Anti-Corruption Compliance in Brazil: Top Ten Considerations

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International companies doing business in Brazil, and Brazilian companies operating globally, need anti-corruption compliance programs in place in order to meet global enforcement standards and to take into account each company's corruption and Brazil's unique enforcement climate.

Brazil's capacity to sail through the latest world financial crisis relatively unscathed, together with twenty years of steady economic growth and solid political restructuring, have made Brazil a hot business climate. With a population of 190 million, a workforce of 110 million, $2.1 trillion GDP (world's 7th highest) and 7.5% real growth in 2010, it's no wonder that global companies are eager to do business in Brazil. In fact, over 220 of the Fortune 500 companies already have branches or regularly conduct business in Brazil. What's more, Brazilian companies increasingly are seeking to do business on a global scale, competing with U.S., European and Asian companies worldwide. With great opportunities, come significant challenges. For Brazil, as with other prominent emerging markets, the perception of corruption in public and private transactions is one of those significant challenges. Transparency International, a non-profit organization, measures the degree to which public sector corruption is perceived to exist in 178 countries and scores countries on a scale from 10 (very clean) to 0 (highly corrupt). In 2010, Brazil scored a 3.7, ranking it 69th of 178 countries. By comparison, Sweden scored a 9.2, the U. S. scored a 7.1, India scored a 3.3, China scored a 3.5 and Chile scored a 7.1.

For international companies operating in Brazil, the potential for corruption in private and public sector transactions poses considerable enforcement risk, given the aggressive anti-bribery enforcement by U.S. authorities and the significantly strengthened and far-reaching UK anti-corruption laws. Those same factors pose equally vexing compliance challenges for Brazilian companies operating abroad. The following Top Ten tips identify some of the key factors companies need to address in assessing their corruption and enforcement risk in Brazil, and for boosting their compliance programs.

1. The Enforcement Landscape is Effectively Global; Anti-Corruption Compliance Must Adopt the Same Mindset

While Brazilian laws, regulations and enforcement practices undoubtedly influence the compliance landscape for international companies operating in Brazil and Brazilian companies operating abroad, aggressive global anti-corruption enforcement efforts and tough anti-bribery laws with extraterritorial reach set the framework for anti-corruption compliance. The U.S. Foreign Corrupt Practices Act ("FCPA"), enacted in the 1970s, was only sporadically enforced until recent years, when it gained significant extra-territorial reach. Now, 38 countries including Brazil are signatories to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 ("OECD Convention"), which establishes the jurisdiction of the member countries to prosecute (i) any individual, regardless of his or her nationality, who commits a corruption/bribery offense within their territories and (ii) their nationals who commit corruption/bribery offenses abroad. In addition, the OECD Convention

sets forth the standards for mutual legal assistance between the member countries in matters related to corruption/bribery offenses. The FCPA, the recently-enacted United Kingdom Bribery Act of 2010 ("UK Bribery Act"), and the international conventions are gradually reshaping the compliance landscape in Brazil, raising the bar for international business conducted by foreign parties in Brazil and by Brazilian parties abroad.

Brazil does not have an exclusively dedicated and exhaustive set of regulations addressing corruption. Rather, bribery and political corruption are largely regulated by the Brazilian Criminal Code and related criminal and administrative laws, that, as a general rule, establish much lighter penalties than similar foreign legislation. This should not, however, lead to the conclusion that compliance with anti-corruption regulations is an easy task in Brazil. Brazil is one of the signatories to the OECD Convention and has had a history of cooperation with jurisdictions that have enacted anti-corruption legislation.

2. Special Attention to the FCPA and UK Bribery Act

Among all anti-corruption legislation with international applicability, special attention must be given to the FCPA and UK Bribery Act. Considering the severe penalties set forth in these statutes and their far reaching applications worldwide, it is crucial to any company doing business inbound or outbound with Brazil to first determine if it is subject to the extra-territorial reach of these laws.

