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Latin America's Headline: Anti-Corruption Legislative and Enforcement Developments

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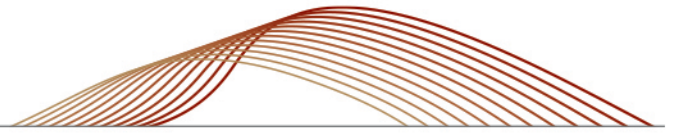
For much of 2015 and 2016, barely a day went by without an anti-corruption-related headline in or involving Latin America, as companies operating throughout the region have—and continue to—become well acquainted with a growing appetite to root out corruption. From the U.S., Kara Brockmeyer, chief of the Securities and Exchange Commission's FCPA unit, recently forecasted the SEC's ongoing interest in this region, including "several cases in the pipeline," while recapping a record fiscal year for FCPA enforcement.¹ The increased focus on Latin America comes as no surprise. Of the 87 companies whose 2016 public filings disclose that they are the subject of ongoing and unresolved investigations under the FCPA, 26 are in Latin America.²

Companies operating in Latin America present particular exposure under the FCPA, as many regional industries are dominated by government-controlled or operated entities. In a region where nearly 93% of surveyed enterprises across Latin America perceive entities like national oil companies and public hospitals to be corrupt, the exposure is significant.³ Latin American operations tend also to involve some U.S. nexus, such as U.S.-based employees or third parties or movement of personnel or products across the U.S. border, often providing a stronger basis for U.S. enforcement than in other, more geographically distant markets.

Cooperation between U.S. and Latin American authorities also appears to be at an all-time high, with anti-corruption efforts growing in Latin America, and U.S. federal authorities expressing a more robust interest in coordinated prosecutions. Nor are these coordinated enforcement actions limited to anti-corruption, as U.S. authorities have recently cited money laundering legislation, the Travel Act's provisions concerning commercial bribery, and RICO to target associated criminal conduct.

Recent FCPA enforcements range from the multi-jurisdictional to specific, discrete allegations in a single country. These include Brazil-based issuer Embraer's \$205 million payments to resolve DOJ and SEC investigations in a number of markets, including the Dominican Republic, to Key Energy's order to pay \$5 million in disgorgement to settle alleged books and records violations arising from payments by its Mexican subsidiary to an employee of state-owned oil company Pemex.

In addition to FCPA liability, businesses in Latin America now face increased risks under local laws, which in many Latin America jurisdictions have evolved to address corruption more comprehensively with much more active enforcement authorities. This update highlights only a few of the many FCPA and local anti-corruption developments in several key Latin America markets, but is by no means exhaustive.



Country-Specific Developments

Argentina

Enforcement Landscape: Late last year, Argentina elected Mauricio Macri as president, a centrist former mayor of Buenos Aires who is expected to reverse the populist policies of his predecessor, Cristina Fernández de Kirchner. Ms. Kirchner is herself currently the subject of a full-scale investigation into allegations of large-scale international money laundering and embezzlement allegations, relating to funds earmarked for public works. Argentina's federal prosecutors recently determined that there is enough evidence to warrant a full-scale investigation.⁴ In yet another scandal implicating the de Kirchner regime, the former Public Works Minister was arrested earlier this summer when he was found with an illegal firearm, disposing plastic bags filled with "wads of cash in several currencies."⁵

The SEC last year also launched an investigation into Argentina's current Minister of Planning, Julio de Vido, and the current governor of the Chubut province, Mario das Neves, in connection with an alleged scheme to award oil contracts involving Pan American Energy, which allegedly paid USD300 million to ensure a 40-year extension of its license to exploit the Cerro Dragón oil basin.⁶

Legislative Developments: Argentine law does not currently criminalize private sector corruption, although individuals involved in corrupt activity can be prosecuted for conduct that results in economic detriment such as fraud and embezzlement. Argentina's National Congress is presently considering a bill, however, that would expand liability to the corporate level, allowing prosecutors to bring criminal charges against corporations that engage in bribery and corruption.⁷ Under this bill, corporations that profit from bribes may find themselves liable, even without the involvement of senior executives. The bill contemplates settlement agreements with cooperators of criminal corruption investigations, and affords corporations the opportunity to avoid sanctions if they can demonstrate the existence of mechanisms designed to prevent corruption.

