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Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act

José Armando Fanjul*

I. Birth of Corruption

Benjamin Franklin once proclaimed, "No nation was ever ruined by trade."[1] Although a characteristic of the time, Franklin's proposition has succumbed to societal acceptance of bribery as a normal business practice, the need for corporate compliance programs, and the overwhelming denial of the ensuing economic problems caused by such action or inaction. Seeing the rise of corruption by United States-based corporations, the legislature enacted the Foreign Corrupt Practices Act ("FCPA") in 1977.[2] In 1977, the Senate reported that Security and Exchange Commission ("SEC") investigations "revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars."[3] The FCPA memorialized and subsequently denounced certain activities as illegal while promulgating various criminal and civil punishments for those convicted of engaging in such action.[4]

"Corruption is far from being a novelty. Its practice is as ancient as

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1. Benjamin Franklin, Thoughts on Commercial Subjects, *in* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 348 (Justin Kaplan ed., Little, Brown, and Co.) (1980).

2. S. REP. NO. 95-114, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

3. *Id.*

4. *Id.*

other social phenomena like prostitution and contraband."[5] As time has elapsed, so has the meaning of corruption;[6] "in the past corruption had a wider significance, embracing the entire moral life of mankind."[7] "In 1619, corruption was defined as the use of 'monies designed for the public service for private ends.' This definition is not far from the supposedly more precise, technical meaning of today which identifies corruption with the misappropriation of public money for private gain."[8]

The instability of Latin American governments and insufficient judicial enforcement has supported pervasive corrupt economies that undermine the financial integrity of both government entities and those participating in economic activities.[9] This Comment addresses the intersection of the FCPA and Latin American countries.[10] Part II focuses on the growing international war on corruption. Part III focuses on both perceived and actual corruption in Latin America. Part IV focuses on the structure of a good compliance program and the criminal repercussions of having an ineffective one. Part V describes one corporation's attempts to meet FCPA requirements and the hardships it faces, while Part VI suggests how a corporation can avoid SEC sanctions and provides a concise conclusion.

II. International War on Corruption

A. The Foreign Corrupt Practices Act

The FCPA was enacted in 1977[11] and was subsequently amended in 1988,[12] 1994,[13] and 1998[14] to clarify the original law and address the

5. INSTITUTE OF LATIN AMERICAN STUDIES, POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA 2 (Walter Little & Eduardo Posada-Carbó eds., St. Martin's Press, Inc.) (1996).

6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.* at 61.

10. The FCPA's provisions regarding accounting requirements and issuers of securities will not be discussed.

11. *See* Foreign Corrupt Practices Act of 1977 amending the Securities Exchange Act of 1934, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1, -2, and -3 (2000)).

12. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 15 U.S.C. § 78dd-1, -2, and 78ff(c) (2000)).

13. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 15 U.S.C. § 78dd-1, -2, and -3 (2000)).

14. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78dd-1, -2, and 78ff(c) (2000)).

international climate regarding corruption.[15] The Act was originally passed using Congress's interstate commerce powers as evidenced by the requirement that the particular violation be committed through the "use of the mails or any means or instrumentality of interstate commerce."[16] The FCPA attempted to eliminate bribery[17] and enforce more stringent accounting[18] requirements for individuals,[19] corporations,[20] and issuers of securities.[21] The FCPA, as it applies to individuals and corporations, makes it unlawful to use "any instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of anything of value to"[22] any foreign official in an effort to influence that official in his or her official capacity,[23] thereby securing an improper advantage or inducing such official to use his or her influence with a foreign government.[24]

Nevertheless, the legislature carefully crafted an exception for routine governmental action, which is known as the "grease exception."[25] Thus, the FCPA does "not apply to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of routine governmental action by a foreign official."[26] The provision is extremely useful in Latin America because it helps corporations navigate the intricacies of unstable governments while remaining in compliance with the FCPA.[27] Furthermore, Congress's careful drafting requires that the payment to government officials be made toward the facilitation of an already legitimate end, which ensures that the exception does not swallow the rule.[28]

For those who might misconstrue the provisions of the FCPA, the penalties imposed for a willful violation are severe.[29] An individual who violates the FCPA faces a maximum fine of five[30] million dollars,[31]

15. *See* S. REP. NO. 95-114, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.
16. *See* 15 U.S.C. § 78dd-1(a) (2000).
17. *See id.*
18. *See* 15 U.S.C. § 78m(b)(2) (2000).
19. *See* 15 U.S.C. § 78dd-2, 78dd-3 (2000).
20. *See id.*
21. *See* 15 U.S.C. § 78dd-1 (2000).
22. *See* 15 U.S.C. § 78dd-2(a)(1)(A) (2000).
23. *See id.*
24. *See* 15 U.S.C. § 78dd-2(a)(1)(B) (2000).
25. S. REP. NO. 95-114, at 10 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.
26. 15 U.S.C. § 78dd-2(b) (2000).
27. Interview with Individual A, *infra* note 196.
28. *See* S. REP. NO. 95-114, at 10 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.
29. 15 U.S.C. § 78dd-2(b) (2000).
30. All monetary sums are in United States dollars unless otherwise specified.
31. 15 U.S.C. § 78dd-2(b) (2000).

imprisonment not lasting more than twenty years,[32] or both.[33] In contrast, the members of a corporation that is charged are not subject to imprisonment, but they may be subject to a maximum fine of twenty-five million dollars.[34] Regardless, any corporation, no matter how slightly connected with allegations of a potential FCPA violation, is likely to suffer substantial damage to its reputation.[35] Aside from large fines, the potential public embarrassment a company faces from an FCPA violation almost mandates that corporations establish effective compliance programs.

B. International Efforts Toward Combating Corruption

Efforts aimed at combating corruption are necessary in the Americas due to the volume of commerce that occurs between these geographically close nations. One such attempt was the Inter-American Convention Against Corruption,[36] where twenty-six Member States of the Organization of American States ("OAS"),[37] twenty of which were Latin American states, agreed to adhere to several important principles.[38] Within the agreement, Member States agreed to make bribery of a government official an extraditable offense.[39] In addition, Member States promised assistance and cooperation with any matters pertinent to the subject of the treaty.[40]

Although the United States has been at the forefront of combating corporate corruption, a unilateral effort toward correcting a multinational issue seems daunting.[41] Nevertheless, many nations have joined the effort as evidenced by the Organization of Economic Cooperation and Development's ("OECD") Anti-Bribery Convention that was adopted in 1997 by thirty Member States and five other non-Member States,[42] four

32. *Id.*

33. *See* Sarbanes-Oxley Act of 2002 increased criminal penalties under Securities Exchange Act of 1934, Pub. L. No. 107-204, Title XI, § 1106, 116 Stat. 810 (to be codified at 15 U.S.C. § 78ff(a) (2006)).

34. *Id.*

35. Robert B. Hughes, *Legal Compliance Checkups: Business Clients*, 1 LEGAL COMPLIANCE CHECKUPS § 1:15 (2006).

36. Organization of American States, Inter American Convention Against Corruption, March 29, 1996, 35 I.L.M. 624.

37. *See id.*

38. *See id.*

39. *See id.* at 731-32.

