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Why The Foreign Corrupt Practices Act is Hurting Our Businesses and Needs to be Reformed

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The Foreign Corrupt Practices Act of 1977 (FCPA) was passed in response to federal investigations of American companies that collectively were making millions of dollars in bribes to various foreign government officials. As a result, the FCPA prohibits companies and individuals from offering or making payments to any foreign official with the purpose of inducing the recipient to misuse his official position by directing business to or maintaining business with the payor.

The FCPA's purpose and goals remain as true and necessary today as they were over 30 years ago when they were first enacted into law. Federal law needs to prevent and prohibit unethical bribes to foreign officials. What has changed in the past 30 years, however, is the federal government's enforcement of the law. In the past few years, the Department of Justice (DOJ) has increased dramatically the number of investigations and enforcement actions under the FCPA, creating what DOJ calls "a new era of FCPA enforcement." Such enforcement would be rational if bribery activity was on the rise. Instead, the dramatic increase in FCPA enforcement is due to DOJ's newly found broad interpretation of the law beyond the FCPA's original intentions. With few judicial decisions and many vague areas of the law, there are little to no reins to limit the agency's investigations on actions it deems to be in violation of the FCPA.

The real effect of DOJ's aggressive enforcement is that it is stifling American companies from doing business abroad and here at home. Companies themselves have to bear the burden of conducting extensive internal investigations if faced with FCPA charges. Many businesses would rather end operations with foreign countries than risk expansive DOJ investigations and spend resources to fight FCPA charges.

With West Virginia's unemployment rate at 9.7%, this state cannot ignore areas of opportunity for job growth and business development. West Virginia is home both to companies with extensive international ties, such as Toyota, Amazon.com, and DuPont, as well as continuously growing health care, biotechnology, and information technology sectors that are likely to take advantage of a global economy and meet demand in international markets. Other companies in similar sectors have settled FCPA anti-

bribery enforcement actions for providing travel and other things of value to Chinese foreign officials at government-owned telecommunications firms and hospitals. No individuals were prosecuted but in these two cases the companies paid up to $2 million dollars to avoid prosecution. Unfortunately, these types of penalties for doing business abroad are all too common for businesses that unknowingly trip over the FCPA. West Virginia companies doing and seeking business abroad should have better definitions to guide their economic growth rather than looming penalties for expanding into international markets.

To keep America's economy growing, the FCPA should be reformed in at least three areas that should concern American businesses:

- *Adding a Corporate "Willfulness" Requirement to the FCPA*. To find an individual guilty of violating the FCPA, a court must find that the individual acted "willfully." But there is no similar requirement for finding a corporation liable under the FCPA. As a result, companies that had no knowledge of its employee's actions are liable automatically for its employee's actions. Similarly, parent corporations are liable automatically for its subsidiary's actions of which the parent corporation had no knowledge. Reforms to the FCPA should clarify that parent corporations that act with "willful ignorance" or look the other way will be held liable but the law will not sanction parent companies that had no knowledge and no basis for knowledge of a subsidiary's illegal actions.

- *Ending successor liability*. DOJ has started to hold companies liable for the actions of a company it acquired or with which it merged despite the fact that the illegal actions were pre-acquisition and pre-merger actions by the other company. DOJ suggests companies perform due diligence for FCPA violations before acquiring or merging with another company. Yet the extensive due diligence required and the fear of FCPA repercussions have a chilling effect on many mergers and acquisitions in today's business world. Most successor liability for other crimes is based on knowledge of the prior bad acts. Yet this is another area of FCPA that imposes strict liability on a company. Like adding a "willfulness" requirement, successor companies should only be held liable for prior criminal acts where they knew of the illegal behavior or willfully worked to conceal it through the merger or acquisition.

- *Adding a compliance defense*. Many companies use good faith efforts to comply with the FCPA by dedicating resources to implement controls, conduct training programs, and monitor compliance. Unfortunately, these companies have no affirmative defense to criminal charges under the FCPA when an employee violates the law and the company's implemented standards. Instead, such compliance programs might be taken into account at sentencing, if at all. Both the United Kingdom and Italy have laws parallel to the FCPA but contain compliance defenses. If a company has rigorous procedures in place to stop foreign bribes and strictly enforces those procedures, then the company has an affirmative defense to bribery charges when a rogue employee bribes a foreign official. Encouraging compliance should be a hallmark of the FCPA, not

punishing the result. A compliance defense would also complement a "willfulness" requirement and allow a corporation to prove what it knew, when it knew it, and how it worked to prevent any improper bribes by its employees or subsidiaries.

Changes to the FCPA are not "pro-bribery" – instead, FCPA reform would bring much needed balance and clarity to the Act and allow West Virginia businesses to better understand the law, set up compliance programs, and conduct mergers and foreign transactions without fear of prosecution or persecution, as the case may be.