

FCPA Update

A Global Anti-Corruption Newsletter



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Mexico Adopts New Anti-Corruption Legislation

I. Introduction

Corruption is estimated to cost Mexico between two and ten percent of its GDP, cut investment by up to five percent, and eliminate nearly half a million jobs from small and midsize businesses.¹ At the same time, recent corruption scandals have battered President Enrique Peña Nieto's administration. For instance, one highly publicized conflict-of-interest investigation, dubbed the "White House scandal," involved the President's wife's purchase of a \$7 million mansion through a favored government contractor.² Unsurprisingly, a 2015 poll ranked the presidential

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1. Rodrigo Gallegos Toussaint, "Índice de Competitividad Internacional 2015," *IMCO* (2015), at 51, 53, http://imco.org.mx/wp-content/uploads/2015/11/2015-ICI-Presentacion_completa.pdf.
2. See Joshua Partlow, "Mexico's President Apologized for a Corruption Scandal. But the Nightmare Goes on for the Reporter who Uncovered It," *Washington Post* (July 22, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/07/22/mexicos-president-apologized-for-a-corruption-scandal-but-the-nightmare-goes-on-for-the-reporter-who-uncovered-it/>.

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administration, Congress, and the nation's political parties among Mexico's least-trusted institutions.³ And Mexico ranked in the bottom half of Transparency International's 2015 Corruption Perceptions Index: 95 out of 168 countries, with a score of 35 out of 100.⁴

Over the summer, the Mexican government adopted new laws that suggest a commitment to changing these perceptions. On July 18, 2016, President Peña Nieto ratified and published new legislation introducing far-reaching reforms to Mexico's anti-corruption regime. Four laws were enacted: the General Law of Administrative Liabilities, the General Law of the National Anti-Corruption System, the Organic Law of the Administrative Justice Federal Court, and the Federal Accounting and Accountability Law. In addition to these new laws, the Federal Congress also amended several existing laws, including the Federal Criminal Code, the Organic Law of the Attorney General's Office, and the Organic Law of the Federal Public Administration. Some of these anti-corruption measures were first proposed to the Mexican legislature in early 2016 through a citizen petition process designed to enhance transparency in the public sector.⁵

Among other significant reforms, the new laws institute disclosure requirements for public servants, impose steep penalties for the commission of corruption-related offenses, provide incentives for the implementation of robust corporate compliance programs and for cooperation with authorities, and provide for coordination among federal, state, and local government institutions fighting corruption. Although it remains uncertain to what extent the government will enforce the new legislation, one thing is certain: the laws establish the most sweeping anti-corruption system in Mexico to date.

II. The General Law of Administrative Liabilities

The General Law of Administrative Liabilities, which will enter into force on July 19, 2017, defines the administrative duties and responsibilities for both public servants and private parties, and establishes penalties for the commission of administrative offenses.⁶ This law will abrogate the Federal Law of Administrative Liabilities of Public Servants, a 2002 law regulating public servants' administrative

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3. "México: Confianza en Instituciones 2015," *Consulta Mitofsky* (Sept. 13, 2016), <http://consulta.mx/index.php/estudios-e-investigaciones/mexico-opina/item/575-confianza-en-instituciones>.
 4. "Corruption Perceptions Index: 2015," *Transparency International* (2015), <http://www.transparency.org/cpi2015#results-table>.
 5. See The Mexico Institute, "Mexico Wins: Anti-Corruption Reform Approved," *Forbes* (July 18, 2016), <http://www.forbes.com/sites/themexicoinstitute/2016/07/18/mexico-wins-anti-corruption-reform-approved/#6280a72356e6>.
 6. Ley General de Responsabilidades Administrativas [LGRA] [Gen. L. of Admin. Liabilities] (Mex.), July 18, 2016.

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responsibilities and sanctions, and the Federal Anti-Corruption Law on Public Procurement, a 2012 law targeting bribery in government contracting.⁷ It will also repeal certain provisions of the 1982 Federal Law of Liabilities of Public Servants.⁸

The General Law of Administrative Liabilities requires public servants to disclose their tax returns, submit statements of assets, and declare conflicts of interest.⁹ The law provides that the statements of assets and conflicts of interest shall be made public, except if the publication affects the “privacy or personal data protected by the Constitution.”¹⁰ The law also sets forth protocols with which public servants involved in public procurement procedures must comply.¹¹

“Although it remains uncertain to what extent the government will enforce the new legislation, one thing is certain: the laws establish the most sweeping anti-corruption system in Mexico to date.”

