

Foreword by Homer E. Moyer, Jr., Miller & Chevalier Chartered

The FCPA

in Latin America

Common
Corruption Risks
and Effective
Compliance
Strategies for
the Region

Matteson Ellis

Chapter 5

Tailored Compliance Strategies for Companies in Latin America

One key message that FCPA enforcement officials convey over and over again is that off-the-shelf, check-the-box compliance programs provide little value to a company. They are not sufficient to compel effective compliance within an organization. In the event of an enforcement action, such lax measures will not generate meaningful credit for the company in the eyes of FCPA enforcement officials. Instead, programs should be dynamic, interactive, and responsive to actual and specific risks that employees encounter in the course of their day-to-day roles and responsibilities. To do this effectively in Latin America, companies can follow specific compliance strategies that have seemed to work particularly well. To be sure, companies apply the following approaches in their operations no matter the region of the world. But in Latin America, these approaches tend to be particularly effective in helping companies implement programs on the ground.

The Importance of Risk-Based Programs in Latin America

Companies doing business in Latin America do not have unlimited compliance budgets. Complicating matters, the diversity of risks in the region mean that companies can become lost or overwhelmed trying to manage every risk, big and small, that their personnel face.

How do companies address this challenge? They tailor their compliance strategies to actual risks. Whether one follows the guidance of the U.S. Federal Sentencing Guidelines, heeds the advice of the FCPA Resource Guide, listens to statements from enforcers themselves, or analyzes FCPA enforcement actions, it is clear that enforcement officials expect compliance efforts to be risk based. Understanding this basic concept will help companies bridge the gap between seemingly impossible compliance expectations and creating an acceptable program that works in practice. As James Tillen, vice chair of Miller & Chevalier's International Department commonly says, "Compliance begins with the premise that every company's anti-corruption compliance program must be tailored to its particular risk profile and resources, and that one size does not fit all."

In Latin America, tailoring compliance strategies to risk means focusing compliance efforts on the highest risk countries, industries, and transactions. Transparency International's 2015 CPI ranks Venezuela and Haiti as the countries perceived as being the most corrupt in the region, followed by Nicaragua, Paraguay, Guatemala,

Honduras, Argentina, Ecuador, the Dominican Republic, Bolivia, and Mexico. All of these are ranked in the top 50% of the most high-risk countries in the world. Many other key Latin American markets, like Colombia, Brazil, and Peru, are not far behind. If companies are doing business in these countries, they should be targeting their compliance dollars accordingly.

In addition, some industries also are considered higher risk than others and deserve more compliance attention. This point was highlighted in remarks given in 2014 by then senior deputy of the Fraud Section of the DOJ Criminal Division, James Koukios. In his remarks, Koukios offered some rare insight to lawyers and compliance specialists throughout Latin America. He described the industries that pose the highest risk in the region, based on the DOJ's own evidence from past and ongoing corruption investigations. Specifically, Koukios highlighted the extractive, utilities, and health sectors in Latin America as particularly risk-prone, because they are often under government control or ownership or involve the provision of public goods. Companies that work in the oil and gas sector in the region, for example, confront regular business with state-owned oil companies as diverse as Petrobras, Pemex, Ecopetrol, YPF, PDVSA, PetroPeru, PetroEcuador, PetroMinerales, Hocol, CENIT, and Petrotrin. Enforcement officials expect any company that is engaged in a high-risk sector to have its guard up.

The U.S. government's expectation of risk-based programs puts a premium on formal risk assessments. FCPA enforcement officials expect companies to think critically about how they engage third parties in high risk jurisdictions, where they engage in public

contracting, and where they have relationships with foreign officials. The DOJ's former chief FCPA enforcer, Patrick Stokes, once explained that the DOJ does not go into a meeting with a company expecting to see specific compliance measures. Instead, the DOJ wants companies to identify for themselves their highest risks and explain how they are addressing those risks: "Just as we don't want companies to have a check-the-box program, we don't have one for evaluating them."

Kara Brockmeyer, Chief of the FCPA Unit of the SEC's Enforcement Division, said at a conference in 2014 that to understand FCPA risk, compliance personnel have to "get out into the field." They need to speak with their workforces about how they do business, understand where they have government touch points, and ensure that controls are structured appropriately to prevent improper payments in high-risk areas. Companies also need to keep their risk assessments up-to-date. Business activities change, and companies need to understand corruption risk implications when they do. A company might have a Mexico-based manufacturing facility that only sells to the United States. When it purchases another facility in the country with significant sales to the Mexican government, its FCPA risk profile changes. When it further acquires a company in Central America as part of a regional expansion, additional compliance steps are necessary.

Risk-based compliance also means that compliance programs will never be fool-proof. Issues could arise in lower risk areas of the company's business. Enforcers understand this. As Stokes once said, "We have no expectation that a compliance program will be perfect

and is going to catch all bad conduct. We understand that bad actors will try to work around controls and try to evade them. But we expect that programs are well thought out to prevent this." Despite failing to stop an improper act, if a company can show that it has taken a thoughtful approach to preventing compliance violations, and that it has focused on highest areas of risk, then it has positioned itself to put forth a reasonable defense.

In comments at a Trace International conference in Mexico in 2013, Alexandra Wrage put her own spin on the concept of reasonable compliance and a company's responsibility for the actions of rogue employees: "The government understands that, when you pick an employee, you are not hiring them to take care of your children. You are hiring them to advance your interests in legal and appropriate ways. The government also knows you might make mistakes. What they want is for you to take a reasonable and consistent approach [to compliance measures]." The important part of this advice is that a company should be able to tell a credible story of concrete steps it has taken to address actual risk.

The FCPA Resource Guide reaffirms the importance of risk-based compliance. For example, when companies rely on numerous third-party relationships, the guidance advises that a risk-based approach to due diligence is essential: "DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area."

Targeting Compliance Training to Latin American Employees

In the 2016 Latin America Corruption Survey, 85% of respondents who worked at multinational companies said that their companies conduct compliance training, while less than half of respondents who worked at local and regional companies said that their companies do so. Wherever it is conducted, FCPA compliance training should cover some basics areas—such as anti-corruption enforcement trends, elements of bribery and books and records/internal controls offenses, common forms of FCPA-prohibited activity, the consequences of non-compliance, industries and sectors under the enforcement microscope, and the specifics of the company's own compliance program.

