Anti-Corruption 2021

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This is the third in our First 100 Days series examining important trends in white collar law and investigations in the early days of the Biden administration. Our previous entry discussed sanctions and export control trends. Up next, congressional inquiries.

Anti-Corruption Enforcement Under the Biden Administration

The FCPA Will Remain an Enforcement Priority

As evidenced by the nearly $2.8 billion in monetary remedies collected by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) in 2020 – including through resolution of two of the largest global corruption cases in history – FCPA enforcement remained a priority for the DOJ and the SEC.

We expect this trend to continue under the Biden Administration, especially in light of President Biden's prioritization of anti-corruption efforts as a "core national security interest." The President has also pledged to convene a global Summit for Democracy in 2021, which will focus on developing a common agenda and securing country commitments related to three areas, one of which is fighting corruption. The Administration also established a new International Anticorruption Champions Award to recognize individuals combating corruption in their own countries.

New Laws Passed as Part of NDAA Will Assist in Investigating and Prosecuting FCPA Violations

The Biden Administration's anti-corruption efforts will be aided by a number of new laws that were passed as part of the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA").

This includes the Kleptocracy Asset Recovery Rewards Act (KARRA), which establishes a new three–year pilot program to be administered by the U.S. Department of Treasury offering awards of up to $5 million to whistleblowers who help identify and recover foreign corruption-linked assets. Whistleblowers are eligible for an award under the program if they furnish information leading to the restraining, seizure, forfeiture or repatriation of "stolen assets" in an account at a U.S. financial institution that come within the United States. The term "stolen assets" is broadly defined to include any "financial assets within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from foreign government corruption."

Federal, state, local or foreign government officers or employees are not eligible to receive an award under KARRA if they furnish information "while in the performance of official duties." In addition, individuals who have "knowingly planned, initiated, directly participated in, or facilitated" the bribery scheme will either be denied awards under KARRA or receive reduced awards.

Along with the already existing SEC whistleblower program – which awards individuals who report possible violations of the federal securities laws to the SEC – the new program will provide law enforcement and prosecutors with a valuable tool to identify corrupt actors and investigate FCPA violations.

The NDAA also included the Corporate Transparency Act ("CTA"), which imposes new federal obligations to disclose the beneficial owners of certain companies. The CTA will be a helpful tool for law enforcement authorities investigating corruption-linked offenses, given that the strategic use of shell companies, front companies, nominees, and other corporate structures used to conceal the true beneficial owners of assets have traditionally made investigations into these companies more difficult. For a more detailed overview of the CTA, please see our prior client alert on this topic here.

The SEC's FCPA enforcement will be assisted by the amendment of the Securities Exchange Act Section 21(d) – also enacted as part of the NDAA – which doubles the statute of limitations applicable to disgorgement claims for scienter-based (intentional) violations of the federal securities laws, including the FCPA. The longer statute of limitations may incentivize the SEC to investigate older conduct and will be particularly helpful to the SEC in FCPA investigations, which typically move more slowly than other enforcement matters. It may also encourage the SEC to bring more charges under the FCPA's bribery provisions, which require a showing of scienter, rather than solely under the statute's internal controls and books and records provisions, which do not. For a more detailed overview of the amendment, see our prior client alert on this topic here.

Increased Focus on Combatting Corruption in Northern Triangle Countries

As part of President Biden's Plan to Build Security and Prosperity in Partnership with the People of Central America, the Administration has promised to make combating anti-corruption in the Northern Triangle – which covers Guatemala, Honduras, and El Salvador –a top priority.

The Administration will be aided in this effort by the Northern Triangle Enhanced Engagement Act, which was also passed as part of the NDAA. The Act targets corruption and human rights violations contributing to migration from the Northern Triangle, and mandates the submission of an annual publicly available report to Congress identifying foreign persons that have engaged in significant acts of corruption in the Northern Triangle region. This list will be known as the "Engel List" in honor of former U.S. Representative Eliot Engel (D-New York). Foreign persons identified on the Engel List will be denied entry into the U.S. and subject to various other visa-related sanctions.

While the Act itself does not require the imposition of any asset blocking sanctions on individuals identified on the Engel List, these individuals will likely be subject to increased scrutiny by the U.S. Department of Treasury's Office of Foreign Assets Control. This could result in asset-blocking sanctions issued pursuant to other U.S. sanctions regimes, including the Global Magnitsky Act, which authorizes sanctions on individuals who have engaged in human rights abuse or corruption.

