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1. Introduction

Foreign companies who intend to bring funds into Argentina to carry out capital contributions in an Argentine company (as direct investments or by granting financial loans), are required to make, a “mandatory deposit” (encaje) before a local financial institution, consisting in a US Dollar, 365-calendar day, non-remunerated mandatory deposit that amounts to 30% of the funds brought into the country.

2. Capital Increase. Corporate resolutions its registration thereof before the General Inspection of Corporations

Once the local company has received the funds, such amounts shall be capitalized in the company. This will require the local company to hold a Shareholders’ Meeting (in the case of a Corporation - Sociedad Anónima) or a Quotaholders’ Meeting (in the case of a Limited Liability Company - Sociedad de Responsabilidad Limitada), which will resolve to capitalize the investment or loan (converted into Argentine Pesos at the applicable exchange rate) and consequently, increase the capital of the company and to amend its bylaws / articles of association accordingly.

Such corporate capital increase is valid and binding vis-à-vis the company and its Shareholders as of the date of the meeting that resolves upon the corporate capital increase.

However, for such capital increase to have effects regarding third parties, it is necessary to register such capitalization before the General Inspection of Corporations (Inspección General de Justicia - “GIC”), which is the administrative agency in charge of the Public Registry of Commerce for the City of Buenos Aires.

Filing for registration of a capital increase will generally require, among other documents, the filing of a certificate, signed jointly by the legal representative of the local company and a certified public accountant, evidencing the inflow of the total amount of the capital contribution in cash.

3. Mandatory deposit. Exception

As an exception to the 30% mandatory deposit to foreign remittances of investments and loans, Argentine Central Bank (the “ACB”) regulations require that, within a certain timeframe, the local company which has received the funds demonstrates the final registration of the capital increase before the GIC.

If this evidence is not provided in due time, the recipient is required to deposit in the local bank (banco de seguimiento) which has received the funds) an amount equal to the mandatory deposit (i.e., 30% of the amount remitted) until the registration of the capital increase is finally achieved.

Prior to January 2014, under Communication “A” 4762, the local company had a term of 240 calendar days (as from its date of filing) to demonstrate such registration before the GIC. This term was extendable for another 180 calendar days on a per case, justified, basis. Upon expiration of this term, the local company was required to make the deposit within the following 10 business days.

This system proved cumbersome, as it did not fully adjust to certain day-to-day aspects of the GIC, mainly as follows:

The GIC provides for two distinct types of filing: (i) a normal filing; and (ii) an expedited filing. Under GIC regulations in force, the expedited filing (which has an increased associated fee) shortens the term for the GIC to analyse and review the filings. However, the GIC does not allow for an expedited filing for registration of capital increases (which require both a legality and accounting analysis by the GIC’s inspectors). As a result thereof, the internal review process by the GIC normally takes several months.

In addition, it is not uncommon that the GIC makes observations and/or requests for additional information/documentation regarding the origin of the funds that are being capitalized. This generally requires the preparation of additional accountant’s certificates, attorney’s explanations and clarifications, informal meetings with the inspectors in charge of the filings, etc., which may significantly extend the timeframe for the GIC to review and finally approve the
In this context, in many cases, the 240-calendar day term (and its 180-calendar day extension) that was required by the ACB (to avoid making the mandatory deposit) was not met. As stated above, this forced local companies to immediately make a large transfer of funds to the relevant bank (i.e., 30% of the funds remitted). This situation was specially aggravated in case the original capitalized funds had already been used by the local company (for instance, to purchase land, cover a negative net worth, repay a loan, etc.).

4. Recent flexibilization by the Argentine Central Bank

On January 29, 2013, the ACB issued Communication “A” 5532 (the “Communication”), which amended Communication “A” 4762. Specifically, the Communication restates and amends the rules regarding the application of the exceptions to the non-interest-bearing deposit of 30%.

To a certain degree, the Communication addresses the issues arising from the extensive timeframe for registering capital increases before the GIC, by extending to 540 days (from 240 days) the term to demonstrate the final capitalization of the funds entered into Argentina by way of direct investments or loans in local companies.

Under the Communication, once the 540-day term has expired, the mandatory deposit must be made within 10 days following the date on which the company becomes aware that the contribution has not been accepted or has been rejected and/or suspended.

Finally, the Communication provides that any deposits made in US dollars that shall be released a local company (whether due to the expiration or to any other reason specified in the regulations) must be reimbursed by the ACB to the relevant bank, in Argentine Pesos (and not in the original currency), which must give to the local company the amount of Argentine Pesos according to the prevailing exchange rate.

4. Conclusion

In conclusion, the newly adopted changes in the mandatory deposit exception procedure by the ACB have aligned and made its provisions consistent with the practical, day-to-day administrative aspects of the registration of capital increases by local companies before the GIC, favoring compliance by local companies with ACB regulations, by granting more realistic terms for registration of capital increases before the GIC.

