

SCCE – 17TH ANNUAL COMPLIANCE AND ETHICS INSTITUTE

ENFORCEMENT GOES INTERNATIONAL WHAT DOES IT MEAN FOR YOUR COMPLIANCE PROGRAM

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Las Vegas - EUA

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Agenda

1) New Anti-Corruption Laws in Latin America

- a) Brazil
- b) Argentina
- c) Colombia
- d) Mexico
- e) Chile
- f) Peru

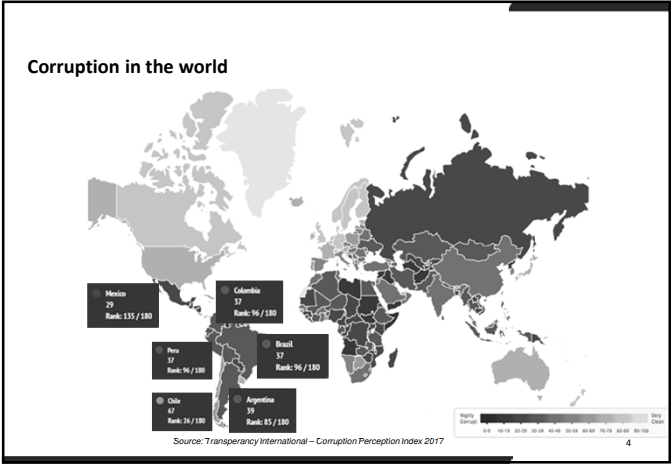
2) Tropicalizing Your Compliance Program

- a) Key differences between North American/US compliance program and one in Latin America
- b) Tailoring your compliance strategies for a Latin American audience
- c) 3rd party risks

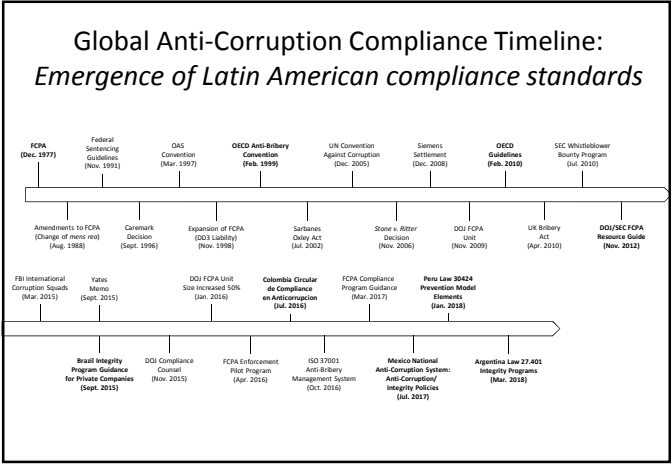
3) Enforcement Issues

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1. New Anti-Corruption Laws in South America







Convergence of Anti-Corruption Compliance Standards in the Americas

	OECD Recommendations	UK's Adequate Procedures	DOJ/SEC FCPA Resource Guide	ISO 37001	Brazil Decree 8.420/2015	Colombia Anti-Corruption Compliance Guidelines	Peru Prevention Model	Argentina Integrity Program	Mexico Integrity Policies
Written Compliance Policy	X	X	X	X	X	X		X	X
Anti-Corruption Training for Employees/Agents	X	X	X	X	X	X	X	X	X
Culture of Anti-Corruption "from the Top"	X	X	X	X	X	X		X	
Risk Assessments	X	X	X	X	X	X	X	X	X
Sufficient Compliance Staff	X	X	X	X	X	X	X		
Third Party Due Diligence	X	X	X	X	X	X		X	
Internal Reporting Mechanisms	X	X	X	X	X	X	X	X	X
Disciplinary Measures for Violations	X		X	X	X	X		X	X

