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# *Biden: The Fight Against Foreign and Transnational Corruption Is a National Security Interest*

June 8, 2021

On June 3, 2021, President Biden issued a National Security Memorandum establishing the fight against corruption both at home and abroad as a core United States national security interest and directing the development of a 200-day interagency review designed to culminate in a report and recommendations on how the United States government and its partners can better combat corruption, enhance transparency in the global financial system and promote good governance. When combined with the anti-money laundering (AML) legislation that entered into force with the January 2021 bipartisan passage of the National Defense Authorization Act for Fiscal Year 2021 (NDAA)<sup>1</sup>—the most significant reforms to US AML laws since the 2001 adoption of the USA PATRIOT Act—and a review of sanctions policy conducted by the Treasury Department, the Memorandum may lead to a heightened focus on illicit financial activity and corruption and may ultimately result in additional resources being allocated to anti-corruption and AML enforcement.

## **A. Overview of the Memorandum**

Defining the need to “counter[] corruption” as a “core United States national security interest,” President Biden advances a multifaceted policy initiative that rests on three key pillars: promoting good governance, ensuring transparency in global financial systems, and combating and preventing corruption. We can expect more detail on President Biden’s anti-corruption strategy with the publication of the Interagency Report after 200 days. President Biden’s focus on promoting good governance, increasing transparency and reducing impunity centers on the following themes:

- Increasing tools available to domestic and foreign anti-corruption efforts, including modernizing resources, strengthening enforcement capacities and promoting anti-corruption norms;

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<sup>1</sup> The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020).

- Promoting cooperation among US agencies and with international partners, including by enhancing US anti-corruption resources provided to foreign countries and by establishing best practices for foreign assistance and security cooperation activities;
- Creating public-private partnerships to combat corruption, including strengthening the ability of civil society, media, and other oversight and accountability actors, like nongovernmental organizations, to investigate and uncover corruption and advocate for reform;
- Combating illicit domestic and international financial activities by, among other things, accelerating regulatory reforms that increase transparency in the beneficial ownership of companies, given the role that opaque corporate structures have played in facilitating corrupt activities; and
- Holding accountable corrupt individuals and transnational criminal organizations, including through stolen-asset recovery and the return of those assets for the benefit of citizens harmed by corruption.<sup>2</sup>

## **B. Fighting Corruption at the Crossroads of AML, Sanctions and the FCPA**

The Biden Administration appears poised to continue the existing trend toward using AML and sanctions tools in concert with the Foreign Corrupt Practices Act (FCPA) to counter foreign government corruption. President Biden’s efforts build upon the framework recently established by the Corporate Transparency Act (CTA),<sup>3</sup> a key component of the AML Act of 2020 (AMLA). The CTA requires the Financial Crimes Enforcement Network (FinCEN) to create and maintain a registry of beneficial ownership information for “reporting companies”<sup>4</sup> with the same types of information as are required by the Customer Due Diligence (CDD) Rule,<sup>5</sup> which applies to the identification and verification of beneficial ownership upon account opening.<sup>6</sup> President Biden’s interagency review

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<sup>2</sup> On June 7, 2021, the DOJ announced that it had seized 63.7 bitcoins (approximately valued at \$2.3 million), funds allegedly representing ransom payment proceeds to individuals from DarkSide, a group which targeted Colonial Pipeline on or about May 7, 2021. The ransomware attack resulted in Colonial Pipeline removing parts of its infrastructure from operation. Colonial Pipeline notified the FBI that DarkSide had accessed its computer network and that it had paid the group approximately 75 bitcoins as ransom. The DOJ’s seizure signals the Biden Administration’s swiftness in using available resources to fight extortion, recover stolen assets, and dismantle criminal enterprises. Department of Justice Seizes \$2.3 Million in Cryptocurrency Paid to the Ransomware Extortionists Darkside, No. 21-528 (June 7, 2021) <https://www.justice.gov/opa/pr/departments-justice-seizes-23-million-cryptocurrency-paid-ransomware-extortionists-darkside>.

<sup>3</sup> NDAA §§ 6401-6403.

<sup>4</sup> The CTA defines a “reporting company” as “a corporation, limited liability company, or other similar entity” that is either “created by the filing of a document” with a state or created in a foreign jurisdiction but “registered to do business” in the United States by the filing of a document with a state. Id. § 6403(a) (adding 31 U.S.C. § 5336(a)(11)).

<sup>5</sup> See 81 Fed. Reg. 29,398 (May 11, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf>.

