

Going South: What U.S. Companies Need To Know About The FCPA And Doing Business In Latin America

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Like the legendary Spanish explorers, Coronado, Pizarro and Cortes, every day more and more U.S. companies are turning their eyes south to Latin America looking for golden opportunities. With over 500 million potential consumers, rapidly expanding economies and opportunities to literally “get in on the ground floor” in hundreds of industries, the incentives to explore business opportunities to the South of the United States are many.

But leaving the United States does not mean leaving behind all U.S. law. The Foreign Corrupt Practices Act (FCPA), makes it a crime for U.S. companies, domestic concerns, or foreign nationals doing business in the United States, as well as organizations and individuals acting on their behalf (e.g. Agents, Representatives, joint ventures), to provide anything of value to any foreign government official in return for: 1) obtaining or retaining business; 2) influencing a foreign official to either do, or not do, an act in violation of his official duty; 3) influencing any decision by a foreign government official related to his duties. There are also accounting requirements for publicly traded companies. The FCPA is a complex law, with multiple requirements and exceptions. The law is enforced by the U.S. Department of Justice criminally and the Securities and Exchange Commission civilly. Penalties for violation can be severe, criminally: e.g., fines up to \$2 million for entities and up to 5 years in prison for individuals and \$250,000 in fines, civilly enormous “disgorgements” and fines are possible (e.g., in 2013, one U.S. company paid over \$380 million to settle FCPA allegations).

All businesses involved in any way with overseas business, or planning to do so in the foreseeable future, should obtain quality advice about how to ensure that their activities will pass the all but inevitable legal scrutiny of the federal government.

Any U.S. company thinking about operating in Latin America needs to be especially cautious. Governmental corruption is perceived to be great in that part of the world and any company operating there needs to be aware that the U.S. authorities view business activity in Latin America to a large extent through that perception. One of the most important “Red Flags” that U.S. criminal and civil regulators employ to decide which companies and business activities to scrutinize is the Corruption Perception Index (“CPI”), promulgated yearly by Transparency International, a leading international nongovernmental organization dedicated to fighting global governmental corruption. The CPI rates countries all over the world for the prevalence of governmental corruption. A quick glance at the CPI for Latin American countries makes apparent their very large corruption perception problem, which will have very real consequence for any US companies wanting to do business in those countries. 180 is the highest “Corruption” rating possible in the CPI.

What these ratings mean is that if you are going to do business in many of the most dynamic Latin American countries, you need to take special precautions because situations where your company may be approached in a

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potentially corrupt context are greater and because intense U.S. federal scrutiny is far more likely.

United States business should and, indeed, must pursue the opportunities that lie to the South, but as all of us have been warned, forewarned is forearmed. So, by all means, go south young businessman and businesswoman, but go carefully and armed with good counsel.