4 Questions On Groundbreaking New Foreign Bribery Law

By **Michael Culhane Harper, David Rybicki and Neil Smith** (January 16, 2024)

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On Dec. 22, 2023, President Joe Biden gave federal prosecutors an early Christmas present, and international kleptocrats a lump of coal, when he signed the Foreign Extortion Prevention Act.

FEPA is a groundbreaking law that, for the first time in U.S. history, makes it a crime for foreign officials to demand or accept bribes in exchange for the performance of an official act to confer a business advantage.[1] The law applies when the foreign official solicits or accepts bribes from issuers or domestic concerns, or from anyone while the official is in the U.S.

The law, which was passed with bipartisan and bicameral support,[2] provides federal prosecutors with a new, sweeping, extraterritorial power to pursue corrupt foreign officials who demand or accept bribes.

For decades, the only foreign bribery law on the books was the Foreign Corrupt Practices Act, which criminalizes the supply side of foreign bribery — i.e., the paying and offering of bribes to public officials in exchange for a business advantage.

However, the FCPA does not empower federal prosecutors to target the other player in a quid pro quo-style bribery scheme — the corrupt official demanding the bribe — and until passage of FEPA, the DOJ has resorted to applying other statutes, like the money laundering and wire fraud statutes, when seeking to indict corrupt foreign officials.[3]

While FEPA aims to fill the demand-side hole left by the FCPA, Congress did not amend the FCPA itself when it passed FEPA, and instead modified the domestic bribery statute, Title 18 of the U.S. Code, Section 201, by adding foreign officials to those persons already prohibited from soliciting, demanding or receiving bribes.

Passage of FEPA is expected to significantly alter the anti-corruption landscape under U.S. law. But with the new law's enactment, important questions remain, including:

- How will federal prosecutors actually use FEPA in pursuing the DOJ's anti-corruption agenda?
- Who will have the authority to bring charges under FEPA?
- What impact does FEPA's inclusion in the domestic bribery statute have on prosecutors seeking to charge corrupt foreign officials?
- How will FEPA affect global companies that draw scrutiny from the DOJ related to the acts of foreign officials?

1. How will federal prosecutors actually use FEPA in pursuing the DOJ's anti-corruption agenda?

On its face, FEPA grants prosecutors the authority to charge foreign officials who demand, solicit or receive bribes in exchange for the performance of an official act to confer a business advantage.

The definition of who constitutes a "foreign official" is expansive and includes high-level officials, i.e., heads of state, members of parliament, cabinet ministers; employees or agents acting in an official or unofficial capacity on behalf of a government, department, agency or instrumentality; and senior officials of foreign political parties.

However, an examination of the DOJ's track record reveals that federal prosecutors have historically tended to refrain from indicting foreign government officials while they remain in power.

Largely driven by diplomatic considerations, the DOJ usually waits for such officials to leave office prior to charging them with bribery-related conduct.[4]

And even after a target for prosecution leaves office, the DOJ has, in certain instances, dropped criminal charges and handed the case off to foreign counterparts — like the DOJ's dismissal in 2020 of money laundering and drug-related charges against former Mexican Secretary of National Defense Salvador Cienfuegos Zepeda, who had retired in 2018.[5]

As the Cienfuegos case shows, we can expect U.S. authorities to be conservative — and even deferential to the desires of foreign governments and prosecutors — when bringing charges under FEPA, especially while the wrongdoers retain office.

This historical reluctance has some wondering whether FEPA will have the teeth that Congress intended.

2. Who will have authority to bring charges under FEPA?

Most federal crimes can be charged by any federal prosecutor located in any of the 94 federal districts in the U.S. However, the DOJ's Justice Manual, the authoritative collection of DOJ internal policies and procedures, specifies certain federal crimes that can only be charged with the involvement and authorization of specialized subdivisions of the DOJ.

For example, the Justice Manual requires that the enforcement of any criminal law affecting or involving national security requires the supervision and approval of the National Security Division.[6]

As for criminal tax matters, the Justice Manual empowers the DOJ's Tax Division with exclusive authority to authorize or decline tax-related prosecutions.[7]

When it comes to charging FCPA violations, the Justice Manual reserves exclusive authority to the Criminal Division's Fraud Section, and notes that FCPA investigations often "will raise complex enforcement problems abroad" and "may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials."[8]

Certainly, many of the same complications involving overseas evidence, involvement of senior foreign officials and sensitivies related to diplomatic comity will be present, and

potentially even more acute, in prosecutions brought under FEPA.

As such, we should expect that the Justice Department will build similar bureaucratic safeguards around decisions to charge FEPA violations.

3. What impact does FEPA's inclusion in the domestic bribery statute have on prosecutors seeking to charge corrupt foreign officials?

FEPA has many similarities to the FCPA, but its key distinctions relate to the fact that it was incorporated into the text of the domestic bribery statute, not the FCPA.

