Hogan Lovells

Latin American investigations guide

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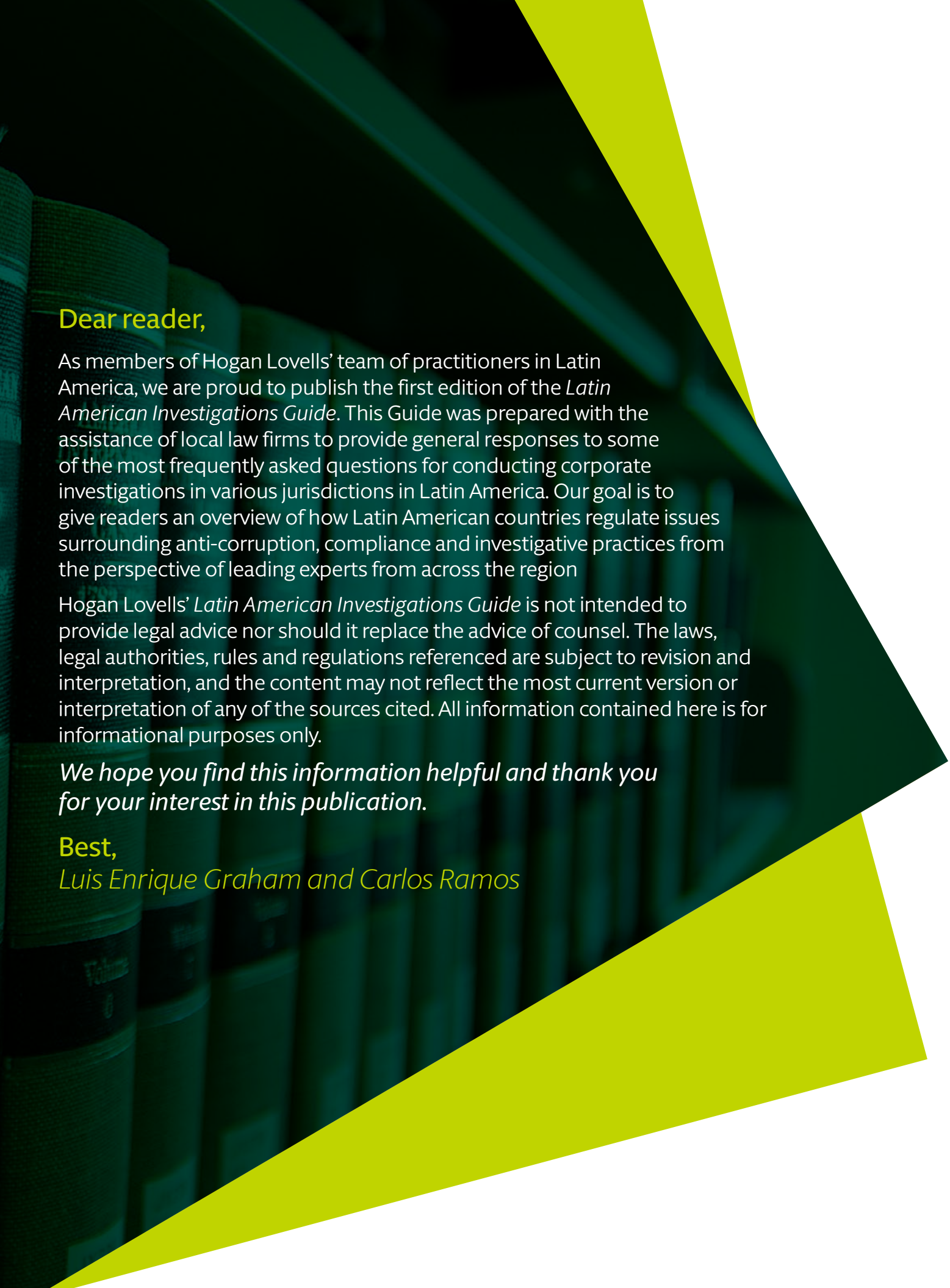

Dear reader,

As members of Hogan Lovells' team of practitioners in Latin America, we are proud to publish the first edition of the *Latin American Investigations Guide*. This Guide was prepared with the assistance of local law firms to provide general responses to some of the most frequently asked questions for conducting corporate investigations in various jurisdictions in Latin America. Our goal is to give readers an overview of how Latin American countries regulate issues surrounding anti-corruption, compliance and investigative practices from the perspective of leading experts from across the region

Hogan Lovells' *Latin American Investigations Guide* is not intended to provide legal advice nor should it replace the advice of counsel. The laws, legal authorities, rules and regulations referenced are subject to revision and interpretation, and the content may not reflect the most current version or interpretation of any of the sources cited. All information contained here is for informational purposes only.

We hope you find this information helpful and thank you for your interest in this publication.

Best,
Luis Enrique Graham and Carlos Ramos

Introduction

Cross-border investigations

Businesses with international operations must overcome a unique set of challenges when dealing with compliance issues and cross-border investigations. Coordination of efforts across multiple jurisdictions, cultural and language barriers, and differing labor, privacy, and compliance legal frameworks are some of the obstacles that may be encountered by companies tasked with conducting internal investigations and compliance-related due diligence.

Nonetheless, cross-border investigations are on the rise and multinational businesses must be prepared to confront these and other challenges they may encounter. From the start of an investigation to determining and implementing remediation efforts, understanding the process can help avoid critical mistakes.

Hogan Lovells' *Latin American investigations guide* was prepared by experts from across the region to provide a snapshot of the rules, regulations, and best practices in 10 jurisdictions in Latin America. The guide is not intended to provide or supplement legal advice. Its aim is to deliver a meaningful assessment of this topic and to assist the reader in navigating the complexities surrounding these issues.

Start of a cross-border investigation

Complaints or allegations made by company employees are a common trigger for cross-border investigations. These claims may involve parties, events, or both from different jurisdictions and can be subject to simultaneous investigation by agencies in more than one country.

Effective intake procedures should have a global outlook and take into account cultural sensitivities. An initial assessment of the facts may require analysis of criminal, civil, privacy, and regulatory concerns in all jurisdictions involved.

The next step in undertaking a cross-border investigation is to consider whether local support is needed. Under some circumstances, a well-versed in-house legal department may suffice. However, outside counsel or other external resources may be necessary, depending on the breadth of the investigation and the issues in question. Once a team of professionals has been assembled, strategies to address data privacy concerns, whistleblower protection, preservation of evidence, and disclosure to local law enforcement and regulatory authorities, among others, can be devised.

Another matter to be considered at the onset is the extent to which a company is legally permitted to inquire into allegations of misconduct, including limits to a company's ability to engage in the investigative process and to process and review personal data in the course of an investigation. Once these determinations have been made, disclosure of the investigation to third parties may be required, including to labor unions, insurance companies, shareholders, and local authorities.

In Latin America, there is a broad range of approaches to these matters. The manner in which a company conducts itself at the initial stages can set the tone for the remainder of the investigation and minimize risks and liability.

Investigation and due diligence

Once the investigative phase begins, companies should implement a short-term action plan that ensures that any ongoing criminal or unlawful conduct is immediately stopped. The preservation of evidence or data should be a priority, especially where this is required under local law. An analysis of the availability of the attorney-client privilege across the jurisdictions involved should be undertaken so as to preserve and maximize any protections available to all parties.

The number of countries that have enacted privacy laws in Latin America is on the rise, thus regulations addressing data privacy should be considered at the investigative phase of a cross-border investigation. These laws tend to have a number of common elements, including requirements addressing notice, consent, processing of sensitive data, conservation of data integrity, and retention. In some countries employees can refuse to cooperate with employer-led inquiries or requests. They should be taken into account when conducting interviews, collecting

evidence, reviewing private employee information, and transferring data. Given the proliferation and expansion of data protection regimes across the region, it is strongly advised that data privacy counsel be consulted to ensure compliance with this rapidly evolving field of law.

Next, the right of participation by third parties, including labor unions and local authorities, should be assessed. Again, the range of legal requirements in this regard is broad. Alerting management, investors, and shareholders may be required under local law. Moreover, providing timely notice to insurance carriers before, during, or after an investigation may be necessary to preserve coverage.

An understanding of local law is crucial throughout all phases of a cross-border investigation, and the investigative phase is no exception. Employee interviews and data collection are often highly regulated activities. Failure to abide by the rules that govern these situations can lead to serious consequences.

The end of the investigation

Once the fact-finding stage of a cross-border investigation has been completed, a company will likely need to create a long-term action plan that includes the implementation of remediation measures. Next steps may also include, but are not limited to, sanctioning employees, addressing oversight weaknesses, evaluating internal investigation protocols, and updating company records. Deadlines must be strictly observed to avoid waiver, such as when imposing employee disciplinary actions. In some countries, remediation efforts will determine whether a company is charged with a violation and, if so, the extent of culpability and penalties imposed.

Another question that should be addressed after the investigative phase is complete is whether a detailed investigation report should be produced or not. This is linked to the question of privilege. If in-house counsel produces an investigation report, this report may not be privileged in some Latin American countries. However, even if outside counsel produces the report, it may only have limited protection if it enters into the custody of the company. This question should be addressed accordingly.

Finally, recovery efforts may be undertaken as the last step. Once the parties liable for misconduct have been identified and disciplined, sanctioned, or prosecuted, an opportunity to recover some of the company's losses may become available, under some circumstances.

Conclusion

Cross-border investigations are complex endeavors. Issues can arise at different stages of an investigation and addressing them quickly and effectively is key to their successful resolution. It is not necessary to know all the answers from the onset, but it is important to understand that retooling domestic processes for a multi-jurisdictional investigation is likely not an appropriate response. Minimizing risks requires a targeted approach that takes into account the fundamental cultural, legal, and business differences involved. We hope that Hogan Lovells' *Latin American investigations guide* is helpful in understanding some of these issues and provides a useful starting point for a reader looking to become more familiar with the different approaches present in the region.

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For more than 30 years, Luis Enrique Graham has represented companies in domestic and international disputes. He has also worked with clients concerned with investigations and anti-corruption regulations, including the Foreign Corrupt Practices Act (FCPA) and local anti-corruption regulations throughout Latin America.

Luis Enrique is a former president of the Mexican Bar Association and member of its Disciplinary Board. He is also a former member of the Consultation Advisory Committee of the Mexican Ministry of Public Administration (*Secretaría de la Función Pública*) for anti-corruption matters.

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Julio Zugasti helps navigate clients through their toughest investigations, complex government contracts, and public procurement issues. He has experience working on anti-corruption and anti-bribery matters, which helps him to identify potential risks his clients face throughout their business.

He assists domestic and international companies in cases involving government agencies, guides clients through the implementation of compliance policies, and is comfortable guiding clients through white-collar and fraud investigations. He is also known for his strategic regulatory advice pertaining to administrative matters involving public procurement and government contracts at both federal and state levels.

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Carlos Ramos Miranda is a practical, business-oriented, and results-driven lawyer, who finds creative solutions to complex problems. Carlos focuses his practice on corporate, M&A, insurance, infrastructure, and energy matters. His diverse practice allows him to understand complexities of specific industries and identify key issues to his investigations practice. He has participated in internal investigations for multinational companies, encompassing internal fraud, anti-corruption, and anti-money laundering matters in Mexico and Latin America.

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Vanessa Pinto Villa is a professional support lawyer in the Latin America Practice Group at Hogan Lovells' Miami office. She collaborates with the group's lawyers across various practice areas with a focus on providing legal and analytical input to business development initiatives, identifying emerging legal issues and trends in the region, and recognizing opportunities to expand business with new and existing clients.

1. We would like to thank Amando Zepeda, former associate (Mexico City); and Darío Rolon, foreign associate (Munich) for their significant contributions to the first edition of the *Latin American investigations guide*.

Latin American cross-border investigation: Eletrobras case study

In March 2014, the Brazilian Federal Police obtained judicial authorization to investigate the bank accounts of an otherwise non-descript gas station called Posto da Torre, located in Brasília, Brazil's capital. Codenamed Operation Car Wash (*Operação Lava Jato*) and run out of the Curitiba Public Prosecutor's office, the investigation initially related to the use of fuel shipments to launder illicit funds. One of the targets of the investigation was a known money launderer named Alberto Youssef. Once arrested, Youssef – who already had talked his way out of prior investigations by turning in other money launderers and fellow criminals – once again provided information about ongoing criminal activity, but this time the information he provided to the Federal Police and public prosecutors would permanently change Brazil's political, legal, and social landscape and reverberate across Latin America.

Youssef provided authorities with information relating to a far-reaching bribery scheme involving Brazil's state-owned oil company, Petrobras, and a cartel of construction companies. In essence, Petrobras officials caused the company to award lucrative public works contracts to the cartel of construction companies in exchange for massive bribes that were used for the personal benefit of several Petrobras directors, as well as to fill the coffers of certain Brazilian political parties. Now in its fifth year, according to public prosecutors, Operation Car Wash has had 66 "phases," led to 244 successful prosecutions, including that of a former Brazilian president, indirectly caused the impeachment of another Brazilian president, and identified a total of BRL $6.4 billion in bribes paid (see: http://www.mpf.mp.br/grandes-casos/caso-lava-jato/atuacao-na-1a-instancia/parana/resultado). Outside of Brazil, the repercussions include the impeachment of a Peruvian president and implication of scores of politicians and others in Argentina, Colombia, Mexico, Panama, and Venezuela.

In July 2015, Hogan Lovells became involved in the 16th phase of Operation Car Wash, codenamed Radioactivity. On 28 July 2015, Brazilian Federal Police arrested Othon Pinheiro da Silva, President of Eletronuclear, a subsidiary of Brazil's state-owned energy company, Eletrobras. The allegations were that Pinheiro da Silva received kickbacks from construction companies in exchange for facilitating contracts relating to Eletronuclear's Angra 3 nuclear power plant. One year later, a related investigation codenamed Operation Pripyat was initiated, targeting Pinheiro da Silva and five other Eletronuclear directors for having had received bribes from one of the major Angra 3 contractors.

Due to the nature of the allegations and the far reach of Operation Car Wash, a special committee set up by Eletrobras engaged Hogan Lovells to conduct an internal investigation of the Angra 3 project and eight other projects in which Eletrobras had an interest. Culminating in a December 2018 settlement with the U.S. Securities and Exchange Commission (SEC), our internal investigation included collecting over 2,500 computers and other devices, reviewing over 35 million pages of documents, conducting over 600 interviews, and providing information to Brazilian authorities that would assist in the successful prosecution of Pinheiro da Silva and four Eletronuclear directors. Throughout this expansive investigation, our team confronted many of the issues discussed in this *Latin American investigations guide*. We discuss several of them below.

Interactions with the special committee

Recognizing that the allegations involved members of the company's management, and in light of its responsibilities and obligations as a company that had American Depository Receipts (ADRs) traded on the New York Stock Exchange (NYSE) and shares traded on the Bovespa (the Brazilian Stock Exchange), Eletrobras created an independent special committee to supervise Hogan Lovells' investigation. Comprised of a former Brazilian Supreme Court Justice, a former member of the Brazilian equivalent of the SEC, and a representative of company minority shareholders (later to be substituted by a former president of a Big Four accounting firm), Hogan Lovells worked closely with the special committee to ensure that its

preliminary findings remained confidential and were not widely disseminated within the company and its subsidiaries.

Self-disclosure to U.S. authorities and interactions with Brazilian regulators

Eletrobras, through Hogan Lovells, made initial disclosures to authorities in the United States and Brazil in July 2015. In August 2018, the U.S. Department of Justice informed Eletrobras that it would not continue its investigation of the company. Later that year, in December 2018, Eletrobras entered into a settlement with the SEC and agreed to pay a US$2.5 million fine to resolve Foreign Corrupt Practices Act internal accounting controls violations. With the assistance of local counsel, Hogan Lovells also interacted on the company's behalf with Brazilian regulators and law enforcement agencies. Providing detailed and timely information relating to the investigation to these regulators was critical to achieving the favorable resolutions discussed above.

Conducting the investigation in parallel with pending class action in the United States

In 2016, a putative securities class action was filed against Eletrobras and certain of its directors in the Southern District of New York, alleging that they participated in a bribery and corruption scheme that affected the value of Eletrobras' ADR's. Although Eletrobras had separate representation in the class action lawsuit, Hogan Lovells conducted its investigation in a manner that minimized the risk of any claim of waiver of the attorney-client privilege or attorney work product protection. This included educating Brazilian authorities on the need for the company to maintain privilege over certain materials and information to prevent waiver as a result of a voluntary disclosure of privileged information to Brazilian authorities. Eletrobras ultimately settled the class action lawsuit in late June 2018.

Interacting with the external auditor

In the wake of the allegations involving Pinheiro da Silva, Eletrobras' external auditor required that the company provide it with sufficient assurances and information regarding the sufficiency of the investigation so as to allow the external auditor to sign off on the company's financial disclosures, including its SEC Form 20-F. Throughout the internal investigation, Hogan Lovells regularly updated the external auditor on the progress of the investigation while attempting to minimize any risk of waiving the attorney-client privilege and attorney work product protections. Due to the breadth and scope of the investigation, the NYSE suspended trading of Eletrobras' ADRs for several months, but ultimately, the external auditor signed off on the company's financial disclosures, and trading was reinstated, averting a potentially catastrophic result for the company.

Challenges in investigating special purpose entities

Eletrobras' interests in several of the investigated projects were held via special purpose entities (SPEs), each of which was independently managed. Some of the other interest holders in these SPEs were the construction companies being investigated in Operation Car Wash, and there was resistance from some of these entities to authorize Hogan Lovells to conduct the investigation – in one instance, an SPE actually filed suit to prevent Eletrobras from requiring that it participate in the investigation, and in other instances the investigation team had to contend with hostile SPE management that only reluctantly allowed the investigation to proceed. Hogan Lovells was careful to conduct the investigation of these projects in a manner that minimized the risk of disseminating privileged information to potentially adverse parties (such as the construction companies).

Conclusion

The Eletrobras investigation was a massive effort that involved over a dozen outside law firms, forensic firms, and other external advisors, multiple agencies in both the United States and Brazil, ongoing class action litigation, and the largest power supplier for the world's ninth largest economy. The larger *Lava Jato* investigation riveted Brazil and Latin America, and new developments were reported in the media seemingly every day. Our involvement spanned four years and two continents, but the investigation was ultimately resolved favorably in a manner that freed Eletrobras to pursue a privatized structure to better serve the energy needs of Brazil.

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Peter Spivack is one of the most experienced members of the Investigations, White Collar and Fraud practice area and served as the global co-leader of the practice for six years. Peter has three decades of experience working with multijurisdictional investigations, including matters involving allegations of bribery and corruption under the FCPA, the UK Bribery Act, and other anti-bribery laws. He has represented companies and individuals in investigations brought by multilateral institutions such as the World Bank and Inter-American Development Bank. Peter also has considerable experience in representing entities and individuals in criminal and civil enforcement matters involving health care, government contracts, competition, and antitrust issues.

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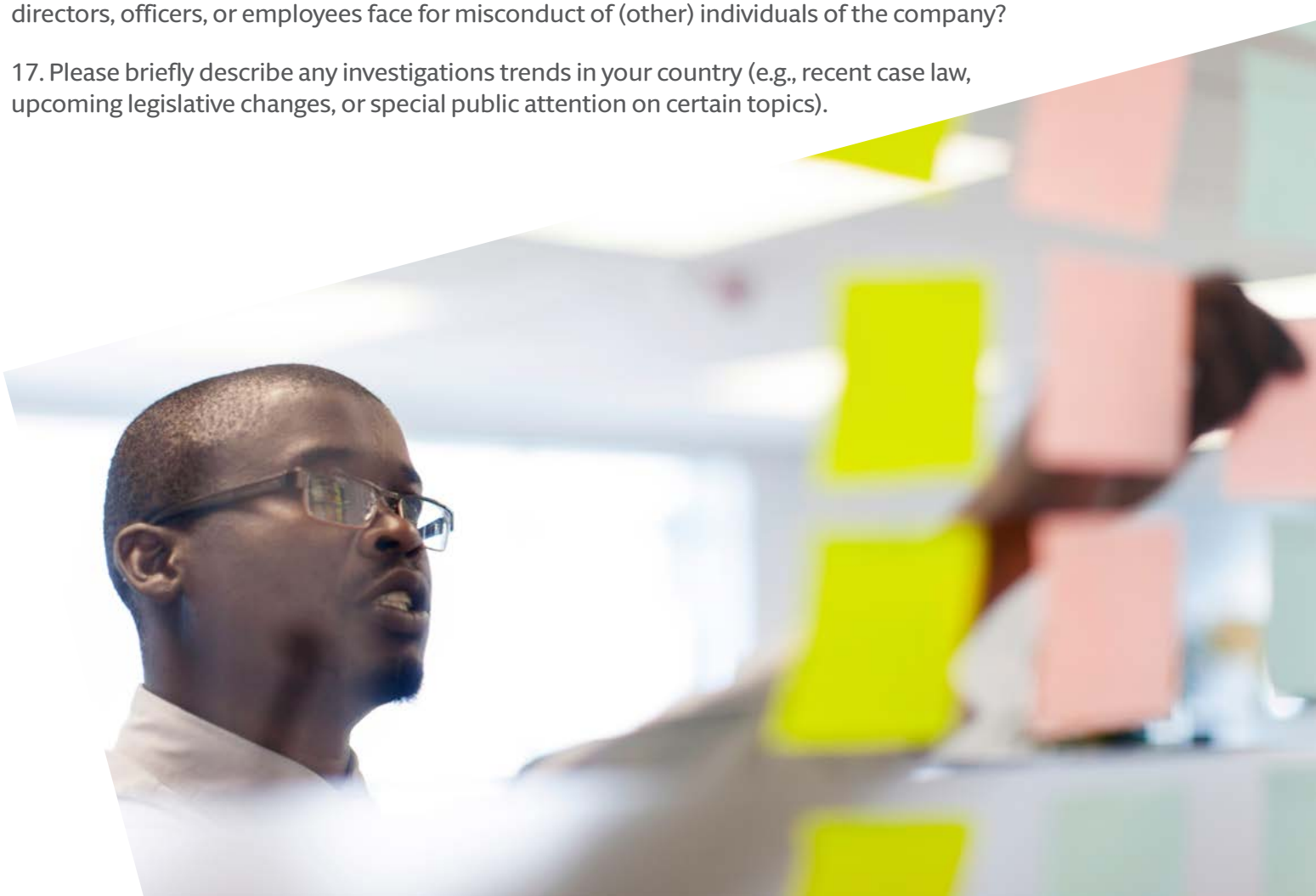
Leveraging his experience abroad and his fluency in four languages, Rafael Ribeiro has significant experience conducting international internal investigations and representing clients in cross-border disputes.

As Latin American countries have begun cracking down on corruption and implementing anti-bribery legislation to target wrongdoers, Rafael has been at the forefront of this movement as part of the team that conducted two of the region's most high-profile anti-corruption investigations on behalf of energy sector clients. These investigations involved novel issues regarding the interplay between local anti-corruption legislation and the FCPA, privilege, data privacy, interactions with regulators from multiple jurisdictions, and parallel civil disputes in several countries.

Guide questions

- 1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?
- 2. Do the following persons/bodies have the right to be informed or is the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?
  - a) Employee representative bodies, such as a works council or union.
  - b) Data protection officer or data privacy authority.
  - c) Other local authorities.
  - d) What are the consequences in case of non-compliance?
- 3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?
- 4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?
- 5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:
  - a) Conducting interviews?
  - b) Reviewing emails?
  - c) Collecting (electronic) documents and/or other information?
  - d) Analyzing accounting and/or other mere business databases?
- 6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?
- 7. Before conducting employee interviews in your country, must the interviewee:
  - a) Receive written instructions?
  - b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?
  - c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?
  - d) Be informed that he/she has the to have his/her lawyer attends?
  - e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?
  - f) Be informed that data may be transferred across borders (in particular to the United States)?
  - g) Sign a data privacy waiver?
  - h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?
  - i) Be informed that written notes will be taken?
- 8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time, form, sender, addressees, etc.)?

- 9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?
- 10. Can attorney-client privilege also apply to in-house counsel in your country?
- 11. Are any early notifications required when starting an investigation?
    - a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.
    - b) To business partners (e.g., banks and creditors).
    - c) To shareholders.
    - d) To authorities.
- 12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?
- 13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?
- 14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?
- 15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?
- 16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?
- 17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).