Below are some additional training best practices that can be particularly helpful in Latin America for encouraging employees' adherence to compliance:

Use local language. Many participants in the region do not speak English. Even if they do, compliance concepts are communicated more effectively if trainings are conducted in the local languages of the region, or else certain key issues could be lost in translation. Employees also might not feel comfortable asking questions in a language other than their native one.

Discuss specific and relevant cases. Trainers should tell sensational bribery stories from prior enforcement actions, preferably ones involving their industries and countries, to capture employees'

attention. For example, even though the U.S. enforcement action against FIFA executives and related parties from Argentina and Brazil does not involve the FCPA, it does involve corruption and soccer and can be a helpful case study in a region where passion for soccer is second to none.

In Argentina, trainers can discuss the Ball Corporation case, in which the company's CEO used the sale of his personal luxury car to pay kickbacks. In Brazil, trainers can share snippets of e-mail between a Dallas Airmotive manager and a Brazilian Air Force sergeant that appear in the company's deferred prosecution agreement. In particular, the company manager e-mails the sergeant: "Tell me, my friend, is everything alright there?? And the hotel is so-so or worth the expense??? I hope that you are enjoying it," to which the sergeant replied: "When I said I had confidence in your good taste, I confess that I underestimated you... hehe The Hotel was excellent. I believe that it was a great present to [my wife]. She insists on passing on thanks to you. Great job, my good friend!!!" In Costa Rica, trainers can cite the example of how Alcatel hired a consultant – that was a perfume company – to provide telecommunications advice, which made the business justification of the engagement problematic when U.S. authorities reviewed it. Finally, in Mexico, trainers can include details of what sound like scenes from a movie: BizJet agents literally carrying bags of cash across the U.S.-Mexico border to bribe officials.

Make trainings interactive. Following a dry PowerPoint that discusses only black-letter law can put employees to sleep, especially in Latin America where audiences value engagement and interaction. Latin Americans like to take part in role plays, participate in

discussions on risk, and ask unfiltered questions. When this happens, employees are more likely to absorb and remember compliance concepts. The scenarios used to convey concepts should be ones that are most relevant in the Latin American context. For example, using a description of a golf outing with a foreign official as an example of high-risk entertainment might not have the strongest impact in Brazil, where golf is not as popular a sport as it is in other parts of the world. Instead, an example of an outing relating to the America's Cup sailing competition might have more impact as an example.

Explain how violations are discovered. When learning about the FCPA, Latin Americans often assume that the chances of enforcement officials discovering bribery are minimal, especially given how rare it is that local anti-corruption laws are enforced. Trainers should make clear that issues can be brought to the attention of U.S. authorities in numerous ways—such as through media reports, whistleblower complaints, industry competitors, or the Federal Bureau of Investigation (“the FBI”). Employees may be interested to hear about increasingly aggressive investigative tactics being deployed today by FCPA investigators, including body wires worn by cooperating witnesses in cases like Petrotiger in Colombia and BizJet in Mexico to obtain evidence against executives, who were later charged with FCPA-related violations.

Describe how individuals can be liable. During anti-corruption training, employees tend to pay more attention when they realize that *they* can be individually liable for FCPA violations, since this usually translates into prison time. Such warnings apply equally to employees outside the United States and to U.S. citizens. Indeed, U.S.

enforcement officials have not shied away from spreading the jurisdictional net widely to the Latin American region. Take, for example, the Venezuelan bribe receiver in the Direct Access Partners case, who was arrested for FCPA-related issues while traveling to Miami. In another example, a former manager at French telecommunications company Alcatel, who was responsible for bribe payments in Costa Rica, was arrested by U.S. authorities while traveling through Miami and eventually pled guilty in the U.S. courts. In 2015, Deputy Attorney General Sally Yates issued a memorandum instructing U.S. prosecutors to prioritize individual liability in all of their investigations, which can implicate non-U.S. citizens as well.

Show how various company actors have a role to play in compliance. A company's chief compliance officer is not the only one in the organization responsible for compliance. Individuals throughout the company have important roles to play. The CEO must establish tone from the top. The internal auditor must build FCPA compliance testing into reviews. Business unit leaders must know how to spot red flags. The more employees understand these multiple responsibilities, the more they begin to appreciate them. In Latin America, this sometimes requires heightened attention, because traditional corporate roles might differ from the way they are commonly understood in the United States. For example, while the general counsel in many U.S. companies is a core member of the company's top management team participating in both business and legal decisions, in Latin America the position is often relegated to a legal service support function. This might be adequate for fulfilling legal duties, but it is not always adequate for fulfilling compliance

duties. To make a compliance program work effectively, the general counsel will often need to offer advice on business matters, since business decisions can implicate a wide range of risks, including compliance with the FCPA.

Remind employees that corruption also exists in the United States. Because some Latin American employees might take issue with the fact that the FCPA targets the corrupt acts of only officials outside the United States, it is helpful to address this issue at the outset of training. The trainer can explain, for example, that other laws in the United States address domestic corruption. The trainer can show pictures of U.S. officials being carried away in handcuffs for committing domestic bribery. Steps like these help ensure that Latin American employees do not feel that they are being unfairly targeted by U.S. enforcement officials.

Inform employees that the FCPA is not the only anti-corruption law being enforced around the world. It is helpful to discuss the web of international anti-corruption laws, treaties, and enforcement agencies currently in place, including local anti-bribery laws in the Latin American countries where the company operates. For example, Brazilian prosecutors initiated the Petrobras corruption investigation that led to a review of dozens of companies and individuals in various industries. In this way, trainers send the message that compliance is relevant not only to U.S. authorities, but also throughout the region and the world. Enforcement threats can come from many different directions, not just the DOJ or SEC.

