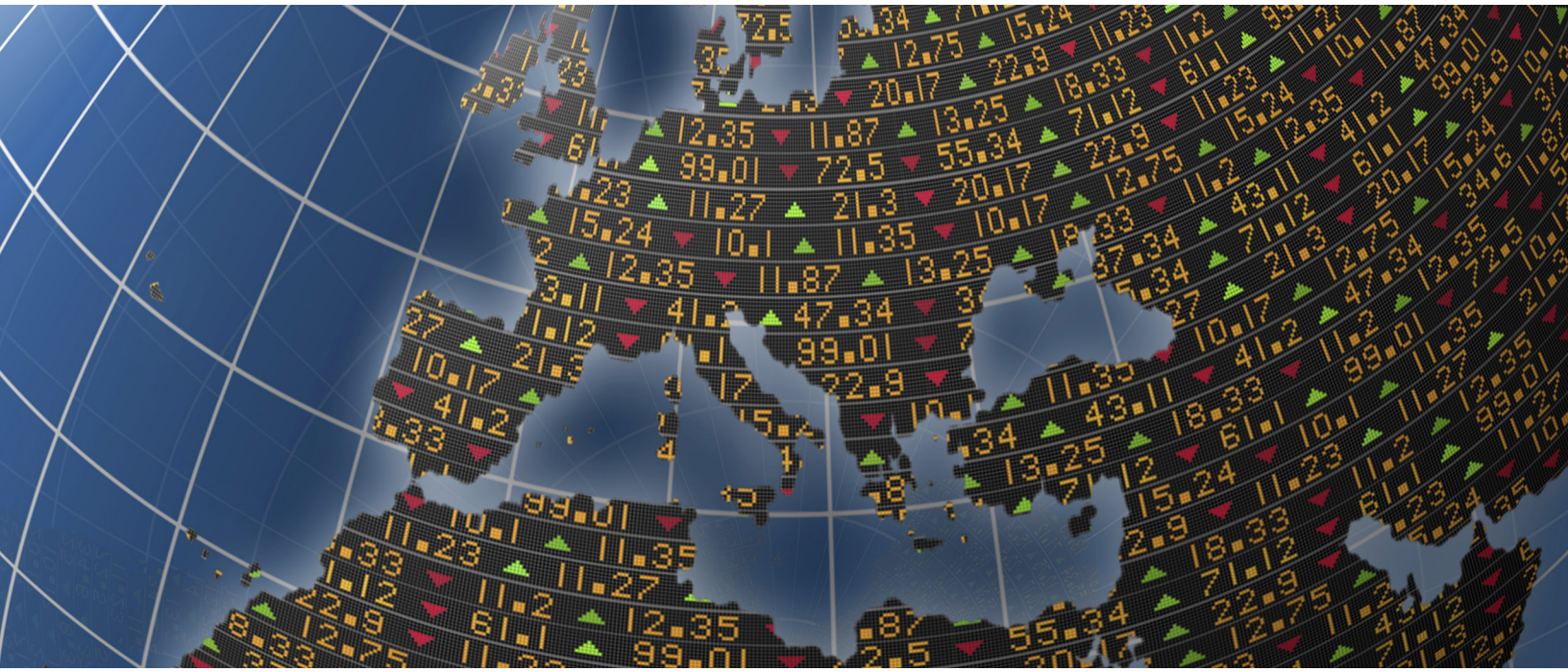
FCPA Update

A Global Anti-Corruption Newsletter



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OECD Issues Latest Assessment of Brazil's Foreign Anti-Bribery Enforcement

On October 19, 2023, the Working Group on Bribery of the Organization for Economic Cooperation and Development (the "OECD") published its Phase 4 report on Brazil's implementation of the OECD Anti-Bribery Convention (the "Report"). The Report focuses on Brazil's progress in addressing the Working Group's recommendations from its Phase 3 review in 2014. In particular, the Working Group previously had recommended that Brazil clarify the reach of its foreign bribery offense, issue a decree regulating its Anti-Corruption Law, establish criminal liability of legal persons, and ensure cooperation among Brazilian agencies investigating and prosecuting foreign bribery.[1]

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1. "Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Brazil," OECD (Oct. 19, 2023), https://www.oecd.org/corruption/anti-bribery/brazil-phase-4-report.pdf ("OECD Phase 4 Report").

