The Guide to Managing a Corporate Crisis

Third Edition

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

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Publisher's Note

Latin Lawyer is delighted to publish *The Guide to Managing a Corporate Crisis*.

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 50 leading practitioners from a variety of disciplines, it provides guidance that will benefit all practitioners when an unexpected crisis hits.

Corruption investigations, expropriation, industrial accidents, pandemics: corporate crises take many forms, but each can be equally dangerous for companies in Latin America. Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Managing a Corporate Crisis*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance, and Regulators*, our online tool that provides an overview of the major 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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The Changing Landscape in Brazilian Investigations Since Lava Jato

Breon S Peace, Jonathan Kolodner and Lisa Vicens[1]

Over the past six years, as Brazilian prosecutors have pursued *Lava Jato* through its many phases and iterations, Brazil has been at the centre of a number of multinational corruption investigations. During this period, we have seen significant developments in corruption investigations as investigative processes and players have evolved and companies have responded. While Operation *Lava Jato* was led by the Brazilian Federal Prosecutor's Office, the Ministério Público Federal (MPF), Brazilian agencies such as the Comptroller General's Office of the Union (CGU), the Federal Police, Attorney General's Office (AGU) and the Court of Accounts (TCU) have increasingly participated in corruption investigations, presenting challenges for companies in responding to such investigations, as well as for the authorities in coordinating and cooperating among themselves. In addition, there has been increased collaboration among international authorities in corruption investigations that have a nexus to multiple countries. Indeed, Brazilian authorities have regularly worked with authorities in the United States and elsewhere in conducting these investigations, which have resulted in some of the largest penalties ever imposed on companies that have engaged in corruption. Since 2014, the US and Brazil have coordinated on enforcement efforts in at least 79 matters,[2] and joint resolutions of Operation *Lava Jato*-related investigations have resulted in more than US$7 billion in penalties shared among international authorities.[3] Additionally, companies have evolved in their approaches to corruption

1 Breon S Peace, Jonathan Kolodner and Lisa Vicens are partners at Cleary Gottlieb Steen & Hamilton LLP. The authors wish to thank the following Cleary Gottlieb attorneys for their contributions to this article: Andrés Felipe Sáenz, Pedro Brandão e Souza and Eduardo D. Amorim.

2 See Efeitos no Exterior, MPF, www.mpf.mp.br/grandes-casos/lava-jato/efeitos-no-exterior (last visited 2 October 2020).

3 See Press Release, U.S. Dep't of Just., 'Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History' (21 December 2016) (https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve);

allegations by conducting internal investigations more routinely (often with the involvement of external auditors that audit the investigations), investing in robust compliance programmes, and taking advantage of leniency programmes and benefits offered by authorities for self-reporting and cooperation.

This chapter analyses recent developments in Brazilian corruption investigations, focusing on the factors that led to their growth, the development of tools in Brazil and the United States in particular to facilitate cooperation, and the practical impact for companies that operate in the region and may be the subject of investigation. In the first part of this chapter, we highlight certain significant legal changes in Brazil over the past several years that led to the success of Operation *Lava Jato*, beginning with the approval in 2013 of Law 12,846 – known as the Anti-Corruption Law or Clean Companies Act (CCA), which, for the first time, established statutory authority for civil and administrative liability for companies in cases of corruption involving Brazilian or foreign public officials, and the related growth not just in investigations, but also the number of agencies involved in those investigations. In the second part, we discuss the enhanced enforcement and coordination challenges within Brazil and between Brazilian and US authorities, and some of the policy changes that have facilitated joint investigations and coordinated resolutions. Finally, in the last section, we discuss ways in which companies operating in Brazil can best prepare for an investigation, including by benchmarking compliance programmes against guidance offered in Brazil and the United States. We also consider how companies facing the prospect of an investigation can best manage the process and the different authorities that may quickly become involved.

