

FCPA Update

A Global Anti-Corruption Newsletter



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7 Latin American Anti-Corruption Enforcement: Walking a Tightrope of Challenges and Opportunities

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Goldman Sachs' 1MDB Settlement Brings Record-Breaking FCPA Recovery for U.S. Authorities

On October 22, 2020, The Goldman Sachs Group, Inc. agreed to pay more than \$2.9 billion to settle coordinated actions that included DOJ and SEC charges alleging FCPA violations in connection with a scheme to pay more than \$1.6 billion in bribes and kickbacks to high-ranking government officials in Malaysia and Abu Dhabi to secure bond underwriting business from 1Malaysia Development Berhad (“1MDB”), Malaysia’s state-owned and controlled investment fund.¹ Goldman’s Malaysia-based subsidiary also pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions.²

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1. Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020), <https://www.justice.gov/criminal-fraud/file/1329926/download> [hereinafter “Goldman DPA”]; Order, *In re The Goldman Sachs Group, Inc.*, Securities Exchange Act Rel. No. 90243 (Oct. 22, 2020), <https://www.sec.gov/litigation/admin/2020/34-90243.pdf> [hereinafter “SEC Order”].
2. Plea Agreement, *United States v. Goldman Sachs (Malaysia) Sdn. Bhd.*, No. 20-CR-438 (E.D.N.Y. Oct. 22, 2020), <https://www.justice.gov/criminal-fraud/file/1329901/download>.

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This settlement involves the largest amount of bribes allegedly paid (\$1.6 billion) and the largest loss amount charged (\$2.7 billion) in an FCPA matter.³ It requires disgorgement of the approximately \$606 million that Goldman received in fees and imposes the largest penalty paid to U.S. authorities in an FCPA case (\$2.3 billion assessed, with \$1.26 billion due to the United States). This resolution, therefore, surpasses Ericsson's December 2019 \$1.06 billion resolution as the largest U.S. recovery in an FCPA case and also marks the second time this year that there has been a record-breaking FCPA-related resolution.⁴

The case also involves the largest number of authorities participating in parallel resolutions with respect to an FCPA case (at least nine).⁵ Having reached a \$2.5 billion settlement with Malaysian authorities in July, Goldman also reached coordinated settlements with the Federal Reserve and the New York State Department of Financial Services, and with authorities in Hong Kong, Singapore, and the United Kingdom. In addition to these resolutions, related civil forfeiture proceedings have recovered more than \$1.1 billion in assets traceable to 1MDB, a handful of individual prosecutions have been brought, and Goldman announced \$174 million in executive clawbacks and pay cuts.⁶

The 1MDB Bribery Schemes

1MDB was formed in 2009 by the Malaysian government to promote investment and economic development projects in Malaysia. The sovereign wealth fund raised money to finance its projects primarily through bond issuances, including approximately \$6.5 billion through three separate bond transactions in 2012 and 2013 that were underwritten by Goldman and designed in part to raise capital to purchase power generation companies and joint venture shares.

Low Taek Jho ("Jho Low"), a Malaysian financier with close ties to senior government officials in Malaysia – including former Prime Minister Najib Razak – and in Abu Dhabi, advised on the formation of 1MDB's predecessor entity and acted as an intermediary or finder for various 1MDB transactions, including those involving Goldman.

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3. U.S. Dep't of Justice, "Acting Assistant Attorney General Brian C. Rabbitt Delivers Remarks Announcing Goldman Sachs/1mdb Enforcement Actions" (Oct. 22, 2020), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-c-rabbitt-delivers-remarks-announcing-goldman> [hereinafter "Oct. 22, 2020 AAAG Remarks"].
 4. In January, Airbus' nearly \$3.7 billion in combined, global penalties became the largest-ever global bribery-related settlement, and DOJ's \$2.09 billion penalty – the majority of which credited amounts paid to France – was the then-largest DOJ penalty assessed (excepting Odebrecht's penalty, which was lowered due to inability to pay). See Antoine F. Kirry et al, "Airbus Reaches Record-Breaking Global Settlement," FCPA Update, Vol. 11, No. 7 (Feb. 2020), <https://www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020>.
 5. Oct. 22, 2020 AAAG Remarks.
 6. See Memo from David M. Solomon, "Goldman Sachs' Statements Relating to 1MDB Government and Regulatory Settlements" (Oct. 22, 2020), <https://www.goldmansachs.com/media-relations/press-releases/current/goldman-sachs-2020-10-22.html>.

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According to the SEC's Order, between 2009 and 2011, Tim Leissner, a Goldman participating managing director and chairman of South East Asia, and Roger Ng, Goldman Managing Director who worked with Leissner, attempted to make Low a formal Goldman client. According to the SEC's Order, they were turned down because Goldman's compliance personnel refused to approve any client relationship with Low based at least in part on concerns regarding the sources of Low's wealth.⁷

As Goldman has admitted, Leissner, Ng, and others continued to engage Low and conspired with him to promise and pay more than \$1.6 billion in bribes and kickbacks to numerous high-ranking government officials, including in the Malaysian government, 1MDB, Abu Dhabi's sovereign wealth fund (International Petroleum Investment Company), and Abu Dhabi's state-owned and controlled joint stock company, Aabar Investments PJS. Goldman admitted that it used Low's connections to secure a role on three debt bond issuances by 1MDB between 2012 and 2013 – projects Magnolia, Maximus, and Catalyze.⁸

“This settlement involves the largest amount of bribes allegedly paid (\$1.6 billion) and the largest loss amount charged (\$2.7 billion) in an FCPA matter . . . and imposes the largest penalty paid to U.S. authorities in an FCPA case . . .”

