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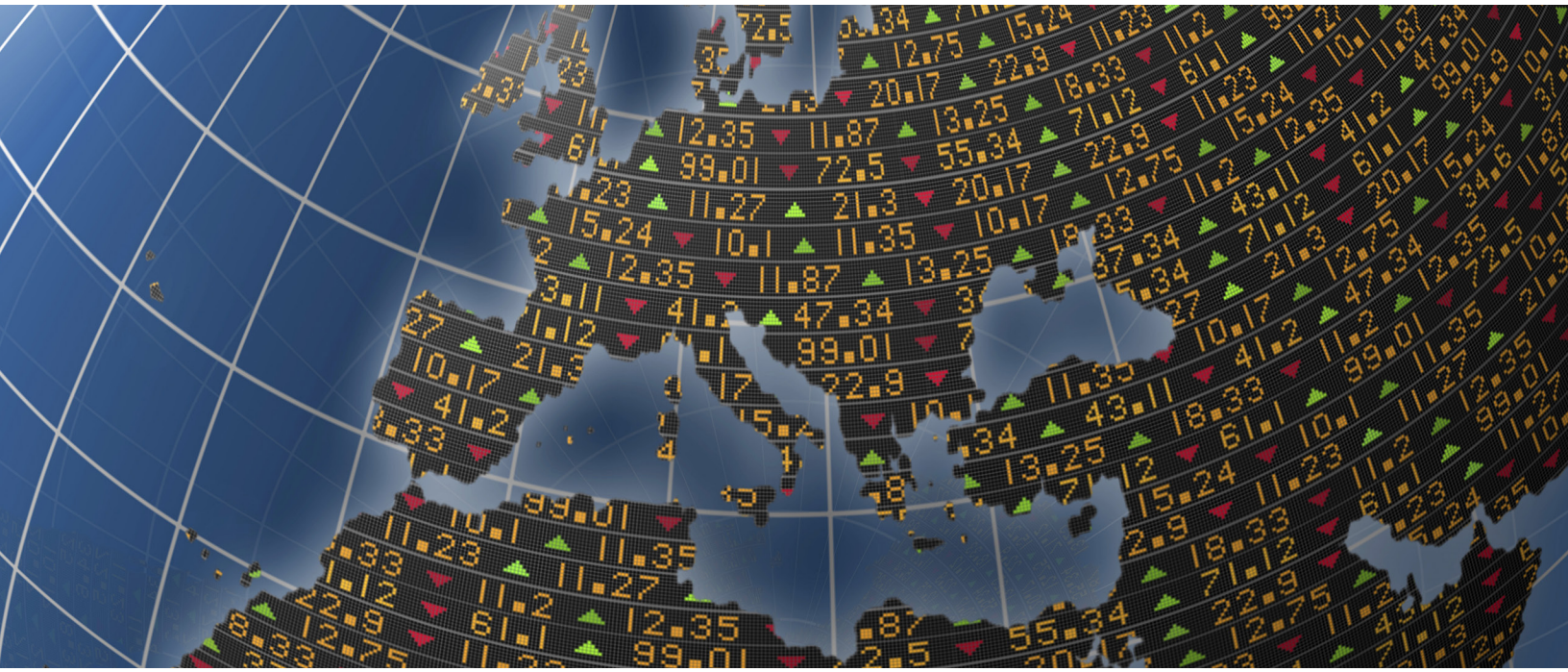

6 OECD Working Group Issues Report on U.S. Anti-Corruption Enforcement

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Pending U.S. Legislation Will Expand Anti-Kleptocracy Initiative

Currently pending before Congress, the National Defense Authorization Act ("NDAA") contains a version of the Kleptocracy Asset Recovery Rewards Act ("KARRA"), which aims to combat corruption by targeting the bribe takers of illicit payments.[1] The new amendment will create a program rewarding whistleblowers who assist authorities in recovering certain proceeds of corruption. To be administered by the Department of the Treasury, this program seeks "to incentivize individuals to notify the U.S. government of assets in U.S. financial institutions

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1. William N. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (hereinafter "NDAA") §§ 9701-9703 (2020), https://www.congress.gov/bill/116th-congress/house-bill/6395/text. As of our publication date, the bill has been vetoed by the President, and the House of Representatives has voted to override the President's veto. *See* Catie Edmondson, *House Votes to Override Trump's Veto of Military Bill*, N.Y. Times (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/politics/house-overrides-trump-veto-military-bill.html.

