FCPA Compliance Risks in Mexico

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Topics

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2. Corruption Challenges in Mexico
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Introduction

Introduction - Is this Mexico?
Introduction - This is also Mexico!

Table 5: Number of countries with which free trade agreements are established and maintained

<table>
<thead>
<tr>
<th>Country</th>
<th>12</th>
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Introduction - This is also Mexico!
Corruption Challenges in Mexico

- High perception of corruption in Mexico
  - Out of 31 countries in Latin America, Mexico occupies position number 22.

- Complex regulatory environment

- Use of gestores (new “dirty” word in Mexico in compliance circles)*

- Large scale procurement

- Security / extortion risks

* As used in a certain on-going investigation involving the Mexican operations of a U.S. base retailer
Corruption Challenges in Mexico

Mexico on position 105 in a total of 176 countries.

Recent FCPA-Related Activity in Latin America

- **BizJet**: US$11.8 million – payments to government officials in Mexico and Panama to secure government contracts

- **Wal-Mart**: Ongoing investigation of payments to government officials in Mexico to secure building permits and variances

- **Biomet**: US$22.8 million – payments to Health Care providers for the purchase of Biomet products

- **Orthofix**: US$7.7 million – payments to doctors employment by an instrumentality of the Mexican government

- **Tyson Foods**: Payments to veterinarians for products’ certifications
Anti-Corruption Enforcement Surge

- Aggressive theories, strategies, and tactics
- Focus on prosecuting individuals
- Willful blindness, jurisdictional expansion, sting operations
- New SEC whistleblower rules will keep the cases coming
- Franks Dodd Act: Bounty can be up to 30% of penalties
- International enforcement and cooperation is increasing
- UK Bribery Act – “the FCPA on steroids” went into effect in July 2011

Map for Top 10 FCPA Settlements

1. Siemens: $800M (2008, Germany)
2. KBR/Halliburton: $579M (2009, U.S.)
3. BAE: $400M (2010, UK)
4. Snamprogetti/ENI: $365M (2010, Nederland/Italy)
5. Technip: $338M (2010, France)
6. JGC: $219M (2011, Japan)
7. Daimler: $185M (2010, Germany)
10. Panalpina: $82M (2010, Switzerland)
Anti-Corruption Laws in Mexico

Mexican Anti-Corruption Laws

- The Federal Penal Code (the “Criminal Code”)

- The Federal Law of Administrative Responsibilities of Public Servants (the “Public Servants Law”)

- The Public Sector Acquisitions, Leases and Services Law (the “Procurement Law”)

- The Federal Law Against Corruption in Public Procurement (the “Anticorruption Law”)

- Any Mexican state or local law, the purpose of which is to prevent or prohibit bribery or other forms of corruption
**Mexican Anti-Corruption Laws**

"Public Servants" – Broadly defined

- Employed by the Mexican federal government (e.g., Mexican Presidency), or any federal government agency (e.g., the SCT), department or instrumentality (e.g., the IMPI)
- Employed by a majority government-owned or government-controlled enterprises (entidades paraestatales) (e.g., PEMEX, IMSS)
- Responsible for managing or allocating federal funds
- In accordance with state-issued anti-corruption laws, any person employed by a state or local government, or state or local government agencies, departments or instrumentalities

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**Mexican Anti-Corruption Laws**

**Public Servants Law**

- Sets forth the following principles: legality, loyalty, impartiality, honesty and efficiency
- Prohibits Public Servant from requesting, accepting or receiving, directly or indirectly any money, real property, movable property, donations or services from any person or legal entity whose professional, commercial or industrial activities are directly related, regulated or supervised by the public servant
- Conflict of interest must be present (i.e., a personal, family or business interest of the Public Servant that may affect his or her impartiality.)
- Prohibition exists during a Public Servant’s employment and for a period of one year thereafter.
Procurement Law

• Prohibits federal contracting entities and states that use federal funds from receiving bids if Public Servant has any personal, family or business interest, whether directly or indirectly through a third party (e.g., spouse, blood relative, business partner, etc.)

