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FCPA: Were the Sting Trials Doomed from the Start?

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When the jury in the second Foreign Corrupt Practices Act (FCPA) Sting case trial came back with two acquittals, and hung on three other defendants, the impact on the Department of Justice's (DOJ) ambitious FCPA enforcement efforts was apparent. *United States v. Goncalves et al.*, No. 09-335 (D.D.C.). And when the DOJ made the difficult decision to dismiss all charges against the remaining defendants, including three who had previously pleaded guilty, that impact could not be mistaken.

We had a front-row seat to the challenges the government faced in the FCPA Sting trials — we represented a client in the second trial, who obtained a mistrial after the jury was unable to reach a unanimous verdict on the charges against him. We were able to follow the development and planning of the FCPA Sting through discovery and the testimony in two trials.

No doubt, the prosecutors and Federal Bureau of Investigation (FBI) agents assembling the case faced many complicated decisions fraught with the potential to impact the trial. Let's explore three of these issues, including the decision to venue the trials in D.C., the use of a well-connected informant with an almost unparalleled checkered past, and the shifting of the investigation midstream to an undercover sting scripted to avoid the use of the term "bribe."

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Despite the outcome in this case, the DOJ is not likely to give up on the use of stings and other non-traditional law enforcement techniques in the white collar or FCPA realm. But, we do see the DOJ recalibrating and trying to avoid some of the pitfalls they ran into this time around.

The FCPA Sting Case and Trials

The FCPA Sting case broke into public view on Jan. 18, 2010, when the FBI arrested 22 individuals in the military and law enforcement products industry, 21 of them by an FBI SWAT team outside of Las Vegas after the defendants had been lured there to receive payments from a supposedly corrupt Gabonese official during the industry's annual "Shot Show." The *New York Times* even hyped the takedown on its front page. Justice officials called the investigation "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."

Fast-forward to mid-2011, following over a year of intensive discovery. Three defendants had pleaded guilty to a Superseding Indictment; 19 defendants remained, broken up into four trial groups. The first trial, of four defendants, went to the jury in July 2011. Following a week of deliberations, the jury hung on all defendants and a mistrial was declared.

The second trial, of six more defendants, began a few months later, in September 2011. By Christmas, the trial judge had granted the defendants' Rule 29 motion for acquittal on conspiracy charges, sending one defendant home entirely. By the end of January 2012, the jury came back with two acquittals, and voted decidedly in favor of acquittal for the remaining defendants. As in the first trial, the judge then granted a mistrial, leaving the government without a conviction over two trials.

Just weeks before the start of the third trial of four additional defendants, the government came to the decision to dismiss all charges, with prejudice, against the 19 remaining defendants. A month later, it also dismissed charges against the three defendants who had previously pleaded guilty. In granting the government's motion to dismiss, the trial judge noted that "[u]nlike takedown day in Las Vegas … there will be no front page story in the *New York Times* or the *Post* for that matter tomorrow reflecting the government's decision today to move to dismiss the charges against the remaining defendants in this case."

District of Columbia As Venue

The FCPA Sting trials took place in federal court in the District of Columbia. But did they have to? One of the fundamental advantages of a sting is that the government can choose how it is structured, including where the key conduct in the sting takes place. The DOJ and FBI, in the FCPA Sting cases, chose Miami and D.C. as the locations of the recorded meetings in their plan. Documents were then sent by defendants to an FBI-monitored sham address in D.C., and the defendants were later invited to D.C. for a gathering purportedly celebrating a mid-level Gabonese official. Moreover, the government required the defendants to ship a sample product to a Virginia warehouse, providing a sufficient basis for venue in a more hospitable jurisdiction close to the DOJ Fraud Section and the FBI office that ran the investigation for three years. The informant was based in Florida, not in D.C., while the defendants were based all over the United States or in other countries, with only one or two near D.C.

Why did the DOJ and FBI choose to venue the case in D.C.? The downside of a D.C. venue was a jury pool that many court observers agree was more hostile to a government sting than, for example, the Eastern District of Virginia, which has played host to numerous high-profile sting trials in the terrorism context. But the basic principle remains: In sting cases, venue can be almost anywhere the government wants it to be.

