“It is tempting to be skeptical of Latin America’s efforts to crack down on corruption. It is often two steps forward and one step back... And yet, as global efforts to shine the light on corrupt actors increase, certain countries in Latin America have asserted their intention to play a part on the international stage through law enforcement actions, government reorganization, public-private partnerships, and international collaboration.”

Suzanne Hayden
President, FTM Global Recovery, LLC

“American companies going into Latin America need to recognize it is a new day, a more regulated environment, and they must be more aware of their operations... No one is too important to arrest. No person is above the law... This is not the Wild West anymore.”

William Lawler, III
Vinson & Elkins Partner & Co-Head
Government Investigations and White Collar Practice

“Just because you think that local custom or common practice requires the payment of a bribe in order to do business doesn't mean you can’t or shouldn't do business without the payment of a bribe. It may delay, and it may cost more in the short run, but... do not pay... A corporate representative who is asked for a bribe should find another way to do business. Your answer should be 'We don’t pay bribes, but would like to do business with you.' If someone puts their hand out, first try to negotiate. If you cannot negotiate, walk away.”

Marc Sherman
Managing Director
Alvarez & Marsal, Global Forensic & Dispute Services

A mixture of economic and social tensions are propelling governments across Latin America to target the corrupt behavior that has long defined how companies, both foreign and domestic, do business in the region. Many Latin American countries—including Brazil, Peru, Mexico, Chile, and Ecuador—have recently enacted new legislation and regulation to combat corrupt business practices. As the resignation of Guatemala’s president last month over an ongoing scandal demonstrates, not even the political elite—let alone corporate officers—are immune anymore from the consequences of doing business “as usual.”
Over the past 18 to 24 months, governments across Latin America have pursued corruption investigations with vigor never before seen in the region. From Mexico through Central America and down to Chile and Brazil, corruption investigations are significantly disrupting politics and business, as tolerance for corruption seems to have fundamentally changed.

WHAT TO KNOW

“Business as usual” has become a liability in Latin America, and new laws, new investigatory bodies, and a new emphasis on public prosecution for corruption appear to be ushering in an era of greater transparency and more ethical business practices. Politicians across the region are attempting to harness the populist backlash against a wave of scandals—particularly in Brazil and Mexico—to bolster their governments and economies.

Government and corporate corruption has historically been a serious drain on national economies across the region. In some countries, corruption siphons off as much as five percent of GDP and undermines programs meant to help create opportunity, share the wealth, and raise standards of living.¹

- The Petrobras scandal in Brazil has added to public anger over vast sums spent on hosting the World Cup and the Olympics, causing President Dilma Rousseff’s popularity to sink to only eight percent and threatening her hold on the government.

- In Mexico, Chile, and Ecuador, presidents face questions over corruption scandals involving members of their own families, as well as issues relating to influence peddling and illegal campaign contributions by big companies.

- Peru continues to root out a culture of corruption that dates back to the administration of former President Alberto Fujimori.

WHAT TO WATCH

“Businesspeople operating in a culture of corruption must always be prepared for a request for an additional reward. Preparation includes understanding local laws as well as US laws. Know your law because that is the one you will encounter if you violate it. Know your counterpart’s laws because you don’t want to find yourself or your company being made an example or described violating them.” – Suzanne Hayden

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¹ Bloomberg Quick Take, Corruption, June 11, 2015
² Austrian Development Agency, Peru Country Profile, Business Corruption in Peru, March 2015
“The psychological cost on a business undergoing an investigation is tremendous... It is really punitive to go through an investigation even if you are not put in jail.” – William Lawler, III

“If it is illegal, don’t do it. For those people that do risk/reward assessments, the risk/reward ratio is changing significantly. US businesses should operate under relevant compliance programs and corporate representatives would be wise to follow them.” – Marc Sherman

**Rousseff in Brazil: Comply With New Laws or Face Consequences**

Over the past two years, Brazilian anti-corruption laws have become among the toughest in the world. RANE Expert William Lawler, III notes that new anti-corruption laws were at first thought to be just window dressing for the World Cup and the Olympics, but since the introduction of the Clean Companies Act, the Brazilians have moved quickly and effectively against corrupt practices. Brazilian President Rousseff has put foreign and domestic corporations on notice that they—and their top officers and employees—will be held financially and legally liable for engaging in corrupt practices.

- The “Car Wash” (Lava Jato) investigation, which centers on corrupt practices around state-controlled oil company Petrobras, is particularly striking given that Brazil has investigated only five corruption cases in the past 14 years.

