

NOTE

Clarifying Grease: Mitigating the Threat of
Overdeterrence by Defining the Scope of the
Routine Governmental Action Exception

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INTRODUCTION

Congress' intent was unambiguous when it enacted the Foreign Corrupt Practices Act (FCPA or Act) in 1977.¹ It designed the legislation to combat the rampant corruption that plagued international commerce and

1. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (2006)).

thereby aimed to minimize bribery's corrosive effects on foreign societies and domestic corporate culture. Critics have argued that the Act, though well-intended, is riddled with statutory ambiguity, which has had perverse and counterproductive consequences.² The routine governmental action exception is a paradigmatic example of the statute's shortcomings. The exception purports to exempt from the Act's anti-bribery provisions those relatively innocuous payments that facilitate routine governmental action. Corporations are left, however, to decipher the Act's vague language within a vacuum of textual, judicial, and regulatory guidance.³ The onerous task of delineating unlawful, corrupt bribes from permissible expediting payments overdeters commercial actors who rationally prefer inaction to potential liability.

Critics disparage the routine governmental action exception as unworkable. Some contend that it lacks a moral basis—that the legislature created a fissure in the FCPA's foundation, enabling corporations to use petty bribes in a way that undermines the Act's fundamental anti-corruption purpose.⁴ Consequently, some academics and practitioners have called for complete congressional excise of the exception.⁵

Rather than propose the impracticable, this Note suggests a legislative middle ground: statutory reform to provide a clear definition of facilitating payments. Specifically, it advances an amendment that refines the exception's current purpose-focused paradigm and adopts a complementary, regionally tailored monetary cap. Facilitating payments that fall below this monetary threshold will enjoy a rebuttable presumption

2. See, e.g., Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done With the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 438 (1987) ("Unfortunately, the swiftness with which Congress enacted the FCPA is altogether too evident, and the inherent ambiguity of its provisions may have led to the loss of legitimate American business opportunities abroad."); Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 871–88 (2001) (criticizing as vague the Act's intent and knowledge requirements as well as its defenses and exception).

3. The FCPA applies to issuers, domestic concerns, and persons. 15 U.S.C. §§ 78dd-1 (for "issuers"), 78dd-2 (for "domestic concerns"), 78dd-3 (for "any person"); see also Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 583–84 (2006). The scope of this Note, however, is limited to the Act's effects on corporate defendants who are also subject to the Securities and Exchange Commission's jurisdiction. I will therefore confine my discussion to portions of the FCPA dealing with "issuers."

4. See, e.g., Antonio Argandoña, *Corruption and Companies: The Case of Facilitating Payments* 17 (IESE Bus. Sch., Working Paper No. 539, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=685861 ("From the ethical point of view, it is always immoral for an official or employee to solicit a facilitating payment.")

5. See, e.g., Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN ST. INT'L L. REV. 251, 254 (2006).

of legality, while those in excess will presumptively stand outside the exception's shelter. In this way, the legislature can equip corporations, prosecutors, and courts with a manageable and flexible standard to analyze expediting payments. This scheme will clarify otherwise ambiguous statutory language, thus mitigating the overdeterrent effect of the current provision and minimizing the social costs associated with this business practice.

In order to establish a framework for the proposed legislative reform, Part I of this Note provides a brief summary of the FCPA's relevant anti-bribery provisions. In an effort to provide a comprehensive definition of facilitating payments, Part II dissects the statutory language of the routine governmental action exception, identifying ambiguities and resulting interpretative complications. This Part also investigates the exception's legislative history, deriving a four-factor test to evaluate expediting payments. Finally, it discusses the few court opinions and administrative proceedings that touch upon the exception. Part III argues that the consequences of statutory ambiguity command modification of the exception. Part IV examines the weaknesses of two commonly proposed solutions, advisory opinions and a per se ban on facilitating payments. Part V recommends supplementing the current purpose-focused analysis of facilitating payments with a regionally tailored, monetary threshold.

I. THE FOREIGN CORRUPT PRACTICES ACT'S ANTI-BRIBERY PROVISIONS AND THEIR SOLE EXCEPTION

A. *The Purpose of the Foreign Corrupt Practices Act and Its Prohibitions*

Four decades ago, bribery of foreign officials was a common practice among many American corporations. In response to a voluntary disclosure program in the 1970s, over four hundred U.S. companies informed the Securities and Exchange Commission (SEC) that they had paid foreign government agents to secure a competitive advantage in international commerce.⁶ Collective acquiescence to this form of global corruption has readily identifiable consequences: it bloats corporations' operational expenditures; forces the implementation of opaque corporate governance; and encourages inefficient, "short-termist" business

6. Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business—The Dawn of a New Era*, 24 MELB. U. L. REV. 349, 359 (2000).

practices.⁷ Meanwhile, these corporate costs pale in comparison to those suffered in target states: officials' coffers swell at the expense of average citizens, who are stripped of the benefits of international investment; lack of transparency precludes public accountability; and, ultimately, bureaucratic inefficiencies clog infrastructure, wearing thin the local government's legitimacy.⁸

Shocked by the extent to which corruption pervaded the foreign business practices of American corporations, Congress crafted a dramatic response to the SEC's report: the Foreign Corrupt Practices Act of 1977. The Act's corporate anti-bribery provision criminalizes (1) corrupt efforts (2) to obtain or retain business or achieve an improper advantage (3) through payments to foreign officials.⁹ Though "corrupt" is statutorily undefined, the legislative history suggests that this element stands in the shoes of a mens rea requirement. In other words, Congress intended to criminalize only those payments intentionally designed to induce misuse of foreign officials' authority.¹⁰ 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."¹¹

B. *The Routine Governmental Action Exception*

From this broad prohibition, Congress carved out a single exception—neither criminal nor civil liability attaches for "payments . . . the purpose of which is to expedite or to secure the performance of a rou-

7. See Robert Bailes, *Facilitation Payments: Culturally Acceptable or Unacceptably Corrupt?*, 15 BUS. ETHICS: A EUR. REV. 293, 294 (2006); see also Antonio Argandoña, *Corruption: The Corporate Perspective*, 10 BUS. ETHICS: A EUR. REV. 163, 169 (2001) ("[A company engaging in corrupt activity] may therefore be neglecting its more lasting advantages . . . in favor of others that are much more transient and may become increasingly expensive to maintain. . . . [T]he corruption's advantages are usually transient, but the costs are usually permanent.").

8. See Bailes, *supra* note 7, at 294.

9. 15 U.S.C. § 78dd-1 (2006). Additional elements of the criminal charge, not directly relevant to this Note, include: "[4] the use of an instrumentality of interstate commerce . . . in furtherance of [5] a payment of, or even an offer to pay, 'anything of value,' directly or indirectly [6] to any foreign official, foreign political party, or foreign political candidate." DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 19* (2d ed. 1999); see also Maris & Singer, *supra* note 3, at 584–85.

10. See *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003) ("We thus conclude that the word 'corruptly' in the FCPA signifies . . . a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position."); Maris & Singer, *supra* note 3, at 585 n.63 (citing H.R. REP. NO. 95-640, at 8 (1977)); see also *infra* Part II.B.

11. S. REP. NO. 95-114, at 4 (1977), as reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

tine governmental action.”¹² The statute’s language focuses on the intent of the payor and the purpose of the payment.¹³ It permits only those payments made to facilitate or expedite tasks “ordinarily and commonly performed” by government officials.¹⁴ As such, Congress distinguished facilitating or expediting payments from their unlawful counterparts, which “create[] a conflict of interest that undermines the objectivity of officials charged with the public welfare.”¹⁵ To provide some analytical guidance, Congress supplied a nonexhaustive list of examples of routine governmental action, complementing this list with a broad catchall:

The term ‘routine governmental action’ means only an action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.¹⁶

II. DEFINING ROUTINE GOVERNMENTAL ACTION: INTERPRETIVE COMPLICATIONS

A. *Ambiguous Plain Language*

Practitioners, academics, and courts have struggled to delineate facilitating payments from unlawful bribes.¹⁷ Though the canons of statutory interpretation require a threshold analysis of the FCPA’s plain language,¹⁸ sections 78dd-1(b) and 78dd-1(f)(3)(A) are riddled with

12. 15 U.S.C. § 78dd-1(b) (2006).

13. *See id.*

14. *Id.* § 78dd-1(f)(3)(A).

15. *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 264 & n.231 (1997) (citing Bill Shaw, *Foreign Corrupt Practices Act: A Legal and Moral Analysis*, 7 J. BUS. ETHICS 789, 790 (1988)).

16. 15 U.S.C. § 78dd-1(f)(3)(A) (2006).

17. *See, e.g.*, STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 16 (2005) (“Determining what constitutes a facilitating payment can be extremely difficult . . .”).

18. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

vagueness.¹⁹ For instance, the term “routine” is expansive and carries many connotations.²⁰ It might refer to actions that are frequently undertaken, those that are ordinary, or those that are widely accepted as legitimate.²¹ While the FCPA provides a list of routine governmental actions to which courts can analogize, the list’s residual clause dramatically expands the exception’s potential reach.²² Without further guidance, corporations are left to wonder whether the phrase “actions of a similar nature” refers to similar behavior, similar ends, similar degree of commonality, or similar acceptability within the community.²³ This ambiguity is best illustrated by consideration of a hypothetical. The FCPA lists “providing phone service, power and water supply” as one example of routine governmental action.²⁴ Does the exception then shelter bribes to acquire Internet access in a country where such technology is not commonplace?²⁵ Because the civil and criminal consequences of violating the FCPA are severe,²⁶ corporations are justifiably wary of solicitations for payment to expedite governmental action in these gray areas.

Expressly excluded from the exception are payments made to “encourage a decision to award new business or to continue business with a particular party.”²⁷ Additional complications arise, however, when attempting to determine whether payments are in fact made for the pur-

19. 15 U.S.C. § 78dd-1(b) provides for the exception, while section 78dd-1(f)(3)(A) defines “routine governmental action.”

20. See Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT’L L. & BUS. 435, 451–53 (2001).

21. *Id.* at 451–52.

22. See Salbu, *supra* note 15, at 264–65 (“While the statutory examples may help business concerns to assess the legality of other payments by analogy, the catchall category of payments ‘similar’ to those listed ultimately retains an element of subjective interpretation. Accordingly, the purported clarifications of the 1988 Amendments may be partially or completely illusory.”) (internal citation omitted).

23. Salbu, *supra* note 20, at 452 (“It’s hard to imagine a less helpful phrase than the catch-all ‘actions of a similar nature.’”).

24. 15 U.S.C. § 78dd-1(f)(3)(A)(iv) (2006).

25. See Lucinda A. Low & John E. Davis, *The FCPA in Investment Transactions*, 1 Foreign Corrupt Prac. Act Rep. (West) § 5:5, n.1 (Oct. 2009) (offering a similar hypothetical and concluding that “[t]he cases and review releases do not answer this question, although it is possible that the [Department of Justice] might ultimately apply U.S. concepts of ‘routineness’ in a particular situation”).

26. For example, Siemens was recently fined \$1.6 billion for violating the FCPA and comparable foreign laws. 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.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>; see also *infra* note 99 (discussing the scope of FCPA liability).

