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The FCPA in Latin America

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Recently, the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") have targeted Latin American business activity under the FCPA. Latin America is a nexus for American business opportunities, making it more likely that actors involved in corrupt business practices in that region are subject to the FCPA.

Latin American countries suffer from several major risk factors for FCPA enforcement, including institutionalized governmental corruption, government-controlled industries and opaque business regulations.

In the past, the DOJ's and SEC's efforts in this region were largely stymied by local governments that refused to legislate against, or investigate, corrupt business practices in their jurisdictions.

But in the last year, several Latin American countries have passed legislation and conducted investigations designed to root out business corruption within their borders.

This proliferation of anti-corruption activity has emboldened the DOJ and SEC to allocate more resources in the region and work with Latin American regulators to curtail corrupt business practices.

Indeed, last year, Kara Brockmeyer, the former chief of the SEC's FCPA Unit, acknowledged that there were "several cases in the pipeline" in Latin America,[1] many of which came to the fore this year.

LATIN AMERICAN ANTI-CORRUPTION LEGISLATION

History tells us that when a Latin American country enacts sweeping anti-corruption legislation, FCPA enforcement activity in that country increases.

For example, in 2014, Brazil passed the Clean Company Act of 2014, which holds companies responsible for the corrupt acts of their employees and introduced strict liability for those offenses.[2]

Since then, Brazilian authorities have worked closely with the DOJ and SEC to investigate and prosecute Brazilian corrupt business practices, leading to a steep rise in FCPA-related enforcement activity in that country.

By May 2017, no country in the world was connected to more ongoing FCPA investigations than Brazil, which was linked to 30 open and active FCPA investigations.[3]

In 2017, several Latin American countries took steps toward joining Brazil against the fight to end corrupt business activities in Latin America, making it likely that the DOJ and SEC will put these countries in their FCPA crosshairs in the near future.

Mexico

On July 19, 2017, Mexico's General Law of Administrative Accountability went into effect.[4] This law targets, among other things, any private party that conducts business activity in Mexico and is found to have:

(i) bribed public officials, including by grease payments, which the FCPA exempts;

(ii) tried to influence a public official, either economically or politically, to obtain a benefit or cause damage to a person or a public official; and/or

(iii) taken any joint action with other private parties to obtain a benefit or advantage in a federal, state or municipal procurement process.

In addition to its scope, the law establishes criminal liability for legal entities (a new legal phenomenon in Mexico). And it forces companies to implement adequate anti-corruption and compliance policies, such as:

(i) organizational guidelines that clearly establish the chain of command;

(ii) a code of conduct;

(iii) recruiting policies addressed to detect potential liabilities when conducting business with the government; and

(iv) monitoring procedures and accountability for the company's personnel.

Companies can also avoid or reduce liability if they act as whistleblowers or cooperate during investigations. Conversely, sanctions may increase if the company was aware of corruption but failed to report it to the relevant authorities.

Peru

On July 1, 2017, Peru's Law Regulating Administrative Liability of Legal Entities for the Commission of Active Transnational Bribery went into effect.[5] Similar to Mexico's anti-corruption reform, this law promises to hold companies liable for bribing government officials.

But unlike the Mexican law, Peru's law targets only companies that bribe foreign government officials or officials belonging to an "international organization."

While this law does not have a cross-border application, it applies either when the foreign government officials are located within Peru or when the bribe is intended to obtain or keep business in Peru.

Penalties under the law include temporary or permanent suspensions or bans, cancellation of licenses, and the dissolution of the legal entity in question.

Argentina

This year, the Argentinian government considered a bill that penalizes legal entities that have engaged in corrupt business practices. Among other things, this bill would accelerate the existing investigations of corruption offenses and increase the punishments for such activities.

Like Peru's anti-corruption law, Argentina's proposed law would target only bribes to foreign government officials or officials who belong to international organizations. The Argentinian government could pass the bill in the coming months.

LATIN AMERICAN FCPA ENFORCEMENT ACTIVITY

The frequency of FCPA-related investigations and enforcement actions in Latin America continues to rise. In 2016, Latin American countries scored an average of 37 out of 100 on the Corruption Perceptions Index.

Our closest Latin American neighbor, Mexico, scored among the lowest in the region with a 30, and was ranked among the lowest worldwide.

