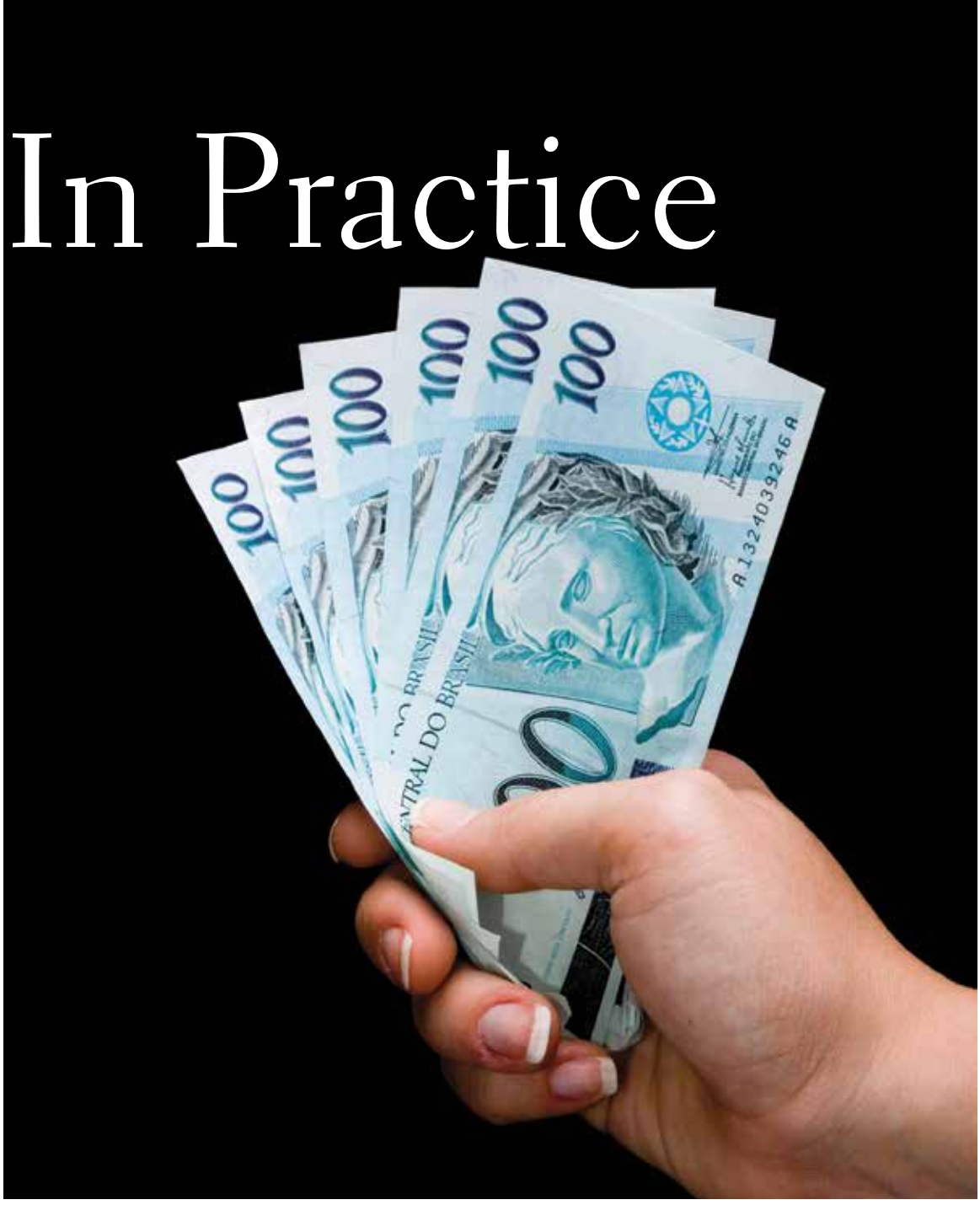
# In Practice



## U.S.-Brazil Alignment Is Incentivizing Companies to Settle Corruption Cases

By Joan Meyer and Fernando Corrêa da Costa

Operation Car Wash is transforming the legal landscape in Brazil. The anticorruption probe began as an investigation into allegations that officers of Petroleo Brasileiro SA, the state-controlled oil company more commonly known as Petrobras, accepted bribes in exchange for awarding contracts at inflated prices to a multitude of construction companies and other businesses. Operation Car Wash revealed systemic corruption across the public company sector that resulted in losses of more than $15 billion and, as of press time, has led to more than a thousand warrants, dozens of pretrial detentions, and more than a hundred convictions. Brazilian authorities have recovered more than $3 billion; the investigation is ongoing.

The aggressive response by Brazilian prosecutors to locate evidence of corruption is cascading through Latin America and has prompted numerous investigations into corruption by other countries outside Brazil. Operation Car Wash underscores the importance, and the practical effect, of the Clean

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Company Act, which Brazil enacted in 2013. The legislation marked the beginning of corporate liability for corruption in that country. Although companies are not subject to criminal liability, the Clean Company Act establishes civil and administrative penalties for companies that engage in corrupt conduct. But, unlike the U.S. Foreign Corrupt Practices Act (FCPA), this legislation does not require proof of corrupt intent. As Brazil adjusts to the new reality of rigorous anticorruption enforcement, a system that incentivizes companies to disclose evidence of corruption and to cooperate with enforcement authorities is taking shape.

In many respects, this incentive structure parallels established law enforcement procedures in the United States. These parallels have important implications for multinational corporations concerning how they should address both known and potential misconduct.

### Reducing Penalties

The benefits of disclosure and cooperation are becoming clear in Brazil. The United States Sentencing Guidelines (USSG) have long provided for a culpability score reduction of up to five points for the timely disclosure of misconduct and full cooperation with the enforcement authorities. If companies comply with these procedures, they may be eligible for substantial reductions in criminal penalties.

