

## **Mexico's Anti-Corruption Laws: Private Entities and Individuals in the Crosshairs**

Understanding Key Provisions, Ensuring Compliance, and Mitigating Legal Risks

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Today's faculty features:

Carlos Chávez, Partner, **Galicia Abogados, S.C.**, Mexico

Matteson Ellis, Member, **Miller & Chevalier Chartered**, Washington, D.C.

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# Mexico's Anti-Corruption Laws: Private Entities and Individuals in the Crosshairs

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Carlos Chávez  
Partner

Galicia Abogados, S.C.  
cchavez@galicia.com.mx

**GALICIA**  
ABOGADOS

Matteson Ellis  
Member

Miller & Chevalier Chartered  
mellis@milchev.com

Miller & Chevalier

# Key Take-Aways

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- Mexico continues to be one of the highest-risk jurisdictions for corruption
- Mexico's landmark 2015-2016 reform of its anti-corruption laws (National Anti-Corruption System) created strong mechanisms for addressing corruption, including establishment of corporate liability
- To date, Mexico's enforcement of the National Anti-Corruption System has been spotty, and many current investigations as politicized in nature
- FCPA enforcement related to Mexico continues to be robust, and coordination on investigations (e.g., evidence sharing) between Mexico and the United States continues to be strong
- Anti-corruption compliance expectations of U.S. authorities, combined with new compliance guidance under Mexican law, presents an opportunity for companies to mitigate legal risk

# Mexico is Perceived as a Corrupt Business Environment

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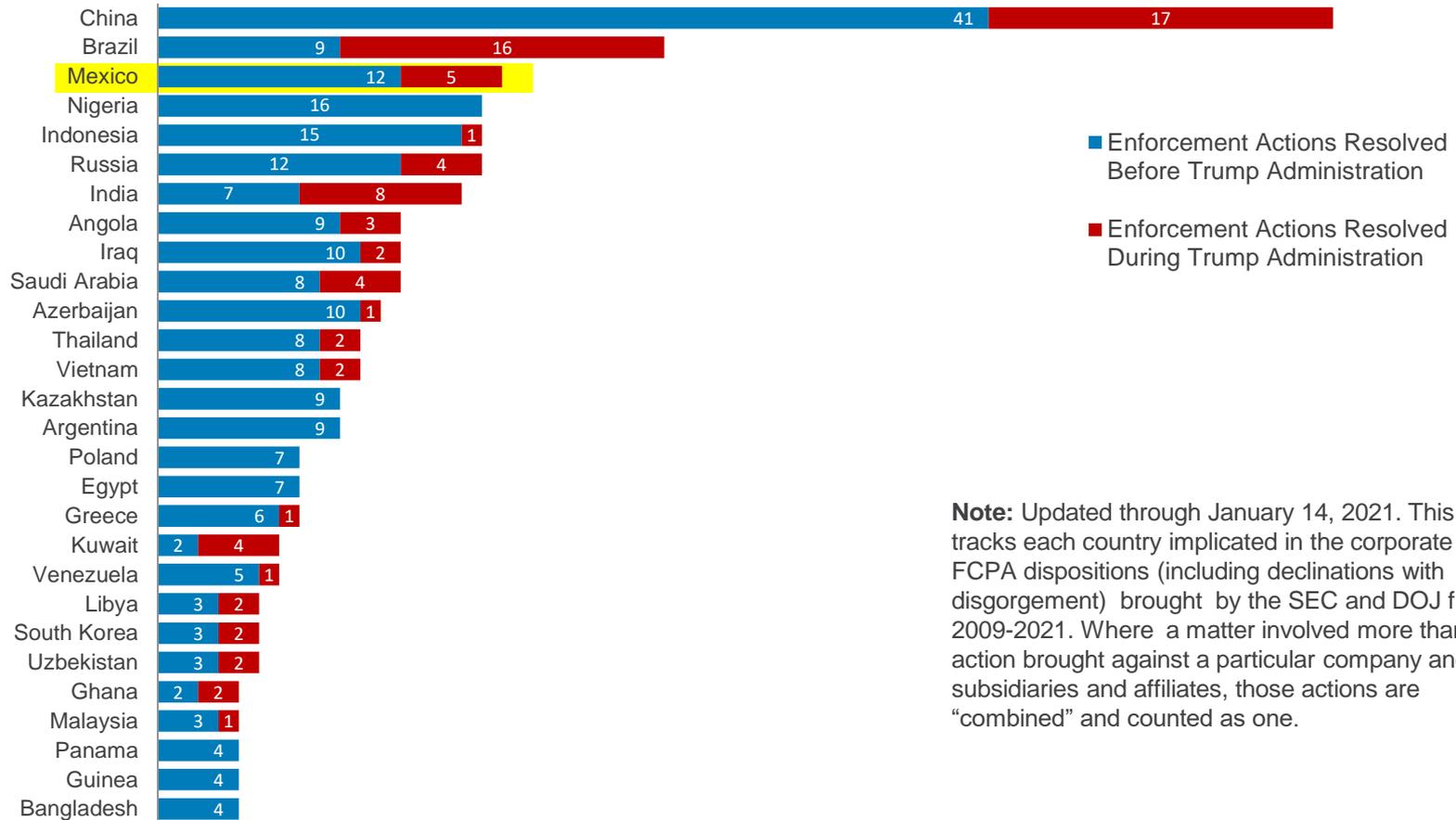
- Mexico scores 31/100 on the 2020 Transparency International CPI and ranks 124 among 179 countries
- According to the Transparency International Global Corruption Barometer 2019:
  - 90% of Mexican survey respondents think corruption in government is a significant problem
  - 34% say they paid a bribe in previous 12 months for a public service
  - 52% who had contact with the police in the previous 12 months paid a bribe

