

Anti-Corruption Regulation 2018

Contributing editor
Homer E Moyer Jr



2018

GETTING THE
DEAL THROUGH

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Homer E Moyer Jr
Miller & Chevalier

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Preface

Anti-Corruption Regulation 2018

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
February 2018

Mexico

Daniel Del Río Loaiza, Rodolfo Barreda Alvarado and Julio J Copo Terrés

Basham, Ringe y Correa

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Mexico is a signatory to three international anti-corruption conventions:

- the Organization of American States (OAS) Inter-American Convention against Corruption;
- the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
- the United Nations Convention against Corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

In Mexico, the foreign bribery law that applies to foreign public officials, besides the Federal Criminal Code, is the US Foreign Corrupt Practices Act (FCPA). Even though the FCPA is a foreign law with application within the US, its effects are applicable for certain activities from abroad (Mexico) in connection with US officials.

The FCPA has primarily two main components:

- anti-bribery provisions; and
- accounting provisions.

Any violation of the FCPA could result in both criminal and civil penalties (imprisonment and fines).

The national regulations applying to domestic public officials are:

Mexican Federal Constitution

Article 113 established the creation of the National Anti-Corruption System (SNA). This agency is the coordinating body between the authorities of all levels of government responsible for the prevention, detection and punishment of acts of corruption and administrative liabilities, and the supervision and control of public resources. Also article 108 of the Federal Constitution defines a 'public official' as:

- all the representatives elected as members of the federal judiciary and the judicial branch of the Federal District;
- officers, employees and, in general, any person who holds a position, post or commission of any nature in Congress, in the legislative assembly of the Federal District, the federal government or the Federal District; and
- civil officials of the bodies to which the Constitution grants autonomy, who will be responsible for the acts or omissions incurred in the performance of their respective functions.

International Cooperation for Development Act

This Act provides legal guidelines for the administration, quantification and control of the resources received from other national and worldwide sources, through procedures that ensure full transparency.

Act on the Conclusion of Treaties

This Act aims to regulate the conclusion of treaties and agreements internationally. Treaties may only be concluded between the

government of the United Mexican States and one or more subjects of public international law.

General Law of the National Anti-Corruption System

This aims to, among other things:

- establish the coordination mechanisms between the diverse members combating corruption at the federal, local, and municipality levels, as well as in city halls of Mexico City;
- set the minimum basis for corruption prevention and administrative offences;
- regulate the organisation and functioning of the Anti-Corruption National System; and
- set forth basis, principles and procedures for the organisation and operation of the Civic Participation Committee.

General Administrative Liabilities Act

This Act establishes the administrative liabilities, the obligations and the sanctions for the commission or omission of public officials of the three governmental levels, as well as of the private entities and individuals that incur in administrative major offences.

Federal Criminal Code

This sets forth bribery as a crime in article 222 for domestic public officials and in article 222-bis for foreign public officials.

Prevention and Identification of Transactions with Funds from Illegal Sources Act

This considers as a vulnerable activity the emission or marketing, card services, credit, prepaid cards and all the instruments constituting the storage of monetary value.

National Development Plan

This is elaborated by the executive during the first six months of the presidential six-year term and consists of a government's guideline to what will be executed during the current term of the president.

Federal Civil Code

Articles 2108 and 2109 set forth the civil liabilities in the case of compensatory damages and loss of future legal earnings.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

As per the General Administrative Liabilities Law a bribe payment to foreign government officials is not specifically considered within the definition of 'bribe'.

Notwithstanding the foregoing, the General Administrative Liabilities Law expressly prohibits collusion in domestic and foreign transactions (eg, bid rigging), in which a Mexican individual or entity participates, and is carried out by any public entity of a foreign state or foreign public official.

The Federal Criminal Code establishes as a crime the act of obtaining or retaining for himself, herself or another person undue

advantages in the development or conducting of international business transactions, and the offering, promising or giving, directly or through an intermediary, of money or any other gift, either in goods or services.

4 Definition of a foreign public official

How does your law define a foreign public official?

Within Mexican law, the legal definition of a foreign public official is established in the Federal Criminal Code:

- article 222-bis defines foreign public official as one who has a job, position or commission whether inside the legislative, executive or judicial branches, or an autonomous public organism inside any order or at any government level of a foreign country, whether appointed or elected;
- any person exercising a function for an authority, body or public company or state participation in a foreign country; and
- any official or agent of a body or public international organisation.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

In Mexico's domestic legislation the restrictions on receiving gifts, travel expenses, meals or entertainment is expressly provided by the General Administrative Liabilities Act, which is applicable for domestic public officials. The referred-to law established the following restrictions to determine conflict of interest: during the course of employment, position or commission, and for a year after, public officials may not request, accept or receive for themselves, or through an intermediary, money or any kind of gift, service, employment, position or commission for themselves, from anyone whose professional activities, commercial or industrial, are directly linked, regulated or supervised by the public official in the performance of his or her job, position or commission.