Emerging Differences in Anti-Corruption Compliance Standards in the Americas

	OECD Recommendations	UK's Adequate Procedures	DOJ/SEC FCPA Resource Guide	ISO 37001	Brazil Decree 8.420/2015	Colombia Anti-Corruption Compliance Guidelines	Peru Prevention Model	Argentina Integrity Program	Mexico Integrity Policies
Specific Gifts, Travel, and Entertainment Policy	X		X			X			
Specific M&A policy			X			X		X	
Regular Updates of Compliance Programs	X	X			X	X	X	X	X
Response to Misconduct			X	X	X	X		X	
Due Diligence for Hiring				X					X
Incorporation of Compliance into Promotion			X	X					

1.1 Brazil

Key features

- Covers not only corruption
- Harsh sanctions
- Strict liability
- Joint liability
- Successor liability
- Liability for acts of third parties
- Credit for compliance program and cooperation



Administrative	Judicial
<ul style="list-style-type: none">➤ fine of 0,1% to 20% of the gross revenue of the previous year✓ R\$ 6,000 to R\$ 60,000,000 (if not possible to use gross revenue criteria)✓ fines shall never be lower than the advantage obtained➤ publication of the condemnatory decision	<ul style="list-style-type: none">➤ Prohibition to receive incentives and public financing from 1 to 5 years➤ Seizure and confiscation of assets and gains➤ Partial suspension or interdiction of its activities➤ Compulsory dissolution of the legal entity

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1.2 Argentina

Key features

- Similar to Brazil's Clean Companies Act in many aspects
- Covers not only corruption
- Harsh sanctions
- Specific compliance requirements
- Sanctions can be exempt if the company: i) self-reports; ii) has a compliance program before the facts; and iii) returns the undue benefit



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FCPA x Argentine’s Law 27,401 x Brazil Clean Companies Act

Enforcement Mechanisms / Liability	FCPA	Argentine's Law n. 27,401	Brazil's Law n. 12,846
	Criminal and Civil	Criminal, Civil and Administrative	Civil and Administrative
Bribery of foreign officials	Yes	Yes	Yes
Bribery of local officials	No	Yes	Yes
Extraterritorial reach	Yes	Yes, but not as broad as under the FCPA and UKBA	Yes, but not as broad as under the FCPA and UKBA
Books and Records	Yes	Yes, but more limited than the FCPA	Silent, but covered on certain existing laws. Compliance regulation addresses it.
Other prohibited acts	No	Yes	Yes
Exception for facilitation payments	Yes	No	No
Corporate criminal liability	Yes	Yes	No
Corporate strict liability	Only under the accounting provisions	No	Yes
Corporate fines	Anti-bribery violation: up to US\$ 2 million per violation / Accounting violation: up to US\$ 25 million per violation. Twice the benefit obtained or sought	2 to 5 times the undue benefit obtained or sought.	Up to 20% of the company's gross revenue of the previous year or up to R\$ 60 MM (around US 27 MM) if gross revenue cannot be determined
Credit for compliance programs	Yes (U.S. Sentencing Guidelines, FCPA Guidance, etc.)	Yes (can be exempt legal entity from liability if combined with other factors)	Yes (amount determined according to Decree 8.420/2015)
Credit for self disclosure / cooperation	Yes (Principles of Federal Prosecution of Business Organizations, FCPA Guidance, etc.)	Yes	Yes (under the leniency program, fines can be excluded and certain other sanctions can be excluded) – Pending approval of Presidential Decree 703/2015

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1.3 Colombia

Colombia’s Law 1778 (2016) (“Transnational Bribery Act”)

- Creates corporate administrative liability for foreign bribery.
- Establishes credit for companies with adequate anti-corruption compliance programs.
- Applies to Colombian companies, including the Colombian subsidiaries of non-Colombian companies registered to do business in the country.
- Companies can be sanctioned with monetary penalties up to approximately US\$55 million and debarment from contracting with the Colombian government for up to twenty years.
- Individuals can face criminal liability, including between 9 and 15 years imprisonment and considerable fines.
- Same level of penalties for domestic bribery, but only after a criminal conviction against a legal representative or director of the company has already been secured.



