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THE GUIDE TO CORPORATE CRISIS MANAGEMENT

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Editors

Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers

The Guide to Corporate Crisis Management

Fourth Edition

Editors

**Sergio J Galvis, Robert J Giuffra Jr
and Werner F Ahlers**

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Publisher
Clare Bolton

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Senior Content Coordinator
Hannah Higgins

Production and Operations Director
Adam Myers

Production Editor
Claire Ancell

Subeditor
Anne Borthwick

Chief Executive Officer
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Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Crisis Management*. Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, 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 Crisis Management*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions*, *The Guide to Restructuring* and *The Guide to Corporate Compliance*, 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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CHAPTER 13

New US Enforcement Priorities and Their Impact on Latin American Companies

Francesca Odell, Jonathan Kolodner and Lisa Vicens¹

A new presidential administration in the United States, particularly one involving a change in political party affiliation, signifies a shift in the enforcement priorities of the US Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and other regulatory agencies. The Biden Administration has focused its attention on several specific issues that further the new President's agenda. In particular, the Administration has made clear that it will prioritise anti-corruption investigations and prosecutions, and has identified the fight against corruption as a national security priority. In addition, the SEC and other agencies have started to make environmental, social and governance (ESG) issues – a key area of focus during President Biden's campaign – the subject of regulatory and enforcement efforts. This chapter discusses how these new enforcement priorities are expected to develop over the next several years, how those developments will impact companies operating in Latin America (and, in particular, Brazil) and how such companies can best protect themselves from corruption and ESG-related risk through appropriate compliance and governance programmes.

¹ Francesca Odell, Jonathan Kolodner and Lisa Vicens are partners at Cleary Gottlieb Steen & Hamilton LLP. They wish to thank Cleary Gottlieb associate Guilherme Duraes for his contributions to this chapter.

Continued Aggressive Foreign Corrupt Practices Act Enforcement Under the Biden Administration

Despite former President Donald J Trump's pre-presidency criticism of the Foreign Corrupt Practices Act (FCPA)² and concerns as to whether his Administration would vigorously enforce what he called a 'horrible law', FCPA enforcement remained alive and well during Trump's term. While the number of publicly disclosed new investigations decreased between 2017 and 2020,³ the DOJ and SEC announced a number of record-breaking resolutions against companies and individuals during that time period,⁴ and, in fact, the DOJ obtained more money in FCPA-related penalties during the Trump Administration than in any previous Administration during the over 40 years since the law was passed.⁵

While the decrease in publicly disclosed new investigations in the past several years may signal a slowdown in new enforcement matters in the short term, given its announced priorities, the Biden Administration is likely to increase anti-corruption enforcement. As an early sign that the SEC would be more aggressive, in February 2021 the Commission expanded the number of officials in the SEC with authority to issue subpoenas and commence investigations from two to 36, providing the enforcement staff with broader authority to pursue matters and to do so more quickly.⁶

In subsequent months, the Administration's focus on anti-corruption enforcement has only increased. On 3 June 2021, the White House issued a memorandum that described 'countering corruption as a core United States national security interest'.⁷ The memorandum laid out the Administration's intention to 'lead

2 Jim Zarroli, 'Trump Used To Disparage An Anti-Bribery Law; Will He Enforce It Now?', NPR, 8 November 2017, <https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now>.

3 See Investigations Initiated per Year that are Publicly Disclosed in Advance of Resolution, Stanford Law School Foreign Corrupt Practices Act Clearinghouse, available at <https://fcpa.stanford.edu/statistics-analytics.html> (last visited 24 September 2021).

4 See DOJ and SEC Enforcement Actions per Year, Stanford Law School Foreign Corrupt Practices Act Clearinghouse, available at <https://fcpa.stanford.edu/statistics-analytics.html> (last visited 24 September 2021).

5 See Renae Merle, 'Trump called global anti-bribery law 'horrible.' His administration is pursuing fewer new investigations', *The Washington Post*, 31 January 2020, <https://www.washingtonpost.com/business/2020/01/31/trump-fcpa/>.

6 Dave Michaels, 'SEC Expands Enforcement Staff's Power to Start New Investigations', *The Wall Street Journal*, 9 February 2021, <https://www.wsj.com/articles/sec-expands-enforcement-staffs-power-to-start-new-investigations-11612894490>.

7 Presidential Action, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (3 June 2021), available at

efforts to promote good governance; bring transparency to the United States and global financial systems; prevent and combat corruption at home and abroad, and make it increasingly difficult for corrupt actors to shield their activities'.⁸ The expectation is that these goals will be pursued through stronger FCPA enforcement, as well as through the use of other anti-corruption laws and mechanisms, including direct aid and cooperation with foreign governments.

In particular, the White House indicated its intent to:

- improve the ability of key executive bodies to promote good governance and prevent corruption, including, if needed, by proposing new legislation;
- combat illicit finance in the United States and in international financial systems, including by robustly implementing laws requiring disclosure of beneficial ownership and reducing offshore financial secrecy;
- hold accountable corrupt individuals, transnational criminal organisations and 'their facilitators' by, among other things, freezing and recovering stolen assets;
- increase the capacity of domestic and international institutions working on anti-corruption efforts by promoting financial transparency, encouraging 'open government' and combating money laundering and bribery, including, where possible, on 'the demand side of bribery' (i.e., those who seek bribes);
- support civil society, the media and other 'oversight and accountability actors' in their research and anti-corruption reform efforts;
- work with international partners to counteract 'strategic corruption' by foreign actors, including by combating interference in 'democratic processes' in the United States and elsewhere;
- increase investigative, technical, financial and political resources for foreign countries that want to reduce corruption;
- assist and strengthen US domestic institutions and foreign governments implementing 'transparency, oversight and accountability measures' designed to counter corruption;
- promote partnerships with the private sector and civil society to advocate for anti-corruption measures and take action to prevent corruption; and
- establish practices and enforcement mechanisms so that foreign assistance and security cooperation activities incorporate built-in corruption prevention measures.⁹

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

8 id.

