

**Coat of Arms of the Republic of Panama****REPUBLIC OF PANAMA****JUDICIAL BRANCH****SUPREME COURT OF JUSTICE****THIRD COURT OF LITIGATION, ADMINISTRATIVE AND LABOR PROCEEDINGS****ENTRY No. 64849-2020****MAGISTRATE EFREN C. TELLO. C.**

ADMINISTRATIVE LITIGATION CLAIM FOR NULLITY PRESENTED BY CARLOS BARSALLO ACTING IN HIS OWN NAME AND REPRESENTATION, SEEKING TO HAVE THE FOLLOWING PHRASE DECLARED NULL AND VOID FOR BEING ILLEGAL: "IN WHICH THE BANKS MAY ALSO DESCRIBE THE REASONS WHY THE COMPOSITION OF THEIR BOARD OF DIRECTORS FAILS TO ADJUST TO THE MINIMUM PERCENTAGE INDICATED BY LAW NO. 56 OF 2017 AND ITS REGULATIONS, WITHIN ARTICLE 1 OF RULE NO. 008-2019 DATED AUGUST 13, 2018, ISSUED BY THE SUPERINTENDENCY OF BANKS".

**Panama, twenty-sixth (26) day of November, two thousand twenty-one (2021)**

**CITATIONS:**

CARLOS BARSALLO, acting in his own name and representation, has filed an Administrative Litigation Claim for Nullity, seeking to have the following phrase declared null and void, due to its illegality: "IN WHICH THE BANKS MAY ALSO DESCRIBE THE REASONS WHY THE COMPOSITION OF THEIR BOARD OF DIRECTORS FAILS TO ADJUST TO THE MINIMUM PERCENTAGE INDICATED BY LAW NO. 56 OF 2017 AND ITS REGULATIONS, WITHIN ARTICLE 1 OF RULE NO. 008-2019 DATED AUGUST 13, 2018, ISSUED BY THE SUPERINTENDENCY OF BANKS".

This claim was received through Resolution dated twenty-seventh (27th) October 2020 (f.43). A copy was sent to the President of the Board of Directors of the Superintendency of Banks of Panama to submit an explanatory report, and it was forwarded to the Administration Attorney General.

**THE CLAIM AND ITS GROUNDS**

In this claim, it is requested the nullity of the phrase: "In which the banks may also describe the reasons why the composition of their Board of Directors fails to adjust to the minimum percentage indicated by Law No. 56 of 2017 and its Regulations, within article 1 of Agreement No. 008-2018 of August 13, 2019, issued by the Superintendency of Banks".

The plaintiff claims that the Panamanian legal system established, through Law 56 of July 11, 2017, the right of women to access and actively participate in decision-making in public and private entities in Panama.

The enforcement of Law 56 of 2017 and the percentages established therein are gradual. Compliance with the percentages of women on boards of directors occurs in a gradual, organized manner, as specified in article 3 of Law 56 of 2017.

Laws are not optional or discretionary, neither by those obliged to comply with them, nor by those in charge of ensuring their compliance. They are either complied with or they are not. It is not possible to establish, through a rule, a requirement to explain the

reasons why a law of clear imperative nature is not complied with, for the first time and only for a certain type of reporting entities. The phrase claimed as null, and void distorts the entire meaning and clarity of Law 56 of 2017 for a specific type of reporting entities.

It is claimed that the phrase does not facilitate better compliance with Law 56 of 2017 and deviates from its text and spirit, as observed after a simple reading and verification of the exercise.

The phrase does not fulfill the optimization function assigned to the Regulations for the Execution of the Laws in terms of compliance. It also fails to align with the Supreme Court of Justice jurisprudence regarding the requirements of subordination, development, and complementarity, as these elements cannot be identified in a careful review of the content and scope of Law 56 of 2017, which the regulation aims to address.

### ALLEGED VIOLATED PROVISIONS

The plaintiff considers that the phrase: "In which the banks may also describe the reasons why the composition of their Board of Directors fails to adjust to the minimum percentage indicated by Law No. 56 of 2017 and its Regulations, within Article 1 of agreement No. 008-2019 of August 13, 2019, issued by the Superintendency of Banks" violates Article 1 of Law 56 of 2017 which establishes the following:

"Article 1. This law establishes the right of women to access and actively participate in decision-making within public and private entities of the country."

The concept of violation is direct by omission. By requiring the reporting entity to explain the reasons for non-compliance, as intended by this rule, it fails to apply the provisions of the rule. It does not effectively respect or protect the right of women to access and actively participate in decision-making, particularly in certain private entities of the country regulated by the Financial Oversight Entities.

The claim also cites a direct violation by omission of Article 2 of Law 56 of 2017 which states the following:

"Article 2. In government institutions, decentralized institutions, public companies, financial intermediaries, and those regulated by them, which have in their organizational structure a board of directors, an administrative council, or similar organizations, at least 30% of women will be appointed to the total of their positions..."

The concept of violation is direct by omission. By requiring the reporting entity to explain the reasons for non-compliance, as intended by this rule, it fails to apply the provisions of the rule. The reporting entities, such as banks, are not required to definitively appoint at least 30% of women to all of their positions on their board of directors. It is sufficient for them to explain to their regulator the reasons for not complying with Law 56 of 2017.

Article 3 of Law 56 of 2017 has also been violated, which states:

"Article 3. This law will be applied in different stages, as follows:

1. The first stage will apply one year after its enactment and will require that the State boards of directors mentioned in the previous article have at least 10% participation of women on their boards.
2. The second stage...
3. The third stage..."

