



THE INTEGRITY AND THE COMPLAINE PROGRAM AS ANTI-CORRUPTION
FRAMEWORK – A COMPARISON BETWEEN UNITED STATES AND BRAZIL

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1. Introduction

This paper intends to make a briefly survey and a legislation comparison about the subject matter integrity and compliance program adopted by United States and Brazil with the main objective to discuss the applicability in Brazil to combat corruption. During the development of the paper, the Brazilian anti-corruption regulation where published and some adjustments were necessary to update the paper.

The theme is largely discussed nowadays due to several cases discovered and publicized by the press, but the first steps where given with the international institutions created form the international cooperation agreements, such as Organization of American States (OAS)¹, Organization for Economic Co-operation and Development (OECD)², and United Nations Office on Drugs and Crime (UNODC)³. Their conventions are the most important international treaties to follow by the States. The Inter-American Convention against Corruption (ICIC)⁴ adopted in March, 1996, in Caracas, Venezuela, is the first legal instrument in this field which recognizes the international reach of corruption and the need to promote and facilitate cooperation between states in order to fight against it. The United Nations Convention Against Corruption (UNCAC)⁵ adopted by the General Assembly by resolution in 2003, defines procedures for the prevention and detection of transfers of assets from unlawful acts, the measures of the recovery of property and methods of international cooperation required a more integrated and efficient action. The Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign

¹ OAS, <http://www.oas.org/en/default.asp>

² OECD, <http://www.oecd.org/>

³ UNODC, <http://www.unodc.org/unodc/index.html?ref=menutop>

⁴ Inter-American Convention Against Corruption, available on <http://www.oas.org/>

⁵ United Nations Convention Against Corruption, (Sept. 2004), available on <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

Public Officials in International Business Transactions⁶, 1997, established legally binding standards to criminalize bribery of foreign public officials in international business transactions. In 2009 issued recommendation of the Council for Further Combating Bribery and the Tax Deductibility of Bribes to Foreign Public Officials.

Brazil has sought to meet the goals established by the Conventions various arrangements. In 2013 Law number 12846 was approved and enacted on January 29th, 2014. This new law referred to in Brazil as Clean Company Act included the various innovations:⁷ objective administrative and civil liability of legal persons for the practice of acts against the public administration, national or foreign, as well as the individual responsibility of their leaders or directors or any natural person, author, coauthor, or participant of the sort. The new Brazilian legislation has the potential to transform the procurement process in Brazil, as well as change the ethics culture and enforce necessary compliance mechanisms and internal controls of government contractors with a focus not only on prevention, but also in the detection of acts of corruption, because in the Article 7 is cleared that the Government's contractors has to have mechanisms of internal controls and integrity.

The Foreign Corrupt Practices Act (FCPA) was introduced in 1977 in United States. It was the first law to criminalize corruption acts enforced on companies and business. In recent years, several other countries issued similar legislation, such as United Kingdom, Canada, Mexico, Singapore, Indonesia, Italy, Zambia, Poland, and Tunisia. Large, multinational companies have felt obliged to fit the American model, because the American laws require that companies that do

⁶ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available on <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

⁷ Brazilian Law 12846, 08/01/2013, available on <http://www4.planalto.gov.br/legislacao/legislacao-1/leis-ordinarias/2013-leis-ordinarias#content>

business with the United States Government meet the requirements regarding internal controls and compliance mechanisms.⁸

In order to understand the context of changes in business relationships, this research aims to demonstrate the necessary conditions of service of the new Brazilian law and compare it with the foreign framework in force. The importance of compliance analysis by the Brazilian Government Institutions and the improvement on the internal procedures are the main reason to give effectiveness to the regulations against corruption. This paper does not intend to exhaust all possibilities of program integrity analyses that companies need as Government suppliers. In fact, this research is only the beginning in evaluating the compliance program required by law.

The theoretical approach in this paper is showed through an international framework, by an overview of international treaties, U.S. Legislation, World Bank Guidelines, the UNODC Guide, and FCPA. In order to display that Brazil laws are comply with international treaties and attempt the main assumptions to combating corruption. The Controladoria-Geral da União (CGU) is demanded to apply the basic premises in analyses the companies' integrity program effectiveness. To properly perform this analysis, it should be based in the international guidelines published as good companies' practices seeing the main risks and engagement of the companies' employees. This paper does not intend make recommendations, even being Brazilian Legislation so recent, because during the research and execution of this paper the Decree and the instructions to CGU operates are being published. This subject is being largely discussed in Brazil, but the law did not make an example. The overview in international conventions and U.S. Legislation is very important

⁸ Federal Acquisition Regulation FAR 52.203-13. The Federal Acquisition Regulations System, consisting of the FAR and agency supplemental acquisition regulations, is a robust set of rules and requirements governing the U.S. Government's procurement process

to understand the processes to CGU evaluates the companies' integrity program and the most important assumptions to be considered.

2. Corporations and Collective Responsibility

When looking at contracts between business and government one must not only look at the importance of ethical and moral responsibility, but also a business's legal responsibility. The actions of business individuals must focus both positive and wrongful actions. It is necessary to think about collective responsibility when taking into consideration the concept of corporations. If one considers the organizational culture of the corporation one must take into account explicit and implicit tools of institutional ethics.

