

Legal Update: Increased Enforcement of the FCPA

Written by: Douglas Mancill

The last several years have seen a dramatic increase in enforcement of the U.S. Foreign Corrupt Practices Act (“FCPA”), which, as most AMCHAM members will know, is a broad law that criminalizes corrupt payments to foreign officials. In the prior decade, the Department of Justice (“DOJ”) did not file a single FCPA case until 2002; but last November, the DOJ announced there were more than 130 open FCPA cases. That number is expected to increase.

As the number of cases increases, we will see increased enforcement against individuals and small businesses, a press to extend anti-corruption laws beyond public officials and the use of more aggressive law enforcement techniques.

The DOJ has not been shy about the increased enforcement against individuals and small businesses. Mark Mendelsohn, who heads FCPA enforcement at the DOJ, described the DOJ’s “effort to prosecute

more culpable individuals, in addition to the companies” in an interview with the International Bar Association at the end of 2009, and previously said: “It is our view that [for the FCPA] to have a credible deterrent effect, people have to go to jail.”

FCPA charges are now being coupled with charges based on the bribery of private persons under the U.S. Travel Act. Last year demonstrated the DOJ’s ability to procure convictions when it extends anti-corruption laws into the private arena. U.S. juries don’t like graft; and the distinction between bribing a public official and bribing a company employee operating in the private sector doesn’t seem to make much of a difference.

Federal officials are also now increasingly using measures in FCPA cases that were more commonly seen in cases against drug gangs and terrorists, such as the use of wiretaps and undercover agents. The “One Shot Show” arrests in January of this year illustrate this trend. In that case, an undercover

FBI agent posing as a corrupt foreign official of an African nation sought to buy security equipment in return for a “20% commission.” Sophisticated surveillance devices were used to record meetings between this “official” and representatives of the companies trying to sell security equipment. FBI agents arrested 22 persons, many of them from smaller companies who hoped to sell security equipment to this African nation. London police also simultaneously executed search warrants in tandem with these raids and arrests. Closer to home, FBI agents have coordinated with counterparts in and traveled to Asia in several recent and very high profile FCPA prosecutions. This is only the beginning of an increasingly aggressive campaign to enforce anti-corruption laws that will extend well beyond U.S. borders.

For more information on the FCPA, see the article entitled “International Anti-Corruption Laws: Expect More Aggressive Enforcement and More International Cooperation,” published in Volume 1/2009 (at page 20) of T-AB.

Douglas Mancill, chair of AMCHAM’s Legal Committee and a partner in Deacons Thailand (Price Sanond Prabhas & Wynne), can be reached at: dmancill@deaconsbkk.com