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COMPLIANCE AS A VALUABLE TOOL FOR AVOIDING ENFORCEMENT ACTION IN MEXICO AND LATIN AMERICA

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The Recent Focus on Corruption in Mexico

On July 19, 2017, the General Law of Administrative Responsibilities (GLAR) went into effect in Mexico, making it a "serious administrative offense" for individuals and companies to engage in bribery, collusion in public bid procedures, influence peddling, and misuse of public funds and resources.[1] Sanctions for violations include significant fines, temporary disqualification from participation in public bids, payment of damages and lost profits, suspension of business activities, and dissolution of a company.[2] When determining a company's liability, GLAR allows the relevant enforcement authority to take into account whether the company self-disclosed the violation, and whether the company had in place a real and effective compliance program or "integrity policy"—analogous to what federal law enforcement authorities in the United States can consider when resolving matters involving companies.[3]

GLAR is part of the new National Anti-Corruption System (SNA) approved by Mexico President Enrique Pena Nieto as part of a significant effort to counter Mexico's reputation as a country where corruption in the government and private sector is commonplace and goes unpunished.[4] Through the SNA, Mexico is seeking to attack corruption in the government and private sector using a coordinated anti-corruption enforcement effort at all levels of government—municipal, state, and federal. Although recent news reports have revealed some disenchantment by government enforcers in Mexico about the government's seriousness about fighting corruption under the new laws,[5] the recent arrest of a former deputy to President Pena—in connection to allegations of illegally funneling public monies through fake Mexican businesses for campaign purposes—may soon undercut that narrative.[6]

While the Mexican government continues to develop its anti-corruption acumen, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) remain willing and able to exercise their authority as global enforcers in the anti-corruption effort. As part of that effort, the global enforcers have vigorously pursued cases in Latin America and Mexico over the last two years—while also making clear in official policy documents that company compliance programs can have significant value when it comes to rooting out corruption in the global marketplace. Accordingly, Mexican and Latin American companies engaged in global operations, as discussed below, should take affirmative steps to effectively and proactively use compliance as a tool to avoid and mitigate enforcement actions by government authorities located inside and outside the country.

The FCPA Pilot Program

In April 2016, the DOJ launched a one-year Foreign Corrupt Practices Act (FCPA) pilot program that was specifically designed to encourage timely voluntary self-disclosures of FCPA-related issues to regulators.[7] Companies that voluntarily self-disclosed, cooperated fully, and timely remediated could be rewarded—in the discretion of prosecutors—with a declination of charges, significantly reduced financial exposure in terms of fines and penalties (up to 50% off the bottom of the guidelines range, rather than the 25% available without timely voluntary self-disclosure), and possibly no monitor.[8]

When the DOJ announced the pilot program it made the following clear:

> The United States is not going at this alone. The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively to combat bribery schemes that cross national borders. In short, an international approach is being taken to combat an international criminal problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us. We are also coordinating to more effectively share documents and witnesses. The fruits of this increased international cooperation can be seen in the prosecutions of both individuals and corporations, in cases involving Dallas Airmotive, Vadim Mikerin, and PetroTiger, among many others.[9]

Notably, a series of post-announcement FCPA cases in 2016–17 confirmed that the DOJ—working alongside the SEC—views itself as the global enforcer against corruption and truly believes that a coordinated strategy with international partners is the most effective way to battle corruption in Latin America and Mexico:

