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FEPA

The Foreign Extortion Prevention Act: Key Changes to U.S. Anti-Corruption Regime Reverberate Well Beyond America's Borders

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The Foreign Extortion Prevention Act (FEPA), signed into law on December 23, 2023, represents a significant shift in the anti-corruption laws of the U.S. and, in particular, American efforts to combat foreign bribery. For the first time, American law directly criminalizes a foreign government official's acceptance of a bribe. Although the FEPA focuses on the government official's conduct, the statute could have significant implications for individuals and entities that do business with foreign governments.

See "FCPA Enforcement, Changes in 2023 Foretell a Busy Year Ahead" (Jan. 17, 2024).

Background

Passed as part of the National Defense Authorization Act, and appearing at Section 5101 within that, the FEPA criminalizes a foreign official's receipt or solicitation of bribes. The new statute closes a long-recognized loophole in the FCPA, which criminalizes paying foreign bribes but imposes no penalty on foreign officials who receive or solicit bribes.

The FEPA changes that. The FEPA criminalizes "corruptly" receiving or requesting anything of value in exchange for (1) "being influenced in the performance of any official act"; (2) "being induced to do or omit to do any act in violation of the official duty"; or (3) "conferring any improper advantage." The official act, an act in violation of a duty or a conferral of improper advantage must be taken in connection with obtaining or retaining business for, or with, any person, or directing business to any person.

The statute broadly applies to any official or employee of a foreign government or any department, agency or instrumentality of a foreign government, including employees of state-owned companies. It also applies to any senior foreign political figure, to officials or employees of public international

organizations, and to persons acting in an official or unofficial capacity on behalf of a foreign government or international organization.

FEPA violations carry a maximum 15-year sentence of imprisonment and a maximum fine of $250,000 or three times the monetary equivalent of the value of the bribe. The statute expressly states that the FEPA is subject to extraterritorial federal jurisdiction.

Prior to enactment of the FEPA, the FCPA criminalized the *payment* of foreign bribes without imposing penalties on the foreign officials who *received* or *solicited* the bribes. U.S. prosecutors relied on bribery-adjacent crimes to prosecute foreign officials for corruption offenses. For example, prosecutors often invoked the money laundering statutes to charge foreign officials in FCPA cases because the bribe payments often passed through U.S.-based banks and FCPA violations are a predicate offense for money laundering. The FEPA now allows prosecutors to directly charge foreign officials with bribery.

See "Newly Signed Foreign Extortion Prevention Act Complements FCPA" (Jan. 3, 2024).

Statutory Ambiguity Raises Questions About FEPA's Scope

Rather than enact the FEPA as part of the FCPA, Congress amended the federal bribery statute, 18 U.S.C. §201(b). At the same time, the FEPA's language – with a few significant exceptions – largely tracks the statutory language of the FCPA. As a result, certain conduct that violates the FCPA may not violate the FEPA, while other conduct excepted from the FCPA may nonetheless be prosecuted under the FEPA.

FEPA's "Official Act" Requirement

The FEPA criminalizes bribes paid to influence "any official act," language drawn directly from the federal bribery statute. The bribery statute expressly defines "official act," and the U.S. Supreme Court has narrowly construed that definition. In *McDonnell v. United States*, the Court held that an "official act" requires a "formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." The official must also "make a decision or take an action . . . or agree to do so."

The FCPA, by contrast, does not refer to an "official act" but, instead, criminalizes bribes paid to "influenc[e] any act or decision of such foreign official in his official capacity." Seizing on the difference in statutory language between the FCPA and the federal bribery statute, at least one court of appeals, in *United States v. Ng Lap Seng*, has held that *McDonnell*'s more stringent "official act" standard does not apply to the FCPA.

Consequently, Congress' decision to include the FEPA in §201, and to incorporate §201's "official act" language, could narrow the scope of FEPA liability as compared to liability under the FCPA. A single corrupt payment might support FCPA liability for the payor, but not FEPA liability for the recipient,

if the facts do not meet *McDonnell*'s more stringent "official act" requirement. Application of the *McDonnell* standard, moreover, may prove problematic in the context of foreign bribery. Courts would need to consider whether the foreign official has formally exercised governmental power akin to deciding a lawsuit, which could present challenges in the context of foreign governmental authority.

FEPA's Business Nexus Requirement

Using language from the FCPA, the FEPA requires a "business nexus" – it criminalizes only bribes paid "in connection with obtaining or retaining business for or with, or directing business to, any person." The federal bribery statute, however, has no such limitation. The bribery statute thus criminalizes bribes paid even when the purpose of the bribe is unconnected to the award of government business. For that reason, FEPA liability is narrower than liability under the federal bribery statute. A corrupt payment to a federal official might not satisfy the FEPA's business nexus element, but that same payment, if made to a domestic official in the U.S., might nonetheless expose the recipient to liability under the bribery statute.

