**ANTIFRAUD**

# Mexico's New National Anti-Corruption System

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With the implementation of the new anti-corruption legislation in Mexico in July of 2016, Mexican President Enrique Pena Nieto and the Mexican government have demonstrated their continuing commitment to combat corruption, support transparent governance and improve the ability of organizations to operate free of the systemic corruption that has plagued both the public and private sectors in Mexico for decades.

The new National Anti-Corruption System is a complex mix of newly enacted laws and amendments to existing legislation that, when combined, create one of the most far-reaching anti-corruption enforcement initiatives to date in Mexico. The new system, once fully implemented and resourced, could bring Mexico in line with existing extraterritorial anti-bribery and anti-corruption legislation including the U.S. Foreign Corrupt Practices Act (''FCPA''), the United Kingdom's Bribery Act of 2010 and Brazil's Clean Company Act of 2015.

We will examine the impact of the recent legislative changes, identify specific anti-corruption framework requirements under the new regime, and examine the challenges of changing a business culture that has heretofore accepted corrupt practices as a ''cost of doing business''.

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## Part 1: Background — Corruption in Mexico

Using Transparency International's Corruption Perceptions Index (''CPI'') as a guide, the level of perceived corruption in Mexico has remained consistent over the last four to five years despite the recent political initiatives to address the issue and a general shift in the public's tolerance of corruption. Mexico's 2015 CPI rating of 35 is indicative of a country that continues to struggle with pervasive corruption in its political, economic and social systems. Although Mexico is Latin America's second-largest market by GDP, it continues to be one of the most corrupt countries in the region with a significant number of FCPA settlements specifically involving Mexico.

The current level of perceived and actual corruption risk coupled with a historically complex, multilevel regulatory environment and personal and corporate security concerns has resulted in a number of common corruption compliance risks in Mexico. These risks include, but are not limited to, the following:

■ Pervasive issues with land administration (property rights), permits, and licensing and regulatory enforcement agencies.

■ Moderate to high corruption risks associated public procurement, the tax and customs administrations and the extractive market segment.

■ A lack of historical enforcement of existing anti-bribery and anti-corruption legislation or the consistent application of laws and regulations in general, particularly at the various levels of government (federal, state and municipal).

■ Limited accountability within the Mexican public sector – systemic, historical failure to hold public officials (public servants) accountable for their actions.

■ Cultural expectations surrounding gifts and hospitality, and a business culture that has internalized corruption as a business cost.

■ Ineffective dispute resolution process or a general lack of confidence in the impartiality of the judicial system where allegations of collusion between the police, judges, and criminal groups is not uncommon.

The ability of the Mexican government to use the new National Anti-Corruption System (''NACS'') as a catalyst to overcome existing cultural norms and address the existing level of corruption will be a significant challenge, and will require the support from all levels of government as well as the involvement of the public and the business community. Political will and cultural changes will also be imperative to successfully transitioning from an over-regulated, underenforced, rules-based approach to a values-based approach in which corruption is no longer viewed as socially acceptable. However, recent corruption scandals involving several politicians linked to the president's political party cast doubt on both the government's will and ability to fully implement the new NACS and make it a real force for change.

## Part 2: Legislative Changes – Mexico's National Anti-Corruption System

Mexico's new anti-corruption system encompasses three principal initiatives that together directly subject companies with ties to Mexico, their directors, officers and employees as well as Mexican public servants to a new anti-corruption legislative framework.

1. Creation of a new National Anti-Corruption System

2. Directly addressing public officials and Conflicts of Interest (''COI'')

3. The inclusion of both the private sector and civil society (e.g. covers both the recipient and the payor of the bribe)

However, to achieve their goals, the Mexican legislature created a complex mixture of new laws and modifications to existing legislation that together create Mexico's new National Anti-Corruption System. Once it is implemented it will be consistent with both OECD standards and existing legislation in other jurisdictions such as the FCPA, the United Kingdom's Bribery Act of 2010 and Brazil's Clean Companies Act of 2015.

One of the most important aspects of the legislative changes is the consolidation of the anti-bribery and anti-corruption rules and regulations into a common system that is applicable at all levels of government (e.g. federal, state and municipal). The existence of one common set of regulations and guidelines will add clarity by providing a single set of expectations for both public officials and private parties.

Mexico's new National Anti-Corruption System consists of four new laws:

■ The General Law of the National Anti-Corruption System (''General Law'') – A governmental body responsible for coordinating the adoption of harmonized anti-corruption regulations at all three levels of government. ■

■ The General Law on Administrative Responsibilities (''GLAR'') – The GLAR is the primary law containing the new anti-corruption provisions and focuses on establishing administrative duties and responsibility for public servants and private parties.

■ The Organic Law of the Administrative Justice Federal Courts – Creates the independent Federal Tribunal for Administrative Justice which has the authority to sanction both public servants and private parties for violations of the new National Anti-Corruption System.

