"RECEIVER BEWARE": HOW THE FOREIGN EXTORTION PREVENTION ACT COULD CHANGE THE FOREIGN CORRUPT PRACTICES ACT

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INTRODUCTION

On August 2, 2019, Representative Sheila Jackson Lee introduced H.R. 4140, otherwise known as the "Foreign Extortion Prevention Act" (FEPA).[1] In theory the bill is simple—if enacted, the FEPA would amend title 18 of the United States Code to prohibit a foreign official from demanding a bribe.[2] However, in practice, this proposed law would have a profound impact on the ways in which criminal prosecutions are conducted and the nature of business and nation-state relationships throughout the world. The FEPA was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on August 28, 2019.[3] It has seen no movement in Congress since then, leaving its likelihood of enactment largely unknown. Nevertheless, the FEPA offers an opportunity to reevaluate U.S. extortion laws (or the lack thereof), discuss the theories underlying anti-bribery and extortion prosecutions, and compare the United States' legal system to that of its international counterparts.

This Article will proceed in four parts. First, it will give a brief explanation of the "Foreign Corrupt Practices Act" (FCPA).[4] It will discuss the FCPA as it is written and as it was intended. It will also discuss the FCPA's limitations, how it operates in conjunction with related laws to prosecute foreign extortion, and

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1. *Foreign Extortion Prevention Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/4140/actions?q={%22search%22:[%22The+Foreign+Extortion+Prevention+Act+–+H.R.+4140%22]}&r=1&s=8&KWICView=false (last visited Aug. 2, 2020).

2. Foreign Extortion Prevention Act, H.R. 4140, 116th Cong. (2019).

3. *See supra* note 1.

4. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)–(h) (2012)) [hereinafter Foreign Corrupt Practices Act].

its underlying rationale. Next, Part II will introduce the Foreign Extortion Prevention Act. It will provide insight into the bill's purpose, rationale, and potential impact. Part III will then compare the FEPA to anti-bribery and anti-extortion laws abroad. Specifically, it will compare U.S. anti-bribery laws with the U.K. Bribery Act and the OECD Anti-Bribery Convention. Finally, Part IV will analyze the merits of the Foreign Extortion Prevention Act.

At bottom, the FEPA offers an opportunity to simplify foreign extortion prosecutions, clarify existing U.S. policy and law, and realign U.S. anti-corruption laws with the international community's best practices. However, as this Article will explore, the proposed law is not without its shortcomings. If enacted, the Foreign Extortion Prevention Act should be seen as only the *first* step in the criminalization of foreign extortion.

I. BACKGROUND: THE FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act was enacted on December 19, 1977,[5] as a congressional response to the discovery of "more than 400 corporations [that] made questionable or illegal payments in excess of $300 million to foreign officials for a wide range of favorable actions on behalf of the companies."[6] As a result, Congress drafted the FCPA with a supply-side focus. Or, to put it another way, the FCPA was enacted as a means of regulating bribers, not receivers. For the purposes of this Article, the word "receiver" will be used in place of "bribee," but defined the same. Thus, a "receiver" (also termed a "bribe-taker") is "[s]omeone who receives a bribe."[7] Broadly speaking, the FCPA "has two purposes, to prohibit the bribery of foreign officials and to establish accounting requirements."[8] Since its enactment, the prohibition against bribing officials has been gradually expanded.

First, the text of the FCPA underwent significant amendments in 1988 and 1998.[9] In particular, the 1998 Amendments dramatically expanded the FCPA's jurisdictional reach. These amendments were largely "driven by [a] desire to conform the FCPA" to the Organization for Economic Cooperation and Development's (OECD) Anti-Bribery Convention.[10] In doing so, Congress expanded the application of the FCPA to all persons offering a prohibited bribe in a U.S. territory.[11] Consequently, the FCPA would now apply to "'any person'—irrespective of citizenship, residency, or location of business activity—committing bribery

5. *See id.*

6. Robin Miller, Annotation, *Construction and Application of Foreign Corrupt Practices Act of 1977*, 6 A.L.R. Fed. 2d 351 (2005).

7. *Bribee*, BLACK'S LAW DICTIONARY (11th ed. 2019). For its part, a "briber" is "someone who offers a bribe." *Id.*

8. Miller, *supra* note 6.

9. Barr Benyamin et al., *Foreign Corrupt Practices Act*, 53 AM. CRIM. L. REV. 1333, 1335 (2016) (citing 15 U.S.C. § 78dd-1(a) (1998); *id.* § 78dd-2(a); *id.* § 78dd-3(a)).