Argentina

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X		X	X
No			X		

Argentina

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In Argentina, the following laws and regulations apply:

- International conventions criminalizing corruption: (i) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (ii) Inter-American Convention Against Corruption; and (iii) United Nations Convention Against Corruption.
- Articles 256 to 259 and articles 265, 266, 268 and 300 of the Argentine Criminal Code (*Código Penal de la Nación Argentina*) criminalize different types of corruption.
- Articles 300 to 306 of the Argentine Criminal Code (*Código Penal de la Nación Argentina*) criminalize money laundering.
- Corporate Criminal Liability Law (*Ley de Responsabilidad Penal de las Personas Jurídicas*) No. 27401.
- Law on Ethical Conduct in Public Office (*Ley de Ética en el Ejercicio de la Función Pública*) No. 25188 and Decree No. 1179/16.
- Decree on Contracting Practices in Public Procurement (*Decreto Régimen de Contrataciones de la Administración Pública*) No. 1023/01.
- Law on Anti-Money Laundering and Counter-Financing of Terrorism (*Ley de Encubrimiento y Lavado de Activos de Origen Delictivo*) No. 25246.

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

There is no legal obligation to inform labor unions or other worker representative bodies of internal investigations.

b) Data protection officer or data privacy authority.

There is no legal obligation to inform a data protection officer or data privacy authority of internal investigations.

c) Other local authorities.

There is no legal obligation to inform local authorities of internal investigations. However, if an administrative or criminal procedure has been initiated against a company or a party associated with a company, it is advisable to coordinate with the public prosecutor's office about the applicable rules of evidence during an internal investigation.

d) What are the consequences in case of non-compliance?

Not applicable.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees have a duty to support investigations initiated by their employer as a consequence of the duty of collaboration that arises from the labor relationship. Under Labor Contract Law No. 20744

(*Ley de Contrato de Trabajo*), the employer has the right to request information about the work performed by employees, and employees have a corresponding duty to provide such information.

It is advisable to request employees' consent to collaborate with internal investigations in advance.

Employees cannot be forced to participate in interviews for an internal investigation. However, an employee's refusal to cooperate may constitute lack of collaboration that could lead to disciplinary measures or sanctions under the law.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Labor Contract Law No. 20744 (*Ley de Contrato de Trabajo*) does not provide a specific deadline for an employer to apply disciplinary sanctions on employees; however, it is required that the employer apply any disciplinary sanction or measure within a reasonable time from the date in which the internal investigation confirms the existence of a breach. Best practices establish that such reasonable time should not exceed 10 days.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

There are no specific data privacy laws, state secret laws, or blocking statutes that apply to conducting interviews in internal investigations.

b) Reviewing emails?

It is advisable to have policies addressing email communications where it is indicated that the company has the power to control emails, that employees do not have a reasonable expectation of privacy when using the company's email service, and to obtain written acknowledgment from employees regarding those internal rules.

c) Collecting (electronic) documents and/or other information?

Article 12 of Data Protection Law No. 25326 (*Ley de Protección de Datos Personales*) provides that personal data cannot be transferred abroad to a "non-adequate" destination (regardless of whether the transfer is to a subsidiary of the company), imposing fines of up to AR$ 100,000 (or US$ 1,800 according to the current exchange rate) for violations. If email, data from personal interviews, electronic documents, or any other kind of personal data is being transferred to the United States (a non-adequate destination according to Law No. 25326), then the company will either need: (i) to obtain consent from the data subject or (ii) to execute an international data transfer agreement. No consent or transfer agreement is required for countries deemed adequate, like those in the European Union and in the European Economic Area, among others.

d) Analyzing accounting and/or other mere business databases?

The provisions referred to in paragraph c) above also apply to business databases. For accounting functions, there are no relevant applicable data privacy laws, state secret laws, or blocking statutes where personal data is not involved. Otherwise, the provisions indicated in paragraph c) shall apply.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

There are no specific procedures that need to be considered in cases where a whistleblower report sets off an internal investigation. Corporate Criminal Liability Law No. 27401 provides whistleblower protection against retaliation among the elements of an adequate compliance program. Therefore, it is very important to protect employees that report misconduct, ensuring that there is no retaliation in relation to the issues raised or information provided in good faith, and to adopt sanctions against anyone who violates the company's non-retaliation policy.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

It is not mandatory for the interviewee to receive written instructions before participating in an employee interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Although it is not mandatory, it could be advisable under specific circumstances.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

Although it is not mandatory, it is advisable to inform the employee that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee.

d) Be informed that he/she has the right to have his/her lawyer attend?

Although it is not mandatory, it could be advisable under specific circumstances.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

It is not mandatory, but it is recommended.

f) Be informed that data may be transferred across borders (in particular to the United States)?

It is required to sign an international data transfer agreement before sending the data to the United States or other "non-adequate" jurisdiction under Law No. 25326, using the standard contractual clauses established by the Argentine Data Protection Agency.

g) Sign a data privacy waiver?

It is not mandatory.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

It is not mandatory. However, it is advisable to inform employees that the information gathered in an interview might be passed on to third parties, including local or foreign authorities.

i) Be informed that written notes will be taken?

It is not mandatory, but it is advisable to inform the interviewee that written notes of the interview will be taken.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

Yes, hold notices and document retention notices are allowed in Argentina.

Retention notices usually detail the type of evidence that must be preserved for the purposes of an investigation, including electronic information such as emails, documents and calendar invitations, as well as printed documents like notes, drafts and duplicates. To keep track of hold notice recipients, the notices should ideally require an acknowledgement of receipt, although evidence of having read a notice sent by email might be sufficient.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Attorney-client privilege may be claimed over the documents produced by lawyers conducting an internal investigation.

There are no specific steps that must be taken to ensure the protection of the attorney-client privilege in Argentina. Client-attorney communications are protected and the attorney's duty of professional secrecy is linked to the constitutional right granted under Article 18 of the Argentine Constitution, which addresses the right to a legal defense and the protection against self-incrimination.

In addition, the Argentine Criminal Code criminalizes the disclosure without due cause of a secret obtained by a person due to his/her status, occupation, employment, profession, or art. Moreover, Article 244 of the Argentine Code of Criminal Procedure establishes the duty to refrain from disclosing secret facts known to the person by reason of their state, job, or profession under penalty of nullity.

Article 244 specifically mentions attorneys, procurators, and notaries, among other professions. Similarly, Article 232 of the Argentine Code of Criminal Procedure indicates that a court can order the presentation of persons and documents, but this order cannot be addressed to parties who can or should refrain from serving as witnesses because of their professional secrecy.

In addition, other regulations that protect professional secrecy are found in local codes of procedure and in the codes of ethics of each of the local bar associations. In this regard, Law 23187 and the Code of Ethics of the Bar Association of Buenos Aires City (Code of Ethics) set forth a specific duty for attorneys to faithfully observe professional secrecy, unless authorized by the interested party. Furthermore, Article 10 of the Code of Ethics recognizes professional

secrecy and the duty to rigorously oppose judges or any other authorities that seek the disclosure of professional secrets by refusing to answer questions that expose him/her to violate the secrecy. Some exceptions to the rule apply, such as when a client grants authorization to disclose the secret or when a lawyer reveals the secret in his/her own defense. Finally, Article 10 of the Code of Ethics also establishes the attorney's duty to observe the right to the inviolability of his/her office and the documents entrusted to him/her.

10. Can attorney-client privilege also apply to in-house counsel in your country?

There are no clear rules or case law regarding this matter.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Insurance contracts usually include provisions that establish the duty of the insured to provide notice of any circumstance that may affect the matters covered by the insurance policy.

b) To business partners (e.g., banks and creditors).

Generally speaking, there is no legal requirement to provide prior notice of an investigation to business partners.

c) To shareholders.

There is no legal requirement to provide prior notice of an investigation to shareholders.

d) To authorities.

There is no legal requirement to provide prior notice of an investigation to authorities. However, in some cases, particularly those involving alleged violations of regulatory requirements, matters that could affect public health or issues dealing with consumer or environmental rights, it may be necessary or advisable to give notice to the respective control organism(s).

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

Depending on the subject matter of the case under investigation, it might be necessary to take immediate action once the irregular conduct has been discovered in order to: (i) stop or prevent the irregular transfer of funds and (ii) avoid the destruction (involuntary or voluntary) of potentially relevant documents. Neither the competent authority nor the applicable legislation provides for specific measures that must be taken immediately, beyond those discussed above.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Corporate Criminal Liability Law No. 27401 was recently adopted, and legal precedence addressing the relationship between local prosecutors' offices and internal corruption investigations is not fully developed.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants are judicial orders that require due process, must indicate the scope of the search, and identify the premises where the search will be performed. Eventually, the seizure of documents or objects should only include those that may constitute criminal evidence and should be promptly recorded by the authorities executing the search.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Under Article 16 of Corporate Criminal Liability Law No. 27401 (*Ley de Responsabilidad Penal de las Personas Jurídicas*), companies and the public prosecutor are entitled to enter into cooperation agreements where a company commits to provide useful information related to an investigation, identify wrongdoers, and provide reimbursement of any monies illegally obtained. Cooperation agreements may be executed until a summons for trial is issued. Negotiations between companies and the public prosecutor are confidential and subject to court approval and supervision. Cooperation agreements must identify the information to be provided by the company and require: (a) the payment of a fine equivalent to any moneys obtained as a consequence of the illegal activity; (b) reimbursement of the amounts illegally obtained; and (c) delivery of any assets that would be confiscated if a judgment was issued. Finally, cooperation agreements may also require remediation actions, community service, disciplinary measures against individuals involved in the wrongdoing and implementation of an adequate compliance program.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

The fines imposed under Corporate Criminal Liability Law No. 27401 (*Ley de Responsabilidad Penal de las Personas Jurídicas*) on legal entities found guilty of offenses are as follows: (a) fines between two and five times the amounts illegally obtained or that the company may have obtained as a consequence of the crime; (b) suspension of corporate activities for up to 10 years; (c) inability to participate in public bids or

doing business with government for up to 10 years; (d) cancellation of the entity's legal capacity if the company was created for the purpose of committing a crime or crimes or when the company's main activity was criminal in nature; (e) loss or suspension of state benefits; and (f) publication of the judgment at its own cost.

When applying these sanctions, courts must take into account: (a) the company's compliance with its internal rules and procedures; (b) the number and seniority of the executives, collaborators, or employees involved in the wrongdoing; (c) the extent of the failure to control the wrongdoers' activities; (d) the monetary damages caused with respect to the size, nature, and economic capacity of the company; (e) whether there was self-reporting and collaboration with the official investigation; (f) the company's willingness to mitigate or to repair the damage caused; and (g) recidivism, if any (recidivism is defined as the commission of a second crime within three years of a prior judgment). Payment of economic sanctions may be paid for up to five years, if necessary for the continuity of the company and to protect the company as a source of employment.

Moreover, legal entities shall not be subject to any sanctions or administrative liability when all the following circumstances are present: (a) there is self-reporting as a consequence of an internal investigation; (b) there is an adequate compliance program in place prior to the occurrence of the offense; and (c) the company refunds any monies illegally obtained. In the case of individuals, their condition and participation must be evaluated on a case-by-case basis and the penalties may range from one to six years in prison, disqualification for public officials and fines ranging from two to five times the amount illegally obtained from the corrupt act.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Corporate Criminal Liability Law No. 27401 (*Ley de Responsabilidad Penal de las Personas Jurídicas*) entered into force on 1 March 2018. Consequently, although many companies in Argentina have already adjusted their compliance programs to the meet the requirements of the new law, the manner in which internal investigations are being performed has not yet been significantly impacted by the new legislation. In fact, we are not aware of the existence of any judicial investigation against a company based upon the provision of the Corporate Criminal Liability Law No. 27401 to date. Corruption-related investigations currently being pursued before the local courts mostly relate to an alleged systemic corruption scheme affecting public construction contracts or public concessions, and correspond to acts committed prior to the entering into force of Corporate Criminal Liability Law No. 27401.

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TICKETS

Brazil

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X		X	X
No			X		

Brazil

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

Generally, investigations related to corruption, bribery, and money laundering in Brazil are subject to the Brazilian Clean Company Act (*Lei Anticorrupção*, Law No. 12,846/2013), the Brazilian Money Laundering Act (*Lei de Prevenção à Lavagem de Dinheiro*, Law No. 9,613/1998), and the Brazilian Criminal Code. In addition, other statutes may apply depending on the sector or industry at issue. For example, cases involving public tenders may be subject to the Brazilian Public Procurement Law (*Lei de Licitações*, Law No. 8,666/1993) whereas cartel and antitrust cases are subject to the Brazilian Antitrust Law (*Lei de Defesa da Concorrência*, Law 12,529/2011).

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

Not required by law. Although Collective Bargaining Agreements can impose the obligation to inform labor unions or works councils about internal investigations, that requirement is unusual in Brazil.

b) Data protection officer or data privacy authority.

The Brazilian General Data Privacy Law (*Lei Geral de Proteção de Dados Pessoais,* or LGPD) requires the appointment of an officer to oversee the processing of employee personal data. The officer can be an individual or a third-party organization. Also, as working responsibilities, the tasks shall include communication with the data subjects and regulatory authority, adopting privacy-related measures within the organization and educating the employees as well as vendors on data protection practices.[1]

c) Other local authorities.

Private companies are not required to report the commencement of an investigation to local authorities. However, public officials may be required to report certain crimes, whereas individuals and companies involved in financial services must report financial crimes and suspicious transactions to the Council for the Control of Financial Activities (*Conselho de Controle de Atividades Financeiras*, or COAF). Furthermore, upon receiving notice from management of any wrongdoing, a board of directors may consider whether it is appropriate to contact law enforcement authorities in addition to commencing an internal investigation, given fiduciary duties imposed by corporate law and potential prosecution credits for cooperation.

The Office of the Comptroller General (*Controladoria Geral da União*, or CGU), Federal Prosecutor's Office (MPF), local prosecutor's offices, Federal Audit Court (*Tribunal de Contas da União*, or TCU), local audit courts, Federal Police, Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica*, or CADE), and Securities and Exchange Commission (*Comissão de Valores Mobiliários*, or CVM) are the major authorities to consider when reporting the commencement of an investigation.

d) What are the consequences in case of non-compliance?

Taking into consideration that companies are generally not required to report the commencement of an investigation, in the case of non-reporting, the company may receive an order to provide clarifications and further information.

1. LGPD was enacted on 14 August 2018. However, on 28 December 2018, former President Michel Temer signed Executive Order No 869/18 making some important changes to the LGPD, most notably creating the Brazilian National Data Protection Authority (*Autoridade Nacional de Proteção de Dados,* or ANPD). This Order was adopted by the Brazilian Congress in May 2019.

2. All abbreviations refer to the name or title in Portuguese, unless otherwise noted.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees are expected to cooperate in internal investigations but should not be forced to participate in interviews and should not be penalized for refusing to be interviewed. In Brazil, labor courts tend to be pro-employee, therefore, imposing cooperation on employees may expose the company to liability. Accordingly, the company should not include advance consents in its labor contracts and policies.

In addition, there are no specific laws or procedures in Brazil providing guidance on how to conduct employee interviews. As a result, interviews usually follow internationally accepted investigation standards. The investigation team usually takes interview notes, and their disclosure to the interviewee should be avoided.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Under best investigation practices, the suspension (as allowed under Brazilian labor laws) of an employee who is suspected of misconduct is recommended. Suspension is not a legal requirement but a practice that has been applied in most large cross-border investigations in Brazil. Also, under Brazilian law an employee can be dismissed with cause (which applies in limited circumstances, such as criminal convictions and breach of employment duties) or without cause (which impacts the calculation of employment indemnifications). As previously mentioned, labor courts tend to be very "pro-employee" in Brazil, thus it is very common for employees to challenge a dismissal (mainly dismissals with cause) in labor courts. Even if the dismissal of an employee is paid in accordance with the law and dismissal costs are properly undertaken, attempts to revert a dismissal or seek further compensation are common.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

None.

b) Reviewing emails?

None. Brazil does not have specific laws or regulations that must be taken into account before reviewing corporate emails for internal investigations. However, according to the Brazilian Federal Constitution, privacy includes all means of communication. Accordingly, access and review of personal emails is prohibited, even if these are located on a corporate device. Therefore, the review of employee emails should only involve corporate emails located on corporate devices (e.g., mobile phones, desktops or laptops) and employment policies should include information prohibiting the use of corporate devices for personal purposes and contain employee consent for the collection of data.

c) Collecting (electronic) documents and/or other information?

On 12 August 2018, the legislature in Brazil adopted the Brazilian Data Protection Law or BDPL (Law No. 13,709/2018), which provides new rules and guidelines for the use of personal data by individuals, private entities, and the public sector. Accordingly, it is advisable that companies obtain prior, clear, and unequivocal consent to collect information from employees subject to an internal investigation, in particular when information is retrieved from corporate devices provided by the company to the employee. By doing so, a company undertaking an internal investigation may be protected from a claim of breach of privacy by the employee. It is important to stress that consent can be secured during the course of business, such as during compliance training. However, if the company does not have policies or procedures related to investigations, it is highly recommended to secure employee consent before the commencement of the investigation.

information is often exchanged with company-owned personal devices provided to the employee for business use, even if individuals also use them for personal purposes. In that respect, it is highly recommended that companies prohibit their employees from using personal devices to handle corporate emails since personal devices cannot be accessed by internal investigators unless authorized by the users. However, if an employee uses chat applications on corporate devices (e.g., WhatsApp, Telegram, Wicker, WeChat), then the data from those applications can be monitored and analyzed by the company.

In addition, processing personal data is not allowed unless permitted under one of following circumstances: (a) with consent from the individual; (b) for compliance by the controller with a legal or regulatory obligation; (c) for the execution of an agreement; (d) to protect health, such as in procedures carried out by health professionals or by health entities; (e) for the legitimate interest of the controller or third party; or (f) for credit protection.

For a consent to be valid, it must be in writing or a legally equivalent manner and should demonstrate the data subject's intention. It is the controller's responsibility to previously inform the employee of the purpose for processing the personal data. The data subject has the right to revoke consent at any time and general authorizations are null and void. Lastly, special conditions are imposed for the processing of sensitive data or data involving underage subjects.

The BDPL encourages data processing agents to implement governance standards and best practice programs. Such measures must be considered by authorities if the company is exposed to liability and penalties are imposed.

Note that the BDPL will be enforceable within 18 months from its enactment. Companies will need to implement policies, procedures, and data processing standards in compliance with the BDPL's regulations within this time. It is uncertain how the application of the new law will be interpreted by public authorities and the courts in Brazil once it comes into effect.

d) Analyzing accounting and/or other mere business databases?

None.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

Brazil does not have a whistleblower protection law or any similar legislation that requires setting a hotline or other anonymous communication channel in private entities. However, on 11 January 2018, Law No. 13,608 was enacted to authorize states to create such hotlines. According to the law, hotlines should preferably be free of charge and operated by a non-profit private entity, through a partnership agreement with the appropriate government entity.

In addition, if an informant chooses to be identified, the confidentiality of his or her personal data must be protected by the entity that receives the report. Also, this law provides that the various subdivisions of government, including federal, state, federal district, and municipal levels, may establish ways to reward whistleblowers who disclose useful information to prevent, repress, or investigate crimes and/or administrative offenses.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

Not required by law.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Not required by law.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

Not required by law. However, the performance of internal investigations is a recent trend in Brazil, so international investigation guidelines are often used as a basis to define procedures. Accordingly, providing Upjohn warnings, complying with requests to not record the interview and stressing confidentiality is recommended since these practices do not violate any Brazilian laws or regulations.

d) Be informed that he/she has the right to have his/her lawyer attend?

Not required by law.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

Not required by law. Collective bargaining agreements can impose the obligation that labor unions must be informed about internal investigations; however, this is unusual in Brazil.

f) Be informed that data may be transferred across borders (in particular to the United States)?

Not required by law.

g) Sign a data privacy waiver?

Not required by law.

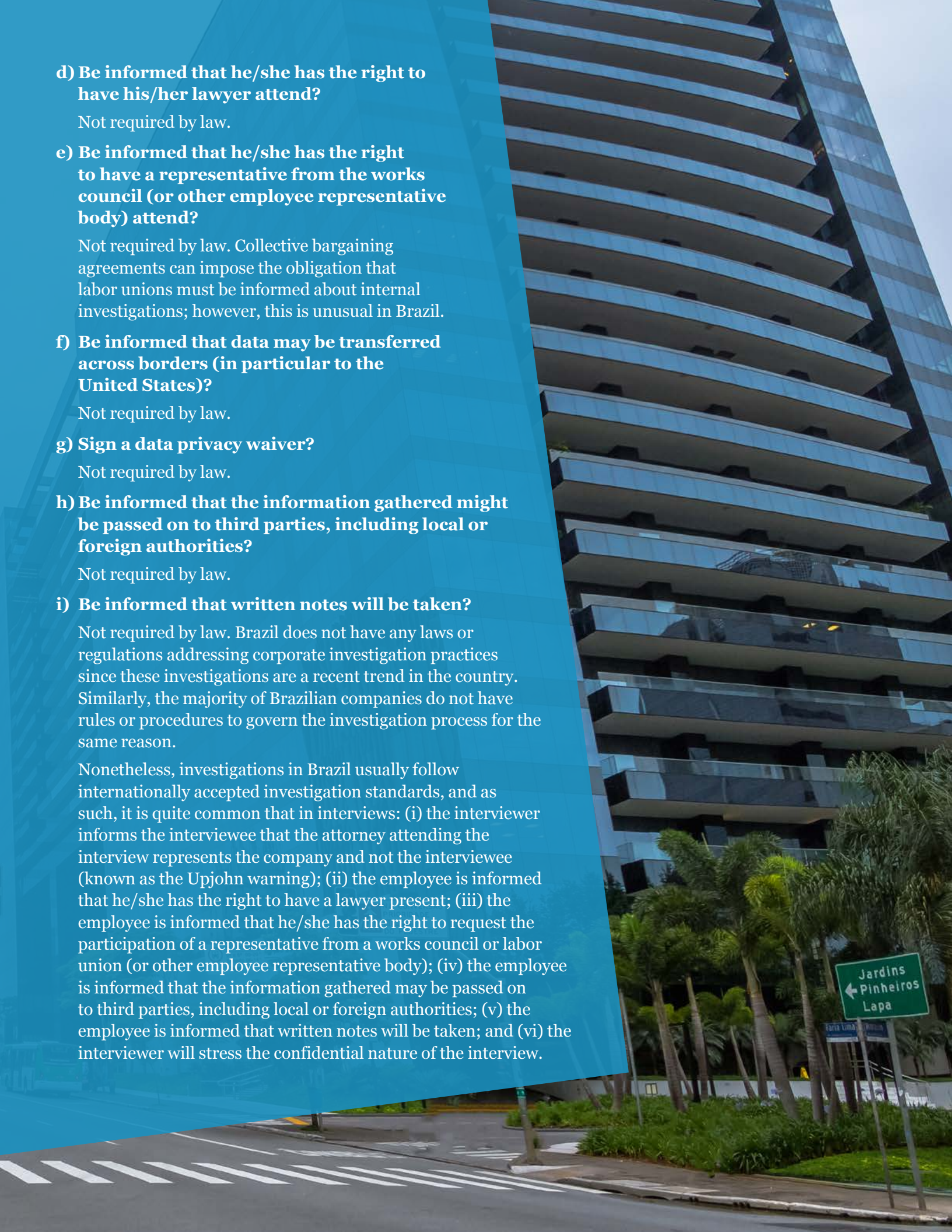
h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

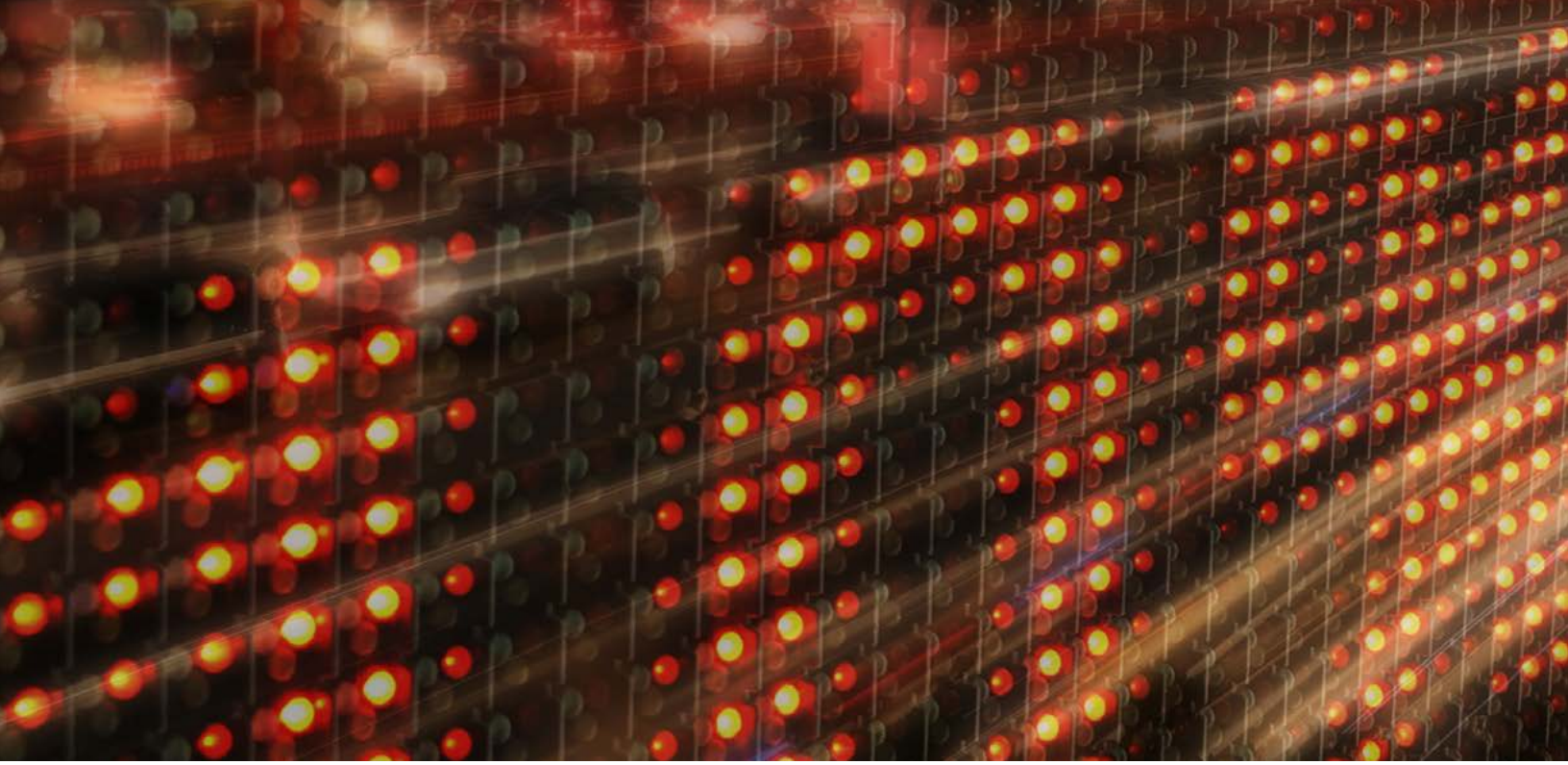
Not required by law.

i) Be informed that written notes will be taken?

