



The Guide to Corporate Crisis Management

Second Edition

Editors

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

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Publisher's Note

Latin Lawyer is delighted to publish *The Guide to Corporate Crisis Management*.

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of over 40 leading practitioners from a variety of disciplines, it provides guidance that will benefit all practitioners when an unexpected crisis hits.

Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America. Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

We are delighted to have worked with so many leading firms and 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 our *Guide to Infrastructure and Energy Investment* and jurisdictional references.

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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Representing Individual Executives in Latin America

Mauricio A España, Hector Gonzalez, Andrew J Levander, Mariel Bronen and Yando Peralta¹

Representing individuals who are being investigated by US regulators is a significant and complicated task, which becomes more complicated when these individuals are Latin American nationals living abroad. This chapter will discuss circumstances under which these nationals could come under US investigation, and key concerns that lawyers should consider when representing Latin American nationals in US regulatory or criminal investigations. As discussed below, US regulators may commence an investigation under various circumstances that can expose Latin American nationals not only to those investigations, but also to the related criminal or civil exposure.

First, we will discuss the potential for US law to apply to individuals located outside of the United States. Second, we will discuss the ability of US law enforcement to pursue actions against foreign nationals and individuals located outside of the United States. Third, we will cover the length of time the US government has to pursue an action against an individual located outside of the United States and ways in which US regulators can lengthen these limitations periods. Fourth, we will examine the risks of extradition to the United States, which vary based on location and offence. Fifth, we will examine the contours of the attorney–client privilege and how it may impact an individual’s defence. Sixth, we will discuss the law relating to an individual’s right to indemnification for legal costs associated with investigations, an important issue in light of the significant cost of effective representation in the United States. Finally, we will examine how these factors may influence an individual’s decision whether to cooperate with US regulators’ investigations.

¹ Mauricio A España, Hector Gonzalez and Andrew J Levander are partners, and Mariel Bronen and Yando Peralta are associates at Dechert LLP.

Extraterritorial jurisdiction and Latin American nationals living abroad

It is well settled that US federal law is presumed to apply only within the United States, unless Congress clearly provides otherwise.² Congress has clearly stated that some laws provide for extraterritorial jurisdiction, meaning that US regulators can prosecute conduct that occurs outside the US borders. Latin American individuals operating abroad, and counsel representing them, should be aware of these laws and whether their conduct is subject to the extraterritorial reach of US law. Several of such laws are discussed briefly in turn.

The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) is a notable example of a law with extraterritorial reach.³ The FCPA, which punishes the act of giving, or promising to give, money or some other benefit to a foreign government official to influence or induce his or her behaviour to obtain or retain business, applies to both US and certain non-US individuals and businesses, and can give rise to liability even when the corrupt act takes place outside the United States. First, the FCPA applies to US individuals and businesses operating anywhere in the world, meaning that, if a US individual or business engages in corrupt conduct in a foreign country, he or she can be subject to liability under the FCPA. Second, any issuer of securities on a US stock exchange, whether the issuer is a US or non-US company (or anyone acting on behalf of such issuer, including foreign nationals), is prohibited from using US mail or any means or instrumentality of US interstate commerce for corrupt conduct anywhere in the world. Third, foreign nationals may be prosecuted if they directly or indirectly, through an agent or intermediary, engage in any act in furtherance of a corrupt payment while in the territory of the United States; or if they act as an agent of an issuer or US individual or entity, regardless of whether the foreign national takes any action in the United States, that engages in corrupt conduct.

Recent decisions by US appellate courts have clarified FCPA liability in cases against foreign individuals. For instance, in *United States v. Hoskins*,⁴ the United States Court of Appeals for the Second Circuit limited liability under the FCPA in cases against foreign nationals acting outside the United States. In *Hoskins*, the Department of Justice (DOJ) alleged that the defendant, a UK national and employee of a UK subsidiary of Alstom SA, was involved in Alstom's US subsidiary's decision to hire consultants, knowing that payments made to those consultants would be used to bribe Indonesian officials.⁵ The defendant never travelled to the United States, but called and emailed conspirators there. The DOJ charged Hoskins based on the theories that he (1) was an agent of Alstom's US subsidiary; and (2) aided, abetted or conspired with that US subsidiary. On appeal from the district court's ruling that

2 *Morrison v. Nat'l Australia Bank Ltd*, 561 US 247, 255 (2010).

3 See 15 U.S.C §§ 78dd-1, et seq. (1977).

4 902 F.3d 69 (2d Cir. 2018).

5 Alstom SA is a French power and transportation company. In December 2014, Alstom pleaded guilty to charges of bribing officials in four countries and agreed to pay a US\$772 million fine to the DOJ. See Dep't of Justice, 'Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges', Justice.gov, <https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>.

the FCPA does not create liability for non-US persons solely for aiding, abetting or conspiring to violate the statute, the Second Circuit affirmed on the conspiracy charge. Specifically, the Second Circuit held that the DOJ may not use conspiracy or accomplice theories on persons not subject to the FCPA as principals. However, the Second Circuit remanded the case for trial; a defendant could still be liable if the DOJ proved that Hoskins acted as an agent of a ‘domestic concern’.

