

 **LATIN LAWYER**

# **THE GUIDE TO CORPORATE COMPLIANCE**

SECOND EDITION

**Editors**

Andrew M Levine, Reynaldo Manzanarez Radilla,  
Valeria Plastino and Fabio Selhorst

# **The Guide to Corporate Compliance**

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Second Edition

## **Editors**

Andrew M Levine, Reynaldo Manzanarez Radilla,  
Valeria Plastino and Fabio Selhorst

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# Publisher's Note

Latin Lawyer and LACCA are delighted to publish the second edition of *The Guide to Corporate Compliance*.

Edited by Andrew M Levine, a litigation partner at Debevoise & Plimpton LLP, Reynaldo Manzanarez Radilla, a corporate attorney and compliance professional at Incode Technologies Inc, Valeria Plastino, vice president, general counsel and regional compliance officer at Lumen Technologies, and Fabio Selhorst, general counsel, chief integrity officer and chief communications officer at Hapvida, this new guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Compliance*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment* and *The Guide to Corporate Crisis Management*, as well as our jurisdictional references and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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# Part 1

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## Setting the Scene

## CHAPTER 2

# Latin America's Compliance Climate Today

Jocelyn E Strauber, Julie Bédard, Lauren A Eisenberg and  
Mayra Suárez<sup>1</sup>

### Introduction

Since 2014, Brazil's *Operation Car Wash* investigation into widespread bribery and corruption involving politicians and state-owned enterprises has dominated headlines and captured public attention across Latin America and around the world. Among other things, the investigation led to the conviction (although subsequently annulled) of one former Brazilian president<sup>2</sup> and the impeachment of another,<sup>3</sup> the guilty pleas of a number of Brazilian and foreign companies, payments of millions of dollars in penalties and more than 200 individual convictions in Brazil.<sup>4</sup> In the wake of that unprecedented enforcement activity, legislators, enforcement agencies and judiciaries within and outside Latin America have made substantial efforts to combat corruption in their respective regions. The US Department of Justice (US DOJ) and US Securities and Exchange Commission (US SEC), for example, have brought corruption-related charges against more

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1 Jocelyn E Strauber and Julie Bédard are partners and Lauren A Eisenberg and Mayra Suárez are associates at Skadden, Arps, Slate, Meagher & Flom LLP.

2 Associated Press, 'Former Brazilian President Lula convicted in second corruption case', *Los Angeles Times* (6 February 2019) <<https://www.latimes.com/world/la-fg-brazil-lula-conviction-20190206-story.html>>; 'What did Lava Jato, Brazil's anti-corruption investigation, achieve?' *The Economist* (9 March 2021) <<https://www.economist.com/the-economist-explains/2021/03/09/what-did-lava-jato-brazils-anti-corruption-investigation-achieve>>.

3 Romero, Simon, 'Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote', *The New York Times* (31 August 2016) <<https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>>.

4 Brazil's Federal Public Ministry, 'Caso Lava Jato – Resultados' (12 February 2020) <<http://www.mpf.mp.br/grandes-casos/lava-jato/resultados>>.

than 100 individuals and corporations in respect of conduct in or related to Latin America since 2015, often in collaboration with enforcement counterparts in other countries.<sup>5</sup>

The international interest in combating corruption in the region shows no sign of abating. In March 2019, the US Federal Bureau of Investigation (FBI) announced the Miami International Corruption Squad (a task force intended to work alongside the FBI's other international corruption squads, the US SEC and the US DOJ's Fraud and Money Laundering Asset Forfeiture sections), signalling the continuing focus of US authorities on corruption in Latin America. The squad was 'created to combat international corruption by addressing foreign bribery, kleptocracy, and international antitrust matters . . . occurring outside U.S. borders but having a nexus to the U.S.'<sup>6</sup> The squad has worked on at least five cases since its creation, including some that settled in 2020, and has developed strong partnerships with law enforcement officials in Brazil, Colombia and Ecuador.<sup>7</sup>

In this context, companies operating in Latin America should be mindful of recent legislative, judicial and enforcement trends, and of global regulators' focus on fighting corruption in the region. This chapter reviews:

- recent trends in legislative and constitutional anti-corruption enforcement regimes in Latin America;
- changes in data protection regimes within and outside Latin America that may affect corporate investigations in the region; and
- global enforcement of corruption-related conduct in Latin America, including the impact of covid-19-related investigations and cooperation among US, Latin American and other regulators.

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5 See section below titled 'Recent enforcement trends'.

6 Press release, Federal Bureau of Investigation [FBI], 'FBI Announces New International Corruption Squad in Miami Field Office' (5 March 2019) <<https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-new-international-corruption-squad-in-miami-field-office>>.

7 See Sun, Mengqi, 'FBI Increasingly Probes for Corruption Overseas', *The Wall Street Journal* (31 December 2020) <<https://www.wsj.com/articles/fbi-increasingly-probes-for-corruption-overseas-11609434000>>.

## Key legislative changes in Latin America and elsewhere

### Development and strengthening of anti-corruption regimes

#### *Corporate criminal liability*

In recent years, many Latin American countries, by legislation or constitutional amendment, have established corporate criminal liability for bribery and corruption offences, with respect to conduct by agents of or for the benefit of corporations or similar legal entities. For example, Argentina (March 2018),<sup>8</sup> Mexico (May 2015)<sup>9</sup> and Peru (April 2016, amended 2017 and 2018)<sup>10</sup> now provide for corporate criminal liability for bribery of domestic public officials; in some countries, corporations can be liable for related conduct such as money laundering, commercial bribery and bribery of foreign officials.

Additionally, in some Latin American countries – such as Brazil, Colombia and Ecuador – only individuals, not corporations, can be held criminally liable for anti-corruption violations, though companies in Colombia may be held jointly and severally liable with employees and executives who engage in corrupt conduct.<sup>11</sup> In Brazil, corporations can only be held criminally liable for environmental violations.<sup>12</sup> In practice, however, corporations will retain criminal counsel

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8 See Law No. 27401 of 1 December 2017 [CXXV-33.763] B.O. 3 (Arg.) <<https://www.ilo.org/dyn/natlex/docs/electronic/106245/130242/f-2006629615/ley%2027401%20argentina.pdf>>. The law provides for criminal liability for offences, including foreign bribery and false books and records, committed with the company's intervention or in the company's name, interest or benefit. Penalties include fines, suspension of commercial activities, disqualification from public tenders, cancellation of corporate registration, loss of government benefits and publication of the conviction. There is no retroactive liability.

9 See 'Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de combate a la corrupción', Official Federal Gazette (Mexico) (DOF 27-5-2015) <[www.diputados.gob.mx/LeyesBiblio/proceso/docleg/62/223\\_DOF\\_27may15.pdf](http://www.diputados.gob.mx/LeyesBiblio/proceso/docleg/62/223_DOF_27may15.pdf)> (providing for criminal liability for (1) offences (including public bribery) committed in the entity's name, on its behalf, for its benefit or using means provided by the entity (2) where the entity did not have proper controls in place). See also General Law of the National Anti-Corruption System, Official Federal Gazette (Mexico) (DOF 18-07-2016) <<http://www.diputados.gob.mx/LeyesBiblio/pdf/LGSNA.pdf>>.

10 See Law No. 30424 of 21 April 2016, El Peruano (Peru) <[www.leyes.congreso.gob.pe/Documentos/Leyes/30424.pdf](http://www.leyes.congreso.gob.pe/Documentos/Leyes/30424.pdf)> (providing for criminal liability for offences, including public bribery and money laundering, committed in the name or on behalf of the legal entity for its direct or indirect benefit).

11 See Law 599 of 24 July 2000, Official Gazette (Colombia), 22 <<https://www.refworld.org/docid/3dbd1fd94.html>>; see Law No. 9605 of 12 February 1998, Official Gazette (Brazil) (13 February 1998) <[www.planalto.gov.br/ccivil\\_03/leis/l9605.htm](http://www.planalto.gov.br/ccivil_03/leis/l9605.htm)>.

12 Law No. 9605 (footnote 11, above).

and closely monitor any proceedings against current and former executives and other employees, particularly given the other forms of liability that corporations face.

### Mandated or recommended compliance programmes and other factors in leniency determinations

A number of countries have passed laws relating to corporate compliance programmes that are (1) required, (2) recommended or (3) if implemented, can entitle a company in violation of anti-corruption laws to leniency.<sup>13,14</sup>

In Brazil, although compliance programmes are not currently required under federal law, companies with effective compliance programmes may be entitled to a fine reduction of up to 4 per cent in civil and administrative proceedings.<sup>15</sup> On 9 December 2020, Brazil released an anti-corruption plan that includes a timetable for development of criteria to assess compliance programmes and calculate cooperation credit as part of leniency agreements.<sup>16</sup>

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13 Federal and certain state laws in Brazil require companies that contract with state entities to have compliance programmes. See, e.g., Decree No. 6112 of 2 February 2018, Official Gazette (Brazil) (6 February 2018); Decree No. 7,753 of 17 October 2017, Official Gazette (Brazil) (18 October 2017); Decree No. 15228 of 25 September 2018, Official Gazette (Brazil) (26 September 2018); Decree No. 4370 of 27 December 2018, Amazon Official Gazette (Brazil) (27 December 2018); Decree No. 20489 of 6 June 2019, States Official Gazette (Brazil) (10 June 2019).

14 See Chapter 14, 'The Advantages of a Robust Compliance Programme in the Event of an External Investigation'.

15 Decree No. 12846 of 1 August 2013, Official Gazette (Brazil) (2 August 2013) <[https://www.in.gov.br/materia/-/asset\\_publisher/KujrjwOTZC2Mb/content/id/30042702/do1-2013-08-02-lei-n-12-846-de-1-de-agosto-de-2013-30042696](https://www.in.gov.br/materia/-/asset_publisher/KujrjwOTZC2Mb/content/id/30042702/do1-2013-08-02-lei-n-12-846-de-1-de-agosto-de-2013-30042696)> [LAC] (no requirement for corporate compliance programmes); Decree No. 8420 of 18 March 2015, Official Gazette (Brazil) (19 March 2015) <[http://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2015/Decreto/D8420.htm](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Decreto/D8420.htm)> (providing credit for effective compliance programmes, defining parameters for evaluating compliance programmes (e.g., customised to each legal entity and its activities, commitment by senior management, training) and providing for the administrative liability of legal persons for the commission of acts against public, national or foreign administrations); Instruction No. 607 of 17 June 2019, Official Gazette (Brazil) (18 June 2019) <[www.in.gov.br/web/dou/-/instrucao-n-607-de-17-de-junho-de-2019-164059674](http://www.in.gov.br/web/dou/-/instrucao-n-607-de-17-de-junho-de-2019-164059674)>. Securities and Exchange Commission of Brazil, Rule No. 607 establishes that any publicly held company with an effective compliance programme may have their fines reduced by up to 25 per cent.

16 See Interministerial Committee to Combat Corruption, 'Anticorruption Plan: Diagnosis and Actions of the Federal Government' (9 December 2020) <<https://www.gov.br/cgu/pt-br/anticorruptcao/plano-anticorruptcao.pdf>>.

Chile provides companies that have effective 'prevention models' with complete immunity from corporate liability for corrupt conduct.<sup>17</sup>

In Argentina, Law 27401 sets forth mandatory and recommended components of a corporate compliance programme:<sup>18</sup>

Mandatory	Recommended
Code of ethics or code of conduct	Periodic risk analyses and review of the compliance programme
Specific policies or procedures to prevent criminal offences in public tenders, administrative agreements or in any other dealings with public administration	Clear anti-corruption tone from the top
Periodic compliance training	Whistle-blower reporting channels
	Whistle-blower protection policy
	Internal investigation protocols to protect the rights of employees under investigation to impose effective sanctions for misconduct
	Third-party due diligence policies
	Due diligence policies relating to mergers and acquisitions
	Appointment of a compliance officer

Some countries provide incentives in the form of credit or leniency for disclosure of misconduct to government authorities and cooperation with investigations. For example, in Peru, the Public Prosecutor's Office can enter into leniency agreements – subject to judicial approval – with individuals and companies who are involved in the commission of certain crimes, including bribery of public officials, when the company or individual (1) voluntarily abandons the criminal activities,

17 See Law No. 20393 (establishing the criminal responsibility of legal persons in the crimes of laundering of assets, financing of terrorism and bribery), 11 November 2009, Official Gazette (Chile) <[http://www.oas.org/juridico/spanish/mesicic3\\_chl\\_ley20393.pdf](http://www.oas.org/juridico/spanish/mesicic3_chl_ley20393.pdf)> (stating that an effective prevention model includes: (1) systems to identify risks, establish specific protocols, rules and procedures to prevent the commission of said offences, and identify procedures for administrating and auditing the entity's financial resources; (2) internal administrative sanctions; (3) procedures for reporting wrongdoing; and (4) procedures to detect and correct systemic failures in the prevention model).