The DOJ and SEC and their international counterparts continued their focus on Latin American corruption in the first half of 2017.

Mexico

Since 2012, U.S. authorities have been investigating Wal-Mart Stores Inc. for allegedly bribing Mexican government officials to facilitate the opening of Mexican store locations.

In October 2016, U.S. authorities offered Wal-Mart a $600 million settlement, which Wal-Mart declined.[6] In May 2017, U.S. authorities offered Wal-Mart a $300 million settlement. Wal-Mart has not officially declined or accepted the offer.[7]

Peru

On July 13, 2017, former president of Peru Ollanta Humala and his wife, Nadine Heredia, surrendered in court in Lima in connection with an investigation of money laundering and conspiracy.

Humala surrendered after a judge ordered Humala and his wife detained for up to 18 months while the investigation continues.

Peruvian prosecutors accused the couple of taking $3 million in illegal campaign funds from Brazilian construction conglomerate Odebrecht S.A. during Peru's 2011 presidential election, and an undisclosed amount from deceased Venezuelan president Hugo Chávez in 2006.[8]

In December 2016, Odebrecht, along with Brazilian petrochemical company Braskem S.A., pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and agreed to a criminal penalty of at least $3.5 billion, the largest foreign bribery resolution in history.[9]

Brazil

On July 12, 2017, former president of Brazil Luiz Inácio Lula da Silva ("Lula") was convicted of corruption and money laundering and sentenced to nearly 10 years in prison.

The Brazilian court's written decision described a scheme in which Brazil's state-owned, national oil company Petroleo Brasileiro S.A. ("Petrobras") awarded contracts to construction firms that funneled money to Lula's allies.

Lula's conviction is a result of a Brazilian federal investigation of Petrobras known as "Operation Car Wash," and the corruption scandal is the largest in Brazil's history.[10]

The DOJ and SEC have been working with their Brazilian counterparts in connection with the investigation to suss out any FCPA liability.

Chile

On January 13, 2017, the SEC announced that Sociedad Quimica y Minera de Chile S.A. ("SQM"), a chemical and mining company based in Chile, agreed to pay more than $30 million to settle civil and criminal FCPA cases.

The SEC alleged that SQM made approximately $15 million in improper payments to Chilean political figures over a seven-year period.

SQM admitted to knowingly failing to implement sufficient internal controls to ensure that payments made by its officers would comply with Chilean law, and also to falsifying its books and records to cover up payments made to cronies of politicians.

Approximately half of SQM's settlement payment is meant to settle the SEC's charges, while the other half is in connection with a deferred prosecution agreement with the DOJ.[11]

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NOTES

[1] Morgan Miller, Bryan Parr and Francesca Erts, How Latin America is Stepping Up Anti-Corruption Efforts, Law 360 (December 9, 2016).

[2] Lei No. 12.846 (Brazil), Aug. 1, 2013.

[3] Thirty Companies Name Brazil in Connection with FCPA-Related Probes, The FCPA Blog (May 19, 2017).

[4] Ley General de Responsabilidades Administrativas [LGRA] [Gen. L. of Admin. Liabilities] (Mex.), July 18, 2016.

[5] Ley Que Regula La Responsabilidad Administrativa De Las Personas Juridicas Por El Delito De Cohecho Activo Transnacional, Ley No. 30424 (Peru), Mar. 17, 2016.

[6] Tom Schoenberg and Matt Robinson, Wal-Mart Balks at Paying $600-Million-Plus in Bribery Case, Bloomberg (Oct. 6, 2016).

[7] Aruna Viswanatha and Sarah Nassauer, U.S. Asks Wal-Mart to Pay $300 Million to Settle Bribery Probe, Wall Street Journal (May 9, 2017).

[8] Simeon Tegel, Latin America's Mega-Corruption Scandal Just Claimed Its Two Biggest Names, Washington Post (July 15, 2017).

[9] Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, DOJ Press Release No. 16- 1515 (Dec. 21, 2016).

[10] Alex Cuadros, The Most Important Criminal Conviction in Brazil's History, New Yorker (July 13, 2017).

[11] Chemical and Mining Company in Chile Paying $30 Million to Resolve FCPA Cases, SEC Press Release No. 2017-13 (Jan. 13, 2017); Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges, DOJ Press Release No. 17-065 (Jan. 13, 2017).

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