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Transition to the Biden Administration: FCPA Enforcement in the Near Term

In our recent 2020 Year-in-Review report,¹ we noted that FCPA enforcement has been remarkably steady across administrations, with a modest decline in the prosecution of individuals this past year.² During the 2020 campaign, however, President Biden promised a heightened focus on fighting corruption, both at home and abroad, arguing that the Trump Administration's "efforts to combat corruption anywhere in the world have been woefully inadequate to nonexistent."³ More generally, President Biden has announced a sharp departure from the ethical clouds hanging over so much of the Trump Administration by issuing a day-one Executive Order on Ethics Commitments by Executive Branch Personnel. While these steps augur in favor of a heightened enforcement environment, it is not yet clear how much, and in what ways, FCPA enforcement will change over the next four years, especially given that Biden's senior nominees for the DOJ and the SEC have not yet been finalized or confirmed by the Senate.

In this memorandum, we consider how President Biden's picks for top roles at the DOJ and the SEC, as well as statements made during the 2020 campaign, may hint at a plan for a more aggressive enforcement approach for the FCPA and related anti-corruption laws. Given that the consistent trend in FCPA enforcement can be credited in large part to the efforts of career prosecutors working across administrations, rather than political appointees, we also discuss some of the career officials serving in key FCPA enforcement roles at the DOJ and the SEC, many of whom are expected to continue in their roles for the foreseeable future. We also highlight a few new and proposed tools that the DOJ and the SEC may turn to, should they seek to flex their enforcement muscles.

Candidate Biden's Comments Regarding Anti-Corruption Enforcement

President Biden spoke generally during his campaign in 2020 about the pernicious impact of corruption, both foreign and domestic, and the need to step up efforts to counter corruption.⁴ One can reasonably infer from candidate

¹ Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2020 Year in Review (Jan. 22, 2021), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2020-year-in-review?id=39259>.

² Compare FRAUD SECTION, U.S. DEP'T OF JUST., YEAR IN REVIEW 2020, at 5, <https://www.justice.gov/criminal-fraud/file/1370171/download> with FRAUD SECTION, U.S. DEP'T OF JUST., YEAR IN REVIEW 2019, at 4, <https://www.justice.gov/criminal-fraud/file/1245236/download>.

³ BIDEN FOR PRESIDENT, THE BIDEN PLAN TO BUILD SECURITY AND PROSPERITY IN PARTNERSHIP WITH THE PEOPLE OF CENTRAL AMERICA, <https://joebiden.com/centralamerica/>.

⁴ Throughout his career, President Biden has repeatedly embraced the need for U.S. partners to fight corruption, which he has said is "the worst enemy of entrepreneurship," a "threat not only to economic growth, but to security and sovereignty." Vice President Joseph

Biden's specific commitments to elevate anti-corruption in U.S. foreign policy and to expand and enhance existing enforcement mechanisms that a Biden Administration will be supportive of FCPA enforcement efforts and may be inclined to aggressively step up enforcement. For example, during the campaign, candidate Biden pledged to issue "a presidential policy directive that establishes combating corruption as a core national security interest and democratic responsibility" and promised to convene a Summit for Democracy with the goal of securing "new country commitments in three areas," one of which was "fighting corruption."⁵

With respect to one region in particular, Central America, candidate Biden promised to focus on attacking the "endemic" "cancer" of corruption in the region—which he argued was one of the "root causes driving migration" from Central America—and called for creating a new office within the Treasury Department's Office of Foreign Asset Control to investigate corruption in the Northern Triangle region; "[p]rioritizing additional funding to train prosecutors in specialized anti-corruption policies and procedures"; and "working with partners to create a regional commission to fight corruption."⁶

If President Biden follows through on his promise to push allies for "new country commitments" on anti-corruption, such a push could conceivably accelerate the long-term trend towards more aggressive anti-corruption enforcement outside the U.S., which could in turn result in an increase in multi-jurisdictional prosecutions involving the DOJ and the SEC. It will be at least several months, however, until we are able to assess the extent to which candidate Biden's campaign rhetoric has impacted his Administration's FCPA enforcement.

The Department of Justice

The responsibility for implementing the Biden Administration's FCPA enforcement priorities will fall to two agencies, the DOJ and the SEC. It is worth considering the agencies' differing leadership structures and the selections that President Biden has made to date, as well as the acting and career officials currently serving in key FCPA-related roles. We consider each in turn.