Discuss the broader importance of compliance. Trainers can discuss why curbing corruption is good for their country and

how corruption corrodes businesses. This lesson is particularly relevant for employees in Latin American, where high-level government officials regularly make headlines for engaging in corrupt acts. As demonstrated by recent mass protests in Brazil, Latin American employees generally are disgusted and fed up with the intermingled nature of politics, corruption, and impunity in their countries.

Properly scope the audience. In Latin America, the idea that training should extend only to “front office” employees who interact with foreign officials is a common misconception. Other employees can be pulled into corruption schemes, too, even if they have no connection to government officials. For example, some employees might manage third parties that interact with officials on the company’s behalf, and they should be prepared to spot red flags. As another example, employees in finance manage the accounting controls that help a company spot corruption and ensure compliance with the FCPA’s accounting provisions. Tailored FCPA training should be given to a wide range of employees within a company’s organization to ensure that they know the rules, understand how their functions support FCPA compliance, and know where to report knowledge of violations. Training can be designed to give all relevant employees a role in protecting the company, no matter their level of responsibility.

Obtain meaningful endorsement of compliance principles. After trainings are over, it is important for companies to obtain formal endorsement of compliance from participants. At a basic level, a signature on a certification form is necessary and a good first step. But note that, as a general matter, the relatively casual way in which U.S. lawyers require certifications and endorsements is often

inconsistent with local norms in Latin America and can cause anxiety. Latin American legal systems are generally modeled on the Portuguese or Spanish systems, which rely heavily on notaries to legalize documents. To be valid, certifications should be obtained through formal processes that employees are used to following.

Listen, respond, and follow up. Trainers should take their time and listen to questions and respond—by e-mail afterward, if necessary. They should discuss follow-up steps, including where employees can go with questions. In Latin America, in particular, giving employees the opportunity to ask questions in private with the trainer directly after a session ends can be an effective way of learning about potential compliance policy violations. Trust goes a long way. Training is just the beginning, not the end. Real endorsement begins after employees have been able to see compliance in action. Once they have participated in compliance processes, they are more likely to embrace programs more meaningfully.

Avoiding Sham Contracts and Phantom Vendors

Some of the most common bribery schemes in Latin America involve the use of sham contracts and phantom vendors. This type of scheme was highlighted in the FCPA case against Siemens in Argentina, in which the company's consulting contract with the Argentine Consulting Group involved no legitimate services and helped facilitate kickbacks to contracting officials there. A similar scheme was at the center of an FCPA enforcement action against

Ralph Lauren Corporation, in which a customs agent in Argentina billed the company for bogus services and used the funds to bribe local customs officials to clear the entry of Ralph Lauren's goods into the country. Such schemes also form the basis of many of the allegations against Petrobras and its contractors, who are accused overbilling the company and using the excess funds to give kickbacks through shell companies. An analysis conducted in 2015 by PricewaterhouseCoopers found that 22% of all FCPA cases involving Latin America between 2000 and 2015 involved the use of fictitious vendors or invoices.

The way these schemes often work in practice is that companies, or their employees, create phony written agreements with third parties, perhaps a consultant or outside vendor, or a local employee sets up a bogus consultancy or contractor. The company makes payments to the third party for purported goods or services, when in reality, the entity provides no legitimate goods or services, or not at the level to justify the compensation. The rest of the money is used for improper purposes, perhaps self-enrichment, or perhaps to bribe foreign officials to achieve some business advantage for the company.

Companies design compliance programs to address these risks by implementing controls that establish the legitimate purpose of expenditures and ensure the accurate and specific recording of the destination of funds.

In particular, the following types of controls are helpful:

Set up third-party approval systems. Pre-set processes, like vendor approval mechanisms, help reduce the possibility that a third

party will be paid based on a sham contract, or that the third party is bogus. Vendor approvals require a second, and sometimes a third, set of eyes to review the agreement and assess its legitimacy before the relationship begins. One example is to require a local approval by a manager in the Latin American country and another approval by a manager at headquarters in the United States. By requiring computer databases to be populated with this information, companies further ensure that various aspects of the arrangement have been properly vetted and approved. Pre-approved vendor lists give businesses a degree of comfort that relationships are legitimate. Similarly, purchase order systems force companies to consider with whom they are dealing and what they are purchasing. It should be noted that approved vendor lists do not always avoid risks completely, since companies often allow exceptions for the use of additional vendors when they are essential and urgent. Nonetheless, such systems do create a bedrock of control. To create additional control, companies can establish budgets that anticipate expenses; pre-approval of these expenses establishes more control over dollars spent. Contracts that arise outside of the pre-approved plan can be scrutinized more closely.

Trust but verify. Companies should verify that third parties are doing what they are supposed to be doing pursuant to their contracts. Companies can do this by reviewing invoices, checks to vendors, purchase orders, inventory records, receiving documents, and other books and records for proof that goods or services were actually received. Vendors should be required to provide backup

documentation to support their invoices, which should be reviewed as well.

During these reviews, companies should keep an eye out for fraudulent documentation, such as fake invoices or bogus line items. In such reviews, visuals are important. Invoices might appear unprofessional, contact information might be incomplete, invoice numbers might be in odd sequences, or numbers might be in round amounts.

To effectively identify fraudulent documentation, local knowledge of the region is essential. A non-Brazilian reviewer might not realize the odd nature of a consulting business that is based in the Planalto Paulista neighborhood in São Paulo, where very few, if any, businesses are located. And while a Google Street View search might reveal a physical building at an agent's purported address, local professionals might realize that Google is not always reliable for such searches in the local market. Rather, they will know that the company should take other steps to verify the agent's real existence. Other common red flags include payments that have no invoices, invoices that have no supporting documentation, cancelled checks with unusual endorsements, or addresses that include only P.O. Box numbers, which are generally harder to verify.

Information listed in the sales documentation should also be verified. Finance, internal audit, or compliance teams can confirm if newly purchased machinery is actually there and in use and if the broken window in the executive's office was actually replaced with a new one. If the provider is a consultant, the report issued by the consultant should be reviewed to see if it matches the description

on the invoice, and discussions with the business person should take place about how the report's recommendations have been put to use.