The Act also mandates the submission by the Secretary of State, in coordination with the Administrator of the United States Agency for International Development (USAID) and the heads of other relevant federal agencies, of a five-year strategic plan to Congress to advance economic prosperity, combat corruption, strengthen democratic governance, and improve civilian security in the Northern Triangle region. This plan will be publicly-available and subject to annual progress updates. If successful, this approach may be used as a model applied to other regions around the world.

Corporate Prosecutions

Likely Uptick in FCPA Corporate Enforcement

Contrary to expectations, corporate FCPA enforcement under the Trump Administration, at least in monetary terms, was quite robust, culminating in last year's record-setting settlements against Airbus (nearly $4 billion in penalties and disgorgement paid to U.S., French, and U.K. regulators) and Goldman Sachs (over $1.6 billion in penalties and disgorgement to the DOJ and SEC after offsets for amounts paid to foreign regulators). On the other hand, the total number of FCPA actions brought by the DOJ and SEC were down substantially in 2020 to its lowest level since 2013, likely a result in significant part of the COVID-19 pandemic, which posed logistical challenges that hampered corporate enforcement generally last year.

The Biden Administration has identified anti-corruption as a centerpiece of its foreign and domestic policy. In the words of a Biden transition official, the President has "made countering corruption at home and around the world a staple of his agenda." Moreover, President Biden has nominated Gary Gensler, who gained a reputation for aggressive enforcement as Chairman of the Commodity Futures Trading Commission (CFTC) from 2009 to 2014, as Chairman of the SEC. Along with the uptick in corporate enforcement generally that usually occurs under Democratic administrations, we expect that these factors will lead to heightened FCPA enforcement activity, and continue to drive large monetary settlements.

In particular, we anticipate that the government's increased aggressiveness on the FCPA front will play out in a number of areas:

Compliance will remain critical. The DOJ made several policy statements in recent years clarifying its (high) expectations of corporate compliance programs and highlighting the importance of effective compliance in obtaining cooperation credit. These included new guidance on the DOJ's evaluation of corporate compliance programs, as well as the first updates in eight years to the FCPA Resource

Guide published jointly by the DOJ and SEC.

The updated guidance emphasized the importance of designing compliance programs effectively, including: targeting compliance risks specifically; ensuring the explicit support of management and the day-to-day relevance and usefulness of compliance resources to employees; continuous reevaluation of risk and policies and procedures; and confirming that the compliance function is actually empowered within the company. We expect that the DOJ will continue to scrutinize these aspects of compliance programs during 2021 in making determinations about charges, penalties, and the imposition of corporate monitors.

The DOJ Resource Guide added several new sections to provide additional guidance, and incorporated the DOJ's 2017 FCPA Corporate Enforcement Policy (see our prior client alert here), which provides that where a company "voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances." The policy further allows for leniency in the mergers and acquisitions context, noting that where "robust pre-acquisition due diligence" is not possible, the DOJ and SEC will "look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts," with maximum credit to companies who voluntarily self-disclose the misconduct.

Given that the Biden-era DOJ and SEC may construe and apply these criteria more strictly, companies would be well-advised to familiarize themselves with them and ensure that they are implemented effectively.

Potential tightening of policies on corporate enforcement. Under the Trump Administration, the DOJ relaxed some of its policies with respect to corporate prosecutions and cooperation credit. Whereas its 2015 Yates Memo (named for then-Deputy Attorney General Sally Yates) required companies to provide "all relevant facts about the individuals involved in corporate misconduct" in order to receive cooperation credit, the DOJ modified this policy in 2018 to require only the identification of individuals "substantially involved in or responsible for the criminal conduct," and not more peripherally relevant employees.

Similarly, the DOJ adopted an anti-"piling on" policy in 2018, which aimed to limit investigations of the same conduct by multiple regulators and directed prosecutors to take into account amounts paid to other law enforcement agencies in determining penalties. That same year, the agency issued the Benczkowski Memo (named for then-Deputy Attorney General Brian Benczkowski), instructing that the imposition of corporate monitors should generally be reserved for companies who fail to demonstrate that their compliance programs are "effective and appropriately resourced at the time of resolution[.]" (For the first time in several years, the government did not impose a monitorship in any corporate FCPA resolution in 2020.) The incoming DOJ leadership may reverse or narrow these policies and raise the bar for companies seeking credit for their compliance efforts. Companies seeking favorable resolutions of FCPA charges would therefore face the prospect of increased pressure to provide details on employees or agents involved in bribery and remediate their compliance failures.

