

GUATEMALA¹

I. Overview of Country²

Guatemala is a democratic republic with three branches of government: executive, legislative, and judicial. The country is composed of 22 Departments (provinces) which in turn are divided into 335 municipalities. Guatemala is a civil law country; laws are valid once enacted and published in the *Official Gazette*. The Constitutional Court is the final arbiter of Guatemalan law.

Businesses in Guatemala are regulated primarily through the Civil Code, which deals with contract law, and the Commercial Code, or Código de Comercio. The most common for-profit vehicle, by far, is the Sociedad Anónima (corporation). By contrast, there are three types of non-profit organizations: Civil Associations, Foundations, and—as of 2003—Non-Governmental Organizations for Development (NGOs). NGOs may be initiated as such, or organizations founded as Civil Associations or Foundations may undergo a conversion process to become NGOs, provided they meet the law's requirements.

II. Registration Procedures

A. For-Profit Organizations³

a. Laws

Although Guatemalan law allows for the formation of sole proprietorships—in which the proprietor has unlimited liability—and partnerships, most corporations are organized as mercantile corporations. These must be formed by two or more people or juridical entities (such as other corporations). The Commercial Code provides for five distinct types of mercantile corporations:

- Corporation / Sociedad Anónima (Articles 86-183 of the Commercial Code): This is the most commonly used form of corporation. Capital is divided into freely transferable shares, and shareholder liability is determined by the amount of shares held. Each shareholder has limited liability. Note that there are also specialty corporations, such as investment corporations or banking corporations, which are regulated by separate legislation.
- General Partnership / Sociedad Colectiva (Articles 59-67 of the Commercial Code): This is not a particularly common form of corporation in Guatemala. There is no issuance of shares. Partners, who are listed on the bylaws, have unlimited liability for damages or debts incurred by the corporation. However, this is distinct from a non-mercantile partnership given that elected officials, who may or may not be partners, have the right to manage and bind the partnership.

¹ The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

² Disclaimer: The author of this section is a U.S.-trained associate, is not qualified to practice Guatemala law, and relied on publicly available information, including Guatemala legislation, government websites, and other online resources.

³ A helpful overview may be found in “Legal Information For Doing Business in Guatemala,” <http://www.hg.org/article.asp?id=4824>.

- Limited Liability Partnership / Sociedad de Responsabilidad Limitada (Articles 78-85 of the Commercial Code): LLPs are popular for foreign investors incorporating subsidiaries in Guatemala, as they limit responsibility to the participation of capital from each partner. All of the partners are treated equally and officials are elected to manage the business. Partner participation is limited to 20 members. The legal name of the corporation must include the complete name of one or more partners.
- Joint Stock Company or Joint Liability Company / Sociedad en comandita Simple o por Acciones (Articles 68-77 and 195-202 of the Commercial Code): These are two different types of corporation—one allowing for shares, one not—that are similar in that they provide for two types of partners with differing levels of responsibility. General partners are granted the right to manage and bind the corporation since they are subject to unlimited liability. Limited partners have less authority, but less liability.

1. Registration Process for a Sociedad Anónima

A Sociedad Anónima may be organized by two or more shareholders for any lawful purpose or purposes. In order to form this corporation, the shareholders (or their agent in Guatemala, as authorized by a power of attorney) must take the following steps:

- Check the proposed company name online in the Commercial Registry (www.registromercantil.gob.gt), as the name of the corporation may not be the same as that of any previously registered corporation.
- Assuming there is no extant corporation with the chosen name, open a bank account in the entity's name and deposit the paid-in capital. Typically, the shareholders must deposit enough funds to cover the incorporation fees (which in turn are dependent upon the company's capital).
- Have an attorney or notary public draft the Articles of Incorporation (Escritura Social). These must include: the name and domicile of the corporation, the general purposes of the corporation, the amount of authorized capital stock and number of shares, whether the shares will be issued to bearer or as registered shares, and the name and domicile of the company's agent, who must be a Guatemalan citizen and is the person legally responsible before the tax authority (Superintendencia de Administración Tributaria, or SAT).
- Have a notary public file the Articles of Incorporation as well as a certified copy of the company's bylaws with the Commercial Registry, and pay the registration fees online.

