



Law Update for Clients

LATIN AMERICA - Anti-Bribery/Anti-Corruption Laws are Being Adopted, Strengthened, and Enforced

Companies Must Have Compliance Programs in Place to Prepare for Increasing Levels of Enforcement Activity

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Although corruption and bribery in Latin American countries have been viewed as pervasive for many years, a trend is developing that shows increasing enforcement activity based on the application of existing laws and the enactment of new laws in many countries. Brazil, Columbia, Mexico and Peru are among the jurisdictions in which new laws have been enacted and enforcement activities have increased. Other countries such as Argentina and Chile have also seen a rise in enforcement activity. For companies that have a presence in Latin America,

attention should be focused on these activities. **The implementation of compliance programs designed to inform about and prevent bribery and corrupt practices is essential to avoid prosecutions or to minimize penalties if a business is accused of such activities.**

This article will provide a brief overview of current anti-bribery/anti-corruption laws, as well as a brief overview of enforcement activities in these Latin American countries.

Argentina

Argentina's laws only allow for prosecution of individuals who break anti-corruption laws. Businesses are not currently liable for consequences of participation in corrupt activities. **The Argentine National Congress is considering expanding the existing laws to allow prosecution of corporations that profit from bribes, and the law would encourage**

businesses to prevent corruption by allowing corporations to avoid sanctions if they can show that they have compliance programs in place to prevent such corruption.

Former Argentine President Cristina Fernandez de Kirchner was indicted last year on corruption charges related to money-laundering and embezzlement relating to

funds targeted for public works. Other government officials are also being

investigated regarding alleged corrupt practices.

Brazil

The Clean Companies Act of 2014 classifies the following as criminal acts: bid rigging and fraud in public procurement, bribery and the attempted bribery of Brazilian public officials and foreign officials. Under this law, companies can be held liable for acts of their employees, even when the company itself was not directly engaged in the activity.

Anti-corruption compliance programs are encouraged to reduce illegal, corruption encouraging behaviors. Guidelines for corporate anti-corruption compliance programs have been issued. The guidelines state that the commitment of senior managers, corporate risk analysis, creation of compliance rules and processes, continuous monitoring, and having a compliance group in a company are critical to an effective compliance program.

Although the Brazilian legislation is among the toughest in Latin America, and there have been a few high-profile prosecutions, enforcement has not yet been significant. The law has a leniency program that allows companies to enter into plea agreements by offering to cooperate in investigations of the

alleged violations. This leniency program is not popular with prosecutors because it can be implemented by the government without prosecutorial involvement. It is still unclear how the existence of compliance programs will factor into mitigating liabilities, but ignoring the guidelines likely increases the risk of severe penalties.

Regarding enforcement activities, the former Brazilian President Dilma Rouseff was removed from office and convicted of budget manipulation. Her predecessor, President Lula da Silva was convicted of corruption and money laundering. A major investigation of corruption and bribery, referred to as Operation Car Wash (Lava Jato), has implicated many construction companies, corporate and government officials. Another corruption investigation called Zelotes has been focused on alleged payments to Brazilian tax authorities by many companies seeking to avoid fines or prosecution for claims of tax evasion. There are other active investigations in Brazil related to corruption in several state-run companies and government ministries.

Chile

Chile's laws characterize money laundering, bribery of public and foreign officials, and facilitation payments as criminal activities.

Increased penalties for violations of the law have been proposed. ***Chile's law includes an express requirement that***

companies take actions to prevent criminal activities, including the implementation of a compliance program designed to prevent prohibited activities. Compliance programs can be certified by the government's insurance regulator. It may be possible that such certification may excuse a company from legal liability, although it may simply create a higher prosecutorial burden of proof. Regardless of how the implication of certification is resolved, compliance programs must be implemented in order to

comply with the law. They will also help to reduce potential penalties.

