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FCPA RISKS FOR U.S. COMPANIES IN LATIN AMERICA, RENEWABLE ENERGY THRIVES IN BRAZIL, AND MEXICO AND THE NEW PRI: ENRIQUE PEÑA NIETO

*Fernando Avelar**

I. FCPA RISKS FOR U.S. COMPANIES IN LATIN AMERICA

THE Foreign Corrupt Practices Act (FCPA) has been a point of increased worry for U.S. companies doing business abroad. Reacting to FCPA enforcement actions, U.S. companies have implemented advanced compliance programs when dealing with international subsidiaries and partners.¹ The recent increase in FCPA enforcement by the federal government and the multimillion-dollar penalties that have been levied on U.S. companies for violations of the FCPA² are the predominant reasons companies are in a rush to get their compliance programs up to par. Latin America is one of the primary areas where U.S. companies are most at risk for FCPA violations because of the corrupt culture of business and politics present in many Latin America countries.³ This article is intended to be an overview of anti-corruption law in the United States and Latin America and to examine why compliance with the FCPA is more important now than ever.

A. FCPA OVERVIEW

The FCPA was enacted in 1977 with the intended purpose of making it illegal for certain persons and entities to make payments to foreign government officials in order to obtain new business or retain current busi-

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1. Matt Ellis, *Is the FCPA working? Three dispatches from Latin America*, FCPA COMPLIANCE & ETHICS BLOG (Oct. 4, 2011, 7:01 AM), <http://tfoxlaw.wordpress.com/2011/10/04/is-the-fcpa-working-three-dispatches-from-latin-america/>.
2. PricewaterhouseCoopers, L.L.P., *What You Should Know about the Foreign Corrupt Practices Act*, DOING BUSINESS IN LATIN AMERICA 3 (May 2011), http://www.pwc.com/en_US/us/transaction-services/publications/assets/pwc-doing-business-in-latin-america-foreign-corrupt-practices-act.pdf.
3. See *Corruption Perceptions Index 2011*, TRANSPARENCY INT'L (Nov. 2011), <http://cpi.transparency.org/cpi2011/results/> (click "Download Report").

ness.⁴ The FCPA was the response from the U.S. Congress after “more than 400 US companies admitt[ed] to making questionable or illegal payments to foreign government officials, politicians, and political parties.”⁵ The U.S. Congress wanted to stop the bribery of foreign officials and “restore the integrity of American businesses” abroad.⁶ Essentially, the FCPA requires that no officer, director, employee, or agent of a company shall corruptly offer to pay something of value or give something of value to any foreign official for the purpose of “(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage.”⁷

B. U.S. GOVERNMENT’S FOCUS ON FCPA VIOLATIONS

One of the main reasons U.S. companies should be worried about potential FCPA violations is the U.S. government’s recent focus on ensuring that U.S. companies are acting as if they were in the United States when abroad. Since 2005, the agencies responsible for enforcing the FCPA, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), have ramped up their efforts to prosecute companies in violation of the FCPA.⁸ The U.S. government decided to substantially increase the amount of resources dedicated to FCPA enforcement⁹ leading to a record high number of companies being prosecuted for FCPA violations in 2010.¹⁰

In 2004, there were only five enforcement actions conducted by the SEC and DOJ, while in 2010 their enforcement actions rose to a total of seventy-four.¹¹ A reason that may have contributed to the increase in the number of enforcement actions is the Sarbanes-Oxley Act, which requires companies to review and report failures in books and records testing, resulting in the detection of more violations.¹²

The increased focus on FCPA enforcement can be seen in the opening of new SEC offices focused on enforcement, an increase in FBI agents focused on enforcement, and financial incentives being offered through

4. *Foreign Corrupt Practices Act*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Aug. 14, 2012).

5. *Doing Business in Latin America*, *supra* note 2, at 2.

6. *Id.*

7. 15 U.S.C. § 78dd-1(a)(1)(A) (2006).

