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The Investigations Review of the Americas 2019

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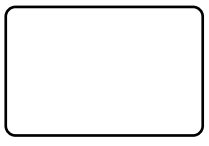

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Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. GIR gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers - the most readable explanation of all the cross-border developments that matter, allowing them they to stay (even more) on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and on the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the *GIR100*) and – after a successful court decision – obliged the US Department of Justice to release the names of unsuccessful candidates for FCPA monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. Some have focused on enforcement areas, such as sanctions and cyber breach – whereas others have taken a thematic approach (eg, looking at the mechanisms which enforcers use to interact, and how those can impact a cross-border investigation). We are also indebted to our jurisdictional rapporteurs across the region for giving us their perspective on the key trends locally. Rounding out the content, the publication also includes overviews from the World Bank and the Brazilian CGU, providing insight from the 'enforcer' point of view. All authors are leaders in their field and we are grateful to them all for their time and energy: we encourage readers and co-authors to share feedback and comments.

If you'd like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Investigations Review of the Americas 2019*.

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Argentina

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New Corporate Criminal Liability Act – how to protect your organisation

This chapter provides a summary of the key characteristics of the Act 27,401 on Criminal Liability of Legal Entities for offences committed against the public administration and transnational bribery (the Act), passed by National Congress on 8 November 2017 and which came into force on 1 March 2018.

The Act represents a key milestone on the plan of action initiated by President Macri's administration to push Argentina to join the Organisation for Economic Co-operation and Development (OECD) and evidences a strong commitment to comply with the requirements of the Anti-Bribery Convention of the OECD, ratified by Argentina in 2000.[1]

The main target of the Act is the creation of a legal framework to provide incentives to the private sector to adopt and implement corporate compliance programmes and cooperate with the authorities to foster a compliance-and-ethics culture.

Although the Act provides the legal framework for combating and punishing corruption at the private sector, such culture will only be achievable with judges that comply with its legal duties and roles preserving the integrity and independence of the judiciary and evidencing an effective commitment towards punishment.

Still there is a long way to go under this new legal and compliance scenario and there is a high level of uncertainty as to the type and level of enforcement that judges and prosecutors will provide to the recently passed Act.

Offences and legal entities covered by the Act

The Act provides that private legal entities[2] (either controlled by national or foreign investors, and including state-owned or state-controlled entities) are liable for the following offences:

- domestic and foreign bribery;[3]
- national and transnational influence peddling;[4]
- negotiations incompatible with public office;[5]
- imposing liability on a public official who acts upon a personal interest, whether directly or indirectly, in any contract or transaction in which the public official is involved by virtue of his or her position;
- illegal exactions,[6] which imposes liability on a public official who uses or applies for its own benefit or that of a third-party funds unlawfully obtained;
- illicit enrichment of officials and public employees;[7] and
- financial statements and reports containing materially false information,[8] imposing liability for inaccuracy or misrepresentation of books and records and accounting information by a founder, director, administrator, liquidator or receiver of a legal entity with the intent to conceal the commission of domestic and foreign bribery and influence peddling offences.

A foreign company doing business in Argentina by setting up a branch, acquiring participation in a local company or incorporating a new subsidiary in the country must take into account that local legal entities are held liable for offences against the public administration and transnational bribery committed directly by the individuals (its directors, officers and employees) acting in its name, interest or on its behalf within the scope of their employment or hierarchical functions (doctrine of vicarious liability) and also for the offences committed indirectly by third parties (either individuals or legal entities) that have a contractual or business relationship with the legal entity and have acted in legal entity's name, interest or behalf.

Legal entities are also liable if they have ratified the third party's involvement, even implicitly. The only exception from liability applies if the individual that committed the offence acted exclusively in his or her own interest and the legal entity did not obtain any benefit from such offence.

Unlike the previous bills[9] discussed at the National Congress before the passage of the Act, which expressly defined the type of third party relationships that would entail the legal entity's liability for offences committed by them,[10] the Act does not expressly define the same, capturing all third parties that have acted in the legal entity's name, interest or behalf.

