

November 20, 2017

## Argentine Corporate Criminal Liability Law Opens the Door to New Enforcement Risks

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November 8, 2017 marked a drastic change for the enforcement landscape in Argentina. On this day, the Argentine National Congress (*Congreso de la Nación Argentina*) enacted a law that—for the first time in the country’s history—subjects Argentine companies to criminal liability for corruption. The newly enacted law, “*La ley de Responsabilidad Penal de las Personas Jurídicas*” or the “Law of Criminal Liability of Legal Entities” (the “Law”), expands criminal liability to the corporate level and opens the door to new enforcement risks for corporations operating in the country.

President Mauricio Macri, who took office in December 2015, is a pro-business, pro-free trade leader whose campaign emphatically declared the need to combat the country’s high levels of corruption to attract foreign investment once again. And last week, the Argentine Chamber of Deputies (*Cámara de Diputados*), the lower house of Congress, enacted the Law. A pillar of Macri’s robust anti-corruption agenda, the Law incentivizes corporations to adopt internal controls to prevent and detect corruption, as well as implement extensive compliance programs. The Law applies steep penalties to corporations convicted of corruption offenses.

The last decade has seen an unprecedented surge in corruption investigations of multinationals operating in Latin America. In recent years, U.S. and Latin American prosecutors, such as those in Brazil and Colombia, have worked closely to pursue corruption investigations of both American companies and domestic companies with a U.S. nexus. Argentina also increased its cooperation with both its regional neighbors and the U.S. in pursuing corruption investigations. The new prosecutorial powers the Law grants, coupled with anticipated Argentine-U.S. government cooperation, signals a changing enforcement landscape in Argentina.

This article will (i) explain the Law’s key components, (ii) describe the history of Argentina’s international cooperation with corruption investigations, and (iii) consider the Law’s implications at a time of increased Argentine-U.S. cross-border collaboration.

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## Background on the Law

During his campaign, President Macri emphasized how the administration of then President Cristina Fernández de Kirchner had “destroyed trust among Argentines and the world,” and that his party’s mission was to “put Argentina back on a path to growth and back into the world.”<sup>1</sup> To that end, President Macri promised tough measures to fight corruption, vowing to align Argentina’s legal system with international standards. On October 20, 2016, nearly a year after taking office, President Macri presented a bill to the Chamber of Deputies, proposing criminal liability for companies involved in certain cases of corruption.<sup>2</sup> The lower house approved the bill on July 5, 2017, and the Argentine Senate (*Honorable Senado de la Nación Argentina*) subsequently modified the bill and sent it back to the lower house for review on September 27, 2017.<sup>3</sup> The lower house approved the bill on November 8, 2017,<sup>4</sup> and it will become enforceable 90 days after being promulgated by President Macri and published in the Official Gazette of the Republic of Argentina.<sup>5</sup>

### Applicable Liability

The Law seeks to hold legal entities criminally liable for transnational bribery and crimes against the public administration. It also strongly emphasizes corporate internal controls to prevent and detect corruption. The Law applies to: (i) crimes committed within Argentina; (ii) crimes committed outside of Argentina by agents or employees of Argentine entities who acted while carrying out their job; and (iii) bribes paid to foreign public officials by Argentine citizens or legal entities domiciled in Argentina.<sup>6</sup>

Under the new Law, corporations will be held criminally liable for crimes: (i) committed directly or indirectly, in the name, interest, or on behalf of the corporation, and when the corporation stands to reap benefits from the crimes; (ii) committed by any of the corporation’s owners, partners, shareholders or associates having influence on the will of the company, representatives, directors, managers, or any other members or employees under its supervision or direction, or its representatives in partnership, agency, concession or trust agreements; and (iii) that resulted from a lack of appropriate supervision and control by the corporation.<sup>7</sup> Corporations will also be held liable for the actions of third-party contractors if they fail to conduct thorough due diligence of those contractors. The Law

1 *Mauricio Macri Vows to End Argentina’s Isolation*, Financial Times, October 25, 2015, available at <https://www.ft.com/content/c77cae92-7d6b-11e5-98fb-5a6d4728f74e>.

2 *Macri en el Congreso: Cómo es el Proyecto de Ley de Responsabilidad Empresarial al que se Refirió*, La Nación, March 1, 2017, available at <http://www.lanacion.com.ar/1988940-macri-en-el-congreso-que-es-la-ley-de-responsabilidad-empresarial-a-la-que-se-refirio>.

3 *El Senado Aprobó con Cambios la Ley que Pena la Corrupción Empresarial*, InfoBae, Septiembre 27, 2017, available at <https://www.infobae.com/politica/2017/09/27/el-senado-sesiona-para-aprobar-con-cambios-la-ley-que-pena-la-corrupcion-empresarial-y-la-restitucion-de-los-feriados-puente/>.

4 *Diputados Convirtió en Ley el Régimen de Responsabilidad Penal Empresarial*, Ámbito, November 8, 2017, available at <http://www.ambito.com/902704-diputados-convirtio-en-ley-el-regimen-de-responsabilidad-penal-empresaria>.

