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Policing the Demand Side of International Corruption: Checking in on U.S. Anti-Kleptocracy Initiatives

Despite its decades of prosecutions and enforcement actions under the Foreign Corrupt Practices Act, the United States has struggled in its regulatory approach towards corrupt foreign officials. It is not alone in this respect; the Organisation for Economic Co-operation and Development (OECD) has estimated that only one in five bribe takers are ever sanctioned.[1] The FCPA prohibits the supply side of

Continued on page 2

1. OECD (2018), Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm. 1.amazonaws.com/files.cnas.org/documents/CNASReport-EconomicWarfare-160408v02.pdf?mtime=20161010171125&focal=none. The study found that foreign officials who demand or receive bribes are criminally sanctioned by parties to the Anti-Bribery Convention only 20% of the time, and the "information flow between demand-side and supply-side enforcement authorities is often slow."

Policing the Demand Side of International Corruption: Checking in on U.S. Anti-Kleptocracy Initiatives

Continued from page 1

foreign bribery (the offer, promise, or payment of a bribe) but not the demand side (the solicitation, acceptance, or receipt of a bribe).[2] To address the demand side of international bribery, the Department of Justice has relied on other laws – most prominently, anti-money laundering laws – to prosecute foreign officials who are within the jurisdiction of the United States.[3] DOJ has also attempted to tackle this issue by seizing the ill-gotten gains through efforts such as the Kleptocracy Asset Recovery Rewards Act. More recently, corruption has become a ground for imposing sanctions on individuals under the Global Magnitsky Act.[4] Last June, the Biden Administration recast the fight against corruption as a matter of national security.[5] A review of indictments, enforcement actions, and other policy measures taken in the past year demonstrates the strengths and weaknesses of these approaches to the demand side of international corruption.

U.S. Approach: Prosecution, Asset Seizure, and Sanctions

Given the limits of the FCPA's anti-bribery provisions, DOJ has come to rely on anti-money laundering statutes (18 U.S.C. §1956 and §1957) as key tools to prosecute the demand side of international corruption. Section 1956 prohibits engaging in financial transactions to conceal the proceeds of crime or facilitate unlawful activities, and Section 1957 prohibits U.S. persons and persons subject to U.S. jurisdiction from engaging in transactions of greater than $10,000 involving the proceeds of crime. The broad scope of these statutes provides DOJ with the tools to criminalize the taking of bribes – which is outside the reach of the FCPA – so long as the bribe money flows through U.S. financial institutions. Other legislation allows the United States to seize property obtained through corrupt means. 18 U.S.C. §981 states that any property, real or personal, involved in a transaction or attempted

Continued on page 3

2. *See United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (rejecting application of conspiracy statute to prosecute foreign bribe taker). While laws in other jurisdictions, such as the UK Bribery Act, do prohibit the demand side of bribery, those prohibitions are subject to territorial limitations. *See* UK Bribery Act §§ 2, 12, which criminalize wholly extra-territorial passive bribery only where the bribe taker is effectively either a British citizen or ordinarily resident in the UK. The UK Bribery Act contains a separate offense for bribery *of* foreign public officials (UK Bribery Act §6), but no corresponding offense of passive bribery *by* foreign public officials. UK Bribery Act §6.
3. Daniel L. Stein, *Biden Highlights Anti-Money Laundering as a Tool to Combat Corruption*, Jan. 19, 2022, https://www.reuters.com/legal/legalindustry/biden-highlights-anti-money-laundering-tool-combat-corruption-2022-01-19/; Department of Justice, *Panama Intermediaries Each Sentenced to 36 Months in Prison for International Bribery and Money Laundering Scheme* (May 20, 2022), https://www.justice.gov/opa/pr/panama-intermediaries-each-sentenced-36-months-prison-international-bribery-and-money.
4. In its original form, the Global Magnitsky Act allows the President to block or revoke U.S. visas and block all U.S.-based property and interests in property of foreign persons (both individual and entities) who have engaged in specified gross violations of human rights or are government officials or senior associates of such officials who are engaged in or responsible for acts of significant corruption. Executive Order 13818 expanded the Act to cover "serious human rights abuse" and "corruption." Human Rights First, *The Global Magnitsky Act* (April 2019), https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf.
5. Joseph R. Biden, Jr., *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* (June 3, 2021), 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/; Kara Brockmeyer, Andrew Levine, David O'Neil, Jane Shvets, *President Biden Declares the Fight Against Corruption a National Security Priority and Directs Federal Agencies to Enhance Enforcement*, (June 7, 2021), https://www.debevoise.com/insights/publications/2021/06/president-biden-declares-the-fight.

