

Global Compact Network Canada

LATIN AMERICA

Chapter Eleven of Designing an Anti-Corruption Compliance Program:
A Guide for Canadian Businesses

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Anti-Corruption in Latin America

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In this chapter, we address Latin America as it is most commonly defined: all countries in the Americas south of the United States, including the countries in the Caribbean. Key topics covered in this chapter include:

- Latin America’s current economic conditions and their link to corruption;
- standard measures of corruption;
- recent legislative and political developments;
- recent enforcement actions;
- the role of whistle-blowers in the fight against corruption; and
- due diligence considerations for doing business in Latin America.

Latin America as a region consistently performs poorly on various corruption metrics, including Transparency International’s (“TI”) Corruption Perceptions Index.¹ The corruption in these countries is often systemic, affecting citizens of all socio-economic statuses and severely impacting each country’s national economy. Through corruption, illicit money is often invested in major foreign business centres instead of in businesses at home. An analysis of the last two decades of TI’s Corruption Perceptions Index shows the failure of Latin American countries to adequately address corruption in the region – with the main exception being Uruguay, which has risen to the top of the index as Latin America’s least corrupt country. Recently, several large scandals have brought heightened attention to corruption and fraud in Latin America, prompting foreign leaders to ask if there will be a renewed focus on increased governmental transparency over the next few years.

In Brazil, the 2014 Petrobras² scandal (also known as “Operation Car Wash,” discussed in detail later in this chapter) led to mass protests against the government and the call to impeach the country’s president, Dilma Rousseff. In September 2015, Guatemalan President Otto Pérez Molina was forced to step down as a result of a corruption investigation and is now awaiting trial for a customs-related fraud. Meanwhile, the impact of the recently released Panama Papers, which marks the largest offshore data leak in history, has been felt worldwide, as many prominent government and public officials had ties to the leaked information. It remains to be seen what kind of impact these events will have on corruption cleanup efforts besides bringing the anti-corruption conversation to the forefront. Most recently, in December 2016, Brazilian construction company Odebrecht agreed to pay the largest penalty ever for a corruption case – US\$3.5 billion – in connection with investigations carried out by Brazilian, Swiss and U.S. authorities into bribes paid in Brazil, Venezuela, the Dominican Republic and Panama.³

¹ See www.transparency.org/cpi2015#results-table.

² Petróleo Brasileiro, known as Petrobras, is Brazil’s national oil company and one of Latin America’s largest companies. In 2014, it was discovered that the self-appointed government executives on the board of Petrobras secretly diverted funds equalling billions of dollars. See www.ft.com/intl/cms/s/2/6e8b0e28-f728-11e5-803c-d27c7117d132.html#axzz47ctkko7n.

³ See www.reuters.com/article/us-brazil-corruption-latinamerica-idUSKBN14B2BD.

Over the past decade, many countries in the region have enacted new laws and set up new anti-corruption offices – and yet, many anti-corruption experts have asserted that the number of corruption incidents has barely wavered. Brazil saw the enactment of the *Brazilian Clean Company Act*; the Colombian government signed into law the *Anti-Corruption Act of 2011*; Guatemala passed the Asset Recovery Law in 2010 and an anti-laundersing law in 2001; and Mexico adopted the Federal Law Against Corruption in Public Procurement in 2012. Despite increases in legislative action, few countries are seeing a decline in corruption. Nevertheless, the tide may be turning given growing public outrage over public corruption. Latin American citizens are increasingly realizing that corruption can create far-reaching financial problems and ultimately lead to a stagnant economy.

While there is still a great deal of regulatory ground to cover in Latin America, the need for systematic improvements and more proactive measures is widely acknowledged and spurring gradual change. Countries that have historically tolerated fraud are beginning to tighten the reins on corruption and are establishing new frameworks to improve their investigative procedures, provide remediation to damaged parties and increase transparency across all levels. This tightening of anti-corruption efforts is the result of both internal and external pressures from Latin American citizens, foreign countries, international development banks and other entities.

I. THE RELATIONSHIP BETWEEN POOR ECONOMIC CONDITIONS AND CORRUPTION

Current Economic Conditions in Latin America

“Latin American Economic Outlook 2016: Towards a New Partnership with China” (2015 by the Organisation for Economic Co-operation and Development/United Nations/Development Bank of Latin America)⁴ provided the following prognosis

for economic conditions in Latin America for 2016 and beyond:

The high economic growth rates of the 2000s experienced in Latin America fueled by favourable external conditions are over. Instead, the region continues to deal with a deteriorating external environment that, without experiencing any major internal crises, is leading to modest growth rates. Medium-term growth projections, however, show further downward revisions. This suggests that potential output growth is less robust than expected, which could present a risk to recent socioeconomic achievements.

