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FCPA to Remain Enforcement Priority Under New Administration Against Backdrop of COVID-19

On March 10, 2021, the United States Senate confirmed D.C. Circuit Judge Merrick Garland as the incoming Attorney General to lead the Department of Justice (DOJ). The confirmation of Biden's nominee to lead the Securities & Exchange Commission (SEC), Gary Gensler, is likely to follow. These selections for the heads of the two regulatory bodies that enforce the Foreign Corrupt Practices Act (FCPA) are expected to reinforce the focus on this area, reflecting President Biden's remarks on the topic. Increased enforcement based on the changing political landscape may also be exacerbated by the increased risk posed by massive government spending and the potential for decreased attention to corporate compliance in the face of a pandemic that has touched every part of the globe over the past year. Companies with exposure in this area should stay attentive to these developments.

Attorneys

[Alexandre H. Rene](#)

[Patrick Welsh](#)

[Nicole D. Horowitz](#)

[Kate Yuan Tian](#)

Trump to Biden: Expectation of Increased Enforcement

Despite President Trump's statements to the contrary, regulatory and criminal enforcement under the FCPA remained active during his administration, with the DOJ and SEC imposing record penalties from 2016 to 2020.¹ While the highest record for average sanctions was \$156 million and for total sanctions was \$1.5 billion through 2015, average sanctions shot up to nearly \$450 million and total sanctions rose to \$5.8 billion by the end of Trump's presidency.² It is important to note, however, that the top six of these historic settlements stemmed from legacy investigations initiated during the Obama era.³ In fact, the DOJ under Trump has commenced fewer new FCPA investigations each year, from 26 in 2016 to five in 2020.⁴

President Biden's advocacy for global anti-corruption efforts during the 2020 campaign indicates that the current administration will expand these efforts.⁵ For example, in early 2020, Biden commented, "[a]s a summit commitment of the United States, I will issue a presidential policy directive that establishes combating corruption as a core national security interest and democratic responsibility, and I will lead efforts internationally to bring transparency to the global financial system, go after illicit tax havens, seize stolen assets, and make it more difficult for leaders who steal from their people to hide behind anonymous front companies."⁶ Biden's appointees are one way of implementing these policy goals.

Attorney General Garland and the Expanding DOJ Task Force

Attorney General Garland, perhaps most widely known for his previous Supreme Court nomination, has extensive prosecution experience with the DOJ in previous Democratic administrations.⁷ Before his appointment to the D.C. Circuit, he served in numerous positions at Main Justice and as an Assistant U.S. Attorney and has expressed excitement about a return to the prosecutor role.⁸ In the FCPA space, he returns to a DOJ foreign bribery unit that has grown to a record size, with 39 total prosecutors.⁹ The DOJ has also strengthened its compliance expertise by hiring a lawyer with experience working on DOJ-appointed corporate monitorships involving companies such as Braskem SA.¹⁰

Garland and the prosecutors in this unit are expected to continue the emphasis on corporate self-disclosure, cooperation, individual accountability, and cross-border coordination with foreign authorities, which have all been key principles of FCPA enforcement since the Obama administration.¹¹ During the past four years, the DOJ codified the FCPA Corporate Enforcement Policy and revised the FCPA Resource Guide, repeatedly emphasizing the call for self-reporting and cooperation.¹² As the Biden administration improves relations with foreign governments, we are likely to see a continued increase in cross-border cooperation between U.S. and foreign authorities in prosecuting and investigating FCPA violations.¹³

Future Leadership and Enforcement Trends at the SEC

If he is confirmed, Biden's nominee to lead the the SEC, Gary Gensler, may likewise usher in a new era of increased scrutiny on public companies and financial institutions for FCPA violations. The SEC under former Chairman Jay Clayton placed an emphasis on "Main Street" investor protections and focused primarily on smaller-scale frauds.¹⁴ Gensler, in contrast, is known for an aggressive enforcement posture towards Wall Street during his tenure at the Commodity Futures Trading Commission (CFTC) under the Obama administration.¹⁵ We can therefore expect that Gensler's SEC may redirect more resources to the oversight and prosecution of corporations and large financial institutions. Moreover, the SEC has recently extended the power to start new investigations and issue subpoenas to 36 senior officials.¹⁶ This breaks from the 2017 decision by the then acting head of the SEC to revoke such authorities from all but two division directors, which may have led to the consistent drop in the number of new cases brought by the SEC since 2016.¹⁷ Providing more SEC attorneys with the ability to bring these cases may reverse this trend and lead to an overall uptick in the number of investigations and enforcement actions.

