

## NEWS & INSIGHTS

JANUARY 2024

### **The Department of Justice Set to Target Foreign Government Personnel with Passage of New Law**

At the end of last year, President Biden signed into law the Foreign Extortion Prevention Act ("FEPA"), sweeping legislation that amends the United States' current domestic bribery statute (18 U.S.C. § 201) to criminalize conduct involving foreign government officials and a variety of people who work on behalf of foreign governments and public international organizations. FEPA represents a significant change from the former U.S. legal framework under the Foreign Corrupt Practices Act ("FCPA"), which carved out from criminal exposure foreign officials and foreign nationals who were not connected to a U.S. domestic concern or issuer. While FEPA's legal validity and interpretation will be challenged in federal criminal prosecutions in the future, the law attempts to criminalize behavior conducted exclusively abroad.

#### WHAT ARE THE BASICS OF FEPA?

FEPA criminalizes conduct by a "foreign official" or a "person selected to be a foreign official." The term "foreign official" includes a wide range of individuals, including any official or employee of (1) a foreign government; (2) a department, agency, or instrumentality of a foreign government; and (3) a public international organization. The person may be targeted if they are acting in their official capacity, or in an unofficial capacity if done with authorization from the entity.

FEPA criminalizes a foreign official "corruptly" demanding, seeking, receiving, accepting, or agreeing to do any of the same, either directly or indirectly, anything of value personally, for any other person, or for a nongovernmental entity, from (1) any person while in the United States; (2) any U.S. issuer; or (3) any U.S. "domestic concern," in return for:

- a. Being influenced in the performance of any official act;
- b. Being induced to do or omit to do any act in violation of the official duty of such foreign official or person; or
- c. Conferring any improper advantage;

in connection with obtaining or retaining business for or with, or directing business to, any person.

FEPA requires further that the conduct occur “in or affecting interstate commerce,” a jurisdictional requirement that the U.S. Department of Justice (“DOJ”) typically proves with evidence of emails or international wire transfers. FEPA expressly states that it is to be applied to conduct outside the United States.

FEPA charges carry a maximum term of imprisonment of up to 15 years and fines up to US\$250,000 or three times the monetary equivalent of the bribe. All fines and penalties collected from FEPA convictions are maintained in a fund that pays certain DOJ components.

### WHAT TO EXPECT MOVING FORWARD

DOJ has made clear that it intends to prioritize foreign bribery prosecutions. DOJ recently announced its International Corporate Anti-Bribery initiative (“ICAB”), which will consist of three DOJ prosecutors from DOJ’s FCPA Unit who will focus on foreign bribery. According to the announcement, ICAB will focus on regions where DOJ “can have the most impact in both coordination and case generation.” ICAB will also be using DOJ data experts to generate leads to “force multiply” and help foreign authorities conduct investigations abroad.

Additionally, DOJ’s current corporate enforcement policy rewards companies for self-reporting and cooperating with DOJ to avoid hefty fines and criminal charges. It is likely that companies will try to avoid criminal penalties by providing purported evidence of FEPA violations to DOJ moving forward. Defending against charges that arise from conduct that occurred exclusively abroad can be challenging, especially when the DOJ does not collect evidence from the foreign country that cuts against the strength of its case.

DOJ has a history of charging foreign nationals who have never set foot in the United States and has previously prosecuted foreign bribery through money laundering statutes. Federal charges often limit the foreign national’s ability to travel and can result in the foreign national’s arrest abroad and extradition to the United States. At times, the extradition process alone can take several years, sometimes while the foreign national sits in detention and has no ability to challenge the strength of DOJ’s evidence.

The attorneys at Ford O'Brien Landy LLP have extensive experience with DOJ and defending foreign nationals against DOJ’s accusations. For more information regarding this alert, do not hesitate to contact our partners below.



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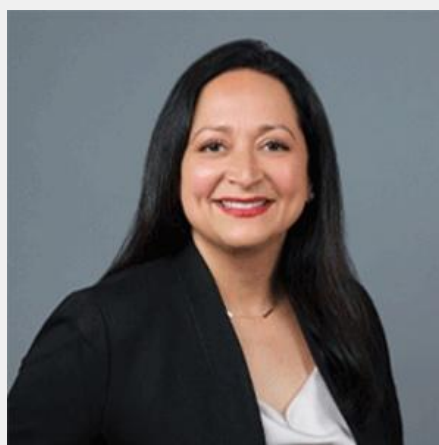
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