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THE GUIDE TO CORPORATE CRISIS MANAGEMENT

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Editors

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

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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Introduction: Effective Crisis Management in Latin America

Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers¹

Around the world, business leaders regularly face crises that can severely disrupt or even threaten their companies' very existence. These crises may arise from an acute threat to the personal safety of employees, the fallout from an industrial or environmental accident, government investigations into compliance failures, financial distress leading to possible insolvency or, as the entire world has experienced recently, a pandemic disease. While businesses and governments have always allocated their time and resources to attempt to anticipate and prepare for the management of different crises, the covid-19 pandemic and its economic effects were the daily, and sometimes exclusive, focus of most businesses and governments during 2020 and part of 2021. As the health and safety of employees and other stakeholders, and, in many cases, business continuity and survival itself, took centre stage, the pandemic crisis that dominated the past 18 months has served as a constant reminder of the inherent unpredictability of crisis preparedness and response. As we move ahead from what is hopefully the worst part of the pandemic, though suffering some of the pandemic's worst effects, Latin America has remained a region of tremendous promise and opportunity for investors and corporations. And yet, the covid-19 pandemic has served as a demonstration of the particularly complex and multifaceted challenges that crisis management in the region can present for leaders, owing, among other things, to the region's diverse and often shifting political landscapes and operating environments.

¹ Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers are partners at Sullivan & Cromwell LLP.

Well before the covid-19 pandemic, the realities of some of these challenges had been at the forefront of many corporate leaders' agendas in the past decade, as companies doing business in Latin America have seen a series of crises topple politicians and wound companies. Perhaps one of the most wide-ranging crises arose from the *Lavo Jato* bribery investigations in Brazil and related investigations, where several executives have been sentenced to prison and companies have been subject to hundreds of millions of dollars in fines from authorities in countries in and outside the region, including Switzerland and the United States. Far-reaching anti-corruption investigations have extended to unrelated matters in many of the region's other largest economies.

Beyond the area of compliance, the region's leading corporations have faced challenges ranging from environmental or industrial accidents, such as spills or dam failures, which have more recently affected companies in extractive industries or hydroelectric power production, to significant renationalisations or expropriatory actions by governments.

As executives and their counsel who have confronted these events have learned, the legal expertise and other multidisciplinary capabilities needed to address these sorts of events are tremendously varied. But crisis situations tend to share common elements. All are typically unexpected or develop in a manner that may take leaders by surprise; all require critical decision-making and communications with key stakeholders under intense time pressure; and all present the possibility of grave consequences if not managed effectively.

To develop and implement any effective crisis management strategy, responsible boards and senior executives must understand how to navigate the specific local contexts in which these challenges unfold. The covid-19 pandemic taught us that the same crisis can have very different effects depending on the specific local contexts and issues each country was facing in a pre-covid-19 world.

Responsible boards and senior executives must also be prepared to put together, on short notice, the right teams that can best advise them to make critical decisions under intense time pressure, and may especially consider instituting advance crisis preparedness protocols addressing pandemic and other risks.

While advisers with the right experience in the region can help clients anticipate, manage and resolve crises across all their complex dimensions, decision makers must also be able to recognise on their own, often under conditions of stress, many of the multifaceted issues that may arise so that they can make best use of these advisers' skills. This guide is designed to assist professional advisers and key corporate decision makers – board members, chief executives, chief financial officers, general counsel and compliance officers – in effectively planning for and managing crises affecting companies in Latin America, including crises

resulting from the covid-19 pandemic. We have gathered contributions from some of the leading practitioners around the world to examine the most important crisis-related issues that have affected businesses in Latin America, and to discuss how crisis managers have effectively confronted those challenges. As lawyers play a central role in helping corporate leaders navigate crises, by limiting liability and mitigating their most far-reaching effects, most of the contributions come from legal practitioners. Because almost all effective crisis responses require a multidisciplinary approach, we have also included insights from global leaders in corporate governance, public relations, international risk management and private sector diplomacy.