40. *See id.* at 732.

41. *See* Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act is not the Answer*, 1 ILSA J. INT'L & COMP. L. 3 (1995) (explaining some of the short-comings of the FCPA and a proposal for change).

42. *See* Organization of Economic Cooperation and Development Anti-Bribery

of which were Latin American nations.[43] The Convention's agreement adopts a multinational effort to provide mutual legal assistance among adhering nations as well as making bribery an extraditable offense in accordance with pre-existing treaties between the nations.[44]

III. Latin American Corruption

A. Latin America's Corruption Phenomenon

Spain provided Latin American states with much of their cultural, social, and political heritage.[45] Unfortunately, these states also inherited a tradition of weak and corrupt governments.[46] In the eighteenth century, the Habsburgs passed down corruption to the Bourbons, who failed to fundamentally alter or eradicate it.[47] Spanish power eventually collapsed and colonial elites seized power between 1810 and 1822.[48] To their advantage, the colonial elites inherited[49] "societies where public office was widely regarded as an extension of private person."[50] The wealthy would often use resources at their disposal to establish relationships that could transfer into political power.[51]

Under these conditions, corruption continually weakened respect for the state while diffusing power, thereby retarding the process that liberal reformers attempted to make.[52] "Although the Spanish crown had been swept away, corruption remained [] an important device for distributing power and resources in societies where family and personal ties continued to overshadow the formal obligations which bind state and citizen in a modern polity."[53]

Latin America's historical origins have a lot to do with the patrimonial relationship it had with Spain.[54] Through its patrimonial relationship, Spain also passed down corruption as a sociocultural phenomenon.[55] This phenomenon is the "result of deeply seated patterns

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Convention, 1997 S. Treaty Doc. No. 105-43.

43. *See id.*
44. *See id.* arts. 9 & 10.
45. INSTITUTE OF LATIN AMERICAN STUDIES, *supra* note 5, at 61.
46. *Id.*
47. *Id.* at 60-61.
48. *Id.* at 61.
49. *Id.*
50. INSTITUTE OF LATIN AMERICAN STUDIES, *supra* note 5, at 61.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 206.
55. THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, COMBATING CORRUPTION IN LATIN AMERICA 4 (Joseph S. Tulchin & Ralph H. Espach eds., Woodrow

in a community's social and economic history."[56] Spain's "widely disseminated practice linking patrimony and power . . . is principally to blame for the spread and the continuous renewal of what can be called the culture of the appropriation of what is public by what is private."[57] Corruption undoubtedly seems "arbitrary and as robbery to the cultured middle class[, yet it] does not have the same connotation in the eyes of the great masses of the poor, rural, and urban."[58] Usually the masses are somehow completely involved in the politics of favors.[59] Thus, the sociocultural phenomenon keeps perpetuating itself over time.

Attached to this perpetuating sociocultural phenomenon is economic theory that bears on how the Latin American public views corruption. "During boom times, when optimism reigns it is—whilst not condoned—generally not condemned."[60] "When times become hard, the public tends to look for scapegoats and often finds them from the boom years."[61] This sociocultural apathy coupled with the historical origins of Latin America has resulted in a culture of perpetual corruption. "The movement of private money into politicians' pockets by means of the public offices they occupy is combined with the inverse movement of politicians' private money to benefit the private interests of the electors, precisely as a reward for their political loyalty."[62] As wealth moves through public offices, it becomes increasingly difficult to distinguish what portions of the comingled funds are public and which are private.[63] The inherently difficult process of identifying money that has entered corrupt channels[64] and the apathetic nature of the Latin American public[65] assist in the perpetuation of a corrupt culture.

B. Perceived Corruption

The international perception of corruption in a country can be an indicator of the level at which such activity is pervasive within the particular nation.[66] It would serve as economic diatribe to posit that

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Wilson Center Press 2000) (2000).

56. *Id.*
57. INSTITUTE OF LATIN AMERICAN STUDIES, *supra note 5*, at 206.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. INSTITUTE OF LATIN AMERICAN STUDIES, *supra note 5*, at 195.
63. *See id.*
64. *See id.*
65. *See id.* at 4.
66. *See* Transparency Int'l, *Corruption Still Rampant in 70 Countries says Corruption Perceptions Index 2005*, (Oct. 18, 2005), *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2005/media_pack.

bribery and corruption lead to the inefficient allocation of funds, investments, and job opportunities, thereby decreasing economic morale and security in the various markets of a nation. Nevertheless, the international perception of corruption is a very important issue in our economically interdependent world. Transparency International is a civil society organization that focuses its effort on fighting corruption.[67] In 2005, Transparency International commissioned Professor J. Graf Lambsdorff of the University of Passau in Germany to produce a table containing the Corruption Perceptions Index ("CPI") for that year.[68]

The study reported on 159 countries, twenty of which can be considered Latin American.[69] The scores in Lambsdorff's study were based on a zero to ten scale: the lowest scores were attributed to a country perceived to be corrupt, while the higher scores proposed to correspond to a highly uncorrupt country.[70] "The CPI score relates to the perceptions of the degree of corruption as seen by business people and country analysts."[71] Of the twenty Latin American countries surveyed, only one, Chile, achieved a score higher than six.[72] Although not conclusive, the data provided by Transparency International tends to place Latin American countries toward the lower end of its index.[73]

C. *Actual Corruption*

Even though accusations and perceptions of corruption are valuable for identifying the actual business practices of certain corporations and individuals, the best indicators of actual business practices are established by analyzing the charges that have been filed or the penalties imposed for FCPA violations. Subsequently, an examination is in order regarding corruption in Latin America.

On November 17, 1982, International Harvester Company, the then-dominant worldwide supplier of turbine compressor equipment[74] used to capture high volumes of natural gas and subsequently deliver the gas to processing plants, "entered a guilty plea to a one count bill of

67. *See id.* Transparency International was founded in 1993 and has several publications that include an annual Global Corruption Report.

68. *See id.* Previous CPI data also available, Michael J. Hershman, *U.S. Foreign Corrupt Practices Act (FCPA): Watergate and Corporate "Slush" Funds*, 1367 PLI/Corp 145, 235-52 (2003). *Id.*

69. Transparency Int'l, *supra* note 66. Total number of countries includes Latin American countries in the Caribbean.

70. *See id.*

71. *See id.* (contained within the explanatory notes).

72. *See id.*

73. *See id.*

74. *See* United States v. Mclean, 738 F.2d 655, 656-57 (5th Cir. 1984).

information charging conspiracy to violate the FCPA."[75] International Harvester essentially pled guilty to bribing Mexican officials who worked for Petroleos Mexicanos, Mexico's national petroleum company, in an effort to gain a business advantage while supplying Petroleos Mexicanos with necessary turbine compressor equipment.[76]

Corruption in the energy sector is well-known and documented, including oil-for-food programs in the Middle East and activities by OPEC members,[77] Latin American ventures into agricultural corruption is as well.[78] In 1990, Billy Lamb and Carmon Willis sued Phillip Morris, Inc. alleging violations of the FCPA and other federal antitrust laws.[79] The plaintiffs were growers and producers of "burley tobacco for use in cigarettes and other tobacco products."[80] On May 14, 1982, a Phillip Morris subsidiary contracted with La Fundacion Del Niño of Venezuela.[81] La Fundacion Del Niño's president at the time was the wife of the then-President of Venezuela.[82] The agreement called for two subsidiaries of Phillip Morris to make donations to La Fundacion Del Niño in amounts totaling $12.5 million.[83] In return, the subsidiaries would be granted the power to control the price of Venezuelan tobacco as well as the ability to eliminate controls on retail cigarette prices in Venezuela.[84] Nevertheless, corruption in Latin America is not limited to the agricultural sector.