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that are linked to foreign corruption, allowing authorities to recover and return these assets."[2]

KARRA Whistleblower Rewards

KARRA will reward individuals for furnishing information under the penalty of perjury that leads to the restraining, forfeiture, seizure, or repatriation of stolen assets in an account at a U.S. financial institution, including a U.S. branch of a foreign financial institution.[3] As currently envisioned, KARRA would create a three-year pilot program administered by the Secretary of Treasury, in consultation with the Secretary of State and Attorney General, as appropriate.[4] KARRA therefore is distinct from both the SEC's existing whistleblower program (the "SEC Program")[5] and DOJ's Kleptocracy Asset Recovery Initiative.[6]

Key provisions of KARRA include that:

- reward payments may not exceed $5 million per individual, with an annual cap of $25 million disbursed from the program, unless raised by the Secretary of Treasury or the President, respectively;[7]
- reward payments will be reduced or denied to an individual who participated in the corrupt activity;[8]
- a reward is not available to officers or employees of a federal, state, or local government, or of a foreign government;[9] and
- the Secretary is instructed to implement the program in a manner that does not duplicate or interfere with another payment authorized by DOJ or other agency.[10]

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2. Rep. Stephen Lynch, *Rep. Lynch Introduces the Kleptocracy Asset Recovery Rewards Act*, Press Release (Feb. 27, 2018), https://lynch.house.gov/2018/2/rep-lynch-introduces-kleptocracy-asset-recovery-rewards-act#:~:text=The%20rewards%20program%20established%20by,prevent%20further%20enabling%20of%20foreign.
3. NDAA § 9703(b).
4. *Id.* § 9703(a), (g).
5. *See* U.S. Securities and Exchange Commission, Office of the Whistleblower, *Frequently Asked Questions* (modified Dec. 10, 2020), https://www.sec.gov/whistleblower/frequently-asked-questions; *see also* Kara Brockmeyer, et al., *SEC Adopts Amendments to Whistleblower Rules to Enhance Program Efficiency and Effectiveness*, Debevoise Update (Sept. 24, 2020), https://www.debevoise.com/insights/publications/2020/09/sec-adopts-amendments-to-whistleblower-rules-to (discussing recent amendments to the whistleblower rules including a uniform definition of "whistleblower" and interpretive guidance on "original information").
6. *See* Leslie Wayne, *Shielding Seized Assets From Corruption's Clutches*, N.Y. Times (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/business/justice-department-tries-to-shield-repatriations-from-kleptocrats.html.
7. NDAA § 9703(e).
8. *Id.*
9. *Id.* § 9703(f).
10. *id.* § 9703(c).

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Interaction between KARRA and the SEC Program

KARRA began as a standalone bill to create a relatively modest pilot program. Ultimately inserted into the NDAA, as presently drafted, KARRA supplements the SEC Program. A potential whistleblower likely may furnish information under the two programs, though seemingly cannot seek a reward from both.

The type of qualifying information furnished by a whistleblower differs between the programs. The SEC Program rewards individuals who supply "original information" about a violation of securities laws (including the FCPA), leading to a successful enforcement action.[11] By contrast, KARRA rewards individuals who report information leading to the restraint, seizure, forfeiture, or repatriation of assets held at a U.S. financial institution.

