

CRIMINALIZING THE "QUO:" THE NEW FOREIGN EXTORTION PREVENTION ACT TARGETS THE DEMAND SIDE OF BRIBERY

Date: 26 December 2023

US Policy and Regulatory Alert

By: Michael Culhane Harper, Christopher L. Nasson, David C. Rybicki, Neil T. Smith

INTRODUCTION

On 22 December 2023, President Biden signed into law the National Defense Authorization Act (NDAA), the annual defense spending bill for 2024.¹ Buried hundreds of pages into the NDAA is the new Foreign Extortion Prevention Act (FEPA), a milestone law that makes it a crime for foreign officials to demand or accept bribes from issuers, domestic concerns, or otherwise from anyone while in the United States, in exchange for the performance of an official act to confer a business advantage.² For almost 50 years, the Foreign Corrupt Practices Act (FCPA) has criminalized the supply side of foreign bribery—i.e., the paying and offering of bribes to public officials in exchange for a business advantage. However, the demand side of the scheme—the foreign official demanding or receiving the bribe in a corrupt *quid pro quo* relationship—cannot be reached under the FCPA. The FEPA addresses this shortcoming by targeting the demand side of foreign bribery and provides prosecutors the tools to go after corrupt foreign officials for demanding or accepting bribes.

BACKGROUND

Since 1977, the FCPA has made it illegal to bribe or attempt to bribe officials of foreign governments, foreign political parties, or public international organizations with the intent to obtain or retain business.³ For almost five decades, the US Department of Justice (DOJ) has vigorously investigated and prosecuted the supply side of foreign bribery cases and brought hundreds of prosecutions against individuals and companies for offering or paying bribes to secure business advantages around the world.⁴ The FCPA's jurisdiction also reaches those intermediaries who help facilitate the bribe scheme.⁵ The FCPA does not cover the officials who are receiving, or sometimes themselves demanding, the corrupt payments.⁶ As such, US prosecutors historically have been unable to pursue foreign officials for soliciting or accepting bribes under the FCPA. Instead, prosecutors have creatively deployed other fraud-related statutes, like the money-laundering statutes, or the RICO statute, when seeking to hold corrupt officials accountable.⁷ The signing of the FEPA significantly alters the anticorruption landscape in the United States and brings the US anticorruption framework in line with foreign jurisdictions that have similar legislation in place to charge corrupt foreign officials.⁸

KEY PROVISIONS OF THE FEPA

While the FEPA finally criminalizes the foreign officials demanding bribes in exchange for official action, the new law is not found within the FCPA. Rather, the FEPA modifies the text of the domestic bribery statute, 18 U.S.C. §

201, to include foreign officials among those prohibited from soliciting, demanding, or receiving bribes. Despite this inclusion in Title 18, much of the FEPA's statutory construction tracks the FCPA, with a few critical differences.

Elements of the FEPA

The FEPA makes it illegal:

1. For any 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 for any other person or nongovernmental entity;
4. By making use of mails or any means or instrumentality of interstate commerce;
5. From:

Any person while in the territory of the United States;

Any issuer; or

Any domestic concern;⁹

6. In return for:

Being influenced in the performance of any official act;

Being induced to do or omit to do any act in violation of the official duty of such foreign official or person; or

Conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person.

“Foreign Official” Under the FEPA

Similar to the FCPA's definition of what constitutes a foreign official, the FEPA includes an expansive provision, with a few key distinctions. Like the FCPA, the FEPA's definition of a foreign official includes 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, unlike the FCPA, the FEPA also covers individuals acting in an “unofficial capacity” for such agencies or entities. Like the FCPA, the FEPA defines foreign official to also include any official or employee of a public international organization (e.g., the United Nations). Unlike the FCPA, while the FEPA does not apply to candidates for political office, the new law does apply to senior officials of foreign political parties.

“Official Act” Requirement

One key distinction between the FCPA and the FEPA arises from the domestic bribery statute's requirement that the public official must take an “official act” in exchange for the bribe. Notably, courts have declined to extend the “official act” requirement to the FCPA.¹⁰ The result of this incongruence creates a narrower standard for the domestic bribery law and a broader one for the FCPA. The decision to modify the domestic bribery statute with the FEPA means that in order to convict a foreign official for demanding or receiving a bribe, prosecutors will likely have to demonstrate evidence of an “official act,” something that has proven difficult historically.¹¹

More Significant Penalties Than the FCPA

Notably, the FEPA's penalties are significantly more severe than those under the FCPA. The statutory maximum penalty under the FCPA's anti-bribery provision is a fine of up to US\$250,000 and imprisonment for up to five years.¹² The FEPA provides a bigger hammer—imprisonment of up to 15 years and fines up to US\$250,000 or three times the monetary equivalent of the bribe.

KEY FEPA TAKEAWAYS

The US government continues to prioritize the fight against extraterritorial corruption and has worked diligently in recent years to deepen its relationships with foreign law enforcement partners.¹³ As previously noted, the DOJ has shown eagerness and creativity in holding foreign officials accountable for their role in bribery schemes by using the money-laundering statutes, economic sanctions, and other tools.¹⁴ It is worth mentioning in this context, however, that for reasons largely driven by consideration of diplomatic comity, the DOJ generally has declined to bring prosecutions against foreign officials while they remain in office.

