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Look Out! They're Gonna Get *YOU*: DOJ Going After Individuals in FCPA Prosecutions

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The heightened focus by the [Department of Justice](#) on possible violations of the [Foreign Corrupt Practices Act \(FCPA\)](#) has received much attention from corporate counsel over the last few years — particularly those in-house counsel whose business unit clients conduct business abroad.

The statute was enacted in 1977, but prosecutions were few and far between for nearly three decades. In the last three years, however, the U.S. has prosecuted more FCPA cases than in all previous years combined.

While the substantial uptick in FCPA prosecutions has been well publicized, a new DOJ tactic has arisen: The targeting of individuals (e.g., CEOs, officers, directors, etc.) — in addition to companies — for suspected FCPA violations. Moreover, DOJ is now employing aggressive investigative tools such as the use of undercover agents in targeting individual employees.

On Nov. 17, 2009, the assistant attorney general for DOJ's [criminal division](#), Lanny Breuer, remarked: "[This past year,] we tried more individuals for FCPA violations than in any prior year. And we indicted more individuals than ever before. That is no accident. In fact, prosecution of individuals is a cornerstone of our enforcement strategy."

DOJ backed up its rhetoric when, on Jan. 19, 2010, 22 executives and employees of companies in the military and law enforcement products industry were indicted for participating in a scheme to bribe a minister of defense in connection with what they believed to be an opportunity to outfit the country's presidential guard. This represented the largest single investigation and prosecution of individuals in the history of DOJ's enforcement of the FCPA.

Following these arrests, DOJ acknowledged the use of undercover agents: "This ongoing investigation is the first large-scale use of undercover law enforcement techniques to uncover FCPA violations. ... 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."

This new focus by DOJ (which will by no means result in any less of a focus on possible corporate liability) adds an additional layer of complication for in-house counsel to navigate when conducting an internal investigation into possible FCPA violations. Corporate counsel should be cognizant of several needed actions — briefly laid out below — when responding to that e-mail or phone call that triggers an FCPA investigation:

- Interviews of employees suspected of FCPA violations;
- Provision of counsel to individual employees;
- Suspension or termination; and
- Enhancements to training and related compliance programs.

1. Interviews of Employees Suspected of Committing FCPA Violations

Once an in-house counsel receives and reviews credible information that a possible FCPA violation may have occurred, the typical next step is to identify who in the company may have knowledge or involvement. An e-mail search is then conducted, after which in-house counsel, in conjunction with outside counsel, plans the interview(s) of the relevant employee(s) ("Employee X").

However, in light of DOJ's new focus on the prosecution of individuals, employees have much more at risk, and the process of employee interviews becomes far more complex than in the past.

Recent court decisions warn counsel of the perils in issuing improper Upjohn warnings. Importantly, flawed Upjohn warnings can compromise the company's ability to cooperate with the government. Accordingly, a proper Upjohn warning must convey the following:

- In-house/outside counsel represents the company, not Employee X;
- The company, not Employee X, holds the attorney-client privilege;
- Employee X's statements will be communicated to the company; and
- The company may decide to waive the privilege and disclose the information it receives to third parties, including the government.

Another aspect of the interview process that should be considered is how — if at all — the interviews will be documented. Prosecutors will likely ask for any interview notes and reports if a company self-discloses a potential FCPA violation.

Although prosecutors are not supposed to consider whether the company waived any privileges in awarding cooperation credit, they may consider whether the company provided relevant facts — which, oftentimes, are difficult to separate from privileged materials. Moreover, if the company decides to hand over interview memoranda, they may be discoverable in subsequent civil litigation by shareholders or other third parties who sue the company's directors for not adequately investigating alleged FCPA violations.

Once the interviews are conducted and it appears that Employee X may have criminal exposure, it may be prudent to provide separate counsel for him/her. Regarding fee advancement, consult the relevant state statute to determine whether indemnification is mandatory or discretionary. Companies that do not outline their indemnification procedures in their bylaws should consider doing so.

Counsel should also review data privacy issues. Certain countries have data privacy laws and blocking statutes that: 1) may require the company to obtain consent to use personal data; and 2) may limit the transmission of personal data to third party countries.

2. How Do You Discipline Employees Who May Have Committed FCPA Violations?

Assume that, after conducting a series of interviews with Employee X, the company comes to the realization that Employee X may have committed an FCPA violation. How do you discipline Employee X?

First, consider whether the employment decision may implicate any foreign labor laws. Depending on which country's laws govern Employee X's employment contract, there may be certain procedural safeguards (e.g., an administrative hearing) s/he must be afforded before any employment action is taken.

As for the decision whether to suspend Employee X or terminate him/her immediately, Employee X's level of cooperation will be affected greatly depending upon which route is followed. FCPA violations — if present at all — often take time to uncover.

In the short term, if credible information reveals that Employee X may be involved in improper conduct (i.e., while perhaps not a clear-cut FCPA violation, it is a clear violation of company policies), suspension with pay may be an appropriate option while the internal investigation proceeds.

Regardless of the decision regarding what to do with Employee X, it is important to limit the impact it has on the rest of the company. By acting swiftly — yet prudently — with respect to Employee X's status, the company can mitigate the likelihood of rumors spreading and of morale taking a major blow. Importantly, the government also has an interest in the company "walling off" Employee X from other employees; the government does not want Employee X interfering with any ongoing investigation.

3. The Importance of Training Programs

Many companies already have FCPA training programs in place. However, the programs often lack substance and are simply viewed as something that companies have to do. The problem is, now that DOJ is aggressively pursuing individuals for FCPA violations — and doing so with tactics such as using undercover agents and similar investigative techniques — inadequate training programs potentially expose the company, its officers, directors, and employees to significant FCPA liability. Some key points to consider:

- Management must make it a priority to communicate to all employees that FCPA compliance should be taken seriously.
- The anticorruption policy should be reviewed with employees at regular intervals throughout the year, and incorporated into training sessions where employees have the opportunity to ask questions.
- Adopt a policy on the use of third parties. The company should provide employees with hypothetical scenarios, sample due diligence questionnaires, anticorruption contractual clauses for use with third parties, and guidance materials for dealing with third parties. In light of DOJ's increased use of undercover agents in conjunction with FCPA investigations, training programs should remind employees to be especially vigilant when meeting with third

parties.

- Provide an analysis of high-risk areas or operations that could expose the company to liability. Equipped with this knowledge, employees will be on heightened alert when conducting transactions in certain countries and industries.
- Develop an FCPA-compliant travel and entertainment expense policy, and remind employees to contact the relevant company personnel if a question arises as to whether a particular expenditure is appropriate.

DOJ's focus on the FCPA is not going away. As individuals increasingly come into focus in the FCPA's crosshairs, in-house counsel should be ready with a game plan for that time when the phone rings or the e-mail comes across the screen advising that there may be a problem. And, of course, the best game plan is sufficient training so as to avoid that phone call or e-mail altogether.

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