Brazil

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I. Summary

A. Types of Organizations

Brazil is a civil law country with a Civil Code (Law 10.406 of January 10, 2002) that provides for two traditional forms of not-for-profit, private legal entities: associations and foundations. [1]

An association is an organization created by at least two individuals and/or legal entities seeking to achieve a particular goal with not-for-profit aims.

A foundation is an organization established through an endowment dedicated to a

public interest cause, with not-for-profit aims. It can be either public or private. Public foundations are composed by the public administration and must be created by law. Private foundations can be established by legal entities (including foundations) and/or individuals, either living or through the disposition of a will.

In Brazil, not-for-profit organizations (NPOs) are eligible to obtain one or more government designations that grant specific tax benefits to the entity or its funders/donors, as well as access to public funding. These designations exist at all three levels of government (federal, state, and local) although for the purpose of this Note the most relevant ones are at federal level. These designations are the following:

1. Public Utility Entity;
2. Public Interest Civil Society Organization (commonly referred to by the acronym OSCIP);
3. Social Organization (known as OS);
4. Certified Beneficent Social Assistance Entity (the certificate is known by the acronym CEBAS).

The Public Utility designation is granted by the Ministry of Justice pursuant to Law 91/1935. To be eligible, the entity must demonstrate effective work in the previous three years. [2]

The OSCIP designation is granted by the Ministry of Justice pursuant to Law 9790/1999. To be eligible, the entity cannot have public employees and/or officials in its governing bodies, and it must abide by some restrictive rules about transparency, accountability and conflict of interest. [3]

The OS designation is currently very restrictive, as it is granted on a discretionary basis by the federal government on the advice of the Ministry in charge of the field of activity of the concerned NPO, pursuant to Law 9637/1998. To be eligible, the entity must have public officials in its governing bodies. [4]

The CEBAS designation is the only one that an entity may have concurrently with one of the previous designations. It is granted to NPOs with activities in the fields of health, education, or social assistance, by the Ministry in charge of the corresponding field. [5]

None of the above special designations are mandatory for a private entity to qualify as a not-for-profit, but they may indicate that it is more nearly equivalent to an IRC §501(c)(3) organization. Accordingly, a grant-maker should inquire whether a not-for-profit entity has one of the designations. Brazil is also in the process of implementing a new regulatory framework for civil society organizations. [6]

B. Tax Laws

The Constitution exempts educational and social assistance NPOs from taxes on their revenues, assets, and services. In order to be eligible, the NPO cannot distribute profits and must demonstrate, through valid accounting records, that all its expenditures were related to its statutory aims. These requirements mean that such

organizations are closer in status to §501(c)(3) organizations in the US.

Organizations that do not qualify for constitutional tax exemptions may still be eligible for tax exemptions granted by law at the federal, state, and municipal levels. Further, NPOs with Public Utility, OS, or OSCIP designations may receive tax deductible grants from corporate donors. (Individuals cannot make tax-deductible donations.)

There is no double taxation treaty between Brazil and the United States.

II. Applicable Laws

- Brazilian Federal Constitution (Articles 5(XVII-XXI), 150(VI)(c) and para. 4)
- Tax Code: Law 5.172 of October 25, 1966 (Articles 9, 14, and 111) (Portuguese) (English Excerpt)
- Civil Code: Law 10.406 of January 10, 2002 (Title II, Chapter II-III) (Portuguese) (English Excerpt)
- Legislation on Public Utility: Law 91 of August 28, 1935 (Portuguese) (English Excerpt); Decree 50.517 of May 2, 1961 (Portuguese) (English Excerpt)
- Legislation on Public Interest Civil Society Organizations: Law 9.790 of March 23, 1999 (Portuguese); Decree 3.100 of June 30, 1999 (Portuguese) (English Excerpt)
- Legislation on Social Organizations: Law 9.637 of May 15, 1998 (Portuguese) (English Excerpt); Decree 5.396 of March 21, 1995 (Portuguese)
- Legislation on Certified Social Assistance Entities: Law 12.101 of November 27, 2009; Decree 7.237 of July 20, 2010 (Portuguese)
- Law on Public Registries: Law 6.015 of December 31, 1973 (Title III, Chapter II, Articles 114-126) (Portuguese) (English Excerpt)
- Law on Volunteerism: Law 9.608 of February 18, 1998 (Portuguese) (English Excerpt)
- Law on Crimes Resulting from Racial Prejudice: Law 9.459 of May 13, 1997 (Portuguese) (English Excerpt), modifying Law 7.716 of January 5, 1989
- Law on Supporting People with Disabilities and their Social Integration: Law 7.853 of October 24, 1989 (Portuguese) (English Excerpt)
- Legislation on Tax Incentives for Cultural Projects: Law 8.313 of December 23, 1991 (Portuguese) (English Excerpt); Decree 5.761 of April 27, 2006 (Portuguese)
- Legislation on Tax Incentives for Sports Projects: Law 11.438 of December 29, 2006 (Portuguese) (English Excerpt); Decree 6.180 of August 3, 2007 (Portuguese)
- Legislation on Tax Incentives for Child Protection Projects: Law 8.069 of July 13, 1990 (Portuguese) (English Excerpt)
- Legislation on Tax Incentives for Elderly Protection Projects: Law 12.213 of January 20, 2010 (Portuguese) (English Excerpt)
- Legislation on Tax Incentives for Oncology and People with Disabilities Health Care Projects – Law 12.715 of September 17, 2012 and Decree 7.988 of April 17, 2013.
- Legislation on Conditions for Tax Exemptions: Law 9.532 of December 10,

