KING & SPALDING

Client Alert

Special Matters & Government Investigations Practice Group

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Uptick In Coordinated U.S.-Brazil Anti-Corruption Enforcement

As companies expand across borders and invest more heavily abroad, foreign enforcement authorities are following the example set by the U.S. Department of Justice and the U.S. Securities and Exchange Commission in directing resources toward aggressive enforcement of their respective countries' laws against bribes paid to government officials. Today, international companies must consider not only the anti-corruption regulatory regimes in their home jurisdictions, but also the criminalization and prosecution of bribery in other locales — sometimes very distant ones — where they do business.

Although corporate compliance and enforcement priorities could shift under the new administration, the U.S. government is unlikely to significantly curtail anti-corruption enforcement, especially following the record-breaking penalties imposed in 2016. Indeed, as foreign agencies begin to more actively share the resource burden of global investigations, U.S. enforcement dollars could reach even further. This point is underscored by the recent uptick in coordinated, multijurisdictional investigations into corruption issues, including a spate of high-profile investigations involving authorities in the U.S. and Brazil. Most notably, Brazilian firms Odebrecht SA and Braskem SA paid a record-setting penalty of over $3.5 billion to resolve a bribery case involving American, Brazilian and other authorities. The stakes have never been higher.

For corporations operating in Brazil and throughout Latin America, anti-corruption compliance has become an especially fraught regulatory challenge. The road to compliance requires navigating not only the Foreign Corrupt Practices Act, but also relatively young laws in other jurisdictions, including the Brazilian Clean Company Act (CCA).

The FCPA and CCA

The FCPA, enacted in 1977, prohibits bribery of foreign officials and imposes accounting and recordkeeping requirements on covered entities. The statute has a wide ambit both in terms of the entities and individuals covered and the definition of foreign officials to whom corrupt payments may not be paid. Further, years of escalating enforcement attention by U.S. authorities — including the DOJ and SEC — have made the FCPA a top concern for corporate leaders. Particularly in Brazil, companies linked to the much-publicized Petrobras matter have experienced firsthand the U.S. government's appetite for anti-corruption investigations, along with a growing willingness by American authorities to partner with foreign regulators to enforce U.S. law. As former DOJ Assistant Attorney General Leslie Caldwell explained in public

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remarks made last November, American authorities have "strengthened [their] coordination with foreign counterparts — sharing leads, making available essential documents and witnesses, and more generally working together to reduce criminals' abilities to hide behind international borders."

The CCA, on the other hand, has been in force only since 2014, and Brazilian law enforcement priorities are still developing. The law provides for corporate administrative liability (including monetary fines ranging from 0.1 percent to 20 percent of a company's annual gross revenue in the year prior to the filing of the administrative proceeding) as well as civil liability, which can result in disgorgement, suspension, or interruption of corporate operations. The CCA also sets forth strict and joint civil liability on domestic and international corporations doing business in Brazil for bribery of Brazilian or foreign public officials, and it imposes liability on companies involved in bid-rigging schemes. However, unlike the FCPA, the CCA does not provide for criminal prosecution.

Changes to the scope and implementation of the CCA are ongoing, with arguably the most significant change issued on March 18, 2015 (Brazilian Presidential Decree 8,420/15). This decree supplemented the CCA by clarifying the administrative procedure for imposing liability on companies, the assessment of fines, the evaluation of compliance programs, books and records provisions,[1] and the parameters of leniency agreements. In addition, some states in Brazil, such as São Paulo, have issued their own decrees to further regulate the administrative procedure and leniency agreements.

Odebrecht and _Rolls-Royce_: A Sign of Things to Come?

The coordinated efforts of U.S. and foreign enforcement authorities were on display in a number of major corporate anti-corruption resolutions announced in 2016. One was the record-setting $3.5 billion settlement involving Odebrecht and Braskem that made front-page news worldwide in December. American and Brazilian authorities — as well as Swiss authorities — were involved in that investigation. Specifically, Odebrecht, which is a Brazilian construction and engineering firm, pleaded guilty in Brooklyn federal court to conspiracy to violate the FCPA and also resolved parallel proceedings with the Ministério Público Federal in Brazil and the Office of the Attorney General in Switzerland. On the same day, the Brazilian petrochemical company Braskem entered into a separate guilty plea for violating the FCPA and settled with the SEC, the Ministério Público Federal in Brazil, and the Office of the Attorney General in Switzerland.

According to publicly available settlement documents, Odebrecht paid approximately $788 million in bribes to government officials in various countries, using a sophisticated structure within the company dedicated to managing such payments. Braskem, an Odebrecht affiliate, contributed millions in payments to this internal bribery system. In a press release announcing the resolution, the FBI emphasized the coordinated investigative efforts among U.S. and foreign authorities, noting, "[o]ur commitment to work alongside our foreign partners to root out corruption across the globe is unwavering and we thank our Brazilian and Swiss partners for their tireless work in this effort."

The U.S. and Brazilian authorities have by no means limited their partnership and coordination to holding Brazilian companies accountable for allegedly unlawful behavior. In January 2017, the British manufacturer Rolls-Royce PLC agreed to pay over $800 million pursuant to a global resolution relating to bribes in connection with government contracts. The settlement involved U.S., U.K., and Brazilian authorities, with Chief Andrew Weissmann of the Fraud Section of DOJ's Criminal Division describing it as "yet another example of the strong relationship between the

[1] The CCA does not mention "books and records," however, the Decree requires that companies in Brazil make and keep books and records that accurately and fairly reflect the transactions and dispositions of the assets of the company, much like the FCPA's books and records provisions.

