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The Practitioner's Guide to Global Investigations - Ninth Edition

An overview of corporate misconduct investigations in Latin America

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An overview of corporate misconduct investigations in Latin America

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Summary

INTRODUCTION

Corporate investigations in Latin America, as in many other regions, have become increasingly common and necessary as government enforcement and social and political movements have drawn sharp attention to corporate misconduct. Perhaps most notably, in 2014, the ***Lava Jato*** corruption scandal, also known as ***Operation Car Wash***, erupted in Brazil and soon spread throughout Latin America. Former presidents, presidential candidates and senior government officials throughout the region were indicted, convicted and (or) investigated for their involvement in misconduct, and companies to this day continue to face scrutiny from enforcement authorities in Latin America and the United States, among other countries.[1] Social uprisings and political movements further prompted the need and desire to implement and enforce social sustainability policies to address workplace misconduct, governance and social issues.[2]

As a result, companies across Latin America have increasingly enhanced and developed more sophisticated compliance programmes, human resources departments and internal audit departments with a key aim of identifying, investigating and addressing misconduct – consistent with enforcement authorities' growing expectations. This chapter addresses best practices for conducting internal investigations in Latin America.

Part one provides an overview of government investigations in the region, including: (1) a high-level review of the United States' enforcement actions after ***Lava Jato*** and key takeaways from those enforcement actions; and (2) an overview of the transnational investigations landscape in Latin America.

Part two addresses best practices and practical guidance on planning and conducting an internal investigation in Latin America.

Because other chapters in this guide focus on specific countries in Latin America, this chapter does not focus on any particular country except to provide examples.

INVESTIGATIONS LANDSCAPE: ENHANCED ANTI-CORRUPTION ENFORCEMENT AND COMPLIANCE FOCUS ON LATIN AMERICA

OVERVIEW OF US ENFORCEMENT ACTIONS IN LATIN AMERICA SINCE 2014

There has been a significant increase in enforcement actions in the region by the United States in recent years. The Foreign Corrupt Practices Act[3] (FCPA) is the primary US law governing foreign bribery and corruption and has been one of the laws used most frequently by US authorities to bring corporate enforcement actions concerning Latin America. These cases have grown exponentially during the past decade. As set out in Table 1, below, there were almost the same number of FCPA enforcement actions in the past 10 years as there had been cumulatively in the 36 years prior, starting when the FCPA was enacted.

TABLE 1: ENFORCEMENT ACTIONS IN LATIN AMERICA SINCE 1977[4]

	1977–2013	2014–present
US Department of Justice enforcement actions	36	37
US Securities and Exchange Commission enforcement actions	30	28

As shown in Table 2, below, these enforcement actions have spanned 13 countries across Latin America.

TABLE 2: NUMBERS OF ENFORCEMENT ACTIONS PER COUNTRY SINCE 2014

	US Department of Justice	US Securities and Exchange Commission
Argentina	4	1
Bolivia	1	0
Brazil	25	15
Chile	2	2
Colombia	3	3
Costa Rica	1	0
Dominican Republic	2	1
Ecuador	6	0
Guatemala	1	0
Mexico	9	9
Panama	1	0
Peru	2	2
Venezuela	4	0

Over two-thirds of US Department of Justice (DOJ) resolutions (25 out of 37 resolutions) and more than half of US Securities and Exchange Commission (SEC) resolutions (15 out of 28) referred to conduct in Brazil, sometimes in addition to other jurisdictions. Roughly half of DOJ actions in Latin America (18 out of 37) include an explicit reference to key players in ***Lava Jato***. A quarter of SEC resolutions (seven out of 28) include similar references to ***Lava Jato*** players.

Not surprisingly, given the prevalence of third parties in most corruption cases, the overwhelming majority of enforcement actions involved paying bribes through some type of third party (e.g., vendor, consultant, agent or other intermediary).

MAIN TAKEAWAYS FROM US ENFORCEMENT ACTIONS IN THE REGION

CROSS-BORDER AGENCY COOPERATION

Numerous enforcement actions have entailed cross-border cooperation between government agencies. This shows that the relationship between US agencies and their Latin American counterparts has continued to deepen, well beyond Brazil.

Recent enforcement actions evidence the good relationship between US and Latin American agencies. Based on their press releases during the past few years, the DOJ and the SEC either coordinated with or received cooperation from multiple countries in the region, including Brazil, Colombia, Ecuador, Mexico and Panama.