Third parties may include, but is not limited to, contractors, consultants, sub-contractors, suppliers, vendors, advisers, agents, distributors, representatives, clients, joint venture partners, consortium partners, outsourcing providers, intermediaries and investors.[11]

Third-party due diligence will be a critical component of any anti-corruption programme to be adopted by the legal entity. Based on the above, foreign entities investing in a local legal entity are encouraged to conduct reasonable due diligence before acquiring any equity participation in a local entity to assess the bribery risk profile of the target. By identifying the scope of the third parties' relationships of the target and having assessed the relevant bribery risks (eg, frequent interaction with government officials, governmental agencies or government-controlled entities), the foreign investor should be able to determine the type and level of due diligence to be performed, the anti-bribery controls to be applied to each risk category and assess whether existing controls are adequate or require further review and changes to an existing compliance programme, or require the implementation of a new programme.

The Act also has extraterritorial reach, applying to any wrongdoing carried out by a national legal entity against a foreign public administration, even if the wrongdoing is committed abroad. One of the essential changes introduced by the Act is the amendment of Section 1 of the Argentine Criminal Code, which expressly introduces an extended jurisdiction in favour of local courts in relation to offences committed abroad by Argentine citizens or legal entities domiciled in Argentina, or by establishments or branches that a legal entity may have in the country.

It is therefore important for legal entities to have adequate knowledge and control over the activity of their employees,

intermediaries, agents or representatives, even when their appointment or the provision of services will be performed overseas, to the extent that they will represent or otherwise act on behalf of the legal entity before foreign public officials.

Parent–subsidiary liability and successor liability

Unlike the US Foreign Corruption Practices Act (FCPA), which imposes administrative liability on a parent company – as explained below – the Act does not impose such liability for offences committed by subsidiaries, except for successor liability resulting from corporate restructurings.

The FCPA imposes administrative liability on a parent company for bribes paid by its subsidiary to the extent that the parent has sufficiently participated in the activity to be directly liable for the conduct (as, for example, when it directed its subsidiary's misconduct or otherwise directly participated in the bribing scheme) and under traditional agency principles where a fundamental characteristic of agency is control.[12]

Before passage of the Act, the bill[13] submitted by the Anti-corruption Office provided that controlling companies would be held jointly and severally liable for compensating any damages that were caused by its controlled entities, including for the payment of the monetary fines imposed on its entities.[14] Such attribution of liability was highly criticised since it did not contemplate the fact that controlling entities and its subsidiaries are legally separate entities and usually acts of corruption are mainly acts attributable to the management or employees of the controlled entity, unless it can be proved that the controlling entity was involved in the offence. Wisely, the final version of the Act does not impose criminal or administrative liability on the controlling or parent company for offences committed by its controlled legal entity.

Consistent with the principles of successor liability of legal entities already reflected under the General Corporations Law,[15] the Act also provides for successor liability, determining that in the event of transformation, merger, absorption, spin-off or any other corporate restructuring, the legal entity's responsibility will be transferred to the surviving legal entity. Successor liability ensures that, by means of corporate restructurings, legal entities do not avoid or circumvent their liability for the offences. Consequently, due diligence procedures performed in the context of pre-merger and acquisition transactions that may result in successor liability will be a mitigating factor of liability of the acquiring entity.

On the other hand, the Act also imposes criminal responsibility on legal entities in cases where they are apparently dissolved, but in reality continue its economic activity and maintain the substantial identity of its clients, suppliers and employees through another legal entity, thus following the same principle set forth under the Spanish Corporate Criminal Liability Act.[16]

Liability of the acquiring entity in the transfer of shares and assets

As opposed to the cases of successor liability explained above, where the Act establishes the successive criminal and civil liability of the resulting transformed, merged, absorbed or split-up legal entity, the Act does not impose liability on the acquiring entity for any offences committed by the target in the context of acquisition transactions (acquisition of shares, quotas or assets).

