

View from the Monitor: Key Areas in an Effective Anti-Corruption Compliance Program

Pamela Davis
Winston & Strawn LLP

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Argentina and Anti-Corruption

- Anticorruption is not only a focus of U.S. Authorities
 - In November 2017, the Argentine Congress passed the Law on Criminal Liability of Legal Entities (the “Law”), which imposed criminal liability on corporations for corruption-related offenses and has been in force since March 2018.
 - In April 2018, the executive branch published Decree 277/18, authorizing the Argentine Anti-Corruption Office to **establish guidelines for corporate compliance programs** recommended by the Law.
 - In 2019, that same Office issued Resolution 36/2019, which included **additional guidance for compliance programs**, specifically directed to entrepreneurs and small and medium-sized enterprises (also known as “PYMEs”).

Argentina and Anti-Corruption

- On April 11, 2019, the government approved a five-year “National Anti-Corruption Plan” by Decree No. 258/2019.11.
- In December, 20, 2019, the new government published Decree 54/2019, which regulates the Anti-Corruption Office and establishes in particular that the Office will become a “non-concentrated” entity within the executive branch, meaning it will have more independence. The Decree further states that the Office has “technical independence” and will fulfill its functions without receiving instructions from the President or any other superior authority within the executive branch.

The Basics of the FCPA



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Conduct Covered by the FCPA

- Bribe or attempted bribe of a government official
- Violation of the books and records provision arising from inaccurate or misleading records inadequate controls
- Failure to implement sufficient internal controls

Why the FCPA Matters in Argentina: Broad Extraterritorial Reach

- U.S. citizens, nationals, residents – wherever located
- U.S. incorporated or headquartered companies
- Any company with any class of equity or debt securities listed on a U.S. exchange or quoted in the U.S. over-the-counter (“OTC”) market
- Agents, employees, officers, directors, and stockholders of any of the above entities when they act on the company’s behalf
 - Any person or entity that aides, abets or conspires with someone subject to the Act’s jurisdictional requirements
- Any person or entity who violates the FCPA while present in the United States
- Successor of an acquired or merging entity, even if the actions took place prior to the acquisition or merger

Why the FCPA Matters in Argentina: Issuers

Under these rules, an Argentinian individual who works for an entity listed on a U.S. exchange, who has

- never traveled to the U.S.
- never sent an email to the U.S.
- never used U.S. banks

Who paid a bribe or offered to pay a bribe **in Argentina**, to an **Argentinian official**, using only **Argentinian currency** on behalf of his **Argentinian** employer can be charged, along with his **Argentinian** company, for a criminal violation of the FCPA.

Why the FCPA Matters in Argentina: Subsidiary/Individuals of US. Concern

Under these rules, an **Argentinian** citizen who works for an **Argentinian** company that is a subsidiary of a U.S. **privately** held company who has

- never traveled to the U.S.
- never sent an email to the U.S.
- never used U.S. banks

Who paid a bribe or offered to pay a bribe **in Argentina**, to an **Argentinian official**, using only **Argentinian currency** on behalf of his **Argentinian** company can be charged, along with his **Argentinian** company and the U.S. parent company, for a criminal violation of the FCPA.

Why the FCPA Matters in Argentina: Agents and Third Parties

Under these rules, an **Argentinian** citizen (independent or employed by an Argentinian company) acting as an agent for a U.S. private or public company who has

- never traveled to the U.S.
- never sent an email to the U.S.
- never used U.S. banks

Who paid a bribe or offered to pay a bribe **in Argentina**, to an **Argentinian official**, using only **Argentinian currency** to further the interests of the U.S. company can be charged, along with the U.S. company, for a criminal violation of the FCPA.

Why the FCPA Matters in Argentina: Conduct Touching U.S. Soil

Under these rules, an **Argentinian** citizen that has never traveled to the U.S., who works for a wholly **Argentinian** company, who paid or offered to pay a bribe in **Argentina**, to an **Argentinian official**, using only **Argentinian currency** on behalf of his **Argentinian** company

- but telephoned or texted the **Argentinian** official's assistant's cell phone to arrange the payment while the assistant was visiting the U.S.
- or sent an email discussing the arrangement through a server located in the U.S.
- or made the payment over a wire that (however briefly) went through a U.S. banking system

can be charged, along with his **Argentinian** company, for a criminal violation of the FCPA.

