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**Operating in Latin America  
in the Wake of COVID-19**

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# Topics We Will Cover Today

- Trade Considerations
- OFAC Compliance Highlights
- FCPA Compliance Highlights
- Price Gouging Risks



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# **Trade Considerations**

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# Issues for Latin America-U.S. Trade Amid COVID-19

- Supply Chain Disruptions
- Economic Slowdown
- Import Regulations
- Export Regulations

# Issues for Latin America-U.S. Trade Amid COVID-19

- Supply Chain Disruptions
  - The WTO estimates that world trade could fall by between 13% and 32% in 2020 due to reduced economic activity from COVID-19
  - Reactions to the pandemic declaration resulted in most countries severely restricting end product and raw material flows related (sometimes tangentially) to addressing COVID-19 issues
  - Additional downturns resulted from global economic shutdowns
    - Factories not producing
    - Demand screeched to a halt for
      - Raw materials
      - Components
      - Parts suppliers

# Issues for Latin America-U.S. Trade Amid COVID-19

- Latin America Economic Impact
  - According to the UN's Economic Commission for Latin America and the Caribbean (ECLAC), the reactions to COVID-19 will cause the worst economic contraction in the history of Latin American and the Caribbean
    - Estimated 5.3% reduction in economic activity in 2020
    - "The interruption of value chains caused by the pandemic will have greater impact on the Brazilian and Mexican economies, which have the region's biggest manufacturing sectors"
    - The region will be seeking increased financial assistance while simultaneously asking for loan forbearance or forgiveness
    - ECLAC suggests supply shocks could push inflation
    - Simultaneously U.S. models suggest deflation

# Issues for Latin America-U.S. Trade Amid COVID-19

- Latin America Impact – Economic Slowdown
- COVID-19 is affecting the region in identifiable areas
- The decline in the economic activity of the region's main trading partners and the effects of that
  - Latin America is heavily dependent on exports, the volume and value of which will be reduced by the global recession.
- Declines in commodity prices
  - Sharp declines from the deterioration of trade will negatively impact Latin American economies and incomes that depend on those exports
  - The unexpected parallel oil market shock disproportionately affects select countries in the region
- Supply chain disruption from all corners – China, Europe and the U.S.
  - Greatest impact on Mexico and Brazil with large manufacturing sectors
- Lower demand for tourism services
- Investor risk aversion leads to higher demand for safe assets
  - Lowers demand for the region's financial assets and can depreciate currencies
- Mexico's decision to shutter hundreds of factories it doesn't consider essential adversely impacted North American supply chains, disrupting food, medical and other critical goods – *Politico*

# Issues for Latin America-U.S. Trade Amid COVID-19

- Import regulations
- Changes in regulations relating to the movement of goods and people
  - Immigration halt in the U.S.
    - 60 days; may be extended
    - Effective April 23, 2020
    - Many exemptions, but designed to protect US labor market
    - Rescission may hinge on reopening schedules, which are dictated by states
  - Focus and emphasis in the short term has been on PPE
    - Early shortages shaped policies still in effect
    - Regulated by U.S. Customs and Border Protection (CBP) and Food and Drug Administration (FDA)



# Issues for Latin America-U.S. Trade Amid COVID-19

- Import regulations
  - CBP and FDA focus has been on *accelerating* entries of PPE and anything COVID-19 related
  - While simultaneously trying not to slow down normal commerce
  - CBP assigned special COVID-19/PPE teams
  - FDA temporary authorizations relating to imports of PPE
  - Temporary relief from certain duty payments upon showing of “significant financial hardship due to COVID-19”
  - Imports subject to duties associated with antidumping and countervailing duties (AD/CVD), and Section 201, 232 and 301 Trade Remedies are not included
- No interruption in Administration’s trade agenda
  - USMCA scheduled to take effect as planned
  - Two (2) new section 232 actions announced (each started before and unrelated to COVID-19)
  - Antidumping reviews continue

