Client Update

Brazil Issues Long-Awaited Decree Implementing the Clean Company Act

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On March 18, 2015, Brazil's President, Dilma Rousseff, signed Decree No. 8,420 further implementing Law No. 12,846, the so-called Clean Company Act (the "Act"), which became effective on January 29, 2014.[1] The Decree took effect on March 19, 2015, when it was published in Brazil's Official Gazette.[2]

Awaited for more than a year, the Decree is part of a recently-announced "package" of new anti-corruption legislation being advanced by the Brazilian federal government.[3] Of particular significance, the Decree regulates the process for imposing administrative liability on legal entities for acts of bribery or corruption under the Act, both within and outside Brazil. It also sets forth guidelines for calculating fines and establishes rules that will govern leniency agreements and the criteria Brazilian regulators use to assess anti-corruption compliance programs, among other topics.

The Decree is a critical step in Brazil's implementation of the Act, which was enacted on August 1, 2013. Reflecting the growing political, economic, and social forces within Brazil that place increasing pressure on the government vigorously to prosecute corrupt acts, the Decree provides ever more reason for companies operating in Brazil to take further steps to review their compliance programs to assure appropriate alignment with the requirements of the Decree,

[1] *See* Andrew M. Levine, Bruce E. Yannett, Renata Muzzi Gomes de Almeida, Steven S. Michaels, and Ana L. Frischtak, "Brazil Enacts Long-Pending Anti-Corruption Legislation," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/insights/publications/2013/08/fcpa-update.

[2] The Decree is available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/decreto/d8420.htm.

[3] In addition to signing the Decree, President Rousseff submitted legislative proposals embodying the government's "anti-corruption package," following nationwide protests against corruption. These proposals address, among other topics, slush funds, money laundering in political campaigns, and stricter screening and conflict-of-interest rules for public servants.

and the Act itself, as well as other applicable anti-corruption laws such as the US Foreign Corrupt Practices Act and the UK Bribery Act 2010.

I. THE DECREE'S ROLE IN IMPLEMENTING THE CLEAN COMPANY ACT

The Act (also known as Brazil's Anti-Corruption Law) imposes strict civil and administrative liability on corporate entities doing business in Brazil for corruption or bribery of Brazilian or foreign public officials, as well as fraud in connection with public tenders. It applies broadly to corporations, partnerships, and proprietorships, and to other for-profit and non-profit entities. The Act provides for monetary fines ranging from 0.1% to 20.0% of a company's annual gross revenues.

Although the Act's January 2014 effective date was a major milestone, many aspects of its implementation remained uncertain, as Brazil's federal government had yet to promulgate the required implementing regulation. The Decree at least partly achieves this critical step, especially with respect to federal administrative actions. While further clarifications of the Act may be issued by federal, state, and municipal authorities that share concurrent authority to enforce the Act, the issuance of the Decree is an essential development for companies conducting business in Brazil or that are otherwise subject to Brazilian law.

II. KEY PROVISIONS OF THE DECREE

A. Overview & Jurisdiction

Among its most important provisions, the Decree establishes an administrative liability process ("Processo Administrativo de Responsabilização" or "PAR") for assessing the administrative liability of legal entities under the Act. The Decree requires the PAR to be concluded within 180 days from the date of the official publication that the process has been initiated, though extensions of this deadline are authorized. The Decree expressly provides for the possibility of searches and seizures in connection with investigations, upon request to the competent authorities. It also states that conduct charged by the government as violating the Act and Brazilian legislation on public bids and government contracts shall be adjudicated in a joint proceeding.

The Decree provides that the Comptroller-General of the Union ("CGU") shall have jurisdiction over enforcement involving alleged bribery of foreign (*i.e.*, non-Brazilian) public officials and, along with other federal governmental entities, concurrent jurisdiction over corruption cases involving Brazilian federal officials. The CGU is also empowered under the Decree to act in extraordinary circumstances, such as in the event of inaction by the authority originally tasked

with handling the PAR, or in "complex" or "relevant" matters. There remain important questions as to how those potentially broad terms will be defined in the first instance by the CGU and then by any reviewing courts.

B. Fines & Other Sanctions

Implementing the Act's sanctions provisions, the Decree articulates the potential consequences for companies that violate the Act, including: (*i*) fines; (*ii*) publication of the decision sanctioning the breaching company in each of a local or national newspaper, notices at the company's headquarters, and on its website; and (*iii*) debarment, in the event of conduct that violates the Act and Brazilian legislation on public bids and government contracts.

In perhaps its most detailed provisions, the Decree sets forth specific rules for calculating fines. The Decree provides detailed guidance for setting the maximum and minimum permissible fines as well as a methodology for calculating the fines actually to be imposed.

The Decree specifies that the maximum fine shall be set at the lower of: (*i*) a percentage of a company's gross revenues, capped at 20% thereof based on the presence of specific aggravating and mitigating factors; or (*ii*) three times the value of the benefit obtained or sought through the misconduct.[4] To facilitate calculation of the former figure, the Decree sets out methods for assessing aggravating and mitigating factors, such as the involvement of the company's senior management in the misconduct and the existence of a compliance program. To facilitate calculation of the latter figure, the Decree enables accused parties to deduct legitimate costs and expenses when the benefit sought or obtained is assessed, thus avoiding a windfall to the government if a bribe was paid but valuable goods or services (such as a stadium timely built to specification) were provided by the bribe-paying party.[5]

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[4] This formula may well have important effects on how cases adjudicated under the Act are litigated. If the benefit obtained or sought exceeds the 20%-of-annual-gross-revenue figure, for example, the detailed rules for calculating the default fine will place significant pressure on accused parties and the government alike to learn the facts relevant to the various aggravating and mitigating factors that could affect the fine calculation. And, because calculation of benefits sought or obtained can also be the subject of dispute, it is possible that both alternative fine calculation methods may be litigated. Similar considerations will animate determinations of the minimum fine amounts if there is controversy over pertinent facts.

