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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 several 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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Sanctions

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.

In our first article from this discussion, Natalia and Evelyn discussed the general enforcement environment taking into consideration a number of U.S. government policy developments that were announced and which came into effect at the beginning of 2021.

In this second article from the same interview with additional comments on developments since the interview, Natalia and Evelyn look at the enforcement environment specifically in the context of sanctions.

THE INTERVIEW

It's difficult to discuss U.S. enforcement without looking at the U.S. sanctions regime and its reach. Evelyn, what role do you feel U.S. sanctions will play as a prevention tool for anti-corruption or anti-money laundering policies?

Evelyn Sanctions have increasingly become a powerful, rapid-fire tool for U.S. law enforcement. Unfortunately, we've seen that many clients doing business or considering doing business with sanctioned entities don't realize the reach of U.S. sanctions and the potential risks of U.S. exposure. In essence, anyone can be subject to U.S. civil or criminal exposure, as well as asset freezes, by dealing with sanctioned companies. One key to understanding the potential impact of U.S. sanctions lies in the difference between primary and secondary sanctions. What we call primary sanctions generally prohibit U.S. persons from engaging in transactions with the so called "specially designated nationals," whose assets can be frozen and cannot be retrieved without permission by the U.S. Treasury's Office of Foreign Assets Control (OFAC). Taking the Iran sanctions regime as an example, U.S. persons are prohibited from taking any goods and services from Iran. But why does someone leading a Guatemalan company care? If you're not a U.S. person and you're not a U.S. corporation, why should you care?

The quick answer is secondary sanctions. While primary sanctions have a limited effect outside U.S. borders, the U.S. often relies on what we call *secondary* sanctions to leverage its global economic dominance and essentially coerce foreign parties to forgo transactions with sanctioned targets. In recent times, the U.S. government has not been shy about imposing sanctions on activities with absolutely no nexus to the United States in order to increase its global crackdown. The imposition of these secondary sanctions has resulted in an even further global reach of its U.S. sanctions regimes. In essence, the U.S. can designate non-U.S. persons and entities for transactions with no strings attached to the U.S. as parties with whom U.S. persons cannot do business; meaning that if the U.S. places secondary sanctions on a party, that party will be deprived from dealing with any U.S. persons, *including U.S. financial institutions*. And that's where the big reach comes. If you do business with a sanctioned party, you would be at risk of losing your ability to engage in international transactions (especially since most international transactions involve U.S. dollars), even when they don't take place in the United States. And corresponding banks, which are set up to facilitate transactions for other financial institutions in a foreign country and are subject to strict rules, will not want to take any sanctions risk.

Natalia, have you seen the U.S. sanctions regime used in this way – as a deterrent of certain activity and as a tool in the anti-corruption and AML efforts – in the Latin American context?

Natalia The imposition of sanctions is definitely not only a U.S. effort; it's an effort increasingly being coordinated with other countries, such as the UK. Back in the spring of 2021 we saw announcements from the U.S. and the UK of sanctions; the UK within its new global anti-corruption sanctions system and in the U.S. under the Magnitsky Act. We received questions from clients asking whether their business partners had any dealings with any of these former public officials or current public officials included in these sanctions lists.

It's important to understand the breadth of such sanctions. It's not that only one or two individuals are being sanctioned; which is the misconception that many people have, who wonder why only a few individuals are sanctioned. We have to understand that corruption works in networks. If you get one of those nodes in the network, then you get a much further reach into the whole corruption scheme. The sanctions regimes included travel bans and asset freezes.

The action seemed to light a lost hope here in Guatemala; a revamped hope that there is someone still out there

fighting against corruption and for the protection of human rights. These actions taken by the U.S. – an important economic partner for Guatemala – provides a light at the end of the tunnel to current law enforcement officials who have been fighting a big monster down here against corruption. Now I think that it's a question of how do we work in a different way that we did in the past, with the regional agencies.

Have you seen the approach of the Biden administration – and do you see the new administration's continued approach – to be any different than that of former administrations? And what do you think Latin American countries can expect?

Evelyn A lot is still yet to be seen. Recent U.S. enforcement activities illustrate that the government has been increasingly using sanctions as a powerful foreign policy and national security tool. As recent as early December 2021, the Biden Administration reaffirmed this in its latest guidance on the "United States Strategy on Countering Corruption," which telegraphs the use of sanctions as a tool to stem corruption and hold corrupt actors accountable.