Several liability[17] is the rule under the Civil and Commercial Code, and several and joint liability is not presumed since it must arise expressly from the law or a contractual obligation.[18] Such is the case when, for example, in a scenario of transfer of a going concern – which does not include the transfer of credits and debts unless expressly agreed – the Act on Transfer of a Going Concern[19] determines that the seller and the purchaser are jointly and severally liable for the commercial debts of the concern if they do not comply with its procedure and publication requirements. Likewise in those cases the seller and the purchaser are joint and severally liable for employment obligations under the Employment Act and for tax and social security obligations under the Tax Procedure Act.

Under the Act, however, there is no joint and several liability of the purchaser in the acquisition of shares and assets. In a stock or quota purchase, there is no 'successor' entity, since the acquired entity still exists, with all its liabilities and assets. For the asset purchase, when a company acquires most of another legal entity's assets, the buyer does not assume the seller entity's liabilities, unless transactions involved an act of fraud or what is called in civil law jurisdictions 'an illicit simulation', a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction in which they engage.

Scope of sanctions

Criminal sanctions are severe and include:

- fines between two and five times the amount of the benefit illegally obtained or that could have been obtained;
- total or partial suspension of business operations for a maximum period of 10 years;
- suspension to participate in public tenders or bids for public works or services or in any other activity involving the public sector for a maximum period of 10 years;
- dissolution and liquidation of the legal entity when it was formed for the sole purpose of committing the offence, or the commission of offences constitutes the legal entity's main activity; and
- loss or suspension of government benefits and the publication of a summary of the conviction sentence at the expense of the legal entity.

If it is imperative to maintain the business operations of the legal entity, or a public service or work, sanctions related to suspension of activities or dissolution or liquidation of the legal entity are not applicable. The judge may also discretionally decide that the payment of fines may be made in instalments during a period of five years, if due to the significant amount of the fine an up-front payment could expose the legal entity to discontinue its business operations or to terminate the employment of its personnel.

To determine the scope of the sanctions, the judge will take into account:

- the non-compliance with the internal rules and procedures of the legal entity (compliance programme);
- the number and hierarchy of the officials (managers, directors, etc), employees and collaborators involved in the offence;
- the omission of surveillance over the activity of the perpetrators and participants in the offence;
- the extent of the damage caused, the amount of money involved in the commission of the offence and the size, nature and economic capacity of the legal entity;
- the legal entity's voluntary self-disclosure of the offence to the authorities as a consequence of an internal investigation;
- the legal entity's subsequent behaviour; and
- the willingness to mitigate or repair the damage and the recidivism.

Do compliance programmes act as a safe harbour under the Act?

Compliance programmes are not mandatory under the Act, except for legal entities wishing to enter into contracts with the public sector. The Act establishes that contracts with the state that require the signature of a minister or another public official of equal rank require the adoption by the legal entity of a compliance programme meeting the criteria provided by the Act.

The Act defines the compliance programme as the set of actions, mechanisms and internal procedures to promote, supervise and control the legal entity's integrity; oriented to prevent, detect and rectify irregularities and the offences punished by the Act.[20] The compliance programme should be commensurate with the risks associated to the legal entity's business and activities and those posed by its size and economic capability.

The Act gives the legal entity the flexibility to adopt, develop and implement a compliance programme tailor-made to its needs, supported by a risk-based assessment to be made on a case-by-case basis. Although it does not provide for a description on the type of risks to be assessed, or specific requirements of control that the entities are required to implement, Section 23 of the Act establishes that the compliance programme must contain, at least, the following three elements:

- a code of ethics or conduct, or compliance policies and procedures applicable to all directors, managers and employees, regardless of their position or function, with guidelines to prevent the offences contemplated by the Act;
- specific rules and procedures to prevent offences and violations in the context of public tenders or governmental bidding procedures, the execution of administrative contracts and any other interaction with the public sector; and
- periodic training for directors, managers and employees.

