

MEXICO'S NEW ANTI-CORRUPTION LAWS

I. INTRODUCTION

It has been almost two years since Mexico took firm steps to root out the fundamental corruption that has plagued its governmental institutions by enacting the General Law of Administrative Responsibilities (GLAR) and making several reforms to existing laws. The GLAR and changes made to the Mexican Federal Criminal Code not only punish government officials for acts of corruption, but also punish both private legal entities and private individuals involved in corruption. The inclusion of private entities is a game-changer.

The ramifications of decades of corruption have taken their toll on Mexico. In the latest Transparency International Corruption Perceptions Index, Mexico ranked 138 of 180 countries “on how corrupt their public sectors are seen to be.”¹ Mexico ranked below Iran and just above Iraq and Venezuela.² Consequently, companies currently doing or looking to do business in Mexico are best served by having a strong compliance department or outside consultants that can provide a solid compliance framework to avoid or mitigate liability under Mexico’s new anti-corruption laws.

The new anticorruption laws and reforms went into force on July 19, 2017.³ These laws, combined with major amendments to existing laws, created the National Anticorruption System (*Sistema Nacional Anticorrupción* or SNA).⁴ The new laws are:

- The General Law of the National Anticorruption System
- The General Law of Administrative Responsibility
- The Organic Law of the Federal Tribunal of Administrative Justice (organizing the courts and establishing rules for removal of judges)
- The Law of Auditing and Accounting of the Federation.

The laws amended to create the SNA are:

- The Law of the Attorney General (creating a prosecutorial anticorruption arm)
- The Organic Law of the Federal Public Administration
- The Federal Criminal Code.



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Although all of these new laws and amendments to existing laws make up the framework of Mexico’s anti-corruption laws are worth examining, this article focuses on the GLAR. Specifically, it discusses the GLAR’s impact on due diligence, compliance, and liability on private individuals and corporations. The article also provides an update on the larger impacts of Mexico’s anti-corruption efforts. In particular, this article draws attention to the now very real threat of prosecution of private individuals and corporate entities for acts of bribery.

II. THE PROSECUTION OF PRIVATE ENTITIES AND INDIVIDUALS IS A GAME-CHANGER

The exposure to administrative liability and potential for criminal prosecution of private legal entities and individuals for acts of bribery in Mexico—as provided for in the GLAR and amendments to the Mexican Federal Criminal Code—is a true turning point in a country where greasing the wheels to obtain permits and licenses has historically been just the cost of doing business. A 2016 survey from PricewaterhouseCoopers, reported by *Forbes*, found that 27 percent of companies doing business in Mexico believed they would be engaged in acts of corruption or bribery within the next two years.⁵

The use of third parties to funnel illicit funds to government officials or their families now falls under the scope of the Mexican Federal Penal Code. Consultants, otherwise known as *gestores*, now face penalties or jail time for facilitating these transactions. As notable investigations into alleged Foreign Corrupt Practices Act (FCPA) cases in Mexico have demonstrated, obtaining permits or licenses in Mexico through the services of *gestores* has been a significant issue. The best known case on this issue prior to the new legislation was the Walmart investigation in which the government alleged the use of these third-party intermediaries to expedite construction permits via illicit payments throughout Mexico.⁶ This led to

changes in Walmart's Global Anti-Corruption Policy and the way it worked with its third-party intermediaries.⁷

The goal of the anti-corruption reforms in Mexico, apart from building trust in the private sector, is placing private companies doing business in Mexico on equal footing with each other. Attempting to do legitimate business in Mexico, without the use of third-party intermediaries greasing the wheels, is for many of these private companies akin to doing business with one hand tied behind their back but it is now required. In addition to levelling the playing field for private actors, another stated purpose of enacting these legislative reforms and creating these new enforcement mechanisms is to provide transparency and accountability to strengthen the trust of the Mexican public in its governmental institutions.⁸

III. PROPER COMPLIANCE MECHANISMS ARE ESSENTIAL

In 2018, two-way trade between Mexico and the United States accounted for over \$678 billion dollars.⁹ Numerous jobs in California and the United States depend on these companies' operations in Mexico.¹⁰ Not being properly prepared for the changes the new anti-corruption laws in Mexico will bring, for example their making it easier for (and encouraging) whistleblowers to come forward, may carry heavy costs to companies in the long run. These new laws also make it compulsory for companies to have a functional compliance framework and provide notice of this compliance framework to its employees and contractors.

