

Brazil's Clean Company Act: How U.S., U.K., and Global Models May Influence Enforcement

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1) Introduction

Brazil's new anti-bribery law (Law no. 12.846/2013), often referred to as the "Clean Company Act," officially took effect on January 29, 2014. This article compares key elements of the Clean Company Act with the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.K. Bribery Act 2010 ("Bribery Act") and considers the outlook for enforcement of the bribery offenses in the new law in the context of U.S., U.K., and global trends. In particular, the article highlights the following themes:

- The impact of extraterritorial jurisdiction on anti-corruption enforcement;
- The various matter resolution tools available to authorities in enforcing the Clean Company Act, as compared to options available to U.S. and U.K. authorities;
- The likely influence of U.S., U.K., and global anti-bribery trends on the Brazilian approach to enforcement under the new law.

Multinational companies accustomed to the demands of the anti-corruption enforcement regimes of the U.S., the U.K., and relevant international bodies (e.g., the World Bank) will not be surprised by the scope and reach of the Clean Company Act. Nevertheless, they should be attuned to its unique features when appropriately tailoring their anti-corruption compliance programs. Indeed, representatives of relevant Brazilian enforcement agencies have publicly pronounced that enforcement of the new law will be a top priority for the Brazilian government.

2) Overview of the Clean Company Act

A. Subjected Entities

The Clean Company Act applies to:

- a) Business organizations in Brazil (whether incorporated or not);
- b) Any Brazilian foundations or associations; and
- c) Foreign companies with any presence in Brazil (even if temporary).

Under the new law, such entities can be strictly liable for prohibited acts committed in their interest or for their benefit (whether exclusively or not). To establish a strict liability violation, Brazilian authorities need only demonstrate that a prohibited act occurred; they need not prove the intent (or knowledge) of the company, or that of any individual officer. This lower threshold of proof was strategically designed to incentivize authorities to actively pursue corporate investigations under the Clean Company Act.

Importantly, Clean Company Act charges are restricted to companies and, therefore, can not be brought against individuals. Nevertheless, individuals involved in related wrongdoing are subject to sanctions set forth in Brazil's Criminal Code and other Brazilian laws (e.g., the Public Tender

Law and the Improbability Law). If, as expected, the Clean Company Act encourages Brazilian authorities to initiate corporate investigations and, thereby, obtain sufficient evidence of wrongdoing relating to specific officers and employees within target companies, the prosecution of individuals under Brazil's Criminal Code and other relevant laws should likewise increase.

Note also that the Clean Company Act provides for successor liability in the event of amendments to the articles of incorporation, transformation, restructuring, merger, acquisition, or spin-off of a company.

B. Prohibited Acts

In addition to regulating corporate corruption, the Clean Company Act covers other illegal acts committed against local Brazilian or foreign public officials, particularly in the context of public tenders. Indeed, the following conduct is likewise prohibited by the Act:

- a) To promise, offer, or give, directly or indirectly, an undue advantage to a public agent or a related third person;
- b) To finance, pay, sponsor or, in any way, subsidize the performance of a prohibited act;
- c) To make use of any individual or legal entity to conceal or disguise its real interests or the identity of the beneficiaries of acts performed;
- d) Regarding public tenders and contracts:
 - i. To thwart or disturb the competitive character of a public tender procedure;
 - ii. To prevent, disturb, or defraud the performance of any act of a public tender procedure;
 - iii. To remove or try to remove a bidder by fraudulent means or by the offering of any type of advantage;
 - iv. To defraud a public tender or a contract arising therefrom;
 - v. To create, in a fraudulent or irregular manner, a legal entity to participate in a public tender or enter into an administrative contract;
 - vi. To gain an undue advantage or benefit, in a fraudulent way, from modifications or extensions to contracts entered into with the public administration;
 - vii. To manipulate or defraud the economic and financial terms of the contracts entered into with the public administration.
- e) To hinder an investigation or audit by a public agency, or to otherwise interfere with this work.

3) Comparing the Clean Company Act with the FCPA and Bribery Act

The following table provides a high-level comparison of the key anti-bribery provisions in the Clean Company Act, the FCPA, and the Bribery Act. The sections that follow this table then consider how the varying components of each of the laws may impact enforcement of the new law in Brazil.

