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# Anti-Corruption Compliance in Brazil: The Challenges Facing US Companies

## Global Strategies Webinar Series

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# Introduction

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## The Compliance Environment in Brazil: Perspectives from the United States

- Brazil Represents One of the Most Dynamic Opportunities for Business in the World Today
  - Brazil is the Top Recipient of Foreign Direct Investment in Latin America and Second Only to China Among Developing Countries
  - Brazil's Economy Has Grown Rapidly Despite the Global Recession, with Projections of About 7 Percent in 2010
  - Brazil is a Major Magnet for US Businesses; the United States is the Largest Source of Foreign Direct Investment in Brazil

## The Compliance Environment in Brazil: Perspectives from the United States

- Brazil is Perceived as a Challenging Compliance Environment
  - Transparency International Ranks Brazil 69<sup>th</sup> of 178 in the World in Its *2010 Corruption Perceptions Index*, with an Index of 3.7 out of 10, Slightly Above China (3.5) and Well Above Argentina (2.9), but Well Below Chile (7.2)
  - The World Bank/IFC *Enterprise Survey 2009* Reports that Nearly 70 Percent of Surveyed Companies Perceive Corruption as a “Major Constraint” for Doing Business in Brazil
  - The World Economic Forum *Global Competitiveness Report 2010-2011* Finds that Corruption is Among the Most “Problematic Factors” in Doing Business in Brazil, Ranking Below Taxes, Inadequate Infrastructure, and Government Inefficiency

## The Compliance Environment in Brazil: Perspectives from the United States

- Structural Features of Brazil that Raise Corruption Risks
  - Large, Decentralized Government (Federal, 26 States, Thousands of Municipalities)
  - Extensive State Involvement in Energy Sector
  - Relatively Underpaid Civil Service at All Levels
  - Common Use of Third-Party Intermediaries
- Cultural Features of Brazil that Raise Corruption Risks
  - Lack of Compliance Culture Among Political Elites
  - Custom of Personal Favors in Business/Government Relations
- Hosting the 2014 World Cup and the 2016 Olympics

## The Compliance Environment in Brazil: Perspectives from Brazil

- Current Compliance Environment
  - Incipient Anti-Corruption Laws Applicable to the Private Sector
  - Low Level of Enforcement of the Existing Anti-Corruption Laws
- Additional Features of Brazil that Raise Corruption Risks
  - Bureaucracy
  - Low Level of Transparency
  - Low Level of Accountability
  - Impunity for Corrupt Behavior
  - Cultural Aspects
  - Growing Presence of the Government in the Economy

## FCPA Enforcement Actions Arising from Conduct in Brazil

- Panalpina (2010): Alleged Payments by Subsidiary to Customs Officials to Import Various Products Unlawfully
- Nature's Sunshine Products ("NSP") (2009): Alleged Payments by Subsidiary to Customs Officials to Import Unregistered Consumer Goods
- Control Components ("CCI") (2009): Alleged Payments to Petrobras Officials to Secure Purchase of Control Valves
- Bridgestone (2008): Alleged Payments by Agents to State-Owned Enterprise ("SOE") Officials to Secure Purchase of Industrial Rubber Products

## FCPA Enforcement Actions Arising from Conduct in Brazil

- Tyco Int'l (2006): Alleged Payments by Subsidiary to Municipal Officials to Secure Contracts for Construction Projects
- Baker Hughes (2001): Alleged Payments by Agent to Officials to Secure Approval of Corporate Reorganization
- International Material Solutions (“IMS”) (1999): Alleged Payments to Military Official to Secure Bid for Trucks
- Control Systems Specialist (“CSS”) (1998): Alleged Payments to Military Official to Secure Purchase of Surplus U.S. Equipment



## FCPA Enforcement Actions Arising from Conduct in Brazil

- Reportedly Pending SEC Investigations
  - Sitel (disclosed 2006): Alleged Accounting Irregularities by Brazilian Subsidiary Relating to Municipal Taxes in Connection with Customer Service Centers
  - Gtech Holdings (disclosed 2004): Alleged Payments to Officials by Brazilian Subsidiary to Secure National Lottery Business

## FCPA Enforcement Actions Arising from Conduct in Brazil

- Principal Risks Identified by Prior Enforcement Actions
  - Types of Activities: Importing (Panalpina, NSP); Government Procurement (Tyco, CSS); Tax Payments (Sitel); Corporate Reorganization (Baker Hughes)
  - Types of Customers: SOEs (CCI, Bridgestone, Gtech Holdings); Military (IMS, CSS); Municipalities (Tyco)
  - Sectors of Economy: Energy (CCI, Bridgestone); Defense (IMS, CSS); Infrastructure (Tyco); Consumer Goods (NSP); Services (Sitel, Gtech)
  - Types of Actors: Management (NSP, CCI); Subsidiaries (Panalpina, NSP, Tyco, Sitel, Gtech); Agents (Bridgestone, Baker Hughes)

