

Chambers

The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Anti-Corruption

Second Edition

Mexico
Gonzalez Calvillo, S.C.

chambers.com

2019

Law and Practice

Contributed by Gonzalez Calvillo, S.C.

Contents

1. Offences	p.4	5. Enforcement	p.11
1.1 Legal Framework for Offences	p.4	5.1 Enforcement of Anti-bribery and Anti-corruption Laws	p.11
1.2 Classification and Constituent Elements	p.4	5.2 Enforcement Body	p.11
1.3 Scope	p.8	5.3 Process of Application for Documentation	p.12
2. Defences and Exceptions	p.9	5.4 Discretion for Mitigation	p.12
2.1 Defences	p.9	5.5 Jurisdictional Reach of the Body/Bodies	p.12
2.2 Exceptions	p.10	5.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption	p.13
2.3 De Minimis Exceptions	p.10	5.7 Level of Sanctions Imposed	p.13
2.4 Exempt Sectors/Industries	p.10	6. Review and trends	p.13
2.5 Safe Harbour or Amnesty Programme	p.10	6.1 Assessment of the Applicable Enforced Legislation	p.13
3. Penalties	p.10	6.2 Likely Future Changes to the Applicable Legislation or the Enforcement Body	p.13
3.1 Penalties on Conviction	p.10		
3.2 Guidelines Applicable to the Assessment of Penalties	p.10		
4. Compliance and Disclosure	p.11		
4.1 National Legislation and Duties to Prevent Corruption	p.11		
4.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions	p.11		
4.3 Protection Afforded to Whistle-blowers	p.11		
4.4 Incentives for Whistle-blowers	p.11		
4.5 Location of Relevant Provisions Regarding Whistle-blowing	p.11		

Gonzalez Calvillo, S.C. has a growing ABC and compliance multi-disciplinary practice which has been evolving in line with the national and international regulatory development on the subject. The practice team is comprised of attorneys with corporate, transactional, regulatory and litigation expertise to offer creative and solid advice to our clients. The firm's practice includes the design, drafting, review and implementation of policies regarding compliance, ethics, anti-corruption, whistle-blowing, anti-bribery,

best practices, gifts and hospitality, among others, as well as training of managerial teams and employees regarding those policies. Moreover, GC advises clients in compliance matters on commercial transactions, including M&A, with a particular emphasis on specific, tailored compliance due diligence. The team has experience advising clients on compliance with the FCPA, the UKBA, and the OECD Anti-bribery Convention, as well as other international and local laws and regulations regarding anti-corruption.

Authors



Luis Mancera is a partner at the firm and has focused his legal practice in administrative law, including anti-corruption, AML and tax-compliance (banking and telecom regulation). He has a deep understanding of compliance,

investigations, and prosecutions' matters, conducted by numerous law enforcement agencies. Prior to joining the firm, he served as General Counsel and Chief Tax Prosecutor, as well as Chief of the Banking and Savings Unit at the Ministry of Finance. In these capacities he was Mexico's representative to the FATF and supervised the Financial Intelligence Unit. Moreover, he was also a member of the governing bodies of the National Banking Commission (CNBV), the National Insurance and Bonding Commission (CNSF), the Bank Savings Protection Institute (IBAP) and the National Retirement Savings Commission (CONSAR). He specialises in constitutional controversy procedures, several of them creating groundbreaking precedents decided by the Mexican Supreme Court of Justice.



Luis F. Ortiz is a counsel at Gonzalez Calvillo and has over 15 years of experience in compliance, anti-corruption, anti-money laundering and tax-related matters. He has specialised in administrative compliance and procedures

(public bidding, recourses, constitutional proceedings and administrative litigation), investigations and public procurement. His practice is focused on advising international and Mexican companies in anti-corruption, anti-money laundering, tax, ethics and integrity compliance, operational risks deriving from FCPA, auditing and training, FCPA internal investigations, whistle-blowing management and policies, white-collar crime prevention, federal litigation and consulting for full compliance with the regulation thereof, as well as training and the design and implementation of preventive controls (ie, policy-making).



Rafael Fuentes is a senior associate at the firm and has strong experience in litigation, consulting, strategy projection and regulatory advice. He has represented leading telecom, infrastructure companies and financial institutions in regulatory

counsel, as well as administrative litigation and constitutional amparo procedures before Federal Court and the Mexican Supreme Court of Justice (Suprema Corte de Justicia de la Nación). He also has a solid tax and administrative litigation background in the private sector against tax and AML authorities, which enables him to provide comprehensive advice on his practice areas with a risk-prevention approach.

1. Offences

1.1 Legal Framework for Offences

1.1.1 International Conventions

Mexico is a signatory and has ratified three international conventions relating to anti-bribery and anti-corruption; these are:

- the Inter-American Convention Against Corruption (B-58) by the Organisation of American States;
- the Convention Against Corruption by the United Nations; and
- the Convention on Combating Bribery of Foreign Public officials in International Business Transactions by the Organisation for Economic Co-operation and Development.

1.1.2 National Legislation

The Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States, or Constitution) sets forth in Article 113 the Sistema Nacional Anti-corrupción (National Anti-corruption System, or NAS). The NAS is defined as the instance that co-ordinates government entities in the prevention, detection, sanction and, depending on the case, criminalisation of corruption.