At the same time, the FEPA does not go as far as the FCPA in limiting liability for certain payments. The FCPA, for example, contains an express statutory exception for payments made "to expedite or secure the performance of a routine governmental action." The FEPA, however, contains no such exception. Thus, even facilitating payments excepted under the FCPA might nonetheless trigger FEPA liability for the foreign official if the payments are sufficiently related to "obtaining or retaining business." Of course, a facilitating payment may fall short of the FEPA's corrupt-intent requirement, may fail to satisfy the "business nexus" element, may not qualify as a quid pro quo, or might fall short of the FEPA's elements for some other reason.

FEPA's Lack of Affirmative Defenses

The FCPA also contains statutory affirmative defenses. For example, an individual cannot be convicted of an FCPA violation if the payment or gift was "lawful under the written laws and regulations" applicable to the foreign official. Similarly, an individual cannot be convicted under the FCPA if the payment constituted a "reasonable and bona fide expenditure" that was incurred by the foreign official and directly related either to the promotion, demonstration, or explanation of products or services; or to the execution or performance of a contract with the foreign government.

The FEPA does not contain either of these statutory affirmative defenses and thus, at first look, appears much broader than the FCPA. However, facts supporting the FCPA's affirmative defenses would almost certainly bear on the FEPA's corrupt-intent element. For example, a foreign official's acceptance of a lawful payment or gift would strongly handicap the government's ability to prove that the foreign official acted "corruptly."

See "Reading the Regulators: Shifts in FCPA Enforcement" (Aug. 16, 2023).

Practical Considerations in FEPA Prosecutions

Prosecutors will likely face legal and practical hurdles in pursuing FEPA prosecutions. Since passage of the FCPA, Congress has recognized the "inherent jurisdictional, enforcement, and diplomatic difficulties" associated with prosecuting foreign officials, for example in *United States v. Castle* (quoting FCPA legislative history). Many attribute the original decision to exclude foreign officials from the FCPA's scope to those concerns. The passage of the FEPA codifies a policy reversal that prioritizes anti-corruption efforts over international comity. But the "jurisdictional, enforcement, and diplomatic difficulties" associated with prosecuting those cases remain.

Immunity for Foreign Officials

Prosecutors pursuing FEPA claims will have to determine the extent of a foreign official's immunity under the common law, such as in *Samantar v. Yousuf*. While the concept of foreign official immunity dates back to the founding era, relevant cases are "few and far between." And those that do exist "provide inconsistent results" as to whether "lower-level foreign officials" are entitled to immunity, according to *Yousuf v. Samantar*.

While the Supreme Court has not squarely addressed the scope of foreign official immunity, it has not foreclosed the possibility that such common law immunity may apply in certain circumstances.[1] For instance, the court in *Yousuf* stated, "we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."[2]

Two categories of immunity are particularly relevant. First, head-of-state immunity – a doctrine stemming from customary international law – may provide a strong defense to a FEPA prosecution. As the court set forth in *Lafontant v. Aristide*, under that doctrine, "a head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States." U.S. courts have upheld that type of immunity even in the face of serious allegations, including aggravated human rights violations, suggesting it may provide a strong bulwark against FEPA enforcement. Although strong, it would also be narrow, insulating only current heads of state.

"Official acts" immunity (or "foreign-official immunity"), by contrast, would reach many more officials at lower levels. But it presents a weaker potential defense than the "absolute" protection that head-of-state immunity offers. Unlike head-of-state immunity, foreign-official immunity extends to an individual by virtue of their acts as an agent of a foreign sovereign, not by virtue of their position. As such, it only applies "for official acts performed within the scope of [an official's] duty, but not for private acts where 'the officer purports to act as an individual and not as an official.'" Under that doctrine, foreign officials are unable to assert immunity for acts "not arguably attributable to the state, such as drug possession or fraud." The interplay between foreign-official immunity and the

FEPA's requirement that foreign officials accept the bribe in exchange for taking (or refraining from taking) an official act could prove fertile ground for further development in the case law.

The U.S. political branches also play an active role in determining a foreign official's entitlement to immunity. The State Department routinely submits "suggestions of immunity" in proceedings where foreign-official immunity is at issue, making a recommendation regarding the application of immunity. With respect to head-of-state immunity, courts view the State Department's recommendations as "determinative." Because the act of recognizing a foreign head-of-state is an extension of the Article II power to "receive Ambassadors and other public Ministers," the executive branch's determination of head-of-state immunity, as in *Ye v. Zemin*, deprives courts of jurisdiction over such individuals and is therefore absolute. With respect to foreign-official immunity, however, courts treat State Department suggestions of immunity as carrying "substantial" but not determinative weight in the analysis of whether the acts in question fall within the scope of the defendant's official duties - see *Yousuf v. Samantar*.

Assuming intra-branch alignment between the DOJ and the State Department, such recommendations may support prosecutorial efforts to enforce the FEPA against foreign officials. Agencies do not always act in harmony, however. Where an intra-branch dispute arises or where a case involves activity at least arguably within the scope of the defendant's official duties, courts may be forced to resolve serious factual and legal issues to assess immunity to FEPA liability.