After an investigation, the SEC filed a settled cease and desist proceeding against International Business Machines Corporation ("IBM") in 2000.[85] Without an admission or denial of guilt, the SEC found that IBM had violated the FCPA and imposed a $300,000 penalty.[86] According to the enforcement proceedings, IBM-Argentina, a wholly-owned subsidiary of IBM, paid approximately $22 million, of which at least $4.5 million was transferred to several bank directors in an

75. *Id.*

76. *Id.* at 656. Holding for Defendant Mclean, the court concluded that "the FCPA prohibits the prosecution of an employee for a substantive offense under the Act if his employer has not and cannot be convicted of similarly violating the FCPA." *Id.*

77. *See* Warren Hoge, *Annan Failed to Curb Corruption in Iraq's Oil-for-Food Program*, Investigators Report, N.Y. TIMES, Sept. 7, 2005, at A6.

78. *See Lamb* v. Phillip Morris, Inc., 915 F.2d 1024, 1025 (6th Cir. 1990).

79. *See id.* Upholding the plaintiff's antitrust claims but striking down their FCPA claim finding that there is no private right of action under the act.

80. *Id.* at 1025.

81. *See id.*

82. *See id.*

83. *See Lamb*, 915 F.2d at 1025.

84. *See id.* at 1024.

85. International Business Machines Corp., S.E.C. Enforcement Proceedings, 2000 WL 1868634 (Dec. 21, 2000), *available at* http://www.sec.gov/litigation/admin/34-43761.htm.

86. *Id.*

attempt to secure a $250 million dollar contract to integrate and modernize the computer system of a commercial bank owned by the Argentine government.[87] With the advent of multinational corporations and the increasing value of government contracts at stake, corporations worldwide are all vying for very lucrative business deals.[88] Corporations focused on the bottom line often find it hard to resist temptation, yet the potential capital loss from an FCPA conviction can be far more dramatic. As Latin America modernizes, the technology sector has seen various corrupt practices on the part of multinational American corporations.

In 2002, the SEC settled a case against BellSouth Corporation after it was discovered that BellSouth violated certain provisions of the FCPA.[89] BellSouth never admitted or denied the SEC's findings for the order or the civil suit filed in federal court.[90] Nevertheless, the court imposed a $150,000 civil judgment against BellSouth.[91] The findings included violations of the FCPA in two Latin American countries.[92] The SEC found that "between September 1997 and August 2000, former senior management of BellSouth's Venezuelan subsidiary authorized payments totaling approximately $10.8 million."[93] Furthermore, between 1998 and 1999, BellSouth's Nicaraguan subsidiary made payments amounting to sixty thousand dollars to the wife of a Nicaraguan legislator who soon thereafter spearheaded the repeal of a law restricting foreign ownership of Nicaraguan telecommunications companies.[94] In addition, BellSouth was then able to gain a business advantage by owning eighty-nine percent of the telecommunications market in Nicaragua.[95]

In 2002, the SEC also found that Syncor International Corporation, a provider of radiopharmaceutical products and services in the United States and eighteen foreign countries, violated the FCPA by making at least $600,000 in illicit payments to doctors employed by hospitals controlled by foreign authorities.[96] According to the SEC's findings,

87. *See id.*

88. *See* Paul Lewis, *A World Fed Up With Bribes; Nations Begin Following U.S. Curb on Corruption*, N.Y. TIMES, Nov. 28, 1996, at 1. Stating that foreign direct investment in emerging economies, increased to $167 billion in 1996 from $44 billion in 1990.

89. *See* BellSouth Corp., S.E.C. Enforcement Proceeding, 2002 WL 49837 (Jan. 15, 2002), *available at* http://www.sec.gov/litigation/admin/34-45279.htm.

90. *See id.*

91. *See id.*

92. *See id.* (countries included, Venezuela where payments totaling about $10.8 million were made and Nicaragua where $60,000 were paid to the wife of a legislator).

93. *See id.*

94. *See* BellSouth Corp., *supra* note 89.

95. *See id.*

96. *See* Syncor International Corp., Administrative Proceeding, 2002 WL 31757634

"these illicit payments were made with the purpose and effect of influencing the doctors' decisions so that Syncor could obtain or retain business with them and the hospitals that employed them."[97] "During the years 2000 through 2002, Syncor de Mexico [a subsidiary of Syncor International Corporation] made a total of at least $200,000 in . . . payments."[98] The SEC filed a civil suit that required Syncor to pay $500,000 as a penalty.[99]

Agents and employees of a corporation that are willfully involved in an FCPA violation can also be fined and imprisoned because of their status as "domestic concerns."[100] Robert King was one of the largest investors in Owl Securities and Investments, Ltd. while the FBI was investigating the group.[101] The FBI's taped conversations of King exposed "dealings between certain individuals who hoped to develop a port in Limon, Costa Rica."[102] Although King's initial dealings were not a violation of the FCPA, the court found that "the planned payment of a $1 million bribe to senior Costa Rican officials and political parties to obtain concessions for the land on which the new development was to be built"[103] were clear violations.[104] Subsequently, the court sentenced King to thirty months imprisonment and fined him sixty thousand dollars.[105]

IV. Corporate Compliance Programs

A. Elements of a Good Compliance Program

It is essential for multinational corporations to have effective compliance programs, both nationally and internationally, if they are to save themselves from future financial hardship, potential imprisonment of its corporate agents, and public embarrassment. Perceived and actual corporate corruption have been public relations nightmares for some corporations in the past decade.[106] As a result, many corporations have tried to prevent corrupt actions by implementing ethical and moral

(Dec. 10, 2002), *available at* http://www.sec.gov/litigation/admin/34-46979.htm.

97. *Id.*

98. *Id.*

99. *See* SEC v. Syncor International Corp., No. 1:02CV02421 (D.D.C.), Lit. Rel. No. 17887 (Dec. 10, 2002).

100. *See* 15 U.S.C. § 78dd-2(h)(1)(A) (2000).

101. *See* United States v. King, 351 F.3d 859, 862 (8th Cir. 2004).

102. *Id.* (affirming the lower court's finding that there was sufficient evidence to support the conviction).