<sup>6</sup> NDAA § 6403(d)(1). While the rulemaking process will define the CTA’s contours and determine a course for reporting beneficial ownership of existing companies, reporting companies will be required to provide

has been directed to use the “robust” beneficial ownership reporting required by the AMLA/CTA to identify and prosecute bad actors as well as to develop preventive strategies to address the use of anonymous companies by criminals to raise, move, store and use assets acquired through illicit means. The approach may narrow at least one channel for sanctions evasion, money laundering, tax fraud, human and drug trafficking, foreign corruption, and other crimes.<sup>7</sup>

The 2016 Global Magnitsky Human Rights Accountability Act (Global Magnitsky Act) also empowered the President to impose sanctions for the corrupt conduct of current and former government officials in their commercial and financial dealings anywhere in the world.<sup>8</sup> The Treasury Department’s sanctions policy review, announced in April 2021, also illustrates this shift to a multilateral approach to sanctions coordination, especially on corruption-related issues, after the unilateralism of the prior administration.<sup>9</sup> Treasury’s goal in this review appears to be to make the sanctions regime more efficient in fighting corruption, in part by reducing the collateral consequences that often accompany sanctions, such as changes to the global economy and unintentional humanitarian effects.

So too has the Department of Justice (DOJ) increasingly used the Money Laundering Control Act (MLCA) to prosecute foreign officials and other individuals whose conduct cannot otherwise be reached under the FCPA. The Second Circuit’s 2018 ruling in *United States v. Hoskins*<sup>10</sup> constrained the FCPA’s jurisdictional reach of certain non-US person defendants. Even prior to *Hoskins*, the DOJ frequently brought charges under the MLCA against defendants—including foreign officials—who were engaged in transactions involving the proceeds of violations of the FCPA or foreign bribery laws or who were engaged in transactions with an intent to promote violations of the FCPA or foreign bribery laws, even when the FCPA did not cover those defendants’ conduct directly.<sup>11</sup> After *Hoskins*, the Government may view use of the MLCA as a particularly helpful tool to fight foreign corruption and bribery.

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FinCEN with beneficial ownership information upon formation. The CTA will require reporting companies to disclose for each beneficial owner a name, address, date of birth and driver’s license or other form of identification number prescribed by the statute. *Id.* § 6403(a) (adding 31 U.S.C. § 5336(b)(2)).

<sup>7</sup> *Id.* § 6402(3).

<sup>8</sup> Pub. L. No. 114-328, 130 Stat. 2533 et seq. On December 20, 2017, President Trump issued a new Executive Order (EO) broadening the Global Magnitsky Act’s sanctions authority. Executive Order 13818, Dec. 20, 2017. For example, the Global Magnitsky Act permitted sanctions for “government officials . . . who are engaged in or responsible for acts of significant corruption.” The 2017 EO changed “significant acts of corruption” to “corruption,” and thus expanded the conduct applicable to the law’s reach.

<sup>9</sup> Deputy Secretary of the Treasury Wally Adeyemo’s Roundtable Discussion with Securities Industry and Financial Markets Association Board of Directors, <https://home.treasury.gov/news/press-releases/jy0141>.

<sup>10</sup> 902 F.3d 69 (2d Cir. 2018) (ruling that a defendant could not be charged with violating the FCPA under conspiracy or accomplice liability if the defendant was not in the category of persons directly covered by the statute).

<sup>11</sup> See e.g., *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004) (holding that the DOJ need not prove an underlying FCPA violation to establish a conspiracy to launder money in violation of the MLCA when the specified unlawful activity involved the FCPA); *United States v. Luis Carlos De Leon-Perez*, Indictment ¶¶ 7-11, No. 4:17-cr-00514 (S.D. Texas Aug. 23, 2017), ECF No. 1 (charging current or former

## C. Key Takeaways

### 1. Robust Enforcement Environment Likely to Intensify

The Biden Administration's focus on the fight against corruption as a "core" national security interest, with an express focus on combating corruption and bringing transparency to the global financial system, may result in more resources being dedicated to anti-corruption and AML enforcement and may herald an even more aggressive enforcement environment than the one that gave us 2020's record-breaking FCPA settlements.