A good place to start in building a compliance foundation based on the new reforms is to formulate and adopt an "Integrity Policy." Article 25 of the GLAR outlines what such a policy must contain:

- (1) An organization and procedures manual clearly stating the functions and responsibilities of every area, and specifying the different chains of command and leadership;
- (2) A code of conduct published to all the members of the organizations containing systems and mechanisms of real-world application;
- (3) An adequate system of internal control and audit that regularly and systematically examines the standards of integrity in the entire organization;
- (4) Appropriate systems put in place for complaints, to the organization and competent authorities, as well

as a disciplinary process with concrete consequences for those acting contrary to the company's rules or Mexican laws;

- (5) Appropriate systems and processes to provide training on the integrity policy;
- (6) Human resource policies to prevent engaging persons who put at risk the integrity of the corporation. However, this policy does not allow for discrimination against any person based on ethnic or national origin, age, disability, social condition, health, religion, political opinion, sexual preference, civil status, or anything that offends human dignity; and
- (7) Mechanisms to ensure transparency of the company's interests.¹¹

These elements provide a good starting point for a strong compliance program. Good communication between a company and its general or outside counsel regarding the implementation of the compliance program, and being able to provide evidence and documentation of notice to employees and contractors of the compliance program in case an investigation ever arises, is key.

Failing to have a strong compliance program in place to deal with these reforms opens a door to liability for both individuals and legal entities. Article 81 of the GLAR punishes private individuals who violate the anti-corruption laws by imposing a fine of twice the benefits gained, or, if no benefits were gained, then from 100 up to 150,000 times the daily minimum wage. The minimum wage in Mexico in 2019 is 102.68 Mexican pesos, so the fine could be up to 15,402,000 Mexican pesos (\$818,000 US dollars).¹² Disqualification or suspension from participating in public work contracts for three months to eight years would also apply, as would indemnification to federal and state tax authorities.¹³

The monetary penalties for private corporations or businesses are twice the benefits gained, or, if no benefits were gained, then from 1,000 up to 1,500,000 times the daily minimum wage. This is 154,020,000 Mexican pesos (almost \$8,200,000 US dollars). The same disqualification and indemnity rules for individuals apply to corporations and businesses.¹⁴

Apart from these financial penalties to corporations, the law also provides for the most severe of penalties, the dissolution of the company (corporate death penalty). These sanctions are not to be taken lightly.

IV. MODELLING MEXICAN ENFORCEMENT ON UNITED STATES GOVERNMENT USE OF FCPA ENFORCEMENT POLICIES

Despite these harsh sanctions, the anti-corruption law does provide for certain mitigating circumstances or opportunities for an individual or a corporation willing to report misdeeds or cooperate with the government's investigation.¹⁵ An acknowledgement of culpability by the individual or corporate entity to the investigative agency can also be grounds for a reduction of sanctions of anywhere from 50 to 70 percent of the fine.¹⁶ This encouragement of self-reporting and cooperation brings to mind the effectiveness of the United States Department of Justice FCPA enforcement actions.¹⁷ By offering a big enough carrot, the US Government has provided companies a path to fully cooperate and avoid prosecution. This clearly guided those in Mexico who devised the new anti-corruption legal framework, and the US Government's use of the FCPA can serve as a guide for Mexican authorities as they seek to root out corruption from both private legal entities and governmental institutions.