# Issues for Latin America-U.S. Trade Amid COVID-19

- Import impacts
  - Look for increase countervailing duty actions once COVID-19 is behind the world
  - Other countries will exploit GATT Article XXI to take 232-like actions
  - The definition of national security and essential security will expand greatly
    - Will now include
      - Medical
      - Food
      - Food supply chain
      - Processing and related equipment

# Issues for Latin America-U.S. Trade Amid COVID-19

- Export regulations
  - Worldwide restrictions on the flow of PPE
  - Supply shortages used to justify
  - Producing countries quickly moved to husband supplies
  - Ramp-up changed the course for some items

# Issues for Latin America-U.S. Trade Amid COVID-19

- Export regulations
  - FEMA given greater role for PPE-related items
  - Expanded use in the U.S. of the Defense Production Act (DPA) authorities
  - Presidential Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use of April 3, 2020
    - Authorized FEMA to take “any and all authority available under [the DPA] to allocate to domestic use, as appropriate, [identified] scarce or threatened materials”
      - N-95 Filtering Facepiece Respirators
      - Other Filtering Facepiece Respirators
      - Certain types of air-purifying respirators and particulate filters/cartridges
      - PPE surgical masks
      - PPE gloves or surgical gloves
  - Broad authority given to FEMA to seize products designated for export
  - Required CBP to hold such exports until cleared by FEMA

## Issues for Latin America-U.S. Trade Amid COVID-19

- Export regulations
  - New regulations a moving target that will now ebb and flow according to requirements and demand
  - Expect restrictions on vaccine and vaccine materials once a preferred vaccine is identified
  - Potential impact on everything from vaccine delivery to constituent products
- The world is in reactive mode, and thus the essential element of predictability eludes us

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# **OFAC Compliance Highlights**

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## Overview Before COVID-19

- Pre-COVID-19, the focus of U.S. sanctions in Latin America has been on Cuba, Venezuela and Nicaragua with increased use of Foreign Narcotics Kingpin Act and Global Magnitsky Act designations of blocked persons.
- The Trump Administration has significantly tightened the sanctions on Cuba, Venezuela and, to a lesser extent, Nicaragua, with a policy of maximum pressure in the case of Cuba and Venezuela to achieve regime change.



## Overview Post COVID-19

- Post-COVID-19, Office of Foreign Assets Control (OFAC) continues to work and to enforce U.S. sanctions but has announced a policy of liberalization with respect to certain COVID-19 assistance and the effects of COVID-19 on sanctions compliance.
- The economic crisis caused by the COVID-19 pandemic has resulted in increased fraud, corruption, money-laundering and other illegal activity and heightened sanctions compliance, and screening is warranted.



# Highlights of Sanctions Programs-Cuba

- Trump's Cuba policy has been to roll back many of the Obama Administration changes to begin to normalize relations after 50+-years of comprehensive sanctions
- Termination of general licenses allowing cruises to Cuba and imposition of further restrictions on private aircraft and vessel travel to Cuba.
- Termination of authorization for unsupervised "People-to-People" travel.
- Created Department of State Restricted Persons List
- Increased restrictions on certain remittances.
- Termination of "U Turn" authorization for U.S. banks.
- Allowed Helms Burton Title III to become effective
- Threatened use of Helms Burton Title IV to exclude from the U.S. foreign principals engaged in trafficking in confiscated property.
- European Union has invoked Blocking Regulation in response to the Helms Burton Title III Litigation.

