

FCPA Update

A Global Anti-Corruption Newsletter



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7 Latin American Anti-Corruption Enforcement: Focus on the Northern Triangle and Beyond

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DOJ Revises Corporate Criminal Enforcement Policies

On October 28, 2021, Deputy Attorney General Lisa Monaco announced revised corporate enforcement policies including rollbacks of certain DOJ policies softened under the Trump Administration.¹ In this article, we discuss DAG Monaco's speech (the "Monaco Speech") and accompanying internal memo (the "Monaco Memo"), focusing on what's old, what's new, and what to watch for.

In addition to signaling generally a "get tough" approach to white collar crime designed to differentiate the Biden Administration, the recent pronouncements

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1. United States Department of Justice, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime" (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute> [hereinafter the "Monaco Speech"]; Memorandum from the Deputy Attorney General (Lisa O. Monaco), "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download> [hereinafter the "Monaco Memo"].

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suggest an increased focus on when corporate entities should be considered recidivists and potentially ineligible for pretrial diversion. DAG Monaco addressed four developments with potentially significant implications for corporations considering whether to self-report potential misconduct and for those already under investigation:

- **First**, and perhaps most significantly, prosecutors now must consider *all* prior corporate conduct – and not just *similar* conduct – in deciding whether to charge a corporation. In combination with the new advisory panel just announced (see below), this change may impact meaningfully companies caught in DOJ’s crosshairs, particularly given its increasingly aggressive stance on what constitutes criminal behavior (such as in areas like the FCPA).
- **Second**, DAG Monaco announced a return to the “Yates Memo” standard on individual liability, requiring companies to disclose all relevant facts regarding all persons involved in corporate misconduct – both inside and outside the company – to obtain *any* cooperation credit. This reinstatement reversed previous Trump Administration guidance limiting the disclosure obligation to those “substantially involved” in misconduct. The re-imposition of this broader requirement may increase the burdens associated with certain white collar investigations and provide prosecutors additional leverage in negotiations with defense counsel.
- **Third**, DAG Monaco rolled back Trump Administration guidance that independent corporate monitors would be imposed as the exception. Instead, the new guidance notes that prosecutors should consider a monitor where a company’s compliance program and controls are “untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution.”² This signals a return to the more frequent use of monitors in corporate resolutions, as well as the accompanying post-resolution costs and burdens.
- **Last**, the DAG announced the formation of a Corporate Crime Advisory Group (the “CCAG”) within DOJ to consider issues such as recidivism and noncompliance with non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”). We’ll be closely watching what comes out of the CCAG in the coming months.

DAG Monaco also underscored the substantial premium on risk-based compliance programs, stressing that corporations can mitigate risks when they “proactively put in place compliance functions and spend resources anticipating problems.”

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2. Monaco Memo at 4.

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Otherwise, as she noted, DOJ will “ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations.”³

Consideration of Prior Misconduct in Charging Decisions

The latest guidance expands the past conduct prosecutors must consider when deciding whether to charge business entities. The Justice Manual previously required prosecutors to consider “the corporation’s history of similar misconduct.”⁴ But prosecutors are now directed to consider “all misconduct,” even if dissimilar to the conduct under investigation and involving different entities within a corporate family.⁵ Although the new guidance recognizes that some prior acts “may ultimately prove less significant,” prosecutors now “must start from the position that all prior misconduct is potentially relevant.”⁶

“In addition to signaling generally a ‘get tough’ approach to white collar crime designed to differentiate the Biden Administration, the recent pronouncements suggest an increased focus on when corporate entities should be considered recidivists and potentially ineligible for pretrial diversion.”

DAG Monaco stated that this change would align the treatment of corporate and individual criminal histories.⁷ However, there is a difference between an individual recidivist – who presumably controls completely his or her own behavior and can choose not to violate the law in the future – and a large multinational company that employs hundreds of thousands of people around the world. As acknowledged in the Justice Manual (and repeatedly under both Republican and Democratic administrations), no compliance program in the world can prevent all misconduct.⁸

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3. Monaco Speech.
 4. Justice Manual (JM) 9-28.600.
 5. Monaco Memo at 3.
 6. *Id.*
 7. Monaco Speech.
 8. JM 9-28.800 (“[T]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees.”).

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The Monaco Memo does not address how prosecutors should view such factors as the passage of time or the fact that the prior conduct occurred in different regions or by different employees, or other distinguishing factors particular to companies in assessing “all prior misconduct.” Subject to future guidance, this change in DOJ approach could disadvantage large companies (or those part of large corporate families) and those operating in heavily regulated industries, such as financial services, natural resources, energy, and healthcare.

Perhaps anticipating such concerns, DAG Monaco suggested that prior misconduct is most relevant to assessing a company’s culture and compliance program. A record of past misconduct may indicate an absence of “appropriate internal controls and corporate culture to disincentivize criminal activity” and that proposed remediation may fail.⁹ Accordingly, companies defending themselves should expect to address how compliance systems implemented after a past episode or misconduct are relevant – or not – to the occurrence of conduct presently under DOJ investigation.

