



Mitigating the Risks of Bribery:

Lessons From Recent Trends
in Latin America and Asia

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The past two years have brought a torrent of bribery-related headlines involving targets of enforcement—and more vigorous prosecution by authorities—in Latin America and Asia. The first quarter of 2017 was especially remarkable: 10 of the 12 enforcement actions the U.S. Department of Justice (DOJ) resolved under the Foreign Corrupt Practices Act (FCPA) in that time period arise from these regions.¹

The increased focus on FCPA violations in Latin America and Asia comes as no surprise, as many regional industries are dominated by government-controlled entities. With local anti-corruption efforts expanding and U.S. authorities expressing increased interest in coordinated prosecutions, cross-border cooperation appears to be at an all-time high. In light of these enforcement efforts, multinational corporations operating in the regions are often called upon to identify and manage risks within their business. Canvassing recent FCPA actions with underlying conduct in Latin America and Asia, as well as local anti-corruption efforts, this article offers guidance to companies on how to mitigate the heightened risks related to bribery and fraud.

Recent FCPA Enforcement Actions: Latin America and Asia

2016 was a banner year in FCPA enforcement—27 companies paid approximately \$2.48 billion to resolve U.S.-based FCPA cases. While the last few months have seen a lull, Latin America and Asia still dominate the geographical scope of enforcement actions.

Latin America

Of 13 corporate and individual enforcement actions resolved as of September 2017, five allege acts of bribery in Latin America, with three stemming from conduct in Brazil.

- *Rolls-Royce*. In January 2017, Rolls-Royce agreed to pay a total global sanction of \$800 million, including a \$170 million penalty to the DOJ, to resolve FCPA allegations that the company engaged in a widespread scheme to pay bribes through intermediaries to officials in Brazil and elsewhere.² Notably, the DOJ premised its jurisdiction for charging Rolls-Royce (a U.K. holding company) on an indirect, U.S.-based subsidiary, various U.S. citizen employees, and U.S. bank accounts used in transferring the bribe payments.
- *Comerma/Beech*. On Jan. 10, 2017, Juan Jose Hernandez Comerma, a former general manager and partial owner of a Florida-based energy company, and Charles Quintard Beech III, owner of multiple Texas-based energy companies, pled guilty to FCPA charges for their roles in a scheme to corruptly obtain contracts from *Petróleos de Venezuela SA*, Venezuela's state-owned and -controlled energy company.³
- *Biomet*. On Jan. 12, 2017, Zimmer Biomet agreed to pay \$30.5 million to resolve DOJ and U.S. Securities and Exchange Commission (SEC) investigations into the company's repeat FCPA violations. After entering into a deferred prosecution agreement with the DOJ relating to payments to doctors in Brazil, Argentina, and China in 2012, Biomet breached the agreement and "knowingly and willfully continued to use a third-party distributor

in Brazil known to have paid bribes to government officials on Biomet's behalf."⁴

- *SQM*. On Jan. 13, 2017, the DOJ and the SEC levied a combined penalty of approximately \$30.5 million and imposed a two-year corporate compliance monitor on *Sociedad Química y Minera de Chile (SQM)*, a NYSE-listed Chilean chemical and mining company.⁵ SQM was accused of failing to oversee a discretionary spending account through which its CEO allegedly made \$14.75 million in improper payments to Chilean politicians, candidates, and their associates.
- *Orthofix*. On Jan. 17, 2017, the SEC announced that *Orthofix*, a Texas-based medical device company, admitted wrongdoing and paid more than \$6 million in civil penalties and disgorgement for improper payments to government-employed doctors by a Brazilian subsidiary.⁶

2017 has also seen the sentencing of Douglas Ray, the president and owner of *Global Aviation Services*, for his role in a scheme to bribe Mexican officials to obtain and retain government aircraft service contracts; he was sentenced to 18 months in prison and \$590,000 in restitution.⁷ In June 2017, the former general counsel of *PetroTiger*, Gregory Weisman, was disbarred in New York and Pennsylvania based on his guilty plea to conspiracy to violate the FCPA, arising out of a scheme to bribe a Colombian official to secure a contract from the country's state-owned oil company.

There are also numerous ongoing FCPA investigations connected to Latin America involving *Wal-Mart Stores Inc.*'s Mexico operations,⁸ the Brazil-based *Intelligent Airlines Inc.*,⁹ the Brazilian energy and logistics conglomerate *Cosan Limited*,¹⁰ and the Brazilian food producer *BRF S.A.*,¹¹ among others.

