

# Brazil's New Anti-Corruption Law: What You Need to Know

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On Aug. 1, 2013, the President of Brazil, Dilma Roussef, signed the country's new anti-corruption law: Law No. 12.846/2013 (Anti-Corruption Law). The law became effective on Jan. 29, 2014 and, for many, may indicate a new era in the ways of doing business in the country. Brazil, long-believed to be a country with significant issues arising from corruption, was ranked 69th out of 176 countries and territories in Transparency International's 2012 Corruption Perceptions Index. The Anti-Corruption Law, which applies to business organizations, foundations, or associations and foreign companies with an office, branch or subsidiary in the Brazilian territory, signals a shift from Brazil's previous focus on individuals and for the first time creates potential strict liability for companies who participate in acts of bribery. In other words, those prosecuting the law will not need to prove that the company had a specific intent with regard to violation of the law.

Liability under the law can be premised on the following "wrongful acts":

- Promising, offering, or giving an undue advantage, directly or indirectly, to a public official, or a third person related to the official
- Financing, sponsoring, or in any way subsidizing, the performance of a wrongful act under the law
- Using another person or entity as an intermediary in order to conceal the company's real interests or the identity of the beneficiaries of the illegal act
- Obstructing or interfering with the investigations, audits, and the general work of public agencies, entities, or officials

The Anti-Corruption Law also contains provisions that specifically address government tenders and contracts. In this context, the law prohibits:

- Thwarting or defrauding the competitive nature of a public tender process
- Preventing, hindering, or defrauding the performance of any act of a public tender process

- Removing or attempting to remove a bidder by fraudulent means or by the offer of any type of advantage
- Eliminating a public tender or the resulting contract
- Creating a fraudulent entity to participate in a public tender and/or enter into a contract with the government
- Illegally benefiting from modifications or extensions of a government contract
- Manipulating or defrauding the economic and financial balance of government contracts

There are important differences between the Anti-Corruption Law and the US Foreign Corrupt Practices Act (FCPA). Unlike the FCPA, Brazil's Anti-Corruption Law is not limited to acts involving foreign officials; it prohibits bribery of both local and foreign government officials. Another key difference concerns the element of intent. The FCPA requires the government to prove that the defendants intended to engage in illegal conduct. The Anti-Corruption Law, in contrast, imposes strict liability for offenders. As a result, Brazilian authorities do not need to show that a person or company intended to violate the law—the fact that a bribe was paid to a public official is sufficient to establish liability.

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The Anti-Corruption Law sets forth various penalties for noncompliance, but unlike the FCPA, it does *not* impose corporate criminal liability. Rather, the penalties under the Anti-Corruption Law are limited to administrative and judicial sanctions. Administrative sanctions may include a fine of up to 20 percent of the offending company's gross earnings for the financial year prior to the initiation of administrative proceedings. If it is not possible to determine the value of the company's gross revenue, the law permits the prosecuting agency to fine the company between R\$6,000 (around \$2,700 USD) and R\$60,000,000 (around \$27,000,000 USD). The liable entity must also publish the condemnatory decision, at its own expense, through a means of communication widely circulated in the area where the violation occurred and the entity conducts business. However, if a company is found liable after administrative proceedings, it does not preclude the commencement of judicial proceedings. Judicial sanctions may include loss of assets, rights or valuables directly or indirectly related to the wrongdoing; partial suspension or interdiction of activities; compulsory dissolution of the company; and prohibition from receiving incentives, grants, or other forms of public funding.

Companies that conduct business in Brazil should enhance their compliance programs to ensure that their employees are educated on anti-corruption policies and, in particular, trained on compliance issues related to public tenders and government contracts. The existence of a robust compliance program will help prevent violations of the Anti-Corruption Law from occurring in the first place and will also be a factor taken into consideration by Brazilian authorities when

determining which sanctions to impose after a company is found liable under the law. Article 7 of the Anti-Corruption Law expressly assures that the “existence of internal mechanisms[,] procedures of integrity . . . as well as the effective enforcement of codes of ethics” will be taken into account when applying sanctions.” Other factors that will be considered include, but are not limited to, the seriousness of the offense, the advantage gained or intended by the offender, the degree or risk of damage, and the company’s cooperation with the investigation. Given that the majority of corruption cases are linked in some way to the use and retention of third parties, this is a critical area where companies should look to enhance or refine due diligence policies. The Anti-Corruption Law, like the FCPA, prohibits acts committed by a company through a third party, so companies should make sure that the third parties acting on their behalf are aware of and compliant with relevant anti-corruption laws and company policies.

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Additionally, the Anti-Corruption Law allows Brazilian authorities to enter into “leniency agreements” with companies that voluntarily disclose violations of the law. Eligibility for leniency is similar to the leniency guidelines of the U.S. Antitrust Division, which require that the company must be the first to report the corrupt conduct and that the conduct must cease immediately. The company must also acknowledge the conduct and fully cooperate with the government. In the event of a leniency agreement, the company’s fine will be reduced by up to two-thirds, and the company will not be required to publish the condemnatory decision and/or become banned from receiving incentives, grants or other forms of public funding in the future.

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