THE LEGAL ALLIANCE OF THE AMERICAS

Transnational Compliance Issues

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Compliance Update in Key Markets

We will first review key compliance trends in:

- Argentina
- Brazil
- Chile
- Colombia
- Peru
- Mexico
- U.S.

Argentina: 2016 Anti-Corruption Developments

2016 THE "REPENTED" ACT

- In his opening speech before the Congress (Dec. 15 2015), entering President Macri pointed out that one of his Government priorities would be the **Fight Against Corruption**. A few days after he was sworn into office, he sent to the Congress a draft bill christened as the "Repented" Act, in order to fight corruption at both levels public and private.
- The bill regulates different aspects of cooperating witnesses and defendants in a criminal investigation related to corruption, white slave traffic, kidnapping, conspiracy, white collar crime, drug dealing, terrorism and minors sex abuse, and the implications of such cooperation.
- A few days ago the bill was approved by the Senate, which incorporated a few minor changes that should be considered again by the Chamber of Representatives in order to be enacted by the president of the republic.

Argentina: 2016 Anti-Corruption Developments

- Benefits for the cooperating party:
  - Reduction of sentence for the offense from one third to the minimum.
  - Prison time can be served under parole.
  - Could be eligible for Witness Protection Program.
- Conditions precedent to granting these benefits are to provide new and certain evidence that:
  - Avoids commitment of a new crime, or stops an ongoing crime.
  - Leads to identify and locate new suspects who are involved in criminal actions on the same or greater level of cooperating party.
  - Determines the source or funding of criminal activities.
- Excluded from benefits: President, Vice President, Ministers, Supreme Court Judges.

Argentina: 2016 Anti-Corruption Developments

JUDICIARY LEVEL

- Right after former president Cristina Kirchner left office, surprisingly all corruptions investigations came back to life…
- This shows the interference from the executive power into the judiciary performed by the Peronist government that threatened judges and prosecutors investigating corruption cases.
- A new era started: A series of summons and indictments started, and some suspects ended in preventive custody.

IMPORTANT CASES – IMPORTANT IMPROVEMENTS

- Tragedy of "Once Station" case. On February 11, 2012, a train with 1,200 passengers crashed into Once Central Station resulting in 52 dead and 702 injured. After due investigation, the DA Office determined a web of corruption between TBA, the company that ran the train line, and public servants who were supposed to control TBA, in which all subsidies ended in the owner's pockets and not in the maintenance of trains. After trial, 21 company officers and public officers of the Dept. of Transportation were convicted and sentenced to between three and eight years imprisonment for manslaughter and corruption. The Secretary of Transportation, Mr. Ricardo Jaime, was sentenced to six years and a prohibition to occupy public positions for seven years.

Argentina: 2016 Anti-Corruption Developments

IMPORTANT CASES (Continued)

- The "Route of the K Money" case. Mr. Lazaro Baez was a close friend to former President Nestor Kirchner. His companies benefited from a 90% award of public projects in the south of the country. It was determined that he collected advance payments without finishing the construction of roads, damns, bridges, infrastructure, etc. These advanced payments were paid back, in the form of room rentals in the Kirchner family´s hotel in the Town of Calafate, in the Province of Santa Cruz. The amount of money that was stolen from the people of Argentina is around USD 4 billion. Mr. Baez is under preventive custody after trying to flee the country in a private plane. His family and a complex web of companies he controls own more than 250 real state properties that equal the size of the city of Buenos Aires.

- Former President Cristina Kirchnar. Mrs. Kirchnar is also involved in two other corruption cases; one for money laundering, as she kept USD 4.6 million in her daughter´s safe box in a bank, without any explanation of where that foreign currency was purchased (presumably in the black market). The other case is related to the Lazaro Baez scandal, in which Mrs. Kirchner's companies were paid by Mr. Baez's companies for non-existing leases in order to share the bribes obtained through public construction awards.

