Amendment to the Foreign Corrupt Practices Act - Another Perspective

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Introduction:

Congress is considering making amendments to the Foreign Corrupt Practices Act (FCPA). There have been Congressional hearings and a number of blogs, papers and letters and webcasts have been published taking positions for and against amendment. Nearly everyone involved vows that they are against bribery in international business and believe it should be a crime. The US Chamber of Commerce has taken the lead, sponsoring a paper titled "Restoring Balance" in October 2010. This advocated the position that substantial amendments to the FCPA are required to create a regulatory environment that is more supportive of international business by US companies and proposed 5 specific areas for amendment. Other groups have taken positions opposing any revisions that would weaken the FCPA, impede enforcement or otherwise allow bribery in international business to go unpunished. The main arguments of the opponents of amendment were set out in "Bursting Bribery" published in September 2011 by the Open Society Foundations. The specter of amendments to the FCPA has prompted the Department of Justice to commit to issuing some form of written "Guidance" within the next few months.

This paper will discuss another set of 6 potential amendments that would make the FCPA easier for business people to understand, enhance the ability of US companies to set up compliance programs and not undermine the goal of reducing corruption in international business.

Much of what is being written about proposed FCPA amendments comes from an ivory tower, Washington-insider perspective – the group known as "FCPA, Inc. The proponents of amendments ignore, or do not understand, the reality of corrupt activity in international business or how anticorruption programs are actually run by companies. For example, the House Subcommittee on Crime, Terrorism and Homeland Security hearings in 2011 did not have testimony from a single witness who had substantial experience in international business, only former or current government lawyers and a lobbyist.

If the FCPA needs to be amended, it must be in a way that reduces uncertainty for business and at the same time strengthens the prohibitions against corporate corruption in international business. The goal of the FCPA in 1977 was to deter bribery of foreign government officials by US companies and individuals by making corrupt payments a crime. Unfortunately, 35 years after the law came into force bribery by US and other companies and individuals in international business remains common, and the vast majority is hidden, undetected and unreported. Most US companies' anti-corruption compliance programs, to the extent they exist at all, are weak and ineffective in preventing, let alone detecting, corrupt activity in the company's international business.

Six Potential Amendments to the FCPA that would provide additional clarity and certainty for US businesses.

The proposals to amend the FCPA do have a kernel of validity. Clarifying the recognized gray areas in the FCPA by regulation, guidance or amendment would reinforce the efforts of those companies that are trying to run effective ethics and compliance programs, and might provide an incentive for other companies to establish effective compliance programs

There are 6 amendments Congress should consider:

1. Amend the FCPA to add provisions making Commercial Corruption a Federal Crime. This is the most important change to make the FCPA easy to understand for US business people.

It is hard to believe that educated business people actually have difficulty determining whether the person they are dealing with is or is not a government official. Not knowing who your customers and intermediaries are puts a businessperson at a distinct competitive disadvantage. Most US business people doing international business are smarter than that.

Commercial corruption, the bribery of individuals in private companies as opposed to government officials, is as corrosive and harmful to business as government corruption. Is it any less harmful to honest competitors when a bribe is paid to get business from a privately owned Telco instead of a government owned Telco? When a bribe is paid to an employee of a foreign telecommunications company and three US companies which competed honestly and bid on that job lose out, it does not really matter to them whether the foreign telco was 49% or 51% owned by a government. The honest US companies and their shareholders still lost business due to bribery. Minimal corporate compliance programs already prohibit bribery of private individuals, even if the FCPA does not.

If the FCPA is to be amended, the amendments should eliminate any uncertainty around "who is a government official" and what is an "instrumentality." The simple way to do this is to make it clear that is illegal under US law to bribe *anyone* to retain or obtain business or secure an unfair business advantage in international business. Currently US federal law ignores the fact that payments of bribes and kickbacks to private individuals accompany most instances of bribery of government officials. Commercial bribery is present in most cases of government bribery - the employees of private intermediaries as well as the employees of the bribe-paying companies all take their cuts, and falsify company records to hide the conduct. The most glaring shortcoming of the FCPA is that Congress failed to recognize that commercial corruption distorts international business and harms competition as much as government corruption.

