One Firm Worldwide℠

WHITE PAPER

February 2018

Peru and Argentina: New Bribe Regimes Put Companies at Risk

In reaction to fallout from the recent Odebrecht scandal, and aided by shifting political winds, Peru and Argentina have enacted significant corporate anticorruption legislation. Both countries have implemented laws establishing a corporate anticorruption regime, expanding the existing framework of individual criminal liability to criminal liability for the corporations themselves. With these actions, Peru and Argentina have demonstrated an increased commitment to combat global corruption.

This Jones Day *White Paper* summarizes the key provisions of the new anticorruption statutes in Peru and Argentina—covering application and jurisdiction, penalties, and corporate compliance standards—as well as certain developments and characteristics that companies with a presence in these countries should consider as they prepare for enforcement.

TABLE OF CONTENTS

PERU 1

Key Provisions 1

Penalties 2

Adequate Compliance as a Complete Defense to Liability 3

ARGENTINA 3

Key Provisions 3

Defenses and Mitigating Measures 4

POLITICAL CLIMATE AND ENFORCEMENT CONSIDERATIONS 4

IMPORTANCE OF COMPLIANCE AND PREVENTIVE MEASURES 5

FURTHER INFORMATION 5

AUTHORS 5

ADDITIONAL LAWYER CONTACTS 5

In response to fallout from the Odebrecht scandal, which began in Brazil in 2014 and swept through Latin America, and aided by shifting political winds, Peru and Argentina have recently enacted significant corporate anticorruption legislation. The impact of the Odebrecht scandal—in which Peru's former president, Alejandro Toledo, was accused of accepting $20 million in bribes from Brazilian construction giant Odebrecht in exchange for infrastructure contracts—has been profound, leading to investigations of corruption involving Odebrecht as well as other actors across the public sector.

In Peru, for example, three former presidents, among various other public officials, have been accused of accepting payoffs and are under varying levels of investigation, whereas the current president, Pedro Pablo Kuczynski, barely survived an impeachment attempt in December 2017 for the same reasons. Similarly, in Argentina, former economy minister and vice president Amado Boudou was recently arrested on racketeering and money laundering charges, former planning minister Julio De Vido was imprisoned in October 2017 on corruption charges, and a federal judge indicted ex-president Cristina Kirchner, calling on Congress to remove her immunity as current senator so that she may also be prosecuted.

In response to widespread protests and increasing evidence of government corruption, both Peru and Argentina have enacted laws establishing a corporate anticorruption regime, expanding the existing framework of individual criminal liability to independent liability for the corporations themselves. In Peru, the new legislation became effective on January 1, 2018; Argentina's goes into effect on March 1, 2018. By enacting these measures, Peru and Argentina have demonstrated an increased commitment to combat global corruption and to comply with international anticorruption standards, including the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials.

This *White Paper* provides a summary of the key provisions of the new anticorruption statutes in Peru and Argentina, as well as certain developments and characteristics that companies with a presence in these countries should strongly consider as they prepare for enforcement.

PERU

In 2016, Peru passed Law No. 30424, introducing a new corporate criminal liability regime for foreign bribery. In an effort to support its accession efforts to the OECD and improve compliance with other international commitments, and, no doubt, in response to increasing revelations of government corruption, Peru also passed Legislative Decree No. 1352, effective January 1, 2018, significantly amending and expanding the scope of Law No. 30424.

Under Law No. 30424 and Legislative Decree No. 1352 (together, the "Corporate Corruption Acts"), corporations may be investigated, prosecuted, and penalized for committing the crimes of transnational and domestic bribery of public officials or servants, as well as money laundering and financing of terrorism. The corporate liability contemplated by these provisions is autonomous; that is, it applies independently of any prosecution or conviction of an individual. If convicted, companies may be subject to fines of up to six times the benefit expected from the commission of the crime, complete debarment from government contracts, and even dissolution.

However, companies may be exempt from liability if, for example, they demonstrate the existence of an adequate compliance program or show that the prohibited conduct was not committed under the orders or authorization of company partners, directors, or administrators. The Securities Market Superintendency, or "SMV" in Peru, is the government agency responsible for evaluating the adequacy of compliance programs. Although the SMV previously estimated that further regulations would be released by the end of December 2017, recent reports state that such regulations are still pending. Nevertheless, the Corporate Corruption Acts provide a minimum set of requirements for compliance programs, which companies should utilize in the meantime. In addition, where complete defenses to liability are inapplicable, companies also have a variety of options for potential leniency, such as cooperating with the prosecuting authorities and remedying any resulting harms.

