



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of Guatemala

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1. The Legal Framework

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption?

Constitution of the Republic of Guatemala

Criminal Code

Procedural Criminal Code

Judiciary Law

Public Officials and Employees Integrity and Accountability Act

Law Against Money and Asset Laundering

Please provide:

a. a brief summary of the offences;

1. Article 418 Criminal Code: Abuse of Authority : The public official or employee who, abusing his position or function, orders or commits any arbitrary or unlawful act to the detriment of the administration or individuals.

2. Article 439 Criminal Code. Passive Bribery: The public official or employee that intentionally solicits or accepts, directly or indirectly, anything of value or benefit, as a favor or present, promise or advantage for himself or for another person, in exchange for such public official or employee to act or refrain from acting in the exercise of their public functions.

3. Article 442 Criminal Code: Active Bribery: Any person who knowingly offers or grants to any public official or employee anything of value or benefit, as a favor or present, promise or advantage for himself or for another person, in exchange for such public official or employee to act or refrain from acting in the exercise of their public functions.

4. Article 442 Bis Criminal Code: Active Transnational Bribery: Any person subject to Guatemalan jurisdiction that offers objects or presents, promises or gives any pecuniary benefit in kind, direct or indirectly to a public official of another state or international organization, in order that the official acts or refrains from acting in the execution of their duties.

5. Article 445 Criminal Code: Embezzlement: The public official or employee who removes or consents another to subtract money or public purposes under his responsibility. The public official or employee who uses for their own benefit, labor or services paid with public funds.

6. Article 449 Criminal Code: Corruption: 1. The public official or employee who directly or indirectly or by simulated acts, is concerned in any contract or operation in which he participates by reason of his office; 2. The public official or employee who, with purpose to profit, interposed his influence to obtain a resolution of any authority.

7. Article 2 Law Against Money and Asset Laundering: A person commits the offense of laundering money or other assets, who by themselves, or by a third person: ... b) acquires, possess, administers, holds or uses goods or money knowing, or by reason of their office, position or profession is obligated to know, that they are the product from or originate from the commission of a crime (any crime); c) Hide or prevent the determination of the true nature, source, location, disposition, movement or ownership of property or money or rights to such property or money, knowing, or by reason of his office, employment, trade or profession is obligated to know, that they are the result of the commission of a crime.

8. Article 16 Public Officials and Employees Integrity and Accountability Act: Illicit Enrichment and Influence Peddling

b. any affirmative defences that are available; and

- Persons under 18 years of age;
- Mental disabilities when the action was committed;
- Self Defense;
- State of necessity (to save one self or another from danger not caused by the person voluntarily, or otherwise avoidable, provided that the act is proportionate to the danger;
- Legitimate exercise of a right;
- Overwhelming fear;
- External force;
- Error;
- Obedience;
- Justified Omission.

c. the penalties that may be imposed upon offenders.

- Prison;
- Arrest;
- Fine.

1.2 Does your jurisdiction outlaw “private” bribery/corruption (i.e. transactions between two or more private entities or persons) as well as “public” bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

The jurisdiction of Guatemala outlaws PUBLIC bribery/corruption. The difference between a public and a “private” case would be if the person who bribes/corrupts a public official is a private entity or individual person.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

Yes.

- Offense committed abroad by a public official in the service of the Republic;
- Crime committed on a ship, aircraft or other means of Guatemalan owned transport;
- Offense committed abroad by a Guatemalan, when extradition has been refused;
- Offense committed abroad against a Guatemalan, only if the case was not tried in the country of its perpetration;
- Crime by treaty or convention must be punished in Guatemala;
- Crime committed abroad against the countries security, constitutional order, territorial integrity, counterfeiting of currency, signature of the President, bonds or other credit instruments.

1.4 Are there any “safe harbours” or exemptions in relation to transactions that might otherwise be regarded as bribes, such as “facilitation payments”, which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

There are no “safe harbours” when a public official or employee receives money, gifts or any pecuniary good that has relations to his office or job. (ex. It is illegal for a public official or employee to receive a christmas or birthday gift from any private entity or individual, in the sense that it can be seen as a bribery or attempt of corruption).

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

Law Against Money and Asset Laundering. Entities subject to the supervision and inspection of the Superintendence of Banks include:

- 1) The individual or legal persons dedicated to brokerage or dealer in securities.
- 2) The issuers and operators of credit cards.
- 3) Offshore entities operating in Guatemala, which are defined as entities engaged in financial intermediation incorporated or registered under the laws of another country and conduct their activities mainly outside the jurisdiction of that country.
- 4) The individual or legal persons performing any of the following activities:
 - a. Systematic or substantial check cashing operations.
 - b. Systematic or substantial operations of issuance, sale or purchase of traveler's checks or money orders.
 - c. Systematic or substantial funds transfers and / or capital movement.
 - d. Factoring.
 - e. Financial leasing.
 - f. Sale of currencies.
 - g. Any other activity that by nature of its operations can be used to launder money or other assets, as established in the regulations.

The Inspectorate of Special Verification, within the Superintendence of Banks, will be responsible for ensuring order and compliance with this law and its regulations, with the functions and powers set out therein. The functions of the Special Inspectorate, the following:

- a) Require and / or receive from the liable persons all information related to financial, commercial or business that may be linked to the laundering of money or other assets transactions.
- b) Analyze the information obtained to confirm the existence of suspicious transactions and transactions or patterns of money or other assets.
- c) Develop and maintain records and statistics necessary for the performance of its functions.
- d) Exchange with counterparts from other countries information for the analysis of cases related to money laundering or other assets, a subscription to such entities memoranda of understanding or other cooperation agreements.
- e) If evidence of the commission of a crime, file a complaint before the competent authorities, identify and provide the evidence that they have knowledge or in its possession.
- f) Provide the Public Prosecution any assistance required in the analysis of information that possesses, and cooperate with the investigation of acts and crimes related to money laundering or other assets.
- g) Impose on the liable persons administrative monetary penalties that apply for any omissions in fulfilling the obligations under this law.
- h) Other arising from this Act or other laws and international agreements approved by the State of Guatemala.

2. Corporate Criminal Liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Yes. The people held responsible for a corporate bribery/corruption crime will be the directors, managers, executives, representatives and/or administrators who have participated in the crime.

2.2 If the answer to 2.1 above is “yes”, please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

Any corporation can be held criminally responsible for a corporate bribery/corruption crime. The persons charged will be the directors, managers, executives, representatives and/or administrators who have participated in the crime. The penalties will be the same as for any other persons (prison and fines), and the definitive cancellation of the company.

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

No.

3. Mutual Legal Assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

Inter-American Convention against Corruption.

Foreign Account Tax Compliance Act.