Cross-border agency activity and cooperation should signal three important considerations for companies operating in Latin America: (1) conduct in certain Latin American countries that previously may have gone undetected or uninvestigated is much more likely to become the subject of a multi-jurisdictional investigation in the current environment; (2) there is both a formal and an informal method for agencies to share information and evidence across borders, which leads to an increased likelihood that authorities will be able to establish sufficient evidence that a crime occurred; and (3) the cross-border cooperation is likely to allow countries that have historically not investigated corporate misconduct to climb the steep learning curve much more expeditiously as they learn from agencies that have been conducting these types of investigations for decades.

COMPANY COOPERATION

Cooperation remains a critical component of US corporate enforcement in Latin America. In nearly every resolution since 2014, both the DOJ and the SEC have drawn attention to the cooperation provided by resolving entities, including production of key documents, factual presentations and making witnesses available for interviews.

The DOJ has rigorous requirements for cooperation and will grant varying degrees of credit based on a company's conduct in the investigation. Full or extraordinary cooperation can afford companies significant benefits; for example, 'timely providing facts obtained through the [] extensive and robust internal investigation', 'making numerous detailed factual presentations', 'proactively identifying information previously unknown to the [DOJ]' and 'collecting and producing voluminous relevant documents and translations' have resulted in a company getting credit for cooperation, which, based on DOJ guidance, can result in a less severe resolution and a substantial discount off any penalty imposed.[5] It is important, however, for companies and defence counsel to keep in mind that, given the significant increase in cooperation between US and Latin American authorities, providing this type of cooperation to US authorities can result in the sharing of that information with Latin American authorities as well, which may not have the same incentive structure and benefits, and may instead use that information to prosecute the company more effectively and harshly.

IMPORTANCE OF REMEDIATION MEASURES

Corporate misconduct, and particularly misconduct that ends up being the focus of a DOJ or SEC enforcement action, can draw attention to gaps or weaknesses in a company's compliance programme. While gaps and weaknesses are not a sign of an ineffective compliance programme, and are to be expected in any company's programme, the way in which the company addresses those gaps and weaknesses, including through a root cause analysis and, where appropriate, disciplinary action, control enhancements, policy revision and training, can reduce the risk of recurrence and lead to a much more favourable resolution with authorities.

Since 2014, nearly every resolution has, at the least, referenced remediation in the form of enhancements to the company's compliance programme after discovery of the misconduct.[6] Conversely, immature programmes, either because they are not fully

implemented or not fully tested by the time of the resolution, is a factor considered in determining the appropriate resolution and can often lead to the imposition of a monitor.[7]

CREDITING OF LOCAL FINES

In recent years, US agencies have become increasingly willing to credit money paid by companies to foreign governments. Since 2014, the DOJ has agreed to credit payments made to foreign authorities against the penalty amount in 21 of the 37 FCPA resolutions. These resolutions included crediting payments made to Brazil,[8] Colombia,[9] Ecuador,[10] the Netherlands,[11] Switzerland[12] and the United Kingdom.[13]

The SEC, likewise, may credit disgorgement (or, when sought, civil monetary penalty) amounts paid to foreign authorities. The SEC will often not impose a civil monetary penalty if there is a parallel DOJ resolution that included a criminal fine or penalty. The SEC may also choose not to impose a civil monetary penalty if a resolving company cooperates or demonstrates an inability to pay.[14] Since 2014, the SEC has imposed a civil monetary penalty in only 12 of the 28 FCPA resolutions, foregoing civil monetary penalties in the other 16 resolutions. Of these 12, the SEC rarely credited payments made to foreign authorities against a civil monetary penalty.[15] However, it will, on occasion, credit disgorgement figures paid to foreign authorities. The SEC agreed to credit disgorgement paid to foreign authorities to offset the disgorgement amounts in six of the 16 resolutions that did not include a civil monetary penalty;[16] in each of these, it specifically agreed to credit amounts paid to Brazil.

This highlights the need for companies and defence counsel to seek to coordinate and secure credit for payments to multiple authorities as early in the resolution process as possible. By encouraging open lines of communication between authorities and providing frequent updates regarding the status and nature of the various enforcement actions in multiple countries, companies and defence counsel can increase the likelihood that payments will be credited.

OVERVIEW OF OTHER RELEVANT TRANSNATIONAL INVESTIGATIONS IN LATIN AMERICA

Since 2014, countries in the region have adopted stronger and more aggressive laws to combat foreign corruption. The Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery has played a critical role in shaping foreign anti-corruption policies and legislation in Latin America. Seven countries – Chile, Mexico, Costa Rica, Colombia, Argentina, Brazil and Peru – have adhered to the OECD's anti-bribery convention, which requires member countries to enact legislation prohibiting foreign bribery.[17] Other countries, of their own accord, have also created laws prohibiting foreign bribery.[18] Some countries, such as Argentina[19] and Chile,[20] have adopted corporate criminal liability for acts of foreign corruption; others, such as Brazil[21] and Colombia,[22] have enacted laws that allow government regulators to civilly and administratively prosecute companies that engage in foreign corruption.