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Colombia's Law 1778 (2016) ("Transnational Bribery Act")

- Enforcement agency is Superintendencia de Sociedades.
- More than 10 companies currently under investigation.
- One company fined \$1.8M for bribes in Ecuador; another company fined \$50,000 for failure to cooperate and case referred to local prosecutors.
- Companies can reduce or avoid penalties when they self-report.
- To be eligible to receive no penalty, companies must meet two conditions (if these conditions are not met, penalties can still be mitigated up to 50% when offenses are disclosed after their performance):
 - (1) They must come forward before Supersociedades initiates its own investigation;
 - (2) They must come forward before the contract at issue in the bribery has been performed.



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1.4 Mexico

Mexico National Anti-Corruption System (2016)

Bolsters liability:

- **For public officials:** Establishes suspension, dismissal, and economic sanctions for "serious administrative offenses", including bribery, embezzlement, misuse of public resources, and collusion.
- **For individuals:** Mexican and non-Mexican individuals will be liable for "serious administrative offenses," such as bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, and wrongful recruitment of ex-public servants.
- **For companies:** Corporate entities will be liable for "serious administrative offenses," including bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, and wrongful recruitment of ex-public servants; includes acts of third parties.
- **Company Sanctions:** Up to twice the amount of the benefit or, if no monetary benefit, up to approximately US\$6 million; debarment of up to ten years from public contracting; suspension of activities up to three years; or, dissolution.



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Mexico National Anti-Corruption System (2016)

- **Compliance:** Provides mitigation for companies with compliance programs in place, with some unique features.
- **Leniency:** Individuals and companies can reduce penalties when self-reporting conduct and cooperating with authorities.



Implements structural changes:

- Coordination of anti-corruption and other controls bodies at all levels of Mexican government: federal, state, municipal.
- Gives federal government audit authority over federal funds allocated to the states.
- Creates an expectation that states will establish their own anti-corruption systems and anti-corruption prosecutors, and has monitoring mechanisms in place to highlight when they fail to do so.

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1.5 Chile

Key Features-Domestic Bribery (Private to Public)

- Any person who offers or agrees to offer an economic benefit to a public official who performs any of the abovementioned actions is also punished under criminal law
- Definition of public official-anyone who holds "position or public duty" including "state dependent" Broad Application
- Penalties-dissolution of company; profit disgorgement and forfeiture of assets
- GTE limitation



Source-Baker & McKenzie Global Compliance News 21

Key Features-Foreign Public Officials

- Offense to “offer, promise or give” for purposes of “obtaining or retaining business or unfair advantage”
- Definition of public official-(a) holds a parliamentary, administrative or judicial position; (b) performs public duties or functions for a foreign state, in a public entity or a state-owned company; or (c) is an official or agent of a public international organization
- Penalties-5 years jail or one or 2X the benefit
- GTE limitation
- Facilitation Payments exempted but “would likely be considered domestic bribery”



Source-Baker & McKenzie Global Compliance News 22

Compliance Programs

- Value of a compliance program written into statute “may serve to eliminate or mitigate criminal liability”
- Absence of compliance program seen as crime
- Risk Assessment;
- Policies, procedures and control to allow execution of task “in a manner which prevents perpetration of crimes”
- Identification by management and audit procedures of “financial resources that allow the entity to prevent their use in crimes”
- Discipline, incentive and internal reporting to prevent crime



Source-Baker & McKenzie Global Compliance News 23

1.6 Peru

Key Features-Definition of Bribery

Distinguishes between passive bribery and active bribery.

- Passive bribery is the act of requesting, accepting or receiving donations, promises or any type of advantages performed by a public official, to carry out or omit an act in violation of his or her obligations, or without violating his obligations. This constitutes a crime that will be sanctioned with imprisonment, as well as disqualification from future public service.
- Active bribery is the act of offering, giving or promising to a public official a donation, promise, benefit or advantage, to persuade him or her to perform or omit acts in violation of his or her obligations, or without violating them.