Asia

Asia—especially China and India—has been a frequent focus of FCPA enforcement in recent years, including resolution of the following matters in 2017.

- *Mondelez*. Without admitting or denying the SEC's allegations that a subsidiary inaccurately recorded expenditures, *Mondelez* agreed to pay a \$13 million civil penalty.¹²
- *Las Vegas Sands*. On Jan. 17, 2017, *Las Vegas Sands Corporation* agreed to pay \$6.96 million in criminal penalties and to disclose FCPA-prohibited conduct—as part of a non-prosecution agreement with the DOJ—that arose out of payments made to a China-based consultant.¹³
- *CDM Smith*. *CDM Smith* entered into a declination with disgorgement with the DOJ to resolve allegations of FCPA violations

in India. The DOJ alleged that employees and agents of CDM Smith and a wholly owned subsidiary in India paid more than \$1 million in bribes to government officials in exchange for transportation infrastructure contracts.¹⁴

- *Chi.* On July 17, 2017, Heon-Cheol Chi, the director of South Korea's Earthquake Research Center, was convicted of laundering bribes through the U.S. banking system that he received from two seismological companies based in California and England.¹⁵

Among the ongoing FCPA-related investigations disclosed this year, Herbalife, Usana Health Sciences, and Sinovac Biotech Ltd. all identified investigations related to conduct in China.

Bribery in the Headlines for Latin America and Asia

Not only are FCPA actions for Latin America- and Asia-based conduct on the rise in the United States, but non-U.S. anti-corruption developments are also garnering attention. Moreover, these local efforts will continue to feed U.S. enforcement actions when the companies and schemes involved implicate U.S. jurisdiction.

Recently, many jurisdictions in Latin America and Asia have tightened their legislation criminalizing bribery and empowering their enforcement authorities to combat pervasive corruption.

Latin America

In Argentina, President Mauricio Macri has cracked down on corruption through new laws and enhanced punishments. Among his efforts is a proposal to allow the filing of criminal charges against corporations engaged in bribery.¹⁶ Argentina's National Congress is also contemplating enactment of a civil forfeiture program, which would allow the state to forfeit assets that are presumed to have an illicit origin without having to obtain a criminal judgment.¹⁷

Brazil's Operação Lava Jato (or "Operation Car Wash") continues to grab front-page headlines for widespread and aggressive enforcement of acts of corruption, bribery, and antitrust violations by more than 20 construction companies and 50 individuals, including

and mechanisms to enhance cooperation among Mexican governmental entities at the local and national levels. Similar to U.S. laws, Mexico's new laws provide sentencing credit for companies that self-report violations and cooperate in government investigations.

Asia

China's anti-corruption campaign also continues to make headlines. The country is clamping down on corruption in the public realm, as well as graft in the private sector. In December 2016, China established a new graft-buster and anti-corruption authority that operates independently of the Communist Party. Under the new regime, Chinese government officials have sweeping powers, akin to those normally reserved for prosecutors and courts, over individuals and entities under investigation. And in February 2017, China revised its Anti-Unfair Competition Law, broadening the scope of commercial bribery to include almost any compensation intended to increase sales or reduce competition.

India has attempted to reduce corruption by demonetizing certain currency notes frequently used in paying bribes. In November 2016, the government replaced its most available denominations, the 500 and 1,000 rupee notes, with new 500 and 2,000 rupee notes, imposing limits on the exchange of the demonetized notes and withdrawal of new notes from banks.

South Korea has perhaps made the greatest strides in anti-corruption enforcement in Asia, from its expansive, new anti-corruption law, the Kim Young-ran Act, promulgated in September 2016, to the indictment of its former president for corruption in April 2017. In April 2017, Korean authorities announced their plan to levy a \$48 million fine against Swiss pharmaceutical giant Novartis International AG for allegedly bribing physicians to use its products.

Increased Cross-Jurisdictional Cooperation on Bribery Crackdown

Cooperation between U.S. and Latin American/Asian authorities also appears to be at an all-time high, with authorities expressing a more robust interest in coordinated prosecutions.