27. 15 U.S.C. § 78dd-1(f)(3)(B) (2006).

pose of “obtaining or retaining business” as criminalized by the Act.²⁸ A plain-language reading might suggest that the FCPA only prohibits payments to secure business contracts. To the contrary, the Fifth Circuit recently concluded that even reduction of tariff liability can fall within the scope of “obtaining or retaining business.”²⁹

Furthermore, the Act does not explicitly limit the size of facilitating payments. Because the statute focuses on payor intent and payment purpose, its plain language suggests that even large bribes designed to solicit routine governmental action do not give rise to criminal liability. Conversely, a de minimis payment may result in enormous criminal and civil fees if the quid pro quo results in new business.³⁰ Yet, in spite of the exception’s text, practitioners agree that anything more than a modest payment is likely to attract the careful scrutiny of the Department of Justice (DOJ).³¹

B. *Guidance from Legislative History: Four Factors Emerge*

1. *The Foreign Corrupt Practices Act of 1977*

When plain language analysis is inconclusive, as is the case with the routine governmental action exception, courts may consult legislative history to facilitate statutory interpretation.³² Even in the earliest stages of the FCPA’s drafting, Congress expressed its desire to exempt from criminal liability payments intended to induce nondiscretionary governmental action. This objective was explicitly recorded in Congressional reports:

In using the word “corruptly”, [sic] the committee intends to dis-

28. See *id.* § 78dd-1(a).

29. Relying on the Act’s legislative history, the court held that Congress intended to prohibit far more than direct attempts to obtain or retain contracts with foreign governments. The Fifth Circuit concluded that payments that reduce tax liability could hypothetically assist in obtaining or retaining business by increasing a corporation’s profit margin, allowing it to underbid on its next government contract and thereby acquire new business. Alternatively, the reduced fees might enable the corporation to spend money on lobbyists, who could then acquire new business on the company’s behalf. See *United States v. Kay*, 359 F.3d 738, 748, 759–60 (5th Cir. 2004).

30. See DEMING, *supra* note 17, at 16; see also DIRECTORATE FOR FIN., FISCAL, & ENTER. AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], UNITED STATES: PHASE 2: REPORT ON IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION ¶¶ 114–15 (2002), available at <http://www.oecd.org/dataoecd/52/19/1962084.pdf> [hereinafter OECD PHASE 2 REPORT].

31. See, e.g., DEMING, *supra* note 17, at 16; see also Maris & Singer, *supra* note 3, at 588.

32. *Kay*, 359 F.3d at 746 (“As the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law. We turn therefore to legislative history in our effort to ascertain Congress’s true intentions.”).

tinguish between payments which cause an official to exercise other than his free will in acting or deciding . . . and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.³³

In other words, Congress did not intend to criminalize payments that merely hastened the inevitable.³⁴ The legislature distinguished these facilitating payments from bribes intended to obtain or retain business, considering the former to be relatively innocuous.³⁵

Legislators and practitioners often refer to these petty bribes as “grease” payments, for they are intended merely to lubricate wheels that bureaucratic friction would otherwise grind to a halt. Grand bribes, by contrast, are typically larger in size, corrupt in purpose, and paid to achieve an end not natural to the ordinary operation of the governmental apparatus.³⁶ Though it is clear that the drafters of the FCPA intended to distinguish grand bribery from grease payments—prohibiting the former, while permitting the latter—they failed to provide a workable mechanism with which to accomplish this end.

2. *Omnibus Trade and Competitiveness Act of 1988*

In its first decade, the FCPA was subject to a great deal of criticism.³⁷ Business leaders complained that the statute placed U.S. corporations at a distinct disadvantage, tying their hands while foreign competitors freely used bribery to secure lucrative contracts.³⁸ Furthermore, statutory uncertainty complicated application of the anti-bribery law. Specifically, detractors focused on Congress’ failure to articulate a clear grease payment exception.³⁹ Rather than delineate permissible payments by their purpose—as the legislative history suggests Congress intended—liability under the original Act turned upon the recipient’s government position. Corporations were not liable for bribing foreign officials

33. H.R. REP. NO. 95-640, at 8 (1977); *see also* DEMING, *supra* note 17, at 15 (defining non-discretionary acts as those that are “automatic or only a matter of time”).

34. *See* H.R. REP. NO. 95-640, at 8.

35. *See* S. REP. NO. 95-114, at 10 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

36. *See* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, & Transnational Bribery*, 33 CORNELL INT’L L.J. 657, 663–64 (2000).

37. *See* Maris & Singer, *supra* note 3, at 576.

38. *See* S. REP. NO. 100-277, at 2 (1988).

39. *See* *United States v. Kay*, 359 F.3d 738, 750 (5th Cir. 2004) (citing S. REP. NO. 100-85, at 53 (1987)).

whose responsibilities were “essentially ministerial or clerical”—classifications that were ambiguous.⁴⁰

Within this environment, Congress amended the Act so as to reflect the drafters’ intent to permit payments for the purpose of expediting routine governmental action.⁴¹ In 1988, it enacted the Omnibus Trade and Competitiveness Act, codifying the current language of the routine governmental action exception.⁴² In doing so, Congress shifted the Act’s focus from recipient status to payment purpose. As the House Report notes:

[T]here has been some criticism that the current statutory language does not clearly reflect Congressional intent and the boundaries of prohibited conduct. Critics have complained that “grease” payments are not clearly excluded, because the payments are defined primarily in terms of the official receiving the payment . . . instead of the purpose of the payment. The statutory change . . . will reflect current law and Congressional intent more clearly.⁴³

The Act no longer references the recipient’s occupational responsibilities. Instead, it now defines lawful payments according to the services for which they are rendered.

The FCPA’s legislative history provides a set of themes to which Congress frequently referred when drafting and amending the exception. From these themes, a four-factor test has emerged to distinguish facilitating payments from those that are “the functional equivalent of ‘obtaining or retaining business’”⁴⁴ or are “a subterfuge for other prohibited payments.”⁴⁵ Focusing on payment purpose, the legislature clearly articulated its intent to criminalize: (1) payments intended to alter dis-

40. See CRUVER, *supra* note 9, at 20; Arthur F. Mathews, *Defending SEC & DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT’L L. & BUS. 303, 313 n.17 (1998).

41. See S. REP. NO. 100-85, at 53 (1987) (“Notwithstanding the intent to exempt facilitating payments from the FCPA’s bribery prohibition, the method chosen by Congress in 1977 to accomplish this has been difficult to apply in practice.”); H.R. REP. NO. 100-40, pt. 2, at 77 (1987) (“However, there has been some criticism that the current statutory language does not clearly reflect Congressional intent and the boundaries of prohibited conduct.”).

42. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1164, 1415 (codified as amended at 15 U.S.C. § 78dd-1 (2006)).

43. H.R. REP. NO. 100-40, pt. 2, at 77.

44. H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.), as reprinted in 1988 U.S.C.C.A.N. 1547, 1954.

45. H.R. REP. NO. 100-40, pt. 2, at 77.

cretionary decision-making so as to increase the payor's business;⁴⁶ (2) payments that are "unusually large in relation to the 'governmental action' performed;"⁴⁷ (3) payments that directly affect competition in contracts,⁴⁸ for instance, where the recipient controls the payor's future business with the government;⁴⁹ and (4) payments in exchange for services to which the payor is not entitled.⁵⁰

No court or statute, however, has expressly adopted this test. Consequently, corporations are left without a clear list of factors to consider when determining whether a payment will enjoy the exception's shelter. Statutory reform is needed to clarify the scope of the exception, place corporations on notice of what constitutes an FCPA violation, and ensure that the principles of due process are served. Meanwhile, given the dearth of authority in the field, these factors may prove a useful guide for corporations as they attempt to navigate the boundaries of the amorphous exception.

C. *The Exception in Practice: A Synthesis of Plain Language and Legislative History*

No judicial or administrative opinion directly addresses the routine governmental action exception.⁵¹ Those that reference facilitating payments, however, affirm the significance of (1) the discretionary nature of the governmental action; (2) the size of the payment relative to the benefit received; (3) the payment's direct effect on competition for contracts, including the recipient's control over future business transac-

46. H.R. REP. NO. 95-640, at 8 ("[T]he committee intends to distinguish between payments which cause an official to exercise other than his free will . . . and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.").

47. H.R. REP. NO. 100-40, pt. 2, at 77.

48. See *Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on Int'l Econ. Policy & Trade of the H. Comm. on Foreign Affairs*, 98th Cong. 211, 221 (1983) [hereinafter *Foreign Trade Practices Act Hearings*] (statement of Mark Feldman, Att'y, Donovan, Leisure, Newton & Irvine).

49. See H.R. REP. NO. 100-40, pt. 2, at 77.

50. See *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004); see also Argandoña, *supra* note 4, at 5.

51. See OECD PHASE 2 REPORT, *supra* note 30, ¶ 115; Maris & Singer, *supra* note 3, at 587-88; U.S. Dep't of Justice, U.S. Response to Questions Relating to Phase I and Phase II, <http://www.justice.gov/criminal/fraud/fcpa/intlagree/related/usrph1-2quest.html> (last visited Dec. 18, 2009). The absence of judicial opinions may be attributed, at least in part, to defendants' decisions to settle rather than litigate the issue. See Longobardi, *supra* note 2, at 494 ("One cannot overemphasize the need for guidelines from the DOJ. This is particularly true because it appears that every enforcement proceeding will be settled, as in the past, by plea agreements.").

tions; and (4) the payor's entitlement to services rendered.⁵² But without a clearly articulated analytical framework, prosecutors and courts have exercised considerable discretion, placing unpredictable emphasis on the exception's various elements.⁵³ While size of payment may be dispositive in one instance, the nondiscretionary nature of the governmental action might control in another. The inconsistent ordering of these standards further muddles the boundaries of an already unmanageable exception.

1. *United States v. Kay: The Business Nexus Requirement*

United States v. Kay provides considerable insight into how a court might treat a true facilitating payment defense.⁵⁴ The defendants in *Kay*, two corporate employees, admitted to bribing Haitian officials in exchange for unlawful tax and tariff benefits. They contended, however, that these payments were outside the scope of the FCPA,⁵⁵ which criminalizes only bribes paid for the purpose of obtaining or retaining business.⁵⁶ The Fifth Circuit rejected this argument, concluding that reduction in tax liability, under the circumstances, satisfied the minimal causal relationship demanded by the FCPA's business nexus requirement.⁵⁷

To interpret the Act's ambiguous text, the Fifth Circuit contrasted what it considered to be the limiting terms of the routine governmental action exception with the otherwise sweeping language of the anti-bribery provisions.⁵⁸ The court unequivocally asserted that Congress intended to narrowly define facilitating payments:

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

52. Compare, e.g., *In re Gore*, Exchange Act Release No. 38,343 (Feb. 27, 1997), available at <http://www.sec.gov/litigation/admin/3438343.txt> (relying on the discretionary control a foreign official exercised in determining a lawful tax benefit), and *United States v. Vitusa Corp.*, 3 Foreign Corrupt Praes. Act Rep. (West) 699.155 (D.N.J. Apr. 13, 1994) (focusing on size of the payment and seniority of the foreign official), with *Kay*, 359 F.3d at 746–50 (emphasizing the use of false documents to confer an undeserved tax benefit).

53. See *infra* Part II.C.3.

54. 359 F.3d 738 (5th Cir. 2004).

55. *Id.* at 740, 743.

56. 15 U.S.C. § 78dd-1(a) (2006).

