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Anti-corruption in emerging markets

Measures for reducing export-corruption risk

South America, Mexico cleaning up their acts



# Global corruption & the FCPA's reach

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# FCPA Enforcement Policy changes with the times

The DOJ has considerably modified its enforcement policies over the past 10 years, especially with the advancement of its FCPA Corporate Enforcement Policy in 2017—and it keeps getting better. **Tom Fox** looks at what's changed in the past two years.

**A**nounced in 2017, the U.S. Justice Department's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy was the result of regulators' desire over 10 years to enhance FCPA enforcement by guiding companies to voluntarily disclose violations, thereby giving the agency a means to identify and penalize the guilty parties.

For the DOJ, one of the most important aspects of the policy has been input from the compliance community on how FCPA enforcement could be made more efficient to further anti-corruption enforcement goals. And while that dynamic hasn't changed, the policy itself has seen a surfeit of modifications.

We offer a look at some of the more significant changes below.

**Anti-Piling On.** Deputy Attorney General Rod Rosenstein, who announced the adoption of the original policy in 2017, rolled out the first amendment titled "Policy on Coordination of Corporate Resolution Penalties" in May 2018. Also known as the anti-piling on policy, Rosenstein said it would encourage "coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct."

The anti-piling on policy introduced four key components:

- » Federal criminal enforcement should not use the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case.
- » The Justice Department would coordinate with other U.S. agencies and regulators on one penalty.
- » This coordination should extend to state regulators and international anti-corruption enforcement authorities.
- » When multiple penalties were warranted for the administration of justice they could be assessed.

Rosenstein said the goal was to: “enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.”

**M&A Safe Harbor.** In July 2018, Deputy Assistant Attorney General Matthew Miner announced another formal addition to the policy in the area of mergers and acquisitions. The change created a presumption of a declination for an acquiring entity purchasing a company that had been in violation of the FCPA if the acquirer met four conditions: voluntarily disclose the wrongdoing, cooperate with the government investigation, extensively remediate, and end the FCPA violations.

This new Safe Harbor formalized what had been seen as an informal provision first articulated in the 2012 FCPA Guidance. Here the Justice Department was incentivizing companies to more fully engage in pre-acquisition due diligence and then integrate the acquired entity into the existing compliance function, take a deep forensic audit, remediate any compliance deficiencies, stop the illegal conduct, and turn over information on any FCPA violations. Miner took it a step further by mandating compliance.

**Benczkowski Memo.** In October 2018, Assistant Attorney General Brian Benczkowski announced changes to the Justice Department monitorship program and, in doing so, communicated at least two factors impacting the enforcement policy. The first was in regard to the importance of remediation during the pendency of an FCPA investigation and the importance of remediating as thoroughly as pos-

sible. This condition tied into the FCPA Corporate Enforcement Policy, simply because remediation is one of the four requirements to secure a declination. If an organization engages in extensive remediation, it is then eligible for a potential declination (pending other criteria, such as if it had made investments in and improvements to its compliance program and if the remedial improvements had been tested). The second concept from the Benczkowski Memo was that compliance programs must be “effective.”

**Modification to the Yates Memo.** In late 2018, Rosenstein gave a speech announcing modifications to the Yates Memo (a memo from Deputy Attorney General Sally Yates in 2015 waging a war against corporate misconduct) that in effect changed some of the FCPA policy requirements. In its original incarnation, the Yates Memo required corporations to investigate *all* employees involved in any FCPA violations and turn over *all* information on *all* those employees who might be involved in any conduct that violated the FCPA. The modification said companies were to focus their efforts on those who were *substantially involved*. Taken together with the enforcement policy, it should be considered an advancement for the compliance profession, allowing a more focused investigation and hopefully quicker overall resolution.

**Messaging Apps.** Just this past month, the DOJ very quietly overturned a rule from the original policy that prohibited companies from allowing employee use of “software that generates but does not appropriately retain business records or communications.” The agency says companies are now free to let their employees operate messaging apps that might delete information, allowing firms to craft policies more in line with their methods of doing business.

This last change emphasizes one of the key themes around the Justice Department’s original announcement of the FCPA Corporate Enforcement Policy—that the regulator is always willing to hear commentary, take advice from outside practitioners, and learn from its own counsel to adapt enforcement policies to changing times. No doubt it will continue to do so as FCPA enforcement evolves. ■



# A region-by-region look at corruption risk

Most regions around the world are making little effort in their fight against corruption—and the United States is no exception—according to Transparency International’s newly released 2018 Corruption Perceptions Index. **Jaclyn Jaeger** has more.

**T**he perceived level of public-sector corruption in the United States is worsening, even as the country continues to lead international anti-corruption efforts. Much of the rest of the world isn’t faring any better.

According to Transparency International’s 2018 Corruption Perceptions Index (CPI), released Dec. 29, the United States fell four points from last year’s CPI, receiving its lowest score in seven years and marking the first time since 2011 that the United States fell outside the top 20 highest-ranking countries on the CPI.

Among 180 countries and territories ranked, the United States scored 71 on a scale from 0 (highly corrupt) to 100 (very clean). “A four-point drop in the CPI score is a red flag and comes at a time when the United States is experiencing threats to its system of checks and balances, as well as an erosion of ethical norms at the highest levels of power,” said Zoe Reiter, TI’s acting representative to the United States.

TI’s 2017 corruption barometer survey explains these findings further. In that survey, nearly six in 10 Americans said the United States was more corrupt than the year prior, with 44 percent saying they considered the president and officials in office as the most corrupt.

“The expert opinion captured by the CPI sup-

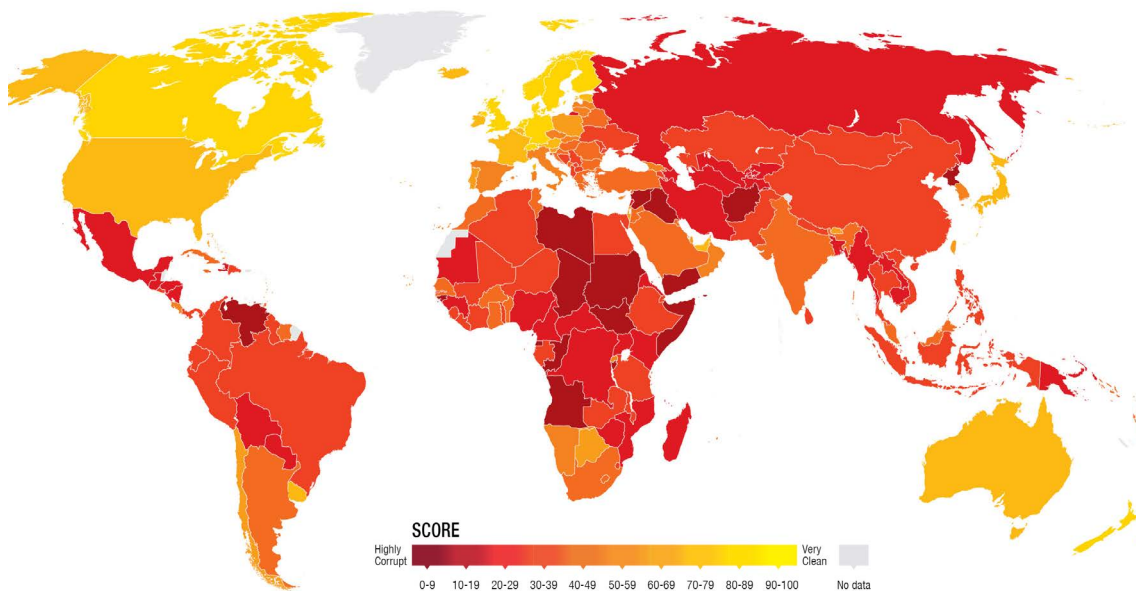
ports the deep concern over corruption in government reported by Americans in our 2017 survey,” Reiter said. “Both experts and the public believe the situation is getting worse.” Many Americans in the 2017 survey expressed an unfavorable opinion of corporate America, as well, with 32 percent believing that most or all corporate executives are corrupt.