103. *Id.*

104. *Id.*

105. *See id.*

106. *See* Lewis, *supra* note 88.

standards throughout all business practices.[107] Nevertheless, not all corporations have initiated those corporate policies because of altruistic goals. "Congress and the [SEC] have imposed a variety of reforms, most notably the Sarbanes-Oxley Act and regulations issued under the Act, to ensure that corporations improve their corporate governance practices."[108]

Corporations that wish to implement compliance programs can follow certain steps outlined by the United States Sentencing Guidelines.[109] However, courts have suggested that these guidelines may not be determinative of a corporation's compliance with the FCPA and various other regulations.[110] A corporation "shall exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[111] Furthermore, the program must be "reasonably designed, implemented, and enforced"[112] so as to achieve the ultimate goal of compliance while "preventing and detecting criminal conduct."[113] Nevertheless, a failure to "prevent or detect"[114] a crime is not determinative of the program's effectiveness.[115] Aside from meeting those two requirements, the United States Sentencing Guidelines set out seven requirements that compliance programs must meet regarding due diligence and the promotion of ethical conduct.[116]

First, a corporation must establish standards and procedures to prevent and detect criminal conduct.[117] The establishment of such standards and procedures can be tough and very time consuming.[118]

Second, the guidelines require that a corporation's governing authority be knowledgeable about the content and operation of the compliance program while exercising reasonable oversight with respect to the implementation and effectiveness of the program.[119] Presumably,

107. *See* Part V, for a discussion on "Corporation X's" hardships.

108. Hughes, *supra* note *35.*

109. *See generally* United States Sentencing Guidelines Manual § 8B2.1, pts. a, b, and c (2004).

110. *See* In re Caremark International, Inc. Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996); *see also* Dan K. Webb, Robert W. Tarun & Steven F. Molo, Corporate Internal Investigations, CORPII App. K, pt. 7 (2006) ("no compliance program can ever prevent all criminal activity.") *Id.*

111. United States Sentencing Guidelines Manual, *supra* note 109, at pt. a(1), (2).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See generally* United States Sentencing Guidelines Manual, *supra* note 109, at pt. a(1)-(7).

117. *See id.* at pt. b(1).

118. *See* pt. V, for a discussion on "Corporation X's" hardships.

119. *See* United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(2)(a).

those administering and promoting the program should have intimate knowledge of its content and purpose as well as the ability to exercise some control over it.[120] Moreover, high-level personnel should be assigned overall responsibility for the compliance program.[121] In addition, specific individuals, not the high-level personnel, shall be given the reins to run the day-to-day operations of the program as well as adequate resources and appropriate authority.[122] These individuals should report periodically to high-level personnel.[123]

Third, a corporation must ensure, through due diligence, "not to include within the substantial authority personnel of the organization any individual who[] . . . has engaged in illegal activities or other conduct inconsistent with"[124] the ultimate goal of a compliance program.[125]

Fourth, a corporation must use reasonable efforts to communicate the requirements of the program by way of training[126] and other forms of disseminating internal information to various individuals including: members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, where appropriate, the organization's agents.[127]

Fifth, a corporation must reasonably ensure compliance with the program through monitoring and auditing in an effort to discover criminal conduct.[128] To further the legitimate ends of the compliance program, corporations must periodically evaluate the effectiveness of their respective program.[129] In addition, if the program is to be successful, the corporation must have a system in place where "employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."[130] This requirement is extremely important. If a compliance program is to work as designed, employees must not fear retaliation for reporting potential criminal conduct, while being cognizant that their complaint will be taken seriously and be investigated.[131]

Sixth, to be effective, a compliance program must be promoted and

120. *See id.* at pt. b(2)(c).
121. *See id.* at pt. b(2)(b).
122. *See id.* at pt. b(2)(c).
123. *Id.*
124. United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(3).
125. *Id.*
126. *See* pt. V, for a discussion on "Corporation X's" hardships.
127. United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(4)(a), (b).
128. *See id.* at pt. b(5)(a). Also *see* pt. V, for a discussion on "Corporation X's" hardships.
129. *See* United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(5)(b).
130. *Id.* at pt. b(5)(c). Also *see* pt. V, for a discussion on "Corporation X's" hardships.
131. *See* pt. V, for a discussion on "Corporation X's" hardships.

enforced consistently while providing incentives for adhering to the program and punishing criminal conduct for failure to prevent or detect such conduct.[132] Incentives play an important role in compliance programs and must make employees feel like adhering to the program is part of their job description.[133] Furthermore, the employees that fail to comply with the program must be reprimanded as an example to others, showing that such behavior will not be accepted because it is harmful to the corporation's goals.[134] If designed effectively, a good compliance program will provide incentives and reinforcement for employees who actively engage in the program as well as those who bring possible violations to the forefront.[135]

Seventh, if and when criminal conduct is discovered, a corporation must reasonably respond to such conduct while attempting to prevent similar acts from occurring in the future.[136] A reasonable response may include making modifications to the compliance program.[137] If a compliance program is to be truly effective, constant monitoring must be a priority for both high-level personnel in charge of the program and subordinates in charge of the program's day-to-day operations.[138]

A corporation must periodically evaluate any potential for conduct that violates the compliance program and subsequently make changes to the program that are likely to reduce the potential for such conduct in the future.[139] As time passes, a corporation is likely to diversify its business ventures, and as such, a responsible compliance program will meet the needs of a corporation's changing dynamic, thereby reducing the risk of criminal conduct that had been previously identified.

B. Positive and Negative Effects of a Compliance Program

A good compliance program requires a large level of commitment if it is to achieve its ultimate goal.[140] This level of commitment includes: constant revisions,[141] audits of the program's ability to appropriately identify criminal activity,[142] dissemination of information regarding goals

132. *See* United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(6)(a), (b).
133. *See* pt. V, for a discussion on "Corporation X's" hardships.
134. *See id.*
135. *See id.*
136. *See* United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(7).
137. *See id.*
138. *See id.* at pt. b(2)(c).
139. *See id.* at pt. c.
140. *Id.* at pt. a(1), (2).
141. United States Sentencing Guidelines Manual, *supra* note 109, at pt. b(5)(a), b(7). *See also* pt. V, for a discussion of "Corporation X's" hardships.
142. *See id.* at pt. a(1)-(7).

and expectations to all employees,[143] establishing that corporate morality and ethics are expected from all,[144] and actively engaging in investigation and reporting of possible criminal activity.[145] Nevertheless, a corporation that takes all the reasonably prudent steps to prevent a compliance violation may fall short.

A corporation that establishes a compliance program, but does not have an appropriate means of achieving a legitimate end, is worse off than a corporation that has no established program.[146] Both plaintiffs and prosecutors in civil or criminal cases can use compliance manuals to demonstrate actions the company should have exercised consistent with its own protocol.[147] Thereafter, the ultimate issue to be resolved at trial is whether the company actually complied with its own policies and procedures.[148] Faced with its own procedures in writing, a corporation would be hard pressed to identify reasons why they were not followed.

