

FCPA Update

March 2013 ■ Vol. 4, No. 8

Spotlight on Latin America: Overview

This is the second regional spotlight issue of *FCPA Update*, following our August-September 2012 spotlight on the Asia-Pacific region. In this issue, we provide an overview of anti-corruption developments and risks in Latin America, as well as guidance for companies that conduct business or are headquartered in the region.¹

I. Why Latin America Matters

A. U.S. Enforcement Efforts

In recent years, misconduct alleged to have occurred in Latin America has been the focus of a growing number of corporate FCPA dispositions and investigations. From 2005 to the present, 20 concluded FCPA corporate enforcement actions have included a Latin America component, representing approximately 20 percent of the total number of corporate FCPA enforcement actions during this period.² Countries identified in these resolved actions include Mexico (8 actions), Brazil (5), Argentina (4), and Venezuela (4).³ In 2012 alone, four of the twelve resolved corporate FCPA actions – one third of the total – involved alleged misconduct in Latin America.⁴

Latin America also figures prominently in fact patterns underlying ongoing investigations by the U.S. government as have been disclosed in U.S. Securities and Exchange Commission (“SEC”) filings. These include five ongoing investigations that involve activities in Brazil, Argentina, Mexico, and other Latin American countries.⁵ In particular, allegations about widespread bribery by Wal-Mart’s largest foreign subsidiary, Wal-Mart de Mexico, have garnered a great deal of media attention, most notably in two lengthy investigative reports

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1. For this issue, we use “Latin America” broadly to refer to Mexico, Central and South America, and countries in the Caribbean in which English is not the primary or national language.
2. A list of these resolved actions appears at Appendix 1.
3. See Appendix 1.
4. See *id.*; see also Paul R. Berger, Sean Hecker, Andrew M. Levine, Samantha J. Rowe, & Amanda M. Bartlett, “The FCPA in 2012: Release of the Government’s Guidance Caps a Year of Disparate Developments,” *FCPA Update*, Vol. 4, No. 6 (Jan. 2013), <http://www.debevoise.com/files/Publication/8866696d-4858-4602-b76e-130dd172a518/Presentation/PublicationAttachment/f1f8c068-ca09-45d4-ab4a-1843e6fac352/FCPAUpdateJan2013.pdf>.
5. A list of all such pending investigations involving Latin American countries appears at Appendix 3.

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Also in this issue:

Guest Column:
Anti-Corruption
Enforcement and
Policies in Brazil:
Changing Times Bring a
Host of Developments

Recent and Upcoming
Speaking Engagements
and Recent Publications

Debevoise’s recent Client Update “U.S. Enforcement Agencies Issue Extensive New FCPA Guidance” is now available in Japanese, Mandarin, Portuguese and Russian. [Click here to read the Update in those languages.](#)

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in *The New York Times* published in April and December of 2012.⁶ In addition to Mexico, Wal-Mart has disclosed ongoing inquiries or investigations involving its operations in several other countries, including Brazil.⁷ Also of note: Brazilian aviation giant Embraer – which is listed on the New York Stock Exchange and therefore qualifies as an issuer subject both to the FCPA's anti-bribery prohibitions and its accounting provisions – is continuing an internal investigation into possible FCPA violations, and is cooperating with the U.S. Department of Justice (“DOJ”) and SEC.⁸ Embraer has not disclosed the geographic scope of its investigation.

In addition, allegations of misconduct in the region have been at the core of a number of criminal prosecutions and civil enforcement actions against individuals in recent years, including actions against 48 individuals initiated since 2005.⁹ These include resolved actions, such as guilty pleas by John W. Warwick and Charles Jumet of Ports Engineering Consultants Corporation for paying bribes to Panamanian officials, and jury convictions of several individuals who committed FCPA violations in Haiti, all of whom received prison sentences.¹⁰ The list of individual prosecutions related to Latin America also includes some charges that have been dismissed, namely the dismissal of the indictments of John O’Shea, formerly of ABB, and Keith Lindsey and Steve Lee of Lindsey Manufacturing, who had been charged for allegedly paying bribes to Mexico’s state-owned electric utility, the Comisión Federal de Electricidad.¹¹

B. Business Environment

It is not surprising that Latin American countries have been featured in a significant number of FCPA prosecutions. Countries in the region have become increasingly important economic players on the global stage, while corruption remains prevalent in some countries.

Although current forecasts for economic growth in the region are not as promising as in recent years, most Latin American countries managed to avoid the worst effects of the international economic crisis.¹² Brazil has the largest economy in Latin America, the

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6. David Barstow, “Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle,” *The New York Times* (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>; David Barstow & Alejandra Xanic von Bertrab, “The Bribery Aisle: How Wal-Mart Got Its Way in Mexico,” *The New York Times* (Dec. 17, 2012), <http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html>.
7. Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q) at 14 (Dec. 4, 2012).
8. Embraer S.A., Report of Foreign Issuer (Form 6-K) at 9 (Oct. 24, 2012).
9. A list of these resolved and pending actions against individuals appears at Appendix 2.
10. See Appendix 2; see also Richard L. Cassin, “A Survey Of FCPA Sentences,” *FCPA Blog* (Feb. 28, 2012), <http://www.fcpablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html>; Bruce E. Yannett, Sean Hecker, & David M. Fuhr, “Esquenazi Sentence of 15 Years in Prison More than Doubles Previous FCPA Record,” *FCPA Update*, Vol. 3, No. 4 (Nov. 2011), <http://www.debevoise.com/files/Publication/0f4c1703-b083-4622-ac28-27f36e5f10dc/Presentation/PublicationAttachment/41b5e776-9403-4311-a47a-8fae3badb6f3/FCPAUpdateNovember2011.pdf>.
11. See Paul R. Berger, Bruce E. Yannett, Sean Hecker, & David M. Fuhr, “DOJ Terminates Proceedings in O’Shea and the SHOT Show Cases,” *FCPA Update*, Vol. 3, No. 7 (Feb. 2012), http://www.debevoise.com/files/Publication/f1606dac-62eb-4299-9bfa-5de993090940/Presentation/PublicationAttachment/db0149b4-0ec7-4633-87b6-69b728577aa1/FCPA_Update_Feb_2012.pdf.
12. See Jonathan Watts, Jonathan Franklin & Sibylla Brodzinsky, “Latin America’s Booming Economies Face Tough Test,” *The Guardian* (Aug. 15, 2012), <http://www.guardian.co.uk/business/2012/aug/15/brazil-latin-america-economic-growth>.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C. Moscow
+1 202 383 8000 +7 495 956 3858