8. Bethany Hengsbach, *Aggressive FCPA Enforcement Persists: Increased Activity, Along With Recent Legal Developments, Mandate that Companies Remain Vigilant*, JDSUPRA (Feb. 2, 2012), <http://www.jdsupra.com/legalnews/aggressive-fcpa-enforcement-persists-in-80168/>.

9. *Id.*

10. Thomas R. Fox, *FCPA Enforcement: Why the Increase Between the First 25 Years and the Last 5?*, FCPA COMPLIANCE & ETHICS BLOG (Mar. 11, 2011, 6:48 AM), <http://tfoxlaw.wordpress.com/2011/03/11/fcpa-enforcement-why-the-increase-between-the-first-25-years-and-the-last-5/>.

11. *Id.*

12. *Id.*

legislation to whistleblowers.¹³ With all of the resources and focus being directed towards enforcement of the FCPA, companies doing business in Latin America have good reason to be careful.

C. LATIN AMERICA'S RISK OF CORRUPTION

Latin America is of special importance to U.S. companies conducting business abroad because of its proximity to the United States and its potential for more than 500 million new consumers.¹⁴ In addition to this, the amount of Free Trade Agreements (FTAs) with Latin American countries is increasing. The United States now has signed a FTA with the following Latin American countries: Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru, and Panama.¹⁵ Significantly, the United States only has nineteen FTAs and, out of those, ten are with countries from Latin America.¹⁶ The barriers to entry in Latin America for U.S. businesses are becoming less and less difficult to overcome, creating attractive business opportunities for U.S. companies.

Of the FCPA actions brought by the SEC in the past two years, over half have involved bribery in Latin America.¹⁷ As mentioned previously, most Latin American countries have been identified by the Corruption Perceptions Index as being highly vulnerable to corruption.¹⁸ Only two Latin American countries are considered to be on the same level with the United States, perceived as "very clean."¹⁹

In addition, recent cases indicate that U.S. companies most at risk for FCPA violations conduct business in regions where state-owned companies dominate the market.²⁰ As mentioned previously, "the FCPA prohibits any domestic individual or business entity from making payments to a 'foreign official' for the purpose of obtaining or retaining business."²¹ The FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof."²² Thus, "whether an employee of a state-owned company is a

13. Hengsbach, *supra* note 8.

14. *What You Should Know about the Foreign Corrupt Practices Act*, *supra* note 2, at 1.

15. *Free Trade Agreements*, OFFICE OF U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/> (last visited Aug. 14, 2012).

16. *Id.*

17. Rose Romero et al., *Energy Companies Find Profits, Peril in Latin America*, NAT'L L.J., Apr. 9, 2012, available at http://www.tklaw.com/files/Publication/fd01cdc5-37b0-4d12-8c7c-a284024e8114/Presentation/PublicationAttachment/dac6af25-07b0-4cf3-b0d9-6cddb17453d/NLJ%20FCPA%20Article_Romero%2c%20Roper%2c%20Stockham.pdf.

18. *See Corruption Perceptions Index 2011*, *supra* note 3.

19. *See id.*

20. Romero et al., *supra* note 17.

21. Alison N. Kleaver & Joseph Barton, *Meaning Of FCPA's "Foreign Official" Causes Uncertainty For Companies Doing Business Abroad*, LATIN AM. BLOG (May 24, 2012), <http://www.latinlawblog.com/2012/05/articles/fcpa/meaning-of-fcpa-foreign-official-causes-uncertainty-for-companies-doing-business-abroad/>.

22. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

foreign official depends . . . upon whether state-owned companies are ‘instrumentalities,’” but the case law on “instrumentalities” is convoluted.²³

Many of the Latin American countries have large business structures that are state-owned. “For example, the governments of Brazil, Colombia, Mexico and Venezuela wholly own the oil companies in their respective countries,” thus making it difficult to know when a U.S. company is more at risk for FCPA violations.²⁴

The lack of anti-bribery and anti-corruption laws in Latin American countries does not help the situation. Brazil, one of the most robust economies in Latin America, currently only has anti-bribery laws that hold individual persons liable for bribery acts, but has no equivalent provisions that apply to corporate liability.²⁵

