CORPORATE GOVERNANCE UNDER THE “ANTI-CORRUPTION LAW”

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Abstract: A recently issued presidential decree shall regulate Brazil’s “Anti-corruption Law” and demand companies to adequate their corporate governance rules.

President Dilma Roussef has issued a decree regulating the enforcement of Law 12.846/2013 - also known as the “Anti-corruption Law”. The enactment of such law is considered a milestone in the history of Brazilian everlasting fight against corruption, since it provisioned the possibility of application of penalties to companies involved in corruption schemes and any other action which may bring harm to national or foreign Public Administration.

Prior to the Anti-corruption Law, no penalties could be applied to the companies themselves as Brazilian Law only condemned companies’ employees – as well as corrupt public agents – who were directly involved in this sort of illegal activity. However, according to the terms of such Law, corrupting companies may now be subject to civil and administrative sanctions.

Fine levy

An interesting aspect of the fine established by such law is the fact that its value will never be smaller than the economic advantage obtained by the corrupt company. That is the provision brought by article 6º of the Anti-corruption Law, which also determines that the value of such fine shall vary from 0.1% to 20% of the corrupt company’s gross revenue before taxes.

This enforced amount shall be ultimately set according to the conditions established by article 7º, such as the gravity of the infraction, the economic advantage obtained or intended by the company, the company’s cooperation towards the investigations, existence of corporate compliance mechanisms, among others.

In case the company’s gross revenue cannot be assessed by the time of the enforcement of the fine established by such law, the levied amounts shall vary from R$ 6.000,00 (six thousand reais) to R$ 60.000.000,00 (sixty million reais).

Corporate Compliance Policy

The decree issued by President Roussef also regulates the structure and objectives of the compliance policy which shall be created and applied by companies in order to identify and punish fraud, money embezzlement, irregularities and other illegal acts carried out against either the Brazilian or a foreign Administration.

A number of criteria are established by the decree so as to provide official standards for the Administration to control the application of the companies’ compliance policies. This controlling task shall be performed by the Controller General’s Office (“Controladoria-Geral da União - CGU”), which is also in charge of investigating and judging companies’ illegal operations under such law.
Leniency Agreement

The Anti-corruption Law also sets forth the possibility for the Administration to enter into Leniency Agreements with corrupt companies.

In case all the legal requirements are met, the corrupting company may receive a softer penalty, which might include, for example, the reduction of the fine amount in exchange for their cooperation.

Since the beginning of the notorious “Lava-Jato Operation” in March, 2014, several bribery schemes operated between Brazilian state-controlled oil company Petrobras and some of the largest Brazilian construction companies have been discovered and, as a result, their corporate governance – or the lack thereof – has been exposed. Consequently, some of those companies are now suffering great economical damages and will lose considerable market value due to such acts.

These recent events have clearly demonstrated how important a compliance policy is for a company, regardless of its size and sort of business, and how much a company (and the public in general) can benefit from following standards of good-faith and accountability.

Our team of Corporate Law has large expertise in advising companies to establish and implement corporate governance rules, and we are prepared to support the performance of adjustments in any corporate structure with a view to comply with the recent ruling on anti-corruption mechanisms.