Not required by law. Brazil does not have any laws or regulations addressing corporate investigation practices since these investigations are a recent trend in the country. Similarly, the majority of Brazilian companies do not have rules or procedures to govern the investigation process for the same reason.

Nonetheless, investigations in Brazil usually follow internationally accepted investigation standards, and as such, it is quite common that in interviews: (i) the interviewer informs the interviewee that the attorney attending the interview represents the company and not the interviewee (known as the Upjohn warning); (ii) the employee is informed that he/she has the right to have a lawyer present; (iii) the employee is informed that he/she has the right to request the participation of a representative from a works council or labor union (or other employee representative body); (iv) the employee is informed that the information gathered may be passed on to third parties, including local or foreign authorities; (v) the employee is informed that written notes will be taken; and (vi) the interviewer will stress the confidential nature of the interview.





8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

There is no legal requirement related to issuing hold notices for private investigations. However, the Clean Company Act (Law No. 12.846/2013) defines as misconduct any act that hinders a public investigation; thus, companies should consider issuing a hold notice to all employees advising that no documents or data should be deleted until further notice.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Generally, Brazilian law recognizes the attorney-client privilege over information provided by a client to an attorney in the course of representation, and attorneys may not disclose such information to third parties. Therefore, attorneys may claim that products of the investigation (such as investigation reports, memorandums, or interview transcripts) are covered by privilege. To protect the confidentiality of internal investigations, companies should require non-attorneys (who are bound by confidentiality obligations regardless of any other formalities) to sign non-disclosure agreements.

Marking materials as "privileged and confidential" and informing witnesses of the legal purpose of the investigation are recommended steps to ensure privilege protection. Marking a document will help to identify it and avoid inadvertent production of any privileged or work-product material. Only attorney-client communications and attorney work product should be marked as confidential. Communications – including those between an attorney and the client – that do not convey or contribute legal advice are unlikely to be deemed privileged.

10. Can attorney-client privilege also apply to in-house counsel in your country?

There is no legal distinction between inside and outside counsel in Brazil, thus the attorney-client privilege applies to both in-house and external lawyers. In-house lawyers have the same legal professional privilege as those in private practice, provided that they have been granted the necessary powers to represent the company and act as lawyers. As long as the communication involves legal issues and the lawyer (in-house or external) is licensed or registered with the competent Brazilian Bar Association, the privilege extends to communications between employees (clients) and counsel.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Not explicitly required by law. However, the Brazilian Civil Code provides that the policyholder shall inform the insurance company of any circumstance that may affect the premium. Moreover, lack of reporting is generally a breach of contract and may give rise to a claim.

b) To business partners (e.g., banks and creditors).

Not required by law.

c) To shareholders.

The board of directors of a publicly held corporation must immediately inform the stock exchange and publish in the press resolutions taken at a general meeting, actions taken by a corporation's administrative bodies, or any relevant facts that occur during the course of business that may substantially influence the decision of market investors to sell or buy securities issued by the corporation.

d) To authorities.

Private companies are not required to report the start of an investigation to authorities. However, public officials may be required to report certain crimes and parties involved in financial services must report financial crimes and suspect transactions to the COAF. Therefore, if the investigation relates to such activity, the company may be required to report it.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

As previously mentioned, Brazil does not have legal requirements or guidelines related to the performance of internal investigations. Also, the decision to publicly report the existence of an internal investigation or contact with law enforcement depends on several factors, including whether the company has shares that are publicly traded. The time and breadth of the disclosure should be analyzed on a case-by-case basis.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Since Brazil does not have legal requirements or guidelines related to the performance of internal investigations, the interaction with public authorities should be analyzed case by case. Local prosecutor offices tend to appreciate cooperation and sharing of information.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Local authorities must secure a search warrant in court before entering a company's premises and must abide by the limitations outlined in the warrant.

While attorneys can claim privilege over certain materials, in practice, the authority conducting the raid will collect any document it deems relevant, and then the party subject to the raid could later challenge the use of privileged documents or information as evidence before the judge hearing the case. In the Operation Car Wash[3], for example, the presiding judge requested certain documents seized to be delivered to Odebrecht's lawyers (a construction company indicted over bribery allegations) for the identification of privileged documents, giving them 72 hours to review the materials. In this case, the lawyers had to clarify the origin and purpose of the materials, and the criteria used to classify them as privileged.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Various Brazilian statutes provide for the permissibility of entering into leniency agreements with authorities. While the particular requirements may vary depending on the authority, companies must usually cease the illegal conduct and assist with the investigation to be eligible, including presenting clear evidence of the wrongdoing that will allow the authorities to prosecute offenders. The benefits of leniency agreements include the reduction or waiver of fines and may prevent exclusion from the public procurement process.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

Under the Clean Company Act, companies found to have engaged in certain crimes are subject to strict liability and may face fines of up to 20 percent of the gross revenue from the preceding year, disgorgement of assets, rights or profits, suspension or interdiction of business activities, dissolution, prohibition from receiving public incentives and/or funds from public institutions, and a ban from participating in public tenders.

Also, controlling, controlled, or affiliated companies are jointly liable for fines and full reparation of damages. Moreover, a successor's liability is limited to the payment of fines and total compensation for the damages caused. Please note that a successor company is not subject to other sanctions arising out of an activity that occurred prior to a merger or amalgamation, except where the transaction was performed for fraudulent purposes.

3. Operation Car Wash, which started in 2014 and is still ongoing, is the largest and most significant high-profile corruption investigation in Brazil. Judge Sergio Moro, who has led Operation Car wash, was recently named Minister of Justice and indicated that the fight against corruption will continue to be a priority in Brazil.

In addition, companies may face penalties arising from other laws – the Money Laundering Act, Public Procurement Law, Improbity Law, and Antitrust Law – which generally provide separate penalties, such as fines and debarment from public procurement. Individuals involved in the misconduct are also subject to criminal prosecution.

Finally, courts and other public authorities will look into a company's compliance program to assess how effective it is and if it complies with our local regulation.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Although the Brazilian Clean Company Act was enacted in 2013, the Brazilian anti-corruption scenario was deeply shaped by the development of Operation Car wash.

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Chile

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X	X	X	X
No					

Chile

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In Chile, the core legislations addressing anti-corruption, bribery, and money laundering are:

- Criminal Code (*Código Penal*, or CC): The CC penalizes bribery of local and foreign public officials, including the offer, delivery, request, and receipt of payments or other advantages, including facilitating payments. In addition, the CC penalizes commercial bribery by providing that the private party offering or delivering a payment or benefit with the intent to be awarded a contract, and the party requesting or receiving such payment or benefit are both subject to criminal liability.

  Penalties for violations include fines, imprisonment, and disqualification from holding public office.

- Law No. 20,393 on Criminal Liability of Legal Entities (*ley sobre la Responsabilidad Penal de las Personas Jurídicas*, or CLLE Law): The CLLE Law imposes criminal liability on legal entities where conduct: (i) constitutes bribery of local or foreign public officials, money laundering, financing of terrorism, or commercial bribery, among other crimes; (ii) is perpetrated in the legal entity's interest, directly or indirectly by its owners, representatives, executives, other individuals in charge of carrying out the entity's business (e.g., agents), or individuals under those persons' supervision and control; and (iii) results from the entity's failure to exercise supervision and control as required by law. These obligations are deemed fulfilled only if the company has effectively implemented internal controls or regulations to prevent the crimes at issue (i.e., has a compliance program that meets statutory requirements).

  Penalties for violations include: (i) the dissolution or cancellation of the legal capacity of the entity; (ii) temporary or perpetual disbarment; (iii) partial loss or temporary prohibition to receive certain government benefits; (iv) fines of up to 300,000 UTM (approximately US$21 million); and (v) other ancillary penalties, such as publication of an excerpt of the relevant judicial decision.

- Law No. 19,913 or the Anti-Money Laundering Act (*ley que crea la Unidad De Análisis Financiero y modifica diversas disposiciones en materia de lavado y blanqueo de activos*, hereinafter the AMLA): The AMLA sanctions money laundering in Chile, penalizing anyone who:

  1) Possesses, hides, or otherwise conceals assets knowing that they directly or indirectly originate from certain crimes, including: (i) drug trafficking; (ii) terrorist acts; (iii) arms control law violations; (iv) securities law violations; (iv) banking law violations; (v) bribery, embezzlement of public funds, and other crimes committed by public officials; (vi) fraud; (vii) tax fraud (restricted hypotheses); (viii) disloyal management; and (ix) embezzlement; or

  2) Acquires, possesses, keeps, or uses such goods intending a financial gain or profit, when the party knows of the illicit origin of the goods or assets at the time they were received.

Penalties for money laundering include imprisonment and fines, confiscation of assets, and other penalties for individuals.

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

The company is not required to inform employee representative bodies or labor unions about an investigation, unless the company's Internal Order, Hygiene, and Safety Regulations (Internal Regulations) provide otherwise, which is not a common practice.

b) Data protection officer or data privacy authority.

Companies are not required to have a data protection officer, and it is not common practice. There is no data privacy authority in Chile.

c) Other local authorities.

In cases involving sexual harassment, if the company decides not to conduct an internal investigation, Article 211-C of the Chilean Labor Code (*Código Laboral*) requires that the employer inform the Labor Board that a sexual harassment complaint has been received so that such authority can conduct the relevant investigation. This notice must be given within five days of receiving the claim by the employee. If the company decides to conduct an internal investigation, it must report its conclusions to the Labor Board.

d) What are the consequences in case of non-compliance?

Non-compliance with the obligations indicated in sections a) and c) above may expose the company to administrative fines. Additionally, if the company decides not to conduct an internal investigation concerning sexual harassment and does not comply with its obligation to inform the Labor Board (*Dirección del Trabajo*), the company may be subject to employee claims for breach of the employer's obligation to protect the employee's life and health and/or violating her/his fundamental constitutional rights.

If a Labor Court determines that a company has infringed on an employee's fundamental rights, it could be exposed to administrative fines, compensation of damages for pain and suffering (*daño moral*) and debarment from entering into government contracts. In addition, if the infringement arises from termination, the employer will have to pay the employee a sum that is equivalent to six to 11 month wages.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

No, employees have no duty to support an internal investigation and the company cannot impose disciplinary measures if an employee refuses to cooperate. At the time of the investigation, it is advisable to document the employee's acceptance or refusal to cooperate.

Although an express authorization for employee cooperation may be included in employment contracts or Internal Regulations, the enforceability of such provisions is questionable. Therefore, any subsequent disciplinary measures could be successfully challenged in court.

Access by the employer to employees' corporate emails and personal devices is not regulated, and judicial and administrative decisions in this regard are not uniform. Nonetheless, decisions allowing the implementation of employer monitoring practices have established certain requirements, including that the employer's right to monitor be included in the company's Internal Regulations, and that any monitoring be preventive in nature and respects employees' dignity and honor, among others.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

While there is no specific legal time limit for imposing a disciplinary measure or sanction (particularly termination) on an employee, labor court decisions have consistently found that any such measure or sanction must be communicated and implemented promptly after the conclusions of an internal investigation become available. Otherwise, a court may find that the relevant misconduct was waived by the employer and/or was not a material breach. The only exception is for sexual harassment complaints, where the company has 15 days from the issuance of the investigation report to adopt the relevant sanctions or disciplinary measures.

In addition, an unreasonably long investigation could also trigger an employee claim for lack of protection or violation of his/her constitutional rights.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

Yes. From a labor perspective, interviews and the entire internal investigation process must be kept strictly confidential, with the exception of disclosure to those employees who are directly involved (claimant and accused) and, if applicable, to the Labor Board.

In addition, Law No. 19,628 on the Protection of Private Life (*ley sobre protección de la vida privada*, or DPL) provides that the processing of personal data must be authorized by statute or by the individual whose data is processed. Because the investigative interview may involve the processing of the employee's or interviewee's personal data, he/she must give written informed consent that identifies the purpose for processing the personal data and that includes the possibility of disclosure to third parties or the public. Electronic consent will suffice if, at a minimum, it allows for the formal identification of the consenting individual. If the employee does not consent, moving forward with the investigation may constitute infringement of the DPL, unless processing the relevant data is permitted based on a legal obligation or right (e.g., social security entities are allowed to process personal data in certain cases).

b) Reviewing emails?

Yes. Although the review of employee emails is not expressly regulated by law, the review of private or corporate emails by an employer without employee consent may constitute a violation of the constitutional right to privacy and amount to a criminal offense, even if the emails were sent or received on company-owned devices.

With regard to corporate and work-related emails (i.e., not private communications), Labor Board and labor court decisions provide non-binding criteria under which employers may review such emails. These criteria include giving sufficient notice to employees of the intent to review business emails, including clauses in employment contracts giving the employer the right to review such emails, restricting the use of corporate email accounts to business communications and providing a warning that there shall be no expectations of privacy when using corporate email accounts.

Also, because reviewing emails entails the processing of personal data, the DPL applies (see answer to 5.a) above).

Moreover, since unauthorized access and review of employee emails may constitute a violation of fundamental constitutional rights and may amount to a criminal offense, legal counsel should be consulted in advance of any such access or review.

Collecting (electronic) documents and/or other information?

Yes. In addition to the restrictions against disclosure and processing of personal data described in question 5.a) above, other confidentiality restrictions may apply to documents. Such restrictions generally consist of contractual non-disclosure obligations, such as those contained in certain business agreements, public tender rules, etc.

c) Analyzing accounting and/or other mere business databases?

No, provided that the databases include company business information. To the extent they include employee information, see 5a) above.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

To the extent the company has an internal procedure addressing this issue, it must be followed. Otherwise, while there is no specific whistleblower protection for employees, any measures or changes in employment conditions subsequent to a whistleblower's report (e.g., relocation, demotion, sanctions, etc.) could be considered discriminatory retaliation and trigger employee claims of unlawful discrimination and infringement of fundamental constitutional rights.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

No, unless it is required in the company's Internal Regulations, which is not a common practice.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

No, unless it is required in the company's Internal Regulations, which is not a common practice.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

No, unless required in the company's Internal Regulations, which is not a common practice. However, it is highly advisable to do so as a matter of professional and business ethics and as a best practice.

d) Be informed that he/she has the right to have his/her lawyer attends?

No, unless required in the company's Internal Regulations, which is not a common practice. It is very unusual for an employee to attend an internal investigative interview with his/her lawyer.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

This is not expressly regulated by law. However, it is not customary that a labor union or work council representative attends an interview in the context of an internal investigation.

f) Be informed that data may be transferred across borders (in particular to the United States)?

Not specifically, but the general obligations regarding confidentiality and data processing, as provided in the responses to section 5 above, will apply.

g) Sign a data privacy waiver?

Not specifically, but the general obligations regarding confidentiality and data processing, as provided in the responses to section 5 above, will apply.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Yes, as provided in the responses to section 5 above.

i) Be informed that written notes will be taken?

No.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

Although document hold notices or document retention notices are neither regulated by law nor common in Chile, it is customary for companies to maintain documents related to an investigation for a period of time that should be no less than the applicable statute of limitations (five years for labor and employment-related obligations, six years for tax matters, etc.).

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Professional secrecy (*secreto profesional*) may protect the findings of an internal investigation, provided there is an attorney-client relationship and the findings are subject to protection under professional secrecy. The main steps to be taken in order to claim such protection are to engage external counsel to conduct the investigation; provide external counsel all evidence, findings, and documents produced during the investigation; and identify all such information and documents as subject to professional secrecy.

10. Can attorney-client privilege also apply to in-house counsel in your country?

No. As a company employee, in-house counsel does not have an attorney-client relationship with the company and, therefore, the *secreto profesional* privilege does not apply.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

No, unless otherwise provided in the relevant insurance policy.

b) To business partners (e.g., banks and creditors).

No, unless otherwise provided in the relevant loan or other agreements.

c) To shareholders.

No, unless otherwise provided in a shareholders' agreement.

d) To authorities.

No. However, in some cartel cases early notice to the antitrust authority through a leniency application may exempt or mitigate fines and criminal sanctions against individuals.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

From a labor perspective, it is advisable (and mandatory in the case of sexual harassment complaints) for the employer to adopt measures to protect the relevant employees, including the avoidance of direct contact between the alleged victim and perpetrator to prevent a violation of the employee's fundamental constitutional rights, preventing the perpetrator's eventual retaliation, among others.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In general, prosecutors will be concerned that evidence procured through internal investigations is legally obtained so that it could be used later during a future criminal investigation and trial, if applicable. Otherwise, a prosecutor's position regarding the value and usefulness of an internal investigation will vary depending on his/her own views and theories in connection with the case when compared with the results of the internal investigation.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants must: (i) identify the building or location to be searched; (ii) identify the public prosecutor in charge of the investigation; (iii) identify the law enforcement agency conducting the search; and (iv) state the reasons justifying the search. In addition, a court may authorize law enforcement to seize documents and assets related to an investigation. If these requirements are not met, the use of evidence obtained from an unlawful search may be challenged in a pre-trial court hearing and may be prohibited from being introduced in the relevant criminal proceeding.

Antitrust dawn raids conducted by the National Economic Prosecutor (*Fiscalía Nacional Económica,* or FNE) must be previously approved by the Chilean Competition Court (*Tribunal de Defensa de la Libre Competencia*) and by a judge from the Santiago Court of Appeals. The request must be based on specific indications of the existence of severe collusion practices. While not expressly provided by statute, a recent decision by the Supreme Court – whose decisions are highly persuasive but not generally binding – found that evidence that does not comply with these requirements must be set aside.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Yes. A prosecutor and corporate defendant may enter into a deferred prosecution agreement called a conditional suspension of a criminal procedure (*suspensión condicional del procedimiento*). Any such agreement will be subject to: (i) court approval, (ii) the legal entity not having a prior conviction and (iii) the non-existence of any other such agreement entered into by the defendant. The case will be dismissed and filed if the corporate defendant fulfills the agreement within six months to three years, depending on the terms of the agreement. Otherwise, prosecution of the case could be reinitiated.

Plea bargain agreements (*procedimiento abreviado*), where a defendant may avoid a guilty plea and criminal trial and receive a limited penalty proposed by the prosecutor, are also available for corporate defendants. The main requirements for such agreements are that: (i) the defendant admits the truthfulness of facts provided in the indictment, as well as of the investigation background; (ii) the prosecutor requests a penalty that does not exceed 10 years of imprisonment; and (iii) the relevant court approves the legality of the agreement.

A compensatory agreement, or *acuerdo reparatorio*, whereby a victim agrees to drop charges based on an agreement by the defendant to compensate damages, is also available to corporate defendants in certain cases.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

If a legal entity is subject to criminal liability under the CLLE Law as a result of the actions or omissions of certain individuals (see answer 1 above), that entity may be subject to fines, disgorgement, confiscation, debarment, and even dissolution or termination of its legal personality. In antitrust cases, a company may be subject to fines, amendment, or termination of anti-competition agreements or transactions, and debarment in the case of cartels. In labor cases, the employer may be subject to fines.

In the case of individuals (including directors, officers, and employees), only the individuals that actively participated through actions or omissions in the relevant misconduct are subject to liability as there can be no liability for the misconduct of others.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Between November 2018 and January 2019, two new laws were approved creating new types of fraud and bribery-related criminal offenses, expanding and increasing penalties for existing ones, and expanding criminal liability of legal entities. This affects all existing and future corporate compliance and crime prevention programs and is likely to bring about a substantial increase in corporate and white-collar crime enforcement.

Regarding data protection, a bill amending the DPL is currently being reviewed by Congress. If passed, it will likely introduce substantial changes to data privacy regulation, such as: (i) the introduction of new bases for the processing of personal data, such as the legitimate interest or contractual obligations; (ii) the creation of a data protection agency with oversight and sanctioning authority; and (iii) the regulation of international data transfers and related matters concerning data security.

On labor and employment matters, in 2018 sexual harassment claims filed with the Labor Board increased by 33 percent. While there is no public record of corporate internal investigations regarding sexual harassment claims, the trend is likely consistent with the Labor Board statistic. This has resulted in a sustained growth of the implementation of preventive measures to avoid any misconduct that could trigger internal investigations.

Finally, regarding antitrust enforcement, a new National Antitrust Prosecutor (head of the FNE) was nominated in December 2018. It is too soon to determine whether this new authority will continue or vary his predecessor's focus on anti-cartel and price-fixing cases.

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Mrs. Silva obtained her law degree at Universidad de Chile and holds a Master of Commercial Law specialized in E-law from University of Melbourne, Australia (2008). She also completed the WIPO Executive Program on Strategic Intellectual Property Management in 2012.

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Colombia

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X	X	X	X
No					

Colombia

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

The international agreements and standards related to money laundering and financing of terrorism applicable in Colombia are:

- International standards to promote effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system; The Financial Action Task Force (FATF) (1990).
- The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1998).
- The International Convention for the Suppression of the Financing of Terrorism (1999).
- The United Nations Convention against Transnational Organized Crime (2000).
- The United Nations Convention against Corruption (2003).
- Memorandum of Understanding between the Governments of the States and of the Financial Action Group of South America against money laundering [GAFISUD] (2000).

Domestic regulations include:

Money laundering and terrorist financing:

- Law 526 of 1999 creating the Information and Financial Analysis Unit (*Ley 526 de 1999 por medio de la cual se crea la Unidad de Información y Análisis Financiero*).
- Law 599 of 200 Criminal Code (*Ley 599 de 2000 Código Penal*).
- Law 906 of 2004 Criminal Procedure Code (*Ley 906 de 2004 Código de Procedimiento Penal*).
- Law 1121 of 2006 dictating rules for the prevention, detection, investigation, and sanction of terrorism financing, and other dispositions (*Ley 1121 de 2006 por la cual se dictan normas para la prevención, detección, investigación y sanción de la financiación del terrorismo y otras disposiciones*).
- Law 1453 of 2011 amending the Criminal Code, Criminal Procedure Code, Code for Children and Adolescents, rules on forfeiture, and issuing other dispositions related to security (*Ley 1453 de 2011 por medio de la cual se reforma el Código Penal, el Código de Procedimiento Penal, el Código de Infancia y Adolescencia, las reglas sobre extinción de dominio y se dictan otras disposiciones en materia de seguridad*).
- Law 1762 of 2015 adopting mechanisms to prevent, control, and sanction smuggling, money laundering, and tax evasion (*Ley 1762 de 2015 por medio de la cual se adoptan instrumentos para prevenir, controlar y sancionar el contrabando, el lavado de activos y la evasión fiscal*).
- Law 1581 of 2012 providing general dispositions related to personal data protection (*Ley 1581 of 2012 – Por la cual se dictan disposiciones generales para la protección de datos personales*).
- Decree 633 of 1993 Organic Statue of the Financial System (*Decreto 663 de 1993 Estatuto Orgánico del Sistema Financiero*).
- Decree 1497 of 2002 regulating Law 526 of 1999 and issuing other dispositions (*Decreto 1497 de 2002 por el cual se reglamenta parcialmente la Ley 526 de 1999 y se dictan otras disposiciones*).
- External Circular No. 0170 of 2002 – Tax and Customs National Office (*Circular Externa No. 0170 de 2002 – Dirección de Impuestos y Aduanas Nacionales*).
- External Circular No. 8 of 2011 – Superintendence of Surveillance and Private Security (*Circular Externa No. 8 de 2011 - Superintendencia de Vigilancia y Seguridad Privada*).