Moreover, the General Law of Administrative Liabilities defines “non-serious”¹² and “serious administrative offenses”¹³ by public servants. The former category includes, among other violations, failing to fulfill entrusted functions and commissions in accordance with an ethics code, disregarding instructions from superiors, not timely and properly submitting statements of assets and conflicts of interest, and failing to collaborate in judicial and administrative proceedings.¹⁴ Public servants who violate the guidelines for “non-serious administrative offenses”

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7. Ley Federal de Responsabilidades Administrativas de los Servidores Públicos [LFRASP] [Fed. L. of Admin, Liabilities of Pub. Servants] (Mex.), Mar. 13, 2002; Ley Federal Anticorrupción en Contrataciones Públicas [LFACP] [Fed. Anti-Corruption L. on Pub. Procurement] (Mex.), June 11, 2012.
 8. Ley Federal de Responsabilidades de los Servidores Públicos [Fed. L. of Liabilities of Pub. Servants] (Mex.), Dec. 31, 1982.
 9. LGRA, arts. 26-31. A prior draft of the legislation that ultimately was not approved extended these requirements to any individual or legal entity that received or executed public resources. Jonathan Adams, “New Anticorruption Laws in Mexico,” *Global Compliance News* (July 26, 2016), <http://globalcompliance.com/new-anticorruption-laws-mexico-20160726/>.
 10. LGRA, art. 29.
 11. *Id.*, arts. 43-45.
 12. *Id.* arts. 49-50.
 13. *Id.* arts. 51-63.
 14. *Id.* arts. 16, 49.

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face a public or private reprimand; potential employment suspension or dismissal; and temporary ineligibility to carry out their public service employment, charges, or commissions, and to participate in public procurement, leases, services, or projects.¹⁵

“Serious administrative offenses” include, among other violations, any form of bribery, embezzlement, misuse of public resources, misuse of information, collusion, abuse of official capacity, improper influence, and concealment of conflict of interest.¹⁶ Public servants who commit the “serious administrative offenses” face potential employment suspension or dismissal; economic sanctions; and temporary ineligibility to carry out their public service employment, charges, or commissions, and to participate in public procurement, leases, services, or projects.¹⁷

In addition to regulating the conduct of public servants, the General Law of Administrative Liabilities defines “serious administrative offenses” for private parties.¹⁸ Notably, legal entities could be held liable for “serious administrative offenses” when the acts related to the offenses are committed by individuals acting in the name of or representing the entity.¹⁹ “Bribery” is defined broadly as “promising, offering, or giving any undue benefit to . . . one or more public servants, directly or through third-parties, in exchange for those public servants performing or refraining from performing an act related to their duties or to those of another public servant.”²⁰ “Bribery” also encompasses “abusing one’s real or supposed influence with the purpose of obtaining or maintaining . . . a benefit or advantage, regardless of acceptance or receipt of the benefit or obtained result.”²¹ Individuals and legal entities who commit bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, or wrongful recruitment of ex-public servants, among other corruption-related offenses, face steep sanctions.²²

Specifically, individuals face monetary penalties of up to twice the amount of the acquired benefits or, if there is no tangible benefit, approximately US\$ 550,000.²³ They also could be rendered temporarily ineligible to participate in public procurement, leases, services, or projects for a three-month to eight-year period.²⁴

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15. *Id.* art. 75.

16. *Id.* arts. 52-64.

17. *Id.* art. 78.

18. *Id.* arts. 65-72.

19. *Id.*, art. 24; see also “New Rules on Anti-Bribery and Corruption Matters for Privately Owned Entities in Mexico,” *Lexology* (July 28, 2016), <http://www.lexology.com/library/detail.aspx?g=23964663-1aa4-4d24-bee0-1680d458e97e>.

20. LGRA, art. 66.

21. *Id.*

22. *Id.* arts. 65-72.

23. *Id.* art. 81.I.(a).

24. *Id.*, art. 81.I.(b).

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In addition, individuals could be forced to pay compensatory damages.²⁵ Legal entities, in turn, face sanctions of up to twice the amount of the benefit and up to approximately \$6 million if there is no monetary benefit.²⁶ Moreover, they could be declared ineligible to participate in public procurement, leases, services, or projects for up to ten years.²⁷ Finally, entities could be subject to the suspension of their activities for a three-month to three-year period, partnership dissolution, and compensatory damages.²⁸

As for the administrative process through which guilt is determined, the standard of proof is beyond a reasonable doubt.²⁹ And the statute of limitations for serious administrative offenses is seven years from the date of the infractions' commission or from the time that the misconduct ceased.³⁰

The soon-to-be-repealed Federal Anti-Corruption Law on Public Procurement provides for liability when a Mexican national, in the context of a public procurement, "promises, offers, or gives money or any other undue gift to a foreign public servant or a third-party, in exchange for that public servant fulfilling or abstaining from fulfilling an act related to his public functions or those of another foreign public servant."³¹ By contrast, the General Law of Administrative Liabilities only specifies that the particular offense of "collusion"—or when "a private party acts in concert with another private party" to secure an advantage in public procurement—will "apply to international commercial transactions," including those involving a Mexican national and foreign public servant.³² By limiting itself to "collusion," the General Law of Administrative Liabilities' extraterritorial reach is more limited in scope than its Mexican predecessor's. At the same time, however, the General Law of Administrative Liabilities' extraterritorial application is broader than the prior legislation in that it applies in the context of local and state public procurements, as well as federal public procurements.³³ Moreover, unlike the Federal Anti-Corruption Law on Public Procurement, the General Law of Administrative Liabilities specifies that antitrust violations will be considered "collusion" and, therefore, will be pursued extraterritorially.³⁴

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25. *Id.* art. 81.I.(c).

26. *Id.* art. 81.II.(a).

27. *Id.* art. 81.II.(b).

28. *Id.* art. 81.II.(c)-(e).

29. *Id.* art. 135.

30. *Id.* art. 74.