9 id.

To accomplish these goals, the Administration will conduct a 200-day inter-agency review process with representatives from 15 federal agencies and offices. We can expect proposed legislation, regulations and executive orders to emerge from this interagency review process, all aimed at creating or strengthening anti-corruption mechanisms.

Also in early June 2021, in his keynote address at a conference, DOJ Acting Assistant Attorney General Nicholas McQuaid stated that the DOJ is developing 'groundbreaking policies' and taking an 'entirely new' approach to FCPA enforcement.¹⁰ According to McQuaid, who at the time was the acting head of the DOJ's Criminal Division (and who therefore oversaw the FCPA unit's work within the Criminal Division's Fraud Section), the DOJ is working to decrease its reliance on self-reporting. The DOJ has encouraged self-reporting through its Corporate Enforcement Policy (CEP), which provides companies with a transparent description of the benefits of self-reporting, including a possible declination or a significant reduction in potential penalties. Following the issuance of the CEP, the DOJ reported an increase in companies' voluntary disclosures of FCPA violations.¹¹ Now, the DOJ wants to pursue more FCPA cases through proactive investigation, using data mining and increased cooperation with foreign governments to build cases. In fact, the DOJ hopes to develop significant evidence independently before engaging with target companies. McQuaid also suggested that, as a result, there would be an increase in FCPA investigations in 2021.

In addition to these new initiatives, Congress has recently expanded the tools available for federal agencies to investigate and prosecute corruption and money laundering. Specifically, the National Defense Authorization Act for Fiscal Year 2021 (NDAA)¹² included several measures that will greatly assist the Administration's anti-corruption efforts, as given below.

10 Nicholas McQuaid, Keynote Address at the 23rd New York Conference on the Foreign Corrupt Practices Act (2 June 2021), available for purchase at <https://www.americanconference.com/fcpa-new-york/agenda/keynote-address-2/>; see also Clara Hudson, 'FCPA enforcement is "in an entirely new" place, says acting criminal division chief', *Global Investigations Review*, 2 June 2021, <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

11 Mengqi Sun, 'FCPA Self-Reporting Program Makes Headway, Justice Official Says', *Wall Street Journal*, 12 March 2019, <https://www.wsj.com/articles/fcpa-self-reporting-program-makes-headway-justice-official-says-11552432318>.

12 William M. (Mac) Thornberry, Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (hereinafter, 'NDAA').

- First, the NDAA put to rest questions about the SEC's authority to seek disgorgement as a remedy for misconduct and the applicable statute of limitations. The NDAA explicitly authorised the SEC to seek disgorgement in civil enforcement actions and set the applicable statute of limitations at 10 years.¹³
- Second, the NDAA incorporated the Corporate Transparency Act, which will significantly expand disclosure requirements related to beneficial ownership, in an effort to combat the use of shell companies for corruption and money laundering. US companies and non-US companies registered to do business in the United States will be required to file annual reports with the US Department of the Treasury's Financial Crimes Enforcement Network, disclosing certain identifying information about beneficial ownership. The information will not be publicly available but can be used by government authorities in connection with investigations.
- Third, the NDAA created the Kleptocracy Asset Recovery Rewards Program, which rewards whistle-blowers with up to US\$5 million when they provide information that results in the forfeiture of 'stolen assets linked to foreign government corruption and the proceeds of such corruption'.¹⁴
- Lastly, the NDAA included the Anti-Money Laundering Act of 2020 (AMLA), which, among other things, authorised prosecutors to subpoena foreign banks for records when conducting criminal investigations, including records maintained outside the United States, as long as the bank maintains a correspondent account in the US.¹⁵

While it is still early in the Biden Administration, these new enforcement tools, as well as the Administration's statements of intent to increase the focus on anti-corruption efforts as a matter of national security and expand enforcement through proactive investigative work, suggest that the next several years could see a significant increase in FCPA matters.

13 NDAA § 6501 (a)(1)(B)(ii).

14 NDAA §§ 9701–9703.

15 NDAA § 6308(a)(3)(A)(i).

Regional developments impacting the Administration's anti-corruption enforcement efforts in Brazil and Latin America

Latin America has long been an area of focus for corruption investigations by US authorities.¹⁶ In fact, the first FCPA case of the Biden Administration arose out of Brazil. Amec Foster Wheeler Energy Limited (Amec), a subsidiary of a United Kingdom-based global engineering company, agreed to pay over US\$41 million to the DOJ and the SEC in connection with Amec's involvement in a scheme to pay bribes to decision makers at *Petróleo Brasileiro SA*, the Brazilian state-owned oil company, in order to win a lucrative contract to design a gas-to-chemicals complex in Brazil.¹⁷ As described below, there are certainly rising concerns about corruption in the region relating to the pandemic and the shut-down of Brazil's largest anti-corruption investigation, *Operation Lava Jato*, among other things. However (or perhaps as a consequence), the Biden Administration remains focused on anti-corruption in the region.

