

FINANCIAL FRAUD LAW REPORT

VOLUME 4

NUMBER 8

SEPTEMBER 2012

HEADNOTE: SECURITIES FRAUD LITIGATION POST-MORRISON Steven A. Meyerowitz	673
DEVELOPMENTS REGARDING EXTRATERRITORIAL EFFECT OF U.S. SECURITIES FRAUD STATUTES Paul R. Bessette, Michael J. Biles, and R. Adam Swick	675
AFTER MORRISON: DISTRICT COURT DENIES MOTION TO DISMISS SEC'S INVESTMENT ADVISERS ACT CLAIM WHERE U.S. ADVISOR ADVISED FOREIGN FUND Yasho Lahiri	680
SECOND CIRCUIT SIGNALS SUPPORT FOR THE SEC'S USE OF "NEITHER ADMIT NOR DENY" LANGUAGE IN CONSENT SETTLEMENTS Paul R. Berger, Jonathan R. Tuttle, Bruce E. Yannett, and John V. Ponyicsanyi	685
M&A TRANSACTIONS: KNOW YOUR PURCHASER, KNOW YOUR MONEY D. E. Wilson, Jr.	691
RECENT SETTLEMENT HIGHLIGHTS NEED FOR OFAC DILIGENCE Thomas C. Bogle and Miriam Gonzalez	696
COMPANIES DOING BUSINESS IN MEXICO SHOULD FOCUS ON NEW ANTI-CORRUPTION LAW Victoria Prussen Spears	701
IN TERROREM IMPACT OF SECURITIES CLASS ACTIONS MAY INCREASE AFTER AMGEN Pamela G. Smith and Jennifer C. Ryan	706
IN RE PACIFIC PICTURES: THE NINTH CIRCUIT REJECTS SELECTIVE WAIVER Sean Hecker, Bruce E. Yannett, and Steven S. Michaels	713
CURBING STOCK MARKET VOLATILITY Robert N. Rapp	722
NINTH CIRCUIT RULING TRIMMING CFAA CLAIMS FOR MISAPPROPRIATION REMINDS EMPLOYERS THAT TECHNICAL NETWORK SECURITY IS THE FIRST DEFENSE Jeffrey D. Neuburger and Daryn A. Grossman	727
FRAUD RESCISSION IN PENNSYLVANIA: NO MORE EXCUSES Sean P. Nalty and Salvatore A. Clemente	731
DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT UPDATE David A. Elliott, Rachel M. Blackmon, and S. Kristen Peters	737

EDITOR-IN-CHIEF

Steven A. Meyerowitz

President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Frank W. Abagnale

Author, Lecturer, and Consultant
Abagnale and Associates

Stephen L. Ascher

Partner
Jenner & Block LLP

Thomas C. Bogle

Partner
Dechert LLP

David J. Cook

Partner
Cook Collection Attorneys

Robert E. Eggmann

Partner
Lathrop & Gage LLP

David A. Elliott

Partner
Burr & Forman LLP

Jeffrey T. Harfenist

Managing Director,
Disputes & Investigations
Navigant Consulting (PI) LLC

William J. Kelleher III

Partner
Robinson & Cole LLP

James M. Keneally

Partner
Kelley Drye & Warren LLP

Richard H. Kravitz

Founding Director
Center for Socially
Responsible Accounting

Frank C. Razzano

Partner
Pepper Hamilton LLP

Sareena Malik Sawhney

Director
Marks Paneth & Shron LLP

Bruce E. Yannett

Partner
Debevoise & Plimpton LLP

The FINANCIAL FRAUD LAW REPORT is published 10 times per year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207, Copyright © 2012 THOMPSON MEDIA GROUP LLC. All rights reserved. No part of this journal may be reproduced in any form — by microfilm, xerography, or otherwise — or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from the *Financial Fraud Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-572-2797. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., PO Box 7080, Miller Place, NY 11764, smeyerow@optonline.net, 631.331.3908 (phone) / 631.331.3664 (fax). Material for publication is welcomed — articles, decisions, or other items of interest. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to the Financial Fraud Law Report, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. ISSN 1936-5586

Companies Doing Business in Mexico Should Focus On New Anti-Corruption Law

VICTORIA PRUSSEN SPEARS

Businesses from the United States and from elsewhere around the world that nearshore or outsource operations to Mexico should pay particular attention to a new anti-corruption law that has just taken effect.

