

September 6, 2019

# The Foreign Extortion Prevention Act: Broadening the Scope of Bribery Prosecutions?

A bill introduced in the House of Representatives in late July would allow the United States to prosecute foreign officials who take bribes. The “[Foreign Extortion Prevention Act](#)” (“FEPA”), introduced by two Democratic and two Republican members of Congress, would make it illegal for a “foreign official” to improperly demand or receive anything of value in return for “being influenced in the performance of any official act” or “being induced to do or omit to do any act in violation of the official duty of such official or person.”

**Attorneys**  
[Ryan Rohlfen](#)  
[Elizabeth Noonan-Pomada](#)  
[Andrew Kaplan](#)

While the bill is an amendment to 18 USC § 201, which prohibits bribery of U.S. domestic public officials, it seeks to fill what many see as a gap in the Foreign Corrupt Practices Act (“FCPA”). The FCPA establishes three specific categories of persons open to potential liability; all three categories require some connection between the person and the United States.<sup>1</sup> Thus, while the FCPA is a powerful tool, the government is limited in its ability to prosecute foreign nationals who accept bribes, or otherwise participate in bribery schemes, if they have no nexus with the United States.

The Second Circuit’s August 2018 decision in [United States v. Hoskins](#) is the most recent example of this limitation. In *Hoskins*, the Second Circuit affirmed the district court’s decision that the government cannot use accomplice or conspiracy theories of liability to broaden the scope of the FCPA. The Court relied on *Gebardi v. United States*, 287 U.S. 112 (1932), in finding that the government cannot use accomplice or conspiracy liability to prosecute a class of individuals who have been excluded from liability by Congress.

Of note, FEPA uses the same definition of “foreign official” as the FCPA. This broad definition, which includes employees of governments and their departments or agencies, as well as employees of state-owned or state-controlled entities, if adopted, could greatly increase the potential categories of FCPA-related defendants. As an amendment to the anti-bribery statute, however, FEPA could be limited in scope by the Supreme Court’s decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Interpreting 18 USC § 201, the Court rejected a broad definition of “official act,” stating instead that “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more” is not an “official act.” If FEPA is adopted, this limitation could be applied to foreign officials who accept bribes.

In summary, while FEPA is not an amendment to the FCPA, the bill could make it easier for American prosecutors to target foreign officials who demand or receive bribes, increasing the number of bribery enforcement actions. As one of the bill’s sponsors, Representative John Curtis of Utah, explained, “[C]urrently, a business being extorted for a bribe can only say ‘I can’t pay you a bribe because it is illegal and I might get arrested.’ This long-overdue bill would enable them to add, ‘and so will you.’”<sup>2</sup>

<sup>1</sup> The FCPA’s anti-bribery provisions apply broadly to three categories of persons and entities: (1) “issuers” and their officers, directors, employees, agents, and shareholders; (2) “domestic concerns” and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States. 15 U.S.C. §§ 78dd-1, et seq.; see also *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, at 10, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

<sup>2</sup> Representatives Jackson Lee, Curtis, Malinowski, and Hudson Introduce Foreign Extortion Prevention Act, Commission on Security and Cooperation in Europe: CSCE, August 2, 2019, available at <https://www.csce.gov/international-impact/press-and-media/press-releases/representatives-jackson-lee-curtis-malinowski>.