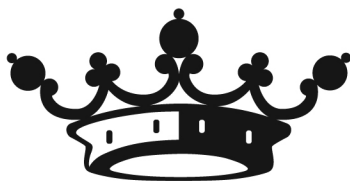


# Understanding Anti-Corruption Issues in Latin America

*An In-Depth Look at Recent Developments and  
Upcoming Trends*



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Fighting Fraud and  
Corruption in Latin America:  
A Guide for Assisting Corporations,  
Financial Institutions, and Their  
Officers and Directors

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## **Understanding the Problem**

Latin America and the Caribbean continue to wage a battle against corruption, bribery, fraud, and their direct by-product, money laundering. These unlawful practices have long been tolerated in many jurisdictions throughout the region, with little risk to the participants. Such practices are still prevalent in the region, notwithstanding a strong push from the U.S. and Europe to freeze assets and assess financial penalties on institutions and individuals who engage in this conduct and violate, among other things, tax, anti-money laundering (AML), and anti-corrupt laws. In today's enforcement-driven environment, it is essential that multinational corporations and financial institutions recognize the serious legal, financial, political, and business risks posed by historically lax local enforcement and compliance practices in the region. Only after understanding the risks that lie in this region, can corporations and their officers learn to identify, prepare for dealing with, and avoid these unlawful practices that could curtail a company's success.

## **Changing Clients and Cases**

As a global law firm focused on international transactions, we represent private enterprises, potential investors, and financial institutions from China, the Middle East, Latin America, and the Caribbean, as well as Europe and the U.S. In the past two years, we have seen a strong upturn in clients from Mexico, the Asia/Pacific region, as well as the Middle East. This regional trend is likely the result of the depressed economic conditions in the U.S., coupled with increasingly robust Sino-Latin American trade and investment. These regions, which are mainly comprised of developing nations lacking tough regulations, have also become the breeding ground for corruption and fraud.

The global economic crisis has created a new class of victim. Corporations, financial institutions, and even government entities have fallen victim to increasingly sophisticated schemes to defraud. Not only have these entities been directly defrauded, they have unwittingly become pawns in the schemes to defraud third parties. This is especially the case with financial institutions, whose account holders have been stripped of their holdings by the perpetrators of Ponzi schemes and other fraudulent activities. Although

these entities may lay claim to the title of “victim,” they have also been labeled villains by the very account holders that have seen their assets depleted due to lax compliance and enforcement policies. There is a line where negligence turns criminal, and institutions that fail to acknowledge the important role they play in protecting against fraud and corruption risk crossing that line. Since 2008, our firm has seen a significant increase in cases involving entities seeking relief as direct victims of fraud while, at the same time, seeking to defend against allegations that they permitted frauds to be perpetrated against third-parties.

Between 2009-2010 our firm has been involved in numerous cases involving alleged violations of the Foreign Corrupt Practices Act (FCPA), codified at 15 U.S.C. §§ 78dd-1, *et seq.*, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), and certain rules and regulations enforced by the U.S. Office of Foreign Assets Control (OFAC), *see, e.g.*, 31 C.F.R. § 515.201 (2009) (Cuba) and 31 C.F.R. § 560.204 (2009) (Iran), which polices commercial dealings with nations considered unfriendly to the U.S., including Cuba, Iran, and North Korea. In addition to specific violations of these various enforcement regimes, U.S. authorities regularly tack-on money laundering charges to FCPA and OFAC violations, as such violations may constitute the type of specified unlawful activity that can turn transactions into money laundering.<sup>1</sup>

## The Current Situation

Over the past twenty years, public corruption and money laundering have emerged as among the top concerns for law enforcement officials, government regulators, and compliance officers working in Latin America and the Caribbean. The global recession has only increased the prevalence of these cases—particularly where cash-starved corporations, financial