Beyond the United States, the 2018 CPI showed that perceived corruption is still rife globally: More than two-thirds of countries scored below 50 in the 2018 CPI, with an average score of 43. The lowest scoring region was Sub-Saharan Africa, with an average regional score of 32, whereas the highest scoring region was Western Europe and the European Union, with an average score of 66. Sixteen other countries saw their scores significantly decline, including Chile, Hungary, Mexico, Turkey, Malta, and Australia.

Below is a region-by-region analysis of the 2018 CPI to help compliance and risk officers tailor their anti-corruption practices further and help companies further inform their audit procedures.

## Americas region

Scoring an average of 44 over the past three consecutive years, the Americas region—encompassing North America, South America, Mexico, and



Canada—“continues to fail in making any serious inroads against corruption,” TI said. Of the 32 countries assessed in the Americas region, Canada ranked highest, with a score of 81, followed by the United States and Uruguay, with scores of 71 and 70, respectively.

Several countries in the region are failing to make any significant progress against corruption, even worsening in some parts. Brazil, for example, received its lowest CPI score in seven years, falling two points since last year, with a score of 35. Nicaragua, too, dropped four points on the CPI in the last seven years, with a score of 25. Chile and Mexico, with CPI scores of 67 and 28, also fared worse, experiencing a five- and six-point drop, respectively, since 2012.

Hovering at the bottom of the index for this region, with a score of 18, is Venezuela. This score reflects “systemic and persistent corruption across the country,” TI stated. Following behind Venezuela with poor scores of their own are Haiti (20) and Nicaragua (25).

The number of poor-performing countries in the Americas region “should come as no surprise given the challenges to the democratic systems and diminishing political rights across North, South, and Central America by populist and authoritarian leaders,” TI said. In this part of the world, several country leaders are using similar tactics that encourage corrupt acts, including:

- » » An undermining of free and independent media, especially when coverage challenges leaders’ messaging;
- » » Attempts at silencing and controlling civil society and international organizations;
- » » An interference with or blunt use of national institutions to weaken the system of checks and balances and increase executive power; and
- » » An increase in conflicts-of-interest and private influence.

“Our research makes a clear link between having a healthy democracy and successfully fighting

public-sector corruption,” said TI Chair Delia Ferreira Rubio. “Corruption is much more likely to flourish where democratic foundations are weak and, as we have seen in many countries, where undemocratic and populist politicians can use it to their advantage.”

### Asia Pacific

With an average score of 44 for three consecutive years among the 31 countries assessed, the Asia Pacific region is on par with the Americas in its efforts—or lack thereof—to tackle corruption. “However, with two countries in the top 10 and two countries in the bottom 10, the region is highly diverse in its anti-corruption approach,” TI noted.

With a score of 87, New Zealand ranks highest in the region for its anti-corruption efforts and second overall on the CPI index (surpassed only by Denmark, with a score of 88). Following closely behind New Zealand are Singapore and Australia, with scores of 85 and 77, respectively. All these countries have well-functioning democratic systems, contributing to their top scores, according to TI.

The poorest performers in the region are North Korea (14), due to its widespread and enduring corruption across the country, followed by Afghanistan (16) and Cambodia (20).

According to TI, the most important countries to watch moving forward due to their “promising political developments” are Malaysia (47), Maldives (31), Pakistan (33), and India (41). In these countries, “massive public mobilization against corruption,

coupled with significant political participation and voter turnout, resulted in new governments that promise extensive anti-corruption reforms,” TI said.

### Western Europe and EU

With an average regional score of 66 out of 100, Western Europe and the European Union fare better than other parts of the globe. Moreover, 14 of the top 20 countries in this year’s CPI are from this region. “However, for a region that prides itself on some of the most robust integrity systems in the world, the patchwork of partially overlapping national and EU-level integrity systems presents its own problems and still has a long way to go to tackle corruption effectively,” TI said.

With 88 points, Denmark remains a global leader on the CPI, closely followed in this region by Finland, Sweden, and Switzerland, each with a score of 85. High scores, however, do not mean these countries are free from corruption. Consider, for example, the money-laundering scandal surrounding Danske Bank in Denmark, as well as the widespread corruptions scandals of Petrobras and Odebrecht, and the 1MDB scandal, each committed by Swiss banks.

The United Kingdom, too, plagued by corruption scandals, received its lowest score on the index since 2016, although it still ranks high at 11, with a respectable score of 80. Public-sector scandals involving Members of Parliament taking undeclared holidays paid for by highly corrupt regimes have contributed, in part, to this fall in score, as have

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Zoe Reiter, Acting Representative to the United States, Transparency International



questions over the origin of money used in the EU referendum, TI said. Scoring lowest in the Western Europe and the EU regions was Bulgaria (42), followed by Greece (45) and Hungary (46).

### **Eastern Europe and Central Asia**

With an average score of 35, Eastern Europe and Central Asia was the second lowest-scoring region in the index, ranking slightly ahead of Sub-Saharan Africa. Few countries in the Eastern Europe and Central Asia region have made progress in combatting corruption, according to TI.

Georgia leads the region with just 58 points on the CPI, followed by Montenegro (45) and Belarus (44). At the bottom, Turkmenistan received the lowest score in the region (20), followed by Uzbekistan (23) and Tajikistan (25). Among countries whose CPI score declined or stayed the same include Azerbaijan (25), Russia (28), Kazakhstan (31), Kosovo (37), Serbia (39), and Montenegro (45).

"Highly corrupt countries that score poorly on the CPI also tend to have fragile democratic institutions, and their citizens have weaker political and civil rights," TI said. Many governments across Eastern Europe and Central Asia, for example, "fail to preserve the checks and balances that are foundational to democracy and instrumental in controlling corruption," TI said.

### **MENA region**

With an average score of 39, the Middle East and Northern Africa region falls behind both the Americas and Asia Pacific regions and ranks only slightly better than Eastern Europe and Central Asia, as well as Sub-Saharan Africa. With a score of 70, United Arab Emirates (UAE) leads the region on the CPI, followed by Qatar (62). The lowest scores in the region were in Syria (13), Yemen (14), and Libya (17), where instability, terrorism, war, and conflict flourish.

"Political corruption remains a central challenge, despite the work of many governments across the region to focus their national priorities on fighting corruption and increasing transparen-

cy," TI said. "This is partly due to corrupt actors who are actively working against these measures and, unfortunately, exerting a great deal of influence over political leaders."

### **Sub-Saharan Africa**

With an average score of 32, Sub-Saharan Africa was the lowest scoring region in the 2018 CPI. For the seventh year in a row, Somalia made the bottom of the list, with a score of 10, followed by South Sudan and Syria, each with a score of 13.

