

Latin America

Six Compliance Lessons from the 2012 Latin America Corruption Survey

By James Tillen and Matteson Ellis

A recent survey of companies spanning 14 countries throughout the Americas, organized by our U.S. law firms Miller & Chevalier Chartered and Matteson Ellis Law PLLC along with 12 Latin American law firms, provides insight into corruption issues in the region. Four hundred and thirty nine respondents from local, regional and multinational companies completed the 2012 Latin America Corruption Survey. The results offer perspectives on the extent of corruption in Latin American countries, the effects of corruption on companies operating in those countries, the effectiveness of regional anti-corruption laws, and tools that companies are using to address corruption risks. For a summary of the survey, see “Miller & Chevalier and Matteson Ellis Law’s 2012 Latin American Corruption Survey Results Shows Increasing Awareness of the FCPA,” *The FCPA Report*, Vol. 1, No. 3 (Jul. 11, 2012).

In this article, we provide additional analysis that will be useful to compliance personnel when they are evaluating the effectiveness of their compliance programs in Latin America. In particular, we highlight four themes of the results and six corresponding takeaways from the survey findings for compliance officers.

Subtle Signs of Improvement in the Compliance Environment

When compared to a similar survey conducted in 2008, which also gauged the opinions of local, regional and

multinational businesspeople operating in the region, the 2012 survey results suggest that the corruption environment in the region is improving. The changes detected are admittedly subtle. Nonetheless, when considered in the aggregate, the movements confirm encouraging trend lines to monitor.

Increased Awareness

Evidence of an improving environment is the fact that 85% of respondents say their company’s management has taken steps to protect the organization from corruption risk, up from 77% in 2008. One reason for this uptick might be the steady increase in FCPA enforcement. Headline cases involving the region mean that more companies are aware of the consequences of ignoring compliance. Indeed, 64% of respondents say they are somewhat or very familiar with the FCPA. Knowledge is especially prevalent among businesspeople working for publicly listed companies or affiliates of U.S. multinational companies. Just 3% of those respondents think their company is not subject to the FCPA and 19% “don’t know.” This is a significant change since 2008. That year, 30% of respondents whose companies were clearly subject to the FCPA did not recognize that their companies were covered by the law. Even the U.K. Bribery Act, which just went into effect last year, is on people’s minds. Forty-percent (40%) of respondents are either somewhat familiar or very familiar with the law.

Competitive Effect

Another positive trend relates to the number of respondents (51%) who say their company has lost business to competitors that have made illicit payments, down from 59% in 2008. Multinational companies (46%) are less likely than local/regional companies (59%) to believe they have lost business to competitors making illicit payments. This difference might be due to the positive effects of compliance programs, which are more prevalent among multinational companies. If a multinational's direct competitors have internal protections against bribery activity as well, they are less likely to pay bribes. In fact, fewer respondents from multinational companies (39%) feel that corruption is a significant obstacle to doing business in comparison to respondents from local/regional companies (52%), another likely by-product of compliance programs.

Enforcement Increase

The results also suggest that enforcement is on the rise. Seventy-five percent (75%) of respondents say they are aware of an offender being prosecuted in the country in which they work for making or receiving illicit payments, up from 69% in 2008. Greater awareness might be due to the fact that, in some countries, more local prosecutions are starting to take place. For example, Honduran authorities initiated investigations into bribery by telecommunications company Latin Node Inc. after its executives were prosecuted in the United States under the FCPA. U.S. officials reportedly have supported the Honduran authorities with evidence through mutual assistance agreements. Similar coordination is occurring between U.S. and Mexican officials as well. Since the change of government in Colombia 18 months ago, there has been a wave of corruption prosecutions in the country.

In Costa Rica, there are now more than seven public bodies with authority to play a role in corruption investigations, working to increase the prevalence of prosecutions. Whether or not anyone is ultimately convicted locally in these cases throughout the region, the fact is that investigations are now more common.

Technology and Globalization

Technology might also be driving awareness. Traditional and new media have the ability to quickly publicize investigations now common in countries like Argentina, Brazil and Mexico. Even if enforcement of corruption laws in many Latin American countries has not significantly changed, the media's coverage of the topic has changed.

Globalization likely plays a role too. By driving more cross-border business, globalization has exposed local and regional companies to anti-corruption standards employed by multinationals. Local and regional companies are increasingly subject to third-party due diligence, acquisition due diligence, trainings, certifications and other compliance initiatives. When a deal falls apart because of a corruption concern, the word spreads in tight-knit regional markets.

Regional Corruption Risks Still Significant

Despite signs of improvement in the compliance environment, risks are still real. The positive trends noted above should be read in context. Latin America remains one of the most corrupt regions in which to operate.

For example, 44% of respondents believe that corruption is a significant obstacle to doing business. Half of all respondents still feel that their company has lost business to competitors

making illicit payments in the region. Almost half of respondents from local/regional companies think that an offender is unlikely to be prosecuted in their countries.