The \$1.6 billion allegedly used for the bribes came from the more than \$2.7 billion in funds misappropriated from the bond offerings Goldman was underwriting. The diverted funds were laundered through U.S. and other financial institutions and used to finance Hollywood films and to make luxury purchases, including yachts, real estate, and art.

Goldman had an anti-corruption policy applicable to all employees that prohibited improper payments to government officials and was overseen and enforced by Goldman's compliance function and its business intelligence group. These groups worked with other committees, including a capital committee that was intended to serve a vital control function, to review potential transactions. But Goldman admitted that control function personnel did not take reasonable steps to ensure

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7. SEC Order ¶¶ 19-20.

8. U.S. Dep't of Justice, "Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion," Press Release No. 20-1143 (Oct. 22, 2020), <https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion> [hereinafter "Oct. 2020 DOJ Press Release"].

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that Low was not involved in the 1MDB transactions, despite knowing that his involvement posed a significant risk, and they either ignored or only nominally addressed red flags that were raised during due diligence and afterward so that the transactions would be approved.⁹

According to the SEC's Order, Goldman failed to maintain a sufficient system of internal accounting controls with regard to the review and approval processes for the commitment of firm capital in large transactions. That resulted in the bank's failure to reasonably assure adequate documentation of the committee's processes, including documentation reflecting due diligence and follow-up regarding concerns raised about the bond deals. The capital committee's review of the three bond deals took place in stages, as is typical. Committee approvals were conditioned upon further steps, including due diligence, that had to be taken to address open items and concerns. However, such further steps were not properly documented.

The DOJ and SEC Settlements

Goldman entered into a three-year DPA with DOJ, and its subsidiary in Malaysia pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions. In connection with the DPA, DOJ imposed a criminal penalty of \$2.3 billion, \$500,000 of which will be paid as a criminal fine by the Malaysian subsidiary pursuant to its guilty plea. This penalty amount reflects only a 10% discount off the bottom of the applicable Sentencing Guidelines fine range, which is a result of DOJ granting Goldman a partial cooperation credit. Goldman did not receive full credit because, according to DOJ, "it significantly delayed producing relevant evidence, including recorded phone calls in which . . . bankers, executives, and control function personnel discussed allegations of bribery."¹⁰

DOJ's resolution noted Goldman's failure to voluntarily disclose the conduct; the nature and seriousness of the offense, which involved not only high-level employees within the bank, but also "others who ignored significant red flags"; the involvement of Goldman's subsidiaries around the world; the more than \$1.6 billion in alleged bribes; the number and high level of the bribe recipients, who included at least eleven foreign officials; and the significant amount of actual loss incurred by 1MDB.

According to the DPA, Goldman's payment obligations will be satisfied upon payment of approximately \$1.26 billion, the largest penalty paid to U.S. authorities in an FCPA case.¹¹ DOJ agreed to credit the remainder of the \$2.3 billion criminal

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9. DPA ¶ 25.

10. *Id.* ¶ 4.

11. *Id.* ¶ 7; Oct. 2020 DOJ Press Release.

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penalty against the total amounts Goldman pays within one year to the SEC (\$400 million); Board of Governors of the Federal Reserve System (\$154 million); New York State Department of Financial Services (\$150 million); UK Financial Conduct Authority and Prudential Regulation Authority (\$126 million); Attorney-General's Chambers of the Republic of Singapore (\$122 million); and up to \$100 million of the amount paid to the Hong Kong Securities and Futures Commission (\$350 million).¹²

To settle the SEC's charges that it violated the FCPA's anti-bribery, books and records, and internal controls provisions, Goldman agreed to a cease-and-desist order and to pay \$606.3 million in disgorgement and a \$400 million civil penalty.¹³ The disgorgement was deemed satisfied by amounts previously paid to Malaysia and 1MDB pursuant to a parallel settlement agreement in August 2020.¹⁴

Related Enforcement Actions Against Individuals

DOJ has previously announced charges against Leissner, Ng, and Low in connection with the 1MDB matter.

In June and August 2018, DOJ charged Leissner with conspiracy to commit money laundering and to violate the FCPA's anti-bribery and internal controls provisions and with circumventing Goldman's FCPA and internal accounting controls.¹⁵ Leissner pleaded guilty in August 2018 and was ordered to forfeit \$43.7 million. In December 2019, he also settled SEC charges that alleged that he violated the FCPA's anti-bribery and accounting provisions, agreeing to be barred permanently from the securities industry and to disgorge \$43.7 million (offset by amounts paid to DOJ).¹⁶

In October 2018, Low and Ng were charged with conspiracy to commit money laundering and to violate the FCPA's anti-bribery provisions.¹⁷ Ng was also charged with violating the FCPA's internal controls provisions in connection with circumventing Goldman's internal accounting controls. Ng, arrested in Malaysia in November 2018, pleaded not guilty and is awaiting trial. Low remains a fugitive.

