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Grease Payments are a Thing of the Past as the Reach of the FCPA Continues to Expand

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For corporations and its employees, the risk of criminal prosecution and civil liability continues to steadily increase as the Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”) demonstrate more zeal in prosecuting both corporations and corporate officials under the anti-bribery¹ and accounting provisions² of the Foreign Corrupt Practices Act (“FCPA”). From 2006 through 2009, these government agencies filed at least 118 enforcement actions against corporations and corporate officials.³ If this number does not seem large on its face, consider that these same agencies only brought approximately 85 enforcement actions between 1977 and 2005, which was the first 28 years of the Act’s existence.⁴ Additionally, the DOJ and the SEC are currently pursuing over 120 FCPA investigations.⁵ But what should be even more alarming than the growing number of enforcement actions is the government’s increasingly aggressive stance on the types of activities it pursues as FCPA violations. This article discusses one particular trend in FCPA enforcement that demonstrates the ever-expanding reach of the Act, namely, the disintegration of the “facilitation payment” exception to liability.

Although the FCPA prohibits payments to foreign officials for the purpose of corruptly influencing them,⁶ corporations and individuals, until recently, could rely upon the facilitation payment exception of the FCPA to exempt them from liability when they made payments to foreign officials “to expedite or to secure the performance of a routine governmental action.”⁷ Recently, however, the DOJ and SEC have pursued FCPA enforcement actions involving the types of payments that could arguably be considered payments for “routine” actions, thereby creating uncertainty as to what, if any, types of payments to foreign officials are really allowed. Furthermore, in recent years, the government has been more willing to bring FCPA enforcement actions for failure to accurately report facilitation payments in a corporation’s books and records.

The FCPA defines “routine governmental action” as “action which is ordinarily and commonly performed by a foreign official.”⁸ The FCPA lists examples of such routine activities, including (1) obtaining permits and licenses, (2) processing governmental papers, such as visas and work orders,

(3) scheduling inspections associated with contract performance or the movement of goods, and (4) providing general utilities, such as phone service, power and water supply.⁹ Despite the fact that the statute specifically lists these activities as falling outside the scope of the anti-bribery provisions, recent FCPA enforcement actions have focused on payments for activities that arguably fall within these categories.

At the time the facilitating payment exception was adopted by Congress in 1988, it was viewed as a necessary response to complaints that the anti-bribery provisions of the FCPA (originally enacted in 1977) precluded the United States from competing effectively in the international market.¹⁰ Congress “recognized that grease payments made to assure or to speed the proper performance of a foreign official’s duties are viewed as acceptable in other parts of the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.”¹¹ However, in recent years, due in part to the signing of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions (“Anti-Bribery Convention”) in February 1999,¹² many foreign countries have adopted legislation banning corrupt payments to government officials.¹³ Accordingly, the original justifications for the facilitation payment exception, to a large extent, no longer exist.

Perhaps in recognition of the out-datedness of the provision, the government recently has pursued FCPA enforcement actions in cases in which the payments made to foreign government officials were not clearly outside the scope of the facilitating payment exception. For example, the government has pursued payments to expedite customs clearance, to schedule pre-shipping production inspections, to have product delivery certificates issued,¹⁴ to secure agricultural inspections,¹⁵ and to expedite the payment of debt.¹⁶ Some commentators have suggested that “the SEC and Justice Department have given such a narrow interpretation to what constitutes a lawful facilitating payment that the defense for making such payments has virtually disappeared.”¹⁷ At the very least, these cases have further blurred the line between what constitutes acceptable and non-acceptable payments under the FCPA.

This lack of clarity and weakening of the facilitation payment exception was recently exemplified in actions taken by defense contractor DynCorp International. On November 9, 2009, the company announced in its quarterly report to the SEC that it *may* have violated the FCPA by making payments totaling as much as \$300,000 to subcontractors to expedite the issuance of visas and licenses from foreign

government agencies.¹⁸ The company further stated that it had self-reported the payments to the DOJ and SEC and had hired outside counsel to conduct an investigation.¹⁹ On November 25th, the company announced that it had terminated its Senior Vice President, Chief Compliance Officer and Executive Counsel, but did not disclose the reason for the termination.²⁰ There has been at least some speculation that the termination was related to the possible FCPA violations reported two weeks earlier by the company.²¹ Although it is not clear at this point whether there are extenuating circumstances at issue in the DynCorp investigation (such as the payments being made to a foreign official whose duties did not include issuing visas, the payments being so high that they suggested something more was being bought, etc.), what is clear is that companies like DynCorp are feeling more pressure to investigate and self-report potential violations due to the realization that the facilitation payment exception offers them little protection in this era of FCPA enforcement.

