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Anti-Corruption

Mexico: Law & Practice

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Law and Practice

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1. Legal Framework for Offences

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 Organization 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.

1.2 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) as the instance that co-ordinates government entities in the prevention, detection and sanction of corruption.

The main laws that were 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 a catalogue of corruption-related administrative offences. Corruption-related crimes are typified in both local and federal criminal codes.

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

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* (Programme Model of Corporate Integrity) was published. This document provides examples of the elements that the GLAR establishes as essentials for a compliance programme.

The *Acompañamiento y Fortalecimiento del Programa de Integridad Empresarial* (Assistance and Reinforcement of the Corporate Integrity Programme) was published in October 2018. This guide comprises six documents that aim to assist small to medium companies in the implementation and management of a compliance programme.

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.

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.

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 crimes committed by public officials, contemplated in the FCC, are susceptible to confiscation.

No recent key amendments have been brought to the national legislation in 2020.

2. Classification and Constituent Elements

2.1 Bribery

There are several offences in force regarding bribery and corruption i) from an administrative perspective, these are mainly established in the federal - GLAR - and local administrative lia-

bility laws, and ii) from a criminal perspective, most bribery and corruption-related crimes are provided by the local criminal codes and the FCC. The main offences and crimes are as follows:

Administrative perspective: administrative offences are catalogued as non-serious and serious.

Serious administrative offences: serious offences may be committed by public officials and/or private parties, the main offences provided by the GLAR are:

- *abuso de autoridad* (abuse of power) (Article 57): an offence that takes place when a public official either exercises powers that he or she does not possess or uses their lawful powers to obtain a benefit for themselves or a third party, or to damage another person or the Public Service;
- *tráfico de influencias* (influence-peddling) (Articles 61 and 68): the illegal practice that takes place when a private party or public official, directly or through a third party, uses influence in the government or connections with the public official at office to obtain a favour, undue advantage or preferential treatment;
- *cohecho* (bribery) (Articles 52 and 66): the illegal practice that takes place when a public official accepts, demands or aims to obtain any undue benefit for themselves or others, because of their position; and when a private party, directly or indirectly, promises, offers or gives any undue benefit to a public official;
- *peculado* (embezzlement) (Article 53): an offence that takes place when a public official authorises, requests, or aims to use or obtain, for themselves or for third parties, State funds without or against a legal basis;
- *utilización indebida de información* (misuse of privileged information) (Article 55): the illegal practice committed by a public official when obtaining a benefit or advantage - for themselves or other public officials - from the use of privileged information;
- *uso de información falsa* (use of false information) (Article 69): the illicit filing of false or altered documents by a private party to obtain an authorisation, a benefit or to harm a third party;
- *actuación bajo conflicto de interés* (conflict of interest) (Article 58): an offence in which a public official takes advantage of his or her official capacity to intervene in matters in which he or she has a conflict of interest or in which he or she is legally unable to intervene;
- *desvío de recursos públicos* (misallocation of public funds) (Article 54): an offence in which a public official authorises, requests or acts towards the misallocation or deviation of public resources, against or without a legal basis;
- *participación ilícita en procedimientos administrativos*;
- *colusión* (collusion) (Article 70): an offence 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) individuals who enter into agreements with competitors to obtain an undue advantage or cause damage to the public treasury;

- *uso indebido de recursos públicos* (unlawful use of public resources) (Article 71): an offence in which an individual appropriates, misuses or misallocates public resources;
- *contratación indebida de ex-servidores públicos* (undue hiring of public officials) (Article 72): an offence in which a private party hires an individual who had been a public official in the previous year and thus has privileged information that could benefit its employer.

