

## Expected FCPA Enforcement in Latin America

by LOURDES SÁNCHEZ RIDGE

Will the Trump administration's changes in corruption enforcement policies decrease prosecutions of companies and individuals doing business in Latin America? Not likely.

Despite the public perception that the Trump administration is relaxing its antibribery Foreign Corrupt Practices Act (FCPA) enforcement efforts, in the last couple of years we have seen an increase in FCPA enforcement against individuals and companies doing business in Latin America. For decades the United States has had very little cooperation from certain Latin American countries. In recent years, though, there have been massive public demonstrations against corruption in the region. For instance, in Mexico, mass demonstrations against corruption drew tens of thousands of people to the streets, culminating in the election of leftist Andrés Manuel López Obrador. Likewise, in Brazil, where there have been violent protests in the past two years. Unstable governments, institutionalized government corruption, and government-controlled industries have traditionally created fertile ground for corruption in these countries. The citizens of these countries have believed for years, and continue to believe, that the major cause of their economic woes and unstable governments is due to corruption. (*Corruption Perceptions Index 2017*, Transparency Int'l (Feb. 21, 2018), <https://bit.ly/2LABx5m>.) These citizens' protests in Latin America have been a significant catalyst for many of these countries to enact anticorruption legislation and aggressively prosecute bribery. This anticorruption climate, in conjunction with new US policies that enhance cooperation among the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) and foreign countries, has made it easier for DOJ and the SEC to investigate violations of

the FCPA and creates a grand opportunity for the United States to increase its FCPA enforcement efforts. Companies and individuals doing business in Latin America should be aware of these new policies and take appropriate measures to successfully avoid investigation or prosecution in the United States. This paper contains significant changes in laws and prosecutions in Latin America and changes in enforcement tactics and policies in the United States that may lead to an increase in FCPA prosecutions.

### Significant Changes in Latin America

Brazil began its wave to combat corruption with the introduction of the Clean Company Act of 2014. This Act holds companies responsible for the corrupt acts of its employees. (*Brazilian Clean Company Act*, GAN Integrity (Nov. 2015), <https://bit.ly/2JpqtFE>.) Under this Act and the Criminal Organizations Act, Brazil has recovered more than \$3 billion in penalties and jailed top government and business leaders—including its former president, Lula da Silva. A task force was formed, called Operation Java Lato (Car Wash), that prosecuted transnational companies such as Petrobras, Odebrecht/Braskem, J&F, Rolls Royce, and Embraer. These investigations and prosecutions revealed significant corruption throughout many countries in Latin America and caused many prosecutions. Due to these prosecutions, Brazilian companies are now starting to take compliance with anticorruption laws more seriously and are learning from their US counterparts on developing more robust compliance programs. As a result of Brazil's aggressive enforcement against corruption, DOJ has investigated 30 companies.

In 2017 Mexico passed Mexico's General Law of Administrative Responsibility. Under this law, corporations are subject to criminal liability. This law prohibits bribery of public officials as well as private parties, including grease payments. Although it is too soon to tell whether this new law will be enforced appropriately, President Andrés Manuel López Obrador ran his political campaign

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on eliminating corruption. Only time will tell whether he is committed to honoring his campaign promise.

In 2016 Colombia enacted the Colombia's Transnational Bribery Act (Ley 178). This is the first foreign bribery statute in Colombia. It holds companies liable for violations committed by their employees. It is expected that new laws will be enacted protecting whistleblowers, requiring companies to identify individuals involved in bribery, and eliminating house arrest for those convicted of corruption. In 2018, Colombia's enforcement agency, "Supersociedades," prosecuted its first company under this Act and recovered \$1.8 million in penalties. It also prosecuted a company for refusing to provide information about a separate company's involvement in a bribery scheme. This prosecution resulted in a \$50,000 fine. Additionally, in 2017, Colombia's former National Director of Anti-Corruption, Luis Gustavo Moreno Rivera, was arrested, convicted, and sentenced to five years in prison for soliciting a bribe from an official that Mr. Moreno Rivera's agency was investigating for bribery. Mr. Moreno Rivera took the bribery in Florida. In Colombia, Mr. Moreno Rivera cooperated with the prosecutor in unveiling a massive corruption scheme in the judiciary and congressional branches. Mr. Moreno Rivera was then extradited to the United States, prosecuted for money-laundering and FCPA violations, and sentenced on January 2, 2019, to four years in prison. (Jay Weaver, *Ex-Colombian Official Gets Four Years in U.S. Prison for Taking Bribe in Mall Bathroom*, Miami Herald (Jan. 2, 2019, 6:46 PM), <https://hrlid.us/2YhkHKf>.) Supersociedades is currently investigating 12 companies for foreign bribery. (Jarrod Demir, *Colombia Investigating 12 Companies for Foreign Bribery: Report*, Colombia Reps. (May 7, 2018), <https://bit.ly/2VXuqb6>.)

In 2018 Argentina's new law, "Law on Corporate Criminal Liability," took effect, imposing criminal liability on corporations and their parent companies for bribery. (Canosa Abogados, *Argentina: Law No. 27401: Corporate Criminal Liability*, Mondaq (Dec. 5, 2018), <https://bit.ly/2JClphp>.) There have been several high-profile prosecutions, including the former president of Argentina, Cristina Kirchner, who is awaiting trial for accepting millions of dollars in bribes in exchange for government contracts. (Agence France-Presse, *Cristina Kirchner to Go on Trial for Corruption After Chauffeur's Notebooks Reveal Bribes Paid to Businessmen*, The Telegraph (Dec. 20, 2018, 9:31 PM), <https://bit.ly/2JbrlOM>.)