SEC "no bribery" cases will remain prevalent. In addition to the FCPA's anti-bribery provision, the SEC is empowered to enforce the statute's books and records and internal controls provisions against issuers. In several cases, it has charged public companies with internal controls and/or books and records violations without charging any act of bribery (for example, its enforcement action against Herbalife Nutrition last year, which resulted in the company's agreement to pay over $67 million in disgorgement and prejudgment interest). These so called "no bribery" cases have been criticized by some as inconsistent with the purpose of the FCPA (but defended by others as promoting effective compliance). In addition, the SEC's broad interpretation of the FCPA's internal controls provisions has come under fire from critics, including the agency's two Republican commissioners, who released an unusual dissenting statement last year contending that those provisions should be limited to controls relating to the accuracy of a company's financial statements.

Because these so-called "no bribery" FCPA actions do not require the SEC to prove scienter, and in light of Nominee Gensler's pro-enforcement inclination, we expect that these cases will remain a prominent feature of the SEC's FCPA enforcement program this year and beyond.

CFTC will be increasingly active. Although the Commodity Futures Trading Commission (CFTC) does not enforce the FCPA, the agency in 2019 communicated its intent to play an anti-corruption enforcement role alongside the DOJ and SEC by targeting corrupt practices that it deems to violate the anti-fraud or other provisions of the Commodity Exchange Act (CEA). This is an untested application of the CEA that may be challenged in future CFTC enforcement actions.

In the meantime, the CFTC has pressed ahead with its anti-corruption program, reportedly opening an investigation of Glencore, and bringing coordinated charges with the DOJ and SEC late last year against energy and commodities trading firm Vitol Inc., resulting in an

order to pay more than $95 million in disgorgement and penalties to the CFTC. The agency alleged that Vitol committed fraud under the CEA by paying and concealing kickbacks to employees and agents of state-owned entities in Brazil, Ecuador and Mexico, which it found "undermined the legitimate forces of supply and demand and the integrity of the global physical and derivatives oil markets." We expect that the CFTC will continue to be an active player in this area.

Enforcement Against Individuals

In 2020, the DOJ brought FCPA charges against 28 individuals and secured 15 FCPA convictions, while the SEC charged three individuals. These numbers were lower than in 2019 (when the DOJ brought FCPA charges against 34 individuals and obtained 30 convictions and the SEC charged six individuals), but, like corporate enforcement activity, were likely impacted by COVID-19.

The DOJ and SEC have long identified the investigation of culpable individuals involved in bribery schemes as a top priority. Acting Assistant Attorney General Rabbit emphasized this point at a speech made at the end of last year by stating that "[e]nsuring individual accountability for corporate wrongdoing has been a hallmark of [the DOJ's] white-collar work in recent years." The Director of the SEC's Division of Enforcement Stephanie Avakian separately also emphasized at a speech made in September 2020 that holding individuals accountable continues to be "a critical part of [the SEC's] program." As a result, we expect that the overall uptick in FCPA enforcement under the Biden Administration will include an increase in DOJ and SEC enforcement against individuals as well. Below are two trends we believe will be important to watch out for in connection with individual prosecutions in 2021:

Prosecution of foreign government officials. The FCPA directly criminalizes the supply side of bribery – i.e. it imposes criminal liability on those that offer bribes to foreign officials – but it does not apply to the demand side of bribery – i.e., to the foreign government official taking the bribes. To work around this gap, the DOJ has increasingly used laws other than the FCPA to prosecute foreign government officials for their participation in bribery schemes. For example, in December 2020, the DOJ brought money laundering charges against a former Venezuelan National Treasurer and her spouse for their alleged participation in a scheme in which they were paid millions of dollars in bribes by a Venezuelan businessman to secure the rights to conduct foreign currency exchange transactions for the Venezuelan government. Earlier in 2020, DOJ unsealed money laundering charges against a former official at Citgo Petroleum Corporation, a subsidiary of Venezuela's state-owned energy company Petróleos de Venezuela S.A., for receiving over $2.5 million in bribes.

