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How Anti-Corruption Push Affects US Cos. Operating Abroad

By **Andrey Spektor** (July 27, 2021, 5:34 PM EDT)


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On June 3, President Joe Biden elevated enforcement of corruption to national security status.[1] The national security study memorandum directed 15 federal agencies — ranging from the U.S. Department of Justice, to the United States Mission and the United Nations to the CIA — to collaborate in a 200-day interagency review to enhance the government's ability to counter corruption.

Although the memorandum identifies corruption "at home and abroad," there is little doubt that much of the enforcement will focus on the overseas operations of domestic companies. Among other things, the directive refers to: oligarchs, democracies worldwide, the global gross domestic products, acts that cross national borders, global financial systems, global anti-poverty and developments efforts, transnational criminal organizations, global anti-corruption norms, and foreign governments.

How We Got Here and Why the June Memo Matters

For companies operating abroad, this memorandum must be reviewed in the context of other developments, some of which began under the last Democratic administration. In July 2010, then-Attorney General Eric Holder announced the launch of the Kleptocracy Asset Recovery Initiative designed to combat "large-scale foreign official corruption and [recover] public funds."[2]

In less than four years, by 2014, prosecutors had frozen almost a half a billion dollars around the world.[3] That same year, the DOJ continued its push to concentrate on "unraveling ... intricate money laundering transactions" by creating a dedicated kleptocracy squad within the FBI that would work with the U.S. Marshals Service and analysts from the Financial Crimes Enforcement Network — itself a dedicated bureau within the U.S. Department of the Treasury.[4]

The DOJ's focus during the Trump administration turned largely elsewhere, mostly combating violent crime in the U.S.[5] Early into that administration, Attorney General Jeff Sessions announced the "reinvigoration of Project Safe Neighborhoods," an initiative to reduce violent crime.[6] Even enforcement of fraud largely looked within the U.S. borders,[7] though there were notable exceptions, particularly in New York.[8]

For the following four years, the department continued its emphasis on prosecuting violent gangs, noting in October 2020 that "Combating MS-13 has been a top priority for the Department of Justice."[9]

It is still early into the Biden administration, but enforcement of transnational fraud, money laundering and corruption appears to have returned with renewed vigor.

The effort received a boost even before Biden was inaugurated. On Jan. 1, the U.S. Senate overrode then-President Donald Trump's veto to pass the Anti-Money Laundering Act of 2020, which, among other things:

- Increased incentives and protections for whistleblowers reporting on money laundering and Bank Secrecy Act violations;[10]

- Enhanced penalties for violating anti-money laundering laws and the BSA;[11]
- Broadened the BSA's coverage to capture dealers of antiquities and cryptocurrency;[12] and
- Perhaps most consequentially, provided authority for the DOJ and Treasury to obtain records from foreign financial institutions with a correspondent account in the U.S.[13]

The last provision may have the most immediate, practical impact for those U.S. banks that maintain correspondent accounts for foreign financial institutions. The new statute, coupled with a 2019 opinion by the U.S. Court of Appeals for the D.C. Circuit, In re: Sealed Case,[14] means that U.S. authorities hold a proverbial hammer over foreign banks to obtain records related to any account — not just the correspondent account.

Traditionally, prosecutors have had to go through the cumbersome process of submitting a mutual legal assistance treaty, or MLAT, request from a foreign government to provide records in assisting a U.S. investigation.

The MLAT vetting process, which is routed through Washington, D.C., and the inevitable delay — sometimes years — in obtaining the material often means that an MLAT request is never submitted. The investment of time and effort is simply not worth the long wait to get something that the foreign authorities may or may not believe is responsive and prudent to produce.

The new law allows law enforcement to circumvent this process by compelling the production of records in trial-admissible form.[15] Although banks can seek reasonable time to comply with the subpoenas, the wait for prosecutors will not be counted in years.

The AMLA provides for enforcement of subpoena requests in federal court, with the threat of stiff penalties on the correspondent bank — $50,000 per day to start, and potentially more after 60 days — as well as civil penalties on any U.S. bank that fails to terminate a correspondent relationship for a noncomplying institution.[16]

It is against the backdrop of this enhanced statutory authority and incentives for whistleblowers that the Biden administration announced its emphasis on rooting out transnational corruption. The DOJ had for years strengthened ties with foreign authorities to collaborate in Foreign Corrupt Practices Act investigations.

For example, in December 2016, a Brazilian conglomerate, Odebrecht SA, and Brazilian petrochemical company Braskem SA pleaded guilty in the U.S. District Court for the Eastern District of New York, and agreed to pay a $3.5 billion penalty to resolve their cases in the U.S., Brazil and Switzerland, all stemming from schemes to pay hundreds of millions of dollars in bribes to government officials in different countries.[17]

Other charges, stemming from the same investigation followed.[18] The corporate resolution, according to the U.S. Attorney's Office, was the "result of an extraordinary multinational effort"; the FBI thanked its "Brazilian and Swiss partners for tireless work in this effort."[19]

Those efforts have apparently only grown, with more recent large multinational resolutions, and more praise from U.S. law enforcement for the assistance provided by foreign authorities.[20]

What to Keep an Eye On

Practical Effect of the Subpoena Power and Potential Challenges to its Use

Although a potential game changer for banks, many questions remain as to how the broader subpoena power will operate in practice.

