Blogs
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U.S. Congress Passes FEPA To Address the “Demand-Side” of Bribery

On December 14, 2023, the U.S. Congress passed the Foreign Extortion Prevention Act ("FEPA"), one of the most important expansions of anti-corruption law in recent years and a key to expanding "demand-side" corruption enforcement.

FEPA makes it unlawful for foreign officials to *demand* or *accept* bribes from U.S. persons or entities or from anyone if the foreign official is in the United States. FEPA operates in concert with its "supply-side" counterpart, the Foreign Corrupt Practices Act ("FCPA"), which prohibits *paying* bribes to foreign officials to assist in obtaining or retaining business.

It is highly likely that President Biden will soon sign FEPA into law, as the Biden administration has committed to working with "allies and partners on enacting legislation criminalizing the demand side of bribery, and enforcing new and existing laws" as part of its effort to make fighting corruption, including enhancing demand-side accountability, a priority.

FEPA addresses a longstanding widespread criticism of the FCPA, namely, that the FCPA heavily penalizes U.S. companies while largely giving a pass to those foreign officials who *solicit* bribes. There have been sporadic attempts to prosecute foreign officials involved in FCPA violations under money laundering statutes, but those efforts have had mixed results, and are largely dependent on the unique conduct and U.S. touchpoints at issue. In addition, under the Global Magnitsky Act, the U.S. has had authority since 2017 to sanction corrupt government officials and essentially freeze all of their assets within U.S. jurisdiction, but the sanctions process can be lengthy and does not include penalties beyond restricting access to U.S. markets. Accordingly, demand for a statute squarely addressing demand-side corruption has been percolating in the anti-corruption legal community for quite some time, and FEPA goes a long way towards addressing those complaints.

Specific Provisions

FEPA amends 18 U.S.C. § 201, the domestic bribery statute, by adding key definitions and a subsection titled "Prohibition Of Demand For A Bribe." These amendments make it unlawful for a "**Foreign Official**" to directly or indirectly demand, seek, receive, or accept anything of value, either personally or on behalf of another, from certain individuals and entities satisfying the **U.S. Nexus**. Finally, like the FCPA, enforcement under the FEPA also requires a showing of a **quid pro quo**. Each of these requirements are discussed below.

"Foreign Official": FEPA defines a "foreign official" broadly to include:

1. Any official or employee of a foreign government or any department, agency, or instrumentality thereof; or any senior foreign political figure (meaning any current or former senior official in a foreign government, political party, or government owned enterprise, an entity formed by, or for the benefit, of such an individual, an immediate family member of such an individual, or a person widely known to be a close associate of such an individual);
2. Any official or employee of a public international organization; or
3. Any person acting in *an official or unofficial* capacity for or on behalf of a foreign government or public international organization.

While this definition does not specifically include political candidates (as the FCPA does), this omission is likely a distinction without a difference due to the general breadth of the FEPA's definition of "any senior foreign political figure."

U.S. Nexus: Similar to the FCPA's nexus requirement, the bribe must be demanded, sought, received, or accepted from (1) "domestic concerns" (i.e., U.S. citizens or residents, as well as entities with a principal place of business in the U.S. or that are organized under U.S. laws), (2) "issuers" (as defined in the Securities Exchange Act of 1934), or (3) from *any person* if the foreign official is within U.S. territory.

Quid Pro Quo: FEPA, like the FCPA, requires that the bribe be demanded, sought, received, or accepted with expectation of a quid pro quo by the foreign official. More specifically, to constitute a violation of FEPA, the bribe must be demanded, sought, received, or accepted in exchange for the foreign official (1) being influenced in the performance of an official act, (2) being induced to do or omit to do any act in violation of the official duty of such foreign official or person, or (3) conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person.

Penalties: Penalties for violation of FEPA include (1) a fine of not more than $250,000 or 3 times the monetary equivalent of the thing of value, and/or (2) imprisonment of up to 15 years.

What Companies Should Do

FEPA focuses on foreign officials and government-owned/-controlled entities and instrumentalities rather than business entities and private individuals, which were, and remain, subject to enforcement under the FCPA's anti-bribery provisions. But companies should still track FEPA developments as its contours are fleshed out through enforcement actions in the coming years. The jurisdictional aspect of the law will be of particular interest, as FEPA represents yet another step towards more aggressive extraterritorial enforcement against foreign governmental actors (which, in recent years, has primarily been done via money-laundering laws and the Travel Act).

Companies should also ensure that their anti-corruption training and internal compliance programs are updated to address FEPA, as being approached by foreign officials or entities to pay bribes could now make recipients of those requests key witnesses and/or custodians of critical evidence in the prosecution of a federal crime against the foreign official.

Authors

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