## Highlights of Sanctions Programs-Venezuela

- Sanctions on Venezuela began with list-based sanctions by Executive Order in 2015 under the Obama Administration, but the Trump Administration significantly expanded them by Executive Orders in 2018/2019
- The sanctions are designed to effectuate regime change by replacing the Maduro government with the Guaido government
- The scope and exceptions to the sanctions are complex and there are many general licenses granted
- Restrictions include trading in certain new Venezuelan debt and use of Venezuela cyber-currencies
- Secondary sanctions have been imposed on non-U.S. persons providing material support for the Venezuelan government

## Highlights of Sanctions Programs-Nicaragua

- The Trump Administration's policy of Nicaragua has been to ratchet up sanctions because of the perceived connections between the Sandinistas and the Cuban and Venezuelan governments.
- This has been accomplished through Executive Orders and use of the Global Magnitsky Act
- In 2018, the U.S. Congress passed the Nicaragua Human Rights and Anticorruption Act of 2018:
  - Requires U.S. to vote against multilateral financing for Nicaragua
  - Authorizes the imposition of sanctions on persons engaged in anti-democratic or corrupt activities
- The list-based sanctions on Nicaragua now include dozens of individuals and entities.

## Highlights of Sanctions Programs-Kingpin Act

- Since the 1995 Executive Order 12978 and the enactment in 1999 of the Foreign Narcotics Kingpin Designation Act, the U.S. government has designated individuals and entities they own or control as blocked persons
- There are hundreds of persons/entities located in Latin America currently designated for this purpose and the list is growing.
- These designations can occur quickly, without advance notice, and can affect high-profile businesses in Latin America.
- Care must be taken in screening listed entities – consider the OFAC 50% rule

# Highlights of Sanctions Programs

## Global Magnitsky Act

- Sergei Magnitsky was a Russian accountant who, in 2009, was tortured, denied medical attention, and found dead in his Moscow jail cell.
- In 2012, the U.S. Congress passed a law in his name that imposed sanctions on a list of Russian officials believed to be responsible for serious human rights violations
- In an important step for global accountability, Congress built on the original Russia-focused Magnitsky law in 2016 and enacted the Global Magnitsky Act, which allows the executive branch to impose visa bans and targeted sanctions on individuals
- The Global Magnitsky Act has been used to designate prominent persons in Latin America

# Highlights of OFAC COVID-19 Sanctions Liberalization

- On March 13, 2020, [President Trump declared a National Emergency](#) in response to COVID-19.
- On April 16, 2020, OFAC published a [fact sheet](#) that summarizes existing exemptions and authorizations to provide humanitarian assistance in the context of the [Iran](#), [Venezuela](#), [North Korea](#), [Syria](#), [Cuba](#) and [Ukraine/Russia-related](#) sanctions programs.
- Separately, OFAC encourages persons, including financial institutions and other businesses, to contact OFAC if the person believes it may experience delays in its ability to meet deadlines associated with regulatory requirements administered by OFAC. This includes:
  - requirements related to filing blocking and reject reports within 10 business days as required by [31 C.F.R. §§ 501.603](#) and [501.604](#),
  - responses to administrative subpoenas issued pursuant to § [501.602](#),
  - reports required by general or specific licenses,
  - or any other required reports or submissions.

# Highlights of OFAC COVID-19 Sanctions Liberalization

- OFAC understands that the COVID-19 pandemic can cause technical and resource challenges for organizations.
- As OFAC has articulated in both its Economic Sanctions Enforcement Guidelines (31 C.F.R. part 501 Appendix A) and its [Framework for Compliance Commitments](#), the agency supports a risk-based approach to sanctions compliance.
- In addition, OFAC encourages persons to submit self-disclosures to the following e-mail account rather than through physical mail: [OFACdisclosures@treasury.gov](mailto:OFACdisclosures@treasury.gov).