Track, monitor, and investigate. Payments made pursuant to third-party contracts should be clearly archived in a company's books and records with specific budget codes that signify the types of goods and services at issue. Records should be made and updated in real time, while the expenses are occurring. Accurate books and records position the company to monitor contracts for potential problems.

Monitoring might include the following strategies:

- Compare paid vendor lists to approved vendor lists. In doing so, the company can identify which paid vendors have not yet been vetted through the normal onboarding process.
- Review contracts based on amounts paid to vendors, the location of the vendors, and what they are doing. For example, testing might give particular attention to contracts for periodic services, where it is sometimes easier for fraud to hide. They might look closely at contracts that deal with intangibles, as opposed to physical goods, or consumable goods. Such contracts might be subject to fewer pre-existing controls, like receiving documents or inventory logs.
- Ask whether certain contracting personnel have shown a special interest in using a specific vendor rather than not using one at all. Reviewers might ask if all transactions with a particular vendor have been handled by only one person at the company.

- Look at historical patterns. Maybe a company's purchases from a particular vendor started small and then grew over time. Maybe the company frequently purchases from the vendor at a level just below that which requires additional authorization. Maybe a company started using the vendor after a particular employee joined and stopped after the employee left.
- Consider the possibility of phantom vendors that set up other fake vendors so that a company can receive bids from more than one source for the same work. Setting up phantom vendors makes the scheme appear more legitimate. It can also help participants inflate costs.

FCPA enforcement actions involving Latin America regularly highlight the need for accounting controls to address bogus invoicing and shell companies. In the US\$22.8 million FCPA settlement with medical devices company Biomet for FCPA violations in Argentina, Brazil, and China, the failure of the company's internal audit function to fulfill compliance-related tasks was at the root of the company's FCPA issues and enabled violations to persist. The company did not review documentation supporting why commission payments were made to doctors. It did not review whether doctors performed actual and legitimate services that would have entitled them to such payments. It did not correctly classify the payments so that the books and records of the company accurately reflected the expenses. If it had performed these functions, the violations likely could have been avoided.

When designing these types of systems, verifications processes, and monitoring in Latin America, FCPA officials suggest

that probing context with a critical eye is vital. In the US\$29.4 million FCPA settlement with Eli Lilly concerning the activities of the company's distributor in Brazil, the SEC noted that the company's pricing committee approved the distributor's price without further inquiry. The SEC concluded that the policies and procedures Eli Lilly had in place to flag unusual discounts were deficient. It noted that the company relied on representations of the sales and marketing manager without adequate verification and analysis of the surrounding circumstances of the transactions.

In the SEC's press release, Kara Brockmeyer, the SEC's chief FCPA enforcer at the time, explained:

Eli Lilly and its subsidiaries possessed a 'check the box' mentality when it came to third-party due diligence. Companies can't simply rely on paper-thin assurances by employees, distributors, or customers. They need to look at the surrounding circumstances of any payment to adequately assess whether it could wind up in a government official's pocket.

Such "surrounding circumstances" are often best understood by locals who know the territory.

Monitoring as a Sign of a Mature Compliance Program

If a company does not test its compliance program, the program is not effective or complete, which is a point that FCPA enforcement authorities repeatedly stress. Without a plan to monitor high-risk activities, and test compliance mechanisms in place, companies run the risk of having programs that will be seen as merely "paper" in nature. It is not enough to create a set of rules and assume that employees are following them.

At an FCPA conference in 2014, Stokes said, "Many times companies have designed a ... robust program, but [failed] to test it. What we expect is to not only have on paper a program, but to test it, to make sure it is working." DOJ will also consider whether a company has been testing its program when it considers whether to require a compliance monitor as part of an FCPA settlement. Similarly, Brockmeyer has said that, when companies go to the SEC to discuss an issue, they should expect to answer questions about how they are testing controls and where internal audit fits into the compliance program: "Bribery cannot happen if the company has control over where the money is going."

In Latin America, compliance monitoring can be particularly important because business relationships between individuals that start innocently can sometimes morph into illicit arrangements. It might take time for actors to develop a rapport that can form the basis of a corrupt plan. Jim Mintz, the founder of the investigative

firm The Mintz Group, has performed investigations all over the world and remarks on how a common feature in Latin America is the deeply hidden nature of financial transactions, something that, he says, usually takes time for actors to develop. Consistent monitoring helps identify changes in relationships and red flags that might not exist at first and only arise over time. By assuming otherwise that all business relationships are as proper as when they began, companies leave themselves exposed.

Moreover, monitoring is important in Latin America because illicit plans that initially go unnoticed by compliance controls can eventually fall apart, as discussed in Chapter 4, at which point it is crucial that companies have detection systems in place. The reality that schemes do not always go as planned creates the opportunity for monitoring programs to catch instances of corruption.

How do companies test their compliance programs for indications of illicit acts? Testing can be divided into two categories: procedures testing and forensic accounting testing.

Procedures Review. Companies can test if the anti-corruption procedures currently in place are working properly. Are their head of sales, business development, and logistics fully trained on their compliance responsibilities? Are corruption risk assessments current? Are employees aware of and adhering to import and export procedures, and charitable giving rules? Are hotline tips being reviewed, categorized, and responded to in an appropriate fashion?

Companies might use their in-house compliance personnel, outside lawyers, or internal audit departments to check if third

parties are being used that do not appear on approved vendor lists and have not been subject to due diligence, if reimbursements related to gifts, travel, and entertainment are being made within pre-authorized levels with supporting documentation and otherwise in a way that is inconsistent with company policies, or if other key processes are not being followed.

Forensic Accounting Review. Companies can confirm that they are not disbursing money in ways not anticipated by conducting diagnostics of their books and records to test for suspicious transactions. For example, they can review the general ledger for potential improper payments in high-risk transactions. If a particular employee oversees frequent transactions with government officials, his or her expense accounts can be reviewed. If a particular service provider is a common intermediary between the company and the government, payments to it can be checked. Companies can review accounts related to “consultants,” “entertainment,” “agent fees,” or “commissions” for unusual patterns or entries. They can look at petty cash to ensure that it is not being used for off-the-books payments. Internal audit or external forensic specialists can provide the best support for these reviews.

