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BRAZIL

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The impact of the Brazilian Anti-corruption Act in the financial industry

Brazil recently passed Law 12,846/13, known as the Anti-corruption Act. This new regulation governs administrative and civil liability for corporate entities that are involved in government corruption, whether in Brazil or abroad.

The Anti-corruption Act closes a gap in Brazilian law, since there was previously no specific statute that imposed a penalty on corporate entities involved in corrupt acts. It is expected that this new law will create a better environment for fighting and punishing corruption in Brazil, reinforcing business ethics and the rectitude of the Brazilian government.

One of the purposes of the Anti-corruption Act is to help fulfill the commitment Brazil made in 2000, to the Organization for Economic Co-operation and Development (OECD), when it ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

With this new law, Brazil now has legislation coupling with international anti-corruption law standards, such as the FCPA in the United States and the UK Bribery Act in the United Kingdom. This will help foreign investors feel more secure about investing in Brazil.

The Anti-corruption Act will become effective at the end of January 2014. It must be interpreted in light of other, equally important, statutes. These include the Money Laundering Act (Law 9,613/98, the Public Bid Act (law 8,666/1993), the Fiscal Responsibility Act (Supplementary Law 101/2000) and the Financial Transaction Confidentiality Act (Supplementary Law 105/2001), among others.

Penalties and liability

The Anti-corruption Act has added an extremely heavy administrative fine to the armour currently available to those fighting against corruption in Brazil. This fine varies between 0.1 per cent and 20 per cent of the company's gross revenue, excluding taxes, from the fiscal year before the administrative proceeding is instated. The fine can never be less than the advantage the company received through undertaking the corrupt act, if that amount can be calculated. When the criteria of gross annual revenue cannot be used, the fine must be between R$6,000.00 and R$60m.

The Anti-corruption Act also provides for joint liability for subsidiary, parent and affiliated companies, as well as for the members of a consortium that are participating in an administrative agreement. This joint liability is limited to the obligation to pay the fine imposed and fully remedy any harm caused.

The government can bring civil lawsuits, seeking the appropriation of assets, rights or securities, to reimburse the public treasury, deemed to have been gained by the organisation through undertaking the corrupt act.

These lawsuits can also seek the suspension or partial suspension of a company's activities and, in more serious cases, the mandatory dissolution of the corporate entity. These sanctions do not limit the penalties and sanctions under Law 8,429/92, which apply to both individuals and corporate entities and which include the suspension of political rights, a civil fine, reparations for the harm caused and a prohibition on contracting with the government or receiving any type of benefit from it.

The possible penalties also include a prohibition on receiving incentives, subsidies, grants, donations or loans from government agencies or entities, or government or government-controlled financial institutions for a specific period.

The piercing of corporate veil theory can also be applied whenever the company has been wrongfully used to facilitate, disguise or conceal the illegal acts described in the Anti-corruption Act, or to hide ownership. In this case, all the sanctions that apply to the corporate entity are extended to its managers and owners who have management authority, after they have been given the right to an adversary proceeding, in which they can fully defend themselves.

Definition of corrupt acts

The corrupt practices listed in the Anti-corruption Act are described as practices that harm a domestic or foreign government or that infringe on domestic or foreign government property, on the principles of the government or on international commitments Brazil has made.

The Anti-corruption Act defines corrupt practices as being those that:

(i) directly or indirectly promote, offer or provide an improper advantage to a government agent or to a third party related to a government agent;
(ii) are proven to finance, defray the costs, sponsor or in any way subsidise, the illegal acts listed in the Anti-corruption Act;
(iii) are proven to have used a natural person or corporate entity intermediary to disguise or conceal the actual interests or identity of the beneficiaries of the acts carried out;
(iv) impede, interfere with or fraudulently benefit from any public bid act or procedure; and
(v) impede the investigation or audit activities of government bodies, entities or agents, or interfere in their activity, including within the framework of the Brazilian financial system regulatory agencies and oversight bodies.

In keeping with Brazilian antitrust law and certain foreign anti-corruption laws, the Anti-corruption Act allows leniency agreements with companies accused of corrupt practices that cooperate in investigations and administrative proceedings, so long as this cooperation results in identifying the other parties involved in the illegal activity, where appropriate, and in the timely receipt of information and documents that prove the illegal act under investigation.

Under the Anti-corruption Act, a leniency agreement can exempt a corporate entity from certain punishments. This includes reducing the amount of the fine by up to two-thirds.

Importance of internal controls

Something that stands out in the Anti-corruption Act is the encouragement given to measures companies take to prevent fraud and corrupt practices in the business environment. It encourages these by expressly stating that the existence of internal mechanisms and procedures that reinforce a company's integrity, such as internal controls, audits, incentives for whistleblowing and the actual enforcement of codes of ethics and conduct within a company, must be taken into consideration when applying sanctions under the law.

Additionally, since the Anti-corruption Act merely requires that a nexus be proven between the transaction and its harmful consequences, in order for punishment to be imposed, companies are well advised to take greater care and more closely monitor their employees' activities.

Companies that have not yet taken measures to prevent and fight fraud and corrupt practices internally, should therefore take steps to do so in a way that complies with the new law. Companies that have already taken these measures should ensure that their codes of ethics, compliance programmes and employee monitoring programmes are fully compliant with the new law.

In the financial sector, banks are expected to institute programmes that integrate Anti-corruption Act requirements into their bank compliance programme. They are also expected to integrate the new requirements into risk control and analysis by including stricter standards in their internal 'know your customer' (KYC), money laundering prevention and anti-corruption and fraud prevention rules.

The Anti-corruption Act applies to business companies, partnerships and sole proprietorships, whether incorporated or not, regardless of the type of organisation or corporate model adopted. It also applies to all foundations, associations of entities or persons and foreign companies that have a head office, branch or representative within Brazil, whether in fact or by law, even if only temporarily.