CLIENT ALERT

New U.S. Law Addresses "Demand Side" Bribery

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On December 22, 2023, President Joseph Biden signed into law the National Defense Authorization Act for Fiscal Year 2024, which contained, among many other provisions, the Foreign Extortion Prevention Act ("FEPA"), a law criminalizing the solicitation or acceptance of bribes by foreign government officials.[1] This new law complements the Foreign Corrupt Practices Act ("FCPA"), which already criminalizes the offering or payment of bribes to foreign government officials, but with the enactment of this new law, the Department of Justice (the "Department" or "DOJ") has a new enforcement tool to prosecute bribery. Although the new law is broader than the FCPA in some significant ways, criminalizing a greater swath of conduct, it remains to be seen what effect the new statute will have, if any, on the number of prosecutions and convictions given the existing tools the Department has to prosecute corruption.

I. Background

The FCPA, enacted in 1977, criminalizes offering or providing bribes to officials of foreign governments and public international organizations, as well as foreign political parties and their officials and candidates.[2] The reach of the FCPA is vast. It applies to (1) companies traded on U.S. stock exchanges, (2) companies incorporated in the U.S. and U.S. citizens anywhere in the world, and (3) anyone acting within the U.S. in furtherance of bribery of a foreign official. The Department and the Securities and Exchange Commission, which both enforce the FCPA, have interpreted foreign official to include

[1] National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2), *codified at* 18 U.S.C. § 201(f).
[2] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, *et seq.*

almost anyone working for a state-owned entity, including, for example, healthcare professionals at state-owned hospitals, employees of sovereign wealth funds, and even employees of U.S. subsidiaries of state-owned enterprises.

Notably, however, the FCPA only criminalizes the conduct of the bribe payor or offeror, not the foreign official who received or solicited the bribe.[3] FEPA addresses this gap.

II. Key FEPA Provisions

Interestingly, FEPA closes the FCPA’s demand side enforcement gap not by amending the FCPA, but instead by amending the domestic bribery statute (18 U.S.C. § 201) to include “foreign officials” among those who are prohibited from soliciting, demanding, or receiving bribes.[4]

FEPA makes it illegal for any:

(1) “foreign official or person selected to be a foreign official;

(2) to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly;

(3) anything of value personally or on behalf of any other person or nongovernmental entity;

(4) by making use of the mails or any means of instrumentality of interstate commerce;”

(5) from any issuer,[5] any domestic concern,[6] or “any person . . . while in the territory of the United States;”

(6) “in return for”

  (a) “being influenced in the performance of any official act,

  (b) being induced to do or omit to do any act in violation of the official duty of such foreign official or person, or

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[3] *United States v. Castle*, 925 F.2d 831, 834-35 (5th Cir. 1991).

[4] 18 U.S.C. § 201(f).

[5] FEPA defines the term “issuer” using the term’s meaning under Section 3(a) of the Securities Exchange Act of 1934, which, abbreviated, is generally “any person who issues or proposes to issue any security.” 15 U.S.C. § 78c(a).

[6] FEPA defines the term “domestic concern” using the term’s meaning under Section 104 of the FCPA, which defines the term as “any individual who is a citizen, national, or resident of the United States and . . . any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd-2(h)(1).

(c) conferring any improper advantage,

in connection with obtaining or retaining business for or with, or directing business to, any person."

Although some of FEPA's language and structure are similar or identical to the FCPA (*e.g.*, both FEPA and the FCPA define a bribe as "anything of value"), there are several key differences.

A. Expanded Definition of "Foreign Official"

As an initial matter, FEPA applies not only to foreign officials but also to individuals "selected to be a foreign official." This potentially could cover bribery of individuals chosen for a government position but not yet serving, or perhaps even individuals nominated for such a position. The FCPA applies to bribes paid to individuals currently in a government position.

FEPA also defines "foreign official" more broadly than the FCPA. Both statutes define the term to include any official or employee of a foreign government or department, agency, or instrumentality thereof, or any individual acting in an official capacity for such agencies or entities. However, FEPA expands liability to individuals acting in an "unofficial capacity for or on behalf of a government, department, agency, instrumentality or a public international organization."[7] What constitutes operating in an "unofficial capacity" is undefined, so it remains to be seen what factors the Department and courts will use in determining who meets that criteria. One possibility could be "advisors" who are not officially appointed but who wield a significant level of influence with a particular government department or agency.

