

AVOIDING THE STING: ENHANCED ENFORCEMENT OF INTERNATIONAL TRADE LAWS

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**A NEW DECADE OF CHALLENGES FOR IN-HOUSE COUNSEL
PROTECT AND DEFEND IN 2010 AND BEYOND**

Avoid the International “Sting” Operation

By Greg Brower and Brett W. Johnson

Before the attacks of September 11, 2001, the United States government rarely relied on “sting” operations to investigate U.S. businesses for violations of export control laws. Although U.S. law enforcement agencies regularly used such operations to investigate corrupt politicians (e.g., the ABSCAM investigation in the early 1980s), enforcement of export control laws were not a high priority and thus did not generally warrant the extraordinary resources necessary for effective undercover operations. Instead, law enforcement agencies relied on disgruntled employees, customs agents at the border, and business competitors as the major sources of evidence to support investigations of export control violations. Now, law enforcement agencies around the world are actively utilizing sting operations to catch companies and individuals who flaunt the law for competitive advantage purposes.

Since September 11, 2001, the United States has invested significant resources into what it terms “national security” investigations. Indeed, in March of 2006, as part of its reauthorization of the USA PATRIOT Act, Congress created a new National Security Division within the Department of Justice (“DOJ”) to, among other things, conduct and supervise national security investigations. U.S. export control laws fall under this “national security” umbrella.

Elsewhere in this edition of *Global Connection*, we describe the January 2010 sting operation by the Federal Bureau of Investigation involving several well known U.S. companies for alleged violations of the Foreign Corrupt Practices Act (“FCPA”). Another recent DOJ investigation involved Amir Ardebili, an Iranian national arrested in the Georgia Republic after trying to make purchases in violation of certain federal laws and regulations enforced by the Department of Treasury’s Office of Foreign Asset Control (“OFAC”)¹. The investigation and resulting arrest allowed the government to access Mr. Ardebili’s contact list which could lead to multiple arrests around the world—including the United States, the Netherlands, Belgium, and Italy².

Other examples of DOJ’s increasing focus on such investigations include (1) ITT violations and \$100 million settlement regarding International Traffic in Arms Regulations, (2) Halliburton’s violation and \$559 million settlement regarding FCPA violations, and (3) Credit Suisse’s violation and \$536 million settlement regarding OFAC violations.

What then can a company do to avoid ending up on the wrong side of such an investigation? The easy answer is: comply with the law. But, the reality of accomplishing this simple goal is very often not so simple. It requires a commitment at the highest levels of company management to the investment in and implementation of an adequate, well-maintained and followed export control compliance program. Moreover, it is not enough to make this commitment only after the company is caught up in an investigation, nor is it sufficient to create a reasonable program that is not properly enforced and updated.

However, a robust, properly resourced, actively enforced and regularly updated compliance program will go a long way, perhaps all the way, toward stopping illegal business activity, even by rogue employees who are intent on violating the law. Even in the case where a rogue employee is somehow able to and does circumvent the company policy to violate the export control laws, a company that has a compliance program in place before the government starts an investigation will have an advantage in mitigating potential criminal and civil risks associated with an alleged violation.

In addition to a serious commitment by senior management, an adequate export controls compliance program should include regular training of employees, appropriate language in contractual agreements and purchase orders, a practical system of internal controls and internal and external audit programs.

¹ See Whittell, G. (Dec. 16, 2009), “Iranian arms smuggler Ardebili sentenced in US to five years in prison,” *The Times* at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6958132.ece.

² *Id.*

Although an export compliance program clearly is a non-revenue generating cost for any company, the risk mitigation associated with such programs is well worth the expense. In fact, large U.S. companies, especially those with significant government contracts, are requiring that their vendors and supply chain partners also have a compliance program that meet these “best practices.”