1997 (Portuguese) (English Excerpt)

- Legislation on Tax Deduction: Law 9.249 of December 26, 1995 (Portuguese) (English Excerpt)
- Provisional Measure ("*Medida Provisóra*") 2.158-35 of August 24, 2001 (Article 59) (Portuguese); Law 9.249 of December 26, 1995 (Article 13, §2, III) (Portuguese)
- Decree 6.170 of July 25, 2007; Ministerial Ordinance No. 507 of November 24, 2011 (Portuguese)
- Law on the Remuneration of Civil Society Organization Officers: Law 12.868 of October 15 2013 (Portuguese)
- Law on Partnerships between the Public Administration and Civil Society Organizations: Law 13.019 of July 31, 2014 (Portuguese) (English)
  Legislation postponing the entering into force of Law 13.019 of July 31, 2014: Provisional Measure 658 of October 29, 2014 (Portuguese)

III. Relevant Legal Forms

A. General Legal Forms

1) *Association*: An association is a self-governed and voluntary organization formed by at least two persons for one or more non-profitable purposes set forth in its founding documents and charter.

The Brazilian Constitution provides expansive protection for the right to freedom of association, including a guarantee against state interference, although it prohibits paramilitary groups (Brazilian Federal Constitution Article 5 (XVII-XXI)). Since Brazil is a civil law country, having legal personality is essential for entering into relationships with third parties or possessing assets. An association acquires legal personality by registering its articles of incorporation and statutes with a notary in charge of the legal entity public register office, along with paying a small fee (Civil Code Article 45; Law 6.015/73 Article 120). There is no need to obtain prior authorization from a government body to acquire legal personality and begin possessing rights under the Brazilian legal system.

2) *Private Foundation*: Often referred to simply as a foundation, a private foundation is a not-for-profit private legal entity with an endowment. According to Brazilian legal doctrine, a foundation is defined as a collection of assets to which legal personality is granted by an operative law and that is devoted to public interest purposes (though, as discussed below, only certain public interest purposes qualify). The foundation's goals are recorded in a written declaration, which must be registered with a public notary.

The Civil Code establishes that the creation of foundations is limited to religious, moral, cultural, or assistance purposes (Civil Code Article 62). However, common understanding accommodates other public interest purposes through a broad interpretation of the concepts set forth in the law.

The Civil Code requires a foundation to have sufficient assets to achieve its purposes

(Civil Code Article 63). To be established, the founder *(Instituidor)* must submit to the Attorney General's Office (*Ministério Público*) the draft deed of incorporation *(escritura pública de constituição)*, statutes, and information about the assets that will form the endowment. Upon receiving the Attorney General's approval, the founders have to register their founding documents in the proper public register office (Civil Code Articles 62-69; Law 6.015/73 Article 120). Once registered, the Attorney General's Office has oversight authority over the foundation's administration (Civil Code Article 66).

3) *Public Foundation*: A public foundation is a not-for-profit private legal entity created by the government upon legislative authorization to undertake public activities not necessarily assigned to the government. They can be established and operated under either a public law or a private law regime. Public foundations have independent administrators and boards, as well as their own assets, which may come from the state or other sources (Law 7.596/87 Article 5(IV)). Public foundations acquire legal personality through the law that create them, while foundations under the private law regime become legal entities by registering their constitutive acts in the public register office. Public foundations are not subject to oversight by the Attorney General's Office, unlike private foundations (Law 7.596/87 Article 5(IV)(3)).

B. Special Designations

a) Civil Society Organizations for the Public Interest (*"Organização da Sociedade Civil de Interesse Público,"* or OSCIP): The permissible activities to be performed by an OSCIP are found in Article 3 of Law 9.790/99 and include:

- social assistance;
- promotion of culture;
- historical preservation and cultural heritage;
- charitable free education;
- charitable free health care;
- nutrition and food security;
- environmental protection;
- promotion of voluntary work;
- promotion of economic and social development;
- experimentation with alternative employment and credit systems;
- protection of rights;
- promotion of citizenship and democracy; and
- development of alternative technologies.

An OSCIP may not distribute any surplus revenues (either general or liquid), dividends, bonuses, or assets derived from the performance of its activities to any of its members, participants, advisors, directors, employees, or donors. Accordingly, an OSCIP must use all of its assets and income in pursuit of a relevant public purpose.

Until 2003, OSCIPs could not receive tax benefits if they remunerated their directors (Law 9.532/97 Article 15(3)). Under Article 34 of Law 10.637/02, however, the governing staff's remuneration is no longer an obstacle for obtaining tax benefits. The salaries cannot exceed the limit established for the remuneration of the Federal

Executive Power (the President and Ministers of Brazil).

The law also established a special form of contract called "*Termo de Parceria,*" that allows partnerships between OSCIPs and the government. Through this legal instrument, an OSCIP may receive public funds or other governmental support to execute public interest projects. Such contracts aim at improving cooperation between government and these organizations, which must always undertake public interest activities according to the terms set forth in the law.

In order to provide more transparency and equity relating to the execution of covenants and transfer contracts ("*Contratos de Repasse*") with not-for-profits, Decree No. 7.568 of September 16, 2011 determined that the conclusion of any agreement or contract for transferring funds to private legal not-for-profits shall be preceded by an open call conducted by the grantor agency or entity to select projects or entities that are able to efficiently execute the object of the call. [7]

b) Social Organizations ("*Organizações Sociais,*"or OS): The title OS can be granted to any not-for-profit private legal entity created to privatize the administration of a public asset (e.g., laboratories, monuments, museums, transportation, public companies, public universities).

