JONES DAY | One Firm Worldwide®

WHITE PAPER

November 2020

Recent FCPA Developments for Latin America

The Foreign Corrupt Practices Act ("FCPA") is a U.S. federal law from the late 1970s that prohibits covered entities and individuals from directly or indirectly paying bribes to non-U.S. government officials to obtain or retain business. It also requires companies with securities listed in the United States to maintain accurate books and records, and adequate internal accounting controls. The U.S. Department of Justice ("DOJ") is responsible for enforcing the criminal provisions of the law, and the U.S. Securities and Exchange Commission ("SEC") is responsible for enforcing the civil provisions. This *White Paper* covers:

- Recent relevant updates to the DOJ and SEC's FCPA Resource Guide;
- Recent enforcement related to conduct in Latin America; and
- Key takeaways for companies with operations in Latin America.

FCPA RESOURCE GUIDE

In 2012, the DOJ and the SEC published their FCPA Resource Guide to provide information about how those two enforcement agencies interpret and enforce the law. The FCPA Resource Guide is not binding law. However, it is valuable for understanding the perspectives of these two agencies.

On July 3, 2020, the DOJ and the SEC published the second edition of the FCPA Resource Guide. The second edition reflects updates to government enforcement policies and recent judicial opinions. It also provides additional guidance on how the DOJ and the SEC evaluate corporate compliance programs and make charging decisions. Like its predecessor, the second edition is an important tool for understanding the current point of view of these two agencies in order to anticipate, mitigate, and/or remediate risks that multinational companies face when doing business in Latin America.

After the second edition of the FCPA Resource Guide was released, Jones Day wrote a *Commentary* describing the relevant developments. Without attempting to summarize the entire FCPA Resource Guide, this *White Paper* focuses on a few topics that are particularly pertinent to those conducting business in Latin America. We conclude by discussing some developments and enforcement actions that have happened since the second edition was published.

"INSTRUMENTALITY" OF A FOREIGN GOVERNMENT

The FCPA makes it illegal to provide anything of value to a "foreign official" in order to obtain or keep business. The law broadly defines the phrase "foreign official" to include "any officer or employee of a foreign government or instrumentality thereof." However, that definition gives rise to a related question: What is an "instrumentality" of a foreign government?

The FCPA Resource Guide adopts the definition of "instrumentality" provided by the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi*. In that case, the defendants were accused of bribing officials of a Haitian telecommunications company. The defendants argued that the company was not an "instrumentality" of the Haitian government, because it did not perform a core government function. The trial court rejected that argument and the Eleventh Circuit affirmed that decision. The Eleventh Circuit held that an "instrumentality" includes "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court described this as a "fact-bound question" and identified various factors for determining government "control" and for determining whether the function is one "the government treats as its own."

The term "instrumentality," even as explained in the FCPA Resource Guide, is a technical one and is not easy to apply. Unlike the United States, many countries—including in Latin America—operate extensively through state-owned entities or state-controlled entities, such as in the defense manufacturing, banking and finance, health care, oil and gas, energy, telecommunications, and transportation sectors. In explaining the meaning of "instrumentality," the FCPA Resource Guide cites an example in which a Swiss engineering company paid bribes to officials of an electricity commission that was owned and controlled by the Mexican government. The case was resolved with an agreement by the company to pay more than US$58 million to the U.S. government.

CONSPIRACY AND ACCOMPLICE LIABILITY

The FCPA's anti-bribery provisions apply only to certain groups of persons, based on their connection to the United States. This includes, for example, U.S. citizens, U.S. companies, or foreign companies that are listed on U.S. stock exchanges (including issuers with exchange-traded American Depository Receipts), whether they are acting inside or outside the United States. This also includes anyone acting on behalf of such persons or companies. Additionally, this includes non-U.S. companies and nationals who commit prohibited acts while in the United States. In the FCPA Resource Guide, the DOJ and the SEC provide a sole example: "a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution."

In addition, activities or actions inside the United States, such as hosting a non-U.S. government official in the United States for all-expenses-paid luxury travel to corruptly influence that official could establish jurisdiction. The DOJ aggressively interprets this provision of the FCPA to apply even to those who *cause* an act to be done within the United States, such as causing improper payments to be made from a bank account

originating in United States to a foreign government official's account outside the United States. Given the role that U.S. banks play in the global financial system, and given the role that U.S. internet service providers play in the global infrastructure of the internet, it is easy for a person located outside the United States to cause a financial transaction or an electronic communication to occur at least partly in the United States—which in the DOJ's view directly subjects that person to the FCPA.