Unfortunately, no compliance program will stop the truly rogue employee who is intent on violating the law for a perceived competitive advantage. Thus, as part of any good compliance program, a company should be prepared to appropriately respond to such situations, including (1) conducting an internal investigation when an violation is internally alleged or discovered and, hopefully, before the government starts its own investigation, (2) making voluntary disclosures to the appropriate government agency when appropriate, and (3) having experienced legal counsel on call to effectively negotiate with government agencies, once a government investigation has commenced, in order to mitigate the company’s civil and criminal risk. Recent law enforcement operations, which have resulted in the payment of billions of dollars in criminal and civil fines for violations of export control laws, should serve as a wake-up call to any company operating globally. Only through proactive compliance efforts can such companies be sure to avoid the “sting.”

DOJ Steps Up FCPA Enforcement

By Greg Brower and Brett Johnson

Earlier this month, the U.S. Department of Justice (“DOJ”) unsealed 16 indictments of 22 senior executives and other employees of several companies in the arms industry. The defendants were charged with violations of the Foreign Corrupt Practices Act (“FCPA”), conspiracy, and money laundering. In conjunction with the arrests, the FBI executed 14 search warrants in several states. Officials in Great Britain also executed search warrants related to a separate investigation into the same activities.

The indictments charge that the defendants participated in a scheme to pay a “commission” to a representative of the defense official of an unnamed African country in order to obtain a \$15 million sales contract to provide security equipment to the country’s security forces. The defendants were allegedly told that one-half of the commission would be paid to the minister himself. What the defendants did not know was that the representative with whom they were dealing was actually an undercover FBI agent, and that there was no actual defense official or African country involved.

These recent indictments are worth noting for several reasons. First, as quickly acknowledged by the DOJ, this investigation is the largest FCPA investigation in the four decades since the law’s enactment. Second, this investigation marks the first time that a significant undercover operation has been used to facilitate an FCPA enforcement action. Third, the multi-national coordination between the United States and foreign law enforcements highlight the extensive risk associated with solicitations and attempted bribery of government officials.

As we first reported in the August 2007 *Global Connection* edition, these new indictments underscore the priority that DOJ has placed on FCPA enforcement actions. Indeed, as the indictments were announced, Assistant Attorney General Lanny Breuer warned that would-be FCPA violators “should stop and ponder whether the person they are trying to bribe might really be a federal agent.”

In addition, while none of the targeted companies have been indicted yet, many of the individual defendants are more senior than most individuals who have been caught up in such investigations in the past, and include company CEOs, VP level executives, and even a corporate general counsel. Specifically, they include the current and former CEOs of publicly-traded Protective Products of America, and the Vice President for Sales at Smith & Wesson, the largest manufacturer of firearms in the United States.

Finally, this investigation is noteworthy because it seems to suggest a new focus on the security products industry. Each of the targeted companies is in the business of selling arms and other security products for defense and law enforcement use around the world. Others in this industry would be well-advised to prepare for enhanced scrutiny in the immediate future.

<h2>Private Right of Action</h2>
<ul style="list-style-type: none"> ▪ <i>Glazer Capital Management</i> (2008) ▪ SOX (shareholder claim) ▪ Unfair Competition Claim ▪ RICO Claim (Civil) ▪ State Claim (New York, California)
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<h2>Avoid the Sting!</h2>
<ul style="list-style-type: none"> ▪ Compliance program (“One size fits all” approach leads to failure) <ul style="list-style-type: none"> ▪ Written Policies (procedures for individual SBU) ▪ Senior management buy-in ▪ Training ▪ Audit ▪ Contractual Agreements <ul style="list-style-type: none"> ▪ Export compliance, standards of conduct, cooperation ▪ Internal hotline program
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<h2>Who is going to tell? Feeling the sting...</h2>
<ul style="list-style-type: none"> ▪ Self disclosure? <ul style="list-style-type: none"> ▪ Possible benefits – deferred prosecution, appointment of monitor ▪ Competitors ▪ Whistleblowers ▪ Wait for federal investigation? <ul style="list-style-type: none"> ▪ May avoid any problems ▪ Short term vs. long term benefits (due diligence investigations, SOX) ▪ Waiver of privileges?
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Voluntary Disclosures

