

TOZZINIFREIRE

ADVOCADOS

THE 2018 COMPLIANCE & ETHICS INSTITUTE

FOUNDED BY DAVID L. LEE

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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

CORRUPTION PERCEPTIONS INDEX 2017

The perceived levels of public sector corruption in 180 countries/territories around the world



Country	Score	Country	Score	Country	Score	Country	Score	Country	Score
Denmark	85	Chile	70	Uruguay	68	Colombia	55	Mexico	50
Sweden	84	Peru	45	Argentina	40	Venezuela	35	Brazil	30
Netherlands	83	Costa Rica	60	Ecuador	50	Paraguay	45	Guatemala	40
France	82	Poland	75	South Korea	80	Japan	85	Germany	80
Switzerland	81	Belgium	78	Australia	75	Canada	72	United States	70
Finland	80	Spain	70	Italy	65	China	60	India	55
Portugal	75	South Africa	65	United Kingdom	70	Russia	50	France	65
Canada	72	Israel	80	New Zealand	75	Singapore	85	Hong Kong	80
United States	70	Ukraine	55	Malaysia	70	Saudi Arabia	50	Qatar	65
Germany	68	China	55	India	50	Indonesia	45	Philippines	40
France	65	Japan	60	South Korea	65	Thailand	55	Vietnam	45
United Kingdom	60	Australia	55	Canada	50	United States	45	Mexico	40
Sweden	55	Denmark	50	Netherlands	45	France	40	Germany	35
Switzerland	50	Finland	45	Portugal	40	Spain	35	Italy	30
Belgium	45	Poland	40	South Korea	35	China	30	India	25
Australia	40	United Kingdom	35	Japan	30	South Africa	25	Israel	20
Canada	35	United States	30	Germany	25	France	20	United Kingdom	15
Sweden	30	Denmark	25	Netherlands	20	France	15	Germany	10
Switzerland	25	Finland	20	Portugal	15	Spain	10	Italy	5
Belgium	20	Poland	15	South Korea	10	China	5	India	0
Australia	15	United Kingdom	10	Japan	5	South Africa	0	Israel	-5
Canada	10	United States	5	Germany	0	France	-5	United Kingdom	-10
Sweden	5	Denmark	0	Netherlands	-5	France	-10	Germany	-15
Switzerland	0	Finland	-5	Portugal	-10	Spain	-15	Italy	-20
Belgium	-5	Poland	-10	South Korea	-15	China	-20	India	-25
Australia	-10	United Kingdom	-15	Japan	-20	South Africa	-25	Israel	-30
Canada	-15	United States	-20	Germany	-25	France	-30	United Kingdom	-35
Sweden	-20	Denmark	-25	Netherlands	-30	France	-35	Germany	-40
Switzerland	-25	Finland	-30	Portugal	-35	Spain	-40	Italy	-45
Belgium	-30	Poland	-35	South Korea	-40	China	-45	India	-50
Australia	-35	United Kingdom	-40	Japan	-45	South Africa	-50	Israel	-55
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Switzerland	-50	Finland	-55	Portugal	-60	Spain	-65	Italy	-70
Belgium	-55	Poland	-60	South Korea	-65	China	-70	India	-75
Australia	-60	United Kingdom	-65	Japan	-70	South Africa	-75	Israel	-80
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Sweden	-70	Denmark	-75	Netherlands	-80	France	-85	Germany	-90
Switzerland	-75	Finland	-80	Portugal	-85	Spain	-90	Italy	-95
Belgium	-80	Poland	-85	South Korea	-90	China	-95	India	-100
Australia	-85	United Kingdom	-90	Japan	-95	South Africa	-100	Israel	-105
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Sweden	-95	Denmark	-100	Netherlands	-105	France	-110	Germany	-115
Switzerland	-100	Finland	-105	Portugal	-110	Spain	-115	Italy	-120
Belgium	-105	Poland	-110	South Korea	-115	China	-120	India	-125
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Belgium	-205	Poland	-210	South Korea	-215	China	-220	India	-225
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Switzerland	-225	Finland	-230	Portugal	-235	Spain	-240	Italy	-245
Belgium	-230	Poland	-235	South Korea	-240	China	-245	India	-250
