

Brazil cracks down on healthcare corruption

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Investigations into alleged corruption in Brazil's healthcare industry show no signs of slowing down. David Andrew Taylor, partner of Brazil's Almeida Advogados, considers whether changing company behaviour through legal compliance is gaining momentum and traction.

“Le Brésil n'est pas um pays sérieux” is a phrase from the 1960s commonly attributed to Charles de Gaulle. In spite of the changing world events since the time of the “Lobster War” between France and Brazil, this critical sarcasm still resonates today. Transparency International ranks Brazil in 96th place (out of 180 countries and territories), reporting that the country

“needs to reform its political system and ensure that existing laws are implemented and enforced.”

Brazil is host to the world’s sixth-largest pharmaceutical market. It is an important strategic location for globally oriented healthcare and life science companies. Top pharma companies such as Sanofi, Novartis, Roche, GSK, Johnson & Johnson, Pfizer, Bayer, MSD, Abbott, AstraZeneca and Merck are all in Brazil.

Total imports of medical devices in Brazil in 2017 was US\$8.6 billion, a 5.4% increase over 2016. There were 2.3 million prosthetics used in surgeries administered under Sistema Único de Saúde (SUS), Brazil's publicly funded healthcare system, in 2017, at a cost of 1.25 billion reais in Brazilian taxpayer spending.

Heightened US Foreign Corrupt Practices Act (FCPA) anti-corruption enforcement took place across a broad range of industries in 2017. Most noticeably in Brazil, the US Department of Justice (DOJ) assessed US\$422 million in criminal penalties on Singapore-based Keppel Offshore & Marine and its US subsidiary Keppel Offshore & Marine USA for paying bribes to Petrobras officials and members of the then-governing Partido dos Trabalhadores (PT) political party. The case fell under the rubric of Operation Car Wash, the biggest corruption scandal in Brazilian history.

Less prominently but no less significantly, in 2017 FCPA enforcement also involved Brazil’s healthcare arena, specifically in regard to the foreign sales practices of US publicly-traded medical device manufacturers Zimmer Biomet Holdings and Orthofix International. Later in the year, following their resolution, the DOJ called for heightened scrutiny of healthcare company foreign practices. It appears that the considerable healthcare market is not immune to criminal corruption.

Brazil’s anti-corruption nucleus – the Car Wash task force of the Federal Public Prosecutor’s Office in Rio de Janeiro – has also probed the healthcare sector. Under Operation Exposed Invoice it filed a complaint with a criminal court in Rio de Janeiro against former state governor Sérgio Cabral, former state health secretary Sérgio Côrtes and several others, charging them with corruption, cartel forming and bidding fraud in connection to an “international bidding club” cartel of foreign companies.

This so-called club was allegedly organised by Miguel Iskin, president of Brazilian medical device distributor Oscar Iskin. Winners were pre-selected for public tenders of medical equipment and prosthetics purchased by the National Institute of Traumatology and Orthopedia (INTO) and the Secretary of Health and Civil Defense (SESDEC) of Rio de Janeiro. The scheme was allegedly first implemented in 2004, when Cortes was Director General of INTO and continued after 2007, when Cabral was elected governor and Cortes was named secretary of health by him. According to the complaint, between 1 January 2007 and 28 December 2014 at least 16.2 million reais was paid out in 35 monthly bribe payments.

In July the anti-corruption nucleus – the Car Wash task force of the Federal Public Prosecutor's Office in Rio de Janeiro – announced at a press conference that, together with the Brazilian Administrative Counsel for Economic Defense (CADE), the Federal Police (DFP), the Federal Court of Accounts (TCU), the Office of the Comptroller General (CGU) and the Brazilian Revenue Service (RF), it was launching a new probe into public health service contracts, Operation Resonance. This builds on Operation Exposed Invoice.

The effectiveness of Federal Police, Civil Police and Federal Public Prosecutor's Office's investigation in obtaining evidence goes some way in implicating companies and even a few prominent politicians. The earnest application of anti-corruption preventative measures (such as those proposed under Congressional and Senate parliamentary investigating committees, as well as by The Clean Company Act) could have an impact on prioritising compliance within this area. But it is one thing for laws to be in place, and quite another thing for them to be respected.

As is readily evident via international news coverage of its more high-profile scandals, Brazil's politicians regularly avoid prosecution on corruption charges, many serving time under mere house arrest, if at all. As can be clearly seen in Operation Car Wash, the business culture is prone to mimicking political reality in the making of corrupt payments or otherwise evading of legal rules and regulation with relative impunity.

Consider the individual cases of Zimmer Biotmet and Orthofix. Between 2000 and 2008 US publicly-traded company Biomet was found to have paid approximately US\$1.1 million in cash incentives to doctors under the employ of the SUS to facilitate the sale of Biomet products in Brazil's public

hospitals. Through a Brazilian distributor, SUS doctors were bribed with payment of “commissions” or “scientific incentives” of 10%-20% above the medical device purchase price. Biomet investigated and voluntarily disclosed its own misconduct and agreed with the DOJ to pay a monetary penalty of US\$17.28 million.

