

COLOMBIA

# Investment rules of the world



## About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# Colombia

*Last modified 20 October 2017*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

Under Colombian law there are no restrictions on offering and selling debt securities but there are some requirements, including the following, that supervised financial institutions shall comply with.

- Debt securities must be registered in the National Registry for Securities and Issuers (*Registro Nacional de Valores y Emisores* (RNVE)).
- The Superintendency of Finance shall approve the specific regulations (ie rules and offering memorandum) for the issuance of securities by means of a public offer.
- For the issuance of notes convertible into shares or notes with the option for the subscription of shares, the issuing company shall have its shares listed on the Colombian Stock Exchange (CSE), in which its notes also have to be listed. Unsecured notes issued by the public offer shall also be listed.
- In case the issuance of debt securities is going to be made exclusively among the shareholders or between the creditors in order to capitalize the obligations of the issuing company, the securities do not need to be listed on the CSE.
- The value of the credit represented by the notes should not be less than 2,000 monthly legal minimum wages (approximately US\$ 491,156 using an exchange rate of COP\$ 3,004).
- The bond's maturity period shall not be less than one year.

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#### *What are common issuing methods and types of debt securities?*

Many different types of debt securities are offered in Colombia. Some common types are:

- **unsecured notes:** they are not secured by a specific asset;
- **notes convertible into shares:** this type of note can be converted into a predetermined amount of the company's equity;
- **risk notes:** these instruments are issued by companies performing its corporate purpose under a restructuring agreement and represent the capitalization of liabilities of such companies;
- **syndicated notes:** notes issued by several companies;
- **secured notes:** Issued by a public warehouse and secured with a specific asset;
- **notes issued by multilateral lending institutions;**

- **mortgage securities:** Issued by credit institutions and backed with a real estate asset; and
- **treasury notes:** Colombian government debt securities.

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## *What are the differences between offering debt securities to institutional / professional or other investors?*

Colombian law does not make any distinction between offering debt securities to institutional/professional and other investors.

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## *When is it necessary to prepare a prospectus?*

Under applicable law, unless an exemption applies, it is necessary to prepare and publish a prospectus where there is an offer of securities to the public or an application for the securities to be admitted to trading on a regulated market.

An offer would not be deemed to have been made to the public if it is made solely to qualified investors, addressed to fewer than 100 identified investors; or is addressed to the issuer's shareholders, so long as there are less than 500 shareholders; or if the issuer is a public utilities company which is offering its shares to investors who will benefit from investments in infrastructure.

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## *What are the main exchanges available?*

Trading system transactions are conducted through a stock exchange (currently the Colombian Stock Exchange – *Bolsa de Valores de Colombia* (CSE)), with the participation of an authorized broker, or through securities trading systems. The CSE provides its own set of regulations (for example, short selling, derivatives and listing regulations). The main securities trading platforms in Colombia are as follows.

- CSE manages and regulates three trading systems:
  - the Colombian Electronic Market (*Mercado Electrónico Colombiano*), through which securities other than public debt securities are traded;
  - the Colombian equity market; and
  - the standardized derivatives market.
- Electronic Trading System (*Sistema Electrónico de Negociación*) is one through which mainly public debt securities are traded, and which is managed by the Colombian Central Bank.
- Foreign Securities Quoting System (*Sistemas de Cotización de Valores Extranjeros* (SIC)) is one through which foreign securities are sponsored by a local broker for listing and trading. Only stock exchanges and administrators of securities trading systems that are under the Superintendency of Finance's surveillance may administer the SIC. Retail investors are able to conduct transactions through this system.
- Over-the-Counter Market, different from the foregoing, covers securities transactions that are not conducted through the CSE or through a securities trading system and must be registered through a different registration system.

Please note that a Latin American exchange is the most significant recent project to enhance the local capital markets. *Mercado Integrado Latinoamericano* (MILA) is a project to unify the stock exchanges markets of Colombia, Chile, México and Peru in order to create a single stock market that will allow the negotiation of stocks of the most representative companies in the region. It is the result of an agreement signed among the aforesaid exchanges and its most important feature is that none of the entering exchanges compromises its autonomy or independence in regulatory or administrative issues as a result of the agreement. Instead, investors may benefit from MILA through an intermediary by using the local platform in local currency, but reaching the companies listed on any of the exchanges involved.

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## *Is there a private placement market?*

Yes, under applicable law a private placement should meet any of the following conditions:

- The offering is addressed to less than 100 identified investors.
- The offering is addressed to the issuer's shareholders, so long as there are less than 500 shareholders.
- The issuer is a public utilities company which is offering its shares to investors who will benefit from investments in infrastructure.

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## *Are there any other notable risks or issues around issuing or investing in debt securities?*

### Issuing debt securities

Issuers are required to take responsibility for all the information incorporated in the prospectuses for debt securities. Misleading statements in, misrepresentations, or omissions from, any applicable offering document or information can give rise to both regulatory and criminal liability under Colombian law. Colombian regulation has various investor protection statutory provisions relevant to liability for an inaccurate offering memorandum.

### Investing in debt securities

Debt security terms and conditions typically contain provisions which may permit their modification without the consent of all investors and confer significant discretions on the trustee (Fiduciary Institution), which may be exercised without the consent of investors and without regard to the individual interests of particular investors. The conditions also provide for at least one ordinary meeting of investors, to be carried out during the first three months of each calendar year, to consider matters affecting the investors' interests. These provisions typically permit defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

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## Establishing and investing in debt / hedge funds

### *Are there any restrictions on establishing a fund?*

Under Decree 2555 of 2010 (Decree 2555), investment fund administration is a task that only brokers, investment administration corporations and trusts companies can perform. Moreover, in Colombia the securities of investment funds are not negotiated on the same platform used to negotiate stocks as a specific negotiation platform has been developed for listed investment fund securities. There is also regulation for specific types of investment fund, such as currency market, real estate, speculation and margin.

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### *What are common fund structures?*

#### Pooled funds

Decree 2555 sets forth the regulation of pooled funds (*Carteras Colectivas*) as financial vehicles created for raising and managing money or other assets from third parties to achieve collective economic results. These vehicles may only be managed by a fiduciary entity (*Sociedad Fiduciaria*), authorized brokers (*Comisionista de Bolsa*) or investment management companies (*Sociedad Administradora de Inversión*), which are responsible for the investments and the back-office activities on behalf of investors.

Decree 2555 establishes four different kinds of pooled funds:

- open-end, in which the participation units may be redeemed before the expiration of the fund's term;
- close-end, in which the units can only be redeemed upon expiration of the fund's term;
- staggered pooled funds through which placement rules define different terms for the redemption of the units before the expiration of the fund's term; and
- exchange traded funds.

Pooled funds are subject to the supervision and special regulation of the Superintendency of Finance and their shares are automatically registered with the National Registry for Securities and Issuers (RNVE).

## Private equity funds

Private equity funds (PEFs) are special purpose vehicles, which are close-end funds (*Carteras Colectivas Cerradas*) that cannot invest more than one third of the fund's assets in publicly traded securities registered with the RNVE.

## Venture capital

The venture capital industry is currently organized as a high-risk investment made through PEF, under the management of general partners, and with the concurrence of angel and institutional investors.

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## *What are the differences between offering fund securities to professional / institutional or other investors?*

Colombian law does not make any distinction between offering fund securities to institutional/professional and other investors.

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## *Are there any other notable risks or issues around establishing and investing in funds?*

### Establishing funds

The incorporation of private equity funds (PEFs) is not subject to the authorization of the Superintendency of Finance. Nonetheless, the management company of the PEF must deliver certain documents to the Superintendency of Finance at least 15 business days before the final closing date of the fund. Additionally, the placement terms of the PEF may establish that the investment decisions of the fund may be delegated to a general partner, whom must credit at least five years of experience in the administration of private equity assets to the PEF be deemed as an eligible investment for local pension fund managers and insurance companies.

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## Managing and marketing debt / hedge funds

### *Are there any restrictions on marketing a fund?*

No, there are no restrictions on marketing a fund. However, the marketing of a fund is carried out by the management company of the fund and/or by the general partner.

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### *Are there any restrictions on managing a fund?*

The incorporation of private equity funds (PEFs) is not subject to the authorization of the Superintendency of Finance. Nonetheless, the management company must deliver certain documents to the Superintendency of Finance at least 15 business days before the final closing date of the fund.

