CLIENT UPDATE

2019 REGULATORY REVIEW AND OUTLOOK

The first part of 2019 has seen clarity on certain substantial issues that have affected both existing and new investments in Mexico. While the outcome of changes in energy regulations remains unclear, the preparations of foreign and Mexican firms have intensified for a much-needed moving forward of investment in the sector. There is now the prospect of welcome consistency in self-regularization of AML required safeguards. A number of key provisions in the Labor Act have been amended. Forfeiture rules applicable to illegal activities have been finalized. Rulemaking is underway for certain aspects of banking and financial activities including Fintech and financial groups.

Our Review and Outlook summarizes these developments, as our clients look to raise capital and move forward with new investments in what continues to be a competitive market.

Self-regularization in respect to AML Required Controls

On October 16, 2012, the Mexican President signed into law the Prevention and Identification of Transactions with Assets Arising from Illegal Transactions Act, which required certain persons to put in place internal controls and meet reporting requirements in respect to designated transactions. The Ministry of Finance realized that a number of persons have failed to establish required controls and meet applicable reporting requirements. On April 16, 2019, the Ministry of Finance released rules to allow the self-regularization of (i) internal control safeguards, and (ii) reporting requirements (the "Rules").

The Rules permit the self-regularization in respect to a failure to comply with the requirements of the Act, for the period July 1, 2013 to December 31, 2018.

The Rules require the filing of an application with the *Servicio de Administración Tributaria* (Internal Revenue Service; "SAT") for authorization of a program of self-regularization in respect to both, imposition of internal controls and satisfaction of overdue reporting requirements, within 30 business days of the Rules coming into effect, which occurred 45 business days after its publication. The effective deadline for the filing of an application was August 15, 2019. The deadline for full implementation of a program was 6 months after filing, or February 15, whichever occurred earlier.

The Rules required the filing of an application for authorization of a self-regularization program with the SAT, which should include, among other data: (i) a description of errors and omissions by the applicant, (ii) proposed corrective measures to cure such breaches, (iii) a

statement that the applicant is not otherwise disqualified to apply for a deferred authorization (including the commission of a crime). If authorized, the self-regularization program should be completed within 210 days from the date of the authorization.

Persons who obtained an authorization for a self-regularization program with the SAT, may file an application for commutation of applicable fines by the SAT within 20 business days of completion of the program. Consequent upon verification of compliance, the SAT may commute applicable fines within six months of such application.

Persons who failed to apply for the required authorization before August 15, 2019 should conduct due diligence to determine the extent of their current controls and the extent to which they fail to comply with applicable requirements. The next step suggested would be to implement required controls and submit applicable reporting requirements so as to be fully compliant from now on.

Subsequent to that and taking into account the possibility of a second program discussed below, such persons may consider filing deferred comprehensive monthly reports in respect to each month of 2019 and lastly in respect to each month starting in 2014.

The SAT is currently considering the issuance of a second self-regularization program. In parallel to following up on such possibility, it is advisable to discuss with counsel the arguments that could be utilized to defend the position that a bona fide, spontaneous compliance with applicable requirements should enable commutation of applicable fines, should a regulatory review by the SAT ensue.

Mexican Congress Passes Labor Law Reform

On April 29, 2019, the Mexican Congress approved a reform to the Federal Labor Act ("FLA"), which became law after promulgation by the President and publication in the Official Daily of the Federation on May 1, 2019.

The reform's objectives include defining the parameters of permissible outsourcing, promoting union transparency and democracy, and streamlining procedures for mediation and adjudication.

The following are key provisions of the amendments to the FLA:

- Outsourcing regime is further defined and regulated in order to make sure that employers will comply with their labor and social security obligations to employees
- Provisions to enhance union democracy and transparency are strengthened, including regulation of union registration, election of union boards and accountability
- Dignified work principles as defined by international treaties are invigorated
- Additional termination causes for both employers and employees are established

The amended FLA expressly prohibits and penalizes the use of the outsourcing regime to simulate a relationship different from a labor relationship.

The obligation of unions to register before the corresponding government authorities is ratified. The amended FLA requires that the authorities make the registration information available to the public, including collective bargaining agreements. Union bylaws shall be available for consultation in the internet pages of such authorities.

Workers' right to unionize shall be exercised through secret ballot vote.

Additional obligations are required to be included in union bylaws, such as the procedure to elect the union board by a secret ballot vote. Union boards shall report to the general assembly on union accounts and finances, including union membership fees (*cuotas sindicales*), periodically. Such changes must be reflected in union by-laws within 240 days from the effective date of the amended FLA.