It is not clear, for example, what self-policing protocols the government will institute; what internal hurdles will be placed in front of line prosecutors in issuing subpoenas on foreign banks that could harm international relationships; and whether the government will seek civil penalties against U.S.

banks that do not end relationships with noncomplying foreign banks.

Moreover, while the D.C. Circuit in In re: Sealed Case held that a U.S. court had personal jurisdiction and comity did not preclude enforcement of a subpoena issued on a foreign bank — under the previous, less expansive version of the statute — other circuits have not yet spoken.

Nor did the carefully written opinion preclude challenges in cases where (1) the subpoena is directed at a noncorrespondent account; (2) the government's interests are something less weighty than obtaining information about North Korea's nuclear program; (3) there is no history of noncompliance with MLAT requests by the foreign government; and (4) there is a realistic prospect of harsh consequences for the foreign bank in disclosing the records.

Whistleblower Activity

The AMLA significantly increased the potential reward for whistleblowers who provide information about BSA violations, from the old ceiling of $150,000 to a new maximum of 30% of the government's recovery, if the monetary sanction exceeds $1 million.

The Treasury also now "shall" pay such an award and no longer "may" choose not to, though how much it will pay remains a discretionary decision.

Finally, whistleblowers now also receive protection from retaliation by employers.

There are reasons to think these changes may have a more modest effect on whistleblower activity than expected. Although the potentially significant upside may incentivize some attorneys specializing in whistleblower representation to take on more representations, the lack of a floor for a potential payout, with no right to appeal the decision,[21] may deter others.

Moreover, the $1 million threshold excludes forfeiture, restitution and victim compensation payments,[22] thereby leaving a very high bar for getting any money, much less substantial payouts.

Nevertheless, the sheer upside of multimillion-dollar award may drive up the interest from whistleblowers, particularly if a large reward is publicized by the government, as the U.S. Securities and Exchange Commission has traditionally done for its whistleblowers.[23]

Increased Prosecution of Foreign Nationals With Limited Ties to the U.S.

With increased cooperation from some foreign governments, the ability to subpoena records in trial-admissible form from foreign banks, and a mandate to root out cooperation overseas, U.S. law enforcement may be extending its reach even further than in the past.

The trend started under the last administration, and continued through a brief setback in an FCPA case. In a 2018 opinion, U.S. v. Hoskins,[24] the U.S. Court of Appeals for the Second Circuit held that the government could not rely on general and broad principles of conspiracy and aiding and abetting to charge an FCPA violation over a noncitizen, who was not employed by a U.S. company, and who did not travel to the U.S. during the commission of the bribery scheme.

The FCPA, the court explained, carefully delineated the categories of foreign nationals who could come under the FCPA's purview. The government decided to proceed under a different theory to trial, that the employee was an agent for the U.S. parent company, and the district court ultimately threw out the jury's guilty verdict; not ready to give up, the government appealed that decision, and the appeal is still pending.[25]

Undeterred, the DOJ updated the FCPA resource guide, not to announce a limit on FCPA enforcement over foreign individuals following Hoskins, but rather to note the decision, and to add that a lower court elsewhere took a different view. In practical terms, Hoskins is unlikely to affect enforcement.

More recently, in May, the DOJ unsealed an indictment against two Austrian citizens, Peter Weinzierl and Alexander Waldstein, arrested in the U.K., both related to the Odebrecht prosecution.[26] Notably the indictment charged money laundering, not FCPA counts, for funneling money to allegedly pay bribes to government officials in several countries.

Unless Hoskins is overturned or appellate courts disagree with Hoskins, money laundering may be the prosecutors' charge of choice going forward. Almost every allegation of corruption is accompanied by allegations of wiring the proceeds of a crime. Yet the maximum prison sentence for money laundering is substantial — 20 years — with a fine that could amount to twice the amount laundered.[27]

Given these developments, there is reason to think that Weinzierl and the DOJ's expansive view of agency relationship in Hoskins is part of an accelerating trend of aggressive prosecution of foreign nationals living abroad that have any conceivable connection to a U.S. company.

Of course once these individuals are prosecuted, and, often, cooperate, U.S. companies will increasingly find themselves in the DOJ's crosshairs.

What Businesses Can Do Today to Prepare for Tomorrow

These legal developments and the anticipated increase in enforcement, particularly for conduct occurring abroad, means that companies should consider taking at least three concrete steps today to protect themselves.

First, foreign banks should consider working with U.S. banks to ensure that accounts not related to any U.S. correspondent account are segregated — that is, that they have no crossover with any U.S. correspondent accounts.

Although the AMLA would still allow U.S. law enforcement to go after those isolated accounts, foreign banks would be well-positioned to move to quash the subpoena based on lack of personal jurisdiction. And because of the potential for setting unfavorable precedent, U.S. authorities may be selective in issuing a subpoena on a foreign bank only for an account that had never touched a correspondent account.

