EDMO COLNAGHI NEVES

Doing COMPLIANCE in Brazil

A **GUIDE** FOR MULTINATIONAL COMPANIES TO DO THE RIGHT THING

10 steps to put in place a successful and effective Compliance Program

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Editora B18 Ltda.
São Paulo, Março 2020
contato@b18.com.br
www.b18.com.br

Doing compliance in Brazil
Coordenação editorial: David Roberto R. Soares da Silva
Revisão: David Roberto R. Soares da Silva
Capa: Rubens Lima
Diagramação: SGuerra Design

Cataloging in Publication (CIP)
Juliana Farias Motta CRB7- 5880

N518d Neves, Edmo Colnaghi
Doing compliance in Brazil: a guide for multinational companies to do the right thing / Edmo Colnaghi Neves. – São Paulo: Editora B18, 2020
270 p. ; 16x23 cm.

ISBN: 978-85-60204-02-1

1. Investments, Foreing. 2. Capital imports. 3. Capital flow. I. A guide for multinational companies to do the right thing

CDD 332.67381

Índice para catálogo sistemático:
1. Investments, Foreing
2. Capital imports
3. Capital flow

To the most important people in my life:
Ivone and Edmo, my parents, Arthur and Victor,
my sons and Milena, my wife


Contents

Preface

Investing in Brazil is no easy task. A lot of pages had been written about the "costs" of having a business in Brazil. Brazilian law system plays an essential role in this context: the tax system, labor laws, and the legal system itself pose challenges that an international investor usually is not prepared. Compliance with such a complex set of rules is not for amateurs. One can attend conferences that try helping investors to understand our system, but until now, there has been little effort in creating a substantial guide that reaches a broader audience.

Therefore, Edmo's initiative is to be praised, not only because it is the first of the kind, but because the book comes in a moment when Brazil needs to increase foreign investments.

Reading the book, one notes very quickly a quality that characterizes everything Edmo does: excellence in every detail. Edmo begins by comparing the Brazilian compliance rules with those of the United States, the United Kingdom, and France. He then goes further by providing the meaning of many local acronyms used throughout the book.

Part 2 is unique by applying well-established methods to planning, implementing, and enforcing an effective and efficient compliance program in Brazilian organizations. And Edmo has extensive experience in the matter. He demonstrates that compliance programs coming from headquarters overseas cannot be merely put in place in Brazil without appropriate adjustments according to local laws. That could result in penalties and unnecessary exposure to the local companies and their management.

In the end, the book brings for the first time, the most relevant legislation and regulation on Brazilian compliance masterly translated into the English language.

The result is a robust and well-structured book, which will contribute decisively to raise the understanding of the compliance environment in Brazil. I congratulate Edmo and wish him nothing less than success!

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Introduction

On the cover of its November 14, 2009's edition, The Economist magazine showed the image of Christ the Redeemer, the famous monument in Rio de Janeiro, like a rocket about to start the launch and the headline "Brazil takes off". In late 2009, the Brazilian economy was in a good moment and there was a lot of enthusiasm about the country.

I was head of the legal department in Latin America for a multinational company and, at that time, the CFO of the organization in LATAM and myself received the visit of executives coming from headquarters. They were considering making new investments in Brazil due to the news shared by international media and they asked for advice.

We scheduled a meeting and spent all afternoon talking about the challenges of doing business in Brazil and explained the complexity of the country's tax system and employment laws. We also talked about Labor Justice, tax litigation and judicial decisions.

It was a very frank and realistic conversation. We could not refrain from sharing the criticism to the real situation. The initial enthusiasm about potential investments, in the beginning of the meeting, decreased continuously as the meeting went by. At the end, the decision about making new investments, despite the international news, was reviewed and put on hold – indefinitely.

While I write these words, Brazil is starting again a new phase of enthusiasm and international investors appear to be willing to come and invest in the country.

