

 **LATIN LAWYER**

**The Guide
to Corporate
Compliance - Fifth
Edition**

**Building effective internal
communication channels**

The Guide to Corporate Compliance - Fifth Edition


The fifth edition of The Guide to Corporate Compliance - edited by Andrew M Levine, litigation partner at Debevoise & Plimpton - brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all those who must navigate the region's complex and fast-changing framework of rules and regulations.

This latest iteration provides fresh analysis on competition rules, how law firms should handle clients subject to US sanctions and developing a strong compliance programme - among other key issues.

Generated: June 15, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

 **LATIN LAWYER**

Explore on LL 

Building effective internal communication channels

María González Calvet, Krystal Vazquez, Baldemar Gonzalez, Cassandra Ferrante and Christopher Majercin

Ropes & Gray

Summary

MANAGING MULTINATIONAL WORKFORCES IN AN ACCELERATING AGE OF ANTI-CORRUPTION 'ACCRETION'

BUILDING EFFECTIVE INTERNAL COMMUNICATION CHANNELS

STONE THROUGHOUT: COMMUNICATING A COMMITMENT TO COMPLIANCE CULTURE

WHO OWNS THIS? ASSIGNING COMPLIANCE OVERSIGHT

COMPLIANCE POLICIES, PROCEDURES AND PRACTICES

USE OF THIRD-PARTY MESSAGING APPS AND MOBILE DEVICES

COMPLIANCE THROUGH CARROTS AND STICKS

ANONYMOUS REPORTING MECHANISMS

MONITORING AND MEASURING COMPLIANCE THROUGH DATA ANALYTICS

ADAPTING TO LOCAL LAWS AND CUSTOMS

COMPLYING WITH SWEEPING LEGISLATION ACROSS JURISDICTIONS WITH VARYING ENFORCEMENT LANDSCAPES

TAILORING A GLOBAL COMPLIANCE POLICY

CONCLUSION

MANAGING MULTINATIONAL WORKFORCES IN AN ACCELERATING AGE OF ANTI-CORRUPTION 'ACCRETION'

Managing risk within multinational, matrixed organisations is no simple feat. The complexities that accompany risk management have only been compounded as US regulators continue to unveil several pieces of policy and renewed guidance for corporate compliance programmes.

Entities that face particular challenges amid these developments include, for example, those that employ nearly 100,000 employees worldwide and that generate significant revenue through production or sales in high-risk jurisdictions that are divided into several business segments. Often, such organisations are supported by global or regional compliance professionals tasked with navigating multiple jurisdictional demands in diverse areas of risk, including anti-bribery programming, employee onboarding and training, third-party due diligence and sanctions.

Building effective communication channels to advance global initiatives to workforces across the globe requires balancing both compliance and commercial priorities. To manage this balance effectively, a compliance programme must deploy a variety of techniques to support multinational workforces while ensuring the compliance programme is oriented to actual business risk and the enforcement landscape.

The cascade of policy announcements surrounding anti-corruption efforts and tools to combat corporate crime more broadly have dramatically altered the enforcement landscape in recent years, resulting in a 33 per cent increase in Federal Corrupt Practices Act (FCPA) matters in 2023 as compared to 2022, and twice as many major national-security corporate resolutions.^[2]

As further evidence of this rapidly evolving landscape, in October 2023, at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute, Deputy Attorney General Lisa Monaco (DAG Monaco or Monaco) announced a new safe harbour policy for voluntary disclosures related to mergers and acquisitions.^[3] In November 2023, the DOJ signalled a renewed commitment to coordinating with other governments to combat corruption by announcing the creation of the International Corporate Anti-Bribery initiative (ICAB). In December 2023, President Joseph Biden signed a presidential proclamation restricting entry into the United States for those who enable corruption and signed into law the Foreign Extortion Prevention Act (FEPA).^[4] Finally, in March 2024, DAG Monaco took the stage at the 39th American Bar Association's National Institute on White Collar Crime (ABA Conference) and presented the DOJ's priorities for enforcing white-collar crime laws and policies, which included demanding stiffer penalties for corporate recidivists, launching a 'whistleblower rewards program' that would provide first-in-time reporting individuals a portion of the forfeiture resulting from successful reports of corporate misconduct, and addressing threats from disruptive technology like artificial intelligence (AI).^[5]

Clearly, the tone from the very top, from the highest levels of the US government itself, is reverberating with a resounding call for collaboration and cooperation to achieve its commitment to combat corporate crime. As the US government reinforces its already robust system of accountability, multinational compliance programmes must expect that they will be held to account for doing the same with their workforces. Compliance professionals will

therefore need to answer the call to more effectively manage, communicate and amplify anti-corruption efforts as the threat of enforcement looms.^[6]

BUILDING EFFECTIVE INTERNAL COMMUNICATION CHANNELS

One key element of corporate governance is a well-designed and well-implemented compliance programme. However, even the best programme will falter absent effective channels to diffuse the principles of an organisation's 'culture of compliance' – the norms that encourage ethical conduct and a commitment to compliance with the law. Effective internal communication facilitates smooth information flow and shapes the way employees engage with an organisation, including how employees perceive its mission and values and how they relate to its culture.

A company conveys sound communication practices through the following:

- setting the tone at the top and throughout the entire organisation;
- delegating compliance oversight and enforcement to a dedicated function;
- implementing, publicising and enforcing compliance policies, procedures and practices;
- operating a robust confidential reporting mechanism;
- collecting and analysing compliance metrics; and
- establishing training initiatives that are tailored and adapted to local laws and customs.

