Top Ten Questions Surrounding the Proposed Amendments to the Foreign Corrupt Practices Act

Jul 1, 2012

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This Top Ten presents the main issues around proposals to amend the Foreign Corrupt Practices Act (FCPA), the US federal law making it a crime for US companies and individuals to bribe government officials outside of the United States to further their international business.

1. What are the Proposed Amendments to the FCPA?

The principal argument for amendment is that the current level of enforcement is harming US business, that the lawyers for US businesses are outgunned by the department of Justice and SEC and are that it is difficult for US business to understand what is prohibited by the FCPA. In the paper "Restoring Balance", the US Chamber of Commerce Practices Act promoted 5reforms to the FCPA. These are:

a.) Adding the Compliance Defense Recognized by the United Kingdom,
b.) Limiting a Company's Successor FCPA Criminal Liability for Prior Acts of a Company it has Acquired,
c.) Adding a "Willfulness" Requirement for Corporate Criminal Responsibility,
d.) Limiting a Parent Company's Civil Liability for the acts of a Subsidiary,
e.) Clarifying the Definition of "Foreign Official."

A scholarly paper rebutting the need for each of these reforms titled, "Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act", was published by the Open Society Foundations in September 2011. This paper did not promote alternative amendments.

Congress held hearings in 2011 and representatives stated they would introduce legislation to amend the FCPA. Congressional momentum for amendment seems to have slowed due to a commitment from the Department of Justice to provide written guidance concerning the FCCP in 2012 and the recent revelation of large-scale bribery by Wal-Mart.

2. Is the UK Bribery Act a Useful Example for Amendments to the FCPA?

The UK Bribery Act went into effect in July 2011 providing an updated approach to the same issues congress dealt with in the 1970s when the FCPA came into existence. UK lawmakers had the advantage of being able to review 30 years of experience with the FCPA. The UK law goes far beyond the FCPA: it criminalizes private commercial bribery, it does not have an exception for facilitation payments,or any affirmative defense for the law of other countries or bona fide business expenditures. The most striking difference is that the UK Act includes a novel, strict liability corporate crime of "Failure of a Commercial Organisation to Prevent Bribery."

Proponents of a "compliance defense" in the FCPA hold up the UK Bribery Act as an example even though the compliance defense in the UK law only applies to the strict liability crime of Failure to Prevent Bribery - a crime that does not exist in the FCPA. Those same proponents do not advocate the US adopting the parts of the UK law which are much more strict than the corresponding provisions of the FCPA. The UK Bribery Act is a well thought out, 21st century approach to criminalizing bribery

in international business and is a useful example for US lawmakers.

3. Is the Current Level of Enforcement of the FCPA Harming US Business?

In the 1980s and 90s the DOJ and SEC brought 2 or 3 cases a year under the FCPA and conducted a handful of investigations. There was no significant reduction of bribery by US companies in international business. During the Bush II administration enforcement actions increased to around 30 a year and that level of enforcement has held for the past several years. This token effort has not changed the attitude of US business people, most of who still believe that bribery is an unavoidable factor in international business. The small number of enforcement actions and a dozen or so extremely high corporate fines have been sufficient to get publicity for the government's effort to enforce the FCPA, but it is questionable whether even a simple majority of US companies involved in international business have taken adequate steps to detect and reduce bribery in their foreign operations.

In the 1970s when the FCPA was the only law criminalizing bribery in international business, US companies complained that the playing field was not level and that they had to compete with British, German, Japanese and other competitors who routinely paid bribes which were not illegal and were tax deductible business expenses in their home countries. That has changed. Due to concerted efforts of multiple US administrations all of the significant countries in international commerce now have laws criminalizing bribery in international business.

There have been a vast number of articles and conferences in the past 7 years as well as increasingly clear case guidance by the Department of Justice. Businesspeople and lawyers that say they do not understand the FCPA or know what to do are not paying attention. It is true that a few companies have been involved in extremely expensive investigations, but for the most part those are companies that uncovered clear evidence of pervasive, longstanding bribery and cover-ups in their organizations. FCPA investigations in companies that have good business and compliance practices in their international operations do not have to be expensive or disruptive. There is little evidence enforcement of the FCPA has harmed US business. If anything enhanced enforcement has publicized the message the reasonable corporate controls on international operations and reducing bribery and falsification of records is good for business.

4. Are the Provisions of what Constitute Reasonable, bona fide Business Expenditures too Restrictive?

The FCPA provides companies with a narrowly worded affirmative defense when they can prove a payment was a reasonable and bonafide business expense. Interestingly, the UK government did not believe this kind of affirmative defense was needed and the UK law does not have a similar provision. The affirmative defense is very restrictive as well as being oddly worded. While it is difficult to believe that intelligent, well-trained US businesspeople do not understand the difference between reasonable business expenditure and a bribe, the current wording of the FCPA creates some confusion. Further guidance from the Department of Justice or an amendment to the FCPA to clarify this affirmative defense would be useful to help US companies understand how to properly document legal business expenses.

5. How does the US end Uncertainty over who is a Government Official and what is a Government Instrumentality?

The advocates of amendment to the FCPA seek to adjust the definitions of who is a government official and what is a government instrumentality in ways that will limit liability of companies for bribes paid to certain classes of individuals. Amending the FCPA to include new definitions of the categories of who can be bribed perpetuates confusion for US business. One fundamental flaw in the FCPA is that it creates the impression that bribery of some persons is "legal" and bribery of other people is illegal.