In terms of current conditions, Brazil’s economy is suffering more than most other economies in Latin America, though much of the region is struggling. Its gross domestic product (“GDP”) shrank 2.9% in Q3 2016 compared to the third quarter of 2015, and its unemployment rose to 11.8% in October 2016.⁵ Argentina’s economy is also floundering, with GDP for Q3 2016 dropping by 3.8% on a year-over-year basis⁶, and Venezuela remains in deep recession. Conversely, Mexico’s GDP grew by 2.0% year on year in Q3, with unemployment at only 3.6% this past October.⁷

⁴ See www.keepeek.com/Digital-Asset-Management/oced/development/latin-american-economic-outlook-2016_9789264246218-en#page2.

⁵ Reuters, “Brazil’s GDP drops 0.8 pct in Q3, as expected.” Nov. 30, 2016.

⁶ FXStreet, “Argentina’s Recession Deepened Further in Q3 2016.”

⁷ *The Wall Street Journal*, “Mexico’s Unemployment Reaches 9-Year Low in October.” Nov. 28, 2016.

The Relationship between Poor Economic Conditions and Corruption

Many researchers have studied the relationship between corruption and economic conditions. One of the most recent research studies by the Organisation for Economic Co-operation and Development (“OECD”), titled “Issues Paper on Corruption and Economic Growth”, examined various measures of corruption globally (including the World Bank’s Worldwide Governance Indicators, explained below) and found a strong correlation between perceived levels of corruption and economic indicators.

The OECD paper notes that it is unclear which factor – corruption or economic conditions – is the dependent variable and which one is the independent variable. Instead, it notes that both are inextricably tied to one another. While several studies have concluded that poor economic conditions breed corruption, others have found that corruption in the public sector places undue restraints on a country’s economy, driving economic indicators down. Regardless, it is clear that a strong correlation between the two exists.

II. STANDARD MEASURES OF CORRUPTION

In this section, we examine two of the best-known measures of the perception of corruption: the annual Transparency International Corruption Perceptions Index and the World Bank’s Worldwide Governance Indicators (“WGI”)

Transparency International’s Corruption Perceptions Index

Transparency International’s Corruption Perceptions Index is scored on a country-by-country basis. Scores are based on surveys and expert assessments. A country’s score indicates its perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean). Rankings are based on each country’s position among the 168 countries included in the 2015 study. The following table includes information excerpted from the 2015 Corruption Perceptions Index for the available countries commonly considered to make up Latin America, as defined above.⁸

Country	2015 Corruption Perceptions Index Score	Rank
Uruguay	74	21
Chile	70	23
Costa Rica	55	40
Cuba	46	56
Jamaica	41	69
El Salvador	39	72
Panama	39	72
Trinidad and Tobago	39	72
Brazil	38	76
Colombia	37	83
Peru	36	88
Mexico	35	95
Bolivia	34	99
Dominican Republic	33	103
Argentina	32	107
Ecuador	32	107
Honduras	31	112
Guyana	29	119
Guatemala	28	123
Nicaragua	27	130
Paraguay	27	130
Haiti	17	158
Venezuela	17	158

⁸ See www.transparency.org/cpi2015.

The 23 countries that make up Latin America have an average TI score of 37.26, compared with the global average of 42.57 for all 168 countries, indicating the continent's higher-than-average perceived level of corruption. The average ranking of Latin American countries was also below average, at 92 out of 168.

Further analysis provides some additional context. Overall, the average scores of the 23 countries listed have remained stable in recent years, rising from 36.83 in 2013 to 37.65 in 2014, followed by a decline to 37.26 in 2015. This dip, coupled with an increase in the overall global average score from 42.44 in 2014 to 42.57 in 2015, indicates that the gap between Latin America and the rest of world grew slightly in 2015.

There are some notable trends for some countries in particular. The countries that have shown a 2013–2015 improvement on the corruption index include:

Honduras (26 to 31)

Dominican Republic (29 to 33)

Panama (35 to 39)

Jamaica (38 to 41)

Paraguay (24 to 27)

There were also a few countries where the perceived level of corruption worsened:

Brazil (42 to 38, after increasing to 43 in 2014)

Venezuela (20 to 17)

Ecuador (35 to 32)

Two countries appear to have ridden a roller coaster over the past three years: Chile and Guatemala. Chile's score rose two points from 2013 to 2014, and then dropped three points in 2015. Guatemala followed a similar track, increasing from 29 to 32 between 2013 and 2014, but then falling four points in 2015.

The World Bank's Worldwide Governance Indicators

The World Bank's Worldwide Governance Indicators reflect six composite measures.⁹ One of those six measures is control of corruption, described as follows:

Control of corruption captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.

To calculate the WGI, more than 30 sources of data are used, including surveys of households and homes, commercial business information providers, non-governmental organizations and public sector organizations.

⁹ See <http://info.worldbank.org/governance/wgi/index.aspx#doc>.