Enhanced Brazilian prosecutorial tools led to the growth in corporate investigations

Prior to the enactment of the CCA, the Brazilian government had created the National Strategy to Fight Corruption and Money Laundering (ENCCLA)[4] – and was a signatory to international anti-corruption conventions. The Brazilian legal system also provided for

Press Release, U.S. Dep't of Just., 'Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case' (17 January 2017), www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act; Press Release, U.S. Dep't of Just., 'SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries' (29 November 2017), www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case; Press Release, U.S. Dep't of Just., 'Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case' (22 December 2017), www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties; Press Release, U.S. Dep't of Just., 'Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations' (27 September 2018), www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

4 Estratégia Nacional de Combate à Corrupção, http://enccla.camara.leg.br/quem-somos; Decreto nº 5.687, Planalto (31 January 2006), www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Decreto/D5687.htm; Decreto nº 4.410, Planalto (7 October 2002), www.planalto.gov.br/ccivil_03/decreto/2002/d4410.htm (promulgating the Inter-American Convention against Corruption).

the independence of the MPF from the judiciary branch.[5] The autonomy of prosecutors,[6] operating through specific 'task forces', was obviously of critical importance in the context of criminal investigations and the prosecution of public officials.[7] However, Brazil had no specific laws tailored to corporate malfeasance.

The CCA represented a sea change, allowing prosecutors to bring civil and administrative proceedings against companies, and creating new mechanisms for Brazilian authorities to combat corruption. It allowed for the establishment of strict liability for companies in corruption cases and significant potential sanctions, including fines and even compulsory dissolution of legal entities.[8] It also created a mechanism for leniency agreements whereby companies that cooperated with authorities could obtain a reduction in potential penalties – a critical tool utilised by prosecutors, at the US Department of Justice (DOJ), to facilitate investigations and to encourage resolutions (settlements) with companies. Notably, the CCA could be enforced not only by multiple agencies within the federal government but also by states and municipalities, creating the potential for overlapping and even competing investigations.

One year after the enactment of the CCA, the MPF launched the largest anti-corruption operation in Brazil's history – Operation *Lava Jato* – which uncovered vast corruption schemes involving contracts with public entities and ensnared high-ranking politicians, prominent businessmen and public servants.[9] Operation *Lava Jato* has reached its 75th phase,[10] with investigations of numerous industries, including naval and civil construction, shipping and energy, among many others. The investigation quickly expanded beyond Brazil's borders given the involvement of multinational corporations, as well as the elaborate use of the international financial system. As a result, Brazilian, US and authorities in other countries have worked together on investigations and have committed to increased cooperation going forward.[11]

The success of Operation *Lava Jato* and other corruption investigations in Brazil has been due to a number of factors, including the independence of the MPF. But, a critical driver for

5 See Article 127 of the Brazilian Constitution, available at www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

6 id. §2. In Brazil, prosecutors are career public servants who have to be approved through public exams, and only attorney-general positions are appointed by the chief of the executive branch of states and federal governments. See also Article 128, §§ 1,3 Brazilian Constitution.

7 'Task forces' like the Lava Jato Task Force created in 2015, were adopted in Brazil, and first regulated by the ENCCLA in 2005, based on similar investigative tactics adopted in the US, UK and Italy. Given its size and importance, the Lava Jato Task Force grew to include prosecutors acting not only in federal criminal courts, but also in higher courts – the Superior Court of Justice. See Entenda o Caso, MPF, www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso (last visited 2 October 2020).

8 See Controladoria-Geral da União – Lei Anticorrupção, available at www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao.

9 See Caso Lava Jato, MPF, www.mpf.mp.br/grandes-casos/lava-jato (last visited 2 October 2020).

10 See PF deflagra a 74ª Fase da Operação Lava Jato - Operação SOVRAPPREZZO para investigar operações de câmbio envolvendo estatal, Governo Federal, www.gov.br/pf/pt-br/assuntos/noticias/2020/09-Noticias-de-setembro-de-2020/pf-deflagra-a-74a-fase-da-operacao-lava-jato-operacao-sovrapprezzo-para-investigar-operacoes-de-cambio-envolvendo-estatal (last visited 2 October 2020).

