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LEGAL ISSUES AND DEVELOPMENTS
FROM CARLTON FIELDS JORDEN BURT

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TAKING YOUR BUSINESS INTERNATIONAL

INSIDE: CUBA'S UNDERDEVELOPED TELECOMMUNICATIONS INFRASTRUCTURE PRESENTS OPPORTUNITIES • DUE DILIGENCE IN CROSS-BORDER ACQUISITIONS PAVING THE ROAD TO ENTER OR RUN AWAY FROM A DEAL IN BRAZIL • FCPA: ANTI-BRIBERY PROVISIONS
• EB-5 PROJECT FINANCE-INVESTOR VISA OPTION

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Taking Your Business International

BY ANDREW J. (JOSH) MARKUS

Going international is a complicated undertaking. The steps required will depend on your specific situation and concerns. The following outlines, in very general terms, some of the issues you must consider as you begin to contemplate international operations.

Anti-Bribery Compliance

If you plan to bid for government contracts, develop an anti-bribery compliance program from the start. The United States has strict rules against corruption in business procurement or retention. The Foreign Corrupt Practices Act (FCPA) governs you and everyone who works for you, whether employees, agents, or partners. In short, the FCPA prohibits giving anything of value to a governmental official or anyone else who might give something to a government official to influence the official in exercising his or her power to award business or allow you to retain business. It also requires you to maintain accurate books and records, which also guards against improper expenditures. A proper compliance program requires training everyone in your business, plus regular compliance checks. If in hindsight, you are deemed to have ignored warning signs, you can be guilty of violating the FCPA. Violations bring substantial fines, and possible jail time.



Local Partners or Agents

Check out your local partner thoroughly before agreeing to do business with it. If it doesn't have a good reputation, don't become partners.

If you do plan to have a local partner or agent, you will need a written understanding with that person. The FCPA and other compliance and termination laws require this understanding to specify the compensation the person will receive and under what conditions. Under local laws, agents often receive severance payments. As this is a matter of public policy in their place of operation choosing Florida law, for instance, will not avoid the obligation. You will also want to determine whether the agent can bind you to contracts.

Additionally, the structure of the entity you use to do local projects is important. Be sure you are protected as to the entity's governance. If possible, have your people control the entity's financial aspects. At all times, be aware of contracts with entities related to your local partner and ensure that you do not overpay for whatever you contract for. If overpaid funds wind up in the pockets of a government official,

problems will result. Stay involved and vigilant. Local general managers can siphon significant funds if you are asleep at the switch.

If possible, control the local entity from outside the foreign country. For example, have the local entity owned by a U.S. entity controlled by you and have the local partner own a part of the U.S. entity. If you do this (or choose some other jurisdiction with predictable law) you may avoid being home-towned in a foreign court if there's a dispute over shareholder's rights and prerogatives. You can then have a U.S. law-governed shareholders agreement with predictable results as to defining the shareholders' rights.

Bilateral Investment Treaties

Whenever possible, choose projects in a country that has a bilateral investment treaty (BIT) with the United States. BITs protect you if you are discriminated against in procurement. They also provide an arbitration mechanism if you are entering into a contract with a government entity or enterprise, and have a dispute.

Corruption Perceptions Index: Visit the website of Transparency International, a global coalition against corruption. There, you can check the corruption perceptions index (CPI) for the countries in which you wish to do business. A ranking that indicates high corruption should be a warning to avoid doing business in that country, or to be extra vigilant. The SEC uses the CPI as one indicator that a country is to be treated with extreme caution.

U.S. Counsel

Use U.S. lawyers familiar with conducting international business. Knowing what questions to ask is important. As the saying goes, "Ignorance is not knowing what you don't know." U.S. counsel will use local counsel. You may think you understand the language or the customs, but local law is important and local counsel experienced in representing foreign investors will teach you a great deal and keep you out of trouble.

Hiring Concerns

Proceed with caution when hiring new employees. You may be unable to terminate an underperforming employee without substantial cost. Remember, employment law worldwide often protects employees to the detriment of the employer.

