April 15, 2020

COVID-19

COVID-19 Lands in Latin America: Mitigation Strategies for Increased Corruption Risk

By Nicolas Berg, María González Calvet, Nicole Horowitz and Krista Evensen, *Ropes & Gray*

COVID-19 cases are increasing throughout Latin America, with thousands of cases in several countries and an anticipated economic contraction of up to 4 or 5 percent in the region. This crisis has led to billions of dollars in aid pouring into the private sphere via Latin American government programs and entities, while governments launch stay-at-home orders and pass other urgent legislation in an attempt to control the pandemic and avoid a region-wide depression.

These necessary emergency measures, when taken together, will almost certainly exacerbate the already elevated corruption risks in Latin America. Past crises in the region and across the globe teach us that bribery and fraud inevitably rise in times of crisis. Thus, it is imperative that companies focus on their response to the crisis while maintaining long-term compliance goals.

In this article, we explore scandals around the region and the world arising from past humanitarian crises to better understand how the COVID-19 crisis poses unique risks given already elevated corruption concerns in Latin America. We then identify four areas of heightened corruption risk on which companies should focus and offer four recommendations for how a company's compliance program can mitigate these risks.

See "How the Continued Political Fallout From the Odebrecht Scandal Is Affecting Anti-Corruption Efforts in Latin America (Part One of Two)" (May 30, 2018); Part Two (Jun. 13, 2018).

Past Crises Offer Insights on Areas of Risk

The global crisis COVID-19 has created is without precedent in the modern era. Nonetheless, past regional or national crises help to illustrate the challenges this crisis may pose, both on a global scale and in Latin America. Unfortunately, the connection between crisis and corruption in Latin America is decades long, and examples abound.

1972 Earthquake in Nicaragua

For instance, on December 23, 1972, several earthquakes left Nicaragua's capital, Managua, in ruins and killed between 4,000 and 11,000 people, injured at least 20,000, and left over 300,000 people homeless. In response to the quake, the U.S. Agency for International Development (USAID) provided $80 million to Nicaragua in loans to assist in the city's rebuilding.

In 1977, USAID opened an investigation into Nicaragua's use of the funds after allegations of misuse arose. The loans funding the reconstruction projects were determined after matching funds were provided by the Nicaraguan government. To inflate the amount received by USAID, Nicaragua allegedly purchased lands under the reconstruction program at "grossly inflated prices" to the benefit of former President Anastasio Somoza's friends and colleagues. Samoza also funneled highly profitable contracts to personal contacts and to companies he owned in conducting land speculation and cement supply, which were funded by USAID.

2010 Earthquake in Haiti

More recently, on January 12, 2010, a magnitude seven earthquake struck Haiti, leaving 220,000 people dead, an additional 300,000 injured, and more than 1 million displaced. The American Red Cross (Red Cross) raised almost $500 million to provide to Haiti in relief funds, but where the funds went became a significant cause for concern. U.S. Senator Chuck Grassley (R-Iowa) initiated an investigation into the Red Cross' use of the funds after ProPublica and NPR reported that only six homes in Haiti had been built five years after the earthquake struck. The Grassley-led investigation found that nearly $125 million of the Red Cross funds were used for "management and other expenses," which included "salaries, contract services, travel expenses and related costs." The remaining donations went to partner organizations doing groundwork in Haiti.

The relief funds distributed after the earthquake were riddled with fraud, as well. A group of journalists affiliated with Connectas, a human rights NGO, discovered a laundry list of fraud in connection with relief projects to benefit Haitian victims of the 2010 earthquake. An investigation revealed that Petrocaribe, a Venezuelan organization established to "help overcome poverty in the Caribbean," designated $3.8 billion in oil loans to fund infrastructure projects to rebuild the broken nation and then embezzled or stole the funds. Findings included inflated contract pricing, infrastructure projects left unfinished, and offshore deposits to personal accounts with ties to the funds.

El Niño in 2017

On a smaller scale, in the wake of El Niño in 2017, a criminal group in Peru posed as a Peruvian government agency carrying out an infrastructure project to address flooding and landslides that plagued Piura. The group lured between 50 and 100 contractors to participate via advertisements stating the project would provide contractors with approximately $7.5 million for such infrastructure projects. The group earned money in this process by soliciting bribes from the contractors and providing sham services to bidders.