While several countries in the region have adopted democratic principles of governance, "several are still governed by authoritarian and semi-authoritarian leaders," TI said. "Autocratic regimes, civil strife, weak institutions, and unresponsive political systems continue to undermine anti-corruption efforts."

Ranking highest in the region was Seychelles, with a score of 66, followed by Botswana and Cabo Verde, with scores of 61 and 57, respectively. Both Seychelles and Botswana "have relatively well-functioning democratic and governance systems, which help contribute to their scores," TI said. "However, these countries are the exception rather than the norm in a region where most democratic principles are at risk and corruption is high." In fact, several countries in this region experienced sharp declines in their CPI scores, including Burundi, Congo, Mozambique, Liberia, and Ghana.

Many low-performing countries share several common characteristics, "including few political rights, limited press freedoms, and a weak rule of law," Transparency International said. "In these countries, laws often go unenforced and institutions are poorly resourced with little ability to handle corruption complaints. In addition, internal conflict and unstable governance structures contribute to high rates of corruption."

The findings are a reminder for risk and compliance officers to periodically revisit and monitor their anti-corruption compliance programs and conduct regular risk assessments to identify areas of greatest risk as it applies to various functions in different parts of the world. ■



## A country-by-country assessment of bribery risk

The 2018 TRACE Bribery Risk Matrix has the latest business-related bribery risk figures for countries around the world. Compliance practitioners may want to pay close attention to those countries in which they operate. **Jaclyn Jaeger** has more.

Compliance and risk professionals in search of a free resource for assessing the level of business-related bribery risk in the countries where they operate will want to have a look at the 2018 TRACE Bribery Risk Matrix, released on December 6.

Anti-bribery standard-setting organization TRACE International first launched its Bribery Risk Matrix in 2014 to meet a need in the business community for more reliable, nuanced information about the risk of commercial bribery worldwide. "Our aim in publishing the TRACE Matrix has always been to provide the compliance community with a more detailed under-

standing of country-specific business bribery risks than can be gleaned from a single score or rank," said TRACE President Alexandra Wrage.

To arrive at each country's score, the matrix analyzes four specific areas (domains) where bribery is known to flourish, along with related sub-domains:

- » **Domain 1:** Business interactions with government (contact with government; expectation of paying bribes; and regulatory burden)
- » **Domain 2:** Anti-bribery deterrence and enforcement;
- » **Domain 3:** Government transparency and civil

service (transparency of government regulatory functions and transparency and health of civil services sector); and

- » **Domain 4:** Capacity for civil society oversight (quality and freedom of the media; and human capital and social development).

For each domain and their related sub-domains, the TRACE Matrix aggregates data obtained from public interest and international organizations, including the United Nations, the World Bank, and the World Economic Forum. Based on statistical analysis of this information, each country was assigned not only an overall score between 1 and 100—with 100 representing the greatest risk—but also scores for each of the four domains and nine sub-domains.

The aggregated data is intended to help compliance and risk departments tailor their due diligence practices to the specific bribery risks of each country, so they can better allocate their limited compliance resources before entering a new market or investing more in an existing market.

“The matrix is designed to present information about our best understanding of the current bribery risks in a country,” Robert Clark, manager of legal research at TRACE International, said during a Webinar that explained the results. “It is not intended to give a comparison over time.”

Often, when people analyze the findings of the matrix, they’ll look to see how many spots each country moved up or down the rankings, whether a country fared better or worse than the previous year, but assessing the results of the report in that way is “problematic,” Clark said, particularly concerning countries that rank in the middle. “The slightest difference in data points can cause a jump of 10 or 20 places, without really changing the level of risk in any meaningful way,” he explained. To more accurately decipher whether a country fares better or worse “requires taking a closer look at the underlying data points and looking at the trends in those underlying data points.”

That is where the TRACE Matrix Data Browser

comes into play. To complement this year’s matrix, TRACE, for the first time, introduced its Matrix Data Browser, an online tool that allows users to sort and group the data from which matrix scores are derived to identify trends and patterns that may be relevant in understanding the risk environment each country presents. “By making the data points underlying the country scores more accessible, this year’s introduction of the Matrix Data Browser will allow users to deepen their contextual understanding even further,” Wrage said.

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Alexandra Wrage, President, TRACE

“As the global head of anti-corruption and government compliance for a company that does business in more than 120 countries worldwide, understanding the risks of each market is a critical part of my job,” said Daniel Seltzer, senior director of anti-corruption and government compliance at management consulting firm Accenture. TRACE’s Bribery Risk Matrix “offers both an easy-to-understand single number rating that accurately quantifies risk and granular detail in four critical categories for those wanting to do a deeper dive,” Seltzer added. “It is a critical part of our risk assessment process at Accenture.”

#### Country-by-country findings

Among the 200 total countries ranked in the 2018 TRACE Bribery Risk Matrix, Africa, with an overall average score of 62, is the most high-risk continent.

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“We here at TRACE hope that you find the Bribery Risk Matrix to be useful in informing your efforts and that you find the Matrix Data Browser an informative, and even a fun, way to come to understand that data a lot better for yourself.”

Robert Clark, Manager of Legal Research, TRACE International

Europe, with an overall average score of 32, was the most low-risk continent. In comparison, the average global score for all countries is 50.

Those that posed the highest risk of commercial bribery overall include Somalia (92), Libya (83), Venezuela (82), Chad (82), Turkmenistan (82), and North Korea (81). In comparison, countries that posed the lowest risk of bribery include New Zealand (5), Sweden (5), Norway (7), Denmark (8), and Finland (9).

The United Kingdom and the United States also fared well, ranking 7th and 18th, respectively, with overall low risk scores of 12 and 21.

**Domain 1.** Breaking down the highest and lowest rankings per domain, the TRACE Matrix found that among all countries, New Zealand posed the lowest risk of bribery in Domain 1 concerning its interactions with government, whereas Macau posed the highest risk.

Digging a bit deeper beyond the top highest and lowest rankings, other countries with low bribery risk scores in Domain 1 include Singapore (4), Sweden (7), Hong Kong (7), United Arab Emirates (8), and Denmark (8). Those that pose a high risk of bribery in Domain 1 and, thus, have many government touchpoints, include Venezuela (99), Turkmenistan (93), Bermuda (92), and Somalia (90).

**Domain 2.** Luxemburg showed the lowest level of commercial bribery risk concerning the quality of its anti-bribery deterrence and enforcement, whereas North Korea showed the highest level of risk. Other countries that scored well in this do-

main include Denmark, Singapore, Norway, Finland, and the Netherlands. Those that scored poorly include Somalia, Equatorial Guinea, Eritrea, and Burundi.

**Domain 3.** Concerning the level of government transparency and civil service, both Sweden and Norway received the highest score, whereas Somalia received the lowest score. Other countries that scored among the highest for government transparency and civil service, according to the report, include New Zealand (6), Netherlands (7), the United Kingdom (7), and Finland (9). Those that scored among the worst in this domain include Chad (95), Eritrea (93), Guinea-Bissau (93), Burundi (92), and Equatorial Guinea (91).

**Domain 4.** Countries that boast the highest capacity for civil society oversight, ranking in the top three in this domain, are Norway, Denmark, and Sweden. Countries that scored especially poorly include Eritrea, North Korea, and Burundi.