We would like to sincerely thank each of our contributors for their time and expertise. Their credentials and accomplishments – which are listed in Appendix 1 – show that these professionals are among the most accomplished in their fields and in providing critical advice to corporate leaders facing potential crises across the region. All contributions to this volume, including those made by the three of us who have had the opportunity to serve as its editors, reflect the authors' own views and not necessarily those of their firms or their clients.

Part I of this guide profiles lessons learned from the covid-19 crisis in two key economies of the region: Brazil and Colombia. While most chapters have been updated to take into account the effects of covid-19, the contributors in this section have focused their chapters specifically on how the covid-19 pandemic transformed the landscape and duties of directors and officers in certain Latin American countries. Partners Cleber Venditti, Paula Indalecio and Thiago Jabor Pinheiro of Brazilian law firm Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados provide valuable insight from their on-the-ground experiences as to how the covid-19 pandemic has affected the duties and day-to-day experience of directors and officers of companies operating in Brazil, and key considerations that directors and officers should bear in mind post the covid-19 pandemic. For a contrasting response focusing on related but distinct issues, Jaime Herrera Rodriguez and Oscar Tutasaura Castellanos of Colombian law firm Posse Herrera Ruiz provide an insightful view of how the covid-19 pandemic affected corporate governance in Colombia.

Part II of this guide starts with a chapter by Jack Devine, the founding partner and president of the crisis management firm The Arkin Group LLC, and The Arkin Group's managing director, Amanda Mattingly, drawn from their years of experience in intelligence and risk management in the region to share strategies

to effectively confront some of the security challenges faced by corporations that choose to continue pursuing economic opportunities in environments with heightened risks of violent crime.

Other contributors to Part II share their experiences of advising clients on the difficult decisions they must make when confronted with the dire consequences of political risk, instability or violence, including the need to exit a jurisdiction where the political situation has created an untenable operating environment.

Partners Mariela I Melhem, Esteban Valansi and Siro P Astolfi of Argentine law firm Mitrani Caballero & Ruiz Moreno Abogados provide an overview of the different crises affecting Argentina and the crisis management tools that can be used by key corporate decision makers doing business in Argentina when dealing with extremely challenging circumstances. Fulvio Italiani and Carlos Omaña of the Venezuelan law firm D'Empaire discuss their experiences advising clients managing corporate crises in that country under circumstances of a continually unfolding political crisis. José Antonio Payet and Carlos A Patrón of the Peruvian law firm Payet, Rey, Cauvi, Pérez Abogados discuss how to deal with government investigations and other challenges in different phases of M&A transactions, and emphasise the importance of selecting experienced and ethical advisers with deep knowledge of the region and specific jurisdictions.

In Part III, contributors explore the critical role that managing communications and stakeholder relations plays in all crisis response strategies. In any context, a company's leadership must establish effective coordination between those involved in legal problem-solving and public communications. This is the central message conveyed by Paul A Holmes, the CEO of North American operations at the global communications firm Finsbury Glover Hering, along with Finsbury director Eric M Wachter. The two share the principles and best practices that have helped them successfully partner with corporate counsel around the world to ensure that legal and communications strategies align in a crisis.

The past few years and the covid-19 pandemic have also highlighted the growing relevance of environmental, social and governance (ESG) matters, which are now critical aspects to be considered in managing stakeholder relations and crisis response strategies. Partners Pablo Jiménez-Zorrilla and Luis Burgueño of Mexican law firm Von Wobeser y Sierra, SC provide a detailed analysis of how ESG procedures are no longer good-to-have tools but rather a mainstream trend that arguably protects and creates value, and a guide that companies can use when developing an ESG approach to management.