Oil-for-Food Corruption in Iraq

Of course, corruption and fraud following a crisis is not confined to Latin America. In 1996, the U.N. Security Council instituted the Oil-for-Food program in response to strict sanctions on Iraq following the Gulf War. The program allowed Iraq to sell enough oil to pay for food and other necessities, while the United Nations was to monitor and approve all of Iraq's oil sales with profits entered into special escrow accounts the U.N. controlled. Although the program prohibited Iraq from purchasing military equipment with the oil proceeds, senior government officials were afforded great discretion in determining who could purchase Iraq's oil, and were permitted to select the vendors from which the United Nations would purchase goods with Iraqi oil profits.

A 2004 investigation led by the Central Intelligence Agency (CIA) revealed Saddam Hussein's exploitation of the program, which resulted in $1.7 billion in kickbacks and surcharges and $10.9 billion in illegal oil smuggling. The CIA's final report found that nearly half of the 4,500 companies participating in the program won lucrative contracts via kickbacks that ultimately benefitted Hussein.

The corruption, however, was not limited to Iraq: an interim report released by the U.N. Inquiry Committee found the Oil-for-Food program's procurement office did not follow the rules it established to "assure fairness and accountability," and the same interim report accused the former head of the program, Benon Sevan, of an "irreconcilable conflict of interest" after discovering Sevan helped a friend's company obtain contracts to sell Iraqi oil. The scandal resulted in congressional investigations examining the role of U.S. companies and individuals in the wrongdoing as well as the program more generally, and the U.S. government initiated investigations into the program via the Treasury Department and the U.S. Attorney's Office for the Southern District of New York.

See "What the French Supreme Court Ruling in the Oil for Food Cases Says About Transnational Double Jeopardy" (Oct. 3, 2018).

Hurricane Katrina

The risk of bribery and corruption after a disaster has increased in the United States, as well. For example, on August 29, 2005, Hurricane Katrina struck Louisiana, and the resulting $108 billion in property damage revealed not only the weak infrastructure in the region but also the weaknesses of its local government. New Orleans' mayor, C. Ray Nagin, took the crisis as an opportunity for personal gain by accepting money, vacations and services – among other benefits – in exchange for city contract awards. Nagin was ultimately found guilty of bribery, wire fraud and filing false tax returns, making him the seventeenth elected official from New Orleans and its suburbs to have been indicted due to corruption arising from the disaster.

2008 Financial Bailout

Similarly, in response to the 2008 financial crisis, Congress implemented the Troubled Asset Relief Program (TARP), which provided a $700-billion bank bailout and was monitored by a congressional oversight panel. To ensure the lawful participation in the program, Congress created the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). The need for SIGTARP proved essential: as of December 31, 2019, SIGTARP investigations have led to the criminal convictions of 381 bankers, bank borrowers and homeowner scammers from fraud, bribery and other schemes connected to the crisis.

Four Areas of Heightened Risk in Latin America

The form corruption may take in the COVID-19 crisis is unclear, but there are four areas where increases are likely.

1) The Healthcare Sector

In the healthcare space, we can expect issues related to companies providing healthcare goods and services that will be subject to almost impossible levels of demand by Latin American governments, which will exacerbate the risk of corruption in procurement, supply and customs. In particular, companies involved in the production and procurement of medical equipment and supplies, especially if dealing directly with the government or public hospitals, could find that their employees are willing to cut corners or rig deals to win government contracts and earn greater revenues. Where the government requests donations of medical equipment and parts, there are opportunities for embezzlement or misappropriation of the supplies.

Latin America is no stranger to these issues, as was seen in the March 2016 FCPA settlement involving Olympus Latin America (OLA), a distributor of endoscopes and related equipment and Olympus Corp. of the Americas' Miami-based subsidiary. Between 2006 and 2011, OLA paid "cash, money transfers, personal grants, personal travel and free or heavily discounted equipment" to health care providers under the guise of holding "training centers" for doctors' continuing education. In reality, the benefits were conferred to induce the providers to purchase OLA's medical equipment. Pursuant to a DPA, OLA agreed to pay a criminal penalty of $22.8 million to the DOJ in addition to installing a corporate compliance monitor.

See "Managing Corruption Risks Facing Healthcare Companies in Eastern Europe" (Jun. 12, 2019).