The purpose of OS's is to facilitate the privatization of public services by not-for-profit organizations. Accordingly, the tasks of these organizations are regulated strictly and always depend on a specific concession from the government. The concession of the right to manage a public company or asset is formalized through a legal instrument called a management agreement ("*contrato de gestão*"), according to Article 5 of Law 9.637/98.

The control of an OS by its founding members is limited by the management agreement, as well as by the structure of the board of directors, which is called the administration council and includes, in addition to the founding members, representatives from the government and the community. An OS that does not comply with the requirements of its management agreement may be disqualified or terminated after the respective administrative procedures are followed (Law 9.637/98 Article 16). [8]

c) Public Utility Entity ("*Declaração de Utilidade Pública,*"or DUP): The criteria for qualifying as a public utility organization are stringent. To be eligible, the organization must have the objectives of promoting education, scientific research, culture, or philanthropy. In addition, it must:

1. be properly registered as a legal entity;
2. be formed in Brazilian territory;
3. have carried on a public interest activity for more than three years;
4. not remunerate its directors under any circumstances nor distribute among any of its members or participants, advisors, directors, employees, or donors any eventual surplus or revenues (either general or liquid), dividends, bonus, and/or assets; and
5. publish a balance sheet and income statements every year.

(Decree 50.517/61 Article 2)

Further, a not-for-profit legal entity with public utility status must annually report on its activities to the Ministry of Justice. The public utility status of a not-for-profit legal entity may be revoked by the Ministry of Justice if the entity ceases to promote its purposes, or if it remunerates its directors, distributes income or assets, or fails to report on its activities for three consecutive years (Decree 50.517/61 Article 6).

d) Social Assistance Beneficent Entity enrolled in the National Council of Social Assistance (*"Entidade Beneficente de Assistência Social inscrita no Conselho Nacional de Assitência Social"* or CNAS). This designation is granted to not-for-profit private legal entities that carry out or promote "social assistance," which includes:

- providing social assistance to needy families, mothers, children, youth, and people with disabilities;
- promoting and developing rights;
- promoting citizenship;
- combating social inequalities;
- enhancing social and popular movements; and
- promoting leadership capacity.

(Law 8.742/93 Articles 2-3, regulated by Resolution 191 of November 10, 2005 of the National Council of Social Assistance)

An entity with this designation may apply for government subsidies and some types of tax exemptions on imports (Legislative Decree No. 37 of November 18, 1966). In addition, according to Article 10 of Law 8.742/93, an entity with this designation may enter into a special collaborative agreement ("*convênios*") with the government to obtain public funding.

e) Social Assistance Beneficent Entity holding the Social Assistance Beneficent Certification ("***Entidade Benficente de Assistência Social detentora do Certificado de Entidade Beneficente de Assistência Social"* or CEBAS**). This designation allows entities to qualify for special tax benefits, such as an exemption from required payments of certain fringe benefits and social security taxes.

In order to obtain the Social Assistance Beneficent Entity Certification, a not-for-profit legal entity must be considered a charitable, social assistance, educational or health organization that carries on free activities or contributes to programs for:

- families, mothers, children, youth, and aid to the elderly;
- education and rehabilitation of handicapped people;
- assistance to children and youth from troubled homes; and
- promotion of education and health assistance without charge.

Under Law 12.101 of November 27, 2009, organizations qualified as OSCIPs by the Ministry of Justice may also obtain the CEBAS designation if they develop activities in the fields of education, health or social assistance. To be entitled to the certification

and to further request the social contribution exemption, a not-for-profit must:

1. be properly registered as a legal entity in Brazilian territory for at least 12 months and provide evidence of developing public interest activities during the last fiscal year by the time of application;
2. be registered with the National Council of Social Assistance, in the case of Social Assistance entities;
3. be registered with the State or Local Council of Social Assistance (according to the location of the entity's head office), in the case of entities performing Social Assistance services;
4. provide evidence that its resources, income, profits and operational results are invested only in the national territory and for advancing its social goals;
5. not retain or receive assets of any individual or any organization that is not considered of social assistance;
6. establish in its charter that in case of dissolution, remaining assets must be transferred to another not-for-profit organization holding the Social Assistance Beneficent Entity Certification or to a public interest entity with similar aims; and
7. perform its activities without discriminating against anyone under any circumstances.

The law also requires that the organization may not remunerate its directors, counselors, or partners; and may not directly or indirectly distribute among any of its members, participants, advisors, directors, employees or donors any surplus or revenues (either general or liquid), dividends, bonus, and/or assets, for the functions or activities assigned to them by their charter.

However, Law 12.868/2013 partially relaxed this restriction: Under the Law, entities with CEBAS designation may now remunerate their leaders without losing any tax benefits, provided that a) the compensation does not exceed the 70% limit established for the remuneration of the executive branch (i.e., President and Justices of the Supreme Court; this ceiling is referred to in the Federal Executive servers); and b) that the total amount paid by the entity to its officers does not exceed five times the above value. (This is explained further in Section IV(A), below.)

It is no longer necessary for any entity to hold the Public Utility Declaration in order to acquire the CEBAS designation. However, health-related entities must demonstrate that they offer at least 60% of their services to the Public Health System (SUS). Organizations developing educational activities must demonstrate that at least 20% of their annual income is dedicated to providing free educational services for the population in general.