"KARRA will reward individuals for furnishing information … that leads to the restraining, forfeiture, seizure, or repatriation of stolen assets in an account at a U.S. financial institution, including a U.S. branch of a foreign financial institution."

A reward payment under KARRA is likely to be significantly lower than under the SEC Program. KARRA limits an individual's reward to no more than $5 million without the Secretary's approval.[12] Under the SEC Program, an individual is eligible to receive 10%-30% of the monetary sanctions imposed in an enforcement action. The qualification language in the SEC Program ("original information . . . that leads to the successful enforcement") appears stricter than in KARRA ("information leading to"), though the distinction might not persist when final rules are promulgated.

In practice, awards under the SEC Program are likely to be more frequent, as eligibility for KARRA attaches only when stolen assets are restrained, seized, forfeited, or repatriated. Like DOJ's Kleptocracy Asset Recovery Initiative, which was created to forfeit the proceeds of foreign official corruption but which has been beleaguered by difficulties identifying hidden assets and conducting forfeitures, KARRA is likely to face similar hurdles.[13] While some types of (unopposed) seizure

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11. *See, e.g.*, U.S. Securities and Exchange Commission, Office of the Whistleblower, *Office of Whistleblower Guidance for Whistleblower Award Determinations* (Sept. 23, 2020), https://www.sec.gov/files/OWB%20Guidance%20for%20WB%20Award%20Determinations_0.pdf.
12. NDAA § 9703(e).
13. *See Wayne*, *supra* note 6.

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or forfeiture actions can resolve quickly once assets are identified, an adversarial process involving court proceedings may prove more cumbersome than the agreed-upon settlements that resolve most FCPA enforcement actions. Finally, KARRA rewards are capped at a maximum of $5 million, while awards under the SEC's whistleblower provisions can reach many multiples of this.[14]

The types of whistleblowers eligible for rewards also differ between KARRA and the SEC Program. The SEC Program only excludes employees of the SEC, other regulatory agencies, DOJ, the PCAOB, any self-regulatory organization, or other law enforcement organization.[15] By contrast, under KARRA, an individual is disqualified if serving as an officer or employee of an "entity" of federal, state, or local government or of a foreign government who furnishes information "while in the performance of official duties."[16] This provision obviously excludes foreign law enforcement personnel sharing information with U.S. authorities through established channels. But there remain open questions as to whether KARRA would exclude other foreign government employees and, if so, to what extent that might impact the program's efficacy.

Last, KARRA provides for reducing or denying an award to an individual who "knowingly planned, initiated, directly participated in, or facilitated the actions that led to assets of a foreign state or governmental entity being stolen, misappropriated, or illegally diverted or to the payment of bribes or other foreign governmental corruption."[17] The SEC Program contains no such restriction and therefore may attract and reward a whistleblower with "unclean hands" wishing to negotiate with the government.

Conclusion

If it becomes law, the impact of KARRA is unclear, and its relative merits may change significantly over the next year as the Secretary of the Treasury issues rules and guidance defining the program. It supplements DOJ's existing Kleptocracy Asset Recovery Initiative, which together with KARRA, represent enforcement primarily focused on bribe takers. In addition to the SEC's existing whistleblower program,

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14. *See, e.g.*, U.S. Securities and Exchange Commission, *SEC Issues Record $114 Million Award* (Oct. 22, 2020), https://www.sec.gov/news/press-release/2020-266.
15. Dodd-Frank Act, H.R. 4173-468, § 922 (2010).
16. NDAA § 9703(f).
17. *Id.* § 9703(e).

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of which the FCPA component focuses on bribe payers, KARRA signals continued effort and attention directed towards battling the demand side of corruption.