Although legal liability can be assigned to companies, it is necessary to point out the moral agent - the people - are represented legally. Therefore, although companies are the ones who maintain legal liability it is important to remember that the moral agents are the ones making decisions. Thus, when the moral act is practiced by people, it's up to them to ensure the ethics and morality.

When it comes to internal policies of the corporations, the focus are the members of the Board of Directors, managers and other employees, assigning the same ethical responsibility in order to replicate the correct conduct when representing the company.

In addition, one should consider the hierarchical structure of the companies and their ethical implications. On the one hand, directors and other managers are morally responsible for the actions of their subordinates, insofar as those subordinates are acting under the instructions of these managers.

Corporate crimes, as corporate corruption, are often committed by individual officers and employees of the corporation acting on their own. A single individual, or even a small number of individuals, who commit fraud without the knowledge of any of the other members of the corporations are not jointly participating in the activity of the corporation, but acting in his or her capacity as an individual and is wholly morally responsible for the crime.

To avoid this kind of conduct it is extremely important that corporations require by law the placement of various measures to lessen the possibility of corruption, including internal disciplinary measures.

As the importance of avoiding wrongdoings by the companies gains greater focus, several Governments and International Organizations have handled consistently, through laws and guides that listen for anti-corruption practices, dealing with necessary domestic issues of corporations, avoiding the spread of employee misconduct and the blaming of companies.

Some of these guidelines are shown and discussed in this paper, such as preventive anti-corruption systems, taking into consideration preventive mechanisms for dealing with corruption independent of any reactive elements.

The mechanisms can be divided into three categories:

- Promoting an environment in which integrity is rewarded and as a consequence, corrupt behavior is discouraged;
- Corporate governance to limit, or eliminate, the opportunity for corrupt behavior;
- Transparency to expose corrupt acts, so that the organization or community can deal with them.⁹

⁹ Miller, Seumas. Corruption and anti-corruption: an applied philosophical approach; Seumas Milles, Edward Spence, Peter Roberts. P.cm.

3. International Conventions

The Inter-American Convention on Human Rights¹⁰ was a framework to reaffirm a system of personal liberty and social justice. It was an important instrument to recognize the essential rights of man. Brazil's accession was published in 1992, reinforcing and complementing the protection provided by the domestic laws. It was a huge step to the American States on their union in worldwide subjects.

The Inter-American Convention against Corruption (OAS)¹¹ was the first commitment to fight against corruption, which recognizes the international reach of corruption and the need to promote and facilitate cooperation between states. This Convention establishes a set of preventive measures; provides for the criminalization of certain acts of corruption, including transnational bribery and illicit enrichment; and contains a series of provisions to strengthen the cooperation between its States Parties in areas such as mutual legal assistance and technical cooperation, extradition and identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of acts of corruption, among others.

The Brazilian initiatives to reach the convention proposes, by CGU performance in prevent, detect, and punish corruption are:¹²

- Change in legislation to typify the crime of transnational bribery;
- Creation of the Council of Public Transparency and Combat of Corruption;
- Creation of the National Strategy of Combat of Corruption and Money Laundering, with a coalition of more than 50 institutions;

¹⁰ Inter-American Convention on Human Rights, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_rights_sign.htm

¹¹ Inter-American Convention Against Corruption, available on <http://www.oas.org/>

¹² To see all initiatives of Brazilian Government, check <http://www.cgu.gov.br/oea/>

- Encouraging the public participation, through the creation of several public policies that include motivational actions and training to engage students, teachers, public employees and citizens in general;
- Making the public administration more transparent, through the creation of the Transparency Portal, which makes data from the federal budget available to the population through the Internet. The Transparency Portal is visited by more than 300 thousand people a month and it stores more than 1 billion types of information about the federal budget.¹³ Besides this, currently there are 112 Transparency Portals of federal agencies or offices, all of them giving detailed information about the budget.
- The Council of Public Transparency and Combat of Corruption has wrote a bill that criminalizes illicit enrichment, sent to the House of the Representatives.¹⁴

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions¹⁵ establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction. The 34 OECD member countries and seven non-member countries - Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa - have adopted this Convention. CGU is the Brazilian Government Institution responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention.

The United Nations Convention against Corruption (UNCAC)¹⁶ is primarily an anti-corruption agreement. The General Assembly recognized that an effective international legal

¹³ The Transparency Portal address at Internet is <http://www.portaltransparencia.gov.br/>

¹⁴ Nascimento, Jose Leonardo Ribeiro. The contribution of the public participation to avoid the misuse of public Funds: a comparison of Brazil and the United States cases. 2012. Available on <http://www.gwu.edu/~ibi/>

¹⁵ The OECD Anti-Bribery Convention, available on <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

¹⁶ United Nations Convention against Corruption, available on <http://www.unodc.org/unodc/en/treaties/CAC/>

instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime (UNODC). The convention highlights are prevention, criminalization, international cooperation and asset recovery.

On criminalization, the convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption.¹⁷ On this last part, is the main discussion in this paper, in order to evaluate the company's integrity program.

