

## White Collar Criminal Defense

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### **Anti-Bribery Expansion: The Foreign Extortion Prevention Act**

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On December 22, 2023, President Biden signed into law the 2024 National Defense Authorization Act. This bipartisan legislation included the Foreign Extortion Prevention Act (FEPA), which enables criminal prosecution of foreign officials who solicit and receive bribes. FEPA is an important addition to the U.S. Department of Justice's (DOJ or Justice Department) increasing efforts to fight foreign bribery.

This client alert will detail FEPA's effect on current laws, what FEPA entails, and what steps should be taken to comply with this new law.

#### **Effect on Current Laws**

Prior to FEPA, the Justice Department relied heavily on the Foreign Corrupt Practices Act (FCPA) to combat foreign bribery. The FCPA targets those who offer or pay bribes to foreign officials—that is, those on the “supply” side of international bribery cases.<sup>1</sup> Its reach does not extend, however, to the foreign officials pocketing the bribes. To prosecute those individuals on the “demand” side of cross-border bribery cases, DOJ was forced to rely on laws such as the federal money laundering and wire fraud statutes. The Justice Department's inability to use the FCPA to prosecute corrupt foreign officials is considered by many a significant shortcoming of an otherwise effective law.<sup>2</sup>

FEPA remedies this by giving the Justice Department a more direct avenue to prosecute those on the demand side of foreign bribery schemes. The law amends the domestic bribery statute, 18 U.S.C. § 201. It is not a direct addition or amendment to the FCPA.

#### **FEPA**

Under FEPA, it is unlawful for any foreign official “to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value” from (1) any person while in the territory of the United States, (2) a U.S. issuer,<sup>3</sup> or (3) a domestic concern<sup>4</sup> in return for (A) being influenced in the performance of any official act; (B) being induced to do or omit to do any act in violation of a foreign official's official duty; or (C) conferring any improper advantage in connection with obtaining or retaining business for or with, or directing business to, any person.

“Foreign official” is defined broadly to mean (1) any official or employee of a foreign government or any department, agency, or instrumentality thereof; (2) any senior foreign political figure;<sup>5</sup> (3) any official or employee of a public international organization; or (4) any person acting in an official or unofficial capacity for or on behalf of a government, department, agency, instrumentality, or a public international organization. Importantly, this definition expands on the FCPA's definition of “foreign official” in two ways. First, FEPA includes people acting in an “unofficial capacity,” whereas the FCPA only addresses an official's conduct in his or her official capacity.<sup>6</sup> Second, FEPA includes “any senior foreign political figure,” which expands on the FCPA's definition by including an official's close associates and immediate family members.

In addition, FEPA requires the Attorney General to issue an annual report concerning DOJ's enforcement efforts under the new law. The report must include information regarding both significant DOJ prosecutions under FEPA as well as corrupt foreign officials, such as "an overview of the scale and nature of bribery involving foreign officials, including an analysis of where these crimes are most likely to be committed." This reporting requirement incentivizes the Justice Department to be active in its use and enforcement of FEPA.

FEPA provides criminal penalties. Violations carry a prison sentence of up to 15 years, a fine of up to \$250,000 or three times the monetary equivalent of the bribe in question, or both.

## Compliance

It is unknown how DOJ will use FEPA as part of its enforcement efforts. The Justice Department could employ FEPA as a separate avenue for prosecution. More likely, it will use the statute as a complement to the FCPA to bolster those cases. Either way, a robust compliance program is critical to protect against the Justice Department's freshly reinforced arsenal of anti-bribery laws. This compliance program should aim to both educate employees and demonstrate good faith efforts to comply with the law. This includes employee trainings, risk assessments, incentives for lawful behavior, appropriate disciplinary measures, confidential reporting, and internal investigations.<sup>7</sup> Additionally, a company should focus on good record-keeping, which ensures accurate financials and helps avoid or flag suspicious payments.

As was the case prior to FEPA, the adequacy and effectiveness of a company's compliance program will be threshold issues and critical determinants of the company's fate should it ever run afoul of these laws.<sup>8</sup> The exact details of a company's compliance program will be different for each company, and thus careful consideration will have to be given in the creation and modification of such a program.<sup>9</sup>

## Takeaways

As the new year kicks off, organizations should be aware of DOJ's expanded toolkit in its already aggressive anti-bribery enforcement efforts. Lowenstein Sandler's White Collar Crime practice group is pleased to provide legal counsel if you have questions concerning compliance with FEPA.

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<sup>1</sup> The FCPA prohibits any "issuer," "domestic concern," or foreign entity acting in U.S. territory from offering or giving "anything of value" to a "foreign official" for the purpose of "obtaining or retaining business." 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

<sup>2</sup> See *Amec Foster Wheeler Energy Limited Agrees to Pay Over \$18 Million to Resolve Charges Related to Bribery Scheme in Brazil*, Office of Public Affairs, [https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery#:~:text=Amec Foster Wheeler Energy Limited \(Amec Foster Wheeler or the,in exchange for an approximately; see also Former Chief Executive Officer of Petrochemical Company Sentenced to 20 Months in Prison for Foreign Bribery Scheme, Office of Public Affairs, https://www.justice.gov/opa/pr/former-chief-executive-officer-petrochemical-company-sentenced-20-months-prison-foreign#:~:text=A Brazilian man who previously,Braskem into a secret slush](https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery#:~:text=Amec Foster Wheeler Energy Limited (Amec Foster Wheeler or the,in exchange for an approximately; see also Former Chief Executive Officer of Petrochemical Company Sentenced to 20 Months in Prison for Foreign Bribery Scheme, Office of Public Affairs, https://www.justice.gov/opa/pr/former-chief-executive-officer-petrochemical-company-sentenced-20-months-prison-foreign#:~:text=A Brazilian man who previously,Braskem into a secret slush).

<sup>3</sup> As defined in 15 U.S.C. § 78c(a).

<sup>4</sup> As defined in 15 U.S.C. § 78dd-2.

<sup>5</sup> As defined in 31 C.F.R. § 1010.605.

<sup>6</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)).

<sup>7</sup> E.g., Evaluation of Corporate Compliance Programs, U.S. Dept. of Justice, Criminal Division, Fraud Section (Feb. 2017),

at <https://www.justice.gov/criminal-fraud/page/file/937501/download>; U.S.S.G. § 8B2.1(c) (providing that "the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in [this guideline] to reduce the risk of criminal conduct identified through this process"); U.S.S.G. § 8B2.1(c); Measuring Compliance Program Effectiveness: A Resource Guide, HCCA-OIG Compliance Effectiveness Roundtable (Mar. 27, 2017), at <https://oig.hhs.gov/documents/toolkits/928/HCCA-OIG-Resource-Guide.pdf>.

<sup>8</sup> E.g., Crim. Div. of the U.S. Dep't of Just. & Enft Div. of the U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 51 (2d ed. July 2020); U.S.A.M. 9-28.300 (listing "the existence and effectiveness of the corporation's pre-existing compliance program" as a factor to be considered when determining whether to charge a corporation with a crime).

<sup>9</sup> The Justice Department measures the effectiveness of a compliance program in part by "(i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct." U.S.S.G. § 8B2.1 comment (n.2(A)).

# Contacts

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