The Re-imposition of the Yates Memo

Although every administration stresses the importance of individual prosecutions, DAG Monaco called it “unambiguously [DOJ’s] first priority in corporate criminal matters.”¹⁰ As part of this emphasis, DAG Monaco announced that DOJ would reinstate the requirement from a 2015 memo by then-Deputy Attorney General Sally Yates that companies disclose all information about all individual wrongdoers to obtain any cooperation credit (the “Yates Memo”).¹¹

Three years after the Yates Memo, the Trump Administration rejected this all-or-nothing approach. While noting that the Yates Memo’s framework “seemed like a great idea,” then-Deputy Attorney General Rosenstein acknowledged the practical challenges a company faces in complying with the guidance.¹² In fact, Rosenstein noted that DOJ sometimes did not strictly enforce the Yates Memo “because it would have impeded resolutions and wasted resources.”¹³ As a result, DAG Rosenstein announced that, in order to receive cooperation credit, a company would be required to identify only “all individuals *substantially* involved in or responsible

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9. Monaco Memo at 3.

10. Monaco Speech.

11. Memorandum from Sally Quillian Yates, Deputy Attorney General, “Individual Accountability for Corporate Wrongdoing” (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

12. United States Department of Justice, “Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act” (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

13. *Id.*

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for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.”¹⁴

DAG Monaco re-imposed the Yates Memo’s requirement that, to obtain *any* cooperation credit, a corporation now must provide “all nonprivileged information relevant to *all* individuals involved in the misconduct,” both “inside and outside the company.”¹⁵ In explaining this reversion, DAG Monaco stated that: (1) distinctions between who was substantially involved or just involved are “confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government;”¹⁶ (2) even individuals with nonsignificant involvement may have important information to provide prosecutors; and (3) prosecutors (and not defense counsel) “are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct.”¹⁷

As we’ve noted previously,¹⁸ this requirement sometimes may place a heavy burden on cooperating companies to identify all those involved in misconduct. Depending on the ultimate contours of this mandate’s enforcement, companies could face substantially increased investigative expenses and lengthier investigations as a result. With these considerations in mind, it is in the interest of cooperating companies, whenever possible, to reach agreement with the government on the appropriately defined temporal and geographic scope of particular investigations.

Reversal of Course on Monitorships

Another Trump-era policy reversed by the recent guidance concerns the use of independent monitorships. Corporate resolutions sometimes include the imposition of such monitors: professionals from outside the company (and often but not always ex-DOJ officials) appointed to oversee a company’s compliance with conditions of an NPA or DPA. These appointments often follow long investigations and years of identifying and remediating compliance weaknesses.

Monitors – whose fees are paid for by the company – can be extremely expensive and burdensome. Recognizing the potential intrusiveness and expense of monitors, in 2018, then-Assistant Attorney General Brian A. Benczkowski issued guidance on the selection of corporate monitors, providing that prosecutors must weigh

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14. JM 9-28.700 (emphasis added); JM 9-47.120 (credit for cooperation in FCPA matters).

15. Monaco Memo at 3 (emphasis added).

16. Monaco Speech.

17. Monaco Memo at 3-4.

18. *E.g.*, Kara Brockmeyer, Andrew M. Levine, Sarah Wolf, & Javier Alvarez-Oviedo, “DOJ Revises Yates Memo to Provide More Flexibility in Corporate Investigations,” FCPA Update, Vol. 10, No. 5 (Dec. 2018), <https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018>.

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the benefits of a monitorship against the potential costs to the company and that monitors should be the exception and not the rule.¹⁹

In her speech, DAG Monaco directly dispelled any impression that “monitorships are disfavored or are the exception.”²⁰ The Monaco Memo states that a monitorship should be considered “[w]here a corporation’s compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of resolution.”²¹ That prospect, of course, further underscores the criticality of companies’ enhancing their compliance controls over the course of a government investigation.

Formation of a New Advisory Group Suggesting More to Come

The DAG also announced the creation of the CCAG, a new advisory group to “consider various topics that are central to the goal of updating our approach to corporate criminal enforcement.” The CCAG will include relevant representatives from within DOJ and also solicit input from external groups including “the business community, academia, and the defense bar.”²²

According to the Monaco Memo, the CCAG will address topics such as cooperation credit, corporate recidivism, and factors bearing on whether a case should be resolved by an NPA, DPA, or guilty plea.²³ As an example of recidivism, the DAG cited a situation where “a company might have an antitrust investigation one year, a tax investigation the next, and a sanctions investigation two years after that.”²⁴ The implication here is that DOJ is grappling with whether and when diversion programs like NPAs and DPAs will remain available to companies that previously resolved other criminal matters through diversion – possibly a reaction in part to criticism by some where DOJ has agreed to successive NPAs or DPAs with the same company.

