Banking Regulation

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David E Shapiro

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GETTING THE DEAL THROUGH

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Ecuador

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Regulatory framework

1 What are the principal governmental and regulatory policies that govern the banking sector?

The Ecuadorian Constitution stipulates that the objective of the monetary, credit, exchange, and financial policy is to define the levels of overall liquidity to guarantee adequate financial safety margins and to direct liquidity surpluses towards investment required for the country's development. This is done through financial organisations from the public, private, public/private and peoples and solidarity economic sectors. They facilitate domestic production for its consequent strategic insertion in both the regional and global economy. Financial activities are deemed to be a public service performed by the public, private, and people's and solidarity economic sectors. Each sector has its specific rules and different oversight entities in charge of preserving the sector's security, stability, transparency and soundness. The Executive Branch has the exclusive power to formulate monetary, credit, exchange and financial policies and regulations.

2 Summarise the primary statutes and regulations that govern the banking industry.

The Organic Monetary and Financial Code (COMF) published in the supplement to Official Gazette 332 of 14 September 2014, regulates the monetary and financial systems of all sectors. Furthermore, it includes the framework for policies, regulations, supervision, oversight and accountability prevailing in the monetary and financial systems, the exercise of their activities, and their relationship with their users. The primary objectives of the COMF are:

- to ensure the economy's liquidity levels for contributing to the execution of the economic programme;
- to procure the sustainability of the national financial system and to guarantee that each sector and the entities forming it comply with the obligations;
- to mitigate systemic risks and to reduce economic fluctuations; and
- to safeguard the rights of users of financial services. Furthermore, the COMF includes the institutions that regulate and oversee the financial sector, especially banks, and sets certain parameters for the incorporation, merger, takeover merger and the like of the institutions of the financial system. It also defines the minimum requirements to be met by the entities of the financial sector with regard to their administration, legal banking reserve, appointment of directors and officers, and so on.

3 Which regulatory authorities are primarily responsible for overseeing banks?

The Monetary and Financial Policy and Regulation Board is in charge of drafting and directing public policies, as well as of the monetary, credit, exchange and financial regulation and oversight. For this purpose, the Board may regulate and rule financial activities carried out by the national financial system.

The Central Bank of Ecuador's role is to instrument the monetary, credit, exchange and financial policies of the state.

The Superintendency of Banks, a technical entity, is in charge of supervising, auditing, intervening in, overseeing and monitoring the financial activities carried out by the public and private entities of the national financial system.

The Superintendency of the Peoples and Solidarity Economy Sector, an oversight entity, is in charge of supervising, auditing, intervening in, overseeing and monitoring of the people's and solidarity financial sector.

The Financial Analysis Unit, the operational entity of the National Anti-Money Laundering Council, is in charge of analysing unusual and unjustified financial operations or transactions and, if the case, reporting them to the Prosecutor's Office.

4 Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

In Ecuador, there are two liquidity funds that are independently administrated and managed: one of the funds corresponds to the private financial sector overseen by the Superintendency of Banks and the other to the social and solidarity financial sector, which is overseen by the Superintendency of the Social and Solidarity Economic Sector. These two funds are managed independently through two commercial trusts. Although both the resources and commercial trusts forming them are of a private nature, they cannot be seized and cannot be affected by the debt of the parties contributing to the fund, except for paying discount window operations and domestic investment from liquidity surpluses.

The monthly contribution that private financial sector entities have to make to the liquidity fund is a sum equal to 8 per cent of the average of their deposits subject to the previous month's legal banking reserve; the goal is to reach 10 per cent of deposits subject to such reserve.

The treatment is different in the case of social and solidarity financial sector entities:

(i) Each month, savings and loan associations for housing have to contribute a sum equal to 5 per cent of the average of the deposits subject to the previous month's legal banking reserve; again, the goal is to reach an amount equal to 10 per cent of deposits subject to the reserve.

(ii) Savings and loan cooperatives from segment 1 and central funds have to contribute to the trust each month. Their contribution must equal 0.5 per cent of the average of their liabilities to the public in the previous month and will be increased by 0.5 per cent in the month of January each year. The goal is to reach an amount equal to 7.5 per cent of their liabilities to the public.

(ii) Savings and loan cooperatives not included in point (ii) make their contributions, depending of the respective segment and pursuant to the rules issued from time to time.

Although the trustee of the trusts is the Central Bank of Ecuador, the Deposit Insurance Corporation, which forms part of the financial safety network, is in charge of managing the liquidity fund.