- As Lawler puts it, what began with a group of US-trained, US-styled professionals—who have been compared to the “Untouchables” who tracked down Al Capone—has now expanded to include all three branches of the Brazilian government. Lawler adds that he does not expect to see any backsliding, and “companies should not expect it.”

- Petrobras has announced that it will not work with anyone who uses an intermediary, and other Brazilian firms are following their lead. As Lawler explains, “this means that companies now have the opportunity to deal directly” with Brazilian private and public entities, and “if in Brazil for the long haul, now have the opportunity to set up their own shop.”

**BRAZILIAN CLEAN COMPANY ACT**

The 2014 Brazilian Clean Company Act (CCA) has been compared to the US Foreign Corrupt Practices Act (FCPA), but has some significant differences that increase exposure for multinationals.

- According to an article written by Marc Sherman of Alvarez and Marsal, the CCA includes harsh administrative sanctions such as mandatory corporate dissolution, the suspension of business activities, and the barring of government incentives for one to five years, as well as civil fines. The CCA extends to cover fraud in public procurement, bids, and contracts.

- The CCA applies to Brazilian companies and all subsidiaries as well as the Brazilian subsidiaries of foreign companies and includes temporary and de facto Brazilian entities. Unlike the FCPA, it does not apply to individuals, who are subject to Brazil’s Criminal Code.

- The CCA does not impose corporate criminal liability, but does impose strict civil and administrative liability. It does not require that corrupt intent be proven.

- The CCA prohibits the bribery of public officials, but it differs from the FCPA in that it is not limited to acts involving foreign officials. It also differs in that the burden is on the corporation to prove that the bribe did not result in any economic advantage to the corporation.
Peña Nieto in Mexico: President Leads Charge Against Corruption

Mexico’s President Enrique Peña Nieto’s push for the passage of the National Anti-Corruption System is aimed at creating a “genuine paradigm shift” in how public and private officials and entities will be held accountable for corrupt activities. Outrage over the systemic corruption in Mexico, the slowdown in economic growth, and a long list of public scandals have pressured Peña Nieto to act.

- In July, Peña Nieto promulgated the seven-point Constitutional Reform Decree that the Mexican Congress is expected to act upon in the current session. The decree directs the legislature to amend the Mexican Constitution to enable the Congress to create legislation to expand and strengthen existing anti-corruption laws, including legislation that would penalize public officials for acts or omissions that affect the legal, honest, loyal, impartial, or efficient discharge of their sworn duty. Penalties are to include administrative as well as financial punishments, including being disqualified for future public service. In addition, public officials will be subject to civil and criminal charges for such misconduct.

- Corruption cases forcing Peña Nieto’s hand include a contract for a high-speed rail line that was originally awarded and then taken away from a Chinese firm, and the involvement of Peña Nieto’s wife and Finance Minister, Luis Videgaray, in a corrupt housing deal with a government contractor.

- RANE Expert Marc Sherman warns that American businesses that run afoul of new Latin American regulations may face burdensome and costly multi-jurisdictional investigations now, and owe multi-jurisdictional fines, as well as other potential extraterritorial punishment.

  “If you do it one time, probably no one’s going to find out. But if you are Wal-Mart, and you’ve done it 600 times, they’re going to find out.”

  William Lawler, III

The new anti-corruption law that Peña Nieto fast-tracked through the legislature in May “seems to have the kind of teeth that can make a difference,” explains Marc Sherman. “It takes the investigation and prosecution for alleged corruption out of the hands of the politicians, who may be involved, and puts it in the hands of a group whose role is to deal with corruption, but there is still skepticism about whether required secondary legislation and implementation will be effective.”

- The Federal Public Law against Corruption for Public Procurement of 2012 makes it illegal to both pay and accept bribes for the purpose of obtaining unfair advantages in negotiating commercial and public contracts. Facilitation payments of any kind are also illegal under this law.

- Under the new legislation, private individuals and companies are also to be subject to punishment for misconduct, and as in the case of public officials, may face administrative and economic sanctions, including fines, being barred from participating in public sector contracts, and indemnification of damages. Individuals acting on behalf of companies will also face suspension of activity and may also be liable to civil and criminal prosecution.
RANE Expert William Lawler notes that American corporations doing business in Mexico are also now on US enforcement authorities’ “radar” more than they were five years ago. Lawler tells companies “don't bribe, businesses just need to plan for delays.”

Humala in Peru: “Peru Has Changed… We Are Not Chavistas”

President Ollanta Humala’s efforts to clean up Peru’s business practices are a sharp contrast to former President Alberto Fujimori, who has been convicted and jailed on corruption charges. According to RANE Expert Suzanne Hayden, if an American company or its representative conducts business in a corrupt manner because “everyone does it” or “it is expected,” they should anticipate facing the criminal consequences in the US—and now, even in Peru. Peru has criminalized active and passive bribery and it is investigating some cases. Hayden warns that it is a predictable next step for the Peruvian government to place foreign companies in the headlines as the “importers of corruption into Peru.”

