

VEIRANO ADVOGADOS

How to comply with foreign and domestic anti-corruption laws

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FCPA Provisions

Anti-bribery
provisions

Books and records
provisions

FCPA – Who is subject?

- Any company that has issued securities that have been registered in the US (including American Depository Receipts – ADRs, e.g. Petrobras) or who is required to file periodic reports with the SEC
- All US nationals, citizens or residents or any company with principal place of business in the US
- Non-US companies and individuals who cause an act in connection with corrupt payment in the US territory (broad definition: e-mail, wire transfer)
- Officers, directors, employees, agents and shareholders acting on behalf of any of the above

FCPA Key Concepts

- “Thing of value”
 - Broad definition
 - Not only cash or cash equivalent
 - No *de minimis* value
- “Foreign Official”
 - Broad interpretation
 - not only traditional government officials, but also employees of state-owned or state controlled entities (“SOE”)

FCPA Enforcement Trends

- Increase of number of cases and severity of penalties
- Reliance on statutes other than the FCPA
- More follow on civil lawsuits (Panalpina)
- More investigations and prosecution of individuals
- FCPA compliance as a top corporate governance issue
- Disgorgement of profits (Siemens)
- Investigation domino effect
- More international cooperation (UK's SFO)

UK Bribery Bill

- any bribery is illegal – not only of foreign officials, but also non-governmental officials, i.e., private citizens
- only defense available: credible evidence that the company had “adequate procedures” in place to prevent persons associated from committing bribery offenses (no facilitation payments allowed)
- strict liability crime when a company fails to prevent bribery
- extraterritorial application
- penalties for individuals for up to 10 years in jail per offense and unlimited fines

OECD Guide to Good Practices

- Clear and visible anti-corruption policy supported by high level administration
- Sense of responsibility for compliance in all levels of the company
- Independent compliance structures
- Constant communication and training
- Anti-corruption measures and disciplinary procedures to deal with violations
- Control procedures - gifts and entertainment, travels, political contributions, charitable donations, sponsorships, requests, extortion and facilitation payments
- Commercial partners - due diligence of risks when hiring, information to partner on company's anti-corruption policy and reciprocal commitment by the partner

Brazilian Anticorruption Rules

- Criminal Code - to request or receive, in one's own benefit or on behalf of a third party, illegal advantage, or accept a promise of illegal advantage (broad definition: money, gift, political influence, job request for a friend or relative)
- Public Tender Law - to frustrate or fraud the competitive characteristic of the public tender

Liability of Private Parties in Brazil

- Corruption, as defined, demands the participation of a public official either actively or passively
- Under the Corruption Law (Lei de Improbidade), a private party may be forced to reimburse the damages caused to the Government
- Rules of the Audit Court (Tribunal de Contas) – Upon confirmation of fraud, the Court may forbid a fraudulent participant in a public tender to participate, for the next 5 years, in any other public tenders
- No specific provision as to corruption between companies

Brazilian Laws are Territorial

- There is no law similar to FCPA with extraterritorial reach
- Laws apply to crimes committed in Brazilian territory and its extensions
- Crimes committed abroad may be subject to Brazilian law (e.g. crimes against State assets or assets of the Administration)
- By virtue of treaties signed by the Brazilian government

Other Applicable Brazilian Laws

- Professional Ethics Code of the Public Officials (1994)
- Code of Conduct of the Senior Officers of the Federal Administration (2000)
- Code of Ethical Conduct of Public Officials of the Presidency and Vice Presidency (2002)
- Law of Public Tenders, Antitrust Law, etc.

Bill of Law 6,826/10

- Liability of legal entities for acts against the public administration, national or foreign
- Liability of legal entity does not exclude individual liability of administrators or managers involved in the illegal activities
- Strict liability of legal entities for illegal acts committed on their behalf by any of their agents, even IF they acted without order or authorization
- Liability even if the illegal acts do not result in effective, direct or exclusive advantage

Industries of Concern and Relevant Risk Areas in Brazil

- Oil/Extractive Industries
- Infrastructure/Transportation
- Military Supply
- Customs
- Tax Authorities
- Intermediaries
- Interactions with employees of state-owned entities

Effective Ethics and Compliance Program

- Written program
- Board oversight
- Responsible persons (high level)
- Operating and reporting
- Management's record of compliance
- Communicating and training
- Monitoring and evaluating
- Consistent enforcement with incentives and discipline
- Right response
- Assessing the risk periodically

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Conclusion

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