

Foreign Corrupt Practices Act

Current Trends and Compliance Measures

American Chamber of Commerce in Thailand
21 November 2011

Douglas Mancill, Partner
PriceSanond (in association with Deacons)
Bangkok Thailand
+66-2-679-1844
dmancill@pricesanond.com

Current Trends

- Enforcement Terrain
- Multi-Jurisdictional Issues
- Whistleblower Provisions
- Proposed Reforms & DOJ Guidance

Enforcement Terrain

- Fewer filings thus far this year, but...
- Focus on Individuals? Since 2008 approximately 70% of FCPA enforcement actions have not resulted in Department of Justice (DOJ) filings against individuals, but...
- Joel Esquenazi – 15 Years

Enforcement Terrain

- Specialized units and serious law enforcement measures.
- Going after demand side, but...
- Debarment of government contractors?
- Risk factors.

Enforcement Terrain

Risk Factors

- Industry Sweeps? Extractive Industries, Telecommunications, Information Technology, Banking & Finance, Arms...
- Third Parties: Payment commensurate with fair market value of services provided?
- Regions & Countries: Important, but local guidance on specific agencies and individuals needed.

Multi-Jurisdictional Issues

- UK's Anti-Bribery Act.
- Increased enforcement by countries that rarely or never enforced their foreign anti-corruption laws before.
- Increased cooperation among foreign law enforcement officials.
- Using 'other laws' to go after alleged middlemen and bribe recipients. This is now being challenged in the U.S. District Court for the Central District of California.

Whistleblower Provisions

Reward: If “original information” provided, bounties of 10% - 30% available when penalties exceed US\$1 million.

- Average fine to settle an FCPA Case in 2010 was US\$78 million, but:
 - Siemens - US\$800 million
 - KBR/Halliburton – US\$579 million
 - BAE Systems PLC -US\$400 million
- SEC “Office of the Whistleblower” Site:
<http://www.sec.gov/whistleblower>

Whistleblower Provisions

- No requirement that the whistleblower first report internally.
- Creation of a cottage industry to assist whistleblowers: “If you would like to confidentially discuss...”
- Easy to find firms offering assistance to whistleblowers on the internet.
- Based on the first seven weeks of data, the SEC is reporting about two FCPA tips a week.
- Pushback? New proposed legislation.

Proposed Reforms

- Adding a compliance defense.
- Limiting a company's liability for the prior actions of a company it has acquired.
- Adding a "willfulness" requirement for corporate criminal liability.
- Limiting a company's liability for acts of a subsidiary.
- Defining a "foreign official".

DOJ Guidance

- Acknowledged US Chamber's attempt to amend the FCPA. But no intention to support reforms that will weaken the FCPA or make it less effective.
 - We “shall determine to what extent compliance... would be enhanced and the business community would be assisted by further **clarification**” of the FCPA.
 - “This is precisely the wrong time to weaken the FCPA”
- Assistant Attorney General Lanny A. Beurer, 8 November 2011

Compliance

Corporate Compliance Program (see handout)

- Source of handout? Guesses?
- Comments on Selected Provisions
 - Corporate Policy – Paragraph 1
 - Clear – No Legalese
English and Thai
 - Concise – Otherwise it won't be read
 - Made Known – You don't want to hear: "We have one?"

Compliance

- Visible Support by Senior Management. Paragraph 2.
- Standards and Procedures for matters listed in Paragraph 3. But not an exclusive list.
- Risk Assessment – including “geographical organization”. Paragraph 4.
- Review – “taking into account relevant developments in the field...” Paragraph 5.

Compliance

- Fair and accurate books. Local costs and practices. Paragraph 7.
- Training: Not only staff, but “where necessary...agents and business partners...” Paragraph 8
- System for advice: “...on an urgent basis or in any foreign jurisdiction in which the Company operates.” Paragraph 9.
- Internal reporting concerning Company and “where necessary...agents...” Paragraph 9.

Compliance

- “Appropriate disciplinary procedures...” Cannot be a paper tiger. Difficult decisions need to be made.
Paragraph 10.
- “To the extent that the use of agents and business partners is permitted at all by the Company...”
Paragraph 11.
 - “risk-based due diligence” Local considerations.
 - Inform agents and business partners of Company’s anti-corruption policy

Compliance

- Difficult area of agents & business partners (Paragraph 10) continued:
 - “reciprocal commitment” to Company’s policy
 - Where “appropriate”:
 - “anti-corruption representations and undertakings”
 - “rights to conduct audits of books”
 - “rights to terminate”

Thank you

While reasonable efforts have been made to ensure the accuracy of the proceeding slides and this presentation, neither constitutes legal advice. For legal advice, please contact qualified counsel.

Douglas Mancill
PRICESANOND (in association with Deacons)
16th Floor, Q House Sathorn
11 South Sathorn Road
Bangkok ,Thailand
Tel: +66-2-679-1844
dmancill@pricesanond.com