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REGIONAL RISK SPOTLIGHT

Cross-Border Internal Investigations in Spain: The Legal and Practical Landscape

By Daniel R. Alonso, *Buckley LLP*; Helena Prieto González, José Fernández Iglesias and Alejandro Ayala González, *Garrigues*

United States practitioners and in-house counsel are by now familiar with the basic questions to ask and steps to follow at the outset of an internal investigation into potential wrongdoing. Acknowledging variations in approach depending on the practitioner and the circumstances, most investigations will need to focus on:

1. deciding who will conduct the investigation – outside counsel or an in-house team;
2. deciding whether company management, the board, or a special committee will have primary responsibility for overseeing and directing the investigation;
3. defining the investigative scope, the working team including experts and consultants if appropriate, and creating work streams;
4. preserving documents, conducting an efficient document review, and employing data analytics if appropriate;
5. planning for and conducting interviews;
6. interacting with outside auditors;
7. reporting on the investigations, particularly whether the report should be written or oral, and how broadly it should be disseminated;
8. deciding whether self-reporting to the appropriate government agency is advisable;
9. remediating compliance lapses and strengthening legal positions; and
10. negotiating with the government, if applicable, and resolution.

For companies with international operations or for foreign companies otherwise subject to U.S. jurisdiction, it is crucial to understand the legal and practical considerations when conducting investigations in particular foreign countries, and to what extent adapting these well-understood steps will be necessary.

In recent years, more and more U.S. investigations have touched Spain and various countries within Latin America, in particular Argentina, Brazil, Colombia and Mexico. Loosely speaking, these countries have cultural, language and regional affinities and similarities that make them useful to study in tandem. If not carefully considered, cross-border investigations involving these nations can easily go astray.

This article is the first of a series that will address the framework for government and internal investigations in these countries, with an aim towards describing best practices for companies and their counsel to follow. We begin with the first of two articles about Spain. This first installment discusses the

criminal process, criminal and civil liability of legal entities and persons, and the role of corporate compliance programs. The second part will address conducting internal investigations in Spain, including issues related to attorney-client privilege, document retention, conducting interviews, and self-disclosure.

See also "Analyzing Spain's New Corporate Compliance Defense" (Apr. 6, 2016).

The Spanish Criminal Process

Criminal prosecutions in Spain are ordinarily initiated and brought by the Public Prosecutor's Office, which is headed by the Attorney General of Spain, either alone or in conjunction with a host of investigative agencies. As described more fully below, the investigation phase of Spanish criminal cases (Investigation Phase) is formally carried out by investigating courts.

Alongside courts, some of the key authorities involved in fraud and corruption investigations are:

- *The Public Prosecutor's Office*, which enforces the Spanish Criminal Code under Memorandums from the Attorney General's office;
- *The Anticorruption Prosecutor's Office*, which is the anticorruption section of the Public Prosecutor's Office;
- *The Central Operational Unit (UCO)*, which is the central body of the Judicial Police Service of the Spanish Civil Guard. It is responsible for the investigation of the most serious forms of crime, including national and transnational organized crime, as well as support to Territorial Judicial Police Units handling interprovincial crime. Among many other things, the UCO focuses on economic offenses, fraud, and money laundering;
- *The Fiscal and Economic Crime Unit (UDEF)*, which investigates national and international, economic crime, as well as operational coordination and technical support to the respective territorial units. It reports to the Central Economic and Fiscal Crime Brigade, responsible for investigating crimes against the Public Treasury, Social Security, financial fraud, stock exchange crimes, and fraud of special significance;
- *The Central Brigade for Investigation of Money Laundering and Anti-Corruption*, which is responsible for investigating crimes related to the laundering of criminal money, international piracy, and corruption in various forms. It is also responsible for asset recovery;
- *The Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences* (SEPBLAC) is Spain's Financial Intelligence Unit, equivalent to FinCEN in the United States;
- *The Central Financial Intelligence Brigade*, which investigates crimes related to any activities subject to control, monitoring or inspection by anti-money laundering bodies like SEPBLAC;
- *The State Tax Administration Agency* (AEAT), the national tax and customs authority. In connection with its investigations of smuggling, organized crime, drug trafficking, or money laundering, it maintains its own armed police force, the Customs Surveillance Service;
- *National Fraud Investigation Office* (ONIF), which investigates tax fraud as part of tax

agency AEAT. One of the most sensitive sections of AEAT, it maintains its own investigative resources and does not work directly for the judges, but rather for the Anticorruption Prosecutor's Office;
- *The Spanish National Stock Market Commission* (CNMV), which regulates the securities markets, equivalent to the SEC in the U.S.; and
- *The Court of Audit*, the central and supreme body that audits the accounts and economic management of the public sector. It often plays a role in investigations involving corruption and government fraud.

