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Debate rages over FCPA enforcement: a 30,000-foot perspective

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A debate is raging about the scope and direction of the Foreign Corrupt Practices Act (FCPA), which prohibits U.S. companies from paying bribes to foreign public officials in order to obtain business.

The debate surrounds the dramatic increase, over the past five years, in FCPA prosecutions and penalties - a period that the U.S. Department of Justice proudly refers to as "the new era of FCPA enforcement." In 2005,

there were just two such criminal filings. Since then, the number has roughly doubled each year, with 48 cases filed in 2010. A similar progression has been seen in FCPA penalties. In 2009 and 2010, eight of the 10 largest-ever FCPA fines were imposed. In 2010, FCPA penalties totaled over \$1.5 billion, which is half the fines for all business crimes prosecuted by the Justice Department that year.

This explosion in FCPA prosecutions has staggered the business community, which has responded by spending millions of dollars - undoubtedly billions of dollars in total - to implement anti-bribery compliance programs; to internally investigate all imaginable FCPA violations; and, if appropriate, to self-report any violations in the hope of obtaining leniency. Fearful of the Justice Department's increased aggressiveness, companies now routinely conduct "corruption due-diligence" investigations of possible business partners, consultants, and other third parties to avoid devastating FCPA liability.

Until recently, the business community suffered in silence, hopeful that the prosecutorial onslaught would abate over time. Last year, however, businesses took a different tack and began to "push back" through proposed amendments to the FCPA itself, and through suggested modifications in the Justice Department's FCPA-enforcement policies. In November 2010 and June 2011, hearings on the proposals were held before Senate and House subcommittees.

These FCPA proposals run the full gamut. Some are clarifications and adjustments in the definition of "foreign public official" or the scope of corporate responsibility for crimes committed by predecessor companies or subsidiaries. Some are beefier proposals for a formalized amnesty program, like the one used by the Antitrust Division; or for a "compliance" defense, like the ones used in the United Kingdom and Italy, if the company has an adequate anti-bribery compliance program in place.

The Justice Department has refused to support any of these suggestions. According to the department, foreign corruption is so rife, and the consequences are so detrimental to the world economy, that vigorous prosecution of FCPA violations is not only warranted, it is essential.

Controversies like this are often hopelessly entrenched, but this one begins with considerable common ground. Everyone agrees that corruption is bad, and everyone agrees that foreign corruption is especially bad because global businesses are increasingly clamoring for foreign contracts. The question is how best to address the problem and balance the competing interests.

One useful starting place is the peculiar history and evolution of the FCPA, which was

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passed in 1977. Before the FCPA, there were no foreign bribery laws anywhere in the world. Instead, if a company (say, a U.S. company) bribed a public official in the "host" country (say, France), then the "host" country (France) would investigate and prosecute the offenders using its domestic bribery laws.

Under the FCPA, such foreign bribery by a U.S. company could be prosecuted by the United States itself, based on jurisdiction over its own companies and citizens. Out of deference to the "host" country, however, the FCPA covers only the U.S. bribe-giver, not the foreign bribe-taker.

For the first 20 years, the Justice Department's enforcement of the FCPA was measured: only one or two cases per year. That approach was supportable on three grounds. First, because the FCPA applied only to U.S. companies, there was concern that more vigorous enforcement would create an "uneven playing field" and hurt U.S. companies in the global competition for foreign contracts. Second, since the world's only foreign bribery statute was the FCPA, there were concerns about the United States being perceived as seeking to become the "world's policeman." Third, FCPA violations were difficult to investigate thoroughly because the bribes occurred in "host" countries, and the United States could therefore conduct only an "outsider's" investigation. Standard investigative techniques such as grand jury subpoenas and search warrants were beyond the U.S.' jurisdiction in the foreign country.

A sea-change occurred in 1998 when, at the urging of the United States, the Organization for Economic Cooperation and Development (OECD) drafted a model foreign-bribery law and persuaded 38 countries to sign a convention committing to passing such a law. Other organizations such as the United Nations and the Council of Europe supported similar legislation, and several years later 140 countries had passed or agreed to pass anti-foreign-bribery laws, which has created a kind of "FCPA network" all around the world.

In light of that network, the United States was eager to implement its "new era of FCPA enforcement." However, there was still a formidable problem: How could evidence of these foreign bribes best be acquired, since the United States still did not have jurisdiction to use traditional investigative techniques in the host countries?

The Justice Department's answer was to use the classic "carrot and stick" approach. The "stick" was the threat of a crushing prosecution if the company was found to have violated the FCPA but had failed to self-report the crime beforehand. The "carrot" was the hope of some leniency if self-reporting had occurred.

This approach has led to some surprising and unusual developments. Over half of FCPA prosecutions come from self-reporting, not from investigations begun by the government. Further, FCPA matters are frequently resolved through unorthodox non-prosecution agreements and deferred-prosecution agreements. In turn, these agreements have sometimes required companies to employ "independent corporate monitors" to review the companies' anti-corruption efforts and report back to Justice Department.

To confuse matters further, as a result of this new "FCPA network," large companies are now subject to the foreign-bribery laws of literally dozens of countries all around the world - and many of those laws impose quite different requirements on the covered companies. Furthermore, the new Dodd-Frank law will encourage whistle-blowers to report suspected FCPA violations, which could result in further internal investigations, self-reporting, and expensive resolutions.

In short, the legal landscape is now very chaotic - and increasingly costly for U.S. businesses.

But, now that the global economy is covered by a network of foreign-bribery laws, there may be less need for a hyper-aggressive FCPA enforcement policy. That is, from a historical perspective, the FCPA's primary contribution may have been its role as the catalyst to the current global anti-corruption revolution, which has changed the structure of the world's laws and has dramatically altered how seriously business takes the problem of global corruption. But that role as a catalyst has already been served. Maybe it's time for to "throttle back" and recognize that the United States is now simply one of the many countries with a foreign-bribery law that warrants serious but proportionate enforcement.

Second, if the "host" country is ready, willing, and able to do so, why not let that country investigate and prosecute under its domestic bribery laws? The Justice Department has emphasized that one way to address the global corruption problem is to build the prosecutorial and law enforcement capacities of foreign countries. Whether motivated by the hope of leniency or a formal amnesty program, U.S. businesses will continue to self-report possible violations, which will provide the department with a

stream of pre-packaged foreign-bribery cases that could, in appropriate circumstances, be handed off to the host countries to resolve.

This approach would have distinct advantages. First, it would permit the bribe-giver and the bribe-taker to be prosecuted in the same proceeding, under the same set of laws. That cannot occur in an FCPA-centric system because the FCPA covers only the bribe-giver, not the bribe-taker. Second, the "host country" clearly has the strongest interest in prosecution, in order to protect the integrity of their government, and to allow the country to "clean up its own shop." Third, having the "host" country manage the investigation would avoid the persistent problem of having an "outsider" country attempt to investigate a crime that occurred within a foreign country.

To be clear, whether such deference makes sense depends on the host country, its domestic bribery laws, resources, and willingness to pursue such bribery responsibly. Sadly, foreign bribery often occurs in countries whose commitment to the rule of law is not robust. But in light of the advantages, perhaps the Justice Department should be more willing to consider referring these self-reported crimes to the host countries, while letting the FCPA play a secondary or back-up role if the host country falters for some reason.

With a global anti-corruption network actually in place, maybe the time has come for Justice Department to use a little more carrot, and a little less stick.

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