No one size fits all when it comes to the channels used to communicate corporate compliance. This chapter discusses general best practices across industries, but they should be individually tailored to each company's operational realities.

TONE THROUGHOUT: COMMUNICATING A COMMITMENT TO COMPLIANCE CULTURE

Effective internal communication is multidirectional: top-down and bottom-up. Organisations comprise individual executives and employees who each should feel personally invested in ensuring and promoting compliance.^[7] Consistent with this principle, regulators evaluate a company's commitment to fostering a strong culture of compliance at all levels of the company – not merely within its compliance department.^[8]

Senior leadership sets the tone for the rest of the organisation. The commitment to compliance is manifested by the extent to which senior leadership articulates the company's ethical standards, conveys and disseminates those standards in clear and unambiguous terms and demonstrates rigorous adherence by example.^[9] In its revised March 2023 guidance on the Evaluation of Corporate Compliance Programs (ECCP), the DOJ recognised that the tone at the top must be further bolstered by the tone at the middle and beyond, which drives the compliance programme on a daily basis and invests subordinates with a sense of ethical responsibility.^[10] Most employees, especially at larger organisations, have little direct contact with senior leadership and therefore are most influenced by the managers who supervise them on a regular basis.

WHO OWNS THIS? ASSIGNING COMPLIANCE OVERSIGHT

Another hallmark of commitment to ethical practices is designating a dedicated function to implement and enforce compliance initiatives. The delegation of this core mandate should

account for an organisation's size and structure and need not be a compliance officer or in-house personnel. Whichever option best complements the size and structure of an organisation, the compliance function should be independent from management and be resourced adequately in terms of budget, human capital and information technology (IT).^[11]

In assessing an organisation's compliance programme, regulators ask not only whether compliance officers have adequate access to and engagement with the business, management and board of directors but also whether general counsels and compliance officers are empowered 'to make the case that investing in strong compliance programs is good for business.'^[12] In the words of DAG Monaco, '[c]ompliance must have a prominent seat at the deal table.'^[13] US regulators are further scrutinising the qualifications and expertise of key compliance personnel, signalling a preference for experienced and qualified personnel to embed compliance and ethical values at all levels of business.^[14] The overarching goal is to maintain a compliance function that is not merely a 'paper programme' but one that is well designed and equipped to handle an organisation's operational demands.^[15]

COMPLIANCE POLICIES, PROCEDURES AND PRACTICES

An organisation's policies and procedures form the foundation upon which an effective compliance programme is built. These policies set forth ethical expectations, outline disciplinary procedures and, more broadly, incorporate the culture of compliance into the organisation's day-to-day operations.^[16]

But policies are meaningful only if personnel know about them. Before doling out disciplinary action, for example, a company must first communicate clearly what constitutes a breach of internal policies, procedures and values and how the company will respond to such a breach. If a breach is corroborated and repercussions are warranted, the company should issue disciplinary action promptly and take steps to improve its compliance programme.^[17] This communicates that misconduct will not be tolerated while also reinforcing fidelity to ethics and accountability.^[18]

A company can ensure employees keep up to date with its policies by requiring periodic certification of compliance and introducing new employees to its ethical values during onboarding.^[19] Externally, a company should inform business partners that it expects all activities carried out on its behalf to comport with internal ethics protocols and lawful business practices by seeking assurances from third parties, where appropriate, through certifications or contractual representations of reciprocal commitments.^[20] These measures ensure that the compliance programme is visible, understood and followed appropriately by all relevant stakeholders. They also comport with regulators' expectation that a company implement policies that reflect the spectrum of risks posed by an evolving global threat landscape.^[21]

DOJ has plainly stated that prosecutors will be asked to consider 'the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct'.^[22] DOJ clearly is taking a company's ability to communicate this new reality to its employees into their calculus. In September 2023, for example, in the Non-Prosecution Agreement with Albemarle Corporation, the DOJ cited the fact that the company disciplined employees involved in misconduct – specifically terminating 11

employees and withholding bonuses from 16 others – as a reason for providing voluntary disclosure credit.^[23]

USE OF THIRD-PARTY MESSAGING APPS AND MOBILE DEVICES

The use of third-party messaging platforms (e.g., WhatsApp, WeChat) as well as ephemeral and encrypted messaging applications (e.g., Signal) for business communications increased substantially during the covid-19 pandemic and is now clearly here to stay. In Latin America, for example, WhatsApp was the preferred communication platform for more than 34 per cent of users in Argentina, Brazil and Colombia and the second most popular in Mexico and Chile.^[24] And, as these messaging services continue to grow in popularity, regulators expect companies to adapt their communication policies and practices to evolving technological realities.^[25]

In March 2023, for example, DOJ expounded on policy changes addressing the use of communications platforms, messaging applications and mobile devices.^[26] Under DOJ's revised ECCP guidance, regulators will not only ask about the electronic communication channels used by the business and their preservation settings, they will also consider how companies communicate the policies to employees and whether they enforce them on a consistent basis.^[27] Regulators will inquire about the company's ability to access such communications, whether they are stored on corporate devices or servers, as well as the company's knowledge of applicable privacy and local laws. 'A company's answers – or lack of answers – may very well affect the offer it receives to resolve criminal liability.'^[28]