4. Compliance Guidelines

The World Bank published a summary of Integrity Compliance Guidelines¹⁸ regarding principles and components commonly recognized by many institutions and entities as good governance, anti-fraud, and corruption practices.

¹⁷ United Nations Convention against Corruption, available on <http://www.unodc.org/unodc/en/treaties/CAC/>

¹⁸ World Bank Integrity Compliance Guidelines, (2010), available on http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf

The UNODC¹⁹ recognizes that States alone cannot work against corruption, do require that businesses, large and small, multinational or local, incorporate in their culture effective actions of integrity and ethics. In order to assist companies' implementation of codes of conduct and ethics, they have developed a practical guide for themselves, based on their own values, an effective anti-corruption program, and ethics. The Guide promotes and encourages companies to adopt internal controls, ethics and compliance program or measures for the purpose of preventing and detecting foreign bribery.

On May 1st, 1991, the United States Sentencing Commission (USSC) officially promulgated the Federal Sentencing Guidelines for Organizations (FSGO). On November 1st, 2004, the USSC amended the Guidelines to provide guidance to organizations through Seven Steps of Compliance.²⁰

The Guidance published are important to the business and Government. The followed items are the most important of an effective anti-corruption compliance program shared among their various guides.

4.1 Support and commitment from senior management for the prevention of corruption

The deployment of an effective anti-corruption program is based on the necessary commitment of the company's leaders, with a holistic approach in internal and external events, because it should address policies and procedures inherent in the culture and values of integrity, transparency, and accountability. To prevent corruption, the senior management must to include two major elements: public policy on zero-tolerance of corruption and developments and

¹⁹ An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide, UNODC, available on <http://www.unodc.org/unodc/en/treaties/CAC/index.html#UNCACfulltext>

²⁰ Biegelman. 2010. 215

implementations of an anti-corruption program. The program has to have detailed policies and procedures and must be continuously emphasized with the employees and stakeholders, with a transparency policy in all stages of negotiations with business partners.

The senior management must ensure that zero-tolerance of corruption program includes: ensuring commitment throughout the company; establishing responsibilities for implementing and continuously improving the anti-corruption ethics and compliance program; providing sufficient resources for the implementation and ongoing improvement of the program, with human resources with relevant skill levels as well as financial resources; and others.

4.2 Developing an anti-corruption ethics and compliance program

To develop and establish an effective anti-corruption program, the company needs to commit to form a program with a high level of detail, consisting of policies and procedures that can be put into practice within the organization according with their values.

To this end, the program must contain at least the following characteristics:

- **Accessibility:** The program should be easily accessible to the employees and business partners, by website, newsletters, publications and other communication vehicles.
- **Readability:** Common language must be used, without technical terms, with real-world examples on a practical level.
- **Applicability:** To make the program relevant the external parties should be involved in communications strategies and trainings, as the employees, to make them understand how the company works.

- Continuity: The program must undergo ongoing adaptation to account for changes in the business environments.
- Efficiency: Uses all capital and human resources properly aiming at lower cost and improve effectiveness.
- Consistency with all applicable laws in the countries in which they operate, including national and international laws.
- Adapt to specific requirements, consistent with the organizational culture, preferences or customs, adapted to the company's risk assessment and the specific areas. Employee training preferences must be taken into consideration.
- Participation of stakeholders, with interactive processes and involvement of all relevant trade unions, auditors and even investor partners, in order to help reduce objections and resistance to the program.
- Shared responsibility with all levels, functions and areas of the company, to better involve all employees.
- Promote a trust-based internal culture in order to create a favorable environment for honest and ethical.

4.3 Oversight of the anti-corruption program

For the anti-corruption program is efficient and effective, the development and implementation require active participation of every employee and relevant business partner, each one with specific responsibilities.

Responsibility for the implementation and execution of the program should fall on the company's Board of Directors, which can receive the assistance of a Committee specifically designated to handle compliance, auditing and ethics.

To do so, in large companies, it is necessary that there be segregation of duties, i.e. an independent internal control unit should periodically audit the procedures adopted for the program. Remembering that the ideal is that the responsibilities of implementation, execution and monitoring should be carried out by persons or different sectors.

4.4 Clear, visible and accessible policy prohibiting corruption

The implementation and supervision of effective anti-corruption policies requires an effective compliance program and rigorous internal controls, resulting in the creation of a formal document, such as a Code of Conduct, with clear and accessible language.

The Code of Conduct should contain who is covered by the policy, such as employees, directors, executives, officers, employees at all levels within the company and business partners.

Procedures must be addressed in daily activities such as: relationships with public officials, including state-owned enterprises and private-to-private relationships, and clearly outline policy prohibitions.

The procedures are supported by real-world examples or generic case descriptions facilitating the understanding in application in daily situations.

Whereas undertakings carrying out cross-border business, anti-corruption policies should take into account the various laws existing in other countries, as well as the different cultures and expectations of business partners.

4.5 Detailed policies for particular risk areas

In the cases and countries where practices and customs are usually accepted, but which in most countries are considered illicit, companies should adopt robust internal control measures that are fully documented and where procedures are monitored and audited. Additionally, these measures should also include an approval process.