Chile's first conviction on foreign bribery charges came in 2015 in a case involving conduct in Bolivia,[23] and, as at April 2022, Chile had conducted at least 10 investigations into foreign bribery, including one conviction and one settlement.[24] According to the website of the Superintendency of Companies of Colombia (the agency in charge of prosecuting foreign corruption) as at 22 September 2023, Colombia had resolved three foreign bribery cases: two involving conduct in Ecuador and one involving conduct in Venezuela.[25] Since 2018,

Peru has commenced at least three foreign bribery investigations and Brazil five, including one major investigation.[26]

Multi-jurisdictional efforts to combat corruption have prompted countries to create informal channels of cooperation beyond the more formal mutual legal assistant treaties; for example, in 2017, in light of the *Lava Jato* investigations, attorneys general from 11 countries – Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico, Panama, Peru, Portugal and Venezuela – signed the Brasilia Declaration on international joint investigations. The attorneys general agreed to cooperate on bilateral and multilateral investigations relating to the *Odebrecht* and *Lava Jato* cases, including by promoting the 'spontaneous' sharing of information.[27] Initiatives like this have allowed regulators to build a network throughout the region and facilitate investigative steps such as 'taking depositions of voluntary witnesses at embassies or consulates of the investigating country and making police-to-police requests'.-[28]

PLANNING AN INTERNAL INVESTIGATION

KEY CONSIDERATIONS FOR INTERNAL INVESTIGATIONS IN LATIN AMERICA

It is best practice for companies to analyse and, where appropriate, investigate allegations of misconduct. Of course, the extent of the investigation may vary depending on the nature, specificity and gravity of the allegation; however, being able to understand, address and remediate misconduct should be a key objective for companies operating around the world, including in Latin America.

Internal investigations generally follow similar guidelines; however, there are some relevant aspects particular to Latin America that should be considered and are described in the following sections. Importantly, the issues described below are not intended to be a comprehensive set of issues that arise during internal investigations or an exhaustive discussion of those issues. Nor is the framework below a strict sequential formula, as some of these issues may need to be handled in a different order (or in parallel), depending on the circumstances.

DETERMINE WHETHER TO INVESTIGATE IN-HOUSE OR HIRE EXTERNAL COUNSEL

One of the first steps in conducting an internal investigation is determining who will investigate the matter: in-house staff (e.g., in-house legal or compliance counsel, or internal audit) or external counsel. To make this determination, the company should consider various factors, including the issue under investigation, whether government agencies (domestic, foreign or both) are already involved, the types of resources that will be required, the subjects of the investigation, including subjects outside the company, and privilege and confidentiality issues.

Different companies may have varying resources available to investigate misconduct internally. Therefore, particularly resource-intensive investigations may benefit from external counsel. Likewise, when the company is already or will likely be under scrutiny by government authorities, retaining external counsel may have an increased chance of persuading those authorities that the company is conducting an 'independent' internal investigation, particularly where the investigation implicates senior corporate executives or concerns issues that fell under the ambit of current in-house attorneys or compliance personnel. This may result in government authorities trusting the company to voluntarily provide evidence without resort to more severe investigative steps, such as subpoenas or even search

warrants. External counsel can also offer in-house attorneys or investigators a certain degree of separation from investigative steps and advice that, although necessary or appropriate, may not be what corporate executives or the board want to hear.

On the other hand, in-house attorneys or investigators are more familiar with the company and are therefore best positioned to conduct investigations requiring sensitivity to the company's culture and operations. In-house attorneys and investigators may also be better able to establish rapport with, and earn the trust of, employees being interviewed and are less likely to raise concerns for those employees. This may be particularly important if the company is still in the process of scoping the issues or collecting evidence, as the presence of external counsel may spur destruction of evidence or other efforts to conceal misconduct.

For all the reasons described above, it is also common, and often preferable, that both in-house attorneys and investigators and external counsel participate in the investigation.

Finally, whether the investigation is conducted internally or by external counsel, an investigation led by lawyers is most likely to remain privileged. Thus, companies should be mindful that investigations conducted by compliance, human resources or internal audit may not be considered privileged either in Latin America or in the United States.