In 2024, US enforcement authorities are delivering on their recommendations and admonishments, leaving less ambiguity on their expectations for compliance with respect to communications management. In January 2024, the DOJ agreed to a Deferred Prosecution Agreement with global software company SAP SE (SAP) in connection with alleged bribery schemes in South Africa and Indonesia.^[29] According to court documents, SAP and its co-conspirators allegedly made bribes intended for the benefit of South African and Indonesian foreign officials via cash payments, political contributions, and wire and other electronic transfers, along with luxury goods purchased during shopping trips. Though SAP did not receive voluntary disclosure credit, it did receive cooperation credit for, among other reasons, 'imaging the phones of relevant custodians at the beginning of SAP's internal investigation, thus preserving relevant and highly probative business communications sent on mobile messaging applications.'^[30] Even companies that historically have not had a legal duty to manage employees' communication platforms, such as those not regulated by securities laws, should take note of regulators' growing scrutiny of these communications more widely.^[31]

Prosecutors' expectation that companies implement communications policies includes those policies that permit employees to use managed bring-your-own-device (BYOD)^[32] devices rather than company-issued devices to access company information, known as BYOD policies.^[33] Many companies require work to be conducted on corporate devices; others permit the use of managed BYOD or unmanaged personal devices. They, like corporate-issued devices, might also have specialised apps or middleware that capture text and app-based communication content, allowing for preservation and monitoring for compliance reviews. An unmanaged personal device that is permitted for business communications will not have technological controls to assist in enforcing the company's communications policy. Such personal devices typically hold a complicated commingling of business and personal communications.

Companies may not be able to prevent every employee from using unauthorised messaging apps for business use, but they can take steps to demonstrate reasonable controls, including by maintaining a clear policy, ensuring retention capabilities, auditing employee use and incorporating information security best practices. In addition, companies should consider technological solutions to restrict employees' ability to install unapproved apps on company-issued and managed BYOD devices and provide employee training to establish further awareness of and compliance with information security practices. For example, some applications may delete messages as soon as they are read (i.e., ephemeral messaging) and some may automatically delete messages after a specified period unless default settings are changed by the user.^[34] It is therefore critical that companies evaluate, in coordination with their local IT functions, the effect that various applications have on company data retention and information security goals.

However, a company chooses to address the use of messaging platforms or mobile devices for business communications, it must strive to prevent circumvention of compliance protocols through off-system activity, preserve all key data and communications and maintain the capability to promptly produce that information for government investigations.^[35]

COMPLIANCE THROUGH CARROTS AND STICKS

Good-faith enforcement of policies and expectations further communicates an organisation's culture of corporate compliance and helps promote responsible corporate citizenship. Indeed, in analysing an organisation's commitment to corporate compliance, government authorities examine whether corporate management is enforcing the programme or tacitly encouraging employees to engage in impropriety.^[36] The government expects companies to use compensation systems to incentivise good behaviour and deter wrongdoing.^[37] Disciplinary action and compensation structures that impose financial penalties for misconduct can deter risky behaviour and foster a culture of corporate compliance.^[38] At the same time, positive incentives, such as promotions, rewards and bonuses for improving and developing a compliance programme or demonstrating ethical leadership, can drive compliance.^[39]

With these principles in mind, the DOJ has indicated that US prosecutors will assess a company's compensation structures when evaluating compliance programmes to determine how these structures contribute to the presence – or lack – of an effective compliance programme. The DOJ's Criminal Division is adopting a pilot programme that requires companies subject to corporate resolutions to implement compliance-promoting material within their compensation and bonus systems.^[40] Additionally, companies that withhold or seek to claw back compensation from liable individuals can obtain a reduction of financial penalties equal to the amount of the clawback.^[41] The goal is to align employee financial interests with an interest in good corporate citizenship. Compliance officials should therefore take note that an important barometer of an effective compliance programme is whether the compensation system effectively incentivises good behaviour and deters wrongdoing.^[42]

The DOJ is following through on crediting companies for taking appropriate action as to culpable employees' compensation. In September 2023, Albemarle Corporation (Albemarle), a publicly traded specialty chemicals manufacturing company, reached resolutions with both the DOJ and SEC to resolve investigations into FCPA violations. The settlement reflected a

compliance credit, with the government giving a dollar-for-dollar fine reduction in the amount of bonuses Albemarle withheld as part of its remediation strategy.^[43] The company withheld US\$763,453 in bonuses from 16 employees during the course of its internal investigation who were either suspected of wrongdoing themselves, or (1) 'had supervisory authority over the employee(s) or business area engaged in the misconduct' and (2) 'knew of, or were willfully blind to, the misconduct.'^[44] Additionally, in January 2024, the DOJ awarded a Deferred Prosecution Agreement to SAP SE in connection with alleged bribery schemes in South Africa and Indonesia.^[45] As part of its internal investigation, the Company withheld bonuses totalling US\$109,141 from employees who engaged in suspected wrongdoing in connection with the conduct under investigation, qualifying the company for an additional fine reduction in the amount of the withheld bonuses.^[46] For companies considering the benefits of the new pilot programme, the credits given to Albemarle and SAP SE demonstrate that there is real value in clawing back or holding back compensation. Even if unsuccessful, prosecutors can credit the good faith effort.^[47] Companies are therefore encouraged to explore innovative, effective and targeted ways of leveraging compensation to incentivise good corporate behaviour and deter misconduct through their own mix of carrots and sticks.^[48]