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The Report determined that Brazil's detection and enforcement of foreign bribery generally have advanced since Phase 3. According to the Working Group, Brazil fully implemented 25 of the prior report's 39 recommendations across 15 areas. However, the Working Group also highlighted areas for Brazil's further improvement, including the detection of foreign bribery offenses, incentives for corporate self-reporting, protection of private-sector whistleblowers, and – importantly – shielding of agencies from real and perceived politicization.[2]

Because the OECD Convention addresses foreign rather than domestic bribery, the Report mentions but does not focus on Brazil's extensive anti-corruption enforcement domestically as part of Operation *Lava Jato* and similar operations. For nearly a decade, Brazil has expansively enforced its Anti-Corruption Law, conducting widescale investigations and prosecutions that have reverberated throughout the region and globally. The Brazilian Federal Prosecution Service ("MPF") reported that, by 2021, *Lava Jato* had yielded 399 individual plea bargain agreements, 28 negotiated resolutions (*i.e.*, leniency agreements), and 361 convictions, with MPF having submitted or received 723 cooperation requests involving dozens of other jurisdictions.[3]

Notwithstanding this robust domestic enforcement, the Report concluded that Brazil is not yet meeting its full potential with respect to foreign anti-bribery enforcement. But a shift might be underway: Last year, Brazil's Comptroller General ("CGU"), a leading anti-corruption enforcement body in Brazil, announced its expanding focus to encompass also corruption outside of Brazil.[4]

I. Recent Progress

According to the Report, Brazilian authorities have successfully implemented the Working Group's Phase 3 recommendations or demonstrated general improvement in three primary areas:

First, the prior report recommended that Brazil increase private and public sector awareness of foreign bribery generally and methods of reporting suspected foreign bribery. In the latest Report, the Working Group lauded Brazil's concerted efforts in this area. Specifically, it recognized CGU's initiatives, often in coordination with other agencies, to enhance anti-corruption training and guidance for both public officials and the private sector.[5]

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2. *Id.* at 102-07.
3. "Resultados Caso Lava Jato" ["Operation Car Wash Results"], Ministério Público Federal (Aug. 24, 2021), https://www.mpf.mp.br/grandes-casos/lava-jato/resultados.
4. Andrew M. Levine, Bruce E. Yannett, *et al.*, "Brazilian Airline Resolves Foreign Bribery Investigations with Reduced Penalty Based on Inability to Pay," FCPA Update, Vol. 14. No. 3, (Oct. 2022), at 6, https://www.debevoise.com/-/media/files/insights/publications/2022/10/fcpa-update-october-2022.pdf?rev=afa47bd63b454619b8f53dda4bbcd951; Ana de Liz, "Brazil boosts focus on corruption beyond its borders," Global Investigations Review (Oct. 26, 2022), https://globalinvestigationsreview.com/article/brazil-boosts-focus-corruption-beyond-its-borders.
5. OECD Phase 4 Report, *supra* note 1, at 15-19, 23, 26, 32, 45, 69, 91-95, 105.

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Second, the Working Group commended Brazil for the "vigour and creativity" with which it has addressed corporate liability and entered into leniency agreements for corporate defendants.[6] Since the prior report, the Working Group noted that Brazilian authorities have sanctioned three companies for foreign bribery using non-trial resolutions, demonstrating Brazil's capacity to handle large and complex cases through its negotiated settlement framework. There are indications that this will continue: In 2023 alone, CGU reported opening 63 administrative accountability processes (so-called "PARs") involving potential violations of Brazil's Anti-Corruption Law.[7] Relatedly, the Working Group recognized Brazilian authorities' demonstrated willingness and ability to cooperate with law enforcement globally, contributing to some of the largest global fines for foreign bribery schemes involving conduct that occurred in Brazil.[8]

"Notwithstanding this robust domestic enforcement, the Report concluded that Brazil is not yet meeting its full potential with respect to foreign anti-bribery enforcement. But a shift might be underway …."