## Addressing the FCPA Risks of Doing Business in Brazil

- Assessing the FCPA Risks of the Company's Brazilian Operations
  - Identifying Structural, Cultural, Activity, Customer, Sector, Actor Risks in Brazil
  - Evaluating the Strength of Brazil-Specific Headquarters Controls
  - Anticipating New Compliance Challenges (e.g., World Cup, Olympics)

## Addressing the FCPA Risks of Doing Business in Brazil

- Mitigating the FCPA Risks Posed by Subsidiaries
  - Setting the Tone at Headquarters
  - Selecting Subsidiary Management Experienced in FCPA Risks
  - Maintaining Strong Accounting Controls
  - Training Subsidiary Personnel
  - Conducting FCPA Audits

## Addressing the FCPA Risks of Doing Business in Brazil

- Mitigating the FCPA Risks Posed by Intermediaries
  - Instituting an Effective Due Diligence System
    - Gathering FCPA-Relevant Background (e.g., Government Relationships)
    - Checking References re Qualifications and Integrity
    - Obtaining Other Third-Party Validation
  - Requiring Contractual Safeguards
    - FCPA Warranties and Covenants
    - Termination Options
    - Compensation Levels and Reimbursement Procedures
    - Training Requirements and Auditing Rights
  - Applying Same Procedures to Joint Venture Partners

## Addressing the FCPA Risks of Doing Business in Brazil

- Mitigating the FCPA Risks of Government Interactions
  - Instituting an Effective Gifts/Entertainment Policy
    - Articulating Reasonable Boundaries
    - Providing Accessible and Responsive Oversight
    - Ensuring Accurate Record-Keeping
  - Instituting an Effective Facilitating Payments Policy
    - Defining Terms
    - Setting Authorization Procedures
    - Ensuring Accurate Record-Keeping

## Addressing the FCPA Risks of Doing Business in Brazil

- Attending to the Basics
  - Know Your People
  - Encourage Communications
  - Document Your Compliance

## Parallels between Anti-Corruption Laws of Brazil and Those of the United States

- Public vs. Private
  - Brazilian Anti-Corruption Laws Focus on Government Officials vis-à-vis Private Sector
  - Companies are not Subject to Penalties
- Company vs. Individual
  - Brazilian Anti-Corruption Laws Impose Penalties Only to the Individual, Even if Such Individual Acted on Behalf of a Company
  - Lack of Criminal Liability for Companies
- Penalties: Imprisonment
  - Penalties for Corruption Crimes are Mostly Imprisonment



## The Terms of Brazilian Anti-Corruption Laws

- International Conventions Signed and Ratified by Brazil
  - OECD Anti-Bribery Convention
  - UN Convention Against Corruption
  - OAS Inter-American Convention Against Corruption
  - UN Convention Against Transnational Organized Crime

## The Terms of Brazilian Anti-Corruption Laws

- Brazilian Penal Code (Decree Law Nr. 2,848/40)
  - Traffic of Influence (art. 332): “Requesting, requiring, charging or obtaining, for oneself or to another person, advantage or promise of advantage in exchange for influencing an act carried out by a public official in the exercise of his/her functions.”
    - Penalty: Imprisonment from 2 to 5 Years, and a Fine
  - Active Bribery (art. 333): “Offering or promising an undue advantage to a public official to induce him/her to perform, omit or delay an official act.”
    - Penalty: Imprisonment from 2 to 12 Years, and a Fine

## The Terms of Brazilian Anti-Corruption Laws

- Brazilian Penal Code (contd.)
  - Active Bribery in an International Business Transaction (art. 337-B):  
“Promising, offering, or giving, directly or indirectly, any improper advantage to a foreign public official or to a third person, in order for him/her to put into practice, to omit, or to delay any official act relating to an international business transaction.”
    - Penalty: Imprisonment from 1 to 8 Years, and a Fine
  - Traffic of Influence in an International Business Transaction (art. 337-C):  
“Requesting, requiring, charging, or obtaining, for oneself or for another person, directly or indirectly, any advantage or promise of advantage in exchange for influencing an act carried out by a foreign public official in the exercise of his functions relating to an international business transaction.”
    - Penalty: Imprisonment from 2 to 5 Years, and a Fine

## The Terms of Brazilian Anti-Corruption Laws

- Brazilian Anti-Money Laundering Law (Law Nr. 9,613/98)
  - “To hide or dissimulate the nature, origin, location, disposition, handling or propriety of goods, rights or values which result, directly or indirectly, from the following offences: I. drug trafficking; II. terrorism and its financial support; III. weapons and ammunition trafficking; IV. kidnapping; V. crimes against the Public Administration; VI. crimes against the national financial system.”
    - Penalty: Imprisonment from 3 to 10 Years, and a Fine