10. Lucinda A. Low & Timothy P. Tenkle, *U.S. Antibribery Law Goes Global*, BUS. L. TODAY 14, 17 (1999).

11. Benyamin et al., *supra* note 9, at 1344.

on U.S. territory."[12] The 1998 Amendments also "created extraterritorial jurisdiction over 'any United States persons,' including U.S. nationals and corporations." And yet, despite this extended reach, the FCPA remained only a means to prosecute bribers, not receivers.

Second, broad judicial interpretations[13] and Department of Justice (DOJ) memoranda have continued to expand the four corners of the FCPA throughout its forty-three-year existence. Of particular significance, the DOJ's September 9, 2015 "Yates Memorandum"[14] established that corporations would be eligible for cooperation credit "*only if* they identify culpable individuals and all relevant factual information about their misconduct."[15] Furthermore, the Yates Memorandum stated in no uncertain terms that DOJ "attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case."[16] Therefore, the Yates Memorandum instructs DOJ attorneys to pursue prosecution of individuals guilty of violating the FCPA *and FCPA-related crimes*. In fact, the DOJ guidance goes so far as to instruct its attorneys to use the four corners of the FCPA to uncover and prosecute additional bribery-related crimes.

Third, prosecutors have used the FCPA to reach both the supply and demand sides of a bribe under other related statutes. Over time, prosecutors from the DOJ's "FCPA Unit" have increasingly "been charging non-FCPA crimes such as money laundering, mail and wire fraud, Travel Act violations, tax violations, and even false statements, in addition to or instead of FCPA charges."[17] It has become "commonplace" for the "DOJ to charge the alleged provider of a corrupt payment under the FCPA and the alleged recipient with money laundering."[18]

Some FCPA observers began to notice this trend as early as 2009.[19] More recently, the trend has become so pronounced that in 2018 the "DOJ's FCPA Unit brought more corruption cases under related statutes . . . than it did under the FCPA."[20] In 2019, the DOJ had 35 criminal FCPA enforcement actions and an additional 19 FCPA-related criminal enforcement actions.[21] Thus, in the last

12. *Id.* at 1345.

13. *See, e.g.*, United States v. Kay, 359 F.3d 738, 755 (5th Cir. 2004) (holding that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor").

14. Memorandum from Sally Quillian Yates, Former Deputy Attorney General, U.S. Dep't of Justice, on Individual Accountability for Corporate Wrongdoing to Assistant Attorney Generals and U.S. Attorneys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [hereinafter Yates Memorandum].

15. Bridget Vuona, *Foreign Corrupt Practices Act*, 56 AM. CRIM. L. REV. 979, 1011 (2019) (emphasis added) (quoting DEBEVOISE & PLIMPTON, *The "Yates Memorandum": Has DOJ Really Changed Its Approach to White Collar Criminal Investigations and Individual Prosecutions?* (Sept. 2015), at 2, https://www.debevoise.com/insights/publications/2015/09/the-yates-memorandum-has-doj-really-changed).

16. Yates Memorandum, *supra* note 14, at 4.

17. GIBSON DUNN, 2019 YEAR-END FCPA UPDATE 2 (Jan. 6, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-fcpa-update.pdf.

18. *Id.*

19. GIBSON DUNN, 2009 YEAR-END FCPA UPDATE (Jan. 4, 2010), https://www.gibsondunn.com/2009-year-end-fcpa-update/.

20. *Id.* at 3.

21. *Id.*

two years, 44.55% of the DOJ FCPA Unit's criminal enforcement actions have been from *FCPA-related charges*.[22] While the use of FCPA-related charges does not necessarily imply demand-side prosecution, it at least demonstrates the DOJ's willingness to use all the laws at its disposal to prosecute bribery from *both* the supply and demand sides.

The FCPA itself remains strictly a supply-side enforcement mechanism, but through its amendments, interpretation, and use it has become a tool for demand-side enforcement. This shift reflects a deeper change in philosophy. As Professor Kevin Davis writes, "bribery is not an individual crime, it is a corrupt bargain that always has at least two sides."[23] While the FCPA is unique because of its history as the first major legislation to criminalize the supply side of a bribe, both literature and government practice have continued to focus on a need to reemphasize demand-side prosecutions.[24] Now, Congress seeks to reemphasize the demand side as well.

