception from one criminal provision, however, does not confer legality.

Examination of the purported legality of facilitating payments requires examination of far more laws than just the Foreign Corrupt Practices Act and far more legal systems than just that of the United States. Facilitating payments may fall within the jurisdiction of the country in which they are paid or within the jurisdiction of the country whose officials are bribed, and under the laws of those countries are almost always illegal. Within the United States, payers of facilitating bribes must contend not only with the Foreign Corrupt Practices Act, but also with other laws intended to control corrupt behavior. Facilitating payments violate wire fraud and money-laundering laws, and the failure to accurately disclose facilitating payments would also incur criminal liability. Finally, the facilitating payments also fall within the scope of laws analogous to the Foreign Corrupt Practices Act that have been enacted by other countries. Unlike the Foreign Corrupt Practices Act, most of these laws do not except facilitating payments.

Facilitating payments nicely illustrate the continuing evolution of the web of laws that attempt to control transnational bribery. How that web of laws will continue to evolve, how the many parts will coordinate their efforts, and how the existence of that web of laws and regulations will affect the behavior of businesses are all interesting questions worthy of close study. The answer to the question asked in this article, however, is clear. Facilitating payments are not legal.

185. See Nichols, Business Case, supra note 92, at 364 (discussing laws without exceptions for facilitating payments); Schroth, supra note 8, at 613 (discussing laws without exceptions for facilitating payments).