The U.S. Department of Justice (DOJ) also has a long-standing practice of awarding penalty reductions for disclosure and cooperation beyond those provided for in the USSG in settlement agreements. In April 2016, the DOJ announced a one-year FCPA pilot program that quantified the additional penalty reductions that it will award companies after disgorging ill-gotten gains. (The U.S. Supreme Court ruled in June that disgorgement is subject to a five-year statute of limitations.) Companies that satisfy the program's cooperation and remediation criteria may receive penalty reductions of as much as 25 percent below the USSG range. Companies that make a voluntary disclosure in addition to cooperating and remediating can receive a reduced penalty that may be as much as 50 percent below the USSG recommendation, and will be considered for a declination in which no criminal penalties are assessed. These substantial benefits of disclosure and cooperation result in greater company cooperation with U.S. authorities in identifying and remediating corruption issues. While the DOJ is currently evaluating the efficacy of the program, it recently announced that the pilot will be extended for an indefinite period.

In Brazil, the Clean Company Act allows companies that cooperate with authorities to receive as much as a two-thirds reduction in penalties and to remain eligible to bid on government contracts. These benefits are significant and, for companies that violate the Act, are viewed as essential to a firm's financial survival. At the time of this writing, more than 10 companies have obtained penalty reductions by executing leniency agreements pursuant to which they paid fines, committed to cooperate with prosecutors, and agreed to improve internal controls and compliance programs.

For example, Camargo Corrêa and Andrade Gutierrez, two of Brazil's largest construction companies, entered into leniency agreements with Brazilian prosecutors whereby they agreed to pay fines in the range of $200 million and $285 million, respectively, and to cooperate with related investigations.

Companies are also entering into joint bribery resolutions with U.S. and Brazilian officials. In January, Rolls-Royce Holdings agreed to pay more than $800 million to settle with Brazilian, U.S., and U.K. authorities over bribery allegations in multiple countries. Recently, two Brazilian multinational corporations, Odebrecht S.A. and its subsidiary, Braskem S.A., entered into cross-border resolutions with authorities in the U.S., Brazil, and Switzerland and agreed to pay a combined $3.6 billion in penalties and disgorgement.