Shareholder activism, a rising global phenomenon, increasingly poses unique challenges to companies' management that can often turn into a corporate crisis. Sergio J Galvis and Werner F Ahlers of Sullivan & Cromwell LLP analyse this

complex issue and the effects that the covid-19 pandemic had and continues to have on shareholder activism in the United States and discuss how Latin American companies may draw on crisis management techniques and strategies to be prepared and effectively respond from a position of strength if and when an activist challenge arises.

Then, Jeremy Feigelson and Andrew M Levine, Debevoise & Plimpton LLP partners, and their colleagues, discuss the central role of communications in designing and implementing incident response plans in the areas of data privacy in cybersecurity. With the extraterritorial reach of the European Union's General Data Protection Regulation and similar legislative efforts in other jurisdictions, privacy breaches can quickly balloon into a legal, as well as reputational, crisis, and the authors stress that compliance professionals across Latin America should be thinking about these risks.

If effectively managed, corporate crises can present valuable opportunities. Pablo Jiménez-Zorrilla of Von Wobeser and Gregorio Lascano of Globant note that an organisation's values and capacity to develop trust with stakeholders are critical for navigating crises and for quickly addressing the reputational risks they bring. They also explore how companies can seek to create value in crises by pursuing opportunities for preserving and strengthening organisations and their reputations across all stakeholder communities. Likewise, effective communication can also play a vital role in avoiding crises, serving a key role in laying the groundwork for the development of sensitive and capital-intensive projects. Luis Carlos Rodrigo Prado of the Peruvian law firm Rodrigo, Elías & Medrano Abogados considers the case study of the successful management of mining projects in Peru, where the law protects indigenous communities by requiring socioeconomic impact studies and prior consultation with those communities.

In Part IV, the guide turns to a category of corporate crises in Latin America that had dominated headlines and arguably had the largest impact on the region's business and political environments before the covid-19 pandemic: anti-corruption investigations and enforcement.

Considering the impact of a new US presidential administration, its enforcement policies and their impact on Latin American companies, Cleary Gottlieb Steen & Hamilton LLP's partners Francesca Odell, Jonathan Kolodner and Lisa Vicens highlight the likelihood of aggressive anti-corruption enforcement and emerging ESG regulations. They note the importance of not only maintaining best practices for compliance functions, but also engaging in continuous risk assessments and focusing on corporate ethics and culture in connection with a shift in enforcement priorities.

Next, in an environment where investigations have proven to be more complex and multiple authorities in different jurisdictions are increasingly working in coordinated multilateral investigations, it is vital that companies have a coordinated and consistent strategy in moving forward from crises. In this context, Kathleen S McArthur, Aisling O'Shea and Olivia G Chalos of Sullivan & Cromwell LLP provide a valuable practical guide for companies in Latin America who may be facing multilateral investigations.

Leonel Pereznieto, a partner of Mexican law firm Creel García-Cuéllar, Aiza y Enríquez, relies on his vast extensive experience in investigations and crisis management to discuss the changes in the Mexican landscape of government investigations into corruption and its potential consequences for Mexican corporates. Together with an analysis of the effects that this shifting investigations landscape may have on companies doing business in Mexico, he presents valuable tools and recommendations for confronting these challenges.

The phenomenon of the *Lavo Jato* investigations can be seen as both a consequence and accelerator of some key trends in the enforcement environment in the region. Lessons for practitioners and corporations seeking to mitigate risks in this new environment are presented by four Morrison & Foerster LLP lawyers: James M Koukios, Ruti Smithline, Gerardo Gómez Galvis and Maria Acosta. While the anti-corruption risks across the region vary, the authors note that legal regimes are increasingly standardising their laws and increasing cooperation among their enforcement agencies. Familiarity with these trends can help practitioners to design and properly prioritise the implementation of robust, risk-based compliance programmes as the best strategy to avoid a corruption-related crisis.