London Hong Kong
+44 20 7786 9000 +852 2160 9800

Paris Shanghai
+33 1 40 73 12 12 +86 21 5047 1800

Frankfurt
+49 69 2097 5000

Paul R. Berger Bruce E. Yannett
Co-Editor-in-Chief Co-Editor-in-Chief
+1 202 383 8090 +1 212 909 6495
prberger@debevoise.com beyannett@debevoise.com

Sean Hecker Andrew M. Levine
Co-Editor-in-Chief Co-Editor-in-Chief
+1 212 909 6052 +1 212 909 6069
shecker@debevoise.com amlevine@debevoise.com

Steven S. Michaels Erich O. Grosz
Executive Editor Co-Managing Editor
+1 212 909 7265 +1 212 909 6808
ssmichaels@debevoise.com eogrosz@debevoise.com

Erin W. Sheehy Noelle Duarte Grohmann
Co-Managing Editor Deputy Managing Editor
+1 202 383 8035 +1 212 909 6551
ewsheehy@debevoise.com ndgrohmann@debevoise.com

Amanda M. Bartlett Samantha J. Rowe
Deputy Managing Editor Assistant Editor
+1 212 909 6950 +1 212 909 6661
ambartlett@debevoise.com sjrowe@debevoise.com

James H. Graham Michael T. Leigh
Assistant Editor Assistant Editor
+1 212 909 6526 +1 212 909 6684
jhgraham@debevoise.com mtleigh@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

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second-largest in the Americas overall, and the seventh-largest in the world. (It briefly overtook the United Kingdom for sixth place in 2011 and is expected to do so again in 2014.)¹³ Mexico's economy, which holds the number two spot in Latin America, grew at 3.9% in 2012,¹⁴ and some expect it to overtake Brazil within a decade.¹⁵ As costs rise in China, Mexico is becoming an increasingly important global manufacturing hub, currently exporting more manufactured goods than all other Latin American countries combined.¹⁶ Mexico has signed more free trade agreements than any other country in the world – four times more than Brazil and twice as many as China.¹⁷

Alongside this economic growth is the continued prevalence of corruption – or at least the perception of it – in a number of Latin American countries. Transparency International's Corruption Perceptions Index ("CPI") assigns scores ranging from 0 to 100, with higher-risk countries receiving lower scores and lower-risk countries receiving high scores. A sample of Latin American country CPI scores and rankings for 2012 appears in Table 2 below, listed from lowest to highest perceived risk of corruption.

Table 2: Transparency International Corruption Perceptions Index 2012: Rankings for Selected Latin American Countries

Country	Score	Worldwide Rank
Chile	72	20
Uruguay	72	20
Costa Rica	54	48
Brazil	43	69
Peru	38	83
Panama	38	83
Colombia	36	94
Argentina	35	102
Mexico	34	105
Bolivia	34	105
Guatemala	33	113
Ecuador	32	118
Dominican Republic	32	118
Nicaragua	29	130
Honduras	28	133
Paraguay	25	150
Haiti	19	165
Venezuela	19	165

Another recent survey, the Americas Barometer poll conducted by Vanderbilt University, also indicates that the risk of corruption is high in a number of Latin American countries. Overall, approximately 20% of those surveyed in the region indicated that they have been asked to pay

a bribe by police officers or other public officials within the past year.¹⁸ More than 40% of respondents in Haiti, Bolivia, and Ecuador said they had been asked to pay bribes over the past 12 months, compared to a low 6% in Chile (comparable to 5% in the United States).¹⁹ In Mexico and Brazil, the figures were 31% and 11%, respectively.²⁰

Corruption scandals in the region continue to make headlines. One of Brazil's latest corruption scandals became international news in November 2012, when President Dilma Rousseff announced that she had dismissed a number of officials alleged to have been involved in an influence-peddling ring. Federal police conducted raids in Brasília and São Paulo and arrested six people, including the Deputy Attorney General, Jose Weber de Holanda Alves. He and twelve others, including a former senator, are currently under investigation.²¹

C. Increasing Efforts to Fight Foreign Bribery

While the U.S. government remains a driving force in penalizing companies for corrupt payments made outside its borders, it is not alone in pursuing anti-bribery enforcement in the region. Companies doing business in the region must also be mindful of the general anti-bribery statutes

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13. See Philip Aldrick, "UK Reclaims Sixth Largest Economy Slot," *The Telegraph* (Dec. 26, 2012), <http://www.telegraph.co.uk/finance/economics/9764781/UK-reclaims-sixth-largest-economy-slot.html>.

14. See Juan Montes, "Mexico's Economy Posts Steady Growth in Fourth Quarter," *The Wall Street Journal* (Feb. 18, 2013), <http://online.wsj.com/article/SB10001424127887323949404578312630094950830.html>.

15. See "Will Brazil Remain the Country of the future?" *The Economist* (Oct. 8, 2012), <http://www.economist.com/blogs/freexchange/2012/10/growth>.

16. See *id.*

17. See Adam Thomson, "Mexico: China's Unlikely Challenger," *Financial Times* (Sept. 19, 2012), <http://www.ft.com/intl/cms/s/0/9f789abe-023a-11e2-b41f-00144feabdc0.html>.

18. Andres Oppenheimer, "Latin America's corruption starts at top," *Miami Herald* (Feb. 9, 2013), <http://www.miamiherald.com/2013/02/09/3224326/latin-americas-corruption-starts.html>.

19. *Id.*

20. *Id.*

21. Anthony Boadle, "New corruption scandal rocks Brazilian government," *Reuters* (Nov. 24, 2012), <http://www.reuters.com/article/2012/11/24/us-brazil-corruption-idUSBRE8AN0BH20121124>.

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on the books in each country in Latin America, as well as more recent legislation and enforcement initiatives to combat foreign bribery.

