

The New 'Sting' of the FCPA

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In the world of corruption, one often resorts to the saying that the truth is stranger than fiction. Until now, this sentiment has lent itself more to the outrageous machinations of the crimes and the criminals than the manner of investigating and prosecuting them. That all changed with the announcement by the Department of Justice that it (with the FBI) conducted a first-of-its-kind multi-year FCPA undercover sting operation and netted indictments of twenty-two individuals from sixteen different companies in the military and law enforcement products industry. To put the cherry on the sundae, the arrests of virtually all of the individuals charged were made at the Shooting, Hunting, Outdoor Trade Show and Conference, known as the SHOT Show.

The sixteen indictments, unsealed on January 19, represent the single largest prosecution against individuals in the history of FCPA enforcement. The investigation and prosecutions also rebut a widely held but incorrect view that FCPA prosecutions only emerge from self reporting or whistleblowers (and the fruits thereof) and demonstrate the ferocity of the DOJ and FBI's independent means and efforts. Indeed, this should not be a surprise given the comments at last Spring's FCPA conference presented by Hughes Hubbard & Reed and Bureau of National Affairs, Inc., when a senior trial attorney for the Fraud Section of the DOJ indicated that the coming years will see more investigations and enforcement actions commenced as a result of traditional law enforcement means. What's more, Assistant Attorney General Lanny Breuer has suggested that this is only the beginning. According to Mr. Breuer, the DOJ is prepared "to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

The twenty-two arrests and sixteen indictments stem from a large-scale undercover operation focusing on allegations of bribery regarding companies that provide military and law enforcement equipment such as armored vehicles, weapons, body armor, ballistic plates, and various accessories. While the charged individuals work for sixteen different companies (including Smith & Wesson), the indictments allege largely the same facts for each, as each person succumbed to the same undercover sting operation.

The indictments allege that the defendants each met with a former executive in the industry, identified in the indictments as "Individual 1," and an individual purporting to be a sales agent and representative of the Minister of Defense for an unnamed African country. In

actuality, the sales agent was an undercover FBI agent. During these meetings, which took place in both Miami and Washington, D.C., the defendants were informed that a potential contract worth approximately \$15 million to provide equipment to the unnamed African country's Presidential Guard was available. The defendants allegedly agreed to a scheme in which they would provide the agent a 20% "commission" on the contract with the understanding that half of the "commission" would be passed along directly to the Minister of Defense, with the other half split between Individual 1 and the sales agent. The defendants allegedly planned to conceal the payments by overstating the contract value and providing two price quotes - one representing the actual cost of the goods, the second representing the cost of the goods plus the 20% "commission."

The indictments allege that the defendants agreed to proceed in two phases. In Phase 1, the defendants were to fill a small order as a test run. The second phase would involve a larger, more complete order. Each indictment specifically alleges several overt acts in furtherance of the conspiracies including receiving payment during Phase 1 from a bank account purportedly held by the unnamed African country, filling the order, providing the faulty price quotations for Phase 1, providing the 20% commission to the sales agent's bank account for Phase 1, signing the purchase agreement for Phase 2, and using instrumentalities of interstate commerce to mail the signed agreements. In at least one case, an individual determined to proceed with the illicit scheme after having received legal advice to the contrary.

Of the twenty-two individuals arrested and charged, five were foreign nationals - four worked for companies based in the U.K. while the other was the C.E.O. of an Israeli company that acts as a sales agent for companies in the industry. Jurisdiction for these individuals was based on the acts that occurred inside the United States including the face-to-face meetings with the undercover agent. Each indictment alleges violations of and conspiracy to violate the anti-bribery provisions of the FCPA, aiding and abetting a violation of the FCPA, and conspiracy to engage in money laundering. Each separate FCPA violation carries a maximum sentence of five years. Conspiracy to engage in money laundering carries a maximum penalty of 20 years.

The implications of this investigation and prosecution are many. Most importantly though, these indictments signal the following:

1. **Increased Use of Traditional Law Enforcement Techniques.** The common thinking has been that enforcement actions are most likely to arise from self-reporting companies or whistleblowers. As these indictments demonstrate, the DOJ is increasingly using the assistance of the FBI and traditional law enforcement techniques to find and investigate violations of the FCPA. The success of the sting operation can only be seen as a harbinger for future similar types of activities consistent with the report from *The New York Times* that law enforcement officials have indicated that as many as six other undercover operations are currently underway.
2. **Enforcement of the FCPA Continues to Grow.** It is no secret that the resources and efforts being devoted to enforce the FCPA today are much greater than they were ten, five, or even two years ago. In particular, over the last year the DOJ has demonstrated its commitment to anti-corruption enforcement through high profile trials of Frederic Bourke

Jr., Congressman William J. Jefferson and film executives Gerald and Patricia Green. The use of new techniques for bringing criminal cases against individuals indicates that neither the trend of increased enforcement against individuals nor increased FCPA enforcement efforts overall are slowing down anytime soon or have been changed with the change of administrations in Washington, DC.

- 3. Evolving Philosophy of FCPA Enforcement.** Until now, FCPA enforcement efforts have largely been focused on investigating and punishing companies and individuals who *have* violated the law. This is a rare instance where the DOJ has shown a willingness to seek out those individuals and companies who are *willing* to violate the law. In addition, the use of undercover agents in a sting operation indicates that the DOJ is looking not just to investigate, but to actively deter foreign bribery. As Mr. Breuer stated, “[f]rom now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.” These forward-looking approaches represent a break from traditional FCPA enforcement philosophies and demonstrate regulatory authorities’ full commitment to ensuring compliance with the FCPA.

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