Conclusion

The latest revisions to DOJ guidance regarding corporate criminal enforcement mark in part a substantive return to Obama Administration guidance, with the prospect of increasing the burden on corporations attempting to cooperate and settle with DOJ. These updates include requiring prosecutors to consider more

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19. Memorandum from Brian A. Benczkowski, Assistant Attorney General, “Selection of Monitors in Criminal Division Matters” (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.

20. Monaco Speech.

21. Monaco Memo at 4.

22. *Id.* at 2.

23. *Id.*

24. Monaco Speech.

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broadly *all* of a company's past misconduct in making charging decisions; increasing DOJ's expectations regarding what constitutes cooperation, in line with the earlier Yates Memo; and eliminating any perceived presumption against monitors. Additionally, the newly created CCAG appears poised to grapple with important issues such as whether and when a company that received a DPA or NPA in a previous DOJ case can qualify again for pretrial diversion.

These changes may impact meaningfully the calculus of companies and their counsel in considering whether to self-report certain matters to DOJ, underscoring that corporate decisions about whether and how to cooperate or self-disclose, and how to navigate DOJ investigations, require careful attention.

Only time will demonstrate how the recent developments translate into enforcement outcomes. But the current administration has sent a clear warning about its intended surge in white collar prosecutions. Indeed, the importance for companies of developing and maintaining effective risk-based compliance programs has never been clearer. As DAG Monaco cautioned at the end of her recent address: "Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct – or else it's going to cost them down the line."²⁵

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25. *Id.*

Latin American Anti-Corruption Enforcement: Focus on the Northern Triangle and Beyond

As 2021 draws to a close, the Biden Administration's pledge to tackle global corruption is taking shape, notwithstanding that the number of FCPA resolutions remains relatively low compared to previous years. Recent DOJ pronouncements underscore a get-tough approach to white collar crime generally and anti-corruption enforcement in particular. Unsurprisingly, DOJ's anti-corruption efforts in 2021 have focused in significant part on Latin America, long a priority of U.S. prosecutors.¹

Both in response to this U.S. focus and as a result of local grassroots efforts, among other factors, domestic anti-corruption efforts in many Latin American jurisdictions have increased markedly in recent years. Nevertheless, the Pandora Papers' release and the ends of several specialized anti-corruption units in Central America have highlighted challenges in regional enforcement. Other developments in El Salvador and Nicaragua, among other countries, likewise have hindered the fight against corruption by undermining democratic governance and reducing penalties for corrupt actors.

More broadly, companies conducting business in Latin America should remain attuned to variations in local enforcement, precarious political forces, and mounting pressures from U.S. authorities. These shifts all impact compliance risk assessments and the calibration of appropriate risk mitigation efforts. To that end, we highlight below key anti-corruption developments across the region, with a particular focus on Central America.

Anti-Corruption Efforts in Central America's Northern Triangle

The Biden Administration has implemented several strategies to slow the arrival of migrants at the southern U.S. border. One prominent approach involves promoting anti-corruption efforts in Central America as a panacea for the violence, poverty, and poor governance that give rise to mass emigration from the region.²

As previously reported, the Biden Administration published on June 3, 2021 a memorandum framing the global fight against corruption as a core U.S. national

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1. See, e.g., Kara Brockmeyer, Winston M. Paes, et al., "New Prosecution Continues DOJ's Trend of Pursuing Foreign Individuals for Alleged FCPA-Related Misconduct Involving Latin America," FCPA Update Vol. 13, No.1 (Aug. 2021), <https://www.debevoise.com/insights/publications/2021/08/fcpa-update-august-2021>.
 2. See, e.g., Natalie Kitroeff, "Biden Faces a Trade-Off: Stop Corruption, or Migration?," N.Y. Times (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/world/americas/guatemala-corruption-migrants.html>.

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security interest.³ A host of policy initiatives have followed since, many concentrating on enforcement in Central America’s “Northern Triangle” of Guatemala, El Salvador, and Honduras:

- On June 7, 2021, DOJ and DHS announced the creation of a Joint Task Force Alpha and an Anticorruption Task Force to bolster U.S. enforcement in Mexico and the Northern Triangle. Joint Task Force Alpha, in addition to addressing human smuggling and trafficking, will liaise with the Anticorruption Task Force on anti-corruption efforts in the region through FCPA enforcement and other means.⁴
- On July 8, 2021, the U.S. State Department released a list of 55 corrupt and undemocratic actors from the Northern Triangle, pursuant to the Northern Triangle Enhanced Engagement Act of 2020. That list included both current and former high-ranking government officials.⁵
- Most recently, DOJ announced on October 15, 2021 the establishment of a tip line to assist the Anticorruption Task Force. That Task Force will review tips for any jurisdictional nexus that would enable the United States to investigate and prosecute wrongdoers and, “where appropriate, ultimately to forfeit and return stolen assets to the people of El Salvador, Guatemala, and Honduras.”⁶

As the Biden Administration rolls out its policies, developments on the ground highlight both progress and setbacks in Central America’s anti-corruption enforcement efforts, as discussed below.