Third, the Working Group noted that Brazilian authorities have incorporated the lessons from nearly a decade of their enforcement experience into new policies and implementing legislation, including Decree 11/129/2022 (the "Decree"), adopted in 2022 to replace the Anti-Corruption Law's previous implementing decree. The new implementing legislation streamlines foreign bribery detection efforts across enforcement agencies and provides guidance for initiating formal administrative proceedings. The Decree also incentivizes corporate compliance by specifically introducing it as a mitigating factor in the enforcement context, providing a corresponding credit and setting out more broadly the Brazilian authorities' expectations regarding corporate compliance programs.[9]

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6. *Id.* at 96.
7. Press Release, "CGU atinge recorde de processos contra empresas punidas pela Lei Anticorrupção," ["CGU reaches record number of lawsuits against companies punished by the Anti-Corruption Law"] (Dec. 1, 2023), https://www.gov.br/cgu/pt-br/assuntos/noticias/2023/12/cgu-atinge-recorde-de-processos-contra-empresas-punidas-pela-lei-anticorrupcao.
8. OECD Phase 4 Report, *supra* note 1, at 3, 12.
9. *Id.* at 15, 27, 50-51, 96.

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II. Areas for Potential Improvement

On the other hand, the Working Group observed that Brazil has yet to achieve foreign bribery enforcement levels consistent with its economic profile and – again drawing a parallel to *Lava Jato* – with the involvement of Brazilian companies in some of the world's largest corruption cases. The Report therefore includes 35 new recommendations across 13 areas concerning the detection of foreign bribery, enforcement actions involving foreign bribery and related offenses, and liability of and engagement with legal persons.[10]

In particular, the Report highlighted four structural factors that have hindered Brazil's foreign bribery detection and related enforcement efforts: (1) lack of clear self-reporting incentives under the Anti-Corruption Law; (2) an inadequate whistleblower protection framework; (3) challenges involving the statute of limitations; and (4) a perceived lack of independence and neutrality among relevant Brazilian government institutions.

A. Self-Reporting

The Working Group noted that Brazil's Anti-Corruption Law offers two principal incentives for self-reporting: access to leniency agreements and recognition of cooperation as a mitigating factor. Leniency agreements may be concluded only when the legal entity under scrutiny approaches Brazilian agencies, demonstrating its "willingness to cooperate with the investigation." However, the Working Group flagged that this framework conditions access to non-trial resolutions on cooperation rather than specifically rewarding self-disclosure in its own right.[11] In comparison, in the United States self-disclosure itself can be tied to specific credits on monetary penalties on top of those provided for cooperation and remediation.

This presents an opportunity for Brazilian authorities and legislators to address the structure of self-reporting incentives. There is significant reason to do so: *All* concluded foreign bribery cases addressed in the Report resulted from self-reporting. In fact, according to the Report, Brazil has yet to uncover foreign bribery allegations through reports from Brazilian public officials, whistleblowers, auditors, tax authorities, export credits, or development agencies, or through anti-money laundering measures or mutual legal assistance.[12]

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10. *Id.* 96-100. The Report also listed 18 issues on which the Working Group plans to follow up as case law, practice, and legislation continue developing. *Id.* at 100-01.
11. *Id.* at 27.
12. *Id.* at 14. The Report noted that the Federal Prosecution Service and CGU each detected only one of its ongoing enforcement actions through a different source: a referral from a foreign authority and the review of foreign bribery allegations compiled by the OECD, respectively. *Id.*

While there clearly is room for enhancing incentives to self-disclose wrongdoing, the Report still recognized some progress. The Inter-Ministerial Ordinance 36/2022 (the "Ordinance") issued by CGU and the Attorney-General's Office ("AGU") provides that fine reductions for leniency agreements will depend on: (1) a company's self-reporting initiative; (2) the company's cooperation; and (3) other relevant factors, such as speed of negotiation and agreed-upon payment terms. It further provides that the "self-reporting initiative" requires both "timeliness" and "originality." Under the Ordinance, a company satisfies the "timeliness" criterion if it demonstrates that it promptly took measures to conduct an internal investigation and requested a leniency agreement with CGU or AGU within nine months. The disclosure is "original" if the information was not already known to CGU or AGU.[13]