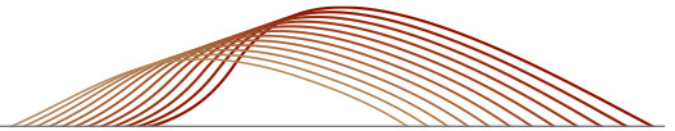
The National Congress is also deliberating the introduction of a civil forfeiture provision, under which state authorities, even in advance of a criminal judgment, could seek forfeiture of assets that are presumed to have an illicit origin.⁸

Argentina awaits implementation of the revised 2014 Criminal Procedure Code, slated to come into force in 2016.⁹ In its first stage, the code will apply only to the criminal courts sitting in the City of Buenos Aires, which do not have federal jurisdiction. Whether the revised CPC will be later implemented in the federal courts remains to be seen.

In addition, Argentina's governmental anti-corruption task force, *Oficina anticorrupción* (OA), has begun issuing reports monitoring local investigations and recent enforcement initiatives.¹⁰

Brazil

Enforcement Landscape: In the midst of economic crisis and sweeping corruption scandals, Brazil's Senate impeached and removed President Dilma Rousseff in August 2016, convicting her on charges of federal budget manipulation. Her removal signals an end to 13 years of governance by the Workers' Party. Dilma's successor, centrist Michael Temer, already faces his own scandals. Temer was recently found guilty of violating campaign finance limits, and his anti-corruption minister separately resigned amid allegations of investigative obstruction. Following the changes in government, former president Lula has been indicted, as has the former leader of the lower house, Eduardo Cunha, multiple



governors including former governors of Rio de Janeiro state, and a number of other prominent public figures.

Operation *Lava Jato* continues to grab front-page headlines in Brazil and the U.S., embroiling in alleged corruption, bribery, and antitrust violations more than 20 construction companies and 50 individuals, including high-ranking government officials and corporate executives. Brazil and U.S. enforcement authorities are reported to be working in close cooperation and toward joint settlements in certain cases.

In Brazil's "other" corruption probe, the *Zelotes* Operation, Brazilian police and federal prosecutors are investigating 70 companies, including multinationals, for alleged payments to members of Brazil's tax appellate council in order to reduce fines or dismiss tax evasion claims of over BRL19 billion.¹¹

Enforcement remains active in a number of other investigations, as well, including Operation *Greenfield*, involving alleged pension fund fraud;¹² Operation *Prypriat*, involving alleged contractor graft by Brazil's state-run energy company;¹³ Operation *Custo Brasil*, involving alleged embezzlement by the Ministry of Planning;¹⁴ Operation *O Recebedor*, involving alleged bribery in the construction of the North-South railway and East-West integration;¹⁵ and Operation *Vidas Secas-Sinhá Vitória*, involving allegedly inflated construction contracts.¹⁶

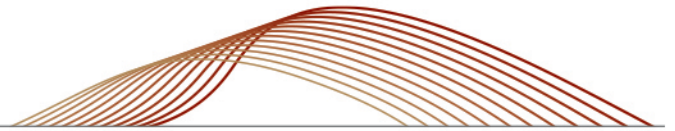
Legislative Developments: Brazil's Clean Companies Act of 2014 (*Lei anticorrupção*) criminalizes bid rigging and fraud in public procurement, direct and indirect acts of bribery, and the attempted bribery of Brazilian public officials and of foreign public officials.¹⁷ The Act holds companies strictly liable for the corrupt acts of their employees, rendering liability even without finding of corporate fault.¹⁸

Brazil issued long-awaited regulations in 2015 setting forth the procedures for imposing this liability, along with guidance as to the calculation of fines and leniency agreements.¹⁹ In addition, the *Controladoria-Geral da União* (CGU)'s Compliance Guidelines for Corporate Entities are not binding, but clarify regulatory expectations for corporate compliance programs. The guidelines set forth five "pillars" for the development and implementation of an effective compliance program: (i) commitment and support of a company's senior management; (ii) designation of a specific department responsible for handling compliance issues within the company; (iii) risk analysis based on the company's profile; (iv) structuring of compliance rules and tools; and (v) strategies for continuous monitoring.²⁰ The CGU guidelines make clear, however, that even companies that have pre-existing compliance programs in place "should acknowledge the necessity of adapting them to Brazil's new legislation, in particular to cover fraud in public procurement and in the execution of contracts with the Public Administration."²¹

In addition, in what may be a unique initiative to foster voluntary adoption of effective compliance programs in the private sector, the CGU, through its *Pró-Ética* program, evaluates companies' compliance programs and efforts to prevent corruption, recognizing approved companies.²² In 2016, 25 of 195 participating companies were approved and recognized.