One important development in this regard is the Foreign Extortion Prevention Act, which was recently introduced in Congress and would fill the gap that currently exists in the FCPA by making it a U.S. criminal offense for foreign government officials to seek or receive bribes. If ultimately passed, the Act may lead to additional prosecutions of foreign government officials by the DOJ. In any case, the prosecution of foreign officials may serve as a powerful tool for the Biden Administration to effectuate its goal of combatting international corruption, particularly in instances where the official is unlikely to be prosecuted by his or her home government. These prosecutions, however, may present complex questions of foreign policy and international comity, as the Administration simultaneously seeks to build up the capacity of countries to effectively combat corruption within their own territory.

Connection to corporate enforcement actions. Pursuant to both the DOJ's FCPA Corporate Enforcement Policy and the SEC's Enforcement Cooperation Program, companies that voluntarily self-disclose and cooperate with the government, including by providing the government with information regarding the officers and employees involved in the underlying violation, are rewarded with declinations or reduced fines and penalties. As we begin to see an uptick in corporate enforcement activity under the Biden Administration, this may also lead to increased enforcement activity against individuals as companies attempt to secure cooperation credit in FCPA investigations by disclosing information about employees involved in the bribery scheme.

This trend has already been visible in prior years – as reported on here, in 2019, the DOJ declined to prosecute Cognizant Technology Solutions Corporation (Cognizant) for FCPA violations, but used information provided by Cognizant as part of the company's voluntary self-disclosure to investigate and prosecute the company's former president and former chief legal officer for their involvement in the bribery scheme. Similarly, in 2020, the DOJ specifically credited asphalt company Sargeant Marine, Inc.'s cooperation in agreeing to a 25% reduction in the criminal fine imposed on the company in connection with the company's scheme to pay bribes to foreign government officials in Brazil, Venezuela and Ecuador, while at the same time bringing criminal charges against several Sargeant Marine employees who were involved in the bribery scheme.

International Cooperation

The past few years of FCPA enforcement have been marked in particular by increased cooperation between U.S. regulators and their counterparts abroad. We expect this trend to continue under the Biden Administration, especially in light of its general commitment to

re-engaging with the international community and strengthening international cooperation across the whole of government to effectuate U.S. domestic and foreign policy goals.

Global Developments

The U.S.

In November 2020, the 44-member OECD Working Group on Bribery published its Phase 4 evaluation of the United States' efforts to implement the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, reviewing developments over the past decade. Not surprisingly, the Report praises the U.S. for its leadership in and sustained commitment to combatting corruption around the world. The Report highlighted four key elements of these efforts: (1) the use of a range of theories of criminal liability to hold both individuals and organizations accountable, (2) successful coordination to enable multi-agency resolution of matters, (3) increasing efforts to coordinate and cooperate globally to investigate and resolve multi-jurisdictional foreign bribery matters in coordination with those other jurisdictions, and (4) devoting resources to assist foreign partners to build capacity to fight bribery.

Looking forward, the OECD's most significant recommendations include enhancing anti-money laundering (AML) enforcement by extending AML obligations to lawyers and accountants; enhancing protections for whistleblowers who report suspected foreign bribery by entities other than public companies; making the SEC's corporate enforcement guidance, which has been less explicit than the DOJ's in communicating its FCPA enforcement and compliance policies, more specific, similar to the (well-received) DOJ guidance; and assessing the effectiveness of the DOJ's corporate enforcement policy in encouraging self-disclosure and deterring bribery.

Asia

In January 2021, China's Ministry of Commerce promulgated rules counteracting the "unjustified" extraterritorial application of foreign laws. This is the latest in a series of steps taken over the past several years to create some protections within China against the application of foreign laws to Chinese companies and nationals. This new regime allows for Chinese companies and nationals to petition for "blocking orders" to prohibit compliance with an "unjustified" foreign law. It remains to be seen whether and to what extent this new law will have any practical impact on the reach of U.S. laws (e.g., the FCPA, securities laws, sanctions) and whether it may prompt a response from other countries, including the United States.

