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BIG CHANGES AFOOT FOR FCPA AND ANTI-BRIBERY ENFORCEMENT?

To Our Clients and Friends:

In several recent announcements, the Biden Administration has signaled that the United States is going on the offensive to root out global corruption. Though new administrations regularly communicate an intention to fight corruption—with varying success in outcomes—closely timed statements from both the White House and the Department of Justice (“DOJ”) in recent weeks suggest this Administration is prioritizing anti-corruption enforcement and may usher in substantial changes to the regulatory landscape—changes that raise important questions about the reach of regulators’ enforcement mechanisms and the potential risks facing companies.

Earlier this month, the White House released a memorandum identifying corruption as a core national security threat and announcing the Administration’s intent to use the full arsenal of its enforcement, financial, foreign policy, and intelligence tools to detect and combat corruption.^[1] Likewise, DOJ Criminal Division leadership emphasized their prosecutors are continuing to build out capabilities to detect and proactively investigate Foreign Corrupt Practices Act (“FCPA”) violations, for example through innovative data mining techniques, in addition to rewarding self-reporting. These announcements, along with the recent enactment of the Anti-Money Laundering Act of 2020 (“AMLA”) and the anticipated implementing regulations, highlight the Administration’s interest in establishing an even more aggressive enforcement environment through the use of broadened detection efforts and strengthened enforcement tools ^[2]

1. White House Statements Establishing the Fight Against Corruption as a Core United States National Security Interest

On June 3, 2021, the U.S. government demonstrated its renewed commitment to combating corruption when the White House published a National Security Study Memorandum that explicitly “establish[es] countering corruption as a core United States national security interest.”^[3] In the memorandum, President Biden emphasized the serious costs of corruption, explaining that it “threatens United States national security, economic equity, global anti-poverty and development efforts, and democracy itself” and drains “between 2 and 5 percent of global gross domestic product.”^[4]

To combat the risks associated with global corruption, President Biden directed Assistants to the President on National Security, Economic Policy, and Domestic Policy to conduct an interagency review process within 200 days and submit strategic recommendations.^[5] Significantly, the interagency review involves a wide array of agencies with different tools, perspectives, and focuses on corruption, including the regular players like DOJ, the Department of State, and the Department of the Treasury, to key players in the defense and intelligence apparatus like the Department of Defense and the Central Intelligence

Agency. It remains to be seen how the Biden Administration will coordinate future anti-corruption efforts, particularly where information sharing between enforcement and intelligence agencies is limited by law, but the Administration appears ready to employ an aggressive multi-front strategy to combat corruption as a national security issue.

The recommendations from the interagency review process will aim to significantly bolster the U.S. government's efforts to, for example, require United States companies “to report their beneficial owner[ship] to the Department of Treasury”;^[6] “hold accountable corrupt individuals, criminal organizations, and their facilitators” by identifying, freezing, or returning stolen assets;^[7] improve frameworks in domestic and international institutions to prevent corruption and to combat “money laundering, illicit finance, and bribery”;^[8] and develop international partnerships to “counteract strategic corruption by foreign leaders” by closing loopholes.^[9] Though the specific recommendations resulting from the study remain to be seen, its aims are directionally consistent with past efforts to increase interagency coordination, explore use of additional enforcement and intelligence tools, and increase focus on corruption as a national security threat.

Vice President Harris’s remarks this week during her trip to Guatemala further demonstrate the White House’s focus on anti-corruption measures and its concerted effort to show the seriousness of its commitment to fighting global corruption.^[10] While her remarks centered on immigration, Vice President Harris took the opportunity to emphasize that the United States is working vigorously to combat corruption by creating “an anti-corruption task force — the first of its kind,” which will combine the forces of DOJ, the Department of Treasury, and the State Department “to conduct investigations and train local law enforcement to conduct their own.”^[11]

2. Statements from Senior DOJ Officials

Consistent with President Biden’s call for increased focus on combating corruption, DOJ officials announced at the June 2, 2021 American Conference Institute’s FCPA Conference that DOJ is developing “groundbreaking policies” and taking an “entirely new” approach to FCPA enforcement.^[12] While many FCPA investigations historically originated from company self-reporting, Acting Assistant Attorney General Nicholas McQuaid, who oversees the Criminal Division, announced at the conference that DOJ is now developing FCPA cases “as much, if not more” through proactive investigation methods. Fraud Section Acting Chief Daniel Kahn added, “we have upped our detection, and we are learning of cases through a number of different ways.”^[13] This messaging suggests DOJ may move to a more aggressive posture in corporate investigations and away from the last administration’s perceived approach, which had encouraged corporate America to engage in “self-policing” and to regard law enforcement “as an ally.”^[14]