The amount protected by deposit insurance with respect to each individual or company is different depending on the insured financial sector:

- for deposits in banks and financial institutions overseen by the Superintendency of Banks, the amount is US$32,000;
- for deposits in financial entities from segment 1 of the people's and solidarity economic sector, it is twice the income tax exempt base fraction in effect, but cannot be less than US$32,000;

- For the remaining segments of the people's and solidarity financial sector, it is the income tax base fraction in effect, but cannot be less than US$11,000.

5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

Public and private financial entities in Ecuador are prohibited from carrying out lending, borrowing, contingent, and service operations with individuals or legal persons connected directly or indirectly with the institution's administration or ownership. Financial institutions may make capital investments in other companies from the financial system that provide financial services or auxiliary financial services in order to turn them into their subsidiaries or affiliates. They cannot, however, carry out lending, borrowing, contingent and service operations with those companies. Although the prohibition is strongly enforced, the following are permitted for operations with institutions from the social and solidarity economy:
- on their own account or for others, purchase, keep and sell securities issued by the public finances governing entity and by the Central Bank of Ecuador;
- receive sight and term deposits;
- perform cash and treasury services;
- receive and keep objects, moveable goods, valuables and documents under consignment for their custody and rent safety boxes for keeping valuables; and
- within the limits, and in compliance with the rules established by the Monetary and Financial Policy and Regulation Board, they may engage in loan operations with their employees who are not part of the entity's administration.

6 What are the principal regulatory challenges facing the banking industry?

The Organic Monetary and Financial Code has ascribed greater transparency to the financial sector and has asserted more control over the sector's services, resulting in transparency and public protection in general. Nonetheless, it has conferred a series of powers to regulation and oversight entities which, if unchecked, may affect the sector's stability. One example is that they may easily change the legal banking reserve, maximum interest rates and direction of credit.

7 Are banks subject to consumer protection rules?

Financial services are public services. Therefore, users' rights are protected by both the Constitution and the Consumers' Defence Law or the Constitution and the COMF. Besides users being able to take civil and criminal action, regulation and oversight entities have the power to define the manner in which users' rights are respected and to place the fines in the case of non-compliance. Other aspects that are regulated and have been reviewed are:
- quality of services;
- minimum information and publicity requirements so that the contents and characteristics of advertisement are clear and not misleading;
- information and credit reports must be precise and updated;
- information about the existence of conflicts of interests regarding activities, operations, and services offered to customers;
- personal information is confidential and protected;
- charges for service must be expressly accepted; and
- the damage caused must be repaired.

8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

The Monetary and Financial Policy and Regulation Board has broad law-making powers for directing monetary, credit, exchange and financial policies. Therefore, it is possible to amend secondary rules applicable to the financial sector. Based on the Board's actions these past months, some changes could include: legal banking reserve rate as a mechanism for planning, regulating and monitoring the economy's liquidity levels; regulation on management, solvency and prudence to which financial entities should be subjected; directives for credit and investment policy and, in general, for lending, borrowing and contingent operations of the entities of the national financial system.

Notwithstanding the foregoing, with respect to financial institutions from the social and solidarity economy, a new law is in the pipeline for subjecting them to the state oversight entity.

Supervision

9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Within the sphere of their competences, oversight entities and financial institutions have broad powers for supervising, auditing, intervening in and monitoring public and private entities forming part of the national financial system. The law dictates three levels of supervision: (i) preventive: applies to entities with adequate financial business management and, in the opinion of the oversight agency concerning stable economic-financial control, good corporate governance and good risk management, implying a lesser risk; (ii) corrective: applies to financial entities with a medium risk profile, understood as entities whose economic-financial condition, corporate governance quality or risk management, show moderate to significant weaknesses in terms of the size and complexity of their operations, warranting a strict follow-up on the supervisor's recommendations; and (iii) intensive: applies to financial entities with a high and critical risk profile. In other words, entities whose economic-financial condition, corporate governance quality, risk management, and so on show they are inadequate to deficient for the size and complexity of their operations. They require significant improvements; or, the likelihood that they will fail to meet the minimum solvency requirements is great or that they have already failed to meet such requirements. This same intervention applies to financial entities with good solvency levels, but that reported losses in the last two quarters or their business projections show that they may fall below the minimum technical equity in the next two quarters.

