

FCPA Dragnet – Could Your Sales Agent Be An FBI Agent?

BY JOANNE M. DARKEY, CORINNE A. LAMMERS, AND ERIC D. ENGBERG

The private sector has an even greater incentive to perform due diligence on would-be agents that assist in obtaining foreign government business after last week's announcement of a two and one-half year sting operation that resulted in the arrests of 22 individuals on charges of violations of the U.S. Foreign Corrupt Practices Act ("FCPA"), conspiracy to violate the FCPA, and money-laundering. All but one of the arrests occurred on the eve of the Shooting, Hunting, and Outdoor Trade Convention in Las Vegas where the defendants were gathered for a trade show.

This largest single investigation against individuals in the history of the FCPA surpasses the total number of individuals charged with FCPA violations last year; the Department of Justice is making good on its assurances that FCPA enforcement is a priority, and that individuals will be targeted. As Assistant Attorney General Lanny A. Breuer stated in the Department of Justice Press Release announcing the charges, "[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."

The Scheme

The recently unsealed indictments allege that the defendants, individuals employed by various unaffiliated companies that supply military and law enforcement products, were involved in a bribery scheme to acquire contracts from the minister of defense of an unnamed African country to outfit the country's presidential guard. The contracts were for a number of products, including tear-gas grenade launchers, M4 rifles, bulletproof vests and handguns. The defendants allegedly agreed in various bars and lounges in Washington, D.C., to submit an inflated sales quotation that included a 20% "commission" to a "sales agent" whom they believed to be representing the defense minister and who would pay 10% to the defense minister in order to secure the contracts. For these artificial sales, each defendant also allegedly received (from the undercover government agent) payments for a "test" sale of not more than \$18,000 that represented a 20% inflated price for the goods sold. The defendants allegedly sent the goods, and then wired 20% of the inflated purchase price to the "sales agent". They were lured into thinking that additional sales would follow that would be worth \$15 million in total for all of the companies. However, there were no actual sales to an African country, no minister of defense was taking bribes, and the only real "agent" was an undercover one from the FBI.

Implications

FCPA Enforcement: A "Number One" Priority With Dedicated FBI Resources

In the Department of Justice Press Release issued Tuesday, January 19, Kevin Perkins, the FBI's Assistant Director of the Criminal Investigation Division stated, "[i]nvestigating corruption at all levels is the number one priority of the FBI's Criminal Division." This commitment is demonstrated

by the involvement of 150 FBI agents merely in the execution of the search warrants and the duration of the investigation (2 ½ years). While the FBI's dedicated team of special agents to work on FCPA cases was created about three years ago, this investigation marks the first widespread use of undercover agents in the white-collar world of FCPA enforcement.

In the past, most FCPA investigations have originated with allegations by whistle-blowers or competitors or from voluntary disclosures by corporations. The Department of Justice previously has stated that at least 130 FCPA investigations are pending. Whether any of those investigations involve sting operations in the works is unknown.

Continued International Enforcement Coordination/Cooperation

The FBI was not alone in taking action. Four of the defendants are U.K. citizens, and the United Kingdom's City of London Police executed seven search warrants in connection with their own investigations into the conduct that led to the U.S. indictments. This case, therefore, continues the recent pattern of cooperation among governments in corruption cases.

Bribes Don't Need to Be Worth Millions of Dollars to Be Prosecuted and You Don't Need to Work at a Billion-Dollar Company

The actual amounts paid by each defendant that were allegedly intended to be passed on as bribes ranged from approximately \$220 to \$1,800. The eventual total bribe payments to be paid by all of the defendants would have totaled \$1.5 million which is 10% of the \$15 million budget to outfit the presidential guard. These bribes certainly are not in the same league as the millions of dollars in bribe payments that have been at issue in many cases and settlements in recent years, which reinforces the fact that there is no *de minimus* or materiality threshold in the FCPA.

All of the individuals are or were employed by small, private companies with the exception of one who is employed by Smith and Wesson Holding Corporation. Several companies were served with subpoenas on January 18, the day of the arrest of the individuals. It is unknown whether any action will be taken against any of the companies.

Conclusion

This latest investigation suggests that 2010 is going to be another headline-making year in FCPA enforcement actions. Whether the use of FBI undercover agents in FCPA sting operations will become commonplace remains to be seen.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Joanne M. Darkey
202-551-1830
joannedarkey@paulhastings.com

Corinne A. Lammers
202-551-1846
corinelammers@paulhastings.com