Additionally, the placement terms of the PEF may establish that the investment decisions of the fund may be delegated to a General Partner, which must credit at least five years of experience in the administration of private equity assets to the PEF be deemed as an eligible investment for local pension fund managers and insurance companies.

Pension funds are also allowed to invest in offshore PEFs managed by general partners that should credit five years of experience and additionally at least US\$1 billion assets under management.

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## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

The derivatives contracts must be executed with entities under the supervision of the Superintendency of Finance (including commercial banks or broker institutions) duly authorized by such Superintendency to enter into derivatives operations. Also, the derivatives operations made through the Colombian Stock Exchange (CSE), shall comply with the all the rules set forth in the General Rules of the Derivatives Market of the CSE (*Reglamento General del Mercado de Derivados*).

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### *What are common types of derivatives?*

Under applicable Colombian law, derivatives are classified in two categories:

- **standardized** – traded through the Colombian Stock Exchange (CSE), nonexistent counterparty risk because of the Central Counterparty Clearing House and constant liquidity (Market creators scheme); and
- **non-standardized** – traded outside the CSE (Over the Counter), existing counterparty risk, the contracts are created taking into account the client's needs, and do not operate within a transactional system.

All of the main types of derivative contracts are widely used in Colombia:

- forwards;
- futures;
- swaps (such as interest rate or currency swaps); and
- options (call options and put options).

The value of the derivative contracts is based on the value of the underlying assets. The main classes of underlying asset seen in Colombia are:

- equity;
- interest rate;
- commodities;
- foreign currency; and
- shares.

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## *Are there any other notable risks or issues around entering into derivatives contracts?*

There are no specific risks or issues around entering into derivatives contracts.

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## Debt finance

### Lending and borrowing

#### *Are there any restrictions on lending and borrowing?*

##### Lending

Pursuant to applicable Colombian law, commercial banks cannot lend to a single person, directly or indirectly, a sum greater than 10% of their Tier 1 Capital (*Patrimonio Técnico*) if the only security for such operation is the borrower's equity. Nevertheless, commercial banks can lend to a single person an amount equivalent to 25% of their Tier 1 Capital (*Patrimonio Técnico*), as long as such loan is secured by eligible collateral and sufficient to secure a risk exceeding 5% of such equity.

Notwithstanding the general rule set above regarding the lending limit of 10%, Decree 816 of 2014 was issued to promote the financing of fourth generation road concessions (*Concesiones de Cuarta Generación*), and establishes that commercial banks can lend to a single borrower who is pursuing a fourth-generation concession, a sum up to 25% of the Tier 1 Capital (*Patrimonio Técnico*).

##### Borrowing

Liabilities acquired by a Broker firm and intended to finance the acquisition of securities may not exceed three times its Tier 1 Capital (*Patrimonio Técnico*).

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#### *What are common lending structures?*

The common structures of bank loans in Colombia are local or foreign loans, whether syndicated or not. Local loans are documented in a simple template promissory note and secured by personal guarantees. However, it is common to have foreign project finance structures for infrastructure projects with some complex guarantee structures covering assets and personal guarantees.

With respect to bank financing in Colombia for individuals, it is common to have mortgage loans, consumer credits, vehicle secured loans and leasing for housing or vehicles.

##### Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid; and
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

##### Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see [Giving and taking guarantees and security](#).

##### Loan commitment



A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain conditions are fulfilled under the corresponding loan agreement; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan if the conditions provided in the corresponding loan agreement are not fulfilled.

## Loan repayment

A loan can also be repayable on demand, on an amortizing basis (in instalments over the life of the loan), scheduled (usually meaning the loan is repayable in full at maturity), or prepaid.

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## *What are the differences between lending to institutional / professional or other borrowers?*

Lending to institutional/professional borrowers is subject to less regulatory oversight and so less burdensome from a compliance perspective.

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## *Do the laws recognize the principles of agency and trusts?*

Yes, both principles are recognized as a matter of Colombian law.

For instance, it is possible to appoint an agent to act on behalf of other parties and a trustee to hold rights and other assets and goods on trust for the lenders or secured parties.

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## *Are there any other notable risks or issues around lending?*

### Generally

The rate of default interest charged on a loan or on finance documents cannot exceed the maximum default interest rate authorized by the Superintendency of Finance for each calendar year.

### Specific types of lending

Some of the most common specific types of lending are:

- mortgage loans;
- consumer credits;
- leasing for housing or vehicles; and
- vehicle-secured loans.

Please note that loans are not subject to registration. However, the granting of a mortgage over real estate requires the issuance of a public deed by a notary and the registration of the mortgage with the applicable land registry office, which triggers the corresponding registration tax as well as the fees charged by the notary plus the applicable VAT.

### Standard form documentation

Most Colombian law finance transactions, including loan agreements are governed by documentation based on standard forms previously approved by the Superintendency of Finance.

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## *Are there any other notable risks or issues around borrowing?*

The personal information of the borrower and the information regarding the loan, payments, prepayments, accrued and due interest, and unpaid interest are sent by the financial institutions to the Risk Centrals (*Centrales de Riesgo*), for its custody. Such information will remain on the databases of the Risk Central, for a period determined by the applicable law.

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## Giving and taking guarantees and security

### *Are there any restrictions on giving and taking guarantees and security?*

Guarantees are commonly used in transactions where the borrower is a special purpose vehicle, a shell company or a vehicle with a limited balance sheet that is part of a group of companies that may provide stronger financial support. In this case, a parent guarantee or a guarantee from one or more affiliates is common.

Guarantees are generally created by a written agreement between the guarantor and the secured creditor.

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### *What are common types of guarantees and security?*

#### Common forms of guarantees

In general terms, a guarantee can take the form of policies issued by authorized insurance companies domiciled in Colombia or abroad; or bonds issued by authorized commercial banks domiciled in Colombia or abroad.

If the policy or bond is issued by an insurance company or commercial bank domiciled abroad, the policy and the bond, as the case may be, must be confirmed by a local insurance company or local commercial bank.

A particular distinction is between a performance guarantee and a payment guarantee:

- A performance guarantee is a term used to describe both performance bonds and performance policies. A performance guarantee describes an undertaking used to protect a buyer and/or a contracting party against the failure of a supplier or contractor to deliver goods or perform services in accordance with the terms of a contract. The issuer of the bond or policy, as the case may be undertakes to pay to the buyer and/or contracting party a sum of money if the seller, supplier or contractor fails to deliver the goods or perform the contracted services on time or in accordance with the terms of the contract.
- A payment guarantee (whether policy or bond) covers the payment of money rather than other contractual obligations.

Additionally, the compliance policies may include some other protections such as: protection for wages and social benefits; and protection for the stability of the work.

Another common policy is the extra-contractual civil liability policy that has the following common protections: employer liability; contractors and subcontractors liability; cross liability; medical expenses; civil liability of owned and not owned vehicles; adjacent properties, cables and underground tubes.

#### Common forms of security

##### OVER REAL ESTATE

##### *Mortgage*

A mortgage allows the creditor to enforce it regardless of a transfer of ownership. The creditor cannot directly take ownership of the secured real estate. More than one mortgage can be granted over the same real estate, in which case the secured creditors are paid on a first-registered, first-served basis.

#### ***Security trust***

The owner transfers the real estate to a professional trustee (entities supervised by the Superintendency of Finance) for the benefit of the secured creditors. Upon an event of default, the trustee must dispose of the real estate according to the instructions in the security trust agreement, and use the proceeds to pay the secured debt.

#### **OVER MOVABLE ASSETS**

Law 1676 of 2013 (Law 1676) unifies the legal framework for all kinds of security interest over movable assets, regardless of whether it is a conditional sale, security trust, pledge, title retention clause, or other form of security interest over movable property.

Law 1676 provides for different types of security interest, as follows:

- fixed security interest;
- purchase-money security interest; and
- floating security interest.

#### **OVER DEMATERIALIZED SECURITIES**

Security is created through both:

- a pledge agreement; and
- recording of the pledge through a book entry by the relevant securities' depository (generally, DECEVAL or DCV).

#### **OVER SHARE CERTIFICATES**

A security interest is created through a security agreement. The security interest is perfected by both:

- the secured creditor taking possession of the share certificates or registration with the National Registry of Security Interests; and
- registration in the company's stock ledger.