Intellectual Property Concerns

Protect your intellectual property before you venture abroad. Register trademarks and logos before you go. In many countries it does not matter who used a trademark or logo first. What matters is who registered it first. Many big U.S. businesses have paid to liberate their trademarks from others who registered them first. Regarding trade secrets and know-how, have written protection that will be effective under the law of the place in which you will operate.

Tax Concerns

Structure your operations efficiently from the start from a U.S. tax perspective. Withholding taxes on distributions can be as much as 30 percent unless you take advantage of reduced withholding under double tax treaty regimes. Moving money from one location to another takes planning.

Funding Your Project

Structure your project's funding in the foreign location. If there will be central bank requirements for registering your investment, make sure you comply. That way, you will be able to repatriate your invested funds. Unofficial investments can cause repatriation of capital problems.

Determine how your banks will fund your operations in foreign jurisdictions. If they cannot take the country risk of your chosen location and you need the financing, you may be unable to do the project.

Check out U.S. government sources of loans for your project as well as U.S. government insurance protections. The Overseas Private Investment Corporation (OPIC) and the Inter-American Investment Corporation as well as the International Finance Corporation have lending capabilities. OPIC also provides insurance against expropriation and inconvertibility of currency. ■



Cuba's Underdeveloped Telecommunications Infrastructure Presents Opportunities

BY BILL CHENG

Following changes in U.S. foreign policy toward Cuba, announced by President Obama in December 2014, U.S. government officials and industry players have begun exploring the development and expansion of Cuba's telecommunications infrastructure and services. This development and expansion, targeted by the Obama administration as a natural step in its plan to normalize relations with Cuba, appears to be a priority as the President encourages gradual, but certain, changes.

Developments began in February 2015, when Cuba's state phone company, ETESCA, in partnership with New Jersey-based IDT Domestic Telecom, established a direct interconnection with the United States for international voice calls for the first time since 1999. Then, in mid-March, several Google executives visited Cuba and met with students and professors at Havana's University of Information Science to discuss, among other things, the island nation's access to and adoption of the Internet and mobile applications and services.

Perhaps the highest-level interchange between the United States and Cuba so far came in late March, when U.S. Deputy Assistant Secretary of State Daniel Sepulveda led a delegation to Cuba to meet with Cuba's Vice Minister of Communications and discuss telecommunication issues.

Though these developments are encouraging, reports from these meetings seem to share a common theme: telecommunications has a long way to go in Cuba. The country has one of the lowest rates of Internet access and mobile penetration in the world (roughly 5-10 percent for each). Internet access and private computer ownership are only possible with government authorization, and most of the population can access the Internet only by paying exorbitant fees at government-sanctioned Internet cafes.

Cuba's underdeveloped telecommunications infrastructure and low Internet and mobile access penetration rates present both significant hurdles and the sizable opportunities of a largely untapped market. The way these opportunities develop will largely depend on the Cuban government's policies going forward. For now, at least from the U.S. perspective, government and industry players appear ready to bet that Cuba's telecommunications sector will take off in the foreseeable future. ■

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Due Diligence in Cross-Border Acquisitions Paving the Road to Enter or Run Away From a Deal in Brazil

BY GIOVANNI C. L. BISCARDI

With the great majority of foreign jurisdictions already adopting U.S.-style acquisition documents in connection with business acquisitions, U.S. investors experience a larger sense of comfort in negotiating their equity investments in new markets. This comfort level is increased by the fact that in many of these foreign jurisdictions, an increasing number of U.S.-trained lawyers is available to serve as local counsel for purposes of negotiating the terms and conditions of the applicable agreements. This is certainly the landscape a foreign investor finds in Brazil.

In this scenario, one of the key concerns relates to the due diligence process which remains largely impacted by local rules, regulations, customs and practices. Initiating the due diligence on the right foot is imperative to secure a good deal or escape from a bad one. For this purpose, U.S. investors should be prepared to ask the right questions and set adequate parameters for the legal due diligence, which parameters will largely depend on the size of the deal and the appetite to risk of the investor.