II. UNDERSTANDING THE FOREIGN EXTORTION PREVENTION ACT

The Foreign Extortion Prevention Act seeks to amend 18 U.S.C. § 201—the statute criminalizing "[b]ribery of public officials and witnesses"—in two significant ways.[25] First, it would broadly define the terms "foreign official" and "public international organization."[26] Second, it would add the following language to the end of Section 201—

> (f) Whoever, being a foreign official or person selected to be a foreign official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for—
>
> (1) being influenced in the performance of any official act; or
>
> (2) being induced to do or omit to do any act in violation of the official duty of such official or person,
>
> shall be fined under this title or imprisoned for not more than two years or both.[27]

Currently, Section 201 only criminalizes the bribing of *domestic* public officials.[28] The FEPA would extend the statute's reach to "foreign officials" *demanding* a bribe. In effect, the FEPA would complete the FCPA's prohibition on

22. *Id.*; GIBSON DUNN, 2018 YEAR-END FCPA UPDATE (Jan. 7, 2019), https://www.gibsondunn.com/2018-year-end-fcpa-update/.

23. Karen E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* 29 (NYU Law School, Working Paper No. 09-22), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393326.

24. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 84 (2007).

25. 18 U.S.C. § 201 (2012).

26. Foreign Extortion Prevention Act, *supra* note 2, at § 2.

27. *Id.* (emphasis added).

28. *See* 18 U.S.C. § 201(a)(1) (2012) (defining "public official"); *see also* Padideh Ala'i, *Civil Consequences of Corruption in International Commercial Contracts*, 62 AM. J. COMP. L. 185, 187–88 (2014).

the supply side of a bribe, by criminalizing the same bribe from the demand side too.

The FCPA was originally modeled after Section 201,[29] but here the Foreign Extortion Prevention Act is modeled after the FCPA. In fact, the FEPA uses the same broad legal definitions for "foreign official" and "public international organization."[30] By using these definitions, Congress is intentionally creating a demand-side counterbalance to the FCPA. If enacted, the FEPA will cover the same scope of transactions as the FCPA, but will enable prosecutors to introduce new criminal charges against receivers who are otherwise able to escape prosecution.

In order to properly understand the FEPA's potential impact on foreign extortion, one must first understand how foreign extortion fits within the FCPA. Technically, bribers are not liable under the FCPA if their actions are the result of extortion or duress. The FCPA does not incur liability in these circumstances because there is no element of corrupt intent.[31] However, the FCPA does not consider "[m]ere economic coercion" to be extortion. Thus, the mere fact that "the payment was 'first proposed [or even demanded] by the recipient . . . does not alter the corrupt purpose on the part of the person paying the bribe.'"[32] As the Southern District of New York distinguished in *United States v. Kozeny*, the FCPA imposes liability regardless of foreign extortion, *unless* there is a well-founded threat of "injury or death."[33] Herein lies the inequity that the FEPA seeks to resolve.

The FEPA criminalizes both direct and indirect extortion by a foreign official. Furthermore, there is no requirement under the FEPA that the extortion include a well-founded threat of "injury or death." Or, to put it simply, the FEPA criminalizes economic extortion. Under current U.S. anti-bribery law, U.S. companies face significant competitive disadvantages because the FCPA only covers a bribe's supply side. This disadvantage is exacerbated by the FCPA's unwillingness to account for economic coercion. Thus, when a U.S. company or individual is confronted with economic extortion by a foreign official, it has no protections under the FCPA, but could nevertheless still face criminal liability if successfully extorted. The FEPA would afford a remedy by criminalizing the foreign official's actions, and thereby rebalancing—or at least partially rebalancing—each party's risk of liability.

Statements by the FEPA's cosponsors help to clarify the bill's purpose and function. Collectively, the bipartisan group of U.S. Representatives stated that the FEPA would enable the DOJ "to indict [foreign] officials for demanding

29. *See* Ala'i, *supra* note 28, at 186.

30. *Compare* Foreign Extortion Prevention Act, *supra* note 2, at § 2(1), *with* Foreign Corrupt Practices Act, *supra* note 4, at §§ 78dd-1(f), 78dd-2(h), 78dd-3(f).

31. CRIM. DIV. OF THE U.S. DEP'T OF JUST. AND THE ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 27 (2d ed. 2020), https://www.justice.gov/criminal-fraud/file/1292051/download [hereinafter FCPA RESOURCE GUIDE].

32. *Id.* (quoting S. Rep. No. 95-114, at 11 (1977)).

33. United States v. Kozeny, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008).

bribes to fulfill, neglect, or violate their official duties."[34] They added that it would protect U.S. businesses that are "regularly targeted by foreign extortionists" by "punishing the *demand side* of bribery."[35] The group also framed the FEPA within the context of the international community by stating that it "will bring U.S. laws in line with international best practices."[36] Representative Tom Malinowski added that the bill creates "a powerful new tool to fight the kleptocracy that impoverishes people and empowers dictators around the world."[37]

In summary, while the FEPA does not actually amend the FCPA, it "could make it easier for American prosecutors to target foreign officials who demand or receive bribes, [thereby] increasing the number of bribery enforcement actions."[38] The FEPA would be a meaningful contribution under Congress' Article I authority to regulate foreign commerce.[39] It would provide further protection for U.S. businesses in the global marketplace, while also reestablishing the United States as a global leader in anti-corruption.[40] Finally, the FEPA would create a consistent and coherent policy condemning bribery from both the demand and supply side. Still, the FEPA is not without its faults. Section IV.B discusses these limitations and shortcomings in detail. Nevertheless, if enacted, the FEPA would be a significant step in the international fight against bribery.

