

New Landmark Foreign Extortion Prevention Act Targets the Demand Side of Foreign Bribery Schemes

by Nicole Engisch and Beth Forsythe

Introduction

On December 22, 2023, President Biden signed into law the landmark, bipartisan Foreign Extortion Prevention Act (the FEPA), as part of the National Defense Authorization Act. Closing a gap in U.S. anti-corruption laws, the FEPA targets the demand side of foreign bribery schemes by creating criminal liability for foreign officials who solicit or receive bribes from U.S. companies and individuals. Before the new law, U.S. anti-corruption laws solely targeted the supply side of foreign bribery schemes by focusing on U.S. companies and individuals who bribed foreign officials. Because the FEPA expressly establishes extraterritorial federal jurisdiction, the law “holds the potential to help root out foreign corruption at its source” and has been hailed as “arguably the most sweeping and consequential foreign bribery law in nearly half a century.”^[1]

Anti-Corruption Enforcement Landscape

The FEPA complements the long-standing Foreign Corrupt Practices Act (the FCPA). The FCPA, enacted in 1977, prohibits U.S. companies from making or offering payments, gifts, or “anything of value” to a “foreign official,” directly or indirectly, for any improper purpose, including influencing the official or to otherwise “secur[e] any improper advantage” in obtaining, retaining or directing business. For nearly half a century, the FCPA has been the preeminent anti-corruption tool used by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC).

After the FCPA was amended in 1998, the FCPA anti-bribery provisions also extended to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. The FCPA’s jurisdiction, however, has never extended to foreign officials who demand or receive the corrupt payments. Congress intentionally declined to extend the FCPA’s reach to foreign officials because of its concern for the “inherent jurisdictional,

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enforcement, and diplomatic difficulties” raised by the potential prosecution of non-citizens.[2] Given the jurisdictional limitations of the FCPA, DOJ relied on other federal statutes to pursue foreign officials engaged in corruption, such as mail and wire fraud (18 U.S.C. §§ 1341, 1343 and 1346),[3] the Travel Act (18 U.S.C. § 1952),[4] and money laundering.[5] Each of these laws had their own limitations.

At A Glance: Key Elements of the FEPA

The newly enacted FEPA is an amendment to the domestic bribery statute, 18 U.S.C. § 201, not the FCPA. Nonetheless, the FEPA largely mirrors the FCPA statutory structure, subject to a few key distinctions. The FEPA makes it “unlawful for any foreign official . . . to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value” from any person while in the territory of the U.S., from an issuer, or from a domestic concern in exchange 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.

The FEPA defines any “person” or “domestic concern,” similarly to how those terms are defined in the FCPA. The term “person” is very broad and includes any company that has its primary place of business within the United States. A “domestic concern” may be an individual, including lawful residents of the U.S., U.S. nationals or U.S. citizens. A “domestic concern” can include U.S.-based non-profits, non-governmental organizations (NGOs), and universities and other educational institutions.

The core FEPA provisions are similar to the core FCPA provisions: DOJ must prove that the bribe was provided in exchange for influencing official government action or otherwise conferred an improper business-related benefit. See 18 U.S.C. § 201(f)(1).

Key Differences Between the FEPA and the FCPA

The FEPA’s definition of a foreign official is both similar to and broader than the FCPA’s definition. For both laws, the term foreign official includes formal employees acting in an official capacity on behalf of a foreign government, department, or agency, as well as a public international organization. The FEPA’s definition of foreign official also includes informal employees “acting in an unofficial capacity” on behalf of a foreign government and related entities. Additionally, the FEPA definition also includes “any senior foreign political figure,” which would include a foreign official’s associates and immediate family members.[6] Besides the broader definition of foreign official, key distinctions between the FEPA and the FCPA include:

- **Extraterritorial Jurisdiction:** The FEPA expressly confers extraterritorial federal jurisdiction over foreign officials who have established a nexus to the United States. DOJ will have jurisdiction over foreign officials who are alleged to have violated the FEPA: (1) in the territory of the United States; (2) when making exchanges with any

U.S. citizens, residents, or entities residing in or organized under U.S. laws; or (3) when labeled an “issuer” under Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)).

- **“Official Act” Requirement:** Because the FEPA is included within the domestic bribery statute, 18 U.S.C. § 201, DOJ is required to demonstrate evidence of an “official act,” an element not required by the FCPA.^[7]
- **No Parallel Proceedings:** Unlike the FCPA, the FEPA does not confer parallel civil enforcement authority on the SEC.
- **Greater Penalties:** The FEPA penalties include up to 15 years in prison and a fine of up to \$250,000 or three times the value of the bribe, whichever is greater. The FCPA penalties only include up to five years in prison and a fine of up to \$250,000.
- **DOJ Reporting Requirements:** The FEPA requires the U.S. Attorney General to issue an annual report to Congress (posted on DOJ’s public website) detailing its enforcement efforts under the new law.

