

Anti-Corruption Compliance

Practical Guidance for Companies Doing Business in Brazil in an
Evolving National and International Enforcement Landscape

Almeida Advogados
Smith Pachter McWhorter PLC

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Topics We Will Cover Today

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- Who We Are
- Why Care About Anticorruption Compliance
- The Corruption Crisis and Enforcement Environment in Brazil
- U.S. Enforcement Abroad
- U.S. Authorities' Expectations/Global Best Practices Standards
- Case Studies: Recent U.S. DOJ FCPA Corporate Settlements
- The Government Bid: FCPA Triage Hypothetical

Who We Are

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Almeida Advogados is a full-service law firm with extensive operations in all aspects of Corporate Law, from advising businesses and structuring transactions to preventing disputes and undertaking litigation. Its headquarters are in São Paulo, with also full operating offices in Rio de Janeiro and Belo Horizonte, and a liaison office in Brasilia. The firm also provides legal support to large foreign law firms, such as intensive assistance to a New York law firm in filing a Class Action against Petrobrás - the Brazilian state-run oil company - before the US District Court for the Southern District of New York.

André de Almeida is the founding and managing partner of the firm. Specialized in Corporate law, mergers and acquisitions and international trade, he has structured numerous corporate operations involving the formation of joint ventures and the purchase and sale of shares in Brazil and abroad. André has significant expertise in Project Finance and financial structuring of companies in Brazil and abroad. He has filed the first Class Action against Petrobras in the USA.

Smith Pachter McWhorter handles all aspects of Foreign Corrupt Practices Act (FCPA) and other White Collar matters for corporate and individual clients, in addition to the firm's other U.S. law practice areas.

Iris Bennett has represented numerous multinational and smaller companies and individual clients in FCPA and other White Collar matters, conducting internal investigations around the globe, representing clients before the DOJ, SEC, and other agencies, and providing advice on clients' anti-corruption compliance programs and a wide gamut of FCPA compliance issues.

Paulo Gusmão is a member of our White Collar and Government Contracts groups, and previously served in the Inter-American Development Bank corporate legal affairs group, where he provided advice on corporate and institutional matters and represented the Bank in employment disputes.

Why Care About Anticorruption Compliance

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- Enforcement Risk
 - Brazilian enforcement
 - U.S. enforcement
 - Other nations' enforcement can also come into play
- Good for Business
 - Corrupt practices may yield short term gains, but often result in poor or even disastrous business results in the longer term
 - Companies who operate internationally, or who want to partner with U.S. or international companies, cannot ultimately succeed in today's environment without adequate anticorruption compliance
- To Do the Right Thing
 - If you are here, then by definition you and your company care about compliance
 - The key to effective compliance is a practical approach that achieves the necessary controls, without overburdening the business operations or resources

U.S. FCPA Enforcement: the Long Arm of the Law

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- The Foreign Corrupt Practices Act prohibits payments or giving anything of value to a non-U.S. government official in order to corruptly influence the official.
- The FCPA also requires companies registered on U.S. stock exchanges to maintain adequate internal accounting controls and accurate books and records, and prohibits circumvention of these requirements.
- The FCPA is enforced criminally by the U.S. Department of Justice, and civilly by the U.S. Securities and Exchange Commission.
- In addition to U.S. companies and nationals, the broad extraterritorial reach of the FCPA means that others who can be subject to prosecution by U.S. authorities include:
 - Non-U.S. companies registered on U.S. stock exchanges and employees/officers/directors of such companies.
 - Non-U.S. privately held companies and non-U.S. nationals where some part of the conduct occurs within the U.S.

U.S. FCPA Enforcement: the Long Arm of the Law (cont.)

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- U.S. authorities are still the leading enforcer when it comes to anti-corruption prosecutions.
- The DOJ and SEC have several advantages: a strong statute, a history of enforcement and thus experience with prosecuting these cases, significant budgetary resources at their disposal, an aversion to litigating such cases by U.S. companies and thus strong cooperation from companies, and, at least historically, support from the key U.S. government authorities for FCPA enforcement (DOJ and SEC leadership, the President, etc.).
 - Increased DOJ resources: 10 additional prosecutors to DOJ Fraud Unit, 3 new FBI squads, new DOJ Compliance Consultant
 - Number of prosecutions up in 2016

U.S. FCPA Enforcement: the Long Arm of the Law (cont.)

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- U.S. authorities have become increasingly aggressive with respect to enforcement of the FCPA regarding conduct with little connection to the U.S.
 - Odebrecht is a case in point: the DOJ prosecuted Odebrecht, a Brazilian company, for bribes of Brazilian officials, and DOJ did so even though Brazilian authorities also brought their own case against Odebrecht.
- U.S./Non-U.S. enforcement authorities are cooperating with each other more than ever.
 - 40 countries have signed the OECD Anti-Corruption Convention
 - Sharing of leads, documents, witnesses, across enforcement agencies
 - While the U.S. has sought, and in some cases obtained, assistance and cooperation from other nations for many years, several recent cases demonstrate significant results.
 - Odebrecht, Embraer, PetroTiger, Vimpelcom, Och Ziff, Hewlett Packard.