Latin America

In Latin America, 2020 was a year of consolidating and trying to preserve past gains rather than one of substantial new anticorruption initiatives. Over the past several years, countries like Peru, Chile and Costa Rica have updated aspects of their domestic anti-corruption laws and provided some additional compliance guidance. Brazil, despite controversies in connection with the wind-down of the "Lava Jato" (Operation Car Wash) investigative and prosecution efforts, continues to be a leader in the region on these issues. U.S. authorities have continued to find ways to collaborate with Brazilian authorities, including, for example the resolution of criminal and SEC cases against J&F Investimentos S.A., which agreed to pay more than $256 million to resolve criminal charges, and another $27 million to resolve SEC charges, all connected to a decade-long scheme to bribe Brazilian banking officials at BNDES, officials at the Petrobras pension fund, and officials at another state-owned bank to obtain hundreds of millions of dollars of financing and other significant financial benefits from those institutions. J&F previously resolved this situation with the Misisterio Publico Federal in Brazil, agreeing to pay the equivalent of $1.4 billion and contribute the equivalent of an additional $414 million to various social projects in Brazil. Although J&F received very little cooperation credit from DOJ, it will receive credit for up to $128 million for payments that it actually makes in Brazil, in recognition of the coordination between U.S. and Brazilian authorities.

The U.K.

In February 2021, the U.K. Supreme Court limited the extraterritorial application of evidence-gathering sections of the Criminal Justice Act of 1987, ruling that the Serious Fraud Office (SFO) cannot compel a foreign company that does not have a registered office in the U.K. and has never carried out business in the U.K. to produce documents located outside the U.K.

This is an important setback for the SFO, which recently also lost some of the investigative tools previously available to it as a member of the European Union following Brexit. The SFO will now need to rely on the relatively slow and cumbersome mutual legal assistance process to obtain documents located abroad. With respect to electronic data stored in the U.S. however, the SFO may in the future be aided by the bilateral data sharing agreement passed in 2019 by the U.S. and U.K. Once it becomes operational, the agreement will allow U.S. and U.K. law enforcement agencies to demand electronic data directly from tech companies based in the other country.

The SFO last year also publicly released two sections of its Operational Handbook, providing non-binding guidance on its evaluation of compliance programs and its criteria for deferred prosecution agreements (DPAs). Both are broadly similar to their DOJ counterparts.

France

Since the enactment of France's Sapin II law in 2016, which marked a new era in the country's anti-corruption enforcement, French authorities have continued to step up their enforcement activity (including a leading role in the globally-coordinated actions against Airbus last year) and align France's anti-corruption regime with international standards. As part of these efforts, the French Anti-Corruption Agency (Agence Française Anticorruption or AFA), has issued a series of pronouncements on Sapin II compliance, including guidelines published last January specifying corruption risks and appropriate compliance measures for companies.

In June 2020, the French Ministry of Justice issued a Circular ("circulaire"), explaining the criteria under which companies will be eligible to resolve an enforcement action through a "Convention Judiciaire d'Interêt Public" (CJIP), similar to a DPA in the U.S. The Circular, which followed 2019 guidance on CJIPs from the AFA and the Parquet National Financier (PNF), the national financial prosecutor, focuses on whether the company is a recidivist, voluntarily disclosed the misconduct, and cooperated with authorities, including identifying culpable individuals. Notably, the Circular also signals an intent to enforce Sapin II extraterritorially against companies "exercising all or part of [their] economic activity" in France. It also specifies that the PNF should focus on industries with high corruption risk, including construction, extractives, transport, telecommunications, pharmaceuticals, energy, and defense contracting.

Multilateral Development Banks

Multilateral development banks (MDBs) have in recent years stepped up their anti-corruption enforcement against participants in MDB-financed projects and increasingly have sanctioned individuals and entities through debarment, which prevents them from further participation in MDB-backed projects. The severity of debarment was magnified in 2010, when the five leading MDBs – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the World Bank – agreed to a mutual debarment policy, under which certain debarment orders by one will trigger debarment by the others. Consistent with this pattern, the World Bank, African Development Bank, and the Inter-American Development Bank reported notable corruption-related debarments in 2020, and we expect that the MDBs' enforcement arms will continue to sharpen their focus on this area.

Reflecting the continuing evolution and growing sophistication of the MDBs' anti-corruption programs, a spokesperson for the World Bank's Integrity Vice Presidency (INT), the unit charged with investigating anti-corruption and other misconduct on behalf of the Bank, indicated last year that INT has adopted a more formal procedure for evaluating compliance programs, akin to the DOJ's Evaluation of Corporate Compliance Programs. As this initiative rolls out, it may furnish additional clarity for entities seeking to mitigate the severity of debarment and other sanctions. It also provides a further incentive for companies involved in World Bank-financed projects to invest in compliance.
