

Provision of Information for the 9th Intersessional Meeting of the Working Group on Prevention – UNCAC – 6 to 7 Sept 2018

11/05/2018

Question 1 - Preventing and managing conflicts of interest

(UNCAC Art. 7, para. 4)

Conflict of Interests Law

Brazilian Law 12813 of 2013¹ regulates, for all public agents of the Federal Executive Branch, the circumstances that constitute conflict of interest and the requirements and constraints to holders of office or job who have access to inside information.

The following circumstances are listed as constituting conflict of interest:

I – to disclose or make use of inside information, in one's own benefit or in the benefit of a third party, which was obtained because of the activities performed in office or job;

II – to perform activities which encompass the rendering of services to or the maintenance of a business relationship with an individual or legal entity that has interests in the decisions of the public official or of a collegiate body of which the said official is a member;

III – to perform, directly or indirectly, activities which, because of their nature, are not compatible with the duties exercised in office or job, including activities developed in related areas or matters;

IV – to act, even informally, as attorney-in-fact, consultant, advisor or intermediary of private interests in agencies or entities of direct or indirect public administration in any Branch of the Federal Government, States, Federal District or Municipalities;

V – to perform acts that benefit the interests of a legal entity in which the public official participates or his/her spouse, partner or relatives, related by blood or by affinity, in direct or collateral line, until the third degree, and which may be benefited by the said official or exercise influence over his/her management acts;

VI – to receive any gift from parties interested in the decisions of the public official or of a collegiate body of which the said official is a member, provided it violates the boundaries and conditions established in applicable regulations; and

¹ Available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12813.htm or, in English, at <http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/law-n-12-813-conflict-of-interests>.

VII – to render services, even in an occasional manner, to companies whose activities are controlled, monitored or regulated by the agency or entity with which the public official is associated.

The referred law also provides that high-level federal public officials² must disclose, on a daily basis, on the Internet, their schedule of public appointments. In addition, high-level officials, as well as public agents with access to inside information, are subject to restrictions based on what Law 12813 describes as circumstances that constitute conflict of interest after they have stepped down from the public office or job within the federal Executive Branch:

I – to disclose or make use of, at any time, inside information which was obtained because of the activities performed in office or job; and

II – within 6 (six) months from the date of discharge, resignation, destitution, dismissal or retirement, except when expressly authorized, as appropriate, by the Public Ethics Committee or the Office of the Comptroller General:

a) to render, directly or indirectly, any type of service to an individual or legal entity with which the public official has established relevant relations because of the duties performed in office or job;

b) to take positions of manager or advisor or establish professional liaisons with an individual or legal entity that performs activities related to the sphere of responsibilities of the office or job previously filled by the public official;

c) to enter into service, consulting or advice contracts, or contracts to perform similar activities, with agencies or entities of the federal Executive Branch that are associated with, even indirectly, the agency or entity in which the public official has filled an office or job; or

d) to intervene, directly or indirectly, in favor of private interests before the agency or entity in which the public official has filled an office or job or with which the public official has established relevant relations because of the duties performed in office or job.

Control

The body responsible for the monitoring and evaluation of conflicts of interest depends on the branch of government and the position held by the agent in question. In the Federal Executive Branch, the Public Ethics Committee (*Comissão de Ética Pública - CEP*) is responsible for overseeing and evaluating cases involving: ministers of State; president, vice-president and director, or person occupying similar position at autonomous government agencies, public foundations, state-owned companies or government-controlled companies; members of the Group of High Level Direction and Advice – DAS levels 6 and 5, or similar. The other cases in the Federal Executive Branch are, in a first moment, the responsibility of the Human Resources department of the organ or entity itself. If the

² The public agents occupying the following offices or jobs are considered high-level public officials for the purposes of Law 12813 of 2013: I – State Minister; II – appointees of special nature or similar category; III – president, vice-president and director, or similar position filled at autonomous government agencies, public foundations, state-owned companies or government-controlled companies; and IV – members of the Group of High Level Direction and Advice – DAS, levels 6 and 5, or similar.