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OECD Working Group Issues Report on U.S. Anti-Corruption Enforcement

On November 17, 2020, the OECD Working Group on Bribery (the "Working Group") issued its Phase 4 Report ("the Report") on U.S. implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments.[1]

The Report commends the United States for "maintaining its prominent role in the fight against transnational corruption." It also highlights the "outstanding achievement" by the United States of bringing 156 cases under the FCPA or other foreign bribery-related offenses, resulting in the conviction or sanctioning of 115 natural persons and 174 legal persons, during the period from September 2010 to July 2019.[2] The Report attributes this robust enforcement to "a combination of [1] enhanced expertise and resources to investigate and prosecute foreign bribery, [2] the enforcement of a broad range of offences in foreign bribery cases, [3] the effective use of non-trial resolutions ["NTRs"], and [4] the development of published policies to incentivise companies' cooperation with law enforcement agencies."[3]

The Report also discusses the methods by which DOJ initially identified issues that led to resolved foreign bribery cases, such as voluntary self-disclosure. It recommends expanding whistleblower protection laws and anti-money laundering requirements to better uncover corrupt activity. The Report also flags the lack of data regarding debarment actions in the United States and includes areas for the Working Group to focus on in the future, such as the impact of the U.S. Supreme Court's decisions in *Kokesh v. SEC* and *Liu v. SEC* on the SEC's ability to obtain disgorgement.

Enhanced Expertise

The Report commends the United States for "significantly enhancing the expertise and resourcing of agencies in charge of investigating and prosecuting foreign bribery."[4] The Report also applauds the development of U.S. prosecutors' "in-house

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1. "Implementing the OECD Anti-Bribery Convention," Organization for Economic Cooperation and Development, https://www.oecd.org/daf/anti-bribery/United-States-Phase-4-Report-ENG.pdf [hereinafter "OECD Report"]; *see also* "OECD Working Group on Bribery Issues Report Commending U.S. for Maintaining Leading Role in the Fight Against Transnational Corruption," DOJ Office of Public Affairs (Nov. 17, 2020), https://www.justice.gov/opa/pr/oecd-working-group-bribery-issues-Report-commending-united-states-maintaining-leading-role (addressing the Report).
2. OECD Report, *supra* note 1 at 7.
3. *Id.*
4. *Id.* at 51.

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compliance expertise," given the importance it attributes to assessing compliance programs in resolving cases.[5]

While the Report praises the "high level of coordination among law enforcement agencies in investigating foreign bribery cases," several of those interviewed by the Working Group expressed apprehension regarding the "growing number of law enforcement agencies investigating FCPA cases."[6] The lead examiners find such concerns to be largely unfounded given the "increasing coordination efforts between historical enforcing agencies and some of the more recent agencies."[7]

Enforcement of a Broad Range of Offenses

The Report also commends the United States for using a broad array of statutes and offenses to supplement enforcement of the FCPA. These laws include the Travel Act (18 U.S.C. § 1952), anti-money laundering statutes (18 U.S.C. §§ 1956-1957), the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), certain licensing, certification, and reporting requirements, and tax laws.[8] Moreover, the Report welcomes efforts by the United States to transcend the FCPA's "supply side" prohibition by pursuing allegedly corrupt foreign public officials through other criminal statutes, including anti-money laundering laws (18 U.S.C. §§ 1956-1957).[9]

Use of Non-Trial Resolutions and Incentives for Cooperation

The Report mainly attributes the United States's high volume of concluded cases to the use of NTRs in the overwhelming majority of instances (96%).[10] The Report notes that NTRs incentivize voluntary disclosures and facilitate resolving complex cases demanding intensive investigations before statutes of limitation expire. The Report also observes the instrumental role of NTRs in multijurisdictional cases, enabling resolutions that are coordinated among several authorities and that provide greater certainty both for companies and prosecutors.[11]

The Report notes concerns within civil society about NTRs for repeat offenders, which potentially could weaken NTRs' deterrent effect.[12] The Report recommends that the United States "address recidivism through appropriate sanctions" and

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5. *Id.* at 50.
6. *Id.*
7. *Id.*
8. *Id.* at 34.
9. *Id.*
10. *Id.* at 71.
11. *Id.*
12. *Id.* at 91.