The alleged Wal-Mart bribery scandal in Mexico¹ appears to have been the final incentive that has led the country to enact a significant new anti-corruption law, the Federal Law Against Corruption in Public Procurement (*Ley Federal Anticorrupción en Contrataciones Públicas*) (the “Anti-Corruption Law”). The new Anti-Corruption Law criminalizes bribes given — or offered — to public officials to obtain a government contract.² Although most foreign companies “nearshoring” or “outsourcing” to Mexico will not be seeking to secure government contracts, they should nonetheless be mindful of the consequences if a third party is doing so on their behalf, lest they get caught up in an expensive and embarrassing corruption scandal.

Corporations doing business in Mexico, from American companies nearshoring to outsourcers from elsewhere around the globe, should pay particular attention to the Anti-Corruption Law because it imposes significant fines not only on government officials who accept bribes or kickbacks but also on foreign executives and corporations that provide those payments or that offer

Victoria Prussen Spears, an attorney, is co-founder and chief executive officer of Global Outsourcing Information Inc. She can be reached at vpspears@optonline.net.

to provide them. Those who violate the Anti-Corruption Law also may face a ban on participating in public projects in Mexico for up to a decade.

BACKGROUND

Mexico has a history of treaties and laws that are intended by its government to limit, and penalize, corruption and financial fraud.³ For instance, the country is a party to the Inter-American Convention against Corruption,⁴ the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,⁵ and the United Nations Convention against Corruption.⁶

Domestically, Mexico has enacted a number of laws intended to limit bribery and corruption, including the Federal Criminal Code (the “Criminal Code”),⁷ the Federal Public Procurement Act (the “Procurement Act”),⁸ the Federal Public Works and Services Act, (the “Public Works Act”),⁹ the Federal Public Servants’ Liabilities Act (the “Public Servants Law”),¹⁰ and the Federal Competition Act (the “Competition Act”).¹¹

These laws prohibit a wide range of conduct, from bribery of public officials and influence peddling to bid-rigging and collusion, but the combined effectiveness of these laws and the treaties has been somewhat mixed. With respect to corruption, Mexico received a score of 3 (compared to a 7 for the United States) and a rank of 100 (compared to a rank of 14 for the United States) from Transparency International, which measured “perceived levels” of public sector corruption.¹² To better meet its obligations under the various treaties highlighted above, Mexico enacted the Anti-Corruption Law, the first comprehensive law in the country that specifically seeks to prevent — and to punish — corruption relating to government contracts.¹³

APPLICABILITY

Under the Anti-Corruption Law, it is unlawful for an individual or company from Mexico or from outside Mexico to give or to offer a bribe or gift to a government worker to obtain a public contract.¹⁴

The law applies to “everyone” engaged in federal government contracting in Mexico, including “bidders, participants in tenders, recipients of [re-

quests for proposals], suppliers, contractors, licensees, concessionaires as well as their shareholders, partners, associates, representatives, principals, agents, attorneys-in-fact, brokers, handlers, managers, advisers, consultants, subcontractors or employees.”¹⁵ Liability can be imposed on a company for acts by its third-party agents that violate the Anti-Corruption Law.

PENALTIES

Under the new law, violators face significant fines in amounts that are determined based on the minimum daily wage in Mexico’s Federal District. In essence, for individuals, fines range from approximately US\$50,000 to US\$250,000 — although they can be substantially increased depending on the value of the unlawful “gain.” Corporations can be fined in an amount ranging from approximately US\$50,000 to US\$10 million. Significantly, fines can be reduced by up to 70 percent for those that discover and report violations to the Mexican authorities. Interestingly, there is no provision in the Mexico Anti-Corruption Law that provides for the disgorgement of profits, which is a common penalty in cases arising under the U.S. Foreign Corrupt Practices Act.¹⁶

STEPS TO TAKE

As more and more countries ramp up their anti-corruption efforts, it should come as no surprise that Mexico is doing the same. Indeed, with its adoption of the Anti-Corruption Law, and its intended creation of an office of a National Anti-Corruption Prosecutor, it appears that Mexico is focusing on corruption now more than ever before. Companies doing business in Mexico, therefore, should consider taking the following steps:

- Create a compliance team to monitor and review public contracts to help to ensure compliance with the Anti-Corruption Law;
- Consider adopting any best industry practices that may be announced by the government of Mexico, especially by the Federal Public Service Ministry, which enforces and administers the new law;

- Ensure that they have appropriate compliance guidelines, especially with respect to contracting with government officials and entities in Mexico;
- Ensure that employees who deal with officials of the Mexican government are trained to comply with the Anti-Corruption Law; and
- Ensure that agents or third-party contractors who act on behalf of companies in Mexico understand the Anti-Corruption Law's requirements and have a history of complying with anti-corruption rules and regulations.

