

# Congress Passes the Foreign Extortion Prevention Act, a Potent New Tool in the Fight Against International Corruption

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**PRACTICES** Litigation, Criminal Investigations and Defense, Foreign Corrupt Practices Act FCPA

For nearly 47 years, the Foreign Corrupt Practices Act (FCPA) has criminalized and prosecuted the “supply side” of foreign bribery – the payment of bribes to foreign officials to assist in obtaining or retaining business. For decades, United States companies have faced criminal liability under FCPA for their involvement in offering or giving foreign bribes to corrupt foreign officials. Yet, criminal liability under the FCPA reaches only the person or entity paying the bribe, leaving a gap in criminal responsibility for the foreign official who solicited or received the bribe.

On December 22, 2023, President Biden filled this gap by signing into law the bipartisan Foreign Extortion Prevention Act (FEPA) which criminalizes the “demand side” of foreign bribery – the act of demanding or accepting bribes. When applied in tandem, FCPA and FEPA extend criminal liability to both the supply and demand side of foreign bribery because both the foreign official receiving the bribe and the entity or person offering the bribe will now be subject to criminal liability.

Under FEPA, a foreign official can be criminally charged for demanding, seeking, receiving, accepting, or agreeing to receive or accept, directly or indirectly, anything of value 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 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.<sup>1</sup>

A foreign official is broadly defined to include any official or employee of: (1) a foreign government; (2) a department, agency, or instrumentality of a foreign government; or (3) a public international organization.<sup>2</sup> FEPA also extends the scope of liability to include any foreign official who is acting not only directly, but those acting indirectly on behalf of a foreign government. A public international organization is defined as an organization designated by an Executive order.<sup>3</sup>

Violations of FEPA carry a penalty of not more than \$250,000 or three times the monetary equivalent of the thing of value, and/or imprisonment for not more than fifteen years.<sup>4</sup> FEPA increases the maximum punishment for an individual as the punishment under FCPA is subject to a maximum fine of up to \$100,000 and a maximum of five years in prison.<sup>5</sup> FEPA also extends extraterritorial federal jurisdiction to bad actors.<sup>6</sup>

Prior to FEPA, law enforcement had to rely on other laws, such as money laundering or wire fraud, to hold accountable those who demanded or accepted the bribe. However, FEPA gives law enforcement a direct tool to prosecute those who solicited or received a bribe. FEPA was passed as a part of the National Defense Authorization Act (NDAA) and is an example of the Biden

Administration's continued efforts to protect national security. On June 3, 2021, President Biden declared the fight against corruption "as a core national security interest of the United States."<sup>7</sup> In his National Security Study Memorandum-1, President Biden found that corruption threatens national security, economic equity, global anti-poverty and development efforts, and democracy itself. As a result, President Biden issued the first United States Strategy on Countering Corruption (the Strategy) in December of 2021.<sup>8</sup>

The Strategy began by laying out the impacts of corruption and proceeded into a five-pillar approach that detailed not only the strategic objectives, but the specific lines of effort that the Biden administration planned to implement. Two years after the initial release of the Strategy, the Biden Administration published a fact sheet which highlighted upcoming and completed actions by the United States government in correlation with the plan laid out by the Strategy.<sup>9</sup> President Biden also reemphasized that the "United States remains resolute in its commitment to fighting corruption." Eleven days after this publication, President Biden signed into law FEPA.

The passage of FEPA presents a potential opportunity to leverage cooperation for a company under investigation for alleged violations of FCPA. If a company is faced with credible allegations of foreign bribery, then a comprehensive internal investigation, including developing facts of the foreign actors who have attempted to extract bribes, should be used as much as a sword and a shield. DOJ has consistently emphasized the voluntary disclosure of corporate criminal conduct and FEPA gives them a clean tool to go after those demanding bribe.

For example, in 2020, a global pharmaceutical company was charged under FCPA for bribing employees of state-owned hospitals to increase the sale of the pharmaceutical company's products.<sup>10</sup> The employees are publicly employed by the state, thus likely to qualify as foreign officials under the FEPA definition. With the passage of FEPA, the Department of Justice now has an avenue to prosecute the employees for demanding or accepting the bribe. It is possible the pharmaceutical company could cooperate with the government to 'flip the switch' so instead of charging the pharmaceutical company under FCPA for supplying the bribe, the government could charge the employees under FEPA for demanding and or accepting the bribe.

The consensus among multiple members of Congress is that FEPA is the most significant international criminal anti-corruption legislation to be passed in a half-century. FEPA creates a very powerful new tool to combat kleptocracy and corruption. While it remains to be seen how the law will be applied in practice, FEPA has the potential to stop foreign bribery at the source.

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2)(f)(1).

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2)(1)(4).

<sup>3</sup> National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2)(1)(5).

<sup>4</sup> National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2)(f)(2).

<sup>5</sup> 15 U.S.C. §§ 78dd-2(g)(2).

<sup>6</sup> National Defense Authorization Act for Fiscal Year 2024, S. 2226, 118th Cong. § 5101(2)(f)(4).

<sup>7</sup> [Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest](#), National Security Study Memorandum-1 (June 3, 2021).

<sup>8</sup> [UNITED STATES STRATEGY ON COUNTERING CORRUPTION: PURSUANT TO THE NATIONAL SECURITY STUDY MEMORANDUM ON ESTABLISHING THE FIGHT AGAINST CORRUPTION AS A CORE UNITED STATES NATIONAL SECURITY INTEREST 4](#) (2021).

<sup>9</sup> [FACT SHEET: U.S. LEADERSHIP IN THE FIGHT AGAINST GLOBAL CORRUPTION](#) (December 11, 2023).

<sup>10</sup> [Novartis AG and Subsidiaries to Pay \\$345 Million to Resolve Foreign Corrupt Practices Act Cases](#) (June 25, 2020).