Anti-Corruption 2017

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Brazil

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Laws

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2. To what extent, and under what circumstances, do the anti-corruption laws in your jurisdiction apply to corporate entities, whether based principally in your jurisdiction or elsewhere?

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8. What are the maximum potential fines or other penalties for violating the anti-corruption laws in your jurisdiction?

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30. Is it common practice for companies in your jurisdiction to conduct anti-corruption due diligence in the course of mergers, acquisitions or joint ventures? (Describe the types of diligence typically performed.)

Other

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32. In the past three years, what do you view as the most notable legislative, regulatory or enforcement developments with respect to the anti-corruption landscape in your jurisdiction?

33. Describe any other significant challenges (eg, legal or cultural issues) that impact anti-corruption compliance, due diligence or internal investigations in your jurisdiction.

Laws

1. What laws or regulations in your jurisdiction prohibit the offering, payment, or receipt of bribes by: domestic government officials; foreign government officials; or other individuals, such as commercial counterparties?

In Brazil, corrupt practices involving government officials are subject to criminal, civil and administrative enforcement. At the criminal level, Decree-Law No. 2,848/1940 (Brazilian Criminal Code) sanctions bribing national and foreign public officials with jail time plus criminal law fines. Other statutes may be applicable, such as Law No. 9,613/1998 (Anti-money Laundering Law) and Law No. 12,850/2013 (Organized Crime Law). At the civil level, Law No. 8,429/1992 (Public Probity Law) sets forth civil liability for those engaging in corrupt practices to the detriment of the Brazilian public entities. Damage claims may be filed primarily based on Law No. 10,406/2002 (Brazilian Civil Code) and Law No. 7,347/1985 (Class Action Law). Law

No. 12,846/2013 (Clean Company Act) introduced strict corporate liability for corrupt practices at the administrative level. Additionally, in cases of companies contracting with public entities, other statutes may be applicable, such as Law No. 8,666/1993 (Public Tender Law), and Law No. 8,443/1992 (Federal Court of Accounts Law).

Although unusual, corrupt practices in the context of private relationships (such as commercial counter parties) may be enforced under the terms of Law No. 9,279/1996 (Industrial Property Law), as they could amount to an unlawful competition behaviour.

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2. To what extent, and under what circumstances, do the anti-corruption laws in your jurisdiction apply to corporate entities, whether based principally in your jurisdiction or elsewhere?

In general, corrupt practices are subject to the Brazilian jurisdiction whenever they affect Brazilian public entities. When the wrongdoing affects foreign public entities, only the Clean Company Act is applicable to corporate entities and solely if the conduct was performed by entities with headquarters, branches or management in Brazil.

At the criminal level, as a rule, only individuals can be investigated in Brazil. Only in exceptional cases, restricted to environmental crimes, the Brazilian legislation provides for criminal penalties for corporations. However, corporate entities could, in theory, be affected by the extra-criminal effects of a criminal sentence as set forth in article 91, II, of the Brazilian Penal Code, that is, possible forfeiture of product or benefit deriving from the crime, preserving the rights of those who were harmed or of third parties acting on good faith. This is a very unlikely scenario that takes place only in extraordinary situations.

Corrupt practices may subject legal entities to two types of legal consequences in the administrative and civil levels: (i) penalties and (ii) indemnification of damages. See Item 8 for details on applicable penalties.

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3. To what extent, and under what circumstances, do the anti-corruption laws in your jurisdiction apply to individuals, whether resident in your jurisdiction or elsewhere?

Individuals are criminally liable for offences against Brazilian public entities (ie, federal government, states, counties, public or semi-public companies and other public entities) regardless of where the offence took place, the citizenship of the offender or his or her place of residence, as set forth in article 7, I, “b” and “c” of the Brazilian Criminal Code. Civil and administrative statutes follow the same liability rule.

Under Brazil's Criminal Code briber payers and recipients may be punished with imprisonment from two to 12 years and fines in case the corruption involves domestic government officials. In case of foreign government officials, the jail sentence may range from one to eight years, plus the payment of fines. Moreover, offences set forth in the Public Tender Law are punishable by prison sentences from two to four years and fines.

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4. How do the anti-corruption laws in your jurisdiction define foreign government officials?

