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Global Practice Guides

Anti-Corruption

Trends and Developments – Mexico

Contributed by
Von Wobeser y Sierra, SC

2018

MEXICO TRENDS AND DEVELOPMENTS

Contributed by Von Wobeser y Sierra, SC **Authors:** Diego Sierra, Pablo Fautsch, Katarina Lundahl

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Von Wobeser y Sierra, which celebrated its 30th anniversary in 2016, is deeply rooted in the Mexican business context. With several foreign-qualified lawyers, its Mexican roots are complemented by fresh international perspectives. The firm's anti-corruption practice is led by partners admitted to practise law in New York and Mexico, who therefore have a thorough understanding of the FCPA and the risks to which companies doing business in Mexico are exposed. The associates have also been trained in multiple legal back-

grounds, contributing to the ability of the practice to tailor its services to companies from around the world. The firm's anti-corruption practice, established in 2012, was one of the first compliance practices in Mexican law firms and has grown steadily to encompass anti-corruption due diligence, investigations and preventative measures. The firm has advised several multinational companies subject to the FCPA's jurisdiction in Mexico, including Anheuser-Busch InBev/Grupo Modelo.

Authors



Diego Sierra is a partner and the head of the anti-corruption practice, with experience in commercial litigation, arbitration and anti-corruption compliance. Diego has advised Fortune 500 companies and international financial institutions in the United States and in Mexico with regard

to FCPA investigations and matters related to anti-corruption due diligence. Diego's representative work includes advising Anheuser-Busch InBev/Grupo Modelo (before and after the acquisition of Grupo Modelo by Anheuser-Busch InBev) in compliance and other matters. Recently, Diego has handled several high-level anti-corruption cases in relation to cross-border corruption investigations in several industries, including software, pharmaceuticals, finance, consumer products and defence contractors. He has also guided Mexican and foreign clients through due diligence under the FCPA and has drafted internal control policies for companies to prevent corruption. He is president of the International Chamber of Commerce (ICC) Mexico Anti-corruption Committee.



Pablo Fautsch is a senior associate with experience in commercial litigation, commercial and investment arbitration, and anti-corruption compliance. He has advised Fortune 500 companies and international financial institutions in the United States and in Mexico, with regard

to FCPA investigations and matters related to anti-corruption due diligence. Pablo's representative work includes advising Anheuser-Busch InBev/Grupo Modelo in compliance and other matters. Recently, Pablo has participated in several high-level anti-corruption cases in relation to cross-border corruption investigations in several industries and guided Mexican and foreign clients through due diligence under the FCPA. Pablo is a member of the Mexican Bar Association, the International Centre for Dispute Resolution Young and International, and the ICC Young Arbitrators Forum.



Katarina Lundahl is counsel in the litigation and arbitration, and anti-corruption compliance practices, who has participated in several FCPA investigations in Mexico, including ones involving software licensing and the beverage industry. She has also advised foreign and Mexican companies in the implementation of adequate processes and mechanisms to prevent corrupt acts in their Mexican business operations, including risk analysis and anti-corruption policies. Katarina is admitted to practise law in Mexico and Finland, and acted as rapporteur at the International Bar Association's Judicial Integrity Initiative Mexico In-country Consultation held in Mexico City in 2015.

The challenge of tackling corruption

Ranking 15th in the International Monetary Fund's (IMF) list of countries by nominal size of economies, Mexico is an economic giant with enormous growth and attraction potential. However, billions of dollars (somewhere between 2 and 10% of the GDP) are lost to corruption on an annual basis, stifling growth and competitiveness, reducing investment and eliminating jobs.

To combat corruption, in 2012 the newly elected government of Enrique Peña Nieto proposed the implementation of reforms to strengthen transparency, accountability and the fight against corruption as top priorities. However, over the following years, anti-corruption reform was buried under reforms that appeared to bring more immediate rewards in the energy and telecom sectors.

Constitutional reform

After several public corruption scandals, constitutional reform was finally adopted in May 2015. The reform created a National Anti-corruption System (NAS), a co-ordinating system between authorities at all levels of government and citizen bodies tasked with the prevention, detection and enforcement of administrative responsibility for corruption-related acts. Several secondary reforms and new laws were enacted to implement the new constitutional framework. However, the implementation process is ongoing.

One of the reforms of major interest for any company doing business in Mexico is the introduction of corporate administrative responsibility for corruption-related acts. The administrative responsibility, implemented in the anti-corruption reform, complements corporate criminal responsibility for corruption-related and other crimes, already in place under federal criminal legislation.

