LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FEPA Cases Are Natural Fit For DOJ's Fraud Section

By **James Koukios and Rachel Davidson Raycraft** (May 24, 2024, 3:58 PM EDT)

James Koukios

Rachel Davidson Raycraft

On March 8, Acting Assistant Attorney General Nicole Argentieri announced that "the same attorneys who investigate and prosecute [Foreign Corruption Practices Act] violations w[ill] also handle cases brought under [the Foreign Extortion Prevention Act]."[1]

FEPA became law in December 2023 and, as discussed in greater detail in a previous Law360 guest column, it effectively extends the reach of the FCPA.[2] While the FCPA applies only to bribe payers — i.e., the supply side — FEPA covers foreign government officials who solicit or accept bribes from companies and individuals with a U.S. nexus, i.e., the "demand side."

Because the FCPA and FEPA are essentially two sides of the same coin, we had previously predicted[3] that FEPA cases would be assigned to the FCPA Unit within the Fraud Section of the U.S. Department of Justice.[4]

While we agree with Argentieri that "[i]t makes sense that the same attorneys who investigate and prosecute FCPA violations would also handle cases brought under FEPA," it begs the questions: Why was the Fraud Section empowered with exclusive jurisdiction over criminal enforcement of the FCPA in the first place? And why does it make sense to extend that jurisdiction to FEPA cases?

Centralizing Control Over the FCPA, and Now FEPA

The Fraud Section's exclusive domain over criminal enforcement of the FCPA, and now FEPA, starkly contrasts with prosecutorial policy regarding the vast majority of federal criminal statutes, which can be prosecuted by any U.S. attorney's office in the country.

While the Fraud Section frequently works hand in hand with U.S. attorney's offices, no FCPA or FEPA investigation or prosecution can be undertaken without its knowledge, express authorization and direct involvement.

When the FCPA was enacted in 1977, it was a pioneering statute — not only in the U.S., but also globally. No law had ever sought to criminalize corrupt business interactions with foreign officials on foreign soil.

From early on, the Criminal Division at the DOJ — also known as Main Justice — was given responsibility for enforcing the FCPA.

Requiring approval from Main Justice before bringing enforcement actions involving complex statutes is not unusual. For example, federal prosecutors must receive Criminal Division approval before bringing criminal or civil Racketeer Influenced and Corrupt Organizations Act cases, and they must receive National Security Division approval before bringing cases involving a long list of national security statutes.

Such approval ensures that the DOJ takes a consistent approach to these statutes nationwide, and helps prosecutors from the various U.S. attorney's offices handling these cases avoid common pitfalls.

What makes FCPA enforcement unique is that prosecutors from the Criminal Division's Fraud Section are given exclusive jurisdiction for initiating and prosecuting FCPA cases. In other words, Main Justice's role in FCPA cases goes beyond approval and requires involvement.

The decision to vest the Fraud Section with exclusive jurisdiction over criminal enforcement of the FCPA was grounded in the unique issues expected to be presented by FCPA cases.

In 1984,[5] the Justice Manual — then called the U.S. Attorneys' Manual — explained that such investigations

> raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. Additionally, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. Close coordination of such investigations and prosecutions with the Department of State, the Securities and Exchange Commission and other interested agencies is essential. ... For all these reasons, the need for close centralized supervision of investigations and prosecutions under the Foreign Corrupt Practices Act is compelling.

The 1984 version of the Justice Manual also cited the Fraud Section's role in administering the FCPA opinion procedure — then called the FCPA review procedure — as a reason for centralizing criminal enforcement in the Fraud Section.

This raises another benefit of centralization: The Fraud Section has been able to provide consistent messaging to the business community about its interpretation of the FCPA and its anti-corruption compliance expectations in a way that likely would be challenging, if not impossible, if enforcement were dispersed across multiple DOJ components.

In explaining the reason for centralization of the FCPA — and now FEPA — enforcement, the current version of the Justice Manual contains language nearly identical to the language from the 1984 version quoted above.[6]

The current version includes an additional justification for centralizing FEPA enforcement: "the investigation, arrest, or prosecution of a foreign government official may implicate national security or diplomatic interests and require coordination with other law enforcement and government agencies in the United States and abroad."

Argentieri echoed this new statement when she stated there are particular and significant "sensitivities" raised when investigating and "prosecuting a foreign government's officials."

A Long History of Prosecuting Foreign Officials

In addition to the policy reasons discussed above, there are very practical reasons for assigning FEPA cases to the same prosecutors who investigate and prosecute FCPA cases.

First, and perhaps most obviously, FEPA issues are the flip side of FCPA issues. It would not make sense to have multiple DOJ components investigating and prosecuting what amounts to the same foreign bribery scheme simply because one law covers the bribe payer, and another covers the bribe recipient.

