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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

The story of Nicaragua's recent troubles is the story of many Latin American nations – politicised economic policies, hesitant foreign investors and an impoverished populace. But unlike some neighbours, there are no vast amounts of mineral or petroleum wealth, and no strategic location to give the country an economic edge. In the end, Nicaragua's economy is based largely on agricultural exports and remittances, and the global economic downturn has all but completely eroded those sources of revenue.

Nicaragua's lawyers see multilateral aid and institutional loans as the nation's best hopes for breaking the hold of poverty on the economy. But allegations of fraud in 2008's municipal election led to the US cancelling \$60 million in aid remaining from US aid agency Millennium Challenge Corporation's account in July 2008.

The move puts many infrastructure projects and aid packages for farmers in jeopardy. With European donors considering similar courses of action at the time of writing, the Nicaraguan government is relying more and more on aid from Venezuela and other sympathetic countries, with the possibility of Russia and Iran chipping in as well.

The government of Nicaragua is keen to break the nation's dependence on foreign oil, and is promoting as many energy projects as it can with the limited resources it has. One affordable source of energy being promoted is the so-called mini-hydroelectric plant, which can be built and operated for a fraction of the money needed to build large-scale dams and turbines. Even a modest 320KW generator can power a village of several hundred households, and institutional developers including the World Bank and IFC (International Finance Corporation) are financing projects throughout the rural areas.

In addition to hydroelectric projects, Nicaragua recently saw power production begin at its first wind energy project, the 400-acre Amayo wind farm in the southern part of

the country, which went online last February. The San Jacinto-Tizate geothermal power project near the city of León – one of the largest geothermal energy projects in the Western hemisphere – recently completed the first phase of its expansion and is expected to produce 72MW by 2010.

The local capital markets have been somewhat active and financial lawyers see Nicaragua's stock exchange as a good source of bargain-priced bonds for foreign investors. Last April, the International Airports Management Company, which oversees Nicaragua's airports, issued \$60 million in bonds on the Nicaraguan market to refinance its debt and improve the airport at Puerto Cabezas. Lawyers are expecting more offerings in the latter part of 2009 and 2010 as authorised placements that are on hold move forward.

Consortium – Taboada & Asociados

Celebrating 50 years in practice, the reputation of Taboada & Asociados was established long before it became the local office of the Consortium network. Competitors note not only the firm's size – it is the largest in Nicaragua – but also the qualifications of the partners. "They have ample experience and a prestigious list of clients," one peer notes.

Rivals particularly mention José Evenor Taboada, a former president of the Central Bank, as an exceptional lawyer who is well-reputed in Nicaragua's business community. "He has strong contacts in both the community and government," one competitor says, "and that is an advantage." Clients echo these sentiments, and in the words of one interviewee: "He has a huge experience and is very well recognised."

Last February, Consortium celebrated the opening of a new office in the historic city of León, its third local office in Nicaragua. The city is an important centre for industry and agriculture, not to mention a tourist destination known for its colonial architecture.

Last year the firm helped the global banking arm of GE Capital up its stake in BAC-Credomatic from 49.9% to 75%. The acquisition was made in accordance with agreements made when GE Capital originally bought shares in the Central American bank in 2005.

Rodrigo Taboada took part in Consortium's work representing Overseas Private Investment Corporation (OPIC) and Citibank's financing for BAC-Credomatic throughout the region. The \$225 million loan is facilitated through a partnership between the US government and private lenders to fund small and mid-sized enterprise throughout Central America.

Leading lawyers

José Evenor Taboada
Rodrigo Taboada Rodríguez

García & Bodán

Aggressively expanding in Central America, García & Bodán traces its history to Nicaragua, though that history spans less than a decade. Competitors admit the bold marketing strategy of García & Bodán's founder Terencio García has garnered an impressive list of clients that paved the way for the firm's quick expansion into El Salvador and Honduras. Clients praise Mauricio Herdocia as an energetic and capable lawyer. "Even though he's young, he has a very good attitude," one client says.

While peers note García & Bodán's strong presence in the real-estate and energy sectors, they also point to the firm's youth and lack of established relationships with international financial institutions as possible limiting factors. Still, the firm's background has led to work with lenders on several recent deals. In 2008, García represented a consortium of banks in El Salvador and Panama regarding an issuance of bonds for their loans to Inmobiliaria Santo Domingo, developer of the Galerías shopping and entertainment complex.

The firm has recently participated in an interesting energy development project in Nicaragua's rural northwest, where geography and terrain make long-distance power distribution difficult. Molina and a team of attorneys represented Canadian sustainable energy developer E8 in a joint-venture with the Nicaraguan government and the village of Wiwilí to build and operate a mini-hydroelectric generator. The power plant will produce 1.48MW of power for the 3000 households and 20 public buildings. The \$7 million deal is an example of an inexpensive and sustainable alternative to larger, more disruptive power projects.

Leading lawyers

Terencio García Montenegro
Gustavo Molina

Arias & Muñoz

Though not as developed as the firm's Costa Rican and El Salvador practices, Arias & Muñoz is praised by peers for hiring talented local attorneys to manage the Nicaragua office. Competitors point to the youth of the attorneys as a detriment, but envy the influx of corporate and finance work from the firm's regional clients. "Their model for growth is more or less what we are following," admits one rival.

The firm's largest transaction of recent months came in 2008, when Arias & Muñoz represented Semillas Cristiani Burkard's purchase by global agrochemical group Monsanto. The sale of the large-scale regional corn-seed operation amounted to \$135 million and was considered a success by the company's shareholders.

All of the Arias & Muñoz offices have been active representing the IFC (International Finance Corporation) in its loans throughout the region, and the Nicaragua practice is no exception. In August 2008, Ana Teresa Rizo counselled the IFC on a project to harvest and reforest lands impacted by 2007's Hurricane Felix. The investment includes acquisition of the lands and a combination of \$9.3 million in loans and equity to several subsidiaries of the timber and lumber consortium Simplemente Madera Group, which will operate the project.

Leading lawyers

Bertha Argüello
Ana Teresa Rizo

Other ranked firms

In a practice area dominated by regional firms, **Alvarado y Asociados** has cornered the market on independent legal networks as a member of both Lex Mundi and the Latin-American Bomchil Group. Competitors note the professionalism of Gloria María De Alvarado, who is characterised as a very capable attorney among a group of talented professionals. "They have a good reputation for being serious people," one peer says. The firm counts among its corporate clients Cemex, Delta and credit data manager TransUnion.

Leading lawyers: Gloria María De Alvarado