

Brazil's New Anti-Corruption Law: FCPA Compliance is No Longer Enough

Understanding Key Provisions, Ensuring Compliance and Mitigating Legal Risks

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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A blue-tinted world map is visible in the background. In the lower right, there is a stylized globe showing the Americas. A large, flowing blue ribbon graphic curves across the bottom half of the slide.

The Brazilian Anti-Corruption Act of 2013

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Thad McBride

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Agenda

- Introduction
- Brazilian Anti-Corruption Act (BAA) of 2013
- The U.S. Foreign Corrupt Practices Act (FCPA)
- Compliance Challenges and Best Practices
- Questions

International Scope

- Cooperation among different countries and jurisdictions (e.g., Siemens)
- Non-U.S. laws and enforcement on rise
- Transparency International
 - Corruption Perceptions Index
 - Global Corruption Barometer



Brazil Background



Key facts about Brazil

- Population of 198.7 million
- World's 7th wealthiest economy with a GDP of US\$ 2.223 trillion in 2012
- World Cup in 2014 / Olympic Games in 2016
- Giant offshore oil and iron reserves
- Primarily a civil law system

Why was the BAA needed?

- Brazil ranked **72** (out of 174 countries) in TI's Corruption Perceptions Index in 2013
- Brazil wants to keep attracting foreign investment
- Following signature of the OECD, UN and OAS anti-bribery conventions, Brazil made significant changes to criminal liability statutes BUT
- Without a new act passed by the Brazilian Congress, **legal entities could not effectively be held liable for corruption**

Why was the BAA needed? (cont'd)

- Presidential elections scheduled for 2014
- Local authorities have recently reported that at least 50% of all corruption cases investigated in Brazil are elections-related
- Brazil-headquartered multinational companies have scored poorly in anti-corruption efforts according to a recent TI report

Additional background

- Initiative of the Federal Executive in 2009
- Finally approved in 2013 amid a major scandal/trial of officials close to the former president at the Supreme Court, some of whom were arrested in November 2013
- Also finally approved amid a downturn of Brazil's economy, demonstrations across the country by dissatisfied citizens [and the imminent presidential election year (2014)]

Compliance Challenges



Compliance challenges

- Trade barriers to protect local industries
- Complex laws
 - Difficult to comply
 - Incentive to pay to navigate administrative processes



Local Custom

- More relaxed attitude toward bribery than in U.S.
- Bribery may be accepted part of business
- Relationships built on trust
 - Personal and family relationships
 - Resistance to formal written agreements

Third Parties

- Reliance on third parties in new markets
 - Agents or other representatives
 - Local counsel, accountants
 - Customs brokers, **a must in Brazil!**
 - Distributors, dealers

- In some jurisdictions (Brazil included) / industries, a local rep is required

The Brazilian Anti-Corruption Act



BAA Overview

- Prohibits bribes + to any official (local or foreign), including State Owned Companies' officials
- Gives opportunities for the public administration to
 - (a) investigate and apply fines and penalties and
 - (b) coordinate legal proceedings with prosecutors
- Broad scope (*i.e.*, any legal entity, branch, office, etc., whether domestic or foreign)

BAA Overview (cont'd)

- Enforcement policy is outlined in the Act.
 - Rigid (as in not flexible) settlement policy with regards to settlement always with admission of guilt;
 - No opportunity for administration to waive conditions for settlement agreements.

BAA Overview (cont'd)

- If violated, administration can apply:
 - Fines will be directly applicable by the Administration:
 - Fines ranging from 0.1% to 20% of the after-taxes revenue earned in the year preceding the year when investigation or audit started*; and/or
 - Wide disclosure of the event depending on severity and other standards (*i.e.*, with added reputational risks).

* Fine will range from c. \$3,000 USD to c. \$30 million USD if revenue of the investigated company cannot be used for application of the 0.1% to 20% fine.

BAA Overview (cont'd)

- Administration plus prosecutors can also seek:
 - At the Judiciary:
 - Unspecified damages (no cap but no clear criteria either)
 - Forfeiture of assets, rights or funds which stem directly or indirectly from a violation
 - Partial suspension or interruption of its activities
 - Compulsory dissolution of the legal entity
 - Prohibition from receipt of incentives, subsidies, subventions, donations or loans from public bodies or entities and public or state-controlled financial institutions, for the minimum term of one (1) and maximum term of five (5) years
 - Freeze of assets, rights or funds

BAA Overview (cont'd)

- What else to worry about?
 - The Judiciary can be slow and damages to reputation and other damages can be aggravated by a slow response from the Brazilian Judiciary.