The new system for corporate administrative offences places increased importance on the prevention of corruption within corporate structures. This new emphasis is a welcome incentive for companies to implement corporate compliance programs, which could lead to important savings in fines and less unwanted press. Under the new rules, which were due to enter into force in July 2017 as part of the new General Law on Administrative Responsibilities, corporate administrative responsibility for corruption-related offences will be assessed based on whether the company has an integrity programme. Accordingly, companies doing or planning to do business in Mexico are encouraged to implement such programmes, including adequate control and training policies, codes of conduct and reporting mechanisms.

Questions over implementation

Since the introduction of the NAS — and given the general public's scepticism towards the government's political will to implement meaningful changes — all eyes have been on

whether and to what extent the new anti-corruption system will be effectively implemented. Recent developments suggest it is too early to tell whether the NAS will prove effective in cleaning Mexican politics of corruption or whether it will remain as a tick-box exercise for Peña Nieto's early promises.

Criticism of the President

While the legal reforms are a significant step towards increased transparency and accountability, the federal executive has been accused of attempts to undermine their impact. During 2016, the acting President came under fire from domestic and foreign press several times for what his critics decried as attempts to water down the reform and shield his scandal-plagued government from inquiry.

First, the original proposal on the General Law on Administrative Responsibilities included a requirement for public officials to file tax, assets and interest declarations, which would automatically become public. However, the lower house of parliament — principally, deputies from the President's *Partido Revolucionario Institucional* (PRI) — refused to approve the requirement of automatic publicity, unless all private parties, including any company and their employees, were also required to make their declarations public. The groundless demand was, of course, nothing but an attempt to distract the public's attention away from the publicity of the declarations of public officials. In June 2016, President Peña Nieto vetoed the requirement regarding private parties, but approved a caveat: under the approved law, the declarations of public officials are public, except for any item that may affect privacy. The exception to the rule of publicity is excessively vague, likely permitting public officials to shield their declarations from publicity under the guise of privacy concerns.

Second, in September 2016 the President's draft Federal Expense Budget for 2017 omitted to allocate funds for one of the key entities of the NAS, the Committee of Citizen Participation, tasked with presiding over the Co-ordinating Committee of the NAS and assisting it in the design, promotion and evaluation of public policies to combat corruption. The omission was seen by many as an attempt to undermine the new system and torpedo what, on paper, seemed like a promising reform.

Only a month later, the president was again criticised, this time for appointing Raúl Cervantes Andrade, a former General Counsel for PRI with close ties to Peña Nieto, as Attorney General. The sitting Attorney General would automatically become Mexico's first independent prosecutor in 2018 and hold office for nine years once a separate politico-electoral constitutional reform, introduced in February 2014, is implemented to create a new general prosecutor's office that no longer depends on the federal executive branch. A few days later, and after widespread criticism, the President presented

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a bill to the Senate to remove the sitting Attorney General's automatic right to become the General Prosecutor in 2018, creating the impression that the government was testing the waters to see how far it could go.

Key appointments

In light of the recent controversies in the implementation of the reform, the impending appointment of the special prosecutor for corruption-related crimes — currently on the Senate's agenda — will be yet another development to look out for during 2017. The special prosecutor was created in the politico-electoral and anti-corruption reforms of February 2014 and May 2015, and will be tasked with the investigation and prosecution of federal corruption-related crimes.

On a more positive note, on 9 February 2017 the Senate's Nominating Commission appointed the five citizens who will comprise the Committee of Citizen Participation of the NAS. The nominations were well received by the public, as all five have extensive backgrounds in civil society, transparency and advocacy. The Committee will act as the public's watchdog within the NAS and will therefore be well positioned to supervise the effective implementation of the new system.

Conclusion

Anti-corruption reform, received with cautious optimism by the general public, has already faced several issues in its implementation phase, which has caused many to question whether it will be able to do what it was established to do: clean corruption from Mexican politics. Whether the reform will ultimately succeed in creating a change on the macro level is a long-term development to watch out for, as decreased corruption would bring important benefits to the Mexican economy as a whole. On the micro level and in the short run, companies doing business in Mexico should be prepared for elevated standards of accountability and transparency under the new General Law on Administrative Responsibilities. Under the old system, the companies interested in implementing schemes to prevent corruption in their Mexican operations were mainly US companies subject to the Foreign Corrupt Practices Act's extra-territorial jurisdiction. As of July 2017, however, any company doing business in Mexico will be well advised to have integrity programmes in place, as those programmes will represent a cheap insurance against the potentially devastating fines, awards of damages, suspensions of activities or even dissolutions that may derive from corruption-related offences committed within corporations.

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