
THE U.S. AND LATIN AMERICAN
RELATIONSHIPS: IS IT A WHOLE
NEW ENFORCEMENT WORLD?

IN CONVERSATION WITH NATALIA CALLEJAS OF AGUILAR CASTILLO LOVE AND EVELYN SHEEHAN OF KOBRE & KIM

MEET THE LAWYERS



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Natalia Callejas is one of ACL's youngest partners and is based in the firm's Guatemala office. Natalia has a multi-specialist practice including advising across project financings, cross-border M&A, energy, telecommunications and pharmaceuticals. She leads the anti-corruption, investigations and compliance practice in Guatemala.



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Evelyn is a partner at Kobre & Kim, based in the Miami office. Evelyn was born in Costa Rica, and later moved to the United States where she began her career trajectory. After working at a number of top U.S. law firms, Evelyn transitioned to the U.S. Department of Justice, where she worked for almost 10 years and served as the Deputy Chief of Asset Forfeiture in the Southern District of Florida. Now at Kobre & Kim, Evelyn focuses her practice on advising high-net-worth individuals, institutional clients and their executives in cross-border investigations, government enforcement actions and in particular, related asset forfeiture matters.

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Last month Aguilar Castillo (ACL) partner Natalia Callejas spoke with Miami-based disputes and investigations partner, Evelyn Sheehan, of Kobre & Kim, in what was a very insightful interview looking at the new U.S. administration and what potential policy changes might mean for the enforcement environment in Latin America. Here is the first in a three-part series of interview-style articles from that discussion.

Since we had our interview, a number of U.S. government policy developments have been announced – many of which were pre-empted and discussed at a theoretical level during the interview – and have since come to fruition. Such developments include:

1. **The National Security Study Memorandum** issued by the Biden administration on June 3 signaling a doubling down on anticorruption efforts with a key focus on interagency collaboration and – significantly – strengthening cross-border coordination to reach these goals of what has been declared a core national security priority;
2. The **establishment of a Joint Task Force Alpha** to fight corruption in Central America, announced by the Attorney General’s Office on June 7, less than a week following the issuance of the National Security Study Memorandum:

“Joint Task Force Alpha will also complement the Justice Department’s efforts to fight corruption. The Justice Department will increase its focus on investigations, prosecutions, and asset recoveries relating to the corruption in the Northern Triangle countries through its Foreign Corrupt Practices Act enforcement program, counternarcotics prosecutions, and Kleptocracy

Asset Recovery Initiative. In addition, adopting a Task Force approach, the department’s OPDAT and ICITAP personnel – including new Northern Triangle anti-corruption legal advisors – will work with Northern Triangle prosecutors and investigators to build corruption cases in those countries themselves, as well as to develop leads that can be pursued by the Kleptocracy Asset Recovery Initiative”; and

3. **Vice President Kamala Harris’ visit to Guatemala** – her first overseas visit since taking office – the same week as the Attorney General Office’s announcement about the Joint Task Force Alpha. During that visit, the Vice President described her task to tackle the root causes of the ‘border crisis’, including corruption and the lack of economic opportunities, and emphasizing the commitment of the U.S. to bolster investigations into corruption.
4. **The Bipartisan Congressional Assembly launched by U.S. lawmakers on June 10** aimed at combating global corruption and kleptocracy. The assembly was held shortly after the National Security Memorandum was issued. President Biden directed more than a dozen U.S. departments and agencies to submit a report within 200 days, with recommendations on how to tackle corruption.

Reportedly, the lawmakers plan to introduce several anti-corruption bills over the course of the next months. This would include the Justice for Victims of Kleptocracy Act, which would disclose the amount of money stolen from citizens of kleptocratic regimes and recovered by U.S. law enforcement, as well as the Foreign Corruption Accountability Act, which would give broad authority to the U.S. to impose visa bans on foreign individuals engaged in corruption.

THE INTERVIEW

Looking at a potentially increased FCPA enforcement under the Biden administration – interestingly, much has been said about the record penalties that were being imposed under the U.S. FCPA during the Trump administration – do you think we can expect a different approach from the Biden administration?

Evelyn It might be a little bit too early to tell, but all indications are that the new administration will pivot from the hostility and apathy towards the region that we saw in the previous years. It's important to remember that President Biden once served as former President Obama's main emissary to Latin America when he was vice president. In his first few months as president, Mr. President Biden has already demonstrated a renewed commitment to those global anticorruption efforts despite the region stalling domestic anticorruption efforts and political instability, which we have unfortunately seen in several countries. The DOJ has made significant progress over the last few years to develop close cooperation with its foreign counterparts in the region and we saw how the prior administration's approach undermined a lot of those relationships, especially when it came to immigration. I'm cautiously optimistic that that will change, and the rhetoric from the new administration will only benefit the cooperation that needs to happen for complex international investigations. In that context, the focus on Latin America by the DOJ is undeniable. More than 60 percent of the FCPA-related enforcement actions brought or announced in 2020 alleged misconduct in Central or South America. So, despite the fact that there are significant investigations in Asia and Africa and all other continents, it's undisputable that Latin America has emerged as the new risk capital for anticorruption & compliance.