Lessons Learned:

Understanding Why a Monitor is Appointed
The Key Areas a Monitor Reviews



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Factors the U.S. Government Considers When Imposing a Monitor

- Did the underlying misconduct involve the manipulation of the company's books and records
 - **Compliance Program Structure**
- Was the misconduct pervasive across the organization or approved or facilitated by senior management
 - **Poor Tone at the Top**
- Has the company made significant improvements in its program and internal controls since the misconduct
 - **Evidence of Improvements**
- If improvements have been made, have those been tested to show they would prevent or detect similar misconduct
 - **Evidence of Effective Implementation**

Understanding the Monitor's Role

- In exchange for a Deferred Prosecution Agreement “DPA,” corporations agree to pay fines, implement corporate reforms and fully cooperate.
 - Compliance expectations are outlined in an addendum to the DPA – Corporate Compliance Program
 - Monitor's mandate – to assess the Company's compliance with the Agreement, including the Corporate Compliance Program.

Understanding the Monitor's Role

- To evaluate the company's compliance program
 - Prevent
 - Detect
 - Remediate
- Look to the Government Considerations
 - Overarching Structure of the Compliance Program
 - Tone at the Top
 - Improvements (before the Monitorship or recommendations by the Monitor)
 - Effectiveness and Implementation of Improvements

What will the Monitor Review

- Organization of the Compliance Group
 - Resources, headcount, location
- Access and/or frequency of reports to the Board
- Risk Assessment or Mapping, Process/Frequency
- Formalized Policies and Procedures
- Investigation Process and Reporting
- Training
 - Internal, External, Control Specific
- Compliance Monitoring

What will the Monitor Review

- Internal Audit
 - Schedule, Findings, Remediation
- Internal Financial Controls
 - Procure to Pay
 - On-boarding of supplier third parties, ability to block third parties, access to financial systems, approval processes related to on-boarding, payments, etc.
 - Order to Cash
 - Write-down/write-off, discounts, ability to block, access to financial systems, approval processes
 - Retention of documents

2 Key Areas in an Effective Compliance Program for Discussion

1

Organization and Structure of the Compliance Function

2

Risk Mapping: How and Why

Organization and Structure of the Compliance Function

- Why Should Companies Build a Compliance Function:
 - Incentives in the event of criminal investigation or prosecution
 - Establish strong culture of compliance with laws and company policies
 - Create strong internal controls
 - Build ability to monitor and track payments; reduces risk of criminal violations and basic loss to company
- Potential Structures:
 1. Stand-alone department
 2. Embedded within Legal
 3. Dual-function leaders

Organization and Structure of the Compliance Function – U.S. Guidance

- U.S. Guidance seems to favor compliance functions with separation and “direct access to the governing authority.”
 - U.S. Sentencing Commission’s *Federal Sentencing Guidelines Manual*
 - Department of Justice’s (“DOJ”) *Evaluation of Corporate Compliance Programs*
 - DOJ and Securities and Exchange Commission’s (“SEC”) joint *Resource Guide to the FCPA*
- **Do not impose** requirements or have the force of law, and authorities do in fact recognize the need for flexibility.

Organization and Structure of the Compliance Function – U.S. Guidance

- ***Evaluation of Corporate Compliance Programs*** guidance advises prosecutors to evaluate the authority and independence of the compliance function, including whether “the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information.”
- ***A Resource Guide to the FCPA*** at 58 (“DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company’s size, complexity, industry, geographical reach, and risks associated with the business”).

Business View: Experiencing a Monitorship

Maria Volentiera
*Compliance Officer,
Volkswagen Group Argentina*

Ramiro Cabrero
*Global Compliance Officer,
Baker Hughes*



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Discussion Regarding Compliance Structure



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Organization and Structure of the Compliance Function

- Current Structure
 - Did this change following the alleged misconduct
 - Did this change following the monitorship
 - What are the pro's and con's you see:
 1. Stand-alone department
 2. Embedded within Legal
 3. Dual-function leaders

Risk Mapping: How and Why



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Risk Mapping: Why

- Good Business Practice
- Government Reasons:
 - Evaluation of Corporate Compliance Programs (Updated April 2019)
 - United States Sentencing Guidelines U.S.S.G. § 8B2.1(c)
 - United States Department of Justice Manual JM 9-47-120(2)(c)

“designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business” and “complex regulatory environment.”

