


# The Guide to Managing a Corporate Crisis

Third Edition

**Editors**
Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers

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# Publisher's Note

Latin Lawyer is delighted to publish *The Guide to Managing a Corporate Crisis*.

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 50 leading practitioners from a variety of disciplines, it provides guidance that will benefit all practitioners when an unexpected crisis hits.

Corruption investigations, expropriation, industrial accidents, pandemics: corporate crises take many forms, but each can be equally dangerous for companies in Latin America. Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Managing a Corporate Crisis*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance, and Regulators*, our online tool that provides an overview of the major regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.



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# Part V

## Anti-Corruption and Government Investigations

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# When Good Companies Fight Against the Bad: A Practical Crisis Management Guide for Doing Business in Mexico

**Leonel Pereznieto and Narciso Campos**[1]

## Introduction

Corruption has been a big challenge in Mexico, especially in recent history. Amid high-profile corruption cases that became public under the previous administrations, corruption became a central issue of the 2018 Mexican presidential election. As one of the main points in President Andrés Manuel Lopez Obrador's (2018–2024) electoral platform, today, the eradication of corruption is at the forefront of the state's policies.[2]

There are very good reasons for this: Mexico currently ranks 130 out of 198 countries in the Corruption Perception Index (CPI), as prepared by Transparency International, an international non-government organisation.[3] Mexico's perception of corruption is high even when compared with its Latin American peers: Brazil ranks 106 out of 198 in the CPI, and other countries in the region such as Peru, Colombia and Chile all fare better than Mexico, ranking 101, 96 and 26 respectively.[4]

Even within the country, the perception of corruption is very high among citizens: according to official government poll numbers, the perception of the frequency of acts of corruption in government institutions is 87 per cent, which has been slightly reduced from a 91.1 per cent in 2017.[5] This has taken a toll on the level of perception of trust in the federal government, although since President Lopez Obrador took office in December 2018,

1 Leonel Pereznieto and Narciso Campos are partners at Creel, García-Cuéllar, Aiza y Enriquez.

2 See National Development Plan 2019–2024, published in the Federal Official Gazette on 12 July 2019, http://dof.gob.mx/nota_detalle.php?codigo=5565599&fecha=12/07/2019. The National Development Plan defines the national economic policy objectives and actions that the federal government will follow during the six-year presidential term. The National Development Plan for 2019–2024 enlists the eradication of corruption as the first item in the agenda.

3 Transparency International, Corruption Perception Index, www.transparency.org/en/cpi/2019/results/.

4 id.

5 INEGI, 2019 National Survey of Quality and Government Impact, Press Communiqué 251/20, 21 May 2020, www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/EstSegPub/encig2019_05.pdf.



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the levels have increased from 25.5 per cent of the population having trust in the federal government in 2017 to 51.2 per cent in 2019.[6]

This regained confidence has been accompanied by a plethora of actions being implemented at the federal level to tackle corruption since the start of this administration. The most relevant of them being the investigations handled by two offices within the executive branch:

- the Financial Investigation Unit (FIU) of the Ministry of Treasury, which handles anti-money laundering (AML) and counter-terrorist financing (CTF) investigations; and
- the Office of the Comptroller General, a cabinet-level ministry entrusted with the administrative oversight of public servants working for the federal government, as well as companies doing business with the government.

This complex environment and the well-warranted focus on anti-corruption by the current administration entails a risk for companies operating in Mexico: the possibility of getting caught up in the middle of investigations and enforcement actions, irrespective of their involvement in any wrongdoing.

Given this state of affairs, doing business in Mexico while trying to maintain a clean operation can be complicated, especially in industries that have historically been more prone to being caught up in corruption scandals, such as those involved in public procurement.

This chapter describes the current state of anti-corruption efforts and tools used by the government, and includes practical advice for companies operating in Mexico, describing typical cases that may result in crises that can arise in the context of anti-corruption investigations in the country, and includes some recommendations on how to prepare for such events.

## Current anti-corruption efforts – tools of the trade

Since the outset of the current Mexican administration, legislative changes have ensued to incorporate more stringent rules for both the criminal and administrative legal responsibilities arising from corruption.

On 12 April 2019, a constitutional amendment was enacted to include inter alia corruption-related criminal offences in the catalogue of those that warrant mandatory prison without bail as a preventive measure – illicit enrichment and abuse of functions.[7]

On 19 November 2019, the Federal Law on Republican Austerity was enacted.[8] This legislation, in addition to providing limits on spending and public trusts,[9] expressly provides that public contracts obtained through corruption, influence peddling or that cause harm to

6 id.