57. *Kay*, 359 F.3d at 740, 755–56; see also *supra* note 29 for a discussion of the reasoning behind this conclusion.

58. *Kay*, 359 F.3d at 750–751, 754–55.

are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person.⁵⁹

The defendants never alleged that their payments fell within the exception's scope.⁶⁰ In light of the four factors set out above, it would have been imprudent for them to do so. The bribes were intended to induce customs officials to take discretionary action, namely, unlawfully accepting falsified documents, and, in exchange, conferring a business benefit to which the defendants were not entitled.⁶¹ Because *Kay* addresses the governmental action exception only in dicta, it is unclear how much weight a future court might afford the opinion when interpreting a claim for shelter under section 78dd-1(b). This particular court, however, clearly views the exception as narrow in scope.

2. *SEC Affirms the Significance of the Four Factors*

SEC administrative proceedings provide insight into the manner by which that agency evaluates routine governmental action. The SEC's publications signal the analytical significance of two factors: the discretionary nature of the acts performed and the degree to which the payor was entitled to the benefits of the payee's performance.⁶² In 1997, various officers and executives of Triton Energy Corporation reached a settlement with the SEC in relation to alleged violations of the FCPA's accounting and anti-bribery provisions.⁶³ Among the many alleged violations, the SEC identified payment of \$23,000 to Indonesian officials in exchange for a tax refund to which the company was entitled.⁶⁴

With carefully selected language, the SEC emphasized that foreign officials retained discretionary control over the amount of the reimbursement: “[There was] uncertainty concerning the amount of reimbursement to which [Triton] was entitled, leaving [an official] to make the decision concerning whether [the tax] had been correctly paid and was subject to reimbursement.”⁶⁵ The bribe did possess some attributes of a permissible expediting payment—specifically, Triton was entitled

59. *Id.* at 749–50.

60. *See id.* at 740, 743.

61. *Id.* at 741. *See generally* 6 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD § 18:2 (2d ed. 2009) (discussing the application and limits of the routine governmental action exception).

62. *See, e.g., In re Gore*, Exchange Act Release No. 38,343 (Feb. 27, 1997), available at <http://www.sec.gov/litigation/admin/3438343.txt>.

63. *Id.* at 1.

64. *Id.* at 10.

65. *Id.*

to at least a portion of the reimbursement.⁶⁶ But, by emphasizing that the government actors had not merely hastened repayment, but also determined the exact amount of the refund, the SEC seems to have afforded greater weight to the discretionary nature of the officials' decisions.⁶⁷

In contrast, among its numerous charges, the SEC alleged that Triton violated accounting regulations by falsely recording and mislabeling \$1,000 monthly payments, which Triton's agents had made to low-level Indonesian officials "for the purpose of expediting payment of monthly crude oil invoices."⁶⁸ Conspicuously absent from the SEC's filings, however, are allegations that these payments also constituted unlawful bribery. It would seem, therefore, that the SEC considered them sheltered by the statutory exception.⁶⁹ This analysis is consistent with the conclusions drawn above, regarding the unlawful tax-related bribes. It is likely that the SEC distinguished these monthly payments—paid over several years—by the nondiscretionary nature of the acts that they were designed to elicit,⁷⁰ namely to "assure timely processing of crude oil invoices."⁷¹ As such, even though their total sum was significant, these payments did not generate the same problems as those that were made to an official who exercised discretion over the amount of a tax reimbursement.

Seven years later, the SEC again implicitly endorsed an approach that emphasized the discretionary nature of the governmental action and the payor's entitlement to services rendered.⁷² In 2004, BJ Services Company entered into a settlement agreement related to alleged violations of the FCPA's accounting and anti-bribery provisions.⁷³ Among the reported bribes was a roughly \$10,000 payment to a representative of Argentina's Secretary of Industry and Commerce.⁷⁴ BJ Services paid the official in order to hasten the importation of business equipment that was held up in delivery.⁷⁵ The settlement further stipulated that the cor-

66. *Id.*

67. *Id.*

68. *Id.* at 11.

69. See Mathews, *supra* note 40, at 365 & n.256 (labeling these payments "'Grease,' 'Facilitating,' Or [sic] 'Expediting'").

70. *Id.*

71. *Id.* at 365.

72. *In re* BJ Servs. Co., Exchange Act Release No. 49,390 (Mar. 10, 2004), available at <http://www.sec.gov/litigation/admin/34-49390.htm>.

73. *Id.*

74. *Id.* ¶ 9.

75. *Id.*

poration believed the equipment “could be imported under Argentina’s laws, [and that] the payment was made to expedite the approval process.”⁷⁶

A payment made to expedite the customs process is a “typical example of a facilitating payment”⁷⁷ and is implicitly condoned by the FCPA.⁷⁸ The Act’s legislative history suggests that such a bribe—paid to cut a path through a morass of bureaucratic obstacles and produce an end to which the payor is entitled—is not punishable.⁷⁹ *In re BJ Services* indirectly corroborates this conclusion. Significantly, the SEC distinguished the \$10,000 by labeling it a “facilitation payment.”⁸⁰ The agency did not expressly conclude that the bribe fell within the exception’s scope. But its separate treatment of this payment, coupled with its choice of label, indicates that the SEC considered it distinguishable from BJ Services’ grand bribes.

3. United States v. Vitusa Corporation: *An Example of Broad Prosecutorial Discretion*

Kay stands at the opposite end of the spectrum from *In re BJ Services*. Falsifying documents and conferring undeserved tax benefits fall well beyond the indistinct borders of “routine.” Speeding equipment through import control, on the other hand, likely enjoys the exception’s shelter. Between these extremes, however, are situations that cause business actors great concern. For instance, the exception might seem to exempt payments that merely hasten reimbursement of government debts owed to a corporation. But in 1994, the DOJ brought charges against Vitusa Corporation for this very type of payment.⁸¹

76. *Id.*

77. DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 5-1 (2006) (citing H.R. REP. NO. 95-640, at 8 (1977)).

78. See 15 U.S.C. § 78dd-1(f)(3)(A)(iv)–(v) (2006) (“The term ‘routine governmental action’ means only an action which is ordinarily and commonly performed by a foreign official in . . . loading and unloading cargo, or protecting perishable products or commodities from deterioration, or . . . actions of a similar nature.”).

79. See *supra* Part II.B for a discussion of the exception’s legislative history and underlying purpose.

80. *In re BJ Servs. Co.*, ¶ 9.

81. SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES & REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at 106 (Oct. 2009), available at <http://www.shearman.com/files/upload/LT-100209-FCPA-Digest-Cases-and-Review-Releases-Relating-to-Bribes-to-Foreign-Officials-under-the-Foreign-Corrupt-Practices-Act.pdf>. The corporation pled guilty and settled with the government, paying a \$20,000 fee. Denny Herzberg, its president, was charged separately. He also pled guilty, paid \$5,000, and was placed on unsupervised probation for two years. *Id.*

In 1989, the Dominican Republic ordered 1,500 metric tons of milk powder from Vitusa.⁸² With an election fast approaching, the Dominican government requested that the corporation ship a sizeable portion of the order in advance of payment.⁸³ Though it never disputed its \$1 million debt, the government repeatedly neglected its contractual obligations, failing to compensate Vitusa for several months.⁸⁴

Over the period of nonpayment, Vitusa's president, Denny J. Herzberg, fruitlessly solicited the help of his congressman, the U.S. Ambassador to the Dominican Republic, and various officers at the American Chamber of Commerce in the Dominican Republic.⁸⁵ Finally, in August 1992, the corporation's commission agent informed Herzberg that for a "service fee" of \$50,000, a senior Dominican official would "us[e] [his] influence to obtain the balance due to Vitusa for the milk powder contract."⁸⁶ Herzberg consulted with the Foreign Agricultural Service Counselor at the U.S. Embassy, who advised that the "service fee" would likely violate the FCPA.⁸⁷ Despite this caution, Vitusa authorized payment of the fee, and, shortly thereafter, the Dominican Republic paid its outstanding balance.⁸⁸

The DOJ prosecuted Vitusa for offering a government official a service fee of less than five percent in order to expedite a non-discretionary act—fulfillment of a debt obligation to which the corporation was entitled.⁸⁹ As the settlement agreement stipulates, "[t]he unlawful payments to the foreign official were made in order to obtain payment of a legitimate and lawful obligation owed by the government of the Dominican Republic to Vitusa."⁹⁰ Further, in the government's own words, the only business conferred to Vitusa was the "full payment of the balance due for [the corporation's] prior sale."⁹¹ Even as described in the prosecution's documents, Vitusa's bribe would seem to fall squarely within the set of payments that Congress intended to exempt from liability. Ironically, it appears that the DOJ focused on the total size of the payments (\$50,000) and the seniority of the official receiving the mon-

82. *United States v. Vitusa Corp.*, 3 Foreign Corrupt Pracs. Act Rep. (West) 699.155, 699.162 (D.N.J. Apr. 13, 1994).

83. *Id.* at 699.163.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 699.164.

88. *Id.*

89. See H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 5:4 (2009).

90. *Vitusa*, 3 Foreign Corrupt Pracs. Act Rep. (West) at 699.161.

91. *Id.* at 699.159–160.

ey, discounting the factors that Congress had emphasized in its 1988 amendment—the nondiscretionary nature of the governmental action and the corporation’s entitlement to the services rendered.

The inconsistent application of prosecutorial discretion is further complicated by the public statements of DOJ officials. Though by no means binding, the analysis of a DOJ agent at an FCPA conference in April 1995 exemplifies the confused state of the law. The representative was asked whether payments to expedite reimbursement of an undisputed value added tax refund complied with the FCPA’s anti-bribery provisions. The DOJ official answered that “such payments would attract the Department’s attention and would be unlikely to be viewed as facilitating payments.”⁹²

As in *Vitusa*, the representative disregarded the drafters’ focus on the payor’s entitlement to services rendered. He justified his answer with the assertion that hastening payment of undisputed tax refunds is not routine governmental action because “the [foreign] official is exercising discretion in deciding whose application to process first” and the decision “concern[s] the retaining of business.”⁹³ The representative’s rationale stands in contrast to the language of the statute itself. Section 78dd-1(f)(3)(A) expressly labels as routine the “processing [of] governmental papers, such as visas and work orders.”⁹⁴ Hastening governmental action of this sort almost certainly requires the reordering of priorities. If extrapolated, the DOJ official’s analysis threatens to swallow the entire exception.

Published judicial and agency opinions do little to resolve the ambiguities of the routine governmental action exception. While they collectively appear to affirm the significance of the four factors emphasized by the FCPA’s drafters, the weight afforded to each element, and even whether certain factors are considered at all, varies from case to case. The DOJ and SEC clearly enjoy enormous prosecutorial discretion. Wielding the broadsword of criminal sanctions, these agencies are free to interpret the FCPA’s equivocal language as they see fit. While the four-factor test derived from legislative history provides a rudimentary guide, wide interpretative variation by officials compels corporations to tread lightly when navigating the routine governmental action exception.

92. ZARIN, *supra* note 77, at 5:4.

93. *Id.*

94. 15 U.S.C. § 78dd-1(f)(3)(A)(ii) (2006).

