/Carey

December 2018

LAW NR. 21,121
AMENDS RULES RELATING TO CORRUPTION AND OTHER CRIMES, INCORPORATES NEW CRIMINAL CONDUCTS, AND EXPANDS CRIMINAL LIABILITY OF LEGAL ENTITIES

Law No. 21,121 (the "Law"), which came into force on November 20, 2018, amends the Criminal Code, Law No. 20,393 on Criminal Liability of Legal Entities, and Law No. 19,913 on Money Laundering, in connection with various criminal conducts relating to corruption and conflicts of interest.

The following is a summary of the main aspects of the Law:

1. Domestic Passive and Active Bribery. The Law incorporates the following amendments to the regulation of domestic passive and active bribery:

1.1. What Constitutes a Bribe: Prior to the Law, criminal liability for domestic bribery required that the actual bribe (i.e., the benefit or advantage requested, accepted, offered or delivered) be of an economic or financial nature. The Law has expanded this to include bribes consisting of any kind of advantage or benefit, not only financial or economic.

1.2. Bribery without corrupt intent or quid pro quo: Prior to the Law, the only case where a crime of domestic bribery could be established without proving corrupt intent or quid pro quo was where the bribe requested, accepted, offered or delivered was a greater fee than the one applicable to the position of the relevant public official. This made the occurrence of this crime very unlikely because most public officials—particularly those of higher ranks, such as a ministers, undersecretaries, members of Congress, etc.—are not entitled to receive payments or fees from private parties by reason of their official position. The Law amends this and provides that this criminal offense will be committed by requesting, accepting, offering or delivering any kind of benefit to which the public official is not entitled. Thus, any unlawful advantage or benefit offered to or

This news alert is provided by Carey y Cía. Ltda. for educational and informational purposes only and is not intended and should not be construed as legal advice.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

accepted by a public official may constitute bribery, without the need to prove a corrupt intent or quid pro quo.

2. Bribery of Foreign Public Officials. The Law includes the following amendments to the regulation of bribery of foreign public officials:

2.1. Prior to the Law, this offense only could occur if the relevant unlawful business or advantage sought by the bribe was within the scope of "any international transactions". The Law extends this scope to any type of economic activity carried out abroad.

2.2. The Law provides that this criminal offense is also perpetrated when the bribe is intended to achieve that the foreign public official performs a function or duty that properly belongs to his/her office—e.g., facilitating payments—an element that was not expressly provided prior to the Law.

3. Unlawful Negotiation. Prior to the Law, this offense penalized public officials, judicial experts, arbitrators, liquidators, guardians and curators who acquired a personal or family interest, whether directly or indirectly, in any matters or business in which he/she intervened due to his/her position. The Law substantially amends the regulation of this conduct by: (i) listing certain specific actions that were previously not expressly considered; (ii) incorporating new types of perpetrators, such as insolvency trustees, company liquidators, asset managers or curators of legally unable persons, company board members and managers; (iii) increasing prison time penalties, which are now up to five years (up from three years and one day); and (iv) increasing disgorgement penalties, which currently range from 50 to 100 percent of the value of the undue interest taken in the business (up from ten to fifty percent).

4. New Criminal Offense: Commercial Bribery. This new criminal offense penalizes (i) employees or agents requesting or receiving an economic or other advantage in order to favor or for having favored a certain party over another party for the execution of a contract; and (ii) anyone offering or agreeing to provide such advantage to the relevant employee or agent, with that same intent.

5. New Criminal Offense: Disloyal Management: This new criminal offense penalizes any person's mismanagement of third party assets, resulting in a loss, when performed through or with an abuse of his/her authorities or other actions or omissions that are manifestly contrary to the asset owner's interests. Aggravated penalties for this

new crime are provided for managers of assets owned by (i) legally unable persons (e.g., curator of a minor or mentally disabled person), and (ii) listed companies and certain regulated corporations.

6. Increased Penalties, Fines and Statute of Limitations.

6.1. Increased Prison Time and Statute of Limitations. The Law increases prison time for a number of criminal offenses, including bribery and certain fraud crimes. Conducts that were previously assigned simple crime penalties—e.g., bribery of foreign public officials—now are subject to felony prison times, starting at five years and one day. As a consequence of this new minimum prison term, the statute of limitations for these conducts has increased from five to ten years, and convicted persons must serve actual prison time as opposed to solely alternative penalties.

6.2. Increased Fines. The Law increases fines that may be applicable to certain crimes, including bribery and other crimes committed by public officials—e.g., increased disgorgement penalty for unlawful negotiation, as described in section 3(iv) above.

7. New Penalties. The Law incorporates to the Criminal Code: (i) for conducts constituting felonies, the penalties of absolute perpetual and absolute temporary disqualification; and (ii) for conducts constituting simple crimes, the penalty of absolute temporary disqualification. In both cases, this penalty entails the inability to hold positions or jobs, or practice trades or professions, in companies that contract with governmental entities, in State-owned companies, in companies or associations where the State has majority ownership or participation, and in companies that participate in government concessions or are otherwise public utilities.

8.New Common Rules for Offences Committed by Public Officials: The Law incorporates certain new common regulations for crimes committed by public officials, such as: (i) a penalty aggravation for crimes committed by certain high-ranking officials; (ii) the count interruption of the statute of limitations applicable to a crime for as long as the relevant public official holds the relevant office, to avoid impunity due to the passing of time; (iii) special aggravating circumstance if the public official is a member of a group or organization for the commission of the relevant crime; (iv) a two-degree penalty reduction that the court may grant for effective cooperation.

9. Certain Gifts not Constituting Bribes. The Law provides that cases where gifts or donations of an official nature or motivated by protocol, or of minor economic value and customarily accepted as expressions of courtesy and good manners, shall not rise up to active or passive bribery.

10. Criminal Liability of Legal Entities. The Law provides the following main amendments to the regulation of criminal liability of legal entities:

10.1. New Predicate Offenses. The Law adds the following criminal offenses to the list of conducts that may result in criminal liability of legal entities: (i) Unlawful Negotiation (see section 3 above); (ii) Commercial Bribery (see section 4 above); (iii) Disloyal Management (see section 5 above), and (iv) Embezzlement (Art. 470 No. 1 of the Criminal Code).

10.2. Increased Penalties. The Law: (i) provides that the penalty of dissolution of the legal entity may be applied to all crimes potentially resulting in a legal entity's criminal liability, if the relevant legal entity has previously committed an offense of the same kind; (ii) increases applicable fines, including a raise of maximum fines from approximately USD 1.4 million (20,000 UTMs) to approximately USD 21.4 million (300,000 UTMs); and (iii) incorporates the penalties of (x) confiscation of funds that are equivalent to the assets that participated in the criminal conduct, and (y) disgorgement.

11. Increased Money Laundering Liability. The Law expands the predicate offenses that may result in a crime of money laundering, by incorporating disloyal management (see section 5 above) and embezzlement.

You can download Law 21.121 at https://www.Leychile.cl/Navegar?idNorma=1125600&buscar=21121

Authors: Marcos Ríos