31. LFACP, art. 9.

32. LGRA, art. 70.

33. *Id.*

34. *Id.*

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In contrast to the Foreign Corrupt Practices Act (“FCPA”), the General Law of Administrative Liabilities does not include an exception for facilitating payments.³⁵ Rather, the law provides that public servants shall not “use their employment, charge, or commission to obtain any benefit or advantage . . . nor seek or accept compensation, benefits, facilitating payments, freebies, or gifts from any person or organization.”³⁶ Likewise, the law proscribes private parties from proffering facilitating payments through its broad prohibition on promising or giving any “undue benefit” to public servants.³⁷ This is in line with Mexico’s prior anti-corruption legislation, which also did not exempt facilitating payments.³⁸

Finally, similar to the practice followed by U.S. prosecutors as dictated under the U.S. Sentencing Guidelines, the General Law of Administrative Liabilities enables entities to mitigate penalties by maintaining an adequate compliance program or “integrity policy.”³⁹ The General Law provides that the “integrity policy” should consist of the following elements: (1) a clear organization and procedures manual that delineates responsibilities and specifies the chain-of-command and leadership; (2) a code of conduct; (3) adequate and effective control systems that ensure that integrity standards are being met; (4) adequate whistleblower and reporting systems, as well as disciplinary procedures for employees who contravene the company’s policies or Mexican law; (5) proper training systems and processes; (6) non-discriminatory human resources policies that prevent the hiring of individuals who could compromise the company’s integrity; and (7) mechanisms that ensure transparency.⁴⁰

Legal entities may also receive credit for self-reporting misconduct and cooperating with government investigations.⁴¹ In addition, a person’s sanctions amount may be reduced by 50 to 70 percent if the person confesses and collaborates with authorities.⁴² Furthermore, the person’s temporary ineligibility to participate in public procurement, leases, services, or projects may be eliminated altogether by whistle-blowing and cooperation.⁴³

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35. 15 U.S.C. § 78dd-2(b).

36. LGRA, art. 7; *see also id.* art. 52.

37. *Id.* art. 66.

38. See “Mexico Adopts National Anti-Corruption Enforcement System: The Global Trend of Anti-Corruption Statutes,” *Taft Law* (July 16, 2015), <http://www.taftlaw.com/news/publications/detail/1259-mexico-adopts-national-anti-corruption-enforcement-system-the-global-trend-of-anti-corruption-statutes>.

39. LGRA, art. 25.

40. *Id.*

41. *Id.* art. 81.

42. *Id.* arts. 88-89.

43. *Id.* arts. 88-89.

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Practitioners have heralded this corporate incentivizing as a potential “game changer;”⁴⁴ indeed, companies doing business in Mexico now have a strong motive to beef up their corporate compliance protocols and collaborate with investigators.

III. The General Law of the National Anti-Corruption System

The General Law of the National Anti-Corruption System, which became effective on July 19, 2016, sets up the new National Anti-Corruption System.⁴⁵ The National Anti-Corruption System, which is contemplated by Article 113 of the Mexican Constitution, is responsible for coordinating among all levels of government authorities – federal, state, and local – to “prevent, detect, and sanction administrative offenses and acts of corruption.”⁴⁶ The National Anti-Corruption System also “supervises and controls public resources.”⁴⁷ The National Anti-Corruption System is comprised of the Coordinating Committee members, the Committee of Citizen Participation, the Steering Committee of the National Control System, and the representatives of state anti-corruption systems.⁴⁸

“Companies and individuals doing business in Mexico must be cognizant of the newly defined corruption-related offenses and steep penalties they could be subject to should they be found liable under the new legislation. Moreover, in light of the potential partial defenses for entities, companies operating in Mexico should ensure that they have adequate compliance programs in place.”

The Coordinating Committee, in turn, is composed of a representative of the Committee of Citizen Participation, who will preside over the Coordinating Committee, the head of the Superior Audit of the Federation, the head of the Special Anti-Corruption Prosecutor’s Office, the head of the Ministry of Public Administration, a representative of the Federal Judiciary Council, the President of the National Institute of Transparency, Access to Information and Data Privacy, and the President of the Administrative Justice Federal Court.⁴⁹ The Coordinating

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44. Monika Gonzalez Mesa, “Mexico Strengthens Anti-Corruption Laws,” *Law.com* (July 22, 2016), <http://www.law.com/sites/almstaff/2016/07/22/mexico-strengthens-anti-corruption-laws/>.

45. Ley General del Sistema Nacional Anticorrupción [LGSNA] [General Law of the National Anti-Corruption System] (Mex.), July 18, 2016.

46. *Id.* arts. 1, 6.

47. *Id.* art. 6.

48. *Id.* art. 7.

49. *Id.* art. 10.

