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Mexico

Luis Rubio-Barnette, Bertha A Ordaz-Avilés and Carlos A Camargo-Tovar

Rubio Villegas y Asociados SC

1 International anti-corruption conventions

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

Mexico is a party to the following anti-corruption conventions:

- United Nations Convention against Corruption;
- Inter-American Convention against Corruption, under the Organisation of American States (OAS); and
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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).

Rules prohibiting the bribery of foreign public officials arise mainly from international conventions to which Mexico is a signatory. In the domestic arena, rules prohibiting bribery of foreign public officials in Mexico include article 222bis of the Federal Criminal Code.

Applicable laws and provisions in Mexico regarding prohibition of bribery of domestic public officials are as follows:

- Federal Law on Administrative Accountability of Public Officials;
- Federal Law on Accountability of Public Officials;
- Federal Law on Transparency and Access to Government Public Information;
- Law on Government Acquisitions, Leases and Services;
- Law on Government Construction and Public Work and Related Services; and
- The Federal Criminal Code which provides a range of sanctions for corruption practices that are considered criminal activities such as:
 - bribery, undue exercise and performance of powers;
 - abuse of authority;
 - undue use of powers and authority;
 - corruption, abusive exercise of powers; and
 - influence peddling and embezzlement (misappropriation).

Furthermore, the Federal Law Against Organised Crime sets forth particular sanctions applicable to cases when public officials participate in any criminal activity prohibited by the referred law.

Foreign bribery

3 Legal framework

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

Article 222bis of the Federal Criminal Code states as a criminal offence for any person to deliberately offer, promise or give, directly or through a third party, money or other kind of gift, whether goods

or services, for the purpose of obtaining or retaining for him or herself or for another party, undue advantages in the development or carrying on of international business transactions to:

- any foreign public official or to any person designated by him or her, in order for such public official to act or refrain from acting on the processing or resolution of any matter related to the functions inherent to his or her position, office or post;
- any foreign public official so that the public official acts or refrains from acting on the processing or resolution of any matter outside the scope of the functions inherent to his or her position, office or post; and
- any person to propose or request that a foreign public official effect the processing or resolution of any matter related to the functions inherent to his or her position, office or post.

4 Definition of a foreign public official

How does your law define a foreign public official?

The Federal Criminal Code defines a foreign public official as:

- any person who holds a public office, employment or commission, whether appointed or elected, in the legislative, executive or judicial branches, regardless of the level of government in any foreign state;
- any person undertaking a function for an authority, organisation or state-owned company in any foreign state; or
- any public officer or agent in any international public agency or 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?

The criminal offence regarding bribery of foreign officials is delimited by the purpose pursued with any offer, promise or gift of money as well as 'any other advantage, whether in assets or services'. In this regard, any gift, travel expense, meal, or entertainment among many other compliments, would be restricted in terms of their purpose.

6 Facilitating payments

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

There is no provision in Mexican law that permits facilitating 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?

The laws prohibit payments through intermediaries or third parties to foreign public officials when the payment is given to a third party with the purpose of proposing or requesting a foreign public official to effect the processing or resolution of any matter relating to the

functions inherent to his or her position, office or post to obtain undue benefit for him or herself or a third party in an international commercial transaction.

8 Individual and corporate liability

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

Both individuals and companies can be held liable for bribery of a foreign official. See question 15.

9 Civil and criminal enforcement

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

There is administrative and criminal enforcement of provisions regarding bribery of foreign public officers.

As to civil enforcement, article 1910 of Mexico's Federal Civil Code states that anyone acting illicitly who causes a tort is liable for damages. Therefore, if an individual or company suffers a tort as a result of bribery of any foreign public officer by any third party, the individual or company suffering the tort could pursue a claim for damages.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Ministry of the Public Function carries out administrative enforcement of anti-bribery provisions regarding foreign officials and domestic public officials.

Criminal enforcement of anti-bribery provisions regarding foreign officials set forth in the Federal Criminal Code, is carried out initially upon a criminal investigation conducted by the Office of the Attorney General as prosecutor, and subsequently the matter is decided by federal courts.

11 Leniency

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

There is no particular mechanism for companies to disclose violations in exchange for lesser penalties.

12 Dispute resolution

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

Enforcement matters cannot be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial.

