



SPOTLIGHT ON LATIN AMERICA

SEVEN COMPLIANCE CHALLENGES

and how to overcome them

**Baker
McKenzie.**

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Introduction

With Brazil leading the charge, governments throughout Latin America are enacting new anti-corruption laws and boosting local enforcement, creating greater compliance risk for companies doing business in the region. For multinationals operating in Latin America, the US Foreign Corrupt Practices Act is no longer the only concern.



In **Brazil**, for example, the government's investigation of Petrobras involving billions of dollars in alleged bribes has led to the arrests of dozens of high-ranking executives at the state-owned oil company and some of Brazil's largest engineering and construction firms. As part of the "Operation Car Wash" probe, Brazil's Supreme Court is also investigating 50 politicians, including the heads of the Federal Senate and the Chamber of Deputies.

In January 2014, Brazil's Clean Company Act took effect, and local authorities have been aggressively enforcing it.

What's notable about the Car Wash investigation is not only its magnitude and reach into the highest levels of government, but that it was initiated by the Brazilian authorities. In the past, local investigators have typically piggybacked on FCPA investigations launched by US enforcement officials. But in January 2014, Brazil's own comprehensive anti-bribery legislation, the Clean Company Act, took effect, and local authorities have been aggressively enforcing it.

"In addition to the new law, we've seen significant enforcement activity," says Bruno Maeda, a partner in the Corporate Compliance Group at Trench, Rossi e Watanabe, a Brazilian firm with a cooperation agreement with Baker McKenzie. "The fact that the Petrobras case was brought by Brazilian prosecutors is a demonstration of what we can expect in the future."

In **Mexico**, the states ratified a federal constitutional amendment in May 2015 that lays the groundwork for the creation of a National Anti-Corruption System. That system includes the establishment of a special anti-corruption prosecutor, greater power and independence for investigative bodies, closer monitoring of state government spending, and a special tribunal dedicated to hearing corruption cases.

The Mexican government previously passed an anti-bribery law to great anticipation in 2012, but it was limited to creating liability for corporations that engaged in bribery during public bids and failed to establish a structure for addressing a wider range of compliance and enforcement issues. The constitutional amendment is expected to lead to broader anti-corruption reform.

“The important point about this development is that it’s a constitutional amendment and it’s backed by President Peña and a coalition of legislators,” says Jonathan Adams, Chair of Baker McKenzie’s Corporate Compliance Group in Mexico. “We have a high probability of getting a good law.”

Argentina doesn’t have an anti-bribery law that establishes criminal liability for corporations like Brazil’s Clean Company Act or the FCPA, but recent scandals have brought the issue of corruption into the public spotlight. In June 2014, Amado Boudou became Argentina’s first incumbent vice president to face corruption charges for allegedly using his influence when he was economy minister to ensure that a contract to print Argentina’s currency was awarded to a company he controlled.

In January 2015, thousands protested when a federal prosecutor investigating President Cristina Fernandez de Kirchner for an alleged cover-up of Iran’s role in a bombing of a Jewish community center in Buenos Aires was found dead in his apartment the night before he was scheduled to testify before Congress. Prosecutors continue to investigate Kirchner for the 1994 terrorist attack, which killed 85 people.

In addition to growing scrutiny of government officials, tax evasion and money laundering cases in Argentina have been rising since 2012, when the government amended those laws to establish criminal liability for corporations. Prior to the amendments, only individuals could be prosecuted for these crimes.

THE NORTH AMERICA CONNECTION

One reason enforcement actions are rising in Latin America is that fact the US Department of Justice and Securities and Exchange Commission officials are now training federal prosecutors from other countries on best practices for conducting investigations. In 2014, the agencies hosted 140 foreign law enforcement agents, including those from Latin America, to groom them on enforcing the FCPA and other anti-corruption laws.

In their commitment to aggressive cross-border cooperation, DOJ and SEC officials have also begun sharing information with their foreign counterparts during ongoing FCPA investigations. In the past, US enforcement authorities typically waited until they had settled their cases before passing on evidence that could lead to local charges.

“We had some money laundering and tax evasion investigations before, but since the amendment there has definitely been an increase in the number of investigations involving companies with ties to the current government,” says Fernando Goldaracena, Chair of Baker McKenzie’s White Collar Crime Practice in Argentina.

In **Colombia**, the government passed a new freedom of information law in March 2014 to address corruption in its public sector. Under the new Transparency and Access to Information law, all levels of government — including state entities, political parties, universities, civil society groups and companies with government contracts — must provide clear records on how they spend public funds.

“There has definitely been an increase in the number of money laundering and tax evasion investigations involving companies with ties to the current government.”

FERNANDO GOLDARACENA

Chair of Baker McKenzie’s White Collar Crime Practice in Argentina



“This is a really interesting development,” says Joan Meyer, Chair of Baker McKenzie’s North America Corporate Compliance Group. “We’ve seen cases where the confidential information that companies gathered during internal investigations and turned over to the DOJ or SEC was passed on to the local authorities. Then they faced prosecution on multiple fronts at the same time, which can be quite challenging to resolve.”

The Dodd-Frank Whistleblower Program has also raised awareness about corruption among employees and third-parties in Latin America by providing financial incentives. Under the program, whistleblowers may be entitled to 30% of the fines collected by the US government if they provide “original information” about corporate misconduct that leads to successful prosecution.

Although the amount of whistleblower tips the SEC receives from Latin American countries is low compared to other regions like Asia and Europe, the number is quickly rising. In 2014, the SEC received 448 tips from outside the US. Of those, 35 came from Latin American countries, up from 19 in 2013.

Colombia also recently became the fifth Latin American country to adopt the OECD's Anti-Bribery Convention, which requires signatories to implement legislation that criminalizes bribery of foreign public officials in international business transactions. Argentina, Brazil, Chile and Mexico have also ratified the convention.

Peru is moving toward establishing stricter anti-corruption laws to gain OECD membership, with two pending bills that would establish criminal liability for companies whose employees and third parties engage in corruption and provide compliance credit for those with corporate compliance programs that fulfill certain requirements.

Given the tougher enforcement environment that multinational companies now face in Latin America, Baker McKenzie created this report to help corporate leaders navigate the recent changes and minimize the growing risk of doing business in the region. This report is not meant to be an exhaustive compilation of the compliance issues that arise in Latin America, but a discussion of the seven compliance challenges that clients raise most often.

The report includes an overview of the seven areas, followed by practical steps companies can take to reduce their compliance risk, as well as real life examples of how other companies are addressing these issues. Armed with this guidance, we hope companies operating in Latin America gain a better understanding of what the greatest risks are and how to lay the groundwork for a more compliant future.

Under Colombia's new Transparency and Access to Information law, all levels of government must provide clear records on how they spend public funds.