The main laws issued to enforce the NAS are

- the Ley General del Sistema Nacional Anti-corrupción (General Law of the NAS);
- the Ley Orgánica del Tribunal Federal de Justicia Administrativa (Organic Law for the Federal Court of Administrative Justice);
- the Ley de Fiscalización y Rendición de Cuentas de la Federación (Federal Auditing and Accountability Law);
- the Ley Orgánica de la Administración Pública Federal (Organic Law for the Federal Public Administration);
- the Ley Orgánica de la Fiscalía General de la República (Organic Law for the Attorney General's Office);
- the Ley General de Responsabilidades Administrativas (General Law of Administrative Responsibilities, or GLAR); and
- the Código Penal Federal (Federal Criminal Code, or FCC).

Most remarkably, the GLAR sets forth administrative offences related to corruption, and the FCC and each state's criminal codes typify corruption crimes. These are the regulations in which all corruption-related offences can be found.

Due to the fact that corruption-related offences are sanctioned by the GLAR and the FCC, this analysis contains general highlights of both perspectives.

1.1.3 Guidelines for the Interpretation and Enforcement of National Legislation

From an administrative perspective, the Secretaría de la Función Pública (Ministry of Public Administration, or MPA) has issued two guidelines on anti-corruption or corporate integrity matters.

In June 2017, the Modelo de Programa de Integridad Empresarial (Model Program of Corporate Integrity) was published. This document elaborates on the elements that the GLAR mandates for a compliance programme.

The Acompañamiento y Fortalecimiento del Programa de Integridad Empresarial de la SFP (Mentoring and Support of the MPA's Corporate Program) was published in October 2018. This guide comprises six documents that aim to aid small- to medium-sized companies in the implementation and follow-up of a compliance programme.

1.1.4 Recent Key Amendments to National Legislation

On 18 July 2016, the GLAR, the NAS General Law and the Organic Law for the Federal Court of Administrative Justice were published in the Official Gazette.

In addition, the FCC, the Federal Auditing and Accountability Law, the Organic Law for the Federal Public Administration and the Organic Law for the Attorney General's Office were amended.

On 11 March 2019, María de la Luz Mijangos Borja was appointed Prosecutor on Corruption Matters of the Fiscalía General de la República (Attorney General's Office - AGO).

On 10 October 2019, the Ley Nacional de Extinción de Dominio (National Law of Asset Forfeiture) came into force. Pursuant to this law, the assets (tangible and intangible) related to corruption crimes and to those committed by public officials, contemplated in the FCC, are susceptible to forfeiture.

At a local level, on 1 September 2017, the Government of Mexico City published its first Ley del Sistema Anticorrupción de la Ciudad de México (Mexico City's Anticorruption System Law), in co-ordination with the NAS.

1.2 Classification and Constituent Elements

There is a set of offences both from GLAR's administrative perspective and from the FCC's criminal perspective.

Administrative perspective: administrative offences are catalogued according to the severity of the infringement as non-serious and serious.

- Non-serious administrative offences. The most relevant of these offences consist in public officials that fail to:
 - (a) denounce acts or omissions that may constitute administrative offences;
 - (b) report any instruction they receive if inconsistent with public office;
 - (c) submit their patrimonial statement;
 - (d) maintain proper control of the documentation and information under its responsibility and prevent its misuse or improper disclosure;
 - (e) collaborate in judicial and administrative proceedings to which they are a party; and
 - (f) ensure, before the execution of public contracts, that in the individual states under oath there is no conflict of interest.
- Serious administrative offences: serious offences may be committed by public officials and individuals. The elements comprising these offences are:
 - (a) *Abuso de autoridad* (abuse of power): any public official who exercises powers not granted or exercises powers to perform actions resulting in a benefit for himself or herself or for a third party, damages to another person or to the Public Service (Article 57 of the GLAR).
 - (b) *Tráfico de influencias* (influence-peddling): the illegal practice, directly or through a third party, of using influence in the government or connections with people in a position of authority in order to obtain a favour, undue advantage or preferential treatment (Article 61 of the GLAR).
 - (c) *Cohecho* (bribery): the illegal practice, directly or through a third party, of providing anything of value to a public official, in order for them to obtain or retain business or an improper advantage (Article 52 of the GLAR).
 - (d) *Peculado* (embezzlement): consists in authorising, seeking or performing actions to use or obtain, for himself or herself or third parties, State funds without or against legal basis (Article 52 of the GLAR).
 - (e) *Utilización indebida de información* (misuse of privileged information): the illegal practice of obtaining and using procurement procedure information that may provide an undue advantage for a bidder (Article 55 of the GLAR).
 - (f) *Uso de información falsa* (use of false information): the illegal use or production of fraudulent information by a private party in a public procurement procedure in order to obtain a benefit or profit (Article 69 of the GLAR).
 - (g) *Actuación bajo conflicto de interés* (conflict of interest): a situation in which a public official takes advantage of his or her official capacity, due to a personal interest in the business, in order to influence the impartiality and/or objectiveness in the performance of his or her duties (Article 58 of the GLAR).
 - (h) *Desvío de recursos públicos* (misappropriation of

public funds): authorising, seeking or performing actions intended to assign or distract state funds, against or without legal basis (Article 54 of the GLAR).