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Committee is charged with, among other tasks, creating an annual report describing its progress and results, establishing bases and principles for effective coordination among its members, designing and promoting national policies, participating in international cooperation mechanisms to combat corruption, and establishing coordination mechanisms with the local anti-corruption systems.⁵⁰ The Coordinating Committee will also create a National Digital Platform, which will include, among other information, a registry of all sanctioned private parties and public officials banned from participating in government contracting and a registry of public denunciations of administrative offenses and acts of corruption.⁵¹ The Executive Secretary of the National Anti-Corruption System shall administer the Digital Platform.⁵²

The OECD Secretary-General recently praised the fact that, thanks to the National Anti-Corruption System, the new reforms “reach beyond the federal level,” as “the new legislation requires the Mexican states to follow suit with their own local anti-corruption systems, thereby tackling some of the strongest footholds of corruption in Mexico.”⁵³ Indeed, the National Anti-Corruption System’s local reach has already been affirmed by Mexico’s highest court. On September 5, 2016, the Mexican Supreme Court overturned two state anti-corruption laws that would have enabled departing governors to select the prosecutors in charge of investigating corruption allegations against them.⁵⁴ The Attorney General’s Office succeeded in arguing that these laws, which were widely perceived as an attempt to circumvent the National Anti-Corruption System, contravened the “new federal anti-corruption standards.”⁵⁵

IV. The Organic Law of the Administrative Justice Federal Court

The Organic Law of the Administrative Justice Federal Court, which entered into force on July 19, 2016, repealed the Organic Law of the Tax and Administrative Justice Federal Court.⁵⁶ The law mandates that the Administrative Justice Federal Court, which forms part of the National Anti-Corruption System, has the authority

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50. *Id.* art. 9.

51. *Id.* arts. 9, 48-49.

52. *Id.* art. 48.

53. Emma Rumney, “Mexico’s “Game-Changing” Anti-Corruption Reforms Celebrated,” *Public Finance International* (Aug. 3, 2016), <http://www.publicfinanceinternational.org/news/2016/08/mexicos-game-changing-anti-corruption-reforms-celebrated>.

54. See “Mexico Enacts New National Anti-Corruption System,” GHY (Sept. 7, 2016), <http://www.ghy.com/trade-compliance/mexico-enacts-national-anti-corruption-system/>; Miracle Jones, “Mexico Supreme Court Overturns State Anti-Corruption Laws,” *The Jurist* (Sept. 6, 2016), <http://www.jurist.org/paperchase/2016/09/mexico-supreme-court-overturns-state-anti-corruption-laws.php>.

55. “Mexico’s Supreme Court Overturns State Anti-Corruption Laws,” *ABC News* (Sept. 5, 2016), <http://abcnews.go.com/International/wireStory/mexicos-supreme-court-overturns-state-anti-corruption-laws-41880781>.

56. Ley Orgánica del Tribunal Federal de Justicia Administrativa [LOTFJA] [Organic Law of the Administrative Justice Federal Court] (Mex.), art. 70, “Transitorios – Primero,” July 18, 2016.

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to sanction both public servants and private parties for administrative violations under the General Law of Administrative Liabilities.⁵⁷ The Court's authority to sanction private parties, however, does not impair other government entities' capability to impose sanctions under the terms of applicable legislation.⁵⁸

Under the new law, the Administrative Justice Federal Court shall have specialized courts, including chambers charged with adjudicating serious corruption-related administrative offenses committed by public servants, individuals, and corporate entities.⁵⁹ Judges in the specialized chambers will be appointed by the President for ten-year terms and approved by the majority of the Senate.⁶⁰ The specialized chambers will begin operating on July 19, 2017, the same date the General Law of Administrative Liabilities enters into force.⁶¹

V. Federal Audit and Accountability Law

The Federal Audit and Accountability Law, which entered into force on July 19, 2016, sets up the Superior Auditor of the Federation, which, among other duties, "investigates and substantiates the commission of administrative offenses detected in its audit functions."⁶²

Notably, companies can be held liable for failing to cooperate with the Superior Auditor of the Federation in the course of an anti-corruption investigation.⁶³ Public servants and individuals who refuse to collaborate and provide solicited information can face a fine of up to 2,000 times the Measure and Update Unit (about \$8,000), and companies can face a fine of up to 10,000 times the Measure and Update Unit (about \$40,000).⁶⁴ The fine can be doubled in the case of a recurring offense, and these sanctions are independent of any additional criminal and civil penalties that are levied under other legislation.⁶⁵

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57. *Id.* arts. 1, 4.

58. *Id.* art. 4.

59. *Id.* arts. 37-38.

60. *Id.* art. 43.

61. *Id.* "Transitorios – Quinto."

62. Ley de Fiscalización y Rendición de Cuentas de la Federación [LFRFCF] [Federal Audit and Accountability Law] (Mex.), art. 1, July 18, 2016.

63. *Id.* art. 9.

64. *Id.* art. 10.

65. *Id.* arts. 9-10.

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VI. Significant Amendments to Existing Laws

In addition to the enactment of four new laws, the government also amended several existing statutes. The amendments to the Federal Criminal Code establish new corruption offenses and penalties for public servants and private parties.⁶⁶ For instance, public servants who “illicitly receive . . . money or any other benefit, or accept a promise to realize an act” related to “their employment, charge or commission” can face up to 14 years in prison and a fine equivalent to 150 days of income, in addition to being rendered temporarily ineligible to hold public office and participate in public projects.⁶⁷ Individuals who “promise or furnish any benefit” to public servants to carry out such an act can face similar imprisonment terms and fines.⁶⁸

“The OECD Secretary-General recently praised the fact that, thanks to the National Anti-Corruption System, the new reforms ‘reach beyond the federal level,’ as ‘the new legislation requires the Mexican states to follow suit with their own local anti-corruption systems, thereby tackling some of the strongest footholds of corruption in Mexico.’”

