

International Anti-Corruption Laws: Expect More Aggressive Enforcement and More International Cooperation

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Even before Barack Obama became the 44th President of the U.S., a sea change in the enforcement of international anticorruption laws had started. The extent of that sea change became evident in December 2008 when Siemens AG and three of its subsidiaries agreed to pay a record U.S. \$1.6 billion in fines to U.S. and European authorities for violating the U.S. Foreign Corrupt Practices Act (FCPA) and European anti-bribery laws.

But the change goes far beyond those record-breaking fines. The number of FCPA cases has increased dramatically – doubling from 2006 to 2007 alone (the last year for which statistics are available). The FBI recently formed a special unit devoted exclusively to FCPA cases and there is much more international cooperation than before. More fundamentally, measures employed to stamp out international corruption have changed to not only include billion dollar-plus fines but also individual prosecutions. Mark Mendelsohn, Chief of FCPA enforcement at the U.S. Department of Justice, had this to say:

“The number of individual prosecutions has risen – and that’s not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.”

At the annual general meeting of the American Bar Association (ABA) held in New York in August 2008, U.S. Department of Justice officials emphasized and cited several examples of the strong links between corruption and human trafficking, catastrophic safety failures that costs lives, failed states and terrorism.

“Transparency and the rule of law will be the touchstone of this presidency”

– President Barack Obama, at the swearing-in for White House staff.

Meanwhile, serious infrastructure projects are planned for Thailand. The tremendous and often hasty jumps in government spending that accompany such stimulus measures are often accompanied by an increase in corruption. This is not a peculiarly Thai phenomenon. It happens elsewhere.

Stimulus measures will occur in a tougher international regulatory environment where enforcement is more focused and aggressive. And because there is history here, enforcement efforts focusing on foreigners and foreign businesses operating in Thailand are not unlikely.

THE INTERNATIONALIZATION OF TRANSNATIONAL ANTI-CORRUPTION LAWS

The U.S. enacted the FCPA in 1977, and it remained a peculiarly American law until 1997, when an Organization for Economic Cooperation and Development negotiating committee drafted the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Countries that adopt the OECD Convention are required to enact domestic laws prohibiting transnational bribery. All 30 members of the OECD and at least seven non-OECD member countries had adopted the OECD Convention as of this writing. Several other countries are in the process of adopting the OECD Convention.

Although the domestic laws of countries that have adopted the OECD Convention vary, the FCPA is the oldest such law and therefore has the most case history. The FCPA addresses transnational bribery in two ways: first, by prohibiting corrupt payments to foreign officials to obtain or retain business; and second, by requiring companies that publically trade in the U.S. to implement accounting and financial controls aimed at ferreting out corrupt payments to foreign officials.

The FCPA not only applies to U.S. companies and citizens, but also applies to non-U.S. corporations subject to regulation by the U.S. SEC and non-U.S. parties “while [they] are

in the territory of the United States.” Because of the critical role that U.S. based facilities play for the Internet, banking and business in general, this particular provision of the FCPA opens broad avenues for application of the FCPA to foreign businesses that might otherwise not be subject to U.S. laws.

For example, few would consider Siemens AG to be an “American” company, and yet Siemens AG and its subsidiaries hold the current “record” in FCPA fines. In an effort to level the playing field for U.S. companies, the U.S. Department of Commerce

maintains a website where incidents of foreign corruption can be reported (http://tcc.export.gov/Report_a_Barrier/index.asp). Tips posted on that site may not only trigger an investigation and prosecution by U.S. authorities, but can also be shared with law enforcement officials in other countries, including those with jurisdiction over the reported bribe recipients.

PENALTIES & “PUBLICITY”

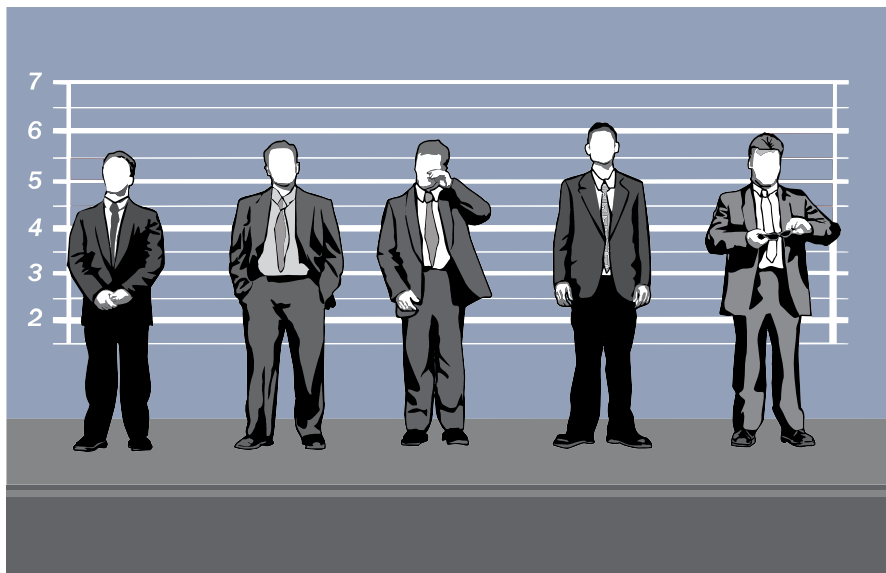
The penalties for violating the FCPA are severe, and include corporate fines of up to U.S. \$2 million for each

violation and disgorgement of proceeds associated with improper payments and, for individuals, fines of up to U.S. \$250,000 and five years imprisonment for each violation. Substantial prison terms have been imposed in several recent FCPA cases.

