

# Client Alert

Special Matters and Government Investigations

**JANUARY 4, 2024**

For more information,  
contact:

John C. Richter  
+1 202 626 5617  
[jrichter@kslaw.com](mailto:jrichter@kslaw.com)

Brandt Leibe  
+1 713 751 3235  
[bleibe@kslaw.com](mailto:bleibe@kslaw.com)

Grant W. Nichols  
+1 512 457 2006  
[gnichols@kslaw.com](mailto:gnichols@kslaw.com)

Lauren O. Konczos  
+1 202 626 9546  
[lkonczos@kslaw.com](mailto:lkonczos@kslaw.com)

---

King & Spalding

Washington, D.C.  
1700 Pennsylvania Ave., NW  
Suite 900  
Washington, D.C. 20006  
Tel. +1 202 737 0500

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> More recently, the Biden Administration included the prosecution of “demand side” bribery in its 2021 Strategy on Countering Corruption.<sup>5</sup>

### 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.<sup>6</sup> 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.<sup>7</sup> 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**

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	

---

---

<sup>1</sup> H.R. 2670, 118th Cong. § 5101 (2023).

<sup>2</sup> 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”).

<sup>3</sup> See *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

<sup>4</sup> See *id.* at 97.

<sup>5</sup> 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>.

<sup>6</sup> 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>.

<sup>7</sup> U.S. Dep’t of Just., *Corporate Enforcement Policy* (2023), <https://www.justice.gov/media/1268756/dl?inline>.



## Special Matters & Government Investigations Partners

Gary Adamson  
*New York*  
+1 212 556 2113  
gadamson@kslaw.com

Adam Baker  
*New York*  
+1 212 556 2376  
abaker@kslaw.com

Matthew H. Baughman  
*Atlanta*  
+1 404 572 4751  
mbaughman@kslaw.com

Amy B. Boring  
*Atlanta*  
+1 404 572 2829  
aboring@kslaw.com

Christopher C. Burris  
*Atlanta*  
+1 404 572 4708  
cburris@kslaw.com

Craig Carpenito  
*New York*  
+1 212 556 2142  
ccarpenito@kslaw.com

Steve Cave  
*Northern Virginia*  
+1 703 245 1017  
scave@kslaw.com

Michael J. Ciatti  
*Washington, DC*  
+1 202 661 7828  
mciatti@kslaw.com

Patrick M. Collins  
*Chicago*  
+1 312 764 6901  
pcollins@kslaw.com

Sumon Dantiki  
*Washington, DC*  
+1 202 626 5591  
sdantiki@kslaw.com

Ethan P. Davis  
*San Francisco*  
+1 415 318 1228  
edavis@kslaw.com

Alan R. Dial  
*Washington, DC*  
+1 202 661 7977  
adial@kslaw.com

Zachary Fardon  
*Chicago*  
+1 312 764 6960  
zfardon@kslaw.com

Ehren Halse  
*San Francisco*  
+1 415 318 1216  
ehalse@kslaw.com

Zachary J. Harmon  
*Washington, DC*  
+1 202 626 5594  
zharmon@kslaw.com

Amy Schuller Hitchcock  
*Sacramento/San Francisco*  
+1 916 321 4819  
ahitchcock@kslaw.com

John A. Horn  
*Atlanta*  
+1 404 572 2816  
jhorn@kslaw.com

Andrew C. Hruska  
*New York*  
+1 212 556 2278  
ahruska@kslaw.com

Mark A. Jensen  
*Washington, DC*  
+1 202 626 5526  
mjensen@kslaw.com

Dixie L. Johnson  
*Washington, DC*  
+1 202 626 8984  
djohnson@kslaw.com

William Johnson  
*New York*  
+1 212 556 2125  
wjohnson@kslaw.com

M. Alexander (Alec) Koch  
*Washington, DC*  
+1 202 626 8982  
akoch@kslaw.com

Yelena Kotlarsky  
*New York*  
+1 212 556 2207  
ykotlarsky@kslaw.com

Jade R. Lambert  
*Chicago*  
+1 312 764 6902  
jlambert@kslaw.com

Jamie Allyson Lang  
*Los Angeles*  
+1 213 443 4325  
jlang@kslaw.com

Raphael Larson  
*Washington, DC*  
+1 202 626 5440  
rlarson@kslaw.com

Carmen Lawrence  
*New York*  
+1 212 556 2193  
clawrence@kslaw.com

Brandt Leibe  
*Houston*  
+1 713 751 3235  
bleibe@kslaw.com

Aaron W. Lipson  
*Atlanta*  
+1 404 572 2447  
alipson@kslaw.com

William S. McClintock  
*Washington, DC*  
+1 202 626 2922  
wmclintock@kslaw.com

Amelia Medina  
*Washington, DC*  
+1 202 626 5587  
amedina@kslaw.com

Andrew Michaelson  
*New York*  
+212 790 5358  
amichaelson@kslaw.com

Patrick Montgomery  
*Washington, DC*  
+1 202 626 5444  
pmontgomery@kslaw.com

Paul B. Murphy  
*Atlanta/Washington, DC*  
+1 404 572 4730  
pbmurphy@kslaw.com

Grant W. Nichols  
*Austin/Washington, DC*  
+1 512 457 2006  
gnichols@kslaw.com

Alicia O'Brien  
*Washington, DC*  
+1 202 626 5548  
aobrien@kslaw.com



Patrick Otlewski  
*Chicago*  
+1 312 764 6908  
potlewski@kslaw.com

Michael R. Pauzé  
*Washington, DC*  
+1 202 626 3732  
mpauze@kslaw.com

Olivia Radin  
*New York*  
+1 212 556 2138  
oradin@kslaw.com

John C. Richter  
*Washington, DC*  
+1 202 626 5617  
jrichter@kslaw.com

Rod J. Rosenstein  
*Washington, DC*  
+1 202 626 9220  
rrosenstein@kslaw.com

Daniel C. Sale  
*Washington, DC*  
+1 202 626 2900  
dsale@kslaw.com

Greg Scott  
*Sacramento/San Francisco*  
+1 916 321 4818  
mscott@kslaw.com

Richard Sharpe  
*Singapore*  
+65 6303 6079  
rsharpe@kslaw.com

Kyle Sheahen  
*New York*  
+1 212 556 2234  
ksheahen@kslaw.com

Michael Shepard  
*San Francisco*  
+1 415 318 1221  
mshepard@kslaw.com

Aaron Stephens  
*London*  
+44 20 7551 2179  
astephens@kslaw.com

Cliff Stricklin  
*Denver*  
+1 720 535 2327  
cstricklin@kslaw.com

Jean Tamalet  
*Paris*  
+33 1 7300 3987  
jtamalet@kslaw.com

Courtney D. Trombly  
*Washington, DC*  
+1 202 626 2935  
ctrombly@kslaw.com

Rick Vacura  
*Northern Virginia*  
+1 703 245 1018  
rvacura@kslaw.com

Richard Walker  
*Washington, DC*  
+1 202 626 2620  
rwalker@kslaw.com

David K. Willingham  
*Los Angeles*  
+1 213 218 4005  
dwillingham@kslaw.com

David Wulfert  
*Washington, DC*  
+1 202 626 5570  
dwulfert@kslaw.com

Sally Q. Yates  
*Atlanta/Washington, DC*  
+1 404 572 2723  
syates@kslaw.com