2) Public Procurement

Already, governments across the region have announced tens of billions of dollars in aid packages that will flood Latin America with public funds and opportunities for fraud and corruption. Brazil has announced a stimulus package of over $29 billion, while the World Bank will provide Argentina with $35 million for use in detection and response efforts generally and Bolivia with $20 million for the purchase of emergency medical equipment and supplies. Chile put into place an $11.7 billion stimulus package, while approving laws to provide cash transfers to families and protecting employment.

As a result, government procurement will pose enormous risks regardless of the industry involved. Even before the release of billions of government dollars earmarked for the COVID-19 response, a 2018 report published by the Inter-America Development Bank estimated that procurement inefficiencies caused by corruption and delays in Latin America and the Caribbean "could amount to as much as 4.4 percent of GDP, or $220 billion."

See the Anti-Corruption Report's three-part series on detecting and mitigating corruption risk when participating in public procurements: "Understanding the Procurement Process" (May 13, 2015); "Steps to Take Prior to Entering into a Procurement Process" (May 27, 2015); and "Seven Steps to Take During and After a Procurement Process" (Jun. 10, 2015).

3) Senior Executives and Sales Organizations

COVID-19 will likely also pose unprecedented pressure on companies' senior executives and sales organizations. The challenges of navigating shelter-in-place and quarantine orders, which have already been put in place in Argentina, Chile, Colombia, Peru and Brazil, are unique to this pandemic. The immense pressure on senior executives, sales representatives, consultants and distributors to keep business operating smoothly and to avoid closure may push individuals to engage in bribery or fraud if they feel it is necessary to protect their jobs or keep their business open. Employees may find themselves more likely to manipulate books and records to qualify for government aid, to rig contracts as a means to obtain much-needed revenue or to boost financial performance to qualify for loans or retain investors, all in an attempt to meet quotas, satisfy their superiors, or protect themselves. As companies deemed non-essential face pressures to remain open, corporate officers might be tempted to make payments to government officials to make exceptions. As levels of unease increase, individuals may decide that these short-term exigencies outweigh the long-term risks of compliance breach.

Even before the extreme pressures wrought by COVID-19, the pressure to boost sales had led to significant bribery issues in Latin America. For example, in June of 2019, Walmart entered into a three-year NPA to settle FCPA allegations, including allegations that the company's internal controls were insufficient to prevent improper payments being made to government officials in Brazil in order to obtain licenses and permits in connection with construction contracts.
See "Firing on All Cylinders: What to Expect in the PDVSA Investigation and How Companies Should Respond" (May 1, 2019).

4) Customs

Companies interacting with customs officials are also at particular risk. In 2014, an OECD study found that customs clearance was the second-highest cause for the payment of bribes behind government procurement. Here, too, international enforcement of Latin America bribery is prevalent. For example, in 2013, Ralph Lauren Co. entered into a non-prosecution agreement to settle a criminal and civil investigation by the SEC and DOJ involving its subsidiary's alleged bribery of government officials in Argentina over a period of five years, agreeing to pay $1.6 million. The Argentine subsidiary bribed Argentinian customs officials to obtain the paperwork necessary for customs clearance, allow for clearance of goods without the provision of any paperwork, or to avoid inspection altogether.

Another example can be found in the case of Helmerich & Payne, Inc. whose Venezuelan subsidiary allegedly made improper payments through its agents to customs officials in Argentina and Venezuela to permit and expedite the movement of equipment and supplies. Helmerich paid a $1-million penalty to the DOJ. As governments tighten controls or even close their borders in response to the COVID-19 crisis, employees may be put under extreme pressure to get much needed goods, supplies and people into or out of Latin American markets.

See the Anti-Corruption Report's three-part series on customs corruption risks: "Identifying the Problem Areas (Part One)" (Oct. 21, 2015); "Four Ways to Limit the Risks of Working With Customs Brokers, Freight Forwarders and Other Third Parties (Part Two)" (Nov. 4, 2015); and "Should a Company Ever Pay a Facilitation Payment to a Customs Official? (Part Three)" (Nov. 18, 2015).

Four Compliance Recommendations to Mitigate Risk

The immediate focus for companies is, and should be, protecting their businesses and personnel from the immediate effects of

COVID-19. But, as soon as practicable, companies should also consider performing forward-looking COVID-19 risk assessments to determine the future risks and pressures this pandemic will place on business and determine what can be done to address areas of concern to avoid legal ramifications.

