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Emerging FCPA Enforcement Strategy

Law360, New York (February 16, 2010) -- On Jan. 18, 2010, FBI agents arrested 22 executives and employees of 16 companies as a result of "the largest action ever undertaken by the Justice Department against individuals" for violations of the Foreign Corrupt Practices Act, a federal anticorruption statute that generally outlaws the practice of bribing foreign officials in order to obtain or retain business.

The indictments resulted from a complex sting operation described by Assistant Attorney General Lanny A. Breuer as "the first large-scale use of undercover law enforcement techniques to uncover FCPA violations."

Not only was the sting operation unprecedented in terms of its size and clandestine character, but also for its target — individuals from small to midsize companies. The indictments and the covert operations that produced them signal a new era in FCPA enforcement. They also tell a cautionary tale that any company, no matter what its size, involved in international commerce should heed.

The so-called “Anti-Bribery Provisions” of the FCPA forbid companies, as well as their officers, directors, agents, and employees from "corruptly ... offer[ing], pay[ing], promis[ing] to pay, or authoriz[ing] the payment of any money, or offer, gift, promise to give, or authoriz[ing] the giving of anything of value to ... any foreign official for the purposes of ... obtaining or retaining business." 15 U.S.C. § 78dd-1.

The “Accounting Provisions” of the FCPA require publicly traded companies and companies that file periodic reports with the U.S. Securities and Exchange Commission to make and keep accurate books and records, and to maintain effective internal accounting controls. See 15 U.S.C. § 78m.

Criminal penalties for violating the FCPA include hefty fines for both companies and individuals, and incarceration for up to five years.

The defendants' companies are based in the U.S., the U.K. and Israel, and each of them manufactures or sells military and law enforcement products such as firearms, grenade launchers, armored vehicles and body armor.

The indictments allege that the defendants participated in a sting operation in which they believed they were bribing the minister of defense of an unidentified African country to secure lucrative contracts to outfit that country's presidential guard corps.

The defendants range in age from 25 to 66, and represent all levels of corporate responsibility: CEOs, directors, general counsel and sales personnel.

According to the indictments, an intermediary, described as a former high-ranking executive in the law enforcement and military equipment industry, solicited meetings with the defendants in Miami and Washington, D.C., at upscale hotels and restaurants.

FBI agents posing as officials of the ministry of defense then requested and received a 20 percent commission from the defendants, half of which, defendants were told, would be paid directly to the minister of defense in order to secure the $15 million contract.

Each defendant faces up to 30 years in prison if convicted on all counts, since the indictments also included charges for violations of conspiracy to violate the FCPA and to commit money laundering.

And that's not all folks. There may be more indictments and arrests to come, given that Breuer has described the investigations sparked by the sting operations as "ongoing." Whether or not they continue to grow in number, the indictments, and the investigations that led to them, teach at least five fundamental lessons about the DOJ's current approach to FCPA enforcement.

First, the indictments showcase the DOJ's appetite for prosecuting individuals for FCPA violations. Breuer addressed this proclivity head-on in his November 2009 remarks to the 22nd National Forum on the FCPA, where he warned:

"[T]he prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations."

In the same address, Breuer stated that it was "no accident" that the DOJ had indicted more individuals in 2009 than in any previous year because "prosecution of individuals is a cornerstone of [the DOJ's] enforcement strategy."

Presumably, that strategy relies in part on the power of personal criminal liability to deter unlawful conduct. FCPA violators may be punished with five-year prison sentences and fines that may not be paid by their employers.

The DOJ reasonably assumes that the potential for personal penalties will greatly effect the risk-benefit calculus underpinning a decision either to bribe a foreign official or to look the other way in deliberate ignorance of such activity.

Whereas an entity may shrug off a potential fine under the FCPA as merely a cost of doing business, the DOJ reasons that it is far more difficult for an individual to ignore the threat of imprisonment and potentially ruinous personal financial sanctions.

Second, the indictments portend a new era of aggressive, proactive enforcement of the FCPA by the DOJ. The investigation that led to the recent indictments spanned two years, and involved 150 FBI agents who executed 14 search warrants across the U.S.

Although the DOJ's past enforcement strategy has relied heavily on voluntary disclosures, the indictments demonstrate that such disclosures are now only part of the picture.

The DOJ seemed to send a message with the covert nature of the sting operations: "[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."

Prospective violators must now also wonder whether their co-conspirators have "flipped" and are working for law enforcement. Indeed, its use of undercover techniques may signal the DOJ's intent to prioritize foreign bribery with the likes of narcotics and organized crime.

