

SIGNIFICANT CHANGES IN ANTI-BRIBERY LAWS IN MEXICO AND COLOMBIA SIGNAL A NEW COMMITMENT TO ANTI-CORRUPTION EFFORTS

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For companies with global operations, the Foreign Corrupt Practices Act (FCPA) is no longer the only anti-corruption law of significance. Mexico and Colombia recently enacted sweeping anti-corruption legislation aimed at ferreting out corruption at all levels of government. Both Mexico and Colombia have faced their fair share of political scandals, so these new comprehensive initiatives are illustrative of the countries' commitment to tackle corruption, rebuild the public's trust in government, and reform the way business is conducted going forward.

MEXICO'S NATIONAL ANTI-CORRUPTION SYSTEM

In July 2016, Mexican President Enrique Peña Nieto approved the National Anti-Corruption System (SNA), the country's most far-reaching anti-corruption enforcement scheme to date. The objective of the SNA is to coordinate and enforce anti-corruption efforts in all levels of government—municipal, state, and federal. Mexico's package of extensive anti-corruption legislation consists of newly enacted laws as well as amendments to existing laws.

Key aspects of Mexico's new enforcement framework are outlined below.

The General Law of Administrative Responsibilities (GLAR)

The GLAR defines the administrative duties and responsibilities for both public officials and private parties, and establishes sanctions for the commission of administrative offenses. Notably, in a bold effort to boost transparency, the law requires public servants to disclose their tax returns, submit statements of assets, and declare conflicts of interest.

The GLAR imposes sanctions on individuals and companies that commit "serious administrative offenses," including the following:

- Bribery
- Collusion in public bid procedures
- Influence peddling
- Use of misleading information
- Misuse of public funds and resources
- Use of false information during administrative proceedings

Companies can be sanctioned for "serious administrative offenses" when an individual commits an offense on behalf of the company; individuals also can be sanctioned.

Sanctions for violations of the GLAR include a fine of up to two times the amount of the acquired benefits obtained, or up to 1.5 million times the Measure and Update Unit¹ (currently 113,235,000 Mexican pesos or approximately USD 6,228,548), temporary disqualification from participation in public bids, and payment of damages and lost profits. Additional penalties for companies that violate the GLAR include suspension of business activities or the dissolution of the company.

When determining a company's liability, the relevant GLAR authority may take into account the company's compliance program or "integrity policy." The elements of an integrity policy are analogous to

¹ The Measure and Update Unit is the economic reference used to determine the payment obligations, fines, and penalties required by Mexican laws and regulations. The Measure and Update Unit is issued annually by Mexico's National Institute of Statistics and Geography (INEGI), and the 2017 Measure and Update Unit is 75.49 Mexican Pesos per unit (<http://www.inegi.org.mx>).

the elements of an effective compliance program as set forth in the US Department of Justice's sentencing guidelines, and should include the following:

- A clear organization and procedures manual
- A code of conduct published and distributed throughout the organization
- Adequate and effective control systems to ensure that integrity standards are being met
- Adequate whistleblower and reporting systems
- Proper training programs
- Human resources policies that prevent the hiring of individuals who could compromise the company's integrity
- Mechanisms to ensure transparency

The law also provides for substantial self-disclosure credit, allowing for a reduction in sanctions if a company confesses and collaborates with authorities.

Federal Auditing and Accountability Law

The Federal Auditing and Accountability Law establishes the Federal Superior Auditor, which among other duties "investigates and substantiates the commission of administrative offenses detected in its audit functions."² Under this new accountability law, a company can face sanctions for failing to cooperate with the Federal Superior Auditor in the course of an anti-corruption investigation. Sanctions include financial penalties of up to 10,000 times the Measure and Update Unit³ (currently 754,900 Mexican Pesos or approximately USD 41,524) and are independent of any other criminal and civil penalties. Financial sanctions can be doubled in the case of a recurring offense.

National Digital Platform

To facilitate coordination among the various levels of government, a new digital platform will be created to centralize important SNA information. This new platform encourages public engagement in the country's anti-corruption efforts by providing an outlet for anonymous reporting. To help improve transparency, the platform also will provide information about public contracts and maintain a registry of companies that have been sanctioned for corrupt acts.

Amendments to Existing Laws

Amendments to the Federal Criminal Code establish new corruption offenses for individuals—both public servants and private parties. For example, private parties now face potential prosecution under a broadened offense of influence peddling. Under the new legislation, influence peddling now encompasses the following:

- Participating in public procurement processes without authorization
- Claiming to have influence over public officials with authorization to make decisions in public affairs
- Promoting the illicit resolution of public affairs issues in exchange for personal benefit or for the benefit of third parties

² Ley de Fiscalización y Rendición de Cuentas de la Federación [Federal Auditing and Accountability Law] (Mexico), art. 1, July 18, 2016.

Potential sanctions for influence peddling include imprisonment for up to six years and a monetary fine equivalent to the income the defendant would earn in 100 days.

