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# THE FOREIGN CORRUPT PRACTICES ACT: IT'S TIME TO CUT BACK THE GREASE AND ADD SOME GUIDANCE

REBECCA KOCH\*

**Abstract:** Congress enacted the Foreign Corrupt Practices Act to combat an epidemic of illicit payments by U.S. businesses and individuals to foreign officials. The FCPA prohibits any bribe to a foreign official to influence any official act, induce unlawful action, or obtain or retain business. The FCPA, however, carves out an exception for facilitating grease payments made to foreign officials to expedite or secure performance of routine government actions. This exception allows for modest payments to low-ranking officials to expedite non-discretionary clerical activities. The FCPA fails to provide a monetary threshold for what constitutes a permissible grease payment. This Note explains that the carve-out for grease payments impedes the Congressional goal of stamping out corruption. To alleviate the problems associated with grease payments, this Note advocates for Congressional repeal, or amendment of, the statute; DOJ promulgation of guidelines defining permissible grease payments; corporate activism; and institutional reform.

## I. INTRODUCTION

Congress enacted the Foreign Corrupt Practices Act (FCPA) in an unprecedented attempt to combat the epidemic of illicit payments by U.S. businesses and individuals to foreign government officials.<sup>1</sup> Despite the FCPA's enactment, transnational corruption remains a potent and debilitating force affecting U.S. foreign policy, the United States' international economic interests, and the political and economic interests of developing nations.<sup>2</sup> This pervasive trend erodes public confidence in the business community and tarnishes the image

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<sup>1</sup> See Gary Eisenberg, *Foreign Corrupt Practices Act*, 37 AM. CRIM. L. REV. 595, 595-96 (2000).

<sup>2</sup> DONALD B. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 1* (2nd ed. 1999) (describing the national and international effects of corruption); Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 686 (2003) (suggesting that the FCPA has not significantly reduced corruption).

of the U.S. government abroad. Against this erosion, the FCPA falls short.<sup>3</sup> The current provisions of the FCPA are weak and ineffectual; specifically, the exception for “grease” or “facilitating” payments made to foreign officials to expedite or secure the performance of routine government actions.<sup>4</sup> These grease payments currently comprise a gray area of corruption, blurring the distinction between legal and illegal payments to government officials and opening the flood gates for abuse.<sup>5</sup> Although the FCPA does not prohibit grease payments, such payments may still be considered bribes, carrying with them many potential deleterious effects.<sup>6</sup> Unlike the United States, the international community is progressing toward criminalization of all payments to foreign officials.<sup>7</sup>

As the basis underlying Congress’ decision to allow grease payments continues to dissolve, Congress and the Department of Justice (DOJ) could rein in the ill effects of grease payments.<sup>8</sup> First, congressional repeal of the statutory exception would provide a quick solution to the troubles associated with grease payments. Another potential avenue for redress is for Congress to amend the statute to provide for a monetary threshold, above which a payment will not constitute a

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<sup>3</sup> See *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, Hearing on S. 305 Before the S. Comm. on Banking, Hous. and Urban Affairs*, 95th Cong. 1 (1977) (opening statement of William Proxmire, Chairman, S. Comm. on Banking, Hous. and Urban Affairs).

<sup>4</sup> See CRUVER, *supra* note 2, at 20 (indicating that grease payments are not prohibited by the FCPA); Perkel, *supra* note 2, at 686 (stating that corruption is still pervasive despite the FCPA provisions).

<sup>5</sup> See Thomas W. Dunfee & David Hess, *Getting from Salbu to the “Tipping Point”: The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, NW. J. INT’L L. & BUS. 471, 476–77 (2001).

<sup>6</sup> See *id.* at 477.

<sup>7</sup> See Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business—The Dawn of a New Era*, 24 MELB. U. L. REV. 349, 350 (2000).

<sup>8</sup> See generally *The Foreign Trade Practices Act, Hearings before the Subcomm. on Int’l Econ. Policy and Trade of the House Comm. on Foreign Affairs*, 98th Cong. 217 (1983) (prepared statement of Mark Feldman, Attorney, Donovan, Leisure, Newton & Irvine) (stating that it was customary practice to give grease payments to underpaid, low-ranking civil servants) [hereinafter *Foreign Trade Hearings*]; H.R. REP. NO. 95–640, at 8 (1977) (stating that it would not be feasible for the United States to attempt to eradicate grease payments unilaterally); M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT’L L.J. 289, 314 (stating that an international consensus has emerged that grease payments constitute bribery); Wallace-Bruce, *supra* note 7, at 350, 357–59 (explaining that an international effort is evolving to minimize, if not eliminate, corruption and that the positive effects of corruption, such as supplementing the incomes of underpaid, low-level government officials, are outweighed by the negative effects).

permissible grease payment.<sup>9</sup> Congress could also establish a two-prong test for permissible grease payments, requiring: (1) the payer to make the payment for the purpose of securing or expediting a routine government action; and (2) that the payment fall beneath a certain percentage of the country's per capita income.<sup>10</sup> Finally, to further prevent abuse of the FCPA and enlighten businesses about grease payments, the DOJ should promulgate guidelines to elucidate what constitutes a permissible grease payment.<sup>11</sup>

Section II of this Note provides a brief history of the FCPA and a summary of the anti-bribery provisions. This section also addresses the international response to transnational corruption that ensued from the enactment of the FCPA. Section III sets forth the arguments against the FCPA and the flaws inherent in the grease payments exception. Section IV addresses various methods to alleviate the troubles associated with grease payments, including the possible repeal of the grease payment exception and the inclusion of a dollar limit for grease payments into the FCPA. This section also advocates for the DOJ to create guidelines to clarify what constitutes a grease payment. In consideration of the inherent limitations of legislative solutions in this arena, this section also addresses extra-legal solutions to the problem of transnational corruption.

## II. BACKGROUND AND HISTORY

### A. *Enactment of the Foreign Corrupt Practices Act in the United States*

Business reliance upon bribery as a method of obtaining favorable, foreign business contracts has evolved into an international business

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<sup>9</sup> See *Business Accounting and Foreign Trade Simplification Act: Joint Hearings Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. and Monetary Policy of the Senate Comm. on Banking, Hous., and Urban Affairs*, 97th Cong. 438 (1977) (prepared statement of Wallace L. Timmeny, Kutak, Rock & Huie) (suggesting that a better approach to grease payments would be to establish a dollar limit) [hereinafter *Business Accounting Hearings*].

<sup>10</sup> See *Foreign Trade Hearings*, *supra* note 8, at 285 (testimony of Steven J. Brogan, Associate, Jones, Day, Reavis & Pogue) (suggesting that the legality of the payment should turn on its purpose); *Unlawful Corporate Payment Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Fin. of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. 44 (1977) (comment of Rep. Krueger, Member, Hous. Comm. on Interstate and Foreign Commerce) (suggesting that the allowance for grease payments could vary with per capita income) [hereinafter *Unlawful Corporate Payment Hearings*].

