CONGRESS MOVES CLOSER TO CLOSING A GAP IN THE FIGHT AGAINST GLOBAL CORRUPTION

At the end of July (just before the August recess), the Senate passed the Foreign Extortion Prevention Act ("FEPA") as Section 1090H of the National Defense Authorization Act. FEPA targets kleptocracy and corruption by criminalizing bribery demands by foreign officials[1] and, in effect, will act as the mirror image of the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA").[2] Efforts in Congress to pass legislation addressing the demand side of foreign bribery date back to 2019.

Both FEPA and its proposed companion legislation in the House (H.R. 4696, introduced by Reps. Joe Wilson and Sheila Jackson Lee) have bipartisan support. According to a press release issued by one of the bill's Senate co-sponsors and long-time advocate of anti-corruption legislation, Senator Sheldon Whitehouse, FEPA is supported by the US Chamber of Commerce, Transparency International U.S., Citizens for Responsibility and Ethics in Washington (CREW) and a broad coalition of civil society organizations. The House version was referred to the House Judiciary Committee on July 23.

Background

The February 2022 Russian invasion of Ukraine highlighted for many both the growing clash between democracy and autocracy as well as the breadth and depth of money laundering, hidden ill-gotten assets and other forms of corruption. The effects of widespread corruption came as no surprise to experts who have for some years called out the corrosive consequences of lack of transparency and failure of political will to identify and interdict flows of dark money through global financial systems. Russia has widely been called out as a kleptocracy, though that view dates back to at least 2014.

The irony is that corrupt actors have used the existing legal landscape – premised on the rule of law, but providing far too little transparency – to hide and transfer illicit cash and other ill-gotten assets. One need look no further than the Pandora Papers and the Panama Papers to

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[1] Bribery typically involves making payments or providing other things of value directly or indirectly to government officials (who can include those running for office, other members of political parties and officeholders) for the purpose of obtaining or retaining business. Bribery, together with extortion, embezzlement and misappropriation, is a subset of public corruption. Corruption essentially is the abuse of public position or authority for personal gain. A government whose leaders deploy corruption on a massive scale to amass wealth for personal gain is kleptocracy.

[2] The operative part of FEPA provides:

"It shall be unlawful for any foreign official or person selected to be a foreign official to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value personally or for any other person or nongovernmental entity, by making use of the mails or any means or instrumentality of interstate commerce, from any person (as defined in section 104A of the Foreign Corrupt Practices Act of 1977, except that that definition shall be applied without regard to whether the person is an offender) while in the territory of the United States, from an issuer (as defined in section 3(a)of the Securities Exchange Act of 1934), or from a domestic concern (as defined in section 104 of the Foreign Corrupt Practices Act of 1977), 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." (Citations omitted.)

get a sense of the extent of the problem. And, yes, one might say that, on the surface, corruption and kleptocracy are victimless crimes, but the harsh reality is very different: corruption/kleptocracy erodes the faith of citizens in government, undermines effective governance, distorts markets and equitable access to services, impairs economic growth, undermines development efforts, contributes to environmental decline, contributes to extremism and weakens democratic institutions.

In early 2021, Congress passed the Anti-Money Laundering Act, which overhauled the Bank Secrecy Act to target money laundering and terrorist financing. As part of that effort, Congress also passed the Corporate Transparency Act ("CTA") within the 2021 National Defense Authorization Act and, in September and December 2022, the Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury promulgated beneficial ownership reporting rules under the CTA.

In June 2021, the Biden administration identified the fight against corruption as a core US national security interest and, in connection therewith, released a Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest ("NSSM"). The NSSM called for specific recommendations to better fight corruption; curb illicit finance; hold corrupt individuals, transnational criminal organizations and other corrupt actors accountable for illicit activity; build international partnerships; and expand foreign assistance to governments and civil society for capacity-building. In December 2021, the administration announced, as a follow-up to the NSSM, its Strategy on Countering Corruption. One component of that strategy is to combat the demand side of bribery, with a focus on working with foreign countries to criminalize demanding or receiving bribes (what is generally known as "passive bribery" – an admittedly somewhat misleading term, as it is not intended to connote that the recipient did not *demand* the bribe; bribe-takers frequently do).

One element of the burgeoning focus on corruption is foreign bribery, which was first addressed in a systematic way in the United States with the passage of the FCPA in 1977. The FCPA criminalized foreign bribery and imposed transparency ("books and records") requirements on public companies. While enforcement under the FCPA was largely dormant in the early years, enforcement picked up around 2005 and began targeting business executives in 2010.

There was a recognition in the United States in the late 1980s that the FCPA was an outlier, with few other countries having criminalized overseas bribery. Rather than dilute the US effort, Congress pushed for more active engagement as a foreign policy matter to get other countries, including those whose tax regimes permitted deductions for the payment of foreign bribes, to criminalize overseas bribery. It was not until February 1997 that the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transaction entered into force. (*See* Frontline Interview with Mark Mendelsohn.)