18 See Law No. 27401 (footnote 8, above).



(2) admits freely, or does not contradict, the facts concerning the criminal conduct and (3) presents himself or herself to the Public Prosecutor's Office, demonstrating a willingness to provide useful information.<sup>19</sup>

Similarly, under Ecuador's Criminal Code, individuals who engage in corrupt conduct can obtain a reduction in their sentence if they provide accurate and verifiable information that (1) clarifies facts under investigation, (2) results in the identification of culpable persons or (3) helps to prevent, neutralise or impede the commission of a crime of equal or greater significance.<sup>20</sup> For an individual to receive cooperation credit, the prosecutor must confirm in the charging document presented to the court that the cooperation was effective.<sup>21</sup>

### Expansion of prohibited and regulated conduct

At the same time that some countries in Latin America are offering leniency to those companies that cooperate or maintain an effective compliance programme, a number of Latin American countries have expanded the reach of their anti-bribery statutes. In Peru and Chile, for instance, the prohibited conduct extends beyond the bribery of public officials and includes commercial bribery, that is to say bribery of individuals acting in a private capacity.<sup>22</sup> Others, such as Venezuela, have also criminalised bribery of foreign, not just domestic, government officials.<sup>23</sup>

Some countries also have placed restrictions on corporate political contributions as a means to combat corruption. For example, in Chile, companies are prohibited from making political contributions; these may be made by individuals only.<sup>24</sup> In Colombia, any company that makes a contribution greater than 2.5 per

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19 See Legislative Decree No. 957, Criminal Procedure Code (Peru), 29 July 2004 <[http://spij.minjus.gob.pe/content/publicaciones\\_oficiales/img/CODIGOPROCESALPENAL.pdf](http://spij.minjus.gob.pe/content/publicaciones_oficiales/img/CODIGOPROCESALPENAL.pdf)>.

20 See Organic Integral Criminal Code, Official Registry (Ecuador), 3 February 2014 <[https://oig.cepal.org/sites/default/files/2014\\_codigopenal\\_ecu.pdf](https://oig.cepal.org/sites/default/files/2014_codigopenal_ecu.pdf)>.

21 *id.*, at Articles 492 and 493.

22 See Law No. 21121 (amending the Criminal Code and other legal rules for the prevention, detection and prosecution of corruption), 20 November 2018, Official Gazette (Chile) <<https://www.bcn.cl/leychile/navegar?idNorma=1125600>>; Legislative Decree No. 1385, Criminal Code (Peru), 4 September 2018 <[https://cdn.www.gob.pe/uploads/document/file/192144/DL\\_1385.pdf](https://cdn.www.gob.pe/uploads/document/file/192144/DL_1385.pdf)>.

23 Official Gazette No. 6155 (Venezuela), 19 November 2014 <<http://www.mindefensa.gob.ve/COMISION/wp-content/uploads/2017/03/leycontracorrupcion.pdf>>.

24 See Law No. 20900 (for the strengthening and transparency of democracy), Official Gazette (Chile), 14 April 2016 <<https://www.diariooficial.interior.gob.cl/media/2016/04/14/do-20160414.pdf>>.

cent of the total contribution permitted under law to any president, governor or mayor may not enter into public contracts with entities administered by the candidate while the candidate is in office.<sup>25</sup>

### Recent reductions in anti-corruption efforts

Despite the strengthening of anti-corruption legislative schemes discussed above, certain countries have softened anti-corruption efforts and penalties over the past year. In January 2020, Honduran president Juan Orlando Hernández declined to renew the Mission to Support the Fight Against Corruption and Impunity (MACCIH), which was created in 2016 and resulted in the prosecution of over 100 people.<sup>26</sup> And a new penal code implemented in Honduras in June 2020 reduced individual sentences for corruption-related crimes.<sup>27</sup>

While the presidents of Mexico and Brazil promised anti-corruption reforms during their respective 2018 presidential campaigns, they have largely failed to enact them.<sup>28</sup> Mexican President Andrés Manuel López Obrador's anti-corruption initiatives have been dismissed by critics as 'largely symbolic'.<sup>29</sup> In October 2021, Brazilian president Jair Bolsonaro ended *Operation Car Wash*, declaring 'There isn't any more corruption in the government.' The following month, one of Bolsonaro's sons (a senator) was charged with embezzlement and money laundering related to theft of public money. Another son, a Rio city council member, has been accused of similar conduct.<sup>30</sup>

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25 See Law 1474 of 12 July 2011, Official Gazette (Colombia) <<http://wp.presidencia.gov.co/sitios/normativa/leyes/Documents/Juridica/Ley%201474%20de%2012%20de%20Julio%20de%202011.pdf>>; see also Law No. 28094 of 30 November 2017 (Peru) (prohibiting political parties from receiving contributions from companies) <[https://portal.jne.gob.pe/portal\\_documentos/files/fd6aadd2-0361-433b-8cab-aef2a0c568b7.pdf](https://portal.jne.gob.pe/portal_documentos/files/fd6aadd2-0361-433b-8cab-aef2a0c568b7.pdf)>.

26 See 'Press Release E-003/20,' Organization of American States (17 January 2020) <[https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-003/20](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-003/20)>.

27 See e.g., Gonzalez, Marlon 'Honduras' new penal code lightens sentences for corruption,' AP News (25 June 2020).

28 See Beittel, June S., 'Status of Latin America's Anti-corruption Fight amid Health and Political Challenges,' Congressional Research Service: Informing the legislative debate since 1914 (21 April 2020) <<https://fas.org/sgp/crs/row/IN11350.pdf>>.

29 id.

30 McCoy, Terrence 'Bolsonaro ran against corruption. Now, he'll have to find another slogan,' *The Washington Post* (21 November 2020) <[https://www.washingtonpost.com/world/the\\_americas/brazil-bolsonaro-corruption-sergio-moro/2020/11/20/dfd4e9f0-282e-11eb-92b7-6ef17b3fe3b4\\_story.html](https://www.washingtonpost.com/world/the_americas/brazil-bolsonaro-corruption-sergio-moro/2020/11/20/dfd4e9f0-282e-11eb-92b7-6ef17b3fe3b4_story.html)>.

## Covid-related relaxation of public procurement requirements and the rise in corruption

Transparency International has observed an 'explosion in irregularities and corruption cases associated with COVID-19 related procurement' in Latin America since the start of the pandemic.<sup>31</sup> This is likely owing, at least in part, to the relaxation of public procurement requirements across the region to facilitate and expedite purchases necessary to combat covid-19.

For example, in February 2020, Brazil enacted legislation permitting the government to contract with companies previously disqualified from the public bidding process, and increased the limit on post-award changes to contracts from 25 per cent to 50 per cent.<sup>32</sup> The legislation also removed any prerequisite for preliminary studies for common goods and services, and created an exception for services and engineering contracts valued at more than 150 million reais from public hearings for tenders.<sup>33</sup>

In a similar effort to ensure adequate resources to combat the pandemic, in March 2020, El Salvador's Legislative Assembly eased regulations related to the public procurement process, including temporary nullification of the Procurement and Contracting Law, the prevailing legal framework regulating government purchases.<sup>34</sup>

## US-Northern Triangle Enhanced Engagement Act

Enacted in December 2020, the Act requires that the US Secretary of State and the Administrator of the US Agency for International Development devise a five-year strategy to, among other things, 'advance economic prosperity' and 'combat

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31 Transparency International, CPI 2020: Americas (28 January 2021) <<https://www.transparency.org/en/news/cpi-2020-americas>>; see also Gressier, Roman, 'Series of Corruption Allegations Stains El Salvador's Promise - What Political Impact Will It Have?,' *El Faro* (11 September 2020) <[https://www.elfaro.net/en/202009/el\\_salvador/24796/Series-of-Corruption-Allegations-Stains-El-Salvador%E2%80%99s-Promise-%E2%80%94-What-Political-Impact-Will-It-Have.htm](https://www.elfaro.net/en/202009/el_salvador/24796/Series-of-Corruption-Allegations-Stains-El-Salvador%E2%80%99s-Promise-%E2%80%94-What-Political-Impact-Will-It-Have.htm)>.

32 See Law No. 13.979, Art. 4 of 6 February 2020, Official Gazette (Brazil) (7 February 2020) <[https://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/l13979.htm](https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l13979.htm)>.

33 See Tibério de Araújo Coutinho Madruga, 'Coronavírus: impacto em contratos e licitações,' *Tribuna do Norte* (10 April 2020) <<http://www.tribunadonorte.com.br/noticia/coronava-rus-impacto-em-contratos-e-licitaa-a-es/477178.?.?>>.

34 See Decree No. 593 of 14 March 2020, Official Gazette (El Salvador) (14 March 2020) <<https://www.diariooficial.gob.sv/diarios/do-2020/03-marzo/14-03-2020.pdf>>.

corruption' in El Salvador, Guatemala and Honduras.<sup>35</sup> The Act also requires the US president to submit to Congress by June 2021 a list of corrupt and undemocratic actors from El Salvador, Guatemala and Honduras who will be denied entry to the United States.<sup>36</sup>

### Data privacy and implications for corporate investigations<sup>37</sup>

There have been significant changes in data privacy and data protection regimes across the world during the past five years. In particular, on 25 May 2018, the European Union implemented a comprehensive data protection framework, the General Data Protection Regulation (GDPR). This new framework may govern the collection of data of Latin American companies in certain circumstances. It also has prompted several Latin American countries to re-examine their data protection regimes.<sup>38</sup>

To date, Brazil has enacted the most comprehensive reform in the region – the General Data Protection Law (LGPD) – which was approved, as amended, in July 2019<sup>39</sup> and went into effect in August 2020.<sup>40</sup> Brazilian residents can seek remedies under the law immediately, although the enforcement of the LGPD's penalties and sanctions provisions will not come into effect until 1 August 2021.<sup>41</sup> Similar to the GDPR, the LGPD establishes a comprehensive data protection system in Brazil and imposes rules for the collection, processing, storage, use and transfer of personal data. The LGPD applies broadly, and extraterritorially, to (1) the processing or collection of personal data in Brazil, (2) the processing of data anywhere in the world related to natural persons located in Brazil or (3)

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35 See The United States-Northern Triangle Enhanced Engagement Act (P.L. 116-260, Division FF, Subtitle F, Sec 352) <<https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR133SA-RCP-116-68.pdf>>.

36 See *id.* at Sec 353.

37 See Chapter 20, 'Data Privacy and Protection Relating to Healthcare in Europe, the United States and Brazil'.

38 See Bojalil, Paulina; et al., 'Data privacy reform gains momentum in Latin America', Inter-American Development Bank Blog (12 February 2019) <<https://blogs.iadb.org/conocimiento-abierto/en/data-privacy-reform-gains-momentum-in-latin-america/>>.

39 See Decree No. 13853 of 8 July 2019 (amending Law No. 13,709), Official Gazette (Brazil) (9 July 2019) <<http://www.in.gov.br/web/dou/-/lei-n-13853-de-8-de-julho-de-2019-190107897>>.

40 See 'LGPD – What You Need To Know About Brazil's Data Protection Law,' Wirewheel (11 September 2020) <<https://wirewheel.io/lgpd-what-you-need-to-know-about-brazils-new-data-protection-law/>>.