There have been many recent corruption investigations in Chile, including one against one of Chile's largest financial holding companies (Penta Group), another involving a large mining company, and yet another focused on the pharmaceutical industry. The Chilean airline LAN was investigated by the U.S. SEC, resulting in a settlement under the FCPA. There has been increasing cooperation among investigators from the U.S. with those in other countries.

Colombia

Colombia recently enacted its first anti-bribery law targeting foreign entities. Like the FCPA, this law allows the government to impose fines and sanctions on entities registered in Colombia, parents of Colombian subsidiaries, and foreign subsidiaries of Colombian companies that gives or offers bribes to foreign officials in exchange for the official performing or omitting or delaying an act that relates to international business transactions. Penalties can be avoided or mitigated by notifying the authorities before an investigation is begun by the government.

The implementation of an anti-corruption program is expressly stated to be a mitigating factor in the determination of penalties. This law is administrative in nature, not criminal, thereby making it easier to levy sanctions than in criminal proceedings.

Several enforcement actions have been taken against government officials alleged to have been involved in procurement kick-back schemes, embezzlement of agricultural subsidies, and conspiracy to bribe oil company officials.

Mexico

In July 2016, Mexico adopted the National Anti-Corruption System, a set of laws intended to coordinate and enforce anti-corruption activities at the federal, state and

municipal levels. The administrative law enacted requirements that public officials disclose their tax returns, submit statements of assets and describe conflicts of interest.

The law imposes sanctions for bribery, collusion in public procurements, influence peddling and misuse of public funds. Companies may also be held liable for offenses committed by individuals on behalf of the company. Individuals may also have personal liabilities for offenses. Mexican law now classifies influence peddling as a criminal activity subject to fines and imprisonment.

Although full implementation of the new and amended laws may take time, it should be noted that there have been investigations into activities of President Pena Nieto and his family. FCPA-related investigations into activities of Walmart, as well as Key Energy's relationship with Mexican government

owned oil producer Pemex have also shown increased interest in prosecuting corruption.

The Mexican law also provides for mitigation of 50-70% of sanctions if a company reports past or ongoing misconduct and has implemented a compliance program. An adequate compliance program must include: a code of conduct with an enforcement process; controls and audit systems to assure internal compliance; an internal whistleblower and reporting system that allows for notice to enforcement authorities; a plan for internal discipline for employees who violate the rules; and, internal policies that prevent the hiring of people who might pose compliance risks to the company.

Peru

The government of Peru enacted the Corporate Corruption Act in 2016, effective in 2017, that holds companies liable for the bribery of public officials. The law applies to the bribery of public officials of a foreign government or international organization committed within Peru, or when the payment of the bribe is intended to obtain or keep business in Peru. ***The new law does provide that the existence of an***

adequate compliance program prior to the corrupt action can shield companies from liability.

During the past several years, Peru has stepped up its investigations into alleged corrupt activities, and has investigated and/or brought charges for corrupt activities against many regional governors and mayors.

Some key thoughts for consideration while developing compliance programs:

- A compliance program should consider how the local audience will respond, with consideration of local and cultural practices and sensitivities
- Internal investigation procedures and internal and external reporting functions must be thought through to
- assure that the activity will create useful information, and to assure that unanticipated liabilities are not created while investigating internal activities or while reporting information to external authorities
- With changing statutory and administrative rules regarding

compliance programs, companies must begin to integrate the compliance function into their operations so that they comply with laws and regulations and so they can be useful in the normal operations of the company

- With greater focus on anti-corruption activities by government authorities,

the role of an independent compliance organization may be key to keeping companies out of legal trouble, can help minimize penalties if there is legal liability, and can help support internal management processes.

Conclusion:

Compliance programs are likely to assume greater significance in Latin American countries as many countries enact tougher anti-corruption laws and as more enforcement actions are undertaken. Businesses with operations or business activities in Latin America should review their existing compliance programs for suitability in this changing environment. Businesses that do not have programs in place should start working to implement compliance programs as soon as possible.