What a country's individual score means, and how it will affect compliance and risk-management efforts, is for each organization's compliance team, in collaboration with other business units, to decide, as they apply their own analysis to the numbers, “but we here at TRACE hope that you find the Bribery Risk Matrix to be useful in informing your efforts,” Clark said, “and that you find the Matrix Data Browser an informative, and even a fun, way to come to understand that data a lot better for yourself.” ■

# Global look at anti-bribery enforcement activity

**Jaclyn Jaeger** explores results from the TRACE International 2018 Global Enforcement Report.

Europe's anti-corruption efforts are escalating and now account for more than half of all foreign bribery investigations globally, surpassing the United States, which maintains the strongest overall enforcement record for bribery and corruption. Elsewhere around the world, domestic foreign bribery enforcement is on the rise, effectively resulting in many corporate enforcement actions.

Those are just a few key findings to come from the 2018 Global Enforcement Report conducted by TRACE International. The report provides a global glimpse into all known enforcement activity—investigations, enforcement actions, and declinations—starting with the first U.S. prosecutions of bribery cases in 1977, following enactment of the U.S. Foreign Corrupt Practices Act. The data covers enforcement activity through Dec. 31, 2018, and is based primarily on cases and investigations tracked in the TRACE Compendium, an online database of cross-border corruption cases.

The report assesses two types of bribery: the bribery of foreign officials (improper payments made by a foreign company to a government official who is not a citizen of the government initiating the enforcement event) and the bribery of domestic officials (improper payments made by a foreign company to a government official who is a citizen of the government initiating the enforcement event).

The findings, broken down by country and industry, are analyzed in more detail below.

**Investigations.** Europe had 157 open investigations into alleged bribery of foreign officials, a 37 percent jump from the previous year's report. The United Kingdom, although trailing behind the United States, had the second highest number of investigations at 47, while the United States had 107 open investigations across 19 countries, representing 35 percent of the 303 open foreign bribery investigations globally.

Among U.S. investigations, 37 concern foreign

bribery allegations involving companies headquartered outside of the United States or individuals with non-U.S. citizenship. The highest number involved companies or individuals in the United Kingdom and Switzerland, with seven investigations, followed by Germany, with five, according to TRACE.

Companies or individuals from the Americas and Asia Pacific made up just 11 percent and 5 percent, respectively, of U.S. investigations concerning alleged bribery of foreign officials being conducted against non-U.S. companies and individuals. One development that may increase investigative activity in the Asia Pacific is the Department of Justice's newly announced China Initiative, aimed at countering Chinese economic espionage. Among the Justice Department's stated priorities as part of this initiative include identifying FCPA cases involving Chinese companies that compete with U.S. companies.

**Enforcement actions.** From 1977 through 2018, 23 countries concluded 392 enforcement actions for the alleged bribery of foreign officials. The United States maintained the strongest enforcement record during this period, bringing 263 enforcement actions (67 percent of all foreign bribery cases).

Eighty-nine of these actions involved companies headquartered outside the United States or individuals with non-U.S. citizenship. European companies and individuals made up the majority (60 percent) of U.S. enforcement actions against non-U.S. companies and individuals concerning alleged bribery of foreign officials—mainly in the United Kingdom, followed by the Netherlands, Switzerland, and France.

Other regions of the world where U.S. enforcement authorities brought enforcement actions include Asia Pacific (19 percent); the Americas (15 percent); the Middle East (2 percent); and Africa (1 percent). According to TRACE, the United States brought 25 enforcement actions in 2018 alone, including two matters



resolved through declination with disgorgement—the Insurance Corporation of Barbados and Polycorn.

European countries initiated 104 enforcement actions for foreign bribery since 1977, including in the Asia Pacific, the Americas (excluding the United States), and the Middle East. Cross-border coordination among European authorities could bump up these numbers in the future. One example is the 220 million Danish Krone fine (U.S. \$33 million) that global coatings manufacturer Hempel reached with Danish and German authorities in March for bribery payments made to ship managers in Germany.

**Domestic bribery.** While the United States and Europe focus heavily on the bribery of foreign officials, elsewhere around the world many countries are focusing on the bribery of domestic officials. Overall, the total cumulative number of domestic enforcement actions grew 22 percent globally.

Among 86 countries conducting domestic bribery investigations, Brazil leads the way with 25. This is in no small part due to the fallout from the massive corruption investigation into Brazilian state-owned energy company Petrobras, which implicated the highest levels of the Brazilian government and dozens of companies after it was discovered that some of Brazil's largest construction and engineering companies received inflated contracts from Petrobras—excess markups that were then used to funnel kickbacks to Petrobras executives and high-ranking politicians.

Investigations into a second massive investigation, “Operation Weak Flesh,” also continue following allegations made in 2017 that agribusiness executives at JBS and BRF bribed food inspectors and politicians to overlook unsanitary practices in exchange for approving sales to domestic and foreign meat and poultry buyers.

Other countries actively investigating domestic bribery include India (16) and China (13). Recent anti-corruption developments, however, may increase enforcement activity moving forward. For example, India's Prevention of Corruption Act, which expressly prohibits bribery by commercial organizations and establishes an adequate compliance defense, came into force in July 2018. And in China, the establishment of

a powerful new anti-corruption enforcement body—the National Supervisory Commission—makes it even more imperative that foreign multinational firms carefully review existing interactions with public officials in the country and enhance their due diligence.

China and Algeria have brought the most enforcement actions concerning the bribery of domestic officials, each with 10 actions. They are followed by Nigeria and South Korea, each with seven actions; Brazil with six; and Cuba, Germany, and Indonesia, with five.

**Bribery of government officials.** Officials in Asia Pacific were the alleged recipients of bribes in approximately 38 percent of enforcement actions, followed by the Americas (excluding the United States) and Africa with 17 percent each, Europe (14 percent), and the Middle East (11 percent).

Chinese officials were the alleged recipients of bribes in more than 100 different enforcement events, more than any other country in the TRACE report. Iraq had the next highest number of enforcement events, followed by Brazil, Nigeria, and India.

In the United States, among the 43 countries where U.S. companies and individuals faced a bribery investigation, Chinese officials were the alleged recipients of bribes in 30 investigations, followed by Brazil (14), India (12), and Russia (11).

Among the 98 total countries where U.S. companies and individuals were subject to an enforcement action between 1977 and 2018, Chinese officials were the alleged recipients of bribes in 51 enforcement actions. This is significantly more than the 18 enforcement actions in Nigeria, where U.S. companies and individuals were subject to the second highest number of enforcement actions, followed by Iraq and Indonesia, each with 17 enforcement actions.

**Enforcement by industry.** Consistent with previous years, the extractive industry experienced the highest number of enforcement actions for alleged bribery of domestic or foreign officials since 1977. In total, 17 enforcement actions resulted from domestic bribery and 40 resulted from foreign bribery.