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## ***Are there any other notable risks or issues around giving and taking guarantees and security?***

### **Giving or taking guarantees**

In general terms, a guarantee can take the form of policies issued by authorized insurance companies domiciled in Colombia or abroad; or bonds issued by authorized commercial banks domiciled in Colombia or abroad.

If the policy or bond is issued by an insurance company or commercial bank domiciled abroad, the policy and the bond, as the case may be, must be confirmed by a local insurance company or local commercial bank. For more information, see [Giving and taking guarantees and security – types](#).

### **Giving or taking security**

Under applicable law, the options to secure loans are limited to mortgages, pledges, trusts over certain tangible and in existence assets, liens over other intangible, future assets and other movable assets and movable guarantees, including rights and actions.

Movable guarantees may be granted by means of an agreement executed by and between the guarantor and the creditor identifying the secured obligation, the amount and description of the assets subject to the guarantee. For this agreement to be opposable to third parties it must be registered in the public registry of movable guarantees. Notwithstanding the above, a movable guarantee will also be opposable by means of the tenancy of the asset by the creditor or the execution of an account control agreement for moneys deposited with financial institutions.

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## Financial regulation

### Law and regulation

*What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

#### Generally

Organic Statute of the Financial System (*Estatuto Orgánico del Sistema Financiero*) (general statute of the financial system)

Law 964/2005 (Ley 964 de 2005) (structure and institutions of the financial system)

Decree 2555/2010 (*Decreto Único*) (structure of the financial system, securities and securities trading)

Legal Basic Circular (*Circular Básica Jurídica - C.E. 029/2014*)

Basic Accounting and Financial Circular (*Circular Externa 100/1995 - Circular Básica Contable y Financiera*)

#### Consumer credit

Financial Consumer Protection Regime (*Régimen de Protección al Consumidor Financiero*) (consumer protection regime)

#### Mortgages

Colombian Civil Code (*Código Civil Colombiano*)

Law 1555/2012 - Advance Payment of Credit Operations (*Pago anticipado de operaciones de crédito*)

#### Corporations

Colombian Code of Commerce (*Código de Comercio Colombiano*)

Legal Basic Circular (*Circular Básica Jurídica - C.E. 029/2014*)

#### Funds and platforms

Decree 2555/2010 (*Decreto Único*) (structure of the financial system, securities and securities trading)

#### Other key market legislation

Financial Consumer Protection Regime (*Régimen de Protección al Consumidor Financiero*) (consumer protection regime)

Anti-trust and Competition (*Protección de la Competencia*)

Habeas Data and Management of Information (*Habeas Data y Manejo de la Información*) (protection and management of the financial consumer information)

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## Regulatory authorization

### *Who are the regulators?*

#### Central Bank

The Colombian Central Bank exercises the customary functions of a central bank, including price stabilization, legal currency issuance, regulation of currency circulation, credit and exchange rate monitoring and administration of international reserves. Its board of directors is the regulatory authority for monetary, currency exchange and credit policies, and is responsible for the direction and execution of the Colombian Central Bank duties. The Colombian Central Bank also acts as a last resort lender to financial institutions.

#### Ministry of Finance

The Ministry of Finance designs, coordinates, regulates and executes economic policy, seeking to create an optimal administration of public finances for the economic and social development of the country. The Ministry of Finance regulates all aspects of finance, securities and insurance activities, pursuant to powers conferred by the Colombian Constitution. As part of its duties, the Ministry of Finance issues decrees related mainly to financial, taxation, customs, public credit and budgetary matters that may affect banking transactions in Colombia. In particular, the Ministry of Finance is responsible for regulations relating to financial institutions' capital adequacy, risk limitations, authorized transactions, disclosure of information and accounting.

#### Superintendency of Finance

The Superintendency of Finance is a technical entity affiliated with the Ministry of Finance that acts as the inspection, supervision and control authority of persons involved in financial, insurance and securities exchange activities, and any other operations related to the management, use or investment of resources collected from the public. The Superintendency of Finance is responsible for supervising the Colombian financial system with the purpose of preserving its stability and trustworthiness, as well as promoting, organizing and developing the Colombian securities market and protecting the users of financial and insurance services and investors in general.

Financial institutions must obtain the authorization of the Superintendency of Finance before commencing operations. In addition, all public offering of securities requires the prior approval of the Superintendency of Finance.

#### Securities Market Self-Regulatory Organization

Self-regulation in the capital markets was formally introduced in Colombia by Law 964 of 2005, and the Securities Market Self-Regulatory Organization (*Autoregulador del Mercado de Valores de Colombia*, or SRO) was created in 12 June 2006.

The SRO is a private entity that has the power to supervise, sanction and regulate the entities subject to self-regulation (ie including securities intermediaries and any entity that voluntarily submits itself to self-regulation).

The SRO's supervisory powers entitle it to review compliance with applicable laws and regulations and impose sanctions in the case of violations. The SRO may also propose regulation aimed at various matters, including conflicts of interest and improving the integrity and quality of the capital markets.

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### *What are the authorization requirements and process?*

Depending on the type of entity, an entity must apply to the Superintendency of Finance for authorization.

The Superintendency of Finance must assess whether the application meets the minimum capital requirements and the other required conditions set forth by the applicable law, within six months of the submission of the complete application.

The Superintendency of Finance will also approve agents and professional individuals of the stock exchange market in their roles.

Authorized entities and individuals are listed on the National Registry for Securities and Issuers (*Registro Nacional de Valores y Emisores*), National Registry for Agents of the Stock Exchange Market (*Registro Nacional de Agentes del Mercado de Valores*) and on the National Registry for Professionals of the Stock Exchange Market (*Registro Nacional de Profesionales del Mercado de Valores*).

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## What are the main ongoing compliance requirements?

Minimum capital requirements are an ongoing compliance requirement for authorized entities.

On 24 August 2012, the Colombian government enacted Decree 1771 of 2012 which amended certain capital adequacy requirements for Colombian credit institutions set forth in Decree 2555 of 2010. Decree 1771 of 2012 maintains the requirement for a credit institution's technical capital to be at least 9% of that institution's total risk-weighted assets.

Since 1 August 2013, technical capital has consisted of the sum of basic capital (*Patrimonio Básico*), or primary capital (Tier I), and secondary capital (*Patrimonio Adicional*), or secondary capital (Tier II); however, primary capital (Tier I) will also consist of the sum of ordinary basic capital (*Patrimonio Básico Ordinario*), or Common Equity Tier I, and a new category of additional basic capital (*Patrimonio Básico Adicional*), or Additional Tier I.

In addition, Decree 1771 of 2012 introduced a new measure of 'core solvency' for Common Equity Tier 1, which requires higher quality capital and is set at a minimum of 4.5% of risk-weighted assets.

By means of Decree 1771 of 2012, the Colombian Government implemented some Basel III accords into the legal regime applicable to Colombian credit institutions, specifically with regard to the capital adequacy requirements as mentioned above.

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## What are the penalties for failure to be authorized?

A person undertaking a regulated activity without being authorized or exempt commits a criminal offence and is liable to imprisonment and economic sanctions.

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## Regulated activities

### What finance and investment activities require authorization?

#### Generally

- Credit institutions (which are further categorized into banks, finance corporations, financing companies and finance cooperatives)
- Financial services entities
- Capitalization corporations
- Insurance companies
- Insurance intermediaries

#### Consumer credit

No financial, banking or credit institution may operate in Colombia without the prior approval of the Superintendency of Finance.

Subject to prior approval of the Superintendency of Finance, foreign banks may operate in Colombia through their subsidiaries established and incorporated in Colombia.

Under Law 1328 of 2009, foreign banks, as of 16 July 2013, are permitted to operate through their 'branches' and are not obligated to incorporate a Colombian subsidiary. Operations through these branches will be subject to prior approval by the Superintendency of Finance. Among others legal requirements, branches have to meet the same minimum capital requirements as independent entities do.

Each credit institution must be separately authorized by the Superintendency of Finance before it may develop and provide financial services. Furthermore, the activities of credit institutions are subject to limitations and restrictions, including limitations and restrictions relating to the extension of credit, risk concentration, investments, conditional operations, foreign currency loans and negotiations, and the administration of third-party funds. One of the principal restrictions on financial activities is that banks may not acquire or hold products, merchandise, shares of corporations, income bonds, or other similar securities, except:

- when the bank has received those goods or securities as collateral for loans it has made; or
- with respect to shares, when they are issued by companies where banks are permitted to hold investments (mainly financial affiliates).