Second, the Fraud Section's FCPA Unit[7] has long used other laws, primarily federal anti-money laundering statutes, to prosecute foreign officials who receive bribes given to them in violation of the FCPA.

The Money Laundering Control Act, codified in Title 18 of the U.S. Code, Sections 1956 and 1957, prohibits certain financial transactions involving a specified unlawful activity, which is defined in the statute to cover a wide range of illegal activities, including violations of the FCPA and other countries' official bribery statutes.[8]

The FCPA Resource Guide, written before the enactment of FEPA, expressly recognizes that "although foreign officials cannot be prosecuted for FCPA violations, they can be prosecuted for money laundering violations where the specified unlawful activity is a violation of the FCPA."[9]

For decades, the Fraud Section has built a successful track record of using anti-money laundering statutes to charge and convict bribe-receiving foreign officials who have used the U.S. banking system to process or conceal bribe payments.

Since 2020 alone, the DOJ has used money laundering charges to prosecute at least 17 foreign officials in connection with FCPA violations. But the DOJ's experience in using money laundering charges to prosecute foreign bribe recipients goes back much further than that.

For example, the FCPA Unit successfully prosecuted both the bribe payers and bribe receivers in the Haiti Teleco case, including securing a trial conviction in 2012 against a former Haitian official on 21 counts related to an alleged scheme to launder the proceeds of an FCPA violation.[10]

As a result of this experience, Fraud Section prosecutors are accustomed to the political sensitivities inherent in seeking corruption-related charges against foreign officials.

We expect that Fraud Section prosecutors will continue to use the money laundering statutes in foreign bribery cases, and that FEPA charges will often be brought alongside money laundering charges in many cases.

When money laundering charges are not available — for example, when a bribe is paid in cash, or when a foreign official has simply demanded, but did not receive and launder, a bribe — Fraud Section prosecutors will be well-equipped to decide when to bring stand-alone FEPA charges.

FEPA Enforcement Belongs With Fraud Section

FEPA, therefore, both fills a gap in U.S. anti-corruption enforcement capabilities, and covers investigatory and prosecutorial territory that is already very familiar to the Fraud Section.

Although FEPA and the FCPA contain some meaningful differences,[11] they are largely complementary, collectively covering the two halves of a bribe exchange between a company or individual with a U.S. nexus and a foreign official.

Historically, the Fraud Section has pursued both halves of such transactions, but did so with imperfect tools. With the passage of FEPA, the Fraud Section is now better equipped to address both the supply side and the demand side of foreign bribery.

The Fraud Section will be able to leverage decades of experience investigating and prosecuting cases under the FCPA and related statutes. Moreover, it is well practiced in navigating the political and diplomatic sensitivities of pursuing foreign bribery cases.

Mobilizing FEPA will not be an easy or seamless task, but the prosecutors at the Fraud Section are well suited for the job.

James Koukios is a partner, co-chair of the securities litigation, enforcement and white collar defense group, and co-head of the the FCPA and global anti-corruption practice at Morrison Foerster LLP. He previously served as senior deputy chief of the DOJ Criminal Division's Fraud Section.

Rachel Konheim Davidson Raycraft is an associate at Morrison Foerster.

Disclosure: Koukios was involved in prosecuting U.S. v. Duperval, the Haiti Teleco case, during his time as senior deputy chief of the DOJ Criminal Division's Fraud Section.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american.

[2] https://www.mofo.com/resources/insights/240117-top-10-international-anti-corruption-developments-for-december-2023.

[3] https://www.mofo.com/resources/news/231214-foreign-bribe-taking-targeted.

[4] https://www.anti-corruption.com/20408951/newly-signed-foreign-extortion-preventionact-complements-fcpa.thtml?utm_source=emailArticle&utm_medium=email&utm_campaign=emailArticle.

[5] DOJ's website maintains an archive of U.S. Attorney's Manuals from 1953 to 1997. The first post-FCPA version in DOJ's archive is from 1984.

[6] https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

[7] In 2006, the Fraud Section formed a dedicated FCPA Unit.

[8] 18 U.S.C. §§ 1956(c)(7)(B)(iv) and (D).

[9] U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition, at 49 (July 2020).

[10] https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

[11] For example, FEPA's definition of "foreign official" includes persons acting in an official or unofficial capacity on behalf of a government, department, agency, instrumentality, or public international organization, while the FCPA only covers those acting in an official capacity. A deeper analysis of the differences between the FCPA and FEPA is available here https://www.law360.com/articles/1719965/dissecting-the-proposed-foreign-extortion-prevention-act.