

LATIN LAWYER

THE GUIDE TO CORPORATE CRISIS MANAGEMENT

FOURTH EDITION

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

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The Guide to Corporate Crisis Management

Fourth Edition

Editors

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

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Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Crisis Management*. Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, this new guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Crisis Management*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions*, *The Guide to Restructuring* and *The Guide to Corporate Compliance,* and our new tool providing overviews of 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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CHAPTER 15

When Good Companies get Caught Up in the Fight — A Practical Crisis Management Guide for Doing Business in Mexico

Leonel Pereznieto[1]

Introduction

A changing environment is always fertile ground for crises to occur. In Mexico, the change brought about by the Federal Executive Administration of President Andrés Manuel López Obrador is no exception. Mr López Obrador's administration assumed power in December 2018 after a landslide victory predicated on change. The brand that President López Obrador and his supporters espoused throughout the electoral campaign and still refers to his movement is '*La Cuarta Transformación*' (the Fourth Transformation) or its initials '4T'.

Companies doing business in Mexico must understand the aspects of change that have been brought about by the López Obrador Administration in order to anticipate and try to solve many of the crisis situations that have become common ground and may affect them directly. Some of the trends of change that have been noticeable through government and that have a bearing on the business environment in Mexico include the following:

A strong federal executive

Vicente Fox, who was elected President in 2000, marked the transition from 70 years of uninterrupted PRI party rule. President Fox and the administrations that followed aspired to a true balance of powers between the Federal Executive,

1 Leonel Pereznieto is a partner at Creel, García-Cuéllar, Aiza y Enriquez. The author would like to thank Narciso Campos for his contribution to the chapter.

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legislative and the judiciary. In practice, this aspiration often resulted in lame duck situations, stagnant decision-making and business interests having enough room to challenge government policies head on and frequently stall them.

In contrast, the current Federal Executive Administration firmly believes in a strong Presidential role that leverages on the majority in Congress and that will not yield to undue pressures from business interests. The federal government will engage in discussions and negotiations with business, but it will do so on its terms and based on clear policy directives that flow down from the top ranks of the Federal Executive. The Administration has sent a clear message: it will not be bullied.

Targeted enforcement

The complex interaction of federal and state jurisdictions, coupled with insufficient financial resources that need to be spread out over a vast territory with more than 120 million inhabitants, is one of the reasons why law enforcement has lagged in Mexico. A 'soft' rule of law has prevailed nationwide because, among other reasons, law enforcement policies have traditionally been conceived as having a ubiquitous influence, despite the reality of Mexico's situation.

Perhaps acknowledging such structural limitations, the federal government has taken a more targeted approach to law enforcement aimed at furthering its core policies. Instead of the 'shotgun' approach to law enforcement adopted by prior administrations, the current one has opted to apply pressure on activities that counter the policy objectives it pursues. For instance, a tough enforcement drive has targeted tax avoidance and the aggressive tax-planning practices that had been prevalent. Also, before covid-19 struck, an enforcement drive was underway, focusing on certain participants in the pharma industry.

Expansive view of corruption

The government has expanded their definition of corruption to encompass not only bribery but also other forms of conflict of interest that, in the view of Mr López Obrador, had infiltrated and co-opted the political class. For example, the President had Congress enact the Austerity Law towards the end of 2019, which essentially closed the revolving door to government officials by establishing a 10-year ban on government officials that had been responsible for regulating an industry from being hired by companies doing business in that industry. This, coupled with more stringent regulations and policies applicable to interaction between government officials and private parties, has made dialogue with the government (especially during a crisis) less fluent.

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Crusade against corruption

Corruption has been a big challenge in Mexico, especially in recent history. Amid high-profile corruption cases that became public during 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 NGO.[3] Mexico's perception of corruption is high even when compared to 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 the citizens: according to government official poll numbers, the perception of frequency of acts of corruption in government institutions is 87 per cent, which has been slightly reduced from 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 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 complex environment and the well-warranted focus on anti-corruption by the current administration entail risks 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.

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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.

6 id.

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This chapter describes the current state of enforcement efforts by the current federal administration, and includes practical advice for companies operating in Mexico, describing typical cases that may result in crises that can arise in the context of the changing environment in the country, and includes some recommendations on how to prepare for such events.

Current enforcement efforts – tools of the trade

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

- 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 8 November 2019, several federal criminal statutes were amended to include tax fraud, smuggling and the use of false invoices, mandating prison without bail as a preventive measure. The Mexican Supreme Court, however, issued a landmark decision on 25 October 2021 that renders such amendments unconstitutional as regards tax fraud and the use of false invoices.
- 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 or influence peddling or that cause harm to 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]

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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.

10 id at Article 9.

11 id at Article 24.

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- Although it did not create it, the current federal administration has started to leverage a very relevant legislative change introduced through congressional activity during the prior administration. The National Code of Criminal Procedure (the Code of Criminal Procedure), which entered into force nationwide at both federal and state level on 14 June 2016, introduced the novel concept under Mexican law of determining criminal liability against legal entities. In this regard, Article 11 *bis* of the Federal Criminal Code links certain criminal offences –including bribery, influence peddling, money laundering, tax fraud and trafficking with false tax invoices – to the provisions of the Code of Procedure that contemplate corporate criminal liability.
- Another tool of the trade stems from the authority vested on federal prosecutors by the Federal Code of Criminal Procedure, which allows for the granting of immunity or leniency to cooperating witnesses.