- Evaluating whether or not to disclose
- Considerations
- Outside Counsel Early
- Preservation Memo
- Internal Investigation
- Evaluating when to disclose
- Federal Sentencing Guideline Issues

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Government Investigations

- Communication is critical
 - Agreement with Investigators about parameters (avoid violating other laws (U.S. and foreign) in trying to cooperate)
- Cooperation is key to prosecution decisions (strategic waivers of rights)
- Maintain communication log
- Keep track of documents/witnesses that are made available to the government
- Get outside counsel involved early
- The changing decision can be a corporate death penalty

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Questions?

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Greg Brower's practice is focused on complex civil litigation, as well as federal and state criminal investigations, regulatory enforcement actions, corporate compliance issues, administrative law matters, and government relations.

Professional Recognition & Awards

Military
United States Navy,
Surface Warfare
Officer, Active and
Reserve Duty
(1987-1993)

Recipient, Patriot Award for Exceptional Support of National Guard and Reserve Employees, United States Department of Defense (December 2009)

Personal

Born in South Milwaukee, Wisconsin
Raised in Las Vegas, Nevada

Professional Memberships & Activities

Related Services

American Inns of Court, Bruce R. Thompson Chapter, Member, Reno, Nevada
National Association of Former United States Attorneys, Member

- >Appellate Services
- >Commercial Litigation
- >Criminal Defense
- >Government Relations
- >Product Liability Litigation
- >Professional Liability Litigation

Other Professional Experience

United States Attorney for the District of Nevada (2007-2009)
United States Government Printing Office, General Counsel (2006-2007)
United States Government Printing Office, Inspector General (2004-2006)
United States Department of Justice, Special Counsel (2003-2004)
Private Law Practice (1992-2003)

Other Public Service

Nevada Technological Crimes Task Force, Member (2008-2009)
Nevada State-Federal Judicial Council, Member (2008-2009)
White House Council on Integrity and Efficiency, Member (2004-2006)
Nevada Juvenile Justice Commission, Member (2002)
National Conference of Uniform State Law Commissioners, Member (2000-2002)
Nevada State Sentencing Commission, Member (2000-2002)
Nevada State Assembly, Member (1998-2002)



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Brett Johnson's practice includes representation in business, export, government contracting, and health care matters, including professional liability defense and commercial litigation matters. In addition to representing large and small businesses, individuals and pro bono clients, he is the editor of the firm's International Industry Group's Global Connection newsletter.

Related Services

- > Commercial Litigation
- > Export Controls and Economic Sanctions
- > Government Relations
- > Health Care
- > International Practice

Representative Transactions

- Advised pharmaceutical company on obtaining \$56 million federal government contract
- Advised emergency services company in regard to \$350 million federal government contract
- Advised pharmaceutical company regarding developing government contract mandated subcontracting plan
- Advised multiple companies regarding developing government Teaming Agreement
- Advised multiple companies in regard to government subcontracting compliance issues
- Advised multiple companies in regard to export licensing issues involving multiple federal and foreign government agencies
- Developed multiple multi-national companies foreign transaction and export compliance programs
- Advised multiple companies in regard to voluntary self-disclosures and responding to governmental requests for information concerning export control violations
- Advised multiple companies and their senior executives in regard to complying with governmental subpoenas and trial preparation
- Advised multiple multi-national companies in developing international sales, distribution, and commercial agency agreements

Professional Memberships & Activities

- Arizona Health Care Lawyers Association
- State Bar of Arizona
 - International Law Section, Chair (2008-2009); Executive Committee (2008-present)
 - Professionalism Committee
 - 2008 State Bar of Arizona Convention, International Law Section Seminar, Co-Chair
- Maricopa County Bar Association
- American Bar Association