In summary, the FCPA prohibits corrupt payments, or offers of payment, to officials of foreign governments or foreign political parties for the purpose of obtaining or retaining business. The FCPA applies to U.S. companies (and subsidiaries), no matter where they do business, and to foreign companies who register shares with the U.S. Securities and Exchange Commission ("SEC"). In addition, the FCPA also requires companies that register with the SEC to keep accurate books and records of all business transactions, and also requires registrants to maintain effective internal accounting controls. The FCPA is enforced by the U.S. Department of Justice ("DOJ"), which can bring criminal charges, and by the SEC, which can bring civil enforcement actions. Corporate penalties for violations of the FCPA are up to $2 million per violation (i.e., each corrupt payment) and disgorgement of gains resulting from the bribes. Individuals face significant prison sentences. In recent years, the number of FCPA investigations, prosecutions and enforcement actions has exploded, resulting in eye-popping financial penalties for companies and prison sentences for individuals. In 2010, the DOJ collected $1.8 billion in penalties, largely from corporations. In addition to fines and penalties, FCPA investigations are costly for companies in terms of internal investigation expenses, legal fees, forensic accounting fees, management resources, and reputational harm. By comparison, an effective anti-corruption compliance program is an inexpensive insurance policy to mitigate the risk of these tremendous costs. Non-U.S. companies have been the targets of many FCPA prosecutions, most notably Siemens AG, Daimler, and BAE.

The UK Bribery Act was passed in April 2010 and went into effect on July 1, 2011. The Bribery Act substantially revised the UK framework for combating bribery in the public and private sectors. The Act covers a broader range of conduct than the FCPA. It criminalizes both the giving and receiving of bribes. Like the FCPA, it prohibits corrupt payments to foreign government officials. In addition, unlike the U.S. law, the UK Bribery Act, also prohibits the offering and receiving of bribes between private business counterparties. Most significantly for companies, under Section 7 of the UK Bribery Act, a company is held strictly liable for the corporate offense of failing to prevent bribery. The UK Bribery Act provides, however, a "safe harbor" defense if a company can demonstrate that it had "adequate procedures" in place to prevent its employees, agents and contractors from paying bribes. The penalties under the Act include prison sentences of up to ten years for individuals and unlimited fines for companies.

Brazilian companies and companies doing business in Brazil need to recognize the UK Bribery Act's extraordinary extra-territorial reach. The Act applies to any company that does business in the UK, making the statute's reach even longer than the FCPA. For example, a Brazilian company with some business operations in the UK can be prosecuted for failing to prevent corrupt payments by one of its employees or agents made in Mexico in connection with business there, with no part of bribe being connected to the UK.

3. Cross-Border Cooperation is Now the Rule, Not the Exception

Cross-border cooperation among prosecutors and regulators has become common in recent years across in all types of criminal and regulatory matters, including corruption and bribery cases. U.S. prosecutors and law enforcement agents, for example, often rely on their foreign counterparts to assist in obtaining evidence, executing search warrants and tracing the flow of illicit payments.

Brazilian compliance authorities routinely cooperate with foreign and international law enforcement agencies in the investigation and prosecutions of a range of criminal conduct. Recent international investigations involving conflict of interest, insider trading, money laundering, and international corruption have been successfully brought to jurisdictions outside Brazil with the assistance of Brazil's CVM ("Comissão de Valores Mobiliários", which is the securities exchange commission of Brazil"), Federal Police and Ministry of Justice. Brazil and the U.S. entered into a Bilateral Mutual Legal Assistance Treaty in 1998, which provides a routinized means for U.S. authorities to seek the assistance of their Brazilian counterparts in obtaining evidence. Cooperation in regulatory enforcement is also increasing. Notably, Brazil's CVM and the U.S. SEC entered into a Memorandum of Understanding for joint cooperation in 2008. Brazil is also a signatory to the IOSCO (International Organization of Securities Commissions) Memorandum of Understandings.

As a consequence of this kind of routine cross-border information sharing and relationship-building among enforcement agencies, an investigation in one country very often results in the other country starting its own parallel investigation. Consequently, even if Brazilian anti-bribery laws may not reach an international company or its employees, a company with corruption compliance problems in Brazil should assume that Brazilian authorities will cooperate with regulators and law enforcement agencies seeking to enforce laws that do reach the company.