10 How do the regulatory authorities enforce banking laws and regulations?

When it deems it appropriate, the oversight agency may exercise the following powers:
- audit;
- inspect;
- intervene in financial institutions when deemed necessary;
- demand that overseen entities define and adopt corrective and recovery measures;
- order overseen entities to increase their subscribed and paid-in capital in cash;
- order the liquidation of financial institutions; and
- initiate administrative processes and, if the case requires, start civil and criminal processes at the appropriate entities; for collecting debts and penalties, they have the power to initiate forced collection procedures, and so forth.

The resolutions passed by the oversight authority cannot be suspended if any claim or remedy is accepted for processing or is heard.

11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

The following are the most common reasons for initiating control measures by requesting additional information, after the institution is audited, and ultimately arriving at the mandatory liquidation of a financial entity:
- liquidity gap;
- inadequate risk management resulting from insufficient assurances, among other things;
- capital shortfall;
- technical equity gap;
- legal banking reserve shortfall;
- inconsistent balance sheets; and
- administrative shortfalls resulting from a lack of knowledge of directors and administrators, among other things.

Normally, if the problem is not recurring, a warning and monetary fine will be issued to the institution; for repeated failure, the oversight entity will intervene and ultimately, as happened in 2014 with Banco Sudamericano, the financial institution will face mandatory liquidation.

Resolution

12 In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

In order to guarantee the proper operation of financial institutions, oversight entities are required to permanently supervise them either onsite or offsite.

Although the oversight agency may intervene in a financial institution at any time, normally it will do so when intensive monitoring has been ordered. This is explained in question 9. The controller must ensure that the institution follows its restructuring plan, called an intensive monitoring plan, which includes commitments, debt and time periods that the institution has with its officers, shareholders and directors. The time periods for recovery cannot be more than 370 days, when intervention owes to equity shortfalls, or two years in other cases. If, within the recovery time period, the financial institution's problems have not been solved or the equity shortfall persists, the institution will be forced into liquidation.

Payments derived from the mandatory liquidation of a financial entity shall be made in the following order:

- deposits up to the legally insured amount covered by deposit insurance;
- payments owed to workers for salaries, indemnification, profit-sharing, reserve funds and retirement pensions paid by the employer, up to the amount stated in the calculations performed per the laws protecting them, as well as liabilities with the Ecuadorian Social Security Institute that are derived from employment relationships;
- discount window lending and domestic investment of liquidity surpluses;
- deposits for sums exceeding the insured amount of priority groups served, up to 50 per cent in addition to the insured amount;
- other deposits for sums exceeding the insured amount;
- other liabilities resulting from funds raised by the financial entity;
- sums paid by the Deposit Insurance Corporation and Liquidity Fund;
- payments owed for taxes, imposts and contributions;
- court costs arising in the common interest of creditors;
- suppliers of the financial entity, up to an amount equal to the deposit insurance; and
- other liabilities.

13 What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

When a financial company enters into mandatory liquidation, the oversight agency will issue a resolution ordering the suspension of operations, the exclusion and transfer of assets and liabilities, and the appointment of a temporary administrator by the oversight agency. The temporary manager fulfils the duties of the administrators and exercises the legal representation of the financial entity, safeguarding its goods. The financial institution's administrators and directors who were in charge of the institution up to the time it entered into mandatory liquidation will no longer fulfil their duties, but will be subject to administrative, civil and criminal liability with respect to their actions and inactions leading to the financial institution's liquidation.

14 Are managers or directors personally liable in the case of a bank failure?

In a mandatory liquidation, the administrators and directors will automatically forfeit their positions and they will not be entitled to claim indemnification even if they are under a relationship of employment with the entity. Likewise, the assets of influential shareholders, related third parties and administrators, including directors, cannot be sold.

A shareholder in an entity from the financial sector is liable for the entity's solvency up to an amount equal to their stockholding; however, in the case of the mandatory liquidation of a financial entity, shareholders who directly or indirectly are persons with influential equity, as defined in point 10 hereof, administrators, officers or employees and related third parties, who have incurred in negligence, gross negligence or ordinary negligence will be liable, even with their personal property. If, during the liquidation, it is established that a crime or quasi crime was committed by an action or inaction, documentation must be provided to the prosecutor for the investigation. In addition, civil action may be started.