# 2020 Latin America Corruption Survey



- Almost 1,000 businesspeople in Latin America surveyed
- Ranked Mexico as one of most corrupt countries in the region
  - Over 50% of respondents working in Mexico say corruption is “significant obstacle” to doing business
  - Less than half of respondents with experience in Mexico are aware of someone being prosecuted for corruption, compared to a regional average in 2020 of 64%
  - Almost 80% view local anti-corruption laws as ineffective or effective only to a small extent
- Most corrupt government areas in Mexico
  - Almost 90% of survey respondents working in Mexico rank the police as significantly corrupt
  - Over 75% rank "prosecution service or investigators" as significantly corrupt, the most corrupt of countries surveyed
  - 81% rank municipal/local governments as significantly corrupt
  - About 2/3 of respondents view Mexican state-owned companies as significantly corrupt

# FCPA Enforcement and Mexico



**Note:** Updated through January 14, 2021. This chart tracks each country implicated in the corporate FCPA dispositions (including declinations with disgorgement) brought by the SEC and DOJ from 2009-2021. Where a matter involved more than one action brought against a particular company and its subsidiaries and affiliates, those actions are “combined” and counted as one.

# Companies Subject to FCPA Actions Based on Mexico Activities

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Member of the Lufthansa Technik Group



# National Anti-Corruption System (NAS) in Context

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- Pivotal role of Mexican civil society in anti-corruption reform
- Broad-based, wholesale, structural reform
  - Rules strengthened for public servants
  - Individual liability bolstered
  - Corporate liability established
  - Local reach
- Mitigation for compliance programs
- Leniency mechanism
- National digital platform

# The 2015 National Anticorruption System Constitutional Amendment

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- Facing increased pressure over corruption scandals, the Federal Executive Branch pursued an amendment to the Federal Constitution that:
  - Created the National Anti-Corruption System (the **NAS**)
  - Enabled the imposition of fines and other liabilities for corporate entities that engage in corrupt practices
  - Vested Congress with powers to pass general legislation regarding administrative liabilities, among others
- These amendments became effective in 2015

# National Anti-Corruption System

## Citizen Advisory Board

- Five members from NGOs, academia, social organizations, etc.
- Acts solely as an advisory body although its Chair also Chairs the Steering Committee

NAS

Steering Committee  
*(Main body of NAS)*

Technical Secretariat  
*(Implements NAS' policies and orders)*

## Ranking Members:

- Chair of the Citizen Advisory Board (*Chair*)
- Chief Judge of the Administrative Court
- Comptroller of the Federal Congress
- Chair of the Transparency and Information Access Institute
- Minister of Public Service
- Representative from the Judiciary Branch
- **Federal Anti-corruption Prosecutor**  
*(appointed 2/2019)*

