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# Hughes Hubbard & Reed

## In the FCPA Blog: Brazil Releases New Guidance on Anti-Corruption Settlements

### Articles & Press

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*\* A shorter version of this article was originally posted on the [FCPA Blog](#) (September 7, 2017).*

In August 2013, Brazil's game-changing Clean Companies Act ("CCA") (Law No. 12,846/13) introduced the "leniency agreement," a deferred prosecution deal for companies willing to plead guilty and settle corruption charges.

While these agreements were created to encourage cooperation, the CCA and subsequent regulations did not provide sufficient guidance on their implementation. As a result, companies viewed them with skepticism, whereas the authorities struggled to make them effective.

The first settlement under the CCA (signed with SBM) was not reached until July 2016. After months of negotiations, it was ultimately blocked by the Federal Prosecutor's Office, on the grounds that it was too favorable to the accused and created a moral hazard by pre-allocating fines to certain government entities.

More recently, in May 2017, authorities sparked controversy over the J&F settlement, which certain members of the public and media perceived to be unfair and lacking transparency.

Perhaps in response to the backlash, the Federal Prosecutor's Office finally took steps to address these shortcomings. On August 29, the agency's Anti-Corruption Unit released detailed guidelines for negotiating and ratifying leniency agreements. They intend not only to facilitate coordination among Brazil's many anti-corruption enforcement agencies, but also to promote transparency and provide useful information to companies facing investigations and considering whether – and how – to engage in settlement negotiations.

While in practice these rules may evolve as more experience is gained, this guidance offers a rare insight into the prosecutors' enforcement principles. Below we highlight its most important provisions.

## **Negotiation protocol**

1. Companies seeking to settle must negotiate with the prosecuting agency with jurisdiction to enforce the CCA or the Administrative Misconduct Law (Law N. 8,429/92) in their specific case.
2. Companies cannot begin negotiating a leniency agreement prior to the negotiation of plea bargains by their employees or directors. These discussions must occur simultaneously or subsequently to the individual settlements.
3. The process begins with preliminary discussions regarding the allegations to be covered by the settlement (including reference to facts and evidence to be produced).
4. If the prosecutors determine that the company's cooperation is necessary and useful to the investigations, the next step is the execution of a non-disclosure agreement (NDA). Negotiations must be kept confidential through completion; the leniency agreement should indicate when its contents may be released to the public.
5. When an NDA is signed, the concerned prosecuting agency must notify the Anti-Corruption Unit; it may also request assistance from the dedicated commission on leniency agreements.
6. The negotiations must be conducted by more than one representative of the prosecution, preferably with criminal and administrative misconduct expertise. If other enforcement agencies are involved (such as the Ministry of Transparency, the Federal Attorney-General, the antitrust agency (CADE), or the federal court of accounts (TCU)), separate agreements must be signed.
7. Official minutes must be kept for every meeting, listing the participants and summarizing the negotiation discussions.
8. If the prosecutors believe the involvement of a particular individual in the negotiations to be morally questionable, they must deny his/her participation and require the company to appoint a different representative.
9. Where applicable, the negotiations must include discussions on potential cross-border activity, in light of Brazil's international commitments in the fight against corruption.
10. The final settlement must be submitted to the Anti-Corruption Unit for review and ratification, along with any necessary clarifications or additional documentation.
11. Once the Anti-Corruption Unit ratifies the agreement, the decision is published, without prejudice to the confidentiality requirements applicable to the process.

## **Essential requirements**

To be ratified by the Anti-Corruption Unit, leniency agreements must include, among others, the following essential requirements.

1. Express reference to the legal provisions authorizing the settlement (legal basis).
2. A detailed description of the parties. Where a group of companies is involved, all entities must be individually identified.
3. Where applicable, an authorization for directors, employees, or other companies within the same group to join the settlement, within a specific time frame.
4. Proof that the company was the first offender to disclose the misconduct in question to the authorities.
5. Proof that the company's cooperation will be effective, including specific reference to new facts or individuals whose involvement was previously unknown to the investigators, as well as related evidence.
6. Statement of the facts covered by the settlement. All facts and supporting evidence must be new to the authorities and relevant to dismantling the illegal scheme.
7. Protocol for disclosure of facts learned post-closing, e.g., reference to amendments to the settlement and potential consequences.
8. Express reference to the core obligations of the company and the prosecution (see below).

9. Authorization for other prosecuting agencies, regulators, or public entities to join the settlement. No evidence or information may be shared with authorities that do not join the settlement or undertake to comply with its terms.
10. Reference to cooperation with foreign agencies.
11. Authorization for the cooperating company to liquidate assets as needed, in order to meet its obligations under the leniency agreement.
12. Minimum confidentiality requirements, expressly indicating who is subject to such requirements and the applicable time frame.
13. Express reference to grounds for termination of the agreement and related consequences.
14. Condition that the agreement must be reviewed and ratified by the Anti-Corruption Unit.

### **Obligations of the company**

1. Produce relevant evidence within the established timeframe.
2. Discontinue the misconduct.
3. Implement a compliance program or hire an external auditor (where applicable).
4. Act in good faith and continue to cooperate with the authorities.
5. Compensate all damages (and provide the related guarantees), without prejudice to the claims of other entities or individuals not expressly covered by the agreement.
6. Pay all applicable fines (and provide the related guarantees).
7. Expressly waive the privilege against self-incrimination.
8. Expressly declare that all information provided is truthful and accurate, failing which the settlement shall be terminated.

### **Obligations of the prosecution**

1. Coordinate with other concerned agencies to seek their participation in the leniency agreement or facilitate the execution of parallel, compatible settlements.
2. Determine an appropriate reward for the cooperation.
3. Where applicable, refrain from filing civil, criminal, or administrative charges based on the facts revealed as a result of the settlement, subject to fulfillment of all conditions.
4. Where applicable, act to suspend related proceedings, or request judgments to be limited to declaratory relief.
5. Act to ensure the validity and enforce the terms of the agreement before external parties.

### **Fines and other sanctions**

1. Fines and other sanctions must be fair and balanced. Companies are entitled to a reward that is reasonable and proportionate to the significance and effectiveness of their cooperation.
2. Payments made under leniency agreements must comply with budget laws and may not be pre-allocated for investment in public entities or agencies in order to prevent moral hazard in the negotiation process.
3. Prosecutors are not authorized to release and discharge companies of all claims for damages and losses. Any payments determined by the settlement on such grounds are considered as advances, pending further assessment.

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