13 Patterns in enforcement

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

No particular pattern of enforcement has been developed during the past year.

14 Prosecution of foreign companies

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

Under the general jurisdictional rules of the Federal Criminal Code, any crime committed outside Mexican territory by a Mexican against a Mexican or a foreigner will be prosecuted only if:

- the offender is within Mexican territory or the crime has an effect in Mexico (this test is met if the offender is an employee of a company with a presence in Mexico);
- the offender has not been tried in the country in which he or she perpetrated the crime; and
- the crime that is being prosecuted is considered a crime in the foreign country and in Mexico.

A prosecutor may not initiate a criminal investigation without the prior presentation of charges either by an interested party or an agency.

15 Sanctions

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

For individuals violating anti-bribery provisions regarding foreign officials, applicable penalties include imprisonment, fines and discharge of any public officials involved. If the value of the bribery does not exceed 500 times the minimum wage payable in Mexico City, the term of imprisonment ranges from three months to two years, and fines range from 30 to 360 'fine-days' (*días multa* – the *días multa* provision implies that the amount of the fine would vary depending on certain economic features as referred to in article 29 of the Federal Criminal Code, including whether the criminal offence is continuous or permanent. In some cases the amount of the fine may be calculated based upon the offender's daily net income or taking into consideration the minimum wage payable in the place and moment where the crime was committed (or both)). Any public official involved could be discharged from duty for a period between three months and two years. In the event that the value of the bribery exceeds the above-mentioned threshold, the term of imprisonment would range from two to 14 years and the amount of the fine would range from 300 to 1,000 fine-days, and any public official involved could be discharged from duty for a period between two and 14 years.

For companies violating anti-bribery provisions regarding foreign officials, the Federal Criminal Code provides that companies may be fined for up to 1,000 fine-days and the court may also order the suspension of activities or dissolution of the company involved, depending on the degree of involvement and knowledge of the management regarding the bribery in the international transaction, and the damages caused or benefits obtained by the given company.

16 Recent decisions and investigations

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

As mentioned in question 13, no particular pattern of enforcement has been developed during the past year.

Financial record keeping

17 Laws and regulations

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

The following laws and regulations govern the keeping of accurate corporate books and records, effective internal company controls, periodic financial statements and external auditing:

- the Commercial Code;
- the General Corporation and Partnerships Law; and
- the Federal Tax Code.

Update and trends

The influence of anti-corruption and transparency ethics is present in public bidding processes in the telecommunications arena. Current public bidding processes for the use and exploitation of spectrum bands and for the use and exploitation of certain portions of the Federal Electricity Commission's dark fibre optic have included the involvement of Transparencia Mexicana, AC, which is the Mexican chapter of Transparency International.

18 Disclosure of violations or irregularities

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

Violations of anti-bribery laws and associated accounting irregularities must be disclosed upon request by the investigating agencies or courts.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

In general, legislation mentioned in question 2 is invoked to prosecute domestic or foreign bribery.

20 Sanctions for accounting violations

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

Article 111 of the Federal Tax Code sets forth a sanction consisting of a term of imprisonment ranging from three months to three years for violating the obligation to maintain adequate bookkeeping and for the keeping of double accounting with dissimilar content.

21 Tax-deductibility of domestic or foreign bribes

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

Article 32 of the Income Tax Law does not allow for deductibility of gifts, compliments and expenses of a similar nature, unless they are related to the offer of products or the rendering of services and are offered to clients in general. Travel expenses, meals, car rental and other travel allowances could be deducted under certain limitations set forth on the Income Tax Law, as long as such expenses do not involve committing a criminal offence in the terms described above.

Domestic bribery

22 Legal framework

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

The Federal Criminal Code defines the criminal offence consisting in the bribery of a domestic public official as follows:

- when a public officer directly or indirectly unduly requests or receives for his or her own benefit or for the benefit of a third party, money or any other gift or accepts any promise, for the purpose of taking any action or refraining from taking an action, whether fair or unfair, relating to his or her functions; and
- when an individual or company in an spontaneous fashion gives or offers money or any other gift to any public official or to any third party, in order to induce the public official to take any action or refrain from taking an action, whether fair or unfair, relating to his or her functions.

23 Prohibitions

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

The law prohibits both the paying and receiving of a bribe. Both criteria are described in question 22.