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high-ranking government officials and corporate executives. Brazil's other well-known corruption probe, Operação Zelotes (or "Operation Zealots"), is an investigation into 70 companies for more than \$6 billion in bribes allegedly paid to members of Brazil's tax appellate council to reduce fines or dismiss claims of tax evasion.¹⁸

Mexico's President Enrique Peña Nieto announced the approval of sweeping changes to Mexico's anti-corruption laws in July 2016. These measures include creation of an independent anti-corruption prosecutor, strengthened whistleblower protections for individuals,

For example, Argentina has conducted several follow-up investigations after Siemens and Ralph Lauren settled FCPA claims with the SEC and DOJ. After the CEO of Chilean airline LAN reached a \$22 million settlement with the SEC in July 2016, there was speculation that local investigations would follow.¹⁹ Meanwhile, a local FCPA investigation of SQM by Chilean tax authorities, run alongside the SEC and DOJ investigations, led to a settlement of more than \$30 million in January 2017. And authorities are cooperating not only with the United States, but also with each other. Japan, South Korea, and a dozen other

countries all cooperated with Brazil in the Petrobras investigation. Argentina also investigated several companies implicated in Brazil's Operação Lava Jato for bribery of government officials.²⁰

Local investigations may also spawn investigations in the United States and elsewhere, under the FCPA or the United Kingdom's Bribery Act 2010, for instance. China's enforcement officials can alert the DOJ by bringing enforcement actions of Chinese anti-bribery laws, which are often widely reported in the public media to create

companies operating in Latin America and Asia should undertake sufficient due diligence to understand the full extent of their third-party relationships and should track and document all their efforts. Keen attention should be paid to red flags, such as requests for payments in advance of rendering services, payment to differing third parties, vague descriptions of services, and payments disproportionate to the services provided. To properly conduct this due diligence, companies should invest in training that takes cultural nuances into account and

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deterrence, and may then trigger the DOJ's own investigation. One example is the landmark GlaxoSmithKline (GSK) case. In 2013, following Chinese authorities' charge of GSK with bribing doctors in China to promote their products, U.S. and U.K. regulators subsequently initiated their own investigations into GSK's sales practices in China.

How to Mitigate the Risk of Bribery: Anticipate Cross-Border Enforcement and Cooperation

With regulators around the world focusing on corruption in Latin America and Asia, companies operating in these areas need a road map for timely intake and investigation of bribery concerns to enable a robust response to investigations and enforcement actions involving multiple regulators.

Allocate Resources and Identify Stakeholders. Numerous stakeholders are likely to have perspectives and interests in a company's response to bribery allegations, including shareholders, individual managers, board committees, labor unions, contractors, and vendors. It is crucial for counsel to understand not only which stakeholders are relevant to their role but also which stakeholders may require separate counsel. Moreover, there must be a clear pathway for escalating major concerns to the company's leadership and—if publicly traded—the market.

Preserve Data. Once an allegation or concern is received, the next step in practice is to preserve, retrieve, and review information that sheds light on the underlying facts. Mapping out what data already exists is, of course, important. But with technology now allowing remote cloud storage, companies also need to determine where their data is actually located. Depending on the jurisdiction, companies may need to consult with counsel about rights and implications under local data privacy laws. In China, for example, collection and analysis of documents is a delicate task since the State Secrets Law prohibits unauthorized individuals and entities from acquiring, possessing, recording, storing, or transferring outside of China information deemed to be a "state secret."

Know Your Third Parties. When dealing with third-party intermediaries, ignorance is not bliss. Failure to know with whom one is engaging—even through others—is no defense to liability. As a result,

that is tailored for the applicable industry, provided to the right people in the company, and conducted regularly.

Conduct an Effective Internal Investigation. Businesses operating in Latin America and Asia are often called upon to identify and manage bribery-related risks through internal investigations. But internal investigations in some jurisdictions can raise procedural and legal issues that are starkly different from U.S. investigations in almost every respect—including issues of legal privilege, data privacy requirements, employment laws, and conflicts of representation. And these legal differences may be magnified by cultural and language differences. It is thus recommended that the individuals with knowledge about key facts should have independent legal representation during both internal and government investigations.

In addition, witness interviews are a crucial part of any internal investigation, but present special challenges in a cross-border investigation. An effective solution is frequently to use a team to conduct interviews, pairing a local lawyer who is a native speaker of the local language with an experienced investigator trained in U.S. law. This allows local counsel to focus on nuances in a witness's testimony and to spot any potential issues in local law, while U.S. counsel can steer the interview toward areas relevant to potential liability.

