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Brazil's Clean Companies Act
Friend or Foe for Multinationals?

Deloitte Forensic

Bribery has long been an accepted part of doing business in many parts of the world, including Latin America and other emerging markets. Over the past decade, however, the U.S. government has increasingly championed its Foreign Corrupt Practices Act (FCPA) to crack down on companies that engage in bribery involving government officials. In 2010, the United Kingdom joined the campaign by passing the U.K. Bribery Act, which takes a similarly strong stance against bribing government officials. Together, the two laws have ushered in a new era of compliance requirements for multinationals. Now, in addition to the FCPA and the U.K. Bribery Act, companies must also consider the efforts of emerging market countries as they wage their own wars against bribery. On August 1, 2013, after three years of legislative effort and public debate, Brazil added to the league of anti-corruption legislation by enacting Law No. 12.846, also known as the Clean Companies Act (CCA).

The CCA, effective as of January 29, 2014, signals Brazil's desire to create a more transparent business environment and Brazilian authorities will likely be looking for some dramatic examples to signal their dedication to that cause. As enforcement efforts develop, both domestic and multinational companies in Brazil may find themselves facing severe consequences for violations. The penalties for breaching the CCA could include fines of up to 20% of a company's prior year gross revenue, disgorgement of profits resulting from bribery and, in some cases, the dissolution of the entire entity. For many companies, particularly multinationals, the penalties would also include intangible, but significant, reputational damage.

In addition to the new liabilities it presents, the CCA could generate benefits for multinationals doing business or seeking to do business in Brazil. While local subsidiaries in Latin America have historically resisted "foreign" legal imperatives, the fact that Brazilian domestic regulators can now legally enforce anti-bribery laws gives multinationals a stronger platform to implement successful compliance programs. From an M&A perspective, the law is likely to spur domestic companies aiming to attract foreign buyers or investors to proactively address risks and compliance gaps.

Getting the potential benefits of the new law without the adverse consequences means ensuring that compliance programs are strong long before regulators come knocking. While the Brazilian law has much in common with the wide-reaching U.S. and U.K. laws, companies cannot assume that any controls and procedures set up to address the U.S. and U.K. laws will be adequate to meet the requirements of the new one. And in the short term, Brazilian acquisition candidates that were not previously subject to the U.S. or U.K. laws may have little or no semblance of a compliance program. To put themselves in the best possible position for growth in the region, multinationals should review and strengthen their anti-corruption compliance efforts for operations already in Brazil, and consider how to sharpen diligence reviews in the case of potential acquisitions.

The law and what it covers

The CCA — which applies to any company operating in Brazil, including multinationals — prohibits direct and indirect efforts to bribe public officials in Brazil or in other countries. This ban extends to schemes that use third parties to carry out a bribe, and also covers bribery attempts that are ultimately unsuccessful. In addition, the CCA makes it illegal to try to rig or defraud public bids in any way, or to tamper with government investigations that probe suspicious activity.

This legislation heralds a number of major changes in how Brazilian law views bribery. One new aspect is that corporations are now liable for corrupt acts that their directors, officers, employees or agents commit. What's more, the CCA establishes a strict liability standard under which companies can face penalties for illegal acts even if there is no proof of management intent or negligence. These provisions stand in sharp contrast to older anti-corruption laws that mostly pertained to individuals and were lightly enforced. For those looking to acquire, it's important to note that the CCA includes successor liability for companies that acquire organizations previously in violation of the law.

The CCA casts a wide net, applying to all business activities in Brazil no matter how small, indirect or temporary they may be. Besides domestic Brazilian entities, the law covers multinational companies that have their headquarters, a branch, or other representation in Brazil, as well as to foreign partners in joint ventures or other investments in the country (even when the investment is not a majority position). It also extends to short-term operations related to events such as the World Cup or Olympics.

As far as what is considered illegal, the term "corrupt acts" includes bribing domestic and foreign public entities or officials, as well as fraudulent acts related to public contracts or tenders. These terms are fairly general and regulators are likely to apply them broadly to a range of people and situations.

Prohibited acts under the CCA

- Direct or indirect acts of bribery, including offers to bribe
- Financial or other support to the bribe activity or to its concealment
- Bid-rigging or fraud in public procurement
- Tampering or interfering with government investigations

Further signaling the gravity of this law, administrative fines could be steep; ranging from 0.1% to 20% of an entity's gross revenue in the year before investigations begin, or R$6000 to R$60 million (roughly U.S.$2500 to U.S.$25 million) as an alternate fine calculation, if the gross revenue cannot be assessed in a particular case. Under no circumstances can the fine be less than the amount by which the responsible entity benefits from the bribe. Furthermore, these fines may be published publicly. Judicial penalties apply as well, and may include the disgorgement of financial benefits the entity received as a result of the bribery, a ban on receiving any form of government subsidy or assistance, and in some cases, the dissolution of the entire entity.

