THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS

Bulletin

of The International Academy of Financial Crime Litigators

LUCINDA A. LOW

"FEPA may create new risks and challenges for companies dealing with enforcement authorities. Does full cooperation, for example, required by the Department of Justice to receive maximum credit against potential penalties, include providing information about the foreign officials who have solicited a bribe?"

ISSUE 3 | SPRING 2024

Introduction

Late last year, as part of the annual defense authorization bill—a "must pass" piece of legislation—Congress passed, and President Biden signed into law, the Foreign Extortion Prevention Act (FEPA) (Public Law No. 118-31, amending 18 U.S.C.§201).

As detailed below, FEPA targets the "demand" side of foreign official bribery—the foreign officials who seek illicit payments--the side left untouched by the U.S. Foreign Corrupt Practices Act (FCPA), which—like the OECD Antibribery Convention--has purely "supply side" application. The new provision's sponsors have hailed it as the "most significant international criminal anti-corruption legislation in half a century."

FEPA was first introduced as a bill several years ago, but failed to get any real traction. However, it has had strong supporters on a bipartisan basis in the U.S. Congress and that fact, coupled with efforts by anti-corruption NGOs and some other external groups, propelled it forward in 2023 amidst increasing concern about the lack of accountability on the demand side and the need for additional tools to combat it.

The U.S. has demonstrated its increasing concern with the demand side through its "no safe haven" initiative, pursuant to which persons involved in bribery or other corruption are denied entry into the United States. Global Magnitsky sanctions have also been used to prevent dealings with persons engaged in corruption or human rights violations. Relying principally on the anti-money laundering (AML) laws, the United States in recent years has stepped up its prosecutions of foreign government officials who receive bribes in the United States or subsequently bring their proceeds into the United States, but this tool has its limitations. The Biden Administration's December 2021 strategy on countering corruption indicated that it planned to work with Congress to criminalize the demand side of bribery.

The "demand side" has also been the subject of increasing concern at the international level. The OECD Council's 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2021), https://legalinstruments.oecd.org/en/instruments/OECD_LEGAL-0378, contained several recommendations focusing on the

"demand side", following on a 2018 OECD study that found that only 20% of foreign officials involved in supply side bribery cases are prosecuted.

Of course, many bribery statutes around the world deal with the demand side. But, like the US domestic bribery statute found at 18 U.S.C.§201, they do not target foreign government officials, but are focused on their own officials. Imposing criminal penalties on officials of a foreign country is a far different matter than targeting one's own officials. That is a big part of the reason why FEPA is significant. So what does this statute do?

FEPA—KEY FEATURES

FEPA was not subject to extensive scrutiny prior to its enactment. No hearings were held in any of the congressional sessions during which the bill was pending. There is therefore little legislative history that can be consulted to shed light on its provisions. But a comparison of its terms to the FCPA is instructive.

Like the FCPA, FEPA takes a criminalization approach. And like the FCPA, it prohibits *quid pro quo* corruption in terms that are broader than the US domestic bribery statute to which it is attached and are closer to the FCPA's. But although it represents the other side of the coin from the FCPA, it is not fully aligned with the FCPA. This is most apparent in who is covered.

Who Is Covered by FEPA

One key difference between the FCPA and FEPA is FEPA's definition of who is a foreign official. FEPA's definition covers a number of persons who are treated as "foreign officials" under the FCPA, namely:

a. officials or employees of a foreign government or any department, agency or instrumentality thereof;

b. officials or employees of a public international organization; and

c. persons acting in an official capacity for those in the previous two categories.

But FEPA's scope is broader. In addition to persons covered by the FCPA, FEPA covers:

a. "senior political figures";
b. any person acting in an unofficial capacity for foreign government or international organization officials; and
c. international organizations that may be designated by the US President by executive order from time to time (i.e., not just those designed under the International Organizations Immunities Act, as is the case under the FCPA).

In addition, the definition of the offense brings into the ambit of the statute a person "selected" to be a foreign official.

Who Is a "Senior Political Figure". FEPA's definition of "senior political figure," taken from U.S. Treasury Department due diligence regulations for banks, is broad. It covers senior officials (defined as individuals with substantial authority over policy, operations or the use of government-owned resources), current or former, in any branch of a foreign government (including specifically the military), whether elected or not, of a "major" foreign political party, and of a foreign government-owned commercial enterprise; companies formed by or benefitting such individuals, their immediate family members (defined to include spouses, parents, siblings, children, and a spouse's parents or siblings), and their close associates based on wide public knowledge or actual knowledge. Prosecutors have treated many of these persons as officials under the FCPA, or used indirect payments prong of the FCPA to cover them, without their being explicitly covered, but FEPA's coverage removes any doubt as to their status.

Acting in an Unofficial Capacity. FEPA's coverage of persons acting in an "unofficial" as well as an official capacity is novel and likely to raise many questions. The concept of acting in an "official" capacity has been part of U.S. antibribery laws for many years and is well established. But who may be deemed to act in an unofficial capacity? Unregistered foreign agents? Family members who don't qualify as "senior political figures" but are in an economic relationship with the official? The issues this element will present will in the first instance be highly factual, but prosecutors and courts will have to determine what type of relationship is legally sufficient when the

traditional indicia of agency may not be present. And even the issue of what is needed for an agency relationship, as recent FCPA litigation has shown, is far from clear.