Last year, soon after *The New York Times's* story on Wal-Mart became global news, Mexico quickly moved to enact already-pending legislation to combat corruption in public procurement.²² In 2009, Chile criminalized bribery of foreign public officials committed abroad either by Chilean citizens or foreign nationals who “habitually reside” in Chile, and also made it a crime for companies to bribe domestic or foreign public officials.²³ As discussed elsewhere in this issue, Brazil is currently considering significant reforms to its anti-bribery law. On January 4, 2013, Peru passed Law 29,976, which gave legal status to a federal anti-corruption commission created in 2010, the *Comisión de Alto Nivel Anticorrupción*, for the purpose of coordinating actions and proposing policies aimed at preventing and combating corruption in Peru.²⁴

These three countries (Mexico, Chile, and Brazil), plus Argentina and (as of January 2013) Colombia have ratified the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”).²⁵ In addition, most Latin American members of the Organization of American States have signed the Inter-American Convention Against Corruption (“OAS Convention”), as noted in Appendix 4. Although deployment of enforcement resources in many Latin American countries, as documented by the OECD in its reviews of the law enforcement programs of signatory countries, can appear less than vigorous,²⁶ growing pressure from digitally-connected citizenries fed up with corrupt behavior will, in Latin America, as elsewhere, no doubt have increasing influence.

Beyond government law enforcement efforts, multilateral development banks have debarred a number of Latin American companies and individuals for engaging in fraudulent or corrupt conduct. The current list of firms and individuals ineligible to

participate in contracts financed by the Inter-American Development Bank (“IDB”) includes several each from countries within the region, including Peru, Guatemala, Bolivia, Paraguay, Colombia, Mexico, Panama, and Nicaragua.²⁷ Sanctioned individuals and entities also face cross-debarment by other multilateral development banks pursuant to the Agreement for Mutual Enforcement of Debarment Decisions, under which the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the IDB agreed to cross-debar companies and individuals found to have engaged in corruption, fraud, coercive practices or collusion.²⁸ Accordingly, the other banks’ lists of sanctioned entities also include some of those the IDB has declared ineligible to be awarded any IDB-financed contracts.²⁹

II. Compliance Concerns

Because Latin American countries differ substantially from one another

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22. See Sean Hecker, Bruce E. Yannett, & María Luisa Romero, “Mexico Catches Up: A New Law Against Corruption in Government Procurement,” *FCPA Update*, Vol. 3, No. 11 (June 2012), http://www.debevoise.com/files/Publication/c97a52f6-8d35-425d-ac8a-a222d7f2c8af/Presentation/PublicationAttachment/06a0bdce-0a9b-46ca-8cc0-d6f9becfa517/FCPA_Update_June_2012.pdf.
23. Criminal Code, Chapter 9bis, Section 251bis; Organic Court Code, Art. 6, No. 2; see also Transparency International, “Trends in Anti-Bribery Laws,” No. 24 at 6 (Mar. 7, 2012), www.transparency.org/files/content/corruptionqas/24_Trends_in_Anti-Bribery_Laws.pdf; Organizatoin of Economic Cooperation and Development, “Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – Chile” (June 2011), <http://www.oecd.org/chile/42097764.pdf>.
24. Law 29,976, Official Diary of Peru, No. 12315 (Jan. 4, 2013), <http://can.pcm.gob.pe/files/Normatividad/Ley29976.pdf> [Spanish]; see also “Peru Government Announces Creation of Anti-corruption Commission,” *Peruvian Times* (Feb. 2, 2010), <http://www.peruviantimes.com/02/peru-government-announces-creation-of-anti-corruption-commission/4745>.
25. Organizatoin of Economic Cooperation and Development, “Anti-Bribery Convention: Status of Ratification” (Nov. 20, 2012), <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>; Organizatoin of Economic Cooperation and Development, “Colombia joins OECD Anti-Bribery Convention” (Nov. 12, 2012), <http://www.oecd.org/daf/anti-bribery/colombiajoinsocedanti-briberyconvention.htm>.
26. See, e.g., OECD Working Group on Bribery, “Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico” (Oct. 14, 2011), <http://www.oecd.org/daf/anti-bribery/Mexicophase3reportEN.pdf>; OECD Working Group on Bribery, “Argentina: Phase 2 – Follow-up Report on the Implementation of the Phase 2 Recommendations” (Sept. 3, 2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/46057339.pdf>; OECD Working Group on Bribery, “Brazil: Phase 2 – Follow-up Report on the Implementation of the Phase 2 Recommendations” (June 4, 2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf>.
27. Inter-American Development Bank, “Sanctioned Firms and Individuals,” <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html> (last visited February 26, 2013).
28. See *id.*; see also Sean Hecker, Noelle Duarte Grohmann, & Rebecca Jenkin, “Multilateral Development Banks to Cross-Bar in Effort to Combat Corruption,” *FCPA Update*, Vol. 1, No. 10 (May 2010), <http://www.debevoise.com/files/Publication/6e353eaf-b866-4a2e-a749-48d81cf6dd09/Presentation/PublicationAttachment/d1c0f536-ffa7-4aaa-b3db-5a7a349f2d25/FCPAUpdateMay2010.pdf>.
29. See, e.g., The World Bank, “Listing of Ineligible Firms & Individuals: Fraud and Corruption,” <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (last visited Feb. 26, 2013); Asian Development Bank Published Sanctions List – Cross Debarred Entities, <http://lnadbg4.adb.org/oga0009p.nsf/sancCrossDebarred?OpenView&count=999> (last visited Feb. 26, 2013); European Bank for Reconstruction and Development, “List of Ineligible Entities,” <http://www.ebrd.com/pages/about/integrity/list.shtml> (last visited Feb. 26, 2013).

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in many ways, including resources, governance, culture, language, and the risk of corruption, there is no effective one-size-fits-all approach to anti-corruption compliance in the region. That said, companies doing business in Latin America

“Import-export, customs and currency controls are a recurring risk in Latin America, where bureaucratic requirements for economic transactions generally impose significant hindrances to the free flow of capital.”

should be aware of a number of recurring compliance concerns in the region that may lead to an increased risk of violating the FCPA or other applicable anti-bribery laws. Companies should also take steps to be informed about risks specific to the jurisdictions in which they operate or have sales. Outside advisers, including law firms and forensic auditors with firsthand experience in the region, can be helpful in evaluating risks, formulating effective

compliance programs, and conducting investigations.

