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U.S. and Mexican Anti-Corruption Enforcement in an Era of Uncertainty: Risks and Opportunity

*By John Walsh, Rommy Flores, Sonia Fleury, WilmerHale, Carlos A. Bello & Noé Pascacio**

In 1977, the United States Congress passed the Foreign Corrupt Practices Act (“FCPA”), the first law seeking to govern business conduct of U.S. companies in foreign markets and with foreign government officials.¹ Since then, the FCPA has become a cornerstone of U.S. anti-corruption enforcement efforts at home and abroad. From its inception, the FCPA was conceived of as a pioneering example of anti-corruption legislation that would “facilitate ... an international solution” to the problem of corruption.² And in fact, 46 jurisdictions around the world now implement comprehensive domestic anti-corruption regimes³—including Mexico.

In the 40 years since the FCPA’s enactment, the U.S. Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) have brought a total of 484 FCPA-related enforcement actions, 44 of which have involved bribes paid to public officials in Mexico, accounting for almost 11% of all actions globally.⁴ Building on the increased enforcement trend started during the second George W. Bush Administration, FCPA enforcement efforts reached a numerical peak under the administration of Barack Obama. From 2009 to early 2017, the SEC and DOJ filed a total of 299 FCPA-related actions, more than all prior administrations combined, and constituting fully 61% of all cases brought since the FCPA took effect.⁵ Of the 44 cases brought since the FCPA’s inception that involved bribery conduct in Mexico, 30 were brought during the Obama administration.⁶

After this period of increasingly active FCPA enforcement by the Bush and Obama Administrations,⁷ proponents of a robust FCPA enforcement scheme expressed concern that the Trump administration would shift its enforcement priorities away from the prior administrations’ far-reaching anti-corruption efforts.⁸ However, in April 2017, Attorney General Jeff Sessions announced the Government’s continued commitment to “strongly enforc[ing] the FCPA and other anti-corruption laws” by “work[ing] closely with... law enforcement partners, both here and abroad.”⁹ Sessions’s remarks regarding cross-border cooperation with other nations align with a vision of the FCPA as a key piece of a global anti-corruption framework comprised of various international conventions and domestic legal schemes and enforcement priorities that will persist regardless of how vigorously the U.S. pursues these cases.¹⁰

Although current relations between the U.S. and Mexico may be stressed, anti-corruption efforts may be one area where the two countries occupy common ground. During a speech in Mexico City on June 1, 2017, Mexico’s Economy Minister Ildefonso Guajardo “explicitly welcomed” some of the objectives the U.S. set out for the renegotiation of the NAFTA trade deal, “including plans to enshrine anti-corruption provisions in NAFTA.”¹¹

Mexican anti-corruption efforts have accelerated in recent years as well. On May 27, 2014, the Mexican Congress amended the Constitution to create the National Anti-Corruption System (Sistema Nacional Anti-Corrupción, or “SNA”).¹² The SNA coordinates federal, state and local authorities dedicated to prevention, detection and sanction of corrupt acts, as well as those authorities focused on accountability and control of public resources. To implement the SNA, the Mexican Congress passed several statutes in July 2016 that came into effect July 19, 2017. These new laws established an overall framework for anti-corruption efforts, created a new federal tribunal (Tribunal Federal de Justicia Administrativa) to hear anti-corruption cases, and established an independent anti-corruption prosecutor’s office (Fiscalía Anti-Corrupción). The SNA also seeks to decentralize anti-corruption efforts by providing for “local anti-corruption systems” to be enacted and implemented at the state and local government levels and by creating a committee of citizen participants (“Comité de Participación Ciudadano”, or “CPC”) composed of notable citizens. The CPC’s chair is also chair of the SNA’s coordinating committee (“Comité Coordinador”), which develops anti-corruption policies and monitors and evaluates progress.

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The SNA has strong enforcement authority over the private sector since both individuals and companies can be held responsible and are subject to potentially heavy sanctions, including monetary fines, debarment from public procurement, payment of damages and losses, and prison if a crime has been committed. Companies found to have violated the SNA can also be forced to dissolution.