5 Article 39 (*Entrada en Vigencia*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

6 Article 29 (*Sustitución del Artículo 1º del Código Penal*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

7 *Bill Proposes Corporate Criminal Liability in Certain Cases of Corruption in Argentina*, Financier Worldwide, June 2017, available at <https://www.financierworldwide.com/bill-proposes-corporate-criminal-liability-in-certain-cases-of-corruption-in-argentina/>.

also imposes successor liability following corporate mergers, acquisitions, or any other type of corporate modification.<sup>8</sup>

### Integrity Programs

Having an “integrity program,” or tailored compliance program, to prevent, detect, remediate and report criminal activities will be a requisite for engaging in certain contracts with the Argentine federal government.<sup>9</sup> The Law does not otherwise require legal entities to implement compliance programs, although having an effective compliance program may benefit companies when penalties are determined. When Argentine courts evaluate a program’s efficacy, they will have to consider the implementation of thirteen factors: i) a code of conduct for employees; ii) rules and procedures for interacting with the public sector; iii) a requirement that third parties follow the code of conduct and policies in certain instances; iv) periodic compliance training for company personnel and relevant third parties; v) periodic compliance program risk assessments and modifications; vi) senior management’s support of the compliance program; vii) visibly available communication channels for personnel and third parties to report irregularities; viii) whistleblower protection policies; ix) whether an internal investigations system is in place to protect the rights of those under investigation and impose effective sanctions for code of conduct violations; x) due diligence procedures to confirm the integrity of third parties; xi) due diligence in cases of major corporate transactions; xii) continuous compliance program monitoring and evaluation; and xiii) a designated compliance officer.<sup>10</sup>

### Penalties

Corporations convicted of corruption offenses will be required to pay two to five times the “undue” benefit obtained, or that could have been obtained, through the criminal conduct. Other penalties may include: total or partial suspension of operating activities for up to 10 years; suspension or termination of government benefits and subsidies; suspension from participating in government bids for up to 10 years; publication of the ruling in national newspapers; and termination of the legal entity, to the extent it was created for the sole purpose of committing the crimes or if such crimes were the entity’s main activity.<sup>11</sup> Legal entities will be exempt from penalties and administrative responsibility if they meet the following conditions: (i) self-reporting a crime, as defined under the Law, that was detected through internal investigation; (ii) establishment of a proper control and supervision system before the facts under investigation occurred, and the wrongdoers took efforts to breach such system; and (iii) returning the undue benefit obtained.<sup>12</sup>

### Leniency Agreements

A legal entity under investigation for breaching the Law will have the option of entering into a leniency agreement with the Argentine authorities (*Ministerio Público Fiscal*). This process could

<sup>8</sup> *Id.*

<sup>9</sup> Article 24 (*Contrataciones con el Estado Nacional*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

<sup>10</sup> Article 23 (*Contenido del Program de Integridad*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

<sup>11</sup> Article 7 (*Penas*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

<sup>12</sup> Article 9 (*Exención de Pena*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

require disclosure of accurate and verifiable information relevant to the investigation; identification of the participants involved in the crime; or recovery of stolen or obtained assets. The agreement will be subject to the following conditions: (i) the legal entity must pay 50% of the minimum fine; (ii) the entity must disgorge the assets and profits obtained through the crime; and (iii) the entity must relinquish those goods that would presumably be forfeited if the entity were convicted of the crime. The agreement could also compel the company to do any of the following: (i) take necessary steps to remediate the harm caused; (ii) offer a particular service that would benefit the community at-large; (iii) discipline the participants involved in the crime; or (iv) establish a compliance program.<sup>13</sup>

## Criticism

Some industry groups have criticized the Law. For example, a March 2017 Organization for Economic Cooperation and Development (“OECD”) report faulted the proposed Law for lacking whistleblower protections, provisions for punishing corruption-related false accounting, or specific asset-recovery rules. The OECD also highlighted that an existing law would continue to govern liability for money laundering even though it applies completely distinct standards from the new Law. To streamline corruption oversight, the OECD recommended that Argentina consider unifying its corporate liability provisions into a single regime.<sup>14</sup> Moreover, there is real concern that the Argentine courts may have different views on how to enforce the Law and that it could take several years for courts to develop uniform criteria. This, of course, could pose a major challenge for corporations attempting to comply with the Law.

## Increased Efforts of International Cooperation

Since President Macri took office, there have been signs of increased Argentine-U.S. cooperation efforts. For example, public reports state that U.S. law enforcement agencies, such as the Federal Bureau of Investigations and the Drug Enforcement Administration, have bolstered their presence at the U.S. Embassy in Buenos Aires.<sup>15</sup> In addition, the U.S. Department of Justice (“DOJ”) has designated a Resident Legal Advisor to the U.S. Embassy in Buenos Aires to strengthen ties with local law enforcement.<sup>16</sup>

More generally, several recent Brazilian corporate corruption scandals, such as those involving Odebrecht, Petrobras and Embraer, have signified increased cooperation between the U.S. and Latin American authorities in cross-border bribery investigations. Even within Latin America itself, countries are beginning to join forces in their attack on corruption. In February 2017, Argentina signed a cooperation agreement with prosecutors from nine other Latin American countries and Portugal

<sup>13</sup> Article 18 (*Contenido del Acuerdo*) of Criminal Liability of Legal Entities Bill Approved by the Argentine Senate on September 27, 2017.