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<sup>1</sup> Under the USA Patriot Act, financial fraud is not a specified unlawful activity. *See* § 302, H.R. 3162, USA Patriot Act, Pub. L. No. 107-56 (2001). However, this charge can still be brought against a company or individual accused of violating other federal fraud related statutes, such as those predicated upon mail or wire fraud. *See* 18 U.S.C. § 1961(1)(B) (2006) (defining “racketeering activity” to include acts indictable under 18 U.S.C. § 1341 – 1343, the laws prohibiting mail or wire fraud). Thus, if a fraudster sends a wire transfer or uses email, fax, or phone lines to perpetrate a financial fraud, the U.S. government can add a money laundering count predicated upon the alleged wire or mail fraud. *Id.*

institutions facing liquidity shortages, and individuals trying to cover financial obligations scramble to find additional sources of capital.

The tensions that coexist in Latin America's political and regulatory structure resemble that of other rapidly developing regions or emerging markets. There is a constant struggle between a national government's desire to grow the economy by attracting foreign investment, and the recognition that bribery and other corrupt practices must be limited through strict regulations that may divert potential investors.

As a threshold matter, rapidly developing nations like Brazil and China often see anti-corruption regulations as an impediment to economic and financial growth. That has been particularly true during the past two years, when government leaders have attempted to stimulate their economies and create new jobs by attracting foreign investment through all possible means. That is not to say that governments across the region have no interest in policing financial transactions to prevent fraud, bribery, and corruption. On the contrary, these nations are developing sophisticated compliance protocols. The challenge, however, lies in enforcement. While the backbone of a sound enforcement regime is firmly in place, the ability to effectively and uniformly enforce the various rules and regulations at play still lags behind other major regions, such as the U.S. and Europe. The goal is to bring parity between policy and enforcement. It is no longer enough for nations to place anti-money laundering laws on the books. Those laws, once enacted, must be complied with and enforced.

A second factor influencing business practices in Latin America is the traditional distrust of the U.S. as its "big brother" to the north. In many jurisdictions, governments criticize the infiltration of U.S. laws within their own borders, and the interference with Latin America's inherent right to regulate its own economies.

Third, many of the smaller jurisdictions in the Caribbean basin have focused their economies on developing an offshore financial industry, serving as tax havens to shelter assets held by a mix of affluent U.S. and European clients. The financial secrecy offered by these jurisdictions has been abused by fraudsters. Most recently, Robert Allen Stanford used the veil of financial secrecy offered by these jurisdictions to set up and maintain

one of the largest Ponzi schemes ever detected. *See SEC v. Stanford International Bank Ltd., et al.*, No. 3-09-298-N (N.D. Tex. Feb. 17, 2009). In the process, Mr. Standford defrauded both individual and institutional investors and depositors of billions of dollars. See *id.*

The final factor affecting the tension between growth and regulation is the inflow of foreign investment into Latin America from China and the Middle East. The growing trade relation between these regions is significant, particularly because of the impact it will have on the way in which business is done throughout Latin America and the Caribbean. While the U.S. and Europe heavily regulate the business community, China and the Middle East have traditionally taken what can best be described as a “hands-off” approach to business, including the allowance of bribery of public officials to gain a commercial advantage. The implementation of this hands-off approach in regions like Latin America and the Caribbean would be significant. As noted above, these regions have developed extensive, even sophisticated, regulatory regimes. However, while the rules may be in place, the enforcement regimes necessary to give these rules teeth are still largely lacking.

Middle Eastern and Chinese investment in Latin America has both positive and negative consequences for the United States. On the positive side, for example, the U.S. benefits from the growth of Sino-Latin American trade by providing both regions with critical services necessary for this line of trade to flourish. For example, companies based in such critical hubs as South Florida are in a unique position to offer critical legal, accounting, and other services to both Latin American and Chinese investors seeking to expand business throughout the region.

On the negative side, however, U.S. companies and financial institutions must avoid the “opportunity with impunity” mentality that often characterizes business dealings in China, the Middle East, and Latin America. Many corrupt politicians, business leaders, and lawyers in Latin America take the position that certain conduct, such as the payment of bribes (in the form of gifts, money, commissions or services) is beyond the reach of U.S. or European laws. Nothing could be further from the truth.