DOJ's Foreign Corrupt Practices Act Unit, which criminally investigates and prosecutes FCPA matters in collaboration with U.S. attorneys across the country, is housed within the Criminal Division's Fraud Section. The Criminal Division is headed by a single Assistant Attorney General (AAG), who must be confirmed by the Senate. The AAG is in turn assisted by a Deputy AAG (DAAG), not Senate-confirmed, who runs both the Appellate and Fraud Sections of the Criminal Division. The chiefs of the Fraud Section and FCPA Unit are both career DOJ prosecutors and not subject to Senate confirmation.

President Biden has tapped D.C. Circuit Judge Merrick Garland and Lisa Monaco to lead the DOJ as Attorney General and Deputy Attorney General, respectively.⁷ Judge Garland has served on the bench since 1997 and was President

R. Biden, Jr., Remarks by Vice President Joe Biden to the Global Entrepreneurship Summit (Nov. 20, 2014); Joseph R. Biden, Jr., *Why America Must Lead Again*, FOREIGN AFFAIRS (Jan. 23, 2020), <https://www.foreignaffairs.com/artides/united-states/2020-01-23/why-america-must-lead-again>.

⁵ Joseph R. Biden, Jr., *Why America Must Lead Again*, FOREIGN AFFAIRS.

⁶ BIDEN FOR PRESIDENT, THE BIDEN PLAN TO BUILD SECURITY AND PROSPERITY IN PARTNERSHIP WITH THE PEOPLE OF CENTRAL AMERICA, <https://joebiden.com/centralamerica/>.

⁷ Jarrett Renshaw and Sarah N. Lynch, *Biden selects Judge Merrick Garland for attorney general*, REUTERS (Jan. 6, 2021), <https://www.reuters.com/article/us-usa-biden-attorney-general/biden-selects-judge-merrick-garland-for-attorney-general-idUSKBN29B2C8>.

Obama's nominee for the U.S. Supreme Court in 2016.⁸ Prior to joining the D.C. Circuit, Garland served as a Deputy Assistant Attorney General and later as Principal Deputy Assistant Attorney General during the first term of the Clinton Administration, gaining praise for his management of the DOJ's response to the bombing attacks in Oklahoma City and the Atlanta Olympics, as well as the investigation regarding the Unabomber.⁹ Monaco, currently a partner in a large U.S. law firm, also has deep ties to the DOJ. Before entering private practice, she served in a number of roles at the DOJ, including Assistant Attorney General for the National Security Division, before becoming President Obama's chief homeland security and counterterrorism advisor.¹⁰ Both Judge Garland and Ms. Monaco are well-respected former prosecutors with extensive DOJ experience and many observers expect an increased emphasis on white-collar crime by the Department under their leadership. Moreover, given his "unusually broad base of support among Democratic lawyers in Washington, D.C.," Judge Garland should also have no difficulty in recruiting top talent to staff key roles at the DOJ.¹¹

President Biden has not yet announced a nominee to serve as Criminal Division AAG. As a result, the Criminal Division, as well as the Fraud Section, is currently being led temporarily by acting officials, Nicholas McQuaid and Daniel Kahn. The FCPA Unit itself continues to be led by Christopher Cestaro, who was promoted to Chief of the Unit in 2019.

- ▶ Nicholas McQuaid,¹² who previously served for nearly four years in the White House Counsel's Office during the Obama Administration, was appointed as Principal Deputy Assistant Attorney General and named as the Acting AAG for the Criminal Division on January 21, 2021.
- ▶ Robert Zink was named as the Acting Deputy Assistant Attorney General (DAAG) for the Criminal Division with responsibility for overseeing the Fraud Section on December 9, 2020. Zink was promoted from his prior position as Chief of the Fraud Section, and has worked within the section for over a decade.
- ▶ Daniel Kahn was named Acting Chief of the Fraud Section in September 2020 after Robert Zink was elevated to the role of Acting DAAG for the Criminal Division.¹³ Before his promotion, Kahn was the Fraud Section's Deputy Chief. Since 2010, Kahn has served in various roles in the Fraud Section, including a stint as head of the FCPA Unit from 2016 to 2019.¹⁴ As a prosecutor, Kahn has tried and convicted numerous individuals in FCPA and other white-collar cases, serving as the lead prosecutor in 10 corporate resolutions and as co-counsel in the first conviction of a

⁸ See generally *id.*

⁹ See generally Nina Tottenberg and Carrie Johnson, *Merrick Garland Has A Reputation Of Collegiality, Record Of Republican Support*, NPR (Mar. 16, 2016), <https://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>.

