

## *Latin American Anti-Bribery Survey*

With the media reporting on corruption scandals in Latin America on an all-too-often basis, the region has a reputation for being a high-risk compliance environment for anti-bribery and anti-corruption. While Brazil is unfortunately well known for corruption at the highest levels of its government, the largess of its national oil company, Petrobras, and the upcoming huge construction projects to enable it to host the 2014 World Cup and 2016 Olympics Games; other countries in the region present serious anti-corruption and anti-bribery risks when engaging in business in those regions.

Recently two US law firms Miller & Chevalier Chartered (Miller & Chevalier) and Matteson Ellis Law joined with 12 Latin American law firms in surveying 439 respondents scattered across 14 countries in Latin America to gauge the extent of corruption in countries throughout the region; the effects of corruption on companies operating in those countries; perceptions of the effectiveness of regional anti-corruption laws; and the tools that companies are using to address corruption risks. The risks inquired about in this survey are covered under both the US Foreign Corrupt Practices Act (FCPA) and UK Bribery Act.

The report noted the following highlights:

- Half of all respondents believe that their company has lost business to competitors making illicit payments in the region. Further, 44% say corruption is a significant obstacle to doing business.
- Just 28% of respondents believe anti-corruption laws are effective in the country where they work, which is an improvement over the 2008 survey (18%). Chile (76%) and the United States (70%) are seen as having the most effective laws.
- The anti-corruption environment throughout the region is showing some signs of improvement from a corporate compliance perspective. 85% of respondents say their company's management has taken steps to protect their organization from corruption risk, up from 77% in 2008. 51% say their company has lost business to competitors that have made illicit payments, down from 59% in 2008. 75% are aware of an offender being prosecuted for making or receiving illicit payments, up from 69% in 2008. These slight changes, in the aggregate, suggest overall improvement and trends to watch.
- More companies operating in the region are prioritizing compliance. Among companies publicly listed in the US and operating in Latin America, 92% of have developed an anticorruption policy, 90% have implemented anti-corruption training and 90% have established procedures for gifts, travel, and entertainment for officials. 64% employ full-time compliance personnel.
- The most frequently implemented anti-corruption measures for multinational, regional, and local companies include general anti-corruption policies (81%); procedures for gifts, travel, and entertainment for officials (70%); procedures for charitable and community donations (63%); and anti-corruption training (61%).
- Effective government investigation and prosecution, coupled with enhanced accountability and transparency in the public sector, are seen as keys to reducing overall corruption.

- 64% of respondents say they are somewhat or very familiar with the FCPA, similar to the 2008 survey (66%). However, in an improvement over 2008, of the respondents whose companies are clearly subject to the FCPA – because the company is publicly listed in the US or an affiliate of a US multinational company – just three percent think their company is not subject to the FCPA and 19% “don’t know.” In 2008, 30% of the respondents whose companies were clearly subject to the FCPA did not recognize that their companies were covered by the law.

From the findings, I believe that there are several key lessons to be learned by the compliance practitioner which should be used in both your risk assessment and tool to enhance your overall anti-corruption and anti-bribery compliance program. The first is that if you are a UK company or are in any manner subject to the UK Bribery Act, you need to immediately perform a risk assessment of your Latin American operations. With the perception of the high levels of corruption, coupled with the lack of faith in local laws or authorities to prevent such conduct; there may be a culture where such conduct is tacitly allowed as simply ‘the way we do business.’ Tie this sense with the lack of specific knowledge about the UK Bribery Act and its substantive differences with the FCPA and your company may well face conduct which violates the Bribery Act of which your Latin American employees and third party partners were not aware of, particularly in the areas of (1) no facilitation payment exemption; and (2) lack of distinction between public bribery of governmental officials and private bribery of private persons who are not governmental officials.

Interestingly, the respondents listed the countries where bribery and corruption is perceived to be the most pervasive. Not surprisingly, Venezuela led the list with almost 80% of the respondents indicating that bribery and corruption was a “significant obstacle” to doing business in the country. (Not to mention the threat of expropriation.) However, respondents ranked three other countries with the same “significant obstacle” notation to doing business due to bribery and corruption. These other countries are Argentina, Bolivia and Mexico. This information should allow you to recognize the high risk nature of doing business in those countries and to assess, evaluate and manage those risks accordingly through your compliance regime.

The survey also listed several ways in which the respondents believed that their employers had begun to address these risks. This information should allow you to focus your compliance resource in some or all of these areas. The survey reported:

- Of respondents who work for companies publicly listed in the US, 92% have developed an anti-corruption policy; 90% have implemented anti-corruption training; 90% have established procedures for gifts, travel, and entertainment for officials; and 72% say they have implemented due diligence policies for third parties. 64% employ full-time compliance personnel.
- Respondents from publicly traded companies, US and otherwise, are almost twice as likely as their private company counterparts to cite significant corruption-protection measures undertaken by their management. For example:
  - Anti-corruption training (82% public; 46% private)
  - Due diligence policies for third parties (65% public; 39% private)
  - Procedures for charitable and community donations (81% public; 53% private)

- Anonymous reporting mechanisms (73% public; 38% private)
- Local/regional companies lag far behind multinationals when it comes to implementing corruption protection measures. For example, just 35% of respondents from local/regional companies say their business has anti-corruption training, compared to 76% of multinationals; 32% of local/regional companies have policies on due diligence for third parties compared to 60% of multinationals; and 35% of local/regional companies have procedures for political contributions compared to 61% of multinationals. Only 20% of local/regional companies employ full-time compliance personnel compared to 56% of multinationals.
- Additional implemented anti-corruption measures cited by respondents include a ban on facilitation payments; an Ethics & Compliance Awareness Week; annual certification; creation of an Ethics Committee; the highlighting of prior enforcement actions; change of company culture toward moral values; and a focus on clients and markets that are less corrupt.

Ominously, but perhaps not surprisingly, the implementation of due diligence measures does not appear to have significantly increased since the last survey, four years ago. However, it is clear that actions by third party intermediaries remain one of the greatest sources of corruption risk for companies subject to the FCPA or Bribery Act operating in the region. In reviewing the FCPA enforcement actions from 2011 to those in 2012 which involved Latin America, almost all included risk created “indirectly” by third party intermediaries, such as customs agents, consultants, sales agents, and deal brokers. Clearly this high priority risk has not been properly managed and you should assess your company’s exposure to bribery and corruption by those with whom your company is partnered up, whether formally in a joint venture or other contractual relationship or in a more informal type of business relationship.

The Miller & Chevalier/Matteson Ellis survey is excellent information for the compliance practitioner. You should review it with an eye towards your business operations in Latin America to help assess and manage the bribery and corruption risks that your company might face in this region.

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