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

success has been prosecutors' ability to use cooperation and leniency agreements to obtain the cooperation of culpable individuals and corporations. While the CCA gave prosecutors the power to enter into leniency agreements with corporations, a separate statute passed in 2013, Law 12,850, gave them the authority to enter into such agreements with individuals. That power was indirectly strengthened when, in 2016, Brazil's Supreme Court upheld a decision holding that convicted criminal defendants should be imprisoned immediately upon an unfavourable outcome on their first appeal as opposed to after they had exhausted all appeals, a process that could take years. By allowing incarceration earlier in the process, this decision greatly increased the incentives for individual defendants to cooperate with Brazilian authorities in exchange for leniency.[12]

Prosecutors have used the leniency process to enhance their information-gathering and identify new avenues of investigation. Authorities are able to discover relationships that otherwise avoided detection through a deep and complex web of intermediaries, shell corporations and beneficiaries. The benefit of these agreements for individuals is obvious – the potential for a greatly reduced period of imprisonment. For companies, the expansion of civil corporate liability for misconduct under the CCA, including penalties of up to 20 per cent of the prior year's gross revenue, debarment from public procurement and even the suspension of a company's activities, provides a significant incentive for companies to seek leniency and cooperate with authorities in their investigations. However, companies have to weigh in the impact of being prosecuted for corruption on their businesses and their reputation. This is particularly true for public companies whose stock is traded outside Brazil.

The leniency process has also become more streamlined since the beginning of Operation *Lava Jato*, allowing prosecutors to enter into agreements more quickly. Specifically, in August 2017, Brazil's Council of Federal Prosecutors released new guidelines[13] for negotiating and ratifying leniency agreements. Of course, such agreements are conditioned on a number of factors, including that the cooperator ceases its participation in the investigated violation, admits to participation in the wrongful act and commits to full cooperation.[14]

More recently, as other Brazilian agencies increasingly focus on conducting corruption investigations of companies using their authority under the CCA, those agencies have developed their own tools to advance investigations with potentially significant impacts on the subjects of those investigations. For example, in August 2019, the CGU implemented a subpoena mechanism that allows it to request information from companies regarding alleged corruption or compliance failures under the CCA, and demand that, within 30 days, they respond to the subpoena and also present their defences, including an overview of their compliance programme.[15] In practical terms, the 30-day requirement provides the CGU with

12 Significantly, in November 2019, the Supreme Court reversed its decision and determined that criminal defendants cannot be imprisoned before they exhaust their appeal options. Since then, although legislation has been introduced to reinstate the prior rule, it has not been adopted.

13 Ministério Público Federal, Orientação No. 07/2017, available at www.mpf.mp.br/pgr/documentos/ORIENTAO7_2017.pdf.

14 Lei 12.846/13, 1 de agosto 2013, Art. 16 (Brazilian Clean Companies Act).

15 Diário Oficial da União, Instrução Normativa No. 13, de 8 de agosto de 2019, www.in.gov.br/web/dou/-/instrucao-normativa-n-13-de-8-de-agosto-de-2019-210039570.

real leverage and can set the tone at the outset of the investigation. And, as discussed below, the speed with which such an investigation may proceed puts a premium on preparation in order to be in a position to quickly respond to a CGU inquiry, including by developing a strong and well-documented compliance programme.

Coordination of investigations within Brazil and with US authorities

Operation *Lava Jato* and similar operations have shown that companies under investigation in Brazil should expect to hear from a number of different authorities. In Brazil, because of the CCA's broad applicability, federal, state and municipal authorities can – and have – investigated misconduct within their jurisdiction. And, of course, potential misconduct taking place in or having a jurisdictional nexus to Brazil and the United States has resulted in investigations by both Brazilian and US authorities.

The early experience of Operation *Lava Jato* suggests that coordination between authorities within Brazil has been a challenge.[16] From a company's perspective, a lack of coordination among authorities makes managing the investigation, and making strategic decisions, very difficult. For example, if authorities are sending different or cumulative document requests, failing to coordinate their interview requests or resolving their investigations on different schedules, the company is placed in the awkward position of navigating these competing interests, bearing the additional costs and potentially being disadvantaged. Companies face the spectre and distraction of perpetual investigations, without the ability to achieve an end to the investigations into the misconduct and finality with a coordinated resolution. This issue can get even more complicated when authorities outside of Brazil are added to the mix.