¹⁰ See Reenat Sinay, *5 Things To Know About Deputy AG Pick Lisa Monaco*, LAW 360 (Jan. 7, 2021), <https://www.law360.com/articles/1342636/5-things-to-know-about-deputy-ag-pick-lisa-monaco>.

¹¹ Tyler Pager, Josh Gerstein, and Kyle Cheney, *Biden to tap Merrick Garland for attorney general*, POLITICO (Jan. 6, 2021), <https://www.politico.com/news/2021/01/06/biden-to-tap-merrick-garland-for-attorney-general-455410>.

¹² McQuaid was most recently a partner at a large U.S. law firm. See C. Ryan Barber, *Latham's Nicholas McQuaid Picked for Leading Role in Biden DOJ's Criminal Division*, NAT. LAW J. (Jan. 21, 2021), <https://www.law.com/nationallawjournal/2021/01/21/lathams-nicholas-mcquaid-picked-for-leading-role-in-biden-dojs-criminal-division/>.

¹³ Dylan Tokar, *Justice Department Gets New Acting Fraud Section Chief*, WALL ST. J. (Sept. 3, 2020), <https://www.wsj.com/articles/justice-department-gets-new-acting-fraud-section-chief-11599169540>.

¹⁴ *Id.*

foreign official for laundering proceeds of FCPA violations.¹⁵ He was recognized by the Department for his role in prosecuting a foreign bribery scheme involving a state-owned telecommunications company in Haiti.¹⁶

In public remarks during the Obama and Trump Administrations, Kahn has stressed that DOJ continues to be focused on holding individuals accountable for FCPA violations, encouraging self-disclosure by corporations, and increasing cooperation and coordination with international enforcement partners. Kahn has also emphasized the importance of strengthening corporate compliance programs according to the enterprise's unique risk profile and the guidelines set forth in DOJ's FCPA Corporate Enforcement Policy.¹⁷

- ▶ Christopher Cestaro, an experienced DOJ prosecutor, was promoted to Chief of the FCPA Unit in July 2019, having previously served first as a trial attorney and later as the Assistant Chief of the unit. Mr. Cestaro succeeded Daniel Kahn when Kahn was promoted to serve as Deputy Chief of the Fraud Section. Prior to coming to DOJ, Cestaro worked in private practice at a law firm and as compliance counsel at a multinational corporation.

During Mr. Cestaro's tenure, the DOJ and the SEC have assessed record-breaking corporate penalties in FCPA settlements: \$2.6 billion in corporate penalties in 2019 and \$2.8 billion in 2020. Foreign authorities assessed an additional \$215 million and \$2.9 billion, respectively, in additional penalties in related cases.¹⁸ In 2020, Mr. Cestaro stated that FCPA enforcement at the DOJ and the SEC remained at "full speed," despite the difficulties caused by the COVID-19 pandemic.¹⁹

The record fines imposed in FCPA prosecutions by career officials at DOJ during the Trump Administration—despite the former president's well-known hostility towards the FCPA—suggest the high probability that current FCPA enforcement trends will largely continue across administrations. For instance, a Biden DOJ will surely look to continue and even expand cross-border cooperation in foreign bribery investigations, encourage corporate cooperation in FCPA investigations, and prioritize individual accountability—all things that the Department also emphasized during the Obama Administration. Of course, as is typical during Democratic administrations, one should expect a Biden DOJ to

¹⁵ See Daniel Kahn, Biography, HARV. L. SCH, <https://hls.harvard.edu/faculty/directory/11835/Kahn>; Daniel S. Khan, Faculty Listing, GEO. U. L. CTR., <https://www.law.georgetown.edu/faculty/daniel-s-kahn/>.

¹⁶ *Id.*

¹⁷ See, e.g., Adam Turteltaub, *Daniel Kahn on the Latest from the Fraud Section at the US Department of Justice [Podcast]*, THE COMPLIANCE & ETHICS BLOG, Society of Corporate Compliance and Ethics (Nov. 5, 2020), <https://complianceandethics.org/daniel-kahn-on-the-latest-from-the-fraud-section-at-the-us-department-of-justice-podcast/>; Adam Turteltaub, *Daniel Kahn on FCPA Enforcement and Compliance Programs [Podcast]*, THE COMPLIANCE & ETHICS BLOG, Society of Corporate Compliance and Ethics (June 14, 2018), <https://complianceandethics.org/daniel-kahn-on-fcpa-enforcement-and-compliance-programs-podcast/>.

¹⁸ Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2019 Year in Review (Jan. 24, 2020), at 1 <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2019-year-in-review?id=30533>; Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2020 Year in Review (Jan. 22, 2021), at 1 <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2020-year-in-review?id=39259>.