Key Provisions

Application and Jurisdiction. The Corporate Corruption Acts apply to the following legal entities: private law entities,

associations, foundations, nongovernmental organizations, nonregistered committees, *de facto* companies, administrative bodies of autonomous states, state-owned companies, and partially state-owned companies. These legal entities are liable when the prohibited conduct is committed in their name or on their behalf, whether directly or indirectly, by: (i) their partners, directors, *de facto* or legal administrators, legal or attorneys-in-fact, or affiliates or subsidiaries; (ii) a natural person subject to the authority and control of the persons mentioned in (i) above, who committed the offense under their orders or authorization; or (iii) a natural person whose commission of the crime was possible because the persons mentioned in (i) above failed to properly supervise or monitor the entrusted activity.

Parent companies may be sanctioned whenever the natural persons of their affiliates or subsidiaries have committed the prohibited conduct under the orders, authorization, or with the consent of the parent company. However, legal entities are *not* liable in cases where the natural person committed the offense(s) exclusively for his or her own benefit, or for the benefit of a third party. In addition, the Corporate Corruption Acts in Peru provide for successor liability. In the case of a merger or spin-off, the acquiring or resulting company can be sanctioned only with a fine (unless the merger or spin-off was done with the intent of avoiding criminal liability, in which case this limitation does not apply). Significantly, the legal entity can avoid liability entirely by implementing an adequate compliance program *prior* to the merger or spin-off, pursuant to the requirements summarized in "Adequate Compliance as a Complete Defense to Liability," below.

Prohibited Conduct. Under the Corporate Corruption Acts, legal entities may be prosecuted for the following crimes, defined in the Peruvian Penal Code:

- **Active Transnational Bribery.** Offering, promising, or providing any gift or advantage to a public official of a foreign government or of a public international organization, in order to obtain or retain business or any other improper advantage in conducting international economic or commercial activities. This mirrors the prohibitions in the Foreign Corrupt Practices Act ("FCPA") and the UK Bribery Act, demonstrating further convergence with global anticorruption standards.
- **Generic Active Bribery.** Offering, giving, or promising a donation, advantage, or benefit to a civil or public servant in exchange for them performing, or failing to perform, acts that either comport with or violate his or her official duties. Notably, this provision (along with Specific Active Bribery, below) relies in part on a *quid pro quo* concept and includes donations on the list of potentially prohibited conduct. As in the United States and the United Kingdom, charitable contributions have become an increasing focus of anticorruption enforcement actions. Companies should take special care to ensure that their donations are made with the proper purpose and to legitimate entities only.
- **Specific Active Bribery.** Offering, giving, or promising a donation, advantage, or benefit to a magistrate, prosecutor, expert, arbitrator, member of the administrative tribunal, or someone in a similar position, with the intent to influence his or her decision on a matter that has been submitted for his or her consideration. The likely purpose of this measure is to strengthen the independence of the judiciary and of the prosecuting authorities.

In addition, the Corporate Corruption Acts impose corporate criminal liability on entities that finance terrorism and engage in money laundering.

Penalties

Administrative Fines. Entities may be liable for up to six times the benefit obtained, or expected to be obtained, from the commission of the bribery. This is similar in concept to the U.S. Alternative Fines Act, which allows a court to increase FCPA-mandated fines up to twice the amount the offender stood to gain from the illicit conduct, but it triples the potential exposure. If this benefit cannot be quantified, however, the Corporate Corruption Acts provide a mechanism for calculating the amount of the fine based on the organization's annual income. For example, if the organization's annual income exceeds 1,700 tax units (in 2017, approximately US$2,139,169), the fine is at least 500 (approximately US$629,167) and not more than 10,000 (approximately US$12,586,995) tax units.

Judicial Penalties. In addition, entities may be subject to various judicial penalties, including suspension of the company's activities for at least six months and up to two years; temporary or permanent prohibition from engaging in the same

types of activities as those in which the crime was committed, facilitated, or concealed; debarment from government contracts; cancellation of licenses, rights, or other administrative or municipal authorizations; permanent or temporary closure of establishments or facilities; and even dissolution. In determining whether any of these penalties apply, the judge will consider a range of factors, including the severity of the conduct, the economic capacity of the legal entity, the extent of the danger or damage caused, the economic benefit obtained from the commission of the crime, the motive for the commission of the crime, and the position held by the individual(s) who violated their duties within the entity.

Mitigating Circumstances. The following factors may mitigate the liability of the legal entity: substantive cooperation in the investigation of the criminal act; preventing the materialization of any harmful consequences of the crime; the total or partial repair of the damage; the adoption and implementation, prior to trial, of a compliance program (see below for how this may operate as a complete defense to liability); and a voluntary confession.