If a non-U.S. person is not directly covered by the FCPA, can that person still be liable based on a theory that the person conspired with, or aided and abetted, someone else who is directly covered by the FCPA? U.S. courts have disagreed on this question.

In *United States v. Hoskins*, the U.S. Court of Appeals for the Second Circuit ruled in 2018 that a foreign national who is: (i) not an agent, officer, director, employee, or shareholder of a U.S. domestic concern or issuer, and (ii) acting outside the United States, cannot be liable for conspiring to violate the FCPA or aiding and abetting FCPA violations. At the time, Jones Day published in Spanish a *Commentary* on this decision and its implications. However, last year a federal trial court in Chicago reached the opposite conclusion.

In the FCPA Resource Guide, the DOJ and the SEC express the same expansive view as this trial court: that the doctrines of conspiracy and accomplice liability can extend the reach of the FCPA to non-U.S. companies and individuals even if it did not take any act in furtherance of the corrupt payment while in the United States—except in the trial courts of the Second Circuit.

To illustrate the importance of these doctrines, six individuals recently have pleaded guilty in the United States in connection with a scheme involving a U.S. asphalt company, Sargeant Marine Inc., that admitted to paying bribes to officials in Brazil, Venezuela, and Ecuador. Of these six individuals, half were foreign nationals—including Brazilian and Venezuelan nationals (one of whom was also a naturalized U.S. citizen) who worked as agents for the asphalt company, as well as a Venezuelan public official who received bribes. The DOJ charged the company's agents with conspiring to violate the FCPA, and the foreign official with conspiring to engage in money laundering in connection with the FCPA violation.

"LOCAL LAW" DEFENSE

The FCPA provides a defense where the payment to a foreign official was "lawful under the written laws and regulations" of the foreign country. When does this "local law" defense apply? In the absence of relevant written laws in the foreign country, this defense does not apply. The FCPA Resource Guide provides the example of a recent case in federal court in New York City, *United States v. Ng Lap Seng*, in which the defendant was charged with a scheme to bribe two ambassadors to the United Nations. The defendant argued that he must be acquitted if the written laws of Antigua and the Dominican Republic did not make the payments unlawful. The judge disagreed, and ruled that the "local law" defense applies only if those written laws affirmatively show that the defendant's acts are lawful.

In practical terms, the "local law" defense—although it exists on paper—is of little use. There are few if any local laws that expressly permit corrupt payments. On the contrary, Latin America has seen a rise in anticorruption enforcement regimes. Jones Day has previously described these developments in Brazil, Peru, and Argentina, as well as in Mexico.

"HALLMARKS" OF AN EFFECTIVE COMPLIANCE PROGRAM

In deciding whether to bring an enforcement action against a company for violations of the FCPA, the DOJ and the SEC routinely assess the effectiveness of a company's anticorruption compliance program. An effective compliance program also increases the chances that a corporation will quickly be able to take other steps—such as a timely internal investigation, internal remedial measures, and (after careful consideration) timely disclosure to the government—that constitute separate factors under the DOJ policy weighing against a corporate prosecution. Such programs for multinational companies typically account for the potential applicability of the FCPA and the anticorruption laws of other countries. Anticorruption compliance is a highly technical area; and a compliance program that is poorly designed, imperfectly implemented, inadequately resourced, or otherwise ineffective, risks doing more harm than good.

The first edition of the FCPA Resource Guide provided 10 "hallmarks" of an effective compliance program. The second edition

adds an eleventh hallmark: the company's "Investigation, Analysis, and Remediation of Misconduct," which draws on elements from the existing hallmarks. According to the FCPA Resource Guide, "The truest measure of an effective compliance program is how it responds to misconduct." The update is based on a revision in June 2020 to another DOJ document, the Evaluation of Corporate Compliance Programs. The change highlights the importance of effective independent internal investigations and the use of "lessons learned" to improve the company's compliance program.

As mentioned in an earlier Jones Day *White Paper*, recent anticorruption regimes in Latin America, such as in Peru and Argentina, include a defense to corporate liability where the corporation has an adequate compliance program in place. Pursuant to these laws, countries have issued or are issuing regulations identifying their own compliance hallmarks, similar to the DOJ and SEC standards. For example, in late 2018 Argentina's anticorruption office approved guidelines on the implementation of compliance programs; earlier, in 2015, Brazil's President signed a decree providing parameters for a compliance program, used by Brazilian authorities in imposing fines or entering into leniency agreements under the 2013 Brazilian Clean Companies Act. Companies should be aware of these DOJ and SEC hallmarks as they become standard across the region.