The simple way to make the FCPA easier for US business people to understand is to amend the law to make it clear that all bribery of any person is a crime. Most US public companies already recognize this and strictly prohibit their employees from paying any kickbacks and bribes to anyone. It is normal business practice for businesspeople to understand the identity and background of the

companies and individuals who are their company's customers and business partners. It would show poor training and inattention to standard practices for a prudent businessperson to not clearly understand when he is dealing with a government employee or government entity in a transaction. Protestations that normally conscientious US business people do not know when they are dealing with a government or government employee simply do not hold water.

The UK and most other major countries have national laws that criminalize commercial corruption. The US leaves criminalization of commercial corruption to the states, and unfortunately only 28 states have law making commercial corruption a crime. The sure way to create certainty for US business is to amend the FCPA to add provisions making commercial corruption a crime.

6. Is the Concept of 'Facilitation Payment" still Useful to US Business?

The FCPA created an exception for facilitation payments providing that, for purposes of US law, certain bribes paid to foreign government officials to expedite routine governmental actions are not illegal. Facilitation payments are illegal bribes in the countries where they are paid. Facilitation payments put US companies in an ethical dilemma: The company's Code of Conduct requires that employees obey all the laws of all countries in which they do business, but the FCPA provides that certain violations of the foreign country's bribery laws may not be illegal under US law. Many US Companies have internal rules prohibiting facilitation payments and very few countries besides the US have a statutory exception for this type of bribe.The best way to deal with the issue is to amend the FCPA to eliminate the exception for facilitation payments.

7. Should the FCPA have an Affirmative Defense for Bribes that are Lawful under the Written Law of the Country there they are Paid?

No country has written laws that permit bribery of its government officials at any level. So this affirmative defense in the FCPA might be considered meaningless except that its existence gives US business people another indication that US lawmakers consider some bribery of foreign government officials to be "legal."Even if a country did permit direct payments by businesses to its government officials to influence their decisions, why should that matter to an ethical US company? Bribery of government officials perverts competitive, free market business and causes companies who refuse to pay for influence to lose out to those who pay bribes. The simple and sure way to end any confusion caused by this affirmative defense is to amend the FCPA to eliminate the affirmative defense for payments that are lawful under the written law of the country where they are made.

8. Should US Companies be Responsible for Bribes paid by their Subsidiaries?

In a word, yes. Companies create and control their subsidiaries. Parent company management appoints its subsidiaries' boards of directors and hires and supervises their management. The parent company receives the profits from the subsidiary and has complete control of the subsidiary's business, legal, financial and compliance activities. For a US parent company to argue that it does not know what is going on in its foreign operations or that it cannot control illegal activities in its foreign subsidiaries is an admission of incredibly bad management. Amending the FCPA to provide an incentive for poor management and inattention to foreign business operations by US companies would be bad public policy and corrosive for US business. To the extent it is not clear that US companies are responsible for corrupt payments by their subsidiaries, DOJ guidance or an amendment to the FCPA may be needed.

9. Should Companies be Responsible for prior Bribery by Companies they Acquire?

Ending successor liability would allow clear acts of intentional bribery to go unpunished and allow companies to retain the profits made from corrupt payments. It would reward both seller companies who conceal their past activities and poor compliance programs and acquiring companies who do limited, ineffective due diligence. Limiting successor liability would lessen the incentive for companies to establish programs to detect and deter bribery in their international operations and allow companies and

individuals who successfully engaged in bribery to retain the profits from their crime. A clear statement in the law imposing strict Successor Liability would provide a strong incentive for companies to engage in very thorough due diligence in international acquisitions and to make sure they extend their compliance programs to the businesses they acquire. Guidance from the SEC would be useful so US companies will have no doubt as to what constitutes prudent due diligence.

10. Does the FCPA Need a "Compliance Defense?"

"Restoring Balance" argues that the FCPA should contain a compliance defense granting companies dispensation from liability for corrupt payments if they have put in place robust, state-of-the-art FCPA compliance programs. It recommends the UK Bribery Act as a guideline for potential amendment to the FCPA.The UK "compliance defense" only apples to the crime of Failure to Prevent Bribery; it does not apply to the crimes of bribing a public official or a private individual. A compliance defense might make sense - if the FCPA had a strict liability crime corresponding to the UK law.US companies are well aware that they will receive substantial credit under the Federal Sentencing Guidelines if they have put in place and actively operate a compliance program, and the DOJ has provided clear and consistent guidance on the elements of an acceptable FCPA compliance program..But many, if not most, US companies still do not have FCPA compliance programs that met the requirements of the Federal Sentencing Guidelines or the DOJ's guidance. Bribery and falsification of corporate records are serious crimes. The existence of even a superb compliance program should not give a company a get out of jail free card that covers every act of bribery done to benefit its business.US Companies already know what they need to do to establish programs to deter and detect corruption, and that good programs are flexible and evolving. A compliance defense is not necessary. It would encourage corporate management to think "we checked all the boxes, so we cannot be prosecuted."

Conclusion

Most of the parties involved in the debate over whether the FCPA should be amended agree that bribery in international business is evil, bad for government, bad for business, bad for competitive free enterprise and bad for the people of the countries where the bribes are paid - and that bribery is a crime. Congress needs to understand that amending the FCPA to make it easier for US companies to pay and conceal bribes and avoid investigation and prosecution is not pro-business.

For a more in depth discussion of proposed amendments to the FCPA, see the article "Amendment to the Foreign Corrupt Practices Act – Another Perspective".

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