COMPARISON:

UK Bribery Act

Foreign Corrupt Practices Act

Brazil's Clean Company Act

Is it an offense?	UKBA	FCPA	Brazil's Clean Company Act
BRIBERY OF PUBLIC OFFICIAL	✓	✗	✓
BRIBERY OF FOREIGN PUBLIC OFFICIAL	✓	✓	✓
FAILURE TO KEEP ACCURATE RECORDS	✗	✓	✗
FACILITATION PAYMENTS	✓	✗	✓
Does the law include...?			
EXTRATERRITORIAL REACH	✓	✓	✓
CORPORATE CRIMINAL LIABILITY	✓	✓	✗
OTHER PROHIBITED ACTS	✗	✗	✓



Challenge 1: Doing Business with the Government

For some multinational companies operating in Latin America, a large portion of their business involves selling goods and services to the government. Many companies, particularly those in highly regulated industries like healthcare, must interact with government agencies frequently to obtain business permits, waivers and licenses, all of which puts them at higher risk of being asked for bribes or engaging in conduct that violates the FCPA or local anti-corruption laws.

In public bids, companies also face compliance risk when vying for government contracts as part of a consortium, as they can be held liable for the misconduct of the other parties. That challenge has been compounded by Brazil's Clean Company Act, which makes each party directly liable for the actions of the others in a consortium.

That's why doing business with the government, particularly in countries with higher levels of corruption, can be tricky for multinational companies that find that business practices and the rules of engagement often differ from what they are used to at home. What can companies do to mitigate their risk during these interactions? Here are some suggestions.

HAVE A GOOD POLICY ON GOVERNMENT INTERACTION.



Companies that do high volumes of business with the government should have a policy that clearly explains how sales and marketing teams should conduct themselves with public officials. It should instruct sales members on how to respond to inappropriate requests, and include rules on issues such as meals, entertainment, travel and conflicts of interests. The policy should also establish best practices, such as having employees take another member of their team with them when meeting with government officials and only meeting with officials at their offices. “Never go alone because if an inquiry does arise, you want a witness who can back you up about what happened at the meeting,” says Vanina Caniza, Chair of Baker McKenzie’s Corporate Compliance Group in Argentina. “The public officer is also less likely to request something inappropriate when there is a witness.”

TRAIN SALESPEOPLE ON THE DO’S AND DON’TS IN THAT POLICY.



Employees engaged in selling products and services to the government need specific training on what they can and cannot do during the public procurement process. The training should include real-life examples and offer practical alternatives. In Brazil, for example, public officials that must create requests for proposals to procure goods and services for a particular government agency sometimes ask the sales representative of a company competing for the contract to write the RFP specifications for them. That becomes a dangerous area, because in doing so, the company could be accused of violating the Clean Company Act’s strict rules on keeping public tenders competitive. “Often the sales representative doesn’t know this is wrong, they think they’re helping,” Brazil Corporate Compliance Partner Bruno Maeda says. “But this puts the company at risk of being accused of unlawfully directing the tender to them.” Instead, the sales representative should be trained to send the government official information about their product from a company brochure or website with a simple email or note that says, “Here’s publicly available information about our product to help you evaluate solutions in the market.”

ENCOURAGE COMPLIANCE AND SALES MANAGERS TO WORK TOGETHER.



To create a culture of compliance, companies must make corruption a business problem, not a compliance problem. This isn't easy, as sales managers and compliance officers often have conflicting objectives. To encourage a good working relationship between the two departments, include the compliance officer in meetings about government business and consult them on deals that could be particularly risky. It's also helpful for compliance officers to look for champions among the sales and marketing staff who have an interest in compliance issues and appear to be on board with supporting and advocating anti-corruption policies. Compliance officers should also occasionally accompany sales managers on their client calls to better understand the business and the challenges the sales teams face. "You see new potential problems you hadn't thought about before and possible solutions to problems you thought were intractable," says Mexico Corporate Compliance Chair Jonathan Adams, who used to be in-house counsel for a large pharmaceutical company. "You're also able to interact more effectively with the sales group."

REJECT INAPPROPRIATE REQUESTS AND REPORT THEM IMMEDIATELY.



Sales managers should be trained to reject inappropriate requests explicitly by saying, "No, we don't do that" or "That's not how our company operates." Often people in this situation try to be polite by saying something like, "Let's see" or "Let me talk to my manager." Even if they don't intend to take the issue further, being vague can put the company at risk of investigation. In one such case, federal agents raided the homes of company officers after a logistics manager was caught on wiretap telling a customs broker she would discuss his request for a fee to expedite their shipment with her manager. The raid ended up in the local papers, which created bad press for the company despite the fact investigators later learned the company hadn't paid bribes to the customs broker. Sales teams should also be trained to immediately report inappropriate requests to the compliance or legal department. "If an employee says no but doesn't report it, that official could make the same request to another employee within the company," Brazil Corporate Compliance Partner Bruno Maeda says. "The company needs to know if there's a problem with a specific official or intermediary because that's someone they don't want to continue working with."

CONSULT OUTSIDE COUNSEL.



Once an employee reports receiving an inappropriate request, it's advisable for the company to seek guidance from outside counsel to investigate the incident and assess whether the company is required to report it to authorities. Even if the incident doesn't rise to that level, it's a good idea for the company to obtain an outside legal opinion to keep on file in the event of an investigation to show the authorities they took the incident seriously. "Having an outside legal opinion makes the internal investigation more credible to a judge because it's been conducted by an impartial party," Argentina White Collar Crime Chair Fernando Goldaracena says. "What the company should not do is disregard the employee's report and rule out the risk to the company."

"If an employee says no but doesn't report it, that official could make the same request to another employee."

BRUNO MAEDA

Partner in Trench, Rossi e Watanabe's Corporate Compliance Group in Brazil

TIP FROM THE FIELD

LIMIT YOUR GOVERNMENT SALES TEAM TO SENIOR EMPLOYEES

"We are very lucky to have a good government affairs team that knows the limits of what they can do when negotiating with the government. The problem is you can't control the government side. They may ask you for favors or other benefits to obtain licenses or waivers. That's why you need to train the people who are going to interact with the government and limit that sales team to a certain number of very senior officials. That's how we approach it."

Latin America Legal Counsel for a global technology company

A hand holding a smartphone with a bokeh background of colorful lights.

Challenge 2: Whistleblowers

Whistleblowing is generally not culturally acceptable in Latin America. Employees often regard it as “snitching” or disrespecting authority. They typically prefer to address issues with their managers or through local channels rather than escalating their concerns to headquarters.