Capital requirements

15 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

The Monetary and Financial Policy and Regulation Board is the regulatory entity and, therefore, defines the minimum requirements for subscribed and paid-in capital of financial institutions. The oversight agency may order an increase in cash in subscribed and paid-in capital. In the incorporation of a financial institution, contributions in kind cannot be made for capital increases. If, however, it is stipulated that the capital increase is to be made in cash, a contribution in kind may be made with the approval of the oversight agency. The asset must be usable in the institution's line of business.

16 How are the capital adequacy guidelines enforced?

Entities from the public and private financial sectors have to create a legal reserve fund with an amount equal to at least 50 per cent of their subscribed and paid-in capital. For this purpose, at least 10 per cent of their annual earnings must be allocated to the fund. Furthermore, they have to comply with the rules regarding financial, liquidity, capital and equity indicators determined by the Monetary and Financial Policy and Regulation Board. These are set depending on the type and complexity of the financial entity and the economic area in which it operates, as well as the internal control systems and risk management demanded from them.

Entities from the national financial system have to keep sufficient reserves that are commensurate with their business in order to address the following, among other things: instantaneous liquidity, structural liquidity, liquidity reserves, domestic liquidity and liquidity gaps; and solvency and technical equity as needed and sufficient for backing the entity's current and future operations. They must also cover losses not protected by risk asset provisions and aimed at the institution's adequate macroeconomic performance. In addition, presently the financial institutions overseen by the Superintendency of Banks and the financial institutions from segment 1 of the social and solidarity economy must always keep a ratio of at least 9 per cent between their technical equity and the average sum by their risk-weighted assets and contingents. The Monetary Board sets the amount for the other segments of the people's and solidarity economic sectors.

In order to cover the money withdrawn by customers, entities from public and private financial sectors are obligated to maintain a legal banking reserve for the deposits and fund-raising they undertake. Presently, for financial institutions with assets over US$1 billion, the legal banking reserve is 5 per cent and for all others 2 per cent. The legal banking reserve is deposited at the Central Bank and does not bear interest in favour of the financial institution that made the deposit. Should a state-owned or private financial entity fail to meet the stipulated legal banking reserve percentage, the Superintendency of Banks will order it to immediately contribute the funds needed to cover the shortfall.

The solvency of foreign financial entities in which an Ecuadorian financial entity has a stockholding equal to more than 20 per cent of capital will be determined by the countries in which they are located. In no case, however, can it be below the higher of either 9 per cent of the ratio between technical equity and risk-weighted assets, which is calculated employing the calculation method applied to financial groups in Ecuador, or the minimum established by the Board.

17 What happens in the event that a bank becomes undercapitalised?

The oversight agency will order a capital increase and, if the capitalisation is not made within the granted term, the entity will enter into mandatory liquidation.

18 What are the legal and regulatory processes in the event that a bank becomes insolvent?

When an institution is declared to be in mandatory liquidation, as described in question 14, and its administrators can no longer fulfil their duties, a receiver will be appointed ex officio. In addition to the civil and criminal action that may be taken against administrators and shareholders, precautionary measures may be taken against them. These measures will be kept in place until the liquidation is over.

19 Have capital adequacy guidelines changed, or are they expected to change in the near future?

With regard to technical equity, the guidelines were changed in December 2016 and that change may slightly alter the rules regulating the liquidity of institutions.

Ownership restrictions and implications

20 Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank. What constitutes 'control' for this purpose?

An individual or company has direct influential power when one of the following conditions is met: It is the owner of 6 per cent or more of subscribed and paid-in capital or capital stock or if it does not quite meet the 6 per cent condition, it has shares in an amount greater than or equal to 600 times the income tax-exempt base fraction, presently at US$11,290.

Influential power because of an indirect relationship is determined as follows:

- the spouse, common-law spouse, or relatives up to the fourth degree of blood relation or second degree of family relation with the administrators of the financial institution or a company with influential power in the financial institution;
- if the person has at least a 1 per cent stockholding in the financial institution's subscribed and paid-in capital; or, if the stockholding is less, the subscribed and paid-in contribution is greater than or equal to 100 times the income tax exempt base fraction;
- the spouse, common-law spouse, or relatives within the second degree of blood relation and relatives up to the first degree of blood relation with shareholders who are persons with influential equity ownership, administrators of a financial entity, or officers of a financial entity who approve credit operations; and
- companies in which the spouse, common-law spouse, or relatives within the second degree of blood relation or first degree of family relation with administrators or officers who approve credit operations, and that own shares representing 3 per cent or more of the capital of the entity.