Providing companies with the opportunity to avoid prosecution or reduce fines and penalties by fully cooperating with the government is a powerful incentive. A recent declination letter, whereby the DOJ's FCPA prosecutorial arm outlines its reasons for declining prosecution of the Cognizant Technology Solutions Corporation ("Cognizant"), outlined several key factors that led the US Government to decline prosecution.¹⁸ These factors are relevant because they serve as a template for the Mexican authorities as they enact their own policies to foster cooperation by companies involved in potential violations of anti-corruption laws.

In Cognizant, the US Government declined prosecution even though the company's employees, including its president and chief legal officer (through third-party intermediaries) authorized the payment of millions of dollars in bribes to foreign government officials.¹⁹ The government considered the following ten factors in making its decision to decline prosecution:

- (1) Cognizant's voluntary self-disclosure of the matters described above within two weeks of the board learning of the criminal conduct;
- (2) Cognizant's thorough and comprehensive investigation;
- (3) Cognizant's full and proactive cooperation (including its provision of all known relevant facts about

the misconduct) and its agreement to continue to cooperate in the ongoing investigations and any prosecutions that might result;

- (4) The nature and seriousness of the offense;
- (5) Cognizant's lack of prior criminal history;
- (6) The existence and effectiveness of Cognizant's pre-existing compliance program, as well as steps that the company had taken to enhance its compliance program and internal accounting controls;
- (7) Cognizant's full remediation, including but not limited to terminating the employment of, and disciplining, employees and contractors involved in misconduct;
- (8) The adequacy of remedies such as civil or regulatory enforcement actions, including Cognizant's resolution with the U.S. Securities and Exchange Commission and agreement to pay a civil penalty of \$6 million;
- (9) Cognizant's agreement to disgorge the full amount of its cost savings from the bribery; and
- (10) The fact that, as a result of Cognizant's timely voluntary disclosure, the US Government was able to conduct an independent investigation and identify individuals with culpability for the corporation's malfeasance.²⁰

Although these factors mitigated the punishment, the Cognizant case did result in the indictment of its former president and chief legal officer, and also included a \$25 million-dollar settlement by the company.²¹

Encouraging companies to root out bad apples and provide material cooperation with a government investigation into alleged wrongdoing in exchange for leniency or prosecutorial discretion is a great incentive to strengthen anti-corruption reforms. Government resources can be saved, and, if the carrot is big enough, a company can investigate corruption in its midst without severely disrupting its day-to-day operations. The use of these tools by the DOJ in its FCPA enforcement policies can provide a path for Mexico to follow in its internal fight against corruption. These are the types of results that could bring forth a new era of anti-corruption sentiment and trust in Mexico's governmental institutions by the private sector.

V. IMPACT OF MEXICO'S ANTI-CORRUPTION LAWS

Mexico's anti-corruption laws went into effect with much fanfare, and when President Andrés Manuel López Obrador (known by his initials AMLO) was elected after running a campaign focused on rooting out corruption, the two seemed like a match made in heaven. However, over two years since the reforms were enacted, the magistrates responsible for punishing the violations of these reforms have yet to be appointed as required by the law.²² Making matters even more complicated is AMLO's unexpected proclamation of amnesty for all past acts of corruption by government officials.²³ The President's proclamation did not absolve multinational corporations, businesses, or private individuals doing business in Mexico from prosecution under the anti-corruption laws, however.

There are also signs of progress in the appointment of the first head of the Mexican Attorney Generals Anti-Corruption Unit, María de la Luz Mijangos Borja.²⁴ Therefore, it is still the best policy to be prepared for the enforcement of these laws when doing business in Mexico.

VI. CONCLUSION

Given some of the similarities between Mexico's new anti-corruption laws and existing FCPA anti-bribery provisions, companies doing business or thinking of doing business in Mexico should work with a team of professionals with a strong knowledge of existing FCPA principles to navigate today's complex world of compliance. Creating a strong compliance framework is the best way for companies to move forward and operate successfully in Mexico.