HR finds evidence or suspicion of conflict of interest, the case is sent to the Ministry of Transparency and Comptroller General (CGU)³ to analyze and make a decision.

As a mechanism to help prevent and remedy conflicts of interest, the CGU developed the system SeCI – Electronic System of Consultations, through which civil servants or public employees can consult the Human Resources department of their organs or entities about the existence of a conflict of interest and request authorization for the exercise of private activities. The system is regulated by Interministerial Ordinance No. 333 of September 19, 2013, of the CGU and the Ministry of Planning, Budget and Management (available at: <http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index>). After a request is registered in the system, the HR department of the organ or entity expresses its opinion on the possible existence of conflict of interest. If the organ or entity suspects or is convinced that there is a possibility of conflict of interest, the consultation is sent to the CGU to decide. If the CGU decides that there is a risk of conflict of interest, the civil servant or employee can appeal, in which case the same authority in the CGU is asked to reconsider. If the authority confirms the initial decision, the case is sent to CGU's Executive Secretary for a final decision. Everything is done electronically and with defined deadlines.

As of March 31, 2018, the number of organs and entities of the Federal Executive Branch using SeCI was 243 (representing 98% of the total). Up to that moment, the system had registered a total of 4,292 requests, 571 of which were forwarded to the CGU because the body or entity identified a possible conflict of interest. In 252 of these cases the CGU confirmed the risk of conflict of interests. It interpreted that the conflict was irremediable in 169 and remediable in 83 of them, provided preventive or mitigating measures were adopted. Only 24 of these 252 decisions of the CGU were object of appeals (9.5% of the total).

Training

Based on a partnership signed with the Brazilian National School of Public Administration (ENAP), the Ministry of Transparency and Comptroller General (CGU) developed the course 'Conflict of Interest Prevention and Remedy', aiming at promoting the effective capacity to analyze cases of conflict of interest within the scope of the Federal Public Administration. The objective is to train the responsible technical staff, within each agency or entity, to carry out qualified analyses on the consultations made through the system SeCI. In 2016, 4 regular courses (with a 21-hour workload) and two reduced courses for state-owned enterprises (of 10 hours) were carried out, totaling 140 trained analysts from 42 bodies and entities. In 2017, another 2 regular courses were held, training 65 analysts.

Sanctions

The public agents who carry out the acts described in Law 12813 as conflicts of interest are subject to the penalties provided for in Law 8429 of 1992 and 8112 of 1990, which may include, for example, compensation of the damages caused and dismissal.

³ The CGU is an organ of the Federal Executive Branch responsible for the defense of public patrimony and administrative probity.

Code of Conduct for High-Level Federal Administration

Adopted in the year 2000, the Code of Conduct for High-Level Federal Administration⁴ aims to, among other objectives: establish basic rules about conflicts between public and private interests and limitations to professional activities after the exercise of public office; minimize the possibility of conflict between the private interest and the functional duty of the Federal Public Administration's authorities.

It is binding for the following public agents: Ministers and Secretaries of State; appointees of special nature, executive secretaries, secretaries or equivalent authorities occupying the position of the Senior Management and Advisory Group (DAS) level six; presidents and directors of national agencies, autonomous government agencies, foundations maintained by the State, State-owned enterprises or government-controlled enterprises.

According to the Code of Conduct, it is forbidden for these public authorities to accept gifts with a value that exceeds one hundred reais, except from foreign authorities in formal occasions in which there is reciprocity.

In addition, in their relationship with other organs and officials of the Public Administration, the public authorities must make clear the existence of a possible conflict of interests, as well as communicate any circumstance or fact that can hinder their participation in a collective decision or in a collegiate body.

The Code of Conduct also provides for constraints for the public authorities after leaving office. They may not:

I - act to the benefit or on behalf of a natural or legal person, including a union or a class association, in a proceeding or business in which he or she has participated, due to the held position;

II - provide advice to a natural or legal person, including a trade union or a class association, using information not publicly disclosed about programs or policies of the Federal Public Administration's body or entity in which he or she held office or with which he or she has had a direct and relevant relationship in the six months prior to the end of the public service.

