

Ecuador¹

I. Ecuador country overview

Ecuador is a republic and has a civil law system.² The current constitution, passed in 2008, divides the government into the following branches: legislative; executive; judicial; transparency and social control; and electoral.³ Weaknesses in the judicial system and the rule of law are significant challenges facing both for-profit and not-for-profit organizations operating in Ecuador. A report by the U.S. Embassy in Ecuador finds that "[i]ssues include frequent challenges to contractual commitments, a judiciary that appears susceptible to external influences, a frequently-changing regulatory environment, and challenges collecting fees on time and in the amounts previously agreed."⁴ As of 2015, Ecuador ranks 115 out of 189 countries in the World Bank's ease of doing business rankings.⁵ The country ranks 110 out of 175 on Transparency International's 2014 Corruption Perceptions Index and 130 out of 142 in its 2012 Judicial Independence Index.

Various provisions of the 2008 Constitution⁶ discuss the right to association and the role of the state in promoting free association:

(1) Article 45 specifies that "[t]he State shall guarantee [the] freedom of expression and association [of children and adolescents], the free functioning of student councils and types of associations.

(2) With respect to users and consumers, Article 55 states that "Users and consumers will be able to set up associations that promote information and education about their rights and that represent and defend them before judiciary or administrative authorities. For the exercise of this and other rights, nobody shall be obliged to associate."

(3) Article 66 guarantees, *inter alia*, "[t]he right to associate, assemble and express oneself freely and voluntarily."

(4) Article 165 provides that "[d]uring the State of Exception, the President of the Republic can only suspend or limit the exercise of the right to the inviolability of domicile, inviolability of

¹ The following memorandum was prepared by pro bono counsel for the ABA Center for Human Rights. It is intended as background information only and should not be relied upon as legal advice on a particular case. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

² Quevedo Vergara, Patricio. "Doing Business in Ecuador." Practical Law Corporation. Accessible on <http://www.us.practicallaw.com>.

³ Constitution of 2008 of the Republic of Ecuador, Title IV "Participation and Organization of Power." The English translation of the Constitution is available online at: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

⁴ "Doing Business in Ecuador: Country Commercial Guide for US Companies." http://www.buyusainfo.net/docs/x_8284643.pdf.

⁵ World Bank Group. "Doing Business 2015, Going Beyond Efficiency. Economy Profile 2015, Ecuador" at 6.

⁶ See the Constitution of 2008 of the Republic of Ecuador.

correspondence, freedom of movement, freedom to associate and assemble, and freedom of information, under the terms set forth by the Constitution.”

(5) Article 277 states that “[t]he general duties of the State in order to achieve the good way of living shall be [*inter alia*] [t]o promote and bolster science and technology, the arts, ancestral wisdom and, in general, activities resulting from the creative initiative of communities, associations, cooperatives and the private sector.”

(6) Article 326 guarantees, *inter alia*, “[t]he right and freedom to organize shall be guaranteed to workers, without prior authorization. This right shall include that of forming trade unions, guilds, associations and other forms of organization, joining those of their choice and freely withdrawing from them. The right of organization is likewise granted to employers.”

II. Registration Procedures

A. For-Profit Organizations

a. Laws

The *Ley de Compañías* (the "Companies Law") recognizes five types of for-profit companies:

- (1) *compañía en nombre colectivo* (a company operating under the registered name of its collective members);
- (2) *compañía en comandita simple y dividida por acciones* (limited partnership);
- (3) *compañía de responsabilidad limitada* (limited liability company);
- (4) *compañía anónima* (joint-stock corporation); and
- (5) *compañía de economía mixta* (a partially government-owned corporation).⁷

The Companies Law also recognizes the existence of unincorporated associations.

The specific registration requirements and procedures vary depending on the type of company established; the requirements and procedures for establishing each type of company are detailed in the Companies Law.⁸ Generally speaking, however, the steps in establishing a limited liability company or joint stock corporation (the most common types of business entities in Ecuador⁹) are as follows:

- **Reservation of the company name with the Superintendent of Companies.**

- o Article 433 of the Companies Law authorizes the Superintendent of Companies to pass regulations, rules and resolutions related to the validity, government and control

⁷ *Ley de Compañías*. Available online at: <http://181.198.3.74/wps/wcm/connect/77091929-52ad-4c36-9b16-64c2d8dc1318/LEY+DE+COMPA%C3%91IAS+act.+Mayo+20+2014.pdf?MOD=AJPERES&CACHEID=77091929-52ad-4c36-9b16-64c2d8dc1318>.

⁸ *Id.*

⁹ See “Doing Business and Investing in Ecuador” report from Pricewaterhouse Coopers, available online at http://www.pwc.com/es_EC/ec/publicaciones/assets/pdf/doing-business-ecuador-06-com-protecao.pdf, p. 88.

of most companies,¹⁰ including joint stock corporations and limited liability companies. Accordingly the Superintendent of Companies has passed certain regulations relating to the reservation and denial of company names. Specifically, each company must have a clear and unique name. The Superintendent of Companies may deny a reservation of a corporate name if the name is contrary to morals or “good customs”, is obscene or tends to incite socially unacceptable behavior. However, the regulations also make clear that the official reviewing the corporate name may deviate from the regulations’ guidelines if warranted by the circumstances and by equity.¹¹ Approval of a corporate name is to be completed within 15 days of submission to the Superintendent.

- The relevant regulation specifies that the reason for denial of a proposed name must be documented. The requesting party may insist on review of the denial by a committee composed of the *intendente jurídico* (legal manager), an advisor appointed by the Superintendent of Companies, and the Director of the Legal Department of Special Proceedings; the committee has five days to rule on the denial. Decisions of the committee may only be overturned by the resolutions of the Superintendent of Companies or via recourse to a relevant administrative proceeding (the precise type of such proceeding is not specified in the regulation).¹²

- **Preparation and notarization of the company's constitutive documents (a deed of constitution, or charter, and bylaws):**

- ***For a joint stock corporation that is to be privately owned:*** two or more shareholders (individuals or legal entities) are required, and the deed of constitution must include the following information¹³:
 1. The date and place of execution of the deed of constitution;
 2. The name, addresses and nationalities of the founding members (which may be individuals or legal entities);
 3. The corporate purpose, which must be concrete (see discussion below for more detail);
 4. The name and domicile of the corporation;
 5. Individual capital contributions, the amount of total authorized capital, the type of shares to be issued and the names, addresses and nationality of share subscribers;
 6. Specification of how capital will be paid (as cash or in-kind);

¹⁰ *Ley de Compañías*, Article 433. Note that, pursuant to Articles 431 and 433, the Superintendent of Companies is not generally empowered to pass regulations governing Ecuadorian *compañías en comandita simple* or *compañías en nombre colectivo*. However, Article 24 of the Companies Law does specify that the Superintendent of Companies may demand information from companies that are not subject to its control as and when it deems it necessary to do so.

¹¹ See Resolución N°. SC. SG. 2008.008 (R.O. 496 de 29 de diciembre de 2008).

¹² *Id.*

¹³ These requirements are found in Article 151 of the Companies Law. Note that there are different requirements for what must be included in the deed of constitution if the joint stock corporation is established via a public offering. Those requirements are found in Article 153 of the Companies Law.