III. MOUNTING COSTS AND THE NEED FOR STATUTORY REFORM

In 2002, the Organization for Economic Co-operation and Development (OECD) dispatched its Working Group on Bribery and International Business Transactions (Working Group) to evaluate U.S. compliance with the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention).⁹⁵ The Working Group criticized the FCPA's routine governmental action exception as "an area of risk . . . open to misuse."⁹⁶ In uncompromising terms, its report described the exception as unworkable.⁹⁷

When considered in light of a trend toward more aggressive enforcement,⁹⁸ hundreds of millions of dollars of potential liability,⁹⁹ and

95. OECD PHASE 2 REPORT, *supra* note 30, ¶ 1. The OECD Convention sets out standards that bind its ratifiers to implement domestic legislation criminalizing bribery of foreign public officials. OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1, *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>. For more information, see http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (last visited Dec. 18, 2009).

96. OECD PHASE 2 REPORT, *supra* note 30, ¶ 114.

97. *See id.* ¶ 115 ("There is an absence of any clear, published guidance as to what the words mean and where the limits are.")

98. SHEARMAN & STERLING, LLP, *supra* note 81, at i ("[T]he SEC and, to a lesser extent, the DOJ continue to adopt aggressive and potentially controversial interpretations of the FCPA in their respective enforcement actions against individuals and corporations."). *See also* DANFORTH NEWCOMB & PHILIP UROFSKY, SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 1 (Mar. 2009), *available at* <http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Recent-Trends-and-Patterns-in-FCPA-Enforcement.pdf> ("More important . . . are the multi-year trends of increasing numbers of enforcement investigations and enforcement actions against both corporations and individuals . . . accompanied by expansive assertions of jurisdiction by the U.S. enforcement authorities . . .").

99. Dwarfing past records, in December 2008, Siemens agreed to pay U.S. and foreign governments more than \$1.6 billion in fines, penalties, and disgorgement payments. Press Release, *supra* note 26. Willful violation of the Act's accounting provisions leaves corporations vulnerable to fees of up to \$25 million. Maris & Singer, *supra* note 3, at 593. For each willful breach of the FCPA's prohibition on bribery, a corporation can be charged \$2 million in criminal fines and \$10,000 in civil penalties. *Id.* Of potentially greater consequence is the threat of debarment. David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 690 (2009); *see also* ZARIN, *supra* note 77, at 1-9, 1-10. Guilty corporations could be precluded from contracting with the U.S. government in the future—a penalty that would sound the death knell for many companies. James C. Nobles, Jr. & Christina Maistrellis, *The Foreign Corrupt Practices Act: A Systematic Solution for the U.S. Multinational*, NAFTA: L. & BUS. REV. AMS. Spring 1995, at 5, 11 ("FCPA violations can also jeopardize the defendant's contracts with the federal government. For large defense contractors, disbarment from U.S. government contracts could well be the most significant deterrent to engaging in conduct proscribed under the FCPA.") (internal citation omitted).

the collateral consequences of even the mere threat of indictment,¹⁰⁰ the ambiguity that surrounds the routine governmental action exception is alarming. One dramatic consequence of statutory equivocation is over-deterrence.¹⁰¹ Unable to delineate lawful payments from unlawful ones, corporations cannot effectively police their own agents.¹⁰² Consequently, some companies unilaterally prohibit the use of grease payments.¹⁰³ As one expert has described, the chilling effect on corporate actors is palpable:

[S]ome companies have adopted policies of routinely erring on the side of caution to avoid possible overstepping. These companies prohibit employees from making not only preference-purchasing payments, but also grease payments. Such policies demonstrate that the FCPA's chilling effect on lawful behavior is no mere theoretical construct.¹⁰⁴

When operating in a country where facilitating payments are the norm, such a policy might even encourage a corporation to divest.

100. Indictment can impose enormous costs on corporations, even if they are later exonerated. For instance, indicted companies incur great legal costs, are stigmatized in the public (and, if publicly traded, their stock will likely lose value), and are distracted from normal corporate business while defending the charges. See OECD PHASE 2 REPORT, *supra* note 30, ¶¶ 49–52.

101. One indicator of the FCPA's dramatic deterrent effect is the increased frequency with which corporations, foreign and domestic, now volunteer evidence of violations of the Act to prosecutors, "regardless of how much merit a case may have." Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J. L. & BUS. 229, 256 (2005). In order to escape the enormous penalties that accompany indictment and prosecution, these companies unilaterally provide the DOJ with evidence of their employees' criminal wrongdoing and assume the significant costs of criminal fines, internal investigation, and compliance program implementation in order to escape even the potential of criminal liability. See generally Brandon L. Garrett, Globalized Corporate Prosecutions, Presentation at Washington University School of Law Conference: New Research in Regulation of Corporations, Managers, and Financial Markets (Mar. 6, 2009) (draft of remarks on file with author) (noting that a combination of broad prosecutorial powers, broad entity liability generated by U.S. respondeat superior standards, and the application of these standards to broad criminal statutes results in "great pressure [for corporations] to cooperate with prosecutors and enter into agreements to settle prosecutions").

102. See OECD PHASE 2 REPORT, *supra* note 30, ¶ 116 ("At least one major company interviewed imposes a policy, applicable worldwide, that irrespective of the existence of the exception, no discretionary payments are to be made without express approval, as a way of reducing the scope for misjudgement by local employees. The high level of concern was also demonstrated by another in-house counsel, who said that when teaching the FCPA he carefully omits all reference to the existence of the exception.").

103. For example, after Young & Rubicam and three of its executives were charged with conspiring to bribe Jamaican officials in violation of the FCPA, the corporation responded by adopting "a policy that forbids even facilitating payments . . . [that] are permitted under the FCPA." Andrew W. Singer, *Ethics: Are Standards Lower Overseas?*, ACROSS THE BOARD, Sept. 1991, at 33.

104. Salbu, *supra* note 15, at 267 (internal citations omitted).

Facing weighty financial penalties, the stigma attached to criminal liability, and potential ineligibility for future government contracts, businesses are unwilling to engage in certain international transactions even when Congress did not intend to require restraint.¹⁰⁵ Thus, vigorous enforcement of unclear provisions goads corporations into a pattern of overly cautious decisionmaking and induces inefficiently low activity levels.¹⁰⁶ As such, the FCPA does not appropriately calibrate threatened sanctions to the social consequences of facilitating payments.¹⁰⁷ For instance, rather than stand trial, Vitusa and its president agreed to pay fees and undergo probation for an act that, in the DOJ's own words, resulted in "no loss to any party and no individual victim."¹⁰⁸ To make matters worse, the prosecution of such victimless conduct has potential effects that go far beyond the penalties directly imposed: Dominican citizens may be left without milk because American suppliers fear nonpayment and choose not to rush future shipments; U.S. citizens may be deprived of the tax revenue generated by such investments; and corporations may

105. It is difficult to calculate the precise costs of the FCPA's statutory ambiguity. Longobardi, *supra* note 2, at 446–47. Empirical evidence indicates, however, that the uncertain parameters of the Act's prohibitions have caused corporations to adopt inefficient business practices. *See id.* at 447 ("[T]he Act is causing corporations to be overcautious and turn down legitimate business opportunities because they are unsure whether a proposed transaction will violate the FCPA. Again, this problem harkens back to the inherent weaknesses and ambiguities found in the Act.") (citations omitted); *see also* Taylor, *supra* note 2, at 879–80 ("Unnecessary costs that American businesses face when attempting to comply with the FCPA are associated with the ambiguous nature of the Act's provisions. . . . [T]hese increased costs may . . . [indicate] excessive expenditures due to inadequate guidelines and the perceived need for protection from uncertainties.") (citations omitted). One expert even suggests that prosecutors' unpredictable enforcement of the FCPA has driven corporations from the United States. Murphy, *supra* note 101, at 259–60 ("It is not just difficult to predict how the FCPA might be applied to a company, it is impossible. . . . The long term risk . . . is that the costs of compliance and the continued risk of sanctions, even in the face of robust efforts to comply, may finally sour companies on doing business [in the United States].").

106. *See supra* note 101. The ill-defined nature of the routine governmental action exception coupled with the anxiety and uncertainty of operating in unfamiliar and often authoritarian foreign settings, raises the question of whether "Americans who are risk averse [would] be dissuaded . . . from transacting [any] business abroad." Salbu, *supra* note 15, at 266. "These questions highlight two concerns: That the FCPA sledgehammer may be poorly equipped to handle subtle moral differences among various factual situations and that the FCPA's ambiguity may deter businesspersons from interacting in international markets." *Id.*

107. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct*, 72 N.Y.U. L. REV. 687, 698 (1997) ("The activity-level goal [of optimal deterrence] requires that the firm bear the full social cost of misconduct associated with its production in order to ensure efficient output levels.").

108. *United States v. Vitusa Corp.*, 3 Foreign Corrupt Pracs. Act Rep. (West) 699.155, 699.161 (D.N.J. Apr. 13, 1994).

be forced to withdraw from lucrative markets because of uncertainty regarding the application of ambiguous statutory language.

The caveat issued by F. Joseph Warin and Andrew S. Boutros regarding deferred prosecution agreements applies equally well to the routine governmental action exception: “[W]hen corporate life and security . . . are at stake, the need for guidance and consistency is absolute.”¹⁰⁹ Though prosecutors are not obliged to counsel potential criminals preemptively, corporations should not be forced to languish in statutory uncertainty, facing the Hobson’s choice of risking criminal liability or refraining from investment in regions where facilitating payments are standard practice. Therefore, Congress ought to clarify the scope of the routine governmental action exception to mitigate the chilling effect caused by its own imprecise drafting.¹¹⁰

IV. UNSATISFACTORY ALTERNATIVES TO THE PROPOSED REFORM

A. *The Advisory Opinion Procedure: An Inadequate Alternative*

One might argue that modification of the FCPA is unnecessary because the Act currently provides an adequate means of clarifying its own ambiguity. To resolve uncertainty regarding the scope of the routine governmental action exception, the DOJ recommends that corporations seek its advice and counsel through its Advisory Opinion Procedure.¹¹¹ This service enables the Attorney General to respond to specific inquiries regarding the likelihood of prosecution for prospective conduct.¹¹² Unfortunately, the DOJ may take up to thirty days to respond to an opinion request.¹¹³ In light of the urgency that often accompanies expediting payments, this procedure may not be a viable option. For instance, a one-month delay might prove financially disastrous to a company attempting to secure the delivery of perishables.

109. F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 130 (2007), <http://www.virginialawreview.org/inbrief/2007/06/18/warin.pdf>.

110. See OECD PHASE 2 REPORT, *supra* note 30, ¶ 116 (“The lead examiners suggest that there may be a case for guidance to be issued by the DOJ to explain the tests it applies in practice to assist in the interpretation of this exception. Alternatively, consideration should be given to amending the wording of the statute to clarify, for the benefit of all, that only minor payments are allowable.”).

111. See U.S. Dep’t of Justice, Lay-Person’s Guide to FCPA, <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> (last visited Dec. 18, 2009).