• If a Public Servant accepts a gift in connection with a procurement process in which he/she has participated, the Public Servant’s employer may not receive a bid from, or enter into an agreement with, the company giving such gift

Anti-Corruption Law

• Prohibits certain conduct with respect to Federal Public Procurement Process, including
  • Carrying out acts that have the purpose or effect of obtaining an undue benefit or advantage
  • Carrying out acts or omissions that have the purpose or effect of improperly allowing participation in a federal public procurement process
  • Using real or pretend economic or political power over a Public Servant in order to obtain a benefit or advantage, irrespective of the result
## Compliance Programs

### Requirements

| Leadership | A successful compliance program must consist not only of well-articulated internal policies and procedures, but must also be built on a solid foundation of ethics endorsed by the board of directors. Companies must have high-ranking compliance officers in place, and these individuals must be provided adequate authority and resources to manage the program on a day-to-day basis. Compliance officers must also have the ear of those ultimately responsible for corporate conduct, including the board of directors. |
| Risk Assessment | An awareness of the nature and extent of risks everywhere the company does business is a critical first step in implementing adequate compliance programs. Enforcement authorities now expect multinationals to have formal processes for assessing the risks to which they are exposed. Without such a process it is difficult to credibly claim to have a robust and risk-based program. |
| Standards and Controls | Authorities are looking for clear evidence that an organization’s compliance program is more than just a piece of paper. Companies should not only have detailed written policies but also clear procedures and protocols for ensuring those policies are implemented. |
Essential Elements of Corporate Compliance (cont’d)

| Training and Communication | Authorities place a great deal of emphasis on ensuring that compliance training programs are reaching key employees, and will look closely at who the company trains, how the training was conducted and how often training occurs. Keys to effective programs include live, annual training for high-risk personnel; tailoring programs to each country where a company operates; and frequent updates to programs that demonstrate an understanding of evolving trends and new legislation. The way in which the company communicates the importance of its program, internally and externally, will also be an important consideration. |
| Monitoring, Auditing and Response | Three essential activities - monitoring, auditing and responding - are how enforcement authorities expect companies to maintain continuous oversight of their compliance programs. In addition to establishing a monitoring system to catch problems and addressing them quickly, it’s also critical for companies to require managers in each country of operation to make compliance reports and to establish protocols for internal investigations and disciplinary action. |

Risk Assessment

Common Compliance Risks in Mexico

- Selling to/Contracting with Governments/State Owned Entities
- Obtaining concessions, authorizations, licenses, permits, or approvals (building permits, occupancy permits, land use rights)
- Common use of gestores
- Dealing with environmental, labor or safety inspection authorities
- Requests for donations by Municipal authorities
- Entertainment and business hospitality
- Requests made under duress/extortion
Standards and Controls: Anticorruption Policy

• Should be foundation of the company’s compliance program
• Include the following items
  − Top Level Commitment - e.g.: “The Company has always expressed its commitment to doing business with integrity and making the right decisions everyday” “The Anticorruption Policy is an extension of our culture”
  − Due diligence process
  − Contractual Protections
  − Training
  − Ongoing management
  − Encourage employees to report questionable acts
• Must apply to all employees and third parties that perform services on the companies behalf.

Standards and Controls: Anticorruption Policy

• Must be written in Spanish and “tropicalized” for use in Mexico
• Should include clear definitions and examples
  − Bribery – “Mr. Mayor, I’ll pay you X, if you award the Company with the contract”
  − Extortion – “If you expect the Municipality to renew your license, it will cost you extra”
  − Facilitating payments – “If you give pay me X, I’ll get your permit approved quickly”
  − Kickbacks – “For every order you give me, I’ll give you 4% of the total sales”
  − Political Contributions
  − Philanthropic Contributions (limited exceptions)
  − Gifts, Hospitality and Entertainment (limited exceptions)
  − Customer Travel (limited exceptions)
Due diligence on third parties

- Company policy must apply to intermediaries (i.e., any third party performing work on the company’s behalf.)
Scenarios
Due diligence on third parties - Contracts

- Company should have a robust due diligence process to support its decision to engage or retain an intermediary.

