

August 22, 2013

Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know

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On August 1, 2013, Brazil enacted Law 12.846, a new anti-corruption law that establishes a comprehensive system of corporate and individual liability for acts of corruption against Brazilian and foreign public officials or governmental bodies.¹ The new anti-bribery law becomes effective on January 28, 2014. Companies conducting direct or indirect activities in Brazil—whether through an employee, independent contractor, subsidiary, or as part of a supply chain—should pay special attention to the contours of this law, the severe penalties for violations, and recommended steps to ensure full compliance.

Background

During the past two decades, Brazil has demonstrated a serious commitment to combat the bribery of public officials in business transactions. During the 1990s, Brazil enacted a myriad of penal laws to combat corruption, including legislation against bribery-related money laundering, securities fraud, concealment of assets, and economic power abuse.² In August 2000, Brazil adopted the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Offices in International Business Transactions.³ and became a signatory to the United Nations Convention against Corruption in December 2003. These international standards are aimed at combating political and governmental corruption in business dealings.⁴ However, according to the OECD, Brazil had not taken sufficient measures to establish corporate and personal liability for the bribery of a foreign public official.⁵

1 Law 12.846 was published on August 1, 2013 and becomes effective 180 days from the date of its publication. The text of the law was published in the Official Federal Gazette at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

2 See the Organisation for Economic Co-operation and Development's (OECD) report, *Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (June 6, 2011), available at <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm>.

3 See *id.*

4 See *United Nations Convention against Corruption Signature and Ratification Status as of 29 May 2013*, available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

5 See the OECD's report, *Brazil: Phase 2 – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Transactions* (Dec. 2007), available at <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm>.

With the enactment of the anti-corruption law, Brazil now establishes its own legally binding standard to combat and prosecute bribery of public officials. The new law not only establishes direct corporate and personal liability for illicit conduct against any level of the three branches of government—executive, legislative and judicial—for particular acts of corruption and fraud within the bidding and procurement of public contracts process, but also applies to acts of corruption committed against foreign public officials, whether the offense occurs within or outside Brazilian borders.

Key Provisions of the Anti-Corruption Law

Covered Persons and Entities

The anti-corruption law applies to companies, regardless of their corporate or legal form, whether foreign or domiciled in Brazil, and whether the unlawful act is committed within or outside Brazilian territory. Civil liability extends to the entity's directors, officers, employees and agents who commit, participate, or aid in the commission of the unlawful act, whether the act is performed in Brazil or abroad.

Unlawful Acts Defined

The law makes it an offense for a person or entity to commit an unlawful act that is contrary to the public administration of the national or foreign government or covenants to which Brazil is a signatory. The unlawful acts include:

- Promising, offering or giving an undue advantage, directly or indirectly, to a public official or a related third party;
- Financing, subsidizing or otherwise sponsoring unlawful acts;
- Utilizing a person or entity as an intermediary to conceal their real interests or the identity of the beneficiaries of the act; and
- Obstructing or interfering with the investigation or prosecution of entities or government officials.

With regard to the procurement of public contracts, the law makes it unlawful to:

1. Frustrate or defraud the bidding process by making adjustments or through other means;
2. Prevent, disrupt or defraud the performance of any act of public bidding;
3. Remove or attempt to remove the bidder by fraud or by offering advantage of any kind;
4. Eliminate the bid or the related contract;
5. Create, fraudulently or intentionally, a legal entity in order to bid for public contracts;
6. Fraudulently obtain undue advantages or benefits, modifications or extensions of government contracts without authorization under the law, as part of the public bidding process; and
7. Manipulate or defraud the economic and financial balance of the public contracts entered into with the government.

The law applies to such unlawful acts performed by any entity against a public entity or officer, even when such act is performed outside of Brazil's territory.

