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Regulatory: Establishing an effective FCPA and anti-corruption compliance program in Latin America

Obstacles include a variety of governments and the U.S.'s broad interpretation of who is a foreign official

BY JAIME GUERRERO
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Over the past few years, U.S. government enforcement agencies have substantially increased the number of investigations—and resulting enforcement actions—of companies and individuals in Latin America over alleged violations of the Foreign Corrupt Practices Act (FCPA). Of particular importance—the number of FCPA prosecutions with a Latin American component is also increasing, indicating that government regulators are taking a hard look at alleged violations of the FCPA in Latin America. Specifically, in 2010 and 2011, the Department of Justice (DOJ) disclosed approximately 44 FCPA and related enforcement actions, with 14 of them, or 32 percent, having a Latin American component.

For a multi-national company operating in Latin America, the challenges inherent in conducting operations in multiple countries, with multiple cultures and languages, are compounded if the company does not have an FCPA and anti-corruption compliance program that is tailored to respond to risks associated with each country within which the company operates. The need for a robust and effective compliance program is paramount in Latin America, where many of the countries have poor perception of corruption rankings within Transparency International's annual Corruption Perception Index. In fact, should FCPA non-compliance occur, enforcement authorities will factor the absence of FCPA policies and procedures into their view of the matter and their assessment of appropriate fines and penalties.

Latin America, which is made up of South America, Central America, the Caribbean and Mexico, consists of approximately 20 countries. While there is no unifying definition of the countries that make up Latin America, the general consensus is that the term Latin America refers broadly to all of the Americas south of the U.S. where the Spanish or Portuguese languages prevail.

To be sure, the languages are substantially similar in Latin American countries. The risk associated with potential FCPA violations, however, varies significantly from country to country. This is so because of the varied political and socio-economic conditions in each of the Latin American countries within which a multi-national company may operate. Indeed, while six of the seven largest countries in Latin America are Spanish-speaking, they each operate under vastly different political systems and socio-economic conditions. The political systems range from democratic republics in Mexico, Peru, Colombia, Chile and Argentina to a near dictatorship in Venezuela.

When reviewing and assessing the effectiveness of a compliance program, it is vitally important that the multinational company understand whether a company employee is negotiating with a private individual or a "foreign official" within each country. U.S. government agencies have taken an expansive view regarding the definition of foreign officials. According to the U.S. government, a "foreign official" covers a broad range of persons—from an elected official to an employee of state-owned or state-controlled enterprises.

Moreover, even if a foreign company is not wholly owned by a foreign state, the U.S. government may still consider it an "instrumentality" of a foreign government if the government exercises substantial control over the entity. Thus, a company's compliance program must be able to identify and appropriately respond to risks associated with a company employee negotiating with a "foreign official" or with the "instrumentality" of a foreign government.

Understanding the local political and socio-economic landscape within which each country that a multinational corporation operates in Latin America will thus be critical in reviewing and assessing the effectiveness of the company's FCPA and anti-corruption compliance program.

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