

LATIN AMERICA

Regional Risk Spotlight: Michael Farhang of Gibson Dunn Discusses Colombia's Troubled Corruption History and Recent Reforms

By Megan Zwiebel

One of the biggest FCPA news stories of 2015 was the surprise guilty plea of former PetroTiger CEO Joseph Sigelman during his DOJ trial. That case brought to the forefront the corruption climate in Colombia, South America's fourth-largest economy, with bountiful natural resources.

Colombia's past, plagued with violence and a difficult-to-control drug trade, continues to shape the country and plays a role in its anti-corruption environment. As recently as the late twentieth century, the Colombian government was engaged in a decades-long struggle for power with anti-government insurgent groups, most notably the Revolutionary Armed Forces of Colombia (FARC). Since then, violence has decreased greatly, starting in the early 2000s when President Álvaro Uribe Vélez was elected on a platform centered on confronting FARC. In 2010, President Juan Manuel Santos Calderón succeeded him in office and in 2012 announced peace talks between the Colombian government and FARC. He has also sponsored a number of initiatives to increase transparency in government and decrease corruption.

For this installment of the Regional Risk Spotlight, The FCPA Report spoke with Michael Farhang, a partner at Gibson Dunn and an expert on Latin America, about Colombia's troubled past and its recent efforts to curb corruption as it emerges as an economic powerhouse. See previously "*Regional Risk Spotlight: Douglas Mancill of PriceSanond Explains the Thai Corruption Landscape*," The FCPA Report, Vol. 4, No. 24 (Nov. 18, 2015).

A Troubled Past Influences Views of Government

FCPAR: How does the anti-corruption climate in Colombia compare to that in other parts of Latin America?

Farhang: A number of countries in Latin America have histories of dictatorship and military rule and in some cases this has led to a wariness about informing on others or reporting misconduct. That can be challenging for companies trying to prevent corruption, particularly in the form of hotline reports and internal investigations. [See "*How Does Your Company's Anti-Corruption Hotline Compare?*" The FCPA Report, Vol. 3, No. 21 (Oct. 22, 2014).]

Colombia has a somewhat different history, marked by political violence and weak government at times in the last few decades. The periods of narco-trafficking and guerrilla activity have influenced the development of government institutions because for certain periods of time government agencies were literally under attack by forces seeking to undermine their power. There is also a certain degree of political corruption that is historically related to the influence of paramilitary groups and narco-trafficking.

As a result of that history, there is a lingering distrust of the political institutions and the government faces issues with transparency at high levels. In the last five years, the government has instituted a number of reforms and there is an upsurge of legitimate national government authority, but there is still a level of mistrust in some quarters.

The Most Pressing Risks

FCPAR: What are the top corruption risks that companies face when doing business in Colombia?

Farhang: Colombia has one of the largest economies in Latin America, and with the recent Free Trade Agreement with the U.S., there are more opportunities for investment by both American and

foreign companies. The issues that are encountered by businesses in Colombia are similar to those in other Latin American countries with expanding economies such as risks in public procurement and in dealing with licensing and taxing agencies.

Additionally, Transparency International identifies law enforcement as one area where people in Colombia perceive a relatively high risk of corruption.

FCPAR: What particular industries are at highest risk?

Farhang: Two major industries in Colombia are mining and natural resource extraction. There is also some government administration of health care which can create risks specific to the health care sector.

[See "*Ceresney, Focusing on Pharma, Discusses SEC Enforcement Priorities and Compliance Expectations*," The FCPA Report, Vol. 4, No. 6 (Mar. 18, 2015).]

And of course, in the energy industry there was the recent PetroTiger enforcement action which included both domestic enforcement and FCPA enforcement resulting in individual prosecutions in the U.S.

[See "*Corruption Risks and Compliance Programs in the Oil & Gas Industry: An Interview with Samuel Cooper of Paul Hastings LLP*," The FCPA Report, Vol. 3, No. 6 (Mar. 19, 2014).]

Colombia's Anti-Corruption Laws and Initiatives

FCPAR: What are Colombia's anti-corruption laws like?

Farhang: Colombia now has a set of comprehensive anti-corruption laws that criminalize both passive and active bribery. The government can go after both bribers and officials who receive or solicit bribes.

New legislation, passed in 2011 and sponsored by President Juan Manuel Santos Calderón's administration, was designed to modernize the prohibitions on bribery in the public procurement and government contracting sectors.

The Santos Administration has also sponsored the Presidential Program for Modernization, Efficiency, Transparency and Combatting Corruption, led by an anti-corruption czar. The purpose of that program is to provide high-level guidance to government agencies about how to implement anti-corruption initiatives.

The Attorney General's office and the Public Prosecutor's office have responsibilities for prosecuting corruption cases internally, and there are significant efforts being made to modernize the judiciary and ensure that there's a comprehensive effort at fighting corruption in Colombia.

FCPAR: Is the Colombian government doing anything to address corruption risks associated with public procurements specifically?

Farhang: The Colombian government has been working on increasing transparency surrounding public procurements. One of the issues that a lot of countries have faced in modernizing and making procurement systems more transparent is having accurate records of who the decision-makers are, when a tender is opened, how decisions are made, and when those decisions are communicated to potential bidders, among other things. To address this, there is now an electronic procurement system in Colombia used to increase transparency and recordkeeping. The idea behind the online procurement system is to have a portal that automatically creates electronic records documenting the actions of procurement authorities in the bidding, negotiating and decision-making processes.

