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PERSPECTIVES

# REDUCING BUSINESS RISKS IN BRAZIL

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It is difficult to overstate the magnitude and significance of the corruption scandals that have unfolded in Brazil during the last several years. Last August, Brazil's Congress impeached president Dilma Rousseff and removed her from office. Former president Lula da Silva, Rousseff's predecessor and mentor, is a defendant in a criminal proceeding and current president, Michel Temer, is under investigation. It appears that corruption runs through the heart of Brazil's government, with more than half the members of Congress reportedly the subject of corruption investigations. Hundreds of individuals have been arrested, including CEOs, board members and other C-level executives from companies throughout the country. Over 80 people

have entered into plea bargains and many others are being prosecuted.

Corruption investigations intensified in 2014 with the passage of the Clean Company Act and 'Operation Car Wash' – more familiarly referred to as *Lava Jato*. Operation Car Wash began as a money laundering investigation and grew to become the largest scandal in Brazil's history, ensnaring some of the country's largest companies and resulting in a gut-punch to the nation's economy. As the Car Wash investigation progressed, other corruption schemes came to light involving the Brazilian Ministry of Health and Ministry of Planning, as well as their contractors. The investigation spread to banks, such as the Brazilian bank, Caixa Econômica Federal,

Eletronbras. Another ongoing investigation, Operation *Zelotes*, has detected bribes to officials to reduce tax penalties. There are also several investigations into the country's medical device industry. Multiple companies in various industry sectors have been implicated in corruption. The revelations have resulted in some companies going out of business, others tipping on the precipice of doing so, and exposing scores of employees to job insecurity. At the same time, *Lava Jato* has revealed just how deeply ingrained corruption is in the country's business community and government.

have transformed the business and political environments in Brazil. But is this just a passing storm or the harbinger of meaningful long-term changes? We do not yet know the answer, but it



is certain that the upheaval has changed the risk matrix for acceptable business practices.

We asked representatives of several major Brazilian companies whether they have seen a significant shift, both in their own companies and among their peers, concerning compliance activities and related standards. Each confirmed that they indeed noticed a profound change in the way companies do business in Brazil. They explained that in reaction to *Lava Jato* and the other high-profile anticorruption investigations, many companies have gone on crash programmes to enhance their compliance capabilities. The representatives described for us their perceptions of the most significant efforts companies are making to mitigate anticorruption risks in this new environment.

### **Change in perception of risks**

Corruption has always been a crime in Brazil, but until Operation Car Wash there has been only spotty enforcement by the local authorities. One of the consequences was the cultivation over time of an attitude of impunity among some at the highest levels of business and government and the perception that anybody could do whatever he or she wanted without fear of punishment. That has now changed, suddenly and perceptibly. Corporate

executives have seen that the authorities are watching, the risk of prosecution is real and that compliance with anticorruption laws is not optional.

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**“Attitudes in Brazil are undergoing an extraordinary transformation and, in many quarters, there is no longer any question about the necessity of due diligence and compliance.”**

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### **Dealing with third parties**

The rise of a new compliance culture in Brazil is changing how companies interact with third parties. According to compliance officers, as recently as a few years ago it was nearly impossible to negotiate anticorruption and other compliance clauses in contracts with vendors. Operation Car Wash has sensitised companies to compliance issues, and vendors and other third parties now have a growing appreciation of the risks of non-compliance.

Many of the problems identified in the investigations involve the activities of third-party agents or vendors acting with the express or tacit approval of company management, or on their own initiative. A company may not have full transparency

into such relationships which, depending on the circumstances, can sometimes be described as 'high-risk'.

Best practices now require that companies identify third-party relationships and group them into categories of high, medium and low risk. The level of scrutiny applied by a company's compliance, audit and legal functions then tracks that risk profile. 'High risk' includes third parties that directly interact with the government on behalf of the company, while 'low risk' encompasses routine-type vendors that have little potential for corrupt activities. High- and medium-risk vendors should undergo carefully documented legal and reputational due diligence at the onset of their work with the company. Issues discovered during the due diligence review should be thoroughly investigated. If problems are confirmed, the relationship with the third-party should be terminated or, at a minimum, subjected to the highest level of ongoing scrutiny and monitoring.

While decisions concerning particular situations must be made on a case-by-case basis, companies following best practices often take precautionary steps when interacting with third parties that include: (i) exercising higher levels of due diligence for high-risk vendors; (ii) requiring that third-party contracts include strict anticorruption provisions; and (iii) monitoring high-risk transactions. Additionally, limiting the term (i.e., no automatic renewals) and scope of contracts with third parties (for example, prohibiting interactions with government officials

without a company representative present) and restricting subcontracting can reduce corruption risks.

### **Training for contract managers and third-party monitoring**

Transactions with third parties can sometimes pose major corruption risks. Observant companies have responded by taking steps to reduce the likelihood of compliance violations by the third parties with whom they interact. Several years ago, most Brazilian companies did not have compliance departments or internal audit functions, and conducted little or no due diligence for third-party relationships. *Lava Jato* has changed that.

Unfortunately, even enhanced due diligence for third-party relationships may not reveal all 'red flags', and situations can change rapidly. In recognition of this, companies must ensure that their contract managers are properly trained to identify risks as an ongoing task. Managers should monitor their business partners' day-to-day activities and review invoices for suspect payments and other irregularities. Any actual or suspected violations should be promptly reported to compliance and/or audit managers.

### **Engagement of compliance department with business leaders**

Attitudes in Brazil are undergoing an extraordinary transformation and, in many quarters, there is

no longer any question about the necessity of due diligence and compliance. But what should company management do if issues surface? In that case, management and internal compliance professionals must interact with one another to address compliance issues in light of business objectives. Compliance personnel should help the company make the right decisions, and not just 'police' relationships. It is essential for compliance specialists to stay in regular contact and engage the business, explain the risks and bring business people on board as to what the company should do as a good corporate citizen. Together, it is easier to find ways to conduct business without subjecting the company to unnecessary risks.

### **Building compliance structures and processes**

The compliance personnel we spoke with at several large Brazilian multinationals emphasised the need to change corporate culture so that compliance becomes everyone's responsibility. They explained that it is an ongoing, never-ending process that requires company leadership to regularly emphasise training to approved standards. Leadership must use every opportunity to promote compliance until it becomes an intrinsic part of the operational signature of the company. One way to reach this goal is to ensure that employees' annual evaluations and advancement within the company include a significant compliance component. In a

compliant company, employees are encouraged to report to management any potential violations of policy. An anonymous reporting channel, such as a telephone or internet 'hotline', is essential to an effective compliance programme. It is also important that all employees, not just those in the compliance department, become compliance leaders. In so doing, a company's compliance programme can become an adaptive way of thinking that is ingrained into every business and operational decision.

### **Conclusion**

Enforcement authorities in Brazil are now aggressively enforcing anticorruption laws and, at the same time, regularly cooperating with their counterparts in the US and elsewhere. As a result, the exchange of information uncovered in investigations is now fast, efficient – and certain. This new cross-border enforcement environment has brought with it a sea change in how government and business function in Brazil. The Brazilian authorities, acting with the support and insistence of Brazil's people, are pursuing a zero tolerance anticorruption policy that is shaking up the way business is done. This anticorruption tidal wave is spreading from Brazil to other countries throughout Latin America. It has spurred investigations in Colombia, Mexico, Peru, Panama, the Dominican Republic, Venezuela, Chile, Argentina, Guatemala, Ecuador and other countries. Market-leading companies recognise that this tidal wave is unlikely to recede anytime soon

and are strengthening their compliance programmes accordingly. **RC**

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