Banks are also subject to other limitations, including limitations on lending activities.

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## *Are there any possible exemptions?*

No financial, banking or credit institution may operate in Colombia without the prior approval of the Superintendency of Finance.

The incorporation of private equity funds is not subject to the authorization of the Superintendency of Finance.

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## *Do any exchange controls or other restrictions on payments apply?*

### General rule

According to the Colombian Exchange Code, the following operations must be channeled through the exchange market:

- importation and exportation of goods;
- foreign indebtedness of Colombian residents and financial costs inherent to these operations;
- foreign investments and their corresponding profits;
- Colombian investments abroad as well as their corresponding profits;
- foreign investments in securities or assets located abroad, unless said investment is made with funds that do not have to be channeled through the exchange market;
- securities and guarantees in foreign currency; and
- derivative operations.

The above-mentioned operations must be made through a foreign market intermediary and/or through a compensation account. Foreign market intermediaries are commercial banks, mortgage banks, financial corporations, commercial financing companies, *Financiera Energética Nacional*, *Banco de Comercio Exterior de Colombia S.A.*, financial cooperatives, stock broker companies and foreign exchange agents. Such operations must be registered with the Colombian Central Bank through the filing of the corresponding form depending on each kind of transaction.

### Prohibition to pay in foreign currency between Colombian residents

In general terms, Colombian residents should pay their mutual obligations in Colombian legal currency. However, since Resolution 1 of 2013, Colombian residents can pay and receive payments in foreign currencies as long as they do it through their compensation accounts.

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## *What are the rules around financial promotions?*

Financial promotions can only be done by financial, banking or credit institution duly authorized to operate in Colombia by the Superintendency of Finance.

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## Entity establishment

### *What types of legal entity are generally used to undertake financial or investment activity?*

Pursuant to applicable Colombian regulation, financial and investment activities must be undertaken exclusively by legal entities under the form of Corporations (*Sociedad Anónima*) or Cooperative Associations (*Asociaciones Cooperativas*).

Corporations are body corporates with separate legal personality and limit the liability of their members.

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### *Is it possible to conduct lending or investment business through a branch or establishment?*

Under Law 1328 of 2009, foreign banks, as of 15 July 2013, are permitted to operate through their 'branches' and are not obligated to incorporate a Colombian subsidiary. Operations through these branches will be subject to prior approval by the Superintendency of Finance. Among other legal requirements, branches have to meet the same minimum capital requirements as independent entities do.

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## FinTech

### FinTech products and uses

#### *What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

#### Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

Marketplace lending is available to address most forms of traditional bank funding products. Recently products have included:

- virtual credit cards;
- consumer loans;
- student lending products;



- small and medium-sized enterprises (SME) lending; and
- residential property and commercial property mortgage lending.

#### MARKETPLACE LENDING IN COLOMBIA

Colombian lawmakers and regulators are currently drafting regulations regarding marketplace lending platforms. It is likely that the volume of lending as well as further and additional product areas will significantly increase over the coming years, as financing becomes more readily available to support the marketplace lending sector.

## Blockchain, smart contracts and cryptocurrencies

#### WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a peer-to-peer mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the block using sophisticated algorithms and add the verified block to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record for example, relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

#### BITCOIN IN COLOMBIA

Law 31 of 1992 sets forth that the Colombian peso is the only legal means of payment with unlimited releasing power. Thus, currently under Colombian law, bitcoin is not an asset that can be considered as equivalent to the legal currency and it has not been recognized as an authorized currency.

The Financial Superintendence of Colombia (SFC) considers that bitcoin can represent a risk to the Colombian financial sector as follows.

- Platforms are anonymous. Virtual currencies can be used in illicit or fraudulent activities, which may include unauthorized funding, money laundering and financing of terrorism.
- There are operational risks. Consumers may be exposed, as digital wallets can be hacked and unauthorized transactions cannot be reversed.
- There is a lack of guarantee. Consumers of virtual currencies are not covered by any type of private or public guarantee and their operations are not covered by any deposit insurance.

- There is a lack of enforceability. Currently there are no mechanisms to enforce transactions that include virtual currencies, which significantly increases the possibility of a default risk.

#### **WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?**

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

#### **SMART CONTRACTS IN COLOMBIA**

Currently, smart contracts are not regulated under Colombian law. Smart contracts in Colombia are still in an early stage but they are expected to be found in different kinds of operations such as voting for a publication in a forum or actions with a higher level of complexity, such as loan guarantees and futures contracts, as well as transactions such as setting payment priorities in structured notes.

#### **WHAT IS A CRYPTOCURRENCY?**

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

#### **CRYPTOCURRENCIES IN COLOMBIA**

Currently, cryptocurrencies are not part of the Colombian stock market or any other platform and thus are not a valid investment for the regulatory authorities. There are at present no operators authorized to offer transactions that include cryptocurrencies.

### **Initial coin offerings and token-based products**

#### **WHAT IS AN INITIAL COIN OFFERING (ICO)?**

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;

- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

#### **ICOS IN COLOMBIA**

Currently, ICOs are not regulated under Colombian law. As cryptocurrencies are not valid in Colombia, the offering of initial coins will be illegal.

### **Artificial intelligence and robo advisory systems**

Automated financial advice tools, also known as 'robo advisors' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms, which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

#### **AI IN COLOMBIA**

Although in Colombia, AI has not been regulated, there are firms that provide an AI service. For instance, customers may order products such as credit cards and insurance through an AI machine.

#### **ROBO ADVISORY SYSTEMS IN COLOMBIA**

In Colombia, while businesses offering such services are not closed to the use of algorithms and models that can provide a more efficient and adequate service, this type of advice is not yet fully automated. Currently it is the client who must still make their own portfolio adjustment or rebalance.

There are two main challenges regarding the implementation of robo advisory systems in Colombia:

- Most of the small financial entities do not have the required technology that allows them to connect with a robo advisory system.
- The lack of regulation means that financial entities are uninformed about this type of advice system.

### **Data analysis and cloud computing**

#### **WHAT IS DATA ANALYSIS?**

According to the Organization for Economic Co-operation and Development (OECD), data analysis is the process of transforming raw data into usable information, often presented in the form of a published analytical article, in order to add value to the statistical output.

Data analysis provides the following support to a FinTech:

- mining data from various sources;
- using data to understand current consumer behaviors and predict future consumer behavior (this is known as 'predictive analytics');
- using data to predict what specific type of consumer will effectively purchase; and
- analyzing data from both internal sources and external sources.

#### WHAT IS THE DIFFERENCE BETWEEN BIG DATA AND DATA ANALYSIS

Big data is defined by the United Nations as the mass volume of data, structured and unstructured, that is too difficult to process within a traditional database and with traditional software. Big data platforms provide the ability to process mass volumes of data and to access and analyze information. For instance, data analysis' main objective is to examine raw data with the purpose of finding patterns in sets of specific information through the use of algorithms.

Under Colombian law, the National Development Plan law assigns to the National Planning Department the responsibility to design and regulate a big data strategy, which will become public policy with two main objectives, being to:

- use big data in the coordination of national planning, therefore maximizing public investment; and
- promote the participation and collaboration of the private sector in the design of the big data in order to resolve private social complexities.

#### BIG DATA IN COLOMBIA

Currently, many sectors are applying big data day to day, in order to improve production and efficiency. An example is rice production in Colombia. By working with Fedearroz, the rice producers' association in Colombia and the international center for tropical agriculture, the rice sector is developing strategies for using and sharing big data to make decisions on when to produce, how to produce, and how to use inputs more efficiently.

#### WHAT IS CLOUD COMPUTING?

The Ministry of Technology Information and Communications (MINCIT) defines the term 'cloud computing' as a technology that offers services within the internet, updating the traditional model of computing. MINCIT refers to the definition given by the National Institute of Standards and Technology, which indicates that cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources that can be rapidly provisioned and released with minimal management effort or service provider interaction.