However, corruption scandals have reached the international media during the past years, especially due to the findings of the so-called *Operação Lava Jato* (Operation Car Wash) conducted by the Federal Police and the Federal Prosecutor's Office. Launched in March 2014 to fight black market currency dealers (*doleiros*) who used gas stations and car washes to launder money for criminals, Operation Car Wash uncovered that the same scheme was being used to transfer kickbacks and bribes to executives of Petrobras (Brazil's state-owned oil company), local politicians and political parties. Eventually, Operation Car Wash uncovered that corruption scandals crossed the Brazilian borders to reach other countries like Peru, Venezuela, Chile, Colombia, Ecuador, Argentina, Panama, Guatemala, Dominican Republic, Cuba, Angola, among others.

Brazil's Anti-Corruption Law was still a few months old at the time Operation Car Wash started, and no one at the time had the smallest idea of where it was going. As the operation's phases unfolded in Brazil, investigators of the U.S. Department of Justice (DoJ) targeted the company for violations under the Foreign Corrupt Practices Act (FCPA) as Petrobras traded American Deposit Receipts at the New York Stock Exchange (NYSE).

Even though most Operation Car Wash's crimes have been committed within the Brazilian borders by Brazilian nationals, its repercussions went all the way up to the United States, making its anti-corruption rules and fines to apply to a Brazilian company.

On September 27, 2018, the DoJ issued the following press release on Petrobras FCPA violations[1]:

> *"**Petrobras Agrees to Pay More Than $850 Million for FCPA Violations***
>
> *Petróleo Brasileiro S.A. (Petrobras), a Brazilian state-owned and state-controlled energy company, entered into agreements with*

[1] U.S. Department of Justice. https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations. Access in January 2020.

U.S. and Brazilian authorities and agreed to pay a combined total of $853.2 million in penalties to resolve the U.S. government's investigation into violations of the Foreign Corrupt Practices Act (FCPA) in connection with Petrobras's role in facilitating payments to politicians and political parties in Brazil, as well as a related Brazilian investigation.

Assistant Attorney General Brian A. Benczkowski of the Justice Department's Criminal Division, U.S. Attorney G. Zachary Terwilliger of the Eastern District of Virginia and Assistant Director Robert Johnson of the FBI's Criminal Investigative Division made the announcement.

"Executives at the highest levels of Petrobras—including members of its Executive Board and Board of Directors—facilitated the payment of hundreds of millions of dollars in bribes to Brazilian politicians and political parties and then cooked the books to conceal the bribe payments from investors and regulators," said Assistant Attorney General Benczkowski. "The Criminal Division's Fraud Section—together with our partners in the Eastern District of Virginia, the SEC, and the FBI—are grateful for the assistance provided by our Brazilian law enforcement counterparts. This case is just the most recent example of our ability to work with our foreign counterparts to investigate companies and other criminal actors whose conduct spans multiple international jurisdictions."

"Protecting the integrity of U.S. financial markets is one of the highest priorities of this Administration," said U.S. Attorney Terwilliger. "Those who choose to access our capital markets while failing to disclose the corrupt activities of company executives will be held accountable. I want to thank our law enforcement partners for their diligence and dedication in pursing this important case."

"Today's global resolution demonstrates the FBI's commitment to thoroughly investigating and holding accountable those international companies who seek to take advantage of our financial system while also facilitating bribes and fraud in other countries," said FBI Assistant Director Johnson. "The hefty $853.2 million criminal

> *penalty should act as a deterrent to anyone seeking to perpetrate this kind of fraud in the future. This case proves that no company is above the law and that corruption that spans borders will not be tolerated by the United States. I want to thank the agents, analysts, and prosecutors who investigated this case in parallel with Brazilian authorities. We will continue to pursue any and all companies and individuals throughout the world who disregard the rule of law and threaten our fair and competitive marketplace for their personal gain."*

This case involving Brazil's largest company, owned both by the government and private shareholders, shows how the FCPA may affect Brazilian companies and how compliance is transnational. Knowledge of the FCPA provisions is vital for Brazilian companies publicly traded in the U.S. stock markets, and also for those that operate, do business or hold bank accounts in the United States. The FCPA can go further to reach local suppliers of organizations subject to its provisions, causing such suppliers to be affected by their clients' compliance programs, policies, codes of conduct, and training.