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"raise awareness of the impact of recidivism on the choice of resolution in FCPA matters."[13] The Report also recommends that law enforcement agencies publicly announce: (i) whether an NPA or DPA with a legal person in an FCPA matter has been extended or completed; and (ii) the ground for any extension of an NPA or DPA with a legal person.[14]

The Report praises the creation of new incentives for voluntary self-disclosure, including issuance of DOJ's Corporate Enforcement Policy ("CEP").[15] The CEP strengthens the incentives for companies to self-report and provides guidance and greater certainty about how the DOJ will reward self-disclosure.[16] The Report notes that, with the CEP, DOJ essentially introduced a new type of NTR: a declination

"[The OECD Report suggests] greater transparency in law enforcement's decision-making process and legal enhancements such as expanded protections of whistleblowers who report possible foreign bribery by non-issuer companies."

with disgorgement, which may be accorded to companies that voluntarily self-disclose, cooperate with the government's investigation, and fully and rapidly remediate the offense.[17] However, private sector representatives express doubts about the sufficiency of DOJ's incentives given uncertainty as to collateral repercussions of such self-disclosure.[18] The Report therefore recommends that the United States continue evaluating the CEP, especially its efficacy in encouraging self-disclosure and deterring foreign bribery.[19]

The Report reiterates some commentators' concerns that DPAs are subject to insufficient judicial review, which have deepened since the April 2016 *Fokker* case.[20]

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13. *Id.* at 92.
14. *Id.*
15. *Id.* at 55.
16. *See* Kara Brockmeyer et al., "U.S. Department of Justice Announces a Revised FCPA Corporate Enforcement Policy" FCPA Update Vol. 9, No. 5 (Dec. 2017), www.debevoise.com/insights/publications/2017/12/fcpa-update-dec-2017-vol-9-no-5.
17. OECD Report, *supra* note 1 at 73.
18. *Id.* at 55.
19. *Id.* at 112.
20. *See U.S. v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016) (holding that, to preserve "the Executive's long-settled primacy over charging," a court is not authorized to reject a DPA based on a finding that the "charging decisions" and "conditions agreed to in the DPA" are inadequate).

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The Report also observes that, beyond the CEP, DOJ has not released consolidated guidance on how prosecutors choose an appropriate NTR – especially as between NPAs and DPAs.[21] While it is not a recommendation in the Report itself, the Report's findings underscore the value of greater clarity regarding how DOJ selects the appropriate NTR, which undoubtedly would be welcomed by both companies and legal practitioners.

Detection of Issues

DOJ currently provides a rough breakdown of how it initially identifies issues that ultimately lead to resolved foreign bribery actions. The Report recommends that the United States continue tracking these sources and providing the data to the Working Group. This recommendation appears to recognize limits on the U.S. authorities' ability to release such data, but encourages it to do so to the "extent permissible."[22]

Although the sources of foreign bribery cases are fairly well distributed among a number of categories, voluntary self-disclosures lead to the most resolved foreign bribery cases (30%). The remaining sources are split among "Whistleblowers Reports" (20%), "Civil or Foreign authorities" (20%), "Media Reports" (15%), and "Other law enforcement activities" (15%).[23] DOJ and the SEC do not identify case-specific sources, citing whistleblower protection laws, as well as concerns about the possible impact on future investigations.[24]

Voluntary Self-Disclosure

The Report lauds the "considerable efforts [by U.S. authorities] to encourage voluntary-self disclosure," which led to the largest subset of resolved cases.[25]

Self-disclosure has trended upward since DOJ implemented its FCPA Pilot Program in 2016 and finalized the CEP in November 2017.[26] During the Pilot Program's first 18 months, the FCPA Unit reported 30 voluntary disclosures, up from 18 in the prior 18-month period.[27]

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21. OECD Report, *supra* note 1 at 91.
22. *Id.* at 32.
23. *Id.* at 13.
24. *Id.* at 13.
25. *Id.* at 29.
26. *Id.* at 27-28.
27. *Id.* at 28.