#### CLOUD COMPUTING IN COLOMBIA

Currently in Colombia there are multiple cloud computing options (from Claro, Google, Microsoft and Amazon). According to the Colombian Chamber of Electronic Commerce (CCCE) the lack of cloud uptake is attributed to overregulation in the sector. Nonetheless, the Colombian government has initiatives to promote cloud computing and is procuring cloud services using Colombia Compra Eficiente Portal. Yet, CCCE determines that government agencies are reluctant to allow further development of cloud computing as it is still perceived as unsafe.

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## *Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?*

### General financial regulatory regime

#### REGULATORY ENTITY

The Financial Superintendence of Colombia (SFC) is a technical entity affiliated with the Ministry of Finance that acts as the inspection, supervision and control authority of persons involved in financial, insurance and securities exchange activities, and any other operations



related to the management, use or investment of resources collected from the public. The SFC is responsible for supervising the Colombian financial system with the purpose of preserving its stability and trustworthiness, as well as promoting, organizing and developing the Colombian securities market and protecting the users of financial and insurance services and investors in general.

Financial institutions must obtain the authorization of the SFC before commencing operations. In addition, all public offerings of securities require the prior approval of the SFC.

#### **GENERAL**

A person must not carry on a regulated activity in Colombia, unless authorized by the SFC. The SFC authorizes the incorporation and operation of all financial institutions. Authorization of the SFC shall be obtained whenever FinTech products or applications involve any financial activity which requires regulatory authorization.

A person undertaking a regulated activity without being authorized or exempt commits a criminal offence and may be liable to imprisonment and economic sanctions.

#### **PROJECT REGTECH**

The SFC has a FinTech division that seeks to create and develop applications that support regulatory compliance. Currently, the main focus of the FinTech division is to optimize the transmission of information among the different financial controlled entities (ie banks, stock exchange, fiduciaries and financial institutions). This initiative is known as 'project RegTech'.

#### **FINTECH SUBCOMMITTEE**

In 2016, the Financial Regulation Unity (URF) formed the FinTech subcommittee to provide a formal space in which the public and private sectors may participate and contribute in the construction of FinTech regulations.

The remit of the FinTech subcommittee includes the following:

- robo advisors;
- cloud computing;
- blockchain; and
- algorithm tradition.

The FinTech subcommittee has not yet issued formal guidelines in connection with the abovementioned matters, although it is expected that it will issue these guidelines no later than December 2017.

#### **ASOCIACIÓN COLOMBIANA FINTECH**

Asociación Colombiana FinTech is a group of entities whose aim is to create a proactive place for the development of FinTech business in Colombia. This association is working in the following areas:

- international transmission of data;
- digital identity;
- digital consultancy;
- digital payment;
- crowdfunding;
- InsurTech;
- bitcoin and blockchain;
- open data for the financial sector; and
- sandboxes.

### **Electronic payments platforms and regulation of peer-to-peer lenders**

## ELECTRONIC PAYMENT PLATFORMS

E-commerce is regulated by Law 527 of 1999, known as the Electronic Commerce Law. E-commerce is defined as all issues arising from a commercial relationship, whether contractual or not, originating from the use of one or more data messages or other similar media. Commercial relationships include the following transactions:

- supply or exchange of goods and services;
- distribution agreements;
- agency of mandate agreements;
- all types of financial, securities and insurance operations;
- infrastructure and construction agreements; and
- licensing.

Electronic security is a component of the SFC's operational risk review. Supervised firms are required to design and implement electronic security policies and contingency plans. The SFC establishes minimum requirements for security and quality of information transmitted through electronic channels.

Colombia has adopted measures aimed at reducing regulatory burdens on the financial sector with the aim of encouraging the expansion of access to financial services and to engage in online commerce. As an example, the financial inclusion law allows the creation of nonbank deposit entities known as specialized companies in deposits and electronic payments (SEDPE). SEDPEs are intended to give individuals access to a savings account, and facilitate safe, quick and cheap money transfers. SEDPEs help individuals who do not necessarily own credit or debit cards to carry out online purchases. Moreover, the law allows mobile phone operators to obtain financial licenses from the SFC to operate SEDPEs.

## PEER-TO-PEER LENDERS

Peer-to-peer lenders are not currently regulated under Colombian law.

## Regulation of payment services

The Financial Superintendence of Colombia has regulatory and supervisory authority over financial entities regarding payment services.

In addition, the Banco de la Republica (Central Bank or BR) is responsible for monetary policy and foreign exchange. It has the authority to adopt certain macroprudential measures, manages and exercises surveillance functions over the payment system, provides liquidity to markets, and acts as a lender of last resort.

## Application of data protection and consumer laws

### DATA PROTECTION AND CONSUMER REGULATIONS

Law 1266 of 2008, Law 1581 of 2012 and Decree 1337 of 2013, each regulate data collection and processing by any financial, commercial and credit institution. The regulations differentiate between the controller and the processor of the data. The data controller is any individual or legal, public or private entity, which by itself or in association with others, makes decisions regarding the database or the treatment of the data and is responsible for it. The data processor is any natural or legal, public or private entity, which by itself or in association with others, processes personal data on behalf of the controller.

### DIFFERENCE BETWEEN TRANSFERRING OF DATA AND TRANSMISSION OF DATA

Regulations differentiate between the transferring of data and the transmission of data. The transferring of data is the operation in which the data controller of the personal data within Colombia sends the information to a receptor (in Colombia or abroad). In this case, the receptor also becomes responsible for the data processing, and therefore shall comply with all applicable laws. Transferring data to foreign countries is prohibited, unless the recipient foreign country is deemed to provide an adequate level of data protection. The transferring prohibition shall not apply, however, in the following cases:

- the owner of the data has authorized the transfer;

- exchange of medical information;
- bank transfers;
- transfers in accordance with international treaties;
- transfer is required due to the existence of an agreement between the owner of the information and the data controller; and
- legally required transfer in order to safeguard public interest.

Any event different from the above mentioned, requires the authorization of the Colombian Superintendence of Industry and Commerce (SIC).

For instance, the transmission of data is the communication between the data controller and the data processor in which the data is sent by the data controller and processed by the data processor on behalf of the data controller. International transmission does not require the authorization of the data owner, as long as an agreement has been executed between the data controller and data processor.

## Money laundering regulations

Firms that are supervised and controlled by the SFC must implement an asset laundering and financing terrorism risk management system (SARLAFT) in order to prevent money laundering and terrorist financing. The SFC has the responsibility to report to the Special Administrative Unit and Financial Analysis (UIAF) any operations conducted by controlled or supervised firms that may be categorized as suspicious, in order for the UIAF to initiate an investigation.

The UIAF has the responsibility to detect, prevent and overcome practices related to money laundering and financing of terrorism by centralizing and analyzing all of the information collected in the exercise of its faculties.

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## What type of funding arrangements and incentives are available to FinTech businesses?

### Early stage

#### SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

#### CROWDFUNDING

The crowdfunding sector is well established, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform, such as Crowdcube or Crowdfunder.

There are two main types of crowdfunding: equity and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

#### ACCELERATORS

There are various incubators or accelerators in the Colombian market which offer support, facilities and funding for startups, often in return for an equity stake. For example, INNPulsa Colombia, a governmental entity created in 2012, promotes and supports startups that

are mainly focused in the productivity and business sector. Bancoldex, another governmental entity, finances any credit required by entities for working capital, fixed investments, and corporate capitalization.

#### ISSUES OF CROWDFUNDING IMPLEMENTATIONS IN COLOMBIA

Currently Colombian regulations do not permit crowdfunding services. However, mindful of the potential benefits of crowdfunding platforms, the Financial Regulation Unity (URF) is proposing reform to the current legal framework in order to allow crowdfunding in Colombia and, at the same time, ensure investor protection and stability for the financial system. The URF proposes three main strategies for a future regulation of crowdfunding in Colombia:

- a clear definition in the law of 'financial crowdfunding';
- to regulate the activity in order for it to be performed, exclusively, by entities under the surveillance and control of the Financial Superintendence of Colombia; and
- to establish duties and conditions to be complied with by all parties that interact in the crowdfunding market.

## Venture capital and debt

#### VENTURE CAPITAL AND DEBT

Venture capital (VC) is equity capital or loan capital provided by private investors or specialized institutions. It is a type of funding used to acquire new or growing businesses, including FinTech businesses. The VC firm provides funding to the startup company in exchange for equity in the startup. VC provides a viable alternative to traditional lending, given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

In Colombia, the VC industry is currently organized as a high-risk investment through private equity funds, under the management of general partners and involving angel and institutional investors.