Five to seven days after the filing, a provisional registration will be automatically granted, at which point the company may begin operations. The provisional registration will give the company a Taxpayer Identification Number for use before the SAT and will provide for registration of the legal representative's appointment and an authorization to print invoices.

Following provisional registration, the application for registration must be published in the *Official Gazette* so that any opposition—typically from corporations with similar names—may be elicited. Any interested party may oppose registration through an administrative proceeding or judicial proceeding, but the bases for opposition are not listed in the law. If there is no opposition, definitive registration of the corporation, along with a commercial

license, Social Security Number, and authorization for social and accounting books, may then be obtained.

According to different sources, the entire process may take anywhere between 18.5 days⁴ to six weeks.⁵ Minimum capital costs are approximately US \$800.

Foreigners may form corporations in Guatemala with the assistance of Guatemalan attorneys or notary publics. These agents sign and file the corporation's Articles of Incorporation, and then assign their rights to the client. Once the business is operational, there are some limitations to foreigners' participation, insofar as Ministry of Labor authorization is required for appointment of more than two foreign managers, and a maximum of 10 percent of employees may be foreigners.

Similar to the U.S., corporations may be dissolved either partially or fully by their shareholders in accordance with their Articles of Incorporation and the Commercial Code. If fully dissolved, a corporation's assets go into a period of liquidation, which may not last more than one year.

B. Not-For-Profit Organizations⁶

a. Laws

i. Civil Associations and Foundations

Prior to 2003, the Civil Code recognized two kinds of non-profit organizational structures in Guatemala.⁷ Both require registration in the Legal Entities Registry of the Interior Ministry (Ministerio de Gobernación), per Registry Law Article 102:

- Civil Associations: Non-profits that promote trade unions or political, economic, religious, social, cultural, professional, sportive, or other objectives
- Foundations: Set up by at least two natural or juridical persons, with a minimum capital requirement of approximately US\$ 6,500, to further the charitable goals of its founder. A foundation's governing documents must catalogue its assets, the purpose of the foundation, and how the assets will be distributed.

The process of registration is not formalized in the Civil Code, which merely requires that associations and foundations register as non-profits with their "municipalities of domicile" to avoid being treated as commercial businesses. At the same time, regulations⁸ specified that the Interior Ministry was the competent authority to approve non-profits as juridical persons.

⁴ The World Bank Group's Doing Business Report for Guatemala lists each step in the registration process as well as an estimated time frame. Notably, it ranks the ease of starting a business in Guatemala 98th, out of 189 economies surveyed. The report is available at: <http://www.doingbusiness.org/data/exploreeconomies/guatemala/#starting-a-business>.

⁵ See Practical Law Guide entry for Guatemala, available at: <http://us.practicallaw.com/cs/Satellite/resource/9-554-4025>.

⁶ The Council on Foundations has published a helpful overview of the non-profit landscape, available at http://www.cof.org/sites/default/files/Guatemala_1.pdf.

⁷ Civil Code, arts. 15, 18. A very comprehensive compilation of laws related to non-profit organizations in Guatemala, including the Civil Code, is accessible here: <http://www.minfin.gob.gt/index.php/legislacion-direcciones-mfp/legislacion-ong-s>. A description of these forms is available at http://www.minfin.gob.gt/downloads/leyes_ongs/2_2.pdf.

⁸ *Ley del Organismo Ejecutivo*, Sección VI, arts. 19 10-40.

Foundations must submit their organizing documentation to the legal department of the Interior Ministry for approval. Their Articles of Incorporation must also be published in the Official Gazette in order for it to be approved by the Ministry, following which it is submitted to the Legal Entities Registry. Nevertheless, the steps for approval are not explicitly codified, nor is the time period involved.

Because it was not spelled out in the law, the process for registration of civil associations was initially quite opaque. In 1998, a piece of legislation—Acuerdo Gubernativo 512-98⁹—normalized the procedure somewhat. This legislation specified that civil associations could be established first by drafting organizing documentation, including Articles of Incorporation (Article 2) and bylaws (Article 3), and then submitting it for approval to the Civil Registry of the municipality in which they intend to be domiciled (Article 4).