Moreover, private parties can now be penalized for, “without being authorized legally to intervene in a public business, claiming to have influence before the public servants empowered to make decisions within those businesses, and intervening before them to promote the illicit resolution of such business, in exchange for a benefit for themselves or third parties.”⁶⁹ Potential sanctions for this form of influence peddling include imprisonment for up to six years and a monetary fine equivalent to the income the defendant would earn in 100 days.⁷⁰ Furthermore, private parties who hold a public contract, permit, or concession and who, in connection with that, use false or forged information to obtain a benefit for themselves or for third parties can be imprisoned for up to nine years and fined an amount equivalent to 100 days of income.⁷¹

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66. Código Penal Federal [CPF] [Federal Criminal Code], Aug. 14, 1931, last amended July 18, 2016.

67. *Id.* arts. 212, 222.

68. *Id.* art. 222.

69. *Id.* art. 221.

70. *Id.* art. 221.

71. *Id.* art. 217.

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Furthermore, the Organic Law of the Attorney General's Office was amended to create an independent anti-corruption prosecutor's office. Specifically, the law provides that "[t]he Special Prosecutor's Office for crimes related to acts of corruption is the entity with the technical and operational autonomy to investigate and prosecute those actions that the law considers crimes of corruption."⁷² This new specialized division will be assisted operationally by the administrative unit for forensic services, investigators, and police agents.⁷³ Among other functions, the Special Prosecutor's Office shall participate as a member of the Coordinating Committee of the National Anti-corruption System.⁷⁴ Both the amendments to the Federal Criminal Code and the amendments creating the Special Prosecutor's Office will enter into force upon the Senate's appointment of the head of the Special Prosecutor's Office.⁷⁵

Finally, the government also strengthened the Secretary of the Public Function's ability to prevent and combat corruption through amendments to the Organic Law of the Federal Public Administration.⁷⁶ For instance, the Secretary of the Public Function can now sanction administrative offenses that fall outside the Administrative Justice Federal Court's ambit (namely, non-serious offenses).⁷⁷ These amendments entered into force on July 19, 2016, "without prejudice to the decree of the General Law of Administrative Liabilities."⁷⁸

VII. Conclusion

As he signed the new anti-corruption measures into law, President Peña Nieto took the opportunity to apologize publicly for the conflict-of-interest scandal that has rocked his administration.⁷⁹ But less than a month later, President Peña Nieto found himself embroiled in a new scandal involving a payment from a rumored

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72. Ley Orgánica de la Procuraduría General de la República [LOPGR] [Organic Law of the Attorney General's Office] (Mex.), May 29, 2009, last amended July 18, 2016, art. 10 Bis.
73. *Id.* arts. 10 Bis, 10 Ter. IV.
74. *Id.* art. 10 Ter. II.
75. CPF, "Transitorios – Primero," July 18, 2016; LOPGR, "Transitorios – Primero," July 18, 2016.
76. Ley Orgánica de la Administración Pública Federal [LOAPF] [Organic Law of the Federal Public Administration] (Mex.), Dec. 29, 1976, last amended July 18, 2016, Art. 37.
77. *Id.* art. 37.XVIII; see also "Una a Una: ¿De Qué Tratan las 7 Leyes del Sistema Nacional Anticorrupción?," *Expansión* (July 19, 2016), <http://expansion.mx/nacional/2016/06/19/una-a-una-de-que-tratan-las-7-leyes-del-sistema-nacional-anticorrupcion>.
78. LOAPF, "Transitorios – Primero."
79. Partlow, *supra* note 2.

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contractor for the property tax on his wife's Miami apartment.⁸⁰ Despite his apology and the adoption of the sweeping legislation, the President's popularity is at an all-time low.⁸¹

The Mexican government's ability to rebound from these scandals and revamp its tarnished image will depend in part on how the new anti-corruption measures are implemented and enforced. Prior anti-corruption measures in Mexico have been widely criticized for their weak enforcement.⁸² Aggressive enforcement of the new anti-corruption reforms could help change the negative public perception of the government's capability to tackle corruption.

Companies and individuals doing business in Mexico must be cognizant of the newly defined corruption-related offenses and steep penalties they could be subject to should they be found liable under the new legislation. Moreover, in light of the potential partial defenses for entities, companies operating in Mexico should ensure that they have adequate compliance programs in place. If the Mexican government vigorously enforces the new reforms as it has signaled it will do, the implementation of this legislation has the potential to be a watershed moment in the nation's history.

Sean Hecker

Andrew M. Levine

Eileen Zelek

Sean Hecker and Andrew M. Levine are partners in the New York office. Eileen Zelek is an associate in the New York office. The authors may be reached at shecker@debevoise.com, amlevine@debevoise.com, and ezelek@debevoise.com. Full contact details for each author are available at www.debevoise.com. The authors would like to thank Diego Sierra of Von Wobeser y Sierra, S.C., for his thoughtful comments in connection with the preparation of this article.