FEPA also includes "any senior foreign political figure" in its definition of foreign official, and defines that term in reference to 31 CFR § 1010.605, which includes current and former senior government officials, senior officials in foreign political parties, and the "spouses, parents, siblings, children, and spouse's parents and siblings" of senior government and party officials.

Unlike FEPA, the FCPA does not apply to former government officials. Moreover, although U.S. enforcement authorities have settled FCPA matters with companies where the thing of value was provided to a relative of a foreign official,[8] courts have not yet determined if the FCPA in fact covers such conduct. FEPA explicitly allows the prosecution of family members of government officials who provide an "improper advantage" in exchange for a thing of value.

Lastly, FEPA does not allow the Department to prosecute foreign political parties for accepting or soliciting bribes. Individuals and companies can be prosecuted for offering/providing bribes to political parties under the FCPA.

7 18 U.S.C. § 201(a)(4)(D) (emphasis added).

8 *See, e.g.*, *In re Qualcomm Inc.*, Admin. Proceeding File No. 3-17145, at *9 (Mar. 1, 2016) (finding that Qualcomm's provision of full-time employment and internships to relatives of foreign officials in order to obtain or retain business violated the FCPA's anti-bribery provision).

B. FEPA Covers More Bribe Payors Than the FCPA

FEPA prohibits a foreign official from accepting or soliciting a bribe from "any issuer." This is broader than the FCPA, which applies only to issuers that have a "class of securities registered pursuant to section 78l of [Title 15]" or that are "required to file reports under section 78o(d) of [Title 15]." Because FEPA and the FCPA also apply to bribe payments made by U.S. companies (*i.e.*, domestic concerns), the main distinction is that FEPA criminalizes receipt of bribes from non-U.S. companies traded over-the-counter; such entities are largely outside the jurisdiction of the FCPA.

C. FEPA Covers More Bribe Recipients

FEPA not only allows the Department to prosecute foreign officials and their immediate relatives, it also punishes the acceptance of bribes personally and for the benefit of any other person or nongovernmental entity. This language appears directly aimed at specific FCPA settlements where companies have allegedly bribed foreign government officials by providing something of value to the official's family member, friend, or a charitable or other organization selected by the official.[9] Again, although U.S. enforcement authorities have settled FCPA matters with such fact patterns, courts have not yet determined if the FCPA in fact covers such conduct. FEPA would explicitly allow foreign officials to be prosecuted for such conduct.

D. "Official Act" Requirement

FEPA imposes liability when the recipient of the bribe, among other things, is "influenced in the performance of any official act" in exchange for "anything of value."[10] The use of the phrase "official act" is interesting, as the Supreme Court in *McDonnell v. United States* interpreted the phrase narrowly. Specifically, in that case the Supreme Court held that then-Virginia Governor Bob McDonnell's conduct—setting up a meeting, calling another public official, hosting an event—did not qualify as official acts.[11] This distinction is all the more notable in that courts have previously refused to read an "official act" requirement into the FCPA.[12]

However, the significance of this choice in drafting seems likely to be small in practice given that FEPA—like the FCPA—also imposes liability where the foreign official is conferring "any improper advantage." The breadth of that phrase—

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[9] *See, e.g.*, *In re Qualcomm Inc.*, Admin. Proceeding File No. 3-17145, at *9 (Mar. 1, 2016) (finding that Qualcomm's provision of full-time employment and internships to relatives of foreign officials in order to obtain or retain business violated the FCPA's anti-bribery provision); *SEC v. Eli Lilly Co.*, 1:12-cv-02045, Complaint ¶¶ 2, 7 (describing payments made by Eli Lilly's subsidiary in Poland to a small charitable foundation founded by the head of a regional health authority).

[10] 18 U.S.C. § 201(f)(1).

[11] *McDonnell v. United States*, 579 U.S. 550 (2016).

[12] *United States v. Ng Lap Seng*, 934 F.3d 110, 132–34 (2d Cir. 2019).

language that was specifically cited by the Second Circuit as not requiring an "official act"[13]—seems to eliminate the limitations imposed by *McDonnell*.