Potential Increase in Parallel Investigations

We can also anticipate more instances of parallel FCPA investigations by a growing number of authorities, including the CFTC. In March 2019, the CFTC launched its foreign corrupt practices initiative by issuing an enforcement advisory on self-reporting and cooperation for foreign corruption-related Commodity Exchange Act (CEA) violations.¹⁸ In December 2020, the CFTC announced its first ever public action pursuing foreign corruption through the CEA: a settlement with the energy and commodities trading firm Vitol Inc.¹⁹ Given the CFTC's increasing interest in pursuing companies for these types of violations, Gensler's future position at the SEC is expected by many to provide an opportunity for the two agencies to collaborate in bringing FCPA-related enforcement actions.

Recent Related Legislation May Strengthen Capabilities

Recent legislation also enhances the ability of both the DOJ and the SEC to combat FCPA violations. On January 1, 2021, Congress enacted the National Defense Authorization Act (NDAA), which contains provisions that may enhance FCPA enforcement.²⁰ For example, the Kleptocracy Asset Recovery Rewards Act (KARRA) in the NDAA launches a three-year pilot program for whistleblowers that is expected to bolster the existing SEC whistleblower program.²¹ Currently, the SEC's whistleblower program provides financial rewards for individuals who contribute original information about bribes *paid to* foreign government officials. It does not, however, cover potential tips regarding other parties or actions in bribery schemes.²² The KARRA pilot program closes this gap by extending whistleblower awards to those who report the *receiving* of bribes by foreign officials and beyond: a whistleblower may be able to collect up to \$5 million if their information leads to the "forfeiture" of "stolen assets linked to foreign government corruption and the proceeds of such corruption," a relatively broad criterion.²³ Although FCPA enforcement is focused on the giving, rather than the receiving of bribes, whistleblower tips provided under the KARRA pilot program may still be useful if they offer leads to relevant U.S. parties involved in misconduct. How the KARRA is implemented on the ground is yet to be seen, but many are optimistic it will boost the U.S. government's ability to pursue FCPA violations by incentivizing a wider range of leads on foreign corruption from home and abroad.

COVID-19 and the Potential for Increased FCPA Violations and Enforcement

Businesses should also be aware that the COVID-19 pandemic inherently poses heightened FCPA risks. Every government around the world is engaging in massive government purchases that create exposure. Meanwhile, the economic downturn, leading to cut costs and reduced workforces, as well as remote work, creating less internal oversight, have likely weakened existing compliance programs. Increased pressure to profit also incentivizes companies to consider irregular sales and marketing practices, further increasing the chance of corruption. Inevitably, increased corruption in the face of the pandemic will lead to violations for fortified enforcement authorities to prosecute.

Conclusion

Given President Biden’s pledges, the refreshed leadership at the DOJ and the SEC, and the enhanced toolbox for regulators, we expect the FCPA to remain a top enforcement priority under the new administration, with a sustained emphasis on cross-border enforcement, individual accountability, and self-reporting and cooperation. COVID-19 adds opportunities for corruption and related enforcement. Looking ahead, companies should remain vigilant in controlling corruption risks and maintain robust compliance programs to combat against an anticipated uptick in the number and rigor of FCPA investigations.