In Brazil, the main areas of concern are tax, labor and litigation.

For tax due diligence, U.S. investors should try to avoid overlap between the work to be performed by accounting and tax personnel, on the one hand, and tax counsel on the other, as both sets of work product must complement each other. As a matter of practice in Brazil, the local tax counsel will be responsible for analysis of materialized liabilities, i.e., administrative and judicial proceedings, focusing on the estimation of the maximum exposure and the chances of success. Accounting and tax personnel, on the other hand, analyze tax policies and practices adopted by the target, in an effort to identify contingencies that

may materialize in the future. Unless a clear pattern of behavior of the Brazilian tax authorities is identifiable, it is difficult to predict if bad practice or policies will result in an administrative or judicial proceeding. However, accounting and tax personnel are generally able to determine the maximum exposure of a potential proceeding and will rely on the opinion of tax counsel to determine the related risk of loss, if and when a claim is initiated by the authorities. In practice, it is not common to set threshold limitations for the tax portion of the due diligence, as consequences should not be measured by potential immediate losses but rather by potential long term negative effects.

Labor due diligence is primarily influenced by the characteristics of Brazilian labor rules and regulations, which offer a paternalistic treatment to employees. Similar to the tax portion of the due diligence, the Brazilian labor counsel focuses on ongoing labor litigation while accounting and tax personnel look into the labor policies and practices adopted by the target. However, unlike the tax analysis, a materiality threshold is generally determined by the investors with the assistance of local legal counsel, in an effort to focus on what is really relevant on the labor side.

Finally, litigation due diligence is materially influenced by the sector in which the target operates, with a distinction between strategic and core business litigation. In order to increase productivity and objectivity, the investor must set realistic thresholds for review of litigation related to the core business, discarding the analysis of minor issues which will not materially impact the affairs of the target. In all consumer-related businesses, special attention should be paid to setting the appropriate methodology for analysis of consumer claims, as they often come in a large number before the Juizados Especiais Cíveis (the small claims courts) and require an adequate review by sampling. On the other hand, proceedings that may affect the entire sector in which the target operates, often carry a strategic concern and must be carefully analyzed, irrespective of the amounts involved.

Therefore, although a globalized legal environment facilitates the negotiation of agreements for acquisitions in Brazil, U.S. investors must dedicate their efforts at the beginning of the acquisition process to carefully define the scope and materiality thresholds for the due diligence process jointly with competent local counsel, in order to improve their chances to make an adequately informed decision, whether such decision is to sign and close a good deal or simply walk away. ■

In Brazil, the main areas of concern are tax, labor and litigation.

FCPA: Anti-Bribery Provisions

BY KEVIN NAPPER

The Foreign Corrupt Practices Act (FCPA) addresses the problem of international corruption in two ways: (1) the anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business; and, (2) the accounting provisions impose certain recordkeeping and internal control requirements on issuers and prohibit individuals and companies from knowingly falsifying an issuer's books and/or records or circumventing or failing to implement an issuer's system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, including fines, disgorgement of profits, and/or imprisonment.

Generally, the FCPA prohibits offering to pay, paying or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.

Who is Covered by The Anti-Bribery Provisions?

The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in U.S. territory.

Issuers—15 U.S.C. § 78dd-1

Section 30(a) of the Securities Exchange Act of 1934 contains the anti-bribery provision governing "issuers." A company is an "issuer" under the FCPA if it has a class of securities registered under § 12 of the Exchange Act or is required to file periodic and other reports with the SEC under § 15(d) of the Exchange Act. In practice, this means any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with the SEC, is an "issuer". A company need not be a U.S. company to be an issuer.

The FCPA prohibits offering to pay, paying or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.

Domestic Concerns—15 U.S.C. § 78dd-2

The FCPA also applies to "domestic concerns." A domestic concern is any individual who is a U.S. citizen, national, or resident, or any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship that is organized under U.S. laws, or that has its principal place of business in the United States. Officers, directors, employees, agents, or stockholders acting on behalf of the domestic concern, including foreign nationals or companies, are also covered.