Developments in these areas will put pressure on companies and financial institutions to integrate their AML, sanctions and anti-corruption functions in order to leverage information—both internal and external—to proactively identify and manage risk. Creating and maintaining a beneficial ownership registry, as the CTA directs, will be a complex undertaking and likely will significantly impact how financial institutions manage their financial crimes compliance risk.<sup>12</sup> Practitioners will need to be ready to advise clients that the failure to do so likely will have implications across compliance areas (e.g., failures to detect corrupt officials using accounts will be more likely to expose the financial institution or company to both FCPA- and AML-related inquiries).

An increased focus on collecting, analyzing and using data across potential enforcement areas also creates potential advantages. This focus on data could enhance the customer onboarding process, making due diligence processes substantially more efficient for financial institutions and other companies. For example, financial institutions may use beneficial ownership information to verify customer data, but they could also use the information as a resource for satisfying customer information collection requirements.

### 2. Interagency and International Cooperation

President Biden's mandate seeks to increase interagency and international coordination. As US government agencies coordinate their efforts, responsibility for certain aspects of anti-corruption enforcement may shift and be reallocated between agencies or individuals. Companies and their counsel should closely follow these developments in order to manage future engagement with enforcement authorities on the FCPA, AML and sanctions.

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Venezuelan government officials with money laundering under the MLCA for allegedly participating in a scheme involving bribes made to corruptly secure contracts or priority in payment from a Venezuelan state-owned energy company); *United States v. Gonzalez*, Information at 3-4, 11, 13-14, No. 13-cr-00901 (S.D.N.Y. Nov. 18, 2013), ECF No. 43 (charging, in part, a Venezuelan government official with travel act and money-laundering violations, which were grounded in the official's intent to promote violations of the FCPA and Travel Act); *United States v. Jean Rene Duperval*, Second Superseding Indictment, No. 1:09-cr-21010 (S.D. Fla. Jan. 19, 2012), ECF No. 685 (charging former director of international relations for a Haitian state-owned telecommunications company for his role in a scheme to launder bribes paid to him by two Miami-based telecommunications companies).

<sup>12</sup> For example, financial institutions must evaluate their current reporting standards and potential policy changes, such as whether to file a Suspicious Activity Report (SAR) in cases where a customer previously provided information inconsistent with the national registry's data.

The Biden Administration's focus on international coordination in the anti-corruption space builds on the May 2018 Policy on Coordination of Corporate Resolution Penalties, which encouraged coordination within the DOJ to prevent the "unnecessary imposition of duplicative fines, penalties, and/or forfeiture" and to achieve fundamental fairness.<sup>13</sup> The DOJ and the Securities and Exchange Commission's (SEC) 2020 update to the FCPA Resource Guide reinforced this aim.<sup>14</sup> Many recent settlements demonstrate international coordination among a diverse set of governmental entities, including those from the United States, Brazil, France, the United Kingdom, Singapore and Malaysia.

### **3. Addressing the Demand Side of Bribery**

The Biden Administration also aims to tackle the demand for improper payments, so we are likely to see continued use of sanctions and AML tools to prosecute foreign government officials, together with and independently of FCPA prosecutions that target the companies and individuals supplying illicit funds. The Biden Administration's coordinated approach to fighting corruption also may deter foreign officials from transacting in US dollars and otherwise using the US financial system to conceal and spend the proceeds of corruption because of the increased difficulty of hiding such illicit activities.

### **4. Benefiting Victims of Corruption**

One aspect of the interagency review's mandate is to recover stolen assets and to use them to benefit affected communities. The Biden Administration apparently aims to create sufficient deterrents on both the supply and demand sides of illicit financial activity so that recovered assets can be used to benefit the communities and individuals that suffer from the theft and waste associated with corruption. The tools included in the AMLA and CTA that require financial institutions to report beneficial ownership information and otherwise increase transparency seem to make it easier to identify the proceeds of illicit activity and to return those proceeds to victims.

It remains to be seen whether this initiative also will result in the creation of programs and institutions focused on addressing the effects of corruption in local communities such as the BOTA Foundation, which was established by the governments of Kazakhstan, the United States and Switzerland as a way to use over \$115 million recovered from bribes paid for Kazakh oil contracts to support programs for poor children and youth and their families in Kazakhstan.

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<sup>13</sup> US Department of Justice, Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JUSTICE MANUAL § 1-12.100, <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>.

<sup>14</sup> The Guide highlighted attempts by the DOJ and the SEC to avoid duplicative penalties and noted one example of positive coordination between the DOJ, the SEC, Brazilian authorities and Swiss authorities in reaching a resolution with Braskem S.A. in 2016. US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act (2020), <https://www.justice.gov/criminal-fraud/file/1292051/download>.