<sup>11</sup> See generally Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, VAND. J. TRANSNAT'L L. 431, 462 (1987) (suggesting that the DOJ acknowledged its role in providing guidance to the application of the FCPA's provisions by issuing guidelines).

custom.<sup>12</sup> Illegal or improper payments by U.S. businesses to foreign officials are certainly not a recent development.<sup>13</sup> Prior to 1977, most nations failed to criminalize the extraterritorial payment of bribes by domestic companies.<sup>14</sup> In the United States, the Securities Exchange Commission (SEC) brought its first action against a corporation for multinational bribery in *SEC v. United Brands*.<sup>15</sup> In *United Brands*, the corporation funneled \$2.5 million in bribes to the President of Honduras in exchange for a reduced local tax on an exported product.<sup>16</sup> Fueled by the *United Brands*' scandal and allegations that corporate giants (particularly Exxon, Gulf, Mobil, and Lockheed) made payments to presidents, prime ministers, and royalty of major trading partners, the SEC created a voluntary disclosure program.<sup>17</sup> The SEC's program resulted in a published report that revealed over 400 U.S. businesses had made questionable payments to foreign officials.<sup>18</sup> Lockheed alone admitted to spending more than \$22 million in bribes to foreign officials.<sup>19</sup> In 1977, after months of discussions with the SEC, Congress unanimously enacted the FCPA as part of the 1943 Securities Exchange Act.<sup>20</sup> "The Senate Committee in which the legislation originated described the Act as a 'strong antibribery law' and recommended its enactment to 'bring corrupt practices to a halt and to restore public confidence in the integrity of the American business system.'"<sup>21</sup>

The FCPA criminalized bribery of foreign officials by U.S. businesses and individuals conducting business abroad.<sup>22</sup> U.S. businesses consequently suffered a competitive disadvantage to foreign busi-

<sup>12</sup> Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 72 (1985).

<sup>13</sup> See David L. Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective than the U.S. Foreign Corrupt Practices Act*, 11 PAC. RIM L. & POL'Y J. 209, 209 (2002).

<sup>14</sup> See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH & LEE L. REV. 229, 230-31 (1997).

<sup>15</sup> Levy, *supra* note 12, at 74.

<sup>16</sup> *Id.*

<sup>17</sup> See Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1255-56 (1999).

<sup>18</sup> *Id.*; Christopher J. Duncan, Comments, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 ASIAN-PAC. L. & POL'Y J. 16, 10 (2000).

<sup>19</sup> Heifetz, *supra* note 13, at 209.

<sup>20</sup> Duncan, *supra* note 18, at 11 (explaining that Congress unanimously enacted the FCPA); Perkel, *supra* note 2, at 683 (indicating that Congress enacted the FCPA as part of the 1943 Securities Exchange Act).

<sup>21</sup> Levy, *supra* note 12, at 71 (quoting S. REP. NO. 95-114, at 4101 (1977)).

<sup>22</sup> Perkel, *supra* note 2, at 683.

nesses that were uninhibited by laws proscribing bribery in international markets.<sup>23</sup> As a result of corporate protest, the FCPA was amended in 1988, and again in 1998.<sup>24</sup> In 1988, to promote a level playing-field and clarify ambiguities in the 1977 FCPA, Congress amended the FCPA under the Omnibus Trade and Competitiveness Act, adding two affirmative defenses and instructing the executive branch to urge the United States' trading partners to pass anti-corruption laws.<sup>25</sup> In 1998, Congress amended the FCPA to implement the provisions of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).<sup>26</sup> The 1998 amendments expanded the breadth of potential FCPA violations by including some foreign nationals within the scope of persons covered by the act.<sup>27</sup>

### B. *The Anti-bribery Provisions*

The FCPA's anti-bribery provisions, located in 15 U.S.C. §§ 78dd-1 to 78dd-3, prohibit any bribe to a foreign official to "influence any official act, induce any unlawful action, induce any action that would assist in obtaining or retaining business, or secure any improper advantage."<sup>28</sup> These provisions prohibit individuals or businesses from offering, paying, promising, or authorizing to pay, either directly or indirectly, money or anything of value to any foreign official.<sup>29</sup> The FCPA provides no distinction between grand and petty bribery.<sup>30</sup> However, relatively large scale bribes (tens of thousands to millions of dollars) comprise the majority of prosecutions.<sup>31</sup>

The 1998 amendments to the FCPA eliminated the territorial nexus requirement between the illicit act and the United States.<sup>32</sup> Consequently, the provisions apply to "any person" who commits bribery on

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<sup>23</sup> *Id.* at 683–84.

<sup>24</sup> *Id.* at 684.

<sup>25</sup> See Salbu, *supra* note 14, at 243 (indicating that Congress amended the FCPA in 1988 under the Omnibus Trade and Competitiveness Act); Perkel, *supra* note 2, at 684 (explaining that Congress amended the FCPA to promote a level playing field and clarify ambiguities in the 1977 FCPA).

<sup>26</sup> Eisenberg, *supra* note 1, at 596.

<sup>27</sup> Perkel, *supra* note 2, at 685.

<sup>28</sup> *Id.* at 691 (quoting the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to dd-3 (2000))

<sup>29</sup> Eisenberg, *supra* note 1, at 601.

<sup>30</sup> Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 682 (2000).

<sup>31</sup> *Id.*

<sup>32</sup> Perkel, *supra* note 2, at 695.

U.S. territory regardless of whether the accused is a resident or conducts business in the United States.<sup>33</sup> Moreover, individual corporate employees can be prosecuted under the FCPA even if their employer-corporation is not found guilty of an FCPA violation.<sup>34</sup> The FCPA also prohibits payments to third parties, “while knowing” that the third party will use any or all of the payment as a bribe, or for any purpose inconsistent with the FCPA.<sup>35</sup> Neither foreign officials who receive bribes from U.S. companies, nor foreign officials who conspire to violate the FCPA, can be prosecuted under the FCPA for such a violation.<sup>36</sup>

Additionally, the 1988 amendments provided U.S. businesses and individuals charged with violating the anti-bribery provisions with two affirmative defenses, thereby eliminating liability for payments that are legal in the recipient country or that are considered “reasonable and bona fide expenditures.”<sup>37</sup> The first affirmative defense allows “payment, gift, offer or promise of anything of value” to a foreign official or political party if the country’s written laws permit such an offering.<sup>38</sup> To successfully use this defense, the DOJ recommends that a U.S. business seek legal advice from both local counsel and through the DOJ review procedure process.<sup>39</sup> The second affirmative defense addresses payments, gifts, offers, or promises of anything of value that constitute a “reasonable and bona fide expenditure.”<sup>40</sup> A defendant may only assert this defense if he or she can show that the bona fide expenditures lack a corrupt purpose.<sup>41</sup> Moreover, the expenditure must be “directly related” either to the promotion, demonstration, or explanation of products and services, or to the execution or performance of a contract with a foreign government or agency.<sup>42</sup>

Convicted violators of the FCPA’s anti-bribery provisions can face severe punishment under the act.<sup>43</sup> A corporation or an individual

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<sup>33</sup> See *id.* at 692.

<sup>34</sup> *Id.* at 692–93.

<sup>35</sup> Eisenberg, *supra* note 1, at 604.

<sup>36</sup> Perkel, *supra* note 2, at 693.

<sup>37</sup> Eisenberg, *supra* note 1, at 605–06.

<sup>38</sup> Perkel, *supra* note 2, at 697 (quoting 15 U.S.C. §§ 78dd-1(c)(1) (2000)).

<sup>39</sup> *Id.*

<sup>40</sup> Eisenberg, *supra* note 1, at 605–06 (quoting 15 U.S.C. §§ 78dd-1(c)(2) (2000)).

