



CHALLENGES OF WORKING WITH INTERMEDIARIES IN EMERGING MARKETS

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WHO ARE YOU?

Chief Compliance Officer

Compliance Officer

Compliance Manager

Compliance Auditor

Government

Attorney

Consultant

Other

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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

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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)



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DOES YOUR ORGANIZATION CONDUCT THIRD PARTY DUE DILIGENCE?

NO

YES, for all
third parties

YES, only
for high risk
third parties



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WHO CONDUCTS THE THIRD PARTY DUE DILIGENCE?

Compliance department

Other department within the organization
(i.e., business, audit, etc.)

External service provider

Other

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CPI 2017

Latin American countries still underperform in terms of corruption perception, exceptions made to Chile and Uruguay



RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	89	71	United Arab Emirates	71	138	Poland	46	165	Russia	39	192	Algeria	29	219	Guinea	21
2	Denmark	88	72	France	70	139	Cuba	47	166	Ghana	40	193	Chad	28	220	Guatemala	20
3	Finland	85	73	Spain	69	140	Malaysia	47	167	India	40	194	Libya	27	221	Democratic Republic of Congo	21
4	Norway	85	74	Malta	68	141	Myanmar	48	168	Bahrain	39	195	Kuwait	26	222	Kenya	20
5	Switzerland	85	75	Belgium	67	142	Hungary	48	169	Cote d'Ivoire	38	196	Kazakhstan	25	223	Chad	20
6	Singapore	84	76	Denmark	67	143	Spain	48	170	Turkey	40	197	Ukraine	24	224	Uzbekistan	19
7	Sweden	84	77	Portugal	67	144	Germany	48	171	Tanzania	38	198	Mali	23	225	Myanmar	19
8	Canada	83	78	Chile	66	145	Georgia	48	172	Armenia	38	199	Guinea	22	226	Equatorial Guinea	17
9	Luxembourg	83	79	Colombia	65	146	Costa Rica	47	173	Paraguay	37	200	Uganda	21	227	Guinea Bissau	17
10	Netherlands	82	80	Uruguay	64	147	Kenya	46	174	Uganda	37	201	Kenya	20	228	Sierra Leone	16
11	United Kingdom	82	81	Peru	63	148	Kenya	46	175	Kenya	37	202	Kenya	20	229	Sierra Leone	16
12	Germany	81	82	Kenya	62	149	Kenya	46	176	Kenya	37	203	Kenya	20	230	Sierra Leone	16
13	Australia	77	83	Kenya	61	150	Kenya	46	177	Kenya	37	204	Kenya	20	231	Sierra Leone	16
14	Hong Kong	77	84	Kenya	61	151	Kenya	46	178	Kenya	37	205	Kenya	20	232	Sierra Leone	16
15	Lebanon	77	85	Kenya	61	152	Kenya	46	179	Kenya	37	206	Kenya	20	233	Sierra Leone	16
16	Austria	75	86	Kenya	61	153	Kenya	46	180	Kenya	37	207	Kenya	20	234	Sierra Leone	16
17	Belgium	75	87	Kenya	61	154	Kenya	46	181	Kenya	37	208	Kenya	20	235	Sierra Leone	16
18	United States	75	88	Kenya	61	155	Kenya	46	182	Kenya	37	209	Kenya	20	236	Sierra Leone	16
19	Ireland	74	89	Kenya	61	156	Kenya	46	183	Kenya	37	210	Kenya	20	237	Sierra Leone	16
20	Japan	73	90	Kenya	61	157	Kenya	46	184	Kenya	37	211	Kenya	20	238	Sierra Leone	16

COMMON ELEMENTS IN LATIN AMERICA

▶ Colombia, Peru, Chile, Argentina and Mexico:

- 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.

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COMMON RISKS IN LATIN AMERICA

▶ Common Risks:

- 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

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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

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FCPA ENFORCEMENT

▶ Current top ten FCPA enforcement actions of all time based on penalties and disgorgement assessed in the U.S. enforcement documents:

1. Petróleo Brasileiro S.A. - Petrobras (Brazil): \$1.78 billion in 2018.
2. Telia Company AB (Sweden): \$965 million in 2017.
3. Siemens (Germany): \$800 million in 2008.
4. VimpelCom (Holland) \$795 million in 2016.
5. Alstom (France): \$772 million in 2014.
6. Société Générale S.A. (France): \$585 million in 2018.
7. KBR / Halliburton (United States): \$579 million in 2009.
8. Teva Pharmaceutical (Israel): \$519 million in 2016.
9. Keppel Offshore & Marine Ltd. (Singapore): \$422 million in 2017.
10. Och-Ziff (United States): \$412 million in 2016.

