Brazil

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SECTION 1: LEGAL LANDSCAPE

1.1 What is the scope of bribe payors and bribe recipients covered by your jurisdiction's anti-corruption laws?

The laws apply to citizens or residents in our jurisdiction; legal entities with a presence in our jurisdiction; and to persons or entities making or offering a corrupt payment to any public official globally.

Brazil's Anti-Corruption Law (Law 12,846/13) entered into force on January 29 2014 and is expected to enhance enforcement against corrupt practices in the country. It establishes strict corporate liability and provides for a combination of administrative and civil sanctions against Brazilian and foreign companies with headquarters, branches or offices in Brazil.

Moreover, directors, employees and third-parties that act on behalf of the company are also liable for corruption practices and may be subject to criminal sanctions under Brazil's Criminal Code. Although individual liability is dependent on proof of intent and prosecution is conducted separately by state and federal criminal prosecutors, it is likely that criminal enforcement will increase, as the new law establishes that government agencies should send copies of their files to the Prosecutor's Office. It provides that a legal entity may be held liable irrespective of whether the individuals are found guilty.

Corporate and individual liability in Brazil focuses on the corruption of Brazilian or foreign officials. Payments or improper advantages to employees of private companies are not illegal under the new law.

Brazil's Anti-Corruption Law does not define public official and it is unclear whether employees at directly or indirectly state-owned or government-funded companies are subject to the law. A previous law has established that sanctions applicable to public officials in cases of misconduct apply to all employees in direct and indirect public administration, at public foundations and at companies publicly funded or that receive government subsidies.

1.2 What conduct directly related to bribery is prohibited by anti-corruption laws?

Laws prohibit direct and indirect payments intended to induce an official to take action; corrupt intent need not be shown; facilitating payments are prohibited.

Under Brazil's Anti-Corruption Law, parties may be held accountable for directly or indirectly (via third parties or intermediaries), promising, offering, giving bribes or financing the corruption of a public official. Although there is no definition of what constitutes a bribe, it is reasonable to assume that prohibited payments include not only cash, but anything of value provided or offered with corrupt intent.

Moreover, the law's broad definition of corruption encompasses (i) fraud or any illegal interference with public tenders and government contracts, (ii) making use of a third-party (natural or legal entity) to dissimulate or conceal the identity of the beneficiaries of the corrupt acts and (iii) obstructing government investigations. Brazil's Procurement Law (Law 8,666/93) also prohibits direct and indirect payments to public officials to interfere with procurement.

Further, individual liability for corruption is established in Brazil's Criminal Code and depends on proof of guilt.

1.3. What conduct related to internal controls and to books and records is covered by the anti-corruption laws?

Laws require accurate books and records and adequate internal controls, but there is generally no consequence under the law absent a material weakness.

Brazil's Anti-Corruption Law does not cover conduct related to internal controls and inaccurate books and records.

SECTION 2: POTENTIAL PENALTIES

2.1 What is the range of direct financial consequences for a company engaged in a prohibited anti-bribery offence?

Laws impose civil or administrative liability on companies that engage in anti-bribery offences, including potential disgorgement of ill-gotten gains. There is no corporate criminal liability.

Administrative fines range from 0.1% to 20% of the company's gross revenue on the year before the investigation began. If it is not possible to determine the company's revenue, fines may range from R$6,000 ($2,700) to R$60 million ($27 million). Additional sanctions such as disgorgement of ill-gotten gains may be sought before Brazilian courts. Corporations found guilty of corruption must also pay compensation for damages.

Joint and several liability for fines and damages is provided for companies part of the same economic group (both parents and sister companies), for related companies, and for members of a consortium as long as the corrupt practice involved the consortium.

2.2 What is the range of collateral consequences for a company adjudicated to have engaged in prohibited antibribery offences?

Laws authorise some collateral suits, and authorise permissive debarment for companies adjudicated to have engaged in anti-bribery offences anywhere in the world.

In addition to the direct financial consequences referred to in 2.1, the Anti-Corruption Law provides for the following sanctions that may be sought through the Brazilian courts: (i) suspension of the company's activities; (ii) compulsory dissolution; and (iii) debarment from procurement and from receiving tax breaks and other incentives.

Moreover, the law created the National Registry of Punished Corporations (*Cadastro Nacional de Empresas Punidas*), which consolidates and makes public all administrative and civil sanctions for corrupt practices imposed by the government, Congress and courts at federal level. State and local authorities are in process of creating their own registries

2.3 What are the typical punishments of individuals prosecuted for paying or accepting bribes?

Laws punish bribe payors and recipients with a range of civil and criminal consequences that can be severe.

Under Brazil's Criminal Code, bribe payors and recipients may be punished with imprisonment from two to 12 years, and fines. Offences set out in the Procurement Law are punishable by prison sentences from two to four years, and fines.

As a result of the Anti-Corruption Law's introduction of strict corporate liability, the enforcement of criminal provisions against individuals will likely increase. The Law establishes that government agencies should share information from investigations with criminal prosecutors so that individuals may also be investigated.

SECTION 3: INVESTIGATION

3.1 What is the role of self-investigation at the remedial stages of an anti-corruption matter?

Laws encourage self-investigation at the investigative and remedial stages of an anti-corruption matter and it can significantly help companies.