[See "*Detecting and Mitigating Corruption Risk When Participating in Public Procurements: Understanding the Procurement Process (Part One of Three)*," The FCPA Report, Vol. 4, No. 10 (May 13, 2015); Part Two, Vol. 4, No. 11 (May 27, 2015); and *Part Three*, Vol. 4, No. 12 (Jun. 10, 2015).]

FCPAR: How are Colombia's anti-corruption efforts succeeding so far?

Farhang: There are structural challenges that Colombia faces in terms of modernizing its anti-corruption

enforcement. The Colombian government has very strong control of the major urban areas, but there are parts of the country, particularly the more rural areas that are less developed, where security is still an issue. So the extent to which anti-corruption initiatives can comprehensively cover all business activities throughout the country is somewhat questionable. Additionally, there hasn't been a huge amount of improvement in Colombians' perception of corruption in their own country.

The country still has a ways to go in terms of implementing and enforcing the national legislation initiatives, but the Colombian government deserves great credit for its efforts to bring Colombia into alignment with international norms. Colombia recently signed the OECD's Anti-Bribery Convention and it's a signatory to other inter-American conventions and the U.N. Convention Against Corruption. There is clearly a very public commitment to anti-corruption enforcement.

Doing Business in Colombia

FCPAR: To what extent are the U.S. government and the Colombian government working together against corruption?

Farhang: As a defense attorney, my window into what the U.S. government may be doing behind the scenes with investigations in Colombia is limited. However, in handling a number of anti-corruption investigations in Latin America over the last several years, I have observed that the U.S. government has developed strong relationships with a number of anti-corruption enforcement agencies in Latin America such as Brazil and Mexico. Now the Free Trade Agreement makes Colombia one of our most important trade partners in Latin America, so the idea that there wouldn't be that kind of coordination on anti-corruption enforcement seems counter-intuitive.

FCPAR: What can companies do to educate themselves about the risks specific to doing business in Colombia?

Farhang: It's important to have local counsel when operating in another country and certainly Colombia is no exception to that. Good, thoroughly vetted local counsel can help interpret some of the recent regulatory changes and assist a company in understanding what the local risks are.

FCPAR: What kinds of third parties will companies find themselves working with in Colombia and what do companies need to do to protect themselves?

Farhang: There is the general range of third-party business partner relationships such as distributors and resellers, agents, brokers, consultants and customs brokers. Companies should have strong internal policies, third-party certifications, and supplier and business partner codes of conduct. Anti-corruption contract clauses are always valuable when dealing with third parties in another country.

It's important to do significant due diligence and vet all third parties, and make sure that any red flags or corruption risks are adequately resolved and dealt with. In terms of doing government business, there should be a priority on making sure that third parties are good business partners and are doing clean business.

[See our three-part series on customs corruption risks: "*Identifying the Problem Areas (Part One of Three)*," The FCPA Report, Vol. 4, No. 21 (Oct. 21, 2015); "*Four Ways to Limit the Risks of Working with Customs Brokers, Freight Forwarders and Other Third Parties (Part Two)*," Vol. 4, No. 23 (Nov. 4, 2015); and "*Should a Company Ever Pay a Facilitation Payment to a Customs Official? (Part Three)*," Vol. 4, No. 24 (Nov. 18, 2015).]

FCPAR: What are the corruption risks associated with gifts, travel and entertainment in Colombia?

Farhang: There isn't a unique culture of gift giving in Colombia that would be unusual from our perspective in the U.S. the way there is in some countries in Asia. However, travel and entertainment for government officials in a procurement context is an area of risk in Colombia.

FCPAR: What are your recommendations for performing internal investigations in Colombia?

Farhang: When I've been down to Colombia, it has been very helpful to be able to speak with local employees and review documents in Spanish. Knowledge of local terminology, which can vary from country to country and region to region, is also helpful. It's a way of building trust and understanding a situation better. It is also important to have some cultural background working within the country, including about its political history, local business relationships and business models.

[See "*Handling the Challenges of Overseas Anti-Corruption Investigations: Forensic Accountants, Government Expectations, Translators, Upjohn Warnings, Privilege Issues and Recording Interviews*," The FCPA Report, Vol. 2, No. 9 (May 1, 2013).]

FCPAR: Are there Colombian data privacy laws that companies need to consider when conducting internal investigations?

Farhang: There is a fairly modern data privacy protection law, consistent with what you might see in Europe with the E.U. Data Protection Directive. Counsel will need to take steps to ensure compliance with that law when performing internal investigations, particularly with regard to collection of data that may contain personal information and the export of data outside of Colombia.

[See "*Conflicting Compliance Obligations: How to Navigate Data Privacy Laws While Performing Internal Investigations and Promoting FCPA Compliance in the E.U. (Part One of Three)*," The FCPA Report, Vol. 2, No. 1 (Jan. 9, 2013); Part Two, Vol. 2, No. 2 (Jan. 23, 2013); Part Three, Vol. 2, No. 3 (Feb. 6, 2013).]

FCPAR: Are there any particular words, phrases or euphemisms that a company should look out for that might indicate that a bribe is being paid?

Farhang: The term "mordida" is a common term in Latin America relating to a bribe, which means "a bite" in both Spanish and Portuguese. Terms for cash, such as "plata" (which literally translates to "silver"), are also words to look out for.