Legal Element	FCPA	U.K. Bribery Act	Clean Company Act
Bribery of Foreign Officials	YES	YES	YES
Bribery of Local Officials	NO	YES	YES
Bribery in Private Context	NO	YES	NO
Extraterritorial reach	YES	YES	YES - Only if the violation relates to Brazilian entity
Books and Records	YES	NO - Covered under other legislation	NO - Covered under other legislation
Other prohibited acts	NO	NO	YES - Acts against Pub. Admin. (e.g., fraud in public tender process, bid rigging)
Exception for Facilitation Payments	YES	NO	NO
Corporate Criminal Liability	YES	YES	NO - Civil and Administrative liability only
Strict Liability	NO	YES - For "failure to prevent bribery"	YES - But for certain sanctions it is necessary to prove intent or fault
Credit for Compliance Program	YES - Via relevant U.S. Sentencing Guidelines	YES - Can be full defense for corporate offense of "failure to prevent bribery"	YES - Amount of credit not yet determined
Credit for Self-Disclosure and/or Cooperation	YES	YES - But somewhat limited and yet to be tested	YES - Under leniency program, fines can be reduced up to 2/3 and other sanctions can be excluded

4) Extraterritorial Jurisdiction - Long Arm of the Law

The Clean Company Act, the FCPA, and the Bribery Act all allow for extraterritorial jurisdiction, which in essence means they can be enforced against companies and/or individuals for actions taken abroad. On the other hand, while the FCPA is only applicable to bribery of foreign public officials, the Bribery Act and the Clean Company Act apply to both foreign and domestic bribery.

One of the principal drivers for many countries that have adopted anti-bribery legislation with extraterritorial reach is the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery ("Convention"). The Convention, enacted in 1997, established binding standards on its member countries to criminalize bribery of foreign public officials in

international business transactions. Both the U.S. and the U.K. are members of the OECD and Brazil ratified the Convention in 2000.

Notably, the OECD played a significant role in the approval and enactment of the Clean Company Act. In its Phase 2 report and evaluation of Brazil's implementation of the Convention (released December 2007), the OECD recommended that Brazil "take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official." Moreover, during the legislative process, OECD representatives testified before Brazil's Congress, emphasizing the importance of the Clean Company Act for Brazil as a critical measure to enable the country to comply with the Convention.

A. FCPA

Generally speaking, the FCPA's anti-bribery provisions apply to "issuers" (companies listed and/or trading on a U.S. exchange, regardless of where they are incorporated), U.S. "domestic concerns" (primarily U.S. entities and persons), and certain persons or entities acting within the U.S.

Although the FCPA, enacted in 1977, predates the OECD Convention, the statute's jurisdiction was significantly expanded in 1998 to enhance its extraterritorial reach. Indeed, since the 1998 expansion, U.S. issuers, entities, and individuals may be prosecuted for their conduct abroad. Similarly, foreign companies (e.g., foreign subsidiaries of U.S. companies) may be prosecuted for bribery under the FCPA for using the U.S. mail or any means or instrumentality of U.S. interstate commerce in furtherance of a corrupt payment. Accordingly, for example, FCPA jurisdiction may, in some cases, be triggered by a telephone call, email, or fax to or from the U.S. -- as well as a wire transfer to or from a U.S. bank.

In practice, the two primary anti-corruption enforcement agencies in the U.S., the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), have demonstrated that they are willing and capable of casting the jurisdictional net quite broadly in enforcing the FCPA's anti-bribery provisions against non-U.S. persons and companies. U.S. authorities have been particularly successful in this regard by, among other things, proactively seeking to establish a nexus (and, in many cases, multiple relevant connections) between the alleged impropriety and the territory of the U.S.

B. U.K. Bribery Act

The extraterritorial jurisdiction of the Bribery Act (with respect to the strict liability corporate offense of "failing to prevent bribery") is potentially even broader than the FCPA. It applies to any company that "carries on a business or part of a business in the U.K., irrespective of the place of incorporation or formation," as well as to companies incorporated in the U.K. (and offenses committed in the U.K.).

Importantly, an offense can be committed by such a "relevant commercial organization" wherever in the world the conduct occurs. This means, for example, that a Brazilian company with a branch, subsidiary, or other operations in the U.K. may be held liable under the Bribery Act for bribes paid in China. This may be the result even if the Brazilian company's U.K. operations had no knowledge of, connection to, or control over the alleged improper conduct in China.

Having said this, it remains to be seen how U.K. authorities will interpret this provision of the Bribery Act in practice. Thus far, there have been no prosecutions brought under the corporate offense. The Bribery Act Guidance issued by the U.K. Ministry of Justice, however, suggests that a "common sense approach" will be taken by prosecutors to determine whether a company has a "demonstrable business presence" in the U.K. with which to establish jurisdiction.