Impact of covid-19 on enforcement efforts and the risk of rising corruption in Latin America

Notwithstanding the Biden Administration's focus on Latin America, one threshold question is whether the covid-19 pandemic has had an impact on anti-corruption efforts in the region. Covid-19 has severely impacted Latin America, causing well over 1.3 million deaths (as at the time of writing) and ravaging entire economies. The pandemic resulted in Latin American governments shifting to crisis management and prioritising healthcare and social programmes. It has also meant that countries have less funding to dedicate to law enforcement priorities. Mexico, for example, halted the implementation of the National Anti-corruption System, and slashed its original budget for this effort, as part of its overall austerity

16 After China, with 69 cases, Brazil and Mexico are the countries with the highest number of cases in the history of the FCPA's enforcement, with 28 and 24 cases respectively, measured by the country where the underlying conduct took place. See Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by FCPA Matter), Stanford Law School Foreign Corrupt Practices Act Clearinghouse, available at <https://fcpa.stanford.edu/statistics-analytics.html?tab=8> (last visited 2 November 2021).

17 See Press Release, US Department of Justice, 'Amec Foster Wheeler Energy Limited Resolves Foreign Bribery Case and Agrees to Pay Penalty of Over \$18 Million', (25 June 2021), <https://www.justice.gov/usao-edny/pr/amec-foster-wheeler-energy-limited-resolves-foreign-bribery-case-and-agrees-pay-penalty>.

measures in response to the pandemic.¹⁸ Investigations and prosecutions, both in the region and in the United States, were impacted by the practicalities of social distancing, lockdowns and stay-at-home orders.

At the same time, the pandemic has created more opportunities for corruption. Transparency International has explained (as learned through prior healthcare crises) that ‘corruption often thrives during times of crisis, particularly when institutions and oversight are weak, and public trust is low’.¹⁹ Unfortunately, there have been a number of allegations of price gouging for medical supplies, including masks, ventilators and body bags, mismanagement of public funds and adulteration of protective gear such as hand sanitiser and masks throughout Latin America during the pandemic.²⁰ In Brazil, public procurement and contracting rules were loosened, reducing transparency, hindering public oversight and creating opportunities for corruption.²¹ The total amount awarded in bids increased by more than six times during the pandemic, with very little transparency.²² Most recently, in Brazil, there have been allegations of corruption in connection with vaccine purchases involving officials in the health ministry.²³ The region’s response to the pandemic is ongoing, and given the relaxation in the procurement process and the lack of scrutiny mechanisms, we are likely to learn of additional allegations of fraud and bid-rigging going forward.

The end of Lava Jato

Another issue that potentially impacts investigations in Brazil in particular is the announcement in February that the Brazilian government officially ended *Operation Lava Jato* (*Operation Car Wash*), a seven-year investigation hailed by many as the largest anti-corruption operation in the world. *Lava Jato* shook up

18 Brian Winter & Geert Aalbers, ‘The Capacity to Combat Corruption (CCC) Index: Assessing Latin America’s ability to detect, punish and prevent corruption (2021)’ at 28, available at https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

19 Transparency International, ‘Corruption and the Coronavirus’, 18 March 2020, <https://www.transparency.org/en/news/corruption-and-the-coronavirus>.

20 Natalie Kitroeff and Mitra Taj, ‘Latin America’s Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks’, *The New York Times*, 20 June 2020 (updated 24 February 2021), <https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html>.

21 Brian Winter and Geert Aalbers, *supra* note 18, at 20–21.

22 *id.* at 21.

23 Ernesto Londoño and Flávia Milhorange, ‘Brazil Vaccine Scandal Imperils Bolsonaro as Protests Spread’, *The New York Times*, 3 July 2021 (updated 21 September 2021), <https://www.nytimes.com/2021/07/03/world/americas/brazil-bolsonaro-vaccine-scandal.html>.

the business and political classes in Brazil and beyond, leading to hundreds of arrests and convictions, the recovery of 4.3 billion reais by the Brazilian state and the imprisonment of former presidents of Brazil, Peru, El Salvador and Panama.²⁴ *Lava Jato* also drove investigations around the world, led companies to cooperate with authorities in Brazil, the US and elsewhere, developed cooperating witnesses and other leads (such as documents obtained through dawn raids), forged closer relationships between authorities in Brazil and abroad and established a culture of corporate compliance in Brazil and throughout the region.

In particular, *Lava Jato* led to significant legislative and regulatory changes in Brazil.²⁵ The Clean Companies Act enacted in 2013 had created a mechanism for leniency agreements whereby companies that cooperated with authorities could obtain a reduction in potential penalties.²⁶ Through *Lava Jato*, the leniency process was streamlined, allowing prosecutors to enter into agreements more quickly and conduct investigations more efficiently. The success of *Lava Jato* also led to an increase in the number of government agencies investigating companies for corruption in Brazil, as well as to the execution of several agreements with other countries, aimed at international cooperation in anti-corruption efforts, which increased the likelihood of multinational investigations arising out of the same set of facts against companies operating in Brazil.²⁷

It is still unclear what the end of *Lava Jato* will mean for anti-corruption enforcement in Brazil. *Lava Jato*'s legacy – in the form of legislative and regulatory changes, new legal precedents and new investigatory techniques – is now entrenched and cannot be easily wiped out, but it stands to reason that a potential slowdown of Brazil's anti-corruption efforts is likely to have a negative impact on investigations in the US and elsewhere.

24 Ricardo Brito and Gram Slattery, 'After seven years, Brazil shuts down Car Wash anti-corruption squad', *Reuters*, 3 February 2021, <https://www.reuters.com/article/us-brazil-corruption/after-seven-years-brazil-shuts-down-car-wash-anti-corruption-squad-idUSKBN2A4068>; see also Ministério Público Federal, 'Resultados', <http://www.mpf.mp.br/grandes-casos/lava-jato/resultados> (last visited 27 September 2021).

