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ABOGADOS

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legal bulletin

31st Edition

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Legal Information

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New regulations for the sale or assignment of payroll credits

The Ministry of Commerce, Industry and Tourism issued **Decree 1348, 2016** (the Decree), with the purpose of regulating "the disclosure of information and risk management of purchases and management of payroll credit operations" originally regulated in **Law 1527, 2012.** The new regulation applies to those transactions made with: (i) seller's foreign exchange liability or without it, and (ii) in case of an assignment with or without solvency guaranty of the debtor.

Notwithstanding the foregoing, the scope of the Decree does not include transactions involving entities under the surveillance of the Superintendence of Finance of Colombia (the Superintendence).

The most relevant aspects of the Decree cover regulations on issues such as: (i) the obligation to disclose information regarding risks of the relevant operations, (ii) risk management of the administration of sold payroll credits, (iii) disclosure of substitutions of payroll credits, (iv) operational risk management of credit portfolio sales and attention to buyers, (v) disclosure of financial statements and seller's solvency and quality indicators, and (vi) rules for the registration before the Sole National Registry of Operators of Payroll Credits (RUNEOL).

I. Obligation to disclose information

The seller of payroll credits shall inform the buyer the operational risks of the transaction prior to entering into the purchase and administration agreement. This disclosure must be duly recorded by the parties. Moreover, the new regulation includes certain items to be accounted for, mainly:

- Delivery of the information of the last three months prior to the execution of the corresponding agreement, of the credit portfolio quality in the manner set forth in the Decree.
- Information about the procedures in case of default by the seller, operator entity or issuer, employer or by the original debtor of the payroll credit.
- Specify that the purchase of credit portfolio in payroll credit operations is not related to a guaranteed yield, likewise, that the resources delivered lack a guarantee of the deposit insurance or of credit during the operation.
- Information regarding the fact that the seller or administrator of the payroll credit is not an entity subject to the surveillance of the Superintendence.

- At the time of initiating the transaction, the seller shall deliver a copy of the following documents: (1) an instrument evidencing the payroll credit being purchased, (2) the credit request of the debtor, (3) the credit review performed by whoever granted the debtor's payroll credit and (4) the debtor's credit history issued by authorized credit bureau entities obtained by the grantor of the loan.

II. Risk management regarding the administration of sold payroll credits

The administration shall be carried out by an entity whose purpose and legal regime allows it to perform such activity, and shall be registered before the RUNEOL. Likewise, the regulation provides that the administration contract shall regulate the following, among others:

- The amounts paid in advance, whether in part or in whole, shall be transferred by the administrator to the purchaser within the respective term.

- The obligation to issuing account statements addressed to the purchaser informing the status of the payroll credits and any new information regarding these.

- Creating controls to prevent the sale of the same payroll credit to different purchasers.

Furthermore, the regulation sets forth that the management of payroll credits may be exercised by a third party, for which the parties involved in the transaction shall be joint and severally liable, or the purchaser may manage and collect the credits acquired pursuant to the guidelines set forth therein.

III. Disclosure of substitution of payroll credits

Disclose when the seller, who also manages the payroll credit has committed to replace the payroll credit sold due to default or any other event, previously agreed. The seller must inform the purchaser about the substitution or replacement, which implies delivering the relevant information regarding the new payroll credit (plan of payments, amount, documentation, among others.)

IV. Operational risk management of the credit portfolio sale and attention to purchasers

Those entities dedicated to credit portfolio sales accrued in payroll credit operations in favor of individuals or entities not registered with RUNEOL shall implement the controls set forth under the Decree for each operation. The controls are mainly: (1) performing at least 4 annual audits through a third party, (2) provide the purchasers access to the payroll reports corresponding to the direct discount and (3) making an office available to the purchaser to inform the status of settled payroll credits, and any complaints and claims these may have.

V. Disclosure of the financial, statements and quality and solvency indicators of the seller

Entities who sell payroll credits or who act as managers of these shall have a web site to which they shall upload the financial information and income statements prepared by the entity and which shall be prepared applying the indicators set forth under the Decree.