Guatemala

Between 2007 and 2019, Guatemala was heralded for strides in anti-corruption enforcement. Fueled in part by the International Commission Against Impunity in Guatemala (“CICIG”) – an independent prosecutorial body formed

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3. “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/>; see also Kara Brockmeyer, Andrew M. Levine, David A. O’Neil, Jane Shvets, Bruce E. Yannett, et al., “Enhanced Cross-Border Anti-Corruption Enforcement Expected as Part of President Biden’s National Security Strategy,” FCPA Update Vol. 12, No. 11 (June 2021), <https://www.debevoise.com/insights/publications/2021/06/fcpa-update-june-2021>.

4. U.S. Dep’t of Justice Press Release No. 21-525, “Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America” (June 7, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight>; see also White House, Press Release, “Fact Sheet: U.S.-Guatemala Cooperation” (June 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/fact-sheet-u-s-guatemala-cooperation>.

5. Report to Congress Pursuant to Section 353(d)(1)(A) of the United States-Northern Triangle Enhanced Engagement, 86 Fed. Reg. 36174 (July 8, 2021), <https://www.federalregister.gov/documents/2021/07/08/2021-14515/report-to-congress-pursuant-to-section-353d1a-of-the-united-states-northern-triangle-enhanced>.

6. U.S. Dep’t of Justice Press Release No. 21-1010, “Justice Department Anticorruption Task Force Launches New Measures to Combat Corruption in Central America” (Oct. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-anticorruption-task-force-launches-new-measures-combat-corruption-central>.

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with UN support – Guatemala increased its anti-corruption enforcement and correspondingly reduced impunity.⁷

However, after Guatemala’s anti-corruption Attorney General Thelma Aldana completed her term in 2018, former Guatemalan President Jimmy Morales forced the CICIG to shutter its operations.⁸ This left a prosecutorial vacuum that has yet to be meaningfully filled. As one illustration, Guatemala’s ranking in the Capacity to Combat Corruption Index subsequently fell from 4.55 in 2019 to 3.84 in 2021 (in both instances with the highest possible score being 10).⁹

“On June 7, 2021, DOJ and DHS announced the creation of a Joint Task Force Alpha and an Anticorruption Task Force to bolster U.S. enforcement in Mexico and the Northern Triangle.”

Further, in what has been described as a politically motivated act, Guatemala’s current Attorney General, Maria Consuelo Porras, dismissed top prosecutor Juan Francisco Sandoval in July 2021.¹⁰ Porras reportedly terminated Sandoval, the head of Guatemala’s Special Prosecutor’s Office Against Impunity (“FECI”), shortly after learning he had been investigating bribes allegedly paid by foreign businessmen to Guatemala’s president, Alejandro Giammattei.¹¹

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7. “Fact Sheet: The CICIG’s Legacy in Fighting Corruption in Guatemala,” Washington Office on Latin America (Aug. 27, 2019), <https://www.wola.org/analysis/cicigs-legacy-fighting-corruption-guatemala>.
 8. Brendan O’Boyle, “The Rise and Fall of CICIG: LatAm’s Biggest Stories of the 2010s,” Americas Quarterly, <https://www.americasquarterly.org/article/the-rise-and-fall-of-cicig-latams-biggest-stories-of-the-2010s>.
 9. Roberto Simon & Geert Aalbers, The Capacity to Combat Corruption Index: Assessing Latin American Countries’ Ability to Uncover, Punish, and Deter Graft 13 (2019), https://www.controlrisks.com/-/media/corporate/files/campaigns/ccc/2019ccc_report.pdf?la=en&hash=93A4E1DC136F91DDC7E98653CD1285A80C0E0AE4; Geert Aalbers & Brian Winter, The Capacity to Combat Corruption Index: Assessing Latin America’s Ability to Detect, Punish and Prevent Corruption 31 (2021), https://www.controlrisks.com/-/media/corporate/files/campaigns/ccc/ccc_2021_report_english.pdf?la=en&hash=A27F7C8F4E5B7970710AA2EF395998C93E8772BF.
 10. Sofia Menchu, “Guatemala Attorney General Fires Leading Anti-Corruption Prosecutor,” Reuters (July 24, 2021), <https://www.reuters.com/world/americas/guatemala-attorney-general-fires-leading-anti-corruption-prosecutor-2021-07-24>.
 11. Gerardo Lissardy, “‘La ilegalidad con la que fui destituido es un mensaje directo para el que se atreva a desafiar al régimen’: Juan Francisco Sandoval, exfiscal anticorrupción de Guatemala,” BBC News Mundo (Jul. 28, 2021), <https://www.bbc.com/mundo/noticias-america-latina-57993177>.