Until recently, efforts at cooperation between Brazilian authorities was largely informal, with multiple Brazilian authorities only participating in select circumstances in multinational settlements. Such settlements, like Technip's simultaneous settlement with the MPF and CGU, along with the DOJ, demonstrates the degree to which this cooperation can be successful.[17] Recently, key authorities in Brazil have recently recognised the benefits of coordinated investigations as well. In August 2020, the TCU, CGU, AGU and the Ministry of Justice signed a technical cooperation agreement, signalling the formalisation of

16 Sem coordenação conjunta, acordos de leniência estão sob risco de anulação, Correio Braziliense (16 June 2017), www.correiobraziliense.com.br/app/noticia/politica/2017/06/06/interna_politica,600381/sem-coordenacao-conjunta-acordos-de-leniencia-estao-sob-risco-de-anul.shtml. At the time of this June 2017 article, since the enactment of the CCA, the CGU and the TCU joined the MPF only once even though the MPF had entered into 10 such agreements; see also Consultor Juridico, 'Moro proíbe que TCU e Receita usem delações contra os próprios colaboradores', available at www.conjur.com.br/2018-jun-13/moro-proibe-tcu-receita-usem-delacoes-colaboradores. In 2018, Judge Sérgio Moro issued an order that prohibited the MPF from sharing evidence produced in the context of plea and leniency agreements in criminal actions with regulators, including the TCU, CGU, AGU and the Central Bank. This decision reversed Moro's own prior opinions that enabled, for example, the TCU to declare the unfitness of certain companies involved in the *Lava Jato* investigation.

17 Cooperation Agreement between the CGU, AGU, Ministry of Justice and TCU concerning the Combat of Corruption in Brazil, available at https://portal.tcu.gov.br/data/files/11/16/BB/03/575C37109EB62737F18818A8/ACORDO%20DE%20COOPERACAO%20TECNICA%20_1_.pdf.

cooperation methods and information-sharing that had already been in progress.[18] Notably, while the MPF is listed as one of the signatories, the Fifth Chamber of the MPF (which is responsible for corruption investigations) subsequently issued a technical note advising the Prosecutor General not to adhere to the agreement.[19] As of September 2020, the MPF has not signed the technical cooperation agreement and there is no indication that it will actually do so, which may substantially impact the relevance of the agreement for the coordination of corruption investigations in Brazil given the MPF's central role.[20]

Regionally, Brazil has emerged as a leader in anti-corruption enforcement efforts. Brazilian authorities have signed cooperation agreements with Colombia and Chile, among others.[21] Beyond South America, the MPF reports that it has made 441 cooperation requests to foreign authorities in 61 countries and received 606 requests from 40 countries.[22] Based on the MPF's figures, the largest number of requests made by Brazilian authorities are to Switzerland (31.3 per cent), followed by the United States (12.9 per cent). In turn, Peru accounts for the highest number of requests to Brazilian authorities (41.2 per cent), followed by Switzerland (36.8 per cent). The extent of this cooperation is reflected in the number of countries participating in some of the most recent multinational settlements, where investigations stemming from misconduct in Brazil have resulted not only in US participation, but also the involvement of countries such as Singapore, the Netherlands, Switzerland and the United Kingdom.

The development of US and Brazilian joint anti-corruption efforts

There is no question that the United States and Brazil have cooperated effectively since 2014, conducting parallel investigations of the same underlying conduct where there is a US jurisdictional nexus, often for companies that are 'issuers' of US securities and therefore potentially liable under the Foreign Corrupt Practices Act (FCPA).[23] Over the past 10 years, Brazil ranks second only to China as the country with the most enforcement actions brought by US authorities, based on where the underlying corruption conduct took place.[24] Unlike

18 Cooperation Agreement between the CGU, AGU, Ministry of Justice, and TCU concerning the Combat of Corruption in Brazil, especially concerning Leniency Agreements of Law 12,845, available at https://portal.tcu.gov.br/data/files/11/16/BB/03/575C37109EB62737F18818A8/ACORDO%20DE%20COOPERACAO%20TECNICA%20_1_.pdf.

19 The MPF 5th Chamber issued Technical Note 2/2020 explicitly rejecting the Cooperation Agreement, available at www.mpf.mp.br/pgr/documentos/NotaTecnicaAcordodeCooperacaoFinal.pdf.