- External Circular No. 1536 of 2013 – Superintendence of Notary and Registry (*Circular Externa No. 1536 de 2013 – Superintendencia de Notariado y Registro*).
- Basic Legal Circular No. 029 of 2014 – Financial Superintendence (*Circular Básica Jurídica No. 029 de 2014 – Superintendencia Financiera*).
- Basic Legal Circular No. 100-000001 of 2017 – Superintendence of Corporations – Chapter X (*Circular Básica Jurídica No. 100-000001 de 2017 – Superintendencia de Sociedades – Capítulo X*).
- Legal Circular of the Superintendence of Industry and Commerce (*Circular Única de la Superintendencia de Industria y Comercio*).
- Resolution No. 74854 of 2016 – Superintendence of Ports and Transportation requiring the mandatory implementation of an integral program to prevent and control money laundering, terrorism financing, and proliferation of weapons of mass destruction (*Resolución No. 74854 de 2016 – Superintendencia de Puertos y Transporte por la cual se establece de manera obligatoria la implementación del sistema integral para la prevención y control del lavado de activos, la financiación del terrorismo y financiamiento de la proliferación de armas de destrucción masiva*).
- Resolution No. 20161200032334 of 2016 providing the requirements to implement and apply the anti-money laundering and counterterrorism financing program – AML/CFT – on companies from the gambling sector and those related to localized games, novel games, sports betting and canine events or similar activities authorized by Coljuegos (*Resolución No. 20161200032334 de 2016 por medio de la cual se establecen los requisitos para la Adopción e Implementación del Sistema de Prevención y Control de Lavado de Activos y Financiación del Terrorismo – SIPILAFT– en las Empresas del sector de juegos de suerte y azar localizados, novedosos y de apuestas en eventos deportivos, gallísticos, caninos y similares autorizados por Coljuegos*).
- Resolution No. 2564 of 2016 providing the rules related to anti-money laundering and counterterrorism financing for Postal Service Operators and repealing Resolution 3677 of 2013 (*Resolución No. 2564 de 2016 por la cual se establecen las reglas relativas al Sistema de Administración del Riesgo de Lavado de Activos y Financiación del Terrorismo para los Operadores Postales de Pago y se deroga la Resolución 3677 de 2013 – Ministerio de Tecnologías de la Información y las Comunicaciones*).
- CONPES 3793 de2013 – Financial Information and Analysis Unit (*Unidad de Información y Análisis Financiero* (UIAF)).

Bribery and corruption:

- Law 599 of 200 of the Criminal Code (Ley 599 de 2000 Código Penal).
- Law 906 of 2004 of the Criminal Procedure Code (Ley 906 de 2004 Código de Procedimiento Penal).
- External Circular No. 100-000003 of 2016 – Superintendence of Corporations (Circular Externa No. 100-000003 de 2016 - Superintendencia de Sociedades).
- Law 1474 of 2011 – Anti-corruption Code (Ley 1474 de 2011- Estatuto Anticorrupción).
- Ley 1708 de 2014 (Código de Extinción de Domino).
- Law 1778 of 2016 – Transnational Bribery Law (Ley 1778 de 2016 - Ley de Soborno Trasnacional).
- External Circular No. 04 of 2014 – Superintendence of Solidary Economy (Circular Externa No. 04 de 2014 – Superintendencia de Economía Solidaria)

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a work council or union.

The company does not have to inform employee representative bodies, such as labor unions, about an internal investigation before it is commenced. However, the labor union to which an employee is affiliated may participate in the investigation since employees are allowed to invite two witnesses or

two labor union members to the investigation interview.

b) Data protection officer or data privacy authority.

The Data Protection Officer (DPO) must be informed of any misconduct that may lead to an internal investigation related to data protection and privacy within the company.

As for informing the Data Privacy Authority (DPA), it will depend on the occurrence of a data breach. According to the general rule stated in section II, subparagraph 2.1 f), second heading in Chapter V of the *Legal Circular* issued by the DPA (*Circular Única de la Superintendencia de Industria y Comercio*), a data breach must be reported to the DPA through the National Database Registry within 15 business days. However, the data breach only has to be reported if it has been confirmed through an investigation.

c) Other local authorities.

There is no other authority that should be informed.

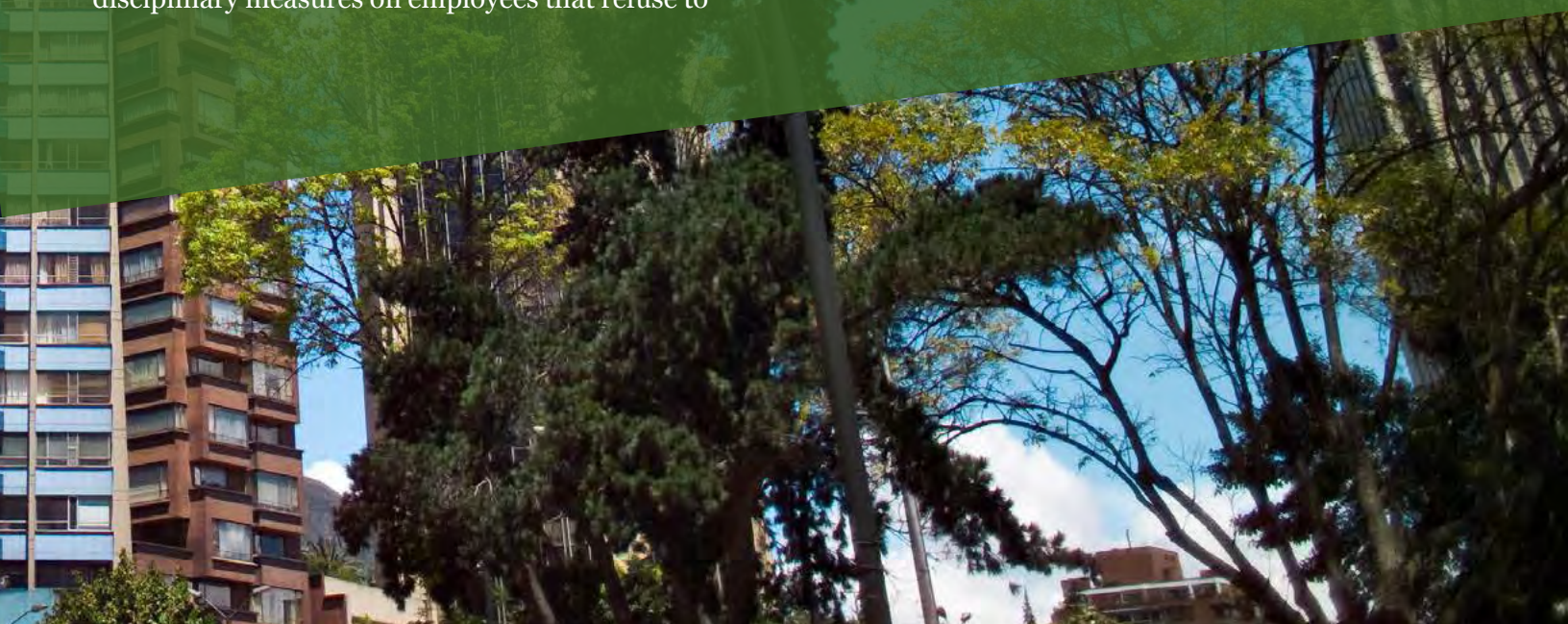
d) What are the consequences in case of non-compliance?

Non-compliance with personal data protection obligations may lead to fines of up to 2,000 times the monthly legal minimum wage (equivalent to approx. US$500,000) and penalties imposed by the DPA, including the suspension or prohibition of general operations under specific circumstances.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

The duties of employees, set forth in Article 58 of the Colombian Labor Code, include cooperation with investigations in cases of imminent risk to people, assets or the commercial establishment of the company. Moreover, employees have a duty to support investigations aimed at solving internal issues. In order to prepare employees and employers to address these situations, companies should include the obligation to cooperate with corporate investigations by any means and in good faith in the code of conduct or other internal employee regulations. Finally, companies may impose disciplinary measures on employees that refuse to cooperate with an investigation since this constitutes a violation of Colombian labor laws and, if applicable, of the internal company regulations.

Furthermore, the general AML regulation sets out that an entity's compliance officer should be an employee with proper experience in AML risk management and should supervise and exercise control over the company's compliance program. In some cases, a board of directors or shareholders may create additional corporate bodies to make the necessary determinations when suspicious activities have been detected.



4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

On 30 August 2017, the Supreme Court of Justice set forth that in cases of disciplinary penalties or termination of employment by an employer, the application of the penalty must be timely, immediate, explicit, and concrete.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

As general rule, an employer that intends to process the personal data of its employees must obtain prior and informed consent in accordance with the *Legal Circular* issued by the DPA (*Circular Única de la Superintendencia de Industria y Comercio*). Accordingly, employers should obtain prior and informed consent before conducting employee interviews where the disclosure of personal data is expected.

In addition, under Article 42 of Law 1621 of 2013 (*Ley 1621 de 2013*), if a company supports intelligence and counterintelligence operations performed by National Special Organs, the use and privacy of information obtained during a corporate interview should be evaluated on a case-by-case basis.

b) Reviewing emails?

If a company has to review business emails during a corporate investigation, it is recommended that the employee authorize such review as provided by the Legal Circular issued by the DPA ("*Circular Única de la Superintendencia de Industria y Comercio*"). However, since the workplace can be regarded to be a public and a private space, it is very important to set rules stating the scope of control that can be exercised by the employer over email communications and set limits to the access of private information by the parties running the investigation.

Employee authorizations should include consent to the review of business emails and other data saved on personal computers.

If a company supports intelligence and counterintelligence operations performed by National Special Organs and the emails include information related to such operations, according to Article 42 of Law 1621 of 2013 ("*Ley 1621 de 2013*"), such emails may be exempt from review and these investigations must be evaluated on a case-by-case basis.

c) Collecting (electronic) documents and/or other information?

If the documents or the information contain employee personal data, the company must obtain prior and informed consent from the data subjects in accordance with the *Legal Circular* issued by the DPA (*Circular Única de la Superintendencia de Industria y Comercio*). However, since the workplace can be regarded to be a public and a private space, it is important to set rules stating the scope of control that can be exercised by the employer over electronic documents and set limits to the access to personal information by the parties running the investigation.

In any case, in order to protect the right to privacy, an analysis of the nature of information to be collected must be performed on a case-by-case basis prior to the collection of information, even if the documents and information are found on company-owned devices.

d) Analyzing accounting and/or other mere business databases?

Law 1581 of 2012 (*Ley 1581 of 2012*) is related to personal data protection and only applies to data owned by individuals. If the collected documents or databases are owned by the company and they do not include data from individuals, the employer is able to access them.

However, if accounting or business databases include personal data, the data subjects must grant prior and informed consent before the employer can process that data, as required under Law 1581 of 2012 (*Ley 1581 of 2012*).

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

The *Transnational Bribery Guide for Companies* issued by the Superintendence of Corporations provides that corporate ethics programs must include mechanisms aimed at providing confidentiality and protection to all employees, associates, and contractors that are willing to report bribery or corruption activity in the company. This means that each company should establish appropriate mechanisms to encourage whistleblowers to report infractions without fear of reprisals from company officials. The Superintendence of Corporations recommends enabling anonymous reporting lines and taking actions to guarantee that no reprisals for reporting infractions are taken. In Colombia, it is common to find whistleblower lines known as "transparency lines" that encourage customers, service users and third parties to report unethical conduct in business.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

The employee must receive a letter from the employer that sets a date and time for an interview as part of the proceedings of the investigation. The letter must contain the matter to be discussed and, in accordance with Colombian labor law, the employee must be able to provide a defense against the claims being investigated prior to the interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

No. The employee can make any declarations.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

No, as no specific rules apply. The introduction of the employer's lawyer is not mandatory.

d) Be informed that he/she has the right to have his/her lawyer attends?

Yes. Also, if the employee requests the presence of a lawyer, the employer may not refuse to allow the employee's lawyer to attend the interview.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

Yes. The employee must receive a letter from the employer setting a date and time for an interview as part of the proceedings of the investigation. This letter must state that the employee is allowed to bring two witnesses or union members to the interview.

f) Be informed that data may be transferred across borders (in particular to the United States)?

According to Colombian legislation, a personal data transfer takes place when the information is submitted from one controller to another. If the personal data is delivered from a controller to a processor[1], this is a transmission under Colombian law.

If the cross-border delivery of personal data implies a transfer between controllers, the authorization to process personal data granted by the data subject must include cross-border transfers as one of its purposes. Moreover, the data subject needs to be informed each time a transfer of the data is made by the controller or by a processor on behalf of a controller.

Cross-border transfers of personal data are, as a general rule, prohibited by Article 26 of Law 1581 of 2012 (*Ley 1581 of 2012*) unless the jurisdiction where the data will be transferred to meets at least the same data privacy and protection standards as the ones provided under Colombian law. Currently, the United States is considered to have adequate data protection standards, thus a data transfer can be performed to this jurisdiction without the requirement of specific consent.

1. A "controller" refers to a legal or natural person responsible for data processing (including creating databases).

In the event that a country does not provide adequate levels of data protection, a transfer without consent may be performed under one of these exceptions:

— With express and unambiguous authorization by the data owner.

— For the exchange of medical data.

— For the sale, purchase or other transaction related to bank and stock transfers.

— Transfers covered under international treaties to which Colombia is a party.

— Transfers necessary for the performance of a contract between the data subject and the controller, or for the implementation of pre-contractual measures (provided there is consent by the subject).

— Transfers legally required in order to safeguard the public interest.

If the cross-border delivery of personal data implies a transmission (between a controller and a processor), the controller and the respective processor must execute a Data Transmission Agreement in order to allow such flow of information.

The analysis to determine if the personal data flow is a transfer or a transmission must be made case by case in accordance with the specific conditions of the operation and the purposes of the processing for each party.

g) Sign a data privacy waiver?

Yes. In Colombia, as a general rule, a data privacy waiver or authorization must be obtained in order to gather and process personal data. Although it is possible to obtain this authorization through a written document, it is sufficient to gather the authorization by any means that allow confirmation of its existence and the scope of the consent given by the data subject.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Yes, a valid data processing consent must be issued by the data subject with a full understanding of the authorization's scope and purpose including the possible transfer of the data to third parties, as provided under article 9 of Law 1581 of 2012 (*Ley 1581 2012*).

i) Be informed that written notes will be taken?

Yes. The interview must be recorded in corporate minutes and the parties involved must agree with the contents of the document.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?

Hold notices or document retention notices are allowed in Colombia since they are not prohibited or otherwise regulated. Moreover, the Colombian Labor Code sets forth that employees may not destroy information belonging to the employer.

9. May attorney-client privilege be claimed over findings of the internal investigation?

Article 34 of Law 1123 of 2007 provides that an attorney may not betray a client by revealing or using the secrets that a client has entrusted to the attorney, unless there is written authorization from the client or to avoid the commission of a crime. In addition, Chapter X of the *Legal Basic Circular* of the Superintendence of Corporations provides that lawyers, notaries, and accountants are not compelled to report suspicious activity if the information came from a situation covered under the privilege of professional secrecy. Nevertheless, a lawyer may decide to report any information related to bribery, corruption, and money laundering even if protected by professional secrecy in order to avoid the commission of a crime.

10. Can attorney-client privilege also apply to in-house counsel in your country?

The attorney-client privilege applies to in-house counsel in the same manner as it applies to external attorneys. In accordance to Chapter X of the *Legal Basic Circular* of the Superintendence of Corporations, in-house counsel must report suspicious activities to the company's legal representative or to the compliance officer, who must then report these activities to the corresponding authority (UIAF).

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

It is not required to provide notice of an investigation to insurance companies unless it is required under an insurance policy's terms and conditions.

b) To business partners (e.g., banks and creditors).

It is not required to give business partners notice of an investigation unless it is required in a corresponding business agreement.

c) To shareholders.

It is not required to give shareholders early notice of an investigation; however, this will depend on the internal policies or by-laws of the company.

d) To authorities.

It is not required to give notice of an investigation to local authorities. Notwithstanding, if the company has confirmed a data breach, it must be reported to the DPA through the National Database Registry within 15 business days (See answer 2. b).

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

Although companies are initially in charge of internal investigations, the AML/CTF regulation sets forth that a compliance officer has the obligation to report confirmed suspicious activity to the UIAF. Moreover, Chapter X of the *Legal Basic Circular* of the Superintendence of Corporations states that while investigations are being carried out, the compliance officer must keep any evidence collected related to money laundering and terrorism financing. In any case, the general rule is that any person that has knowledge of the commission of a crime has the duty to file the corresponding complaint before a criminal prosecutor.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

Articles 549 to 564 of the Criminal Procedural Code set forth that corporate investigations may be carried out internally under certain conditions but the Prosecutor's General Office maintains preferential power to prosecute criminal actions. In that case, the individual known as private prosecutor may request authorization from a supervisory judge to perform investigative acts. The judge, apart from verifying compliance with legal requirements, will assess the urgency and proportionality of the investigative act. If it meets all legal requirements, the judge will order the prosecutor who authorized the investigation of the criminal action to coordinate its execution.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Search warrants and dawn raids may be carried out by administrative or criminal authorities, depending on the subject matter. On the criminal side, the Criminal Procedural Code distinguishes between search warrants performed under the scope of a criminal process and those performed at the investigation stage. In the first case, the judge must provide a previous authorization, and in the second, there is no need for authorization. Nevertheless, both processes need an authorization from the respective criminal prosecutor. On the other hand, administrative search warrants are regulated by Law 1564 of 2012 (Ley 1564 de 2012). This regulation states that a judicial authority must authorize a search warrant to be performed by administrative authorities.

If the evidence was not collected by legal means, the administrative authorities will not be able to use the information.

In administrative investigations, the government officer performing the investigation will require an official act or resolution issued by a competent authority establishing the scope and purpose of the audit or investigation. Once the evidence is collected and evaluated, if the administrative entity finds grounds to open a formal investigation and issue charges, the company will be informed of those actions. Under this type of procedure, the company will have the right to challenge the charges and provide evidence that supports its defense (due process).

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Article 19 of Law 1778 of 2016 ("*Ley 1778 de 2016*") lists the benefits available to companies that provide information related to criminal activity involving bribery. The Superintendence of Corporations will base its decision on the quality, utility, and propriety of information provided and the benefits for disclosure to authorities may include total or partial exoneration.

Under antitrust law, Article 14 of Law 1340 of 2009 (*Ley 1340 de 2009*) provides that the Superintendence of Industry and Trade will grant benefits to individuals and legal entities that have participated in illicit conduct if they inform the competition authority about such conduct and cooperate collecting information and evidence. These benefits may include the total or partial exoneration of the penalty.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

Article 91 of Law 906 of 2004 (*Ley 906 de 2004*) and Article 35 of Law 1778 of 2016 (*Ley 1778 de 2016*) set forth that legal entities can be sanctioned, either with fines or with the suspension of the legal personality, due to the illicit behavior of its legal representatives or managers. With respect to individuals, it is necessary to demonstrate that the director, officer, or employee was involved in the conduct in order to impose penalties. In any case, if a company officer commits fraud, then they may be subject to fines or imprisonment.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Regarding cases of transnational bribery, in 2018 the Superintendence of Corporations imposed a fine of approximately USD$1.5 million to international water management company Grupo INASSA S.A. after the Delegation of Economic and Accounting Affairs declared that Grupo INASSA S.A. was involved in transnational bribery for having offered or made payments to Ecuadorian public officials in 2016.

Also, on 6 December 2018, legal entities and individuals that participated in the "Ruta del Sol II" project were found guilty of corruption by the Administrative Tribunal of Cundinamarca as a result of the bribes offered to the former Vice-Minister of Transportation, Gabriel Ignacio García Morales. After finding that collective rights involving the protection of public moral, public budget, public transportation, and free and fair competition were breached, the tribunal proceeded to declare the Ruta del Sol II Concession Agreement definitively suspended. A fine of COP $800,156,144,362.5 (approx. US$250 million)[2] was also imposed on all the condemned parties (Concesionaria Ruta del Sol II, Construtora Norberto Odebrecht S.A., Odebrecht Latinvest Colombia S.A.S., Episol, among others). This is one of the most well-known cases of corruption because it involved public and private legal entities from across Latin America, including Colombia, where multiple public servants were convicted or are subjects to investigations.

2. Approximately USD $246.2 million.

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Prior to joining the Corporate/Merger and Acquisitions practice group, Santiago worked as a lawyer at the Superintendence of Public Utilities and was a legal intern at the Superintendence of Corporations. He focuses his practice on Corporate, M&A, and Compliance.

Costa Rica

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X	X	X	X
No					

Costa Rica

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In Costa Rica, the applicable laws are:

- Law No. 8422 against Corruption and Illicit Enrichment in Public Functions (*Ley contra la Corrupción y Enriquecimiento Ilícito en la Función Pública*).
- Law No. 7786 on narcotics, psychotropic substances, illicit drugs and related activities, money laundering, and terrorism financing (*Ley sobre estupefacientes, sustancias psicotrópicas, drogas de uso no autorizado, actividades conexas, legitimación de capitales y financiamiento al terrorismo*).
- Articles 347 to 354 of the Criminal Code, Law 4573 (*Código Penal*).
- Law 8968, Data Protection Law of Costa Rica (*Ley de Protección de la Persona frente al Tratamiento de sus Datos Personales*).

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

No, there is no obligation to inform works councils or unions of internal investigations. However, if an employee is under contract, it is important to review whether there is a clause that specifically provides this right.

b) Data protection officer or data privacy authority.

No, in Costa Rica it is not mandatory nor is it customary for companies to have a data protection officer.
The Data Protection Authority (as defined below) must be informed only where a breach of the security measures taken by the company to handle personal data has occurred (articles 38 and 39 of the Regulation of the Data Protection Law of Costa Rica, Law 8968).

c) Other local authorities.

No. In Costa Rica, there are no other authorities that must be informed about an internal investigation before it starts.

d) What are the consequences in case of non-compliance.

According to article 16 of the Data Protection Law, Costa Rica's Data Protection Authority (*Agencia de Protección de Datos de los Habitantes*, also known as PROHAB) has the authority to apply sanctions for non-compliance with Costa Rica's Data Protection Law.

Failure to take appropriate data security measures carries a penalty of up to 30 base salaries (around US$24,000) as well as the suspension from employment for up to six months of the party in charge of maintaining security for databases containing protected information.

Even when the Data Protection Law exclusively imposes monetary penalties, it is possible to seek an injunction in civil court against conduct in violation of the Data Protection Law. In these cases, a civil claim will have to be filed after the injunction.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

The Costa Rican Labor Code defines two principles that must be taken into consideration with respect to the duty of employees to support an investigation:

- The principle of good faith and fairness, which is included in all labor contracts under Article 19 of the Labor Code.
- The employee obligation to perform the services contracted subject to the authority of the employer, as well as the obligation to provide assistance without the right of additional remuneration.

Moreover, employees must comply with any measures implemented by the employer for the safety and personal protection in the company (Article 71 of the Labor Code).

Accordingly, labor courts have found that employees may cooperate with internal investigations, such as by participating as witnesses or in interviews, given that they are subject to the management and control of the company. However, if an employee refuses to cooperate, no disciplinary measures can be taken even when cooperation was expressly established in the employee's contract of employment.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

According to Article 414 of the Labor Code, the rights of an employer to justly dismiss or discipline employees expires within a period of one month that will begin to be counted from the time the wrongful conduct took place or once the conduct became known by the employer.

In the event that the employer must comply with a sanctioning procedure, the intent to sanction must be notified to the employee within the period prescribed and, thereafter, the one-month time limit will begin to run from the time the employer is in a position to decide on the issue.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

In Costa Rica, there are no rules or regulations for conducting interviews.

b) Reviewing emails?

In Costa Rica, the right to privacy and the right to secrecy in employee communications are without a doubt a fundamental right. However, these rights are not absolute and do not always prevail over the right of an employer to conduct business or to make use of work equipment. In this respect, an employer can establish surveillance measures, such as the review of employee emails, when these measures have been communicated in advance to the employee. The measures implemented by the employer are subject to the principle of good faith.

