The Guide to Managing a Corporate Crisis

Third Edition

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

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This article was first published in December 2020
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LATIN LAWYER

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 3435 Farringdon Street, London, EC4A 4HL, UK

www.latinlawyer.com

ISBN 978-1-83862-429-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following law firms, advisory firms and corporations for their learned assistance throughout the preparation of this book:

Anheuser-Busch InBev

The Arkin Group LLC

Chevez Ruiz Zamarripa

Cleary Gottlieb Steen & Hamilton LLP

Creel, García-Cuéllar, Aiza y Enriquez

Debevoise & Plimpton LLP

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Sullivan & Cromwell LLP

Publisher's Note

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

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 50 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, pandemics: 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 Managing a Corporate Crisis*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance, and Regulators*, our online tool that provides an overview of the major regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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Representing Individual Executives in Latin America

Mauricio A España, Hector Gonzalez, Andrew J Levander, Mariel Bronen and Yando Peralta[1]

Representing individuals under investigation by US regulators is a significant and complicated task, especially when these individuals are Latin American nationals living abroad. This chapter discusses key issues and concerns that lawyers should consider when representing Latin American nationals in US regulatory or criminal investigations, including the unique impact of the covid-19 pandemic on international investigations.

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 abroad. Individuals in Latin America, including their counsel, should be aware of these laws and that their conduct could be subject to the extraterritorial reach of US law. Several such laws are discussed briefly in turn.

The Foreign Corrupt Practices Act (FCPA) is a notable example of a law with extraterritorial reach.[3] The FCPA 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. It applies both to 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. Second, any issuer of securities on a US stock exchange, either US or foreign (or anyone acting on behalf of such issuer, including foreign nationals), is prohibited from

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

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

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

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 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 who is engaging in such corrupt conduct. This is true regardless of whether the foreign national's conduct takes place in the United States.[4] Accordingly, US regulators' reach extends not only to US persons and entities, and issuers of securities on US exchanges, but also to Latin American nationals who take any action in the United States in furtherance of a corrupt payment to a foreign government official or who take action abroad on behalf of a US entity or issuer.[5]

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.[6]

Certain offences related to obstruction of justice expressly provide for extraterritorial application. These offences include witness tampering[7] and retaliation against a witness.[8] Obstruction of justice 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 UK national for conduct that took place wholly outside the United States, including his efforts to influence the testimony of several witnesses in a US grand jury investigation.

The Federal Money Laundering statutes[9] also provide the Department of Justice (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 the United States'.

Jurisdiction to seek documents and information in Latin America

US regulatory and criminal investigations are routinely global in nature, requiring US regulators to seek documents or testimony from outside of the United States. Accordingly, it is important to understand the constraints on US regulators' ability to collect documents and testimony abroad. For instance, 28 U.S.C. Section 1783 authorises US courts to issue subpoenas to US nationals or residents located in a foreign country to appear or to produce evidence. Section 1783's subpoena power, however, does not extend to foreign citizens or nationals present outside the United States.[10] Despite Section 1783's limitation, US regulators still have certain methods of gathering evidence from foreign nationals residing abroad.

4 See US Dept. of Justice and SEC, 'A Resource Guide to the Foreign Corrupt Practices Act', at 9-11 (3 July 2020).

5 See id.

6 15 U.S.C. § 6a.

7 18 U.S.C § 1512.

8 18 U.S.C § 1513.

9 18 U.S.C. §§ 1956 and 1957.

10 See *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);

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.[11] 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.[12] Informal requests use ad hoc methods to secure assistance, often quicker than formal requests, but the evidence obtained may not always conform to the Federal Rules of Evidence or otherwise be admissible in a US proceeding.[13] Executive agreements are international agreements entered into between foreign nations and the executive branch of the US government 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 abroad by serving subpoenas on branches of the bank or business in the United States. This tactic may be used even when production of the records would violate the foreign country's secrecy laws.[14]

If witnesses who ordinarily are not subject to a US subpoena because they are located abroad voluntarily travel to the United States, US prosecutors may serve them with a subpoena and compel them to testify.[15] Depending on the circumstances, the witness may be served with the subpoena at the time and place they enter the 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 in civil cases. Other countries permit 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.[16] Even if different procedures are followed, US courts generally hold that the depositions are admissible unless

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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.'); *United States 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.').

