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The Biden Administration Intensifies Scrutiny on Corruption with New National Security Study Memorandum and Joint Task Force

On June 3, 2021, President Joe Biden issued a National Security Study Memorandum (NSSM) directing several federal agencies, including the Department of Justice (DOJ), to conduct an interagency review and submit a report and recommendations within 200 days of the NSSM. The NSSM is significant because it "establish[es] countering corruption as a core United States national security interest." Moreover, the NSSM represents the Biden Administration's continued crackdown on the use of U.S. financial institutions to launder criminal proceeds, and this time it is through the lens of combatting corruption.

Just a few days later on June 7, 2021, U.S. Attorney General Merrick B. Garland announced that the Department of Justice would create Joint Task Force Alpha to fight corruption in Central America as well as combat human smuggling and trafficking. Specifically, prosecutorial resources of the DOJ and the Department of Homeland Security (DHS) will form the Joint Task Force Alpha and focus on Mexico and the Northern Triangle countries of Guatemala, El Salvador, and Honduras.

The NSSM and Joint Task Force Alpha confirm that anti-corruption (both domestic and international) is and will continue to be a very high priority for the Biden Administration.

The NSSM

The NSSM aims to "promote good governance; bring transparency to the United States and global financial systems; prevent and combat corruption at home and abroad; and make it increasingly difficult for corrupt actors to shield their activities." The notable strategies for combatting corruption, include:

- robustly implementing Federal law requiring United States companies to report their beneficial owner or owners to the Department of the Treasury
- addressing the demand side of bribery
- holding corrupt actors accountable using civil enforcement actions, advisories, or sanctions
- strengthening financial institutions' frameworks to prevent corruption in development finance projects
- supporting and strengthening the capacity of civil society, media, and other oversight and accountability actors to research corruption, advocate for change, investigate corruption, and hold bad actors accountable
- assisting domestic and foreign authorities to implement transparency, oversight, and accountability measures to counter corruption

Implications for FCPA and Other Illicit Finance Enforcement

The U.S. Government uses the U.S. Foreign Corrupt Practices Act (FCPA) as the primary mechanism to drive anti-corruption compliance abroad. Over the last two decades, FCPA enforcement has steadily increased regardless of the political climate or administration in power. Recently, FCPA penalties and settlements hit record highs with 2020 and 2019 being the two largest years ever for FCPA enforcement in terms of total penalty amounts, as further discussed in GT Alert, FCPA Enforcement: What to Expect in 2021 (White Collar Insights - 2021 Outlook Series - Part 1).

The NSSM directs the U.S. government to "work with international partners to counteract strategic corruption" and requires multiple U.S. agencies to work together to provide recommendations. The NSSM directives would seem to support and promote the growing trend in FCPA enforcement (and elsewhere) of more multi-jurisdictional parallel investigations and greater interagency cooperation. Even before the NSSM, commentators predicted a continued increase in FCPA enforcement in the coming years. So, in that respect, the NSSM is an expected spotlight on the U.S. Government's anti-corruption efforts.

The FCPA prohibits persons subject to U.S. jurisdiction from promising, offering or giving anything of value, directly or indirectly, to any "foreign official" in order to obtain or retain business, or secure any improper advantage. In other words, the FCPA prohibits U.S. companies from paying bribes to further their business interests. However, the FCPA has limitations because it only prohibits supply-side bribery. As a result, the U.S. government relies on a mishmash of statutes like the money laundering statutes to prosecute the so-called demand side of bribery, i.e. prosecuting corrupt foreign government officials who funnel money into or through the United States. The NSSM's explicit emphasis on addressing the demand side of bribery may foreshadow increased efforts by law enforcement to use the money laundering statutes as a means of pursuing foreign corruption cases.

Notably, the NSSM comes on the heels of enactment of a series of new money laundering and foreign corruption provisions in the National Defense Authorization Act of 2021 (NDAA), the creation of a new corporate beneficiary registry that will give law enforcement a potentially powerful new tool to trace the proceeds of corruption in the U.S. financial system.

Importance of AML and FCPA Compliance

While it is too early to predict the ultimate NSSM recommendations, we do know that companies currently subject to the FCPA and AML obligations, especially financial institutions and those participating in development finance projects, may experience greater scrutiny for possible corruption violations and/or for facilitating the movement of corrupt proceeds. A strong compliance program is necessary to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

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