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# Congress Passes Foreign Extortion Prevention Act, Expanding Federal Criminal Liability to Foreign Officials

On December 14, 2023, Congress passed the Foreign Extortion Prevention Act (“FEPA”)<sup>1</sup> with bipartisan support as part of the National Defense Authorization Act for Fiscal Year 2024. President Biden is expected to sign the law. FEPA will establish criminal liability for foreign officials who “corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value” from (a) any person while in the territory of the United States, (b) a U.S. issuer or (c) a domestic concern, in exchange for an improper business advantage.<sup>2</sup> With FEPA enacted as a complement to the U.S. Foreign Corrupt Practices Act (“FCPA”),<sup>3</sup> the U.S. will join a host of strategic allies in a growing multilateral effort to criminalize demand-side foreign bribery as well as supply-side.<sup>4</sup>

## Key Takeaways

- All companies whose business interacts with foreign government officials should review their anti-corruption compliance programs and consider revisions where necessary to address what is likely to be a new area of DOJ enforcement. Among the areas that may require particular attention are:
  - Considering the extent to which anti-corruption, third-party due diligence, gifts, travel and entertainment, and other related policies need to be revised in light of FEPA’s expanded definition of who is a “foreign official”;
  - Updated training for personnel who interact with any person who is a “foreign official” under FEPA; and
  - Heightened scrutiny and due diligence regarding third parties and third-party transactions involving current and former foreign officials, their family members and associates.
- The passage of FEPA reflects the Biden Administration’s and DOJ’s emphasis on addressing corporate crime through the lens of national security concerns, empowering DOJ to focus in particular on foreign officials in countries that the U.S. government perceives to pose national security threats.<sup>5</sup>
- The extent to which FEPA significantly increases the DOJ’s anticorruption efforts remains to be seen, including because aggressive FEPA prosecutions could lead to diplomatic conflicts with the nations whose foreign officials are subject to prosecution.
- The interplay between FEPA enforcement and FCPA enforcement will require close attention as DOJ articulates its expectations of companies that voluntarily self-disclose and/or cooperate with respect to the implicated “foreign officials.”

## Background

The FCPA's anti-bribery provisions criminalize the payment of anything of value to a foreign government official for certain business-related benefits.<sup>6</sup> FEPA will serve as the long-awaited companion to the FCPA by extending criminal liability to foreign government officials who demand or receive improper payments from U.S. persons or while in U.S. territory. Receipt of those payments is not currently covered by the FCPA.

Although FEPA amends the federal domestic bribery statute, 18 U.S.C. § 201, it borrows heavily from the FCPA. FEPA's definition of "foreign official" is, however, broader than that of the FCPA because it encompasses not only those individuals acting in an official governmental capacity, but also those acting in an *unofficial* capacity.<sup>7</sup> In addition, FEPA expands the definition to include "any senior foreign political figure," which encompasses certain current or former senior foreign officials (whether elected or not), politicians, executives of government-owned commercial enterprises and their family members, close associates and businesses.<sup>8</sup>

FEPA also incorporates a similar jurisdictional framework to the FCPA by encompassing offenses that occur in or with a sufficient nexus to the United States, including where the conduct occurs within a U.S. territory, the demand is of a company that issues U.S. securities or the demand is directed at a U.S. "domestic concern," including U.S. citizens, nationals and business entities.

