

Congress Passes Foreign Extortion Prevention Act to Prosecute Corrupt Foreign Officials

December 22, 2023

On December 14, 2023, Congress passed the Foreign Extortion Prevention Act (“FEPA”) with bipartisan support as part of the 2024 National Defense Authorization Act (“NDAA”).

This legislation, which President Biden is expected to sign in the near future, closes a notable gap in law enforcement’s ability to combat foreign corruption and will serve as a companion to the Foreign Corrupt Practices Act (“FCPA”). While the FCPA has been used to prosecute the “supply side” of foreign bribery—that is, those offering, promising, authorizing, or paying bribes—FEPA will create a mechanism specifically dedicated to address the “demand side” of foreign corruption—*i.e.*, the corrupt officials who solicit and receive bribes. FEPA has been described by Transparency International as “arguably the most sweeping and consequential foreign bribery law in nearly half a century,”¹ and its impact on the prosecution of foreign bribery is likely to be significant.

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¹ Congress Passes Landmark Law to Criminally Prosecute Corrupt Foreign Leaders (Dec. 14, 2023), <https://us.transparency.org/news/congress-passes-landmark-law-to-criminally-prosecute-corrupt-foreign-leaders/>, clearygottlieb.com



The FCPA has proven to be a highly effective tool for DOJ in its efforts to combat foreign corruption, but it has been limited in its ability to only address half of the equation. While under *U.S. v. Castle*, foreign officials cannot be prosecuted for FCPA violations,² federal prosecutors have utilized other criminal statutes to address the “demand side” of foreign bribery. For example, the federal money laundering statutes have recently been utilized to convict the former Guinean Minister of Mines and Geology for accepting \$8.5 million in bribes in exchange for lucrative mining rights and laundering those funds through the American financial system,³ and the former Treasurer of Venezuela for accepting and laundering over \$100 million in bribes in exchange for access to purchase bonds from the Venezuela National Treasury at a favorable exchange rate.⁴

As a companion to the FCPA, FEPA addresses this “demand side” enforcement gap by creating a mechanism specifically designed for prosecuting foreign officials that solicit or receive bribes in exchange for being influenced or induced to perform or omit an official act or official duty, or conferring an improper advantage, in connection with obtaining or retaining business. It does so not by amending the FCPA itself, but by amending the domestic criminal

bribery statute⁵ to include “foreign officials” as a distinct class of individuals covered by the law.⁶

FEPA is similar in many respects to the FCPA. For example, jurisdiction under FEPA requires that the corrupt acts have a sufficient nexus to the United States falling within the same categories used under the FCPA, specifically demanding, seeking, receiving, or accepting bribes from issuers of U.S. securities, domestic concerns (*i.e.*, U.S. companies and U.S. persons), or while in the territory of the United States. Additionally, FEPA also requires a corrupt *quid pro quo* for something of value. And while FEPA defines “foreign official” in largely the same manner as the FCPA,⁷ there are a few distinctions of note:

- *Unofficial capacity*: FEPA expands the FCPA’s definition of a foreign official to include not only persons working on behalf of a foreign government in an official capacity, but also those “acting in an *unofficial* capacity for or on behalf of . . . a government, department, agency, [] instrumentality . . . or a public international organization.”⁸
- *Senior political officials*: FEPA’s definition of foreign official also goes a step further than the FCPA by covering “any senior foreign political figure,” as defined in 31 CFR § 1010.605,⁹ which

² See *United States v. Castle*, 925 F.2d 831, 836 (5th Cir. 1991). That said, the FCPA’s books and records provision has been applied in cases involving state-owned entities, such as Petrobras. See, e.g., *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations* (Sept. 27, 2018),

<https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>.

³ Former Guinean Minister of Mines Sentenced to Seven Years in Prison for Receiving and Laundering \$8.5 Million in Bribes From China International Fund and China Sonangol (Aug. 25, 2017), <https://www.justice.gov/opa/pr/former-guinean-minister-mines-sentenced-seven-years-prison-receiving-and-laundering-85>.

⁴ Former Venezuelan National Treasurer and Husband Convicted in International Bribery Scheme (Dec. 15, 2022), <https://www.justice.gov/opa/pr/former-venezuelan-national-treasurer-and-husband-convicted-international-bribery-scheme>.

⁵ 18 U.S.C. § 201.

⁶ Because FEPA amends only the criminal bribery statute, unlike the FCPA, it does not appear to confer jurisdiction to the SEC. Although, the SEC may make a criminal referral to the DOJ in connection with any FCPA investigation of potential misconduct under FEPA, as the SEC continues to remain highly focused on FCPA enforcement.

⁷ 15 U.S.C. § 78dd-1(f)(1)(A) (“The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.”).

⁸ Text - S.2347 - 118th Congress (2023-2024): Foreign Extortion Prevention Act, S.2347, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/2347/text>.