Due to the fact that these countries lack a clear line regarding the legality of acts, especially concerning the facilitation payments, political contributions, charitable contributions, sponsorships, gifts or hospitality and conflicts of interest, these companies should be more transparent in their conduction of business.

4.6 Application of the anti-corruption program to business partners

Given the complexity of business negotiations, the anti-corruption policy must encompass all its relationships, including subsidiaries, affiliates, joint ventures, agents and intermediaries, contractors and suppliers.

Companies should inform pertinent partners of the established policies combating corruption, and advise them to consider their own risks, in order to fully emphasize their zero-tolerance for corruption.

Based on the initial stage and risks of exposure, companies aiming to minimize risks, should establish the following main activities in these areas:

- Legal status and type of partner organization,
- Financial assessment and the dependence of the same in relation to others of the same group,

- Determination of potential conflict of interest, assessing the anti-corruption commitment of the Director of partner,
- Market reputation,
- Lifting previous information regarding involvement in corruption scandals,
- Quality evaluation of anti-corruption program adopted.

Depending on the level of risk exposure, it is necessary the monitoring of partner, with the following characteristics: filling in a self-assessment form to report the progress of the anti-corruption program, own investigations to evaluate the partner program and program evaluation request by third parties, such as independent expert.

4.7 Internal controls and record keeping

For the implementation of effective business activities and the successful minimization of risk associate with these activities, it is necessary to preserve and maintain accounting books and all documentation pertinent to the business and its partners, as well as the establishment of an internal control system ensuring the effectiveness and efficiency of the business operations.

The internal control system should contain at least the following elements:

- Organizational measures: Depending on routine business activities and considering the complete description of operations, approval limits, segregation of activities, and functions and restricted access to sensitive operations.
- Controls: Should be applied to the Organization as a whole and integrated into the main and underlying operations carried out by the company, including the adherence to internal standards, to facilitate the detection of irregularities in the

commission of infractions. As well as the monitoring of activities performed by directors that have a direct influence on the Commission.

Responsibilities for the system of internal controls:

- Designing, implementing and maintaining the system of internal controls, ensuring that designated departments can perform the previous and subsequent controls in line with manuals and approved practices.
- Evaluating the system of internal controls on a periodic basis.
- Oversight of the system of internal controls, to maintain the effectiveness of the program.

4.8 Communication and training

Communication and training of employees regarding the anti-corruption policy and procedures must be carried out periodically, in both the hiring and promotion processes.

In addition to face-to-face training and self-training, normally carried out online, the company should always inform their employees about the risks of exposure to acts of corruption, the penalties imposed by the company and the communication policy regarding the reporting of unlawful acts carried out internally.

4.9 Promoting and incentivizing ethics and compliance

For anti-corruption policies to take effect and become accepted by employees, companies should encourage behavior in accordance to good practices implemented by the internal standards for commercial operations.

It should be encouraged that employees and business partners use compliance procedures of the company such as: financial rewards like bonuses, promotions, gifts and gratuities and non-financial rewards, like recognition prizes, courses and celebrations.

Considering the implementation of forms of compensation by incentives to stimulate ethics and compliance can be seen as a controversial point for challenging the conduct of employees, the following points should be taken into consideration:

- Stronger incentives with tighter controls to balance performance targets and incentives.
- Rewarding expected behavior. Ethical behavior as well as compliance with company policy is expected and an individual obligation of employees, and cannot be rewarded. However it is necessary to make clear what other ideal behaviors are, in addition to promoting those that deserve priority in the company.
- Reducing intrinsic motivation. The incentive might generate a misinterpretation that might confuse others.
- Prevent subjectivity in performance evaluations by establishing transparent and objective criteria.
- Be sure to give equal opportunities to all employees to engage in anti-corruption programs and to receive recognition for doing so.
- Encourage and reward people who denounce acts of corruption, in order to encourage this type of conduct.

4.10 Seeking guidance – detecting and reporting violations

Companies require a strict control for detection of fraud, by means of procedures and specific departments for this purpose. This method avoids an unnecessary risk to the reputation of the company and facilitates the investigation of those involved.

To consolidate a routine fraud detection, the company must establish the following mechanisms: internal (e.g., internal controls, investigations, internal audit, hotline for guidance and reporting, and ombudsmen) and external (e.g., external auditors, complaints and concerns from other external parties, media reports, and ombudsmen).

A clear reason that misconduct should be carried out for a specific Department is because it raises credibility and ensures that the communication be reported to the competent sector and that it can be investigated. Techniques for doing so include hotlines, ombudsman or compliance departments, avoiding the fear of persecution or retaliation, and ensuring confidentiality.

4.11 Addressing violations

The treatment given by the company in cases of reported violations of the Code of Ethics should involve a proportional internal penalty. Such violations would be proved by an internal investigation, and be facilitated by public authorities when dealing with employees and business partners in the case of administrative and legal proceedings.

The company must still adopt a transparent disciplinary policy, containing: the sanctions, depending on the seriousness of the act committed; the procedures, and responsibilities for data collection; internal investigations; penalties; notifying external authorities; and ample defense to the accused and opportunity to appeal.

