The approval of the new Brazilian anti-corruption law (Law nº 12,846/2013), in force as of January 29, 2014, and more widely known as the Brazilian Clean Company Act, has strongly contributed to the importance of adopting effective compliance programs by Brazilian companies to prevent and detect violations of law, and to implement anti-corruption controls to minimize risks in their respective businesses.

The new Act establishes administrative and civil liability on legal entities for illicit acts practiced against local and foreign Public Administration. The law’s enactment was directly related to the international commitments undertaken by Brazil as a signatory of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The Brazilian Clean Company Act is applicable to business companies and sole proprietorships, incorporated or not, regardless of the type of organization or legal structure adopted, as well as to foundations, associations of entities or persons, and foreign companies with registered offices, branches or representation in Brazil, legally or de facto organized, even if temporarily. Unlike the U.S. FCPA, which requires proof of corrupt intent, the Brazilian Clean Company Act contemplates the strict liability of legal entities, in civil and administrative levels, for acts of corruption committed in their interest or benefit without the need to prove that the management or directors had the intention to corrupt.

According to the new Act, controlling and controlled entities, affiliates or companies in consortium are jointly liable for the practice of acts prohibited by the Act. Such joint liability is limited to the obligation to pay fines and full restitution of the damages caused. There is also successor liability in the case of corporate restructuring as the legal entity’s liability remains in the event of any amendment to the articles of association, transformation, acquisition, merger or spin-off. Therefore, investors seeking to acquire or invest in a Brazilian company should take extra care and conduct thorough anti-corruption due diligence prior to the investment.

The sanctions provided under the new Act may be enforced against legal entities that engage in corruption of public officials, as well as in fraudulent practices in connection with public tenders and government contracts. With respect to administrative sanctions, legal entities may be subject to fines of up to 20% of the entity’s gross revenues in the year preceding the one in which the administrative proceeding is initiated, or up to BRL 60 million (US$27m1) in circumstances in which it is not possible to calculate gross revenues. Other administrative sanctions include publication of the condemnatory decision in media of wide circulation. The imposition of these administrative sanctions does not exempt the offending entity from the obligation of full restitution of the damages caused. If the offending entity is found civilly liable under the Act, it may be subject to various judicial sanctions, including loss of assets, partial interdiction of its

1. Approximate value based on the June 26, 2014 exchange rate.
activities, prohibition to receive incentives or financing from government financial institutions for a period of one to five years, among others.

The Brazilian Clean Company Act specifies a number of factors that must be considered by the authorities and courts when imposing administrative sanctions against an offending entity. Most significant, in line with the United States and United Kingdom laws and practices, in deciding what sanctions to impose on the offending entity, the Act sets forth that the Brazilian government will give weight to the existence of an effective compliance and ethics program. Another important provision is the possibility of the Public Administration entering into leniency agreements with a company that collaborates with an investigation. Entering into a leniency agreement will result in a reduction or exemption of certain sanctions.

Pursuant to Brazilian law, legal entities cannot be held criminally liable for the crime of corruption. Only individuals may be prosecuted criminally for the crime of corruption as per the Brazilian Criminal Code. Such individuals may be, for instance, the CEO or the employee who actively committed or assisted the act of corruption. Therefore, bribing a public official can constitute not only a violation of the Brazilian Clean Company Act by the offending entity, but also a violation of the Brazilian Criminal Code by the individual who actively participates in the corruption practice.

Lastly, it is worth mentioning that Brazilian law does not make any exception for facilitation payments, which are prohibited and considered to be bribes. Therefore, any payment made to a public official to expedite or secure the performance of a routine governmental action is also considered a bribe under Brazilian law.

Conclusion

General Partners and Limited Partners can mitigate the risk of becoming jointly liable for violations of the new Act by conducting an anti-corruption due diligence prior to investing, including outlining specific warranties and indemnifications in the purchase agreement, and taking effective measures for integrating the target company into the investor's anti-corruption compliance program once the deal is finalized.

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