<sup>41</sup> Perkel, *supra* note 2, at 698.

<sup>42</sup> *Id.* at 698 (quoting 15 U.S.C. §§ 78dd-1(c)(2) (2000)).

<sup>43</sup> See Corr & Lawler, *supra* note 17, at 1263. A violation of the anti-bribery provisions of the FCPA requires proof of the following:

acting on his own behalf may face fines up to \$2 million per violation.<sup>44</sup> The FCPA provides that an individual acting for a corporation can receive fines up to \$100,000 and imprisonment for a maximum of five years for each violation.<sup>45</sup> In addition to criminal punishment, the FCPA provides for civil penalties of up to \$10,000 for violations of the anti-bribery provisions by either a corporation or an individual.<sup>46</sup>

Contrary to its objective of stamping out multinational bribery, the FCPA does not prohibit all payments to foreign officials.<sup>47</sup> An exception to the FCPA permits payments to public officials for “routine governmental actions.”<sup>48</sup> Congress added the “routine government action” language to the FCPA in the 1988 amendments to clarify the provision in the original version that permitted payments to foreign officials who performed “ministerial” or “clerical” duties.<sup>49</sup> This statutory exception permits U.S. businesses to make “modest” payments to low-ranking officials to speed up or secure the performance of clerical activities that do not involve the exercise of discretion.<sup>50</sup> The FCPA’s exception for grease payments does not extend to payments to for-

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(i) a U.S. “issuer, “domestic concern,” or “any person,” including the officers, directors, employees, agents or shareholders acting on behalf of the issuer, domestic concern, or person (ii) makes use of the mails, or any means or instrumentality of interstate commerce (iii) in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value (iv) to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, or other person knowing, that the payment to that other person would be passed on to a foreign official, foreign political party or official thereof, or candidate for foreign political office (v) inside the territory of the United States or, for any United States personality, outside the United States (vi) to corruptly (vii) influence any official act or decision, or induce an action or an omission to act in violation of a lawful duty, or to secure any improper advantage (viii) or induce any act or decision that would assist the company in obtaining, retaining, or directing business to any person.

Perkel, *supra* note 2, at 693–95 (quoting 15 U.S.C. §§ 78dd-1 (2000)).

<sup>44</sup> Corr & Lawler, *supra* note 17, at 1263.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1264.

<sup>47</sup> See Eisenberg, *supra* note 1, at 604.

<sup>48</sup> *Id.* (quoting 15 U.S.C. § 78dd-1(b) (1994); 15 U.S.C. § 78dd-2(b) (1994))

<sup>49</sup> CRUYER, *supra* note 2, at 20 (stating that the 1988 amendments changed the focus of grease payments from the status of the recipient to the purpose or nature of the payment); see Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 *Nw. J. INT’L L. & BUS.* 435, 449–50 (2001) (stating that Congress amended the FCPA to allow grease payments for routine government acts, instead of allowing such payments to foreign officials with ministerial or clerical functions).

<sup>50</sup> DON ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 5-1 to -3* (1995).

ign officials that are used to encourage those officials to generate new business or continue business with a particular party.<sup>51</sup> Routine government actions consist of non-discretionary acts that a foreign official ordinarily performs during daily business.<sup>52</sup> The FCPA describes such routine acts as: obtaining permits, licenses, or documents that are needed to do business in a foreign country; processing governmental papers, such as visas and work orders; scheduling inspections; providing police protection; picking-up or delivering mail; providing phone, power, and water service; and loading, unloading, or protecting perishable products or commodities.<sup>53</sup> The FCPA provides no dollar limit on the amount of permissible grease payments.<sup>54</sup> No court has yet to interpret this exception to the FCPA.<sup>55</sup>

### C. *International Developments*

In the time since 1977, nations have begun to view bribery and corrupt practices as a “scourge” and “impediment” to international business, economic and political development, and stability.<sup>56</sup> The increased recognition of corruption and its negative effects is evidenced by the proliferation of numerous international initiatives against bribery and corruption.<sup>57</sup> For example, Transparency International, the European Union, the Council of Europe, the European Bank for Reconstruction and Development, the International Monetary Fund, the Inter-American Development Bank, and the Asian Development Bank all have instituted anti-corruption measures and programs.<sup>58</sup>

The most significant recent development in international corruption law is the OECD Convention, adopted in November 1997 by the Organization for Economic Cooperation and Development.<sup>59</sup> The stimulus for the OECD Convention stemmed from the 1988 amendments to the FCPA that directed the executive branch to pursue in-

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<sup>51</sup> Perkel, *supra* note 2, at 696.

<sup>52</sup> *Id.* at 696–97.

<sup>53</sup> *Id.* at 697.

<sup>54</sup> CRUVER, *supra* note 2, at 20.

<sup>55</sup> Perkel, *supra* note 2, at 697; Salbu, *supra* note 49, at 451.

<sup>56</sup> Bonnie H. Weinstein, *International Legal Developments in Review: 2001 Business Regulation*, 36 INT'L LAW. 355, 355 (2002).

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* at 357.

<sup>59</sup> John W. Brooks, *Fighting International Corruption*, 20 No. 6 GPSOLO 42, 42 (2003) (calling the adoption of the OECD Convention the most significant development in international law); Heifetz, *supra* note 13, at 210 (indicating that the adoption of the OECD Convention occurred in November 1997).

ternational anti-bribery measures within the OECD.<sup>60</sup> In 1989, the U.S. representatives to the OECD put forth efforts to initiate a multi-lateral agreement against bribery.<sup>61</sup> As a result of international pressures, the majority of the OECD member states agreed to comply with the non-binding package of recommendations contained in the OECD Recommendations on Bribery in International Business Transactions.<sup>62</sup> In May 1997, the OECD Committee reconvened to evaluate the measures implemented by member countries pursuant to the recommendations.<sup>63</sup> Throughout the course of this meeting, the U.S. delegation strongly encouraged other members to adopt a binding anti-bribery agreement that ultimately led to the adoption of the OECD Convention.<sup>64</sup>

The Preamble to the OECD Convention provides that “bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”<sup>65</sup> Signatories of the OECD Convention assumed obligations to implement its provisions through the passage of domestic legislation by December 31, 1999.<sup>66</sup> The ensuing enactment of domestic anti-bribery laws demonstrated some level of international support for the idea that bribery of foreign public officials is unacceptable.<sup>67</sup>

The OECD Convention requires its parties to promulgate laws that criminalize the bribery of foreign officials.<sup>68</sup> The Convention defines the act of bribery as:

[T]o offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or

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<sup>60</sup> Heifetz, *supra* note 13, at 213.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See Id.*

<sup>65</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, pmb1. [hereinafter OECD Convention].