Despite this stigma whistleblowing is rising in Latin America, and companies without strong programs for handling these tips internally are at greater risk of enforcement actions. In 80% of the whistleblower cases the SEC has prosecuted to date, the informant raised his or her concerns internally first. That underscores the importance of companies taking these tips seriously to reduce the need for employees to take their concerns to the authorities to be heard.

Once companies get employees to voice their concerns, another challenge of whistleblower programs is deciding how to categorize and prioritize the reports that come in. What kind of protocols and procedures should you have to determine who should investigate a particular tip and whether it’s valid? Here are suggestions for eliciting and handling these reports.

PROTECT YOUR WHISTLEBLOWERS.



A major reason employees don't report misconduct is because they are afraid they will lose their jobs or be retaliated against in other ways by management or their peers.

To gain their trust, it's crucial to show employees you are taking whistleblower tips seriously by investigating the allegation, having a strong non-retaliation policy, and keeping the identities of those who report private. "Protecting the confidentiality of the whistleblower is very important and companies are not always successful at this because of information leaks," Argentina Corporate Compliance Chair Vanina Caniza says. "If you fail to do so in one internal investigation, you can kill all possibilities of having additional whistleblowers in the future."

TRAIN EMPLOYEES ON WHAT THEY SHOULD REPORT.



Another reason employees fail to report is ignorance. Often they don't know what constitutes misconduct. Or they are hesitant to report because they weren't there or aren't sure what they saw. That's why it's important to train employees on the types of conduct that are prohibited and emphasize that they should report their suspicions even when they aren't 100% certain what happened so the compliance or legal team can investigate to determine its validity.

INVOLVE TOP EXECUTIVES IN WHISTLEBLOWER TRAINING.



Showing employees you are serious about compliance requires top-level commitment. One way to demonstrate that commitment is having senior executives attend compliance training. When one company launched a new compliance program in Brazil, the CEO gave the opening speech at all 10 employee trainings to stress the importance of compliance and using the whistleblower hotline. "Some employees had never met the CEO before and to see him dedicating his time to the compliance program had a big effect on them," Brazil Corporate Compliance Partner Bruno Maeda says. "We heard that after the training, the level of activity on the whistleblower hotline increased significantly."

TIP FROM THE FIELD

CREATE AN OPEN REPORTING ENVIRONMENT

“We stress having an open reporting environment. Anybody can raise a concern and upload it into our system or send an email to a board member. At every corporate meeting, we open and close with a request that employees come forward and report impropriety. We stress that it’s not only a right, it’s an obligation.”

Gabriela Cremaschi
South America Senior Counsel
General Electric

“Protecting the confidentiality of whistleblowers is very important and companies are not always successful.”

VANINA CANIZA

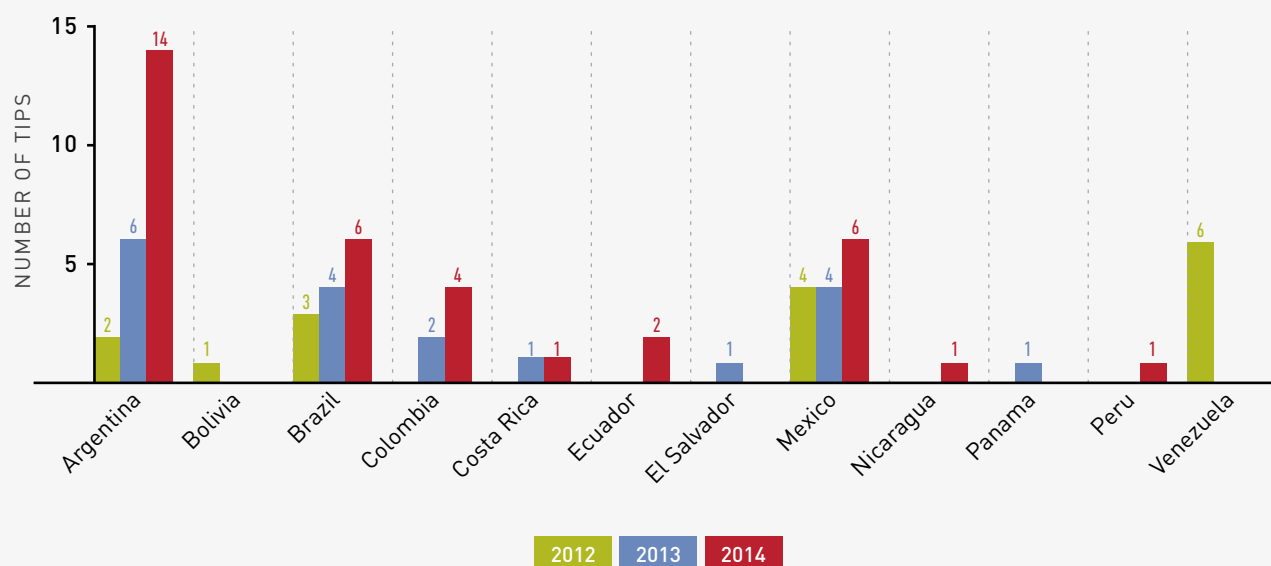
Chair of Baker McKenzie’s Corporate
Compliance Group in Argentina

ESTABLISH AN EFFECTIVE SYSTEM FOR CATEGORIZING AND DIRECTING WHISTLEBLOWER TIPS.

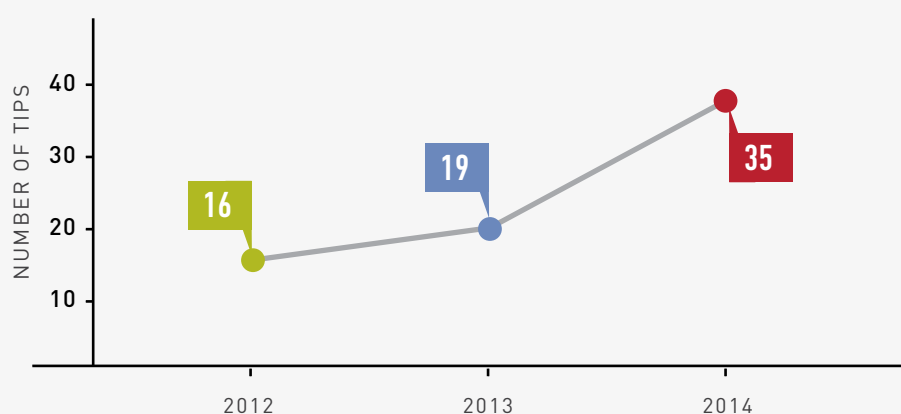


Many companies have human resources oversee their whistleblower programs and hotlines. As they develop more sophisticated compliance programs, however, many are realizing that legal and compliance departments should be the first contact for these allegations because they are better equipped to detect compliance issues. No matter who the first line of defense is, companies need a system for categorizing the types of tips they receive and internal policies that dictate who investigates the matter. One global technology provider that operates in Latin America has an 800 number accessible from anywhere in the world operated by a third-party vendor that can respond in any language and direct the report to the appropriate internal committee depending on whether it’s an ethics, financial or FCPA matter. Tips that involved more serious financial and FCPA allegations are referred to an outside firm for investigation.

