TRANSPARENCY INTERNATIONAL
the global coalition against corruption

TI-U.S. Office
1110 Vermont Ave. NW
Suite 500
Washington, DC 20005
Tel: 614-668-0258
info-us@transparency.org
www.transparency.org

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The Honorable Lindsey Graham
Chairman
U.S. Senate Committee on the Judiciary

The Honorable Diane Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary

RE: The Foreign Extortion Prevention Act

Dear Chairman Graham and Ranking Member Feinstein:

On behalf of Transparency International U.S., we urge your support of the Foreign Extortion Prevention Act ("FEPA"). This short, simple, and commonsense change to existing law[1] would update federal anti-bribery law for the 21st century by aligning it with legal frameworks used across the country and across the world, equip the Department of Justice with a tool they need to combat corruption, and extend to American businesses necessary protections when operating abroad.

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.

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 at the expense of the rest of us, bribes undermine public health and safety, 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.

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[1] U.S. 18 § 201.
[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.")

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."[4] Unfortunately, federal law has failed to adapt to these changes. Where the laws of many of our global economic competitors—and of nearly every state in the U.S.—criminalize the equally pernicious "demand side" of bribery, U.S. law is silent on the subject. 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.

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.[5] 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.[6]

This common-sense approach to combatting bribery is already the norm in American law. The overwhelming majority of U.S. states have criminalized both the giving and receiving of political bribes,[7] having enacted Model Penal Code § 240.1[8] 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.[9]

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[4] 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.

[5] Other countries that have criminalized demand-side bribery include Malaysia, Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Russia, Serbia, Slovenia, and Ukraine. *See id.*

[6] 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.

[7] Columbia Law School, "U.S. Anti-Corruption Oversight: A State-by-State Survey," https://www.law.columbia.edu/capi-map#capi-mapinfo.

[8] *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…").

[9] *Id.* (emphasis added).

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. The Department has also attempted to read the FCPA broadly—an effort most recently rejected by the U.S. Court of Appeals for the Second Circuit.[10] It's now clear that Congress, and Congress alone, is capable of giving law enforcement the tools they now need.

The FEPA fills the gap by expanding federal bribery law to cover a foreign official or agent thereof who "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value." This language, short and simple, will help American businesses and American law enforcement combat the harmful and disruptive impacts of bribery.

The United Nations estimates that over $3.6 trillion dollars—some 5% of global gross domestic product—is lost to corruption each year. The FEPA builds upon the critical foundation established by the FCPA by supplying another means of combatting the harms to business and society caused by corruption. We urge you to adopt it with expediency.

For questions or additional information, please contact Scott Greytak at sgreytak@transparency.org or 614-668-0258.

Sincerely,

Gary Kalman
Director

Scott Greytak
Advocacy Director

[10] *See U.S. v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).