Criminal perspective: the FCC provides for the following corruption-related crimes:

- *ejercicio ilícito del servicio público* (unlawful exercise of public service) (Article 214): under this crime the FCC encompasses six conducts. In essence, it refers to public officials who:
 - (a) exercise public powers without being lawfully entitled to do so;
 - (b) misuse information or documentation;
 - (c) submit reports stating false facts or circumstances;
- *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:
 - (a) use public force to prevent the enforcement of a legal provision;
 - (b) deny individuals the protection or service that they are obliged to grant;
 - (c) do not report an unlawful deprivation of liberty; and
 - (d) demand part of the salary of their subordinates;
- *coalición de servidores públicos* (collusion of public officials) (Article 216): the collusion of public officials to take measures that contravene the law;
- *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 officials who unlawfully:
 - (a) grant concessions, permits, licences, adjudications or authorisations, franchises, subsidies on taxes, rights, contract debt, among others;
 - (b) deny granting the aforementioned operations or fail to comply with their obligation to manage and verify them;
 - (c) divert public funds;
- or any person who improperly requests, procures, or promotes the illegal granting of the transactions referred to in subsection (a) in the final point above 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,

- *remuneración ilícita* (improper acceptance or payment of compensations) (Article 217 TER): this crime is committed by public officials who approve or receive a payment, compensation, pension, loan, or credit that without lawful grounds to do so;
- *concusión* (extortion) (Article 218): this crime is committed by public officials who illegally demand undue funds, securities, or services by virtue of tax or contribution, surcharge, income, yield or salary;
- *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 harm those who denounce such offences;
- *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 for a personal economic benefit; or use privileged information to make investments, sales, acquisitions or any other act that produces an undue economic benefit;
- *tráfico de influencias* (influence-peddling) (Article 221): under this crime, the FCC encompasses four conduct typologies that, in essence, refer to:
 - (a) public officials who promote, manage or request the illicit processing of public business outside the responsibilities inherent to their employment;
 - (b) any private party who incites the foregoing conduct;
 - (c) public officials who unduly request or promote any resolution or action that correspond to other public official, resulting in economic benefits; and
 - (d) private parties 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;
- *cohecho* (bribery) (Article 222): this crime is committed by:
 - (a) public officials who directly or indirectly request or receive any money or benefit, or accept a promise, in exchange for doing or refraining from doing an act related to their functions, regardless of whether it is for themselves or for others;
 - (b) private parties who give, promise or deliver any benefits to public officials in exchange for doing or refraining from doing an act related to their functions; and
 - (c) the federal legislator that, in the federal budget approval process, improperly allocates resources or awards public works and/or service contracts, in exchange for money or any consideration;

- *cohecho a servidores públicos extranjeros* (bribery of foreign officials) (Article 222 bis): 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 as goods or services - to a foreign public official;
- *peculado* (embezzlement) (Article 223): under this crime there are four conduct typologies. In essence, it refers to any person (public official or private party) who diverts any asset or public fund from its legal purpose;
- *enriquecimiento ilícito* (unlawful enrichment) (Article 224): the illegitimate increase of a public official's net worth or patrimony.

It should be noted that the specific typology of each conduct may vary depending on 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.

As referred to in **1.2 National Legislation**, bribery is both an administrative offence and a crime. The FCC (Article 222) and the GLAR (Articles 52 and 66) provide different concepts and sanctions for bribery.

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

Bribery Related to Hospitality Expenditure

Hospitality expenditures, gifts, promotional expenditures and facilitation payments may be considered as bribes under Mexican legislation.

Before July 2017, the FCC established a specific monetary threshold for gifts that could be given to public officials. After that date, an absolute prohibition was imposed, so no public official - either directly or through third parties - will be permitted to receive a gift of any kind or anything of value by reason of his or her public service.

Thus, granting gifts, hospitality and/or promotional expenditures to a public official is prohibited. Nevertheless, for such an action to be considered an offence, the hospitality expenditure or any other gift has to be given with the aim of 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 of the GLAR).

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, employees and any person who works for the *Congreso de la Unión* (Federal Congress) or in the *Administración Pública Federal* (Federal Public Administration); and
- 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 local Autonomous Agencies; and
- 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, bribing foreign public officials to obtain an undue advantage in international commercial transactions is a crime. 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 neither an offence nor a crime. Nonetheless, it is becoming a common practice for corporations to prohibit such actions in their internal code of ethics.