¹⁹ Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Developments: Q3 2020 (Oct. 16, 2020), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-developments-q3-2020?id=38156>.

take a more aggressive tack on corporate enforcement generally. In the FCPA context, this might result, for example, in a greater willingness to impose corporate compliance monitors and an even greater ratcheting up of fines.²⁰

Securities and Exchange Commission

Like the DOJ, a specialized FCPA Unit within the SEC's Enforcement Division has responsibility for civil enforcement of the FCPA with respect to issuers and any officers, directors, employees, agents, or stockholders acting on their behalf. This unit, which coordinates closely with the DOJ's FCPA Unit, was established in 2010 and has been led by Charles Cain since November 2017.

Mr. Cain, recognized for his extensive experience with the FCPA, was previously Deputy Chief of the unit from 2011 to 2017 and was one of the co-authors of the Resource Guide to the U.S. Foreign Corrupt Practices Act (the "FCPA Resource Guide") jointly published by the DOJ and the SEC during the Obama Administration.²¹ During his leadership, the SEC has concluded record settlements for FCPA violations in partnership with the DOJ and counterpart enforcement agencies abroad.

As with the DOJ, one can generally expect more aggressive enforcement at the SEC after President Biden's nominee for SEC Chairman, Gary Gensler, is confirmed by the Senate. Many predict that Gensler will favor more muscular regulation of financial institutions and other large firms due to his reputation for being an aggressive Wall Street regulator when he was head of the Commodity Futures Trading Commission ("CFTC") during the Obama Administration. Under Gensler's leadership, the CFTC initiated a record number of enforcement actions and imposed record-setting fines on financial institutions.²²

However, Gensler's nomination is unlikely to have a meaningful impact on the SEC's enforcement agenda for several months at least due to the plodding nature of the Senate confirmation process. Once confirmed, Gensler will cement Democratic control of the SEC, as the Commission is currently divided evenly between two Democratic and two Republican commissioners.²³

²⁰ During President Obama's second term, the DOJ imposed 10 outside monitors as a part of compliance obligations, seven of which were imposed in 2016. During the Trump Administration, the DOJ imposed seven outside monitors, zero of which were imposed in 2020. See Foreign Corrupt Practices Act Clearinghouse, *Compliance Obligations*, STANFORD L. SCHOOL, <http://fcpa.stanford.edu/statistics-analytics.html?tab=3>.

²¹ See generally Press Release 2017-206, Sec. and Exchange Comm'n, Charles Cain Named Chief of the Foreign Corrupt Practices Unit (Nov. 2, 2017), <https://www.sec.gov/news/press-release/2017-206>; Samuel Rubinfeld, *SEC Names New Anti-Bribery Unit Chief*, WALL ST. J. (Nov. 29, 1999); <https://www.wsj.com/articles/sec-names-new-anti-bribery-unit-chief-1509661397>.

²² See generally Chris Arnold, *Wall Street Insider Turned Tough Market Cop: Biden's Pick To Head SEC*, NPR (Jan. 27, 2021) <https://www.npr.org/2021/01/27/960723183/wall-street-insider-turned-tough-market-cop-bidens-pick-to-head-sec>.

²³ The Commission is composed of five commissioners, each appointed to staggered five-year terms. By law, no more than three commissioners may belong to the same political party.

Potential New FCPA Enforcement Tools

The likelihood of an uptick in more aggressive enforcement in the Biden Administration is heightened by the fact officials at the DOJ and the SEC, regardless of whom President Biden appoints, are likely to leverage new enforcement tools recently authorized by Congress in the 2021 National Defense Authorization Act (NDAA).²⁴

- ▶ In response to concerns over the use of anonymous shell companies to circumvent anti-corruption, anti-money laundering, sanctions, and other laws, Congress incorporated the Corporate Transparency Act into the NDAA, provisions of which significantly expand beneficial ownership disclosure requirements. Ultimately, all newly formed and existing U.S. corporations, limited liability companies, other similar entities, and non-U.S. companies registered to do business in the United States will be required to file annual reports with the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") disclosing certain identifying information regarding the reporting company's beneficial owners, defined to mean individuals who own 25 percent or more of the ownership interests of a company and/or who exercise "substantial control" over a company. While the beneficial ownership information will not be publicly available, as is the case in some foreign jurisdictions, regulators and law enforcement agencies will be able to leverage the information when conducting investigations.²⁵
- ▶ The NDAA also includes several other provisions relating to anti-corruption and anti-money laundering enforcement, including the Kleptocracy Asset Recovery Rewards Act (the "KARRA") Pilot Program, which provides that whistleblowers who provide information that results in the forfeiture of "stolen assets linked to foreign government corruption and the proceeds of such corruption" may receive up to \$5 million. The pilot program will expire after three years unless re-authorized.²⁶
- ▶ In response to recent Supreme Court decisions adverse to the SEC, Congress also used the NDAA as a vehicle to amend the Securities Exchange Act of 1934 to place the SEC's disgorgement remedy on a firmer footing, explicitly authorizing the agency to seek disgorgement in civil enforcement actions and setting the applicable statute of limitations to 10 years. These amendments come after the Supreme Court's decisions in *Liu v. SEC*, 140 S. Ct. 1936 (2020) and *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which together established equitable limitations on the SEC's use of disgorgement, as well as a five-year statute of limitations.²⁷

