

## Brazil's Public Prosecutors' Office issues leniency guidelines

Leniency agreements became an effective tool for investigating corrupt practices in Brazil in the past three years. In the context of the [Car Wash Operation](#) alone, at least ten agreements have been executed to date, making possible to identify bribery-related practices that would otherwise remain undetected.

On 24 August 2017, the 5th Review Board of the Federal Prosecutors' Office, composed by three federal prosecutors responsible for coordinating and setting rules of conduct in connection with corruption investigations, issued [Resolution No. 07/2017](#) on the negotiation and execution of leniency agreements for legal entities interested in settling bribery-related cases ("Guidelines"). The Guidelines mainly reflect the current practice of the federal prosecutors when negotiating leniency agreements and is binding on all units of the Federal Prosecutors' Office in Brazil.

Leniency agreements executed with the Federal Prosecutors' Office primarily address civil liability and do not strictly follow the procedure provided in the Clean Company Act, but derive from a combination of statutes, such as the Clean Company Act, the Antitrust Law, the Public Probity Law, the Organized Crime Law, the United Nations Convention against Corruption and the Palermo Convention. The Guidelines are an effort to provide transparency and predictability for when negotiating such agreements. They are structured in 18 paragraphs, which may be grouped as follows:

**Authority in charge of the negotiation.** The negotiation shall be led by the prosecutor with authority to file civil claims, based on Law 8,429/1992 or Law 12,846/2013, considering the facts covered by the agreement, who shall be accompanied by at least another federal prosecutor. The leniency agreement is expected to cover at least civil corporate liability for bribery-related facts. If individuals are interested in executing criminal plea agreements covering the same facts of the leniency agreement, the leniency negotiation shall be conducted in parallel or following that one led by the criminal prosecutor.

**Formal aspects of the negotiation.** Whether or not it is convenient to enter into a specific agreement is a decision under the prosecutors' discretion. Once prosecutors, based on preliminary discussions with the interested party, believe it is worth to engage into negotiations, a confidentiality agreement shall be signed and specific case files opened to formalize the negotiation. The execution of a confidentiality agreement shall be submitted before the 5th Review Board of the Federal Prosecutors' Office, which may involve the "Plea and Leniency Agreements" specialized unit. All meetings shall be documented in the case files, specifying place, participants and subject under discussion. The leniency files remain under secrecy, which may only be lifted after the agreement is signed. All facts reported by the leniency applicant shall be described in annexes, including supporting evidence. No deadline is provided for the conclusion of the leniency negotiations.

**Leniency applicant's obligations.** The Guidelines set forth minimum obligations for leniency applicants, as follows: (i) to cease its involvement in the illegal conduct, (ii) to implement a compliance program and/or to engage external monitors, if applicable (iii) to fully cooperate with the investigation, (iv) to indemnify the damages caused by the conduct, which does not exclude the possibility of other damage claims being brought by other public entities (v) to pay the applicable fines provided under Law 8,429/1992 and/or Law 12,846/2013, (vi) to provide guarantees of the payment referred in (iv) and (v), and (vii) to acknowledge that the information and documents provided under the agreement are truthful and correct. Additionally, the agreement may limit the settling party's ability to make divestments.

**Prosecutors' obligations.** When executing a leniency agreement, prosecutors commit to (i) act before other authorities to check whether they would be interested in joining the leniency agreement or in signing a separate similar agreement, as long as the latter is consistent with

### São Paulo

Av. Brig. Faria Lima, 2601  
12th floor - 01452-924  
São Paulo, SP - Brazil  
Phone. +55 11 3555 5000

### Rio de Janeiro

Praia de Botafogo, 440  
15th floor - 22250-908  
Rio de Janeiro, RJ - Brazil  
Phone. +55 21 3503 2000

### Brasília

SBN Q 1, Bl B, n. 14, Ed. CNC  
2nd floor - 70714-900  
Brasília, DF - Brazil  
Phone. +55 61 2109 6070

Legal Bulletin  
September 2017

the one signed by the federal prosecutors, (ii) offer benefits that would result from the execution of the agreement, which includes not pressing civil charges against the settling party for facts disclosed under the agreement, or in cases where charges have already been pressed, require the suspension of such civil claims before courts, and (iii) argue before third-parties the validity of the leniency agreement. Finally, under the Guidelines, prosecutors can request another individual to represent the legal entity's interests before the agency if they feel that the current representative is not acting in good-faith in the context of the negotiations.

**Other authorities.** Other prosecutors and authorities may later join the agreement by fully accepting its terms, after which the evidence and information gathered through the leniency agreement may be shared, subject to the same obligations applicable to the federal prosecutors. The Guidelines also allow for the joint negotiation of leniency agreements with other authorities, such as Brazil's antitrust agency (CADE), the Office of the Comptroller General (CGU), and the Court of Auditors (TCU), in which case separate agreements would have to be signed.

**Fines and damage compensation.** The Guidelines provide that fines shall be calculated based on Article 12 of Law 8,429/1992 and/or Articles 6 and 16 of Law 12,846/2013, as well as Articles 17 to 20 of [Decree 8,420/2015](#). Prosecutors shall take into account the usefulness and extent of the applicant's collaboration to the investigation, also considering proportionality principles, to assess the level of fine and damages. A leniency agreement does not grant immunity from further damage claims brought by other parties, which could be a deterrent for self-reporting considering that in Brazil co-conspirators are jointly and severally liable for damages caused by any illegal activity. Finally, proceeds coming out of the leniency agreement shall not be directed to government agencies.

**Transnational corrupt practices.** Whenever possible, the leniency agreement shall address transnational corruption practices related to the reported facts, as well as cooperation with foreign authorities in light of international treaties and conventions regulating the matter.

**Review by the 5<sup>th</sup> Review Board.** All leniency agreements shall be submitted to the 5<sup>th</sup> Review Board of the Federal Prosecutors' Office that may (i) confirm the agreement, (ii) request further information from the prosecutors in charge of the negotiation, or (iii) reject the agreement. The decision shall be made available to the general public but the case files may continue to be under seal, if necessary to preserve the investigations.

**Challenges ahead.** While the Guidelines are a welcome improvement, they do not address important issues around leniency agreements. For example, the guidelines do not provide for (i) a marker system that would allow an interested party to approach the authority without having all the information to file for leniency, as it is the case of CADE's leniency negotiation process; and (ii) rules if the leniency negotiation terminate without an agreement or if the agreement is not confirmed by the 5<sup>th</sup> Review Board. It would be reasonable to assume that information and documents (including electronic data) provided to the federal prosecutors during the settlement negotiation would be returned or destroyed in case the parties fail to reach an agreement. This is even more critical considering that there is no oral application and that prosecutors negotiating the agreement are the same ones with the authority to prosecute the leniency applicant. Also, the cooperation framework with other agencies is still very limited, leaving uncertainty to the process.

Companies involved in corrupt practices will need to carefully consider whether or not to get ahead of the facts and self-report, considering the myriad of measures contemplated under this still loosely defined leniency process. The transition of Brazil's federal prosecutors' leniency program into a mature and tested set of rules and practices is a process that we are seeing now — as in any such transitions, it will not be without some turbulence.

São Paulo

Av. Brig. Faria Lima, 2601  
12th floor - 01452-924  
São Paulo, SP - Brazil  
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440  
15th floor - 22250-908  
Rio de Janeiro, RJ - Brazil  
Phone. + 55 21 3503 2000

Brasília

SBN Q 1, Bl B, n. 14, Ed. CNC  
2nd floor - 70714-900  
Brasília, DF - Brazil  
Phone. + 55 61 2109 6070