41 See Decree No. 14010 of 10 June 2020, Presidência da República (Brazil) (10 June 2020) <[https://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/l14010.htm](https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l14010.htm)>.

the processing of personal data for the purpose of offering goods or services in Brazil.<sup>42</sup> The National Data Protection Authority (ANPD), which was formed in August 2020, enforces the LGPD.<sup>43</sup> Non-compliance can result in sanctions, including warnings with a time limit for taking corrective action, suspensions of processing activities that violate the law and public disclosure of the infraction.<sup>44</sup> It can also include fines of up to 2 per cent of annual revenues generated in Brazil during the prior year, excluding taxes, up to a maximum of 50 million reais per infraction.<sup>45</sup> Other countries in the region have taken steps to increase privacy and security protection for personal data. For example, the National Congress of Chile is currently considering a new data protection bill that would enhance Chile's existing data protection regulation, Law No. 19628/1999 on the Protection of Private Life. On 15 December 2020, the Chilean government placed the bill into an 'urgent category' in an effort to expedite the legislative process.<sup>46</sup> The Chilean government expects the bill to be approved in 2021.<sup>47</sup>

Legislation in the United States enables US authorities to obtain data stored overseas. A law enacted in 2018 is notable in that it could enable US law enforcement to compel the production of data residing in Latin America. On 23 March 2018, then-president Donald Trump signed the Clarifying Lawful Overseas Use of Data Act (the CLOUD Act), which allows US law enforcement agents to compel US electronic communication service providers to produce data stored outside the United States in certain circumstances.<sup>48</sup> The CLOUD Act amended the Stored Communications Act<sup>49</sup> to clarify that a US electronic communication service provider must 'disclose the contents of a wire or electronic communication, and any record or other information pertaining to a customer or subscriber' within its possession, custody or control, regardless of where the data is located.<sup>50</sup>

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42 See Decree No. 13709 of 14 August 2018, Official Gazette (Brazil) (15 August 2018) <[https://www.in.gov.br/materia/-/asset\\_publisher/Kujrw0TZC2Mb/content/id/36849373/do1-2018-08-15-lei-no-13-709-de-14-de-agosto-de-2018-36849337](https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/36849373/do1-2018-08-15-lei-no-13-709-de-14-de-agosto-de-2018-36849337)>.

43 See Decree No. 10474 of August 26 2020, Official Gazette (Brazil) (27 August 2020) <<https://www.in.gov.br/en/web/dou/-/decreto-n-10.474-de-26-de-agosto-de-2020-274389226>>.

44 See Decree No. 13709 (footnote 40, above), at Article 52.

45 *id.*

46 See 'Chile – Data Protection Overview,' OneTrustDataGuidance (January 2021) <<https://www.dataguidance.com/notes/chile-data-protection-overview>>.

47 *id.*

48 Consolidated Appropriations Act, Pub. L. No. 115-141, Division V §§ 101–106, 132 Stat 348, at 1213–25 (23 March 2018) <<https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf>>.

49 18 U.S.C. 121 § 2701, et seq.

50 Consolidated Appropriations Act, Division V § 103(a)(1).

Service providers can challenge warrants seeking data if they reasonably believe that the customer or subscriber that is the subject of the warrant 'is not a United States person and does not reside in the United States' or if the disclosure would 'create a material risk that the provider would violate the laws of a qualifying foreign government'.<sup>51</sup> The CLOUD Act also allows certain foreign governments to enter into bilateral agreements with the United States and request data directly from US electronic communication service providers, instead of through a mutual legal assistance treaty.<sup>52</sup>

## Recent enforcement trends

### Covid-related corruption investigations

As noted above, the urgent need for governments across Latin America to provide medical equipment and services has led regulators to relax public procurement requirements.<sup>53</sup> This covid-related change fosters ample opportunity for corruption, particularly in the healthcare industry.

It is therefore not surprising that a number of countries have announced investigations or prosecutions of corruption related to government purchases of medical supplies, such as protective masks, sanitiser, ventilators and body bags.<sup>54</sup>

For example:

- **Argentina:** Authorities are investigating the sale of expired surgical masks to the city of Buenos Aires at 10 times their listed price.<sup>55</sup>

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51 *id.*, at § 103(b).

52 *id.*, at §§ 104 and 105. As at 15 February 2021, only the United Kingdom had entered into a bilateral agreement with the United States.

53 See Simon & Aalbers, 'The Capacity to Combat Corruption (CCC) Index', AS/COA and Control Risks (2020) <[https://www.as-coa.org/sites/default/files/archive/CCC\\_Report\\_2020\\_Updated.pdf](https://www.as-coa.org/sites/default/files/archive/CCC_Report_2020_Updated.pdf)>; Harris, Schipani, 'Coronavirus corruption cases spread across Latin America', *Financial Times* (7 July 2020) <<https://www.ft.com/content/94c87005-7eb1-47c4-9698-5afb2b12ab54>>; Levine, Yannett & Archanjo, 'Compliance Tips Amid Rising Fraud Risk in Latin America', *Law360* (31 August 2020) <<https://www.law360.com/articles/1305800/compliance-tips-amid-rising-fraud-risk-in-latin-america>>; Kitroeff, & Taj, 'Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks', *New York Times* (20 June 2020) <<https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html>>.

54 See, e.g., Kitroeff & Taj, 'Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks', *New York Times* (20 June 2020) <<https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html>>.

55 See Goodman, 'Spread of coronavirus fuels corruption in Latin America', *AP News* (27 May 2020) <<https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c>>.

- Brazil: authorities are investigating contracts and purchases totaling over 1 billion reais (US\$200 million), including conduct of three state governors, in covid-related corruption investigations.<sup>56</sup> One of these governors, Wilson Witzel, was temporarily removed from office in August 2020 owing to alleged kickbacks tied to the development of field hospitals intended to combat covid-19.<sup>57</sup>
- Bolivia: the health minister was arrested for allegedly purchasing 170 ventilators from a distributor for quadruple their original sale price and double the cost of other available options.<sup>58</sup>
- Colombia: the inspector general is investigating hundreds of corruption cases relating to contracts for covid-related emergency supplies.<sup>59</sup>
- Ecuador: '[P]rosecutors in Ecuador announced they had identified a criminal ring that had colluded with health officials to win a contract selling body bags to hospitals at 13 times the real price'.<sup>60</sup>
- Mexico: authorities are investigating the purchase of ventilators by a federal hospital at a price 85 per cent higher than other available options.<sup>61</sup>

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56 See Harris & Schipani, 'Coronavirus corruption cases spread across Latin America,' *Financial Times* (7 July 2020) <<https://www.ft.com/content/94c87005-7eb1-47c4-9698-5afb2b12ab54>>.

57 See McCoy, 'Rio's governor suspended amid widening corruption probe involving Brazil's pandemic response,' *The Washington Post* (28 August 2020) <[https://www.washingtonpost.com/world/the\\_americas/brazil-coronavirus-corruption-rio/2020/08/28/fe213756-e918-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/world/the_americas/brazil-coronavirus-corruption-rio/2020/08/28/fe213756-e918-11ea-970a-64c73a1c2392_story.html)>; Harris & Schipani, 'Coronavirus corruption cases spread across Latin America,' *Financial Times* (7 July 2020) <<https://www.ft.com/content/94c87005-7eb1-47c4-9698-5afb2b12ab54>>.

58 See Almonte, Bates, 'Corruption and Coronavirus in Latin America', *Corporate Compliance Insights* (8 September 2020) <<https://www.corporatecomplianceinsights.com/corruption-coronavirus-latin-america-covid/>>.

59 See id.

60 See Kitroeff & Taj, 'Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks', *New York Times* (20 June 2020) <<https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html>>.

61 See Almonte & Bates, 'Corruption and Coronavirus in Latin America', *Corporate Compliance Insights* (8 September 2020) <<https://www.corporatecomplianceinsights.com/corruption-coronavirus-latin-america-covid/>>.

In March 2020, '13 Latin American chapters of Transparency International presented a set of proposals to mitigate the risk of corruption in public procurement as part of the region's response to the Coronavirus'.<sup>62</sup>

In the United States, both the US DOJ and the US SEC announced early in the pandemic that their enforcement efforts and resources would be directed at combating covid-related misconduct,<sup>63</sup> as well as the continuing enforcement of all federal laws.<sup>64</sup>

## State-owned entities

### *Operation Car Wash: Petrobras and beyond*

After almost seven years of investigating corruption schemes in Brazil and elsewhere, *Operation Car Wash* was officially disbanded at the end of January 2021.<sup>65</sup> Although *Operation Car Wash* began with Petróleo Brasileiro SA (Petrobras), Brazil's state-owned and state-controlled energy company, many other state-owned or state-controlled enterprises were implicated across Latin America. Companies interacting with state-owned or state-controlled enterprises in Latin America should scrutinise these interactions.

Between December 2016 and December 2017, at least four companies reached resolutions with the US DOJ or the US SEC (or both), acknowledging bribe payments made to or through Petrobras, as well as, in some instances, additional improper payments to other government or state-owned entities (SOEs) or officials.<sup>66</sup> The alleged misconduct of these companies spanned Latin America

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62 'Coronavirus Sparks High Risk of Corruption Across Latin America', Transparency International (26 March 2020) <<https://www.transparency.org/en/press/coronavirus-sparks-high-risk-of-corruption-across-latin-america>>.

63 See Attorney General Barr, 'COVID-19 – Department of Justice Priorities', US DOJ (16 March 2020) <<https://www.justice.gov/archives/ag/page/file/1258676/download>>; see also SEC Coronavirus (COVID-19) Response, US SEC (29 December 2020;) <<https://www.sec.gov/sec-coronavirus-covid-19-response>>.

64 See Deputy Attorney General Rosen, 'Continuing to Investigate and Prosecute Federal Crime', US DOJ (18 March 2020) <<https://www.justice.gov/file/1268696/download>>; see also SEC Coronavirus (COVID-19) Response, US SEC (16 March 2020) <<https://www.sec.gov/sec-coronavirus-covid-19-response>>.

65 See Brito, Ricardo, 'After Seven Years, Brazil Shuts Down Car Wash Anti-Corruption Squad', Reuters (3 February 2021) <<https://www.reuters.com/article/us-brazil-corruption-idUSKBN2A4068>>.

66 See, e.g., Letter from Sandra Moser, Acting Chief, Fraud Section, US Dep't Justice [US DOJ], to F Joseph Warin, Gibson, Dunn & Crutcher LLP (26 September 2018) [hereinafter US DOJ Press release, 26 September 2018] <<https://www.justice.gov/opa/press-release/file/1096706/download>>; Press release, US DOJ, 'SBM Offshore N.V. & U.S.-based



– including alleged payments in Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Panama, Peru and Venezuela. In connection with the US resolutions, the Brazilian authorities were also able to secure independent settlements with all four companies.<sup>67</sup> In 2020, the US DOJ resolved charges with two more companies for corrupt conduct related to Petrobras.<sup>68</sup>

Following Odebrecht's December 2016 resolution with US, Brazilian and Swiss authorities, prosecutors from 10 Latin American countries formed a task force to investigate potential bribes paid by the company, emphasising information sharing and cooperation in the region.<sup>69</sup> As a result of its efforts to cooperate, the company has reached agreements with prosecutors in at least six countries in Latin America.

On 27 September 2018, Petrobras agreed to pay US\$1.78 billion – at the time, the largest single US Foreign Corrupt Practices Act (FCPA) resolution – to resolve investigations by the US DOJ, the US SEC and Brazilian authorities.<sup>70</sup>

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Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries' (29 November 2017) <<https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>>.

- 67 See, e.g., 'Keppel Offshore & Marine Reaches Global Resolution with Authorities in the U.S., Brazil and Singapore', Keppel Offshore & Marine (23 December 2017) <[www.keppelom.com/en/news-item.aspx?sid=2605&aid=5875&title=keppel-offshore-marine-reaches-global-resolution-with-authorities-in-the-us-brazil-and-singapore](http://www.keppelom.com/en/news-item.aspx?sid=2605&aid=5875&title=keppel-offshore-marine-reaches-global-resolution-with-authorities-in-the-us-brazil-and-singapore)>; Press release, SBM Offshore, 'SBM Offshore achieves settlement with Dutch Public Prosecutor's Office over alleged improper payments. United States Department of Justice closes out the matter' (12 November 2014) <<https://www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter>>.
- 68 See Deferred Prosecution Agreement at A-15, A-18, *United States v. Vitol Inc.*, No. 20-539 (E.D.N.Y. 3 December 2020) [hereinafter *Vitol Deferred Prosecution Agreement*, 3 December 2020] <<https://www.justice.gov/criminal-fraud/file/1346651/download>>; Press release, US DOJ, 'Sargeant Marine Inc. Pleads Guilty and Agrees to Pay Over \$16 Million in Criminal Fines to Resolve Foreign Bribery Case' (22 September 2020) [Sargeant Marine Press Release, 22 September 2020] <<https://www.justice.gov/usao-edny/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-over-16-million-criminal-fines-resolve>>.
- 69 See Boadle, Anthony, 'Latin American prosecutors join forces on Odebrecht bribes', *Reuters* (17 February 2017) <<https://www.reuters.com/article/idUSL1N1G200Y>>.
- 70 Press release, US DOJ, 'Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations' (27 September 2018) [hereinafter US DOJ Press release, 27 September 2019] <<https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>>; US DOJ Press release, 26 September 2018 (footnote 64, above); Press release, US SEC, 'Petrobras Reaches Settlement With SEC for Misleading Investors' (27 September 2018) <[https://www.sec.gov/news/press-release/2018-215?utm\\_medium=email&utm\\_source=govdelivery](https://www.sec.gov/news/press-release/2018-215?utm_medium=email&utm_source=govdelivery)>.

