

APPENDIX H

WORKING GROUP ON BRIBERY: STUDY GROUP ON SMALL FACILITATION
PAYMENTS

Survey #2 on Treatment of Small Facilitation Payments by Members

(4 May 2009)

Please respond to the following questions on the treatment of small facilitation payments by your country. These questions have been proposed by various delegations to the Working Group, to supplement information received in response to the 20 January 2009 survey. Your responses will be compiled and presented in a Note by the Secretariat for the June 16-19 Plenary.

1. Please clarify whether your country is in favour of repealing or maintaining the exception for small facilitation payments in Commentary 9 to the Convention.

The United States is in favour of maintaining Commentary 9 to the Convention concerning small facilitation payments. We would also like to reiterate that the Commentary to the Convention was included in the transmittal package sent to the U.S. Senate for approval as part of the Convention ratification process and emphasize that such a change would require at a minimum consultations with the Senate. Moreover, such a change would require an amendment to our criminal statute, which would necessitate approval by both houses of Congress. The U.S. Foreign Corrupt Practices Act (FCPA) does not prohibit "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The FCPA provides an illustrative list of what qualifies as "routine governmental action." This list includes actions ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and (v) actions of a similar nature. The FCPA, however, states that "routine governmental action" does not include "any decision . . . to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

2. If your country's implementing legislation does not provide for an exception for small facilitation payments, will or have your enforcement authorities investigated or prosecuted such payments?

*As noted above, the FCPA does provide for this exception. However, the Department of Justice has considered such payments to be small payments, and large sums of money will rarely, if ever, be considered as falling within the exception. Recent cases illustrate that the Department of Justice has prosecuted payments that defendants have argued constitute facilitating payments and the courts have held in favor of the U.S. Government, *see United States v. Kay*, 359 F.3d 738 (5th Cir. 2004), available at: <http://www.usdoj.gov/criminal/fraud/docs/02-04-04usvkay.pdf>. The Department of Justice has also undertaken enforcement actions that illustrate it construes this exception narrowly, *see Department of Justice Release concerning Vetco International Ltd*, DOJ Release 07-075, Feb. 6, 2007, available at http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.*

3. If your country's implementing legislation does not provide for an exception for small facilitation payments, does your country provide any guidance to the investigating and prosecutorial authorities on such payments (either in the law itself or otherwise, e.g. investigators/prosecutors manual)?

As noted above, the FCPA does provide for this exception. See the definition of "facilitating or expediting payments" above. Guidance to federal prosecutors on facilitation payments provides as follows:

The FCPA contains an explicit exception to the bribery prohibition for facilitating payments made in furtherance of routine governmental action. See §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The statute lists several examples of payments that may be made to facilitate or to expedite performance of a routine governmental action, including payments made to: obtain permits, licenses, or other official documents; process governmental papers, such as visas and work orders; provide police protection, mail pick-up and delivery; provide phone service, power and water supply, cargo handling, or protection of perishable products; and schedule inspections associated with contract performance or transit of goods across country. See §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4). Other similar actions may also be covered by this exception. "Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party. Id.

Department of Justice, Criminal Resource Manual at 1018.

4. If your country's implementing legislation does not provide for an exception for small facilitation payments, does your country provide any guidance to the private sector on such payments, either in the law itself or otherwise (in a guidance brochure that is publicly available, e.g. on a relevant website)?

As noted above, the FCPA does provide for this exception. We presently believe that the language of the FCPA, including its definition of "facilitating or expediting payments" above is sufficient guidance. The Criminal Resource Manual guidance noted above is publicly available on the Department of Justice website at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm. In addition, the Department of Justice website addressing the Foreign Corrupt Practices Act includes a "Layperson's Guide to the Foreign Corrupt Practices Act" which includes the following guidance regarding the facilitation payments exception:

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether

to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.

See <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>

As noted, the Department of Justice Opinion Procedure establishes an effective means that permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA, including conduct related to "facilitating or expediting payments". The Opinion Procedure regulations are available at:

<http://www.usdoj.gov/criminal/fraud/fcpa/opinion/frgncrpt.html>

5. Does your country support any initiatives such as programmes of good governance to address the "corrosive phenomenon" (of small facilitation payments), either in terms of country-specific initiatives or general policies? If so, please provide any assessment of which types of programmes work best.

Yes, many different U.S. Government agencies have or support good governance programs aimed at fighting corruption. The U.S. sponsors anticorruption programming throughout the world that is intended to contribute to countries' abilities to implement their international anticorruption commitments (for example under the United Nations Convention Against Corruption (UNCAC)) and to combat corruption and promote good governance generally. The U.S. has supported the placement of anticorruption advisors and the provision of other technical assistance to help a number of countries implement UNCAC, in partnership with UNODC and other organizations. The U.S. provided more than \$760 million in Fiscal Year 2007 towards good governance assistance on the global level through the Department of State and USAID, a significant portion of which specifically targeted bribery and corruption, and approximately \$144 million through Millennium Challenge Corporation (MCC) threshold programs on anti-corruption signed in Fiscal Year 2007. Through in-country technical assistance such as skills development training and advice on legislative drafting, U.S.-funded programs support the adoption of anti-corruption reforms including governance institutions, effective prevention and enforcement mechanisms, as well as laws, processes, and policies that promote transparency and accountability consistent with the UNCAC and other multi-lateral instruments that articulate best practices. The U.S. assistance also promotes strengthening of rule of law and justice institutions including integrity and internal oversight mechanisms, criminal tax and customs enforcement systems, anti-money laundering reforms, asset forfeiture tools, financial intelligence units, and specialized and vetted law enforcement units.