According to Hayden, the most recent conviction of Fujimori could be viewed as Peru's affirmation of the role of a free press, which is also useful for fighting the issue of corruption in general, as well as the government's increasing intolerance for the embezzlement of state funds.

President Humala is seeking to attract much-needed foreign investment to Peru, but his populist views may be an impediment. Humala, a former Peruvian army officer, believes that foreign-dominated companies extracting silver, copper, zinc, and gold have inadequately compensated Peruvians.

Humala remains sensitive to charges of corruption that have been made in the press against his friends and family, including his wife and brother-in-law, who are under investigation on charges of money laundering.

Correa in Ecuador: National Plan “a Complete Non-Starter”

Ecuadorean President Rafael Correa has pledged to tear down the “hierarchy of bribery” which he blames for enabling the wealthy to hoard the nation’s wealth and keep the majority impoverished. RANE Expert Marc Sherman says there is no data to suggest that the Ecuadorian government’s plan to fight corruption will be as effective as they want it to be. Correa's government aims to improve Ecuador’s rank of 110 on the 2014 Transparency International list of most corrupt governments.

Despite failings and shortcomings, Ecuador's new anti-corruption laws do have teeth and can have serious consequences for companies who are accused, investigated, or found to be in violation of the laws.

DECREE NUMBER 635

Decree Number 635 of the Peruvian Penal Code, passed in 1991 and amended in 2008, effectively criminalized corruption in Peru.

- The decree covers passive and active bribery, attempted corruption of officials, extortion, and money laundering.
- It does not, however, criminalize so-called “facilitation payments.” As a result, experts agree that corruption remains a serious problem for businesses in Peru.
Foreign corporate officials who are asked for a bribe are advised to “walk away” or risk being caught up in a prosecution.

Despite promises to end corruption in Ecuador, Correa’s much-heralded National Plan for the Prevention and Fight Against Corruption has made little progress to date. The anti-corruption laws have not been applied evenly, and while thousands of cases have been filed since Correa began his much-heralded “revolution” against corruption in 2007, few have been brought to a conclusion.

Although charges of corruption are being filed with greater regularity, Marc Sherman laments “there seems to be a fair lack of transparency in enforcement of anti-corruption laws. You don’t see a high number of prosecutions in Ecuador.”

Although judges who fail to prosecute or delay prosecution of corruption cases supposedly risk being fired, there is little evidence of that threat being enforced. In addition, political and familial connections can delay investigations or even cause rulings to be reversed.

President Correa has used the law and the bodies that investigate it to attack opponents. The president has also intervened on behalf of his supporters and members of his own family, including a cousin and his brother, Fabricio, who was accused of corruption involving contracts between his own business interests and the state.

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**ECUADORAN CRIMINAL CODE**

The new Ecuadoran Criminal Code that took effect in August 2014 made Ecuadoran and non-Ecuadoran individuals and corporate entities which bribe public servants or public workers subject to criminal sanctions.

- The new code greatly expands the definition of what constitutes a public servant or worker, broadening it to apply to those who work under government contracts, or are involved in providing services to government institutions, businesses owned by any government entity, or political parties.

- Facilitation payments, gifts, provisions of any thing or service of value and many types of donations, as well as the offer or even promise to do any of the above, are also now prohibited when a public worker or servant is involved.

- Companies found in violation of the anti-corruption laws are subject to civil, criminal, and administrative punishments that can include fines, termination of public contracts, and being prohibited from future public contracts, as well as loss of any insurance or bank guarantees for contracts that are terminated due to the violation of the anti-corruption laws.

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**Chile's Bachelet: Making Progress but Losing Popularity**

Chilean President Michele Bachelet’s approval rate among voters has dropped dramatically over the course of the past year, from over 50 percent to below 30 percent, as a result of an economic downturn and a series of corruption scandals that have threatened Chile’s reputation as a “clean” place to do business. Bachelet’s own son was involved in an influence-

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3 *Americas Quarterly*, June 3, 2015
4 *The Guardian*, *Chilean president rocked by corruption allegations against family members*, April 8, 2015
5 *Reuters*, *Support for Chilean president Bachelet sliding fast-polls*, December 13, 2014
peddling scandal based on his dealings with one of the nation's wealthiest businessmen, Banco De Chile's Andronico Luksic.

- Chile ranks as the twenty-first least corrupt country in the world, according to Transparency International's measure of perceived levels of corruption.