Petrobras acknowledged that it received bribe payments from companies in exchange for contracts, which Petrobras executives retained or passed to Brazilian politicians and others with influence over public projects.<sup>71</sup>

As part of its resolution, Petrobras agreed to cooperate with other current investigations into related conduct. Both US and Latin American authorities have been active in prosecuting companies that paid bribes to and through Petrobras. Since the resolution of the Petrobras investigation in September 2018, the US DOJ and the US SEC have, individually or jointly, reached resolutions with at least five additional companies for Petrobras-related misconduct.

## Other SOEs

*Operation Car Wash* led investigators far beyond Petrobras. In April 2015, 'Brazilian prosecutors said they had also found evidence of fraud at the country's health ministry and at state-owned bank Caixa Econômica Federal'.<sup>72</sup> Additionally, in October 2020, J&F Investimentos S.A. (J&F), a Brazil-based investment company, as well as its subsidiary JBS S.A., resolved enforcement actions with both the US DOJ and US SEC wherein the company admitted to making nearly US\$150 million in corrupt payments to high-ranking Brazilian government officials, including almost US\$25 million to a member of the legislative branch of the Brazilian government in exchange for securing hundreds of millions in financing from Caixa Econômica Federal.<sup>73</sup> J&F also made bribe payments to an executive at Banco Nacional de Desenvolvimento Econômico e Social (BNDES), another Brazilian state-owned and -controlled bank.<sup>74</sup>

Brazil's state-owned electric utility, Centrais Elétricas Brasileiras SA (Eletrobras), has also been the focus of anti-corruption investigations by both Brazilian and US authorities. In July 2015, Brazilian authorities arrested the chief

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71 id.

72 Jelmyer, Rogerio; Magalhaes, Luciana, 'CEO of Brazil's Eletronuclear Arrested in Wide Corruption Probe', *The Wall Street Journal* (28 July 2015) [hereinafter Jelmyer; Magalhaes, 'CEO of Brazil's Eletronuclear Arrested in Wide Corruption Probe'] <[https://www.wsj.com/articles/brazil-car-wash-corruption-probe-spreads-to-eletronuclear-1438091569?mod=article\\_inline](https://www.wsj.com/articles/brazil-car-wash-corruption-probe-spreads-to-eletronuclear-1438091569?mod=article_inline)>.

73 Press Release, US DOJ, 'J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over \$256 Million to Resolve Criminal Foreign Bribery Case' (14 October 2020) [hereinafter J&F Press Release, 14 October 2020] <<https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign>>; Press Release, US SEC, 'SEC Charges Brazilian Meat Producers With FCPA Violations' (14 October 2020) <<https://www.sec.gov/news/press-release/2020-254>>.

74 J&F Press Release, 14 October 2020 (footnote 71, above).

executive of Eletrobras and executed nearly two dozen related search warrants.<sup>75</sup> In October 2016, Eletrobras filed a delayed annual report for 2015 ‘because [it] required additional time to conduct an investigation into certain allegations’ relating to *Operation Car Wash* and disclosed that it was cooperating with the US DOJ, the US SEC, Brazilian authorities and others.<sup>76</sup> In August 2018, Eletrobras disclosed that the US DOJ declined to prosecute the company for FCPA violations but, in December 2018, Eletrobras paid US\$2.5 million to settle US SEC charges that it violated the books and records and internal controls provisions of the FCPA.<sup>77</sup>

*Operation Car Wash* has also brought investigators to state-owned enterprises in other countries. For example, in December 2016, after the investigation unearthed allegations that bribes were paid to an executive of a Mexican state-owned and state-controlled company, Petróleos Mexicanos (PEMEX) began investigating whether any of its executives received illicit payments in connection with the scheme.<sup>78</sup> In July 2019, ‘the Federal Attorney General’s Office [in Mexico] announced that it had obtained several arrest warrants against a former executive officer of PEMEX and other members of his family in connection with alleged crimes’ identified by *Operation Car Wash*.<sup>79</sup> In May 2020, PEMEX stated that it was continuing to cooperate with Mexican, US and other government authorities in connection with recent investigations related to other companies.<sup>80</sup>

During the past few years, US authorities have also undertaken sweeping investigations of alleged corruption at state-owned and state-controlled entities in Venezuela and Ecuador. Although these have largely resulted in individual enforcement actions, in 2020, the US DOJ resolved two corporate investigations related to corruption schemes in Venezuela and Ecuador, which included corrupt

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75 Jelmayer; Magalhaes, ‘CEO of Brazil’s Eletronuclear Arrested in Wide Corruption Probe’ (footnote 70, above).

76 Eletrobras, Annual Report (Form 20-F) (11 October 2016) <<https://eletrobras.com/en/ri/DemonstracoesFinanceiras/20F%202015.PDF>>.

77 Press release, US SEC, ‘SEC Charges Eletrobras with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA’ (26 December 2018) <<https://www.sec.gov/enforce/34-84973-s>>.

78 Petróleos Mexicanos (Form 6-K) (29 September 2017) <[https://www.pemex.com/ri/reguladores/Informacion%20SEC/Form%206-K\\_20170929.pdf](https://www.pemex.com/ri/reguladores/Informacion%20SEC/Form%206-K_20170929.pdf)>.

79 Petróleos Mexicanos (Form 6-K) (11 September 2019) <<https://www.pemex.com/ri/reguladores/Informacion%20SEC/Form%206-K%20A,%20filed%20Sep11,%202019.pdf>>.

80 Petróleos Mexicanos (Form 20-F) (8 May 2020) <[https://www.pemex.com/ri/reguladores/ReportesAnuales\\_SEC/20-F%202019%20PDF.pdf](https://www.pemex.com/ri/reguladores/ReportesAnuales_SEC/20-F%202019%20PDF.pdf)>.

payments to Empresa Pública de Hidrocarburos del Ecuador (PetroEcuador), a state-owned oil company in Ecuador, and Petroleos de Venezuela S.A. (PdVSA), a Venezuelan state-owned and -controlled oil company.<sup>81</sup>

In June 2019, Citgo Petroleum Corp (Citgo) confirmed that it received a subpoena requesting information relating to bribery in Venezuela. Citgo has been implicated in certain individuals' guilty pleas but has not been publicly charged nor has it reached a public corporate resolution.<sup>82</sup> In August 2020, the US DOJ announced an indictment against a former procurement officer and manager at Citgo that charged the official with accepting and directing bribe payments from various businessmen in exchange for assisting with business opportunities at Citgo and PdVSA.<sup>83</sup> This latest indictment is part of a larger US DOJ investigation in which 27 individuals have been charged with crimes related to bribery at PdVSA.<sup>84</sup>

Similarly, while the US DOJ's investigation has not yet resulted in the prosecution of PetroEcuador, the US DOJ has actively prosecuted individuals and some companies who paid or received bribes related to PetroEcuador.<sup>85</sup> In cases against individuals, PetroEcuador has tried to establish its victim status and entitlement to restitution, arguing that it was unaware of the bribery scheme and suffered financial losses as a direct result of the criminal acts.<sup>86</sup> Requests for victim status

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81 Sargeant Marine Press Release, 22 September 2020 (footnote 66, above).

82 See Wethe, David; Kassai, Lucia, 'Citgo Gets U.S. Subpoena Related to Venezuela Bribery Probe', *Bloomberg* (3 June 2019) <<https://www.bloomberg.com/news/articles/2019-06-03/citgo-gets-u-s-subpoena-related-to-venezuela-bribery-probe>>.

83 Indictment, *United States v. Jose Luis De Jongh-Atencio*, No. 4:20-CR-305 (S.D. Tex. 16 July 2020) <<https://www.justice.gov/criminal-fraud/file/1307276/download>>; Press release, US DOJ, 'Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme' (6 August 2020) [Citgo Press Release, 6 August 2020] <<https://www.justice.gov/opa/pr/former-venezuelan-official-charged-connection-international-bribery-and-money-laundering>>.

84 Citgo Press Release, 6 August 2020 (footnote 81, above); see also Indictment, *United States v. Natalino D'Amato*, No. 1:20-cr-20241-KMW (S.D. Fla. 24 November 2020) <<http://fcpa.stanford.edu/fcpac/documents/5000/004182.pdf>>; Information, *United States v. Carlos Enrique Urbano Fermin*, No. 1:20-cr-20163-RNS (S.D. Fla. 20 March 2020) <<http://fcpa.stanford.edu/fcpac/documents/5000/004084.pdf>>.

85 See Vitol Deferred Prosecution Agreement, 3 December 2020 (footnote 66, above); Sargeant Marine Press Release, 22 September 2020 (footnote 66, above).

86 See e.g., Petitioner Victim PetroEcuador's Memorandum of Law in Support of Motion for Recognition of its Rights as a Victim and Entitlement to Restitution, *United States v. Chatburn*, No. 1:18-cr-20312-CR-Cooke (S.D. Fla. 13 December 2019); EP PetroEcuador's Memorandum of Law in Support of Motion for Recognition of its Rights as a Victim and Entitlement to Restitution, *United States v. Baquerizo*, No. 1:18-cr-20596-DPG (S.D. Fla. 18

by state-owned enterprises – including PetroEcuador – have been unsuccessful in US courts.<sup>87</sup> For example, in a September 2019 ruling rejecting PetroEcuador's motion for victim status, the court noted that 'the level of pervasive, constant, and consistent illegal conduct among EP PetroEcuador's principals was sufficient to preclude EP PetroEcuador from being recognised as a victim under the MVRA'.<sup>88</sup> Similar motions by Instituto Costarricense de Electricidad of Costa Rica and Bariven SA, a subsidiary of PdVSA, were rejected.<sup>89</sup>

### Coordination among regulators

Recent actions reflect continuing coordination with respect to civil and criminal enforcement actions, both within the various federal, state and local law enforcement and regulatory agencies in the United States and among US law enforcement and regulatory agencies and their non-US counterparts.

In May 2018, the US DOJ formalised its position on coordination in a policy requiring US DOJ attorneys to coordinate internally, with other law enforcement partners in the United States and counterparts abroad (the Anti-Piling On Policy).<sup>90</sup> The Anti-Piling On Policy recognises that '[w]hen multiple law

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January 2019); Petitioner Victim PetroEcuador's Memorandum of Law in Support of Motion for Recognition of its Rights as a Victim and Entitlement to Restitution, *United States v. Cisneros*, No. 1:19-cr-20284-RS (S.D. Fla. 25 October 2019).

