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FOREIGN CORRUPT PRACTICES ACT

## FCPA Challenges from Across the Pacific

By Debra Wong Yang

It can begin in a number of ways, but undoubtedly, with global expansion into the Asia region, the volume of the following types of calls has tremendously increased.

You are in-house counsel of a growing technology company. You have just been made aware that an employee in the Asia Pacific Region has alleged some type of kickback made to a local official. Or, you are acquiring a small company in Asia and are in the midst of conducting your due diligence, when you start to hear that there may have been bribes paid to local officials. Or, as in-house counsel, you find out that after a fully completed sale of a large amount of diagnostics laboratory equipment to a state-owned hospital, the wife of the hospital chain's chief procurement officer (the individual that selected your company to supply the equipment) was paid 10 percent of the sales price through a shell company for her work as a "consultant," when, it appears, she did no actual work on the deal.

In considering the company's response, your first reaction is rightly to think about whether this allegation might implicate the Foreign Corrupt Practices Act, or FCPA. You know that the FCPA contains three main provisions: (1) the anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments with the intent to obtain or retain business; (2) the books-and-records provision requires that companies make and keep accurate books, records, and accounts; and (3) the internal controls provision requires that companies devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.

Having identified that FCPA might be implicated, you now face issues common to FCPA investigations. Here are some suggestions for navigating those issues, espe-



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cially for matters arising out of Asia and Southeast Asia:

### Move Quickly On Interviews

The sooner that investigations begin, the more accurate the data that can be captured. The sooner you interview individuals, the fresher their recollections will be, making it easier to piece together what happened, how, and why.

Employees and executives leave the company over time. This includes the alleged wrongdoers, who are perhaps the most important people to interview.

Employment contracts and/or company codes of conduct or policies often require that current employees participate in internal investigations. However, companies have little or no leverage over former employees. The only caveat - one must make this decision to interview with a good sense of the contents of the documents.

### Move Quickly On Documents

Document retention and collection should also be started and completed as quickly as possible. Mandatory document and e-mail preservation notices should be quickly sent to all possibly relevant employees. Further, the company will need to figure out the uni-

verse of potentially relevant documents, and where those files are stored and backed-up, both electronically and physically. E-mails and documents are lost over time. Backup e-mail servers only retain limited amounts of employee data for short periods of time. Hard drives crash and lose their contents. Employees work on personal computers and then leave the company. All of these issues make the documentary record more sparse and difficult to obtain as time goes on.

### **Understand Local Data Privacy Restrictions and Rules**

Each country has its own rules and regulations defining what is protected, and determining what should be kept private. In some countries, penalties apply to those who violate the data privacy laws. One must be extremely aware of the specific rules, some of which are not clear themselves. And an experienced practitioner will know how to implement a proper filtering process to get those documents reviewed locally or, alternatively, on foreign soil.

### **Figure Out Who Might Be Implicated**

The company must make sure that no one who might possibly be implicated in the investigation is also part of the investigation team.

For example, if a regional attorney was involved in approving the 10 percent consultant fee, she should not be active in the investigation. Further, where the allegation results in an employee or executive maintaining an interest distinct from the company, she may need separate counsel.

### **Select Solid Vendors**

The company will need to quickly consider selection of its vendors, which commonly include outside counsel, forensic accountants, and litigation/document review companies. You'll want to select vendors that are experienced in the relevant region and have a good working relationship with one another. This will speed the investiga-

tion process and reduce inefficiencies.

### **Being Respectful of the Local Business**

To the extent possible, the company should try to minimize the investigation's disruption of daily business operations.

For example, conducting interviews at alternative locations or before or after the work hour may reduce tension, speculation, and distraction from the actual business at hand.

Searches of offices, copying of hard drives, and removal of documents should take place at night to reduce disturbance and lessen chatter. Likewise, one should understand that sometimes this foreign office or subsidiary might have been acquired and therefore have a corporate culture that is very different from its parent. It is important to get a quick handle on those differences.

Additionally, one should also focus on the following issues, which are ever-present in FCPA investigations in Asia:

### **Ensure Strong Language/Translation Capabilities**

You'll need to figure out the language capabilities possessed in-house and by outside counsel. It is critical that the interviewers and document reviewers are familiar with local dialects, as words and phrases pertaining to graft, especially in many Asian languages, may have cloudy meanings or may not perfectly translate into English.

For interviews, you might need a professional translator or association with local counsel. For document review, you'll need to figure out whether local counsel is qualified to conduct the review and then translate the important documents, or whether language capabilities must be located in the U.S.

### **Be Wary of Countries More Prone to Corruption**

Of the 33 countries in the Asia Pacific region, all but nine scored below a 5 on the Corruption Perceptions Index. These

include China (3.6), India (3.4), Indonesia (2.8), and the Philippines (2.4).

Obviously, however, the U.S. government will not accept a "this is how things get done there" excuse. Given the inherently risky nature of conducting business in these countries, the company should be very careful to seriously investigate allegations, as the Department of Justice and Securities and Exchange Commission will expect the company to have tight controls in place in countries with well-known corruption risks.

### **Be Careful of Third Parties**

Companies can be, and frequently are, held liable for acts done on their behalf by third parties.

For example, Veraz Networks Inc., a California-based telecommunications firm, recently agreed to a \$300,000 civil penalty because its third-party consultants provided approximately \$4,500 in gifts to officials of a state-controlled telecommunications company in China, and offered other bribes through distributors in China and Vietnam.

Further complicating matters is the fact that many Asian nations require that foreign firms use a local distributor or reseller, or work through a joint venture with a local firm. The company should conduct due diligence of, and carefully monitor, its third party partners, especially in Asia.

### **Watch Out for Gift Giving and Other Culture Norms**

In many Asian cultures, gift-giving is a common and expected practice. American companies operating in Asia face the difficult task of drawing the line between allowing gifts as a permissible social custom and disallowing donations that are mere bribes.

While no two FCPA investigations are perfectly similar, thoughtful planning and actions around these investigation issues should enhance the success and efficiency of the process, and hopefully make the U.S. regulators look more kindly upon your company, if they became involved.