This is not altogether surprising, given that countries rich in natural resources tend to be hotbed areas for bribery and corruption. Heightening this risk is

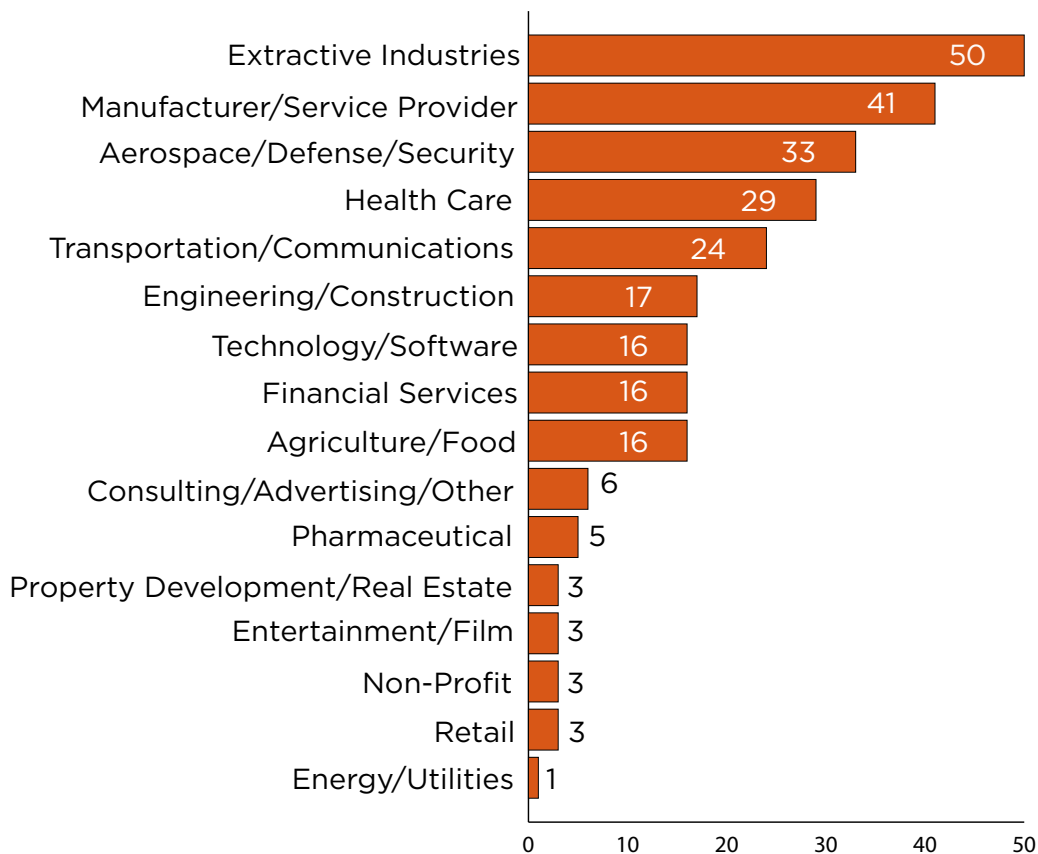
that countries rich in natural resources also are dominated by state-owned entities, where interactions with foreign government officials are commonplace.

In the United States alone, the extractive industries faced 50 enforcement actions for the bribery of domestic and foreign officials—the highest among all industries. Some of the largest bribery cases in this sector brought by U.S. enforcement authorities have involved Petrobras, as well as Venezuela's state-owned and state-controlled energy company,

PDVSA, and Ecuador's state-owned and state-controlled energy company, PetroEcuador.

Trailing not far behind the extractive industry, engineering and construction companies represented the second highest number of all non-U.S. enforcement actions globally, with 21 resulting from domestic bribery and 15 resulting from foreign bribery, according to TRACE. Additionally, manufacturers and services providers saw 16 enforcement actions resulting from domestic bribery and 18 from foreign bribery. ■

### Enforcement actions by industry



Source: TRACE International



# Third-Party Risk is NOT Just About FCPA Anymore

*Prior to 2019, the rules for dealing with third parties were simple: perform due diligence, implement sanctions screening software, use reputable cloud providers, and ensure that everybody stays out of politics.*

But in 2019 and beyond, the risk of third-party relationships is no longer limited to the wrath of the Department of Justice and Serious Fraud Office. Reputational risk has gone up exponentially with respect to third-party behavior.

Aggressive new sanctions actions by the Office of Foreign Assets Control (OFAC) have raised the bar, and the fallout from data breaches post-European General Data Protection Regulation (GDPR) means that third parties holding customer data have more power than ever to topple the public's trust of a company.

## Third-party risk has broadened in three substantial ways:

1. Expanded risk of prosecution for sanctions violations
2. Increased reputational risk of association with controversial companies and CEOs
3. Heightened risk of a data breach exposure

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**by Kristy Grant-Hart**

Founder and CEO, Spark Compliance

**and NAVEX Global®**

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## The Rising Risk of Working with Sanctioned Parties

In late November, shockwaves went through the compliance community when Cobham Holdings Inc. reached a settlement with OFAC for \$90,000 because of a sanctions violation. The settlement was the second recent OFAC action relying on the “50 percent rule.” In Cobham Holdings’ case, the underlying violation was not triggered because the person or entity was on the Specially Designated Nationals and Blocked Persons List, but instead because the company’s former subsidiary allegedly sent goods to a blocked Russian entity. What contributed to this failure? Cobham Holdings’ third-party search software failed to raise red flags that would have caught the compliance issue before it was a problem.

Regulatory agencies such as OFAC are upping their game when it comes to catching violators. Companies have long relied on automatic sanctions screening software. In most cases, they have to. Multinationals may have tens of thousands of third parties, especially if they cater to members of the public that need to be screened before services can be provided. But the Cobham Holdings’ prosecution is a reminder that software alone cannot be the answer. Review protocol designed by humans and implemented consistently is required to reduce risk and to provide a barrier to what is often a strict liability offense.

## The Rising Reputational Risk of Association

For decades, most companies have tried to steer well away from politics – at least publicly. But the rise of social media, shareholder activism, and the 24-hour news cycle have led to pressure for companies to react to politics as never before.



*Even our blue-chip companies are not immune to the reputational dismantling that results from catastrophic culture failures.*

That reaction can have a ripple effect, especially on other companies closely linked to the target of such activism.

In 2018, numerous companies all asked for their campaign contributions back after a candidate for U.S. Senate made controversial comments caught on tape. Also in 2018, several companies announced that they would stop selling the AR-15 firearm after shootings at a Florida school. These days, companies are taking a public stance on controversial issues – and that creates a whole new kind of reputational risk for the entities working with them.

Publicly announced decisions that are made in response to controversy will frequently create passionate polarized responses. Statements of internal policy, such as companies announcing they will no longer reimburse meat-based meal expenses, have created a media storm. Even our blue-chip companies are not immune to the reputational dismantling that results from catastrophic culture failures.

When it comes to reputational risk from third parties, not all relationships are created equal. For instance, if a company uses a bank that incurs a billion-dollar fine, the controversy at the bank will likely have no effect on the company whatsoever. However, if a company has a joint venture with a third party that makes an unpopular proclamation or has a CEO scandal, the negative halo effect can be extremely destructive.

## The Rising Risk of Third Parties Holding Personal Data

Perhaps the most spoken phrase this year in compliance and privacy departments was, “Fines can go up to 4 percent of global turnover.” Although the big GDPR deadline passed in May 2018, enforcement is just starting. Indeed, many European data protection authorities are beginning to show their teeth, with prosecutions and huge fines taking hold.

It's not just Europe where data breaches create cause for alarm. Nearly every state in the U.S has some sort of data

breach notification law, and California's new Consumer Privacy Act will up the ante further for compliance requirements.

Regardless of regulatory jurisdiction, your customers don't care if your third party was careless with their data. If you have a data breach, the customer will be angry with your company. Your company will also likely be the one providing solutions. Some solutions, such as credit monitoring, can be very expensive if extended to thousands of people.