Criminal perspective: the FCC provides for the following crimes:

- (a) *Ejercicio ilícito del servicio público* (unlawful exercise of public service) (Article 214): under this crime the FCC encompasses six conduct typologies. In essence, it refers to public officials that:
 - (i) exercise their public office without having the legitimacy to do so;
 - (ii) misuse information or documentation;
 - (iii) submit reports stating false facts or circumstances.
- (b) *Abuso de autoridad* (abuse of authority) (Article 215): Under this crime the FCC encompasses 14 conduct typologies. In essence, it refers to public officials who:
 - (i) use public force to prevent the enforcement of a legal provision;
 - (ii) deny individuals the protection or service that they are obliged to grant;
 - (iii) when in charge of an establishment intended for the execution of penalties (ie, a prison), continue to deprive a person of his or her liberty, without reporting it to the corresponding authority or fail to comply with the release order issued by the competent authority;
 - (iv) do not report an unlawful deprivation of liberty;
 - (v) demand part of the salary of their subordinates.
- (c) *Coalición de servidores públicos* (coalition of public officials) (Article 216): consists in the collusion of public officials to take measures contrary to the law.
- (d) *Uso ilícito de atribuciones y facultades* (unlawful use of powers and faculties) (Article 217): under this crime the FCC encompasses nine conduct typologies that in essence refer to the public official who unlawfully:
 - (i) grants concessions, permits, licences, adjudications or authorisations, franchises, subsidies on taxes, rights, contract debt, among others;
 - (ii) denies the granting of the operations referred to or fails to comply with its obligation to administer and verify them, knowing the unlawfulness of such an act;
 - (iii) diverts public funds; or any person who improperly requests, procures or promotes the illegal granting of the transactions referred to in the preceding section or is a party thereto. This crime may also be committed by any concession or permit-holder that uses false or misleading information regarding the yield or

profits obtained.

- (e) *Pago y recibo indebido de remuneraciones de los servidores públicos* (improper payment of salaries) (Article 217 of the TER): this crime is committed by public officials who pay out or receive a payment, remuneration, pension, loan or credit that does not correspond to the authorised remuneration of the budget.
- (f) *Concusión* (extortion) (Article 218): this crime is committed by public officials who illegally request undue money, securities or services by virtue of tax or contribution, surcharge, income, yield or salary.
- (g) *Intimidación* (intimidation) (Article 219): this crime is committed by public officials who, using violence, intimidate a person to prevent him or her from denouncing the alleged commission of a conduct penalised by the GLAR or FCC, or harms the interests of persons who denounce such offences.
- (h) *Ejercicio abusivo de funciones* (abusive exercise of powers) (Article 220): this crime is committed by the public officials who unlawfully grant contracts, concessions, permits, licences, authorisations, franchises; unlawfully perform any legal act that produces a personal economic benefit, or use the information to which they have access by reason of their public office, to make investments, disposals or acquisitions, or any other act that produces an undue economic benefit.
- (i) *Tráfico de influencias* (influence-peddling) (Article 221): under this crime the FCC encompasses four conduct typologies that in essence refer to public officials who promote, manage or request the illicit processing of public business outside the responsibilities inherent to their employment, any person who incites the foregoing conduct, public officials who unduly request or promote any resolution or action that correspond to other public official, resulting in economic benefits, and individuals who, without being legally authorised to intervene in a public business, claim to have influence over the public officials empowered to make decisions within that business, and intervene before them to promote the illicit resolution of the business.
- (j) *Cohecho* (bribery) (Article 222): this crime is committed by public officials who directly or indirectly request or receive any money or any other benefit, or accept a promise, in exchange for doing or not doing an act related to their functions, regardless of whether it is for themselves or for others, individuals who give, promise or deliver any benefits to public officials in exchange for doing or not doing an act related to their functions, and the federal legislator who, in the federal budget approval process, improperly allocates resources or awards public works and/or service contracts, in exchange for money or any consideration.

- (k) *Cohecho a servidores públicos extranjeros* (bribery of foreign officials): this crime is committed by any person who, for the purpose of obtaining undue advantages in the development of international commercial transactions, offers, promises or gives, money or any other gift, whether in goods or services to a foreign public official.
- (l) *Peculado* (embezzlement) (Article 223): under this crime there are four conduct typologies. In essence, it refers to any person (public official or not) who diverts any asset or public fund from its legal purpose or any private person who, as a custodian of public funds or assets, diverts such funds from their legal purpose; any person (public official or not) who unlawfully uses public funds with the purpose of promoting his or her political or social image, or for the purpose of denigrating any person.
- (m) *Enriquecimiento ilícito* (unlawful enrichment): the illegitimate increase of a public official's net worth or patrimony.

The specific typology of each conduct may vary depending from the provisions of the GLAR or the FCC. The description of the previous offences is a conceptual representation and it does not necessarily reflect the exact text of the law.

Bribery

As referred to in **1.1.2 National Legislation**, bribery encompasses an administrative and a criminal perspective. The FCC (Article 222) and the GLAR (Articles 54 and 66) sanction bribery as described in this section.

If a public official accepts a bribe or the mere promise of a bribe, he or she will incur both an administrative offence and a crime. No material result is required for a bribe to be sanctioned.