To close Part IV, Mauricio A España and Andrew J Levander and their colleagues from Dechert LLP provide technical guidance and practical advice on matters that corporate leaders often have to confront in anti-corruption investigations that could develop into a crisis. The authors note that executives based in Latin America can face significant personal risks under a US regulatory or criminal investigation because of the extraterritorial reach of applicable US laws, and survey the key issues for counsel who are considering and advising on these risks. Of course, crises can emerge from regulatory or enforcement actions beyond anti-corruption investigations, which is the focus of Part IV.

Finally, Part V, explores some of the tactics and tools that corporations can use when facing existential crises of potential financial insolvency. Giuliano Colombo, a partner at Pinheiro Neto Advogados, and his colleague João Guilherme Thiesi da Silva, discuss the fiduciary duties of directors and officers of companies in an insolvency context, which became increasingly relevant as many Brazilian companies struggled with the economic fallout of the covid-19 pandemic.

Eugenio Sepúlveda of the law firm Galicia Abogados in Mexico then presents key lessons for navigating an insolvency by focusing on aspects of the Mexican legal regime that are most relevant to debtors in financial distress. This chapter illustrates that the laws governing financial insolvencies offer powerful tools for effectively navigating this type of crisis, but if not properly managed they can exacerbate a dire situation. Taking a broader view of tools that may be available to corporate managers irrespective of the specific jurisdiction in the region, Andrew G Dietderich, James L Bromley and Fabio Weinberg Crocco of Sullivan & Cromwell LLP explain how debtors based in Latin American jurisdictions can benefit from the extraterritorial reach of the US Bankruptcy Code, specifically how Chapters 11 and 15 of the Code can help debtors to actively manage international restructurings.

We have collected the knowledge and advice of leading practitioners across a variety of disciplines, jurisdictions, practice areas and perspectives, precisely because the types of crises that can arise in Latin America are tremendously diverse and do not lend themselves to a single ‘one size fits all’ approach toward preparedness and effective response. At the same time, this survey of crises provides some common lessons that should benefit all corporate leaders, especially in these unprecedented times of a global pandemic and its aftermath.

While crises are by their nature unpredictable, executives must try to identify in advance where and how they might unfold and develop a familiarity with those political and legal contexts. This first step can provide the basis for conducting ‘tabletop’ exercises or reviews of how other institutions have dealt with similar crises. These exercises should include key questions such as: how does the company survive the first week of a possible crisis? How does the company manage relations with key stakeholders? And, what are the key risks from missteps in dealing with government agencies?

Crisis management plans that emerge from these exercises vary but should start by defining the crisis and involving key decision makers early. Companies need to determine the oversight and management roles played by top executives and key advisers, and how they will coordinate among themselves. A theme that recurs throughout this volume is the importance of defining the right teams of both internal resources and external experts, and establishing effective coordination between those teams. It is also critical to define the proper oversight role of the board. Companies need protocols for when and how to involve their board and for defining its proper role in monitoring and oversight. In addition, once the company and its advisers have identified the areas of concern, the board’s composition may have to be evaluated to determine whether it includes the necessary expertise. The covid-19 pandemic and its implications provided an interesting

test case of the breadth of issues, from stakeholder health and safety to remote working considerations and continuity plans, that should be considered in these board exercises.

Once a crisis is identified and a team is assembled, it is critical to maintain flexibility to respond properly to new information and to recognise and address reactions of key stakeholders. Adequately managing and reacting to the flow of information in a crisis is one of the most important functions of crisis management. A qualified crisis communications team ideally maintains a close partnership among investigators, legal counsel, public and government relations, and other advisers. The company's leaders must empower this team to gather facts, contacts and timelines in an appropriate manner and as quickly as possible, and communicate with external stakeholders, including the relevant government agencies, employees, customers and the general public. Throughout this process, understanding cultural differences, as well as the relevant political and legal context, is key, and requires close consultation with the right advisers at every step.