Aggravating Circumstances. The existence of specific unit or group within the legal entity whose purpose or activity is unlawful constitutes an aggravating circumstance. In addition, where the legal entity commits any of the crimes included in these provisions within five years after judicial penalties have been imposed, the judge may increase or extend these penalties up to one half above the legal maximum provided.

Adequate Compliance as a Complete Defense to Liability

Corporate Compliance. An organization found to have committed any of the offenses under these provisions is exempt from liability if, prior to the commission of the offense, it adopted and implemented a corporate compliance program appropriate to the nature, risks, needs, and characteristics of the entity, and consisting of surveillance and control measures intended to prevent these crimes or to significantly reduce their commission. Such a program must consist of at least the following elements: (i) a person in charge of prevention, appointed by the highest administrative body in the organization; (ii) identification, evaluation, and mitigation of risks to prevent the commission of the aforementioned crimes; (iii) implementation of complaint procedures; and (iv) dissemination and periodic training on the prevention model.

ARGENTINA

On November 8, 2017, the National Congress of Argentina passed the Law on Corporate Criminal Liability ("CCL"), creating an anticorruption corporate liability regime and bringing Argentina into compliance with its obligations under the OECD. The CCL will become effective on March 1, 2018. As with the statutes enacted in Peru, the CCL introduces corporate criminal liability for various forms of corruption, similarly operating autonomously and independently of any individual prosecutions or convictions. The CCL mirrors the regime in Peru in criminalizing domestic and transnational bribery, but also expands corporate liability to potentially related conduct, such as false accounting and influence peddling. Moreover, the CCL provides a defense to liability based on an adequate compliance program, although, unlike Peru, it also requires the entity to have detected and reported the crime as a result of its own voluntary investigation. In addition, companies may be exempt from liability if they can show that the person who committed the offense acted solely for his or her own benefit. They may also mitigate their liability up to 50 percent of the minimum fine by entering into a cooperation agreement with prosecuting authorities, which creates a significant set of obligations. Argentina will likely release additional guidance on enforcement of the CCL after receiving the results of an OECD Integrity Review later in 2018.

Key Provisions

Application and Jurisdiction. Legal entities are liable when the prohibited conduct is committed, directly or indirectly, with the legal entity's authorization or in its name, interest, or benefit; liability attaches even when the person committing the offense lacked the authority to act on behalf of the entity, as long as the relevant management ratified his or her conduct. On the other hand, the legal entity will *not* be liable if the person who committed the crime acted solely for his or her exclusive benefit, and without generating any benefit for the legal entity. As is now the case in Peru, in the event of a merger or other corporate modification, liability is transferred to the resulting or acquiring company.

Prohibited Conduct. The CCL criminalizes both domestic and transnational bribery, defining the latter as offering, promising, or giving, whether directly or indirectly, sums of money, gifts, favors, promises, advantages, or any other object of pecuniary

value to a public official of a foreign state or of an international public organization, in order to induce that official to use his or her influence in an economic, financial, or commercial transaction, or to induce him or her to act, or omit doing any act, related to the exercise of his or her official public duties.

Moreover, the CCL prohibits influence peddling; negotiations incompatible or inappropriate for public office; payments made to public officials who illegally demand taxes, fees, or gifts; illicit enrichment of officials and employees; and the production of false balance sheets and reports to conceal any bribery or to engage in influence peddling. The latter prohibition specifically reflects increasing compliance with global anticorruption standards, similar to the FCPA, which criminalizes false entries in company books and records.

Penalties. Legal entities may be subject to the following penalties: a fine of two to five times the benefit obtained or expected to be obtained from the commission of the crime; total or partial suspension of activities for up to 10 years; suspension for up to 10 years of any public services, work, bids, or any other activity linked to the government; dissolution and liquidation of the legal entity (but only when the entity was created for the sole purpose of committing the crime, or where the prohibited conduct constituted the entity's main activity); loss or suspension of any state benefits; and the publication of the conviction at the expense of the legal entity.

In making this determination, judges will take into account certain factors, including the quantity and hierarchy of officials, employees, and collaborators involved in the crime; the failure to supervise the activities of the participants; the extent of the damage caused; the amount of money involved in the commission of the crime; the size, nature, and economic capacity of the legal entity; any effort to mitigate or repair the damage; and subsequent behavior and recidivism.