The DoJ press releases continues and clarifies the reach of the FCPA:

> *"Today's substantial resolution demonstrates the FBI's continued commitment to working with U.S. and international partners to investigate corruption no matter where it occurs," said Special Agent in Charge Matthew J. DeSarno of the FBI Washington Field Office's Criminal Division. "We remain committed to holding companies and executives who violate the Foreign Corrupt Practices Act accountable for their activity, and we will continue to work diligently to uphold the integrity of an increasingly global marketplace."*
> *According to Petrobras's admissions, while the company's American Depository Shares traded on the New York Stock Exchange, members of the Petrobras Executive Board were involved in facilitating and directing millions of dollars in corrupt payments to politicians*

and political parties in Brazil, and members of Petrobras's Board of Directors were also involved in facilitating bribes that a major Petrobras contractor was paying to Brazilian politicians. During this period, for example, a Petrobras executive directed the payment of illicit funds to stop a parliamentary inquiry into Petrobras contracts, and the executive also directed payments received from Petrobras contractors to be corruptly used to pay millions of dollars to the campaign of a Brazilian politician who had oversight over the location where one of Petrobras's refineries was being built.

Petrobras admitted that it failed to make and keep books, records and accounts that accurately and fairly reflected the company's capitalization of property, plant and equipment as a result of the bribes being generated by the company's contractors with the cooperation of certain Petrobras executives, and that certain Petrobras executives signed false Sarbanes-Oxley (SOX) 302 sub-certifications while they were involved in, and were aware that other executives at Petrobras were involved in, obtaining and facilitating the payment of millions of dollars in bribes to Brazilian politicians, to Brazilian political parties and to themselves. Petrobras also admitted that certain executives failed to implement internal financial and accounting controls in order to continue to facilitate bribe payments to Brazilian politicians and Brazilian political parties.

Petrobras entered into a non-prosecution agreement and agreed to pay a criminal penalty of $853.2 million to resolve the matter. This reflects a 25 percent discount off the low end of the applicable U.S. Sentencing Guidelines fine range for the company's full cooperation and remediation. In related proceedings, Petrobras reached a settlement with the U.S. Securities and Exchange Commission (SEC) and Petrobras entered into an agreement to reach a settlement with the Ministerio Publico Federal in Brazil. Under the non-prosecution agreement, the United States will credit the amount that Petrobras pays to the SEC and Brazil under their respective agreements, with the Department of Justice and the SEC receiving 10 percent ($85,320,000) each and Brazil receiving the remaining

> *80 percent ($682,560,000). As part of the agreement, Petrobras has agreed to continue to cooperate with the Department in any ongoing investigations and prosecutions relating to the conduct, including of individuals, to enhance its compliance program and to report to the Department on the implementation of its enhanced compliance program."*

The final part of DoJ's press release explains Petrobras' failures and further cooperation with the investigations and also the remedial compliance measures it put in place to prevent future fraud, including replacement of board members and executives, governance reforms, and disciplinary actions against on the offenders. It reads:

> *"The Department reached this resolution based on a number of unique factors presented by this case, including that Petrobras is a Brazilian-owned company that entered into a resolution with Brazilian authorities and is subject to oversight by Brazilian authorities, and that, in addition to the significant misconduct engaged in by Petrobras, a number of executives of the company engaged in an embezzlement scheme that victimized the company and its shareholders. In addition, the company did not voluntarily disclose the conduct, but did notify the government of its intent to fully cooperate after learning of the allegations of misconduct; Petrobras fully cooperated in the investigation and fully remediated. Petrobras's cooperation included conducting a thorough internal investigation, proactively sharing in real time facts discovered during the internal investigation and sharing information that would not have been otherwise available to the Department, making regular factual presentations to the Department, facilitating interviews of and information from foreign witnesses, and voluntarily collecting, analyzing and organizing voluminous evidence and information for the Department in response to requests, including translating key documents. Petrobras also took extensive remedial measures, including replacing the Board of Directors and*

the Executive Board (the company's high-level managers) and implementing governance reforms, as well as disciplining employees and ensuring that the company no longer employs or is affiliated with any of the individuals known to the company to be implicated in the conduct at issue in the case.