VI. Annotation with the Sole National Registry of Operators of Payroll Credits or Direct Discount (RUNEOL)

The Operators of Payroll Credits shall request the Chambers of Commerce the respective registrations, updates, renewals or voluntary cancellations through the means provided for such purpose by the corresponding Chamber of Commerce.

On the other hand, the regulation provides that the registration before the RUNEOL shall be valid for one year. Therefore, the renewal of such registration shall be made each year between January 1st and March 31st.

If the corresponding renewal is not made, “its effects shall cease, as well as the joint liability of the employer or paying entity regarding the payment or discount directed to the operator, with regard to the disbursements made subsequent to the non-renewal.”

Finally, it is worthwhile mentioning that Superintendence of Companies issued the Circular Externa 100-000008 of 2016, amending the Circular Básica Jurídica, with the aim of providing the required instructions for compliance with the content of the Decree.

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Derivative Financial Instruments: recent announcements from the Central Bank (Banco de la República)

Last semester the Central Bank ("BR", for its Spanish acronym: Banco de la República) made an announcement regarding derivative financial instrument's regulations more than six fold. This summary includes the main conclusions reached by this entity. Sometimes the BR has modified in whole its previous doctrine, and in other instances it has applied the derivatives' exchange regime in a restrictive but consistent manner.

The BR, through constitutional mandate, is the monetary, credit and exchange authority in Colombia. The BR, through its Board of Directors, is empowered to "regulate the currency, foreign exchange and credit." Thus, it is responsible for issuing the regulation enforceable for derivative financial operations, such as exchange operations, as required by law.

1. **Exchange market and commodities derivatives brokers: Opinion JDS 13647 dated June 28, 2016**

Bank establishments, as foreign exchange intermediaries (FEI) may not enter into derivative operations over commodities with foreign counterparties; they may solely trade this type of derivatives with local counterparties.

This time, a citizen filed a consultation regarding a contradiction between article 40 of External Resolution n. 8 of 2000 of the Board of Directors of the BR ("Resolution 8"), and article 78 of Law 1450 / 2011 (National Development Plan 2010-2014.) Article 40 of Resolution 8 sets forth that Colombian residents, other than the FEI, may enter into derivative transactions over commodities prices with certain foreign agents qualified as professional agents. On the other hand, article 78 of the National Development Plan 2010-2014 sets forth that bank establishments are authorized for investing in the commodities market by trading derivatives regarding agricultural and livestock goods and products, among other commodities.

The citizen questioned the regulatory restriction of Resolution 8, taking into account that the National Development Plan law does not include any restrictions or distinctions applicable to banking establishments. The BR, determined that banks, as FEIs, are only authorized for carrying out the exchange operations determined by the Board of Directors of such entity under Resolution 8, and that such operations are limited to commodity derivatives with resident counterparties in the local market.

2. **Contracts for Difference: Opinion JDS-19704 dated September 12, 2016**


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Products referred to as “CFD” correspond to the financial derivatives definition set forth under the exchange regulations, namely the CFDs in fact are financial derivatives. This is a novel concept that modifies the previous viewpoint of the BR in which, since up to September 12, 2016, such entity deemed the CFDs as margin account instruments and not financial derivatives.

In Colombia CFDs are atypical contracts, which are not regulated by contractual provisions, thus the BR has interpreted their legal nature in two different documents:

a. Opinion JDS-03409 dated February 2011, in which the BR defined them as a type of margin account, rejecting the thesis that they are related to derivative financial instruments; and

b. Opinion JDS-19704 dated September 12, 2016, wherein the BR defines CFDs as a type of financial derivatives.

Pursuant to the consultation files with the BR in 2016, the CFDs “are contracts where it is agreed that the purchaser shall deliver the seller the difference between the price of an asset (for instance: shares or stock market indexes) at the time of entering in to the contract and its price at its closing time; they are settled in cash; there is no physical delivery nor do they generate ownership transfer of the underlying asset [and] they are executed through a margin basis, implying the delivery of cash to the agent on a regular basis for continuous negotiation.”

The BR analyzed the financial derivatives regulatory definition, both regarding exchange and financial regulations in charge of the Financial Superintendence of Colombia, reaching the conclusion that the description described of the CFD falls under the financial derivatives definition.

