

BRAZIL

Current as of May 2018

Comments related to any information in this Note should be addressed to [Lily Liu](#).

TABLE OF CONTENTS

- I. Summary
 - A. Types of Organizations
 - B. Tax Laws
- II. Applicable Laws
- III. Relevant Legal Forms
 - A. General Legal Forms
 - B. Special Designations
 - C. CSOs Map
- IV. Specific Questions Regarding Local Law
 - A. Inurement
 - B. Proprietary Interest
 - C. Dissolution
 - D. Activities in General
 - E. Economic Activities
 - F. Political Activities
 - G. Discrimination
 - H. Control of Organization
- V. Tax Laws
 - A. Tax Benefits for Not-for-Profit Private Legal Entities
 - B. State and Municipal Tax Exemptions
 - C. Incentives for Philanthropy
 - D. Double Tax Treaty
- VI. Knowledgeable Contacts

I. SUMMARY

A. TYPES OF ORGANIZATIONS

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. 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.

An **association** is a traditional form of not-for-profit organization created by at least two individuals and/or legal entities seeking to achieve a particular goal with not-for-profit aims. Associations may have all kinds of purposes.

The Brazilian Civil Code also recognizes **foundations** as private legal entities. [1] 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.

By definition, foundations must serve public benefit or public interest purposes. According to the Civil Code, those purposes must be within one of the following areas: social assistance; culture, defense and preservation of historical and artistic heritage; education; health; food and nutrition security; environment defense, preservation and conservation and promotion of sustainable development; scientific research, development of alternative technologies, modernization of management systems, production and dissemination of information and technical and scientific knowledge; promotion of ethics, citizenship, democracy and human rights; and religious activities (Law 13.151/2015 Article 1). The activities of foundations are restricted to those set forth in their constitutive documents.

Brazil adopted a new regulatory framework for **civil society organizations** (CSOs) in 2014; Law 13.019/2014 was the result of extensive dialogue and consultation between civil society and the government [2]. According to Law 13.019/2014, civil society organizations are:

(a) non-profit private entities that do not distribute any results, remains, operational, gross or net surplus, dividends, waivers of any nature, shares or portions of its assets, earned through the exercise of their activities, and that implement them in full pursuit of their corporate purpose, immediately or through the establishment of an endowment or reserve fund among their shareholders or partners, directors, officers, employees, donors or third parties; (Included by Law 13.204 of 2015)

(b) cooperative societies under Law n. 9.867 of November 10, 1999 integrated by people at risk or personal or social vulnerability; those reached through programs and actions to fight poverty and generate employment and income; focused on the development, education and training of rural laborers or training of technical assistance and rural extension agents; and those trained to carry out activities or projects of public interest and of a social nature; (Included by Law 13.204 of 2015) and

(c) religious organizations that engage in activities or projects that are in the public interest and of a social nature that is distinct from those aimed at exclusively religious purposes. (Included by Law 13.204 of 2015)

Law 13.019/2014 entered in force for the union, federal district, and states in January 2016, and for the municipalities in January 2017. Because it is a national law, each federal entity can regulate it, adapting its general provisions to local specificities.

In general, the new law has resulted in positive changes, including the obligation of public calls for CSO-government partnerships and access to public funding; the possibility of

partnerships involving networks of CSOs; and the strengthening of civil society in general. However, some challenges remain, including strengthening the monitoring and evaluation of partnerships to ensure adequate accountability.

B. TAX LAWS

The Constitution exempts educational and social assistance CSOs from taxes on their revenues, assets, and services. In order to be eligible, the CSO 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, CSOs may receive tax deductible grants from corporate donors. Individuals cannot make tax-deductible donations directly to CSOs, but they can do so to projects developed by CSOs for specific beneficiary publics, such as children and adolescents, the elderly, cancer patients, persons with disabilities, or in specific fields, such as culture and sports.

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)
- Law on Partnerships between the Public Administration and Civil Society Organizations: Law 13.019 of July 31, 2014 (Portuguese) (English); Provisional Measure 658 of October 29, 2014 (Portuguese); Law 13.204 of December 14, 2015; Decree 8.726, of April, 27, 2016
- 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), as amended by Law 13.151 of July 28, 2015
- 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 8.242 of May 23, 2014 (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; Decree 7.988 of April 17, 2013
- Legislation on Conditions for Tax Exemptions: Law 9.532 of December 10, 1997 (Portuguese) (English Excerpt), as amended by Law 13.151 of July 28, 2015
- Legislation on Tax Deduction: Law 9.249 of December 26, 1995 (Portuguese) (English Excerpt)
- Provisional Measure ("*Medida Provisória*") 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 providing amendments to the Civil Code regarding the purposes of foundations, and amendments to the tax law allowing for charitable associations and foundations to remunerate officers: Law 13.151 of July 28, 2015

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-profit purposes set forth in its founding documents and charter. 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, Law 10.406/2002, Article 45; Law 6.015/1973 Article 120). Following the acquisition of legal personality, associations need to register before the Federal Revenue.

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 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).