Policing the Demand Side of International Corruption: Checking in on U.S. Anti-Kleptocracy Initiatives

Continued from page 2

transaction in violation of §§ 1956, 1957, or other money laundering provisions, or any property traceable to such property, is subject to forfeiture in the United States. Since 2010, the U.S. government, through the Kleptocracy Asset Recovery Initiative of the Money Laundering and Asset Recovery Section (MLARS) of DOJ has worked to identify the proceeds of foreign corruption, seize those assets where possible, and, in some cases, return those assets to those harmed by the corruption.[6] The initiative was strengthened by the passage of the Kleptocracy Asset Recovery Rewards Act (KARRA) in 2020.[7] KARRA, as part of the National Defense Authorization Act, aims to combat corruption by targeting bribe takers by rewarding whistleblowers who assist the government in recovering proceeds of corruption.[8]

"Since declaring international corruption a national security priority, the Biden Administration has continued to use the anti-money laundering, asset forfeiture, and sanctions mechanisms to combat the demand side of international corruption."

Targeted economic sanctions (potentially cutting individuals off from the U.S. financial system) are also a method for addressing the demand side of bribery. The Global Magnitsky Human Rights Accountability Act (2016) allows the U.S. President to block or revoke U.S. visas and to block all U.S.-based property and interests in property of foreign government officials or senior associates of such officials who are engaged in or responsible for acts of significant corruption.[9]

Challenges to the U.S. Approach

Even with the tools described above, there are significant hurdles to addressing the demand side of international bribery. *First*, there is the problem of proof. Tracing funds through multiple intermediaries to an ultimate recipient can be extremely difficult (and not required for a successful FCPA prosecution). *Second*, there are limits to the legal process. The United States can indict persons outside the United States, but they need to be extradited to the United States (or arrested

Continued on page 4

6. Department of Justice, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation* (2017), https://star.worldbank.org/sites/star/files/booklet_-_english_final_edited.pdf.
7. Kleptocracy Asset Recovery Rewards Act, H.R. 116-60, 116th Cong. §2(a)(3).
8. William N. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (hereinafter "NDAA") §§9701-9703 (2020).
9. Exec. Order No. 13818, 82 Fed. Reg. 60839.

Policing the Demand Side of International Corruption: Checking in on U.S. Anti-Kleptocracy Initiatives

Continued from page 3

while in the United States) to be prosecuted. Criminal forfeiture requires a criminal conviction and civil forfeiture requires that the property be inside the United States.[10]

Third, there are limits to what one country (despite the broad reach of U.S. law enforcement) can do in combatting international bribery. While cooperation among international law enforcement agencies has increased significantly over the past decade in supply-side bribery cases, cooperation is more difficult, if not impossible, when it involves sitting foreign government officials. The OECD study uncovered that international cooperation is not a major source of detection for demand-side bribery. The study noted that cooperation between law enforcement authorities in the demand-side and supply-side jurisdictions did not play a material role in detecting allegations.[11]

Finally, despite the Biden administration's declaration that corruption is a national security issue, the United States has other foreign policy and national security goals that could be complicated by attempts to police behavior of foreign officials.

Recent Cases

Since President Biden's national security memorandum, DOJ has continued to use anti-money laundering statutes to prosecute corrupt foreign officials. In March 2022, DOJ charged two former Venezuelan officials with money laundering for receiving over $1 million in bribes in exchange for agreeing not to pursue criminal charges against certain individuals in Venezuela.[12] The scheme involved funds transferred to a bank account in the Southern District of Florida, establishing a jurisdictional basis for the prosecution.[13] The two individuals were in Venezuela at the time they were indicted and remain at large.[14]

On June 16, Carmelo Urdaneta Aqui, a former Venezuelan oil ministry lawyer, was sentenced to four years in prison by a Miami judge after being charged in a money laundering scheme in 2018.[15] Mr. Aqui was convicted for accepting tens of millions of dollars in bribes, some of which he invested in real estate ventures in the Miami area. The case involved business loans to Venezuela's state-owned oil company,

Continued on page 5

10. 18 U.S.C. § 981.
11. OECD at 15.
12. Department of Justice, *Two Former Senior Venezuelan Prosecutors Charged for Receiving Over $1 Million in Bribes* (Mar. 8, 2022), www.justice.gov/usao-sdfl/pr/two-former-senior-venezuelan-prosecutors-charged-receiving-over-1-million-bribes.
13. *Id.*
14. *Id.*
15. Jay Weaver, *Former top Venezuelan oil ministry lawyer gets 4 years in Miami money laundering case* (June 16, 2022), The Miami Herald, https://www.miamiherald.com/news/local/crime/article262389502.html.

