END OF GREASE PAYMENTS COMING

As recently reported in WragBlog, the OECD announced a new recommendation at the OECD's celebration of "International Anti-Corruption Day" and the Tenth Anniversary of the "Entry into Force of the OECD Anti-Bribery Convention". This change relates to facilitation payments (aka "grease payments") which are legal under the Foreign Corrupt Practices Act (FCPA).

OECD Secretary-General Angel Gurría described these low-level payments, designed to expedite performance of a "routine government action" such as obtaining mail delivery, phone or power service, as "corrosive . . . particularly on sustainable economic development and the rule of law".

Facilitation payments, also known as "expediting payments" or "grease payments," are bribes paid to induce foreign officials to perform routine functions they are otherwise obligated to perform. Examples of such routine functions include issuing licenses or permits and installing telephone lines and other basic services. The only countries that permit facilitation payments are the United States, Canada, Australia, New Zealand and South Korea. Facilitation payments, however, are illegal in every country in which they are paid. They have come under increasing fire under the FCPA as inconsistent with the totality of US policy on anticorruption.

This change by the OECD brings the considerable problems associated with facilitation in the international business arena into keener focus. Just like large commercial bribes, grease payments abuse the public trust and corrode corporate governance. Treating them as anything other than outright bribery muddies the compliance waters and adds confusion where there should be clarity. This new stance by the OECD, coupled with the increased enforcement under the FCPA, may well bode the end of facilitation payments.

I. TRACE Facilitation Payments Benchmark Survey

In October, 2009, TRACE International published the results of its "Facilitation Payments Benchmark Survey". TRACE conducted a global survey with the following objectives: (1) to understand how facilitation payments are perceived in the international business community, including the level of risk they are deemed to pose and the compliance challenges they present; and (2) to map corporate policies on facilitation payments, including whether they are permitted and, if so, the types of safeguards corporations impose on their payment.

The results of the TRACE survey reveal a definitive move by corporations to ban facilitation payments, coupled with an awareness of the added risk and complexity presented by facilitation payments:

- 76% of survey respondents believe it is possible to do business successfully without making facilitation payments given sufficient management support and careful planning.

- Over 70% believe that employees of their company either never, or only rarely, make facilitation payments, even if their corporate policy permits facilitation payments.
- Over 93% revealed that their job would be easier, or at least no different, if facilitation payments were prohibited in every country.
- Nearly 44% reported that their corporations prohibit facilitation payments or simply do not address them because facilitation payments are prohibited together with other forms of bribery.
- Almost 60% of respondents reported that facilitation payments pose a medium to high risk of books and records violations or violations of other internal controls.
- Over 50% believe a company is moderately to highly likely to face a government investigation or prosecution related to facilitation payments in the country in which the company is headquartered.

II. Facilitation Payments under the FCPA

The original version of the FCPA, enacted in 1977, contained an exception for payments made to non-US officials who performed duties that were "essentially ministerial or clerical". In 1988 Congress responded by amending the FCPA under the *Omnibus Trade and Competitiveness Act* to clarify the scope of the FCPA's prohibitions on bribery, including the scope of permitted facilitation payments. An expanded definition of "routine governmental action" was included in the final version of the bill, reflecting the intent of Congress that the exceptions apply only to the performance of duties listed in the subcategories of the statute and actions of a similar nature. Congress also meant to make clear that "ordinarily and commonly performed actions", with respect to permits or licenses, would not include those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of "obtaining or retaining business for, or with, or directing business to, any person".

The FCPA now contains an explicit exception to the bribery prohibition for any "facilitation or expediting payment to a foreign official, political party, or party official for the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official". "Routine government action" does not include any decision by a public official to award new business or continue existing business with a particular party. The statute lists examples of what is considered a "routine governmental action" including:

- obtaining permits, licenses, or other official documents to qualify a person to do business in a country;
- processing government papers, such as visas or work orders;
- providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products from deterioration; and
- actions of a similar nature.