<sup>66</sup> Heifetz, *supra* note 13, at 210.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 214.

retain business or other improper advantage in the conduct of international business.<sup>69</sup>

It defines foreign public official as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprises; and any official or agent of a public international organization.”<sup>70</sup> The Convention further requires that parties criminalize complicity with, the attempt to, as well as the conspiracy to, commit such bribery.<sup>71</sup> Many scholars have criticized the OECD Convention for its failure to prohibit bribery of political parties and candidates, as well as the tax deductibility of illicit payments.<sup>72</sup>

The United Nations directed its attention to the issue of bribery in 1996, as evidenced by the General Assembly’s adoption of two declarations: The Declaration Against Corruption and Bribery in International Commercial Transactions and The Declaration of the International Code of Conduct for Public Officials.<sup>73</sup> The first declaration attempted to criminalize foreign bribery and abolish tax deductibility for bribery of foreign officials as a legitimate business expense.<sup>74</sup> In 1998, the General Assembly adopted the second declaration, urging the criminalization of the bribery of foreign officials and the development of programs to combat bribery and corruption.<sup>75</sup> In December 2000, a number of United Nations member states signed the United Nations Convention Against Transnational Organized Crime, calling for the criminalization of both national and international corruption.<sup>76</sup>

In 1996, the Organization of American States adopted the Inter-American Convention Against Corruption (“Inter-American Convention”). seeking to eradicate bribery and corruption in member countries.<sup>77</sup> Although bearing similarities to the FCPA and OECD Convention, the Inter-American Convention goes even further to combat bribery and corruption.<sup>78</sup> For instance, it addresses the demand side of

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<sup>69</sup> OECD Convention, *supra* note 65, art. 1 § 1.

<sup>70</sup> *Id.* art. 1 § 4(a).

<sup>71</sup> *See id.* art 1 § 2.

<sup>72</sup> Perkel, *supra* note 2, at 704.

<sup>73</sup> Weinstein, *supra* note 56, at 355.

<sup>74</sup> *Id.* at 355–56.

<sup>75</sup> *Id.* at 356.

<sup>76</sup> Brooks, *supra* note 59, at 43.

<sup>77</sup> *Id.* at 42.

<sup>78</sup> *Id.*

bribery by prohibiting the solicitation of improper payments by government officials.<sup>79</sup> To comply with the Inter-American Convention's requirements, signatories must criminalize both demand and supply side corruption, the bribe-seeking acts or omissions by governmental officials, as well as the payments themselves.<sup>80</sup> Unless particular circumstances warrant application of an exception, the Inter-American Convention further requires that each member state proscribe "illicit enrichment," defined as an "unexplainable significant increase in wealth."<sup>81</sup> Regrettably, the Inter-American Convention lacks a valid enforcement mechanism.<sup>82</sup>

### III. DISCUSSION

#### A. *Problems with the Grease Payment Exception*

##### 1. The Statutory Language is Ambiguous

Numerous ailments currently plague the FCPA's exception for grease payments, thereby impeding its goal of eliminating illegal payments to foreign officials.<sup>83</sup> A close examination of the statutory text reveals problems with its construction, that, in turn, hinder enforcement of the FCPA and provide insufficient guidance to U.S. businesses.<sup>84</sup> One source of trouble with the grease payment exception arises from the indeterminacy of the statutory language.<sup>85</sup> Specifically, enforcement difficulties with the provision arise from the possible multiple interpretations of "routine."<sup>86</sup> A U.S. business can interpret "routine" in several different ways: a business could interpret it to simply mean "frequently," or the business could interpret it to mean "ordinary" or "commonplace."<sup>87</sup> Whether a payment to a foreign official is permissible under the exception may depend on the particular inter-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Brooks, *supra* note 59, at 42–43.

<sup>82</sup> *Id.* at 43.

<sup>83</sup> See generally, e.g., Salbu, *supra* note 14, at 266 (stating three problems with the FCPA's provision for grease payments).

<sup>84</sup> See *id.* (explaining that the FCPA forces businesses to analogize to the statute when situations arise that are not specially enumerated in the statute, which is something businesses are ill-equipped to perform).

<sup>85</sup> *Id.*

<sup>86</sup> See Salbu, *supra* note 49, at 451–52.

<sup>87</sup> *Id.* at 451.

pretation of “routine” taken.<sup>88</sup> Moreover, a foreign official demanding a payment to speed up a decision honestly may be seeking payment for quick service, or may be using euphemistic language to cloak what is really a bribe for preferential treatment in contract procurement.<sup>89</sup> The various interpretations of the meaning of “routine” thus can leave a business in the lurch as to how to lawfully proceed.<sup>90</sup>

The FCPA’s definition for “routine” government action sets forth some examples of permissible grease payments to government officials and indicates that it will also permit “actions of a similar nature.”<sup>91</sup> The statute, however, provides sparse guidance when questionable situations arise that are not specifically enumerated in the statute, leaving businesses and individuals analogizing between what is specifically permitted in the provision and what they intend to do.<sup>92</sup> The statutory language also treats some “ethically justifiable, or even desirable” payments as clearly illegal or fails to properly identify the payment.<sup>93</sup> To illustrate this proposition, it is possible to imagine a government official, during the course of a civil war where a government was blocking food deliveries, agreeing to allow such deliveries for personal kickbacks.<sup>94</sup> In this situation, such a bribe would clearly be socially desirable but prohibited due to the statutory language.<sup>95</sup>

The FCPA’s exception for payments for routine, non-discretionary government actions is further troublesome since circumstances often arise where it is not clear what constitutes a non-discretionary, facilitating payment.<sup>96</sup> For example, suppose a foreign government official offered to expedite the processing of a company’s lawfully-owed Value-Added Tax refunds in exchange for a percentage of each refund.<sup>97</sup> The

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<sup>88</sup> See *id.* (illustrating three different interpretations of “routine,” and analyzing the results under the statute).

<sup>89</sup> Salbu, *supra* note 14, at 266.

<sup>90</sup> See Salbu, *supra* note 49, at 451. It should be noted that if a U.S. citizen or business is contemplating conduct that raises issues of legality under the anti-bribery provisions, the FCPA permits the citizen or entity to request an opinion from the DOJ as to whether the conduct would be lawful under the DOJ’s present enforcement policies. Corr & Lawler, *supra* note 17, at 1264. The DOJ is required to make a decision within thirty days of receiving the request. *Id.* If the DOJ states that the prospective conduct would not constitute a violation of the anti-bribery provisions, that creates a rebuttable presumption that the conduct is lawful. *Id.*

<sup>91</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78dd-1(f) (3) (A) (2000).

<sup>92</sup> Salbu, *supra* note 49, at 452.

<sup>93</sup> See *id.* at 451.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> See ZARIN *supra* note 50, at 5–3.

<sup>97</sup> *Id.*

company intended the payment to the official only to expedite the processing of the company's lawful claim to what the government owed it.<sup>98</sup> Although the payment facially appears to satisfy the requirements of the grease payment provision, a DOJ official declared that the DOJ likely would not consider this payment to be a grease payment.<sup>99</sup> The DOJ official reasoned that the foreign government official was exercising discretion in this situation when determining whose refunds to process first.<sup>100</sup> To some extent, such discretionary action is inherent in expediting the processing of any government papers.<sup>101</sup> The exception for grease payments thus leaves U.S. businesses to grapple with determining what constitutes a payment for discretionary government actions.<sup>102</sup>

In addition to deciphering the discretionary government action puzzle, U.S. businesses also must successfully deduce what constitutes a payment to "obtain" or "retain" business.<sup>103</sup> The difficulties associated with distinguishing between grease payments and payments made to obtain or retain business pose serious enforcement problems, as well as substantial problems for U.S. businesses attempting to conduct business abroad.<sup>104</sup> In *United States v. Kay*, the Court of Appeals for the Fifth Circuit concluded that the FCPA failed to sufficiently illustrate when a payment to a foreign official was in fact a payment intended to obtain or retain business.<sup>105</sup> In *United States v.*

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<sup>98</sup> *Id.* at 5–4.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> ZARIN, *supra* note 50, at 5–3.