#### DIFFERENCES BETWEEN VENTURE CAPITAL AND CROWDFUNDING

The principal difference between VC and crowdfunding is equity. Investors acquire equity in the startup, crowdfunders do not. Generally, crowdfunding has a higher risk as it acts as a pre-order platform where there is a reasonable probability that the startup may fail to deliver the pre-order.

## Warehouse and platform funding

Warehouse financing is a form of inventory financing in which loans are made to manufacturers and processors on the basis of goods or commodities held in trust as collateral for the loans. The goods may be held in public warehouses approved by the lender, or may be held in field warehouses located in the borrower's facilities but controlled by an independent third party. A financial institution engaged in warehouse financing will usually designate a collateral manager who issues a warehouse receipt to the borrower that certifies the quantity and quality of the stored goods or commodities.

Warehouse financing may be suitable for FinTech companies which own a portfolio of assets. Some FinTech companies may see warehouse funding as a temporary form of financing to be followed by a larger capital markets transaction at a later date.

Law 1676 of 2014 provided a new legal framework on security interest over movable assets. The law introduced many changes but among the most important are:

- an increase in the kinds of assets that may be subject to a security interest;
- the creation of a new centralized system where filing and searches of security interests may be conducted; and
- new methods to enforce security interests against third parties and debtors.

This law promotes the use of warehouse and platform funding in Colombia.

## Senior bank debt and capital markets funding

#### SENIOR BANK DEBT



Senior bank debt is a debt financing obligation issued by a financial institution to a company or individual that holds legal claim to the borrowers assets ranking above all other debt obligations. The debt is considered senior to all other claims against the borrower, which means that in the event of a bankruptcy the senior bank debt is the first to be repaid before all other interested parties receive payment.

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis, depending on the creditworthiness and asset base of the business.

#### CAPITAL MARKETS FUNDING

Capital markets are the markets where securities such as shares and bonds are issued to raise medium to long-term financing, and where securities are traded. Securities may be issued by a company issuing shares or bonds to raise money. Bonds could also be issued by other entities in need of long-term funds.

Currently, in Colombia, FinTech companies have not issued bonds to invite investors as a way of raising funding, due to the lack of regulation.

### Incentives and reliefs

There are certain provisions that incentivize specific platforms for FinTech business. For example, the last amendment of the Colombian Tax Code includes an incentive for the cloud computing platforms; cloud computing platforms shall be exempt from value added tax.

In addition, taking into account that it is expected that Congress will introduce a law that regulates FinTech businesses, the Asociación Colombiana FinTech has proposed that the legal FinTech framework includes tax deductions for:

- companies' vehicles and or structures that have, as a main objective, crowdfunding services;
- investors' funders or resource generators who interact with crowdfunding providers; and
- any financing or investment through a lending, crowdfunding or entrepreneur platform.

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## Portfolio sales

### Loan transfers and portfolio sales

#### *What are common ways of buying and selling loans?*

Loans are commonly traded in Colombia. The most common forms of loans and debt trading are as follows.

#### Assignment and assumption agreements

The most common form of loan trading is an assignment and assumption agreement between the original lender and the new lender.

#### Novation agreements

For facilities in which the lender's obligations (mainly disbursement of the loan) are pending, the substitution of one lender by another is made through a novation agreement, executed by the lender with the debtor and the substituted lender.

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#### *What are the main considerations when transferring a loan and related security?*

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercise by the seller's legal advisors. Some of the key considerations include:

- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;

- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;
- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms; and
- **consent** – whether a transfer requires the consent or notification of the debtor or of any other parties.

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## Projects

### Financing / investing in energy / infrastructure

#### *To what extent are energy and infrastructure assets publicly or privately owned?*

##### Generally

The ownership of energy and infrastructure assets on Colombia varies according to the asset's sector. In general, public utilities and infrastructure services must be provided by the state, but they can engage private sector investment through concession contracts that grant to a private individual or company the provision or operation of a public service or the construction of a work or good.

Additionally, the government issued the Public-Private Partnership's (PPP) regime (Law 1508 of 2012) to attract long-term investors with enough financial capacity to develop:

- the design and construction of infrastructure and its utilities;
- the construction, rehabilitation, improvement or equipment of infrastructure, including the operation and maintenance of the infrastructure; and
- infrastructure for providing public services.

Projects typically use a BOOT structure where at the end of the 30-year concession period, the infrastructure reverts to the public sector who will own and operate it, or grant it in concession again to a different investor. PPPs can be structured to develop infrastructure in any sector in which the provision of infrastructure and its related services are needed and to projects with a minimum investment of US\$1.7 million. There are two type of PPPs:

- Public Initiative PPPs structured by the government that can be developed using private and/or public resources; and
- Unsolicited Proposals PPPs that are structured by a private company (only for new projects) which can be funded 100% with private resources or with private resources and a maximum of 20% public funds.

Colombia's main privatizations have occurred in the electricity, mining and hydrocarbon sectors. Under Law 226 of 1995, the state can privatize state-owned companies by alienating the shares or convertible bonds owned by the government in a company's capital by offering them to the company's cooperatives and workers associations in the first place. If they show no interest, the government can then proceed to offer them to the general public. In addition, the Constitution allows for the government to create mixed-economy companies that are jointly owned by the public and private sectors. These companies, organized under the structure of a joint-stock corporation, can own and operate infrastructure assets or provide infrastructure services.

##### Energy

The private sector finances and delivers most of the required infrastructure in the energy sector.

##### ELECTRICITY

The electricity sector in Colombia is a complex system comprised of generation, transmission, distribution, commercialization and interconnection activities. The economic agents who can participate in this sector's activities are public-owned companies, private companies and mixed-economy companies.

The construction of energy generation facilities and its connecting power lines to the interconnection and transmission networks can be performed by any economic agent, which maintain the ownership of the assets. In addition, companies that own power lines, substations and facilities that are part of the National Interconnection Network, as well as electricity transmission and distribution assets, also maintain their ownership.

#### **MINING AND HYDROCARBONS**

Subsoil and mineral resources are owned by the state. However, the state doesn't participate in oil and gas production or mineral extraction as these activities are performed by private companies and ECOPETROL, a mixed economy company, through concession contracts (mining) and exploration and production contracts (hydrocarbons) granted by the National Mining Agency and the National Hydrocarbons Agency respectively.

The Regulation Commission for Energy and Gas (CREG) and the Mining and Energy Planning Unit (UPME) are the principal state agencies responsible for regulating the energy sector and market in Colombia.

### **Telecoms infrastructure**

The telecommunications networks (fixed and mobile) in Colombia can be publicly or privately owned operators and service providers.

The electromagnetic spectrum is a public good subject to the state's administration and control. Law 182 of 1992 (modified by Law 335 of 1996) introduced a reform in this sector in Colombia by establishing the possibility for private companies to provide television services through national operation private channels. In addition, television services can be provided by public entities and organized communities.

### **Transport infrastructure**

#### **AVIATION**

Air transportation in Colombia is considered a public service. There are several ownership structures in Colombia's aviation market, including private aerodromes and public aerodromes operated by territorial entities or by private companies that operate them under concession contracts. However, airports are owned by the state but constructed and operated by a private company under a concession agreement that usually lasts 20 years. These concessions were previously granted and managed by the Civil Aviation Authority but recently the National Infrastructure Agency (ANI) took over this task.

#### **PORTS**

Ports in Colombia are constructed and maintained by port-operating companies organized as joint-stock companies, which can be publicly owned, privately owned or jointly owned by a private company and a public entity. Only port-operated companies can be granted with a port concession contract for a 20-year period.

#### **RAILWAYS**

Two mining companies privately own the only two standard gauge railways that currently exist in Colombia. However, private initiative PPP projects have been presented to the ANI and are under study in its feasibility phase for financing and operating the currently inactive lines.

#### **ROADS**

Road and highways in Colombia can be classified into four categories:

- national road network under concession, financed and operated by private companies;
- non- concessional national road network financed by the national government and operated by the National Roads Institute;
- secondary road network, financed and operated by departments; and

- tertiary road network financed and operated by municipalities.

Road infrastructure in Colombia linking private participation has been developed through three generations of concession contracts to finance, design, build, operate and maintain highways. A fourth generation of concessions was launched in 2012 under the PPP scheme, where private investors can participate in public initiative PPPs bidding processes or present unsolicited proposals to be entirely founded with private resources or with both public and private funds.