Under Article 21 of Law 12.101/09, CEBAS concessions and renewals are no longer the exclusive responsibility of the National Council of Social Services. The Ministries of Health, Education, and Social Development also analyze and make decisions on requests presented by not-for-profits, according to their primary performance area. [9]

For organizations developing activities in more than one of the areas specified above, the concessions and renewals of certificates will depend on the approval of the respective Ministries. This means that, in addition to complying with the general rules set forth by the law and decrees, an organization will also have to obey particular requirements specified by each of the relevant Ministries. The Ministries of Health,

Education and Social Development supervise the organizations to ensure compliance with the conditions that gave rise to the certification. At any time they may ask the organizations to submit documents and perform audits and due diligence. If non-compliance is verified, the authority that granted the certificate may cancel it, and the organization may appeal the decision.

C. The National Registry of Entities Qualified by the Ministry of Justice (CNEs/MJ)

The National System of Entities Qualified by the Ministry of Justice (CNEs/MJ) was created in January 2007 by a governmental decree. Under this decree, all organizations qualified as OSCIP or holding a Public Utility Status, along with all foreign organizations authorized to conduct activities in Brazil, must register with the Ministry of Justice and submit annual financial and activity reports. The CNEs/MJ is designed to publicize the entities' financial accounts and reports on activities carried out during the year. These reports can be presented and disseminated electronically. OSCIPs that faithfully provide their accounts once a year may obtain a "Certificate of Regularity," which is necessary for the execution of "*Termos de Parceria*" with the government and needed to benefit from fiscal incentives.

IV. Specific Questions Regarding Local Law

A. Inurement

Organizations with tax-exempt status conferred by the Brazilian Constitution (discussed further, below) should not distribute any assets or profits among their members (National Tax Code Article 14). Such organizations must devote all of their funds to the pursuit of their social purposes (Law No. 9.532/97 Article 12).

In addition, laws granting special designations – such as the Law on Civil Society Organizations and the Law on Social Organizations – prohibit the inurement of personal benefit to private individuals or for-profit entities. In general, the organization's bylaws must state that they shall not, under any circumstances, distribute among any of their members or participants, directors, advisors, employees, or donors any surplus or revenues (both general and liquid), dividends, bonuses, or assets or equity (Law 9.790/99 Article 1(1)). Fringe benefits are also prohibited. The remuneration of board members and administrators, on the other hand, is not prohibited by the Federal Constitution or by the Brazilian Tax Code (which regulates tax-exempt status conferred by the Brazilian Constitution).

Prior to 2013, the law required that not-for-profits refrain from providing remuneration to board members in order to benefit from their tax-exempt status (Law 9.532/97 Articles 12 and 15). However, Law 12.868/2013 amended the wording of Article 15 of Law 9.532/97 to authorize the remuneration of organization's leaders and directors. Law 12.868/2013 now ensures that salaries paid to a civil society

organization's officers do not prevent its exemption from tax and social contribution. However, the new Law imposes the following conditions: a) the remuneration of directors must be less than 70% of the Federal Executive servers; and b) the total amount paid by the entity to its officers may not exceed five times that value.

When it comes to the remuneration of statutory officers, there is a third condition that must be satisfied: they may not be a spouse or a relative (up to the third degree) of founders, partners, directors, counselors, benefactors or equivalent of a certified institution. Finally, the law expressly allows for the remuneration of a statutory director or officer who is cumulatively employed by the same organization, provided that there is compatibility of working hours (Law 12.868/2013 Article 6).

Organizations qualified by the Ministry of Justice as OSCIPs continue to have a specific provision in Article 4(IV) of Law 9.790/99, allowing them to remunerate directors who effectively work in the executive management of the entity or who provide specific services. In both cases, directors must be paid the market average rates in the region corresponding to the organizations' area of operation. Under Law 10.637/02 Article 34, however, the governing staff's remuneration is no longer an obstacle for the fruition of tax benefits if: (i) they are hired as employees; and (ii) their salaries do not exceed the limit established for the remuneration of members of the Federal Executive Power.

A not-for-profit entity without tax-exempt status and without any special designation is not subject to limitations regarding inurement.

B. Proprietary Interest

1) *Associations*: Founders, members and donors lose all property rights over assets granted to an association once they are registered under the association's name, except for the possibility to recover the donated assets in case of the association's dissolution.

2) *Foundations*: No founder, member, or donor can retain a proprietary interest on assets granted to foundations.

3) *Special Designations*: Founders and members of entities holding special designations and also donors cannot retain a proprietary interest in assets they contribute to such organizations.

C. Dissolution

1) *Associations*: An association may be dissolved (i) by decision of its members; (ii) according to provisions set forth in its constitutive acts; or (iii) involuntarily, by judicial order, according to a due process of law (Brazilian Federal Constitution Article 5(XIX)). The association's bylaws may establish that in case of dissolution, all members can be reimbursed the funds given to the organization. According to Article 61 of the Civil Code, any additional assets remaining upon dissolution must be transferred to a not-for-profit organization named in its bylaws or, in case of

omission, by resolution to a municipal, state, or federal institution with similar objectives.

2) *Foundations*: A foundation may be terminated if its purposes become illicit or impossible to achieve or if it reaches the end of its term, if stipulated in its constitutive acts. Any assets remaining upon dissolution must be transferred to a not-for-profit organization with similar objectives or to a government entity (Civil Code Article 69).

