

Corruption Risks In Brazil: Ensuring Compliance with the FCPA & BCCA



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WELCOME!

Please standby. Our webcast will begin shortly.

Speaker Introduction



Matteson Ellis has extensive experience in international anti-corruption compliance and enforcement, including the U.S. Foreign Corrupt Practices Act (FCPA). He has worked on anti-corruption matters in multiple capacities, including prevention, detection, remediation, investigation, defense, and enforcement.

Ellis focuses particularly on the Americas, having spent several years in the region working for a Fortune 50 multinational corporation and a government ethics watchdog group. He is multilingual and is a frequent speaker on corruption matters in Mexico, Brazil, Colombia, Argentina, and other Latin American markets.

Ellis earned his B.S. from Dartmouth and a M.S. and J.D. from Georgetown University.

Speaker Introduction



Julie Moriarty leads product strategies for The Network's training and communications solutions. She has been helping companies create and maintain effective global ethics and compliance initiatives for more than 14 years.

Moriarty has spoken in the U.S. and internationally regarding methodologies for embedding company values into the global corporate culture and led teams that assist companies in implementing, managing and evaluating effectiveness of ethics and compliance programs.

Previously, **Moriarty** has been a strategic advisor regarding third-party due diligence and has held executive-level positions with responsibilities for delivering corporate integrity and training programs around the world.

Corruption Risks in Brazil

Ensuring Compliance with the U.S. Foreign Corrupt Practices Act (FCPA), and Brazilian Clean Companies Act (BCCA)

Matteson Ellis (Member, Miller & Chevalier Chartered)

The Network

April 2, 2015

Corruption Risks in Brazil

1. Common corruption risks for companies operating in Brazil
2. Changing climate in Brazil
3. Brief overview of the FCPA and BCCA
4. FCPA and BCCA compliance strategies for Brazil