Collective bargaining agreements are required to be reviewed every two years and approved by secret ballot vote of the workers.

Unions and collective bargaining agreements, are required to be registered with the *Centro Federal de Conciliación y Registro Laboral* (Labor Registration and Mediation Federal Center), which is entrusted to review compliance with basic requirements of the FLA prior to granting registration.

Mediation in labor disputes is to be conducted by the same *Centro Federal de Conciliación y Registro Laboral* .

The amended FLA is unfortunately silent in respect to a recurrent problem in Mexican labor relations, which is the undue pressure often exercised by Mexican unions on employees to follow certain conducts prescribed by the union.

As to labor procedural regulations, the amendments include new rules in connection with legal representation, evidence, statute of limitations, burden of proof, among other. Additional rules and operational concepts in connection with Federal and Local labor mediation and adjudication are incorporated.

Employers should plan an audit of labor relationships, including collective bargaining agreements, to ensure compliance with the requirements of the amended FLA.

Transactional due diligence should be conducted when planning a merger, acquisition or other forms of corporate combinations, so as to ensure compliance with the amended FLA an identify points in respect to which corrective measures may have to be adopted.

Mexican Congress Passes Forfeiture Act Related to Illegal Transactions

On July 25, 2019, the Mexican Congress approved the Forfeiture Federal Act ("FFA"), which became law after promulgation by the President and publication in the Official Daily of the Federation on August 9, 2019.

The FFA consolidates and streamlines provisions existing in various statutes, establishes a unified procedure to adjudicate seizure and forfeiture actions and entrusts their exercise to specific bodies.

While there has been some progress on the enforcement and legislative fronts, corruption and money laundering persist as a significant concern. NGO's have largely credited this to the lack of sustained, long-term policies and reforms tackling more forcefully the historic and structural underpinnings of corruption.

Mexico experienced an eventful year on the anti-corruption front, with some high-profile investigations, prosecutions, settlements and legislative developments. As anti-corruption compliance and enforcement continue developing in the country, it is essential to stay attuned to such developments and to mitigate proactively the related compliance risks.

The FFA provides that assets purchased with proceeds from illegal transactions, utilized for or in connection with illegal transactions are subject to forfeiture by the Mexican Federal government or the state governments, as appropriate.

An action for the forfeiture of tainted assets can be brought by the General Attorney's Office provided there is (i) an illegal transaction, (ii) assets arising from such illegal transaction or utilized for or in connection with such illegal transaction, (iii) a causal connection between (i) and (ii), and (iv) knowledge by the person who owns, or possesses such assets, of the origin or intended use of the same.

Applicable penalties include attachment, assignment of assets for a public use or sale at public auction of the same.

The FFA provide for instances in which an anticipated assignment for public use or an anticipated sale of the relevant assets may be effected, before a final judgement is rendered by a competent court. Should the court rule that the forfeiture action does not proceed, the interested party is entitled to restitution which in case of a sale would only entitle to receive an amount equal to the proceeds of the anticipated sale, less costs paid to effect such sale. This provision is likely to be challenged on constitutional grounds before Mexican federal courts.

Successors and assigns would remain subject to actions initiated against owners or possessors in respect to tainted assets, under the FFA.

There is no statute of limitations in respect to an action related to assets arising from an illegal transaction. The statute of limitations in respect to an action related to assets utilized for illegal purposes is 20 years.

There is a presumption of good faith, which requires proof that an interested party was barred from knowing or otherwise unable to know that the relevant assets were originated in or utilized for an illegal transaction. This provision may be subject to a review by Mexican federal courts on constitutional grounds.

The FFA provides for a mechanism of cooperation with foreign authorities.

The lead administrator of the FFA is the *Instituto de Administración de Bienes y Activos* (Assets Administration Institute). Mirror regulators are suggested to be created by the states, so as to administer state laws on the subject.

The *Secretaría de Bienestar* (Ministry of Welfare) is required to submit an annual report in respect to forfeiture actions under the FFA, to the Mexican Federal Congress.

The prospects for a vigorous enforcement of anti-corruption legislation, including the FFA among other statutes, will be enhanced once the President of Mexico leads the movement for appointment of a truly independent Attorney General, rather than of a political appointee ratified under nominal procedures by the Mexican Federal Congress, where his party currently enjoys a majority.

* * *

We will keep you posted on future developments.

Please do not hesitate to contact us with any questions.

Berdeja Abogados, S.C.

September 11, 2019