The result is a score ranging from –2.50 (most corrupt) to +2.50 (least corrupt). The most recent scores were determined for 2013 and 2014. WGI scores for some of the largest Latin American countries are shown in the accompanying table:

Country	2014	2013
Chile	+1.477	+1.518
Uruguay	+1.352	+1.335
Costa Rica	+0.729	+0.594
Panama	-0.355	-0.362
Brazil	-0.378	-0.118
Colombia	-0.394	-0.439
Argentina	-0.580	-0.461
Peru	-0.592	-0.439
Bolivia	-0.640	-0.589
Mexico	-0.733	-0.476
Ecuador	-0.817	-0.610
Nicaragua	-0.885	-0.731
Paraguay	-0.999	-1.041
Venezuela	-1.382	-1.277

These scores mostly mirror the rankings and trends in TI's Corruption Perceptions Index, lending further credibility to both studies. Brazil and Venezuela are on a downward trend in their perceived levels of corruption, while Uruguay and Costa Rica are improving.

By way of comparison, the WGI scores for Canada and the United States in 2014 were +1.818 and +1.323, respectively.

III. RECENT LEGISLATIVE AND ENFORCEMENT DEVELOPMENTS

In 1997, the OECD finalized its *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*. Forty-one countries have formally documented their acceptance of the Convention, including seven countries that are not OECD members. Five of the 41 signatories are in Latin America:

Argentina

Brazil

Chile (OECD member)

Colombia

Mexico (OECD member)

Once a country ratifies the Convention, OECD performs peer-review examinations, resulting in written reports on the country's implementation of its anti-corruption provisions.¹⁰ These peer reviews are performed in phases:

Phase 1 evaluates the country's legislation to implement the Convention

Phase 2 assesses the effectiveness of the country's application of the legislation

Phase 3 focuses on enforcement of the legislation

A fourth phase, launched in March 2016, focuses on the enforcement of the anti-corruption legislation, as well as cross-cutting issues tailored to the country's specific needs and outstanding recommendations from Phase 3.

Of the five Latin American countries that have ratified the Convention, all but Colombia (which was the latest to ratify in 2012), have received their Phase 3 reports. The results are mixed.¹¹ Brazil and Chile were commended for the progress they have made, but were also encouraged to address additional recommendations made by their peer review teams

¹⁰ See www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.

¹¹ See www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm.

(however, it should be noted that Brazil's report was written before the Petrobras and Odebrecht cases came to light). Argentina came under severe criticism, with OECD's doubt of its "commitment to fight foreign bribery." The OECD's "grave concerns" included Argentina's lack of a law that punishes companies for foreign bribery and/or prosecutes individuals who commit these crimes abroad – along with the "widespread delays" in its investigations.

Mexico is furthest along in the OECD peer-review process. It received its Phase 3 report in 2011, three years earlier than the other countries. In a 2014 follow-up report, however, Mexico was found to have implemented some, but not nearly all, of the 2011 recommendations made by its peer-review team. Only four out of the original 22 recommendations had been fully implemented, while 10 others were partially implemented and eight were not yet implemented. This was hardly a glowing review of the country's progress after three years.

Coordinated focus on corruption within Latin America can be traced to 1996, with the adoption of the *Inter-American Convention against Corruption* ("IACAC"). The IACAC, which has been signed and/or ratified by 34 countries, aims to promote and strengthen the mechanisms to combat corruption, and to promote, facilitate and regulate co-operation to ensure the effectiveness of the measures to combat corruption in the performance of public functions. The IACAC establishes a number of anti-corruption measures in four areas:¹²

Criminalization: Establishes the criminalization of corrupt acts, including bribery and illicit enrichment

Co-operation: Includes provisions to strengthen co-operation between its States Parties for mutual legal assistance, technical co-operation, extradition and identification

Asset Recovery: Includes provisions to strengthen co-operation between its States Parties for tracing, freezing, seizing and forfeiting the proceeds of acts of corruption

Monitoring: The IACAC Follow-Up Mechanism ("MESICIC") provides a comprehensive system of inter-state monitoring and compliance assessments

Each country has the freedom to adopt its own anti-corruption laws with the IACAC framework in mind.

The remainder of this section will focus on a few of the most significant recent legislative and political developments.

Brazil

Brazil's recent high-profile scandals have put it under pressure to implement laws enabling the prosecution of corrupt acts. In 2014, federal police and prosecutors uncovered the largest corruption scheme in Brazilian history involving Latin America's largest company, Petrobras. The Operation Car Wash scandal started as a money-laundering investigation at a chain of fuel service stations and then expanded to cover allegations of corruption in Petrobras, a state-owned company. Another high-profile scandal emerged around the same time, involving allegations of money laundering, corruption and procurement fraud by executives at Embraer S.A., a global aircraft company headquartered in Brazil.

The Petrobras and Embraer scandals point to a need for the Brazilian government to increase anti-corruption efforts and strengthen or establish laws to prosecute corrupt acts. As part of this effort, Brazil enacted new anti-corruption legislation that aims to impose civil and administrative liabilities on corporate entities doing business in Brazil for the bribery of Brazilian or foreign public officials. One of these measures, the *Brazilian Clean Company Act*, Law no. 12,846, enacted on January 29, 2014, holds companies responsible for the corrupt acts of their employees. This act, however, does not impose criminal penalties – it merely enforces civil penalties.

