

The Lawyer's Brief

WEST®

Is Your Business Affected by the US FCPA? Are You Sure?*

By Richard M. Tollan, David S. Krakoff, James T. Parkinson**

Americans have an expression, “you can’t escape the long arm of the law,” and when it comes to the United States Foreign Corrupt Practices Act (the “FCPA”), this is especially true. Many companies operating in Asia are subject to the FCPA, some of whom may not even know it, and an even greater number of companies are affected by the FCPA because of their dealing with companies who are subject to it. Increased enforcement in recent years, along with escalating penalties, make it ever more critical that businesses in the region understand how the FCPA may affect them. In addition, unique business and cultural customs in various Asian markets means compliance can require even greater vigilance. Read on to find out how you may be affected.

Passed over 30 years ago, the FCPA bars covered companies and individuals from making or offering bribes to government officials. Application of the FCPA is not limited to U.S.-based companies or U.S. citizens and many companies operating in Asia are covered by the FCPA. The U.S. government has initiated enforcement actions against scores of companies involved in a range of business sectors, including the telecommunications, steel, energy, pharmaceutical, petrochemical, manufacturing and financial services sectors, involving government officials throughout the region including in China, Thailand, Vietnam, Indonesia and India.

Are You Subject to the FCPA?

The FCPA applies to Asia-based companies in three main ways:

- Asia-based companies listed on U.S. stock exchanges. Any company with a class of securities registered with the U.S. Securities and Exchange Commission (the “SEC”) or which is required to file reports with the SEC is an “issuer” and therefore subject to the FCPA. Most notably this includes companies based in Asia with American Depository Receipts (“ADRs”) trading on U.S. exchanges.
- U.S. subsidiaries of Asia-based companies and U.S. citizens, nationals or residents. U.S.-incorporated subsidiaries of Asian parent companies; employees of those U.S.-based subsidiaries; and all U.S. citizens, nationals, or residents, no matter where they are located are subject to the FCPA (all “domestic concerns”).
- Conduct while in the territory of the United States. If conduct in furtherance of an improper payment occurs “while in the territory of the United States”, the FCPA may reach Asia-based companies, even if they do not qualify as “issuers” and are not incorporated in the United States. The key for this basis of jurisdiction is the existence of some connection to the territory of the United States, which might be as little as an email from outside the United States to someone in the United States who participated in the conduct, or routing a wire

VOL. 40, NO. 4
February 25, 2010

IN THIS ISSUE:

Letter from the Editor.....1

FCPA Enforcement Priorities
in Action: The Summer of
Individual Convictions1

Is Your Business Affected
by the US FCPA? Are
You Sure?.....4

DOJ Issues FCPA Guidance
on Free Product Promotions
with Foreign Government
Customers.....6

No-Match, No More.
Now What?.....7

H-1B Visas Are Still
Available, But Be Careful,
They May Bite9

Continued Workforce
Reductions Call for Diligence
in Managing Foreign
National Employees11

Federal Diversity Jurisdiction:
Do You Know Where
Your “Principal Place
of Business” Is?12

New SEC Guidance on
Shareholder Proposals.....16

Foreign Investment
Financing in China.....17

Other News19

TO CONTACT US:

Customer Service 1-800-328-4880
Product Info & Sales 1-800-344-5009

west.thomson.com

transfer through a bank account in the United States.

If I'm not Subject to the FCPA Why Should I Care?

U.S. companies have been held liable for violating the FCPA based upon the conduct of joint venture partners, merger targets, agents and other third-parties acting on their behalf. As a result, if your business is a joint venture partner, agent or engages in mergers or acquisitions with U.S. counterparties, your own business operations may be subject to new scrutiny from potential partners. To protect themselves, U.S.-based companies undertaking business dealings with Asia-based counterparties now routinely conduct extensive due diligence, particularly relating to the anti-corruption compliance programs in place at the Asia-based company. Even minority investments present risk for U.S. companies so diligence is required on even seemingly remote parties. Such inquiries may be as simple as asking whether such a program exists, or as complex and intrusive as interviewing executives, examining policies and training materials, and conducting audits. In addition, U.S. companies will expect Asian partners to conduct their businesses in ways that do not put the U.S. party at risk; this may require training, compliance certifications and the development of FCPA-related policies and procedures.

What Does the FCPA Require?

The FCPA contains two general requirements: the anti-bribery provisions and the accounting provisions.

Under the anti-bribery provisions, individuals and companies are prohibited from making or offering corrupt payments to "foreign officials." Specifically, the anti-bribery provisions prohibit offers, payments, promises or authorizations to pay any money or thing of value to any foreign official, political party or candidate for public office, intended to influence any act or decision in order to obtain or retain business.

The accounting provisions require companies that qualify as "issuers" to make and keep accurate books and records, and to maintain an adequate system of internal accounting and financial controls. As a result, companies must accurately reflect all expenses or facilitation payments

in their accounting books to allow for the preparation of financial statements that conform to generally accepted accounting principles.