How Small- and Medium-Sized Enterprises Meet Compliance Expectations

Large companies are not the only ones subject to FCPA enforcement scrutiny, and they are not the only ones that should have compliance practices in place. While large multinational corporations are regularly in the crosshairs of FCPA enforcement, smaller companies can be subject to enforcement, too. For example, Dallas Airmotive, an airline repair and overhaul company with less than 1,000 employees, settled an FCPA action in 2014 for improper payments in Brazil, Peru, and Argentina.

In fact, smaller companies are often more vulnerable. They can be easy targets for bribery shakedowns, since they have lower profiles than larger companies. In a 2015 survey conducted by FTI Consulting of executives at hundreds of companies operating in Mexico, 21% of respondents overall said that it was “necessary or very necessary” to pay bribes to do business with the government while 37% of executives at small companies expressed the same sentiment. Smaller companies are also more likely to go out of business as a result of an FCPA investigation. One example is Direct Access Partners, a Wall Street brokerage firm with only 30 employees that was investigated for making improper payments in Venezuela in 2013. After this investigation began, the firm closed down its business.

How should small and medium-sized enterprises (“SMEs”) apply these standards, especially smaller companies that still have

significant corruption risk profiles? SMEs’ resources, personnel, and capacity are usually much more limited than those of multinational corporations. Does a privately held oil and gas services company with 100 employees in Texas and 250 on-site in Brazil need a stand-alone compliance officer? How robust of a third-party due diligence and monitoring program does a small technology company with 200 distributors throughout Latin America need to have in place? These are the types of questions that companies need to answer for themselves.

To seek answers to their questions, SMEs may want to refer to the following helpful materials and sources:

U.S. Sentencing Guidelines. Section 8B2.1 of the U.S. Sentencing Guidelines provides a description of compliance expectations for smaller companies, explaining that SMEs “shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations.” It states that SMEs can meet these requirements with “less formality and fewer resources” than larger companies. This can mean reliance on existing resources or systems that are simpler than those of larger companies.

The Sentencing Guidelines provide four examples:

- The governing authority’s discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization’s compliance and ethics efforts;
- Training employees through informal staff meetings, and monitoring through regular “walk-arounds” or continuous observation while managing the organization;

- Using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and
- Modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

FCPA Resource Guide. The FCPA Resource Guide provides, “small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating companies’ compliance programs.” Chuck Duross, who headed the DOJ’s FCPA Unit from 2010 to 2014, once explained that one of the main reasons for producing the FCPA Resource Guide was to help provide information for smaller companies: “In October 2010 the OECD proposed that we provide better guidance as to both our enforcement priorities, our interpretations of the statute and the like, particularly aimed towards small and medium enterprises ... the guide was the ultimate product of that.” This insight suggests that Chapter Five of the FCPA Resource Guide’s description of the “Hallmarks of Effective Compliance Programs” should be read, understood, and followed not only by multinational corporations, but by SMEs, as well.

Enforcement officials. The Assistant Director of the SEC’s FCPA Unit, Charles Cain, and former Chief of the DOJ’s Fraud Section, Jeffrey Knox, have discussed SMEs in the context of FCPA enforcement. Cain noted that, while the SEC recognizes that companies have different resources, smaller companies still need to find ways to manage risk:

I can’t give specific examples how, but it generally involves the creative use of existing resources. While not the same as big companies, they are addressing the same risks and need to be creative. They need to make it a standard part of business. If compliance is part of the culture, the compliance program overlay doesn’t need to be as big.

Knox noted that authorities would still ask, “Were the [compliance] actions taken reasonable? Was there management involvement? Was the misconduct pervasive? What is the culture of the company?”

In 2014, the SEC’s Kara Brockmeyer noted that smaller companies need compliance mechanisms in place, but that they do not necessarily need “Rolls-Royce” programs. She advised that SMEs should still try to leverage the controls they have in place to address FCPA risks. For example, SMEs should use their internal audit function to ensure books and records are complete, supporting documentation is maintained for expenditures, employees know what they can spend money on, and segregation of duties and authorization levels are in place. She said that the types of controls that help prevent misconduct like embezzlement are the same controls that can prevent bribery.

In 2014, Patrick Stokes also explained that the DOJ realizes that SMEs cannot conduct the same type of M&A due diligence as larger companies. But he said, “We expect them to identify the highest risk areas and take a look at the books and some contracts

to the extent possible and follow it up and conduct more thorough review of various subsidiary and units around the world where it is operating.”

When to Use Outside Help for FCPA Compliance Matters

Given that Latin America presents considerable corruption risks, and anti-corruption compliance in the region can become complicated, companies often find it necessary to look for outside help. External lawyers, accountants, technology consultants, due diligence and investigation groups, and providers of online training programs all play critical roles in helping companies build anti-corruption compliance programs throughout the region. Increasingly in the region, local service providers are building impressive capabilities in these areas to support the compliance programs of companies operating in the region. They provide “home grown” solutions for Latin American businesses. But companies should know when to use them.

Before seeking outside assistance, companies should implement the following basic measures:

Assign responsibility. Outside compliance experts are of little help if there is not a person at the company in charge of directing and overseeing their work. When outside providers take direction from multiple people, communication lines can become crossed. Bills can quickly add up. Whether it is the general counsel or a specific

compliance officer, companies are wise to appoint one person with responsibility for managing compliance enhancements.

Ensure broad-based commitment. The board and management should understand what compliance enhancements will entail. They should be informed of the things that will be expected of the company as the program is built. They should also have a sense of what a compliant company will ultimately look like. Without up-front commitment, companies can waste time and resources. For example, situations occur where experts are well into conducting a risk assessment and designing a program when a senior officer suddenly decides to pull the plug. Such actions might even create greater risk for the company. Imagine how enforcement officials would perceive a company that takes initial steps to better understand its risks and enhance its program, and then suddenly decides to stop.