In the related SEC matter, Petrobras also agreed to pay to the SEC disgorgement and prejudgment interest totaling $933,473,797, which shall be reduced by the amount of any payment Petrobras makes to the class action Settlement Fund in the matter of In re Petrobras Securities Litigation, No. 14-cv-9662 (S.D.N.Y.)."

The Petrobras' case was one of the most significant cases the DoJ has ever investigated and punished. It ultimately illustrates the current moment of globalization and how foreign legislation affects the Brazilian business environment. Needless to say that the case creates waves of consequences to all organizations that do business with Petrobras. The company's supply chain is extensive and formed by thousands of organizations that will also have to behave according to its new compliance program to keep their contracts.

But, despite having to follow the FCPA provisions, Petrobras and its suppliers have to follow Brazil's rules on anti-corruption, antitrust, integrity, and many others. The same applies to thousands of organizations operating in Brazil, whether formed under local laws or headquartered overseas.

One purpose of this book is to bring some light on local compliance rules to those willing to operate, or already operating in Brazil, and to help them to understand our compliance culture. The other is to present some practical aspects to implement and maintain an effective compliance program in Brazil that helps to mitigate risks, and that follows ethical principles. In other words, to do the right thing.


PART 1

Compliance around the world and the Brazilian experience


1.1 Compliance around the world

Many people have been surprised during my lectures in universities when I say that some European countries, until early 2000, not only tolerated corruption committed by their companies in other jurisdictions, but also allowed corruption costs – that is, money spent in corrupting foreign officials – to be deductible for tax purposes. This has changed nowadays, but it was a sad reality not so long ago.

The United States has been leading compliance matters worldwide as it was the first country to enact anti-corruption rules with its Foreign Corruption Practice Act (FCPA) in 1977. The FCPA has two separate sets of rules, one dealing specifically with anti-bribery and the other contemplating accounting provisions (books, records, and internal controls). While most people immediately associate the FCPA with its anti-bribery provisions, they often overlook the accounting ones, primarily because anti-corruption legislation of most countries are silent on accounting matters. Another unique feature of the FCPA is that, while its anti-bribery provisions apply only to foreign corruption practices, the accounting provisions operate independently and can reach activities unrelated to corruption within the United States. For instance, an organization that fails to keep sufficient records of an entirely legal business transaction may violate the FCPA if such an organization is publicly listed in the United States.

As we will see throughout this book, although inspired by the FCPA, Brazil's anti-corruption laws depart from the US law as they

do not contemplate accounting matters. Under the FCPA, the unlawful act of bribery includes an offer, payment, promise to pay, or authorization of payment of any money, directly or through agents or intermediaries, to a foreign official to secure, maintain or refer business or to achieve an improper advantage. While those acts are also illegal in Brazil, a departing point between the FCPA and the Brazilian anti-corruption laws deals with the so-called corrupt intent. Under the FCPA, corrupt intent can be defined as one seeking to influence or persuade a foreign official to act or fail to act contrary to his or her official duty. It is a definition far from clear, but it is an essential element for FCPA that requires a thorough analysis during a corruption investigation to determine accountability. In Brazil, the corrupt intent is irrelevant as the local laws contemplate strict liability, as we will see further below. The absence of the corrupt intent was a shock to many FCPA practitioners who considered Brazil's Anti-Corruption Law extreme in this sense.

