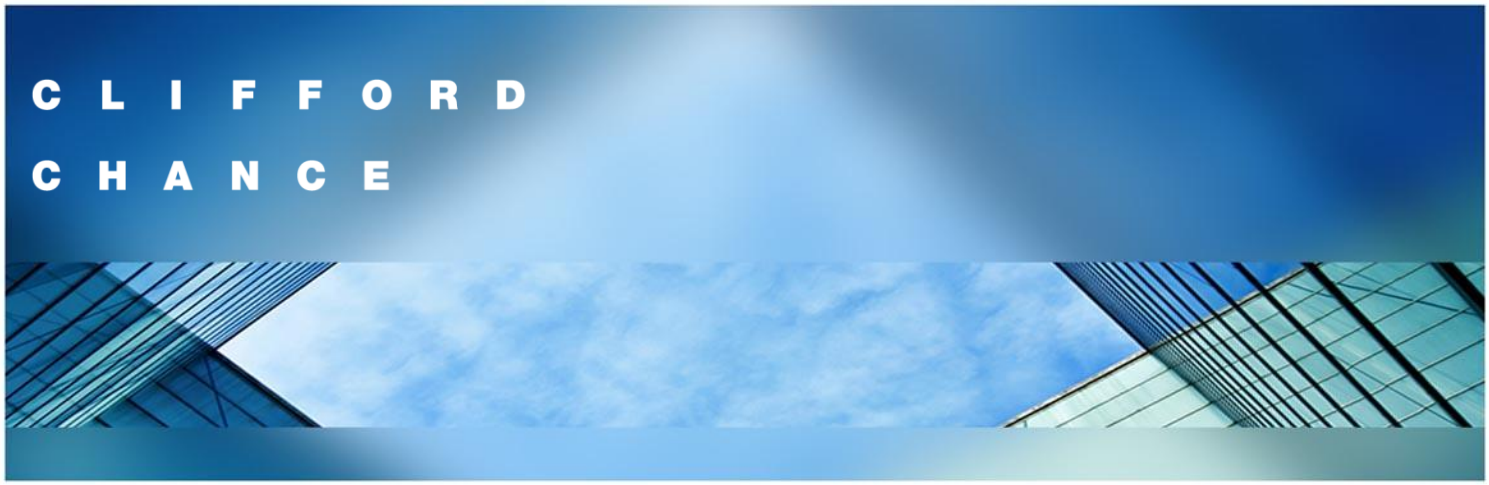

MIND THE (BRIBERY) GAP: RECENT U.S. ANTI-BRIBERY LEGISLATION ADDRESSES VOID CREATED BY "DEMAND-SIDE" BRIBERY

The Foreign Extortion Prevention Act (the "**FEPA**"), which U.S. President Joe Biden signed into law in December 2023 as part of the 2024 National Defense Authorization Act, amends the main federal domestic anti-bribery law, 18 U.S. Code section 201, by making it unlawful for foreign officials to solicit or accept bribes from U.S. persons and companies.[1] This new law is the first of its kind in the United States to target the foreign recipients of bribes and fills in the "demand-side" gap left by the Foreign Corrupt Practices Act (the "**FCPA**").[2]

DEVELOPMENT

Much attention has lately focused on sanctions and export controls and the resulting risks that multinationals face in their global operations. The recent passage of the FEPA reflects the reality that the U.S. government continues to view foreign bribery as a priority concern and one with longstanding national security implications that will not disappear anytime soon.[3]

Before the FEPA's enactment, U.S. prosecutors used other laws such as the Travel Act, the Money Laundering Control Act (the "**MLCA**"), various sanctions, and the wire and mail fraud statutes to pursue foreign officials who solicit or accept bribes. The MLCA in particular has been a favored tool of U.S. prosecutors due to its wide jurisdictional reach and minimal U.S.-nexus requirement. For example, last year, a former official of a Venezuelan state-owned oil company pleaded guilty to conspiracy to commit money laundering by receiving bribes in connection with foreign currency exchange schemes.[4] Most recently, the U.S. Department of Justice ("**DOJ**") drew on the MLCA, among similar other laws, to