Anti-Corruption Compliance Programs: What U.S. Authorities Expect and Global Best Practices Require

- Three core principles for anticorruption/ethics and compliance programs
 - Prevent
 - Detect
 - Respond
- Overall: maintain a strong culture of compliance and adequate controls.
 - Thoughtfully designed
 - Adequately resourced
 - Leadership from the top
 - Compliance function has a real voice
 - Meaningful remediation
 - More than a “paper program”
- These principles are reflected and articulated in further detail in various DOJ guidance materials, U.S. corporate criminal sentencing rules, and DOJ settlements with companies in corporate FCPA matters.

What U.S. Authorities Expect and Global Best Practices Require (cont.)

- In 2015, DOJ engaged a seasoned Compliance Consultant from the private sector to assist the Department in further augmenting and refining its assessment of corporate ethics and compliance programs.
- In February 2016, the DOJ's Compliance Consultant issued additional guidance on the Department's Evaluation of Corporate Compliance Programs.
 - We will discuss the principles in this recent guidance within the framework of the three core principles of prevention, detection, and response.

What U.S. Authorities Expect and Global Best Practices Require (cont.)

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- Prevent
 - Senior and Middle Management
 - Tone at the Top
 - Oversight
 - Autonomy and Resources for the Compliance Function
 - Experience
 - Stature
 - Independence
 - Funding
 - Policies and Procedures
 - Relevant policies and procedures for the company's risks and legal requirements
 - Design
 - Implementation
 - Training for gatekeepers (finance, procurement, legal)

What U.S. Authorities Expect and Global Best Practices Require (cont.)

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- Prevent (cont.)
 - Training and Communications
 - Content and audience tailored to risks
 - Form and accessibility
 - Availability of guidance
 - Third Party Management
 - Assessment of risks associated with third party partners, suppliers, etc.
 - Due diligence, contractual provisions, controls over payments, monitoring
 - Integration with company systems (procurement, vendor management, finance)

What U.S. Authorities Expect and Global Best Practices Require (cont.)

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- Detect
 - Risk Assessment
 - Ethics and compliance risk management process
 - Information gathering and analysis
 - Accounting for manifested risks
 - Continuous Improvement, Periodic Testing and Review
 - Internal Audit
 - Compliance program auditing
 - Periodic updating of policies and procedures
 - Confidential Reporting and Investigation
 - Effective reporting mechanisms
 - Properly scoped investigation by qualified personnel
 - Root cause analysis, attention within the company, and remediation
 - Mergers and Acquisitions
 - Due diligence
 - Integration

What U.S. Authorities Expect and Global Best Practices Require (cont.)

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- Respond
 - Analysis and Remediation of Misconduct
 - Root cause analysis
 - Prior indications
 - Remediation
 - Incentives and Disciplinary Measures
 - Accountability
 - Human Resources process
 - Consistent application
 - Approach to incentivizing ethical behavior

What U.S. Authorities Expect: Case Study #1

Sociedad Química y Minera de Chile (2017)

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- Sociedad Química y Minera de Chile (SQM), a Chilean chemicals and mining company, was required to settle with both the DOJ and the SEC in connection with payments to politically-connected individuals in Chile from a fund under the control of one of the Company's officers.
- Payments were made in the form of donations to dozens of foundations controlled by or closely tied to Chilean politicians who were important to SQM's business, such as an official with influence over the government's mining plans in Chile. Payments were also made to vendors associated with politicians, including family members.
- SQM ultimately paid \$30.5M into U.S. authorities in connection with the settlements and had to agree to other onerous requirements, including imposition of a monitor.

What U.S. Authorities Expect: Case Study #1

Sociedad Quimica y Minera de Chile (2017) (cont.)

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Compliance Failures	Remediation*
Donations made to charities controlled by or associated with government officials relevant for SQM's without due diligence or anti-bribery controls.	Implementation of new accounting and payment process controls.
Fictitious invoices and contracts to justify third party payments with no services rendered, including to vendors who were relatives of government officials.	Implementation of new accounting and payment process controls.
Internal Audit identified high-risk vendors and recommended their contracts be terminated; contracts continued or were substituted with new fictitious vendors, and payments continued.	Reconstitution and staffing of new internal audit and compliance functions.
High-level executives, including one responsible for internal controls, were involved. Lower-level employees cooperated.	<p>Termination of one executive; discipline of another.</p> <p>Revised Code of Ethics and conducted company-wide training.</p> <p>In-depth training for an employee who failed to respond to red flags.</p>

* Specific remedial measures taken in addition to broad requirement to implement a comprehensive anti-corruption compliance program and to agree to an independent compliance monitor.

