Anti-Corruption and Sovereign States

PRESENTATION FOR BRAZILIAN OFFICIALS
September 8, 2010
Relevance Of Anti-Corruption Initiatives To Sovereigns
Bribery Effects

- **Direct impact on economies:** The World Bank recently found that “between US$20 and US$40 billion every year is stolen from developing countries through bribery, misappropriation of funds, and other corrupt practices”

- **Indirect impact on economies:** Decreases incentive for private investment
Effects Of Enforcement And Anti-Corruption Initiatives

- Enforcement can lead to return of lost funds
- Initiatives such as EITI can lead to greater transparency
- Decreased corruption can lead to increased investment
The Regulatory Framework
Foreign Corrupt Practices Act (FCPA)
FCPA Provisions

The FCPA consists of two provisions:

- **Anti-bribery Provision** prohibits providing “anything of value” to “government officials” in order to obtain or retain business or an unfair advantage.

- **Books and Records Provision** requires companies to maintain accurate books and records and devise and maintain a system of internal accounting controls.
FCPA Enforcement Agencies

- **Department of Justice (DOJ):** responsible for enforcing the criminal provisions of the FCPA and for civil enforcement of its antibribery provisions.

- **Securities and Exchange Commission (SEC):** responsible for civil enforcement of the accounting and antibribery provisions with respect to issuers.
FCPA: Anti-Bribery

The FCPA makes it unlawful for a person or entity covered by the Act to make:

1. “an offer, payment, promise to pay, or authorization of” the payment or giving of
2. money or “anything of value”
3. corruptly
4. “directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office”
5. In order to (a) “influenc[e] any act or decision of such foreign official”, … (b) “secur[e] any improper advantage” or (c) “induce such foreign official … [to] influence any act or decision of such government or instrumentality”
6. To “obtain[] or retain[] business for or with, or direct[] business to, any person”
FCPA: Anti-Bribery

Knowledge Includes

- Actual knowledge
- Awareness or suspicion that an event is likely to occur
- Avoiding knowledge of corrupt acts through willful blindness

"That's all I know, because it was at precisely that moment that I pulled the wool over my eyes."
FCPA: Anti-Bribery

Money or “Anything of Value” Includes

- Cash
- In-kind gifts, services and entertainment
- Sponsorships supported by the government official
- Travel, food and lodging expenses
- Promise of future employment
FCPA: Anti-Bribery

“Foreign Official” Includes

- “…any officer or employee of a foreign government or any department, agency or instrumentality thereof [. . . ] or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality …”

- Includes employees of state-owned entities and sovereign wealth funds
FCPA: Anti-Bribery

Indirect bribes are unlawful under FCPA

- Payment through a third-party is unlawful
- Payment to a relative, spouse, or other person which might benefit an official is unlawful under the FCPA
FCPA: Anti-Bribery Exceptions

- Facilitating payments (exception)
- Local law defense (affirmative defense)
- Reasonable business expense (affirmative defense)
  - Connected to “promotion, demonstration, or explanation of products or services” or the “execution or performance of a contract”
  - Expenses are “reasonable” and “bona fide” and “directly related” to business purpose
FCPA: Record-Keeping

- The FCPA requires companies whose securities are traded on a national exchange to meet record-keeping and internal accounting controls that are consistent with generally accepted accounting practices or any other applicable criteria.

- Includes entries in foreign subsidiaries that are consolidated into parent’s books
FCPA: Record-Keeping

To accomplish this companies must:

- Make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of corporate assets

- Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized and all amounts are recorded accurately
FCPA: Record-Keeping

Other important issues to note regarding the record-keeping provisions:

- **Amount**: although the record-keeping requirements exist as a complement to the anti-bribery provisions (e.g., to prevent “slush funds” and off-the-book accounts), the record-keeping requirements cover all payments, not just those that would be “material”

- **Intent**: a company can be in violation of the FCPA even if it did not intend to break the law or to keep inaccurate books and records
Who Is Subject To The Act?

- Any U.S. Citizen or Resident
- Any U.S. Company
  - Officers, directors, employees, agents and consultants
  - U.S. parent companies may be liable for the acts of their foreign subsidiaries if they authorized, directed, or controlled the prohibited activity, failed to have adequate internal controls to detect improper payments, or violated books and records provisions by failing to detect improper entries
- Any Foreign Company Listed on the U.S. Exchange
  - Companies with securities registered on a national securities exchange and those required to file annual reports with the SEC, and the officers, directors, employees, and agents of those companies (this would include companies like Petrobras)
- Any Other Company or Person Within the U.S.
  - *Any person* committing an act in furtherance of a bribe inside the territory of the U.S.
Does The Facilitation Payment Exception Under The FCPA Still Exist In Practice?