Still, the Working Group highlighted a lack of clarity on how self-reporting translates into fine reductions. Although CGU explicitly states that companies can expect a 1%-1.5% discount for cooperation and up to 2% for "voluntary admission of responsibility,"[14] CGU's guidance does not identify a specific reduction for self-reporting. Furthermore, details of fine reductions in prior resolutions are not publicized, meaning that one cannot determine whether CGU specifically credited self-reporting in calculating the fine, and, if so, by how much.[15]

For these reasons, the Working Group recommended that MPF and CGU clarify the extent to which a company may expect to receive a reduction in fines when it self-reports bribery allegations before authorities become aware of them.[16]

B. Whistleblower Protection

In Brazil's prior Phase 3 report, the Working Group found that "whistleblowing was extremely unlikely" due to the public's distrust of Brazilian enforcement authorities and the lack of an effective framework for protecting whistleblowers. As a result, the Working Group recommended in its Phase 3 review that Brazil enact measures to protect private-sector whistleblowers from discrimination or retaliation.[17] Reflecting that this was not a problem unique to Brazil, in 2021, the Working Group issued its Recommendation of the Council for Further Combating

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13. *Id.* at 27-28.
14. *Id.* at 28.
15. *Id.* at 28-29.
16. *Id.* at 97 (item 1(g)).
17. *Id.* at 29, 106 (item 14(c)).

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Bribery of Foreign Public Officials in International Business Transactions ("2021 Recommendations"), calling among other measures for OECD member states to protect public- and private-sector whistleblowers.[18]

The recent Report found that Brazilian authorities have taken steps to improve whistleblower protections. However, these measures have been primarily focused on whistleblowers employed in the public sector, leaving private-sector whistleblowers vulnerable to retaliation and disciplinary action. In particular, the Working Group noted that new legislation and decrees have expanded Brazil's whistleblower protection framework and that authorities are currently assessing the status of the existing whistleblower legislation. Brazil's primary whistleblower legislation, Law 8.122/1990 (as amended by Law 12.527/2011), added anti-retaliation measures for "any person" who reports "crimes against the public administration, unlawful administrative procedures or any actions or omissions harmful to the public interest." Supplementary acts, including Decree 10.153/2019, protect the identity of whistleblowers who report crimes or irregularities against the "federal public administration." There are also varied and accessible reporting channels, such as online portals, phone hotlines, or ombudsman units in public administration and public companies.[19]

However, the Report found that the existing whistleblower protection framework continues to be of "limited relevance" to the private sector and highlighted that core anti-retaliation provisions still fail to apply expressly to reports of suspected foreign bribery. The Working Group therefore recommended that Brazil adopt legislation in line with the 2021 Recommendations that will expressly protect whistleblowing in connection to foreign bribery and also protect private-sector whistleblowers.[20]

C. Statute of Limitations

The Working Group noted that judicial proceedings in Brazil are lengthy and that, in many cases, delays in obtaining final convictions can result in the statutes of limitation expiring. Brazil's statute of limitations for natural persons is initially calculated based on the maximum penalty for the specific offense, but it can be recalculated after the case is sentenced based on the length of the penalty imposed. As a result, at the end of the proceedings, a shorter statute of limitations can retroactively apply to a defendant who is sentenced to a shorter period of imprisonment than the maximum.

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18. "Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions," OECD, (Nov. 25, 2021), Art. XXII, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378; Andrew M. Levine, Winston M. Paes, *et al.*, "Biden Administration's Strategy on Countering Corruption Seeks New Era of Global Anti-Corruption Enforcement and Cooperation," FCPA Update, Vol. 13, No. 5 (Dec. 2021), at 7, 13-17, https://www.debevoise.com/-/media/files/insights/publications/2021/12/fcpa-update-december-2021.pdf?rev=519f4ac80adf4ab2ba3e6bd288937719&hash=26AF1B8BEFEDA922FC888837127D3BA3.
19. OECD Phase 4 Report, *supra* note 1, at 30-31.
20. *Id.* at 30-33.