The Act further provides that the compliance programme may also contain additional elements that will be considered mitigating factors of liability. These are:

- periodic risk assessment and evaluation and the subsequent amendment of the compliance programme;
- clear and unambiguous support and commitment to the compliance programme by the governing body and management;
- internal reporting channels (compliance hot lines) for reporting irregularities, open to third parties and properly communicated;
- appropriate whistle-blower protection policy against retaliations;
- an internal investigation system that protects the rights of those individuals under investigation and provides for actual sanctions in case of violations to the code of ethics or conduct;
- the implementation of procedures to verify the integrity and reputation of third parties or business partners (suppliers, distributors, agents, intermediaries, etc), at the time of retaining their services;
- due diligence procedures applicable to corporate transformation and acquisitions transactions, to verify the existence of irregularities of unlawful acts or of the existence of vulnerabilities in the legal entities involved;
- the monitoring and continual assessment of the compliance programme's effectiveness;
- the appointment of an internal individual (compliance officer) responsible of the development, coordination and supervision of the compliance programme; and
- compliance with the regulatory requirements applicable to the programme issued by the respective national, provincial, municipal or communal authorities that rule the activity of the legal entity.

The above elements are substantially similar to such reflected in international anti-bribery corruption trends and the criteria that multinational companies – subject to rules such as the FCPA or the UK Bribery Act – have adopted in recent years, as well as consistent with the guidance that several international authorities or organisations, like the US Department of Justice (DOJ),[21] the OECD,[22] the United Nations Office on Drugs and Crime and the World Bank have issued for the evaluation of corporate compliance programmes.

It is not clear at this point – since there are still no judicial precedents on the matter – what will be the criteria to be applied or followed by the authorities interpreting the adequacy or sufficiency of a compliance programme. Consistent with the experience of international jurisdictions like the United States, Brazil, or the Executive[23] has recently delegated to the Anti-corruption Office[24] the responsibility to prepare the principles, guidelines and criteria (including practical cases) to provide technical advice to both the private sector – for the development and adoption of a compliance programme – and the public sector (authorities and governmental agencies) that will evaluate the adequacy of compliance programmes under the terms of the Act. Competent authorities at the national, provincial, municipal or communal level may also issue regulatory requirements applicable to the compliance programmes.

In sum, having an adequate compliance programme:

- excludes the legal entity's criminal liability if it self-discloses the offence and reimburses the benefit illegally obtained;
- is a mitigating factor of liability to be considered by the judge at the time of determining the imposition of sanctions; and
- is a reasonably necessary condition to enter into any leniency agreement with the authorities.

A compliance programme does not exclude the legal entity's criminal and administrative liability unless the following three conditions are simultaneously met:

- it has voluntarily disclosed to the authorities the offence, which was detected as a result of the legal entity's internal control and investigation,
- it implemented a compliance programme – pursuant to the guidelines of the Act – prior to the perpetration of the offence; and
- it has reimbursed the benefit illegally obtained.

It is worth mentioning that there are no specific laws or regulations governing internal corporate investigations in Argentina. There are no restrictions under local laws for a legal entity to initiate and conduct an internal investigation (with due respect of employees' constitutional rights to due process and legal defence and privacy rights).[25] Corporate policies adopted by the legal entity may require an internal investigation, or such an action can be the result of a decision made by the board or similar corporate body as part of its duties and responsibilities. It must be noted that internal investigations performed by external audit or law firms in Argentina do not have the major consideration that they have in the US – where the Securities and Exchange Commission and the DOJ place great deference on private investigations – and a board may decide to initiate an internal investigation to comply with its legal duties. There is no legal obligation in Argentina for the legal entity or its management to disclose the results of an internal investigation. If the legal entity decides to self-disclose the results of an internal investigation, it

is not yet clear the level of consideration, weight and analysis that judges and prosecutors will provide to the information gathered, the fact that the legal entity had adopted a compliance programme or not and, if affirmative, if such programme would be considered adequate to prevent the offence.

