Key Takeaways

Skadden

Hot Topics in Brazil: Addressing US Regulatory, Litigation and Transactional Compliance/ Corruption Challenges

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On May 20, 2015, Skadden held a seminar in São Paulo, Brazil, to discuss the reach and implications of U.S. securities laws, anti-corruption laws and U.S. regulators on Brazilian companies and issuers. The group of speakers consisted of Skadden partners from a variety of practice groups and offices, focusing on areas such as government enforcement and the U.S. Foreign Corrupt Practices Act (FCPA), securities law and litigation, and international arbitration, and included, from New York, Jay Kasner, Scott Musoff, Paul Schnell and Lawrence Spiegel; from São Paulo, Richard Aldrich, Filipe Areno, Julie Bédard and Mathias von Bernuth; and, from Washington, D.C., Gregory Craig. The event was attended by in-house counsel from major Brazilian corporations active in cross-border transactions as well as local counsel from Brazilian law firms that represent such Brazilian companies.

US Foreign Corrupt Practices Act: Reach, Scope and Effect on Brazilian Companies

The first panel, with Mr. Areno, Mr. von Bernuth, Mr. Craig, Mr. Schnell and Mr. Spiegel, discussed the increasing relevance of the FCPA on foreign corporations. In particular, the panel emphasized how, in recent years, very aggressive enforcement of the FCPA has ensnared companies with only minimal ties to the United States. Since the global economic recession in 2008, U.S. regulators have more actively pursued and investigated possible FCPA violations, with fines totaling billions of U.S. dollars. The panel also noted that many non-U.S. companies operate under the false belief that the FCPA applies exclusively to U.S. companies, and this misunderstanding can often pose serious risks to companies that engage in cross-border commercial activity. Furthermore, the panel noted the long arm of U.S. regulators, which often rely on cooperation from local regulatory bodies in a company's home country to enforce the FCPA.

The keys to mitigating the risks associated with violations of the FCPA lie in the "three C's": culture, compliance and cooperation. Long before the threat of an actual investigation, it is in every company's best interests to implement policies to ensure compliance with the FCPA and to instill a culture within the company that does not tolerate any behavior anathema to the FCPA. This culture should apply not only internally but also with the company's dealings with third parties, as such relationships are also subject to scrutiny by FCPA regulators. However, once the threat of an FCPA inquiry is no longer hypothetical ("once the knock on the door comes"), the panel members stressed the importance of cooperation with regulators to identify and thoroughly investigate

the alleged violation. Moreover, if any actual violations are discovered, U.S. regulators often will look more favorably on companies that have strong cultures of compliance as a possible mitigating factor when meting out penalties. Lastly, the panel left the audience with "the 10 Golden Rules of the FCPA," which included among them: a zero-tolerance standard for corruption, periodic risk assessments and a credible internal reporting system.

Shifting gears from the basic principles of the FCPA, the panel next turned its attention to the impact that FCPA investigations can have on cross-border M&A transactions. The panel discussed how even the mere specter of an FCPA investigation can often poison the dynamics of a deal and give an unfair advantage to non-U.S. bidders that are not subject to the same high level of scrutiny as U.S. buyers. The panel advised that the most effective ways to uncover and to address any possible FCPA issues in transactions are by conducting a more thorough diligence process and incorporating additional contractual protections against these kind of issues. While many companies may view these additional steps as costly and time consuming, they are now a reality of many cross-border transactions given the nearly ubiquitous efforts of regulators worldwide to identify and uncover corruption.

US Securities Litigation and International Arbitration of Corruption

The second panel, featuring Ms. Bédard, Mr. Kasner and Mr. Musoff, discussed the foundational principles of the U.S. statutory scheme governing potential liability that attaches to issuers and others for material misstatements or omissions in the sale, offering and trading of securities. Setting forth a general overview of the Securities Act of 1933 and the Securities Exchange Act of 1934, the panel discussed the scope of liability under both laws, how damages are calculated and the respective statutes of limitation and repose. The panel noted the timeliness of these issues, especially for Brazilian issuers, given the recent issues at Petrobras, Brazil's state-controlled oil giant that has been the target of numerous lawsuits in recent months alleging fraud and misrepresentation under U.S. securities laws. In the last year and a half, Petrobras has been heavily investigated by the Brazilian Federal Police for an alleged bribery scheme. Since the end of 2014, investors have filed a number of putative class action lawsuits against Petrobras, its directors and officers, its underwriters and its auditors for alleged misstatements in its financial statements due to the company's purportedly corrupt dealings with its suppliers. The panel then discussed the requirements for U.S. securities laws to apply outside the U.S. based on the U.S. Supreme Court's *Morrison* decision: the laws will apply to transactions listed on U.S. domestic exchanges or U.S. domestic transactions in other securities.

Finally, the panel focused on claims of illegality and corruption in international arbitration proceedings. The panel noted that there is a growing body of international law being applied in arbitration forums, such as international anti-corruption conventions. The panelists provided an overview of arbitration proceedings that have involved allegations of corruption and the arbitration panels' treatment of such allegations, contrasting it with parallel proceedings in courts of law.

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