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Source: www.fcpablog.com

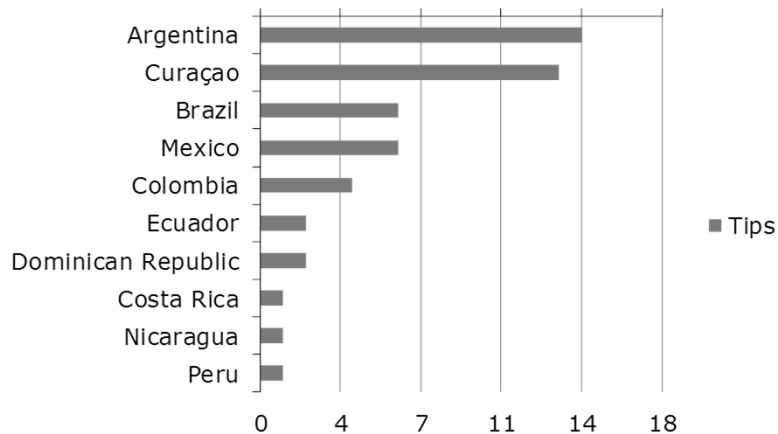
FCPA ENFORCEMENT

▶ Some of the cases involving Latin America:

- **Petróleo Brasileiro 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)

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



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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.

Which countries are linked to the Odebrecht scandal?
Spread of Odebrecht scandal



Total bribes paid by Odebrecht (\$USm)

Admitted		Alleged	
Brazil	\$349m	Antigua	\$10.5m
Venezuela	\$98m	El Salvador	
Dominican Republic	\$92m		
Panama	\$59m		
Angola	\$50m		
Argentina	\$35m		
Ecuador	\$33.5m		
Peru	\$29m		
Guatemala	\$18m		
Colombia*	\$11m		
Mexico	\$10m		
Mozambique	\$1m		

*Colombia - a further \$16m is alleged by prosecutor

Source: US Department of Justice, El País, La Prensa Gráfica, Brasilia declaration of judicial co-operation, signed by prosecutors

BBC

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 on 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:

- Consultant/agents
- Law firms
- Customs agents or freight forwarders
- Software consulting
- Distributors
- Shell companies
- Marketing consultants
- PR Companies
- Engineering and construction companies
- Joint venture partners
- Consortium partners
- Investment holdings

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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** (12,846/2013)
 - **Procurement Law** (Law 8,666, 1993)
 - **Administrative Impropriety Law** (Law 8,429, 1992)

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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

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RED FLAGS - THIRD PARTIES

- Intermediary refuses to sign anticorruption 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.

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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

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DUE DILIGENCE

- └ **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

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DUE DILIGENCE

Due Diligence when hiring intermediaries

- 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's role/need? Services clearly spelled out? Pricing and payment?

- 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 - anticorruption clause and Suspension and Termination Clauses

- Training

- Updated due diligence

- Auditing (exercising audit right)

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THIRD PARTIES

ALSO CONSIDER:

- Extending your company's policies and procedures to your third parties
- Give access to canal hotline/helpline/ethics line



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ANNEX -General Legal Framework in Latin America

Country	Legislation	Comments
Argentina	Law No. 27,401	On March 1, 2018, Argentina's first anti-corruption entered into force.
Brazil	Law No. 12,846/2013	"Brazilian Clean Company Act" or "Anti-corruption law", in force since January 29, 2014
Chile	Law No. 20,931 amended by the Law. No. 20,393	Law No. 20,931 of July 05, 2016 amended the Law. No. 20,393, listing the willful or negligent receipt of stolen goods as an underlying crime that could give rise to criminal liability of a legal entity.
Colombia	Law No. 11,778/2016	<i>Ley contra la Corrupción Transnacional</i> Ley contra la Corrupción Transnacional
Mexico	<i>Ley General de Responsabilidades Administrativas</i>	<i>Ley General de Responsabilidades Administrativas</i> of July 18, 2016. entered into force on July 19, 2017.
Peru	Law No. 30,424/2016	Effective from January 1, 2018 according to amendment made by Legislative Decree 1352.
Venezuela	Law No. 5.637 amended by the Law No. 6.155	Law No. 6.155 dated 19 November 2014 (the "Anticorruption Law"), which partially amended the Anticorruption Law published in the Official Gazette No. 5.637 of 7 April 2003.

A D V O C A D O S

ANY QUESTIONS?



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