Source-Baker & McKenzie Global Compliance News 25

Key Features-Foreign Public Officials

- Definition of public official-(a) holds a office; (b) works for government; (c) is an official or agent of a public international organization; (d) military official or police; (e) one who has contractual relationship with government; or (f) who performs functions in name of state.
- Exemption for GTE



Source-Baker & McKenzie Global Compliance News 26

Key Features-Penalties

- For Companies
 - a) 2 to 6 times benefit obtained or expected
 - b) Business license suspension
 - c) Business license revocation
- For Individuals
 - Penalties-5 years jail or one or 2X the benefit
 - a) For Private Citizens-Up to 8 years imprisonment
 - b) For Public Officials-up to 15 years imprisonment



Source-Baker & McKenzie Global Compliance News 27

Compliance Programs

- It must also include, at a minimum, the following elements (with an exception for small enterprises):
- A person (or body) in charge of prevention, appointed by the highest administrative body of the legal entity and able to exercise this function autonomously;
- Identification, evaluation, and mitigation of risks related to the offenses covered by this law;
- Reporting procedures;
- Dissemination and periodic training; and
- Continuous evaluation and monitoring of the prevention model.



FCPAmericas Blog

US - Chile – Peru Anti-Corruption Laws

Enforcement Mechanisms / Liability	US FCPA	Chilean Criminal Code, Articles 248 to 251	Peruvian Criminal Code - Legislative Decree N° 635, Articles 393 to 398
	Criminal and Civil	Criminal and Civil	Criminal and Civil
Bribery of foreign officials	Yes	Yes	Yes
Bribery of local officials	No	Yes	Yes
Extraterritorial reach	Yes	Yes, but not as broad as under the FCPA	Yes, but not as broad as under the FCPA
Books and Records	Yes	Yes, but more limited than the FCPA	Yes, but more limited than the FCPA
Other prohibited acts	No	Yes	Yes
Exception for facilitation payments	Yes	No	No
Corporate criminal liability	Yes	Yes	Yes
Corporate strict liability	Only under the accounting provisions	Yes-for failure to have compliance program	No
Fines and Penalties	Anti-bribery violation: up to US\$ 2 million per violation / Accounting violation: up to US\$ 25 million per violation. Twice the benefit obtained or sought	Corporate dissolution, profit disgorgement, forfeiture and payment of 1 to 2 times the undue benefit obtained.	2 to 6 times benefit obtained or expected. Corporate suspension or termination. Up to 8 years jail for individuals; 15 years for government officials accepting bribes
Credit for compliance programs	Yes (U.S. Sentencing Guidelines, FCPA Corporate Enforcement Policy)	Yes	Yes Also ISO 37001 is "recommended"
Credit for self-disclosure / cooperation	Yes (Principles of Federal Prosecution of Business Organizations, FCPA Corporate Enforcement Policy, Yates Memo)	Yes	Yes

2. Tropicalizing Your Compliance Program

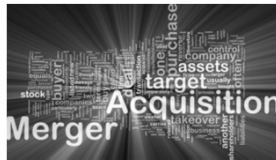
2.1. Key differences between North American / US compliance program and one in Latin America

Key differences between North American or US compliance program and one in Latin America



Training

- Adapt training materials to the local culture
- Refer to local laws and enforcement
- Refer to FCPA cases from the region
- Include real-life scenarios
- Do not overdo slides
- Use local language



M&A Due Diligence

- Local resistance to M&A Due Diligence
- Key issues to probe (tax, licenses and permits, public procurement, political contributions)
- Check local public databases
- Importance of past legal cases, public procurement records, and tax documents

Key differences between North American or US compliance program and one in Latin America

- Document hold notice may trigger massive data deletion
- Local laws cover not only corruption
- Local databases to be used for background checks
- Compliance contractual provisions may not work
- Expectations of local authorities



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- Profile report
- Conformity report
- Evaluation Spreadsheet