Defenses and Mitigating Measures

- **Effective Collaboration Agreements.** Entities can receive a 50 percent reduction of the minimum fine if they enter into "effective collaboration agreements" with prosecutors. Under these agreements, entities are responsible for providing useful, verifiable information regarding the facts of the crime, including the identification of the participants, as well assisting in recovering the proceeds. In addition, the entity must relinquish the benefits it received from the commission of the crime, as well as any assets that would presumably be confiscated in the event of a criminal penalty; repair the damage caused; take the initiative to provide services to the community; discipline those involved in the commission of the crime; and implement (or improve) a compliance program pursuant to the requirements below.

- **Exemption from Liability.** Entities that: (i) detect and report the crime as a result of their own internal investigation; (ii) demonstrate that an adequate compliance program existed *prior* to the prohibited conduct, which meets the requirements for such programs set forth by this law; *and* (iii) disgorge the improper benefits obtained from the commission of the crime, may be fully exempt from liability. These three conditions result in a higher standard for the establishment of a complete defense than the Corporate Corruption Acts in Peru or the FCPA in the United States.

- **Compliance Program.** In order to establish the aforementioned defense to liability, or to obtain leniency under an effective collaboration agreement with prosecuting authorities, the legal entity must implement a compliance program consisting of internal procedures promoting integrity, supervision, and control, aimed at preventing, detecting, and correcting the conduct prohibited by the CCL. This compliance program must consist, at a minimum, of a code of ethics and conduct applicable to all directors, administrators, and employees; specific rules clarifying illegal conduct in the context of financial interactions with the public sector, such as bidding processes and administrative contracts; and periodic compliance training for directors, administrators, and employees. Compliance programs may also incorporate additional measures, such as internal reporting procedures, whistleblower protection policies, and effective sanctions for violations of the code of ethics and conduct.

POLITICAL CLIMATE AND ENFORCEMENT CONSIDERATIONS

The passage of the Corporate Corruption Acts in Peru and the Law on Corporate Criminal Liability in Argentina signal a rapidly decreasing tolerance for corruption, animated, perhaps, by the downfall of powerful political figures. Despite some

tensions, the introduction of corporate liability in the criminal context, the prosecution of an unprecedented number of government officials, and the widespread public support for anticorruption measures in both Peru and Argentina indicate a landmark shift toward a greater commitment to the rule of law.

IMPORTANCE OF COMPLIANCE AND PREVENTIVE MEASURES

In demonstrating governmental acceptance and implementation of global anticorruption standards, these new corporate criminal liability regimes also expose companies operating in Peru and Argentina to new and significant risks. Given that these laws provide authorities with greater power to prosecute corporate corruption and bribery, and given that potential sanctions are quite severe, companies can best protect themselves by implementing comprehensive compliance programs to help ensure that risks to the organization are appropriately addressed and that corporate personnel know and follow the new legal requirements.

FURTHER INFORMATION

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/. To learn more about Jones Day's experience in counseling companies and individuals that have received an allegation of corruption or have become the subject of government investigation, please visit our website.

AUTHORS

James C. Dunlop
Chicago / São Paulo
+1.312.269.4069 / +55.11.3018.3915
jcdunlop@jonesday.com

Emmanuel E. Ubiñas
Dallas
+1.214.969.3670
eeubinas@jonesday.com

Guillermo E. Larrea
Mexico City
+52.55.3000.4064
glarrea@jonesday.com

Cristina Pérez Soto
Miami
+1.305.714.9733
cperezsoto@jonesday.com

Special thanks to Pamela I. Yaacoub, Jones Day Chicago, for her assistance in the preparation of this White Paper.

ADDITIONAL LAWYER CONTACTS

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

Randy S. Grossman
San Diego
+1.858.314.1157
rsgrossman@jonesday.com

Jamila M. Hall
Atlanta
+1.404.581.8465
jhall@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Henry Klehm III
New York
+1.212.326.3706
hklehm@jonesday.com

Weston C. Loegering
Dallas
+1.214.969.5264
wcloegering@jonesday.com

Christopher R.J. Pace
Miami
+1.305.714.9730
crjpace@jonesday.com

Luis Riesgo
São Paulo
+55.11.3018.3939
lriesgo@jonesday.com

Nicholas E. Rodríguez
Miami / New York
+1.305.714.9706 / +1.212.326.3608
nerodriguez@jonesday.com

Eric Snyder
São Paulo / Washington
+1.202.879.3912
esnyder@jonesday.com

Neal J. Stephens
Silicon Valley
+1.650.687.4135
nstephens@jonesday.com

Jason S. Varnado
Houston
+1.832.239.3694
jvarnado@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. Printed in the U.S.A.