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## The Risk of Carbon Copy Prosecutions in Thailand

Companies and individuals that admit to violating the U.S. Foreign Corrupt Practices Act (FCPA) for acts committed in Thailand risk criminal prosecution in Thai courts. When defendants in FCPA cases seek negotiated resolutions to their charges in the United States, they generally enter into guilty pleas, deferred prosecution deals, or non-prosecution agreements. By doing so, defendants formally admit to a set of facts and illegal conduct. Although the admissions are made as part of an investigation in the United States, they can potentially be used as the basis for a criminal case in Thailand. This legal phenomenon is known as a “carbon copy” prosecution.

The risk of carbon copy prosecutions is significant because the vast majority of FCPA cases are resolved by negotiated resolution. In 2014, the U.S. Department of Justice (DOJ) brought seven FCPA enforcement actions against corporate defendants. Five of these resulted in non-prosecution or deferred prosecution agreements and two ended with plea agreements. The Securities and Exchange Commission, which is the United States’ other FCPA enforcement arm, also brought seven corporate cases in 2014 (some related to the DOJ cases), with all seven resulting in settlements. Since 2009, 50 FCPA cases have been settled by the DOJ.

The U.S. government has broadly stated that it would be stepping up its FCPA prosecutions. In 2014, the DOJ punished FCPA defendants for a total of USD 1.25 billion—a yearly record. This included a fine of USD 772 million against one company alone. Also, in January 2015, the Federal Bureau of Investigation announced that it would be adding more manpower to its FCPA investigation teams. As the number of FCPA cases grows, so will defendants’ admissions through settlement.

The American anti-corruption focus coincides with an anti-corruption drive in Thailand. Since taking power in a 2014 coup, officials from the ruling military government in Thailand have repeatedly emphasized that tackling graft is a core domestic priority. A number of high-profile cases ensued, including against senior police and security officers. Nevertheless, corruption remains widespread in Thailand. Indeed, one of the 2014 FCPA cases involved corrupt activity in Thailand. The confluence of stronger Thai and American enforcement policies with a high degree of exposure to corruption in the Kingdom means a greater risk of carbon copy prosecutions.

This article will examine the risk of carbon copy prosecutions by comparing the FCPA with Thai anti-bribery laws. The more the FCPA intersects with Thai law, the more grounds there are for a prosecution in Thailand based on an FCPA case. In other words, if a company or individual admits to violating the FCPA, that conduct may also give rise to a violation of Thai law.

## Comparison of FCPA and Thai Anti-Corruption Laws

### Prohibition on Bribery

The FCPA prohibits a person to corruptly pay, offer to pay, authorize, or promise to pay a government official to influence a decision for business purposes. Thailand also penalizes bribing public officials. The Criminal Code makes it a crime for anyone to give, offer, or agree to give property or another benefit to influence an official. Further, Thailand’s Act Regulating the Offense Relating to the Submission of Bids and Tender Offers to Government Agencies (Bids Offense Act) criminalizes paying bribes to win government bids. The FCPA and Thai law almost mirror each other regarding their respective bribery prohibitions. Both restrictions are broad in that they cover the promise to bribe in addition to actual wrongful payments.

One area of uncertainty between the two laws, however, is the definition of “government official.” The FCPA takes an expansive view, and includes everyone from ministers to employees of state-owned enterprises. This is not so clear under the Criminal Code, which prohibits giving bribes to “officials,” as well as legislators. Officials are undefined in the Code. It is therefore uncertain if employees of state-owned firms would be considered as government officials. In contrast, the Bids Offense Act takes a broad approach, similar to the FCPA, and defines government agencies as ministries, local authorities, and government enterprises, among others.

Bribing government officials for business advantage is clearly prohibited by both the FCPA and Thai law. While the interpretation of officials may differ between the FCPA and the Criminal Code, the Bids Offense Act’s broad scope covers a large portion of corrupt activities, most of which involve bribery to win government contracts. Therefore, an FCPA defendant’s admissions of corrupt conduct in Thailand would likely be legally sufficient to give rise to a criminal prosecution in Thailand.

### Coverage

The FCPA covers American entities and individuals, as well as non-U.S. companies that register securities in America. Similarly, the coverage of the Thai Criminal Code and the Bids Offense Act is wide—both cover all criminal acts committed in Thailand. The laws also do not distinguish between Thai and foreign nationals. So if, for example, a U.S. citizen bribes a Thai official, the American would fall under the jurisdiction of both the FCPA and Thai criminal law.

In terms of corporate liability under the FCPA, parent companies are liable for the acts of their employees, subsidiaries, and agents. In Thailand, there are no specific laws imposing criminal liability on a company where an offense relating to corruption is committed by an employee or agent of that company. A company may, however, be guilty and subject to the same punishment as its employee or agent who actually committed the offense where:

- ▶ the employee or agent acted within the company’s objectives, as a representative of, and for the company’s benefit; or
- ▶ the company (via its directors) had knowledge of, approved, or enjoyed the benefit of the offense; or
- ▶ the company did not take reasonable steps to prevent the offense.

*Continued on page 11*

Foreign parent companies are also not off the hook. Pursuant to the Criminal Code, if an offense committed in Thailand was “instigated” or “supported” from outside of Thailand, the instigator/supporter can be punished for the offender’s actions in Thailand. For instance, if a party in Thailand bribes a government official at the behest of a foreign-domiciled company, that company can be prosecuted in Thailand.