Leniency or collaboration agreements under the Act

Before being summoned to a judicial process, legal entities may enter into a leniency agreement with the Attorney General's Office as long as the legal entity commits to provide accurate, complete and verifiable information for the clarification of the facts, identification of the individuals and legal entities that participated in the offence, or the reimbursement of the proceeds of the offence as well as the fulfilment of the following commitments:

- payment of a fine equal to half of the minimum fine applicable under Section 7, subparagraph 1 of the Act (illegally obtained benefit or benefit which could have been obtained by the violation);
- restitution of the goods or reimbursement of proceeds resulting from the offence; and
- forfeiture of the goods – that would potentially be seized in the event of conviction – to the state.

Additional conditions of the agreement may include:

- taking necessary actions to remediate or repair the damage caused;
- providing a public service to the community;
- imposing disciplinary sanctions to the individuals involved in the offence; and
- implementing a compliance programme in the terms of the Act, or improving or amending a pre-existing programme.

The information provided in the framework of the investigation for the execution of the agreement is confidential and the judge may discretionally accept or reject the leniency agreement. If approved, the judge or the public prosecutor, within one year, are required to verify if the information provided by the legal entity is useful, legitimate and accurate. If approved, a final judgment must be issued by the judge in the terms of the leniency agreement.

The Act does not specify the effects of the leniency agreement in relation to the criminal action, particularly whether the legal entity that successfully satisfies or performs the agreement, will or not see charges dismissed or not further prosecuted. Unlike the original bill, which provided as an option the possibility to provide immunity to the legal entity that cooperated with the authorities, the leniency agreement contemplated by the Act does not exclude liability by way of providing immunity – as in other international jurisdictions – but only seems to provide mitigation.

The purpose of collaboration or leniency agreements is to deter, punish and rectify corporate behaviour, while limiting the collateral consequences of a corporate indictment or conviction, such as loss of a licence, loss of governmental benefits and restriction to do business with state entities. In the United States, prosecutors increasingly use different types of cooperation agreements, such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Both DPAs and NPAs allow legal entities to avoid the authorities' prosecution to the extent that they abide by the terms of the agreement, but under a DPA the government files criminal charges with the court (the information and the agreement itself are filed and must be approved by the court), while nothing is filed or approved by the court in an NPA. In these agreements, the defendant pleads guilty to certain charges and agrees to cooperate with the authorities. In exchange, the authority dismisses other possible charges or imposes an attenuated judgment.

Leniency agreements under the Act have certain common characteristics with DPAs. Both are pre-trial agreements to combat corruption, to punish and rectify corporate misbehaving and defendants are required to plead guilty and agree to cooperate, preserve the integrity of the legal entity, require certain mandatory remedial measures, etc, however, the leniency agreements do not, in principle, provide for dismissal of the charges.

Leniency agreements are consistent with the commitments assumed by Argentina under the United Nations Convention Against Corruption,[26] where the state members committed:

- to take appropriate measures to encourage persons who participate or who have participated in the commission of an offence to supply information useful to competent authorities for investigative and evidentiary purposes; and
- to provide factual, specific help to competent authorities that may contribute to deprive offenders of the proceeds of crime and to recover such proceeds.

The Convention leaves to the discretional decision of each state party to consider, providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence, and also providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence. For this purpose, the state parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law.

Argentina criminal law already contemplates the entering into of collaboration agreements for other type of crimes such as, for example, money laundering, terrorism, drug trafficking, and kidnapping.

Notes

1 OECD Convention on Combating Bribery of Foreign Public Officials, adopted on November 21, 1997, ratified by Argentina and approved by Act No. 25,319 on 7 September 2000, Official Gazette, 18 October 2000.
2 Act 26, 994 Civil and Commercial Code (1 August 2015), Sections 141 and 148 defines the scope of all private legal entities incorporated under any legal form whether of national or foreign capital and including state-owned enterprise, civil associations, foundations, mutual associations, cooperatives, churches, confessions, religious communities or entities, and horizontal property regimes.
3 Criminal Code, Sections 258 and 258 (bis).
4 Criminal Code, supra No. 3, Section 258.
5 Criminal Code, supra No. 3, Section 265.
6 Criminal Code, supra No. 3. Section 268, means the act of incorporating the proceeds of an illegal exaction into the patrimony of the public official or third party.
7 Criminal Code, supra No. 3, Sections 268 (1) and (2).
8 Criminal Code, supra No. 3, Section 300 bis.
9 House of Representatives, Bill No. 0031-PE-2016
10 House of Representatives, supra No. 10. Bill No. 0031-PE-2016, Section 3 listed the following, business associates capable of exerting influence on the legal entity's decisions; its attorneys-in-fact, representatives, concessionaires or representatives in

a trust agreement, suppliers, contractors, agents, distributors and any other individual or legal entity to whom it may be contractually related.