25 See generally Breon Peace, Jonathan Kolodner and Lisa Vicens, 'The Changing Landscape in Brazilian Investigations Since *Lava Jato*', *Latin Lawyer*, 9 December 2020, <https://latinlawyer.com/guide/the-guide-corporate-crisis-management/third-edition/article/the-changing-landscape-in-brazilian-investigations-lava-jato#footnote-020>.

26 Law No. 12.846/13, 1 August 2013 (the Brazilian Clean Companies Act).

27 See Ministério da Justiça e Segurança Pública, '*Cooperação internacional é marcada por ampliação de acordos contra crime organizado e corrupção*', 4 November 2019, www.justica.gov.br/news/collective-nitf-content-1554990835.08.

Relatedly, given the allegations of corruption against the Bolsonaro Administration in connection with the purchase of covid-19 vaccines,²⁸ as well as investigations into all four of President Bolsonaro's sons,²⁹ one significant issue to watch is the upcoming general election in Brazil in October 2022. Notably, the current front-runner is former President Luiz Inacio Lula da Silva, who had previously been convicted of corruption as part of *Lava Jato*. While that conviction has been overturned, his re-election as President would obviously raise concerns as well.

Corruption and migration in Latin America as US national interest

Another reason for a renewed focus on anti-corruption efforts in Latin America is that the Biden Administration views combating corruption (by strengthening institutions and democracies in the region) as an important step to address illegal immigration. Accordingly, the Administration recently announced that it will increase its anti-corruption efforts in the Northern Triangle Region (Guatemala, Honduras and El Salvador) in particular, and Central America more broadly.

In May 2021, Vice President Kamala Harris announced a 'Call for Action' and the agreements of 12 companies and organisations to invest in the Northern Triangle Region, in an effort to foster economic development and combat corruption.³⁰ In June, on her first foreign trip as Vice President of the United States, Harris visited Guatemala to discuss relations with the Northern Triangle countries. In Guatemala, she explicitly connected illegal immigration with corruption, and stated, 'We must root out corruption wherever it exists . . . It erodes the confidence the people have in their government and its leaders.'³¹

28 Ricardo Brito, 'Brazil top prosecutor to investigate Bolsonaro over COVID-19 vaccine deal', *Reuters*, 3 July 2021, <https://www.reuters.com/world/americas/brazil-prosecutor-general-asks-bolsonaro-investigation-over-vaccine-deal-2021-07-02/>.

29 Constança Rezende and Marcelo Rocha, 'All Four of Jair Bolsonaro's Sons Are under Investigation', *Folha de S. Paulo*, 22 March 2021, <https://www1.folha.uol.com.br/internacional/en/brazil/2021/03/all-four-of-jair-bolsonaros-sons-are-under-investigation.shtml>.

30 The White House, 'President Harris Launches a Call to Action to the Private Sector to Deepen Investment in the Northern Triangle' (27 May 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/27/fact-sheet-vice-president-harris-launches-a-call-to-action-to-the-private-sector-to-deepen-investment-in-the-northern-triangle/>.

31 Brian Naylor and Tamara Keith, 'Kamala Harris Tells Guatemalans Not To Migrate To The United States', *NPR*, <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states>; see also The White House, 'Remarks by Vice President Harris and President Giammattei of the Republic of Guatemala Before Bilateral Meeting' (7 June 2021), <https://www.whitehouse.gov/briefing-room/speeches->

Immediately following Harris's statements in Guatemala, the White House announced the creation of an Anti-corruption Task Force explicitly focused on the region, which will draw on resources of 'US prosecutors and law enforcement experts to investigate and prosecute corruption cases with a nexus in the United States, Guatemala and the region'.³² The task force has three dedicated components:

- increased focus on the global Kleptocracy Asset Recovery Initiative to prosecute corruption cases and seize illicitly obtained assets from corruption in Guatemala, El Salvador and Honduras;
- assignment of additional resident legal advisers to provide 'capacity-building, training and case-based mentoring to the Guatemalan Public Ministry', to build corruption cases; and
- a 'rapid response' team of US prosecutors and law enforcement experts to provide support to develop corruption cases.

In October 2021, the DOJ announced that it had created an anonymous tipline (an FBI email address) where individuals and entities can report information about corrupt actors in El Salvador, Guatemala and Honduras.³³ The tips will be reviewed by the Anti-corruption Task Force, which will then determine whether there is a possible jurisdictional link to the US allowing the Task Force to conduct investigations.³⁴

Companies based or operating in Latin America should continue to be particularly vigilant about corruption risk. Recent events, including the economic and political turmoil in Brazil and Latin America, along with the disruptions brought about by the pandemic, have heightened that risk. And while developments such as the termination of the *Lava Jato* task force and the recent budget cuts to the implementation of the anti-corruption system in Mexico raise some questions about anti-bribery enforcement in those countries, we believe that investigations of corruption will continue, as law enforcement has become more

remarks/2021/06/07/remarks-by-vice-president-harris-and-president-giammattei-of-the-republic-of-guatemala-before-bilateral-meeting/.

32 The White House, 'US - Guatemala Cooperation' (7 June 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/fact-sheet-u-s-guatemala-cooperation/>.

33 Press Release, US Department of Justice, 'Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America', (15 October 2021), <https://www.justice.gov/opa/pr/justice-department-anticorruption-task-force-launches-new-measures-combat-corruption-central>.