Acting Assistant Attorney General McQuaid emphasized that DOJ is using its independent authority to gather evidence in corruption cases through law enforcement sources and cooperators, “proactive and innovative” data mining, and partnerships with foreign governments. He suggested that DOJ increasingly is “covertly” developing evidence before ever engaging with target companies and that the public can expect an increase in DOJ-driven FCPA investigations before the end of the

year.[15] McQuaid assured the audience that DOJ will produce FCPA enforcement results on par with the “size, scope, and significance” of previous years.[16]

McQuaid further warned that companies should not attempt to game DOJ’s anti-piling on policy “to get lower penalties for foreign corruption violations.”[17] The policy is designed to encourage coordination in parallel investigations to avoid unfair and duplicative penalties by multiple agencies for the same misconduct.[18] Despite DOJ’s anti-piling on policy, the inefficiencies and lack of coordination at the investigation and resolution stages continue in large part because DOJ’s policy only binds DOJ. McQuaid cautioned that DOJ will “not restrict the scope of our enforcement actions in response to tactically front-loaded resolutions.”[19] In other words, companies may be wise to coordinate with DOJ if they wish to seek credit for resolving related claims by other agencies and prosecuting authorities.

DOJ has long claimed to rely less on self-disclosures as the genesis of its investigations and to be exploring new investigatory mechanisms. It remains to be seen whether McQuaid’s recent statements signal a real shift in DOJ’s investigatory approach and will lead to a proportional increase in cases originating from DOJ-driven investigations. Gibson Dunn will continue to closely track the FCPA docket to monitor these enforcement trends.

3. Anti-Money Laundering Act of 2020

The recent enactment of the AMLA gives the Biden Administration another mechanism to fight corruption, and the U.S. government can be expected to use its new found powers under the AMLA to target certain conduct that is typically regulated through FCPA enforcement.[20] Prosecutors have increasingly used money laundering criminal statutes and investigatory powers to investigate and bring enforcement actions for corrupt conduct. While the AMLA is not primarily focused on anti-corruption measures, it does provide the U.S. government with enhanced investigatory tools that likely will similarly be used by the Biden Administration to identify and punish corruption.

As one of its many goals, the AMLA seeks to prevent criminals from using shell companies in the U.S. to launder illegally obtained money, such as proceeds from corrupt activities.[21] To curtail this practice and to “assist national security, intelligence, and law enforcement agencies with the pursuit of crimes,” the AMLA calls for regulations that will require certain legal entities that are formed within the U.S. or registered to do business within the U.S. to disclose to the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) their beneficial ownership and that will require FinCEN to maintain a non-public, federal registry of that information.[22] Many types of entities are excluded from this reporting requirement, including public companies, entities subject to significant U.S. regulatory oversight, and other types of entities that are not typically shell companies that pose heightened AML risk. Although FinCEN’s registry will be non-public, law enforcement agencies will be able to request access to information for national security, law enforcement, and intelligence purposes.[23]

Other portions of the AMLA similarly grant the U.S. government enhanced investigatory powers to assist in identifying corruption. For example, the AMLA expands prosecutors’ foreign subpoena powers by authorizing them to subpoena any foreign bank that maintains a correspondent account in the United States for records, including those maintained outside of the United States, relating to any account at the

foreign bank that are the subject of “any investigation of a violation of a criminal law of the United States.”[24] Once the implementing regulations are promulgated, the Biden Administration is likely to utilize FinCEN’s corporate registry and the U.S. government’s heightened subpoena powers to help identify and investigate companies and individuals engaged in corrupt activities, whether through the FCPA, money laundering, or other criminal statutes.

In addition to expanding investigatory powers, the AMLA also expanded penalties for certain financial activities, which can assist the U.S. government in its enforcement efforts against international corruption and bribery.[25] The AMLA creates a new prohibition on knowingly concealing or misrepresenting a material fact from or to a financial institution concerning the ownership or control of assets involved in transactions entailing at least \$1 million of assets and assets belonging to or controlled by a senior foreign political figure or an immediate family member or close associate of a senior foreign political figure.[26]

The AMLA also drastically increases penalties for certain violations of the Bank Secrecy Act, which imposes money laundering regulatory requirements on financial institutions, with particularly enhanced penalties for repeat offenders.[27] The Secretary of Treasury will be able to impose civil penalties on recurring offenders in an amount either triple the profit lost due to the violation or “two times the maximum penalty” under the new provision.[28]

Accordingly, the AMLA’s implementing regulations may solidify the Administration’s objective of increasing the U.S. government’s ability to combat all forms of corruption by providing additional investigatory and enforcement powers to pursue such activity when related financial transactions fall under the broad scope of the AMLA.