DETERMINE WHO WILL HAVE OVERSIGHT OF THE INVESTIGATION

Determining who will have oversight of the investigation is important to ensure that the investigation is seen as objective, independent and free of conflicts.[29] In most cases, the in-house legal team, senior management and board of directors will have oversight of the investigation; however, the investigator should consider whether any employees should be isolated from the investigation itself or from briefings about it; for example, if the allegations implicate the CEO of the company, the CEO should not oversee, or perhaps even be briefed on, the investigation, and those with a direct line of report to the CEO ought not to lead the investigation. Likewise, if certain board members or senior executives are implicated, it may be best for the board to create a special committee made up of a select number of independent board members to oversee the investigation. A special committee may also be created if the investigation involves a significant issue for the company or will otherwise require frequent attention by the board, as a special committee will be able to accommodate more frequent briefings and decisions than the entirety of the board.

IDENTIFY RELEVANT COMPANY POLICIES AND INTERNAL INVESTIGATION PROCEDURES AND BECOME FAMILIAR WITH ANY LOCAL LAW REQUIREMENT

Another important step is to identify all relevant company policies and internal investigation procedures applicable to the issues under investigation. Adhering to the established internal policies and procedures avoids the appearance that certain investigations are being handled inappropriately and that certain subjects of investigation are being treated more favourably or unfairly, mitigates the risk of employee lawsuits and demonstrates to government authorities that the company is taking the investigation seriously. Separately, understanding the policy framework applicable to the conduct under investigation is likely to improve investigators' understanding of the expectations and motivations of investigation subjects.

It is also critically important to become familiar with applicable local rules and laws that may affect the investigation, such as data privacy restrictions and labour laws, to ensure the investigative steps taken do not violate local law or otherwise create issues for the company; for example, Colombia's data privacy law broadly prohibits the use of personal

data by companies unless the owner of the data has explicitly authorised its use for a specific purpose.[30] Thus, to avoid any issues when collecting and reviewing potentially personal data during the course of an investigation, companies operating in Colombia should obtain express consent from employees, which can often be obtained by having an employee complete a detailed personal data usage form as part of the employment onboarding process or through the signing of a consent form during the course of an investigation.

Some local laws may even be prescriptive about how an investigation must be conducted; for example, Chile requires that sexual harassment investigations be completed within 30 days and that all sexual harassment allegations be submitted by the affected person in writing.-[31] The employer must initiate the investigation immediately or refer the case to the labour inspector within five days of receiving the written report.[32]

Thus, understanding the policy and legal framework is a critical step when conducting internal investigations.

DETERMINE THE SCOPE OF THE INVESTIGATION AND CREATE AN INVESTIGATION PLAN

Another best practice for most investigations is to define the scope and create an investigation plan that identifies the issue under investigation. Determining the time frame and issues to be investigated, data and devices to be collected, custodians from whom to collect data and devices, individuals to interview and other steps to be taken is critical to ensure the investigation addresses the allegations while remaining focused and efficient.

During this phase, it may be necessary or beneficial to conduct scoping interviews, including interviewing the individual who reported the allegations (assuming they are willing to be interviewed) and members of the company's IT department, who can help determine what data is available and what the existing default and potential data retention and backup system capabilities are.

Those leading the investigation should also consider whether and when to issue a preservation notice. Doing so can be critically important to prevent the spoliation of evidence, but depending on the allegations and circumstances, it may be better to wait until after devices are collected and imaged, and systems are backed up, which would prevent wrongdoers from deleting relevant evidence upon learning of the investigation.

As described in 'Identify relevant company policies and internal investigation procedures and become familiar with any local law requirement', above, the investigation plan may also be informed by the company's policies and procedures and local laws, including whether and when certain employees need to be notified about the investigation, whether the investigation must be conducted or concluded within a specified period, whether the person under investigation has the right to suggest witnesses and review and comment on the final report, and whether the employee alleged to have engaged in misconduct (or the employee's supervisor) must be notified of the investigation.

Finally, the investigation plan can also describe how the investigation will be reported; for example, some investigations are summarised and reported through a formal written memo, while others are communicated via a PowerPoint presentation. Regardless of the form it takes, it is important to record the investigative steps, findings, conclusions and remediation so that it is well documented for future use if additional related issues arise in the future or if the enforcement authorities initiate an investigation at some later point in time.

It is important to note, however, that an investigation plan should remain flexible and be revisited during the course of the investigation, as completed investigative steps and findings can often lead to changes in subsequent steps identified in the plan.

COLLECT DATA AND REVIEW DOCUMENTS

Collecting and reviewing documents is often a foundational step in the investigation. Documents allow investigators to create an initial understanding and timeline based on contemporaneous communications, and to pressure-test witness statements during interviews. But collecting and reviewing documents is not a simple task, and may implicate logistical and technological obstacles, data privacy restrictions, labour laws and the employees' contractual terms of employment, among other issues.