DODD-FRANK WHISTLEBLOWER TIPS FROM LATIN AMERICAN COUNTRIES



TOTAL WHISTLEBLOWER TIPS FROM LATIN AMERICA



TOP 5 WHISTLEBLOWING COUNTRIES IN LATIN AMERICA IN 2014



Source: US Securities and Exchange Commission

Challenge 3: Leniency Agreements

More prosecutors in countries like Brazil, Chile and Colombia are using leniency agreements to encourage companies under investigation to provide information that could lead them to other violators. To receive reduced sanctions, companies must provide incriminating evidence against competitors or other companies they do business with. This development has created greater risk for everyone, as investigations that start out with one company spread quickly as those cooperating in the investigations implicate others.

“The authorities don’t just want information about one sector, they want to hear from the operator of the scheme everything they did, including in other sectors,” Brazil Corporate Compliance Partner Bruno Maeda says. “That’s extending the scope of investigations and increasing the number of cases.”

The issue of leniency agreements also raises the question of what companies should do when operating in a market embroiled in a corruption scandal. Should you review your contracts and business deals to make sure they were properly vetted and documented? Or continue business as usual until something arises? Here are suggestions for operating in a heightened enforcement environment.

BE PROACTIVE.



Amid a public corruption scandal, it's best to review your contracts to determine if they're in good standing. If you do have business agreements with an implicated party, carefully review those contracts to identify red flags. If you uncover potential misconduct, contact local counsel to help you determine the appropriate next steps. In the event that investigators do include you in the inquiry, they are more likely to be lenient if they see you took action to investigate and remediate the problem on your own rather than ignoring it until receiving a subpoena.

LEARN FROM SCANDALS.

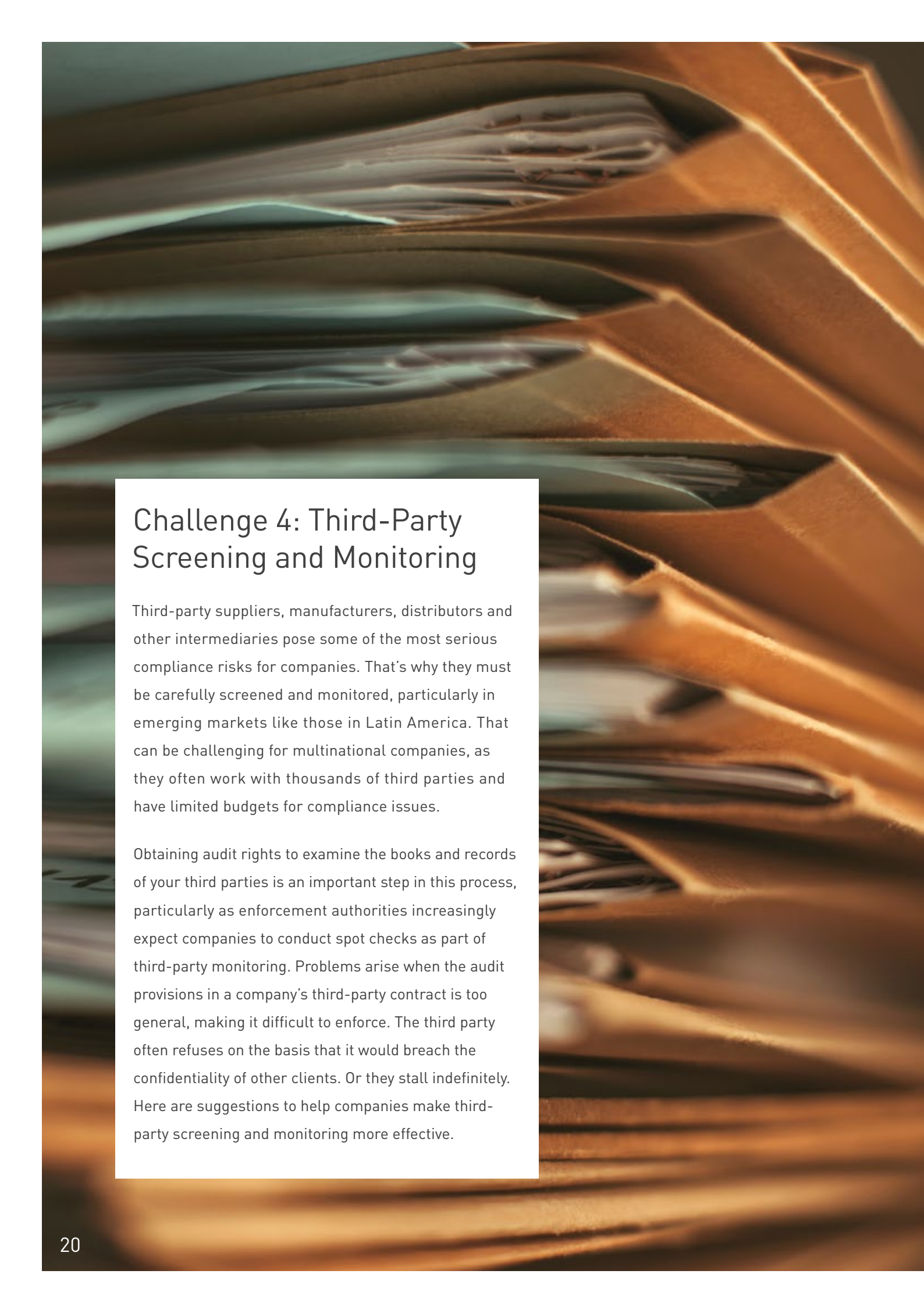


Even if your company isn't associated with co-conspirators in a corruption scheme, use the scandal as an opportunity to ensure your own house is in order. "Perhaps the scandal hasn't affected your company, but based on the schemes alleged in the press, you should ask, 'Would our policies and controls have protected us if that happened to us?'" Brazil Corporate Compliance Partner Bruno Maeda says. For example, if the scandal involves companies making payments to consultancy service firms that turn out to be fictitious fronts for funneling bribes, review your procedures for reviewing consultancy services agreements to make sure they're effective. Do you require proof of services before hiring them? Do you review their background and experience? Those are the types of actions enforcement authorities want to see companies taking to demonstrate they are learning from the mistakes of others.

ASSESS WHETHER DISCLOSING INFORMATION IN ONE JURISDICTION COULD HURT YOU IN OTHERS.