¹² See www.business-anti-corruption.com/about/about-corruption/inter-american-convention-against-corruption.aspx.

The *Brazilian Clean Company Act* prohibits financing, paying or subsidizing a prohibited act, as stipulated in the law. This includes bid rigging and fraud as related to public procurement and direct/indirect acts, or attempted acts, of bribery. The penalties for these acts include fines of up to 20% of a company's gross revenue from the previous year or, in more serious instances, the dissolution of the company. The *Clean Company Act* allows for leniency if the entity in question self-discloses or co-operates with investigators.

Brazil also has an anti-corruption agency, the Comptroller General of Brazil ("CGU"), which is the authority in the executive branch for investigating corruption and cases involving the payment of bribes to foreign authorities by Brazilian nationals. The CGU has four internal secretariats with different responsibilities for preventing and investigating corruption cases: the Corruption Prevention and Strategic Information Secretariat, the Federal Internal Control Secretariat, the National Disciplinary Board and the Office of the Ombudsman.

Colombia

The Colombian government has taken many steps in the past decade to curb corruption. In July 2011, President Juan Santos signed the *Anti-Corruption Act of 2011* into law, a policy that aims to manifest more accountability and transparency in the public bidding process. The law also criminalizes extortion, active and passive bribery, political corruption and trading confidential state information for preference in business scenarios. In addition to these new provisions, Santos's administration has created an anti-corruption office and has become a signatory to several high-profile international anti-corruption measures, including the United Nations *Convention against Corruption* ("UNCAC") and the *Inter-American Convention against Corruption* ("ICAC"). The country also became the 40th signatory to the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-Bribery Convention) on January 23, 2013. Colombia's participation in these international agreements means that it must,

among other responsibilities, enact legislation that criminalizes the act of bribing a foreign public official, promotes international anti-corruption enforcement efforts, and participates in a comprehensive system of interstate anti-corruption monitoring and compliance assessments.

Accompanying these new actions are enforcement tools the Colombian government is hoping to impose. The penalty for corrupt payments that offer any kind of advantage, monetary or otherwise, to a public official carries a fine of US\$30,000, three to six years of imprisonment and a ban on running for public office for a period equal to the years of imprisonment.

Despite the multitude of policy improvements, however, Colombia continues to face corruption challenges. The country's place in TI's Corruption Perceptions Index worsened from 57 in 2002 to 94 in 2012. Several major scandals, including those involving the Nule Group in 2011¹³ and PetroTiger in 2014¹⁴, have posed further challenges to its war on corruption. On an optimistic note, Colombia's 2015 index ranking was 83, a few notches better than its 2012 placement.

Mexico

In 2012, Mexico adopted the Federal Law Against Corruption in Public Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*, or "LFACP"). Like the *Foreign Corrupt Practices Act* ("FCPA"), the LFACP prohibits companies and individuals from offering money or gifts to secure a business advantage in the procurement of public procurement contracts with the Mexican government. LFACP is like the U.K.'s *Bribery Act* in that it expands on the FCPA's provisions to also include the bribery of non-governmental officials (commercial bribery) in its policies. The Mexican law constitutes payments and/or gifts to both foreign and domestic

¹³ Four men were fined and one was sent to prison for embezzling millions of dollars meant for public roads and construction projects.

¹⁴ U.S. Department of Justice charged the company's co-CEOs and its former general counsel for their involvement in a bribery scheme to obtain a US\$39 million contract in violation of the *Foreign Corrupt Practices Act*, defrauding the company in a kickback scheme relating to an acquisition, and to launder the proceeds of their crimes.

officials as bribery, and, unlike the FCPA, does not include an exception for facilitation payments.

Mexico's challenge, however, is not in its lack of anti-corruption laws, but in the poor enforcement of these laws. This could be changing with the creation of the National Anti-Corruption System (*Sistema Nacional Anticorrupción* or "SNA"), which was passed in April 2015. While the SNA does not pinpoint any newly defined public corruption crimes, it does send a clear signal that Mexico intends to take a strong position on enforcing the anti-corruption efforts that started in 2012.

The SNA is a constitutional amendment that, once fully ratified by the Mexican states, establishes a clear enforcement framework to correct the current institutional flaws in the Mexican system. It is designed to enforce anti-corruption provisions with a coordinated effort spanning all levels of government – municipal, state and federal.

The SNA has a coordinating committee that will develop an annual report containing the progress and results of the exercise of its functions and the implementation of policies and programs in the field. Although the SNA does not establish new corruption-related offences, it does strengthen penalties for corruption. Other key provisions of the SNA include:

1. the establishment of the Federal Tribunal of Administrative Justice and the appointment of a special prosecutor to impose sanctions on violators;
2. a requirement for states to do the same;
3. a requirement for public servants to declare their assets and interests;
4. an extension of the statute of limitations for serious administrative misconduct from three to seven years; and
5. permission for the Federal Audit Office and Public Administration Ministry to investigate and conduct audits more frequently and advocate for enforcement of the law against potential violators.

