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You Just Can't Bribe People Like You Use To . . .

(Or, More Seriously, DOJ Investigation Signals A New Era in FCPA Enforcement)

On January 19, 2010, the Department of Justice ("DOJ") unsealed sixteen indictments charging twenty-two individuals with violations of the Foreign Corrupt Practices Act ("FCPA"), allegedly arising from schemes to bribe foreign government officials. The DOJ also announced that, in connection with the indictments, the FBI had executed fourteen search warrants across the U.S., and the City of London police had executed seven search warrants in the U.K. The product of an FBI sting operation hailed in a DOJ press release as "the largest single investigation and prosecution against individuals in the history of the DOJ's enforcement of the [FCPA]," the indictments may signal a fundamental shift in the DOJ's ongoing campaign "to erase foreign bribery from the corporate playbook."

The FCPA generally prohibits companies and their officers, directors, employees, and agents from offering, paying, promising to pay, or authorizing to offer or pay money or "anything of value" to foreign officials for the purpose of obtaining or retaining business. The indictments name sixteen companies based in the U.S., the U.K., and Israel, all of which manufacture or sell military and law enforcement products running the gamut from grenade launchers to armored vehicles. The defendants allegedly participated in an FBI-designed sting operation that led the defendants to believe that they were securing a contract to outfit the presidential guard of an unidentified country in Africa by paying bribes to that country's minister of defense.

On January 18, 2010, all twenty-two defendants were arrested, twenty-one of them while they were attending an industry trade show in Las Vegas. The sting operations, and the resulting indictments, potentially mark a paradigm shift in the way the DOJ enforces the FCPA. They teach at least three critical lessons.

- **First,** the DOJ is taking aim at individual violators of the FCPA. With the recent indictments, the DOJ has brought charges against almost the same number of individuals that it indicted for FCPA violations (or who pled guilty to FCPA-related charges) in all of 2009, *i.e.*, twenty-three. Part of the strategy appears to rely on the powerful deterrent effect of personal liability, since a conviction for conspiracy to violate the FCPA carries a maximum prison term of five years. The DOJ seems to be betting that an executive views the threat of jail time quite differently from a

monetary fine against the company.

- **Second,** the DOJ will be proactive, not relying solely on companies to perform their own investigations and voluntarily disclose their violations. The DOJ and FBI affirmatively sought out and built cases against the twenty-two defendants. For proof of the DOJ's commitment to aggressive enforcement, one need look no farther than the search warrants executed across the U.S. and U.K. in connection with the indictments or the DOJ's recent claim to have currently over 140 open investigations into FCPA violations. Not only will the DOJ's willingness to invest resources likely increase the reach and frequency of its enforcement efforts, but it should also drive up the "price" for settling cases. Having spent the time and money to indict, it's unlikely that the DOJ will agree to take a loss in resolving the case. In terms of priority for federal law enforcement officials, foreign bribery may soon belong in the same league as narcotics and organized crime.

- **Third,** gone is any notion that only large multinational corporations need to be concerned about being a target of FCPA enforcement. With some notable exceptions, nearly all the companies involved in the recent indictments are relatively small, many with fewer than twenty employees. One is a family business with just four employees, owned and operated by siblings (now both defendants). Before the recent sting, most publicized FCPA cases involved large, multinational corporations, such as Siemens and Chevron. As a result, many small to medium-sized companies may have believed they were not at risk due to their low profile. Recent events demonstrate that belief to be mistaken. Any company, regardless of its size, engaging in international commerce is now a viable potential target.

This shift in focus is particularly significant because financial constraints often make smaller companies *more* likely to engage in activity that violates the FCPA, whether "knowingly" or not. Such companies often lack the resources of larger corporations, which leads them to affiliate with independent agents to represent them in foreign countries. These agents often lack even a rudimentary understanding of the FCPA. To compound matters, smaller companies often have little or nothing in the way of FCPA compliance programs since many view such programs as cost prohibitive. However, these recent indictments suggest that even a relatively small investment in a robust compliance system can result in significant net savings.

These fundamental changes in the DOJ's approach to enforcement are likely to render many corporate FCPA compliance policies inadequate and outdated. To avoid expensive and protracted violations, and even jail time for employees, businesses must adjust their compliance programs with an eye toward (at least) the lessons outlined above. Companies cannot write off a potential FCPA investigation or fine as a cost of business so long as the DOJ seeks to impose individual criminal liability. Instead, a company's commitment to self-monitor must be at least as rigorous as the DOJ's commitment to aggressively and proactively investigate potential violations.

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