

High Risk Markets & FCPA

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Brian R. Michael
Partner
King & Spalding LLP

Julie Myers Wood
Chief Executive Officer
Guidepost Solutions

Tedra Foster
Senior Director, Ethics and Compliance
Herbalife Nutrition

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Agenda: Three Topics



- Effective Strategies for Hiring 3rd Parties with Government Ties in China



- Recent Developments in Brazil and Mexico



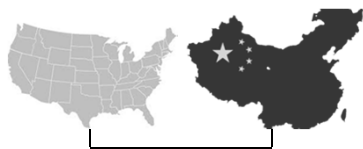
- Practical Considerations Regarding Adherence to ISO 37001



First Topic...



Effective Strategies for Hiring 3rd Parties with Government Ties in China



China: Effective Strategies

U.S. Legal Framework: The FCPA



- **Covers U.S. "persons"**
 - U.S. citizens, nationals, or residents of U.S.
 - Entities based in U.S. or issuers of U.S. securities
 - U.S. investors in a foreign entity
 - Officers, directors, employees, agents, stockholders of U.S. entities
- **Potential exposure for non-U.S. "persons"**
 - Non-U.S. subsidiaries of U.S. parent
 - Non-U.S. agents acting on behalf of U.S. companies
 - Non-U.S. persons acting while in U.S. territory
 - Non-U.S. accounts containing proceeds of improper payments
- **Anti-Bribery Provisions**
 - Prohibits the promise, authorization, payment, or offer of money or anything of value, "corruptly," directly or indirectly, to any foreign official for the purpose of influencing an official or securing any improper advantage, in order to obtain or retain business.
- **Accounting Provisions**
 - Issuers are required to make and keep accurate and reasonably detailed books, records, and accounts, as well as maintain adequate internal controls.

China: Effective Strategies

China's Compliance Environment



- **Strong anti-corruption laws on the books**
- **Aggressive local enforcement activity**
- **Domestic and foreign companies targeted**
 - *GlaxoSmithKline (GSK)* – British pharma company used travel agencies to facilitate bribery payments to doctors, hospitals and government officials
 - Fined 3 billion yuan (\$489 million dollars) by Chinese authorities
 - Investigation into GSK by US and UK prosecutors
- **Exposure in the U.S.**
 - 16 FCPA investigations involving China in 2016
 - *GSK*
 - *JP Morgan ("Sons and Daughters")*
 - *Nu Skin Enterprises*
 - *AstraZeneca*

China: Effective Strategies

Risks Specific to the Region



- **State-owned and state-controlled businesses**
 - More than 76% of assets are owned by the government, which means that to do business in China a company will most likely have to negotiate with the state
- **Required used of local companies**
 - For example, Chinese law prohibits foreign companies from employing locals leading many to use third party agencies to staff their workforce
- **Data privacy**
 - Strict data localization requirements for certain industries and restrictions on sending data outside of China
- **Chinese media**
 - Chinese government regularly uses the media to expose alleged corporate malfeasance
 - Risk of being the next high-profile target

China: Effective Strategies



Third Party Red Flags



- **DOJ/SEC FCPA Guide**
 - Excessive commissions to agents or consultants
 - Unreasonably large discounts to third-party distributors
 - Consulting agreements that only vaguely describe services
 - Consultant in a different line of business than for which it was engaged
 - Third party is related to or closely associated with a foreign official
 - Third party became part of the transaction at the express request or insistence of foreign official
 - Third party is a shell company incorporated in an offshore jurisdiction
 - Third party requests payments to offshore accounts

China: Effective Strategies



Third Party Due Diligence Objectives



Identify areas of exposure

- What issues does the third party face?
- Explain due diligence requirements and timing.
- Develop risk assessment process.

Mitigate exposure

- Amend your due diligence requirements as the process unfolds and information develops.
- Avoid business with third parties involved in illegal, unethical, or questionable practices.

Monitoring

- Monitoring and compliance measures around known risks and taking remedial action as needed
- Integration into compliance systems and culture.
- Maintaining attention to the potential discovery of previously-unknown historical corrupt conduct.

China: Effective Strategies



Develop a Risk-Based Approach

- **Secure good intelligence about third parties**
 - Background, history of the industry, publicly aired concerns
 - Ownership, compliance oversight and culture, risky transactions
- **Exhaust internal sources of knowledge**
- **Establish a record of due diligence steps, reasons for them, and results**
- **Train employees regarding risks, red flags, and how to report concerns**
- **Put in place effective, ongoing monitoring process**



Second Topic...