Conclusion

These developments suggest we may see important shifts to the anti-corruption enforcement landscape under the Biden Administration, with a heightened focus on combatting corruption, including through expanded detection and enforcement mechanisms. Though the recent announcements from the White House and DOJ are directionally consistent with the messaging we have seen from previous administrations—insofar as they emphasize corruption as a national security focus, the need for interagency cooperation, and the development of new investigatory tools—the timing of these announcements, along with the recent enactment of AMLA, puts us on notice that real change may be afoot. For companies and senior executives, some of these changes may make it more difficult to anticipate regulatory risks. While it remains to be seen how the Biden Administration’s interagency review effort will change the enforcement landscape, DOJ’s claims of success with data mining and other enforcement tools to identify and proactively investigate cases, along with the enhanced anti-money laundering powers coming online, may signal an era of heightened anti-corruption enforcement risks. Companies and practitioners will want to keep a keen eye on how the enforcement landscape changes over time, particularly when considering the benefits and risks of self-disclosure. In this new enforcement regime, companies may find the outcomes of regulatory investigations harder to predict. We also note that these shifts come at a time of increasing anti-corruption enforcement action

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by regulators around the globe. Navigating in this new environment will require close attention to these changes.

[1] The White House, *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/> (“National Security Study Memorandum”).

[2] One columnist identified the new anti-corruption plans as a step toward challenging “kleptocrats” and “klepto-dictators around the world.” See David Ignatius, *Biden’s Anti-corruption Plan Appears to Have Some Teeth. Here’s Hoping They Bite.*, Wash. Post (June 3, 2021), <https://www.washingtonpost.com/opinions/2021/06/03/bidens-trying-crack-down-international-corruption-lets-hope-it-works-this-time/>.

[3] See National Security Study Memorandum, *supra* fn. 1.

[4] *Id.* § 1.

[5] *Id.* § 2.

[6] *Id.* § 2(b).

[7] *Id.* § 2(c).

[8] *Id.* § 2(d).

[9] *Id.* § 2(f).

[10] U.S. Embassy in Guatemala, *Remarks by Vice President Harris and President Giammattei of Guatemala in joint Press Conference* (June 7, 2021), <https://gt.usembassy.gov/remarks-by-vice-president-harris-and-president-giammattei-of-guatemala-in-joint-press-conference/>.

[11] *Id.*

[12] Nicholas McQuaid, Acting Assistant Attorney General, Dep’t of Justice, Keynote Address at the Foreign Corrupt Practices Act New York (June 2, 2021); See also Clara Hudson, *FCPA Enforcement is “In An Entirely New” Place, Says Acting Criminal Division Chief*, Global Investigations Rev. (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

[13] *Id.*

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[14] Dep’t of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Keynote Address on FCPA Enforcement Developments* (Mar. 7, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-roSENSTEIN-delivers-keynote-address-fcpa-enforcement>.

[15] See Hudson, *FCPA Enforcement is “In An Entirely New” Place, Says Acting Criminal Division Chief*, *supra* fn. 12.

[16] *Id.*

[17] *U.S. Official to Firms: Don’t Game DOJ Policy Against Multiple Penalties*, Reuters (June 2, 2021), <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02/>.

[18] See Dep’t of Justice, *Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute* (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar> (“Today, we are announcing a new Department policy that encourages coordination among Department components and other enforcement agencies when imposing multiple penalties for the same conduct. The aim is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.”).

[19] See *U.S. Official to Firms: Don’t Game DOJ Policy Against Multiple Penalties*, *supra* fn. 17.

[20] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395. Division F of the National Defense Authorization Act is the Anti-Money Laundering Act of 2020 (“AMLA”).

[21] *Id.* §§ 6002, 6403.

[22] *Id.*

[23] *Id.*

[24] *Id.* § 6308(a)(3)(A)(i).

[25] For more information on the AMLA, please see Gibson Dunn’s previous client alert titled *The Top 10 Takeaways for Financial Institutions from the Anti-Money Laundering Act of 2020*, <https://www.gibsondunn.com/the-top-10-takeaways-for-financial-institutions-from-the-anti-money-laundering-act-of-2020/>.

[26] AMLA § 6313.

[27] *Id.* § 6102, 6309.

[28] *Id.* § 6309.

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