Several specific U.S. programs are described below.

For example, the Office of Government Ethics (OGE), annually hosts a substantial number of foreign delegations (composed primarily of government officials) who are visiting the United States in part to learn about the U.S. approach to good governance, the prevention of corruption and the promotion of integrity. As a standard part of its presentation, OGE discusses the U.S. executive branch approach to the subject of gifts--no solicitation allowed, no gifts of cash or cash equivalents, and a very low value limit for acceptable non-cash gifts (\$20). This often leads to a very lively discussion with the delegations both on how these rules were set and why. In general the

delegations have evidenced an appreciation for the candid presentations of not only the substance of OGE's program and the standards of conduct but why particular standards are set. Concerning which programs work best, many U.S. Government agencies have also developed on-line training that can be accessed by any employee in any level of position. In addition, each agency has ethics officials who are available to answer questions at any time with regard to the application of the standards of conduct including the gifts provisions. Over the years, OGE has determined that the most effective way of instilling an appreciation for the individual rules is by promoting an ethical culture generally in an agency.

Another example is the U.S. Department of Commerce Good Governance Program (GGP), which focuses on providing good governance training to the private sector. The GGP supports national, private sector-led initiatives which work toward the creation of transparent, ethical business climates in 11 countries worldwide. Training, materials, and resources provided by the U.S. Government support the education of local businesses on responsible business practices and awareness of applicable national and international laws and conventions on corruption. Training materials include: the Business Ethics Manual (which is available in English, Spanish, and Russian), the Russia Corporate Governance Manual, and the Handbook for Commercial Dispute Resolution in Russia. The GGP has trained over 2,000 private sector representatives from program countries and continues to train more each year. The GGP provided four intensive, Train-the-Trainer Programs: three focused on business ethics with trainees hailing from Russia, the Newly Independent States, and Latin America, and one with a corporate governance focus for Russian participants. Trainees from the train-the-trainer programs have subsequently provided training to hundreds of individuals in program countries and developed corporate codes of conduct, corporate ethics and compliance programs. Concerning which programs work best, the GGP builds the capacity of local leaders from the private sector, NGO, and academic communities to form sustainable anticorruption coalitions. These local coalitions then build national demand for transparent and stable business climates and educate the local business community on the benefits of conforming to responsible international business standards.

The U.S. Department of Justice also has numerous good governance programs. The Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) provides good governance assistance all over the world. Just as one example, it has several such programs in Eurasia, where it is currently providing anti-corruption assistance through the U.S. Millennium Challenge Corporation (www.mcc.gov) in Ukraine and Kyrgyzstan focused on ethics and financial disclosure and helping create regimes consistent with international standards (namely UNCAC). OPDAT just finished a two-year MCC program in Moldova in March focused on improving the organization and operation of its chief anti-corruption agency. All of the foregoing programs had Resident Legal Advisors to provide on the ground support. OPDAT also provided Moldova with anti-corruption assistance through its RLA and programs. OPDAT also does corruption prevention work in Georgia with its Public Prosecutor's office. In Azerbaijan, OPDAT has addressed corruption through anti-money laundering assistance (based on Money Laundering's qualification as a predicate crime) – and that country has just passed a FATF compliant law due to OPDAT assistance – OPDAT is now undertaking programs to assist with implementation of that law.

For more information on U.S. Government good governance programs, including programs of the U.S. Departments of Justice, State, and Commerce, the Office of Government Ethics, as well as the U.S. Agency for International Development, these agencies' websites are below:

<http://www.usdoj.gov/criminal/opdat/mission/mission.html>

<http://www.state.gov/p/inl/crime/corr/index.htm>

<http://www.ita.doc.gov/goodgovernance/>

<http://www.usoge.gov/index.aspx>

http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption/index.html

6. Does your country provide any advice or support to companies facing solicitation of small facilitation payments by foreign public officials to help them resist such solicitation?

Yes. The Departments of Commerce, State, and Justice have assisted U.S. companies in cases involving solicitation in the past, and will continue to be available to assist U.S. companies in the event that they are solicited for bribe or facilitation payments from foreign public officials in the future. Such U.S. Government assistance is available irrespective of the size of the solicitation request. Often companies approach U.S. officials in U.S. Embassies, such as the U.S. Commercial or Foreign Service Officers, or they may contact Washington agencies directly when they have been solicited or have learned that one of their competitors has been solicited for bribe payments from a foreign public official.

The U.S. Department of Commerce has a "bribery hotline" accessible from the Department of Commerce Trade Compliance Center's website at http://tcc.export.gov/Report_a_Barrier/index.asp, through which U.S. companies can report bribery activity in international business transactions, including solicitation requests. The Department of Justice also has an email hotline specifically for FCPA complaints at FCPA.fraud@usdoj.gov. When information is received relating to acts of bribery that may fall within the jurisdiction of other Parties to the Convention, the information is forwarded, as appropriate, to national authorities for action.

The U.S. Departments of Commerce and State also provide worldwide support and advocacy for qualified U.S. companies bidding for foreign government contracts. Problems, including corruption by foreign governments or competitors, encountered by U.S. companies in seeking such foreign business opportunities can be brought to the attention of appropriate U.S. Government officials.

Finally, as noted above, the Department of Justice Opinion Procedure establishes an effective means that permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA, including conduct related to "facilitating or expediting payments". The Opinion Procedure regulations are available at: <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/frgncrpt.html>