Thus, companies in the United States and Brazil are now recognizing that they have strong incentives to cooperate with authorities in both countries, although it is not yet clear to what extent voluntary self-disclosure will be viewed as an important factor in evaluating cooperation and mitigating penalties in Brazil.

### Influence Over Outcomes

The benefits of settling a case rather than litigating it are widely recognized in the United States and are now understood in Brazil. In the United States, settling allows a company to publicly acknowledge the facts surrounding a wrongdoing, saving the company time, stress, and the expense of legal proceedings. In contrast, a trial can do significant harm to a company's reputation and goodwill with customers by generating headlines over an extended period of time as damaging evidence is presented in court. Taking a case to trial against the government presents risks that cannot be fully controlled by the company. Pursuing a settlement, on the other hand, gives a company a relative degree of influence over the outcome of a case and may allow it to negotiate which facts, including mitigating facts, will be publicly disclosed, what penalties will be paid, and whether parent and subsidiary companies should be treated as equally culpable.

It remains to be seen whether settling with the Brazilian government will allow companies to influence outcomes or mitigate negative press. While it is true in theory that a settlement may allow a company to stipulate to a limited, properly scoped statement of facts, there is an increased risk in Brazil that individuals involved

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in the settlement negotiations, or who are separately represented, may make unauthorized disclosures. Moreover, the Brazilian disclosure process has been more transparent than that of the United States: critical documents are made available to the press, and prosecutors are willing to be more candid about the progress and results of an investigation. This transparency may reduce the perceived value of a settlement in Brazil. Nevertheless, a company operating in Brazil still has strong incentives to seek a settlement rather than litigate, despite the absence of the more established structure in the United States.

### The Growing Risks of Prosecution

Notwithstanding the fact that failure to disclose potential misconduct to government authorities can lead to increased penalties in the United States and Brazil, some companies may hesitate to disclose, hoping that the misconduct will not be independently discovered. In the United States, there are two primary reasons why authorities might learn of undisclosed misconduct. First, federal prosecutors are very active in investigating corruption, and an investigation of misconduct by one company in a particular industry often leads to the discovery of misconduct by other companies in the same industry. Second, the Dodd-Frank Wall Street Reform and Consumer Protection Act includes a whistleblower provision that provides substantial financial incentives for individuals who report to the government misconduct at publicly traded companies.

Brazil has a long-standing practice of letting corporate corruption go unpunished. However, the risk that undisclosed conduct will be discovered and prosecuted has increased dramatically in recent years. New technology, an integrated international banking system, and international cooperation among multiple jurisdictions have all made it much easier for enforcement authorities to discover corrupt activities.

The Operation Car Wash probe has demonstrated that an investigation of one company can expose a web of corruption involving many other actors.

Although Brazil does not have a whistleblower statute, its Congress passed a law in 2013 authorizing prosecutors to enter plea bargain agreements with criminal defendants who provide information that leads to the discovery of other wrongdoers and the recovery of ill-gotten gains. Plea bargain agreements have since become the most effective tool of criminal investigators. These agreements played a key role in the evolution of the probe, with individuals entering into agreements both after being held in pre-trial detention and, as the pressure increased, even before detention.

The risk that undisclosed misconduct will be discovered and punished is substantial in both the United States and Brazil, thus elevating the risks of nondisclosure.

### An Ineffective Defense Strategy

Although cooperation can lead to substantial penalty reductions in the United States and Brazil, some companies may believe that obstructing an investigation and using delay tactics could work to their advantage. This has historically been the case in Brazil, where penalties could only be imposed after all appeals were exhausted but could not be imposed after the statute of limitations expired, even if charges were filed or a conviction was obtained within the limitations period. Because defendants could generally file several different appeals, it was common for a case to last for up to a decade, which made it possible for wrongdoers to avoid punishment by using delay tactics until the statute of limitations expired.