20 Notably, other relevant agencies such as the Brazilian Antitrust Authority, the Brazilian Securities Exchange Commission and the Brazilian Central Bank were also not a part of the Technical Cooperation Agreement.

21 For example, on 13 February 2018, Brazil signed a cooperation agreement with Colombia, to improve investigations, exchange information and impose administrative penalties on private companies involved in corruption and transnational bribery. On 26 March 2019, Brazil and Chile signed the Interinstitutional Cooperation Agreement to Fight Corruption, which set forth mechanisms for mutual assistance for the implementation of measures to prevent, detect and punish offences conducted against the public administration, as well as to develop strategies for promoting a culture of integrity.

22 Caso Lava Jato, MPF, available at www.mpf.mp.br/grandes-casos/lava-jato (last visited 2 October 2020).

23 Depending on the misconduct and where it took place, foreign companies can also be liable under the FCPA's anti-bribery provisions.

24 Brazil is still a distant second in this regard with less than half the number of enforcement actions involving conduct in Brazil, as compared with those involving conduct in China throughout this same period. See Location of Improper

with China, however, US and Brazilian prosecutors appear to have developed relationships forged over a number of coordinated resolutions, and a 'playbook' for executing those resolutions. Indeed, there are prosecutors at the DOJ's Fraud Section (which is responsible for FCPA investigations), attorneys at the SEC's FCPA Unit and agents at the FBI's Miami office[25] that focus on investigations of wrongdoing in Brazil and Latin America more generally.

Recent US policy changes have also encouraged cooperation between the United States and Brazil. Over the past several years, in an effort to increase cross-border cooperation and provide companies transparency and insight into their decision-making processes, the DOJ and the SEC have issued new guidance and policies.

First, in November 2017, the DOJ adopted the Corporate Enforcement Policy, which provided guidelines regarding the credit the DOJ will provide to companies that self-report FCPA violations and that cooperate with any resulting investigation by authorities – including a presumption that self-reporting companies that are not repeat offenders or otherwise have not engaged in egregious conduct will not be criminally charged.[26] The Corporate Enforcement Policy also provides for a discount of up to 50 per cent off of the potential penalty under the United States Sentencing Guidelines for companies that are not eligible for a declination but cooperate and fully remediate wrongdoing. The upshot of this policy, from a global perspective, is that companies that have identified wrongdoing in Brazil and are subject to FCPA jurisdiction are incentivised to report that conduct to the DOJ and the SEC and cooperate with their investigations of that conduct.

Second, in May 2018, the DOJ announced its 'anti-piling on' policy, which encourages federal prosecutors to take into consideration in calculating any US criminal penalty the fines imposed by different authorities in the US and abroad for the same underlying misconduct. This policy formalised the DOJ's existing practice of providing credit for penalties paid to other authorities. For example, in the Technip resolutions discussed above, the DOJ calculated that the appropriate criminal fine under the US Sentencing Guidelines was US$296,184,000. However, the DOJ credited the approximately US$214,331,033 in fines imposed in Brazil toward that penalty, and ultimately required Technip to pay US$81,852,967 to the US government.

From the perspective of a company facing potential investigations in the United States and Brazil, these two policies could provide significant benefits. Under the 'anti-piling on' policy, a company can negotiate with authorities in the US and Brazil (and in other interested jurisdictions as well) for a coordinated resolution. Significantly, any penalties imposed in those other jurisdictions may be credited toward the total US penalty. And, at the end of this process, the investigated company may be able to achieve finality and global peace.

Payments, 2011-2020, Stanford Law School Foreign Corrupt Practices Act Clearinghouse, available at http://fcpa.stanford.edu (last visited 2 October 2020).

25 In March 2019, the FBI opened a new field office to combat international corruption by addressing foreign bribery, kleptocracy and international antitrust matters. See FBI Press Release, 'FBI Announces New International Corruption Squad in Miami Field Office' (5 March 2019), available at www.fbi.gov/news/pressrel/press-releases/fbi-announces-new-international-corruption-squad-in-miami-field-office.

26 U.S. Dep't of Justice Criminal Division, FCPA Corporate Enforcement Policy (Updated March 2019), available at www.justice.gov/criminal-fraud/file/838416/download.