4. Brazil's Anti-Corruption Enforcement and Its Spill-Over Effects

The Federal Police in Brazil have been aggressively investigating political corruption for a number of years. In addition, the Brazilian media has recently published a number of stories detailing allegations of official corruption. Together, these actions have resulted in a number of high profile arrests or resignations of high-ranking public officials. While no criminal convictions have been obtained to date, Brazil's president, Dilma Rousseff, has pledged follow-through on corruption investigations.

While the focus of investigations in Brazil has been on political figures, to the extent the alleged misconduct involves allegations of kickbacks or bribes from businesses, particularly international businesses, the spillover effect of probes like these may well be the launching of anti-corruption investigations by authorities in the U.S., the UK, or elsewhere. As noted above, Brazilian law enforcement authorities are generally favorably disposed to cooperate with their foreign counterparts.

5. Assessing Corruption Risk

An effective anti-corruption compliance program begins with a company's assessment of the risk of encountering corruption or bribery when conducting business. There is no one-size-fits-all approach. Companies need to consider a range of factors: the type of business and the types of transactions it enters; who its customers and counter-parties are; the degree of interaction with government officials; the degree that government regulations and permitting impact the business; and, to the extent that a company uses intermediaries such as agents, brokers, distributors, consultants and joint venture partners to conduct business. Because the FCPA and the UK Bribery Act and other laws hold companies responsible for the corrupt actions of their intermediaries, subsidiaries and affiliates, third-party risk assessment is vitally important.

Although no industry and no market sector is immune from corrupt practices, in Brazil or elsewhere, it is highly advisable that foreign companies doing in business in Brazil pay special attention when engaging in activities related to public works and construction (notably infrastructure projects), foresting and environmental services, and large supply contracts with federal, state, and local governments (e.g., medical care, pharmaceuticals, and office equipment and supplies). These areas are particularly vulnerable to corruption and may, in some situations, be characterized by government officials looking for payoffs.

There is no substitute for in-country expertise. International companies unfamiliar with the myriad of Brazilian local, state and federal laws, regulations, and agencies assume unnecessary risk unless they enlist the guidance of experienced counsel to help them recognize the local corruption red flags and to navigate through such regulations.

6. Anti-corruption Policies and Training Programs

Historically, officers and other personnel employed by multinational companies with subsidiaries in Brazil were not familiar with the FCPA, the UK Bribery Act or with any local anti-corruption regulation. This lack of awareness imposes a considerable risk on companies doing business in Brazil.

A comprehensive and well-documented anti-corruption policy and training program can minimize the risk of charges under the

FCPA or mitigate the penalties in any enforcement action. With respect to the UK Bribery Act, these measures can be key in avoiding liability entirely (the statute provides that companies will not be held liable for the corporate offense of failure to prevent bribery if the company can establish that it had "adequate procedures" in place to avoid corrupt payments).

The policy should reflect a commitment by top-level management to prevent bribery; that commitment should be demonstrated by making senior managers responsible for its implementation. The procedures should be proportionate to the bribery risk a company may face. Assessment of potential external and internal risks of bribery on the company's behalf should be led by a top-level manager. Risk assessment should be periodic, informed and well-documented. The policy and training should make clear top managements' "zero tolerance" for bribery and should cover, in addition to bribery, gifts and payments to foreign officials and business counter-parties, charitable donations, hospitality and travel, and the requirement for maintaining accurate and complete accounts.

Importantly, the company's policies and procedures need to be clear, circulated widely to its employees and easily accessible. Training of employees should be documented and periodic. Enhanced anti-corruption training should be provided to employees and managers in high-risk positions, for example those who deal with government officials and regulators, and those who solicit business. There should be clear lines of communication for employee questions and the ability to anonymously report problem conduct.

7. Third Party Due Diligence is Crucial

The company's due diligence procedures in relation to persons or entities that perform services for or on the company's behalf is a critical component of an anti-corruption policy because the company will be held responsible for the actions of its agents and intermediaries. Companies should insist that its agents and joint venture partners have equivalent anti-bribery procedures and certified compliance in place. A good practice is for companies to insist on training key personnel of their intermediaries and business partners. Although it is impossible to completely eliminate the risk imposed by third parties, this risk can be mitigated by proper due diligence of potential contractors, sub-contractors, suppliers, and intermediaries. In addition, including express anti-corruption terms in contracts executed with third parties can be helpful to avoid further problems and to defend the company in case charges are brought under anti-corruption laws. The risks presented by third parties in Brazil should not be underestimated, mainly because of the more relaxed local regulations and the absence of a clear anti-corruption business culture in the country.

