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ENFORCEMENT TRENDS

Latin American Corruption in the Crosshairs of the Biden Administration

By Evelyn B. Sheehan and Amanda Tuminelli, *Kobre & Kim*

Latin America has emerged as the new risk capital of anti-corruption compliance over the last few years, with more than 60 percent of the 51 FCPA and FCPA-related enforcement actions brought or announced in 2020 involving allegations of misconduct in Central or South America. Although it is too early to tell exactly how the new administration will approach Latin American policy, all indications appear to point to a significant pivot from the previous administration's hostility and apathy towards the region. At the same time, the Biden Administration, including its newly appointed leadership at the Department of Justice, is unapologetically supporting anti-corruption enforcement efforts.

This renewed commitment to FCPA enforcement, combined with the 2021 National Defense Authorization Act (NDAA) which provides new tools for the U.S. to aggressively pursue its enforcement agenda, should raise red flags for Latin American stakeholders and especially for high net worth individuals (HNWI) and their respective networks of professional advisors.

This article discusses recent anti-corruption enforcement activity in Latin America and the implications of the new tools available under the NDAA and the Northern Triangle Act for companies and HNWI operating in Latin America.

See "What to Expect From the Biden Administration's New Anti-Corruption Tools" (Mar. 3, 2021).

Latin American Focus

U.S. law enforcement has been steadily developing and expanding its own investigatory capabilities toward foreign bribery and kleptocracy matters arising in Latin America.

Expansion of U.S. Enforcement in Latin America

In March 2019, the FBI announced that it would be formally expanding its international corruption squads (ICSs) to include a dedicated unit based in Miami.

Hailed as a "force multiplier to combat international corruption matters," the Miami ICS has been emphasized by Christopher Cestaro, Chief of DOJ's FCPA Unit, as further evidence of U.S. law enforcement's continuing investment in conducting cross-jurisdictional investigations with Latin American authorities.

In these pursuits, U.S. law enforcement has demonstrated a clear willingness to aggressively prosecute conduct far beyond its borders, and against foreign actors who very often believe themselves to be unreachable.

In particular, the U.S. government is investigating and prosecuting bribery, money laundering and other illicit conduct by corporate entities and individuals constituting or otherwise employed by or associated with state-owned energy companies.

Notable prosecutions include those targeting Petrobras, Centrais Elétricas Brasileiras S.A. (Eletrobras), Telefónica Brasil SA in Brazil and Petróleos de Venezuela, S.A. (PDVSA) in Venezuela.

Individuals have also been the subject of recent U.S. government investigations, including in relation to Odebrecht S.A. in Panamá and Empresa Pública de Hidrocarburos del Ecuador (PetroEcuador) in Ecuador. In addition to blockbuster corporate financial penalties that have grabbed headlines for many years, the DOJ has increased its focus on forfeiture of assets from individual defendants. For example, it has reportedly seized over $450-million worth of assets related to criminal prosecutions of individuals linked to PDVSA in Florida.

The scrutiny of HNWIs and corporations doing business in Latin America, coupled with the renewed focus on anti-corruption efforts of the Biden administration is likely to result in an expansion of the DOJ's footprint in the region.

See "DOJ's Long Arm Over Latin America: Recent Trends and Future Risks From Extraterritorial Application of U.S. Laws" (Sep. 30, 2020).

Politicization of Corruption Investigations

Even while U.S. regulators are increasing their capacity for investigating and prosecuting corruption in Latin America, local anti-corruption enforcement efforts are facing roadblocks. The politicization of corruption investigations, in particular, has undermined anti-corruption efforts in countries such as Brazil and Guatemala. For example, in 2019, the Brazilian Supreme Court approved a decision that could overturn over 30 convictions related to the state's "Lava Jato" anti-corruption probe, based on procedural issues at trial. The ruling stemmed from a *habeas corpus* petition filed by a former Petrobras employee.

The previous year, the Supreme Court overturned the corruption sentence of former Petróleo Brasileiro S.A. (Petrobras) CEO Aldemir Bendine, for similar procedural reasons. More recently, the Brazilian Supreme Court reversed a number of lower court decisions against former President Luiz Inácio Lula da Silva over issues of judicial impartiality. Justice Sergio Moro, the federal judge who presided over President da Silva's case, has been accused of communicating with prosecutors outside of approved channels and in violation of Brazilian rules of judicial conduct. The Supreme Court found that Justice Moro had not acted impartially while presiding over President da Silva's case as part of Operation Lava Jato.

Similarly, in early 2019, Guatemala said it was withdrawing from a United Nations-backed anti-corruption commission and gave the commission's staffers one day to leave the country. When making the announcement, President Morales was accompanied by defendants convicted in a corruption case in which the *Comisión Internacional contra la Impunidad en Guatemala* (CICIG) participated, signaling his support for the defendants.

