Arrests Signal New Era in Enforcement

Addressing the 22nd National Forum on the Foreign Corrupt Practices Act (FCPA) in November 2009, Assistant Attorney General Lanny Breuer issued the following warning: "the prospect of significant prison sentences...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."

On Jan. 19, 2010, the Department of Justice (DOJ) demonstrated the type of FCPA enforcement Breuer had in mind when it unsealed 16 indictments charging 22 individuals with FCPA violations allegedly arising from schemes to bribe foreign government officials. The DOJ also announced that, in connection with the indictments, the FBI had executed 14 search warrants across the U.S. and the city of London police had executed seven search warrants in the U.K. The product of an FBI sting operation hailed in a DOJ press release as "the largest single investigation and prosecution against individuals in the history of the DOJ's enforcement of the [FCPA]," these indictments may signal a fundamental shift in the DOJ's ongoing campaign "to erase foreign bribery from the corporate playbook."

The FCPA generally prohibits companies and their officers, directors, employees, and agents from offering, paying, promising to pay, or authorizing to offer or pay money or "anything of value" to foreign officials for the purpose of obtaining or retaining business. The indictments name 22 executives and employees of 16 companies based in the U.S., the U.K., and Israel. The defendants' companies, which the indictments do not identify by name, each manufacture or sell military and law enforcement products running the gamut from grenade launchers to armored vehicles. The defendants allegedly participated in an FBI-designed sting operation that led the defendants to believe that they were securing a contract to outfit the presidential guard of a country in Africa (not identified in the indictments - "Country A") by paying bribes to that country's minister of defense.

In fact, neither an actual country nor an actual defense minister were involved. Instead, the defendants met with undercover FBI agents posing as representatives of a corruptible foreign official. Each defendant allegedly committed the same set of substantially similar acts in furtherance of the bribery scheme. First, the defendant met - over the phone or at an upscale locale - with an undercover agent purporting to be the sales agent for Country A's ministry of defense. During that meeting, the sales agent explained that Country A intended to purchase $15 million worth of supplies for its presidential guard and that the defendant's company needed to pay a 20 percent "commission" if it wanted to win Country A's business. The sales agent stated he would keep half of the commission as a "fee" for facilitating the sale, and forward the remainder to Country A's Minister of Defense. The sale would then proceed in two phases. The purpose of the first phase, which included only a small number of goods, was to prove to the Minister of Defense that the defendant was willing to pay for Country A's business. The second phase would include a larger number of items.

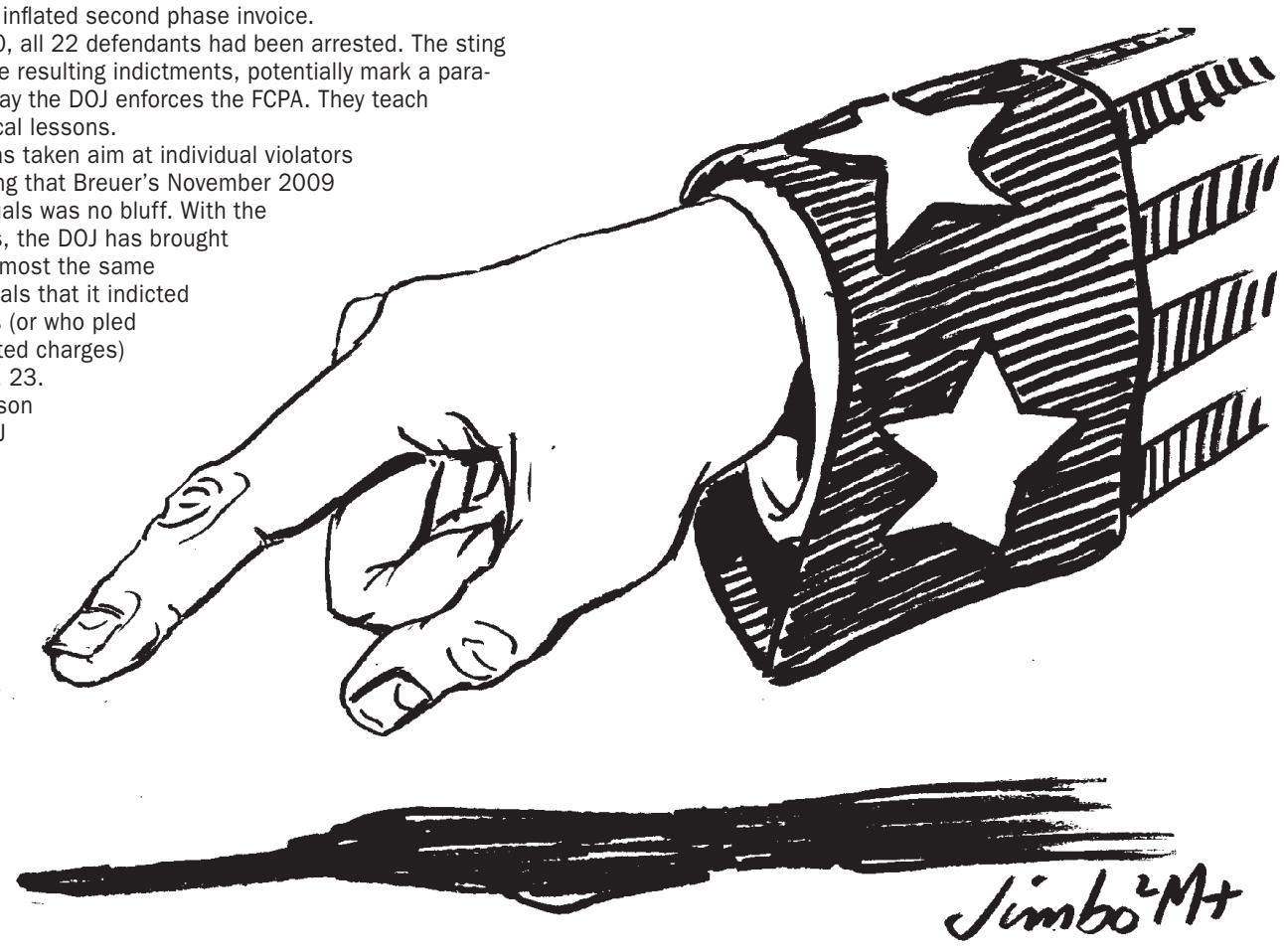
Each defendant allegedly agreed to proceed with the transaction and subsequently delivered two invoices to the sales agent for the first phase for the sale. One invoice reflected the goods' actual price. The other reflected the actual sales price plus the 20 percent "commission" that, once received, would be kicked back to the sales agent (and ultimately the Minister of Defense). When the defendant received payment on the inflated invoice, he allegedly sent the 20 percent commission to the sales agent and shipped the items sold to Country A.