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# **FCPA Compliance Highlights**

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# FCPA: The Current Environment

## THE PERFECT STORM

- High Demand – Low Supply – Urgent Need
- Pre–COVID-19 weakening of strong Latin American economies
- General COVID-19–related deceleration of economies
- Economic and health crisis is a breeding environment for corruption
  - Bidding procedures are disrupted
  - Mounting pressure on solutions
  - Limited human and financial resources

# FCPA: The Overview

- The FCPA was enacted in an effort to repair the credibility and negative perception of American companies both nationally and internationally following the Watergate scandal.
  - Antibribery Provisions
  - Accounting Provisions
- Applies to:
  - U.S. and foreign public companies listed on U.S. stock exchanges or who file reports with the Securities and Exchange Commission (SEC) (“issuers”)
  - U.S. businesses and persons (“domestic concerns”)
  - and foreign businesses and persons while in the U.S. or its territories

## **HOW DO I VIOLATE THE FCPA?**

To violate the FCPA's antibribery provisions, the following elements must be satisfied

- 1.** a covered person
- 2.** subject to the jurisdiction of the FCPA
- 3.** offers, pays, promises to pay, or authorizes the payment of money or anything of value
- 4.** to any foreign official or to a third party "while knowing" that all or part of the payment or other thing of value will be given to a foreign official
- 5.** corruptly for the purpose of influencing any act or decision of a foreign official in his official capacity, inducing a foreign official to do or omit to do any act in violation of his lawful duty, inducing a foreign official to use his influence to affect an act of the foreign government, or securing any improper advantage
- 6.** in order to obtain or retain business

## Significant Penalties for Violating the FCPA

- Companies may be fined up to \$2 million for violations and \$25 million for violations of the accounting provisions (public companies only).
- Individuals may be fined up to \$250,000 and imprisoned for up to five (5) years for each violation and fined up to \$5 million and imprisoned for up to twenty (20) years for violations of the accounting provisions.
- Civil and criminal forfeiture of property may be imposed.
- Civil penalties may be imposed in actions brought by the DOJ and the SEC.
- Compliance monitoring or self-review may be imposed.
- Debarment may be imposed.
- Loss of export privileges may be imposed.



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# FCPA Violations: Common Causes

- Poor tone at the top
- Lack of global compliance organization and failure to hold employees and supervisors accountable
- Poor financial controls
- Lack of an effective internal audit function
- Failure to make real changes following prior FCPA investigations

# FCPA: Compliance Red Flags

- Payments to foreign officials or businesses
- Request by a foreign official to work with a specific third party
- Rumors of or a reputation for unethical behavior or bribery by a third party or foreign official
- Lack of qualifications, training, or expertise by a third party
- Requests for payment outside of a contract
- Unusual payment patterns or requests
- Unusually high fees or expenses and lack of transparency
- Request by a third party to remain anonymous
- Unwillingness by a third party to cooperate with an audit
- Unwillingness by a third party to represent/certify that such party has not paid and does not pay bribes
- Operations in countries that have a history of corruption

## FCPA: Corruption and Fraud Trends

### Common methods of improperly obtaining business:

- Unjustified multilevel supply chain
- Unvetted vendors/newcomers
- Personal connections – improper influence
- Donations to ostensibly charitable organizations
- Fee-for-service arrangements
- Registration “consultants”
- Triangular and offshore distribution arrangements
- Congresses, advisory boards, and speaker programs
- Gift card programs