Chile

Enforcement Landscape: Chile continues its regulatory investigation into "Pentagate," a scandal involving alleged corruption by the Penta Group. Investigation began in late 2014, following the discovery that the Penta Group, one of Chile's largest financial holding companies, had allegedly utilized a system of fake invoices to evade taxes and illegally funnel funds to the U.D.I. Party campaign.²³ The investigation was hailed as a "turning point for democracy in Chile, an opportunity to restore public faith."²⁴



The Penta Group investigation led to a parallel investigation into *Sociedad Química y Minera de Chile* (SQM), a mining corporation that controls most of Chile's lithium production. Authorities allege that SQM financed the campaigns of presidential candidates for years, resulting now in an ongoing investigation of more than 190 business executives, politicians, and intermediaries, who are charged with tax evasion, fraud, issuing false invoices, money laundering, and bribery.²⁵ The investigation is being carried out by the SEC, DOJ, and Chilean tax authorities.

Chile's National Economic Prosecutor's Office (*Fiscalía Nacional Económica*) recently targeted the pharmaceutical industry in parallel, conducting several anti-competition investigations into the industry's alleged collusion and use of economic incentives to pharmacies to sell more expensive drugs.²⁶

The U.S.-listed Chilean airline, LAN, also recently reached a USD22 million settlement with the SEC in July 2016, following allegations that a Delaware shell company funneled a USD1.1 million payment to an Argentine consultant through money laundering channels. The kickback was ultimately traced to an Argentine government official with control over airline routes.²⁷

Legislative Developments: Chile's anti-corruption legislation criminalizes money laundering, facilitation payments, and the active and passive bribery of public officials and foreign officials.²⁸ In response to these high profile cases, Chile announced the enactment of new anti-corruption regulations focusing on mandatory asset disclosure requirements for public officials.

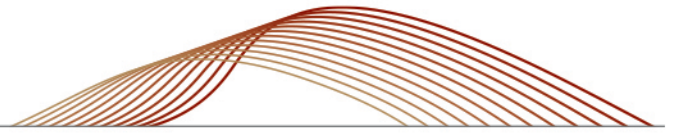
A bill has also been recently presented in Congress proposing general amendments to anti-corruption regulation, including the increase of penalties for bribery and other corruption crimes, and amendments to provisions related to the bribery of foreign governmental officials. As part of the new anti-corruption agenda, a new channel was created in Chilecompra, the government's online public procurement portal, to anonymously report government procurement irregularities.²⁹

Chile's Corporate Criminal Liability Act provides credits for companies that adopt a compliance program before the commission of the requisite offense. Indeed, Chilean law sets forth an explicit obligation for companies to actively prevent crimes.³⁰ Local firms, authorized by Chile's Securities and Insurance Authority, are tasked with reviewing and certifying a company's compliance programs as sufficient.³¹ *Chile Transparente* (the Chilean branch of Transparency International) has moreover developed a Corruption Prevention System to provide assistance to private firms to facilitate their compliance with the Corporate Criminal Liability Law.³²

Colombia

Enforcement Landscape: In Colombia, the recent "Merry Go Round" investigation saw Senator Iván Moreno and his brother, Samuel Moreno, Bogota's mayor, imprisoned for corruption. The pair was allegedly involved in a kickback scheme relating to the embezzlement of USD500 million through the award of public procurement contracts to construction companies. Iván Moreno was sentenced to 14 years in prison for extortion, influence peddling, and the illegal signing of contracts, while Samuel Moreno was sentenced to 18 years in prison for proffering preferential treatment to the Nule Construction Company in exchange for a USD15 million bribe.³³

Ex-Minister of Agriculture Andrés Felipe Arias was recently found guilty in Colombia of embezzling USD12.5 million through an agricultural subsidy program. Arias had reportedly operated an illegal bidding process that allowed for siphoning of public funds intended for the subsidies program.³⁴ Arias



fled to the U.S. prior to conviction where he claimed asylum, and is currently facing extradition proceedings in Florida.³⁵

