# Accounting for change

**ROSA RESTREPO TEP** EXPLAINS RECENT LEGISLATIVE CHANGES IN PANAMA

**KEY POINTS**

**WHAT IS THE ISSUE?**
Two recent pieces of Panamanian legislation have introduced changes regarding record-keeping and trust law.

**WHAT DOES IT MEAN FOR ME?**
Members that establish structures incorporating either Panama corporations or private interest foundations must be aware of the need to keep accounting records. Amendments to trust law include clarifications on tax issues, and new and revised regulatory requirements.

**WHAT CAN I TAKE AWAY?**
An explanation of the key elements of both pieces of legislation.

**PANAMA HAS INTODUCED** several laws and regulations regarding transparency obligations to assist in the global fight against money laundering and terrorist financing. Two of the most significant recent laws are *Law No 52 of 27 October 2016* (Law 52)[1] and *Law No 21 of 10 May 2017* (Law 21).[2]

## LAW 52

Panama's taxation system is mainly territorial, in that – generally speaking – only income earned from Panamanian sources or with respect to assets located in Panama is taxed. Other taxes, including municipal and value-added taxes, are also applicable.

All companies, once registered publicly, are also registered with the internal tax authorities and provided with a tax identification number. Any company that has activities in Panama is subject to permit and licensing requirements and, as such, is required to keep accounting records and fulfil tax obligations prescribed by applicable laws, including the Panama *Commercial Code*.

On the other hand, companies that are registered in Panama, but do not have a physical presence or carry out business in the country, are not subject to taxes in Panama. These are generally referred to as offshore companies. They are not supervised by local tax authorities, but those of the jurisdiction in which their business is conducted.

Law 52 imposes an obligation to keep accounting records, and any underlying documentation, on any corporation, limited liability company, private interest foundation and any other legal entity for commercial purposes constituted under the laws of Panama whose activities and operations take place or have effects outside Panama. The law does not require that these accounting records be prepared in Panama, on the basis that the resident agent would have sufficient information to identify where the records are kept and who is responsible for maintaining them.

After the passing of Law 52, legal entities that do not carry out operations that are perfected, consumed or have their effects within Panama[3] are obliged to keep accounting records and supporting documentation. These must be kept at the office of the resident agent in Panama, or at any other place determined by the entity's board of directors or administrators. Should accounting records and supporting documentation not be maintained at the resident agent's office in Panama, the agent must receive written confirmation regarding the physical address where accounting records and supporting documentation are maintained, as well as the name and contact details of those who retain them.

Further, the resident agent must be informed, in writing, of any changes in the physical address or contact information within a period of no more than 15 working days from the date on which the change was approved. When the accounting records and supporting documentation are not maintained at the resident agent's office in Panama, and following a formal request from a competent authority, the entity must

*'A trust subject to the laws of Panama will not be considered void or invalid on the basis that the settlor's country of domicile or residence does not recognise trusts'*

provide such documents to its resident agent within 15 days. If said request is not fulfilled, the resident agent must file its resignation with the public registry.

The law does not impose any obligation to produce or file periodical financial statements, but companies must keep sufficient records in order to provide transparency regarding their activities and financial situation at any given time.

Any legal entity that does not comply with the obligations established under the provisions of Law 52 will be sanctioned with a fine.

Law 52 also includes an obligation on the entity to keep a copy of the register of shareholders, members or quota holders at the office of the resident agent in Panama. This is in addition to the requirement under article 36 of *Law 32 of 26 February 1927*, which governs limited liability companies (*sociedades anónimas*).

## LAW 21

This new law covers regulatory issues, tax clarifications and changes to the basic trust law in Panama. Two key changes are the incorporation of a risk-based approach to the trust business, and reinforcement of the supervision and regulatory powers of the Superintendency of Banks of Panama (SBP). These changes bring the Panamanian trust business, and trustee practices, in line with international standards, and within the globally accepted framework of transparency and flexibility.

Law 21 also sets out the requirements to obtain a trust licence, including the relevant application process. In regulatory terms, Law 21 requires that any natural or legal person who wishes to carry out trust business be properly licensed and subject to supervision by the SBP.

The legislation outlines clearly the need for trustees to establish internal controls, policies and procedures to prevent their services from being used for money laundering, the financing of terrorism or any other illegal activity. These include the obligation to know their clients as well as their employees, and monitor their activities.

On tax matters, Law 21 confirmed that the transfer of assets from a settlor to a trust shall be exempt from all types of taxes. Nevertheless, transfers to any beneficiary or to third parties will be subject to all relevant taxes.

The new legislation made amendments to article 9 of *Law No 1 of 5 January 1984* (Panama's trust law), listing additional items that must be included in the trust instruments:

- the designation of the beneficiaries and their substitutes (except for determined purpose trusts);
- the purpose of the trust;
- the rights and obligations of the settlor and the beneficiaries; and
- a clause with the warning that the trustee's responsibility does not imply any guarantee on the outcome of the trust.

The legislation also confirms that the laws of Panama apply when determining the legal capacity of the parties to consent to, or to enter into, a trust. Moreover, a trust subject to the laws of Panama will not be considered void or invalid on the basis that the settlor's country of domicile or residence does not recognise the legal concept or legal form of a trust.

Licensed trustees welcomed the legislation's clarification that trustees' obligations are of measures and actions, and not of results – and, as such, the trustee cannot guarantee that the purpose of the trust will be fulfilled.

Also, as a rule of public order, the fiduciary responsibilities assigned to the trustee in Law 21 are non-delegable, and any clause that exempts the trustee from such responsibilities shall be deemed as non-existent.

In cases where a trustee is replaced, and the assets of the trust are transferred by the outgoing trustee to the incoming one, the public registry that receives the transfer deed for registration shall not consider it as a regular transfer of assets, provided that this change takes place within the same trust.

The following are provided, by the legislation, as new causes of termination of a trust:

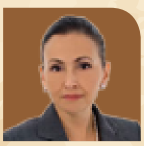
- declaration of nullity of the trust instrument;
- mutual agreement between the settlor, the trustee and the beneficiaries;
- a decision of the settlor to revoke the trust; and
- where the trustee has lost contact with the settlor or the beneficiary for a period of more than five years.

In this regard, the law states that the net value of the assets of the trust will be transferred to the National Bank of Panama after due verification of the facts by the SBP.

For the purposes of proper supervision and regulation, the law requires that any trust and its supporting documents that have been drafted in a language other than Spanish must, when the SBP reviews or requests them, be accompanied by a corresponding translation into Spanish.

Financial advisors, lawyers and licensed trustees welcomed all the legislative changes, and took the amendments as an opportunity to review and assess their policies and procedures already in place.

1 bit.ly/2tFmSs8
2 bit.ly/2ePApeo
3 Even companies that do not transact business in Panama must keep accounts. These are commonly known as 'offshore companies'



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