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80. Rafa Fernandez de Castro, "Mexico's First Lady linked to Florida apartment owned by potential government contractor," *Fusion* (Sept. 20, 2016), <http://fusion.net/story/334733/mexicos-first-lady-linked-to-florida-apartment-owned-by-potential-government-contractor/>.
81. See "Mexican President Peña Nieto's Approval Rating Plummetts to 22%," *Telesur* (Sept. 11, 2016), <http://www.telesurtv.net/english/news/Mexican-President-Pena-Nietos-Approval-Rating-Plummetts-to-22-20160911-0005.html>; Lourdes Pintado, "Mexico: President's Approval Ratings Tank as Public's Frustration with Corruption Grows," *Forbes* (Aug. 17, 2016), <http://www.forbes.com/sites/riskmap/2016/08/17/mexico-presidents-approval-ratings-tank-as-publics-frustration-with-corruption-grows/#6724fab43bb5>.
82. See "Mexico Adopts National Anti-Corruption Enforcement System: The Global Trend of Anti-Corruption Statutes," *Taft Law* (July 16, 2015), <http://www.taftlaw.com/news/publications/detail/1259-mexico-adopts-national-anti-corruption-enforcement-system-the-global-trend-of-anti-corruption-statutes>; "Mexico Corruption Report," Business Anti-Corruption Portal (updated February 2016), <http://www.business-anti-corruption.com/country-profiles/mexico>.

Charitable Donations as FCPA Violations: SEC Settles with Nu Skin Over Donation by Chinese Subsidiary

On September 20, 2016, the U.S. Securities and Exchange Commission (“SEC”) settled an administrative action against Nu Skin Enterprises (“Nu Skin”) (the “Order” or “Nu Skin Order”),¹ a Utah-headquartered cosmetics and nutritional products direct sales company listed on the New York Stock Exchange.² The Order alleges that Nu Skin’s Chinese subsidiary (“Nu Skin China”) made a contribution to a charity sponsored by an unnamed high-ranking Chinese Communist Party official in order to obtain the official’s help in avoiding an adverse administrative proceeding and fine. As a result, the Order alleges that Nu Skin violated the books and records and internal controls provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”). Without admitting or denying the allegations, Nu Skin agreed to “disgorgement” of \$431,088 with interest of \$34,600 and a civil penalty of \$300,000.³ The Nu Skin Order reminds companies and practitioners of the importance of policing charitable donations, especially where the donations may be made in connection with pending government action, as allegedly occurred in this case. The Order also highlights a potential double standard applied to foreign charitable donations as opposed to those in the U.S. Further, it once again demonstrates the SEC’s virtual strict liability approach to the books and records and internal controls provisions with respect to wrongdoing by foreign subsidiaries. Finally, although unclear, the Order again raises an intriguing question as to whether the SEC intends to expand its apparent view that benefits provided to the children of foreign officials might violate the FCPA.

The Nu Skin Order

Outside of China, Nu Skin operates primarily through direct selling or multi-level marketing channels, whereby products are promoted or sold through offsite meetings rather than in stores and commissions are paid to those at multiple levels in the marketing structure. Multi-level marketing is prohibited in China, where sales must be made through a store, even if the products are promoted in off-site meetings. As also explained in connection with the Avon enforcement action in 2014, Chinese law requires companies following a modified direct sales model

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1. *In the Matter of Nu Skin Enterprises, Inc.*, Securities and Exchange Act of 1934 Rel. No. 78884; Admin. Proc. File No. 3-17556 (Sept. 20, 2016), <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.
 2. *Id.* at ¶ 1.
 3. *Id.* at p. 5.

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to obtain licenses at the national, provincial and local level, creating ample space for impropriety.⁴

In 2013, Nu Skin China sales representatives allegedly held promotional meetings in a city in which Nu Skin China had neither a license nor a physical store. These meetings were discovered by the Province's Administration of Industry and Commerce ("AIC") (the administrative body also responsible for policing commercial bribery) which initiated an investigation.⁵ Because an adverse AIC determination could have potentially damaging effects on Nu Skin China's ability to subsequently obtain licenses in the province and elsewhere in China, Nu Skin China employees allegedly decided to make a donation to a charity in the province "in order to affect the outcome of the [AIC] investigation."⁶ Nu Skin China allegedly sought assistance from a high-ranking Communist Party official (the "Party Official") to identify a local charity. That official, who had previously supervised the head of the Provincial AIC, suggested a donation to a charity which, although it did not yet have a branch in the province, he was responsible for establishing.⁷ Nu Skin China also allegedly engaged the AIC on the issue, suggested a resolution by which it "donate[d] some money instead of a fine."⁸ The AIC proposed a fine of RMB 2.8 million (\$431,088) and Nu Skin China employees again contacted the Party Official to propose a RMB 1 million (\$154,000) donation to the charity he had recommended and with which he was affiliated.

Nu Skin China allegedly alerted Nu Skin of its intention to make the charitable donation, but did not inform Nu Skin of the connection between the donation, the AIC investigation and the Party Official.⁹ Nu Skin "identified that a large donation in China could pose FCPA risks," and told Nu Skin China to consult with FCPA counsel resident in China.¹⁰ FCPA counsel told Nu Skin to include anti-corruption language in the donation agreement with the charity, which, unknown to Nu Skin, was later removed from the final contract.¹¹ Within a week, the donation was made at a public ceremony where the Party Official spoke and a few days later the AIC sent notice to Nu Skin China that it did not intend to proceed against or to fine Nu Skin China.