Recently, two U.S. law firms and twelve Latin American law firms jointly surveyed 439 respondents across fourteen Latin American countries to try and gauge the amount of corruption that exists in those countries.²⁶ Two key highlights from the survey are (1) that only 28 percent of the respondents believe that anti-corruption laws are effective in the country they work in, and (2) that “[h]alf of all respondents believe that their company has lost business to competitors making illicit payments in the region.”²⁷

This information points to the fact that some Latin American countries still have some ground to cover in order to bring their anti-bribery and anti-corruption laws up to U.S. standards. In addition, a lack of anti-bribery and anti-corruption laws cultivates an environment in which officials at the local level expect illicit payments from international companies doing business in their town.²⁸ This correlates with one of the key highlights from the survey mentioned above: companies that do not partake in the bribery tactics lose a competitive edge to companies who are willing to play the game.²⁹

D. A CHANGING LANDSCAPE

As mentioned above, many of the Latin American countries where American companies do business do not have adequate laws in place to battle corruption and bribery schemes. Since the increased enforcement of the FCPA, American businesses are taking matters into their own hands by making sure their compliance programs are advanced enough to

23. Kleaver & Barton, *supra* note 21.

24. Romero et al., *supra* note 17.

25. Matteson Ellis, *Lessons from the Mensalão: Brazil's Largest-Ever Corruption Trial*, CORP. COMPLIANCE INSIGHTS (Aug. 22, 2012), <http://www.corporatecomplianceinsights.com/lessons-from-the-mensalao-brazils-largest-ever-corruption-trial/>.

26. Thomas R. Fox, *Latin American Anti-Bribery Survey*, FCPA COMPLIANCE & ETHICS BLOG (July 5, 2012, 1:51 AM), <http://tfoxlaw.wordpress.com/2012/07/05/latin-american-anti-bribery-survey/>.

27. *Id.*

28. Ellis, *supra* note 1.

29. Fox, *supra* note 26.

detect and handle any corruption that might occur within the corporation while operating abroad.³⁰

For example, in Mexico, United States-based energy companies have implemented stable compliance programs that have communicated to foreign officials that bribes are no longer tolerated; rather, they are to be frowned upon.³¹ In a coastal town where many of these companies do business, local officials know not to expect any extra payment or benefit because of the repetitive FCPA training by the U.S. energy companies.³² It seems that the uniform action taken by these companies has created an environment where bribes are not the norm.³³

An ever-increasing number of corporations have been upgrading and implementing advanced compliance programs to deal with the corruption issues they face in Latin America.³⁴ In the joint survey mentioned above, 93 percent of the 439 respondents from multinational companies said their company had taken steps to protect the company from corruption risk.³⁵ In addition, the survey stated that 75 percent of the respondents said their company had anti-corruption training.³⁶ The numbers for local and regional companies were not as good as for multinational companies — only 75 percent said their company had taken steps to protect the company from corruption risk, and only 35 percent had anti-corruption training available for their employees.³⁷

For U.S. companies doing business in Latin America, it is of high importance they understand the risks posed by the region. Latin America is a growing region full of business opportunities, but the compliance industry in Latin America lags behind. Because of this, U.S. companies must implement their own compliance programs in order to guard themselves from the broad provisions of the FCPA.

II. RENEWABLE ENERGY THRIVES IN BRAZIL

In recent times, countries all over the world are beginning to place great emphasis on using clean energy. Whether it is because of global warming or to import less energy, clean energy seems to be the wave of the future, and while some countries have turned away from this trend, Brazil has welcomed it with open arms.

Brazil has been recognized as a growing leader in the use of renewable energy. Brazil's Energy Research Company recently released the 2011

30. See Ellis, *supra* note 1.

31. See *id.*

32. *Id.*

33. *Id.*

34. See Samuel Rubenfield, *Latin America Surveys Find Gaps in Corporate Anti-Corruption Measures*, WALL ST. J. (June 14, 2012, 10:13 AM), <http://blogs.wsj.com/corruption-currents/2012/06/14/latin-america-survey-finds-gaps-in-corporate-anti-corruption-measures/>.

