Parallel Lives: How Brazil and the United States Consider Leniency Agreements and Compliance Programs

By Adria Perez

In today's global environment, conduct in one country can potentially violate anti-corruption laws of more than one country. When faced with this possibly debilitating scenario, companies need to understand both the commonalities and differences between the anti-corruption laws and their implementation to avoid further increasing their exposure.

Recent international news has focused on the Brazilian government's corruption enforcement. Under the Brazilian civil law system, generally companies cannot be convicted of crimes. Almost two years ago, the Brazilian government promulgated the Brazilian Clean Company Act (the "Act"). The Act imposes civil or administrative liability on "legal persons," including companies, for conduct against the Brazilian or foreign governments, which includes promising, offering or giving, directly or indirectly, any "improper advantage" to a public official or a related third person.[1] Other articles have discussed the elements and penalties in Brazilian and U. S. anti-corruption laws, but little attention has been given to comparing how the two governments consider leniency agreements and corporate compliance or integrity programs. This article fills that gap.

Many similarities exist between the two countries with regard to leniency agreements and corporate compliance programs. The most overt difference is likely based on the differences between the common law and civil law legal systems. The Brazilian decrees and regulations outline the procedures and factors for entering into leniency agreements and the government's review of corporate compliance programs. The decrees and regulations appear definite and structured. What may be less clear is how the Brazilian government will follow them. On the other hand, the United States government has published principles and guidelines that appear less structured or definite. Again, how the government authority or court follows the principles and guidelines is key. When faced with a parallel investigation in both countries, the Brazilian regulations appear to provide more predictability or a "road map" to follow when a company is determining how to react to possible misconduct.

I. Leniency Agreements

Whether characterized as a "leniency agreement" as in Brazil or a deferred prosecution or non-prosecution agreement as in the United States, both governments consider self-reporting to be a necessary prerequisite for an agreement. The decision whether to disclose voluntarily a potential violation to a government authority is difficult. One of my clients recently described voluntary disclosure as "calling an air strike" on oneself. Although self-reporting can be risky, there may be potential gain or at least an avenue to mitigate the exposure. In both countries, in order to enter into a leniency agreement (using the Brazilian term), the governments require a commitment from the company to cooperate and provide information about the misconduct.

The Brazilian regulations dedicate an entire chapter to leniency agreements. To obtain a leniency agreement, the company must:

1. "[B]e the first to state their interest in cooperating with the investigation of the specific injurious act;"[2]
2. Identify all other persons involved in the infringing conduct;[3]
3. Collect and provide information and documents concerning the conduct;[4]
4. Stop its involvement in the conduct on the day it proposes entering into a leniency agreement;[5]
5. Admit its participation in the conduct;[6]
6. "Fully and permanently" cooperate in the investigation and proceedings;[7] and
7. Implement or enhance its compliance program.[8]

For companies, the first factor appears the most difficult. As previously mentioned, determining whether to disclose in order to seek leniency can be a challenging question even though the Brazilian Act does not require specific intent (it is strict liability) and prohibits facilitation or grease payments.[9] Even more challenging is weighing *when* to disclose because there may be a competitor, employee or third party intermediary also seeking to benefit from self-reporting and the government may already know about the company's misconduct.

The benefit for a company disclosing in Brazil is that a leniency agreement can include a fine that is less than the regulated minimum value under the Act.[10] Additionally, entering into a leniency agreement could prevent the:

1. Publication of the Brazilian authorities' decision to sanction the company;
2. Prohibition on receiving government funding, loans, donations, subsidies or incentives in the future; or

3. Imposition of civil sanctions delineated in other Brazilian statutes concerning government tenders and contracts.[11]

The United States government does not provide a list of requirements for entering into an agreement when seeking leniency for a corruption offense. However, the Brazilian list above could persuade the United States government to enter into an agreement. When determining how to resolve a matter, such as whether to enter into an agreement, the United States Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") consider voluntary disclosure. With the disclosure, the United States government expects the company to cooperate by providing information and evidence as well as identifying the involved actors.[12]

In the United States, self-reporting and accepting responsibility may lead to a fine reduction under the Sentencing Guidelines.[13] There is no requirement to be the first actor to disclose the misconduct. However, if a company becomes aware of the misconduct through its compliance program and "unreasonably" delays its disclosure to government authorities, the sentencing court may not allow the company to benefit from a reduction of its culpability score due to the ineffectiveness of the compliance program.[14] Unlike in Brazil, a company cannot rely on government regulations to show why the United States government should consider a leniency agreement if the company satisfied the above Brazilian requirements list.

