McDermott Will & Emery

The FCPA in BRIC Countries: 2011 Enforcement Trends in Emerging Markets

June 16, 2011

In the coming decade, developing BRIC (Brazil, Russia, India and China) economies will continue to expand while becoming further intertwined in the global economy. Attractive as potential investment opportunities in BRIC may be, U.S. and multinational companies need to remain vigilant to the potential corruption risks of doing business in these emerging markets. It is apparent that BRIC-based entities will become increasingly subject to U.S. FCPA enforcement in coming years, while emerging market governments are increasingly willing to piggyback off U.S. enforcement actions, and cross-border cooperation will increase in enforcing anti-bribery laws.

In the spring of 2010, market observers decided this is BRIC's decade. BRIC is shorthand for Brazil, Russia, India and China, the world's fastest growing emerging markets. Between 2000 and 2010, BRIC (and the sometimes included South Africa) had contributed more than one-third of the world's gross domestic product (GDP) growth, and increased from one-sixth to one-fourth of the world economy in purchasing power parity (PPP) terms (*BRICs Monthly*, Issue No. 10/03, May 20, 2010, *available at* http://www2.goldmansachs.com/ideas/brics/brics-decade-doc.pdf). Their middle classes increased in exponential terms as foreign companies entered into, and domestic companies grew from, BRIC markets. In the coming decade, these economies will continue to expand while becoming further intertwined in the global economy. By 2030, it is estimated that 60 percent of the world's GDP will come from BRIC countries.

Attractive as the potential investment opportunities in BRIC may be, U.S. and multinational companies need to remain vigilant to the potential corruption risks of doing business in these emerging markets. The U.S. Securities and Exchange Commission (SEC), U.S. Department of Justice (DOJ) and other global law enforcement agencies such as the UK Serious Fraud Office (SFO), have all recently ramped up enforcement against bribery and corruption around the globe, but especially in these emerging markets. Companies found in the crosshairs of a government investigation often choose to settle these charges out of court and pay hefty fines and penalties instead of leaving themselves open to the uncertainty of taking their cases to trial. U.S. law enforcement is also increasingly targeting individuals for prosecution for violations of the Foreign Corrupt Practices Act (FCPA) and jail sentences for culpable defendants are getting longer.

A number of notable trends have emerged based on recent FCPA enforcement actions involving BRIC. First, many BRIC-based entities—and not just Western companies and their foreign subsidiaries—are increasingly being subject to FCPA enforcement. Second, emerging market anticorruption law enforcement authorities are increasingly willing to piggyback off of U.S. enforcement actions and are now initiating their own investigations and enforcement actions against companies who have settled cases with U.S. regulators. Finally, recent actions by the United States and its European counterparts signal an increased willingness for cross-border cooperation in enforcing the FCPA and other global anti-bribery laws. In 2011 alone,

U.S. regulators have initiated investigations against a large U.S. food retailer in India, a prominent U.S.-based gaming company based on a whistleblower complaint from a senior officer in its China-based subsidiary and a large U.S.-based cosmetics company, to name a few. This year has also continued the trend of multi-million-dollar settlements, including the US$10 million settlement by IBM on March 18, relating to FCPA allegations in Korea and China, and the April 8 settlement of Johnson & Johnson for US$77 million to resolve FCPA charges involving its activities in Greece, Poland and Romania.

These trends mean one thing: that companies—both U.S.-based companies with operations in BRIC and BRIC-based companies registered with the SEC or otherwise doing business in the United States—need to reassess their existing compliance programs to ensure they are adequately protected against FCPA and international anticorruption risks. Companies that find themselves subject to investigations by U.S. or UK regulators, need to think in terms of global resolutions that include possible settlements with local anticorruption agencies as well.

FCPA Enforcement Against BRIC-Based Entities

The past year has brought a new reality: we are now seeing enforcement against foreign entities themselves, not just foreign subsidiaries of U.S. companies. Until December 2010, American commentators could not cite to a single case in which a Chinese issuer—not a Chinese subsidiary with a U.S. parent—was the focus of an FCPA inquiry. That quickly changed when *The Wall Street Journal* broke the news that a Dalion, China-based issuer named Rino International Corp. had disclosed in its Form 8-K SEC filing that it was the subject of a U.S. investigation regarding its financial reporting and FCPA compliance from 2008 through 2010. Following a scathing November 2010 research report by analyst Muddy Waters LLC, the SEC opened a wide-ranging inquiry into Rino's books and internal control issues, along with anti-bribery issues. This investigation is a first for a Chinese company; however, as more Chinese and other BRIC-based issuers continue seeking U.S. investors and listing their shares on U.S. exchanges, FCPA enforcement action against companies that fail to implement effective FCPA compliance programs will continue to increase.

More Piggyback Anticorruption Enforcement Actions in Foreign Jurisdictions

In the past decade, anticorruption prosecutions by local authorities in emerging markets has been on the upswing. Between 2005 and 2010, for example, the Chinese recovered US$4.62 billion in anti-bribery and graft prosecutions, with 119,000 corruption cases investigated in 2010 alone. (See "Bribery and Corruption on the Rise in 2010," *China Daily*, January 6, 2011; "Fighting Corruption is Party's Top Priority," *China Daily*, July 14, 2006; "Number of corruption cases slightly up," *Xinhua*, December 29, 2010.) Multinational entities are now under more scrutiny than ever in these markets, and local law enforcement authorities are demonstrating a willingness to piggyback off of U.S. FCPA enforcement actions.