Policing the Demand Side of International Corruption: Checking in on U.S. Anti-Kleptocracy Initiatives

Continued from page 4

PDVSA, that were repaid with inflated returns through a government controlled currency exchange.[16]

Although no foreign government officials were charged in the United States at the time of FCPA resolutions with Odebrecht and Braskem in 2015, a number of former foreign officials have been subsequently charged in money laundering cases. On March 29, 2022, the former Comptroller General of Ecuador, Carlos Ramon Polit, made his initial appearance in Miami for allegedly engaging in a scheme to use the U.S. financial system to launder money to promote and conceal an illegal bribery scheme in Ecuador.[17] He joins several other Latin American officials or their relatives, including two sons of the former president of Panama,[18] who were indicted for receiving bribes as part of the Odebrecht bribery scheme. Polit allegedly solicited and received over $10 million in bribe payments from Odebrecht S.A., in exchange for using his position of power to influence the comptroller's office to benefit Odebrecht.[19]

On the asset seizure and recovery side, in March 2022, the Treasury Department formally launched the KARRA whistleblower program. In doing so, it announced that it seeks information on corrupt assets linked to the Odebrecht scandal, corruption originating in Russia, and from the 1MDB scandal.[20] The announcement specifies that, in order to qualify for the whistleblower bounty, the assets must be in an account at a U.S. financial institution, come within the United States, or come within the possession or control of any U.S. person.[21]

Finally, on the occasion of International Anti-Corruption Day (December 9, 2021), the United States sanctioned alleged bribe takers from Angola, El Salvador, Guatemala, Liberia, and Ukraine under the Global Magnitsky Act.[22] There were also sanctions under the Act against allegedly corrupt military officials in Cambodia,[23]

Continued on page 6

16. *Id.*
17. Department of Justice, *Former Comptroller General of Ecuador Indicted for Alleged Bribery and Money Laundering Scheme* (Mar. 29, 2022), https://www.justice.gov/opa/pr/former-comptroller-general-ecuador-indicted-alleged-bribery-and-money-laundering-scheme.
18. Department of Justice, *Panama Intermediaries Each Sentenced to 36 Months in Prison for International Bribery and Money Laundering Scheme* (May 20, 2022), https://www.justice.gov/opa/pr/panama-intermediaries-each-sentenced-36-months-prison-international-bribery-and-money.
19. *Id.*
20. U.S. Department of Treasury, *Kleptocracy Asset Recovery Rewards Program*, https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence/terrorist-financing-and-financial-crimes/kleptocracy-asset-recovery-rewards-program; Department of Justice, *U.S. Departments of Justice and Treasury Launch Multilateral Russian Oligarch Task Force* (Mar. 16, 2022), https://www.justice.gov/opa/pr/us-departments-justice-and-treasury-launch-multilateral-russian-oligarch-task-force.
21. *Id.*
22. U.S. Department of the Treasury, "Treasury Issues Sanctions on International Anti-Corruption Day" (Dec. 9, 2021), https://home.treasury.gov/news/press-releases/jy0523.
23. U.S. Department of the Treasury, "Treasury Targets Corrupt Military Officials in Cambodia," https://home.treasury.gov/news/press-releases/jy0475.

Continued from page 5

a police official in Mexico,[24] and two sitting heads of state, Milorad Dodik, the ethnic Serbian member of the Bosnian presidency,[25] and President Alyaksandr Lukashenka of Belarus.[26]

Proposed Initiatives

Congress is currently considering a law that would directly address the demand side of bribery. The Foreign Extortion Prevention Act (FEPA), which has been discussed in Congress since 2019, aims to cover any foreign official or agent who "corruptly demands, seeks, receives, or accepts a bribe in or affecting U.S. interstate commerce."[27] The enactment of FEPA would remove the need of the U.S. government to rely on the anti-money laundering statutes to investigate and prosecute cases against bribe takers.

Conclusion

Since declaring international corruption a national security priority, the Biden Administration has continued to use the anti-money laundering, asset forfeiture, and sanctions mechanisms to combat the demand side of international corruption. However, the inherent difficulties of policing extraterritorial conduct remain.

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Continued on page 7

24. U.S. Department of the Treasury, "Treasury Works with Government of Mexico to Sanction Corrupt Police Official and Other Individuals Supporting CJNG" (June 2, 2022), https://home.treasury.gov/news/press-releases/jy0803.
25. U.S. Department of the Treasury, "Treasury Sanctions Milorad Dodik and Associated Media Platform for Destabilizing and Corrupt Activity" (Jan. 5, 2022), https://home.treasury.gov/news/press-releases/jy0549.
26. U.S. Department of the Treasury, "Treasury Sanctions Russians Connected to Gross Human Rights Violations and Corrupt Leader of Belarus" (Mar. 15, 2022), https://home.treasury.gov/news/press-releases/jy0654.
27. Transparency International, *Foreign Extortion Prevention Act (FEPA) Factsheet*, https://us.transparency.org/resource/foreign-extortion-prevention-act-fepa-factsheet/.