- 87 See Hudson, Clara, 'PetroEcuador is not a victim, Miami judge says', *Global Investigations Review* (23 September 2019) <[https://globalinvestigationsreview.com/article/jac/1197882/ petroecuador-is-not-a-victim-miami-judge-says](https://globalinvestigationsreview.com/article/jac/1197882/petroecuador-is-not-a-victim-miami-judge-says)>; Godoy, Jody, 'Lawyered-Up Suspect Says Taped Calls Violated Ethics Rule', *Law360* (22 May 2019) <[https://www.law360.com/ articles/1162008/lawyered-up-suspect-says-taped-calls-violated-ethics-rule](https://www.law360.com/articles/1162008/lawyered-up-suspect-says-taped-calls-violated-ethics-rule)>.
- 88 Omnibus Report and Recommendation, *United States v. Baquerizo*, No. 1:18-cr-20596-DPG (S.D. Fla. 20 September 2019) (internal citation omitted).
- 89 See 'ICE Again Gets A Chilly Response From The 11th Circuit', *FCPA Professor* (6 August 2012) <<http://fcpprofessor.com/ice-again-gets-a-chilly-response-from-the-11th-circuit/>> (summarizing Instituto Costarricense de Electricidad of Costa Rica's [ICE] failed attempt at petitioning for victim status in the Alcatel-Lucent bribery case at trial level and in its efforts to appeal before the 11th circuit); 'PdVSA "Victim" Petition Denied', *FCPA Professor* (28 February 2017) <<http://fcpprofessor.com/pdvsa-victim-petition-denied/>> (summarising the unsuccessful attempt of Bariven SA, a subsidiary of Petróleos de Venezuela, SA [PdVSA], to get victim status and restitution; the US DOJ argued that Bariven was merely trying to gain access to sensitive and confidential information about its investigation into bribery and corruption at Bariven and its parent, PdVSA).
- 90 US DOJ, Justice Manual § 1-12.100 – Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (May 2018) [hereinafter Justice Manual 1-12.100] <<https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.100>>.

enforcement and regulatory agencies pursue a single defendant for the same or substantially similar conduct', the result may be 'unwarranted and disproportionate penalties for that conduct'.<sup>91</sup> Coordination among regulators avoids 'unfair duplicative penalties' and 'depriv[es] a company of the benefits of certainty and finality ordinarily available through a full and final settlement'.<sup>92</sup> As the then Attorney General Rod Rosenstein explained: 'We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on. We need to think about whether devoting resources to additional enforcement against an old scheme is more valuable than fighting a new one'.<sup>93</sup>

The Anti-Piling On Policy consists of four principles, which apply to the US DOJ's cooperation with other US regulators and with foreign authorities:

The US DOJ should not 'use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments'.<sup>94</sup> For example, the US DOJ 'should not employ the threat of criminal prosecution solely to persuade a company to pay a larger settlement in a civil case'.<sup>95</sup>

US DOJ attorneys in different departments should coordinate with each other – be it through 'crediting and apportionment of financial penalties, fines, and forfeitures, [or] other means of avoiding disproportionate punishment' – to 'achieve an overall equitable result'.<sup>96</sup>

The US DOJ should 'endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct'.<sup>97</sup>

The US DOJ should consider whether multiple resolutions with different regulators are necessary for the 'interests of justice to be fully vindicated'. Some of the relevant factors include:

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91 Deputy Associate Attorney General Stephen Cox, Remarks as Prepared for the Cleveland, Tennessee, Rotary Club (12 March 2019) <<https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-gives-remarks-cleveland-tennessee-rotary>>.

92 Deputy Attorney General Rod Rosenstein, Remarks as Prepared for the New York City Bar White Collar Crime Institute, New York (9 May 2018) [hereinafter Rosenstein Remarks, 9 May 2018] <<https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>>.

93 *id.*

94 Justice Manual 1-12.100 (footnote 88, above).

95 Rosenstein Remarks, 9 May 2018 (footnote 90, above).

96 *id.*

97 Justice Manual 1-12.100 (footnote 88, above).

*the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the [US DOJ], separate from any such disclosures and cooperation with other relevant enforcement authorities.<sup>98</sup>*

It is important to note that this policy does not require the US DOJ to refrain from imposing its own penalties for conduct also investigated and penalised by other US and non-US enforcement agencies. The policy merely requires US DOJ prosecutors to consider whether multiple resolutions are necessary – the US DOJ is free to conclude that, for example, conduct that it perceives to be egregious warrants multiple penalties imposed by different authorities. Furthermore, the policy further incentivises cooperation with the US DOJ, as that is a factor to be considered by the US DOJ in evaluating whether multiple penalties are necessary. Although it is common for new US DOJ leadership to re-evaluate the policies of prior administrations, to date, the Biden Administration has not signalled an intention to depart from the Anti-Piling On Policy.<sup>99</sup>

### Coordination between the US DOJ and other US regulatory agencies

Because Latin American companies whose shares or American Depositary Receipts (ADRs) are publicly traded in the United States are subject to US SEC regulation, the Anti-Piling On Policy may be useful to companies facing US DOJ and US SEC investigations, in that the policy provides a basis to contend that the imposition of substantial penalties by both agencies would be unnecessary and unwarranted. Indeed, the Anti-Piling On Policy encourages US DOJ attorneys to coordinate with other agencies where possible – including the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of the Foreign Assets Control, in addition to the US SEC – to better ‘detect sophisticated financial fraud schemes and deploy adequate penalties and remedies to ensure market integrity’.<sup>100</sup>

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98 id.

99 See Vanderford, Richard, 'For Anticorruption Enforcement Under Biden, Big Policy Shifts Unlikely', MLex (25 January 2021) <<https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/for-anticorruption-enforcement-under-biden-big-policy-shifts-unlikely>> ('Another signature anticorruption enforcement policy, the "no piling on" policy announced by then-Deputy Attorney General Rod Rosenstein, is likely to persist.').

100 Rosenstein Remarks, 9 May 2018 (footnote 90, above).

In the anti-corruption space in particular, a company that is headquartered or conducts business in Latin America and is publicly traded in the United States (including through ADRs) may be subject to investigations and penalties by both the US DOJ and the US SEC for the same alleged violations of the FCPA. In a speech on 3 October 2019, then-US Attorney General William Barr reiterated the US DOJ's commitment to coordination, particularly with the US SEC: 'Critically . . . if a company meets the benchmarks of good corporate behavior, the [US] DOJ can use its discretion to act in deference to a[] [US] SEC parallel resolution'. Barr cited two companies that the US DOJ declined to prosecute in the past in light of a simultaneous US SEC resolution.<sup>101</sup>

Indeed, recent enforcement actions do suggest that the US DOJ may be willing to decline to prosecute where the US SEC is investigating and reaches a resolution. For example, of the seven companies to which the US DOJ has issued formal declinations since 2018:

- five involved US-based companies publicly traded on a US stock exchange that reached resolutions with the US SEC;<sup>102</sup> and
- one involved a UK-based company that was not publicly traded in the United States and the US DOJ explicitly tied the declination to the UK authorities' ongoing investigation of the same conduct.<sup>103</sup>

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101 US Attorney General William P. Barr, Remarks As Prepared for Delivery at the US SEC's Criminal Coordination Conference (3 October 2019) <<https://www.justice.gov/opa/speech/us-attorney-general-william-p-barr-delivers-remarks-us-securities-and-exchange-commission>>.

102 See, e.g., Letter from Robert Zink, Chief, Fraud Section, US DOJ, to Mark Schamel et al., Womble Bond Dickerson LLP (5 August 2020) <<https://www.justice.gov/criminal-fraud/file/1301826/download>>; Letter from Matthew Kruger, US Attorney, E.D. Wis. and Robert Zink, Chief, Fraud Section, US DOJ, to David W Simon et al., Foley & Lardner LLP (19 September 2019) <<https://www.justice.gov/criminal-fraud/file/1205341/download>>; Letter from Sandra Moser, Acting Chief, Fraud Section, US DOJ, to Caz Hashemi, Wilson Sonsini Goodrich & Rosati, and Rohan Virginkar, Foley & Lardner LLP (20 December 2018) [hereinafter Letter from Sandra Moser to Caz Hashemi] <<https://www.justice.gov/criminal-fraud/file/1122966/download>>; Letter from Craig Carpentino [sic], US Attorney, Dist. of N.J., and Sandra Moser, Acting Chief, Fraud Section, Criminal Division, US DOJ, to Peter Spivack, Hogan Lovells (23 April 2018) <<https://www.justice.gov/criminal-fraud/file/1055401/download>>.

103 Letter from Daniel S Kahn, Deputy Chief, US DOJ, to Matthew Reinhard, Miller & Chevalier Chartered (20 August 2018) <<https://www.justice.gov/criminal-fraud/page/file/1088621/download>> (noting that one reason for declination was 'the fact that [Guralp Systems Limited], a U.K. company with its principal place of business in the U.K., is the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and has committed to accepting responsibility for that conduct with the SFO.'). The final declination involved a Barbados-based company that earned less



This signals that when a company fully resolves corruption-related violations with another enforcement agency – whether in the United States or elsewhere – the US DOJ may be less inclined to bring its own charges, particularly if the company has taken certain investigative, cooperative or remedial measures. Even when the US DOJ provides a formal declination, however, it may still require a company to disgorge ill-gotten profits.<sup>104</sup>

If the US DOJ does not issue a formal declination, it may still decline to bring charges if a company reaches a resolution with the US SEC concerning the same conduct.

Notwithstanding the Anti-Piling On Policy, the US DOJ and the US SEC are not prohibited from simultaneously investigating and penalising the same conduct. Indeed, the US DOJ and the US SEC may be inclined to insist on multiple resolutions if companies do not voluntarily self-disclose or fully cooperate with the government's investigation.

The potential for overlapping enforcement has only grown with the US Commodity Futures Trading Commission's (CFTC) entry into the foreign-corruption space, despite the CFTC's intention to avoid 'pil[ing] onto other existing investigations'.<sup>105</sup> In March 2019, the CFTC issued an Enforcement Advisory regarding 'self-reporting and cooperation for violations of the Commodity Exchange Act (CEA) involving foreign corrupt practices' and indicated that the agency would pursue foreign corruption that affected commodities

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than US\$100,000 in illicit profits from the bribery scheme and voluntarily self-disclosed the conduct. Following the declination, US DOJ charged the company's former Chief Executive Officer and Senior Vice President.

104 See Letter from Craig Carpenito, US Attorney, District of N.J., and Robert Zink, Acting Chief, Fraud Section, Criminal Division, US DOJ, to Karl H Buch and Grayson D Stratton, DLA Piper LLP, and Kathryn H Ruemmler and Douglas N Greenburg, Latham & Watkins LLP (13 February 2019) <<https://www.justice.gov/criminal-fraud/file/1132666/download>>; Letter from Sandra Moser to Caz Hashemi (footnote 100, above).

105 CFTC Director of Enforcement James M. McDonald, Remarks as Prepared for the American Bar Association's National Institute on White Collar Crime (6 March 2019) <<https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2>>.

and derivatives markets.<sup>106</sup> In December 2020, the CFTC brought its first enforcement action related to foreign bribery.<sup>107</sup> Two other companies have also disclosed ongoing investigations.<sup>108</sup>

Despite the Anti-Piling On Policy, *Operation Car Wash* has resulted in substantial and at times overlapping corporate fines and penalties imposed by US, Latin American and other law enforcement and regulatory entities, raising questions about the benefits of the policy when applied in practice. And because Latin American authorities do not have a similar policy, companies that resolve their US exposure without resolving their exposure throughout Latin America may find themselves subject to crippling additional fines and penalties for largely similar or related conduct. Latin American authorities would do well to consider a similar policy, to encourage cooperation and to ensure that companies that cooperate and resolve their exposure with multiple law enforcement and regulatory authorities can continue to operate post-resolution.

## Global coordination

During the past several years, there has also been an increase in global anti-corruption enforcement and coordination, particularly with respect to investigations involving Latin America.<sup>109</sup> In 2017 alone, the US DOJ reportedly received cooperation from approximately 20 countries in cases brought under the FCPA.<sup>110</sup> Similarly, the US SEC acknowledged that, in 2017 and 2018, it had received assistance from more than 25 jurisdictions in FCPA cases.<sup>111</sup> Since 2014,

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106 Press release, CFTC, 'CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices' (6 March 2019) <<https://www.cftc.gov/PressRoom/PressReleases/7884-19>>.

107 Press release, CFTC, 'CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation' (3 December 2020) <<https://www.cftc.gov/PressRoom/PressReleases/8326-20>>.

108 See Tokar, Dylan, 'Derivatives Regulator Uses Dodd-Frank Rule to Target Foreign Bribery', *The Wall Street Journal* (22 December 2020) <<https://www.wsj.com/articles/derivatives-regulator-uses-dodd-frank-rule-to-target-foreign-bribery-11608633001>>.

109 Allen II, Warren T; Bosworth, B Michelle, 'Multi-Jurisdictional Anti-Corruption Investigation and Enforcement Trends and Developments' in *The Review of Securities & Commodities Regulation*, Vol. 51, No. 17 (2018).

110 Kahn, Daniel, 'Responding to the Upward Trend of Multijurisdictional Cases: Problems and Solutions', 66 DOJ J. Fed. Law & Prac. 125, 126 (2018).

