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U.S. Tools to Bankrupt Kleptocracy: The Foreign Corrupt Practices Act (FCPA)

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The Foreign Corrupt Practices Act (FCPA) was passed in 1977 and prohibits U.S. persons from bribing foreign officials. The law was developed after an investigation by the U.S. Securities and Exchange Commission found that in order to secure business opportunities overseas, over 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign officials. The same investigation found that these firms were using "secret slush funds" and falsifying corporate records to disguise illicit payments to foreign officials (as well as illegal campaign contributions to U.S. politicians).

The FCPA in action

Currently, there are two main components of the FCPA:

1. A compliance requirement that places certain record-keeping and accounting requirements on U.S. firms doing business overseas.

2. The criminalization of bribing foreign officials in order to gain a competitive advantage.

The key U.S. government agencies and law enforcement institutions responsible for administering the FCPA are the Justice Department (DOJ) and the Securities and Exchange Commission (SEC).

The most important evolution in the interpretation and enforcement of the FCPA in recent years is that it can be applied to non-U.S. persons who bribe officials outside the United States. For such cases, investigators must demonstrate that at some point during the planning or execution of a bribery scheme the perpetrators either crossed into U.S. territory or used the U.S. financial system to process an illegal transaction. For example, several companies based outside the United States that were implicated in the now notorious Bonny Island bribery scheme—a decade-long arrangement to bribe government officials in petroleum-rich Nigeria— paid a total of $1.4 billion in criminal and civil penalties. There has also been an evolution in the interpretation of what constitutes a bribe, as major U.S. companies have come under scrutiny for hiring the children of foreign officials.

Tackling violent kleptocracy with the FCPA

The FCPA should be a foundational element of the U.S. framework for countering kleptocracy overseas. Moving forward, the FBI and SEC should be directed to thoroughly examine credible accusations of bribery of government officials in East and Central Africa wherever there may be

a U.S. nexus—even if the case does not directly involve U.S. companies. For transactions in U.S. dollars, the United States may have jurisdiction over the case if there is a U.S. nexus. Should this be the case, the FBI and the DOJ should investigate to determine if illicit payments were made using the U.S. financial system or within U.S. jurisdiction. Furthermore, any such investigation should target not only the bribe payers but also the recipients.

Additionally, FCPA convictions can and should trigger corresponding anti-money laundering probes into the movement of the funds and should result in the recipient of the bribe being placed under sanctions. This means that if a U.S. company is found to have paid an illegal bribe to a government official in, say, South Sudan or the Democratic Republic of the Congo (DRC), the government official who received the bribe would automatically be placed under U.S. sanctions and prohibited from traveling to the United States or engaging in transactions with U.S. businesses (including foreign companies listed on U.S. stock exchanges) or financial institutions. Additionally, a key objective of such prosecutions should be to obtain evidence (via plea agreements) about the recipients of bribes as well as the institutions and middlemen involved in receiving and processing illicit payments.

Preserving and strengthening the FCPA

Since the FCPA came into force, a small but vocal set of powerful critics from within the business community have called for it to be rolled back. In recent years, opponents have claimed that the U.S. government is overly aggressive in its enforcement of the law. The government's definition of bribery, this line of reasoning goes, is too expansive. However, this argument is off base. U.S. law enforcement and regulatory institutions are merely keeping pace with increasingly innovative criminals who have come up with clever new ways of paying bribes.

One major shortcoming of the FCPA is that it does not criminalize all types of bribery, such as petty corruption. This is problematic, as petty corruption—such as the extortion of bribes by the recipients of facilitation payments—is inextricably linked to grand corruption. Bribes paid to venal bureaucrats only serves to preserve a problematic status quo and ultimately strengthen kleptocratic systems of government.

A second shortcoming is the FCPA's emphasis on the payers of bribes as opposed to the receivers of bribes. This has meant that, historically, government officials who extort and receive bribes from foreign businesses—especially officials operating in places where government and law enforcement agencies have been hijacked by a small ruling clique—rarely suffered consequences. Efforts to bridge this gap, however, are already underway.

The United States should further expand and strengthen the FCPA in order to address these challenges.

For more information, please read Enough's report Bankrupting Kleptocracy: Financial Tools to Counter Atrocities in Africa's Deadliest War Zones.