The expansive use of sanctions was obviously one of the main focuses under the Trump administration and especially the case with Cuba, Nicaragua and Venezuela. Under Biden, even though we might expect a shift in U.S. policy towards Latin America, we might not see much of a change with respect to sanctions themselves. The Biden administration has continued to deploy some of the sanction tools introduced by the prior administration to expand its offensive against corruption and human rights abuses even further.

Earlier in his campaign, for instance, Biden announced his intentions to revisit the U.S. policy towards Cuba. Instead, rather than scaling back Trump's restrictions on Cuba, the Biden administration imposed its own sanctions on four Cuban government officials and the national police following the Cuban government's recent crackdown on peaceful demonstrators in July 2021.

When it comes to Venezuela, the new administration has initially indicated its inclination to narrow the scope of sanctions and tailor them more specifically to focus on officials within the Maduro regime involved in corruption and human rights abuses. The administration has also urged more coordination on sanctions with the EU, where those individuals' resources and families are located. It appears, however, that the Biden administration will continue to follow its predecessor's policy and stay the course on Venezuela sanctions. Following the recent Venezuelan elections, the Biden administration reinforced its continuous recognition of Venezuela's opposition leader as the legitimate president of the country and announced that the Venezuela oil sanctions will remain in place. While narrower in scope, the European Union has also signaled the renewal of sanctions against Venezuelan officials for another year following the country's elections.

More recently, the U.S. has also imposed financial sanctions on Paraguayan individuals, as well as their associated entities, for their roles in corruption schemes. These actions further represent the U.S. government's redoubled efforts to combat corruption in Latin America, including in the Argentina, Brazil, and Paraguay Tri-Border Area, utilizing sanctions as a powerful pressure tool.

The same is expected with regards to Central America, where the U.S. government has significantly expanded its sanctions regime. The U.S. government has repeatedly warned companies and investors to be mindful of who they associate with in the region, including through its regional diplomats.

In Nicaragua, for instance, the U.S. embassy has recently underscored President Daniel Ortega's regime as a major point of concern, given his strong ties with Venezuela. In response to a crackdown against democratic activities by Ortega, who refused to allow for a free and fair election, the U.S. recently imposed sanctions on more than 100 public officials in Nicaragua, including Ortega himself and his wife. Nicaragua is likely to face even greater pressure moving forward, including when it comes to trade embargos – something investors doing business in the country should also be mindful of, notwithstanding potential sanctions exposure and reputational risks.

In addition, as recent as September 2021, the U.S. announced sanctions against seven public officials in El Salvador and Guatemala, including five Salvadoran Supreme Court justices, for undermining the democracy and obstructing corruption investigations in those countries. Those individuals were also added to the United States' Undemocratic and Corrupt Actors list which, under section 353 of the United States–Northern Triangle Enhanced Engagement Act, generally makes the perpetrators ineligible for visas and admission to the United States.

It's worth noting that China is an interesting space to watch in this context. China has become Latin America's greatest trading partner in the past few years and it appears that this relationship will continue to solidify. In El Salvador, for instance, the Bukele administration has already signaled its intentions to strengthen its relationship with China, which might draw even higher U.S. scrutiny.

Under Trump, we all witnessed the U.S. government's aggressive approach towards China's growing influence in the region, especially in the context of sanctions; Trump placed restrictions on Mexico to prohibit trade with China. While Trump was building the wall to close borders and continued with that line of rhetoric, China seized the opportunity to invest billions and strengthen its ties in the region. It might be too early to tell, but companies operating in Latin America (and especially in Central America) with eyes towards China should closely follow how the U.S. will position itself in light of China's growing influence in the region. We might see the U.S. strengthening its sanctions regime as a whole, as well as U.S. heightened enforcement arising from the increased attention placed in the region.

Final thoughts

Individuals and businesses need to be fully aware and well-advised about the risks that they are facing if they consider doing any sort of transactions with individuals or other entities that are considered sanctioned entities by the United States government. By dealing with sanctioned entities, you may be exposed to secondary sanctions, including asset freezes and losing your ability to transact with U.S. banks. It's important to have independent litigation counsel involved in these cases early on, especially considering that you might end up having to interface with the Department of Justice, OFAC or other law enforcement agencies.

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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 sixteen 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.