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Sandoval later fled to the United States with evidence purporting to prove the allegations against President Giammattei.¹² DOJ officials reportedly have initiated an investigation into the matter,¹³ and the State Department has since sanctioned Porras and other Central American officials for “obstructing investigations into acts of corruption.”¹⁴ Despite increased outrage on the ground in Guatemala, Rafael Curruchiche, Sandoval’s replacement at FECCI, delayed months in pursuing claims against President Giammattei.¹⁵

El Salvador

Over the past year, Salvadoran President Nayib Bukele has expanded his power, undermined the independence of state institutions, and stymied the fight against corruption in El Salvador.

On May 1, 2021, weeks after President Bukele’s Nuevas Ideas (New Ideas) Party obtained a majority in congressional elections, the legislature replaced the Attorney General, Raul Melara, and all five magistrates of the Constitutional Court with supporters of the President.¹⁶ At the time of his termination, Melara reportedly had been investigating several members of the Bukele administration for alleged negotiations with MS-13 gang members and corruption related to COVID-19 funds.¹⁷ Within two weeks, the Chief of the Anticorruption Unit of the Attorney General’s Office resigned, and President Bukele granted immunity to the officials accused of mismanaging COVID-19 funds.¹⁸

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12. Sonia Perez D., “Anti-Corruption Prosecutor Praised by U.S. Flees Guatemala,” AP News (July 24, 2021), <https://apnews.com/article/guatemala-65df7392334755e69796386d26256295>.
 13. @NormaJTorres, Twitter (Aug. 27, 2021, 12:22 PM), <https://twitter.com/NormaJTorres/status/1431290992137674755>.
 14. Press Release, U.S. Dep’t of State, “United States Announces Actions Against Seven Central American Officials for Undermining Democracy and Obstructing Investigations into Acts of Corruption” (Sept. 20, 2021), <https://www.state.gov/united-states-announces-actions-against-seven-central-american-officials-for-undermining-democracy-and-obstructing-investigations-into-acts-of-corruption>.
 15. Jody Garcia & Natalie Kitroeff, “Guatemala Investigates Claim of Bribe Paid to Its President,” N.Y. Times (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/world/americas/guatemala-president-bribe-giammattei.html>.
 16. “El Salvador: Dismissal of Constitutional Chamber and Attorney General Seriously Undermines the Rule of Law - Bachelet,” U.N. Office of the High Commissioner for Human Rights (May 4, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27053&LangID=E>.
 17. Roman Gressier, “Criminal Investigation Found the Bukele Administration Hid Evidence of Negotiations with Gangs,” El Faro (Aug. 23, 2021), https://elfaro.net/en/202108/el_salvador/25670/Criminal-Investigation-Found-the-Bukele-Administration-Hid-Evidence-of-Negotiations-with-Gangs.htm?st-full_text=all&tpl=11.
 18. “El Salvador: Legislature Deepens Democratic Backsliding,” Human Rights Watch (Nov. 1, 2021), <https://www.hrw.org/news/2021/11/01/el-salvador-legislature-deepens-democratic-backsliding#>.

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In June 2021, President Bukele terminated the country's 2019 cooperation agreement with the Organization of American States ("OAS") to establish the International Commission Against Impunity in El Salvador. That prosecutorial body was intended to help fight corruption and impunity in the country.¹⁹

And on September 3, 2021, the newly appointed Constitutional Court judges issued a ruling allowing presidents to run for consecutive reelection, seemingly defying the Salvadoran constitution. The State Department condemned the ruling and later added the judges to the U.S. Undemocratic and Corrupt Actors list (the "Engel List") under section 353 of the Northern Triangle Enhanced Engagement Act, barring the judges from entering the United States.²⁰

In parallel, on September 7, 2021, El Salvador became the first country in the world to adopt Bitcoin as legal tender.²¹ U.S. authorities, however, have been skeptical of the cryptocurrency, noting its potential use in fraud and extortion. On October 6, 2021, Deputy Attorney General Lisa O. Monaco announced a National Cryptocurrency Enforcement Team that will investigate and prosecute criminal misuses of cryptocurrency.²²

Honduras

Honduras likewise has faced a series of setbacks in its anti-corruption efforts over the past two years.

On January 19, 2020, Honduran President Juan Orlando Hernandez allowed the mandate of the OAS-backed Mission to Support the Fight Against Corruption in Honduras ("MACCIH") to expire.²³ Just months later, in August 2020, a special appeals court dismissed charges against 22 defendants involved in the so-called Pandora case, wherein over \$12 million in government agricultural funds were allegedly channeled to political campaigns.²⁴ The U.S. Congress denounced these