However, the SNA provides corporations the opportunity to reduce the extent of exposure to sanctions and penalties by implementing robust internal compliance programs, codes of conduct, control, vigilance and audit systems, whistleblower procedures, personnel training and cooperation with authorities.¹³ Much like U.S. companies, Mexican companies are now beginning to adopt these procedures and systems as a part of good corporate governance.

The SNA is still in its infancy, and an evaluation of its effectiveness in practice is not yet possible. Still, there are early signs of progress. Public reaction to the new law has been largely positive. Members of the new CPC were named in January 2017. Commentators have lauded the creation of the CPC and the seriousness with which it has undertaken its work: “[T] here is nothing dark in the creation of an entity for the fight against corruption... some are starting to shake, but this is normal, it is a sign that this group of citizens in taking the right path.”¹⁴

Nevertheless, challenges remain. The SNA’s budget is not yet adequate to support the robust structure required for such an undertaking.¹⁵ Additionally, key appointments for the SNA have lagged: the specialized anti-corruption judges have not been confirmed and the SNA’s anti-corruption prosecutor’s office has become the subject of partisan controversy.¹⁶

The SNA’s first real case may be one involving corruption in the construction of the busy Cuernavaca-Acapulco highway. Earlier this year, a sinkhole suddenly appeared in the highway, taking the lives of two people. According to reports, the highway’s construction suffered from corruption at all levels of government. The first full meeting of the SNA’s coordinating committee revealed seven investigations related to the sinkhole matter. The coordinating committee’s supreme audit institution (“Auditoria Superior de la Federación”) has already uncovered approximately \$15 million in unjustified payments and services that did not comply with the specifications of the contracts.¹⁷ Although we have yet to see the full results of this investigation, it will certainly be a test case for the SNA’s commitment and effectiveness.

In this first year of the Trump Administration, Mexico-U.S. relations are at a moment of tension and uncertainty. Anti-corruption efforts by both countries, however, may be an area of continued and even renewed joint cooperation and resolve.

* Bello, Gallardo, Bonequi y García, S.C.

¹ Roger Witten, *Business Law Monographs: Complying with the Foreign Corrupt Practices Act*, Volume II, § 1-1.

² *Id.* at 949.

³ Global Overview of Anti-Corruption Laws 2017, *Global Compliance News* (2016), <https://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/>.

⁴ We developed these statistics from the source material from the SEC and DOJ along with the Stanford Law School FCPA Clearinghouse. See *Foreign Corrupt Practices Act (FCPA), Chronological List, DEPT OF JUSTICE; SEC. & EXCHANGE COMM’N, SEC ENFORCEMENT ACTIONS: FCPA CASES*. See also <http://fcpa.stanford.edu/statistics-keys.html>. We count FCPA enforcement actions as follows: any proceeding brought by the DOJ or SEC (or both) against individuals or corporations based on violations of the FCPA or based on FCPA-related misconduct, including declinations with disgorgement that are listed on the DOJ and SEC’s websites as “enforcement actions.” We also include the most recent FCPA enforcement action *United States v. Baptiste* (1:17-mj-06216-MPK, Doc. No. 3) (Aug. 29, 2017) even though it is not yet listed on the DOJ’s 2017 cases.



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⁵ We count Bush/Obama administration cases as all cases filed between January 1, 2009 and January 18, 2017. We count Trump administration cases as all cases filed between January 19, 2017 and the present.

⁶ Chronological List, DEPT OF JUSTICE; SEC. & EXCHANGE COMM'N, SEC ENFORCEMENT ACTIONS: FCPA CASES. See also <http://fcpa.stanford.edu/statistics-keys.html>. Thus far, the Trump administration has not brought any FCPA-related enforcement actions involving bribery conduct in Mexico.