Clarifying the FCPA by extending it to cover commercial corruption would provide needed certainty for business people. It would bring the US up to the legal standard now followed by almost every other nation. Business managers and company lawyers would no longer have do deal with the issues of “who is a government official" and what is an "instrumentality," because those terms would no longer be needed. There would be no need for the DOJ to torture facts into the realm of the Travel Act. The UK Bribery Act of 2011 contains separate provisions for

bribery of government officials and bribery of anyone else, but it is clear that bribery of anyone is a crime. The UK was following the lead set by many other countries. The US is an outlier in not having a clear law that all bribery in international business is a criminal offense. The FCPA should be amended make it clear that any bribery is a crime.

2. Eliminate the exception for Facilitating Payments.
This exception legitimizes the payment of low-level bribes to foreign government employees by US companies in order to get the government employee to do their job or do it more quickly. The FCPA gives business people and lawyers an argument that this type of bribe is somehow less illegal and less unethical and less harmful to good business and good government by calling it a "facilitation payment."

Permitting facilitating payments makes the US an outlier in the international community and makes the FCPA seem quaintly outdated and ethnocentric. While the US FCPA may create an exception in the US for these payments, they are always illegal bribes in the country where they are paid. The facilitation payment exception perpetuates uncertainty among US business people as to which bribes are legal and which are illegal, and provides those business people who have a propensity to pay bribes with an excuse that their clearly unethical and illegal activity may somehow be "legal."

Too much time has been spent looking for indications that certain small bribes are not illegal enough to be prosecuted. The excuses are usually variations of "everybody does it" and "it would be more expensive to do business if I have to strictly obey all the laws of the countries where I do business." Corporate ethics programs nearly always commit a company to obeying all laws where it does business. Many adequate corporate compliance programs clearly prohibit facilitation payments. Companies that have prohibited facilitation payments report that this has not harmed their competitiveness. In any amendment of the FCPA, the Facilitation Payment Exception should be eliminated.

3. 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. And why should US companies that care about compliance and are committed to running an ethical business care if such bogus laws do exist? Would the fact that corrupt rulers of a country pervert its laws to provide that bribery of members of the royal family or ruling elite is "legal" make those bribe payments any less destructive to ethical business practices of US companies? Even poor corporate compliance programs already prohibit those unethical payments. Like the Facilitating Payment exception this affirmative defense creates unnecessary confusion for US business management. This affirmative defense was ill conceived at the time the FCPA was written and there is no reason for it to continue to exist. In any amendment of the FCPA, the "lawful under written law" defense should be eliminated.

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, pre-existing compliance program.

Claims that the US should include a "compliance defense" in an amended FCPA are of ten based on mischaracterizations of the UK Bribery Act of 2011. To be clear, even a state of the art, robust compliance program is NOT a defense under the UK law to the crime of bribing a foreign government official, the part of the UK law that is most analogous to the FCPA.

In addition to provisions criminalizing bribery of government officials and bribery of private parties, the UK Bribery Act also included a separate strict liability crime of "failure to prevent bribery." This additional strict liability crime for corporations does not exist in the FCPA. The additional provision was needed in the UK law because without it, UK corporations could often be outside the reach of the Bribery Act.

Under UK practice, it is very difficult for prosecutors to hold companies responsible for crimes committed by employees and agents. So if the UK had not included the strict liability "failure to prevent bribery" provision in its Bribery Act, a corporation would be able to escape punishment and retain the fruits of its employees' and agents' bribery. A similar issue also exists in most Civil Law jurisdictions, so essentially everywhere in the world except the USA. In the UK situation, the strict liability crime of "failure to prevent bribery" is appropriately limited by including an affirmative defense: The company must prove it had in place proportionate and adequate measures to prevent bribery.