The definition of foreign government official is set forth by article 337-D of the Brazilian Criminal Code:

For criminal matters, those who, even if temporarily or without remuneration, hold public office, employment or function in state entities or diplomatic offices of foreign governments are considered public foreign officials. Sole paragraph: Are equivalent to public officials those holding office, employment or function in companies controlled, directly or indirectly, by foreign public entities or in public international organisations.

Similarly, the Clean Company Act, in its article 5, item V, first paragraph, defines foreign Public Administration as "state organs and entities or diplomatic officers of other countries, in any governmental level or sphere, as well as legal entities controlled, directly or indirectly, by foreign public entities or in public international organisations". The Clean Company Act also repeats the concept of foreign public official in the Brazilian Criminal Code.

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5. What level of knowledge or intent is required to prove a violation of the anti-corruption laws in your jurisdiction?

At the criminal level, individuals normally face criminal liability for corrupt practices only if the wrongdoing is a wilful act. Notwithstanding, "wilful blindness" is increasingly used by prosecutors in corruption and money laundering criminal cases to establish liabilities for individuals who have deliberately opted not to be aware of a certain conduct. For civil claims based on Public Probity Law, Brazilian Superior Court of Justice has ruled that strict liability is not applicable and intent is required to find defendants liable. At the administrative level, under Law No. 12,846/13, no proof of intent is required for corporate liability; proof that bribes were paid will suffice. This is the same standard used for liability under the Public Tender Law (except for the crimes prescribed herein) and the Federal Court of Auditors Law, as well as for compensation for damages.

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6. Do the anti-corruption laws in your jurisdiction prohibit facilitating payments? (That is, small payments to expedite or to secure the performance of a routine government action to which a company is entitled, such as obtaining permits, processing visas, utility services, customs clearance, police protection.)

Pursuant to Brazil's anti-corruption laws, parties may be held accountable for directly or indirectly (ie, via third parties or intermediaries), promising, offering, giving bribes or financing the corruption of a public official. Undue payment to public officials, regardless of the amount, is considered illegal even if made to expedite or secure the performance of a routine government action to which a company is entitled. The Clean Company Act also encompasses fraud or any interference with public tenders and government contracts, as well as the obstruction of government investigations. At the criminal level, when bribes are paid to make public officials violate their legal duties, the Brazilian Criminal Code prescribes an increase of one-third of jail time for conspirators.

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7. What affirmative defences are available with respect to the anti-corruption laws in your jurisdiction?

Defences against criminal charges are normally based on arguments of expiration of the statute of limitation and/or allegations that defendants were victims of extortion. *Ne bis in idem* is usually used as a defence for reducing fines imposed due to the varied dimensions of liability under different statutes. Other general affirmative defences are virtually possible, although less effective in practice, such as insanity allegations. Procedural errors and illegality of evidence are also usual allegations.

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8. What are the maximum potential fines or other penalties for violating the anti-corruption laws in your jurisdiction?

For corporate criminal liability please see Item 2. Individuals are sanctioned with jail time and fines varying in accordance to the specific felony.

At the administrative level, the Clean Company Act sets forth (i) fines ranging from 0.1 per cent to 20 per cent of the company's gross revenue in the year prior to the commencement of the investigation – taxes excluded – in an amount not lower than the benefit obtained, whenever it is possible to estimate it, as well as (ii) a publication of the decision. The Public Tender Law establishes penalties of (i) caveat; (ii) fines, as defined in the instructions for bidders or the relevant contract; (iii) temporary suspension from public tenders; (iv) prohibition of executing contracts with public entities; and (v) debarment. Law No. 8,443/1992 sets forth fines of up to 54,820.84 reais (the maximum fine is annually revised) and debarment.

Civil fines are set forth in article 12, item I, of the Public Probity Law, which refers to “acts of administrative improbity that result in unlawful enrichment”. The fine amounts to up to three times the value of the unlawful enrichment and may also include forfeiture of assets or figures obtained by means of the misconduct, full compensation for damages, suspension of political rights for up to 10 years and prohibition of contracting with public entities or receiving any public benefit or incentive. Public officials can lose their positions in public entities.