111 Peikin, Steven, Remarks at the IOSCO/PIFS-Harvard Law School Global Certificate Program for Regulators of Securities Markets, 'The Salutary Effects of International Cooperation on SEC Enforcement' (3 December 2018) <<https://www.sec.gov/news/speech/speech-peikin-120318>>.

Brazil has assisted in at least 16 US DOJ or US SEC investigations that resulted in corporate resolutions, Mexico in at least three and the Dominican Republic in at least one. As then-Assistant Attorney General for the US DOJ's Criminal Division Leslie Caldwell stated: '[W]e increasingly find ourselves shoulder-to-shoulder with law enforcement and regulatory authorities in other countries. Every day, more countries join in the battle against transnational bribery'.<sup>112</sup> In some instances, the US DOJ has deferred to foreign authorities' investigations and prosecutions, or credited companies the fines paid to foreign authorities for related conduct.<sup>113</sup>

Recent resolutions of corruption investigations involving conduct in Latin America reflect this increased cooperation. On 28 January 2020, Airbus SE agreed to pay combined penalties of more than US\$3.9 billion – to date, the largest single FCPA resolution – to resolve charges with the United States, France and the United Kingdom arising out of a scheme to use third-party business partners to bribe government officials and non-government airline executives.<sup>114</sup> The investigations spanned more than a dozen countries in which Airbus does business, including Brazil, Colombia and Mexico. Notably, the UK Serious Fraud Office (SFO) and the French National Financial Prosecutor's Office (PNF) entered into a joint investigation team agreement to facilitate their investigations. This resulted in the SFO and the PNF each focusing on conduct in different countries.<sup>115</sup> Given that Airbus is not a US issuer or domestic concern and

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112 Assistant Attorney General Leslie R. Caldwell Speaks at the American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (19 November 2014) <<https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st>>.

113 See, e.g., Press release, US DOJ, 'Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case' (17 January 2017) <<https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>>; US DOJ Press release, 26 September 2018 (footnote 64, above); Press release, US DOJ, 'Keppel Offshore & Marine Ltd & U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case' (22 December 2017) [hereinafter US DOJ Press release, 22 December 2017] <<https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>>.

114 Press release, US DOJ, 'Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' (31 January 2020) [hereinafter US DOJ Press release, 31 January 2020] <<https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>>.

115 Statement of Facts Prepared Pursuant to Paragraph 5(1) of Schedule 17 to the Crime and Courts Act 2013, *Regina v. Airbus SE* (filed 31 January 2020) <[www.tisrilanka.org/wp-content/uploads/2020/01/R-v-Airbus-Statement-of-Facts.pdf](http://www.tisrilanka.org/wp-content/uploads/2020/01/R-v-Airbus-Statement-of-Facts.pdf)> ('The PNF focused

that there was only limited territorial contact over the corrupt conduct, the US authorities gave Airbus credit for any payments to the SFO and the PNF.<sup>116</sup> To date, Latin American authorities have not publicly announced investigations or charges against Airbus.

Misconduct initially identified during *Operation Car Wash* in particular has led to coordination between US and Latin American regulators in a number of large corporate settlements. As previously mentioned (see footnote 77), in December 2017, Keppel Offshore & Marine Ltd (Keppel), a shipyard operator in Singapore, and its US-based subsidiary reached a global settlement with authorities in the United States, Brazil and Singapore in connection with payments to public officials in Brazil.<sup>117</sup>

Similarly, in February 2018, the Brazilian Federal Police began investigating allegations that TechnipFMC plc (Technip) paid bribes to win contracts with Petrobras.<sup>118</sup> In related proceedings in June 2019, US and Brazilian authorities reached corporate resolutions with Technip, wherein Technip agreed to pay a combined criminal fine of more than US\$296 million, with the United States receiving US\$81 million and Brazil US\$214 million.<sup>119</sup>

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its investigations more particularly on Airbus and its divisions' conduct in the following countries: United Arab Emirates, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, and Kuwait. The SFO focused its investigations on Airbus and its divisions' conduct in the following countries: South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana, Colombia and Mexico. Within this scope, the PNF and SFO selected a representative sample of the markets and concerns involved.').

116 Deferred Prosecution Agreement Paragraph 4, *United States v. Airbus SE*, No. 1:20-cr-00021-TFH (D.D.C., 28 January 2020) <<https://www.justice.gov/criminal-fraud/file/1242051/download>> (noting that Airbus 'is neither a U.S. issuer nor a domestic concern, and the territorial jurisdiction over the corrupt conduct is limited; in addition . . . France's and the United Kingdom's interests over the Company's corruption-related conduct, and jurisdictional bases for a resolution, are significantly stronger, and thus the [DOJ has] deferred to France and the United Kingdom to vindicate their respective interests as those countries deem appropriate, and the [DOJ has] taken into account these countries' determination of the appropriate resolution into all aspects of the U.S. resolution[.]').

117 US DOJ Press release, 22 December 2017 (footnote 111, above).

118 See 'A Polícia Federal abriu um inquérito, no âmbito da Operação Lava-Jato, para investigar suposta propina em contratos da Petrobras envolvendo cinco plataformas', *Jornal O Sul* (19 February 2018) <<https://www.osul.com.br/policia-federal-abriu-um-inquerito-no-ambito-da-operacao-lava-jato-para-investigar-suposta-propina-em-contratos-da-petrobras-envolvendo-cinco-plataformas/>>.

119 Deferred Prosecution Agreement Paragraph 7, *United States v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. 25 June 2019) <<https://www.justice.gov/opa/press-release/file/1177316/download>>; Press release, 'Controladoria-Geral da União, CGU, AGU, MPF e DOJ firmam primeiro acordo de leniência global no âmbito da Lava Jato' (25 June 2019) <<https://www>.

In addition to companies already discussed, two companies recently resolved FCPA cases with the US DOJ or the US SEC (or both) involving conduct in Latin America, in which the US authorities received assistance from, or reached simultaneous resolutions with, authorities in Latin America.<sup>120</sup> For example, in January 2017, Rolls-Royce reached a related leniency agreement with Brazil's Attorney General's Office (MPF), under which it would pay a US\$25.5 million penalty for corrupt payments made to secure Petrobras contracts.<sup>121</sup> In reaching the agreement, the MPF emphasised the quick response by Rolls-Royce and the importance of the company's continuous cooperation with Brazilian regulators; Rolls-Royce made itself available to the regulators throughout the investigative process and, in early 2015, provided Brazilian authorities with the results of its internal investigation into the alleged payments.<sup>122</sup>

Coordination between countries has recently moved beyond coordinated enforcement and into legislative alignment. Chapter 27 of the United States-Mexico-Canada Agreement (USMCA), which went into effect on 1 July 2020,<sup>123</sup> requires not only cross-border cooperation between the countries' respective enforcement authorities but for each country to 'adopt or maintain legislative and other measures' that criminalise bribery, solicitation or acceptance of a bribe and embezzlement or misappropriation of public funds, among other measures.<sup>124</sup>

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gov.br/cgu/pt-br/assuntos/noticias/2019/06/cgu-agu-mpf-e-doj-firmam-primeiro-acordo-de-leniencia-global-no-ambito-da-lava-jato>; Leniency Agreement, Acordo de Leniência Firmado Entre a Controladoria Geral da União (CGU), a Advocacia-Geral da União (AGU) e Technip Brasil - Engenharia, Instalações e Apoio Marítimo Ltda. e Flexibrás Tubos Flexíveis Ltda. (25 June 2019) <[www.mpf.mp.br/atuacao-tematica/ccr5/coordenacao/colaboracoes-premiadas-e-acordos-de-leniencia/doc\\_acordos\\_votos/Acordo\\_TECNHIP\\_1.25.000.001452-2018-11.pdf/@download/file/Acordo\\_TECNHIP\\_1.25.000.001452-2018-11.pdf](http://www.mpf.mp.br/atuacao-tematica/ccr5/coordenacao/colaboracoes-premiadas-e-acordos-de-leniencia/doc_acordos_votos/Acordo_TECNHIP_1.25.000.001452-2018-11.pdf/@download/file/Acordo_TECNHIP_1.25.000.001452-2018-11.pdf)>.

120 See Nunes, Samuel; et al., 'Rolls-Royce pagou US\$ 9,32 milhões em propina para fechar contrato', G1 Globo (17 January 2017) [hereinafter *Rolls-Royce pagou*] <<http://g1.globo.com/pr/parana/noticia/2017/01/mpf-confirma-acordo-de-leniencia-com-rolls-royce-na-lava-jato.html>>; Epstein, Evan, 'Top 10 FCPA-Related Cases in Latin America', Medium (29 May 2018) <<https://medium.com/@evan.epstein/top-10-fcpa-related-cases-in-latin-america-ef0129747cf1>>.

121 See *Rolls-Royce pagou* (footnote 118, above).

122 id.

123 Office of the US Trade Representative, U.S. Mex. Can. Agreement, <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>>.

124 Office of the US Trade Representative, 'U.S.-Mex.-Can. Agreement, Chapter 27, Article 27.3-1: Measures to Combat Corruption' <[https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/27\\_Anticorruption.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/27_Anticorruption.pdf)>.

Each country retains discretion with respect to the enforcement of its anti-corruption laws and parties do not have a real recourse if they believe another party has failed to enforce its anti-corruption laws in compliance with the USMCA.<sup>125</sup>

## Individuals

### US enforcement

The US DOJ and the US SEC continue to prioritise individual accountability in enforcing the FCPA for conduct in Latin America and elsewhere. US DOJ policy emphasises the importance of pursuing individual criminal liability as the strongest deterrent against future corporate wrongdoing and requires companies to identify individuals who were 'substantially involved in or responsible for the criminal conduct' to earn cooperation credit.<sup>126</sup> Acting Assistant Attorney General Brian Rabbitt re-emphasised this commitment in December 2020 remarks, noting that, 'Ensuring individual accountability for corporate wrongdoing has been a hallmark of our white-collar work in recent years, and 2020 was no exception'.<sup>127</sup>

This prioritisation has led to an increase in FCPA charges against individuals. In December 2019, then-Assistant Attorney General Brian Benczkowski announced: 'So far in 2019, the Criminal Division's FCPA Unit has publicly announced more charges against individuals [34] than in any other year in history. It has also publicly announced more guilty pleas by individuals [30] than ever

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125 *id.*, at Articles 27.6.1-2 and 27.8.1-3.

126 Rosenstein, Rod J, Deputy Attorney General, Remarks as Prepared for the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (29 November 2018) <<https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>>; see Justice Manual, 9-28.210 – Focus on Individual Wrongdoers <<https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210>>.

127 Rabbitt, Brian C, Acting Assistant Attorney General, Remarks as Prepared for the American Conference Institute's 37th Annual Conference on the Foreign Corrupt Practices Act (3 December 2020) [hereinafter Remarks by Brian Rabbitt, 3 December 2020] <<https://www.justice.gov/opa/speech/remarks-acting-assistant-attorney-general-brian-c-rabbitt-aci-37th-annual-conference-fcpa>>.

before'.<sup>128</sup> Similarly, 'in 2020 the [US] DOJ's Fraud Section publicly charged 29 individuals in connection with FCPA matters'.<sup>129</sup> Some, however, have taken issue with the US DOJ's counting.<sup>130</sup>

The US DOJ and the US SEC also continue to rely on cooperating companies to assist in individual prosecutions. Companies' assistance in identifying individuals and supporting the US DOJ's prosecution of these individuals is a factor that the US DOJ has cited in declining to bring corporate criminal charges and is key for companies obtaining cooperation credit.<sup>131</sup> In November 2018, the US DOJ revised its policies to provide cooperation credit to qualifying companies that identify individuals that were 'substantially involved in or responsible for' potential criminal misconduct – a change from earlier policy that required companies to identify all individuals involved in the misconduct to receive any credit.

The US DOJ has made additional efforts to provide greater clarity into how it assesses companies' compliance programmes and remediation efforts, once becoming aware of wrongdoing. In September 2019, then-Deputy Assistant Attorney General Matthew S Miner noted that the US DOJ is 'focused on investigating and prosecuting the individuals responsible for fraudulent behavior and corporate crime'.<sup>132</sup> However, he explained 'deterrence alone is not enough', outlining how the US DOJ has tried to make cooperation and voluntary self-disclosure easier for companies by providing more transparency through 'greater clarity regarding how voluntary self-disclosures will be treated and what will be

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128 Benczkowski, Brian A, Assistant Attorney General, Remarks as Prepared for the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (4 December 2019) <<https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference>>.

