CHALLENGES OF WORKING WITH INTERMEDIARIES IN EMERGING MARKETS

This Session Uses Polling

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WHO ARE YOU?

Chief Compliance Officer
Compliance Officer
Compliance Manager
Compliance Auditor
Government
Attorney
Consultant
Other
### Which location do you think poses the highest risks for your organization?

- United States and territories
- Latin America
- Asia-Pacific
- Africa
- Europe (excluding Eastern Europe)
- Eastern Europe

### What is the most common intermediary used by your organization in emerging markets?

- Sales agents
- Distributors
- Consultants
- Business partners
- Customs agents/brokers
- Lawyers
- Other (e.g., lobbyists, marketing agents)

### Does your organization conduct third party due diligence?

- No
- Yes, for all third parties
- Yes, only for high-risk third parties
Latin American countries still underperform in terms of corruption perception, exceptions made to Chile and Uruguay

**COMMON ELEMENTS IN LATIN AMERICA**

- Corruption of public officials is a crime
- Commercial bribe is not considered a crime (depends in Argentina)
- Facilitation payment is not allowed
- No obligation to adopt compliance program (in Chile is recommended but not a legal requirement)
- Violation of the Code of Conduct is not a just cause for termination of the employment agreement, unless there are grounds under the labor law.
COMMON RISKS IN LATIN AMERICA

- Judiciary system - bribing for favorable sentences or to avoid prosecution
- Police force - Off-duty police officers
- Bribes for public services - medical services or public utilities
- Bribes to enforce (or to avoid the enforcement of) intellectual property rights
- Customs - facilitation payments and bribes to import restricted products
- Local governments (municipalities) - high level of misappropriation of public funds (donations, contributions, etc.)
- Bribes to ignore environmental regulation
- Bribes for the obtaining of public contracts

INTERNATIONAL ANTICORRUPTION LAWS

- Increasingly aggressive legislation, regulation, enforcement, and government expectations:
  - Extraterritorial reach of anti-corruption laws
  - Severe fines, penalties, and disgorgement
  - Collateral consequences that impair business
  - Substantial costs and burdens of responding to inquiries
  - Potential for private litigation
  - Reputational damage

FCPA ENFORCEMENT


Source: www.fcpablog.com
FCPA ENFORCEMENT

Some of the cases involving Latin America:

- Petrobrás S.A. ("Petrobras") (Brazil)
- Odebrecht S.A. and Braskem S.A. (Brazil and others - 2016)
- *JBS S.A. (Brazil) "Settled in Brazil.
- Siemens AG (Argentina, Mexico, Venezuela - 2008)
- Wal-Mart Stores, Inc. (Mexico and Brazil)
- SBM Offshore N.V. (Brazil - 2017)
- Keppel Offshore & Marine Ltd (Brazil - 2017)
- Embraer S.A. (Brazil)
- Rolls-Royce plc (Brazil)
- Petróleos de Venezuela, S.A. ("PDVSA") (Venezuela)

REPORTS TO SEC ORIGINATED FROM LATIN AMERICA AND THE CARIBBEAN IN 2014

CAR WASH IN LATIN AMERICA (Lava Jato)

Odebrecht was involved in a sophisticated corruption network involving politicians from all over the world, including 9 countries in Latin America.

*Indicates a case settled in Brazil.
CAR WASH IN LATIN AMERICA (Lava Jato)

Agreement to facilitate investigations on Odebrecht wrongdoings

- The Brazilian Federal Prosecution Office (MPF) signed in February 2017 the largest agreement on international collaboration related to Car Wash Operation
- The agreement was signed by prosecutors from Brazil, Argentina, Chile, Colombia, Ecuador, Mexico, Peru, the Dominican Republic, Venezuela, Panama.
- These countries have committed an international collaboration in the investigations involving crimes committed by Odebrecht, its employees and directors

THIRD PARTIES

- Majority of FCPA recent cases and recent Lava Jato operation in Brazil involve third parties
- Wide range of third parties:
  - Consultants/agents
  - Law firms
  - Customs agents or freight forwarders
  - Software consulting
  - Distributors
  - Shell companies
  - Marketing consultancies
  - PR Companies
  - Engineering and construction companies
  - Joint venture partners
  - Consortium partners
  - Investment holdings