In *United States v. Ng Lap Seng*,⁶ decided in August 2019, the Second Circuit further defined the standards for imposing liability under the FCPA. There, the Second Circuit affirmed the conviction of a Chinese real estate developer who bribed two United Nations (UN) officials to encourage the UN to select his Macau convention centre for an annual conference. The first bribe consisted of hiring one ambassador to work at a media entity he controlled. The second involved paying for a vacation for a second ambassador’s family and funding a UN concert arranged by the second ambassador. The defendant also paid the ambassadors’ relatives for no-show jobs and sham contract work.⁷

The ambassadors then wrote to the UN Secretary General urging the UN to select Ng’s convention centre as the site of the annual conference. They also persuaded the relevant UN committee to issue a letter in support of Ng’s convention centre. The second ambassador, serving as president of the UN’s General Assembly, led a trip with other UN officials to inspect Ng’s convention center and voiced his continued support for holding the UN conference there. The UN selected Ng’s convention centre to host the conference, and Ng signed an agreement binding him to make the convention centre available at no cost to the UN.⁸

The Second Circuit held that the government did not need to prove that Ng intended for the UN ambassadors to commit an ‘official act’ in support of his bribery scheme. This decision stands in contrast with the US Supreme Court decision in *McDonnell v. United States*.⁹ *McDonnell* holds that, under the general bribery statute, a government official is liable if, in exchange for payment, he or she exercises some type of formal government power (i.e., engages in an ‘official act’) to resolve a specific question or proceeding pending before the government. Official acts exclude informal exercises of government influence, such as setting up meetings or organizing events where other officials might consider taking some form of government action.

In addition, the Second Circuit held that establishing ‘corrupt intent’ under the FCPA does not always require proof that an individual intended for government officials to violate an official duty.¹⁰ Finally, the Second Circuit found that bribery related to ‘obtaining or retaining business for or with, or directing business to, any person’ did not refer solely to commercial business profits directed to defendant. Even where the commercial benefits of such a transaction appeared to belong entirely to the UN, the statute prohibits directing business to ‘any person’, including the UN. Last, the court held that a jury could reasonably find that hosting a conference *pro bono* might also maximise the long-term profits of Ng’s

6 No. 18-1725-cr, 2019 WL 3755676 (2d Cir. 9 August 2019).

7 *Ng Lap Seng*, 2019 WL 3755676, at *2-4.

8 See *id.* at *2-4.

9 136 S. Ct. 2355 (US 2016).

10 *Ng Lap Seng*, 2019 WL 3755676, at *21.

business.¹¹ The Second Circuit thus upheld Ng's four-year conviction upon a broad reading of the FCPA.

Accordingly, pursuant to the FCPA, US regulators can reach not only US persons and businesses or issuers of securities on US exchanges, but also Latin American nationals who take any action while in the United States in furtherance of a corrupt payment to a foreign government official or those who take action abroad on behalf of a US entity or issuer.¹²

The Foreign Trade Antitrust Improvements Act

Under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), US antitrust law applies to anticompetitive activities outside the United States when the foreign conduct has a direct, substantial and reasonably foreseeable effect on US domestic commerce or import trade; and the effect gives rise to a claim under the Sherman Act.¹³ In these instances, the FTAIA gives the US DOJ the power to prosecute antitrust violations.

Obstruction of justice

Certain offences related to the obstruction of justice expressly provide for extraterritorial application. These include witness tampering¹⁴ and retaliation against a witness.¹⁵ Obstruction of justice in the context of a government or regulatory investigation most commonly occurs when a witness takes action to impede or hinder a government investigation. For example, in *United States v. Norris*, 753 F.Supp.2d 492 (E.D.Pa. 2010), the court affirmed the conviction of a national of the United Kingdom for conduct that took place wholly outside of the United States, including his or her efforts to influence the testimony of several witnesses in a US grand jury investigation.

Money laundering

The Federal Money Laundering Statutes¹⁶ impose criminal penalties for various money laundering offences. Both statutes provide the DOJ with extraterritorial jurisdiction: Section 1956 applies to 'foreign persons' who commit offences involving transactions, property or institutions with certain specified connections to the United States, and Section 1957 imposes criminal liability on 'United States person[s]' who engage in prohibited transactions 'outside of the United States'.

Jurisdiction to seek documents and information in Latin America

US regulatory and criminal investigations are routinely global in nature, which, in many instances, requires US regulators to seek documents or testimony from outside of the United States. Accordingly, it is important to be aware that US regulators attempting to collect

11 id. at *23.

12 See US Dept. of Justice and SEC, 'A Resource Guide to the Foreign Corrupt Practices Act' at 10–12 (2012).

13 15 U.S.C. § 6a.

14 18 U.S.C. § 1512.

15 18 U.S.C. § 1513.

16 18 U.S.C. §§ 1956 and 1957.

documents and testimony from abroad are subject to certain constraints that are not present when collecting evidence in the United States. For instance, 28 U.S.C. Section 1783 authorises US courts to issue subpoenas to a US national or resident located in a foreign country to appear or to produce evidence. However, courts have held that Section 1783's subpoena power does not extend to foreign citizens or nationals present outside the United States.¹⁷ Despite Section 1783's limitation, US regulators still have certain methods of gathering evidence from foreign citizens and nationals residing abroad.

The US Department of Justice

The DOJ's methods of obtaining evidence from abroad can be grouped into formal and informal means. Formal requests include: letters rogatory, treaty requests and requests pursuant to executive agreements. A letter rogatory is a request from a judge in the United States to the judiciary of a foreign country requesting the performance of an act that, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty.¹⁸ Most treaty requests are made pursuant to a mutual legal assistance treaty (MLAT). An MLAT defines the mutual obligation between participating countries to provide assistance, the scope of assistance, and the contents of the request.¹⁹ Informal requests use ad hoc methods to secure assistance, often more quickly and flexibly than by formal means, but the evidence obtained may not always conform to the Federal Rules of Evidence or otherwise be admissible in a US proceeding.²⁰ Executive agreements, are international agreements that are placed into force without the advice and consent of the Senate. Such agreements may provide alternative channels for obtaining evidence from abroad.