ENDNOTES

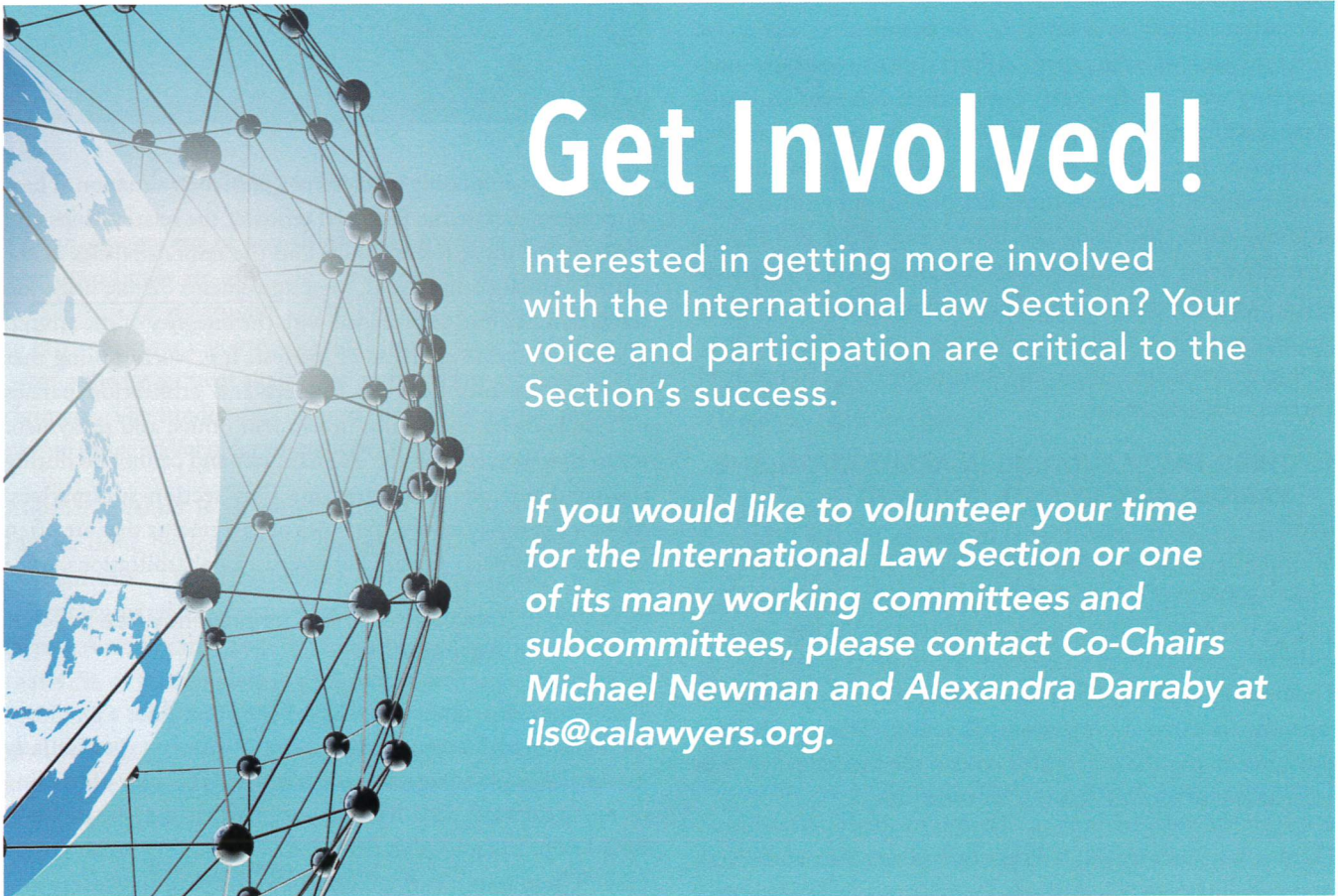
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