

Promising Anti-Money Laundering Legislation in Brazil

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In light of new anti-money laundering trials in Brazil which are expected to take place with greater frequency and in addition to the new enactment of a tough anti-bribery law required by OECD that is shades of the Foreign Corrupt Practices Act and the UK Bribery Act, FTI Consulting delves into the genesis of the new anti-money laundering law and its implications for both companies and individuals who conduct business in Brazil.

2005 in Brazil observed one of the largest corruption scandals when the embezzlement of public funds to purchase political support came to light. This scandal, known as *Mensalão*,¹ involved the purchase of congressional votes by the ruling political party in Brazil. 38 defendants were charged, among whom included the President's Chief of Staff, José Dirceu. The long list of charges during the lengthy trial included: money laundering, embezzlement, corruption, conspiracy and the misuse of public funds. During the trial, several of the defendants had money laundering charges dropped due to the fact that the Brazilian anti-money laundering (AML) law at the time required actual knowledge of the origin of the funds.

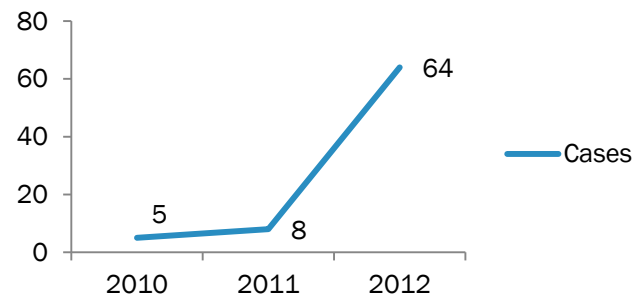
In July of 2012, Brazilian President Dilma Rousseff signed an amendment, enacting the country's Anti-Money Laundering Law. This new law known as "12.683/2012" changed the manner in which the country previously addressed this type of economic and financial crime. The new law defines money laundering as the concealment of proceeds of any crime or misdemeanor, no matter how large or small. The new law also excludes the requirement that actual knowledge of the origin of the illicit fund must exist.

In the previous anti-money laundering legislation, known as "9.613/98" the criminal act of money laundering was only committed if it was linked to the following crimes: illicit trafficking in narcotic substances or similar drugs; terrorism; terrorism and its financing; smuggling or trafficking of weapons, munitions or materials used for its production; or extortion by kidnapping.

This list of defined crimes substantially affected the reach of the previous AML law. The recently amended law duly expands its scope to include the concealment of proceeds of any criminal offense. According to the Brazilian Federal Supreme Court (STF) and the National Council of Justice (CNJ), with the passing of the new AML law, the Brazilian federal courts judged 64 cases involving money laundering in 2012. This represents a marked

increase of 700% when compared to 2011, where there were only eight cases involving money laundering.

Number of AML Cases per Year



Source: Superior Tribunal Federal

The New AML Law

The new AML law attests to a paradigm shift in Brazil's legislative ethos towards anticorruption and also indicative that the country is conforming to international demands to counter and criminalize money laundering activities and counter terrorism financing. Brazil is a member of Financial Action Task Force (FATF) and of Grupo de Acción Financiera de Sudamérica (GAFISUD) and a signatory to the following relevant conventions:

- Vienna Convention
- Palermo Convention
- United Nations Convention Against Transnational Organized Crimes
- Convention on Mutual Administrative Assistance in Tax Matters with 50 countries
- Tax Information Exchange Agreement (ATIF) with Bermuda
- Tax Information Exchange Agreement (TIEA) with the United States
- Agreement on Legal Cooperation with Switzerland;
- Tax Information Exchange Agreement with the United Kingdom
- Tax Information Exchange Agreement with Uruguay;
- Tax Information Exchange Agreement with Guernsey and Jersey
- Tax Information Exchange Agreement with Cayman Island

The new AML law also expands the list of those required to submit "suspicious" financial information to the Council for Financial Activities Control (COAF). The COAF, an equivalent to a

¹ Translation: large allowance

financial intelligence unit, is an agency reporting to the Ministry of Finance and is entrusted with combating money laundering and terrorist financing in Brazil. Among the agency's duties is its responsibility for coordinating mechanisms for cooperation and information exchange that enable a deterrence of money laundering.

Among those required to report suspicious activities include those who work with sporting events, artistic works, fairs, exhibitions (and similar events), luxury goods and those who sell high-value goods derived from rural or animal origin. Further, those who engage in advisory roles, consulting, bookkeeping, audit and any kind of assistance who encounter suspicious activities are also required to report suspicious activities.

The ceiling of the fine for those in violation of not reporting financial activities to the COAF increased from \$200,000 Brazilian reais (approximately US\$90,000) to \$20 million Brazilian reais (approximately US\$9,000,000).

Criminal violations of money laundering result in 3–10 years in prison and this sentence can be increased by up to two-thirds in the case of recurrence. It can be reduced by the same proportion if the accused cooperates with the investigation.

Under the new rule of law, assets may be seized prior to sentencing. The rationale is to limit the laundering of assets and to prevent the depreciation of any assets that have been seized.

Greater investigative scope has also been afforded to police and prosecutors as a result of the AML law in Brazil. This includes access to government registry information, telephone company records, internet provider information as well as credit card information.

The new law does not require actual knowledge of the origin of the illicit funds; rather the standard used adopts the philosophy that the accused "should have known". Moreover, had the new AML law been applied to the *Mensalão* trials, this new standard would have changed the outcome with regard to money laundering charges.

Compliance with the New Law

With the removal of predefined crimes and the criteria of actual knowledge from the new legislation, knowing who you do business with and receive money from has become increasingly more relevant. In order to comply with the new AML law and minimize noncompliance risk, it will be important for companies to:

- Assess adequacy of its current controls specifically to prevent and comply with new AML law;
- Apply greater scrutiny and diligence to assess reputational background of business partners, third parties, clients and employees;
- Monitor suspicious transactional activities (trend and frequency analysis for anomalies);
- Monitor deposits, payment methods and behavior of suppliers and third parties interacting with the entity;
- Provide strong oversight of internal controls involving business partners, third parties, clients and employees;
- Provide oversight of segregation of duties and ensure independence of contracting, payment and approval functions within the company;
- Provide training on new rules, notification of monitoring and enforcement of new rules;
- Prepare a reporting action plan, should a transaction be noncompliant to pre-defined non-compliant (red flag) criteria.

For individuals, it is also equally important to know with whom you do business and interact financially, since the law applies to persons and entities.

For more information pertaining to the implications of the new AML law and how to reduce money laundering risks, contact Cynthia Catlett, Director in the FTI Consulting Brazil Forensic and Litigation Consulting segment.

The views expressed in this article are those of the authors and not necessarily those of FTI Consulting, Inc., or its other professionals.



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