#### **PUBLIC TRANSPORTATION**

The Massive Transportation Integrated Systems (SITM) were recently implemented in Colombia's major cities for improving urban public passenger transportation. The construction of the infrastructure (ie lanes, stations, stops) needed for the SITM's was performed by private construction companies who were awarded with a public works contract by the city's government. For the operation of the systems, local governments award 10-year concession contracts, some for purchasing, maintaining and operating the buses and others to operate the payment collection systems.

### **Other infrastructure**

#### **RESIDENTIAL PUBLIC UTILITY SERVICES**

Water supply, sewage, sanitation, electric energy (transportation to final user), natural gas distribution, basic public telephone and mobile telephone in rural areas are considered as residential public utility services, and must be provided by a Public Utility Company (*Empresa de Servicio Público Domiciliario* (ESP)), incorporated under the structure of a joint-stock corporation. ESP shareholders may be companies or individuals from the private sector, public sector entities or mixed economy entities. Even though a single ESP may provide more than one public utility service, the regulatory agencies (Water and Basic Sanitation, Energy and Gas and Telecommunications) may limit the ESP's business to only one service to prevent monopolization.

#### **DEFENSE AND NATIONAL SECURITY**

Typically, defense assets are owned by the public sector. However, private companies can provide goods and services required for this sector to the government.

#### **SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, PENITENTIARIES, PUBLIC BUILDINGS)**

Typically, infrastructure from these sectors is owned by the public sector. Most social infrastructure assets in Colombia are directly financed by the government. However, the goal is to attract private investment through PPPs to develop these sectors that have traditionally been left behind.

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## ***Are there special rules for investing in energy and infrastructure?***

### **Generally**

Whether a specific investor can invest in a particular project will depend on the terms of the project's procurement if it is carried out by the public sector. Regarding an existing/operating project, the possibility for a private company to invest will depend on whether there are any contractual restrictions on change of control or contract assignment.

On private sector infrastructure, the investor would need to consider the need of licenses (ie construction, environmental, planning), previous consultations, entity's consents or permits to carry out the project.

### **Energy**

The energy sector in Colombia is highly regulated and controlled by the Regulation Commission for Energy and Gas (CREG) and the Mining and Energy Planning Unit (UPME) which are the principal state agencies responsible for regulating the energy sector and market in Colombia. These public entities are currently issuing new resolutions regarding regulated and non-regulated users, the tariffs to be charged to the final users, subsidies and the elaboration/update of the National Energy Expansion Plan. Investors should keep in mind if they will be developing in the regulated or non-regulated segments of the energy market, and the advances in the implementation of the regulation regarding alternative energy that was issued in 2001 but that has not had much development yet.

## Telecoms infrastructure

Under the regime introduced by Law 1341 of 2009, all telecommunications services (ICT's) may be freely provided without any license or authorization; the only requirement is for the provider to be registered in a public record. The Communications Regulatory Commission is the state agency in charge of regulating the ICT's sector in Colombia.

Regarding television, all agents must have a license or contract granted by the National Television Agency for operating and providing television services that usually lasts 10 years.

## Transport infrastructure

For a private sector sponsor to carry out a highway project, the company must meet the enabling requirements established by the National Infrastructure Agency (ANI) in a prequalification stage previous to the bidding process: experience in financial investment or project structuring/development and financial capacity. Once the contract is awarded by the ANI, the private investor that will act as a sponsor must constitute a special purpose vehicle (SPV) to execute the specific project that constitutes the object of the contract awarded by the ANI. In addition, the SPV must constitute a trust fund that will manage the project's equity investments, the debt originated by the lenders, the toll-road collection funds, the commercial exploitation money and the government's resources when the project requires public funds (*Vigencias Futuras*).

There is usually a restriction on the change of control of a private sector sponsor in these highway projects: during the pre-operation phase (pre-construction and construction) and until the first year of the operation and maintenance phase, sponsors may assign their participation but the SPV has to maintain as a shareholder holding a 25% equity interest, a party that presented financial and experience requisites during the bidding process; and after the first year of the operation and maintenance phase until the end of the concession without restrictions.

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## What is the applicable procurement process?

Public Procurement in Colombia is governed by the General Statute for Public Procurement, composed by Law 80 of 1993, Law 1150 of 2007 and Decree 1082 of 2015. The following are the sector-specific regulations that are excluded from the application of the general regime:

- Residential Public Utility Services are governed by Law 142 of 1994 and subject to private law regime.
- Electric energy activities are governed by Law 143 of 1994 and subject to private law regime.
- Telecommunications are governed by Law 1341 of 2009; (iv) Ports are governed by Law 01 of 1991.

Contracts procured by the public sector must be awarded following the principles of objective selection, transparency, economic efficiency, planning, publicity and responsibility. All public contracts must be awarded through a public tender unless the regime establishes specifically that a given contract must be awarded following one of the exceptive procedures. However, in all cases the public entity will need to publish the procedure's terms of reference and contractual documents in the electronic system SECOP. The following are the five selection procedures for awarding public contracts:

- **Public tender** – This selection process is used by state agencies to select contractors through a public invitation that is extended to all people interested in entering into a contract with such entity so that they, on equal conditions and following an established objective criterion, submit their proposals, from which the most favorable will be selected.
- **Abbreviated selection** – This procedure is used in cases in which the characteristics of the object to be contracted, the circumstances of contracting, or the value or destination of the goods or services may be contracted by an expedited public tender. It is allowed in the following instances:
  - when the good to be acquired has uniform technical characteristics and are of everyday use by state entities;
  - for minor amount contracts, determined based on the annual budget of the contracting entity;
  - for celebrating contracts for the provision of health services;

- in the cases when a public tender process has been declared deserted (without suitable bidders);
  - for the alienation of public assets;
  - for acquiring goods produced or intended for agricultural purposes that are offered on legally constituted product exchanges;
  - for celebrating contracts that have as an object the commercial and industrial activities inherent to industrial and commercial state entities;
  - the contracts of entities dedicated to the execution of programs regarding protection to individuals in risk, demobilization and reinsertion to civil life of people belonging to armed groups, displaced population, human rights protection, and population in high risk of vulnerability; and
  - for acquiring goods and services required for national defense and security.
- **Merits-based contest** – This selection process must be used only to select contractors for consultancy projects in which the work is mostly intellectual and so the public entity must consider the bidder's professional qualities or technical expertise instead of the price of the services.
  - **Direct contracting** – This is an exceptional selection mechanism since its application is restricted to the following events only:
    - when the public entity has declared that the contract must be celebrated to ensure the continuity of the service (*'urgencia manifiesta'*);
    - for contracting loans;
    - for celebrating inter-administrative contracts;
    - for the confidential contracts celebrated to acquire goods and services required for national defense and security that must be kept under reserve;
    - contracts for the development of scientific and technological activities;
    - escrow agreements celebrated by regional entities;
    - when there are no other suppliers in the market for the provision of the good or service; and
    - for the provision of professional services and administrative support, or for the execution of artistic works that can be only entrusted to specific individuals.

## Investing in energy and infrastructure

The selection mechanisms and rules for the celebration and execution of public-private partnership (PPP) contracts are also ruled by the General Statute for Public Procurement. However, the selection mechanism that applies depends on the project's initiative (public or private) and if it requires public funds, according to what is prescribed in Decree 1467 of 2012.

### PUBLIC INITIATIVE PPP

The selection mechanism that must be selected by the public entity is the public tender. However, the entity can choose to open a prequalification round where the investor's financial and experience capacities will be evaluated when the project's estimated value exceeds US\$17 million.

### UNSOLICITED PROPOSAL PPP

#### *Funded 100% by a private investor*

Once the state entity approves the project presented by the originator in its feasibility phase, it must publish a public call for third parties to manifest if they are interested in the project structured by its originator. If no other companies show their interest, the state agency can award the contract directly to the project's originator. If other companies manifest an interest in the project, the state entity must open an abbreviated selection process to award the contract. During the public process, the originator has the right to present a second offer improving the value of the offer that was qualified in the first place. If, even by exercising its right, the originator doesn't obtain the first place, the company has the right to be compensated by the winning offeror for the costs incurred when structuring the project.