²⁴ William M. (Mac) Thornberry Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

²⁵ See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Congress to Include Significant Expansion of Beneficial Ownership Disclosure Requirements for U.S. Companies and non-U.S. Companies Registered to do Business in the United States as a Part of the 2021 NDAA (Dec. 8, 2020), https://www.paulweiss.com/media/3980664/congress_to_include_significant_expansion_of_beneficial_ownership_disclosure_requirements.pdf; Kelsey Landau and Norman Eisen, *A momentous victory for global anti-corruption efforts*, BROOKINGS (Jan 28, 2021), <https://www.brookings.edu/blog/up-front/2021/01/28/a-momentous-victory-for-global-anti-corruption-efforts/>.

²⁶ Nat'l Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 9701-9703, 134 Stat. 3388; see generally Matthew Stephenson, *It's Not Just the Corporate Transparency Act: Other Reasons To Welcome the Passage of the U.S. NDAA*, THE GLOBAL ANTICORRUPTION BLOG (Jan. 28, 2021), <https://globalanticorruptionblog.com/2021/01/12/its-not-just-the-corporate-transparency-act-other-reasons-to-welcome-the-passage-of-the-u-s-ndaa/#more-17474>.

²⁷ See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Annual Defense Spending Bill Includes Amendments Expanding SEC's Ability to Seek Disgorgement (Dec. 16, 2020), https://www.paulweiss.com/media/3980683/annual_defense_spending_bill_includes_amendments_expanding_sec_s_ability_to_seek_disgorgement.pdf.

- ▶ In addition to these legislative changes, the SEC has recently expanded the number of officials in the agency's enforcement division with authority to initiate investigations and issue subpoenas to 36 senior officials. This move reverses a Trump Administration decision to limit such authority to only two senior officials, which may have contributed to a noticeable drop in investigations and enforcement actions undertaken by the SEC between 2016 and 2020.²⁸

There are also prospects for a further strengthening of the FCPA in the current Congress. The Countering Russian and Other Overseas Kleptocracy ("CROOK") Act, a bipartisan bill re-introduced earlier this year in both the Senate and the House of Representatives, would impose additional financial penalties on significant violators of the Foreign Corrupt Practices Act. Funds recouped under the CROOK Act would then be used to fund programs that fight global corruption.²⁹

Conclusion

President Biden's rhetoric and campaign promises suggest that efforts to combat corruption, both at home and abroad, will be a significant focus for the Biden Administration. Given that FCPA enforcement under the Trump Administration was more of a continuation of long-standing enforcement trends rather than a break from those trends, it is reasonable to expect that during the near-term period of transition, the Biden Administration's FCPA enforcement efforts will continue apace. With some new tools becoming available and refreshed leadership arriving at the DOJ and the SEC, it is likely that over time FCPA enforcement will become more robust, reflecting the particular priorities of the new Administration. While we will need to wait and see what stamp new leaders will put on this area, more rigorous enforcement is certainly on the horizon.

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²⁸ See generally Dave Michaels, *SEC Expands Enforcement Staff's Power to Start New Investigations*, WALL ST. J. (Feb. 9, 2021), <https://www.wsj.com/articles/sec-expands-enforcement-staffs-power-to-start-new-investigations-11612894490>.

²⁹ See Press Release, Fitzpatrick & Keating Reintroduce CROOK Act (Jan. 23, 2021), <https://fitzpatrick.house.gov/2021/1/fitzpatrick-keating-reintroduce-crook-act>; Press Release, Cardin, Wicker Introduce Bill to Counter Corruption and Promote Good Governance (Feb. 4, 2021), <https://www.cardin.senate.gov/newsroom/press/release/cardin-wicker-introduce-bill-to-counter-corruption-and-promote-good-governance->.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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