# General Administrative Liabilities Act (the **New Anti-Corruption Act**)

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- The New Anti-Corruption Act was enacted in 2016 and became effective in July 2017
- It is a comprehensive anticorruption framework (all levels of government, public, and private sectors)
- The New Anti-Corruption Act covers both:
  - Public service and public officers, as it is a comprehensive codification of public service principles, obligations, and infringements
  - Private parties, as it introduces corrupt practices that can result in liability for private parties and sets the principles of compliance and leniency

# New Anti-Corruption Act

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- Upon becoming effective, the New Anti-Corruption Act superseded the 2012 Act and the public officers' liabilities acts
- State legislatures were required to implement mirror anti-corruption legislation by July 2017 applicable at the local level
- While most states missed the initial deadline, all now have passed local anti-corruption legislation and all have a special anti-corruption prosecutor
  - A few states (3) still require to pass local laws to be fully compliant

# Liabilities of Public Officers

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- For purposes of prevention, the New Anti-Corruption Act requires that public officers:
  - Report their wealth as well as the assets of their close family members when they join or leave the public service and annually
  - Prepare and file tax returns and make a specific declaration disclosing any interests they have which could lead to the existence of a conflict of interest
- Violations of the Act are divided into **minor** offenses and **aggravated** offenses:
  - **Minor** offenses are acts of public officers that contravene the principles of public service but that are not necessarily tantamount to corruption
  - **Aggravated** offenses are actions that violate public service principles and corrupt acts

# Risks to Private Parties Associated with Engaging in Corrupt Acts

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- From a practical perspective:
  - Risk of being extorted
  - Reputational harm
- From a legal perspective:
  - Criminal prosecution
  - Significant fines
  - Ban from public procurement
  - Restrictions on the ability to conduct business

# Liability for Private Parties

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Private parties (individuals and corporations) may incur liability under the New Anti-Corruption Act for the following conduct:

- **Bribery:** Offering, promising, or delivering, directly or through a third party, any undue benefit (bribe) to a public officer, in exchange for the latter to take an action, or refrain from taking an action, within her power, or to use her influence with another public officer, for the purpose of obtaining an illegal advantage or benefit for themselves or third parties.
- **Influence peddling:** Using actual influence, economic or political power, or claiming to have such power, to induce a public officer to take or refrain from taking an action in order to obtain an advantage or benefit themselves or third parties.
- **Use of false information:** Using false information or simulating compliance with applicable requirements in the context of an administrative proceeding in order to obtain an illegal advantage or benefit.
- **Obstruction of justice:** Presenting, in the context of an investigation into violations of the New Anticorruption Act, false information, or failing to provide or unduly delaying the submission of required information.
- **Collusion:** Directly, or through intermediaries, colluding with other private parties to obtain an illegal advantage or benefit in a public tender, or engaging in arrangements with competitors if the same result is harm to the public finances.
- **Misappropriation of public resources:** Illegally appropriating public resources or using the same for unauthorized purposes or failing to report the use of authorized public resources.
- **Misappropriation of non-public information:** Hiring or engaging persons who served as public officers within the immediately preceding year and who are in possession of material non-public information obtained in the performance of their duties as public officers, to obtain a competitive advantage.

# Liability for Private Parties

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- Fines for an amount of up to two times the economic benefit obtained from the corrupt act or, if no benefit is obtained, up to approximately MXP\$11.0 million (approx. USD 550,000), in the case of individuals, or MXP\$110.0 million (approx. USD 5,500,000), in the case of corporations
- Ban from public tenders for a period of up to eight years in the case of individuals and 10 years in the case of corporations
- Obligation to indemnify the public treasury for losses and damages (*daños y perjuicios*) caused to it
- For corporations, if and to the extent the relevant corporation obtained economic benefit from the corrupt act and the shareholders or partners, board of directors or other management and supervision bodies thereof participated in the corrupt act, or that the corporation is systematically used as a means to engage in corrupt acts:
  - Prohibition from engaging in trade for a period not to exceed three years, and/or
  - Dissolution and liquidation of the corporation

# The Criminal Angle

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- In addition to the administrative (*i.e.*, civil) liabilities set forth in the New Anti-Corruption Act, private parties may also face criminal prosecution for, among others:
  - Influence peddling, which may result in imprisonment of two to six years
  - Bribery, which may result in imprisonment of up to 14 years, fines and the prohibition for up to 14 years from performing another public job, position or commission
  - Bribery of foreign public officers, which may result in the same liabilities applicable to the felony of bribery, described above
- Corporations may be criminally prosecuted for these felonies:
  - In the case of influence peddling and bribery, only to the extent a lack of adequate control is established