34 id.

professionalised and public expectations concerning transparency have become more engrained. Similarly, we expect the US focus on enforcement in the region to grow and even to put pressure on such efforts, given the priority the Biden Administration has placed on combating corruption as a matter of national security. The Administration's efforts in this regard will also be aided by the strong relationships that law enforcement authorities in the US have developed with their counterparts in Brazil and Latin America over the past few years.

ESG as the new frontier for companies and regulators

As the recent developments in enforcement reflect, companies in the US, Latin America and elsewhere are by now familiar with the idea that the US government is focused on corruption risks, and they have had time to address (or attempt to address) those risks through their compliance functions. However, companies are now contending with the emergence of a potential new set of compliance risks: environmental, social and governance issues, broadly referred to as 'ESG'. ESG issues can include a variety of things, such as a company's consideration of sustainability, the environment and climate change, diversity, human capital, corporate purpose and governance. This growing focus on ESG stems from the changing role of the corporation in society; rather than focusing solely on maximising profit for shareholders, corporations are now expected to serve the interest of other stakeholders as well, including employees, customers, local communities and society at large.³⁵ It also stems from the growing awareness of the impact – both good and bad – that corporations can have on society and local communities.

Laws and regulations relating to ESG are still largely developing around the world. To date, ESG issues in companies have been driven by shareholders, including large institutional investors that have made certain ESG issues a priority, as well as shareholders who have submitted ESG-related proposals. In the US, the combination of the disruptions of the covid-19 pandemic, growing focus on racial justice and social justice issues, and the election of President Biden

35 Ethics & Compliance Initiative, 'A Guide to ESG: What Ethics & Compliance Professionals Need to Know About the Rise in ESG Investing and How It May Impact Their Work' (March 2021) at 2, available at <https://mk0ecihomepagexcvllh.kinstacdn.com/wp-content/uploads/2021-ECI-WP-Guide-To-Environmental-Social-and-Governance.pdf>.

all have created further momentum for ESG issues.³⁶ In particular, the Biden Administration has already set in motion a robust process to create, standardise and enforce ESG requirements.

Interestingly, Latin American multinational companies may be uniquely equipped to design compliance programmes that address corruption risk and comply with new ESG requirements. In a survey of 200 senior compliance and risk professionals around the world, 62 per cent of Latin American companies (and 64 per cent of companies in the Asia-Pacific region) stated that ESG is already a part of their compliance programmes, compared to 36 per cent of US and Canadian companies and 52 per cent of European companies. One possible reason for these numbers is that there may be a correlation between perceived levels of regional corruption and the demand for ESG.³⁷ In other words, because Latin America and Asia have historically had higher corruption numbers, companies in these regions may feel that their compliance programmes need to address a broader scope of measures to assuage investor concerns.

Another reason may be the labour-intensive nature of the region's key industries and the state's involvement in the management of natural resources – factors that increase both ESG and corruption risk. The highest-revenue multinationals (companies headquartered in Latin America that have an international presence) tend to engage in 'key economic sectors such as energy, commodities, retail and mass consumption goods',³⁸ which are all labour-intensive industries. Moreover, many 'have close connections with national governments or are, in fact, partially or totally owned by the government'.³⁹ For these companies, managing risks related to corruption and managing risks related to ESG may go hand in hand.

New environmental disclosure requirements on the horizon

With regulators in the United States focused on ESG, US issuers can expect changes that impose some degree of standardisation in establishing, tracking and reporting their environmental metrics. For example, in February 2021, Acting

36 Todd Ehret, 'ESG is more than just a new burden for compliance', *Reuters*, 21 July 2021, <https://www.reuters.com/article/bc-finreg-esg-new-compliance-obligations/insight-esg-is-more-than-just-a-new-burden-for-compliance-idUSKBN2ER1WP>.

37 Kroll, '2021 Anti-Bribery and Corruption Benchmarking Report' at 6, available at <https://www.kroll.com/-/media/kroll/pdfs/publications/2021-anti-bribery-corruption-benchmarking-analyzed-report.pdf>.

38 Sales revenue of major companies headquartered in Latin America in 2020, Statista, <https://www.statista.com/statistics/763939/latin-america-companies-sales/> (last visited 29 September 2021).

39 id.

SEC Chair Allison Herren Lee directed the SEC's Division of Corporate Finance to enhance its focus on climate-related disclosures in public company filings.⁴⁰ Thereafter, on 3 March, the SEC announced that climate-related risks would be one of the agency's examination priorities for 2021.⁴¹ The very next day, the agency announced the creation of a Task Force within the Division of Enforcement focused on climate and ESG issues.⁴² The Task Force is a Division-wide effort, consisting of 22 members drawn from the SEC's headquarters, regional offices and enforcement specialised units.⁴³ It will initially work to identify material gaps or misstatements in issuers' disclosure of climate risks under existing rules; evaluate and pursue tips, referrals and whistle-blower complaints on ESG-related issues; and provide expertise and insight to teams working on ESG-related matters across the Division.⁴⁴

The SEC has also requested public comments on the parameters of climate disclosures.⁴⁵ The request included a number of guiding questions, including what type of information should be disclosed, whether disclosures should be

40 US Securities and Exchange Commission, 'Statement on the Review of Climate-Related Disclosure' (24 February 2021), <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>.

41 Press Release, US Securities and Exchange Commission, 'SEC Division of Examinations Announces 2021 Examination Priorities' (3 March 2021), <https://www.sec.gov/news/press-release/2021-39>; US Securities and Exchange Commission, 2021 Examination Priorities (Division of Examinations), available at <https://www.sec.gov/files/2021-exam-priorities.pdf>.