Ensuring appropriate collection of data will almost always require coordination with the IT department and may benefit from the assistance of an external vendor that can host significant amounts of data while offering the ability to efficiently search, review and code documents. Investigators will most often need to fashion search terms to narrow the document review universe and may use artificial intelligence algorithms to further assist in identifying the most relevant documents. Whatever method is used to identify the database, it will inevitably be both over- and under-inclusive, so reviewers with an understanding of the underlying facts and allegations should help to refine the search terms and algorithms as the document review proceeds and interviews are conducted.

Because in Latin America most documents will be in Spanish or Portuguese, the investigator should become familiar with the specific local terms, including as they apply to the industry terminology. As an example, countries have different ways of referring to bribes and there are at least 10 different terms in Spanish, including ***chancuco,cohecho, coima, dádiva, mordida, serrucho, diezmo, peaje, tajada and vacuna***. As such, to ensure that all the relevant terms are captured on the search term list, it is advisable that in-house counsel reviews the proposed search terms or that the investigators meet with a neutral employee who can provide context on the terms used locally and help to identify key terms and expressions. Document reviewers need to be equally familiar with the local language and specific terms to be able to review documents efficiently.

In addition to reviewing documents stored on the company's database, investigators should also consider reviewing employees' off-system communications, including text messages and WhatsApp communications, which is the way many individuals communicate in Latin America.

The DOJ released guidance in 2022 and again in 2023, stating that companies are expected to create 'effective policies governing the use of personal devices and third-party messaging platforms for corporate communications'.[33] Failing to have these policies could negatively affect a company seeking cooperation and compliance credit in connection with an investigation.[34] In 2023, the DOJ added questions to the Criminal Division's Evaluation of Corporate Compliance Programs guidance in connection with the use of messaging applications and personal devices. The new guidance requires companies to evaluate and understand their communications channels, review the applicable policies and understand risks.[35]

This may be easier said than done, however, given that many companies in Latin America have bring your own device (BYOD) policies, and employees are often reluctant to allow investigators to access their personal phones. Maintaining BYOD policies that clarify that

employees must provide access to their devices during an investigation can provide leverage for the company, but some countries may not view this as enforceable and thus the employee could simply refuse to hand over their device. Moreover, if employees use messaging apps such as WhatsApp to communicate, even if a company has effective policies and is successful in securing the employees' devices, many of these messages may be deleted before collection.

INTERVIEW EMPLOYEES

As an initial matter, as in other parts of the world, a successful interview in Latin America often depends on the rapport created between the investigator and the interviewee and this rapport is often built based on subtle actions. As such, being aware of expected cultural manners will be helpful; for example, before an interview, the investigator should know how the interviewee likes to be addressed: by their first name or do they prefer to be called Ms, Sir, Doctor, ***licensiado*** or ***ingeniero***? Because Spanish has a formal and an informal second person singular form (***tú***/***usted***), investigators should understand the proper form to use to address the interviewee. The proper form will again depend on the country and origin of the interviewee; for example, in parts of Colombia, men generally use the form ***usted*** when talking to one another, but in Chile, using ***usted*** could reflexively create a wall between the interviewee and interviewer. Additionally, because rapport is often built over time, having an in-house attorney with whom the employee is already familiar may lead to a more candid and successful interview, and interviewers with less familiarity may even want to proceed with an initial interview to gather background information and develop a rapport, and then follow up with a more substantive interview shortly afterwards. Moreover, preparing a portfolio of documents to show the interviewee during the interview will often help to refresh recollections and more effectively promote discussion of important issues.

One relevant consideration for interviews is whether attorneys should provide the interviewee with an ***Upjohn*** warning at the beginning of the interview, essentially alerting the employee to the fact that the lawyers conducting the interview are lawyers for the company, not the employee, that the interview is privileged, and that the privilege belongs to the company, which it can choose to waive or not.[36] Although this warning is fairly typical in US investigations, it still has the risk of confusing or alarming the employee, a risk that is magnified in Latin America, where this introduction is not as typical. Nonetheless, emphasising the company's confidentiality and anti-retaliation policies may go a long way towards putting the employee at ease and prevent disclosures or gossip about the interview, and including the principles of an ***Upjohn*** warning as part of that introduction may be beneficial to the company if there is later a claim by the employee that they thought the interviewer was their attorney.

Another consideration when conducting employee interviews in Latin America is how the interview is recorded; for example, it is more common in Latin America than in the United States for a company to make audio or video recordings or to transcribe witness interviews so that, if needed in future labour litigation, it will be able to offer the recorded interview statements as evidence supporting a termination. However, companies may also choose to record the interview through an interview memorandum that summarises the interview and reflects the conducting attorney's mental impressions of the interview, so as to better protect the attorney–client and work-product privilege. In addition, audio or video recording or taking verbatim notes during the interview may cause the interviewee to feel intimidated and inhibited and, therefore, could result in less sharing of important information.