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LAW NO. 12.846/2013 - THE DAY FOLLOWING THE NEW ANTI-CORRUPTION LAW IN BRAZIL - HOW TO AVOID ITS RISKS?

Enacted by President Dilma Rousseff in August 2013, Law No. 12.846/2013, also known as the Anti-Corruption Law, came into force and effect last January 29th, introducing essential provisions in preventing and combating acts of corruption committed against national or foreign public administration.

With the purpose of harmonizing the relationship between companies and government, the aforesaid law follows the global legal trend towards the prevention, combat and prosecution of acts of corruption. The major inspirational texts for its drafting were the “Foreign Corruption Practice Act – FCPA,” adopted in the United States in 1977, as well as the United Kingdom’s “Anti Bribery Act” of 2010.

Moreover, the new law intends to maintain Brazilian legislation in line with international treaties that Brazil is signatory and bound to, namely (i) the Inter-American Convention against Corruption (1996); (ii) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (1997); and (iii) the United Nations Convention against Corruption (2003).

It is of utmost importance to emphasize that both American and British set of laws on the subject matter, in addition to the abovementioned international treaties, intend to materialize the repression of corruption, by

In this perspective, the new Brazilian legislation innovates as to its penalties, by creating specific instruments for penalizing companies involved in acts of corruption. Prior to this law, such companies were not held liable. Furthermore, the law brings manifold novelties
as regards its national and extraterritorial application, since the new legal framework foresees the possibility of condemning a company committing an act of corruption abroad.

Prior to the law’s enactment, the conducts deemed illicit as well as the penalties foreseen in the Brazilian Criminal Code whether pecuniary or restrictive of freedom, were only applied to natural persons who were actively and/or passively involved in crimes of corruption (directors/company representatives and public servants).

Thus, the new law, already in force, specifically provides for the objective accountability and liability of legal entities in the administrative and civil scope.[1]

Amongst the practices subject to penalties rendered by the Anti-corruption Law, it is worth highlighting the following: (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official; (ii) to defraud, manipulate or otherwise interfere with the competitive character or any acts of public bids; (iii) trying to exclude or excluding a bidder, by defrauding or offering any kind of advantage; (iv) to create, by fraudulent means, a legal entity to participate in a public bid or administrative contract resulting therefrom; and (v) to manipulate or defraud the economic and financial stability of contracts with the public administration.

The new set of rules provides severe administrative pecuniary penalties, with fines ranging from 0.1% to 20% of the company’s gross turnover of the year prior to the commencement of the investigation, or, if it is impossible to adopt such a criterion, fines will range between R$ 6,000.00 (six thousand Brazilian reais) to R$ 60,000,000.00 (sixty million Brazilian reais).[2]

In order to determine the value of the fines adjured, the characteristics of each concrete case will be taken into account, such as the severity of the offense committed, the advantages obtained or envisaged, the degree of damage and the economic situation of the offender.

In the judicial sphere, legal entities participating in acts of corruption against the public administration, may be subject to the following sanctions: (i) confiscation of assets, rights and/or values obtained from the offense; (ii) suspension or partial ban of the company’s activities; (iii) prohibition of receiving incentives, subsidies, grants, donations or loans from public entities for a period ranging from 1 (one) to 5 (five) years; and (iv) compulsory dissolution of the company.

The possibility of dissolution of the company will be possible if proven that the legal entity has been used to conceal the identity of the beneficiaries of the offense, or if it is commonly used to promote illegal acts.

Additionally, it is important to note herein the creation of the National Register of the Sanctioned Companies (Cadastro Nacional de Empresas Punidas - CNEP),[3] aiming at listing - and making public - all the companies sanctioned by the multiple levels and bodies of the public administration.

An especially interesting aspect that has generated a series of discussions on the new law is the possibility of concluding a “leniency agreement.”[4] Although subjective as to its nature, the effects of such an “agreement” in relation to the extinction of the criminal punishment still remain unclear.

Likewise, even if there is the possibility of exemption and/or reduction of sanctions under the Anti-Corruption Law by carrying out a leniency agreement with the government, the most effective way of reducing liability for the company involved in cases of corruption, is the creation and adoption of compliance rules.

The adoption of compliance programs aims at establishing a set of procedures that shall result in transparency and accountability of activities carried out by the company. It also intends to contribute to the process of denouncing, investigating and punishing acts of corruption, while preventing the occurrence of misconducts by the company or its representatives. In conclusion, when effective, these programs can be a mitigating circumstance in the imposition of penalties foreseen in the Anti-Corruption Law.

Although there are still several issues under discussion on the applicability and effectiveness of the newly enacted law, it particularly aims at fostering an efficient market environment, bringing countless benefits to firms considered “clean” ("ficha limpa"), including but not limited to the possibility of obtaining loans at lower interest rates.

Thus, it is clear that the new law stimulates competition and meritocracy whilst corruption
is combated and repressed, further urging that company directors rigorously and effectively collaborate in the combat - and mainly - prevention of corruption.