Mexican reforms also include the introduction of a whistle-blower program that allows citizens to report corrupt activities to the Mexican House of Representatives.

Peru

Peru has taken several measures aimed at curbing corruption in recent years, starting with its ratification of the UN *Convention against Corruption* in 2004. In 2006, the country introduced stiffer penalties for individuals found guilty of corruption.

One of Peru's most important steps forward began in 2013 with the implementation of its National Anti-Corruption Plan for 2013 to 2016. The plan strengthens Peru's legal framework by, among other things, introducing corruption control offices in all state institutions and enhancing complainant protections.

Nevertheless, Peru is among several Latin American countries to suffer allegations of corruption at the highest levels of government. In early 2016, the Peruvian attorney general's office announced that it had begun an investigation into whether the country's president at the time, Ollanta Humala, whose term ran from July 2011 to July 2016, received bribes from the engineering and construction conglomerate Odebrecht. The Peruvian investigation was triggered when Brazilian police began investigating allegations that the engineering company had made payments of approximately US\$3 million in bribes. Due to presidential immunity, a formal investigation of Humala could not begin until his term ended in late July.

Before the Humala investigation, former Peruvian president Alberto Fujimori had eight years added in 2015 to his existing prison term after being convicted of diverting military funds. Fujimori had previously been convicted of crimes against humanity and corruption and given 60 years' worth of sentences for those convictions – this despite 25 years being the maximum time anyone can serve under Peruvian law.

Guatemala

Guatemala has suffered from slow progress in its fight against corruption, with criticism from the United States that the government has not provided sufficient resources to allow for publicly funded offices to comply with its anti-corruption initiatives. Over the past two decades, Guatemala has attempted to enforce legislation to curb the high rate of corruption in the country. These efforts included the ratification of the UN *Convention against Corruption* (“UNCAC”) in November 2006 and the *Inter-American Convention against Corruption* in July 2001. The country had also passed an anti-money laundering law in 2001 targeting both money laundering and terrorist financing. Under the law, someone who deposits over US\$3,000 in a financial institution is subject to additional requirements, such as a sworn statement. Further legislation included the Asset Recovery Law, passed by Congress in 2010, enabling Guatemalan courts to seize goods and assets derived from illicit activities, including embezzlement and the misappropriation of public funds, extortion, trafficking and money laundering. Several anti-corruption agencies have also been created, such as the Commission for Transparency and Anti-Corruption, as part of a push toward greater transparency.

Despite setbacks in its fight against corruption, Guatemala is continuing to see positive momentum in its efforts. Most recently, Guatemalan President Otto Pérez Molina, who had initially campaigned for office on the promise of ending widespread corruption, was ordered to stand trial for bribery and illicit associations that allegedly culminated in a multi-million-dollar customs scam. A UN-backed investigative commission, which was established to dismantle criminal networks, was able to bring Molina to trial very quickly. Evidence found by the commission prompted large public protests that forced Molina to step down in September 2015. This success may be a sign that these initiatives are working and that the people’s voice against corruption is starting to be heard.

Chile

Even Chile, ranked as the least corrupt Latin American country in the World Bank’s WGI and the second-least corrupt in TI’s Corruption Perceptions Index, has found itself embroiled in accusations of high-level political corruption. In April 2016, President Michelle Bachelet and two former presidents found themselves under investigation for possibly accepting campaign bribes from the mining company Sociedad Química y Minera de Chile. Even the head of TI’s Chilean office, Gonzalo Delaveau, resigned after his name appeared in a massive data leak that was dubbed the Panama Papers. Delaveau’s name was linked to five companies domiciled in the Bahamas.

IV. ENFORCEMENT ACTIVITY

In this section, we provide an overview of some recent cases that are representative of the enforcement activities that have taken place in Latin America in recent years. Organizations that are considering doing business in any Latin American country should do extensive research of the enforcement activity in that country.

This section is organized into two broad subcategories of enforcement activity. The first subcategory discusses cases initiated by law-enforcement or government agencies in Latin America. The second section describes enforcement cases pertaining to the FCPA brought about by the U.S. government.

Another law with significant international ramifications is the U.K. *Bribery Act*. Enforcement activity by the U.K. Serious Fraud Office (“SFO”), however, has only begun ramping up in recent years, with the primary focus outside the United Kingdom being in the Middle East. No cases, or at least none that have been made public, have emerged stemming from activities in Latin America at the time of this chapter’s writing. It should be noted, though, that the *Bribery Act* has even broader potential applications than the FCPA. Since its provisions go beyond U.K. companies to also include foreign companies that do business in the United Kingdom, a Latin American

company with an office in the U.K. could find itself liable for a bribe paid on its behalf anywhere in the world. In addition, the *Bribery Act* extends beyond bribery of government officials to also address commercial bribery. Any organizations globally can be found liable under this act – they should be aware that extensive investigations by the SFO outside the U.K. would be likely.

