

Latin America Likely to Face Continued Robust U.S. Anticorruption Enforcement

Manuel (Manny) A. Abascal, Daniel J. Dominguez, Katherine A. Sawyer, and Lucas Fontes Novaes*

In this article, the authors explain that companies operating in Latin America should reexamine anticorruption best practices and be prepared to act quickly in response to a U.S. government inquiry.

In 2022, nearly 60 percent of the U.S. Department of Justice's (DOJ) Foreign Corrupt Practices Act (FCPA) enforcement actions and more than two-thirds of FCPA-related prosecutions of individuals had connections to Latin America.¹ U.S. regulators have increasingly leveraged ongoing local investigations in Latin America, collaborated with counterparts in the region, relied on a suite of federal statutes to reach non-FCPA conduct, prioritized resources, and incentivized whistleblower reports. Indeed, in fiscal year (FY) 2021, the U.S. Securities and Exchange Commission (SEC) received approximately 169 whistleblower reports originating in Latin America² and in FY 2022, the list of foreign countries from which the highest number of tips originated included Mexico and Brazil.³

Consequently, companies operating in Latin America should be prepared for continued robust U.S. enforcement activity across the region.

This article summarizes recent U.S. enforcement trends in Latin America and highlights the key drivers for increased investigations and enforcement actions in the region. It also provides practical tips for ensuring compliance teams are prepared and accountable in this environment. Finally, it provides recommendations for companies facing inquiries from U.S. regulators.

Enforcement Activity and Trends in 2022

In 2022, FCPA enforcement actions involved conduct in 12 Latin American countries, with Brazil claiming the top spot as

the country most frequently implicated in FCPA-related bribery schemes.⁴ Table 1 details notable FCPA enforcement actions in the region.

Many of the enforcement actions in the region last year underscore the importance of third-party due diligence and monitoring for companies operating in Latin America.

The DOJ was also active in its prosecution of individuals in the region. In 2022, the DOJ charged 13 individual defendants for FCPA-related violations and all but one were government officials or intermediaries with no direct connection to a public company prosecuted by U.S. authorities.⁵

Continued Robust Enforcement Activity Likely

This year already has ushered in FCPA prosecutions based on conduct in Latin America.⁶ This trend is likely to continue for a variety of reasons:

- *Follow-On Investigations.* U.S. enforcement authorities will likely continue to follow collateral leads identified during recent investigations in Latin America as they did in the wake of Lava Jato (Operation Car Wash). There, the sprawling Brazilian investigation of widespread corruption and money laundering at Petrobras led to the DOJ's investigation into Braskem and parent company Obdebrecht S.A., and to a broader industry sweep targeting the construction and infrastructure industries in Brazil and throughout the region. Similarly, the investigations related to Petr leos de Venezuela S.A. (PDVSA) could precipitate a broader industry-wide investigation of the energy sector as well as targeted investigations of PDVSA joint venture partners, or PDVSA-related consortia and their member entities in various countries throughout the region based on evidence developed in related investigations.⁷
- *Supply Chain Relocation from China to Mexico.* With increasing shipping disruptions and geopolitical fracture, exporters from China have begun setting up operations in Mexico to protect their sales to the United States and reduce reliance on factories in Asia. These additional touch-points will give U.S. regulators more potential investigative