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12. DPA ¶¶ 4(k), 7–9. Separately, in July 2020, Goldman agreed to pay the Malaysian government \$2.5 billion for its alleged fraud connected to 1MDB.
 13. SEC Order at IV.
 14. *Id.* at IV.B.
 15. Information, *United States v. Leissner*, No. 18-cr-00439-MKB (E.D.N.Y. Aug. 28, 2018), <https://www.justice.gov/opa/press-release/file/1106936/download>.
 16. Order, *In re Leissner*, Securities Exchange Act Rel. No. 87750 (Dec. 16, 2019), <https://www.sec.gov/litigation/admin/2019/34-87750.pdf>.
 17. Indictment, *United States v. Low*, No. 18-cr-00538-MKB (E.D.N.Y. Oct. 3, 2018), <https://www.justice.gov/opa/press-release/file/1106931/download>.

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Conclusion

Describing this case as “historic because of the unprecedented coordination” that led to “parallel resolutions with no fewer than nine other U.S. and foreign authorities,”¹⁸ DOJ and the SEC thanked in their respective press releases 17 regulatory and/or law enforcement agencies and offices in several jurisdictions including France, Guernsey, Hong Kong, Luxembourg, Malaysia, Singapore, Switzerland, and the United Kingdom.

It was only in August 2015 that the United States brought its first FCPA case against a large bank (BNY Mellon), but since then, there have been six such cases involving more than \$3.8 billion in total global fines and penalties. Five of these have been brought in the past three years, and they involved more than \$3.6 billion (the vast majority now from the Goldman settlement, previously from the Société Générale settlement).¹⁹

The most significant areas of enforcement in the industry have included interactions with sovereign wealth funds and hiring practices, with roughly half of the relevant enforcement actions in each category. This case is no different. The numbers are larger, but the lessons remain the same. Interactions with sovereign wealth funds, public pension funds, and other state-owned and controlled entities present significant corruption risk, particularly when well-connected intermediaries are involved.

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18. Oct. 22, 2020 AAAG Remarks.

19. These are: Goldman Sachs, Barclays, Deutsche Bank, Credit Suisse, Société Générale – and this is not including several other cases related to financial sector activities (e.g., Legg Mason, Och-Ziff, Dun and Bradstreet, Insurance Company of Barbados, World Acceptance Corp.).

Latin American Anti-Corruption Enforcement: Walking a Tightrope of Challenges and Opportunities

Anti-corruption enforcement in Latin America continues to evolve. Some countries have taken steps forward and others steps back, though most in all fairness have experienced a mixture of both. According to Transparency International's latest Corruption Perceptions Index, the Americas region as a whole is perceived as slightly more plagued by corruption than in the prior year.¹ In addition to battling such perceptions, the region arguably has become less capable of detecting, punishing, and creating mechanisms to fight corruption, as reflected in the Capacity to Combat Corruption Index.² Entering 2021 with a weaker ability to fight corruption is particularly concerning given other significant challenges facing Latin America, including political and social unrest, as well as the economic impacts of COVID-19.

In recent years, Brazil has enforced vigorously its relatively new anti-corruption laws and regulations, launching massive investigations that have reverberated throughout the region. Perhaps unsurprisingly, Operation *Lava Jato* and other recent Brazilian enforcement have been the objects of both praise and criticism. The country's anti-corruption system is facing what some describe as growing pains, others as an adjustment, and yet others as a backlash. More broadly, Latin America has witnessed important anti-corruption developments, including new laws in Argentina, Colombia, Mexico, and Peru and various successes in enforcing these laws. But the region also continues grappling with serious obstacles to achieving its full anti-corruption potential.³

On October 7 and 8, 2020, as part of *Latin Lawyer – GIR Interactive Anti-Corruption & Investigations* (the "Conference"), enforcers, lawyers, and compliance professionals convened virtually – in lieu of what would have been the eighth annual gathering in São Paulo, Brazil – to discuss anti-corruption enforcement in the region. We address below some of the most salient issues.

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1. "The Corruption Perceptions Index 2019," Transparency International (Jan. 2020), <https://www.transparency.org/en/cpi>.
 2. "The Capacity to Combat Corruption (CCC) Index: Assessing Latin America's Ability to Detect, Punish, and Prevent Corruption Amid COVID-19," Americas Society, Council of the Americas, and Control Risks (June 2020), https://www.as-coa.org/sites/default/files/archive/2020_CCC_Report.pdf.
 3. See, e.g., Andrew M. Levine, Marisa Taney, Carolina Kupferman, Sol Czerwonko, et al., "The Year 2019 in Review: A Record-Breaking Year of Anti-Corruption Enforcement," FCPA Update, Vol. 11, No. 6 (Jan. 2020), <https://www.debevoise.com/insights/publications/2020/01/fcpa-update-january-2020>; Andrew M. Levine, Kara Brockmeyer, and Daniel Aun, "Latin America's Evolving Anti-Corruption Landscape: Brazil in Flux and Regional Reverberations," FCPA Update, Vol. 11, No. 3 (Oct. 2019), <https://www.debevoise.com/-/media/files/insights/publications/2019/10/fcpa-update-october-2019.pdf>; Andrew M. Levine, Daniel Aun, Fabricio M. Archanjo, et al., "The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement," FCPA Update, Vol. 10, No. 6 (Jan. 2019), <https://www.debevoise.com/insights/publications/2019/01/fcpa-update-january-2019>.

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I. Brazil and the United States

At the Conference, representatives of Brazilian and U.S. authorities shared their views on several important topics, including cooperation in investigations, corporate resolutions, and the future of Brazilian and U.S. anti-corruption enforcement. A panel of seasoned defense counsel then responded, addressing difficulties that companies face in cross-border investigations, including whether and when to self-report to authorities and complexities in resolving multijurisdictional matters.