<sup>102</sup> *See id.* at 5–3 to 5–4 (providing an example of a facially legal payment but declared as one that would "attract the [DOJ's] attention" and likely be deemed unlawful).

<sup>103</sup> *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 271 (1998).

<sup>104</sup> *See id.* (indicating the need for uniformity in interpreting the FCPA). The DOJ official at the FCPA conference concluded that the payment to the government official to expedite the processing of the business's refund would violate the FPCA since it involved a payment to a foreign official for the retention of business. ZARIN, *supra* note 50, at 5–3 to –4.

<sup>105</sup> *See* *United States v. Kay*, 359 F.3d 738, 744–45 (5th Cir. 2004). In 2001, a grand jury indicted two American Rice, Inc. executives for bribing Haitian officials to accept false bills of lading, which ultimately decreased the import duties owed. Russell Gold, *U.S. Court Ruling Bolsters Statute Against Bribery*, WALL ST. J., Feb. 9, 2004, available at [http://online.wsj.com/article\\_print/0,,SB107627922252323843,00.html](http://online.wsj.com/article_print/0,,SB107627922252323843,00.html). The U.S. Court of Appeals for the Fifth Circuit held that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within the coverage of the FCPA. *Kay*, 359 F.3d at 756. In reaching this conclusion, the court reasoned from the FCPA's legislative history to determine that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person. *Id.* at 755–56.

*Vitusa Corporation*, the DOJ prosecuted the Vitusa Corporation for FCPA violations resulting from payments or promises of payments of approximately \$50,000 to a foreign official to secure payment of a debt owed by the government of the Dominican Republic.<sup>106</sup> Even though the debt was undisputed and the money was intended to expedite and secure payment, the DOJ treated the payment as an unlawful payment to induce an official to use his influence to obtain or retain business.<sup>107</sup>

## 2. A Grease Payment is Still a Bribe

Whether a payment to a government official is to expedite a routine government action or to obtain a contract for construction of a hospital, the payment constitutes a bribe with several potential deleterious effects.<sup>108</sup> Even small grease payments can have significant impacts.<sup>109</sup> For example, modest bribes paid to building inspectors may result in tragedy if an inspector approves a building despite code violations.<sup>110</sup> Under some circumstances, a small payment to a public official to expedite a routine government action is as corrosive and morally deficient as a large payment to a public official to obtain or continue business.<sup>111</sup> According to the “broken windows hypothesis,” legislation ought to target grease payments as aggressively as higher-level corruption due to its potentially infectious nature.<sup>112</sup> This theory suggests that the ability of lower-level officials to accept bribes encourages higher-level officials to take bribes of a more substantial amount and with greater detriment to the public.<sup>113</sup> Additionally, cor-

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<sup>106</sup> ZARIN, *supra* note 50, at 5–4. The government of the Dominican Republic failed to pay its bill in full to Vitusa Corporation for deliveries of powdered milk. Corr & Lawler, *supra* note 17, at 1278. When the Dominican Republic government submitted a payment on the milk contract, Vitusa arranged for a portion of these funds to be channeled to the Dominican government official. *Id.*

<sup>107</sup> ZARIN, *supra* note 50, at 5–4. “The collection of money is part of obtaining or retaining business, and a payment in furtherance of that goal is not a facilitating payment.” *Id.* at 5–5. However, it has been argued that the Vitusa Corporation payment was not a payment in furtherance of obtaining or retaining business, and thus, the Justice Department ought to have treated it as a facilitation payment. Arthur F. Mathews, *Defending SEC and 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, 316 (1998).

<sup>108</sup> See Dunfee & Hess, *supra* note 5, at 477.

<sup>109</sup> See Salbu, *supra* note 30, at 664.

<sup>110</sup> See *id.*

<sup>111</sup> See Dunfee & Hess, *supra* note 5, at 477 (explaining the negative effects of grease payments as set forth in the Broken Windows hypothesis)

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

ruption may spread to higher levels of government as the bribe-accepting lower-level officials ascend within the hierarchy of government positions.<sup>114</sup>

### 3. The International Community's Tolerance for Grease Payments Is Fading

The FCPA's treatment of facilitating payments as lawful is inconsistent with the local laws of many foreign countries and international conventions that have come into effect since the FCPA's enactment.<sup>115</sup> The local laws of most foreign countries treat these facilitating payments as illegal.<sup>116</sup> Congress originally excluded such payments from the FCPA's prohibitions in recognition that such payments were common and even legal in many countries.<sup>117</sup> Such payments may still be common, but they are no longer legal in many countries.<sup>118</sup> The FCPA in effect allows U.S. businesses to make payments to government officials that may violate the laws of the recipient country, thereby contributing to low-level corruption.<sup>119</sup> The FCPA's exception for facilitating payments brought much international criticism of the FCPA during the implementation of the OECD Convention.<sup>120</sup> This criticism evidently was taken to heart as there is no exception for grease payments in the OECD Convention.<sup>121</sup> The Commentaries on The OECD Convention (OECD Commentaries), however, provide that "small facilitation payments" do not constitute payments made to "obtain or retain business or other improper advantage" and are consequently not an offense.<sup>122</sup> The Commentaries further add that "criminalization by

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<sup>114</sup> *Id.*

<sup>115</sup> See Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 491, 493-94 (1998) (providing an example of an international convention that does not allow for grease payments); ZARIN, *supra* note 50, at 5-5 (suggesting that the FCPA's allowance for grease payments is inconsistent with the local laws of many nations).

<sup>116</sup> ZARIN, *supra* note 50, at 5-5.

<sup>117</sup> II ROGER M. WITTEN, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT* § 2.09, at 2-11 (1997).

<sup>118</sup> See ZARIN, *supra* note 50, at 5-5.

<sup>119</sup> Low et al., *supra* note 103, at 269.

<sup>120</sup> Homer E. Moyer Jr. et al., *The U.S. Foreign Corrupt Practices Act: Its Origins, Development, Implementation, and Issues to Watch*, 2002 A.B.A. CENTER FOR CONTINUING LEGAL EDUCATION, NATIONAL INSTITUTE, SEC. INT'L L. & PRAC. § III(3)(C)(4).

<sup>121</sup> WITTEN, *supra* note 117, § 2.09, at 2-12 n.76.

<sup>122</sup> OECD Convention, *supra* note 65, comment., art. 1, para. 9.

other countries does not seem a practical or effective complementary action."<sup>123</sup>

In contrast to both the FCPA and the OECD Commentaries, the Inter-American Convention does not create an exception for facilitating payments to government officials.<sup>124</sup> Article VIII of the Inter-American Convention criminalizes all payments made "in connection with any economic or commercial transaction, including facilitating payments."<sup>125</sup> Additionally, the United Nations Convention against Corruption criminalizes the "direct or indirect promising, offering or giving, of an undue advantage to the official such that he will act or refrain from acting in the exercise of his official duties."<sup>126</sup> A literal interpretation of this language would include the criminalization of facilitating payments to government officials.<sup>127</sup> 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.<sup>128</sup>

#### IV. ANALYSIS

##### A. *Repeal of the FCPA's Exception for Grease Payments*

Repeal of the FCPA's exception for grease payments quickly resolves the deficiencies in the statutory language, the potential adverse consequences of such payments, and aligns the United States with the international norms concerning bribery as expressed by the international community.<sup>129</sup> Repeal of the grease payment exception is also appropriate considering the erosion of the foundation underlying Congress' original decision to permit grease payments.<sup>130</sup> When draft-

<sup>123</sup> *Id.*

<sup>124</sup> Nash, *supra* note 115, at 493.