7. The sworn statement from each founding shareholder regarding the proper formation and payment of capital (in accordance with Article 147 of the Companies Law);
 8. The form of administration and the powers and designation of officers;
 9. The manner and time of general meetings;
 10. The designation of the corporation's legal representatives;
 11. The method of distributing profits. Note also that by law, private companies established in Ecuador must distribute 15% of pre-tax profits to employees;¹⁴
 12. Liquidation procedures
- ***For a limited liability company:***¹⁵ a limited liability company requires a minimum of two members and may have a maximum of fifteen. If the number of members exceeds fifteen, the company must, within three months, convert its legal form, reduce the number of members or dissolve.¹⁶ Limited liability companies may not operate as banks, insurance providers or savings institutions. Legal entities may be members of a limited liability company, with the exception of banks, insurance providers, savings institutions and foreign joint stock corporations. Additionally, ecclesiastical and religious orders, the clergy, certain public officials and persons who have declared bankruptcy (without subsequent rehabilitation) cannot be members of a limited liability company.¹⁷ A limited liability company's charter must include the following:
 1. The name, addresses and nationalities of the company (which may be individuals or legal entities). If foreign companies are shareholders, the deed of constitution must include a certificate documenting the company's existence and legal standing from its jurisdiction of incorporation, as well as a list of all of the shareholders (which must include the names, addresses, and marital status of individual shareholders and the names and addresses of legal entities who are shareholders).
 2. The corporate purpose, which must be concrete (see discussion below for more detail);
 3. The name, domicile of the company, and its duration;
 4. The total amount of capital, the value of individual capital participations of each shareholder, and amounts paid toward the same;
 5. Form of the corporation's administration and designation of legal representatives;
 6. Procedures for shareholder meetings

¹⁴ See Article 328 of the current Constitution and the US State Department report at <http://www.state.gov/e/eb/rls/othr/ics/2013/204634.htm>.

¹⁵ See Section V of the Companies Act.

¹⁶ See Article 365 of the Companies Act.

¹⁷ Article 101 of the Companies Law; Article 7 of the Código de Comercio (the "Commerce Code"). Note that Article 7 of the Commerce Code appears to prohibit such persons from engaging in trade or merchant activity of any kind; however, the only explicit prohibition on their participation in companies as members contained in the Companies Law appears to be the prohibition on their being members of a limited liability company.

- **Deposit of the applicable minimum capital requirement in an account in the company's name:**
 - o For a joint stock corporation, at least 25% of the authorized share capital must be paid-in.¹⁸ The minimum share capital is USD 800.¹⁹ There is no maximum share capital. Share capital may be increased or decreased by amending the company's deed of constitution, but the Superintendent of Companies must approve such amendment. The amended deed of constitution must be filed in the Mercantile Registry.
 - o For a limited liability company, at least 50% of each capital participation must be paid at the time of formation. The remaining 50% is payable within one year from the date of the company's establishment. The minimum capital amount is not specified in the Companies Law but rather is established by the Superintendent of Companies; it is currently USD 400.
- **The appointment and registration of a legal representative (indicated in the deed of constitution);**
- **The notarized constitutive documents for both joint stock corporations and limited liability companies must be approved by the Superintendent of Companies.** Following approval, the notarized documents and certificate of approval are filed with the Mercantile Registry. The company or corporation comes into legal existence upon filing with the Mercantile Registry.
- **Tax registration:** The Companies Law also requires limited liability companies and joint-stock corporations to apply for a tax registration number in the *Registro Unico de Contribuyentes* at the *Servicio de Rentas Internas*.
- **Filing with the Central Bank:** The Ecuadorian Central Bank must be notified of the identity of any foreign investors.²⁰

The process to register a *compañía en nombre colectivo* or a limited partnership has similar elements, but a civil judge conducts and oversees the registration procedure.

On average, the registration of a joint stock corporation or limited liability company may take three to four weeks.²¹ To facilitate the formation of new companies, the Superintendent of Companies promulgated resolution No. SCV-DSC-G-14-008 in June 2014; this resolution sets forth a simplified, electronic registration process for establishing a for-profit company.²² This allows the bulk of the registration process to be done online via the website for the Superintendent of Companies at: <https://www.supercias.gov.ec/web/privado/seguridad/htm/tramites.htm>. Transfers and assignments of shares of companies organized under the laws of Ecuador must be registered with the Superintendent of

¹⁸ See Article 147 of the Companies Law.

¹⁹ See Quevedo Vergara, Patricio. "Doing Business in Ecuador." Practical Law Corporation.

²⁰ *Id.*

²¹ See *Id.* and World Bank Group, "Doing Business 2015, Going Beyond Efficiency. Economy Profile 2015, Ecuador." However, a "Doing Business and Investing in Ecuador" report from Pricewaterhouse Coopers notes that it may take as many as 90 days for incorporation, particularly if foreigners are involved. Report available online at http://www.pwc.com/es_EC/ec/publicaciones/assets/pdf/doing-business-ecuador-06-com-protecao.pdf.

²² Superintendencia de Compañías y Valores. Resolución No. SCV-DSC-G-14-008, published 19 June 2014. Available online at: <http://181.198.3.74/wps/portal/Inicio/SectorSocietario/Normativa/Resoluciones>.

Companies within eight days of the transfer or assignment, and this process may be done online as well.²³ Companies may also update their corporate documents online.

Article 3 of the Companies Law prohibits the formation and operation of companies which (i) are contrary to public order, applicable law, or established custom; (ii) lack a legitimate business purpose; or (iii) tend to, or promote, a monopoly.²⁴ A company may only be established to carry out a single corporate purpose or objective (although this may be achieved by various stages of development or phases) and the purpose must be clearly stated in its charter.²⁵ Furthermore, a company is limited to only one economic area of activity (eg: pharmaceuticals, shipping, telecommunications). To aid in compliance with this requirement, the Superintendent of Companies is required to publish an annual classification of corporate activities, which may be based on the International Standard Industrial Classification of All Economic Activities.²⁶

Article 361 of the Companies Law provides that a company is dissolved in the following instances:²⁷

1. The time period specified in the company's charter for its duration has expired.
2. The company's primary domicile is moved to a foreign country.
3. The company is legally adjudged to be bankrupt.
4. By shareholder agreement (in accordance with the Companies Law and the company's corporate charter);
5. The purpose for which the company was formed has been fulfilled or becomes manifestly impossible to fulfill;
6. Upon accumulated losses equal to fifty percent or more of its capital stock, or in the case of limited liability companies, joint-stock corporations, certain limited partnerships and partially government-owned corporations, upon accumulated losses equal to one half of its capital stock plus total reserves.
7. Upon merger with, or acquisition by, another company, in accordance with Article 337 of the Companies Law.
8. The number of shareholders or members falls below the minimum required by law, provided that if the company has not increased the number of shareholders/members to the minimum required within 6 months, then after that time period the remaining shareholder or member(s) will be personally liable for the corporation's obligations until a corresponding declaration of dissolution is filed (note also that for a limited liability company, if the number of members exceeds fifteen,

²³ See *Ley de Compañías*, Article 21 and <https://www.supercias.gov.ec/web/privado/seguridad/htm/tramites.htm>.

²⁴ *Ley de Compañías*, Article 3. Note that the Companies Law does not describe specifically how a decision that a company (or proposed company) violates one or more of items (i), (ii) or (iii); however, the Superintendent of Companies (or in the case of *compañías en comandita simple* or *compañías en nombre colectivo*, a judge) would presumably make this determination either at the time the initial application is submitted or upon (and as part of) making a determination that a company should be dissolved. A challenge of a dissolution may be brought pursuant to Article 370. Other, administrative proceedings potentially may be brought as well, pursuant to *Estatuto del Régimen Jurídico y Administrativo de la Función Ejecutiva* or other law (although we have not examined the possibilities for such administrative proceedings in detail).

²⁵ *Id.*

²⁶ See *id.* and <https://www.supercias.gov.ec>.

²⁷ The Companies Law also provides for special circumstances under which *compañías en nombre colectivo* and *compañías en comandita simple* are dissolved.

the company must either convert its form or reduce the number of shareholders within three months or the company is dissolved).

9. Failure to comply, over a period of five years, with the reporting requirements set forth in Article 20 of the Companies Law (which requires financial statements and other information to be provided to the Superintendent of Companies).
10. Failure to raise the minimum capital stock required by law.
11. Violation of, or non-compliance with, applicable laws, regulations or the corporation's constitutive documents if such violation or non-compliance threatens its normal operation or causes grave harm to the interests of shareholders/members or third parties.
12. If the company obstructs or otherwise makes difficult the oversight, control and supervision of the Superintendent of Companies, or if the company violates a regulation promulgated by the Superintendent.
13. For any other cause established by law or in the corporation's charter.

