

Business Pushback against Brazil Foreign Bribery Bill

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In January 2012, FCPAméricas reported on how Brazil is currently considering an overhaul of its foreign bribery law (see [Another BRIC in the Anti-Corruption Wall](#)). In March, we reported on how a special committee created by the Brazilian Congress to analyze the bill made revisions to the draft that bolstered certain provisions (see [Road to Corruption Overhaul](#)). Reports now indicate that Brazilian businesses have begun a significant lobbying effort to weaken the bill. These interests have already made some progress in getting it sidelined.

Key features of the Draft Bill 6.826/2010 under consideration by the Brazilian Congress would dramatically strengthen the country's bribery laws. For example, the bill would establish the direct civil liability of corporations making them liable for the acts of their directors, officers, employees, and agents under the theory of *respondeat superior*. It would also create strong sanctions, establish credit for voluntary disclosure, cooperation, and compliance programs, and put in place a broad definition of "foreign official." The revised version clarifies and makes more important the voluntary disclosure and compliance program credits. Such changes have the potential to incentivize Brazilian businesses to take compliance more seriously, which would work to reduce corruption in a country where it is prevalent and reduce risks to outside investors as well.

In light of blockbuster FCPA investigations currently underway in Latin America, like [Embraer](#) and [Wal-Mart](#), these changes seem significant. More importantly, they appear to bring Brazil closer in line with its commitments under the [OECD Anti-Bribery Convention](#). They also enhance Brazil's current local anti-corruption legislation.

Now the Brazilian business community appears to be pushing back. The major Brazilian news source, Valor Econômico, [reports on](#) an "increasing resistance from the business sector." As a result of this pressure, the special Congressional committee has delayed its vote on the bill, originally scheduled for May 9th, until May 23rd. There is also a chance that the Brazilian House of Representatives will decide to remove the vote from the special committee and require the legislation to be voted on directly by the full House first. This would change the process, placing the bill in line behind several others. Brazilian experts say that, if this happens, it is possible that the bill will never be put up for vote, or could take several years. In either event, approval would likely be delayed until after the OECD's next working group review in 2014. If this happens, Brazil will remain out of compliance with its OECD commitments.

This is not new phenomenon, especially for FCPA reform watchers in the United States. The U.S. Chamber of Commerce's Institute for Legal Reform has pursued a [sustained and articulate campaign](#) to roll back some of the FCPA's key provisions, including placing limits on a parent company's liability for the acts of its subsidiaries and limiting notions of successor liability. Interestingly enough, in light of [recent reports](#) about Wal-Mart's widespread bribery, U.S. Congressional members [have initiated](#) an investigation into Wal-Mart's potential involvement in the Chamber's efforts to weaken the FCPA at the

same time that Wal-Mart executives seem to have known about and silenced bribery problems in the company's own operations in Mexico.

What does the Brazilian business community want to see? We do not know for sure because it appears that lobbying efforts have not been made public. They appear to be happening behind the scenes (in contrast to the U.S. Chamber of Commerce that has pursued a very [public](#) effort). Nonetheless, Brazilians on the ground report that the lobbying efforts have targeted, among other things, the bill's provisions regarding successor liability, corporate strict liability for the acts of its employees and agents, and heightened sanctions.

Successor liability, if included in the bill, would make companies liable for the corrupt acts of the companies they acquire. In the context of international anti-corruption law, such a theory is based on the premise that the value of an acquisition should reflect the acquiree's actual value – that the purchaser should acquire both a company's assets and its liabilities. Thus, if an acquiree has built its business on corrupt acts, the purchaser would not be permitted to benefit from that wrongdoing. However, successor liability is also often paired with the notion that, if the purchaser can show it has conducted adequate anti-corruption due diligence of the acquiree, remediated any compliance problems, brought the acquiree's compliance activities up to basic standards, and self-reported these actions, it can reduce or eliminate liability for past wrongdoing. These issues, including elimination of successor liability, are currently being considered by the Brazilian Congress.

A reduction in the level of sanctions is also reportedly under consideration. The current draft proposes sanctions of between 0.1% – 20% of the company's gross revenue in the previous year. Lobbying efforts are reported to seek to change this to between 0.1% – 20% of the gross revenue in the previous year of the *specific line of business* involved. Local experts say that this change would complicate calculations of penalties and create massive litigation around how business revenues are determined.

The person currently at the center of these issues is Congressman Carlos Zarattini. Congress put him in charge of the special committee working on the bill. He is considered to be fair and is said to be pursuing this work in a democratic way, including all stakeholders (his peers, trade associations, academic experts, etc.) in the negotiating process.

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