7 See Decree declaring the amendment of Article 19 of the Constitution regarding mandatory prison as a preventive measure, published in the Federal Official Gazette on 12 April 2019, http://dof.gob.mx/nota_detalle.php?codigo=5557700&fecha=12/04/2019.

8 See Decree that enacts the Federal Law on Republican Austerity and amends the General Law on Administrative Responsibilities and the Federal Law on Budget and Fiscal Responsibility, published in the Federal Official Gazette on 19 November 2019, http://dof.gob.mx/nota_detalle.php?codigo=5579141&fecha=19/11/2019.

9 See e.g., Federal Law on Republican Austerity, Articles 10 and 17.



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public finances will be null and void, as determined by a judicial authority.[10] It also obliges public servants to legally separate themselves from assets that may result in conflict, and establishes a 10-year cooling-off period for high-ranked public servants after they leave office, forbidding them from being employed by companies they supervised or regulated or for which they obtained privileged information by virtue of their public position.[11]

These legislative actions have been accompanied by a revamping in the day-to-day activities of two main offices of the federal public administration that have been used to investigate and tackle corruption-related charges: the FIU and the Office of the Comptroller General.

The impact of their actions has been expanded by direct coverage from both public sources, especially directly through daily conferences and media, which has further exerted pressure on companies and individuals subject to, and caught up in, corruption-related investigations.

## FIU – financial-related investigations

The FIU was created in 2004,[12] following recommendation 29 of the Financial Action Task Force (FATF).[13] The FIU is the central agency in charge of:[14]

- receiving reports from financial entities and designated non-financial businesses related to suspicious activities (suspicious activities reports);
- analysing reports received, including operational analysis and strategic analysis, to identify specific targets as well as trends and patterns; and
- disseminating findings and information to other authorities.

The foregoing functions are typical of the FATF-modelled FIUs in the 37 countries that are part of the FATF organisation.[15]

10 id., at article 9.

11 id., at article 24.

12 Decree that amends the Internal Rules of the Ministry of Treasury and the Law of the Treasury Service of the Federation, published in the Federal Official Gazette on 7 May 2004, http://dof.gob.mx/nota_detalle.php?codigo=670102&fecha=07/05/2004.

13 See FATF (2012–2019), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, www.fatf-gafi.org/recommendations.html.

14 FIU, '¿Quiénes somos?' , www.uif.gob.mx/es/uif/quienes_somos.

15 There are 37 Member Countries of FATF: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, China, Iceland, India, Ireland, Israel, Italy, Japan, South Korea, Luxembourg, Malaysia, Mexico, the Netherlands, New Zealand, Norway, Portugal, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States, and 2 regional organisations: European Commission and Gulf Co-operation Council. FATF, FATF Members and Observers, www.fatf-gafi.org/about/membersandobservers/.



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As part of a comprehensive financial reform undertaken in 2014, the FIU was granted the authority to block accounts in the financial system, as contemplated under Recommendation 4,[16] 6 and 7 of the FATF Recommendations.[17]

As part of its administrative powers, the FIU may order banks and other financial institutions to immediately suspend any transactions and services to their clients through the inclusion of such clients in a 'blocked persons list', which is confidential.[18] This power to effectively freeze bank accounts can be subject to judicial review, although the judiciary's intervention would only ensue after the filing of an *amparo* lawsuit against the FIU's actions.

The FIU is also empowered to denounce the commission of AML and CTF criminal offences before the Attorney General's Office,[19] who in turn is the authority that can request the freezing and seizure of assets as a precautionary measure before federal courts[20] and prosecute the criminal offences.

The FIU has undertaken a more prominent and public role in the investigation of corruption in past years, ordering the freezing and seizure of bank accounts in cases ranging from human trafficking to criminal organisations and high-profile corruption cases.[21]

### Office of the Comptroller General – administrative-related investigations

Traditionally, the Office of the Comptroller General has been the main authority of the federal government empowered with the investigation and administrative prosecutions of corruption-related charges in the administrative sphere. It has done so through the internal control organs that respond directly to the Comptroller General but that are operationally and physically located within each authority in the federal public administration.

Its main activities, as they relate to the investigation of private parties, have been carried out based on its oversight powers over contracts entered into by the federal government and private parties on procurement and public works.

16 'Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value. Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures.'

17 See Decree that amends several provisions on finance and enacts the Law to Regulate Financial Groups, published in the Federal Official Gazette on 10 January 2014.

18 Law of Credit Institutions, Article 115; Internal Regulations of the Ministry of Treasury, Article 15, Section XXXII.

19 See Federal Criminal Code, Articles 400 bis and 139 quater; see also Federal Law to Prevent and Identify AML Transactions, Article 6, Section IV; see also Internal Regulations of the Ministry of Treasury, Article 15, Section XIII.