DOJ’s Challenges

While the FEPA has greatly enhanced DOJ’s international anti-bribery enforcement tools, DOJ will likely face political and jurisdictional challenges in investigating and prosecuting foreign officials. For example, foreign law enforcement authorities may refuse to assist DOJ, particularly in countries that lack Mutual Legal Assistance Treaties with the U.S., and foreign criminal targets may assert jurisdictional, immunity, and extradition defenses.

Application of DOJ’s Corporate Enforcement Policy to the FEPA

Pursuant to DOJ’s substantial revisions to the Criminal Division’s Corporate Enforcement Policy in 2023, U.S. companies are incentivized to voluntarily self-disclose all criminal misconduct if they wish to receive cooperation credit, including a potential declination of prosecution and fine reductions.^[8] Although the Corporate Enforcement Policy predates the FEPA, it applies to all corporate criminal misconduct and thus applies not only to violations of the FCPA but also the FEPA.

Key Take-Aways and Recommendations

DOJ’s Corporate Enforcement Policy provides that in evaluating a U.S. company’s cooperation, DOJ will consider whether the U.S. company had an effective compliance program that identified the misconduct that the company voluntarily self-disclosed to DOJ.^[9] Thus, U.S. companies may wish to reassess and update their anti-corruption compliance programs to ensure they include reference to the FEPA as well as the FCPA. Anti-corruption compliance programs should prohibit both the giving and receiving of any potentially corrupt payments and should also:

- Recommend responses for employees and agents who are asked for bribes, to include reference to the new FEPA provisions that criminalize acts by foreign officials who demand bribes.
- Require good record-keeping and documentation of any payments to foreign officials, including invoices, receipts, and written justifications.
- Prohibit payments that are conditioned on any specific action by a foreign official.
- Require due diligence regarding any third parties who may deal with foreign officials

on the company's behalf to ensure third party compliance with anti-corruption laws.

- Mandate periodic anti-bribery and anti-corruption training of employees, including foreign-based employees.
- Adopt clear and easily accessible internal mechanisms to report any activity that may be considered a bribe requested by a foreign official and to properly investigate all reports.
- Implement ongoing monitoring and auditing of anti-corruption compliance programs.

A U.S. company that learns of an employee or agent who appears to have made or offered a bribe to a foreign official should consult with counsel to determine how to respond, including whether to voluntarily self-disclose and cooperate with DOJ for potential cooperation credit.^[10]

^[1] Congress Passes Landmark Law to Criminally Prosecute Corrupt Foreign Leaders, Transparency Int'l, Dec. 14, 2023.

^[2] *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (citing the FCPA's legislative history).

^[3] The mail and wire fraud statutes prohibit the use of mail and interstate wire communications to execute a "scheme or artifice to defraud" or to deprive another of money or property, including the intangible right of "honest services."

^[4] The Travel Act prohibits travel or use of the mails in interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity, including violations of the FCPA.

^[5] DOJ's prior efforts to hold foreign actors accountable under a conspiracy or complicity theory have failed. See e.g., *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) (when Congress demonstrates an affirmative legislative policy not to punish some type of participant in a criminal transaction, using the conspiracy statute to broaden the scope of liability subverts the carefully defined statutory purpose).

^[6] See 31 C.F.R. § 1010.605(p).

^[7] Under 18 U.S.C. § 201(a)(3), the term "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

^[8] Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy. The policy provides that a company will not qualify for a presumption of a declination if aggravating factors are present, although the company may still obtain a declination ultimately if the company immediately and voluntarily self-disclosed misconduct, had an effective compliance program, and provided extraordinary cooperation and undertook

extraordinary remediation.

[9] See USAM 9-28.300 (“the existence and effectiveness of the corporation’s pre-existing compliance program” is a factor DOJ considers when determining whether to charge a corporation with a crime). In March 2023, DOJ updated its Evaluation of Corporate Compliance Programs.

[10] For more information on DOJ’s 2023 policy announcements, see these earlier e-updates from Dorsey & Whitney: DOJ Seeks to Reward Due Diligence and Timely Self-Disclosures in Mergers & Acquisitions Through New Safe Harbor Policy; DOJ Announces First-Ever Pilot Program on Compensation Incentives and Clawbacks; Revisions to Corporate Guidance Regarding Electronic Communications, and Resource Commitments for Corporate Compliance with Sanctions and Export Control Laws and DOJ Announces Additional Incentives for Corporate Cooperation in Criminal Enforcement.