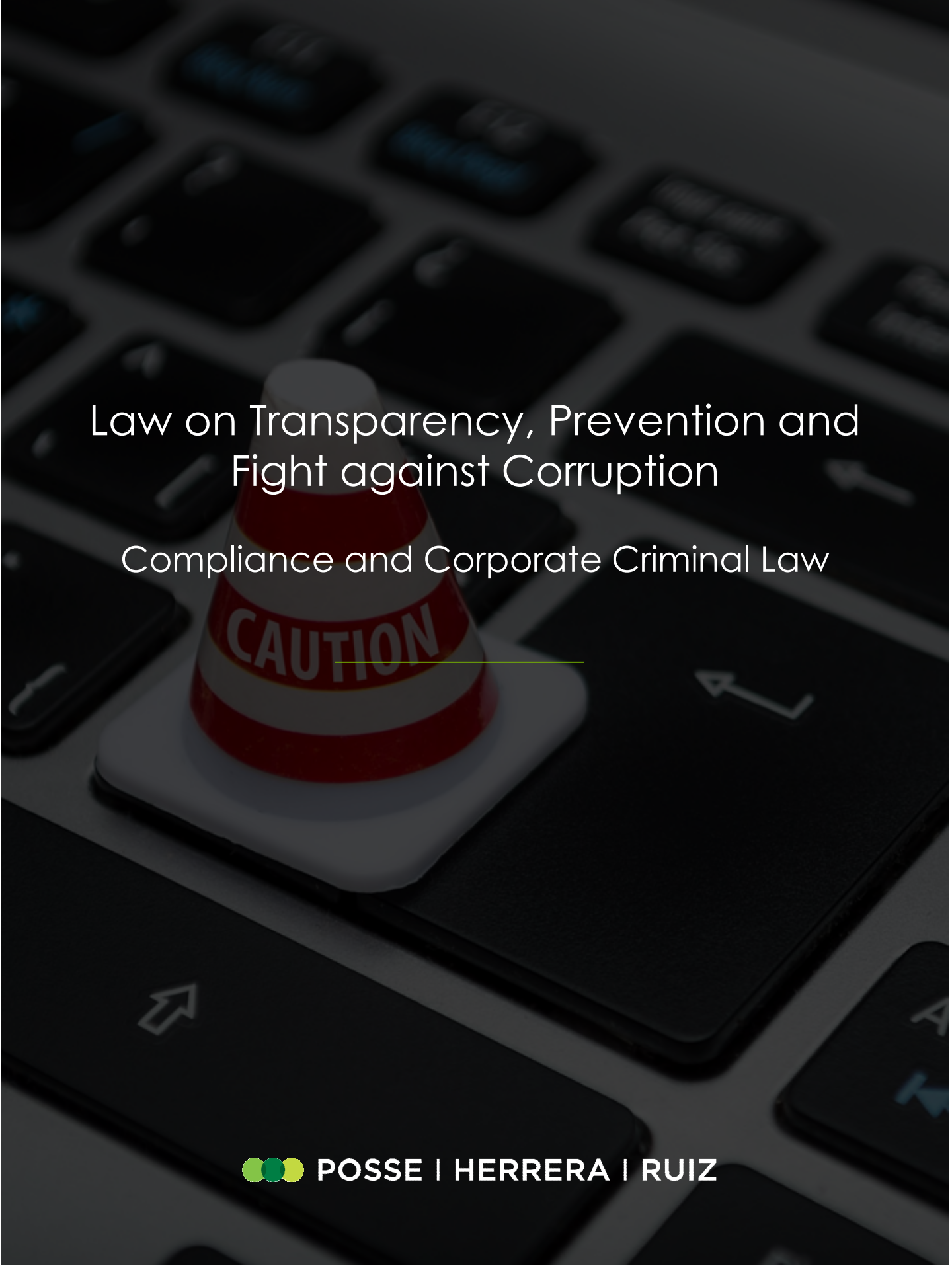

Law on Transparency, Prevention and Fight against Corruption

Compliance and Corporate Criminal Law

POSSE | HERRERA | RUIZ

Law on Transparency, Prevention and Fight against Corruption

As a result of Law 2195, issued on January 18, 2022, the Colombian Government carried out a reform aimed at fighting corruption, including changes in the areas of compliance, administration of assets derived from criminal activities, Government contracting, competition, liability of public officers and reparation of damages to the Government for acts of corruption.

In the area of compliance and corporate criminal law, the most significant changes are related to (i) the expansion of the administrative liability regime for legal entities and branches of foreign companies for criminal activities, (ii) due diligence procedures regarding knowledge of counterparties, (iii) the reform of the administrative liability regime for legal entities and branches of foreign companies for acts of transnational bribery, (iv) the strengthening of compliance programs in the private and public sector, and (v) the administration of assets derived from criminal activities.

