

# Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



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- 1 **FCPA and Bribery Act**  
*Aggressive enforcement of the U.S. Foreign Corrupt Practices Act and the recent passage of the U.K. Bribery Act are impacting the operations of multinational corporations in Asia.*
- 3 **NACC Reporting Requirement**  
*A new notification from Thailand's National Anti-Corruption Commission will require businesses to submit reports for all government procurement contracts valued at over THB 500,000.*
- 4 **Labor Laws in Times of Calamity**  
*Events like the recent flooding in Thailand raise a host of employment issues for businesses to consider.*
- 5 **Foreign Workers in Vietnam**  
*Companies employing foreign workers in Vietnam need to be aware of the grounds for such employment, as well as visa, work permit, and tax issues.*
- 6 **Identifying the Right Carrier**  
*In shipping disputes, it is essential to correctly identify the correct "carrier" of the goods to ensure that they can be held liable for cargo damaged in transit.*
- 7 **IP in Financial Services**  
*Financial service businesses are increasingly seeking to maximize the value of their trademarks, patents, copyright, and trade secrets.*
- 8 **Business Method Patents**  
*Through recent case law, the patentability of business methods and computer programs has become clearer in the U.S., the U.K., and Europe.*
- 9 **New Thai Government's IP Policy**  
*In October 2011, the recently elected Thai government held a meeting to announce details of its policy on intellectual property matters, with a focus on amendments to the Copyright Act.*
- 10 **Countering IP Infringement**  
*Tilleke & Gibbins is introducing a new in-house investigation unit, a consumer hotline on counterfeit goods, and a coalition-based approach to dealing with landlords.*
- 11 **Customs Training**  
*Tilleke & Gibbins and our clients have teamed up to educate customs officers on brand protection issues.*
- 12 **Tilleke & Gibbins Updates**  
*Legal 500, Asialaw Profiles, and ASIAN-MENA COUNSEL have recognized Tilleke & Gibbins and our attorneys with top-tier rankings.*

## The Long Arm of the Law: Impact of the FCPA and the U.K. Bribery Act

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Recent trends showcase a clear intent by two of the world's global powers to tackle corruption abroad. In recent years 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 U.K. 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 and the Asia Pacific region as a whole.

### FCPA Legal Framework

The FCPA was enacted in 1977 during a period in which there were a number of high-profile international bribery scandals involving U.S.-based multinational corporations. There was initial attention focused on international corruption after passage of the FCPA, but this slowly dissipated, and for most of the time since its enactment through the 1990s, there was little aggressive enforcement against corrupt practices abroad committed by U.S. companies and their representatives.

One reason for the lack of practical enforcement by relevant authorities lay in the scope of the FCPA itself. The 1977 Act only prohibited U.S. companies and nationals from making improper payments to foreign officials, parties, or candidates, in order to help a company obtain, retain, or direct business to another party. It did not extend liability to foreign companies, subsidiaries, or nationals. This was significant, since many companies could still facilitate improper payments through third-party foreign companies and nationals.

To eliminate the limited reach of the 1977 Act and to comply with U.S. international obligations adopted by the Organization for Economic Cooperation Development, the FCPA was amended in 1998. Among the amendments was an expanded scope of jurisdiction, in which prosecution would no longer be limited to U.S. companies and nationals. The 1998 amendments gave the responsible authorities the right to prosecute foreign companies and nationals who cause violations of the FCPA to take place, in part, in the United States. The foreign company or national need not be physically in the United States to impose liability, as long as some act in furtherance of the FCPA violation occurs in the territory of the United States.

### Vigorous Enforcement

The 1998 amendments to the FCPA, combined with a surge in high-profile corruption scandals during the last decade, have resulted in prosecutions increasing dramatically. Recently, a DOJ representative confirmed that since 2005 the DOJ had been involved in foreign bribery-related settlements totaling 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 statements by U.S. Attorney General Eric Holder, who in 2009 expressed

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an intent to “vigorously enforce” the FCPA. Within months of the Attorney General’s announcement, the SEC established a new FCPA unit specifically tasked with devising ways to more proactively enforce the FCPA.