III. A COMPARATIVE PERSPECTIVE: HOW THE FOREIGN EXTORTION PREVENTION ACT COMPARES WITH FOREIGN LEGAL SYSTEMS

A. The U.K. Bribery Act

On April 8, 2010, the United Kingdom passed the U.K. Bribery Act 2010 (U.K. Bribery Act) into law.[41] The U.K. Bribery Act was immediately seen as a signal that countries overseas had "a desire . . . to fight bribery in a more aggressive manner."[42] Among the Act's anti-bribery provisions is a prohibition on "being bribed."[43] Section 2 of the Act lays out the demand-side prohibition, stating that an individual is guilty of an offense if he or she "requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a

34. Press Release, U.S. Helsinki Commission, Representatives Jackson Lee, Curtis, Malinowski, and Hudson Introduce Foreign Extortion Prevention Act (Aug. 2, 2019), *available at* https://www.csce.gov/international-impact/press-and-media/press-releases/representatives-jackson-lee-curtis-malinowski.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.*

38. ROPES & GRAY, THE FOREIGN EXTORTION PREVENTION ACT: BROADENING THE SCOPE OF PROSECUTIONS? (Sept. 6, 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/09/The-Foreign-Extortion-Prevention-Act-Broadening-the-Scope-of-Bribery-Prosecutions.

39. *See* U.S. CONST. art. I, § 8, cl. 3.

40. *See infra* Section IV.A.2.

41. Bribery Act 2010, c. 23 (U.K.), http://www.legislation.gov.uk/ukpga/2010/23/introduction.

42. Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J.L. & BUS. 845, 864 (2011).

43. Bribery Act 2010, c. 23, § 2 (U.K.).

relevant function or activity should be performed improperly."[44] The Act further clarifies that this conduct is illegal regardless of whether it is conducted through a third party or is obtained for the advantage of another party.[45]

The U.K Bribery Act "has been characterized as the strictest anti-corruption legislation to date."[46] It covers both the demand and supply sides of a bribe, while the FCPA only covers the supply side.[47] Furthermore, the U.K. Bribery Act criminalizes the bribery of both "domestic and foreign government officials," as well as "commercial bribery."[48] The most controversial aspect of the law is its broad jurisdictional reach. It not only applies "to acts by British citizens and organizations, but also to acts by companies that do business" in the U.K.[49] Penalties for violating the Act "include unlimited fines for companies and individuals and a term of imprisonment of up to [ten] years for individual defendants."[50]

On March 14, 2019, the House of Lords' Select Committee on the Bribery Act of 2010 issued a report on post-legislative scrutiny.[51] Among its many findings, the Committee reported that from 2011 to 2017, twenty-two defendants were proceeded against under Section 1, the Act's supply-side provision.[52] Fourteen of these defendants were found guilty and sentenced.[53] Comparatively, fourteen defendants were proceeded against under Section 2, the Act's demand-side provision, during this same period.[54] All fourteen of theoe defendants were found guilty, thirteen of whom were sentenced.[55] This data provides practical insight into the early trends of demand-side prosecution.

According to this report, about 39% of the cases brought under the U.K. Bribery Act between 2011 and 2017 were against demand-side defendants, and 100% of those prosecutions resulted in a conviction.[56] Meanwhile, supply-side cases accounted for approximately 61% of total prosecutions, but had only a 64% conviction rate.[57] These findings are by no means predictive of U.S. prosecutions

44. *Id.* § 2(1)–(2).

45. *Id.* § 2(6)(a)–(b).

46. Sharifa G. Hunter, *A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business*, 18 ILSA J. INT'L & COMP. L. 89, 109 (2011).

47. Lawrence J. Trautman & Joanna Kimbell, *Bribery and Corruption: The COSO Framework, FCPA, and U.K. Bribery Act*, 30 FLA. J. INT'L L. 191, 210 (2018).

48. Jordan, *supra* note 42, at 864.

49. Ryan J. Rohlfsen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151, 158 (2012).

50. Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Funs, and Money: The Bribery Problem and the U.K. Bribery Act*, 47 INT'L LAW. 481, 502 (2013) (quoting GIBSON DUNN, 2010 YEAR-END FCPA UPDATE (Jan. 3. 2011), http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx).