Additionally, the DOJ can use *Bank of Nova Scotia* subpoenas to obtain bank or business records located abroad by serving subpoenas on branches of the bank or business located in the United States. This tactic may be used even when production of the records would violate the foreign country's secrecy laws.²¹

If a witness who ordinarily is not subject to a subpoena because he or she is located abroad voluntarily travels to the United States, US prosecutors may serve him or her with a subpoena and compel him or her to testify.²² Depending on the circumstances of the case, the witness may be served with the subpoena at the time and place he or she enters the

17 See *Aristocrat Leisure Ltd v. Deutsche Bank Trust Co Americas*, 262 F.R.D. 293, 305 (S.D.N.Y. 2009) (In any event, courts faced with similar circumstances have found that foreign nationals living abroad are not subject to subpoena service outside the United States); *US v. Taveras*, No. 04-CR-156 (JBW), 2006 WL 1875339, at *15 (E.D.N.Y. 5 July 2006). ([T]he federal district court's power of subpoena does not extend to non-citizens beyond the nation's borders); *United States v. Korolkov*, 870 F. Supp. 60, 65 (S.D.N.Y. 1994). (The government is unable to compel the attendance of any of these witnesses at trial at New York (under § 1783 and the Federal Rules of Criminal Procedure). As there [sic] are not citizens of the United States and do not reside here, they are not amenable to United States subpoenas); *United States v. Serhan*, No. 14-20685, 2015 WL 4886578, at *2 (E.D. Mich. 17 Aug 2015) (holding § 1783 does not allow the government, in a criminal proceeding, to subpoena a non-resident, non-national living outside the United States).

18 See US Attorney's Resource Manual, Criminal Resource Manual, CRM 1-499, CRM 275.

19 id. at 276.

20 id. at CRM 266-285.

21 See *In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir.), cert. denied, 469 US 1106 (1985).

22 See Fed. R. Crim. P. 15; 18 U.S.C. § 3503.

United States, or at a later date if the DOJ becomes aware of the witness's presence in the United States.

In some countries, depositions of willing witnesses may be taken at the US Embassy or consulate without a formal request. For example, signatories to the Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, which include Argentina, Brazil, Colombia, Costa Rica, Mexico and the United States, generally permit such depositions to be taken in civil cases. Other countries permit the taking of such depositions only of US citizens, while others permit only depositions taken pursuant to a formal request and in accordance with the laws and procedures of the place where the request is executed.²³ Even if different procedures are followed, US courts generally hold that the depositions are admissible unless 'the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable'.²⁴

The Commodity Futures Trading Commission

The Commodity Futures Trading Commission (CFTC) can issue an investigatory subpoena outside the United States, but only if the recipient is a US citizen or national. Foreign nationals living abroad are not within the agency's subpoena power. Congress has authorised the CFTC to issue subpoenas '[f]or the purpose of securing effective enforcement . . . [and] for the purpose of any investigation' into matters within the CFTC's purview.²⁵ The CFTC may serve the subpoena on an individual who is not 'within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country'.²⁶ Federal Rule of Civil Procedure 4.1(A) provides that the process 'must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits.' However, as discussed above, the statute only allows service of an extraterritorial subpoena on 'a national or resident of the United States who is in a foreign country'.²⁷

The Securities and Exchange Commission (SEC)

The Securities and Exchange Commission (SEC) may issue subpoenas for documents or testimony, pursuant to Section 19(c) of the Securities Act, Section 21(b) of the Exchange Act, Section 209(b) of the Advisers Act, and Section 42(b) of the Investment Company Act. Pursuant to these provisions, it may compel the production of any relevant records from

23 US Attorney's Resource Manual, Criminal Resource Manual, CRM 1-499, CRM 285.

24 *United States v. Salim*, 855 F.2d 944, 953 (2d Cir. 1988) (approving the use of depositions taken pursuant to letter rogatory where defendants were not present at French deposition, defence counsel were not permitted to be present while the witness testified, and the presiding magistrate conducted the examination, asking questions counsel submitted in writing).

25 7 U.S.C. § 9(5).

26 *id.* at § 9(7).

27 28 U.S.C. § 1783.

any place in the United States.²⁸ While the applicable rules governing service of subpoenas do not address whether service may be made on foreign nationals outside the United States, case law indicates that it cannot.²⁹

For example, in *SEC v. Zanganeh*,³⁰ the SEC was authorised to subpoena witness testimony ‘from any place in the United States or any State’.³¹ The court stated that where no individual service occurred and the respondent was not in the United States, ‘the [agency] has no power to subpoena an alien nonresident to appear before it from a foreign land.’³² However, if service of the subpoena is made within the territorial limits of the United States, courts have held that service of the subpoena requires production of documents outside the United States.³³

The personal jurisdiction defence

Lack of personal jurisdiction is a popular and significant defence in cases involving foreign national defendants located outside the United States. When the personal jurisdiction of a federal court is invoked, the relevant inquiry is whether the respondent has had sufficient ‘minimum contacts’ with the United States to enable the court to exercise personal jurisdiction over him or her consistent with the Due Process Clause of the Fifth Amendment.³⁴ In a criminal prosecution, the government needs to establish personal jurisdiction by satisfying the minimum contacts, as well as a reasonableness analysis.³⁵ The ‘minimum contacts’ inquiry requires the court to consider whether the defendant has sufficient contacts with the forum state to justify the court’s exercise of personal jurisdiction, whereas, the reasonableness analysis requires courts to weigh several factors, including the burden on the defendant, the interest of the forum state and the plaintiff’s interest in obtaining relief, the interstate judicial system’s interest in efficient resolution of controversies and the shared interests of the several states in further fundamental substantive social policies.³⁶