3) *Special Designations*: If any organization with a special designation is dissolved or has its designation revoked, all assets acquired from the government must be transferred to another organization with the same designation and similar aims. These provisions must be included in the organization's bylaws. (For example, see Law 9.790/99 Article 4(IV); Law 9.637/98 Article 2(I)(j); and Resolution No. 31/99 Article 3(IV) of the National Council of Social Assistance.)

In addition, the assets managed by Social Organizations under the Management Agreement are public property, and must revert to public administration at the time of the organization's dissolution.

D. Activities in General

1) *Associations*: Associations are generally permitted to engage in any lawful activities according to Brazil's constitutional freedoms of assembly and of association (Brazilian Constitution Article 5(XVII)). Associations are constitutionally prohibited only from pursuing paramilitary purposes.

2) *Foundations*: By definition, foundations must serve public benefit or public interest purposes. Their activities are restricted to those set forth in their constitutive documents. According to the Civil Code, they may have religious, moral, cultural and assistance purposes.

3) *Special Designations*: Organizations granted special designations are limited to the development of a host of prescribed activities:

a) Civil Society Organizations for the Public Interest (OSCIPs) may:

- promote social assistance programs;
- promote cultural activities and the protection and maintenance of historic and artistic assets;
- promote free education;
- promote free health care;
- carry on food aid programs and nutritional education programs;
- promote sustainable development and environmental protection programs;
- promote volunteerism programs;
- promote social and economic development and fight poverty;
- carry on not-for-profit experiments regarding new patterns for social production activities and alternatives for production, commerce, employment, and credit systems;
- promote the creation and consolidation of legal rights;
- promote legal services;

- promote ethics, peace, citizenship, democracy, human rights and other universal values; and
- study, research, and develop new technologies and disseminate scientific and technical knowledge regarding the activities mentioned herein.

b) Social Organizations:

- promote education;
- promote scientific research;
- promote technological development;
- promote environmental protection and preservation; and
- promote cultural activities and health care.

c) Public Utility Entities:

- promote education and scientific research programs; and
- carry on scientific research, cultural activities, and non-discriminatory philanthropic activities.

d) Social Assistance Beneficent Entities:

- provide social assistance to needy families, mothers, children, youth, and persons with disabilities;
- promote and develop rights;
- promote citizenship;
- address social inequalities;
- enhance social and popular movements; and
- promote leadership capacity.

e) Certification of Social Assistance Beneficent Entity:

These are the same as the activities listed under Social Assistance Beneficent Entity, with the addition of the ones that can be exercised by organizations qualified as OSCIPs.

E. Economic Activities

In general, not-for-profit organizations in Brazil may pursue economic activities. They can invest in the stock market, participate in mergers and acquisitions, and acquire control of companies. However, there are relevant restrictions. First, economic activities cannot constitute the primary purpose of the organization. Second, no profits or income of any kind may be distributed to employees, directors, managers, collaborators or members under any circumstances. Instead, any surplus must be used to carry out the social purposes of the organization. Further, the revenues resulting from such activities must be fully applied in Brazil to fulfill the organization's purposes (Brazil Tax Code Article 14(II)). The organization's bylaws may impose additional restrictions on its economic activities.

The Civil Code defines associations as entities organized for non-economic purposes

instead of not-for-profit, which means that these organizations may pursue *economic activities*, but not have *economic goals*.

F. Political Activities

Brazilian law generally imposes no restrictions on the ability of foundations and associations to engage in legislative or political activities. These entities may freely support candidates for public office, for instance, as well as advocate for or against legislation. Any restriction on political activities would be contained in the organization's governing documents.

The only explicit limitation on political activities applies to Organizations of the Civil Society for the Public Interest, which may not take part in political campaigns under any circumstances or support political parties or politicians in any way (Law 9.790/99 Article 16). These restrictions cover political party activities and the nomination of candidates for parliamentary and local government elections at the county level.

The law does not expressly prohibit political or legislative activities by public foundations or social organizations. However, the nature of their structure, their purposes, and the activities they undertake may implicitly keep them from engaging in political issues.

G. Discrimination

Brazilian law imposes criminal penalties on anyone who denies or restricts a student's admission to a public or a private educational institution on the basis of race or disability (Federal Law 7.716/89 Article 6, amended by Law 9.459/97 and Law 7.853/89 Article 8). In addition, an organization holding the Certification of Social Assistance Beneficent Entity may not discriminate against any person under any circumstances.

In July 2008, Brazil ratified the United Nations Convention on the Rights of Persons with Disabilities with a qualified quorum, thus affording the Convention constitutional status according to Constitutional Amendment No. 45/04. As a result, all laws in Brazil must be revised to respect, fulfill and implement the rights, principles, and guidelines established by the Convention with regard to persons with disabilities.

H. Control of Organization

In general, no restriction exists on the control of not-for-profit organizations by other organizations or persons. The Federal Constitution guarantees the freedom of self-organization of associations (Federal Constitution Article 5(XVIII)). It is possible that a Brazilian not-for-profit organization may be controlled by a foreign entity or by an American grantor charity (which requires the charity to specifically provide so in the affidavit). In such cases, at least one of the persons responsible for the organization’s activities must be Brazilian or a Brazilian proxy must be nominated.

V. Tax Laws

In order to understand the tax benefits available to not-for-profit organizations, it is necessary to have an overview of the Brazilian tax system. The power to create and collect taxes ("*tributos*") is shared among the federal government, states, the Federal District, and municipalities, and is defined and regulated by the Federal Constitution, the Brazilian Tax Code, and several other statutes. The expression "*tributos*" includes duties ("*impostos*"), public service fees ("*taxas*"), social contributions ("*contribuição social*"), improvement charges ("*contribuições de melhoria*") and economic domain intervention contributions ("*contribuição de intervenção no domínio econômico*").