Another hot issue in enforcement involves restitution. An ongoing challenge and source of frustration for many officials is the difficulty of recovering compensation for damages after a fraud determination has been made. Whether the funds are supposed to come from the fraudsters, third parties or the justice system, victims are not being compensated on a consistent basis.

Regulators are starting to address this issue more often as the spotlight shifts from investigation to restitution. Finding blame and reaching a settlement is no longer enough – achieving full compensation is now the new standard for embezzlement cases. We are seeing regulators increasingly take actions to claw back benefits that guilty parties received to ensure that those benefits are rightly allocated to the victims of corruption.

Actions Taken by Latin American Law-Enforcement and Government Agencies

Petroleo Brasileiro (Petrobras) – State-Owned Brazilian Oil Company¹⁵

Between March 2014 and March 2015, dozens of engineers, construction executives and Petrobras officials were arrested as part of the above-mentioned Operation Car Wash. Each arrest allowed prosecutors to gather more evidence, often through plea bargains in which the implicated figures had named their co-conspirators. Brazilian prosecutors alleged that executives at construction firms colluded to inflate the price of Petrobras contracts and channel kickbacks from Petrobras to Brazilian politicians and political parties, and they demanded the

return of approximately 1.18 billion BRL, or approximately US\$448 million. A political scandal blew up in March 2015, when Brazil’s Supreme Court announced that it was investigating 34 politicians on suspicion of their involvement in Petrobras. Former president Luiz Inácio Lula da Silva was implicated in the scandal, as well as then-president Dilma Rousseff, who faced an impeachment that forced her out of office. On the same day that Rousseff appointed da Silva to a position in her cabinet, a Brazilian judge ordered a pause on the appointment, suggesting it was likely an illegal move designed to save da Silva from prosecution on the Petrobras scandal.

Embraer S.A. – Brazilian Aerospace Conglomerate¹⁶

Prosecutors in Brazil filed a criminal complaint in 2014 against Embraer’s vice presidents, directors and managers, charging them with corruption and money laundering for allegedly bribing officials in the Dominican Republic and Argentina to secure deals for commercial and defence aircraft. The alleged bribery helped Embraer secure a US\$92 million contract in 2008 to sell eight turboprop attack-support aircraft to the Caribbean country. In Argentina, the investigations involved the sale of 20 passenger jets, worth about US\$900 million at Embraer list prices, to a domestic state airline. Embraer had stated publicly that it was conducting an internal investigation and co-operating with the U.S. Department of Justice and the U.S. Securities and Exchange Commission (“SEC”) regarding possible violations of the FCPA.

¹⁵ Sources: www.theguardian.com/world/2016/mar/20/brazil-corruption-impeachment-probe and www.vox.com/2016/3/18/11260924/petrobras-brazil.

¹⁶ See www.reuters.com/article/us-embraer-probe-idUSBRE9A100W20131102.

Penta Group (Empresas Penta) – Chilean Holding Company¹⁷

In late 2014, Chilean investigators began unravelling a system of fake invoices used by one of Chile's largest financial holding companies, the Penta Group, to direct funds to the right-wing U.D.I. Party's campaign coffers while evading taxes along the way. The Penta Group investigation led to a parallel investigation involving mining company SQM in which prosecutors are investigating more than 190 business executives, politicians and intermediaries who have been charged with tax evasion, fraud, issuing false invoices, money laundering and bribery.

Otto Pérez Molina – Guatemala's Former President¹⁸

In September 2015, Guatemalan prosecutors accused former president Otto Pérez Molina of masterminding a scheme in which businesses bribed officials to clear their imports through customs at a low tax rate. Prosecutors alleged the scheme collected US\$3.8 million in bribes between May 2014 and April 2015, including two separate US\$800,000 bribes to Molina and former vice president Roxana Baldetti, who has already been jailed. A UN commission helped gather criminal evidence for the case, much of which is reportedly based on an estimated 89,000 wiretapped phone calls. The president resigned in September 2015 after Congress lifted his political immunity.

AstroPharma – Honduran Pharmaceutical¹⁹

In July 2015, Honduras's Supreme Court issued an arrest warrant for Lena Gutierrez, congressional vice president and member of the ruling National Party, for her role in a national medical scandal. The charges included falsification of public documents and fraud against the government via drug sales to the Ministry of Health. Gutierrez's company, AstroPharma, allegedly sold the government low-quality drugs

at an inflated price. Gutierrez's court case remains unresolved after it was determined in late 2016 that a new judge would need to be appointed. The Gutierrez case emerged from a larger and still ongoing investigation into corruption and embezzlement at the Honduran Social Security Institute. That investigation has resulted in allegations of embezzlement in excess of \$300 million, of which \$90 million was allegedly funnelled to the National Party.