But in 2017 the DOJ alleged that within the years 2009 to 2013 Biomet executives, ignoring internal audit recommendation and a company-wide requirement to the contrary, had continued to use a Brazilian distributor that had paid bribes to SUS doctors to sell its products. It disguised this use by marketing its products under one of the distributor’s affiliated companies. Moreover, due to supposed improper recordkeeping, Biomet couldn’t determine whether the bribe payment was ongoing. Biomet earned close to US\$3.2 million in profits from its sales in Brazil between 2009 and 2013 due to said continued distributor use. In 2017 Zimmer Biomet (Biomet was acquired by Zimmer Holdings in 2015) entered into a three-year deferred prosecution agreement where it accepted responsibility for the alleged conduct, including paying a further criminal monetary penalty of US\$17.46 million and hiring an independent compliance monitor for three years.

In another case, the Brazilian subsidiary of Texan surgical and non-surgical medical equipment maker Orthofix was found to have implemented an improper payment scheme whereby it paid a commission of approximately 33-43% of the hospital-billed sales price to the commercial representative responsible for the sale. The commercial representative would in turn pay the doctors involved typically 20-25% of the sales price. Some 12.5% of Orthofix Brazil sales were to public sector customers (such as SUS hospitals and its doctors).

Commercial representative-related companies would falsely invoice Orthofix for services that were never rendered. These “administrative expenses” (approved by Orthofix Brazil’s former general manager and instructed to be paid by its former finance director) would also be used to fund doctor payment. The doctor bank account direct deposit or in-person payment percentages, total amounts and instructions were openly discussed by Orthofix Brazil employees and the commercial representatives.

Orthofix subsequently agreed to pay a civil money payment to the Securities and Exchange Commission of US\$2.9 million (plus US\$2.9 million in disgorgement and US\$263,375 in prejudgment interest). It also agreed to retain an independent compliance consultant for one year to test and review its compliance programme.

The Organisation for Economic Co-operation and Development (OECD) – Brazil is a signatory to its convention on combating bribery of foreign officials in international business transactions – outlines the greater gains to be achieved from building long-term business goals with propriety, integrity and transparency, first and foremost reputationally. But sometimes companies and their executives ignore this potential and perpetuate the status quo. It is fundamentally problematic that without true answerability they are ill-disposed to change this approach.

The extra-territorial reach of a now-empowered FCPA, with actual accountability through aggressive application of fines, the threat of individual prison sentencing in the US and compulsory appointment of internal monitors to scrutinise and dissuade, should efficaciously curb the temptation of SEC-registered companies operating in Brazil to engage in corrupt payments and fraudulent scheming.

Its path is not an easy one. Take the recidivism of Biomet as an example. But the FCPA's particularly effective level of enforcement in preventing the wilful misconduct of bribery and books, records and internal controls evasion abroad is a most needed and anticipated catalyst to bringing about change in Brazil in this context.

That said, systematic change must come about from within. "Within" is meant at the specific company level, where it is essential that those individuals concerned – starting at upper management – have the gravitas to implement correct action.

There has been a building groundswell of enthusiasm in Brazil towards the improved application of company compliance measures, which has been achieved by Brazilian law. As recent important examples, Federal District Law 6.112/18 and Rio de Janeiro State Law 7.753/17, both in effect as of the beginning of this year, mandate companies supplying products or providing services to their jurisdictions by means of public contracting, consortiums, conventions, concessions or public-private partnerships to

have viable compliance programmes in place. Concomitantly, there has been an increased sophistication in the compliance-related service rendering of outside counsel as they work with internal counsel in playing an ever more central role in imposing internal control.

On the topic of corporate business lawyers, a quotation of JP Morgan is that “[w]ell, I don’t know as I want a lawyer to tell me what I cannot do. I hire him to tell me how to do what I want to do.” It is this business-oriented legal input in company decision-making that is often the crux of the problem. It is entering the dangerous zone between legitimately utilising valid exemptions and loopholes in stated law and deliberately negating the law for business gain and advantage.

Successful business practice in this modern high-risk environment is not solely about following legally enforced discouragement and prevention methods as much as it is about establishing a culture of good business and legal ethics in which to work. Transparent and enforced legal and business ethics – here in Brazil as everywhere – are what will steer the correct course and prevail in the long run.

A full version of this article is available at <http://esa.oabrij.org.br/wp-content/uploads/2018/10/Brazilian-Healthcare-Fraud.pdf>, as appears in the first edition of the Revista Digital ESA-RJ digital magazine of the Rio de Janeiro chapter of the Brazilian Bar Association, which was launched at the bar association’s ‘Five Years of the Anticorruption Law’ symposium held on 31 August 2018 in Rio de Janeiro.