Business consultants and other third-party sales facilitators. A key risk is the use of business consultants and other third-party facilitators, such as *gestores* in Mexico. *Gestores* featured prominently in the *New York Times* articles about Wal-Mart de Mexico, which reported that the company paid *gestores* tens of thousands of dollars per permit needed to open stores throughout the country.³⁰ Distributors can also be used as a mechanism to pay bribes, as the SEC recently alleged in its enforcement action against Eli Lilly for bribes paid to Brazilian health officials.³¹

Government ownership and oversight. Another key risk is the degree of government ownership and oversight in certain sectors, particularly in natural resources. Energy giants Ecopetrol and Petrobras are majority-owned by the governments of Colombia and Brazil, respectively. Other state-owned energy companies in the region include Petroecuador (Ecuador), Pemex (Mexico), and PDVSA (Venezuela).

In several recent enforcement actions involving the pharmaceutical and medical device sectors, the DOJ and SEC have considered government-employed doctors and hospital employees in several Latin American jurisdictions to be foreign

officials, including Mexico (Orthofix),³² Argentina (Biomet),³³ and Brazil (Biomet, Eli Lilly).³⁴ Similarly, veterinarians also have been considered government officials, as in the SEC’s enforcement action against Tyson Foods in 2011.³⁵

Customs and currency controls. Import-export, customs and currency controls are a recurring risk in Latin America, where bureaucratic requirements for economic transactions generally impose significant hindrances to the free flow of capital. Bribes to local officials for the purpose of evading these controls, or, even just to speed up the many approvals that can be required, are a frequent source of compliance cases and played prominently in the Nature’s Sunshine “control person” liability case in 2009.³⁶

Successor liability. Companies considering acquisitions in the region should be cognizant that they can be held liable for misconduct by the target, demonstrating the importance of adequate pre-acquisition due diligence. The risk of successor liability in connection with the acquisition of a company doing business in Latin America was illustrated by the Latin Node enforcement action in 2009. In June 2007, eLandia International acquired Latin Node, Inc., which was headquartered in Florida. It was only after the closing that eLandia discovered that its

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30. Barstow, note 6, *supra*; Barstow & Xanic von Bertrab, note 6, *supra*.

31. SEC Press Rel. 2012-273, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), <http://www.sec.gov/news/press/2012/2012-273.htm>. The SEC further alleged that Eli Lilly made improper payments to officials in Russia, China, and Poland.

32. *SEC v. Orthofix Int'l N.V.*, No. 4:12-CV-419, Complaint at ¶ 11 (E.D. Tex. July 10, 2012).

33. SEC Press Rel. 2012-50, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), <https://www.sec.gov/news/press/2012/2012-50.htm>.

34. *Id.*; SEC Press Rel. 2012-273, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), <http://www.sec.gov/news/press/2012/2012-273.htm>.

35. SEC Press Rel. 2011-42, SEC Charges Tyson Foods with FCPA Violations (Feb. 10, 2011), <http://www.sec.gov/news/press/2011/2011-42.htm>.

36. *See* SEC Litig. Rel. 21162, SEC Charges Nature’s Sunshine Products, Inc. with Making Illegal Foreign Payments (July 31, 2009), <https://www.sec.gov/litigation/litreleases/2009/lr21162.htm>.

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new acquisition had for several years been making improper payments to government officials in Honduras (as well as Yemen). Even though all of the improper payments – approximately \$2.2 million in total – were made before the acquisition, eLandia still paid a criminal fine of \$2 million after self-reporting and cooperating with the DOJ.³⁷ Furthermore, eLandia shut down Latin Node and wrote off its entire investment.³⁸

Infrastructure spending. Large infrastructure projects have formed the basis for past FCPA enforcement actions, such as those against Siemens Venezuela in connection with mass transit projects in Valencia and Maracaibo.³⁹ Brazil is currently under pressure to quickly complete large infrastructure improvements in preparation for the 2014 World Cup and the 2016 Summer Olympics, and is also spending more than \$500 billion for infrastructure investments as part of the *Programa de Aceleração do Crescimento*, or Growth Acceleration Program.⁴⁰ Companies bidding for a piece of this bounty should be alert to potential requests for improper payments.

Language differences. Although it may seem like obvious advice, it is essential for companies to translate anti-corruption policies into the local language, and to conduct training that employees,

agents, and partners can understand. The failure to do so was highlighted in the SEC's complaint against Orthofix, which alleged that Orthofix's Mexican subsidiary, Promeca, had paid bribes to Mexican officials over a seven year period. The complaint noted: "Although Orthofix disseminated some code of ethics and anti-bribery training to Promeca, the materials were only in English, and it was unlikely that Promeca employees understood them as most Promeca employees spoke minimal English."⁴¹ Indeed, companies whose regional compliance personnel lack working knowledge of Spanish and Portuguese can face very significant obstacles to achieving compliance. The ideal compliance organization, in which compliance issues are escalated at an early stage, remains difficult to achieve if compliance and internal audit and corporate security personnel lack language skills and familiarity with local norms and customary practices.

New trading relationships. As trade between Latin American countries and high-risk jurisdictions increases – for example, China has been Brazil's largest trading partner for the past several years,⁴² and lends more to Latin American countries than the World Bank and the IDB combined⁴³ – the risk increases that subsidiaries of U.S.-listed companies or U.S. domestic

concerns operating in Latin America will face heightened U.S. regulatory scrutiny. Still other companies that trade goods or services in U.S. dollars or that may, as part of trade with other regions, transit goods through (or employ service providers in) the United States, face an increased risk that trading relationships originating in Latin America could implicate the FCPA or other transnational anti-corruption regimes such as the U.K. Bribery Act.

The risk that Latin American personnel, long trained to appreciate the risks in their home countries, might fall prey to practices in their firms' operations outside Latin America is also an emerging threat. For example, if Latin American business entities covered by the FCPA are now entering into commercial transactions directly with Asian counterparties or are themselves projecting their businesses into other higher-risk jurisdictions, additional training and compliance checks may be necessary. Training on "local laws" might need to include the laws of Asian, Eastern European, and still other jurisdictions with which covered Latin American businesses are doing business.

III. Best Practices

Companies with operations in high-risk jurisdictions in Latin America should consult several key sources of guidance in

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37. See *United States v. Latin Node, Inc.*, No. 09-20239-CR, Government's Sentencing Memorandum (S.D. Fla. Apr. 3, 2009).