Additionally, Spanish law authorizes accusations by any Spanish citizen that is aggrieved by criminal conduct. These prosecutions by private actors may also include simultaneous claims for damages, as Spain does not draw the same procedural lines as the United States between criminal and civil proceedings, and private actors are allowed to file accusations even if the Public Prosecutor does not. Further complicating the landscape is the so-called "popular accusation," available in Spain and a sprinkling of other countries to allow even private actors not aggrieved by criminal conduct to initiate prosecutions.

Like many civil law jurisdictions, Spain does not recognize the "opportunity principle," roughly equivalent to plea and charge bargaining in the United States. Therefore, once criminal charges have been alleged and found to be supported by sufficient evidence, the prosecutor generally has no choice but to seek a conviction under the law. Conversely, if the charges are not supported by sufficient evidence, the prosecutor must withdraw the accusation.

Criminal proceedings in Spain consist of four stages:

1. *Investigation Phase* – Formal investigations are carried out by investigating courts, called Juzgados de Instrucción in Spain. Although prosecutors have input and can suggest lines of inquiry, their only formal role is to safeguard the principle of legality.
2. *Intermediate Phase* – In this phase, the Investigating Court decides whether the case is supported by sufficient evidence or whether it must be dismissed due to insufficient evidence. If the case is supported by sufficient evidence, the prosecuting party then presents charges by filing a formal accusation (equivalent to an indictment or information), provides or proposes the evidence to be used in the Trial Phase, and requests monetary relief, if applicable. The matter then proceeds to the Trial Phase, in which the defendant either stands trial and seeks an acquittal, or accepts responsibility, in a procedure not unlike a guilty plea in the U.S.
3. *Trial Phase* – Trials are presided over by the Judging Court, and involve all customary due process rights.
4. *Execution Phase* – Upon conviction, the Judging Court will impose and execute sentence.

In practice in white collar cases, both senior executives and corporations have the right to engage counsel from the moment they are notified that a criminal investigation is underway. Additionally, under Spanish law, corporations have the option to designate a "representative particularly appointed" – unknown in the U.S. except for an analogous figure used in civil depositions – which allows the entity to have a "physical presence" within

the proceeding. These special representatives act before the courts through all phases by, for instance, providing statements, as if they were the corporations themselves. Together with counsel, they can guide the corporate defense and develop strategy.

See "Regional Risk Spotlight: Corruption Perceptions and Compliance Expectations in Spain" (May 24, 2017).

Criminal and Civil Liability of Legal Entities and Senior Personnel

The Spanish Criminal Code envisions criminal liability of legal entities in Article 31-bis, which establishes a closed list of criminal offenses for which companies can be prosecuted, provided that a crime was committed by its officers or employees for the entity's benefit and within the scope of its activity. These tend to be white collar crimes, and the list notably includes money laundering, domestic and transnational bribery, fraud, some types of forgery, campaign finance violations, influence peddling, tax fraud, and environmental crimes. The list also includes some non-white collar crimes, such as human trafficking and terrorism, among others.

Once authorities have information that a corporate crime may have been perpetrated, they typically launch a judicial investigation, which, as mentioned, is carried out formally by Investigating Courts, with input from prosecutors and other agencies. Serious investigations will often involve senior management and even directors, though their individual liability depends on their particular actions, as Spanish criminal law does not provide for strict liability offenses.
As in the United States, companies may well be criminally liable even if the specific natural person responsible has not been individually identified or prosecuted. In practice, however, legal entities are rarely brought before courts if particular individuals have not been. Importantly, since 2014, Spanish law has imposed on the directors of public companies a specific duty of corporate risk control, such that directors may now be held civilly liable, as guarantors, for offenses committed by employees.

Legal entities in Spain may also be subject to administrative and civil processes in certain types of cases, most commonly money-laundering or securities-related issues.
The former is under the jurisdiction of the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences, known as SEPBLAC, which is also Spain's financial intelligence unit – the equivalent of the American Financial Crimes Enforcement Network, or FinCEN. Securities matters are handled by the CNMV, the Spanish National Stock Market Commission, which enforces the Good Governance Code and conducts disciplinary proceedings against those companies that operate within the Spanish market.

