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Brazil's Clean Companies Act: Implementing Regulations

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Clean Companies Act (Law 12846): Implementing Regulation

- Decree no. 8.420 (March 18, 2015)
- Ordinances of Office of the Comptroller General (OCG):
 - No. 909 (April 07, 2015)
 - No. 910 (April 07, 2015)
- OCG Normative Ruling no. 1 (April 07, 2015)
- OCG Normative Ruling no. 2 (April 07, 2015)
- TCU (Federal Audit Committee) Normative Ruling No. 74, (February 11, 2015)

Clean Companies Act (Law 12846): Implementing Regulations

- Decree no. 8.420 (March 18, 2015)
 - Administrative Sanctions and Judicial Implementations; Leniency Agreements and Compliance Programs
- OCG Ordinance no. 909 (April 07, 2015)
 - Assessment of Compliance Programs
- OCG Ordinance no. 910 (April 07, 2015)
 - Procedures for imposition of penalties

Clean Companies Act (Law 12846): Implementing Regulation

- OCG Normative Ruling no. 1 (April 07, 2015)
 - Methodology for determining income for penalty purposes
- OCG Normative Ruling no. 2 (April 07, 2015)
 - Creating national database of companies varred from contracting with the Public Administration
- TCU Normative Ruling no. 74 (February 11, 2015)
 - Establishing TCU's right to participate in negotiation and approval of leniency agreements

Clean Companies Act (Law 12846): Key Questions

- How are fines calculated?
- What are Leniency Agreements?
- What is the process for imposing fines?
- Are compliance programs relevant?

Administrative Sanctions

- Fine



0,1% to 20% of gross
income

OR

BRL 6 K to BRL 60 million

- Extraordinary publication of the decision

How Penalties Are Calculated: (Decree 8.420/2015)

Conduct	Percent
Was misconduct continuous?	1% to 2,5%
Was top management aware of – or did it tolerate – the misconduct?	1% to 2,5%
Disruption of Services?	1% to 4%
Ability to Pay	1%
Repeat Offense?	5%
Size of Affected Contract	0% to 5%

- Fine calculated based on gross annual income in the year preceding the commencement of the administrative process

- Five mitigating factors reduce penalties

Conduct	Percent
Attempt	(1%)
Pre-investigation restitution	(1,5%)
Extent of Cooperation	(1% to 1,5%)
Self-Disclosure	(2%)
Effectiveness of Compliance Programs	(1% to 4%)

Ability to Pay: (Decree 8.420/2015)

- General Solvency Index > 1
 - Total Assets / Total Liabilities
- General Liquidity Index > 1
 - $(\text{Current Assets} + \text{Long-term Assets}) / (\text{Current Liabilities} + \text{Long-term liability})$
- Net Profit

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Size of Affected Contract: (Decree 8.420/2015)

Value of Contracts	Income Percentage
Up to R\$1.500.000,00	0%
From R\$1.500.000,00 to R\$10.000.000,00	1%
From R\$10.000.000,00 to R\$50.000.000,00	2%
From R\$50.000.000,00 to R\$250.000.000,00	3%
From R\$250.000.000,00 to R\$1.000.000.000,00	4%
Over R\$1.000.000.000,00	5%

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Leniency Agreements: (Decree 8420/2015 e OCG Ordinance 910/2015)

- First to Come Forward Requirement:
 - Clean Companies Act (Law 12846/2013) – Article 16:
“§ 1º The agreement mentioned in the heading may be executed only if the following requirements are, cumulatively, met:
 - I. the legal entity is the first to express its interest to cooperate with the investigations of the illegal act;”**



Leniency Agreements: (Decree 8420/2015 e OCG Ordinance 910/2015)

- First to Come Forward Requirement:
 - Decree 8.420/2015, Art. 30:
 - “The legal entity wishing to enter into a leniency agreement must:
 - I. be the first to express its interest in cooperating with the investigation of the illegal act, **when relevant**;