Argentina: 2016 Anti-Corruption Developments

CONCLUSIONS AND CHALLENGES

- It seems that Argentina finally started a new phase, in which the citizenship and the government are determined to fight corruption, since they realized that CORRUPTION KILLS.

- The judicial system is starting to function on an independent basis, and the new government gave total freedom to investigate and prosecute. The appointment of two new well respected Supreme Court members is proof of that will.

- A new rule of law model has been established with equality and a strong sense of justice.

- There is still a lot to be achieved to maintain such standards, but we are on the right path.

Brazil: 2016 Anti-Corruption Developments

Brazil's anti-corruption laws range from regulations for public officials to criminal statutes.

- **Anti-Bribery Law (also referred to as Corporate Liability Act or Clean Company Act (No. 12.846/2013).** Types of offenses that are prohibited:
  - Corruption (i.e., to promise, offer, give, directly or indirectly, undue advantage to public official or related third party / use of stooges)
  - Public tender related offenses (i.e., frustrating or defrauding a public tender, bid rigging etc.)
  - Hindering of investigation
- The Anti-Bribery Law provides for **strict liability** of companies:
  - No need to prove **intent or fault**.
- Brazilian legislation also prohibits **money laundering** (No. 9613/98, as amended in 2012):
  - No list of underlying crimes: funds arisen from the practice of any crime and that are omitted may characterize money laundering crime (example: tax crimes)
- Proposed legislation on private corruption is pending.

Brazil: 2016 Anti-Corruption Developments

- Targets of the Anti-Bribery Act: **legal entities** (the "supply side")
  - Brazilian (even if offense committed abroad)
  - Foreign (with offices, branches or representation in Brazil)
- Sanctions for legal entities include:
  - Administrative: **fines that range from 0.1% to 20% of the legal entity's gross revenues** and publication of adverse judgment in wide circulation press.
  - Effective compliance programs: impact on reduction of fines.
  - Judicial: disgorgement; partial suspension or interdiction of business; dissolution; disbarment (public contracting).
- Individuals:
  - Criminal Code: prohibition includes bribery of public officials (national and foreign).
  - Crimes provided across sparse legislation, such as Public Tender Act (No. 8.666/93).
  - Important: trends in criminal cases (*teoria do domínio do fato*/willful blindness) - used in court since 2005 Mensalão (The Big Monthly) scandal to target the so-called mentors of corruption schemes based on their capacity to act/to avoid the offense
- Risk areas: any kind of contact with public officials

Brazil: 2016 Anti-Corruption Developments

Operation Car Wash ("Lava Jato")

- Enforceable judgment (i.e., imprisonment) after appealable second instance conviction
  - Habeas Corpus case no. 126.292 (2016) - Federal Supreme Court
  - Federal Constitution: assumption of innocence until final unappealable decision
  - Penal Procedure Code: imprisonment after unappealable decision
- 10 Actions Against Corruption (proposed legislation)
  - A campaign created by the Federal Public Prosecutor's Office (MPF) to fight systemic corruption in public administration - http://www.dezmedidas.mpf.mp.br/
- Concessionaire (Odebrecht, Queiroz Galvão, UTC Participações and Eco Realty Fundo de Investimentos) has recently suspended construction works of subway line in São Paulo due to difficulties to obtain long term financing with public bank BNDES.

Brazil: 2016 Anti-Corruption Developments

"TIME FOR TEMER"*

- **CHALLENGES**
  - Restart the economic growth, reduce inflation and solve government's fiscal situation
    - long term freeze on public spending (limited to inflation)
    - reform of the pension system
  - Operation Car Wash and involvement of Congressmen and other politicians, including members of the government
  - Political polarization (coalitional presidentialism)
  - Unpopularity of the new government and opposition from the PT.

* Title Source: The Economist – September 3rd, 2016

Brazil: 2016 Anti-Corruption Developments

"TIME FOR TEMER"* (Continued)

What Now?

