

Mexico's national anti-corruption system: The politics of integrity

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The issue of corruption and fraud has long plagued companies doing business in Latin America. Mexico is no exception. As a result, in June 2015, Mexico's Congress voted to amend its constitution to revamp its anti-corruption regime.

The following year, Mexico revised and supplemented its existing laws to implement the amendment. Among its new laws is the General Law on Administrative Responsibilities,¹ which went into effect July 19, 2017.

The GLAR defines Mexico's corruption offenses and, along with the other new laws, is intended to create Mexico's National Anticorruption System. Like the U.S.'s Foreign Corrupt Practices Act, the GLAR's anti-corruption provisions prohibit the payment of anything of value to government officials in exchange for a business benefit.

While the GLAR is focused mainly on preventing domestic corruption, its anti-collusion provisions apply to international commercial transactions and thus prohibit bid-rigging or collusion to secure permits, licenses or contracts from foreign governments.²

Some Mexican states, including Nuevo León, Sonora and Tamaulipas, have appointed local anti-corruption prosecutors and commenced corruption investigations. But to date Mexico has not implemented measures needed to implement the GLAR, such as the appointment of a national anti-corruption chief prosecutor and magistrates tasked with adjudicating GLAR cases.

However, as anyone who closely watched Mexico's recent presidential election knows, Mexico's newly elected president, Andrés Manuel López Obrador, has vowed to make the fight against corruption the guiding policy of his administration.³ Thus, immediate and aggressive enforcement of the GLAR's anti-corruption provisions should be expected.

Accordingly, Mexican companies, as well as U.S. companies operating in Mexico, need to be aware of the GLAR's prohibitions and take steps to effectively minimize the risk of violating its strictures. Crafting and implementing a tailored, robust compliance program is the best way to avoid corruption and minimize the risk of violating the GLAR.

BACKGROUND

The GLAR prohibits many offenses relating to bribery, corruption and conflict of interest. Specifically, it bans payments and offers to provide anything of value to state or federal government officials and prohibits individuals from using their influence or position to secure benefits from government officials, i.e. influence-peddling.

The GLAR also considers collusive contracts, combinations or agreements among competitors in procuring local and foreign government contracts as a form of corruption.

The statute also bars companies from gaining an improper competitive advantage by hiring former public officials for one year after they have left government service if that they possess privileged information that was acquired as a result of their public employment.

While the GLAR shares many similarities with the Foreign Corrupt Practices Act's anti-bribery provisions, one notable difference is that the GLAR is mainly a domestic statute, which only incidentally punishes bribery of foreign officers (as noted above, the Federal Criminal Code does prohibit and punish the making of bribes to foreign officials under certain circumstances).

In contrast, the FCPA is at its core a prohibition on bribes to foreign government officials. As a result of this distinction, it is possible for corrupt conduct to violate both the GLAR and FCPA. Unlike the FCPA's broad extraterritorial jurisdiction, the GLAR's foreign reach is limited to bid-rigging in foreign government procurement contracts.

Apart from those significant differences, the GLAR largely mirrors the FCPA's substantive anti-bribery prohibition, which prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business.

Mexico's Model Compliance System, enacted pursuant to the GLAR, also mirrors the FCPA's books-and-records provisions. Those provisions require issuers to maintain a system of internal controls. Like the FCPA, Mexico's new anti-corruption laws apply equally to individuals and corporations, both foreign and domestic.

As is true with respect to violations of the FCPA and other major anti-corruption statutes, a violation of the GLAR can have significant consequences. For instance, individuals may be subject to fines either up to twice the amount of illicit gains or approximately \$600,000 if no ill-gotten proceeds were obtained.

Corporations are also subject to double damages, or up to approximately \$6.2 million if there were no ill-gotten gains received.

Individuals can be temporarily disqualified from either being a public servant or, if a private citizen, from participating in procuring government contracts. Corporations may be disqualified from public procurement for up to 10 years, barred from conducting business for up to three years or be subject to involuntary judicial dissolution.

In addition, Mexico's Congress amended the Federal Criminal Code, adding fines and prison sentences for private individuals who engage in influence-peddling or bribery.⁴

A person convicted of influence-peddling can be fined up to 100 days' salary and sentenced to up to six years in prison. Bribery may carry up to 14 years in prison and a fine of 150 days' salary if the value of the illicit benefits exceeds \$2,000.

Fortunately, and of notable significance, the GLAR, like the FCPA, offers ways for companies to mitigate the penalties and consequences of violating its anti-corruption provisions. Under the GLAR, entities that self-report and cooperate with authorities will receive a reduction in sanctions of 50 to 70 percent.

Such cooperation requires collaborating on an ongoing basis with authorities, providing information about the scheme to authorities and refraining from engaging in further corrupt conduct.

In assessing penalties, prosecutors tasked with enforcing the GLAR will also consider whether a company had an effective compliance program in place. Unfortunately, leniency under the GLAR does not grant immunity from criminal prosecution under the criminal codes.

As noted above, the criminal codes punish certain corrupt practices, such as bribery and influence peddling, as criminal offenses.

