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New Law fights corruption and requires formatting companies' internal rules

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As of February 1st, when Federal Law No. 12,846 will come into force, Brazilian and foreign companies in the country will face a new and different scenario in their relations with public entities. This is because this law, which has been popularly known as the "anti-corruption law", comes to combat and severely punish any and every act committed by companies, their representatives, suppliers and business partners who violate or cause damage and injury to the domestic or foreign public assets, against principles of public administration or against the international commitments assumed by Brazil.

This new legal model, which changes all the rules previously set in the country, makes available to the authorities the most efficient and effective mechanisms to hold administratively and judicially accountable those who commit illegal conducts. Firstly, unlike the previous system, the new law is more severe and extensive than the law which attacked the acts of administrative misconduct, especially since punishment may be based simply on acts that generate damage to public property, and not on the acts that were previously legally described as crimes and after judicial determination, as usually occurred.

Secondly, the act is determined by the initiation of a simple administrative procedure, processed and decided by the public entity itself, which is also responsible for sentencing, which, in theory, turns guarantees of adversarial and legal defense less effective when compared with the same processing through judicial Courts.

Finally, the law establishes the strict liability of legal entities, no longer requiring the determination of fault of the agent, or who actually carried out the illegal conduct, also allowing the piercing of the corporate veil (through which the shareholders can be held liable with their personal assets to pay the debt of the company), a situation that was not present in the determination of acts of administrative misconduct, even in the criminal sphere. This scenario gives the public entity free will and discretion to consider a particular activity as an act that obstructs administrative activity, including services of investigation, or the practice of acts that are harmful to the administration, increasing the incidence of the law and the risk of companies' liability. Especially because the complaints can be received and processed by any administrative body of the public administration, direct or indirect, including regulatory agencies and independent governmental agency (Brazilian Health Surveillance Agency, Brazilian Patent and

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Trademark Office, IRS, Brazilian Electricity Regulatory Agency, etc.), whereas the supervision on law enforcement is a responsibility of the controlling agencies, Audit Courts and others, through integrated systems, without prejudice to other (remembering that many regulatory and other agencies share data with the IRS, Federal Audit Court, Federal Police and the Office of the Controller General).

Pursuant to the celerity of the administrative process, the new law also creates difficulties for companies to prove the absence of corruption acts or conducts.

Among the applicable penalties we can underscore the following: the imposition of fines – which may reach 60 million Reais or 20 % of the revenue that the company obtained the year before the introduction of the anti-corruption process; the prohibition of obtaining new incentives and tax exemptions, loans, etc, for a five-year term; the suspension of business activities; registration in the corrupt companies records; the full refund of any damage caused to the public coffers. Also note that this law is of wide application and, regarding national public entities, is intended to protect not just the Federal Government, but also the Brazilian states and municipalities.

Throughout this quadrant and given the need for profound change in company's behavior, a thorough study of the law which will soon be in force is recommended, and, following the corporate governance policies adopted in other countries, creating rules, guidelines and compliance guidelines, such as the establishment of a code of conduct and internal procedures standards at companies, which will serve as a tool of prevention and defense, and especially to relativize the strict liability and the piercing of the corporate veil, exempting certain levels of direction of companies and the feasible personal liability of partners when answering for acts committed eventually by an employee of the company in Brazil or abroad, and that the law fit as being corrupt and harmful to the interest.

If you would like more information or guidance on this subject, please do not hesitate to contact us, we shall be pleased to provide you all the necessary assistance.

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