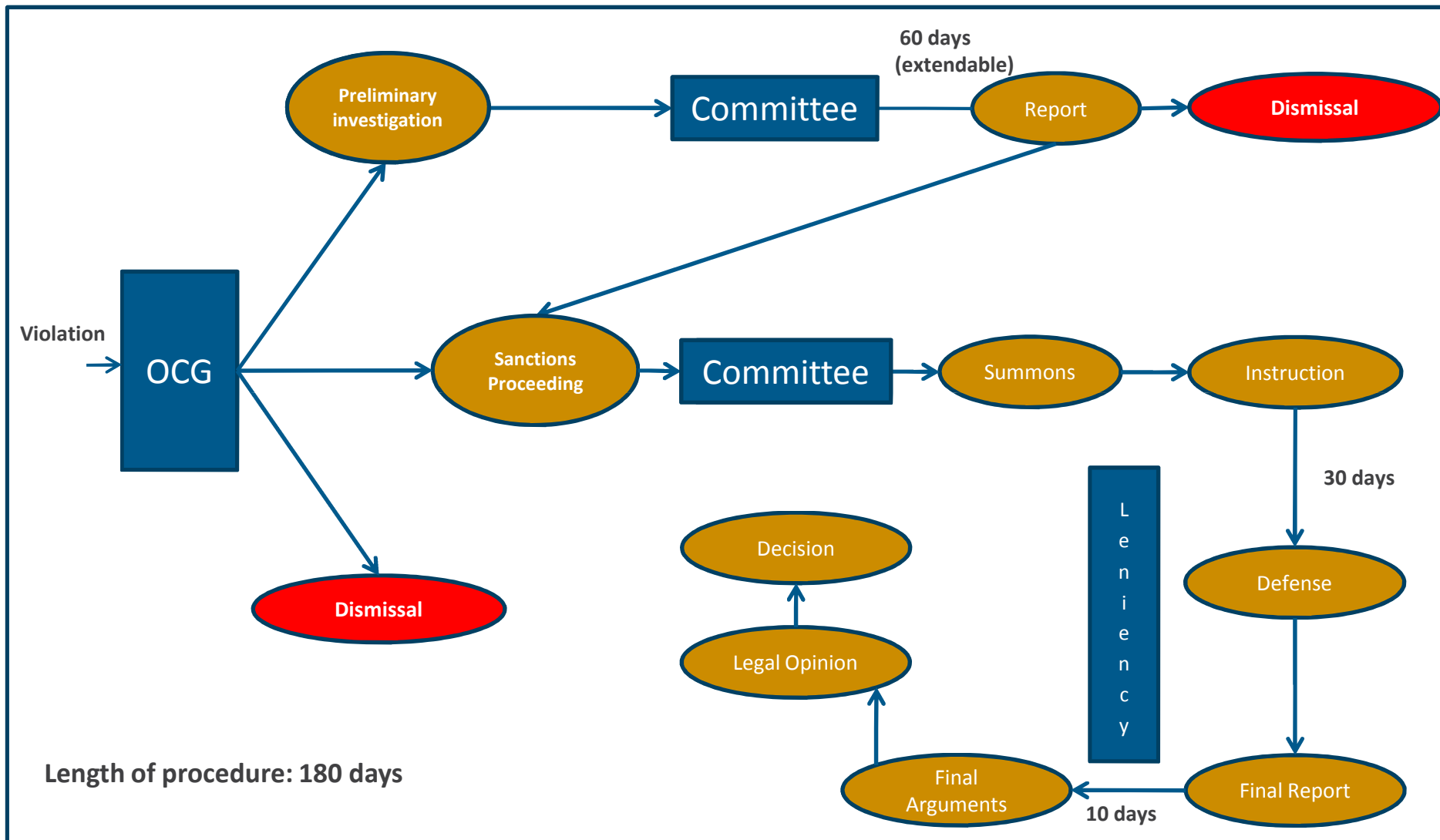
Leniency Agreements: (Decree 8420/2015 e OCG Ordinance 910/2015)