There is no monetary threshold for determining when a payment crosses the line between a facilitation payment and a bribe. The accounting provisions of the FCPA require that facilitation payments must be accurately reflected in an issuer's books and records, even if the payment itself is permissible under the anti-bribery provisions of the law

III. Risks associated with relying on the "facilitation payments" exception

Facilitation payments carry legal risks even if they are permitted under the anti-bribery laws of a particular country. In the US enforcement agencies have taken a narrow view of the exception and have successfully prosecuted FCPA violations stemming from payments that could arguably be considered permissible facilitation payments. Violations of the accounting and recordkeeping provisions of the FCPA are also more likely when a company makes facilitation payments. Abroad, countries are increasingly enforcing domestic bribery laws that prohibit such payments. Companies that allow facilitation payments face a slippery slope to educate their employees on the nuances of permissible payments in order to avoid prosecution for prohibited bribes.

A. US enforcement authorities construe the exception narrowly

Other than as discussed above, there is no definitive guidance on circumstances in which the facilitation payments exception applies. There may be less risk of enforcement by US authorities in cases involving bona fide facilitation payments that are made specifically for one of the purposes enumerated in the FCPA. However, companies still face the risk of at least facing a governmental inquiry to explain the circumstances surrounding the payments, possibly resulting in penalties based on an unanticipated restrictive interpretation of the exception.

B. Potential non-compliance with the FCPA's accounting and recordkeeping provisions

While the anti-bribery provisions of the FCPA permit facilitation payments, the accounting and recordkeeping provisions of the law nevertheless require companies making such payments to accurately record them in their books and records. Companies or individuals may be reluctant to properly record such payments, as it shows some semblance of impropriety and effectively creates a permanent record of a violation of local law. However, failure to properly record such expenditures may result in prosecution by the Securities and Exchange Commission (SEC) even if the underlying payments themselves are permissible. One example of prosecution resulting from the misreporting of seemingly permissible facilitation payments involves Triton Energy Corporation, which settled an investigation by the SEC involving multiple alleged FCPA violations, including the miss-recording of facilitation payments. An Indonesian subsidiary of the company had been making monthly payments, of approximately $1,000, to low-level employees of a state-owned oil company in order to assure the timely processing of monthly crude oil revenues. The SEC did not charge that these payments violated the anti-bribery provisions of the FCPA; however, these payments were miss-recorded in corporate books and therefore violated the FCPA's accounting and

recordkeeping provisions. Triton Energy consented to an injunction against future violations of the FCPA and was fined $300,000.

C. Increased enforcement of non-US laws that do not recognize an exception for facilitation payments

While the FCPA and certain other national anti-bribery laws contain exceptions for facilitation payments, such payments typically are considered illegal in the country in which they are made; there is not any country in which facilitation payments to public officials of that country are permitted under the written law of the recipient's country. Accordingly, even if a particular facilitation payment qualifies for an exception of the FCPA, it, nevertheless, is likely to constitute a violation of local law – as well as under anti-bribery laws of other countries that also might apply simultaneously – and thus exposes the payer, his employer and/or related parties to prosecution in one or more jurisdictions. While enforcement to date in this area has been limited increased global attention to corruption makes future action more likely. Countries that are eager to be seen as combating corruption are prosecuting the payment of small bribes with greater frequency.

D. Corporate approaches to facilitation payments may exceed the legitimate scope and applicability of the exception

As demonstrated in the TRACE Benchmark Survey, businesses struggle with how to address the "facilitation payments" exception in their compliance policy and procedures, if the subject is covered at all. Businesses should be wary of allowing employees to decide on their own whether a particular payment is permissible. Unless such payments are barred completely or each payment is subject to pre-approval (which in many cases would be unrealistic (e.g., passport control)), there is always the risk that an employee, agent or other person whose actions may be attributed to the company will make a payment in reliance on the exception when in fact the exception does not apply. In addition, the temptation to improperly record otherwise permissible facilitation payments has been discussed above.

IV. End of facilitation payments?

The global business environment has changed even as the FCPA has remained static. In the absence of any legislative action to roll back the facilitation payment exception, the Department of Justice (DOJ) and the SEC plainly have set out to repeal it on a case-by-case basis. US companies should recognize the weakening of the argument supporting a facilitation payment exception and should develop compliance policies that do not permit any kind of grease payments. A policy that prohibits all payments (unless there is high level of legal and compliance approval) will relieve businesses of the compliance burden of differentiating between lawful and unlawful payments. From the point of view of the modern global corporation, a compliance regime that attempts to differentiate between "good" corrupt payments and "bad" corrupt payments will do more harm than good.