Illegal bribes + under the BAA

- 5 categories of illegal actions:
 - Promise, offer or gift of “illegal advantages” to official;
 - Funding “illegal advantages” and other illegal actions under the Act;
 - Use of an alter ego to conceal identity or interests;
 - Fraud in tenders or governmental contracts;
 - Blocking of governmental investigations.

Illegal bribes + under the BAA

- Illegal advantages to official
 - Directly or through official related party;
 - In exchange for what? Anything?
 - No break for facilitation payments.

Officials under the BAA

- A foreign official is defined as “whoever plays a public role, job or function in state bodies, entities or diplomatic representations of a foreign country or in a legal entity controlled directly or indirectly by that foreign country or in international public organizations, even if on an interim or unpaid capacity”.
- But the BAA applies to local officials (of the Executive, Legislative or Judiciary) and officials of Brazilian State Owned Companies.

Purpose under the BAA

- Strict liability: a company will be held liable if (a) the fact, (b) the result and (c) the link between (a) and (b) are proven.
- If the link between a fact and a result is *reasonably clear* (after governmental investigation is completed) = company will probably have the burden of proving legality of its actions
- What does *reasonably clear* mean?

Internal Controls

- Fines and sanctions should be lower if a company has adopted “integrity internal mechanisms and procedures, audit and incentives to reporting and *effective* application of codes of conduct and ethics” (emphasis added). (VIII of Section 7)
- Also: “Criteria for evaluation of the mechanisms and procedures contemplated in VIII of Section 7 above shall be defined by regulation issued by the Federal Executive”.

Expected Enforcement

- The Act will be effective late January 2014.
- Regulations still to be issued by the Federal Executive (when and what is still uncertain).
- Decentralized governmental investigations at local and regional levels is a rule, except for foreign officials. Plenty of room for lack of consistency in enforcement of the act.

Expected Enforcement (cont'd)

- Settlements are going to be possible under the BAA even if the standard is strict liability, with some limitations, including as to a requirement “to take full responsibility” (as opposed to with no admission of guilt).
- But prevention is definitely the best way forward.

The Foreign Corrupt Practices Act



FCPA Overview

- Prohibits bribes to **foreign** officials
- Requires issuers to maintain:
 - Accurate books and records
 - Robust internal controls
- *Aggressive* enforcement