Bribery Related to Hospitality Expenditures

Hospitality expenditures, gifts, promotional expenditures and facilitation payments may be considered as bribes under Mexican legislation and consequently are treated and sanctioned as such.

Before July 2017, the FCC established a specific monetary threshold for gifts that could be given to public officials. After that date, the prohibition became absolute, so no public official, either himself or herself or through third parties, may receive a gift of any kind by reason of his or her public service, regardless of its value.

Thus, granting gifts, hospitality and/or promotional expenditures is prohibited. Nevertheless, for such action to be considered an offence, the hospitality expenditures or any other gift has to be in exchange for obtaining an illegal benefit from the public official.

If a public official receives a gift or benefit without his or her consent, they shall immediately inform the MPA and deliver the gift to the *Servicio de Administración y Enajenación de Bienes* (Asset Management and Disposal Service) (Article 40).

Failure to Prevent Bribery

From an administrative perspective, the GLAR provides that, if a public official fails to report acts that may constitute administrative offences, he or she will incur in a violation. (Article 49).

Furthermore, the administrative offence of *encubrimiento* (concealment) is committed by a public official who, in the exercise of his or her function, becomes aware of acts or omissions that may constitute administrative violations and deliberately engages in some form of cover-up (Article 62).

Concealment is also typified and sanctioned by the FCC (Article 400) as a crime that takes place when a person does not try to prevent, by the lawful means at his or her disposal, to prevent the consummation of crimes that they know could be committed or are being committed.

Definition of Public Official under Mexican Law

The Constitution (Article 108) defines “public officials” as follows:

At a federal level:

- representatives of popular election;
- members of the judicial power;
- officials and employees and any person who holds a job in the *Congreso de la Unión* (Federal Congress) or in the *Administración Pública Federal* (Federal Public Administration);
- public officials of *Organismos Constitucionalmente Autónomos* (Autonomous Agencies).

At a local level:

- the head of the executive power of the federal entities (states);
- the deputies of the local legislatures;
- the magistrates of the local high courts of justice;
- the members of the councils of the state judicatures;
- the members of the town councils’ and mayor’s offices;
- members of bodies granted autonomy by the local constitutions;
- other local public officials.

The FCC defines a federal public official as any person who performs an employment, position or commission of any nature in the centralised federal public administration or in that of Mexico City, decentralised agencies, state-owned companies, organisations and companies assimilated to

them, public trusts, productive state companies, autonomous agencies, in the federal congress, or in the federal judiciary, or those who manage federal public resources. (Article 212)

Bribery Related to Foreign Public Officials

Under the FCC, bribery of foreign public officials is sanctioned when it takes place in international commercial transactions. It is sanctioned with the same penalties as common bribery (fines and prison sentences) (Article 222 bis).

Bribery between Private Parties in a Commercial Setting

Pursuant to Mexican legislation, bribery between private parties is not considered an offence or crime. Nonetheless, it is becoming a common practice for corporations to prohibit such actions in their internal code of ethics.

Influence-peddling

Offences Related to Influence on Decision-making

In the GLAR and the FCC, there are two administrative offences and one crime related to influence-peddling, as previously described in this section.

Foreign Public Officials

There is no specific typology regarding influence-peddling of foreign public officials.

Financial Record-keeping

The use of false information is a specific offence sanctioned by the GLAR (Article 69). The offence takes place when an individual or corporation presents false or altered documentation with the purpose of obtaining an authorisation, an undue benefit or advantage or harm to a third party.

Under the FCC, the use of false information may also carry criminal liability if an individual commits perjury before a public authority in the exercise of their function.

However, as in other jurisdictions there is a strict regulation in the financial sector related to a) correctly recording their financial and accounting situation, and b) reporting and properly informing the authorities and the public on, among others, relevant information.

The different financial laws (security law, banking law, insurance and bonding company law, among others) have their own set of administrative violations and criminal offences for failing to comply with such provisions in order to meet international prudential standards and to protect the soundness of the financial sector.

Public Officials

Misappropriation of Public Funds by a Public Official

As previously described in this section, there are several administrative and criminal offences related to misappropriation of public funds by a public official.

The administrative offences related to misappropriation of public funds are:

- embezzlement (Article 53 of the GLAR);
- misallocation of public resources (Article 54 of the GLAR).

The crimes related to the misappropriation of public funds by public officials are:

- abuse of authority (Article 215 of the FCC);
- extortion (Article 218 of the FCC);
- unlawful use of powers and faculties (Article 217 of the FCC);
- *del pago y recibo indebido de remuneraciones de los servidores públicos* (undue payment receipt of a salary or equivalent higher than the legally established amount for the position) (Article 217 Ter of the FCC).
- intimidation (Article 219 of the FCC).

Offences related to the Unlawful Taking of Interest by a Public Official

The offences related to the unlawful taking of interest by a public official are:

- under the GLAR: conflict of interest; and
- under the FCC: influence-peddling.

Offences Related to Embezzlement of Public Funds by a Public Official

As previously set forth in this section, embezzlement is considered both a criminal and an administrative offence under the FCC and the GLAR. Furthermore, misallocation of public resources is another specific administrative offence under the GLAR (Articles 53 and 54 of the GLAR).