If you decide to cooperate with the authorities to receive favorable treatment, be aware that you could face prosecution in other jurisdictions because of growing cross-border collaboration among foreign enforcement agencies. During an internal investigation, for example, you may uncover that some employees are bribing officials in the health department in Mexico to get medications approved. Before revealing that information to US officials to avoid sanctions, you need to determine whether that information could be passed along to the Mexican authorities and used against you in Mexico. Unlike the US, Mexico doesn't offer leniency for self disclosure, so you should assess whether it's worth the risk to disclose to US officials. "If your company even aspires to be global, you need to gauge the result of your actions abroad," Mexico Corporate Compliance Chair Jonathan Adams says.



Challenge 4: Third-Party Screening and Monitoring

Third-party suppliers, manufacturers, distributors and other intermediaries pose some of the most serious compliance risks for companies. That's why they must be carefully screened and monitored, particularly in emerging markets like those in Latin America. That can be challenging for multinational companies, as they often work with thousands of third parties and have limited budgets for compliance issues.

Obtaining audit rights to examine the books and records of your third parties is an important step in this process, particularly as enforcement authorities increasingly expect companies to conduct spot checks as part of third-party monitoring. Problems arise when the audit provisions in a company's third-party contract is too general, making it difficult to enforce. The third party often refuses on the basis that it would breach the confidentiality of other clients. Or they stall indefinitely. Here are suggestions to help companies make third-party screening and monitoring more effective.

MAKE THIRD-PARTY SCREENING MORE THAN A TICK-THE-BOX EXERCISE.



Many companies distribute third-party questionnaires, receive them back, but then fail to review them. To make this is a meaningful exercise, the local compliance officer should be reviewing the answers to identify red flags, such as third parties with family ties to local government officials and those without operating histories. “Final sign off by a well-trained compliance officer is key for this not to be just a check-the-box process,” Argentina Corporate Compliance Chair Vanina Caniza says. “As time goes by, the compliance officer can train additional people to review these questionnaires and escalate the issue to the legal or compliance department if they find something questionable.”

PRIORITIZE RISK.



Given limited resources, applying the same level of scrutiny to all third parties is not feasible for most companies. Instead, they should conduct basic reviews of lower risk third parties and dedicate the majority of their resources to scrutinizing higher risk third parties. Many companies use a matrix to evaluate the level of risk an intermediary poses based on factors such as type of third party, jurisdiction, and the third party’s level of interaction with government officials. Then they adjust their level of review accordingly.

MAKE YOUR AUDIT PROVISIONS SPECIFIC.



To improve your chances of being able to exercise your audit rights, the provision in your third-party agreement must be more than standard, boilerplate language. It needs to identify exactly what documents you will have access to, such as those directly related to the goods or services the third party is providing. Also keep in mind that the enforceability of audit rights varies among countries and you may need to tailor the provision to conform with local law. In Argentina and Colombia, for example, you cannot enforce audit rights without the other party’s permission no matter what the contract says. Going into the agreement, it’s important to know that if your third party refuses access, courts in these countries will not compel them to comply. Your only alternative may be analyzing whether their refusal is grounds for termination of the business relationship, which leads to other complications, such as local laws that require remedial action when terminating a contract.

TIP FROM THE FIELD

BROADEN THE TYPES OF THIRD PARTIES YOU SCREEN

“Because of recent tax scandals involving lawyers in Brazil, we’ve decided to strengthen our policies and reviews on third-party service providers, including law firms, performing a very thorough background check and training.”

Gabriela Cremaschi
South America Senior Counsel
General Electric

BE MINDFUL OF DATA PROTECTION LAWS.

TIP #4

As data protection in Latin America becomes increasingly important, companies with compliance initiatives face conflicting rules when trying to access third-party information, transfer data abroad and comply with local data privacy regulations. In Colombia and Peru, for example, third-party intermediaries often use their need to protect the personal data of their employees and contractors as an excuse to limit the scope of the audits and screening initiated by their clients and partners. But with adequate procedures, your company can create data privacy compliant programs that will enable you to undertake the level of screening and auditing you need to do to protect yourself against third-party compliance risk.

CONDUCT PERIODIC REVIEWS OF YOUR THIRD-PARTY SCREENING POLICY.

TIP #5

As enforcement priorities evolve, it’s important to stay current on the issues prosecutors are targeting and those that have become less relevant. For example, investigating customs agents may have been an area of government scrutiny in the past, but authorities have since shifted their focus to other compliance issues. That’s why it’s important to periodically review which third parties you are screening and seek direction from local counsel to make sure you are allocating your resources to managing the most important risks in that market. “We find the corporate world wants to do this analysis once and then forget about it because it’s expensive and takes a lot of time,” Argentina Corporate Compliance Chair Vanina Caniza says. “But the truth is that compliance in every country is a moving target. If you don’t conduct periodic reviews, you may have a good third-party screening policy for five years ago.”

ANTI-CORRUPTION LAWS IN LATIN AMERICA

Is it an offense?	Argentina	Brazil	Chile	Colombia	Mexico	Peru	Venezuela
BRIBERY OF PUBLIC OFFICIAL	✓	✓	✓	✓	✓	✓	✓
BRIBERY OF FOREIGN PUBLIC OFFICIAL	✓	✓	✓	✓	✓	✓	✓
FACILITATION PAYMENTS	✓	✓	✓	✓	✓	✓	✓
FAILURE TO KEEP ACCURATE RECORDS	✗	✗	✗	✗	✗	✗	✗
CORRUPT PRACTICES WHEN CONTRACTING WITH PUBLIC ADMINISTRATION	✓	✓	✓	✓	✓	✓	✓
LIABILITY FOR ACTS OF THIRD PARTIES	✗	✗	✗	✗	✓	✗	✓



Challenge 5: Internal Investigations

Prosecutors in some Latin American countries have become stricter about what they expect companies to do to avoid, uncover and respond to misconduct. In Brazil, for example, the Clean Company Act stresses the importance of conducting risk assessments and engaging in regular monitoring of third parties. It also makes corporate board members more responsible for compliance and requires companies to have specific procedures for employees who interact with government officials during public tenders.

“The point is that the elements of your compliance program are no longer best practice or opinion,” says Esther Flesch, a corporate compliance partner in Trench, Rossi e Watanabe’s Sao Paulo office. “In Brazil, it’s now law. These things need to be part of your compliance program or it is not sufficient for your company to get credit during a government investigation.”

A major part of making sure your compliance program meets government expectations requires conducting timely, credible internal investigations when allegations of corruption arise. Here are suggestions for making your internal investigations run more smoothly.

DEVELOP AN APPROPRIATE INVESTIGATIVE PLAN.



