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Congress, Get Out Your Pencils: FCPA Rules Are Ripe for Revision

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The cycle of certain laws is all too familiar. A specific issue or need arises and gains national attention. Congress drafts a law with the best intentions of solving the problem. Experts and the public applaud the legislation for bringing significant change. Only years later does the country discover that there are additional consequences beyond what the drafters intended. The discovery of these new issues sends Congress back to the drawing board.

The Foreign Corrupt Practices Act (FCPA) is a prime example of a law that has been through this cycle and needs to be redrafted. When the legislation was first passed in 1977, the federal government had recently discovered that American companies were making millions of dollars in bribes to various foreign government officials. The FCPA prohibits companies and individuals from offering or making payments to any foreign official for the purpose of inducing the recipient to direct new or continuing business to the briber.

More than 30 years later, the basics of this law are still necessary to prevent and punish unethical bribes, but businesses have discovered that the U.S. Department of Justice's (DOJ) interpretation of the law is broader than anyone intended.

Recently, the DOJ dramatically increased the number of investigations and actions related to the act. Unlike the activity in 1977, this heightened enforcement does not come from illegal bribes but the DOJ's broad interpretation of the law, which is now being applied to otherwise legitimate and ethical actions.

The law is undeniably vague, and few judicial decisions exist to provide additional guidance. Without these restraints, DOJ officials have embraced their power to apply the FCPA to unintended situations, resulting in a climate of fear for American companies that conduct any business abroad.

American businesses bear the burden of conducting extensive internal investigations if they are faced with FCPA charges. Many companies opt to settle and pay millions of dollars in penalties rather than engage in an uncertain and often protracted legal battle to advocate for their innocence. Other organizations have scaled back or ceased doing

business abroad to avoid compliance costs and possible prosecution.

Ohio businesses are no strangers to conducting business abroad. Ohio is the eighth-highest exporting state, exporting more than $41 billion in goods to more than 200 countries and territories. These goods come from not only our large businesses but also our thriving small to mid-sized firms. But the FCPA treats everyone alike, so any company doing business abroad is likely to unknowingly trip over the FCPA.

Room for Improvement

The good news is that a few specific changes to the law would continue to prevent unethical bribes, but also allow companies the breathing room to do business abroad without fear of unwarranted retribution. Here are four modifications that would improve the FCPA and return it to its original intentions:

- Congress should add a corporate willfulness requirement to the FCPA. Whereas individuals must be found to have acted "willfully" to be criminally prosecuted under the FCPA, there is no similar requirement to prosecute a corporation. As a result, companies are liable for any employee's illegal actions, even if the company had no knowledge of them. This provision creates a double standard of strict liability on corporations but allows extra defenses for an individual prosecuted under the same law.

- Congress should limit a parent company's liability for the acts of its subsidiaries. The original law was intended to hold parent corporations liable when they acted "through" a subsidiary. But parent companies now are being prosecuted even when they had no knowledge of the subsidiary's actions.

- Congress should end successor liability for companies that acquire or merge with a business that is prosecuted under the FCPA. The DOJ suggests performing extensive due diligence on a target company's FCPA violations. Yet successor liability for other crimes does not place such a burden on the acquiring company. Instead, the standard is whether the successor company had knowledge of the prior bad acts. It makes no sense for FCPA violations to be held to a different standard.

- Congress should add a compliance defense. Where a company makes a good-faith effort to comply with the FCPA and institutes a system of checks and controls, it should have an affirmative defense to bribery charges. Italy and Great Britain already carry similar provisions in their foreign bribery laws.

The FCPA is ripe for Congressional editing. These changes would help end the unfair consequences and encourage American companies to continue to grow their business abroad.