We consider that this could apply for foreign officials in connection with article 222-bis of the Federal Criminal Code, referred to in questions 3 and 4.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The anti-bribery provisions of the FCPA expressly provide that:

[S]hall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action . . .

However, Mexican laws do not permit facilitating or 'grease' payments.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Based on the General Administrative Liabilities Act, payments through intermediaries or third parties to any public official are prohibited under any circumstances; notwithstanding this, such prohibition has a restriction, consistent when performing the public charge and for a year after, receive, request or accept money or any kind of gift, service, employment, position or commission for himself or herself, from anyone whose professional activities, commercial or industrial, are directly linked, regulated or supervised by the public official in the performance of his or her job, position or commission, to determine conflict of interest.

It should be mentioned here that domestic public officials are subject to the above; however, as we stated in question 5, there is some interpretation in the field of foreign public officials as they could be considered inside the protection arena of such regulation.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, Mexican law prohibits bribery equally by individuals and corporations, but the sanctions are different because of the nature of the liability assumed by the parties. This means that companies cannot be punished with an imprisonment sanction, but the ones who are legally responsible, shareholders, the board of directors or those who work in the company or the partners of it, or anyone involved in the bribery, could face criminal sanctions. On the other hand, companies can bear civil liability, and they most likely will be penalised with economic sanctions.

Additionally, the sanctions imposed by the General Administrative Liabilities Law for the commission of major offences (bribery, unlawful participation in public tender procedures, influence peddling, use of false or altered information, misuse of public resources and unlawful contracting with former public officials) are:

- Major economic penalties: For individuals, the penalties are from 7,304 Mexican pesos up to approximately 10.96 million pesos; and for corporations the sanctions are from 73,040 pesos up to approximately 109.56 million pesos.
- Temporarily disqualification on participation in acquisitions, leasing, services or public works: for individuals from three months up to eight years; and for corporations the sanctions are from three months up to 10 years.
- Penalties exclusively for corporate entities: Suspension of all activities from three months up to three years, and dissolution and liquidation of the entity in particularly grave cases; and
- Penalties for individuals and corporate entities: Indemnity for damages and lost profits to the public treasury.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Pursuant to the Corporations Act, a merger agreement has no full effect until a three-month term has passed since its execution between the parties. The main purpose of the aforementioned term is so that any creditor can claim any right. So, the successor entity can be held liable for bribery in the event of a merger or acquisition, since the legal character of the corporations is also assigned to the target, so in such event, the target company and the successor are the same person for legal purposes.

Additionally, the successor and new company can argue in its own favour that the illegal action was committed prior its constitution, and reduce the liability.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Civil enforcement is regulated in the Federal Civil Code, and criminal enforcement is established pursuant the Federal Criminal Code. These codes enforce the application of penalties for the breach of any disposition of the aforementioned codes, including the Criminal Code that provides that bribery is a crime, the purpose of which is the gathering or retention for himself, herself or another person undue advantages in the development or conduction of international business transactions, offering, promising or giving, directly or through an intermediary, money or any other gift, either in goods or services.

We interpreted that the obligation for the enforcement of foreign bribery acts is also established in the Federal Constitution. The Constitution established in article 133 that the Constitution, the treaties to which Mexico is a signatory (and that are ratified by our Senator's Chamber) and the federal acts are the supreme law of our nation. This means that if a foreign bribery law is provided by a convention or a treaty, the Mexican state is obligated to execute and monitor its compliance with such Act.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The government agency in charge of enforcing all the bribery acts and regulations is the Ministry of Government Affairs. This ministry monitors the performance of federal public officials, determines the purchasing policy of the Federation, audits the spending of federal funds and coordinates internal control bodies in each federal agency, among other functions that are determined in the Structural Act on the Public Federal Administration and its own rules and regulations governing internal organisation in detail.

On 27 May 2015, the Constitutional Amendment in Anti-Corruption Matters was published in the Official Federal Gazette. Because of this amendment, the Anti-Corruption National System was created constitutionally, which comprises:

- the heads of the Superior Audit Office;
- the prosecutor for the fight against corruption;
- the minister of government affairs;
- the president of the Federal Court of Administrative Justice;
- the president of the Mexican Agency of Transparency, Access to Information and Protection of Personal Data;
- a representative of the Council of the Federal Judiciary; and
- other public committees.

On 18 July 2016, in the evening edition of the Federal Official Gazette, the National Anti-Corruption System General Act was published, which regulates the Anti-Corruption National System.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

According to articles 88 and 89 of the General Administrative Liabilities Law, the individual or entity may confess in order to benefit from leniency when penalties are imposed.