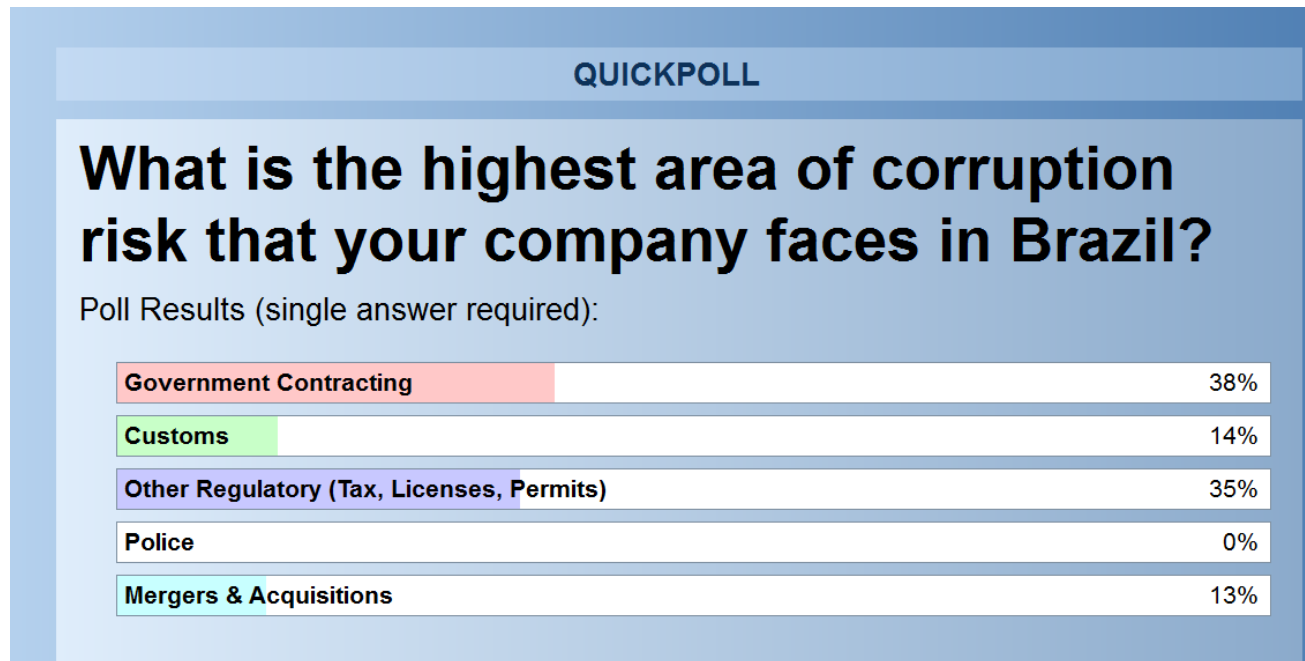
Participant Poll #1

What is the highest area of corruption risk that your company faces in Brazil?

1. Government Contracting
2. Customs
3. Other Regulatory (tax, licenses, permits)
4. Police
5. Mergers & Acquisitions

Participant Poll #1 - RESULTS

What is the highest area of corruption risk that your company faces in Brazil?



Key Areas of Corruption Risk in Brazil

Brazil 101: Understanding *Jeitinho Brasileiro*

- “The Brazilian Way”
- An attitude / style
- The grace by which Brazilians accomplish tasks and find ways around problems
- Can also facilitate corruption when used to circumvent rules

Key Areas of Corruption Risk in Brazil

Government Contracting

- At issue in several current corruption investigations involving Brazil
- Sophisticated nature of schemes
- Use of third party agents and distributors
- Use of shell companies / false invoices
- Gifts, travel, entertainment
- Relevant FCPA actions:
Dallas Airmotive, Biomet, Eli Lilly, BizJet

Key Areas of Corruption Risk in Brazil

Government Contracting

- **Eli Lilly (2012):** The Indianapolis-based pharmaceutical maker paid US\$29.4 million to settle with the SEC for improper payments.
 - Its Brazilian subsidiary “allowed” one of its pharmaceutical distributors to pay bribes to public officials to win US\$1.2 million in sales to the Brazilian government. The distributor used approximately 6% of the purchase price (approximately US\$70,000) to bribe officials.
 - When Eli Lilly gave an unusually large discount of 17% and 19% to the distributor (compared to normal 10% discounts in Brazil), the company failed to apply additional safeguards to ensure that the savings were not being used for bribes.
 - The company’s pricing committee approved the discounts without further inquiry; inadequate policies and procedures were in place to flag the unusual discounts; the company relied on representations of the sales and marketing manager without adequate verification.

Key Areas of Corruption Risk in Brazil

Customs and Regulatory

- Poor regulatory quality
- More official discretion
- More interactions with government officials
- Reliance on *despachantes*
- Relevant FCPA actions:
Nature's Sunshine, Panalpina

Key Areas of Corruption Risk in Brazil

World Bank Doing Business Report 2014

- Countries ranked on clarity, predictability, and efficiency of regulatory quality.
- Brazil: for overall “ease of doing business,” ranked 116 out of 183.
 - ✧ Starting a business: 123
 - ✧ Dealing with construction permits: 130
 - ✧ Getting electricity: 14
 - ✧ Registering property: 107
 - ✧ Getting credit: 109
 - ✧ Protecting investors: 80
 - ✧ Paying taxes: 159
 - ✧ Trading across borders: 124
 - ✧ Enforcing contracts: 121
 - ✧ Resolving insolvency: 135

Key Areas of Corruption Risk in Brazil

Customs and Regulatory

- **Nature's Sunshine (2009):** A manufacturer of nutritional and personal care items settled with the SEC in connection with charges involving alleged cash payments made by its wholly-owned Brazilian subsidiary to Brazilian customs officials in 2000 and 2001. Company paid FCPA civil penalty of US\$600,000.
 - Payments made to import certain unregistered products in Brazil. Brazilian government had reclassified certain vitamins, herbal products, and nutritional supplements being sold in Brazil as medicines. Company had to re-register as medicines.
 - Subsidiary was “unable to register some of these products.” As a result, its sales declined from US\$22 million in 2000 to approx. US\$2.6 million in 2003. Months of inventory stuck at port.
 - To circumvent the new registration requirements, the Brazilian subsidiary made undocumented cash payments to Brazilian customs brokers, some of which were passed on to customs officials.
 - Subsidiary falsified books, records, and accounts to hide the payments. It recorded the cash payments as “importation advances.” At first, had no accurate supporting documentation for cash payments. Then purchased fictitious supporting documentation.