24 Public officials

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

According to the Politic Constitution of the Mexican United States (the Constitution), the following persons and positions are considered to be a public officer:

- persons that have been elected as representatives in a public election;
- members of the Federal Judiciary Office and members of the Judiciary Office of the Federal District;
- officers, employees and in general any person that fulfils an employment, position or commission of any nature in the Federal Congress or in the Legislative Congress of the Federal District; and
- public officials of autonomous agencies, who shall be responsible for acts or omissions featured during their respective terms and duties.

Governors of the different states, representatives in state congress, justices of state superior courts of justice; and members of local judiciary are deemed responsible for violations to the Constitution and federal laws, as well as for any undue use of federal funds and resources. State constitutions also set forth the standard to define public officers in light of their responsibilities in the performance of any employment, position or commission in such states and their corresponding municipalities.

From a criminal perspective, a public official is any person who fulfils an employment, position or commission of any nature in: the Public Federal Administration; the Public Administration of the Federal District; decentralised agencies; state-owned companies; state-controlled organisations or companies that are comparable to state-owned companies; public trusts; the Federal Congress; or in the Federal Judiciary or in the Judiciary of the Federal District; or that manage federal economic resources. Also, state governors, representatives to local or state congress and justices of state superior courts shall be deemed liable for criminal offences falling within the scope of the Federal Criminal Code.

25 Public official participation in commercial activities

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

Some particular laws provide that certain public officials shall refrain from undertaking any other employment, job, post or commission whether public or private, except for academic positions. In general, no express prohibition is set forth regarding a public official's participation in commercial activities other than the general rule regarding soliciting, accepting or receiving employment, posts or commissions for him or herself or their acquaintances that proceed from individuals or companies whose professional, commercial or industrial activities are directly linked, regulated or supervised by the relevant public official in exercise of his or her employment, post or commission and that involves a conflict of interest. This general prohibition applies throughout the term of the public official's office and one year thereafter. Nevertheless, it is essential that specific rules applying to each public post be reviewed, in order to identify any particular limitation.

26 Travel and entertainment

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

The Law on Administrative Accountability of Public Officials prohibits public officials from soliciting, accepting or receiving gifts, services, employment, posts or commissions for themselves or their acquaintances that proceed from individuals or companies whose professional, commercial or industrial activities are directly linked, regulated or supervised by the relevant public official in exercise of their employment, post or commission and that involves a conflict of interest. This prohibition applies throughout the term of office of the public official and one year thereafter.

27 Gifts and gratuities

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

No express provision is set forth that makes certain types of gifts and gratuities permissible.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Commercial private bribery could be considered as fraud under Mexican legislation. Moreover, Mexico is a signatory to the United Nations International Convention against Corruption, which provides for private commercial bribery.

29 Penalties and enforcement

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

From an administrative perspective, violations of the Law on Government Acquisitions, Leases and Services and of the Law on Government Construction, Public Work and Related Services, may result in prohibition for companies and individuals to participate in future public bids. Also, penalties for public officials involved in violations of anti-bribery domestic provisions may result in:

- public or private warning;

- separation from the employment, post or position for certain periods;
- destitution;
- fines;
- temporal prohibition to undertake any employment, position or post in the public service; or
- fines and separation from their posts.

From a criminal perspective, violation of anti-bribery provisions regarding domestic public officials can result in penalties such as imprisonment, fines and removal of the public officials involved. Furthermore, if the value of the bribery does not exceed 500 times the minimum wage payable in Mexico City, the term of imprisonment ranges from three months to two years, and fines range from 30 to 360 'fine-days' (see question 15). Any public official involved could be discharged from duty for a period between three months and two years. In the event that the value of the bribery exceeds the above-mentioned threshold, the term of imprisonment would range from two to 14 years and the amount of the fine would range from 300 to 1,000 fine-days, and any public official involved could be discharged from duty for a period between two and 14 years.

30 Facilitating payments

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

Domestic anti-bribery laws strictly ban facilitating payments and these laws have been enforced.

31 Recent decisions and investigations

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

Some recent Supreme Court jurisprudence states that in the case of 'active bribery', in order to allege responsibility of the supposed offender, it shall be necessary to demonstrate that the offer for bribery was a spontaneous act from the referred person towards the public official. Without demonstrating the *motu proprio* element, the given person may not be deemed responsible for acts of bribery.



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