Nicaragua

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The new criminal code: sanctioning corporate and white-collar crimes and protecting the financial system's stability

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A new Criminal Code has recently been enacted in Nicaragua. Law 641, published in different editions of *La Gaceta* (the official daily publication), entered into full legal force and effect on July 9 2008 and presents a punitive system containing some novelties for Nicaraguan criminal law by implementing new crimes that may be applied to businesses.

Corporate crime

As a relevant new criminal type, the Criminal Code has included corporate crime, which is divided into two categories: (i) abusive business management; and (ii) authorisation of unlawful acts.

Abusive business management would be committed by directors, managers, controllers, auditors, legal representatives, administrators or partners of commercial or civil entities or non-profit associations who make or contribute to abusive decisions or agreements on their own or third parties' behalf, causing serious damage to the entity they represent. Additionally, the alteration of accounts or financial information in order to show a distorted situation causing economic harm to the company, partners or third parties will also be considered as abusive business management and the company's directors and representatives may be punished with one to three years in prison.

On the other hand, the Criminal Code has established that the authorisation of unlawful acts would be perpetrated by directors, managers, controllers or legal representatives of companies duly incorporated or in the process of incorporation authorising or giving their consent to carry out acts against the law or the company's by-laws that may cause damage to the company or third parties. This crime may be punished with six months to two years in prison.

Crimes against consumers

Regarding the right of the public to truthful information, the Criminal Code has also established severe penalties for those offering public bonds, shares or other securities, hiding facts and true circumstances, or affirming false information or circumstances that might cause damage to third parties. Punishment for this crime is from six months to two years in prison.

On the other hand, a partner, director, manager, controller, auditor, accountant or legal representative of a company who authorises the publication of false financial statements or balance sheets regarding the company's patrimonial situation, creating harm to another party, may be punished with six months to three years in prison.

In addition to these crimes, the Criminal Code punishes any crime committed through a legal entity, establishing that if the actions of directors, managers or representatives of a legal entity on behalf of such result in the attribution of a crime to the company, such person will be held criminally liable and will face the penalty established for the corresponding crime.

Crimes against the financial system

Dispositions have also been included regarding the financial system's transparency and financial institutions, seeking to guarantee to all parties involved in financial transactions or business that the information, data, records and so on related to the financial system is accurate and secure.

In this sense, with respect to financial entities, the Criminal Code establishes that a person who hides, distorts, alters or destroys information, data, financial statements' antecedents, minutes books, accounting books, accounts, correspondence or any other financial entity's documents intentionally, to cause damage to the institution or to avoid or to make difficult the supervising activities of the Governmental Control Authority, as well as to prevent access to the financial entity's accurate patrimonial information or the truthful identification of the invested capital, will be responsible for a crime against the financial system, and may be punished with five to seven years in prison.

Moreover, in connection with the distribution of dividends or utilities, the partners, directors and any other executives of financial entities supervised by the corresponding government regulator that has authorised and approved fictitious utilities distribution, utilities that have not been authorised by the government regulator or those that have been objected to by that authority, will be subject to a punishment of three to five years in prison.

Also, to protect the financial system, the Criminal Code includes a punishment for those persons committing acts of fraud that endanger the system's solvency, liquidity and stability, and for those spreading (through any mass means) rumours or non-authorised information about the system's solvency, liquidity or risks. Both activities are punishable with four to six years in prison.

The new Nicaraguan Criminal Code has answered a need for the stronger control of the financial system and business activities in general. It caused great expectation in the financial and business sectors even before its entry into force.

Financial and corporate

Recommended firms
Tier 1
Consortium - Taboada & Asociados
García & Bodán
Tier 2
Arias & Muñoz
Tier 3
Aguilar Castillo Love
Alvarado y Asociados
Barrios & Asociados
Delaney & Associates
Munguía Vidaurre Zuñiga

"Nicaragua is fragile when it comes to re-elections," says a local lawyer. Nicaragua does not have a political culture where administrations can transition smoothly.

The amount of investment in Nicaragua has receded in the last year, due to political and economic turmoil in the wake of the 2006 elections. Many investors did not expect the leftist candidate, Daniel Ortega, to be successful. Although the new government has not yet begun to re-appropriate companies the way it did in the eighties, this regime has made investors nervous with its socialist policies and hints at nationalisation of certain industries.

There are a number of free-trade zones that have closed since Ortega was elected, with more slated to close in the future. The judicial system is largely politicised, and potential investors see no guarantee that their rights will be respected. In some cases, by presidential decree, the government has levied special taxes on the gross sales of certain successful companies. The government is able to gather the necessary information regarding corporate earnings when companies file their returns with the tax administration.