Jurisdiction can be conferred over a foreign individual if he or she engages in prohibited conduct in a US territory; uses a US instrumentality of interstate commerce to do so; causes

28 See SEC Division of Enforcement, Office of Chief Counsel, Enforcement Manual at 17 (28 November 2017).

29 Under Rule 8 of the SEC’s Rules Relating to Investigations (17 C.F.R. § 203.8), service of subpoenas issued in formal investigative proceedings shall be effected in the manner prescribed by Rule 232(c) of the SEC’s Rules of Practice (17 C.F.R. § 201.232(c)). Rule 232(c), in turn, states that service shall be made pursuant to the provisions of Rule 150(b) through (d) of the SEC’s Rules of Practice (17 C.F.R. §§ 201.150(b) through (d)).

30 470 F.Supp. 1307 (D.D.C.1978).

31 *SEC v. Zanganeh*, 470 F.Supp. 1307 (D.D.C.1978).

32 *id.*

33 See *SEC v. Minas de Artemisa, SA*, 150 F.2d 215 (9th Cir. 1945); *Ludlow Corp v. DeSmedt*, 249 F.Supp. 496, 500–01 (S.D.N.Y.), *aff’d sub nom. FMC v. DeSmedt*, 366 F.2d 464 (2d Cir.), *cert. denied*, 385 US 974, 87 S.Ct. 513, 17 L.Ed.2d 437 (1966) (broadly construing the agency’s power to require the production of documents located outside the country, but it was careful to acknowledge ‘that the service of the subpoena [was] made within the territorial limits of the United States’).

34 *Int’l Shoe Co v. Washington*, 326 US 310, 316 (1945); Application to Enforce Admin. Subpoenas Duces Tecum of *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996).

35 See 15 U.S.C. § 78aa; *Int’l Shoe Co v. Washington*, 326 US 310, 316 (1945); *SEC v. Straub*, 921 F. Supp. 2d 244, 254 (S.D.N.Y. 2013); *SEC v. Sharef*, 924 F. Supp. 2d 539, 545–46 (S.D.N.Y. 2013).

36 *Sharef*, 924 F. Supp. 2d at 252, 546.

an act to be done within a US territory by any person acting as that individual's agent; or acts as an agent of an issuer or US entity, regardless of whether the foreign individual takes any action in the United States.³⁷

For example, in the FCPA context, the personal jurisdiction defence often arises in cases regarding officers, directors or other control persons of SEC regulated entities. Generally, manipulating financial statements to cover up illegal foreign action or certifying the accuracy of those manipulated financial statements by individuals who knew or should have known that US investors would rely upon those statements will confer personal jurisdiction in the United States.³⁸ Courts, however, are careful to note that 'a conclusory statement that a foreign defendant caused an issuer to make false and misleading filings is not enough to support personal jurisdiction'.³⁹

Whether a court exercises personal jurisdiction over an individual depends on the particular facts of each case. For instance, in *SEC v. Sharef*, where the SEC alleged that the defendant, a German executive living in Argentina, engaged in a decade-long bribery scheme to retain a US\$1 billion government contract to produce national identity cards for Argentine citizens, the court dismissed the FCPA claims because the executive's alleged corrupt activity lacked a connection to his employer's financial statements.⁴⁰ The court refused to characterise a call from New York to the defendant (which he did not initiate) or the routing of an alleged US\$10 million bribe (which he did not direct) through US accounts as purposefully directed towards the United States.⁴¹ In contrast, in *SEC v. Straub*, foreign executives of a company listed on the New York Stock Exchange made false representations and certifications abroad in connection with reports filed in the United States.⁴² In *Straub*, the court held that those facts were sufficient to confer personal jurisdiction over the foreign executives.⁴³ The court also found that the executives sent documents relating to the bribery scheme in emails that were routed through or stored on network servers located within the United States, which qualified as using an instrumentality of interstate commerce in a corrupt manner for purposes of bringing an FCPA claim.⁴⁴

37 US Dept. of Justice and SEC, 'A Resource Guide to the Foreign Corrupt Practices Act' at 10–12 (2012). In courts outside of the Second Circuit, a foreign individual may also be subject to jurisdiction if he or she aids, abets or conspires with an issuer or US person or entity, regardless of whether the foreign individual takes any action in the United States. See *United States v. Hoskins*, No. 16-cr-1010 (2d Cir, 24 Aug 2018).

38 See *Sharef*, 924 F. Supp. 2d at 547; *In re Royal Ahold N.V. Securities & ERISA Litigation*, 351 F.Supp.2d 334, 351–52 (D.Md.2004) (United States courts frequently have asserted personal jurisdiction over [foreign] individual defendants who sign or, as control persons, approve the filing or dissemination of, particular forms required by the SEC that they knew or should have known would be relied on by US investors).

39 *In re Braskem SA Sec. Litig.*, 246 F. Supp. 3d 731, 770 (S.D.N.Y. 2017).

40 *id.* at 546–48.

41 *id.* at 542–43.

42 *Straub*, 921 F. Supp. 2d at 255–56.

43 *id.* at 255.