ANONYMOUS REPORTING MECHANISMS

Among the truest measures of a company's commitment to compliance is how it responds to potential misconduct. A company should have in place a well-functioning reporting mechanism for the anonymous reporting of suspected or actual breaches of internal policy.^[49] An effective mechanism will facilitate the timely and thorough investigation of those reports, which includes routing complaints to proper personnel and tracking timing metrics of open and closed investigations.^[50] Upon completion of a thorough probe, an organisation should document outcomes, monitor implementation of any remedial measures and share investigative findings with relevant stakeholders.^[51] Should reported allegations be substantiated, best practices recommended by the DOJ dictate that the company examine what happened, why it happened (i.e., the root cause) and how to avert similar incidents moving forward (i.e., the lessons learned).^[52]

But it is not enough to have such a reporting system in place without ensuring that employees and third parties know it exists.^[53] Publicise the reporting system broadly, through periodic trainings or email reminders that boost its profile.^[54] Hotline usage is a good barometer of how well a company is advertising its reporting channels. Infrequent or non-use of a reporting hotline implies that employees or third parties are unaware of its existence or are aware but either lack the know-how to escalate concerns or are uncomfortable with or distrust the process.^[55] In contrast, healthy hotline usage evinces a well-functioning system and constructive environment wherein individuals are empowered to 'speak up'.

Moreover, actively encouraging personnel to submit reports without fear of reprisal reinforces a corporate culture that promotes honest behaviour and incorporates reporting as part of one's ethical duties. To further signal transparency and foster trust in the process, provide detailed information on the procedural next steps after submitting a report.^[56] Regulators want to see that reports 'are taken seriously, appropriately documented, investigated, and – if substantiated – remediated'.^[57]

MONITORING AND MEASURING COMPLIANCE THROUGH DATA ANALYTICS

A staple of dynamic compliance programmes are mechanisms for collecting metrics to help detect and prevent misconduct, which also strengthen an organisation's internal communication channels more broadly. Indeed, government enforcement authorities have signalled that companies need to be collecting and analysing metrics about their programmes, emphasising the growing importance of data analytics in communicating to employees and stakeholders an organisation's commitment to maintaining an effective compliance system.^[58] A data-driven approach to compliance programmes can have resounding effects on fostering a culture of compliance and ethics.^[59]

US enforcement authorities are expanding their use of data analytics as a key prosecutorial tool. Just as government regulators use these tools to detect and combat criminal schemes, so too are organisations increasingly expected to leverage data analytics tools within their operations to monitor compliance with laws and policies, ferret out wrongdoing, and deliver meaningful remediation.^[60]

Gathering data helps organisations identify, mitigate and respond to compliance risks in real time and diagnose behavioural compliance trends. Either internally or with external assistance,^[61] companies can optimise the utility of data analytics by tracking core compliance metrics, including due diligence reviews, hotline usage, investigations opened and closed, training completion rates, policies drafted or revised, disciplinary action and remediation status.^[62] Capturing these metrics not only helps companies analyse patterns of misconduct and identify compliance vulnerabilities, it also helps companies demonstrate their commitment to mitigating risk when engaging with regulators in the context of government investigations.^[63] Analysing metrics further enables substantive assessment of high points and growth opportunities while offering benchmarks with which to anchor compliance targets and goals moving forward. This, in turn, breeds transparency and accountability by facilitating the reporting of actionable data to relevant stakeholders.

ADAPTING TO LOCAL LAWS AND CUSTOMS

As if implementing a dynamic compliance programme were not already a delicate balancing act on its own, adapting programmes to address a spectrum of anti-corruption laws and other legislation adds to the challenge but is one that compliance programmes must address.

COMPLYING WITH SWEEPING LEGISLATION ACROSS JURISDICTIONS WITH VARYING ENFORCEMENT LANDSCAPES

Distilling the vast expanse of bribery laws into manageable content for employees to understand and follow is not easy, especially with the cascade of countries that have enacted or amended a host of strong anti-corruption laws and enforcement regimes over the past decade. The FCPA, enforced by the DOJ and the SEC, is broadly applicable to US companies as well as foreign companies or persons with a nexus to the United States and their affiliates. This legislation prohibits foreign bribery of government officials but applies to the bribe payer only, whereas the UK Bribery Act (UKBA), passed in 2010, applies to both the bribe payer and the recipient. In December 2023, the enactment of the FEPA, however, brought US practices more in line with the UK by criminalising the demand side of bribery.^[64] The FEPA also has the potential to significantly expand US jurisdiction over typical corporate bribery cases, and presents increasing risks for global companies like those operating in Latin America. Moreover, the UKBA prohibits bribery of foreign public officials and private

parties alike. These statutory regimes and the regulators who enforce them are usually well known to compliance professionals.

Relatedly, the anti-corruption terrain in Latin America imposes jurisdiction-specific requirements that organisations must navigate. Various countries in Latin America, including Brazil, Colombia and Mexico,^[65] have enacted corporate compliance requirements of their own in recent years, and companies engaged in those markets must be cognisant of these varying enforcement landscapes, which are also undergoing their own respective evolutions.^[66] For example, the Chilean government has even proposed new anti-corruption provisions to their constitution.^[67] In December 2023, the President of Chile presented the National Public Integrity Strategy that aims to fight corruption head on and includes more than 200 concrete measures to improve integrity standards and prevent corruption.^[68] Ecuador also took steps in 2023 towards anti-corruption draft bills and robust compliance requirements, including taking the step of appointing a specialised panel of judges that will focus on anti-corruption and organised crime matters.^[69] In 2023, Argentina also saw the first enforcement action of a corporate liability law passed in 2018.^[70]

Taken together, it is clear that multinational organisations will need to ensure that their compliance programmes and global personnel adhere to the mandates that regulators impose. And whether it is the FCPA, the UKBA or local anti-corruption laws, the basic proscription is the same: nothing of value can be given, directly or indirectly, to improperly influence government officials or commercial counterparties.