■ The Federal Accounting & Accountability Law – Makes companies liable for their failure to cooperate with the Federal Supervisor Auditor and allows for fines and penalties in the form of tax assessments.

The NACS also amends five existing laws:

1. Federal Criminal Code;

2. Organic Law of the Federal Public Administration;

3. Tax Coordination Law;

4. General Government Accounting Law; and

5. Organic Law of the Attorney General's Office.

The new General Law creates a structural support system, based on the OECD Anti-Bribery Convention, to oversee the new and amended legislation. Critical among the components of the National Anti-Corruption System is the creation of a Coordination Committee whose members will be charged with the design and implementation of universal corruption policies and the effective coordination of anti-corruption policies within the government, and the Citizen Participation Committee, whereby Mexican citizens will have a voice in regulating corruption in Mexico via participation in the Coordination Committee. Additionally, an independent anti-corruption prosecutor will be created along with a Federal Tribunal for Administrative Justice both of which will be responsible for sanctioning or prosecuting violations of the new laws and regulations.

The GLAR is the legislative backbone that sets in place the checks and balances for the implementation of the National Anti-Corruption System. It creates administrative liability for companies, affiliates, officers

and employees who do business (directly or indirectly) in Mexico. Mexico's anti-corruption system extends the government's jurisdiction to offenses committed outside of Mexico by those who have a close connection to Mexico. Accordingly, the GLAR has created the extraterritorial reach that is often associated with both the U.S. FCPA and the UK Bribery Act. However, it remains to be seen if the Mexican Anti-Corruption System extends the offense of bribery to include the failure to prevent bribery which is a part of the UK Bribery Act. Also, the law specifically encompasses acts taken by a third party on behalf of an entity. Thus third party due diligence, oversight and monitoring will also be critical to maintaining compliance with the new NACS.

The GLAR specifically provides that the following activities are prohibited:

■ Bribery and explicitly prohibits facilitation payments.

■ Gifts to public officials regardless of value.

■ Illegally participating in or attempting to influence administrative proceedings.

■ Engaging in influence peddling or the use or attempted use of influence, economic or political power on a public official to obtain a benefit from said official. Several specific examples of inappropriate activities have been provided and include:
    ■ Colluding with another private party to obtain benefit or advantage in a federal, state or municipal public procurement process
    ■ The use of false information during an administrative proceeding
    ■ Obstructing government investigations
    ■ Misappropriating public funds
    ■ The prohibition of current or former officials from using privileged information for personal benefit, or for the benefit of their relatives or third parties. A one-year period applies, after the official has retired from public service, before the information is considered not privileged.
    ■ Hiring current/former officials who have received sanctions within the new anti-corruption system.

The fines and penalties associated with an administrative action are significant. An entity or individual can be fined up to two times the benefit obtained per instance with a maximum individual penalty of approximately six hundred thousand U.S. dollars and a maximum of six million U.S. dollars for an entity. Further the entity can be debarred from participating in any government contracting process for ten years, and an individual can be excluded for eight years. To enforce the debarment period, a National Digital Platform will be created as a public registry of entities and individuals who have been debarred under the NACS. Depending on the severity of the case, the GLAR also permits for the suspension of the company's activities for three years, liquidation of the company, and the possibility of requiring the entity to indemnify the Mexican government for the costs associated with the administrative action. All of the above remedies are pursuant to the special prosecutor proving guilt using the "beyond a reasonable doubt" standard.

The good news for companies is that there is an affirmative defense that includes mitigating factors that can reduce the sanctions under the GLAR by 50 to 70%. To obtain the discount an organization has to have had a compliance program in place at the time of the illicit conduct that is adequately integrated into the organization and a specific policy against corruption, according to article 25 of the GLAR. The guidance provided to date includes a specific reference to the FCPA Resource Guide provided by the U.S. Department of Justice and the U.S. Securities and Exchange Commission, and the UK Ministry of Justice Bribery Act 2010: Guidance. In addition, to the U.S. and UK compliance guidance the GLAR guidance specifically mentions the following components of an anti-corruption compliance program:

■ A corporate code of conduct.

■ Adequate company policies and procedures which collectively clearly address bribery and corruption.

■ The existence of a compliance function with clear line(s) of responsibility to management and the Board of Directors ("BOD").

■ Adequate internal accounting controls (e.g. the ability to maintain adequate books and records).

■ Adequate whistleblower and reporting systems including whistleblower protections.

■ Adequate human resources support
    ■ Employee Training (policies and ethics)
    ■ Adequate Hiring (employee screening processes)
    ■ Mechanisms to ensure transparency
    ■ Disciplinary measures for violations of policy

■ A self-reporting processes and active cooperation with authorities throughout the investigative process.

## Part 3: U.S. Public and Private Industry Considerations

As with any new legislative effort both industry and governmental agencies should evaluate the new statutory and administrative mandates to determine the most cost-effective way of complying with the program. As previously noted, Mexico's new National Anti-Corruption System is modeled after international anti-bribery and anti-corruption standards that most multinational organizations are already subject to in other jurisdictions. Accordingly, organizations with ties to Mexico should evaluate what changes to their existing compliance programs are required.