2.2 Influence-Peddling Offences Related to Influence on Decision-Making

Pursuant to the GLAR and the FCC, influence-peddling is both an administrative offence and a crime which can be committed by private parties and public officials.

Foreign Public Officials

Under the current legal framework, there is no offence regarding influence-peddling by foreign public officials.

2.3 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 files false or altered documentation to obtain an authorisation, an undue benefit or advantage or to harm 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 (Article 247).

However, as in other jurisdictions, there is a strict regulation in the financial sector related to i) the correct record-keeping of financial institutions, and ii) the proper disclosure - to authorities and the general public - of relevant information.

The different financial laws (security law, banking law, insurance and bonding companies law, among others) have specific sets of administrative and criminal offences applicable to breaches of such provisions, in order to meet international prudential standards and to protect the soundness of the financial sector.

2.4 Public Officials

Misappropriation of Public Funds by a Public Official

Per the GLAR and FCC, 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); and
- 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);
- improper payment or acceptance of compensations (Article 217 Ter of the FCC); and
- 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 (Article 57); and
- under the FCC: influence-peddling (Article 221).

Offences Related to Embezzlement of Public Funds by a Public Official

As previously mentioned, embezzlement is considered both a criminal and an administrative offence under the FCC and the GLAR. (Article 53 of the GLAR 223 of the FCC).

Furthermore, misallocation of public resources is a specific administrative offence under the GLAR (Article 54 of the GLAR).

If the misallocation of public resources generates 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 may be committed by public officials are:

- administrative perspective: collusion (Article 70 of the GLAR). As previously mentioned, 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) individuals enter into agreements with competitors to obtain an undue advantage or cause damage to the public treasury.
- criminal perspective: unlawful use of powers and faculties (Article 217 of the FCC). This crime is committed by:
 - (a) the public officials who unlawfully:
 - (i) grant concessions, permits, licences, adjudications or authorisations, franchises, subsidies on taxes, rights, and contract debt, among others;
 - (ii) deny the granting of the operations referred to or fail to comply with their obligation to administer and verify them, knowing the unlawfulness of the act; and
 - (iii) divert public funds;
 - (b) any person who improperly requests, procures or promotes the illegal granting of the above-mentioned

transactions or is a party thereto.

2.5 Intermediaries

Bribery and the bribery of foreign public officials are sanctioned even if their commission took place indirectly, 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 70 of the GLAR); and
 - (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); and
 - (d) bribery of foreign officials (Article 222 bis of the FCC).

3. Scope

3.1 Limitation Period

The GLAR provides that non-serious administrative offences can be investigated and sanctioned within a term of three years. Serious administrative offences have a statute of limitations of seven years (Article 74).

The crimes set forth in the FCC can generally be prosecuted within a term equal to the 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 average penalty is of 7.1 years, and this term is its statute of limitations.

3.2 Geographical Reach of Applicable Legislation

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

3.3 Corporate Liability

Corporations will be held liable for any of the GLAR's serious administrative offences when the acts that constitute them are

carried out by individuals acting in the name or representation of the corporation and the offence is carried out with the intention of obtaining a benefit for the corporation (Article 24 of the GLAR).

Pursuant to the FCC, corporations can be criminally liable only for a specific catalogue of crimes contained in that code (Article 11 bis). Corruption-related crimes such as bribery and influence-peddling are included in the catalogue.

Criminal Perspective

Corporate criminal liability first came into force at a federal level.

Subsequently, amendments were made to the criminal codes of each state, gradually including liability for corporations.

To date, only the criminal codes of the states of Jalisco, Puebla, Quintana Roo, Veracruz and Yucatán 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 do not provide a specific catalogue of crimes that corporations can commit. However, a corporation will be liable for the crimes committed on their behalf, for their benefit or with the means that they provide, if the authorities determine that there was a “lack of due control” within the corporation (Article 421 of the NCCP).

The absence of a specific catalogue of crimes leaves corporations open for criminal liability in relation to any crime, with great discretion on the authority’s behalf and no clear fines and sanctions.

It should be noted that 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).

