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Newly enacted legislation criminalizes corruption by foreign officials

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The recently enacted Foreign Extortion Prevention Act, meant to serve as the mirror image of the Foreign Corrupt Practices Act, criminalizes the solicitation and receipt of bribes by foreign officials. Because DOJ already prosecutes foreign officials using existing statutes, we do not expect this new law to materially alter the enforcement landscape. But there are several open questions of interpretation and enforcement that could impact companies accused of offering or paying bribes.

The Foreign Corrupt Practices Act (FCPA), which prohibits the offer or payment of anything of value to foreign officials in order to obtain or retain business, does not criminalize the solicitation or receipt of bribes by foreign officials. Congress initially thought it best to focus on bribery by U.S. companies and U.S. issuers, as opposed to charging foreign officials who received those bribes. That is, Congress focused on the supply side of the foreign bribery equation (the companies), as opposed to the demand side (the foreign officials). As a result of an exception to the general applicability of conspiracy statutes, DOJ has also been precluded from prosecuting foreign officials for conspiring to violate the FCPA. The newly enacted Foreign Extortion Prevention Act (FEPA), which generally criminalizes the flip side of the FCPA, is the recognition that corrupt foreign officials are often the driving force behind corruption schemes and that it is neither sufficient nor logical to focus only on the supply side of the equation. FEPA largely tracks the FCPA, and therefore we do not expect a significant change in the type of conduct that DOJ investigates and prosecutes. However, the newly enacted FEPA deviates from, and is both narrower and broader than, the FCPA in a few notable areas. And there are also several questions of interpretation that could lead to additional areas of investigation or enforcement for companies.

Key differences between FEPA and FCPA

Although FEPA was intended to criminalize the solicitation and receipt of bribes that would otherwise violate the FCPA, there are several drafting peculiarities and deviations from the FCPA, including its placement in the domestic bribery statute, explicitly expanding covered conduct to payments that ultimately benefit third-party organizations, making the use of U.S. interstate commerce a required element regardless of who pays the bribe, and slightly expanding definition of "foreign official."

Placement in the domestic bribery statute: Despite being clearly identified as addressing the flip side of FCPA violations, FEPA is currently slated to sit within 18 U.S.C. § 201, a domestic bribery statute. This will likely create complications in enforcement, as the statute may be interpreted by courts in the context of domestic bribery rather than the FCPA. Of note, the Supreme Court has interpreted the domestic bribery statute more narrowly than courts have interpreted the FCPA in terms of what is required by way of official action. Conversely, courts have concluded that conspiracy applies broadly to domestic bribery statutes, while at least one circuit court has concluded that conspiracy does not apply in the same way to the FCPA.

Payments for the benefit of third parties: The FCPA prohibits payments, directly or indirectly, to foreign officials. FEPA takes this one step further and criminalizes payments not only to foreign officials "personally," but also "for any other person or nongovernmental entity" at the direction of the foreign official. Although DOJ and SEC have in the past brought cases where the tangible benefit was provided to a third party, including referral hiring cases, the theory in those cases was that an intangible benefit was conferred to the foreign official. Under FEPA, DOJ would not need to prove an

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intangible benefit to the foreign official, so long as something of value was provided to the “other person or nongovernmental entity.”

Use of interstate commerce: Under the FCPA, a person acting while physically present in the United States need not use U.S. interstate commerce to violate the statute under the territorial provision (15 U.S.C. § 78dd-3). Likewise, under the FCPA, a U.S. incorporated company or U.S. citizen paying a bribe overseas need not use U.S. interstate commerce to violate the FCPA under the “Alternative Jurisdiction” provision. Yet under FEPA, the use of U.S. interstate commerce is required regardless of whether the payor is acting while in the territory of the United States, and regardless of whether the payor is a U.S. incorporated entity or citizen.

Definition of “foreign official”: Although FEPA largely tracks the FCPA in its definition of “foreign official,” it deviates from the FCPA in two ways. First, the FCPA defines “foreign official” to include agents acting “in an official capacity” on behalf of a foreign government, department, agency, or instrumentality, whereas FEPA defines the term to include agents acting both in an official capacity but also acting in an “unofficial capacity” on behalf of the government, department, agency, or instrumentality. Second, in addition to prohibiting payments to foreign officials, the FCPA separately prohibits payments to “any foreign political party or official thereof or any candidate for foreign political office.” FEPA does not include this prohibition but, unlike the FCPA, defines “foreign official” to include “senior foreign political figures,” cross-referencing an expansive definition of the term (including current or former officials of major political parties, senior executives of foreign government-owned commercial enterprises, an entity formed by or for the benefit of any such individual, immediate family members of such individuals, and persons widely known to be a “close associate” of such individual).

Potential impact for companies

Despite the intended aim of increasing “foreign official” prosecutions through FEPA, given the current use of anti-money laundering and wire fraud statutes to prosecute foreign officials for much of the conduct covered by FEPA, the newly enacted statute ironically may have the biggest impact, albeit indirectly, on companies.

First, FEPA may give DOJ the ability to investigate and prosecute companies for conduct not currently covered by the FCPA. FEPA makes clear by its terms that it “shall not be construed as encompassing conduct that would violate” the FCPA, “whether pursuant to a theory of direct liability, conspiracy, complicity, or otherwise.” But as described above, FEPA covers some conduct not covered by the FCPA, including payments directed to third parties and payments to unofficial agents and senior political figures. Therefore, depending on how DOJ chooses to interpret and enforce FEPA, and how courts interpret it, companies could be subject to investigation and/or prosecution for conspiracy to violate FEPA. Compounding this problem is the placement of FEPA in 18 U.S.C. § 201, to which conspiracy generally applies.

Second, because FEPA theoretically increases DOJ’s ability to prosecute foreign officials, it also provides companies an ability to increase their cooperation with DOJ by providing information that could lead to FEPA prosecutions, and therefore increase the cooperation credit a company can receive during the course of an investigation.

Third, because DOJ may now be able to prosecute certain foreign officials previously outside its reach, this may increase DOJ’s leverage on such foreign officials, who may cooperate and implicate additional companies that paid them bribes. Thus, as we generally recommend, companies should continue to monitor when there are DOJ prosecutions in certain regions or industries in which a company operates.

Key takeaways

Given the way that FEPA was drafted and existing statutes already utilized by DOJ to prosecute foreign officials, as well as diplomatic complications with prosecuting and extraditing foreign officials, we believe it is unlikely that FEPA’s enactment will lead to a significant increase in the prosecution of foreign officials.

Nevertheless, we will continue to monitor the application of the new statute to officials but also whether and how it is applied to companies accused of paying bribes to those officials. Depending on how DOJ interprets and enforces FEPA, companies may need to recalibrate who they consider to be foreign officials, including for purposes of business development activities.

We also recommend, as we generally do, that companies monitor the industries and regions in which DOJ prosecutes foreign officials under FEPA (as well as other statutes) because it may signal an area of focus for DOJ, and when foreign officials cooperate with DOJ, it often leads to the investigation and prosecution of additional companies doing business with those officials.

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