42 Press Release, US Securities and Exchange Commission, 'SEC Announces Enforcement Task Force Focused on Climate and ESG Issues' (4 March 2021), <https://www.sec.gov/news/press-release/2021-42>.

43 *id.* Around the same time, the Commodity Futures Trading Commission (CFTC) also announced the establishment of a new Climate Risk Unit, focused on the role of derivative markets in addressing climate-related risk and transitioning to a low-carbon economy. The Office of the Comptroller of the Currency and the Federal Reserve also published statements on the financial and financial stability risks posed by climate change. See Press Release, US Commodity Futures Trading Comm., 'CFTC Acting Chairman Behnam Establishes New Climate Risk Unit' (17 March 2021), <https://www.cftc.gov/PressRoom/PressReleases/8368-21>; Press Release, Off. of the Comptroller of the Currency, 'Acting Comptroller of the Currency Statement Regarding Climate Risk at the Financial Stability Oversight Council' (31 March 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-40.html>; Celso Brunetti et al., Bd. of Governors of the Fed. Rsrv. Sys., 'Climate Change and Financial Stability' (19 March 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.htm>.

44 US Securities and Exchange Commission, *supra* note 42.

45 US Securities and Exchange Commission, 'Public Input Welcomed on Climate Change Disclosures' (15 March 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

mandatory and whether requirements should vary by industry. As SEC Chair Gary Gensler explained in July: ‘Investors are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs.’⁴⁶ Gensler asked SEC staff to propose new rules for the Commission’s consideration by the end of the year.⁴⁷ While, at the time of writing, the SEC is still weighing the public comments it has received, it appears certain that the agency will require at least some level of additional climate-related disclosures going forward.

It is still unclear whether the SEC will impose different rules on different industries or geographies, but Latin American companies, particularly those that operate in extractive, energy and manufacturing industries, should expect to have their disclosure requirements heightened, and should bolster their compliance and internal controls infrastructure with respect to climate-related disclosures. In addition, for companies operating in Latin American countries that joined the Paris Accord, the SEC is likely to require disclosures related to obligations or commitments arising out of the Accord. To get ahead of regulatory scrutiny, companies should start thinking more carefully and specifically about their environmental goals, and how they disclose and track those goals. In particular, companies should consider implementing (ideally automated) methods to measure their environmental metrics, such as carbon footprint, reduction of greenhouse gases and other pollutants, and use of different types of energy sources, which may become part of future disclosure requirements.

Some Latin American countries, such as Costa Rica and Chile, have historically been leaders on climate and environmental issues. However, the region’s largest economy has recently come under scrutiny for its environmental policies: the Bolsonaro Administration has made headlines for rolling back environmental regulations, claiming to do so in an attempt to propel the economy. In addition, illegal deforestation has increased dramatically in the country over the past two years. In late 2019, Brazil’s space agency reported that 3,700 square miles of the Amazon rainforest had undergone deforestation – the highest loss of Brazilian rainforest in a decade, consisting of forest nearly the size of Lebanon.⁴⁸ Giving

46 US Securities and Exchange Commission, ‘Prepared Remarks Before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar’ (28 July 2021), <https://www.sec.gov/news/speech/gensler-pri-2021-07-28>.

47 id.

48 Matt Sandy, ‘“The Amazon Is Completely Lawless”: The Rainforest After Bolsonaro’s First Year’, *The New York Times*, 5 December 2019, <https://www.nytimes.com/2019/12/05/world/americas/amazon-fires-bolsonaro-photos.html>.

into enormous international pressure, the Brazilian government announced in August and September of this year that it would adopt policies to combat fires in the Amazon and protect the environment.⁴⁹ In addition to the harm it has caused to the Brazilian environment, there are a number of economic reasons why we would hope and expect the Brazilian state to continue to reverse its unpopular environmental policies. Studies indicate that Bolsonaro's environmental policies have scared away some international investors.⁵⁰ In addition, corporate leaders of large Brazilian companies and Brazilian units of multinational companies, such as Amazon, Shell, JBS and Embraer, have demanded that the Administration do so. In September, they wrote a letter urging Brazil to take the lead on climate change issues, including by stopping illegal deforestation in the Amazon and entering into an agreement on rules for global carbon markets.⁵¹

The emergence of 'social' or 'human capital' disclosure requirements

The SEC is also aiming to create new rules for 'social' disclosures. In June 2021, the agency announced that it plans to propose a rule requiring public companies to disclose a range of workforce or 'human capital' data. As SEC Chair Gensler explained, new disclosures 'could include a number of metrics, such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety'.⁵² The SEC had already issued rules in 2020 requiring companies to describe their 'human capital resources, including the number of persons employed . . . and any human capital measures or objectives that the [company] focuses on in managing the business'.⁵³

49 Lisandra Paraguassu and Jake Spring, 'Brazil to hire more environmental agents in bid to fight forest fires', *Reuters*, 31 August 2021, <https://www.reuters.com/world/americas/brazil-contract-700-agents-combat-environmental-destruction-2021-08-31/>;

Stephen Eisenhammer, 'Brazil committed to protecting environment, Bolsonaro tells UN; activists unconvinced', *Reuters*, 21 September 2021, <https://www.reuters.com/world/americas/brazils-bolsonaro-says-committed-environmental-protection-2021-09-21/>.

50 Universidade Federal de Minas Gerais, '*Política ambiental do governo Bolsonaro afasta investidores internacionais*' (14 July 2020), <https://ufmg.br/comunicacao/noticias/politica-ambiental-do-governo-bolsonaro-afasta-investidores-internacionais>.