Fighting corruption is a two-way street. With the Anti-Corruption Law and other initiatives, Mexico is trying to improve its business climate, and attempting to counter the negative perception that the nation is one where bribery is a necessary cost of doing business. Foreign companies operating in Mexico, and other countries with bribe-permissive cultures, must “Just Say No” to requests for bribes or gifts, however harmless or compulsory they might seem. The new Anti-Corruption Law is one more reason to do so. Once dishonest government officials start paying the price under the new law, and foreign businesses refuse to cooperate in illegal schemes, corrupt officials will eventually get the message.

NOTES

¹ See, e.g., Mexico Launches Anti-Corruption Law As Wal-Mart Scandal Worries Government, *Forbes*, April 27, 2012, available at <http://www.forbes.com/sites/ivancastano/2012/04/27/mexico-launches-anti-corruption-law-as-wal-mart-scandal-worries-government/>.

² The text of the law, in Spanish, is available on the official Web site of Mexico's Ministry of the Interior at http://dof.gob.mx/nota_detalle.php?codigo=5253615&fecha=11/06/2012. The text as translated into English can be found at http://translate.google.com/translate?hl=en&sl=es&tl=en&u=http%3A%2F%2Fdof.gob.mx%2Fnota_detalle.php%3Fcodigo%3D5253615%26fecha%3D11%2F06%2F2012.

³ See, <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/mexico/initiatives/public-anti-corruption-initiatives/>.

⁴ <http://www.oas.org/juridico/english/treaties/b-58.html>.

⁵ http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html.

⁶ http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

⁷ <http://www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf>.

⁸ <http://www.diputados.gob.mx/LeyesBiblio/pdf/14.pdf>.

⁹ <http://www.diputados.gob.mx/LeyesBiblio/pdf/56.pdf>.

¹⁰ <http://www.diputados.gob.mx/LeyesBiblio/ref/lfrasp.htm>.

¹¹ <http://www.diputados.gob.mx/LeyesBiblio/pdf/104.pdf>.

¹² See, 2011 Corruption Perceptions Index, *available at* <http://cpi.transparency.org/cpi2011/>.

¹³ See, “New Federal Anti-Corruption in Public Contracts Act,” *available at* <http://www.galicia.com.mx/wp-content/uploads/2011/02/Legal-Update.-New-Federal-Anti-Corruption-in-Public-Contracts-Act-v.1.pdf>.

¹⁴ In particular, the Anti-Corruption Act applies to: “International Business Transactions: The acts and procedures related to contracting, implementation and compliance with procurement contracts, leases, services [of] any kind, public works and services related thereto and...The granting and renewal of licenses or authorizations, and any further authorization or formality related to these transactions, carrying out any public agency or organization of a foreign state or involving the participation of a foreign public official and in which development participate, directly or indirectly, persons or entities of Mexican nationality.” http://dof.gob.mx/nota_detalle.php?codigo=5253615&fecha=11/06/2012.

¹⁵ See, “Mexico’s New Federal Law Against Corruption In Public Procurement In Force,” *available at* [http://www.chadbourne.com/files/Publication/edc1ead6-b1d1-4686-8f96-e6d9e4a649f5/Presentation/PublicationAttachment/15aa601e-a533-4ebf-bc78-b1d62e22ee24/MC_LFACP_ca\(Graham\).pdf](http://www.chadbourne.com/files/Publication/edc1ead6-b1d1-4686-8f96-e6d9e4a649f5/Presentation/PublicationAttachment/15aa601e-a533-4ebf-bc78-b1d62e22ee24/MC_LFACP_ca(Graham).pdf).

¹⁶ See, 15 U.S.C. §§ 78dd-1, *et seq.*