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Amendment to the Foreign Corrupt Practices Act - Another Perspective

Proposals for and against amending the Foreign Corrupt Practices Act, the US Federal law against government bribery in international business, have been percolating for the past 18 months. US Chamber of Commerce took a lead role, sponsoring a paper titled "Restoring Balance" in October 2010, advocating the position that substantial amendments to the FCPA are required to promote international business by US companies. Other groups have taken positions opposing any revisions that would weaken the FCPA or impede enforcement. The main arguments against the Chamber's proposed amendments were set out in "Bursting Bribery" published in September 2011 by the Open Society Foundations. The possibility of amendments has prompted the Department of Justice to commit to issuing some form of written "Guidance" within the next few months. All parties profess to agree with the basic reason the FCPA exists: bribery in international business is a serious crime that should be deterred and punished.

The Chamber is promoting 5 amendments which, taken as a whole, would make it significantly more difficult for the DOJ and SEC to enforce US criminal law against bribery in international business by US corporations. The advocates on the other side are opposing the Chamber's proposals, but not advocating significant amendments of their own. Status quo is to leave the FCPA as–is and enforcement to the fairly broad discretion of the Department of Justice and SEC.

In reviewing the positions of both sides, neither side has mentioned several potential amendments that would make the law more certain for US business people and promote the goal of reducing corruption in international business. Indeed the proposals in "Restoring Balance" would require complex new definitions and rules which will make the FCPA even more confusing and difficult for US business people to understand. Congress should consider common sense changes that reduce the potential for confusion by US business people and eliminate or modify poorly written provisions of the 35-year-old FCPA. This article discusses 6 amendments that would make the law easier for US business people to understand and help US companies create and run meaningful FCPA

compliance programs.

1. Eliminate the Exception for Facilitating Payments.

The FCPA contains an exception for low-level bribes euphemistically called "facilitation payments." Facilitation payments are bribes. This exception creates the illusion minor bribery of employees of foreign governments by US companies and their agents can be "legal." The exception for facilitation payments creates serious confusion for business people because it gives them the impression that some bribes are permitted under US law, but it can be difficult in practice to determine which bribes Congress considers tot be "legal." The facilitating payments exception is offensive to normal ethical standards of corporate governance and should not exist.

2. Eliminate the affirmative defense for bribes that are "lawful under the written law or regulation of the country."

No country has written law that permits conduct that is illegal under the FCPA. But business people and non-specialist lawyers see this language in the statute and think it must have some meaning. They are forced to guess which types of bribes Congress considers to be "legal." What difference does it make to good corporate governance if a country rigs its laws to allow bribery of members of its royal family or specific government employees? This affirmative defense is meaningless and confusing and there is no reason for it to remain in the law.

3. Amend the FCPA to add Provisions Making Commercial Corruption a Federal Crime.

This is the most important change and would make the FCPA easier for US business people to understand. A major flaw of the FCPA is it makes it a crime to bribe only certain people, i.e. "foreign officials" including employees of "instrumentalities" of foreign governments. Writing the FCPA this way gave rise to the idea among US business people and lawyers that bribes to other people can be paid legally and ethically.

It is a waste of time to argue whether Congress intended this result, though it has been the cause of a vast amount of discussion at conferences over who is a government official and what is an instrumentality. Congress should recognize the fundamental error and put an end to any confusion by simply amending the FCPA to criminalize all bribery of anyone in international business.

After all, when a bribe is paid by one US company (or a UK, German or Chinese company) to an employee of a foreign telecommunications company to win a bid and three other US companies which competed honestly and bid on that project lose to the briber, it does not really matter to the losing US companies whether the foreign telco was 49% or 51% owned by a government. The honest US companies still lost business due to bribery. If the FCPA covered all bribery, no one will ever need to ask the bogus questions about whether a person is a "government official" or whether an entity is an "instrumentality."

The FCPA should be stated in simple terms all business people can understand: It is a crime to bribe anyone. By making this change Congress would also recognize the current status of US business ethics. Nearly all US public corporations already have internal ethical codes of conduct that prohibit commercial bribery, and all corporate anti-corruption training orders employees to not bribe anyone. So amending the FCPA to include commercial bribery involves no change of existing practice for US companies or their management or employees.

4. Add a UK style strict liability crime of failure to prevent bribery to the FCPA and a corresponding affirmative defense for proving an adequate compliance program.

The UK Bribery Act came into effect in July 2011 and contains a new crime that does not exist in the FCPA: Failure by a business organization to Prevent Bribery. It is a strict liability crime: if bribery occurred in a company's business, the company has violated this law. Due to the strict liability aspect of the crime, the UK government provided an affirmative defense - if the company can prove it had in place adequate processes to prevent bribery before the bribery occurred, it could avoid liability for this specific crime. Congress should consider amending the FCPA to incorporate this UK innovation in legislation against corruption in

international business. Adopting the UK 's "failure to prevent" legislation would make the prohibitions of the FCPA and US expectations about compliance programs much more clear to US business people.