Bribery

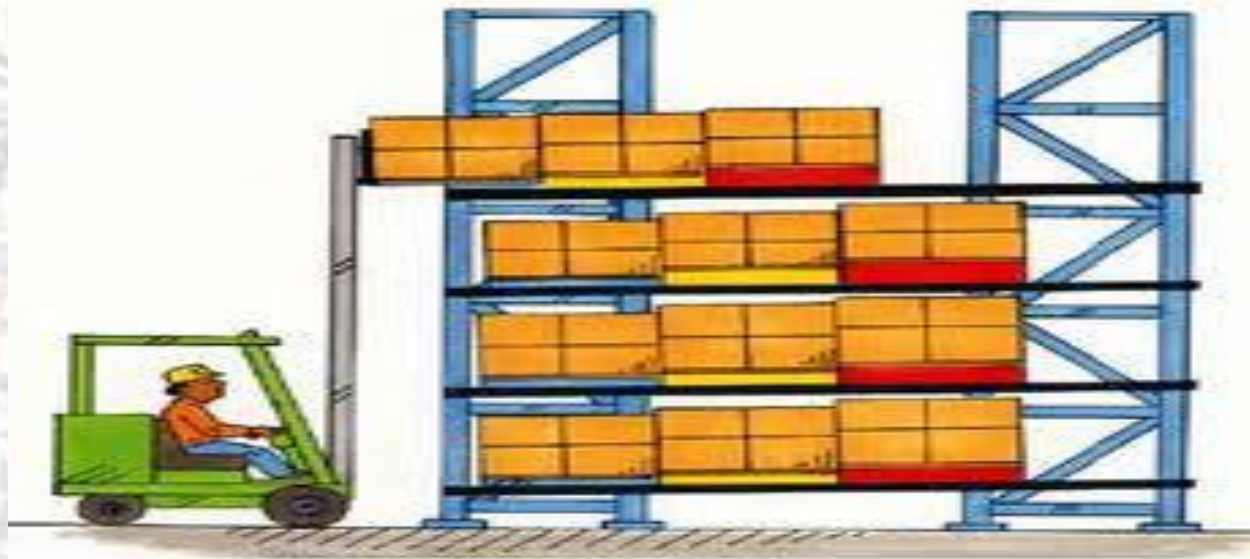


Foreign Official

PETROBRAS



Prohibited Purpose



Books & Records / Internal Controls



Recent Enforcement

- BizJet (2013)
 - European airline's U.S.-subsidiary that provides aircraft maintenance, repair, and overhaul services
 - Four **executives**, including CEO, allegedly bribed officials in Mexico, **Brazil**, and Panama to secure contracts
 - Paid directly and *indirectly* through shell company
 - \$11.8mm settlement with DOJ

BAA v. FCPA



BAA vs. FCPA

- Many similarities but some differences
- BAA extends further than FCPA
 - Strict liability except for limited situations
 - Offense to bribe **local** officials
 - Offense to hinder competition in governmental tenders
 - No exception for facilitation payments
 - Settlements are conditional on always taking full responsibility (no no admission of guilt, no waiver of that condition possible)

BAA vs. FCPA (cont'd)

- Under the BAA, criminal liability of individuals needs to be handled separately
- Under the BAA, in the event of a merger, the liability of the surviving entity will be limited to fines and damages and further limited to the value of the subject assets (except in the case of fraud or clear intent to commit fraud, which must be proven).

BAA vs. FCPA (cont'd)

- Enforcement will be mostly decentralized at local agencies.
- Whether or not an official contributes to an illegal action, fines (and public disclosure), in principle, are not diminished or eliminated.
- Damages may/could theoretically be reduced by contribution of an official to an illegal action under the BAA and despite vetoed language (and accompanying reasoning for the veto).

Compliance Best Practices



Culture of Compliance

- Consistent message from the top
- Clear overarching policy supported by *specific procedures*
- Tangible commitment to compliance
- Reward / penalize personnel

Compliance Resources

- Designate capable compliance official(s)
- Budget to appropriately administer compliance program
- Periodic reporting to Board

Training

- Communicate standards and training
- **TRANSLATE**
- Train transaction partners as needed



Due Diligence

- Obtain detailed information about partners
 - Check references
 - Review public records
- Engage local counsel
- Consider additional steps if risk is high:
 - Background check
 - Interviews
 - Require training

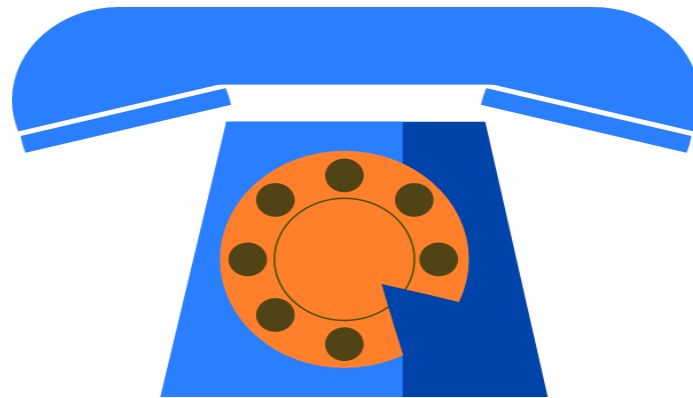


Internal Controls

- Recordkeeping
 - Keep copies of training materials
 - Maintain complete **files of due diligence**
- Accounting
 - Follow authority matrix when necessary
 - Require adequate approvals and supporting documentation before reimbursement
 - Train *local accounting* personnel
 - Monitor **petty cash**

Reporting

- Reporting
 - Expect personnel to report issues that arise
 - Provide for anonymous reporting (including reporting tools that work AROUND THE WORLD)
 - Address and remediate issues that are identified



- **No retaliation in case of a good faith report**

Audit

- Reviewing and evaluating
 - Periodic internal reviews of your policies / processes
 - Identify areas of weaknesses and strengths
 - Assign clear responsibility for compliance improvements

Especially critical in landscape where laws conflict

Thank You!

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