

BCR CLIENT ALERT (Mar. 26, 2024)

President Biden Signs Foreign Extortion Prevention Act

On December 22, 2023, President Joseph Biden signed into law the Foreign Extortion Prevention Act (FEPA), which Congress enacted as part of the Fiscal Year 2024 National Defense Authorization Act.¹

The FEPA creates 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.²

The FEPA is aimed at the “demand side” of foreign bribery, which the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) do not.

The FEPA is added as 18 U.S.C. § 201, which is part of the domestic bribery statute. The FEPA provides penalties for violating the FEPA, including imprisonment of up to 15 years and a fine of up to \$250,000 or three times the value of the bribe, whichever is greater. The FCPA puts a ceiling on the penalty at two times the monetary gain obtained or loss incurred by another person. The statutory maximum is up to five years imprisonment. Hence, the FEPA penalties are harsher compared to the FCPA.

While the language and structure of the FEPA are analogous to the FCPA, important differences exist. They both refer to “foreign official”. FEPA defines “foreign official” to include: (1) any official or employee of a foreign government or any department, agency, or instrumentality thereof; (2) any senior foreign political figure; (3) any official or employee of a public international organization; (4) any person acting in an official capacity for or on behalf of a government, department, agency, instrumentality, or public international organization; or (5) any person acting in an unofficial capacity for or on behalf of a government, department, agency, instrumentality or a public international organization.³ The FEPA enlarges the definition of a “foreign official.” The FCPA definition includes “any person acting in an unofficial capacity for or on behalf of a government, department, agency, instrumentality, or a public international organization. The FEPA also goes beyond FCPA in including the conduct of “senior foreign political figures,” instead of referring to officials of foreign political parties or candidates for foreign political office like the FCPA.

¹ H.R. 2670, 118th Cong. (1st Sess. 2023).

² *Id.* § 5101(2).

³ *Id.* § 5101(1)(C).



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Extraterritorial Provisions

The FEPA expressly provides that FEPA offenses are subject to extraterritorial jurisdiction. The clear statement should enable prosecutors to overcome jurisdictional claims even if foreign officials are not present in the U.S. when they commit the violations or to try to dismiss civil or administrative forfeiture cases.

Notwithstanding the clear extraterritorial jurisdiction outlined in the FEPA, it remains to be seen whether U.S. prosecutors will be able to obtain international enforcement cooperation with foreign governments when the U.S. tries to prosecute foreign officials. In addition, it does not account for potential diplomatic issues that may challenge such prosecutions.

In the *Hoskins* cases, [*United States v. Hoskins*, ---F.4th---, 2022 WL 330357 \(2d Cir. Aug. 12, 2022\)](#) (*Hoskins II*), courts have imposed limits on the circumstances under which individuals working for U.S. entities — individuals who would otherwise fall outside the FCPA’s reach — are liable as “agents” of a U.S. entity.⁴

FEPA also requires the U.S. Department of Justice to publish an annual report that discusses the scale and nature of foreign bribe demands against U.S. companies, the effectiveness of U.S. diplomatic efforts to protect American companies from foreign bribe demands, and the efforts of foreign governments to prosecute those crimes.

Analysis

Significantly, until the enactment of FEPA, U.S. law did not criminalize bribe demands by public officials. Instead, U.S. law only punished the U.S. company if and when it paid those bribes.

The U.S. legal framework was more limited than that of dozens of other countries, including the United Kingdom, Germany, and France, who criminalize both the giving and the demanding of foreign bribes.⁵

In addition, a number of international anti-bribery conventions, such as the Inter-American Convention against Corruption, the UN Convention against Corruption, and the Council of Europe Criminal Convention against Corruption, all criminalize the demand side or passive bribery.

Civil society organizations were proactive and critical in helping pass FEPA. In particular, Transparency International U.S. (TI US), Citizens for Responsibility and Ethics in Washington, (CRW), the U.S. Chamber of Commerce, Foundation for Defense of Democracies (FDD) Action, and a broad coalition of civil society organizations that work to promote transparency and accountability in government all worked to persuade the Congress to enact FEPA.⁶

⁴ For a discussion of *Hoskins II* and the extraterritorial jurisdiction aspects, see Frederick T. Davis, *The End of U.S. v. Hoskins: And the End of an Era?*, 38 INT’L ENFORCEMENT L. REP. 491 (Dec. 2022);

⁵ Transparency International U.S., [Foreign Extortion Prevention Act](#), Factsheet, June 21, 2023.

⁶ Transparency International U.S., [US Congress Passes Landmark Law to Criminally Prosecute Corrupt Foreign Leaders](#), Dec. 14, 2023.



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In 2022, TI US reported that researchers looked at 47 exporting countries. Three of these countries – China, India, and Singapore – are not signatories to the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention.

The report found that only two countries – the U.S. and Switzerland – actively enforce their foreign anti-bribery laws. Seven countries were found to have moderate enforcement, and 38 countries conducted limited or virtually no enforcement of their foreign bribery laws.⁷

FEPA arises largely from the Biden Administration’s prioritization of good governance and anti-corruption. In March 2023, the White House [issued a fact sheet](#) on implementing the U.S. strategy on countering corruption. In this regard, on December 6, 2021, President Biden issued the first [United States Strategy on Countering Corruption](#) to respond to the threat transnational corruption poses to U.S. national security. Part of the strategy is to increase the authority and resources for investigating and prosecuting transnational corruption. Another part is to provide technical assistance and capacity building for foreign governments while also engaging them to prevent and prosecute corruption.

Implications for Entities

FEPA will likely increase prosecutors’ focus on combating corruption. While the Fraud Division of the U.S. Department of Justice prosecutes and oversees the prosecution of FCPA cases, Assistant U.S. Attorneys can bring prosecutions of FEPA. Hence, it remains to be seen how much consistency will develop in the way the 94 offices of U.S. prosecutors charge FEPA violations.

FEPA is likely to increase FCPA investigations while prosecutors are investigating FCPA violations and vice versa. U.S. prosecutors may go after entities and individuals on a theory of aiding and abetting or conspiracy to pay bribes under FEPA.

Companies that have joint ventures or other alliances with foreign state-owned companies should exercise care that their employees are not ensnared because they could be considered “foreign officials” under FEPA in an individual capacity. Such a situation would undoubtedly have an adverse reputational effect on their employers.

It will be interesting to watch the response of foreign governments to FEPA. One of the reasons for FEPA is the lack of prosecution by foreign governments of their own officials for the demand side of bribery. FEPA may also motivate other countries with laws against the demand side to become more active.

With the significant penalties for violations of FEPA and the explicit extraterritorial jurisdiction, U.S. and international entities with anti-corruption policies should take advantage of the enactment of FEPA to review and consider updating their policies. Section 8B2. 1(b) of the U.S.

⁷ Transparency International U.S., [U.S. Is One of Only Two Countries Actively Enforcing Anti-Bribery Law](#), (Oct. 11, 2022). Transparency International U.S., *Exporting Corruption 2022: Assessing Enforcement of the OECD Anti-Corruption Convention* (Oct. 11, 2022).



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Sentencing Guidelines provides that due diligence and the promotion of desired organizational culture are indicated by the fulfilment of seven minimum requirements, which are the hallmarks of an effective program that encourages compliance with the law and ethical conduct.

FEPA may cause foreign governments where the demand side occurs to investigate and prosecute cases, so that uncertainty must also be taken into consideration by relevant stakeholders.

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