In addition, some employees may request to be accompanied by a lawyer during the interview. Although the appropriate response will depend on the circumstances, as a general matter it may be best to permit the lawyer to attend as a matter of fairness and to avoid any later claims by the employee, so long as the lawyer is not disruptive. Note that, in some cases, employees may be unionised and may want their labour union leader to participate in the interview; however, companies and defence counsel should keep in mind that having a non-lawyer third party join an interview could harm the integrity and confidentiality of the investigation and result in a waiver of privilege.

DRAFT THE INVESTIGATION REPORT AND REMEDIATION PLAN

Once the investigation is concluded, the investigator should record the findings and brief the relevant parties. As referenced above, this could take the form of a thorough and detailed written report, a higher-level written summary, a PowerPoint presentation to the parties overseeing the investigation, or some combination of these options that describes the investigative steps, findings, conclusions and remediation.

In terms of remediation, if the company decides to dismiss any employees, it is best practice to undertake this decision in consultation with labour counsel, given the implications of labour laws in the region. Furthermore, if a company plans to claw back any compensation – a tool that has recently been emphasised and incentivised by US authorities – it is likewise important to consult local employment counsel, as this action may be precluded and even illegal in certain countries in the region.

DECIDE WHETHER TO VOLUNTARILY DISCLOSE

If the internal investigation uncovers findings of corruption or other illicit conduct, the company will need to consider whether to self-report to government authorities (in addition to any other disclosure obligations that may exist). Self-reporting may be helpful in countries where benefits are offered, such as Argentina,[37] Colombia[38] and Peru.[39] Notably, these jurisdictions also consider having a well-established compliance programme to be a key factor for a declination or a reduction of the penalty; however, even if the specific country's legislation includes benefits for self-reporting, because of the few precedents and the fact that benefits for cooperation are generally left to the discretion of the prosecutor or the judge, it is difficult to accurately assess the risks and benefits of self-reporting.

Another important consideration is whether multiple jurisdictions are implicated by the misconduct. As described in 'Cross-border agency cooperation', above, given the significant cross-border cooperation demonstrated, a self-disclosure to one country may necessarily lead to investigations by other authorities. Thus, it is important to assess the benefits of self-disclosure in all countries that may become active in the investigation and to determine the best approach for disclosing to multiple authorities.

Finally, companies should weigh the benefits of self-reporting against the risk of triggering a potentially long government investigation that would naturally bring reputational and operational consequences. Self-reporting could also lead to civil lawsuits or investigations by foreign regulators that may or may not credit the initial self-reporting efforts by the company, and could carry the additional risk of expanding in scope beyond the issue identified in the self-report because of overbroad discovery requests.[40]

CONCLUSION

As pressure to combat corporate misconduct rises in the region, Latin American governments are likely to continue to enhance their enforcement efforts and their expectations of how companies handle allegations of misconduct.

As a result, companies operating in Latin America will face enhanced pressure to have adequate compliance systems, including effective guidelines and procedures to conduct investigations. Although there is not a one-size-fits-all approach to conducting an internal investigation, taking into consideration the issues outlined above will help companies better address corporate misconduct and put themselves in the best position with government regulators.

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ENDNOTES

[1] See, e.g., 'Brazil Eletronuclear CEO Gets 43-Year Sentence for Corruption', Reuters (4 August 2016); Colin Dwyer, 'Former Brazilian President Lula Convicted of Corruption, Sentenced to Prison', NPR (12 July 2017); Andrea Zarate and Nicholas Casey, 'Peru's President Faces Possible Ouster in Corruption Scandal', ***New York Times*** (15 December 2017); Gideon Long, 'Ecuador's Former President Convicted on Corruption Charges', ***Financial Times*** (7 April 2020); 'Mexico Attorney General Seeks up to 39 Years Prison for Ex-Pemex Boss', Reuters (5 January 2022); Manuel Rueda, 'Colombian Prosecutors Accuse Former Presidential Candidate of Taking Money from Odebrecht', AP News (10 July 2023); 'Guatemala's Anti-corruption Candidate Wins Presidency in a Landslide Vote', NPR (21 August 2023).

[2] See, e.g., Amanda Taub, '"Chile Woke Up": Dictatorship's Legacy of Inequality Triggers Mass Protests', ***New York Times*** (3 November 2019); 'Colombians Fill Streets in Protest, Riding Region's Wave of Discontent', ***New York Times*** (21 November 2019).