In terms of dissolution: Both civil associations and foundations can be dissolved according to the provisions of their organizing documents. A competent court may petition to dissolve a civil association if it is engaged in illegal activities (Civil Code Article 25). The Civil Code contains two dissolution articles that apply to foundations only: Article 20 charged the Attorney General with ensuring that foundation resources were used in keeping with the donor's intent. Were the donor's intent to be impossible to effectuate, per Article 21, the bequest could be transferred by the relevant judicial authority to another institution with comparable objectives.

ii. Development NGOs

In 2003, the passage of the Law of Non-Governmental Organizations for Development (Decree Number 02-2003) changed the landscape of non-profit law in Guatemala. This was in part a response to the proliferation of NGOs in the country and consequent charges that the field was unregulated and unaccountable to donors.

Decree Number 02-2003 creates a new category of non-profit: development NGOs.¹⁰ It specifies how development NGOs may be formed:

- They must have cultural, educational, or sportive objectives; provide social services, assistance, or charity; and engage in economic and social development (Article 2)
- They must have as an objective the promotion of developmental policies that are social, economic, cultural, and environmental (Article 3)
- Any civil association or foundation may register as an NGO as long as it complies with the requirements of Decree Number 02-2003; at the same time, an organization with seven or more members may register as an NGO from the outset
- They must be registered with the Civil Registry in the NGO's domicile—with international NGOs registering in the capital
- They are subject to specific requirements in terms of board composition and the content of bylaws
- They must register with the SAT, presumably to maintain tax-exempt status

⁹ http://www.minfin.gob.gt/downloads/leyes_ongs/textos_legales/2_1Acuerdo512-98.pdf.

¹⁰ Decree Number 02-2003, available at

http://www.minfin.gob.gt/downloads/leyes_ongs/textos_legales/2_1Decreto2-2003.pdf.

Decree Number 02-2003 contains provisions prohibiting NGOs from distributing dividends, benefits or privileges to their members (Article 18). It specifies that up to 25 percent of an NGO's membership or founders may be foreign, as long as they are Guatemalan residents (Article 7(c)). It also allows for dissolution via a specific process (Articles 20 and 21).

While Decree Number 02-2003 offers much-needed elaboration of procedures regulating NGOs, it does not supersede the registration process for civil associations, Acuerdo Gubernativo 512-98, and therefore substantial confusion remains about the overlapping requirements and different forms of organizations.

C. Analytical comparison of the legal process of registration

The primary distinction between non-profits and for-profits in terms of registration and formation appears to be in terms of legal clarity. While the process for formation of a Sociedad Anónima in Guatemala is quite defined and straightforward, with a central registry and the same series of steps to take regardless of where the corporation is domiciled, the layers of laws that regulate non-profits mean that there remains substantial confusion regarding the various corporate forms that a non-profit may take. The publication of Decree Number 02-2003 clarified matters somewhat, and many recently founded NGOs in Guatemala have been created under this mechanism. Yet the intersections between this law and the provisions of the Civil Code—which have not been superseded—are not clear. At the same time, registration procedures may vary by municipality, and there is no central regulatory authority or source of redress.

III. Tax Laws

A. For-Profit Organizations

a. Laws

Decree Number 26-92 imposes an income tax upon individuals and corporations in Guatemala.¹¹ As of 2015, there are two income tax systems in Guatemala: 25% over profits from lucrative activities, or a simplified regime. Most businesses in Guatemala may take advantage of a simplified tax rate – a 7% direct tax on gross income (5% on the first 30,000 QZT).

Most of Guatemala's tax revenue is derived from the Value Added Tax, or VAT. The VAT tax rate is 12%, paid by businesses through monthly tax returns.

Entities performing commercial or agricultural activities that obtain a gross margin greater than 4% of their gross income, and that have their own equity, are also subject to a 1% Solidarity Tax. This may be credited toward the payment of Income Tax at certain points.

Guatemala has a number of tax incentives, primarily for exporters. Commercial and manufacturing companies that operate within Free Trade Zones (Decree 65-89) get a 10-year income tax waiver, as well as a waiver on VAT and import taxes on raw materials, machinery, and equipment. There are tax incentives for developers of renewable energy projects.

B. Not-For Profit Organizations

a. Laws

¹¹ Ley del Impuesto Sobre la Renta ("ISR"), Decree Number 26-92. The tax exemption for non-profits is found in Ch. IV, art. 6(c).