Actions Taken by the United States Involving FCPA Offences in Latin America

SAP – Activities in Panama

SAP International, Inc. is a U.S.-based subsidiary of software maker SAP SE, a German company. The former head of Latin American sales for SAP International, a U.S. citizen, pleaded guilty in 2015 to criminal charges under the FCPA and was sentenced to 22 months in prison for his role in orchestrating a complex bribery scheme. In February 2016, SAP SE was ordered by the SEC to pay disgorgement of US\$3.7 million. The plan to pay bribes to Panamanian government officials involved selling SAP software at a deep discount to a local partner, and the local partner then selling the software to the government agency at realistic prices. The profits created a slush fund out of which the bribes were paid. The deep discounts used to create the fund were hidden on the books of another affiliate, SAP Mexico, disguised as legitimate discounts. This scheme went on from 2009 to 2013. No civil penalty was assessed to SAP SE on top of the disgorgement, likely a result of the company's thorough investigation, extensive co-operation with the SEC and prompt voluntary institution of remediation efforts upon learning of the violation.

¹⁷ See www.nytimes.com/2016/04/08/world/americas/chile-corruption-press-gag-law.html.

¹⁸ See www.bbc.com/news/world-latin-america-34194227.

¹⁹ See www.telesurvtv.net/english/news/Expired-Drugs-Found-in-Honduras-Fraud-Gripped-Health-Institute-20150624-0014.html and www.jurist.org/paperchase/2015/10/corruption-trial-begins-for-honduras-congressional-vp.php.

Hewlett Packard – Mexico Subsidiary²⁰

In April 2014, the U.S. Department of Justice (“DOJ”) and the SEC announced FCPA enforcement actions against Hewlett Packard Mexico, S. de R.L. de C.V. (“HP Mexico”) for the falsification of books and records and circumvention of HP internal controls to sell hardware and software to Petróleos Mexicanos (Pemex), Mexico’s state-owned petroleum company. To secure Pemex contracts, HP Mexico retained a third-party consultant and paid it a commission of \$1.41 million. Having ties to senior Pemex executives, the consultant then passed US\$125,000 of the payment on to a Pemex official. The consultant had not been processed through HP’s due-diligence and contracting procedures, so a “pass-through” third party – which had previously gone through HP’s third-party procedures, but played no role in the Pemex transaction – was used to funnel the money to the consultant.

Olympus Latin America – Brazil²¹

In March 2016, a criminal complaint was filed against Olympus Latin America, Inc. (“OLA”) for alleged FCPA violations.²² OLA is incorporated in the United States and is affiliated with the Japanese Olympus Corporation. OLA sells medical equipment to government and private customers. The criminal complaint alleges that from 2006 to 2011, OLA paid almost US\$3 million in bribes and improper payments to foreign government officials in Argentina, Bolivia, Brazil, Colombia, Costa Rica and Mexico. These officials were often publicly employed health-care professionals.

OLA agreed to pay US\$22.8 million, roughly three times the profits Olympus made from the transactions, to resolve the criminal allegations. They also entered a three-year deferred-prosecution agreement with enhanced compliance obligations. It was understood that Olympus co-operated with federal investigators, but, according to the agreement, “did not timely, voluntarily disclose the FCPA violations.”

LAN Airlines – Argentina

In February 2016, the CEO of LAN Airlines agreed to pay a US\$75,000 penalty to settle claims with the SEC that he violated FCPA accounting rules by authorizing payments to a consultant knowing the money would be passed on to union officials in Argentina. The US\$1.15 million in payments went to the consultant’s U.S.-based account.

The impetus for the scheme arose when LAN, a Chilean airline, ventured into the Argentine market in 2005. In 2006 and 2007, LAN’s Argentine subsidiary was engaged in a dispute with its unionized employees. The consultant was purportedly engaged to conduct a study of existing air routes. The SEC, however, asserted that the consultant’s role was really to help settle the labour dispute by passing on a portion of the payments to union officials.

Most interesting about this case is that the recipient of the bribe was not a foreign official as defined by the FCPA. This is not the first time that the SEC has used the FCPA to target commercial bribery and other violations that go beyond the traditional definition.

²⁰ See <http://media.straffordpub.com/products/fcpa-compliance-in-latin-america-2015-2015-06-24/presentation.pdf>.

²¹ See www.fcpablog.com/blog/2016/3/1/olympus-pays-doj-228-million-to-resolve-latin-america-fcpa-o.html.

²² See <https://www.justice.gov/criminal-fraud/fcpa/cases/olympus-latin-america-inc>.

V. WHISTLE-BLOWERS IN LATIN AMERICA

Historically, the perception has been that the people of Latin America are less inclined to blow the whistle on suspected acts of corruption. But the data show this is a misconception.

ACFE Report

The 2016 *Report to the Nations on Occupational Fraud and Abuse* from the Association of Certified Fraud Examiners (“ACFE”) studied 2,410 cases of fraud and corruption investigated between January 2014 and October 2015²³ – 112 of those cases were in Latin American and Caribbean countries.

