

# **A New Tool in the Battle against Global Bribery**

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*This is a policy paper that analyzes a significant new development in U.S. regulatory policy designed to enhance the effort to fight global corruption. In a bold attempt to protect and promote fair competition in the global economy, the U.S. has provided government regulators with a powerful new tool. In a reversal of previous policy, the U.S. now allows prosecutors to go after foreign officials who demand bribes, even if the act of bribery occurred outside the United States. The use of this new anti-bribery tool is considered a major political and ethical development in the field of international business.*

*Keywords: corruption, bribery, competition, extraterritorial*

## **INTRODUCTION**

Global business corruption is a serious problem that adversely free markets and consumers around the world. Unfortunately, international bribery is a complex problem to solve because it is fraught with economic, legal, and political repercussions. However, there is a significant new development in the U.S. regulatory scheme work designed to address the global corruption problems in a more effective way.

Bribery by U.S. businesses in all international transactions, directly or indirectly involving foreign government officials, has been prohibited for almost fifty years. However, there has always been a rather large loophole in the bribery laws. Officials of foreign governments and/or government-related business entities were essentially beyond the reach of the U.S. law for any act occurring outside the U.S., which was almost always the case.

Now that loophole has finally been closed. The new development, starting in 2024, now allows U.S. government authorities to pursue and hold accountable foreign officials who demand bribes from American companies trying to secure business, regardless of where it occurs, (Urgensen et al., 2023). The hope is that this new tool will help reduce global business bribery.

## **STATEMENT OF PROBLEM: BRIBERY'S NEGATIVE CONSEQUENCES ON COMPETITION**

Over the past twenty-five years, or more, there have been significant efforts by multiple jurisdictions to curtail global bribery. The U.S. and the U.K., as well as other international organizations including the OECD (Organization for Economic Cooperation and Development), the OAS (Organization of American States), and the UNCAC/COSP (Conference of the States Parties to the United Nations Convention against Corruption) have all made efforts to address international bribery, (Penn 2024). However, despite the existence of such regulations, a recent report by the OECD discovered more than 500 foreign bribery cases

in just the fifteen year period between 2000 and 2015, and that’s just the proverbial tip of the iceberg, (OECD 2022).

Corruption has a negative effect on competition in many different types of industries. Frequently, bribes significantly increase the cost of doing business. Bribes, on average, equaled more than 10 percent of total transaction value globally. The chart below, based on information from the aforementioned OECD report, demonstrates the added transactional cost due to global bribery in various sectors, (OECD 2022).

**TABLE 1  
COST OF BRIBERY (BY OECD)**

<i>Industry or Sector</i>	<i>Average added cost of bribes/per transaction</i>
Extractive (mining/drilling)	21%
Retail/wholesale	19%
Service	17%
Transportation	16%
Manufacturing	16%
Health care	14%
Electricity and gas	11%

Furthermore, corruption poses a threat to competition and economic prosperity for Americans and for people around the world. When officials demand bribes they effectively steal from their citizens. Honest businesses cannot compete, and trust in the free market system plummets.

The real policy challenge has been that the focus of most anti-bribery regulation has been on so-called ‘active bribery’ (the actual payment of the bribe). For example, the OECD Anti-bribery Convention and the U.S. Foreign Corrupt Practices Act (FCPA) address only active bribery, while so-called ‘passive bribery’, the requesting and/or accepting of a bribe, was not punished under U.S. law, nor the OECD or OAS, (Greytak 2024). Essentially, U.S. and global policies only applied to businesses, and their executives, who made illegal bribery payments. Thus over the years, many American companies and executives have been punished for non-compliance, including large monetary fines and/or incarceration. However, since the law did not enable the U.S. government to hold the foreign officials responsible, the global corruption problem continued to exist to a large degree.

## **OVERVIEW OF U.S. POLICY**

Domestic business bribery has long been illegal throughout the United States, with federal and state authorities sharing enforcement powers over bribery. Most domestic bribery laws have been on the books for many decades; the origins of the federal law dates back to the 1940’s. The ethical/legal status of domestic bribery is not controversial, virtually all agree that it is wrong and should be prohibited.

International business bribery laws have evolved since the 1970’s. After going largely unregulated for years, it first became regulated with passage of the FCPA, in 1977, (91 Stat. 1494-8). In the mid-70’s, prior to the passage of the FCPA, there were multiple public scandals involving bribery of foreign officials by American companies and executives, which together led Congress to enact the FCPA.

Some of the corrupt payments were made by old line U.S. blue-chip companies. Among the major corporate examples was the Lockheed case, in which officials of aerospace company Lockheed paid foreign officials in Japan, and several other countries, to buy their planes and other defense technology. Other examples of major corporations included Northrop, United Brands, Gulf Oil, and Mobile. Multiple investigations by the Securities and Exchange Commission eventually led to hundreds of major U.S. companies admitting making unethical and/or illegal payments, (Jones and Berry 1977).

The U.S. Foreign Corrupt Practices Act has two main sections, an anti-bribery section and an accounting section, (91 Stat. 1494-8). The anti-bribery provisions of the FCPA generally prohibit any offer,

payment, promise to pay, or authorization of the payment of money or anything of value, to any official person, in an international business transaction. The bribe must have been made with knowledge that the money, or thing of value, was offered to a foreign official in order to assist in obtaining or retaining business.