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19. Press Release, Organization of American States, "Statement from the OAS Secretariat on CICIES" (June 7, 2021), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-059/21. Of note, in just April 2021, the U.S. had announced a \$2 million contribution to the Commission. See Press Release, U.S. Embassy of El Salvador, "United States Announces \$2 Million Contribution to CICIES to Fight Corruption" (April 7, 2021), <https://sv.usembassy.gov/united-states-announces-2-million-contribution-to-cicies-to-fight-corruption>.
 20. Press Release, U.S. Dep't of State, "Salvadoran Re-Election Ruling Undermines Democracy" (Sept. 5, 2021), <https://www.state.gov/salvadoran-re-election-ruling-undermines-democracy>.
 21. Oscar Lopez & Ephrat Livni, "In Global First, El Salvador Adopts Bitcoin as Currency," N.Y. Times (Sept. 7, 2021), <https://www.nytimes.com/2021/09/07/world/americas/el-salvador-bitcoin.html>.
 22. U.S. Dep't of Justice Press Release No. 21-974, "Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team" (Oct. 6, 2021), <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team>.
 23. Press Release, Congresswoman Norma Torres, "Sole Central American in Congress: End of MAACIH Is a Blow to Rule of Law" (Jan. 24, 2020), <https://torres.house.gov/media-center/press-releases/sole-central-american-congress-end-maccih-blow-rule-law>.
 24. U.S. Dep't of State, Honduras 2020 Human Rights Report 14 (2020), <https://www.state.gov/wp-content/uploads/2021/03/HONDURAS-2020-HUMAN-RIGHTS-REPORT.pdf>.

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developments and noted that the dismantling of MAACIH could disturb “efforts to address the underlying conditions driving high levels of irregular migration to the United States.”²⁵

In June 2020, Honduras implemented a new penal code that reduced sentences for corruption crimes and permitted less restrictive penalties for those able to repay ill-gotten funds.²⁶ The U.S. government subsequently has turned to pursuing Honduran officials:

- In March 2021, a former Honduran congressman and brother of President Hernandez was sentenced to life in prison for drug trafficking and ordered to forfeit \$138.5 million. DOJ characterized the crime as a “state-sponsored drug trafficking conspiracy.”²⁷
- On July 20, 2021, the State Department added former Honduran President Jose Lobo Sosa and his family to the Engel List, accusing Lobo Sosa and his wife of accepting bribes from drug trafficking organizations and engaging in fraud and the misappropriation of funds.²⁸
- Most recently, U.S. federal prosecutors reportedly have begun to probe allegations of drug trafficking against President Hernandez himself.²⁹

Developments Beyond the Northern Triangle

The Regional Impact of the Pandora Papers

On October 3, 2021, the International Consortium of Investigative Journalists released the “Pandora Papers,” a set of over 11.9 million financial documents that revealed a vast network of offshore dealings implicating more than 100 billionaires, 30 world leaders, and 300 public officials.³⁰ In response, a bipartisan group of U.S. lawmakers introduced the Establishing New Authorities for Businesses Laundering

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26. La Gaceta, Decreto No.130-2017 [Decree No. 130-2017] (May 10, 2019), https://www.tsc.gob.hn/web/leyes/Decreto_130-2017.pdf.

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29. Jon Lee Anderson, “Is The President of Honduras a Narco Trafficker,” *New Yorker* (Nov. 8, 2021), <https://www.newyorker.com/magazine/2021/11/15/is-the-president-of-honduras-a-narco-trafficker>.

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and Enabling Risks to Security Act (“ENABLERS Act”). The proposed legislation would expand the Bank Secrecy Act to apply the same reporting requirements currently imposed on banks to all actors who enable money laundering.³¹

The Pandora Papers have also sparked numerous anti-corruption investigations in Latin American states. These investigations, some of which are highlighted below, may have profound implications on the regional anti-corruption enforcement landscape:

“[D]omestic anti-corruption efforts in many Latin American jurisdictions have increased markedly in recent years. Nevertheless, the Pandora Papers’ release and the ends of several specialized anti-corruption units in Central America have highlighted challenges in regional enforcement.”

- In **Brazil**, several high-ranking public officials and businessmen were implicated in the Pandora Papers, including the President of the Central Bank, Roberto Campos Neto, and the Minister of Economy, Paulo Guedes. The Pandora Papers indicated that Guedes purportedly holds \$10 million in offshore accounts in the British Virgin Islands.³² Guedes maintains that his offshore investments are legal, but critics have called for his and Campos Neto’s resignation.³³
- President Sebastián Piñera of **Chile** recently defeated impeachment charges sparked by the Pandora Papers.³⁴ According to the Chilean Center for Investigative Reporting, President Piñera was involved in the 2010 sale of a mining company partially owned by his family members that was reportedly contingent on the Chilean government refraining from enacting new

Continued on page 15

31. Will Fitzgibbon, “U.S. Lawmakers Call for Crackdown on Financial ‘Enablers’ After Pandora Papers,” Int’l Consortium of Investigative Journalists (Oct. 7, 2021), <https://www.icij.org/investigations/pandora-papers/us-lawmakers-call-for-crackdown-on-financial-enablers-after-pandora-papers>.