# Latin America: Corruption and Fraud Trends

**Companies with government customers continue to have higher risk** due to:

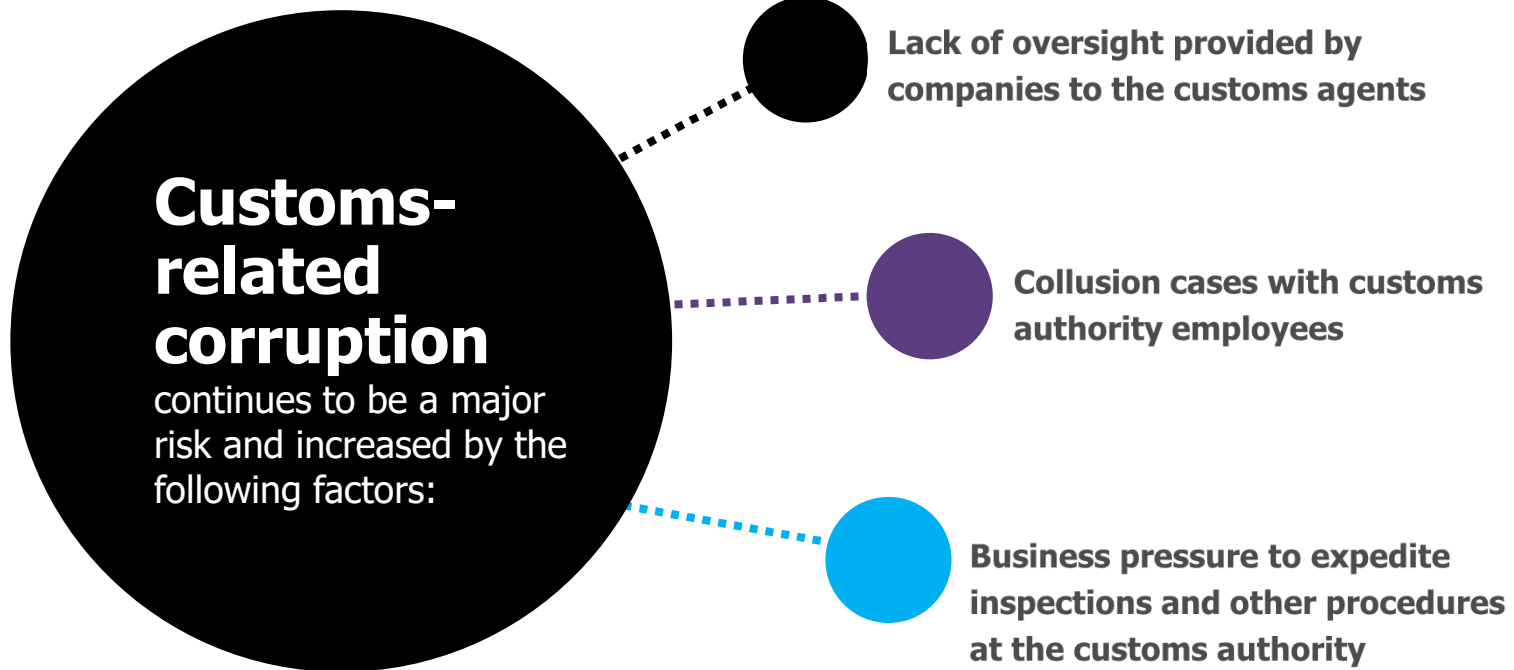
- Unclear tendering processes and vendor selection criteria
- Unclear criteria to assign contracts directly
- Use of third parties to explore the business market
- Utilization of distributors and agencies as intermediaries



# Latin America: Corruption and Fraud Trends

- **Utilization of third party continues to be one of the major risks:**
  - “Gestores” responsible for obtaining permits and licenses
  - Third parties are unknown
  - Lack of contracts
  - Lack of anticorruption and right-to-audit provisions in existing contracts
  - Unclear compensation schemes
  - Nonexistent third-party audits
  - Ineffective oversight of fees and expenses reimbursement
  - No due diligence conducted before engaging third parties

# Latin America: Corruption and Fraud Trends



# Latin America: Corruption and Fraud Trends

- **Providing gifts, meals, and entertainment to clients** (private and government) continues to be a cultural issue. Risk is increased by the following factors:
  - Lack of policies and procedures
  - Gift policies not customized to comply with local regulations
  - Lack of logs and purchasing controls
  - Offering meals and entertainment continues to be the most popular way to gain the favor of government officials and clients in the private sector

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## What Are Companies Doing to Reduce FCPA Risk?

