

# Client Alert

## US-Brazil Coordination on Anticorruption Cases: What Lies Ahead?

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Authorities in Brazil and the United States are enjoying historic collaboration in their fight against public corruption. Over the last five years, Brazilian and US authorities have worked together on investigations resulting in hundreds of charges against individuals and entities and billions of dollars of corporate fines.

It was not always this way. A decade ago, US and Brazilian authorities collaborated on relatively few criminal investigations of any type. From narcotics to corruption, it was once an exceptional event for US and Brazilian authorities to successfully coordinate on a significant investigation.

There are a variety of reasons why US-Brazil coordination has dramatically improved: financial – Brazil's economy has grown dramatically, drawing the attention of American financial watchdogs; legal – Brazilian laws have changed in important ways over the last decade, including a 2013 law expanding the use of plea bargains; and the practical – US authorities diverted substantial resources to counter-terrorism investigations in the immediate wake of 9/11, and the gradual reduction of resources in that area have freed up investigators elsewhere.

Whatever the reasons, the results of recent US-Brazil coordination have been, from a law enforcement perspective, spectacular and unprecedented. But today, after so much has been accomplished, some commentators predict that this extraordinary period of cooperation must be close to an end, either because all the biggest cases have already been made or because domestic political forces in both countries are beginning to push back against sprawling corruption cases like *Lava Jato*. Some now believe the *Lava Jato*-era may best serve as a model for other potential foreign partners for American prosecutors. The question arises: What is left to be done in Brazil?

A lot.

Brazil and the US have expended substantial resources in forging a unique and productive relationship over the last several years. It is not one that US authorities will lightly turn away from absent extraordinary reasons. And the compelling evidence suggests that US activity in Brazil will continue at a very high level for years to come.

*First*, FCPA enforcement activity is one of the relatively few areas of US law enforcement that has *not* declined under the Trump Administration. It serves as a robust source of high-profile cases, which is attractive on an organizational level – US agencies (DOJ and SEC) like to build significant cases – and an individual level – agents and prosecutors want to do the same.

Put simply, the FCPA is the most effective tool for making headline-grabbing cases against multi-national companies involving staggering settlement amounts. A senior DOJ official recently touted that its main fraud unit in Washington, D.C. “has already reached 11 corporate resolutions over the first eight months of 2019, which is an increase over the 10 corporate resolutions reached in the entire year of 2018.” FCPA enforcement appears to have been the source of more than half of those corporate resolutions.

*Second*, for anticorruption matters, the US has no relationship with a foreign government that is as productive as its relationship with Brazil. In a speech last month, SEC Chairman Jay Clayton acknowledged that the US largely stands alone when pursuing anticorruption abroad:

“Corruption is corrosive. We see examples where corruption leads to poverty, exploitation and conflict. Yet, we must face the fact that, in many areas of the world, our work may not be having the desired effect. Why? In significant part, because many other countries, including those that have long had similar offshore anti-corruption laws on their books, do not enforce those laws.”

Clayton added that, while US authorities have long acknowledged the “need for greater international cooperation,” he has “not seen meaningful improvement.” Clayton said that US authorities should “recognize that we are acting largely alone and other countries are incentivized to play, and I believe some are in fact playing, strategies that take advantage of our laudable efforts.”

While striking in their candor, Clayton’s comments are consistent with the experiences of many lawyers who handle corruption matters: US authorities often take the view that they cannot rely upon anti-corruption authorities in much of the rest of the world. Brazil is now one of the most notable exceptions to this view, as reflected in the coordinated resolutions we have seen in the *Lava Jato* era.

*Third*, there are many more corruption cases to be made in Brazil. Brazilian media has identified some of the new directions that Brazilian-US anticorruption investigations are heading, including an intense focus on the massive Brazilian health care sector. Notably, there is a long – and to date, unchallenged in a US court – line of settlements where US authorities have taken the position that employees of foreign health care systems are “foreign officials” under the FCPA. While that view may be vulnerable to legal attack – it’s not at all clear that Congress intended for health care workers to hold a status akin to foreign legislators and heads of state under the Act – it appears to be widely accepted amongst US authorities responsible for FCPA enforcement in Brazil and elsewhere, which leaves fertile ground for joint US-Brazilian settlements in health care graft matters.

In sum, the era of US-Brazilian cooperation is not over. It may just be beginning.

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