What U.S. Authorities Expect: Case Study #2

Rolls Royce (2017)

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- Rolls-Royce was required to settle with the U.S. DOJ and SEC as well as with Brazilian and U.K. authorities in connection with improper payments to officials in Brazil and a number of other countries around the world.
- In Brazil, a U.S. subsidiary of Rolls Royce paid commissions to a Brazil-based oil and gas services “commercial advisor” while knowing that portions of those payments would be paid to a officials at Petrobras to obtain contracts for equipment and long term service agreements.
- Rolls Royce was fined \$809M in a global settlement with Brazilian, U.K. and U.S. authorities.

What U.S. Authorities Expect: Case Study #2 Rolls Royce (2017) (cont.)

Compliance Failures	Remediation*
<p>Paid commissions to a third party intermediary under the guise of “technical advisory” services with knowledge that the payments would be shared with one or more officials at Petrobras to obtain business.</p>	<p>Termination of business relationships with all third-party intermediaries involved in the corruption schemes.</p> <p>Enhanced procedures for reviewing and approving third-party intermediaries.</p> <p>Material reduction in use of third-party intermediaries.</p> <p>Engaged outside compliance advisor to review compliance program, reporting to the Board of Directors.</p>
<p>High-level executive and a number of lower-level employees involved.</p>	<p>Termination of six employees and resignation of eleven employees implicated in the corruption schemes.</p>
<p>Obtained competitor technical and pricing information through the technical advisor in order to win Petrobras bid after having been technically disqualified.</p>	<p>Enhanced procedures for reviewing and approving third-party intermediaries.</p> <p>Material reduction in use of third-party intermediaries.</p>
<p>Structured agreement with “technical advisor” to pay commissions on accelerated schedule, to induce the contract award, rather than according to Rolls Royce’s normal procedures of paying when paid by the customer.</p>	<p>Enhanced internal controls.</p> <p>Material reduction in use of third-party intermediaries.</p>

* Specific remedial measures taken in addition to broad requirement to implement a comprehensive anti-corruption compliance program.

FCPA Triage: The Government Bid

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FormacaoTech, Inc. is a Brazil-based company in the technology sector and is registered on the U.S. stock exchange.

FormacaoTech has formed a joint venture with a Chinese company to pursue a bid with the Chinese Ministry of Justice to supply high tech surveillance equipment and associated services. FormacaoTech is the majority partner in the JV, and has management control. However, its JV partner, Superior Vigilance, has experience with relevant technology and has told FormacaoTech that it can help navigate the Chinese government's procurement rules.

Superior Vigilance brings in an individual named Paul Lee, who has a small tech company in Shanghai, to help with the bid process. FormacaoTech is aware of this, but does not know what the formalities of the relationship with Lee are, if any.

During the bid process, Lee/Superior Vigilance obtain helpful information regarding the customer's needs and the qualifications of other competitors. FormacaoTech makes various changes to the JV's bid at various points in response to this information. Some of the information is redundant of information published as part of the RFP and subsequent official communications from the MOJ, but some of the information is not.

FCPA Triage: The Government Bid (cont.)

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- The FormacaoTech/Superior Vigilance joint venture ultimately wins the bid.
- FormacaoTech learns that Superior Vigilance had promised Lee a success fee and a subcontract on the program. This agreement was not reduced to writing. Superior Vigilance also tells FormacaoTech that Lee incurred approximately 50K USD in travel and hospitality-related expenses during the course of the bid, and ask to split the costs to reimburse them. Superior Vigilance also wants to pay Lee his success fee, and to engage him as a subcontractor.
- The lead for the FormacaoTech bid team calls Lee to learn more about how he obtained information during the bid process and the nature of the expenses that he incurred. Lee assures the lead for the FormacaoTech bid team that he is quite aware of international anticorruption rules, and there is nothing to worry about, but that he cannot share details about his work over the phone or identify the names of officials he was dealing with at the MOJ. Lee explains that they can meet in person in Shanghai and he will be happy to talk in more detail.

FCPA Triage: The Bid (cont.)

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- What are your next steps when you learn of these facts if you are:
 - A member of InfoTech's Legal Department
 - A member of InfoTech's Compliance team
 - An member of InfoTech's executive leadership
- What if any compliance failures (whether or not there was a violation of law) occurred with respect to:
 - The bid process
 - Superior Vigilance
 - Paul Lee
- Can or should InfoTech:
 - Reimburse Lee's expenses
 - Pay him a success fee
 - Use him as a subcontractor on the program
- Can the JV go forward with accepting the contract from the Chinese MOJ
- How can InfoTech improve its ethics and compliance program and/or relevant controls to prevent such incidents in the future
- Has there been a violation of U.S. or Brazilian anti-corruption laws?

Additional Questions?

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- We solicit your questions about any aspect of anticorruption compliance best practices and/or real or hypothetical situations your company may confront in this area, including, e.g.:
 - Third party due diligence and controls
 - Training and communications
 - Hotlines, internal investigations and disciplinary/remediation process
 - DOJ requirements, SEC requirements, Brazilian requirements
 - How do we evaluate our own program and identify priorities for improvement
 - Etc.