



## OECD CALLS FOR AN END TO FACILITATING PAYMENTS EXCEPTION

The Organization for Economic Cooperation and Development (“OECD”) has called for a prohibition on facilitating payments (or “grease payments”) currently permitted under the anticorruption laws of several nations, including the United States. Corruption is a formidable obstacle to economic and political progress in the developing world, and the OECD is at the forefront of an international effort to combat bribery by regulating the practices of companies from the world’s wealthiest nations. When the OECD’s Convention on Combating Bribery of Foreign Officials in International Business Transactions was created in 1997, however, the Organization advocated laws that would prohibit large bribes and permit small payments for routine government action. Anticorruption advocates have long urged enforcement authorities to abandon this distinction, and the OECD has now joined their ranks. In late November, the OECD recommended that all signatory nations to the Convention review their approach to facilitating payments, and that companies subject

to those laws prohibit or discourage the use of such payments in internal company controls and in ethics and compliance programs.

Although most OECD nations claim to have a zero tolerance policy against foreign bribery, the laws of the United States and some other countries contain anomalous exceptions for facilitating payments paid to foreign officials. Commonly known as “grease payments,” these small bribes are permitted for “routine governmental actions,” a concept that is difficult to reconcile both in the law and in corporate codes of conduct. When the United States Congress amended the Foreign Corrupt Practices Act (“FCPA”) in 1988, it created an exception for “facilitating or expediting payment[s]” made to foreign officials to expedite or secure the performance of “routine governmental actions.” 15 U.S.C. §§78dd-1(b), 78dd-2(b), 78dd-3(b). In order to qualify for this exception, a payment must relate to the performance of a routine government function such as the issuance of a license; the

provision of phone, power, and water service; police protection or mail delivery; or scheduling inspections associated with contract performance or the shipment of goods. The laws of South Korea, Canada, and New Zealand permit similar payments to foreign officials.

Under these laws, the difference between a permissible facilitating payment and a prohibited bribe turns on the exercise of discretion by the government official. Accordingly, paying a customs official to schedule an inspection of goods may be permissible, but paying the same customs official in order to move ahead of competitors in line for inspection is likely to be prohibited. Indeed, if the customs official exercises any discretion in conducting the inspection, then the payment will almost certainly be viewed as improper. Distinguishing permissible facilitating payments from unlawful corrupt payments has become untenable for many organizations, and 80 percent of U.S. companies prohibit facilitating payments altogether.

The 1997 OECD Convention did not call for the prohibition of facilitating payments, noting that they were generally illegal in the foreign country concerned and that the appropriate manner to address and minimize those payments would come in the form of support for good governance programs. Criminalization of these payments, which were typically small, was not viewed as a “practical or effective complementary action.” Some critics suggested that the OECD’s permissive stance on this issue resulted in a failure to control the supply-side regulation of bribery. Indeed, most OECD signatories banned such payments altogether, notwithstanding the terms of the Convention. The United Kingdom, for example, does not recognize the legality of minor facilitating payments. Thus, although consistent with the OECD Convention, the FCPA is out of sync with the law in most developed countries.

The OECD’s new position on the facilitating payments exception is an important development in the fight against international corruption. Although the OECD has no power to enact legislation, the organization has been the primary force behind the promulgation of anticorruption laws. The

OECD regularly monitors the implementation and enforcement of anticorruption laws, issuing periodic reports and recommendations. As the momentum behind anticorruption enforcement has grown, the OECD has become less tolerant of facilitating payments, recently noting their “corrosive” effect on sustainable development and the rule of law. Interestingly, the OECD directed its recent call for a prohibition of facilitating payments to multinational companies as well as to governments. Because these companies are subject to the laws of multiple OECD nations, they would benefit from a consistent approach under the law and pursuant to their own policies.

The abolition of any exception or defense to the FCPA has the effect of expanding the scope of the law’s prohibitions, creating a risk that conduct once considered to be legal will now be subject to enforcement actions. Even so, eliminating the facilitating payments exception within the FCPA could have a number of positive benefits for companies subject to U.S. law.

First, such a change in the law would eliminate the need to draw a fine line between bribes that are permitted and those that are prohibited based on an ambiguous concept of the recipient’s discretion. Prohibiting all bribes avoids the risk that a policy permitting facilitating payments would be interpreted or implemented improperly.

Second, banning facilitating payments under the FCPA would remove a dilemma faced by companies that must obey both U.S. law and the law of the country in which they are doing business. While current U.S. law allows a company and its agents to make facilitating payments, the risk remains that these payments will be prosecuted by local authorities. Moreover, such payments must be recorded accurately on the company’s books in order to comply with the FCPA’s internal controls provisions, putting U.S. companies in the awkward position of recording payments that are prohibited by another country. Eliminating the facilitating payments exception resolves this problem by bringing U.S. law into line with local law.

The ultimate effect of the OECD's recommendations will become apparent only with time. To date, U.S. enforcement authorities have declined to comment, and Congress is silent on the issue. As the OECD's recommendation suggests, however, the most significant steps toward eliminating facilitating payments may not be made by enforcement authorities, but by the multinational companies active in the developing world. In the meantime, companies subject to the FCPA and similar laws should review their corporate policies and, to the extent that those policies permit facilitating payments, consider amending them in accordance with the OECD's recommendations.

## LAWYER CONTACTS

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