Unfortunately, despite national and international outcry against corruption in these countries, Guatemala and Venezuela have failed to heed to the

public outrage. In Guatemala, on January 8, 2019, President Jimmy Morales demanded the expulsion and disbandment of Peru's anticorruption commission, Comisión Internacional Contra la Impunidad en Guatemala (CICIG). The president's motivation, it is believed, is due to the Commission's investigation of him. (*El gobierno de Guatemala ordena la expulsión de la Cicig*, BBC News Mundo (Jan. 8, 2019), <https://bbc.in/2Ly97c8>.) In the United States, the DOJ has recently prosecuted numerous individuals for FCPA violations. In particular, it prosecuted a scheme where Venezuela's former national treasurer received over \$1 billion of bribes from a television billionaire mogul. The foreign official was sentenced to 10 years in prison in the United States. (Vivian Sequera et al., *Venezuela Ex-treasurer Who Took \$1 Billion in Bribes Sentenced to 10 Years*, Reuters (Nov. 27, 2018, 12:55 PM), <https://reut.rs/2PnydqO/>.) The television owner was charged with FCPA violations on November 20, 2018; that case is still pending. (*Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving over \$1 Billion in Bribes*, U.S. Dep't of Justice (Nov 20, 2018), <https://bit.ly/2H9yw6J>.)

### New US Policies

Since 2016 there have been significant changes in US enforcement policies on foreign bribery. At first blush it may seem that these changes benefit companies and individuals, but in practice, they may not. In 2016 Deputy Attorney General Rod Rosenstein announced an FCPA pilot program. This program was incorporated into the *US Attorneys Manual*. (U.S. Dep't of Justice, *U.S. Attorney's Manual Insert*, <https://bit.ly/2VchKJ7>.) Under the new policy, the DOJ may decline prosecution of any company that voluntarily self-discloses, fully cooperates with an FCPA investigation on a timely basis, identifies individuals who are "substantially" involved in the misconduct, remediates misconduct, and disgorges ill-gotten profits. The DOJ, though, has the final say as to whether the company has met the requirements for declination. In the first 18 months of the pilot program, at least 30 companies voluntarily disclosed FCPA violations. (Press Release, U.S. Dep't of Justice, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://bit.ly/2HelFjX>.) That is a 67 percent increase from the previous 18 months. Since the inception of the pilot program in 2016 until the present, DOJ has issued declination letters to only 11 corporations. (*Declina-*

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particularly true with regard to the use of driver's license suspensions as punishment for nonpayment. The suspension of a driver's license when an individual is unable to pay fines and fees is particularly invidious. A driver's license suspension not only makes it difficult for an individual to take care of basic needs such as caring for children or grocery shopping, it also often renders the person unable to work, which further impedes the individual's ability to pay down fines and fees. Frequently, the individual drives despite the suspension, which can result in other charges, incurring additional fines and fees and furthering a vicious cycle of mounting debt and prolonged involvement with the criminal justice system. Several states, including Florida, Illinois, Oregon,

Minnesota, and Montana, are considering reforms to limit suspensions as a punishment for failure to pay. The ABA has been able to express support for some of these bills, citing the Guidelines.

This reform, even if successful, is the tip of the iceberg. Much more work is needed to ensure that no individual is punished in our courts solely for being poor. The Guidelines provide a roadmap for policymakers, who should regularly evaluate and improve the administration of fines and fees in their jurisdictions.

The *ABA Ten Guidelines on Court Fines and Fees* are available on the website of the ABA Standing Committee on Legal Aid and Indigent Defendants under Public Defense Policies. ■

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tions, U.S. Dep't of Justice (Feb. 15, 2019), <https://bit.ly/2H4NgUc>.) Because of its success at encouraging companies to self-disclose, the pilot program is now permanent and has been expanded to other criminal violations. Even though there is an opportunity for companies to receive a declination from the government if they self-disclose, there are no guarantees and the decision is contingent on the subjective criteria of the DOJ. Therefore, companies need to fully understand the new policy and ascertain whether the policy as actually practiced will benefit them before determining to self-disclose.

Additionally, in May 2018 the DOJ announced a new policy against "piling on" fines and penalties resulting from the same misconduct but prosecuted by different jurisdictions. This policy requires US prosecutors to coordinate and cooperate with other domestic and international prosecuting agencies in an effort to avoid duplicative fines and disproportionate and inefficient enforcement. The policy, which is also incorporated into the *US Attorneys Manual*, seeks more equitable global outcomes for companies. DOJ also announced that it will give credit to those companies that identify employees who have "substantial involvement" in a bribery scheme. Prior to this policy, DOJ gave credit to companies that disclosed any "relevant facts about the individuals involved in corporate misconduct." Although it may seem that this new policy aims at targeting only those individuals who are the real violators of the statute, a company may find itself

self-disclosing and then realizing that DOJ's definition of "substantial involvement" is at odds with its own definition, thereby not obtaining the credit anticipated. Again, this policy may seem beneficial to corporations and individuals, but with the support and assistance of Latin American countries that are aggressively enforcing anticorruption laws, we may see more FCPA prosecutions in the region and more fines recovered by the United States.

Latin American countries that are actively and seriously prosecuting bribery are looking towards the United States as a model in adopting compliance plans, enacting laws similar to the FCPA, and adopting prosecution tactics. Although the U.S.'s new policies and practices seem to relax FCPA enforcement efforts, they may, in reality, increase FCPA prosecutions in Latin America. With this prosecutorial and cooperative momentum in Latin America and the new US policies, those doing business in Latin America will need to understand the new laws and enforcement practices in those countries as well as the new policies and enforcement practices in the United States before determining a course of action. ■