Interagency Coordination

In the United States, effective coordination between DOJ and the SEC has contributed significantly to the success of anti-corruption enforcement efforts. As explained by Robert Dodge, Assistant Director of the SEC's FCPA Unit, each agency possesses its own authority to enforce the FCPA and makes independent decisions on investigations and case resolutions. Working in parallel, the agencies work together closely to coordinate their efforts on anti-corruption matters where they share jurisdiction. The U.S. agencies may seek to avoid duplication of efforts at the investigative stage by, for example, holding joint meetings with company representatives and agreeing to accept productions containing the same documents. DOJ and the SEC also often coordinate with one another when resolving parallel matters in order to avoid duplicative or inconsistent remedies.

In Brazil, coordination among the three main anti-corruption agencies – the Attorney General's Office (AGU), Comptroller-General's Office (CGU), and Federal Prosecution Service (MPF) – remains a work in progress. Brazil's anti-corruption system seemingly is facing growing pains that are somewhat understandable, especially for a relatively young system developed largely amidst several expansive enforcement operations. In August 2020, the AGU, CGU, and TCU executed a Technical Cooperation Agreement ("TCA") coordinated by the Brazilian Supreme Court, seeking to increase coordination among the agencies and to promote legal certainty, particularly involving leniency agreements. The MPF is listed as a party but did not execute the document, and the so-called MPF's 5th Chamber – which focuses on anti-corruption efforts – issued a detailed Technical Note advising the head of the MPF against doing so.⁴

Questions persist about the TCA's ultimate fate and how best to facilitate coordination among Brazil's anti-corruption agencies. As explained by Ricardo Wagner de Araujo, Special Advisor for anti-corruption matters at the CGU, the TCA sought to delineate the agencies' roles in order to increase cooperation

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4. Andrew M. Levine, Kara Brockmeyer, Daniel Aun, et al., "Brazilian Authorities Announce Anti-Corruption Cooperation and Leniency Framework; MPF's 5th Chamber Opposes It," FCPA Update, Vol. 12, No. 2 (Sept. 2020), <https://www.debevoise.com/insights/publications/2020/09/fcpa-update-september-2020>.

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and coordination, recognizing their respective roles and authority. MPF prosecutor Marcelo Ribeiro de Oliveira noted that the MPF is the only Brazilian anti-corruption agency with criminal authority and suggested that the TCA, as drafted, does not properly recognize the MPF's role. Oliveira also identified other potential concerns regarding the TCA, including the absence of the antitrust regulator, securities regulator, and Central Bank. Lucio Alves Angelo Junior, Federal Attorney at the Anti-Corruption Department of the AGU, stressed the importance of observing the core institutional functions of each agency. He also suggested that the MPF's absence from the TCA is not necessarily a major concern at the moment, given that the MPF may choose in the future to join other agencies on a case-by-case basis. Similarly, Araujo noted that the CGU and MPF continue cooperating as usual and that both agencies meet weekly to discuss ongoing leniency negotiations and prior resolutions, among other things.

“Entering 2021 with a weaker ability to fight corruption is particularly concerning given other significant challenges facing Latin America, including political and social unrest, as well as the economic impacts of COVID-19.”

Notwithstanding such efforts, there remain important unresolved issues for corporate cooperators in coordinating among Brazil's enforcement agencies and achieving finality when negotiating leniency. In particular, the authorities are yet to be fully aligned on who should do what. Nevertheless, regulators and defense counsel alike generally recognize that each agency plays an important role and will benefit from pursuing effective ways to continue working together. Likewise, panelists suggested to the extent possible that engaging with the AGU, CGU, and MPF at the same time, including if self-reporting, typically will help parties obtain greater legal certainty as they negotiate resolutions.

The End of *Lava Jato*?

Given recent developments in Brazil, panelists at the Conference speculated as to whether *Lava Jato* as we know it was about to end and what anti-corruption enforcement in Brazil may look like going forward. Although *Lava Jato* may be approaching its formal end,⁵ Brazilian authorities clearly expect anti-corruption enforcement to continue, including close cooperation with U.S. and other authorities.

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5. Camila Bomfim and Vladimir Netto, “PGR Prorroga Força-Tarefa da Lava Jato no Paraná até Janeiro De 2021” [PGR Extends Carwash Task Force in Paraná Until January 2021], G1 (Sept. 9, 2020), <https://g1.globo.com/politica/noticia/2020/09/09/pgr-prorroga-forca-tarefa-da-lava-jato-no-parana-por-seis-meses.ghtml>.

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For example, Marcelo Oliveira of the MPF noted that Brazilian prosecutors are trying to replicate investigative techniques adopted during *Lava Jato* in more recent cases. He added that reliance on leniency agreements to resolve allegations of wrongdoing has become a practice in Brazil that will not go away after *Lava Jato* ends.