129 Remarks by Brian Rabbitt, 3 December 2020.

130 Cassin, Richard L, 'Why FCPA scoreboards can be so different', FCPA Blog (13 December 2019) <<https://fcgablog.com/2019/12/31/why-fcpa-scoreboards-can-be-so-different/>> (noting that Benczkowski's numbers include all defendants in cases where any defendant is charged with an FCPA violation and defendants who were 're-indicted' following initial indictments in prior years).

131 See, e.g., Letter from Richard P Donoghue, US Attorney, E.D.N.Y. and Sandra L Moser, Acting Chief, Fraud Section, Criminal Division, US DOJ, to Adam B Siegel, Freshfields Bruckhaus Deringer US LLP (23 August 2018) <<https://www.justice.gov/criminal-fraud/page/file/1089626/download>> ('[T]he Department has decided to close its investigation of this matter based on a number of factors, including . . . the fact that the Department has been able to identify and charge the culpable individuals.').

132 Miner, Matthew S, Deputy Assistant Attorney General, Remarks as Prepared for the 6th Annual Government Enforcement Institute (12 September 2019) <<https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government>>.

expected from companies that seek self-disclosure credit'.<sup>133</sup> These policy changes and remarks reflect not only the government's focus on prosecuting key individual actors in misconduct but, equally important, incentivising corporate cooperation.

Of 66 companies that reached large<sup>134</sup> FCPA-related resolutions with the US SEC or the US DOJ (or both) between 2015 and February 2021, the US government pursued at least 45 individuals related to the conduct of at least 21 companies. The vast majority of the individuals were employed by the settling company or its subsidiaries, held senior positions or were directly involved in authorising, causing or concealing bribe payments. Those individuals prosecuted by the US DOJ who were not directly employed by the settling company were generally third-party consultants who paid bribes on behalf of the settling company.<sup>135</sup>

In a notable departure from the typical situation in which a corporate entity cooperates, achieving a more favourable resolution for the entity and facilitating US DOJ enforcement actions against culpable individuals, the US DOJ has brought more than 30 individual prosecutions in connection with two Latin American SOEs in the energy sector, notwithstanding that neither entity nor any other company had yet reached a resolution relating to those schemes. For example, the US DOJ has aggressively prosecuted individuals related to PetroEcuador. As of 23 January 2020, the US DOJ had announced 13 public charges and guilty pleas against individuals in the US DOJ's investigation into bribery and money laundering involving PetroEcuador.<sup>136</sup> On 28 January 2021, one individual was sentenced to 35 months in prison for his role in the scheme.<sup>137</sup> As the DOJ explained:

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133 *id.*

134 Combined monetary payments of US\$9,875,000 or greater.

135 See, e.g., *Rolls-Royce PLC* (Petros Contogouris, Andreas Kohler).

136 See, e.g., Press release, US DOJ, 'Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials' (23 January 2020) <<https://www.justice.gov/opa/pr/miami-based-businessman-pleads-guilty-fcpa-and-money-laundering-violations-scheme-involving>>. A federal grand jury in the Eastern District of New York has also announced an indictment against an individual alleged to have 'participated in a conspiracy to pay and conceal bribes to then-Ecuadorian officials, including at [PetroEcuador].' Press release, US DOJ, 'Oil Trader Indicted in International Bribery and Money Laundering Conspiracy Involving Corrupt Payments to Ecuadorian Officials,' (22 September 2020) <<https://www.justice.gov/opa/pr/oil-trader-indicted-international-bribery-and-money-laundering-conspiracy-involving-corrupt>>.

137 Press release, US DOJ, 'Businessman Sentenced for Foreign Bribery and Money Laundering Scheme Involving PetroEcuador Officials' (28 January 2021) <<https://www.justice.gov/opa/pr/businessman-sentenced-foreign-bribery-and-money-laundering-scheme-involving-petroecuador>>.



*The individuals prosecuted include former PetroEcuador officials who received and concealed the bribe payments, businessmen and contractors who paid the bribes to obtain contracts from PetroEcuador, and intermediaries who enabled and facilitated the bribery through the use of U.S. and offshore companies and bank accounts.*<sup>138</sup>

## Local enforcement in Latin America

While US agencies have pursued bribe payers and facilitators, as well as employees of state-owned enterprises, Latin American authorities have aggressively prosecuted politicians and high-level government officials, many of whom received bribe payments uncovered in *Operation Car Wash*. In efforts to ensure accountability of government officials, prosecutors have sought to hold former senior politicians in pretrial detention, try them in absentia or imprison them after their conviction is upheld by an appellate court. The latter practice, however, was recently rejected in Brazil in 2019 – where it has had wide implications for the many politicians under investigation – when former president Luiz Inácio Lula da Silva was released from prison on the basis of a Brazilian Supreme Court decision that defendants cannot be imprisoned until they fully exhaust their appeals, including beyond the appellate court level, which can take years.<sup>139</sup>

Still, aggressive prosecution of high-level officials continues across Latin America. In Peru, for example, every president elected from 1985 to November 2020 ‘with the exception of one interim leader who served for just eight months – has either been impeached, imprisoned or sought in criminal investigations’.<sup>140</sup> On 16 July 2019, former president Alejandro Toledo was arrested in California, a year after a formal extradition request was made by Peru, where he faces corruption charges.<sup>141</sup> During his arrest, Toledo was found to be in possession

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138 id.

139 See Federal Court of Justice, Brazil (7 November 2019) <<http://portal.stf.jus.br/processos>>; Boadle, Anthony, ‘Top Brazil court ends early prison rule in decision that could free Lula’, (7 November 2019) <<https://www.reuters.com/article/us-brazil-corruption-court/top-brazil-court-ends-early-prison-rule-in-decision-that-could-free-lula-idUSKBN1X1020>>.

140 Quigley, John, ‘Impeached, Jailed, Wanted: President Is a Dangerous Job in Peru’, (11 November 2020) <<https://www.bloomberg.com/news/articles/2020-11-11/impeached-jailed-wanted-president-is-a-dangerous-job-in-peru>>.

141 See Burnson, Robert, ‘Ex-Peru President Charged With Corruption Wins Bail in U.S.’, Bloomberg (updated 11 October 2019, 01:50 BST) [hereinafter Burnson] <<https://www.bloomberg.com/news/articles/2019-10-10/ex-peru-president-held-in-u-s-custody-to-be-released-on-bail>>; see also Sage, Alexandria, ‘Peru ex-president denied bail in U.S., wife dragged from court after outburst’, *Reuters* (12 September 2019) <<https://www.reuters.com/article/us-peru-corruption-toledo/peru-ex-president-denied-bail-in-us-wife-dragged-from-court-after-outburst-idUSKCN1VX2P4>>.

of a suitcase that contained US\$40,000 in cash; he was deemed a flight risk by US courts and ultimately denied bail.<sup>142</sup> Toledo was said to have taken a US\$20 million bribe during his term as president.<sup>143</sup> In March 2020, a judge ordered Toledo's release on home confinement due to covid-19 concerns, on the condition that he pay US\$500,000 cash bail and that his wife surrender her passports.<sup>144</sup> Toledo continues to fight his extradition to Peru.<sup>145</sup> Former president Pedro Pablo Kuczynski is in pretrial detention and is facing corruption charges relating to allegations uncovered by *Operation Car Wash*.<sup>146</sup> Former president Alberto Fujimori is serving a 25-year sentence for human rights violations and corruption.<sup>147</sup> Fujimori's daughter, Keiko Fujimori, who narrowly lost the presidential election to Kuczynski in 2016 and leads the Peruvian opposition, was detained and released twice, most recently in May 2020, in connection with allegations of money laundering.<sup>148</sup> Keiko Fujimori is a candidate in the April 2021 elections and has publicly said that she would pardon her father if elected.<sup>149</sup> In April 2019, former president Alan García committed suicide when police arrived at his home to place him in pretrial detention for alleged corruption.<sup>150</sup>

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142 See Viguria, Carlos, 'Justicia de EE.UU. determina que Alejandro Toledo continúe en prisión', *Perú21* (14 November 2019) <<https://peru21.pe/politica/justicia-de-eeuu-determina-que-alejandra-toledo-continue-en-prision-noticia/>>; Burnson (footnote 139, above).

143 'U.S. judge orders release of Peru ex-president on bail due to coronavirus outbreak', *Reuters* (19 March 2020) <<https://www.reuters.com/article/us-peru-corruption-toledo-idUSKBN21703W>>.

144 See id.

145 Iovino, Nicholas, 'Judge Advances Extradition Case Against Ex-Peru President', *Courthouse News Service* (4 September 2020) <<https://www.courthousenews.com/judge-advances-extradition-case-against-ex-peru-president/>>.

146 'Aprueban 36 meses de prisión preventiva para Pedro Pablo Kuczynski', *CNN Español* (19 April 2019) <<https://cnnespanol.cnn.com/2019/04/19/aprueban-36-meses-de-prision-preventiva-para-pedro-pablo-kuczynski/>>.

147 'Keiko Fujimori: Peru opposition leader walks free from jail', *The Guardian* (29 November 2019) <<https://www.theguardian.com/world/2019/nov/30/keiko-fujimori-peru-opposition-leader-walks-free-from-jail>>.

148 'Peru's Keiko Fujimori to be freed from prison during graft investigation', *Reuters* (4 April 2020) <<https://www.reuters.com/article/us-peru-corruption/perus-keiko-fujimori-to-be-freed-from-prison-during-graft-investigation-idUSKBN22C3YQ>>.

149 Aquino, Marco, 'Peru's Keiko Fujimori says would pardon father if elected president', *Reuters* (18 January 2021) <<https://www.reuters.com/article/us-peru-politics/perus-keiko-fujimori-says-would-pardon-father-if-elected-president-idUSKBN29N1HT>>.

150 'Making sense of the suicide of Alan García, a former president of Peru', *The Economist* (27 April 2019) <<https://www.economist.com/the-americas/2019/04/27/making-sense-of-the-suicide-of-alan-garcia-a-former-president-of-peru>>.

In Argentina, Cristina Fernández de Kirchner (former President and Senator and current Vice President) had 11 court cases pending against her, including in connection with allegations of corruption.<sup>151</sup> Some of the charges stemmed from Los Cuadernos (known as the *Notebooks* scandal), an investigation made public in August 2018 that was triggered by the publication of several notebooks written by the driver of a high-ranking public official in Argentina. The notebooks detailed bribes paid to public officials in connection with contracts for public works.<sup>152</sup> The scandal has implicated dozens of public officials and business owners.

In Bolivia, prosecutors issued an arrest warrant for former president Evo Morales, who resigned in October 2019 following a disputed election,<sup>153</sup> although the arrest warrant was annulled a year later.<sup>154</sup> In January 2020, the interim government opened a corruption investigation into almost 600 former Morales officials, including the former president.<sup>155</sup>

In Mexico, the Special Prosecutor's Office for Combating Corruption launched 950 investigations between March 2019 and March 2020.<sup>156</sup>

The former vice president of Ecuador, Jorge Glas, was sentenced to six years in prison in December 2017 for corruption unearthed by *Operation Car Wash*.<sup>157</sup> As of November 2019, 'the Attorney General's Office had indicted 24 former government and private-sector officials, including [former President] Correa and Glas,

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151 Mur, Robert, "'La condena ya está escrita", afirma Kirchner en su juicio por corrupción', *La Vanguardia* (12 March 2019, last updated at 09:43) <<https://www.lavanguardia.com/internacional/20191202/472029885966/cristina-kirchner-juicio-corrupcion-argentina.html>>; Alcoba, Natalie, 'Argentina's ex-President Kirchner faces first corruption trial', Al Jazeera (21 May 2019) <<https://www.aljazeera.com/news/2019/05/argentina-president-christina-kirchner-faces-corrupcion-trial-190521131408914.html>>.

152 Do Rosario, Jorgelina; Gillespie, Patrick, 'Why Kirchner's Comeback Goes Through Argentine Court', *Bloomberg* (last updated 12 August 2019, 11:00) <<https://www.bloomberg.com/news/articles/2019-05-30/why-kirchner-s-comeback-goes-through-argentine-court-quicktake>>.

153 'Bolivia issues arrest warrant for Evo Morales', *Financial Times* (8 December 2019) <<https://www.ft.com/content/aa5ace2e-21e6-11ea-b8a1-584213ee7b2b>>.