See "The Fiendishly Difficult Problem of Managing Parallel Resolutions" (Sep. 4, 2019).

The Role of Corporate Compliance Programs

The section of the Spanish Criminal Code that sets out criminal liability of legal entities, Article 31-bis, also sets forth a complete legal exemption if the entity had, at the time of

the commission of the crime, an effective corporate compliance system in place. For crimes committed by employees, that means the existence of a so-called "organization and management model" (*i.e.*, a compliance program) that is effective at preventing the crimes at issue, or at least significantly reducing the risk of their commission. For crimes committed by company officers or directors, eligibility for the exemption additionally requires that the company have had in place an internal body entrusted with oversight of the compliance controls; that that supervisory mechanism had in fact carried out sufficient oversight; and that the perpetrators sought to avoid the controls in a fraudulent manner.

Whether applied to crimes committed by employees or by management, the Spanish Criminal Code sets out six essential requirements for effective compliance programs, which internal investigators will want to have handy. To be eligible for exemption from criminal liability, programs must:

- identify the types of activities of the entity that could lead to crimes being committed;
- establish policies and procedures designed so that the decision-making process at the company works to prevent crime;
- establish financial and accounting controls designed to prevent the commission of crimes;
- require reporting by employees of risks and non-compliance, and create an adequate channel to do so;
- establish appropriate disciplinary procedures to hold employees accountable for breaches; and
- include continuous testing and modifications, particularly after compliance breaches and after certain organizational and business changes.

Evaluation of compliance programs in criminal matters, as the Spanish Supreme Court has ruled, should be carried out during the Investigation Phase. Thus, if the company's compliance program fit the standards of the Criminal Code, the company itself can avoid standing trial and may "leave" the proceeding at that point. In practice, however, the Public Prosecutor's Office rarely focuses on the issue during the Investigation Phase, commonly relegating compliance discussions to the Trial Phase. This of course presents an opportunity for companies to argue during the earlier Investigation Phase that their program was adequate, and that they should be absolved of liability without the need to proceed to the Trial Phase.

Notably, the Spanish Criminal Code is not the sole source of the compliance obligation for legal entities, and listed companies in particular will want to consult the Good Governance Code of Listed Companies, updated in 2020. The Good Governance Code is considered "soft law," meaning that its requirements are not prescriptive, and it is enforced by the CNMV, equivalent to the SEC. Other, more specific areas of compliance, such as anti-money laundering, are beyond the scope of this article.

Daniel R. Alonso is a partner in Buckley's New York office, where he handles white collar defense, internal investigations, civil litigation, and compliance in the areas of anti-corruption and sanctions. He served in the U.S. Attorney's

Office for the Eastern District of New York and was the Chief of the Criminal Division.

Helena Prieto González is a partner in Garrigues' criminal law practice area and head of the internal investigations unit. Her areas of expertise include crimes relating to the securities market and corporate crime. She previously worked in the prosecution offices of both Barcelona and Madrid and also served in the Spanish Attorney General's Office.

Jose Fernández Iglesias is principal associate in Garrigues where he handles white collar defense, and compliance in the areas of corporate crimes. He holds a PhD in criminal law and is a certified fraud examiner.

Alejandro Ayala González is an associate in Madrid's Garrigues office in the criminal law practice area and internal investigation unit, where he handles offenses concerning economic crime in general and compliance matters.

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INTERNAL INVESTIGATIONS

A Guide to Conducting Cross-Border Internal Investigations in Spain: The Investigation

By Daniel R. Alonso, *Buckley LLP*; Helena Prieto González, José Fernández Iglesias and Alejandro Ayala González, *Garrigues*

In recent years, more and more U.S. investigations have touched Spain and various countries within Latin America, in particular Argentina, Brazil, Colombia and Mexico. Loosely speaking, these countries have cultural, language and regional affinities and similarities that make them useful to study in tandem. If not carefully considered, cross-border investigations involving these nations can easily go astray.

In this two-part article about Spain, we address the framework for government and internal investigations in that country, with an aim towards describing best practices for companies and their counsel to follow. This second installment addresses conducting internal investigations, including issues related to attorney-client privilege, document retention, conducting interviews and self-disclosure. The first installment discussed the criminal process, criminal and civil liability of legal entities and persons, and the role of corporate compliance programs.