E. Steeper Penalties

FEPA's penalties are more severe than the FCPA's. Under the FCPA's anti-bribery provisions, an individual can be imprisoned up to five years.[14] FEPA provides for imprisonment of up to 15 years.

An individual or an entity can also be fined under the FCPA, $250,000 for individuals, $2 million for entities, or, under alternative sentencing provisions, both individuals and entities can be fined an amount of up to twice the gross pecuniary gain or loss from a violation. FEPA provides for fines of up to $250,000, or three times the monetary value of the bribe.

F. Criminal Enforcement Only

Although the FCPA can be enforced both criminally and civilly,[15] FEPA only allows for criminal prosecution. This difference aligns with FEPA's focus on enforcement against individual foreign officials, rather than the FCPA's focus on the offeror of the bribe, which often involves enforcement against companies as well as individuals.

III. The Impact of FEPA Remains to Be Seen

FEPA provides the Department with another tool to continue to aggressively pursue prosecutions relating to foreign bribery, and, in particular, its much touted focus on bringing enforcement actions against individuals for bribery offenses. Prosecution of bribe recipients has been an increasing focus of the DOJ and of international organizations, including the Organisation for Economic Co-operation and Development (the "OECD"), which in November 2021 issued a revised Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions that explicitly called for more enforcement and action on the "demand side" of bribery.[16]

Nevertheless, it is not yet clear whether FEPA will markedly change the number of prosecutions, who is prosecuted, or what penalties they receive. For years, the Department has successfully employed other statutes to police foreign bribery,

13 *Ng Lap Seng*, 934 F.3d at 134.

14 Individuals convicted of violating the FCPA accounting provisions face up to 20 years in prison.

15 For more information regarding the delineation between civil and criminal enforcement of the FCPA, *see* https://complianceconcourse.willkie.com/resources/anti-bribery-and-corruption-enforcement-us-enforcement-authorities/.

16 *See* Willkie Compliance Insight, OECD Issues First Update to Anti-Bribery Recommendation in Over a Decade (December 8, 2021), available here.

including the Travel Act[17] and money laundering statutes.[18] FEPA may provide the Department with a more straightforward approach towards prosecuting demand side bribery, and the potential for treble damages certainly arms the Department with a large stick. But it remains to be seen whether FEPA's passage will materially increase the number of bribery prosecutions or convictions, particularly given the existing statutes and that suspected or indicted foreign officials are unlikely to make themselves subject to the jurisdiction of the United States. Moreover, foreign governments may be reluctant to extradite government officials, even where treaties would allow for extradition. It remains to be seen how FEPA and the potentially competing concerns of international political comity, as well as the foreign policy implications of possible prosecutions, will be reconciled in actual cases.[19]

Rather than the prosecution of foreign government officials, a primary motive for FEPA seems to be the protection of U.S. businesses. Remarks from Congresspersons applauding the passage of FEPA demonstrate that legislators were motivated to enact the law in order to level the playing field for law-abiding U.S. companies. In particular, Senator Thom Tillis stated that FEPA "will help promote free enterprise and protect American businesses from corrupt foreign officials who try to extort them."[20]

IV. Conclusion

The passage of FEPA also serves as a reminder of the importance of companies maintaining robust, risk-focused compliance programs. Although FEPA is focused on criminalizing the solicitation of bribes by foreign government officials, the law is reflective of the U.S. government's continuing focus on the prosecution of foreign corruption.

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17 Superseding Indictment, *United States v. Jose Luis De Jongh-Atencio*, No. 4:20-cr-00305 (S.D. Tex. Dec. 16, 2020), available here.

18 *See, e.g.*, DOJ Press Release, Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company (Jan. 16, 2020), available here; DOJ Press Release, Former Minister of Government of Bolivia, Owner of Florida-Based Company, and Three Others Charges in Bribery and Money Laundering Scheme (May 26, 2021), available here.

19 One possible consequence of the enactment of FEPA is that within the context of FCPA enforcement actions, the Department may place greater emphasis on a company providing evidence of the wrongful conduct by the government official, in addition to requiring the company to produce evidence identifying culpable individuals within the company. A company's assistance in any FEPA prosecution could, therefore, affect the cooperation credit that company receives in resolving its own FCPA matter.

20 Senator Sheldon Whitehouse, "Bipartisan, Bicameral Foreign Extortion Prevention Act Signed into Law" (Dec. 26, 2023), available here.

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