Globally, 39.1% of the fraud cases investigated were initially detected by tips – mostly from employees (51.5%), as well as vendors, customers and others, including 14% who remained anonymous. Tips are consistently ranked as the top method for detection of fraud and corruption. As data analytics and internal audit groups become more effective at targeting fraud, the percentage of fraud and corruption detection via tips is declining slightly, dipping from 43.3% in 2012 to 42.2% in 2014 and below 40% in 2016.

In a similar vein, 36.9% of cases were detected by tip in Latin America, according to the 2016 report. This figure was 36.8% in 2014 and 43.2% in 2012, signalling that Latin America as a region identifies fraud and corruption by tip with approximately the same frequency as the global statistics indicate.

If there is a difference among whistle-blowers in Latin America, it may be with regard to the individuals sought out when whistle-blowers voice concerns. Globally, 20.6% of whistle-blowers report their concern to their direct supervisors, 18% go to an executive and 13.1% seek out a fraud investigation team.

In Latin America, 31.6% of whistle-blowers brought concerns straight to an executive in 2016. Meanwhile, 15.8% reported to their direct supervisor and just 5.3% went to a fraud investigation team.

The SEC Report

The SEC also measures whistle-blower activity, and its formal program was instituted under the *Dodd–Frank Act*. Fiscal year 2015 was a record year for this whistle-blower program, with 3,923 tips – an 8.4% increase over 2014 and more than 21% over 2013. Almost a quarter of these tips are classified as “other”, but 687 were for corporate disclosures and financial reporting, and 613 were for fraud associated with public offerings. The FCPA tips steadily increased to represent 186 of the 3,923 tips for 2015.

As expected, more than 2,900 of the 2015 tips came from within the United States, while tips from Latin American countries steadily rose. In 2013, only 25 calls came from Latin America, but that number nearly doubled to 49 in 2015. In 2015, the Latin American countries with the most tips for the SEC were Brazil (14), Mexico (13) and Chile (11). In 2014, Argentina led the pack with 14 tips.

²³ See www.acfe.com/rtn2016.aspx.

VI. CONSIDERATIONS FOR ORGANIZATIONS DOING BUSINESS IN LATIN AMERICA

Violations of anti-corruption laws are increasingly resulting in multiple layers of investigations. For example, an investigation by one foreign government under its anti-corruption statute may very well trigger an investigation by the U.S. government under the FCPA. Enforcement of the FCPA continues to evolve. According to the 2015 Yates Memo, the U.S. Department of Justice now emphasizes individual accountability – not just corporate liability – in its investigations. Additionally, in April 2016, the DOJ initiated an FCPA enforcement pilot program that clarifies what is needed for a company to receive “co-operation” credit, which can lower its penalty in an FCPA case. The pilot program indicates there is an expectation that a company disclose “overseas documents”, as well as the location of such documents. The only exception from this foreign document disclosure expectation is for instances in which a foreign law prohibits such disclosure. Even then, the company must clearly establish this prohibition. The pilot program also expects – “where requested and appropriate” – that the company will provide translations of relevant documents that are in languages other than English.

The FCPA is no longer the only anti-corruption legislation that companies need to pay attention to when conducting business in Latin America. Several countries have implemented anti-corruption laws and other enforcement frameworks in recent years. And as noted in the pilot program, cross-border prosecutorial co-operation and information sharing is at an all-time high. Mexican and U.S. officials, for instance, both participated in an investigation into possible corruption in Mexico involving Walmart. A separate investigation of Odebrecht involved authorities from Brazil, the United States and Switzerland.

Therefore, it is critical to plan ahead and actively manage business operations in Latin America.

Due Diligence in Latin America

As business in Latin America increases, so, too, does the need to perform due-diligence and market-entrance studies. The barrier to entry in Latin America poses some obstacles, but many can be mitigated with careful due diligence.

The landscape for investigators and due-diligence experts in Latin America is very different than that of North America and Europe, among other continents. Searching for information about a corporation located in London or New York, for example, often quickly and easily results in access to full registration details, and in the case of London, the nationalities and complete birth dates of appointed company administrators, secretaries and directors.

This kind of personal information, however, does not have to be shared in Latin America. In addition, many national and local jurisdictions within Latin America have not yet moved to computerized systems for public records and are still retrieving paper and index cards. This barrier to information makes it necessary to go through investigative contacts or show up at each municipal office personally to attempt to gather basic data for an investigation.

The best solution is for investors and business owners to partner with experts in the Latin American investigative landscape. Latin American investigators know, for example, that corporate documents can be obtained first-hand through online portals in Panama and Mexico, that Brazil has partial court information online, and property records must be retrieved by hand in a state municipal office in Mexico. As more individuals do business in Latin America, and with heightened focus on transparency, there will likely be a push for information to be more easily shared with the public through online sources or otherwise. In the meantime, organizations must make sure that robust due-diligence and third-party risk monitoring and audits are regularly performed as part of a compliance program, along with a comprehensive training program for personnel.