Territorial Jurisdiction—15 U.S.C. §78dd-3

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise or authorization to pay) while in U.S. territory. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions.

What Jurisdictional Conduct Triggers The Anti-Bribery Provisions?

The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines “interstate commerce” as “trade, commerce, transportation or communication among the several states, or between any foreign country and any state or between any state and any place or ship outside thereof.” The term also includes the intrastate use of any interstate means of communication or any other intrastate instrumentality. Thus, placing a telephone call or sending an email, text message or fax from, to, or through the United States involves intrastate commerce, as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.

What Is Covered? The Business Purpose Test

The FCPA applies to payments intended to induce or influence a foreign official to use his or her position “in order to assist...in obtaining or retaining business for or with, or directing business to, any person.” This requirement is known as the “business purpose test” and is broadly interpreted. Not surprisingly, many enforcement actions involve bribes to obtain or retain government contracts. The FCPA also prohibits bribes in the conduct of business or to gain a business advantage. For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test.

As companies develop their efforts to ward off public bribery and corruption within their operations, the U.S. government continues to refine the way it brandishes the FCPA to fight global corruption. General counsel would be well advised to keep current on the Department of Justice's enforcement trends and evolving prosecution theories. ■



EB-5 Project Finance–Investor Visa Option

Creative Financing for U.S. Developers and Businesses

BY JULIE C. FERGUSON

In recent years, developers seeking to raise capital have taken a keen interest in the EB-5 regional center investor visa program. Regional centers are entities designed to use immigrant investor capital to promote economic growth in a particular geographic area or region. Developers seeking to raise capital through this program can invite foreign investors to invest \$1 million and pool that capital into a new commercial enterprise that creates employment for 10 U.S. workers for each \$1 million invested. Developers with projects located in Targeted Employment Areas (TEAs) can invite foreign nationals to invest at the reduced amount of \$500,000. The investor visa program is an attractive source of financing because:

- Developers enjoy relatively inexpensive borrowing costs (ranging from 3 to 5 percent); and,
- Investors are attracted by the prospect of getting a green card, which provides an important part of the return on the investment.

Green Cards for Foreign Investors

The EB-5 investor visa program gives permanent residency (a green card) to foreign nationals who invest in individual capital development projects as well as projects sponsored by regional centers. After five years of residency, the foreign investors can apply for U.S. citizenship.

The Regional Center Program

Most investors opt to invest in projects sponsored by regional centers. Regional centers are legal entities organized to use immigrant investor capital to promote economic growth in a particular geographic area in specified industry clusters.

**Currently,
approximately
85 percent of EB-5
visas are issued to
Chinese nationals.**

**The EB-5 program has
generated more than
\$6.8 billion in new
investment since its
inception in 1990.**

Any entity, government, or private organization may apply for regional center designation by submitting a written economic development plan and proposal to U.S. Citizenship and Immigration Services (USCIS).

A regional center's proposal must contain a clearly identified, contiguous geographic area typically defined by census tracts. Some regional centers cover an entire state, while others encompass several counties or several small census tracts. If the center contemplates investments of \$500,000, it must identify the TEAs. Most EB-5 visas are issued through the regional center pilot program because USCIS allows regional centers and the projects they sponsor to calculate job creation through econometric models that count direct, indirect, and induced jobs. Companies seeking to raise capital through the EB-5 program can either establish their own regional center or affiliate with an existing one.

Project Types That Have Successfully Accessed EB-5 Financing

The project types most suitable to the EB-5 program are those that create many jobs. Project types are driven by the appetites of investors, particularly Chinese investors. These investors like the loan model, security, and projects with some type of local, state, or federal government backing or involvement. EB-5 capital has been used to fund such projects as:

- hotels and casinos
- mixed-use multi-family rentals
- high speed rail systems
- farms
- ski resorts
- film production
- nursing and assisted living facilities
- hospitals
- medical research facilities
- manufacturing facilities
- large infrastructure and construction projects and bridge construction ■



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