COVINGTON

COVINGTON & BURLING LLP

ADVISORY | Anti-Corruption

9 August 2013

NEW BRAZILIAN ANTI-BRIBERY STATUTE

In another sign of the times, Brazilian President Dilma Rousseff signed on 1 August 2013 -- as expected -- the Brazilian Clean Companies Act (the "Act").[1] The Act subjects for the first time Brazilian companies and other Brazilian entities plus foreign entities having a registered office, branch or other representation in the Brazilian territory to civil and administrative sanctions for bribing either Brazilian or foreign public officials.[2] The Act, which is scheduled to take effect on 29 January 2014, also applies to fraud in relation to public tenders.[3]

The Act's Context

Although Brazil has been a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions for 12 years, proposals to bring Brazil into line with convention standards had languished for years in the Brazilian Congress.[4] Following widespread public protests over the past 18 months against official corruption in Brazil, the Brazilian House of Representatives finally approved in April 2013 a bill broadly consistent with OECD standards. The Brazilian Senate approved the Clean Companies Act on 4 July 2013, at which point the Act was sent to President Rousseff for signature.

As has been true in several European countries, criminal liability traditionally has been limited in Brazil to individuals. The Act does not alter that approach. Neither does the Act amend existing laws in the Brazilian Criminal Code imposing liability upon individuals for acts of corruption -- liability that requires proof that the person who has been charged offered or promised a benefit to a public official in exchange for the official's performing, refraining from performing or delaying an act within the scope of the official's public duties.

The Provisions of the Act

The Act prohibits the bribery of domestic and foreign public officials. Bribery is defined in the Act to include promoting, offering or giving, "directly or indirectly, an improper benefit to a public agent * * * or * * * a third person related to him [or her]." Unlike the US Foreign Corrupt Practices Act but in line with legislation in many other countries, the Act apparently prohibits the offering or making of so-called "facilitation" payments. In addition, the Act prohibits the use "of a

---

[1] A copy of the Brazilian Clean Companies Act, as enacted, as well as an informal -- non-certified -- translation are attached to this advisory.

[2] The Act covers business and professional entities, whether or not operated for profit, "regardless of the form of organization or the corporate model adopted."

[3] The Act was published in the Diário Oficial da União, the official gazette of Brazil's federal government, on 2 August 2013. The Act thus is scheduled to take effect on 29 January 2014 -- 180 days of its publication the Diário Oficial da União.

[4] Although bills were introduced in the Brazilian Congress in 2010 that would have held companies and partnerships operating in Brazil liable for acts of corruption committed on their behalf as well as acts of corruption from which they benefitted and hearings were held on some of those bills, numerous attempts during 2011 and 2012 to bring them to the floor of the Brazilian Senate and House of Representatives failed.

natural or legal third party to hide or cover up the real interests or the identities of the beneficiaries of the acts performed * * *."[5]

For sanctions to be imposed upon an entity, the Act does not require a finding of criminal liability on the part of directors, officers, employees or agents of the entity. Neither does it require prosecutors to establish that the entity's directors, officers, employees or agents acted with a corrupt intent. According to the Act, the "legal persons [subject to the Act] shall be held strictly liable, administratively or civilly, for the injurious acts stipulated [in the Act] performed in their interest or benefit, exclusive or not."

The Act also prohibits bid rigging and other fraudulent conduct affecting the public procurement process. That includes –

- hindering or defrauding, "through collusion, agreement, or any other method, the competitive nature of a public request for bid[s] * * *;
- preventing, disturbing or defrauding "the performance of any act in a public request for bid[s] * * *;
- defrauding a "public request for bid[s] or contract derived therefrom";
- creating, "fraudulently or improperly, a legal person to participate in a public request for bid[s] or [entry] into an administrative contract";
- obtaining "an improper advantage or benefit, fraudulently, for modifications or extensions in contracts entered into with the public administration, not authorized by law, the invitation to a public request for bid[s], or the respective contractual instruments"; and
- manipulating or defrauding "the economic and financial balance of contracts entered into with the public administration."

In addition, the Act prohibits efforts "to hinder the investigation or supervisory work of public bodies, entities, or agents, or to intervene in their actions, including within the framework of regulatory agencies and supervisory bodies of the national financial system." Unfortunately, the Act does not describe in detail what conduct might run afoul of those prohibitions. At the very least, the destruction of pertinent documents after having been informed of the commencement of administrative proceedings seems likely to constitute prohibited obstruction.

Violations of the Act can be sanctioned with civil fines of as much as 20 percent of the entity's gross billings from the fiscal year prior to the initiation of administrative proceedings or, if the prior fiscal year's revenue cannot be calculated, of R$ 60 million (approximately USD 26 million).[6] Entities violating the Act also are liable to being dissolved or suspended. In addition, they are subject to forfeiture and debarment as well as the loss of public "incentives, subsidies, subventions, donations, or loans from public bodies or entities and public financial institutions or those controlled by the public authorities * * * for a minimum period of * * * [one] year and a maximum of * * * [five] years."[7]

[5] The statute of limitations for conduct prohibited by the Act is five years "computed from the date the violation becomes known, or, in the case of a permanent or ongoing violation, from the date that it ended."

[6] The R$ 60 million figure mentioned in the Act may not set a ceiling on the fine that can be imposed. The reason is that another of the Act's provisions states that the "application of the penalties stipulated in this article (Article 6) does not exclude, in any case, the obligation to fully indemnify the damage caused."

[7] To ensure that any penalties that are imposed will be collectable and that any harm that has been done by prohibited conduct will be curable, the Act authorizes the Public Ministry of the State Attorney's Office or legal representation agency, or equivalent, to freeze the entity's assets.