The rise of 'shadow investigations'

While not directly related to the actions of authorities, companies operating in Brazil should also be aware of another development that is relevant to how they manage the investigative process. Indeed, a particularly unique feature of Brazilian corruption investigations has been the rise of in-depth 'shadow investigations' or 'shadow audits' performed by the company's external auditor.

When a company's external auditor learns of potential corrupt activities that may adversely impact the company's financial statements, it may require the company to conduct an internal investigation and, to the extent wrongdoing is identified, take remedial measures. External auditors may withhold sign-off on financial statements until it is satisfied that the company has taken the appropriate investigative steps.

In Brazil, the shadow investigation or 'audit of the investigation' by the auditor is a common practice. It is conducted to ensure that the investigation is performed in accordance with forensic best practices and is procedurally sound, thus ensuring its reliability. As part of their shadow investigations, auditing firms will seek regular reporting from the investigative team that it took appropriate steps to 'follow the evidence', that the investigator pursued relevant avenues of inquiry and that it made reasonable decisions in its investigation. While shadow investigations are meant to be procedurally focused – indeed the auditor may not direct the investigation – the involvement of another stakeholder external to the company presents its own challenges, in addition to managing the investigation being conducted by the authorities, and requires careful coordination.[27]

Key takeaways for companies managing corruption risk and investigations

Given the risks that companies operating in Brazil, the United States and elsewhere face from corruption-related investigations, companies are advised to take certain steps to mitigate that risk and, in the event of an investigation, to manage it appropriately.

Companies should ensure that they have implemented a compliance programme that follows best practices, including maintaining a strong anti-corruption policy and financial controls to prevent corruption. There are various ways in which a company can benchmark its anti-corruption programme.

In April 2017, for example, the DOJ released the first iteration of its compliance guidance, the Evaluation of Corporate Compliance Programs, which sets forth comprehensive guidance 'to assist prosecutors in making informed decisions as to whether, and to what

27 For example, at least in the United States, there is a risk that confidential communications between the company and the lawyers conducting the investigation (and the lawyers' work product), which may be protected from disclosure to third parties under the law, will lose such protection if disclosed to auditors, and thus will be discoverable by third parties. In the United States, not all courts consider an auditor to have a unity of interest with the company such that privilege attaches to communications between the company, its counsel and its auditors. Given that the information uncovered in a corruption investigation is often extremely sensitive, investigative teams must make efforts to avoid unnecessary disclosure of privileged information to auditors to third parties, including private litigants. This includes ensuring that the attorney work product is clearly labelled, that privilege applies and is protected in all relevant jurisdictions, that auditors are made aware of and abide by their confidentiality obligations and that auditors agree to a common scope of disclosure to minimise any waiver of privilege.

extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution'.[28] This guidance has been updated twice since its first release, most recently in June 2020.[29] The guidance is framed around three questions, focused on the design of the programme, whether it is applied earnestly and in good faith, and whether it works in practice. The DOJ places great focus on the use of data-driven analyses and the application of lessons learned, including remediating misconduct and improving a programme in light of any identified gaps. Likewise, in Brazil, companies can look to similar guidelines provided by various agencies, including the CGU's Programa de Integridade.

Companies with strong compliance programmes are in the best position to prevent and detect misconduct. Indeed, once allegations of potential corrupt activities surface, companies should investigate such activities. And, if that misconduct is identified, companies should take remedial actions, which may include taking disciplinary actions and enhancing policies, procedures and controls. By identifying corrupt activities before the authorities do, companies are better positioned to negotiate more favourable leniency agreements with the Brazilian authorities and take advantage of the benefits of the DOJ's Corporate Enforcement Policy by self-reporting and cooperating in any US criminal investigation, if US authorities have jurisdiction. And, since the authorities in the United States and Brazil will look at the strength of a company's compliance programme in assessing how to resolve a matter (including the potential penalty), maintaining a compliance programme that utilises best practices will help mitigate potential sanctions.

