

# Daily Journal

www.dailyjournal.com

TUESDAY, FEBRUARY 20, 2018

PERSPECTIVE

## Latin America's wave of anticorruption laws

By Michael M. Farhang

As trade among the U.S. and Latin American countries has increased, so has the need for effective anticorruption measures to ensure a level playing field when U.S. companies do business abroad. When it comes to fighting corruption in the business context, the U.S. government's efforts under the U.S. Foreign Corrupt Practices Act often take center stage in the press, but there have been some important and recent legislative developments in a number of Latin American countries that provide key takeaways for U.S. companies, including the continuing importance of corporate compliance programs.

Anticorruption laws are now part of many countries' international obligations. The Organisation for Economic Co-operation and Development's Anti-Bribery Convention which establishes legal standards criminalizing bribery of foreign public officials in international business transactions, now has 43 signatory countries, of which six — Argentina, Brazil, Chile, Colombia, Costa Rica and Mexico — are in Latin America. These countries and others in the region are stepping up to meet the need for enhanced legislation with vigor. In the last several years, a number of them have dramatically enhanced enforcement, revamped legal tools, and renewed public commitments to fighting commercial corruption.

Such efforts have the potential to dramatically impact the environment in which many U.S. companies do business. The U.S. is a party to unilateral or multilateral trade agreements with a number of countries in Latin America, including Mexico, Chile, Colombia, Peru, Panama and Costa Rica, and has significant trade with a number of others, including Argentina and Brazil. According to the U.S. Census Bureau, for example, U.S. imports from Latin America last year topped \$115 billion and exports to the region were even larger, at \$150 billion.

In the last several years, partially as a response to legal obligations under the OECD Convention and partially in reaction to recent high-profile corruption

scandals, a number of countries in Latin America have undertaken sweeping legislative reforms to enhance the tools used by their governments to fight corruption in public contracting. Full implementation and execution may still remain to be seen in some cases, but the legislative progress has nonetheless been significant.

Mexico, Argentina and Peru, for example, enacted significant new laws last year that focus on the responsibility of companies involved in corrupt activity. In Mexico, the new General Law of Administrative Responsibility which took effect in July 2017, creates new categories of administrative offenses by companies involved in bribery of public officials in public contracting processes, with substantial monetary and debarment penalties. Argentina's new 2017 Law on Corporate Criminal Liability, expands corporate criminal liability to include bribery activity that takes place either in Argentina or abroad and even creates potential successor liability in mergers and acquisition transactions. In early 2017, Peru adopted Legislative Decree No. 1352, which creates independent corporate liability for certain bribery and money laundering crimes and enhanced debarment penalties in corruption cases. Colombia, which has had a foreign bribery statute penalizing corporate corruption — the Transnational Corruption Act — on its books since 2016, has been considering additional reforms in the last year to strengthen whistleblower protections, require additional disclosures from companies, and create specialized judicial expertise regarding corruption issues. Chile is also currently considering amending legislation that would strengthen existing criminal liability and penalties under the country's Corporate Criminal Liability Act of 2009.

In Brazil, where Brazilian law enforcement's Operation Lava Jato has resulted in a number of criminal prosecutions relating to alleged public corruption and money laundering, the Brazilian Congress has been considering an initiative called the "Ten Measures Against Corruption" that would bring new changes to corruption

laws and criminal proceedings, including enhanced penalties. Brazil's Clean Companies Act, enacted in 2014, criminalizes bid rigging, bribery, and fraud in public procurement and holds companies responsible for corrupt acts of their employees.

A key aspect of these legislative developments that should interest U.S. and multinational companies is the new emphasis on incentivizing corporate compliance programs through provisions in the laws themselves — including some features that do not exist under the FCPA. Unlike the FCPA, which does not provide for a legal defense against liability based on corporate compliance programs, a number of these national laws have provisions for potential defenses or mitigations to corporate liability based on the company's maintenance of an adequate anticorruption program.

The incentives provided may be significant. Under Argentina's law, for example, a corporation may be exempted from criminal liability where it self-reports corrupt misconduct, returns undue benefits gained through the misconduct, and had a preexisting and adequate internal control and compliance program. Mexico's new anticorruption law, like Brazil's Clean Companies Act, allows authorities to consider a company's compliance program in mitigation if it incorporates a number of hallmarks, including written policies, training, and reporting systems, and there are additional incentives for voluntary self-reporting. Chile's law also provides credit for companies that adopt preexisting compliance programs and even requires companies to take affirmative steps to prevent criminal activity, with a mandatory review and certification process for compliance programs overseen by Chile's Securities and Insurance Authority. Peru's new law also provides for a form of safe harbor based on a preexisting compliance program, and also includes protections against liability for acquiring companies that use proper due diligence to detect corrupt activity during the acquisition process.

There are important lessons for U.S. companies that seek to take advantage of the burgeoning business

opportunities in the region. First, the enhancement of legislation and enforcement tools will likely continue, as it represents an important step in meeting international commitments by a number of Latin American governments to strengthen anticorruption laws, an obligation shared with dozens of other countries worldwide. Second, some countries in Latin America have arguably even gone further than the U.S. in fashioning legislation that can incentivize companies to help fight corruption by maintaining effective compliance programs and rooting out internal misconduct where they find it. This means that is more important than ever for U.S. companies to keep their compliance efforts robust and sustainable in order to continue to take advantage of business opportunities in these markets.

The advantages of effective corporate compliance programs cannot be overstated. Although the U.S.'s FCPA enforcement regime does incorporate some collateral incentives for adequate compliance and self-reporting — through the U.S. Sentencing Guidelines and nonbinding DOJ and SEC policies, for example — several of the countries discussed in this article have advanced their anticorruption laws even further by enshrining such incentives in key provisions of the legislation itself. New anticorruption legislation in a number of U.S. trading partners in Latin America can foster even greater confidence in a fair and level playing field among business competitors. By incentivizing corporate compliance, moreover, these countries are coming up with new and creative ways to enlist companies in their national efforts to combat corruption.

**Michael Farhang** is a partner in the Los Angeles office of Gibson Dunn & Crutcher LLP. He is a former federal prosecutor and regularly leads internal investigations and provides compliance counseling for corporate clients in Latin America.



FARHANG