



JONES DAY  
**COMMENTARY**

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## BRAZIL'S CLEAN COMPANY LAW: NEW RISKS FOR COMPANIES DOING BUSINESS IN BRAZIL

In early July, as millions of Brazilians flooded the streets to protest against government corruption and waste, Brazil took the final steps to enact a landmark anticorruption law. On August 1, Brazilian President Dilma Rousseff signed Law No. 12.846, also known as the Clean Company Law (the “Law”), which establishes a corporate anticorruption regime that shares characteristics with the U.S. Foreign Corrupt Practices Act (“FCPA”) and the U.K. Bribery Act. The Law imposes strict civil and administrative liability on Brazilian companies for domestic and foreign bribery. International companies with a presence in Brazil are also covered if they engage in bribery within Brazil.

The Law will go into effect on January 29, 2014, 180 days from the date of its publication in Brazil’s Official Gazette, and will have important and immediate implications for companies that operate in Brazil. The new liability imposed on companies is in addition to existing criminal liability for individuals who engage

in bribery of Brazilian and foreign public officials. The ability of Brazilian prosecutors to target companies under the Law may mean heightened exposure under existing law for officers, directors, and employees of those companies. The Law also provides for an enforcement regime that promises to be expensive for companies that might become its targets.

The adoption of the Law caps a three-year process that mostly predates the recent public outcry against corruption. Its longer aim was to improve Brazil’s compliance with the OECD Convention on Combating Bribery of Foreign Public Officials, to which Brazil (although not an OECD member) is a signatory. Approval of the Law was widely regarded as an important move to align Brazil with other nations with corporate anticorruption laws on their books, and it demonstrates Brazil’s significant commitment to the rule of law.

These considerations and other recent events, such as the trial and conviction of high-ranking officials of the former presidential administration and members of Congress in a widespread corruption case known as the “*Mensalão*,” created an atmosphere favorable to the Law’s passage in April by the Brazilian *Câmara dos Deputados* (House of Representatives), where it had been stalled since 2010. Corruption fatigue, boosted by the revelations of the *Mensalão* and the huge expenditures associated with Brazil’s hosting of the World Cup and the Olympics, whose cost overruns many attribute to corruption, provided impetus for the recent protests and ensured the bill’s swift passage in the Senate and its subsequent signing into law.

Hence, the Law arrives in a heated atmosphere of heightened attention to corruption and corruption enforcement, which may influence how and against whom the Law is enforced. This is still uncharted territory; questions still remain as to what extent Brazil will step up its anticorruption enforcement, how it will define the bases for leniency under the Law, and to what extent Brazilian authorities will coordinate their enforcement activity with other countries such as the U.S. and U.K., whose anticorruption laws—the FCPA and the U.K. Bribery Act—can reach conduct in Brazil. Possible outcomes are discussed herein.

Below is a summary of the key provisions of the Clean Company Law that companies should be aware of, as well as certain developments and characteristics, unique to Brazil, that companies with a presence in Brazil should strongly consider as they prepare for the enforcement of the Law.

## KEY PROVISIONS OF THE CLEAN COMPANY LAW

### Application and Jurisdiction

The Law, which has a jurisdictional reach slightly less ambitious than that of the FCPA and the U.K. Bribery Act, governs both the domestic and foreign actions of Brazilian companies, including Brazilian subsidiaries of foreign parent companies. It also governs actions within Brazil of non-Brazilian companies that have an office, branch, or other type of representation in Brazil. This includes both foreign companies that are legally established in Brazil and those that are determined to be *de facto* in Brazil, even if only temporarily.

### Prohibited Conduct

The Law prohibits direct and indirect acts of bribery or attempted bribery of Brazilian public officials or foreign public officials. This includes not only the giving or offer of bribes, but also the giving of any financial or other support to the bribe activity or its concealment, and the use of third parties to execute or assist the bribe scheme. The Law also forbids bid rigging and fraud in the public procurement process. Lastly, the Law prohibits any tampering with government investigations.