When you uncover or receive reports of potential misconduct, your preliminary assessment should consider three factors: the credibility of the allegations, the seriousness of the accusations, and whether they warrant immediate action. That will help you develop an investigative plan that fits the situation. As part of the internal investigative process, it's crucial that you not only conduct a thorough review, but uncover who was involved in the misconduct and discipline them appropriately.

DON'T TERMINATE EMPLOYEES SUSPECTED OF MISCONDUCT BEFORE YOU HAVE THE FULL STORY.



When corruption issues arise, do not assume that firing the employees involved will resolve the problem. In fact, you need to collect all the relevant information the employees have before dismissing them, when they will be less likely to talk to you. During those interviews, you need to determine what happened, who else was involved and how far within the organization the problem went. Often these incidents are handled by human resources and employment counsel, who are typically more focused on finding just cause for dismissing the employee without having to pay termination indemnities than investigating corruption. That's why it's advisable for HR to consult with compliance counsel to determine whether the situation warrants further inquiry. "If you effectively destroy evidence by placing a potential witness out of the reach of investigators, any lingering doubts will be resolved by assuming the worst," says Reynaldo Vizcarra, Managing Partner of Baker McKenzie's Mexico offices.

When corruption issues arise,
do not assume that firing the
employees involved will resolve
the problem.

WORK TOGETHER.



Identifying compliance issues isn't the only challenge, it's also determining who should investigate matters, report them to the board and decide how cases should be handled.

Boards can differ on the level of detail they want about internal investigations. Some want to know all the details, while others just want reassurance you're taking care of the problem. Knowing how your board is likely to react and presenting information in a way that doesn't create a crisis becomes important. This requires having a clear plan for who will take the lead in an investigation and making sure other departments are checking with legal counsel before taking action. Confusion arises when the internal audit, financial and legal departments aren't working together. In one such case, an internal audit team decided to review an acquisition the company had made a few years prior to determine whether there were potential FCPA violations. The result was an unprivileged report about financial impropriety at that subsidiary that the company ended up having to turn over to the DOJ because it was being investigated for FCPA violations in other countries. That led to additional enforcement actions that could have been avoided if the internal audit department had been communicating with in-house counsel.

REHEARSE HOW TO HANDLE INVESTIGATIONS.



An effective way to create a process for tackling corruption issues is through scenario training. This training can be provided for board members and senior personnel in

key areas of the business to prepare them for the types of compliance issues they are likely to face and educate them on the proper methods for addressing them. These exercises help avoid panic and confusion, as well as identify who on the executive team is best equipped to deal with various issues. Certain board members, for example, may be more qualified to handle a cyber security breach investigation than a corruption matter.

KNOW WHEN TO BRING IN OUTSIDE COUNSEL.



Deciding when to seek outside counsel is a question of budget, what the allegations are, whether it's a local or foreign law issue, and who was involved in the misconduct.

If it's a potential FCPA issue, you should seek outside counsel to preserve attorney-client privilege. If it's a foreign law matter, you need to consult with local counsel in the country at issue. And if it involves high-level executives or local management, it's advisable to retain outside counsel to look into the matter to ensure the investigation is impartial. "When you bring in an independent, outside investigation team, you mitigate a lot of the risk in these types of circumstances," Mexico Corporate Compliance Chair Jonathan Adams says.

THREE WAYS TO DEMONSTRATE TOP-LEVEL COMMITMENT

One element companies are required to have in their corporate compliance programs is "top-level commitment." But that's a vague concept that can be difficult to prove to enforcement authorities. What does top-level commitment look like? Here are examples.

1. Your global compliance officer reports directly to the board of directors. To be effective, your compliance officer needs to have sufficient authority and autonomy. Having him or her report to the board demonstrates that your company puts that position on the same level as other executive officers. In addition, local compliance officers should report to your global compliance officer, not local management, to maintain their independence.

2. Compliance is on your board's agenda. Having your compliance officer give periodic reports to the board on the status of the company's compliance program, ongoing investigations, and enforcement trends shows that top management is involved in the process. Being able to use board meeting minutes to demonstrate that compliance was a frequent topic of discussion could work in your favor during government investigations.

3. Your top executives tout the importance of compliance. The fact that your CEO or company president often talks about the company's commitment to compliance in corporate communications and at company events and meetings can also be useful mitigating evidence. It's important to document those speeches and keep them on file in the event of a government inquiry.

CORRUPTION PERCEPTIONS INDEX 2014

Latin America

Every year Transparency International measures the perceived levels of public sector corruption in 175 countries around the world and scores each country on a scale from 1 to 100. To see the full results, visit www.transparency.org/cpi.

SCORE: 0 \longleftrightarrow 100
Highly Corrupt Very Clean



Global
Average Score
43



Latin America
Average Score
45



Venezuela
19



Paraguay
24



Nicaragua
28



Ecuador
33



Argentina
34



Mexico
35



Bolivia
35



Panama
37



Colombia
37



Peru
38



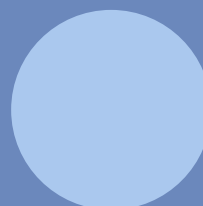
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39



