

Coping with Legal Compliance in BRIC Countries and Other Emerging Markets

PricewaterhouseCoopers General Counsel Forum

Chicago

Thursday, October 16, 2008

Friday, October 17, 2008

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Corruption in BRIC Countries According to Transparency International 2008 Survey (180 Countries)

- China – 72nd
- Brazil – 80th
- India – 85th
- Russia – 147th

Background

- Enhanced enforcement climate
- Climate of CSR
- Application of company codes of ethics/business conduct
- Higher duty in “red flag” countries
- Importance of due diligence and compliance program

Focus of Presentations

- China – implementing compliance program
- Russia – compliance in transactional context (commercial and M&A transactions)
- Brazil – conducting investigations
- India – differences between FCPA and local law

China

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Preston M. Torbert

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China – General Background

- History
- Economic Development
- Short Term Perspective
- Examples
- Compliance's Perfect Storm

China's Anti-Corruption Legislation

- Official Bribery
 - Criminal Law
 - Opinion of July 8, 2007
- Commercial Bribery
- Improper Acts vs. Facilitating Payments

Enforcement Policies

- Strengthening Enforcement
- Enforcement against Taker vs. Giver of Bribe
- Increasing International Cooperation
- Increasing FCPA Enforcement
- U.S.-China Relations
- Relationship with Officials

China-Specific Requirements and Challenges

- Implementing an “Effective” Compliance and Ethics Program in China
- Challenges:
 - History, Economy, Perspective
 - Understanding the law

General Practice: Apply General International Compliance and Ethics Program

- Local law only reviewed for conflicts
- Another approach: Can local law make a program more “effective”?
- Examples from China:
 - Requirement for a Supervisor
 - Annual Inspection Report

Three Suggestions

- Make use of the position of Supervisor
- Emphasize training
- Remove disincentives to reporting

Other Issues with a Compliance and Ethics Program in China

- Relationship with government and party officials
- Chinese employment law
- Whistleblower protection
- Privacy, Data Protection, and Defamation
- CEO's commitment

Coping with Legal Compliance in Russia

Arthur L. George, Baker & McKenzie, Chicago

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Background to Corruption in Russia

- Long history during Soviet and pre-Soviet times
- Now one of most corrupt industrialized countries. Problem worsened under Putin, except perhaps in courts.
- New effort by Medvedev to combat corruption
- High level of scrutiny of foreign companies and foreigners by Russian stakeholders

Doing Business In Russia: Take Nothing for Granted

- “Hidden” government officials
- Offshore diversions
- “Black cash”
- Corrupt intermediaries: customs brokers, distributors, and agents
- “Designated” service providers
- The “audit temptation”
- “Commission” payments

Russian Anti-Corruption Legislation

- Criminal Code prohibits
 - bribery of “public officials” (definition differs from FCPA “foreign officials”)
 - commercial bribery (example: kickbacks)
- Civil Service Legislation generally prohibits Russian “civil servants” from accepting benefits and from participating in commercial activities (with limited exceptions)
- Civil Code prohibits giving gifts to civil servants with value exceeding 500 Rubles (or approximately \$20) in connection with their position

Russian Anti-Money Laundering Legislation

Russian Criminal Code prohibits financial and other transactions in monetary funds or other property:

- acquired as a result of the crime committed by this person, or
 - knowingly acquired by other persons illegally for the purpose of bringing the image of legality to the monetary funds or other property.
- Knowledge that the funds are proceeds of a crime is necessary
 - Proceeds of capital flight, tax evasion and non-payment of customs duties are excluded

Special Anti-Corruption Issues in Russia

- Hospitalities, gifts and entertainment
- Intermediaries
- International sales and importation (customs)
- Offshore structures/payments
- Mergers & acquisitions
- Charitable contributions

Commercial Transactions

- Legal problems include tax fraud, customs fraud, currency control violations
- Need due diligence on Russian business partners, intermediaries
- Beware of third-country parties and payments
- Check for involvement of government officials and bodies
- Commercial bribery (kickbacks)
- Need contractual provisions re compliance

Compliance in M&A Context: Exposure

- FCPA risk according to DOJ:
 - Cannot acquire the benefit of a bribe. Must exclude benefit from acquisition.
 - Risk of violation right after closing. Must correct problems and have “effective” compliance program as of closing. May need to fire violators.
- Compliance problems may necessitate asset deal
- Contractual provisions re compliance