112. See 15 U.S.C. § 78dd-1(e)(1) (2006).

113. *Id.*

Indeed, because of its cumbersome nature, corporations rarely make use of the procedure.¹¹⁴ As noted by one experienced former prosecutor, “[t]he opinion procedure process should not be undertaken lightly. For requestors who are unprepared, the process can be lengthy and costly.”¹¹⁵ Corporations are also wary of the advisory opinion process because it exposes requestors to potential future liability. As evidenced by Vitusa’s analogous efforts to consult with an Agricultural Service Counselor, informing the government of one’s intention to pay a foreign official may only invite scrutiny of past and future transactions.¹¹⁶ Even if the transaction underlying an inquiry does not give rise to liability, the DOJ could still prosecute a corporation for attaching inaccurate or incomplete information to its request.¹¹⁷ Furthermore, because the opinions are responses to specific inquiries, they are of limited precedential value; even a minor factual deviation necessitates a fresh opinion request. Worse still, a favorable opinion does not guarantee that the DOJ will refrain from prosecuting the action endorsed by its own release.¹¹⁸

The DOJ has decided not to promulgate guidelines to govern analysis of the FCPA’s anti-bribery provisions.¹¹⁹ Certainly prosecutors are under no obligation to provide potential criminals a detailed map with which to escape liability. But lacking even rudimentary directions and faced with equivocal statutory language, companies are left to navigate the exception’s narrow passage without a rudder. Therefore, the chilling effect caused by the statute’s shortcomings commands legislative action.

114. CRUVER, *supra* note 9, at 62 (“Due . . . to ambiguities in the Review Procedure and to the host of uncertainties and pitfalls associated with its use . . . the use of the Review Procedure is infrequent.”).

115. DEMING, *supra* note 17, at 19.

116. *See United States v. Vitusa Corp.*, 3 Foreign Corrupt Pracs. Act Rep. (West) 699.155, 699.164 (D.N.J. Apr. 13, 1994).

117. DEMING, *supra* note 17, at 18–19.

118. *See* 15 U.S.C. § 78dd-1(e)(1).

119. *See Anti-Bribery Provisions*, 55 Fed. Reg. 28,694-02 (July 12, 1990) (“After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary.”); Longobardi, *supra* note 2, at 474–75.

B. *A Per Se Ban: A Counterproductive Alternative*

1. *A Per Se Ban Would Prove Impracticable*

Some commentators have called for a per se ban on facilitating payments.¹²⁰ They contend not only that distinguishing grease payments from grand bribery is impracticable, but also that attempts to do so are philosophically unsubstantiated.¹²¹ These scholars reject the “myth of corruption as a matter of culture”—that is to say, the notion that some foreign societies are tolerant or even welcoming of grease payments.¹²² They argue that facilitating payments are a form of corruption, which stand on the same shaky moral footing and raise the same fundamental public policy concerns as grand bribery.¹²³ Grease payments extort corporations, result in delayed services, deprive citizens of the benefits of tax revenue, destabilize the public administrative system, and foster a culture of corruption and disregard for the rule of law.¹²⁴ Accordingly, many opponents of facilitating payments demand that the United States join the rising international tide and proscribe all forms of corruption, even petty bribery used to induce routine governmental action.¹²⁵

120. See, e.g., Zervos, *supra* note 5, at 254 (“[T]he negative impact of administrative corruption, the relatively limited practical benefit of the exemption for ‘grease’ money and the great symbolic disadvantage the exemption creates . . . suggest[] that the United States [should] repeal the FCPA exemption [for routine governmental action].”).

121. See *id.* at 274–75 (“Most potential subdivisions of the low-level administrative bribery currently permitted by the FCPA are either relatively easy to classify bribes into or would be useful categories to consider, but none actually meet both criteria.”).

122. Bailes, *supra* note 7, at 297.

123. See *id.*; see also Zervos, *supra* note 5, at 263–69 (arguing that the economic and symbolic costs of the exception outweigh its benefits).

124. See Argandoña, *supra* note 4, at 7 (“If the use of facilitating payments becomes common practice, they [sic] have a corrosive effect on people’s trust in legal, administrative and judicial procedures (transaction costs increase, and they do so unpredictably and arbitrarily.”); Rebecca Koch, Comment, *The Foreign Corrupt Practices Act: It’s Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT’L & COMP. L. REV. 379, 402 (2005) (“Thus, institutionalized corruption creates a vicious cycle where poverty causes bribery, which exacerbates existing structural problems that result in increased poverty, which, in turn, leads to more bribery.”); *Bribery: The Worm That Never Dies*, ECONOMIST, Mar. 2, 2002, at 12 (“Facilitation payments are merely the first move in . . . a chess game that begins to lead to bribery. . . . Today’s facilitation payment is tomorrow’s bribe.”) (internal quotation marks omitted).

125. See Koch, *supra* note 124, 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.”); see also Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT’L L. 491, 493–94 (1998) (“There are . . . differences . . . between the wording of Article VIII [of the Inter-American Convention against Corruption] and that of the FCPA For example, the FCPA specifically excepts from coverage ‘facilitating payments[.]’ . . . Article VIII, however,

The concerns raised by these authors are not devoid of merit.¹²⁶ All the same, a per se ban on grease payments would prove impracticable and ineffective. In many cultures, payment for routine governmental action is a widespread practice, engrained within social norms and local mores.¹²⁷ As Dr. Nii Lante Wallace-Bruce has noted, “[i]t would be far better to have a provision that is workable and can be enforced, rather than have one which looks good on the statute books but is totally unenforceable.”¹²⁸ In fact, the impracticable nature of a per se ban proved to be a central motivation for Congress when it carved out the grease payment exception in 1977.¹²⁹

2. *Perverse Consequences of a Per Se Ban*

Of modest size and offered to low ranking officials, facilitating payments are inherently difficult to detect. As such, effective enforcement of a per se ban would require significant reallocation of resources. Such a proscription would force federal prosecutors to siphon energy otherwise directed at combating grand bribery to track de minimis corporate

contains no such exception.”); Bonnie H. Weinstein, *International Investment, Development, and Privatization*, 36 INT’L LAW. 355, 355 (2002) (“In recent years, bribery and corrupt practices, in its various forms, have been increasingly viewed as a scourge and impediment to international business, economic and political development and stability. . . . It is evident from the status of numerous international initiatives that it will remain so in the years ahead.”).

126. It is beyond the scope of this Note to engage the academic debate surrounding the moral permissibility of grease payments. For the sake of providing a balanced perspective, however, it is worth noting that several scholars reject the moral equivalence of facilitating payments and grand bribery. These commentators note that despite the trend mentioned above, the international community has not reached consensus on the impermissibility of facilitating payments. This is evidenced by the fact that the seminal international anti-corruption agreement, the OECD Convention, does not proscribe facilitating payments. See Argandoña, *supra* note 4, at 10. Professor Steven Salbu takes issue with the notion that grease payments cannot be distinguished from grand bribery. Salbu, *supra* note 36, at 683 n.194. Adopting a teleological approach, he contends that the benefits associated with facilitating payments can outweigh their costs. See Salbu, *supra* note 20, at 441–44. Unlike grand bribes, facilitating payments are lawful, in part because the payor is entitled to the services rendered. See Argandoña, *supra* note 4, at 5. Finally, many authors caution against the threat of moral imperialism, noting that while corruption is universally rejected, disagreement regarding the scope of its definition abounds. See, e.g., Bailes, *supra* note 7, at 295; Salbu, *supra* note 20, at 455–56. By proscribing the use of facilitating payments, the United States would force countries in which grease payments are culturally acceptable to either forgo the benefits of U.S. corporate investment or alter local customs and social mores.

127. See Bailes, *supra* note 7, at 295.

128. Wallace-Bruce, *supra* note 6, at 371.

129. H.R. REP. NO. 95-640, at 8 (1977) (“[T]he committee recognizes that [grease payments] are not necessarily so [negatively] viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments.”).

payments intended to induce performance of services to which the payors were entitled. This redistribution of scarce government resources would be inconsistent with the underlying purpose of the FCPA.¹³⁰

Absent a dramatic reallocation of prosecutorial resources, however, a per se prohibition on grease payments would likely go unenforced.¹³¹ Nonenforcement would, in turn, undercut the ban's deterrent effect. Corporations would quickly learn of SEC and DOJ prosecutorial ambivalence towards grease payments and likely maintain their current payment levels. Worse still, this approach would undoubtedly tarnish the reputation of enforcement agencies. Accustomed to violating the letter of the law with impunity, corporations may even begin to brashly test the limits of prosecutorial complicity, engaging in corrupt practices from which they would have otherwise abstained. In this environment, a per se ban would prove counterproductive to the very objectives advocated by its proponents.

If, alternatively, the DOJ maintained its aggressive posture and vigorously pursued each payor of a grease payment, the risks of overdeterrence would grow increasingly pronounced. Thus, while a per se ban might achieve statutory clarity, it threatens to exacerbate, rather than correct, the negative consequences of inefficient deterrence.

Where grease payments are a common business practice, assured prosecution will necessitate either termination of business or reformation of local culture. Inducing a society to abandon its norms is not only impractical, but also smacks of moral imperialism.¹³² Corporations will therefore have no choice but to divest and disassociate with agents that refuse to reform independently. As one scholar has noted, “[t]he point here is that it does not matter how good a multinational’s codes or policies on bribery are[] . . . ; if they do not accept the way things are done, they simply cannot operate.”¹³³

130. See H.R. REP. NO. 100-40, pt. 2, at 77 (1987) (“U.S. enforcement resources should be devoted to activities having much greater impact on foreign policy.”); see also *supra* Parts I.A, II.B (discussing Congress’ intent when it drafted and modified the FCPA).

131. See H.R. REP. NO. 100-40, pt. 2, at 76 (“Any prohibition under U.S. law against . . . petty corruption would be exceedingly difficult to enforce”); see also Zervos, *supra* note 5, at 290 (suggesting that to be most effective an enforcement plan for a per se ban would require the DOJ “to make greater use of tools it currently has for reducing corruption” and would require the Federal Bureau of Investigation (FBI) to “consider adding work on anti-corruption to the remit of FBI agents stationed overseas”).

132. See *supra* Part IV.B.1 & note 126 for a brief discussion of the debate surrounding the moral permissibility of grease payments.

133. Bailes, *supra* note 7, at 296.

Just as statutory ambiguity causes overdeterrence and undermines the Act's original purpose, detection and prosecution of every facilitating payment would impede realization of the FCPA's ultimate objective: eradication of grand bribery. To make matters worse, unqualified compliance with a per se ban—even more than the uncertainty that now surrounds the exception's scope—may lead to divestment in developing countries where facilitating payments are a de facto necessity. With U.S. corporations in flight, average citizens of target states might suffer diminished quality of life.¹³⁴ Corporations whose hands are not bound by the FCPA could fill the void left by retreating U.S. companies. If unchecked by any anti-corruption convention, these new actors could readily engage in grand bribery.¹³⁵ Consequently, a per se ban on grease payments may in fact undermine recent advances in global anti-corruption efforts.

Congress' choice to permit facilitating payments in 1977 may have been a reluctant one, but it represents a realistic decision.¹³⁶ Members of the House and Senate recognized that in some countries grease payments are a common occurrence and may even be culturally permissible. They appreciated that a per se ban is likely unenforceable,¹³⁷ raises concerns of moral imperialism,¹³⁸ and places U.S. corporations at a distinct competitive disadvantage.¹³⁹ Concluding that a policy of prosecuting every payment to a foreign official would *not* contribute substantially to the eradication of international corporate corruption, Congress attempted to carve out a routine governmental action exception.

134. See Wallace-Bruce, *supra* note 6, at 357 (discussing possible “benign effects of corruption,” especially in developing countries, including local job growth, economic development, and the lowering of trade barriers).