51 Jake Spring, 'Business leaders urge Brazil to take lead on climate or be left behind', *Reuters*, 27 September 2021, <https://www.reuters.com/business/sustainable-business/business-leaders-urge-brazil-take-lead-climate-or-be-left-behind-2021-09-27/>.

52 US Securities and Exchange Commission, 'Prepared remarks at London City Week' (23 June 2021), <https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321>.

53 Press Release, US Securities and Exchange Commission, 'SEC Adopts Rule Amendments to Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K' (26 August 2020), <https://www.sec.gov/news/press-release/2020-192>.

However, an analysis showed that those rules did not have much of an impact on disclosures, as they did not require companies to disclose any hard numbers about their workforce, other than the number of employees.⁵⁴ We expect that any new rules will be more stringent and specific about the data that companies will be required to disclose.

One issue that remains to be seen is whether and to what extent these rules will apply to foreign issuers, which obviously operate in different political and cultural contexts. In Latin America in particular, how will companies be expected to count and report the number of employees who are part of a racial or ethnic minority? How will the different and more complex labour laws in countries like Brazil factor into reporting on turnover, salaries and benefits? The SEC has not yet requested public comment on the potential new human capital disclosure requirements, but Latin American companies issuing securities in the US would be well advised to consider participating in the process, as the different legal, political and cultural contexts in which they operate may dictate different disclosure requirements.

On 6 August 2021, the SEC approved Nasdaq's rule change requiring Nasdaq-listed companies with six or more directors to have, or explain why they do not have, at least one director who self-identifies as female and one director who self-identifies as an underrepresented minority or LGBTQ+. The rule allows foreign companies to meet the diversity objective by including two female directors. This suggests that the SEC may make accommodations for foreign companies when it comes to required disclosures around diversity, equality and inclusion (and perhaps other areas as well).

ESG disclosure requirements will soon be a reality. As investors become more demanding about the kinds of information they would like in order to make their investment decisions, companies based or operating in Brazil and Latin America should undertake their own assessment of whether their operations reflect their corporate values and are responsive to investor concerns. Obtaining ESG metrics and considering what changes may need to be made to their policies and procedures, as well as internal controls, will allow companies to get ahead of these risks and plan an appropriate course of action.

54 Rob Peters, 'Intelligize Report: Companies Avoid Revealing Human Capital Metrics', *Intelligize*, 27 April 2021, <https://www.intelligize.com/intelligize-report-companies-avoid-revealing-human-capital-metrics/>.

Takeaways for companies managing corruption risk and ESG disclosure requirements

One result of the significant number of recent FCPA cases in Latin America, as well as legal and regulatory changes in the region, is that companies are taking enforcement very seriously, even amid the recent adversities brought about by the covid-19 pandemic. Over the past decade or so, large Latin American companies have seen that compliance programmes can deter misconduct or allow them to identify it sooner. Recent settlements have also shown that companies benefit from having strong compliance programmes in place that allow them to investigate bad actors and demonstrate to authorities that the company is law abiding and promotes an environment of compliance.

Moreover, companies have become increasingly focused not just on having a compliance function that monitors and enforces controls and policies, but on one that furthers a company's ethics and culture. The best compliance programmes will adapt and change to reflect evolving ethical and legal standards and risks. The recent focus on ESG and the Biden Administration's linkage of corruption and transparency reflect an evolution in public expectations about the ways governments operate and the ways that businesses should care about the communities in which they operate. They also present additional risks to companies as they navigate shifting legal requirements and increasing corruption risks. A strong compliance programme, through continuous assessment and review, should take these considerations into account, both to communicate a company's values as they evolve and to protect it against changing risks, both external and internal. These roles are mutually reinforcing:

- identifying corporate risks through continuous assessment allows a company to implement effective controls;
- enforcing those controls demonstrates the company's commitment to integrity and ethics; and
- communicating those values promotes a culture of compliance with the company's policies and procedures.

Given the growing focus on ESG, Latin American companies should therefore ensure that their compliance functions take account of both corruption risks and ESG developments, and that their compliance programmes reflect their values and safeguard them from violations of law.

Another reason for companies to focus on these enforcement trends is to make sure that their compliance programmes comport with best practices. Company management should assume, given the environment, that their peers are engaging in best practices. Also, regulators are likely to compare companies in the same

region or sector whenever there is a corruption issue. In particular, to the extent that wrongdoing extends across a particular business sector (which is frequently the case), having a strong compliance programme puts companies in the best position to identify it first.

Of course, unlike anti-corruption compliance, which has by now become a fixture of compliance programmes and international investigations, ESG requirements are only now being developed. This creates challenges, as companies will potentially have to redesign internal controls and compliance programmes, create new functions and acquire additional expertise. Again, however, the tools and methods for addressing these new ESG requirements are complementary to those that are currently being utilised by companies (and are emphasised by US authorities) in the context of corruption risks. Specifically, the new ESG requirements that are being considered by US regulators, and that will have a significant impact on Latin American companies, are largely disclosure-based rules that are highly data-driven. Companies that are leveraging technology and compliance data analytics to better understand existing or developing risks can use the same tools to design compliance programmes to address ESG risks. This includes, for example, using a compliance programme to assess sustainability and environmental goals like allocation of resources, and to draw lessons as to what has worked (or has not) in the past.

