

FEPA: The latest hammer in the DOJ's anti-bribery toolbelt

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On December 22, 2023, President Biden completed the proverbial “sandwich” against international bribery schemes by signing the groundbreaking Foreign Extortion Prevention Act (“FEPA”) into law. FEPA represents the other side of the well-established Foreign Corrupt Practices Act (“FCPA”) coin in that it targets law enforcement efforts against corrupt foreign officials who demand or accept bribes in exchange for the performance of an official act to confer a business advantage.^[1] FEPA marks the first legislation in U.S. history that applies to the demand side of bribery - corrupt foreign officials who request, receive, or agree to receive a bribe while in the U.S. territory in connection with obtaining or retaining business.^[2]

Since the 1977 enactment of FCPA, federal prosecutors were empowered to prosecute only the supply side of foreign bribery - U.S. persons or entities who paid or offered bribes to foreign officials in exchange for a business advantage. The advantage could include such things as preferential treatment in licensing applications, expedited response to petitions or foreign legislation enactment, or preferential treatment in contract selection. Under FCPA, bribes were not only monetary but could also include excessive entertainment or reimbursement of travel expenses. Although the enforcement of FCPA was geared at reducing the incentives for quid-pro-quo treatment, it often left one party to suffer the consequences for the two-sided transaction. As a work-around to enforce against the receiving side of the bribe, prosecutors applied other laws, including money laundering and wire fraud statutes, against foreign officials.^[3]

By passing FEPA, the United States remains at the forefront of anti-corruption enforcement worldwide. FEPA aims to deter foreign officials from placing added pressure on U.S. entities seeking to expand or remain in foreign territories. FEPA also expands the definition of “foreign official” beyond the FCPA practice. Under FEPA, a foreign official includes formal and informal employees or agents of foreign officials, including those working in an “unofficial capacity.”^[4] The broad definition includes ambassadors, embassy staff, advisors to ministries, government agencies or officials, members of government committees or panels, healthcare professionals at government-owned or controlled hospitals, employees of public international organizations such as World Bank, and members of a royal family.^[5] Further, FEPA provides incentives for companies to disclose to the DOJ when a foreign official requests or demands a bribe.

Lastly, by amending Section 201 (the domestic bribery statute) rather than changing the language in FCPA, the FEPA incorporates 201 caselaw - making offenses subject to extraterritorial federal jurisdiction.^[6] This is important because it extends federal authority over not only demands that occur in U.S. territory, but adds jurisdiction over foreign officials who violate FEPA 1) when making exchanges with any U.S. citizen, resident, or entity residing in or organized under U.S. laws; or 2)

when making demands of U.S. companies that are issuers of U.S. securities under Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(c)(a)).^[7]

The penalties for violating FEPA are also more callous than FCPA. Under FEPA, violators face fines up to \$250,000 or three times the bribe's monetary value, imprisonment of up to 15 years, or both. FCPA violators face fines up to \$250,000 and up to five years imprisonment.

Seeking to keep Congress apprised of its impact and ensure legislative intent, FEPA also requires the U.S. Attorney General to submit an annual report including:

1. Demands by foreign officials for bribes from U.S. entities and the efforts of foreign governments to prosecute such cases;
2. S. diplomatic efforts to protect U.S. entities from foreign bribery, and the effectiveness of those efforts in protecting such entities;
3. Major actions taken under FEPA in the previous year, including enforcement actions taken and then penalties imposed;
4. The effectiveness of the DOJ in enforcing the Act; and
5. The resources or any legislative actions the DOJ may need to ensure adequate enforcement of FEPA.^[8]

The role of an “official act” in FEPA enforcement

Prior to the FEPA amendment to the domestic bribery statute, the U.S. Supreme Court has held that in order to prove a violation of the statute, the government must provide evidence that the bribed official undertook an official act in exchange for the corrupt payment.^[9] This requirement is not a part of FCPA. Although difficult to prove historically, prosecutors seeking to enforce FEPA will likely have to provide such evidence to secure a conviction.

Will violators be charged under both FCPA and FEPA?

The FCPA and FEPA will likely be enforced together, though independent prosecutions are possible.^[10] The DOJ Justice Manual requires that FCPA violations are charged only by the Criminal Division's Fraud Section due to concerns about “complex enforcement problems abroad” and difficulty interviewing witnesses in foreign countries.^[11] Those concerns remain in FEPA prosecutions. Therefore, it is likely that the DOJ will build in additional safeguards to ensure that overseas evidence is strategically gathered and protected.

How does FEPA affect U.S. companies doing business overseas?

The FEPA self-disclosure requirement will likely have the greatest impact on U.S. companies because, although incentivized, it provides an opportunity for the DOJ to investigate companies who are not only suspected of paying bribes but also those that are suspected of receiving bribes from foreign officials. The underlying level of cooperation from those companies is a matter of first impression and is not clearly defined in FEPA. Companies should be cautious that in addition to

disclosing evidence about foreign officials who demanded bribes, prosecutors may also request evidence that incriminates those officials before giving credits for meaningful cooperation.^[12]

Future considerations for FEPA enforcement

Should a U.S. company face the idea of FEPA enforcement or cooperation, there are several risks keep in mind:

- Is it appropriate to self-disclose to the DOJ?
- Does the company possess evidence of an official act in furtherance of the bribe?
- Will the company itself face a FCPA investigation following the disclosure of a FEPA incident?
- Will foreign officials prosecuted under FEPA cause increased scrutiny of contracts between U.S. and foreign entities?

How can I prepare my business for FEPA enforcement?

U.S. companies should perform a thorough review of anti-corruption policies and procedures. Compliance officers should analyze current anti-bribery policies to ensure that protections are in place in the event of a foreign bribery demand and train all employees who engage in foreign commercial communications on the company's anti-corruption controls and reporting procedures. It is vital for all employees who may receive a foreign bribery demand to understand the requirements under FEPA and how the company requires them to act in that circumstance.

Our White Collar, Government Investigations & Regulatory Compliance group is here to help at any stage of the process. Whether you're facing a disclosure, an investigation or an enforcement action, our experienced team can help navigate whatever challenges you may face.

For additional information, please reach out to a member of the team:

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[1] FEPA can be found in Section 5101 of the National Defense Authorization Act, available here: <https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670enr.pdf>.

[2] *Id.*

[3] 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").

[4] 18 U.S.C. § 201.

[5] Foreign Corrupt Practices Act - FAQs, Princeton University Office of General Counsel. https://ogc.princeton.edu/sites/g/files/toruqf2461/files/media/508_fcpa_faqs.pdf

(last accessed Jan. 22, 2024).

[6] The Foreign Extortion Prevent Act (FEPA) signed into law: What it means for companies worldwide. <https://www.jdsupra.com/legalnews/the-foreign-extortion-prevention-act-2075805/>.

[7] *Id.*

[8] 18 U.S.C. § 201(f).

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

[10] The Foreign Extortion Prevent Act (FEPA) signed into law: What it means for companies worldwide. <https://www.jdsupra.com/legalnews/the-foreign-extortion-prevention-act-2075805/>.

[11] See Justice Manual § 9-47.110. See also [4 Questions On Groundbreaking New Foreign Bribery Law - Law360](#) (last accessed Jan. 22, 2024).

[12] *Id.*