Over the past decade, as anticorruption enforcement actions by the Department of Justice and Securities and Exchange Commission focused heavily on conduct in China, U.S. companies also concentrated their anticorruption compliance efforts on their Chinese operations. More recently, Latin America has come into focus for U.S. regulators. Since 2009, the number of settled Foreign Corrupt Practices Act (FCPA) enforcement actions involving conduct in Latin America has outpaced the number of actions originating from conduct in China. As a result, many companies are paying closer attention to their Latin American operations and taking steps to ensure that their compliance programs adequately address corruption risks in the region.

Brazil, the seventh-largest economy in the world, historically was relatively closed to foreign investment. Yet in the past two years, the Brazilian government has made it easier for foreigners to obtain work permits and has added new incentives to attract business. Mexico likewise has taken steps to attract foreign investment. One analyst has dubbed Mexico “the China of the West,” citing Mexico’s low wages, strong supply base, and global network of free-trade agreements as reasons for Mexico’s allure. Widespread corruption in the region, however, has made entering into or expanding business within Latin America a risky endeavor. In Transparency International’s 2013 Corruption Perception Index, which measures perceived levels of public sector corruption globally, most Latin American countries scored between 19 and 53 on a scale from 0 (highly corrupt) to 100 (not corrupt). Specifically, Mexico, Argentina, Venezuela and Colombia were among the most corrupt, scoring 35 or lower. Also, in a survey of local citizens’ everyday experience with corruption, Transparency International’s Global Corruption Barometer found 87 percent of Mexican citizens felt that their public officials were corrupt. In Colombia, Argentina and Venezuela, between 70 and 80 percent of citizens felt that their officials were corrupt. Such an environment of rampant corruption poses serious compliance challenges for companies.

Uptick in FCPA Enforcement

With the increased flow of business to Latin America and the attendant corruption risks, the number of enforcement actions focused on Latin America has, unsurprisingly, increased in the last five years. In each year since 2009, the number of settled FCPA enforcement actions involving conduct in Latin America has either equaled or outpaced that for conduct in China (Table 1). And, during the last five years, there were more than five times the number of actions against individuals arising from conduct in Latin America than in China (Table 2). These actions are extremely costly to defend. Wal-Mart’s Mexican unit represents both the opportunity and peril of doing business in Latin America. In November 2011, Wal-Mart informed the DOJ and...
the SEC that it was conducting an internal investigation into possible bribery violations, which the New York Times later reported involved $24 million in alleged bribes to Mexican officials, including $16 million in alleged “donations” and “contributions” used to secure permits. As of January 2014, Wal-Mart has reported spending over $400 million on costs associated with its FCPA investigation and projects that it will spend an additional $200 million to $240 million in 2014.

In addition to direct costs of investigation, fines and penalties, anticorruption issues can carry costs that are less obvious at first blush, such as disgorgement of ill-gotten profits, drop in stock prices, shareholder litigation, investigations by non-U.S. governments, reputational harm, complications with business partners that have their own compliance requirements, distraction from key business objectives, and difficulties in mergers and acquisitions.

Due to the growing focus of U.S. regulators on Latin America and the potentially crippling costs of defending against one of these actions, companies are increasing their compliance resources in this region.

Navigating Requests for Charitable Donations

Bribery in high-corruption risk areas can take many forms — from overt payments of cash in a bag to more nuanced forms that are harder to detect and make it difficult to devise a compliance program that minimizes the risk of an FCPA violation. One risk area seen with increasing frequency in Latin America relates to “charitable donations.” While legitimate charitable donations are not per se illegal under the FCPA, it is illegal to make any payment, including a donation, with the intention of improperly influencing an official in order to secure a business advantage. Thus, navigating seemingly innocuous requests for donations so as not to unknowingly commit an FCPA violation can be challenging.

The DOJ’s FCPA opinions can be a useful resource for companies in this regard. The DOJ issues these opinions in response to written requests by companies about whether specific, prospective conduct conforms with the DOJ’s FCPA enforcement policy. While each FCPA opinion is specific to the facts provided by the requesting company (requestor), these opinions can nonetheless be instructive for others.

For example, Opinion 10-02 provides useful guidance on charitable-type grants or donations. In Opinion 10-02, the requestor, a U.S. nonprofit microfinance institution (MFI), was transitioning its Eurasian subsidiaries to commercial status. To do so, the Eurasian country’s government required the subsidiary to make a grant of 33 percent of its capital to local MFIs. In its request to the DOJ, the requestor outlined the due diligence process undertaken to vet the potential grant recipients and the proposed controls to which the grant, if made, would be subject, including:

• FCPA certifications by the grant recipient;
• Due diligence to confirm that the recipient’s officers were not affiliated with the foreign government;
• A requirement that the recipient provide audited financial statements;
• A written agreement with the recipient restricting the use of funds;
• Steps to ensure that the funds were transferred to a valid bank account;
• Confirmation that contemplated activities had occurred before funds were disbursed; and
• Ongoing monitoring of the program’s efficacy.

While each situation will of course be different, these examples suggest concrete steps that companies can take when considering making a charitable contribution in a high-risk region.

In this era of heightened enforcement attention on Latin America, companies should evaluate whether their compliance programs adequately address the risks posed by their Latin American operations.

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Charts by Rei Estrada