Non-profit associations and foundations, as well as religious organizations, are exempt from income tax providing:

- The organization is registered as tax-exempt with SAT
- The income is derived from donations and fees (rather than business income, which is subject to income tax whether or not it is related to the organization's charitable activities)
- The organization's profits are not distributed among members (note that this is not a requirement for an organization as such, but only for the purposes of tax-exempt status)

Taxpayers may receive income tax deductions for charitable donations at either the lesser of 5 percent of the taxpayer's annual income or QZT 500,000. This is true for donations *other than to* universities, scientific organizations, and cultural institutions. Donations to these three types of institutions, per a Guatemalan high court decision, receive an unlimited tax deduction.

There are regulations outlining the procedures for verifying donations so that donors can receive ISR deductions. Charities must send letters with content dictated by Article 18 of the Regulation on the Income Tax Law (Acuerdo Gubernativo 206-2004) for each deductible donation. The SAT may audit non-profits authorized to receive deductible donations to ensure compliance with the law.

Services provided by non-profits are also exempt from VAT, as are membership fees and dues. Donations to charities are also exempt from VAT.

There are six kinds of organizations, including public and private educational centers and universities, that are fully exempt from VAT.¹² Non-profits that do not fall into these categories must still pay VAT on purchases as a final consumer.

Similarly, certain categories of non-profits—educational centers and religious institutions, for example—are also exempt from Guatemala's property tax and stamp tax (a tax on certain legal documents). Other organizations are not exempt.

C. Analytical comparison

While there are tax incentives for certain for-profits in Guatemala, the country has an extensive non-profit tax regime. Non-profits do not appear to suffer disparate tax treatment in Guatemala. Rather, different types of non-profits are accorded varying levels of tax exemptions, with universities, cultural institutions, scientific organizations, and religious institutions generally receiving preferential treatment. This was reflected in a recent decision by Guatemala's Constitutional Court, which noted explicit protection for these categories of institution in Article 88 of the Constitution.¹³

IV. Financial Transaction Laws

A. For-Profit Organizations

a. Laws

i. Foreign Investment/Foreign Funding Laws

¹² Decree 27-92, Article 8.

¹³ See Archana Sridhar, *Tax Reform and Promoting a Culture of Philanthropy: Guatemala's "Third Sector" in an Era of Peace*, 31 *FORDHAM INT'L L. J.* 1 (2007).

It is generally easy for foreigners to invest in Guatemala. In 1998, Guatemala passed law to encourage and facilitate foreign investment.¹⁴ By all accounts, the signing of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), which entered into law in Guatemala in 2006, has significantly eased barriers for entry by U.S. corporate investors. At this point, most foreign investment in Guatemala is U.S.-based.¹⁵

There are generally no restrictions to the formation of joint ventures, the purchase of local companies, as well as investment in certain sectors. In terms of the formation of new Guatemalan corporations, there are some practical issues that complicate investment, such as additional paperwork required to demonstrate solvency, as well as the appointment of a Guatemalan legal representative. Foreigners may own 100% of a Guatemalan business and laws prohibit discrimination against foreigners.

ii. Political Contribution Laws

Corporations may donate to political parties and may donate to candidates through their political organizations. Foreign entities or individuals, with the exception of educational entities, may not donate to political parties.¹⁶

B. Not-For Profit Organizations

a. Laws

i. Foreign Investment/Foreign Funding Laws

A for-profit organization or American charity may control a Guatemalan foundation or civil association either directly or indirectly. As noted earlier, the NGO Law, Decree Number 02-2003, allows up to 25% of an organization's members or founders to be foreign.

Notably, Guatemala has more foreign NGOs than any other Central American country. This fact is not uncontroversial; there have been suggestions that the over-abundance of NGOs, including foreign NGOs, has made Guatemala dependent upon foreign help, outsourcing public services to NGOs, and created a patchwork of overlapping services.¹⁷

ii. Political Contribution Laws

Per the Civil Code, civil associations may engage in political activities (though it does not specifically discuss lobbying).¹⁸ The Civil Code does not discuss foundations in this respect.

¹⁴ Foreign Investment Law (English), http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/gua/investment_law.pdf.

¹⁵ "Doing Business In Guatemala," available at <http://www.export.gov/guatemala/doingbusinessinguatemala/index.asp>.