The United States Sentencing Guidelines have been extended to civil cases arising under the FCPA.[149] In *United States v. Metcalf & Eddy, Inc.*,[150] the Massachusetts District Court "settled a civil FCPA case requiring the imposition of a compliance program drawn directly from the guidelines."[151] In its order of final judgment against Metcalf & Eddy, Inc., the court also imposed a $400,000 fine.[152]

If illegal activity occurs and the corporation in question "had in place at the time of the offense an effective compliance and ethics program[,]"[153] such program will reduce the corporation's culpability.[154] However, a reduction in the corporation's culpability will be negated if, after "becoming aware of an offense, the organization unreasonably delayed reporting the offense."[155] A reduction in culpability is also negated if high-level personnel of the corporation "participated in, condoned, or [were] willfully ignorant of the offense."[156]

According to the United States Sentencing Guidelines, "there is a

143. *See id.* at pt. b(4)(a), (b).
144. *See id.* at pt. b(6)(a), (b).
145. *Id.* at pt. a(1), (2).
146. *See* Hughes, *supra* note 35.
147. *See id.*
148. *See id.*
149. *See id.*
150. United States v. Metcalf & Eddy, Inc., No. 99CV-12566-NG, 1, 3, Consent and Undertaking (D. Mass. Dec. 14, 1999), *reprinted in* Business Laws, Inc. (FCPA) at § 699.749. (unreported).
151. *Id.*
152. *See id.*
153. United States Sentencing Guidelines Manual, *supra* note 109, pt. f(1).
154. *Id.*
155. *Id.* at pt. f(2).
156. *Id.* at pt. f(3)(a).

rebuttable presumption . . . that [the] organization did not have an effective compliance . . . program if"[157] the individual who "participated in, condoned or was willfully ignorant of the offense was"[158] high-level personnel or had substantial authority over the program.[159] Presumably, the reduction in culpability for a corporation is negated if any of the individuals involved in the illegal activity were high-ranking personnel within the corporation.

However, if the corporation, within a reasonable time after becoming aware of an offense and "prior to an imminent threat of disclosure or government investigation,"[160] reports such offense to the appropriate governmental authority, a reduction in culpability will be assessed.[161] To receive leniency, the corporation must fully cooperate with any government investigation as well as demonstrate recognition and affirmative acceptance of responsibility for the criminal conduct.[162]

Although high-level participation in illegal activity can prevent a reduction in culpability, an effective compliance program can also shield these same individuals from the criminal acts of other corporate employees.[163] *In re Caremark International Inc.*,[164] though not related to the FCPA, provides a good example of how an effective compliance program can shield individuals from personal liability.[165] According to the indictment issued in 1994 by a grand jury in Minnesota, Caremark International, Inc. had paid over $1.1 million for the distribution of a drug it marketed.[166] The court stated, "no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law."[167] Moreover, the court stressed that high-level corporate employees must exercise good faith in the operation of a compliance program so that information regarding violations of law will come to their attention in a timely manner.[168]

157. *Id.* at pt. f(3)(b).
158. United States Sentencing Guidelines Manual, *supra* note 109, at pt. f(3)(b).
159. *Id.*
160. *Id.* at pt. g(1).
161. *Id.*
162. *See id.*
163. Hughes, *supra* note 35, at § 1:12.
164. *See In re Caremark International*, 698 A.2d 959 (approving the settlement agreement for $250 million while finding no liability on the part of the directors).
165. *Id.*
166. *Id.* at 963-64.
167. *Id.* at 970.
168. *In re Caremark International*, *supra* note 164, 963-64.

C. *Prosecutorial Areas of Interest*

Aside from having effective compliance programs in place, it is important for corporations to be aware of the factors that prosecutors take into consideration when deciding whether to charge a particular corporation. A December 12, 2006 memorandum from the Deputy Attorney General to United States Attorneys ("McNulty Memorandum") stated succinctly that "[t]he prosecution of corporate crime is a high priority for the Department of Justice."[169] Moreover, Mcnulty posited that every Department of Justice investigation would inevitably protect investors and ensure public confidence in corporations.[170]

In general, "[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment."[171] In addition, charging a corporation is likely to elicit immediate remedial steps within that particular corporation as well as having an effect throughout the particular industry.[172] In addition, the charge may assist in changing corporate culture as well as the behavior of the employees of a particular corporation.[173] Thereafter, the McNulty Memorandum set out various factors that prosecutors should look toward when charging a corporation.[174]

Prosecutors are to look at a variety of factors that may shed light on the corporation's proclivity toward criminal activity or inaction to known activity.[175] The pervasiveness of wrongdoing within a corporation can be established if a large number of employees from a particular department are engaged in misconduct or if upper management condoned the action.[176] In addition, "[p]rosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining to bring criminal charges."[177] "A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of compliance programs."[178] Therefore, corporations that have previously been involved in any action regarding corporate misconduct should be as proactive as possible in ensuring that they do

169. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice (Dec. 12, 2006), *available* at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

170. *Id.* at 1.

171. *Id.* at 2.

172. *Id.*

173. *Id.*

174. *McNulty Memorandum, supra* note 169, at 4-5.

175. *Id.* at 4.

176. *Id.*

177. *Id.*

178. *Id.* at 6.

not succumb to the same or similar fate as before.

The McNulty Memorandum also encourages corporate compliance programs due to their "self-policing" nature that includes voluntary disclosures of any activity the corporation discovers on its own.[179] "However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents."[180] Although a compliance program may help reduce a corporation's culpability,[181] it will not completely shield it from criminal charges.[182] If a corporation has a compliance program and an FCPA violation occurs, the violation may be indicative that the program is not being adequately enforced.[183]

The McNulty Memorandum further recognizes that:

> [N]o compliance program can ever prevent all criminal activity . . . critical factors . . . are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.[184]

A corporation's ready willingness to make restitution for any illegal action also holds weight, though payment of a fine is not a substitute for potential charges.[185] Furthermore, prosecutors should consider "remedial actions[] such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers."[186] Even though a compliance program will not be completely determinative of the potential liability of a corporation, it seems clear that a compliance program will be given serious consideration in determining potential charges, corporate liability, and fines. These factors seem inextricably intertwined, and when coupled with recent corporate scandals, cement the need for an effective compliance program within all multinational corporations.

Finally, "[i]n negotiating plea agreements with corporations,

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179. *McNulty Memorandum, supra* note 169, at 12.

180. *Id.*

181. *Id.* at 13.

182. *Id.*

183. *Id.* at 12-13. *See also* pt. IV, § B, for a discussion of the rebuttable presumption that leniency should be negated if the individuals involved in the criminal activity "participated in, condoned, or [were] willfully ignorant of the offense" while serving in their capacities as high-level officials or individuals in control of the compliance program.

184. *McNulty Memorandum, supra* note 169, at 14. *See also* pt. IV, § A, for a discussion of the various elements of a good compliance program.

185. *Id.* at *15*.

186. *Id.*

prosecutors should seek a plea to the most serious, readily provable offense charged."[187] Subsequently, corporations should not expect to plea down any charges while remaining cognizant that they will be charged with the highest crime for which evidence exists. "In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context."[188] The terms of the plea agreement may also include judicial oversight.[189] It would seem that an effective compliance program is integral to any corporation if it wishes to comply with the FCPA or various other laws and if a company wants to diminish its vulnerability to fines and sanctions while protecting its high-level and management personnel.

V. Multinational "Corporation X"[190]

Intellectual conjecture, economic theory, and historical analysis provide insight into Latin American corruption. The laws of the United States, legislative comments, and notes provide a framework for corporations to follow in establishing compliance programs to combat corruption. Nevertheless, it is helpful to put all these theories and conjecture into perspective, as viewed and experienced by a large multinational corporation with operations in Latin America.

