



**Compliance, Investigation
and White-Collar**

Trends 2024

Lefosse



Context



Compliance, Investigation and White-Collar

The year 2024 began with significant expectations on the scrutiny of external audits when conducting their work in this first quarter, given the increased rigor resulting from the reputational crises that marked 2023, related to failures in internal controls and accounting records identified in Brazilian publicly traded companies. As trends, we expect a strengthening of these controls and new rules with requirements for the accountability of senior management and management bodies.

The advance in the regulation of the cryptocurrency market is noteworthy upon the recent approval by the U.S. Securities and Exchange Commission – SEC of bitcoin investment funds - ETFs, which are now traded on the stock exchange.

This publication addresses these and other trends for the year ahead and their impacts on business activity. We hope our assessment helps in your 2024 planning.



2024 Scenario



Increased External Audit Scrutiny of Corporate Governance

During 2023, authorities conducted significant investigations of breaches in accounting records and controls, mainly involving the retail sector.

As a result, authorities strengthened their mutual coordination to investigate these infractions; we highlight, in particular, the coordination between the Brazilian Federal Public Prosecutor's Office - MPF and the Securities and Exchange Commission - CVM.

In addition, the lessons learned from these investigations allowed the companies and authorities to consolidate measures for the improvement of control and compliance environments, such as:

- The enforcement of civil liability systematic against the administration of listed companies; the indemnification claims against controlling shareholders and independent auditors of such companies; the disclosure of material facts; the refund of bonuses and advantages otherwise bonded to the company's performance in the event of fraud that altered this performance; and changes on the statute of limitations for related lawsuits. Also, impacts on the accountability of the board of directors, fiscal council, audit, and financial committees in the context of analyzing and approving financial statements;
- Independent auditors registered with the CVM should be able to obtain credit information contracted by corporations, large companies, or investment funds they audit from the Central Bank of Brazil, including through direct access to the system;
- The definition of the crime of "patrimonial infidelity" (infidelidade patrimonial);
- Improvement in the system for whistleblowers protection.

As a result, external audits have shown and implemented greater scrutiny in their analyses and investigations.

We expect that the fallout from these cases will lead to a review of procedures by authorities such as the CVM and Brazilian B3 to enhance transparency and accountability of companies and the auditors themselves in their activities.



2024 Scenario

Issues such as the role of governance bodies and their members, the credibility of their representations in the context of financial statements, and the strengthening of regulatory frameworks are already on the agenda and should be further explored in 2024, including abroad (as per the Economic Crime and Corporate Transparency Act - ECCTA, recently published in the United Kingdom).



Review of the Car Wash Operation Leniency Agreements

There have long been discussions about the possibility of reviewing the collaboration agreements signed within the scope of the Car Wash Operation, whether concerning the reduction of the amounts of the monetary obligations assumed by the companies in these agreements, the new ways of fulfilling these obligations, or the validity of some of the agreements signed.

At the beginning of 2023, political parties filed a lawsuit (*Arguição de Descumprimento de Preceito Fundamental - ADPF n. 1.051*) with the Federal Supreme Court – STF aiming at recognizing the “Unconstitutional State of Affairs” (*Estado de Coisas Inconstitucional – ECI*) that would underpin the review of the sanctions provided for in the leniency agreements signed during the Car Wash Operation.

The basis of the ADPF involves

- (i) the severity of these agreements to the collaborating companies;
- (ii) the fact that companies signed these agreements before having a formal cooperation in place between the authorities (the Technical Cooperation Agreement - ACT, signed in 2020);
- (iii) the alleged MPF's abuse in the negotiation; and (iv) the alleged "situation of political-juridical-institutional abnormality" that led to the signing of cooperation agreements before the ACT.

As a result, other companies and individuals are challenging their agreements in courts to review some of the parameters established at the time these commitments were made, in a sort of cascade effect from the STF Justice Dias Toffoli decision, which, in September 2023, annulled the evidence of the Car Wash Operation.



2024 Scenario

There have been several statements from the authorities about the legal uncertainty generated by the review of leniencies. More recently, in November, the Federal Attorney General's Office - AGU issued an opinion opposing the suspension of payments of the agreed penalties and asked the STF to dismiss the requests made in the ADPF.

The companies affected by the Car Wash Operation could benefit from a favorable outcome to the lawsuit. On the other hand, the review could weaken the leniency institute since it calls into question legal certainty. It is worth noting that the MPF's 5th Coordination and Review Chamber - CCR approved only two leniency agreements in 2023, the lowest number since 2015.



Broadening the Compliance Role to Cover ESG Issues

Environment, social, and governance (ESG) initiatives have been debated for quite a long time in the market, which has increased the regulations issued by the authorities. As a result, adopting ESG requirements has broadened the compliance officer's role, which was previously focused on corruption prevention, to include ESG issues in their agendas now.

In this context, the Brazilian CGU has signaled that it will require compliance programs to implement human rights, anti-discrimination, environmental preservation, and workers protection mechanisms.