Key Areas of Corruption Risk in Brazil

Mergers & Acquisitions

- Challenges with Family Owned Companies
- Pre- and Post-Acquisition Due Diligence
- Compliance Integration
- Relevant FCPA actions: *Tyco*

Key Areas of Corruption Risk in Brazil

Mergers & Acquisitions

- **Tyco International Ltd. (2006):** Settled civil action with SEC for US\$50 million penalty. The FCPA allegations were among a larger set of SEC violations. Management ignored red flags brought to its attention about corrupt conduct of subsidiaries.
 - In 1998, Tyco acquired a Brazilian engineering company that worked in construction of water, wastewater, sewage, and irrigation systems. In the acquisition due diligence, payments to government officials were discovered as common and were “portrayed as necessary in industries in which [the acquiree] conducted business.”
 - After acquisition, approximately 60% of acquiree’s total contracts involved some form of payment to a government official.
 - Some payments made through “lobbyists” with full knowledge that all or a portion of the money would be given to officials. Lobbyists submitted inflated invoices.
 - False invoices generated by companies owned by acquiree’s employees to obtain funds for the illicit payments and conceal them on books and records.
 - Executives of parent company in California participated in phone calls and meetings where payments were discussed.

Changing Climate in Brazil

Important Anti-Corruption Developments

- Embraer Investigation
- Petrobras Investigation
- 2016 Olympics

Changing Climate in Brazil

How local investigations are affecting risk climate

- Local investigations initiated / led by Brazilian authorities, not U.S. authorities
- Active press / allegations of overhyped media reports
- Engaged public – including protests
- Changing behavior of government officials

FCPA Anti-Bribery Provisions

- No *issuer, domestic concern*, person with a U.S. nexus
- May *corruptly*
- Take any action *in furtherance of payment* or a promise, offer, or authorization of payment
- Of a bribe or *anything of value*
- *Directly or indirectly* (with “*knowledge*”)
- To a *foreign official*
- To *obtain or retain business* or *improper advantage*

FCPA Accounting Requirements

- Maintain books, records, and accounts that, in reasonable detail, accurately reflect transactions and the disposition of assets
- Maintain a system of internal accounting controls sufficient to reasonably assure that transactions are:
 - Consistent with management authorizations
 - Recorded so that financials can conform with GAAP
- Primarily civil/administrative penalties, but criminal for willful violations



Brazil Clean Companies Act

- Corporate administrative and civil liability
- Prohibited acts:
 - ❖ Domestic & foreign bribery
 - ❖ Public procurement-related violations
- Strict liability – no need to show intent
- Significant sanctions (ie., up to 20% of the gross revenue of the legal entity)
- Explicit credit for compliance programs, self-disclosure, and cooperation



