

FCPA / BRAZIL: THE PERFECT STORM FOR ANTI-CORRUPTION ENFORCEMENT

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With ever increasing pressure on its government to stamp out corruption, Brazil presents a “Perfect Storm” for [Foreign Corrupt Practices Act \(FCPA\) / Anti-Corruption enforcement](#) approaching the 2016 Olympics. Having the Olympic Games centered in Rio de Janeiro presents the perfect opportunity for Dilma Rousseff’s government to show that it takes enforcement of anti-corruption laws seriously. As such, companies should ensure their compliance initiatives are being vigorously updated and monitored. This is especially the case with regard to third-party relationships. While passage of the Clean Companies Act (CCA) brought Brazil in line with an ever growing international consensus against corruption, the CCA has been sparingly enforced. Though the CCA penalizes both corporations and individuals for corrupt conduct, implementing regulations called for by its passage have yet to be enacted. The CCA applies a strict liability standard against companies, administratively and civilly, for those acts of corruption performed for their benefit. This standard distinguishes the CCA from the FCPA and UK Bribery Act, allowing Brazilian authorities to impose sanctions without a finding of corrupt intent against the offending company or its employees. While Brazil has an excellent enforcement mechanism in place to address foreign bribery, it has done little to actually utilize this tool against outside interests who engage in corrupt activities in Brazil. In October 2014, an Organisation for Economic Cooperation and Development (OECD) report confirmed that even though the CCA’s foreign bribery offense covers bribery cases through a third party, Brazilian authorities have failed to give full effect to this enforcement mechanism. In its findings, the OECD noted its concern regarding the “ [still low level of enforcement of foreign bribery in Brazil.](#)” Indeed, Brazilian authorities have not initiated a single action against a foreign company under the CCA. The OECD report identified follow-up initiatives needed to bring Brazil’s anti-corruption enforcement into full effect. Some of those suggested initiatives include:

- The drafting and enactment of regulations required to implement the CCA;
- Being more proactive in the investigation and prosecution of foreign bribery; and
- Continued support of companies, encouraging the adoption of adequate internal controls and compliance systems to both prevent and detect corruption activities.

Currently, Brazil is addressing tremendous political and social strife due, in

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part, to rampant internal corruption identified through investigation of state run oil-giant Petrobras and a number of its executives. The ramp up to the 2016 Olympics will put Brazil and its history of corruption in the international spotlight. Vigorous enforcement of its own anti-corruption laws would go a long way toward addressing those who criticize the Rousseff administration and the corrupt business and political systems that have existed in the South American democracy for many years. Foreign companies would serve as attractive targets for a sudden rise in Brazilian anti-corruption enforcement. Like many countries, the corruption landscape in Brazil is complicated by cultural factors. Doing business in South America's largest economy typically means working within the cultural framework of third-party "fixers," agents traditionally hired to assist foreign companies in working through the Brazilian bureaucracy. These "fixers," known as *despachantes*, traditionally play a critical role. Noted columnist Robert Eugene DiPaolo described this role as follows:

[D]espachantes have become an essential part of the process and maneuvering through the layers of governmental bureaucracy in Brazil, much as real estate brokers have become an essential part of finding and renting an apartment in New York City.

Of particular note in working with *despachantes* is the concept of facilitation payments. The FCPA provides an exception for such payments, typically given to a government official to expedite performance of a legal duty. Under the CCA, however, there is no exception for facilitation payments. A company risks liability when making such payments through a third party in Brazil. As such, it is critically important that companies conducting business in Brazil perform significant due diligence when using third parties to support their business interests. Recent demonstrations against corruption in Brazil have gained [significant media attention](#). The eyes of the world will be focused squarely on Brazil over the next sixteen months leading up to the 2016 Rio Olympic Games. The world stage provides the perfect avenue for Brazil to initiate enforcement efforts against corruption by foreign companies, their employees and third party agents. Companies doing business in Brazil must beware of this rising anti-corruption sentiment; must closely monitor the changing business and political environment within Brazil; and must adjust their compliance efforts to meet those changes.