PLANO DE AVALIAÇÃO		SÉRIE: _____	
PROVAÇÃO		DATA: _____	
NOME DO ALUNO: _____		NÚMERO DA FOLHA: _____	
PROFESSOR: _____		MATERIA: _____	
DATA DO TESTE: _____		MATERIA: _____	
PROVAÇÃO		DATA: _____	
NOME DO ALUNO: _____		NÚMERO DA FOLHA: _____	
PROFESSOR: _____		MATERIA: _____	
DATA DO TESTE: _____		MATERIA: _____	

Published in September 2018

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- Seek to provide consistency for evaluations at the Executive Federal Level
- Fines cannot be exempted
- Around 140 questions to be addressed
- Program should exist prior to the conduct
- **[Organizational Integrity Culture (1,8%) x Compliance Policies and Procedures (1,5%)] + Response to the Wrongful Act (1,3%)**
- Need to address aspects related to public procurement
- Criticism to policies and procedures not adapted to Brazil (e.g., possibility of facilitation payments)
- Hotline needs to be available to third parties

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Brazil's Guidance on Evaluation of Compliance Programs – Some Controversial Aspects...

- Organizational structure should be available on the company's webpage
- Risk Assessment reports to be produced to demonstrate element of compliance program
- Need to publicize information about participation in public tenders and contracts signed with public administration
- "The legal entity self-reported to the competent authorities before the commencement of a sanctioning proceeding?"

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2.2. Tailoring your compliance strategies for a Latin American audience

Considering Context:

Widespread Notions of Impunity

- More than three-quarters (77%) of Latin Americans believe their country's anti-corruption laws are ineffective; about half (48%) say corruption is a significant obstacle to doing business.
- More than half (52%) believe they have lost business to corrupt competitors; of those, most (89%) say they did not report such misconduct to the authorities. 71% of those who did make reports say the government failed to investigate.



Source: Miller & Chevalier, 2016 Latin America Corruption Survey

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Considering Context:



Companies increasingly adopting tools to mitigate third-party bribery risks

- Latin Americans indicating that their companies perform third-party due diligence increased by approximately 8% since the 2012 Survey (51% in 2012; 59% in 2016).
- The use of anti-corruption contract terms increased by 7% (59% in 2012; 66% in 2016).

Source: Miller & Chevalier, 2016 Latin America Corruption Survey

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Considering Context:

Various anti-corruption compliance environments in the region

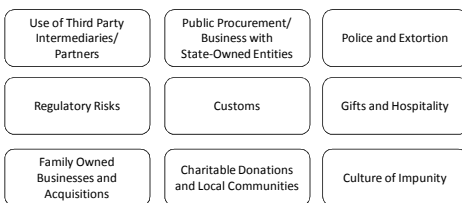
Exceptional growth in compliance efforts	Growing compliance efforts	Less developed compliance efforts
Brazil Colombia Mexico	Argentina Chile Costa Rica Ecuador Peru Uruguay	Bolivia Dominican Republic El Salvador Guatemala Honduras Nicaragua Panama Paraguay Venezuela



* Statistics based on the 2016 Latin America Anti-Corruption Survey (Miller & Chevalier)

Targeting compliance controls:

Common Corruption Risks in Latin America



Considering culture:

Best practices for compliance personnel

- Establishing trust with business units.
- Need for empowerment in the compliance role.
- Emphasizing local laws.
- Values-based compliance in addition to rules-based compliance.
- Appealing to emotion.
- Governance structures as critical.



Source: *The FCPA in Latin America* (2016)

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2.3. Third Party Risks

Assessing and Managing 3rd Party Risks

Five Steps of Third Party Management



Source-The Compliance Handbook

The Basics

- Broad and clear statement of policy;
- Important to communicate message that business sponsors around the globe have to follow procedure;
- Explain tiers of review: standard, enhanced and focused;
- Provide forms and make available for entry ON-LINE (best way to ensure compliance); and
- Risk-based due diligence based on red flags and/or weighting formula



Source-The Compliance Handbook

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Mitigating 3rd Party Risk

- Use full 3rd party risk management cycle
 1. Business Justification
 2. Questionnaire
 3. Appropriate level due diligence
 4. Compliance terms and conditions in contract
 5. Management of relationship after contract execution
- Request business and customer references
- Culture, compliance and ethics interview
- Reasonableness of commission structure
- Clear contractual requirements for services that are monitored
- Compliance training