Table 1

Company	Date	U.S. Agency	Penalty	Countries	Conduct
Glencore International A.G. ¹	May 2022	DOJ, (CFTC)	\$1.1 billion	Brazil, Venezuela, and various countries in Africa	The government alleged that the company paid nearly \$100 million in bribes through intermediaries and other third parties to government officials in seven countries, including Brazil and Venezuela. ²
Tenaris ³	June 2022	SEC	\$78 million	Brazil	A Brazilian subsidiary of Tenaris allegedly paid \$10.4 million in bribes in relation to bids for business from Brazil's state-owned oil entity, Petrobras.
GOL Linhas Aereas Inteligentes S.A. ⁴	September 2022	DOJ, SEC	\$41 million	Brazil	GOL resolved charges stemming from a scheme to use fraudulent third-party vendor contracts to disguise and pay bribes to officials to secure passage of certain legislation with tax benefits to GOL.
Stericycle Inc. ⁵	December 2022	DOJ, SEC	\$84 million	Mexico, Argentina, and Brazil	The government alleged that at the direction of executives in its Latin America division, Stericycle employees made bribe payments to officials in Brazil, Mexico, and Argentina to obtain business from government customers. Most of the bribes were allegedly paid in cash through sham third parties.

Company	Date	U.S. Agency	Penalty	Countries	Conduct
UOP LLC, (d/b/a Honeywell UOP) ⁶	December 2022	DOJ, SEC	\$160 million	Brazil and Algeria	The government alleged that the company conspired to offer a \$4 million bribe to a high-ranking official at Petrobras in exchange for contracts and other business advantages.

Notes

1. Press Release, Dep't of Justice, Glencore Entered Guilty Pleas To Foreign Bribery and Market Manipulation Conspiracies (May 24, 2022), <https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies>.
2. Not included in this summary are the Commodity Futures Trading Commission (CFTC) charges regarding commodity manipulation which involve U.S. domestic conduct.
3. Press Release, SEC, SEC Charges Global Steel Pipe Manufacturer with Violating Foreign Corrupt Practices Act (June 2, 2022), <https://www.sec.gov/news/press-release/2022-98>.
4. Press Release, Dep't of Justice, GOL Linhas Aéreas Inteligentes S.A. Will Pay Over \$41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil (Sept. 15, 2022), <https://www.justice.gov/opa/pr/gol-linhas-aereas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery>; Press Release, SEC, SEC Charges Gol Intelligent Airlines, Brazil's Second Largest Airline, with FCPA Violations (Sept. 15, 2022), <https://www.sec.gov/news/press-release/2022-164>.
5. Press Release, Dep't of Justice, Stericycle Agrees to Pay Over \$84 Million in Coordinated Foreign Bribery Resolution (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>; Press Release, SEC, SEC Charges Stericycle with Bribery Schemes in Latin America (Apr. 20, 2022), <https://www.sec.gov/news/press-release/2022-65>.
6. Press Release, Dep't of Justice, Honeywell UOP to Pay Over \$160 Million to Resolve Foreign Bribery Investigations in U.S. and Brazil (Dec. 19, 2022), <https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil>; Press Release, SEC, SEC Charges Honeywell with Bribery Schemes in Algeria and Brazil (Dec. 19, 2022), <https://www.sec.gov/news/press-release/2022-230>.

fodder in the region. Geopolitical (U.S.-Sino) tensions coupled with increased presence of Chinese companies in Latin America may further incentivize allocation of U.S. enforcement resources to address China's increased presence in the region.

- *Increased Cross-Border Cooperation.* Coordination between U.S. and foreign agencies has become the new normal and is only likely to increase in the post-pandemic landscape. In February 2023, Brazilian President Luiz Inácio Lula da Silva and U.S. President Joseph Biden met in Washington, D.C., and pledged to increase bilateral coordination during a joint appearance.⁸ This appearance came on the heels of a year that saw historic levels of cross-border cooperation between U.S. and Brazilian authorities that yielded high-profile settlements in 2022 related to bribery schemes in Brazil and other Latin American countries.⁹

Recent statements of senior DOJ officials confirm the likelihood of increased cross-border cooperation with Latin American authorities. In a November 2022 speech, DOJ Fraud Section Chief Glenn Leon said that with the pandemic waning, DOJ will seek to “create” law enforcement partnerships in countries where none previously existed.¹⁰