35. *Id.*

36. *Id.*

37. *Id.*

National Energy Balance Report, which provides a detailed analysis of energy usage in Brazil.³⁸ The most staggering fact from this report is that nearly 86 percent of Brazil's electricity in 2010 originated from renewable energy sources.³⁹ This number is quite impressive compared to other economic superpowers of the world; for example, the United States was only at 13 percent.⁴⁰

Brazil has used a multi-step approach in order to nurture a strong and efficient renewable energy market. It began with Brazil's implementation of Law 10.438, also known as the Programme of Incentives for Alternative Electricity Sources (PROINFA).⁴¹ Brazil instituted policies that coordinated with PROINFA to allow renewable energy businesses better access to funds via their state bank, Brazilian Development Bank (BNDES).⁴² Brazil also uses an auction-based system to award long-term contracts for energy business.⁴³ All of these decisions have helped Brazil build a successful renewable energy sector, a sector that Brazil hopes to become a world leader in.

A. PROINFA

In 2002, Brazil enacted its flagship act, PROINFA, to cultivate the renewable energy sector.⁴⁴ PROINFA was created by Brazil in response to the energy crisis of 2001 that plagued the nation and stunted its productive capacity and growth.⁴⁵ PROINFA's main goal is to have 10 percent of all electricity produced in the country come from renewable energy sources.⁴⁶ The program is split into two phases: (1) promoting the use of

38. Charles Kennedy, *Renewable Energy Supplied 88.8% of Brazil's Electricity in 2011*, OILPRICE.COM (June 19, 2012, 10:01 PM), <http://oilprice.com/Latest-Energy-News/World-News/Renewable-Energy-Supplied-88.8-of-Brazils-Electricity-in-2011.html>.

39. *Balanco Energético Nacional Ano Base 2010*, MINISTÉRIO DE MINAS E ENERGIA 16 (2011), http://www.forumdeenergia.com.br/nukleo/pub/resultados_pre_ben_2010.pdf.

40. *How Much of Our Electricity Is Generated from Renewable Energy?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energy_in_brief/article/renewable_electricity.cfm (last updated June 27, 2012).

41. See Lei No. 10.438, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 29.4.2002 (Braz.), available at http://www.planalto.gov.br/ccivil_03/Leis/2002/L10438compilada.htm.

42. See Stephan Nielsen, *Local Content Rule Thwarts Solar Development in Brazil*, RENEWABLE ENERGY WORLD (Aug. 9, 2012), <http://www.renewableenergyworld.com/rea/news/article/2012/08/local-content-rule-thwarts-solar-development-in-brazil>.

43. Jared Anderson, *Data Show Brazil's Wind Energy Market Is Wide Open for Business*, AOL ENERGY (Aug. 27, 2012), <http://energy.aol.com/2012/08/27/data-show-brazil-s-wind-energy-market-is-wide-open-for-business/>.

44. *Programme of Incentives for Alternative Electricity Sources (PROINFA)*, WORLD RESOURCES INST., <http://projects.wri.org/sd-pams-database/brazil/programme-incentives-alternative-electricity-sources-proinfa> (last visited Aug. 28, 2012) [hereinafter *PROINFA*].

45. Marcos Chaves Ladeira & André Vertullo Bernini, *Brazil Encourages Alternative Electric Energy Development: Taking a Closer Look at Brazil's PROINFA Program*, BRAZILIAN-AMERICAN CHAMBER COM. (May 20, 2012), <http://brazilcham.com/print/65568>.