In the US, public companies have been on notice they were required to have adequate FCPA compliance programs for at least a decade. In contrast to the US, anti-corruption compliance programs were almost nonexistent in UK companies prior to 2011. Including an affirmative defense based on a company having in place a reasonable compliance program is an incentive in the unique UK legal situation and specific terms of the UK Bribery Act.

US criminal law and practice is substantially different that of the UK. So adding a new "compliance defense" to the FCPA without adding a corresponding new crime of failure to prevent bribery would essentially allow a US companies that can prove it had an "adequate" compliance program to escape prosecution for bribery and retain the profits it received from the illegal conduct. Adding a strict liability crime of failure to prevent bribery would provide additional clarity to US business people about what the law prohibits and what must be done to comply with the law.

Some of the submissions in favor of adding a compliance defense to the FCPA make it seem like most US companies are running state of the art, robust FCPA compliance programs. That is, at best, wishful thinking. Many US companies have FCPA compliance programs which appear thorough on paper but which are far from adequate in practice. Only a few US companies have established FCPA compliance programs that are credibly capable of deterring and detecting violations in their organizations, and even those are often underfunded and poorly staffed.

Amending the FCPA to include a strict liability crime of failure to prevent bribery and corresponding compliance defense would provide clarity as well as an incentive to US business

management to establish, fund, staff and implement meaningful anti-corruption compliance programs. Otherwise adding a compliance defense is not warranted or needed and will increase uncertainty for US businesses and litigation.

5. Add provisions to the FCPA to make it completely clear that parent companies are responsible for the illegal acts of their subsidiaries.

Amending the FCPA to allow companies to avoid responsibility for the criminal activity of their subsidiaries is plain nuts. Corporations establish multiple subsidiary corporations in various countries to further their business goals. The US parent company selects and appoints the boards of directors of its international subsidiaries, and in nearly all cases these directors are employees of the US company or its other subsidiaries. The US parent company selects and hires the senior management of its international subsidiaries. Business managers in the US parent company select the heads of Sales, Finance, Legal and other day-to-day managers of subsidiaries. The US parent company is responsible for establishing the policies and compliance programs of its international subsidiaries and it is responsible for the accuracy of the books and records of its international subsidiaries. It receives, or defers, the profits earned by its subsidiaries. Foreign subsidiaries are creations of parent companies and exist to increase profits, limit liability and make it easier to do global business. It is the duty of the parent company's board of directors and management to control the company's international subsidiaries.

It makes no sense to allow a US company to create and use a network of foreign subsidiaries as a shield to liability for bribery, money laundering, export control violations - or any criminal activity. If the FCPA is to be amended, it should include provisions that make it clear to US corporate management that corporations are completely responsible for the FCPA violations of their subsidiaries.

6. Enhance the scope of the FCPA's "bona fide expenditures" affirmative defense.

A combination revised statutory language and clear written guidance from the DOJ and SEC concerning the FCPA's "*bona fide* expenditures" affirmative defense would be helpful to US companies and not restrict enforcement of the law in cases of actual bribery.

This affirmative defense was written in the mid-1970s and its wording seems to create a very narrow defense. This can be confusing to company lawyers and business people. It is certainly true that gifts, meals, entertainment and travel are frequently used as bribes to influence employees of governments and businesses, so companies do have to be careful and understand how their money is being spent. Normal, legitimate business activities, promotional expenses and marketing and incentive programs have to be subject to controls and audits so the company understands, tracks and records its expenditures, including taking adequate measures to ensure company assets are not being used for bribes. The FCPA is oddly and confusingly worded so the *bona fide* expenditure affirmative defense has spawned a vast number of conference sessions to dissect gifts, meals, entertainment and travel expenses as well as other payments for business promotions.

Company lawyers involved in FCPA programs often interpret the language of the affirmative defense very broadly –based on hope that the law actually conforms to the ever-changing reality

of international business. Those companies that have established reasonable anti-corruption compliance programs have already put in place clear, strict reporting and accounting rules and mandatory training on gifts, meals, entertainment and promotional expenses. It is a very rare businessperson who does not understand where the line is between reasonable corporate hospitality and a bribe – especially when they have received repeated specific training from their employers on how to make that distinction and have written company policies and programs to guide their conduct. Because business practices change from time to time and differ significantly from industry to industry and country-to-country, this area may better suited for a combination of ongoing Guidance in addition to statutory amendment. A specifically worded statutory amendment could easily be out of date shortly after it was written.