Moreover, only 28% of respondents believe that anti-corruption laws are effective in the country where they work. Though this is an improvement over the result in 2008 (18%), it still reflects a widespread view that laws do not serve as adequate deterrents in various Latin American countries. Only 13% of respondents say they reported their concerns to authorities after they lost business to competitors that made illicit payments, also reflecting a general lack of faith in the ability of governments to address corruption. Only a third of the respondents who reported concerns to the authorities say that the government investigated the matter.

These results are likely due to several factors, depending on the country. Some Latin American countries have highly politicized judicial systems or under-resourced law enforcement agencies. Cases in some countries can take years to conclude with no decision, or if a court applies a penalty, the state has no effective asset recovery measures to enforce it.

For example, though Guatemala has several anti-corruption provisions in its criminal code, only 2% of respondents believe that the country's laws are effective. This result is likely due to extremely lax enforcement. Not one respondent considers Paraguay's legal anti-corruption regime to be effective, most likely because there is no national anti-corruption law in Paraguay. Despite its ratification of the Inter-American Convention Against Corruption and United Nations Convention Against Corruption, the country's

commitments have not yet been incorporated into domestic law or practice.

In contrast, respondents view Chile (76%) and the United States (70%) as having highly effective laws. The United States is widely recognized as an aggressive enforcer of its anti-corruption laws. Chile has a less recognized enforcement track record, but consistently ranks as the least corrupt Latin American country in Transparency International's Corruption Perceptions Index.

The implication for multinational companies operating in Latin America is that compliance programs are essential. Respondents state that the best ways to reduce corruption are through effective government investigation and prosecution, coupled with enhanced accountability and transparency in the public sector. Short of this, respondents indicate that their companies are forced to rely on their own preventative measures.

Compliance Program Benchmarking

The survey results signal a notable increase in the prevalence of compliance programs at companies working in the region. Ninety-five percent (95%) of respondents from publicly listed companies say their company management has taken steps to protect the company from risk. Ninety-three percent (93%) of multinationals have done so. Eighty percent (80%) of private companies and 75% of local/regional companies are taking steps to address risk.

The survey went further to gauge the specific types of compliance efforts that companies are making, data that serves as a useful benchmark.

For example, among publicly listed companies in the United States and operating in Latin America, the following percentages have implemented the following mechanisms:

- Anti-corruption policy: 92%
- Anti-corruption training: 90%
- Procedures for gifts, travel and entertainment of officials: 90%
- Procedures for charitable and community donations: 84%
- Procedures for political contributions: 72%
- Procedures for facilitations payments: 65%
- Anonymous reporting mechanisms: 79%
- Anti-corruption contract terms: 77%
- Anti-corruption audits and assessments: 72%
- Due diligence policies for third parties: 72%
- Pre-acquisition due diligence: 72%
- Full-time compliance personnel: 64%

For private companies operating in the region:

- Anti-corruption policy: 74%
- Anti-corruption training: 43%
- Procedures for gifts, travel and entertainment of officials: 54%
- Procedures for charitable and community donations: 48%
- Procedures for political contributions: 38%
- Procedures for facilitations payments: 40%
- Anonymous reporting mechanisms: 35%
- Anti-corruption contract terms: 48%
- Anti-corruption audits and assessments: 36%
- Due diligence policies for third parties: 39%
- Pre-acquisition due diligence: 37%
- Full-time compliance personnel: 30%

For multinational companies operating in the region:

- Anti-corruption policy: 88%
- Anti-corruption training: 76%
- Procedures for gifts, travel and entertainment of officials: 81%
- Procedures for charitable and community donations: 73%
- Procedures for political contributions: 62%
- Procedures for facilitations payments: 58%
- Anonymous reporting mechanisms: 65%
- Anti-corruption contract terms: 69%
- Anti-corruption audits and assessments: 60%
- Due diligence policies of third parties: 60%
- Pre-acquisition due diligence: 61%
- Full-time compliance personnel: 56%

For local or regional companies in the region:

- Anti-corruption policy: 69%
- Anti-corruption training: 35%
- Procedures for gifts, travel and entertainment of officials: 48%
- Procedures for charitable and community donations: 44%
- Procedures for political contributions: 34%
- Procedures for facilitations payments: 35%
- Anonymous reporting mechanisms: 28%
- Anti-corruption contract terms: 41%
- Anti-corruption audits and assessments: 32%
- Due diligence policies for third parties: 33%
- Pre-acquisition due diligence: 33%
- Full-time compliance personnel: 20%

Though these results do not necessarily suggest that each category of company is undertaking the levels of compliance precautions necessary to adequately manage risk, it can give companies an idea of where they stand with respect to their peers.

Specific Risks in Specific Markets

The survey gauged levels of corruption not only by country, but also by area of government within each country: the executive branch, legislative branch, judicial branch, customs, police and municipal/local. The results show that risks vary within countries.