Adding a "compliance defense" to the FCPA without simultaneously adding the new crime of failure to prevent bribery would not make sense. A compliance defense would simply weaken the FCPA, undermine its basic tenants and create a new area of litigation around whether a company that had profited from bribery is nevertheless entitled to a defense based on it's failed compliance program. Courts will be called on to determine whether a compliance program was "robust" or "state-of–the-art." That is not simple to understand or good for business.

It is already clear under the Federal Sentencing Guidelines that a company will get credit for a compliance program. That has been true for many years, but most companies have not put in place FCPA compliance programs that implement the DOJ's clear guidance. Any US company that spends a modest amount of time researching the FCPA and examining its business practices can readily determine what elements it needs to have in place to have in an "adequate" FCPA compliance program.

5. Add provisions to the FCPA to make it clear that a Parent Company is Responsible for the Violations of its Subsidiaries.

Managers of US companies know that they create, manage and are responsible for their company's subsidiaries. Subsidiaries are created and exist to generate profits and provide business advantages to the parent company. Subsidiaries should not be a convenient and easily manipulated shield from criminal liability, and US law must be clear on that point. Companies with average FCPA compliance programs apply their program to all of their domestic and international subsidiaries. Business people in those companies would be surprised if someone told them US law allowed their company to create a subsidiary that could engage in activities that might violate the FCPA and ignore the company's ethical rules. They would be surprised if the law shielded the parent company from liability even if a subsidiary engaged in criminal activity. Relaxing the FCPA for subsidiaries adds to the list of

gray areas in which unethical people can argue that Congress intends that certain types bribes are legal. To the extent it is not already clear, the FCPA should be amended so US business people understand that the parent company is responsible for the bribery, corruption and false records of any of the company's subsidiaries.

6. Widen the scope of the FCPA's "reasonable and bona fide expenditures" affirmative defense.

It is important for US companies to be able to engage normal sales and marketing operations. The FCPA should clearly promote this. The current language of this affirmative defense for is poorly worded and unnecessarily restrictive. It limits bona fide business expenditures to those "directly related to the promotion, demonstration or explanation of products or services; or the execution or performance of a contract..." That limitation is not necessary and is confusing to business.

In general, US businesses should be able to defend themselves against charges of FCPA violations if they can prove the payments they made were reasonable and bona fide business expenses done for a substantial, legitimate corporate business purpose.

The 7th Point: Successor Liability

Congress should reject proposals to weaken successor liability. Restricting successor liability would permit companies to retain the profits derived from intentional, clearly illegal corrupt activity. If companies know they will be able to keep the profits from the bribery of the business entities they acquire, they have no incentive to take reasonable measures to detect bribery prior to an acquisition. Limiting successor liability would provide a perverse incentive for sellers of businesses to conceal conduct which might be illegal and for buyers to refrain from engaging in rigorous due diligence. Due diligence by US companies in international acquisitions is already weak. The burden, cost and legal liability for the corrupt activity should be on the company that engaged in the corruption in the first place and later sold its business – and the purchaser who enjoys the increased value and ongoing profits derived from the illegal conduct also needs to be subject to prosecution and required to disgorge the profits of bribery.

Conclusion:

The FCPA has been in place for 35 years, though minimal enforcement of the law only started in the Bush II administration. The FCPA set the international standard for criminalizing bribery in international business. In the 21st century, bribery in international business is still common and widespread, and based on the high level of corruption, the current enforcement efforts of the DOJ and SEC are still at a low level that most US companies can ignore. Most US business people still do not consider bribery by a US company in Russia, China or Brazil to be a "real" crime. There is no reason to change US legislation to make it more difficult for the government to prosecute acts of bribery or falsification of corporate records by companies or individuals.

Some changes to the FCPA are warranted to remove obsolete provisions such as the exception for facilitation payments and the affirmative defense of legality. The scope of the FCPA should be widened to include all bribery in international business, so companies do not have to be concerned with whether a person is a "government official" or a company is an "instrumentality." US corporations already have internal rules prohibiting all bribery, government or commercial, in their operations and those of all their subsidiaries - the FCPA should follow the sensible lead of business in this regard. To the extent it is not already clear, Congress should provide that parent companies are responsible for the unlawful activity of their subsidiaries. These changes would make the FCPA easier for corporate management to understand, and benefit ethical and compliant US companies.

By: Stephen Clayton, Law Office of Stephen Clayton

See the complete Article, "Amendment to the FCPA - Another Perspective," at: http://www.acc.com/legalresources/resource.cfm?show=1311945

There is also a "Top10 Questions Surrounding Proposed Amendments to the FCPA" at http://www.acc.com/legalresources/publications/topten/ttqstpattfcpa.cfm

In May 2012, an earlier version of the article was sent to members of the House and Senate who have been involved in the discussions on amending the FCPA.