Persons related by presumption include:

- anyone who has received a loan in preferential conditions for time periods, interest rates, no security, or that is disproportionate with respect to the borrower's equity or payment ability;
- anyone who has received a loan without providing adequate security, has no loan history, or is domiciled abroad, and there is no available information on that person;
- anyone who has received a loan because of reciprocity with another financial entity;
- anyone who receives preferential treatment in lending operations; and
- anyone deemed to be related by presumption, subject to the general rule issued by oversight entities.

21 Are there any restrictions on foreign ownership of banks?

Foreign individuals or legal persons, including foreign financial entities, may incorporate financial entities or establish branches or representation offices in Ecuador, without any limits on investment, although subject to the same rules governing domestic investment. When a foreign financial institution operates through a branch or representation office, the parent company is jointly liable for the obligations of the branch or representation office in Ecuador.

22 What are the legal and regulatory implications for entities that control banks?

The regulation and oversight entities listed in question 3 have broad regulating and oversight powers in the financial sector. Within their scope of action, they may:

- regulate the credit, exchange, financial, insurance and securities policy;
- define the mechanism for instrumenting and executing the policies and regulations of the monetary, exchange, and credit policy;
- monitor, audit, intervene in, oversee and supervise all financial institutions; and
- review unusual economic operations or transactions.

23 What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

The shareholders, administrators, including directors, officers, or employees, internal and independent auditors, qualified risk firms, appraisal experts and others providing services supporting the supervision of the financial institution, have to ensure the correct management of the financial institution, as well as its strict compliance with the legal rules governing it, and are jointly liable for the financial institution's actions and inactions. Liability may be administrative, civil and criminal.

24 What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

Anyone with direct or indirect influence will be jointly liable for the financial institution's actions and inactions. Liability may be administrative, civil or criminal.

Changes in control

25 Describe the regulatory approvals needed to acquire control of a bank. How is 'control' defined for this purpose?

Any change in the ownership of capital implying the direct or indirect taking of control of the financial institution requires the prior approval of the oversight entity.

26 Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

There is no difference between nationals and foreigners; for foreigners, however, additional documentation regarding the legal existence of the company and the representation of the individual or company is required. If an acquisition is involved that could lead to the consolidation of a concentration of financial entities, the prior authorisation of the Superintendency for the Control of Market Power will be required.

27 What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank?

In general, oversight agencies will check any change of control of the institution, as well as the origin of the funds used for the incorporation or acquisition of the financial institution. Consequently, before new shareholders are approved, the following must be submitted in addition to all identification documents, in the case of an individual, or certificate of legal existence, in the case of a company, whether national or foreign:

- Certificate stating that they have not been administrators, shareholders, or controlling shareholders, whether directly, indirectly, or otherwise, in financial institutions in or out of the country that were declared to be in mandatory liquidator or otherwise regularised with public resources or through deposit insurance systems, in the past 10 years. A controlling shareholder is a shareholder having asserted significant and decisive influence in the decisions or administration of such institutions.
- Sworn statement that the resources are their own and come from licit activities. For this purpose, they must provide information about their financial situation in the past five years.
- Sworn statement that they are neither the direct nor indirect title holders of stock in companies unrelated to the financial business, with presence or business in the Ecuadorian market.
- In the case of companies, a list of the shareholders representing more than 2 per cent of capital stock. The list must include all

shareholders until the natural persons representing them are ultimately determined. If the company is listed on the stock exchange, a certificate from the stock exchange and a certificate from those persons with dominant power or influence in the company will be required.

28 Describe the required filings for an acquisition of control of a bank.

Generally, taking control of a financial institution requires authorisation from the Superintendency of Banks. It could also require the approval of the Superintendency for Control of Market Power when the direct or indirect acquisition of the ownership or other right over shares in capital or bonds or interest in the capital of a financial institution leads to either a horizontal or vertical economic concentration. This is also the case when a stock purchase produces a connection through the common management or other agreement or act or a factual or legal transfer of the assets of an economic operator to a person or economic group or grants them control or decisive influence in the decision-making by the financial institution's regular or special administration.

To request authorisation from the Superintendency of Banks for the stock purchase. Proof of the integrity and economic solvency of the shareholders must be provided in the terms and conditions described in question 27.

29 What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

If approval from the Superintendency for the Control of Market Power is not needed, the authorisation could take 30 to 60 working days after all documents have been submitted. If approval from the Superintendency for the Control of Market Power is needed, it may take between six and eight months, which means that the process could take between 10 and 12 months.

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