Many individuals have varying views as to the overall effect of the FCPA, nevertheless countries worldwide have chosen to adopt legislation outlawing bribery.[191] The United States' adoption of the FCPA was a good idea but it contains many imperfections.[192] However, without the FCPA, corruption would be more pervasive amongst corporations; therefore, it is good to see that the United States has taken a stance.[193] Unfortunately, the fashion in which the FCPA was drafted has created a lot of problems.[194] Having some accountability is great and truly needed, but demanding one hundred percent accountability is

187. *Id.* at 18.

188. *Id.*

189. *McNulty Memorandum, supra* note 169, at 19.

190. The name of the corporation will not be given in an effort to protect and maintain its right to privacy. Furthermore, in an effort to protect the rights of the two individuals who agreed to be interviewed, their names will also be withheld.

191. *See* pt. II, § B, for a discussion of the international efforts towards combating corruption.

192. Interview with "Individual B," Senior Counsel of the International Division responsible for Latin America & Canada, Corporation X, in City Y, State Z (Jan. 3, 2007) [hereinafter Interview with Individual B]. *See also* Muffler, *supra* note 41, at 3.

193. Interview with Individual B, *supra* note 192.

194. *See id.*

improbable and changes the original mission of the FCPA.[195] It is also important to remember that the FCPA deals in very fine gradations of intent.[196] The FCPA fails to draw a bright line within the text or legislative history that would put an individual on notice that the activity they are engaging in is a violation of the statute.[197] It is essentially an intent issue.[198]

A. Interview with Individual A

As previously discussed, the perception of a state can often be indicative of the actual corruption occurring in a particular state. Which Latin American state is perceived as being the most corrupt in the eyes of a Vice President and Senior Counsel at a large multinational corporation? According to one, corruption is a direct function of the role of the state in the economy.[199] It is of no consequence that the government is labeled as right-wing or left-wing politically.[200] This is evidenced by states like Ecuador and Peru who have traditionally had military authoritarian regimes, as juxtaposed with Chile, which has had a more truly liberalized economy and thus is less likely to be corrupt.[201]

Nevertheless, looking at a state's central government may not be completely determinative, it is also important to look at a particular state's disseminated power structure.[202] One example is Argentina, a country that is highly federalized and rarely has problems in the capital city of Buenos Aires.[203] However, the same is not true of provincial governments and provincial regulators.[204] The same issues abound in Brazil, as its provincial structures are also subject to corruption.[205]

In response to an outbreak of corruption amongst corporations, Corporation X concluded that it needed a global compliance program beginning with education.[206] In an effort to implement its plan, Corporation X worked with outside counsel to formulate a corporate

195. *See id.*
196. Interview with "Individual A," Vice President & Senior Counsel, Corporation X, in City Y, State Z (Jan. 3, 2007) [hereinafter Interview with Individual A].
197. *See id.*
198. *See id.*
199. *See id.*
200. *See id.*
201. Interview with Individual A, *supra* note 196.
202. *See id.*
203. *See id.*
204. *See id.* *See* pt. III, § A, for a discussion of the international efforts towards combating corruption ("Usually the masses are somehow completely involved in the politics of favors."). *Id.*
205. Interview with Individual A, *supra* note 196.
206. *Id.*

policy statement and objectives that would express its position on corruption and bribery.[207] The result was a twenty-page document outlining the "dos and don'ts."[208] Simultaneously, a compliance department was assembled with the goal of educating employees as well as preventing any potential corrupt activity.[209] Corporation X knew it was important to track finances and how money was spent abroad; thus, it has various departments that work with an outside firm in an effort to follow money and see where certain expenditures are made.[210] Constant monitoring occurs and is subsequently followed by an internal audit.[211] The audits proceed as a regular matter, with those countries at the lower end of the Transparency International list usually receiving more attention.[212]

An effective compliance program and routine audits are not sufficient to combat corruption.[213] A compliance program requires a lot of resources and the company must stand behind it.[214] A corporate commitment of resources is the most important aspect of a compliance program, if it is to be truly effective.[215] Individual A is a Senior Executive at the company and has spent at least forty percent of the last two years working on FCPA matters and compliance in general.[216]

Part of the inherent problem with compliance is that corporations have increasingly become multinational, making inspection and monitoring more difficult.[217] The head of Latin American operations for Corporation X is in the United States but travels to Latin America often in an effort to monitor compliance.[218] High-level personnel within the compliance program are primarily located in the United States.[219] Nevertheless, there is a need for individuals on the ground in particular countries. However, clients feel most comfortable when their high-level legal personnel are primarily located in their place of business or headquarters.[220] Therefore, every single executive in Latin America, including managers and some low-level employees, have been trained in

207. *Id.*
208. *Id.*
209. *Id.*
210. Interview with Individual A, *supra* note 196.
211. *Id.*
212. *Id.*
213. *See id.*
214. *See id.*
215. Interview with Individual A, *supra* note 196.
216. *Id.*
217. *See id.*
218. *Id.*
219. *Id.*
220. Interview with Individual A, *supra* note 196.

FCPA compliance.[221] The training is done in person when possible, over the phone, or by video conference.[222] Additionally, there is an online training manual available in at least twenty different languages.[223]

As outlined by the United States Sentencing Guidelines, if a corporation is to have an effective compliance program it should make reasonable efforts to communicate the requirements of the program with its employees or agents.[224] Corporation X has a training manual for lawyers, finance personnel, executive management at the mid-director level, and employees in the compliance department.[225] Individual A has conducted half of the trainings himself, while head lawyers for particular divisions train individuals within their sectors.[226] However, it is somewhat impractical for a multinational corporation to do all of the required training face to face; as such, other means are used.[227] For individuals who cannot be trained in person, Corporation X uses video and audio conferences to provide the same compliance information; those trained via this method have been extremely receptive.[228] Employees also take online quizzes regarding FCPA and other compliance matters.[229] As a percentage of the industry, Corporation X believes that it has reached a large number of people as compared to other corporations.[230]

Once employees have been trained, it is important that there be a conduit for reporting potential FCPA violations.[231] To facilitate reporting, Corporation X established a hotline where information can be received on an anonymous or identified basis.[232] Furthermore, all individuals know specifically who they are supposed to report to if they have a compliance issue.[233]

If a corporation is to have an effective compliance program it must also get employees involved in a corporate culture that does not tolerate

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221. *Id.*
222. *Id.*
223. *Id.*
224. *See* pt. IV, § A, for a discussion of the components of a good compliance program, specifically factor four.
225. Interview with Individual A, *supra* note 196.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. Interview with Individual A, *supra* note 196.
231. *See* pt. IV, § A, for a discussion of the components of a good compliance program, specifically factor five.
232. Interview with Individual A, *supra* note 196. "However, there are some very complicated issues that arise with regards to privacy laws in Europe, which makes compliance somewhat tougher. The German government almost shut down the hotline because it violated their privacy laws." *Id.*
233. *Id.*

corruption.[234] Corporation X uses performance evaluations to accomplish this goal; the evaluations adjudge compliance, ethics, and integrity.[235] The corporation first looks to see if the particular individual has met their job objectives, then it evaluates how the particular individual behaved in achieving those objectives.[236] There are no incentives for compliance but there are clear disincentives for non-compliance.[237]