¹⁶ See generally "Political Finance Data for Guatemala," <http://www.idea.int/political-finance/country.cfm?id=91>.

¹⁷ See, e.g., Peter Rohloff, Anne Kraemer Díaz, and Shom Dasgupta, *Beyond Development: A Critical Appraisal of the Emergence of Small Health Care Non-Governmental Organizations in Rural Guatemala*, Human Organization, Vol. 70, No. 4, 2011, <http://www.mayahealth.org/wp-content/uploads/2012/02/Rohloff-et-al-2011-Beyond-Dev.pdf>.

¹⁸ Civil Code, Article 15(3).

The NGO Law also does not include a discussion of these issues.

C. Analytical Comparison

The ease with which Guatemala accepts foreign investment does not seem to vary substantially from the for-profit sector to the non-profit. Both are quite open to foreign investment and may conduct relatively free financial transactions.

V. Auditing/Reporting Requirements

A. For-Profit Organizations

a. Laws

For-profit institutions are supposed to publicize their balance sheets and profit and loss statements annually with the Commercial Registry, as well as publish them in the Official Gazette. The publication is not typically done, however, given lack of space.

There are more complicated regulatory regimes for certain industries, including financial institutions, insurance companies, public companies, etc.

B. Not-For Profit Organizations

a. Laws

Non-profits issuing tax deductions to donors are subject to audit by the SAT. Annually, upon the completion of the tax year (March 31st), these organizations must provide the SAT with a list of donations received and demonstrate that they were used for tax-exempt purposes. The SAT has authority to oversee the accounting of development NGOs, per Article 13 of the NGO Law.

The NGO Law initially provided that all NGOs would be overseen by the primary government audit agency, the General Controller of Accounts. However, a network of NGOs came together to challenge this court provision on Constitutional grounds and prevailed, as the Guatemalan Constitution only gives the GCA authority to regulate NGOs receiving public funds.¹⁹ Currently, then, there is substantially more oversight for Guatemalan NGOs receiving public funds, which are regulated by the GCA, than for private NGOs, which are overseen by a combination of the SAT (if they receive tax-deductible donations) and the Attorney General.

Given the patchwork nature of NGO regulation, and the fact that it depends significantly on self-reporting and self-auditing, there have been several legislative proposals to create a national oversight commission, clarify the NGO Law, and impose reporting requirements and sanctions for violations.

C. Analytical Comparison

Given that auditing and reporting requirements are not extensively developed for either for-profits or non-profits, there is no clear pattern of disparate treatment between the two groups.

VI. Penalties for Non-Compliance

¹⁹ Constitutional Court file 538-2003, Holding IV.

As noted above, the unclear nature of regulatory and reporting requirements, particularly for non-profits, make this analysis difficult to undertake.

OVERVIEW CHART

Issue	For-Profit Organizations	Not-For Profit Organizations	Similarities
Registration Procedures	<ul style="list-style-type: none"> • Most common corporate form is Sociedad Anónima (corporation) • Relatively straightforward registration process; central registry for filing 	<ul style="list-style-type: none"> • Two forms described in Civil Code; development NGOs created through 2003 NGO Law • Registration procedures were initially through the Interior Ministry, with registration in a central Legal Entities Registry; now, however, some organizations may be registered in the Civil Registry of their local municipality 	Overlapping (yet incomplete) legislation in the non-profit arena means registration process and requirements are less clear than those for mercantile corporations
Tax Laws	For-profits are subject to income tax, VAT, and a Solidarity Tax, with few exceptions	Non-profits are exempt from income tax and somewhat exempt from VAT; the scope of tax exemption and tax deductibility of donations varies by type of organization	Non-profits generally receive preferable tax treatment
Financial Transaction Laws	Few restraints on foreign investment or political contributions by corporations	Few restraints on foreign involvement-foreign NGOs may set up in Guatemala provided their purposes are non-contrary to law. Political action by non-profits is not addressed in the law.	Quite similar
Auditing/Reporting Requirements	Must publish balance sheets and profit/loss reports annually	No clear reporting or auditing regime. Multiple governmental authorities, including	Given lack of publicly available information, difficult to distinguish the two regimes

		the SAT, may be involved.	
Penalties	N/A	N/A	N/A