

**Changes Coming:
US Sentencing Guidelines, UK Bribery Bill
and the OECD on Facilitation Payments
Part III**

At its April 7, 2010 meeting the United States Sentencing Commission approved amendments to its Sentencing Guidelines. The next day on April 8, 2010, the UK Bribery Bill received Royal Assent. These two events follow the December 9, 2009 release by the Organization for Economic Co-Operation and Development's (OECD) *Recommendation for Further Combating Bribery of Foreign Public Officials*, when the OECD marked the tenth anniversary of the entry into force of the OECD Anti-Bribery Convention.

These three releases, which comprise of two changes in the legal schemes by two of the world's largest economic players and the proposal of one of the largest Non-Governmental Organizations (NGO) dedicated to ending corruption across the globe portend significant changes in how companies will be structured and transact business going forward in the new decade. This is the third and final of three postings which have discussed the changes that companies, with any US or UK presence, will be required to implement. In the initial post we considered the changes to the US *Sentencing Guidelines*; we then discussed the changes required by the UK *Bribery Bill*; and in this third and final post in this series, we will end with the recommendations regarding facilitation payments as found in the OECD's *Recommendation for Further Combating Bribery of Foreign Public Officials*.

The OECD and Facilitation Payments

In late 2009, to celebrate "International Anti-Corruption Day" recognizing the Tenth Anniversary of the OECD Anti-Bribery Convention, the OECD released "The Recommendation for Further Combating Bribery of Foreign Public Officials". In this report the OECD recommended changes relating to facilitation payments (aka "grease payments") such as those which are legal under the 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 sharper 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. 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.

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.

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 DOJ and Securities and Exchange Commission (SEC) plainly have set out to repeal the facilitation payment exception 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.

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