

## TOP 3 FCPA HITS OF 2010-THE GUN STING CASE

As we enter the second half of 2010 it is time to review what we believe to be three of the more significant Foreign Corrupt Practices Act (FCPA) matters which came to significant public attention in the first half of this year. We will review the (Ding Dong) Avon Calling matter revolving around its China operations; the case of the HP German subsidiary paying bribes to obtain a contract in Russia and today we begin with the Gun Sting case.

On January 18, 2010, on the floor of the largest annual national gun industry trade show in Las Vegas, 21 people from military and law-enforcement supply companies were arrested, with an additional defendant being later arrested in Miami. The breadth and scope was unprecedented. Assistant Attorney General for the Criminal Division of the US Department of Justice (DOJ), Lanny Breuer, who led the arrest team, described the undercover operation as a “two-and-a-half-year operation”. The arrests represented the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement of the FCPA.

As explained in the indictments, one FBI special agent posed "as a representative of the Minister of Defense of a country in Africa (Country A), later identified as Gabon" and another FBI special agent posed "as a procurement officer for Country A's Ministry of Defense who purportedly reported directly to the Minister of Defense". Undercover criminal enforcement techniques such as wire taps, video tapes of the defendants and a cooperating defendant were all used in the lengthy enforcement action. In a later indictment, and seemingly unrelated to the “Africa” part of this undercover sting operation, allegations were included that corrupt payments were made to the Republic of Georgia to induce its government to purchase arms.

The FCPA Professor has written extensively on the legal issues involved in this massive case, which include entrapment and whether there must actually be a foreign governmental official involved, rather than someone posing as such, for the FCPA to apply. Chris Matthews, writing in MainJustice.com, has written extensively regarding the court proceedings in Washington DC on this matter. Both of these blogs provide excellent overviews of the Gun Sting matter and we recommend both postings to you.

But what does all of this mean for the Chief Compliance Officer (CCO) sitting in his office in the US? It should mean quite a bit. There are several lessons from which you can learn and immediately implement in your FCPA compliance program if you have not previously done so.

1. **High Risk Country.** The undercover FBI agent was represented to be a sales agent who the defendants believed represented the Minister of Defense for Gabon. Any agent or transaction involving an agent in West Africa should receive heightened scrutiny as it is a high risk country. Any transaction involving an agent, a 20% commission or anything that remotely seems unusual should require

Compliance Department involvement at some level. Procedures should be put in place to routinely **Red Flag** any such transactions for further review.

2. **Agent Due Diligence.** As the Sales Agent was an FBI agent posing as a corrupt foreign governmental official, it would appear that little-to-none due diligence was performed on the proposed agent. Such an approach (clearly) invites FCPA liability. All agents should receive the highest level of investigation, internal evaluation, contractual obligation and post-contract signing by management going forward. If your choices are close the deal without performing adequate due diligence OR walking away from the deal because of adequate due diligence, it is far better to complete the process than to close the business transaction without adequate risk analysis through the due diligence process. As noted with Number 1 above, any transaction in West Africa should have heightened scrutiny and any agent from this area of the world should be subjected to the current 'best practices' of agent due diligence, review and management.
3. **Commission Amount.** In this case, an agent, who for doing very little or nothing, was to receive a commission of 20% which is clearly above the standard and should have raised a **Red Flag**. Further, it was made clear that at least part of the commission would be paid as a bribe. Any commission should be reviewed by not only the Legal or Compliance Departments in a company but also by internal audit to assure that it is not out of line with other commissions paid. If required external forensic auditors should be brought into to review the proposed transaction.

The Gun Sting case and its aftermath may well be with us for sometime. All we can say, with any certainty, is that *more will be revealed*.

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