51. *The Bribery Act 2010: Post-Legislative Scrutiny*, HL Paper 303 (Mar. 14, 2019), *available at* https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf.

52. *Id.* at 16.

53. *Id.*

54. *Id.* at 17.

55. *Id.*

56. *Id.*

57. *Id.*

under the FEPA, but they still provide real insight into how the bill could function as law.

The U.K. Bribery Act is a useful analog for FEPA proponents and opponents alike. While neither the Act, nor the House of Lords' Report prove that the law is an effective deterrent, it is safe to assume (as the Report does) that there is at least some deterrent effect.[58] This, coupled with the Act's successful demand-side conviction rate, presents a strong case for enacting the FEPA.

B. The OECD Anti-Bribery Convention & the International Community

The OECD Anti-Bribery Convention (OECD Convention) was signed on December 17, 1997.[59] The OECD Convention is "considered the foremost global legal instrument for fighting the supply side of foreign bribery."[60] While the OECD Convention provides guidelines for multinational enterprises to combat bribe solicitation and extortion,[61] its actual offenses focus solely on the supply side.[62] The OECD Convention has inspired many of its member countries—and even some non-member countries—to enhance their domestic anti-bribery laws. In fact, the 1998 FCPA Amendments were adopted in response to the OECD Convention.[63] However, like the FCPA, the OECD Convention still only focuses on one half of the bribe.

In 2018, OECD published a study regarding the foreign bribery enforcement of receivers.[64] The study candidly acknowledged the OECD Convention's shortcomings, stating that "[t]o have a globally effective overall enforcement system, both the supply-side participants . . . and the demand-side participants . . . of bribery transactions must face genuine risks of prosecution and sanctions."[65] The OECD study notes that there is a higher deterrent effect if both sides of the transaction face legal risks.[66] At least in theory, receivers are less likely to demand bribes because if the supply side is detected, so too will the demand side.[67] In so doing, law enforcement creates "mutually reinforcing outcomes" by punishing both sides of the crime.[68]

58. *Id.* at 39–40.

59. Org. for Economic Coop. & Dev. (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at 3, 37 I.L.M. 1 (Dec. 17, 1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention].

60. OECD, FOREIGN BRIBERY ENFORCEMENT: WHAT HAPPENS TO THE PUBLIC OFFICIALS ON THE RECEIVING END? 9 (2018).

61. *See* OECD Convention, *supra* note 59, at § VII.

62. *See id.* at art. 1.

63. Michael P. Van Alstine, *Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA*, 73 OHIO ST. L.J. 1321, 1327–29 (2012) (explaining how Congress conformed the FCPA to the OECD Convention).

64. OECD, *supra* note 60.

65. Thomas Firestone & Maria Piontkovska, *Two to Tango: Attacking the Demand Side of Bribery*, AM. INTEREST (Dec. 17, 2018) (quoting OECD, *supra* note 60, at 9), https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/.

66. *Id.*

67. *Id.*

68. *Id.*

Many foreign governments already have demand-side anti-bribery laws in place, even though OECD is only just beginning to explore demand-side enforcement recommendations. For example, the U.K., the Netherlands, France, and Switzerland all already have demand-side laws.[69] The United Nations Convention Against Corruption (U.N. Convention) has also recommended demand-side enforcement since 2004.[70] Article 16 of the U.N. Convention recommends criminalizing both the "offering or giving to" and "the solicitation or acceptance by a foreign public official or an official of a public international organization."[71]

Still, many nations have yet to implement demand-side laws. For example, Brazil's anti-bribery law, Brazilian Law No. 12.846 (Clean Company Act), remains supply-side focused, even though it was passed as recently as August 1, 2013.[72] The Clean Company Act includes provisions against both domestic and foreign corporations, extraterritorial jurisdiction, and even strict liability in specific circumstances.[73] Yet, the Act still only addresses half of the bribe. Therefore, if Congress were to enact the FEPA, it would simultaneously realign the U.S. with the international community's best practices and reestablish itself as a global anti-corruption leader.

IV. ANALYSIS OF THE FOREIGN EXTORTION PREVENTION ACT AS LEGAL POLICY

A. Arguments Counseling in Favor of Enactment

1. Better Protection and Better Competition Outcomes for U.S. Companies

Perhaps the best argument in favor of enacting the FEPA is that it better protects honest U.S. companies stuck between liability under the FCPA and losing business as a result of foreign extortion. Today, "honest businesses . . . are increasingly faced with illegal demands from foreign officials in corrupt regimes and unscrupulous competition from companies, including state-owned enterprises."[74] Honest U.S. companies are often at a competitive disadvantage because of the supply-side focus of U.S. anti-bribery laws. This disadvantage is furthered by the systemic nature of foreign bribery. For example, it is frequently the case that "[f]oreign officials who take bribes . . . share a portion of their

69. Jessica Tillipman, *No Easy Solutions to the Scourge of Demand-Side Bribery*, FCPA BLOG (Aug. 27, 2019, 12:38 PM), https://fcpablog.com/2019/08/27/no-easy-solutions-to-the-scourge-of-demand-side-bribery/.; *see also* U.S. Helsinki Commission, *supra* note 34.