Corporation X has a no-tolerance policy for non-compliance with the FCPA, thus if someone violates the FCPA he or she is fired automatically no matter what level he or she holds at the corporation.[238] There are various types of behavior that may be questionable but not necessarily illegal; these activities are covered in performance evaluations.[239] Corporation X has very little tolerance for anyone who crosses the line, and therefore anyone who does is fired openly so that other individuals in the company are aware of what was going on.[240] However, a problem arises internationally with countries that have at-will employment.[241] In those particular countries, Corporation X has to conduct an investigation before the statutorily-required time span under local labor laws, making a public firing more difficult.[242] In some countries, a violation of United States law is not just cause for firing an employee; in this situation, Corporation X usually pays the remuneration required under local law and fires the individual.[243]

FCPA compliance can be very confusing for a corporation, but there are several things that a corporation could do in an effort to comply. First, Senior Management must show an open and constant commitment to FCPA compliance.[244] Second, consistency is important, a corporation cannot just binge on FCPA issues for two months or two years; compliance must be incorporated into normal business practices.[245] When done openly and constantly, it will serve to provide visibility to all

234. *See* pt. IV, § A, for a discussion of the components of a good compliance program, specifically factor six.

235. Interview with Individual A, *supra* note 196.

236. *Id.*

237. *Id.* "While there are no incentives, unfavorable performance evaluations will negatively affect the individual's bonus." *Id.*

238. *Id.*

239. *Id.* "It is also important to remember that the FCPA deals in very fine gradations of intent." *Id.* *See* pt. V, for a discussion of the components of a good compliance program, specifically factor six.

240. Interview with Individual A, *supra* note 196.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Interview with Individual A, *supra* note 196.

employees regarding corporate expectations.[246] Third, a corporation must be realistic.[247] A corporation must take an honest inventory of the business it is involved in and the particular risks that its industry is susceptible to.[248] Fourth, a corporation cannot lie.[249] It can tell employees to be culturally sensitive in their business dealings but still require them to comply with the FCPA.[250] Sometimes it might be hard to attempt to change the culture where a person is conducting business; the best advice in that situation is to walk away from that particular business venture.[251]

As an example, Individual A explains how Corporation X has dealt with Argentina, which he views as being exceedingly corrupt.[252] Historically, Argentina had a strangle hold on the economy, leaving under-compensated individuals in the country to expect a pay off during business dealings.[253] In Argentina, problems have not occurred specifically with government officials, but rather normal business individuals who expect to receive financial compensation for performance of their job duties.[254] Within Latin America, bribery is culturally accepted as perfectly normal behavior, even though it is known to be wrong.[255] Thus, Corporation X is at a competitive disadvantage because local companies only need to worry about local corruption legislation, which is rarely enforced.[256]

Nevertheless, Corporation X cannot operate under culturally-accepted corrupt practices and has subsequently analyzed whether Argentina is still a viable business option.[257] While the Argentine population is somewhat rich, the business risk must be analyzed and a determination reached.[258] Corporation X explains to its local managers that it is not trying to be culturally insensitive, but rather acting prudently in the assessment of the potential legal and financial ramifications of non-compliance with the FCPA.[259]

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. Interview with Individual A, *supra* note 196.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. Interview with Individual A, *supra* note 196.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

B. Interview with Individual B

Individual B works specifically in the Latin American division of Corporation X and thus has a unique view with respect to perceived and actual corruption in the region. When asked which Latin American country is most susceptible to corruption, he quickly quipped: Argentina.[260] However, Ecuador, though not necessarily corrupt, has a terrible legal system making enforcement of rights nearly impossible.[261] The inadequacy of the Ecuadorian legal system is most notably exemplified by its decision to go on strike for about three months.[262] Furthermore, Brazil, Venezuela, and Mexico raise various issues due to their thin social fabric.[263]

The lack of judicial enforcement in certain areas has led to corrupt legislation that is useless.[264] In turn, multinational corporations that are not based in the United States have a competitive advantage.[265] Often multinational corporations that are not based in the United States deal directly with prosecutors in the particular country, making corrupt practices more practical, whereas multinational corporations based in the United States must go through United States prosecutors who often do not understand what is going on in these international jurisdictions.[266] Sometimes the problem is further exacerbated because competitors in the foreign country are also government officials, which prohibits any type of reasonable competition if a corporation wants to comply with the FCPA.[267] Thus, Corporation X has had to limit various aspects of industry where it cannot compete as well as cease business relationships with individuals who might place them in a risky situation.[268] Corporation X has had to change its business models because it cannot compete without making bribes or political contributions.[269]

In an effort to proactively prevent any situation that might lead to an FCPA violation, Corporation X is involved in extensive compliance

260. Interview with Individual B, *supra* note 192. The statements by both interviewees correspond with Argentina's CPI ranking, which places them in the lower half. *See generally* Transparency Int'l, *supra* note 66.

261. Interview with Individual B, *supra* note 192.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Interview with Individual B, *supra* note 192. "Moreover, U.S. based multinational corporations face complicated discovery issues under U.S. legislation that are not relevant under foreign legislation." *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

training.[270] Nevertheless, it faces severe problems, particularly because the FCPA is comprised of complex provisions that are often difficult for individuals to explain or understand.[271] Corporation X breaks down training into two distinct parts.[272] The first is legal training, which involves many legal nuances and often does not have a lasting effect on trainees.[273] The second type of training is less formal in substance and consists of past experiences and lessons learned.[274] During training, employees must learn that the Latin American elites are so well connected that it is hard to find business individuals who have no conflicts of interest.[275] Thus, employees must be cognizant of this fact and simultaneously navigate local laws to determine who might be considered a government official.[276]

However, these two types of training are not enough.[277] Warnings to employees are not enough; nevertheless, it does not seem economically feasible to go into a Latin American country to train all low-level employees in person.[278] While a corporation could easily document on paper that training has occurred, in actuality attaining the training required by law is nearly impossible.[279] Aside from a logistical nightmare, the FCPA requirements raise some serious linguistic and cultural issues.[280] There is no equivalent for the English word "compliance" in Spanish, French, or Portuguese;[281] in actuality, the word has other meanings in various countries.[282] The FCPA raises many translation issues for words and ideas that do not exist in Latin American countries.[283]

Training in FCPA compliance coupled with a violation may still be insufficient grounds to fire an employee. As previously discussed, country-specific employment law might be a bar toward rapid, efficient, and public firings.[284] Corporation X runs the risk of being sued for libel,