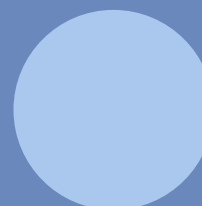
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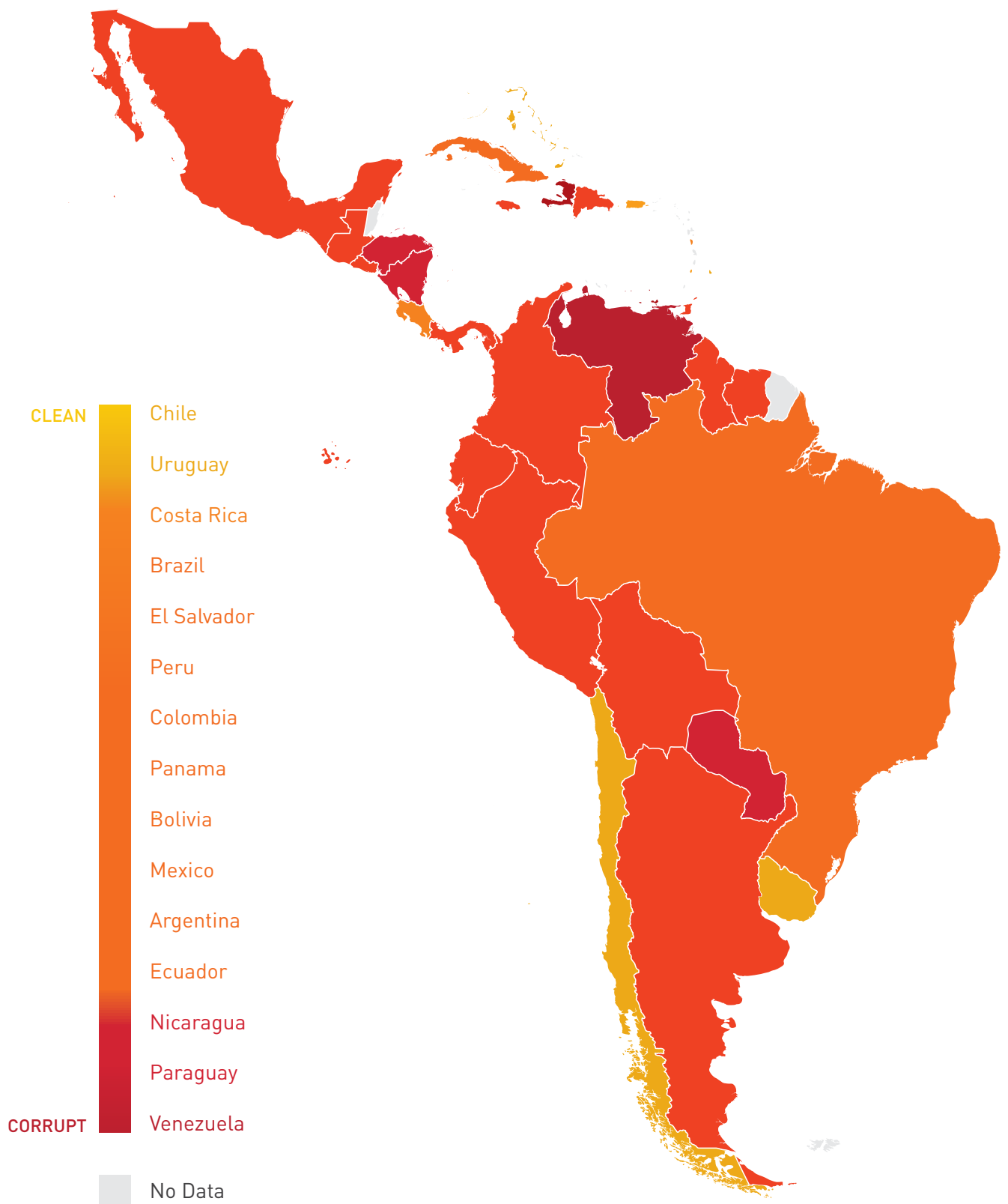
Costa Rica
54




Uruguay
73



Chile
73





Challenge 6: Gift Giving, Hospitality and Charitable Donations

Gift giving, hospitality and charitable donations pose another area of compliance risk for companies operating in Latin America, as they can be perceived as bribes based on the timing and circumstances. One question clients often have is under what conditions they can pay travel expenses for government officials to visit their facilities or attend industry conferences to learn more about their products and businesses. Company managers often worry about how far they can go in funding these trips before it can be perceived as offering something of value to win favor.

Another major compliance concern is charitable donations. It's not uncommon for government officials in Latin America to threaten to close down a company's manufacturing plant unless it makes a donation to a certain charity. Or they make it a condition of awarding a bid or signing a particular business agreement. Many companies have responded to these requests with the approach that as long as the charity is a registered non-profit organization, it's acceptable to go ahead and make the donation. But this is exactly the type of impromptu giving that can get you into trouble with enforcement authorities. Here are suggestions for establishing more effective hospitality and charitable giving policies and practices.

CREATE A CLEAR GIFT GIVING AND HOSPITALITY POLICY TAILORED TO YOUR MAJOR MARKETS.

TIP #1

Many Latin American countries have local laws or guidelines that can help companies establish appropriate monetary thresholds for corporate giving to public officials. In Colombia, for example, the government publishes a chart showing the per diems it approves for government staff and officers on business trips. Those caps, which vary depending on the official's seniority and destination, would be good limits for you to impose when funding business travel for Colombian officials. If you are providing the same level of hospitality the public official would have received if the government were paying, it will be more difficult for investigators to perceive the offering as extravagant.

INVITE THE AGENCY, NOT THE PERSON.

TIP #2

Confusion can arise when a company wants to invite a public official to visit one of its factories to showcase a new technology or product. Technically the government should pay the official's way if it is part of his or her official duties to be educated on the latest options on the market. In reality, governments often don't fund these trips because of limited budgets. So how can you get the official there without being accused of impropriety? One alternative could be telling the government agency you will pay for one person to visit the factory and let the agency select who will go. That demonstrates your offer was not intended to target one person with something of value, but to provide an educational opportunity for the agency.

SET UP A CHARITABLE GIVING PROGRAM AND DECIDE IN ADVANCE WHICH CHARITIES YOU WILL FUND.


TIP #3

Having an official program and making charitable contributions based on a set schedule will help avoid the types of random donations that can raise the suspicions of prosecutors. It is also important to contribute directly to the charity and to monitor whether it is used for the purpose you intended. Simply having a donation agreement with the charity will not protect you if the circumstances are sketchy. "It's just not believable that this morning the sales director discovered this great new charity and you need to give them \$50,000 immediately," Mexico Corporate Compliance Chair Jonathan Adams says. "That kind of thing doesn't happen."

PUBLICIZE DONATIONS AND HOSPITALITY ON YOUR WEBSITE.

TIP #4

Another method for combating the appearance of impropriety is to publicize a charitable donation or hospitality in a press release posted on your corporate website. Drawing attention to the issue can help undermine the inference that you intended to use the donation or hospitality as a means of obtaining special treatment from government officials.



Challenge 7: M&A and Joint Ventures

During mergers and acquisitions, target companies in Latin America are sometimes reluctant to submit to compliance due diligence. Corporate leaders will often say, “Why are you asking me these questions? Look at my books, that’s all you need to know.” But compliance due diligence is an important exercise in deals involving high-risk jurisdictions and industries, given the liability that companies assume when they acquire or partner with another business.

Joint ventures can be particularly risky because companies don’t always screen and monitor these relationships as closely as they should. Some companies actually have policies that if they don’t own more than a majority interest, they won’t conduct regular audits of that joint venture. That can be dangerous, because companies that own only a minority interest may still be liable for the conduct of the JV and can find themselves unprepared for the consequences. Here are suggestions for ensuring greater levels of compliance in your partnerships and transactions.

CONDUCT COMPLIANCE DUE DILIGENCE BASED ON RISK FACTORS, NOT THE DEAL VALUE OR OWNERSHIP INTEREST.



Many companies determine the level of compliance due diligence they will conduct in an M&A deal or joint venture based on how big the deal is or what percentage they will own in a partnership. The problem with this approach is that compliance risk doesn't differentiate between a US\$5-million acquisition and a US\$50-billion acquisition. The US\$5 million acquisition can be just as problematic for the company if there are major compliance issues. To avoid unwelcome surprises, your deal team needs to determine whether to conduct compliance due diligence and how closely to monitor a partnership based on risk factors, not business interests.