TAILORING A GLOBAL COMPLIANCE POLICY

A global enterprise faces a wide array of compliance concerns including bribery, corruption, embezzlement, money laundering, employee kickbacks, accounting irregularities and conflicts of interest across geographies. Tailoring compliance programmes to the localities in which multinational companies operate while simultaneously addressing these cross-jurisdictional concerns poses yet another uphill challenge.

A multinational company may, for instance, choose to implement uniform global compliance policies that include requirements that are either more or less restrictive than local regulations, like those discussed above. Other multinational companies may mix and match – applying consistent standards globally while also supplementing them with country-specific guidance. Given the sheer number of individuals within a multinational organisation, it is also advisable that companies create roles for compliance professionals to be available to personnel globally for ‘on the ground’ guidance and feedback.

Tailoring training to an audience’s size, industry, risk profile, geographical footprint, language, sophistication and subject-matter expertise is crucial and underscored in the DOJ’s March 2023 ECCP.^[71] Above all else, when developing training programmes, multinational companies should tailor presentations and materials to the roles of its workforce, and policies and training should be presented in local languages and in person to the extent possible.^[72] Aiding companies that operate in Spanish-speaking jurisdictions and recognising the significant need for alignment with regional developments, the US government has published a Spanish-language version of the FCPA Resource Guide.

Training programmes should also be brimming with real-world examples tailored to any specific localities. Real-world examples that span the globe while also implicating Latin America are not difficult to find. For example, a 2023 FCPA resolution with Corficolombiana marked the first ever coordinated resolution with Colombian authorities in a foreign bribery

case.^[73] Corficolombiana, a Colombian financial services institution, agreed to pay over US\$80 million as part of a global resolution for participating in a scheme to pay millions of dollars in bribes to high-ranking government officials in Colombia.^[74] Corficolombiana was a member of a joint venture with Odebrecht, the Brazilian construction conglomerate.^[75]

Furthermore, it was announced on 1 March 2024, that Gunvor S.A. (Gunvor), an international commodities trading company based in Switzerland, has pleaded guilty and will pay over US\$661 million to resolve foreign bribery allegations of the company's corrupt scheme to pay substantial bribes to Ecuadorean government officials to secure business with Ecuador's state-owned and state-controlled oil company, Petroecuador, over the course of a decade.^[76] Here, money was used to bribe Ecuadorean officials, including Nilsen Arias Sandoval, a then-high ranking official at Petroecuador. The bribe payments were routed through banks in the United States using shell companies in Panama and the British Virgin Islands controlled by Gunvor's co-conspirators. This resolution also included cooperation from international partners in the Cayman Islands, Colombia, Curacao, Ecuador, Panama, Portugal, Singapore and Switzerland.

The increase in individual prosecutions involving Latin America also signals a continued focus on the region as well as a regulatory focus on individual accountability. In February 2024, an oil and gas trader was convicted for his role in a scheme to bribe Ecuadorean and Mexican government officials while also laundering money to secure contracts for his then-employer, Vitol Inc.^[77] It is alleged that the trader paid more than US\$1 million in bribes to officials of Petroecuador, an Ecuadorean state-owned oil and gas company, and PEMEX Procurement International, a subsidiary of PEMEX, the Mexican state-owned oil and gas company.^[78] Furthermore, in late 2023 the DOJ settled with two UK Reinsurance Brokers who admitted to engaging in a scheme to bribe multiple Ecuadorian government officials. This resolution demonstrates the department's 'steadfast commitment to hold both corporate and individual wrongdoers accountable for their crimes.'^[79] The department to date has charged eight individuals in related matters.^[80] Clearly, US regulators are committed to holding individuals accountable as these case studies relating to Latin America demonstrate.

Tailoring global compliance policies in a way that grapples with these real-world realities, whether they draw from corporate resolutions or individual prosecutions, will only provide multinational companies with a competitive advantage and bolster their ability to attract and retain superior talent. It will also ensure that business is done the 'right' way and help employees, wherever they are in the world, take stock in a company that acts with integrity.

CONCLUSION

Compliance programmes that incorporate the lessons learned from around the globe and marshal the tools outlined above as prophylactics will be well positioned to avoid enforcement actions on the back end. Government regulators are encouraging companies to do precisely that for their own benefit.

Architects who design compliance programmes in this age of accelerating anti-corruption 'accretion' must look to the past, present and future in managing multinational workforces and building effective internal communication channels. Compliance programmes should factor into their policies the role of incentives, clawbacks as well as the use of communications platforms. Training should include lessons learned from past enforcement actions as well as lessons from within a company while making innovative use of measures such as data analytics in diagnosing, mitigating and responding to compliance risks. Training

should also take a multidirectional approach to educating the workforce on the current state of anti-corruption accretion and its evolving nature and be tailored to an employee's locality when applicable. In addition, trainings should provide employees a glimpse into what the future could hold as seen in recent enforcement actions if compliance is not prioritised, providing adequate resources, anonymous reporting mechanisms, guidance and even mega-fine figures to ensure that the future is not, in fact, realised.

ENDNOTES

[1] María González Calvet is a partner, and Krystal Vazquez, Baldemar Gonzalez, Casandra Ferrante, and Christopher Majercin are associates, at Ropes & Gray.