- Very limited exception
- Applies to:
  “(1) documentation that qualifies a party to do business and (2) scheduling an inspection - very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.” United States v. Kay, 359 F.3d 738, 751 (2d Cir. 2004)
- Does not apply to:
  “routine governmental action” does not include “any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.” 15 U.S.C. § 78dd-1(f)(3)(B).
The Whistleblower Provision in the Financial Regulatory Reform Bill
Whistleblower Provisions

- Apply to all SEC FCPA actions, as well as DOJ FCPA actions based on the whistleblower information
- Must be original information that leads to successful enforcement
- Whistleblower may receive 10%-30% of monetary sanctions for FCPA cases resulting in over $1 million in sanctions
- Whistleblower cannot collect if convicted of a crime related to the information, submitted false information, or is an auditor of a public company
Whistleblower Provisions Implications

- Extends whistleblower provisions to FCPA context
- Previous whistleblower provisions only allowed a percentage of false claims recovered from a company, not penalties
- Changes the calculus of self-reporting potential FCPA violations
The UK Bribery Act
Key Provisions Of The UK Bribery Act

- Comes into force in April 2011
- There will be a consultation exercise in September 2011 and final guidance issued in early 2011
- Prohibits business to business bribery
- Prohibits bribing domestic and foreign government officials
- Penalizes failure to prevent bribery committed on companies’ behalf
UK Bribery Act vs. The FCPA

- Prohibits commercial bribery
- Punishes those accepting a bribe (except foreign officials)
- Holds companies strictly liable for failing to prevent a bribery offense, but allows an affirmative defense of “adequate procedures” to prevent bribery
  - Imposes strict liability for failure to prevent bribery on company that “carries on a business” in the UK even if the prohibited act has no connection to the UK
- Does not contain exception for facilitation payments
- Contains no books and records provisions (but use other laws for relevant enforcement)
Impact Of The UK Bribery Act

- May require reassessment of business to business interactions
- May require reassessment of hosting of government officials
- May require reassessment of compliance procedures to ensure that they are “adequate” to prevent bribes
- Supports elimination of facilitation payment exception in corporate policies
International Treaties

- Inter-American Convention Against Corruption
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- United Nations Convention against Corruption
- EU Convention Against Bribery
FCPA Cases Involving Brazilian Foreign Officials
Control Systems Specialist Inc. (1998)

- Ohio company that bought surplus military equipment, refurbished it, and resold it
- Brazilian Air Force Lt. Colonel was paid US$257K in bribes by CSS and its agent so that he would grant a contract to CSS to purchase military equipment
- They also bribed a U.S. Air Force official US$66K to get information
- CSS received US$672K from Brazil for the contract
- DOJ prosecuted
- CSS had to pay US$1.5K; President of CSS pled guilty, paid restitution of damages, and received 6 months home confinement.
International Materials Solutions Corp. (1999)

- Company that sold reconditioned fork lift trucks, among other things
- Paid US$67K in bribes to a Lt. Colonel in the Brazilian Air Force, acting as the Foreign Liaison Officer in the U.S.
- DOJ prosecuted
- Company paid US$1K and placed on one year probation; president sentenced to 4-month confinement
Baker Hughes (2001)

- SEC prosecuted civilly
- Paid $10K to agents in Brazil without investigating whether there would be payments to foreign officials
- Also had violations in Indonesia and India
- Entered into a cease and desist order with no penalty
- In 2007, Baker Hughes had additional bribery problems and had to pay US$44M in fines. That case did not involve Brazil.
Tyco (2006)

- Involved Tyco subsidiary, Earth Tech Brazil, which constructed water, sewage, and irrigation systems for the government entities in Brazil
- Tyco acquired company knowing about illicit payments in Brazil and industry
- 60% of contracts entailed bribes to Brazilian officials
- Civil enforcement by the SEC
- FCPA was subset of securities violations
- Tyco required to pay US$50M in civil penalty
Bridgestone Corporation (2008)

- Involved sale of marine hoses used to transfer oil between tankers and storage facilities
- Payments made to employees of state-owned entities, including in Brazil
- Bridgestone employee pled guilty to making payments, sentenced to 24 months and paid a fine of $80,000.
Control Components Inc. (2008/2009)