38. See eLandia International, Inc., Quarterly Report (Form 10-Q) at 21 (May 19, 2009); eLandia International, Inc., Quarterly Report (Form 10-Q/A) at 1, 11-13 (Sept. 5, 2008).

39. See DOJ Press Rel. 08-crm-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

40. See Ihssane Loudiyi, "Brazil Announces Phase Two of the Growth Acceleration Program," *World Bank Growth and Crisis Blog* (Mar. 30, 2010), <http://blogs.worldbank.org/growth/brazil-announces-phase-two-growth-acceleration-program>.

41. *Orthofix*, note 32, *supra*.

42. See "Brazil Sets Trade Records, Due To Chinese Demand," *Associated Press* (Jan. 2, 2012), <http://www.npr.org/2012/01/02/144587105/brazil-sets-trade-records-due-to-chinese-demand>; Malcolm Moore, "China Overtakes the US as Brazil's Largest Trading Partner," *The Telegraph* (May 9, 2009), <http://www.telegraph.co.uk/finance/economics/5296515/China-overtakes-the-US-as-Brazils-largest-trading-partner.html>.

43. See Ralph Atkins, "Global Capital Flows Plunge 60%," *Financial Times* (Feb. 28, 2013), <http://www.ft.com/intl/cms/s/0/ace926b8-80f6-11e2-9908-00144feabdc0.html>.

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developing or strengthening anti-bribery compliance and training programs. These include the following:

- DOJ and SEC's jointly-issued FCPA Guidance, formally known as "A Resource Guide to the U.S. Foreign Corrupt Practices Act,"⁴⁴
- U.S. Sentencing Guidelines (specifically, section 8B2.1),⁴⁵
- U.K. Ministry of Justice guidance regarding the prevention of bribery by commercial organizations,⁴⁶
- OECD Guidelines for Multinational Enterprises, most recently updated in 2011,⁴⁷ and
- The Committee of Sponsoring Organizations of the Treadway Commission ("COSO") Integrated Framework, which is not specific to anti-bribery compliance, but which identifies five components of effective internal controls that are helpful in this context: control environment, risk assessment, control activities, information and communication, and monitoring.⁴⁸

In particular, the long-awaited FCPA Guidance describes the following elements of an effective compliance program:

1. a commitment from senior management and a clear anti-corruption policy;
2. a concise, accessible code of conduct as well as "policies and procedures that

outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures;"

3. oversight responsibility vested with senior executives who have sufficient authority, autonomy and resources;
4. strong risk assessment and internal audit procedures;
5. periodic training and advice on FCPA compliance;
6. appropriate disciplinary procedures and positive incentives;
7. risk-based due diligence on third parties;
8. mechanisms for confidential reporting and efficient, reliable internal investigation;
9. periodic testing and review of compliance procedures; and
10. for mergers and acquisitions, thorough pre-acquisition due diligence and post-acquisition integration.⁴⁹

IV. Conclusion

With the United States only barely emerging from its severe recession, the continuing economic crisis in the Eurozone, the rapidly emerging events in the Middle East following the "Arab Spring," and the dominance in business news of global trade issues between U.S. and European

countries and Asia (particularly China), one risk to global businesses in 2013 is that anti-corruption compliance efforts in Latin America might take a back seat to other priorities. As those who live in or regularly do business in the region can readily appreciate, Latin America's continued emergence as a center of global business activity requires a corresponding allocation of scarce compliance resources. If statistics, enforcement actions, and third-party evaluations of compliance risks are a guide, in-house compliance personnel at global and regional companies will need to work diligently to address the compliance challenges faced in the region.

Bruce E. Yannett
Andrew M. Levine
Dietmar W. Prager
Noelle Duarte Grohmann

Bruce E. Yannett, Andrew M. Levine, and Dietmar W. Prager are partners and Noelle Duarte Grohmann is an associate in the firm's New York office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at beyannett@debevoise.com, amlevine@debevoise.com, dwprager@debevoise.com, and ndgrohmann@debevoise.com. Full contact details for each author are available at www.debevoise.com. The authors would like to thank associate Nicholas Folly for his research assistance.

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49. FCPA Resource Guide at 56-63.

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Appendix 1: Resolved Corporate FCPA Enforcement Actions
2005 to the Present Involving Latin American Countries/Territories

Company	Year	DOJ/SEC	Lat Am Countries/Territories
Oil States International, Inc.	2006	SEC	Venezuela
Tyco International Ltd.	2006	SEC	Brazil
Paradigm, B.V.	2007	DOJ	Mexico
Siemens AG	2008	Both	Venezuela, Argentina, Mexico
Willbros Group, Inc.	2008	Both	Ecuador, Bolivia
Control Components Inc.	2009	DOJ	Brazil
Helmerich & Payne, Inc.	2009	Both	Venezuela, Argentina
Latin Node, Inc.	2009	DOJ	Honduras
Nature's Sunshine Products, Inc.	2009	SEC	Brazil
ABB Ltd.	2010	Both	Mexico
Alcatel-Lucent S.A.	2010	Both	Costa Rica, Honduras
Pride International, Inc.	2010	Both	Mexico, Venezuela
Aon Corp.	2011	Both	Costa Rica
Ball Corporation	2011	SEC	Argentina
Bridgestone Corp.	2011	DOJ	Mexico
Tyson Foods, Inc.	2011	Both	Mexico
Biomet, Inc.	2012	Both	Brazil, Argentina
Eli Lilly and Company	2012	SEC	Brazil
Lufthansa Technik AG / BizJet International Sales and Support, Inc.	2012	DOJ	Panama, Mexico
Orthofix International NV	2012	Both	Mexico

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Latin America Overview ■ Continued from page 8

Appendix 2: Resolved or Pending Individual FCPA Enforcement Actions
2005 to the Present Involving Latin American Countries/Territories