Natalia Unfortunately Evelyn's statement about Latin America being the new risk capital, is a true one. I think

we've seen recently the interest taken by Vice President Harris here in the region; and the message that has been communicated to us is that the U.S. is facing a problem with immigration and a problem in security, and much of that problem stems from our lack of ability to provide an adequate standard of living to our own citizens, owing in large part to significant levels of corruption. There is a collateral effect caused by not handling our own internal issues with corruption – and that, in the end, affects the U.S., affects how we do business, and of course, also affects investments done here by commercial partners in North America. A large part of what we need right now, as attorneys and as citizens, is to look to how we solve the problem of building those technical capabilities needed to deal with corruption and related issues.

And part of that technical ability or capacity would presumably come in the form of a U.S.-backed agency. What do you think a U.S. joint task force or similar agency could mean in relation to U.S. involvement in foreign anticorruption efforts in Latin America?

Natalia We've been the guinea pigs in Guatemala and Honduras in terms of how international agencies can work towards enforcement or aiding enforcement agencies locally. We've had different stages of involvement of international agencies throughout the years. Some might call it successful intervention of international agencies and some might call it foreign intervention in our judiciary system. So, the answer really depends on who you ask; it's a polarizing issue. The focus currently is clearly on the Northern Triangle countries – Guatemala, El Salvador and Honduras. It will be interesting to see if other countries outside the U.S. will back such a joint task force or agency.

Formerly, in Guatemala we had the CICIG, which was funded not exclusively by the U.S., although it was a very important financial and political partner; it was a UN-backed agency. With Honduras, it was an



OAS-backed agency. I think political receptivity and political will behind such a task force may depend on involvement of other non-U.S. entities and countries, as well as whether such an effort is seen as furthering a political ideology rather than the root causes of corruption. What we want and what is needed is an agency that can be independent and objective in the treatment and the prosecution of cases. The creation of such a task force should be seen as an aide of transfer of knowledge, of technical capabilities, of building up that which we lack in our current public prosecutor offices. This can be a challenge when U.S.-backed agencies are seen as little more than a political or ideological tactic. Central America is not a unified region. We have different, very different scenarios in each country and different challenges.

Evelyn I echo everything Natalia said. Battling corruption is very much a new priority for the administration. There's a clear awareness that the issue of corruption is endemic and that what happens in Central America affects the United States. We expect redoubled efforts by the United States to fight corruption in the region and increased funding in coordination with foreign counterparts and in capacity building. Whatever help

the U.S. can provide in capacity building and funding is not selfless. The capacity building is absolutely key to combat corruption. When I was at the DOJ, I was part of that capacity building. Paper cases are incredibly hard to put together, to actually have time to build those kinds of cases without pressure. And together with the capacity building and the funding, we will, of course, see increased exposure of individuals and entities in the region. For those in the region who may be involved in any sort of activity that exposes them to U.S. criminal exposure or asset exposure, there is reason to worry because I believe the trends that we have observed over the last few years will only get stronger.

I also wanted to mention that there's pending legislation in Congress that we are watching closely. Back in December of 2020, the U.S. Congress approved the United States Northern Triangle Enhanced Engagement Act, also known as the Northern Triangle Act, which focuses on strengthening exactly the kinds of measures that we've been discussing in Central America countries like Guatemala, El Salvador and Honduras. So, under this new act, individuals would be potentially sanctioned. Persons should pay careful attention to everything that is going on and seek appropriate advice.

Looking at the new U.S. Anti-Money Laundering Act – what tools does the act bring to facilitate criminal investigations abroad, and are there risks and concerns associated with those tools?

Evelyn The new law is massive, but I'll try to point out a few of the highlights of the new tools that that DOJ will have at its disposal; and not just the DOJ, but the regulatory and law enforcement apparatus of the United States.

First, there's now expanded subpoena power over foreign bank records. The new act expands the reach of the U.S. to obtain records maintained outside of the United States that are not even linked to U.S. corresponding accounts. The new act allows the U.S. to subpoena records relating to any account at the foreign bank, including records maintained outside the United States. That's a huge expansion. We expect some litigation about that and there's some area to push back.

The second thing that I would point out is the whistleblower rewards program that has also been implemented. The new act increased payouts to whistleblowers. Instead of a \$150,000 cap, the new version allows for the collection of up to 30 percent of the funds or sanctions where recovered penalties surpass a million dollars.