⁷ Increased enforcement during this time period could also be related to increased use of Mutual Legal Assistance Treaties (“MLATs”) between the U.S. and other countries, including Mexico. See Department of State, 7 Foreign Affairs Manual § 962.1, stating that “[t]he treaties include the power to summon witnesses, to compel the production of documents and other real evidence, to issue search warrants, and to serve process.”

⁸ Samuel Rubinfeld, Some Experts Predict FCPA Enforcement Drop Under Trump, Wall Street Journal, Nov. 11, 2016, <https://blogs.wsj.com/riskandcompliance/2016/11/11/some-experts-predict-fcpa-enforcement-drop-under-trump/>. See also Gabe Friedman, Will the Trump Administration Soften FCPA Enforcement? Bloomberg Law (Jul. 11, 2017), <https://bol.bna.com/will-the-trump-administration-soften-fcpa-enforcement/>

⁹ Jeff Sessions, Attorney General, US Department of Justice, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

¹⁰ Roderick Thomas and Colin Colherty, FCPA Expectations under President Trump, Law360, Jan. 24, 2017, <https://www.law360.com/articles/883641/fcpa-expectations-under-president-trump>. See also World Bank Sanctions and Compliance, <http://www.worldbank.org/en/about/unit/integrity-vice-presidency/sanctions-compliance>

¹¹ Mexico Minister Queries U.S. Talk on Cutting NAFTA Trade Deficits, Reuters, Jul. 18, 2017, <https://www.reuters.com/article/us-usa-trade-nafta-mexico/mexico-minister-queries-u-s-talk-on-cutting-nafta-trade-deficits-idUSKBN1A31ED>

¹² Adams, Jonathan & Christian Leo, “New Mexican Anti-Corruption Law Enters into Force July 19, 2017,” Global Compliance News, available at <https://globalcompliancenews.com/new-mexican-anti-corruption-law-20170713/>.

¹³ A corporate entity may receive reduced penalties and credit for self-disclosure of misconduct and the extent of cooperation with the government. See Sistema Nacional Anticorrupción (SNA), <https://www.gob.mx/sfp/acciones-y-programas/sistema-nacional-anticorrupcion-64289?idiom=es>.

¹⁴ Javier Risco, La “Trampa” que Nunca Existió, El Financiero, Jul. 3, 2017, <http://www.elfinanciero.com.mx/opinion/la-trampa-que-nunca-existio.html>

¹⁵ Arrancará Sistema Nacional Anticorrupción con 214 mdp de Presupuesto, SDP Noticias, Jun. 26, 2017, <https://www.sdpnoticias.com/nacional/2017/06/26/arrancara-sistema-nacional-anticorrupcion-con-214-mdp-de-presupuesto>. See also Hector Molina and Jorge Monroy, Plantean Presupuesto Transversal para el SNA, El Economista, Sept. 12, 2017, <http://eleconomista.com.mx/sociedad/2017/09/12/plantean-presupuesto-transversal-sna>.

¹⁶ Enrique Cardenas, ¿Por qué no se ha nombrado al fiscal anticorrupción?, El Financiero, Aug. 17, 2017, <http://www.elfinanciero.com.mx/opinion/por-que-no-se-ha-nombrado-al-fiscal-anticorrupcion.html>; see also Armando Ríos Piter, Fiscal Anticorrupción en Julio, Excelsior, Jul. 3, 2017, <http://www.excelsior.com.mx/opinion/armando-rios-piter/2017/07/03/1173327>

¹⁷ Hay Siete Investigaciones Iniciadas por Socavón en el Paso Expres: Comité del SNA, Proceso.Com.Mx, Sept. 6, 2017, <http://www.proceso.com.mx/501966/siete-investigaciones-iniciadas-socavon-en-paso-expres-comite-del-sna>; see also SNA Investigará Irregularidades que Derivaron en el Socavón del Paso Express, Noticieros Televisa, Sept. 5, 2017, <http://noticieros.televisa.com/ultimas-noticias/nacional/2017-09-05/sna-investigara-irregularidades-que-derivaron-socavon-paso-expres/>.