

BRIEFING MEMO

To: Interested Parties

From: Transparency International U.S. Office¹

Date: May 2021

Re: The U. S. Must Criminalize the “Demand Side” of Foreign Bribery

American businesses are increasingly faced with illegal demands from foreign officials in corrupt regimes, and unscrupulous competition from state-owned companies in those countries. One short, simple, and bipartisan change to federal law would extend much-needed protections to these American businesses, align U.S. foreign bribery law with legal frameworks used across the United States and across the world, and equip the Department of Justice with a powerful new tool for combatting global corruption.

Background

Since its adoption in 1977, the Foreign Corrupt Practices Act (“FCPA”)² has served as a model law for regulating the “supply side”³ of bribery by prohibiting U.S. companies and individuals from offering or paying bribes to foreign officials in furtherance of a business deal. By permitting a small group of well-connected people to play by a different set of rules, bribes are used to evade public health and safety rules, ignore national security risks, and divert scarce taxpayer money to wasteful or harmful projects. Writ large, such corruption increases the cost of doing business, undermines business confidence, and makes it much harder for small and medium enterprises (“SMEs”) to do business abroad. Anti-bribery laws like the FCPA level the playing field and help ensure that officials make decisions based on what’s good for the public—not simply their own self-interest. From 2016 to 2019, the Department of Justice and the Securities and Exchange Commission, the agencies that jointly enforce the FCPA, recovered more than \$1 billion in penalties per year.⁴ And 2020 saw the largest foreign bribery resolution to date, as Airbus, a global provider of civilian and military aircraft based

¹ Transparency International U.S. is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, the organization partners with businesses, government, and citizens to promote transparency and accountability and curb the abuse of power in both the public and private sectors.

² 15 U.S.C. §§ 78dd-1, et seq.

³ See OECD, “Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?” www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm (“The supply side of foreign bribery relates to what bribers do – it involves offering, promising or giving a bribe to a foreign public official to obtain an improper advantage in international business. In contrast, the demand side of foreign bribery refers to the offence committed by public officials who are bribed by foreign persons.”)

⁴ See Richard L. Cassin, “FCPA Enforcement Index,” FCPA Blog, <https://fcgablog.com/lists/>.

in France, agreed to pay nearly \$4 billion to resolve foreign bribery charges with authorities in the U.S., France, and the United Kingdom.⁵

Long the standard-bearer for regulating corrupt business practices, the FCPA has helped build a fairer global economic playing field. Yet U.S. businesses are “increasingly faced with illegal demands from foreign officials in corrupt regimes and unscrupulous competition from companies, including state-owned enterprises in such countries.”⁶ Unfortunately, federal law⁷ has failed to adapt to these changes. Where the foreign bribery laws of many of our global economic competitors criminalize both the “supply” and the equally pernicious “demand” side of foreign bribery, U.S. law only criminalizes the former. This incomplete legal framework hamstrings U.S. law enforcement’s ability to police corrupt activity, and forces American businesses to compete on an uneven playing field in the global economy.

International and Domestic Legal Frameworks

The United Kingdom, France, Switzerland, and many other significant economic players have passed anti-bribery laws that criminalize the solicitation or receipt of bribes by foreign officials.⁸ This understanding of the two-directional nature of bribes has been echoed by the Organization for Economic Cooperation and Development (“OECD”), which noted recently:

To 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.⁹

This common-sense approach to combatting bribery is already the norm in American law. U.S. domestic bribery laws, as well as the bribery laws of the overwhelming majority of U.S.

⁵ See U.S. Department of Justice, “Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case,” Jan. 31, 2020, <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>.

⁶ Tom Firestone & Maria Piontkovska, “Two to Tango: Attacking the Demand Side of Corruption,” *The American Interest*, Dec. 17, 2018, https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/#_ftnref10.

⁷ 18 U.S.C. § 201.

⁸ Other countries that have criminalized the demand-side of bribery include Albania, Algeria, Armenia, Bolivia, Bosnia and Herzegovina, Bulgaria, the Republic of Congo, Croatia, Estonia, France, Georgia, Germany, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Malaysia, Macedonia, Moldova, Montenegro, the Netherlands, Poland, Romania, Russia, Serbia, Slovenia, Sweden, Switzerland, Ukraine, and the United Kingdom. See *supra* note 4 and Lucinda Low, Sarah R. Lamoree, and John London, “The ‘Demand Side’ of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn’t Enough,” *Fordham L. Rev.* Vol. 84, 2 (2015), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5145&context=flr>.

⁹ OECD, “Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?” 3, www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm.

states, criminalize both the giving and receiving of political bribes,¹⁰ the states having enacted the American Law Institute's Model Penal Code provision on bribery in official and political matters¹¹ or variations thereof. As explained in the Code:

Article 240 consists of a series of offenses designed to reach various means by which the integrity of government can be undermined. The most serious offense is bribery...which performs the traditional function of punishing both the bribe giver and the bribe receiver in cases where the future performance of official functions is sought to be influenced by the offer of money or other benefits.¹²

The U.S. Department of Justice has done what it can to fill the void left by the FCPA. When faced with prosecuting demand-side bribes, it has cobbled together elements of other, imprecise federal crimes such as the Travel Act,¹³ Sherman Act,¹⁴ and mail,¹⁵ wire,¹⁶ and financial institution¹⁷ fraud statutes. The Department has also attempted to broadly interpret the FCPA itself in order to prosecute foreign entities engaged in global bribery schemes. Unfortunately, this expansive approach was rejected in 2018, when the U.S. Court of Appeals for the Second Circuit determined that foreign nationals, even when they conspire to violate the FCPA, fall outside the FCPA "when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory."¹⁸ It's therefore clear that Congress, and Congress alone, is capable of providing the jurisdictional reach the Department needs to comprehensively prosecute global bribery schemes.¹⁹

A Short, Simple, and Bipartisan Solution

Legislation like the Foreign Extortion Prevent Act (H.R. 4140), or "FEPA," first introduced in August of 2019 with strong bipartisan support, would expand the federal bribery and gratuity statute²⁰ to cover any foreign official or agent thereof who "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value." This language,

¹⁰ See Columbia Law School, "U.S. Anti-Corruption Oversight: A State-by-State Survey,"

<https://www.law.columbia.edu/capi-map#capi-mapinfo>.

¹¹ See MPC § 240.1. ("Bribery in Official and Political Matters. A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another...").

¹² *Id.* (emphasis added).

¹³ 18 U.S.C. § 1952.

¹⁴ 15 U.S.C. § 1.

¹⁵ 18 U.S.C. § 1341.

¹⁶ 18 U.S.C. § 1343.

¹⁷ 18 U.S.C. § 1344.

¹⁸ See *U.S. v. Hoskins*, 902 F.3d 69, 93-94 (2d Cir. 2018).

¹⁹ See *U.S. v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) ("Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power").

²⁰ 18 U.S.C. § 201.

short and simple, would help protect American businesses and empower American law enforcement to combat the harmful and disruptive impacts of foreign bribery.

Conclusion

The FEPA would help turn the tide against global corruption, build upon the critical foundation established by the FCPA, and close a significant gap in our anti-corruption laws.

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