The immediate consequence of this new characterization of CFDs as derivatives, is that all the existing regulations on derivatives, including the restrictions on the type of fulfillment and ratings of the counterparties applies now to CFDs transactions.

3. Registration of derivatives operations for purposes of Close-out-netting: JDS-24326 dated November 10, 2016

“Derivatives transactions may not be reported in a consolidated manner as an operation of purchase or sale in whole; their reporting shall be segregated.”

Regarding this opinion, the BR made a pronouncement about the correct manner for the registration of derivatives operations for purposes of the early liquidation procedure (close-out-netting) with Colombian counterparties, under **article 74 of Law 1328 / 2009.**

The BR established that derivatives operations may not be reported in a consolidated manner as a sale operation in whole and a purchase operation in whole; on the contrary, the report shall segregate each operation separately, with the purpose of being able to trace each transaction, evidencing in an accurate manner each modification, and for the protection of the close-out-netting benefit.

This is a transcendental opinion, since the BR reiterates the possibility of registering commodities derivatives operations under the provisions of the External Regulatory Circular Letter DODM-144, with the purpose of obtaining the close-out-netting benefit.

4. **Indebtedness of FEIs in foreign currency with non-residents: Opinion JDS-25779 dated December 1, 2016**

A FEI obtaining funding in foreign currency from a non-resident for carrying out active credit operations in legal currency, shall obtain exchange rate hedging through a derivative as from the date of the disbursement and until the maturity of the financing.

The citizen inquired the BR about the FEIs' obligation of hedging the exchange rate risk of its foreign indebtedness operations in foreign currency, for the development of active local operations in Pesos, through the trading of derivatives or through a Colombian investment abroad. The question was if the hedging derivative should be in force as from the date of disbursement of the indebtedness in foreign currency, or otherwise it would be in force as from the disbursement of the active operations in Pesos traded locally by the FEI. The BR was clear reiterating that, pursuant to the current Exchange regime, the derivatives hedging operation shall be in force as from the foreign indebtedness disbursement. This is the only way for the FEI to hedge the exchange rate risk of the funding, and thus for complying with its regulatory obligation.

5. **Derivatives operations compliance between FEIs: Opinion JDS-25777 dated December 1, 2016**

Compliance of derivative operations between FEIs shall occur subject to non deliverable forward (NDF), always provided that both FEIs act in accordance with their main corporate purpose. Otherwise, if one FEI acts pursuant to its secondary corporate purpose, compliance may be effective Deliverable Forward (DF) if any of the conditions foreseen under the exchange regulations is satisfied for this type of compliance.

The citizen inquired the BR about the difference among the following operations: (i) those carried out by the FEIs as such, and (ii) those carried out in their capacity as Colombian residents. The BR reiterated its viewpoint regarding such operations, establishing that "a FEI acts in its capacity as resident when it develops acts pursuant to its secondary corporate purpose, with the purpose of exercising the rights and complying with legal and conventional obligations deriving from its corporate activity and existence." Hence the FEI acts in its capacity as FEI when it develops activities inherent to its main corporate purpose.

Consequently, when FEIs act in their capacity as FEIs in derivative operations among themselves, compliance shall be financial (NDF), while if one of them acts as resident (within the development of its secondary corporate purpose), compliance may be effective (DF), subject to the existence of the conditions set forth under section 4.1.2. of Regulatory External Circular Letter DODM-144.

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The national immigration authority “Migración Colombia” updated the requirements for immigration matters carried out with the entity

Last December 22nd the Special Administrative Unit Migración Colombia (Migración Colombia) issued Resolution 2367 / 2016 (the Resolution), updating several immigration procedures such as temporary stay permits (PTP) requests, registration of foreign minors, foreigner’s ID card requests, certificate of immigration movements, and safe-conduct certificate requests.