In a U.S. enforcement action, PetroTiger's former CEO recently plead guilty in the United States on charges of conspiring to bribe an Ecopetrol official for an oil service contract in Colombia. Prosecutors alleged that he and other PetroTiger employees had paid USD333,500 in bribes to Ecopetrol SA, for assistance in securing a USD45 million oil services contract.³⁶ Colombia's authorities are reported to be cooperating with the enforcement proceeding, arresting six then-current and former Ecopetrol employees accused of have accepted bribes from PetroTiger.³⁷

In response to the recent surge of investigations, Colombia's government announced in late 2015 the creation of a corruption "early warning system," with new risk-mapping and cross-checking tools to be used by enforcement agencies.³⁸

Legislative Developments: Earlier this year, Colombia also enacted Law 1778, known as the Transnational Corruption Act ("TCA"), the country's first foreign bribery law. The law vests authority within the Colombian government to impose sanctions and fines on: (i) legal entities registered in Colombia; (ii) foreign parent companies of Colombian subsidiaries; and (iii) foreign subsidiaries of Colombian companies.³⁹ The TCA creates corporate liability where (1) a director, employee, contractor, or certain shareholders, (2) gives, offers, or promises, (3) to a foreign public official, (4) directly or indirectly, (5) money, any other good with monetary value, or any other benefit or prerequisite, (6) in exchange for the official to perform, omit, or delay any act related to the exercise of the official's functions, and (7) in relation to international business transactions.⁴⁰

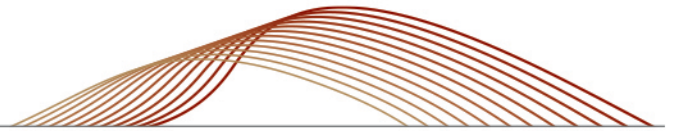
Under the TCA, companies can reduce or avoid penalties by self-reporting, so long as the company comes forward before the commencement of any government investigation, and before the contract at issue has been performed. Penalties can be mitigated up to 50% where offenses are disclosed even after their performance.⁴¹ The TCA also specifically lists the implementation of anti-corruption compliance procedures as a mitigating factor in the calculation of penalties. The government is expected to soon publish compliance guidance that details its compliance expectations and methods of assessment for purposes of extending mitigation credit.⁴²

Mexico

Enforcement Landscape: Mexican President Enrique Peña Nieto was recently implicated in a scandal involving the presidential family's purchase of a USD7 million home and related allegations of favoritism in government contracts worth up to USD76 million.⁴³ Although an investigation by Mexico's Public Function Secretariat found that no conflict of interest existed in the award of government contracts associated with the President's real estate deals, the specter of nepotism lingers, with the President recently issuing a public apology and renewed commitment to fighting corruption.

With respect to ongoing enforcement actions in Mexico, Wal-Mart Stores, Inc., disclosed possible FCPA issues arising from its Mexico operations in late 2011. Walmart continues to address concerns that employees in Mexico are alleged to have made payments to expedite permits and licenses for the building and operation of stores in Mexico.⁴⁴

The SEC also recently announced resolution of its investigation into Houston-based Key Energy Services, Inc.⁴⁵ Key Energy is alleged to have improperly recorded "consulting" payments made to *Petróleos Mexicanos* ("Pemex"), the Mexican state-owned oil company, in exchange for inside information leveraged to negotiate contracts. According to the SEC Order, the company failed to



perform due diligence on the consulting firm that received the payments, and failed to enter into a written agreement for several years. The Order further alleges that there was no evidence that the consulting firm performed any legitimate services for the company. Due to the company's extensive remediation, the SEC assessed no civil penalty, and the company paid USD5 million as disgorgement. In April 2016, the company disclosed in a securities filing that DOJ had declined to prosecute the company.⁴⁶

Legislative Developments: Separate from the June 2016 effective date for Mexico's new criminal code and criminal procedure code, on July 18, 2016, Mexican President Peña Nieto signed legislation implementing a new National Anti-Corruption System.⁴⁷ (The Supreme Court subsequently overturned as unconstitutional two state laws, Veracruz and Chihuahua, seeking to supplant the federal law and vest enforcement with state governors, in apparent attempts to shield themselves from investigation.⁴⁸) The new laws hold companies and individuals liable for corrupt acts against local and foreign officials and governments, with individuals facing sanctions of up to two times the amount of the acquired benefits, and ineligibility in procurement or state-owned projects for up to eight years. Companies can also face debarment of up to 10 years, as well as suspension of activities, partnership dissolution, and damages. The law creates Mexico's first independent anti-corruption prosecutor, as well as whistleblower protections for individuals, and methodology to enhance cooperation across local authorities and international regulators.⁴⁹ While some aspects of the laws took immediate effect, others will come into effect in 2017.