<sup>125</sup> *Id.* (quoting the Inter-American Convention, June 27, 1996, art. VIII, S. TREATY Doc. No. 105-39.

<sup>126</sup> United Nations Convention Against Corruption, Dec. 11, 2003, art. 15(a), 43 I.L.M. 37, 46.

<sup>127</sup> *See id.*

<sup>128</sup> *See* McCary, *supra* note 8, at 314.

<sup>129</sup> *See* Salbu, *supra* note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear); McCary, *supra* note 8, at 314 (noting that that an international consensus has emerged that grease payments are bribery); Wallace-Bruce, *supra* note 7, at 350 (explaining that the international community is progressing toward the elimination of corruption).

<sup>130</sup> *See Foreign Trade Hearings*, *supra* note 8, at 217 (stating that it was customary practice to give grease payments to underpaid, low-ranking civil servants); H.R. REP. NO. 95-640, at

ing the legislation that would lead to the FCPA, Congress propounded several reasons for its ambivalence toward grease payments.<sup>131</sup> First, in sharp contrast to the United States, numerous countries treated grease payments as socially permissible.<sup>132</sup> Second, a unilateral attempt by the United States to eradicate all such payments was not considered to be feasible, and U.S. businesses would be crippled by a competitive disadvantage abroad if such payments were prohibited.<sup>133</sup> Finally, it was reasoned that many civil servants in developing countries earned inadequate wages and customary practice required U.S. businesses to provide them with gratuities.<sup>134</sup> Even if these reasons were still valid, however, Congress' decision to allow grease payments would be subject to criticism because corruption's negative impact outweighs any positive effect it might have.<sup>135</sup>

As the international community progresses toward the criminalization of all payments to foreign officials, Congress can no longer ground its treatment of grease payments in the assertion that foreign countries perceive such payments as culturally acceptable.<sup>136</sup> The criminalization of facilitating payments abroad prompted international criticism of the FCPA during the OECD Convention implementation process.<sup>137</sup> By continuing to permit grease payments, Congress may be sanctioning the continued violation of local anti-corruption laws of foreign countries and the emerging international conventions that criminalize grease payments.<sup>138</sup> Moreover, given the emerging norms of the international community, the United States would no longer have to police

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8 (stating that it would not be feasible for the United States to attempt to eradicate grease payments unilaterally).

<sup>131</sup> See *Foreign Trade Hearings*, *supra* note 8, at 217; H.R. REP. NO. 95-640, *supra* note 8, at 8.

<sup>132</sup> WITTEN, *supra* note 117, § 2.09, at 2-11.

<sup>133</sup> See *Foreign Trade Hearings*, *supra* note 8, at 217.

<sup>134</sup> *Id.*

<sup>135</sup> See Wallace-Bruce, *supra* note 7, at 352, 357-59 (explaining that corruption's negative consequences outweigh any positive effects it might have).

<sup>136</sup> See McCary, *supra* note 8, at 314; Wallace-Bruce, *supra* note 7, at 350, 352 (showing that an international effort to extinguish corruption has emerged and that law enforcement, rather than culture, is to blame for the non-enforcement of anti-corruption laws).

<sup>137</sup> See Moyer, *supra* note 120, § III(C)(4).

<sup>138</sup> See Heifetz, *supra* note 13, at 210 (stating that the rise of domestic anti-bribery laws demonstrates international intolerance of bribery of foreign government officials); Nash, *supra* note 115, at 493 (stating that the FCPA appears noncompliant with Article VIII of the Inter-American Convention).

grease payments unilaterally if Congress decided to criminalize such payments.<sup>139</sup>

Instead of the intended altruistic effect contemplated by Congress, grease payments can also adversely affect the host country.<sup>140</sup> Grease payments can interfere with the proper administration of government and result in social unrest.<sup>141</sup> In an effort to pocket more grease payments, government officials, who issue licenses or permits, may deliberately delay operations.<sup>142</sup> Furthermore, grease payments can create a perception that governments select only certain individuals for those strategic jobs that provide opportunities to accept bribes, leading to feelings of inequity, resentment, and potentially a national uprising.<sup>143</sup>

### B. *Amendment of the Statute to Include a Monetary Threshold*

Although elimination of the grease payments exception would ameliorate its deleterious effects, Congress and U.S. businesses will surely resist, asserting: (1) such a ban imposes enforcement difficulties; and (2) prosecution for small grease payments is undesirable.<sup>144</sup> The opposition will likely further contend that legislation targeting petty facilitation payments is ineffective and subject to charges of moral imperialism.<sup>145</sup> If such resistance impedes Congressional repeal of the exception for grease payments, an alternate solution still

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<sup>139</sup> See Wallace-Bruce, *supra* note 7, at 350 (noting that an international consensus against corruption is emerging).

<sup>140</sup> See *id.* at 357–59 (setting forth six reasons why grease payments are more harmful than helpful).

<sup>141</sup> See *id.* at 358.

<sup>142</sup> *Id.*

<sup>143</sup> See *id.* at 358–59.

<sup>144</sup> See Salbu, *supra* note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear); Salbu, *supra* note 30, at 688 (stating that prosecution for petty bribery is undesirable); McCary, *supra* note 8, at 314 (noting that that an international consensus has emerged that grease payments are bribery); Wallace-Bruce, *supra* note 7, at 371 (stating that payment for routine government actions is entrenched in many developing countries and a business can be harmed by refusing to make a grease payment).

<sup>145</sup> See Salbu, *supra* note 30, at 688. The risk of moral imperialism is greater with petty bribery than grand bribery because it is less controversial to treat a large payment, for example a \$9.9 million kickback, as corrupt, than a small payment of a few hundred dollars. See *id.* at 682–83. Grand bribery is less likely to serve any of the potentially legitimate social functions that justify smaller payments. *Id.*

exists to rein in the difficulties and abuses associated with grease payments: a dollar limit or ceiling on permissible payments.<sup>146</sup>

Although Congress intended to permit small payments for routine government actions, the FCPA fails to provide any monetary ceiling on permissible payments.<sup>147</sup> Qualifying payments permitted under the grease payments exception, in theory, ought to constitute “modest” sums of money to low-ranking officials.<sup>148</sup> In practice, the absence of a monetary limit has resulted in bribes ranging from a few dollars to customs officials to bribes as large as tens of thousands of dollars.<sup>149</sup> The potential for negative effects increases with the size of the illicit payment.<sup>150</sup> The incidence rate of economic, political, and social harm is higher with a bribe of thousands of dollars than with a smaller bribe of a few hundred dollars.<sup>151</sup>

The amplified risks associated with larger bribes suggest the need for Congressional amendment of the FCPA to limit the dollar amount of grease payments.<sup>152</sup> The FCPA’s legislative history reveals both comments by Congressmen and witness testimony advocating for the inclusion of a dollar limit for permissible grease payments.<sup>153</sup> For example, Wallace Timmeny testified before various House Congressional subcommittees that the FCPA should contain a monetary limit on grease payments.<sup>154</sup> Additionally, Congressman Krueger of the House Committee on Interstate and Foreign Commerce stated that a lawful grease payment should not exceed a set percentage of the re-

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<sup>146</sup> See *Business Accounting Hearings*, *supra* note 9, at 438 (suggesting a better approach to grease payments would be to establish a dollar limit).