See "How a Brazilian Supreme Court Ruling May Hamper the Fight Against Corruption," (Apr. 15, 2020).

NDAA: New Tools for Prosecutors

In addition to a renewed and proactive focus on anti-corruption from the Biden Administration, recently enacted legislation has provided new tools for the United States to aggressively pursue its enforcement agenda. On January 1, 2021, Congress overrode President Trump's veto to enact the NDAA, which, aside from allocating the annual defense budget, includes the Anti-Money Laundering Act of 2020 (AML Act), the Corporate Transparency Act (CTA) and the Kleptocracy Asset Recovery Rewards Act (KARRA).

Expanded Subpoena Power Over Foreign Bank Records

The AML Act expands the jurisdictional reach of the Treasury and Justice Departments to obtain records from foreign banks with U.S. correspondent accounts. While the government already had limited subpoena power to obtain documents related to correspondent bank accounts, the new authority under the AML Act extends to "records relating to the correspondent account or any account at the foreign bank, including records maintained outside of the United States."

Thus, the AML Act now allows the government to subpoena records maintained outside of the U.S. that are not linked to U.S. correspondent accounts. The government can use its expanded subpoena power in any criminal investigation or civil forfeiture action, which means this tool is far-ranging, and likely to result in increased exposure for overseas entities and HNWIs.

Of grave concern for many observers is the fact that the AML Act expressly provides that potential conflicts with foreign secrecy or confidentiality laws cannot be the sole basis for quashing or modifying a subpoena. As a result, foreign banks may face conflicting obligations under local law and U.S. law: on the one hand, local bank secrecy and data privacy laws might limit a bank's ability to provide records to U.S. authorities, while on the other hand, banks could potentially face severe consequences from U.S. authorities for noncompliance with a subpoena, all while facing stiff daily civil penalties of $50,000 for failure to comply.

The AML Act also prohibits foreign banks from notifying any person named in such a subpoena about the existence or contents of the subpoena. In yet another sign that U.S. authorities are focusing on financial penalties, any funds held in the correspondent account of a foreign bank maintained in the United States with a covered financial institution may be seized to satisfy civil penalties. The law itself does not resolve these issues, and how the DOJ will choose to use its expanded authority remains to be seen, but it is likely that foreign banks will challenge the scope of the DOJ's authority to seek foreign bank records.

See "Navigating an Aggressive AML and Sanctions Enforcement Environment: Risks and Frameworks" (Jan. 20, 2021).

New Whistleblower Rewards Programs

The NDAA includes two new whistleblower programs that will assist the government in both uncovering corruption and tracing corrupt assets. Significantly, the 2020 AML Act re-vamped its whistleblower program (Section 6314) with a financial structure similar

to that of the SEC and CFTC whistleblower programs, and increased potential payouts to whistleblowers. While the upper limit on whistleblower awards under the prior Act was capped at $150,000, the 2020 version allows whistleblowers to collect up to 30 percent of funds and/or sanctions recovered by the government in cases where penalties total over $1 million.

The NDAA also adds a second whistleblower program – the Kleptocracy Asset Recovery Rewards Act (KARRA) (at Section 9703) – and a new corresponding criminal charge (at Section 6313 of the AML Act, discussed below).

KARRA rewards whistleblowers who help identify and recover foreign corruption-linked assets stored in the U.S. and increases the scope of whistleblower programs beyond companies registered with the SEC. Under KARRA, the government is interested in information related to "stolen assets in an account at a U.S. financial institution (including a U.S. branch of a foreign financial institution), that come within the United States, or that come within the possession or control of any United States person." Increased rewards will serve as an incentive to those with information about criminal conduct, and the expanded scope of conduct covered by these programs will also likely result in an uptick in enforcement actions.

See the ACR's two-part series taking a fresh look at hotlines: "Responding to a Global Focus on Whistleblowers" (Sep. 1, 2020); and "Fostering a Speak-Up Culture and Leveraging Data" (Sep. 16, 2020).

New Criminal Charge Related to PEPs

The AML Act creates a new criminal offense under the Bank Secrecy Act, 31 U.S.C. § 5335, which imposes liability on any person who conceals, falsifies or misrepresents a material fact "concerning the ownership or control of assets involved in a monetary transaction" if the assets are owned or controlled by a Politically Exposed Persons (PEP) and comprise more than $1 million.

This new criminal offense carries a maximum sentence of 10 years, and/or a $1-million fine, and includes civil and criminal forfeiture provisions authorizing the forfeiture of all "property involved" in a violation of the statute. Wealthy individuals and professionals servicing such individuals (*e.g.*, private wealth management, financial advisement, or asset holding structures) can expect increased scrutiny of any assets or funds with ties to the United States.