Data privacy and surveillance measures are regulated by the Data Protection Law, the Constitution of Costa Rica, and provisions of the Labor Code as well as the data protection rules dictated by the International Labor Organization.

c) Collecting (electronic) documents and/or other information?

According to the case law dictated by the Constitutional Chamber of the Supreme Court, employers in Costa Rica must guarantee the safety of employees' private data maintained on company devices. Information and electronic documents stored in an employee's computer are protected by the employee's fundamental right to secrecy of communications, even if such information is public record or company property.

The employer must obtain informed consent from the employee when seeking to access or use the private information maintained on company-owned equipment. This informed consent must be specific and unequivocal and has to fulfill the requirements established in Article 5 of the Data Protection Law.[1]

Also, according to jurisprudence, companies have unrestricted access to business information maintained on company-owned equipment such as computers, cellular phones and other devices. However, personal information contained in such devices must be respected.

d) Performing accounting functions and/or accessing business databases?

If accounting records or business databases include employee personal data, this data is protected by the provisions of the Data Protection Law No. 8968.

1. Article 5 of the Data Protection Law establishes the following requirements for valid informed consents: (i) it must be unequivocally provided by the owner of the personal data in writing or electronically and the owner has to be informed of the existence of the database; (ii) it must identify the purposes intended for the use of the personal data collected; (iii) it must identify the recipients of the information and others who can access the information; (iv) it must state whether it is mandatory or optional to respond questions required during the data collection process; (v) the consent must be maintained by the party responsible for managing the company's databases of personal information; (vi) it must identify the consequences of refusing to supply the personal information requested; (vii) it must explain the possibility of exercising the rights included in the Data Protection Law; and (viii) it must contain the address and identity of the person or company in charge of the database.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

In Costa Rica, there is no legislation addressing whistleblower protection in internal investigations.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

No, it is not necessary for the employee to receive written instructions unless the investigation involves a sexual harassment claim.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

No, there is no duty in Costa Rica to warn employees against making self-incriminating statements during the course of an interview unless the investigation is for a sexual harassment claim.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

Yes, there is an obligation to inform the employee that a lawyer present at the interview represents the company and does not represent the interviewee.

d) Be informed that he/she has the right to have his/her lawyer attends?

Yes, the party being interviewed has the right to be informed that they have the right to have an attorney present.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

Yes, public sector employees subject to an interview for a corporate investigation must be informed that they are entitled to have a union or council representative in attendance at the interview.

f) Be informed that data may be transferred across borders (in particular to the United States)?

Yes, according to the Data Protection Law and its regulations, the transfer of personal data requires the informed consent of the owner, and the data to be transferred must have been collected in a lawful manner and according to the criteria established by law. However, the transfer of personal data between the party responsible for maintaining business databases to a manager, service provider, information technology intermediary, or a company affiliate is not considered a transfer.

g) Sign a data privacy waiver?

Yes. In Costa Rica, the Data Protection Law No. 8968 is a public order law that grants the right to informative self-determination, which includes the principles and guarantees related to the legitimate treatment of personal data. The right of self-determination guarantees the right to be informed of the use of personal data and to grant the consent to use personal data. Information self-determination is also recognized as a fundamental right derived from the right to privacy, which allows control over the flow of personal information and aims to prevent discrimination.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Yes, under the Data Protection Law and its regulations, the transfer of information gathered during the course of an investigative interview to third parties, including local or foreign authorities, requires consent from the party involved.

i) Be informed that written notes will be taken?

Yes, there is a right to be informed that written notes or audio recordings will be taken.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

There is no particular regulation in Costa Rica on this issue.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Yes, according to Article 41 of the Code of Legal, Moral, and Ethical Duties of the Legal Profession, it is prohibited to reveal information obtained during the course of a corporate investigation that is protected by the attorney-client privilege. In Costa Rica, the obligation to maintain professional secrecy continues after the professional relationship has ceased. Moreover, Article 41 establishes that an attorney must warn his employees of the obligation to prevent disclosure of confidential client information subject to the attorney-client privilege.

If an attorney is called as a witness in an investigation against a client, he must invoke the right not to answer those questions whose answers are likely to violate the professional duty of secrecy.

10. Can attorney-client privilege also apply to in-house counsel in your country?

Yes, Article 7 of the Undisclosed Information Law No. 7975 imposes the obligation to maintain the confidentiality of protected information on any person (no matter the profession) who due to their position, employment, or business relationship has access to undisclosed confidential information, information with commercial value or information subject to non-disclosure as a result of a contract or agreement.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Yes, as this is typically required under most insurance policies.

b) Business partners, including banks and creditors.

Yes, if required by contract.

c) To shareholders.

Yes, if required by the status of the shareholder or under a shareholders' agreement.

d) To authorities.

Yes, according to Article 39.c of the Regulation of the Data Protection Law (*Reglamento a la Ley de Protección de la Persona frente al Tratamiento de sus Datos Personales*), notice of any corrective measures that a company will take following an investigation must be presented to the Data Protection Authority.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

In Costa Rica, the basic principle in any investigation is the respect of due process.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In Costa Rica, there is no particular regulation on this issue.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

According to Article 193 of the Criminal Procedure Code, search warrants for corporate entities must be issued by a judge and must take place between 6:00 a.m. and 6:00 p.m., except in cases of urgency.

The resolution that authorizes a search warrant must include the following information:

- Name and position of the person that orders the search warrant and the number assigned to the procedure.
- A precise identification of the place or places subject to search.
- The name of the authority that will be in charge of executing the search.
- The reasons for the search warrant.
- The time that the search will take place.

Also, a copy of the resolution that authorizes and orders the search warrant must be provided to the party subject to the search. Once the search is complete, the results must be promptly reduced to writing.

If these prerequisites are not fulfilled, the evidence gathered cannot be used (Article 181 of the Criminal Procedure Code).

15. Are deals, non-prosecution agreements or deferred prosecution agreements available and common for corporations in your jurisdiction?

Yes, it is common and possible for companies or corporations to enter into non-prosecution agreements. It is important to keep in mind that companies are only subject to civil liabilities resulting from any criminal activity and they are not subject to criminal convictions or penalties imposed on individuals that manage or effectively control those companies.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

According to the Labor Code, fines can be imposed on companies or company directors for any misconduct of the company that violates the Constitution of Costa Rica, the International Treaty on Human Rights or regulations of the International Labor Organization. The liability of natural persons is subjective whereas corporate liability is objective. When a third-party representative of the company engages in wrongful conduct, the company is also liable for such conduct and may be subject to sanctions.

Sanctions for parties involved in wrongdoing may include verbal or written warnings, temporary suspension of a labor contract without payment or termination of a labor contract without responsibility to the employer.

Also, in cases regarding the application of the Corruption and Illicit Enrichment in Public Functions Law, Article 44 establishes fines applicable to legal persons when their directors, managers, or employees give compensation, gifts, or provide an improper advantage when these are promised or offered in relation to the exercise of the functions inherent to the position or when using corporate assets or means for those purposes.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Costa Rica has increasingly faced issues related to corruption and non-compliance. As such, there is continuous public discussion on how to improve the laws that govern these issues as well as the enforcement of these laws. For these reasons, it is possible to expect changes to the legal framework in this area in the near future.

Moreover, since Costa Rica has a lot of investment from international companies, there will probably be modifications to the Data Protection Law of Costa Rica in the near future because of the enforcement of the European General Data Protection Regulation.

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Guatemala

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X			X
No			X	X	

Guatemala

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In Guatemala, the following laws apply to anti-corruption, bribery and money laundering:

- Criminal Code (*Código de Penal*), including the set of reforms known as the Laws Against Corruption (*Leyes Anti-Corrupción*).
- Law Against Money Laundering (*Ley Contra el Lavado de Dinero y Otros Activos*).
- Law to Prevent the Financing of Terrorism (*Ley de Prevención Contra el Financiamiento de Terrorismo*).
- Law to Extinguish Property (*Ley de Extinción de Dominio*).

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

No, there is no local regulation applicable to this matter. Collective agreements are usually limited to economic and social issues. Provisions regarding internal investigations are usually not included in these types of agreements.

b) Data protection officer or data privacy authority.

There is currently no specific data privacy law in Guatemala. As such, companies do not have an obligation to appoint a data protection officer, and there is no data privacy authority or agency. Companies do not have an obligation to report internal investigations to these agents or authority, and such agents or authority do not have the right to participate in corporate investigations.

c) Other local authorities.

According to the Anti-Money Laundering Act (*Ley Contra el Lavado de Dinero u Otros Activos*), all entities subject to the supervision of the Superintendence of Banks (*Superintendencia de Bancos,* or SIB) have the obligation to report unusual or suspicious transactions, including information regarding the parties involved, to the Prosecutor's Office (*Ministerio Público*) or the Special Verification Office (*Intendencia de Verificación Especial* – a division of SIB). This includes banks, financial groups, financial organizations, insurance agencies, credit card issuing agencies, offshore companies, factoring companies, and any other organization or financial institution that may be used as a tool for money laundering due to its everyday business operations.

d) What are the consequences in case of non-compliance?

Failure by an individual or legal entity subject to the supervision of SIB to comply with the obligation to inform the Prosecutor's Office or the Special Verification Office of money laundering activity may result in a fine of US$10,000.00 to US$50,000.00 (or its equivalent in local currency). Moreover, this conduct could be considered hampering and interfering with an investigation, both of which are crimes under Guatemalan criminal law.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

No, there is no duty to cooperate with an investigation. However, it is recommended that all interviews are documented in writing before an official administrative authority or by affidavit signed by the employee. Moreover, interviews should be carried out within regular working hours. Interview records should contain as many details and facts as possible.

Finally, since the interview is to be held voluntarily, the employee can stop or leave at any time.

Under circumstances where the employer is the owner of phones, computers, tablets, and other electronic devices used by the employee, these may be reviewed by the employer without prior authorization.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The statute of limitations for an employer to sanction employees is 20 business days from the day the company or employer learns of the event triggering the investigation. If the investigation will surpass the 20 business day term, the employer can make a written request to the Ministry of Labor to interrupt or stay the term for an additional 20 business days. This request may be filed as many times as needed. During that period, the employer's sanction rights are preserved and disciplinary measures may be applied for the duration of the new time limit, including dismissals with justified cause.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

As of the time of this guide, there is no specific data privacy law in Guatemala applicable to corporate interviews. However, the Guatemalan Constitutional Court has set certain precedents stating that the Free Access to Public Information Law (*Ley de Acceso a la Información Pública*, Decree 57-2008 of the Congress of the Republic of Guatemala) applies to parties that manage employee databases and/or obtain and have access to employee personal information.

This regulation applies to both individuals and legal entities, granting the following rights to the owner of the information: (a) information cannot be transferred without the prior written authorization of the owner; (b) information can only be used for the purpose for which it was obtained; (c) the owner of the information can request to have the information classified as confidential; and (d) the owner of the information can request updates and clarifications on the use of such information. There is an obligation to protect these rights if information is obtained through an interview.

Interviews are voluntary and can only be compelled by court order. Prior authorization is required for the transfer or disclosure of information obtained during the interview, including in cases where the interview was held by court order.

b) Reviewing emails?

The Constitution of Guatemala acknowledges the confidentiality of communications and states that information obtained without authorization or court order is not admissible in court. The Guatemalan Criminal Code provides that illegal access to communications is a crime punishable by fines of US$10 to US$ 150 and imprisonment of six months to three years. The maximum fine applies if the information obtained by the employee(s) pertains to official matters and/or if the information is published in any way.

If the company reviews employee e-mails under its domain, it could be argued that the company is the owner of such communications, and thus the penalties mentioned above will not apply. In addition, employees may authorize employers to review e-mails in their employment agreement or in writing in a separate document.

c) Collecting (electronic) documents and/or other information?

The same rights mentioned previously in section (a) apply. Therefore, if documents or information are collected, it is necessary to have prior written authorization from the owner of the information before such collection. Authorization may be granted by any written means, including electronic communications, as long as the grantor is properly identified.

d) Analyzing accounting and/or other mere business databases?

The rights mentioned previously in section (a) apply. However, this information may only be analyzed by its owner, the Tax Authority and by the District Attorney's Office with an appropriate court order.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

Currently, there are no legal requirements or procedures in this regard in Guatemala. Nonetheless, companies with compliance systems usually have internal procedures and protocols that must be followed when a whistleblower report triggers an investigation.

With regard to antitrust, Guatemala has not enacted an antitrust law as of the time of publication. Therefore, there are no specific procedures to be considered in this respect. However, the Guatemalan Congress is currently debating an antitrust bill, which is pending final congressional approval. As a result, it is uncertain what effects, if any, this law will have on whistleblower reports until a final version of the legislation is adopted.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

No. However, it is advisable to inform the interviewee that the interview is voluntary and that he/she may stop or walk away at any time.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

No. However, it is advisable to inform the interviewee that the interview is voluntary and that he/she may stop or walk away at any time.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

No, however, it is recommended to do so.

d) Be informed that he/she has the right to have his/her lawyer attends?

No, it is not mandatory to be informed that a lawyer may be present at an interview for a corporate investigation.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

No. This is not required by law. However, a Collective Agreement may include this type of provision.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

No, although it is recommended.

g) Sign a data privacy waiver?

No.

h) Must the interviewee be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

No. However, it is recommended.

i) Be informed that written notes will be taken?

No. However, it is recommended.

These interviews are commonly recorded by affidavits duly signed by the interviewee and a Public Notary, or in a deed, including notes and statements made by the interviewee executed by those present during the interview.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

Document hold notices are not regulated nor required under Guatemalan law. However, a criminal court can order the preservation of certain information or documents as a precautionary measure during a criminal trial.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Under Guatemalan law, an attorney must not reveal a client's secret. Attorneys have a duty of loyalty towards their clients and are responsible for any damages or harm caused to the client for having disclosed confidential information. An attorney that is called as a witness and is asked to produce evidence may not disclose any information provided by the client that is confidential (privileged). Therefore, an attorney may claim the attorney-client privilege protection if he/she is called to disclose the findings of an internal investigation for which he/she was properly engaged and provided services as an attorney.

10. Can attorney-client privilege also apply to in-house counsel in your country?

There are no precedents on this matter nor is it specifically regulated under Guatemalan laws. However, we are of the opinion that the relationship between in-house counsel and the company as employer-client qualifies as an attorney-client relationship and, as such, the privilege should apply.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Early notice to insurance companies in these cases is not legally required but may be contractually required in order to claim insurance coverage under the terms of an insurance policy.

b) To business partners (e.g., banks and creditors).

There is no legal obligation to give notice to business partners, but it may be required by contract.

c) To shareholders.

There is no legal obligation to give notice to shareholders, but it may be required by contract or the company's articles of incorporation, bylaws or SHA.

d) To authorities.

There is no legal obligation to give notice to authorities.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

Guatemalan law does not require any immediate measure to be taken once an internal investigation has started. However, if a crime is discovered during the course of an investigation or once it is finalized, the Guatemalan Criminal Code establishes the obligation to report such crime to the competent authorities. The sanction for failing to report criminal activity is a fine of up to US$125.00.

Regarding investigations carried out by the Prosecutor's Office, there is no immediate measure neither required nor established by law. However, it is advisable to provide any evidence to authorities and to cooperate with ongoing investigations.

Regarding antitrust, as stated above, the Guatemalan Congress is currently debating an antitrust bill, which is pending final congressional approval. As a result, the requirements of the final version of the law that may eventually be adopted by Congress are unknown at this time. In anticipation of the adoption of this antitrust legislation, many Guatemalan companies have begun to implement tailor-made antitrust compliance training programs for all executives, managers, and employees, especially those with sales and pricing responsibilities. Companies implementing such programs will be in a better position to detect the existence of anticompetitive conduct and, if necessary, to seek corporate leniency from antitrust authorities.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

There are no steps that must be taken to comply with the rules of local prosecutors. However, local prosecutors would probably be concerned if they consider that an internal investigation affects, interferes, or hinders an ongoing or future criminal investigation.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Under the Guatemalan Criminal Code, a search warrant can only be issued by a criminal court at the request of the Prosecutor's Office and will only be enforceable for the following 15 business days. The order must contain: (i) the name of the criminal court and a brief summary of the proceeding; (ii) the specific place to be searched; (iii) the authority that will carry out the search; (iv) the reason(s) for the search warrant; and (v) the date and signature of the judge issuing the order. The search may only take place from 6 am to 6 pm.

If those requirements are not fulfilled, any gathered evidence is not admissible in court.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Yes. The Prosecutor's Office may enter into plea agreements with companies involved in criminal investigations to prevent prosecution of underlying crimes. Such agreement can only be made for crimes for which imprisonment does not exceed five years, non-intentional crimes, and for tax-related offenses.

Once the company has pled guilty and has paid any damages or taxes owed as a result of the criminal activity, the criminal court then accepts the agreement and the company is placed on probation for a period of two to five years.

Such arrangements are common in Guatemala, particularly in tax-related crimes.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

Directors, officers or employees of a company are held responsible for the crimes of a company only if they participated in the alleged conduct and their participation made such crimes possible. In those cases, penalties can include fines, imprisonment, disgorgement and debarment. Additionally, a fine of US$10,000.00 to US$625,000.00 can be imposed on a company for each crime committed.

Employees, however, could be held liable for the civil responsibility and damages caused by the criminal act.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Recently, a trend has developed in Guatemala concerning tax-related felonies and corruption investigations. There has been a significant increase in investigations regarding money laundering, tax fraud, and other financial crimes, mainly due to the local presence of the International Commission Against Impunity (*Comisión Nacional Contra la Impunidad en Guatemala* or CICIG, a UN-sponsored international commission against organized crime) and an increased number of corruption cases discovered within local public authorities.

Alejandro Cofiño
QIL+4 Abogados, Partner

Alejandro is a partner at QIL+4 Abogados. His practice focuses on financing, foreign investment, banking, capital markets, commercial agreements, environmental compliance, international and cross-border agreements (Agency and Distribution), with special emphasis on different types of corporate finance, project finance, arbitration, and M&A in commercial, industrial, banking, financial, and energy sectors.

Alejandro has been involved in some of the most important financial transactions in Guatemala in the last few years, including 144 A/Regulation S private offerings in international capital markets, power project financing, acquisition of companies in commercial, industrial, banking, financial and energy sectors, and corporate financing for Guatemalan and Central American corporations. In these transactions he has represented local and foreign lenders, including banks, financial institutions, multilateral and development agencies, as well as borrowers that obtain financing governed under Guatemalan or foreign laws.

In addition to his finance-related experience, Alejandro handles environmental topics, including compliance and verification procedures, environmental due diligence, regulatory issues, and international treaties on climate change and clean development mechanisms, including carbon markets, environmental services, and REDD.

In 2011, before QIL+4 Abogados, Alejandro was a founding partner at 4Abogados. He also worked in Washington D.C. as legal advisor at the Inter-American Investment Corporation and in a joint program between an international law firm and Conservation International (CI). Alejandro is frequently invited to speak and join panels at seminars and meetings on topics related to his areas of practice, including subjects on entrepreneurship and young entrepreneurs. He is admitted to practice in Guatemala and in New York.

Verónica Orantes

QIL+4 Abogados, Associate

Veronica is an associate at QIL+4 Abogados. Her practice focuses on infrastructure and energy project finance and development. She has substantial experience advising foreign and domestic financial sponsors as well as borrowers and lenders in project financings throughout Latin America. In particular, Veronica has significant experience in the financing of energy and infrastructure projects in both bank and capital markets.

Veronica obtained her law degree at Universidad Francisco Marroquín and has an LL.M. from Duke University School of Law. She is admitted to practice law in Guatemala and in New York.

Melissa Echeverria

QIL+4 Abogados, Associate

Melissa is an associate with extensive experience in commercial and private banking, advising local and foreign financial institutions in syndicated loan structures, bond issuance, guarantee structures, cross-border transactions, and other types of financing structures and mechanisms.

Melissa has participated in a wide variety of advisory and due diligence assignments, including buy-side and sell-side M&As, project finance, structured finance, and debt and equity financings.

She also has experience representing clients in complex dispute resolutions and arbitration proceedings, including strategies to create solutions to complex litigation.

Melissa is an active member of the civil association for the Center of Antitrust Studies (*Centro de Estudios de la Competencia*). She obtained her law degree at Universidad Francisco Marroquín (cum laude, 2009) and has an LL.M. from Boston University School of Law (2014).

Marcos Ibargüen

QIL+4 Abogados, Partner

Marcos is a partner at QIL+4 Abogados. He is actively engaged in the practice of corporate, banking, and finance law, representing international and Guatemalan companies. He regularly participates in matters involving M&As, corporate and financial restructurings, strategic alliances, and business law in general.

Marcos has advised in several Eurobond issuances representing either the local issuer, including the Republic of Guatemala, among others, as well as the intermediary/underwriter bank. He also has extensive knowledge and experience in agency, distribution and franchise matters and agreements, both in negotiating new agreements as well as dealing with the complexities that often accompany terminations of those business relationships. Recently, Marcos has been involved in rapidly changing aspects of anti-trust law in Guatemala, counseling and advising companies seeking to adapt their practices and business activities to comply with anti-trust laws yet to be enacted by the Guatemalan Congress.

Marcos is a graduate of Francisco Marroquín University (cum laude, 1992). He also has a Master's in Comparative Jurisprudence from New York University. He is admitted to practice in Guatemala and in New York.

Additional contributions by José Quiñones and Otto Ardon (Tax); Alejandro del Valle (Intellectual Property); Ignacio Grazioso (Compliance, Money Laundering, and Anti-Corruption); Evelyn Rebuli and Javier Castellán (Labor and Employment); and Luis Pedro Martínez and José Quiñones (Criminal Law).

Mexico

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X		X	X
No			X		

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

The Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos* – Mexican Constitution) provides the general principles for the National Anti-Corruption System, which are further developed and implemented through ancillary legislation.

Mexico is also party to various international conventions addressing anti-corruption, including: (i) the Inter-American Convention Against Corruption; (ii) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and (iii) United Nations Convention Against Corruption.

The most important laws implementing the Mexican Constitution and the various treaties addressing anti-corruption, bribery, and money laundering in Mexico are:

- General Law on Administrative Accountability (*Ley General de Responsabilidades Administrativas* - GLAA).
- Federal Law to Prevent and Detect Operations with Proceeds of Illicit Origin (*Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita* - AML").
- Federal Law Against Organized Crime (*Ley Federal contra la Delincuencia Organizada*).
- Federal Criminal Code (*Código Penal Federal* - FCC).
- National Code of Criminal Procedure (*Código Nacional de Procedimientos Penales* - NCCP).

Other laws and regulations that may apply with respect to internal and external investigations on anti-corruption, bribery, and money laundering include:

- Federal Economic Competition Law (*Ley Federal de Competencia Económica* – FECL).
- Federal Law on the Protection of Personal Data Held by Private Parties (*Ley Federal de Protección de Datos Personales en Posesión de los Particulares* –PDPL).
- Federal Law on Transparency and Access to Public Information (*Ley Federal de Transparencia y Acceso a la Información Pública*);
- Federal Labor Law (*Ley Federal del Trabajo* – FLL).
- Federal Law on Administrative Procedure (*Ley Federal de Procedimiento Administrativo* – FLAP).

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

Companies do not have a duty to inform employee representative bodies before or after commencing internal investigations. Furthermore, there is no obligation for employee representative bodies to participate in the investigation. However, if a company's internal compliance policy requires such notification, then it will have to observe this requirement. As such, companies must evaluate whether it is in their best interest to adopt these procedures.

Where there is a collective bargaining agreement (CBA) in place for unionized employees, companies should review and confirm whether there are any specific obligations in this respect.

Under some circumstances, it may be good practice for companies to issue a cooperation notice to employees that will participate in the investigation. For example, this notice may be issued in cases where the obligation to cooperate was not expressly agreed upon in writing in prior documents.

b) Data protection officer or data privacy authority.

With respect to data privacy matters, it is not compulsory to inform data privacy authorities or the company's data protection officer about the initiation of an internal investigation. However, it is a good practice to notify the data protection officer about an internal investigation to ensure compliance with internal investigation procedures

(e.g., confirming if privacy notices have been delivered to the employees, etc.) and to ensure that data resulting from the investigation is properly stored, retrieved, and protected in order to prevent data losses.

c) Other local authorities.

It is not mandatory or customary to inform local authorities before an internal investigation is commenced.

If a company determines that a crime was committed by a company employee, it must inform criminal authorities. Otherwise, if the crime was committed for the benefit of the company and the company does not report it, it runs the risk of exposure to criminal liability for concealment of the crime.

Entities in the financial sector (i.e., banks and other financial institutions) must carry out annual reviews through internal or external auditors to assess the operational efficiency of internal programs implemented to prevent and detect potential criminal activity, such as money laundering and terrorist funding. Audit results must then be furnished to the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* or CNBV) in accordance with regulatory deadlines. If the auditor identifies possible omissions or inconsistencies in the policies, the auditor must include in the report the observations and the remedial actions to comply with the regulatory framework.

d) What are the consequences in case of non-compliance?

