

Anti-Corruption Compliance and Enforcement Trends in the US and Globally



In conjunction with World Law Group's Compliance & Investigations Group, attorneys Jonathan, Kathleen Harris, John Nassikis, and Daniel Bernstein of member firm Arnold & Porter recently shared their observations on trends with U.S. Foreign Corrupt Practices Act (FCPA) compliance and enforcement. Here is what they had to say.

Larger financial penalties for violations: Eight of the ten largest-ever FCPA penalties have been imposed within the past five years, with two different multi-billion-dollar settlements just last year. Enforcement authorities in the United States and abroad are gaining experience with increasingly large, sophisticated cases.

International coordination: The two multi-billion-dollar enforcement actions last year (involving Goldman Sachs and Airbus) both involved coordinated settlements with authorities in other countries. In fact, the Justice Department's announcement of the Goldman resolution acknowledged the assistance of an alphabet soup of criminal and regulatory agencies in the United Kingdom, Switzerland, Singapore, Luxembourg, Malaysia, France, and Guernsey. The one corporate FCPA settlement announced so far under the Biden Administration was coordinated with Brazil and the United Kingdom. And in his first national security memorandum, issued in June, President Biden emphasized the importance of international cooperation in the fight against corruption.

Interagency coordination: President Biden's *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* highlighted the need for interagency coordination in the United States too—coordination beyond just the DOJ and SEC, the traditional enforcement agencies for the FCPA. President Biden has called on numerous departments in the executive branch (including Treasury, Defense, and State), as well as the intelligence community, to work together to combat corruption. A report with recommendations from the interagency review President Biden ordered is due by the end of the year. And if FCPA enforcement actions over the past few years are any guide, we expect to see various financial and bank regulators continuing to work alongside the DOJ and SEC in bringing corruption cases.

Focus on Latin America: A significant portion of FCPA enforcement actions over the past few years has arisen out of corruption in Latin America, including sprawling cases involving corruption at state-owned oil companies in Brazil, Ecuador, and Venezuela. The focus on Latin America is likely to continue, given the region's proximity to the United States, established relationships between enforcement authorities, and Vice President Kamala Harris' recent public statements about dedicating resources to the fight against corruption in Central America.

Incentives for cooperation: The DOJ's FCPA Corporate Enforcement Policy, formally adopted in 2017, creates a presumption that a company will not be prosecuted, absent aggravating circumstances, if it voluntarily discloses the misconduct, fully cooperates with the government's investigation, and remediates any problems. Under the policy, companies also may receive up to a 25% reduction in penalties if they cooperate and remediate but do not self-report. The policy—with its tangible rewards for cooperation—seems here to stay.

Focus on corporate compliance programs: "Compliance" has become a watchword for enforcement agencies around the world and a particular focus for the U.S. Department of Justice, which last year published updated guidance on Evaluation of Corporate Compliance Programs. We have seen the DOJ's FCPA Unit putting more resources behind this, taking a hard look at the design of corporate compliance programs and how they actually work in practice. Prosecutors are evaluating compliance programs (1) historically, at the time of the (mis)conduct under investigation; (2) at the time of their charging decisions; and (3) for the duration of any deferred prosecution, monitorship, or other reporting terms.

Collateral litigation: In addition to investigation costs, remediation costs, and any monetary sanctions imposed by enforcement authorities, companies and individuals that come under FCPA investigation are now often also facing collateral civil litigation and arbitration, including shareholder derivative suits (e.g., breach of fiduciary duty, fraud, waste claims); securities class actions; RICO claims; commercial contract disputes; and/or whistleblower/retaliation

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claims. These legal actions can be expensive and disruptive for a company, particularly if not managed right.