Source-The FCPA in Latin America

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Determining Appropriate Due Diligence

Risk-based due diligence based on red flags and/or weighting formula

- Qualifications
- Associations with foreign government officials
- Business rationale for hiring third party, including contract terms describing services, payment terms, invoice payment requirements
- Ongoing monitoring, audits and training (update due diligence, training, audit rights, certifications, desk audits, spot issue checks)
- Distributing compliance and ethics program to third party, commitment and certification, and integration into training program

Multi-levels of due diligence depending on continuing risk analysis (weighting and red flags)

- Tier I: Initial open source, public intelligence
- Tier II: In country review of sources, documents
- Tier III: Investigative services; in-country interview

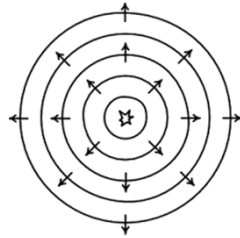


Source-The Compliance Handbook

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Determining Appropriate Due Diligence

- Risk based
- Does it make sense?
- Apply it consistently
- Document Document Document

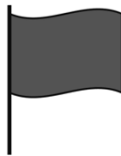


Source-The Compliance Handbook

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Common Red Flags

- ✓ Allegations or reputation of corruption or misconduct
- ✓ Large or unusual compensation arrangements
- ✓ Existing or former foreign official
- ✓ Close ties to existing or former foreign official
- ✓ Lack of transparency of ownership structure
- ✓ No track record in industry
- ✓ Suspicious payment arrangements
- ✓ Limited access to information



Source: The Compliance Handbook

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Other Tools to Reduce Risk

- Verified invoices and payments
- Additional training or comparable program
- Monitoring: transaction testing, desktop audits, formal, issue specific
- More than annual certifications
- Additional compliance reminders
- Update and refresh due diligence
- Agent and Distributor Codes of Conduct
- Office, Country or Region-Specific Compliance Program Reviews



Source-The Compliance Handbook

Some Latin American Issues

Responding to in-country pushback

- Teach
- Listen
- Be flexible
- Stay focused on the risk
- Clear contractual requirements for services that are monitored
- Compliance training



Source-The FCPA in Latin America

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Handling backlog

- Build internal capacity
- Outsource
- Prioritize DD on the highest risk
- Prioritize DD where no contract exists
- Build DD into contract renewals
- Use technology



Source-The FCPA in Latin America

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Managing 3rd parties related to government officials

- Is there a *bona fide* commercial reason to use 3rd party?
- Does comp arrangement make market sense?
- Can the government official benefit directly?
- Does the contract have appropriate anti-corruption representations?
- Has the 3rd party disclosed the contract to the government?



Source-The FCPA in Latin America

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Responding in the face of corruption

- Review agreements to see if appropriate language exists;
- Speak with your business unit to understand the relationship at issue;
- Speak with your business unit to see if other red flags are present;
- Request information on 3rd party's compliance program



Source-The FCPA in Latin America

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3. Enforcement issues

3. Enforcement issues-Brazil

Results of operation Car Wash – so far...

- 54 phases
- 2,476 procedures initiated
- 962 dawn raids
- 549 requests for international cooperation (269 active to 45 countries / 279 passive from 36 countries)
- 236 orders of arrest
- 227 individuals taken for deposition
- 176 plea agreements with individuals
- 11 leniency agreements with companies
- 81 criminal charges against 346 individuals
- 211 convictions against 139 individuals
- BRL 3,2 billion blocked

Source: Federal Prosecutor's Office – updated on September 10, 2018

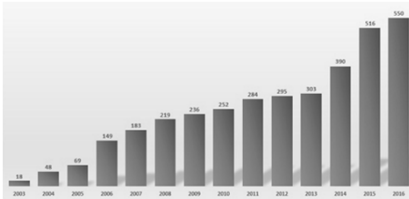
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Results of operation Car Wash – so far...



