

Regulatory and Enforcement Alert

Biden Administration Issues New Strategy to Counter Corruption

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Last week, the White House issued the “United States Strategy on Countering Corruption” (the “Strategy”), which outlines “five mutually reinforcing pillars” centered on responding to and preventing corruption. The Strategy memorandum, while largely aspirational and short at this stage on concrete plans, suggests that the Biden administration plans to devote significant resources to its anti-corruption efforts through increased government spending, “aggressive enforcement action,” launching new programs and initiatives aimed at curbing corruption, enhancing global partnerships, and further strengthening anti-corruption infrastructure domestically and internationally.

The Biden administration appears to be the first to view the fight against corruption as a core U.S. national security interest. Consistent with that view, the Strategy envisions an increased role for the Intelligence Community, and increased information-sharing between the Intelligence Community and law enforcement. While a laudable goal in principle, the administration should carefully consider how reliance on “intelligence” collection methods—which often do not include constitutional safeguards—could taint law enforcement investigations.

Three of the more notable aspects of the Strategy are the administration’s focus on (1) anti-money laundering (“AML”) controls for registered investment advisers, (2) holding accountable—and imposing tougher penalties on—so-called “gatekeepers” who facilitate corrupt conduct, including lawyers, accountants and trust/company service providers, and (3) increasing cooperation both domestically and with foreign authorities, especially with regard to anti-corruption and AML laws.

- The Treasury Department will “re-examine” the Financial Crimes Enforcement Network’s (“FinCEN”) 2015 Notice of Proposed Rulemaking that would have required SEC-registered investment advisers to implement AML programs and file suspicious activity reports (“SARs”). While FinCEN never moved forward with the plan, the Strategy expresses concern over a perceived “lack of regulatory oversight” of the industry, which “may allow corrupt actors to invest their ill-gotten gains in the U.S. financial system through hedge funds, trusts, private equity funds, and other advisory services or vehicles.”
- The Strategy emphasizes the potential role of “gatekeepers” in facilitating corruption, which seems supported in light of the release of the Pandora, Paradise, and Panama Papers. The Strategy observes how current statutory requirements may impose legal challenges to prosecuting gatekeepers because they often may not know the source of their clients’ income and use of proceeds. The Strategy indicates a willingness to seek additional legislation from Congress. It is difficult to imagine laws that would permit enforcement

(much less criminal enforcement) with anything less than proof of knowledge and intent, but the Strategy also suggests that states could increase professional sanctions.

- Cooperation with foreign authorities has long been a priority of U.S. anti-corruption enforcement. The Strategy offers some specific initiatives, including more focused efforts to return assets to citizens of harmed countries (where appropriate). Steps to encourage foreign authorities to initiate their own prosecutions may become important as well: as FCPA defendants (particularly individuals and contractors providing services for foreign subsidiaries of U.S. companies) continue to bring jurisdictional challenges, the Biden administration may find it increasingly difficult to prosecute individuals with tenuous connections to the U.S.

Fifteen federal agencies coordinated with the White House to develop the Strategy. Moving forward, the administration will shape its anti-corruption policies and enforcement actions around the following five pillars:

Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Better Fight Corruption.

The Strategy aims to improve data collection, sharing, and analysis, with an emphasis on cooperation among U.S. government agencies, with foreign governments, and with non-government groups. Notable goals include increased funding for FinCEN to build a beneficial ownership database and improved policies for ensuring that foreign aid and domestic public investment reach their intended targets.

Curbing Illicit Finance. In addition to increasing enforcement, the U.S. Government intends to strengthen existing AML and counterterrorism efforts by increasing transparency. The Strategy envisions regulations implementing the Corporate Transparency Act, mandating disclosure of beneficial ownership for federal contractors, introducing reporting requirements for real estate transactions, and, as noted, possibly reviving FinCEN's efforts to impose AML-related controls on SEC-registered investment advisers. More ambitiously, "cognizant of" the fact that "it is . . . difficult to prove" intent or fault under existing law, the Government will consider new legislation strengthening rules governing lawyers, accountants, trust and company service providers, and other "gatekeepers" to the financial system.

Holding Corrupt Actors Accountable. The Strategy calls for greater efforts to hold corrupt actors accountable, both by enforcing existing laws and by cooperating with Congress to develop new legislation. This pillar approaches corruption comprehensively, through initiatives such as directing the National Cryptocurrency Enforcement Team to focus on complex investigations, including investigations of cryptocurrency mixing and tumbling services, efforts to criminalize the demand side of bribery—the FCPA, for example, targets bribe payors, not the foreign official recipients—coordinating with international partners, and addressing deficiencies in the U.S. anti-money laundering regime, including by collecting beneficial ownership information on those who control anonymous shell companies, and by increasing transparency in real estate transactions.

Preserving and Strengthening the Multilateral Anti-Corruption Architecture. The Strategy envisions an important role for compliance with existing multilateral anti-corruption agreements and expanded multilateral anti-corruption cooperation. Significant multilateral vehicles for promoting anti-corruption include the G7, the G20, international financial institutions, and the Department of Defense.

Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Goals. The Strategy looks to improve the enforcement of partner governments' anti-corruption laws and to support foreign anti-corruption measures at the government and grassroots levels. The U.S. plans "a substantial expansion in anti-corruption focused U.S. assistance" and accompanying monitoring. It also aims to leverage law, education, and technology to engage a diverse range of parties in anti-corruption efforts.

The Strategy is in line with other recent measures taken by the Biden administration, including a program to reward whistleblowers for providing information about foreign-government corruption, an increased focus on cybersecurity, and a continued focus on Sanctions and Export Controls.

Taken as a whole, the release of the Strategy is a signal that companies should take proactive steps to assess their existing compliance programs, with a particular focus on their anti-corruption, sanctions, and AML controls, as well as identify risks that could expose companies with U.S. touchpoints—including foreign-domiciled affiliates—to an investigation or enforcement action in the U.S. And while the specific enforcement policies will likely take time to develop and take root, making the effort now to ensure the appropriate structures and policies are in place may pay dividends down the road.

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