⁹ *Id.* (referring to 31 CFR § 1010.605)

includes current and former executive, legislative, administrative, military or judicial figures; current and former senior officials of major foreign political parties; current and former senior executives of foreign government-owned commercial enterprises; and any immediate family member or person who is “widely and publicly known . . . to be a close associate” of a senior foreign political figure.¹⁰

- *Political candidates*: FEPA is narrower than the FCPA in at least one respect. Though FEPA applies to the senior political officials described above, including current and former senior officials of major foreign political parties, in a departure from the FCPA,¹¹ FEPA does not explicitly extend to foreign political candidates.

How FEPA will be enforced will be a development that bears monitoring. There may be jurisdictional and foreign official immunity challenges to enforcing the law, and even where individuals are investigated and prosecuted, culpable officials would still need to be extradited. There will be information available to monitor the statute’s enforcement, as the DOJ will be required, as part of the legislation, to submit an annual report to Congress and publicize a summary of major enforcement actions taken under FEPA and the penalties imposed.

Perhaps the most clear takeaway from FEPA’s enactment is that it signals the ongoing commitment of the U.S. government to fighting global corruption. DOJ has repeatedly recognized that foreign bribery

“threatens national security and sustainable development.”¹² Early on, the Biden Administration stated its intention to “rectify persistent gaps in the fight against corruption” and to work with “allies and partners on enacting legislation criminalizing the demand side of bribery, and enforcing new and existing laws, including in the countries where the bribery occurs.”¹³ As part of that effort, Acting Assistant Attorney General Nicole Argentieri recently noted that DOJ has stepped up its partnership with foreign law enforcement authorities “not only in Foreign Corrupt Practices Act (FCPA) matters, but across a full range of our investigations. And our footprint of successful partnerships continues to grow. In recent years, we’ve worked with our enforcement colleagues all across the globe, including . . . in the United Kingdom, but also in Brazil, Malaysia, Switzerland, Ecuador, France, South Africa, Colombia, the Netherlands, Singapore, and more.”¹⁴

This is fully consistent with the aggressive stance that DOJ has taken in the enforcement of foreign bribery and corruption in recent years and likely signals an increasingly active enforcement climate in this space. AAG Argentieri also recently announced the launch of the International Corporate Anti-Bribery initiative (or, “ICAB”), which will leverage the experience of a team of anti-bribery prosecutors to strengthen new and existing partnerships around the world and facilitate cooperation and information sharing with the goal of more effectively investigating and prosecuting foreign bribery offenses.¹⁵ With this initiative, DOJ is clearly

¹⁰ *Id.*

¹¹ 15 U.S.C. § 78dd-1(a)(2) (prohibiting bribes offered or given to “any candidate for foreign political office”).

¹² A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT: SECOND EDITION (July 2020), <https://www.justice.gov/media/1106611/dl?inline>

¹³ UNITED STATES STRATEGY ON COUNTERING CORRUPTION 4, 26 (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>. See also generally MEMORANDUM ON ESTABLISHING THE FIGHT AGAINST CORRUPTION AS A CORE UNITED STATES NATIONAL SECURITY INTEREST (June 3, 2021),

<https://www.govinfo.gov/content/pkg/DCPD-202100467/pdf/DCPD-202100467.pdf>; Department of Justice Strategic Plan FYs 2022-2026, <https://www.justice.gov/doj/doj-strategic-plan/objective-42-combat-corruption-financial-crime-and-fraud>.

¹⁴ Acting Assistant Attorney General Nicole M. Argentieri Delivers Remarks at the American Bar Association 10th Annual London White Collar Crime Institute (Oct. 10, 2023), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-american-bar>.

¹⁵ Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Address at the 40th International Conference on the Foreign Corrupt Practices

looking to further advance its efforts in expanding international cooperation and enforcement among various authorities in the fight against foreign corruption.

FEPA's enactment will only increase DOJ's expectation that the subjects of anti-bribery investigations cooperate fully in order to receive credit in connection with resolving FCPA matters. To this end, although it remains to be seen exactly how FEPA will be enforced and how it will interact with the FCPA, corporations should ensure that their compliance programs adequately address the new liabilities created by FEPA in order to maximize eligibility for any cooperation credit when faced with a DOJ investigation. Also significant in AAG Argentieri's recent remarks was her emphasis on individual accountability. While this has consistently been a theme of DOJ's enforcement of the FCPA and related statutes, subjects of FCPA investigations should be aware that, in order to receive cooperation credit, they may be expected to assist DOJ in any companion FEPA investigation or prosecution stemming from the same corrupt acts.

Overall, it will be important to monitor DOJ's implementation of FEPA in the coming months to appropriately respond both from a compliance perspective and to ensure that internal investigations put companies and individuals in the best position possible to defend potential DOJ enforcement actions.

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Act (Nov. 29, 2023),
<https://www.justice.gov/opa/speech/acting-assistant->

[attorney-general-nicole-m-argentieri-delivers-keynote-address-40th.](https://www.justice.gov/opa/speech/attorney-general-nicole-m-argentieri-delivers-keynote-address-40th-)