Even when an executive is able to avoid a stint in a U.S. penitentiary for violating the FCPA, it’s still a career killer. With the resources now available on the Internet, it doesn’t take much effort to identify executives involved in FCPA violations or much imagination to identify bribe recipients. Indeed, a FCPA blog (<http://fcpublog.blogspot.com/2008/12/help.html>) is asking readers to help identify bribe recipients in the Siemens matter and publishing the results on its site. To date, no company or person in Thailand has been mentioned on the blog.

USE OF INTERMEDIARIES AND DUTY TO INVESTIGATE

The scope of the FCPA’s prohibition on corrupt payments is much broader than many realize. The FCPA criminalizes the use of intermediaries to make prohibited payments. The FCPA makes it unlawful to make a payment to a third party while knowing that all or a portion of the payment will



FCPA Fallout in Thailand

Examples of Foreign Corrupt Practices Act violations abound, and there have been high-profile cases in Thailand. Ramifications for violation are serious as illustrated by the following examples.

In December 2007, a Los Angeles film executive and his wife were arrested for allegedly violating the FCPA and other federal laws by purportedly making corrupt payments to a Thai official. They now face

21 separate federal counts each with penalties ranging from five to 20 years imprisonment. The Thai government has apparently shared evidence with U.S. prosecutors, who are now haggling with defense counsel over hundreds of pages of Thai-language documents.

The case is scheduled for trial on April 21, 2009. If convicted, the Los Angeles film executive and his wife could spend the remainder of their lives in prison. Of the few people who have gone to trial

since 1991 for allegedly violating the FCPA, none has been acquitted.

In 2004, revelations that California based InVision made potentially illegal payments in Thailand, China and the Philippines in connection with the sale of CTX scanners nearly tanked General Electric’s U.S. \$900 million acquisition of InVision. That case and others where deals have tanked because of FCPA allegations, demonstrate the deal killing effect of alleged FCPA violations.

go directly or indirectly to a foreign official for a corrupt purpose. And the term “knowing” includes conscious disregard and deliberate ignorance. Knowledge of an unlawful act can be imputed when a person or company possesses information indicating a “high probability” that activity prohibited under the FCPA may occur.

This creates a duty of investigation if “red flags” of a FCPA violation are present. Red flags raising a duty to investigate include:

- Retention of a consultant or agent that is a close relative of the government official involved in making decisions relevant to a foreign business.
- Use of an intermediary that has no or insufficient staff or facilities, but can still “get the job done.”
- An advisor or consultant saying something along the lines of “everyone pays bribes in this country” or “it was necessary to get the deal done.” If this occurs, you have a serious problem.

There are many other red flags, but they most generally involve a combination of (a) government connections, and (b) an intermediary that will earn fees or profits that are not commensurate with that intermediary’s legitimate contribution to the project or transaction.

THE PROBLEMATIC “FACILITATION EXCEPTION”

The FCPA also includes an exception for so-called facilitation or “grease” payments for “routine government actions” (e.g., procuring work permits and visas), but this “exception” should be approached carefully. Distinguishing between permitted facilitation payments and prohibited bribes can be difficult. U.S. authorities have imposed substantial penalties on the basis of what were arguably facilitation payments. Payment of facilitation payments can create a culture of corruption conducive to the payment of prohibited bribes. Even if

the facilitation payment is permitted under the FCPA, it is often illegal under local law. Further, although the FCPA contains a facilitation payment exception, transnational anti-bribery laws of many of the other countries that have adopted the OECD Convention do not contain this exception. Transparency International, a leading international anti-corruption NGO, opposes exempting facilitating payments from anti bribery laws, and even in those jurisdictions where this exception exists, the authorities are taking an increasingly narrow view of the exception.

WHAT CAN YOU DO?

The best way to avoid liability under transnational anticorruption laws is to have a compliance program in place that prevents corrupt acts from happening in the first place. Indeed, when a FCPA violation occurs, the Department of Justice and the U.S. SEC look at an organization’s FCPA compliance program (or the absence of such a program) in determining the nature and size of penalties that will be imposed. An effective compliance program should at least include the following:

1. Written procedures and policies that are available to everyone in the company. In Thailand, these procedures and policies should be available in English and Thai to avoid any confusion, feigned or otherwise, about the company’s zero tolerance for corruption. Further, the procedures and policies should be reviewed by local Thai legal counsel to ensure consistency with local law.
2. Protocols for disciplining employees who violate anti-corruption policies and procedures. In Thailand, these protocols should be reviewed against the protections provided to employees under Thai labor laws.
3. Periodic compliance audits by personnel familiar with both transnational anti-corruption laws,

Thai law and Thai business culture. In some cases, these audits should extend to the local organization’s agents, consultants and distributors, meaning that the necessary contractual clauses permitting such audits are in place. And if red flags of a FCPA violation become apparent, the audit rights contained in these contractual clauses should be enforced.

4. Continuous monitoring and updating of the compliance policies by independent parties. Updates should be based on input at the headquarters and local level.
5. Active, genuine and visible involvement of the organization’s most senior management in the compliance program.

Ultimately the compliance program must be serious and be taken seriously at all levels of the organization. A paper tiger or half-hearted compliance program could be worse than not having any compliance program at all, but not having any policy at all is simply not acceptable now. ■

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Want to Know More?

AMCHAM’s Tax & Legislation Committee will be hosting a session on the Foreign Corrupt Practices Act, including an overview of the law, current trends, and a look at Thailand’s anti-bribery laws and investigations.

The meeting will be held 8:00 a.m. on March 23, 2009. For more details check AMCHAM’s website.