How rigorously enforcers will pursue the law and apply penalties is still unknown. If Brazil follows the global trend, regulators there will share information within and across borders, potentially multiplying the effect of any violations they discover. In the U.S., for example, the Securities and Exchange Commission and the Department of Justice have developed an ongoing collaboration to bring both civil and criminal charges against public companies, and the U.S. agencies are now working with regulators in Europe when conducting investigations.

Review checklist for multinationals currently operating in Brazil

Despite the fact that liability does not hinge on a company's intent, the law does leave room for some leniency if a company maintains good controls and cooperates in an investigation. As enforcement trends begin to play out, multinationals can help protect themselves by performing regular risk assessments regarding their Brazilian operations, and solidifying a compliance program to mitigate identified risks. The programs should include both proactive and reactive elements, such as written policies and procedures, employee training programs, controls around the retention and monitoring of third parties and investigation protocols.

Multinationals should verify that Brazilian operations have the necessary elements in place and that they are comprehensive and robust. Some key elements are listed below:

☑ **Anticorruption policies and procedures** — These should include written policies regarding the allowable and prohibited uses of: petty cash, travel, meals and entertainment, gifts, sponsorships, donations and political contributions, as well as appropriate retention bonuses, compensation schemes and monitoring procedures for third parties, including disbursements and authorization levels for expenditures.

☑ **Communication and training programs** — Companies should make local employees and relevant third parties aware of the CCA's implications for the company and for their particular jobs. Training sessions may also cover how to raise concerns if an employee or third party suspects wrongdoing.´ Disciplinary consequences for non-compliance with policies should also be communicated to employees and relevant third parties.

☑ **Risk-tiered due diligence on third-party intermediaries, including sales agents, consultants, distributors and brokers** — Using local agents is often necessary to navigate complex local laws, but multinationals should be aware that they can now face charges for any wrongdoing that an agent commits while working on their behalf. To help contain any liabilities associated with third party intermediaries, pre-contract due diligence procedures should include

investigating an agent's professional history to identify previous legal or compliance problems, the use of any unusual compensation schemes, and former or current connections to the government.

☑ **Internal Controls** — Companies complying with the FCPA or U.K. Bribery Act will likely find their current controls provide a good base for compliance with the CCA. In reviewing the controls, companies will want to look for gaps that do not address the CCA's requirements, as well as the current state of reporting and response systems, such as hotlines.

☑ **Monitoring to test effectiveness of program and identify gaps** — Companies will want to embed periodic monitoring and testing of the compliance program and of controls to assess that they reasonably address corruption risks. Identified gaps should be addressed on an ongoing basis.

☑ **Investigation protocols** — While it is not pleasant to play out the scenario of investigators knocking on the door, it's crucial that a company have a thoughtful plan for responding to Brazilian regulators. This becomes even more important as the CCA allows various public entities from the federal to state to local levels to open investigations into potential violations. Accordingly, a response framework should include the possibility that multiple government entities will be involved, and may have parallel sets of information requests for the company. Companies should consider who is on their team of "first responders," and what local resources (internal and external) they may be able to use when it comes to working with domestic Brazilian authorities.

What the CCA means for multinationals looking to acquire operations in Brazil

For companies looking to make acquisitions or investments in Brazil, the CCA means the potential for new liabilities. Similar to the FCPA regime, companies may be held liable for the previous acts of businesses they acquire, even if they pre-date the acquisition. That means due diligence processes must be even more thorough. Executives will have to push past the inevitable protests at a target company that certain information is immaterial, irrelevant or unobtainable, and make sure that they can factor whatever liabilities they find into decisions of whether or not to make an offer, and at what price.

Conversely, the new environment that the CCA signals could make both pre-acquisition diligence and post-acquisition integration much easier, priming local Brazilian employees to accept rigorous internal controls systems more readily. It should also help diminish the concerns many multinational acquirers face about how the business will perform once home country policies prohibit bribes and the like. And if illegal practices become less common as a result, liabilities should also decrease in the long-term.

Conclusion

Although the CCA took effect January 29, 2014 it will likely be some time before the Brazilian government's enforcement agenda becomes clear. A case history, as well as additional guidance from the government, should help clarify many of the gray areas in the legislation such as which Brazilian entities will be responsible for investigating potential violations, how compliance programs will be evaluated, and how fines will be calculated in practice. Meanwhile, companies need to be prepared, knowing that local regulators will be looking for outstanding examples to show their strength.

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