In order to determine the level of leniency, the authority will take into account the timing of the benefit application, as well as any supporting evidence provided.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Violations of criminal or civil enforcement law are not subject to alternative resolution mechanisms, following public order, pursuant to the law. This is different from agreements between parties that can be solved through a dispute resolution process determined by the same parties.

'Public order' is known as the institutions and rules considered essential by the state for the running of the government and the well being of the community. Public order dispositions cannot be waived.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

It must be said that the most important and recent shift regarding the enforcement of both national and foreign rules is that the Mexican Congress passed the SNA during May 2015, pushing a major constitutional amendment and the creation of secondary laws, which were published on 18 July 2016.

The SNA aims at working as a coordination mechanism between the governmental entities, the auditing entities and the ones in charge of controlling public resources. The main highlights of the constitutional amendment are, among other things:

- the obligation for public officers to file personal estate and conflict of interest statements;
- the Federal Superior Auditor (ASF) is granted extra powers to execute 'real time' audits;

- the creation of a new system to determine liability over public servers and, when applicable, to individuals committing administrative offences; and
- Mexican states must create their own local anti-corruption systems.

At a glance, the SNA has the following features aimed at preventing, detecting and punishing corrupt acts:

- the ASF is in charge of reviewing the use of public federal resources and Mexican states' debt in cases where the federation appears as guarantor; it will submit claims for unlawful actions to the anti-corruption prosecutor and administrative courts;
- the ASF has the faculty to investigate corruption offences and will take them to court; and
- the Federal Administrative Court rules over corruption crimes cases, imposing sanctions on public officers and private entities through the creation of specialised courts on administrative liabilities procedures.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

For the prosecution of any foreign person – both individuals and companies – the domestic authority will require the support of a judicial authority located in the place where the violation occurred. The foreign support needed is requested through a rogatory letter; under the rules of civil and criminal procedure, it is a communication from a court of law officially asking another court in a different jurisdiction for assistance in a particular court action.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Pursuant to the Federal Criminal Code, the sanctions can be imprisonment for individuals and economic penalties for entities; however, the amount would vary depending on the seriousness of the violation.

Additionally, the FCPA, applicable for the foreign bribery rules, imposes huge economic sanctions for those violating this Act. Individuals and corporations are subject to both civil and criminal penalties if found to be in violation of the FCPA anti-bribery, accounting or other provisions. This means not only fines, but also the possibility of imprisonment for individuals found in violation of an FCPA provision.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

A recent investigation involving foreign bribery includes the case of Odebrecht, a Brazil-based corporation, which was involved in an international bribery case. The investigation has revealed corrupt practices with Mexican high-ranking public officials from Pemex (the government-owned petroleum company) with Odebrecht.

Financial record-keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Corporations Act sets forth the specific rules for a shareholders' registry, shareholders' meeting registry and capital variations, besides the control of the financial statements that must be presented at the annual shareholders' meeting.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Every person, both individuals and companies, must respect and protect privacy data of other individuals; such information must always remain confidential, unless the data owner authorises its disclosure. When violations to anti-bribery laws occur, privacy data can be

disclosed only under court order; in such event, any person whether an individual or a company must cooperate with the authority, in order to prevent or mend the illegal action. Under such a scenario, the person who manages personal information, must disclose the necessary data or information – including violations – under its power and to its knowledge.

The specific regulation ruling data protection is the Federal Law on the Protection of Personal Data in the Possession of Private Parties, which includes several chapters about confidentiality rules inside companies.

20 Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The financial record-keeping legislation is territorial, or in other words meant to prosecute domestic bribery; however, as explained earlier, the domestic (national) court can ask for foreign support from a court located in another jurisdiction, in order to prosecute the crime abroad. This kind of action consists of the sending of a rogatory letter to the court in the other jurisdiction, requesting the provision of support by such court.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The Federal Tax Code provides the accounting rules and every obligation around them. In connection with bribery, the tax authority shall apply the law based on the seriousness of the violation.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The Federal Tax Code only provides for the deductibility of those expenses that are or were strictly necessary for the normal course of business.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Federal Criminal Code typifies the activity of bribery as a crime. In this case, it is regulated in article 222 for domestic public officials, and it is legally defined as a public official who themselves, or through another person requests or receives for themselves or unduly for another, money or any other gift, or accept a promise to do or stop doing an act related to his functions of his job, position or commission, and who spontaneously gives or offers any of the money or any other gift persons mentioned above, to any public official to do or skip an event related to their duties, their employment, office or commission.