MAKE SURE YOU ARE NOT BUYING A CRIMINAL ENTERPRISE DISGUISED AS A BUSINESS.



Over the years, many companies have made an acquisition only to discover that the business model is not viable without corrupt payments and arrangements. "If you don't understand what drives sales, there's a good chance you don't want to know," Mexico Corporate Compliance Chair Jonathan Adams says. "And eventually, the enforcement authorities may know before you do."

CREATE A POST-ACQUISITION INTEGRATION PLAN BASED ON A RISK ASSESSMENT AND AUDITING PROFILE THAT FITS THE TRANSACTION.



During M&A due diligence, you have likely collected a lot of information from the target about their business. That information can provide a good road map for what your post-acquisition integration plan should look like. The plan should take into account risk factors like industry type, amount of business the target does with the government, and whether it's a family business or division of a multinational company. As you follow that plan, make sure you take action to prevent illegal practices from continuing under your ownership, such as removing troublesome managers and terminating problematic third-party relationships.

PLAN TO INTEGRATE WITHIN SIX MONTHS TO A YEAR.



Following a merger or acquisition, enforcement authorities understand that it takes time to clean up and integrate the operations of another business — within reason. That’s why it’s important to follow your post-acquisition plan while taking remedial action and considering any necessary disclosures to the authorities. The DOJ and SEC generally give companies a year to go through this process before pursuing investigations or enforcement actions related to an acquired entity. Even if misconduct is later uncovered, the fact that you had a good post-integration plan and followed it diligently will put you in a much better position with investigators because it shows you were taking compliance issues seriously.

“If you don’t understand what drives sales, there’s a good chance you don’t want to know. And eventually, the enforcement authorities may know before you do.”

JONATHAN ADAMS

Chair of Baker McKenzie’s Corporate Compliance Group in Mexico



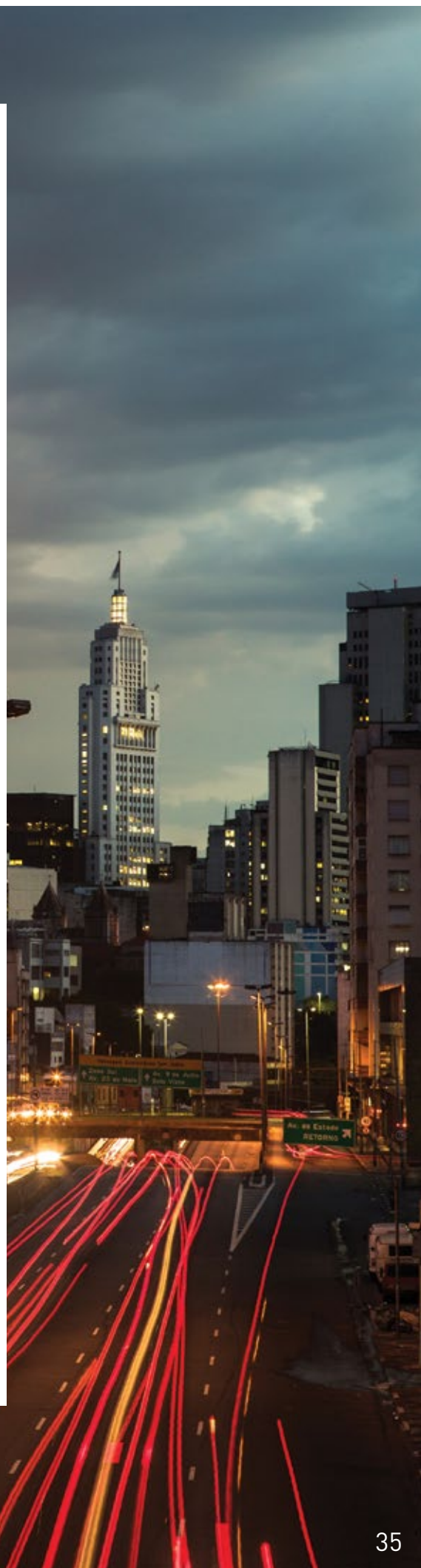
Conclusion

With Brazil becoming a hotbed of enforcement activity, Mexico adopting a constitutional amendment to establish a National Anti-Corruption System, and Argentina boosting money laundering and tax evasion prosecutions, multinational companies operating in Latin America must take a hard look at what they are doing to prevent, detect and respond to corporate misconduct.

From Colombia to Peru, governments are taking steps to enact laws aimed at combatting corruption, gaining OECD membership, and bringing corporate compliance into greater alignment with the requirements and practices in more advanced jurisdictions. Local authorities in Latin America are increasingly initiating large-scale investigations and requiring companies to show that their compliance programs are more than words on paper.

Having good anti-corruption policies and procedures is a start, but companies must also take action to demonstrate they are addressing the most important compliance risks they face when operating in the region. Taking action requires an understanding of and willingness to implement best practices in the areas of doing business with the government; whistleblowers; leniency agreements; third-party screening and monitoring; internal investigations; gift giving, hospitality and charitable donations; and M&A and joint ventures.

This report is intended to provide guidance in those areas by giving companies a roadmap based on the deep knowledge and vast experience of our corporate compliance partners in Latin America, as well as the strategies employed by other multinationals in the region.



About Baker McKenzie's Latin America Corporate Compliance Group

Compliance. We effectively address compliance challenges even as we help maximize opportunities. Our team gives on-the-ground assistance to help manage regulatory matters, employing thorough knowledge of local laws and cross border regulations. We provide tailored risk management and compliance solutions, assisting international operations with investigations, litigation and remedial actions across jurisdictions. Our proactive approach also includes creating programs to help in-house teams implement compliance policies and protocols.

www.bakermckenzie.com/LatinAmerica

If you have questions about this report or would like to know more about our Latin America Corporate Compliance Group, please contact:

ARGENTINA

Vanina Caniza

+54 (11) 4310-2226

Vanina.Caniza@bakermckenzie.com

MEXICO

Jonathan Adams

+52 (55) 5351-4128

Jonathan.Adams@bakermckenzie.com

BRAZIL*

Bruno Maeda

+55 (11) 3048-6838

Bruno.Maeda@trenchrossi.com

PERU

Teresa Tovar

+51 (1) 618 8500 x 552

Teresa.Tovar@bakermckenzie.com

CHILE

Sebastian Doren

+56 (2) 2367-7065

Sebastian.Doren@bakermckenzie.com

VENEZUELA

Maria Fernanda Zajia

+58 (212) 276-5159

MariaFernanda.Zajia@bakermckenzie.com

COLOMBIA

Carolina Pardo

+57 (1) 634-1559

Carolina.Pardo@bakermckenzie.com

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