- October 2016: A Brazilian aircraft manufacturer agreed to pay more than $205 million to resolve long-running corruption probes with US (DOJ and SEC) and Brazilian enforcement authorities, arising from allegations of bribe payments to government officials in the Dominican Republic, Saudi Arabia, and Mozambique to secure aircraft contracts. In addition to Brazilian enforcement authorities, the DOJ and the SEC received investigative assistance authorities in the Dominican Republic and South Africa.[10]
- December 2016: A Brazilian construction company and a Brazilian petrochemical company agreed to pay $3.5 billion to $4.5 billion to resolve corruption charges with enforcement authorities from the United States (DOJ and SEC), Brazil, and Switzerland, arising from allegations of bribe payments and concealment of bribes paid to government official and political parties to secure contracts, favorable tax treatment, and preferential rates for raw materials.[11]
- December 2016: A global pharmaceutical company paid a total of $519 million to resolve civil and criminal cases with the DOJ and the SEC that alleged the company—through certain executives and employees—paid bribes to government officials in Russia, Ukraine, and Mexico to increase the use and sales of its drugs. Investigative assistance was provided by the Mexico Attorney General's Office (Procuradura General de la República or PGR).[12]
- January 2017: A US-based medical device company agreed to pay $17.4 million to resolve FCPA criminal charges that alleged the company—after previously settling FCPA claims with the DOJ in 2012—continued to use a third-party distributor in Brazil that was known to have paid bribed government officials in Brazil, and paid bribes through its Mexican subsidiary to customs brokers and subagents so that the company could import contraband product that lacked proper registration or labeling. Although the government considered the company a repeat offender, the government agreed to a deferred prosecution agreement (DPA) requiring an independent monitor because the company cooperated fully in the investigation and provided information about the individual involved in the misconduct.[13]
- January 2017: A Chilean chemicals and mining company agreed to pay more than $30 million to the DOJ and the SEC to resolve criminal and civil allegations that it violated the FCPA by failing to implement sufficient internal controls to prevent improper payments by the company to Chilean officials and politicians who had influence over the company's mining operations, and by falsifying books and records to conceal the payments by disguising them as consulting and professional services paid to vendors who in fact had personal ties to the Chilean officials and politicians.[14]
- January 2017: A US-based medical device company agreed to pay more than $14 million to settle FCPA charges that alleged its Brazilian subsidiary committed FCPA accounting violations by improperly recording revenue, and committed FCPA bribery violations by making improper payments to doctors at government-owned hospitals in Brazil to increase the use and sales of the company's products. Investigative assistance was provided by the Brazil Securities and Exchange Commission (Comissao de Valores Mobiliarios of Brazil or CVM).[15]
- December 2017: A Singapore-based company and its wholly owned US subsidiary agreed to pay more than $422 million to resolve corruption charges with enforcement authorities in the United States (DOJ), Brazil, and Singapore. The FCPA and related corruption charges arose from allegations of a decade-long scheme in which the company paid millions of dollars in bribes to officials at a Brazilian state-owned oil company and to the then-governing political party in Brazil to secure contracts related to the company's shipyard operating and ship repair business.[16]

During this same period of significant FCPA enforcement activity involving bribes in Latin America and Mexico, a US-based manufacturer and supplier of aboveground liquid storage tanks took advantage of the newly announced FCPA pilot program when it voluntarily disclosed to the DOJ that the company had paid more than $500,000 in bribes to government officials in Venezuela and China to influence purchasing decisions and secure $2.7 million in net profits to the company. In this voluntary self-disclosure matter announced in September 2016, federal prosecutors exercised their discretion not to criminally prosecute the company because the company did the following:

1. Timely and voluntarily disclosed the illegal conduct
2. Conducted a thorough and comprehensive internal investigation
3. Cooperated fully and provided all known facts concerning misconduct by individuals
4. Disgorged all profits from the illegal conduct
5. Enhanced its compliance program and internal accounting controls
6. Remediated the problem by firing/sanctioning employees and terminating agents/distributors involved in the illegal conduct[17]

The New FCPA Corporate Enforcement Policy

Clearly finding value in the FCPA pilot program—with a total of 30 voluntary self-disclosures over an 18-month period, as compared to 18 self-disclosures for the previous 18-month period—the DOJ announced its new "FCPA Corporate Enforcement Policy" on November 29, 2017.[18] The new policy makes the FCPA pilot program permanent and takes the bold additional step of creating a "presumption" of nonprosecution where companies "voluntarily self-report the issue, cooperate fully with prosecutors, and identify and remediate the root causes and gaps in compliance controls that led to the problem."[19] To receive nonprosecution treatment under the FCPA Corporate Enforcement Policy, companies must also still identify the individuals responsible for the misconduct and must still pay to the DOJ (or a relevant regulator like the SEC) all disgorgement, forfeiture, and restitution resulting from the misconduct.[20]

Now fully incorporated into the US Attorney's Manual—the guidance manual for federal prosecutors—the presumption will apply in the vast majority of FCPA cases where the company satisfies the three-part test and no aggravating factors are present. Aggravating factors "include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism." Notably, in cases in which aggravating factors are present, companies that satisfy the three-part test of disclosure, cooperation, and remediation will still be eligible for a 50% fine reduction even though they will still face prosecution.[21]

During the rollout of the new policy, Deputy Attorney General Rod Rosenstein stated that "[e]ffective deterrence of corporate corruption requires prosecution of culpable individuals" rather than simply imposing large fines on companies that ultimately penalize shareholders. Accordingly, the DOJ views law-abiding companies as law enforcement allies in the fight against corruption for which the government should "provide incentives . . . to engage in ethical corporate behavior." In that regard, companies with robust compliance programs that allow them to identify, remedy, and disclose FCPA violations should be rewarded for good corporate behavior.[22]