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270. *Id.*
271. Interview with Individual B, *supra* note 192.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* *See* pt. III, § A, for a discussion of the corrupt elitist system Latin America inherited from Spain.
276. Interview with Individual B, *supra* note 192.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. Interview with Individual B, *supra* note 192.
282. *Id.*
283. *Id.* Regardless of the translation issue, all Latin American employees receive a compliance manual, which lays out all of the FCPA requirements translated in Spanish. Moreover, all employees must certify that they have received a compliance manual. *Id.*
284. *Id.* *See also* pt. V, § A, for a discussion of the complicated nature of at-will

a serious crime in Latin American countries where reputation and social status is highly valued, if it punishes an employee publicly and does not have adequate legal proof that stands up in court.[285] Latin American jurisprudence does not place a large value on oral testimony, in comparison with the United States.[286] It is almost a requirement that the employer have some hard evidence to prove just cause for firing an individual.[287] This is often very difficult because corruption usually occurs under covert circumstances involving cash payments.[288] One example of sufficient evidence would be a notarized videotape depicting the corruption.[289] Corporation X could subsequently fire an employee publicly on the basis of lack of honor or moral turpitude.[290] Nevertheless, if an individual is fired without a public ouster of corrupt activities, other employees may be aware of their bad reputation and are likely to draw inferences regarding the real reason for the firing.[291]

A corporation seeking to implement a compliance program must keep all of the aforementioned problems in mind if it is to be successful in complying with the FCPA. True compliance requires that a corporation implement the proper form of the program.[292] However, form is not sufficient, as substance is what will truly make a compliance program effective.[293] A corporation could easily provide evidence in the form of slides or documentation of FCPA training if they were under a government investigation.[294] Nevertheless, the substance of the program is more important because it is responsible for how individuals learn what is appropriate or inappropriate.[295] Moreover, corporations must be cognizant of the particular problems that its employees are facing.[296] Corporations that have not been diligent in identifying these recurring problems are likely to find that employees have resolved the problems in an illegal manner.[297] As such, a corporation should identify particular problems and provide its employees with solutions that are compliant with United States law.[298] However, the FCPA does not distinguish

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employment in Latin America.

285. Interview with Individual B, *supra* note 192.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. Interview with Individual B, *supra* note 192.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. Interview with Individual B, *supra* note 192.
296. *Id.*
297. *Id.*
298. *Id.*

where a particular violation may occur, leaving a corporation with a logistical training nightmare if it is truly multinational.[299]

A corporation should also conduct a risk-management study that is tailored to capture potential FCPA violations.[300] Corporations must also be cognizant of the fact that the FCPA is written to capture everything, and as such, the risk-management study should focus on particular risks that are prevalent in the particular industry and country it is involved in.[301] After conducting the study, the corporation should reevaluate any new risks or gaps that surfaced.[302] The corporation would be best protected by conducting a "lessons learned" process, where further study into the corporate culture and the particular industry are conducted.[303] The results of conducting these studies may not necessarily be positive, thereby leading a corporation to the conclusion that it is impossible to operate ethically in a particular region.[304] Corporation X has been faced with the same problem and has chosen to withdraw from any ongoing business operations in the particular country.[305]

However, a corporation should be mindful if its study reveals that a business division in a particular country is working smoothly and reveals no problems.[306] If this situation occurs, the corporation should conduct an immediate audit of the reporting system, as it is likely that there is something wrong.[307] Furthermore, new and revised training may be appropriate because some of the employees clearly do not have a full appreciation of the law.[308] Nevertheless, a corporation should be mindful of the message it sends.[309] If the corporation sends a message that a compliance failure is unacceptable, then employees are likely to hide certain information out of fear.[310] Thus, the corporation should have thorough conversations with its employees regarding failure, while simultaneously establishing reasonable alternatives.[311] A corporation must understand that compliance is not merely about encouraging employees to behave morally, but rather understanding the underlying factors which lead an employee to justify corruption or bribery when

299. *Id.*
300. Interview with Individual B, *supra* note 192.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. Interview with Individual B, *supra* note 192.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. Interview with Individual B, *supra* note 192.
311. *Id.*

making a business decision.[312]

VI. Moving Forward While Learning From The Past: Lessons Learned

Latin America's proclivity toward corruption can be gleaned from its historical origins and its general inability to overcome deeply rooted societal and political problems.[313] While corruption is understood as being wrong and immoral,[314] a system of social connections and political friendships undermines any effort toward a transparent government.[315] Subsequently, any multinational corporation would be wise to actively and tacitly promote an effective compliance program.[316]

Any corporation that is not seriously considering potential risk management issues in Latin America should be mindful of the many SEC sanctions that have been levied against various corporations.[317] Moreover, the fervor with which the McNulty Memorandum charges government prosecutors should serve as a sufficient deterrent, if not an adequate motivator.[318] For corporations that heed the obvious warning signs, an effective compliance program can serve as a good foundation and be further solidified through constant monitoring.

A corporation should establish, at minimum, a compliance program that outlines standards and procedures to assist in the detection of criminal conduct.[319] Once established, a corporation's governing authority should be intimately attuned with the general workings and overall goals of the compliance program.[320] Subsequent to compliance familiarization, those in charge of the compliance program should make reasonable, if not zealous, efforts to communicate the new standards to employees.[321]

In an effort to follow up with newly instituted standards and procedures, the corporation should set up a monitoring and auditing

312. *Id.*

313. *See* pt. III, § A, for a discussion of the historical origins of corruption in Latin America.

314. *See* pt. V, § A, for a discussion of how Latin American employees perceive corruption.

315. *See* pt. III, § A, for a discussion of the historical origins of corruption in Latin America.

316. *See* pt. III, § C, for a discussion of a myriad of corporations who have been involved in corrupt activities in Latin America.

317. *See* pt. III, § C, for a discussion of actual corruption in Latin America and subsequent fines levied.

318. *See* pt. IV, § C, for a discussion of prosecutorial areas of interest and the Deputy Attorney General's charge in the McNulty Memorandum.

319. *See* pt. IV, § A, for a discussion of an effective compliance program.

320. *See id.*

321. *See id.*

system.[322] Nevertheless, monitoring needs to be coupled with consistent enforcement and punishment for employees who fail to comply with the program.[323] If a corporation discovers criminal conduct, it should reasonably respond while simultaneously updating the compliance program to prevent future violations.[324]

Corporations, individual employees, and agents should remember the steep fines imposed under the FCPA.[325] Individuals are subject to a maximum fine of five million dollars or imprisonment of up to twenty years or both.[326] Moreover, the corporation involved could be charged a maximum fine of twenty-five million dollars, though there is no potential for imprisonment.[327]

The corporation should be mindful of the fine gradations that the FCPA imposes,[328] remembering that the use of "any instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of anything of value to"[329] any foreign government official may be considered a violation of the FCPA. As a crime of intent, any offer or promise to pay may constitute a violation.[330] Thus, a compliance program that is not enforced may never effectively prevent SEC sanctions.[331]

If a corporation is to avoid the old idiom of being "penny wise and pound foolish," a front-loaded investment in a detailed compliance program is the most prudent way of preventing future financial loss and embarrassment. Nevertheless, form must be supported by effective monitoring and evaluation in order to maintain the substance required for a truly effective compliance program.

322. *See id.*
323. *See id.*
324. *See* pt. IV, § A, for a discussion of an effective compliance program.
325. *See* pt. II, § A, for a discussion of the FCPA.
326. *See id.*
327. *See id.*
328. Interview with Individual A, *supra* note 196.
329. *See* 15 U.S.C. § 78dd-2(a)(1)(A) (2000).
330. *See id.*
331. Interview with Individual A, *supra* note 196.