The Law also defines “foreign public entities” and “foreign public officials” to include, respectively, entities directly or indirectly controlled by the public sector of a foreign country, and individuals with even temporary or unpaid employment at such entities. The Law’s definition of “foreign public entities” and “foreign public officials” is thus explicit, where the FCPA has been implicit, defining these terms by judicial or executive guidance. Unlike the FCPA, therefore, the Law spells out a control test for determining whether companies with state ownership qualify as public entities for enforcement purposes.

### Liability

Under the Law, companies are subject to strict civil and administrative liability, in the form of restitution for damages, administrative fines, and other civil penalties for the acts of their directors, officers, employees, and agents when such acts of prohibited conduct would benefit the company (directors and officers are liable only to the extent of their fault). Moreover, the Law provides that joint and several liability for fines and the restitution for damages extends to the parent company, controlled entities of the company, affiliates, and joint venture partners. The Law also allows for the piercing of the corporate veil to reach its officers and shareholders with management roles, whenever the legal entity is used to facilitate, conceal, or disguise the illicit conduct.

Similar to the FCPA and the U.K. Bribery Act, the Law also imposes successor liability in the event of mergers and incorporations. In both cases, the acquiring entity can be held liable for acts of corruption implicating the acquired entity, even if such acts took place prior to the date of the transaction. Successor liability is limited to restitution and the payment of fines up to the value of the assets

transferred in the transaction. However, those limits can be ignored if the prosecuting authorities are able to prove that the transaction was executed with fraudulent intent.

### **Penalties**

**Administrative Fines.** Administrative fines range from 0.1 percent to 20 percent of the responsible company's prior year's gross revenue (taxes excluded). If, however, authorities are unable to assess the gross revenues for the prior year, an alternative fine applies, which ranges from R\$6,000 (approx. US\$3,000) to R\$60 million (approx. US\$30 million). It is important to note that the Law states that these fines can never be lower than the benefit obtained by the responsible company. Furthermore, the administrative sanctions levied against the responsible company may be published publicly.

The calculation of the fines will be determined by an evaluation of the offense itself (including its seriousness, the benefit sought or obtained by the company due to the illegal act, the damages and negative impacts caused by the act, and the economic situation of the responsible company) as well as the company's internal compliance program and the company's level of cooperation with the investigation. The amount involved in other contracts that the company has with the implicated government body apart from the one subject to an investigation will also be taken into consideration.

**Judicial Penalties.** On top of the administrative fines, the Law also provides for severe judicial penalties for responsible companies: disgorgement of benefits obtained by the illegal act, suspension or partial interruption of the company's activities, or dissolution of the legal entity. Companies may also be banned from receiving government assistance in the form of subsidies, grants, donations, or loans for a period ranging from one to five years. Dissolution of the legal entity is applicable only when the court determines that the company has been customarily used to facilitate or promote the violation of the Law or that the purpose of the legal entity is to conceal the true identity of the beneficiaries of the acts.

## **BENEFITS OF COMPLIANCE, SELF-REPORTING, AND LENIENCY AGREEMENTS**

The Law provides incentives in the form of reduced fines for companies that have implemented effective anticorruption compliance programs, essentially codifying a form of leniency similar to the consideration given to compliance programs in the United States under the U.S. Sentencing Guidelines for Organizations and by the U.S. Department of Justice when it decides whether to charge organizations or when negotiating a plea. Even though the text of the Law does not specifically provide an affirmative defense to liability based on "adequate procedures" or other indicia of an effective compliance program, as does the U.K. Bribery Act, it recognizes internal integrity procedures, internal audits, and a structure of reporting mechanisms as key components to an effective anticorruption compliance program. Prior to the law going into force, Brazil's Federal Executive branch is expected to publish specific guidelines on what constitutes an effective compliance program and how authorities will evaluate compliance programs and weigh those considerations when levying penalties.