44 *Straub*, 921 F. Supp. 2d at 262–64. See also Application to Enforce Admin. Subpoenas Duces Tecum of *SEC v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (determining that a former president of Bahamian companies had sufficient minimum contacts with the United States to support the district court's exercise of personal jurisdiction enforcing administrative subpoena duces tecum issued by SEC, based on his trading activities on behalf of the companies directed toward United States and relating to matters underlying the SEC investigation).

Extending or suspending statute of limitations

The statute of limitations applicable to most federal criminal offences and conspiracies is five years from the date that the offence is committed.⁴⁵ It is important to keep in mind that, under certain circumstances, the applicable statute of limitations may be tolled (i.e., suspended), while the individual is outside of the United States.

First, the government may request that the individual enter into a tolling agreement, extending the statute of limitations in accordance with the terms of the agreement. Depending on relevant factors, including the individual's status as a witness, subject or target of the investigation and their risk of extradition, it might make sense to enter into a tolling agreement for a number of reasons, such as to obtain more time to convince prosecutors not to file charges, or to provide the foreign national with immunity or cooperation credit.

Second, pursuant to 18 U.S.C. Section 3292, the government may seek a court order suspending the statute of limitations for up to three years to obtain evidence from a foreign country. Under Section 3292, the suspension period begins on the date of the request to the foreign authority and ends when the foreign authority takes final action on the request.⁴⁶ Generally, the request for foreign evidence must be made prior to the expiration of the original five-year limitations period, and some courts have also held that the court order must also be obtained within the original limitations period.⁴⁷

Third, pursuant to 18 U.S.C. Section 3290, '[n]o statute of limitations shall extend to any person fleeing from justice.' Most courts have held that the statute of limitations is tolled if the government can 'prove by a preponderance of the evidence that [the defendant] concealed himself with the intent of avoiding prosecution'.⁴⁸ Thus, the mere absence from the jurisdiction is generally not enough to toll the statute of limitations under this exception.⁴⁹ Evidence relevant to a finding that a defendant has fled under Section 3290 includes failing to return home or work after learning about a warrant, concealing information about their whereabouts, and leaving the jurisdiction after the crime.⁵⁰

45 See *Agency Holding Corp v. Malley-Duff & Assocs, Inc*, 483 US 143, 155 (1987) (finding that 18 U.S.C. § 3282 establishes a five-year limitations period for non-capital federal offences); *US v. Grimm*, 738 F. 3d 498, 501 (2d Cir. 2013) (holding that the statute of limitations applicable to conspiracies is five years from the date that the offence is committed); 18 U.S.C. § 3282 (Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offence, not capital, unless the indictment is found or the information is instituted within five years next after such offence shall have been committed.).

46 18 U.S.C. § 3292(b).

47 *United States v. Kozeny*, 493 F. Supp. 2d 693, 708 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 166 (2d Cir. 2008) (dismissing several counts of an indictment on the grounds that it was returned outside of the limitations period); but see *United States v. Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995); *United States v. Neill*, 940 F. Supp. 332, 336-337 (D.D.C. 1996), vacated in part on other grounds, 952 F.Supp. 831 (D.D.C. 1996).

48 *United States v. Greever*, 134 F.3d 777, 781 (6th Cir. 1998); *Donnell v. United States*, 229 F.2d 560, 565 (5th Cir. 1956); *United States v. Florez*, 447 F.3d 145, 149-151 (2d Cir. 2006).

49 In jurisdictions where 'mere absence' from the jurisdiction is enough to satisfy § 3290, courts must, nevertheless, examine the defendant's intent in cases where the defendant did not physically leave the relevant jurisdiction. In *Matter of Extradition of Liuksila*, 133 F. Supp. 3d 249, 257 (D.D.C. 2016).

50 See *United States v. Fowlie*, 24 F.3d 1070, 1072-73 (9th Cir. 1994); *Florez*, 447 F.3d at 153.

The risk of extradition for Latin American nationals living abroad

Whether an individual in Latin America is at risk of extradition to the United States depends on the terms of the extradition treaty, if one exists, between the country in which they are located and the United States. The United States has entered into bilateral agreements with 20 Latin American countries regarding extradition.⁵¹ Counsel should consult the relevant treaty provisions for specific guidance.

Dual criminality and extraditable offences

Many extradition treaties contain dual criminality provisions, which tend to have the effect of limiting the circumstances under which foreign nationals may be extradited to the United States. Under such provisions, a person is extraditable only for offences punishable under the laws of both countries.⁵² Therefore, if the conduct that DOJ seeks to prosecute in the United States is not a criminal offence in the country where the individual is located that country is unlikely to extradite him or her to the United States for prosecution.

In addition, treaties vary regarding what constitutes an extraditable offence. Some treaties define an extraditable offence as any offence imposing a penalty of imprisonment for a year or longer, as well as attempts, conspiracies and participation in such offences.⁵³ In some cases, treaties limit extraditable offences according to where the relevant conduct took place. For example, the treaty between the United States and the Dominican Republic treats offences as extraditable regardless of where the conduct took place. Other countries, such as Chile, require wholly intra-state activity or limit extraterritorial jurisdiction to laws that both countries apply extraterritorially.⁵⁴

