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Briefing note
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US FCPA Jurisdiction in Asia Pacific: To Infinity and Beyond?

Recent cases brought by US law enforcement have made it clear that companies who are not incorporated or operating in the United States, not listed on US stock exchanges, and not doing business anywhere in the United States can still be subject to jurisdiction under the US Foreign Corrupt Practices Act (FCPA). In what must look like rocket science to some, jurisdiction can turn on nothing more than an email, a US dollar denominated transaction, or assisting a US business partner. Since over half of all US FCPA investigations last year involved conduct or companies based in Asia (Japan, China, Malaysia, Thailand, Indonesia, Vietnam, Myanmar, South Korea and Taiwan), Asian companies are rightly wondering just how far US jurisdiction extends.

The Language of the FCPA

Formerly, companies who were not considered "US issuers" or "domestic concerns" may have drawn some comfort from the language of the FCPA. That is because the anti-bribery provisions of the FCPA appeared to be limited to issuers, domestic concerns and persons while in the territory of the United States. However, the language is actually broader than it appears.

- Issuers is defined to include any company with a class of securities registered under section 12 of the Exchange Act or that files reports with the SEC pursuant to section 15(d) of the Exchange Act.
- The term “domestic concern” includes a US citizen (wherever located) and any business entity (such as a corporation, partnership or unincorporated organisation) organised under the laws of a US state or which has a principal place of business in the United States.
- The FCPA criminal and civil provisions apply not only to the company, but also to any stockholder, officer, director, employee and agent who violates the Act while acting on behalf of the issuer or domestic concern.
- Lastly, the term “person” means any natural person other than a US national or any business entity organised under the laws of a foreign nation or political subdivision thereof.

The plain language of the FCPA extends its extraterritorial reach to include proscribed acts of bribery that occur entirely outside US territory by US issuers and domestic concerns. In addition, it extends to any “person,” which effectively includes both individuals and companies on whose behalf they are acting, regardless of nationality, who commit "an act in furtherance of bribery within US territory."

Aggressive Interpretation of FCPA Jurisdiction

That last clause, "an act in furtherance of bribery within US territory," is interpreted by United States law enforcement authorities as having virtually intergalactic reach.

- Emails, telephone calls, and faxes: Jurisdiction for the anti-bribery charge in the case involving Magyar Telekom was premised on the U.S.-based email addresses of foreign officials involved in bribery, which caused emails to be "passed through, stored on, and transmitted from servers located in the United States.” In another case involving a Japanese manufacturer, jurisdiction was based on emails discussing a bribery scheme sent between Japan and the United States.
- Sharing financial information arising from bribery: Jurisdiction over US issuers for violations of the books and records provisions has been based on falsified records disguising bribery payments sent to US issuer parent companies by their non-US subsidiaries. Such was the case for Magyar Telekom, but also in a string of cases before that. Because the false financial records were consolidated in the parent companies' financial reports, there was found to be a sufficient nexus to the United States.
- Transfers to US bank accounts: Beginning in 2008 with Siemens and extending through to the case against Japanese company JGC in 2011, US authorities found that the act of denominating a transaction in US dollars, which would be transferred between two

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foreign banks via a "correspondent" bank in the United States, was sufficient to establish jurisdiction. By using US currency in bribery transactions, the parties involved had used the US financial system in furtherance of the bribery scheme, according to the US authorities. This is no doubt the most tenuous basis for jurisdiction under the anti-bribery provisions, as the parties would not necessarily have knowingly and deliberately taken actions in the United States, probably being entirely unaware that the transaction would pass briefly through the United States banking system as it was processed. This theory has not been challenged in court yet.

Law enforcement authorities have also focused on the relationship between the non-US company and its business partners and customers who may be US issuers or US companies.

- JGC and Marubeni, two Japanese companies, who were not issuers, were found to have aided and abetted and conspired with a US company, KBR, and other members of a consortium to execute a conspiracy to pay bribes. Interestingly, Marubeni could have been charged under a direct theory of liability as it met and corresponded with a co-conspirator in the United States. Choosing to charge on an aiding and abetting theory instead may have been meant to send a message as to how broad DOJ considers its jurisdiction.
- Panalpina, a freight forwarder that was also not a US issuer, was nevertheless charged under the books and records provisions – accused of acting as an agent of its US issuer oil and gas customers by disguising the true nature of bribe payments in inflated invoices that created a slush fund out of which it paid bribes on behalf of those customers, thereby aiding and abetting their FCPA violations.

Conclusion and Recommendation

Companies in Asia Pacific are right to be concerned by the FCPA's seemingly infinite reach and by US enforcement authorities' focus on this region of the world. Common business practices such as the use of third-party agents, intermediaries, introducers and fixers should be carefully scrutinised under FCPA standards. Similarly, policies regarding gifts, hospitality and entertainment, all important to building guanxi and personal relationships, should be reviewed for consistency with FCPA case law. Understanding the heightened risk associated with the prevalence of state-owned and controlled businesses in Asia is critical in avoiding FCPA liability. Finally, if you don't have an FCPA compliance program already in place, get one.

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