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Dissecting The Proposed Foreign Extortion Prevention Act

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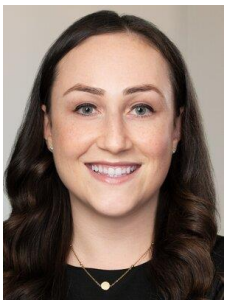
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On July 18, the Foreign Extortion Prevention Act was introduced in both chambers of the U.S. Congress.

The FEPA, if it becomes law, would make it a crime for foreign officials to solicit or receive a bribe from any person or company in the U.S.

More specifically, the FEPA would make it

> unlawful for any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value personally or for any other person or nongovernmental entity, by making use of the mails or any means or instrumentality of interstate commerce, from any person ... while in the territory of the United States, from an issuer ... or from a domestic concern ... 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 the official duty of such foreign official or person; or (C) conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person.

Violators could be punished by up to 15 years in prison and a fine of $250,000 or three times the value of the bribe.

Filling the Demand Side Gap

The FEPA seeks to fill a gap in the Foreign Corrupt Practices Act.

The FCPA focuses on the "supply side," not the "demand side," of foreign bribery in that only the bribe payer, but not the bribe receiver, can be convicted for violating its anti-bribery provisions.

This distinction was highlighted in United States v. Castle.[1] In Castle, held in the U.S. Court of Appeals for the Fifth Circuit, the U.S. Department of Justice attempted to prosecute two Canadian officials — Donald Castle and Darrell Lowry — who allegedly accepted bribes from executives at U.S.-based Eagle Bus Company in exchange for a municipal bus contract.

The DOJ alleged that the Canadian officials conspired with the U.S. executives to violate the FCPA.

The Fifth Circuit concluded in its 1991 opinion, however, that because Congress had specifically enumerated the individuals within the FCPA's reach — including "virtually every possible person connected to the payments except foreign officials" — it was "only logical to conclude that Congress affirmatively chose to exempt this small class of persons [the foreign officials accepting the bribe] from prosecution."[2]

The court held that the DOJ could not use the general conspiracy statute to evade this limitation.

The DOJ has responded to this limitation in the FCPA, in part, by using other statutes to prosecute the demand side of foreign bribery.

In United States v. Duperval,[3] for instance, the U.S. Court of Appeals for the Eleventh Circuit's 2015 opinion affirmed a foreign official's convictions under the Money Laundering Control Act, or MLCA.

While serving as director of international relations for Haiti's state-owned and -controlled telecommunications company, Haiti Teleco, the defendant accepted about $500,000 in bribes from U.S.-based telecommunications companies Terra Telecommunications Corp. and Cinergy Telecommunications Inc. in exchange for preferred telecommunications rates, favorable contracts and other business advantages.

At trial, the DOJ established that the defendant had laundered the proceeds of FCPA violations through the U.S. financial system, in violation of the MLCA.

Although the DOJ successfully used the MLCA to combat demand-side bribery in Duperval, the MLCA is not available in many situations, including when a bribe is paid in cash or when a foreign official has simply demanded a bribe.

Other federal statutes, such as the mail and wire fraud statutes and the Travel Act, also contain significant gaps in their ability to apply to foreign bribe seekers.

In limiting the FCPA to bribe payers, Congress considered the "inherent jurisdictional, enforcement, and diplomatic difficulties" raised by the application of the FCPA to non-citizens of the U.S. and the fact that many foreign nations already prohibit the receipt of a bribe by an official.[4]

Over the years, however, domestic bribery laws have proven relatively ineffective in combating the demand side of foreign bribery.

For example, in a 2018 study, the Organization for Economic Cooperation and Development's Working Group on Bribery found that only one-fifth of surveyed supply-side foreign bribery prosecutions were accompanied by a domestic sanction on the demand side:[5]

> To have a globally effective overall enforcement system, however, both the supply-side participants (i.e. the bribers) and the demand-side participants (i.e. the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.[6]

The OECD Working Group has encouraged its member states to work with companies and domestic authorities to address the demand side of bribery.[7]

The FEPA reflects a changed view on the effectiveness of this approach alone.