11 International Standard, ISO 37,001 (first edition 15 October 2016) Anti-bribery management systems- requirements with guidance for use, Section 3. Definition of 'business associate'.

12 Press Release, SEC Charges Alcoa with FCPA Violations (9 January 2014), available at www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936.

13 House of Representatives, supra No. 10, Bill No. 0031-PE-2016.

14 House of Representatives, supra No 10, Bill No. 0031-PE-2016, Section 4 provides that controlling companies will be jointly and severally liable for compensating any damages caused and for the fines imposed on its controlled entities

15 Act 19,550, supra No. 16, General Corporations Law, Sections 74 and subsequent (transformation), Sections 82 through 87 (absorption, merger and spin-off).

16 Spain, Act 5/2010 (22 June 2010), Section 130.

17 Act 26, 994 Civil and Commercial Code (1 August 2015), Section 825.

18 Act 26, 994 Civil and Commercial Code (1 August 2015), Section 828.

19 Act 11,867 Transfer of ongoing Concern.

20 Act 27,401 (8 November 2017) Corporate Criminal Liability for Offences Against the Public Administration and Transnational Bribery, Section 22.

21 US Department of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs. Available at https://www.justice.gov/criminal-fraud/page/file/937501/download.

22 Draft Outline Anti-Corruption Ethics and Compliance Handbook (2013) jointly published by OEDC, UNODC and World Bank. Available at https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

23 Executive Power Decree 277/18 (5 April 2018).

24 Act No. 25,233 (December 1999) created the Anti-corruption Office and Decree No. 102/99 regulates its functions and main responsibilities. It is an agency within the Ministry of Justice and Human Rights headed by the Secretary of Public Ethics, Transparency and Fight against Corruption.

25 Global Investigations Review, *The Investigations Review of the Americas 2018*, 'Argentina: current anti-corruption landscape'.

26 United Nations Convention against Corruption, adopted on 31 October 2003 (by the General Assembly of the United Nations), ratified by Argentina on 28 August 2006, and effective by means of Act No. 26,097, Official Gazette, 12 September 2006.

Mariela Inés Melhem
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Mariela Inés Melhem has a renowned experience in domestic and international business law, mergers and acquisitions and global trade compliance involving multiple jurisdictions, including Europe, Japan, Latin America, United States and the Middle and Far East.

She regularly advises clients on domestic and international commercial contract agreements and compliance matters, including export control regulations, economic sanctions, anti-corruption and supply chain issues. She also regularly provides counsel to both domestic and international clients on corporate compliance programmes including creating and assessing compliance and training risk assessments, as well as conducting and evaluating anti-corruption due diligence and compliance in the context of foreign investments and mergers and acquisitions.

Ms Melhem is a partner and member of the corporate and M&A and compliance and corporate crime practices at Mitrani, Caballero & Ruiz Moreno. She was the first female partner at Mitrani Caballero Ojam & Ruiz Moreno. Previously, she was an associate with the corporate department of Baker Botts, in the New York office (1998–1999), and visiting attorney at the business and international department of Vinson & Elkins, LLP in Houston, Texas (summer programme, 1998).

She has participated as a speaker in local and international seminars and conferences. She is a member of the American Bar Association (ABA) and of the City of Buenos Aires Bar. She is part of the academic group of the Argentine Association of Ethics and Compliance in the national and international certification programme.

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The firm also assists clients in assessing and handling self-reporting issues, navigating through administrative, civil and criminal investigations or proceedings before public bodies, and developing and implementing anti-corruption policies, compliance plans and training programmes.

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