4.12 Periodic reviews and evaluations of the anti-corruption program

Both the evaluation and the various enhancements to the anti-corruption program of the company must be carried out continuously, during its execution and revised as needed to adapt to new occurrences, such as new organizational structures, changing organizational processes, changes in business operations, new business, changes in legislation and the emergence of corruption cases that reach the company or partners.

Also taking into consideration the cases in which the anti-corruption program should be changed due to its evaluation as to the effectiveness, efficiency and long-term sustainability, is important.

In addition, the quality of the program should be evaluated as:

- Results of internal monitoring of relevant practices, monitoring the training strategy, the effectiveness of internal controls, and the weaknesses in detection of irregularities by the internal control.
- Management's assessment by internal and external audits to provide an independent evaluation about the policies and procedures.
- Provide the information lifted by employees and business partners to review policies and procedures.
- Assessments of employee skills, business partners, policies and risks could indicate the important elements of the program.
- Benchmarks or comparisons to business partner anti-corruption programs.

The aforementioned items are important starting points to guide companies in major negotiations in various parts of the world. These items are inserted in the Brazilian Decree number 8420, as a requirement for evaluating a given company's integrity program.

Companies must always consider all the opportunities for improvement of anti-corruption policies, seeking to continue their effectiveness, through reviews of internal and external partners. The results of the evaluations should be reported and discussed by employees and shareholders looking to demonstrate the level of commitment of the Board of Directors within the program. All of these detailed requirements are important for the companies to adopt. The companies should understand that countering corruption requires more than merely complying with domestic laws and avoiding negative consequences, and is necessary to make business around the world, with different Governments and different cultures.

Recent developments in the States' legislation have further highlighted the important role business must play in fighting corruption. In Brazil, the legislation is robust and intended to establish some requirements to analyze the companies' compliance program. The items referred to in this chapter is applicable to CGU as a checklist for the Integrity Program evaluation as provided by law.

5. The U.S. Federal Acquisition Regulations System and The Brazilian Government Procurement Activities Law

The Brazilian and American legal traditions are from different schools. While Brazilian law is based on Civil Law, the United States has its laws based on system known as Common Law. The first system is collected in the law codes, the second uses co-creation of law by decisions of the judges on a case by case basis rather than statutes.²¹

²¹ Oliveira, Frederico Resende de. Comparative study between the North American and Brazilian systems of combating corruption. 2011. Available on <http://www.gwu.edu/~ibi/>

Different from Brazil, the Federal Acquisition Regulation (FAR)²² requires contractors to establish a Code of Business Ethics and Conduct with enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. The contractor needs to establish the code of conduct, make it available to every employee, make efforts for prevention and detection of criminal conduct and promote an organizational culture to touch on ethical conduct and commitment to compliance of the law. FAR 52.203-13 requires contractors to establish an effective ethics and compliance program with the highest degree of integrity and honesty, which requires in contracts above a certain amount the procedures of Code for business ethics and conduct.

The U.S. Law establish the importance of robust compliance standards and procedures, in order to give effectiveness to the compliance program. The companies shall establish program to prevent and detect criminal conduct and ensure compliance with the law. Training shall be provided to leadership, employees and other organization's agents. FAR requires companies to have an internal control system do provide assignment of responsibility to adequate ethical program. And make sure the system of internal controls includes organizational measures and prevention, detection, suitable controls. The Regulation about Procurement Process in Brazil does not discuss topics about the ethical conduct of government contractors and this requirement is contemplated only on Article 7 of 12846/2013 law. As a result of the new legislation, Brazilian companies must adopt criteria aimed at the reduction of risks arising from the impact of the new standard and its sanctions, one must create or revise the manuals of best practice and the adoption of an effective internal compliance system, which will act preemptively in cases of potential legal infractions.

²² Federal Acquisition Regulation FAR 52.203-13. The Federal Acquisition Regulations System, consisting of the FAR and agency supplemental acquisition regulations, is a robust set of rules and requirements governing the U.S. Government's procurement process

Although this legislation is perceived as innovation, those who follow the subject know that since the FCPA, companies need to adopt procedures and codes of ethical conduct in the corporate world. The companies must have internal mechanisms and procedures of integrity, audit, complaint of irregularities, as established in the Brazilian Law. They must apply with greater effectiveness the codes of ethics and conduct in the corporate scope. That is an important point to apply the sanctions: demonstrates the effective enforcement of codes of ethics and conduct across the company.

The Decree number 8420,²³ published in March, 2015, established the parameters for evaluation of the specifications of internal control mechanisms, as well as integrity procedures. These parameters are based on risks assessments, commitment of employees and Board Directions, mechanisms of internal controls, code of ethics, procedures of integrity, and others discuss on various Guidelines made by international institutions. These Guidelines are disposed on specific chapter in this paper.