## Key Steps for an Organization to Take

### Implement a Sanction Screening Protocol that Involves People

While your sanctions screening software is a critical safeguard, a system needs to be in place to review problematic or potentially problematic third parties. Check the settings on your software. Is it set to allow you to review fuzzy matches? Do you have an escalation protocol that allows the compliance team to review potential matches?

*Your customers don't care if your third party was careless with their data,*  
***the customer will be angry with your company.***





Does the compliance team perform a regular spot check to ensure the software is working as it should? Have you separated third parties or customers from high-risk countries (those currently under sanctions) for deeper-dive screening than those in lower-risk countries?

Review your protocol to ensure you've got a system in place that works. A good system will utilize software and humans to ensure compliance.

### Have a Back-Up Plan for Critical Third Parties

Perform a risk assessment to determine which of your key suppliers, joint venture partners, and other high-profile relationships are most exposed to reputational risk. For business-critical third parties, try to find a back-up that can be implemented should a political statement or other scandal threaten the company. Forward thinking can protect your company from being drowned by another company's bad actions or ill-thought-out political statement.

### Check Your Contracts with Companies that Have Personal Data

If you target or sell to Europeans, or if you have a European presence, you probably prepared for GDPR. Now is the time to make sure those third-party processor contracts have the required terms from Article 28.

Whether your company is in Europe or not, Article 28 terms can be very useful for all of your contracts with third parties that process personal data on your company's behalf. Make sure you include the requirements that the company notifies you without delay if a data breach occurs. Put in safeguards requiring minimum levels of data security. Add in the requirement to delete or amend data that is no longer active or accurate.

Third-party risk must be managed. By expanding your viewpoint from "bribery risk" to a holistic review of each third party, you'll be able to protect your company in all of the ways required in 2019 and beyond.

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# Anti-corruption in emerging markets

**Jaclyn Jaeger** provides an update on a recent Gibson Dunn Webcast where a panel of anti-corruption experts shared key insights into the latest anti-corruption developments in some of the world's largest—and most corrupt—regions.

**A**s companies look to expand their global footprint in emerging markets, they are met with an ever-present threat of corruption—a compliance risk that should be top of mind for compliance officers as more countries' anti-corruption efforts and corruption scandals of historic proportions take the national stage.

In a recent Webcast, a panel of anti-corruption experts with law firm Gibson Dunn shared some key insights into the latest anti-corruption developments in some of the world's largest—but most corrupt—regions and offered some practical tips on how to do business in these countries without running afoul of anti-corruption laws. The regions, which are

discussed in more detail below, include Asia, Russia, Latin America, and Africa.

### China

In China, ongoing trade wars and political reform are causing a tremendous amount of market uncertainty, increasing commercial bribery risk on the ground there. Moreover, China's economic growth rate is projected to slow to 6.3 percent in 2019. Such market pressures often drive misguided efforts on the part of local management and sales teams to meet sales targets through improper activities, said Kelly Austin, partner-in-charge of Gibson Dunn's Hong Kong office.

Moreover, it's projected that China's anti-corruption efforts will continue, if not escalate, under the country's powerful new National Supervisory Commission (NSC). Established in March 2018, the NSC effectively consolidates and expands the enforcement arm of China's anti-corruption agencies. Whereas the Central Commission for Discipline Inspection (CCDI) covers party members only, the NSC covers "all public servants, regardless of branch of government or Party membership," including executives of state-owned enterprises.

"Even though this National Supervisory Commission focuses on government officials, we are seeing clients who are allegedly involved in the supply side of bribery—the bribe payers—continuing to be caught up in these investigations," Austin said. Thus, companies addressing anti-corruption enforcement matters in China need to have experienced counsel—both People's Republic of China (PRC) local counsel and international counsel—who really understand how these various anti-corruption enforcement bodies interact with one another, Austin said.

Compliance and legal professionals should also look to recent enforcement actions in China, as they point to a broad range of business activities that could result in a U.S. Foreign Corrupt Practices Act enforcement action. Examples include:

- » Credit Suisse and the FCPA risks associated with

hiring practices of Chinese authorities;

- » Panasonic and Stryker and FCPA risks associated with third parties;
- » United Technologies and the FCPA risks associated with gifts and sponsored travel in the China market; and
- » Polycom and FCPA risks associated with off-book funds—like rebates and discounts—and how they are used to make bribe payments.

Also, relevant to China's anti-corruption campaign, the State Administration for Market Regulation and the NSC have launched campaigns targeting specific sectors as part of their anti-bribery and anti-corruption efforts—particularly the pharmaceutical, medical devices, and educational sectors. Companies operating in these sectors may find themselves the subjects of inquiries and should prepare for heightened enforcement activity, Austin said.

### Russia

In Russia, the most significant development on the anti-corruption front concerns the expanded scope of corporate liability for bribery offenses. Whereas Article 19.28 of the Code of Administrative Violations originally called for the prosecution of a company or a third party for the giving of a bribe "in the interests of" the company, the revised law, signed into law Dec. 27, 2018, now also covers bribes given in the interests of any "affiliated" entity. This means a company—including any foreign company subject to Article 19.28—could be held liable for any bribe made in the interest of any subsidiary, group company, distributor, or any other entity affiliated with the company.

The law applies to bribes given not just to the primary bribe taker, but also to anyone who is designated by the primary bribe taker to receive the bribe, regardless of whether it knew, or had reason to know, of such payment. Enforcement activity under Article 19.28 is already bearing fruit: Based on statistics published in a newly created public register of companies that have faced administrative sanctions under this statute, 429 companies faced prosecutions

for Article 19.28 violations in 2017, and another 280 companies faced prosecutions in 2018, to date.

These recent anti-corruption developments make it even more important that companies operating in Russia implement robust anti-corruption compliance programs and conduct thorough third-party due diligence. “Conducting vigorous third-party due diligence is key to avoiding FCPA risk,” said Benno Schwarz, a partner in the Munich, Germany, office at Gibson Dunn.

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“The use of intermediaries remains a corporate weakness and, therefore, a focus of enforcers. While the risks vary, significant care needs to be taken in business dealings, particularly in high-risk business sectors.”

Sacha Harber-Kelly, Partner, Gibson Dunn

#### India

One big development in India is the long-awaited amendments to the Prevention of Corruption Act (PCA), which came into effect in July 2018. The law makes it an offense to pay a bribe, “whereas previously that was unclear,” Austin said. The law prohibits any person from accepting any “undue advantage” from anyone that would cause a public servant to perform public duties in an improper, dishonest manner.

Additionally, legal entities can be held criminally liable for the actions of their employees, agents, and service providers. A foreign parent company also can be held liable for the actions of its Indian subsidiary. The amended PCA specifically clarifies that facilita-

tion payments are also prohibited. Importantly, under the law, managerial personnel can be held liable if they are found to have consented to, or schemed with, the person who committed the offense under the PCA.

Companies can avoid liability if they have in place a compliance program that includes adequate procedures designed to prevent bribes. Guidelines are currently in development as to what constitutes adequate procedures, but, for now, the adequate procedures provisions under Section 7 of the U.K. Bribery Act, and the standards expected by the U.S. government for FCPA internal controls, “should be guiding the adequate procedures you are putting in place in India,” Austin said.

