

The Department of Justice Goes Undercover to Enforce the FCPA

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Written by Nathan A. Andrisani and Maria Gonzalez Calvet

The U.S. Department of Justice (DOJ) continues to ramp up its aggressive anticorruption enforcement efforts. That message was loudly reinforced this week when DOJ announced the indictments and arrests of 22 individuals from 15 separate military and firearms products companies for Foreign Corrupt Practices Act (FCPA) violations. This represents a clear signal from DOJ that in FCPA cases (1) it will aggressively use law enforcement techniques once reserved for traditional criminal cases such as organized crime; and (2) in addition to companies, it will now target executives and employees for criminal prosecution. This is the beginning of what DOJ has warned will be a new wave of rigorous FCPA enforcement.

The indictments were the product of an unprecedented FBI undercover operation, in which an FBI agent posed as a “sales agent” acting on behalf of an African Minister of Defense. According to the charges, each of the 22 individuals agreed to pay a 20% commission to the purported sales agent in order to win part of a \$15 million deal to provide military products to the country’s presidential guard. Twenty-one of the arrests were made at a firearms industry trade show in Las Vegas. At the same time, the FBI executed 14 search warrants around the country; another seven search warrants were carried out simultaneously in the UK by the City of London Police, which was coordinating with U.S. authorities. Each of those arrested faces the prospect of a maximum sentence of more than 20 years’ imprisonment.

While the outcome of the individual cases remains to be seen, DOJ’s actions are noteworthy for several reasons. First, DOJ certainly has shown that it is serious about its oft-stated intention to aggressively prosecute individuals for violations of the FCPA. It also reinforces the seriousness of another stated DOJ objective of targeting whole industries—as opposed to individual companies—that it believes may be involved in FCPA violations. Even more important, these arrests show that DOJ now intends to use in FCPA cases tools that have long been used with great success in other areas of criminal investigation, including undercover sting operations, search warrants, and possibly wiretaps. And finally, these arrests show that international law enforcement officials—at least in the UK—are willing partners in DOJ’s new hard-hitting strategies.

There is every reason to expect that U.S. law enforcement agencies and their overseas partners will continue the use of aggressive, coordinated tactics; indeed, splashy cases like this one likely will only

increase the government's appetite for such tactics. Assistant Attorney General Lanny A. Breuer signaled as much in his statement announcing the charges: "The fight to erase foreign bribery from the corporate playbook will not be won overnight, but these actions are a turning point. 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."

In addition to the obvious impact on individuals, this week's actions have significant implications for corporations. Given the low burden imposed on the government to hold corporations criminally accountable for the actions of their employees, companies should be firmer than ever before in establishing, enforcing, and policing compliance with strong anticorruption policies. Also, when making the often difficult decision of whether to self-report an FCPA violation, a company can no longer safely assume that the government likely would not otherwise learn of the matter. Rather, the company must consider whether the government may already know.

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If you have any questions regarding this Law Flash or the FCPA, or require assistance with any other issue relating to the defense of any other government enforcement matters, please contact the authors, Nathan J. Andrisani (215.963.5362; nandrisani@morganlewis.com) and Maria Gonzalez Calvet (215.963.5517; mcalvet@morganlewis.com), or any of our white collar practitioners:

Washington, D.C.

Fred F. Fielding	202.739.5560	ffielding@morganlewis.com
Mark E. Matthews	202.739.5655	mark.matthews@morganlewis.com
Barbara "Biz" Van Gelder	202.739.5256	bvangelder@morganlewis.com
Mark A. Srere	202.739.5049	msrere@morganlewis.com
Amy Conway-Hatcher	202.739.5953	aconway-hatcher@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com
Kathleen McDermott	202.739.5458	kmcdermott@morganlewis.com

New York

Leslie R. Caldwell	212.309.6260	lcaldwell@morganlewis.com
Kelly A. Moore	212.309.6612	kelly.moore@morganlewis.com
Joanna C. Hendon	212.309.6377	jhendon@morganlewis.com

Philadelphia

Eric W. Sitarchuk	215.963.5840	esitarchuk@morganlewis.com
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Jack C. Dodds	215.963.4942	jdodds@morganlewis.com
Lisa C. Dykstra	215.963.5699	ldykstra@morganlewis.com
Eric Kraeutler	215.963.4840	ekraeutler@morganlewis.com
Matthew J. Siembieda	215.963.4854	msiembieda@morganlewis.com
Colm F. Connolly	215.963.4841	cconnolly@morganlewis.com
Zane David Memeger	215.963.5861	zmemeger@morganlewis.com
Nathan J. Andrisani	215.963.5362	nandrisani@morganlewis.com
Meredith S. Auten	215.963.5860	mauten@morganlewis.com
San Francisco		
John H. Hemann	415.442.1355	jhemann@morganlewis.com
William H. Kimball	415.442.1277	wkimball@morganlewis.com
Lisa Tenorio-Kutzkey	415.442.1309	ltenorio-kutzkey@morganlewis.com
Los Angeles		
Alicia Villarreal	213.612.7245	avillarreal@morganlewis.com
Frankfurt		
Dr. Jürgen Beninca	+49.69.714.007.19	jbeninca@morganlewis.com
Paris		
Thierry Dalmasso	+33 1 53 30 44 39	tdalmasso@morganlewis.com

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