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4. *Id.* at ¶ 4. See also Securities and Exchange Comm'n v. Avon Products, Inc., Complaint, No. 14-CV-9956 (D.D.C. Dec. 17, 2014).

5. Nu Skin Order at ¶ 6.

6. *Id.* at ¶ 8.

7. *Id.*

8. *Id.* at ¶ 9.

9. *Id.* at ¶ 13.

10. *Id.*

11. *Id.*

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Charitable Donations

The SEC's cease-and-desist proceeding against Nu Skin is not the first FCPA enforcement action involving donations to a *bona fide* charity. In 2004, the SEC filed a complaint against Schering-Plough¹² in connection with a donation to the Chudow Castle Foundation, which was supported by a local Polish health official. Eight years later, the SEC filed a similar complaint against Eli Lilly¹³ in connection with the same charity. In neither case was the legitimacy of the charity questioned. Charitable contributions also played a small part in the VimpelCom resolution,¹⁴ although the facts of that case involved dealings with the foreign official associated with the charity that went beyond the charitable donation. Although the Nu Skin Order suggests that the unnamed charity supported by the Chinese official had yet to establish an office in the relevant province, it does not suggest that the charity was a front or anything other than legitimate.

“The Nu Skin Order reminds companies and practitioners of the importance of policing charitable donations, especially where the donations may be made in connection with pending government action.”

Like the Schering-Plough complaint, the Nu Skin Order involves alleged violations of only the books and records and internal controls provisions (the Eli Lilly complaint involved allegations relating to a number of other countries in addition to the donation to the Chudow Castle Foundation). Although a suspected violation of the anti-bribery provisions of the FCPA is neither required nor, as in the recent LAN Airlines enforcement action, always present¹⁵ in connection with books and records and internal controls charges, it often lurks in the background – especially where there is a disgorgement payment, as there is here. The anti-bribery provisions require a promise or payment of “anything of value”

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12. Securities and Exchange Comm'n. v. Schering-Plough Corp., Complaint, No. 04-CV-00945 (D.D.C. June 9, 2004).
 13. Securities and Exchange Comm'n v. Eli Lilly and Co., Complaint, No. 1:12-cv-02045 (D.D.C. Dec. 12, 2012).
 14. Securities and Exchange Comm'n v. VimpelCom Ltd., Complaint, No. 1:16-CV-01266 (S.D.N.Y. Feb. 18, 2016), at ¶ 36.
 15. See *In the Matter of LAN Airlines*, Securities Exchange Act of 1934 Rel. No. 78402; Accounting and Auditing Enforcement Rel. No. 3792; Admin. Proc. File No. 3-17357 (July 25, 2016) (alleging violations of the books and records provisions in connection with payments to unions, without specifically alleging that the union members were “foreign officials”).

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“to a foreign official” or “to any person, knowing that all or a portion of such money or thing of value will be offered, given or promised ... to a foreign official.”¹⁶ As a donation to a *bona fide* charity is neither, a violation of the anti-bribery provisions would require either seeing the thing of value as the reputational benefit gained by the foreign official or creating the legal fiction that the money was donated on behalf of the official (essentially that the money was given to the official who then directed it to the charity).

As with the Schering-Plough and Eli Lilly cases, internal communications suggest that the Nu Skin China donation was made with the expectation that the official would take action in Nu Skin China’s favor, specifically by using influence to stop the AIC investigation.¹⁷ Unlike in the Eli Lilly and Schering-Plough cases, where the donation was made to the charity favored by the formal decision maker, it is worth noting that Nu Skin China’s employees did not offer a payment to the relevant AIC officials or to a charity the AIC officials chose (something that has happened before).¹⁸

Despite the issues raised by Schering-Plough, Eli Lilly and now Nu Skin in the context of overseas bribery, donations to charities connected with public officials are common in the United States,¹⁹ and even have become an issue in this year’s presidential election.²⁰ Moreover, the U.S. Department of Justice has recently,²¹ and controversially,²² included donations to charities as part of the penalty to be paid by banks in some recent settlements. The potential for a double standard is especially relevant to a books and records charge based on the fact that “the payment to the charity was inaccurately and/or unfairly described as a donation rather than a payment to influence the Party Official to favorably impact the outcome of the AIC investigation.”²³ Both domestically and internationally, both can be true simultaneously.

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16. See 15 U.S.C. § 78dd-1(a)(1) and (3) (emphasis added).

17. Nu Skin Order at ¶ 14.

18. See, e.g., “China: Wuhan AIC Official on Trial for Bribery,” Ethicsbase (Nov. 9, 2012), <http://ethixbase.com/eanews/china-wuhan-aic-official-on-trial-for-bribery/>.

19. See Raymond Hernandez and David W. Chen, “Gifts to Pet Charities Keep Lawmakers Happy,” New York Times (Oct. 18, 2008), http://www.nytimes.com/2008/10/19/us/politics/19charity.html?_r=0.