II. Compliance or "Integrity" Programs

Under the Brazilian regulations, the largest potential reduction of a fine under the Act occurs when the company maintains an integrity program with the certain characteristics that are outlined below. The use of a compliance program can reduce a fine between one and four percent.[15] An effective compliance program could yield double in terms of a fine reduction than even voluntary disclosure, which has up to a two percent reduction.[16] The potential reduction percentages show how the Brazilian government seeks to incentivize companies to implement effective compliance programs. In the United States, the Sentencing Guidelines that govern the sentencing of corporations consider the effectiveness of a company's compliance program, which could potentially lead to a reduction in a monetary penalty.[17]

The Brazilian regulations describe an integrity program as a "set of mechanisms and internal procedures on integrity, auditability, and incentivized reporting of irregularities, as well as the effective application of codes of ethics and conduct, policies, and directives aimed at detecting and correcting deviations, fraudulent acts, irregularities, and illicit acts performed against the [Brazilian] government or a foreign government."[18] The regulations emphasize that the company must "constantly improve[] and adapt[]" the compliance program.[19] The United States government agrees that effective compliance programs are "dynamic and evolv[ing]."[20] The Sentencing Guidelines further note that an effective compliance program responds to conduct by modifying the program to prevent future similar violations.[21]

The Brazilian regulations delineate the characteristics the Brazilian government will look for when considering the effectiveness of a compliance program, including:

1. "Tone at the top" commitment, such as the company's senior management;
2. Code of conduct or ethics for company personnel and third parties, such as intermediaries and suppliers;
3. Training on the compliance program;
4. Risk analysis to determine how to modify and improve the compliance program;
5. Accurate books and records;
6. Specific policies or procedures to prevent fraud or illegal acts when the company engages with the public or government sector directly or indirectly through intermediaries;
7. Independent corporate body with authority that will review and enforce the compliance program;
8. Mechanism for employees and third parties to report issues as well as protection for whistleblowers;
9. Disciplinary action for violating the compliance program; and
10. Due diligence procedures for hiring third parties and before any mergers and acquisitions.[22]

The Brazilian regulations provide that the Brazilian authorities, when evaluating the compliance program, will consider the company's:

1. Size;
2. Corporate structure;
3. Use of third-party intermediaries;
4. Market sector;
5. Geography and operational footprint; and
6. Work with the public or government sector.[23]

Additionally, the Brazilian authorities will review "the importance of government authorizations, licenses, and permits for [the company's] operations."[24] These factors are included in the "Profile Report" and "Program Conformity Report" forms that an April 2015 Brazilian regulation requires the Brazilian government to review when evaluating a company's compliance program.[25] For both reports, the company must provide documentation

concerning the compliance program, which could include Board of Directors minutes, training presentations and participation statistics, documents concerning the use of any hotlines or reporting mechanisms and accounting records.

In the United States, a court may subtract up to three points from the company's culpability score if the offense occurred while a company maintained an effective compliance program that identifies and prevents misconduct and promotes an ethical and legally compliant corporate culture.[26] Cooperation in the investigation and acceptance of responsibility can lead to a two point reduction.[27] A reduction in the company's culpability score may reduce the company's fine.

Although the United States government does not provide requirements for corporate compliance programs or ask companies to complete reports, the DOJ and SEC's "Resource Guide to the U. S. Foreign Corrupt Practices Act" provides the "Hallmarks of Effective Compliance Programs." The hallmarks comprise the same characteristics that the Brazilian government lists in its regulations and reports, including:

1. Commitment from senior management and a clearly articulated policy against corruption;
2. Code of conduct and compliance policies and procedures;
3. Risk assessments;
4. Training and continuing advice;
5. Third-party due diligence;
6. Continuous improvement, such as periodic testing and review; and
7. Due diligence for mergers and acquisitions.[28]

The Resource Guide further emphasizes the importance of providing:

1. Resources to the independent compliance department that oversees the program;
2. Incentives for those who report any issues; and
3. Resources toward any integration after a merger or acquisition.[29]

There are similarities between what the two governments expect from an effective compliance program. Additionally, both governments provide incentives for maintaining an effective compliance program, including the potential reduction in fines if an offense occurs. The difference between the two governments lies in the more highly-structured Brazilian process as compared with the more subjective United States process. In Brazil, companies seeking the compliance program fine reduction are required to complete forms and submit evidence supporting the information about the programs. The submission of supporting information further stresses the importance of documenting a compliance program's features, effectiveness and improvement over time.