Recent Developments in Brazil and Mexico



Brazil & Mexico: Recent Developments



Transparency International Index 2016

RANK	COUNTRY/TERRITORY	SCORE
9	Canada	62
11	United States	74
21	Uruguay	71
24	Bahamas	68
34	Chile	65
37	Barbados	61
38	Saint Lucia	60
39	Saint Vincent and the Grenadines	60
39	Dominica	59
41	Costa Rica	58
46	Grenada	55
50	Cuba	47
54	Suriname	45
78	Brazil	40
83	Jamaica	39
87	Panama	38
90	Colombia	37
95	Argentina	36
95	El Salvador	36
101	Peru	35
101	Trinidad and Tobago	35
108	Guyana	34
113	Bolivia	33
120	Dominican Republic	31
120	Ecuador	31
123	Honduras	30
123	Mexico	30
123	Paraguay	30
136	Guatemala	28
145	Nicaragua	26
159	Haiti	20
168	Venezuela	17

Brazil & Mexico: Recent Developments




Risks Specific to the Region



- **State-owned and state-controlled businesses**
 - SOEs dominate several industries: oil & gas, electricity, transportation, healthcare
- **Third parties**
 - Consultants commonly used to navigate government bureaucracies and process the paperwork required by those bureaucracies
- **Customs and Import/Export**
 - Risks for U.S. companies importing/exporting merchandise in/out LatAm
- **Perceived culture of corruption**
 - Culture of “jeitinho” (Brazil) or personal favors (Mexico)


Brazil & Mexico: Recent Developments

Enforcement Trends



Brazil

- 2014 Clean Company Act
- “Operation Car Wash”: Petrobras
- Oderbrecht, Eletrobras, JBS



Mexico

- 2016 National Anti-Corruption System
- 2016 Transparency and Access to Public Information Law
- *But... independent corruption prosecutor's appointment blocked*

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Brazil & Mexico: Recent Developments

Increased Cross-Border Risk




- Tougher anti-corruption standards throughout the region
- Continued emphasis on cross-border cooperation
- Argentina investigating approximately 100 companies following a tip from Brazilian prosecutors related to “Operation Car Wash”
- *Rolls-Royce* settlement involving U.S., U.K., and Brazilian authorities
 - Former DOJ Fraud Section Chief Andrew Weissmann:
 - “[Y]et another example of the strong relationship between the United States and U.K. Serious Fraud Office and Brazilian Federal Prosecution Office, and the collective efforts to ensure that ethical companies can compete on an even playing field anywhere in the world.”
- Recent *Wal-Mart* settlement

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Brazil & Mexico: Recent Developments

Practical Tips



- **Due Diligence**
 - Comprehensive due diligence on all potential business contacts to evaluate whether they are government officials
- **Retaining Counsel**
 - When handling cross-border investigations, consult both foreign and U.S. counsel with experience in handling international investigations
- **Information Handling**
 - Consider restrictions on information that can (or must) be provided to authorities
 - Although attorney-client privilege is treated similarly in U.S. and Brazilian litigation, Brazil has additional restrictions on disclosure of client information
- **Criminal Liability**
 - Some countries do not have corporate criminal liability; instead, liability may fall on the individual(s) who manage the company

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Third Topic...



Practical Considerations Regarding Adherence to ISO 37001



ISO 37001: Practical Considerations



What is ISO?

- The International Organization for Standardization (ISO) develops and publishes International Standards
- It is comprised of the national standards bodies from 163 member countries
- It has developed nearly twenty thousand voluntary international standards



ISO 37001: Practical Considerations



What is ISO 37001?

- Anti-bribery management system standard published in October 2016
- Designed to help an organization establish, implement, maintain, and improve an anti-bribery compliance program
- Includes a series of measures and controls that represent global anti-bribery good practice



ISO 37001: Practical Considerations



ISO 37001 Requirements

- **Organizations must implement measures and controls in a reasonable and proportionate manner to help prevent, detect, and deal with bribery, including:**
 - Anti-bribery policy
 - Management leadership, commitment and responsibility
 - Personnel controls and training
 - Risk assessments
 - Due diligence on projects and business associates
 - Financial, commercial and contractual controls
 - Reporting, monitoring, investigation and review
 - Corrective action and continual improvement



ISO 37001: Practical Considerations



Implications



- **Impact still unclear**
 - Commentators have opined that the standard will be widely adopted as the new global standard for anti-bribery compliance
- **Major corporations seeking certification**
 - Microsoft and Wal-Mart have recently announced that they will seek certification
 - Others likely to follow suit
- **No direct legal consequences to not following the standard**
 - *But...* being certified may be viewed as a mitigating factor in FCPA prosecutions
 - *SEC and DOJ officials have remarked:* "Anything that tells companies, especially overseas companies, what is expected from an anti-corruption perspective is a good thing."

Questions/ Conclusion