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, even though they may not have been directly involved in the wrongful or illegal behavior. This is an exceedingly broad scope of liability and, as such, potentially impacts business operations on a broad scale.

While there was an historic focus on prosecution of companies and their executives only where they had specific knowledge of or participated in illicit behavior, 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 behavior.

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. As such, it is crucial that companies understand the potential liabilities and evaluate them thoroughly before engaging in actions that could violate the FCPA, even where the practice of making such payments is culturally acceptable in a foreign jurisdiction.

### U.K. Bribery Act

While the U.S. authorities have been moving toward more aggressive enforcement of the FCPA in recent years, lawmakers in the United Kingdom recently made a significant historical step toward more effective enforcement of U.K. anti-bribery laws by passage of the Bribery Act of 2010.

The U.K. Bribery Act largely mirrors the FCPA in scope and intent by criminalizing bribery of foreign officials and serves as a comprehensive replacement for the U.K.’s much-maligned anti-bribery laws. Unlike the FCPA, however, there is no exception for recognized facilitation payments. Of significant additional importance is the fact that the U.K. Bribery Act criminalizes 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 U.K. Bribery Act for purposes of such criminal liability extends not only to U.K. companies, but to any international company that does any part of its business whatsoever in the U.K. Indeed, this jurisdictional reach is significant and potentially implicates many companies with only occasional contact with the U.K.

### Impact in Asia

While there are a minimal number of reported cases

under the U.K. Bribery Act due to its relatively recent enactment, there are some clear examples of the more aggressive approach taken in FCPA enforcement in the Asia Pacific region. What follows is a representatively small sample of the large number of active investigations, prosecutions, and recent settlements pursued by the DOJ and the SEC.

In late 2004 the DOJ entered into a settlement agreement with a California-based company, InVision Technologies, Inc. (InVision), in connection with sales of explosive detection scanners for use in international airports in Thailand, China, and the Philippines. InVision, through its employees, agents and, in the case of Thailand, through a distributor set up by InVision, authorized bribes to government officials in order to facilitate business. Illicit payments were made through agents and masked by the distributor pricing differential. However, InVision acted aggressively to mitigate liabilities and voluntarily disclosed the conduct to the DOJ and accepted responsibility for its actions. In addition, its soon-to-be parent company also accepted responsibility for ensuring InVision’s future compliance. Combined with its agreement to pay a penalty of \$800,000, InVision avoided criminal liability.

In a 2010 corruption-related investigation, authorities alleged violations of the FCPA by tobacco producers, Universal Corporation, Inc., Alliance One International, Inc., and their foreign subsidiaries. In addition to allegations of wrongdoing in other jurisdictions, it was alleged that the companies conspired with Thai government officials to obtain approximately \$30 million in sales contracts for the supply of tobacco. It was further alleged that, between the years 2000 and 2004, these companies paid nearly \$800,000 to the officials of the government-owned Thailand Tobacco Monopoly in an effort to secure approximately \$11.5 million in sales contracts for subsidiaries in Brazil and Europe. In a rare tandem settlement, the producers and their subsidiaries agreed to settlement of the criminal allegations under the FCPA as well as the SEC civil claims, the latter involving disgorgement of \$4,581,276.51 and \$10,000,000 respectively.

### Compliance Measures

Recent trends in enforcement of the FCPA and the essentially broad nature of both the FCPA and the U.K. 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 programs. Such programs, 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 impact company policies and practice. Failure to take adequate precautions to ensure compliance with relevant anti-bribery legislation could result not only in primary liability under the FCPA and U.K. Bribery Act, but also in costly shareholder disputes, institution of investigations for corruption in other jurisdictions, and public relations difficulties.

While compliance measures are critical in efforts to minimize potential liabilities, it is also important for management and legal counsel to have in place processes to thoroughly investigate and take necessary actions to remedy the harm caused by the alleged wrongdoing and to discipline those involved. Further, while there are no mandatory reporting requirements, it is also important to evaluate whether cooperation with the relevant authorities is practical, since in some instances it could provide an opportunity for companies and their counsel to elaborate or otherwise persuade government attorneys and staff that no criminal or civil actions should be pursued. 