These requirements will be mandatory for companies interested in participating in public bids, adding to the evidence of integrity program requirements imposed by the New Brazilian Public Procurement Law. Once released, the ESG conditions will impact companies' relationship with the government in several aspects, such as (i) companies benefiting from the Brazilian New Growth Acceleration Program (*Programa de Aceleração do Crescimento – PAC*); (ii) companies willing to obtain CGU's certification *Pro-Ética*; and (iii) companies applying for public funding, given the cooperation agreements signed by CGU with the Brazilian National Development Bank - BNDES and other financial institutions.

These new requirements are broadening the role of compliance officers, and companies need to strengthen their integrity programs and the skills of their professionals to meet these criteria accordingly.



2024 Scenario



Clawback Clauses

Among the recently revised U.S. Department of Justice (DoJ) guidelines, the *Compensations Incentives and Clawbacks Pilot Program* is the subject of much debate in the Brazilian business community. The Program aims to incentivize companies to link compensation to executives' compliant behavior. According to the DoJ, companies should adopt clauses that expressly bind bonuses and other incentives granted to their executives to the reach of the compliance metrics established by the company. These clauses should also explicitly allow for the withholding and reimbursement of these incentives when these executives fail to comply with the integrity program. In return, the DoJ will offer fine reductions to companies that seek to recover compensation granted to executives involved in misconduct.

Although there is no specific rule determining the adoption of such clauses in Brazil, it is likely that this "trend" will soon be incorporated, mainly by multinational companies that are subject to U.S. jurisdiction. For instance, the debate about the possibility of adopting financial penalties (e.g., withholding bonuses) as a disciplinary measure for misconduct, or for not attending training sessions, or even the adoption of compliance and ESG metrics as performance targets by these executives is being highly considered; however, it is still debatable from the local perspective, especially under the civil and labor law, and depends on the hiring regime adopted these companies.



2024 Scenario



Increase in CGU Enforcement through Administrative Accountability Proceedings - PAR

In recent years, CGU has strengthened its role in enforcing the Brazilian Anti-corruption Law (Law n. 12.846/2013). Throughout 2023, the CGU implemented several initiatives to consolidate and improve such enforcement and increase transparency in applying this Law. The statistical panels on leniency agreements, the fines calculator, and the Pro-Ethics Company certification program are good examples of these initiatives.

In addition, there is an apparent effort by the CGU to spread the word about the establishment of PARs, developing the capacity of other federal, state, and municipal authorities through training and guidelines to increase and unify the application of the Law. This scenario, combined with the ongoing review of the collaboration rules, especially regarding the so-called *julgamento antecipado*, improves the Comptroller Offices' roles and will likely increase the number of administrative proceedings (PARs) initiated by these local, state, and federal authorities. See, in this regard, the recent Resolution n. 25/23 of the São Paulo State Comptroller General's Office (CGE/SP), which, following the parameters of the CGU, established criteria for calculating fines and rules for settlements in ongoing PARs with the CGE/SP.

The expansion of the comptroller's offices, however, cannot be disconnected from the adequate application of the Anti-Corruption Law, both in terms of the proper classification of the misconduct in the articles provided by such Law and to avoid the application of sanctions indiscriminately, affecting bona fide third parties (such as acquirers and investors) instead of focusing on the actual violators.

The expansive interpretation of the Law can result in severe setbacks in its application, leading to an increase of the - already significant - challenges in the multijurisdiction authorities and, therefore, reducing companies' incentives to cooperate.



2024 Scenario



Strengthening Whistleblowing Channels and Use of Corporate Communication Tools

As a result of the 2023 fraud investigations and the OECD recommendations in its 4th phase report, the authorities are expected to pay special attention to whistleblowers' reports and update best practices on hotlines and whistleblowers' protection in the country.

Whistleblowing channels must be able to receive and deal with reports effectively; otherwise, whistleblowers will seek other available avenues to make their report, such as (i) reporting directly to external auditors as a way of pressuring for an investigation or (ii) accessing the authority themselves. These alternatives to companies' internal hotlines may be reinforced by the recent bill of laws providing monetary rewards for whistleblowers whose information leads to effective investigation and disgorgement by public bodies.

Although the idea of remunerating whistleblowers has its obstacles - mainly cultural - in Brazil, it is widely used in American jurisdictions. See the recent case in 2023 in which the US SEC paid the largest award ever to a whistleblower, totaling 279 million dollars. The whistleblower compensation practice may expand with the recent changes brought by the U.S. Foreign Extortion Prevention Act - FEPA, which increased the scope and reach of U.S. laws to target foreign public officials who have demanded or accepted undue advantages from U.S. companies and individuals.

Whistleblowing rules and protection for whistleblowers have also caused numerous discussions in the European Union due to the different laws - and various levels of protection - adopted by countries when implementing the European Commission's Directives, with a direct impact on multinationals operating in more than one E.U. country.