11 See US Attorney's Resource Manual, Criminal Resource Manual, CRM 1–499, CRM 275.

12 See id., at 276.

13 See id., at CRM 266–285.

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

15 See Fed. R. Crim. P. 15.

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

'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'.[17]

The Securities and Exchange Commission (SEC) may also 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 any place in the United States.[18] 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.[19]

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 them consistent with the Due Process Clause of the Fifth Amendment.[20] In a criminal prosecution, the government needs to establish personal jurisdiction by satisfying the 'minimum contacts,' as well as a reasonableness analysis.[21] The 'minimum contacts' inquiry requires a court to consider whether the defendant has sufficient contacts with the forum state to justify the court's exercise of personal jurisdiction. The reasonableness analysis requires a court 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 furthering fundamental substantive social policies.[22]

Jurisdiction can be conferred over foreign individuals if they engage in prohibited conduct in a US territory; use a US instrumentality of interstate commerce to do so; cause an act to be done within a US territory by any person acting as that individual's agent; or act

17 *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).

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

19 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)).

20 See *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).

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

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

as an agent of an issuer or US entity, regardless of whether the foreign individual takes any action in the United States.[23]

The 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.[24] 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 that agreement. Depending on the 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.[25] 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.[26]

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 a 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'.[27] Thus, the mere absence from the jurisdiction is generally not enough to toll the statute of limitations pursuant to this exception.[28] Evidence relevant to a finding that a defendant has fled under Section 3290 includes failing

23 See US Dept. of Justice and SEC, 'A Resource Guide to the Foreign Corrupt Practices Act' at 10–11.

24 See *Agency Holding Corp v. Malley-Duff & Assoc's, Inc.*, 483 US 143, 155 (1987) (finding that 18 U.S.C. § 3282 establishes a five-year limitations period for non-capital federal offences); *United States 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.).

25 18 U.S.C. § 3292(b).

26 *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).

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

28 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. Matter of Extradition of Liuksila, 133 F. Supp. 3d 249, 257 (D.D.C. 2016).

to return home or work after learning about a warrant, concealing information about their whereabouts and leaving the jurisdiction after the crime.[29]

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.[30] Counsel should consult the relevant treaty provisions for specific guidance.

Many extradition treaties contain dual criminality provisions, which tend to limit the circumstances under which foreign nationals may be extradited to the United States. Under such provisions, a person is extraditable to the United States only for offences punishable under the laws of both countries.[31]

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.[32] In some instances, 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.[33]

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

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

30 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).

31 See, e.g., Treaty on Extradition, Arg.-US, at Art. 2.

32 See, e.g., Extradition Treaty, Dom. Rep.-US, at Art. 3.

33 See, e.g., Extradition Treaty, Chile-US, at Art. 2.

take different approaches. Mexico, for example, is not required to extradite its citizens to the United States, but may do so at its discretion.[34] Brazil, however, does not permit the extradition of its citizens to the United States, but may permit naturalised citizens to be extradited for crimes committed before naturalisation and for drug trafficking offences.[35]

Risks of international travel

The United States' wide-ranging extradition treaties present significant exposure for individuals subject to criminal prosecution in the United States even outside of Latin America. The United States has extradition treaties with over 100 countries around the world, including bilateral treaties with all European Union Member States[36] except Croatia.[37] An individual's risk of international travel, therefore, varies depending on the existence and terms of those treaties. 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.[38] An additional risk associated with international travel includes the possibility that a flight could be unexpectedly rerouted to a country with an extradition treaty with the United States. Citizens from countries that protect its nationals from extradition, however, cannot invoke this protection abroad.

The impact of the covid-19 pandemic

The covid-19 pandemic has presented unique challenges to international investigations. Court closures, modified judicial procedures, travel restrictions and quarantine orders around the world are causing delays and complications.

In some cases, these conditions are hindering the US government's ability to obtain documents and testimony abroad. As a result, prosecutors are seeking alternative methods of questioning witnesses located outside of the United States. For instance, requests for remote interviews have become more frequent. Although individuals faced with a remote interview are less likely to be able to delay or avoid an interview on the grounds that travelling to the United States is inconvenient, individuals must still weigh their interest in delaying any requested interview against their interest in appearing cooperative. Witnesses also need to seriously consider the risk of confusion and miscommunication in a remote interview, especially when translation is required.

In addition to delaying many extradition proceedings, the pandemic has given rise to novel arguments to fight extradition, including that it is not safe or humane to extradite

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

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

36 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. EU Member Countries, Europa.eu available at https://europa.eu/european-union/about-eu/countries/member-countries_en (23 July 2020).

37 See Treaties in Force, US Dept. of State, available at www.state.gov/documents/organization/282222.pdf (1 January 2018).