Instead of amendment to the FCPA statute and guidance from the DOJ, Congress may want to do something radical and look at the example of the UK Bribery Act. The UK Act provides no affirmative defense for business expenses at all. The British approach may make it more clear to business people that any payments intended to corruptly influence a government official or private person are bad for business and criminal offenses. Compared to the British, Americans prefer to have very specific and lengthy laws so Congress may not be able to follow the sensible approach taken in the UK Bribery Act.

A Seventh Topic where Guidance would be Helpful: Successor Liability

In addition to these six proposed amendments that would make the FCPA more clear and certain for US business people, ongoing regulatory guidance would be helpful in the area of successor liability.

Congress should reject proposals to do away with 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 and for buyers to refrain from engaging in rigorous due diligence. The result could be that the DOJ and SEC will be able to prosecute the individuals involved, but will be prevented from bringing action against the company that received and is enjoying the past and ongoing profits of large scale, long-term intentional bribery.

FCPA due diligence in international acquisitions is often lightweight and ineffective. The corporate and outside counsel on legal teams working on acquisitions usually do not have much experience with the company's international business or with sales and distribution, and are often just checking boxes. Rules on effective due diligence in international acquisitions were established in the Johnson and Johnson deferred Prosecution Agreement, Attachment D, and in the DOJ's Halliburton Opinion Release (08-02, June 2008). Tough standards like these are needed when acquisitions involve poorly understood international operations in corrupt countries.

Thorough due diligence provides a substantial benefit to the acquiring company – it understands the risks it is acquiring. In the end, the knowledge that a company will not be allowed to retain

the profits from the past corruption of a company it acquires is the most effective incentive for thorough due diligence before an acquisition is completed and thorough integration of the employees and "agents and business partners" after the deal closes. The burden and cost of the corrupt activity should also be placed on the company that engaged in the corruption in the first place, and later sold its operations – as well as on the purchaser who enjoys the benefits from the corruption. The DOJ and SEC should be able to trace the proceeds of the criminal activity to the shareholders of the bribing company who received the proceeds of the sale. This is one of the areas in which clear provisions in DOJ Guidance based on the Johnson and Johnson, Halliburton and other examples would be very useful for US business people.

Discussion:

Bribery, kickbacks, falsification of records and other corrupt activity are widespread in international business and pervasive in many countries. Despite the fact that the FCPA has been in place for three decades, many US business people do not believe that bribing a foreigner to gain a business advantage should be a crime. Ask business people if they believe it is possible to do business successfully in Russia, Indonesia or China without paying bribes. Most will answer some variation on the themes of "bribery is part of their culture" and "payments are a reality of doing business in those markets." In most cases US business people deal with the problem by leaving the details of in-country business to the local team on the ground. Don't Ask, Don't Tell, is alive and well when it comes to corruption in international business. Indeed, many members of Congress and employees of the US government and other governments do not seem to consider bribery and kickbacks to gain an unfair advantage in international business to be "real" crimes. For example, in most US cases the investigation of the alleged violation is delegated to the company suspected of violating the law using acceptable outside counsel under loose supervision of the DOJ or SEC.

There is general agreement in the small club of FCPA practitioners that some provisions of the FCPA are strangely and vaguely worded. It is not clear that this vagueness in the law makes any practical difference to a US company that is actively trying to run an ethical business. The plain fact is, any company with a reasonable compliance program already clearly prohibits falsification of company records, facilitating payments, and bribery of ANYONE including employees of private companies and employees of companies that are owned by foreign governments as well as foreign public officials. These prohibitions are published in plain English and companies train their employees on their internal rules. Most US multinationals do not hire stupid people, so an employee who has read the mandatory policies and attended the mandatory training, can be assumed to understand what is prohibited, and any vagueness in the language of the FCPA itself is irrelevant. Companies with ethics programs have already compensated for the vagueness in the FCPA without harm to their business.