[3] The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. § 78dd-1, ***et seq.*** (FCPA).

[4] The set of FCPA resolutions in this section was sourced largely from the Stanford Law School Foreign Corrupt Practices Act Clearinghouse database (-https://fcpa.stanford.edu/index.html (accessed 4 July 2024)). The resolution documents were independently reviewed by the authors.

[5] See U.S. Dep't. of Justice (DOJ), Justice Manual § 9-28.700 (which states that cooperation is a 'mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (e.g., suborning perjury or false statements, or refusing to comply with lawful discovery requests)'. See also 'Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy', DOJ, Office of Public Affairs (17 January 2023). See (per quotations above), e.g., Deferred Prosecution Agreement at ¶ 4(c), ***United States v. Corporación Financiera Colombiana S.A.***, No. PJM-23-0262 (D. Md. Aug. 10, 2023). See also Deferred Prosecution Agreement at ¶ 4(b), ***United States v. GOL Linhas Aereas Inteligentes***

S.A., No. PJM-22-0325 (D. Md. Sept. 16, 2022); Deferred Prosecution Agreement at ¶ 4(c), *United States v. UOP LLC d/b/a Honeywell UOP*, Criminal No. 22-cr-624 (S.D. Tex. Dec. 19, 2022).

[6] See, e.g., Plea Agreement at ¶ 7(e), *United States v. J&F Investimentos SA*, No. 20-CR-365 (MKB) (E.D.N.Y. Oct. 14, 2020) ('[A]lthough the Defendant did not have anti-corruption controls or an anti-corruption compliance program at the time of the conduct described in the Statement of Facts, the Defendant has since engaged in remedial measures, including . . . creating and establishing an anti-corruption compliance program . . . significantly increasing the importance of anti-corruption compliance messaging within the company [and] conducing regular and robust anti-corruption compliance trainings.').

[7] See DOJ, Justice Manual § 9-28.800 (stating that prosecutors 'should evaluate a corporate compliance program as a factor in determining, inter alia, whether to charge the corporation, the terms of a corporate resolution, and the need for an independent compliance monitor'); see also Memorandum from Assistant Attorney General, Criminal Division, 'Revised Memorandum on Selection of Monitors in Criminal Division Matters', DOJ (1 March 2022) (explaining the factors that need to be considered when assessing the necessity and benefits of imposing a monitorship); see, e.g., Deferred Prosecution Agreement, *United States v. Stericycle, Inc.*, No. 22-CR-20156 (S.D. Fla. Apr. 18, 2022) ('[D]espite its extensive remedial measures . . . the Company to date has not fully implemented or tested its enhanced compliance program, and thus the imposition of an independent compliance monitor for a term of two years, as described more fully below and in Attachment D, is necessary to prevent the recurrence of misconduct.').

[8] See, e.g., Deferred Prosecution Agreement, *United States v. UOP LLC d/b/a Honeywell UOP*, Criminal No. 22-cr-624 (S.D. Tex. Dec. 19, 2022); Deferred Prosecution Agreement, *United States v. GOL Linhas Aereas Inteligentes S.A.*, No. PJM-22-0325 (D. Md. Sept. 16, 2022).

[9] See, e.g., Deferred Prosecution Agreement, *United States v. Corporación Financiera Colombiana S.A.*, No. PJM-23-0262 (D. Md. Aug. 10, 2023).

[10] See, e.g., Plea Agreement, *United States v. Gunvor S.A.*, No. 24-85 (ENV) (E.D.N.Y. Mar. 1, 2024).

[11] See, e.g., Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-686 (S.D. Tex. Nov. 30, 2017).

[12] See, e.g., Plea Agreement, *United States v. Braskem S.A.*, No. 16-644 (RJD) (E.D.N.Y. Dec. 21, 2016).

[13] See, e.g., Deferred Prosecution Agreement, *United States v. Amec Foster Wheeler Energy Limited*, No. 21-CR-298 (E.D.N.Y. June 25, 2021).

[14] See, e.g., Cease and Desist Order, *Vantage Drilling International*, Exchange Act No. 84617 (Nov. 19, 2018); Cease and Desist Order, *Key Energy Services, Inc.*, Exchange Act No. 78558 (Aug. 11, 2016); Cease and Desist Order, *SAP SE*, Exchange Act No. 77005 (Feb. 1, 2016).

[15] But see Cease and Desist Order, *Petróleo Brasileiro S.A. – Petrobras*, Exchange Act No. 10561 (Sept. 27, 2018) ('Respondent shall receive a dollar-for-dollar credit . . . of any payment made in agreement with the Brazilian authorities as described in the non-prosecution agreement.').

