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Anti-Corruption Reforms in the BRIC Countries

By **Jeremy Zucker**

When the United States passed the Foreign Corrupt Practices Act (FCPA) in 1977, it made a long-term investment, arguably at the cost of near-term competitiveness, in the ability of the U.S. economy to raise corporate and ethical best practices globally. With a number of reforms now underway in Brazil, Russia, India and China (the high-growth, high-risk BRIC countries), it appears the investment is paying dividends: global anti-bribery reform is here to stay. At the same time, these developments expose multinational companies and their partners in BRIC countries to new obligations and additional compliance and enforcement risks.

Notwithstanding the recent anti-bribery reforms in the BRIC countries, these nations will continue to pose significant anti-bribery non-compliance risks in the near term. One gauge of bribery risk is provided by Transparency International's (TI) Corruption Perceptions Index (CPI). In 2013, all four BRIC countries scored below 50 on a 100-point scale (with 0 being highly corrupt and 100 being very clean). In the analysis below, we contextualize the recent anti-bribery reforms in each BRIC country and describe how these reforms may impact your anti-bribery risk assessments and compliance approach.

BRAZIL

Brazil is well-positioned to implement anti-corruption reforms in 2014. Over the past five years, Brazil's CPI score and ranking has improved slightly (from 37 to 42 out of 100, and from 75th to 72nd), nonetheless in 2013 Brazil scored higher on the CPI than

Russia, India, and China.

Brazil's recent progress may be attributed to the anticipation and eventual passage of the Brazilian Clean Company Act (BCCA) (Federal law number 12,846) in 2013. The new law took effect on Jan. 29, 2014. While largely similar to the FCPA, there are some notable distinctions of which companies operating in Brazil should be aware. For instance, the BCCA imposes strict civil and administrative (although not criminal) liability on foreign and domestic corporations that bribe public officials. A key distinction from the FCPA is that under the BCCA corrupt intent need not be proved. In addition, so-called facilitation or "grease" payments are not permitted under the BCCA. The Brazilian law also goes further than the FCPA by prohibiting fraud in public procurement, bid rigging, and contracts with public bodies, and by covering bribes made to both domestic officials in Brazil as well as foreign officials. Importantly, the BCCA provides explicitly that companies will receive credit for compliance programs.

The effectiveness of the new legislation will depend on how aggressively Brazilian authorities enforce the law. In this regard, since ratifying the OECD Anti-Bribery Convention in 2000, Brazil has only completed one prosecution for the bribery of foreign public officials. However there are reasons to be more optimistic about Brazil's recent commitment to enforcement. Both the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) have applauded Brazil's increased commitment to combating corruption. The Co-Director of the SEC's Division of Enforcement, Andrew J. Ceresney, recently praised the new law, noting that it is more expansive in its reach than the FCPA. Furthermore, Deputy Attorney General James M. Cole and Chief of the SEC's FCPA Unit Kara N. Brockmeyer have noted that their agencies are involved in multi-jurisdictional anti-corruption cooperation efforts with Brazilian authorities. U.S. officials have conducted training in Brazil on anti-corruption enforcement, and Brazilians

are increasingly participating in international anti-corruption conferences.

Notwithstanding uncertainty as to how the law will be applied and enforced once in effect, there is a strong case for companies to tread lightly. The upcoming World Cup in 2014 and the Olympics in 2016 provide potentially significant opportunities for Brazilian authorities to make headlines with public enforcement examples. Companies with operations in Brazil should take steps to ensure proper compliance procedures are in place. And the compliance community should encourage Brazilian authorities to publish guidelines regarding what they would consider an effective compliance program under the BCCA. In the interim, companies would be well advised to follow global best practices that comport with guidance released by U.S. authorities and by the UK Ministry of Justice.

RUSSIA

Of the BRIC countries, Russia received the lowest CPI marks in 2013, with a score of 28 out of 100, resulting in a ranking of 127th out of 177 countries. Even though both of these marks reflected improvement (from a score of 22 and a ranking of 146 in recent years), Russia has its work cut out to reduce bribery. A 2013 survey conducted by Ernst & Young found that 82% of respondents in Russia believed corruption and bribery were widespread; the Kroll Advisory Solutions' 2013-2014 Global Fraud Report found that 32% of respondents from Russian firms reported losses due to corruption and bribery, which is double the percentage from last year. Despite the bearish outlook on Russian anti-corruption reform and enforcement, Russia has recently taken steps in the right direction that should oblige all but the most risk-tolerant companies to update their compliance procedures.

In addition to ratifying the OECD Anti-Bribery Convention in February 2012, Russia recently passed new domestic legislation. On Jan. 1, 2013, Russia implemented an amendment to its anti-corruption law (Article 13.3

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of Federal Law No. 273-FZ) requiring all corporations organized in Russia to develop anti-corruption compliance measures. Russia also introduced guidance — the first in 13 years — on the law. Importantly, the recent guidance defines a bribe more narrowly than the FCPA and UK Bribery Act (UKBA), which may complicate enforcement. In addition, the amendment provides a broad definition of “extortion,” which can serve as a defense for companies or individuals accused of giving bribes.

The OECD Phase 2 Report issued October 2013 encouraged more active Russian anti-bribery enforcement, noting that Russia had yet to prosecute a case involving foreign bribery, and that law enforcement agencies did not appear to be focused on doing so. Russia's enforcement of its new anti-corruption law might be galvanized by an intention at the top to respond to such “criticism.”