EXTENSION OF THE ADMINISTRATIVE LIABILITY REGIME FOR LEGAL ENTITIES AND BRANCHES OF FOREIGN COMPANIES FOR CRIMINAL ACTIVIES

Before the issuance of Law 2195 of 2022, the administrative liability regime of legal entities and branches of foreign companies for criminal activities was the exclusive competence of the *Superintendencia de Sociedades* (Superintendence of Companies); it only applied with respect to the crime of bribery; it only applied to the conducts made by legal representatives or administrators; and it implied three sanctions: a fine of up to 200,000 SMLMV, publication of the sanction in a widely media for up to one year, and prohibition to receive incentives or subsidies from the Government for 5 years.

As a result of the new law, this administrative sanctioning regime has also been extended to legal entities (companies) that form **consortiums** or **temporary unions**, **industrial and commercial companies of the Government** and **non-profit entities**.

Likewise, the catalog of crimes for which the sanctions of this administrative sanctioning regime would be applicable was expanded: from bribery to all crimes against public administration (public corruption), all crimes against the environment, all crimes against the economic and social order (among others, smuggling, customs fraud or money laundering), financing of terrorism, crimes enshrined in the Anti-Corruption Statute or in general any crime related to public assets were introduced. At this point it is important to highlight that the new law activates administrative sanctions not only if there is an enforceable conviction for these crimes, but also the recognition of a principle of opportunity (also know as deferred prosecution agreements).

There was also an expansion of the persons who, upon committing the conduct, can trigger the sanctioning process and its sanctions. Previously, this could only happen if the legal representative or an administrator committed the act of corruption; now, this has been expanded to include **officials** as well, which can be interpreted as any employee.

The sanctions were also expanded: the **disqualification** to contract with the Government on a permanent basis was added; the sanction of **removal** of administrators, officers or employees was added; and the term of prohibition to receive subsidies or incentives from the Government was extended from **5 to 10 years**.

In relation to competence, the new law broadened this spectrum by granting competence to investigate and administratively sanction these criminal activities to all the oversight, inspection and control entities of the Government. Thus, the Superintendence of Corporations will no longer be the only entity competent to hear these matters. This means that this sanctioning regime will apply to all the supervised entities of all the oversight, inspection and control entities of the Government (i.e., all the superintendencies, territorial entities, among others).

Law 2195 modified the requirements for administrative sanctions for criminal activities, which are now as follows:

1. The existence of **an enforceable criminal sentence** or **opportunity principle** against any of the administrators (legal representative or member of the board of directors) or officers of the legal entity or branch. In this point, the main modification compared to the previous regulation consists in extending the liability of the legal entity to the acts committed by its officers.

2. That the conviction or the principle of opportunity is related to the **direct** or **indirect** (i.e., by an intermediary, through a subordinate or a third party) commission of crimes against the public administration (**public corruption**), against the environment, the economic and social order (among others, **smuggling, customs fraud or money laundering**), **financing of terrorism**, crimes established in the Anti-Corruption Statute or in general any crime related to the **public patrimony**. As mentioned above, the previous regime only imposes this type of liability for the commission of the crime of bribery.

3. That the legal person or branch has **sought to benefit** or has **benefited** from the commission of the offense. Under the previous regime, there was only interest if the legal person had effectively benefited from the commission of the offense.

4. That the legal person or branch **tolerated** or **consented** to the commission of the offense, taking into account the application of the respective **controls.**

5. That the legal person or branch is **domiciled** in **Colombia**.

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The administrative sanctions will consist of:

1. **Fine** of up to **200,000 SMLMV** (Colombian minimum wages), similar to the sanction in force under the previous regime, but now the greater value between the benefit obtained or intended will be added to such amount.

2. **Permanent disqualification** from contracting with the Government.

3. **Publication** of the sanction in a **communication media** of national circulation up to **five times**, and **publication** of the sanction in the **web page** of the sanctioned party **between six months and one year.**

4. **Prohibition** to receive **incentives** or **subsidies** from the Government for **10 years** (previously 5 years).

5. **Removal** of **managers**, **officers** or **employees** convicted or benefited by the principle of opportunity.

6. **Removal** of **administrators**, **officers** or **employees** who have **tolerated** or **consented** to the crimes.

In order to give publicity to the sanctions imposed, they will be registered in the corresponding public registry of the Chamber of Commerce.

Another innovation of the law is that it broadens the criteria for the graduation of sanctions. Previously there were three graduation criteria related to (i) the existence and effectiveness of transparency and business ethics programs; (ii) the adequate performance of a due diligence process in the case of companies or branches of foreign companies domiciled in Colombia acquired by a third party; (iii) and the delivery of evidence by the legal entity in relation to the crimes committed by its administrators. The new law introduces six aggravating graduation criteria and seven mitigating graduation criteria for sanctions.

The aggravating criteria includes the damage done, the economic benefit obtained, recidivism, obstruction of justice, among others. Regarding the mitigating criteria, the most important are the acceptance of the charges, the compliance with precautionary measures, the delivery of evidence, the performance of due diligence, having reported the facts, implementing programs to prevent these crimes or refraining from executing legal transactions or exercising rights arising from acts of corruption.