BRAZIL - ANTI-BRIBERY AND ANTI-CORRUPTION

- Main Brazilian anti-bribery law: Brazilian Penal Code (Decree-Law 2,848, 1940) for bribery of Brazilian and foreign public officials.
  - Passive corruption
  - Active corruption
  - Active corruption in international business transactions
  - Influence in international business transactions

- Legal entities cannot be held criminally liable for the crime of corruption
  - Under the Brazilian law, only individuals may be criminally prosecuted for the crime of corruption (except for environmental crimes)
  - Laws predominantly intended for punishing legal entities:
    - Brazilian Anti-corruption Law (12.401/2011)
    - Procurement Law-Law 8,666, 1993
    - Administrative Impropriety Law (Law 8,429, 1992)
BRAZIL - ANTI-BRIBERY AND ANTI-CORRUPTION

THIRD PARTY COMPLIANCE RISKS

LAW 12, 846/13 - ANTI-CORRUPTION LAW
- Strict liability
- Promise, offer or give, direct or indirectly, undue advantage
- Third Party acting in the interest or benefit of, exclusive or not
- Joint Liability (i.e. Consortium Partners)

FINE: UP TO 20% OF THE COMPANY’S GROSS REVENUE + DAMAGES

RED FLAGS - THIRD PARTIES

- Intermediary refuses to sign anti-corruption clause
- Commercial representative has family or commercial relationship with a public official.
- The agent requests his/her name to be kept secret,
- The agent insists he/she will be exclusively responsible for contacting the local government and/or he/she insists that will be responsible for all necessary licenses.
- The intermediary does not have office, employees or structure to provide services.
- Payment structure - success fee
- The agent makes strange requirements, such as the invoice to be postdated or payment to be paid in cash, or payment to another third party
- Governmental client has preference for certain consultants or agents without specific reason.

RED FLAGS - THIRD PARTIES

- Lack relevant experience
- No market value for service rendered or excessive payment for services rendered
- Any request for unusual manner of payment (a large advanced payment, off-shore, banks, third party)
- Lack of transparency in financial records
- Amendments to the original contracts without or unclear justifications
- Vague deliverables in agreements
- Shell company or unorthodox corporate structure
- Questionable background or reputation
DUE DILIGENCE

- Due diligence for hiring and supervision of third parties
  - Simple: checking of public information (internet / public entities / programs)
  - Deeper: reputation check
  - Previous: desirable; After: mitigating

- Prior verification/due diligence in case of mergers, acquisitions and corporate restructuring
  - Existence of irregularities / illicit acts
  - Vulnerabilities (i.e., lack of compliance program)
  - Avoid succession

DUE DILIGENCE

- Risk Based Due Diligence
  - Qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with government officials.

- Business rationale for including the third party in the transaction.
  - Why and what services are needed? Pricing and payments?

- Some form of ongoing monitoring of third-party relationships.
  - Services actually performed, amendments and scopes, price variations

- Compliance certification
- Approval process
- Compliance contractual provision safeguards - anti-corruption clause andSuspension and Termination Clauses
- Training
- Updated due diligence
- Auditing (exercising audit rights)

THIRD PARTIES

- Also consider:
  - Extending your company’s policies and procedures to your third parties
  - Give access to hotline/helpline/ethics line
## ANNEX - General Legal Framework in Latin America

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>Law No. 27,401</td>
<td>On March 1, 2018, Argentina’s first anti-corruption law entered into force.</td>
</tr>
<tr>
<td>Brazil</td>
<td>Law No. 12,846/2013</td>
<td></td>
</tr>
<tr>
<td>Chile</td>
<td>Law No. 20,931 amended by the Law No. 20,393</td>
<td>On May 30, 2013, the current anti-corruption law entered into force.</td>
</tr>
<tr>
<td>Colombia</td>
<td>Law No. 11,778/2016</td>
<td>Law entered into force on November 1, 2016.</td>
</tr>
<tr>
<td>Venezuela</td>
<td>Law No. 5,537 amended by the Law No. 6,135</td>
<td>Law entered into force on September 17, 2017.</td>
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**ANY QUESTIONS?**

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