20 National Criminal Procedeeings Code, Articles 138, Section II and 155, Section IV.

21 See UIF, Press Releases, www.uif.gob.mx/es/uif/comunicados.



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During 2015 and 2016, a comprehensive set of constitutional and federal legislative reforms was enacted to combat corruption, which revamped the anti-corruption institutional framework in both the criminal and administrative spheres:[22]

- the National Anticorruption System was created, which coordinates all actions at the federal, local and municipal levels;
- existing institutions were strengthened:
  - the Federal Tribunal on Administrative Justice was renamed and revamped as the prime jurisdictional entity entrusted with handling disputes between the federal public administration and private parties, including imposing penalties for serious administrative misconducts committed by public servants and administrative misconducts committed by private parties;
  - the Superior Audit of the Federation – the House of Representative's technical body – was revamped and is now empowered to audit any federal public entity in Mexico and, if it finds the commission of an administrative misconduct or criminal offence, it can carry out the investigation for administrative serious misconducts, and denounce the commission of criminal offences before the Attorney General's Office; and
  - the Attorney General's Office was revamped with a Special Attorney's Office for criminal offences related to corruption;
- corruption-related criminal offences, which are investigated by the Attorney General's Office, were amended in the Federal Criminal Code, which is extensive to both private individuals and companies, as well as to public servants.[23] For companies, the offences can carry the following penalties:
  - suspension of activities and closure of premises for up to six years;
  - prohibition on engaging in future activities related to the commission of a criminal offence;
  - disqualification from participating in public procurement contracts for up to six years; and
  - judicial management for up to six years; and[24]

22 Decree that amends the Contitution on the fight against corruption, published in the Federal Official Gazette on 27 May 2015, http://dof.gob.mx/nota_detalle.php?codigo=5394003&fecha=27/05/2015; Decree that amends the Federal Criminal Code on the fight against corruption] published in the Federal Official Gazette on 18 July 2016, http://dof.gob.mx/nota_detalle.php?codigo=5445043&fecha=18/07/2016; Decree that amends the Organic Law of the Federal Public Administration on internal control of the Federal Executive, published in the Federal Official Gazette on 18 July 2016, http://dof.gob.mx/nota_detalle.php?codigo=5445044&fecha=18/07/2016; Decree that enacts the Law on Fiscalisation and Accountability of the Federation, and amends article 49 of the Fiscal Coordination Law and article 70 of the General Law on Governmental Accounting, published in the Federal Official Gazette on 18 July 2016, http://dof.gob.mx/nota_detalle.php?codigo=5445046&fecha=18/07/2016; Decree that enacts the General Law of the National Anticorruption System, the General Law on Administrative Responsibilities and the Organic Law of the Federal Tribunal on Administrative Justice, published in the Federal Official Gazette on 18 July 2016, http://dof.gob.mx/nota_detalle.php?codigo=5445048&fecha=18/07/2016; Decree that amends the Organic Law of the General Attorney's Office, published in the Federal Official Gazette on 18 July 2016, http://dof.gob.mx/nota_detalle.php?codigo=5445050&fecha=18/07/2016.

23 See Federal Criminal Code, Articles 11 bis and 212.

24 id., at article 11 bis.



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- administrative misconduct committed by private parties – both individuals and companies – was detailed in the General Law on Administrative Responsibilities, which can carry the following penalties: fines, disqualification from participating in public procurement contracts for up to 10 years, compensation for damage to public finances; temporal suspension of any commercial, economic, contractual or business activities of a company for up to three years and the dissolution of the company:[25]
    - during the course of determining the administrative responsibility of private companies, an effective compliance programme can serve as a mitigating factor,[26] as well as cooperation with the investigative authorities for leniency.[27]

Within the current legal framework, the Office of the Comptroller General continues to carry out investigations related to administrative misconduct committed by private parties, although this is limited by the jurisdictional review of the Federal Tribunal on Administrative Justice, which is the entity that ultimately imposes penalties on private parties.

The Office of the Comptroller General continues to carry out the main investigations related to the prosecution of private parties at the federal level, which include those related to public contracts for procurement and public works.

## Typical cases

In recent months, prominent anti-corruption cases have been investigated and covered broadly in the media. Typical cases are as follows:

- FIU cases;
    - the FIU would report an investigation, once accounts of investigated parties are frozen, usually former public servants under corruption-related criminal and administrative investigations;
    - the FIU would cast a wide net on the investigation, and the account freezing orders could include persons and companies involved in commercial transactions with the former public servants;
    - as a result, non-related third parties may be caught up in the investigations. This hinders their ability to operate their business during the course of the FIU's investigation, even though the third party may not have been privy and may not have participated in the underlying corruption charges, presumably committed by the former public servant. Investigations are often reported in the media, adding an additional layer of complexity for the non-related third parties, as they have to deal with reputational effects;
    - this may result in a heavy burden on third parties to a corruption-related investigation that may not be prepared against such scenario and the judicial remedies that may need to be activated to move past the penalties; and

25 General Law on Administrative Responsibilities, article 81.

26 id., at article 25.