B. SPECIAL DESIGNATIONS

CSOs may obtain one or more government designation that grants specific tax benefits to the organization or to funders and donors. These designations exist at the federal, state, and local level of government, though for the purpose of this Note, the most relevant ones are at the federal level. These designations are as follows:

1. Public Interest Civil Society Organization (OSCIP);
2. Social Organization (OS);
3. Certified Beneficent Social Assistance Entity (CEBAS).

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 closely equivalent to an IRS §501(c)(3) organization. Accordingly, a grant-maker should inquire whether a not-for-profit entity has one of these designations.

Public Interest Civil Society Organization (OCSIP)

The **OSCIP** designation is granted by the Ministry of Justice pursuant to Law 9790/1999. In order to be eligible, the organization must not have public employees and/or officials in its governing bodies, and it must abide by certain rules about transparency, accountability, and conflict of interest. [3]

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;
- ☐ Development of alternative technologies; and
- ☐ Studies and research for development and implementation of technologies concerning the mobility of persons by any means of transport.

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.

Social Organization (OS)

The **OS** designation is granted on a discretionary basis by the federal government on the advice of the Ministry in charge of the NPO's field of activity, pursuant to Law 9637/1998. In order to be eligible, the organization must have public officials in its governing bodies. [4]

The OS designation can be granted to any not-for-profit private legal entity created to privatize the administration of public assets (e.g., laboratories, monuments, museums, transportation, public companies, and public universities). Indeed, the purpose of the OS designation is to facilitate the privatization of public services by not-for-profit organizations. Accordingly, the activities 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). [5]

Social Assistance Beneficent Certification (CEBAS)

CSOs must obtain the **CEBAS** designation in order to enjoy special tax benefits, such as an exemption from paying social security taxes and certain fringe benefits. The CEBAS designation is granted to CSOs with activities in the fields of health, education, or social assistance by the Ministry in charge of the corresponding field. [6]

In order to obtain the CEBAS, 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 persons with disabilities;
- 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, for an organization to receive CEBAS certification and 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. For entities performing social assistance services, be registered with the State or Local Council of Social Assistance (according to the location of the entity's head office);
3. Provide evidence that its resources, income, profits and operational results are invested only in the national territory and for advancing its social goals;
4. Not retain or receive assets of any individual or any organization that is not considered of social assistance;
5. 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
6. Perform its activities without discriminating against anyone under any circumstances.

Additionally, health-related entities must demonstrate that they offer at least 60 percent of their services to the Public Health System (SUS). Organizations developing educational activities must demonstrate that at least 20 percent 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 under the responsibility of the Ministries of Health, Education, and Social Development. The requests are presented by not-for-profits to one of the three Ministries according to their primary performance area. [7] 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 monitor the organizations to ensure compliance with the conditions that gave rise to the certification. At any time, they may ask organizations to submit documents, provide information, and perform audits and due diligence. If non-compliance is verified, the authority granting the certificate may cancel it and the organization may appeal the decision.

C. CSOS MAP

Created by Decree 8.726/2016, which regulates Law 13.019/2014, the CSOs Map is a virtual platform that compiles information and data about CSOs in Brazil based on different

databases. The platform is managed by the Institute of Applied Economic Research (IPEA) but can be updated by CSOs themselves.

Among its various goals, the Map intends to bring more transparency to actions performed by CSOs, particularly those carried out in partnership with the public administration, and to provide more information about the relevance and diversity of their projects and activities.

The CSOs Map is available at: <https://mapaosc.ipea.gov.br>.

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 revenue (both general and liquid), dividends, bonuses, 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 not-for-profits to 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 ensures that salaries paid to civil society organizations' officers do not prevent exemption from tax and social contribution. However, the law imposes the following conditions: (a) the remuneration of directors must be less than 70 percent that of the Federal Executive Power; 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 where the organizations is operating. Under Article 34 of Law 10.637/02, 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.

As per the new text provided by Law 13.204/2015 to Article 12(a) of Law 9.532/97, charitable non-profit associations or foundations may remunerate their leaders and directors if they meet the requirements set forth in Articles 3 and 16 of Law 9.790 of March 23, 1999: Remuneration must be a) in adherence with the maximum values practiced by the market in the corresponding region where the organization develops its activities; b) approved in a decision of the higher decision-making body of the entity, and c) registered in the correspondent minutes. 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 with 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.)

According to Law 13.019/2014, civil society organizations shall provide in their bylaws that in case of their dissolution, any remaining assets should be transferred to another legal entity of a similar nature which meets the requirements of Law 13.019/2014 and whose purpose is preferably similar to its own.

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 (OSs) may:

- ☐ Promote education;
- ☐ Promote scientific research;

- ☐ Promote technological development;
- ☐ Promote environmental protection and preservation; and
- ☐ Promote cultural activities and health care.

c) Certified Social Assistance Beneficent Entities (CEBASs) may carry out all those activities that can be carried out by organizations qualified as OSCIPs. In addition, they may:

- ☐ 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. 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, 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 OSCIPs, 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 CEBAS designation 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.

