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Preparing for Brazil's New Anti-Corruption Law: What In-House Counsel Should Know

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Earlier this year, the Brazilian government approved a sweeping anti-corruption law known as the Brazilian Clean Companies Act ("BCCA" or "Act"), which is set to take effect on January 29, 2014. The new law provides for a wide range of administrative and legal penalties for violators, and is as broad as—if not broader than—the U.S. Foreign Corrupt Practices Act ("FCPA"). As Brazil's economy continues to surge, and the Brazilian government continues to promote a vigorous anti-corruption agenda, companies that do business in Brazil must ensure that their policies and procedures are satisfactory. This advisory provides an overview of the anti-corruption enforcement risk in Brazil, summarizes the new law, compares it to the FCPA, and offers practical compliance suggestions for in-house counsel.

Anti-Corruption Enforcement Risk in Brazil

In addition to the corruption risk encountered by companies while transacting business in Brazil, there is now increased regulatory risk created by the enactment of the BCCA.

High Corruption Perception Score. Brazil has historically received a middling-to-poor ranking on Transparency International's Corruption Perceptions Index, which is a primary benchmark used by Western law enforcement and anti-corruption practitioners.

Intense Scrutiny by American Regulators. Brazil has been the focal point of numerous high-profile FCPA investigations by the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), the two American regulators tasked with enforcing the FCPA. More than a dozen major FCPA cases have focused on business conducted in Brazil, which places the country near the top of the list in terms of the volume of DOJ/SEC investigative activity. Moreover, U.S. regulators have also repeatedly

focused on anti-competitive conduct in Brazil, and such investigations can often spur subsequent anti-corruption investigations.

Government-to-Government Cooperation. Unlike the governments of many other high-risk countries, such as that of Russia, the Brazilian government has embraced a very aggressive posture towards corruption. While this obviously culminated in the enactment of the BCCA, the government had begun focusing intently on combatting corruption well before that historic measure was passed. As a new generation of political leadership has assumed the reins in Brazil's democracy, fighting corruption has emerged as an effective political issue that allows politicians to separate themselves from the "old ways." Indeed, in several recent cases, the Brazilian government played an important role assisting Western prosecutors to investigate and build cases. We anticipate this trend to accelerate in the years ahead, augmented by the new Act.

Local Law Challenges. Brazil operates under a federal system of government similar to that of the United States. As a result of this system, local law challenges can often emerge that present unscrupulous officials with the ability to potentially coerce bribes at several stages of a transaction or project.

Corporate Ownership. As with other nations confronting corruption risk, it can be sometimes challenging to determine (i.e., "know your customer") the ownership structure and composition of companies in Brazil. While one may be able to determine the corporate ownership of large, publicly held state-owned corporations without a thorough due diligence, it can be difficult to determine the ownership and the influence of the state on the governance of smaller, privately held companies.

M&A Activities. One of the recent economic trends in Brazil is for established U.S. companies to purchase entrenched Brazilian incumbents, many of whom have a dominant market position in their respective space. Given Brazil's corruption history, such purchases may carry significant anti-corruption enforcement risk given the reality that in many countries (such as the United States), the purchaser "buys" any misconduct of the acquired entity. This risk arises not only in the context of acquisitions, but also in strategic combinations such as joint ventures. As a result, purchasers must take every step to ensure that the target's market position has not been the result of graft.

The Brazilian Clean Companies Act

Generally speaking, the BCCA takes a somewhat similar approach to anti-bribery as does the United States under the FCPA. Where there are differences, however, the Act goes beyond the FCPA approach.

Before discussing what's new, it's important to note what has not changed: the scope of criminal liability. In Brazil, criminal liability for anti-corruption violations is limited to individuals, and the BCCA does not change this. Nor does the Act change the existing criminal anti-bribery offense under the Brazilian Criminal Code, which requires that the government prove that the defendant offered or promised a benefit to a government official in exchange for the official's agreement to take an action (or forbear) within the scope of the official's duties.

That having been said, the BCCA will usher in a host of significant reforms that are relevant to virtually every aspect of anti-corruption compliance in Brazil. These include the following:

Expanded Scope of Coverage and Strict Liability. The BCCA provides for administrative and civil strict liability for foreign and domestic corporations that "promise, offer or give, directly or indirectly, any undue advantage to a public servant or a third person related to him," or that fund efforts or use a third party to do so. This is one of the main points in which the BCCA differs from the FCPA. Under the FCPA, the government must prove that a defendant willfully violated the FCPA. The fact that a company subject to BCCA

may be held liable for violation thereof—even though it had no knowledge of such violation committed by an employee and had all necessary compliance programs in place—has been a profound concern for general counsels in Brazil.

Corporate Defendants. While corporations still cannot be pursued criminally in Brazil, the BCCA arms Brazilian regulators with powerful tools, such as strict liability, to pursue corporate wrongdoers—both domestic and foreign. With respect to the latter, the Act takes a broad approach to foreign corporations, and considers any entity with a registered office, branch, or other representation in Brazil to be subject to Brazil jurisdiction.