135. See Bailes, *supra* note 7, at 296 (“In this respect, companies realize that if they do not engage in facilitation or bribery payments, there will be a number of other similar companies who will and they will thus lose business and competitive advantage.”).

136. H.R. REP. NO. 100-40, pt. 2, at 76–77 (“Any prohibition under U.S. law against this type of petty corruption would be exceedingly difficult to enforce, not only by U.S. prosecutors but by the company officials themselves. Thus while such payments should not be condoned, they may appropriately be excluded from reach of the FCPA.”).

137. *Id.*

138. See *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 42–45 (1977) [hereinafter *Unlawful Corporate Payments Act Hearings*] (testimony of Rep. Krueger, Member, H. Comm. on Interstate and Foreign Commerce); see also *supra* Part IV.B.1 & note 126 for a brief synopsis of the debate surrounding the moral permissibility of grease payments.

139. See Wallace-Bruce, *supra* note 6, at 371 (discussing the similar conclusion of the drafters of the OECD Convention).

Through three major drafting events, Congress has created, amended, and retained the routine governmental action exception.¹⁴⁰ It has therefore unequivocally expressed its desire to shelter facilitating payments from criminal liability. In doing so, it has articulated a belief that permitting some form of grease payments is socially beneficial, or at least preferable to the available alternatives. The purpose of this Note is not to call into question this conclusion.¹⁴¹ Rather, this Note seeks to identify a better way of formulating and implementing the exception. Reform is required. Statutory flexibility and clarity must be achieved in order to minimize the potential for overdeterrence.

V. A PROPOSED SOLUTION: A TWO-PART TEST AND MANDATORY CORPORATE COMPLIANCE

A. *Guiding Principles: Statutory Clarity and Flexibility*

Statutory reform of the routine governmental action exception must bear two traits: clarity and flexibility. The former is of central importance to corporate risk analysis.¹⁴² Efficient decisionmaking requires the capacity to determine accurately the scope of the law and, with it, the potential liability consequences of foreign investment.

But, as shown by the inadequacies of a *per se* ban on facilitating payments, clarity cannot come at the expense of flexibility. Rigid

140. Congress drafted the FCPA in 1977, amended it in 1988, and incorporated elements of the OECD Convention in 1998. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78o, 78dd-1, 78dd-2, 78ff); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1164, 1415-24 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78a, 78dd-1 to dd-3, 78ff); *see also* Maris & Singer, *supra* note 3, at 576 (describing the effects of the 1988 and 1998 amendments).

141. Again, this Note does not attempt to fully scrutinize the moral validity of petty corruption, but the argument is intractably interwoven with any evaluation of the FCPA's overall efficacy. For more information regarding the impact of facilitating payments on development in foreign states, *see Unlawful Corporate Payment Act Hearings, supra* note 138, at 44 (testimony of Dr. Gordon Adams, Council on Economic Priorities) (recognizing that some consider facilitating payments a necessary supplement to wages of underpaid foreign officials); Salbu, *supra* note 20, at 453-56 (noting that corporations may be better equipped than governments to "effect meaningful changes" to a culture of corruption); Wallace-Bruce, *supra* note 6, at 356-57. *But see* Zervos, *supra* note 5, at 263-66 (arguing that grease payments have a deleterious effect on the corporations that pay them and on the governments whose officials accept them).

142. *See* S. REP. NO. 100-85, at 54 (1987) ("A clearer law will assist U.S. businessmen to police their own actions with greater confidence and will reaffirm our national policy against using bribes to obtain, retain, or direct business.").

bright-line rules have collateral consequences. Thomas W. Dunfee and David Hess have noted that, “any attempt to control bribery must be sensitive to local traditions. Likewise, any attempt to structure corporate principles on bribery must allow for flexibility at the level of actual practice. We cannot expect firms facing diverse market and cultural environments to follow a unified approach.”¹⁴³ A clear and flexible legislative solution would enable multinational corporations to conduct business in regions where facilitating payments are the norm. It would also provide advance notice of what constitutes a violation of the statute, affording companies their due process rights. Ultimately, it would enable prosecutors to enforce the law in the manner envisioned by Congress.

B. Payment Purpose and a Monetary Threshold: A Two-Prong, Hybrid Test

Congress can assure statutory flexibility by retaining the routine governmental action exception’s focus on subjectively valid payment purpose. To achieve clarity, however, FCPA liability must also depend on a supplemental requirement of compliance with an objective dollar threshold. Further, this cap should be regionally tailored to accommodate local economic conditions and cultural idiosyncrasies.

1. Subjective Element: Retaining and Clarifying the Purpose-Based Test

Modern analysis of the routine governmental action exception focuses on the purpose of the payment and the intent of the payor. During congressional hearings, it was noted that to abandon the subjective element would merely create a floor price for international commerce.¹⁴⁴ In addition, as former counsel to the International Finance Subcommittee of the Senate Banking Committee and former Deputy Assistant Secretary of Commerce Stanley J. Marcuss has argued, “confining [the exception] to payments that are ‘small’ . . . would further objectify the offense by making size rather than state of mind the determinant of the offense. . . . A little payment to corrupt the decision-making process is just as bad as a big payment to corrupt the decision-making process.”¹⁴⁵

143. Thomas W. Dunfee & David Hess, *Getting from Salbu to the ‘Tipping Point’: The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT’L L. & BUS. 471, 475–76 (2001).

144. See Koch, *supra* note 124, at 398; see also *infra* Part V.E.

145. Stanley J. Marcuss, *Implications of the OECD Recommendations*, 1 Foreign Corrupt Pract. Act Rep. (West) § 18:8 (Oct. 2009).

In keeping with the purpose of the FCPA, payments made to obtain or retain business should be proscribed regardless of their size. For this reason, Congress should not strike the subjective element from the exception. But it does not logically follow, as Marcuss suggests, that Congress must refrain from introducing a monetary threshold. Instead, the legislature should craft a two-pronged conjunctive test, which considers both the subjective purpose of the payment and an objective application of a threshold payment amount. This model would enable prosecutors to wield evidence of corrupt purpose when challenging small payments, as well as permit corporations to defend large payments with proof of a valid purpose.

Congress should announce a clear standard to define the subjective component of routine governmental action, thereby mitigating some of the complications that arise out of the current test. Though no court opinion, piece of legislation, or agency guideline has explicitly articulated and applied the four-factor test, Congress should now unequivocally set out these elements as controlling in any evaluation of expediting payments. Courts and prosecutors should consider whether corporations offered payments for the purpose of facilitating (1) nondiscretionary governmental action, where (2) the size of the payment is reasonable relative to the governmental action, (3) the payment has no direct effect on competition for contracts, and (4) the payor is entitled to the services that the government official was duty-bound to perform.¹⁴⁶ Since these factors are derived from the FCPA's legislative history and directly address the Act's primary purpose, they would rightfully comprise the core of the new test.

Application of this standard is not automatic, for it will require a fact-bound, ad hoc analysis. Nonetheless, by explicitly articulating the factors that govern evaluation of these payments, Congress will make great strides towards providing statutory clarity and interpretive predictability. Corporations can achieve a degree of confidence by incorporating these elements into their compliance programs and codes of conduct, using these elements to guide internal investigations, and, most importantly, employing these elements as shields against allegations of corruption. Further, the monetary threshold's bright quantitative guidepost in the second prong will complement this catalogue of considerations and will provide an additional useful analytical aid.

146. See *supra* Part II.B.2.

2. *Objective Element: Capping Facilitating Payments*

Conspicuously absent from the current exception is any element of objectivity. Forty years of fruitless attempts to define routine governmental action have led to the conclusion that the subjective purpose test is difficult to apply, vulnerable to manipulation, and independently insufficient.¹⁴⁷ A monetary threshold would provide corporations with the degree of certainty for which they have hungered, enabling them to engage in daily transactions with foreign officials without fear of quixotic prosecution.

Critics contend that capping facilitating payments would provide corrupt corporate actors with a liability safe haven.¹⁴⁸ Under the proposed model, however, the objective element will merely determine which party bears the initial burden of demonstrating whether the payment purpose was unlawful. As such, the monetary threshold will not supplant the current emphasis on the payor's intent, but rather will supplement it by providing corporations with a clear guidepost.

If prosecutors bring charges against a corporation for payments that fall below the threshold, the cap will serve as an affirmative defense, and the defendant will bear only the burden of production.¹⁴⁹ Once a defendant presents some evidence that the payment's purpose was facilitation of routine governmental action, the prosecution must not only prove every element of the offense, but also must disprove the affirma-

147. See OECD PHASE 2 REPORT, *supra* note 30, ¶ 114–16.

148. See *infra* Part V.E for a more detailed discussion of and response to this argument.

149. At common law, the burdens of production and persuasion are traditionally aligned: “the burden of proving affirmative defenses—indeed, all . . . circumstances of justification, excuse or alleviation—rest[s] on the defendant.” *Dixon v. United States*, 548 U.S. 1, 8 (2006) (citations and internal quotations omitted). Congress, however, has the unquestionable authority to sever the burden of proof. See *id.* at 19 (Alito, J., concurring). Here, the circumstances surrounding facilitation payments make burden-splitting appropriate. First, by requiring that defendants satisfy only the burden of production, the amendment provides corporations with a greater degree of certainty when operating abroad, minimizing the possibility of overdeterrence. Additionally, where an affirmative defense negates an “essential element of the offense charged[.]” burden-splitting is justified and the government should retain the burden of persuasion. *Id.* at 11 (citing *Davis v. United States*, 165 U.S. 373, 378 (1897), *superseded by statute*, 18 U.S.C. § 17 (2006) (holding that in murder prosecutions, contrary to the general common law rule, the government should bear the burden of proving sanity, as insanity negates the mens rea, an essential element of the crime)). As applied to the FCPA, congressionally mandated burden-splitting is appropriate because the routine governmental action exception is closely linked to an essential element of the offense charged, namely corrupt payment purpose. See *United States v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004) (noting that the FCPA is only implicated when payments are made for a corrupt purpose). The elements of the subjective test—for example, the governmental action's nondiscretionary nature and the payor's entitlement to services rendered—speak directly to a payment's “corrupt” quality.

tive defense.¹⁵⁰ The affirmative defense will fail if prosecutors prove beyond a reasonable doubt that a payment or series of payments was not intended to expedite routine governmental action. For example, if a clear pattern of below-cap “facilitating payments” emerges, prosecutors might allege that the sum of these payments was unreasonable relative to the governmental services provided and that the payments were directed at an individual who controlled future business transactions, thereby directly affecting competition for contracts. By linking the subjective and objective prongs, this hybrid test checks perversion of the cap’s purpose.

Inversely, courts will treat payments above the cap as presumptively *not* within the exception’s purview. This presumption, however, is rebuttable through evidence of a valid subjective purpose. Two defenses are possible: a challenge to the predicate facts or to the presumed facts. To challenge the predicate facts, the corporation need only prove by a preponderance of the evidence that the payment or collection of payments was below the threshold. Alternatively, the defendant could apply the four-factor test to prove by a preponderance of the evidence that the payment was in fact for the purpose of facilitating routine governmental action. Should the corporation fail to meet this burden, it cannot affirmatively avail itself of the exception’s shelter.