[16] See, e.g., Cease and Desist Order, ***Honeywell International Inc.***, Exchange Act No. 96529 (Dec. 19, 2022); Cease and Desist Order, ***GOL Linhas Aereas Inteligentes S.A.***, Exchange Act No. 95800 (Sept. 15, 2022); Cease and Desist Order, ***Stericycle, Inc.***, Exchange Act No. 94760 (Apr. 20, 2022).

[17] Organisation for Economic Co-operation and Development, 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378 (accessed 4 July 2024)).

[18] See e.g., Anti-Corruption Law, Official Gazette No. 6.155 of 19 November 2014 (Venezuela) (establishing corporate criminal liability for domestic and foreign corruption offences).

[19] See Law No. 27,401 of 2 March 2018 (Argentina) (establishing corporate criminal liability for foreign corruption offences).

[20] See Law No. 20,393, enhanced by Law No. 21,595 (Chile) (establishing corporate criminal liability for crimes, including bribery of a foreign public official).

[21] See Clean Company Act, Law No. 12,846 of 2013 (Brazil) (establishing corporate civil liability for crimes involving bribery of a foreign public official).

[22] See Law 1778 of 2016, modified by Law 2195 of 2022 (Colombia) (establishing corporate administrative liability for crimes involving bribery of a foreign public official).

[23] 'Fiscalía obtiene el primer fallo por cohecho transnacional', Chile Transparente (31 December 2015).

[24] See Fiscalia, Ministerio Público, 'Visita in Situ República de Chile' (April 2022) (https://www.oas.org/es/sla/dlc/mesicic/docs/mesicic6_cl_res_ane28.pdf (accessed 28 October 2024)).

[25] See 'Decisiones en firme de soborno transnacional', Superintendencia de Sociedades de Colombia (-https://www.supersociedades.gov.co/en/web/asuntos-economicos-societarios/decisiones-en-firme-gst (accessed 4 July 2024)).

[26] Gillian Dell and Andrew McDevitt, 'Exporting Corruption 2022', Transparency Int'l (-https://files.transparencycdn.org/images/2022-Report-Slim-version-Exporting-Corruption-English.pdf (accessed 4 July 2024)).

[27] See Gina Cabrejo, 'Fighting Corruption through International Cooperation', Nat'l Ass'n of Att'ys Gen. (https://www.naag.org/attorney-general-journal/prosecuting-corruption-through-international-cooperation (accessed 4 July 2024)).

[28] ibid.

[29] Daniel S Kahn, Leo R Tsao and Eugene E Soltes, ***Corporate Criminal Investigations and Prosecutions*** (Aspen Publishing, 2022), 91.

[30] See Law No. 1581 of 2012 (Colombia) (establishing personal data protections and allowing the use of personal data as long as the user provides express consent). See also Law No. 19,628 of 1999 (Chile) (establishing privacy data protections and allowing the use thereof based on the data subject's informed, written consent); Renato Jijena, 'Proteccion de datos personales en material laboral: el derecho a la imagen propia del trabajador', Diario

Constitucional.cl (19 May 2021) (explaining how some companies warn employees about the company's use of their private data).

[31] See Labour Code (Chile), Title IV, Article 211-A, ***et seq***.

[32] ibid.

[33] See Memorandum from Deputy Attorney General Lisa O Monaco, 'Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group', DOJ (15 September 2022); and see also, 'Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime', DOJ (2 March 2023).

[34] ibid.

[35] Evaluation of Corporate Compliance Programs, DOJ, Criminal Division (March 2023), 17–18.

[36] ***Upjohn*** warnings are named after the Supreme Court case addressing the attorney–client privilege in the context of companies. In the case, ***Upjohn Co. v. United States***, 449 U.S. 383 (1981), the Supreme Court held that companies have a privileged relationship with their counsel, which extends to statements made by employees, and that the privilege belongs to the company and not to any individual employee. Warnings provided at the outset of an interview later became known as ***Upjohn*** warnings, despite warnings not being discussed in the ***Upjohn*** case.

[37] See Law No. 27,401 of 2018 (Argentina) (establishing corporate criminal liability for domestic and foreign corruption offences and benefits for cooperation).

[38] See Law 1778 of 2016, Article 19, modified by Law 2195 of 2022 (Colombia) (establishing the benefits a company may receive if it self-discloses or cooperates with the Superintendency of Companies).

[39] See Criminal Procedure Code, Article 472, ***et seq.*** (Peru) (establishing the benefits a company may receive if it self-discloses or cooperates in an investigation).

[40] See Kahn, et al., footnote 29, at 123.

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