

Five Key Takeaways from the White House Strategy on Countering Corruption

In brief

On December 6, 2021, the White House issued the first ever consolidated United States Strategy on Countering Corruption (the "Strategy"). The Strategy follows President Biden's June 3, 2021 memo that established the tackling of corruption as a central US national security interest (the "Memo"). That Memo tasked fifteen US Federal Government departments and agencies to conduct an interagency review to examine corruption as a national security threat and jointly develop a strategy that would significantly enhance the United States' ability to combat corruption. The Strategy is the result of those agencies' review.

In depth

The Strategy is organized into five Pillars, and within each a number of Strategic Objectives. The five Pillars are:

1. Modernizing, coordinating, and resourcing US Government efforts to fight corruption;
2. Curbing illicit finance;
3. Holding corrupt actors accountable;
4. Preserving and strengthening the multilateral anti-corruption architecture;
5. Improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals.

Although the newly created Strategy is not directly binding on the private sector, and much of its content is focused on US foreign policy and diplomatic objectives, it provides US and international companies with an indication of the US Government's and several of its agencies' likely legislative, administrative, and enforcement agendas in the coming months and years. The Strategy highlights a number of areas in which the regulatory burden on certain companies and industries is likely to increase. Those are areas which companies can begin to prepare for now. For those companies subject to corruption related regulatory inquiries and enforcement actions in the US, the Strategy highlights how those cases will likely be treated by the US Government, working with its international counterparts.

The Strategy highlights the US Government's interest in "working with the private sector to improve the international business climate by encouraging the adoption and enforcement of anti-corruption compliance programs by US and international companies" as a key element of the Third Pillar in "Holding corrupt actors accountable." The Strategy serves as an important reminder to companies that corporate anti-corruption compliance entails much more than just fulfilling the requirements of the US Foreign Corrupt Practices Act ("FCPA").

Below we have set out what we consider to be the five most significant points and key takeaways from the Strategy for companies:

1. Combatting the US Domestic Market's Role in Facilitating Corruption and its Proceeds

The Strategy recognizes that while corrupt conduct often occurs abroad, the proceeds of that corruption and the financial interests of its participants are often located in the US. So long as these actors are able to invest and hide their ill-gotten gains in the US the conduct will continue. This is the focus of the Strategy's Second Pillar "Curbing illicit finance". The Strategy



highlights a number of means through which this issue may be addressed, by driving transparency and by enforcing US domestic anti-money-laundering ("AML") laws. These include:

- The Treasury Department's Financial Crimes Enforcement Network (FinCEN) mandate to build a new corporate beneficial ownership data system for use by law enforcement.¹ The 2019 Corporate Transparency Act ("CTA") requires the Treasury to create a beneficial ownership registry that collects information about the true owners of certain companies—and to make that information accessible to Federal agencies engaged in national security, intelligence, and law enforcement activity; state, local, and tribal law enforcement.
- Expansion of regulations requiring disclosure of beneficial ownership in high value cash real estate transactions. At present, enhanced disclosure requirements are only required in certain metropolitan areas pursuant to FinCEN geographic targeting orders.
- Focus on transparency and regulation of both traditional and emerging asset categories that may be used to launder money and conceal the proceeds of crime. These include cryptocurrency, other digital assets, art and antiquities, precious metals and other natural resources.

The Strategy makes clear that a focus on these assets and the ways that they may be used to launder money will also lead to an increased focus on the gatekeepers to those markets and those who facilitate illegal or non-transparent conduct. This could include investment advisers, private equity funds, real estate brokers, lawyers, accountants, trusts and their trustees and company service providers, incorporators, and registered corporate agents and nominees.

The Strategy also indicates the Government's intention to more actively use its existing powers for gathering information from financial institutions and other gatekeepers. This includes the law enforcement power under Section 314 of the PATRIOT Act to issue requests for information through FinCEN to more than 14,000 financial institutions in order to locate accounts and transactions of persons who might be involved in money laundering.²

These market players will likely see their regulatory burden (including know your customer and other due diligence and transparency requirements) increase as a result of these initiatives set out in the Strategy. For now, there are few specifics in the Strategy as to what those requirements might be, and in particular the extent to which further AML requirements may be extended to non-financial institutions in the future.

2. Particular Considerations for US Government Contractors and Recipients of US Funds

The Strategy also includes important information for Government contractors and federal grant recipients, as well as the companies that work with, or for, those entities. First, as part of its broader push for transparency, the Administration plans to continue using its authority under Section 885 of the FY21 National Defense Authorization Act ("NDAA") to require all prospective federal contractors as well as grantees to disclose all beneficial owners, underscoring the need for continued diligence regarding ownership certifications and diligence in acquisitions.³ Second, the Strategy calls on agencies to continue using their suspension and debarment powers to remove corrupt actors from the federal marketplace and supply chain, and highlights the capabilities of the Interagency Suspension and Debarment Committee.⁴ The specific inclusion of debarment as an area of enhanced enforcement should be a wakeup call for companies, reminding them that - even though the debarment numbers dropped this fiscal year - the Government continues to see debarment and suspension as a powerful tool. Indeed, suspension or debarment will usually disqualify a company from not only bidding on Federally-funded contracts and grants as a prime contractor but also from working as a subcontractor or vendor for any Federally-funded entities or projects.