Lastly, if the misallocation of public resources derives a personal benefit for the perpetrator, it may also lead to criminal liability under the criminal typology of unlawful enrichment (Article 224 of the FCC).

Offences Related to Favouritism by a Public Official

Offences in terms of favouritism can lead to criminal and administrative liability. Those that are committed by public officials are:

- administrative perspective: under the GLAR: collusion (Article 70). This serious administrative offence may be committed by:
 - (a) an individual who, with one or more private parties, carries out actions with the intent of obtaining an undue benefit or advantage in public contracting of a federal, local or municipal nature; and/or
 - (b) when individuals enter into agreements with competitors to obtain an undue advantage or cause damage to the public treasury;

- criminal perspective: under the FCC: unlawful use of powers and faculties (Article 217). This crime is committed by:

- (a) the public official who unlawfully:
 - (i) grants concessions, permits, licences, adjudications or authorisations, franchises, subsidies on taxes, rights, and contract debt, among others;
 - (ii) denies the granting of the operations referred to or fails to comply with its obligation to administer and verify them, knowing the unlawfulness of the act;
 - (iii) diverts public funds;
- (b) any person who improperly requests, procures or promotes the illegal granting of the transactions referred to in the preceding section or is a party thereto.

Intermediaries

Provisions Concerning the Commission of an Offence through an Intermediary

Bribery and bribery of foreign public officials are sanctioned even if their commission took place through a third party.

The Mexican legal framework establishes that the following offences will be sanctioned even if they were committed through an intermediary/third party:

- administrative perspective:
 - (a) bribery (Articles 52 and 66 of the GLAR);
 - (b) collusion (Article 69 of the GLAR);
 - (c) undue hiring of ex-public officials (Article 72 of the GLAR);
- criminal perspective:
 - (a) abusive exercise of powers (Article 220 of the FCC);
 - (b) influence-peddling (Article 221 of the FCC);
 - (c) bribery (Article 222 of the FCC);
 - (d) bribery of foreign officials (Article 222 bis of the FCC).

1.3 Scope

1.3.1 Limitation Period

The GLAR provides that non-serious administrative offences can be investigated and sanctioned within the term of three years. Serious administrative offences have a statutory period of seven years for investigation and sanction from their commission (Article 74).

The crimes set forth in the FCC can generally be prosecuted within a term equal to the arithmetic average of the minimum and maximum prison penalties applicable to the crime, which may never be under three years (Article 105).

For example, for bribery, the minimum penalty is three months in prison, while the maximum penalty is 14 years in prison (168 months).

Therefore, the arithmetic average for bribery to be criminally prosecuted is of 7.1 years of the date of commission.

1.3.2 Geographical Reach of Applicable Legislation

While the GLAR and the FCC have a national geographical reach, each of the 32 states that compose the Mexican Republic have their own administrative and criminal legislation, which is enforceable in their respective jurisdictions.

1.3.3 Corporate Liability

Corporations will be held liable for any of the GLAR's serious administrative offences when the acts that constitute the offences are carried out by individuals acting in the name or representation of the corporation and the offence is realised with the intention to obtain a benefit for the corporation (Art. 25 of the GLAR).

Pursuant to the FCC, corporations will be criminally liable only for a specific catalogue of crimes contained in that code (Article 412 bis).

According to that catalogue, corporations can be criminally liable for corruption-related crimes such as bribery and influence-peddling.

Federal Level

The corporate criminal liability first came into force at a federal level. Subsequently, there were amendments to the criminal codes of each state, gradually including criminal liability for corporations.

Local Level

To date, only the criminal codes of the states of Hidalgo, Jalisco, Puebla, Quintana Roo and Veracruz provide catalogues of crimes which are substantially similar to the catalogue set forth in the FCC and by which a corporation can be investigated, prosecuted and sanctioned.

The criminal codes of the other 27 states and Mexico City do not provide a specific catalogue of crimes for corporations. However, a corporation will be liable when the means to commit a crime by an individual is an asset of the corporation and there is a nexus between the individual's crime and the benefit for the corporation.

The absence of a specific catalogue of crimes leaves corporations open for criminal liability of any type with great discretion and no clear fines and sanctions related to their legal nature.

Furthermore, even though the GLAR sets forth a catalogue of serious administrative offences by which corporations may be prosecuted, each state (as described in section 1.1.4 **Recent Key Amendments to National Legislation**) has its own anti-corruption administrative legislation; therefore, the administrative offences that may be established at a local level may vary from each other.

Individuals and corporations can be held liable for the same offences. Both the GLAR and the NCCP set forth that entities can be held liable regardless of the liability of individuals (Article 421 of the NCCP) (Article 83 of the GLAR).

Criminal liability does not cease if the corporations are merged, demerged, or acquired by third parties. Thus, the "succeeding entity" can be held accountable for offences committed prior to the acquisition (Article 421 of the NCCP).

2. Defences and Exceptions

2.1 Defences

From an administrative perspective, to determine the liability of corporations when a serious offence is committed, it will be considered if the corporation has due control in its internal and external processes and, specifically, if that corporation has an "integrity policy" or compliance programme which must include the following elements as a minimum (Article 25 of the GLAR):

- clear manual of organisation and procedures in which the functions and responsibilities of each area are outlined;
- a code of conduct duly published and practised by all the members of the corporation;
- systems of control, supervision and audit that periodically examine the compliance with the integrity standards of the corporation;
- whistle-blowing systems within the corporation and towards authorities, as well as disciplinary measures for those who fail to comply with the internal standards and Mexican legislation;
- training systems and processes regarding integrity standards;
- human resources' policies tending to avoid the incorporation of people that might generate a risk to the integrity of the corporation; and
- mechanisms that ensure transparency and publicity of the corporation's interests.