- Continuity of Operation Car Wash
- Will former President Dilma Rousseff be investigated/prosecuted under Operation Car Wash?
- Will President Michel Temer be investigated/prosecuted?
- Privatization of State-owned companies (i.e. Petrobrás, Correios)?
- Leniency agreements under the Anti-Bribery Act

* Title Source: The Economist – September 3rd, 2016

Chile: 2016 Anti-Corruption Developments

- Chile's anti-corruption laws range from transparency regulations for public officials to criminal statutes:
- **Corporate Criminal Liability Law (No. 20.393) since 2009.** It prohibits:
  - Bribery of national and foreign public officials;
  - Money laundering (including the formation of an illicit association); and
  - Financing of terrorism.
- Sanctions for firms include: dissolution; disbarment (public contracting); and fines up to US $1.4 Million.
- Individuals: Arts. 248 – 252, Criminal Code: Prohibits bribery of public officials (including foreign).

Chile: 2016 Anti-Corruption Developments

- Responsible Entities:
  - Cases are handled by public criminal prosecutors (local).
  - State´s Defense Council responsible for the integrity of public funds must file actions for crimes involving public officials (particularly bribery).
  - State´s Controlling Entity must refer corruption cases to prosecutors.
- Intelligence and coordination (Mutual Legal Assistance):
  - **UAF** (Financial Analysis Unit of the Treasury) for money laundering (banks, brokers, insurers, etc. are reporting entities)
  - **UNAC** (Anti-corruption Unit of the Public Prosecutor's Office-**PPO**).

Chile: 2016 Anti-Corruption Developments

- Cases and proceedings:
  - Double proceeds cases: public officials (congress members) who received simultaneously wages for consultancy work from corporations. Formal infringement, but with political implications and possible bribery charges.
  - FIFA racketeering investigation by the U.S. Department of Justice (DOJ): Guilty plead by former head of Chilean football federation.
  - Re-opening of the LATAM Airlines case triggered by press information and 2014 OECD report (bribery of public officials in Argentina).
  - Cases dealing with waste management contracts by municipalities; may involve multinational corporations.

Colombia: Key Compliance Issues

There are three major areas of concern regarding compliance in Colombia:

- Corruption: Besides implementing programs to ensure compliance with FCPA regulations and prevent money laundering, Colombia recently enacted a transnational bribery statute. The new law, which updates the Anticorruption Statute, follows the OECD recommendations and establishes that certain companies will have to implement compliance programs before March, 2017.

  Money Laundering and Financing of Terrorism Prevention: Local laws impose certain duties on companies to prevent money laundering and financing of terrorism risks. Certain companies are required to implement a program to reduce risks and to appoint a compliance officer.

Colombia Compliance Topics Continued

- Antitrust: The Superintendence of Industry and Commerce (SIC), Colombia's antitrust enforcement agency, has begun to effectively use the Leniency Program in cartel investigations. Although Law 1340 of 2009 created the Leniency Program, it was not until the last couple of years that SIC has completed investigations and imposed penalties based on the information provided by whistleblowers.
- Compliance programs have been promoted by SIC as tools to prevent antitrust violations, and the agency has hinted that companies with compliance programs will receive credit for them in the event of investigations.
- Data Protection: Under the Data Protection law, data bases have to be registered before SIC by November 2016. Registration requires internal work aimed at identifying data bases and establishing the regulation and compliance standards.

Mexico's National Anti-Corruption System

- Mexico reformed its constitution in 2015 to create a National Anti-Corruption System ("NACS").
- Creates the Audit National System and the National Digital Platform.
- The National Digital Platform monitors public servants' relevant information, which is available to competent authorities who may conduct random searches.
- Creates a multidisciplinary committee, with citizenship participation, to act as liaison between different authorities.

Mexico's National Anti-Corruption System

- Public servants are required to file a statement containing their assets, liabilities, conflicts of interest and tax compliance.
- The Superior Auditing Office may impose fines and request prosecution, seeking incarceration and payment of damages and losses.
- A specialized court now has authority to resolve monetary complaints against public servants.
- A new Anti-Corruption Special Attorney has authority to investigate and prosecute corruption acts.