- Data analytics focused on compliance aspects, particularly corruption and money laundering
- Risk assessments focused on fraud, corruption, and money laundering
- Increasing monitoring audits using data analytics techniques
- Integrity diligence procedures focused on third parties and employees
- Third-party audits
- Training employees and third parties

# FCPA Violations: Undesired Business Consequences

- Enterprise valuation distortion
- Sales and marketing practices that depend on improper payments
- Lack of sales creativity
- Theft, embezzlement, and unaddressed conflicts of interest
- Enforcement investigations and potential civil and criminal prosecutions
- Potential future shareholder litigation and other lawsuits
- Other potential consequences include self-monitoring, corporate integrity agreements, and potential ban from participating in public health reimbursement programs

# FCPA: The Checklist

- **Top-Level Commitment**
  - Tone at the Top
  - Board Knowledge and Oversight
  - Executive Responsibility (Compliance Officer)
  - Adequate Staffing, Authority, and Access to Board
- **Risk Assessment**
  - Country
  - Industry
  - Business Partners
  - Governmental Oversight
  - Points of Contact
- **Standards and Procedures**
  - Content
  - Review
- **Monitoring and Review**
  - Monitoring and Auditing
  - Periodic Review



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# FCPA: The Checklist

- **Communication and Training**
  - Communications (reasonable steps to communicate periodically)
  - Training
  - Types (mix of web-based, in-person, etc.)
  - Subjects of Training
- **Reporting**
  - Reporting Hotline
  - Guidance
  - Response
- **Due Diligence**
  - Employees
  - Third Parties
  - M&A Diligence
  - Post acquisition Integration
- **Incentives and Discipline**
  - Incentives (positive evaluations/promotion if good compliance)
  - Discipline
  - Consistent Promotion and Application



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# **Price-Gouging Risks**

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# Price Gouging Laws



## KEY ELEMENTS

- Triggering Event
- Goods/Services Protected
- Lookback Time Period
- Types of Increase Prohibited
- Penalties
- Exceptions



## FEDERAL ANGLE

- Executive Order pursuant to Defense Production Act
- Hoarding and Price Gouging Task Force



## LAWS IN A TIME OF EMERGENCY

- Speed and evolution
- Patchwork nature
- Difficulty in locating/tracking
- Ambiguous language

# Price Gouging Risks

<b>Who Is At Risk?</b>	<b>What Is The Risk?</b>
<ul style="list-style-type: none"><li>• In the Supply Chain</li><li>• Near the Supply Chain</li><li>• Industries</li></ul>	<ul style="list-style-type: none"><li>• Investigation/Litigation</li><li>• Penalties</li><li>• Collateral/Brand Damage</li></ul>

# Managing Risks Associated With Price Gouging

- Evaluate your internal Compliance Program
- Ensure your Third-Party Partners comply with the law and your policies
- Document everything!
- Maintain open lines of communication with the Government
- Mind the process

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Humberto Padilla Gonzalez represents clients in a broad range of cross-border matters including mergers and acquisitions (M&A), investments, joint ventures, international commercial finance transactions, and contractual and simple operational matters throughout Latin America. Further, he often assists clients with respect to internal compliance investigations under the Foreign Corrupt Practices Act (FCPA), as well as data privacy issues. Humberto is also part of a cross-practice Global Workforce team providing integrated cross-border advice, counseling, and strategic planning on labor, employment, benefits, and immigration issues in Latin America.

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A white-collar and commercial litigator, Rebecca J. Hillyer concentrates her practice on False Claims Act (FCA) and qui tam litigation and complex business fraud and disputes. Becca regularly counsels and defends clients facing multistate, multi-agency or parallel government investigations and litigation. Becca serves as national counsel for a pharmaceutical manufacturer in *In re: National Prescription Opiate Litigation* (N.D. OH), and in federal and state courts across the country, defending against claims based on allegedly fraudulent promotion of opioids.