1) Clear and Consistent Messaging

Companies should strive to convey a compliance-focused tone from its top management to serve as a model for employees to follow. This might be in the form of a statement from the CEO, whether via email or video. A company should also provide compliance video training to its remote employees supplemented with reminders of the importance of abiding by such rules during these stressful times. Understanding at the employee level that bribes and corruption are not in the long-term interest of the company or the individual is of the utmost importance at a time when employee oversight is greatly reduced and pressures abound.

See "30 Creative Ideas for Compliance Messaging" (Mar. 4, 2020).

2) Focus on Gatekeepers

During times of crisis, companies should focus even more than ever on adequately resourcing and training their corporate gatekeepers, including finance personnel. The DOJ views the gatekeeping function as critical to maintaining a system of proper internal controls to prevent and detect potential wrongdoing. For example, the DOJ has described corporate gatekeepers as its "partners" in preventing and detecting corruption. The DOJ's Evaluation of Corporate Compliance Programs (ECCP) highlights that prosecutors should examine whether companies have "established policies and procedures that incorporate the culture of compliance into its day-to-day operations," including what guidance and training gatekeepers have been provided in control processes.

More broadly, the SEC has previously declared a focus on gatekeeper cases, viewing them as enablers of widespread misconduct given gatekeepers' unique position in being able to prevent wrongdoing. The SEC has emphasized that gatekeepers are of increased importance during times of constrained resources, precisely because gatekeepers can prevent wrongdoing among numerous other actors.

Accordingly, best practices dictate that a robust compliance program focus on personnel closest to the payments and approvals processes to ensure they are appropriately examining suspicious payments and third parties. Specifically, in crises or other periods of heightened risk, gatekeepers should ensure that any expenditures are appropriate and match written contracts or other payment terms; insist that any new vendors, consultants and agents have been properly vetted; and verify that a legitimate business purpose exists for any unusual or large payments.

See "Training Insights From In-House Experts": Part One (Jun. 1, 2016); and Part Two (Jun. 15, 2016).

3) Monitoring Third Parties

Companies should emphasize that third parties that sell or manufacture its products must continue to abide by applicable compliance policies and anti-corruption and sanctions laws. Part of a company's COVID-19 risk assessment should focus on governmental or regulatory touchpoints that third parties may

have on its behalf during this crisis.
For example, companies that move goods or people across borders should be diligent in ensuring that customs and immigration laws are respected, both by their employees and their third-party agents. Travel restrictions and border closures during these times can result in customs clearance and procedural delays, and companies should be on high alert for any irregularities in the process, which could tip off corruption concerns.

See "Seven Tips for Conducting Integrity Due Diligence on Third Parties in Brazil" (Mar. 6, 2019).

4) Keeping Compliance Well-Resourced

As is already happening globally, federal governments and global aid organizations are investing money throughout Latin America into the private and public spheres in an attempt to bolster economies' abilities to overcome COVID-19's ravaging effects. While companies may be tempted to eliminate or reduce compliance teams, infrastructure or spending during these difficult financial times, past crises show that the legal and regulatory risks that businesses face now are only elevated in the face of this crisis and the resultant economic uncertainty.

See "Five Tools Every Chief Compliance Officer Needs for Effective FCPA Compliance: Title, Authority, Access, Budget and Culture (Part One of Two)" (Apr. 3, 2013); Part Two (Apr. 17, 2013).

Nicholas Berg is a partner in Ropes & Gray's Chicago office. He focuses his practice on SEC and other government enforcement matters, internal investigations, compliance issues and complex litigation. Berg has substantial experience advising clients in a broad array of industries on all aspects of the securities and anti-corruption laws, including the FCPA, as well as insider trading and financial statement and disclosure issues. Berg has also spent much of his practice representing clients in federal securities fraud and consumer class actions, private equity disputes, and transaction-related litigation in U.S. state and federal courts.

María González Calvet is an anti-corruption and international risk partner at Ropes & Gray's Washington, D.C., office. Calvet has worked with leaders in government, business and finance to investigate and assess risk across the Latin American region for more than a decade. Earlier in her career, she was a trial attorney in the DOJ Fraud Section and was a member of the FCPA Unit where she led some of the Department's most important investigations involving allegations of corruption and other white collar offenses in Latin America.

Nicole D. Horowitz is an associate in Ropes & Gray's litigation and enforcement group in San Francisco. Her practice covers a broad range of civil litigation, including securities, antitrust, and complex commercial disputes, SEC enforcement matters, internal investigations, and international risk assessment.

Krista Evensen is an associate in Ropes & Gray's litigation and enforcement group in Chicago.