United States and U.K. Serious Fraud Office and Brazilian Federal Prosecution Office, and the collective efforts to ensure that ethical companies can compete on an even playing field anywhere in the world."

Practical Tips for Navigating Multijurisdictional Investigations

Given the reality of broad, multijurisdictional anti-corruption investigations and the significant consequences thereof, corporations doing business from, or within, Brazil must be mindful of a few key cross-border considerations.

First, in Brazil, there are many government-owned enterprises and other entities connected to individuals who might be considered government officials for purposes of the FCPA or CCA (*e.g.*, state- run hospitals, public utilities). Accordingly, it is critical for multinationals operating in Brazil to perform comprehensive due diligence on all potential business contacts to evaluate whether they are — or resemble in status or function — government officials.

Second, when handling investigations involving U.S. and Brazilian prosecutors, companies must consult both Brazilian and U.S. counsel with experience in handling international investigations. Clear communication with the respective prosecutors' offices is crucial, and the methods and process by which successful communication is achieved can be different in the two jurisdictions. While the SEC and DOJ are jointly responsible for enforcing the FCPA in the U.S., the responsibility for enforcing the CCA is assigned to the highest-level jurisdiction in Brazil affected by the underlying bribery. Thus, the prosecutor's office — state or federal — responsible for enforcing the CCA in a particular instance will correspond to the level of the official involved in the alleged bribe. Experienced Brazilian and American counsel are required to navigate these nuances.

Third, at the administrative level, the enforceability of the CCA is decentralized and, once more, varies according to the government official connected to the bribe. The Ministry of Transparency, Supervision and Comptroller General of the Union (MTSC) has exclusive federal authority to initiate administrative proceedings related to the bribery of foreign officials. However, for the bribery of domestic officials, the MTSC shares jurisdiction with the federal, state and/or municipal level agency at issue. Indeed, every federal, state and municipal level government agency is responsible for administratively enforcing the CCA and must enact its own decrees regulating its respective administrative procedures. To set forth just one possible scenario, if a bribe implicates an official of the state of São Paulo, that local government is responsible for enforcement at the administrative level pursuant to a state decree. Brazil has a federative legal system; thus, until the first CCA enforcement actions are brought, important questions will remain unresolved concerning concurrent enforcement proceedings. Thoroughly assessing and understanding these questions in consultation with counsel is the prudent course of action for almost any major company in Brazil.

Fourth, companies must be careful to consider differences in handling evidence in the two countries during the course of an investigation. Restrictions on information that can (or must) be provided to American authorities may differ from restrictions on what can (or must) be provided to Brazilian authorities. Although the attorney-client privilege is treated similarly in U.S. and Brazilian litigation, Brazil has additional restrictions surrounding the disclosure of client information, even in the case of an explicit client waiver. For example, in Brazil, an attorney may not be permitted to disclose client information obtained over the course of the representation unless the disclosure is expressly authorized by the client and it is essential for the client's defense.

Finally, companies must recognize that corporate criminal liability may apply differently in Brazil than in the U.S. Put simply, the Brazilian legal system generally does not authorize criminal liability for corporate entities; rather, criminal liability may fall upon the individual(s) who manage the company if he or she has performed an act deemed a crime under Brazilian law. Thus, while a company may have limited exposure to a corporate criminal charge in Brazil, the company's executives may need to seek a separate judicial settlement in Brazil at the same time as an administrative

leniency agreement is negotiated for the corporate entity. This legal landscape is quite unlike that of the U.S., where, by contrast, corporate entities (including parent companies) may be pressured into pleading guilty or negotiating deferred prosecution and non-prosecution agreements to resolve allegations of corporate criminal conduct.

Companies seeking to do business in Brazil must monitor these anti-corruption developments closely.[2] Bribery cases in Brazil are likely to remain a hot topic, with additional high-profile corporate investigations rumored to be announced in 2017. It is crucial, not only for companies, but also for their executives and boards, to require their counsel to closely coordinate efforts in both North and South America in the unfortunate event of a complex multijurisdictional investigation.

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King & Spalding's Global Anti-Corruption and FCPA practice is led by the former Assistant Attorney General in charge of the DOJ's Criminal Division and includes many former senior government officials from the DOJ and SEC. Our lawyers have extensive experience on both sides of the table and a strong network of relationships in the global enforcement community. This gives us the perspective and credibility to counsel you on multiple fronts and across borders – and help reduce your risks when doing business overseas.

We assist clients in a wide variety of industries with every aspect of FCPA counseling and representation, and we do so in every region of the world. Our team of lawyers has long experience advising companies on compliance issues, and includes former compliance professionals from major international corporations. Armed with that experience, we develop and implement compliance and due diligence plans that help you anticipate, prevent and resolve issues before they become more serious. We manage internal investigations and government inquiries effectively and efficiently – no matter how complex and far-reaching they are. Our experience as government investigators and our high level of credibility with enforcement authorities gives us the judgment to guide clients to the best possible outcome, and to do so out of the public eye.

When multiple parallel investigations in different countries are required, we have the depth to handle them in close coordination – ensuring every issue is uncovered and addressed efficiently. Our team practices from eight offices in the U.S. and 11 other international offices and has handled anti-corruption matters in more than 70 countries around the globe.

[2] For example, in 2015, federal prosecutors in Brazil launched a campaign to close ranks on corruption and proposed ten measures to further this objective. The initiative, known as "10 Measures Against Corruption" (Measures), were ultimately presented to the Brazilian Congress as a bill of law. In late 2016, the House of Representatives approved a drastically different version of the Measures that, among other things, would allow defendants in corruption investigations to sue investigators for abuse of power. Prosecutors have threatened to resign if the current version of the Measures is signed into law. Discussions about the Measures are expected to continue in 2017.