Application to Public Bidding Process. As an example of coverage that is broader than the FCPA, the BCCA penalizes corporations that engage in wrongdoing in the public bidding process. This includes prohibitions against bid rigging and other fraudulent conduct during a public bidding process.

Internal Governance and Incentives for Voluntary Disclosure. Like the FCPA, the BCCA encourages corporations to implement “internal mechanisms and procedures for integrity,” which can subsequently be used to qualify for reduced penalties. However, unlike the FCPA, the Act also includes significant statutory incentives that encourage voluntary disclosure. For example, the BCCA includes leniency provisions that self-disclosing entities can avail themselves of if they detect potential wrongdoing prior to it coming to the attention of the government, cooperate thereafter, and prevent further misconduct. Obtaining leniency would exempt the corporation from some of the Act’s penalties and could reduce the applicable fine by two-thirds.¹

Robust Sanctions. Corporations that violate the BCCA will face significant administrative sanctions, including fines of up to 20 percent of their gross revenue in the preceding year. If such a figure cannot be calculated, a fine between R\$6,000 and R\$60 million (approximately \$26 million in U.S. dollars) will be assessed. If a legal action is filed, corporations will be subject to additional penalties, ranging from disgorgement to mandatory dissolution.² Corporations may also be banned from receiving any subsidies, grants, or loans from public bodies or public financial institutions for up to five years. Finally, corporations that are penalized will be listed in a national registry.

Successor Liability. Under the BCCA, the responsibility of a corporation survives even if it is involved in a merger or acquisition. However, the successor entity will generally only be required to pay fines and full compensation for the damage caused to the limit of the assets transferred; other penalties may apply if the corporation acted fraudulently.

Strategies for In-House Counsel to Consider

In light of the intersection between corruption risk in Brazil and the realities of the aggressive new anti-corruption enforcement matrix set forth in the BCCA, in-house counsel should take prudent steps to ensure their business models are able to manage risk without undermining the company’s core mission. In-house counsel may wish to consider the following:

Audit the Company’s Existing Anti-Corruption Policy and Procedures. Many companies, in Brazil and elsewhere, may not have revised their anti-corruption policies and procedures within the past several years. For any company for which that is the case, in-house counsel should conduct a detailed compliance

¹ The law provides that such a leniency agreement “does not relieve the person’s legal obligation to make full reparation for the damages caused.”

² The law provides for mandatory dissolution when the corporate status has been used to facilitate or promote the commission of unlawful acts, or the entity was formed with the intent to conceal or disguise illicit interests or the identity of the beneficiaries of the acts committed.

review of the company's anti-corruption policies and procedures. The BCCA offers generous benefits to companies that maintain comprehensive and credible anti-corruption programs, and no company doing business in Brazil should risk losing such benefits by virtue of inaction.

Conduct Targeted Anti-Corruption Due Diligence. Under both the BCCA and the approach taken by U.S. regulators under the FCPA, targeted anti-corruption due diligence represents a company's first line of defense in the acquisition setting. Such due diligence should be conducted by seasoned anti-corruption counsel and should focus on a range of potential risk factors, including the nature of the industry, role played by the government, and revenue stream sourcing, to name three examples. Effectively gauging risk pre-acquisition can have a number of benefits, including avoiding successor liability issues and driving a better deal (lower valuation). We believe it is likely that Brazilian regulators—like their U.S. counterparts—will consider the quality of the due diligence to be a critical factor in charging decisions under the BCCA.

Monitor Media for Potential Red Flags. As the pace of prosecutions continues to grow—both in Brazil and in the United States—so too will media coverage. In-house counsel should stay abreast of all active anti-corruption and antitrust investigations that relate to the company's geography, competitors and lines of industry. Such investigations can often breed investigations of other companies, and thus, in-house counsel should be aware of existing enforcement trends both to protect the company and as a means of highlighting (for the business side of the company) the need for anti-corruption compliance.

Consider Special Policies for the World Cup and the Olympics. With Brazil set to host the World Cup in 2014 and then the Summer Olympics in 2016, every company doing business in Brazil should consider whether it needs a special policy, procedures or training for certain employees regarding potential entertainment at these events. The Beijing Olympic Games in summer 2008 are instructive, as Western prosecutors have investigated—and prosecuted—several significant anti-corruption matters relating to the Games. These have included bribe payments relating to infrastructure projects as well as improper entertainment gratuities. At a minimum, every company doing business in Brazil should have clearly defined policies for entertainment during these events—including rules and approval requirements for things such as tickets, transportation, hotel accommodations, etc.

Conclusion

With the BCCA, Brazil has joined the club of countries that have robust anti-corruption laws offering steep penalties for corporate wrongdoers. We anticipate that Brazilian regulators will aggressively enforce the Act and continue to collaborate closely with their American counterparts. In-house counsel can manage these risks with an appropriate set of precautions, including the measures outlined above.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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