1 National Defense Authorization Act for Fiscal Year 2024, H.R. 2670, 118th Cong. Sec. 5101 (codified at 18 U.S.C. § 201).
2 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, *et seq.*).
3 Joseph R. Biden, The White House, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (2021).
4 Factual Proffer, United States v. Nass, No. 1:23-cr-20089 (S.D. Fl. Mar. 29, 2023), ECF No. 14.

indict a Honduran official for accepting bribes from U.S. persons.[5] In both of these cases, neither official was subject to direct U.S. corruption charges, although the charging documents explicitly referred to their receipt of bribes. Moreover, in the latter case, DOJ charged the payers of the bribes with violating the FCPA (or conspiracy to violate the same).

The FEPA provides a new tool in the arsenal of U.S. prosecutors, who no longer need to find "workarounds" to charge and prosecute demand-side bribery. Instead, for the first time, the FEPA offers a direct route to penalize foreign officials for receiving or accepting bribes under U.S. law.

KEY PROVISIONS

Key elements of a FEPA violation include the following:

- *Focus on "Demand-Side" Bribery*: Since 1977, the FCPA has targeted the supplier of a bribe while staying silent on the conduct of the recipient. The FEPA closes this gap by expressly permitting U.S. prosecutors to pursue criminal charges against certain foreign officials who "corruptly demand, seek, receive, accept, or agree to receive or accept" a bribe.
- *Broadened Definition of "Foreign Official"*: The FEPA definition of "foreign official" largely parallels that of the FCPA,[6] with three notable modifications that have the potential to increase the exposure risk for employees and directors of overseas state-owned enterprises.
    - *"Senior Foreign Political Figure"*—The FEPA applies to any senior foreign political figure, which includes current or former senior officials in the executive, legislative, or similar branches of a foreign government; senior officials of a major foreign political party; and senior executives of a foreign government-owned commercial enterprise.[7] It further applies to immediate family members of that individual; any entities formed by or for the benefit of that individual; and any persons who are close associates of that individual.[8]
    - *"Unofficial Capacity"*—The FEPA also applies to "any person acting in an unofficial capacity for or on behalf of" a governmental entity, "instrumentality," or "public international organization."[9] Thus, depending on the entity's status, an individual working unofficially on behalf of a state-owned enterprise could be subject to the FEPA. As with the FCPA, the FEPA does not define "instrumentality" of a foreign government. The FCPA Resource Guide states that "[w]hether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and

5 Indictment, United States v. Zaglin, No. 1:23-cr-20454 (S.D. Fl. Nov. 29, 2023), ECF No. 3.
6 The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-1(f)(1).
7 18 U.S.C. § 201(a)(4)(A)(ii) (citing 31 C.F.R. § 1010.605).
8 *Id*.
9 18 U.S.C. § 201(a)(4)(D).

function."[10] We expect U.S. prosecutors to apply the same analysis under the FEPA.

- *"Foreign Political Parties and Candidates"*—Although outside its definition of "foreign official," the FCPA prohibits bribing "any foreign political party or official thereof or any candidate for foreign political office." Conversely, the FEPA does not mention candidates for foreign political office, but does refer to persons "selected to be a foreign official," which can reach elected individuals who have yet to be sworn into office.

- *Similarly Broad Jurisdictional Reach*: Like the FCPA, the FEPA applies only when a specified nexus to the United States exists. U.S. prosecutors may charge and prosecute a foreign official under the FEPA if that official solicits or accepts a bribe from an issuer;[11] from a domestic concern;[12] or while in the territory of the United States.[13]

Underscoring Congress's apparent seriousness in combating demand-side bribery, the FEPA mandates an annual report that describes, in part, the bribery demands of foreign officials, diplomatic efforts to protect against such bribery, and enforcement actions taken under the FEPA. DOJ must submit this report to Congress annually as well as post it on DOJ's publicly available website.

PENALTIES

The FEPA provides for imprisonment of up to 15 years and/or a fine of up to US$250,000 (or three times the monetary value of the bribe) for any violators of this law. Foreign officials able to evade arrest may face asset freezes and seizures or even extradition when traveling to or within a country maintaining an extradition treaty with the United States.

