

Critics Target Bribery Law

By JOE PALAZZOLO

For corporate America's top lobbyists, trying to curb a powerful antibribery law known as the Foreign Corrupt Practices Act has risen to the top of the agenda, sparking a widespread debate about how the legislation is enforced.

In the past five years, a remarkable run of enforcement of **the U.S. law has led to about \$4 billion in penalties against corporations.** The law prohibits companies from paying bribes to foreign officials to win business. A violation can result in criminal prosecution.



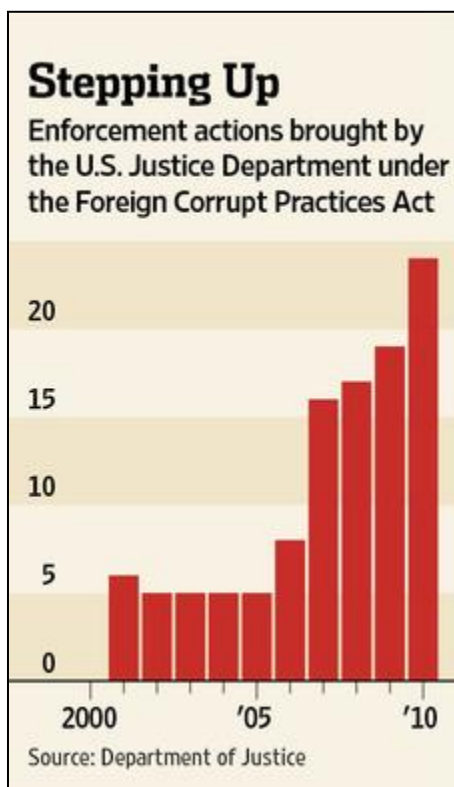
Lanny Breuer is head of the Justice Department's Criminal Division, which oversees cases involving the Foreign Corrupt Practices Act.

Congress passed the law in 1977, **after the Watergate scandal** revealed the use of corporate slush funds to bribe foreign government officials, but it was sporadically enforced until recent years. Justice Department officials have attributed the recent enforcement push, in part, to the 2002 Sarbanes-Oxley Act, which requires corporate officers to certify the accuracy of their financial statements. That has led to more companies discovering potentially illicit payments on their books and disclosing them to the Securities and Exchange Commission and the Justice Department, they say.

High-profile settlements involving both U.S. and foreign companies, including Siemens AG, Halliburton Co. and Johnson & Johnson, have burnished the law's reputation as a major force internationally. In the Siemens case, the department accused the company of funneling more than \$50 million in bribes through consultants and agents to officials in Argentina, Bangladesh, Venezuela and elsewhere in return for contracts. Siemens, in 2008,

admitted wrongdoing and agreed to pay record penalties of \$1.6 billion to U.S. and German authorities to end the probes.

But as the FCPA's stature has grown, so has resistance from companies, which have thus far responded by paying for multimillion-dollar compliance programs that help them identify bribery risk in their dealings abroad.



Now, amending the law is a priority for the U.S. Chamber of Commerce, the largest lobbying organization in Washington. In the first three quarters of this year, the chamber paid outside lobbyists—including former Attorney General Michael Mukasey, now a partner at Debevoise & Plimpton LLP—a total of more than \$700,000 to press for changes to the FCPA and other laws, according to House lobbying records. Debevoise & Plimpton has received \$140,000 for Mr. Mukasey's work, according to lobbying records.

Though they can't estimate to what extent, the chamber and defense lawyers say they have anecdotal evidence that the law has had a chilling effect, stunting U.S. business interests abroad as companies shun deals for fear of triggering FCPA probes.

U.S. authorities have said their goal is not only to prosecute FCPA violations but also to promote a level playing field in business transactions by eliminating corruption from the

equation. But the chamber and lawyers who support amending the FCPA say there is still substantial confusion over what is legal and what isn't.

The law bars companies from paying bribes to foreign officials, but the chamber wants clarity on whether employees of companies with state ownership or control behind them qualify as such. The Justice Department has taken an expansive view, arguing, for instance, that virtually every employee a pharmaceutical company encounters in a state-run health-care system could be considered a foreign official.

U.S. senators Amy Klobuchar (D., Minn.) and Chris Coons (D., Del.) have said they plan to introduce legislation that would clarify parts of the law. "We certainly don't want to remove FCPA's teeth, but if we can make the road map clearer for American companies, we should try," said Ian Koski, a spokesman for Sen. Coons. Rep. Bobby Scott (D., Va.), who sits on the House Judiciary Committee, said he and other committee members are also looking at the law. "If you're going to have these kinds of penalties, companies ought to know clearly what the rules are," he said.

The Justice Department and anticorruption advocates say that any changes to the FCPA, the first law of its kind, would send the wrong message to foreign governments that recently passed or updated bans on foreign bribery, including China, Russia and the U.K. "This is precisely the wrong moment in history to weaken the FCPA," Lanny Breuer, head of the Justice Department's Criminal Division, which oversees FCPA cases, said at a recent legal conference in Washington. "There is no argument for becoming more permissive when it comes to corruption."

Yet enforcement authorities also appear to be heeding companies' complaints. The Justice Department is planning to introduce "detailed new guidance" on the law sometime next year, Mr. Breuer said. A Justice Department spokeswoman declined to comment.

Lawyers don't expect any adjustments to damp the U.S. government's efforts. But even if the department simply clarifies definitions, companies would have leverage they didn't have before, they say.

Because companies, with few exceptions, settle the cases out of court to guard against the possibility of crippling criminal convictions, defense lawyers try to interpret the government's legal positions by examining settlement documents, but they are difficult to apply broadly, according to Claudius Sokenu, a partner at Arnold & Porter LLP.

Harold Kim, senior vice president at the U.S. Chamber of Commerce, insisted that a change in the law is "the best solution."

One major change proposed by the chamber would allow companies to avoid liability if they can prove they had robust measures in place to prevent bribes, such as training programs. Another proposal under consideration by lawmakers would give companies a reduction in penalty—as much as 40%—if they self-report a possible violation. Companies

could receive additional discounts for informing on other companies involved in corrupt practices.

Robert Tarun of Baker & McKenzie LLP, who authored the discount proposal, said the government needs to "quantify credit for real cooperation so companies and boards can make informed decisions."

Justice Department officials say companies are already given credit for cooperation.

George Terwilliger, a former deputy attorney general and now a partner at White & Case LLP, said companies should have a grace period to investigate new acquisitions and disclose what they find without fear of prosecution.

Heather Lowe, director of government affairs at the anticorruption group Global Financial Integrity, which opposes any changes to the FCPA, said companies should be doing those types of investigations before making acquisitions, adding that if wrongdoing is uncovered, the parties can adjust the purchase price accordingly. "It's part of the deal," she said.

The Wall Street Journal reported last week that Pfizer Inc. is expected to pay more than \$60 million by the end of the year to resolve U.S. government probes into whether the drug maker and Wyeth, which it acquired in 2009, paid bribes to win business overseas. The company has declined to comment.