#### Latin America

In Latin America, while it’s important to understand the nuances of each region’s anti-corruption laws, there is a broader developing trend in several major Latin American jurisdictions of late in moving toward a U.S.- or U.K.-style compliance regime, said Joel Cohen, co-chair of Gibson Dunn’s White-Collar Defense and Investigations Group.

In Argentina, for example, Law 27.401, which came into force in March 2018, imposes strict liability for companies that commit bribery and participate in the illicit enrichment of public officials, among other crimes. The law complements existing anti-bribery laws in the country that apply only to individuals. Companies in Argentina may avoid prosecution, however, if they self-report the misconduct and disgorge ill-gotten gains. Companies may also be exempt from penalties if they implement an “integrity program,” the minimum requirements of which are defined in the law.

Peru is also making strides in its battle against corruption. Effective since Jan. 1, 2018, Peru amended and significantly expanded Law 30424, which introduced a new corporate criminal liability regime for foreign bribery in 2016. Under the amended law, companies may be held liable for domestic and overseas bribery of public officials, as well as for money laundering and terrorism financing. In addition to

direct liability, a company may be held accountable for actions conducted in its name, for its benefit, or on its behalf.

To be exempt from liability, a company must demonstrate the existence of an adequate compliance program or show that the misconduct was not committed under the orders or authorization of company partners, directors, or administrators. Other options for potential leniency include cooperating with the prosecuting authorities and taking remedial measures.

#### Africa

In Africa, most enforcement actions continue to be brought by enforcement authorities in the United States and the United Kingdom, with a focus on the extractive industry and the financial services sector. Among companies that have faced enforcement actions in the extractives industry for corrupt business dealings in Africa include Kinross Gold, Glencore, and Griffiths Energy. Ongoing investigations include ENRC and Rio Tinto.

And in the financial services sector, companies that have faced enforcement actions for corrupt business dealings in Africa include Société Générale, Legg Mason, and Credit Suisse. “What we see here is various types of enforcement occurring in Africa,” said Sacha Harber-Kelly, a partner at Gibson Dunn in the London office. While many actions are domestically led, often focusing on domestic corruption, there is an emerging trend of enforcement actions against employees of foreign concern, not just against civil servants and former ministers, he said.

Across all continents and countries, “the use of intermediaries remains a corporate weakness and, therefore, a focus of enforcers,” Harber-Kelly said. “While the risks vary, significant care needs to be taken in business dealings, particularly in high-risk business sectors.”

Pre-engagement screening and ongoing monitoring throughout the lifetime of any engagement can help reduce the sort of third-party risk agents and intermediaries pose. ■

### THIRD-PARTY RISK AREAS AROUND THE WORLD

**Corruption matters involving third parties have been at the core of recent enforcement actions conducted by enforcement authorities around the world. Below, Gibson Dunn has put together a list of high-risk third parties that companies might encounter in each region of the world and, thus, where they should focus their due diligence efforts.**

- » **China:** Consultants, design institutes, PR/marketing firms, event organizers, travel agents, or distributors.
- » **India:** Sales agents, distributors, tendering/procurement agents, government liaison agents, logistics providers, joint venture partners, or fictitious vendors.
- » **Korea:** Distributors, customs clearance agents, travel agents, or event planners.
- » **Russia:** Distributors, state-owned customers, fictitious service providers, vendors, or private customers.
- » **Latin America:** Sales and marketing agents, customs brokers, lobbyists, or tendering agents.
- » **Africa:** Joint venture partners and consultants.

Source: Gibson Dunn





# Measures for reducing export-corruption risk

A recent study from corruption watchdog Transparency International rates countries on their enforcement processes, or lack thereof, under the OECD Anti-Bribery Convention.

**Jaclyn Jaeger** has more.

**M**ost of the world's largest exporting countries are doing a poor job at enforcing foreign bribery, leaving exporters vulnerable to bribery and corruption risk.

That's according to the "Exporting Corruption Progress Report 2018," conducted by corruption watchdog Transparency International (TI), which rated countries based on their enforcement against foreign bribery under the OECD Anti-Bribery Conven-

tion. The Convention requires signatory countries to criminalize bribery of foreign public officials and introduce related measures.

TI scored each country based on number of investigations commenced, cases opened, and cases resulting in sanctions from the past four years. Based on this data, relative to its share of global exports, each country was ranked as having either "active," "moderate," "limited," or "little or no" enforcement.

The countries TI reviewed are responsible for more than 80 percent of world exports.

Overall, the report found that only 11 of the 44 jurisdictions rated conduct active or moderate enforcement against companies that bribe abroad. Just seven OECD signatory countries show active enforcement: Germany, Israel, Italy, Norway, Switzerland, the United Kingdom, and the United States. Together, they make up 27 percent of global exports.

Another four countries show moderate enforcement: Australia, Brazil, Portugal, and Sweden. These countries are responsible for 30.8 percent of world exports. Eleven countries show limited enforcement, while 22 countries showed little to no enforcement. Together, the 33 countries in the “limited” and “little or no enforcement” categories account for approximately 52 percent of world exports.

In this year's report, TI for the first time evaluated China (the world's largest exporter), Hong Kong, India, and Singapore—which are each responsible for more than two percent of global exports but are not signatories to the OECD Convention. These four exporters are in the “little or no enforcement” category. China alone contributes 10.8 percent of the total exports.

“Governments have promised to implement and enforce laws against bribing foreign officials under the OECD and UN conventions, [and] yet many are not even investigating major cases of grand corruption, which involve state-owned enterprises and senior politicians,” TI Chair Delia Ferreira Rubio said in a statement.

### Reducing export corruption risk

Reducing bribery and corruption risks associated with exports begins with a sound anti-corruption compliance program and risk mitigation efforts. “If you have not invested in risk management, you are putting yourself seriously at risk in export markets,” says Brook Horowitz, CEO of IBLF Global, a non-profit group that promotes responsible business through collective action.

When importing from, or exporting to, a high-risk market—like the ones ranked by TI's Exporting

Corruption progress report—common warnings or red flags to watch for generally include:

- » Third-party agents and distributors;
- » Unusual buyer requests/requirements or transactions;
- » Marketing and samples;
- » Gifts and entertainment;
- » Donations (political or charitable), related somehow to the timing of winning a project;
- » Close relations between employees and suppliers; and
- » Businesses owned or operated by Politically Exposed Persons.

“Companies should pay specific attention to the donations,” says Cüneyt Eti, managing director of Sius Consulting. When it may appear to be a harmless charitable donation on its face, “you may find the charity is owned by a public official or PEP,” he says. “I highly advise companies to dig a little bit deeper and do their homework before making charitable donations.”

It's important for export compliance professionals to train employees on how to remove the personal element from the relationship when discussing transactions. That can be difficult because, in many of these high-risk markets, the personal relationships are what's important, Horowitz says.

When discussions concern business transactions, that's when employees need to use “bureaucratic language,” Horowitz says. “It's not within the policies of my company. I need a receipt. I need to discuss this with my manager. I'd like to discuss that with your manager at the next level up—a supervisor.”

A workplace culture where senior management turns a blind eye to misconduct also increases bribery and corruption risk when importing from, or exporting to, high-risk markets. Often in these situations, by the time the company catches wind of the wrongdoing, “the public authorities have found out about it as well,” Horowitz says. Establishing an open-door culture and encouraging employees to raise concerns

reduces bribery and corruption threats.