The Clean Company Act prescribes the following civil penalties (i) confiscation of assets, (ii) suspension of the company’s activities, and (iii) debarment from receiving tax breaks and other incentives, and (iv) compulsory dissolution of company.

Damages claims depend on each case. For example, in the context of the Car Wash Operation, Federal Prosecutors claimed for damages of 10 times the amount paid in bribes.

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9. Is there any pending legislation related to anti-corruption in your jurisdiction?

There are several projects pending before the Brazilian Congress. The most relevant are:

- “Anticorruption package”: several projects related to, among others, (i) higher penalties for slush fund, especially in campaigns; (ii) the adoption of Supplementary Law No. 135/2010 (Clean Record Law) to all public servants; (iii) criminal liability for public servants who fail to explain the discrepancy between their private wealth and their wages; and (iv) anticipated confiscation of assets in corruption cases.
- “10 actions against corruption”: proposal submitted by the Federal Prosecutors’ Office through a popular project of law which seeks more efficiency in fighting corruption mainly by changing procedural provisions. Tougher treatment for corruption cases is also part of the 10 actions.

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Enforcement

10. Are corporate entities that violate the anti-corruption laws in your jurisdiction subject to criminal prosecution, civil enforcement actions, or both?

See question 2.

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11. Which government agencies may bring enforcement actions under your jurisdiction’s anti-corruption laws?

At the criminal level, Prosecutors' Offices (state or federal) are the only agencies able to bring charges. Civil cases based on the Public Probity Law may be brought by (i) the legal entity targeted by the conduct and (ii) the Prosecutors' Office. Additionally, civil cases may be filed by parties claiming compensation for damages. Charges based on the Public Tender Law and the Clean Company Act may be brought by (i) the legal entity targeted by the conduct and (ii) the Internal Control Offices, such as the Ministry of Transparency at federal level. Finally, Law No. 8,443/1992 is subject to enforcement by the Federal Court of Auditors.

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12. Have any multinational corporations or their domestic subsidiaries been subject to enforcement actions in your jurisdiction for domestic or foreign bribery violations?

Many multinational corporations have been investigated for corrupt practices in Brazil. For example, in the state of São Paulo, a French corporation has been investigated for paying bribes to public officials in connection with contracts in the energy sector. The same company is also investigated for bid-rigging in public tenders for subway lines, in which a German company also figures as a co-conspirator. Also in São Paulo, prosecutors settled a civil case against a German bank for bribes allegedly paid to a former Mayor of the city of São Paulo. More recently, the Operation Zelotes began to investigate more than 70 companies for corruption at the Brazilian Tax Board of Review, many of which are multinational companies (involved in, eg, the banking and pharma sectors). A Brazilian company and some of its former employees are also being investigated for corrupt practices for bribing Dominican public officials regarding aircraft sales. Finally, Operation Car Wash, which investigates corruption in Petrobras, also identified several multinational companies allegedly involved in payment of bribes, such as Italian and Swedish contractors and a Dutch supplier of floating production solutions. As of September 2016, a total of 1,016 companies had been found liable under the Public Probity Law and are listed in the Brazilian Register of Parties Convicted for Improbity.

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13. Have the employees of any multinational corporations or their domestic subsidiaries been subject to enforcement actions by prosecutors or other agencies in your jurisdiction for domestic or foreign bribery violations?

Yes. See question 12.

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14. Have resolutions of anti-bribery enforcement actions with corporate entities resulted in settlements, such as deferred prosecution or non-prosecution agreements or leniency agreements?

The Clean Company Act establishes a Leniency Programme under which self-disclosure of corrupt practices and cooperation by corporations could result in a reduction of up to 2/3 of the fine and immunity from some, but not all, sanctions. In order to qualify for the Leniency Programme, the company must (i) be the first to apply for leniency, (ii) confess and cease its involvement in the investigated misconduct and (iii) commit to full and permanent cooperation with the investigations. Although the Law refers to “Leniency”, it does not allow for the possibility of full exemption from sanctions. The Leniency Programme was further regulated by Decree No. 8,420/2015, which softened the need to be the first to apply by adding the expression “when such circumstance is deemed relevant”. Additionally, Clean Company Act’s Leniency Programme may also address violations of Public Tender Law, in order to exclude or waive penalties prescribed therein.

