FEPA: Combating the Demand-Side of Bribery

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Few global legal issues can be solved with just one approach, or by being addressed from only one angle. Such is the case when it comes to battling bribery and corruption involving foreign officials outside of the United States. After decades of the United States being limited to prosecuting the supply-side of bribery transactions, Congress has finally enacted legislation to combat the demand-side of bribery through its passage of the Foreign Extortion Prevention Act. Not only does the Foreign Extortion Prevention Act target those who accept bribes, it also requires the Department of Justice to publish the highest profile enforcement actions each year. This article describes the Foreign Extortion Prevention Act and analyzes how this new legislation will fit into and affect the global framework aimed at prosecuting the bribery of foreign officials.

Overview of FEPA

On 23 December 2023, President Joe Biden signed the Foreign Extortion Prevention Act (FEPA) into law as part of the National Defense Authorization Act.[1] Under FEPA, it is unlawful for any covered person or entity to “demand, seek, receive, [or] accept” anything of value on behalf of themselves, another person, or a nongovernmental entity. FEPA has a considerably broad scope, criminalizing bribery schemes regardless of whether the benefit was conferred directly or indirectly—indeed, the text of the statute does not even make a meaningful distinction between a “foreign official” acting in an official capacity and one acting in an unofficial capacity. After initially defining a foreign official somewhat intuitively—as any official or employee of a foreign government, agency, department, or instrumentality—FEPA goes on to draw from previously enacted statutes with existing definitions. For example, a “foreign official” under FEPA also includes a “person” as defined under the Foreign Corrupt Practices Act (FCPA), a “senior foreign political figure” as defined by the Department of Treasury, as well as a “public international organization” as designated by the International Organizations Immunities Act. The fact that these definitions are expressly incorporated into FEPA underscores how the new legislation is not intended to be a standalone enforcement tool, but rather a part of a comprehensive framework for combatting bribery and corruption globally.

FEPA’s breadth does not stop with its statutory definitions; the statute also permits—if not requires—extraterritorial application. FEPA applies to any person within the territories of the United States, and encompasses any transactions that make use of the mail or other U.S. instrumentalities of interstate commerce. Moreover, Congress specifically drafted FEPA to also apply to foreign companies that issue securities regulated by the Securities and Exchange Commission (SEC). Moreover, the statute applies in any location that has been defined as a “domestic concern” under the FCPA. While the reach of FEPA is patently broad, we have not yet seen how U.S. courts will interpret FEPA’s extraterritorial application. FEPA also cabins itself by expressly disclaiming the right to enforce behavior that would violate certain provisions of the Securities Exchange Act of 1934 and the FCPA, no matter the theory of liability.

Penalties for violators of FEPA include fines of up to US$250,000 or three times the money value of the object of the transaction. People who violate the statute could also face up to fifteen years in prison, in addition to monetary fines.

Differences Between FEPA and the FCPA

The FCPA is a longstanding law that acts as the other side of FEPA's anti-bribery coin.[2] While the FCPA has always criminalized the act of offering a bribe, FEPA operates to fill in the gaps and targets acts that constitute receiving a bribe. Both statutes cover all U.S. persons, and both extend coverage to include foreign issuers of securities. However, one significant difference between the two anti-bribery statutes is where Congress has placed the onus to act. A corporation, if covered by the FCPA, must affirmatively ensure it is accurately maintaining its books and must develop and implement an adequate system of internal accounting controls. FEPA, by contrast, imposes no requirement on any of the covered entities to ensure the statute is not being violated under their roofs.

Notably, while FEPA appears to spare imposing monitoring obligations on its subjects, it does not have the same scheme for the Department of Justice (DOJ), FEPA's enforcement authority. FEPA requires the DOJ to review its enforcement actions from the previous year and provide a comprehensive report to committees in the U.S. House of Representatives and the U.S. Senate, as well as publish the report on its website. Per statutory mandate, the attorney general must work with the secretary of state to detail demands by foreign officials from U.S. companies, the efforts of foreign governments to prosecute such cases, and what diplomatic efforts of the United States operate to protect U.S. companies. Finally, the report must summarize the major enforcement actions taken, penalties imposed, and the effectiveness of the DOJ's actions, and detail what resources or legislative action is needed for adequate enforcement under FEPA. While the DOJ compiles press releases and makes its enforcement actions under the FCPA publicly available, there is no single comprehensive report and analysis, as is required under FEPA.

Anti-Bribery Enforcement Around the World

FEPA is not the first law of its kind, nor is it even one of the most aggressive versions of anti-bribery legislation that exists in the world right now. The UK Bribery Act of 2010 (UK Bribery Act) is far-sweeping legislation the criminalizes any UK citizen or person located within its borders from paying or receiving—directly or indirectly—a bribe.[3] Like FEPA, the UK Bribery Act applies in both the public and private sectors. One important characteristic of the UK law is that it creates a mechanism through which companies may be liable under the act, even if they did not participate in or have knowledge of the bribery. However, the UK Bribery Act provides that a corporation may escape liability upon a showing that it implemented adequate procedures to prevent the bribery.

