
*Citizens' initiative to amend:
Section "A" of Article 102 of the Mexican Constitution
in relation to criminal liability of companies.*

On February 10th, 2014, section A of article 102 of the Mexican Constitution was amended in order to transform the *Procuraduría General de la República* (Attorney General's Office) into an independent public organization called *Fiscalía General de la República* ("**FGR**"). Unfortunately, almost four years later, it hasn't yet come into force.

On January 31st, 2018, more than 300 civic organizations, through the group called #Reforma102, submitted a citizens' amendment initiative to modify the same section A of article 102 of the Mexican Constitution. Such amendment aims to promote the creation of an FGR that effectively addresses Mexican challenges in terms of impunity, autonomy, competence, and impartiality of the executors of justice.

Specifically, the proposals of the citizen initiative that we consider of special interest to our clients are as follows:

- i) That the Attorney General in charge of the FGR has real independence and autonomy, so that he or she can i) responsibly exercise the FGR's legal power, ii) resist political pressure, and iii) be guided by truth and legality;
- ii) That the current Attorney General of the *Procuraduría General de la República* does not automatically become the Attorney General of the FGR, but that such position be filled as established in the Mexican Constitution. This is in order to ensure that the new FGR is not just a change of name that does not change Mexico's legal system;
- iii) That the Public Prosecutor has an operational efficiency that ensures an effective investigation and prosecution of crimes that can meet the challenges of Mexico's criminal reality; and
- iv) That the Attorney General of the FGR can be removed for criminal liability or serious administrative misconduct, in accord with the National Anticorruption System ("**NAS**").

In this regard, with the new control systems proposed to ensure that Mexican authorities and executors of justice are independent, competent, objective, impartial and protectors of access to justice and due process of law, it would be wise for companies to have in mind that **they could be subject to criminal liability** under to the new Mexican adversarial criminal justice system.

Article 27 bis of Federal District Criminal Code provides that companies will be liable for crimes committed on their behalf or for their benefit by their legal representatives or administrators (*de facto* or *de jure*); or when people under the authority of the companies engage in an act considered a crime by the law when the company did not exercise *due control* over them.

Due control is the principal defense of companies against criminal liability. It is understood that companies do not have *due control* when they: *i*) do not have mechanisms to prevent and detect crimes; *ii*) in spite of having such mechanisms, there is a structural defect in them because they are not optimal; and *iii*) do not adopt effective and appropriate control mechanisms that aim to prevent the committing of crimes.

Therefore, a company can now be liable for, among other things, crimes against health, influence peddling, bribery, fraud, concealment, operations involving resources derived from illicit sources, environmental crimes, copyright crimes, kidnapping, human trafficking, and tax fraud.

Hence, in order for companies to mitigate risks, we highly recommend that our clients update and strengthen their *compliance* programs to ensure *due control* inside their companies, and to avoid the occurrence of any conduct sanctioned by the criminal law. This prevention is also closely related to risk mitigation regarding corruption matters.

To obtain additional information contact our experts:

Diego Sierra, Partner:
+ 52 (55) 5258-1039, dsierra@vwys.com.mx

Pablo Fautsch, Associate:
+ 52 (55) 5258-1027, pfautsch@vwys.com.mx

Sincerely,

Von Wobeser & Sierra, S.C.

Mexico City, February 14th, 2018.