The following activities are considered incompatible with the position previously exercised and therefore prohibited for the public authorities during a period of four months, unless there is specific legislation providing for a different term:

I - accept the position of administrator or counselor, or establish professional relationship with a natural or legal person with whom they have had a direct and relevant official relationship in the six months prior to the end of the public service;

II - intervene, for the benefit or on behalf of a natural or legal person, before a body or entity of the Federal Public Administration with which they have had a direct and relevant official relationship in the six months prior to the end of the public service.

⁴ Available at http://www.planalto.gov.br/ccivil_03/codigos/codi_conduta/cod_conduta.htm

Question 2 – asset and interest disclosure systems

(UNCAC Art. 8, para. 5)

Brazilian legislation establishes the obligation for all public agents to declare all assets and values that make up their private property. This declaration, which must be updated yearly and when leaving office, shall include real estate, movable property, livestock, money, securities, stocks, and any other type of property and assets, located in the country or abroad. When applicable, the declaration shall also cover the assets and property values of the spouse or partner, children and other persons living under the economic dependence of the declarant, excluding only domestic objects and utensils.⁵

Brazilian law also provides that the following public agents must send a copy of their asset declarations, with indication of sources of income, to the National Court of Accounts (TCU)⁶: President of the Republic; Vice-President of the Republic; Ministers of State; members of the National Congress; members of the Federal Judiciary; members of the Federal Prosecution Office; all those who hold elective positions and positions of trust, in the direct, indirect and foundational administration of any of the Powers of the Union.⁷

Federal law also provides that, in order to take office, all federal civil servants must declare if he/she holds any other public office or job⁸.

In addition to these declarations, high-level federal public officials are obliged to submit to the Public Ethics Commission (*Comissão de Ética Pública*)⁹, of the Presidency of the Republic, information about potential conflict of interests and how they will be addressed.¹⁰ The public authority must also inform the Public Ethics Commission about any proposals of work or future business in the

⁵ Law 8429 of 1992. For the purpose of this law, public agents are defined as whoever holds mandate, office, job or function – even if temporarily or without remuneration – by election, appointment, assignment, hiring or any other form of investiture or bond in one of the following organs or entities: direct, indirect or foundational administration of any of the Powers of the Union, States, Federal District or Municipalities, a company that has been incorporated as public property or any entity whose creation or funding relies for more than fifty percent on the public treasury. The Decree 5483 of 2005 regulates the asset declarations among public agents of the federal executive government.

⁶ The National Court of Accounts (*Tribunal de Contas da União* – TCU) is a collegiate institution located within the legislative branch of government to audit the executive branch. At its head are nine Ministers appointed by Congress, the President and the Office of the Public Prosecutor. The TCU carries out audits, controls, and supervises the spending of public funds.

⁷ Law 8730 of 1993.

⁸ Law 8.112 of 1990.

⁹ The Commission is an advisory body composed of seven members appointed by the President for a mandate of three years.

¹⁰ Code of Conduct for High-Level Federal Administration and Law 12813 of 2013. Public agents occupying the following offices or jobs are considered high-level public officials: I – State Minister; II – appointees of special nature or similar category; III – president, vice-president and director, or similar position filled at autonomous government agencies, public foundations, state-owned enterprises or government-controlled enterprises; and IV – members of the Group of High Level Direction and Advice – DAS, levels 6 and 5, or similar.

private sector, as well as any negotiation involving a conflict of interest, irrespective of its acceptance or rejection.¹¹

Public agents who are not high-level officials but have access to inside information¹² must submit the same information about potential conflict of interests and how they will be addressed to the Ministry of Transparency and Comptroller General (CGU).

If there is suspicion of misconduct, the National Court of Accounts, the Public Ethics Commission or the CGU can start an investigation.