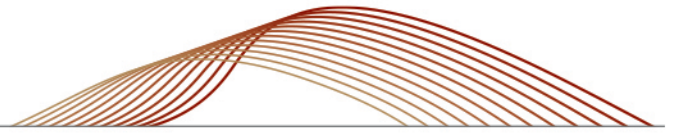
The new legislation provides for some partial defenses, including credit for the existence of a compliance program with effective reporting and whistleblower protection tools.⁵⁰ Companies are eligible for such credit if their compliance programs include, at minimum: (i) organizational charts with manuals specifying the duties of each part of the organization; (ii) a code of conduct that is publicized and rolled out throughout the organization; (iii) adequate internal accounting controls; (iv) a whistleblower program; (v) training programs on relevant ethics policies; (vi) human resources policies designed to prevent hiring individuals who increase the risk of corruption at the organization; and (vii) mechanisms that ensure transparency. Entities and individuals may also receive credit for self-reporting and fully cooperating with the authorities, with individuals receiving a reduction of 50 percent to 70 percent of the total amount of his or her sanction.

Panama

Enforcement Landscape: Grupo Unidos por el Canal, the consortium overseeing the expansion of the Panama Canal, is reportedly facing an investigation after a criminal complaint was filed against it for inflating cost overrun claims.⁵¹ The investigation arising from a complaint filed with Panama's Attorney General's Office purportedly focuses on misuse of the nation's resources through the submission of "unjustified" economic claims.

U.S. enforcement actions continue in Panama as well. In December 2015, Vicente García, a former Latin America sales director for a U.S. subsidiary of SAP A.G., the German software company, was sentenced to 22 months' imprisonment following his guilty plea to conspiring to violate the FCPA.⁵² Specifically, García admitted that he had participated in a scheme to bribe Panamanian officials for purposes of securing government technology contracts from 2009 to 2013. Former Panamanian president Ricardo Martinelli is alleged to have been a bribe recipient.

Panama's anti-corruption mechanisms include asset forfeiture, whistleblower and witness protection, and conflict-of-interest regulations. However, anti-corruption laws are generally perceived as



ineffective and not rigorously applied, with local government enforcement initiatives only weakly prosecuting those accused of corruption.⁵³

Peru

Enforcement Landscape: As of 2015, 10 of 25 regional governors in Peru were either under preliminary investigation or appealing corruption-related charges. More than 1,500 district-level mayors in office either were under or had been previously investigated for criminal activity, and 10 percent of sitting members of congress had been suspended for ethical violations since 2011.⁵⁴

Peru's executive branch did not escape the cloud of corruption, with a recent leaked tape allegedly reflecting a plot by the current president's health minister to "mine" the system for personal gain,⁵⁵ and former president Ollanta Humala is currently facing investigation for alleged campaign contribution money laundering.⁵⁶

Legislative Developments: While Peru's Penal Code neither explicitly criminalizes facilitation payments nor outlines the official procedure for accepting gifts, the government of Peru earlier this year passed the Corporate Corruption Act, expected to take effect in July 2017. The act holds companies liable for the bribery of public officials, with fines totaling up to six times the benefit obtained or expected.⁵⁷ This new legislation follows years of increasing investigations into corrupt public officials.

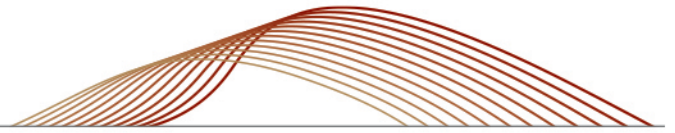
The new Corrupt Corruption Act provides safe harbors from liability if an adequate compliance program was in place prior to the corrupt activity.⁵⁸ Companies are additionally instructed to use a specialized due diligence tool to mitigate the corruption risks associated with public procurement.⁵⁹

Venezuela

Enforcement Landscape: More than two-thirds of Venezuelan companies surveyed in one study reported that they expect to give gifts to officials in order to secure government contracts, with favoritism among procurement officials rampant, and most public contracts exempt from open tenders.⁶⁰