46. *Id.*

renewable energy (*i.e.*, wind, biomass, and small hydro) via various incentives and subsidies, and (2) converting those renewable energies from the first phase into a 10 percent renewable energy share of total annual energy consumption for Brazil.⁴⁷

B. BNDES FINANCING

One of the key benefits for businesses looking to undertake renewable energy projects in Brazil is the generous financing through Brazil's state bank.⁴⁸ The projects are financed via the state-bank, BNDES, which is the chief federal agency for long-term funding of Brazil's development.⁴⁹ The BNDES offers long-term financing with low interest rates for renewable energy projects—such as wind—if a certain percentage of the parts for the project are made in Brazil.⁵⁰ For example, the current requirement is 60 percent for wind projects.⁵¹

C. AUCTION-BASED SYSTEM

Another successful contributor to Brazil's renewable energy growth is the regulated auction system used to award contracts.⁵² These contracts have been handed out since 2009⁵³—using the auction system—and have been consistently given to several companies since then.⁵⁴ The wind project auctions have attracted several investors because the price of wind power in the latter half of 2011 fell below the price of electricity generated by natural gas.⁵⁵ These auctions have created an environment of competition across the Brazilian energy sector, forcing many companies to be more competitive with their pricing.⁵⁶

Brazil's continued success in the renewable energy sector is a culmination of several different policies synthesizing to create a thriving renewable energy sector. Brazil's emergence into renewable energy was a fairly recent and rapid ascension, and it will be interesting to see if Brazil can sustain that community in the long-term.

47. *PROINFA*, *supra* note 44.

48. *See* Ladeira & Bernini, *supra* note 45.

49. *Id.*

50. *See* Christiana Sciaudone, *Bank Set to Further Tighten Brazil's Wind Turbine Content Rules*, RECHARGE (Aug. 24, 2012), <http://www.rechargenews.com/energy/wind/article320778.ece>.

51. *See id.*

52. *See Analysis of the Regulatory Framework in Brazil 2011*, GWEC, <http://www.gwec.net/publications/country-reports/analysis-regulatory-framework-brazil/#> (last visited Dec. 13, 2012).

53. *Id.*

54. *See* Luiz Claudio S. Campo & Lucio Teixeira, *Renewable Energy Recap: Brazil*, RENEWABLEENERGYWORLD.COM (Jan. 2, 2012), <http://www.renewableenergyworld.com/rea/news/article/2012/01/renewable-energy-recap-brazil>.

55. *Id.*

56. *Id.*

III. MEXICO AND THE NEW PRI: ENRIQUE PEÑA NIETO

In early July, Enrique Peña Nieto was chosen by the citizens of Mexico to be the country's new leader.⁵⁷ President Peña Nieto's win over his counterparts in rival parties was not a big surprise, but the fact that he belonged to the Institutional Revolutionary Party (PRI) was.⁵⁸ The PRI dominated the political realm in Mexico for seventy-one years until 2000 when Vicente Fox of the National Action Party (PAN) beat out the PRI.⁵⁹ Looking back on the seventy-one year reign by the PRI, the party's control in Mexico is remembered for its "corruption, electoral fraud and occasional bouts of brutal authoritarianism," which is why many in Mexico are not fully convinced that President Peña Nieto was the right answer.⁶⁰ But President Peña Nieto recognized this and recently stated, "[t]he Mexican people have given our party a second opportunity. We will honor it with results."⁶¹ President Peña Nieto hopes to reaffirm the people of Mexico's confidence in the PRI by following through with his campaign promises, which were primarily to stir economic growth via tax reform and oil privatization and to reduce the vast amount of drug-related violence that has plagued Mexico for years.⁶²

A. ECONOMIC DEVELOPMENT

One of the foundations for Mr. Peña Nieto's presidential campaign was his pledge to improve economic development in Mexico and create more jobs for the Mexican people.⁶³ According to Luis Videgaray, Mr. Peña Nieto's campaign manager, the first priority after the July 1 victory was to pass corporation-aimed tax reform.⁶⁴ Mexico currently has one of the "lowest tax takes in the western hemisphere," and the tax reform that is envisioned by President Peña Nieto is one that will help the Mexican government raise more revenue and come more in line with the international

57. Ruben Navarrette Jr., *Is Peña Nieto good news for Mexico?*, CNN (July 3, 2012, 2:24 PM), <http://edition.cnn.com/2012/07/03/opinion/navarrette-mexico-election/index.html>.

58. See Pamela K. Starr, *Enrique Peña Nieto: Mexico's new face*, L.A. TIMES (July 6, 2012), <http://articles.latimes.com/2012/jul/06/opinion/la-oe-starr-mexico-president-20120706>.