For companies subject to the GLAR, a tailored and robust compliance program will not only minimize the risk of violating Mexico's anti-corruption laws, but will also mitigate the potential liabilities that Mexican regulators will seek to impose if such violations occur.

Indeed, the Secretariat for the Civil Service recently promulgated guidance regarding what constitutes a model compliance program, which includes:

- An organizational manual clearly and completely detailing internal procedures.

- A code of conduct openly published and distributed.
- Adequate and efficient control, supervision and auditing systems.
- Adequate whistleblower and internal reporting systems.
- Adequate employee training systems.
- Human resources policies that shield the company from people that may increase the risk of corruption exposure.
- Mechanisms that ensure transparency.⁵
- Mexico's guidance is similar to that provided by the U.S. Department of Justice, which states that an effective compliance program should include the following elements:⁶
 - The program should be "adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees."⁷
 - Steps should be taken to determine and ensure that the compliance program is working.⁸
 - Compliance personnel should have adequate autonomy, resources and stature.⁹
 - The corporation's employees should be "adequately informed about the compliance program and are convinced of the corporation's commitment to it."¹⁰
 - Gatekeepers — i.e., individuals who issue payments or review approvals — should have clear guidance and training.¹¹
 - There should be an effective reporting mechanism, i.e., a whistleblower hotline, and processes to adequately address disclosures and investigations.¹²
 - Periodic audits and reviews should be conducted, and continuous improvements to the program should be made.¹³

Also along these lines, recent amendments to Mexico's National Criminal Procedure Code (Código Nacional de Procedimientos Penales) and certain local criminal codes (including, notably, the criminal code of Mexico City), specifically subject corporations to criminal liability for certain offenses.

This liability applies if, among other things, individuals commit the offenses on behalf of such entities, for their benefit or with resources provided by them, and if it is established that the respective entity failed to exercise "adequate control."

While the recent amendments do not provide any further guidance regarding what constitutes "adequate control," having a reasonable compliance program that is implemented and enforced in accordance with the aforementioned guidelines should support a finding that adequate controls exist and mitigate exposure.

While Mexico still has great strides to make in carrying out its commitment to anti-corruption under the GLAR, there is

little doubt that it will soon ensure its government is able to aggressively investigate and prosecute corruption.

Indeed, the new trade agreements that Mexico has recently been negotiating with the European Union, Canada and the U.S. include anti-corruption chapters, underscoring the importance of this topic to Mexico. Accordingly, it would be prudent for companies operating in Mexico to ensure that they have a compliance program in place that complies with the GLAR and the FCPA.

NOTES

¹ Ley General de Responsabilidades Administrativas [LGRA], Diario Oficial de la Federación [DO], 18 de Julio del 2016.

² The GLAR is not a criminal statute and therefore only administrative (i.e., civil) liability can be imposed under the same. The Federal Criminal Code and the criminal codes of the several states of Mexico, however, contain chapters that specifically list and punish as criminal offenses different corrupt practices. In the case of the FCC, bribery of foreign officers is punished as a criminal offense.

³ According to AMLO’s *Plan de Nación 2018 – 2024*, corruption is the main cause of inequality and poverty in Mexico. While the plan makes it clear that corruption will not be tolerated and that the law will be upheld, no specific enforcement actions are outlined and no legal changes are proposed.

⁴ See Código Penal Federal [], art. 212-224, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 26-06-2017 (Mex.). On top of influence-peddling and bribery, public officials can be fined or imprisoned for a wider range of conduct, including abuse of power, graft, extortion, intimidation, self-enrichment, insider trading and embezzlement.

⁵ Secretaría de la Función Pública, Prensa, *Como parte del SNA, entra en vigor la obligación para las empresas de contar con un Programa de Integridad*, <https://www.gob.mx/sfp/es/prensa/como-parte-del-sna-entra-en-vigor-la-obligacion-para-las-empresas-de-contar-con-un-programa-de-integridad-empresarial-117711?idiom=es>.

⁶ See Dep’t of Justice, *Evaluation of Corporate Compliance Programs*, Justice.gov, available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁷ United States Attorneys’ Manual 9-28.800 Comment. The USAM is a comprehensive reference guide designed for assistant U.S. attorneys and Justice Department personnel responsible for prosecuting violations of federal law. It contains general policies and procedures relevant to the work of the Department of Justice. The USAM is meant to provide guidance; it is non-binding. It is prepared under the supervision of the attorney general and the direction of the deputy attorney general. The USAM is divided into nine titles, with chapters and subtopics. The USAM uses a paragraph numbering system for ease of reference. Using “1-2.345” as an example, the numbering works as follows: “1” refers to the Title; “2” to the chapter; “3” topic within the chapter; “4” to the subtopic; and “5” to the paragraph number.

⁸ *Id.*

⁹ See Dep’t of Justice, *Evaluation of Corporate Compliance Programs*.

¹⁰ USAM 9-28.800 Comment.

¹¹ See Dep’t of Justice, *Evaluation of Corporate Compliance Programs*.

¹² *Id.*

¹³ *Id.*

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