Practice Update

Enactment of the Foreign Extortion Prevention Act Expands the U.S. Department of Justice's Ability to Prosecute International Corruption Matters

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The breadth of the recently enacted FEPA presents pitfalls for U.S. companies dealing with foreign governments and state-owned entities requiring significant caution and effective compliance controls.

On December 22, 2023, President Biden signed into law the Foreign Extortion Prevention Act (FEPA). FEPA amends the existing federal bribery of a public official statute, 18 U.S.C. § 201, to include demands for and acceptance of bribes by a foreign official. FEPA adds yet another powerful tool to the Department of Justice's toolbox, as a complement to the Foreign Corrupt Practices Act (FCPA) and Interstate and Foreign Travel in Aid of Racketeering Enterprises (The Travel Act), to combat bribery involving foreign officials. Other federal extortion criminal statutes such as the Hobbs Act, 18 U.S.C. § 1951, do not include express provisions covering demands for bribes by foreign officials. Given the U.S. government's recent focus on targeting foreign actors and kleptocrats who violate U.S. criminal laws or otherwise foment violations of U.S. criminal laws by U.S. companies and executives, the enactment of FEPA comes as no surprise.[1]

FEPA makes it unlawful for any "foreign official" to "corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value." Notably, FEPA expands on the FCPA's broad definition of the term "foreign official" to include even persons acting in an **unofficial** capacity on behalf of a foreign government and senior foreign political figures not necessarily serving in the foreign government. Like the FCPA, it also includes "any official or employee of a foreign government or any department, agency, or instrumentality thereof"; "any official or employee of a public international organization"; and any "person acting in an official capacity for or on behalf of" a public international organization or foreign government, including any department, agency, or instrumentality thereof. A "public international organization," in turn, includes those organizations in which the United States already participates under any treaty per federal law or executive order issued by the president, or any other international organization that is designated by executive order to be covered by FEPA. Because FEPA merely amends Section 201, which has no provision allowing for enforcement of Section 201 by the SEC, FEPA is unlike the FCPA in that it does not confer any authority to the SEC to pursue enforcement actions for FEPA violations.[2]

The law's impact will depend, in part, on other countries' reactions to FEPA and whether they will agree to cooperate with U.S.-based investigations, prosecutions, and requests to extradite foreign officials charged with U.S. federal crimes. This effect is yet to be seen, although the EU and the UK already have robust extradition treaties with the United States that presumably will give this law considerable effect.

Regardless of the international community's reaction to the law, however, U.S. companies, particularly those subjected to inappropriate demands for illicit payments by foreign officials, should take note of this development. Providing

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anything of value to a foreign official is rarely (if ever) a good idea, but there can be a fine line between an extortion victim (FEPA violation) and a willing bribe payer (FCPA violation), so companies need to be especially vigilant and sensitive to such circumstances. To establish that it is an extortion victim rather than a willing bribe payer, companies should consider promptly reporting to federal law enforcement any inappropriate demands for payment (extortion attempts) by foreign officials. U.S. companies in the past may have argued that they failed to contact law enforcement upon learning of a foreign official's demand for a bribe payment because that foreign official, before FEPA's enactment, might escape criminal liability for demanding the payment. FEPA potentially eliminates, or at least greatly diminishes, the persuasive impact of any such excuse in the eyes of federal law enforcement. This is an important consideration for any company that is or potentially might be under investigation and/or is seeking to negotiate a favorable resolution with DOJ.

Thus, any existing corporate compliance program related to anti-corruption laws or FCPA compliance should incorporate a component that educates and trains corporate employees and executives regarding conduct prohibited by FEPA. Strict financial internal controls that require appropriate documentation and approvals for any outside payments are also an essential part of a robust and effective anti-corruption compliance program. Corporate compliance programs should also ensure that there are proper channels for employees to report anonymously any demands for bribes made by foreign officials. Any communications received from those channels should be investigated and followed up on by compliance teams, so that any report of a demand for a bribe by a foreign official is properly reported, investigated, and acted upon without fear of retaliation by the company against employees and executives who deal with foreign officials, state-owned companies, or their proxies. If there exists credible evidence to believe that a foreign official has demanded a bribe from the company, the company should promptly seek legal counsel to help it navigate the issue.

Violations of FEPA carry criminal penalties of imprisonment of up to 15 years and fines up to the greater of $250,000 or three times the value of the bribe demanded or received. The law explicitly provides for broad extraterritorial application, so long as the demand, receipt, acceptance, or offer of a bribe occurs in the United States or involves: (1) a company that has issued U.S. securities, (2) any U.S. business entity, or (3) any U.S. citizen, national, or resident. FEPA expands the current bribery regime as to include foreign officials' demand or acceptance of bribes, which previously only criminalized bribery offers to or by a foreign official under the FCPA.

The breadth of FEPA and its potential for severe penalties requires significant caution and effective compliance controls for U.S. companies that deal with foreign governments and state-owned companies, as those entities might enlist the services of third-party intermediaries to act on their behalf in an "unofficial capacity," but who would fall squarely within FEPA's broad definition of "foreign official." The breadth of the law will likely encourage more investigations and scrutiny into dealings with foreign state-owned companies. Also of note, in light of the recently enacted FinCen regulations requiring disclosure of beneficial ownership of U.S. entities,[3] DOJ will possess an expanded information and knowledge base to pursue investigations against companies with ties to foreign actors. It is likely that U.S. entities having close connections to foreign officials or heightened exposure to foreign actors will be the subject of additional scrutiny by U.S. law enforcement.

We have seen an increase in Latin American investment in the U.S. and with U.S. companies. This reverse in the investment flow is mainly due to the political and economic chaos encircling many countries in Latin America. This increase has greatly benefited business in the U.S.; however, any opportunities from doing business implicating or involving foreign companies, investors, or actors, requires robust anti-corruption, anti-money laundering, FCPA, and other compliance policies given the current

enforcement climate. A robust compliance program provides security and a significant competitive advantage to U.S. companies and individuals doing business abroad. Moreover, given the DOJ's insistence that companies have an effective compliance program in place, together with the potentially steep penalties associated with FEPA and FCPA violations and the costs associated with DOJ investigations and prosecutions of companies and individuals targeted by DOJ enforcement actions, having a robust anti-corruption compliance program is an absolute must for companies doing business internationally or domestic companies partnering with foreign investors.

Should you have any questions regarding FEPA and its effects in Latin America, or any anti-corruption matter, please do not hesitate to contact the authors of this article.

Citations

[1] *See, e.g.*, *Task Force Will Surge Federal Law Enforcement Resources to Hold Accountable Corrupt Russian Oligarchs*, DOJ, https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture#:~:text=Today%2C%20Attorney%20General%20Merrick%20B,and%20partners%2C%20in%20response%20to (Merrick Garland announcing, in 2022, its KleptoCapture task force dedicated to enforcing sanctions against foreign actors) (last visited Jan. 24, 2024).

[2] *See Foreign Extortion Prevention Act*, Congress.gov, *available at* https://www.congress.gov/bill/118th-congress/senate-bill/2347/text (last visited Jan. 24, 2024), for a copy of the bill that was signed into law, enacting FEPA's provisions.

[3] *See U.S. Beneficial Ownership Information Registry Now Accepting Reports*, Dept. of Treasury, *available at* https://home.treasury.gov/news/press-releases/jy2015 (last visited January 24, 2024).