[2] Stanford Law School Foreign Corrupt Practices Act Clearinghouse 2023 FCPA Year in Review, Stan., <https://enews.law.stanford.edu/t/r-e-tijllld-nykkuwyhi-ky/>; US DOJ, Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (4 October 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self> (noting also that the DOJ has added dozens of new corporate crime prosecutors).

[3] See US DOJ, New Safe Harbor Policy, *supra* note 2.

[4] U.S. Congress Passes Law to Criminally Prosecute Corrupt Foreign Officials, Ropes & Gray LLP (19 December 2023), <https://www.ropesgray.com/en/insights/alerts/2023/12/us-congress-passes-law-to-criminally-prosecute-corrupt-foreign-officials>.

[5] See US DOJ, Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (7 March 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>.

[6] See US DOJ, Acting Assistant Attorney General Nicole M. Argentieri Delivers Remarks at the American Bar Association's 10th Annual London White Collar Crime Institute (10 October 2023), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-american-bar>:

The Criminal Division's goals are also clear – to lead through both our enforcement and policy work in the areas of corporate and white-collar crime and to have an impact that reaches far beyond any individual case. To encourage good corporate citizenship, incentivize investments in compliance programs, and further our primary goal of individual accountability. To generate policies that are transparent and predictable, so that we can effectuate real change in corporate behavior domestically. And to work with our partners to amplify that change internationally.

[7] See US DOJ, Crim. Div., Evaluation of Corporate Compliance Programs 9 (Mar. 2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [US DOJ ECCP] ('it is important for a company to create and foster a culture of ethics and compliance with the law at all levels of the company.').

[8] US DOJ, Acting Assistant Att'y General Nicole M. Argentieri Delivers Keynote Speech at the American Bar Association's 39th National Institute on White Collar Crime (8 March 2024),

<https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american> ('Companies, employees, shareholders, and patients trust these gatekeepers [(executives and lawyers)] to set the tone and culture at an organization. And when they fail to do so, there is a cost.')

[9] See *id.*; see US DOJ ECCP, *supra* note 7; World Bank Grp., Integrity Compliance Guidelines 5 (2017), <https://wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf> [World Bank Guidelines].

[10] See US DOJ ECCP, *supra* note 7, at 9 ('Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them.');

US DOJ & SEC, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 58 (2d ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> [FCPA Resource Guide].

[11] See US DOJ ECCP, *supra* note 7, at 10. Dep't of the Treasury's Office of Foreign Assets Control, A Framework for OFAC Compliance Commitments 2 (May 2019), <https://ofac.treasury.gov/media/16331/download?inline>.

[12] See US DOJ, New Safe Harbor Policy, *supra* note 2.

[13] *id.*

[14] See US DOJ, SAP to Pay Over \$220M to Resolve Foreign Bribery Investigations (10 January 2024), <https://www.justice.gov/opa/pr/sap-pay-over-220m-resolve-foreign-bribery-investigations>.

[15] See US DOJ ECCP, *supra* note 7, at 9; US DOJ, Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the New York City Bar Association's International White Collar Crime Symposium (28 November 2023), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-new-york> (noting that 'a paper policy not acted upon is really no better than having no policy at all') [US DOJ, Miller Remarks].

[16] See *id.*, at 4.

[17] See US DOJ, Argentieri, *supra* note 8.

[18] See *id.* ('A strong compliance program is key to preventing corporate crime before it occurs and to addressing misconduct when it does take place. Our corporate enforcement policies are designed to encourage companies to invest in strong compliance functions and to step up and own up when misconduct occurs.')

[19] See OECD, Corporate Anti-Corruption Compliance Drivers, Mechanisms and Ideas for Change 39 (2020), <https://www.oecd.org/corruption/Corporate-anti-corruption-compliance-drivers-mechanisms-and-ideas-for-change.pdf>.

[20] See World Bank Guidelines, *supra* note 9, at 10; FCPA Resource Guide, *supra* note 10, at 62.

[21] See US DOJ, Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (Mar. 7, 2024),

<https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>.

[22] US DOJ ECCP, supra note 7, at 12; U.S.S.G. § 8B2.1(b)(6) ('[t]he organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct').

[23] See US DOJ, Albemarle to pay Over \$218M to Resolve Foreign Corrupt Practices Act Investigation (29 September 2023), <https://www.justice.gov/opa/pr/albemarle-pay-over-218m-resolve-foreign-corporate-practices-act-investigation>.

[24] See Tiago Bianchi, Share of Internet Users in Selected Latin American Countries Who Say WhatsApp Is Their Favorite Social Network as of 3rd Quarter 2022, Statista (22 March 2023), <https://www.statista.com/statistics/1323710/whatsapp-favorite-social-media-latin-american-countries/>.

[25] See Ropes & Gray, Not All Messaging Apps are Ephemeral (5 April 2023), <https://www.ropesgray.com/en/insights/podcasts/2023/04/not-all-messaging-apps-are-ephemeral>; GIR Miller Remarks ('Company policies and procedures addressing the use of personal devices and third-party messaging systems for business purposes will be reviewed as part of evaluating the effectiveness of a corporation's compliance program.').

[26] We are intentionally not referring to mobile devices as 'personal devices'. Given important legal and technical implications that apply to the different types of mobile devices, discipline should be employed when addressing this topic to note the differences between (1) corporate-issued mobile devices; (2) BYOD mobile devices; and (3) truly personal devices.

[27] See US DOJ ECCP, supra note 7, at 17; US DOJ, Assistant Att'y Gen. Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual Nat'l Instit. on White Collar Crime (3 March 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national> [ABA Conf. Polite Remarks].

