

Fashion Apparel Law Blog

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FCPA: The Latest Trend in Fashion

Hardly a day passes without new revelations about global FCPA investigations. In just the past ten days, cases involving companies as diverse as Hewlett-Packard, BHP Billiton and Avon have been reported. Earlier this year 22 individuals were arrested simultaneously on two continents in a global FCPA sting operation, the first of its kind. The U.S. Department of Justice reportedly has 140 active FCPA investigations underway.

The Avon case is noteworthy because it demonstrates that the FCPA is no longer the exclusive domain of government suppliers, infrastructure contractors or developers of natural resources. It has arrived on the catwalk and the cosmetics counter.

Avon reported that it suspended four of its executives as the result of an internal investigation into bribery in China. The Avon case has since spread to other countries, and Avon's shares fell 8% when the global investigations were revealed. The suspended executives included the company's general manager, head of finance and head of corporate affairs in China and a sales executive in Malaysia. Avon reported that it made voluntary disclosures about the investigation to the U.S. Department of Justice and the U.S. Securities and Exchange Commission.

Although the details of the Avon case have not been disclosed, direct selling was not allowed in China under a law passed in 1998. Avon, however, was able to secure permission in late 2005 to begin direct selling on a limited basis. Later the government issued direct-selling regulations and granted Avon a broader license in February 2006 to make such sales.

The FCPA has a wide jurisdictional scope and is used by the Justice Department to pursue companies and their affiliates and agents worldwide who have offered or given anything of value to foreign government officials, either directly or via intermediaries, in order to obtain or retain business. The jurisdictional triggers are such that parent companies can face exposure for the actions of their foreign subsidiary employees and other agents. The statute also reaches improper payments aimed at preferential customs, regulatory or tax treatment. Actual knowledge of wrongdoing is not required to impose penalties. An awareness of a high probability of wrongdoing that is not followed by robust due diligence to ensure compliance is enough to result in liability.

Companies with headquarters outside the United States are subject to the FCPA if they have any

securities, such as ADRs, listed on U.S. exchanges. Even if they are not listed in the United States and have no U.S. offices they can be caught if their executives or agents commit prohibited act while visiting the United States. Public companies also face exposure if improper payments are mischaracterized in their accounts.

The penalties authorized include prison terms of up to five years per violation and fines of up to two million dollars per violation or two times the benefit gained from the wrongdoing. This disgorgement of two times the profit has been used repeatedly by the Justice Department in recent years to extract penalties of hundreds of millions of dollars.

This increased focus on corruption is not merely an American phenomenon. Britain just passed a new Bribery Act this month which reaches foreign bribery and, among other things, creates a corporate crime of "failing to prevent" bribery.

Fashion and apparel companies sourcing and moving goods around the world and dealing with government authorities either directly or through agents owe it to themselves and their shareholders to do regular legal assessments with appropriate in-country due diligence in order to identify and remedy any problems as early as possible. Waiting for these problems to be discovered by enforcement authorities, or revealed by third parties, means a larger problem and higher exposure because the profits accrued as time passes will be doubled under the formula for the calculation of penalties.

Companies that do not already have carefully designed global FCPA compliance policies and procedures should make this a priority.

Sheppard Mullin's FCPA specialists advise some of the world's largest multinationals in this area and have handled investigations and implemented compliance programs for companies on every continent.

For further information on how the FCPA affects your fashion or apparel company, please feel free to contact us.