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Administrative order to terminate public trusts, public mandates and similar instruments

On Thursday, April 2, 2020, Andrés Manuel López Obrador, President of the United Mexican States, ordered the publication in the Official Federal Gazette (“DOF”) of a decree directing the termination of public trusts (but only in respect of public trusts that do not have their own officers and employees), public mandates and similar instruments (the “Decree”), pursuant to which all ministries and entities conforming the Federal Administration, the Office of the President and the Agrarian Courts (each a “Relevant Government Agency”) are instructed to process the early termination of such public trusts, mandates and similar instruments¹ (the “Vehicles and Instruments”) in respect of which any such Relevant Government Agency is the responsible party in respect of their administration, to the effect that all rights and obligations deriving from the Vehicles and Instruments be further assumed by each such Relevant Government Agency, respectively,² and become payable against their respective annual budgets.

In that sense, each Relevant Government Agency must, as a general rule, reach out to the relevant trustees, attorneys-in-fact or agents of the Vehicles and Instruments and instruct them to transfer to the Federal Treasury, by no later than April 15, 2020, all federal public funds managed by the respective Vehicles and Instruments. Any exception to the foregoing general rule will need to be expressly authorized by the Ministry of Finance and Public Credit (“SHCP”), in consultation with the Ministry of Public Administration (“SEFP”), but only to the extent that the head of the Relevant Government Agency provides adequate grounds, based on fact and law, to justify such authorization, and provided, further, that if SHCP fails to respond within 10 business days, the request for authorization will be deemed as denied.

Furthermore, upon effectiveness of the Decree³, as a general rule each Relevant Government Agency is instructed not to use or otherwise commit federal public funds managed by Vehicles and Instruments.

¹ To provide context to the scope of the Decree, public trusts that do not have their own officers and employees are those referred to in article 9 of the Federal Law of Budget and Financial Responsibility (*Ley Federal de Presupuesto y Responsabilidad Hacendaria*), which are organized in a different manner to those that conform the *administración pública paraestatal* because the former do not have a technical committee and executive officers, and consequently are not considered as *entidades paraestatales* for purposes of the Federal Public Administration Law (*Administración Pública Federal*).

² Paragraph XIII of article 2 of the Federal Law of Budget and Financial Responsibility (*Ley Federal de Presupuesto y Responsabilidad Hacendaria*) defines them as “the Legislative and Judicial Bodies, autonomous entities which are allocated funds in the Expenses’ Budget (*Presupuesto de Egresos*), as well as the ministries and public entities, which incur those expenses set forth in article 4 of this Law against the Expenses’ Budget (*Presupuesto de Egresos*)”. For purposes of the Decree, only those Vehicles and Instruments for which a Relevant Government Agency acts as the administrative unit or principal having primary responsibility are affected. Any other public trusts, public mandates or similar instruments created by the Legislative and Judicial Branches of Government and autonomous entities are excluded from and not affected by the terms of the Decree.

³ Pursuant to the transitory article of the Decree it shall become effective upon its publication in the DOF – April 2, 2020.

RITCH M U E L L E R

Only in very special circumstances, when the head of the Relevant Government Agency provides SHCP, with a copy to SFP, adequate grounds, based on fact and law, to justify an exception to the general rule, may SHCP authorize that such funds be used or committed for specific purposes; provided that if SHCP fails to respond within 10 business days, the request for authorization will be deemed as denied.

The following Vehicles and Instruments are expressly excluded from the scope of the Decree:

- (i) those created pursuant to law or legislative decree, the termination of which would require constitutional or other legal amendments;
- (ii) those that are considered as “legal instruments” that serve as public debt mechanisms; and
- (iii) those that were established for the purpose of addressing health emergencies or satisfying labor or pension-related obligations.

The scope of such exceptions is relatively straightforward with respect to those listed in paragraphs (i) and (iii) above, since the same are directly related to the form of creation of such Vehicles and Instruments and to the consequences of their termination, as well as to the specific purpose for which they were created. Nonetheless, it is not possible to conclusively assert the scope of application of the exception provided for in paragraph (ii) above, due to its ambiguity⁴, without guidance from SHCP, being the ministry in charge of providing administrative interpretation of the Decree.

Finally, the Decree provides that failure to comply with its terms will result in administrative liability in terms of the General Law of Administrative Liability (*Ley General de Responsabilidades Administrativas*). To that effect, there is a wide range of possible sanctions against individuals involved in the managing of Vehicles and Instruments, which include a simple warning and/or economic fines and/or a disqualification and ban from public service.

The Decree, its scope and its interpretation may have a direct or indirect impact on the way that many economic agents do business with the public sector in Mexico. It is important to note that notwithstanding that the Decree expressly provides for the safeguarding and protection of the interests of third party that may be affected by its terms, each particular situation will be different and the possible implications should be analyzed on a case by case basis taking into consideration the specific circumstances of each case. To the extent that the application of the Decree does in fact end up affecting rights of third parties with a vested interest in any of the Vehicles and Instruments, there may be legal remedies available to such affected third parties, which may include an injunction against the immediate application of the Decree and a ruling or judicial decision requiring the Federal Government to cease the effects of the Decree against the affected party and uphold and honor the affected rights.

The President and his team have highlighted that the Vehicles and Instruments have traditionally lack transparency with respect to the use of funds managed. It is for this reasons that the measures adopted through the Decree do not come as a surprise at present, particularly considering that the implementation of the Decree will provide the Federal Government with additional resources to be discretionally deployed and used to address the current crisis associated with COVID-19.

⁴ The exception does not provide any clarity as to the definition of “public debt mechanisms”, or otherwise as to which type of public debt it refers to (i.e. (1) Federal Government Debt (*Deuda del Gobierno Federal*), (2) Public Sector Debt (*Deuda del Sector Público*), and/or (3) Historic Balance of the Public Sector Financial Requirements (or Debt Historic Balance) (*Saldo Histórico de los Requerimientos Financieros del Sector Público (o Saldo Histórico de la Deuda)*). For example, an interpretation of such exception may be that it is limited to those public trusts set forth in paragraph VI of article 1 of the Federal Law of Public Debt (*Ley Federal de Deuda Pública*), entitled to incur obligations, whether direct or contingent, deriving from financings.

RITCH M U E L L E R

Should you require further information, our team of professionals is available to answer any questions. We encourage you to reach out to your ordinary Ritch Mueller contacts to seek advice and discuss your particular circumstances and any issues in connection with the application of the Decree.

Otherwise, feel free to reach out to us at contacto@ritch.com.mx so we may direct your query to the appropriate team members.

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