Likewise, defense lawyers at the Conference reported on new enforcement operations underway in Brazil and their shared expectation that such work would remain vigorous, notwithstanding potential political pressures to the contrary. Indeed, shortly after the Conference, the CGU fined Madero and Vivo for breaches of the Brazilian Anti-Corruption Law involving allegations that the former gave cash and food to government inspectors and that the second distributed World Cup tickets to government officials.⁶ Additionally, COVID-related enforcement activity remains in the enforcement spotlight.⁷

At the time of the Conference, President Jair Bolsonaro momentarily announced that he “ended *Lava Jato* because there is no longer corruption in government.”⁸ Shortly thereafter, he stated that he would give a “flying kick in the neck” of any government official who engages in such misconduct.⁹ But as we know, corruption is unlikely to be entirely eradicated in Brazil or anywhere for that matter. Case in point: Only a few days after President Bolsonaro’s remarks, the press reported that a local senator was caught in a police raid with cash stashed between his buttocks.¹⁰ This politician – who reportedly serves as Bolsonaro’s vice-leader in the Senate – is under investigation for allegedly misappropriating government funds destined for COVID-19 relief.¹¹ Following the raid, he resigned from his role as a member of the congressional commission in charge of monitoring such government aid.¹²

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6. Decisions of September 15, 2020, Case Nos. 00190.105384/2018-01 and 00190.106166/2019-67, Official Gazette, Ed. 199 § 1 at 92 (Oct. 10, 2020), <https://www.in.gov.br/web/dou/-/decisao-de-15-de-setembro-de-2020-283217967>; <https://www.in.gov.br/web/dou/-/decisao-de-15-de-setembro-de-2020-283218062>.
 7. See, e.g., “COVID-19: CGU e PF Combatem Fraudes na Secretaria da Saúde de Roraima” [COVID-19: CGU and Federal Police Combat Fraud in Roraima’s Health Department], Federative Republic of Brazil (Oct. 14, 2020), <https://www.gov.br/cgu/pt-br/assuntos/noticias/2020/10/covid-19-cgu-e-pf-combatem-fraudes-na-secretaria-da-saude-de-roraima>.
 8. Ricardo Della Colletta, Daniel Carvalho, and Gustavo Uribe, “Eu Acabei com a Lava Jato Porque Não Tem Mais Corrupção no Governo, Diz Bolsonaro” [I Ended Carwash Because There Is No Longer Corruption in Government, Says Bolsonaro], Folha De S. Paulo (Oct. 7, 2020), <https://www1.folha.uol.com.br/poder/2020/10/bolsonaro-diz-que-lava-jato-acabou-porque-governo-nao-tem-mais-corrupcao.shtml>.
 9. Daniel Carvalho, “Bolsonaro Diz que Dará Voadora no Pescoço de Quem Praticar Corrupção em seu Governo” [Bolsonaro Says He Will Give a Flying Kick in the Neck of Whoever Engages in Corruption in His Government], Folha De S. Paulo (Oct. 17, 2020), <https://www1.folha.uol.com.br/poder/2020/10/bolsonaro-diz-que-dara-voadora-no-pescoco-de-quem-praticar-corrupcao-em-seu-governo.shtml>.
 10. Marcelo Rocha, “PF Apreende Dinheiro Entre as Nádegas de Vice-Líder do Governo Bolsonaro em Ação Sobre COVID” [Federal Police Seizes Money In-Between Buttocks of Vice-Leader of Bolsonaro’s Government in Operation Related to COVID], Folha De S. Paulo (Oct. 14, 2020), <https://www1.folha.uol.com.br/poder/2020/10/pf-apreende-dinheiro-entre-as-nadegas-de-vice-lider-do-governo-bolsonaro-em-acao-sobre-covid.shtml>.
 11. *Id.*
 12. Elisa Clavery, “Chico Rodrigues Pedo para Sair de Comissão do Congresso que Acompanha Gastos com a COVID-19” [Chico Rodrigues Requests Leaving Congressional Commission that Monitors COVID-19 Expenditures], G1 (Oct. 16, 2020), <https://g1.globo.com/politica/noticia/2020/10/16/chico-rodrigues-pedo-para-sair-de-comissao-do-congresso-que-acompanha-gastos-com-a-covid-19.ghtml>.

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Cross-Border Cooperation

Over the years, as discussed at the Conference, Brazilian and U.S. authorities have developed strong and collaborative relationships, apparent in the Embraer case and continuing with *Lava Jato* and its various offshoots. Even as administrations have changed, Brazilian and U.S. authorities have remained close, exchanging information and evidence, even informally, as they conduct parallel investigations into matters of mutual interest.¹³ This closeness and coordination is not limited just to criminal authorities. The AGU and CGU have joined the MPF in developing close ties with the U.S. authorities, as is illustrated by the (pre-TCA) Technip resolutions.

As discussed at the Conference, the close relationships between authorities in both countries have contributed, for instance, to practitioners often recommending that companies self-reporting to federal authorities in Brazil do so in the United States as well, if applicable, and vice-versa. Additionally, certain aspects of Brazilian enforcement have evolved in recent years to track aspects of U.S. practice. For example, as observed at the Conference, Brazilian authorities have gone from settling matters and then having companies conduct internal investigations to expecting that companies investigate at least core facts prior to entering into leniency agreements.

International Piling On

Another challenging issue discussed at the Conference involves the very real risk of piling on, namely companies being subject to penalties from authorities in multiple countries for the same underlying conduct. DOJ expressly recognized as much in 2018 when issuing its Policy on Coordination of Corporate Resolution Penalties, instructing U.S. prosecutors to be mindful of imposing duplicative penalties in matters involving other U.S. and non-U.S. authorities.