Similar to the tension presented by the expanded subpoena power, financial institutions and professionals in jurisdictions with privacy laws preventing disclosure of personal information could face criminal exposure in the U.S for complying with a foreign jurisdiction's privacy law. While the AML Act does not provide guidance on resolving these issues, it will likely be subject to testing and litigation in the jurisdictions in which the U.S. begins using this new legislation.

See "Best Practices for Data Transfers in the Wake of *Schrems II*" (Mar. 3, 2021).

New Pilot Program for International Cooperation

The AML Act also includes the establishment of a program that requires financial institutions with U.S. suspicious activity reporting obligations, such as banks, to disclose such suspicious activity to foreign affiliates.

The AML Act creates several new positions within U.S. government agencies, including U.S. Treasury Attachés and Foreign Financial Intelligence Unit (FIU) Liaisons, many of whom will be stationed at embassies and other U.S. government outposts.

New Beneficial Ownership Reporting Requirements

Continuing the theme of funds and asset tracing, the U.S. Corporate Transparency Act (CTA), part of the NDAA, has broken new ground by requiring beneficial owners of U.S. corporate entities to register with U.S. authorities. Under the law, all beneficial owners who have a 25 percent or greater ownership stake in a U.S. shell company, or otherwise exert substantial control over a U.S. shell company, will be required to disclose their names, addresses and date of birth to the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN).

This is yet another example of increased scrutiny of beneficial ownership in foreign assets. While the CTA carves out exemptions for entities that are relatively unlikely to be shell companies, many questions remain as to who qualifies as a beneficial owner with "substantial control," an important term that remains undefined in CTA and that will hopefully be clarified by FinCen regulations.

Importantly, although FinCEN must generally keep confidential the information that reporting companies submit pursuant to these requirements, in certain circumstances and upon request, federal law enforcement agencies may access the information, and the information may be shared with foreign countries and with federal functional regulators or other appropriate regulators.

With the changes to the CTA, the United States joined a growing list of countries – including the United Kingdom, the British Virgin Islands, the Cayman Islands, Bermuda and Cyprus, among others – that require the disclosure of valuable beneficial ownership information and seek to clamp down on the use of shell companies to conceal assets, launder illicit funds, or evade taxes.

Other Legislation to Watch: The Northern Triangle Act

Finally, in addition to the newly enacted NDAA, the U.S. Congress approved H.R 2615, the "United States-Northern Triangle Enhanced Engagement Act" (the Northern Triangle Act) on December 21, 2020, which focuses on strengthening anti-corruption measures in Guatemala, El Salvador and Honduras. As the author of H.R. 2615, Representative Eliot L. Engel, said, "My legislation will support the incoming Biden-Harris Administration as it redoubles efforts to support a more secure, democratic and prosperous Central America."

The Northern Triangle Act requires the Biden administration to list individuals who reside within the Northern Triangle and are involved in "significant corruption." The individuals on this semi-public list would be sanctioned, preventing them from entering the U.S. and leaving them exposed to asset freezes. Individuals could also face sanctions such as visa revocation and asset blocking. The International Emergency Economic Powers Act (IEEPA) (50 U.SC § 1701) allows for the blocking of all property transactions by a foreign person "if such property or interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person."

HNWIs and the institutions that support them should pay careful attention to cross-border information sharing, as well as exposure related to assets caught in the crosshairs of Northern Triangle anti-corruption enforcement.

Increased Vigilance Warranted

HNWIs and companies with ties to Latin America should now more than ever commit to educating themselves on the nuances of the above policies and how they will likely be applied in real-world scenarios in the years to come.

Given the above trends, professionals involved in fields such as private client wealth management, financial advisement and asset structuring must remain vigilant. They would be best served by adopting precautionary measures such as investing in compliance programs and engaging with experienced specialists capable of navigating the often opaque boundaries of foreign enforcement actions and international money laundering investigations.

The ability to spot vulnerabilities and potential issues long before they devolve into crisis situations will be key to these parties' efforts to keep their legitimate assets, reputations and personal liberties intact.

Evelyn B. Sheehan is a lawyer at Kobre & Kim in Miami. She focuses her practice on advising high net worth individuals, institutional clients and their executives in cross-border investigations, government enforcement actions and related asset forfeiture matters. In addition, she counsels clients in global asset tracing investigations and asset recovery efforts. She was previously Deputy Chief of the Asset Forfeiture Division in the U.S. Attorney's Office for the Southern District of Florida.

Amanda Tuminelli is a lawyer at Kobre & Kim in New York. She focuses her practice on representing institutional and individual clients in complex cross-border litigation matters, as well as criminal and regulatory investigations.