The move to amend the FCPA is based on the misleading idea that the FCPA is being aggressively enforced. The proponents of amendment have made a lot of noise about the enormous increase in cases brought by the US government in the past 4 - 5 years, claiming this is prosecutorial overreach that is harming legitimate business activities. In reality, enforcement of

the FCPA can be seen as high only if one's standard for enforcement of criminal law against bribery is extremely low.

It is true that in 8 years the Bush administration increased FCPA enforcement as much as ten-fold from the almost nonexistent enforcement level of the 80s and 90s. But there are hundreds, if not thousands, of instances of bribery in international business every week. Depending on who is counting, the DOJ and SEC have been bringing around 30-40 FCPA cases each year for the past few years. Some of these "cases" are in fact double or triple counted because the DOJ and SEC each bring actions against corporations and their related individuals based on the same set of facts. It is not credible to claim that the small number of FCPA actions the DOJ and SEC bring each year constitute aggressive prosecution that threatens law-abiding, compliance conscious US companies.

Studies show that people cheat when they are given a chance and believe they can get away with it. In the case of business corruption, the cheaters have the added incentive of believing the bribe they are paying is both "for the good of my company" and "for the good of my team." Bribery, kickbacks and lavish gifts are easy to justify when they are done for the good of the group - and when enforcement of the FCPA by the DOJ and SEC has not reached the level that business people consider it to be a credible threat.

Given the large amount of corrupt payments in international business, the US government's current FCPA enforcement is still at a minimal, nuisance level. If the US government can keep up prosecution at the current moderate level for 10 or 15 more years, and keep up its pressure on other countries to increase prosecutions, the effort may have an impact on behavior and result in a significant reduction in bribery in international business- in a few decades. The DOJ and SEC have been impressively skilled at getting maximum publicity from their modest efforts and minimal staff and budget. They have negotiated enormous disgorgements of profits from illegal conduct with a few huge multinational companies in a handful of cases that involved blatant, large scale, intentional bribery. To most companies, the threat of FCPA enforcement is minimal; so low it can, for corporate budget and staffing purposes, still be ignored.

The DOJ's weak enforcement actually perpetuates a problem. Company management can claim they do not understand the law, and because they do not see much risk of being investigated, they do not see the need to hire employees or engage outside experts who do understand the law. These companies also do not investigate how they are doing business outside the US. Increased enforcement of the FCPA would encourage more companies to put in place appropriate business practices and, in the future, may push anti-bribery compliance by US companies to a tipping point.

Blogs and articles make it seem as if Congress is on the verge of intentionally changing US law to make it easier for US companies and individuals to escape prosecution for bribery in international business.(Though this may have been tempered somewhat by the recent disclosures of large scale bribery and cover up by senior management at Wal-Mart.) Each of the individual points advocated by the lobbyists for amendment would slightly weaken the government's ability to enforce the FCPA. Taken as a complete package, the lobbyists' proposed amendments could put many of the clear cases of bribery that are detected beyond the reach of law enforcement.

The amendments proposed in "Restoring Balance" would make it easier for companies and individuals that engage in corrupt activities to escape liability and/or retain the profits gained by bribery. The nascent deterrent effect of the FCPA would be substantially weakened.

Furthermore, the lobbyist's proposals would actually aggravate the problem US companies have with not knowing how the law is going to apply to specific situations. The position advocated in "Restoring Balance" requires adopting new confusing definitions of "foreign official" and "instrumentality" as well as complex new rules to replace existing practices that are already clear to business people who are paying attention. This will take years to settle out and perpetuate confusion.

The basic purpose of the Foreign Corrupt Practices Act is to deter and, when necessary, punish, instances of bribery in international business. The FCPA was the first national law criminalizing bribery in international business and established a world standard. The US government worked throughout the 80s and 90sto level the playing field in international business by championing the OECD Convention on Combating Bribery of Foreign Public Officials and the United Nations Convention Against Corruption. Based on those consistent US efforts, in the past 15 years most developed countries involved in global commerce have enacted laws similar to the FCPA, many of which are stronger than the FCPA on paper. Recently several countries have started to bring enforcement actions, again following the US example. Due to the example of the FCPA and consistent US leadership, international anti-corruption standards have been established and are starting to work.

