

TERRUM

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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

The Impact of the Application of Local Anti-Money Laundering Laws to International Transactions.

by Kendra Medina.

In previous editions of TERRUM we have described the scope and purpose of the recently enacted anti-money laundering laws in Mexico¹. In this Article, I would like to analyze and discuss in particular some of the provisions of this law (*Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita*, the “Mexican Anti Money Laundering Law”) that have a significant impact on the manner and timing of how an international transaction is documented between foreign residents that involve assets located in Mexico. The Mexican Anti Money Laundering Law entered in full force and effect on July 17, 2013 and its regulations a month after. Therefore, the impact of this law is already a reality that needs to be taken into consideration by the legal counsels or advisors of foreign residents when dealing with these kind of transactions.

The Mexican Anti Money Laundering Law has been much criticized for its vague drafting and unclear reference to the individuals and entities that are subject to its provisions, as well as to the viable options for such individuals and entities to provide evidence of compliance with this law. Consequently, it is of the essence for the governmental entities and officers, when interpreting and applying this law, to take into consideration the purpose for which it was created. The purpose of the law is to prevent and detect acts or operations involving resources from illicit activities and those tending to finance terrorism, by imposing the obligation to report acts or operations related to “vulnerable” activities.

“The purpose of the law is to prevent and detect acts of operation involving resources from illicit activities.”

The law provides for a long list of activities that are considered to be vulnerable and, not surprisingly, limit the amounts that can be paid in cash in certain cases (e.g. purchase of real estate, jewelry, precious metals and stones, bullet proof services, tickets to participate in lotteries or raffles; title transfer of partnership or stock shares and payment of prizes); and consequently, imposes the obligation to report these activities to the Mexican tax authorities. One of the ways the law uses to make sure these activities will be diligently reported is to make the governmental officers vested with the capacity to certify the authenticity of the documentation of certain transactions (*fedatarios públicos*)² personally liable for not reporting this type of transaction where their services are required. Also, by limiting the amounts that can be delivered in cash, the number of operations under which payment obligations have to be met, will be met through the financial system, and the financial institutions are obliged to share information with the tax authorities.

Within the category of “vulnerable” activities is included the creation of property rights and liens over any kind of vehicle (including aircraft, ships and locomotives), as well as the rights to use and enjoy such vehicles (such as leasing) and any assignment of rights thereof. Under Mexican law, all rights and interests on aircraft, ships and locomotives that are Mexican registered, must be recorded at the relevant local registry either as required by the applicable specific legislation or in order to be opposable to third parties; and in order to be properly recorded, the supporting documentation is required to be notarized. This notarization can

1.- Please refer to TERRUM Editions August 2013 and November 2013.

2.- They can be either Notary Public or Commercial Notary Public (Corredores).

be completed within or outside Mexico, but if completed in Mexico, the Mexican Notary Public will be required to report any transaction of this nature, to the Mexican tax authorities because it would be classified as “vulnerable”.

The law provides that, in addition to the reporting obligation aforementioned, the *fedatarios públicos*, shall make reference in their notarial certification to the form in which the payment obligations under any such operations are met. There are hundreds of *fedatarios públicos* in Mexico and unfortunately, the law is not specific enough to help with the interpretation on how this requirement can be met. Consequently, each *fedatario público* have come up with different interpretations on how they can certify that the parties involved in this kind of transactions have provided evidence of the delivery of payment. There are more flexible *fedatarios públicos*, who are happy to make notarial certifications based on a statement made by the parties of the transaction that payment has not been delivered in cash, while there are others that require a copy of the confirmation of receipt of the transfer of funds of the payment and, if such payment obligations are continuing through time (e.g. payment of rents), even a detailed list of payment dates and amounts paid throughout the whole term of the obligation.

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The law is so vaguely drafted, that it actually ends up differentiating the approach for requesting this information, between those transactions where payment obligations have already been delivered, either in full or in part prior the execution of a public deed containing the guarantee for such payment, from those where no payment has been delivered at the moment of executing the documents. This can clearly become very confusing when precisely for some transactions, the date on which the closing takes place, the transfer of funds and the execution of guarantees to guarantee the repayment of such funds must take place on the same date, but the times on which each action actually happens may vary.

For example: The transfer of funds from a bank located in Asia to a Lessor located in Europe that has financed with this credit for the acquisition of an aircraft operating and located in Mexico. In order for the bank to release the funds, it may require to have a mortgage placed over the aircraft, in proper form under the laws of the jurisdiction where it is located. In such case, then the Mexican Notary Public must ratify the signatures of the document containing such mortgage, but it may require evidence of transfer of funds before completing the ratification process. This makes no sense from a logistics viewpoint, because due to the difference in time zones, obtaining such evidence prior to the time on which the public deed is being signed sometimes may not be possible and therefore, the parties to the transaction are presented with an additional hurdle for closing.