59. Navarrette, *supra* note 57.

60. See Daniel Trotta, *Mexican Election Could Return Old Rulers to Power*, CHI. TRIB. (July 1, 2012), http://articles.chicagotribune.com/2012-07-01/news/sns-rt-us-mexico-electionbre85slg3-20120629_1_enrique-pena-nieto-pri-mexican-election.

61. Nacha Cattán, *Peña Nieto Prosperity Vow for Mexico Means Mastering the PRI*, BLOOMBERG (July 2, 2012, 12:10 PM), <http://www.bloomberg.com/news/2012-07-02/pena-nieto-prosperity-vow-for-mexico-means-mastering-his-party.html>.

62. See Adam Thomson, *Peña Nieto vows to push on with reforms*, FIN. TIMES (July 3, 2012, 2:07 AM), <http://www.ft.com/intl/cms/s/0/8b96dd16-c4a1-11e1-a98c-00144feabdc0.html#axzz26UebjMeG> (requires registration).

63. Rory Carroll, *Enrique Peña Nieto: hopes, fears and swoons for Mexico's would-be president*, GUARDIAN (June 29, 2012, 9:40 AM), <http://www.guardian.co.uk/world/2012/jun/29/enrique-pena-nieto-mexico-elections>.

64. Adam Thomson, *Peña Nieto pledges business tax reform*, FIN. TIMES (June 21, 2012, 9:59 AM), <http://www.ft.com/intl/cms/s/0/d6df6b08-baec-11e1-81e0-00144feabdc0.html#axzz24ulfcvck> (requires registration).

standards.⁶⁵ The plan for President Peña Nieto is to close some of Mexico's tax loopholes that allow Mexico's biggest companies to not pay their fair share.⁶⁶

In addition to tax reform, President Peña Nieto hopes to improve the Mexican economy by adding an element of privatization to Mexico's state-owned oil industry, currently dominated by Pemex.⁶⁷ The plan is to open up the oil sector and provide private capital in order for it to become more efficient and effective.⁶⁸ President Peña Nieto has been in close talks with the United States about his energy and infrastructure plans in Mexico, which would include private sector investments in Mexico's oil monopoly and shale gas industry.⁶⁹

In order to achieve these reforms, President Peña Nieto will have to negotiate and compromise across party lines because the PRI failed to achieve a majority in Congress.⁷⁰ This will be key if President Peña Nieto wants to achieve his oil privatization reform pledge, because a constitutional amendment will likely be required.⁷¹ The Mexican Constitution states, "[i]n the Nation is vested the direct ownership of *all natural resources* of the continental shelf and the submarine shelf of the islands"⁷² In order for a constitutional amendment to be passed, a two-thirds majority will be necessary, which the PRI does not currently hold.⁷³ One of the primary reasons for a shift from PAN back to the PRI is the immense drug-violence in Mexico, which has resulted in more than 55,000 deaths since 2007.⁷⁴ President Peña Nieto pledged during his campaign to create an elite federal security force that will coordinate with local police to track down drug traffickers.⁷⁵ In order to do this, President Peña Nieto needs to acquire the cooperation of the state governors and convince them to adjust their security institutions to combat drug violence.⁷⁶

It seems that President Peña Nieto's campaign pledges of drug and economy policy reform are all contingent on reaching out to other party leaders for cooperation. President Peña Nieto will need to come through on at least some of his campaign pledges if the PRI is to reassure its new image of modern democracy with Mexican doubters.

65. *Id.*

66. *Id.*

67. See Andres Oppenheimer, *Mexico will not return to third world foreign policy*, MIAMI HERALD (July 4, 2012), <http://www.miamiherald.com/2012/07/04/2880840/mexico-will-not-return-to-3rd.html>.

68. See Thomson, *supra* note 64.

69. See Oppenheimer, *supra* note 67.

70. Cattán, *supra* note 61.

71. *Id.*

72. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (emphasis supplied).

73. Cattán, *supra* note 61.

74. Trotta, *supra* note 60.

75. Cattán, *supra* note 61.

76. *Id.*