[1] Article 1 of the Law No 12.846/2013 - This law provides for the civil and administrative objective liability of legal persons committing acts of corruption against the public, domestic or foreign administration. This Law applies to corporations and simple companies, with or without legal personality, regardless of the form of organization or corporate model adopted, as well as to any foundations, associations of persons or entity, or foreign companies having their registered office, branch or representation in the Brazilian territory, constituted in fact or by law, even temporarily.


[3] Article 22 of the Law No 12.846/2013 - Within the Federal Executive Branch, it is created the National Register of Sanctioned Companies (Cadastro Nacional de Empresas Punidas - CNEP ), which will list and make public the sanctions applied by the bodies and entities of the Executive, Legislative and Judicial Branches of all levels of government, on the basis of this Law.

[4] The highest authority of each body or public entity may enter into a leniency agreement with the legal persons responsible for being involved in the acts foreseen by this law, when they effectively collaborate to the investigations and to the administrative proceedings. Such a cooperation shall result in: I) - the identification of the others involved in the offense, when appropriate, and II) - the swift gathering of information and documents proving the offense under investigation.

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Chile

NEW ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM INSTRUCTIONS

On January 27, 2014, new instructions regarding the Environmental Impact Assessment System Regulation were issued by the Environmental Evaluation Service (the “Instructions”). Their main purpose is to further develop the scope of application of article 27 of the new Environmental Impact Assessment System Regulations (the “Regulations”), which in turn provides the possibility to a project applicant to request information to the Environmental Evaluation Service regarding the technical and legal requirements to be considered when such project affects or may affect indigenous communities, prior to the submission of its project.

The Regulations entered in force on December 24, 2013 and adjusted the rules regarding the Environmental Impact Assessment System in line with the amendments made to Act Nr. 19,300 (General Environmental Act), improving the existing system and aiming to provide further technical, transparent and efficient environmental acceptances when granting an environmental qualification. Additionally, the Regulations promote further coordination between the Environmental Evaluation Service, other State organizations and citizens.

Among other matters, the Regulations: (i) set the thresholds of activities subject to the Environmental Evaluation Service authority; (ii) regulate the right to access information, the participation of citizens in the environmental impact assessment process, as well as the opportunities to exercise such rights; (iii) includes a procedure by which indigenous communities must be consulted during a project analysis and review, according to the ILO (International Labor Organization) Convention No. 169; (iv) updates the list of special environmental permits that must be issued by the relevant authorities within the scope of the Environmental Assessment Evaluation System; and (iv) reduces the timeframe involved in the environmental assessment evaluation process, limiting the number of addendums that may be submitted in connection with a specific project environmental impact statements and studies.

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NEW MEDICATIONS ACT

On February 14, 2014, a new Medications Act submitted to the Chilean Congress by the Health Ministry entered into force (the “Act”). It amended the Health Code, and rules regarding the promotion, trade requirements, conditions, and distribution of medications within the Chilean territory.

The Act aims to safeguard the supply of high-quality and low-cost medication by promoting bioequivalent alternatives with the same medical effect as the original counterparts, thereby: (i) setting forth that doctors and health professionals must specify the
international non-proprietary name of the drug in their prescriptions; (ii) requiring drugstores to maintain a minimum stock and guarantee the sale of all bioequivalent products listed by the Health Ministry; (iii) allowing only the advertising of medicine not subject to prescription; (iv) banning economic incentives to persons involved in the administration, supply and sale of pharmaceutical products which privilege the use of certain medications; (v) allowing the placement of non-prescription medicine (OTC drugs) in medicine shelves within drugstores; and (vi) setting forth the obligation for drugstores to provide their customers, at the latter’s request, with bioequivalent products if it demonstrates such bioequivalence, otherwise it must provide the prescribed medication.

In addition, the Act sets the obligation for drugstores and their suppliers to disclose pricing information regarding the medicines to their clients.

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NEW TELECOMMUNICATION SERVICES REGULATIONS

On February 13, 2014, the new Telecommunication Services Regulation (the “Regulation”) submitted by the Transport and Telecommunications Ministry to the Chilean Congress was published in the Official Gazette, and shall enter into force on June 13, 2014. This Regulation renders ineffective and replaces the existing public telephone service regulations. Additionally, it further sets forth telecommunication services suppliers and user rights and obligations regarding the contracting, use and commercialization of internet, paid television as well as mobile and public telephone services.

The Regulation’s purpose is to improve the telecommunication services market transparency by providing clear rules for suppliers, thus regulating: (i) information disclosure duties towards their users; (ii) tied products offer and sales; (iii) supply agreements requirements; (iv) the contracting process; (v) termination and early termination of telecommunication services; and (vi) billing.

The regulation, further sets specific content to be included in these services agreements depending on the type of telecommunication service contracted, as well as legal obligations and duties applicable in case of services suspension, interruption or disturbance.

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