Interestingly, the Supreme Court recently addressed a similar question in the context of federal mail and wire fraud: when an individual with influence over government policy, but not a public official, may be charged with depriving the public of "honest services." *Percoco v. United States*, 598 U.S. 319 (2023). In that case, the Supreme Court rejected a test based on an individual's dominance over government policy and indicated that test should be whether decision-making authority was delegated to the individual.

Persons "Selected" to Be an Official. Covering persons "selected" to be officials is consistent with the federal domestic bribery statute, but diverges from the language of the FCPA. The FCPA covers not only foreign officials, but officials of political parties (not just "major" parties), candidates for political office, and the political parties themselves. While these campaign-related issues are outside the scope of FEPA, the concept of "selection" will likely require factual inquiries into the governmental processes of the foreign countries concerned. The definition of "person who has been selected to be a public official" in the domestic bribery statute is "any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed".

FEPA'S DEFINITION OF THE OFFENSE

Although FEPA has extortion in its name, the offense it establishes goes well beyond the definition of extortion historically applied in the FCPA context, which involves threats of death or serious harm to persons or extreme damage to property. FEPA's offense covers "foreign officials" who:

- Corruptly
- demand, seek, receive, accept, or agree to receive or accept
- directly or indirectly
- with the requisite jurisdictional nexus (discussed below)
- anything of value

- either personally or for any other person or nongovernmental entity
- from certain specified persons (discussed below)
- in return for certain actions, including an improper advantage
- in connection with obtaining or retaining business for or with, or directing business to, any person.

In a number of respects this definition is the mirror image of the FCPA, as the table below demonstrates. Indeed, several of the elements ("corruptly," anything of value," "directly or indirectly," and "obtain or retain business") are identical to those in the FCPA. Also similar is that mere agreement, rather than the actual receipt, of value will suffice. Some other elements are not present in the FCPA, but are part of the domestic bribery statute (e.g., the element of "either personally or for any other person or governmental entity").

More significantly, the FCPA covers any "act in furtherance" of an offer, promise, payment, etc.," while FEPA appears to focus on the completed act, which narrows its scope. And although FEPA is drafted more broadly than the domestic bribery statute in terms of its *quo*—which the courts have generally construed narrowly based on its "official act" requirement—its *quo* does not fully parallel the FCPA, as the table below demonstrates.

Furthermore, FEPA requires that the givers of value be a person covered by one the FCPA's three antibribery prohibitions: an "issuer", a "domestic concern"; or "any person." Moreover, the "any person" category incorporates that provision's territorial jurisdictional limitation, i.e., that the giving of value must occur while that person is in the territory of the United States. The meaning of this term has not been fully settled under the FCPA, and its uncertainties will undoubtedly be mirrored here, but it reinforces the territorial nature of FEPA, discussed further below.

What this means is FEPA will be triggered only by conduct involving, on the supply side, persons who are covered by the FCPA. Those are not just U.S. persons, but include foreign "issuers,", foreign companies with their principal place of business in the U.S., making them "domestic concerns", and other foreign persons who act within the United States. Those foreign persons who are beyond the reach of the FCPA, however, can be involved in corrupt transactions with foreign officials without triggering FEPA. This suggests that FEPA, as a tool to pursue kleptocrats and their enablers as its sponsors have trumpeted, will not fill a major part of the gap that is perceived to exist.

EXTRATERRITORIALITY AND RELATIONSHIP TO THE FCPA

FEPA provides that the offense it defines "shall be subject to extraterritorial federal jurisdiction." 18 U.S.C.§201(f)(3). This language has presumably been included to overcome the presumption against extraterritorial application of federal laws that the U.S. Supreme Court has articulated in recent years. It is not entirely clear how this will operate, however, as FEPA's offense is defined in territorial terms. FEPA's jurisdictional nexus requirement for the demand side official is the well-known "use of the mails or other means or instrumentality of interstate or foreign commerce". Thus, the statute is based on territoriality, rather than universal jurisdiction. It is therefore not clear what this provision will mean in practice.

FEPA also sets forth (in 18 USC.§201(f)(5)) a rule of construction that states that:

> *This subsection shall not be construed as encompassing conduct that would violate section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 or 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2; 15 U.S.C. 78dd-3) whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise.*

This provision, referencing the FCPA's three anti-bribery prohibitions, appears to have been designed to create a wall between FCPA and FEPA prosecutions, such that conduct that would violate the FCPA is not covered by FEPA. FEPA's language raises many questions, however, about the interface between the two. Many FCPA cases—perhaps as many as half--are brought not as straight FCPA violations but as conspiracy cases. Does this mean that persons whose conduct is covered by FEPA cannot be co-conspirators with a bribe payer? Cannot be charged with aiding and abetting or other secondary offenses? Since the FCPA's indirect liability standard includes a specific prohibition on payments to "any person", while "knowing" of a pass-through, collisions between the FCPA and FEPA, with its much broader definition of "foreign official," seem destined to occur.