Have a comprehensive plan. A “scattershot” approach to compliance can be a waste of time and resources. All too often, companies hire outside help in ways that are not timely, are misdirected, and might even undermine ultimate compliance objectives. A company should not hastily hire experts to conduct FCPA training in an operational area of concern when its policies on which to train are outdated. A company should not decide to design and roll out a due diligence program before employees understand why they need to prioritize this work or before they are equipped to interpret the data obtained. For example, it is harder to build controls on an *ad hoc* basis around specific instances of gifts, entertainment, and hospitality, instead of developing a broad policy to guide such interactions when they arise. Instead, companies should use outside assistance

pursuant to a comprehensive approach, analyzing where they currently are, where they need to be, and creating a roadmap to reach this goal. Enforcement officials want to know that a company has a plan for meeting basic compliance expectations, and they want to see evidence that the company is advancing pursuant to that plan. By seeking outside assistance pursuant to a comprehensive plan, companies help ensure they can achieve maximum value for their investment of resources.

Do your homework. Before a company starts spending its compliance dollars, it should take some time to do its homework. Ample amounts of publicly available information exist that can assist companies in improving their compliance programs. One helpful starting point is to reach out to industry peers to understand how they approach compliance. Benchmarking against other companies can be essential. Seeking recommendations can save time.



It is all too easy for a company to want to apply the exact same compliance policies, procedures, strategies, and methodologies to its Latin American operations as it does in other parts of the world. But a template approach can lead to lack of effectiveness—and if compliance efforts are ineffective, resources go to waste, and corruption risk still persists. To be effective on the ground, it is essential for companies to think critically about unique risks and compliance needs in the region and to tailor their approaches accordingly. A thoughtful approach is the best protection.

Chapter 6

Where Culture Fits Into Compliance in Latin America

One of the bedrock lessons from the FCPA is that, when it comes to enforcement, cultural norms are irrelevant. It does not matter to law enforcement officials whether corrupt acts—like paying “commissions” to sales agents in Brazil, giving a “tip” to a highway official in Mexico, or hiring the unqualified son of the Colombian Minister of Mines—are standard practice in a certain country. Yes, it is true that the FCPA provides an affirmative defense for activity that is lawful under written local laws or regulations. But written laws in Latin America never legalize bribery, not even petty corruption. In this way, FCPA attorneys and those responsible for enforcement often must ignore cultural practices.

But when considering anti-corruption compliance, the situation is just the opposite. Recognizing the importance of local culture

can be key, especially in Latin America. If companies do not respond to local norms in structuring their programs, companies will not be able to effectively convey compliance concepts and manage corruption risk. Companies in Latin America are using cultural cues to tailor compliance strategies in a variety of different ways.

The “Circle of Trust” in Compliance

Successful compliance officers in Latin America regularly say that the most important lesson for the development of an effective compliance program is to establish positive relationships with business units in a company. Patrick Henz, compliance officer for the Americas at Primetals Technologies, describes the need to establish a “circle of trust.” Weatherford’s Regional Compliance Counsel for Latin America, Marco Padilla, similarly explains the relationship as one that must be built on confidence, where employees feel that they and their company will be better off if employees disclose an issue than if they do not. Thus, he says, a compliance officer must be a “trusted business partner.” Compliance works best in Latin America when relationships are collaborative, not static.

If, on the other hand, the compliance officer is seen as a threat, the compliance function runs the risk of breaking down. Employees might not seek out guidance when there is an issue of potential compliance significance. Even worse, they might choose to hide certain transactions to avoid potential scrutiny – even if the transactions are entirely legitimate – undermining a culture of transparency. There

can also be an unintended reverse effect when employees, who are prone to engage in criminal acts, feel more compelled to actually engage in them because of the wall that exists between a company’s rule-enforcing employees and its business-generating personnel.

If unaddressed, the divide can grow into hostility. In one situation, an outsider from the United States was brought into a Mexican company to build compliance measures, and began his work by requiring employees to participate in a two-day “introduction” workshop on anti-corruption laws. The trainer spoke only in English and showed no interest in establishing a personal rapport with the employees. On day two, the employees showed up wearing Mexican soccer team jerseys. When the trainer asked if Mexico was playing that day, the employees laughed. They had worn the jerseys as a display of defiance to the out-of-touch newcomer, who many associated with “Yankee Imperialism,” a historical attitude toward aggressive United States intrusion in Mexican affairs. This small episode illustrates that, in Latin America, local norms must be acknowledged if a compliance officer wants her efforts to be worthwhile. Without showing respect, compliance will falter.

Compliance officers need to become trusted partners of the business units. They need to be seen as resources for guidance and support. How does one build a circle of trust in Latin America? How does one foster true buy-in?

Some common best practices are discussed below.

Make the personal touch. Some compliance officers in the region go out of their ways to make the personal touch. They have

personal sit-downs and go to coffees with employees and make site-visits to company units away from headquarters. They may also do so with business partners by scheduling in-person visits in which they describe in detail the company's compliance program. They may explain to the third-party the nature of indirect liability to demonstrate why the very existence of the engagement creates a risk. Making a personal effort to explain the laws and trends behind compliance facilitates a cooperative relationship.

One compliance officer tells the story about how keeping a bowl of candy on her desk and her office door wide open results in her colleagues regularly dropping by to chat, which can serve to strengthen the compliance function. Another compliance officer tells how his in-person meeting with one employee actually inspired the employee to make a presentation on ethics at the local university. In Latin America, face-to-face engagement can go a long way.

Ensure empowerment. Red tape is a common feature of Latin American business, and it is all too easy for a compliance officer to fall into the trap of being perceived as merely another formality. One way companies avoid this perception is by empowering compliance officers to act in meaningful ways. Rather than serving as one more checkpoint in a company bureaucracy, compliance personnel can be given a leadership voice in the organization. Compliance officers can make determinations on when policy violations occur. They can be given the ability to stop a high-risk transaction from going forward, or at least be provided a strong voice to influence executives who make the final call.

Emphasize local laws. Any employee of a company subject to the FCPA can create liability for the company by paying bribes, no matter how far away from the United States the employee resides. The problem is that the further away from the United States the employee sits, the more abstract, foreign, and insignificant the FCPA can seem. How does a company emphasize the importance of FCPA compliance for those situated far from headquarters? One way is by educating employees about local anti-corruption laws in compliance policies, guidelines, and trainings.

