Brazil’s New Anti-Corruption Law

Implications for Multinational Companies
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Anti-Corruption Enforcement

• Emerging Trend Towards Multi-National Enforcement
  – Foreign Corrupt Practices Act
  – U.K. Bribery Act
  – Chinese Investigations
  – Brazil’s Anti-Corruption Law
Historical Background

• Existing Legal Framework
  – Brazilian Penal Code
  – Law on Administrative Improbity (No. 8,429/1992)
  – Bid Law (No.8,666/1993)
  – Code of Ethics for Public Officials of the Brazilian Federal Administration (Decree No. 1,171/1994)

• International commitments
  – United Nations Convention Against Corruption
  – Inter-American Convention Against Corruption - OAS
  – OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Historical Background

BRAZIL

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* Transparency International
Historical Background

- International Pressure
- Conviction of Governmental Officials for Corruption ("Mensalão" – Criminal Lawsuit 470)
- 2013 Demonstrations and Riots
Substantive Terms: Unlawful Conduct

• **Corruption**: To Promise, Offer or Give, Directly or Indirectly, an Undue Advantage to a Public Official, or to a Related Third Party

• Use of an Intermediary with the Intent to Conceal the Interests or the Identity of the Beneficiaries (Requires Intent)

• Financing, Subsidizing or Otherwise Sponsoring Unlawful Acts (Strict Liability)
Substantive Terms: Unlawful Conduct

• Against Public Bids and Contracts
  – Several Actions that Result in Bid Rigging
  – Fraudulently Obtain any Undue Advantage or Benefit in Connection with Amendments or Extensions of Contracts
  – Manipulate or Defraud the Economic-Financial Equilibrium of a Contract

• Create Obstacles to Investigations or Audits by Public Officials or Entities
Substantive Terms: Who is Subject to the Law

• All Brazilian Corporate Forms
  – Includes all Subsidiaries of Multinational Companies
• Foundations
• Associations
• Foreign Companies with Headquarters, Branches or Representation in Brazil
Substantive Terms: Innovations

• Administrative Sanctions
  – Corruption
  – Fraud in Public Bids
  – Imposition of Difficulties to Investigations

• Strict Liability
  – No Need to Prove Culpability

• Penalties Imposed on Companies
  – Previously, Only Individuals for Most Cases

• Extra-Territorial Reach
  – Acts by Brazilian Companies Against Foreign Public Administration, Even When Abroad
Substantive Terms: Administrative Sanctions

• Administrative Fine
  – 0.1% to 20% of Gross Revenue
  – BRL 6K to BRL 60 Million

• Extraordinary Publication of the Decision
  – In Major Newspaper
  – On Website
  – At the Company Premises
Substantive Terms: Judicial Sanctions

- Disgorgement of Assets, Rights or Values that were Acquired as a Result of the Offense
- Suspension or Prohibition of the Activities of the Legal Entity
- Prohibition from Obtaining Incentives, Subsidies, Grants, Donations or Loans from Public Authorities, for up to Five Years
- Compulsory Dissolution of the Legal Entity
Substantive Terms: Factors for Application of Penalties

- Seriousness of the Violation
- Advantage Obtained or Intended
- Whether or not the Violation was Consummated
- Degree or Danger of Damage
- Negative Effects Produced
- Ability to Pay
- Value of the Contracts
- **Whether the Legal Entity has Cooperated with the Investigation**
- **Existence and Effectiveness of the Compliance Program**
Substantive Terms: Procedure

Entire process: 180 days

OGC = Office of the Comptroller General
Incentives to Prepare

• Regulation is Still Pending

• Compliance Programs
  – Can Result in Reduced Sanctions

• Self-Reporting Mechanism
  – Can Result in Reduced Sanctions
  – Leniency Program
Incentives to Prepare

• Possibility of Leniency Agreement if the Legal Entity:
  – Is the First to Come Forward and Demonstrates its Interest to Cooperate
  – Ceases its Involvement in the Practice
  – Confesses its Participation and Cooperates with the Investigation
Incentives to Prepare

• Leniency Agreement May Result in:
  – Exemption from the Extraordinary Publication
  – Exemption from Prohibition from Obtaining Tax Incentives and Donations
  – Fines Reduced up to 2/3

• Leniency Program does not Exempt Companies from Obligation to Repair any Damages Caused
Implications for Compliance

• Penalty Mitigation Provisions Place Premium on Effective Compliance Programs

• Strict Liability for Acts of Agents Also Provides Substantial Incentive for Building Compliance Infrastructure

• Penalties Provisions Offer Clues as to Those Elements of Compliance Programs Likely to Be Given Weight
  – Internal Mechanisms and Procedures on Integrity
  – Effective Application of Code of Conduct
  – Whistleblower Incentives
  – Audit
Implications for Compliance

• What are Key Elements of An Anti-Corruption Program for Companies Doing Business in Brazil?
  – Initial Assessment of Compliance Risks
  – Statement of Anti-Corruption Compliance Policy, Including Explanation of Consequences of Non-Compliance
  – Assigned Compliance Responsibility within Senior Management
  – Specified Compliance Procedures
    • Due Diligence with Respect to Agents and Other Intermediaries
    • Due Diligence with Respect to Joint Venture Partners and Acquisitions
    • Standard Compliance Provisions in Contracts
    • Limitations on Promotional Expenditures
Implications for Compliance

• What are Key Elements of an Anti-Corruption Program for Companies Doing Business in Brazil? (Contd.)
  – Fair and Accurate Record-Keeping
  – Orientation and Repeated Training of Key Personnel
  – Periodic Self-Certification Process
  – Procedures for Reporting Violations or Suspected Violations
  – Periodic Compliance Audits to Test Policy’s Effectiveness
  – Periodic Risk Assessments and Corresponding Modifications of Compliance Program

• Be Alert for Regulatory Clarification
Implications for Internal Investigations

• More Enforcement Bodies Implies Increased Risks of Detection and Prosecution
  – Risk Assessment No Longer Limited to Prospects of U.S. Enforcement
  – Growing Potential for Simultaneous or Successive Enforcement Actions in Multiple Jurisdictions
  – Internal Investigations Take on Increased Importance
Implications for Internal Investigations

• Assessing Risks requires *Facts*, not Assumptions
  – Investigation at Direction of Counsel
  – Preliminary Assessment to Determine Investigative Scope
  – Fact-Gathering Process Must be Defensible
  – Reassess Risks and Strategies as Facts Develop
Implications for Internal Investigations

• Global Investigation, but Subject to Local Laws
  – Local Data-Protection Laws
  – Local Privacy Laws
  – Local Employment Laws
  – Importance of Local Legal Expertise
Implications for Disclosure Decisions

• Decisions Must Consider Costs/Benefits on Global Basis
  – Likelihood of Enforcement Action(s)
  – Possible Incentives
    • Potential Availability of Leniency Programs
    • Potential to Reduce Sanctions Through Self-Disclosure even Absent Leniency
  – Possible Disincentives
    • Difficult to Limit Disclosures
    • Difficult to Preserve Privileges
    • Expanded Potential for Civil Litigation
Thank you for joining us.

Questions? Please email evilleda@mayerbrown.com