Approximately one month later, the defendant would send a pair of invoices to the sales agent for the second phase of the sale. Like the previous pair of invoices, this pair included one invoice presenting the true sales price of the goods and the other presenting the true price plus 20 percent. Thereafter, another undercover agent, this one posing as a procurement officer for Country A's ministry of defense, contacted the defendant and told him that the Minister of Defense was pleased with the goods delivered and the "commission" he received. Consequently, the procurement officer told the defendant that the Minister of Defense wanted to go forward with the second phase of the sale. To complete the deal, the defendant allegedly accepted a purchase agreement from the procurement officer incorporating the prices listed in the defendant's inflated second phase invoice.

By Jan. 19, 2010, all 22 defendants had been arrested. The sting operations, and the resulting indictments, potentially mark a paradigm shift in the way the DOJ enforces the FCPA. They teach at least three critical lessons.

First, the DOJ has taken aim at individual violators of the FCPA, proving that Breuer's November 2009 warning to individuals was no bluff. With the recent indictments, the DOJ has brought charges against almost the same number of individuals that it indicted for FCPA violations (or who pled guilty to FCPA-related charges) in all of 2009, i.e., 23.

And there is reason to suspect the DOJ will not be slowing down anytime soon. Breuer has stated that the DOJ's increased attention to individuals "is no accident. In fact, prosecution of individuals is a cornerstone of [the DOJ's] enforcement strategy." Part of that strategy appears to rely on the powerful deterrent effect of personal liability. A conviction for conspiracy to violate the FCPA carries a maximum prison term of five years. The DOJ seems to be betting that an executive views the threat of jail time quite differently than a monetary fine against the company. If the recent indictments are any indication of things to come, we should expect more charges against individuals in the future.



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Second, the DOJ will be proactive, not relying solely on companies to perform their own investigations and voluntarily disclose their violations. The DOJ and FBI affirmatively sought out and built cases against the 22 defendants. According to U.S. Attorney Channing Phillips, the indictments "reflect the [DOJ's] commitment to aggressively investigate and prosecute those who try to advance their business through foreign bribery." For proof of the DOJ's commitment, one need look no further than the search warrants executed across the U.S. and U.K. in connection with the indictments or the DOJ's recent claim to have currently over 140 open investigations into FCPA violations. Not only will the DOJ's willingness to invest resources likely increase the reach and frequency of its enforcement efforts, but it should also drive up the "price" for settling cases. Having spent the time and money to indict, its unlikely that the DOJ will agree to take a loss in resolving the case. In terms of priority for federal law enforcement officials, foreign bribery may soon belong in the same league as narcotics and organized crime.

Third, enforcement of the FCPA is a multinational concern, and foreign governments are stepping up their willingness to cooperate with U.S. authorities. The current indictments, which resulted in part from assistance from authorities in the U.K., are just the latest example of cooperation between the DOJ and foreign law enforcement. The Office of the Prosecutor General in Munich played a particularly important role in the prosecution of Siemens AG for violations of the FCPA, which resulted in a guilty plea and a $1.6 billion fine in December 2008. Similarly, in 2006, the No. 1 Intermediate Court of Beijing sentenced the former head of China Construction Bank to 15 years in prison for violating China's prohibition on domestic bribery. According to court papers, the defendant had accepted bribes from a middleman working with American company I.B.M. to sell information technology services to the bank.

These fundamental changes in the DOJ's approach to enforcement are likely to render many corporate FCPA compliance policies inadequate and outdated. To avoid running afoul of the FCPA, businesses must adjust their compliance programs with an eye towards (at least) the lessons outlined above. Companies cannot write off a potential FCPA investigation or fine as a cost of business so long as the DOJ seeks to impose individual criminal liability. Instead, a company's commitment to self-monitor must be at least as rigorous as the DOJ's commitment to aggressively and proactively investigate potential violations.

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