70. *See generally* United Nations Convention Against Corruption, Sept. 2004, *available at* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

71. *Id.* at art. 16.

72. Zachary B. Tobolowsky, *Brazil Finally Cleans Up Its Act with the Clean Company Act: The Story of a Nation's Long-Overdue Fight Against Corruption*, 22 L. & BUS. REV. AM. 383, 384 (2016) (citing Lei No. 12.846, de 1 de Agosto de 2013, Diario Oficial da Uniao de 2.8.2013 (Braz.)).

73. BAKER MCKENZIE, BRAZIL'S CLEAN COMPANY ACT: HOW U.S., U.K., AND GLOBAL MODELS MAY INFLUENCE ENFORCEMENT 3 (July 14, 2014), https://www.bakermckenzie.com/-/media/files/insight/publications/2015/10/global-issue-spotting-for-automotive-parts/brazilcleancompanyact.pdf?la=en.

74. Firestone & Piontkovska, *supra* note 65.

illegal proceeds with their superiors, and [the receiving] officials frequently threaten to expose the higher-ups with whom they shared if they are not protected."[75]

U.S. companies are often in competition with corrupt foreign companies for business from corrupt foreign officials. These companies are forced to lose out on international business opportunities in order to comply with the United States' imbalanced supply-side bribery laws. It is in this context that the Foreign Extortion Prevention Act offers relief. It does so by creating a means to rebalance the scales. As Representative John Curtis, one of the bill's cosponsors, states, "[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.'"[76] But now, the FEPA will enable that same company "to add, 'and so will you.'"[77]

The FEPA's potential for relief is mostly speculative and would not be known for several years after enactment. However, a recent OECD survey considered the impact that demand-side enforcement has in countries with comparable laws. It reported that receivers "are known to have been sanctioned in only one fifth of the [fifty-five] schemes" studied.[78] The survey also concluded that information sharing between "demand-side and supply-side enforcement authorities is often slow," and that the sanctioning of receivers largely "poses the same enforcement challenges as sanctioning supply-side bribers."[79]

Ultimately, it is uncertain that the FEPA will deliver the relief it claims. Section IV.B.3 presents one of the bill's primary obstacles—the presumption against extraterritoriality. Nevertheless, at a minimum, the FEPA would be a symbolic step towards rebalancing the inequities of the global marketplace and protecting honest U.S. companies.

2. The International Community

As discussed in Section III.B, the FEPA would help align U.S. anti-bribery laws with the international community's best practices, and simultaneously reestablish the U.S. as a global anti-corruption leader. If the bill is enacted, U.S. law will prohibit domestic bribery of public officials under 18 U.S.C. §201, the supply side of foreign bribery under the FCPA, and the demand side of foreign bribery under the FEPA. This would realign U.S. anti-bribery laws with nations like the U.K. and international agreements like the U.N. Convention. The FEPA is not only a symbolic step in the global fight against corruption, it is also a practical means to increasing global prosecutions.

The FEPA would effectively pressure foreign nations to prosecute bribery offenses. As Representative Richard Hudson, one of the FEPA's cosponsors, explained, "a U.S. indictment can help the forces of the rule of law in other

75. *Id.*
76. U.S. Helsinki Commission, *supra* note 34.
77. *Id.*
78. OECD, *supra* note 60, at 7.
79. *Id.*

countries to root out corruption by pressuring the domestic government in question to charge the individual."[80] The pervasive and systematic nature of foreign bribery schemes makes this an essential means to ending global corruption. According to Representative Hudson, "[e]ven if a kleptocrat cannot be immediately extradited, a U.S. indictment serves as a play-by-play of the crime committed that can be used to support additional measures—such as sanctions—and can force transnational criminals to think twice before traveling abroad to spend their ill-gotten gains."[81] Therefore, the FEPA would provide meaningful assistance to demand-side prosecutions in the U.S. and abroad.