6. The Foreign Corrupt Practices Act and The Clean Company Act

The Foreign Corrupt Practices Act (FCPA)²⁴ is the mother of all anti-corruption legislation, and it was originally enacted in the post-Watergate era as a response to widespread global corruption that was identified during that period. The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business.²⁵ The FCPA required recording-keeping, internal

²³ Brazilian Decree 8420, 03/18/2015, available on http://www.planalto.gov.br/CCIVIL_03/ Ato2015-2018/2015/Decreto/D8420.htm

²⁴ FCPA, available on <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>

²⁵ Nascimento, Jose Leonardo Ribeiro. The contribution of the public participation to avoid the misuse of public Funds: a comparison of Brazil and the United States cases. 2012. Available on <http://www.gwu.edu/~ibi/>

accounting controls and disclosure from persons subject to the American jurisdiction. It also outlawed some kinds of payments was designed in 1977. The FCPA has been amended twice since its inception: in 1988 and 1998, when the changes were due to adequacy of U.S. legislation to the OECD anti-bribery Convention. The FCPA penalties include fines of high value (in some cases reaching millions of dollars) and imprisonment. The United States has been alone for two decades at the forefront in the prevention and prosecution of foreign bribery, so that they were inducers of international law on the subject.²⁶

Two important points of the U.S. relationship with the OAS Convention are worth mentioning:

- The FCPA excludes from its bans payments to civil servants in order to induce them to do acts that are already provided in their routines.
- The second important point is the fact that the United States took the position that the country was not required to comply with illicit enrichment. This provision, according to the U.S., violates their constitutional presumption of innocence. Thus, the United States made a reservation with respect to this article.²⁷

Although the United States have ratified the three international conventions against corruption, little practical effect resulted, since the U.S. legislation was before them and, in general, its provisions are more comprehensive and stringent than those contained in the Conventions. The United States has been alone for two decades at the forefront in the prevention and prosecution of foreign bribery, so that they were inducers of international law on the subject.

²⁶ Oliveira, Frederico Resende de. Comparative study between the North American and Brazilian systems of combating corruption. 2011. Available on <http://www.gwu.edu/~ibi/>

²⁷ Oliveira, Frederico Resende de. Comparative study between the North American and Brazilian systems of combating corruption. 2011. Available on <http://www.gwu.edu/~ibi/>

The Clean Company Act²⁸ is one year old, but the penalties are severe as U.S. law, that also include fines of high value and imprisonment. Government enforcement and the new legislation could not be sufficient to stop bribery. Its requirements for greater transparency and accountability for financial reporting and internal controls, opened the door for disclosures and investigations. Further emphasize effective compliance and ethics programs in order to mitigate punishment for criminal offenses.

These compliance program enhancements are required for all companies, public or private, and included anti-corruption and fraud prevention elements. The stage is set for enforcement and compliance. Brazilian and foreign companies with business in Brazil now had to increase their internal auditing departments, focus on internal controls, better police third-part agents, and carefully review all payments.²⁹ Now Brazil has to provide a powerful incentive for companies to establish their own programs that work to prevent and detect violations of the law.

7. Importance of compliance program analyses

Since the OECD³⁰ establishes standards to criminalize bribery, CGU has recommended a set of practices that help companies to contribute to the implementation of the recommendations:

- To joins Codes of Best Corporate Practices, in order to improve the corporative governance of national companies;
- To give incentive for the creation of internal controls;
- To offer courses and seminars about corruption;

²⁸ Brazilian Law 12846, 08/01/2013, available on <http://www4.planalto.gov.br/legislacao/legislacao-1/leis-ordinarias/2013-leis-ordinarias#content>

²⁹ Biegelman, Martin T. Foreign corrupt practices act compliance guidebook: protecting your organization from bribery and corruption – Martin T. Biegelman, Daniel R. Biegelman.

³⁰ Available on <http://www.cgu.gov.br/ocde/>

- To create and to execute integrity programs based on conduct codes;
- To orient and to train employees in order to know the law about corruption, making them able to distinguish what is active and passive corruption, misconduct, fraud, embezzlement etc.;
- To make it clear that every employee is forbidden to give or to offer bribes.³¹

The OECD monitoring the implementation the Convention³². On Phase 2, the evaluation about company internal controls, ethics and compliance programs or measures had been highly recommended that Brazil encourage companies to implement internal company controls and to develop monitoring bodies. An increasing number of companies appeared to be adopting corporate codes of conducts, although these rarely covered foreign bribery. An annual study by the Brazilian Institute of Business Ethics (IBEN) indicates that the number of large Brazilian companies who have, and publish, a corporate code of ethics was the same in 2014 as it was in 2009 (approximately 36%), although the study also theorized that the number would increase in light of the adoption of the Corporate Liability Law (CLL).³³ A review of 27 companies operating in major Brazilian sectors shows that only nine have a specific, publicized policy on corruption and none refer to foreign bribery. All companies at the on-site visit had compliance programs. This is a positive sign, although all but one of the companies were subsidiaries of major foreign companies or Brazilian companies listed on the US stock exchange and indicated that these programs were implemented to comply with foreign legislation; this makes it difficult to measure the effect of Brazil's laws independently.