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1. See The Stanford Law School Foreign Corrupt Practices Act Clearinghouse, *Total and Average Sanctions Imposed on Entity Groups per Year*, <http://fcpa.stanford.edu/statistics-analytics.html> (last visited Mar. 15, 2021).
 2. See The Stanford Law School Foreign Corrupt Practices Act Clearinghouse, *Investigations*, <https://fcpa.stanford.edu/investigations.html> (last visited Mar. 15, 2021).
 3. See The Stanford Law School Foreign Corrupt Practices Act Clearinghouse, *Largest U.S. Monetary Sanctions By Entity Group*, <https://fcpa.stanford.edu/statistics-top-ten.html> (last visited Mar. 15, 2021).
 4. *Id.*
 5. See, e.g., Joseph R. Biden, Jr., *Why America Must Lead Again*, Foreign Affairs (Jan. 23, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>.
 6. *Id.*
 7. Information Regarding Judge Merrick B. Garland, U.S. Court of Appeals D.C. Circuit, <https://www.cadc.uscourts.gov/internet/home.nsf/content/vl+-+judges+-+mbg> (last visited Mar. 15, 2021); *Former Acting U.S. Attorney General Monty Wilkinson’s Remarks*, U.S. Dep’t of Justice (Mar. 11, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-garland-addresses-115000-employees-department-justice-his-first>.
 8. *Id.*
 9. Dylan Tokar, *Justice Department’s Foreign Bribery Unit Adds Prosecutors, Compliance Expertise*, Wall St.J. (Mar. 8, 2021, 5:30 am), <https://www.wsj.com/articles/justice-departments-foreign-bribery-unit-adds-prosecutors-compliance-expertise-11615199402>.
 10. *Id.*
 11. See *Podcast: Insiders’ Perspectives on the Ins and Outs of the 2020 DOJ FCPA Guide: A Conversation with Ropes & Gray’s Anti-Corruption and International Risk Leaders*, Ropesgray.com (July 15, 2020), <https://www.ropesgray.com/en/newsroom/podcasts/2020/July/Podcast-Insiders-Perspectives-on-the-Ins-and-Outs-of-the-2020-DOJ-FCPA-Guide>; A Resource Guide to the U.S. Foreign Corrupt Practices Act, Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (updated July 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> (last visited Mar. 15, 2021) (hereinafter “FCPA Resource Guide”).
 12. A 2018 memo from the Justice Department recognize the costs of monitors and expressing reluctance in employing them. Brian A. Benczkowski, *Selection of Monitors in Criminal Division Matters* (Oct. 11, 2018), U.S. Department of Justice, <https://www.justice.gov/criminal-fraud/file/1100366/download>; FCPA Resource Guide at 54-55.
 13. See Jaclyn Jaeger, *Record Year of FCPA Enforcement a Sign of More to Come in 2021*, Compliance Week (Dec. 10, 2020, 8:30 AM), <https://www.complianceweek.com/regulatory-enforcement/record-year-of-fcpa-enforcement-a-sign-of-more-to-come-in-2021/29815.article>.
 14. See Aaron Nicodemus, *Analysis: With Clayton Leaving, SEC Likely to Target Financial Institutions*, Compliance Week (Nov. 16, 2020, 5:42 PM) <https://www.complianceweek.com/regulatory-policy/analysis-with-clayton-leaving-sec-likely-to-target-financial-institutions/29727.article>; Jay Clayton, *Remarks to the Economic Club of New York* (Sept. 9, 2019), <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.
 15. See Chris Arnold, *Wall Street Insider Turned Tough Market Cop: Biden’s Pick to Head SEC*, NPR (Jan. 27, 2021), <https://www.npr.org/2021/01/27/960723183/wall-street-insider-turned-tough-market-cop-bidens-pick-to-head-sec>.

16. Dave Michaels, *SEC Expands Enforcement Staff's Power to Start New Investigations*, Wall St.J. (Feb. 9, 2021), <https://www.wsj.com/articles/sec-expands-enforcement-staffs-power-to-start-new-investigations-11612894490>.
17. Dave Michael, *SEC Chief Scales Back Powers of Enforcement Staff*, Wall St.J. (Feb. 15, 2017), <https://www.wsj.com/articles/sec-chief-scales-back-powers-of-enforcement-staff-1487199642>.
18. See CFTC Enforcement Advisory: Advisory on Self-Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices (Mar. 6, 2019) (“Enforcement Advisory”); CFTC Press Release Number 7884-19, *CFTC Division of Enforcement Issues Advisory on Violations of the Commodity Exchange Act Involving Foreign Corrupt Practices* (Mar. 6, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7884-19>.
19. CFTC Press Release Number 8326-20, *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8326-20>.
20. Matthew Stephenson, *It's Not Just the Corporate Transparency Act: Other Reasons To Welcome the Passage of the U.S. NDAA*, The Global Anticorruption Blog (Jan. 28, 2021), <https://globalanticorruptionblog.com/2021/01/12/its-not-just-the-corporate-transparency-act-other-reasons-to-welcome-the-passage-of-the-u-s-ndaa/#more-17474>.
21. *Id.*; Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 9701–9703, 134 Stat. 3388, <https://www.congress.gov/bill/116th-congress/house-bill/6395/text/enr>.
22. See FCPA Resource Guide at 82; U.S. Securities and Exchange Commission, *Office of the Whistleblower Frequently Asked Questions*, <https://www.sec.gov/whistleblower/frequently-asked-questions> (last visited Mar. 15, 2021).
23. Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 9701–9703, 134 Stat. 3388, <https://www.congress.gov/bill/116th-congress/house-bill/6395/text/enr>.