Under criminal law, for a conduct to be considered a criminal offence, there must be a strict correspondence between the prohibited conduct described in law and the act committed by the offender (typology). In this respect, the authority

has the obligation to prove that correspondence, otherwise the individual/corporation cannot be sanctioned.

As a means of defence, the offender must prove that the portrayed illicit conduct lacks a typical element to be construed as such.

Mexican criminal legislation sets forth that to evaluate a corporation's criminal liability the authority shall consider if there was a lack of "due control" within the organisation. There is no definition for "due control" in the FCC as provided in the GLAR. There is no sufficient judicial precedent to that effect; some academics argue that the "integrity policy" of the GLAR may be considered as an element of defence if the corporation is involved in a crime, but, nonetheless, there can be no certainty as to how the courts will resolve without precedent (Article 421 of the NCCP) (Article 25 of the GLAR).

2.2 Exceptions

There are no exceptions for these offences.

2.3 De Minimis Exceptions

There are no de minimis exceptions for these offences.

2.4 Exempt Sectors/Industries

No sectors or industries are exempt from these offences.

2.5 Safe Harbour or Amnesty Programme

Administrative Perspective

Anyone who has committed an administrative offence may confess their liability and get a reduction in the corresponding sanction, provided that he or she co-operates fully and continuously with the investigating authority and ceases to practise the conduct (Articles 88 and 89 of the GLAR).

Criminal Perspective

The criminal authority has an opportunity criterion based on the application of remediation efforts, provided that the damage caused to the victim has been repaired or guaranteed (Article 256 of the NCCP).

The remediation efforts may result in not exercising the criminal action, in the following cases:

- non-violent crimes penalised with up to five years in prison;
- economic crimes committed without violence;
- when there is a more severe penalty that has already been imposed or will be imposed for another crime;
- if the defendant provides essential information for the prosecution of a more serious crime and commits to testify in the trial;
- when the criminal prosecution is disproportionate or unreasonable.

3. Penalties

3.1 Penalties on Conviction

The penalties for the offences listed in section 1.2 are as follows:

The general sanctions for administrative offences and crimes for public officials (Article 78 of the GLAR) (Articles 212 to 224 of the FCC) are:

- suspension, dismissal or temporary separation from public office;
- economic sanctions;
- prison.

For individuals (Article 81 of the GLAR) (Article. 212 to 224 of the FCC):

- economic sanctions;
- temporary disqualification from participation in public procurement;
- compensation for damages;
- prison.

For companies (Article 81 of the GLAR) (Article 422 of the NCCP):

- economic sanctions;
- temporary disqualification from participation in acquisitions, leases, services or public works;
- suspension of operations;
- dissolution of the corporation.

3.2 Guidelines Applicable to the Assessment of Penalties

Administrative Perspective

The following elements should be considered for the individualisation of sanctions derived from administrative offences:

For public officials (Article 80 of the GLAR):

- patrimonial damages caused;
- hierarchical level within public service and personal background;
- socio-economic circumstances;
- means used to commit the offence;
- recurrence of non-compliance with obligations;
- the obtained benefit.

For individuals (Article 82 of the GLAR):

- the degree of involvement;
- recurrence;
- socio-economic circumstances;
- the severity of the damage;
- the obtained benefit.

Criminal Perspective

To impose sanctions, authorities must take into account the following elements (Article 52 of the FCC):

- the severity of the damage;
- the nature of the action or omission and the means employed to execute it;
- circumstances of time, means and place;
- the level of involvement in the commission of the crime;
- subjective conditions of the individual, such as education, traditions, age, social and economic conditions;
- subsequent behaviour in relation to the offence committed.

Moreover, each administrative offence and crime has a penalty range with a maximum and minimum sanction. Sentences vary according to the offence (Article 52 of the FCC), for example, bribery, which carries a minimum sentence of three months' to two years' imprisonment and 30 to 100 days of fine. The maximum sentence is two to 14 years' imprisonment and 100 to 150 days of fine.

Assessment of Repeated Offences

According to the GLAR, when determining the sanction that shall be imposed on an individual, public officials need to take into account if that individual has previously committed other administrative offences (Article 82 of the GLAR).

Likewise, the FCC sets forth that previous crimes will be assessed when determining sanctions for a crime. It also provides that, when an individual has committed a serious crime and is being judged for another crime of a similar nature, the sanction for it can be increased by two thirds and up to a double of its maximum (Article 65 of the FCC).

4. Compliance and Disclosure**4.1 National Legislation and Duties to Prevent Corruption**

The GLAR (Article 25) provides the elements that a compliance or integrity policy are to meet for a corporation's liability to be considered.

As previously mentioned, a corporation will be criminally liable when, among others, it is determined to have a lack of "due control". A compliance programme is a relevant element to support the fact there was due control in the corporation.