***Funded by a private investor with 20% public funds***

The investor has to be selected through a public tender process. The project's originator will have a 3% to 10% bonification in its final qualification during the tender process as a reward for its previous efforts in structuring the project.

An investor may choose, however, to seek to invest in a project that has already been procured and is operational. A special purpose vehicle (SPV) project company's shareholder may assign its contractual position to the shareholder, in which case such investments are controlled by the state entity who awarded the contract as procurement regulations establish that the assignment must be previously approved by the awarding entity. Moreover, an investor can also invest in an ongoing project by acquiring an interest in an SPV project company, where typically such investments are controlled by contractual mechanisms within the original contracts celebrated between the SPV's shareholders.

## Financing energy and infrastructure

Publicly procured contracts include a disposition that states that the SPV must register the lenders before the public entity and any change on the funding arranged, requires consent from the public sector. In addition, contracts provide that if the SPV incurs in a breach of any of the financial documents or contracts entered with the lenders, these have a step-in right to control the project.

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## *What are the most common forms of funding / investing in energy and infrastructure?*

### Funding

In Colombia, energy and infrastructure finance needs are met mainly by national or international commercial banks, nonbank finance companies (*Corporaciones Financieras*) and private equity funds that act together with multilateral agencies to serve as project lenders. Recently, insurance companies and private pension fund administrators have acted as financing sources for infrastructure projects.

Common forms of funding in energy and infrastructure include:

- syndicated bank loans made on a project-finance basis to a special purpose vehicle (SPV) project company, on medium- to long-term bases;
- private equity fund loans;
- project notes; and
- refinancing of the debt in the operation phase of the project.

Colombia's government has tried to expand the funding base and increase liquidity in the market by various means. Recently, the *Financiera de Desarrollo Nacional* was created as a mixed-economy financial company that offers financing, guarantee and advisory services for energy and infrastructure projects.

### Investing

Large engineering and construction companies act as sponsors in the development of infrastructure projects, while oil producers and energy agents are the companies that invest in the energy sector.

Common forms of investing in these sectors include:

- equity investment in project's SPVs in the form of share capital or subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

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## Restructuring

## Enforcement and sanctions

### *When can there be regulatory investigations?*

Violations of the financial system rules and regulations are subject to administrative, and in some cases, criminal sanctions.

The Superintendency of Finance exerts its supervisory powers over the financial sector on a consolidated and comprehensive basis. The consolidated supervision extends to all financial institutions including banks operating in Colombia and their subsidiaries abroad, in the latter case to the extent permitted by the laws of the respective country of incorporation.

The Superintendency of Industry and Commerce is responsible for advancing administrative investigations of antitrust violations by financial and non-financial corporations, and has the power to impose corresponding sanctions.

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### *What regulatory penalties may apply?*

The Superintendency of Finance may inspect Colombian financial institutions on a discretionary basis and has the authority to impose sanctions including admonitions, fines, removals, or administrative takeovers on such institutions and their directors and officers for violations of Colombian laws or regulations, or such financial institutions' by-laws.

If a financial institution exceeds the lending and investment limits as set forth in the applicable law, the Superintendency of Finance may impose a fine up to twice the amount by which any such loan exceeded the limit and, in some cases, there may be criminal sanctions.

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### *What criminal penalties may apply?*

The Colombian Criminal Code introduced criminal rules and regulations to prevent, control, detect, eliminate and prosecute all matters related to financing terrorism and money laundering. The criminal rules and regulations cover the omission of reports on cash transactions, mobilization or storage of cash, and the lack of controls.

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## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### *Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?*

There is no stamp, registration, or other similar tax payable on loan agreements, bonds or other debt instruments.

Documents granting security (eg mortgage instruments) that have to be registered either on the Public Deed Registry, or before a Chamber of Commerce, are subject to:

- a registry tax that ranges between approximately US\$30 (for 'documents *without* amount') and 1% of the contract amount, depending on the specific characteristics of the document to be registered; and
- a registry fee which ranges from approximately US\$6 (for 'documents *without* amount') to 0.5% of the contract amount.

In most cases, mortgage instruments are considered 'documents *with* an amount', and therefore subject to registry tax and fees calculated as a percentage (and not the fixed amounts mentioned above).

The execution of a public deed is subject to the payment of notary fees which, in the case of a mortgage, amount to 0.3% of the secured amount (plus a 19% value added tax on the notary fee). This also applies to instruments which are granted through public deed without a legal requirement to do so.

Liens over personal property such as shares, intangibles, and accounts receivable, are not subject to registry tax, as they are not inscribed in the Public Deed Registry or Chamber of Commerce but rather in the Personal Property Securities Registry, which charges a fixed registry fee of approximately US\$10.

### **Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?**

The transfer or assignment of a mortgage would, in principle, be subject to the registry taxes and fees, and notary fees since, in practice, these transfers or assignments are carried out through a cancellation of the pre-existing mortgage and the creation of a new mortgage.

The documentation of the substitution of mortgaged assets, without a change in parties or the secured obligations, is deemed by regulation as a 'document *without* amount' (such that the fixed amounts mentioned above are applicable).

### **Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?**

The assignment of a security over personal property (eg shares, intangibles and accounts receivables) is subject to a fixed registry fee of US\$10, payable to the Personal Property Securities Registry.

Bonds, promissory notes, loan agreements and similar debt instruments are not required to be registered with the Public Deed Registry or before a Chamber of Commerce, nor are they required to be incorporated on a public deed, and therefore are not subject to the aforementioned taxes and fees (which are normally charged upon securities and not upon debt instruments).

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## ***Do tax authorities take priority on enforcement?***

### **On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?**

Under current applicable law, the liabilities of a borrower in insolvency proceedings are discharged in the following order of priority:

- expenses incurred after the start of the insolvency proceedings;
- pension liabilities;
- liabilities covered by a security interest up to the amount of the security interest;
- tax obligations (enforcement by the Colombian Tax Authority (*Dirección de Impuestos y Aduanas Nacionales* (DIAN)), or the local tax administration, depending on the tax due);
- other kinds of liabilities; and
- unsecured liabilities.

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## ***Is withholding tax on interest payments applicable?***

### **Is there withholding tax on interest payments under a loan?**

Interest payments made under a loan from Colombian source income are subject to withholding tax. According to Colombian tax law, the source of interest income depends on the domicile of the debtor.

## If so:

### What is the rate of withholding?

The general withholding tax rate for interest payments made by a person resident for tax purposes in Colombia to a recipient who is not resident for tax purposes in Colombia, is 15%. This rate is increased to 34% (33% from 2018) when the recipient is resident for tax purposes in a country listed by Colombia as a non-cooperative or low tax jurisdiction.

### What are the key exemptions?

Interest payments on loans granted by persons not resident for tax purposes in Colombia to Colombian banks, financial cooperatives, commercial finance companies, financial corporations, the Colombian Nation and territorial authorities, as well as certain government-owned finance agencies (Bancoldex, Finagro and Findeter), are not considered Colombian source income and are, therefore, not subject to withholding taxes or income taxes.

Interest payments arising from loans intended to finance public infrastructure projects in Colombia, and granted for a term equal to, or longer than, eight years, could be subject to a reduced 5% withholding tax rate.

The double tax treaties entered into by Colombia may allow for a reduction of the general withholding tax rate (normally to 10%), provided that the conditions set forth in the applicable treaty are complied with (such as the recipient being the effective beneficiary of the interest, and not a mere conduit entity).

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes. However, the Colombian Tax Administration recently changed a doctrine that has been in place since 2013, to accept an exception from withholding tax for interest payments on bonds and other debt securities issued outside of Colombia by a Colombian resident, provided the bonds or other debt securities are not traded on the Colombian markets. According to this new interpretation, there would not be withholding taxes in these cases.

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## *Are foreign lenders and debt security holders subject to tax on interest payments?*

### Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

Lenders who are not resident in Colombia and whose only Colombian source income are interest payments, are not required to file an income tax return in Colombia, provided that any applicable withholding tax has been adequately charged. In this event, the withholding tax becomes the final tax due in Colombia. If these conditions are not fulfilled, an income tax return is due and the tax has to be calculated according to the general rules (which tax the profits of foreign lenders on a net, rather than gross, basis at a rate ranging from 33% to 40%).

### Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes. However, if the exception from withholding tax for interest payments on debt securities issued and traded outside of Colombia applies, an income tax return would not be required.

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