154 'Juez boliviano anula orden de arresto contra exlíder Morales', *Reuters*, (26 October 2020) <<https://www.reuters.com/article/justicia-bolivia-morales-idLTAKBN27C02G>>.

155 'Bolivia opens probe into 600 former Morales officials', *France24* (8 January 2020) <<https://www.france24.com/en/20200108-bolivia-opens-probe-into-600-former-morales-officials>>.

156 'Informe Annual de Actividades y Resultados', Fiscalía Especializada en Combate a la Corrupción (11 March 2020) <<http://www.skadden.com/-/media/files/publications/2020/12/cross-border-investigations-update/informe-annualdeactividadesyresultadosfiscalaespec.pdf>>.

157 'Ecuador's Vice President Sentenced to 6 Years in Corruption Case' (Reuters), *The New York Times* (13 December 2017) <<https://www.nytimes.com/2017/12/13/world/americas/ecuadors-vice-president-sentenced-to-6-years-in-corrupcion-case.html>>.

in an investigation of an alleged bribery scheme called the '2012–2016 Bribes', involving the Brazilian Odebrecht company and other firms that allegedly financed political party activities and campaigns during the Correa government in exchange for government contracts'.<sup>158</sup> Correa was convicted in April 2020, sentenced to eight years in prison, and banned from serving in politics for 25 years.<sup>159</sup>

## Industry-specific focuses

### Healthcare

In the past five years, the US DOJ and the US SEC have brought a number of enforcement actions in the healthcare space, including with respect to corrupt payments made to Latin American officials. For example, in January 2017, Zimmer Biomet Holdings, Inc (Zimmer Biomet) and its indirect subsidiary, JERDS Luxembourg Holding Sàrl, resolved investigations by the US DOJ and the US SEC concerning its dealings with a corrupt third-party distributor in Brazil.<sup>160</sup> The company agreed to pay a US\$17.4 million criminal penalty, a civil penalty of US\$6.5 million and approximately US\$6.5 million in disgorgement and prejudgment interest to US authorities, in connection with its admission that it failed to follow the conditions of a 2012 deferred prosecution agreement (DPA) with the US DOJ by continuing to use a third-party distributor in Brazil known to have paid bribes to government officials on the company's behalf. Zimmer Biomet also failed to implement an adequate system of internal controls in Mexico, which resulted in the payment of bribes to Mexican customs officials.<sup>161</sup>

Other companies in the medical sector that have settled FCPA investigations with the US DOJ or the US SEC (or both) in the past five years in connection with conduct in Latin America include, for example, Olympus Latin America, Inc

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158 '2019 Country Reports on Human Rights Practices: Ecuador', U.S. Department of State, Bureau of Democracy, Human Rights and Labor <<https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ecuador/>>

159 Cabrera, José María León, 'Ecuador's Former President Convicted on Corruption Charges,' *The New York Times* (7 April 2020) <<https://www.nytimes.com/2020/04/07/world/americas/ecuador-correa-corruption-verdict.html?searchResultPosition=1>>.

160 See Deferred Prosecution Agreement, *United States v. Zimmer Biomet Holdings, Inc.*, No. 12-CR-00080 RBW (D.D.C., 12 January 2017) <[https://www.millerchevalier.com/sites/default/files/resources/FCPARReview/FCPARReviewSpring2017\\_Zimmer\\_DPA.pdf](https://www.millerchevalier.com/sites/default/files/resources/FCPARReview/FCPARReviewSpring2017_Zimmer_DPA.pdf)>; Order Instituting Cease and Desist Proceedings, *In re Biomet, Inc.*, Exchange Act Release No. 79780 (12 January 2017) <<https://www.sec.gov/litigation/admin/2017/34-79780.pdf>>.

161 Press release, US DOJ, 'Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges' (12 January 2017) <<https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>>.

(Olympus),<sup>162</sup> Orthofix International NV<sup>163</sup> and Alere Inc.<sup>164</sup> In nearly all these investigations, the US DOJ or the US SEC considered the companies' voluntary cooperation, implementation of compliance programmes or remediation when determining the penalty. For example, the US DOJ gave Olympus a 20 per cent penalty reduction because of its cooperation in undertaking an extensive internal investigation, translating a number of foreign language documents and gathering and analysing voluminous evidence.<sup>165</sup>

The government's focus on companies in the life sciences sector continues, including with respect to their Latin American operations. On 22 July 2019, Koninklijke Philips NV (Philips), headquartered in the Netherlands, disclosed that the public prosecution service in Rio de Janeiro and the Brazilian antitrust authority are conducting an investigation into tender irregularities in the medical device industry in Brazil and that Philips is one of the companies involved in the investigation. Philips is also conducting an internal investigation and is cooperating with requests from the Brazilian authorities, the US DOJ and the US SEC.<sup>166</sup> On 9 December 2020, Brazil's Federal Prosecution Service (MPF) announced that it had reached a settlement with Philips, under which the company would pay 11.6 million reais and implement additional compliance measures.<sup>167</sup>

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162 See generally Deferred Prosecution Agreement, *United States v. Olympus Latin America, Inc.*, No. 16-3525 (MF) (D.N.J., 2016) <<https://www.justice.gov/criminal-fraud/file/831256/download>>.

163 See Press release, US SEC, 'Medical Device Company Charged With Accounting Failures and FCPA Violations' (18 January 2017) <<https://www.sec.gov/news/pressrelease/2017-18.html>>.

164 See Order Instituting Cease and Desist Proceedings, *In re Alere Inc.*, Exchange Act Release No. 81,742 (28 September 2017) <<https://www.sec.gov/litigation/admin/2017/33-10417.pdf>>.

165 See Press release, US DOJ, 'Medical Equipment Company Will Pay \$646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America' (1 March 2016) <<https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals>>.

166 Koninklijke Philips N.V., Report of Foreign Private Issuer Pursuant to Rules 13a-16 and 15d-16 (Form 6-K) (22 July 2019) <<https://www.sec.gov/Archives/edgar/data/313216/000031321619000014/phg-20190722.htm>>.

167 See Press Release, Brazil MPF, 'MPF firma acordo de leniência com Philips e garante ressarcimento de quase R\$ 60 milhões aos cofres públicos' (9 December 2020) <<http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/mpf-firma-acordo-de-leniencia-e-garante-o-ressarcimento-de-quase-r-60-milhoes-aos-cofres-publicos>>; Thomas, James, 'Philips resolves Brazilian medical device bribery probe,' *Global Investigations Review* (10 December 2020), <<https://globalinvestigationsreview.com/news-and-features/investigators-guides/brazil/article/philips-resolves-brazilian-medical-device-bribery-probe>>.

Similarly, the US SEC announced on 2 July 2020 that it had reached an agreement with Alexion Pharmaceuticals, a company headquartered in Massachusetts, in an action involving, in part, allegations that the company's subsidiaries in Brazil and Colombia 'failed to maintain accurate books and records, including by creating or directing third parties to create inaccurate financial records concerning payments to patient advocacy organizations'.<sup>168</sup> This settlement was in connection with a subpoena that the company received from the US SEC in 2015 and a request for information from the US DOJ.<sup>169</sup>

Additionally, the healthcare industry has been especially susceptible to covid-related corruption in Latin America (as discussed above).<sup>170</sup>

## Aviation

Companies in the aviation industry that do business in Latin America have also been recent targets of anti-corruption enforcement actions, including with respect to corrupt payments made to officials in the region. Airbus's January 2020 settlement with authorities in the United States, France and the United Kingdom is only the most recent example.<sup>171</sup>

On 25 July 2016, LATAM Airlines Group SA (LATAM) settled charges relating to a scheme orchestrated by its predecessor, LAN Airlines SA, to pay bribes to Argentine union officials via a false consulting contract with a third-party intermediary. LATAM entered into a three-year DPA with the US DOJ, under which it agreed to pay a US\$12.75 million criminal penalty, enhance its compliance programme and retain an independent monitor.<sup>172</sup> The US DOJ considered the company's cooperation in the investigation but also took into account that the company did not voluntarily disclose the violations or remediate adequately. As a result, the US DOJ imposed a penalty within the US Sentencing Guidelines range rather than providing a discount off the bottom of the range.<sup>173</sup>

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168 See Press Release, US SEC, 'SEC Charges Alexion Pharmaceuticals with FCPA Violations' (2 July 2020) <<https://www.sec.gov/news/press-release/2020-149>>.

169 Alexion Pharmaceuticals, Inc. (Form 10-K), at 54 and 55 (4 February 2020) <<https://ir.alexion.com/static-files/c1e8aa68-bbb7-4745-9a73-6efce71e29be>>.

170 See, e.g., Goodman, Joshua, 'Spread of Coronavirus fuels corruption in Latin America' AP News (27 May 2020) <<https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c>>.

171 See US DOJ Press release, 31 January 2020 (footnote 112, above).

172 See Press release, US DOJ, 'LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$12.75 Million Criminal Penalty' (25 July 2016) <<https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275>>.

173 *id.*

LATAM also agreed to pay approximately US\$9.4 million to the US SEC in disgorgement and prejudgment interest.<sup>174</sup> The US SEC considered remedial acts by LATAM and its predecessor LAN, including the implementation of a basic compliance programme, the adoption of a new code of conduct, the hiring of a compliance manager and annual training of employees on anti-corruption.<sup>175</sup>

Three other companies in the aviation industry have resolved FCPA cases with the US DOJ or the US SEC (or both) in recent years in connection with conduct in Latin America.<sup>176</sup>

There are also continuing investigations regarding several airlines in the region. For example, in May 2017, Brazil's Gol Linhas Aereas Inteligentes SA disclosed that it had concluded an internal investigation that revealed that irregular payments had been made to public officials and that the company planned to report the conclusions of its investigation to relevant authorities in due course.<sup>177</sup> It is as yet unclear whether the US DOJ or the US SEC opened an investigation into the company.

## Conclusion

As recent events make clear, regulators throughout Latin America are aggressively investigating allegations of corruption and prosecuting wrongdoers. Further, regulators in the United States and Europe have been working together and with Latin American regulators to enforce their own anti-corruption laws in connection with allegations of legal violations in the region. Companies doing business in Latin America should ensure that they have robust anti-corruption policies and safeguards in place, and be prepared to coordinate with multiple regulators from various jurisdictions should they be the subject of an investigation, and consider carefully the costs and benefits of proactive voluntary cooperation.

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174 Press release, US SEC, 'LAN Airlines Settles FCPA Charges' (25 July 2016) <<https://www.sec.gov/news/pressrelease/2016-151.html>>.

175 See Order Instituting Cease and Desist Proceedings, *In re LAN Airlines S.A.* (25 July 2016) <<https://www.sec.gov/litigation/admin/2016/34-78402.pdf>>.

176 See, e.g., Deferred Prosecution Agreement, *United States v. Dallas Airmotive, Inc.*, No. 14-CR-483 (N.D. Tex., 10 December 2014) <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/12/30/dai-dpa-final.pdf>>; Deferred Prosecution Agreement, *United States v. Rolls Royce PLC*, No. 2:16-cr-347 (S.D. Ohio, 20 December 2016) <<https://www.justice.gov/criminal-fraud/file/929126/download>>.

177 See Gol Intelligent Airlines, Inc., Annual Report Pursuant to Section 13 or 15(d) (Form 20-F), at 82 (1 May 2017) <[http://ri.voegol.com.br/conteudo\\_en.asp?idioma=1&conta=44&tipo=53780&id=0&submenu=0&img=0&ano=2016](http://ri.voegol.com.br/conteudo_en.asp?idioma=1&conta=44&tipo=53780&id=0&submenu=0&img=0&ano=2016)>.

## APPENDIX 1

# About the Authors

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Jocelyn Strauber is a partner in the government enforcement and white-collar crime group at the firm. She represents companies and individuals in a wide array of criminal and civil enforcement matters. Prior to joining Skadden in 2013, she held numerous roles at the US Attorney's Office for the Southern District of New York, including, most recently, co-chief of the Criminal Division's Terrorism & International Narcotics Unit.

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This guide delivers specialist insight to our readers – general counsel, compliance officers, government agencies and private practitioners – who must navigate the region’s complex, fast-changing framework of rules and regulations.

In preparing this guide, we have been working with practitioners from a variety of disciplines and geographies, who have contributed a wealth of knowledge and experience. We are grateful for their cooperation and insight.

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