U.K. Government Receives Options for Reforming Corporate Criminal Liability Regime

On June 10, 2022, the UK Law Commission published its long-anticipated final report following its review of the law of corporate criminal liability, with a focus on economic crimes.[1] The report explains the proposals that were reviewed and sets out a number of options for reform for the UK Government to consider. Below, we analyze those that will be of most relevance. It had been expected that the Law Commission would provide more concrete recommendations that could lead to significant change, however, the report now leaves the path forward quite open-ended.

Retain or change the identification doctrine? Currently, corporations are generally subject to criminal liability on the basis of the "identification doctrine," meaning that only the conduct of persons who represent its "directing mind and will" can be attributed to the company. The narrow way in which this has been interpreted has been criticized on several grounds, including for making it too difficult to prosecute larger companies for offences committed in their interests by their employees.

Rather than making a clear recommendation, the Law Commission presented three options:

- (1) Retain the identification doctrine (as interpreted by existing case law)
- (2) Extend the identification doctrine by attributing the actions of a member of "senior management" to the company where they engaged in, consented to or connived in the offense. A senior manager is any person (including a director) who has a significant role in managing or organizing the whole or a substantial part of the company's activities, or in making decisions in that respect.
- (3) As with option 2 above, while defining the company's chief executive and chief finance officer as always being senior managers.

The Law Commission considered but rejected the alternative "respondeat superior" model of corporate criminal liability prevalent in the United States, whereby the actions of any employee or agent (not just its directing mind and will) can be attributed to the company. Most responses to the Law Commission's consultation paper did not support this option and highlighted criticisms that it is overly broad and gives too much power and discretion to prosecutors.

Continued on page 8

1. Law Commission, *Corporate Criminal Liability: an options paper* (June 10, 2022), https://www.lawcom.gov.uk/project/corporate-criminal-liability/.

U.K. Government Receives Options for Reforming Corporate Criminal Liability Regime

Continued from page 7

New "failure to prevent" offenses? In response to the difficulty in directly attributing misconduct to companies under the identification doctrine, the UK Government introduced corporate criminal offences for "failure to prevent" bribery and the facilitation of tax evasion. Broadly, these render a company liable where persons associated with it commit bribery or facilitate tax evasion by third parties and the company did not have "adequate procedures" or "reasonable procedures" to prevent the misconduct."

While there had been some expectation that the Law Commission might recommend introducing several new "failure to prevent" economic crime offenses, and this was supported by the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS), only one option was proposed:

- A corporate offense of failure to prevent fraud by an associated person where that person intended to benefit the company or to benefit another person to whom they provide services on behalf of the company. This would incorporate a defense of implementing reasonable procedures to prevent fraud.

The fraud offences would include fraud by false representation, obtaining services dishonestly, the common law offence of cheating the public revenue, false accounting, fraudulent trading, dishonest representation for obtaining benefits, and fraudulent evasion of excise duty.

In particular, the Law Commission rejected the creation of an offense of failure to prevent money laundering. It cited the potential for overlap with the existing money laundering regulations applying to regulated businesses such as banks, law firms and accounting firms, which face higher money laundering risks.

Civil penalties as an alternative to prosecution? Where there is insufficient evidence to prosecute a company for a criminal offense or in less serious cases of wrongdoing, the Law Commission proposed that the relevant authorities be able to use a new civil enforcement mechanism. This could involve giving the SFO and/or the CPS the power to impose administrative monetary penalties on companies, with a right of appeal to an independent tribunal and ultimately to the civil courts. However, the CPS strongly opposed this option, which would give it a quasi-judicial function and require significant internal restructuring.

Analysis. Although it represents an important contribution to the corporate criminal liability field, the Law Commission's patchwork of ideas (not all of which are covered above) provides limited impetus for the UK Government to implement any significant reforms. The lack of a clear direction or recommendations may be due to the wide variety of responses the Law Commission received on many issues,

Continued on page 9

U.K. Government Receives Options for Reforming Corporate Criminal Liability Regime
Continued from page 8

demonstrating the complexity of those issues and the level of disagreement among interested parties. It will be interesting to see which, if any, options the Government decides to take forward. At this stage, no timetable has been set out for any reforms.

The report's rejection of an offense of failure to prevent money laundering is somewhat unexpected. While the Law Commission's reasons make some sense in relation to the regulated sector, a "failure to prevent" offense could complement the existing money laundering offenses in the Proceeds of Crime Act for the much larger number of companies outside the regulated sector.

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