8. Monitoring and Review of Anti-Corruption Program

An anti-corruption policy and procedures program should not be static, but should be subject to ongoing review and assessment. Periodic reviews involving compliance and internal audit personnel should test the implementation and effectiveness of the policies, continually looking for and investigating "red flags" indicating potential corruption risk. However, regardless of the good work an internal team may be doing, should the company have any suspicions of potential risks related to anti-corruption regulations compliance, it is advisable to conduct an external audit. A team of highly qualified outside lawyers and auditors will likely be more efficient and impartial in conducting an investigation.

Although not required by Brazilian law, several local subsidiaries of international companies doing business in Brazil have successfully implemented compliance mechanisms and processes. Hotlines, questionnaires and control mechanisms can make all the difference when a specific business falls under detailed investigation of cross-border enforcement authorities. Compliance officers need also to have proper knowledge not only of local corruption legislation but also of international treaties and specific statutes of jurisdictions of interest, such as the place where the controlling entity of the corporation has its headquarters.

9. Anti-Corruption Due Diligence is Crucial in the Acquisition of Companies in Brazil

Detailed and specific anti-corruption due diligence is of paramount importance when considering establishing a presence in Brazil through acquisition of a Brazilian company or by entering a joint-venture arrangement with a Brazilian partner. Fierce competition and a maturing anti-corruption compliance culture in Brazil may have lead the local company to seek competitive advantages through improper payments in the past. Enforcement officials are likely to hold the successor company responsible for past corrupt payments by the acquired company. Due diligence should include detailed and documented scrutiny of labor and service agreements, as well as obtaining sufficient information to fairly evaluate corruption risk by measures such as submitting questionnaires to key officers in the target company. Use of counsel and consultants experienced in these diligence steps is key to

minimizing the risk of unpleasant post-acquisition liability.

10. Unlike the U.S., Brazilian Laws and Regulations Generally Do Not Require Self-Reporting

Public companies and companies in highly-regulated industries in the U.S. are quite familiar with the obligation to self-report to local regulators when they discover incidents of non-compliance with regulations. Failure to self-report can itself be a crime under certain circumstances. In the foreign bribery context, U.S. public companies often self-report to the SEC or the DOJ if they discover potential FCPA violations. Private concerns without public company reporting obligations sometimes self-report to the DOJ as well. In the UK, authorities similarly expect and encourage self-reporting to regulators. Such self-reporting involves a complex analysis of the potential benefits and risks of self-disclosure. In Brazil, however, the corporate self-reporting culture is not well-developed. Under Brazilian law, there is no such thing as a "duty to report a crime." Brazilian criminal law incorporates and respects the principle of "non-self incrimination." No one in Brazil can be held liable for not reporting the existence of a crime, if the occurrence of such crime is known to a specific individual. On the other hand, in recent investigations in Brazil involving economic crimes, such as antitrust violations or certain white collar crimes, the strategy of awarding whistleblowers with immunity deals or less severe penalties has been used on occasion. As experienced in other jurisdictions, the use of the so-called "leniency agreements" or "plea bargaining" has allowed Brazilian law enforcement authorities to go after the bigger offender or dismantle complex and entangled corruption schemes with assistance from the inside.

Indeed, regardless of the lack of a "duty to report a crime" in Brazil or the possible agreements by chance available in economic crimes prosecutions, international companies operating in Brazil and Brazilian companies operating abroad should be aware of their obligations under any foreign regulations applicable to their businesses, notably due the OECD provisions related to international cooperation between the member countries.

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Considering all the challenges of mitigating corruption risk and establishing a viable anti-corruption compliance program in Brazil, it is clear that the issue must be treated carefully. The FCPA, the UK Bribery Act and similar laws are complex and often demand professional assistance to ensure compliance. Although a thorough anti-corruption policy and procedures, proportionate to a company's business and risk profile, are not without cost, the investment is worthwhile, considering the severe penalties for non-compliance with such regulations.