



## **The Growing Enforcement of Foreign Bribery Legislation**

## Are You Aware of the Risks?

For companies operating in various countries in the Asia-Pacific region and around the world, there is a growing need to understand foreign corruption laws and the true risks that these pose, not only at a corporate level but also for individuals on the board and within the business.

The US Foreign Corrupt Practices Act (FCPA) is, by now, reasonably well known while there has, over recent months, been much commentary offered around the introduction of the UK Bribery Act (UKBA). Various other countries however are also increasingly enforcing their own legislation.

The current global anti-bribery landscape is changing at a rapid pace.

### The UKBA

Many companies and advisors are currently focused on the UKBA, and for good reason. Its broad extra-territorial reach, zero-tolerance stance against facilitation payments and targeting of companies that fail to prevent bribery, make it, in many respects, more robust than the FCPA.

Broadly, the UKBA:

- Makes it unlawful to offer, promise or give a bribe to anyone (i.e. not only Government officials)
- Makes it unlawful to request, agree to receive or accept a bribe from anyone
- Creates a discrete offence for bribing a public Government official
- Creates a new strict-liability offence for companies that 'fail to prevent bribery'
- Does not provide any exceptions for 'facilitation payments'.

Perhaps the most significant aspect of the UKBA is the introduction of a new strict-liability corporate offence for 'failing to prevent bribery. If a company connected with the UK engages in bribery anywhere in the world, it will automatically be at risk of having committed an offence, for which unlimited fines may be imposed. The only defense will be if a company is able to demonstrate that it has implemented 'adequate procedures' to prevent the bribery.

Prudent companies are taking steps now to ensure that they perform adequate risk assessments in order that they may implement a robust corruption compliance program that provides the business with policies, procedures and controls that accord with best practice.

### Increased Willingness to Enforce

On 1 July 2011, following a two-year investigation by Australian Federal Police (AFP), charges were announced against six individuals and two companies in Australia in relation to alleged bribery of foreign Government officials. Both the companies concerned, Securrency International Pty Ltd and Note Printing Australia Limited are subsidiaries of Australia's Reserve Bank.

This case is significant because it is the first time charges have ever been laid under Australia's foreign bribery legislation (which is contained in its Commonwealth Criminal Code Act) since the provisions were introduced 12 years ago. There are increasing calls for these charges to be a watershed event, which will see increased enforcement of Australian bribery laws to protect its trading reputation abroad. Australia has been heavily criticized over recent years for its lack of enforcement of such laws.

The AFP, working with the UK's Serious Fraud Office (SFO) and other regional authorities, has been investigating allegations that bribes had been paid to Government Officials in countries including Vietnam, Indonesia and Malaysia between 1999 and 2005 to secure note-printing contracts. Securrency produces polymer bank notes used in various countries around the world.

Over the past two years, the AFP has reportedly compiled tens of millions of documents to support the recent charges. The cooperation between the AFP and the SFO in particular would appear consistent with the overall increasing level of cooperation we are seeing between regulators and law enforcement officials around the world.

With questions being raised as to the possible involvement of Australian trade officials in some of Securrency's transactions, there are increasing calls by Australian politicians for a full Parliamentary Inquiry to be established to examine the matter.

### **The widening risks**

While recent attention has focused on the UKBA and issues like Securrency, the FCPA remains a formidable compliance risk to companies around the world, and not just those in the United States, according to Mr Pulvirenti. The Securrency matter is an example of how companies may be exposed to investigations and/or legal proceedings in several jurisdictions simultaneously (often without realising).

The FCPA is not just an issue for US companies and individuals. Indeed, eight of the current top ten penalties issued by US authorities, which range from US\$70 million to US\$800 million, involve non-US companies. The FCPA is wide reaching and the DOJ and SEC aggressively enforce its provisions.

As Securrency is the first ever prosecution in Australia, and one of the larger current investigations in the Asia Pacific region, US authorities may also be looking at it to see if there is any cause for them to exert US jurisdiction.

While most people appreciate that the FCPA applies to US 'domestic concerns' (US nationals, entities and residents) and 'issuers' (entities that have issued securities registered in the US, requiring periodic reports to be filed with the SEC), changes to the legislation in 1998 also make anti-bribery provisions applicable to "any person" (including foreign nationals and companies) if they cause, directly or indirectly, an act in furtherance of a corrupt payment to take place within the US.

Many non-US companies do not appreciate the full extra-territorial reach of the FCPA or how they may unwittingly be affected by US jurisdiction. The FCPA provisions and the authorities' interpretation of them are very broad. Depending on the circumstances, it may only take the use of US bank accounts, US dollar-denominated payments (which clear through US intermediary banks), or the use of US mail and wires for US authorities to seek to enforce US jurisdiction – regardless of whether any other countries might also have jurisdiction.

Companies with a regional or international presence will need to be increasingly vigilant and devote proper resources to deal with corporate governance responsibilities imposed by local and foreign legislation. By doing so, they will be able to address and mitigate the multiple risks that they face.

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