The function of the threshold is not to impose a rigid, dispositive element into the routine governmental action calculus. Rather, it is designed to clarify and improve applicability of the otherwise subjective exception. The burden-shifting cap should enable corporations to act with greater certainty as they operate abroad and thereby should mitigate the overdeterrent effect of the current regime.¹⁵¹

150. See *supra* Part I.A for a discussion of the basic elements a prosecutor must prove under the FCPA’s anti-bribery provisions.

151. It is worth considering the practical effect of this modified scheme on a typical corporation. For example, as have “[m]ost sophisticated companies of significant size,” FMC Corporation has instituted a corporate compliance program to mitigate the risk that an employee will violate the FCPA in the scope of employment and, by so doing, expose the entire company to liability. Patrick J. Head, *The Development of Compliance Programs: One Company’s Experience*, 18 NW. J. INT’L L. & BUS. 535, 541 (1998). Accordingly, FMC has established a set of internal Business Conduct Guidelines, which “focus on certain very pragmatic issues dealing with so-called ‘grease payments’ because of the recurring nature of these issues in practice.” *Id.* at 542 (citation omitted). However, the company’s guidelines only require advanced approval by the general counsel and Chief Financial Officer for facilitation payments in excess of \$5,000. *Id.* A payment of this size would also necessitate the filing of a report with the company’s corporate controller. *Id.* The figure of \$5,000 is seemingly arbitrary. There is no assurance that the DOJ will treat a \$4,000 payment any differently than a \$6,000 payment. If, however, Congress adopts the system proposed by this Note, the corporation could readily modify its internal compliance guide-

C. *Calculating the Cap: Per Capita Wealth and Cultural Norms*

1. *Per Capita Wealth: A Useful Starting Point*

A facilitating payment cap based on per capita wealth was proposed in congressional hearings as early as 1977.¹⁵² Percentage of per capita wealth offers a readily applicable standard with which to calculate the monetary threshold; however, the benefits of applying a single, bright-line percentage are outweighed by the costs of adopting this rigid standard. This type of cap fails to take into consideration peculiarities of individual cultures, such as disparity of wealth or social norms governing the nature of acceptable payments and gifts. Thus, while per capita income might prove a useful factor in cap calculation, it should not be the sole consideration.¹⁵³

2. *Cultural Norms: Reflecting and Accommodating Local Preferences*

While a near-universal consensus has emerged as to the deleterious effects of bribery, the definition of “corrupt” often varies according to cultural idiosyncrasies.¹⁵⁴ As such, cultural norms should also play a role in distinguishing facilitating payments from unlawful bribes. By taking social customs into consideration, Congress can address accusations of moral imperialism. Rather than impose American ideals on a society that considers grease payments ethically permissible, the cap would account for a state’s gift-giving or payment-making culture. In fact, the incorporation of regional mores into facilitating payment analysis is consistent with Congress’ intent to permit payments that do not offend local moral and legal standards.¹⁵⁵

lines and replace the \$5,000 figure with this new objective cap, supplementing it with a brief description of the four guiding factors of the subjective prong. Accordingly, FMC would enjoy increased confidence in the efficacy of its prophylactic compliance measures.

152. Congressman Robert Krueger analogized the monetary threshold to the statutory cap limiting members’ private annual income. When pressed further, he suggested that “the threshold [could] vary according to the per capita income in the country.” *Unlawful Corporate Payments Act Hearings*, *supra* note 138, at 44.

153. *But cf.* Koch, *supra* note 124, at 396–99 (proposing a facilitating payment cap based on per capita wealth).

154. *See* Salbu, *supra* note 20, at 455–56 (“This conceptual condemnation of bribery is a logical extension of a more general honesty norm. At a more particularized level, however, the precise boundaries of what constitutes a bribe may differ.”) (citations and internal quotation omitted)

155. *See Business Accounting and Foreign Trade Simplification Act: J. Hearing on S. 430 Before the Subcomm. on Int’l Finance and Monetary Policy and the Subcomm. on Securities of the S. Comm. on Banking, Housing & Urban Affairs*, 99th Cong. 91 (1986) (statement of Calman

The task of evaluating cultural permissibility of facilitating payments is a complicated one. It requires inquiry into whether a society permits grease payments at all and, if so, in what contexts and to what extent. Even if such payments are commonplace in a state, when establishing the cap, Congress must be wary of perverting true local preferences.

Haphazard attempts to establish a culture-specific monetary threshold would invite abuse. Addressing a similar concern, General Olesgun Obasanjo, the former president of Nigeria, loudly denounced foreign investors for manipulating his country's gift-giving culture to excuse their corrupt practices.¹⁵⁶ He noted that the local culture is one of "appreciation and hospitality," and for this reason, token monetary gifts are given openly.¹⁵⁷ By contrast, discrete or lavish offerings are considered embarrassing and are refused.¹⁵⁸

South Korea provides another illustration of a state in which private actors have perverted a gift-giving culture and exploited tradition to "justify" corrupt payments. *Ttokkap*, or "rice-cake expenses," are given during Korean Thanksgiving and on New Year's Day.¹⁵⁹ To accommodate local culture, the Korean Supreme Court has recognized a "social courtesy exception" to the country's anti-bribery laws.¹⁶⁰ Accordingly, *ttokkap* offered to officials as social courtesies, rather than in exchange for performance of some official act, do not give rise to liability so long as they do not "exceed[] socially acceptable levels."¹⁶¹ In recent years, South Korea uncovered a scheme by which business conglomerates bribed two presidents with \$638 million in *ttokkap*, exerting their influ-

J. Cohen, Vice President, Emergency Comm. for American Trade) ("[T]he key inquiry would be for what is the payment being made and is such a payment customary in the foreign country in order to facilitate or expedite performance."); *Unlawful Corporate Payments Act Hearings*, *supra* note 138, at 42 (statement of Rep. Krueger, Member, H. Comm. on Interstate and Foreign Commerce) ("On the other hand, I am also partially reared in a time of cultural relativism in which I am taught . . . we in America are not to impose our values on other people because that is a kind of nationalism that is out of fashion."); *see also* 15 U.S.C. §78dd-1(c)(1) (2006) (creating an affirmative defense for payments that are "lawful under the written laws and regulations of the foreign . . . country"); Maris & Singer, *supra* note 3, at 588 n.80 ("[T]he drafters of this amendment intended that the normal rules of legal construction would apply when interpreting the term 'lawful' under a foreign country's written laws and regulations.") (citation omitted).

156. *See* Wallace-Bruce, *supra* note 6, at 375.

157. *Id.*

158. *Id.*

159. *Id.*

160. Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 564 (1997).

161. *Id.* at 565.

ence over the state's foremost decision-makers.¹⁶² This example is of particular importance because of the manner in which South Korea's society loudly and unequivocally rejected the manipulation of its cultural norms. To assure that the perpetrators did not escape with impunity, South Korean courts developed a novel "comprehensive bribe theory."¹⁶³ The courts held that these payments were so far in excess of "customary practice" that they amounted to the functional equivalent of bribery.¹⁶⁴

3. *Arriving at a Figure: Two Potential Approaches*

The task of tailoring caps to account for regional prosperity and cultural idiosyncrasies will undoubtedly prove complicated, particularly in those areas of the globe where commercial practices and social preferences differ significantly from those of the United States. To deal with these complexities, Congress should adopt one of two approaches: either delegate responsibility to a taskforce or fold these considerations into the subjective standard of the two-prong test.

Congressional delegation of responsibility to a taskforce comprised of academics, lawyers, and businesspeople would result in the greatest clarity for corporations involved in international transactions. Such individuals are better equipped than legislators to evaluate the practical realities of corporate decisionmaking, cultural norms of gift giving, and the institutionalization of facilitating payments.

The taskforce must first determine the degree of geographic particularity with which the regional caps would apply. States would constitute the default unit. Adjustments could be made, however, if investigation revealed regional peculiarities that the monetary threshold should reflect.

As noted above, per capita wealth can serve as a useful starting point when calculating a monetary threshold for facilitating payments. The taskforce should also take the additional measure of inquiring into the typical wage of low-level bureaucrats, the most likely recipients and solicitors of grease payments. The collection of experts should then adjust the figure to reflect local cultural norms. Considerable effort must be made to distinguish facilitating payments from dressed-up bribes that "exceed[] socially acceptable [payment or gift] levels."¹⁶⁵

162. Wallace-Bruce, *supra* note 6, at 375.

163. Kim & Kim, *supra* note 160, at 567.

164. Wallace-Bruce, *supra* note 6, at 375.

165. Kim & Kim, *supra* note 160, at 565.

Local law will likely prove useful in accomplishing this objective. Legislation may serve as expressions of cultural preferences, and, as with the South Korean example, judicial opinions might speak directly to the issue of socially acceptable forms of gift giving. Consultation with domestic authorities is also essential. Local “insiders”—counsel, influential members of civil society, and academics—can all play an integral role in this process.¹⁶⁶

Upon setting the monetary caps, the taskforce should not entirely disband. Instead, a core group or subcommittee should periodically hold hearings to review the system and update the caps. In this way, the thresholds can be adjusted to reflect changes in economic conditions and to remedy miscalculations arising out of faulty interpretations of local norms.

Creating and maintaining a taskforce will likely prove costly. Congress might therefore deem it more efficient to set broad regional caps that primarily reflect per capita wealth and incorporate the considerations detailed above within the subjective prong of the two-part test. As discussed above, corporations whose payments exceed the threshold can only avail themselves of the exception by proving by a preponderance of the evidence that they intended their payments to facilitate routine governmental action. In order to offset the sweeping nature of these broad regional caps, Congress should allow companies to supplement their arguments with evidence of cultural preferences and local levels of prosperity. Expert witnesses could be called and statutes and court opinions could be offered to demonstrate compliance with social norms of the target state. Just as with the four factors of the subjective test, evaluation of social customs is consistent with congressional intent.¹⁶⁷

D. Linking the Affirmative Defense to Mandatory Corporate Compliance

Amendment of the anti-bribery provisions would prove meaningless if violation of the new statutory terms went undetected and unenforced. In the past, prosecutors have used the FCPA’s extensive accounting and auditing requirements as a net with which to catch those violators of the anti-bribery provisions whose criminal liability would otherwise be too

166. Wallace-Bruce, *supra* note 6, at 376 (“Whilst it may be difficult for an outsider to distinguish between gift giving which falls within socially acceptable parameters and that which does not, for those familiar with the culture this may not be difficult at all.”).

167. See *supra* note 155 and accompanying text.

difficult to prove.¹⁶⁸ Corporations' own auditors are better equipped than their government counterparts to detect financial irregularities. As such, adoption of an adapted mixed-liability regime would improve the new two-pronged test's efficacy.¹⁶⁹ Accordingly, Congress should limit the availability of the exception's affirmative defense to corporations that comply with the statute's accounting, auditing, and publication obligations.

Congress need not dramatically alter the FCPA's accounting and auditing provisions. Section 78m(b) already requires recordkeeping that, "in reasonable detail, accurately and fairly reflect[s] the transactions and dispositions of the assets of the issuer."¹⁷⁰ Since the routine governmental action exception is not a defense to accounting irregularities, corporations must carefully document grease payments in their records.¹⁷¹ Currently, however, they do not need to delineate these payments from other expenditures.¹⁷² With modest statutory modification, Congress could assure more effective FCPA enforcement by requiring separate line-item listing and clear labeling of facilitating payments.