20. See Amy Chozik and Steve Erder, “Foundation Ties Bedevil Hillary Clinton’s Presidential Campaign,” New York Times (Aug. 20, 2016), <http://www.nytimes.com/2016/08/21/us/politics/hillary-clinton-presidential-campaign-charity.html>.

21. See, e.g., Department of Justice Press Rel. No. 14-773, “Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages,” July 14, 2014, <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

22. See Kimberly A. Strassel, “Justice’s Liberal Slush Fund,” Wall Street Journal (Dec. 3, 2015), <http://www.wsj.com/articles/justices-liberal-slush-fund-1449188273>.

23. Nu Skin Order at ¶ 16.

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Unlike in the United States context, however, the donations in the Eli Lilly, Schering-Plough and Nu Skin matters involved imminent *quid pro quos* described in internal communications, which cannot be described as merely building goodwill or providing support to the community in which the company operates. It seems clear that the SEC considers a payment to a *bona fide* charity to be a bribe if the payment is requested by a government official and if part of the rationale for making the payment is the hope of avoiding impending adverse government action. In Nu Skin, the Order mentioned twice that the AIC had obtained sufficient evidence to show violations and had decided to charge Nu Skin China. Nevertheless, two days after a public ceremony announcing Nu Skin's charitable contribution, at which the Party Official spoke, the AIC issued a final decision that Nu Skin would not be charged or fined.

Virtual Strict Liability

On occasion, orders alleging violations of the internal controls provisions point to obvious deficiencies in anti-corruption policies, such as the lack of anti-corruption training²⁴ or the lack of compliance personnel in China²⁵ (leaving aside the question of whether such controls are the "internal accounting controls" required by the statute). More often, as we have noted,²⁶ the existence of an improper payment is taken as "evidence" that controls were insufficient, citing controls that, had they been in place, might have prevented the payments. The Nu Skin Order specifically states that Nu Skin violated the internal controls provisions by not requiring that Nu Skin China conduct due diligence on the charity, even though: (i) Nu Skin "identified that a large donation in China could pose FCPA risks," and, therefore instructed Nu Skin China to consult with external counsel; (ii) Nu Skin China did not inform Nu Skin of the connection between the Party Official, the AIC investigation and the donation; and (iii) Nu Skin China allegedly ignored the advice of external counsel.²⁷ Given that Nu Skin China was deliberately not disclosing the connection between the official and the AIC investigation, it is doubtful that due diligence would have disclosed the scheme. The Nu Skin Order nevertheless provides guidance to companies involved in making charitable donations in high-risk markets that such due diligence should be carried out on all charities to which donations are made.

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24. See, e.g., *U.S. Securities and Exchange Comm'n. v. Maxwell Technologies, Inc.*, Complaint, Case No. 1:11-cv-00259 (D.D.C. Jan. 31, 2011).

25. See, e.g., *In the Matter of Bristol-Myers Squibb Co.*, Securities and Exchange Act of 1934 Rel. No. 76073; Admin. Proc. File No. 3-16881 (Oct. 5, 2015).

26. See Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, "SEC Brings Enforcement Actions of 2016," FCPA Update, Vol. 7, No. 7 (Feb. 2016).

27. Nu Skin Order at ¶ 16.

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Sons and Daughters: Looking Ahead

In connection with the Bank of New York Mellon²⁸ and Qualcomm²⁹ cease-and-desist orders, the SEC has claimed that providing internships, even unpaid internships, to children of foreign officials can violate the FCPA's internal controls and books and records provisions. The Nu Skin order suggests, but does not find, a further possible extension of that theory. The Nu Skin Order is only six pages long, and twice in those six pages, the SEC mentions that the Party Official had requested letters of recommendation for his child.³⁰ As "further indicia of the improper purpose for the payment" to the charity, the Order states that this request was given additional urgency with the onset of the AIC investigation and that Nu Skin eventually obtained such letters from an unnamed "influential US person."³¹ The Nu Skin Order, therefore, puts issuers on notice that, not only is an unpaid internship a potential FCPA violation, but so might be arranging letters that could help an overseas government official's offspring who are seeking admission to schools in the United States. Once again, the SEC's view of what conduct might constitute a *quid pro quo* poses the question whether similar conduct directed towards a public official in the United States would receive similar treatment.

Colby A. Smith

Andrew M. Levine

Philip Rohlik

Colby A. Smith is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. The authors may be reached at casmith@debevoise.com, amlevine@debevoise.com, and prohlik@debevoise.com. Full contact details for each author are available at www.debevoise.com.

28. *In the Matter of Bank of New York Mellon Corp.*, Securities and Exchange Act of 1934 Rel. No. 75720; Accounting and Auditing Enforcement Rel. No. 3679; Admin. Proc. File No. 3-16762 (Aug. 18, 2015).

29. *In the Matter of Qualcomm, Inc.*, Securities and Exchange Act of 1934 Rel. No. 77261; Accounting and Auditing Enforcement Rel. No. 3751; Admin. Proc. File No. 3-17145 (Mar. 1, 2016).

30. Nu Skin Order ¶¶ 8, 11.

31. *Id.* at ¶ 11.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jane Shvets
Deputy Executive Editor
+44 20 7786 9163
jshvets@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Carolina Kupferman
Assistant Editor
+1 212 909 6274
ckupferm@debevoise.com

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