A related and likewise thorny issue involves the circumstances under which authorities from one country should defer entirely to authorities in another country, notwithstanding overlapping jurisdiction. At the Conference, Christopher Cestaro, Chief of DOJ's FCPA Unit, expressed his view that U.S. prosecutors appreciate the potential primacy of other jurisdictions and seek to recognize that in practice by crediting payments to foreign authorities as part of coordinated resolutions in which the United States receives smaller shares of the total penalties. In certain cases involving Brazil specifically, he indicated that DOJ has taken a comparatively

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13. Of particular note, the recently announced Protocol to the Agreement on Trade and Economic Cooperation Between the Government of the United States of America and the Government of the Federative Republic of Brazil Relating to Trade Rules and Transparency actually contains an entire annex focused on anti-corruption. See Office of the United States Trade Representative, "United States and Brazil Update Agreement on Trade and Economic Cooperation with New Protocol on Trade Rules and Transparency" (Oct. 19, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules>.

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small percentage of penalties, given what U.S. guidelines could warrant, and credited significant payments to non-U.S. regulators. More broadly, Cestaro suggested that U.S. authorities are likely to continue reaching such coordinated resolutions where it has jurisdiction and identifies sufficient evidence of meaningful wrongdoing. It remains unclear, though, whether and under what circumstances DOJ might refrain from bringing any action rather than merely taking a smaller percentage of the penalties, such as where the U.S. nexus or interest is attenuated and foreign authorities already have taken decisive action.

II. Developments Across Latin America

Beyond Brazil, other countries in the region likewise have encountered difficulties in their anti-corruption efforts, including significant challenges arising from COVID-19 and as reflected in the region's weakened capacity to fight corruption.¹⁴ At the Conference, experts shared insights on: (1) significant anti-corruption developments across the region; and (2) efforts to bolster compliance programs to address new challenges posed by COVID-19.

The Broader Regional Landscape

Leading anti-corruption lawyers and other in-house and external experts speaking at the Conference discussed recent developments in Latin American countries, including:

- In **Argentina**, following significant changes to the country's anti-corruption laws, some expected that *Cuadernos* might be the next *Lava Jato*.¹⁵ This of course has not happened. More broadly, there has been much concern about the future of anti-corruption enforcement under the new government, including given the continued criminal investigations into now-Vice President Cristina Kirchner.¹⁶
- **Bolivia** has attempted to prevent corruption by imposing strict revolving-door rules. As discussed during the Conference, this approach has been criticized for effectively preventing individuals with commercial experience in compliance and corporate governance from entering government.

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14. Andrew M. Levine, Kara Brockmeyer, and Fabricio M. Archanjo, "COVID-19 and Combatting Corruption in Latin America," FCPA Update, Vol. 11, No. 12 (July 2020), <https://www.debevoise.com/-/media/files/insights/publications/2020/07/fcpa-update-july-2020.pdf>; Andrew M. Levine, Bruce Yannett, and Fabricio Archanjo, "Compliance Tips Amid Rising Fraud Risk in Latin America," Law360 (Aug. 31, 2020), <https://www.law360.com/articles/1305800/compliance-tips-amid-rising-fraud-risk-in-latin-america>.

15. Andrew M. Levine, Kara Brockmeyer, and Daniel Aun, *supra* note 3.

16. Andrew M. Levine, Kara Brockmeyer, and Fabricio M. Archanjo, *supra* note 14.

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- **Chile**, despite enacting new anti-corruption legislation in 2018,¹⁷ has experienced an unprecedented wave of political crisis and social unrest.¹⁸ A few months ago, in this context, General Humberto Riffo, director of Public Procurement of the Police (referred to locally as “Carabineros”), reported a potential fraud to the National Attorney General. This triggered a now-ongoing investigation into whether the national police carried out a million-dollar scheme involving uniform purchases in 2016.¹⁹ This investigation comes years after the conclusion of Chile’s landmark corruption case involving a sophisticated tax fraud carried out by top executives of one of Chile’s largest financial groups (PENTA), a tax auditor, and a former government official.²⁰

“It remains unclear, though, whether and under what circumstances DOJ might refrain from bringing any action rather than merely taking a smaller percentage of the penalties, such as where the U.S. nexus or interest is attenuated and foreign authorities already have taken decisive action.”

- **Colombia** continues to grapple with reverberations of *Lava Jato* as corruption is uncovered in the country, including persistent concerns regarding the impact of political rifts.²¹
- **Guatemala** has sought to strengthen its anti-corruption system by outsourcing prosecutorial resources, though it remains unclear whether this measure has substantially improved the country’s prosecutorial system.²²