Two recent changes in Brazilian law have greatly reduced the likelihood that a company can use delay tactics to avoid punishment for corrupt acts or to shield key employees from liability. The Clean Company Act now provides that the statute of limitations in a corporate corruption case is satisfied by the filing of a lawsuit within the limitations period. In other words, even if delay tactics are used after litigation has begun, a company can still be held liable for its misconduct.

Additionally, Brazilian jurisprudence now allows punishment in any case to be imposed after the first appeal rather than after all appeals are exhausted, sharply decreasing the likelihood that delay tactics can enable key employees to invoke the statute of limitations and escape the consequences of their misconduct.

In the United States, penalties can be imposed


Staff of Brazil's Ministry of Transparency scrub the office door of Fabiano Silveira, who resigned just weeks into his tenure as minister in light of a corruption probe last year.

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after the limitations period as long as charges were filed within the statute of limitations, so that a delay after a lawsuit is filed cannot affect the liability of companies or their employees. Additionally, it is common practice for prosecutors to require companies to enter tolling agreements during an investigation in order to obtain cooperation credit so that they can effectively extend the limitations period. Delay tactics in the hope that a case cannot be brought have virtually no value in the United States, and much less value in Brazil than they had in the past. In both countries, the cost of losing cooperation credit is likely to exceed the perceived benefit of delay.

### Alignment Across Jurisdictions

For a company that does business in the United States and Brazil, the growing alignment in incentives simplifies the decision to disclose, cooperate, and settle. In the past, a company would likely have wanted to make a disclosure to U.S. authorities in order to obtain a reduction in penalties, to increase its ability to influence the case's outcome, and to avoid the collateral consequences and negative publicity associated with a trial. The company, however, would have also had a reasonable expectation that U.S. authorities would not have bothered to disclose the misconduct to Brazilian prosecutors, who were perceived to have a weak enforcement regime. Without that disclosure, Brazil would otherwise not have learned of the misconduct and, by the time the case was settled, would not have been able to complete their investigation and prosecution before the statute of limitations expired.

As incentives in the U.S. and Brazilian legal systems become more closely aligned, a company is less likely to make a disclosure in the United States without simultaneously making a disclosure in Brazil that would eliminate any concerns related to intergovernmental information sharing. Nonetheless, there are five crucial points that directors of companies that operate in Brazil should keep the following in mind about the Brazilian legal system:

1. Brazilian law provides incentives for cooperation, but does not make clear the link between self-disclosure and penalty reductions.
2. Since the process for disclosing wrongdoing is still new, the extent to which the settlement negotiation process allows a company to influence outcomes has not yet been determined.
3. A company seeking to mitigate negative press by entering a settlement that contains a scoped statement of facts may not be able to rely on prosecutors to maintain confidentiality over all the information they have received.
4. The absence of a whistleblower statute means that prosecutors do not have access to an effective vehicle for reporting misconduct, and that may reduce the likelihood that prosecutors will discover that misconduct.
5. The fact that Brazil does not have an established practice of entering tolling agreements during an investigation increases the perceived benefit of delay tactics as compared to the United States.

The incentives to disclose, cooperate, and settle are still weaker in Brazil than in the United States. While attitudes toward disclosure are generally changing in Brazil in light of its cooperation with the United States, there may be some cases in which a company will want to weigh the advantages of a disclosure to Brazilian authorities.

For example, calls for a whistleblower statute in Brazil may lead to legislation that increases the risk of nondisclosure. Even without new legislation, Brazilian prosecutors can encourage self-disclosure by treating it as a quantifiable mitigating factor in penalty calculations, and can encourage settlements by establishing a clear pattern of respect for confidentiality.

These changes would be significant steps in forming an incentive structure in Brazil that parallels the incentive structure in the United States. In any event, growing alignment of incentives across jurisdictions is a welcome development for prosecutors and companies alike. Prosecutors can ensure uniformity in outcomes, which increases the perception of fairness in the system. Alignment also simplifies decision making for multinational corporations by encouraging disclosure to and cooperation with all relevant authorities.

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