³¹ Nascimento, Jose Leonardo Ribeiro. The contribution of the public participation to avoid the misuse of public Funds: a comparison of Brazil and the United States cases. 2012. Available on <http://www.gwu.edu/~ibi/>

³² Available on <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm>

³³ IBEN, "Pesquisa Código de Ética Corporativo 2014" (March 2014), available on <http://www.pesquisacodigodeetica.org.br/2014/pdf/Pesquisa2014.pdf>

On Phase 3, the OECD report mentions the efforts have been made by Brazil. The CGU and the Ethos Institute have developed a Pro-Ethics Company Register which evaluates and publicises the names of companies with good ethics practices.³⁴ This initiative is positive but appears under-utilised (there are currently only 17 companies on the list). Brazil considers the low number of companies included on the list illustrates the stringency of the evaluation process, however; only 153 companies have applied for inclusion which is an extremely low proportion of Brazil's 5.2 million companies. Brazil reports that changes are currently being made to "make it easier for companies to understand the evaluation process and apply for it." Brazil's National Contact Point on the OECD Guidelines for Multinational Enterprises has translated the Guidelines into Portuguese and distributed them to 500 stakeholders across the business community. The lead examiners are encouraged that Brazil, and particularly the CGU, has recently taken steps to encourage companies to develop and implement corporate compliance programs, including through the new Corporate Liability Law (CLL). They recommend that Brazil continue to encourage companies, particularly unlisted companies and SMEs, to develop and adopt adequate internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by providing guidance in the context of the implementing Decree to the CLL and by promoting the OECD Good Practice Guidance. The lead examiners also recommend that Brazil encourage companies to develop monitoring bodies.³⁵

In March 19th, 2015, Brazil published the Decree number 8420³⁶ regulating objective administrative and civil liability of national and foreign companies for the practice of acts against

³⁴ Available on www.cgu.gov.br/empresaproetica/joined-pro-ethics/empresas.asp

³⁵ Available on <http://www.oecd.org/daf/anti-bribery/brazil-oecdanti-briberyconvention.htm>

³⁶ Brazilian Decree 8420, 03/18/2015, available on http://www.planalto.gov.br/CCIVIL_03/ Ato2015-2018/2015/Decreto/D8420.htm

the public administration. In April 8th, 2015, Brazil published the regulation to evaluate the integrity program as the Decree.

Companies should specify and contextualize the interactions established with national or foreign public administration. According to the importance of obtaining governmental authorizations, licenses and permissions in its activities; the amount and the values of existing contracts concluded or with entities and public bodies in the past three years and the participation of those in annual sales of the legal entity; frequency and relevance of using agents intermediaries, such as proxies, brokers, consultants or sales representatives, the interactions with the public sector.

The companies should highlight the integrity program with explanation of the importance of the implementation of each of the parameters. In addition to demonstrate the functioning of the integrity program in the routine of legal person, with historic data, statistics and specific cases. And demonstrate the performance of the integrity program in the prevention, detection and remediation of the harmful act object of verification. After evaluation by the public entity, the definition of the percentage of penalty reduction shall consider the degree of adequacy of program integrity to the company profile and its effectiveness.³⁷

8. Conclusion

There is no doubt about the importance in adopting a zero tolerance policy against corruption, mainly because corruption slows economic development and contributes to governmental instability. UNODC³⁸ considers corruption as a major impediment to economic and

³⁷ Brazilian Ordinance 909, 04/08/2015, available on <http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?jornal=1&pagina=3&data=08/04/2015>

³⁸ UNODC, available on <http://www.unodc.org/unodc/en/corruption/index.html?ref=menuaside>

social development, and is trying to introduce to public and private sectors what society is losing with bribery and corrupt officials. For example, it is assisting States in the ratification and implementation of relevant international treaties.

International conventions were a legal framework in the fight against corruption, mainly due to assist developing countries in establishing effective public policies. The Brazil edited various laws: laws, decrees, ordinances and regulatory instructions. Defined public policies to combat corruption. Instituted CGU as central body responsible for implementation and monitoring activities necessary for meeting the assumptions set out in international treaties.

CGU has worked on three major aspects:

- Prevent: typifying the crime of transnational bribery, encouraging the public participation, transparency in public administration, keeping the Council of Public Transparency and Combat of Corruption, giving an incentive to national companies improve corporative governance and internal controls, and offer trainings about corruption;
- Detect and punish: investigate and punish public officials suspected of bribery, audits and inspections alone or with the federal police and prosecutors;
- Monitoring: a survey of policies and legislations pending deployment, proposition of regulatory framework, analyses integrity programs based on conduct codes.

Brazil did its homework by filling the international treaties with these new laws and regulations. The legislations give the Brazilian companies the responsibility to act as good corporate citizens. This tenet is complemented with evidence and an understanding among companies that fighting corruption makes good business sense and that a well-executed integrity program will yield greater value over time.

These Brazilian Legislations could provide the public agencies of power to actualize its missions as well as contribute to anti-corruption effectiveness. This legal provision for the requirement codes of ethics and conduct for government contractors, as well as integrity procedures, were established by the Decree number 8420. At CGU, it is possible to apply the administrative sanctions and evaluate the companies' Integrity Program.

The international Integrity Compliance Guidelines are important to private sector as to the public agencies. Fights against corruption and bribery in national and international business to strengthen the development and confidence in the markets. The check list suggested in this paper is based on the most important guidelines of international organizations that are engaged in anti-corruption practices.