Given the elevated anti-bribery non-compliance risk in Russia and the potential for enforcement by U.S., UK and perhaps also Russian authorities, companies operating in Russia should take a proactive approach to compliance by implementing the suggestions contained in the new law, such as maintaining an anti-bribery compliance program, reviewing public guidance for distinctions between the Russian law and the FCPA and UKBA, and conducting comprehensive due diligence on third-party agents and prospective partners.

The DOJ and SEC have expressed continued commitment to enforcing the FCPA against U.S. companies doing business in Russia, demonstrated by recent prosecutions of Russian subsidiaries of Pfizer, Eli Lilly, and Panalpina. With the Winter Olympics in Sochi this month, companies should be prepared for heightened scrutiny, under the FCPA and potentially under the Russian law as well.

INDIA

India is the only BRIC country without legislation prohibiting the bribery of foreign officials. However, as this article goes to print, there are several laws being actively debated by the Sansad, the Indian legislative body. An anti-corruption bill, the “Lokpal Bill,” already passed on Dec. 18, 2013. The Lokpal Bill creates a national ombudsman to investigate charges of graft against elected representatives and bureaucrats. The Prevention of Corruption (Amendment) Bill, 2013, seeks to strengthen India's Prevention of Corruption Act of 1988 by making bribery by commercial organizations an offense for both the entity offering a bribe and the entity receiving the bribe.

Also awaiting legislative approval is The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, which would criminalize giving bribes to public officials. Effective May

2011, India also implemented an act prohibiting the receipt of foreign funds by political parties. Moreover, the anti-corruption movement in India is gaining some traction, resulting in the formation last year of a new political party.

India's CPI score has stagnated in light of the lack of progress on anti-corruption legislation. Its CPI score in 2013 (36 out of 100) remained the same as in 2012, while its ranking declined over the past five years from 84th to 94th. A 2013 Ernst & Young survey indicated 69% of respondents in India believed that corruption and bribery were widespread. The Kroll Advisory Solutions' 2013-2014 Global Fraud Report found that 37% of respondents acknowledged that their firms were highly vulnerable to corruption in India, up from 32% from the previous year.

On a brighter note, however, the SEC and DOJ recently have announced their cooperation with the Indian government in FCPA enforcement matters. Recent public frustration with the rampant bribery and pressure to keep up with Brazil, Russia, and China have forced the Indian government to seriously consider anti-bribery reform and may make India a country to watch in this regard in 2014.

CHINA

In recent years, China cracked down on government officials who accept bribes. Several recent enforcement examples demonstrate China is now also serious about punishing entities offering bribes abroad. Effective May 2011, China amended the PRC Criminal Code to criminalize the payment of bribes to non-PRC government officials and to international public organizations. On Jan. 1, 2013, the Chinese government issued public guidance interpreting existing criminal bribery laws, setting monetary thresholds for penalties, and providing the possibility of mitigation for voluntary disclosure. Notwithstanding the anti-bribery amendment enacted in 2011, China's CPI scores have languished; in 2013 it scored 40 out of 100, with a rank of 80th.

There are reasons to be bullish on Chinese anti-bribery enforcement in 2014. The Chinese Communist Party appointed a powerful figure, Wang Qishan (Secretary of the Communist Party's Central Commission for Discipline Inspection), for a five-year term to head the anti-corruption unit. Mr. Qishan has publicly warned that the Chinese government's anti-corruption campaign is intended to instill “a sense of awe” with regard to the consequences of continued malfeasance. Thus, it appears China may be serious about enforcing anti-bribery commitments. In connection with the anti-bribery commitment, Chinese authorities recently detained four Chinese executives of GlaxoSmithKline Plc with significant attendant publicity.

Despite indications that the Chinese gov-

ernment takes anti-corruption issues seriously, the climate for anti-bribery compliance in China remains complicated by a mosaic of state priorities. In recent months China put three anti-corruption activists on trial. In addition, a survey released in October 2013 found that of 100 multinational corporations operating in 16 jurisdictions (including India, Russia, and Brazil), Chinese multinational companies were the least transparent and most prone to corruption. Furthermore, unlike Brazil and India, which have been praised by the DOJ and SEC for increased cross-border cooperation regarding anti-bribery investigations, U.S. government officials have informally but repeatedly suggested that there has been limited cooperation from the Chinese. In October 2013, officials from the Commerce, Justice and State departments went to China to encourage Chinese officials to take strong actions to publicize and enforce the 2011 amendment.

Companies operating in China face significant anti-bribery risk due to the pervasiveness of state-owned enterprises, increasing the number of entities that may be deemed foreign public officials under the FCPA. Maintaining strong internal controls in China necessitates deep industry knowledge and vigilantly training employees and business partners. Knowledgeable outside counsel with investigative experience in China and local counsel are essential for companies conducting business in China.

CONCLUSION

As countries like the U.S. and UK continue to vigilantly enforce anti-bribery laws, it is clear that BRIC countries have begun to emulate this approach. Many of the new anti-bribery laws in BRIC countries go farther than the FCPA in important respects, but will they be enforced? The next challenge for regulators in both BRIC countries and developed markets will be to harmonize the anti-corruption compliance landscape so as to provide the business community with consistent “do's and don'ts” across jurisdictions. Until then, given the dynamic nature of anti-bribery laws and their enforcement, companies operating in the BRIC countries should be familiar with all applicable anti-bribery laws, foreign and local, and assess and modify their compliance procedures as appropriate.