[5] This approach for calculating "benefit" is roughly similar to the method utilized by US federal courts to calculate the "gross gain" to be considered in the federal sentencing statute, 18 U.S.C. § 3571, which permits fining corporate and individual defendants convicted of a bribery or other offense up to twice the "gross gain" or "gross loss" caused by the crime of conviction.

The Decree likewise establishes minimum fine levels, at the higher of: (*i*) the value of the benefit intended or obtained; or (*ii*) 0.1% of gross revenues, or BRL 6,000, when it is not possible to utilize the company's gross revenues. Companies that enter into leniency agreements might benefit from a reduction of up to two-thirds of the "applicable fine," as calculated under the Act and the Decree.

Additionally, the Decree specifies the operation of national registries publicizing details about individuals and companies that have been sanctioned under the Act or debarred.

C. Leniency Agreements

A company that has violated the Act or certain provisions of Brazil's legislation on public bids and government contracts may enter into a leniency agreement as a means to mitigate possible sanctions. Under the Act and the Decree, entry into a leniency agreement requires cooperating with the government's investigation and administrative proceeding, identifying other involved parties, and expeditiously providing information and documents evidencing the misconduct to the government. Specifically, under the Decree, in order for a company to enter into a leniency agreement it must: (*i*) take the initiative of approaching the authorities, when doing so is relevant; (*ii*) have ceased involvement in the misconduct; (*iii*) admit its participation in the misconduct; (*iv*) "fully and permanently" cooperate with the authorities; and (*v*) provide proof of the misconduct. As set forth in the Decree, the CGU may execute leniency agreements relating to conduct at the federal level or involving foreign governments, but it remains unclear whether – and, if so, to what extent – this authority will be shared with other law enforcement authorities, such as federal prosecutors.

Although the Act provides that a company will not be released from providing appropriate compensation for the damages it caused, it may benefit under the Decree from one or more of the following outcomes by entering into a leniency agreement: (*i*) exemption from publication of the decision sanctioning its conduct; (*ii*) exemption from the prohibition against receiving incentives, subsidies, subventions, donations, or loans from government bodies, public entities, or financial institutions owned or controlled by the government; (*iii*) reduction in the fine imposed; or (*iv*) exemption from, or mitigation of, administrative sanctions set out in certain statutes governing public tenders and government contracts. A leniency agreement may extend to legal entities belonging to the same "economic group" (*i.e.*, corporate family), provided those entities jointly execute the agreement.

D. Compliance Programs

The Decree contains several provisions relating to compliance programs. With regard to leniency agreements, the Decree requires a provision mandating the adoption or improvement of an existing compliance program by the breaching company. Also, as noted above, the Decree provides that the adoption and implementation of a compliance program will be a mitigating factor when calculating fines.

Consistent with best practices, the Decree recognizes that an effective compliance program must be risk-based, tailored according to factors such as a company's size, structure, and industry; jurisdictions where it conducts business; reliance on third parties; and the degree of interaction with government entities, among other considerations. The Decree also sets out parameters for assessing the effectiveness of a compliance program, including: (*i*) the commitment of the company's upper management to the program; (*ii*) the standards of conduct and codes of ethics applicable to employees, managers, and, as appropriate, third-party service providers; (*iii*) periodic training; (*iv*) internal controls; (*v*) specific procedures to prevent fraud and wrongdoing in the context of bidding procedures and the performance of government contracts, among other contexts; (*vi*) the independence and authority of the internal body responsible for applying and overseeing the program; and (*vii*) disciplinary measures applicable in the event of violations of the program.

As expected, these criteria largely parallel guidance previously provided by other regulators, such as the US Department of Justice and the US Securities and Exchange Commission in their November 2012 guidance,[6] and the UK Ministry of Justice in guidance issued in 2011,[7] as well as in pronouncements of the Organization for Economic Cooperation and Development.[8] The Decree also expressly states that the CGU will issue further regulations and guidelines that govern in more detail the assessment of compliance programs.

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[6] *See* US Dep't of Justice and US Securities and Exchange Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (Nov. 2012) at 56-66, http://www.justice.gov/criminal/fraud/fcpa/guidance/.

[7] *See* UK Min. of Justice, "The Bribery Act 2010: Guidance" (Mar. 2011) at 20-31, https://www.gov.uk/government/publications/bribery-act-2010-guidance.

[8] *See, e.g.*, OECD, "Good Practice Guidance on Internal Controls, Ethics, and Compliance" (Feb. 2010), http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf.

III. CONCLUSION

Issuance of the Decree is a long-awaited step in implementing the Act and underscores ongoing attention in Brazil to anti-corruption enforcement. Companies and individuals subject to the Act and, now, the Decree have more reason than ever to take stock of their existing practices and to assess how improvements can be made to assure compliance with not only Brazilian law, but also other anti-corruption laws that may apply to their conduct. While the enforcement environment in Brazil, as elsewhere, remains dynamic and subject to a variety of political, economic, and social forces, the promulgation of the Decree is proof that Brazil is taking clear steps to implement strong anti-corruption laws and that those ignoring best practices when operating in or from Brazil may be doing so at their peril.

We will continue to monitor the actions taken by the government in Brazil as it works to implement the Act and the Decree.

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Please do not hesitate to contact us with any questions.

March 23, 2015