In today's regulatory climate, foreign investors who engage in corrupt practices or trade with nations on the OFAC list, such as Iran, Cuba, or North Korea, may find that the U.S. government has frozen their U.S. bank accounts or other assets. They may be indicted for criminal activities, face the risk of possible extradition, and/or the payment of millions of dollars in fines. For a full list of nations on the OFAC list *see* Dept. of Treas., OFAC Sanctions Programs, [www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml](http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml) (last accessed June 4, 2010). If funds for the bribe came from a publicly traded company in any form, then a host of U.S. securities laws including Sarbanes-Oxley will also come into play. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C.)

Critically, the U.S. does have a certain level of extraterritorial jurisdiction in Latin America and the Caribbean, and is clearly willing to use whatever leverage it can to impose sanctions in these cases. For example, last December, Siemens agreed to pay more than \$1.6 billion to settle corruption probes in the U.S. and Germany related to alleged "worldwide" corruption, including the bribery of Brazilian and Venezuelan government officials. *See SEC v. Siemens Aktiengesellschaft*, SEC Lit. Release No. 20829 (D.D.C. Dec. 15, 2009). This has spiked an interest in cash-strapped government agencies to increase efforts to prosecute and collect these fines.

Latin American governments have balked at these enforcement actions by the United States. However, governments throughout the region are powerless to effect any meaningful change, especially if change will result in a noticeable decrease in investigations or enforcement actions targeting alleged violators of U.S. anti-corruption laws. In the end, it is in the region's best interests to at least make an effort to curb fraud and corruption. The consequences of their failure to do so may be significant, including a decrease or elimination of U.S. financial support.

## **Issues and Responses**

Nine years ago, the 9/11 terrorist attacks profoundly changed the U.S. outlook and approach to national security. Since 2001, a number of new anti-terrorism laws have been passed, and regulators have increasingly focused on stopping the flow of funds to terrorist groups. *See e.g.*, USA

Patriot Act, Pub. L. No. 107-56, 115 Stat. 572 (2001); Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002); The REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005). That has translated into a heightened enforcement of AML, bank security, and “know your customer” regulations in the financial sector. U.S. authorities are also now stepping up their investigation and prosecution under the FCPA, *see* 15 U.S.C. §§ 78dd-1, *et seq.*, having announced a new enforcement initiative and formation of a multi-agency task force.

The increased enforcement of laws designed to combat fraud and corruption will unquestionably affect the way in which business is done throughout Latin America and the Caribbean. In the past year, several Latin American nations—including Venezuela, Bolivia, Ecuador, and Brazil—have strengthened their relationships with Iran and other countries which are on the U.S. OFAC list. *See* Dept. of Treas., OFAC Sanctions Programs, [www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml](http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml) (last accessed June 4, 2010). Legal practitioners need to be particularly careful when dealing with transactions that involve a nation, entity, or individual on one of the many lists maintained by OFAC. Any movement of U.S. funds or other assets can and will be frozen by government authorities as a sanction for doing business with these specially designated nations, individuals, or entities. For a full list of designated individuals on the OFAC list *see* Dept. of Treas., SDN List, [www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf](http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf) (last accessed June 4, 2010). For example, the U.S. effectively barred Banco Delta Asia, a Macau-based financial institution, from using the U.S. financial system because of allegations that it was facilitating the finance and sale of arms to North Korea. *See* Imposition of Special Measure Against Banco Delta Asia SARL, 70 Fed. Reg. 52,217 – 219 (Sept. 20, 2005).

## **The Practice**

As noted above, there has been a significant increase in the number of investigations and prosecutions targeting fraud, bribery, and corruption. Money laundering charges are also typically coupled with these offenses and are especially prevalent in cases involving Ponzi schemes or other organized schemes to defraud.