IMPLICATIONS FOR STATE-OWNED ENTERPRISES

Employees and directors of state-owned enterprises now face greater exposure from the dual risks posed by the FCPA and the FEPA. The FEPA's broad definition of "foreign official," along with the extra-territorial reach of U.S. anti-corruption laws, creates a challenging landscape for individuals and companies doing business involving the United States. This involvement includes work with U.S. persons and companies, in or through the United States, and possibly even communications or payments traversing U.S. territory. Companies engaged in such work also must ensure that their employees and agents, no matter at what level, remain aware of and compliant with these and similar laws.

Although still too early to tell, the FEPA could put the offending bribe recipient at the center of overt geopolitical tensions, behind-the-scenes diplomatic tussles, or legal battles over sovereign immunity and extra-territorial jurisdiction. The FEPA

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10 U.S. Dep't of Just. & Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20 (2d ed. 2020); *see, e.g.*, United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014) (setting forth non-exhaustive lists of factors to assess whether an entity is an "instrumentality" of a foreign government).

11 18 U.S.C. § 201(f)(1) (citing 15 U.S.C. § 78c(a)) (generally, any company registered on a U.S. stock exchange or one that is required to file periodic reports with the U.S. Securities and Exchange Commission).

12 18 U.S.C. § 201(f)(1) (citing 15 U.S.C. § 78dd–2) (any individual U.S. citizen, national, or resident as well as any entity incorporated or organized in the United States, or with its principal place of business in the United States).

13 18 U.S.C. § 201(f)(1) (citing 15 U.S.C. § 78dd–3).

could just as well lie "dormant," serving mostly as a warning or threat to those bribe recipients who would prefer not to have extradition orders against them or not have their assets frozen or seized. More obvious is that the FEPA is yet another addition to a complex regime of U.S. laws—including sanctions, export controls, the FCPA, the MLCA, and more—now used to promote U.S. national security interests beyond traditional physical borders.

NEXT STEPS

All companies, whether U.S.-based or "foreign" state-owned or commercial entities, face an increased risk of doing business regardless of where they operate. But all can take certain steps to mitigate this risk and reduce the chance of exposure to U.S. extra-territorial laws.

- *Develop a more robust compliance program and anti-corruption training regimen.* DOJ's Justice Manual expressly notes that charging a corporation for "the single isolated act of a rogue employee" may be inappropriate where a "robust compliance program" was in place.[14] This note highlights the utility of comprehensively reviewing and revamping compliance programs to close gaps and address weaknesses. In addition, any company that interacts with "foreign official[s]" should revamp their anti-corruption training regimen by incorporating the FEPA. This inclusion would offer employees a basis for pushing back against any improper requests that they may receive from foreign officials and help protect them (and the company they serve) from risk of exposure.
- *Perform a revamped risk assessment of all operations.* The broad reach and severe penalties of the FCPA and the FEPA demonstrate that all companies should determine with whom they do business, where the greatest risks of bribery lie, and whether the company itself falls within the purviews of these laws.
- *Investigate and remediate any alleged misconduct as early as possible.* DOJ's Corporate Enforcement Policy clearly explains the benefits of early and voluntary self-disclosure of corporate misconduct and the consequences of not doing so.[15] Investigating alleged misconduct can allow companies to get in front of the problem, address its root cause(s), and prepare for a possible disclosure to the relevant authorities in exchange for leniency. Demonstrating timely remediation of the root cause(s), once identified, will also be key both before disclosure and during possible settlement negotiations with the authorities. Furthermore, companies may benefit by proactively identifying the individuals involved in the misconduct, including the bribe recipient(s) subject to the FEPA.

Foreign bribery remains a top risk for multinationals, due both to its prevalence and the significant penalties associated with anti-bribery enforcement actions. The FEPA's passage signals the U.S. government's view of bribery as a core national security concern that all individuals and entities must play a role in combating.

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14 *Compare* U.S. Dep't of Just., Justice Manual 9-28.500: Pervasiveness of Wrongdoing Within the Corporation *with* U.S. Dep't of Just., Justice Manual 9-28.800: Corporate Compliance Programs ("The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*.").

15 U.S. Dep't of Just., 9-47.120: Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (updated Jan. 2023).

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