The Act contains potentially powerful incentives for voluntary disclosure. Under the Act, an entity that reports misconduct before it has come to the attention of prosecutors, cooperates thereafter (including by identifying "others involved in the violation, if applicable") and stops the misconduct before being ordered to do so can qualify for leniency. The leniency incentives in the Act include up to two-thirds reduction in the fine that otherwise could have been imposed.[8] Reductions in the other sanctions provided in the Act also potentially can be obtained so long as the entity qualifies for leniency.

Entities subject to the Act also can qualify for reduced sanctions if they have developed and implemented "internal mechanisms and procedures for integrity, audit, and incentives to report irregularities and the effective application of codes of ethics and conduct * * *." The criteria for such credit are to be developed by the Federal Executive Branch. Unlike the UK Bribery Act 2010, however, the Act does not give to an entity subject to the Act a statutory defense to prosecution if it is deemed to have developed and implemented "adequate procedures" to combat bribery.

Whether the disclosure and leniency provisions of the Act will lead to the development of a "compliance culture" in Brazil -- as suggested by several of the Act's proponents -- remains, of course, to be seen. Much will depend in that connection upon the criteria for leniency that are developed by the pertinent authorities and the robustness of the Act's enforcement. It also will depend, of course, upon the consistency with which the Brazilian prosecutors actually apply whatever disclosure incentives and leniency criteria that are developed.[9]

Finally, the Act contains provisions for successor liability. In the event of amendments to the entity's articles of association or merger with another company, the surviving or successor entity will be at risk of being held to be fully liable for all of the sanctions provided in the Act. In the event of an acquisition, the acquiring company's potential liability will be limited to fines and restitution of the damage that was caused up to the value of the assets that were acquired.

Concluding Observations

India is now the only BRICS country (Brazil, Russia, India, China and South Africa) that has failed to enact legislation prohibiting the bribery of foreign officials by entities operating within the country. South Africa was first out of the proverbial gate, having enacted such legislation in 2004. China and Russia enacted such legislation in 2011, with China having initiated recently a series of widely publicized bribery investigations of both foreign and domestic companies, including foreign pharmaceutical companies.

Only time will tell whether continuing public pressure in Brazil to tackle corruption will lead to an upsurge in actual bribery prosecutions in Brazil.[10] Although some have suggested that any increase in the number of prosecutions is likely to be limited to the federal level, thus leaving unchecked corruption at the state and municipal levels as well as -- quite possibly -- bribery by entities operating in Brazil directed at foreign officials, any company proceeding on those assumptions would have to have a rather large appetite for risk.

---

[8] According to the Act, any leniency agreement that is negotiated must not exempt the entity "from the obligation to cure in full the damage caused" by the illegal act.

[9] During the past 12 years, since ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Brazil has completed only one prosecution for the bribery of foreign public officials and reportedly has commenced only two additional investigations. That seems likely to change with enactment of the Act -- particularly if public pressure in Brazil for effective efforts to combat corruption continues. By contrast, the federal police in Brazil reportedly conducted 289 domestic bribery investigations in 2012, resulting in 1,600 arrests -- including the arrest of more than 100 public officials.

[10] One indication of the continuing impact of public pressure in Brazil to tackle official corruption is the recent introduction in the Brazilian House of Representatives of a bill that would make public corruption a "heinous crime," which would increase the potential criminal penalties that could be imposed upon individuals who have bribed a public official.

With the accession of Colombia in January 2013, five Latin American countries now have ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. That includes the two countries -- Brazil and Mexico -- having the largest economies in Latin America. Although it may be too soon to tell whether other Latin American countries will decide over the coming months to follow Brazil and Mexico (plus Colombia) in enacting legislation prohibiting foreign as well as domestic bribery by entities operating within those countries, the importance of Brazil and Mexico within Latin America would appear to make that a distinct possibility.

In the meantime, entities operating in Brazil should consider -- if they have not already done so -- developing and implementing policies and procedures to combat the bribery of both domestic and foreign officials. In addition to leaving such companies subject to prosecution in countries other than Brazil, the failure to do so could well be viewed in retrospect to be -- as the *Buenos Aires Herald* has suggested -- "a very onerous mistake."

If you have questions concerning the issues discussed in this advisory or covered in the attachments, please contact any of the following members of our Global Anti-Corruption Practice Group:

Tammy Albarran	+1.415.591.7066	talbarran@cov.com
Robert Amaee	+44.(0)20.7067.2139	ramaee@cov.com
Stephen Anthony	+1.202.662.5105	santhony@cov.com
Bruce Baird	+1.202.662.5122	bbaird@cov.com
Lanny Breuer	+1.202.662.5674	lbreuer@cov.com
Eric Carlson	+86.10.5910.0503	ecarlson@cov.com
Casey Cooper	+44.(0)20.7067.2035	ccooper@cov.com
Christopher Denig	+1.202.662.5325	cdenig@cov.com
Steven Fagell (co-chair)	+1.202.662.5293	fagellse@cov.com
James Garland	+1.202.662.5337	jgarland@cov.com
Haywood Gilliam	+1.415.591.7030	hgilliam@cov.com
Robert Kelner	+1.202.662.5503	rkelner@cov.com
Nancy Kestenbaum	+1.212.841.1125	nkestenbaum@cov.com
David Lorello	+44.(0)20.7067.2012	dlorello@cov.com
Lynn Neils	+1.212.841.1011	lneils@cov.com
Mona Patel Doshi	+1.202.662.5797	mpatel@cov.com
Don Ridings (co-chair)	+1.202.662.5357	dridings@cov.com
John Rupp (co-chair)	+44.(0)20.7067.2009	jrupp@cov.com
Anita Stork	+1.415.591.7050	astork@cov.com
Alan Vinegrad	+1.212.841.1022	avinegrad@cov.com