I. Temporary Stay Permits (PTP)

Pursuant to the new regulations, in order to apply for a PTP, the foreigner should complete the Sole Processes Form (the Form), make the payment corresponding to processing fees and attach in PDF format the following information:

a. Copy of the passport information page or identification document used to enter the country; and

b. The documents attesting to the application, which vary in accordance with the PTP to be processed, as follows:

- PTP-1: evidence of being beneficiary of the international convention or treaty or invitation from any Colombian public entity.
- PTP-2: document issued by an educational center or of formation, “in a non regular academic program not exceeding the maximum permanence allowed to the visitor”, evidencing the participation, attendance, convention, practice or training.
- PTP-3: evidence of the medical center authorized/registered indicating that the applicant shall submit to a medical treatment.
- PTP-4: the requirement by a judicial or administrative authority requesting the interested party to clarify its personal situation.
- PTP-5: travel ticket attesting to the departure from the country or the order authorizing “the temporary import of touristic transportation means” issued by the National Directorate of Taxes and Customs (DIAN) along with the evidence of having the resources for guaranteeing subsistence and the development of the activities declared.
- PTP-6: document accrediting the participation or attendance to an academic, scientific, artistic, cultural or sports events; job interviews, entrepreneurial training, commercial processes or press coverage, without any labor relationship whatsoever.
- PTP-9: document evidencing that “the conditions of urgency or humanitarian necessity persist.”

The Resolution established the possibility to apply for a PTP online under certain circumstances.

II. Foreigners Registration

Foreigners under 7 shall comply with the registration process outlined in Resolution 2367 / 2016, by presenting the following information:

- Process the Form and attach a copy of the passport information page in PDF format.
- In person attendance to an assistance center of Migración Colombia.
- Present the original passport and a valid visa.

The registration is free of charge, and foreigners over the age of seven shall also apply for an Identity Card (Cédula de Extranjería) during the registration process.

III. Immigration Identity Card (Cédula de Extranjería)

The following requirements shall be complied with for requesting such document:

- Processing the Form and attaching a copy of the passport information page in PDF format.
- In person attendance to an assistance center of Migración Colombia.
- Pay the processing fees.

Likewise, foreigners underage between 7 and 17 years old applying for the Identity Card as holders of the beneficiary visa shall attend to an assistance center of Migracion Colombia accompanied by their father,mother or legal representative.

IV. Certification of immigration movements

Pursuant to the new regulations, Colombians may apply for the certificate of immigration movements online, while foreigners should still apply for this document in person and in compliance with the requirements outlined in Resolution 2367 / 2016.

Likewise, the regulation grants a 10-day period to request corrections in the document without having to incur in additional payments.

V. Safe Conducts

Foreigners applying for this document shall comply with the following requirements:

a. Processing the Form and attaching a copy of the passport information page and the documents attesting to the application in PDF format.

b. In person attendance to an assistance center of Migración Colombia.

c. Present the original passport or travel document along with a valid immigration status.

d. Pay the processing fees.

It also establishes that the requests for duplicates of safe-conduct certificates due to damage or loss will have no cost.

Likewise, under new regulations the application for duplicates of safe conducts is free of charge on the events set forth in the Resolution, including, among others: (i) due to cancellation of the Visa, PIP and PTP; (ii) for application of duplicates in case of deterioration or loss; or (iii) by request of an administrative authority.

Resolution 2367 / 2016 became enforceable as from December 22, 2016 and repealed Resolution 1241 / 2015.

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The National Government established an increase for the minimum wage for year 2017

Last December, the Ministry of Labor (Mintrabajo) issued **Decree 2209 of 2016,** which established the increase for the minimum monthly wage, since the Permanent Negotiation Commission for Labor and Wages Policies integrated by the representatives of the Government, business associations and labor unions, did not reach an agreement. Consequently, this regulation provides an increase of 7% for year 2017; this translates into an increase of COP $48.261 for which the minimum legal monthly wage (MLMW) in force for this annuity will be COP $737,717.

This amount is defined taking into account certain variables such as the Consumer Price Index (CPI), the inflation target, the increase of the Gross Domestic Product (GDP), and the economic productivity, amongst other variables.

It is worthwhile recalling that several labor obligations and restrictions are expressed in MLMW. Such is the case of the integral minimum wage, which for 2017 may be agreed solely for wages equal to or greater than COP $9,590,321 (equal or exceeding 13 MLMWs).

Furthermore, please take into account that no employee may earn less than the MLMW, while rendering services in the maximum ordinary working hours, and the same, with the integral minimum wage, which is also a minimum that shall be adjusted every year.