The new recording rules should be supplemented by reporting duties. Congress should amend the FCPA to require more than mere publication of corporate expenditures to the SEC. The Act should compel companies to catalogue facilitating payments in digestible form, listing each payment made to foreign officials, the country employing the official, and the routine governmental action performed. Availability of the affirmative defense should depend upon whether a corporation issued this final report to its managerial body and disseminated copies to the public.¹⁷³

168. Zervos, *supra* note 5, at 260–61 & n.46 (analogizing this method to charging Al Capone with tax evasion rather than violation of the prohibition on alcohol sale and consumption).

169. A mixed-liability regime incorporates elements of strict and duty-based liability, penalizing corporations not only for their misconduct, but also for "failure to perform . . . mandated enforcement dut[ies]." Arlen & Kraakman, *supra* note 107, at 691.

170. 15 U.S.C. § 78m(b)(2)(A) (2006); *see also* Maris & Singer, *supra* note 3, at 580.

171. Homer E. Moyer, Jr. et al., *The U.S. FCPA in 2006: Increased Enforcement, Alternative Dispositions, Compliance Monitors, and Other Developments*, 1 Foreign Corrupt Prac. Act Rep. (West) § 11:14 (Oct. 2009) ("Even though facilitating payments fall outside the scope of the FCPA's anti-bribery provisions, they still must be accurately recorded as 'facilitating payments' in corporate books and records."); *see* BROMBERG & LOWENFELS, *supra* note 61, § 18:2.

172. *But cf.* DEMING, *supra* note 17, at 23 (noting that regulators are likely to be less suspicious of those facilitating payments that are clearly labeled).

173. By harnessing nongovernmental organizations to serve as watchdogs of corporate corruption, Congress can minimize costs and assure unfiltered, widespread dissemination of these reports. For examples of two organizations dedicated to improving government transparency in developing countries, see Publish What You Pay, <http://www.publishwhatyoupay.org/> (last visited Dec. 18, 2009), and Extractive Industries Transparency Initiative,

By focusing public scrutiny on corporate exploitation of the exception, the publication of these reports would accomplish the difficult task of deterring both the supply and the demand for facilitating payments. As Professor John C. Coffee has said of criminal liability, widespread stigmatization of conduct effectively augments the deterrent force of penal measures. “Although we cannot hang a scarlet letter on the corporation,” he writes, “the criminal process has a unique theatricality which can convey public censure far more effectively than the civil-law process.”¹⁷⁴ Because facilitating payments would remain legislatively sanctioned, a publication requirement would stand in the shoes of criminal liability and serve the essential deterrent function that Professor Coffee describes.¹⁷⁵ Further, public disclosure would contribute to this end without the collateral consequences of prosecution.

Once a corporation explicitly announced the extent to which it made use of the exception, its shareholders and consumers could voice their approval or condemnation of the business practice. Thus, publication would create an incentive for corporations both to adjust their use of facilitating payments to acceptable levels and to increase reputation-rehabilitating anti-corruption measures. Meanwhile, publication would also effectively test the monetary threshold. If the cap were not properly calibrated to the customs of the target state, public outcry and local attempts to limit facilitating payments would compel modification of the threshold to reflect these expressions of domestic preferences.

E. Responses to Potential Criticism

In the past, Congress has considered and rejected the imposition of a cap on facilitating payments. During hearings before the Subcommittee on International Economic Policy and Trade, former prosecutor Stephen J. Brogan suggested that while such a threshold would provide clarity, it would also create an environment ripe for abuse. He argued, “We ought not have to say well, \$10,000 is OK but \$10,001 isn’t OK. I wouldn’t be surprised to see that become a toll. If you put \$10,000 in [the statute], I

<http://www.eitransparency.org/> (last visited Dec. 18, 2009).

174. John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 424–25 (1981). *But see* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 332 (1996) (“We question . . . whether criminal convictions against corporations serve any useful function that civil judgments against them . . . would not.”).

175. *See* *United States v. Gementera*, 379 F.3d 576, 601–02 (2004) (noting that public display of a sign that announced the nature of the defendant’s unlawful act served both legitimate rehabilitative and deterrent functions).

think to do business abroad you better have \$10,000.”¹⁷⁶ In other words, by using a cap to define bribery, Congress might create a floor price for doing business abroad. Corrupt officials would persistently demand the exact amount of the threshold.

Considering the perspective of a manipulative businessman, Professor Samuel Buell has echoed these concerns.¹⁷⁷ Writing expressly about fraud, he warns that “overly specific ex ante articulation of what counts as [a crime] will only supply a clearer roadmap to the evasive actor, frustrating efforts to punish ex post what in substance is . . . blameworthy or undesirable.”¹⁷⁸ Buell might argue that by establishing a bright-line rule within the statute, Congress would create a safe haven. Corporate actors could engage in corrupt bribery with impunity, so long as they do not exceed the cap.

Concerns regarding the rigidity of a monetary threshold are not without merit. The apprehensions of Brogan and Buell are less potent, however, when considered in light of the subjective, purpose-based analysis with which the cap is paired. The monetary threshold’s central purpose is to provide a bright, but not inflexible, line. The cap simply creates rebuttable presumptions, not a hard floor or safe haven from prosecution.

Corrupt payments below the threshold could still give rise to criminal liability if either the corporation failed to raise some evidence of the four elements of routine governmental action, or the government disproved the exception’s applicability. Further, new recording and reporting requirements would mitigate the threat of overindulgence in the exception. Because the affirmative defense would be available only to corporations that published their records, companies that made frequent use of facilitating payments would likely endure public stigmatization.

Similarly, a payment in excess of the cap would not necessarily compel a finding of guilt. For instance, a corporation might argue either that the nature of its industry or exigent circumstances justified a larger payment. In this situation, the corporation would bear the burden of proving by a preponderance of the evidence that the payment was, in fact, intended for the purpose of facilitating routine governmental action. The defendant might note that the second factor—size of payment relative to governmental action—acknowledges that costs vary according to services rendered. For example, officials may demand far more to

176. *Foreign Trade Practices Act Hearings*, *supra* note 48, at 285 (testimony of Stephen J. Brogan, Associate, Jones, Day, Reavis & Pogue).

177. *See, e.g.*, Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006).

178. *Id.* at 1973–74.

expedite labor-intensive processing of factory certification than they would to issue workers' visas. Additionally, no factor in the standard is dispositive. Even if payment size relative to services rendered tilted in the government's favor, a defendant could still stress that the recipient possessed no control over the company's contractual relations with the government, that the action was not discretionary, or that the corporation was entitled to the services rendered. Because the statutory language would explicitly articulate the four factors, courts would be obliged to weigh each of these arguments when evaluating the ultimate issue of liability. Accordingly, when deciding whether to offer a payment in excess of the cap, corporate actors would at least have foresight into a court's analytical approach, thus improving their ability to predict whether the payment would be considered facilitating and fall within the Act's routine governmental action exception.

A related criticism raises the question of the proper calibration of regional caps. There is a risk that Congress or its taskforce might initially set a cap too low—that is to say, at a level that does not properly reflect local cultural preferences. Thus, the exception would prove under-inclusive; its presumptions would not protect payments that ought to be considered facilitating. If this were to happen, a skeptic might argue that corporations would be left in the same precarious position that they face today—confronted by the threat of prosecution for making a payment that Congress did not intend to criminalize.

Even if a cap were initially set too low, however, the risks of over-deterrence under the proposed model would not be as pronounced as they are today. First, defendants and prosecutors alike would be aware of the elements that comprise the test's subjective prong and of each party's respective evidentiary burden. Corporations could, therefore, more accurately conduct risk assessment when deciding whether to make over-cap payments. Further, companies could take some comfort in the availability of cultural arguments to buttress their claims of payment permissibility. Additionally, if a monetary threshold were set too low and widespread corruption charges resulted, the increased frequency of prosecution in a particular region should prompt the congressional subcommittee or taskforce to modify the cap. Corporations might expedite this correction process by engaging in lobbying efforts and by participating in congressional hearings to present evidence of the cultural permissibility of certain over-cap payments.

Conversely, if a cap were set too high and the label of "facilitating payments" proved over-inclusive, a similar analysis would apply. In this

set of circumstances, payments that should not be considered “facilitating” would enjoy the protection of the exception’s presumptions. But if prosecutors were able to disprove the applicability of the exception, they could still bring charges for corrupt payments that fall below the monetary threshold. Meanwhile, corporations would be well-positioned to conduct risk assessment, given the availability of the affirmative defense and the clear articulation of the factors governing the subjective prong. Additionally, as noted above, improved recording and reporting provisions should raise public awareness of corporate exploitation of an over-inclusive cap.

While the subjective prong provides a safeguard for proper operation of the monetary threshold, Congress may establish complementary measures to ensure a smoother transition to the system proposed by this Note. For example, during early implementation of the statutory amendments, there may be a period in which cap adjustment will be necessary. As discussed above, violations of the anti-bribery provisions give rise to severe criminal sanctions.¹⁷⁹ To mitigate the costs associated with defending against possible prosecution during this adjustment period, Congress might consider temporarily adopting a modified penal regime.¹⁸⁰ One commentator, Alexandros Zervos, has proposed a scheme that can be adapted to suit the system this Note recommends.¹⁸¹ To better calibrate corporate culpability to the crime charged, penalties should be adjusted to reflect the percentage paid in excess of the cap, executives’ “involvement in or tolerance of the criminal activity[,]” a corporation’s prior history of similar violations, and the existence and accuracy of the corporation’s self-reporting.¹⁸² As in the scheme proposed by Zervos, first violations would merely result in probation or monitoring, while repeated violations “should be explicitly identified as . . . indicator[s] of broader corporate honesty problems—and automatically trigger additional investigations/supervision.”¹⁸³ A temporary

179. See *supra* note 99.

180. While a modified penal regime may be an appropriate complement to the suggested statutory modifications, a more exhaustive inquiry into the topic of designing properly calibrated penal schemes is beyond the scope of this Note.

181. See Zervos, *supra* note 5, at 284–90 (recommending a penal model designed for a per se ban on administrative bribery).

182. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b), (c), (g) (2009) (setting out these considerations, among others, as factors affecting a corporate defendant’s culpability score); see also Zervos, *supra* note 5, at 288–89 (discussing the importance of creating “strong incentives [for companies] to tighten their corporate compliance systems in order to avoid the higher penalties levied on repeat offenders[]”).

183. See Zervos, *supra* note 5, at 286.

penal scheme of this nature would further the ultimate objective of mitigating overdeterrence, while providing the congressional subcommittee or taskforce with an opportunity to remedy cap miscalculations.

CONCLUSION

Critics denounce the Foreign Corrupt Practices Act as replete with statutory ambiguity. The routine governmental action exception is emblematic of this legislative equivocation. The government's preference for aggressive prosecution, coupled with the hefty consequences of indictment, create an environment in which corporations cannot confidently rely upon the exception's shelter. Meanwhile, inconsistency permeates the limited number of judicial and agency opinions that address facilitating payments. For these reasons, the exception threatens to overdeter corporate actors, driving them to adopt inefficient precautions in order to avoid liability.

Statutory amendment is necessary. Congress should modify the FCPA to state explicitly the elements that constitute routine governmental action. Congress should also improve the current purpose-based test by adding an objective monetary threshold that governs allocation of the burden of proof. This objective-subjective hybrid test, complemented by improved recording and reporting standards, would draw bold lines around the parameters of the exception and thereby minimize the risks of overdeterrence.