Senator Sheldon Whitehouse stated that the bill "send[s] a clear message" to "international kleptocrats and criminals seizing any and every opportunity to extort American businesses and undermine our national security" that "demanding a bribe from American companies will not be tolerated."[8]

Senator John Kennedy expects the FEPA to "level the playing field by making foreign officials follow the rule of law."[9]

Comparing the FCPA to the FEPA

Rather than amending the FCPA, the FEPA would amend the current federal domestic bribery statute, Title 18 of the U.S. Code, Section 201.

That said, the FEPA and the FCPA are largely complimentary, both in their overall intent and in their wording.

The FEPA's and the FCPA's definitions of "foreign official" are very similar but differ in some interesting ways. The FEPA's definition of foreign official is broader than the FCPA's in one key respect.

While both acts define "foreign official" to include persons acting in official capacities on behalf of a government, department, agency, instrumentality or public international organization, the FEPA would also apply to persons acting in unofficial capacities for such entities.

But the FEPA's definition is narrower than the FCPA's in that the FEPA does not appear to apply to bribe demands by candidates for foreign political office, though it would prohibit bribe demands from senior officials from a major foreign political party and persons selected to be a foreign official.

Interestingly, both the FEPA and the FCPA include employees of instrumentalities of foreign governments within their definition of foreign official without defining the term "instrumentality."

This suggests that Congress is comfortable with the Eleventh Circuit's 2014 holding in United States v. Esquenazi[10] that, under certain circumstances, a state-owned enterprise can be considered an instrumentality.[11]

By incorporating the definition of "senior political figure" from federal anti-money laundering regulations, the FEPA also expressly includes senior executives of foreign government-owned commercial enterprises within its definition of foreign official.

In terms of "quid pro quo," both the FEPA and the FCPA use the expansive term "anything of value" for the quid element, but there is a slight difference in the quo element.

The FEPA expressly incorporates Section 201's use of the term "official act."

In McDonnell v. United States, the Supreme Court read this term narrowly in 2016, holding that such an

act must involve "a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing."[12]

Conduct such as "setting up a meeting, hosting an event or contacting an official — without more — does not count as an 'official act.'"[13]

In United States v. Ng Lap Seng[14], the U.S. Court of Appeals for the Second Circuit held in 2019 that the FCPA's "business nexus" components were more "expansive" than Section 201's "official act" component.[15]

Thus, by also incorporating part of the FCPA's "business nexus" element — i.e., by prohibiting a foreign official from demanding a bribe in return not only for an "official act" but also for "conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person" — the FEPA prohibits a broader range of actions than the domestic bribery component of Section 201.

Conclusion

If the FEPA becomes law, it will be music to the ears of many U.S. businesses that feel that they bear an unfair burden when it comes to foreign bribery enforcement.

While the FEPA does fill the gap created by inadequate domestic enforcement against bribe seekers, it does not address another of Congress' original concerns in excluding foreign officials from the scope of the FCPA.

More specifically, the FEPA does not on its face address the political risk of empowering a DOJ line prosecutor to seek bribery charges against a potentially significant foreign official in the U.S.

This is a critical consideration that DOJ leadership will have to address if the FEPA becomes law.

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[1] 925 F.2d 831 (5th Cir. 1991).

[2] Id. at 831.

[3] No. 12-13009, 2015 WL 507906 (11th Cir. Feb. 9, 2015).

[4] Castle, 925 F.2d at 836 (citing legislative history).

[5] OECD, Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? (2018).

[6] Id.

[7] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 25, 2021).

[8] Senator Sheldon Whitehouse, "Whitehouse, Tillis Applaud Senate Passage of Bipartisan Foreign Extortion Prevention Act" (Jul. 28, 2023), available at https://www.whitehouse.senate.gov/news/release/whitehouse-tillis-applaud-senate-passage-of-bipartisan-foreign-extortion-prevention-act.

[9] Senator John Kennedy, "Kennedy, Tillis, Whitehouse introduce bipartisan bill to protect U.S. businesses from foreign extortion" (Jul. 19, 2023), available at https://www.kennedy.senate.gov/public/2023/7/kennedy-tillis-whitehouse-introduce-bipartisan-bill-to-protect-u-s-businesses-from-foreign-extortion.

[10] 752 F.3d 912 (11th Cir. 2014).

[11] Id. at 925.

[12] 579 U.S. 550, 571 (2016).

[13] Id. at 556.

[14] 934 F.3d 110 (2d Cir. 2019).

[15] Id. at 133.