In the past year, authorities in countries such as Honduras, Malaysia and Italy have begun piggybacking off U.S. anti-bribery efforts. Those countries are not alone. India has commenced anticorruption enforcement actions against companies

such as against Dow Chemical subsidiary DE-Nocil Crop Protection. In February 2007, that company settled with the SEC, consenting to a civil penalty of US$325,000. China has done the same. In recent years, it has piggybacked off U.S. and U.K. enforcement actions against companies such as Lucent, Rio Tinto and Siemens, each of which paid millions of dollars to resolve FCPA allegations with U.S. regulators. Even Nigeria has capitalized on U.S. enforcement cases, obtaining US$128 million over the last six months in settlements from the four multinational companies involved in the Bonny Island bribery case (the consortium known as TSKJ involved U.S. Halliburton's then subsidiary, KBR). Nigeria is also racking up large financial settlements from companies involved in the Panalpina probe, a bribery scandal involving improper payments by Panalpina, a global freight forwarding company, to Nigerian customs officials to expedite its oil service clients' goods and products into Nigeria. These settlements come on the heels of KBR/Halliburton and Panalpina shelling out millions of dollars to U.S. regulators in 2010 to resolve FCPA charges.

Another example of the piggyback phenomenon is the case of Alcatel-Lucent S.A. In December 2010, Alcatel paid US$92 million in criminal penalties and US$45 million in disgorgement to U.S. authorities after the company admitted to violating internal controls and books and records provisions of the FCPA regarding its consultants' illegitimate funneling of bribes to foreign officials. After Alcatel-Lucent settled with the DOJ and SEC, foreign law enforcement authorities located in the countries where the offenses occurred, including Honduras, Malaysia and Nigeria, began investigations of their own.

Foreign regulators are not only going after U.S. and UK targets, they are also seeking information gathered in those enforcement actions. Honduras's top anti-corruption prosecutor recently asked U.S. law enforcement to turn over all information underpinning the Alcatel-Lucent settlement, including the identities of the Honduras public officials who were alleged to have accepted bribes. Nigeria has requested the same involving bribery scandals there. It is unclear how much assistance the United States will give because the U.S. government is likely skeptical about the willingness of these countries to act against the alleged bribe recipients, particularly if they are in high positions with these governments. However, companies under investigation are incentivized to cooperate with the foreign countries' investigations because failing to do so may risk violating the terms of their settlement agreements with U.S. authorities. This may explain why many of these companies choose to settle charges brought in foreign jurisdictions even after paying large fines and penalties in the United States. The lesson learned from this new enforcement trend is that companies who find themselves subject to a U.S. FCPA probe should know that settlement with U.S. authorities may not be the end of the matter, and should work toward negotiating a global settlement to avert future investigations by foreign regulators in other jurisdictions.

Increased Cross-Border Cooperation

It is also becoming clear that the DOJ and SEC have "never been more focused on building relationships with their foreign counterparts" (*The Wall Street Journal*, "Corruption Currents: Trends to Look for in 2011," December 30, 2010). American agencies are reported to be holding informal meetings, under the auspices of the OECD and other international forums, regarding the coordination of anti-bribery efforts. It is now regular practice for the U.S. Federal Bureau of Investigation to

open its files to its counterparts in London any time there is even a slight link to the United Kingdom; similarly, the DOJ serves as part of the British organized crime center. Some recent anti-bribery actions by the DOJ have also been in close coordination with the British SFO. American and German institutions have also been working more closely in recent anticorruption probes involving a prominent French-based insurance company and U.S.-based technology company who do business in these countries. With emerging market governments asking for increased support of their anti-bribery actions from their counterparts in the United States and United Kingdom, the stage is set for promoting more cross-border cooperation in anticorruption matters, and it is only a matter of time before similar institutional and organizational collaboration extends to BRIC governments as well.

Conclusion

The world is flattening and business and investment opportunities in BRIC and other emerging markets will continue to attract U.S. and other foreign investors. As a result, U.S. companies and others doing business in these emerging markets need to be proactive about safeguarding themselves against FCPA and other corruption risks. If they do find themselves embroiled in a DOJ- or SEC-initiated investigation where they may have some FCPA liability, they need to be mindful of the larger picture of the possibility of piggyback litigation in other jurisdictions when they are strategizing on how to resolve the matter.

The McDermott Difference

McDermott Will & Emery's Foreign Corrupt Practices Act (FCPA) and International Anti-Corruption Group has substantial experience assisting clients with internal investigations, government enforcement actions and regulatory inquiries, FCPA compliance counselling and transactional due diligence. McDermott FCPA and International Anti-Corruption lawyers have experience across many industries in each of the international “hot spots” for government investigations and prosecutions, including Africa, South America, the Caribbean, Europe, the Middle East and Asia, where MWE China Law Offices is the only firm exclusively affiliated with a U.S. law firm that can legally practice Chinese law, including interviewing witnesses and representing clients before Chinese regulatory agencies and courts.