Mexico

For example, respondents view Mexico as having the highest levels of corruption in their police forces (92% calling it significant) and at municipal and local levels (88%) but lower levels in the executive branch (less than 20%). This result could be explained by the fact that, in Mexico, the police have historically been known for corruption at all levels, from local to federal, despite efforts to professionalize forces. The Mexican media has also exposed several cases of local and municipal corruption lately, some linked to the narcotics trade, which might drive the high result. In contrast, though often criticized for ineffectiveness, the executive branch is largely perceived as cleaner than other bodies, maybe because many people do not have regular interactions with executive branch officials.

Bolivia

The results indicate that Bolivia has high levels of corruption in the executive branch (56%) but lower levels in municipal/local areas (40%) compared to other countries. The press

in Bolivia has reported on scandals involving high-ranking members of the executive branch, possibly reflected in these numbers. In contrast, government processes on the local level are seen as generally more transparent, which might be behind lower views of risk at that level.

Venezuela

Respondents rank Venezuela as having the highest levels of corruption out of any country in the executive branch, judicial branch and customs. Almost 80% of respondents see corruption as a significant obstacle to doing business there. This could reflect the common perception of corruption in the authoritarian government of Hugo Chavez and the concerns of business regarding possible seizure of assets by the government. In contrast, respondents view the local/municipal levels of government as relatively clean. This difference could reflect a perception that local governments in Venezuela, often controlled by the political opposition, are more dedicated to ethical business and government practices.

In averaging the country results, the responses show three distinct corruption tiers. Chile, Uruguay and the United States are seen as having the lowest overall corruption. Peru and Costa Rica straddle the corruption tiers with more corruption perceived at the local/police/customs level but fairly trustworthy national-level executive, legislative and judicial branches. At the other end of the spectrum, Colombia, Mexico, Brazil, Bolivia, Argentina, Ecuador, Guatemala and Venezuela are viewed as having significant government corruption, with Paraguay topping the list.

Customs and Police

Across all countries, executives rank two areas of government as particularly susceptible to corruption – customs and police.

Almost two-thirds of respondents rate these government functions as having “significant corruption” in the countries in which they have experience.

The reasons for this finding are complicated. Although customs and police officials at higher levels can certainly be corrupt, risks are most often associated with lower-level officials – like traffic police and port officials. These officials often have lower levels of education. Their wages are low. They often supplement their salaries, including through bribe requests, to bring in enough money to support their families and cover basic needs. These areas of government are often described as less formal and more unprofessional.

The survey results regarding specific areas of government can help companies guide their compliance activities, including risk assessments.

Take-Aways for the Compliance Officer

Overall, the 2012 Latin America Corruption Survey suggests that corruption risks in Latin America are dynamic. Companies and their compliance officers must take into account the nature of specific and evolving risks in the locations in which they operate when building their compliance strategies. Compliance officers can leverage the survey results in administering their anti-corruption compliance programs in Latin America. Here is a list of some, among many, ways in which the survey results can help. The survey:

1. Provides context for regional partners. Compliance officers can use the fact that more people in the region are aware of anti-corruption compliance practices to their advantage. When dealing with a potential Latin American partner or third party who is reluctant to participate in due diligence processes, accept compliance provisions in contracts, or embrace other compliance best practices, companies can use the survey results to show that such requirements are now commonly accepted.
2. Shows need for greater U.K. Bribery Act awareness. The results suggest that compliance officers responsible for companies operating in the region and subject to U.K. jurisdiction will want to spend more time building awareness of the risks associated with the U.K. Bribery Act, given the apparent low levels of current awareness.
3. Highlights lack of local law deterrent effects. Depending on where their companies are operating in the region, compliance officers can consult the survey to better understand the possible deterrent effects, or lack thereof, of local anti-corruption laws. The poor opinion of local laws in many countries might indicate that compliance officers should bolster their efforts beyond local law considerations to ensure they adequately address risk.
4. Helps shape compliance strategies. Compliance teams have limited resources. The survey’s findings about different countries’ varying degrees of risk provide an empirical guidepost to help shape compliance strategies. For example, when operating in Mexico, compliance officers will want to be particularly focused on police risk. In Venezuela, they should pay extra attention to their dealings with customs officials and the Executive Branch.
5. Provides basis for trainings. In conducting anti-corruption compliance trainings in the region, the survey data can provide a helpful starting point for discussions on the nuances of risks found on the ground. Trainers can ask trainees if the results comport with their day-to-day experiences. If they do, what does that risk actually

look like in practice? If not, what might account for the difference? Training is most effective when it has context and involves participation and real life scenarios and role plays.

6. Benchmarks current practices. Compliance officers can use the data as a benchmark for understanding how their own programs compare to those of others in their category. If a multinational company operating in the region does not have specific policies for gifts, travel and entertainment of officials, it now knows that it is in a 20% minority. If a publicly listed company is not

incorporating anti-corruption terms into its contracts with local companies, it knows that it is among a group of less than a quarter of its peers in lacking this practice.

These are just a few of the many ways that the empirical data of the 2012 Latin American Corruption Survey can help compliance officers do their jobs more effectively.

James Tillen is Coordinator of Miller & Chevalier's FCPA and Anti-Corruption Practice Group. Matteson Ellis is Principal of Matteson Ellis Law and writes the FCPAméricas Blog.