Mexico's National Anti-Corruption System

- Definition of public servant to include basically all persons involved in corruption acts, including non-public servants.
- Criminal responsibility to public servants for not preventing or informing corruption activities.
- Increases imprisonment terms for responsible parties and disables them temporarily to hold public office or participate in public bids.
- Penalties are increased when crime is committed by elected officials or those working for a police, customs or migratory agency.
- Two new felonies are established: Influence Trafficking and Intimidation.

Peru Compliance Update – Current Regulation

- **ANTICORRUPTION LAW N°30424** (April 2016):
  - Comes in force on January 1, 2017
  - Only for bribery given to public officers from foreign countries or public international agencies (Case Article 397-A Criminal Code)
  - Sanctions to legal entities. Fines include: Administrative fines (sextuple of the benefit); partial suspension or interdiction of business; dissolution; disbarment (public contracting).
- **CRIMINAL CODE AND SPECIAL LAWS**
  - Money laundering, corruption, bribery
  - Punish individuals with criminal sanctions
  - Punish companies involved with confiscation of goods, real state and material.

Peru Compliance Update – Current Regulation

- **FINANCIAL INTELLIGENCE UNIT – (FIU):** Supervises certain companies to prevent asset laundering and terrorist financing
  - Reporting Companies (Financial and insurance system; Cars, ships and airplanes traders; Private Custom Agencies; Investment funds management, mutual funds management, pension insurance funds management, among others
  - Obligations: Elaborate prevent protocols of asset laundering and terrorist financing; Designate a Compliance Officer; Identify customs and workers; Control and inform operations of customers; Implement a training program for the workers.
  - Sanctions: fines up to USD 150,000 per infringement

- **DATA PROTECTION:** Law 29733 (July 2011 / 2013 / 2015)

Peru Compliance Update – NEW DEVELOPMENTS

- July 28, 2016 New Government.
- One week ago, Government requested the Congress delegation of faculties to issue laws in several subjects.
- *To include other matters in the scope of the anticorruption law, money laundering and to extend the faculties of the FIU.*

U.S.: 2016 Transnational Anti-Bribery Compliance Developments

The 2016 major developments in anti-bribery compliance in the U.S. are as follows:

- Increasing number of DOJ and Securities and Exchange Commission ("SEC") Foreign Corrupt Practices Act ("FCPA") enforcement actions.
- Through the end of August 2016, the SEC had initiated a total of 14 FCPA actions, whereas it initiated 9 such cases in all of 2015 and 8 in 2014.
- The total 2016 SEC recoveries in these 14 actions is $288.3 Million (with an average of $20.6 Million recovery per case), compared to a 2015 SEC total recovery of $113.8 Million (with an average of $12.6 Million recovery per case).

2016 – Latin-America Related SEC Enforcement Actions

- Of the 14 SEC enforcement actions initiated in 2016 to date, three relate to Latin-America (majority of actions relate to China).

- On August 11, 2016, the SEC announced that Houston-based Key Energy Services, Inc. ("Key") agreed to pay $5 Million in disgorgement to settle charges that it violated the FCPA accounting provisions, in connection with $229,000 in improper consulting payments made by Key's Mexican subsidiary to an employee of Pemex, Mexico's state-owned oil company.

- On February 4, 2016, the SEC announced that Ignacio C. Plaza, President of LATAM Airlines, a Brazilian-Chilean airline, agreed to pay a $75,000 penalty to settle charges that he violated the FCPA when he authorized improper payments to a third-party consultant who he knew would route part of the funds to Argentina union officials in the midst of a labor dispute.

2016 – Latin-America Related SEC Enforcement Actions Continued

- On February 1, 2016, the SEC announced that SAP SE, the software company, agreed to pay $3.7 Million in sales profits to settle SEC charges that it violated the FCPA when its deficient controls enabled an executive to pay bribes to procure business from the government of Panama.
- Takeaways:
  - Number of SEC actions per year continues to increase rapidly
  - The amount of penalties and recoveries per action has nearly doubled from 2015.
  - The SEC is increasing its focus on actions against executives for FCPA accounting violations and deficient compliance controls.