While the global recession has contributed to an increase in fraud and corruption, other factors also affect this trend. Most notably, the use of exchange controls by various governments throughout Latin America and the Caribbean has led to the rise of a parallel black market that is built upon non-traditional and unregulated financial institutions. These entities, existing beyond the reach of traditional compliance and enforcement mechanisms, nevertheless funnel illicit proceeds into local banks with U.S. correspondent banking relationships. Lax compliance at the local level (i.e., where accounts are opened and monies received) can result in significant legal risks for these institutions in the U.S., and for those that do business for them. In fact, it is increasingly common for authorities to issue subpoenas and/or seizure warrants to U.S. based financial institutions where these black or gray market currency exchange companies maintain their U.S. dollar deposit accounts. All it takes is one questionable transaction, and all the accounts (and therefore all the funds of the exchange house's customers) become exposed to seizure.

Our law firm is often called upon by these institutions to assist in investigating potential violations of U.S. and other foreign laws. In order to properly assess our client's exposure, we typically begin our investigation by analyzing the institution's internal operating procedures, compliance protocols, and documentation. The information we seek from clients depends on the nature of our engagement, the client's business activities, and various other factors, including whether or not the client is a public entity.

During an anti-corruption or anti-bribery legal action, depending on the nature of the case, we may interview the client's bankers, accountants, and corporate or personal attorneys. We may also talk with government officials, central bank representatives, or other individuals who can shed light on the situation. In some cases, our investigators will also conduct in-depth interviews with outside witnesses to help determine the unvarnished facts of the matter. Finally, we will analyze the level of documentation in the client's file to determine his level of risk to criminal prosecution, or fines.

There are two basic client scenarios. First, a client may seek legal assistance to defend against charges of bribery, corrupt practices, money laundering,

or illegal technology transfer. In these matters, our strategy is simple: listen carefully to the client, obtain as much documentation as possible, review the applicable laws and regulations—both in the U.S. and the Latin American jurisdiction—and conduct a thorough investigation of the client’s operations, including independent, third-party sources. Our firm has a team of private investigators, including former FBI and Customs agents, as well as other law enforcement officers, who are on call to conduct an enhanced evaluation, in conjunction with our firm, of the client’s business activities and practices.

Second, a client who is interested in doing business in Latin America may ask our firm for advice relating to the legal, financial, tax, and business risks prior to making an investment in the region. In these cases, we review the client’s objectives and current business operations, and analyze the risks associated with that transaction or investment. That includes time spent educating clients on bribery and corruption issues. Our goal is to help them avoid being accused of misconduct and allow them to protect themselves against the potential misconduct of their partners in the region. Indeed, U.S. authorities are increasingly not pursuing cases premised on direct evidence of bribery or corruption. Rather, they are investigating, prosecuting, and imposing sometimes hefty fines for failure to comply with the disclosure and record-keeping provisions of the FCPA. This is a prime example of an area where we can educate our clients so as to avoid the expense—both emotional and economic—of defending against a criminal FCPA investigation or prosecution.

### **Legal Challenges and Factors**

The two biggest challenges for practicing in this area of the law are directly related to each other: knowing your client and determining the facts of the case. There is no substitute for due diligence at every step of the way—after all, several U.S. law firms have been accused of laundering money for their clients. A law firm should have clear policies and procedures for handling international clients, an internal governance structure, and zero tolerance for questionable financial transactions of any kind.

A third challenge for law firms is trying to stay on top of the ever-changing and often politically motivated maze of federal and state regulatory reforms.

It can be difficult to understand the scope and limitations of the spate of new laws and rules aimed at identifying and preventing financial fraud. Attorneys need to do their homework—and in some cases provide educated guesses based on analogous existing laws on possible outcomes—in order to be effective advisors to their clients. At a minimum, you want to receive regular updates and alerts on your computer from key regulatory agencies in this area, such as the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN).