Jurisdictional Challenges

Prosecutors must also establish a sufficient nexus to the U.S. to pursue FEPA charges. Under the statute, foreign officials can be prosecuted when using "the mails or any means or instrumentality of interstate commerce" to demand or agree to accept a bribe (1) from an "issuer" of U.S. securities, (2) from a "domestic concern," or (3) from "any person ... while in the territory of United States." [3]

The carefully drawn categories of persons subject to FEPA liability may present limitations for prosecutors. As in the FCPA context, courts can be expected to find that the statutorily drawn limitations preclude broadening the Act's scope through conspiracy charges or theories of accomplice liability.[4]

Foreign Policy and Diplomatic Issues

Foreign policy concerns and diplomatic issues abound. Enforcing U.S. criminal law directly against foreign officials in their individual capacities might derail foreign policy objectives, undermine diplomatic relationships and alienate even traditionally friendly jurisdictions. Especially considering that many countries independently criminalize bribery through domestic statutes, FEPA cases could be viewed as an intrusion on foreign sovereignty. Selective enforcement, grants of immunity and other remedial steps may blunt some of those effects, but those measures are unlikely to completely erase tensions caused by FEPA enforcement. Foreign countries, accordingly, may adopt

countermeasures aimed at disincentivizing such enforcement or erect practical barriers such as refusing to extradite individuals charged with FEPA violations.

See "Exploring the Shift in the DOJ's Prosecutorial Reach of Foreign Defendants" (Apr. 27, 2022).

Implications for Firms Doing Business With Foreign Governments

Because the FEPA imposes criminal liability on the foreign government official who accepts the bribe, private entities may not view the FEPA as a significant development for the private sector. Not so. To be sure, the FEPA expressly provides that it shall not be construed to "encompass conduct that would violate [the FCPA] whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise." Thus, an individual confronted with liability for violating the FCPA cannot also be convicted under the FEPA.

The FEPA and the FCPA are not directly overlapping, though. And, under some circumstances, a foreign official's receipt of a bribe might trigger liability under the FEPA even when payment of the bribe would not violate the FCPA. In that situation, the FEPA's rule of construction may not apply and the payor might be prosecuted for conspiring to violate the FEPA or under a similar theory. A defendant so charged would almost certainly invoke the FEPA's rule of construction or argue that, under *Hoskins*, theories of secondary liability are unavailable under the FEPA.

Courts will ultimately decide the FEPA's scope, but entities and individuals that do business with foreign governments should nonetheless monitor developments under the FEPA and remain attuned to potential sources of liability. Those entities should re-evaluate their anti-corruption policies and compliance procedures to ensure that those policies and procedures reflect changes in the law under the FEPA. Companies should pay particular attention to how their policies treat hospitality programs, and the use of facilitating payments and other payments that may fall within the scope of the FCPA's exceptions and affirmative defenses but for which no corresponding exceptions or defenses exist under the FEPA. Anti-corruption training should reflect this new reality, and the entity's compliance and legal departments should monitor developments under the FEPA as the courts resolve ambiguity in the statute and the DOJ provides further guidance on enforcement priorities under the statute.

The FEPA may also ease barriers to extradition from certain countries. Most extradition treaties with the U.S. require reciprocal criminality. In other words, the treaties require that the conduct for which extradition is sought must also be criminalized by the extraditing country. Many – but not all – countries criminalize foreign bribery, and the DOJ frequently seeks extradition from those countries of individuals charged with FCPA violations.

In countries that do not criminalize foreign bribery, however, extradition for FCPA violations is more difficult. Even where foreign bribery is not criminal, most countries criminalize domestic

bribery, though. In those countries, individuals charged with violating the FEPA may be more easily extradited than those charged with violating the FCPA.

See "DOJ Releases Opinion Affirming Extortion and Duress Exemptions to the FCPA" (Mar. 2, 2022).

Conclusion

The FEPA is a significant development in American anti-corruption law. Although on its face, the FEPA targets foreign government officials, private entities and individuals that do business with foreign governments would be well-served by understanding the contours of the FEPA; remaining abreast of developments concerning the interplay among the FEPA, the FCPA and other anti-corruption laws; and responding to those developments with updates to corporate policies and anti-corruption procedures.

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[1] See also *Turkiye Halk Bankasi A.S. v. United States* (remanding for the Court of Appeals to consider whether common-law-immunity principles precluded criminal prosecution of foreign state instrumentality).

[2] On remand, the Second Circuit has scheduled oral argument for February 28, 2024. See Dkt. 203, 20-3499 (2d Cir.). This will be a critical case to watch regarding the availability and scope of foreign-official immunity.

[3] The Act cross-references the definition of an issuer in the Securities and Exchange Act of 1934 (15 U.S.C. §78c(a)). It also cross-references the definition of a domestic concern in the FCPA (15 U.S.C. §78dd-2), which includes U.S. citizens or residents, as well as entities with a principal place of business in the U.S., or which are organized under the laws of the U.S. A trove of court decisions exists interpreting both of those definitions, making their application in the FEPA context straightforward. The territorial alternative of demanding a bribe from someone "in the territory of United States" will similarly not be difficult to apply in most circumstances.

[4] See *United States v. Hoskins*. ("FCPA's carefully-drawn limitations do not comport with the government's use of the complicity or conspiracy statutes" to apply FCPA liability to a broader set of individuals.)