A. Tax Benefits for Not-for-Profit Private Legal Entities

1. Constitutional Tax Exemption

In Brazil, tax benefits depend on the nature of the not-for-profit organization's activities rather than the nature of the organization itself. This means that the legal form of a not-for-profit is irrelevant in determining its tax benefits.

Article 150(VI)(c) of the Brazilian Constitution stipulates that the federal government, states, Federal District and cities are not allowed to tax not-for-profit private legal entities engaged in education and social assistance. This tax exemption applies only to those assets, income, and services related to the essential activities of the entity. In addition, the Article provides that statutes may specify criteria that educational and social assistance organizations must satisfy in order to obtain the tax benefit.

Article 14 of the National Tax Code stipulates that to obtain tax exemption, an educational or social assistance entity:

i. shall not distribute its assets or profits among its members;
ii. shall keep accounting books in order to promote transparency of its activities and accounts; and
iii. shall limit the use of its resources to the Brazilian territory and to maintaining and developing its aims.

Other laws impose additional conditions. For an educational or social assistance organization to be eligible for tax exemption, it must also:

i. not remunerate in any way its board members or governors (managers and staff can be remunerated) for the functions or activities assigned to them by its bylaws (see Section IV(A), infra, for additional details);
ii. invest all its funds in the maintenance and development of its objectives;
iii. keep full records of income and expenses using proper accounting procedures;
iv. keep records for at least five years to demonstrate the origin of revenues, the nature of expenses, and any other acts and transactions that may change its net worth;
v. submit income tax statements to the Federal Revenue Office annually;

vi. make sure that in case of merger, acquisition, liquidation, or dissolution, its assets are transferred to another similar organization that is also eligible for exemption; and
vii. comply with additional requirements set out in statutes related to the operation of tax-exempt organizations (Law No. 9532/97 Article 12).

Provided that the foregoing requirements are met, the educational or social assistance entity needs merely to declare that it is eligible for the exemption before the Revenue Service Authorities ("*Receita Federal*").

2. Federal Tax Exemptions

To be granted other tax benefits not stipulated in the Federal Constitution, a not-for-profit organizations must fulfill several requirements. The following taxes and duties ("*impostos*"), governed by federal laws, are applicable to not-for-profit organizations (unless otherwise specified, the requirements apply to all types of not-for-profit entities):

1) **Revenue Tax ("*Imposto de Renda*" – IRPJ)**: Full exemption from payment of the revenue tax. Entities awarded this benefit must fully complete the income tax form every year and must comply with the requirements of Article 12, items (i) to (v) of Law 9532/97 referred to above (Law 9.532/97 Article 15; Federal Constitution Article 150(VI)(c); Tax Code Law 3.470/58 Article 113; Law 5.172/66 Articles 9(IV)(c) and 14(I-III); 1999 Income Tax Law (RIR/99) Article 808(3)).

2) **Social Contribution on Profit ("*Contribuição Social Sobre o Lucro*")**: Full exemption from payment of this contribution. To benefit from it, entities must fully complete the income tax form every year and comply with the requirements of Article 12, items (i) to (v), of Law 9.532/97 cited above (Law 9.532/97 Article 15).

3) **Social Integration Program Contribution ("*Programa de Integração Social*" - PIS)**: Since 2003, education and social assistance entities must collect and pay 1% of all employees' salaries. Other not-for-profit entities must pay 0.65% of their receipts (Federal Constitution Article 195(I)(7); Law 10.637/02).

4) **Social Security Financial Contribution ("*Contribuição para o Financiamento da Seguridade Social*" - COFINS):** Full payment exemption for educational and social assistance entities. Since 2004, other not-for-profit entities must collect and pay 7.6% of their receipts (Federal Constitution Article 195(I)(7); Law 10.833/03).

5) **Social Welfare Contribution ("*Contribuição Previdenciária*" - INSS):** Full exemption to social assistance organizations that are granted both federal Public Utility Status and the Certification of Social Assistance Beneficent Entity (Federal Constitution Article 195(I)(7); Law 8.212/91 Article 55).

6) **Work Accident Fund Contribution ("*Contribuição para Acidente do Trabalho*"):** Full exemption to social assistance organizations that are granted both federal Public Utility Status and the Certification of Social Assistance Beneficent Entity (Federal Constitution Article 195(I)(7); Law 8.212/91 Article 55).

7) **Importation Tax ("*Imposto de Importação*" - II):** According to Article 2(I)(a) of

Law 8.032/90, social assistance and educational private legal entities are given special treatment on payment of the Import Tax on products imported for their activities.

8) **Industrialized Products Tax ("*Imposto de Produtos Industrializados*" - IPI)**: Social assistance and educational entities' products are fully exempted from IPI since they are for their own use or are freely distributed to their students (Decree 4.544/2002).

9) **Credit, Exchange and Insurance Operations Tax ("*Imposto sobre operações de crédito, câmbio e seguro*" - IOC e "*Imposto sobre Operações Financeiras*" - IOF)**: There are no exemptions from payment of Credit, Exchange and Insurance Operations Tax or the Financial Operations (capital gains) Tax (Law 5.143/66).

10) **Rural Real Estate Tax ("*Imposto Territorial Rural*" - ITR)**: Full exemption from payment of the Rural Real Estate Tax if the amount exempted is used to pursue the entity's goals (Federal Constitution Article 150(VI)(c); Decree 4.382/02 Article 3).