Fight against corruption in Brazil

- **Arrests** for crimes against the Public Administration increased **133%** between **2008** and **2012**
- Federal Police has been **very active** (number of Special Operations)



- Increase in **cooperation** with foreign authorities

Not only about Car Wash...

Acronym

Money laundering scheme to benefit political campaigns

Greenfield

Fraudulent management of pension funds

Zealots

Bribes in return of favorable decisions issued by Tax Court

Exposed Fracutre

Fraud and corruption in the context of public health contracts in Rio de Janeiro

Carne Fraca

Payment of bribes to obtain licenses and permits by meat companies

Prosthesis Mafia

Payment of bribes to HCP in exchange of prescription of prosthesis

Recent anti-corruption trends

- Strong enforcement
- Strong cooperation (locally and internationally)
- Use of monitors
- Challenges with leniency agreements
- Use of plea agreements
- Scrutiny of compliance programs and internal investigations by Brazilian authorities

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3. Enforcement issues-International

Top Ten FCPA Enforcement Actions-2017 & 2018

2017

1. Telia Company - \$965MM in 2017
2. Siemens - \$800 MM in 2008
3. VimpelCom - \$795MM in 2016
4. Alstom - \$772 million in 2014
5. KBR / Halliburton - \$579 MM in 2009
6. Teva Pharmaceutical - \$519MM in 2016
7. Keppel Offshore & Marine Ltd. - \$422 MM in 2017
8. Och-Ziff - \$412 million in 2016
9. BAE: \$400MM in 2010
10. Total \$398MM in 2013

Source: OCP's blog

2018

1. Petrobras - \$1.78 bn in 2018
2. Telia Company - \$965MM in 2017
3. Siemens - \$800 MM in 2008
4. Veon (formerly- VimpelCom - \$795MM in 2016
5. Alstom - \$772 million in 2014
6. Société Générale \$585 MM in 2018
7. Teva Halliburton - \$579 MM in 2009
8. Teva Pharmaceutical - \$519MM in 2016
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10. Och-Ziff - \$412 million in 2016

Source: OCP's blog

Top Ten global Enforcement Actions

2018 Top 10 International Anti-Corruption Enforcement Penalties

1. JBF-Brazil-\$3.6 bn-Brazil
2. Odebrecht/Braskem-\$2.6 bn-US, Switzerland and Brazil
3. Petrobras-\$1.78bn in US and Brazil
4. Siemens-\$1.6bn-Germany and US
5. Telia Company -\$965MM -US and Sweden
6. Alstom-\$814 in US and Switzerland
7. Rolls-Royce-\$809MM -UK, US and Brazil
8. Veon (formerly Vimpelcom)-\$795MM-US and The Netherlands
9. Halliburton-\$604MM-US and Nigeria
10. SocGen-\$585 MM - US and France

2017 Top 10 International Anti-Corruption Enforcement Penalties

1. JBF-Brazil-\$3.6 bn-Brazil
2. Odebrecht/Braskem-\$2.6 bn- US, Switzerland and Brazil
3. Siemens-\$1.6bn-Germany and US
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5. Alstom-\$814-US and Switzerland
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8. Halliburton-\$604MM-US and Nigeria
9. Teva Pharmaceutical-\$519MM- US
10. Och-Ziff-\$422 MM in US in 2016

Issues in International anti-corruption investigations and enforcement

- Strong enforcement
- Strong cooperation (locally and internationally)
- One-Pie (anti-piling on)
- When, where and how to self-disclose
- Privacy considerations-GDPR
- Privilege considerations
- Scrutiny of compliance programs and internal investigations by authorities
- No international standard

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Issues in International anti-corruption Mergers and Acquisition

- Safe Harbor now embedded in US Attorneys Manual
- Pre-acquisition DD critical
- Culture, values and ethics
- Post Acquisition
- Integration
- Full forensic investigation
- Self-disclosure
- Business Value
- Loss of ongoing business after acquisition

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Questions



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Thanks!

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