In May 2008 Ortega's government reached an agreement with the Spanish conglomerate Unión Fenosa to acquire a 16% stake in the company and a seat on its board. This agreement came after months of threatening to nationalise the company, in the midst of government accusations that Unión Fenosa had breached its concessions agreement by failing to invest in infrastructure development, thereby causing widespread blackouts throughout the country. This demonstrates Ortega's willingness to impose state controls, despite his rhetoric about protecting private property and foreign investment.

In general though, the legal framework is largely unchanged by the election. At the beginning of his term, President Ortega passed labour regulations and a Competition Law. The country did not have a true antitrust regime prior to this new Competition Law coming into effect. The Law requires that companies looking to merge must first notify the proper regulatory body, but is currently unenforceable, as the committee is not yet constituted.

It is difficult to know where the country is going; some fear Ortega's interventionism will cause foreign investors to look elsewhere, and deprive the country of the foreign support it needs to meet its budget and fund its social programmes.

Consortium - Taboada & Asociados

The Nicaraguan arm of the Consortium legal network, Taboada & Asociados, is a full-service firm, but has a recognised specialisation in corporate and banking work. The firm's clients include Citibank, Scotiabank, GE Finance, and Banco General de Panama. One rival comments: "Taboada & Asociados deserves its position, largely because Mr Rodrigo Taboada does very good work and is trusted in the legal community."

Led by Rodrigo Taboada, the firm advised US-based Caterpillar Financial Services on the $18.8 million transfer of its financial portfolio in Latin America to its Mexican subsidiary, Caterpillar Crédito. The move consolidated Caterpillar's presence in Latin America to support the emerging markets and to further its goal of granting more personal loans.

In March 2008, the firm offered legal counsel on the placement of $11 million in loans for Oikocredit, a Nicaraguan financial institution. The loan assistance will facilitate the extension of credit to various social sectors in Nicaragua, which will aid in the development of the country's economy.

The firm also advised GMG de Nicaragua, a chain of radio, television and consumer electronics stores, on the creation of a commercial loans division. Additionally, the firm advised GMG on obtaining $18.5 million credit from other financial groups in Nicaragua, boosting the company's competitiveness.

Leading lawyers
José Evenor Taboada
Rodrigo Taboada Rodríguez

García & Bodán

García & Bodán has been successful in creating a regional network. The firm has a presence in three Central American countries, and also has correspondents in Guatemala and Costa Rica, with an eye towards establishing two full-time offices in those countries. Some rivals say that the firm does not have senior partners with sufficient experience in the legal sector; they reason that the attorneys are more involved in public relations and politics. Nevertheless, the firm has been involved in some important transactions over the past year.

In April 2008, led by Terencio García Montenegro, the firm advised MKJ International Explorations on obtaining two petroleum grants and a contract for the exploration of petroleum in the Caribbean. The initial investment towards exploration will be for $15 million; the exploration phase will last for six years. The second phase, conditional on the company finding a commercially exploitable product, will last 30 years and will warrant an investment of $500 million.

The firm exploited its advantage as a regional player to represent Intelsat, a satellite operators, on its dealings with the telecoms regulatory entities of Honduras and Nicaragua, regarding the merger between PanAmSat and Intelsat. The firm, in its negotiations with the regulatory bodies, ensured the continuation of Intelsat's services in these territories.

Leading lawyers
Terencio García Montenegro
Federico Gurdián Sacasa

Arias & Muñoz

Arias & Muñoz, like many other firms in Central America, is benefiting from a standardised level of service across its offices as a result of its connection with a regional legal network. "Arias is still in the process of building here," says a Nicaraguan lawyer. "Their strategy was to hire talented young lawyers in Nicaragua, who have been successful. Perhaps they have a lack of experience, which is a weakness. I expect that we will hear more from this firm in the future."

Arias & Muñoz often represents multilateral lenders and offshore banks. In December 2007, led by Ana Teresa Rizo, the firm advised International Finance Corporation in structuring and securing a $50 million loan to Monte Rosa, a subsidiary of Pantaleon Sugar Holding. Later in April 2008, the firm advised the same client on two mezzanine debt facilities for $17 million in favour of a logistics and transportation company with operations in Mexico, Central America and Panama.

Leading lawyers
Bertha Argüello de Rizo
Ana Teresa Rizo

Other notable firms

Aguilar Castillo Love has a small practice in Nicaragua, but through its association with the pan-regional network of the same name, the office has gained a reputation as a capable corporate and financial firm. The lawyers in the Nicaragua office are known for their academic credentials, but the firm is quickly gathering commercial experience. Last year, in its representation of Lawgistic, the firm conducted the regional due diligence process related to the worldwide joint venture between Siemens and Nokia. The firm also conducted due diligence in Nicaragua on the operations and scope of the non-profit organisation Habitat for Humanity International.