B. State and Municipal Tax Exemptions

As long as Federal Constitutional principles are observed, state and municipal governments have the right to grant not-for-profit private legal entities exemptions from state and municipal taxes.

C. Incentives for Philanthropy

1. Contributions to not-for-profit private legal entities granted Public Utility Status or OSCIP special designations

Corporate contributions to organizations granted federal Public Utility Status or Civil Society Organization for the Public Interest designations may be deducted up to 2% of the corporation's tax base operating profit ("*lucro operacional*") before the corporation calculates its revenue tax liability (Law 9.249/95 Article 13(2)).
Only corporations may claim tax benefits for such contributions. Individuals are not eligible for tax benefits for contributions to not-for-profit organizations granted Public Utility Status or OSCIP special designations.

2. Contributions to cultural projects

Law 8.313/91 ("*Lei Rouanet*") created the National Cultural Programme (Pronac), which allows projects approved by the Ministry of Culture to receive sponsorships and donations from companies and individuals, which may deduct – totally or partially – the amount invested from their income tax.

Under this law, the treatment of sponsorships differs from that of donations. [10] A company may deduct 40% of the value of its donation and 30% of the sponsorship from its income tax. The total amount of the deduction may not exceed 4% of the total tax liability (Law 8.313/91 Article 26; Law 9.532/97).

An individual may deduct 80% of the value of her/his donation and 60% of her/his

sponsorship from her/his tax income. The total amount of the deduction may not exceed 6% of the person's total tax liability (Law 8.313/91 Article 26; Law 9.532/97).

In addition, individuals and companies may deduct 100% of the value of the donation or sponsorship if they have supported certain specific activities including, but not limited to:

- theater;
- books on arts, literature and humanities;
- instrumental and erudite music;
- arts exhibitions; and
- libraries and museums.

Gospel music and corresponding events were recognized as cultural manifestations for the purposes of Rouanet Law, according to Article 31(A), except when they are promoted by churches (Law 8.313/91 as amended by Law 12.950 of January 9, 2012).

Decree 5,761/06 established mechanisms to promote the "democratization" of certain programs, projects, and activities in order to provide:

- more affordable prices for the population;
- accessible conditions for aged and disabled persons;
- the distribution of goods free of charge for beneficiaries previously identified by the Ministry of Culture; and
- the development of diffusion strategies in order to broaden access to incentivized programs, projects, and activities (Article 27 I(a)(IV).

Many states have laws concerning contributions for cultural projects and tax exemptions of ICMS for donors and sponsors. [11] Some examples include Bahia (Law 7.015/96, modified by Law 9.846 of December 28, 2005; and Law 11.899 of March 30, 2010); Ceará (Law 13.811 of August 16, 2006); Rio de Janeiro (Decree 22.486/86); Pernambuco (Law 12.310 of December 19, 2002); and São Paulo (Law 12.268/2006).

Many municipal governments also have laws that provide deductions for cultural activities. Examples include Rio de Janeiro (Municipal Law No. 1.940 of December 31, 1992 and Decree 33.384 of February 8, 2011); São Paulo (Municipal Law 10.923/90).

3. Contributions to not-for-profit private legal entities certified by the Council of Public Policies for Children and Youth

The Council of Public Policies for Children and Youth has a fund composed of revenue from government contributions as well as corporate and individual donations. The fund is used to support public policies for children and youth, and its resources may be distributed to certified organizations. Donations to the fund are deductible as follows:

- Corporate donations - Full deduction of the donation up to a limit of 1% of the income tax due; and

- Individual donations - Full deduction of the donation up to a limit of 6% of the income tax due.

4. Contributions to Sports Projects

Under Law 11.438/06 regulated by Decree No. 6.180/07 ("*Lei de Incentivo ao Esporte*"), projects approved by the Ministry of Sports can receive sponsorships and donations from companies and individuals. All projects must be approved by a Technical Commission from the Ministry of Sport before receiving donations or sponsorships.

Individuals may deduct – totally or partially – the amount invested from their income tax up to a limit of 6%, and companies may deduct up to a limit of 1%. Donations and sponsorships that directly or indirectly benefit companies or individuals that maintain relations with the donor or the respective sponsor may not be deductible.

Projects combining education and sports shall involve at least 50% of students from public schools of the surrounding area where they will be held.

Donations include:

a. free transfer of money, goods and services for projects (though not for publicity) concerning sporting and "para-sporting" activities; and
b. free distribution of tickets to sporting and "para-sporting" events by companies, to their employees or to needy communities.

The maximum deductible value will be annually fixed by the Executive Power, based on applicable corporate and individual tax rates.

5. Contributions to the National Fund for the Elderly.

Law 12.213/10 established the National Fund for the Elderly, which is designed to subsidize programs and activities that protect the social rights of the elderly, and create conditions to promote their autonomy, integration, and effective participation in society.

The procedures for taxpayers to obtain the deduction were defined by the Normative Instruction of the Federal Revenue Service No. 1.131, of February 21, 2011. According to this Normative Instruction, the sum of deductions derived from donations made to the National Fund for the Elderly and to the Fund for the Rights of Children and Youth (or to private not-for-profit legal entities certified by the National State or Municipal Councils of the Rights of Children and Youth) cannot exceed 1% of the income tax due. The donations made to this fund cannot be deducted as operating expenses. There is also an overall limit for the deductions, which corresponds to 6% of the total revenue tax liability; this includes the sum of all the deductions made to the Fund for the Rights of Children and Youth, to the National Fund for the Elderly, to cultural, sportive and "para-sportive" projects, as well as to audiovisual activities.