Even if payments for routine governmental functions were clearly allowed under the FCPA, and few, if any, are today, these payments will undoubtedly violate the local laws of the country in which the foreign official is located. There is no country that allows its own officials to be bribed.²² Therefore, even if a U.S. corporation determines that a payment to a foreign official will comply with the FCPA, the corporation will necessarily face a risk of prosecution in the country where the foreign official is located. While it used to be the case that local bribery laws in foreign countries were rarely enforced, that trend is also changing.²³ A U.S. corporation can no longer rely on the foreign country to look the other way when it violates that country's bribery laws. "Countries, like China, that are eager to be seen to be combating corruption, are prosecuting the payment of small bribes with increased frequency."²⁴ Furthermore, most countries' anti-bribery laws do not contain an exception for facilitation payments.²⁵ As a result, if a U.S. corporation with foreign subsidiaries has a policy allowing facilitation payments and a subsidiary makes use of this policy, the U.S. corporation may face an additional risk of prosecution by the country in which the subsidiary is located.²⁶

Another complication resulting from the facilitation payment exception is that "there is no parallel exception" under the accounting provisions of the FCPA.²⁷ This fact has taken on more significance in recent years as the accounting provisions have been utilized more frequently by the government in FCPA actions.²⁸ The accounting provisions require that all facilitation payments to foreign officials be properly recorded in the corporation's books and records and that the corporation maintains adequate internal accounting controls.²⁹ This means that if a U.S. corporation makes a payment that does

in fact fall within the narrow facilitation payment exception, the corporation and its officials may still be subjected to criminal prosecution or civil liability if the corporation does not properly record these payments. The failure to properly record these payments is a common temptation because recording them creates evidence of a local law violation.³⁰ The risks associated with the failure to report these payments were exemplified in a 2007 SEC enforcement action against Dow Chemical Company. The SEC charged Dow with violating the accounting provisions of the FCPA after the company failed to record payments made by Dow's subsidiary in India to Indian officials to ensure the expedient registration of the company's products.³¹ Although the payments made by Dow's subsidiary arguably qualified as facilitation payments, Dow was still subjected to a \$325,000 civil penalty and a cease-and-desist order due to the accounting violations.³² In addition to the civil penalty, it was reported that Dow, which self-reported the violation to the SEC, also spent "tens of million of dollars" on the internal investigation.³³

In light of the growing uncertainties surrounding the facilitation payment exception, the only safe action for corporations to take is to prohibit its employees from making any sort of facilitation payment. In fact, it has been reported that 80 percent of U.S. companies have now banned facilitation payments entirely.³⁴ "The facilitation payment is very much a remnant of another era. . . . U.S. companies should recognize the weakening of the argument supporting a facilitating payment exception and should develop compliance policies that do not permit any kind of grease payments. . . ."³⁵

Despite the changing global environment on bribery regulation, some commentators still express concern about the business costs of eliminating all facilitation payments.³⁶ However, at least one recent study demonstrated that this concern is unfounded and concluded that "firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations and face higher, not lower, cost of capital."³⁷ Even if implementing a ban on facilitation payments does create business costs for a corporation, the alternative carries the risk of much graver costs.

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¹ 15 U.S.C. § 78dd-1(a) ("It shall be unlawful . . . [to make an offer or payment] to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity . . . or securing any improper advantage . . .").

² 15 U.S.C. § 78m(b)(2)(A) ("Every issuer which has a class of securities registered . . . shall make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer"); 15 U.S.C. § 78m(b)(2)(B) ("Every issuer which has a class of securities registered . . . [must] devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that, among other things, the transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles).

³ Gibson, Dunn & Crutcher LLP, www.gibsondunn.com (stating that from 1/1/09 through 6/30/09, 14 DOJ and five SEC FCPA enforcement actions have been filed); FCPA Blog (providing information on five DOJ and four SEC FCPA enforcement actions that were filed between 7/1/09 and 12/13/09); Parker, Jay, et al., "Prescriptions for Compliance With the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies," 64 Bus. Law. 691, 692 (May 2009). (stating that from 2006 through 2008, the government filed 90 FCPA enforcement actions).

