

KIRKLAND ALERT

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U.S. Department of Justice Arrests 22 in Unprecedented FCPA Sting Operation

On January 19, 2010, the U.S. Department of Justice unsealed the indictments of 22 executives and employees in the military and law enforcement products industry, signaling a new era in Foreign Corrupt Practices Act enforcement.

According to the DOJ press release, the 16 indictments “represent the largest single investigation and prosecution against individuals in the history of DOJ’s enforcement of the Foreign Corrupt Practices Act (FCPA),” which prohibits U.S. citizens and companies from paying bribes to foreign government officials in order to obtain or retain business. In addition, the DOJ obtained the evidence necessary for the indictments from real-time undercover operations, not from the *post-hoc* corporate disclosures that have characterized most prior FCPA prosecutions.

The 16 indictments involved actions by the un-named “Individual 1,” a former executive in the military and law enforcement products industry; Individual 1 apparently cooperated with the government investigation of the charged defendants, who are described as having been his former business associates. As part of the undercover operation, Individual 1 claimed to be negotiating a deal on behalf of an un-named country in Africa and introduced the defendants to two undercover FBI agents, who were posing as representatives or procurement officers from that country. The defendants all agreed to pay a 20 percent commission to an agent that they believed to be a representative of the minister of defense. The undercover agents told the defendants that half of the commission would be paid directly to the minister of defense.

To generate the funds to pay the commissions, DOJ alleges that the defendants would provide two price quotations for the sales in question: one representing the actual sales price and one adding a further 20 percent, which would be received by the defendants’ company and then provided to the representatives, who would purportedly use half to pay the “minister of defense.” According to the indictments, the defendants agreed to make a “test sale,” in which the undercover agents represented that half the commission would be paid to the minister of defense to obtain the contract for a second, larger sale of additional goods. This test sale involved the defendants wiring funds covering the 20 percent commission fee to the undercover agent’s bank account, with the alleged understanding that half of those funds would be passed onto the minister of defense.

It is clear that DOJ intends this investigation to mark a significant departure from prior FCPA cases. To date, the standard DOJ approach has been to conduct *post-hoc* investigations of a company’s dealings with foreign officials. Many companies have cooperated with the government’s requests for information in the knowledge that the government could serve subpoenas or gain additional information by other coercive measures. That cooperation has, on occasion, involved providing information concerning specific employees, who might then be targeted for prosecution by the government.

In this instance, however, DOJ has taken an approach used more often in drug and organized crime cases: it has gained access to an informant who has then introduced undercover law enforcement officers to apparent wrongdoers, thus allowing the undercover agents to conduct a real-time investigation aimed at individual executives. In fact, the executives’ employers are not named in the indictments or press releases; under DOJ policy, this generally indicates that they have not yet been the subject of criminal charges.

It is also clear that DOJ intends the regulated community to receive this news as evidence of a more aggressive approach. First, all of the arrests but one were made at the industry's annual conference in Las Vegas; the sole exception was of an individual arrested in Florida who appears no longer to be employed by the company he worked for at the time of the alleged misconduct. Moreover, Lanny Breuer, the Assistant Attorney General for the criminal division, who oversees FCPA prosecutions, said that "This ongoing investigation is the first large-scale use of undercover law enforcement techniques to uncover FCPA violations and the largest action ever undertaken by the Justice Department against individuals for FCPA violations... From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent." Similarly, the New York Times reported that at the press conference, Breuer added that "the message is

that we are going to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

These developments are clear signals that the DOJ intends to be even more aggressive in its prosecution of corruption crimes, especially against individual defendants. Although the prosecution of individuals has risen steadily in recent years, 22 charged defendants would be a typical number for an entire year as opposed to one investigation. As a result, companies and executives should be aware that their real time actions in dealing with foreign governments and their representatives will be under increasing scrutiny from the U.S. government. As importantly, that scrutiny may go well beyond after-the-fact reviews in connection with corporate inquiries and include real time investigative tactics such as surreptitious recordings and undercover operations.

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