

FCPA IN LATIN AMERICA: 2012 IN REVIEW

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A busy year of FCPA enforcement in Latin America provides a number of lessons for companies keen to maintain a high level of compliance, says Matteson Ellis, an FCPA attorney at Miller & Chevalier Chartered who focuses on enforcement and compliance issues in Latin America.

In the history of robust enforcement of the US Foreign Corrupt Practices Act (FCPA) by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), seventy-six enforcement actions have involved Latin America. More than half of the region's countries have been implicated. Enforcement activity in 2012 was no exception, as cases continued to involve a number of countries, including Mexico and Brazil. These recent developments make clear that foreign bribery of Latin American public officials remains under the microscope of US officials.

The following six cases from 2012 demonstrate the diversity of ways that foreign bribery in Latin America can create liability for US and non-US companies and individuals.

BizJet (Mexico, Panama): Bribes for public contracts

Oklahoma-based BizJet settled FCPA charges with the DOJ for bribing government airline officials in Mexico and Panama to secure contracts. The company agreed to pay US\$11.8 million in criminal fines and to enter into a three year deferred prosecution agreement (DPA). The corruption scheme started with the gifting of cell phones and smaller amounts in the low US\$1,000s. After time, the company established a shell company to generate improper payments in much larger amounts (for example, US\$176,000 and US\$210,000). The Latin America sales manager literally carried bags of cash across the Mexican-US border.

Despite the egregious nature of this bribery scheme, the company received a fine that was less than a third of the suggested minimal fine in the US Federal Sentencing Guidelines. This decrease was due in large part to the company's extraordinary cooperation, including conducting an extensive internal investigation, voluntarily making US and foreign employees available for interviews, and collecting, analysing, and organizing voluminous evidence and information for the DOJ.

Biomet (Brazil, Argentina): Internal audit's compliance role

The Indiana medical device maker settled with the SEC and DOJ for US\$22.8 million and entered into a three-year DPA for bribes paid by its subsidiaries, employees, and third parties to publicly-owned hospitals to secure business. The company's Brazilian subsidiary was aware that its distributors were paying doctors between 5 and 25 percent of the value of the medical devices in exchange for purchases of its product. In Argentina, invoices incorrectly described services purportedly provided by doctors. For example, bribe

payments were described as “commissions.”

Enforcement officials used the settlement to illustrate the failure of internal audit to exercise its necessary FCPA compliance function. Internal audit failed to conduct adequate reviews of documentation to make sure it supported commission payments to doctors. It did not review proof that the doctors actually provided the services claimed. It also failed to ensure correct classification of the payments in the company’s books and records.

Orthofix (Mexico): Local language essential to compliance

The Lewisville, Texas-based medical device company paid US\$7.7 million to settle with the SEC and DOJ and entered into a three-year DPA based on charges that its Mexican subsidiary bribed public doctors there to win business over a seven-year period. The case highlights several important aspects of the FCPA, including the nature of accounting violations (the payments were incorrectly described as “promotional expenses”), improper use of third parties to pay the bribes, and improper gift-giving of things like cash, computers, and televisions.

Most of all, the case shows the essential nature of local language in FCPA compliance. FCPA authorities made clear that codes of conduct must be translated in local languages. Training must utilise multiple languages. In addition, enforcement officials sent the message that, when a company does a majority of its business with the government, in this case 60%, special compliance precautions are warranted.

Eli Lilly (Brazil): Distributor risks

The Indianapolis-based pharmaceutical maker paid US\$29.4 million to settle with the SEC for improper payments in Brazil and other countries. Its Brazilian subsidiary “allowed” one of its pharmaceutical distributors to pay bribes to public officials to win US\$1.2 million in sales to the Brazilian government. The SEC stated that, when Eli Lilly gave an unusually large discount of 17% and 19% to the distributor, the company failed to apply additional safeguards to ensure that the savings were not being used for bribes. The SEC determined that normal discounts for distributors in Brazil amounted to only 10%. The SEC also found that, in this case, the distributor at issue used approximately 6% of the purchase price (approximately US\$70,000) to bribe officials.

Latin Node (Honduras): Executives sentenced

In 2009, Miami-based telecommunications company Latin Node pled guilty to violating the anti-bribery provisions of the FCPA and paid a US\$2 million fine. The company had used a Guatemalan third party to enter into fake agreements which were used to facilitate bribe payments to officials in Honduras and Yemen. Payments were made to obtain interconnection agreements and reduced rates with state-owned telecommunications companies in those countries. The Honduras payments totaled over a half million dollars. Senior executives at Latin Node had approved the payments. The individuals included the former VP for business development, Manuel Caceres; the former senior commercial executive and CCO, Juan Pablo Vasquez; and, the former CFO Manuel Salvoch. In 2012, they were sentenced to jail for their participation in the scheme.

The government alleged that Caceres negotiated the payment of the bribes and that Vasquez and Salvoch facilitated the scheme. The defendants were also alleged to have made efforts to hide the bribes in preparation for an acquisition of their company. Caceres was charged with conspiracy, money laundering, and various violations of the FCPA. Vasquez and Salvoch were charged with conspiracy. They each pled to conspiracy. Caceres was sentenced to 23 months in prison, Vasquez to three years probation and a US\$7,500 fine, and Salvoch was sentenced to ten months in prison and supervised release.

Haiti Telco (Haiti): Directors sentenced

Three former directors of Haiti's state-owned telecommunications company, Telecommunications D'Haiti, were sentenced in the United States to prison for conspiracy to money laundering related to bribes they were paid by US companies, including Terra Telecommunications Corp. The former president of Terra previously had received the longest prison sentence for FCPA violations in history, fifteen years in jail. The sentencing of the three former directors, Jean Rene Duperval, Robert Antoine, and Patrick Joseph, all Haitian citizens, shows US enforcement's willingness to proceed against non-US government officials who receive bribes.

In return for the bribes, the Haiti Telco officials provided preferential rates and credits. Since the FCPA does not reach bribe acceptors, the officials were charged with money laundering-related violations instead. Antoine pled guilty and was sentenced to 48 months, which was reduced to 18 months. Duval was convicted at trial and sentenced to 108 months, three years of supervised release, and an assessment of US\$2,100. He has appealed the conviction. Mr. Joseph pled guilty and was sentenced to one year in prison.