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Bribery Bill Fills Gap In Foreign Corruption Enforcement

By **Ryan Rohlfsen, Jason Linder and Yana Grishkan** (December 21, 2023, 1:10 PM EST)


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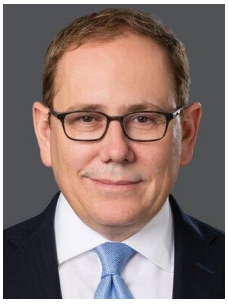
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On Dec. 14, Congress passed the Foreign Extortion Prevention Act to criminally prosecute foreign officials who seek or receive bribes from U.S. persons or businesses.

Part of the National Defense Authorization Act, the legislation is expected to be signed by President Joe Biden.

If enacted, FEPA will significantly expand the U.S. government's ability to prosecute foreign officials involved in bribery schemes. It will also likely increase multijurisdictional cooperation and coordination, as the U.S. will join countries such as the U.K., Germany and France, which maintain laws that criminalize the demand side of foreign bribery.

It could, however, create tension between the U.S. and other nations, depending upon the situation.

FEPA Fills Gap in Existing Foreign Bribery Framework

The Foreign Corrupt Practices Act criminalizes offering bribes to foreign officials, but it does not apply to foreign officials who accept or demand such bribes. Instead, the U.S. Department of Justice has historically charged foreign officials for related crimes, such as money laundering or tax evasion.

FEPA fills this gap by dramatically expanding U.S. enforcement authority to criminally prosecute foreign officials who accept or demand bribes from Americans or American companies.

FEPA amends the domestic statute criminalizing bribery of federal officials — Title 18 of the U.S. Code, Section 201 — to include a new subsection f titled "Prohibition of Demand for a Bribe."[1]

The amendment makes it unlawful for any foreign official to seek or accept anything of value from U.S. persons or certain U.S. companies in exchange for performing or omitting any official act or otherwise conferring an improper business advantage.

Notably, as FEPA amends only the criminal bribery statute, it does not confer jurisdiction on the U.S. Securities and Exchange Commission to investigate and bring civil enforcement actions against foreign

officials for seeking or accepting a bribe.

FEPA uses the same jurisdictional framework as the FCPA, criminalizing bribery while in the U.S. or of persons or companies with a sufficient nexus to the U.S. FEPA thus targets offenders:

- Whose conduct occurs within U.S. territory;
- Who make demands of companies that are issuers of U.S. securities; and
- Who make demands of those considered U.S. domestic concerns, i.e., U.S. citizens, nationals, corporations or other business entities.

Offenders under FEPA may face fines of up to $250,000 or three times the monetary equivalent of the thing of value received, imprisonment of up to 15 years, or both. By comparison, under the FCPA, individuals are subject to a fine of up to $250,000 or twice their gross pecuniary gain,[2] and imprisonment for up to five years.

In addition to criminalizing the demand side of foreign bribery, FEPA requires the DOJ to provide Congress with annual reports regarding its enforcement activities under the law, the need for resources or further legislation to ensure adequate enforcement, and the efforts of foreign governments to prosecute such cases.

Prospect of Increased Enforcement

Simply put, FEPA will make it easier for the DOJ to prosecute foreign officials involved in bribery schemes.

The DOJ will no longer have to rely on anti-money laundering or tax evasion statutes, which typically require the foreign official to take additional steps to avail themselves of U.S. jurisdiction, such as depositing illegal bribe proceeds in a U.S. bank account.

Instead, the DOJ will need to prove only that a foreign official demanded or sought anything of value in exchange for an official action or an improper business advantage.

While FEPA also criminalizes the receipt of bribes by foreign officials, a demand alone is sufficient to establish a criminal violation.

Further, the proof the DOJ must adduce under FEPA is, in at least one material respect, lower than under the FCPA. To convict an individual under the FCPA, the DOJ must prove that the individual acted willfully, i.e., with the knowledge that their conduct was unlawful.[3] In contrast, FEPA is silent as to mens rea, making it likely courts will only require the lower level of proof that a foreign official acting knowingly, rather than willfully.

In addition, FEPA's reach extends beyond the FCPA's definition of "foreign official" as "any official or employee of a foreign government or any department, agency, or instrumentality thereof ... or of a public international organization," or "any person acting in an official capacity" on behalf of such entities.

FEPA adds to this definition:

- "[A]ny senior foreign political figure," as defined in Title 31 of the Code of Federal Regulations, Section 1010.605, which includes elected and unelected foreign officials; certain politicians;[4] executives of government-owned commercial enterprises, and their family members, close associates, and businesses;[5] and

- "[A]ny person acting in an unofficial capacity for or on behalf of a [foreign] government," or any department, agency, or instrumentality thereof.