Unlike the Leniency Programme established in Law No. 12,529/2011 (Antitrust Law), the benefits of the Leniency Programme in the Clean Company Act are not extended to the individuals involved, which could still be liable under other statutes.

To date, one leniency agreement was executed with the Ministry of Transparency and six were executed with the Federal Prosecutors’ Office. Leniency agreements executed with the Federal Prosecutors’ Office do not strictly follow the procedure provided in the Clean Company Act, but derive from a combination of legislations, such as the Clean Company Act, the Antitrust Law, the Organised Crime Law, the United Nations Convention against Corruption and the Palermo Convention. Those agreements address both criminal and civil charges against companies and individuals, but do not prevent administrative authorities from continuing their investigations and imposing the applicable penalties. Moreover, they do not exclude damages claims.

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15. In recent years, have there been trials or other proceedings in which an individual or corporate entity has contested alleged violations of anti-corruption laws in your jurisdiction?

Yes, many of those proceedings are still pending. It usually takes more than 10 years for a lawsuit to reach a conclusion. In the past 20 years, some cases have been dismissed based on the use of illegal evidence and procedural errors.

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16. To what extent do the regulatory agencies provide incentives for companies to self-report known or suspected violations?

Under Decree No. 8,420/2015, companies which self-report a violation prior to the commencement of a formal investigation may receive a discount of 2 per cent on the applicable fine. Additionally, the Clean Company Act provides that an effective compliance programme can

lead to discounts of up to 4 per cent on the applicable fines. Companies may also apply for the Leniency Programme, as detailed in question 14.

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17. To what extent do the regulatory agencies take into account a company's level of cooperation with the government's investigation or the strength of its compliance programme when considering whether to bring enforcement actions or when assessing penalties?

The Clean Company Act gives credit to companies that adopt "effective" compliance programmes (ie, internal auditing and self-reporting procedures as well as rules on ethics and corporate conduct). At the administrative level, under Decree No. 8,420/2015, companies may receive a discount ranging from 1 per cent to 1.5 per cent on the applicable fine for cooperating with the investigation, regardless of the existence of a leniency agreement. Furthermore, effective compliance programmes may lead to discounts of up to 4 per cent on the applicable fines. To prove the effectiveness of its compliance programme in the context of an Administrative Proceeding, the company must submit:

- a "profile report" with information on corporate structure and governance and other relevant information on key activities (eg, hierarchy, employees, decision-making and interaction with public officials); and
- a "compliance report" including (i) description of its programme, (ii) evidence that the compliance programme is integrated with the company's daily activities, indicating past experiences and (iii) evidence that the integrity programme played a role in preventing, detecting and solving the target conduct.

Apart from administrative investigations, cooperation with the investigation and the existence of a compliance programme may be construed as good faith aiming to reduce the applicable penalties.

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18. What has been the most significant fine or monetary penalty to date under the anti-corruption laws of your jurisdiction?

Recently, a construction company executed a leniency agreement with Federal Prosecutors' Office through which it agreed to pay 1 billion reais to settle multiple corruption allegations. At the administrative level, state authorities imposed fines under the Clean Company Act in nine different cases – the highest fine so far was 1,703,647.35 reais, in a case adjudicated by the Secretary of Transparency of the state of Maranhão.

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19. Do the regulatory agencies use any other statutes to prosecute conduct related to bribery and corruption?

Regulators use legislations that are not specific for fighting corruption, such as the Public Tender Law, the Class Action Law, the Anti-money Laundering Law and the Organised Crime Law.

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20. Have the regulatory agencies issued general guidance regarding compliance with and enforcement of the anti-corruption laws?

Yes, Decree No. 8,420/2015 sets forth the criteria that should be taken into account when assessing compliance programmes and Regulation No. 909/2015 establishes the procedures for such assessment (see question 17). Additionally, on 22 September 2015, the Ministry of Transparency issued a general guidance on anticorruption compliance programmes indicating key elements that should be taken into account when executing such programmes. The Ministry's recommendations are divided into five areas: (i) top-level commitment and support; (ii) department in charge of compliance; (iii) profile and risk assessment; (iv) rules and procedures in place; and (v) permanent monitoring. Joint Regulation No. 2,279/2015 prescribes a simplified procedure for assessing compliance programmes in small businesses. On 17 November 2015, the Ministry of Transparency also issued specific guidance on compliance programmes for small business.