C. Clean Company Act

The Clean Company Act prohibits bribery of both local and foreign officials. Foreign companies that have an office, branch, or representation in the territory of Brazil can be held liable under the law. There is currently some debate about how the extraterritorial jurisdiction of the Clean Company Act will operate in practice. Although applicable in theory to foreign companies (e.g., those with offices in Brazil), some believe that the new law is likely to be enforced more actively against Brazilian legal entities (e.g., the Brazilian subsidiary of a U.S. Company) involved in illegal acts overseas.

The Office of the Federal Comptroller General (“CGU”) has authority to investigate and apply administrative sanctions for the illegal acts committed against foreign public officials under the Clean Company Act. As a central agency of the federal government, the CGU has a qualified team specialized in anti-corruption investigation and enforcement techniques. The agency has also been involved in discussions about the new law since the early legislative stages and is familiar with the law’s features. Given CGU’s centralized approach and specialized expertise, it will likely apply the law fairly and coherently.

5) Tools of the Trade – Deferred Prosecution, Non-Prosecution, and Leniency Agreements

A. U.S.

When calculating penalties for violations of the FCPA, DOJ concentrates its evaluation on the U.S. Sentencing Guidelines (“USSG”) in all of its resolutions, including guilty pleas, Deferred Prosecution Agreements (“DPAs”) and Non-Prosecution Agreements (“NPAs”). Prosecutors in the U.S. have been utilizing DPAs and NPAs since 1999. These latter two enforcement options can often expedite the resolution process. They allow DOJ to impose penalties, fines, and other terms and conditions on companies in FCPA matters in return for DOJ’s agreement to defer a prosecution, or otherwise refrain from filing charges, for a set term (often two or three years).

An agreement by DOJ in this respect, however, is subject to the good conduct of the company and adherence to the terms of the agreement, which often include, for example, the imposition of certain anti-corruption compliance program enhancements and remediation commitments. If the company successfully completes the term of the agreement, DOJ will not pursue criminal charges. The use of DPAs and NPAs by DOJ in FCPA matters has created certain efficiencies in the FCPA enforcement process and, in many cases, results in lower-cost resolutions for companies.

B. U.K.

On February 24, 2014, The Crime and Courts Act 2013 made DPAs available for the first time in the U.K. DPAs will provide a mechanism for effectively settling the criminal liability of a corporate entity without prosecution, in return for the company agreeing to a number of conditions (e.g., paying a financial penalty, paying compensation, or cooperating with the future prosecution of individuals). DPAs are perceived as an important tool for prosecutors in tackling serious economic crime in the U.K. These agreements may be used in some cases in lieu of corporate court prosecutions and are designed, as in the U.S., to expedite settlement. DPAs in the U.K. will be entered into only after close judicial scrutiny and prior approval of the courts, on a case by case basis.

The U.K. Serious Fraud Office (“SFO”), the U.K. agency responsible for investigating and prosecuting serious or complex fraud and corruption in the U.K., has expressed optimism that DPAs will be effective for bribery and fraud enforcement in the same way they have been in the U.S. For example, David Green, the current Director of the SFO, has, on a number of occasions, stated his preference that the SFO follow the same “carrot and stick” approach

employed in the U.S. (e.g., harnessing the threat of prosecution and the rewards of self-disclosure as a means of encouraging DPAs).

C. Brazil

As with DPAs and NPAs in the U.S., and DPAs in the U.K., the Clean Company Act includes an alternative resolution mechanism for companies seeking to more efficiently resolve bribery-related matters with public authorities -- so-called "leniency agreements." Under the new law's enforcement regime, companies will be given credit for self-disclosure and cooperation (new concepts for Brazilian anti-corruption enforcement). While the Clean Company Act does not obligate companies to self-report violations, those that cooperate with investigations in this manner will receive credit in the ultimate calculation of sanctions. Moreover, companies that cooperate, enter into leniency agreements, and fulfill the related legal requirements (which include admissions of wrongdoing) can have their fines reduced by up to two-thirds of the total, and will be exempt from certain judicial and administrative sanctions.

Companies, however, should give careful consideration to the specific circumstances of the case before deciding to self-disclose to Brazilian authorities. This caveat is important because the Clean Company Act can overlap with other laws that may apply to the facts of the case but that might not, for example, include leniency provisions. Also, it is important to note that, while a leniency agreement might settle charges for companies, individuals can still be liable for the relevant illegal acts (as discussed above).

