

# Client Alert

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## Brazil's New Clean Companies Act Continues Global Fight Against Corruption

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After years of legislative limbo, and in response to growing social unrest, on Friday, August 2, 2013, President Dilma Rousseff signed into law the Clean Companies Act (the "Act")—Brazil's first sweeping anti-corruption law targeting corporations. The Act addresses both bribery of foreign government officials by Brazilian companies and bribery of local officials by any company. The law will take effect in 180 days. The Act is the latest development in the growing global trend of increasing legislation to combat corruption.

### THE CLEAN COMPANIES ACT

The Act establishes liability for companies that engage in bribery in Brazil or overseas. Prior to the new law, only individuals could be punished for corruption under Brazil law. The Act makes a company strictly liable for bribes paid on its behalf by its employees, without the need to establish: (1) the individual employee's liability or (2) that the company's management or directors had a corrupt intent. The Act follows Brazil's long-held tradition of not recognizing criminal liability for corporate entities, imposing only civil and administrative liability.

### Covered Persons and Prohibited Activities

The Act itself is very broad. Its foreign-bribery provisions apply to any entity registered in Brazil, regardless of whether or not the company is listed on a public exchange or headquartered in the country. As with the U.S. Foreign Corrupt Practices Act (FCPA), the meaning of "foreign government official" under the Act is expansive and applies to anybody holding office irrespective of position or rank.

The Act goes further than the FCPA in that it outlaws any facilitation payments—payments to foreign officials to expedite routine government actions. This is in line with the global trend of prohibiting such payments. For example, the UK Bribery Act prohibits facilitation payments. While facilitation payments are not prohibited under U.S. law, the Resource Guide to the FCPA put out by the U.S. Department of Justice and U.S. Securities and Exchange Commission recognizes that "the OECD's Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments," and notes that "the United States has done [so] regularly."<sup>2</sup>

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<sup>2</sup> "A Resource Guide to the U.S. Foreign Corrupt Practices Act," DOJ (Nov. 14, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>. ("DOJ FCPA Resource Guide").

# Client Alert

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## Penalties

Penalties for bribery under the Act include both judicial and administrative consequences. Administrative fines may amount to as much as twenty percent of the liable entity's gross revenue for the fiscal year prior to that in which the administrative proceeding was initiated. Additionally, possible judicial penalties include disgorgement of any benefits obtained, suspension of company activities, and even compulsory dissolution of the entity.

## Voluntary Disclosure and Self-Regulation

The Act encourages companies to self-regulate and incentivizes companies to cooperate with authorities in their anti-corruption efforts. The Act seeks to promote voluntary disclosure by lowering the penalties imposed by up to sixty-six percent for those entities that voluntarily disclose. It does not, however, offer complete amnesty, and it is unclear whether self-disclosure could expose companies to liability under other statutes. It thus remains to be seen whether enforcement mechanisms will be robust enough to entice companies to self-report when they know they will still be penalized, albeit to a lesser extent.

Similarly, the Act takes into account whether a corporation has a compliance program in place when determining what level of sanction to impose. Brazil does not yet have a well-developed compliance culture, and this law is seen as a key initial step toward fostering one. Companies are also encouraged to cooperate with investigating authorities and are given credit for cooperation. Exactly how much credit or what tangible benefit entities may receive by cooperating remains to be clarified.

## DESPITE ITS BROAD LANGUAGE, THE ACT HAS SOME LIMITATIONS

While the Act has been lauded from some quarters for its tough stance against corruption, it is not without criticism.

For instance, unlike the FCPA, debarment is not available as a judicial sanction. Similarly, while the FCPA recognizes that a company may inherit broad liability through an acquisition, the Act limits successor liability of the acquiring entity to fines and restitution of the damage caused, up to the value of the transferred assets. The Act also places significant limitations on third-party liability such that it is much more difficult under the Act—as opposed to the UK Bribery Act or the FCPA—for a company to be held liable for the acts of its agents.

These features will likely be reviewed by the OECD Working Group during its 2014 Review, when it will evaluate whether the Act satisfies the criteria laid out in the OECD Anti-Bribery Convention.

## PART OF A BROADER TREND

The Act is among the recent anti-bribery legislation passed by countries around the world. As newly industrialized and emerging-market countries continue to grow in influence on the world stage, additional legislation is likely to follow. The extent to which these laws will be enforced remains to be seen.

## BRICS

Now that Brazil has enacted anti-corruption legislation outlawing foreign bribery, India is the only country in the BRICS group of countries (Brazil, Russia, India, China, and South Africa) that has not done so. China and Russia

# Client Alert

passed laws outlawing foreign bribery in 2011.<sup>3</sup> South Africa has had such legislation since 2004. Although India does not yet have legislation in force, it does have a number of bills pending that would address overseas corruption. These recent developments in Brazil, China and Russia may increase pressure on India and other emerging economic powers to more seriously address corruption and satisfy the anti-bribery criteria established by the OECD.

## Latin America

As Latin America's largest economy, with increasing influence worldwide, Brazil's anti-bribery efforts could have a significant impact on the region. Latin America as a whole is already increasing its focus on foreign bribery. Brazil joins Mexico, Latin America's second-largest economy, and Colombia in passing anti-corruption legislation with a foreign-bribery component in recent years.<sup>4</sup> With the accession of Colombia in January of this year, five Latin American countries are now party to the OECD Anti-Bribery Convention.

## MORE TO COME?

It is worth noting that the Act is not the only anti-corruption measure Brazil is pursuing. In June, the Senate approved a bill that would make corruption a "heinous crime" and thereby increase potential jail terms for corruption-related offenses. This legislation is now pending before the House of Representatives. Nonetheless, Parliament has shown no indication it has reconsidered holding corporate entities criminally liable for such behavior.

The passage of the Act was the culmination of a decade-long effort to bolster domestic and foreign anti-corruption policy in Brazil—catalyzed in recent weeks by public outcry and massive protests that have taken over the streets in Brazil. By making companies liable for bribery in Brazil and abroad, the new law fills in gaps in the existing legislation and brings Brazil closer to compliance with its obligations under the OECD Anti-Bribery Convention. Although the bill has been signed into law, it will not go in effect until early 2014. It remains to be seen whether the passage of the Act itself, without any tangible changes this year, will be enough to assuage the concerns of the people calling for reform in the streets.

It also remains to be seen if the Act, once it goes into effect, will be actively enforced. There is much speculation that the Act will be enforced only at the federal level, if at all, but there are serious concerns that it will not have any impact at the state and municipal levels. With the spotlight of the World Cup and the Olympics coming to Brazil in 2014 and 2016, respectively, the world will be watching.

<sup>3</sup> See, e.g., Sherry Yin, Paul McKenzie, and Dan Levinson, *China Outlaws Bribery Overseas*, Client Alert (Aug. 8, 2011), available at <http://www.mofo.com/files/uploads/Images/110808-China-outlaws-Bribery-overseas.pdf>; Joe Palazzolo, *Russia Criminalizes Foreign Bribery*, Wall Street Journal, May 5, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/05/05/russia-criminalizes-foreign-bribery/>.

<sup>4</sup> See *FCPA + Anti-Corruption Developments: 2012 End of Summer Round-Up*, available at <http://www.mofo.com/files/Uploads/Images/121010-FCPA-Anti-Corruption-Developments.pdf> (discussing Mexico's Federal Anti-Corruption Law on Public Procurement that came into effect on June 12, 2012).

# Client Alert

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