3. One Clear Anti-Bribery Policy

If enacted, the FEPA would establish one coherent and consistent anti-bribery policy in the United States. Currently, only the supply side of a bribe to a foreign official is punishable under the FCPA. While resourceful prosecutors are able to use FCPA-related crimes to pursue justice against receivers, the lack of an explicit prohibition on foreign extortion undercuts the rationales for prohibiting bribery. The FEPA will make the U.S. policy against foreign bribery unequivocally clear, while also simplifying criminal prosecutions. It will add another tool to the prosecutor's toolbox and reduce the need to resort to the litany of FCPA-related crimes. In sum, if the FEPA is passed into law, and then enforced as law, "it would address a long-standing complaint by the individuals and companies that often face prosecution while the [demand-side] foreign officials remain untouchable."[82]

B. Arguments Counseling Against Enactment

1. Imbalanced Penalties

The Foreign Extortion Prevention Act states that whoever violates Section 2(f) "shall be fined under this title or imprisoned for not more than two years or both."[83] Fines under the FEPA will likely be comparable to the FCPA, but prison sentences will likely be substantially shorter.

The FEPA's fine structure is set pursuant to title 18 of the U.S. Code. Under 18 U.S.C. §3571(b)(3) the maximum fine for an individual committing a felony is $250,000, while the maximum fine for an organization committing the same crime is $500,000 under Section 3571(c)(3).[84] However, Section 3571(d) states that "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may

80. U.S. Helsinki Commission, *supra* note 34.
81. *Id.*
82. Tillipman, *supra* note 69.
83. Foreign Extortion Prevention Act, *supra* note 2, at § 2(f).
84. 18 U.S.C. § 3571(b)(3), (c)(3) (2012).

be fined not more than the greater of twice the gross gain or twice the gross loss," so long as it does not unduly complicate or prolong the sentencing process.[85]

As the FCPA Resource Guide notes, under Section 3571(d) "courts may impose significantly higher fines than those provided by the FCPA."[86] Prosecutors seeking particularly heavy fines for FCPA charges can still pursue increased fines under the alternative fine structure, but the prosecution has the burden of proving that the case merits exceptional fines. Under the text of the FCPA, each violation of the anti-bribery provisions subjects corporations or other business entities to fines up to $2 million.[87] Meanwhile, "[i]ndividuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to $250,000."[88]

At bottom, the fine structures for the FEPA and the FCPA are reasonably comparable.[89] Prosecutors in FEPA cases would likely have more success levying exceptionally heavy fines under Section 3571(d), than prosecutors in FCPA cases. But, the FCPA's maximum fine for business entities is four times larger than its Section 3571(c)(3) counterpart. Furthermore, the FCPA and the FEPA both subject individuals to a maximum of $250,000. Finally, prosecutors can pursue fines under Section 3571(d) for both FEPA and FCPA convictions.

Perhaps the more controversial disparity between the FEPA and the FCPA is the difference in potential prison sentences. Under the FEPA an individual shall not be imprisoned for more than two years; however, under the FCPA, individuals can be sentenced to "imprisonment for up to five years."[90] Accordingly, bribers would be able to receive prison sentences up to two and a half times the length of their receiving counterparts. By providing lesser sentences for receivers, the FEPA weakens its own ability to level the playing field for U.S companies. Although the FEPA would still disincentivize receivers from committing extortion, it would leave the same, albeit smaller, imbalance in place.

Under the FEPA, receivers would still have less risk of liability for conducting economic extortion than bribers would have for acceding to it. If Congress' primary intent is to support U.S. companies abroad, then it should take steps to increase the penalties for receivers.

2. Different Standards Under the FEPA and the FCPA

The FEPA's use of the FCPA's definitions for "foreign official" and "public international organization," as well as statements by the bill's cosponsors indicate that the FEPA is intended to function as the FCPA's other half. However, the FEPA's text creates a subtle, but potentially significant discrepancy between the enforcement actions of the supply and demand sides.

85. *Id.* § 3571(d).

86. FCPA RESOURCE GUIDE, *supra* note 31, at 69.

87. *Id.* (citation omitted).

88. *Id.* (citation omitted).

89. Of note, there are basic limitations in comparing the FCPA's *specific* penalty provisions to the FEPA's *general* fine structure under title 18.

90. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A) (2012).

Section 2(2) of the Act criminalizes extortion "in return for—(1) being influenced in the performance of any *official act*; or (2) being induced to do or omit to do any act in violation of the *official duty* of such official or person."[91] As Professor Mike Koehler has commented, the FEPA adds a qualifying element for receivers that is different than the FCPA.[92] Specifically, receiver liability is qualified by an "official duty" or an "official act." By comparison, the FCPA criminalizes supplying a bribe to any foreign official for purposes of—

> (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
>
> (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,
>
> in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[93]

At first glance, the FCPA's qualifiers appear to encompass the FEPA's qualifiers. Both the FEPA and the FCPA qualify criminal liability with official duties and acts. Yet, the FCPA also broadly describes the inducement of a foreign official's misuse of influence as a qualifier. More generally, it is unclear if Congress intends for the FEPA to have the same standard as the FCPA (just in less words) or a different one.