Article 369 of the Companies Law empowers the Superintendent of Companies (by petition or *sua sponte*) to declare a company dissolved for any of the reasons specified in paragraphs five through 13 above.²⁸ Article 359 also permits the Superintendent of Companies (by petition or *sua sponte*) to declare a company inactive if it has not engaged in business operations for two consecutive years. The company may be dissolved if the company remains inactive for thirty days following receipt of the Superintendent's resolution of inactivity. In all cases, the declaration of dissolution must be published in a newspaper of widespread circulation.²⁹ More broadly, Article 577 of the Código Civil (the "Civil Code") provides that corporations can be dissolved by law if they comprise the security or interests of the State.³⁰

Article 370 of the Companies Law provides that the Superintendent's declaration of dissolution of a company may be challenged in the corresponding *Tribunal de lo Contencioso Administrativo* (Court of Administrative Litigation) within ten days of the date of publication of the declaration. The challenge must be brought by shareholders or members representing at least 25% of the company's paid-in capital. Notably, Article 370 states that the challenge does not have a staying effect on the corporate dissolution and that in no case may the dissolution and liquidation procedure be suspended.

Additionally, Article 374 of the Companies Law provides a mechanism by which a company that has been declared dissolved can be reactivated (provided the cause of the dissolution is cured) if the company's registration in the Mercantile Registry has not yet been cancelled.

b. Case Law

We did not research case law in this area.

B. Not-For Profit Organizations

a. Laws

²⁸ Provided that the company is the type of corporate form over which the Superintendent of Companies has regulatory authority. See footnote 7 above.

²⁹ *Ley de Compañías*, Article 371.

³⁰ This provision applies equally to not-for-profit corporations. See Section B below.

Paragraph 13 of Article 66 of the Constitution of Ecuador guarantees "the right to associate, assemble and express oneself freely and voluntarily." Article 565 of the Civil Code provides that non-profit organizations must be formed either pursuant to an established law or approved by the President. Ecuador has not enacted a comprehensive statutory framework governing not-for-profit corporations.³¹ As such, not-for-profit corporations' establishment and operations are governed by regulations issued pursuant to the President's Article 565 authority.

Executive decree no. 339 of November 1998 delegated to each government ministry the authority to promulgate regulations governing not-for-profit corporations that operate within the ambit governed by the ministry (eg, the Ministry of Environment may promulgate regulations governing environment-related not-for-profits). In June 2013, President Correa promulgated Executive Decree No. 16, which established a new framework governing the registration, operation, oversight and dissolution of not-for-profit corporations.³² This framework is referred to as the *Reglamento para el Funcionamiento del Sistema Unificado de Informaciones de las Organizaciones Sociales y Ciudadanos* (Regulation for the Functioning of the Uniform System of Information regarding Non-profit and Citizen Organizations). The Uniform System is referred to as "SUIOS" (for its initials in Spanish). Executive Decree No. 16 does not, however, explicitly revoke the delegation of regulatory authority made under Executive Decree No. 339.

Article 12 of Executive Decree No. 16 divides not-for profit organizations into two types: not-for profit corporations and not-for profit foundations:

Not-for Profit Corporations

Article 13 of Executive Decree No. 16 specifies that not-for-profit corporations must have a minimum of five members and be established via a charter. Such corporations are further subdivided into three degrees: first degree are the smallest and most local (examples include associations, clubs, etc); second degree not-for-profit corporations are made of groups of first degree corporations (examples include federations, chambers, unions, etc.); and third degree corporations are made of second degree corporations (examples include national unions and similar nation-wide organizations). The Executive Decree does not explicitly specify the types of activities that a not-for-profit organization can undertake, but Article 26 (which regards dissolution and is discussed below) makes non-profit organizations subject to dissolution for, *inter alia*, involvement in partisan political activities and interference in public policy or politics which threatens either the internal or external security of the country or which affects public peace and order. Additionally, not-for-profits that are engaged in certain, specified activities are not eligible for income tax exemption (see tax section below for further detail).

Not-for Profit Foundations

Article 14 of Executive Decree No. 16 provides that a not-for profit foundation may be comprised of one or more members. If the foundation has multiple members, its constitutive documents must

³¹ This provision applies equally to for-profit and not-for-profit corporations. However, there does not appear to be a statutory framework regarding the establishment of not-for-profit corporations, as there is for for-profit corporations.

³² Available online at: <http://www.inclusion.gob.ec/wp-content/uploads/downloads/2014/11/Decreto-Ejecutivo-16.pdf>.

establish a board of directors of at least three members. Per Article 14, foundations are organizations designed to benefit the good of society, such as by promoting or developing cultural, educational and social activities, as well as to conduct philanthropic activities.

Registration requirements

Non-profit foundations and corporations must apply for legal recognition and approval of their bylaws online via the SUIOS website. To do so, they must upload documentation demonstrating/containing the following:³³

A. Resolution of the constitutive general assembly of the organization being formed, which must include:

1. Name of the organization.
2. Full name, nationality and national identification card (or similar document) number of each of the founding members.
3. The desire of the members to establish the organization.
4. Purpose and general objective of the organization.
5. List of interim directors.
6. Full name and national identification card (or similar document) number of the person in charge of the organization's establishment process and the telephone number, email and physical address where such person can receive notifications.
7. Identification of the place in which the organization will have its domicile and the phone number, fax and/or email address of the organization, if available.

B. Any private company that wishes to be a member of a not-for profit organization must also present:

1. Corporate authorizations (certified by the corporate secretary) indicating the company's desire to be a member of the non-profit.
2. Full names, nationality, national identification card (or similar document) number and signature of the company's legal representative(s).
3. Certified copy of the approval of the company's formation from the relevant governmental entity (typically the Superintendent of Companies).
4. Certified copy of the listing of the directors of the participating company and documentation evidencing the legal representative of the company.
5. The participating for-profit organizations and any industry or business association must also submit a certificate of good standing issued by the relevant supervisory body (in the case of for-profit companies, this is the Superintendent of Companies).

The non-profit must also upload the certification of the registration of participating for-profit organizations in RUOS (discussed below).

C. Resolution of the constitutive general assembly approving the not-for-profit's bylaws, which must relate to the following (at minimum):

1. The name, area/ambit of the not-for-profit's operations, and the organization's address

³³ Article 17 of Executive Decree No. 16

2. The territorial reach of the not-for-profit
3. The purpose and objectives of the not-for-profit
4. The organizational structure
5. Rights and obligations of the members
6. Manner of electing officers and the duration of their appointment
7. The obligations and attributes of the internal management/boards: board of directors, administrators, and legal representation
8. Corporate assets and the management of the same
9. The obligations and attributes of the investigatory and internal control board
10. The manner and time of general assembly meetings
11. The quorum for holding a general assembly meeting and the quorum for taking decisions at such meetings
12. Mechanisms for including and excluding members; such mechanisms must guarantee due process at all times
13. Amending the bylaws
14. Dispute resolution framework
15. Causes of and procedure for dissolution and liquidation

D. Certified documentation showing the minimum capital required has been paid in (either in cash or in kind).

The capital requirements are as follows:³⁴

- first degree corporations: USD 400
- foundations and second and third degree corporations: USD 4,000

Note that not-for profits made of persons or groups given "priority attention" (the Decree specifies that groups entitled to "priority attention" are those not-for profits whose purpose is the defense of such persons' rights) are exempt from the capital requirement.

Article 18 of Executive Decree No. 16 specifies that uploaded applications will be reviewed to assess: 1) compliance with the regulations set forth in Executive Decree No. 16 and 2) whether the application is contrary to public order or any law. A report regarding the application is to be issued to the relevant competent authority within 15 days of the application. The proposed non-profit will also be made aware of the details of the report.