If a company becomes aware that a crime was committed and it does not inform criminal authorities, the company may be prosecuted for concealment of a criminal offense, which generally implies that the company covered the criminal acts of the responsible parties or hid the effects of criminal activity. As a result, the company may be sanctioned with a fine, confiscation of goods acquired from the criminal conduct, publication of the judgment, and dissolution of the company.

If a company violates a specific obligation in the CBA to inform employee representative bodies about internal investigations, non-compliance could lead to conflicts with the union (e.g., potential call for strikes).

For purposes of determining company liability, the GLAA establishes that in cases of an administrative violation, such as bribery and influence peddling and collusion, the competent administrative authority may consider the fact that the company has a compliance policy to be a mitigating factor, among others. The compliance policy must include an adequate system of internal controls and periodic audits to effectively mitigate any liability, among other requirements.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

In general, there is no obligation for employees to support internal investigations. However, employees have a duty to observe good practices in the workplace and to inform the employer about deficiencies that could affect the employer's interests.

To ensure employee cooperation, companies should include provisions that require employee support during investigations in employment contracts, internal labor regulations, and audit system provisions found in compliance policies. These provisions should include details about the imposition of sanctions or disciplinary measures for refusal to cooperate. To legally apply disciplinary measures, compliance policies must be included in the company's internal labor regulations, which must be filed with the Labor Court. When all requirements are met, a company can sanction employees as provided under the FLL, such as by giving warnings or imposing a maximum suspension of eight (8) days without pay. All sanctions should be properly documented to reduce risks in case of conflicts.

Moreover, under the PDPL, employers should provide all applicants seeking employment a privacy waiver before collecting personal data during the interview and hiring process.

Furthermore, companies should: (i) state in their employment contracts and internal policies that company files and company-owned devices may be monitored from time to time; and (ii) secure express written consent to collect and review employee personal information and personal electronic devices, so that there is no reasonable expectation of privacy in these items. Companies may not review employee personal information and best practice is not to monitor company-owned electronic devices without said express written consent.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

Yes, employers have 30 days from the date they become aware of a breach to apply sanctions, including termination of employment with cause if applicable under the FLL. Investigations and investigative conclusions must be properly documented for purposes of calculating deadlines under the statute of limitations for imposing disciplinary measures, if applicable.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

In cases where employee personal data may be collected during internal interviews, a privacy waiver must be provided before collecting the relevant information, unless (i) it was delivered during or as part of the hiring process; and (ii) the privacy waiver indicates that the employee's personal data may be reviewed for investigative purposes.

b) Reviewing emails?

Employee business communications are subject to review by the company without consent when the information is stored in corporate databases or on company-owned devices; otherwise, express written consent must be secured. Conversely, private communications (including emails) are strictly protected under the Mexican Constitution and may only be reviewed if one of the participating parties provides consent or as permitted under federal law. As previously noted in question 3 above, employee consent may be included in employment contracts, privacy notices, or the company's internal policies, and consent notices should state that there is no reasonable expectation of privacy in corporate databases or corporate-owned devices.

c) Collecting (electronic) documents and other information?

As mentioned above, employers are required to provide a privacy waiver to collect personal data and/or personal information or communications from employees. Employers must secure the employees' express consent when collecting: (i) financial records, such as bank accounts; (ii) sensitive personal data, such as medical records or information pertaining to an employee's religion; and (iii) personal communications or information, such as text or instant messages.

If personal data and/or information are collected by an employer without consent, employers may incur liability, including fines. It is important to review whether employment contracts or applicable CBAs impose specific procedures addressing employee consent. However, employers are able to collect information from employees without securing a privacy notice where the information is not considered personal data (i.e., data that can be used to identify an individual) and/or personal information (i.e., information related to an employee's work activities).

With that said, according to the PDPL, the party responsible for the management of personal data, such as an employer, data processor, or external forensic team, processing information related to an investigation must protect the confidentiality of personal data during the collection and review of the information.

There is non-binding precedent (*tesis aislada*) in Mexico that states that personal communications must be lawfully collected (i.e., providing and securing the corresponding notices and consents)

and duly recorded by documenting the chain of custody of any collected devices.[1]

d) Analyzing accounting and/or other mere business databases?

If the business databases contain personal data, the company must provide notice that personal data may be stored and analyzed for investigative or statistical purposes, among other reasons. Notice is not required for undertaking review of personal data contained in corporate files or databases that does not identify a specific individual.

Reports that contain information on vulnerable activities, such as credit loans or issuance of travelers' checks, that are prepared by financial entities or similar companies or individuals may be reviewed and exchanged for purposes of strengthening money-laundering protection measures.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

The GLAA does not provide any specific procedures addressing whistleblower reports. However, the Federal Health and Safety Regulations in the Workplace (*Reglamento Federal de Seguridad y Salud en el Trabajo*) sets out that employers must implement confidentiality mechanisms to protect those reporting violations in the workplace. Failure to do so may result in fines of up to US$20,000.

Moreover, companies that have established compliance policy procedures addressing whistleblowers must strictly observe them. When adopted, these policies must include mechanisms to report violations of the company's policies to the organization and to authorities. If the whistleblower report sets off an internal investigation, it is customary and recommended that the company protect the informant from retaliation. If an employee violates the company's whistleblower policies, the employee may be sanctioned in accordance with applicable regulations.

The Ministry of Public Affairs (*Secretaría de la Función Pública*) and other private bodies recently issued a Business Compliance Program Model (*Modelo de Programa de Integridad Empresarial* (Program)) with the purpose of advising companies on implementing compliance policies. The Program recommends that whistleblower systems establish channels that protect the confidentiality and integrity of informants (e.g., hotlines) and include policies that guarantee investigation of the allegations.

1. Chain of custody refers to maintaining a clear record of the individuals who had custody or possession of any evidence, such as collected devices, to ensure that the information contained therein has not been altered.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

Employers are not compelled to provide employees written instructions before conducting an interview but should consider providing a verbal explaination of the circumstances surrounding the investigation to the employee. If written instructions are delivered, these should be reviewed to ensure they are consistent with the strategy, purpose, and scope of the investigation and to mitigate the risk of potential employee claims.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

Although the Mexican Constitution sets forth that no individual can be compelled to make a self-incriminating statement and has the right to remain silent, there is no statutory provision requiring an interviewer to inform the employee of this right. However, the employee may refuse to make any self-incriminatory statements.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

An Upjohn Warning is not required under the FLL or other regulations; however, it is customary to provide this disclosure in Mexico. It is also customary to inform the interviewee that responses provided in the interview may be shared with third parties for purposes of the investigation at the company's discretion.

d) Be informed that he/she has the right to have his/her lawyer attends?

This is not required under the FLL or other regulation.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

This is not required under the FLL or other regulation; however, CBAs must be reviewed for any particular obligations for unionized employees, if applicable.

f) Be informed that data may be transferred across borders (in particular to the United States)?

Interviewers are not required to inform employees that their personal data may be transferred across borders before conducting employee interviews. However, according to the PDPL, companies should obtain employee consent before transferring their personal data to foreign third parties; otherwise, the company may be considered liable and the relevant sanctions will apply. Also, where personal data is stored in databases located abroad, the owner of the database (i.e., the party responsible or processor of the personal data) should implement administrative, physical, and technical measures to secure the personal data in accordance with the PDPL.

g) Sign a data privacy waiver?

As previously mentioned, employers should provide all employees a privacy waiver before collecting personal data. If at the time of the

interview the interviewee has not previously signed a privacy waiver, the company must obtain the executed waiver before collecting or reviewing employee personal data.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Interviewers are not required to inform employees that the information gathered at an interview might be passed on to third parties. Under the PDPL, employee consent to transfer personal data is required except where the data is transferred: (i) to affiliates, subsidiaries, or controlling companies; (ii) for the public interest or for the administration of justice; or (iii) for the recognition, exercise, or defense of rights in a judicial procedure, among others. Depending on the circumstances, transfer to local or foreign authorities may be permissible under sections (ii) or (iii), above.

i) Be informed that written notes will be taken?

Employers do not have the duty to inform interviewees that notes will be taken during an interview. However, it is recommended to document the investigation and information obtained at any interview before implementing disciplinary measures. This is often done by keeping minutes or administrative minutes of the interview, which if possible and if appropriate, should be signed by the employee.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

In general terms, hold notices or document retentions are allowed, with no specifics to be observed since they are not regulated under Mexican law.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Unlike other jurisdictions, Mexico does not have specific regulations addressing the confidentiality of communications between clients and attorneys with the purpose of securing legal advice. However, there are constitutional and legal grounds to sustain a fundamental right for the protection of communications between lawyers and their clients, equivalent to the international attorney-client privilege doctrine, as well as judicial precedent that confirms this interpretation.

The Regulatory Law of Article 5 of the Constitution, Regarding the Exercise of Professions in Mexico City (*Ley Reglamentaria del Artículo 5 Constitucional, Relativo al Ejercicio de las Profesiones en la Ciudad de México*) requires every professional to keep the secrecy of matters that are entrusted to them by clients, with a few exceptions. Similarly, the NCCP establishes that the testimony of persons who must keep secrecy because they acquired knowledge of the fact due to their trade or profession is inadmissible in a court proceeding.

In addition, the FCC establishes sanctions on professionals who reveal secrets or confidential communications without just cause and without the consent of the party that may be harmed. Also, the FLL establishes that employees must keep the confidentiality of technical, commercial, and manufacturing secrets directly or indirectly processed by them, and other secrets known to them due to their work or involvement in processing this information. This applies to any professional in Mexico, not only to attorneys.

Federal courts have recently published judicial criteria that reinforce professional secrecy. One example is the criteria established by the Collegiate Circuit Courts in resolution I.3°.C.698 C in 2018 "PROFESSIONAL SECRET. IMPOSES THE OBLIGATION TO NOT SURRENDER TESTIMONY ON FACTS INVOLVING THIRD PARTIES." This resolution establishes that professional secrecy is associated with the right to privacy and that certain people or entities (doctors, attorneys, financial institutions, accountants, priests, among others) may not disclose information gained in the exercise of their professional activities without consent. In this sense, an individual who knows certain information due to their professional practice may not be forced to testify about it, unless the owner of the information authorizes it.

Also, in 2017 a landmark decision was issued recognizing that although the attorney-client privilege is not expressly established under the FECL, it is guaranteed by the Mexican Constitution through the protection of the fundamental rights to: (i) privacy; (ii) present a defense; (iii) secrecy of correspondence; and (iv) practice a profession. The court confirmed that antitrust audit reports performed by external counsel for their clients are protected by such privilege, as long as the communications meets the following criteria: (i) the report is issued by external counsel and (ii) the information contained in the report relates to the client's right to a proper defense. However, this is a non-binding precedent.

10. Can attorney-client privilege also apply to in-house counsel in your country?

As stated above, there is no specific regulation addressing the attorney-client privilege in Mexico and the regulations and legal opinions that establish professional secrecy only apply to the relationship between professionals and their clients. Under Mexican law, a company is not considered the client of in-house counsel; therefore, professional secrecy cannot be claimed by in-house attorneys over the findings of the internal investigation.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Under the Law of the Contract of Insurance (*Ley sobre el Contrato de Seguro*), the insured must report to the insurance company any risks that affect the persons, assets, or properties insured. If the insured fails to provide such notice, the obligation to provide coverage might terminate.

Likewise, as soon as the insured becomes aware of an act that could lead to a claim against the insurance company, it must inform the company. A delay in reporting this type of information may reduce the sum of coverage originally agreed upon.

b) To business partners (e.g., banks and creditors).

No, unless otherwise required under specific agreements.

c) To shareholders.

No, unless otherwise required by the company's bylaws or under specific agreements. Under some circumstances, companies listed in the stock exchange must file an electronic report for public disclosure of information on events affecting the company at the time it becomes aware of them. In that regard, these events include corrupt practices in public procurement procedures or the initiation of a judicial, administrative, or arbitration proceeding against the company, among others.

d) To authorities.

Yes, under some circumstances, companies listed in the stock exchange must inform the CNBV about the investigation in terms of the applicable regulations.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

If a company becomes aware of criminal activity involving the company, it is recommended that it implement measures to minimize and prevent any potential damages, including ensuring that the criminal activity is stopped. Some measures that can be taken are reporting the criminal activity to local authorities and investigating all parties with any relationship to the perpetrator. It is also advisable for the company to review and reinforce its compliance policies during an investigation, including: (i) codes of conduct; (ii) audit and surveillance systems; (iii) internal labor regulations; and (iv) training systems, among others. In addition, it is important to preserve all evidence.

In the case of financial entities, if the entity suspects that an employee or client is involved in criminal activity (e.g., money laundering), the entity must submit a report to the authorities requesting the

commencement of an investigation of the suspicious activity.

In terms of data privacy, if a company suffers a security breach (e.g., unauthorized access to customers' or employees' personal data), it must conduct an internal investigation to identify the causes and must implement actions to improve its security measures. The company also has to inform the data subjects of any breaches to databases containing financial or sensitive personal data, as required by the PDPL.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In Mexico, it is not common for prosecutors to be informed of corporate investigations. However, if a past or ongoing crime is detected as a result of an investigation, the company must file a report with the relevant Public Prosecutor's Office (PPO); otherwise, the company may be found liable of concealment.

For purposes of imposing sanctions, the GLAA establishes that if an administrative authority finds a company liable for administrative misconduct, the authority will consider the voluntary reporting of the parties involved to be a mitigating factor when imposing any sanctions. Accordingly, companies should consider promptly informing administrative authorities of any internal administrative breaches to obtain all available benefits for self-reporting.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

The Mexican Constitution prohibits authorities from disturbing any person and their domicile, papers, or possessions without a prior written order that clearly states the legal grounds and reasoning for the disturbance issued by a competent authority.

Under the NCCP, if the PPO has reason to believe that there is information relevant to an investigation and requires an inspection of private property or possessions, the PPO must first request a search warrant from a control judge. The search warrant must contain at least (i) the name and position of the control judge; (ii) the place to be inspected, the items to be sought, and/or the individuals to be arrested; (iii) the purpose of the inspection; (iv) the date and time the inspection will take place; and (v) the names of the authorized public officials that will carry out the inspection.

The FLAP sets forth that administrative authorities such as the Energy Regulatory Commission (*Comisión Reguladora de Energía*) and the National Commission of Private Security (*Comisión Nacional de Seguridad Privada*) may carry out verification visits to confirm compliance with the law for issuing or maintaining permits. Public officials performing verification visits must have a written order signed by the authority authorizing the visit and the order must specify the place, purpose, scope, and legal grounds for the verification visit, among others. However, it is important to note that a verification visit does not constitute a search warrant under Mexican law.

If the prerequisites of the search warrants or written orders for verification visits are not fulfilled, the evidence gathered may not be used against the company. In those cases, the company must submit a brief before the competent authority to challenge the inspection or written order official letter.

Similarly, the FECL authorizes competition authorities to conduct unannounced dawn raids at the premises of companies for searches related to ongoing investigations. For this purpose, the investigative authority (without a judicial intervention) must issue an inspection order that contains: (i) the purpose, scope, and duration of the dawn raid; (ii) the name and address of the individual or companies to be inspected; (iii) the name or names of the public officers that shall carry out the dawn raid; and (iv) the enforcement measures that shall be imposed during the inspection.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Plea deals, non-prosecution agreements, and deferred prosecution agreements are generally not available to corporations, with some exceptions.

For example, according to the GLAA, individuals that confess to an administrative violation may obtain the benefit of reduced sanctions, which may range from 50 percent to 70 percent reduction in the amount of the fine, or in case of temporary disbarment to participate in public procurement, it could result in immediate reinstatement.

To obtain those benefits, it is necessary that (i) the confession occur before the parties involved are informed of the administrative procedure; (ii) the individual confessing is the first to contribute evidence that allows the authority to confirm the existence of the administrative violation and identify the parties involved; (iii) the individual confessing cooperates with authorities in a full and continuous manner; and (iv) the individual confessing suspends the administrative violation at the request of the authority.

Parties making subsequent contributions to the investigation may also obtain limited benefits, including the reduction of potential sanctions by up to 50 percent.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

According to the GLAA, companies are liable for the misconduct of others when the activity was committed by individuals who acted on behalf, or in representation, of the company and to obtain a benefit for the company.

Companies that are liable for the criminal activity of others are subject to: (i) fines up to double the amount of any financial benefits obtained from the criminal conduct, and, if no financial benefit was obtained, of up to approximately US$6 million; (ii) disbarment from bidding for public contracts for up to 10 years; (iii) suspension of business activities from three months up to three years; (iv) dissolution of the company; and (v) compensation for damages caused to the government.

Likewise, the NCCP sets forth that companies may be held criminally liable for the crimes committed by their representatives, managers, partners, or employees when the violation was carried out (i) on behalf and/or in benefit of the company; (ii) through means provided by the company; and (iii) the criminal authority determines that the company was neglectful in supervising the criminal conduct. The company's criminal liability is assessed separately from that of the party who committed the crime.

With respect to criminal conduct involving bribery, the FCC imposes fines of up to US$4,000 and, under exceptional circumstances, a court may also order the suspension of business activities or dissolution of the company, depending on the degree of company involvement, management's knowledge of the bribery, and the damages caused or financial benefits obtained by the company.

For money-laundering violations, the FCC can impose fines of up to US$19,700 and a court may order (i) the suspension of business activities; (ii) dissolution of the company; or (iii) disbarment from participating in public procurement, among others. Also, the FCC establishes increased penalties for money-laundering activity when the party acted as counsel, administrator, officer, employee, attorney, or service provider when committing the crime.

The AML establishes administrative penalties for natural and legal persons that perform non-financial vulnerable activities for the misconduct of others.

Internally, from an employment law perspective, company directors, officers, or employees may be subject to disciplinary measures for the misconduct of others if those individuals authorized or instructed another employee to conduct illegal activities, including money laundering or bribery activities.

With respect to bid-rigging in public procurement, the following offenses are considered absolute monopolistic practices: hard-core cartel, collusion, anticompetitive conspiracy or collusive agreement. The FECL can impose the following sanctions on entities or parties involved in such conduct: (i) fines

up to 10 percent of the company's annual income for tax purposes (sales in Mexico); and (ii) payment of damages through individual or class action civil proceedings. Parties engaged in monopolistic practices on behalf of companies can be sanctioned as follows: (i) fines up to 200,000 times the measuring economic unit (*Unidad de Medida y Actualización*), which are in general terms considered in Mexican pesos and set forth the obligations payment amounts; (ii) five to 10 years' imprisonment; and (iii) loss of professional licenses or disbarment for up to five years. Fines could be doubled for second time offenders.

Finally, a company or a data processor may be fined US$400 to US$1,280,000 for breaches of data privacy obligations by company employees before, during, or after an investigation. Such sanctions would be imposed under the PDPL.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

In recent years, Mexico has joined multilateral agencies specialized in fighting anti-corruption and bribery, such as the Financial Action Task Force (FATF). In that regard, Mexico has adopted the 40 recommendations of the FATF to strengthen its anti-money laundering legislative regime by: (i) criminalizing money laundering in accordance with the strictest international standards, (ii) creating the Financial Intelligence Unit (Unidad de Inteligencia Financiera), and (iii) reinforcing the powers of the regulatory and supervisory authorities in this matter.

Moreover, in 2011, Mexico entered into a partnership with the Organization for Economic Co-operation and Development (OECD) to improve its procurement practices and step up its fight against bid-rigging through the implementation of the OECD Competition Committee's *Guidelines for Fighting Bid Rigging in Public Procurement* (2009). Since then, the Competition Commission has sanctioned several cases of bid-rigging in public procurement by Mexico's Social Security Department (*Instituto Mexicano del Seguro Social*), which is the second largest public procurer in Mexico and the largest public buyer of health products.

In 2015, the National Anticorruption System (NAS) was created with the purpose of increasing coordination among the three levels of government (federal, state and municipal) to prevent, detect, and impose sanctions on corruption and bribery activity. To implement the NAS, it was necessary to enact regulatory laws such as GLAA and to make amendments to other laws, such as the FCC. However, the implementation of NAS has not been completely successful.

In September 2019, the Guidelines for the Promotion and Operation of the Citizens' Whistleblower System Against Corruption (the Whistleblower System) became effective. Its purpose is, among others, to promote the reporting of conduct by public officials in violation of federal regulations. The Whistleblower System is an electronic platform through which citizens may anonymously report alleged acts of corruption, human rights violations, or sexual harassment committed by public officials, so that the relevant public authority may start an investigation. This tool is intended to decrease corrupt activities as well as increase investigation and prosecution of corruption in government.

Lastly, the new ruling political party in Mexico, MORENA, and President Andrés Manuel López Obrador have made several statements indicating the fight against corruption and bribery at the executive, legislative, and judicial branches is a priority of this administration. It is possible to expect amendments to applicable regulations at the federal and local levels, including changes to public procurement procedures and criminal regulations as a result and the Mexican Congress is currently reviewing various bills addressing these issues.

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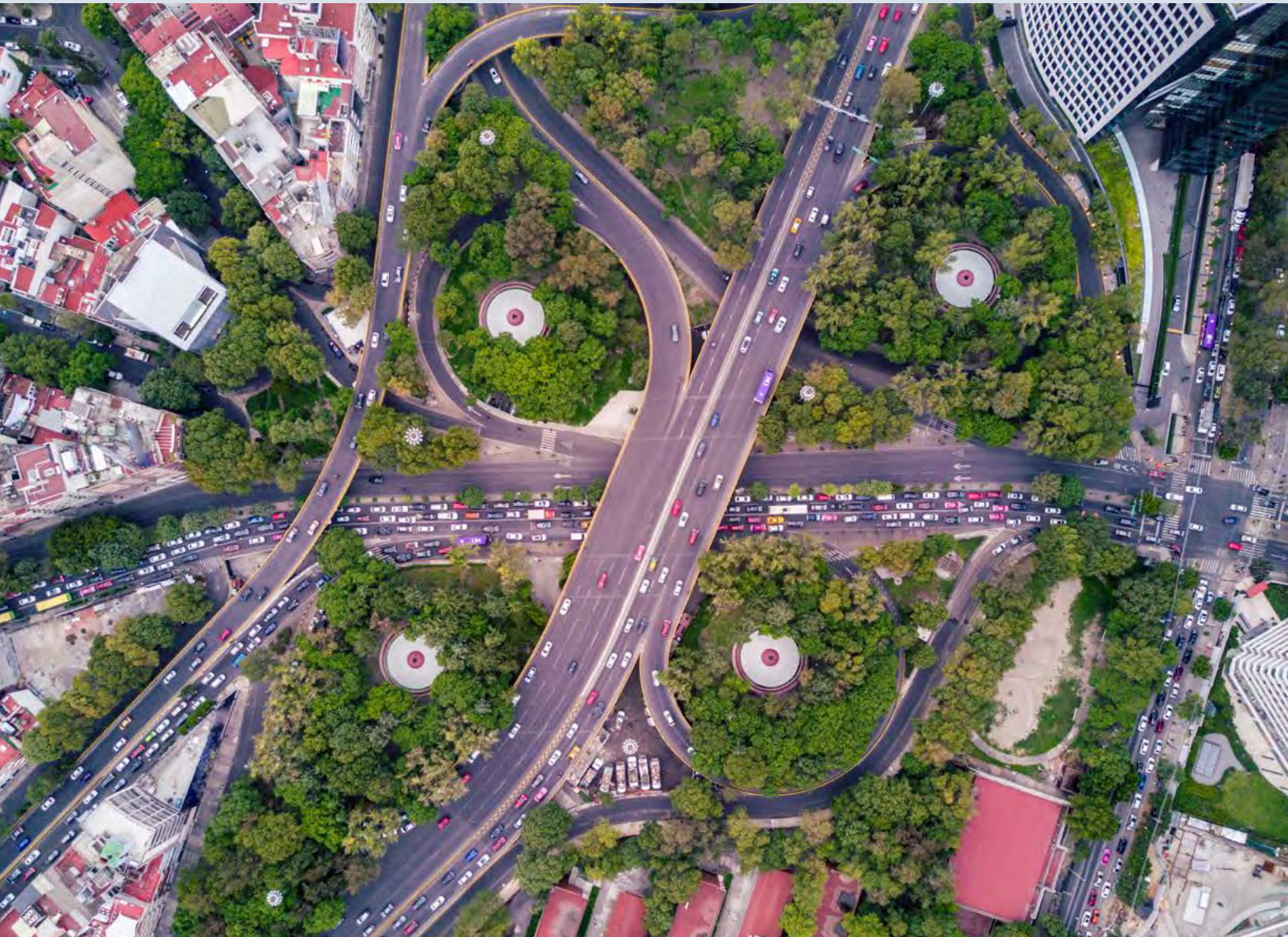
She has participated in several secondments. Additionally, from October 2016 to January 2017, she had a trainee experience in Hogan Lovells (Paris) LLP, which included a professional capability of assessments in Spanish, English, and French simultaneously.

