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Client Alert Commentary

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Brazilian Anti-Corruption Law: 7 Implications and Challenges for Companies Doing Business in Brazil

Brazil's impending enforcement of its new global anti-corruption law underscores the importance of internal anti-corruption compliance programs.

Brazil's landmark anti-corruption statute will take effect 29 January 2014. Enacted on August 2, 2013, Law No 12,846/2013 (the Law), establishes civil and administrative liability of legal entities in relation to acts of corruption.

The Law implements the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention,[1] strengthens anti-corruption enforcement, and is broadly in line with (and, in some respects, even stricter than) similar legislation found in other jurisdictions — such as the US Foreign Corrupt Practices Act and the UK Bribery Act.[2] Brazil's Law represents a significant step, exposing companies — not just individuals — to liability and fines for the first time.[3]

The Law applies to offenses against the Brazilian or foreign public administration,[4] including acts committed outside of Brazilian territory. Therefore, the Law will directly impact foreign companies doing business in Brazil, as well as Brazilian companies doing business abroad.

The Brazilian government is expected to issue regulations to further detail some of the Law's provisions — particularly regarding how internal anti-corruption compliance programs may be taken into account as a mitigating factor for purposes of applying sanctions under the Law.

Top 7 Implications

Companies doing business in Brazil should be aware of the following main provisions of the Law.

1. **The Law applies to foreign companies doing business in Brazil and to Brazilian companies, irrespective of corporate form.** Foreign companies active in Brazil through branches, subsidiaries or representative offices, even if *de facto* or temporary, are subject to the Law. Likewise, the Law applies to any type of Brazilian legal entities, associations or foundations.

2. **Legal entities are subject to strict administrative and civil liability, regardless of fault or intent.**[5] Demonstrating that one or more offences were committed in a legal entity's interest or to its benefit, will be sufficient to establish liability without the need to prove negligence or wilful corruption conduct.[6]

3. **The Law defines offences broadly.** The definitions may be summarized as:
(i) To promise, offer or effectively give, directly or indirectly, undue advantage to a public official or to

a third entity related to a public official
(ii) To fraud, manipulate or otherwise interfere with public bids or public contacts
(iii) To finance, fund or sponsor, by any means, the offenses listed in the Law
(iv) To attempt to conceal or dissimulate, through intermediary individuals or companies, corrupt intent or the identity of the beneficiaries of corrupt acts
(v) To obstruct government investigations

4. **Sanctions are severe and may involve a significant financial burden, as well as substantially limit the ability for entities to do business in Brazil.** [7]
   - Administrative sanctions can amount to 20 percent of the company's gross revenues in the year prior to the beginning of the investigation; alternatively, sanctions may reach R$60 million (approximately US$30 million) if gross revenues cannot be established; sanctions also include the publication of the decision finding liability on the internet and other widely circulated media.
   - Civil sanctions may include the loss of assets or rights; interdiction of the company's activities; compulsory dissolution; prohibition of receiving funds, subsidies, loans or other incentives from public entities — including public financial institutions — for up to five years.
   - Sanctions are cumulative with the obligation to fully reimburse the benefits (values, assets) illegally obtained or repair the damage caused.
   - Companies within the same group or consortium partners may be held joint and severally liable for the payment of fines and for the restitution of damages.

5. **The government may consider compliance programs and internal codes of conduct as mitigating factors.** Regulations are expected to clarify how internal compliance mechanisms (*e.g.,* periodic training, monitoring, reporting channels, auditing procedures and codes of conduct) will be evaluated and taken into account to possibly reduce the applicable sanctions. The Law lists other possible aggravating and mitigating factors, such as: gravity of the infraction, amount of the undue advantage obtained, economic status of the entities or individuals involved, whether or not the offense was consummated and degree of cooperation with the relevant investigations.

6. **Successor liability applies.** Liability under the Law will subsist in case of corporate restructuring through mergers, acquisitions, change of corporate form, contractual amendments or spin-offs**.** In the case of mergers and acquisitions, as long as there is no fraud, successor liability is limited to the payment of fines and restitution of damages up to the value of the assets transferred.

7. **Leniency may reduce fines and other sanctions.** Leniency agreements are available to the first entity to voluntarily disclose the violation, as long as the company fully cooperates with the investigation (*e.g.,* by identifying other participants, providing information and documents), confesses its participation in the offense and completely ceases its involvement. Leniency benefits include: (i) the reduction of up to 2/3 of the applicable administrative fine; (ii) avoiding the widespread publication of the decision finding liability; (iii) eliminating the prohibition to receive public funds, subsidies, loans or other incentives from public sources.

Preparing for the Challenges Ahead

In view of the far-reaching application of the Law and the attendant risks, legal entities doing business in Brazil should immediately consider the following:

- The Brazilian authorities are likely to be more pro-active in the investigation and prosecution of corruption offenses, as well as to increase their international cooperation with other jurisdictions in the fight against corruption.

- Implementing and/or reviewing compliance programs and training should be a high priority.
- Undertaking a tailored risk-assessment can ensure compliance success. Such an assessment should consider: the frequency and level of interaction with public officials in the daily conduct of business; the decision-making layers within the company; the need to have third-party agents or subcontracted companies involved in the business; participation in consortium or joint ventures.
- Due diligence is critical prior to mergers and acquisitions given the risk of successor liability.
- Partnerships should be carefully considered due to the risk of joint and several liability.

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Endnotes

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1 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 and ratified by Brazil on 24 August 2000 (http://www.oecd.org/brazil/brazil-oecdanti-briberyconvention.htm). Brazil was criticized for its decade-long delay to implement the Convention, but recent popular claims against corruption that reached the streets across the country have created a momentum which the National Congress and the Federal Government seized on to finally approve the Law.

2 For instance, differences between the Law and the US FCPA: the Law applies to the corruption of both foreign and local public administration (while the FCPA only applies to the bribery of foreign officials); unlike the FCPA, the Law applies to offenses other than bribery (notably, to bid-rigging in public procurement); the facilitating payments exception from the FCPA is not found in the Law; the liability imposed by the Law is strict, while the liability under the FCPA requires proof of intent.

3 In Brazil, individuals (public officials, managers or employees) involved in corruption offences are subject to criminal liability; as a rule, criminal liability does not extend to legal entities.

4 The definition of foreign public administration includes foreign government bodies or agencies, public-controlled legal entities, diplomatic representations and public international organizations. The definition also includes foreign public officials — *i.e.,* any individuals that hold a position in a foreign public entity, regardless of title, contract length or remuneration.

5 The Law does not impose criminal liability on legal entities; as mentioned, criminal liability in Brazil is personal and as a rule only applies to individuals.

6 While the company's liability is not conditioned to the finding of liability of its managers or other individuals, the latter may be held personally liable to the extent of their participation in the illegal conduct.

7 The Law was approved by the Brazilian Congress with some more favorable provisions, according to which: (i) administrative penalties would be limited to the total value of the contract object of the corruption offense; (ii) some sanctions were conditioned to proof of corrupt intention; (iii) the active participation of the public official to the act could serve as mitigating factor. These provisions were all vetoed by the President and have been permanently excluded from the final text of the Law.