Both the anti-bribery and accounting provisions apply to "issuers", while companies and individuals qualifying as "domestic concerns" are subject only to the anti-bribery provisions of the FCPA.

Who is a "Foreign Official" and How Does This Relate to Employees of State-Owned Businesses?

Under the FCPA, a "foreign official" is defined broadly to mean any officer or employee of a foreign government or any of its departments or agencies, or any person acting in an official capacity, regardless of rank or position. Employees of state-owned businesses may qualify under the FCPA as foreign officials, even if local law would not view them as government officials or the employer as state-owned. For example, physicians and administrators employed by state-owned hospitals, employees at government-run airports or officials at state-owned oil companies have all been found to be "foreign officials" in recent U.S. prosecutions. In addition, local law in some countries in Asia may permit a level of interaction with government officials that, while possibly complying with local business convention, commercial morality or even domestic law, might be barred under the FCPA.

What About Conduct by Agents or Third Parties?

Due to the high level of governmental involvement in many Asian economies, many Asian businesses interact on a regular basis with government officials. Companies operating in the manufacturing, mining and retail sectors interact with government officials regarding business licenses, product registrations, occupancy permits, inspections, customs and the supply chain. Financial services companies interact with government officials in share or bond offerings and tax audits. It is difficult for any company to operate successfully in the region without significant interaction with "foreign officials."

For a variety of reasons, companies often utilize third parties or agents in their business activities. Under the FCPA, improper payments by third parties may also violate the statute, even if there is no direct knowledge by

Copyright 2010 Thomson Reuters. All rights reserved. THE LAWYER'S BRIEF (ISSN 0898-9966) is published monthly by Thomson Reuters/West, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Subscription Price: \$1,005.00 annually. This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought. The information contained herein is based upon sources believed to be accurate and reliable—including secondary sources. Where cases, statutes, or other official materials have been reprinted, we have attempted to provide materials as close to the originals as possible, but we do not purport to publish any documents verbatim. While we have exercised reasonable care to ensure the accuracy of the information presented, no representation or warranty is made as to such accuracy. Readers should check primary sources where appropriate and use the traditional legal research techniques to make sure that the information has not been affected or changed by recent developments.

the company of improper behavior. The FCPA imposes a heightened standard of due diligence on companies who use agents or other third-parties in dealing with government officials; companies must actively seek to understand the activities of anyone acting on their behalf and avoid dealing with any party associated with past corruption.

What are the Unique Issues Facing a Company Accessing U.S. Capital Markets?

Over 100 companies based in China have accessed the U.S. capital markets by listing shares on U.S. exchanges. Every company listing its shares in the U.S. automatically becomes subject to FCPA jurisdiction and U.S. enforcement authorities expect these companies to develop and implement FCPA compliance programs designed to prevent and detect corruption risks.

Developing an FCPA compliance program can involve many practical challenges including: ensuring that the books and records are accurate and provide the level of detail required by the FCPA; and communicating the legal requirements to all personnel who present potential risks for the company who may not be aware of the FCPA's requirements. An initial step for any company considering a U.S. listing or a SEC registered offering, or otherwise newly subject to the FCPA, to avoid legal difficulties is to conduct a baseline FCPA risk assessment, and then to evaluate how best to mitigate any risks.

What are the Consequences of a Violation?

The penalties for violating the FCPA can be substantial and disruptive to a company's business operations. The German company Siemens holds the dubious distinction of

having paid the highest fines thus far, with penalties of over US\$ 1 billion paid to enforcement authorities in the United States and Germany. In addition to the potential for fines, many individuals have been sent to prison for violations of the FCPA, with sentences exceeding five years.

There may also be significant collateral consequences to violating the FCPA. If a company's reputation is associated with corruption, it may be very difficult to attract strong multinational business partners. In a recent indictment issued by the U.S. government, a number of PRC-based state-owned enterprises were named as recipients of improper payments. U.S.-based companies will now be very cautious about interacting with these companies.

Another potential consequence might be a forfeiture action seeking funds related to FCPA violations, such as the U.S. government's recent action seeking funds in three Singapore bank accounts. The complaint alleged that a Chinese company improperly deposited funds into an account owned by the son of a former prime minister of Bangladesh. Under U.S. law, funds transferred through the U.S. and derived from or traceable to certain unlawful activities, such as violations of the FCPA, may be subject to a forfeiture action.

ENDNOTES

* Copyright 2009 JSM, Mayer Brown LLP and/or Mayer Brown International LLP. All rights reserved. Reprinted with permission. This article provides information and comments on legal issues and developments. It is intended to provide a general guide to the subject matter and is not intended to provide legal advice or a substitute for specific advice concerning individual situations. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

** Richard Tollan (richard.tollan@mayerbrownjism.com); David Krakoff (dkrakoff@mayerbrown.com); James Parkinson (jparkinson@mayerbrown.com).