Australia	-235	United Kingdom	-240	Japan	-245	South Africa	-250	Israel	-255
Canada	-240	United States	-245	Germany	-250	France	-255	United Kingdom	-260
Sweden	-245	Denmark	-250	Netherlands	-255	France	-260	Germany	-265
Switzerland	-250	Finland	-255	Portugal	-260	Spain	-265	Italy	-270
Belgium	-255	Poland	-260	South Korea	-265	China	-270	India	-275
Australia	-260	United Kingdom	-265	Japan	-270	South Africa	-275	Israel	-280
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Switzerland	-275	Finland	-280	Portugal	-285	Spain	-290	Italy	-295
Belgium	-280	Poland	-285	South Korea	-290	China	-295	India	-300
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Sweden	-295	Denmark	-300	Netherlands	-305	France	-310	Germany	-315
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Belgium	-355	Poland	-360	South Korea	-365	China	-370	India	-375
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Sweden	-370	Denmark	-375	Netherlands	-380	France	-385	Germany	-390
Switzerland	-375	Finland	-380	Portugal	-385	Spain	-390	Italy	-395
Belgium	-380	Poland	-385	South Korea	-390	China	-395	India	-400
Australia	-385	United Kingdom	-390	Japan	-395	South Africa	-400	Israel	-405
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Switzerland	-425	Finland	-430	Portugal	-435	Spain	-440	Italy	-445
Belgium	-430	Poland	-435	South Korea	-440	China	-445	India	-450
Australia	-435	United Kingdom	-440	Japan	-445	South Africa	-450	Israel	-455
Canada	-440	United States	-445	Germany	-450	France	-455	United Kingdom	-460
Sweden	-445	Denmark	-450	Netherlands	-455	France	-460	Germany	-465
Switzerland	-450	Finland	-455	Portugal	-460	Spain	-465	Italy	-470
Belgium	-455	Poland	-460	South Korea	-465	China	-470	India	-475
Australia	-460	United Kingdom	-465	Japan	-470	South Africa	-475	Israel	-480
Canada	-465	United States	-470	Germany	-475	France	-480	United Kingdom	-485
Sweden	-470	Denmark	-475	Netherlands	-480	France	-485	Germany	-490
Switzerland	-475	Finland	-480	Portugal	-485	Spain	-490	Italy	-495
Belgium	-480	Poland	-485	South Korea	-490	China	-495	India	-500

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

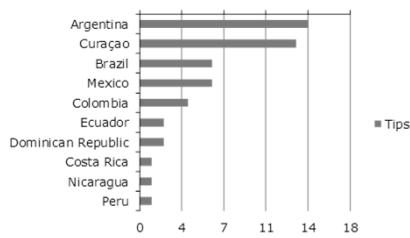
FCPA ENFORCEMENT

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 \$90m	
Panama \$89m	Under investigation
Angola \$80m	Chile
Argentina \$55m	Portugal
Ecuador \$33.5m	
Peru \$29m	
Guatemala \$18m	
Colombia* \$11m	
Mexico \$10m	
Mozambique \$1m	

*Colombia - a further \$10m is alleged by prosecutor

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

ES/18

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

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2 0 1 7 2 0 1 8

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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2 0 1 7 2 0 1 8

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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2 0 1 7 2 0 1 8

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	Ley contra la Corrupción Transnacional Ley contra la Corrupción Transnacional
Mexico	Ley General de Responsabilidades Administrativas	Ley General de Responsabilidades Administrativas 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.

ANY QUESTIONS?



SHIN JAE KIM
skim@tozzinifreire.com.br



RENATA MUZZI
rmuzzi@tozzinifreire.com.br



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