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Client Alert

Special Matters and Government Investigations

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Foreign Extortion Prevention Act (FEPA)

How the New Law Creates Legal Risks and Opportunities for International Businesses

On December 22, 2023, President Biden signed into law the 2024 National Defense Authorization Act (NDAA), which will give the U.S. Department of Justice (DOJ) new tools to prosecute foreign bribery. The Foreign Extortion Prevention Act (FEPA) will amend the domestic bribery statute (18 U.S.C. § 201) to make it a criminal offense for foreign government officials to solicit or receive bribes from any person in the United States, any issuer, or any domestic concern.[1] This client alert describes the new law and assesses its likely effects on foreign affairs and anti-bribery and anti-corruption (ABAC) investigations.

HOW FEPA GOES BEYOND THE FCPA

While the Foreign Corrupt Practices Act (FCPA) focuses on the "supply side" of bribery, meaning those who *offer or pay* bribes, FEPA instead focuses on the "demand side" of bribery by subjecting the recipients of bribes, the payment of which would likely violate the FCPA, to prosecution under 18 U.S.C. § 201. The demand side has been a focus of DOJ policy statements and enforcement efforts. Enforcement, however, generally has been through other laws, like money laundering, wire fraud, and the Travel Act. In parallel to recent DOJ initiatives, the Organization of Economic Cooperation and Development recently called for member states to amend their criminal statutes to prohibit soliciting and obtaining bribes by foreign officials. By enacting FEPA, the United States joins countries like the United Kingdom, Switzerland, and France in making such revisions to its laws.

FEPA will allow the United States to prosecute foreign officials for demanding or accepting bribes. The law expressly states that it does not encompass conduct that would violate the FCPA "whether pursuant to a

theory of direct liability, conspiracy, complicity, or otherwise," which sets FEPA apart from the FCPA. Presumably, this expressed distinction between the FCPA and FEPA is intended to keep defendants from applying defenses to FEPA that have been used successfully in defense of FCPA charges and makes clear that this statute is distinct from the FCPA.

FEPA makes it "unlawful for any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept," either directly or indirectly, "anything of value personally or for any other person or nongovernmental entity" in return for:

- Being influenced in the performance of an official act;
- Being induced to do or omit to do any act in violation of an official duty; or
- Conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person.

FEPA defines the term "foreign official" as:

- Any official or employee of a foreign government or any department, agency, or instrumentality thereof;
- Any senior foreign political figure;
- Any official or employee of a public international organization; or
- Any person acting, whether in an official or unofficial capacity, for or on behalf of a government, department, agency, instrumentality, or a public international organization.

Notably, FEPA's definition of "foreign official" goes beyond the FCPA's by referring to individuals who act in unofficial capacities as well as official capacities.[2] Further, the "senior political figure" category incorporates language from the federal anti-money laundering regulations.

According to the offense defined by FEPA, foreign officials violate the law when the other elements are satisfied:

- While the foreign official is in the territory of the United States;
- When something is corruptly offered or given by an issuer, as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)); and
- When something is corruptly offered or given by a domestic concern, as defined in section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. § 78dd-2), which means generally U.S. citizens, nationals, or residents and U.S. based or created business organizations.

These requirements incorporate parts of the FCPA, but FEPA is a criminal statute that does not confer parallel civil enforcement authority on the U.S. Securities and Exchange Commission, like the FCPA does, to bring civil enforcement actions against foreign officials.

The law states that the new offense defined by FEPA is "subject to extraterritorial Federal jurisdiction," expressly rebutting the legal presumption against extraterritorial application of federal law that has stymied some corruption prosecutions.[3]

Anyone found guilty of violating FEPA faces a maximum penalty of fifteen years in prison and a fine of up to $250,000 or three times the amount of the bribe's monetary value.