Companies being investigated by authorities in Brazil and the United States should also consider how best to ensure that those investigations are coordinated. That coordination can become challenging given the number of different authorities that may become involved in Brazil. However, companies can take several steps to ensure that investigations are appropriately coordinated, with the goal, if it becomes apparent that the authorities are seeking a resolution, of that resolution being coordinated. This includes deciding early in the investigation which enforcement authorities to report to, the sequence in which to make these reports and the best means to approach authorities to ensure appropriate 'credit' for doing so (e.g., whether the company should approach an authority itself or request that one authority help coordinate with other authorities). Companies should be transparent in their communications with the different authorities involved, ensure that the authorities are being provided similar factual and procedural updates on the investigation and that the investigations are proceeding along a similar, consistent timeline. Likewise, to the extent that it becomes necessary, companies can also facilitate discussions themselves among the

28 U.S. Dep't of Justice Criminal Division, Evaluation of Corporate Compliance Programs (Updated June 2020), available at www.justice.gov/criminal-fraud/page/file/937501/download.

29 The Evaluation of Corporate Compliance Programs was comprehensively restructured in April 2019. It was again revised, less drastically, in June 2020.

various authorities, communicating what they understand the timing of investigative steps to be and encouraging the investigating authorities to coordinate with one another.

Conclusion

Despite the success of Operation *Lava Jato*, its future remains uncertain. Recently, there has been a debate within the MPF concerning whether to extend the mandate for task forces such as that from Operation *Lava Jato*. In September 2020, the head office of the MPF decided to maintain the Operation *Lava Jato* task force at least until the end of January 2021.[30] However, it appears that the task force likely may not continue after that period. The MPF has been discussing the creation of a permanent anti-corruption unit to replace these existing task forces. Amid these discussions, Deltan Dellagnol, who led the Operation *Lava Jato* task force, and Anselmo Lopes, who led the *Greenfield* task force, each announced that they would leave their respective roles.[31]

While there are open questions concerning what the future of anti-corruption prosecution in Brazil holds, there is no question that, since the commencement of *Lava Jato*, Brazilian authorities have become highly sophisticated at conducting corruption investigations and working alongside authorities in the United States and elsewhere to prosecute misconduct.

These institutional changes are not likely to go away and, as a result, Brazilian companies and multinational companies operating in Brazil have changed their approach to investigating potential misconduct in their organisations and have put into place compliance and integrity programmes whose purpose is to detect and prevent such misconduct. Continued investment in compliance and integrity programmes and efforts by companies to foster a culture of compliance in their organisations may prove to be among longest-lasting and most significant impacts of Operation *Lava Jato*.

30 PGR prorroga atuação da Operação Lava Jato no Paraná, Agencia Brasil (9 September 2020) available at https://agenciabrasil.ebc.com.br/justica/noticia/2020-09/pgr-prorroga-atuacao-da-operacao-lava-jato-no-parana.

31 The *Greenfield* task force published a note stating that it was already understaffed before Anselmo Lopes's decision.

Appendix 1

About the Authors

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Breon S Peace is a partner in the New York office of Cleary Gottlieb. His practice focuses on white-collar criminal defence, regulatory enforcement matters and complex litigation. He regularly conducts sensitive internal investigations and represents corporations and individuals in investigations involving allegations of, among other things, corruption, fraud and money laundering. He also advises corporations on crisis management, corporate governance issues and compliance programmes. Breon frequently handles matters involving the US Department of Justice, the Securities and Exchange Commission and authorities around the world.

He has represented numerous clients in Latin America in criminal and regulatory investigations of corruption, fraud and other potential misconduct. Additionally, he has assisted companies in the region with the development of anti-corruption compliance programmes.

Breon has been recognised as a leading lawyer by *Chambers USA*, *Chambers Latin America*, *The Legal 500: United States*, *Who's Who Legal: Investigations* and *Benchmark Litigation*. He frequently speaks and writes on key criminal and regulatory enforcement issues.

He previously served as an Assistant US Attorney for the Eastern District of New York and prosecuted criminal cases. He taught a course on criminal prosecution at New York University School of Law, where he also received his law degree.

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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 on behalf of clients, which frequently involve allegations of fraud or corruption. 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, Jon 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 very active in Latin America, and regularly represents clients in internal investigations and enforcement matters in the region. Jon is recognised as a leading lawyer by *Benchmark Litigation*.

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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 investigation of 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 by *Chambers*, *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 and a BS from Georgetown University.

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