51 See Extradition Treaty, Dom. Rep.–US, 12 Jan 2015, T.I.A.S. No. 16–1215 (Dominican Republic); Extradition Treaty, Chile–US, 5 June 2013, T.I.A.S. No. 16–1214 (Chile); Extradition Treaty, Peru–US, 26 July 2001, T.I.A.S. No. 03–825 (Peru); Extradition Treaty, Para.–US, 9 Nov 1998, T.I.A.S. No. 12,995 (Paraguay); Treaty on Extradition, Arg.–US, 10 June 1997, T.I.A.S. No. 12,866 (Argentina); Treaty on Extradition, Bol.–US, 27 June 1995, T.I.A.S. No. 96–1121 (Bolivia); Extradition Treaty, Costa Rica–US, 4 Dec 1982, S. Treaty Doc. No. 98–17 (1982) (Costa Rica); Extradition Treaty, Colom.–US, 14 Sept 1979, S. Treaty Doc. No. 97–8 (1979) (Colombia); Extradition Treaty, With Appendix, Mex.–US, 4 May 1978, T.I.A.S. No. 9,656 (Mexico); Treaty on Extradition and Cooperation in Penal Matters. Uru.–US, 6 Apr 1973, T.I.A.S. No. 10,850 (Uruguay); Treaty of Extradition, Braz.–US, 13 Jan 1961, T.I.A.S. No. 5,691 (Brazil); Additional Protocol to the Treaty of Extradition, Braz.–US, 18 June 1962, T.I.A.S. No. 5,691 (Brazil); Treaty for the Mutual Extradition of Fugitives from Justice, Guat.–US, 27 Feb 1903, T.S. No. 425 (Guatemala); Supplementary Extradition Convention, Guat.–US, 20 Feb 1940, T.S. No. 963 (Guatemala); Extradition Treaty, Ecuador–US, 28 June 1872, T.S. No. 79 (Ecuador); Supplementary Extradition Treaty, Ecuador–US, 22 Sept 1939, T.S. No. 972 (Ecuador); Treaty for the Extradition of Fugitives from Justice, Hond.–US, 15 Jan 1909, T.S. No. 569 (Honduras); Supplementary Extradition Convention, Hond.–US, 21 Feb 1927, T.S. No. 761 (Honduras); ‘Treaty Providing for the Mutual Extradition of Fugitives from Justice, Cuba–US, 6 Apr 1904, T.S. No. 440 (Cuba); Additional Extradition Treaty, Cuba–US, 14 Jan 1926, T.S. No. 737 (Cuba)’ Treaty of Extradition, and Additional Article, US–Venez., Jan. 19 and 21, 1922, T.S. No. 675 (Venezuela); Treaty of Extradition, El Sal.–US, 18 Apr 1911, T.S. No. 560 (El Salvador); Treaty on Extradition, Nicar.–US, 1 Mar 1905, T.S. No. 462 (Nicaragua); Treaty for the Mutual Extradition of Fugitives from Justice, Haiti–US, 9 Aug 1904, T.S. No. 447 (Haiti); Treaty Providing for the Extradition of Criminals, Pan.–US, 25 May 1904, T.S. No. 445 (Panama).

52 e.g., Treaty on Extradition, Arg.–US, at Art. 2.

53 e.g., Extradition Treaty, Dom. Rep.–US, at Art. 3.

54 e.g., Extradition Treaty, Chile–US, at Art. 2.

Some treaties contain lists of covered offences. For example, the treaty between the United States and Colombia contains a lengthy schedule of offences, including murder, drug trafficking, and securities and competition violations.⁵⁵

Extradition of nationals

Even if the offence at issue is covered by the applicable treaty, not all Latin American countries permit extradition of their own citizens to the United States, and those that do take different approaches. Mexico, for example, is not required to extradite its citizens to the United States, but may do so in its discretion.⁵⁶ Brazil, on the other hand, does not permit the extradition of its citizens to the United States. However, it may permit naturalised citizens to be extradited for crimes committed before naturalisation and for drug trafficking offences.⁵⁷

Risks of international travel

The United States' wide-ranging extradition treaties presents significant exposure for individuals subject to criminal prosecution in the United States even if they are not present in a Latin American country. The United States has extradition treaties with over 100 countries around the world. For example, all European Union Member States,⁵⁸ except Croatia, have bilateral extradition treaties in force with the United States.⁵⁹ An individual's risk of international travel, therefore, varies depending on the existence and terms of the treaty between the destination country and the United States. In one example, a defendant charged with FCPA violations in Mexico and Panama was arrested in the Netherlands while on personal travel and extradited to the United States.⁶⁰ In another example, the DOJ charged five Venezuelan government officials with violations of the FCPA as part of its ongoing investigation into *Petróleos de Venezuela, SA (PDVSA)*.⁶¹ According to the indictment, the five officials were engaged in money laundering and bribery to secure contracts for PDVSA, the state-owned petroleum corporation. Four of the five defendants were arrested in Spain. One has already been extradited to the United States; the other three await extradition.⁶² An

55 e.g., Extradition Treaty, Colom.-US, 14 Sept. 1979, at Appendix.

56 See Extradition Treaty, With Appendix, Mex.-US, at Art. 9.

57 See Constituição Federal [C.F.] [Constitution] Art. 5 (Braz.).

58 Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom. EU Member Countries, Europa.eu available at http://europa.eu/about-eu/countries/member-countries/index_en.htm (11 April 2015).

59 Treaties in Force, US Dept. of State, available at <https://www.state.gov/documents/organization/282222.pdf> (1 January 2018).

60 See Dep't of Justice, 'Former Chief Executive Officer of Lufthansa Subsidiary BizJet Pleads Guilty to Foreign Bribery Charges', Justice.gov, <https://www.justice.gov/opa/pr/former-chief-executive-officer-lufthansa-subsidiary-bizjet-pleads-guilty-foreign-bribery>.

61 See Dep't of Justice, 'Five Former Venezuelan Government Officials Charged in Money Laundering Scheme Involving Foreign Bribery', Justice.gov, <https://www.justice.gov/opa/pr/five-former-venezuelan-government-officials-charged-money-laundering-scheme-involving-forei-o>.