Third, gone is any notion that only large multinational corporations need to be concerned about running afoul of the FCPA. With some notable exceptions, most of the companies involved in the recent indictments are relatively small, some with fewer than 20 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 have 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.

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.

As Breuer stated in November 2009, "[w]e recognize the issues of costs to companies to implement robust compliance programs, to hire outside counsel to conduct in-depth internal investigations, and to forego certain business opportunities that are tainted with corruption. Those costs are significant and we are very aware of that fact. The cost of not being FCPA compliant, however, can be far higher."

Fourth, the indictments exemplify the DOJ's current trend toward industry-wide investigations. The defense industry, because of its systemic interaction with foreign officials, has long been a target of FCPA enforcement. Similar investigations are underway in the pharmaceutical, life sciences, and oil and gas industries.

These investigations allow the government to amass knowledge of how an industry works, then more efficiently shepherd its resources to utilize that knowledge on its next target within the industry.

This learning curve reduces the resources DOJ must expend to build its next prosecutable case. Companies in these industries need to be aware that such scrutiny is taking place, and must prepare accordingly.

Finally, the U.K. authorities' involvement in the current investigation indicates that enforcement of the FCPA is increasingly becoming a multinational enterprise and that the U.S. is not alone in its stance against bribery and related conduct.

Reinforcing this trend, on Feb. 5, 2010, British defense contractor BAE Systems PLC announced that it would plead guilty and pay $450 million to settle corrupt practices charges brought in tandem by the DOJ and the U.K.'s Serious Fraud Office.

Cooperation between the U.S. and foreign authorities has also produced significant results in the past. For example, in December 2008, Siemens AG pled guilty to charges of FCPA violations that the DOJ brought with substantial assistance from authorities in Germany.

These lessons, particularly when viewed together through the lens of the recent indictments, literally change the rules of the game when it comes to FCPA enforcement.

In order to avoid running afoul of the statute, a rigorous anticorruption and compliance policy is an essential first step for those companies starting from scratch.

For those with existing compliance programs, practitioners should not assume that their corporate clients' FCPA compliance systems are properly equipped to deal with this evolution in the law. We offer the following suggestions for best practices in avoiding liability under the statute.

FCPA compliance begins with a zero tolerance, antibribery policy. Company policy should include a written antibribery code of conduct that is distributed to all employees, and that includes disciplinary procedures for FCPA violations.

Employees should certify that they have read the policy and understand that they are obligated by it, and should update this certification on a regular basis. Training should address bribery and corruption issues, particularly for employees working in parts of the world where corruption is widespread.

Training should also include instruction on the appropriate response to situations where bribes may be solicited or viewed by local custom as "necessary," and should illustrate the penalties for a violation of the statute.

A reporting mechanism or "hotline" should be established so that employees can report suspicious conduct, and employees should be encouraged to utilize it. Companies should update these training modules on a regular basis to reflect developments and current trends in FCPA enforcement.

Due diligence is a key component of robust FCPA compliance. It must be thorough and far-reaching, and should extend to all aspects of the company's business that involve operations overseas.

These include arrangements with third-party agents such as consultants, independent sales representatives, and lobbyists; joint venture partners, including subcontractors; and requests for business courtesies for foreign officials.

A company considering any merger with or acquisition of an entity with an international business component should analyze the transaction from a FCPA perspective. This process will often include a review of certain company documents, interviews of prospective employees, and an examination of books and records.

If any red flags surface in the due diligence phase, attorneys and forensic accountants with proficiency in the FCPA should conduct an investigation, including in-country interviews with key personnel and a comprehensive examination of relevant documents.

Once the transaction is complete, employees of the acquired entity must be trained to ensure they have a working knowledge of the FCPA and the activity it prohibits.

Companies should establish standardized expense and reimbursement policies so that inappropriate travel, gift and entertainment expenses can be identified in a timely manner.

Such policies include requiring managerial approval of all requests for business courtesies for foreign officials, including all travel, gift and entertainment expenses, and all expenses over a specified amount; maintaining detailed records of all expenses incurred on behalf of foreign officials; and requiring receipts for all expense reimbursement.

As a result of these recent indictments, and the government's increased focus on FCPA enforcement, these are dangerous times for companies that choose to bury their heads in the sand when it comes to the FCPA.

Unless companies adjust, and implement compliance programs at least as rigorous as the government's enforcement efforts, the risk of hefty fines — and even jail time — are real.

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