⁴ Parker, Jay, et al., "Prescriptions for Compliance With the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies," 64 Bus. Law. 691, 692, fn. 5 (May 2009)

⁵ Breuer, Lanny A., "Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum," (November 12, 2009).

⁶ Holtmeir, Parker J., et al., "Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Science Companies," 64 Bus. Law. 691, 696-97, May 2009.

⁷ 15 U.S.C. § 78dd-1(b).

⁸ 15 U.S.C. § 78dd-1(f)(3)(A).

⁹ *Id.*

¹⁰ Perkel, Walter, *Foreign Corrupt Practices Act*, 40 Am. Crim. L. Rev. 683, 684 (2003).

¹¹ Carroll, John K., et al., "The Incredible Shrinking FCPA Facilitation Payment Exception," *New York Law Journal* (October 13, 2009).

¹² OECD Convention on Combating Bribery of Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAF/IME/BR(97)20, 37 I.L.M., art 1.1.

¹³ *Id.*

¹⁴ Carroll, John K., et al., "The Incredible Shrinking FCPA Facilitation Payment Exception," *New York Law Journal*, October 13, 2009.

¹⁵ SEC Litigation Release No. 20,214 (July 26, 2007).

¹⁶ *United States v. Vitusa Corp.*, Cr. No. 93-253 (D.N.J. 1994).

¹⁷ Marcu, Aaron R., et al., "U.S. Prosecutors Target Record Number of Non-U.S. Companies in Anti-Bribery Investigations," *Andrews Delaware Corporate Litigation Reporter*, October 19, 2009. See also Carroll, John K., et al., "The Incredible Shrinking FCPA Facilitation Payment Exception," *New York Law Journal*, October 13, 2009 ("In the absence of any legislative action to roll back the facilitation payment exception, the DOJ and SEC plainly have set out to repeal it on a case-by-case basis").

¹⁸ Cole, August, "DynCorp Says It May Have Broken U.S. Law," *Wall Street Journal* (November 19, 2009).

¹⁹ *Id.*

²⁰ Cole, August, "DynCorp Fires Executive Counsel," *Wall Street Journal*, November 28, 2009.

²¹ Jones, Ashby, "In Wake of FCPA Disclosure, DynCorp Top Lawyer Gets Ax," *Wall Street Journal*, November 30, 2009.

²² Wrage, Alexandra, et al., "Small Bribes Buy Big Problems," *Center for International Private Enterprise*, at 3, September 20, 2007.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ *Id.* at 4.

²⁷ *International Regulatory Compliance Challenges Facing EPC Contractors*, Construction Briefings, May 2009.

²⁸ See Gibson, Dunn & Crutcher LLP, www.gibsondunn.com.

²⁹ 15 U.S.C. § 78m(b)(2)(A) and (b)(2)(B). See also Wombolt, Kyle A., "Curbing Corruption," *The Recorder*, (October 6, 2008).

³⁰ Wrage, Alexandra, et al., "Small Bribes Buy Big Problems," *Center for International Private Enterprise*, at 3, September 20, 2007 (stating that many businesspeople who were interviewed by the authors expressed reluctance to record facilitation payments because they were seen as "creating a record of a violation of local law").

³¹ Wombolt, Kyle A., "Curbing Corruption," *The Recorder*, (October 6, 2008).

³² Reisinger, Sue, "Why Are More Companies Self-Reporting Overseas Bribes?" *Corporate Counsel*, July 16, 2007.

³³ *Id.*

³⁴ Fulbright & Jaworski's 2008 Litigation Trends Survey.

³⁵ *Id.*

³⁶ See, e.g., Blundell, Neill, "Anti-Corruption Compliance Programs and Adequate Local Knowledge—Essential Tools for Any International Business," *Metropolitan Corporate Counsel* (September 2008).

³⁷ Wrage, Alexandra, et al., "Small Bribes Buy Big Problems," *Center for International Private Enterprise*, at 4, September 20, 2007 (citing Daniel Kaufmann and Shan-Jin Wei, "Does 'Grease Money' Speed up the Wheels of Commerce?" Paper presented at the American Economic Association Meeting, Chicago, IL 1998).