Additional contributions by Regina Torrero (Labor and Employment); Alan Tirzo Ramírez (Antitrust, Competition, and Economic Regulation); Adriana Medina and Adriana Pavón (Compliance); and José Carlos Altamirano and Dulce Vega.



Panama

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X	X	X	X
No					

Panama

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In addition to the Constitution of Panama, the main laws applicable in Panama to anti-corruption, bribery and money laundering are as follows:

- Law 14 of 2007, as amended, adopting the amended and restated Criminal Code (*Ley 14 de 2007, como ha sido modificada, que adopta el texto único del Código Penal*).
- Law 59 of 1999, as amended, regulating Article 299 of the Constitution and including dispositions against corruption in public office (*Ley 59 de 1999, como ha sido modificada, que reglamenta el Art. 299 de la Constitución Politica y dicta otras disposiciones contra la corrupción administrativa*).
- Law 6 of 2002 regulating transparency in public office and establishing the Habeas Data action and other regulations (*Ley 6 de 2002, que dicta normas para la transparencia en la gestión pública, establece la acción de Habeas Data y dicta otras disposiciones*).
- Law 33 of 2013, as amended, creating the National Authority of Transparency and Access to Information (*Ley 33 de 2013, como ha sido modificada, que crea la Autoridad Nacional de Transparencia y Acceso a la Información*).
- Law 121 of 2013, modifying the Crimminal Code, Judicial and Criminal Procedure and adopting certain measures against organized crime (*Ley 121 de 2013, que reforma el Código Penal, Judicial y Proceso Penal y adopta medidas contra las actividades relacionadas con el delito de delincuencia organizada*).
- Law 23 of 2015, as amended, adopting measures to prevent money laundering, financing of terrorism, and financing of the proliferation of weapons of mass destruction and other regulations (*Ley 23 de 2015, que adopta medidas para prevenir el blanqueo de capitales, el financiamiento del terrorismo y el financiamiento de la proliferación de armas de destrucción masiva, y dicta otras disposiciones*).
- Law 23 of 2015 and Law 121 of 2013 specifically address money laundering activity and its associated conduct, in addition to anti-corruption and bribery.

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies such as a works council or union.

Organized workers' associations, such as work councils or labor unions, do not have the right to be informed of an internal investigation before it is commenced or to participate in the investigation, unless this has been agreed upon in a collective bargaining agreement.

b) Data protection officer or data privacy authority.

Law 81 of 26 March 2019 (Law 81) regulates data protection, creates a Council for Data Protection composed of members of the public and private sector and establishes the *Autoridad Nacional de Transparencia y Acceso a la Información* (National Authority for Transparency and Access to Information) as the entity that supervises data protection matters. Law 81, which enters into effect in 2021, does not impose an obligation to inform the aforementioned authority or council before commencing an internal investigation.

c) Other local authorities.

If related to a potential crime, there is an obligation to report an internal investigation to the competent criminal authority. Furthermore, internal investigations of regulated entities, such as banks, insurance companies, among others, must be notified to their respective regulator, which in the case of money laundering may include the Financial Analysis Unit (*Unidad de Análisis Financiero*).

d) What are the consequences in case of non-compliance?

In general terms, consequences for non-compliance include fines, suspension of licenses, and ethical code violations, among others. Under the Criminal Code, failure to act where there is a duty to do so may have criminal implications where such failure is related to a crime that is being prosecuted and the omission can be perceived as the act of an accomplice or participant in the crime.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Employees must participate in an interview to support an investigation, but they can refuse to cooperate with the interview process. In those cases, the employer cannot impose any disciplinary measures. Nevertheless, if the company has evidence that the employee is involved in wrongdoing that amounts to a good cause for employment termination, it will have the right to dismiss the employee without paying severance, as established in the Labor Code.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

The Statute of Limitations is governed by the following rules:

- According to Article 12(6) of the Labor Code, the right to dismiss an employee or to impose disciplinary measures expires after two months. This period shall be counted from the date of the misconduct.
- In the case of criminal acts, the statute of limitations will run from the date on which the incident becomes known to the employer, but in no event can this period exceed a total of two years.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

There is no express regulation on the matter. From an employment law perspective, there is no regulation prohibiting employee interviews in connection with internal investigations.

b) Reviewing emails?

An employer can review emails or other electronic data if the computer, cell phone, or other electronic device is property of the company and was provided to the employee to perform their hired job. We recommend that companies regulate in writing the use of electronic equipment and warn employees that any files stored on company devices are subject to review by the employer.

We also recommend that the employer include a disclaimer in employment contracts or a separate form that states that company-provided equipment should only be used for work purposes, that no personal information should be kept therein, and that the employer has consent to access, review, dispose of and store any personal information found in company devices.

c) Collecting (electronic) documents and/or other information?

Employers have the right to collect any type of documents, electronic or non-electronic, or any other information from employees if the computer, cell phone, or other electronic device is the property

of the company and was provided to the employee to perform their hired job. In this case, we recommend that the review of emails or documents be completed in the presence of a Public Notary that will serve as witness to verify the information retrieved. Another option is to seek a court order issued as part of a judicial process in which it is requested by the interested party.

d) Analyzing accounting and/or other mere business databases?

There are no restrictions for employers to perform accounting functions or to access business databases.

Lastly, for purposes of 5.b), 5.c) and 5.d) above, criminal investigations are a matter of public order, and as such, the State Prosecutor has broad authority to investigate any misdemeanor or felony and its authors or participants. The State Prosecutor may hold interviews without restrictions. However, for the purposes of searching or confiscating mail or other private documents, prior authorization of a supervisory judge will be required. Similarly, searching or confiscating computers or other electronic equipment or information stored therein also requires authorization by a supervisory judge.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

There are no specific procedures and there is no legal protection for whistleblowers, unless a company's internal rules include provisions addressing the matter.

For criminal investigations, there are measures for the protection of witnesses, victims, legal experts or expert witnesses, or other parties who intervene in a case (Article 332 of the Criminal Code).

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

In Panama, there are no legal regulations for conducting employee interviews. There is no obligation to provide written instructions to the interviewee. If an employee is required to participate in an interview, the employer can provide a verbal explanation of the reasons or causes for the interview.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

It is not necessary. If the interview will be taped, it is advisable to inform the interviewee and obtain consent before moving forward with the interview.

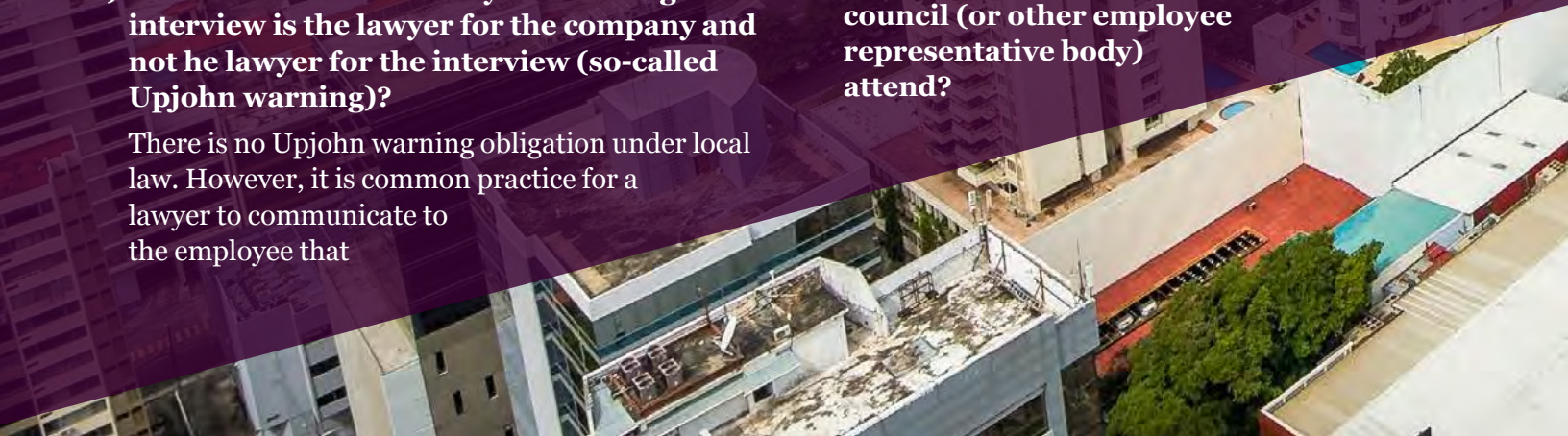
c) Be informed that the lawyer attending the interview is the lawyer for the company and not he lawyer for the interview (so-called Upjohn warning)?

There is no Upjohn warning obligation under local law. However, it is common practice for a lawyer to communicate to the employee that they are attending the interview on behalf of the company. If an external lawyer will be present at the interview, the interviewee must be informed. There is no obligation for the employer to accept a request by the interviewee to have a lawyer present at the interview. Nevertheless, an employee can refuse to participate in the interview or answer questions.

d) Be informed that he/she has the right to have his/her lawyer attends?

The employer does not have the obligation to inform the interviewee that he/she has the right to have a lawyer present at the interview.

e) Be informed that he/she has the right to have a representative from the work council (or other employee representative body) attend?



If the employee is a member of a labor union, the employee has the right to have a representative of the union present during the interview.

f) Be informed that data may be transferred across borders (in particular to the United States)?

Under the Panamanian Labor Code, there is no obligation to inform employees of cross-border data transfers. However, if the information is considered personal data, consent will be required for the information to be collected, stored, and transferred.

g) Sign a data privacy waiver?

There is no obligation on employers to provide employees a data privacy waiver. However, if personal information (personal data, sensitive, confidential, or restricted) is expected to be discussed at the interview, and this information will be collected, stored, or transferred, it is recommended that the interviewee sign a waiver consenting to the use, collection, and storage of personal information.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Yes, we recommend that the interviewee be informed that information gathered at the interview may be shared with third parties, and that consent is requested by the employer to share this information. Note that if the employer is legally required to share information obtained at the interview, then consent from the employee is not required and the information may be passed to local or foreign authorities without taking any additional steps.

i) Be informed that written notes will be taken?

Before beginning an interview, employers should inform employees that written notes will be taken and that they may be asked to sign the minutes or records of the interview.

During the interview, it is recommended that the company be represented by at least two witnesses that should sign the final minutes or report of the interview.

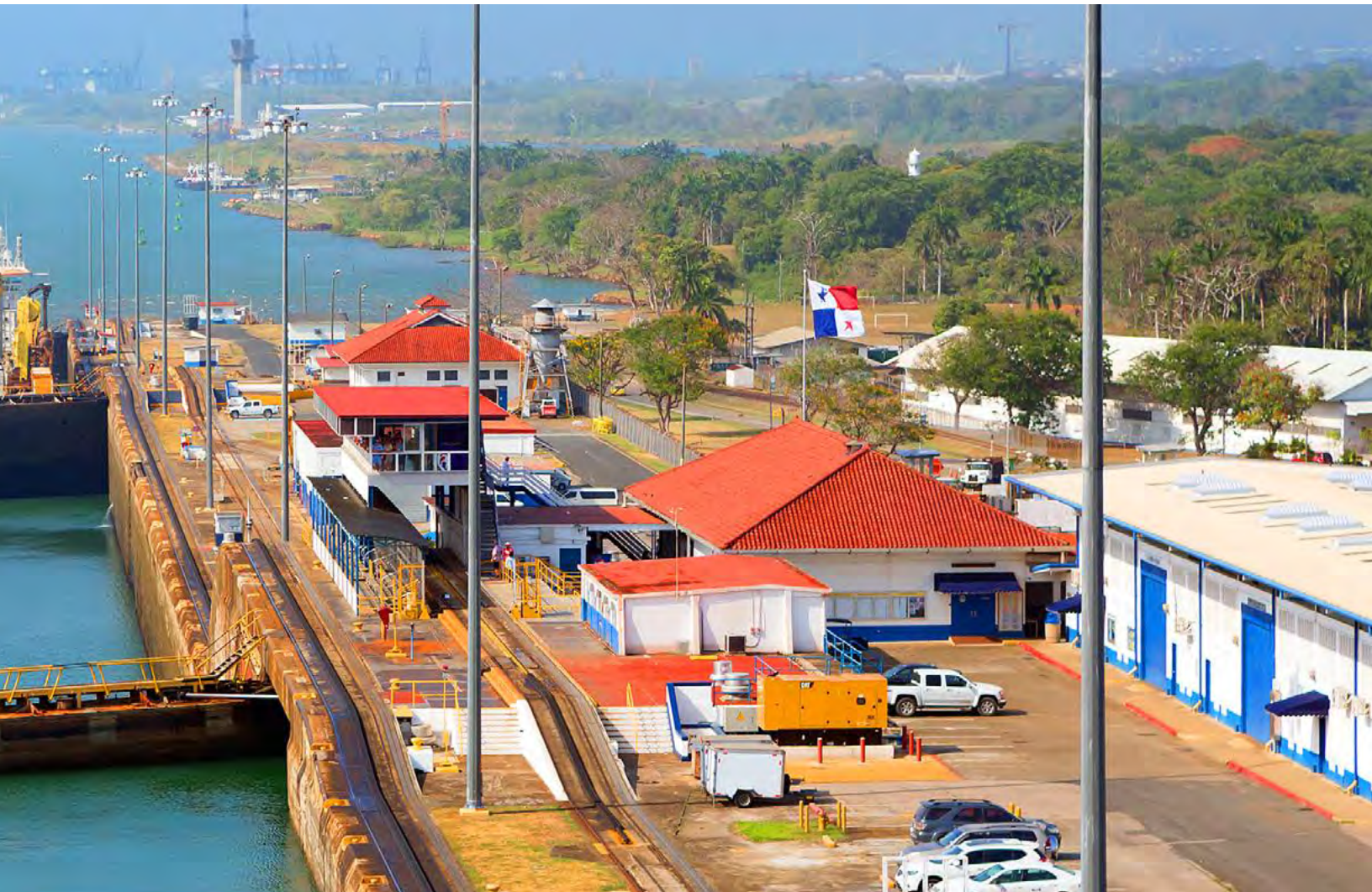
8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

There are no employment law regulations addressing document hold or retention notices in Panama; therefore, in-house counsel would be able to send such warning to employees.

Moreover, there are no such notices under the Criminal Code. However, Article 255 of the Criminal Code establishes as a crime any behavior that tends to conceal, cover, or obstruct the determination, origin, location, destination, or ownership of moneys, assets, securities, or other financial resources, or grants benefits when those benefits are a result, directly or indirectly, of any crime related to money laundering.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Article 309 of the Criminal Code establishes that the following items cannot be confiscated or searched: (1) written communications or notes between an accused and their attorney or between persons that have abstained to act as witnesses due to a legal requirement (e.g., physicians and patients, lawyers and clients, parent and child, among others); and (2) medical exams or diagnosis related to medicine or science performed under professional confidentiality if they do not relate to the purpose of the investigation. This limitation only applies when the communications or documents are held by the person(s) that must abstain from rendering testimony or act as witness or, in the case of professionals, are subject to the professional privilege. Furthermore, Art. 912 (1) of the Judicial Code establishes that "[t]he following [parties] are not obligated to testify: 1. The attorney or attorney in fact about confidences received from their clients and the advice given to them regarding the process that they are handing."



10. Can attorney-client privilege also apply to in-house counsel in your country?

Yes, it is applicable to any person that is an attorney, without distinction.

11. Are any early notifications required when starting an investigation?

Under the Labor Code, early notifications are not required when starting an internal investigation. If criminal activity is found, it is advisable to report it to the authorities.

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

Yes, in general terms.

b) To business partners (e.g., banks and creditors).

Yes.

c) To shareholders.

Yes, as a matter of good corporate governance and subject to the relevance and materiality of the issues for the company, notice should be provided, at a minimum, as part of the corporate annual report.

d) To authorities.

Yes. If criminal activity is suspected, it must be reported to the appropriate regulatory authority. If the activity is related to financing transactions of money laundering, financing of terrorism or weapons of mass destruction, the Financial Analysis Unit (*Unidad de Análisis Financiero*) should be notified.

There is no regulation in the Criminal Code that requires the State Prosecutor to notify insurance companies, banks or creditors, shareholders, or other authorities. Law 121 of 2013 against organized crime allows the State Prosecutor to issue a resolution ordering a total or partial gag order for up to 30 days, and this time may be extended by the same period if required by the investigation.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

If the company has enough evidence that proves criminal activity by an employee or employees, the parties involved can be immediately dismissed with cause, in which case no severance will be owed to such parties.

At the same time, a complaint to the competent criminal authority should be submitted by the legal representative of the employer. Once the competent criminal authority has knowledge of the criminal action, if it is considered a crime, it will have to initiate the appropriate investigations and the State Prosecutor will take necessary actions to prove the crime and discover the authors and other participants.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

In Panama, the crimes of corruption by governmental officials (against public administration) and money laundering (against the economic order) are prosecuted *ex officio,* and a complaint or internal investigation is not required. Nonetheless, an internal investigation by a regulatory body of a regulated entity, such as banks, insurance companies, and broker firms, or by the Financial Analysis Unit may serve as a stepping stone to start a separate investigation. Investigations by the Financial Analysis Unit are limited to financial transactions. In turn, this may also result in the investigation of any other crimes by the Public Ministry.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

It is necessary for a resolution to be issued explaining the reasons for the warrant. It is not enough to only mention the existence of a crime; the resolution must describe any signs or evidence to support the issuance of the warrant. Moreover, the warrant must be issued by a competent authority. If any evidence is found or collected without a warrant or if the warrant is issued by a government official without authority, the search is deemed invalid under the law and any evidence gathered is of no legal value.

15. Are deals, none-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Panama's Code of Criminal Procedure allows corporations to enter into plea agreements for final judgements or agreements of collaboration to provide information to uncover the authors of a crime or to provide evidence of a crime. In those cases, an investigation against the company is suspended and it is possible for the criminal file to be closed if the company's collaboration results in the prosecution of the parties involved or if the information provided by the company serves to uncover another crime.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

An employee can be subject to monetary fines or penalties for crimes involving the company, but the consequences of those actions are only civil damages. In Panama, from a criminal law perspective, only the individuals who committed the crime are subject to prosecution. However, in accordance with Article 51 of our Criminal Code, if a company was used to commit a crime, then it may be subject to penalties, cancellation of licenses, loss of fiscal benefits, barred from entering into contracts with the government, and dissolution, among others.

17. Please briefly describe any investigation trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Recently approved legislation to fight organized crime allows defendants to enter into collaboration or sentencing agreements for the purposes of uncovering those crimes or the criminal authors. This legislation also permits the State Prosecutor's Office to impose gag orders and deny access to the case files to all other parties, including defense attorneys. This last element is currently a matter of study and dispute since many consider that it violates the right to a defense. At the time of this writing, our constitutional courts have not addressed the constitutionality of this measure. In addition, recently approved legislation criminalizes certain tax offenses. Lastly, there is a bill under consideration by our Legislative Branch related to the imprescriptibility of crimes of corruption.

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Inocencio Galindo is a partner at Morgan & Morgan and heads the Banking and Finance and the Mining practice groups. Prior to joining Morgan & Morgan, Mr. Galindo worked as an associate at a major U.S. law firm.

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In addition, Mr. Galindo practices general corporate and commercial law, advising clients on a wide range of commercial transactions, both domestic and cross-border.

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Mr. Galindo obtained a B.A. in Business Administration (cum laude) in 1993 from Georgetown University and a J.D. in 1996 from Georgetown University Law Center.

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Peru

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes	X	X	X	X	X
No					

Peru

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

The Peruvian Criminal Code (*Código Penal*), enacted in 1991, includes the traditional crimes associated with corruption such as passive bribery, generic active bribery, specific active bribery, transnational active bribery, embezzlement, conspiracy to fix public procurement, and influence peddling. However, the Peruvian legal framework has recently undergone the following three major changes:

- Two provisions that criminalize corruption within the private sector were added to the Criminal Code in September 2018.
- Law No 30424 (*Ley que Regula la Responsabilidad Administrativa de las Personas Jurídicas*), enacted on 20 April 2016, provides for the criminal liability of legal entities for certain offenses, such as conspiracy to fix public procurement, money laundering, active bribery, active transnational bribery, influence peddling, and terrorism financing. Therefore, a legal entity could be liable for any of these crimes if they were committed in its name or on its behalf and for its direct or indirect benefit by an individual with a link to the company. Further, a company could be excused from liability if, before the crime, it had an adequate compliance program that should include, among other elements, a compliance official, risk assessment and mitigation mechanism, whistleblowing system, training program, and continuous monitoring of the compliance model.
- Under the context of the complex corruption cases known as Operation Car Wash and the Construction Club, on 12 March 2018 Law No 30737 (*Ley que asegura el pago inmediato de la reparación civil a favor del Estado peruano en casos de corrupción y delitos conexos*) was enacted to ensure the compensation of the Peruvian Government and the completion of significant ongoing infrastructure projects. This law allows corporations to enter into plea agreements with the Prosecutor's Office in exchange for providing sufficient information concerning the identity of any parties involved with the crime being investigated and the circumstances of how it was committed.

Concerning money laundering offenses, these are regulated by Legislative Decree No 1106 (*Decreto Legislativo de lucha eficaz contra el lavado de activos y otros delitos relacionados a la minería ilegal y crimen organizado*). This decree criminalizes conversion, transfer, concealment and transportation of moneys or securities with an illicit origin. Moreover, since 2016 the mere act of being in possession of money or goods with a known illicit origin can presumably be considered a criminal offense. Within the administrative field, the guidelines and regulatory norms published by the Office of the Superintendent of Financial Institutions (SBS) and the Financial Intelligence Agency (UIF-Peru) are crucial for money laundering detection and prevention.

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.

There are no Peruvian laws establishing that employee representative bodies or labor unions must be informed about the commencement of an internal investigation. Although unusual, labor unions could request to include a clause addressing this issue in their collective agreement.

b) Data protection officer or data privacy authority.

It is not compulsory to inform the General Office for Transparency, Access to Public Information, and Protection of Personal Data

(*Dirección General de Transparencia, Acceso a la Información Pública y Protección de Datos Personales*) about the commencement of an internal investigation.

c) Other local authorities.

It is not compulsory to inform local authorities before the commencement of an internal investigation nor is it a standard procedure adopted by local companies.

d) What are the consequences in case of non-compliance?

Overall, there is no right or duty involved in this regard. Thus, there are no consequences for non-compliance.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

There is no law imposing a duty on employees to support or participate in internal investigations. Nonetheless, the Peruvian Supreme Court has established that according to the good faith principle, the observance of an adequate volitional and technical effort is required to fulfill the interest of the work creditor (employer), as well as not to injure the rights of third parties. From this principle, it follows that if an employee refuses to cooperate with an investigation concerning a misdeed that might have impaired the company's interests, the employer could impose a disciplinary measure. It is also worth noting that local companies usually include a duty to collaborate in internal workplace regulations.

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

By virtue of the immediacy principle established in Article 32 of Supreme Decree No 003-97-TR (*Texto Único Ordenado del D. Leg. N° 728, Ley de Productividad y Competitividad Laboral*), an employer must impose a disciplinary measure at the time it becomes aware of the misconduct. According to the Constitutional Tribunal, there is no fixed term for the employer to act upon the discovery of the misconduct by one of its employees. However, the employer must act within a reasonable time to be determined on a case-by-case basis.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

Law No 29733, (*Ley de Protección de Datos Personales*) enacted on 3 July 2011, establishes two basic principles. First, it is required to have the owner's consent to legally process personal data. Second, personal data must be collected for a specific, explicit, and lawful purpose. Hence, the general rule is that for a company to use the personal data of its employees during an internal investigation, including at the interview stage, the employee must have previously provided informed, express, his reason, in recent times companies have begun to request this permission at the time the employment relationship begins. Nonetheless, this consent would be unnecessary if the personal data is publically available.

b) Reviewing emails?

Article 2.10 of the 1993 Peruvian Constitution (*Constitución Política del Perú*) states that every person is entitled to the secrecy and inviolability of their communications and private documents. The Peruvian Supreme Court has established two different criteria in this respect. From a labor law perspective, the Supreme Court has determined that an employer cannot claim to be the owner of its employees' business email accounts and does not have the right to review employee communications (case Casación No 14614-2016 Lima). However, during a criminal proceeding

concerning a conspiracy to fix public procurement, the Supreme Court asserted that if there is a high probability that business emails are used to exchange communications with criminal content, it is neither illegal nor unconstitutional for the employer to review its employees' emails (case *Recurso de Nulidad* No 817-2016/Lima). Note that an employee's prior consent enables the employer to review an employee's business email account.

c) Collecting (electronic) documents and/or other information?