## The Terms of Brazilian Anti-Corruption Laws

- Rules Applicable to Government Officials
  - Code of Conduct for High-Ranking Federal Government Officials
    - They can not Receive Salary or Any Other Remuneration from a Private Source in Violation of the Law, or Transport, Lodging, or Any Other Favors from Individuals
    - Their Participation in Seminars and Conferences may be Sponsored by the Private Sector Provided that (i) It's a Matter of their Personal Interest; (ii) the Information on any Financial Compensation and/or Payment of Travel Expenses Made by Private Sponsor is Duly Disclosed; and (iii) the Sponsor Must have No Interest in any Decisions that can be Made by the Official
    - Acceptance of Gifts is Authorized in Only Three Cases: (i) If the Gift has No Financial Value; (ii) If the Value of the Gift is Less than BRL100 (USD58); or (iii) If the Gift is a Matter of Protocol on the Part of a Foreign Official and Involves Reciprocity.

## The Terms of Brazilian Anti-Corruption Laws

- Rules Applicable to Government Officials (contd.)
  - Code of Ethics of BNDES (National Economic and Social Development Bank – owned by the Federal Government)
    - The BNDES Officials are not Allowed to Receive any Monies, Gift, or Advantage, Including Personal Invitations for Travel and Other Benefits, Except Where the Invitation is Made by a Foreign Official with Reciprocity
    - Acceptance of Gifts is Authorized Only in the Following Cases: (i) If the Gift has No Financial Value; or (ii) If the Gift is Distributed by the Entity as Courtesy, Advertisement, or Promotion or in Special Events or in Dates of Celebration, as Long as the Financial Value of the Gift is BRL100 or less (USD58), Considering the Sum of the Value of All Gifts Sent by One Entity
  - Penalties: Reprimand to the Government Official

## The Enforcement of Brazilian Anti-Corruption Laws

- Federal Governmental Authorities
  - Office of the Comptroller General (CGU)
    - Corruption Prevention and Strategic Information Secretariat (SPCI)
  - Brazilian Court of Audit (TCU)
  - Brazilian Central Bank (BC)
  - Brazilian Securities and Exchange Commission (CVM)
- Challenges to Raise the Level of Enforcement
  - Adequate Laws and Regulations Applicable to Companies, Including Effective Penalties to Both Public and Private Sectors
  - Improvement in the Judicial Power

## Anti-Corruption Law Trends in Brazil

- Federal Bill 6,826/10
  - Establishes Administrative and Civil Liability for Companies in Case of Acts of Corruption Involving Brazilian and Foreign Public Administration
    - Bribery
    - Fraud in Public Tenders
    - Use of Intermediaries to Hide or Dissimulate Real Intentions
    - Labor and Social Security Tax Evasion
  - Applicable to All Companies with Headquarters, Branches, or Representation in Brazil



## Anti-Corruption Law Trends in Brazil

- Federal Bill 6,826/10 (contd.)
  - Proposed penalties
    - Fines from 1 to 30 Percent of the Company's Annual Gross Income (if It is Not Possible to Calculate the Annual Gross Income, the Fine will Range from BRL6,000 (USD3,480) to BRL6,000,000 (USD3,480,000))
    - Full Compensation for the Damage
    - Prohibition to Bid for Future Government Procurement Contracts and to Receive Incentives, Subsidies, Grants, and Loans from Public Entities, Including Financing
    - Agents Controlled by the Government, from 2 to 10 Years
    - Publication of the Conviction
  - Companies will be Subject to Penalties Even if They do not Obtain Any Gain as a Result of Corrupt Behavior
  - Level of Internal Compliance will be Relevant to the Definition of the Penalty

## Anti-Corruption Law Trends in Brazil

- Improvement of Anti-Corruption Laws Applicable to Companies
- Dissemination of Compliance Culture among Brazilian Companies
- The Level of Enforcement is Likely to Increase, but at a Slow Pace

## Application of the United Kingdom Bribery Act 2010

- Takes Effect April 2011
- Applies to Anyone That Conducts Business in the United Kingdom, Even if the Violation is Perpetrated by a U.S. Company While Doing Business in Brazil
- Bars Bribing a Foreign Official
- Also Bars Failing to Prevent Bribery, Making a Company Strictly Liable for Bribery Perpetrated by Anyone Acting on its Behalf If It Does not Have “Adequate Procedures” to Ensure Compliance
- Includes No Exception for Facilitating Payments
- Provides for Unlimited Fines, Ten Years in Prison

Anti-Corruption Compliance in Brazil

## Questions & Answers

- Use Q&A Function via Webex

## Conclusion

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