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To illustrate that point, the Report focused on the Aircraft Manufacturer case, which remains the only foreign bribery case brought to trial in Brazil. In that case, most of the defendants were acquitted at the appellate court on statute-of-limitations grounds.[21] In fact, of the ten defendants convicted in 2018 in this matter, eight were acquitted for statute-of-limitations issues. For those acquittals, the appellate court concluded that the defendants benefitted from a shorter statute-of-limitations period based on the length of their sentences (rather than the nature of the offense of committed) and that such period had expired. For all eight defendants, the applicable maximum incarceration period was twelve years for foreign bribery, corresponding to a sixteen-year statute-of-limitation period. However, the court concluded that because those eight defendants received only two-year prison terms, the recalculated statute of limitation was four years.[22]

"[T]he Report … strongly urged Brazil to make needed reforms to: [i]ncrease the sanctions for individuals and ensure that the statute-of-limitations period for foreign bribery does not impede prosecution; [p]rotect foreign bribery cases from political bias; and [s]wiftly enact greater protections for whistleblowers employed in the private sector."

In light of the ongoing Aircraft Manufacturer case, the Working Group recommended that Brazil "urgently address" the "unwanted consequences" of its approach to statutes of limitation.[23] The Report does not attribute the acquittals in that case solely to how Brazil approaches statutes of limitation, but highlights that Brazil's system is unique and that retroactively recalculating the statute of limitations based on the actual sentence imposed, alongside Brazil's permissive approach to appeals, may hamper foreign bribery prosecutions.

D. Independence and Politization

Unsurprisingly given political upheavals in Brazil over the past few years, including fallout from *Lavo Jato*,[24] the Report flagged concerns about independence and political bias that often surround corruption investigations in Brazil. Specifically,

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21. *Id.* at 10.
22. *Id.* at 61.
23. *Id.* at 98.
24. Kara Brockmeyer, Andrew J. Ceresney, *et al.*, "The Year 20-22 in Review: Normalcy Returns as Regulatory Expectations Rise," FCPA Update, Vol. 14, No. 6 (Jan. 2023), at 57-64, https://www.debevoise.com/-/media/files/insights/publications/2023/01/fcpa-update-january-2023.pdf?rev=d6d5615525ec4a3391ce2b5b95749f49&hash=86989DBEFEE910228A89EFC099F10187.

the Working Group raised concerns about the politicization of the ministerial office that oversees the MPF and about Brazil's former President's interference in the work of the Federal Police and other investigative agencies, notwithstanding the Brazilian Constitution's guarantee of prosecutorial independence.[25]

The Working Group also emphasized the chilling effect of the expanded Law No. 13.869/2019, which criminalizes "abuse of authority" by public officials. The Report noted that, despite there being no known cases of prosecutors themselves being prosecuted under this law, prosecutors, police officials, and defense lawyers interviewed by the Working Group as part of the review perceived that the law has had a chilling effect on prosecutors. Prosecutors themselves shared that they need to be "extra careful" with their investigations since the law's adoption.[26]

The Report indicated that this chilling effect has been exacerbated by recent administrative and disciplinary actions launched by Brazilian government agencies against federal prosecutors involved in prominent anti-corruption investigations. These actions – taken by the Federal Court of Accounts ("TCU") and the National Council of the Public Prosecution Service ("CNMP") – have been appealed and are pending final resolution. A report submitted by Transparency International underscored that decisions by TCU and CNMP created "serious legal insecurity for public officials acting in cases of corruption by powerful individuals."[27] Similarly, prosecutors interviewed during the Working Group's on-site visit in Brazil stated that these actions were taken without cause as a form of retaliation.

Given the independence issues seemingly faced by law enforcement officials, the OECD recommended that Brazil develop safeguards to shield MPF, the Federal Police, and other investigative agencies from politicization or the perception of politicization, reinforce guarantees against possible political bias by law enforcement agents, and protect prosecutors involved in sensitive anti-corruption cases from retaliation.[28]

III. Looking Ahead

Over the last decade, following the enactment of its Anti-Corruption Law and the extensive investigative and prosecutorial efforts of *Lava Jato*, Brazil witnessed an unprecedented surge in domestic anti-corruption enforcement. While commending Brazil's anti-corruption detection and enforcement efforts as *Lava Jato* unfolded,

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25. OECD Phase 4 Report, *supra* note 1, at 56.
26. *Id.* at 52-57.
27. *Id.* at 55.
28. *Id.* at 57.