Additionally, the Administrative Liabilities General Act imposes sanctions because of the commission of major offences, such as:

- bribery;
- illegal participation in administrative procedures;
- traffic of influences;
- submitting false or altered information or simulating compliance with the requirements in order to obtain any kind of authorisation, benefit or advantage, or to prejudice third parties;
- when corporations or individuals that are participating in the public procurement reach a commercial agreement in order to obtain a benefit or damage the public finances;
- unlawful use of public resources; and
- contracting with former public servants.

The sanctions that may be imposed includes:

- Major economic penalties: for individuals, the penalties are from 73,040 pesos up to approximately 10.96 million pesos; and for corporations the sanctions are from 73,040 pesos up to approximately 109.56 million pesos;
- Temporary disqualification on participation in acquisitions, leasing, services or public works: for individuals, from three months

up to eight years; and for corporations the sanctions are from three months up to 10 years.

- Penalties exclusively for corporate entities: suspension of all activities from three months up to three years; and dissolution and liquidation of the entity in particularly grave cases.
- Penalties for individuals and corporate entities: indemnity for damages and lost profits to the public treasury.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The Federal Criminal Code penalises both activities. The first section of article 222 regulates the actions of receiving, requesting or accepting any kind of bribe, and the second section of the same article sanctions the activity of giving and offering money to any domestic public official.

The Administrative Liabilities General Act prohibits the commission of major offences, such as:

- bribery;
- illegal participation in administrative procedures;
- traffic of influences;
- submitting false or altered information or simulating compliance with the requirements in order to obtain any kind of authorisation, benefit or advantage, or to prejudice third parties, when corporations or individuals that are participating in the public procurement reach a commercial agreement in order to obtain a benefit or damage the public finances;
- unlawful use of public resources; and
- contracting with former public servants.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Article 108 of the Federal Constitution defines a public official as:

- all the elected representatives, members of the federal judiciary and the judicial branch of the federal district;
- officers and employees and, in general, any person who holds a position, post or commission of any nature in the Congress, in the legislative assembly of the Federal District or the federal government or the Federal District; and
- civil officials of the bodies to which the Constitution grants autonomy, who will be responsible for the acts or omissions incurred in the performance of their respective functions.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Based upon the Federal Constitution, public officials are requested to submit, under penalty of perjury, a disclosure of assets and interests to the authorities that are legally competent for this kind of information.

Notwithstanding the foregoing, the General Administrative Liabilities Law expressly prohibits collusion in domestic and foreign transactions (eg, bid rigging), in which a Mexican individual or entity participates, and is carried out by any public entity of a foreign state or foreign public official.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Restrictions on receiving travel expenses, meals or entertainment are expressly provided by the General Administrative Liabilities Law, applicable for domestic public officials. Pursuant to the new law, all public officials must act with probity when they perform their jobs, position or commission, without obtaining or intending to obtain any benefit, privilege or personal advantage therefrom or in favour of any third party, and not to try to receive or accept from any individual or entity compensations or any other kind of benefits.

28 Gifts and gratuities**Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?**

Yes; if a public official receives, from a person, a good or donation, the cumulative value of which exceeds 10 UMAs (measurement and update units) at the time of reception, he or she has the legal obligation to inform the authority that the Ministry of Government Affairs determines (to make them available) in a period not exceeding 15 working days.

29 Private commercial bribery**Does your country also prohibit private commercial bribery?**

Mexico lacks full regulation regarding private commercial bribery; however, these types of violations are prosecuted as fraud. After the publication of the secondary laws of the SNA, the Federal Administrative Court has the faculty to sanction public officials and others, whether individuals or companies, acting in acts linked to administrative major offences.

30 Penalties and enforcement**What are the sanctions for individuals and companies violating the domestic bribery rules?**

For violations of domestic bribery rules, sanctions that can be imposed are imprisonment or economic penalties, or both, depending on the seriousness of the violation.

The sanctions imposed by the Administrative Liabilities General Act for the commission of major offences are:

- Major economic penalties: for individuals, the penalties are from 7,304 pesos up to approximately 10.96 million pesos; and for

corporations the sanctions are from 73,040 pesos up to approximately 109.6 million pesos;

- Temporary disqualification on participation in acquisitions, leasing, services or public works: for individuals, from three months up to eight years; and for corporations the sanctions are from three months up to 10 years.
- Penalties exclusively for corporate entities: suspension of all activities from three months up to three years; and dissolution and liquidation of the entity in particularly grave cases.
- Penalties for individuals and corporate entities: indemnity for damages and lost profits to the public treasury.

31 Facilitating payments**Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?**

No.

32 Recent decisions and investigations**Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.**

One recent investigation regarding bribery is around the former governor of the state of Veracruz, Mr Javier Duarte. Mr Duarte faces charges of organised crime and money laundering.

There is also the case of the drug lord Joaquin Guzmán Loera (aka El Chapo), who is being investigated for anti-money laundering provisions violations, besides bribery actions.



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