Administrative Perspective

Even though the GLAR (federal law) sets forth a catalogue of serious administrative offences by which corporations may be prosecuted, each state has its own anti-corruption administrative legislation; therefore, the administrative offences that may be established at a local level may vary from each other.

Corporate and Individual Liability

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).

4. Defences and Exceptions

4.1 Defences

From an administrative perspective, to determine the liability of corporations when a serious offence is committed, authorities will assess whether the corporation had due control in its internal and external processes and, specifically, if the corporation has an “integrity policy” or compliance programme. Pursuant to the GLAR, a compliance programme must include, at least, the following elements (Article 25 of the GLAR):

- a 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, with mechanisms for its enforcement;
- systems of control, supervision and audit that periodically examine the compliance with the integrity standards - or the compliance programme - 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.

Furthermore, for a conduct to be considered an administrative or 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 found liable and sanctioned.

As a means of defence, the alleged offender must prove that its actions do not meet all the elements that constitute the typology in question.

Mexican criminal legislation sets forth that, in order 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, nor are there judicial precedents 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).

4.2 Exceptions

There are no exceptions for these offences.

4.3 De Minimis Exceptions

There are no de minimis exceptions for these offences.

4.4 Exempt Sectors/Industries

No sectors or industries are exempt from these offences.

4.5 Safe Harbour or Amnesty Programme

Administrative Perspective

Anyone who has committed an administrative offence may confess their actions to the authorities and get a reduction in the corresponding sanction, provided that they co-operate fully and continuously with the investigating authority and cease to practise the conduct (Articles 88 and 89 of the GLAR).

Criminal Perspective

The criminal authority has an “opportunity criterion” based on remediation efforts, in the sense that, to be eligible for the criterion, the damage caused to the victim should be repaired or covered (Article 256 and 257 of the NCCP).

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

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

5. Penalties

5.1 Penalties on Conviction

The penalties for the criminal and administrative offences listed in **2. Classification and Constituent Elements** 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.

5.2 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, authorities need to take into account whether 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 that crime can be increased by two thirds and up to double its maximum (Article 65 of the FCC).

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Current legal framework provides incentives for corporations actively to prevent corruption. For instance, the GLAR (Article 25) sets forth that having a compliance programme - or integrity policy - will be taken into account when determining administrative liability for corporations.

Furthermore, a corporation will be criminally liable when, among others, it is determined to have a lack of "due control". Corporations that have a compliance programme should be able to prove that due control to the authorities and thus could prevent criminal liability.

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 commit a violation (Article 49).

Furthermore, the administrative offence of *encubrimiento* (concealment) is committed by the public official who, in the exercise of his or her functions, becomes aware of acts or omissions that may constitute administrative offences and deliberately engages in some form of cover-up (Article 62 of the GLAR). Failure to prevent bribery from an administrative perspective may result in fines and disqualification from public office.

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 - the crimes that are being committed or could be committed. Failure to prevent bribery from a criminal perspective may result in fines and prison sentences.

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

Pursuant to the GLAR, public officials who fail to report the administrative offence that they detect in the exercise of their functions commit a non-serious administrative offence (Article 49 of the GLAR).

The NCCP establishes an obligation for any individual or corporation that 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 sanction for failing to comply with the obligation (Article 222 of the NCCP).

6.3 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 Ministry of Public Administration 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 provides 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 commit an obstruction of justice, and an administrative offence (Article 64 of the GLAR).

6.4 Incentives for Whistle-Blowers

There are no specific incentives for whistle-blowers to report bribery or corruption related offences, either from an administrative or criminal perspective.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

From an administrative perspective, relevant provision for whistle-blowers can be found in the GLAR, in the Guidelines for the Promotion and Operation of the System of Corruption Whistle-blowers and in the *Protocolo de Protección para Personas Alertadoras de la Corrupción* (Protocol on the Protection of Corruption Whistle-blowers), the latter published on 19 October 2020 in the Official Gazette.