- Bachelet says inequality is Chile's "one great enemy," and she intends to use education, tax, and labor reforms to attack it.

In April, Bachelet vowed to “personally lead without any fear” a crackdown on corruption in business and politics in Chile. She promised to craft and institute a new and much stricter set of anti-corruption measures, which are to include requiring government and other public officials to declare the contents of their bank accounts. Opposition members have hailed Bachelet's efforts as a “good first step” to fight corruption, but only a first step, and one that has not gone far enough to end corruption in Chile.

- The definition of public official is also to be expanded to include those working on public contracts for regional as well as national state-run entities, including foundations.

- In the meantime, Bachelet has ordered all public-sector officials to provide an extensive financial declaration “that includes all professional and business activities, whether they are remunerated or not, in which a person has participated during the two years previous to having assumed their post. Bachelet has proposed the constitution be amended to require former presidents to make a similar declaration.

- Companies doing business with public officials and public entities in Chile are taking note of this highly charged atmosphere and are advised to be especially vigilant in their compliance with Chilean law.

Chile has been called on the carpet for not enforcing its laws, notes Marc Sherman, but President Bachelet's response to a recent storm of corruption charges has been to press Chilean authorities to aggressively investigate and prosecute these and other cases.

- In the past year, and at Bachelet's direction, Chile's top anti-corruption prosecutor has attempted to make an example of both The Penta Group, a financial holding company whose known assets exceed $30 billion, and Chile's Chemistry and Mining Society (SQM), which for over 20 years was headed by former dictator Augusto Pinochet's son-in-law. Both companies face multiple criminal charges, including tax fraud and making illegal campaign contributions.

- Blumar, a major Chilean fishing company that has a US subsidiary, is also under investigation for similar alleged wrongdoings. Blumar could also face charges in the United States under the FCPA's anti-bribery provisions.

**WHAT TO CONSIDER**

Organizations with long-standing interests in Latin America may benefit from reviewing and updating their institutional policies and practices to ensure that their staff on the ground is paying
proper attention to legal, regulatory, and political changes around corrupt business practices and to ensure that they are in keeping with new laws and regulations being promulgated.

- A close review of your organization's anti-corruption policies, procedures, and expectations with both expatriate and foreign national staff could mitigate the risks of inattention and inaction by individuals skeptical about the sincerity of government crackdowns on unethical behavior.

- A review of the relationships, policies, and practices with local partners and third party counterparts may also be prudent. Frequently organizations conduct thorough due diligence only at the outset of a relationship, whereas a best practice is to regularly monitor or review extended partners to ensure no new risks have emerged, and that counterparties too are keeping up to date with legal and regulatory requirements.

ABOUT OUR CO-AUTHORS

Suzanne Hayden has spent thirty years in public service and law enforcement serving as a senior advisor to members of the US government (Justice, State, Treasury, Intelligence and Defense) and to International Organizations (ICTY, UNODC and IACA). A former Senior Prosecutor for the US Department of Justice, Ms. Hayden served as lead prosecutor on over 30 money laundering and drug trafficking organized crime cases. She currently provides technical assistance and advice to corporations and international public and private sectors in the area of integrity-building, legislation, anti-corruption, anti-money laundering, complex financial crime and terrorist financing. She is a licensed attorney.

William Lawler, III is the co-head of Vinson & Elkins Government Investigations and White Collar Practice Group. Bill's experience includes Foreign Corrupt Practices Act, criminal antitrust, health care fraud, public corruption, campaign finance, and other white-collar crime issues. He frequently advises corporate boards, audit committees, and management on compliance, risk mitigation, and investigative matters. Many of Bill's matters are high profile ones, subject to public and media security. Bill writes and speaks frequently on white collar, government investigations, compliance, and corporate governance issues.

Marc Sherman is a Managing Director with Alvarez & Marsal Global Forensic and Dispute Services in Washington, D.C. He specializes in financial fraud, white-collar investigations and dispute damages. With more than 30 years of experience in business, consulting and forensic accounting, Mr. Sherman has worked with clients across a broad range of industries, including real estate, construction, hospitality, telecommunications, banking, manufacturing insurance, higher education and retail and franchising, among others. He is a frequent speaker on forensic accounting investigations and damages, and has published chapters in several treatises on internal investigations, compliance programs and anti-money laundering.

About RANE

RANE is an information services and advisory company serving the market for global enterprise risk management. We provide access to, collaboration with, and unique insights from the largest global network of credentialed risk experts covering over 200 categories of risk. Through our collective insight, we help enterprises anticipate emerging threats and manage today's most complex risks more effectively.