If the report finds that the application contains all of the required information, the organization must present the original certified documentation to the competent authority in order for the documentation to be validated and the organization officially approved. This must be done within 8 days of the date of the report. If an application is rejected for failure to comply with the regulations set forth in Executive Decree No. 16, the competent authority will give the organization a grace period of 20 days to supply the additional/missing information. If the application fails to comply with the requirements a second time, it is denied. However, the organization can reapply in the future, without prejudice.³⁵

Foreign NGOs

³⁴ Article 17.5 of Executive Decree No. 16.

³⁵ Article 18 of Executive Decree No. 18.

Foreign non-governmental organizations ("NGOs") that wish to conduct "non-reimbursable activities of international cooperation" must apply with the *Secretaría Técnica de Cooperación Internacional* (the "Technical Secretariat of International Cooperation"). The application must indicate the purpose and activities that the NGO wishes to carry out in Ecuador. The NGO must attach documentation evidencing its legal existence, including its bylaws written in Spanish. Once the NGO has received authorization from the Technical Secretariat of International Cooperation, it must register via SUIOS.³⁶

The Technical Secretariat of International Cooperation will request additional information (including information relating to the NGO's legal status, solvency, honesty and seriousness) from Ecuadorian embassies and consulates abroad. The Secretariat may solicit such information from embassies and consulates in the country under whose laws the NGO is established, in the country where it has its principal headquarters, or in countries where the NGO has conducted similar activities. If satisfied with the documentation, the Secretariat will sign a *Convenio Básico de Funcionamiento* (a "Basic Agreement of Functioning"). The Secretariat will also notify the NGO in writing once it is officially authorized to begin operating in Ecuador. The NGO may have its operating authorization revoked if it (i) violates the Basic Agreement of Functioning or the requirements of Executive Decree No. 16 or (ii) if it carries out activities other than those specified in the Basic Agreement of Functioning or activities that are contrary to security or public order.

Certification and Accreditation of Not-for-Profits

Non-profits must obtain certification from, and be accredited by, the *Secretaría Nacional de Gestión de la Política* (the "National Secretariat of Policy Management.")³⁷ Article 45 of Executive Decree No. 16 does not specify the steps for certification in detail, but rather simply provides that the National Secretariat of Policy Management shall certify the organizations that are registered in accordance with the requirements set forth in Executive Decree No. 16. The certification from the National Secretariat of Policy Management constitutes the qualifying document, or license, that permits the non-profit to engage in its specified non-profit activities and is to be renewed with each new board of directors.

Article 46 of Executive Decree No. 16 requires non-profits that receive public funding or resources to register in the *Registro Único de Organizaciones Sociales* (the "Single Registry of Non-Profit Organizations" or "RUOS") and to be accredited by the relevant state entity from which it is receiving funding. Although there is not a similar, explicit requirement for all non-profits to register in RUOS, this seems to be what is contemplated by the certification from the National Secretariat of Policy Management discussed in the previous paragraph, in light of the fact that RUOS is maintained by the National Secretariat of Policy Management and the fact that several provisions of Executive Decree No. 16 refer to certifications from RUOS.³⁸ Article 6 of Executive Decree No. 16 specifies that each not-for-profit organization has the right to obtain certification by RUOS.

³⁶ Article 31 of Executive Decree No. 18.

³⁷ Article 45 of Executive Decree No. 16.

³⁸ See, eg, Article 19 of the Decree (relating to amendment of bylaws and requiring a RUOS certification for the same); see also the description of the purpose and function of RUOS in Article 42 of the same.

Required legal counsel

General provision no. 8 of Executive Decree No. 16 explicitly requires not-for-profit organizations to obtain legal advice and representation in connection with any application or written request related to the legal validity of the non-profit.

Dissolution

Article 26 of Executive Decree No. 16 provides the following causes of mandatory dissolution for non-profit organizations:

1. Falsification or adulteration of the application documentation or the information contained therein
2. Deviation from the purpose and objectives for which the organization was established
3. Repeated breach or violation of the orders or decisions of a) the competent authorities that are tasked with granting legal status to the organization, or b) oversight and regulatory authorities
4. Reduction in the number of members below the applicable minimum requirement
5. Termination of the time period for which the organization was established
6. Involvement in partisan political activities
7. Interference in public policy or politics which threatens either the internal or external security of the country or which affects public peace and order.
8. Failure to comply with obligations set forth in the Constitution, law or the regulation set forth in Executive Decree No. 16.

Dissolution on the basis of the aforementioned causes is declared by the government ministry that approved the organization's by-laws and granted it legal recognition. In doing so, the ministry must apply the procedure established in the *Estatuto del Régimen Jurídico y Administrativo de la Función Ejecutiva* (the statute governing the legal and administrative regime of the executive branch).³⁹ Such dissolution may be done in response to a petition or the relevant ministry may act *sua sponte*.

Executive Decree No. 16 states that not-for-profit organizations may bring the lawsuits and/or administrative proceedings that they deem necessary to protect their rights. It does not specify any further detail about such redress or the time period in which a claim or administrative proceeding must be brought.⁴⁰ Article 30 of the Decree provides that a non-profit organization that has been dissolved may be reactivated by either judicial or administrative order.

Once a non-profit has been dissolved, Article 28 of Executive Decree No. 16 empowers the state to donate the non-profit's property to another not-for-profit organization.

b. Case Law

We did not research case law in a holistic fashion. We note, however, that there have been multiple lawsuits brought before the Constitutional Court of Ecuador challenging the constitutionality of

³⁹ Article 26 of the Executive Decree No. 16.

⁴⁰ *Id.*

Executive Decree No. 16.⁴¹ However, it appears the Court has not yet ruled on these cases: a search on the website of the Constitutional Court does not return anything related to Executive Decree No. 16. The press release found at <http://www.fundamedios.org/defensa-y-promocion/articulos/organizaciones-piden-la-corte-constitucional-resolver-demandas-contr> suggests the Court is delaying or avoiding hearing such challenges.

C. Analytical comparison of the legal process of registration

The basic processes of registration of for-profit corporate entities and non-profits are in many respects identical in Ecuador. The non-profit has to provide the same fundamental documentation as to the corporate purpose, governance etc. However, the non-profits are subject to much greater disclosures for the initial grant of authority to act. Given the significant bureaucratic hurdles in forming a legally recognized not-for-profit, there could be a tendency to organize informal groups to advocate social policy changes, rather than proceed with formation of a corporate entity or foundation to achieve a non-profit goal.

The cost of initial registration is far greater for non-profits than for-profit organizations. For all but the smallest non-profits, the capital requirements for formation is five times greater than the requirements for the formation of a profit seeking corporate entity (USD 4,000 vs. USD 800). The capital required for the smallest form of non-profit is the same as that required for a limited liability business entity (USD 400).

A substantial barrier for registering non-profits (given that they may have limited resources) is the requirement that all filings for the initial formation and subsequent operations must be overseen or performed by a licensed attorney, thus adding to the expense of formation. Although the government has sought to simplify the mechanism for reporting requirements by use of an electronic portal for a single point of contact (as it has done with for-profit registration), the electronic filing for non-profits still requires the involvement of legal counsel. This cost can be substantial because of the close regulatory oversight exercised by the government agencies of the non-profit, including the requirements for filing immediate reports whenever there is a change of officers or board members or other change of its operations.

The oversight of the formation and regulation of non-profits is more diffuse and subject to a greater array of agencies than for-profits. For-profits have essentially only to deal with the Superintendent of Companies. In contrast, non-profits may have a number of regulatory agencies reviewing their initial application (because a given non-profit may be subject to regulation by more than one agency). The basis for approval of the non-profit's initial request for authority to operate appears much more complex and discretionary. In contrast, the for-profit approval is largely formulaic and limited to a short laundry list of requirements for the basis corporate charter.

⁴¹ See, eg, <https://decreto16.files.wordpress.com/2014/02/demanda-de-inconstitucionalidad-cucomitae.pdf>; see also <http://www.flacsoandes.edu.ec/observatoriodiscriminacion/index.php/notas/343-demanda-al-decreto-ejecutivo-16>.