DUE DILIGENCE PROCEDURES IN KNOWLEDGE OF COUNTERPARTIES

The new law unifies criteria with respect to Government entities, natural persons, legal persons or structures without legal or similar status that are obliged to implement a money laundering prevention system or to submit information to the single registry of beneficial owners with respect to the due knowledge of their counterparties. In this regard, the law requires them to:

1. **Adequately identify** the persons with whom they enter into legal business or Government contracts.

2. **Identify the beneficial owners** of these counterparties **and take reasonable measures to verify the information reported**.

3. **Request and obtain** information on the **intended purpose** of the legal relationship.

4. **Perform due diligence** on an **ongoing basis**.

5. **Maintain the information** received **up to date**.

6. **Retain** the information for a term of **five years** from January 1st following the year in which the legal relationship ended.

This unification of criteria has a relevant impact on the current money laundering prevention systems implemented by obliged companies (SAGRILAFT, SARLAFT, SIPLA, SIPLAFT, etc.), since this new stricter standard takes precedence over the standards issued by the superintendencies or supervisory entities. Thus, it is expected that in the coming months many superintendencies and supervisory entities will modify their circulars or resolutions on this matter to adjust to these legal provisions, which will imply the reform of the systems implemented by the obliged companies.

REFORM TO THE REGIME OF ADMINISTRATIVE LIABILITY OF LEGAL ENTITIES OR BRANCHES OF FOREIGN COMPANY FOR ACTS OF TRANSNATIONAL BRIBERY.

Since Law 1778 of 2016, in Colombia the Superintendence of Companies has administratively sanctioned legal entities or branches of foreign company supervised by it that incur in transnational bribery conducts. The new law brings the following novelties in this matter:

1. If a parent company commits the conduct of transnational bribery in favor of a subordinate, without the subordinate having participation in the conduct, then the subordinate **will also be sanctioned**. This sanction will also take place when not the parent company, but another legal person of the same corporate group, or that is directly or indirectly controlled by the parent company, commits the conduct in favor of the subordinate.

2. To the fine of 200,000 SMLMV that may be imposed by the Superintendence of Companies for this conduct**, the greater value** between the **benefit obtained** or **intended** will be **added.**

3. The **benefits for collaboration** now have **stricter requirements**, such as that the Superintendence of Corporations has not **previously known** the information provided by the prosecuted entity or that the prosecuted entity has taken **effective remediation measures.**

STRENGTHENING TRANSPARENCY AND ETHICS PROGRAMS IN THE PRIVATE AND PUBLIC SECTOR.

Since 2016, the Superintendency of Companies has promoted the adoption of **transparency and business ethics programs** ("PTEE" by its Spanish initials) with respect to its supervised companies. This trend has now been **extended** to **all legal entities subject to inspection, surveillance or control by any superintendency or authority with these functions.**

The regulation of this matter by each of the superintendencies or inspection, surveillance or control authorities is still pending. However, it can already be foreseen that this legal reform will have a profound impact on many companies in the country not supervised by the Superintendence of Companies, since as has been happening for some years in the real sector of the economy, now companies in other economic sectors will also have to make economic and human investments in the design and implementation of a PTEE, the appointment of compliance officers and the adoption of rules and processes aimed at preventing corruption risks.

In relation to the public sector, the new law obliges each national, departmental and municipal entity, regardless of its contracting regime, to implement **transparency and public ethics programs** ("PTEP" by its Spanish initials) in order to promote a culture of legality and prevent corruption risks in the public sector. These PTEPs must implement due diligence measures, reports to the UIAF, whistleblower channels, and in general transparency and risk management strategies.

MANAGEMENT OF ASSETS DERIVED FROM CRIMINAL ACTIVITIES

For several years now, Colombia has been strengthening the fight against criminal organizations by attacking the assets or economic income derived from crime. The clearest example of this has been the sophisticated technification of the asset forfeiture action and the work carried out by the Fund for Rehabilitation, Social Investment and Fight against Organized Crime (FRISCO by its Spanish initials), which is administered by the Special Assets Company (SAE by its Spanish initials).

In the context of this judicial action, there are various forms of administration of these assets, such as provisional destination, lease, barter, among many others. One of the most prominent forms of asset administration is early disposal, considered an efficient and effective way to administer assets seized from mafias and to obtain economic resources for the Government with their disposal.

The new law in question has transferred the experience gained in the context of the forfeiture of ownership action on the administration of assets to the criminal process, inasmuch as the same figures have been created for the administration of assets derived from crimes, especially the **early alienation**. Thus, now the Special Fund for the Administration of Assets of the Attorney General's Office will have much more efficient tools to administer assets for **confiscation purposes.**

POSSE HERRERA RUIZ

For more information, contact:

Oscar Tutasaura:
oscar.tutasaura@phrlegal.com

BOGOTÁ
Telephone: +57 (1) 325 7300
Cra 7 No. 71-52, Torre A 5th floor.
Código Postal 110231

MEDELLÍN
Telephone: +57 (4) 4488435
Cra 43A # 1 – 50 Torre 2
Ofifice 864 8th Floor, San Fernando Plaza

BARRANQUILLA
Telephone: +57 (5) 3112140
Cra 53 # 82 – 86
4to floor.