Make the Right Disclosure at the Right Time. Once misconduct is established, a crucial decision must be made: whether to report the conduct to enforcement agencies and when. Counsel needs to understand local reporting requirements. People and companies that are subject to certain licensing regimes (e.g., financial institutions or gaming operators) are required to report specific kinds of unlawful conduct to regulators. Corporations should be aware that if they move slowly, employees, competitors, or whistleblowers might well report misconduct to law enforcement and regulators first. Even where self-reporting is not mandatory, corporations are sometimes incentivized to self-report and cooperate with prosecutors, particularly in light of the DOJ's "Yates Memorandum" and the FCPA Pilot Program, both of which aim to motivate companies to voluntarily self-disclose FCPA-related misconduct, cooperate with authorities, and remediate flaws in controls and compliance. As to timing of self-disclosure, the DOJ stated that self-disclosure must occur before

imminent threat of disclosure or government investigation; must be made within a reasonable time after becoming aware of the offense, with the burden on the company to establish reasonableness; and must contain all relevant facts known to the company, in order to enjoy the benefit of the Pilot Program.²¹

Conclusion

In light of the amplified scrutiny by U.S. and non-U.S. regulators on operations in Latin America and Asia, a unified and coherent strategy by counsel with deep experience in each relevant jurisdiction is more necessary than ever. Since there is no sign that this scrutiny will soon fade, companies and individuals doing business in these regions should take steps to understand the new anti-corruption regime and the expanding web of potential liability related to corruption and fraud. ☉



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Endnotes

¹For purposes of this article, charges brought against individuals involved in the same bribery scheme are treated as one enforcement action.

²See Deferred Prosecution Agreement, *United States v. Rolls-Royce plc*, No. 16-cr-247 ¶ 4.b (S.D. Ohio, Dec. 20, 2016), <https://www.justice.gov/opa/press-release/file/927221/download>.

³Press Release, U.S. Dep't of Justice, Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Schemes (Jan. 10, 2017), <https://www.justice.gov/opa/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery-schemes>.

⁴See Press Release, SEC, Biomet Charged with Repeating FCPA Violations (Jan. 12, 2017), <https://www.sec.gov/news/pressrelease/2017-8.html>.

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⁶See Press Release, SEC, Medical Device Company Charged with Accounting Failures and FCPA Violations (Jan. 18, 2017), <https://www.sec.gov/news/pressrelease/2017-18.html>.

⁷See Notice of Appeal, *Wadler v. Bio-Rad Labs Inc.*, No. 15-cv-2356 (N.D. Cal. June 7, 2017).

⁸Abhijith Ganapavaram & Gayathree Ganesan, *Wal-Mart Rejects Settlement with U.S. Over Alleged Bribery: Bloomberg*, REUTERS (Oct. 6, 2016, 12:32 PM), <https://www.reuters.com/article/us-walmart-probe/wal-mart-rejects-settlement-with-u-s-over-alleged-bribery-bloomberg-idUSKCN12620Z>.

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¹¹BRF S.A., Annual Report of Foreign Private Issuer (Form 20-F) 8, 123 (Apr. 26, 2017), https://www.sec.gov/Archives/edgar/data/1122491/000129281417001013/brfform20f_2016.htm.

¹²See Order Instituting Cease-and-Desist Proceedings, *In re Cadbury Ltd. & Mondeléz Int'l Inc.*, Securities Exchange Act Release No. 79,753 (Jan. 6, 2017), <https://www.sec.gov/litigation/admin/2017/34-79753.pdf>.

¹³See Non-Prosecution Agreement, *Las Vegas Sands Corp.* (Jan. 17, 2007), at 2, <https://www.justice.gov/opa/press-release/file/929836/download>.

¹⁴Press Release, The World Bank, World Bank Announces End of Fiscal Year Investigative Outcomes (June 30, 2017), <http://www.worldbank.org/en/news/press-release/2017/06/30/world-bank-announces-end-of-fiscal-year-investigative-outcomes>.

¹⁵Press Release, U.S. Dep't of Justice, Director of South Korea's Earthquake Research Center Convicted of Money Laundering in Million Dollar Bribe Scheme (July 18, 2017), <https://www.justice.gov/opa/pr/director-south-koreas-earthquake-research-center-convicted-money-laundering-million-dollar>.

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