But now, at the point the United States' long campaign against corruption in international business is starting change attitudes and conduct in US companies, Congress seems to be on the verge of being lobbied into curtailing the US effort. Members of Congress seem to be seduced by the idea that making it difficult for prosecutors to enforce bribery laws is pro-business. They miss the point that eliminating bribery is the certain way to level the playing field and foster business based on the quality of products and services, not on which company can devise the best methods to pay and conceal bribes. If the FCPA is to be amended, Congress should enact appropriate terms to provide US business with greater certainty, while at the same time reinforcing the appearance that the US remains committed to the long campaign against corruption.

Conclusion:

There is uncertainty in a few of the terms of the 1977 law, but the FCPA itself is fundamentally sound. The proposed amendments of those lobbying for changes do not address some of the points of confusion at all, and in other cases would perpetuate the confusion. For example, the best way to provide certainty for US business people about the definitions of terms like "government official" and "instrumentality" is not to diddle with the definitions and continue the distinction between bribery of a government official and bribery of anyone else. Any uncertainty can be eliminated and an unambiguous standard established for US business people by amending the FCPA to make clear it is a crime to bribe ANYONE. Compliance minded US companies would not have any problem with making this change in the law because every US public

company that has an ethics policy already strictly prohibits bribery of any type in its business. The FCPA can be amended to follow the established ethics and compliance practices of US corporations.

Many of the issues with the FCPA that have been brought up by those lobbying for amendments could be better dealt with by reasonably worded written guidance and regulations put in place by the DOJ and SEC. Unfortunately few people seem to believe the DOJ will provide written guidance that will deal with the issues effectively and provide clarity for companies. It will more likely leave itself with maximum discretion. The 43 pages of Guidance provided by the UK Government is hardly a paragon of clarity.

A few companies may be spending large amounts on FCPA compliance programs and crazy amounts of time and money on internal investigations after bribery has been brought to the attention of senior management in their organization. A large part of that is due to US management failing to understand how their company actually does international business. Tall tales such as the YouTube video of the Senator Klobuchar smilingly recounting to a DOJ lawyer the story of a nurse's taxi ride causing a company to go through a huge, costly investigation do not help. Any company with a reasonably competent compliance staff would resolve a situation like that in minutes with a few emails or phone calls. Companies are well advised to do reasonable risk assessments and to set up strong compliance programs that follow the DOJ guidance. That is the best way to reduce the prospect of FCPA violations and penalties.

Because US management of ten does not have a good handle on their own company's international operations, they do not know who in their international organization they can trust or what they can believe, and they cannot conduct focused internal investigations. They end up relying on outside law firms staffed by risk-averse former prosecutors who have never worked in an international business to conduct open-ended, extremely disruptive international investigations –and the costs quickly skyrocket. You could feel sorry for the company, except for the fact that someone in their organization DID engage in corrupt payments to further its business and to try to make a profit for the company. The management either ignored or underestimated the risk, and did not put staff and programs in place to adequately educate its employees, monitor its business or deter criminal activity.

A number of US companies have in place well considered, reasonable practices that effectively deal with the components of an adequate, proportional International Anti-corruption Compliance Program. US companies are gradually getting the message and programs are becoming more common and more complete year by year. At some point in the future, FCPA compliance by US companies will reach a tipping point and bribery in international business will no longer be thought of as inevitable and acceptable. The DOJ and SEC are never going to be given the resources to conduct enough investigations and bring enough cases to eradicate the crime of bribery in international business by US companies. The focus should be on making sure the FCPA is clear and that companies have an incentive to implement an effective compliance program. For that to happen, a well-written law must be backed by a credible threat of enforcement. The 6 amendments proposed in this article would help provide clarity to business people and bring the FCPA into the 21st century.