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Whistleblowing

The Report identifies whistleblowing as another source of detection for U.S. authorities. The Report describes the United States's "multiple layers of protection" for whistleblowers as a "powerful framework" and suggests that the Working Group recognize this approach as a good practice.[28] However, the Report identifies some gaps in such whistleblower protections and recommends that the United States reinforce its protective measures.[29]

The Dodd-Frank Act and the Sarbanes-Oxley Act provide the "two main sources of anti-retaliation protections for private sector whistleblowers who report foreign bribery allegations."[30] The biggest gap concerns whistleblowing involving companies not covered by these laws. The only protection afforded these whistleblowers is the federal anti-retaliation law,[31] which does not offer the whistleblower any remedy. Beyond addressing these gaps, the Report also calls on the United States to "enhance guidance about the protections available."[32] For example, Dodd-Frank's protections apply only if a report is made to the SEC. If a whistleblower, unaware of this requirement, reports illicit conduct only to DOJ, she could lose out on the law's protection.

Anti-Money Laundering Obligations

The Report notes the potential of the United States's Anti-Money Laundering ("AML") regime to uncover corrupt financial activity.

However, the Report also observes that the AML obligations under the Bank Secrecy Act and corresponding Treasury Department regulations do not apply to non-financial institutions, like law firms, accounting firms, and trust and company service providers.[33] It recommends extending these obligations to such non-financial entities.

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28. *Id.* at 22.
29. *Id.*
30. *Id.* at 19.
31. *Id.* at 22, tbl. 1.
32. *Id.* at 22.
33. *Id.* at 15.

Debarment

Although the Report notes that the United States implemented the Phase 3 recommendation that debarment from government contracting and arms export license denials are "applied equally in practice to domestic and foreign bribery,"[34] the Report raises concerns over lack of data. The Report recommends that the United States publish data about the number of debarments that follow from NTRs.[35]

Because most foreign bribery actions end with NTRs, these figures could, according to the Report, serve as a measure of debarment's deterrent impact. It is worth noting, however, that the United States views debarment as "a protective measure of business risk, not a dissuasive" tool.[36]

Recent Supreme Court Decisions

The Report also identifies for follow-up the impact of two recent Supreme Court cases, *Kokesh v. SEC* and *Liu v. SEC*. Among other holdings, *Kokesh* subjected disgorgement to a five-year statute of limitations,[37] and *Liu* limited disgorgement to net profits rather than revenue.[38] *Liu* also required that the SEC return disgorged funds to victims (e.g., investors).[39] The SEC has stated that the *Kokesh* decision cost it $1.1 billion in disgorgement in 2019. *Liu* may further impinge the SEC's ability to collect disgorgement by precluding the remedy when there are no identifiable victims.

The Report flags its concerns "with the significant limitation on disgorgement's availability" following *Liu*. The Report therefore recommends that the Working Group follow up to "ensure that the U.S.'s capacity to recover ill-gotten gains from foreign bribery remains possible, in line with Article 3 of the Convention."

Conclusion

The Report lauds the United States's track record of anti-corruption enforcement and also suggests areas of improvement. These include greater transparency in law enforcement's decision-making process and legal enhancements such as expanded protections of whistleblowers who report possible foreign bribery by non-issuer companies.

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34. *Id.* at 96.
35. *Id.* at 98.
36. *Id.*
37. *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635, 1642 (2017).
38. *Liu v. Securities and Exchange Commission*, 149 S. Ct. 1936, 1940 (2020).
39. *Id*; OECD Report, *supra* note 1 at 94-95.

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With the incoming Biden administration expected to ramp up white-collar criminal enforcement, it is worth watching how and to what extent U.S. authorities will implement the Report's recommendations.

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