Roadblocks to Implementation

It remains to be seen whether and to what extent the DOJ will apply FEPA to investigate and prosecute foreign officials who otherwise would not have been charged under existing law, e.g., money laundering.

FEPA is consistent with the DOJ's stated "number one priority" of pursuing individuals,[6] as well as with the White House's published strategy for combating corruption, which prioritized the creation of improved tools for addressing the demand side of bribery.[7]

Any enforcement activity, however, will certainly face significant practical and political difficulties. Such difficulties are the primary reasons why the receipt of a bribe was specifically excluded from the scope of the FCPA's prohibition of foreign bribery when Congress enacted it in 1977 and amended it in 1988 and 1998.

For example, many FEPA prosecutions will not be able to reach defendants who are foreign nationals in foreign countries with potentially no past or future connection to the U.S.

Further, many countries already criminalize receipt of a bribe by local officials, calling into question the utility of FEPA in connection with such jurisdictions.

Other countries — especially those with interests adverse to the U.S. — will refuse to extradite their citizens, although countries lacking a strong rule-of-law culture may be willing to hand over to the U.S. officials from a previous regime.

Moreover, the enforcement of FEPA particularly risks causing diplomatic tensions, considering the law's contemplated targets — government officials, politicians, executives of government-affiliated companies, as well as their families and associates.

Under these circumstances, multinational cooperation will be critical to effective enforcement. Both Congress and the DOJ recognize this. FEPA requires the DOJ to provide annual reports to Congress regarding U.S. diplomatic efforts to protect U.S. entities from foreign bribery, while the DOJ continues to emphasize the importance and the fruits of collaboration with their foreign counterparts.

For example, in announcing revisions to corporate criminal enforcement policies in 2022, Deputy Attorney General Lisa Monaco wrote that "[c]ooperation with foreign law enforcement partners — both in terms of evidence-sharing and capacity-building — has become a significant part of the Department's overall efforts to fight corporate crime."[8]

In fact, all corporate FCPA matters that resulted in a criminal resolution in 2022 were coordinated with parallel resolutions by domestic and foreign authorities.

Looking Ahead

The current political and legal landscape — including the Biden administration's continued emphasis on targeting foreign corruption, the DOJ's intimations that it will "zealously pursue corporate crime" as a matter of national security,[9] and the passage of FEPA in Congress — signals that companies should prepare for sustained and potentially new enforcement activity.

In particular, companies owned or operated, even in part, by foreign governments — even those companies that operate in commerce like purely private companies — need to analyze the risk they and their employees may face under FEPA.

That said, the anticipated enactment and enforcement of FEPA is not likely to change the best practices for preventing, monitoring and addressing corruption and bribery risks for most companies.

As such, companies generally should proceed with business as usual, while maintaining and strengthening their anti-bribery and anti-corruption compliance programs, including through:

- Regular anti-corruption trainings, particularly for employees and agents who interact with any person or entity who may fall under the expansive definition of "foreign official" under FEPA;
- Maintenance of an easily accessible whistleblower resource;
- Increased scrutiny and due diligence involving third-party transactions with foreign officials or their associates; and
- Effective monitoring and auditing of business and compliance activities.

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[1] The text of the bill is available here: https://www.congress.gov/bill/118th-congress/senate-bill/2347/text.

[2] See 18 U.S.C. § 3571(d).

[3] Bryan v. United States, 524 U.S. 184, 191-92 (1998).

[4] In one minor respect, FEPA's definition of "foreign official" is narrower than under the FCPA. Unlike the FCPA, FEPA does not apply to candidates for foreign political office.

[5] The term "senior foreign political figure" means (i) a current or former (A) senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not); (B) senior official of a major foreign political party; or (C) senior executive of a foreign government-owned commercial enterprise; (ii) a corporation, business, or other entity that has been formed by, or for the benefit of, any such individual; (iii) an immediate family member of any such individual; and (iv) a person who is widely and publicly known (or is actually known by the relevant covered financial institution) to be a close associate of such individual. 31 CFR § 1010.605.

[6] Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement, DOJ (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[7] United States Strategy on Countering Corruption Pursuant to the National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest 4 (June 3, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf; see also generally Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, National Security Study Memorandum-1.

[8] Deputy Attorney General Lisa Monaco, Memo re: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download.

[9] Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime, DOJ (March 2, 2023) https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national.