RECENT DEVELOPMENTS IN LATIN AMERICA

The DOJ and the SEC continue to enforce the FCPA against conduct in Latin America. They are also increasingly cooperating with anticorruption authorities in the region and, as a sign of increasing coordination and cooperation, entering into joint settlements with foreign law enforcement authorities. In September 2020, the asphalt company discussed above, Sargeant Marine, pleaded guilty in federal court in New York to conspiracy to violate the FCPA, and agreed to pay a criminal fine of more than US$16 million. The day after the guilty plea, a senior DOJ official with responsibility for FCPA enforcement gave a speech in which he emphasized the cooperation between the DOJ and its international partners, specifically mentioning Brazil. Also in September 2020, the DOJ unsealed charges in the same federal court against the former manager of an oil trading firm, alleging that he paid bribes to Ecuadorian officials to win a US$300 million oil contract.

In August, the DOJ issued a letter declining to prosecute World Acceptance Corporation, a consumer finance business, despite the DOJ's conclusion that the company's Mexican subsidiary paid more than US$4 million to third parties, which were partially used to bribe Mexican union and government officials to obtain contracts to make loans to union members. The company entered into a separate agreement with the SEC in which it agreed to pay more than US$20 million.

The DOJ's decision to decline prosecution was based on the company's prompt self-disclosure of the misconduct, the company's cooperation, the company's steps toward remediation, and its agreement to pay back the ill-gotten gains, alongside other factors. Under the DOJ's Corporate Enforcement Policy, where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there is a presumption that the DOJ will decline prosecution of the company absent aggravating circumstances. This declination is the most recent application of the policy, and it illustrates the potential value of a proactive decision to cooperate fully.

Finally, in the area of the FCPA—unlike other areas of U.S. criminal law—there is a procedure that allows a company to seek an opinion from the DOJ as to whether a proposed action is lawful. The opinions issued by the DOJ as part of that process, called "opinion procedure releases," are made public. In August 2020, the DOJ released such an opinion for the first time in six years. This is a reminder that companies may seek such opinions, although it is not always advisable to do so.

KEY TAKEAWAYS FOR COMPANIES WITH OPERATIONS IN LATIN AMERICA

As the updates to the FCPA Resource Guide and recent enforcement activity indicate, the FCPA has broad application to U.S. and non-U.S. entities and individuals. The DOJ and the SEC have taken an aggressive approach to the reach of the FCPA, including (for example) through the definition of an "instrumentality" of a foreign government, through the notion of causing acts within the United States, and through doctrines of conspiracy, aiding, and abetting.

Recent enforcement activity also demonstrates that increasingly, U.S. authorities continue to act in close cooperation with their foreign counterparts in Latin America to conduct

coordinated investigations and to increase the chances of effectuating successful enforcement actions that would result in large monetary recoveries.

Understanding these current perspectives of the DOJ and the SEC is important for ensuring an effective compliance program, for conducting a thorough internal investigation of any wrongdoing, and for promptly responding to a government inquiry. It is also important to have the assistance of counsel experienced in handling FCPA matters in Latin America and elsewhere.

LAWYER CONTACTS

Authors

Robert S. Huie
San Diego
+1.858.314.1123
rhuie@jonesday.com

Samir Kaushik
Dallas
+1.214.969.5092
skaushik@jonesday.com

Cristina Pérez Soto
Miami
+1.305.714.9733
cperezsoto@jonesday.com

Luis Riesgo
São Paulo
+55.11.3018.3939
lriesgo@jonesday.com

Eric Snyder
New York
+1.212.326.3435
esnyder@jonesday.com

Emmanuel E. Ubiñas
Dallas
+1.214.969.3670
eeubinas@jonesday.com

Additional Contacts

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Henry Klehm III
New York
+1.212.326.3706
hklehm@jonesday.com

Hank Bond Walther
Washington
+1.202.879.3432
hwalther@jonesday.com

David J. DiMeglio
Los Angeles
+1.213.243.2551
djdimeglio@jonesday.com

José Bonilla
Madrid
+34.91.520.3907
jbonilla@jonesday.com

Guillermo E. Larrea
Mexico City
+52.55.3000.4064
glarrea@jonesday.com

Bertha Ordaz-Avilés
Mexico City
+52.55.3000.4018
bordaz@jonesday.com

Neal J. Stephens
Silicon Valley
+1.650.687.4135
nstephens@jonesday.com

Fernando F. Pastore and Ephraim D. Abreu assisted in the preparation of this White Paper.