<sup>14</sup> *Phase 3bis Report on Argentina*, OECD, March 2017, available at <http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf>.

<sup>15</sup> *FBI, DEA e Interpol de EEUU Intentan Profundizar el Vínculo con la Argentina*, Télam, March 21, 2016, available at <http://www.telam.com.ar/notas/201603/140382-fbi-interpol-estados-unidos-investigaciones-colaboracion-relacion.php>.

<sup>16</sup> *Attorney Advisor/Resident Legal Advisor Argentina Description*, U.S. Department of Justice Criminal Division, September 15, 2016, available at <https://www.justice.gov/legal-careers/job/attorney-advisor-resident-legal-advisor>.

to investigate construction conglomerate Odebrecht in connection with Operation Car Wash. The parties to the agreement will form a task force to share evidence in the investigation of bribes paid by Odebrecht on construction projects across the region.<sup>17</sup>

## Looking Forward

There is currently no precedent for prosecuting corporations in Argentina who may also be vulnerable to U.S. corruption charges because, until now, there was no corporate criminal liability under Argentine law. In some instances, however, where the U.S. authorities announced an FCPA-related settlement, the Argentine authorities dutifully opened criminal investigations. These Argentine criminal investigations, however, often yielded no results in terms of criminal or civil penalties for those allegedly involved.

For example, in July 2016, South American-based LATAM Airlines Group S.A. agreed to pay the U.S. Securities and Exchange Commission (“SEC”) more than \$34 million to settle violations of the FCPA in connection with improper payments it authorized during a dispute between the airline and its union employees in Argentina.<sup>18</sup> Only a month later, in August 2016, Argentine federal judge Rodolfo Canicoba Corral opened a LATAM bribery investigation and requested DOJ assistance.<sup>19</sup> The airline continues to operate in Argentina without receiving any domestic sanctions for its corruption-related activity.

In April 2013, the Ralph Lauren Corporation agreed to pay an \$882,000 penalty to the DOJ to resolve allegations that it violated the FCPA by bribing customs officials in Argentina from 2005 to 2009 to obtain merchandise clearance.<sup>20</sup> The SEC also entered into a non-prosecution agreement with Ralph Lauren in which the company disgorged more than \$700,000.<sup>21</sup> Argentine authorities promptly opened a criminal investigation in 2013 to look into the bribes that Ralph Lauren’s Argentine subsidiary paid. While the company has since closed its operations in the country, no domestic bribery or corruption charges were ever filed.<sup>22</sup>

When the Brazilian Anticorruption Law, also known as the Clean Companies Act, came into effect in 2014, Brazilian prosecutors used the law’s new tools to launch the largest anticorruption

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<sup>17</sup> *Latin American Prosecutors Join Forces on Odebrecht Bribes*, Reuters, February 17, 2017, available at <http://www.reuters.com/article/us-brazil-corruption-latinamerica-idUSKBN15W2H7>.

<sup>18</sup> *LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$12.75 Million Criminal Penalty*, U.S. Department of Justice, July 25, 2016, available at <https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275>.

<sup>19</sup> *Chile’s Piñera Cited in LAN Bribes Case*, Buenos Aires Herald (Online Edition), August 10, 2016, available at <http://www.buenosairesherald.com/article/219613/chile%E2%80%99s-pi%C3%B1era-cited-in-lan-bribes-case>.

<sup>20</sup> *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty*, U.S. Department of Justice, April 22, 2013, available at <https://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay>.

<sup>21</sup> *SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct*, U.S. SEC, April 22, 2013, available at <https://www.sec.gov/news/press-release/2013-2013-65htm>.

<sup>22</sup> *Ralph Lauren Corp. Agrees to Pay Fine in Bribery Case*, Deal Book New York Times, April 22, 2013, available at <https://dealbook.nytimes.com/2013/04/22/ralph-lauren-pays-1-6-million-to-resolve-bribery-case/?mcubz=0>.

investigation in the country's history—setting off a worldwide shockwave by uncovering extensive corruption. Following in the footsteps of Brazil, Argentina is attempting to bolster its legal and enforcement regime with tougher domestic sanctions for corporate wrongdoers and prosecutorial assistance from the U.S. If the Argentine Corporate Criminal Liability Law is applied in a similar fashion to Brazil's Clean Companies Act, we may see a rapid uptick in large-scale corruption investigations in Argentina.

Companies with operations in Argentina and those thinking of doing business there should become well-versed with the Law and strictly adhere to Argentina's corporate compliance and regulatory standards. And should a company doing business in Argentina resolve FCPA allegations with U.S. authorities, it must now be prepared for a follow-on Argentine criminal investigation targeting the company itself—and not merely the employees involved in the alleged corrupt conduct.