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

foreign defendants to the United States in light of the risk of spreading the virus across borders and the risk that the extradited individual will be exposed to the virus in a US prison.[39] This argument is likely to be more compelling when the defendant is located in a country with a low covid-19 infection rate. Nonetheless, extradition proceedings involving Latin American defendants continue to move forward with some success. For example, in *United States v. Jimenez Suarez et al.*, No. 16-cr-00048 (EDNY) (AMD), a Dominican citizen, charged in connection with an international conspiracy to distribute cocaine, was successfully extradited from the Dominican Republic to the United States on 4 May 2020.[40]

Individuals should also expect a post-pandemic uptick in government and internal investigations and enforcement activity similar to the increase that followed the 2008 financial crisis. In addition to a general increase in investigatory activity as a result of a return to 'normal' operations, the focus of these investigations may include, among others, fraud and corruption related to the procurement of covid-19 related government stimulus grants or loans; the public procurement of healthcare supplies and emergency equipment; public contracts to provide emergency services; and private donations to governments or state-owned enterprises to battle the pandemic.

Attorney–client privilege

Issues regarding attorney–client and attorney work product privilege associated with a company often arise in the representation of individuals where the individual's defence requires disclosure of privileged materials or assertion of the advice of counsel defence. In general, a US company will have custody of any privileged materials that are relevant to the 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 a party to or aware of subject to a joint defence or common interest agreement with the company, but the ability to disclose privileged information 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. First, the advice of counsel defence allows otherwise privileged communications to be disclosed when an individual accused of wrongdoing claims that their attorney advised them that the conduct was legal.[41] Second, the crime-fraud exception dictates that when an individual

39 See *Hafeez v United Kingdom.*, European Court of Human Rights (Apr. 6, 2020), Hudoc.echr.coe.int, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202335%22]} (asking the United Kingdom government whether, in light of the covid-19 pandemic, the extradition of a 60-year old man with a number of health conditions from the United Kingdom to the United States poses a risk that the European Convention on Human Rights Article 3 prohibition of inhuman treatment); see also Teddy Andre Romero Gonzales, La extradición en tiempos de pandemia, Laley.pe (4 May 2020), https://laley.pe/art/9656/la-extradicion-en-tiempos-de-pandemia.

40 See Dep't of Justice, 'Alleged International Narcotics Trafficker Extradited from Dominican Republic', Justice.gov, www.justice.gov/usao-edny/pr/alleged-international-narcotics-trafficker-extradited-dominican-republic.

41 See *Moskowitz v. Lopp*, 128 F.R.D. 624, 638 (E.D. Pa. 1989) (permitting individual officers to raise the advice-of-counsel defence without the consent of the corporation and observing that '[a]lthough in theory the privilege belongs to the

uses communications with an attorney to facilitate an improper or illegal act, the individual, or their company, cannot benefit from the protection of the attorney–client privilege.[42] Finally, the self-defence doctrine applies when a government agency accuses an attorney of wrongful conduct in their communications with a client, in this situation otherwise privileged materials must be disclosed.[43]

Absent one of these three situations, an individual must convince the company to waive privilege with respect to relevant information. However, this can be risky for the company because selective or limited waiver of attorney–client privilege has been generally rejected, and is generally disfavoured with respect to attorney work product unless there is a confidentiality agreement.[44] Another significant complication that arises in the representation of Latin American nationals is that the law relating to attorney–client privilege in their respective countries 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 their employer is a crucial consideration. The law in Delaware – where most large US companies are headquartered and which is similar to 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 US 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, the individual 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.

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corporation, fairness dictates that it be waived where a corporate officer asserts the reliance on counsel defense.' (citations omitted)).

42 See, e.g., *Clark v. United States*, 289 US 1, 15 (1933); *In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2d 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.').

43 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).

44 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).

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.[45] 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 him or her 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'.[46]

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 provision.[47] 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.[48] The court also held that internal audits in anticipation of litigation are not covered unless expressly provided in the policy.[49]

Cooperation with US regulators

The extraterritorial reach of the relevant law, the ability of a US 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

45 See id., 8 Del. C. § 145(a)–(b).

46 See id., § 145(e).

47 See id., § 145(a)–(b).

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

49 See id., at 1322.

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 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 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 numerous options in between, such as allowing your attorney to provide information via an attorney proffer, or 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 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 US investigation of an individual in Latin America.

Appendix 1

About the Authors

Mauricio A España
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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 was also 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 was also 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 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

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Mr Gonzalez has been consistently recognised for his white-collar criminal defence practice and his securities and shareholder litigation practice by *The Legal 500: United States*, 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 '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 Litigation: White Collar Crime & Government Investigations category 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 has significant experience representing executives in connection with FCPA investigations involving activity in Latin America.

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Yando Peralta focuses his practice on general litigation matters. Mr Peralta joined Dechert as a summer associate in 2016. While at law school, Mr Peralta was an intern to the Hon Ronald L Ellis, Magistrate Judge, US District Court for the Southern District of New York. In addition, he served as the Mulligan Competition Editor for the Fordham Moot Court Board.

Prior to joining Dechert, Mr Peralta worked at a legal non-profit as a non-attorney advocate. He represented individuals seeking public benefits in state administrative hearings.

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

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ISBN 978-1-83862-429-3