[28] *id.*

[29] Deferred Prosecution Agreement, United States v. SAP SE, No. 1:23-CR-202 (E.D. Va. 10 January 2024), <https://www.justice.gov/opa/media/1332661/dl?inline>.

[30] See US DOJ, SAP to Pay Over \$220M to Resolve Foreign Bribery Investigations (10 January 2024), <https://www.justice.gov/opa/pr/sap-pay-over-220m-resolve-foreign-bribery-investigations>.

[31] See Ben Penn, DOJ Crackdown Prompts Compliance Scramble on WhatsApp, Signal, Bloomberg Law (14 March 2023), <https://news.bloomberglaw.com/us-law-week/doj-crackdown-prompts-compliance-scramble-on-whatsapp-signal-6>; Jane Yoon & Mark Carper, Revisiting Employee Communication Policies After DOJ Memo, Law360 (13 October 2022), <https://www.law360.com/articles/1538257/revisiting-employee-communication-policies-after-doj-memo>.

[32] Here we make a distinction between a managed BYOD device from a truly personal and unmanaged device. A managed BYOD device will have some form of MDM (Mobile Device Management) or EMM (Enterprise Mobility Management), which serves to allow access to approved systems, can block the installation of unapproved systems and apps, and offers other security features. This is one reason it is important to refer to mobile devices more specifically as between corporate-issued, BYOD and personal.

[33] See ABA Conf. Polite Remarks, *supra* note 27.

[34] See Not All Messaging Apps are Ephemeral, Ropes & Gray (5 April 2023) <https://www.ropesgray.com/en/insights/podcasts/2023/04/not-all-messaging-apps-are-ephemeral>.

[35] See US DOJ, Argentieri, *supra* note 8, <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-speech-american>, ('At the beginning of its internal investigation, the company imaged the phones of relevant employees, preserving highly probative communications that were sent on mobile messaging applications. This sort of proactive, impactful cooperation makes a real difference in our ability to advance our independent investigation.').

[36] See US DOJ ECCP, *supra* note 7, at 2.

[37] See US DOJ, Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting (21 September 2023), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-global> ('The Department expects companies to use compensation systems to align their executives' financial interests with the company's overall interest in good corporate citizenship.'). See also US Sent'g Comm'n, Guidelines Manual, U.S.S.G. § 8B2.1(b)(6) (2023) (noting that an organisation's compliance programme should entail '(A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct').

[38] See US DOJ, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022) [Monaco Memo], https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf, ('Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal 'gray areas.'').

[39] See US DOJ ECCP, *supra* note 7.

[40] See US DOJ, Miller Remarks, *supra* note 15.

[41] *id.*

[42] *id.*

[43] See US DOJ, Albemarle to pay Over \$218M to Resolve Foreign Corrupt Practices Act Investigation (29 September 2023), <https://www.justice.gov/opa/pr/albemarle-pay-over-218m-resolve-foreign-corporate-crime-practices-act-investigation>.

[44] id.; See also ABA Conf. Polite Remarks, *supra* note 27.

[45] See Deferred Prosecution Agreement, *United States v. SAP SE*, No. 1:23-CR-202 (E.D. Va. 10 January 2024), <https://www.justice.gov/opa/media/1332661/dl?inline>.

[46] id.

[47] See US DOJ, Acting Assistant Attorney General Nicole M. Argentieri Delivers Keynote Address at the 40th International Conference on the Foreign Corrupt Practices Act (29 November 2023), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-keynote-address-40th>.

[48] See US DOJ, Principal Associate Deputy Attorney General Marshall Miller Delivers Remarks at the Global Investigations Review Annual Meeting (21 September 2023), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-global>; See also Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (7 March 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations> ('Using a mix of carrots and sticks to promote responsible corporate citizenship.').

[49] See US DOJ ECCP, *supra* note 7, at 6.

[50] See id. See U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, 'a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation').

[51] See FCPA Resource Guide, *supra* note 10, at 66.

[52] See ABA Conf. Polite Remarks, *supra* note 27 (providing that prosecutors will continue to ask how companies 'learn from the issues they encounter').

[53] See World Bank Guidelines, *supra* note 9, at 13.

[54] See Helen Kim, Taking a Fresh Look at Hotlines: Fostering a Speak-Up Culture and Leveraging Data, *Anti-Corruption Report* (16 September 2020), <https://www.anti-corruption.com/7543386/taking-a-fresh-look-at-hotlines-fostering-a-speakup-culture-and-leveraging-data.shtml>.

[55] See Vincent Pitaro, Revisiting Compliance Programs in Light of the DOJ's Updated ECCP, *Anti-Corruption Report* (30 September 2020), <https://www.anti-corruption.com/7626661/revisiting-compliance-programs-in-light-of-the-doj-s-updated-eccp.shtml>.

[56] See Kim, *supra* note 54 ('Companies should provide regular training to employees on the reporting process, not just the existence of the hotline, to set expectations and encourage continued engagement.').

[57] US DOJ, Assistant Att'y General Kenneth A. Polite Jr. Delivers Remarks at NYU Law's Program on Corporate Compliance and Enforcement (25 March 2022) [NYU PCCE Polite Remarks], <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

[58] See, e.g., Rebecca Hughes Parker, *Using Data to Enhance Compliance Programs*, *Anti-Corruption Report* (5 January 2022), <https://www.anti-corruption.com/18633206/using-data-to-enhance-compliance-programs.html> ('The DOJ, SEC and other enforcement authorities have made clear that companies need to be gathering and analyzing data about their compliance programs, and the agencies themselves have become more sophisticated in their knowledge of data analytics.');

US DOJ, Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (28 October 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute> ('[D]ata analytics plays a larger and larger role in corporate criminal investigations, whether that be in healthcare fraud or insider trading or market manipulation.').