Associated Corporate Entity	Individuals	Year Initiated	Disposition/Status	DOJ/ SEC	Countries
ABB Ltd.	Ali Hozhabri	2008	Plea	Both	Brazil, Paraguay
	John Joseph O'Shea Fernando Basurto, Jr	2009	Acquittal Plea	DOJ	Mexico
Alcatel CIT	Christian Sapsizian	2006	Plea	DOJ	Costa Rica
Bridgestone Corp.	Misao Hioki	2008	Plea	DOJ	Argentina, Brazil, Ecuador, Mexico, Venezuela
Control Components Inc.	Mario Covino	2008	Plea	DOJ	Brazil
Haiti Teleco	Jean Rene Duperval Joel Esquenazi Carlos Rodriguez Robert Antoine Juan Diaz Patrick Joseph Jean Fourcand Antonio Perez Marguerite Grandison Amadeus Richers Washington Vasconez Cruz Cecilia Zurita	2009	Conviction Conviction Conviction Plea Plea Plea Plea Plea Plea Ongoing Ongoing Ongoing Ongoing	DOJ	Haiti
Latin Node, Inc.	Manuel Caceres Jorge Granados Manuel Salvoch Juan Pablo Vasquez	2010	Plea (all)	DOJ	Honduras
Lindsey Manufacturing Company	Keith Lindsey Steve Lee Angela Aguilar Enrique Aguilar Noriega	2010	Dismissal Dismissal Dismissal Fugitive (extradition halted)	DOJ	Mexico
Nature's Sunshine Products, Inc.	Douglas Faggioli Craig D. Huff	2009	Civil penalty, Injunction Civil penalty, Injunction	SEC	Brazil
Ports Engineering Consultants Corporation	John W. Warwick Charles Jumet	2009	Plea Plea	DOJ	Panama
Pride International, Inc.	Bobby Benton Joe Summers	2009 2010	Civil penalty, Injunction Civil penalty, Injunction	SEC	Mexico, Venezuela
Siemens AG	Bernd Regendantz Uriel Sharef Herbert Steffen Andres Truppel Ulrich Bock Stephan Signer Eberhard Reichert Carlos Sergi Miguel Czysch	2011	Civil penalty Ongoing SEC dismissed; DOJ ongoing Ongoing Ongoing Ongoing Ongoing Ongoing Ongoing	SEC Both Both Both Both Both DOJ Both DOJ	Argentina
Willbros Group, Inc.	Jim Bob Brown Jason Steph Paul G. Novak James K. Tillery Gerald Janses Lloyd Biggers Carlos Galvez	2006 2007 2008 2008 2008 2008 2008	Plea Plea Ongoing (fugitive) Plea Civil penalty Civil penalty Civil penalty	Both DOJ DOJ Both SEC SEC SEC	Ecuador

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Appendix 3: SEC Disclosures Regarding FCPA Investigations Involving Latin American Countries/Territories

Company	Disclosure Date(s)	Lat Am Countries/ Territories
GlaxoSmithKline plc	20-F filed Mar. 13, 2012	Argentina; Brazil
Grifols, S.A.	F-4 filed Aug. 10, 2010 20-F filed Mar. 29, 2012	Brazil
IDT Corporation	10-K filed on Oct. 14, 2004 10-K filed on Oct. 14, 2005 10-K filed on Oct. 14, 2008 10-Q filed on June 11, 2012 10-K filed Oct. 15, 2012 10-Q filed Dec. 10, 2012	Haiti
Wal-Mart Stores, Inc.	8-K filed May 17, 2012 10-Q filed June 1, 2012 8-K filed Nov. 15, 2012 10-Q filed Dec. 4, 2012	Mexico
Zimmer Holdings, Inc.	8-K filed Oct. 12, 2007 10-Q filed Nov. 9, 2007 10-Q filed May 3, 2012	South America (countries not specified)

Appendix 4: Latin American Countries That Have Adopted the OAS Convention

Signatory	Year Entered into Force
Argentina	1997
Belize	2002
Bolivia	1997
Brazil	2002
Chile	1998
Colombia	1996
Costa Rica	1997
Dominican Republic	1999
Ecuador	1997
El Salvador	1999
Guatemala	2001
Haiti	2004
Honduras	1998
Mexico	1997
Nicaragua	1999
Panama	1998
Paraguay	1997
Peru	1997
Uruguay	1998
Venezuela	1997

Anti-Corruption Enforcement and Policies in Brazil: Changing Times Bring a Host of Developments

Although Brazilian anti-corruption law traces back in time more than 175 years, the ruling by the Brazilian Supreme Court on one of the most publicized corruption related cases in the country's history – the *Mensalão* or “big monthly allowance” matter,¹ made 2012 one of the most relevant years in recent Brazilian anti-corruption enforcement history.

Throughout the second half of 2012, the Brazilian Supreme Court practically stopped all other business to rule on the *Mensalão* case. The case involved 38 defendants, among whom were high ranking public officials, including members of Congress and the former Chief of staff of President Luiz Inácio Lula da Silva.² As a result of the Court's deliberations, most of the defendants were convicted of criminal acts including corruption and money laundering.

Although the *Mensalão* case has not necessarily created new concepts or a new legal framework in the Brazilian system – acts of corruption have been criminalized in the Brazilian Criminal Code since 1830³ – it has brought to light changes that were already in motion in Brazil's anti-corruption enforcement policies.

This is certainly a time of change in Brazil. The upcoming World Cup and

Olympic games have brought the world's attention to the Brazilian market. New investments are entering the country, bringing with them new models of doing business and a new business culture. In addition, for the past several years, Brazilian authorities have indicated a shift in their anti-corruption enforcement, investigational and prosecutorial efforts from a focus on the corrupted public official to the role of the private party who corrupts.

I. Current Brazilian Legal Framework

Under the current Brazilian legal framework, those involved with acts of corruption may face criminal, civil and administrative sanctions. If the accused is a legal entity, however, only civil and administrative proceedings and sanctions may be brought. Under Brazilian law legal entities do not have criminal liability.⁴

In general, under criminal law, civil law and administrative rules, any payment (or anything of value) offered to a public official with the intent that he or she conduct, omit or delay an official act, is illegal, regardless of value or entitlement to the action at issue. Therefore, there is no facilitating payments exception under Brazilian law.

Currently, there are no legal provisions specifically directed at anti-corruption compliance efforts and related topics – that is, there is no analogue to the internal controls requirements of the FCPA or the “adequate procedures” defense to the U.K. Bribery Act 2010 (“UKBA”) “corporate offense.” As will be further discussed in this article, there is currently a bill making its way through Brazil's Congress that would include such legal provisions in the Brazilian system.