6. Contributions to the National Support Program to Oncology Care and the

National Support Program to Health Care of Persons with Disabilities

Provisional Measure 563 of April 3, 2012, instituted the National Program to Support Oncology Care (PRONON) in order to raise resources for preventing and fighting cancer. It also established the National Support Program to Health Care of Persons with Disabilities (PRONA/PCD), which is aimed at raising resources to stimulate and develop prevention and rehabilitation of persons with disabilities, including early diagnosis, treatment, adjustment of prostheses and mobility aids.

In order to benefit from donations and sponsorships in PRONON, a not-for-profit organization must be: (i) certified as a Social Assistance Beneficent Entity holding the Social Assistance Beneficent Certification (CEBAS), according to Law 12.101/2009; (ii) be qualified as a Social Organization (OS) according to Law 9.637/98; or (iii) be qualified as OSCIP, according to Law No. 9.790/99.

To benefit from donations and sponsorships in PRONA, a not-for-profit organization must be: (i) certified as a Social Assistance Beneficent Entity holding the Social Assistance Beneficent Certification (CEBAS), according to Law 12.101/2009; (ii) meet the requirements of Law 9.637/98 (OS Law); *and* (iii) be qualified as OSCIP, according to Law 9.790/99.

Under this regulation, companies may deduct up to 50% of donations and 40% of sponsorships from their income tax. The total amount of deduction may not exceed 4% of the total tax liability (Provisional Measure 563/12 Article 4 Section 4; Law 9.532/97).

Individuals may deduct up to 100% of donations and 80% sponsorships from their income tax. The total amount of deduction may not exceed 6% of the person's total tax liability (Provisional Measure 563/12 Article 4 Section 3 and Law 9.532/97).

D. Double Tax Treaty

There is no double tax treaty between Brazil and the United States.

VI. Knowledgeable Contacts

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Footnotes

[1] In 2003, Law 10.825/2003 revised the Civil Code to include religious organizations as a new type of organization. According to this Law, every religious organization is free to establish, organize, and define its internal structure. Moreover, the State cannot deny its registration and existence. The Law also states that the chapter of the Code concerning for-profit organizations also applies in part to associations.

[2] See http://www.planalto.gov.br/ccivil_03/Leis/1930-1949/L0091.htm.

[3] The Law provides a number of other important measures for organizations' institutional development and the increasing of legal certainty in the implementation of partnerships. Through Provisional Measure 658, of October 29, 2014, the beginning of the law's enforcement was postponed to July 2015, on the request of representatives of civil society organizations and public entities, to allow them to better prepare for the implementation of the new law.

[3] See http://www.planalto.gov.br/ccivil_03/Leis/L9790.htm

[4] See http://www.planalto.gov.br/ccivil_03/leis/l9637.htm

[5] See http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12101.htm

[6] Law 13.019 was approved by President Dilma Rousseff on July 31. Created through a participatory process with the active engagement of civil society, the Law mandates the creation of mechanisms to increase transparency in public financing of CSOs and enhance the effectiveness of state-civil society partnerships. For instance, the Law replaces the so-called "covenants" (now only applicable to partnerships involving state entities), with "collaborative terms" and "fostering terms." The Law includes provisions regarding public calls for partner organizations; and provides for the possibility of payment of organizations' indirect expenses and staff costs with transferred public funds.

As a result of the Law's adoption, the legal environment related to civil society in Brazil may undergo significant changes in the near future with the enactment of new legislation; readers of this Note are encouraged to confirm the current state of the Law and its implementation after December 2014.

[7] The public call that was optional for the conclusion of Partnership Agreements (*"Termo de Parceria")* with OSCIPs according to Law 9.790 of March 23, 1999, and Decree No. 3.100 of June 30, 1999 (regarding the qualification of NPOs as OSCIPs), is now considered mandatory.

[8] The law that creates the special OS designation has been the subject of litigation before the Supreme Court since 1998, and it is expected that it will undergo some

changes in the future.

[9] The certificate's request and renewal procedures are regulated by Decree 7.237 of July 20, 2010, updated by Decree 7.300 of September 14, 2010. According to this regulation, the first request presented by a not-for-profit organization shall be assessed within six months, except when complementary information is required by the Ministry responsible for granting the certificate. The certificates will remain valid for three years and renewals will be granted for the same period of time.

[10] Decree 5.761/06 defines a "donation" as the definitive and irreversible transfer of money or goods to the proponent – either a juridical or natural person – whose cultural program, project, or action has been approved by the Ministry of Culture. "Cultural Sponsorship" is defined as either the definitive and irreversible transfer of money or services – with a promotional purpose – or the payment of expenses and the use of realty or goods of the sponsor, without the transfer of property, for the accomplishment of a cultural program, project or action which has been approved by the Ministry of Culture (Decree 5.761/06 Article 4, IV and V).

[11] The Tax on the Circulation of Goods and Transportation and Communication Services ("*Imposto sobre Circulação de Mercadorias e Prestação de Serviços*" - ICMS) is a state tax which is covered by the Federal Constitution and by a specific national law, but many of its provisions are determined by Interstate Tax Conventions. The Federal Constitution exempts educational and social assistance not-for-profit organizations from the ICMS. Other not-for-profit organizations can be exempted from the referred tax as long as their state laws grant this benefit (Federal Constitution Article 155(II); Section 2(XII)(g); Complementary Law 87/96; specific state laws).