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17. “Ley N° 21.121 Anticorrupción: Perfecciona el Marco Legal del Cohecho y Soborno [Anti-Corruption Law No. 21.121: Improves the Legal Framework for Bribery], *MicroJuris* (Nov. 20, 2018), <https://aldiachile.microjuris.com/2018/11/20/ley-no-21-121-anticorrupcion-perfecciona-el-marco-legal-del-cohecho-y-soborno/>.
 18. Ernesto Londoño, “What You Need to Know About the Unrest in Chile,” *New York Times* (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/world/americas/why-chile-protests.html?referringSource=articleShare>; Carlos Peña, “Trouble in Paradise: Chile’s Inequality Explodes” *New York Times* (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/opinion/25chile-pinera-crisis.html?referringSource=articleShare>.
 19. “Denuncian Gran Fraude en Carabineros de Chile: Compra de Uniformes Complica a la Institucion” [Great Fraud in Carabineros de Chile Is Denounced: Purchase of Uniforms Complicates the Institution], *El Universal* (Aug. 26, 2020), <https://eluniversal.cl/contenido/15339/denuncian-gran-fraude-en-carabineros-de-chile-compra-de-uniformes-complica-a-la->; “Denuncian Millonario Fraude en Compra de Uniformes de Carabineros” [Millionaire Fraud in Purchase of Police Uniforms Reported], *Tele13* (Aug. 26, 2020), <https://www.t13.cl/noticia/nacional/denuncian-millonario-fraude-compra-uniformes-escuela-carabineros-fisco-26-08-2020>.
 20. *E.g.*, Pascale Bonnefoy, “Executives Are Jailed in Chile Finance Scandal,” *New York Times* (Mar. 7, 2015), <https://www.nytimes.com/2015/03/08/world/americas/executives-are-jailed-in-chile-finance-scandal.html>; “Fin del Caso Penta: Las Condenas, Juicios Abreviados y Salidas Alternativas [End of the Penta Case: Convictions, Shortened Trials and Alternative Exits], *Tele13* (July 11, 2018) <https://www.t13.cl/noticia/politica/caso-penta-deja-condenas-juicios-abreviados-y-suspensiones>.
 21. *E.g.*, “Colombia Court to Appoint Special Prosecutor in Odebrecht case,” *Reuters* (Nov. 29, 2018), <https://fr.reuters.com/article/odebrecht-colombia-idINL2N1Y42DG>; “Álvaro Uribe’s Detention Deepens Colombia’s Divisions,” *New York Times* (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/world/americas/uribe-colombia-house-arrest.html>.
 22. Elisabeth Malkin, “Guatemala’s Experiment in Fighting Corruption Is Under Attack,” *New York Times* (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/world/americas/guatemala-corruption.html>.

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- In **Mexico**, despite President Andrés Manuel López Obrador having campaigned extensively on an anti-corruption platform, actual progress in this area has been slower than some expected.²³ More recently, though, Attorney General Alejandro Gertz launched a corruption investigation against former President Enrique Peña Nieto.²⁴ This has been viewed as significant given that no Mexican president ever has been criminally prosecuted.²⁵ The investigation comes after former Pemex head, Emilio Lozoya, claimed that Peña Nieto and Luis Videgaray, Mexico's former finance minister, funneled millions of dollars in bribes relating to the 2012 presidential campaign and directed millions of dollars to members of the Mexican congress in return for legislative votes to pass legislation in 2013 and 2014.²⁶
- **Peru** experienced a constitutional crisis when President Martín Vizcarra dissolved the congress in 2019, accusing the opposition of stonewalling attempts to curb corruption.²⁷ Prosecutors recently noted they would open a preliminary investigation into President Vizcarra, who allegedly received hundreds of thousands of dollars in bribes from a construction company that won a public works contract when he was a regional governor.²⁸ More broadly, and as discussed during the Conference, Peru has been trying to focus on implementing preventive measures and strengthening compliance and transparency.

U.S. Enforcement

Latin America also continues to feature prominently in U.S. enforcement of the FCPA and related laws. More recently:

- In April 2020, DOJ unsealed the third superseding indictment in the FIFA matter.²⁹

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23. Andrew M. Levine, Kara Brockmeyer, and Marisa Taney, "Anti-Corruption Enforcement in Mexico: A Possible Turning Point?" FCPA Update, Vol. 10, No. 11 (June 2019), <https://www.debevoise.com/insights/publications/2019/06/fcpa-update-june-2019>.

24. Fredrik Karlsson, "Mexico's Ex-President Peña Nieto Investigated For Corruption," Latin Lawyer (Aug. 17, 2020), <https://latinlawyer.com/article/1230028/mexico%E2%80%99s-ex-president-pena-nieto-investigated-for-corruption>; see also Natalie Kitroeff, "Mexico's Former President Accused in Bribery Scandal," The New York Times (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/world/americas/Mexico-Pena-Nieto-bribes.html>.

25. *Id.*

26. *Id.*; see also Andrew M. Levine, Kara Brockmeyer, and Marisa Taney, *supra* note 23.

27. Simeon Tegel, "Peru's President Dissolved Congress. Then Congress Suspended The President," The Washington Post (Oct. 1, 2019), https://www.washingtonpost.com/world/the_americas/perus-president-dissolved-congress-then-congress-suspended-the-president/2019/10/01/7b404cd6-e451-11e9-b0a6-3d03721b85ef_story.html; John Otis and Juan Montes, "'God And Money': Graft in Peru Sparks Political Reckoning," The Wall Street Journal (Oct. 9, 2019), <https://www.wsj.com/articles/god-and-money-graft-in-peru-sparks-political-reckoning-11570618801>.

28. Marcos Aquino, "Peru's Vizcarra Denies New Corruption Allegations, Prosecutors To Investigate," Reuters (Oct. 19, 2020), <https://www.reuters.com/article/us-peru-politics/perus-vizcarra-denies-new-corruption-allegations-prosecutors-to-investigate-idUSKBN2742JG?il=0>.

29. U.S. Department of Justice, "Three Media Executives and Sports Marketing Company Indicted in FIFA Case" (Apr. 6, 2020), <https://www.justice.gov/usao-edny/pr/three-media-executives-and-sports-marketing-company-indicted-fifa-case>.