Another major challenge comes from the fact that the Caribbean and Latin America, like most emerging markets, may consider practices that the U.S. considers corrupt or dishonest to be a normal course or manner of doing business. However, these areas also present tremendous legitimate business opportunities that result in clients wanting to take their businesses to the regions. Therefore, if the client is going to do business in these jurisdictions, the best approach to protect your client and yourself is to correctly document any transaction, especially those where government or public entities have a role in the transaction.

### **Recent Measures**

Under the current Obama Administration, there has been a clear push to pass new anti-fraud laws and regulations—many of which have implications for companies doing business in Latin America. In health care, for example, a U.S. Department of Justice (DOJ) official warned that the agency would look closely at the way companies selling their products overseas dealt with foreign officials—and payoffs to local officials would not be tolerated. Already, this year the DOJ has more than 150 new FCPA investigations pending. Accordingly, companies must have governance compliance programs and engage in early self-reporting to avoid an indictment or substantial fines.

On April 14, U.S. Senate Banking Committee Chairman Christopher Dodd (D-CT) introduced the Restoring American Financial Stability Act of 2010, which includes financial incentives for employees to report securities violations. *See* S. 3217, 111th Congress (April 15, 2010). This whistleblower provision would also apply to money laundering cover-ups at a financial institution by encouraging bank compliance officers to “come clean” about

suspicious activities. If passed, this law would certainly heighten scrutiny of financial institutions—internally as well as externally. At a minimum, we expect to see a modest increase in whistleblower cases in the region, as it is unlikely whistle blowers will come forward without the assurance of U.S. amnesty.

The net effect of these legislative changes is dubious at best. The only real remedy is close cooperation and a uniform and consistent approach among governments, with comprehensive, region-by-region coordinated attacks on international money laundering, terrorist financing, and corruption. Compliance training is also essential, as educated bankers, bank regulator businessmen, and lawyers provide the best safeguard against these practices.

## **Conclusion**

In the future, U.S. and international cooperation among law enforcement agencies, and the sharing of financial intelligence between the public and private sectors, must increase. Based on the worldwide scope of financial fraud in recent years, Latin American and Caribbean jurisdictions are reconsidering whether the risks of “turning a blind eye” to corruption outweigh the perceived benefits. This notion, along with the steady push for international cooperation, will lead to an increase in multilateral and bilateral agreements relating to money laundering, bribery and other corrupt practices. These agreements, however, will need to account for the cultural and economic differences between regional landscapes. An obstacle to this reform is that satisfaction with the status quo remains strong throughout Latin America. Consequently, measurable reform, especially in this difficult financial climate, will take time.

My advice to other lawyers practicing in this area: ask plenty of questions until you are satisfied with the answers. Then document the answers with supporting records. Thorough record keeping is critical. Remember that by protecting your client from potential misconduct, you protect yourself and your law firm.

We also believe that law firms should draft commercial and investment agreements very carefully, using language that absolves their clients of any association with corrupt practices by a local partner. Although this may not

prevent a U.S. criminal investigation, well-drafted agreements, as well as strong corporate governance programs, can be the difference between being the target of an investigation or simply being a witness testifying to the corrupt actions of a third party.

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*Upon graduation from law school, Mr. Diaz served as an assistant state attorney in the Miami-Dade County State Attorney's Office from 1986 to 1990 for the Honorable Janet Reno, former U.S. attorney general and then Miami-Dade state attorney. During his tenure as a prosecutor, Mr. Diaz rose through the office to become a division chief, where he primarily investigated and prosecuted homicide and major crimes cases.*

*From 1990 to 1998, Mr. Diaz became a named partner at an AV-rated boutique litigation firm where he put his considerable trial experience to good use litigating RICO, complex commercial and international money laundering and public corruption cases in Latin America. In 1998, Mr. Diaz opened his own AV-rated full service international law firm and has been engaged in the successful defense and prosecution of some of the most well known and highly publicized Ponzi scheme and public corruption cases, fraud and money laundering investigations in Latin America and other regions in the world.*



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