The general guidance for integrity programmes is available at www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf. The guidance for small businesses is available at: www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/integridade-para-pequenos-negocios.pdf.

Additionally, the "Pro-Ethics" Registry of Ministry of Transparency lists companies that voluntarily engaged in contributing to an ethical business environment, and have agreed to be assessed periodically according to pre-established criteria.

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International cooperation

21. To what extent do regulators in your jurisdiction cooperate with foreign regulators in enforcing applicable anti-corruption laws?

Brazilian investigators often cooperate with foreign regulators in enforcing applicable anti-corruption laws, especially due to money laundering practices that may take place overseas. International cooperation is relevant to identify money track, block and recover assets, as well

as to find suspects and extradite suspects when possible. The three main tools for international cooperation are letters rogatory, validation of foreign decision and direct support. Letter rogatory is used when some procedures have to be carried out in other jurisdiction. The validation of foreign decision aims to grant effect, in Brazil, to rulings issued by foreign courts (or the other way around). Direct support requests take place when the requesting state asks for a judicial or non-judicial act to be carried out in other jurisdictions, such as exchange of information, documents, arrestment, emergency injunctions and precautionary measures. Finally, there is an informal level of cooperation through meetings, phone calls and so on that allows investigators to expedite the exchange of information. However, information gathered through informal contacts cannot be submitted as evidence in formal proceedings.

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22. Is there a formal understanding with regulators in other jurisdictions to share information and provide reciprocal assistance in enforcement matters?

Brazil is part of three important multilateral agreements among countries for mutual assistance on fighting corruption: the Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the United Nations' Convention against Corruption, and the Inter-American Convention Against Corruption. Additionally, Brazil is part of bilateral agreements with Canada, China, Colombia, South Korea, Cuba, Spain, USA, France, Honduras, México, Nigeria, Panama, Peru, Portugal, Switzerland, Suriname and Ukraine.

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23. Has the sharing of information with foreign regulators contributed to any enforcement actions in your jurisdiction?

International cooperation has a significant role in identifying the money track and blocking and recovering assets in cases of money laundering connected to corruption. In the context of Operation Car Wash, international cooperation for fighting corruption increased significantly. There are currently 112 requests for international cooperation and 745.1 million reais have been recovered through international cooperation. Other recent remarkable facts are the arrest of a black market operator in Portugal in 2015 and criminal charges filed by the Brazilian General Prosecutor against a (currently former) congressman based primarily on evidence gathered by Swiss criminal authorities of money laundering and other financial frauds.

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Investigations

24. Must publicly traded companies in your jurisdiction disclose pending investigations in their regulatory filings, or is such disclosure typical, even if not required?

There is no specific obligation to disclose pending investigations prior the formal commencement of a proceeding. On the other hand, formal judicial or administrative proceedings in which the company is involved must be disclosed, except in cases in which the proceeding is confidential. Material contingencies must also be reported, as well as settlements in administrative and judicial proceedings.

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25. Have any companies publicly disclosed investigations relating to bribery or corruption issues within the past five years?

Yes, see question 15.

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Risk areas

26. Which industries or business sectors in your jurisdiction are most vulnerable to public corruption?

Based on recent investigations, construction and engineering, oil and gas, pharma sector and supply of school meals industries seem to be more exposed to corrupt practices. Businesses operating in regulated sectors or that depend on governmental authorisation, such as fuel retailing, real state and public transport, are also significantly vulnerable to corruption.

Other investigations also revealed smaller corruption schemes involving an enormous variety of sectors, ranging from supply of garbage bags to surveillance systems.

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27. Is it common in your jurisdiction for companies to engage third parties to assist in interacting with government officials, whether in connection with sales and marketing or with obtaining permits, licences, or other government approval?

Yes, companies frequently retain consulting firms to assist them in dealing with red tape, as well as firms to represent them for sales purposes and to help to devise a market strategy. Many consulting firms are managed by former public servants, who take advantage of their long-term experience in the public administration. Law No. 12,813/2013 (Conflict of Interests Law) regulates, among other issues, the relationship of former federal employees with the Public Administration after leaving office.

