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Reviewing Trade Through A Different Lens – The Middle East

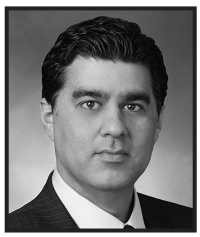
The Editor interviews ***Tamer A. Soliman****, Partner, Akin Gump Strauss Hauer & Feld LLP's Abu Dhabi office*.

Editor: Please tell our readers about the trade areas about which you advise both corporate and government clients. When did you start this practice?

Soliman: I started practicing about 13 years ago in Washington, DC with Akin Gump, a firm I found attractive because of its reputation as a "go-to" firm for policy and regulatory issues. About three years ago, we decided to launch the practice abroad, and I moved to Abu Dhabi to head that effort. We work with clients on a range of regulatory, law and policy issues relating to substantive areas such as export control/ITAR, FCPA, economic sanctions, money laundering and general governance matters. Functionally, my work includes handling internal investigations, enforcement actions, due diligence in the M&A context, and day-to-day counseling on compliance and governance issues. I work with both U.S. and EU companies as well as Middle Eastern and Asian clients who want to navigate that regulatory environment or establish a world-class compliance program because they recognize its importance to their business objectives. We also work with foreign sovereigns on a number of issues in this area, including assisting with Washington policy issues and helping their business constituencies expand trade and transition to a new market.

Editor: Why is Abu Dhabi a desirable location from which to conduct a regulatory practice on such matters as defense procurement, development of high tech and knowledge-based industries?

Soliman: We see two great things happening here: first, the UAE and the GCC, more broadly, are among the most dynamic markets in the world, experiencing impressive growth in trade both westbound and eastbound. Not only is this arguably the most important regional market for aerospace and defense procurement – two areas in which the firm has particular depth – but the UAE's economic vision is to establish a knowledge-based economy. That means transfer of know-how, R&D capabilities, production in high tech industries and partnerships with blue chip companies – everything from space launch to semiconductors to scientific research. It also means establishing and maintaining credibility with global regulators. So for our GCC clients with this orientation, we help them navigate the system – whether it's obtaining regulatory authorizations to receive controlled goods and technology, establishing meaningful compliance programs or negotiating and aligning with global partners. Second, we see a growing recognition among our Western clients of the importance of working more closely with their foreign operations on regulatory compliance issues abroad. That is an outgrowth of a number of things, but largely it stems from the hundreds of millions of dollars and extremely costly investigations in cases like those of Siemens involving FCPA violations or Standard Chartered on the sanctions side. These cases have really raised awareness of the importance as well as the challenges of establishing a meaningful compliance program across borders. Practicing in the UAE expands our reach and proximity to our clients' EMEA and Asian operations. This has proven a tremendous value-add for our clients.



Tamer A. Soliman

Editor: How have regulatory investigations and compliance changed in your area (or other areas relating to trade) over the past 10 years or so?

Soliman: First, when I started, most trade regulatory and compliance practices were in Washington. Now we see practitioners in this area in several European countries (less so in other jurisdictions). We also see new export trade control laws elsewhere – the UAE, Malaysia, Hong Kong, Singapore and a number of other jurisdictions. An advantage of having practiced in Washington in that context is that there is a longer and deeper record of dealing with these issues, and this is definitely an area where practical experience is crucial. The other key change has been the impact of those penalties that I mentioned on the attitude toward compliance. For more and more of our clients, the internal discussion has changed, and it's now not so much *why* do we need to do this, but *how* can we do it in a way that makes sense for the company?

Editor: What challenges do U.S. companies face in remaining in compliance while operating abroad and in the Middle East in the areas of export control?

Soliman: Risk of diversion is certainly an important issue when it comes to any trade hub – whether the UAE or Singapore or Hong Kong. Even more than other contexts, it's especially important that U.S. companies operating in such hubs know their customers and do appropriate due diligence. A second challenge for many U.S. companies is in getting sufficient alignment with their local affiliates and business partners. Managing these issues remotely from a desk at company headquarters has several limitations. There is still a steep learning curve and often a lack of awareness as to how U.S. export controls can impose continuing obligations on buyers, even after the seller is out of the picture. One of the mistakes that U.S. companies make is to rely on contract clauses with key business partners that simply say "you agree not to violate export control laws," when there is more work to be done with partners in the Middle East on raising awareness of exactly what that means.

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Please email the interviewee at tsoliman@akingump.com with questions about this interview.

Editor: Why do export classification reviews sometimes become difficult when an exported product can be used for both military and civilian purposes?