Make trainings "local." Compliance trainings are more effective when they incorporate local cultural considerations and are conducted in local languages. For example, by role-playing corruption scenarios that commonly occur in a specific country, employees can better understand the dynamics of compliance. Brazilian employees can be shown, in Portuguese, what to do when an official asks for *uma propina* ("a tip"). Mexican teams can be trained on how to handle a *mordida* ("a bite") request from the electricity company. Such education and training will help employees better grasp expectations and rules.

Be sensitive to cultural concerns of acquired companies. After a corporate acquisition, acquiring companies generally want to quickly integrate new companies into their compliance programs, but sometimes they need to take time to respond to cultural considerations. One colleague was embedded in an acquired company for six months to manage the FCPA compliance integration of the formerly family-run business. The local company needed to be brought up to speed quickly on compliance processes. The colleague

recognized that she could not have done her job successfully without a high degree of cultural sensitivity. This meant she was able to listen to local employees more often than dictating to them, to know when to introduce new compliance concepts and correct lingering misunderstandings (and when not to do so), to sense when to concede issues and when to push back, and to artfully generate buy-in from the company's various sectors. It meant first building respect and trust through personal relationships, including dinners and family gatherings with her local colleagues. It also meant slowly educating the company on the stakes associated with non-compliance and the rationale behind the rules. After six months, the local company was up to speed and had internalized the compliance processes in a way it would not have if compliance would have been one-way mandated.

Focusing on Values

While in some parts of the world a rules-based compliance program may work best, programs in Latin America seem to work better when they emphasize values instead.

Of course rules must always be part of a compliance program, and a rules-based approach does provide obvious benefits. For one, it establishes clear guidelines on what laws must be followed and is often more efficient to enforce. Latin American personnel, however, often respond best when, above all else, they know that programs are part of the fabric of the organization, woven into the company's DNA. Employees respond more positively to matters concerning business

ethics and personal morals. Programs work better when employees feel emotionally connected to protecting a company's reputation for conducting clean and transparent business. Employees gain a feeling of pride when their companies succeed based on working hard and competing fairly in the marketplace, not by cutting corners and engaging in corrupt acts. Appealing to employees to "do the right thing" also helps generate ownership in compliance throughout an organization.

Moreover, in Latin America, when a company loses its good reputation, employees often feel the effects directly. When a company makes headlines for engaging in corrupt activity, it tarnishes the company's name and, with it, the reputation of all its employees. In this way, employees often have a personal reason for wanting to protect a company's reputation.

Another reason why a values-based approach works so well in Latin America is because employees are often less swayed by written rules, which might be connected to the lax enforcement of laws on the books in many parts of the region. Lax enforcement has resulted in high levels of perceived impunity. In the 2016 Latin American Corruption Survey, only about half of the respondents from the region thought that an offender is likely to be prosecuted in the country where they work. When the consequences of violating laws are amorphous, employees come to believe that it is irrelevant to follow policies designed to comply with those laws. Telling employees that they must follow company policy or risk going to jail has little impact in jurisdictions where people rarely go to jail for corruption-related offenses.

In practice, best-in-class companies in Latin America establish values-based compliance programs in various ways. Examples of those measures are described below.

- **The value of ethics is reinforced by a strong tone-from-the-top.** The CEO regularly makes public statements stressing the importance of the ethics and compliance program and sends e-mail reminders on a quarterly basis, recapping compliance success stories and instilling in business unit leaders that they own compliance risk. Additionally, senior-level executives, including the CEO, help lead annual staff-wide compliance trainings.
- **Compliance has a seat at the table.** Compliance is involved in business decisions from the start, rather than being brought in at the last minute. For example, compliance officers participate in board meetings, with an active role in sharing data related to areas of risk with decision makers.
- **The company takes a collaborative approach to compliance.** Designated “compliance champions” from various business units (often appointed by their peers) engage in monthly “compliance meet-ups,” in which they gather to discuss compliance challenges or creative ideas for program modification. Additionally, compliance officers themselves regularly seek input from business unit leaders, demonstrating a collaborative approach to the program.
- **Companies rotate compliance officers in and out of business units.** This helps facilitate better relationships between the compliance teams and the business units, and further encourages business unit leaders to take on ownership of

compliance. Often, business leaders have the ability to spread a much stronger message about compliance than those who have responsibility for only compliance, who sometimes are perceived as a company’s internal police officers.

- **Compliance leaders interact with industry peers.** Compliance officers attend industry conferences where they showcase the strength of their company’s compliance program to the business community. This, in turn, helps to generate a sense of pride among employees about their company’s culture of ethics and compliance.
- **The company regularly instills the importance of ethical behavior.** The company establishes a set of guiding principles that form the backbone of its Codes of Conduct and Business Ethics. Some companies take it a step further by creating a summarized version of their principles, posting them in lunchrooms and hallways. By creating a summarized version, too, employees can carry handouts and distribute them at meetings with government officials, subcontractors, business partners, and other contacts with whom company personnel interact. Furthermore, managers and supervisors give regular reminders at monthly staff meetings on the importance of compliance and ethics.
- **Compliance metrics are embedded in performance reviews.** Managers and supervisors include compliance metrics in performance reviews, with input from the compliance department, so that compensation, promotion, and bonuses incorporate a commitment to compliance. This gives employees concrete incentives to pay attention to compliance.

- **Positive behavior is recognized and rewarded.** Companies find ways to honor personnel who have contributed to the compliance program in a positive way. For example, the employee may be brought to headquarters to meet with the CEO, be publically recognized in the company's online newsletter, or be rewarded during a "town hall" ceremony.
- **Bad behavior is handled appropriately.** Employees who engage in misconduct are swiftly disciplined. Such disciplinary measures can include termination for serious violations, no matter the employee's position in the company.

When first introducing an anti-corruption compliance program in Latin America, achieving local buy-in can be a challenge. People might be accustomed to doing things a certain way. Sometimes corporate culture must change to make compliance efforts work. Such change is not something that happens overnight, but it can be generated most quickly when companies know how to appeal to their employees' values.