In addition, Brazilian law does not punish private or commercial corruption/ bribery. In order for a corruption-related offense (criminal, civil or administrative) to take place, there must be the involvement of a Government institution or official.

Nevertheless, the Brazilian legal framework adopts a broad concept of “public official” for purposes of applicable criminal, civil and administrative laws.

Although the definition of public official may vary in accordance with the applicable law, in general anyone who, even if transitorily or without remuneration, works for any level, branch or agency of government, or for any company or entity owned by the government is considered a public official.⁵ The definition of public official also extends to anyone who works

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1. Brazilian Supreme Court Criminal Case at n. 470.

2. Luiz Inácio Lula da Silva was the President of Brazil at the time of the alleged criminal acts.

3. Código Criminal do Império: articles 130, 131, 132, 133, http://www.planalto.gov.br/ccivil_03/leis/lim/lim-16-12-1830.htm [Portuguese].

4. In general, under Brazilian law legal entities do not have criminal liability and therefore cannot face criminal charges. Nevertheless, administrators, employees and representatives of legal entities may be held individually criminally liable for acts of corruption/bribery involving the legal entity.

5. For criminal purposes, for instance, Article 327 of the Brazilian Criminal Code defines a public official as “anyone who, even if transitorily or without remuneration, holds a public post, employment or function.” As for civil matters, the Administrative Improbity Law (Law n. 8492/1992) considers a public official anyone who holds, “even if transitorily or without remuneration, upon election, nomination, designation, hiring or any other means of endowment a mandate, post, employment or function.” Finally, the Brazilian law on public contracts and biddings (Law 8666/93), defines public officials as “anyone who holds, even if transitorily or without remuneration, a public function or employment,” as well as “anyone who holds a post, employment or function in parastatal entities, as well as in foundations, public companies and mixed economy companies, and other entities that are, directly or indirectly, controlled by the Public Administration.”

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for a private company that is hired to provide a public service.⁶

Corruption Related Criminal Offenses

Criminal offences are generally defined in the Brazilian legal framework through specific laws or directly under Criminal

In general terms, the offense of trafficking influence, defined in Article 332 of the Criminal Code, prohibits anyone from requesting or obtaining any advantage (similar to the concept of anything of value as will be discussed in further details under the “active corruption” analysis) in exchange for influencing an act of a public official, regardless of whether the public official himself or herself knows of such undue advantage or receives an undue advantage.⁸

The penalties applicable to those who are found guilty of trafficking of influence are two to five years imprisonment plus fines.⁹

Passive and active corruption, defined in articles 317 and 333 of the Brazilian Criminal Code, clearly define as crimes the payment of bribes to public officials and the receipt of bribes by such public officials. As shown below, the terms of such articles are even broader.

Article 317 of the Brazilian Criminal Code defines passive corruption as:

“Art. 317 – To request or receive, for oneself or for another, directly or indirectly, even if outside or prior to assuming the function, but for reason of such function, undue advantage, or to accept as promise of such advantage.”

The crime of active corruption, committed by the private party, is in turn defined under article 333 of the Criminal Code as:

“Art. 333 - To offer or promise an undue advantage to a public official, for him to conduct, omit or delay an official act.”

Therefore, the crime of corruption in Brazil is not limited to the payment of bribes, but rather the offer or conferral of any undue advantage. This is similar to the FCPA’s concept of offers of “anything of value” – in other words, anything that is valuable to the public official receiving the proffered advantage or an offer of same.

As noted, the undue advantage does not actually have to be provided or received, as the simple request of an undue advantage by a public official or the offer and promise of such advantage to a public official is enough for the crime of corruption to occur.

The penalties for those who are found guilty of active corruption consist of two to twelve years in jail plus fines.¹⁰

The Brazilian Criminal Code, in accordance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention”),¹¹

“[An] undue advantage does not actually have to be provided or received, as the simple request of an undue advantage by a public official or the offer and promise of such advantage to a public official is enough for the crime of corruption to occur.”

Code. For anti-corruption purposes, the most relevant offenses are defined in the Criminal Code.⁷

The corruption offenses are mainly trafficking in influence, active corruption, passive corruption and corruption involving foreign public administrations.

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6. Article 327 of the Brazilian Criminal Code further states that “anyone who holds a post, employment or function in a parastatal entity, and who works for companies that have been contracted to render services or to execute activities that are typical of the Public administration” are also considered to be public officials.

7. The Brazilian anti-money laundering law, Law 9.613/1998, has also been relevant in anti-corruption enforcement efforts in Brazil. Originally the anti-money laundering law established a list of specific predicate offenses, among which crimes against national and foreign public administrations were included. Many corruption cases therefore often include money laundering allegations. In 2012, the money laundering law was modified, revoking the specific list of predicate offenses. Currently, any criminal offense can be a predicate to money laundering.

8. The crime of trafficking influence is defined in Article 332 of the Criminal Code as “to request, demand, collect or obtain for oneself or for another, promise of advantage or benefit, under the pretext of influencing an act committed by a public official in the exercise of his function.”

9. Article 332 of the Brazilian Criminal Code

10. Article 333 of the Brazilian Criminal Code.

11. Organization of Economic Cooperation and Development, “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Status of Ratification” (Nov. 20, 2012), http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html. Brazil ratified the Convention on August 24, 2000. *Id.*

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also establishes the liability for acts of corruption/bribery against foreign public officials and institutions.

Active corruption in international commercial transactions (article 337-B) is defined as “directly or indirectly promis[ing], offer[ing] or giv[ing] an undue advantage to a foreign public agent, or to a third party, in order to influence him to practice, omit or delay an official act related to an international commercial transaction.”

Those who are found guilty of active corruption in international commercial transactions are subjected to one to eight years imprisonment plus fines.¹²

In addition, the Criminal Code also establishes the crime of trafficking in influence in international commercial transactions, defined by article 337-C as “request[ing], demand[ing], collect[ing] or obtain[ing] for oneself or for another, promise of advantage or benefit, under the pretext of influencing an act committed by a foreign public official in the exercise of his function related to an international commercial transaction.”

The penalties applied to those found guilty of this criminal offense are two to five years imprisonment plus fines.¹³

Corruption Related Civil and Administrative Offences

One of the most relevant civil laws in Brazil for anticorruption purposes is Federal law n. 8429 of July 2, 1992 on administrative improbity. Because this law is of a civil nature with civil sanctions, it may be applied to individuals and legal entities.