4.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

Pursuant to the GLAR, the omission of a public official to report an administrative offence that he or she detects in the exercise of his or her functions constitutes the administrative offence of a cover-up (Article 49 of the GLAR).

The NCCP establishes the obligation for any individual or corporation who is aware that an offence has been committed to disclose that information to the public prosecutor's office. Nevertheless, the law does not establish a specific sanction if the obligation is not met (Article 222 of the NCCP).

4.3 Protection Afforded to Whistle-blowers

From an administrative perspective, the GLAR specifies that those who report an administrative offence, or act as witnesses in a proceeding arising from one, may request reasonable measures of protection.

The MPA issued the *Lineamientos para la promoción y operación del Sistema de Ciudadanos alertadores internos y externos de la corrupción* (Guidelines for the Promotion and Operation of the Internal and External Corruption Whistle-blowers), which specify that some of the measures that might be granted for the whistle-blower's protection are:

- psychological or medical care;
- those that aim to prevent retaliation against the whistle-blower; and
- assistance in any legal claim against him or her.

Furthermore, a public official who reveals the identity of an anonymous witness will incur an obstruction of justice, and an administrative offence (Article 64 of the GLAR)

4.4 Incentives for Whistle-blowers

There are no specific incentives for whistle-blowers from an administrative and criminal perspective.

4.5 Location of Relevant Provisions Regarding Whistle-blowing

From an administrative perspective, relevant provision for whistle-blowers can be found in the GLAR and in the Guidelines for the Promotion and Operation of the System of Corruption Whistle-blowers.

5. Enforcement**5.1 Enforcement of Anti-bribery and Anti-corruption Laws**

With regard to administrative and criminal perspectives of the enforcement of anti-bribery and anti-corruption laws, it depends on the nature of the enforcement of anti-corruption provisions. Those set forth in the GLAR are administrative, and criminal offences are regulated in the FCC.

5.2 Enforcement Body**Authorities**

In recent years, the federal government has focused its efforts on strengthening the NAS. As a result, new bodies have been created:

- new powers for the Federal Congress: to appoint anti-corruption officials and to create new government agencies and administrative and criminal laws;
- new powers for the Chief Audit Office: new powers to promote the accountability of public funds or trusts of public or private nature, and to efficiently investigate and prosecute individuals with severe corruption offences;
- creation of the *Fiscalía Especializada en Responsabilidades Administrativas* (Prosecutor's Office for Corruption Matters): a branch of the Attorney General's Office, technically and operationally independent to prosecute corruption crimes;
- creation of new areas for the Federal Court of Administrative Justice: new powers to review administrative offences charges. The Regional Court for Administrative Responsibilities and the Third Sections of the Court were created.

Division of Powers

- investigation: investigatory powers for corruption offences will be held by the CAO, the AGO and the *Órganos Internos de Control* (Internal Control Organs) of each Ministry;
- procedural development and resolution:
 - (a) proceedings with constitutional rights of legal defence and due process;
 - (b) administrative resolutions subject to appeal remedies before independent courts;
- Appeal Courts:
 - (a) the *Tribunal Federal de Justicia Administrativa* (Federal Court of Administrative Justice - FCAJ) is an independent court that will review administrative offences resolutions;
 - (b) the judgments of this Court will be subject to an amparo proceeding held before the Federal Judiciary.

In terms of criminal responsibility specifically, the authorities in charge are:

- *Ministerio Público de la Federación* (Federal Prosecutor) Ministry of Public Administration:
 - (a) investigation of crimes;
 - (b) execution of criminal action before the courts;
 - (c) order the relevant measures to prove the existence of the crime and the responsibility of the person who committed it;
- supervisory judge:
 - (a) supervises the Federal Prosecutor's performance in the investigation;
 - (b) instructs the process;
- Trial Court:
 - (a) oral phase;
 - (b) submission of evidence;
 - (c) dictates sentence;
- Court of Appeal: appellate instance;
- Collegiate Criminal Court: amparo proceeding.

All of the aforementioned bodies collaborate with each other, in terms of their corresponding statutes and regulation.

5.3 Process of Application for Documentation

Administrative and Criminal Perspective

The authorities related to the NAS have systems of institutional co-ordination and collaboration established in their own regulations.

5.4 Discretion for Mitigation

Some examples of the authority's discretion to mitigate its enforcing powers and their consequences are:

Administrative Perspective

The GLAR provides that those who committed an offence or are currently participating on its commission can obtain a sanction reduction if they self-report. If the first person to self-report provides sufficient elements of conviction and co-operates with the authorities, then he or she can have a sanction reduction of 50% to 70% and even a total reduction of the sanction in the case of temporary disqualifications to participate in acquisitions, leases, services or public works.

Those who subsequently confess the same offences could obtain a sanction reduction of up to 50% (Articles 88 and 89 of the GLAR).

Criminal Perspective

As previously stated, under the NCCP the public prosecutor may apply what is called as the "opportunity criterion" and refrain from exercising the criminal action (see **2.5 Safe Harbour or Amnesty Programme**).

