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Can the FCPA Be Good for Business?

Congress and enforcement authorities could encourage growth through a safe harbor and clearly stated penalty reduction formulas.

Compliance with the US Foreign Corrupt Practices Act (FCPA) is now a fact of life for US companies, as well as for foreign companies subject to US securities laws. With the advent of the United Kingdom's Bribery Act, and continued pressure from international organizations for stepped-up anti-corruption laws and enforcement programs around the globe, the trend toward expansive global anti-corruption initiatives continues.

But that is the old news; on the horizon is an initiative to reform the FCPA and to advocate for enforcement policies that, by serving the statute's fundamental objectives, would render the FCPA far more business-friendly than is now the case.

For those whose initial reaction to this suggestion is to question why "business-friendly" is even a factor, please note the current abysmal economic conditions in the United States. The development and enforcement of US laws governing the commercial affairs of US businesses are both part of the problem and part of the solution to restoring growth in the economy. Those responsible for making and enforcing our laws are in a position to adopt laws and policies that can help foster, rather than inhibit, business growth. At the heart of that analysis, asking whether broad-ranging laws like the FCPA are functioning as an impediment to a restored economy is worthwhile.

Given the enforcement environment, businesses considering expansion that involves overseas operations would be foolhardy not to measure FCPA risk when undertaking a risk-benefit analysis of opportunities abroad. Assessment of FCPA risk in that context is burdened by both uncertainty about the scope and terms of the statute and by unevenness, at least as perceived, in its enforcement policy. In turn, that uncertainty risks giving US businesses pause in considering overseas expansion at a time when growth abroad can help create jobs at home. As a 2010 report by the Business Roundtable noted, "the global engagement of US multinationals has long supported American jobs and economic growth." US lawmakers and enforcement authorities have the opportunity to encourage growth by eliminating or reducing the uncertainty in FCPA risk.

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Removing obstacles to entrepreneurship and growth need to be essential goals of federal policy, including with regard to business regulation and law enforcement. Although some policies may have more impact than others, there is no magic bullet policy that will make all well. Rather, just as an accretion of obstacles to economic vitality occasioned by over-criminalization and other excessive regulation of commercial affairs has contributed to our stagnant economic conditions, so too will an accretion of reforms designed to eliminate or lessen those obstacles contribute to restoration. Because of its global impact on the expansion of US businesses abroad, it is worth looking specifically at the FCPA as a case study for worthwhile reform initiatives.

Recently, the House Judiciary Committee's crime, terrorism, and homeland security subcommittee, chaired by Rep. James Sensenbrenner (R-Wis.), held an in-depth hearing on whether FCPA reform is needed. Various voices have been heard at the hearing and in other fora advocating for changes to the statute itself, as well as suggesting changes in the policies that govern its enforcement.

For instance, the US Chamber of Commerce's Institute for Legal Reform has offered several proposals to reform the FCPA. Its suggestions include adding a compliance defense to the FCPA (similar to the "adequate procedures" defense available under the UK Bribery Act), defining more specifically "foreign official" under the FCPA, limiting a company's liability under the FCPA for acts of a subsidiary or an acquired company's actions prior to acquisition, and including a "willfulness" requirement for corporate liability under the FCPA. These are solid ideas meriting serious consideration by Congress. But even more can be done to reform the FCPA and its enforcement in ways that can help, rather than hinder, US companies doing business abroad.

One of the surest methods for US businesses to expand globally is through the acquisition of existing foreign companies. In many emerging markets, most acquisition targets are beyond the purview of the FCPA and thus unlikely to employ anti-corruption compliance policies. But these companies have become attractive targets because of their position in growth markets. Those markets are also noted as typically more corrupt than other, more established markets subject to closer scrutiny by governments. Preacquisition due diligence, looking specifically at indicia of potential FCPA compliance issues, can be an asset to decision making. But in most circumstances, the opportunity for the kind of in-depth examination that is likely to reveal potential FCPA compliance issues is quite limited. As a result, any acquisition abroad, and particularly those in emerging markets, can carry a ticking time bomb of FCPA compliance issues.

I have advocated in congressional testimony that Congress amend the statute to provide a period of repose under the FCPA following an acquisition. The idea is that US companies, with notice to US enforcement authorities, would have a defined period after an acquisition in which to perform a rigorous FCPA compliance review of the acquired entity. If FCPA compliance issues were uncovered, the acquiring company would remediate them, and disclose both the existence of the problem and its remediation to the government. The acquiring company would be immune from civil or criminal enforcement as to matters uncovered during the review period, which could be on the order of 90 to 120 days. At its most elemental level, this procedure would serve the fundamental objectives of the FCPA, which are to root out and eliminate corruption in the global marketplace. That it may also tip the balance toward overseas expansion by reducing the risk of hidden FCPA liability is good for business and good for the US economy.

Encourage Self-Disclosure

Congress and US FCPA enforcement authorities could also consider acting more broadly to reward self-examination and disclosure of FCPA compliance problems. Through either congressional enactment or a change in enforcement policy, or some combination thereof, the FCPA could become far more business-friendly—that is, a positive factor for economic growth through business activity—without at all sacrificing its laudable goal to foster a corruption-free global commercial environment. Simply having more certainty and greater reward when businesses police themselves, fix their own problems and disclose them to the government would go a long way toward achieving the goals of the FCPA without unnecessarily impinging on entrepreneurial initiative by US companies abroad.

The Department of Justice's and Securities and Exchange Commission's stated enforcement policy is to reward companies for voluntary disclosures and/or cooperation with agency investigations concerning FCPA compliance issues. Not so clear is what the real benefit to a company of disclosure and cooperation may be. Experience teaches that both agencies use a general formula guided by applicable guidelines to provide some benefit to disclosing and cooperating companies, but very much on an individual, case-by-case determination.

As a result of prior congressional enactments, including the Sarbanes-Oxley law and the US Sentencing Commission's guidelines, US companies already spend considerable sums of money designed to both deter and detect FCPA and other violations of law in their business operations. Enforcement policies that recognize both the value and the efficiency of such compliance projects would send a positive signal to businesses

concerning the benefits of such activity. The vast majority of businesses want to maximize compliance in their business operations and recognize that there is a disadvantage in competing in a global marketplace that is permeated by corruption. Thus, they share the government's FCPA enforcement goals. Achievement of those goals could be enhanced in a business-friendly way by establishing a safe harbor from criminal prosecution and a clearly stated formula for reducing monetary penalties for companies that police themselves, remediate and voluntarily disclose FCPA violations to the authorities.

Unfortunately, it appears today that government policy and practice is moving away from a cooperative and business-friendly mode of making and enforcing the FCPA and other laws. The SEC whistleblower bounty program created by Dodd-Frank puts the SEC more in a position of the enforcement cop ready to play "gotcha" with businesses than as a partner willing to work with the business community to root out and remediate corrupt practices. The Justice Department, the primary enforcer of the FCPA's bribery provisions, has demonstrated no openness to date to considering reforms that would make the terms of the statute more clear and make enforcement of it more certain and balanced. US businesses can help themselves by advocating for reform of the FCPA's terms and its enforcement. Until such reforms gain momentum, these companies will have to be prepared to face greater FCPA risk than is necessary as part of the price of moving businesses forward and bringing sustained growth to US companies and the economy—which is so dependent on them for job creation and expansion.

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