Furthermore, the Law allows administrative authorities to execute leniency agreements with companies that self-report violations. Such companies may benefit from a reduction of up to two-thirds of the fines that could have been imposed (this reduction in fines does *not* apply to forfeiture/restitution) and protection against the prohibition on receipt of public subsidies and benefits and the widespread publication of the penalty. Brazil's specification of the range of benefit to be obtained through cooperation distinguishes its law from U.S. practice under the FCPA, where the degree of benefit to be obtained is generally up to the U.S. Department of Justice during negotiation of deferred prosecution agreements or pleas, or the courts in deciding whether to accept a plea agreement.

To be eligible to benefit from a leniency agreement, the company must be the first to come forward and report the violation, cease the violating activity, cooperate with the government's investigation, and admit to having participated in the illegal activity. There is also a requirement that the

company's contribution must lead to the identification of other parties involved in the illicit conduct (if any), and that it eases the authorities' access to evidence of the violation.

There is some uncertainty as to how effective the leniency agreement will be, considering that it only grants the company limited protection from prosecution of conduct regulated by the Law. By admitting their participation in the illegal activities under the Law, companies may open themselves to prosecution and penalties under other applicable statutes and their admission can be used as a powerful tool by prosecuting authorities to justify steep penalties.

#### **Statute of Limitations**

Violations of the Law are subject to a five-year statute of limitations.

## **ROUSSEFF'S VETOES**

In signing the bill into law, President Rousseff vetoed three notable provisions of the version that had been sent to her by Brazil's Congress. First, Rousseff vetoed a provision that would have limited the amount of the fine to the value of the asset or service sought by the company through the illegal act, therefore leaving the only ceiling for the fines to be 20 percent of the responsible company's prior year's gross revenue. Her second veto eliminated a provision that would have allowed authorities to consider the conduct of the involved public officials when calculating the fine. President Rousseff's last veto removed the requirement for proof of fault or willful misconduct for the imposition of the harsher civil penalties. These penalties include suspension of business activities, dissolution of the corporate entity, and a prohibition from the receiving of government grants. The result of these vetoes is a Law more rigid than what had been approved by Brazil's Congress, removing language that softened the penalty structure for offending companies.

Brazil's Constitution provides Congress with 30 days following the receipt of the official communication of the presidential vetoes to discuss and vote on whether to override them. The Brazilian press has reported that the Congressional coalition supporting the government has declared

its disagreement with these vetoes, which allegedly broke an agreement between the Executive branch and Congress to ensure the swift passage of the Law. However, Congress rarely overrides vetoes, and it remains unlikely that it would do so in this instance.

## **ENFORCEMENT CONSIDERATIONS**

#### **Administrative Prosecution**

Enforcement of the Clean Company Law is entrusted to the highest executive, legislative, or judicial authority affected by the conduct, giving rise to administrative enforcement as well as enforcement by the public prosecutor (*Ministério Público*) in cases where civil enforcement is sought. This means that enforcement actions can be brought by affected government regulators, such as IBAMA (environment), ANVISA (health), ANP (oil and gas), and many others. Because of this, interpretation and enforcement of the Law is likely to proceed in haphazard and conflicting ways, according to differing procedures and subject to differing policy influences. Civil prosecution by the *Ministério Público* may give rise to other problems. Under the Brazilian system, the *Ministério Público*—which is made up of public prosecutors at both the federal and state levels—is a functionally independent part of the Federal Executive branch, whose decision-making is not subject to approval or check. Each individual prosecutor is free to initiate prosecution actions according to his or her convictions under the law, with little prospect of being overruled.

As written, the Clean Company Law will provide government agencies and the *Ministério Público* with a strong tool to investigate and prosecute companies doing business or operating in Brazil for any corrupt activity within the Brazilian territory and abroad. The enhanced public scrutiny of corruption in Brazil, coupled with prosecutorial independence, may embolden public prosecutors to seek high-profile companies against which to enforce the Clean Company Law. However, it is too early to predict whether government agencies will aggressively enforce the Law.