Soliman: This is an issue we run into a lot, particularly abroad. There is a perception that export controls are only about military items, when, in fact, very strict controls apply to a broad range of commercial items under U.S. law as well as EU, UAE and other laws. From a U.S. perspective, the rules have long been that if you modify or adapt a commercial item for a military application, it becomes subject to military rather than commercial export control. Manufacturers that service both commercial and defense markets must track original design intent very carefully. In addition the classification system itself can be very challenging, the lists of items being based on technical performance characteristics. So it is essential to work closely with technical personnel to ensure the company understands the export classifications of its current goods and technology and can anticipate how that will evolve with its business.

Editor: Who is the regulator who would oversee that?

Soliman: There is more than one regulatory agency in the U.S. The principal agencies are the State Department for defense articles and services and the Commerce Department for commercial/dual-use items. In addition, the Department of Energy and Nuclear Regulatory Commission have jurisdiction over nuclear items. They interface with other agencies in the national security apparatus in reviewing applications and scrutinizing the end user or the foreign licensee.

There has been progress in reforming export control supervision. Just recently, both the departments of Commerce and State issued new rules on the transfer of certain items in the aerospace sector from the State Department's jurisdiction to the Commerce Department's. This is a significant step insofar as it recognizes that items adapted for military application that do not have a significant military function should be consigned to oversight by the agency that oversees non-military items.

Editor: What challenges exist for GCC countries in seeking to acquire high tech imports in navigating through the morass of Washington regulatory agencies?

Soliman: The most significant thing a company can do is understand how its business is likely to intersect with these issues and have a plan for managing them. This is a new area for many companies, and the issues are difficult to manage, even for many U.S. companies. For some foreign companies that did not previously realize how heavily their business intersects with these issues, a coordinated strategy will be required to address licensing and compliance controls and assess potential disclosure considerations.

In some cases, planning ahead means considering not just the legal but also the political dimensions to the issues. The controversy several years ago in connection with Dubai Ports World's planned acquisition of port management over several U.S. port facilities is a good example. That was really a wake-up call for many companies that were not previously familiar with CFIUS (Committee for Foreign Investment in the U.S.), which administers the U.S. national security review process for foreign investment in the United States. We regularly assist companies to navigate that process and generally advise companies to look carefully at even minority stakes in U.S. entities that could have national security implications. The key is advanced planning and a grounding in the complex regulatory and policy issues in this area.

Editor: What challenges do U.S. companies with foreign subsidiaries face in terms of compliance with the Foreign Corrupt Practices Act? How do you advise your clients with foreign subsidiaries to comply with both the FCPA and the UK Bribery Act?

Soliman: Establishing controls over a remote location is always difficult. The UAE actually fares pretty well in international corruption risk benchmarks, but the broader region is one which many would consider high risk in this area. Two of the most challenging issues in antibribery practice come into focus here: one is in the area of gifts and entertainment and hospitality. This is very much a relationship-based culture, and there are certain ways in which expectations are often different than those in the United States. The other is third-party due diligence, where information on companies and on counterparties is not always readily available. You often run into complex holding structures, making it difficult to know who ultimately controls your counterparty.

With respect to the UK Bribery Act, the law has gotten a lot of attention because it has some provisions that are even more stringent than those in the FCPA, including the disallowance of facilitation payments and a corporate strict liability offense for failure to prevent bribery. At the same time, the U.S. remains at the forefront of enforcement in terms of penalties and sheer reach. Much of the substance of the Bribery Act is consistent with positions that many of our clients have taken over the years in light of agency enforcement practice. Along with colleagues in our London and Washington offices, we work closely with companies to update or establish procedures that are both practical and consistent with the Bribery Act, FCPA and other local laws. What is critical is to take a look at the operations as a starting point: where is the risk? How can it be managed meaningfully?

Editor: What training programs do you suggest for companies' employees in the face of the FCPA and the Bribery Act?

Soliman: Training is an essential component of any compliance program. You need controls, but you also need to establish a culture of compliance and accountability across the organization, and that starts with training. There are a number of options for training – from Web-based/online training tools for basic awareness to live training sessions. As with other aspects of compliance, the most important thing is that the approach be thoughtful and tailored – to the risk, geography and even the role. It's critical that the training be relevant to the role and accessible in its delivery and reflect the specifics of the company's program. And there is no substitute for a live session, both in engaging with the group and in getting a better sense of what is actually happening in remote locations.

Editor: Do you find that the recent issuance of the Resource Guide interpreting parts of the Foreign Corrupt Practices Act has been useful to you and your clients?

Soliman: It's a helpful resource insofar as it gives companies a framework for thinking about their own programs, which should be constantly evolving, or a starting point to develop a program if they don't have one. The Guide highlights the extremely broad reach of the FCPA, but the most interesting aspects are in the discussion of effective compliance programs and what that means in the bribery arena. The key message is the extent to which enforcement officials use these criteria to critically evaluate whether there is more than just a paper policy. Does the program reflect a serious assessment by management of where their operational risks are, looking at the company as a whole, and does it really reflect a serious investment by management to address those risks?