A recent DOJ declination letter indicates that, although corruption is potentially inevitable in Venezuela, companies doing business there can drastically minimize their exposure through the implementation of compliance procedures. HMT LLC, a manufacturer of above-ground liquid storage tanks for the oil and gas industry, was found to have artificially inflated its products in paying up to USD500,000 in bribes to officials at state-owned oil company PDVSA. Although HMT was ordered to disgorge USD2.7 million, the DOJ otherwise declined to take any enforcement action, citing HMT's timely, voluntary self-disclosure of the violations, enhanced compliance programs and internal accounting controls, and remediation efforts (including the termination of employees involved in the FCPA violations and the sanctioning of other employees through suspensions, pay freezes, bonus suspensions, and reductions of responsibilities).⁶¹

This follows the DOJ's recent investigation into New-York based broker dealer Direct Access Partners ("DAP"), which was alleged to have bribed an official at the state-owned and state-controlled *Banco de Desarrollo Económico y Social de Venezuela*, in exchange for directing bond-trading business (including bonds issued by Venezuelan state-owned enterprises) to DAP. The investigation culminated in 2015 in the sentencing of DAP's CEO and managing director to four years' imprisonment.⁶²



Legislative Developments: The Venezuelan Anti-Corruption Law of 2014 does not address bribery of foreign officials, but criminalizes several corruption offenses, including extortion, passive and active bribery, and abuse of office.⁶³

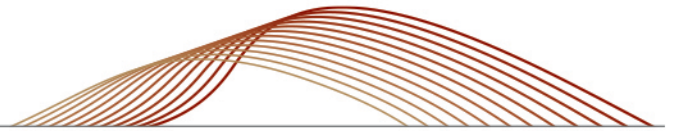
Businesses operating in other Latin American countries have found themselves targets of both FCPA enforcement proceedings and local anti-corruption efforts ranging, for example, from the arrest of the Dominican Republic defense minister in connection with the Embraer investigation;⁶⁴ U.S. federal charges against the former president of Costa Rica's soccer association in connection with the FIFA investigation;⁶⁵ the detainment of Guatemala's former president and vice president, Otto Perez Molina and Roxana Baldetti, in connection with the *La Linea* alleged customs bribery ring;⁶⁶ and the establishment of an anti-corruption body in Honduras, the *Misión de Apoyo Contra la Corrupción y la Impunidad en Honduras* (the Support Mission Against Corruption and Impunity in Honduras).⁶⁷

Compliance Safeguards

While corporations doing business in Latin America continue to adopt traditional safeguards such as dedicated compliance personnel, anti-corruption policies, anonymous reporting mechanisms, and procedures on gifts, travel and hospitality, charitable donations and political contributions, and audits, additional compliance safeguards can and should be taken to mitigate corruption risks:

1. Conduct regular risk assessments to assess the nature and extent of emerging risks and to properly adapt the compliance program and related resources to evolving trends, new business opportunities and areas of growth, and other factors presenting corruption risk.
2. Create procedures to monitor regulatory and enforcement developments in operating countries, with focus on the legislative changes and enforcement actions most relevant to the company's particular exposure areas.
3. Ensure that global compliance programs are specifically tailored and adapted to Latin American operations and contextual realities, incorporating local laws, compliance standards, and local enforcement takeaways.
4. Ensure compliance procedures address industry- and Latin America-specific risks.
5. Employ dynamic training and education to raise awareness on an ongoing basis as to potential exposure areas.
6. Implement policies and controls relating to third parties, including the use of anti-corruption contract terms in third-party contracts, due diligence review, and risk-based monitoring of third-party activities.
7. Incorporate whistleblower protections and initiatives, along with policies to monitor such reports and encourage self-reporting.
8. Periodically test effectiveness of compliance program as implemented in Latin American operations to ensure program is appropriately designed and implemented to mitigate corruption risks





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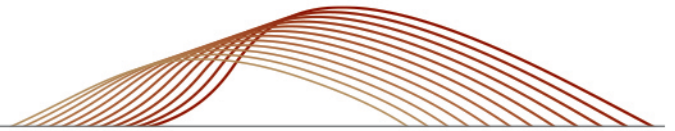
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³⁰ Paul Hastings LLP

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