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Anti-Corruption / International Risk

August 17, 2016

Mexico Enacts a Sweeping New Anti-Corruption Regime, Accompanied by a Public Apology from President Peña Nieto and Increased Attention on Mexico's Energy Sector by U.S. Regulators

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After an aggressive grassroots campaign, Mexican President Enrique Peña Nieto recently announced the enactment of sweeping changes to Mexico's anti-corruption regime. The new law is a significant step toward transparency in a country that consistently ranks among the most corrupt in the region and the world. Almost as noteworthy, President Peña Nieto publicly apologized for his own involvement in a conflict-of-interest scandal that has plagued his administration for years.

The New Legislation in Mexico

The new legislation was originally proposed in early 2016 to the Mexican legislature through a unique citizen petition process primarily aimed at increasing transparency of public sector officials. More commonly known as the "three of three" proposal, this original legislation would have required three separate stakeholder groups—public officials, close relatives of public officials, and any individual or entity that is the beneficiary of a government contract—to publicly disclose three pieces of personal information: (1) an accounting of their personal assets, (2) certain tax information, and (3) an accounting of their economic and beneficial interests. Ultimately, the Mexican government stopped short of adopting the "three of three" proposal in full. Specifically, the new law does not require recipients of government contracts to disclose personal assets, tax information or economic interests. It also allows public officials to withhold information "whose publication may affect privacy or personal data protected by the Constitution."

While some of the transparency provisions of the legislation were pared back, the new law goes beyond transparency to enhance the Mexican anti-corruption regime more broadly. For the first time, the new law creates an independent anti-corruption prosecutor. It also creates whistleblower protections for individuals and implements methods to enhance cooperation across federal, state, and municipal enforcement authorities as well as with the U.S. government and other international regulators.

The regulations, which will come into effect on July 19, 2017, also provide for significant criminal and administrative sanctions for private parties and legal entities that are found to have engaged in bribery, collusion in public bid procedures, influence peddling, wrongful use of public resources, or wrongful recruitment of ex public servants, among other acts. Individuals face sanctions of up to twice the amount of the acquired benefits (or if no tangible benefit, around $600,000 USD), temporary ineligibility to participate in procurement, leases, services or state-owned projects for a period ranging from three months to eight years, and compensatory and/or punitive damages. Legal entities face similar sanctions—up to twice the amount of the benefit (and up to $6 million USD if no monetary benefit)—and could be deemed ineligible to participate in procurement, leases, services or state-owned projects for up to 10 years. Entities could also be subject to suspension of activities for a period ranging from three months to three years, partnership dissolution, and compensatory and/or punitive damages. Along with the new penalties, the new regulations provide for some partial defenses for entities and persons charged with violating the law. For example, legal authorities will give credit for the existence of a current compliance or integrity program that includes effective reporting and whistleblower protection tools. Entities may also receive credit for self-reporting misconduct and collaborating with government investigations, and a person who has committed a serious administrative offense can confess and fully and continuously cooperate with authorities in exchange for a reduction of 50-70% of the total amount of his or her sanction.

President Peña Nieto's Public Apology

In an unprecedented step, Peña Nieto issued a public apology, during the press conference announcing the legal reforms, for the distraction of an ongoing conflict-of-interest scandal that has plagued his administration for nearly two years. Beginning in November 2014, Mexican media outlets started reporting that a major government contractor had sold a luxurious, seven-bedroom home valued at $7 million to Peña Nieto's wife, first lady Angélica Rivera. The contractor who designed and sold the home to Rivera, Grupo Higa, had been part of a consortium of companies who won a multibillion-dollar infrastructure contract during Peña Nieto's presidency. What is more, one of the contractor's chief executives was a close friend of Peña Nieto. Rivera and Peña Nieto maintained that the purchase of the home was legitimate, and a government-sponsored investigation found no evidence of wrongdoing on the part of either member of the first family. However, during his press conference, Peña Nieto apologized for the effect the controversy had on public perception of his administration, though he maintains that he had not broken any laws and that combatting corruption would continue to be a principal goal of his administration.

As evidenced by the promulgated legislation and Peña Nieto's own words during the signing of these regulations, corruption is a key area of focus both for the Peña Nieto administration and the government watchdogs that were responsible for the grassroots effort to mobilize the Mexican legislature.

Continued U.S. Enforcement of Conduct in Mexico: Key Energy Settlement

The changes to Mexico's anti-corruption enforcement regime occur at the same time that regulators in the U.S. have again demonstrated that corruption in Mexico remains an enforcement priority. On August 11, 2016, the U.S. Securities and Exchange Commission announced that Key Energy Services, Inc., a Houston-based energy company, would pay $5 million USD in disgorgement for violations of the internal controls and books-and-records provisions of the Foreign Corrupt Practices Act. The Commission explained that its investigation yielded evidence that Key Energy's Mexican subsidiary had made payments to an employee at Pemex, Mexico's state-owned oil company, in order to induce the employee to provide information that would benefit Key Energy while negotiating contracts with Pemex. Key Energy paid the Pemex employee through a third-party consulting firm and recorded the payments as legitimate business expenses in the records of the Mexican subsidiary.

The Key Energy settlement and recent changes in Mexican law prove that the "state of play" regarding interactions with government officials in Mexico is shifting, becoming increasingly fraught with risk. Given this reality, companies should consider how their past or future conduct may make its way into the public sphere and monitor the practical application of these new laws on the day-to-day operations of their businesses. For example, companies doing business in Mexico can protect themselves by ensuring they perform comprehensive, risk-based due diligence on engaged and prospective third parties, training and educating their employees on the risks associated with doing business in Mexico, and examining the company's internal controls to ensure that the company has properly accounted for its funds, its presence in the country, and any interactions with government officials.

For more information please feel free to contact a member of Ropes & Gray's leading anti-corruption and international risk team.