- Involved company selling severe service control valves used in the nuclear, oil and gas, and power generation industries
- Involved US$1M in payments to state-owned entities, including Petrobras
- Company and a number of employees pled guilty
Nature’s Sunshine (2009)

- Company sells vitamins, herbal products, and nutritional supplements
- Products were reclassified as medicines in Brazil but company was not able to register them
- Company paid money to agents, who bribed Brazilian customs officials to allow Nature’s Sunshine to import unregistered products
- Company paid US$600K in fines; two employees paid US$25K in fines
Other Cases

- **Pharmaceutical FCPA Investigation (2010):** DOJ and SEC are targeting large pharmaceutical companies and their operations in a number of countries, including Brazil.

- **Pride International Inc. (2010):** Oil rig operating company found evidence of illegal payments to Brazilian officials as well as 7 other countries. Has not settled with the government.

- **Universal Leaf Tabacos Ltda. (2010):** Brazilian company bribed Thai officials and agreed to pay $4.4M in fines.
Mechanics Of An Investigation
Anatomy Of An Investigation

- **Starting the investigation:** Discovery by the corporation of a potential violation, receipt of a subpoena, a search warrant, an agent’s knocking on door

- **Conducting the investigation:** Document review, interviews, discussions with the government

- **Ending the investigation:** No action, non-prosecution, deferred prosecution, fines, sentence
Actions Taken By Or Affecting Sovereigns Relating To Bribery
Sovereign Involvement

- Enforcement of anti-bribery laws within their countries
- Cooperation with foreign law enforcement officials
- Bringing lawsuits against bribery offenders
- Recovering the proceeds of bribery transactions
Enforcement Of Antibribery Laws Within Their Countries

- **Brazilian Criminal Code**: penalized government bribes and incorporates the OECD Convention on Combating Bribery of Foreign Public Officials in International Business

- **Adoption of Inter-American Convention Against Corruption**

- **New proposed anti-bribery bill**: Includes sanctions against companies that behave improperly in public bidding procedures or bribe officials
Cooperation With Foreign Law Enforcement Officials

- **Cooperation:** Inter-jurisdictional cooperation has increased, including with multilateral development banks

- **Examples:**
  - Siemens involved U.S. coordination with German authorities as well as others, including the World Bank
  - BAE involved both UK and U.S. enforcement officials
Bringing Lawsuits Against Bribery Offenders

- **Oil-For-Food (Iraq):** Iraq brought suit against multiple companies in U.S. federal court claiming that bribes in Oil-For-Food scandal deprived Iraqis of billions in benefits.

- **Alcatel-Lucent S.A. (Costa Rica):** Costa Rica’s state-owned telecommunications and electricity company brought a case in Florida state court claiming racketeering violations based on bribes paid to Costa Rican government officials.

- **Alcoa (Bahrain):** Bahrain’s aluminum company sued ALCOA in U.S. federal court for fraud and racketeering in payments made to government officials.
Bringing Lawsuits Against Bribery Offenders (Brazil)

- **Federative Republic of Brazil v. Jorgina de Freitas**: Litigation in Florida courts with judgment for Brazil of US$120M and recoveries in US, Channel Islands, Cayman Islands and Singapore of approximately US$15M. Participation by INSS.

- **Federative Republic of Brazil v. Ilsson Escossia da Veiga**: Civil litigation in courts of the State of Florida resulting in recoveries of US$5-$10M. Participation by INSS.

- **Federative Republic of Brazil v. Nicolau dos Santos Netto**: Litigation in Florida courts, supported by Mutual Legal Assistance Treaty proceedings and litigation in the Bahamas and in Brazil resulting in recoveries. Participation by AGU and asset recovery unit.

- **Gtech Holdings Corp. (Brazil)**: Brazil’s Public Ministry sued to recover money paid by the government to Gtech because lottery contracts resulted from bribes paid to Caixa Economica Federal, the state-owned bank that runs the lottery.
Recovering The Proceeds Of Bribery Transactions

- **UK’s Serious Fraud Office (SFO):** SFO planning to send US$45M from BAE Systems bribery investigation back to Tanzania
- **Direct Asset Recovery Proceedings**
- **Forfeiture Proceedings By DOJ**
- **World Bank:** World Bank has Stolen Asset Recovery Initiative to provide capacity building and promotion of the return of stolen assets to original owners
Thank You
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