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environmental regulations.³⁵ Chile's national prosecutor's office recently announced that it would investigate these allegations.³⁶

- In **Colombia**, over 500 citizens were named in the Pandora Papers, including former Presidents César Gaviria and Andrés Pastrana; former ministers Guillermo Botero, Gina Parody, and Fernando Araújo Perdomo; current Vice President and Foreign Minister, Marta Lucía Ramírez; current Minister of Transportation, Ángela María Orozco; and current Director of the Colombian Tax and Customs Organization, Lisandro Junco Riveira.³⁷ Although these revelations have not resulted to date in any public prosecutorial action, other recent anti-corruption enforcement developments in Colombia are noteworthy:
 - o In September 2021, Colombia's Minister of Information and Communication Technologies, Karen Abudinen, resigned at the request of President Ivan Duque. Abudinen's resignation was prompted by an investigation into her alleged role in an embezzlement scandal involving a company contracted to provide Internet access to rural schools.³⁸ The company allegedly falsified bank documents and failed to comply with its contractual obligations after receiving an advance of approximately \$18 million dollars from the government.³⁹ Abudinen testified before the Investigation Chamber of the Supreme Court of Justice in November 2021, asserting her innocence.⁴⁰
 - o In October 2021, attorney Augusto Ocampo filed a formal request in Colombia's Supreme Court of Justice to initiate a criminal investigation into the more than 70 senators and house representatives who voted to suspend anti-fraud legislation ahead of the 2022 elections. The legislation would have barred government officials from granting public funds to private contractors in the six months before and after elections.⁴¹

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35. Francisco Skoknic & Alberto Arellano, "Pandora Papers: Familias Piñera y Délano sellaron millonaria compraventa de Minera Dominga en Islas Vírgenes Británicas," CIPER (Mar. 10, 2021), <https://www.ciperchile.cl/2021/10/03/pandora-papers-familias-pinera-y-delano-sellaron-millonaria-compraventa-de-minera-dominga-en-islas-virgenes-britanicas>.

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38. "Colombia: Renuncia Karen Abudinen Tras Escandalo de Corrupcion en Centros Digitales," DW (Sept. 9, 2021), <https://www.dw.com/es/colombia-renuncia-karen-abudinen-tras-esc%C3%A1ndalo-de-corrupci%C3%B3n-en-centros-digitales/a-59138880>.

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- In **Ecuador**, the Attorney General's Office opened an investigation on October 21, 2021 into President Guillermo Lasso after opposition leader Yaku Perez presented allegations linking him to the Pandora Papers' revelations. The leak revealed that President Lasso allegedly had transferred assets from Panamanian entities to two trusts in South Dakota in violation of a 2017 law banning officials from holding investments in offshore tax havens.⁴²
- On October 4, 2021, **Mexico's** Financial Intelligence Unit reportedly launched investigations into over 3,000 Mexican citizens implicated in the Pandora Papers, including Julio Scherer, a former senior legal advisor to Mexican President Andres Manuel López Obrador. The Pandora Papers revealed that Scherer – who has since resigned from his position – is a large shareholder in a British Virgin Islands company that owns a \$1.5 million apartment in Miami through shell companies.⁴³ Additionally, on November 6, 2021, Guatemalan authorities seized \$35,000 in cash from a private jet carrying guests to the wedding of Santiago Nieto, the former head of Mexico's Financial Intelligence Unit and an ally of President López Obrador. Nieto recently resigned in response.⁴⁴
- In **Panama**, the Pandora Papers indicated that Panamanian law firm Aleman, Cordero, Galindo & Lee allegedly was involved in creating shell companies to hide money for more than 160 Panamanian officials, including three former presidents.⁴⁵ Nonetheless, in a letter to the ICIJ, the Panamanian government reiterated its commitment to anti-corruption efforts. Unrelated to the Pandora Papers, a New York federal court recently denied bail to Luis Martinelli, son of Panama's Former President Ricardo Martinelli, who in 2020 fled the United States amidst plea negotiations with DOJ regarding his involvement in the Odebrecht bribery scandal. Prosecutors allege that Luis Martinelli and his brother facilitated \$28 million in bribes paid by Odebrecht to a high-ranking government official in Panama between 2009 and 2014, while their father was president.⁴⁶

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Costa Rica

Multiple corruption scandals have surfaced in Costa Rica this year. Most notably, a bribery matter involving public infrastructure projects – nicknamed Cochinilla – made headlines in June 2021. It since has resulted in the indictment of over 25 current and former government officials and 50 private actors. The charged individuals include representatives of the National Highway Council, the Ministry of Public Works and Transport, Constructora MECO S.A. (“MECO”), and various other companies in the public construction sector.⁴⁷ According to Costa Rica’s Judicial Investigation Department (“OIJ”), the implicated individuals created a criminal network through which businessmen bribed public officials for nonpublic information and preferential treatment in bids for government infrastructure contracts.⁴⁸ The investigation is ongoing, and multiple individuals remain incarcerated.

“These developments also suggest the possibility of increased U.S. collaboration with Latin American governments in anti-corruption enforcement and, more broadly, in other initiatives to combat corruption.”