See "In-House Perspectives on Starting an Internal FCPA Investigation" (Oct. 30, 2019).

Conducting Internal Investigations

Internal investigations in Spain are a relatively new corporate tool, which received a boost from the recognition of corporate criminal liability in 2010. To date, neither legislation nor case law has deeply addressed internal investigations in any meaningful way. The result has been that companies and practitioners have had to develop best practices on their own, using the experience in other countries as a guide. U.S. companies operating in Spain, and therefore facing theoretical criminal liability from the legal regime there, will typically adhere to U.S. best practices, as long as they do not conflict with local law.

Attorney-Client Privilege

Communications with Spanish outside legal counsel are privileged to the extent that they are for the purpose of legal advice. As in the United States, interviews with corporate employees as part of an investigation that seeks to ascertain facts so that counsel may advise the company would generally be privileged. Unlike the United States, however, the witness is not legally bound not to share

the communication. This could create tricky situations for counsel seeking to maintain the confidentiality of an investigation, and that could impact the decision about whether or not to self-disclose. In practice, to minimize the effect of such situations, companies and investigators typically *do* require employees – albeit without threat of sanction – to keep the content of the interview secret. An interviewee's divulging of the contents of such communications will not serve as a waiver of privilege in Spain.

Because attorney-client privilege for in-house attorneys is not specifically recognized in Spain, the best practice is for outside counsel to lead internal investigations. The European Court of Justice has thus far been reluctant to apply the privilege to in-house counsels' advice, because in-house lawyers are not perceived to be sufficiently independent. Although proposals have been championed that seek to apply the privilege to in-house lawyers, so far the best authority suggests that communications with in-house lawyers are not privileged. Notably, the attorney-client privilege will apply with equal force to lawyers licensed outside of Spain.

See "Preserving Privilege in Audits and Internal Investigations" (Jun. 24, 2020).

The Investigative Team

As with investigations globally, the makeup of the team is crucial. As in most jurisdictions, a best practice in Spain is to include local team members to the extent possible, while engaging U.S. counsel to provide appropriate U.S. law advice. Spanish counsel will be important, as Spanish criminal procedure has peculiar aspects that require both a sharp understanding of the rules and a sensitivity to the local culture – particularly if local judges and prosecutors become involved.

Importantly, because some or most of the interviewees will not speak fluent English, it is usually helpful not only to integrate local team members, but also to have fluent Spanish speakers as part of the U.S. team. This is true even if the decision is ultimately made to conduct the interviews in English through an interpreter, both because facility with the culture and language will still prove helpful, and because many documents are likely to be in Spanish. We note that conducting interviews in English without an interpreter, even with English-speaking employees, is risky, in that courts may well invalidate the interview if they believe that witnesses were not afforded the benefit of their primary language.

The use of outside forensic consultants is common in Spanish internal investigations, although depending on the matter, outside counsel will often proceed directly, without the need for such personnel. On occasion, forensic consultants will themselves lead internal investigations, particularly those involving complex or specialized subject matter. Of course, this option has the obvious drawback of not affording the protection of the attorney-client privilege. Notably, though, more and more judges are recognizing that the privilege does apply to forensic consultants who are engaged by attorneys for the purpose of rendering legal advice to a corporate client.

Counsel will need to avoid two pitfalls. First, the question of whether consultants or experts fall under the attorney's privilege remains in some dispute, so the investigation should proceed with the understanding that communications with the consultants might in the end not be afforded the privilege's

protection. But perhaps more importantly, even if the privilege is recognized, counsel for companies that wish to cooperate and provide new and decisive evidence – which in Spain will mitigate the penalty – will need to persuade the Public Prosecutor's Office and the court that the privilege will not be an obstacle to communicating relevant information to the authorities. In this regard, counsel can cite the policies of the U.S. Department of Justice, which in 2006 declared that waiver of the privilege is not a prerequisite for cooperation credit under DOJ policy. Instead, DOJ expects that cooperating companies will provide the relevant facts known to the company, without requiring waiver.

Finally, it is important to note that when an internal investigation is being conducted at the same time as a judicial investigation, the public prosecutor will often take a special interest, and even try to steer it in a particular direction. As often occurs in the U.S. as well, it is not uncommon for prosecutors to make specific information and documentation requests even before the investigation is complete, and counsel should be prepared to address such requests with an eye towards ensuring the successful completion of the investigation.