In keeping with the greater scrutiny of non-profits, a foreign non-profit's operations may be scrutinized by the staffs of the Ecuadorian embassies in other countries where the foreign non-profit is established and/or operating. No similar provision exists for foreign for-profit business entities.

III. Tax Laws

A. For-Profit Organizations

a. Laws

The principal laws governing taxation of for-profit organizations are the *Código Tributario* (the "Tax Code") and the *Ley del Régimen Tributario Interno* (the "Domestic Tax Regime Law"). The Tax Code sets forth the basic framework for relations between taxpayers and tax authorities, whereas the Domestic Tax Regime Law contains the bulk of actual tax legislation.⁴²

For-profit organizations are subject principally to the following taxes:

1. Income tax

Chapter 1 of the Domestic Tax Regime Law discusses income tax.⁴³ Companies that are incorporated under the laws of Ecuador and foreign companies with branches or permanent establishments in Ecuador are subject to income tax. Currently, the income tax rate on for-profit companies is twenty-two percent.⁴⁴

2. Value added tax ("VAT")

Article 52 of the Domestic Tax Regime Law imposes a value added tax on the transfers of moveable property, regardless of whether the transfer is by an individual or a legal person and regardless of whether or not the transfer is supported by consideration. Per Title II of the *Reglamento para la Aplicación de la Ley de Régimen Tributario Interno* (the "Regulation for the Application of the Domestic Tax Regime Law"), the VAT amount is currently twelve percent.⁴⁵

3. Tax on the remittance of currency

⁴² See Pricewaterhouse Coopers. "Doing Business and Investing in Ecuador", chapter 13 Tax System. Available online at: http://www.pwc.com/es_EC/ec/publicaciones/assets/pdf/doing-business-ecuador-06-com-protecao.pdf.

⁴³ The Domestic Tax Regime Law is available online at <http://descargas.sri.gov.ec/download/pdf/leytribint.pdf>.

⁴⁴ Quevedo Vergara, Patricio. "Doing Business in Ecuador." Practical Law Corporation. Accessible on <http://www.us.practicallaw.com>.

⁴⁵ The Regulation for the Application of the Domestic Tax Regime Law is available online at <http://www.sri.gob.ec/BibliotecaPortlet/descargar/b38aeb06-a2a7-401a-83ee-9f9564f86f04/Reglamento+para+la+Aplicaci%F3n+de+la+Ley+de+R%E9gimen+Tributario+Interno+actualizado+a+enero+2013.pdf>.

All capital outflows from Ecuador are subject to a five percent remittance tax. Subject to this tax, foreign investors are permitted to repatriate one hundred percent of the net proceeds and capital of their investment.⁴⁶

4. Municipality taxes

Companies incorporated under Ecuadorian law, as well as those foreign companies with permanent establishments in Ecuador, are subject to municipality taxes. These taxes are levied by the municipality in which they operate and include a municipal tax on total assets and a municipal permit tax.

5. Contribution to the Superintendent of Companies

Article 449 of the Companies Law specifies that the funds necessary to cover the expenses of the Superintendent of Companies are to come from “contributions”. The Superintendent itself determines annually the amount of contribution that a given company is required to pay. However, the contribution may not exceed a specified percentage of the company's assets.

Additionally, the government of Ecuador has implemented a variety of tax benefits for corporations. In particular:

- the Production Code contains tax incentives intended to attract investment (both foreign and domestic) in certain priority sectors, such as fresh and processed food, forestry, agro-forestry, metalworking, petrochemical products, pharmaceuticals, tourism, renewable energies, logistical services, biotechnology and applied software;
- the 2005 Tax Incentives Law exempts certain investments in key areas (hydroelectric generation projects, oil refineries, airports, etc.
- the Free Trade Zone Law, in effect since 1991, exempts goods or raw materials entering one of the country's established free trade zones from taxation, including customs duty. Entities operating within a free trade zone are also exempt from income tax.⁴⁷

For more information about Ecuadorian corporate tax incentives, please see: <http://www.proecuador.gob.ec/en/invest-in-ecuador/why-invest-in-ecuador/incentives-and-clear-rules-for-production/>

b. Case Law

We did not research case law in this area.

B. Not-For Profit Organizations

a. Laws

⁴⁶ U.S. Department of State. "2014 Investment Climate Report Ecuador". Available online at: <http://www.state.gov/documents/organization/228171.pdf>

⁴⁷ See Pricewaterhouse Coopers. "Doing Business and Investing in Ecuador", chapter 13 Tax System. Available online at: http://www.pwc.com/es_EC/ec/publicaciones/assets/pdf/doing-business-ecuador-06-com-protacao.pdf.

Paragraph 5 of Article 9 of the Domestic Tax Regime Law provides for income tax exemption for not-for-profit organizations that are dedicated or related to the following:

1. Religious worship
2. Charity
3. Promotion and development of women, children and families
4. Culture, art, education or research
5. Health
6. Sports
7. Professional organizations and unions
8. Political parties

To be eligible for income tax exemption, the organization's assets and income may only be used for the organization's stated purpose, and only the portion of the organization's income that is re-invested directly in the organization is exempt.

Additionally, Article 19 of the Regulation for the Application of the Domestic Tax Regime Law requires that a not-for-profit organization desiring to claim income tax exemption receive a certain minimum percentage of its income from donations. For an organization whose annual income is between USD 0 and USD 50,000, 5% of the organization's income must come from donations. For organizations whose income is between USD 50,001 and USD 500,000, at least 10% of the organization's income must come from donations in order for the organization to qualify as income tax exempt. Any not-for-profit with annual income in excess of USD 500,000 must receive at least 15% of its income from donations in order to qualify as income tax exempt.

The provisions of the Domestic Tax Regime Law and the Regulation for the Application of the Domestic Tax Regime Law which discuss exemptions for not-for-profits do not explicitly exempt such organizations from paying VAT, tax on the remittance of currency or municipality taxes. However, not-for-profit organizations are not required to make contributions to the Superintendent of Companies, as this is a requirement imposed by companies pursuant to the Companies Law, which does not govern non-profit organizations.

b. Case Law

We did not research case law in this area.

C. Analytical comparison

The tax regime applicable to for-profit organizations is also generally applicable to not-for-profit organizations. However, not-for-profits may claim tax-exempt status for income tax if they meet the statutory and regulatory requirements described above. Not-for-profits are also not required to pay contributions to the Superintendent of Companies, as they are outside of its regulatory purview.

IV. Financial Transaction Laws

A. For-Profit Organizations

a. Laws

i. Foreign Investment/Foreign Funding Laws

A 2014 report from the U.S. Department of State finds that Ecuador is relatively open to foreign investment.⁴⁸ Articles 313, 314 and 315 of the 2008 Constitution provide that the state is charged with managing certain "strategic sectors", either through state-owned or state-controlled companies. Such strategic sectors include energy, telecommunications, non-renewable natural resources, transportation, hydrocarbon refining, water and biodiversity.⁴⁹ However, in most industries (ie, non-strategic industries), foreign investment with up to one hundred percent foreign equity is permitted.⁵⁰

By law, all foreign investments must be registered with the central bank of Ecuador.⁵¹ Foreign investment may be made via capital contribution or via intangible technological contributions, tangible goods, etc.⁵² First, the foreign investment must be registered in the Mercantile Registry and proof of this registration must then be submitted upon registration with the central bank. The central bank registration must be completed within forty days of the date of the investment.⁵³ The central bank, in turn, must make monthly reports regarding foreign investments and submit these to the *Ministerio de Comercio Exterior, Industrialización y Pesca* (the "Ministry of Foreign Commerce, Industry and Fisheries" or the "MFCIF"). The MFCIF is the main administrative agency tasked with implementing legislation related to foreign investment.⁵⁴

Foreign debt funding provided to private Ecuadorian persons (both individuals and legal persons) must also be registered with the central bank. The specific registration requirements vary depending on the type of debt funding provided and whether the debtor is an individual or a legal person. The registration must be completed within forty-five days of the disbursement of funds.⁵⁵

Additionally, Ecuador is a member of the Andean Community, which has promulgated its own regulations related to foreign investment.⁵⁶ In particular, Decision 291 of the Andean Community establishes a "Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties."⁵⁷

ii. Political Contribution Laws

⁴⁸ U.S. Department of State. "2014 Investment Climate Report Ecuador". Available online at: <http://www.state.gov/documents/organization/228171.pdf>.