<sup>147</sup> See CRUVER, *supra* note 2, at 20 (stating that Congress did not want to prohibit small payments under the FCPA); WITTEN, *supra* note 117, § 2.09, at 2-12 (noting that the FCPA has no per se limit on the size of the grease payment).

<sup>148</sup> See ZARIN, *supra* note 50, at 5-1.

<sup>149</sup> Timothy Ashby, *Steering Clear of the Foreign Corrupt Practices Act*, 45 ORANGE COUNTY LAW. 10, 11 (2003).

<sup>150</sup> Salbu, *supra* note 30, at 663.

<sup>151</sup> *Id.* at 663-64.

<sup>152</sup> See *Business Accounting Hearings*, *supra* note 9, at 438 (suggesting a better approach to grease payments would be to establish a dollar limit); *Unlawful Corporate Payment Hearings*, *supra* note 10, at 43 (suggesting that grease payments should be illegal if over a set amount); Salbu, *supra* note 30, at 663-64 (stating that larger bribes have a greater likelihood of causing economic, political, and social harm).

<sup>153</sup> See *Business Accounting Hearings*, *supra* note 9, at 442-43 (suggesting that a permissible grease payment would fall beneath a certain monetary threshold and in fact be a payment to expedite the movement of goods or personnel); *Unlawful Corporate Payment Hearings*, *supra* note 10, at 44 (suggesting that grease payments should be limited to a set percentage of the recipient country’s per capita income).

<sup>154</sup> See *Business Accounting Hearings*, *supra* note 9, at 442-43.

recipient country's per capita income.<sup>155</sup> He reasoned that basing the grease payment threshold upon the host country's per capita income would create an equitable or uniform approach to grease payments.<sup>156</sup>

The FCPA's legislative history further suggests that the inclusion of a dollar limit for grease payments never materialized largely because Congress did not want to set a minimum price for conducting business abroad and felt that the legality of a grease payment should focus upon the payment's nature and purpose.<sup>157</sup> During pre-FCPA hearings, Congressman Krueger suggested limiting grease payments to some percentage of per capita income in the recipient country, or \$8,700, because "when a Congressman earns more than that in private income it is illegal, but if he earns less, it is legal."<sup>158</sup> Congressman Eckhardt rejected this idea, insisting that the focus of any legislation must be on what constitutes a legal grease payment versus a payment to corruptly influence a foreign official.<sup>159</sup> Eckhardt added, "I am a little bit skeptical about trying to draw minimum amounts because I can conceive of situations which involve \$100 that would be clearly corrupt, whereas a situation which may involve as much as \$500 may not be."<sup>160</sup> Prior to the 1988 amendments, a witness before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs also suggested a minimum threshold for a bribe to be considered something other than a grease payment at the amount of \$5,000.<sup>161</sup> Subsequently, Congressman Berman solicited reactions to this idea.<sup>162</sup> Another witness testified that the focus must be on the purpose of the payment and that the insertion of a dollar cap would set a minimum price for conducting business abroad.<sup>163</sup> During another subcommittee hearing, a witness also suggested establishing a dollar limit on grease payments in addition to the requirement that the payment be for a routine government ac-

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<sup>155</sup> See *Unlawful Corporate Payment Hearings*, *supra* note 10, at 44.

<sup>156</sup> See *id.* (indicating that tagging grease payments to per capita income would create cost equity).

<sup>157</sup> See *Foreign Trade Hearings*, *supra* note 8, at 285 (suggesting that providing a dollar limit for grease payments would create a floor cost for conducting business abroad); *Business Accounting Hearings*, *supra* note 9, at 438 (indicating that what constitutes acceptable grease payments should focus on the nature of the payment).

<sup>158</sup> *Unlawful Corporate Payments*, *supra* note 10, at 43, 44.

<sup>159</sup> See *id.* at 52.

<sup>160</sup> *Id.*

<sup>161</sup> *Foreign Trade Hearings*, *supra* note 8, at 227.

<sup>162</sup> *Id.* at 285.

<sup>163</sup> *Id.*

tion.<sup>164</sup> In response, practitioner witnesses William A. Dobrovir and Theodore Sorenson indicated that the focus ought to remain on the purpose of the payment, rather than a minimal amount.<sup>165</sup>

The inclusion of a dollar limit for grease payments does not conflict with the concerns expressed by Congress about creating a floor cost for conducting business abroad when it is part of the following two-prong test.<sup>166</sup> Under this proposed analysis, the FCPA would still require that the nature or purpose of the payment be to expedite or secure a routine government action.<sup>167</sup> The test described, however, would additionally require that the payment fall beneath a set percentage of the country's per capita income.<sup>168</sup> The continued focus on the nature or purpose of the payment ensures that, even if a payment falls within the monetary limit, it will not be permissible unless it is actually a payment to secure or expedite a routine government action.<sup>169</sup>

### C. *The Role of the DOJ*

The DOJ also has an essential role in clarifying and preventing the abuse of the FCPA.<sup>170</sup> A U.S. business confronted with a proposed transaction involving questionable grease payments can turn to the DOJ for assistance.<sup>171</sup> To elucidate its enforcement priorities with respect to the FCPA's bribery provisions, the DOJ released a statement in November 1979 that identified factors likely to increase prosecution and investigation, including the size of the payment, the size of the transaction, and the past conduct of the involved persons.<sup>172</sup> Although the size of the payment or transaction is an escalating factor, the statement fails to provide any further clarification to facilitate decision-making by U.S. businesses.<sup>173</sup> If a business still requires further guidance, it can request an opinion procedure from the DOJ that provides a

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<sup>164</sup> *Business Accounting Hearings*, *supra* note 9, at 442–43.

<sup>165</sup> *Id.* at 443.

<sup>166</sup> *See id.* at 442–43 (stating that grease payments should include a dollar amount, and must also clearly be payments to expedite the movement of goods or personnel).

<sup>167</sup> *See* Foreign Corrupt Practices Act, 15 U.S.C.A. § 78dd-1 (b).

<sup>168</sup> *See Unlawful Corporate Payments Hearings*, *supra* note 10, at 44.

<sup>169</sup> *See Business Accounting Hearings*, *supra* note 9, at 442–43.

<sup>170</sup> *See* Longobardi, *supra* note 11, at 462 (suggesting that the DOJ acknowledged its role in providing guidance to the application of the FCPA's provisions by issuing guidelines).

<sup>171</sup> *See* CRUVER, *supra* note 2, at 62.

<sup>172</sup> *Id.* at 61.