Also, if an individual company director or employee is named or implicated in an FCPA case, that person is at risk of prosecution in Thailand. Under the Criminal Code, an individual director in Thailand can be held liable for a company’s offense if he or she is considered to have taken part or assisted in the offense. Such language is also included in the Bids Offense Act, which states that a manager is deemed a co-principal in the commission of an offense if the crime is committed in the interest of the company.

### *Books and Records*

In addition to prohibiting bribes, the FCPA requires companies that are publicly traded in the United States to keep accurate accounting records. The accounting records must reflect the company’s actual business transactions. In other words, recording a bribe as a “consulting fee,” for example, is a distinct FCPA violation. Importantly, the FCPA requires a parent company to ensure that its subsidiaries comply with the accounting requirements.

The closest law that Thailand has to the FCPA’s accounting provision is the Anti-Money Laundering Act (AMLA). The AMLA makes it a crime for someone to conceal the true nature of an asset involved in committing an underlying offense. The AMLA specifically includes corruption as an underlying offense.

However, it is questionable whether a bribe giver’s false recording of an unlawful payment would constitute an AMLA violation. On the one hand, the AMLA defines wrongful assets as funds obtained from an illegal act. In other words, the AMLA seems to apply only to bribe recipients and not to bribe givers. On the other hand, wrongful assets are further defined in the AMLA as assets involved with “aiding and abetting” a crime. Therefore, if paying a bribe is considered to be “aiding and abetting” an offense (i.e., receiving a bribe), the payer’s false accounting can be considered a violation of AMLA. If a prosecutor or court follows a more liberal interpretation of the AMLA, the legal risk of a carbon copy prosecution in Thailand based on FCPA accounting violations would be higher.

### *Facilitation Payments*

Facilitation payments are one of the few allowable payments that can be made to government officials under the FCPA. Facilitation payments are narrowly defined as payment to cause officials to perform routine non-discretionary actions, such as police protection, mail delivery, and utility provision. Payments relating to winning government contracts are never exempted.

Thai law, in contrast, does not allow facilitation payments. The Criminal Code makes it illegal for an official to receive any type of payment or benefit just to do his or her job. While the Criminal Code does not expressly penalize the giver of facilitation payments, if the payment is related in any way to government contracts, the giver can be punished under the Bids Offense Act. As such, if an FCPA defendant admits to making a facilitation payment, they would not be punished under the Criminal Code, but,

depending on the circumstances, could be charged based on the Bids Offense Act.

### **International Double Jeopardy**

A strong defense to a carbon copy prosecution is international double jeopardy. This legal principle states that a person cannot be tried twice for the same charge following acquittal or conviction. Such a provision is contained in Section 11 of the Thai Criminal Code. Under Section 11, if a person has been punished by a foreign court for an offense committed in Thailand (e.g., bribing a public official), a Thai court may inflict less or no punishment for the offense. The Thai court therefore has discretion to punish a defendant if that party has already admitted to wrongdoing in the United States and was punished.

The Section 11 defense, however, would only apply to parties that were actually punished in an FCPA case. Other parties that may have been implicated, but not punished, would find it difficult to argue double jeopardy in Thailand. For example, if a Thai subsidiary, country director, or other employee or agent were implicated—but not charged—in an FCPA case, they could still face prosecution in Thailand if a Thai court determines that these parties are distinct from the parent.

### **Enforcement and Reform**

While the FCPA and Thai anti-corruption laws differ in some respects, they share a core component: prohibition on bribing public officials for business advantage. As such, the two laws share enough commonalities to create a legal risk of a carbon copy prosecution. However, whether such a case would actually be brought in Thailand is uncertain. Historically, Thailand has not pursued criminal cases against bribe givers—especially those that are foreign entities. Prosecutions of governmental bribery recipients have been more common.

For example, in a 2010 case, subsidiaries of a U.S. tobacco leaf company settled FCPA charges with the U.S. government for bribing employees of a Thai state-owned tobacco firm to win contracts, among other things. The FCPA defendants admitted to the bribes, but no criminal charges were brought against them in Thailand. However, the bribe takers were investigated. In another example, Thai authorities investigated the former director of the Tourism Authority of Thailand based on the FCPA conviction of an American couple. The couple has not faced any charges in Thailand. To date, there has also not been any mention of criminal charges being brought against the defendant in the 2014 FCPA case involving Thailand.

But this hands-off approach to bribe givers could change. High-level government officials have said that they plan to reform the country’s approach to fighting corruption. A stated focus of the reform is to pursue bribe payers, in addition to receivers. This would serve as a deterrent to bribery, according to the officials. Thailand’s neighbor, China, has also implemented an anti-corruption drive that freely pursues bribe payers, including foreign-invested companies. If Thailand makes good on its anti-graft promises and emulates China’s approach to corruption, the number of prosecutions could increase exponentially.

FCPA settlements make it much easier for Thai authorities to initiate corruption cases, since FCPA defendants legally admit to facts and wrongful behavior. Double jeopardy notwithstanding, FCPA defendants that admit to bribing officials in Thailand would be virtually powerless to defend a Thai prosecution. As a result, FCPA defendants and implicated parties make easy targets. Foreign investors doing business in Thailand should be wary of these risks. 🚧