⁴⁹ 2008 Constitution of Ecuador.

⁵⁰ U.S. Department of State. "2014 Investment Climate Report Ecuador".

⁵¹ See the legal framework related to foreign investment on the website of the *Banco Central de Ecuador* at http://www.bce.fin.ec/documents/pdf/servicios_bancarios/NormativaINVEXTRANJ.pdf.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Pricewaterhouse Coopers. "Doing Business and Investing in Ecuador", chapter 5.

⁵⁵ See the legal framework related to foreign debt reporting on the website of the *Banco Central de Ecuador* at

⁵⁶ The Andean Community is a customs union comprised of Ecuador, Bolivia, Colombia and Peru. See <http://www.comunidadandina.org/Index.aspx> for more information.

⁵⁷ Decision 291 is available online at <http://www.sice.oas.org/trade/junac/decisiones/dec291e.asp>.

The *Ley orgánica electoral y de organizaciones políticas de la República del Ecuador, Código de la Democracia* (the "Electoral Law") governs contributions to political candidates, campaigns and organizations.⁵⁸

Article 215 of the Electoral Law specifies that political organizations registered with *Consejo Nacional Electoral* (the National Electoral Council) and political candidates may receive legal contributions and donations.⁵⁹

Additionally, Article 216 of the Electoral Law states that political organizations may receive funding for political campaigns from the following sources:

1. Membership fees from their affiliates/members, as well as money contributed by a candidate to his or her campaign;
2. Donations from Ecuadorian natural persons and from natural persons who are legal residents of Ecuador; and
3. Income earned by the political organization

Article 219 of the Electoral Law prohibits donations from Ecuadorian nationals (individuals) who have entered into contracts with the state (provided that the contract is for the construction of public works, for services, or for natural resource exploitation). Also, any individual who is involved directly or indirectly in litigation with the state on the basis of a public works or public service contract may not make political contributions.

Furthermore, Article 360 of the Electoral Law prohibits political organizations from receiving, directly or indirectly, contributions from the following:

1. State enterprises
2. Concessionaires or licensees of public works or services that are property of the state
3. Religious congregations
4. Natural or legal persons having contracts with the state
5. Foreign businesses, institutions or states

Article 359 of the Electoral Law sets forth limits on the amount of contributions that may be made by a given person. The limit is the same regardless of whether the contribution is being made by a natural or legal person.

Finally, Article 297 of the Electoral Law establishes fines for any contribution made in violation of the Electoral Law. Any natural or legal person (whether Ecuadorian or foreign) who makes an illegal contribution will be fined in an amount equal to three times the amount of the illegal contribution.

b. Case Law

⁵⁸ Full text of the law, which was passed in 2009, is available at <http://cnemorona.gob.ec/LEY%20ELECTORAL.pdf>. A reform law was passed in 2012 (and is available at https://www.oas.org/es/sap/deco/moe/ecuador2013/docs/CODIGO_DEMOCRACIA.pdf). The reform law does not, however, appear to have changed any of the provisions discussed here.

⁵⁹ Article 353 of the Electoral Law states that political organizations may receive both public and private funding, in accordance with the other provisions of the Electoral Law.

We did not research case law in this area.

B. Not-For Profit Organizations

a. Laws

i. Foreign Investment/Foreign Funding Laws

The foreign investment and foreign funding framework discussed above does not appear to distinguish between for-profit and not-for-profit organizations in cases where the organization in question is receiving the investment and/or the funding. Thus, the legal requirements listed above for for-profit organizations seem to be equally applicable to not-for-profit organizations.

However, we note that Decision 291 of the Andean Community does provide special treatment for certain organizations providing foreign investment/funding into Ecuador. Decision 291 specifies that investments made by the following organizations are "neutral" and thus are not taken into account when calculating the percentage of foreign or domestic ownership of an organization:

- (i) Inter-American Development Bank (IDB);
- (ii) International Finance Corporation (IFC);
- (iii) German Corporation for Economic Cooperation (DEG);
- (iv) Danish Industrialization Fund for Developing Countries (IFU); and
- (v) Inter-American Investment Corporation (IIC).

ii. Political Contribution Laws

The provisions discussed above in the for-profit section do not distinguish between for-profit organizations and not-for-profit organizations.

b. Case Law

We did not research case law in this area.

C. Analytical Comparison

On their face, the foreign investment and political contribution provisions discussed above seem to treat a for-profit organization and non-profit organization the same. However, regarding the political contribution provisions, it seems possible (at least in theory) that if a not-for-profit organization donated to a political party, the state—if it were so motivated—could argue that making the contribution constituted a deviation from the organization's established purpose and could proceed to dissolve the non-profit on that basis. The statutory causes for dissolution applicable to a for-profit corporation are also likely sufficiently broad and vague that the state could make a similar argument for a for-profit organization, but doing so could be less straightforward than with a not-for-profit.

V. Auditing/Reporting Requirements

A. For-Profit Organizations

a. Laws

Article 20 (relating to companies established under Ecuadorian law) and Article 23 (relating to foreign companies operating in Ecuador) of the Companies Law require companies subject to the regulatory authority of the Superintendent of Companies to submit the following information during the first quarter of each year.⁶⁰

1. Authorized copies of the company's financial statements and administrative reports
2. Roster of administrators, legal representatives and members/shareholders
3. All other information required pursuant to regulations promulgated by the Superintendent of Companies.

Additionally, pursuant to Article 23, foreign companies operating in Ecuador must also submit an “authorized copy of the Annex on Financial Movement of Goods and Services.”

Pursuant to Article 361 of the Companies Law, failure to comply with the reporting requirements in Article 20 for a period of five years, and more generally, failure to comply with applicable law (including the reporting requirements in the Companies Law) are grounds for dissolution of a company over which the Superintendent of Companies has regulatory authority.

Pursuant to Article 25 of the Companies Law, the Superintendent of Companies may also demand to see up-to-date financial statements for any company within its control at any time.

Article 318 of the Companies Law requires external auditing for companies whose assets exceed a certain amount (the precise amount is specified by the Superintendent of Companies).

b. Case Law

We did not research case law in this area.

B. Not-For Profit Organizations

a. Laws

Reporting

Board membership

Article 21 of Executive Decree No. 16 requires registration of the board of directors of a non-profit via SUIOS. The following documentation must be provided:

1. The petition to hold the meeting electing the board;
2. Resolution of the general meeting at which the board is elected. The resolution must be certified by the non-profit's secretary;

⁶⁰ Because, as stated above, article 431 does not give the Superintendent of Companies general regulatory authority over Ecuadorian *compañías en comandita simple* or *compañías en nombre colectivo*, these reporting obligations do not appear to apply to them. However, Article 24 of the Companies Law does specify that the Superintendent of Companies may demand information from companies that are not subject to its regulatory control as and when it deems it necessary to do so.

3. Full names of all members present at the meeting, along with their identifying documentation (national ID card, etc) and their signatures;
4. Up-to-date certification from RUOS

The same registration process must be followed whenever new board members are elected.