The Brazilian Congress should also progress in protecting whistleblowers, considering the bill of law n. 1,640/2023 (currently under discussion) that provides for six months' job stability or proportional compensation. Other initiatives are also underway, guided by the OECD, to standardize the criteria of whistleblowing channels available to different government bodies.



2024 Scenario

Finally, the misuse of communication tools will also continue to be a significant issue in investigations and sanctions around the world: U.S. authorities have fined companies millions for "widespread and lasting failures" to maintain the internal controls and records required by the regulatory authority in the face of the pervasive use of communication applications, including WhatsApp, iMessage, and Signal.

Given Brazil's culture of parallel use of communication tools, disciplining employees to comply with professional and employer-authorized platforms continues to be a significant challenge for companies.



Money Laundering Prevention: Crypto Assets and Sports Betting

Despite the publication in December 2022 of the Brazilian Legal Framework for Crypto Assets, which defined virtual assets, service providers, and the crime of fraud using crypto assets and their penalties, there are still several fronts to be implemented in the country. Bill n. 3.706/2021, currently under analysis by the Constitution and Justice Committee - CCJ, aims to bring greater clarity to the prevention and combating of criminal conduct related to this sector by proposing the segregation of assets for cryptocurrency exchanges in Brazil and the criminalization of the conduct of (i) the constitution of financial pyramids; and (ii) the intermediation or negotiation of crypto assets with purposes of committing crimes.

On November 8, 2023, the Central Bank of Brazil stated that cryptocurrency exchanges do not need authorization or a license to operate in the country. However, the Bank is expected to issue regulations regarding exchanges and the assets they trade in the second quarter of 2024.

Advances in transparency and control of transactions with crypto assets are directly proportional to the relevance that these assets are gaining in the market. Similarly, their use for criminal activities and the involvement of major players in high-profile media cases have attracted even more attention to the sector from regulatory bodies.



2024 Scenario

In this context, initiatives to regulate the cryptocurrency market are beginning to emerge. See the SEC's approval on January 10 of the creation of bitcoin investment funds (ETFs), which have already started to trade bitcoins on the stock exchange. ETFs allow investors - including individuals - to buy and sell shares with exposure to bitcoin without these investors directly owning the cryptocurrency. A more regulated environment will undoubtedly attract more investors, resulting in more significant growth in these markets.

At the same time, regulating sports betting is another issue that should move forward in 2024. In late December 2023, President Lula signed Bill n. 3.626/2023 (Federal Law n. 14,790/2023), establishing that a fixed-odds lottery is a betting system that includes virtual online gaming events and real sports-themed events, such as soccer and volleyball matches, for example, in which the bettor wins if they guess a specific condition of the game or the outcome of the match, as well as providing for taxation on the turnover of online betting companies - the bets - as well as on the winnings taken by the bettor. Online games supposedly already operate clandestinely in Brazil and would now be monitored by the government, which should prevent money laundering schemes. Yesterday (January 31, 2024), the Federal government created the bureau that should supervise bets and online games - the *Secretaria de Prêmios e Apostas*.



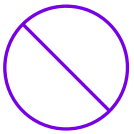
Limits to the Non-Prosecution Agreement

In November 2023, the Federal Supreme Court resumed the trial of habeas corpus n° 185.913, which discusses the limits for applying the non-criminal prosecution agreement - ANPP. The issue under discussion refers to the retroactive application of the ANPP in cases already ongoing before the Law n° 13.964/2019 - the Law that formally created the ANPP - came into force.

When finalized in 2024, the trial will define theses on the application of the ANPP and its appropriate procedural moment, such as, for example, until the final and unappealable sentence of the criminal prosecution or earlier. This agreement can be used by individuals and companies in cases involving crimes with minimum sentences of less than four years, serving as an alternative to the severe custodial sanctions established by Law.



2024 Scenario

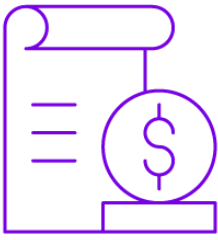


FATF report and the fight against money laundering

Last year, the Financial Action Task Force (FATF) evaluated Brazil on the efforts adopted to nationally prevent and combat money laundering, terrorist financing, and the proliferation of weapons of mass destruction (PLD/FTP).

According to the FATF report, Brazil has shown positive results in recent years. However, Brazil has yet to address in 2024 and the coming years some of the challenges highlighted in the FATF report. For example, the report mentions the need for better coordination between public authorities, an intense crackdown on laundering in “non-financial” sectors, and a closer look at consultancy and advisory activities in general, which are considered sensitive.

The FATF’s findings will directly influence the actions of Brazilian authorities throughout 2024, especially regarding demands for greater control of operations carried out by companies in regulated sectors.



Our practice

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Our [Compliance, Investigation and White-Collar](#) practice closely monitors changes and updates that will impact the market. For further clarification on this matter, or others that may be of interest to you, contact [our professionals](#).

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