# Distinctions with the FCPA

	New Anti-Corruption Act	FCPA
<b>Subject persons</b>	Individuals, corporations, and public officials	Individuals and corporations
<b>Scope</b>	Foreign and local officials	Foreign officials
<b>Prohibited acts</b>	Administrative offenses committed by public officials and individuals, and corporations involved in serious administrative offenses	Bribery of foreign officials; books and records and internal controls failures
<b>Facilitation payments</b>	Not allowed	Exception for facilitation or expediting payments made in furtherance of routine governmental action
<b>Strict liability</b>	Liability independent of corrupt intent	Anti-bribery provisions require corrupt intent; accounting provisions approach strict liability

# Distinctions with the FCPA

	NAS	FCPA
<b>Books and records</b>	Not contemplated in legislation	Yes, accounting provisions cover books and records
<b>Corporate liability</b>	Yes, corporations can be held liable	Yes, corporations can be held liable
<b>Sanctions</b>	<p><b>Public officials:</b> Public or private admonition; suspension of employment, position, or commission; termination of employment; temporary disqualification to hold public office and fine</p> <p><b>Individuals and corporations:</b> Fine; disqualification from participating in public procurement; indemnity for damages, compensatory damages and lost profits to the public treasury; suspension of activities and corporate dissolution</p>	<p><b>Anti-bribery Provisions</b></p> <ul style="list-style-type: none"> <li>• Companies face up to USD 2 million in criminal fines per violation</li> <li>• Companies can also be subject to civil fines, debarment from government business, or loss of export privileges</li> <li>• Individuals face up to USD 100,000 per violation, imprisonment up to five years per count</li> <li>• Or twice benefit improperly obtained or loss caused</li> </ul> <p><b>Accounting Provisions</b></p> <ul style="list-style-type: none"> <li>• Companies face up to USD 25 million per violation, plus possible disgorgement of profit</li> <li>• Individuals face up to USD 5 million and 20 years imprisonment per violation (as well as civil fines)</li> </ul>

# Distinctions with the FCPA

	NAS	FCPA
<b>Credit for compliance programs</b>	For the imposition of sanctions, integrity policies of the corporation will be considered	Not statutorily, but U.S. Sentencing Guidelines provide credit for compliance programs
<b>Credit for self-disclosure and cooperation</b>	Sanctions could be reduced for corporations filing charges for administrative offenses or for cooperating with investigations	Not statutorily, but U.S. Sentencing Guidelines provide credit; FCPA Corporate Enforcement Policy creates presumption of declination when certain factors are met
<b>Indirect liability</b>	Not necessary to establish corrupt intent for administrative offenses	Permits indirect liability for acts of third parties
<b>Statute of limitations</b>	Minor administrative offenses: three years Serious administrative offenses/individuals and corporations involved in administrative offenses: seven years	Five years

# Distinctions with the FCPA

	NAS	FCPA
<b>Jurisdiction</b>	Public officials, individuals and corporations acting in Mexico, including foreign individuals and companies	U.S. individuals and corporations worldwide; foreign individuals and corporations acting within U.S.; companies listed on U.S. exchanges (U.S. issuers) and their employees acting worldwide; and agents acting on behalf of a covered individual/corporation
<b>Enforcement</b>	Administrative and criminal	Civil and criminal
<b>Negotiated plea agreement</b>	Settlement agreements permitted under certain circumstances	Corporate settlement agreements are negotiated regularly

# Current Enforcement Climate in Mexico

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- Corruption was the main subject in all campaigns during the 2018 election, especially AMLO's
- Enforcement of anticorruption laws under AMLO has largely been seen as politicized
- Questions remain as to effectiveness of Special Prosecutor
- Unpredictable enforcement is itself a risk for companies doing business in Mexico

# FCPA Enforcement Continues

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- Mexico is priority focus based on recent comments by DOJ and FBI
- Cooperation/evidence-sharing between Mexican and U.S. authorities continues
- Monitoring of Mexican media by U.S. enforcement agencies
- Areas of common risk and enforcement focus: customs, regulatory issues, business with government entities, use of third parties/business partners

# Pemex Investigations Underway by Mexican and U.S. Authorities

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- Investigations into conduct of prior Pemex leadership underway, but eventual results are difficult to predict
  - Former high-level Pemex officials under investigation by Mexican authorities for corruption
  - Former Pemex officials extradited from Europe
  - Former Pemex CEO cooperating with Mexican authorities