Second, companies should ensure they have strong reporting mechanisms in place as part of their compliance programs. The enhanced whistleblower incentives and protections for reporting potential BSA or AMLA violations will have less impact on companies that encourage reporting and provide clear channels for escalation of concerns, including anonymous ones.

Relatedly, companies should treat incidences of nonreporting as noncompliance, subject to discipline and, conversely, provide positive feedback for reporting issues. When a quick internal investigation proves the concerns unmerited, the employee should still be commended, not discouraged, for coming forward.

Third, U.S. financial services companies with operations abroad should evaluate their current anti-money laundering and anti-corruption programs in anticipation of the increased appetite by the government to launch investigations. Robust compliance programs not only prevent violations in the first place but could also provide leverage in negotiating resolutions with the government.

Prosecutors are more likely to consider any single violation an isolated incident rather than an indication of a culture of noncompliance, particularly if the company has, for instance, taken concrete steps to screen for excluded parties, proactively monitor for potential issues, and mitigate AML and anti-corruption risks.

Harsh penalties and monitors are less likely to be installed if the program needs calibration to prevent future subversions rather than a major overhaul.

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[1] Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, June 3, 2021, available at,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/.

[2] Attorney General Holder at the African Union Summit, July 25, 2010, available at, https://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit.

[3] Rubenfeld, Samuel, March 6, 2014, The Morning Risk Report: DOJ Kleptocracy Initiative Roars With Record Haul, https://www.wsj.com/articles/BL-252B-3735.

[4] Attorney General Holder Delivers Remarksat the Ukraine Forum on Asset Recovery, April 29, 2014, https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarksat-ukraine-forum-asset-recovery.

[5] Department of Justice Awards More Than $458 Million to Fight Violent Crime, November 2, 2020, available at, https://www.justice.gov/opa/pr/department-justice-awards-more-458-million-fight-violent-crime.

[6] Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce Rising Tide of Violent Crime, October 5, 2017, available at https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other.

[7] Announcement of the Task Force on Market Integrity and Consumer Fraud, available at, https://www.justice.gov/fraudtaskforce; Executive Order 13844 of July 11, 2018, available at https://www.govinfo.gov/content/pkg/FR-2018-07-16/pdf/2018-15299.pdf.

[8] See, e.g., Three Former Mozambican Government Officials and Five Business Executives Indicted in Alleged $2 Billion Fraud and Money Laundering Scheme That Victimized U.S. Investors, March 7, 2019 Press Release, available at https://www.justice.gov/usao-edny/pr/three-former-mozambican-government-officials-and-five-business-executives-indicted.

[9] Department of Justice Releases Report on its Efforts to Disrupt, Dismantle, and Destroy MS-13, available at https://www.justice.gov/opa/pr/department-justice-releases-report-its-efforts-disrupt-dismantle-and-destroy-ms-13.

[10] See generally 31 U.S.C. § 5323.

[11] See 31 U.S.C. § 5335(d).

[12] See 31 U.S.C. §5312(a)(2)(Y).

[13] See 31 U.S.C. § 5318(k)(3)(A)(i).

[14] In re Sealed Case , 932 F.3d 915 (D.C. Cir. 2019).

[15] See 31 U.S.C. § 5318(k)(3)(A)(ii).

[16] See 31 U.S.C. § 5318(k)(3)(A)(i)

[17] Odebrecht And Braskem Plead Guilty And Agree To Pay At Least $3.5 Billion In Global Criminal Penalties To Resolve Largest Foreign Bribery Case In History, December 21, 2016, available at https://www.justice.gov/usao-edny/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-criminal.

[18] Two Individuals Charged for Their Role in Bribery and Money Laundering Scheme Involving Former High-Ranking Government Official in Panama, July 6, 2020, https://www.justice.gov/usao-

edny/pr/two-individuals-charged-their-role-bribery-and-money-laundering-scheme-involving-former.

[19] Odebrecht And Braskem Plead Guilty And Agree To Pay At Least $3.5 Billion In Global Criminal Penalties To Resolve Largest Foreign Bribery Case In History, December 21, 2016, available at https://www.justice.gov/usao-edny/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-criminal.

[20] See, e.g., Vitol Inc. Agrees to Pay Over $135 Million to Resolve Charges for Bribery Schemes in Latin America, December 3, 2020, available at https://www.justice.gov/usao-edny/pr/vitol-inc-agrees-pay-over-135-million-resolve-charges-bribery-schemes-latin-america.

[21] 31 U.S.C. § 5323(f)(2)(A).

[22] 31 U.S.C. § 5323(a)(2)(B).

[23] Published at https://www.sec.gov/whistleblower/pressreleases.

[24] United States v. Hoskins, 902 F.3d 69, 97 (2d Cir. 2018).

[25] Second Circuit Docket No. 20-842.

[26] Indictment available at https://www.justice.gov/usao-edny/press-release/file/1397491/download.

[27] 18 U.S.C. § 1956(a)(1)(B)(ii).