

White Collar Defense and Investigations Alert



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One Manhattan West
New York, NY 10001
212.735.3000

Foreign Extortion Prevention Act Criminalizes Demand-Side Bribery

On December 22, 2023, President Biden signed into law the Foreign Extortion Prevention Act (FEPA) as part of the fiscal year 2024 National Defense Authorization Act. FEPA criminalizes demand-side bribery by foreign officials — the demand or acceptance of a bribe from a U.S. citizen, company or issuer, or anyone located within the territory of the U.S., when made to obtain or retain business. Specifically, the law’s prohibitions extend to any of the following conduct by 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 ... “

Prior to FEPA, neither the Foreign Corrupt Practices Act (FCPA) nor the U.S. domestic bribery regime penalized corrupt *demands* by foreign officials upon U.S. persons, instead criminalizing *offers* of bribes to foreign officials. The Hobbs Act (18 U.S.C. § 1951) — which prohibits payments induced “under color of official right” that affect foreign commerce — theoretically offers a potential vehicle for penalizing demand-side bribery by foreign officials. However, DOJ has not traditionally applied the Hobbs Act to the conduct of foreign officials.

The newly enacted law modifies domestic bribery statutes codified under 18 U.S.C. § 201 and, as such, does not modify or infringe upon the ambit of the FCPA. FEPA explicitly states that it does not criminalize conduct that would violate Section 30A of the Securities Exchange Act of 1934 or Sections 104 or 104A of the FCPA, “whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise.” Still, FEPA mimics some key elements of the FCPA’s prohibitions against foreign corruption:

1. FEPA’s jurisdictional scope is, like the FCPA’s, broad: FEPA criminalizes corrupt demands by foreign officials if made of a U.S. issuer, a U.S. domestic concern or any person in the territory of the United States.
2. FEPA’s definition of a “foreign official” is similarly broad in scope: any person acting officially or unofficially on behalf of a government, or any department, agency or instrumentality thereof, or on behalf of any public international organization.
3. FEPA requires a *quid pro quo*, namely, that an official’s demand of a thing of value be made in return for: (1) “being influenced in the performance of any official act;” (2) “being induced to do or omit to do any act in violation of the official duty of such foreign official or person;” or (3) “conferring any improper advantage, in connection with obtaining or retaining business for or with, or directing business to, any person.”

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Violations of FEPA carry a potential penalty of: (1) a fine of not more than \$250,000 or three times the monetary equivalent of the thing of value; and/or (2) imprisonment for not more than 15 years. FEPA also requires the U.S. attorney general to publish a yearly report summarizing the DOJ's major enforcement actions under the law.

Anti-corruption organizations believe that FEPA will help root out foreign corruption at its source by penalizing foreign officials who might otherwise evade prosecution by their home governments. FEPA's criminalization of the demand-side of bribery fills a hole in the U.S.'s otherwise robust anti-corruption regime.

Contacts

Maria Cruz Melendez

Partner / New York
212.735.2320
maria.cruzmelendez@skadden.com

Andrew M. Good

Partner / London
44.20.7519.7247
andrew.good@skadden.com

Ryan D. Junck

Partner / London
44.20.7519.7006
ryan.junck@skadden.com

Bradley A. Klein

Partner / Washington, D.C.
202.371.7320
bradley.klein@skadden.com

Steve Kwok

Partner / Hong Kong
852.3740.4788
steve.kwok@skadden.com

David Meister

Partner / New York
212.735.2100
david.meister@skadden.com

Chelsea B. Mihelich

Associate / London
44.20.7519.7095
chelsea.mihelich@skadden.com