Tainted, But Well-Connected, Informant

Unlike venue, the government is usually stuck with whatever informant it is dealt, warts and all. In the FCPA Sting case, an informant fell into the FBI's lap via a voluntary disclosure by his employer of his illegal conduct. As the FBI soon learned, and as came out during testimony in the trials, the informant's illegal conduct spanned decades, including bribery of foreign and U.N. officials, money laundering, customs violations, drug and prostitution crimes, embezzlement, and extensive tax evasion. When the informant finally testified in the second Sting trial (having not been called by the government in the first trial), almost a full day of his direct testimony was taken up by his recounting, in gory detail, his various crimes, followed by weeks of withering cross-examination by six defense attorneys. The damage to his credibility was immeasurable.

The informant's upside was his decades-long experience in the military and law enforcement products industry, comprised of hundreds of large and small companies competing for contracts with governmental buyers around the world. The informant was exceedingly well-connected among suppliers, agent intermediaries, distributors, and end users in various countries. According to the prosecutors at trial, he gave the government entrance into a world where bribes were discussed only behind closed doors by trusted colleagues. An FCPA sting in this area would also make a splash in a previously untargeted industry.

We are not trying to say that the government should swear off use of informants with long criminal histories. That would be both impractical and illogical. Informants are often the government's best window into past, existing, and future illegal dealings. However, the government can take steps to wean informants from an investigation in favor of undercover agents who are less vulnerable to attack on the witness stand. In the FCPA Sting, the FBI case agent testified that reducing the investigation's reliance on the informant was not possible because there was no way for a new undercover agent to gain the trust of so many (22) defendants in a short period of time. That may be true. But a possible solution may be to abandon the larger splash of 20-plus defendants to focus on a smaller number of defendants an undercover agent can handle. And if near-total reliance on the informant is necessary, firmer control of the informant — including his spending, e-mail accounts, text messaging, and government payments — by his FBI handlers becomes a requirement to avoid the many avenues of attack open to the FCPA Sting defendants.

Of necessity, agents and prosecutors get very close with informants in an intense, years-long investigation. Here, despite the informant's personal shortcomings, the government's support despite the results went a long way when it recommended a sentence of probation. The court, however, saw the informant's past crimes quite differently, instead sentencing him to 18 months' imprisonment. (*See* sentencing details in "Hotline," page 8.)

A Midcourse Investigative Correction with a Script That Avoided the 'B-Word'

The Sting investigation began with "real world" deals, *i.e.*, deals with actual foreign governments, for a year and a half. But the problem was that the supposedly illegal deals the government was monitoring weren't winning the corrupt contracts. That's when DOJ decided it had to make a midcourse correction that controlled the outcome — and the Sting was born.

When scripting the Sting, the government took the advice of its informant and avoided using the word "bribe" when describing the payments at issue to the defendants, instead talking about kickbacks hidden in "commissions" paid to an intermediary sales agent to be passed on to a foreign official end user. As numerous government witnesses testified, the government was concerned that individuals would hear the word "bribe," immediately conclude the deal was a sting, and run for the hills. By using the term "commission," the government believed it was using the lingua franca of the industry to describe a bribe.

However, as anyone who has bought a house, insurance, or a car, knows, "commission" can be a legitimate term describing a perfectly legal form of compensation for sales agents. Using a term like "commission" instead of "bribe" permitted the defense to argue inherent ambiguity in the way the payments were presented, which proved to be an advantage under a statute where criminal liability turns on the defendant's state of mind — knowledge and corrupt intent. The problem was only exacerbated in the military and law enforcement products industry, where the employment of sales agents working on commission is not only customary, but also required in certain countries when dealing with the government.

The government must walk a very fine line between tipping off targets to the covert nature of a deal, while assuring that the illegality of conduct is made "reasonably clear to potential subjects" as required by the FBI's governing guidelines for undercover operations. That line will shift depending on the industry and circumstances of the case, but it may be advisable to limit the scope of an undercover operation by removing a potent attack from the arsenal of defense counsel.

Conclusion

In the final analysis, the trial judge in the FCPA Sting trials expressed his hope that the DOJ and FBI could learn from the experience of the FCPA Sting investigation and trials. When the government ultimately moved to dismiss the Sting indictments, the court expressed his confidence that "this will be in the end a positive, if not painful, lesson that results in better prosecutions of individuals in the future under the FCPA."