Proactive measures to consider include:

- » Devoting adequate resources to export control compliance;
- » Screening all transactions against government lists to ensure you're not doing business with designated entities or individuals, like PEPs;
- » Ask agents for certification;
- » Include audit clauses in contracts;
- » Conduct training regularly, ensuring that employees understand export control laws and can apply that knowledge to their day-to-day job responsibilities;
- » Put unusual, suspicious requests in writing; and
- » Have an escalation process in the event of suspicious transactions.

If an employee already gave or received a bribe, or the company has discovered or become aware of such misconduct, export compliance professionals should undertake a self-evaluation:

- » Request supporting documentation;
- » Perform an internal audit;
- » Make employees aware of the potential consequences;
- » Check payment-related documentation; and
- » Review invoices (especially suspicious expenses)

The follow-up question is whether or when to self-report. Self-reporting misconduct uncovered during an import or export assessment is not always cut-and-dry, since anti-corruption reporting is not consistent country-to-country. The question of where to report can be confusing, Horowitz says. "At that point," he says, "you need legal advice."

### **Proactive compliance**

Although the TI report addresses governments rather than companies, as it advocates for active enforcement of foreign bribery laws by governments, "compliance professionals could use the report as one resource for their corruption risk assessment

of countries and should ensure that their compliance programs address those risks adequately," says Christine Hosack, TI's Business Integrity Programme coordinator.

"Beyond the report, we encourage companies to adopt, actively implement, report on, and promote comprehensive compliance programs to prevent corruption, domestically and abroad," Hosack says. Promoting a company's compliance program throughout the supply chain and with other third parties—such as contractors and agents—is essential to mitigate third-party bribery risk, she says. Such efforts should be matched with an appropriate level of third-party due diligence, especially in countries with high corruption risks.

When reporting, TI recommends that companies publicly disclose information in the following areas:

- » Anti-corruption compliance programs;
- » Organizational transparency;
- » Financial information on a country basis; and
- » Beneficial ownership.

"Disclosure of this information not only enables others to hold companies to account, but also discourages corrupt behavior, reducing companies' reputational and financial risks from bribes or fines," Hosack says.

Moreover, companies have a role to play in tackling corruption in the public sector, as corruption increases their costs, creates uncertainty, and poses risks of fines and reputational damage. "For this, we see a collective approach as most efficient, and we encourage companies to work in coalitions with government and civil society actors to enforce anti-corruption commitments and improve national anti-corruption mechanisms," Hosack says.

Although exporting in an ethical manner can be challenging in many markets, evidence shows that operating with integrity "helps companies to mitigate risks, increase access to capital, and protect and enhance a company's reputation," Hosack says, "which can unlock new commercial opportunities and create a competitive edge." ■

# South America, Mexico cleaning up their acts

A look at key investigations and enforcement actions in South America and Mexico in the past four years signifies a changing legal landscape that offers CCOs lessons in advancing third-party anti-corruption compliance. **Tom Fox** explores.

While Brazil has led the way in both anti-corruption legislation (the Clean Companies Act) and anti-corruption enforcement (Operation Car Wash), many South American countries and Mexico have stepped forward over the past few years and created their own anti-corruption legal regimes. These changing regulatory landscapes stem from significant investigations and enforcement actions that every compliance practitioner should consider when enhancing third-party anti-corruption compliance. An in-depth look at some key developments follows.

## I. Anti-Corruption Laws

**Argentina-Article 27, 401, enacted 2016.** The Argentina anti-corruption law is similar to Brazil's Clean Companies Act in many respects—it covers not only international but also domestic corruption; it employs some severe penalties for violation of the Act, with fines ranging from two to five times the benefit sought or received; and, while it does not have specific compliance requirements, a company can avoid liability under the Act if it (i) self-reports to the government, (ii) has a compliance program before the incident underlying the legal violation occurred; and (iii) returns the undue benefit, or profit disgorgement.

**Colombia-Law 1778, enacted 2016.** Colombia's anti-corruption law, the “Transnational Bribery Act,” created corporate administrative liability for foreign bribery. The law applies to Colombian companies, including Colombian subsidiaries of non-Colombian companies registered to do business in the country. The penalties can be steep for violating the Act, as organizations could be sanctioned with monetary fines up to approximately U.S. \$55 million and face debarment from contracting with the Colombian government. Individuals may also encounter criminal liability, including between 9 to 15 years imprisonment and considerable fines. The Act also established credit for those companies with adequate anti-corruption compliance programs that did not lay out effective elements of a compliance program. A company can avoid liability if it self-reports before the government opens an investigation or if it self-disclosed before it began performance under the contract procured via corruption.

**Mexico-National Anti-Corruption Systems, enacted 2016.** Under Mexico's National Anti-Corruption System, corporate entities can be held liable for “serious administrative offenses” such as bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, and

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The bottom line for compliance practitioners is they should be ramping up their compliance efforts in South and Central America, as the regulators seem to be actively enforcing their new anti-corruption regimes and aren't about to let down their guard.

wrongful recruitment of ex-public servants. The law also includes acts of third parties. Penalties can range up to twice the amount of the benefit received, reaching approximately U.S. \$6 million; debarment of up to ten years from public contracting; suspension of activities up to three years; or dissolution. The law mandates the coordination of anti-corruption and other controls bodies at all levels of Mexican government: federal, state, municipal. From the compliance program perspective, the law provides mitigation for companies with compliance programs in place. Individuals and companies can reduce penalties when self-reporting conduct and cooperating with authorities. Finally, non-domestic companies desiring to do business with Mexican state-owned petroleum company Pemex and other state-owned enterprises must have anti-corruption compliance programs.

**Peru-Law 30424, enacted 2018.** Peru makes illegal both the offering and paying of bribes (active bribery) and the receipt of bribes (passive bribery). The penalties for corporations include 2 to 6 times the amount of the benefit received or the expected benefit. The criminal penalties for individuals can range from 8 years for paying a bribe to 15 for government officials who receive a bribe. The law mandates the equivalent of a chief compliance officer—that being a person who is in charge of prevention of corruption in an organization, who is appointed by the highest administrative body of the company, and who can exercise the compliance function autonomously. The law also has distinct specifications for compliance programs, including the following elements: identification, evaluation, and mitigation of risks related

to the offenses covered by this law; internal reporting procedures; communication and periodic training; and continuous evaluation and ongoing monitoring of the compliance function.

## II. Significant Investigations and Enforcement Actions

Argentina has been enthralled with “The Notebook” corruption scandal, named for eight notebooks kept by the driver of a close advisor to the Minister of Federal Planning under the prior Kirchner(s) regimes from 2003 to 2015. These notebooks documented at least seven years of elaborate corruption schemes involving senior officials in Argentina's government that detailed bribes of up to \$200 million paid to key figures in the Kirchner(s) administrations. While Chile—whose anti-corruption law was passed back in 2009—and Mexico have both been moving toward an enforcement action against construction giant Odebrecht. Odebrecht CEO Marcelo Odebrecht was arrested in 2015 in connection with an investigation into a bribery scandal involving oil giant Petrobras. If both of these investigations can be resolved, they'll add significant cache to the anti-corruption efforts not only in both countries, but also the entire region.

The bottom line for compliance practitioners is they should be ramping up their compliance efforts in South and Central America, as the regulators seem to be actively enforcing their new anti-corruption regimes and aren't about to let down their guard. ■



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