The administrative improbity law seeks the punishment of the illicit enrichment of public officials and of damages caused to the public coffers, as well as the restitution, to the public administration, of such damages. It is applicable to anyone who induces or contributes for the act of improbity, or who in any way directly or indirectly benefits from such act.¹⁴ Therefore, even if the illicit enrichment is of the public agent, the private party that aids in such enrichment is also liable under the terms of the law.

Federal law n. 8666 of June 21, 1993, known as the “procurements” law is also relevant in the Brazilian anti-corruption efforts. The law establishes the rules applicable for public procurement procedures and for public contracts.¹⁵ This law is amorphous in the sense that it applies both civil and criminal penalties, not necessarily specifying when one or the other should be imposed, and establishes rules for administrative procedures.

II. Enforcement Efforts in Brazil

As previously stated, the ruling of the *Mensalão* case was perhaps the most emblematic law enforcement event in current Brazilian history.

The case involved alleged crimes by government officials, private banks and companies in an alleged scheme to buy political support for the proposals presented by the Executive Power. Most of the 38 defendants in the case were convicted for active and passive corruption and money laundering, among other charges.¹⁶

Although changes in the Brazilian enforcement efforts have become more apparent through the ruling on the *Mensalão* case, those observing actions by the prosecution, police authorities and the courts, even prior to the *Mensalão* case, may have discerned that change in anti-corruption enforcement was already taking place due to two main factors: (i) change of the focus of the Brazilian authorities from the corrupted to the corruptor and (ii) external/foreign factors.

The Brazilian police authorities have substantially improved their investigation techniques, adopting technological advancements and working closely with police authorities of other countries in combined efforts to exchange experiences and collaborate in transnational cases. In addition, increasing investigative operations against private parties and entities are demonstrating a rising focus by the investigative authorities on the role of the private parties who are involved in corrupting or paying bribes to public officials. Private parties are increasingly being questioned about their relations with public officials and their role in corruption schemes.

Another important factor underlying the enforcement changes in Brazil comes from abroad. Foreign companies subject to laws such as the FCPA and the UKBA that are coming into Brazil through mergers or joint ventures are seeking conformity by the Brazilian companies with the terms of such foreign anti-corruption laws. On the other hand, Brazilian companies that do business abroad are finding themselves subject to the

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12. Article 337-B of the Brazilian Criminal Code.

13. Article 337-C of the Brazilian Criminal Code.

14. Brazilian Federal Law n. 8429, Article 3 (June 2, 1992), http://www.planalto.gov.br/ccivil_03/Leis/L8429.htm [Portuguese].

15. Brazilian Federal Law n. 8666 (June 21, 1993), http://www.planalto.gov.br/ccivil_03/Leis/L8666cons.htm [Portuguese].

16. Brazilian Supreme Court Criminal Case at n. 470. The ruling by the Supreme Court was broadcast live. However, the official sentence has not yet been published in the official gazette.

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jurisdiction of the foreign authorities such as the U.S. Department of Justice and the U.S. Securities and Exchange Commission. In order to participate and compete in world markets, and at the same time mitigate the risks of international business transactions, many companies in Brazil are seeking to adopt compliance standards adopted abroad under laws such as the FCPA and the UKBA.

III. Future Trends in Brazilian Compliance

The adoption and implementation of compliance programs by companies doing business in Brazil is significantly driven by obligations under non-Brazilian legal regimes. Currently, there is no applicable law in Brazil or formal understanding by the Brazilian authorities that directly mandates the standards that should apply to compliance programs at private enterprises.

However, as signatory to the OECD Convention, Brazil has agreed to adopt all internal laws required to comply with the Convention, and to peer review regarding its compliance efforts.

Brazil has been questioned by the OECD regarding its approach towards the liability of legal entities in the Brazilian system. The Convention establishes that “each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”¹⁷ As previously stated, under Brazilian law legal entities do not have criminal liability. In the past, the Brazilian authorities have interpreted the Convention

to provide each signatory the discretion to establish the limits of such liability, within their internal legal framework.¹⁸

However, faced with its international obligations, the competent Brazilian authorities have presented to Congress a bill (Legislative Bill No. 6826/2010), through

“In order to participate and compete in world markets, ... many companies in Brazil are seeking to adopt compliance standards adopted abroad under laws such as the FCPA and the UKBA.”

which civil and administrative liability of legal entities specifically for practices related to acts of corruption against both national and foreign public administrations is imposed. Note that the bill does not impose criminal liability of legal entities as it would be incompatible with the current legal framework.¹⁹

The bill also incorporates new principles of compliance into the Brazilian legal system. It specifically establishes reporting and compliance measures that must be considered by the competent authorities when applying penalties against legal entities. Under the bill, the establishment

and enforcement of compliance programs would be formally introduced in Brazilian law as affirmative defenses in civil and administrative proceedings to what otherwise might be liability for acts related to corruption in which companies may be involved.

Although at this point it is difficult to predict when the bill will be passed into law, pressure coming from Brazil’s international obligations, especially under the OECD Anti-Bribery Convention, is likely to be a driving force in Congress.

IV. Conclusion

Changes in Brazilian enforcement and policies are new and many times subtle. Such changes can often go unnoticed by those who are not carefully observing. In light of a growing enforcement environment, however, the risks related to improper business practices that may have been more widely tolerated in the past are undoubtedly rising in Brazil. Those who are doing business in Brazil need to take heed, and should look to the future and to the current signs of transformation when considering their compliance efforts.

Antenor Madruga
Ana Maria Belotto

Antenor Madruga is a partner and Ana Maria Belotto is a consultant on foreign law at the Brasília office of the law firm of Barbosa, Müssnich & Aragão. They may be reached at ant@bmalaw.com.br and asb@bmalaw.com.br.

17. Organization of Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2 (Nov. 21, 1997), <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>.

18. See OECD Directorate for Financial and Enterprise Affairs, “Brazil: Phase 1 Review of Implementation of the Convention and 1997 Recommendation” at 10 (Aug. 31, 2004), <http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/33742137.pdf>.

19. As previously mentioned, under Brazilian Law legal entities are not criminally liable. The only exception is for environmental crimes.

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