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Compliance best practices

28. Is it common for companies in your jurisdiction to have an internal hotline or other mechanisms by which anonymous reports or other compliance questions or concerns may be raised?

Internal hotlines are mostly present in larger companies, especially those that are subsidiaries of multinational companies and/or are publicly traded. However, following the enactment of the Clean Company Act, companies are increasingly starting to implement compliance programmes. Creative mechanisms, such as internal leniency programmes, have also been implemented by Brazilian companies in recent years.

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29. Is it common practice for companies in your jurisdiction to conduct anti-corruption due diligence before engaging third parties, such as agents, consultants and distributors?

It is not common for Brazilian companies to conduct anticorruption due diligence before engaging third parties. In general, decisions on engaging third parties are based on commercial needs and often neglect legal exposures arising from such interaction. Exceptions are some subsidiaries of multinational companies and large and/or publicly traded companies. Companies that previously faced charges for corrupt practices in connection with their relationship with suppliers may have also implemented such due diligence procedures to avoid new occurrences. Diligences typically performed include background check on the counterparts to figure out whether it has already been mentioned as part of corruption schemes. Background checks may also be extended to its shareholders, officers and their family. Other documents attesting compliance with tax obligations may also be required.

It is expected that the number companies adopting these procedures will increase in the following years, given that Decree No. 8,420/2015 considers the extension of integrity policy to suppliers, when applicable, to be a key aspect of an effective compliance programme.

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30. Is it common practice for companies in your jurisdiction to conduct anti-corruption due diligence in the course of mergers, acquisitions or joint ventures? (Describe the types of diligence typically performed.)

It is not common practice for companies to conduct anticorruption due diligence prior to mergers and acquisitions, except for larger or listed companies or subsidiaries of multinationals, which performed these diligences for the purposes of addressing international requirements, such as FCPA. Occasionally, companies conducted due diligences targeting contracts with public entities in order to identify potential contingencies, especially when the transaction involved more sensitive industries, such as construction and energy. Recent anticorruption enforcement

developments are driving merger and acquisitions due diligences to increasingly incorporate anticorruption concerns.

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Other

31. Have shareholders of publicly traded companies in your jurisdiction initiated civil actions related to any company's violation of anti-corruption laws?

In connection with Operation Car Wash, a shareholder of Petrobras filed a civil claim for damages against the company and the federal government in the state of Rio de Janeiro. Additionally, Petrobras and Eletrobras are being sued by shareholders for corrupt practices in class actions pending before US courts.

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32. In the past three years, what do you view as the most notable legislative, regulatory or enforcement developments with respect to the anti-corruption landscape in your jurisdiction?

The Clean Company Act, which created strict corporate liability for corrupt practices at the administrative level, is the most remarkable legislative development in Brazilian anti-corruption enforcement in the past three years. Besides inaugurating a new dimension of corporate liability, the Clean Company Act also seeks to foster the adoption of internal mechanisms of prevention and self-report, such as compliance programmes and leniency agreements. Decree No. 8,420/2015 and regulations from the Ministry of Transparency, which regulate key aspects of anti-corruption enforcement in Brazil, are also notable innovations. Furthermore, Law No. 12,850/2013 (Law on Organised Crime), although not referring exclusively to anticorruption, played a significant role in anti-corruption enforcement in Brazil by regulating criminal plea bargain agreements. Finally, Brazil's Supreme Court decision ruling that judicial decisions may be enforced following the second instance appeal, rather than only after final review of the higher courts, gives more effectiveness to judicial decisions and increases the incentives for convicted individuals to negotiate pleas and disclose corrupt schemes.

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33. Describe any other significant challenges (eg, legal or cultural issues) that impact anti-corruption compliance, due diligence or internal investigations in your jurisdiction.

There are many significant challenges in anticorruption landscape in Brazil, such as: (i) multiplicity of statues applicable to corruption cases; (ii) ineffectiveness of cooperation between agencies; (ii) poor regulation of leniency agreements; (iv) lack of transparency in public entities;

(v) an incipient culture of self-reporting violations; (vi) labour issues over the course of internal investigations; (vii) uncertainty on legal privilege limits; and (viii) lengthy judicial proceedings.

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