27 id., at article 88.



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- Office of the Comptroller General:
  - the Office of the Comptroller General investigates public procurement processes, as part of its regular actions – or addressing potential wrongdoing made public;
  - suppliers of government contractors may be hailed into the Office of the Comptroller General's direct investigations;
  - the Office of the Comptroller General can effectively bar companies from entering into future public contracts, which could include third-party suppliers that had no legal, contractual obligation with the government; and
  - this may also result in a burden on companies that, although not directly suppliers to the government, do business with government contractors.

## Recommendations

With the current state of affairs in Mexico, particularly the heavy emphasis on the fight against corruption, companies should be mindful about the risks of their operations in the country.

Special emphasis should be drawn to relationships with third parties, whether commercial or otherwise, that may expose the company to criminal and administrative liabilities, as well as to the purview of the FIU or the Office of the Comptroller General's powers of investigation.

Companies doing business in Mexico should have a plan in place in case they are caught up in an investigation process.

A 'break-in-case-of-emergency' plan should include the identification of key members of management that should be informed immediately and initial actions to be undertaken.

Key matters to be included in the contingency plan, and preventive actions, include the following:

- know your client:
  - a key element of preparation is a purely preventive measure: companies should always know who they are doing business with, through comprehensive supplier and client due diligence and act to mitigate any commercial relationship that may pose risks. Special emphasis should be drawn to politically exposed individuals that may be more prone to be subject to anti-corruption investigations. Robust, risk-based compliance programmes should always be implemented;
  - documenting steps taken to manage risk is important, as it may come in handy before administrative and jurisdictional authorities;
- business continuity:
  - the freezing of accounts is very disruptive for businesses, since the company subject to a blockage of accounts is not be able to receive payments from clients or make payments to suppliers and employees. An alternate operation plan should be prepared to allow the company to continue to operate for at least 15 business days after an event happens, while the matter is sorted out with the FIU;
  - even if caught under an investigation and precautionary freezing of assets, judicial review of the administrative authority's actions can be sought for through an *amparo* proceeding;



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- communication:
  - an effective communication strategy should be designed to balance the need to share information and cooperate with authorities and other stakeholders with the legal obligations to partners, contractors and other third parties to not disclose confidential information;
  - special emphasis should be drawn to address media coverage to mitigate reputational impact to the company; and
- re-evaluate constantly:
  - to weather the crisis, the internal team entrusted with the decision-making should constantly reconsider the effectiveness of the actions undertaken and balance the need to change course with the objective to follow internal procedures.



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# Appendix 1

About the Authors

**Leonel Pereznieto**

Creel, García-Cuéllar, Aiza y Enriquez

Leonel Pereznieto is a partner in the Mexico City office of Creel, García-Cuéllar, Aiza y Enríquez and co-heads the firm's investigations and compliance practice group. He has conducted numerous complex anti-corruption and white-collar investigations. In close collaboration with global and international counsel, Leonel has participated in investigations involving conduct in Mexico with a cross-border impact. He also regularly advises clients on the tailoring and implementation of compliance programmes by using his thorough understanding of corporate governance and his experience across various industries and cultures. His regulatory expertise enhances his investigations and compliance capabilities while affording clients effective advice on government matters, including procurement, concessions, licences and cooperation agreements.

**Narciso Campos**

Creel, García-Cuéllar, Aiza y Enriquez

Mr Campos has advised financial institutions on all kinds of regulatory matters related to their operations, including those related to compliance and anti-money laundering and counter-financing of terrorism (AML/CFT).

His regulatory practice encompasses all legal aspects of the operations of banks and financial groups, including authorisations, shareholding and corporate structures; corporate governance; treasury transactions, capitalisations and optimisations of capital; compliance, risk consolidation, controls and regulatory matters related to AML/CFT, including sanctions; annual bank evaluation pursuant to the Banking Law; product development and matters related to consumer protection; revocation and resolution processes; related-party transactions; payment systems and niche bank regulation.



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Corruption investigations, expropriation, industrial accidents, pandemics: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

Published by *Latin Lawyer*, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, *The Guide to Managing a Corporate Crisis* is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region. Fifty leading practitioners from a variety of disciplines have contributed their knowledge and insights from their experience.

Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book provides guidance that will benefit all practitioners when an unexpected crisis hits.

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