<sup>173</sup> *See generally id.* (providing a limited list of factors that increase the likelihood of DOJ investigation or prosecution).

statement of whether the business's proposed transaction violates the FCPA and whether the DOJ would bring any enforcement action.<sup>174</sup> In fact, if a posed transaction does not fit within one of the prescribed categories for routine governmental action, an opinion procedure should be sought.<sup>175</sup> However, due to ambiguities in the review procedure and drawbacks associated with its use, businesses infrequently rely upon this source.<sup>176</sup> The insufficient assistance provided by these two avenues, and the scarcity of enforcement actions against violators of the FCPA, adds to the darkness in which businesses must function.<sup>177</sup>

Given the problems associated with the review procedure and the scant body of available case law, the DOJ's promulgation of guidelines could provide U.S. businesses with a useful definition of what constitutes a grease payment.<sup>178</sup> During the wave of opposition and proposed amendments that followed enactment of the FCPA, the DOJ expressed a steadfast unwillingness to issue FCPA guidelines.<sup>179</sup> The DOJ asserted that guidelines would be impractical and unduly burdensome for the DOJ with little or no benefit to U.S. businesses.<sup>180</sup> The DOJ contended that it could not issue guidelines that would enable U.S. businesses to tailor their transactions to accord with the FCPA.<sup>181</sup> Specifically, the DOJ contended that illustration of only a few hypothetical transactions as legally permissible would result in businesses restricting operations to bring them within the confines of the given examples.<sup>182</sup> On the other hand, if the DOJ attempted to list every possible business permutation companies may employ, businesses would be forced to hunt through the voluminous list in search of a fact pattern similar to its intended transaction.<sup>183</sup> Either approach

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<sup>174</sup> *Id.* at 62. To request a review of a proposed transaction, a party must provide detailed information relevant and material to the proposed conduct, as well as any other information that the DOJ requires. Longobardi, *supra* note 11, at 462.

<sup>175</sup> See CRUVER, *supra* note 2, at 20–21.

<sup>176</sup> *Id.* at 62.

<sup>177</sup> See Longobardi, *supra* note 11, at 470 (explaining that the DOJ has conducted only eighteen reviews of proposed business transactions and all were positive).

<sup>178</sup> See CRUVER, *supra* note 2, at 61–62 (discussing problems with the review procedures); Longobardi, *supra* note 11, at 473–74 (noting that a widespread belief existed that the ambiguities in the FCPA necessitated DOJ guidelines); Perkel, *supra* note 2, at 697 (stating that no court has interpreted the grease payment provisions); Salbu, *supra* note 14, at 266 (explaining several deficiencies with the statutory language that make the grease payment provision unclear).

<sup>179</sup> Longobardi, *supra* note 11, at 474.

<sup>180</sup> See *id.* at 474–75.

<sup>181</sup> See *id.* at 475

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

would restrict business dealings and potentially disadvantage U.S. businesses in foreign markets.<sup>184</sup>

In light of the troubles associated with providing hypothetical business transactions, the DOJ could simply issue guidelines that indicate what constitutes a grease payment.<sup>185</sup> A possible set of guidelines could mandate that “the payor’s purpose must be to secure or expedite a routine government action and the payment cannot exceed a specific dollar threshold based upon a percentage of the recipient country’s per capita income.”<sup>186</sup>

#### D. *The Role of Business in the United States Beyond Profit-making*

The effect of any actions by Congress or the DOJ in attacking bribery will be diminished without the active and responsible participation of corporations.<sup>187</sup> Firms may seek to provide their employees with clear guidance on what constitutes a permissible grease payment through their codes of conduct.<sup>188</sup> One business code provides: “[E]ven though such payments may possibly be expected in accordance with area customs and legal interpretations, and would confer no improper business advantage on the company, every effort should be made to avoid them.”<sup>189</sup>

#### E. *Extra-legal Solutions to Weed out the Roots of Corruption*

Vigorous enforcement of a revised and ideally lucid FCPA may still, however, be ineffectual in cracking down on illegal bribes to foreign officials.<sup>190</sup> States can attack transnational corruption with both legislation and institutional change.<sup>191</sup> Legislative solutions, such as the FCPA, seek to control undesirable behavior primarily by imposing

<sup>184</sup> Longobardi, *supra* note 11, at 475

<sup>185</sup> *See id.*

<sup>186</sup> *See Business Accounting Hearings, supra* note 9, at 442–43 (stating that grease payments should include a dollar amount and must clearly be payments to expedite the movement of goods or personnel); *Unlawful Corporate Payment Hearings, supra* note 10, at 44 (stating that the level of permissible grease payments should vary with a country’s per capita income).

<sup>187</sup> *See Dunfee & Hess, supra* note 5, at 477 (arguing that corporations should provide employees with guidance on grease payments through codes of conduct);

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (quoting FRITZ HEIMANN, *THE SYNERGY BETWEEN CORPORATE AND GOVERNMENT REFORMS IN FIGHTING BRIBERY* 30 (Francois Vincke et al. eds., 1999)).

<sup>190</sup> *See Salbu, supra* note 30, at 659 (stating that legislative reform may not ultimately address the problems that inure to grease payments).

<sup>191</sup> *Id.*

criminal fines or other penalties.<sup>192</sup> Such legislative endeavors, however, may inadequately address corruption as long as corruption is rooted in political, social, or economic institutions such as patronage, low government wages, poverty, and poor economic conditions.<sup>193</sup> Eradication of corruption may continue to evade legislative solutions because such solutions dictate conduct rather than attempting to resolve the underlying causes of corruption.<sup>194</sup> Thus, institutional reform may be more successful in combatting corruption than the legislative process.<sup>195</sup>

By attacking corruption at its roots, institutional reform may be a more effective method to weed out corruption.<sup>196</sup> To illustrate, if poverty fosters an environment conducive to corruption, then a war against poverty would also be a war against corruption.<sup>197</sup> Nations can encounter significant challenges, however, when attempting institutional change due to the cyclical nature of some causes of corruption.<sup>198</sup> For example, corruption often funnels a nation's resources away from its people and into the wallets of the corrupt elite, thereby exacerbating poverty.<sup>199</sup> 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.<sup>200</sup> To break the cycle and reduce corruption, legislative mechanisms should modify these institutions and social structures that support or encourage bribery.<sup>201</sup>

## CONCLUSION

To advocate amendment of the FCPA in 1983, U.S. Trade Representative William Brock indicated that "we have a responsibility to paint a bright line for our firms to follow so that they know exactly what Congress intended that they can and cannot do."<sup>202</sup> Congress has failed to paint this bright line with regard to the grease payment

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<sup>192</sup> *See id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Salbu, *supra* note 30, at 659–62.

<sup>196</sup> *Id.* at 660.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Salbu, *supra* note 30, 660–61.

<sup>201</sup> *Id.* at 661.

<sup>202</sup> *Foreign Trade Hearings*, *supra* note 8, at 28 (prepared statement, William E. Brock, U.S. Trade Representative).

exception in the FCPA. Changes in the international community's perception of corruption and grease payments have contributed to the erosion of the logical foundation underlying the FCPA's original exception for grease payments. Congress can address the troubles associated with grease payments by repealing the FCPA's exception for grease payments, or by amending the statute to include a monetary limit set through country specific per-capita income evaluation for permissible grease payments. Transnational corruption will continue to thrive unless Congress acts, the DOJ promulgates guidelines, and corporations closely monitor and reduce reliance upon grease payments. Without the accompaniment of institutional reform, however, legislative solutions to corruption will only achieve limited success in this battle against corruption and its ill effects.