Additionally, private parties who hold a public contract and use false or forged information to obtain a benefit for themselves or for third parties in connection with that contract now face criminal penalties of up to nine years of imprisonment and a fine in an amount equivalent to 100 days of income.

Independent Special Prosecutor

The SNA also amended the Organic Law of the Attorney General's Office to create Mexico's first independent special prosecutor for corruption crimes. The new special prosecutor's office is an operationally autonomous entity tasked with investigating and prosecuting acts of corruption.

Implementation Delays

It is important to note that while the SNA came into effect on July 19, 2017, some key implementation aspects remain outstanding, including those related to enforcement mechanisms (e.g., the appointment of the special prosecutor and justices with special jurisdiction within the Federal Administrative Justice Court) and the approval of local anti-corruption systems by the vast majority of Mexican states. Further, in those instances where Mexican states were able to adopt legislation and create local anti-corruption systems mirroring the SNA, those systems are far from being ready for implementation, and much work remains to be done.

COLOMBIA'S TRANSNATIONAL CORRUPTION ACT

In February 2016, Colombia enacted its first foreign bribery law—the Transnational Corruption Act (TCA). The enactment of the TCA comes after the Organization for Economic Co-operation and Development's (OECD's) Phase 2 review and recommendation that Colombia strengthen its anti-corruption laws.

The TCA was enacted to bolster Colombia's enforcement regime and help the country meet its commitments under the OECD Anti-Bribery Convention. The TCA creates liability for Colombian companies, foreign parent companies of Colombian subsidiaries, and foreign subsidiaries of Colombian parent companies. The TCA expands upon existing Colombian law (Law 1474 of 2011), which was directed at domestic bribery.

Prohibited Acts

Article 2 of the TCA creates liability when individuals and companies engage in prohibited acts, namely, when (1) a director, employee, contractor, or shareholder (2) gives, offers, or promises (3) to a foreign public official—that is, a non-Colombian government official, (4) directly or indirectly, (5) money, any other good with monetary value, or any other benefit or prerequisite (6) in exchange for the official to perform, omit, or delay any act related to the exercise of the official's functions (7) in relation to international business transactions.

Enforcement

The Superintendent of Corporations is the regulatory body that oversees all companies domiciled in Colombia and is the only authority with jurisdiction to enforce the TCA. Articles 20 and 21 of the TCA give the superintendent the power to request information from companies and compel testimony. Companies that do not comply are subject to fines by the superintendent.

A unique aspect of the TCA is its information sharing mechanism. Under Article 28, prosecutors are required to forward evidence to the superintendent if, in the course of an investigation, they come across information that indicates bribes may have been paid to benefit a company. Likewise, the superintendent

will forward any evidence of individual liability to prosecutors. The superintendent also exchanges information with the National Taxes and Customs Directorate regarding suspicious activity.

Sanctions

The TCA creates corporate liability through administrative penalties. Corporations can receive a maximum penalty of USD 40.5 million. Additional sanctions include prohibiting the company from contracting with any state-owned entity for up to 20 years, ordering the company to publish its sanctions on its website, and preventing the company from receiving any government subsidy for up to 5 years. However, the imposition of fines requires a previous conviction against a company director or legal representative. Notably, Colombia's existing anti-corruption laws directed at domestic bribery do not require such a conviction.

Under Article 30 of the TCA, individuals also face penalties. Individuals can be held criminally liable—receiving a sentence of 9–15 years' imprisonment and considerable financial sanctions—when they engage in a prohibited act for their own benefit or for the benefit of a third party.

TCA modified Article 34 of the Act 1474 of 2011 and related measures against companies when they seek to benefit from prohibited acts, giving the Superintendent of Corporations the power to impose the same penalties referred to above.

Ethics and Compliance Programs and Self-Reporting

Like the new Mexican anti-corruption enforcement regime, Colombian law encourages self-reporting. Under Article 19 of the TCA, companies can reduce and even avoid penalties when they self-report. In order to avoid penalties, a company must come forward before an investigation has been initiated by the authorities and before the contract at issue in the bribery has been performed. If both of these requirements have not been met, penalties can still be reduced up to 50% when offenses are disclosed after they have occurred.

There also are mechanisms for graduated sanctions depending on the existence, implementation, and effectiveness of a company's transparency and business ethics programs as well as appropriate processes for due diligence.

HOW COMPANIES ARE RESPONDING

While there remains broad skepticism regarding the implementation and enforcement of the SNA and TCA, companies with multinational operations nevertheless recognize that enforcement risk has expanded beyond US authorities. They further recognize the possibility that, in light of Mexico's and Colombia's seemingly aggressive steps at cracking down on corruption, and consistent with the US Department of Justice's April 2016 FCPA Enforcement Plan, US enforcement authorities will collaborate with their foreign counterparts to investigate and prosecute violative conduct.

That has led companies to reevaluate the resources they have committed to their compliance programs and the efficacy of such programs—and never has an effective compliance program been more important.

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