Limits of US Current Law

As noted above, since 1977, US businesses (including public companies listed in the United States) and non-US companies listed in the United States, and their officers, directors, employees and agents, as well as US citizens, nationals and residents,[3] have been barred by

[3] The FCPA also covers certain foreign nationals or entities, not otherwise covered by the categories cited in the text, engaging in or furthering a corrupt payment while in the United States,

the FCPA from offering to bribe, or bribing, foreign officials (*see generally* DoJ FCPA Resource Guide*)*. However, there is nothing under the FCPA or otherwise under US law that prevents foreign officials from demanding or receiving bribes from those subject to the FCPA. US government efforts to expand the reach of the FCPA in enforcement contexts, which requires a nexus to the United States, to date have been unsuccessful.

As the Helsinki Commission notes in its FEPA Q&A, while foreign extortion can be prosecuted under US law (*e.g.*, under mail and wire fraud statutes or anti-money laundering statutes), these laws were not designed to address transnational kleptocracy and are not as ideal as a statute that criminalizes the core of the wrongdoing. Similarly, a 2018 report issued by the OECD entitled "Foreign Bribery Enforcement – What Happens to the Public Officials on the Receiving End?" posits that "[t]o have a globally effective overall enforcement system, … both the supply-side participants (*i.e.,* the bribers) and the demand-side participants (*i.e.*, the public officials) of bribery transactions must face genuine risks of prosecution and sanctions.

Bridging the Gap

FEPA would remedy the gap by criminalizing the demand side, namely passive bribery. If bribes are demanded of covered companies or entities by foreign officials (as defined), there is sufficient evidence of the violation and the jurisdictional predicate is met,[4] the Department of Justice could decide to indict the foreign official and seek his/her extradition to the United States. Penalties for violations of FEPA include fines and imprisonment (up to 15 years), or both.

While the FCPA is part of the Securities Exchange Act of 1934, FEPA would be part of the passive bribery provisions of Title 18 of the US Code (Section 201).

The United States is by no means a pioneer in tackling foreign passive bribery. Foreign passive bribery is covered, for example, under the Council of Europe's Criminal Law Convention on Corruption, which has been ratified by 46 countries (the United States has signed but not ratified). Various countries have opted out of the foreign passive bribery provision, but many have not. The 2003 EU Council Framework Decision on Combatting Corruption in the Private Sector covers both active and passive bribery, as does the Directive

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as well as officers, directors, employees and agents acting on behalf of the foregoing. Shareholders in certain circumstances also are covered.

[4] I note that FEPA does not contain an analogue to the "alternative jurisdiction" clauses of the FCPA that obviate the need to establish use of the mails or of interstate commerce for covered acts committed outside the United States by issuers, by officers, directors, employees or agents of issuers that are "US persons" or by "US persons"). Prior versions of FEPA (*i.e.,* those introduced in the 116th Congress and the 117th Congress) did not have the use of the mail or of interstate commerce predicate. It may take expansive readings of the jurisdictional predicate (*e.g.,* an invitation or other correspondence sent to a recipient in the United States) to establish jurisdiction for enforcement purposes.

FEPA expressly provides that an offense under FEPA "shall be subject to extraterritorial Federal jurisdiction," presumably to reflect Congress' intent that it apply extraterritorially, and thereby counter the general presumption against extraterritorial application. (*See generally*, "Protecting Americans from Foreign Bribery: The Legal Framework Behind the Foreign Extortion Prevention Act," published by Transparency International U.S.)

on Combatting Corruption proposed by the European Commission in May of this year. The UK Bribery Act 2010 also covers both active and passive bribery.

Potential Consequences

If both sides of a bribery transaction face such risks, the overall deterrence effect of the global law enforcement system is expected to be enhanced. The legislative intention is that foreign public officials should be less willing to demand bribes and US businesses should be more cautious when offering them.

As Tom Firestone and Maria Piontkovska noted in their article "Two to Tango: Attacking the Demand Side of Bribery," while extradition to the United States may not be assured, criminalizing foreign passive bribery could make it difficult for bribe-takers to travel (certainly to the United States and, potentially, to any other country that has an extradition treaty with the United States). An indictment could be used to support sanctions under the Global Magnitsky Act or to put pressure on foreign governments to bring domestic charges against the bribe-takers. Finally, FEPA provides some cover to US businesses in resisting demands by foreign officials for bribes ("this will be a problem for you as well").

Concluding Thoughts

It should come as no surprise that the war in Ukraine has given a much-needed boost to efforts to address more forcefully bribery and corruption that experts on corruption/kleptocracy/money laundering and certain policymakers have doggedly been calling out for years.

Many jurisdictions have anti-bribery and broader anti-corruption legislation in place, but nonetheless public corruption can be a fact of life for businesses operating on a global scale. While the anti-bribery, anti-corruption and anti-money laundering landscapes have evolved significantly in recent years, businesses subject to the FCPA can find themselves at a competitive disadvantage when competitors are subject to less stringent anti-bribery regimes in their home jurisdictions or more lax enforcement under regimes that on paper are as strict as, or even stricter than, the FCPA. Any legislation that effectively reduces the likelihood that foreign bribes will be demanded of US businesses has the potential to mitigate that disadvantage.

While one can anticipate a host of questions around practical aspects of bringing enforcement actions under FEPA, ranging from the low likelihood that foreign governments would extradite a serving senior government officials (or any official for that matter) to the potential challenges in satisfying the jurisdictional predicate (it is much simpler to establish that predicate when a bribe is offered or paid, than demanded), signing FEPA into law would be a welcome development.

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