See "Insights on Negotiating With the DOJ: How the Process Has Changed" (Jun. 24, 2020).

Document Retention

Document retention notices are not required under Spanish criminal law. That said, there are good reasons for cross-border investigators to issue appropriate document holds as a best practice. Most significantly, the results of the investigation could well be disclosed to U.S. prosecutors or regulators, who will expect all reasonable steps to be taken so that evidence is not lost or destroyed. But more importantly, Spanish law considers it a criminal offense for individuals to destroy or alter evidence of underlying offenses, making it wise for companies to ensure their employees do not go down that path.

Listed companies are also required to cooperate with the CNMV in its supervisory and inspection activities, and face administrative punishment if they do not.

See "Retaining Business Records in an Era of Disappearing Messaging Apps" (Nov. 14, 2018).

Access to Employee Communications and Devices

Under the European Convention on Human Rights, companies are allowed to have control of information technology tools and devices that they put at their employees' disposal so that they can carry out their work duties. However, under the so-called Barbulescu II doctrine of the European Court of Human Rights (Barbulescu v. Romania), companies may exercise such authority only if they overcome the employee's expectation of privacy in such data. The legality of accessing employee communications is analyzed under the following factors:

- whether the employee has been told that their correspondence might be monitored;
- the degree of intrusion by the employer, including the duration of monitoring, which files were accessed, and how many people have access to the results of the monitoring process;
- whether there were legitimate business reasons for monitoring correspondence;

- whether less intrusive methods of monitoring could have been used than direct access to the content of employee communications;
- the use the company made of the fruits of the monitoring activity, and if that use corresponded to the original objective that provided the grounds for the monitoring; and
- the existence of mechanisms designed to protect employees, ensuring that employers do not access the content of communications without first informing employees.

Thus, counsel conducting internal investigations must assess whether the company has met these requirements before it may access company emails, texts, or other data contained on employer-owned devices. Note, by contrast, that *personal* devices may only be examined in internal investigations with the express consent of their owners. In practice, as a cultural matter, such consent is rarely forthcoming.

See "New Criteria for Employee Monitoring Practices in Light of ECHR Decision" (Oct. 18, 2017).

Conducting Interviews

As stated, for cultural as well as language reasons, a best practice in Spain is for a local team to be at least involved in employee interviews, and for such interviews to be conducted in Spanish or at least through a Spanish interpreter. But because internal investigations are a new phenomenon, key questions remain unanswered, indicating caution when planning interviews.

Most significantly, it is not clear yet if the rights that witnesses and defendants enjoy within criminal proceedings (privilege against compelled self-incrimination, right to remain silent, right to representation, and so on) apply to internal investigations. Although such rights theoretically conflict with the ordinary duties of employees under Spanish law – such as the duty to cooperate with good faith corporate activities – it is commonly thought within the corporate legal community that rights akin to those in criminal proceedings will ultimately be incorporated into internal investigations by Spanish courts. This is because internal investigations can be seen as an instrument that aims to prevent and detect crime, and for that reason can easily be seen as almost a step in advance of a criminal investigation, suggesting that witnesses and custodians could see their rights in jeopardy.

Moreover, Spanish labor law provides employees with a high level of protection in general terms and taking disciplinary action if they refuse to answer questions from their employers is not always an easy task. The prevailing view, therefore, is that companies may not legally compel employees to answer questions or even to cooperate with the course of the investigation.

For that reason, it is common to give witnesses in corporate investigations in Spain a warning that might be described in the U.S. as *Upjohn* on steroids: they should be informed that they have the right not to participate in the interview; the right to appoint and bring their own attorney; the right not to answer some or any questions put to them; and the right to leave the interview at their discretion. As there is a lack of an internal investigation culture in Spain, it is also usually key to explain

the aim and scope of the investigation to the interviewee, including that it is intended to be covered under the company's attorney-client privilege. In practice, this may lead to an explanation of the general scope of the internal investigation, why the interviewee has been called, and what the aim of the interview is.

Of course, there will be a natural tension between the desire of corporate counsel to gather facts as part of cooperation with U.S. authorities, and the risk that these warnings and explanations will lead employees to refuse to be interviewed. Skillful counsel will have to navigate that tension in the context of a corporate culture that is not accustomed to internal investigations.