Conducting Due Diligence in Russia

- Deal with sensitivity issues at outset
- Review the target's compliance policies and procedures and determine their effectiveness
- Review target's history with government officials/agencies, including any shareholdings or employment of government officials.
- Financial controls/payments to intermediaries:
 - “slush funds” and suspicious cash payments
 - excessive hospitality/travel and entertainment expenses/gifts
 - charitable contributions
 - third-party companies in Russia or offshore

Implementing Compliance Program in Russia (1)

- Fix problems discovered in DD and update DD before closing to test effectiveness of compliance program as of then
- Review elements of program including code of ethics for consistency with Russian law
- Follow legal procedures necessary to make program obligations enforceable at workplace
- Dovetail with CSR
- Hire local compliance manager financial director/controller

Questions?

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Conducting Internal Investigations in Brazil

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Brazil's General Scenario

- Political and economic stability
- Democracy is maturing
- No macro barriers to entry



However,

- Compliance issues still keep clients awake at night in Brazil
 - Bureaucracy/Corruption – FCPA
 - Tax/Customs duties and costs - High taxation
 - Intensification of local prosecution of illegal conducts and corruption practices
 - Increased collaboration between Brazil and foreign authorities (including U.S. authorities)



Overview of anti-corruption legislation

- No criminal liability for legal entities
- No commercial bribery
- Concept of public official is broad
- Acceptable Gifts & Hospitality x illegal bribe
- Facilitation payments
- Administrative Improbity Law



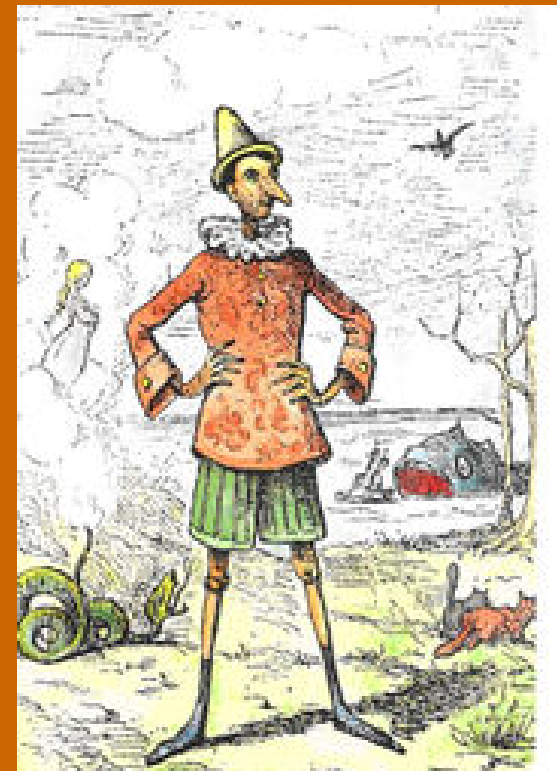
Top 5 Insights on Compliance Investigation in Brazil



The truth, the whole truth, and nothing but the truth...

Interviews and Questionings

- Investigated individuals and witnesses have the right to:
 - Not attend an internal interview;
 - Remain silent
 - Not tell the truth
 - And lie!
- Except in specific situations, employee cannot be terminated for cause for refusing to cooperate



Evidence / Discovery

- **There is no duty of discovery**
 - Documents can be requested – if you know that they exist!
 - Attorney-client privilege is recognized, but not a full guarantee in case of police raids and search and seizure actions
- **Importance of documents and expert examination**
 - Limited weight of oral evidence



Electronic evidence / retention

Electronic evidence

- Electronic data have been admitted as evidence in court

Document retention

- No general obligation to retain documents (with exceptions – e.g. tax, labor, etc.)
 - Is it allowed to destroy documents?
 - Before or after investigation/lawsuit begins?
 - What are the consequences?