The third thing relates to beneficial ownership registration. Under the new act, beneficial owners of U.S. corporate entities will now be required to register with the U.S. Treasury's Financial Crimes Enforcement Network (FINCEN). FINCEN is the American financial intelligence unit (FIU). This is yet another example of increased scrutiny of beneficial ownership in foreign assets. Importantly, although FINCEN must generally keep confidential the information that it is reporting, that information may be shared with foreign countries and with federal regulators in foreign corporations as well. While FINCEN is not allowed to share that information with private parties, it is encouraged and allowed to share it with foreign FIUs, which bears an obvious risk. Important to note is that not only is there now a requirement for you to register your beneficial ownership, but there are criminal liabilities if you misrepresent

something in that registration. Needless to say, financial institutions and professionals in jurisdictions with privacy laws preventing this disclosure are going to struggle with how it is that they're going to both comply with domestic law without getting in the crosshairs of the DOJ. So that is an area that will be closely watched when DOJ starts using more of these tools.

Natalia Of course, the new reach that this act has will definitely have a significant impact. From a Guatemalan perspective, we still have no privacy laws here, so it will be a fairly easy process to provide information from this side. Interestingly we have seen recommendations from the DOJ in relation to Latin American countries strengthening our anti-money laundering legislation - signaling deficiencies in how we are not including certain items that are crucial to AML investigations. A number of tools may potentially be implemented via new bills or amendments to bills. There are some recommendations that have come from the changes that the U.S. has made in their own legislation that I think will serve as a guide for us to strengthen our legislative tools here.

And, will the new U.S. AML measures lead to a tightened collaboration between foreign agencies?

Evelyn In short, yes. Cooperation, cooperation, cooperation – the drumbeat is clear.

The new AML Act establishes a new pilot program that encourages international cooperation and *requires* financial institutions with U.S. suspicious activity reporting obligations to disclose such suspicious activity to foreign affiliates. So, it's not just a *potential* sharing, it is becoming a *requirement*. In addition to that, the pilot program creates new positions within the U.S. government agencies, including U.S. Treasury, attachés and foreign financial investigative intelligence unit liaisons, many of whom will be stationed at embassies and other U.S. government outposts, including in Latin America.

Another 'string' to the enforcement bow is the U.S. Kleptocracy Asset Recovery Act. Evelyn, could you tell us a little bit more about that?

Evelyn In addition to the whistle blower pilot program that I mentioned previously, which focused on

prosecution and reward for actionable intelligence, the Kleptocracy Asset Recovery Act, which was also part of that huge legislation that I mentioned, is indicative of the increased focus on asset recovery. It created a pilot program that rewards whistleblowers with information that results in the seizure and forfeiture of assets linked to foreign government corruption. Increased rewards will serve as an incentive, obviously, to those with information about criminal conduct, whether those are gatekeepers like the ones that Natalia was mentioning, professionals who service high-net worth individuals or other individuals with actionable intelligence that actually results in seizure and forfeiture. This will likely result in an uptick in enforcement actions and asset seizures, I'd be surprised if it didn't.

Most law firms in Latin American countries have very little experience in asset forfeiture, could this be an opportunity for transfer of knowledge to the Central American region?

Natalia Yes, definitely. I think we're dealing with an area of law that traditionally has not been very specialized in our region. It's fairly new to us, and therefore, legal practices are slowly starting to understand how to handle those cross-border matters. We benefit from partnering with experts that understand how to do this in a more sophisticated and technical manner, and we provide the local, 'boots on the ground' and understanding of the

political and legal landscape. And so, the combination of foreign expertise and local partners, I think is a very strong one. We've seen it work in investigations cases, working alongside firms and working alongside also foreign agencies and officials and also institutional offices. We should take advantage of this opportunity.

Final thoughts

With increased and sharpened enforcement tools in the U.S. law enforcement's arsenal – FCPA enforcement program, Global Magnitsky Act, DOJ's Kleptocracy Asset Recovery Initiative, new subpoena power enacted as part of the National Defense Authorization Act for 2021, Task Force Alpha – and the clear focus on tackling corruption in the Northern Triangle Countries of Central America, and throughout Latin America – it's safe to say that it is more important than ever for companies to have robust anti-corruption compliance frameworks in place, as well as for stakeholders, gatekeepers, companies and individuals to commit to educating themselves on the nuances of the new policies and developments. It is vital to seek independent counsel as early on as possible – especially considering you might end up having to interface with the DOJ or other law enforcement agencies.

The firms

Aguilar Castillo Love is a full-service Latin American law firm with more than 60 lawyers working across Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Paraguay. Through legitimacy, cross-border business insight and forward-thinking legal expertise we provide security for our clients on highly complex and critical matters. We prioritize the quality of our practice, the nature of its work and the value of our relationships. We are instruments for business integrity through the law.

Kobre & Kim is an Am Law 200 global law firm focused exclusively on disputes and investigations, often involving fraud and misconduct. With fifteen locations around the world, including São Paulo, Buenos Aires and Miami, Kobre & Kim offers extensive experience with cross-border litigation and investigations for Latin America-based clients in crisis situations arising from international fraud and misconduct cases.