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BRAZILIAN UPDATE – New Brazilian Anti-corruption Law and Regulations

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Editors' Note: This update comes from Francisco Antunes Maciel Müssnich (founding partner) from Barbosa, Müssnich & Aragão Advogados. Francisco Müssnich is a member of XBMA's Legal Roundtable, and a leading expert on Brazilian corporate and M&A matters. This paper was jointly authored by Adriana Dantas and Eduardo Carvalhaes from Barbosa, Müssnich & Aragão Advogados.

Highlights:

- New legislation establishes sanctions to legal entities involved in corrupt and other illegal acts. Among the sanctions are fines that range from 0,1% to 20% of the annual gross revenue and prohibition from receiving public benefits.
- The law provides for the strict liability of the legal entities. The liability remains in case of mergers and acquisitions.
- The adoption by the legal entities of an effective compliance program that comprises internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities will be taken into consideration by Brazilian authorities when imposing sanctions.
- Decrees to be enacted by the Federal, State, District and Municipal Governments shall establish how a compliance program will be evaluated and clarify the jurisdiction for enforcing the law. The Federal Decree is still pending.

MAIN ARTICLE

On January 29, 2014, Federal Law 12,846 ("Anti-corruption Law") entered into force. The Anti-corruption Law provides for the administrative and civil

liability of legal entities involved in acts against the national or foreign public administration.

The Anti-Corruption Law seeks to fill a gap in Brazil's legal system by addressing corruption and corruption-related practices with more effective legal mechanisms, such as severe sanctions assessed based on a strict liability concept.

The law expands on certain requirements imposed by the U.S. Foreign Corrupt Practices Act ("FCPA"), and companies doing business in Brazil should closely analyze the differences between the two laws.

The Anti-Corruption Law was designed to address corruption in business transactions carried out by Brazil-based entities, as well as foreign entities that operate through an office, branch or representation in Brazil.

Corruption is defined as "to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her". Notwithstanding the focus on corruption, the Anti-corruption law prohibits several "acts against national or foreign public administration", such as:

1. to hinder of investigations or inspections carried out by public entities;
2. to thwart or defraud, by means of an adjustment, arrangement or any other method, the competitiveness of a public bidding procedure;
3. to fraudulently obtain an undue advantage or benefit from an amendment to or extension of an administrative contract, without authorization under the law, or from the notice of public bidding or the related contractual instruments; and
4. to manipulate or defraud the economic-financial balance of an administrative contract.

The commitment of any of these acts subjects a legal entity to the imposition of severe sanctions. At the administrative level, companies are exposed to fines ranging from 0,1% to 20% of their gross annual revenue, and special public disclosure of the decision in means of communication widely distributed. In case a civil judicial proceeding is initiated, legal entities may be compelled to forfeit assets and rights obtained by means of corrupt practices, their business activities may be suspended, they may be prohibited from receiving incentives, subsidies, subventions, donations or loans from public entities, and they may even be compulsorily wind up. Besides, the Anti-corruption Law created the National Registry of Punished Companies (CNEP in the Portuguese acronym) which will consolidate all sanctions applied.

The Anti-Corruption Law also introduces new risks in merger and acquisitions transactions involving Brazilian companies. It provides for

successor liability – liability for the payment of the fine and full compensation of the loss suffered by the public entity still remains after the merger or acquisition. Thus, anti-corruption due diligence will become an even more usual practice in Brazil. Since companies can be liable for the acts of third parties committed for the company's benefit, anti-corruption due diligence on third parties must also become an important business practice.

Under the strict liability, the legal entity is liable for the performance of these acts in its interest or for its benefit and is subject to the imposition of a sanction, despite whether or not an employee acted in the scope of his employment, whether or not a third party committed the act, or whether or not the compliance program was effective.

The managers and administrators of the companies involved in corruption can also be held liable for their acts, but the liability regime applicable to natural persons is subject to the terms of the culpability of such persons (i.e. it is not a strict liability regime).

When determining the sanction, however, the existence and effectiveness of compliance programs will be evaluated by the sanctioning authority. The Federal Government must still establish standards for evaluating compliance programs. A Decree is currently under scrutiny of the Civil Chief and the Presidency, and is expected to be published soon.

The cooperation of the legal entity to investigate the infractions will also be taken into account in the imposition of sanctions. Therefore, the adoption of an effective compliance program that not just avoids illegal acts but that also includes procedures and mechanisms in support of an eventual investigation can reward the legal entity twice.

The evaluation of a compliance program is not the only important topic that is expected to be regulated by the Decrees. The Anti-corruption Law establishes that, at the administrative level, the highest authority of each public body and entity of will have the authority to investigate and decide the cases occurred. Brazil is divided in 26 States, 1 Federal District and more than 5,000 thousand Municipalities, each one of them with several bodies and entities. Several authorities are potentially capable of imposing sanctions and collecting its economic benefits, what create a risky environment. Therefore, to prevent possible public abuses, it is expected that the Federal Decree will determine the "highest authorities" at the Federal Union level and will provide guidance to the other spheres (States and Municipalities). The Federal Decree shall also provide for mechanisms of coordination between the several authorities responsible for the investigation.

Two States ran ahead and published their own State Decrees. Before the enactment of the Federal Decree, the States of São Paulo and Tocantins published, respectively, Decree 60,106/2014 and Decree 4,954/2013. In general, both States copied the relevant provisions of the Anti-corruption law and determined the “highest authority” that will decide the cases occurred and execute leniency agreements with the legal entities. São Paulo created its own State Registry of Punished Companies (CEEP in the Portuguese acronym) in addition to the nationwide CNEP, created by the Anti-corruption Law.

The Brazilian framework on anti-corruption law and enforcement is evolving, following trends and concepts adopted internationally. Severe sanctions, strict liability and several public bodies and entities responsible for investigating and deciding the acts committed, dramatically increase the risks of committing a corruption act. Consequently, companies doing business in Brazil should carefully measure corruption-related risk with a view not only to past and present perceptions, but also to the signs of change that already point to a much more responsive and strict enforcement environment in the near future.

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