See the ACR's Guide to Mastering Internal Investigation Interviews: "Logistics" (Feb. 5, 2020); "Warming Up" (Sep. 30, 2020); and "Getting to the Truth and Adapting to the Pandemic" (Oct. 14, 2020).

Self-Disclosure and Cooperation

If an internal investigation is conducted in the absence of a pre-existing government investigation, the company faces the difficult decision of whether to self-disclose. As in the United States, self-disclosure of a criminal offense to the appropriate authorities, before having knowledge that a judicial investigation has or is about to be brought, can mitigate the severity or extent of corporate criminal liability. This can happen in one of two ways.

A Confession

The first and most traditional way is that under Spanish law, cooperating with a government investigation, including providing the facts to the authorities as a "confession," can lead to lower punishment after a criminal conviction. This is of some advantage, as criminal sanctions in Spain can be harsh, and can include suspension of business activities, closure of premises, debarment from public programs, and in extreme cases, dissolution. But because, as noted above, Spain does not recognize the "opportunity principle" (charge bargaining), there has not traditionally been an opportunity to avoid conviction through, say, the types of deferred prosecution or non-prosecution agreements that are well understood in the U.S.

Self-Disclosure and a Compliance Program

Second, under a recent policy change that aligns Spain more closely to U.S. practice, self-disclosure can lead to an exemption from criminal liability – if it is coupled with an effective pre-existing compliance program. As described above, corporations in general are entitled under Spanish law to avoid conviction if they can show that they had effective programs in place. In a January 2016 Circular, the Spanish attorney general directed prosecutors to attach special value to the discovery and self-disclosure of offenses by corporations, and when coupled with an effective compliance program, to request an exemption from criminal conviction for the company. Specifically, the attorney general wrote that discovery and self-disclosure are evidence of the effectiveness of the compliance program, and, perhaps more importantly, the compliance culture of the entity – a factor that U.S. regulators have also emphasized in recent years.

See "A Close Look at the New ECCP's Commentary on Compliance" (May 29, 2019).

Voluntary Provision of Documents

Corporate cooperation in Spain, which as stated above is only a factor that mitigates punishment, consists of "providing evidence, at any stage of the proceeding, that is new and decisive to clarify the criminal liabilities arising from the deeds." (Article 31-quarter.1-b). As witnesses under Spanish law are *required* to submit to interviews by judicial authorities in any event, in practice corporate cooperation means providing documents and other evidence without the need for judicial request. If that evidence or information is privileged, although the authorities are not allowed to request a waiver of privilege expressly or directly, a company's unwillingness to provide information based on the attorney-client privilege will likely be viewed with suspicion by the Public Prosecutor's Office and court.

Also notable is that, unlike in the U.S., it is possible to seek an exemption from criminal liability based on an effective compliance program without otherwise cooperating, as cooperation is not a necessary factor under that provision of Spanish law.

Private Prosecutions

Another wild card not present in the U.S. is that, as mentioned above, the Public Prosecutor's Office does not have a monopoly on criminal prosecution, and, therefore, any person (including legal entities) injured by an offense is entitled to prosecute the alleged perpetrator. Indeed, the Criminal Procedure Act requires the Judiciary Police to instruct the victims of an offense of their right to institute their own private prosecution. Circulars like the 2016 guidance, moreover, apply only to the Public Prosecutor's Office. Therefore, even when the prosecutor requests either an exemption from punishment or mitigation of sentence, the case could involve other charging parties that refuse to do so.

Finally, when considering self-disclosure, it is important to note that some entities regulated by the securities regulator CNMV or by bank supervisors have more specific, and often mandatory, self-reporting requirements. And, of course, companies subject to public disclosure requirements under the securities laws will have to disclose material frauds or controls failures that might have been uncovered by internal investigations.

Conclusion

The parameters for U.S.-Spain internal investigations are evolving rapidly as part of a field that is still in its infancy, and indeed, this article has only begun to scratch the surface. But hopefully, our practical observations will be of use when addressing allegations of fraud and corruption within corporations. In particular, the local culture and language will be crucial considerations, as will consultation with experienced Spanish and U.S. practitioners.

Daniel R. Alonso is a partner in Buckley's New York office, where he handles white collar defense, internal investigations, civil litigation, and compliance in the areas of anti-corruption and sanctions. He served in the U.S. Attorney's Office for the Eastern District of New York and was the Chief of the Criminal Division.

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