# Pemex Investigations Underway by Mexican and U.S. Authorities

- Potential wrongdoing under investigation (based on press reports):
  - Bribes by contractors (e.g., SeaMar, Altos Hornos) to obtain contracts
  - Bribes by contractors to obtain meetings (\$50,000/meeting with former CEO)
  - Pemex contractors using consultants owned by relatives of Pemex officials
  - Pemex purchase of fertilizer plant at inflated price as part of kickback scheme
  - Former head of Pemex logistics promised 700 tanks of gasoline to three fuel companies in exchange for 30 percent advance payment and never delivered the fuel
  - Some of bribes were used to finance former Mexican President Peña Nieto's presidential campaign



# U.S.-Mexico-Canada Agreement (USMCA)

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- USMCA's Chapter 27 anti-corruption provisions oblige Mexico to adopt or maintain anti-corruption measures while encouraging the promotion of:
  - Anti-corruption organizations and campaigns
  - Training of public officials
  - Cross-border cooperation among enforcement authorities of the signatory countries

# Mexico National Anti-Corruption System: Mitigated Penalties for Compliance Programs

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- Effective compliance policies may lead to fine reduction
  - An effective integrity policy includes, among others,
    - A clear organization and procedures manual that delineates responsibilities and specifies chain-of-command and leadership
    - A code of conduct
    - Adequate and effective supervision, audit, and control systems to constantly and periodically examine compliance of integrity standards throughout the organization
    - Whistleblower and reporting systems, and disciplinary procedures for employees who violate company policies or Mexican law
    - Training systems and processes
    - Nondiscriminatory HR policies that prevent hiring individuals who could compromise the company's integrity
    - Mechanisms that ensure transparency and disclosure of interests
  - The New Anticorruption Act explicitly sets a benefit of a reduction in fines for entities with such policy components
- A compliance program may create prima facie evidence of adequate control and a basis for defense of criminal charges
  - Entities having compliance programs may be entitled to a 25% reduction of the applicable penalties

# DOJ/SEC FCPA Resource Guide: 10 Hallmarks of Effective Compliance Programs

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1. Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
2. Code of Conduct and Compliance Policies and Procedures
3. Oversight, Autonomy, and Resources
4. Risk Assessment
5. Training and Continuing Advice
6. Incentives and Disciplinary Measures
7. Third-Party Due Diligence and Payments
8. Confidential Reporting and Internal Investigation
9. Continuous Improvement: Periodic Testing and Review
10. Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

# DOJ's Updated Guidance on Evaluation of Corporate Compliance Programs

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- “No rigid formula”
- Makes inquiries related to three basic questions:

①

Is the company's compliance program well designed?

②

Is it being applied “earnestly and in good faith”(i.e., effective implementation)?

③

Does it work?

# Pressures for Corporate Compliance from Other Sources

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- The administration has publicly called out companies and individuals who it believes have engaged in illegal or unethical behavior, putting premium on being able to demonstrate sound compliance practices
- Business partners, auditors, financial institutions, NGOs, among others, continue to exert pressure on government and companies to address corruption and other forms of corporate misconduct

# Mexico National Anti-Corruption System: Leniency Mechanism

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- The New Anti-Corruption Act features a leniency mechanism under which an offender who confesses can obtain a 50% to 70% reduction off of the applicable fine as well as immunity from being banned from participating in public tenders, provided that:
  - A formal investigation has not been notified to any of the alleged offenders
  - The applicant is the first to provide sufficient evidence
  - The applicant cooperates fully and continuously, and ceases its illicit conduct upon instruction from the competent authority
- Subsequent applicants may obtain up to a 50% discount, provided that they produce further evidence to the investigative or prosecuting authority
- Application to this program does not grant criminal immunity
- In the case of corporations, the statute fails to:
  - State if the leniency marker would also grant immunity from suspension of activities and/or liquidation
  - Provide details as to the scope of the marker (directors, officers, employees?)

# Contact Information

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Carlos Chávez  
Partner  
Galicia Abogados, S.C.  
[cchavez@galicia.com.mx](mailto:cchavez@galicia.com.mx)



Matteson Ellis  
Member  
Miller & Chevalier Chartered  
[mellis@milchev.com](mailto:mellis@milchev.com)  
+1 202.626.1477