DOJ has previously leveraged U.S. anti-money laundering laws to prosecute foreign government officials involved in bribery schemes,<sup>9</sup> so FEPA is likely to make DOJ even more active in this space. If the bill is signed into law, in the months ahead, DOJ will likely announce and begin to implement an enforcement program. We also expect DOJ to provide guidance about which part of DOJ's Criminal Division will have primary enforcement authority for FEPA and the extent to which companies seeking FCPA resolutions may also be required to cooperate with FEPA prosecutions. FEPA prosecutions may also raise legal issues for U.S. courts to resolve, including with respect to prosecutions of foreign officials who seek bribes from entities they do not know are U.S. issuers or domestic concerns. FEPA also requires DOJ to submit an annual report to Congress noting activity under the statute and enforcement efficacy.<sup>10</sup> Penalties under FEPA include imprisonment of up to 15 years and fines up to the greater of \$250,000 or three times the value of the bribe.<sup>11</sup>

Notably, Members of Congress have explicitly linked FEPA to concerns related to national security and ongoing concerns with leveling the playing field for U.S. companies. Applauding the Senate's passage of FEPA, Senator Sheldon Whitehouse (D-RI) said: "America is in a clash of civilizations with international kleptocrats and criminals seizing any and every opportunity to extort American businesses and undermine our national security."<sup>12</sup> Senator Thom Tillis (R-NC) added that "American businesses too often face bribery demands from foreign officials, putting them at an economic disadvantage for following the law."<sup>13</sup>

We will continue to monitor for further developments related to FEPA.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>1</sup> H.R. 2670, 118th Cong. (1st Sess. 2023), available [here](#).

<sup>2</sup> *Id.* § 5101(2).

<sup>3</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq.*

<sup>4</sup> The United Kingdom, France and Germany each criminalize demand-side bribery. See Transparency Int’l U.S., *Foreign Extortion Prevention Act Factsheet* (Jun. 12, 2023), available [here](#).

<sup>5</sup> See Paul, Weiss, *DOJ Previews New Guidance on Voluntary-Self Disclosure in Mergers and Acquisitions Signaling Continued Focus on Corporate National Security Crimes* (Sept. 27, 2023), available [here](#).

<sup>6</sup> 15 U.S.C. §§ 78dd-1(a)(1)–(3).

<sup>7</sup> See 18 U.S.C. § 201. FEPA follows the FCPA’s definition of foreign official by encompassing “any person acting in an official capacity”; however, it extends the definition to “any person acting in an unofficial capacity for or on behalf of a foreign government.” Compare 15 U.S.C. § 78dd-1(f)(1)(A), with H.R. 2670 § 5101(2).

<sup>8</sup> A “senior foreign political figure” is defined as “(i) A current or former: (A) Senior official in the executive, legislative, administrative, military or judicial branches of a foreign government (whether elected or not); (B) Senior official of a major foreign political party; or (C) Senior executive of a foreign government-owned commercial enterprise; (ii) A corporation, business, or other entity that has been formed by, or for the benefit of, any such individual; (iii) An immediate family member of any such individual; and (iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to be a close associate of such individual.” 31 C.F.R. § 1010.605(p)(1)(i)–(iv) (2023). For purposes of this definition: “(i) Senior official or executive means an individual with substantial authority over policy, operations, or the use of government-owned resources; and (ii) Immediate family member means spouse, parents, siblings, children and a spouse’s parents and siblings.” *Id.* § 1010.605(p)(2)(i)–(ii).

<sup>9</sup> See, e.g., Indictment at 11–12, *United States v. Naeem Riaz Tyab*, No. 1:19-cr-000038 (D.D.C. May 3, 2018) (indicting a former Republic of Chad ambassador under anti-money laundering laws who solicited and accepted over \$2 million in bribes from a Canadian-based company while in the United States), available [here](#); see also Criminal Complaint at 19, *United States v. Luis Berkman*, No. 0:21-mj-06320 (S.D. Fla. May 20, 2021) (charging Bolivian officials and U.S. citizens under anti-money laundering laws for their roles in securing a Bolivian contract for a U.S. company), available [here](#).

<sup>10</sup> H.R. 2670 § 5101(2).

<sup>11</sup> *Id.*

<sup>12</sup> Senator Sheldon Whitehouse, *Whitehouse, Tillis Applaud Senate Passage of Bipartisan Foreign Extortion Prevention Act* (Jul. 28, 2023), available [here](#).

<sup>13</sup> *Id.*