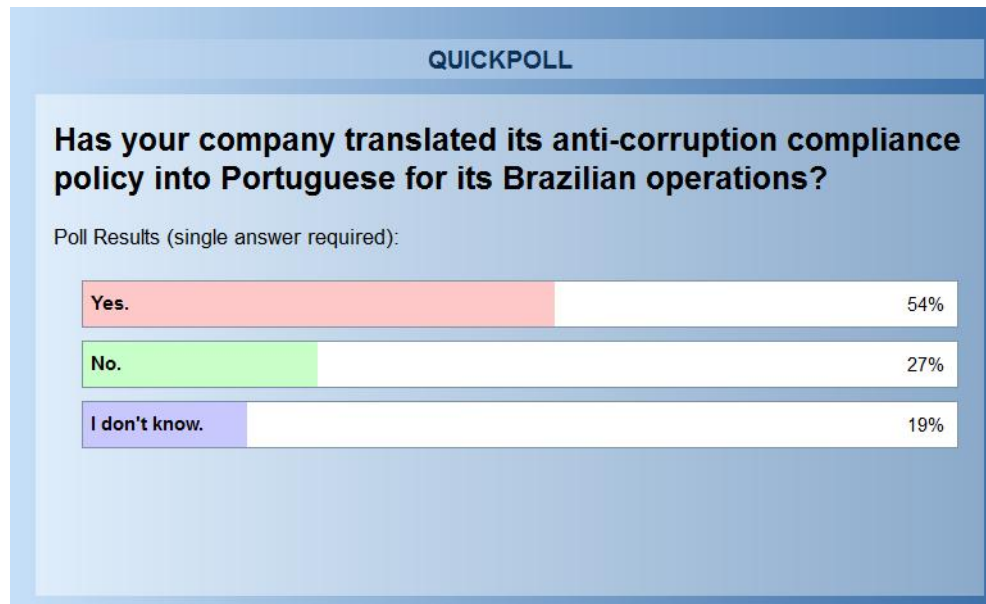
Participant Poll #2

Has your company translated its anti-corruption compliance policy into Portuguese for its Brazilian operations?

1. Yes
2. No

Participant Poll #2 - RESULTS

Has your company translated its anti-corruption compliance policy into Portuguese for its Brazilian operations?



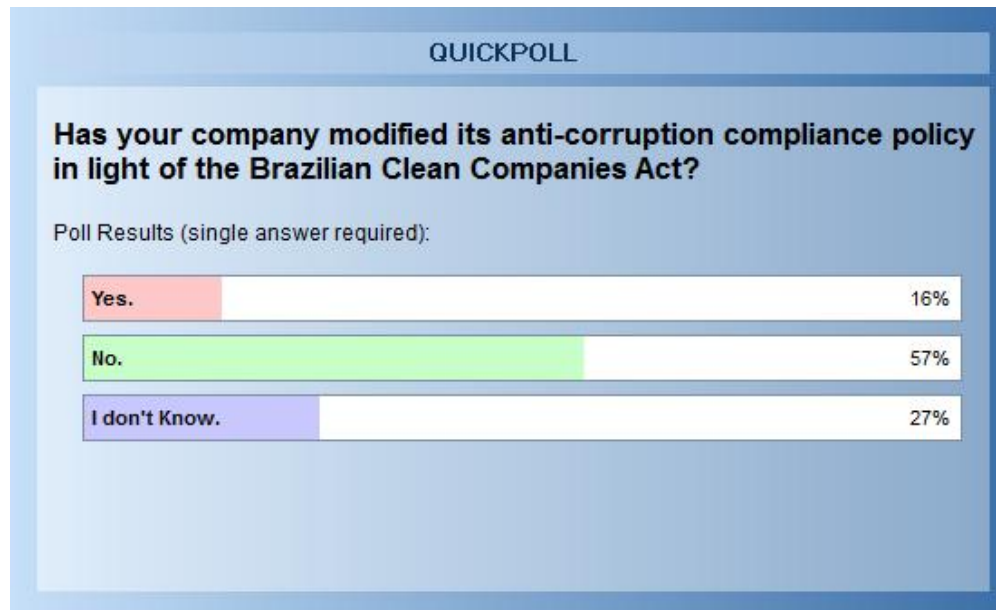
Participant Poll #3

Has your company modified its anti-corruption compliance policy in light of the Brazilian Clean Companies Act?

1. Yes
2. No

Participant Poll #3 - RESULTS

Has your company modified its anti-corruption compliance policy in light of the Brazilian Clean Companies Act?