6) Enforcement Approaches in the U.S. and U.K.

U.S. enforcement of FCPA matters by the DOJ and the SEC continues at a brisk pace in mid-2014, as highly publicized around the world. DOJ initiated a robust 19 enforcement actions in 2013, which included a nearly fourfold increase in the size of the average corporate fines. The top 20 all-time FCPA settlements in U.S. dollars range from \$54 million to a staggering \$800 million. This list includes three cases resolved in 2014 alone.

That said, SEC figures released in December 2013 received some attention based on the fact that the SEC had only brought eight FCPA enforcement actions in 2013, down from 12 in 2012, and 25 in 2011. While the DOJ and SEC often work together in pursuing FCPA cases, the DOJ often pursues FCPA cases against individuals, which contributes to its higher enforcement numbers. It remains to be seen whether the lower number of matters initiated by the SEC is indicative of a longer-term enforcement trend or an anomaly related to the timing and type of cases pursued in 2013. The continued high level of fines in 2014 would seem to suggest the latter, which both agencies have sought to publicly confirm.

In recent U.K. and international press, the SFO has received criticism in relation to its historic internal management practices and enforcement matter oversight. It is in this context that the SFO's record on anti-corruption enforcement is typically considered. The Bribery Act came into force in July 2011, but it has yet to result in a corporate prosecution by the SFO or any other U.K. prosecutor. The three convictions under the Bribery Act thus far all involved individuals and low-value domestic bribes.

It is important to note, however, that the U.K. has continued to prosecute bribery and corruption involving facts, and using legislation, that pre-date the Bribery Act. Moreover, as in the U.S., the length of time that it takes to properly investigate and prosecute these complex cases results in a long pipeline of matters that date back several years. (One would anticipate a similar "ramp up" period for prosecutions brought under the Clean Company Act in Brazil.) That said, there has been some movement on the enforcement of the Bribery Act. In August 2013, the SFO brought its first Bribery Act charges (the previous three convictions were all brought by the U.K.'s general criminal prosecutorial body, the Crown Prosecution Service). The charges of making and accepting a

financial advantage contrary to the Bribery Act were brought against three individuals in connection with a £ 23 million scheme involving sales of bio fuel investment products to U.K. investors between April 2011 and February 2012.

7) Outlook for Brazil's Enforcement of the New Bribery Law

The Brazilian Government has been targeting corruption for some time now – well before the enactment of the Clean Company Act. Between 2008 and 2012, for example, the number of individuals convicted for corruption and related crime increased 133%. That surge includes only final judicial decisions and, by comparison, is seven times higher than the increase of the incarcerated population during the same period. Moreover, in 2013 alone, the Brazilian Federal Police conducted 296 special operations to combat corruption, money laundering, and related crimes. As a result, 1,785 individuals, including 96 public employees, were arrested. With this background, the Clean Company Act is expected to be enforced vigorously.

Brazil has also seen an increase in the exchange of information -- both among local authorities and with foreign prosecutors. For example, recently, the Federal Police signed strategic cooperation agreements with the Brazilian Securities and Exchange Commission and the Brazilian Internal Revenue Service. At the international level, enforcement actions in Brazil have implicated a number of foreign multinationals, and information obtained by the Brazilian authorities has been shared with foreign authorities. Conversely, foreign authorities are increasingly sharing information with Brazilian authorities.

Finally, it is notable that focused transparency has been an important tool to prevent and detect corruption in Brazil, expanding access to information and the acts of public officials. Indeed, the federal government maintains a “transparency portal” through which one can obtain information about, among other things, spending by the federal government on procurement and contracts, spending by each federal agency on per diems and office supplies, and spending through the credit cards of public employees. Currently, the information is made accessible almost in real time (expenses from the day are available on the portal the following day). The portal also maintains a list with names of individuals and companies debarred or suspended at the federal level and in most states. As of mid-May 2014, the list over 10,000 names.

In conclusion, by integrating key elements of the U.S. and U.K. anti-bribery legislation (e.g., extraterritorial jurisdiction), incorporating case resolution alternatives that have proven effective in the U.S. (and mimicked enthusiastically in the U.K.), and fostering cooperation, information-sharing, and other global anti-corruption trends, Brazil has created a successful template with which to maximize the enforcement capabilities of the authorities charged with carrying out the powerful mandate of the Clean Company Act.

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