III. Conclusion

A company that is part of a parallel investigation in both Brazil and the United States has the option to seek a leniency agreement and persuade both governments to reduce the company's exposure due to the company's compliance program. Although Brazil appears to have implemented a more structured approach, few concrete differences appear when seeking leniency agreements and maintaining an effective compliance program.

The key is that a company operating or doing business in both countries needs a strong compliance program to detect and prevent misconduct. If the program detects wrongdoing, the company should consider disclosing the misconduct to both governments. This is especially so in Brazil because the Brazilian authorities provide a leniency agreement when the company is the first to convey its interest in cooperating with the investigation. If the company voluntarily discloses to the Brazilian government in order to obtain a leniency agreement, it may also need to disclose to the United States authorities.

Depending on the strength of the compliance program, the company may be able to obtain up to a four percent fine reduction under the Brazilian regulations. An effective compliance program could also result in a better resolution for the company with the United States government, especially if the company discloses the misconduct, which could lead to a deferred prosecution or non-prosecution agreement and possibly a fine reduction.

The above Brazilian requirements and United States recommended characteristics can help companies implement effective compliance programs that can prevent possible offenses and detect misconduct in time for the company to determine how best to mitigate the exposure in both countries.

Endnotes

1. Lei No. 12.846 [Clean Company Act], de 1 de Agosto de 2013, Diário Oficial da União [D.O.U.], capítulo II, art. 5(I) de 2.8.2013 (Braz.) [hereinafter Clean Company Act], *available at* https://www.cov.com/files/upload/E-Alert_Attachment_Brazilian_Clean_Companies_Act_Original.pdf.
2. Decreto No. 8.420, de 18 de Março de 2015, Diário Oficial da União [D.O.U.], capítulo III, art. 30 de 19.3.2015 (Braz.) (translated courtesy of Merrill Brink International at merrillbrink.com/fcpa-and-bribery-act-translation.html) [hereinafter Decreto No. 8.420].
3. *Id*. at capítulo III, art. 28(I).
4. *Id*. at capítulo III, art. 28(II) & 30(V).
5. *Id*. at capítulo III, art. 30(II).
6. *Id*. at capítulo III, art. 30(III).
7. *Id*. at capítulo III, art. 30(IV).

8. *Id*. at capítulo III, art. 37(IV).
9. Clean Company Act, *supra* note 1.
10. *Id*. at capítulo II, seção II, art. 20(II)(b).
11. Decreto No. 8.420, *supra* note 2, at capítulo III, art. 40(I-II) & (IV).
12. U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act 54-55 (2012), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf..
13. *Id*.
14. U.S. Sentencing Guidelines Manual § 8C2.5(f)(2) (U.S. Sentencing Comm'n 2014).
15. Decreto No. 8.420, *supra* note 2, at capítulo II, seção II, art. 18(V).
16. *Id*. at capítulo. II, seção II, art. 18(IV) & (V).
17. U.S. Sentencing Guidelines Manual, *supra* note 14, at § 8C 2.5(f)(1).
18. Decreto No. 8.420, *supra* note 2, at capítulo IV, art. 41.
19. *Id*.
20. U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, *supra* note 12, at 56.
21. *Id*. at 54.
22. Decreto No. 8.420, *supra* note 2, at capítulo IV, art. 42 (I)-(XVI).
23. *Id*. at capítulo IV, art. 42 (XVI), para. 1, at VI.
24. *Id*.
25. Portaria No. 909, de 7 de Abril de 2015, Diário Oficial da União [D.O.U.] de 8.4.2015 (Braz.).
26. U.S. Sentencing Guidelines Manual, *supra* note 14, at § 8C 2.5(f)(1).
27. *Id*. at § 8C 2.5(g)(2).
28. U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, *supra* note 12, at 57-63.
29. *Id*.

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