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the Report recommended that Brazil augment its efforts to combat foreign bribery and strongly urged Brazil to make needed reforms to:

- Increase the sanctions for individuals and ensure that the statute-of-limitations period for foreign bribery does not impede prosecution;
- Protect foreign bribery cases from political bias; and
- Swiftly enact greater protections for whistleblowers employed in the private sector.

While only time will tell the extent to which Brazil embraces this charge, as some have suggested it will, we will continue to monitor the situation carefully.

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Congress Passes Foreign Extortion Prevention Act, Targeting "Demand Side" of Foreign Bribery

On December 14, 2023, the U.S. Congress approved the Foreign Extortion Prevention Act ("FEPA"), which will make it a federal crime for any foreign government official to demand or receive a bribe from a U.S. citizen, resident or company in exchange for taking or omitting to take official action or conferring any improper business-related advantage.[1] This legislation, which is part of the National Defense Authorization Act and expected to be signed into law by President Biden, substantially expands U.S. enforcement authority with respect to foreign bribery and aligns with the Biden Administration's elevation of anti-corruption enforcement to a national security priority.

For decades, U.S. enforcement authorities have focused principally on the "supply side" of foreign bribery, charging companies and individuals with violating the Foreign Corrupt Practices Act (the "FCPA") by offering, promising, authorizing or paying bribes to foreign government officials. FEPA's enactment enables the Department of Justice to target more directly the "demand side," the foreign officials who seek and accept bribes. Although both U.S. and non-U.S. authorities have charged government officials for this conduct under other laws (like money laundering), the availability of a criminal statute directly analogous to the FCPA likely will increase the frequency and effectiveness of such enforcement. This legislation received bipartisan support in Congress and has been lauded by groups as disparate as Transparency International and the U.S. Chamber of Commerce, reflecting broad-based interest in investigating and prosecuting corrupt foreign officials.

FEPA will establish a new federal criminal offense in terms similar to the FCPA's anti-bribery provisions. Specifically, FEPA will make it a crime for a foreign government official "to corruptly demand, seek, receive, accept, or agree to receive or accept, directly or indirectly, anything of value" from any person while in the territory of the United States, or from any U.S. issuer or domestic concern,

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1. National Defense Authorization Act for Fiscal Year 2024, H.R. 2670, Section 5101, https://www.congress.gov/118/bills/hr2670/BILLS-118hr2670enr.pdf.

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in exchange for taking or omitting to take official action or conferring any improper advantage. Several parallels to the FCPA stand out:

- The legislation defines "foreign official" very broadly, just as courts and enforcement authorities have done in the FCPA context: according to FEPA, a foreign official includes any official or employee of a foreign government or "instrumentality"; any "senior foreign political figure"; "any official or employee of a public international organization"; and any person acting in an official or unofficial capacity on behalf of a foreign government, instrumentality or public international organization.
- In defining the circumstances in which demands for bribes have a sufficient nexus to the United States to trigger criminal liability, FEPA uses the same categories as the FCPA: demands made to issuers of U.S.-listed securities or to U.S. domestic concerns, or to any person while within the territory of the United States, will be unlawful, provided the other elements of the offense also exist. Indeed, FEPA expressly cross-references and incorporates the FCPA's definition of "domestic concern," which includes U.S. citizens, residents and companies.
- Like the FCPA, FEPA also requires a corrupt *quid pro quo*: the bribe must be in return for influencing official government action or otherwise conferring an improper business-related benefit.

The creation of a criminal offense specifically targeting demands from foreign officials for bribes could be the harbinger of new anti-corruption enforcement activity, reaching beyond the usual targets of FCPA cases. It remains to be seen, however, whether DOJ will use this new authority to investigate and prosecute cases that otherwise would not have been brought or instead will use FEPA largely to enhance their enforcement of the FCPA (including by charging additional individual defendants). FEPA's enforcement also could encounter significant jurisdictional challenges, including foreign officials charged under the statute who may remain beyond the reach of U.S. authorities and never see the inside of a U.S. courtroom. From a political perspective, charging foreign officials also may invite diplomatic repercussions and even spark international conflict.

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We will monitor closely developments relating to FEPA and its prospective enforcement.

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