In Peru, there are no specific laws addressing this issue. Nonetheless, it is both reasonable and appropriate to inform employees, through employee manuals, internal regulations or any other communication channel, that the workspace may be subject to search for the collection of documents or any other information related to an internal investigation. Further, this arrangement also guarantees the employees' right of defense.

Note that there are no binding precedents regarding a reasonable expectation of privacy at the workplace. However, when courts have ruled on related issues they, have established that the employee's consent is always necessary.

d) Analyzing accounting and/or other mere business databases?

In general terms, accounting and business databases are allowed to be used or accessed. In this respect, Law No 27489 (*Ley que regula las centrales privadas de información de riesgos y de protección al titular de la información*) regulates the information process through which companies known as private risk information bureaus operate. These organizations handle data related to financial, commercial, tax, labor, or insurance obligations, which individuals or legal entities use to undertake an economic solvency analysis. By the nature of this information, there is no need to require the data owner's consent.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

The regulation for Law No 30424 suggests that companies' internal reporting systems include: (i) information channels; (ii) disciplinary measures; (iii) whistleblower protection mechanisms to avoid retaliation and discrimination; and (iv) incentive schemes to promote the role of compliance programs.

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

There are no specific regulations in Peru governing how companies should conduct internal interviews with employees. However, to ensure an employee's right of defense and to avoid that the legality of the interview might be called into question, it is advisable to provide him/her with a summary of the issues under investigation.

b) **Be informed that he/she must not make statements that would mean any kind of self-incrimination?**

There is no legal obligation in Peru concerning self-incriminatory statements within an internal investigation. Nonetheless, to prevent that the legality of the information collected at the interview might be called into question, it is advisable to inform the interviewee that he/she has the right not to make any statement that might incriminate him/her, and to obtain a signed acknowledgement of receiving this warning.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

There is no specific legal obligation to do so. However, according to the Peruvian Bar Association's Code of Ethics (*Código de Ética del Abogado*), lawyers must act with loyalty and good faith. Therefore, to avoid that the legality of the information collected at the interview might be called into question, it is advisable to inform the interviewee that the lawyer attending the interview only represents the company and not the employee and to obtain a signed acknowledgment of receiving this warning.

d) Be informed that he/she has the right to have his/her lawyer attends?

There is no specific legal obligation to do so. However, to ensure the employee's right of defense and to avoid that the legality of the information collected at the interview might be called into question, it is advisable to inform the interviewee that he/she has the right to be assisted by a lawyer and to obtain a signed acknowledgement of receiving this information.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

As stated before, there are no laws in Peru establishing that employee representative bodies or labor unions must participate in internal investigations. Hence, the interviewee has no specific right in this regard.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Although this is not a pre-requisite before conducting an interview, according to Law No 29733, personal data can only be transferred across borders if the recipient country maintains an adequate level of protection for this sort of data. If the recipient country does not have an appropriate level of security, the issuer of the personal data must ensure that the processing of such data abroad is carried out under the provisions of Peruvian Law. However, this last requisite does not apply to personal data that an ownerhas previously given informed, express, and unequivocal consent to be transferred across borders.

g) Sign a data privacy waiver?

According to Law No 29733, the employer must inform the interviewee that the personal data collected during the interview could be used during the internal investigation and request his/her express and unequivocal consent for this purpose. With regard to information sent through the employee's business email accounts or stored in company-owned devices, please refer to the answers for questions 5b and 5c above.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities

According to Law No 29733, the employer must inform the interviewee that the personal data collected during the interview might be passed on to third parties, including local or foreign authorities, and must request express and unequivocal consent for this purpose.

i) Be informed that written notes will be taken?

There is no legal obligation in this regard.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

There is no applicable regulation for internal investigations in this regard. However, based on the principle of good faith (see question 3), employees should comply with document hold notices or document retention notices.

With respect to criminal investigations, Article 218 of the New Criminal Procedure Code (*Nuevo Código Procesal Penal*) states that if the owner or holder of a document that is necessary to clarify facts related to an investigation refuses to provide it to the prosecutor, the prosecutor may request a warrant from a judge to seize or review said document.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Article 2.18 of the 1993 Peruvian Constitution states that every person is entitled to the attorney-client privilege (professional secrecy). Furthermore, the Peruvian Supreme Court has established that the right to the attorney-client privilege should prevail over the right to collect evidence.

Hence, although there is no specific regulation, this protection may be claimed over the findings of an internal investigation where there was direct involvement by Peruvian external counsel. To ensure this protection, it is advisable that the documents collected should be kept in the custody of external counsel.

10. Can attorney-client privilege also apply to in-house counsel in your country?

Although there is no specific regulation in Peru on this issue, some private lawyers and academics have started to adopt the principle established by the European Court of Justice in the Akzo Nobel case, which states that communications with in-house lawyers are not covered by professional privilege.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

There is no regulation with regard to providing notice to insurance companies of internal investigations; this will depend on the insurance policy. Nonetheless, it is standard practice to include a clause requiring notice in most insurance policies.

b) To business partners (e.g., banks and creditors).

There is no regulation with respect to providing notice to partners of internal investigations. Accordingly, this will depend on the contract or agreement with business partners.

c) To shareholders.

There is no regulation with respect to providing notice to shareholders. Accordingly, this will depend on the company's bylaws and shareholders' agreements. Nonetheless, among Peruvian companies listed on the Stock Exchange Market, it is standard practice for the board of directors to assess whether an event that triggers an investigation is materially adverse to the company, i.e., whether the event has the potential to substantially affect the ordinary course of business. If so, the company should inform its shareholders.

d) To authorities.

There is no regulation with respect to providing notice of an investigation to local authorities.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

At the beginning of an investigation, the most urgent action to carry out is to attempt to remedy or compensate any damage to third parties, as well as to identify and correct any internal procedures that may have failed to address the issue involved, particularly those procedures related to the compliance program.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

There are no steps that must be taken to comply with the rules of local prosecutors as Peruvian prosecutors typically do not participate in, or rely on, internal investigations.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

According to criminal procedure regulations in Peru, lawful searches can be carried out in the following scenarios: (i) in *flagrante delicto*; (ii) where there is an imminent danger that a crime will be committed; or (iii) where there are reasonable grounds to believe that a person or assets relevant to a criminal investigation can be found on the premises that will be subject to the search. Only in the last case is it required to have a judicial authorization. Furthermore, there is an express rule stating that obtaining evidence in violation of fundamental guarantees, such as the inviolability of the home, lacks efficacy or probative value.

Article 15.3.c of the Peruvian Antitrust Law (*Ley de Represión de Conductas Anticompetitivas*) allows inspection visits – not searches – during a proceeding, even without prior notice. If a company denies the antitrust authority access to its facilities, a judicial mandate will be required.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

Following the fallout of the corruption cases known as Operation Car Wash and Construction Club, the Peruvian legislature recently introduced a new, important amendment to the New Criminal Procedure Code. Accordingly, corporations are now able to sign plea agreements with the Prosecutor's Office, which could lead to the exoneration of criminal and administrative sanctions including disqualifications from dealing with the public sector or the reduction of other penalties.

The Peruvian Antitrust Law also incorporates a clemency program under which any person may ask the antitrust authority to be exonerated from any fine in exchange for evidence that helps to detect and investigate a collusive practice and assists in punishing the parties responsible for said conduct.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

As a general rule, criminal liability for the acts of a third party is prohibited. However, an individual may be punished for acts committed by another person when he/she had the legal duty to prevent them and willfully omitted that obligation. In that case, he/she may receive the same penalty as the offender.

Legal entities could be liable for the acts of a third party when those acts are carried out in its name and for its benefit. In this case, the penalties that can be imposed include fines, suspension of activities, cancellation of licenses, and even the dissolution of the legal entity.

Companies or individuals responsible for infringements to the Peruvian Antitrust Law could also face fines.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

There has been a growing concern in recent times about good and responsible corporate governance, which encourages the adoption of compliance programs to identify, assess, and reduce legal risks.

Further, authorities have the challenge to achieve the goals of the newly adopted legal framework concerning plea agreements between legal entities and prosecutors.

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In addition to his private practice, he has been consulted several times by government entities, including the Advisory Committee of the Commission of Human Rights of the Congress of the Republic of Peru as well as the Citizen Security Commission. He is recognized by international legal publications as a leading lawyer and recommended in his country as an expert within his field.

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Sergio is a senior associate at the Lima office, where he focuses his practice on litigation, white-collar crime and corporate compliance. Previously, from 2013 to 2017, he was an advisor at the Peruvian National Council of Judiciary, a public institution in charge of assessing the performance of all judges and prosecutors. He is a former Criminal Law Lecturer at the Scientific University of the South in Peru. He has written and published several research articles focused on substantive aspects of criminal law, and he has also been a speaker at various conferences, both in Peru and abroad.

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Carlos is an Assistant Lecturer for the courses of Labor Law, Employment Law, Integration Seminar on Labor and Employment Law and International Labor Law at Pontificia Universidad Católica del Perú. He is also a former member of the Board of Directors of IUS ET VERITAS, law students' association from Pontificia Universidad Católica del Perú Law School.

Uruguay

	Corporate liability	Public bribery	Commercial bribery	Extraterritorial applicability of criminal laws	Adequate procedures defense
Yes		X			X
No	X		X	X	

Uruguay

1. What are the applicable laws referring to anti-corruption, bribery, and money laundering in your country?

In Uruguay, the following laws apply:

a) Anti-corruption & Bribery

- Criminal Code of Uruguay (*Código Penal*) – Articles 153 to 167.
- Act No. 18.485 dated 11 May 2009 (*Ley de Partidos Políticos*) – act of financing for political parties.
- Act No. 18.056 dated 14 November 2006 – ratifying the United Nations Convention Against Corruption (*Convención de las Naciones Unidas contra la Corrupción*).
- Executive Branch Decree No. 30/003 dated 23 January 2003 – Rules of Conduct for Public Office (*Normas de Conducta en la Función Pública*).
- Act No. 17.060 dated 23 December 1998 – Anticorruption Act –Rules of Conduct for Public Office (*Normas de Conducta en la Función Pública*).
- Act No. 17.008 dated 15 September 1998 – Ratifying the Inter-American Convention Against Corruption (*Aprobación de Acuerdo Internacional – Corrupción*).

b) Anti money-laundering

- Act 19.574 dated 1 October 2018 – Comprehensive Law Against Money Laundering (*Ley Integral contra el Lavado de Activos*) and Executive Branch Decree No. 379/2018.
- Act 19.484 dated 1 May 2017 - Approval of International Standards in International Fiscal Transparency, Prevention and Control of Money Laundering and Terrorism Financing (*Aprobación de Normas de Convergencia con los Estándares internacionales en Transparencia Fiscal Internacional, Prevención y Control del Lavado De Activos y Financiamiento Del Terrorismo*).
- Anti-terrorism Act 19.749 dated 15 May 2019 (*Ley Contra el Financiamiento del Terrorismo y Aplicación de Sanciones Financieras contra las Personas y Entidades Vinculadas al Terrorismo, su Financiamiento y la de la Proliferación de Armas de Destrucción Masiva*) and Executive Branch Decree No. 139/19 dated 16 May 2019 – Regulatory Decree of the Anti – Terrorism Act (*Decreto N° 136/019 que reglamenta la Ley N° 19.749 del 15 de Mayo de 2019*).
- Anticorruption Act 17.060 dated 23 December 1998 - Penalizes money laundering connected with public corruption (*Ley Cristal. Funcionarios Públicos*).
- Anti-Drugs Act 17.016 dated 28 October 1998. (*Ley de Estupefacientes*).
- Executive Branch Decree No. 147/2018 dated 23 January 2003 - Rules of Conduct for Public Office (*Normas de Conducta en la Función Pública*).
- Executive Branch Decree No. 379/2018 dated 12 November 2018 – Regulatory Decree of Act 19.574 (see above).

2. Do the following persons/bodies have the right to be informed or the company obliged to inform about an internal investigation before it is commenced and/or to participate in the investigation (e.g., the interviews)?

a) Employee representative bodies, such as a works council or union.
No.

b) Data protection officer or data privacy authority.
No.

c) Other local authorities.
No.

d) What are the consequences in case of non-compliance?

From a data privacy perspective, there is no obligation to inform any of the above mentioned persons/bodies before starting an internal investigation.

In Uruguay, there is no law or decree stating that works councils or labor unions have the right to be informed of internal investigations or imposing a duty on companies to notify these organizations before starting an investigation. However, from an employment law perspective, it might be advisable to give an employee implicated in an investigation a chance to defend themselves against any allegations, in particular if the investigations can result in sanctions against them.

3. Do employees have a duty to support the investigation, e.g., by participating in interviews? Are there any recommendations for the company to be better prepared to request such support (e.g., advance consents)? If so, may the company impose disciplinary measures if the employee refuses to cooperate?

Although there is no legal requirement for employees to cooperate with investigations, considering the duty of collaboration that arises in all employment relationships and in accordance with the principle of good faith, employees should collaborate with corporate investigations to the extent they can.

We suggest that employers include provisions addressing cooperation in internal investigations in employment contracts, company codes of conduct, or other internal policies. If a provision is included in one of those documents and an employee refuses to cooperate, then the company may impose disciplinary measures. Finally, any sanction imposed on an employee for misconduct must observe the principle of reasonableness (*principio de razonabilidad*).

4. May any labor law deadlines/statute of limitations be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?

No. In Uruguay, investigative actions do not affect statute of limitations or other labor law deadlines. Moreover, there are no regulations limiting the ability of employers to sanction employees. Legal precedent sets the guidelines to be followed on these issues.

5. Are there relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before:

a) Conducting interviews?

Though the employer is permitted to investigate, collect information, and conduct interviews, internal corporate investigations should be conducted in an ethical manner and strictly observe constitutional and fundamental rights; otherwise, the company might be subject to penalties.

b) Reviewing emails?

Article 28 of Uruguay's Constitution (*Constitución de la República*) states that an individual's papers and correspondence are private and that the right to privacy cannot be violated without due process of law. However, recent case law and scholarly opinions have interpreted this provision to exclude from constitutional protection corporate emails and correspondence. Corporate email accounts and correspondence are deemed property of the employer and must be used solely for work-related matters. Employees may not use these accounts for personal use. Furthermore, because corporate email accounts are considered business tools, the employer has the right to monitor these communications. This applies to information on devices such as mobile phones and any applications found on those pieces of equipment.

It is also highly recommended that employers provide written notice in the company's internal regulations and employment agreements clearly indicating that corporate email accounts, corporate mobile phones, and other devices must only be used exclusively for work-related matters. This

places employees on notice that communications through corporate channels may be monitored.

c) Collecting (electronic) documents and/or other information?

Under Article 4 of Act. No. 18.331, "sensitive data" cannot be collected without previous and express consent. Sensitive data is defined as information that reveals a person's racial or ethnical origin, political preferences, religious or moral convictions, trade union membership, or information pertaining to health or sex life.

d) Analyzing accounting and/or other mere business databases?

Accounting information and business databases may be freely analyzed by the employer since, as stated above, they are the company's property.

6. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g., for whistleblower protection)?

No, there are no specific procedures to be considered in case of a whistleblower report, and there are no limitations on topics reported, persons allowed to report, and persons implicated. In addition, there is no requirement to engage with the whistleblower after the report.

However, the following guidelines should be considered:

a) Information provided through a whistleblower system may only be retained for as long as it is necessary to fulfill the end for which it was collected.

b) Whistleblower policies must be provided in Spanish.

c) Confidentiality must be maintained.

d) Anonymity of the whistleblower must be maintained (unless the whistleblower waives this right).

7. Before conducting employee interviews in your country, must the interviewee:

a) Receive written instructions?

It is not mandatory for the employee to receive written instructions.

b) Be informed that he/she must not make statements that would mean any kind of self-incrimination?

It is not mandatory.

c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called Upjohn warning)?

It is not mandatory. However, it is advisable to inform the interviewee that the lawyer attending the interview represents the company and not the interviewee.

d) Be informed that he/she has the right to have his/her lawyer attends?

It is not mandatory. However, it is advisable to inform the employee that they have a right to have a lawyer present.

e) Be informed that he/she has the right to have a representative from the works council (or other employee representative body) attend?

It is not mandatory.

f) Be informed that data may be transferred cross-border (in particular to the United States)?

Yes. Under Act. No. 18.331, it is required by law to inform and obtain consent from the data owner before transferring any type of data across borders, regardless of whether the country where the data is being transferred to has or not adequate data protection levels under Uruguay's standards.

g) Sign a data privacy waiver?

It is not mandatory. However, it is recommended that the employer request a data privacy waiver from the interviewee allowing all information to be passed on to third parties.

h) Be informed that the information gathered might be passed on to third parties, including local or foreign authorities?

Please see answer 7.g) above.

i) Be informed that written notes will be taken?

It is not mandatory. However, as a practical matter, the employee should be informed that written notes will be taken.

8. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees, etc.)?

Document hold notices or document retention notices are not regulated in Uruguay. Consequently, there are no provisions prohibiting companies from delivering these notices to their employees, third parties, or their counterparts.

Although there are no provisions regulating their formalities and content, they should be in Spanish, and it would be prudent to identify the specific information to be preserved.

9. May attorney-client privilege be claimed over findings of the internal investigation? What steps may be taken to ensure privilege protection?

Yes, attorney-client privilege may be claimed over the findings of internal investigations.

10. Can attorney-client privilege also apply to in-house counsel in your country?

Yes, it would apply to both outside and in-house counsel.

11. Are any early notifications required when starting an investigation?

a) To insurance companies (D&O insurance, etc.) to avoid losing insurance coverage.

No. Early notifications are not legally required when starting an investigation in Uruguay. Nonetheless, it would be prudent to review the terms and conditions of any directors and officers liability insurance policies to avoid potential loss of insurance coverage.

b) To business partners (e.g., banks and creditors).

No.

c) To shareholders.

No. Early notifications are not legally required when starting an investigation in Uruguay. Nonetheless, it would be prudent to notify the company's board of directors of any new investigations and regularly provide updates on ongoing ones.

d) To authorities.

No.

12. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g., any particular immediate reaction to the alleged conduct?

In general, the answer is no. However, with respect to anti-money laundering (AML) provisions, certain parties including lawyers, accountants, public notaries, and others must report unusual, questionable, or highly complex transactions to the public agency in charge of the execution of AML, as required under the Act 19,574. Those reports may lead to a formal criminal investigation by those agencies. Parties subject to AML notice provisions must report the transaction prior to its performance to be in compliance with AML.

13. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?

There is no specific regulation in this respect, but a district attorney conducting a formal investigation may rely on the findings or evidence of a corporate investigation.

14. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, may gathered evidence still be used against the company?

Under articles 189 and 197 of the Criminal Procedural Code, the district attorney may authorize the police to conduct search warrants or raids on companies in the context of a formal criminal investigation.

If there is no previous authorization from the district attorney and no investigation is being conducted, the evidence gathered will not be admissible under the Uruguayan Criminal Procedural Code.

15. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?

No. There is no corporate criminal liability in our jurisdiction. Criminal liability is only imposed on individuals.

16. What types of penalties (e.g., fines, imprisonment, disgorgement, or debarment) may companies, directors, officers, or employees face for misconduct of (other) individuals of the company?

The general principle under Uruguay law is that individuals may be held liable exclusively for those acts or omissions in which they have had a personal involvement. Penalties for violations include fines, admonishment, imprisonment, and debarment.

However, there are certain cases where tax or corporate law establishes penalties on individuals through vicarious liability. Some examples include:

- Corporate income tax–directors are jointly liable for the taxes owed by the company, regardless of negligence or fraud (strict liability).
- Contracting companies are jointly and severally liable for employment obligations of their subcontractors.
- Directors may face debarment for a corporation's insolvency.

17. Please briefly describe any investigations trends in your country (e.g., recent case law, upcoming legislative changes, or special public attention on certain topics).

Following the approval of Act 19.574 and in accordance with OECD guidelines, Uruguayan authorities have increased investigations of public notaries, accountants, free trade zone users, currency exchange houses, and others to verify compliance with money-laundering regulations.

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Guillermo Duarte's practice focuses on corporate transactions, mergers and acquisitions, and project finance matters. Mr. Duarte has handled some of the most visible projects in Uruguay, including establishing local subsidiaries of well-known multinational companies. Mr. Duarte regularly reviews various types of agreements such as license agreements, stock-acquisition agreements, purchase agreements, distribution agreements, and shareholder agreements. He also frequently completes multi-jurisdictional templates involving Uruguay law on matters such as data privacy, online gambling, antitrust, mergers, distribution, and IP.

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Mr. Leonardo Melos joined Bergstein Abogados in 2005 and is the lead partner in the firm's litigation, arbitration, and antitrust practice. He was appointed as a judge by the Supreme Court of Justice, serving in that capacity between 2006-2007. As judge, Mr. Melos was involved in the initial investigations of criminal activities within his jurisdiction.

In 2007 he rejoined the firm, where he continued practicing in the litigation department. Since then, Mr. Melos has represented corporate clients and individuals in white-collar crime matters including tax crimes, fraud, and misappropriation, among others.

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Having joined Bergstein Abogados as a trainee, Vanessa Corvini has been a member of the Corporate practice group since 2013. Mrs. Corvini focuses her practice on anti-corruption, corporate, and compliance issues. She handles corporate compliance requirements at the Corporate Department of the firm, and in that capacity, she has dealt on a regular basis with the Corporate Controlling Agency, being in charge of capital increase procedures, capital reduction proceedings, and money and anti-money laundering practices. Mrs. Corvini has assisted many companies in complying with anti-money laundering regulations.

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Mariana Pison joined Bergstein Abogados in early 2013 as a specialist in labor and employment law. In 2015, Ms. Pison worked in Machado Mayer, São Paulo as an intern.

Ms. Pison has assisted various multinational companies in Uruguay with establishing local operations. She regularly collaborates with clients on issues related to hiring of personnel, proceedings before government agencies, and compliance, to name a few.

Global leadership

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Leading our global Investigations, White Collar and Fraud practice, Crispin, has wide ranging experience in international and cross-border issues arising out of complex fraud, bribery and corruption, insolvency and asset recovery situations. Now based in London, he worked in our Hong Kong office for 5 years and subsequently managed our offices in Asia and the Middle East for 8 years.

Over the years Crispin has acted on some of the leading cases in his field, including Arrows Limited, in which the House of Lords first sought to define the powers of the UK's Serious Fraud Office and the huge multi-jurisdictional investigation and litigation arising from the collapse of BCCI bank. He also acted for the UK pension interests in the unique cross border trial that took place simultaneously in Delaware and Toronto to determine the distribution of the billions of dollars held by the bankruptcy trustees of the U.S., Canadian and European estates of Nortel.

He brings a wealth of experience advising on the UK Bribery Act and guiding management boards through the minefield of compliance with 'adequate procedures' around the globe. Crispin has also acted as pro bono partner and is co-chair of the firm's Citizenship Panel.

Stephanie Yonekura

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Stephanie Yonekura brings a unique perspective to any internal investigation. Having served as the Acting U.S. Attorney in Los Angeles, Stephanie knows the hot-button issues that are considered in every stage of any government investigation.

As the Acting U.S. Attorney of the largest office outside of Washington, D.C., Stephanie was an active participant in the larger Department of Justice community, serving on nationwide committees on white collar fraud, cybercrime, and intellectual property. Stephanie interacted with corporations when they were under investigation as well as when they were victims of crimes.

Stephanie worked with the FBI, SEC, IRS, CFTC, and various inspectors general as a prosecutor for more than 14 years, on issues including financial institution fraud, government fraud, securities fraud, and cybercrime. She developed a strong reputation with the court, defense counsel, and investigating agencies for digging into the facts and collaborating with law enforcement agencies and victims. She was also known for her ability to streamline investigations and make fair and equitable charging and sentencing decisions. In the courtroom, Stephanie exudes confidence, knowledge, and integrity.

In private practice, Stephanie uses her extensive experience in the trenches, in the courtroom, and as the chief law enforcement officer in Los Angeles to help clients understand the key issues and investigate matters strategically and surgically.


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Vanessa Pinto Villa is a professional support lawyer in the Latin America Practice Group at Hogan Lovells' Miami office. She collaborates with the group's lawyers across various practice areas with a focus on providing legal and analytical input to business development initiatives, identifying emerging legal issues and trends in the region, and recognizing opportunities to expand business with new and existing clients.

Vanessa also assists in the production of relevant articles for in-house and external publications and conducts research to create presentations that build on the different areas of practice of the group and enhance the firm's profile.

Prior to joining Hogan Lovells, Vanessa worked as a commercial litigator in a boutique Miami law firm, where she handled a variety of complex disputes. In law school, she earned high honors and graduated second in her class from Florida International University College of Law in 2012. Her pro bono work includes serving as attorney ad litem on dependency matters in the Miami-Dade Circuit Court's Juvenile Division and participating in restoration of civil rights programs.

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