FCPA Compliance

Basic Expectations

- Tone at the Top
- Codes of Conduct
- Anti-Corruption Policies and Procedures
- Risk Assessments
- Internal Controls
- Trainings
- Due Diligence on Third Parties
- Contractual Compliance Terms and Conditions
- Discipline / Incentives
- Hotlines / Internal Investigations
- Auditing / Testing

BCCA Compliance

Recently-Published Regulations

Discuss 16 Key Features

- Commitment of senior management and Board
- Policies and procedures applicable to everyone in company
- Policies and procedures applicable to third parties
- Periodic training
- Periodic risk assessments
- Accurate and complete books and records
- Internal controls to ensure reliability of financial statements
- Specific procedures related to public procurement and interactions with government officials

BCCA Compliance

Recently-Published Regulations

Discuss 16 Key Features

- Independence and authority in the compliance function
- Existence of a hotline available to employees and third parties
- Disciplinary measures in the case of wrongdoing
- Procedures to immediately stop irregularities detected and to take measures to remediate damages caused
- Due diligence on third parties
- Due diligence in corporate and M&A transactions
- Continuous monitoring of the program
- Transparency in political contributions

Key Features of Anti-Corruption Compliance in Brazil

Risk Assessments

The design of anti-corruption compliance programs should be based on periodic corruption risk assessments. An assessment of corruption risk considers multiple factors, including:

- The country or region in which the company and its subsidiaries operate;
- The company's sector or industry;
- The ways in which the company interacts with foreign officials;
- The company's use of third parties, such as consultants or agents, to interact with foreign officials;
- The existence of joint venture partners or other affiliates that interact with foreign officials

Key Features of Anti-Corruption Compliance in Brazil

Third Party Due Diligence

“Third Parties” can include consultants, sales agents, distributors, independent contractors, accountants, customs brokers, lawyers, lobbyists, and others.

Because indirect payments to foreign officials by third parties constitute some of the most problematic areas under the FCPA, companies should take steps to minimize risk. Due diligence and oversight activities might include:

- Vetting third parties for qualifications, questionable reputations, history of wrongdoing, and relationships with government officials.
- Establishing and documenting a business rationale for their use.
- Educating third parties on applicable anti-corruption rules and the company’s compliance program.
- Obtaining certifications from third parties regarding compliance with the FCPA.

Due diligence should be risk-based, applying greater degrees to third parties engaged in higher risk activities.

Key Features of Anti-Corruption Compliance in Brazil

Third Party Due Diligence

Ways to vet and monitor third parties include:

- Checking references;
- Issuing questionnaires to obtain background information on ownership, registration/incorporation, government relationships, and qualifications;
- Reviewing media reports, government denied and debarred persons lists, and other databases against the third party and its principals;
- Interviewing third party personnel to clarify outstanding questions;
- Ensuring that fees and payment terms are competitive and justified;
- Making payments against pre-approved work plans and cost lists;
- Ensuring invoices have adequate detail and support;
- Including compliance contractual provisions in agreements;
- Including audit rights in agreements;
- Training third parties on compliance.

Key Features of Anti-Corruption Compliance in Brazil

Monitoring and Testing

- Companies should periodically review and test anti-corruption compliance controls.
- This involves thinking critically about a program's potential weaknesses and risk areas.
- Third party relationships should be monitored. This can include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications.
- The driving principles of monitoring should be improvement and sustainability.

THANK YOU

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Questions?



Q&A

Contact Us



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THANK YOU!



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Upcoming Events...



ON-DEMAND WEBCASTS

Creating An Engaging Global Code of Ethics

Featuring Lori Tansey Martens (International Business Ethics Institute)

April 7th @ 1:00 pm Eastern Time

EVENTS

Ethics & Compliance Exchange 2015 – New York City

Featuring K&L Gates Partner Donald C. Dowling

April 21st | 12:00 pm - 6:00 pm

Ethics & Compliance Exchange 2015 – Philadelphia

Featuring K&L Gates Partner Donald C. Dowling

April 23rd | 12:00 pm - 6:00 pm

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<https://www.tnwinc.com/12873/on-demand-webinar-corruption-risks-in-brazil-ensuring-compliance-with-the-fcpa-bcca/>