5.5 Jurisdictional Reach of the Body/Bodies

- Federal Congress: it has jurisdiction over all Mexican territory within the subjects under federal jurisdiction, including the emission of laws regulating the National Anti-corruption System and the *Auditoría Superior de la Federación* (Chief Audit Office - CAO).
- Chief Audit Office: it promotes the accountability of public funds or trusts of Federal provenance, even if they are administered by states or municipalities; and the investigation of actions that involve irregularities or unlawful conducts in the entry, exit, management, custody and enforcement of Federal funds and public resources. Furthermore, derived from its investigations, before the FCAJ and the *Fiscalía Especializada en Responsabilidades Administrativas* (Prosecutor's Office for Administrative Offences), it denounces the imposition of sanctions that correspond to federal, state or municipal public officials, as well as those for individuals.
- Prosecutor's Office for Corruption Matters: the branch of the *Fiscalía Especializada en Responsabilidades Administrativas* (Attorney General's Office) that is responsible for the investigation, prevention and prosecution of corruption crimes contained in the FCC and, for these reasons,

it will request cautionary measures against the accused and gather evidence that proves the accused's participation in the respective crime. The Prosecutor is also a member of the NAS Committee.

- Federal Court of Administrative Justice: it is part of the NAS. The Court will sentence those responsible for the payment of indemnities and pecuniary sanctions derived from the damages that affect the Federal Public Treasury or the assets of the federal public entities.
- Federal Judiciary: according to the *Ley Orgánica del Poder Judicial de la Federación* (Organic Law of the Federal Judiciary), federal judges may be involved in proceedings in respect of crimes committed by or against federal public officials and those arising from federal public service or against it.

5.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

It is important to mention that the following are not “landmark cases”, but media-driven cases. Additionally, these affairs and investigations are currently ongoing, which means that there is still no final judgment. Therefore, in accordance with the principle of “presumption of innocence”, no comment can be made on the criminal liability of any individual or corporation listed below.

- Odebrecht: The Office of the Federal Attorney General is collaborating with the US Department of Justice and ten other countries in the investigation of the Brazilian construction corporation “Odebrecht”, for alleged bribery of public officials. On 28 May 2019, an arrest warrant was issued against Emilio Lozoya Austin, former general director of *Petróleos Mexicanos* “PEMEX”. However, the arrest warrant has not been made effective.
- Rosario Robles: the former head of the *Secretaría de Desarrollo Social* (Ministry of Social Development) is currently being prosecuted for alleged unlawful exercise of public service related to the *Estafa Maestra* (Master Scam) case, in which irregular contracts were awarded for the performance of public services, using public universities as a vehicle to divert more than USD400 million.
- César Duarte: the former governor of Chihuahua has 21 arrest warrants against him, but those warrants have not been executed. Among other crimes, he is accused of leading a series of misappropriations of public resources of at least 200 million pesos.
- Andrés Manuel López Obrador is under investigation regarding the alleged involvement of public officials of the administration of the ex-president Enrique Peña, as well as his personal friends, in crimes related to bribery and corruption.

5.7 Level of Sanctions Imposed

The cases referred to in 5.6 **Level of Sanctions Imposed** are ongoing investigations, therefore there is still no final judgment regarding any of them.

6. Review and trends

6.1 Assessment of the Applicable Enforced Legislation

In 2017, the Organization for Economic Cooperation and Development (OECD) carried out an assessment of Mexico's NAS and as a result issued a work plan which encompassed several recommendations.

In January 2019, the Follow Up Report on the OECD Integrity Review of Mexico was issued. In it, the OECD determined that the NAS “*has the potential to be a “game changer” in Mexico's fight against corruption as it promotes the definition of a comprehensive anti-corruption strategy, gives a prominent role to civil society and lays the foundations for a more coordinated approach among key actors and between levels of government*”.

Nonetheless, the report noted that the NAS is not yet fully operational and that it faces obstacles such as insufficient experience and professionalisation of internal control bodies' staff, uncompetitive wages and under-staffing.

6.2 Likely Future Changes to the Applicable Legislation or the Enforcement Body

Future Changes from an Administrative Perspective

Despite the introduction of the NAS in Mexico's legal system and the efforts made for its efficient implementation, it is not yet fully operational, mainly for the following reasons:

- the magistrates of the Federal Court for Administrative Justice have not yet been appointed;
- the NAS Citizen Participation Committee, which channels input from civil society and whose legitimacy relies on its objectivity and independence, requires formal recognition as a legal entity and regular funding to support its team and operational needs;
- the NAS' National Digital Platform, which will promote information-sharing and co-ordination at all levels of government, is currently being designed, along with an Advisory Group to address technical challenges and to provide strategic recommendations.

In respect of these reasons, it is the responsibility of the public administration to implement the necessary measures to correct these deficiencies, since it is the best route to achieve an efficient NAS that can truly combat corruption in Mexico.

Future Changes from a Criminal Perspective

- in relation to the lack of a specific catalogue of criminal typologies in the local criminal codes of all 27 states, the corresponding state congresses may be expected to include a catalogue similar to the one included in the FCC in each of such codes.
- in relation to the lack of definition of the term “due control” as an element to mitigate criminal liability, a

definition of this term, whether legislative or jurisdictional, may be expected, which would provide certainty for corporations.

Gonzalez Calvillo, S.C.

Montes Urales 632
Lomas de Chapultepec
11000
Mexico City

gonzalez calvillo
meet new standards

Tel: +52 (55) 5202 7622
Email: info@gcsc.com.mx
Web: www.gcsc.com.mx