Registration of members

Executive Decree No. 16 requires non-profit organizations to submit the names, addresses, general data, national identification card (or similar document) for all members.⁶¹ Upon the inclusion or exclusion of members, the organization must submit the following to SUIOS, which transfers the information to the competent supervising authority:

1. Application for registration, signed by the organization's legal representative;
2. Minutes and resolution of the organization's general meeting in which the organization makes the decision to include or exclude the relevant members;
3. Application for admittance to the organization or application to leave the organization, signed by the person so requesting;
4. If the general assembly's action has the effect of excluding or removing a person from the organization, the supervising authority is to review the procedure and basis for the exclusion or removal in order to determine whether such member's right to due process was violated;

Supervision, audits and related reporting

Article 39 of Executive Decree No. 16 makes non-profits subject to the following control and supervision:

1. Operating oversight by the relevant state authority that initially authorized the establishment of the non-profit. Such oversight relates to: verification of the documentation submitted by the organization; fulfillment of the organization's stated purpose and objectives; registration of the board of directors; and the organization's membership roster.
2. Oversight regarding the utilization of public resources and funds; note that because Ecuadorian tax law provides that any tax exemption enjoyed by a non-profit constitutes a public subsidy, this oversight authority could ostensibly provide the government the authority to oversee and review the expenditures of any non-profit that enjoys tax exempt status.⁶²
3. Tax control by the *Servicio de Rentas Internas* (see discussion of tax laws above)
4. Any other oversight authority provided for bylaw.

Article 40 of Executive Decree No. 16 states that in order to facilitate the oversight provided for in Article 39, non-profit foundations and corporations must provide:

1. Minutes and resolutions of their general meetings;
2. Economic and financial reports;

⁶¹ See Article 23 of Executive Decree No. 16; <http://www.icnl.org/research/monitor/ecuador.html>.

⁶² See Article 9 of the *Ley del Régimen Tributario Interno*.

3. Auditing and approved annual reports;
4. Any other information related to their activities that is required by the relevant supervising governmental entities.

The same Article specifies that non-profit organizations have an obligation to facilitate any access required by state authorities in order to conduct physical audits and verifications.

b. Case Law

We did not research case law in this area.

C. Analytical Comparison

There is a far greater degree of regulatory intrusion of the state into the affairs and reporting of non-profits compared to for-profit organizations. A non-profit may be required to turn over all documentation and information relating to it and its operation to the state, when and as the state requires. Additionally, a non-profit is required to provide financial, audit and similar economic reports on at least an annual basis in order for the regulators to determine that the non-profit is conducting its affairs appropriately. In contrast, the financial reporting requirement for for-profit corporate bodies is far less stringent in that although there is an annual reporting requirement, a for-profit corporation may omit to provide financial statements for upwards of five years before the Superintendent of Companies is authorized to take action to revoke its corporate authority.

The extent of the potential intrusion of the regulators into the affairs of non-profit organizations includes the requirement of giving access to government agents to its facilities and papers at any time in order to determine the organization is operating appropriately. There is no similar *carte blanche* authority granted to the Superintendent of Companies to make on-site inspections of a for-profit's operations, facilities and documentation.

VI. Penalties for Non-Compliance

A. For-Profit Organizations

a. Laws

i. Civil

Article 445 of the Companies Law permits the Superintendent of Companies to impose fines upon companies subject to its regulatory oversight for any violation of applicable laws or regulations. If the law or regulation in question does not specify the amount of the fine to be imposed, Article 445 gives the Superintendent discretion to set the fine. However, the fine cannot exceed more than twelve times the minimum wage.⁶³ Additionally, as discussed above, a company may be dissolved if it does not comply with the statutory framework.

ii. Criminal

⁶³ Note that Article 445 does not specify whether this limit is based on the annual minimum wage, weekly minimum wage, etc.

The Companies Law does not explicitly provide for criminal penalties for violation of any of the regulatory framework discussed previously. Similarly, there is no provision of the *Código Orgánico Integral Penal* (the "Penal Code") which explicitly references the Companies Law. However, certain acts which would violate the Companies Law may also be punishable criminally. For example, submitting false financial statements to the Superintendent of Companies presumably violates the reporting requirement in Articles 20 and 23 of the Companies Law, and Article 312 of the Penal Code criminalizes the falsification of financial information by, *inter alia*, corporate administrators and legal representatives.⁶⁴

B. Not-For Profit Organizations

a. Laws

i. Civil

Dissolution for failure to comply with the prescribed regulatory framework appears to be the principal civil penalty for non-compliance. Furthermore, the bases for dissolution set forth in the Executive Decree No. 16 (listed in the section above discussing registration of not-for-profit organizations) appear to provide the government significant discretion and have the potential for abuse.

For example, an environmental non-profit called Foundation Pachamama was dissolved by the government in December 2013 on the bases of: (i) deviation from its stated purpose and goals and (ii) interference in public policy that threatens either the internal or external security of the country or which affects public peace and order.⁶⁵ The putative grounds for the dissolution was that Foundation Pachamama had "incited a violent protest" on November 28, 2013. Foundation Pachamama was dissolved on December 4, 2013. The Foundation denies that any of its members participated in violent acts.⁶⁶ Foundation Pachamama, which had been operating in Ecuador for 16 years, appealed to the Ministry of the Environment.⁶⁷ The basis of the appeal was that Foundation Pachamama's dissolution occurred without prior notice and without due process or the opportunity to be heard.⁶⁸ The appeal was denied.⁶⁹

As noted above, a non-profit may seek redress for dissolution via either judicial or administrative mechanisms. In general, however, acts of administrative agencies of the state are generally given

⁶⁴ Note that the current Penal Code was promulgated in 2014 and is available online at http://www.justicia.gob.ec/wp-content/uploads/2014/05/c%C3%B3digo_org%C3%A1nico_integral_penal_-_coip_ed._sdn-mjdhc.pdf. The Companies Law was promulgated in 1999. Cross-references to the Penal Code are listed following certain sections of the Companies Law; however a codification of the Companies Law from 2014 was consulted, and the cross-references in it do not appear to have been updated to reflect the new Penal Code.

⁶⁵ The order dissolving Foundation Pachamama is available online at: <http://www.presidencia.gob.ec/wp-content/uploads/downloads/2013/12/NOTIFICACION-MAE-Y-ACUERDO.pdf>.

⁶⁶ See <http://www.pachamama.org/news/fundacion-pachamama-goes-to-the-inter-american-commission-of-human-rights>.

⁶⁷ The Ministry of the Environment is the relevant supervisory authority since Foundation Pachamama operates within the ambit of the environment.

⁶⁸ See <http://www.pachamama.org/news/fundacion-pachamama-goes-to-the-inter-american-commission-of-human-rights>. The Foundation proceeded to take its case to the Inter-American Commission of Human Rights.

⁶⁹ See <http://www.ambiente.gob.ec/recurso-de-apelacion-presentado-por-fundacion-pachamama/>.

immediate effect, and an organization's dissolution is generally not stayed during the appeal (unless the order of dissolution provides otherwise).⁷⁰

ii. Criminal

Executive Decree No. 16 does not explicitly refer to any criminal penalties for failure to comply with the regulations set forth therein. Additionally, the Penal Code does not appear to have a general section or provision that imposes criminal liability for failure to comply with a regulation. However, certain grounds for dissolution of a not-for-profit, such as threatening the internal or external security of the country, could provide a basis for criminal liability. For example, Article 348 of the Penal Code criminalizes the "incitement of discord among citizens", and Article 349 criminalizes membership in, or promotion of, a subversive group.

C. Analytical comparison

The criminal penalties for both for-profit and non-profit corporate organizations are largely identical: neither the Companies Law nor the regulations applicable to non-profits specify a separate criminal penalty. Rather, the provisions of the Penal Code would be generally applicable to both for-profits and not-for-profits. With respect to civil penalties, dissolution appears to be the most daunting civil penalty the government could impose on both for-profits and not-for-profits.

Upon dissolution and liquidation, a for-profit company's debts are paid and any remaining assets are distributed to its shareholders/members. However, once a non-profit is dissolved, its assets are to be donated by the state to another not-for-profit organization, per Article 28 of Executive Decree No. 16. Given the fact that an organization's dissolution is not stayed pending an appeal and the fact that an agency/administrative appeal may not give the organization an adequate opportunity to be heard (as appears to have been the case with Foundation Pachamama), non-profit organizations appear more susceptible to forfeiture of their assets than do for-profit organizations.