For example, on March 5, 2023, a judge in Ecuador approved corruption charges against 37 individuals, including a former Chinese ambassador, over an alleged bribery scheme to win a contract to build a \$2.5 billion hydroelectric dam. Ecuador's attorney general reported that prosecutors issued 10 mutual legal assistance requests for evidence to countries including the United States, Switzerland, Belize, Panama, Spain, and China during their investigation, with every country responding except China.¹¹

- *Availability of Other U.S. Laws to Buttress Anticorruption Efforts.* The DOJ has increasingly relied on other U.S. criminal laws to reach conduct beyond the purview of the FCPA, such as money laundering or wire and mail fraud. The DOJ now commonly charges the alleged provider of a corrupt payment under the FCPA and the alleged recipient with money laundering violations. For example, of the 13 individuals criminally charged in 2022, only four were charged with substantive FCPA violations.¹²

- *Prioritization of Resources.* DOJ Deputy Attorney General Lisa Monaco announced in September 2022 that the DOJ will request an additional \$250 million from Congress to fund corporate crime initiatives in 2023.¹³ By way of comparison, the DOJ's entire budget request for FY 2022 for the Criminal Division was \$215.2 million.¹⁴ If Congress agrees to fund these corporate crime initiatives, the DOJ will have significantly more resources at its disposal.
- *SEC Whistleblower Program.* Under the SEC's program, whistleblowers are eligible for an award of 10 percent to 30 percent of the aggregate monies any U.S. regulator receives,¹⁵ including non-U.S. individuals. In FY 2022, the SEC paid approximately \$229 million in whistleblower awards to 103 individuals.¹⁶ Also in FY 2022, the list of foreign countries from which the highest number of tips originated included Mexico and Brazil.¹⁷

Tips for Anticorruption Compliance Best Practices

Given the confluence of factors above and the continued focus on Latin America, companies operating in the region should be more attuned than ever to anticorruption compliance best practices in 2023. The DOJ and SEC have issued a number of policy updates and guidance emphasizing the importance of empowered and accountable compliance functions. Given the compliance risks in operating in Latin America, the following tips should inform a review of anticorruption compliance systems. Companies should:

- Reevaluate corporate compliance risks.
- Refresh their corporate compliance programs to ensure that they address new business realities, supply chains, and other post-pandemic changes and consider improvements at regular intervals.
- Ensure that the compliance function is appropriately resourced.
- Focus on training gatekeepers (such as compliance personnel, accounting, finance, and other key personnel) and middle management.
- Update protocols and controls around the use of personal devices and third-party messaging applications based

on recent updates to U.S. enforcement guidance and the prevalence of messaging applications in the region, such as WhatsApp.¹⁸

- Consider policy additions to recoup or reduce compensation due to compliance violations, policy violations, or misconduct based on recent updates to U.S. enforcement guidance. Relatedly, consider incentives for compliance with policies and reporting obligations.¹⁹
- Update protocols for responding to whistleblower reports and investigations, and train counsel, senior executives, and appropriate personnel on those protocols.
- Consider creating a crisis response team to communicate with management and coordinate with company counsel and the government. Consider the appropriate composition of the crisis response team, including potentially internal and external counsel, officers and directors of the company, and representatives from key teams, including information technology and public relations.
- Be vigilant about clearly marking all privileged materials to ensure the preservation of applicable legal privileges.
- Understand key information technology (IT) issues, including the location of servers, how and where data are stored, data retention policies and practices, network access capabilities and restrictions, and who is best situated to make immediate changes to routine procedures. Enterprise data access structuring and restrictions are a critical structural component of managing enforcement and collateral litigation risks.

What to Do If the Government Comes Calling

Even companies with a strong code of conduct, an exemplary tone at the top, robust internal controls, and a culture of compliance may still face allegations of misconduct that can lead to government investigations. The following considerations should be top of mind for companies under U.S. regulatory scrutiny:

- *Document Preservation.* Immediately take proactive steps to preserve documents, including from messaging applications, collect and image devices, and modify data retention practices as needed to ensure documents are not destroyed.