Brazil's Anti-Corruption Law gives credit to companies that adopt 'effective' compliance programmes, involving internal audits, self-reporting procedures and rules on ethics and corporate conduct (see Article 7, VIII).

Moreover, the law establishes a leniency programme, under which self-disclosure of corrupt practices and cooperation by corporations could result in a reduction of up to two-thirds of the fine and immunity from some, but not all, sanctions. Although the law refers to leniency, it does not allow for full exemption from sanctions and establishes that the authority may afford the applicant a lenient treatment, even if there are no additional parties involved in the investigation. Therefore, the rules in the law are similar to those of a typical leniency programme, but are not strictly equivalent.

Unlike the leniency programme established in the Antitrust Law (Law 12,529 of November 30 2011), the benefits of the Anti-Corruption Law's leniency programme are not extended to individuals, who may be liable under Brazil's Criminal Code and other statutes, such as the Procurement Law. Further, filing for leniency before the authority investigating corruption activities in a case that potentially involves both bid-rigging and corruption charges will not ensure leniency under the Antitrust Law. A separate application process before the Administrative Council for Economic Defense would have to be pursued.

Article 7, III, of the law also establishes that a company under investigation that cooperates with the authorities may be entitled to a reduction of the applicable sanctions.

3.2 With respect to anti-corruption compliance programmes, what are the regulatory expectations if a business wants to receive credit or leniency during an investigation into corrupt behaviour by company personnel?

Regulators do not typically provide guidance on what they expect from anti-corruption compliance programmes, and credit is not customarily given for having a robust programme.

The Anti-Corruption Law requires the federal government to issue regulations on the criteria used to assess an effective compliance programme. Such secondary legislation is also expected to set out rules regarding cooperation during an investigation, including how it will be taken into account to reduce the applicable sanctions. For further information, please refer to the answer to the previous question.

3.3 What resources are available to regulators to investigate and prosecute anti-corruption offences?

Law enforcement personnel have some resources and are in the middle range of countries in terms of anti-corruption enforcement.

Since January 2014, the highest authority at each government agency at the executive, legislative and judiciary powers where an alleged corruption practice takes place may be responsible for enforcing the Anti-Corruption Law. In the federal government, such agencies have concurrent jurisdiction with the Office of the Comptroller General; furthermore, state and local authorities are expected to further regulate the investigative and decision-making process and powers (the States of São Paulo, Tocantins and Paraná, as well as the city of Cubatão, have already done so, and such regulations generally mirror what has been instituted by the new law with respect to the federal agencies – i.e., concurrent jurisdiction between each agency head where the corrupt act has allegedly taken place and the Comptroller's Office).

As for investigative powers, the Law includes broad powers, including search and seizure. Over the last decade, changes to the institutional framework have been introduced. In 2003, approximately 60 government agencies with concurrent jurisdiction over corrupt practices formed the National Strategy for the Fight against Corruption and Money Laundering (*Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro*) to exchange information and cooperate in investigating their respective cases. In 2006, the Office of the Controller General also created a special unit in charge of setting out policies to prevent corruption – the Secretary of Corruption Prevention and Strategic Information.

Nonetheless, government agencies in Brazil routinely face funding and human resources limitations that hinder their ability to conduct investigations. Likewise, backlogs in the country's court system hold back further advances in enforcement in this area.

3.4 What are the customary forms of resolution of individual and corporate regulatory actions?

Laws permit individuals and companies to voluntarily resolve regulatory actions, but only if they admit liability.

While Brazil's Anti-Corruption Law (which only applies to corporations) does not include settlement provisions, the federal government may include such possibility in the decree expected to be issued shorty. As the law now stands, regulatory actions could be resolved more rapidly if the company cooperates with the investigation, and such cooperation would be taken into account while defining sanctions to be imposed. Admission of liability is only required, under the law, for a leniency applicant. As for individuals, Brazil's Criminal Code only allows settlements for crimes which are sanctioned with a jail term of under a year or a fine – ie, settlements are not applicable to corruption crimes.

SECTION 4: ADJUDICATION

4.1 What is the perception with respect to the fairness of regulators and the judicial system in addressing anti-corruption?

The perception is that political and social factors can play some role in terms of who is investigated and prosecuted for anti-corruption offences.

Enforcement against corrupt practices is relatively recent. While it has significantly increased over the past decade, there is still the perception that it is not as strict against politically influential individuals and companies as it should be. This began to change in 2013, when Brazil's Supreme Court adjudicated an investigation of prominent public officials and business people for bribery and other corruption offences, several of which were convicted and imprisoned (the case is known as *Mensalão*).

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Araujo co-chairs the IBA Working Group on Cartels and is a member of the ABA International Cartel Task Force. *Global Competition Review* named her on its Top 100 Women in Antitrust list and *Latin Lawyer* included her among the Inspiring Women in the Legal Profession. *Who's Who Legal, Legal 500* and *Chambers and Partners* listed her among the world's leading lawyers and she has been nominated by the members of the Latin American Corporate Counsel Association for inclusion in *LACCA Approved 2014*. Araujo holds an LLM from Georgetown University.