62 id.

additional risk associated with international travel includes the possibility that a flight could be unexpectedly re-routed to a country with an extradition treaty with the United States. Of course, citizens from countries protecting its nationals from extradition cannot invoke this protection abroad.

Positives and negatives of attorney–client privilege

Issues regarding the attorney–client and attorney work product privilege belonging to a company often arise in the representation of individuals where the individual’s defence may require disclosure of privilege materials or assertion of the advice of counsel defence. In general, a US company will have custody of any privileged materials that may be relevant to an individual’s defence, as well as have the right to decide whether to waive privilege over those materials.

It is often possible to obtain access to privileged information that the individual was party to or aware of pursuant to a joint defence or common interest agreement with the company, but the ability to disclose privileged information to the government in connection with a defence is much more difficult.

There are three scenarios in which otherwise privileged communications may be disclosed in a US government investigation regardless of the company’s preference: the advice of counsel defence, the crime–fraud exception and the self–defence doctrine.

The advice of counsel defence allows otherwise privileged communications to be disclosed when an individual accused of wrongdoing claims that his or her attorney advised him or her that the conduct was legal.⁶³

The crime–fraud exception dictates that where an individual uses communications with an attorney to facilitate an improper or illegal act, the individual, or his or her company, cannot benefit from the protection of the attorney–client privilege.⁶⁴

Finally, the self–defence doctrine applies when a government agency accuses an attorney of wrongful conduct in his or her communications with a client, in this situation otherwise privileged materials must be disclosed.⁶⁵

Absent one of these three situations, an individual must convince the company to waive privilege with respect to relevant information. This, however, can be risky for the company because selective or limited waiver of the attorney–client privilege has been generally rejected, and is generally disfavoured with respect to attorney work product unless there

63 See *Moskowitz v. Lopp*, 28 F.R.D. 624, 638 (E.D. Pa. 1989) (permitting individual officers to raise the advice-of-counsel defense without the consent of the corporation and observing that ‘[a]lthough in theory the privilege belongs to the corporation, fairness dictates that it be waived where a corporate officer asserts the reliance on counsel defense.’ (citations omitted)).

64 e.g., *Clark v. US*, 289 US 1, 15 (1933); *In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir.1984). (It is well established that communications that otherwise would be protected by the attorney–client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.).

65 See *SEC v. Forma*, 117 F.R.D. 516, 524 (S.D.N.Y. 1987) (recognising that the self–defence doctrine permits an attorney to disclose attorney–client communications in order to defend himself against accusations of wrongful conduct and finding that attorney appropriately gave testimony in SEC investigation that waived the attorney–client privilege).

is a confidentiality agreement.⁶⁶ Another significant complication that arises in the representation of Latin American foreign nationals is that the law relating to the attorney–client privilege in his or her respective country may not exist or may not be as strong as that in the United States. Under these circumstances, counsel may be able to freely use information or communications that would otherwise be privileged in the United States.

Executive entitlement to indemnification

Adequate legal representation in a US government investigation is costly. Thus, whether an individual is entitled to, or can obtain, indemnification of legal expenses from his or her employer is a crucial consideration in any defence. The law in Delaware – where most large United States companies are headquartered and which is similar to the corporate law of many other states – may provide a backstop of coverage if the company is a subsidiary of a Delaware corporation. So too may a company’s by-laws. For comprehensive protection, however, individuals should seek an indemnification agreement and make sure the company has a thorough insurance policy that will cover expenses relating to defending against a United States government investigation. At the outset of an investigation, the individual should establish whether he or she is entitled to indemnification by law or by agreement. If he or she is not already entitled to indemnification, he or she should seek indemnification from his or her employer on the grounds that it is in the company’s best interest that the individual have access to the best representation possible. A company’s agreement to indemnify an individual, however, may be subject to laws that prohibit a company from indemnifying employees for, among other things, wilful or bad-faith misconduct or fraud.

Statutory coverage and indemnification agreements

Delaware statutes allow corporations to indemnify corporate officers for expenses and liabilities incurred in defending against an investigation relating to their position as an officer or director.⁶⁷ An officer’s or director’s right to indemnification, however, will not apply if their conduct was unlawful, in bad faith, or not in the best interest of the company. If an officer or director is successful in defending against the prosecution or investigation, the company must indemnify the officer or director for the expenses incurred in defending the investigation or prosecution if permissible. Delaware law also permits a company to pay the relevant legal expenses in advance of any disposition as long as the officer or director executes an ‘undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section’.⁶⁸

Delaware law also permits companies and individuals to enter into indemnification agreements, which are controlling as long as they do not conflict with a mandatory statutory

66 See *In re Steinhardt Partners, LP*, 9 F.3d 230, 235 (2d Cir. 1993); *Permian Corp v. United States*, 665 F.2d 1214, 1217–18, 1219–22 (D.C. Cir. 1981).

67 8 Del. C. § 145(a)–(b).

68 *id.* § 145(e).

provision.⁶⁹ Thus, it is advisable to have an indemnification agreement that defines key terms, lays out indemnity procedure and provides quality insurance.

Insurance policies

Because indemnification may not always be available, executives should also make sure that the company has a broad insurance policy that would cover their legal fees and expenses in the event of an investigation. Insurance policies usually cover formal claims – relating to civil, criminal and administrative matters – but should also cover informal proceedings. Without these protections, the policy provisions may not trigger until it is too late, if at all.

