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Locke Lord QuickStudy: The New Foreign Extortion Prevention ?Act Augments U.S. Anti-Corruption and Anti-?Bribery Laws and ?Targets Demand-Side Corruption

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On December 22, 2023, President Biden signed the Foreign Extortion Prevention Act ("FEPA") into law as part of the fiscal year 2024 National Defense Authorization Act, sweeping in a new era in U.S. anti-corruption measures. FEPA marks a significant augmentation of the current Foreign Corrupt Practices Act of 1977, as amended (the "FCPA"), by criminalizing demand-side bribery by foreign officials. FEPA targets both the demand and acceptance of a bribe from U.S. entities or individuals, or anyone within U.S. territory, with the intention of securing or retaining an unfair advantage in business. Notably, prior to FEPA, neither the FCPA nor the U.S. domestic bribery regime addressed corrupt demands by foreign officials on U.S. persons. The new FEPA models U.S. anti-boycott laws by requiring "victims" of bribery to report bribery demands and requests.

Key Tenets of FEPA

As we delve into FEPA, it is crucial peel back the layers that present significant opportunity for legal interpretations and enforcement. Below is an outline of certain elements that merit careful consideration:

1. **Placement within the Domestic Bribery Statute:** Despite its explicit focus on addressing the counterparty to FCPA violations, FEPA is enacted within 18 U.S.C. § 201, a statute related to domestic bribery. This placement introduces potential complexities in enforcement, as courts may interpret the statute through the lens of domestic bribery rather than the FCPA. The Supreme Court's historical tendency to construe the domestic bribery statute more narrowly than the FCPA adds a layer of complexity to how FEPA might be applied.
2. **Payments for the Advantage of Third Parties:** FEPA is broader than the FCPA by criminalizing payments not only made directly to foreign officials but also those made "for any other person or nongovernmental entity" as directed by the foreign official. In contrast to previous cases where tangible benefits were provided to third parties, FEPA eliminates the need for proof of an intangible benefit to the foreign official. As long as something of value is provided to designated "other persons or nongovernmental entities," FEPA may come into play.
3. **Mandatory Use of Interstate Commerce:** Differing from the FCPA, FEPA introduces the requirement of interstate commerce. Under FEPA, the use of U.S. interstate commerce is a requirement regardless of whether the payor is within the territory of the United States or is a U.S. incorporated entity or citizen.
4. **Definition of "Foreign Official":** While FEPA's definition of "foreign official" is similar to the definition in the FCPA, we highlight two significant differences. First, FEPA broadens the definition of "foreign official" to include agents acting not only "in an official capacity" but also in an "unofficial capacity" on behalf of a foreign

government entity. Second, FEPA excludes the FCPA's separate prohibition on payments to "any foreign political party or official thereof or any candidate for foreign political office." Instead, FEPA incorporates a more expansive definition of "senior foreign political figures," which broadens the definition to cover individuals associated with foreign political entities.

5. **Jurisdictional Reach and Definition of Foreign Official:** FEPA's jurisdictional reach is expansive, covering corrupt demands by foreign officials targeting U.S. issuers, domestic entities, or persons within the United States. The definition of "foreign official" under FEPA includes any person acting officially or unofficially on behalf of a government department, agency, or instrumentality, or on behalf of any public international organization.
6. **Quid Pro Quo Requirements:** FEPA introduces a quid pro quo element, necessitating that officials' demands for something of value be made in exchange for specific actions, such as influencing the performance of an official act or conferring improper advantages.

Penalties for Non-Compliance

FEPA imposes substantial penalties for violations, including fines of up to $250,000 or three times the monetary equivalent of the thing of value, along with imprisonment for a maximum of 15 years. The law also mandates the U.S. Attorney General to publish an annual report summarizing major enforcement actions under FEPA.

- **Broader Investigative and Prosecutorial Implications:** Despite FEPA's primary goal of increasing prosecutions of "foreign officials," its repercussions on companies should not be overlooked. FEPA could empower the Department of Justice ("DoJ") to investigate and prosecute companies for conduct not covered by the FCPA. Notably, FEPA extends its reach to areas beyond the FCPA, such as payments to third parties and unofficial agents. Depending on how FEPA is interpreted and enforced by the DoJ, companies might face investigations and potential prosecution for conspiracy to violate FEPA.
- **Collaborative Opportunities with the DoJ:** FEPA introduces an avenue for companies to collaborate with the DoJ; U.S. persons can provide information that might lead to FEPA prosecutions of foreign officials, thereby bolstering cooperation and gaining credit for any investigations.
- **Altered Dynamics and Implications for Foreign Officials:** FEPA's potential to widen the DoJ's scope to prosecute foreign officials has broader implications. Foreign officials, now susceptible to DoJ actions, might cooperate and implicate additional persons involved in corrupt practices.

Proactive Measures to Ensure Compliance

1. **Compliance and Due Diligence:** It is imperative that U.S. persons review and update their Anti-Bribery / Anti-Corruption compliance programs to align with FEPA's new provisions.

2. **Risk Mitigation Strategies:** It is essential to update risk mitigation strategies, including training employees on the implications of FEPA and fostering a corporate culture rooted in transparency and ethical behavior.

3. **Reporting Obligations:** Be aware of new reporting obligations and requirements to cooperate with any investigations that may arise. Staying informed about the annual report from the DoJ regarding major FEPA enforcement actions to screen against your counterparties.

Looking Ahead

The enactment of FEPA expands the U.S. anti-corruption regime by addressing a critical gap in the law related to demand-side bribery. Foreign officials evading prosecution in their home countries may now face consequences under U.S. law, potentially ushering in increased transparency and accountability.

We recommend that U.S. companies review their compliance programs to make sure they are FEPA compliant, particularly with regard to interactions with public officials.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or ?tax advice. ???Please ????reach out to the ?authors for any specific questions. We expect ?to continue to monitor the ???topics ????addressed in this paper and provide ?future ?client updates when useful.?

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