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- In July 2020, U.S.-based Alexion Pharmaceuticals agreed to settle FCPA-related charges brought by the SEC concerning conduct by subsidiaries in Brazil and Colombia, among other countries.³⁰
- In August 2020, U.S.-based World Acceptance Corporation settled FCPA-related charges brought by the SEC relating to conduct of a Mexican subsidiary.³¹
- Last month, U.S.-based Sargeant Marine pleaded guilty to DOJ charges that it conspired to violate the FCPA and agreed to pay a criminal fine to resolve charges stemming from a scheme to bribe government officials in Brazil, Ecuador, and Venezuela.³²
- And earlier this month, Brazil-based J&F pleaded guilty to, and entered into a cooperation plea agreement with DOJ in connection with, FCPA charges related to a scheme to bribe Brazilian officials in exchange for obtaining financing and other benefits for J&F and J&F-owned entities. J&F also agreed – along with its subsidiary, JBS, as well as shareholders Joesley Batista and Wesley Batista – to settle with the SEC in a related action.³³

Corruption and Fraud Risk During the Pandemic

An important theme throughout the Conference involved the pandemic's impact on the region's anti-corruption landscape and how companies can ensure that their compliance programs respond appropriately to novel corruption and fraud risks.³⁴ This includes, for example, risks posed by governments distributing considerable public funds with fewer controls than might apply in the ordinary course. Such challenges have forced compliance departments to think creatively about their resourcing and the most effective tools to ensure compliance amidst onerous circumstances.

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30. U.S. Securities and Exchange Commission, "SEC Charges Alexion Pharmaceuticals with FCPA Violations" (July 2, 2020), <https://www.sec.gov/news/press-release/2020-149>.

31. U.S. Securities and Exchange Commission, "SEC Charges Consumer Loan Company with FCPA Violations" (Aug. 6, 2020), <https://www.sec.gov/news/press-release/2020-177>.

32. U.S. Department of Justice, "Sargeant Marine Inc. Pleads Guilty and Agrees to Pay Over \$16 Million in Criminal Fines to Resolve Foreign Bribery Case" (Sept. 22, 2020), <https://www.justice.gov/usao-edny/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-over-16-million-criminal-fines-resolve>.

33. U.S. Department of Justice, "J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over \$256 Million to Resolve Criminal Foreign Bribery Case" (Oct. 14, 2020), <https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign>; U.S. Securities and Exchange Commission, "SEC Charges Brazilian Meat Producers With FCPA Violations" (Oct. 14, 2020), <https://www.sec.gov/news/press-release/2020-254>.

34. See Andrew M. Levine, Bruce Yannett, and Fabricio Archanjo, *supra* note 14.

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In particular, the challenge during the pandemic to “get things done” naturally can fuel pressures to cut compliance corners. This risk is especially acute when rapidly engaging third parties, especially those with government touchpoints, without an ordinary due diligence process. Charitable contributions – even though well-intentioned – likewise can pose serious compliance risks, especially when involving a governmental nexus.

As discussed at the Conference, companies benefit greatly from having compliance officers who truly understand their companies’ needs and who engage actively with business leaders when critical commercial decisions are made. There is no one correct way to do this. Examples include having compliance personnel on crisis management teams and forming interdisciplinary COVID-19 anti-fraud groups to monitor relevant changes in finance and procurement procedures. In addition, speakers at the Conference emphasized the importance of strong tone at the top and promoting a genuine compliance culture, while recognizing challenges in doing so in an already overloaded corporate communications environment. Given the serious corruption and fraud risks in Latin America, companies clearly must make compliance a top priority, developing and deploying effective compliance strategies, notwithstanding potential cost-cutting and other financial constraints.

“For companies operating in the region, the importance of deploying nimble and effective strategies to mitigate compliance risks cannot be overstated.”

III. Looking Ahead

Throughout Latin America and the world, 2020 has presented unprecedented challenges, including in combatting corruption. The current health and economic conditions facing Latin America pose yet additional hurdles that require governments to stay resolute and employ creative strategies in their anti-corruption efforts.

Likewise, at the Conference, keynote speaker Drago Kos, Chair of the Working Group on Bribery, Organisation for Economic Co-operation and Development, expressed acute concern about growing nationalism in some countries. He suggested that this trend may undermine the hard-fought anti-corruption progress of recent years. Among other impacts, nationalism may make countries less likely to work together and to heed recommendations of international organizations.

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Kos underscored the importance of countries collaborating in the fight against corruption, warning of the dangers posed by uncoordinated and duplicative enforcement efforts. While recognizing the “perfect storm” of the current moment, Kos also urged the private sector to step up, work for change, and help stave off corruption.

Of course, such efforts by the private sector are not without their own complexities. In a keynote address, Marta Viegas, Head of Corporate Governance for IDB Invest in Latin America and the Caribbean, observed that investing in the region requires careful consideration of various compliance and reputational risks, especially in the current climate and sometimes with limited investment resources. In order to navigate these trying times, Viegas underscored the importance of working together. She explained that people need to make important decisions faster than ever and stressed that the best way to manage risk is to have open, transparent communications between compliance personnel and the relevant decision-makers.

This past year, Latin America has experienced both setbacks and progress in its anti-corruption fight. For companies operating in the region, the importance of deploying nimble and effective strategies to mitigate compliance risks cannot be overstated. Navigating these potentially treacherous waters over the next year and beyond undoubtedly will require that compliance have a meaningful seat at the corporate table.

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