FEPA requires the U.S. Attorney General to submit an annual report to various congressional committees summarizing: (1) "demands by foreign officials for bribes from entities domiciled or incorporated in the United States, and the efforts of foreign governments to prosecute such cases"; (2) "U.S. diplomatic efforts to protect entities domiciled or incorporated in the United States from foreign bribery, and the effectiveness of those efforts"; (3) major actions taken by the DOJ under the new law; and (4) resources or legislative action needed by the DOJ to ensure adequate enforcement. Such reports will be publicly available on the DOJ's website.

FEPA was first introduced in Congress in 2019, with strong bipartisan support, largely as a result of a decision by the Court of Appeals for the Second Circuit holding that conspiracy and complicity charges under the FCPA could not be used to prosecute foreign nationals who did not commit a crime in U.S. territory.[4] More recently, the Biden Administration included the prosecution of "demand side" bribery in its 2021 Strategy on Countering Corruption.[5]

FEPA & FOREIGN AFFAIRS

As recognized in the law's annual reporting requirements, prosecutions under FEPA are likely to affect U.S. foreign affairs. Congress has expanded U.S. criminal jurisdiction steadily since the 1970s, and decisions regarding the charging of foreign officials under FEPA will require conversations and negotiation between the DOJ, the White House, the State Department, and the U.S. intelligence community, as well as members of Congress, who often express their interest in the conduct of U.S. foreign relations. Diplomatic and intelligence implications of charging decisions could also lead to retaliation and asymmetrical responses by foreign nation-states.[6] The larger the foreign relations and intelligence implications of charging a foreign official, the greater the implications for U.S. government policy, and the more likely there will be opportunities for advocacy and negotiation with the DOJ on behalf of targeted clients.

FEPA & ABAC INVESTIGATION CONSIDERATIONS

FEPA will likely affect the way the DOJ investigates allegations of corruption and bribery, as well as how in-house and outside counsel conduct internal investigations into those matters. The DOJ recently revised its corporate enforcement policy again to emphasize credit for self-reporting, cooperation, and remediation by companies.[7] Thus, companies may be able to avoid FCPA liability or earn cooperation credit from the DOJ in a negotiated resolution by providing evidence to the DOJ of foreign officials demanding or accepting bribes. The existence of FEPA now may give companies an additional incentive, under the right circumstances, to self-disclose misconduct by foreign officials where such evidence is available; for example, when there is risk of the DOJ potentially obtaining information from the foreign official as part of a cooperation deal, or such information is not available but would be of high value in aiding a government investigation.

CONCLUSION

Experienced counsel will be essential to navigating the strategic issues raised by this new law, particularly in terms of the diplomatic and intelligence implications, as well as managing conversations with the DOJ in connection with any ABAC-related internal investigations. The availability of a new statute to prosecute foreign officials arguably gives foreign officials offered bribes an incentive to report wrongdoing by U.S. companies and their employees to avoid prosecution themselves.

King & Spalding's partners and experts in its Special Matters & Government Investigations, National Security & Corporate Espionage, and Government Advocacy & Public Policy teams have many years of valuable experience representing and advising parties in matters related to anti-corruption, national security and foreign affairs, and congressional inquiries. We will continue to closely monitor developments related to FEPA and its impacts on companies, governments, and foreign officials.

ABOUT KING & SPALDING

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[1] H.R. 2670, 118th Cong. § 5101 (2023).
[2] U.S. enforcement authorities have taken an expansive view of the wording of the FCPA's definition of "foreign official" and may interpret it to include individuals acting in an unofficial capacity who perform an official or governmental function. *See United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (defining "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own").
[3] *See United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
[4] *See id.* at 97.
[5] White House, United States Strategy on Countering Corruption (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.
[6] *See, e.g.*, Drew Hinshaw, Joe Parkinson & Aruna Viswanatha, *How Snatching American Citizens Turned Into a Tool of Hostile Governments*, WALL ST. J. (Dec. 27, 2023), https://www.wsj.com/world/american-hostages-hostile-governments-cc7343a8?st=kv53jsiwdocu3lo.
[7] U.S. Dep't of Just., Corporate Enforcement Policy (2023), https://www.justice.gov/media/1268756/dl?inline.