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# Regulation of Lawyers' Compliance news

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# Anti-money laundering obligations for legal professionals in Brazil: the current status of the debate

In 2012, Law No 9.613 (AML Statute) was amended, updating the legal framework to comply with FAFT recommendations. New rules, substantive and procedural, brought Brazilian legislation to the third generation of AML regulation. In addition to the abolition of a former limited list of predicate offences, the amendments also broadened the list of Designated Non-Financial Businesses or Professions (DNFBPs) required to perform customer due diligence, record keeping and reporting of suspicious transactions obligations (AML regime). Besides notaries<sup>1</sup> and registers, among the new DNFBPs are those involved in providing assistance, consultancy, accounting, auditing and advising on transactions involving buying and selling of real estate; creation, operation or management of legal persons or arrangements, and buying and selling of business entities/companies, foundations or trust funds; creation and management of bank, savings or securities accounts; and financial, corporate or estate transactions (new language of Article 9, sole paragraph, nr XIV, of Law No 9.613).

The major question to arise here is whether lawyers are covered by the new provision. Given that Article 9, sole paragraph, nr XIV, does not refer to 'lawyers' or any other sort of professional but, on the contrary, its language addresses services that might be rendered by a wide range of professionals including lawyers, it has been disputed whether they would be applicable to the latter and, if so, to what extent.

The AML regime provided by the Brazilian AML Statute is not directly applicable but depends on the further issuance of specific regulation to be enacted for each kind of profession or activity obliged to comply with AML obligations (Article 14, Law No 9.613). The regulation shall be issued by the authority or self-regulatory body (SRB) in charge of regulating the relevant profession or, where

such a body does not exist, directly by the Brazilian FIU, that is, COAF. As the services envisaged in Article 9, sole paragraph, nr XIV, of Law No 9.613 might be rendered by a wide range of professionals, some of which are not covered by self-regulatory bodies, the Brazilian FIU issued a regulation addressing AML obligations for them (COAF Resolution No 24).<sup>2</sup> However, this resolution does not apply to lawyers as the duty to regulate legal professionals in Brazil is the sole responsibility of the Brazilian Bar Association ('Ordem dos Advogados do Brasil', or simply OAB), and that would be the SRB competent to implement the new legislation were lawyers deemed to be subject to the Brazilian AML Statute.

So far, the Brazilian Bar Association has not issued such regulation; on the contrary, it has passed an official legal opinion stating that lawyers are not subject to the duty to report suspicious transactions. Nevertheless, that does not mean that services rendered by lawyers are totally excluded from AML obligations.

The types of activity carried out by legal professionals in Brazil can be divided into three categories: (i) representing a client in litigation (judicial, administrative, arbitration); (ii) providing legal advice related to an actual or potential litigation, or providing legal advice in negotiations; and (iii) carrying out transactions representing and instructed by their clients.

International regulation, following the approach suggested by FATF in Resolution Nos 22 and 23, generally exonerates lawyers providing the services mentioned in (i) and (ii) above from AML regime. That also seems to be the case with the new Brazilian provision that only refers to a specific set of services: assistance, consultancy, accounting, auditing and advising in the transactions listed thereto. The new provision clearly excludes services provided in relation to an actual or potential litigation.

Even in the absence of the language of Article 9, sole paragraph, nr XIV, professional privilege, as expressly provided for in Law No 8.906 (also known as ‘Lawyers Statute’, Article 7, n II), would bar such obligations to be imposed on lawyers, as would the constitutional privilege against self-incrimination (Brazilian Constitution, Article 5, nr LXIII).

The sensitive point, however, remains with those lawyers that carry out transactions representing and instructed by their clients ((iii) above) as these services would fall within the scope of the transactions targeted by Article 9, sole paragraph, nr XIV. Initially, it might seem that these professionals could be covered by the AML regime as no litigation, actual or potential, is connected to the rendering of these services. However, the Lawyers Statute states that any *legal* assistance, consultancy and advice shall be only performed by lawyers (Article 1) who are, therefore, covered by the remaining provisions of the Statute, among them the one providing for professional privilege.

As professional privilege only applies where the professional is rendering *legal* services, when a lawyer renders another kind of service in relation to the transactions mentioned in Article 9, sole paragraph, n XIV, it will be covered by the AML regime. That is to say that professional privilege covers legal *services*, not legal *professionals*. Therefore, when a lawyer is rendering services as an accountant, financial agent, real estate agent, etc, or directly carrying out transactions referred to in Article 9, sole paragraph, n XIV, on behalf of its client, her or she will be subject to the AML regime regardless of his or her professional status.

Not being subject to AML obligations does not transform the rendering of legal services into a safe haven for lawyers, nor

does it result in impunity for those engaging in such practices. Lawyers can be (and are actually being) held criminally liable under the Brazilian AML Statute when complicit in a money laundering scheme or participating in a client’s scheme to launder money or assisting him or her in doing so. As lawyers are required to adhere to strict ethical rules that govern their relationship with clients, and may not assist a client in any wrongdoing (Brazilian Bar Association Ethical Code for Lawyers, Article 2), disciplinary action can also be imposed in cases of complicity. If he or she believes that their services are being or will be used in the furtherance of crime, he or she shall withdraw or refrain from representation.

So far, the only official document issued by the National Bar Association on the matter was the legal opinion mentioned above, exempting lawyers from suspicious transaction reporting. That does not exclude, however, the important role that the Brazilian Bar Association might play in increasing awareness and education in this matter. In connection with this, the issuance of a good practice guide – like the one issued by the ABA in the US – to help lawyers in identifying if and when a client presents an unacceptable risk would be widely welcomed. As such, the recently issued FAFT Report, ‘Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals’ (2013) might be a useful first step in identifying the particular risks of misusing a lawyer’s services to launder money.

#### Notes

- 1 In Brazil, notaries are not considered legal professionals and, thus, are not subject to the ethical rules and professional privilege regulated in Law No 8.906 (also known as, ‘Lawyers Statute’).
- 2 The official website of COAF contains the whole AML regulation: [www.coaf.fazenda.gov.br](http://www.coaf.fazenda.gov.br).