The provisions of the anti-bribery section are relatively general in nature, prohibiting making bribes to gain a business advantage. The accounting provisions are somewhat more specific, requiring companies follow numerous accounting regulations. The accounting provisions are essentially focused on transparency and internal controls. Specific rules include the following requirements: all transactions should be recorded to encourage and enforce accountability, should be recorded in a manner which allows for the accurate preparation of financial statements, and should not be made without proper managerial authorization, (91 Stat. 1494-8).

However, one of the basic principles of the FCPA has been that it cannot be used against a foreign official who demands, or takes, a bribe for helping a company win a contract or retain business. It has always excluded foreign officials who requests and takes bribes, (91 Stat. 1494-8). Essentially, the FCPA's prohibition on paying bribes abroad has been limited to companies in the United States, and those acting in this country, meaning the enforcement of the anti-bribery provisions has been limited to U.S. persons and U.S. businesses. This limitation has been consistently reinforced by the Department of Justice and the courts.

Thus, the FCPA has, since its enactment, criminalized giving or offering a bribe, but not soliciting, demanding, or receiving one. This was an obvious deficiency in the law, given that every case of bribery involves both a bribe-giver (active) and a bribe-requester (passive). Many felt this was an unfair approach because it often meant that the root cause of business corruption went unpunished. If a foreign official let a U.S. business executive know that a bribe, or under-the-table payment, would be required to land a lucrative contract, that foreign official was beyond the regulatory reach of the U.S. enforcement agencies, even though it was the official who requested the bribe.

The U.S. policy has proven to work well at the domestic level, but has not effectively addressed corruption on an international basis. The policy has been "treating the symptom, not the cause", and failed to solve the real root of the problem.

## **NEW POLICY CHANGES**

Starting in 2024 U.S. regulatory authorities will now have a new tool in their fight allowing them to pursue foreign officials who demand bribes from American business managers trying to secure business, (Firestone et al., 2024). A provision in the National Defense Authorization Act, passed by Congress and signed by President Biden in December 2023, makes it a crime for a foreign official to ask for or take a bribe from an American person, a U.S. company, (18 USC § 201). The Foreign Extortion Prevention Act (FEPA) significantly extends the reach of U.S. anti-bribery laws, (18 USC § 201).

According the press release at the time of the bill's signing, global corruption poses a serious threat to prosperity and security for people around the world. The White House identified the following five pillars that the new law should help to achieve, (White House 2023):

- Modernizing, Coordinating, and Resourcing U.S. Efforts to Fight Corruption
- Curbing Illicit Finance
- Holding Corrupt Actors Accountable
- Preserving and Strengthening the Multilateral Anti-Corruption Architecture
- Improving Diplomatic Engagement and Leveraging Foreign Assistance

The most important new development under the FEPA is that it now criminalizes the demand, or recipient-side, of foreign business-related bribery, or so-called 'passive' bribery. In other words, U.S. law now addresses foreign corruption at its source, (18 USC § 201). Prior to the passage of the FEPA, the Department of Justice had tried to rely on other criminal laws, such as fraud and/or money laundering laws. However, those laws are somewhat limited. The FEPA more effectively gives prosecutors the tools to target demand-side global corruption.

The FEPA is based on a doctrine known as the ‘extraterritorial application’ of U.S. law, which is the legal ability of a government to exercise authority beyond its boundaries, (Shin 1990). U.S. prosecutors now have the authority to charge bribery cases involving U.S. interests, regardless of where the offense occurred, including in foreign jurisdictions. This is similar to the extraterritorial application of some other U.S. laws including antitrust/competition laws and securities laws.

The concept of applying U.S. law to acts occurring in foreign nations has generally been legal since WWII. In 1945, in a case involving Alcoa, a court ruled that U.S. has jurisdiction over commercial activity committed abroad if it affected commerce in the United States. While somewhat controversial, extraterritorial application is a crucial foundation of the new FEPA.

The FEPA also requires the Attorney General to report to Congress, as well as on the DOJ website, a list of the demands by foreign officials for bribes from U.S. entities. The report will also detail efforts to prosecute such cases. Under FEPA, the punishment is significant. Violators can be fined up to \$250,000, or three times the value of the bribe, and imprisoned for up to 15 years, or both, (18 USC § 201).

## CONCLUSION AND ANALYSIS

The FEPA’s passage comes after years of campaigning by a bipartisan coalition of anticorruption groups and the U.S. Chamber of Commerce, (Urgensen et al., 2023). Transparency International U.S., an anticorruption advocacy group played a key role in drafting the legislation, along with the Helsinki Commission. The FEPA had bipartisan support, rather rare in today’s political environment. Supporters include Sen. Sheldon Whitehouse, Sen. Thom Tillis, Rep. Joe Wilson, and Rep. Sheila Jackson Lee, (Greytak 2024).

The executive director of advocacy for Transparency International (TI) released a statement calling the FEPA the most consequential anti-foreign-bribery law passed in almost 50 years, (Greytak 2024). TI believes that the FEPA has the potential to disrupt the dynamics of corruption by empowering the U.S. Government to criminally prosecute any foreign official who demands or accepts a bribe from any American or American company, anywhere in the world.

With the new tools created by the FEPA, foreign officials charged with taking bribes can be arrested if they enter U.S. territory; if they live in a country with an extradition treaty with the U.S., or if they travel to a third country that has an extradition treaty with the U.S. If it’s enforced effectively, the FEPA will protect U.S. companies operating abroad so they won’t be subject to bribery demands, (Greytak 2024). In summary, the new policy tools are expected to better tackle the issue of bribery and corruption, leading to a more competitive global market.

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