While it may not be possible to completely evaluate the impact of the new legislative program, the available information and guidance does highlight some areas of concern for entities whose policies and procedures are based on the U.S. FCPA Resource Guide.

1. Facilitation payments are strictly prohibited.

2. The GLAR strictly prohibits gifts to government officials with no consideration of intent or monetary value.

3. The ability to engage former Mexican public servants to navigate the complexities of dealing with the government is going to be subject to additional scrutiny. In addition to the one-year waiting period and adequate background diligence, the new legislative guidance focuses extensively on prohibiting influence ped-

dling. Accordingly, the employment of former public servants will increase an entity's exposure to allegations of corruption if these employees are directly or indirectly engaged in governmental interactions (e.g. regulatory compliance or government contracting).

4. The definition of a Politically Exposed Person (''PEP'') may also be expanded as the additional regulatory guidance or policies are emitted from either the Coordination or Citizen Participation Committees.

Market participants will also look to the first few enforcement actions under the new regime which could drive changes to compliance programs – especially if the enforcement actions appear to inappropriately target foreign entities or are perceived to be anti-competitive through selective enforcement. Additionally, the level of observed cooperation with the international regulatory agencies as well as state and municipal cooperation in Mexico will need to be monitored.

## Part 4: Next Steps

When evaluating compliance programs, it is equally important to both adapt existing compliance systems to the new legislative requirements and maintain a level of flexibility to accommodate both local issues and future changes in the regulatory landscape. An organization's risk tolerance and risk mitigation strategies are also relevant for purposes of addressing updates to the compliance program. Potential areas of immediate focus related to Mexico's NACS include, but are not limited to, the following:

1. Engaging in discussions with local subject matter professionals to gain a more complete understanding of the potential risks and exposures.

2. Conducting an Anti-Bribery and Anti-Corruption (''ABC'') Risk or gap Assessment. The information and guidance available for Mexico's NACS warrants an examination of both an entity's ABC compliance program (policies, procedures, controls, operating structure, etc.) as well as an assessment of its operating effectiveness. The program's effectiveness is an integral part of an entity's ability to obtain sanctions reductions.

3. Proactively addressing the required cultural changes within Mexican operating entities will require adequate time, planning and the investment of finite compliance resources. Analyzing and clearly articulating the potential ABC exposure to management and the BOD will require an investment of time and resources before the new NACS is fully operational.

4. Policy development or revisions, including an employee Code of Conduct and supporting policies, procedures and guidance documents, will be essential to asserting both the existence and effectiveness of a functioning ABC compliance program pursuant to an affirmative defense argument should a violation of the NACS occur.

5. Assessing Employee Training Requirements:

a. Cultural training – Identifying and overcoming ethnocentrism and other barriers to the cultural changes required pursuant to the NACS

b. Updating and delivering policy, process and procedural training

c. Investigative (Due Diligence/Forensic Investigations) Training – Recognize and quantify the potential exposure and ensure that if a violative event is uncovered the entity has the ability to adequately assess and quantify the event and obtain the benefits of self-reporting

6. Adequate employee screening and due diligence with particular focus on former public servants (e.g. revised hiring and termination policies).

7. Evaluate the existing continuous monitoring (data analytics) program – Performance evaluation of existing compliance efforts to determine if they are adequate to detect violations of revised company policies, procedures and controls.

Risk and gap assessments, policy changes and updates, and new processes can be revised with a stroke of the proverbial pen. However, changing the entrenched culture of an organization is by far the most difficult task many organizations will ever face.

Cultural changes take both time and a considerable investment by the organization and will require the buy-in of employees and stakeholders to be successful. Some barriers, such as understanding the need to change, are more easily overcome while others such as obtaining the required resources, motivation and overcoming institutional politics can be much greater hurdles to success.

Adequate planning resources, including external expertise, and the necessary time to implement the desired changes are critical to successfully ensure that your company is prepared to address and defend an organization from the adverse impacts of bribery and corruption.

## Conclusion

Mexico's new anti-corruption laws, including the establishment of federal regulatory bodies and committees to enforce ABC compliance and to mete out fines and sanctions, represent a serious and concerted effort by the Mexican government to move towards a set of internationally accepted anti-corruption standards. Entities active in Mexico, either directly or indirectly, including through third-parties, need to commit to either developing or modifying their existing anti-corruption compliance programs to ensure conformity with the available NACS guidance. This commitment encompasses addressing the challenges of implementing sustainable changes in an entity's culture with a heretofore laissez-faire attitude towards corruption. Companies who are found to have contravened the laws, but have developed and implemented appropriate policies, procedures and controls may, under certain circumstances, appeal for mitigation of the associated fines and penalties thereby generating a substantial return on their compliance investment.