Outreach to public officials about disclosure requirement

Executive Power

Guidelines and information for high-ranking officials on who, what, when and how to disclose and the legal framework are available on the website of the Commission on Public Ethics:

<http://etica.planalto.gov.br/informacoes-de-interesse-de-altas-autoridades/declaracao-confidencial-de-informacoes>

Legislative Power

Chamber of Deputies – there are three websites that provide guidance, the first covers who, when and how to declare; the second provides a list of documents deputies must complete before taking up public office; and the third is a guidance note on how to fill in the tax form (which can be used as the financial disclosure):

- <https://www2.camara.gov.br/edbr/inicio>
- <http://www2.camara.leg.br/a-camara/estruturaadm/depes/secretariado-parlamentar/paraimprimirtodosformularios>
- <http://www2.camara.leg.br/a-camara/estruturaadm/depes/secretariado-parlamentar/dirpf-declaracao-de-bens-e-direitos>

Senate – the webpage lists all documents a senator needs to present to take up public office. The list includes the financial disclosure form as well as a conflict of interest form:

http://www.senado.gov.br/senadores/novaLegislatura/posse_dos_senadores.asp

Oversight – Main agencies involved

There are two main bodies handling the financial disclosures. First, the *Ministry of Transparency and Comptroller General* (CGU) receives the disclosures of all federal public officials within the executive branch. There are approximately 700,000 federal public officials submitting their disclosure forms each year.

¹¹ Code of Conduct for High-Level Federal Administration. The group of authorities obligated by this provision does not include members of the Group of High Level Direction and Advice – DAS, level 5.

¹² Defined by Law 12813 of 2013 as: the holders of offices or jobs who, because of their position, are granted access to inside information capable of generating economic or financial advantages to them or to a third party.

Second, the National Court of Accounts (TCU) receives the financial disclosures of high level public officials (President of the Republic, Vice-President of the Republic, Ministers of State) and public officials in positions of trust within the executive branch, as well as public officials of the other branches, including the Federal Prosecution Office.

The CGU and the TCU are entitled to carry out investigations based on the financial disclosure forms. The internal HR office of each agency checks to ensure public officials have submitted their disclosure form.

With the use of a computer-based system and business intelligence, the CGU carries out a systematic examination of forms and intelligence information to analyze the evolution of wealth of public agents, in order to verify the compatibility of their private wealth with the resources they officially earn.¹³ If there is any incompatibility, the CGU shall file a wealth investigation proceeding or request the competent body or entity to do so. The findings shall be transmitted to the CGU, the Federal Prosecution Office, the TCU, the Revenue Service and the Financial Intelligence Unit (*Conselho de Controle de Atividades Financeiras – COAF*). The competent agency then determines if and what sanctions should be applied to these public officials.

The Public Ethics Commission may also apply sanctions depending on the misconduct of Ministers or other high-level public officials.

Transparency

The following authorities must make it public if he or she holds more than five percent of the capital of a government-controlled enterprise, a financial institution, or a company that negotiates with the Public Sector: I – State Minister; II – appointees of special nature or similar category; III – president, vice-president and director, or similar position filled at autonomous government agencies, public foundations, state-owned enterprises or government-controlled enterprises; and IV – members of the Group of High Level Direction and Advice – DAS, level 6, or similar.¹⁴

The National Court of Accounts must periodically publish in the National Official Journal an extract of the asset and income declarations it receives from: the President of the Republic; the Vice-President of the Republic; the Ministers of State; the members of the National Congress; the members of the Federal Judiciary; the members of the Federal Prosecution Office; and all those who hold elective positions and positions of trust, in the direct, indirect and foundational administration of any of the Powers of the Union.¹⁵

The Supreme Electoral Court (*Tribunal Superior Eleitoral*) publishes on its website summaries of assets of electoral candidates. Candidates covered range from the president of the Republic to local council officials: <http://divulgacand2012.tse.jus.br/divulgacand2012/ResumoCandidaturas.action>

¹³ Decree 5483 of 2005, which regulates Law 8429 of 1992, establishes that the Ministry of Transparency and Comptroller General (CGU), within the Federal Executive Branch, may analyze the evolution of wealth of a public agent whenever needed, in order to verify the compatibility of his/her private wealth with the resources he/she officially earns.

¹⁴ Code of Conduct for High-Level Federal Administration.

¹⁵ Law 8730 of 1993.

The summaries are backdated so the public can access, for example, summaries of the 2010 presidential candidates: <http://divulgacand2010.tse.jus.br/divulgacand2010/jsp/index.jsp>