Risk Mapping: Perspectives from Baker Hughes and Volkswagen

- Current Structure
 - Did this change following the alleged misconduct?
 - Did the structure change following the monitorship?
- Do you find the process valuable?
 - Understand the company's business from a commercial perspective
 - Identifies, assesses, and defines the risk profile
 - Assesses whether the program devotes appropriate scrutiny and resources to the spectrum of risks

Risk Mapping: Considerations in Risk Mapping

- location of its operations
- the industry sector
- the competitiveness of the market
- the regulatory landscape
- potential clients and business partners
- transactions with foreign governments
- payments to foreign officials
- use of third parties
- gifts, travel, and entertainment expenses
- charitable and political donations

Risk Mapping: What the Monitor Reviews

- Risk-Tailored Resource Allocation Considerations
 - Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors?
 - Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?

Risk Mapping: What the Monitor Asks

- Updates and Revisions
 - Is the risk assessment current and subject to periodic review? Have there been any updates to policies and procedures in light of lessons learned? Do these updates account for risks discovered through misconduct or other problems with the compliance program
 - “[t]he effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment” and whether its criteria are “periodically updated.” JM 9-47-120(2)(c)
 - “the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct”) U.S.S.G. § 8B2.1(c)

QUESTIONS?

Ramiro Cabrero

*Global Compliance Officer,
Baker Hughes*

Maria Volentiera

*Compliance Officer,
Volkswagen Group Argentina*

Pamela Davis

*Head of Anticorruption
Practice, Winston & Strawn LLP*



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About Winston: Contacts

CORPORATE AND TRANSACTIONAL: LATIN AMERICA & CARIBBEAN PRACTICE



Talbert Navia
Co-Chair, Latin America & Caribbean
Compliance, M&A, Private Equity, Capital
Markets, and Financing
New York
+1 (212) 294-4728
tnavia@winston.com

LITIGATION AND INTERNATIONAL ARBITRATION: FCPA & ANTI-CORRUPTION PRACTICE



Pamela Davis
Chair, FCPA & Anti-Corruption
San Francisco
+1 (415) 591-1410
pdavis@winston.com

 LinkedIn: www.linkedin.com/company/winston-&-strawn-llp/

 Twitter: @WinstonLaw

 Facebook: <https://www.facebook.com/WinstonStrawnLLP/>

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About Winston: General

Our Long History in Argentina

Our group in charge of the Latin American practice (formerly Chadbourne & Parke) joined Winston & Strawn LLP two years ago bringing with it over 30 years of experience in Argentina, having represented leading Argentine companies in historic transactions and dispute resolution in different sectors and industries. As a result of our work in Argentina, we have an in-depth knowledge of the country's legal, political, regulatory and commercial framework, as well as a thorough understanding of the energy (conventional and non-conventional), infrastructure, construction and telecommunications industries.

About the specialized anti-corruption team

The specialized team on White Collar, Regulatory Defense and Investigations, including FCPA and *compliance*, is led by the only attorney in the United States who has been appointed three times by the SEC and DOJ as a “monitor” in FCPA resolutions, and includes 20 former prosecutors and former assistant prosecutors from the U.S. Department of Justice, former senior U.S. government officials, including a former U.S. Ambassador to Uruguay and former Assistant Secretary of State for Central American, Caribbean and Cuban Affairs at the U.S. Department of State, and more than 20 other leading anti-corruption lawyers.

The FCPA team led more than 150 corruption-related investigations in the last 5 years around the world, including numerous cases in Latin America, including leading companies in Brazil, Chile, Colombia and Mexico, among others.

About Winston & Strawn

Winston & Strawn LLP is an international law firm with more than 900 attorneys across 15 offices in Brussels, Charlotte, Chicago, Dallas, Hong Kong, Houston, London, Los Angeles, Moscow, New York, Paris, San Francisco, Shanghai, Silicon Valley, and Washington, D.C. The exceptional depth and geographic reach of our resources enable Winston & Strawn to manage virtually every type of business-related legal issue. We serve the needs of enterprises of all types and sizes, in both the private and the public sector. We understand that clients are looking for value beyond just legal talent. With this in mind, we work hard to understand the level of involvement our clients want from us. We take time to learn about our clients’ organizations and their business objectives. And, we place significant emphasis on technology and teamwork in an effort to respond quickly and effectively to our clients’ needs.