Although the local and national associations of Mexican Public Notaries have tried to standardize the requirements to be made by each notary public in order to comply with the obligations imposed under the Mexican Anti Money Laundering Law, it is clear that it is going to take a while before all of them agree on one interpretation, as is natural within a transition period for any new law. Therefore, legal counsels and advisors of

foreign residents when dealing with this kind of transactions in Mexico must be aware and make their clients sensitive to these additional “KYC” provisions to be taken into consideration. Unfortunately, the Mexican Anti Money Laundering Law is another case where poor legislative drafting causes the scope of application of the law to be extended to foreign resident parties for transactions that may have little or nothing to do with doing business in Mexico and the purpose for which the Mexican Anti Money Laundering Law was conceived in the first place.

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Agriculture Secretary Tom Vilsack Highlights Recent Trade Breakthroughs with Mexico.

Agriculture Secretary Tom Vilsack highlighted recent progress on a number of trade issues with Mexico following a panel discussion with Mexico's Secretary of Agriculture Enrique Martínez y Martínez. The panel was part of the Global Forum on Agro Food Expectations forum in Mexico City. Vilsack's remarks come as Mexico's expanded import ruling to allow increased potato imports from the U.S. goes into effect today. Mexico also recently announced it would expand American beef imports as well. A full range of U.S. beef and beef products can now be exported to Mexico, potentially increasing U.S. beef and beef product exports by \$50 million. *AG WEB. 20/05/2014.*

Spanish oil company Repsol ends operations in Argentina.

Spanish oil company Repsol has ended its operations in Argentina, two years after the government seized its assets. Last month the Argentine congress gave final approval to pay \$5bn (£3bn) in compensation for Repsol's stake in Argentine oil firm YPF. The Spanish company has now announced that it has sold the last batch of bonds it received to cover its losses. *BBC News. 23/05/2014.*

Telecommunications bylaws on hold.

The Telecommunications Reform was a constitutional reform approved by the Mexican Congress last year. However the reform has not been fully terminated as the bylaws are still in standby. The Senate has already seen the temperature rise as the discussions for further regulation commence among the PRD party and the PAN. A backfire of accusations between the left and right party has been evident, as the left party request a different and new law project, for they feel all their initiatives were boycotted by the project to be discussed on June. The lack of coordination among parliamentary groups in Mexico may cause the discussion to be called under an extraordinary session, which is set to be during the FIFA World Cup, for some, a political tactic to leave civilians out of the discussions. *CNN Mexico. 25/05/2014.*

Mexico Had Surprise April Trade Surplus on Manufacturing Growth.

Mexico reported its third trade surplus in a row in April, the longest streak in almost two years, as manufacturing exports surged, signaling the economy is recovering from a disappointing start to the year. The surplus totaled \$510 million last month, the national statistics agency said on its website today. It was more than estimated by any of the nine economists surveyed by Bloomberg, whose median projection was for a \$433 million deficit. Foreign sales of manufactured goods, which accounted for 83 percent of exports last month, increased 7.1 percent, the most since September. *Bloomberg. 26/05/2014.*

Mayor Oceanic Fraud.

The Mexican authorities have finally set an arrest warrant against Chief Executive Officer of Oceanografía S.A, the oil service provider that along with Citigroup Inc. have incurred in a \$400 million loan fraud. The Finance Ministry took hold of Oceanografía's assets as only \$185 million of the collateral backing \$585 million of loans could be verified. The Fraud has already resulted in 11 dismissals and legal processes for members of Citigroup. However, Oceanografía S.A. is still pending to be charged, the arrest warrant for its CEO is a start. *Bloomberg. 29/05/2014.*

President backs justice reform.

To pursue justice, Mexican governmental institutions need to expand their capabilities and improve their coordination to combat highly dangerous criminal organizations, President Enrique Peña Nieto said Thursday. At the inauguration of the General Assembly of the 31st National Conference of Law Enforcement in Mérida, Yucatán, the president referred to objectives of the New Accusatory, Adversarial and Oral System of Criminal Justice, which was approved in 2008 and will be implemented in 2016. *The News. 30/05/2014.*

PRI pushes energy reform.

No outside event will postpone energy reform legislation, affirmed the coordinator of the parliamentary group of the Institutional Revolutionary Party (PRI) in the Chamber of Deputies, Manlio Fabio Beltrones Rivera. Also, Luis Alberto Villareal Garcia of the National Action Party (PAN) said that discussions on energy reform represents an opportunity for a new, open, competitive and productive sector. A working committee was formed on May 29 that for the next three weeks will analyze the energy issue, in which deputies will meet with officials from the Secretariats of Finance and Energy, Petróleos Mexicanos (Pemex), the Federal Commission of Energy and the Banco de México to better understand the necessary elements of energy reform. *The News. 30/05/2014.*

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