¹ See Strategic Objective 1.4

² See Strategic Objective 3.5

³ See Strategic Objective 2.1

⁴ See Strategic Objective 3.1



In addition, the Strategy highlights areas in which anti-corruption considerations should be built into other international financing initiatives, including climate finance for developing nations,⁵ USAID financing,⁶ and US development funding made available through international financial institutions such as the World Bank.⁷

3. International and Domestic Cooperation in Anti-Corruption Enforcement

In the past, the US Government often brought anti-corruption enforcement actions on its own; usually through FCPA enforcement led by the Department of Justice ("DoJ"). However one of the most significant trends in US and international anti-corruption enforcement in recent years has been the growth in cooperation between national prosecutors and a proliferation in coordinated multi-jurisdictional enforcement actions and related settlements. Today, it is rare to see a significant corporate anti-corruption enforcement case being brought by a single country's enforcement agency. By their nature corruption cases tend to be trans-national, with the bribe payer, the bribe recipient, the bribe payment and the proceeds of the corrupt conduct often crossing borders and being located in, and under the jurisdiction of, several different regimes at the same time. Effectively combatting corruption requires cooperation between all of those jurisdictions. This can be a challenge where formal multi-lateral governmental assistance programs and other barriers prevent the swift and effective sharing of information between international counterparts. The Strategy aims to break-down some of those barriers, for example by committing resources to enable the international cooperation and coordination of law enforcement agencies,⁸ through the use of recently expanded DoJ powers to subpoena certain financial records held abroad⁹ and with a commitment to engage with the Organization for Economic Cooperation and Development ("OECD") Working Group on Bribery to improve and expand international cooperation.¹⁰

What is more, the underlying premise of the Strategy, and the Memo which preceded it, is that there are numerous agencies within the US Government which have a role in investigating and ultimately prosecuting corruption cases. The execution of the Strategy intends to drive a greater cooperation, intelligence and evidence sharing between those domestic agencies.

For these reasons, companies and individuals facing corruption investigations and prosecutions will likely have to defend those cases on several fronts, dealing with different countries' prosecutors simultaneously.

4. Tackling the Demand Side of Corruption

US global anti-corruption efforts have traditionally focused on enforcement of the FCPA and the supply side of bribery - i.e. by prosecuting companies who pay bribes overseas to win business or secure other improper benefits from public officials. While the Strategy makes clear that the DoJ will continue to aggressively pursue FCPA cases, a significant part of the Strategy is devoted to attacking the demand side of bribery - i.e. the requestors and recipients of bribes. Specifically, Pillar Three is entitled "Holding corrupt actors accountable" and includes the goals of "enacting legislation criminalizing the demand side of bribery, and enforcing new and existing laws, including in the countries where the bribery occurs." This part of the strategy also includes a Treasury Department pilot Kleptocracy Assets Recovery Program which will provide payments to individuals for information leading to the identification and recovery of stolen assets held in US financial institutions.¹¹ This demand side focus is consistent with the OECD Working Group on Bribery's recent Revised Recommendation for Further Combating Bribery in International Business Transactions which urges countries to combat the demand side of bribery by addressing the solicitation and acceptance of bribes by local government officials.¹²

⁵ See Strategic Objective 1.5

⁶ See Strategic Objective 1.4, 1.5, 3.3, 3.4 and 5.4

⁷ See Strategic Objective 4.2

⁸ See Strategic Objective 2.2

⁹ See Strategic Objective 3.1

¹⁰ See Strategic Objective 3.3

¹¹ See Strategic Objective 3.1

¹² See <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>



5. The (Increasing) Role of Whistleblowers

Many significant corruption cases come to the attention of the international community and to US and other enforcement agencies as a result of whistleblowers. In several places, the Strategy highlights the importance of the US and its partners protecting corporate whistleblowers, investigative journalists and others who help to bring corrupt conduct to light, often at considerable personal risk.¹³ The US Government's endorsement of these important players in the fight against corruption, and the Strategy's commitment to creating an environment that facilitates whistleblowing and protects whistleblowers, is likely to continue to embolden potential corporate, governmental and other whistleblowers. As a result of these statements and other recent international measures, such as the implementation of the EU Whistleblowing Directive in each of its Member States, companies can expect to see increasing numbers of whistleblowers in the future, raising potential issues both within and outside of their organizations.

Conclusion

The Strategy reinforces the US Government's commitment to being a central player in the fight against international corruption. The US Government will not seek to do this on its own, but rather as part of a network of domestic and international stakeholders that, acting together, can have a significant impact in reducing corrupt conduct and targeting its actors and proceeds.

Many of the specific actions that will need to be taken to execute the Strategy's objectives remain to be identified, but several agencies have already made announcements in this regard. For example, on December 9, Secretary of State Antony Blinken announced that the State Department is establishing a Coordinator on Global Anti-Corruption to deliver on the State Department's commitments made in the Strategy. At the same time, Blinken also announced that the State Department, together with the Treasury Department's Office of Foreign Assets Control was sanctioning several individuals for their involvement in significant international corruption.¹⁴

For their part, each of the agencies contributing to the Strategy are required to report annually to the President on progress made against the Strategy's goals. We will monitor the implementation of the Strategy's ambitious objectives.

¹³ See for example Strategic Objectives 3.5 and 5.2

¹⁴ See <https://www.state.gov/elevating-anti-corruption-leadership-and-promoting-accountability-for-corrupt-actors/>



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