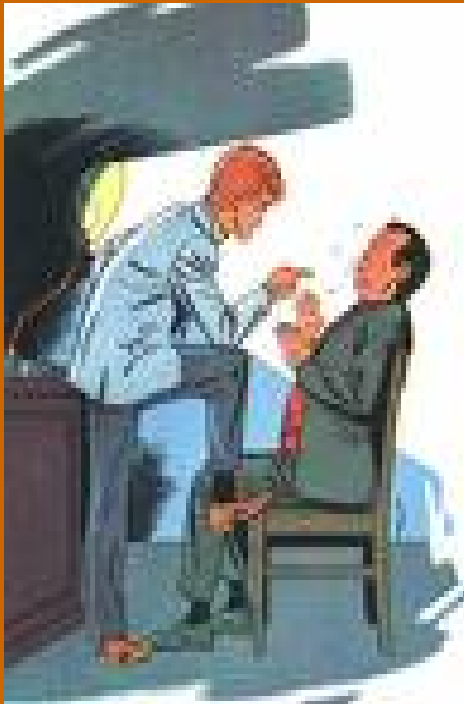


Data privacy

- Privacy is a Constitutional right
- Nevertheless...
 - Email and Internet monitoring have been admitted
 - Express notice to employees is advisable
 - Private e-mails – safest position is to review only with consent
 - Bank and tax information can only be accessed with court order



Moral Damages



- Avoid embarrassment of the investigated employees, interviewees and other people
- Interviews should be conducted with care
- Importance to take cultural differences into account (including language issues)
- Existence of suspicion over certain employees should not be disclosed

What to do next...

Measures when illegal practices are detected:



- Civil action to recover damages?
- Criminal measures?
 - Exposure of the company to full police investigation – no settlement
- Termination for cause
 - Timing is essential

Thank You!

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Coping with Legal Compliance Challenges in BRIC Countries and Other Emerging Markets

Differences between Indian Anti-Corruption Laws and FCPA and other Related Issues

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Sameer Desai

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Overview - Indian Legal System

- Well-developed legal system based on English common law
- Recently enacted laws based on commitments under international treaties
- Almost all laws and regulations written in English
- Higher courts conduct proceedings in English
- Judicial remedy fair, but delayed
- Equal legal protection to foreign and Indian investors

Major Areas of Compliance

- Employment regulations
- Customs and excise
- Sales tax and octroi
- Corporate laws
- Financial sector regulations
- Environmental regulations – central, state and local

Important Differences between FCPA and Prevention of Corruption Act ("POCA")

- Facilitation payments
 - FCPA: Permitted
 - POCA: Not permitted
- Geographical coverage
 - FCPA: Potentially extra-territorial coverage
 - POCA: Limited to acts performed in India

Important Differences between FCPA and POCA

- Plea bargain
 - FCPA: Typically available
 - POCA: Not available
- Related accounting and auditing issues
 - FCPA: Breach by listed corporations also triggers involvement of SEC and potentially stiff penalties.
 - POCA: Breach by listed Indian corporations may trigger involvement of Securities and Exchange Board of India (“SEBI”) but potential penalties are relatively low.

FCPA Issues – Fertile Grounds

- Customs, Excise and Sales Tax
- Labor
- Power, Water and other infrastructure
- Income tax assessments
- Lower level judiciary
- Environmental issues

Various Slush Fund Generating Methods of Indian Subsidiaries

- Sale of wastage
- Over-invoicing by suppliers / Under-invoicing by customers
- Increased payments to subcontractors, consultants and / or agents
- Phantom employees
- Phantom expenses

Anti-Corruption Regulations in India

- Prevention of Corruption Act
 - Both, giver and recipient liable
 - Persons involved liable for criminal and civil liability
 - Corporations and senior officers can also be found liable
 - Definition of “public servant” very wide; includes public sector employees
- Indian Civil Service Rules
 - Written invitations must be provided prior in time
 - Invitations must clearly detail complementary benefits
 - Invitations must be cleared by superiors prior to civil servant’s acceptance
- Anti-bribery provisions also in most government RFPs and contracts

Indian Approach to Internal Investigations

- Non-aggressive approach
- Must involve persons with knowledge of local language and customs
- Must always maintain cordiality and respect; avoid humiliation at all costs
- Age and status of investigators should match those of employees under investigation
- Pay special attention to non-verbal cues
- Do not expect express admissions
- Bribes do not carry similar level of social stigma

Measures When Illegal Practices Detected

- Termination of managerial employees:
 - Unless irrefutable evidence available, termination for convenience preferable
 - If termination for cause, expect extensive litigation with former employee
- If findings made public (including to SEC), expect police investigation of company and employees in India
 - Public prosecutors not empowered to enter into plea bargains
 - Investigation can cause considerable disruptions

Questions?

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Summary of Compliance Issues in BRIC

- Higher corruption, higher obligations
- Examine local law in addition to U.S. law
- Vet all commercial/M&A transactions
- Adopt and implement “effective” compliance program:
 - Consistent with local law and code of ethics
 - Adopt and implement so will be enforceable
 - Local compliance and control function