Notably, companies operating in Latin America have already had to adjust their compliance programmes to account for new risks in the wake of the pandemic. Covid-19 has forced compliance programmes to learn to function remotely while simultaneously contending with a host of new challenges, including supply chain disruptions, new health, safety and environmental regulations and the heightened risks of increased government relief funding. The crisis has, to a significant extent, provided another model for how companies can address emerging ESG risk. It has underscored the importance of continuous risk assessment and the use of technology to effectively monitor and enforce controls. Companies have learned that a strong culture of communication and 'tone at the top' is critical to rapidly adjust to an ever-changing scenario, to disseminate information from management and to react to new issues in a timely manner. A number of companies, including in Latin America, have also adopted compliance working parties comprised of key compliance personnel that meet regularly (and remotely) to determine what adjustments are needed to address evolving external and internal risks.

In sum, the likelihood of aggressive enforcement and emerging ESG regulations highlights the importance of not only maintaining best practices for compliance functions, but also engaging in continuous risk assessments and focusing on corporate ethics and culture. Adopting these best practices can create

opportunities for companies to best position themselves to manage these evolving risks. In particular, to the extent that Latin American companies issuing securities in the US have already built in standards and practices for measuring ESG goals, they could provide recommendations to the SEC through the public comment process. They should also emphasise any special circumstances that hinder their ability to comply with certain potential ESG requirements. Lastly, they should consider advocating for their own governments to issue new regulations and cooperate with the SEC and other US regulators, to avoid potentially conflicting requirements. For instance, Brazil's Securities and Exchange Commission (CVM) indicated in September 2021 that it also aims to streamline and standardise ESG disclosure requirements.⁵⁵ While new requirements will undoubtedly create new burdens, companies with strong ESG practices will also enjoy a reputation for ethical conduct and thereby attract more investor capital.

55 Felipe Laurence, *ESG é um dos motores da agenda regulatória da CVM, diz presidente*, *Valor*, 29 September 2021, <https://valorinveste.globo.com/objetivo/de-olho-no-mercado/noticia/2021/09/27/esg-um-dos-motores-da-agenda-regulatria-da-cvm-diz-presidente.ghtml>.

APPENDIX 1

About the Authors

Francesca Odell

Cleary Gottlieb Steen & Hamilton LLP

Francesca L Odell is a partner in Cleary Gottlieb's New York office, where she assists both international and US clients on a range of capital markets and corporate governance matters. She is one of the foremost capital markets lawyers for Latin American and Brazilian international issues, and her clients include many of the region's largest companies in the oil and gas and telecommunications sectors. Her cross-border practice focuses on capital markets, corporate governance, M&A, private equity, project finance and restructuring transactions. In addition to her transactional practice, Francesca regularly advises boards of directors and management on a variety of topics, including disclosure and compliance matters; stock exchange listing requirements; board composition and director independence; shareholder engagement and activism; shareholder proposals and proxy season trends; management and director succession planning; and environmental, social and governance (ESG) issues. Francesca is recognised as a leading capital markets and corporate/M&A lawyer by *Chambers Global*, *Chambers Latin America*, *The Legal 500 Latin America* and *Latin Lawyer 250*, and as a leading lawyer for Latin American investment by *Chambers US*. Francesca joined the firm in 1996 and became a partner in 2005. She received a JD from New York University School of Law.

Jonathan Kolodner

Cleary Gottlieb Steen & Hamilton LLP

Jonathan S Kolodner is a partner in Cleary Gottlieb's New York office. Jon's practice focuses on white-collar enforcement and regulatory matters. Jon regularly conducts cross-border internal investigations, frequently involving allegations of fraud or corruption. He is very active in Latin America, and regularly represents clients in internal investigations and enforcement matters in the region. Prior

to joining Cleary Gottlieb, Jon was a prosecutor with the US Attorney's Office for the Southern District of New York for 12 years. While there, he served in various leadership positions, including as acting chief of the Criminal Division, and for two years as the chief of the Complex Frauds Unit, where he oversaw 20 senior prosecutors investigating sophisticated white-collar crimes ranging from financial and investment schemes to violations of the FCPA and cybercrime. Jon is recognised as a leading lawyer by *Chambers US* and *Benchmark Litigation*. He received a JD from Harvard Law School and a BA from Harvard College.

Lisa Vicens

Cleary Gottlieb Steen & Hamilton LLP

Lisa Vicens, a partner in Cleary's New York office, has extensive experience working in Brazil and Latin America on FCPA and other cross-border issues. She regularly represents public companies and their boards in internal and governmental investigations, advises on the development of compliance and integrity programmes and counsels clients in advance of strategic transactions. Lisa has worked on a number of internal investigations into allegations of corruption or fraud for companies in Brazil and Latin America and has represented companies and individuals before various US authorities and in parallel litigation proceedings. She has also provided advice in the region on assessing risk in connection with strategic transactions or conducting compliance and integrity programme reviews. Lisa has been recognised for FCPA by *Chambers Global* and *Chambers US*, *The Legal 500*, *Latinvex* and *Benchmark Litigation*. She was named among Global Investigations Review's top 100 Women in Investigations. Lisa joined the firm in 2005 and became a partner in 2015. She received a JD from New York University School of Law and an MA in Latin American Studies and a BS in foreign service from Georgetown University.

Cleary Gottlieb Steen & Hamilton LLP

One Liberty Plaza
New York, NY 10006
United States
Tel: +1 212 225 2000
evicens@cgsh.com
flodell@cgsh.com
jkolodner@cgsh.com
www.clearygottlieb.com

Published by Latin Lawyer and LACCA, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, *The Guide to Corporate Crisis Management* is designed to assist key business decision makers and their advisers in effectively planning for and managing a corporate crisis in Latin America.

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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