These legislative actions have been accompanied by a revamping of the day-to-day activities of three main offices of the Federal Public Administration that have been used to investigate and tackle corruption-related charges:

- the Financial Investigation Unit (FIU) of the Ministry of Treasury, which handles anti-money laundering (AML) and counterterrorist financing (CT) investigations;
- the Attorney General's Office (FGR), the independent body responsible for conducting the investigation and prosecution of federal crimes; and
- the Office of the Comptroller General (SPF), 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.

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.

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FIU – financial-related investigations

The Mexican 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 business 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 FIUs in the 37 countries that are part of the FATF organisation.[15]

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 two 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 Mexican FIU was granted the authority to block accounts in the financial system, as contemplated under recommendations 4,[16] 6 and 7 of the FATF.[17]

As part of its administrative powers, the FIU may order banks and other financial institutions to suspend immediately 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 CT criminal offences before the Attorney General's Office,[19] which, in turn, is the authority that can request the freezing and seizure of assets as a precautionary measure before federal courts[20] and prosecute criminal offences.

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

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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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FGR – criminal investigations

In 2014, amendments were made to the Mexican Constitution that created an independent Attorney General's Office to replace the General Prosecutor's Office. Unlike its predecessor agency, which was one of the Presidential cabinet agencies and allowed the President to appoint and dismiss its head with relative ease, the amended Constitutional text provides for a nine-year term of the Attorney General and strict procedures before the Senate for appointment and dismissal. This powerful enhancement of the federal prosecutorial function resulted in an almost four-year political standstill.

To break this standstill, one of the first actions of President Lopez Obrador, soon after taking office in December 2018, was to submit to Congress a law setting forth the organisational structure for the Attorney General's Office. Simultaneously, with the support of his political party's majority both at the House of Representatives and the Senate – which was also won in the same election process that earned him the Presidency – Mr Lopez Obrador appointed Alejandro Gertz Manero as the Attorney General.

Alejandro Gertz Manero served as the Public Security Secretary for Mexico City in the late 1990s and then as the Federal Public Security Secretary during the first years of the Vicente Fox Administration in the early 2000s. Mr Gertz is known for his diehard prosecutorial style and for favouring traditional law enforcement methods for getting the job done.

Corruption-related criminal offences – which are investigated by the Attorney General's Office – were amended in the Federal Criminal Code, and extend to private individuals and companies, as well as public servants.[22] For companies, offences can carry the following penalties:

- suspension of activities and closure of premises for up to six years;
- prohibition to engage in future activities that were related to the commission of the criminal offence;
- disqualification from participating in public procurement contracts for up to six years; and
- judicial management for up to six years.[23]

22 See Federal Criminal Code, Articles 11 *bis* and 212.

23 id at Article 11 *bis*.

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SPF – administrative-related investigations

Traditionally, the SPF 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 units that respond directly to the SFP but that are operationally and physically located within each agency of 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.

In 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.[24]

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
- dissolution of the company.[25]

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24 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.

25 General Law on Administrative Responsibilities], Article 81.

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In 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 SFP continues to carry out investigations related to administrative misconduct committed by private parties, although it 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 SFP 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 enforcement 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 to 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 must deal with reputational effects; and
- 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.

26 id at Article 25.

27 id at Article 88.

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FGR cases

FGR cases follow a path that is not unusual in other jurisdictions, but that had not been widely used (at least not formally) by Mexican prosecutors. Namely, a strong, targeted investigation is pursued against an individual that is thought to be central to a broader criminal scheme. The investigation often calls on a judge to issue a mandatory prison order without bail as a preventive measure. Under these circumstances the individual is offered immunity in exchange for cooperating with evidence and testimony against other individuals or entities involved in the alleged criminal operation.

SFP cases

- The SFP investigates public procurement processes, as part of their regular actions – or addresses a potential wrongdoing made public.
- Suppliers of government contractors may be called into the SFP's investigations office.
- The SFP 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.
- This may also result in a burden on companies that, while not direct suppliers to the government, do business with government contractors.

Recommendations

With the changing environment 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 given 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 powers of investigation of the FIU, FGR and SFP.

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

A crisis management 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.

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- 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 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 through an *amparo* proceeding.

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 of partners, contractors and other third parties not to disclose confidential information.
- Special emphasis should be drawn to address media coverage to mitigate reputational impact to the company.

Revaluate 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.

Focus on policy and enforcement trends

Companies must remain well-informed about the new government policies that are being pursued generally or within a specific sector or industry in order to anticipate potential backlashes and develop courses of action that can ultimately

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promote dialogue with government. Falling back on the often-cited meaning of the Chinese word for crisis, *wei-chi*, well-anticipated dangers can be a source for opportunities.

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APPENDIX 1

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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.

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Published by Latin Lawyer and LACCA, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, *The Guide to Corporate Crisis Management* is designed to assist key business decision makers and their advisers in effectively planning for and managing a corporate crisis in Latin America.

This guide delivers specialist insight to our readers – general counsel, compliance officers, government agencies and private practitioners – who must navigate the region's complex, fast-changing framework of rules and regulations.

In preparing this guide, we have been working with practitioners from a variety of disciplines and geographies, who have contributed a wealth of knowledge and experience. We are grateful for their cooperation and insight.

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