Another law with similar aims as FEPA is a French law known as the Sapin II Act.[4] The Sapin II Act obligates corporations or groups of corporations to create and implement anticorruption mechanisms. Similar to the DOJ for FEPA, the French Anticorruption Agency (*Agence Française Anticorruption*) is the monitoring and enforcement agency, which can impose steep fines, and violations can even result in the company being monitored by the French government. The Sapin II Act also allows nongovernmental organizations (NGOs) like Anticor to commence proceedings related to corruption matters. In addition, the French law explicitly provides for the protection of whistleblowers.

Analyzing last year's FCPA enforcement data offers no discernible enforcement pattern, nor does it reflect that the DOJ is focusing on any particular region. To the contrary, FCPA enforcement actions in 2023 spanned both corporate and individual actors and prosecuted briberies connected with Brazil, Venezuela, Honduras, Indonesia, and India. Indeed, if the FCPA enforcement actions are indicative of any trend regarding the geographic scope of FEPA enforcement actions, one can conclude that the DOJ will not focus on any one region but will continue to prosecute claims from various parts of the world. For example, Transparency International examines countries against the 100-point Corruption Perceptions Index (CPI), where 100 is very clean and 0 is highly corrupt. While the aforementioned countries span the globe, each of them scores below 40 on the CPI.[5]

Practical Implications

Given FEPA's recent implementation, one can only speculate the practical effect the new law will have on anti-bribery enforcement, whether domestic or foreign. However, analyzing how FEPA fits into the already robust framework of global anti-bribery enforcement efforts offers glimpses of what effects may arise. FEPA prohibits people from accepting items of value in return for being influenced to perform any official act, and further criminalizes accepting items of value in return for being induced to violate the official duty of the foreign official or person.

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One practical implication of FEPA's enactment is that bad actors may not be able to avoid enforcement and the negative publicity that comes with it, even by attenuation. For instance, a company that frequently appears in the annual report may face commercial backlash, as private and public companies may hesitate to risk relations with such a company, particularly given the definition of covered actors identified in FEPA's text. It is possible that companies may face increased pressure to correct their faulty practices, simply because the cost of facing enforcement on *both* sides of a bribery scheme may be too high for many companies to risk. For instance, Honeywell International, Inc., recently faced steep fines imposed by the SEC and the Brazilian government due to corrupt practices committed by its subsidiaries in Belgium.[6] To the extent that some companies regard bribery as simply the cost of doing business in certain regions, Congress may hope that the anticorruption framework created by the FCPA and FEPA together may operate as a sufficient deterrent.

It is not out of the realm of possibility that some informal network emerges from the distinct laws. The UK Bribery Act and the Sapin II Act, like FEPA, involve public dissemination of violators of their respective statutes. It makes sense that companies and NGOs, ones with presences in multiple countries, would communicate and note which entities and jurisdictions present potential issues of liability, especially given the broad scope of who can be found liable under FEPA. Companies should revisit their monitoring protocols and ensure they are equipped to handle any increased scrutiny that FEPA could bring upon their organizations.

However, a nongovernmental anticorruption network may fall victim to the very behaviors it seeks to eradicate, as evidenced by the recent decision in France whereby a Paris Administrative Court stripped authority from Anticor—the French NGO formerly permitted to act as a party in civil cases concerning corruption and bribery.[7] Ironically, Anticor was found to have failed to abide by its own bylaws, internal rules, and regulations, which resulted in a problematic lack of transparency into its *own* financial operations. FEPA's requirement that the DOJ justify its enforcement actions from the previous year may reflect the U.S. government's attempt to resolve/preempt the "who watches the watcher" problem highlighted in France with the Anticor fiasco. To that end, the DOJ may simply choose to work with foreign counterparts to root out corruption and bribery schemes in violation of FEPA, as the SEC often does with respect to FCPA enforcement. Just last year, the SEC prosecuted an FCPA violation out of Guinea, with help from the Australian Federal Police and the United Kingdom Serious Fraud Office.[8]

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Endnotes

1 18 U.S.C. § 201.

2 15 U.S.C. § 78dd-1.

3 Bribery Act 2010, c. 23 (Eng.).

4 Loi 2016-1691 du 9 décembre 2016 relative a la transparence, a la lute contre la corruption et a la modernization de la vie economique [Law 2016-1691 of 9 Dec. 2016 Relating to Transparency, the Fight Against Corruption, and the Modernization of Economic Life], Journal Officiel de la République Française [J.O.] [Official Gazette of France], 9 Dec. 2016.

5 *Corruption Perceptions Index*, Transparency Int'l (30 Jan. 2024), (https://www.transparency.org/en/cpi/2023).

6 Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, *Honeywell UOP to Pay Over $160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil* (19 Dec. 2022) (https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil).

7 TA Paris, 23 June 2023, Rec. Lebon 2111821/6-1.

8 Press Release, U.S. Sec. & Exch. Comm'n, 2023-46, *SEC Charges Rio Tinto plc with Bribery Controls Failures* (6 Mar. 2023) (https://www.sec.gov/news/press-release/2023-46).