In addition, Mintrabajo issued Decree 2210 of 2016, which established the transportation aid for 2017, for an amount of COP$83,140. This legal fringe benefit is recognized to those employees earning up to 2 MLMW. It is also worthwhile to recall that the Transportation Aid is taken in consideration as part of salary base for liquidating the legal service bonus and the unemployment saving aid according to law, in those cases wherein the employee is entitled to its recognition.

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Term extension for registering the databases with the National Database Registry (NDBR)

Article 25 of Statutory Law 1581 of 2012 provides that data controllers are obliged to register databases with the National Data Base Registry ("NDBR"). In this sense, the Ministry of Commerce, Industry and Tourism ("MinCommerce") issued **Decree 1074 of 2015,** determining that data controllers should register the databases in the NDBR within the year following the creation of the Registry by the competent authority, in this case, the Superintendence of Industry and Commerce ("SIC").

However, since compliance of the registration represented certain inconveniences for the companies obliged, the registration deadline, initially established for November 8, 2016 was extended by **Decree 1759 of 2016** and the term for registering the databases with the NDBR was modified with the following timeline:

1. Data Controllers, whether private legal entities or mixed economy entities (public and private) registered in local chambers of commerce shall have until June 30, 2017 to register.

2. In case of natural people, public entities different than mixed economy corporations and private legal entities who are not registered in a local chamber of commerce, shall have until June 30, 2018 to register.

3. Databases created after the mentioned datelines, must be registered within the two following months after their creation.

Obligations for natural people, public entities difter from mixed economy corporations and private legal entities which are not registered in the chambers of commerce:

External **Circular Letter 001 of 2016** of the SIC ("Circular Letter 001"), modified Chapter Two of Title V of the Sole Circular Letter 44511 of 2001 of the SIC, regarding the instructions for data controllers.

Pursuant to Circular Letter 001 natural people, public entities different than mixed economy corporations and private legal entities not registered with the chambers of commerce and responsible for data processing, shall comply with the new timeline established for the registration of the databases in the NDBR, pursuant to what is foreseen under Decree 1759 of 2016. Furthermore, reports established under section 2.7 of Circular Letter 001 shall be submitted according to the External Circular Letter's guidelines.

Likewise, whoever is obliged to register the databases with the NDBR is obliged to comply with the instructions given by the External Circular Letter, such as:

I. Data controllers must register the following information with the NDBR:

   a. Information stored in data bases: such as classification of personal data collected therein along with the respective groups consisting of categories and subcategories.

   b. Safety measures for information: measures applied by the data controller for guaranteeing database safety.

   c. Data origin: it must be stated if the same was collected directly from the data subject or provided by third parties, informing if the corresponding authorization was obtained or if a specific cause of exoneration for its collection can be applied.

   d. Data international transfer: it must be identified who is the designated data controller that will receive personal data, identifying him, his country of location and if a declaration of conformity was issued by the SIC's Delegate Office for Personal Data Protection.

   e. Data Transmission: the data controller's identification must be informed, as well as the country wherein the same is located and the existing Data Transfer Contract, pursuant to Decree 1074 of 2015 or, otherwise, the declaration of conformity issued by the SIC's Delegate Office for Personal Data Protection.

   f. Data Assignment: the assignee is responsible for processing the database assigned, upon perfecting the assignment, for which the assignee shall be identified.

   g. Update report: any claims filed by the data subjects regarding the NDBR, as well as any security/safety breach, shall be reported as an update according to the guidelines foreseen under the External Circular Letter.

II. Information Update:

According to Circular Letter 001 **the information shall be updated:**

   a. Within the first 10 business days of every month, whenever any material changes occur regarding the information registered, such as changes related the database purpose, the data processor, the service channels for the data subject, among others.

   b. Every year, between January 2 and March 31;

   c. Within the first 15 business days during the months of February and August every year, data controllers shall update the information regarding any claims filed by the data subjects.

Finally, External Circular Letter 001 of 2016, informed that next year the

NDBR shall be available for data controllers who have a domicile different from Colombia to register their databases, prior disclosure of the relevant instructions.

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