- *Retain Outside Counsel.* Consider retaining counsel with experience in DOJ/SEC investigations. Doing so will allow in-house counsel to continue day-to-day responsibilities, provide the company with credibility in the eyes of the government, and bolster the preservation of attorney-client privileges.
- *Preliminary Remediation.* Take immediate steps to ensure improper or illegal conduct has ceased, terminate relationships with any third parties implicated in misconduct, and consider what other remediation might be necessary.
- *Internal Investigation.* Design an appropriately scoped internal investigation plan (document collection and review, witness interviews, internal audit, etc.). This will put the company in the best possible position to understand and control the narrative with regulators.
- *Cooperation.* Companies should weigh several important considerations in determining whether to disclose a potential violation. However, once the U.S. government is involved, companies should consider the financial and reputational benefits of cooperation with U.S. authorities and understand what level of cooperation must be demonstrated for those benefits to be realized. The DOJ recently updated its Corporate Enforcement Policy to further incentivize cooperation even when the company failed to voluntarily disclose a potential violation.²⁰
- *Producing Documents.* Prepare to negotiate the scope of document requests and identify potential legal barriers to compliance, such as data privacy laws, blocking statutes, and IT structural restrictions.
- *Government Interviews and/or Investigative Testimony.* Consider which employees to make available for government interviews and prepare them for testimony, including through a thorough review of relevant documents and communications.
- *Disclosure Considerations for U.S. Public Companies and Foreign Private Issuers.* Consider whether disclosure is warranted by assessing the materiality of the investigation, underlying conduct, potential collateral consequences, and potential outcomes. In addition to determining whether to disclose the fact of an investigation, a company should

also consider whether the investigation affects any pending disclosure documents or registration statements.

Key Points

- In 2022, Latin America was a hotbed for FCPA enforcement. As the region feels the ripple effects of recent significant enforcement actions, governments lean into cross-border coordination, and pandemic effects dissipate, FCPA enforcement activity in Latin America is likely to increase into 2023.
- Ongoing local investigations and regulatory enforcement in Latin America could be a precursor for or evidence of U.S. government regulatory action. Companies should not underestimate the collateral consequences of seemingly localized actions that may also create exposure in the United States.

Conclusion

Companies operating in Latin America continue to face unique challenges in managing and mitigating legal exposure in the United States and should expect to remain under the microscope of U.S. regulators. Given this backdrop, companies in the region should focus on implementing robust compliance measures to minimize exposure. They also should implement critical response plans and be prepared to act quickly and nimbly in response to regulator inquiries.

Notes

* Manuel (Manny) A. Abascal (manny.abascal@lw.com) is a partner in the Litigation & Trial Practice of Latham & Watkins and is based in Los Angeles. Mr. Abascal handles complex and high-stakes litigation and government investigations matters for clients in several industries. Prior to joining Latham in 2000, Mr. Abascal was an assistant U.S. attorney in Los Angeles, where he prosecuted and tried numerous and diverse fraud cases. Daniel J. Dominguez (daniel.dominguez@lw.com) is local cochair of the Litigation & Trial Department in the firm's Washington, D.C., office, a partner in the firm's

Litigation Department, and a member of the firm's White Collar Defense & Investigations Practice. He serves as a Vice Chair of the firm's Diversity Leadership Committee. Mr. Dominguez primarily advises clients on white collar defense, internal investigations, and enforcement actions by the U.S. Department of Justice and the U.S. Securities and Exchange Commission. Katherine A. Sawyer (katherine.sawyer@lw.com), counsel in the firm's office in Washington, D.C., and a former federal prosecutor, is an experienced trial lawyer who represents clients in white collar litigation and government investigations. Lucas Fontes Novaes (lucas.novaes@lw.com) is an associate in the firm's office in Washington, D.C.

1. Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2022 FCPA Year in Review, <https://fcpa.stanford.edu/fcpac-reports/2022-fcpa-year-in-review.pdf>.

2. <https://www.sec.gov/files/owb-2021-annual-report.pdf>.

3. https://www.sec.gov/files/2022_ow_ar.pdf.

4. See Dep't of Justice, Foreign Corrupt Practices Act—Enforcement Actions, “Related Enforcement Actions: 2022” (2022), <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2022>.

5. Stanford Law School Foreign Corrupt Practices Act Clearinghouse, 2022 FCPA Year in Review, <https://fcpa.stanford.edu/fcpac-reports/2022-fcpa-year-in-review.pdf>.

6. For example, in February 2023 a grand jury in Connecticut indicted a senior oil trader for a U.S.-based company and a foreign national from Brazil for antibribery violations of the FCPA and money-laundering charges in connection with a scheme to pay bribes to government officials in Brazil to win contracts with Brazil's state-owned oil company, Petrobras. See Press Release, Dep't of Justice, Senior Oil and Gas Trader and Brazil-Based Intermediary Charged in Bribery and Money Laundering Scheme (Feb. 17, 2023), <https://www.justice.gov/opa/pr/senior-oil-and-gas-trader-and-brazil-based-intermediary-charged-bribery-and-money-laundering>.

7. For example, in December 2022, the DOJ filed a superseding indictment against Javier Aguilar, a trader at the U.S. subsidiary of European oil trading company Vitol, accusing him of paying bribes in Mexico in addition to a previously alleged bribery scheme in which Aguilar is accused of bribing officials at the state oil company of Ecuador to secure a \$300 million contract. See Superseding Indictment, *United States v. Aguilar*, No. 20-CR-00390 (E.D.N.Y. Dec. 2, 2022), <https://www.justice.gov/criminal-fraud/file/1556516/download>.

8. Statements and Releases, The White House, Joint Statement Following the Meeting Between President Biden and President Lula (Feb. 10, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/10/joint-statement-following-the-meeting-between-president-biden-and-president-lula/>.

9. See Dep't of Justice, *supra* notes 4-8.

10. Stewart Bishop, *Overseas & Out of Time: DOJ Reforms Boost Cross-Border Risk*, LAW360 (Dec. 20, 2022, 11:15 pm), <https://www.law360.com/articles/1559343/overseas-out-of-time-doj-reforms-boost-cross-border-risk>.

11. Ana de Liz, *Ecuador to File Charges Over Alleged Hydroelectric Dam Bribery Scheme*, Global Investigations Review (Feb. 23, 2023), https://globalinvestigationsreview.com/article/ecuador-file-charges-over-alleged-hydroelectric-dam-bribery-scheme?utm_source=US%252C%2Ballies%2Bo%2Bcrack%2Bdown%2Bon%2BRussia%2Bneighbours%2Bassisting%2Banc%2Btions%2Bevasion&utm_medium=email&utm_campaign=GIR%2BJust%2BSanctions.

12. Stanford Law School Foreign Corrupt Practices Act Clearinghouse, *2022 FCPA Year in Review*, <https://fcpa.stanford.edu/fcpac-reports/2022-fcpa-year-in-review.pdf>.

13. Dep't of Justice, Justice News, Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

14. Dep't of Justice, Summary of Budget Authority by Appropriation (May 13, 2021), <https://www.justice.gov/jmd/page/file/1398951/download>.

15. SEC, Office of the Whistleblower, <https://www.sec.gov/whistleblower> (Nov. 22, 2022).

16. SEC, SEC Whistleblower Office Announces Results for FY 2022 (Nov. 15, 2022), https://www.sec.gov/files/2022_ow_ar.pdf.

17. https://www.sec.gov/files/2022_ow_ar.pdf.

18. <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

19. *Id.*

20. Dep't of Justice, 9-47.120—Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, <https://www.justice.gov/opa/speech/file/1562851/download>.