- First to Come Forward:
 - OCG Ordinance 910, Art. 30:
 - “The Committee in charge of conducting the negotiation of the leniency agreement shall be responsible for:
 - II. Evaluating the evidence presented by the legal entity demonstrating:
 - a) That it is the first to express the interest in cooperating with the investigation of the illegal act, **when relevant**;

Leniency Agreements: (Decree 8420/2015 e OCG Ordinance 910/2015)

- Time to apply for a Leniency Agreement:
 - Decree 8.420/2015, Art. 30, 2nd paragraph:
 - “The application for a Leniency Agreement may occur until the conclusion of the report prepared in the Administrative Sactions Proceeding”

Procedure for Administrative Sanctions



Leniency Agreements: (Decree 8420/2015 and OCG Ordinance 910/2015)

- Role of the the Public Prosecutor's Office
 - Not addressed in the regulation
 - OCG says the PPO should be involved
 - * TCU decision dated April 15, 2015 (after the webinar) confirmed that Public Prosecutors Agreement is not a requirement, but Public Prosecutors should be given na opportunity to issue na opinion on the agreements.
- For Leniency Agreements:
 - Compliance Programs are assessed
 - Adjustments may be required



Compliance Programs: (OCG Ordinance 909/2015)

- Profile (Risk Assessment) Report
 - Industries in which the company operates
 - Organizational structure
 - Number of employees
 - Interactions with Public Administration
 - Third party intermediaries (agents, brokers, sales representatives, etc.)
- Best Practice
 - The basis for the preparation of the Compliance Program
 - Before the legal requirement, it was already good practice

Compliance Program: (OCG Ordinance 909/2015)

- Compliance Program Assessment Report
 - Purpose is to determine how compliance program has been implemented
 - Description of program features and relevance to company's profile
 - Data history, statistics and documents
- Best Practice
 - Before the legal requirement, a periodic assessment of the program was a good practice

Compliance Programs: (Decree 8420/2015)

- What the Regulations Require:
 1. The commitment of top-level management, including the company's board, which shall be evidenced by visible and clear support
 2. Standards of conduct, code of conduct and ethics applicable to all employees, directors and third parties
 3. Standards of conduct, code of conduct and ethics applicable to all subcontractors, agents, suppliers and related third parties
 4. Regular training
 5. Regular risk assessment procedures with adjustments to the program
 6. Fair and accurate accounting

Compliance Programs: (Decree 8420/2015)

- What the Regulations Require:
 7. Internal controls that assure accurate accounting and records
 8. Specific procedures to avoid fraud and unlawful conduct in bidding processes or in any relationship with a public entity (even if through a third party), such as payment of taxes or obtaining authorizations, permits licenses, or certificates
 9. Independence, structure and authority of the internal department responsible for the enforcement of the compliance program
 10. Effective whistleblower mechanisms that are accessible to employees and related third parties;
 11. Disciplinary actions in the event of breach of the compliance program

Compliance Programs: (Decree 8420/2015)

- What the Regulations Require:
 12. Procedures ensuring that improper activity is detected, stopped, and remediated
 13. Due diligence in hiring and supervising third parties, such as suppliers, service providers, agents and associates
 14. Due diligence in mergers and acquisitions
 15. Continuous monitoring of the compliance program to prevent, detect and remediate CCA violations
 16. Transparency with regard to its political donations

How To Prepare

- If You Do *Not* Have a Compliance Program in Brazil:
 - Prepare a Profile (Risk Assessment) Report
 - Develop a Compliance Program in accordance with the Profile Report
 - Implement the Compliance Program
 - Train Personnel
 - Monitor Program, evaluating the results from 6 to 12 months and make adjustments (Program Assessment Report)

How To Prepare

- If You Have a Compliance Program in Brazil:
 - Assess whether a risk analysis was performed at the time the program was implemented
 - Assess existing program in light of Risk Analysis (Profile Report); making adjustments as needed
 - Prepare Compliance Program Assessment Report

Thank You

For questions, please reach out to either of us:

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