DOJ's 2016 Latin-America Related Enforcement Actions and Policy Initiatives

- On July 25, 2016, DOJ announced that LATAM Airlines agreed to pay $12.75 Million in criminal penalties related to a scheme to pay bribes to Argentine union officials via a false $1.5 Million consulting contract with a third-party intermediary (an advisor to senior Argentina government officials) in violation of the FCPA accounting provisions.
- On April 5, 2016, DOJ issued its FCPA Enforcement Plan and Guidance, which announced: (1) a more than doubling of DOJ resources allocated to FCPA enforcement; (2) increased coordination with its foreign counterparts; and (3) the launching of a one-year FCPA Enforcement Pilot Program, effective immediately.

DOJ's 2016 Latin-America Related Enforcement Actions and Policy Initiatives Continued

- On March 23, 2016, DOJ announced that Miami businessman Jose Shiera Bastides pleaded guilty to FCPA criminal charges related to his role in a scheme to corruptly secure energy contracts from Venezuela's state-owned oil company Petroleos de Venezuela S.A. Sentencing of Mr. Bastides is pending.
- On March 3, 2016, DOJ announced a settlement of criminal charges filed against Olympus Corporation of the Americas and Olympus Latin-America, both subsidiaries of Olympus Corporation, a Japan-based maker of medical equipment, which agreed to pay $22.8 Million in penalties, resulting from providing money, travel and free equipment to government-affiliated doctors and hospitals across Central and South America to induce them to purchase Olympus products.
- Takeaways:
  - DOJ continues to focus on larger cases than the SEC and to seek companies to self-report violations, by enticing companies to take advantage of the reduced penalties provided for under its one-year Enforcement Pilot Program.

Key Compliance Topics

We will now examine the following key compliance topics:

- Situations where compliance issues have transnational impact
- Benefits from effective compliance programs
- FCPA advice to a U.S. company considering an acquisition of a non-U.S. business
- How to evaluate FCPA/transnational bribery risks and ways to address them
- How multinational companies should deal with a single global compliance program for multiple jurisdictions

Situations Where Compliance Issues have Transnational Impact

- There are situations where the same offense/act is subject to anti-bribery actions in more than one country.
- Although criminal law is usually applied on a territorial basis and jurisdiction is by nature national in scope, a compliance investigation in one country can lead other jurisdictions to open related investigations.
- For instance, under the Argentine Criminal Code, the judge of the place where the effects of the crime are tangible is authorized to prosecute the underlying crime. Thus, even if the underlying offense occurred outside Argentina, it could lead to a prosecution in this country.
- Another example of this is the so-called Carwash investigation in Brazil, which has led to an FCPA investigation by the U.S. authorities of Brazilian companies that trade securities in the U.S.

Benefits from Effective Compliance Programs

- Corporate compliance has the benefit of targeting infringements by means of auditing and controlling measures and strategies.

- Compliance can help detect earlier any misconduct or infringement in order to take the necessary internal steps.

- In Chile, companies can be exempted from fines and other sanctions if they comply with due diligence requirements and effectively implement a certified “Offense Prevention Model”.

- Nonetheless, public prosecutors may prove that a compliance program is sham or merely formal.

Benefits from Effective Compliance Programs Continued

- In case of self-reporting, there are no exemptions or immunities.
- Nevertheless a company's compliance policy should result in a more favorable treatment (reduction of sentence):
  - If the company before being aware of the proceeding, self-reports the infringement;
  - If the company implements efficient means to prevent similar misconduct, before trial begins (certification included); and
  - Criminal courts may suspend the execution of a sentence under certain conditions. But the Public Prosecutor´s Office is of the view this only applies to small and medium size companies, not large firms and could contest the suspension.

