Bangkok Post The world's window to Thailand

CORPORATE COUNSELOR

Impact of foreign Anti-Corruption campaigns

Published: 23/09/2011 at 12:00 AM

Newspaper section: Business

Recent trends showcase a clear intent by two of the world's global powers to tackle corruption abroad. The United States, through the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), has dramatically increased its investigation and enforcement of the Foreign Corrupt Practices Act (FCPA). In addition, in 2010 the United Kingdom acted aggressively to address an historical weakness in its anti-bribery laws by enacting the UK Bribery Act.

These laws, combined with supporting whistleblower legislation and active enforcement by relevant authorities, represent some of the world's most aggressive anti-bribery efforts to date, efforts that directly impact the operations of multinationals and their partners operating in Thailand.

The FCPA was enacted in 1977 but through the 1990s there was little aggressive enforcement against corrupt practices abroad committed by US companies and their representatives. However, with a number of high-profile corruption scandals during the last decade (including two involving activities in Thailand), prosecutions have increased dramatically.

Recently, a DOJ representative confirmed that since 2005 it had been involved in foreign bribery-related settlements totalling more than $1.5 billion. Further, there has been a significant increase in the number of individual criminal indictments of company representatives, with nearly half coming since 2009 alone.

This is further supported by US Attorney General Eric Holder, who in 2009 expressed an intent to "vigorously enforce" the FCPA, a statement that supports the fact that former and ongoing FCPA investigations implicate not only Fortune 500 companies, but numerous small businesses. Within months of Mr Holder's announcement, the SEC established a new FCPA unit specifically tasked with devising ways to more proactively enforce the law.

In addition to its accounting provisions, the FCPA establishes civil and criminal liability for the bribery of foreign government officials in order to obtain or retain business, direct business to other persons, or secure an improper advantage. The FCPA also defines government official broadly with potential liability extending not only to direct actions of a company or its employees, but also to consultants and other third-party partners. Further, both criminal and civil liability can extend to the officers and directors of the relevant company. This is an exceedingly broad scope of liability and, as such, potentially affects business on a broad scale.

While there was a historic focus on prosecution of companies and their executives only where they had specific knowledge of or participated in illicit behaviour, there is a more recent trend toward broadening the application of FCPA enforcement actions. Specifically, there are an increasing number of cases that show that executives and their companies can be prosecuted even where they did not have direct knowledge of the wrongful behaviour.

The FCPA does provide an exception to liability under the bribery provisions for what are classed as "facilitation" payments. These are essentially payments made that are for the purpose of expediting or securing performance of "routine governmental action". There are also exceptions for payments that are otherwise lawful under local laws or for "reasonable" and "bona fide" expenditures. Unfortunately, the language of the FCPA facilitation payment exception is somewhat ambiguous and leaves companies with little clear guidance on what is acceptable and what may lead to potential liability.

While the US authorities have been moving toward more aggressive enforcement of the FCPA, authorities in the UK recently took a significant historical step toward more effective enforcement of its anti-bribery laws by passage of the UK Bribery Act of 2010.

The UK Bribery Act largely mirrors the FCPA in scope and intent by criminalising bribery of foreign officials and serves as a comprehensive replacement for the country's much maligned anti-bribery laws.

Unlike the FCPA, however, there is no exception for recognised facilitation payments. Of significant additional importance is the fact that the UK act criminalises the failure of a company and its executives to adequately prevent the bribery of foreign government officials by their employees or third parties acting on their behalf.

Incredibly, the jurisdictional reach of the UK Bribery Act for purposes of such criminal liability extends not only to UK companies, but to any international company that does any part of its business whatsoever in the UK. Indeed, this reach is significant and potentially implicates many companies with only occasional contact with the UK.

Recent trends in enforcement of the FCPA and the essentially broad nature of both the FCPA and the UK Bribery Act highlight the need for companies operating internationally to conduct adequate due diligence of their business partners and to implement comprehensive corporate and legal compliance programmes. Such programmes, while appropriately devised on an international legal scale, should also be tailored to the legal and cultural environments in which the companies operate, since each country has its own anti-bribery customs and laws that affect company policies and practice.

This article was written by Michael Ramirez of the Consultant, Dispute Resolution Department at Tilleke & Gibbins International Ltd. Please send comments or suggestions to Andrew Stoutley at andrew.s@tillekeandgibbins.com