With the addition of FEPA's demand-side provisions to their anticorruption arsenal, DOJ prosecutors are finally equipped with a straightforward tool to pursue corrupt officials and can be expected to intensify their efforts to target demand-side corruption worldwide. While it remains to be seen how the FEPA will be enforced and incorporated into the globalized foreign bribery enforcement and diplomatic frameworks, its passage is a further reminder to US companies and persons doing business around the world of the continuing emphasis that US authorities place on investigating and prosecuting foreign bribery cases.

The law's enactment also reemphasizes the need for companies to implement and maintain strong anticorruption compliance programs and effective training to ensure that companies are prepared for an environment of enhanced enforcement—programs and trainings that should now include FEPA compliance.

Moreover, companies considering self-disclosure or cooperation with the government in a foreign bribery matter should be mindful that in addition to providing the government with evidence related to company employees who participated in potential misconduct, prosecutors should be expected to intensify their focus on seeking evidence inculcating the corrupt officials as well.

We will continue to closely monitor the rollout of the FEPA and its impact on global business and compliance. Our White Collar Defense and Investigations group includes former high-level officials from DOJ's Criminal Division, FCPA Unit, the SEC's Division of Enforcement, and US Attorney's Offices throughout the country who have deep experience in all aspects of DOJ and SEC investigations and enforcement actions. For more information regarding this client alert, do not hesitate to contact the authors or other members of our White Collar Defense and Investigations group.

FOOTNOTES

¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-h-r-2670-national-defense-authorization-act-for-fiscal-year-2024/>

² FEPA can be found in Section 5101 of the NDAA, available here: <https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670enr.pdf>.

³ 15 U.S.C. § 78dd-1, *et seq.*

⁴ See all historical public FCPA enforcement actions published by the DOJ available here:

<https://www.justice.gov/criminal/criminal-fraud/enforcement-actions>

⁵ See, e.g., Superseding Indictment, *U.S. v. Glenn Oztemel, Gary Oztemel, and Eduardo Innecco*, No. 23-CR-26-KAD (D. Conn. February 14, 2013), ECF No. 1, available here: <https://www.justice.gov/criminal/criminal-fraud/enforcement-actions>; and Indictment, *U.S. v. Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares*, No. 210CR065-RJD (E.D.N.Y. February 4, 2021), ECF. 12, available here:

<https://www.justice.gov/media/1181426/dl?inline>.

⁶ Foreign officials may “not be charged with violating the FCPA itself, since [it] does not criminalize the receipt of a bribe by a foreign official.” *U.S. v. Blondek*, 741 F. Supp. 116, 117 (N.D. Tex. 1990), *aff’d*, *U.S. v. Castle*, 925 F.2d 831, 834-35 (5th Cir. 1991) (holding that “foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA.”).

⁷ See, e.g., Superseding Indictment, *U.S. v. Claudia Patricia Diaz and Adrian Jose Velasquez Figueroa*, No. 18-CR-80160-WPD (S.D. Fla. Dec. 15, 2020), ECF. No. 44, available here:

<https://www.justice.gov/media/1111191/dl?inline>.

⁸ U.K. Bribery Act 2010, <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

⁹ Similar to the FCPA, the FEPA's jurisdictional hooks attach when the foreign official seeks a bribe from one of three categories of persons: an issuer, a domestic concern, or any person while they are in the territory of the United States. The FEPA takes the definition of these three terms directly from how they are defined under the FCPA, as follows: (1) any person while in the territory of the United States; (2) an “issuer” as that term is defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)); or (3) a “domestic concern” is defined to include any individual who is a citizen, national, or resident of the United States, or any corporation or business entity which has its principal place of business in the United States, or which is organized under the laws of a state or territory of the United States.

¹⁰ *U.S. v. Ng Lap Seng*, No. 18-1725-CR, 2019 WL 3755676, at *1 (2d Cir. Aug. 9, 2019).

¹¹ See, e.g., *McDonnell v. U.S.*, 136 S. Ct. 2355 (2016).

¹² 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e).

¹³ See U.S. Dep't of Justice Press Release discussing the creation of the “International Corporate Anti-Bribery initiative, or ICAB”, *Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Address at the 40th International Conference on the Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE, (Nov. 29, 2023), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-address-40th>.

¹⁴ See, e.g. U.S. Dep't of Treasury Press Release, *Treasury Sanctions Over 40 Individuals and Entities Across Nine Countries Connected to Corruption and Human Rights Abuse*, U.S. DEP'T OF THE TREASURY, (Dec. 9, 2022), <https://home.treasury.gov/news/press-releases/jy1155>; U.S. Dep't of Treasury Press Release, *Treasury Targets Transnational Corruption*, U.S. DEP'T OF THE TREASURY, (Dec. 11, 2023), <https://home.treasury.gov/news/press-releases/jy1973>.

KEY CONTACTS



MICHAEL CULHANE HARPER
PARTNER

WASHINGTON DC
+1.202.778.4572
MICHAEL.HARPER@KLGATES.COM



CHRISTOPHER L. NASSON
PARTNER

BOSTON, NEW YORK
+1.617.261.3135
CHRISTOPHER.NASSON@KLGATES.COM



DAVID C. RYBICKI
PARTNER

WASHINGTON DC
+1.202.778.9370
DAVID.RYBICKI@KLGATES.COM



NEIL T. SMITH
PARTNER

BOSTON
+1.617.261.3180
NEIL.SMITH@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.