[59] See *In Global Investigations Review, Compliance Team Discuss Understanding and Shaping Organizational Culture*, *Ropes & Gray LLP* (17 October 2023), <https://www.ropesgray.com/en/news-and-events/news/2023/10/in-global-investigations-review-compliance-team-discuss-understanding-and-shaping-organizational>.

[60] See US DOJ, *Argentieri* (29 November 2023), *supra* note 47 (stating, 'just as we are upping our game when it comes to data analytics, we expect companies to do the same').

[61] See *Corporate Compliance is Both a Legal and Human Challenge*, *Ropes & Gray LLP* (20 June 2023), <https://www.ropesgray.com/en/news-and-events/news/2023/06/corporate-compliance-both-legal-and-human-challenge> ('Recognizing that compliance is not an exclusively legal, regulatory, and enforcement exercise also means that lawyers or other traditional risk professionals may not be the solution to compliance problems. 'Data-driven compliance, like human-centered compliance, is a multidimensional concept.').

[62] See Andy Miller, *How Visual Analytics Can Fuel a Compliance Program*, *Anti-Corruption Report* (2 December 2020), <https://www.anti-corruption.com/8042481/how-visual-analytics-can-fuel-a-compliance-program.html>.

[63] See NYU PCCE *Polite Remarks*, *supra* note 57:

We want to see examples of compliance success stories—the discipline of poor behavior, the rewarding of positive behavior, the transactions that were rejected due to compliance risk, positive trends in whistleblower reporting, and the partnerships that have developed between compliance officers and the business. . . . We want to know that a company can identify compliance gaps or violations of policy or law.

[64] U.S. Congress Passes Law to Criminally Prosecute Corrupt Foreign Officials, *Ropes & Gray LLP* (19 December 2023), <https://www.ropesgray.com/en/insights/alerts/2023/12/us-congress-passes-law-to-criminally-prosecute-corrupt-foreign-officials>.

[65] In Colombia, the Anti-Corruption Act, Law 1474 of 2011, criminalises active and passive bribery, foreign bribery, political corruption and money laundering, among other crimes, and establishes administrative, criminal and fiscal sanctions. In Mexico, the General Law of the National Anti-Corruption System (SNA) coordinates the

prevention, detection and prosecution of anti-corruption cases across municipal, state and local jurisdictions. Additionally, the Chilean government has even proposed new anti-corruption provisions to their constitution. Ropes & Gray LLP, Columbia, <https://www.ropesgray.com/en/EnforcementExpress/Interactive-Maps/Latin-America/Colombia> (last visited 22 March 2023); Anti-Corruption Act, Law 1474 of 2011, <http://wp.presidencia.gov.co/sitios/normativa/leyes/Documents/Juridica/Ley%201474%20de%2012%20de%20Julio%20de%202011.pdf> (last visited 22 March 2023).

[66] See David Hill, Evolving Anti-Corruption Laws in Latin America, Anti-Corruption Report (31 January 2024), <https://www.anti-corruption.com/20460581/evolving-anticorruption-laws-in-latin-america.html>.

[67] Eduardo Engel & Benjamin Garcia, A New Constitution for Chile: Let's Try Again? Hewlett Found. (21 February 2023), <https://hewlett.org/a-new-constitution-for-chile-lets-try-again/>.

[68] Chile Gov't, Government Presents Almost 200 Anti-Corruption Measures (4 December 2023), <https://www.gob.cl/en/news/government-presents-almost-200-anti-corruption-measures/>.

[69] See Hill, supra note 66.

[70] id.

[71] See US DOJ ECCP, supra note 7, at 1.

[72] See Globalizing Your Compliance Program, Ropes & Gray LLP (29 January 2018), <https://www.ropesgray.com/en/newsroom/alerts/2018/01/Globalizing-Your-Compliance-Program>.

[73] See US DOJ, Argentieri (Nov. 29, 2023), supra note 47.

[74] id.

[75] id.

[76] US DOJ, Commodities Trading Company Will Pay Over \$661M to Resolve Foreign Bribery Case (1 March 2024), <https://www.justice.gov/opa/pr/commodities-trading-company-will-pay-over-661m-resolve-foreign-bribery-case>.

[77] US DOJ, Oil and Gas Trader Convicted for Role in Foreign Bribery and Money Laundering Scheme (23 February 2024), <https://www.justice.gov/opa/pr/former-oil-and-gas-trader-convicted-role-for-foreign-bribery-and-money-laundering-scheme>.

[78] id.

[79] US DOJ, British Reinsurance Brokers Resolve Bribery Investigations (Nov. 20, 2023), <https://www.justice.gov/opa/pr/british-reinsurance-brokers-resolve-bribery-investigations#:~:text=%E2%80%9CTysers%20and%20H.W.,the%20Justice%20Department%27s%20Criminal%20Division>.

[80] Id.

ROPES & GRAY

María González Calvet

Krystal Vazquez

Baldemar Gonzalez

Casandra Ferrante

Christopher Majercin

maria.calvet@ropesgray.com

krystal.vazquez@ropesgray.com

baldemar.gonzalez@ropesgray.com

Prudential Tower, 800 Boylston Street, Boston MA 02199-360, United States

Tel: +1 617 951 7984

<https://www.ropesgray.com/en>

[Read more from this firm on LL](#)