PENALTIES

The penalties for a FEPA violation are a "fine of not more than $250,000 or 3 times the monetary equivalent of the thing of value, imprisoned [sic] for not more than 15 years, or both". 18 USC§201(f)(2).

FEPA—CONCLUSIONS AND IMPLICATIONS

The press release of a key FEPA sponsor after its passage stated that: "This system gave unscrupulous companies operating in a corrupt environment a competitive edge while disadvantaging companies beholden to the rule of law, including American companies." But these corrupt companies may be beyond the reach of the FCPA and the corrupt officials, if the supply side is not covered by the FCPA, may be beyond the reach of FEPA.

As with any legislation of this nature, some period of time will be necessary to assess the utility and value of the new tool FEPA provides to prosecutors. As this short article has shown, this new law is unclear in a number of respects. But prosecutions may not be the only relevant metric. Both the reporting provisions of the statute, and the fragmentary legislative history that exists, suggest one purpose of the legislation is to help arm companies subject to the FCPA against corrupt official demands, by potentially deterring those who would solicit them through the threat of their own criminal liability. Another may be to stimulate prosecution by the officials' home countries.

Both goals are implied by the reporting requirements of FEPA, which mandate annual reporting by the Attorney General to the Congress, and made public, addressing: the efforts of foreign governments to prosecute "demand side" cases; US diplomatic effects to protect US companies from foreign bribery and their effectiveness; enforcement and other actions taken under FEPA and penalties imposed; and the effectiveness of enforcement efforts and additional measures that could be taken to ensure adequate enforcement. These provisions implicitly acknowledge the challenges that FEPA enforcement is likely to face.

Companies subject to the FCPA should incorporate FEPA in their training programs, to make their employees, agents and supply chains aware of this new tool and how it may help their response to corrupt solicitations by foreign officials or persons believed to be acting on their behalf. Foreign nationals with family or business links to foreign government officials, as well as the officials, on the other hand, face new risks as a result of FEPA.

FEPA may create new risks and challenges for companies dealing with enforcement authorities. Does full cooperation, for example, required by the Department of Justice to receive maximum credit against potential penalties,

include providing information about the foreign officials who have solicited a bribe? This may be an unattractive option, especially for companies with ongoing business in the official's jurisdiction, potentially adding additional disincentives to situations of self-reporting. And U.S. government officials other than prosecutors may face increased perceptions that they are acting as informants for the enforcement authorities.

Elements of the FEPA Antibribery Offense:
A Comparison to the FCPA and the U.S. Domestic Bribery Statute

FEPA	FCPA	Domestic Bribery
Foreign Official: **a.** officials or employees of a foreign government or any department, agency or instrumentality thereof ((4)(A)(i); **b.** officials or employees of a public international organization ((4)(B); and (c) persons acting in an official capacity for those in the previous two categories ((4(C)); any senior political figure, as defined in section 1010.605 of title 31, Code of Federal Regulations, or any successor regulation"; **c.** in (4)(D), any person acting in an unofficial capacity for the government of international organization officials identified in (a) and (b) in the preceding paragraph; and (c) international organizations that may be designated by the President by executive order from time to time. Also covers persons "selected" to be a Foreign Official.	*Foreign Official:* **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. **b.** For purposes of subparagraph (A), the term "public international organization" means -- (i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication. Also prohibits improper payments to political party officials, candidate for political office, and the political parties. And prohibits improper payments to "any person, while knowing..."	Covers "public officials" and persons "selected" to be public officials.
Corruptly	Same	Same

FEPA	FCPA	Domestic Bribery
demand, seek, receive, accept, or agree to receive or accept	No analog (supply side statute)	Same
directly or indirectly	Same	Same
Jurisdictional nexus: yes, use of the mails or other means or instrumentality of interstate or foreign commerce	Jurisdictional nexus: yes (differs for 3 antibribery prohibitions, both territoriality and alternative nationality)	No explicit statutory language
Quid Pro Quo Statute: yes	Same	Same [official act requirement?]
Quid: Anything of value	Same	Same
either personally or for any other person or nongovernmental entity	Not specified	Very similar to FEPA: "personally or for any other person or entity"
Giver of the quid: "issuer", "domestic concern", or "any person" under 15 USC §§ dd-1, dd-2 and dd-3 [FCPA tie-in]	Prohibits bribes by "issuers", "domestic concerns" and "any person", including officers, directors, shareholders, employees and agents	
Quo: **a.** being influenced in the performance of any official acts; **b.** being induced to do or omit to do any act in violation of the official duty of such foreign official or person; or **c.** conferring any improper advantage.	**a.** (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or **b.** inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality	**a.** being influenced in the performance of any official act; **b.** being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or **a.** being induced to do or omit to do any act in violation of the official duty of such official or person.
in connection with obtaining or retaining business for or with, or directing business to, any person.	Same	No "business" element

AUTHORS

Lucinda Low

Fellow Lucinda Low practices at Steptoe LLP, based in its Washington, D.C. office. She is a well-known authority on the U.S. Foreign Corrupt Practices Act and other anti-corruption laws.