The *Diamante* scandal, which came to light in November 2021, similarly involves alleged bribes paid to public officials by MECO employees in exchange for favorable treatment in government infrastructure bids, among other allegations.⁴⁹ Of the thirteen individuals detained in the 40 related raids, six are acting mayors, including the mayor of San José, Costa Rica’s capital city.⁵⁰

And in yet another scandal revealed in November 2021, codenamed *Azteca*, the Costa Rican government detained 27 individuals, including sixteen public officials, allegedly involved in drug trafficking, money laundering, and corruption.

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47. Pablo Rojas, “Fiscalía Imputa a Otros 12 Funcionarios del Conavi en Caso ‘Cochinilla,’” CR Hoy (Aug. 31, 2021), <https://www.crhoy.com/nacionales/fiscalia-imputa-a-otros-12-funcionarios-del-conavi-en-caso-cochinilla>.

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The investigation began with the arrest of a man in 2019 who allegedly was part of a criminal organization that had created sham construction companies to bribe officials from the Costa Rican Institute of Aqueducts and Sewers for favorable influence in bids for government contracts. According to OIJ, the organization leveraged these government contracts to launder illicit funds through a loan scheme crafted with the help of a National Bank official.⁵¹ These funds were then allegedly used to purchase assets that have since been seized by the Costa Rican government.⁵²

While this trio of recent scandals has revealed the extent to which corruption persists in Costa Rica, the investigations that followed evidence an increased push for anti-corruption enforcement under the leadership of President Alvarado. Earlier in President Alvarado's term, Costa Rica enacted Legislative Decree 9699, which for the first time implemented corporate criminal liability for corruption-related offenses.⁵³ And more recently, after addressing the OECD Working Group on Bribery's criticism of its anti-corruption efforts, Costa Rica formally became an OECD member on May 25, 2021.⁵⁴

Nicaragua

Nicaraguan President Daniel Ortega has taken numerous steps to tighten his grip on power since first assuming office in 2007, including by naming his wife as his running mate in presidential elections and appointing his children as presidential advisors or executives in state-owned companies.⁵⁵ In July 2020, the United States sanctioned one of President Ortega's sons, Juan Carlos Ortega Murillo, accusing him of corruption and other crimes.⁵⁶

Most recently, in the months leading up to the November 7, 2021 presidential election, President Ortega ordered the arrest of dozens of political dissidents and opposition candidates.⁵⁷ And after President Ortega was declared the winner,

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51. Daniel Chinchilla, "Caso Azteca, Lideres 'Sacrificaban' Ganancias Personales Para Sobornos y Sostener Lavado," CR Hoy (Nov. 13, 2021), <https://www.crhoy.com/nacionales/caso-azteca-lideres-sacrificaban-ganancias-personales-para-sobornos-y-sostener-lavado>.
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several countries labeled the election a sham.⁵⁸ President Biden denounced a “pantomime election that was neither free nor fair, and most certainly not democratic,” and banned President Ortega, his wife, and several other officials from entering the United States.⁵⁹

In response to these developments, on November 3, 2021, Congress passed the Reinforcing Nicaragua’s Adherence to Conditions for Electoral Reform (“RENACER”) Act, comprising new initiatives to monitor, report on, and address corruption by President Ortega’s government and family.⁶⁰ The RENACER Act would require, among other things, “classified reporting on corruption perpetrated by President Ortega’s government and family” and the “add[ition of] Nicaragua to the list of Central American countries subject to corruption-related visa restrictions.”⁶¹ The U.S. State Department also has halted aid to Nicaragua and continues to oppose any loan or financial assistance to the Nicaraguan government.⁶²

Conclusion

Latin America has long been a priority of FCPA enforcement. Even so, the Biden Administration’s new measures aimed at combatting corruption in the region – and particularly in El Salvador, Guatemala, and Honduras – have set the tone for a further increase in related efforts in Latin America. Echoing the FBI’s 2019 launch of the Miami-based International Corruption Squad focused on corruption in Latin America, initiatives such as DOJ’s Joint Task Force Alpha and Anticorruption Task Force reflect deepening commitments to tackle corruption in the Northern Triangle and beyond.

These developments also suggest the possibility of increased U.S. collaboration with Latin American governments in anti-corruption enforcement and, more broadly, in other initiatives to combat corruption. As we wait to see how the Biden Administration’s anti-corruption policies unfold, companies should prepare for the

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58. See, e.g., Press Release, Foreign, Commonwealth & Development Office, “Nicaragua: UK Statement on Presidential Elections,” (Nov. 8, 2021), <https://www.gov.uk/government/news/nicaragua-uk-statement-on-presidential-elections>; Press Release, “Statement by Minister Joly on Nicaragua’s November 7 Electoral Process” (Nov. 8, 2021), <https://www.canada.ca/en/global-affairs/news/2021/11/statement-by-minister-joly-on-nicaraguas-november-7-electoral-process.html>.
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61. *Id.*
62. U.S. Dep’t of State, “U.S. Relations with Nicaragua” (Sept. 14, 2021), <https://www.state.gov/u-s-relations-with-nicaragua>.

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potential of even stricter scrutiny by taking steps to mitigate corruption risks in Latin America and especially Central America.

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