Appealing to Emotion

On Mexican highways, there are official government signs that read, "*Conduce con precaución. Tu familia te espera*" ("Drive carefully. Your family is waiting for you"), and "*Después de un accidente, ya nada es igual*" ("After an accident, nothing is the same"). On some routes, the government might leave wreckage from car accidents with signs that read, "In January 2013, six people died here." In this way,

the government seeks to convince people to drive safely by appealing to emotion. In fact, emotion is a common driver of action in Latin America in many ways. It is on display in television advertisements and news reporting. The most popular soccer commentators are the ones that scream, weep, and holler. In these ways, Latin American audiences are affected by messages that impact their hearts.

This dynamic has relevance for anti-corruption compliance programs as well. Incorporating an emotional element into compliance efforts can make compliance work better. One compliance officer in Mexico, for example, begins her trainings by discussing the types of leaders they wish to have in Mexico, the pride they feel when their leaders do the right thing and the shame that results when they do not. An Argentine compliance leader likes to ask about people's families and children when training on compliance procedures. He asks: "Is a corrupt business environment the type of place we really want to leave to our kids?" One Colombian company plans to produce a compliance video that shows a non-compliant executive being arrested by U.S. authorities upon arrival in Miami en route to Disney World, while his children look on with tears in their eyes.

Invoking emotion plays off of values, including family and pride. It focuses on how people ultimately relate to one another. It motivates people at the core. This is often how the most fundamental change in corporate behavior occurs, especially in Latin America.

Cultural Nuances in Internal Reporting Mechanisms

Internal reporting mechanisms, such as confidential and anonymous hotlines, offer employees a way to report potential anti-corruption violations. FCPA enforcement officials expect such mechanisms as standard components of compliance programs. Companies seeking to implement them in Latin America, however, need to consider a number of issues, including what types of technology to use, how to train employees to use it, and how to handle reports when they come in.

To ensure that hotline programs work successfully in Latin America, companies often make the following adaptations:

Incorporate local culture and language. To make hotlines and other reporting mechanisms credible in the eyes of Latin American audiences, companies publicize them in local languages with local idioms. A company working in Brazil should not hire a Portuguese provider to draft its Brazilian hotline materials with Portugal terminology. These messages must be communicated in local fashions and by local providers. This includes putting posters in common areas of businesses where employees regularly congregate. One Colombian company likes to publish cartoons on its intranet reminding employees of the ways they can report violations.

Clearly explain the hotline's purpose. When educating the Latin American workforce on internal reporting mechanisms, companies should take extra care to explain the specific *purpose* of the

hotline: to find out about potential corruption. If not, a hotline can be perceived as a way of expressing all sorts of opinions and grievances to their company. Although workers may report potential anti-corruption violations, they may also feel compelled to disclose a host of other issues, for example, that their boss leaves work early, their colleagues chat by the printer, or they were passed over for a promotion. This can overwhelm hotlines with reports that have nothing to do with bribery or corruption. One Venezuelan compliance officer once complained that his tip line had turned into a *telenovela* (what we refer to in the United States as a “soap opera”). To maximize the effectiveness of the hotline, employees must understand what is appropriate and what is not.

Clearly explain the hotline's process. As important as it is to explain to employees the purpose of the hotline, it is equally important for employees to have accurate expectations about how reports into the hotline will be used. Employees should understand, for example, that they should not expect to receive a final report concerning the findings. At the same time, however, when an employee has a credible tip, it is important for the company to keep the person apprised of progress in the internal review. This demonstrates to employees that the company is taking reports seriously and reduces the potential that the employee will take the same information to law enforcement, either in that country or in the United States.

Stress anti-retaliation protections. In many Latin American countries, employees might have a sincere and reasonable reluctance to come forward with reports of corruption. In countries like Honduras or Argentina, such reluctance might be due to a genuine

fear for personal safety, or a lack of faith in the courts to protect them. In other countries like Paraguay or Bolivia, such reluctance might be due to the fact that, if an employee who makes the report is terminated as a result, it might be hard for that employee to find another job given the lack of local employment opportunities. To overcome this reluctance, companies should make continuous efforts to stress that hotlines are anonymous and that the company maintains a zero-tolerance policy toward any form of retaliation. Companies may also want to give employees the option of submitting tips by e-mail or other methods, since some employees might fear that hotlines tips could be recorded and traced.

Appoint qualified hotline personnel. The people who manage hotlines and other reporting mechanisms, including those who listen and respond to reports, should be well-trained and familiar with local cultural nuances. Having a call center in New Jersey for a report from Nicaragua is not the most effective structure. The people who receive the calls should be able to engage with callers according to local customs and norms. They should also be prepared to be good listeners, to ask open-ended questions, and to respond to complaints in ways that avoid creating unnecessary legal exposure for the company, a particularly difficult task given the strong labor protections in many Latin American countries. As a result, hotline personnel also should have a basic familiarity of local labor rules.

Regional managers and ethics offices should have similar familiarity, since another common way in which violations are reported is through these personnel. Managers are the eyes and ears on the ground and often are the best conduits for reminding

employees of their reporting options. Nor is it uncommon for managers to directly receive sensitive reports of compliance issues. For these reasons, managers should be educated on how to handle reports when they come in. If the company is highly decentralized, it should have an ethics officer at each operational unit throughout the region tasked with handling complaints. Systems must be designed to educate all actors in the reporting chain about which issues to escalate and how to track reports. Mechanisms should be in place to ensure documentation and tracking of the reports.

Those best positioned to inject Latin American cultural norms into compliance are from local communities themselves. They can more easily identify relevant practices and opportunities to “tropicalize” compliance, as the process is referred to locally in the region. However, companies should always be careful not to be overly reliant on these local efforts – the concept of “culture” can sometimes be used as an excuse for promoting lax controls, too. When a local Brazilian company tells you there is no such thing as a “forensic accounting” discipline in the country, or that it is inconsistent with local culture to vet the books and records of a business partner in a critical way for corruption issues when exercising audit rights, the “culture” rationale should be suspect. In these cases, practitioners should demand adherence to international compliance standards, not purported local practices.