Additionally, because its existence is regulated exclusively by executive orders and regulations (as opposed to a statutory framework), a not-for-profit's legal recognition and validity appears more fragile than that of a for-profit. Pursuant to his statutory authority under Article 565 of the Civil Code, the President could, in theory, issue a new decree dissolving all not-for-profit organizations. Since for-profit organizations are governed by precise statutory framework, abolishing them in one fell swoop would be more difficult.

D. Statistics on actual penalties for each group (if, available)

We did not readily find such statistics.

OVERVIEW CHART

Issue	For-Profit Organizations	Not-For Profit Organizations	Similarities
Registration	<u>Registration requirements</u>	<u>Registration requirements</u>	Basic

⁷⁰ See Articles 161 and 189 of the *Estatuto del Régimen Jurídico y Administrativo de la Función Ejecutiva*.

<p>Procedures</p>	<p>(may register online but not required)</p> <ol style="list-style-type: none"> 1. Reservation of the company name with the Superintendent of Companies. 2. Preparation and notarization of the company's constitutive documents (a deed of constitution, or charter, and bylaws): 3. Deposit of the applicable minimum capital requirement in an account in the company's name 4. The appointment and registration of a legal representative (indicated in the deed of constitution) 5. Approval of the notarized constitutive documents by the Superintendent of Companies 6. Tax registration 7. Filing with the Central Bank <p><u>Causes of dissolution</u></p> <ol style="list-style-type: none"> 1. Duration expired 2. Domicile moved outside Ecuador. 3. Bankruptcy of company 4. Shareholder agreement 5. Completion of purpose or impossibility of completing the same 6. Certain accumulated losses 7. Merger or acquisition 8. Inadequate number of shareholders or 	<p>(must register online)</p> <ol style="list-style-type: none"> 1. Resolution of the constitutive general assembly to establish the not-for-profit 2. Resolution of the constitutive general assembly approving the not-for-profit's bylaws 3. Certified documentation showing payment of the minimum capital required 4. Certification and accreditation by the National Secretariat of Policy Management and registration with RUOS. 5. Required legal counsel <p><u>Causes of dissolution</u></p> <ol style="list-style-type: none"> 1. Falsification or adulteration of the application documentation or the information contained therein 2. Deviation from the purpose and objectives for which the organization was established 3. Repeated breach or violation of the orders or decisions of a) the competent authorities that are tasked with granting legal status to the organization, or b) oversight and regulatory authorities 4. Reduction in the number of members below the applicable minimum requirement 5. Termination of the time period for which the 	<p>documentation required is similar, but not-for-profits are subject to a greater/more in-depth level of scrutiny in the scope of the documentation required and timing to provide such documentation.</p> <p>Causes of dissolution are similar, but the not-for-profit dissolution appears more subject to government discretion (and therefore possible abuse)</p>
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	<p>members</p> <p>9. Five years' failure to comply with financial reporting requirements</p> <p>10. Failure to raise required minimum capital stock</p> <p>11. Violation of, or non-compliance with, applicable laws, regulations or the corporation's constitutive documents if such violation or non-compliance threatens its normal operation or causes grave harm to the interests of shareholders/members or third parties.</p> <p>12. Obstruction or frustration of supervision of the Superintendent of Companies</p> <p>13. Any other cause established by law or in the corporation's charter.</p>	<p>organization was established</p> <p>6. Involvement in partisan political activities</p> <p>7. Interference in public policy or politics which threatens either the internal or external security of the country or which affects public peace and order.</p> <p>8. Failure to comply with obligations set forth in the Constitution, law or the regulation set forth in Executive Decree No. 16.</p>	
Tax Laws	<p>The principal taxes are: (1) income tax; (2) VAT; (3) tax on currency remittance; (4) municipality taxes; and (5) required contribution to the Superintendent of Companies</p>	<p>The not-for-profit is exempt from income tax if it meets the statutory and regulatory requirements for exemption. Generally, these require (1) the organization to be dedicated to one of the specific type of activities listed in the statute and (2) to obtain the applicable minimum percentage of its annual income from donations.</p>	<p>Requirement to pay VAT, tax on currency remittance and municipality taxes appears to exist in both instances.</p>
Financial Transaction Laws	<p>Foreign Investment/Foreign Funding Laws</p> <ul style="list-style-type: none"> • State-ownership or 	<p>Foreign Investment/Foreign Funding Laws</p> <ul style="list-style-type: none"> • State-ownership or state-control required in 	<p>Our research did not reveal significant differences;</p>

	<p>state-control required in companies operating in constitutionally-designated "strategic sectors"</p> <ul style="list-style-type: none"> • Registration of foreign investments with central bank • Registration of foreign debt funding with central bank • Decision 291 (relevant to Andean Community) <p>Political Contribution Laws</p> <ul style="list-style-type: none"> • Political organizations registered with <i>Consejo Nacional Electoral</i> (the National Electoral Council) and political candidates may receive legal contributions and donations. • Political organizations may receive funding for political campaigns from donations from Ecuadorian natural persons and from natural persons who are legal residents of Ecuador • Religious congregations and foreign businesses, institutions and states cannot contribute to political organizations 	<p>companies operating in constitutionally-designated "strategic sectors"</p> <ul style="list-style-type: none"> • Registration of foreign investments with central bank • Registration of foreign debt funding with central bank • Decision 291 (relevant to Andean Community) <p>Political Contribution Laws</p> <ul style="list-style-type: none"> • Political organizations registered with <i>Consejo Nacional Electoral</i> (the National Electoral Council) and political candidates may receive legal contributions and donations. • Political organizations may receive funding for political campaigns from donations from Ecuadorian natural persons and from natural persons who are legal residents of Ecuador • Religious congregations and foreign businesses, institutions and states cannot contribute to political organizations 	<p>framework the same for for-profits and non-profits</p>
<p>Auditing/Reporting Requirements</p>	<p>Reporting</p> <ul style="list-style-type: none"> • Annual reporting of: <ul style="list-style-type: none"> 1. Authorized copies 	<p>Reporting</p> <ul style="list-style-type: none"> • <i>Board membership</i>: upon registration and whenever 	<p>Both for-profits and non-profits have reporting</p>

	<p>of the company's financial statements and administrative reports</p> <p>2. Roster of administrators, legal representatives and members/shareholders</p> <p>3. All other information required pursuant to regulations promulgated by the Superintendent of Companies</p> <ul style="list-style-type: none"> • Superintendent of Companies may demand up-to-date financial statements at any time. • External auditing required in some instances. 	<p>new board members are elected.</p> <ul style="list-style-type: none"> • <i>Membership list</i> • <i>Changes in membership</i> <p><u>Supervision, audits and related reporting</u></p> <ul style="list-style-type: none"> • Oversight by authority that initially authorized the establishment of the non-profit. • Oversight regarding the utilization of public resources and funds; • Tax control by internal revenue service • Any other oversight authority provided for bylaw. • Information that must be reported: <ol style="list-style-type: none"> 1. Minutes and resolutions of their general meetings; 2. Economic and financial reports; 3. Auditing and approved annual reports; 4. Any other information related to their activities that is required by the relevant supervising governmental entities. 	<p>requirements. However, there is a far greater degree of regulatory intrusion of the state into the affairs and reporting of non-profits compared to for-profit organizations.</p>
<p>Penalties</p>	<p>Principal civil penalty appears to be fine or dissolution. No separate criminal penalty applicable; any criminal violation</p>	<p>Principal civil penalty appears to be dissolution. No separate criminal penalty applicable; any criminal violation would be specified by Penal Code.</p>	<p>Criminal penalties appear identical, since the Penal Code is the basis in</p>

	would be specified by Penal Code.		both instances. Principal civil penalty is dissolution. Causes for dissolution specified for not-for-profits appear to leave greater discretion for the state; higher possibility of forfeiture for not-for-profits.
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