

ALERTS

China, Argentina Take On Corruption, Corporate Criminal Liability

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China and Argentina passed anti-corruption laws that went into effect recently.

On March 20, 2018, China passed a new law creating the National Supervisory Counsel (NSC). Creation of this new state organization sets the stage for potentially significant change in the legal and regulatory landscape of anti-corruption enforcement in China. The NSC will oversee a network of local supervisory commissions across China with broad powers to investigate bribery and abuse of office in the public sector.

Significant effects of this new legislation include:

- Consolidating existing corruption fighting powers of several government departments into a single party-run agency
- The potential to broaden the scope and frequency of anti-corruption investigations
- Empowering the NSC to operate independently of judiciary and other state agencies
- Providing broad powers to investigate bribery and abuse of office in the public sector
- Creating increased risk for foreign entities and investments
- The potential to undercut existing anti-corruption initiatives that place emphasis on open government and transparency in corruption investigations
- That the powers of the NSC will supersede those of Supreme People's Court and Supreme People's Procuratorate
- The broadened investigative powers of the NSC will reach not only Communist Party members, but all public employees, including those at universities, state owned companies, hospitals, sports organizations, village governments and research institutes
- Empowering the NSC to interrogate and detain suspects, freeze their assets and search their premises
- Allowing the NSC to detain suspects for up to three months (can be extended by another three months) to provide assistance in corruption investigations
- Advising that it will cooperate with international agencies investigating corruption issues
- Referring investigations to People's Procuratorate for prosecution
- An increasing focus on the source of bribes

There will most certainly be a need to closely monitor how the new law is implemented, to identify how corruption enforcement will change under

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the NSC regimen and what impact it will have on foreign companies. Given the increased emphasis on and broadened scope of anti-corruption enforcement envisioned by creation of the NSC, there will be greater need for companies to conduct thorough due diligence into business partners, agents and third-party representatives. Steps should be taken to review and update compliance protocols to ensure companies are protected against the ever-increasing scope of Chinese anti-corruption enforcement.

Argentina Enacts Corporate Criminal Liability Law

On December 1, 2017, Argentina enacted Law 27-401, which went into effect in March 2018. This new legislation, known as the Law on Corporate Criminal Liability and Compliance Programs for Certain Corruption Cases (CCL), establishes corporate criminal liability for bribery related to specified interactions with public officials including:

- Active domestic bribery
- Transnational bribery
- Trading in influence
- Participating in an active form of misrepresentation in books and records aimed at concealing the commission of bribery or trading in influence offenses

Prior to enactment of the CCL, corporate criminal liability in Argentina was limited to a much narrower list of offenses, including tax evasion and smuggling. The CCL has significantly expanded the list of offenses to which corporate criminal liability may attach. In doing so, it establishes potential penalties for offending entities as follows:

- Sets fines at two to five times the “undue” benefit obtained or that could have been secured through the prohibited activity
- Forfeiture of assets obtained through illegal activities
- Loss or suspension of previously earned government benefits
- Debarment from participating in government bids and contacts
- Full or partial suspension of company activities for up to 10 years
- Shutting down company where evidence shows its main purpose was carrying out criminal activity

In determining the level of penalization to be imposed, courts will consider a number of factors, including whether the company had an effective compliance program in place prior to the criminal activity. Courts will also consider whether the company voluntarily self-reported its improper activity to law enforcement authorities.

The CCL contemplates the passage of additional laws addressing compliance programs requiring that each such program shall: (1) be appropriate for the risk, size and economic activity of the entity; (2) include a code of ethics and internal policies to aid in the prevention of crimes involving interaction with the public sector; and (3) provide training to help effectuate the compliance goals.

The CCL also makes having a compliance program a requirement for entering into certain contracts with the Argentine government. As such, companies with a presence in Argentina need to consider reviewing and potentially update their compliance documents to ensure they meet CCL prerequisites.

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