Facilitation Payments

A note should be made about "facilitation payment," which is very common in many countries in Latin America and around the globe. This practice refers to the act of paying a small amount of money to induce a public official to perform a routine governmental action that they are otherwise obligated to perform. Although the U.S. Foreign Corrupt Practices Act provides exceptions for facilitation payments and affirmative defenses in the event of prosecution,⁶ Brazil's new anti-corruption law does not exempt facilitation payments from prosecution. Accordingly, based on a plain reading of the law, facilitation payments are prohibited under Brazil's new anti-corruption law.

6 See Philip Berkowitz, David Goldman, and Ellen Temperton, *U.K. Bribery Act 'On-Line' as of July 1 – U.S. Employer Impact* (Aug. 12, 2011) available at <http://www.littler.com/publication-press/publication/uk-bribery-act-line-july-1-%E2%80%93-us-employer-impact>.

Enforcement and Penalties

The law provides for civil and judicial penalties for noncompliance, and charges several governmental agencies, *i.e.*, the Administrative Council for Economic Defense, the Ministry of Justice, and the Ministry of Finance, with the power to prosecute violations and impose applicable sanctions. Additionally, the highest authority in the executive, legislative and judicial branches may initiate the investigation or prosecution of the alleged offense, at their own discretion or based upon a petition filed with the government, and will be authorized to grant clemency or a reduction of any penalty.

Imposed civil penalties will be based on the totality of the circumstances of the case, and can amount to up to 20% of the company's gross income or a fine of up to BRL\$60,000,000 (approximately \$25 million in U.S. dollars) if the gross income cannot be calculated. The factors to consider when determining the appropriate sanction are as follows:

1. Seriousness of the offense;
2. Advantage obtained or intended by the offender;
3. Whether the offense was consummated;
4. Degree of injury or threat of injury;
5. Negative effect produced by the offense;
6. Economic situation of the offender;
7. Cooperation with the investigation of the offense;
8. Existence of mechanisms and procedures to ensure integrity and auditing, encourage whistleblowing, and implementation of codes of ethics and conduct within the company; and
9. The value of the contracts held by the company with the public agency or entity injured.

Judicial penalties may be imposed individually or cumulatively and may consist of mandatory dissolution of the business, complete or partial cessation of business operations, restitution of benefits received (whether gained directly or indirectly), and/or seizure of assets. Additionally, the business may be disqualified from receiving government-sponsored incentives, loans, subsidies or donations for up to five years, and/or required to post a bond as surety to redress any special right or remedy on behalf of the injured party which may include the government.

The liability for any civil or judicial penalties may extend to the parent company, subsidiaries and affiliated companies, and may survive a merger, acquisition or other corporate transformation.

The law provides a five-year statute of limitations from the date of the offense, except that where a continuing violation is found, the limitations period shall begin on the date on which the offense ceased.

Recommendations

Brazil is one of multiple jurisdictions that have enacted anti-corruption laws that trigger corporate and personal liability for offenses committed within and outside of the country's national borders. Additionally, numerous governments around the globe have ratified international anti-bribery treaties, such as the OECD and the United Nations conventions. Companies expanding their global footprint through international business transactions, such as when business is conducted within a supply chain context, should seek legal counsel to implement a corporate compliance program that will take into account key international anti-corruption laws and conventions, to ensure global compliance.

At a minimum, an effective corporate compliance program should:

- Develop a code of conduct and internal policies that reflect the company's commitment to a culture of integrity where bribery and corruption are strictly prohibited and penalized;
- Conduct due diligence to evaluate the company's current practices, including current expenditures that may be deemed suspect under foreign anti-corruption laws, to identify areas of risks;

- Take appropriate measures to eradicate any practice that may contravene anti-bribery laws;
- Implement mechanisms and procedures to ensure corporate integrity and business ethics, such as a means of internal disclosure of suspected unlawful acts without retaliation; and
- Train all personnel on the company's ethical culture and the legal requirements of anti-corruption laws and regularly communicate to all staff the company's policies.

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