



November 2019

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Delayed Consequences—Mexico Seeks Damages Long After FCPA Resolution

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In recent years, companies that resolved FCPA government investigations increasingly faced collateral shareholder derivative and securities fraud cases. These shareholder suits typically allege that the company's officers and directors violated their fiduciary duties by failing to maintain adequate internal controls, ignoring red flags or other indicia of improper behavior, or otherwise neglecting to oversee the company's anti-corruption program. While these cases have had mixed success for plaintiff's attorneys, they create disruption for the board, are costly to the company, and raise further commercial and legal complications. Companies now have other potential risks to consider, perhaps several years after resolving an FCPA investigation with the U.S. government.

On October 19, 2019, the Mexican government filed a civil lawsuit in U.S. federal court against Michigan-based medical technology firm Stryker Corporation. In 2013, Stryker had agreed to pay \$13.2 million to resolve a civil FCPA action by the U.S. Securities and Exchange Commission ("SEC"), without admitting or denying the allegations, which claimed employees of Stryker made improper payments to foreign officials in five countries, including Mexico (the "2013 FCPA Settlement"). The Instituto Mexicano del Seguro Social ("IMSS"), which provides public healthcare services in Mexico, now alleges that employees of a Stryker subsidiary in Mexico made improper payments to IMSS employees in order to obtain favorable contractual terms on medical device sales contracts. IMSS contends it is entitled not only to avoid its contractual obligations to Stryker but also to collect damages equal to the amount by which the contracts were improperly inflated. The complaint appears to be based on many of the same allegations as the 2013 FCPA Settlement.

The case is noteworthy for a few reasons. The 2013 FCPA Settlement described events that occurred between March 2004 and January 2007, suggesting that this attempt at civil recovery has come as much as fifteen years after the alleged misconduct. Hinting at a reason for the delay, the Mexican government alleges that "the same officials who should have challenged Stryker's illegal conduct were the officials who received Stryker's bribes. As a result, IMSS was unable to bring this lawsuit until the recent change in government administration." The current Administration's emphasis on anti-corruption appears to include revisiting conduct, particularly insofar as it implicates prior administrations.

This also represents a novel approach by the Mexican government to recover damages. While it is common for other countries to "piggyback" enforcement actions by other regulatory authorities, criminally charge local government officials, pursue domestic debarment proceedings or seek international cooperation, the filing here of a civil lawsuit in U.S. District Court is an unusual step. In the past, Mexico has not pursued companies named in anti-corruption investigations involving conduct in

Mexico. In this case, the Mexican Government may be sending a tough message that it will protect its interests and seek its own monetary recovery where misconduct occurred within its territory.

Key Takeaways

Although the current Mexican administration took control less than one year ago, it is already suggesting that it intends to be more aggressive about anti-corruption enforcement than the prior administration. This includes the implementation of Mexico's National Anti-Corruption System, which provides for independent anti-corruption agencies and stricter anti-corruption laws. It also includes the Mexican Parliament's passage, on November 6, 2019, of new legislation broadly empowering the Ministry of Finance to freeze the bank funds of those suspected of money laundering or corruption offenses. While it is unclear whether the administration or the anti-corruption agencies had a role in pursuing civil litigation against Stryker, the lawsuit could be interpreted as another sign that the country is pursuing efforts to detect and prosecute bribery offenses, and will not defer to other international authorities.

Companies with business operations in Mexico should be especially cautious about FCPA and anti-corruption compliance in the present climate. It is vital in high-risk jurisdictions such as Mexico that companies design and maintain up-to-date compliance programs in consultation with experienced outside counsel. Moreover, if issues arise, companies and FCPA counsel should be mindful of yet another potential litigation risk—civil litigation by foreign states—that may be triggered by a settlement with U.S. enforcement authorities. In such context, companies must carefully consider the collateral consequences of any resolution, and counsel should take steps to minimize the risk of further proceedings, exclusion or debarment that can result.



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