Prior to the announcement of the new policy, the DOJ issued several pieces of guidance to assist companies and their lawyers to understand what is expected of them in terms of compliance. The DOJ and the SEC jointly issued their *Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA)* in November 2012 (revised June 2015), and the DOJ's Fraud Section more recently issued guidance in February 2017 titled *Evaluation of Corporate Compliance Programs*.[23] The guidance outlines and discusses the 11 areas that the DOJ evaluates when reviewing a corporate compliance program in the context of making a charging decision or negotiating a case resolution:

1. Analysis and remediation of underlying misconduct
2. Senior and middle management
3. Autonomy and resources
4. Policies and procedures
5. Risk assessment
6. Training and communication
7. Confidential reporting and investigation
8. Incentives and disciplinary measures
9. Continuous improvement, periodic testing, and review
10. Third-party management
11. Mergers and acquisitions[24]

While the above-referenced DOJ compliance materials predate the new policy, unsurprisingly the DOJ appears to remain wedded to the compliance concepts it has previously articulated. Under the "Timely and Appropriate Remediation in FCPA Matters" subsection of the new policy, the DOJ will evaluate the following criteria—taking into account the size and resources of an organization—when determining whether a company's compliance and ethics program warrants full credit:

- The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated
- The resources the company has dedicated to compliance
- The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk
- The authority and independence of the compliance function and the availability of compliance expertise to the board
- The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment
- The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors
- The auditing of the compliance program to ensure its effectiveness
- The reporting structure of any compliance personnel employed or contracted by the company

While the new policy does not provide a guarantee for companies as the DOJ is unable to "eliminate all uncertainty" in prosecutorial discretion, the new policy reaffirms the principal that compliance matters when it comes to dealing with the global enforcers. When evaluating whether a company will be entitled to nonprosecution under the new policy, the government will be looking at whether the company has a real and effective compliance program in place. In this regard, companies with demonstrably strong and robust compliance programs generally have an easier time investigating and identifying the full scope of unethical behavior that needs to be disclosed to the government, while companies with weak compliance programs generally have a much harder—and costlier—time identifying the full scope of the unethical employee behavior resulting in possible criminal exposure.

Before the government makes any decision about how to resolve a case against a corporate entity under the new policy, the government will need to be convinced that the company conducted an appropriate internal investigation that was thorough and tailored to the scope of the wrongdoing. By sufficiently investing in and using compliance as a proactive tool in the first instance, companies can better position themselves to argue for nonprosecution under the new policy should their employees engage in criminal, corrupt, and unethical behavior for which the company can arguably be held accountable. The same can likely be said for actions brought under GLAR in Mexico.

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[1] *See* Morgan Lewis White Paper, "Significant Changes in Anti-Bribery Laws in Mexico and Colombia Signal a New Commitment to Anti-Corruption Efforts" (Sept. 2017).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *See* Azam Ahmed, "Mexico's Government Is Blocking Its Own Anti-Corruption Drive, Commissioners Say," N.Y. Times (Dec. 2, 2017).
[6] *See* Azam Ahmed and J. Jesus Esquivel, "Mexico Graft Inquiry Deepens with Arrest of a Presidential Ally," N.Y. Times (Dec. 20, 2017).
[7] *See* Press Release, US Department of Justice, "Criminal Division Launches New FCPA Pilot Program"; The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016).
[8] *See supra* note 7.
[9] *See supra* note 7.
[10] *See* Press Release, US Department of Justice, Oct. 24, 2016.
[11] *See* Press Release, US Department of Justice, Dec. 21, 2016.
[12] *See* Press Release, US Department of Justice, Dec. 22, 2016.
[13] *See* Press Release, US Department of Justice, Jan. 12, 2017.
[14] *See* Press Release, US Department of Justice, Jan. 13, 2017.
[15] *See* Press Release, US Securities and Exchange Commission, Jan. 18, 2017.
[16] *See* Press Release, US Department of Justice, Dec. 22, 2017.
[17] *See* US Department of Justice Declination Letter, Sept. 29, 2017.
[18] *See* Speech, US Department of Justice, "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2017); Morgan Lewis LawFlash, "DOJ Makes Major Move to Expand Leniency for Companies That Disclose Foreign Bribery" (Nov. 29, 2017).

[19] *See supra* note 18.
[20] *See supra* note 18.
[21] USAM 9-47.120, FCPA Corporate Enforcement Policy.
[22] *See supra* note 18.
[23] *See* FCPA Resource Guide; *see also* Evaluation of Corporate Compliance Programs.
[24] *See supra* note 23.