The Brazilian Inclusion Law (Law 13.146/2015) entered into force in January 2016. The law compiles a series of rights concerning persons with disabilities, including the right to work, the right to an inclusive education, and the enjoyment of legal capacity. It also recognizes as a criminal offense the discrimination of 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) 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 percent of all employees' salaries. Other not-for-profit entities must pay 0.65 percent 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 percent 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 Certification of Social Assistance Beneficent Entity (Federal Constitution Article 195(I)(7); Law 12.101/09).

6) Work Accident Fund Contribution ("*Contribuição para Acidente do Trabalho*"): Full exemption to social assistance organizations that are granted both federal Public Utility Status (a status abolished as of 2015) and the Certification of Social Assistance Beneficent Entity (Federal Constitution Article 195(I)(7); Law 12.101/09).

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.

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 with OSCIP designation

Corporate contributions to organizations granted the federal OSCIP designation may deduct up to 2 percent 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)). Law 13.204/2015 extended this option, allowing all organizations that meet the requirements of Articles 3 and 16 of Law 9.790/1999 to offer such benefit to donors.

Only corporations may claim tax benefits for such contributions. Individuals are not eligible for tax benefits for these contributions to not-for-profit organizations, regardless of 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. [8] A company may deduct 40 percent of the value of its donation and 30 percent of the sponsorship from its income tax. The total amount of the deduction may not exceed 4 percent of the total tax liability (Law 8.313/91 Article 26; Law 9.532/97).

An individual may deduct 80 percent of the value of her/his donation and 60 percent of her/his sponsorship from her/his tax income. The total amount of the deduction may not exceed 6 percent 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 percent of the value of the donation or sponsorship if they have supported certain specific activities including, but not limited to:

- ☐ Theater;
- ☐ Books on art, literature, and the humanities;
- ☐ Instrumental and erudite music;
- ☐ Art 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)). [9]

Many states have laws concerning contributions for cultural projects and tax exemptions of ICMS for donors and sponsors. [10] 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 with projects approved by Councils of Public Policies for Children and Youth

The Councils of Public Policies for Children and Youth (Federal, State and Municipal) have a fund composed of revenue from government contributions as well as corporate and individual donations. These funds are 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 percent of the income tax due; and
- Individual donations - Full deduction of the donation up to a limit of 6 percent of the income tax due.

4. Contributions to Sports Projects

Under Law 11.438/06 regulated by Decree 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 percent, and companies may deduct up to a limit of 1 percent. 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 percent of students from public schools of the surrounding area where they will be held.

Donations include:

1. Free transfer of money, goods and services for projects (though not for publicity) concerning sporting and “para-sporting” activities; and
2. 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 percent 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 percent 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 (PRONAS/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 PRONAS, 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 percent of donations and 40 percent of sponsorships from their income tax. The total amount of deduction may not exceed 4 percent of the total tax liability (Provisional Measure 563/12 Article 4 Section 4; Law 9.532/97).

Individuals may deduct up to 100 percent of donations and 80 percent sponsorships from their income tax. The total amount of deduction may not exceed 6 percent 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. [11]

VI. KNOWLEDGEABLE CONTACTS

Paula Storto – paula@sbsa.com.br

Stella Camlot Reicher – stella@sbsa.com.br

Laís de Figueirêdo Lopes – lais@sbsa.com.br

Szazi Bechara Storto Rosa e Figueiredo Lopes Advogados

www.sbsa.com.br

Av, Nove de Julho, 4865 – conj. 81

São Paulo - SP - Brasil - CEP 01407-902

Tel/Fax: (55) (11) 3884 3416 or 3061 9040

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 *EU Country Roadmap For Engagement With Civil Society*, http://eeas.europa.eu/archives/delegations/brazil/documents/press_corner/news/resumorot_eiro_en.pdf. Last access in 30.5.2018.

[3] The Law provides a number of other important measures for organizations' institutional development and to increase 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.

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

[5] 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.

It is worth noting that after the impeachment of the elected President Dilma Rousseff in August 2016 and Michel Temer's inauguration as Brazil's new President, changes to the CSO regulatory framework took place. The new government defended and carried out a comprehensive labor law reform that was criticized by workers' representative organizations. The government also sought to approve social security reform that was criticized for harming the poorest Brazilians and those with lower life expectancy. Temer's government also discontinued important social programs, resulting in significant setbacks. In this vein, initiatives to cancel exemptions and immunities of several segments (including

CSOs) have been discussed; the government also issued Decree 9.190 of November 1, 2017, which sets forth the National Program for Publicization (PNP) providing for the absorption of activities by legal entities qualified as OS - Social Organizations under the terms of Law 9.637/98.

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

[7] 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] 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.

[8] 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.

[9] 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).

[10] 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).

[11] Brazil has no double tax treaties with the following countries: Argentina, Austria, Belgium, Canada, Chile, China, Denmark, Ecuador, Finland, France, Germany, Hungary, India, Israel, Italy, Japan, Luxembourg, the Netherlands, Peru, Sweden, Trinidad and Tobago, Turkey, Ukraine, and Venezuela. See <https://idg.receita.fazenda.gov.br/acesso-rapido/legislacao/acordos-internacionais/acordos-para-evitar-a-dupla-tributacao/acordos-para-evitar-a-dupla-tributacao>.