Some of those distinctions are straightforward. For instance, the penalties for a violation of FEPA are significantly more severe than those under the FCPA. The statutory maximum penalty for individuals under the FCPA's anti-bribery provision is a fine of up to $250,000 and imprisonment for up to five years.[9] FEPA provides a bigger hammer: imprisonment of up to 15 years and fines up to $250,000, or three times the monetary equivalent of the bribe — whichever is greater.

Other differences are more complicated. The U.S. Supreme Court has held that in order to prove a violation of the domestic bribery statute, the government must adduce evidence that the bribed official undertook an official act in exchange for the corrupt payment.[10]

Notably, courts have declined to extend the "official act" requirement to the FCPA.[11] The result of this incongruence creates a more demanding standard of proof for the domestic bribery law than for the FCPA.

The decision to amend the domestic bribery statute by adding FEPA means that in order to convict a foreign official for demanding or receiving a bribe, prosecutors will likely have to offer evidence supporting the existence of an official act — something that has proven difficult historically.

Prosecutors may also need to think twice before adding a FEPA charge to an FCPA prosecution, as they will need to consider whether they have sufficient evidence to prove an official act by the foreign official.

Similarly, they'll need to weigh the potential for confusion among potential jurors when charging two seemingly similar bribery statutes with two different evidentiary standards.

4. How will FEPA affect global companies that draw scrutiny from the DOJ related to the acts of foreign officials?

The enactment of FEPA creates additional considerations for U.S. and international companies doing business around the globe — particularly for those considering self-disclosure or cooperation with the government in a foreign bribery matter.

First, prosecutors can be expected to intensify their focus on seeking evidence from companies that inculpates corrupt foreign officials. This likely creates an opportunity for cooperating companies to give prosecutors more of what they want, but also may mean heightened expectations for what is characterized by DOJ as good or extraordinary cooperation.

Companies should be aware that in addition to providing the government with evidence related to company employees who participated in potential misconduct, prosecutors will

likely also demand evidence incriminating the foreign officials as a prerequisite for meaningful cooperation credit.

What should a company do in the event it receives a bribe demand from a foreign official? Should it self-disclose to the DOJ even if the company has refused to pay a bribe? And, if so, should the company still expect to face a full FCPA investigation after the voluntary self-disclosure?

Companies will need to closely evaluate these risks introduced by FEPA before approaching the DOJ with a voluntary self-disclosure.

Conclusion

FEPA is now the law of the land, but how the DOJ will use it, who can charge it and how federal prosecutors will incorporate it into foreign bribery prosecutions are all open questions.

One thing is certain: Prosecutors will be eager to devise ways to use this new tool in the fight against transnational corruption. And corporations will be faced with an even more complicated risk calculus when deciding whether to self-disclose potential misconduct to the government.

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[1] FEPA can be found in Section 5101 of the National Defense Authorization Act, available here: https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670enr.pdf.

[2] https://www.whitehouse.senate.gov/news/release/bipartisan-bicameral-foreign-extortion-prevention-act-signed-into-law.

[3] Foreign officials may "not be charged with violating the FCPA itself, since [it] does not criminalize the receipt of a bribe by a foreign official." U.S. v. Blondek, 741 F. Supp. 116, 117 (N.D. Tex. 1990), aff'd, U.S. v. Castle, 925 F.2d 831, 834-35 (5th Cir. 1991) (holding that "foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate

the FCPA").

[4] See, e.g., Indictment, U.S. v. Esquenazi, et al., No. 09-cr-21010 (S.D. Fla. Aug. 5, 2011), ECF No. 3; Indictment, U.S. v. Inniss, No. 18-cr-134 (E.D.N.Y. Mar. 15, 2018), ECF No. 1; Superseding Indictment, U.S. v. Claudia Patricia Diaz Guillen, et al., No. 18-CR-80160 (S.D. Fla. Dec. 15, 2020), ECF No. 44.

[5] See, e.g., U.S. Dep't of Justice Press Release discussing the US dropping charges against the former Mexican Secretary of National Defense General Salvador Cienfuegos Zepeda, Joint Statement by Attorney General of the United States William P. Barr and Fiscalía General of Mexico Alejandro Gertz Manero, U.S. Dep't of Justice, (Nov. 17. 2020), https://www.justice.gov/opa/pr/joint-statement-attorney-general-united-states-william-p-barr-and-fiscal-general-mexico.

[6] See Justice Manual § 9-90.010.

[7] See Justice Manual § 9-90.010.

[8] See Justice Manual § 9-47.110.

[9] 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. §§ 3571(b)(3), (e).

[10] See, e.g., McDonnell v. U.S., 136 S. Ct. 2355 (2016).

[11] U.S. v. Ng Lap Seng, No. 18-1725-CR, 2019 WL 3755676, at *1 (2d Cir. Aug. 9, 2019).