Another topic that may cause surprise to FCPA practitioners is facilitating (or grease) payments. Under the FCPA, any facilitating or expediting payment to a foreign official, political party, or party official with the purpose of expediting or securing the performance of a routine governmental action is not per se a bribe. The key elements here are (1) the purpose and (2) the routine government action, which include processing papers, issuing permits, and other activities of a public official, which he or she is already bound to perform. Unlike bribes, where the corrupt intent is to influence the outcome of an official's decision, the facilitating payment has no such intention, but rather to make things happen faster. For that reason, facilitation payments are one of the few exceptions from anti-bribery prohibitions of the FCPA. Brazil, however, does not make such a distinction, so facilitating payments are a crime and can result in punishment under the local anti-corruption rules.

The United Kingdom Bribery Act (UKBA), of 2010, is considered one of the strictest anti-corruption laws in the world and have some influence over Brazil's 2013 legislation. Despite many similarities

with the FCPA, it departs thereof by including private corruption and penalties for failure of compliance programs to prevent corruption. Under UKBA, if an act of corruption occurs in the United Kingdom, the rules will apply regardless of the nationality, status (individual or organization), or where it was committed. UKBA considers an offense to offer, promise, pay, apply, agree, receive, or accept improper financial or other advantages, directly or through an intermediary, to a foreign official and fail to prevent corruption.

The UKBA departs from the FCPA by not requiring the corrupt intent, which might have influenced Brazil's 2013 legislation. Another influence is the accountability of organizations that fails to prevent acts of corruption and penalty relief for those who cooperate with authorities during corruption investigations. But Brazil departs from UKBA by limiting its application to the corruption of public officials. Offers, promises, and payments of improper financial advantages between private parties are not punishable under Brazilian laws, at least not at the moment.

France also has anti-corruption laws since Napoleon was the emperor, but they received criticism from the OCDE and international non-governmental organizations (NGOs), especially regarding enforcement. Until recently, French anti-bribery and anti-corruption laws were highly intricate and sparse, including more than 30 types of criminal offenses applicable to bribery and influence peddling[2], which made enforcement a nightmare. The turning point came in December 2016 when France enacted the law on transparency, corruption, and economic modernization, nicknamed *Loi Sapin II*.

The law toughened corruption penalties, established compliance instruments (such as the *convention judiciaire d'intérêt public*) and reporting obligations to large organizations, and created France's Anti-Corruption Agency (*Agence Française Anticorruption*, or AFA). Since *Loi Sapin II*, compliance programs in France, where

[2] Influence peddling is the practice, often illegal, of using one's connections with the government to influence or to obtain favors or special treatment for another.

applicable, must contemplate measures to prevent corruption, bribery and influence peddling, such as a code of conduct, reporting (whistleblowing) channels, corruption risk assessment, risk assessment for clients, suppliers and intermediaries, internal and external controls, compliance training and audit, disciplinary and sanction procedures, among others. With *Loi Sapin II*, AFA, and new measures coming in 2019, France is making an effort to join the club of nations with the most modern anti-corruption legislation in the world, like the United States, the UK, and more recently, Brazil.

1.2 Compliance in Brazil

In Brazil, the first steps towards implementing compliance rules came with the enactment of criminal laws, such as Law No. 9,034/1995 on criminal organization, and Law No. 9,613/1998 relating to money laundering, followed by promulgation of the OECD Anti-Bribery Convention in 2000 and enactment of Law No. 10,467/2002 that makes a crime any act of bribery of a foreign public official.

As the 2014 FIFA World Cup in Brazil approached, corruption allegations have surfaced and Brazil experienced for weeks waves of protects and demonstrations against corruption in mid-2013 with citizens demanding government action. Before and after the protests, Brazil made significant advances in terms of implementing transparency, compliance and anti-corruption rules, such as Complementary Law No. 135/2010 on clean record for political candidates, Law No. 12,527/2012 (the Freedom of Information Act), Law No. 12,683 (the Anti-Money Laundering Reform Act), Law No. 12,813/2013 on conflict of interests for public officials, and Law No. 12,850/2013 (the Organized Crime Act). The most relevant piece of legislation, however, was Law No. 12,846/2013 on corporate liability for actions against domestic and foreign administrations, also known as the Anti-Corruption Law (*Lei Anticorrupção*, or LAC) or the "Clean Company Act".