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

The enforcement of anti-bribery and anti-corruption laws depend on the nature of the breached provisions. Those set forth in the GLAR and local administrative liability laws are administrative, and criminal offences are mainly regulated in the FCC and local criminal codes.

7.2 Enforcement Body Authorities

In recent years, the federal government has focused on strengthening the NAS. As a result, the following changes have been made:

- 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 investigate and prosecute efficiently individuals who have committed severe corruption offences;
- creation of the *Fiscalía Especializada en Responsabilidades Administrativas* (Prosecutor's Office for Administrative Offences): a branch of the Attorney General's Office, technically and operationally independent to prosecute corruption crimes; and
- 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 Section of the Court were created.

Division of Powers

The relevant authorities concerning investigation and enforcement of administrative liability are:

- investigation: investigatory powers for corruption offences will be held by the Chief Audit Office, the Ministry of Public Administration and the *Órganos Internos de Control* (Internal Control Organs) of each government body;
- 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 liability specifically, the authorities in charge are:

- *Ministerio Público de la Federación* (Federal Prosecutor) and the Attorney General's Office:
 - (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.

7.3 Process of Application for Documentation

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

7.4 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 participating in 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, 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 to the same offences could obtain a sanction reduction of up to 50% (Articles 88 and 89 of the GLAR).

Criminal Perspective

The criminal authority has an "opportunity criterion" based on remediation efforts, in the sense that, to be eligible for the criterion, the damage caused to the victim should be repaired or guaranteed (Article 256 and 257 of the NCCP).

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

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

7.5 Jurisdictional Reach of the Body/Bodies

Federal Congress

The Federal Congress 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

The Chief Audit Office 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 Prosecutor's Office for Administrative Offences, it denounces the imposition of sanctions to federal, state or municipal public officials and individuals.

Prosecutor's Office for Corruption Matters

The Prosecutor's Office for Corruption Matters is the branch of the *Fiscalía Especializada en Combate a la Corrupción* (Attorney General's Anti-Corruption Office) that is responsible for the investigation, prevention and prosecution of corruption-related crimes provided by the FCC and, for these reasons, it will request cautionary measures against the defendant and gather evidence that proves the defendant's commission of the respective crime. The Prosecutor is also a member of the NAS Committee.

Federal Court of Administrative Justice

The Federal Court of Administrative Justice is part of the NAS. The Court will sentence those responsible for the payment of compensations 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.

7.6 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 no final judgment has been issued. 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. In connection with the case, Emilio Lozoya Austin, former general director of Petróleos Mexicanos "PEMEX", was detained in Spain and extradited to Mexico on 17 July 2020. He is currently on trial for bribery, money laundering and criminal association.
- 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 is accused of embezzlement. He was arrested on 8 July 2020, in Florida, where he is currently in jail while his extradition process takes place.

7.7 Level of Sanctions Imposed

The cases referred to in 7.6 **Recent Landmark Investigations or Decisions Involving Bribery or Corruption** are ongoing investigations, therefore there is still no final judgment regarding any of them.

8. Review and Trends

8.1 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 co-ordinated 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.

8.2 Likely Future Changes to the Applicable Legislation of 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.

Due to 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.

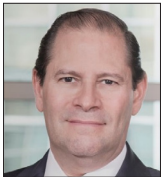
Future Changes from a Criminal Perspective

- 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 these 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. has a growing ABC and compliance multidisciplinary 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 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 oth-

ers, as well as training of managerial teams and employees with regard to 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 relating to anti-corruption.

Authors



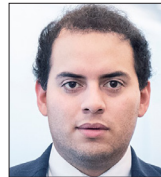
Luis Mancera is a partner at the firm and has focused his legal practice in administrative law, including anti-corruption, AML and tax compliance (banking and telecoms regulation). He has a deep understanding of compliance, investigations, and prosecution matters,

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Juan Carlos Peraza is a counsel at the firm and has focused his legal practice on compliance, anti-corruption, regulatory, administrative, and constitutional litigation. His experience includes advising national and foreign companies from highly regulated sectors, with an emphasis

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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 telecoms and infrastructure companies and financial institutions in regulatory counsel, as well as

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