### **The Brazil Anticorruption Environment—Corruption as a “Heinous Crime”**

Alongside the Clean Company Law, the strong anticorruption sentiment in Brazil has also influenced Brazil’s Congress to take another significant step against corruption. The Senate recently approved a bill (Bill No. 5900/13) that establishes corruption as a “heinous crime,” a legal concept that allows for tougher punishments for corrupt practices, including travel and other restrictions that could seriously hamper the ability of executives and companies to carry out operations when facing charges for this category of crime. This bill, which still requires approval from Brazil’s House of Representatives, would apply to government officials who take advantage of their public position to demand favors and to those who embezzle public funds. It would also apply to individuals and institutions who offer bribes to government officials. Approval of Bill No. 5900/13 is further indication of the strong movement taking place in Brazil against corruption.

### **Change Won’t Happen Overnight**

While the Clean Company Law represents a significant shift in the legal structure against corporate corruption in Brazil, it may take time for a clear enforcement landscape to emerge. Sustainable investigations demand resources, and agencies will have to develop enforcement procedures. Fragmented enforcement authority may give rise to possibly conflicting decisions by the various government agencies charged with enforcing the Law; government agencies may be unable to devote adequate budget and personnel to enforcement objectives outside their core competence; the filing of weak cases in a rush to use the new authority may compromise enforcement efforts; and an increase may be observed in requests for cooperation by U.S. and U.K. authorities. Furthermore, the Federal Executive branch is required by the Law to regulate how authorities will evaluate compliance programs. Such measure will further clarify enforcement objectives, as will outcomes in cases that are actually filed and—in Brazil’s civil law system—the commentary these generate.

### **FCPA Considerations**

Given the Law’s liability provisions and hefty penalty structure, companies facing enforcement under both the Law in Brazil and under the FCPA in the U.S. may, when planning negotiations with the U.S. Department of Justice, wish to factor in the potential for penalties to be paid in Brazil. Companies in such

circumstances should consider whether the form of a contemplated resolution in the U.S. (or any other jurisdiction) may provide a predicate or create an incentive, by establishing facts or yielding admissions, that give a roadmap for Brazilian authorities to take action under the Law.

The Law may also provide a basis for joint enforcement activity by U.S. and Brazilian authorities. The U.S. and Brazil are parties to a Mutual Legal Assistance Treaty, or “MLAT,” which entered into force in 2001. The MLAT was designed to enhance the United States’ and Brazil’s ability to investigate and prosecute criminal matters. The avenue exists, therefore, for Brazilian authorities enforcing the Law to seek assistance from the U.S. where U.S. companies or persons are concerned, and for U.S. authorities to seek the cooperation of Brazilian authorities in matters they are investigating under the FCPA. The Law’s application of anticorruption enforcement to companies may provide additional incentive for cooperation between Brazilian and U.S. authorities in such cases.

### **Importance of Awareness and Compliance**

The Clean Company Law presents new risks for companies doing business in Brazil. Its passage into law represents both a public and a political will and enthusiasm for corruption to be more effectively prosecuted in Brazil. The Law provides a new tool for authorities to prosecute corporate corruption and bribery within Brazil and abroad. However, as in other jurisdictions where similar laws exist and are enforced, neither this new Law, nor its enforcement, nor the public enthusiasm behind it will completely eliminate corruption in Brazil. Given this fact, the availability of new legal means to combat corruption, and the broadened enforcement mandate among government agencies and public prosecutors, it is critical that companies give more attention to the risks and compliance requirements posed by the Law.

Companies with a presence in Brazil are strongly encouraged to implement robust compliance programs to ensure an in-depth understanding and constant awareness of the Law throughout their business operations in Brazil and abroad. Such comprehensive programs will help companies ensure compliance with the provisions of the Law and may significantly ameliorate penalties in instances where, despite these efforts, the Law is violated.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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