FCPA advice to a U.S. company considering acquiring a non-U.S. business

I would advise the company that before proceeding with the acquisition, there should be a thorough anti-bribery due diligence of the acquisition target ("Target"). Such due diligence should include, at a minimum, the following components:

- Assess the risk level of the Target's country and industry
- Review Target's compliance history from public and company records
- Review Target's ethics and compliance policies and procedures, if any exists
- Determine whether Target conducts risk-based employee compliance training
- Assess whether Target has a compliance hot line for employees and others
- Review any Target reported compliance issues and how they were resolved
- Assess whether Target conducts audits and reviews of its compliance function
- Assess the level of autonomy and reporting lines of Target's compliance function
- If acquisition is done, to conduct post-merger compliance training and remediation of any issues identified during due diligence

How to evaluate FCPA/transnational bribery risks and ways to address them

- From a Colombian perspective: FCPA and transnational bribery statutes enacted in several jurisdictions, including Colombia, raise several concerns for transnational companies.
- In order to evaluate risks, I would suggest, firstly, reviewing the types of businesses that your company conducts and the counterparts that you deal with. It is important to recognize that you may have liability even when acting through an agent or distributor. Hence, if you have local partners or agents, you should expressly impose the same compliance duties on them that you would require of your own employees.

How to evaluate FCPA/transnational bribery risks and ways do to address them Continued

- Secondly, be sure to make your compliance policies relevant for your local teams. Having a policy is meaningless, if it does not become part of your corporate everyday culture. Local training should not be overlooked. Standardized compliance training may be useful, but adding local flavor is often preferable and ensures that key concepts are addresses. Local training also helps to address concerns that otherwise may go unnoticed.

- Finally, conduct periodical evaluations, so that you have an adequate risk assessment and have the tools to update policies, improve your compliance programs and training.

HOW MULTINATIONAL COMPANIES SHOULD DEAL WITH A SINGLE GLOBAL COMPLIANCE PROGRAM FOR MULTIPLE JURISDICTIONS

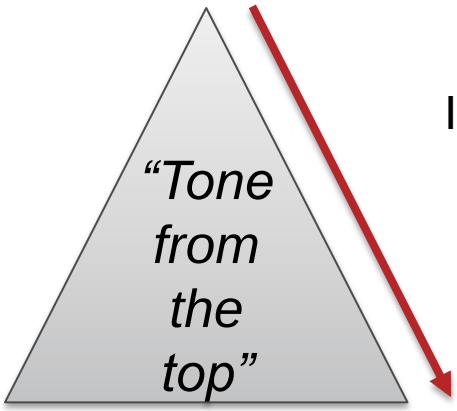
What Usually Happens

- The parent company:
  - Has more experience with compliance laws and programs
  - Tends to create and develop the programs abroad
- Development of such programs in accordance with the key international laws (e.g. FCPA, UK Bribery Act)
- Programs in line with the group values and strategies
- Global risk assessment

HOW MULTINATIONAL COMPANIES SHOULD DEAL WITH A SINGLE GLOBAL COMPLIANCE PROGRAM FOR MULTIPLE JURISDICTIONS

Common Concerns

- Risk assessment: global and regional
  - Elements of connection
  - Identification of risks within the several countries on which the group has business
- One program for all the companies of the group?
- Need for adjustment to the local reality (culture, organizational structure, legislation, etc.)
  - E.g.: **gifts and entertainment** policies have to be **jurisdiction-specific**
- (Lack of) Autonomy of the local directors and managers
- Autonomy, involvement in the process as a whole, commitment



In Brazil
and
abroad

Common Concerns (continued)

- (Lack of) Autonomy of the regional compliance bodies or equivalent
  - Qualified people, in the country, for updating or help keeping the program updated (legislation and jurisprudence)
  - Issue spot: when the compliance officer is based abroad, make sure there is a high-performing person/team in each location to be the local resource
- Implementation of the program with effective training and regional guidelines (group team in Brazil committed to implementing the program)
- Effectiveness of the communication structure with the parent company
- Issues with a mere translation:
  - Local understanding of the program
  - Staff training: need for **tailor made training**
  - Program reviews
  - Reporting channels (hotlines): service in a foreign language; translation of complaints may adversely affect investigation

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