- Process
  - Employee prepares a “Business Justification Statement” and send to supervisor
  - Agent completes Questionnaire
  - Submits to Review Committee

- Identify risks and red flags:
  - Agent refuses to take training, certify compliance, sign a contract etc.
  - Unusual / Above-m market commissions
  - Agent lacks staff or facility to perform services
  - Requests money to “get the business”
  - Unusual payment methods (cash, foreign bank accounts)
  - Approve or deny engagement of Agent

Scenarios
Due diligence on third parties - Contracts

- Company’s contracts must contain important anti-corruption terms.
- Deviation from standard contracts should be subject to Review Committee approval

- Suggested terms
  - Audit rights for company may audit Agent’s books and records
  - Clear description of services provided
  - Mandatory training as prescribed by Company
  - No appointing of subcontractors without authorization
  - Maintenance of complete and accurate books and records
  - Annual submission of Anticorruption Compliance Certificate
  - Termination rights
  - Mandatory arbitration
Scenarios

Gifts - FCPA Analysis:

• Was the gift (or other hospitality, such as travel or entertainment) made with corrupt intent?
  – Payment intended to induce the recipient to misuse her/his official position
  – FCPA does not require that the official accepted the corrupt inducement

• Permissible gifts:
  – “Bona fide” - made in good faith and not to secure preferential treatment
  – “Directly related to promotion of goods or services”
  – Not in violation of local law or ethical standards
  – Disclosure will not embarrass Company

Gifts - Mexican Law Analysis

• Not clearly regulated but the Public Servants law sets forth a monetary limit: no more than 10 times the daily minimum wage of Mexico City (approx. to US$45 a year) (the “US$45 Limit”)

• Under a Resolution published on December 13, 2006 by the Ministry of Public Function:
  – Public servant must inform, in writing, the receipt of a good or the offered service that exceeds the US$45 Limit to the control unit of the agency in which the public servant works (“Control Unit”) within a term not to exceed of 7 business days (the “Notice”).
  – The Notice must: (i) set forth the essential characteristics of the good or offered service; (ii) the estimated value, (iii) date of receipt; and (iv) the giver’s name, and (iv) the relationship of the public servant with the giver.
  – Within 3 business days from the Notice’s receipt, the Control Unit may authorize that the Public Servant keep the good or the offered service, if the Control Unit determines that no conflict of interest exists (the “Resolution”).
Gifts

Gifts - Mexican law analysis

- The Public Servant must deliver to the General Directorate of Responsibility and Patrimonial Status (the “Patrimonial Directorate”) of the Ministry of Public Function the unauthorized good, within 4 business dates from the date of receipt of the Notice
- The Patrimonial Director may donate the unauthorized item to other entities of the Federal Public Administration of Mexico

• General recommendations:
  - Infrequent; no conflict of interest
  - Promotional items with company logo
  - Always maintain supporting documentation including: (i) description; (ii) recipient; (iii) amount/value; (iii) any approvals required or obtained

Meals – Mexican Law Analysis

• No clear rule under Mexican law. Not clear whether the US$45 Limit applies to Meals

• General recommendations:
  - Meal must be (i) limited to a clear and legitimate business purpose (i.e., the official has no personal interest), and (ii) there is no connection between meal and potential actions or omissions of official relating to host’s business opportunities.
  - Reasonable
  - Non lavish
  - Infrequent
Questions?

Thank you!

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Prior to joining the Mexico City office in 2011, he spent over 10 years in the Chicago office, where he advised multinational corporations on a wide-range of cross-border business and commercial law issues in Mexico and other Latin American countries. Mr. Pérez-Serrano is licensed to practice law in Mexico and in the state of Illinois, USA.

Mr. Pérez-Serrano focuses his practice on cross-border M&A and international business transactions, including joint ventures, strategic alliances and corporate reorganizations projects. He also advises on a range of compliance matters, such as anti-corruption, US Foreign Corrupt Practices Act (FCPA) investigations, and on developing and implementing compliance programs. His clients include multinational companies in the automotive, manufacturing, pharmaceutical, real estate, and information technology sectors.