## Kenneth J. Nunnenkamp



**Partner**

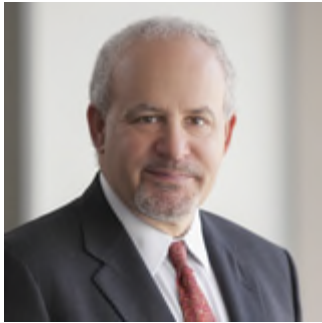
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Kenneth Nunnenkamp represents clients in international trade and national security matters before United States federal courts and government agencies, including the US departments of State, Commerce, Homeland Security, Defense, and Treasury. His practice involves internal investigations and disclosures, including voluntary disclosures and responding to government demands, as well as federal court defense against government actions. He also advises on compliance counseling and training, transactional due diligence—including both domestic and cross-border transactions—and statutory submissions to US government agencies.

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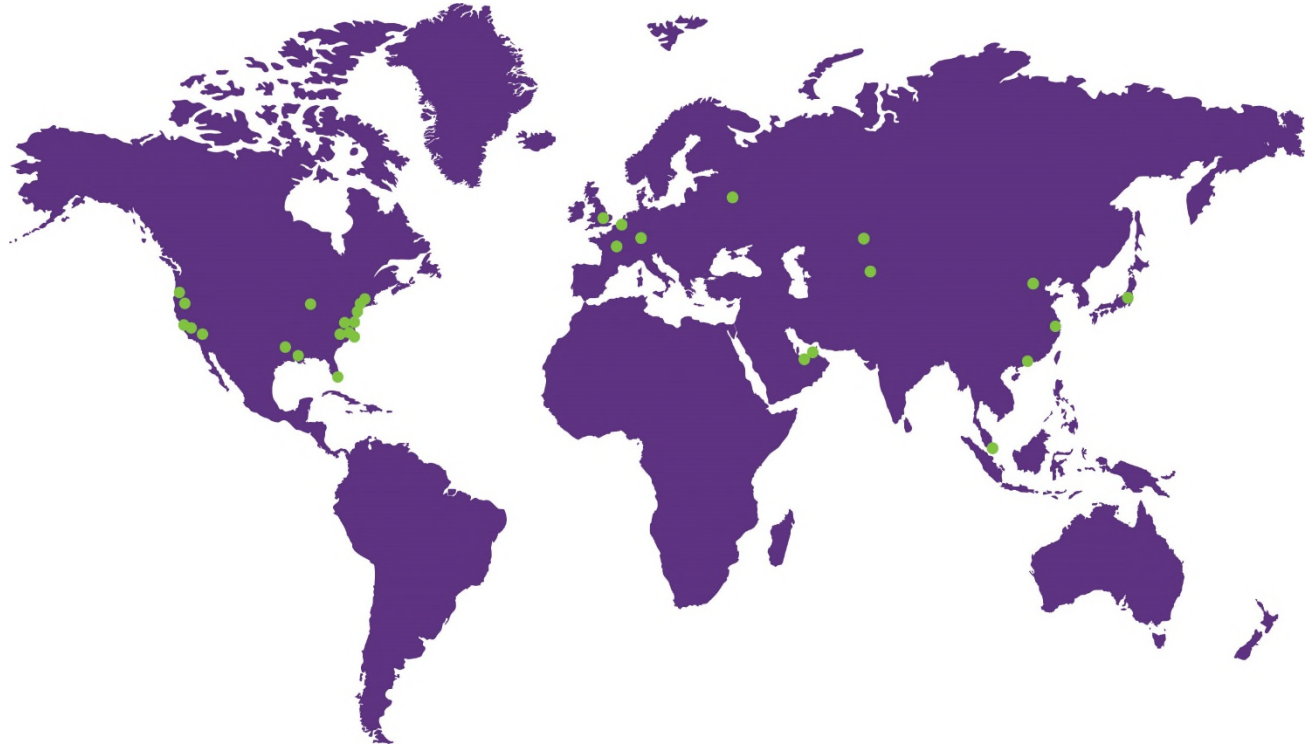
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