A good insurance policy should also expressly apply to government and internal investigations, as well as pre-claim inquiries such as internal audits. The failure to do so can have significant detrimental effects. For instance, in *Office Depot, Inc v. National Union Fire Ins Co of Pittsburgh, Pa*, the court found that neither an SEC pre-claim investigation nor a voluntary internal audit of Office Depot constituted ‘claims’ for which defendant insurer had to reimburse the plaintiff for individual officers’ legal expenses.⁷⁰ The court also held that internal audits in anticipation of litigation are not covered unless expressly provided in the policy.⁷¹

Cooperation with US regulators

The extraterritorial reach of the relevant law, the ability of a United States court to exercise jurisdiction, the statute of limitations, the risk of extradition, the indemnification of legal costs, access to and the ability to disclose privileged information are all key factors that should influence an individual’s decision to cooperate with a government investigation in the United States and the extent of that cooperation. Individuals should also consider whether immunity may be available in exchange for information they can provide.

Other key considerations include whether an individual’s employment will be jeopardised by the failure to cooperate and whether cooperation is necessary to maintain goodwill in the industry generally. For example, an older individual, close to retirement, that faces little risk of extradition and has no need to travel may choose not to cooperate because the potential of an indictment or other enforcement action is unlikely to have a material effect on his or her quality of life.

Cooperation may take many forms. On one end of the spectrum, of course, is the decision not to cooperate by refusing to provide information to the government and an employer conducting an internal investigation. On the other end of the spectrum is the decision to come to the United States to provide information and testimony either on a voluntary basis or pursuant to a subpoena. There are, of course, numerous options in between, such as allowing your attorney to provide information via an attorney proffer, submitting to a voluntary interview via telephone or videoconference. If an individual is considering coming the United States to sit for an interview in a criminal investigation, it is generally advisable to ask for a safe passage letter that provides assurance that the individual will not be

69 id. § 145(a)–(b).

70 See 734 F. Supp. 2d 1304, 1308 (S.D. Fla. 2010).

71 See id. at 1322.

arrested or served with process during the trip and that the prosecutor will not share information about the trip with other government bodies. In sum, there are numerous important considerations when mounting a defence to a United States investigation of an individual in Latin America that lawyers and their clients should carefully consider.

Appendix 1

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Mauricio A España focuses his practice on complex commercial litigation and white-collar and securities litigation matters. He has significant trial experience and regularly counsels clients on internal corporate investigations; criminal, regulatory and state attorneys general investigations; bankruptcy-related litigation; and commercial disputes.

Mr España was recently named a Future Leader by *Who's Who Legal: Investigations* in 2018. He is also listed as a Top Lawyer Under 40 for 2017 by the Hispanic National Bar Association and among the 2017 '40 Under 40' by *Global Investigations Review*, which honoured 40 lawyers, across 11 countries, under 40 who are shaping the future of the investigations practice. He has also been recognised as one of *Law360's* Rising Stars of 2015, a national list of attorneys under the age of 40 whose legal accomplishments belie their age. Mr España has also been named a Rising Star by the *New York Law Journal* in 2015, which is awarded to 50 outstanding attorneys under 40 who have made an impression on their colleagues, their clients and the larger legal community. He was one of only five lawyers recognised for his work in the securities area.

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Hector Gonzalez advises corporations and executives on a wide range of matters, with a focus on complex commercial litigation, criminal and related civil and administrative matters, SEC and CFTC enforcement proceedings and internal, grand jury and state attorneys general investigations. In addition, he regularly represents clients in all aspects of Foreign Corrupt Practices Act (FCPA) matters and has extensive experience working on matters in Latin America. Mr Gonzalez plays an active role in firm leadership and currently serves on the firm's Policy Committee, and as the deputy chair for the firm's global litigation practice. He also heads the firm's diversity and inclusion efforts.

Mr Gonzalez has been consistently recognised for his white-collar criminal defence practice and his securities and shareholder litigation practice by *The Legal 500 US*, which praises him as 'a great lawyer' in commercial litigation, having 'an extraordinary amount of expertise' in securities shareholder litigation, and being 'an excellent trial lawyer and strategic thinker who won't waste clients' time or money.' He is ranked in *The Best Lawyers in America* for his white-collar criminal defence practice.

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Andrew J Levander is chair of the firm's Policy Committee and a partner in the white-collar and securities litigation group. A former Assistant US Attorney for the Southern District of New York in the Securities and Commodities Fraud Unit, Mr Levander is consistently recognised for excellence in the practice of law. Mr Levander is a Fellow in the American College of Trial Lawyers, which is widely considered to be the premier professional trial organisation in the United States. Since 2004, he has been cited as a leading lawyer by *Chambers USA*, a referral guide to leading lawyers in the United States based on the opinions of their peers and clients. In 2017, Mr Levander was named as a Litigator of the Year by *The American Lawyer* for being a lawyer who has, 'reshaped the law, the industries in which their clients operate and the way their colleagues in the bar approach cases'. Mr Levander received the Chambers USA Award for Excellence in White Collar Crime & Government Investigations in both 2013 and 2010. He has also been honoured by *Law360*, *The Best Lawyers in America*, *Benchmark Litigation*, and *The Legal 500* for his litigation skills.

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Mariel Bronen focuses her practice on white-collar, complex commercial and securities litigation matters. Her representative matters include cases in state and federal court.

Ms Bronen was a member of the Dechert litigation team recognised as part of the *Financial Times*' 2014 Top 40 North American Innovative Law Firms for their representation of Argentina's two largest creditors – with combined claims for over US\$3.5 billion – in multinational litigation and judgment enforcement proceedings. The matter concluded in a victory before the Supreme Court of the United States.

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Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

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