The chapters that follow provide a practical and valuable guide for decision makers and their advisers as they develop their crisis preparedness plans for businesses in Latin America. While each company will confront its own unique set of multifaceted risks and challenges, these chapters will help business leaders and their advisers to best position themselves to withstand and emerge strong when an unexpected crisis hits.

We again thank our many illustrious contributors for their insightful and practical contributions to this volume and, more broadly, to the rapidly evolving discipline of crisis management. We would also like to express our sincere appreciation for the significant efforts of many of our colleagues at Sullivan & Cromwell LLP, without whom this volume would not have been possible, particularly Marcos Vizcarrondo, Renata Mascarenhas and Manuel Martínez Pérez.

APPENDIX 1

About the Authors

Sergio J Galvis

Sullivan & Cromwell LLP

Sergio Galvis is a leading corporate lawyer in the United States who is known for his cross-border work, especially in Latin America. He joined Sullivan & Cromwell LLP after graduating from Harvard Law School and clerking for the Honourable Lawrence W Pierce of the US Court of Appeals for the Second Circuit, and has been a partner at the firm since 1991. He is a member of S&C's management committee, oversees the firm's recruiting and administrative functions and leads its Latin America practice.

Sergio has worked with clients across more than 25 countries in Asia, Europe and the Americas on hundreds of significant matters in a broad range of practices, including crisis management, criminal defence and investigations, workouts and restructurings, corporate governance, sovereign financing, capital markets, M&A and project financing. He also regularly works on OFAC compliance and sanctions issues, especially as they relate to Latin America situations.

Robert J Giuffra Jr

Sullivan & Cromwell LLP

Robert J Giuffra Jr is recognised as one of the leading litigators in the US. He is a member of Sullivan & Cromwell LLP's management committee, responsible for the litigation practice. A fellow of the American College of Trial Lawyers and the International Academy of Trial lawyers, Mr Giuffra has represented Fortune 500 companies in some of the highest-stakes litigations and investigations of the past two decades, including those arising from the financial crisis, Enron's bankruptcy and HealthSouth's accounting fraud. He is currently US national coordinating counsel for Volkswagen in diesel emissions litigations and investigations and helped secure landmark US regulatory and consumer settlements. He

also represents Fiat Chrysler in US litigation and investigations over diesel emissions. He has represented leading Latin American companies, including Tenaris' in securing the first SEC deferred prosecution agreement and Grupo Mexico in Delaware derivative litigation. He has won precedent-setting US court decisions, including limiting the extraterritorial application of US securities laws. A graduate of Princeton and Yale Law School, Mr Giuffra clerked for Chief Justice William Rehnquist of the US Supreme Court and for Judge Ralph Winter of the Second Circuit. As Chief Counsel of the US Senate Banking Committee, he was a principal drafter of the Private Securities Litigation Reform Act.

Werner F Ahlers

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Werner Federico Ahlers is a partner in Sullivan & Cromwell LLP's general practice group, whose practice focuses on a wide range of cross-border mergers and acquisitions, joint ventures, private equity transactions and corporate matters. Werner advises on a variety of corporate, project and restructuring financing matters, and in the areas of corporate governance and crisis management. He is a core member of the firm's Latin America practice, and regularly acts on equity and debt investments for strategic investors based in and outside the region, private equity, pension and sovereign wealth funds, and bank and multilateral agency lenders. His practice spans diverse sectors, including mining and metals, power and energy, real estate, infrastructure, telecommunications, healthcare and financial services.

Werner has been repeatedly recognised for his cross-border advisory work by leading legal publications, such as *Chambers* (Global and Latin America), *Latin Lawyer*, *Law360*, *The M&A Advisor*, *The American Lawyer* and *The Legal 500* (Latin America and the US). Werner serves on the executive subcommittee and as chair of the Latin America sub-committee of the Cyrus R Vance Center for International Justice. He is a native speaker of Spanish and is proficient in Portuguese.

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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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