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New Strategy in FCPA Enforcement Has Business Paying Attention

By Jesse Sunenblick | January 21, 2010

The arrests earlier this week [1] in a foreign bribery scheme have attracted considerable notice in business circles, largely because the methods the FBI used to enforce the Foreign Corrupt Practices Act (FCPA) broke new ground.

The arrests of the 22 defendants, executives and employees of companies in the military and law enforcement products industry were the result of a two and a half year FBI undercover operation, and the sting targeted smaller companies doing business overseas.

Two executives of firms specializing in FCPA compliance said the case, which involves the largest number of individuals charged in a FCPA case — with potentially more charges to come – has significant ramifications on future U.S. business dealings abroad.

One take, expounded by **Michael J. Hershman**, President of the Fairfax Group,which describes itself as a risk management firm involved in both domestic and foreign business, is that the sting signifies a new focus on small-to-mid-size firms by the Justice Department's FCPA team.

"It is a game changer," Hershman says. "There are a lot of smaller firms in many different industries that would love to do business overseas. But they don't have a clue how to do it, or the resources to figure out how to do it right. Some of these business see the hiring of an agent, a middleman, as a quick route to easy money. And they are not sufficiently educated about the FCPA and what the implications are.

"The big guys would not have fallen for this. They're sophisticated enough that some guy walking into their office and saying, 'I know first cousin of the chair of the Minnesota Dept of Transportation, and there's a bid coming out for contracts…' they wouldn't let the guy get beyond the first sentence."

Hershman says the issue of the Justice Department focusing too exclusively on large firms as FCPA violators has been a subject of discussion amongst attorneys specializing in FCPA cases.

"This is an indication that DOJ is beginning to refocus its priorities.

Meanwhile, **Daniel Karson**, the executive managing director of Kroll, which also bills itself as a global risk management firm, thinks the bust represents a sea change in the DOJ's strategy of enforcing the FCPA, as well as an eye-opener that has his clients calling in for assurances, and possibly giving Kroll more work.

"This has sent a chill down the back of a lot of companies," Karson says. "Mainstream companies, not just from the defense industry, are now wondering, 'Am I at risk?'"

“Bear in mind that 75 percent of FCPA cases are self reported. This is an instance where everybody found out about the case the same day. Now the companies involved are back-peddling: they have to go to DOJ and say, ‘Hey, we have a good compliance program, these guys are rogues.’”

As for the role of third-party functionaries in international business, Karson says:

“A lot of companies in international sales often use third party representatives, and in some cases sell to resellers. The level of diligence with respect to resellers varies. This [bust] instills in the minds of general counsels and heads of procurement: who am I doing business with? How well do I really know my reps, vendors, and end parties?”

Karson related an example of how the arrests could affect a hypothetical company, similar to ones he works with.

“Lets say you’re a seller of bulletproof vests, you sell to governments. You either sell through employees — your own sales force — or through third-party independent agents who get a commission for their sale. People on your payroll go out to countries and approach purchasing officers … or you obtain services of an independent agent located in the country (often a former employee of a ministry) who says he knows people and can sell your product. He makes introductions to heads of procurements, you complete a sale, he gets a commission. The danger is: he may be kicking back part of commission to ministry official — his company may actually be owned by a government official…so in effect there has been a payoff.

Going forward, Karson says:

“Companies have to tell or remind employees and reps: you are forbidden to make payments to foreign officials, you can’t give benefits, rebates, or commissions in consideration of a contract. There must be written rules in place that make clear this is prohibited conduct. Companies need training sessions where employees are instructed in person, and have to sign documents acknowledging their understanding of these rules. This builds the case so that if such an incident does take place company can go into DOJ and say, ‘Look at the rules we have in place. Here’s an agreement signed by the person you just arrested.’”

The New York Times and Corporate Counsel magazine published more details about Tuesday’s arrests in Las Vegas and Miami.

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