This is a significant textual discrepancy, which in turn, will create a significant discrepancy in the prosecution outcomes of receivers and bribers. As Professor Jessica Tillipman writes in reference to the FEPA, "[t]here is no compelling reason for this different standard, and creating one adds an unnecessary hurdle for prosecutors."[94] The FEPA's proposed standard decreases its ability to solve the problems it was drafted to fix. It is unclear why Congress is proposing a new standard unless it considers the FEPA's new standard a necessary simplification of the FCPA's current standard. If this is the case, then a new amendment to the FCPA could be on the horizon.

3. Foreign Jurisdictional Obstacles

As Professor Koehler has noted, the FEPA "is sure to suffer from jurisdictional hurdles in prosecuting corrupt foreign officials and butt up against the presumption against extraterritoriality."[95] The presumption against extraterritoriality "is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial

91. Foreign Extortion Prevention Act, *supra* note 2, at § 2(2) (emphasis added).

92. *Bill Seeks to Capture the Demand Side of Foreign Bribery Through Amendment to 18 USC 201*, FCPA PROFESSOR (Aug. 5, 2019), http://fcpaprofessor.com/bill-seeks-capture-demand-side-foreign-bribery-amendment-18-usc-201/.

93. 15 U.S.C. § 78dd-1(a); *see also id.* §§ 78dd-2(a), 78dd-3(a).

94. Tillipman, *supra* note 69.

95. FCPA Professor, *supra* note 92.

jurisdiction of the United States.'"[96] It applies across the board, even when "there is a risk of conflict between the American statute and a foreign law."[97] To rebut the presumption, the statute must "evince a clear indication of exterritoriality."[98]

If enacted, the FEPA will likely struggle to rebut this presumption. The presumption against extraterritoriality is typically applied when Congress seeks to "regulate[] conduct" abroad.[99] Here, the FEPA is intended to regulate the conduct of receivers abroad and afford relief. However, the FEPA's text and history do not expressly rebut the presumption. While the bill generally uses broad language, it does not directly state that it has exterritorial application. Courts may still find that the FEPA's purpose and relationship to the FCPA imply such application, but if the current language is passed into law, it is likely that any extraterritorial application will be highly contested.

Furthermore, from a practical standpoint, even if the presumption against extraterritoriality is rebutted, the FEPA will have a weak jurisdictional reach without buy-in from foreign nations. Many countries such as Brazil and the U.K. already have anti-bribery laws with extraterritorial reach. The FCPA itself has extraterritorial application. However, international assistance is circumstance dependent, and will likely diminish when the enforcement action is against a foreign receiver, especially if he or she is connected to the foreign nation's government. As some FCPA observers have noted, "[u]nless the assets derived from the offense or the defendant is within the jurisdiction, the effects of prosecution may remain largely symbolic."[100]

CONCLUSION

In theory, the Foreign Extortion Prevention Act is a beneficial addition to U.S. anti-bribery laws. By criminalizing the demand side of a bribe, the FEPA completes what the FCPA started. If enacted, together the FEPA and the FCPA will criminalize the whole bribe. This will simplify bribery prosecutions by lessening the need for FCPA-related crimes and will create a more unified anti-bribery policy. The FEPA will also create a larger deterrent by creating "mutually reinforcing outcomes" for prosecutors. Finally, the FEPA will better align U.S. anti-bribery laws with the anti-bribery laws of its international counterparts, while simultaneously reestablishing the U.S. as an anti-corruption leader. In theory, the FEPA should be seen as an important and beneficial step in the right direction.

96. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

97. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (quoting *Morrison*, 561 U.S. at 255).

98. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118 (2013) (quoting *Morrison*, 561 U.S. at 264–65).

99. *Id.* at 108, 116.

100. Anton Moiseienko, *When Should Foreign Bribe-Takers Be Prosecuted?*, FCPA BLOG (Sept. 11, 2019, 12:38 PM), https://fcpablog.com/2019/09/11/when-should-foreign-bribe-takers-be-prosecuted/.

However, in practice, the FEPA has significant shortcomings. First, the FEPA's punishment provision will create a large imbalance between bribers and receivers. In doing so, it weakens its own value as a deterrent because receivers will *still* be risking less during an illegal transaction. Furthermore, the FEPA faces significant jurisdictional enforcement concerns. The presumption against extraterritoriality, coupled with the unknown level of international cooperation, creates significant doubt as to whether the FEPA would be successful. Therefore, if the Foreign Extortion Prevention Act is enacted, U.S. lawmakers should view this law as a first step, not a final one.