The United States published the FCPA in 1977. Since then, the fight against corruption became a huge challenge throughout the world. Finally in 2003 the UNODC Member States realized the relevance of their struggle against corruption and also resolved to intensify efforts to fight transnational crime. It is possible to realize the importance of the American legislation, so that other countries could also focus efforts to combat corruption.

The analysis between the Brazilian and U.S. laws, observed that the two legislations have significant differences. First, the age and effectiveness of both. FCPA has produced effect several times, with punishment and liabilities, while Brazilian law is recent and still has no example to be studied. Second, the difficulty of putting into practice the Brazilian law requiring successive regulations. Finally, the maturation and Brazilian cultural change from the practice of robust anti-corruption legislation.

The Brazil has advanced a lot, putting into practice the assumptions laid down in the international framework cited in this paper. However, at the moment is important in take care in providing effectiveness in national legislation, as well as strict adherence to existing standards.

Now is the time to start to apply the legislation and monitoring the operation, in order to adapt the law to future practical cases. And the CGU will have the key role of centralizing the information necessary for the application of the Brazilian legislation on assessment of corporate integrity programs, as well as monitor the implementation of the legislation by other public agencies.

9. Appendix

For CGU to apply the sanctions, the suggestion is to evaluate the companies Integrity Program according to the new decree, which is a check list.³⁹ The check list suggested is a shortened form which may be extended or adapted, based on the size, complexity, and market of the company.

Checklist

COMMITMENT FROM SENIOR MANAGEMENT	Yes	No
Senior management demonstrates strong and visible support and commitment for the company's anti-corruption program		
Counselors demonstrates strong and visible support and commitment for the company's anti-corruption program		

CODE OF ETHICS AND INTEGRITY POLICIES AND PROCEDURES	Yes	No
The Code of Ethics is formally documented		
The Code of Ethics is publicly available to all employees		
The Code of Ethics is publicly available to all business partners		
The Integrity Policies and Procedures are formally documented		
The Integrity Policies and Procedures are publicly available to all employees		
The Integrity Policies and Procedures are publicly available to all business partners		

³⁹ An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide, UNODC, available on <http://www.unodc.org/unodc/en/treaties/CAC/index.html#UNCACfulltext>

Contractors and suppliers are addressed by the policies and procedures		
Agents and intermediaries are addressed by the policies and procedures		
A accessible policy is in place, which outlines the roles and responsibilities for implementation, execution and continuous improvement of the program		
The company evaluates and prescribes corrective actions continuously to the program		

INTEGRITY PROGRAM TRAINING	Yes	No
Communication and training are directed at employees and main business partners		
Communication and training are included in the internal recruitment and external hiring process		
Communication and training are provided on a regular basis		
Standardized communication and training provide information on the relevance of the program to employees and business partners		

RISK ASSESSMENT	Yes	No
The company conducts a standard risk assessment annually		
The company defines operational roles and oversight responsibilities		
The company identifies corruption-related risks by using internal and external sources		

The outcomes of the overall risk assessment are used to promote corrective measures		
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RECORD KEEPING	Yes	No
A formal policy outlines procedures to maintain accurate books and records		
There are public reports on its practices in maintaining books and records		

INTERNAL CONTROLS	Yes	No
The objectives of the system of internal controls are safeguarding a company's assets		
The system of internal controls includes organizational measures and prevention, detection, manual and automated controls		
The system of internal controls is evaluated by internal and external auditors on a regular basis		
The effectiveness of the system of internal controls is assessed periodically		

GOVERNMENT PROCUREMENT ACTIVITIES	Yes	No
The company defines operational procedures to prevent fraud and unlawfulness in procurement process		
The company defines operational procedures to prevent fraud and unlawfulness in government contracts		
The company defines operational procedures to prevent fraud and unlawfulness in government interactions		

The company provides guidance about the best practices for obtaining permits, licenses, certificates, tax payments, and audits		
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DETECTING AND REPORTING VIOLATIONS	Yes	No
The company provides a secure and easily accessible reporting hotline or ombudsman to encourage the reporting of violations		
Persons reporting are treated with confidentiality		
It is clearly stated that employees and business partners are expected to report violations		

DISCIPLINARY MEASURES	Yes	No
It provides a catalogue of sanctions, guidelines on procedures and responsibilities, and opportunities to appeal		
It clearly states the sanctions for employees		
It clearly states the sanctions for business partners		
Sanctions are relevant, proportionate and applied in practice		

BUSINESS PARTNERS	Yes	No
The company assesses the risk on acquisitions, subsidiaries, affiliates, joint ventures and corporate restructurings		
Business partners are monitored and motivated to adhere to the integrity program		

PERIODIC REVIEWS AND EVALUATIONS	Yes	No
There are regular reviews and evaluations of the program		
Evaluation is based on effectiveness, efficiency and sustainability		
Results of the review and evaluation are communicated to employees and business partners		

TRANSPARENCY	Yes	No
The company maintains accurate books and records of political contributions		
The company publicly reports about expenditures to political parties, party officials and candidates		