The concept of violation is direct by omission. By requiring the reporting entity to explain the reasons for non-compliance, as intended by this rule, it fails to apply the provisions of the rule. The reporting entities, such as banks, are not required to definitively appoint at least 30% of women to all of their positions on their board of directors. It is sufficient for them to explain to their regulator the reasons for not complying with the Law.

It is considered that Article 11 (5) of Executive Decree No. 52 of April 30, 2008, which adopts the Consolidated Text of Decree Law 9 of February 26, 1998, as amended by Decree Law 2 of February 22, 2008, known as the Banking Law, has been infringed. This provision states:

"Article 11. Duties of the Board of Directors. The Board of Directors shall have the following duties:

1. ...

5. To establish, in the administrative sphere, the interpretation and scope of legal or regulatory provisions in banking matters..."\*\* (Emphasis and underlining by the plaintiff)

The concept of the violation is direct by omission. By requiring the reporting entities to explain the reasons for non-compliance, the banking regulator exceeds the powers granted by the Banking Law in the matter of issuing agreements.

### CONDUCT REPORT OF THE DEFENDANT ENTITY

On page forty-five (45) of the file, there is a report signed by the President of the Board of Directors of the Superintendency of Banks, which states:

"This Superintendency, when interpreting and applying legal provisions related to the new requirement for a thirty percent (30%) female representation on the board of directors, in accordance with the Banking Law (Law 56 of 2017) and Executive Decree No. 2241-A, followed the regulations established in Law 56 and Executive Decree No. 241-A. These regulations mandated the use of compliance questionnaires for monitoring. Consequently, after thorough reviews, the text of Rule 8-2019, which amended Article 11-A to Rule 5-2011 (regarding compliance monitoring) ..."

...It is important to note that while Law 56 of 2017 " establishes the participation of women on the boards of various entities, including reporting entities, which directly affects banking regulations, this Superintendency - responsible for regulating and supervising corporate governance for these entities- incorporated the law's requirements to ensure these entities adjust the composition of their Boards of Directors accordingly...

...Law 56 of July 11, 2017, "which establishes the participation of women in State Boards of Directors," specifies in Article 3 that the implementation of women participation percentages will occur gradually, in different stages. It also notes that the current compositions of boards, which have been previously appointed, as well as the rights of their members, will not be affected. Instead, the application will begin with new appointments made from the date of the law's validity. Therefore, when reporting entities complete the "Compliance Questionnaire for Law 56 of 2017," they may indicate that no changes have been made to their Board of Directors and provide reasons for not meeting the required gender composition."

## OPINION OF THE ADMINISTRATION ATTORNEY GENERAL

The Administration Attorney General issued an opinion on this case through Opinion NO. 1549 of December 29, 2020, which is on page 57 of the file, and stated that:

...without a doubt, Executive Decree 241-A of July 11, 2018, defines each reporting entity subject to monitoring by the Ministry of Economy and Finance, and establishes mechanisms to ensure compliance with Law 56 of July 11, 2017, in both the public and private sectors. Upon request from the Ministry, these entities will provide information to generate publicly accessible statistics and reports on the matter...

...In this regard, Chapter III of Executive Decree 241-A of July 11, 2018, outlines the monitoring mechanisms applicable to the entities regulated by the Financial Oversight Entities...

...In that same context, Article 8 of Executive Decree 241-A of July 11, 2018, states that Financial Oversight Entities will establish in their corporate governance rules the best practices related to the selection of board members of the reporting entities. For monitoring purposes within the framework established by Law 56 of July 11, 2017, private sector entities will be subject to compliance questionnaires. If they cannot comply with the legal mandate, they must explain the reasons...

...This Office does not agree with the petitioner's assertion that the phrase "...in which banks may also describe the reasons why the composition of their Board of Directors fails to meet the minimum percentage indicated by Law 56 of 2017 and its regulations, published in the Official Gazette 28572-B of July 19, 2018" is illegal. The phrase does not intend to exempt or relieve the reporting entities from complying with the provisions of Law 56 of July 11, 2017, and its regulations. On the contrary, it aims for private entities, within the framework of their policies, manuals, and corporate governance regulations, to explain the reasons why the appointment and participation of women on their boards of directors have not adhered to the minimum percentage established for this purpose...

...In Rule 005-2011 of September 20, 2011, through which the Superintendency of Banks, as a Financial Oversight Entity, updates the provisions on Corporate Governance, amended by Rule 008-2019 of August 13, 2019, adding an article related to the appointment of board directors...

**ARTICLE 11-A. APPOINTMENT OF BOARD OF DIRECTORS MEMBERS.** In accordance with the provisions established in Law No. 56 of July 11, 2017, and Executive Decree No. 241-A of July 11, 2018, which regulates it, banks must appoint at least thirty percent (30%) women to all positions on their Board of Directors. For this purpose, the bank shall make these appointments, considering the stages set out in Article 3 of Law No. 56 of 2017.

...Compliance with the minimum percentage must align with the requirements for the appointing board members, such as professional qualifications, experience, record, among other necessary aspects. This is in accordance with rules that govern the relationships and structure of these private entities, which are regulated and supervised by financial oversight entities...

... Article 3 of Law 56 of July 11, 2017, clearly states that boards of directors formed before the law's enactment will not be affected by the provisions.

Instead, the law will apply to boards where new appointments are made from its effective date...

...this Office considers that the inquired phrase in Rule 008 of August 13, 2019, adheres to the principle of legality as it is subordinated to Law 56 of July 11, 2017. It does not contradict the law's text or spirit but rather seeks to ensure or facilitate its observance, application, and implementation. This approach ensures compliance with the requirement for at least 30% of women representation on boards of directors at each stage outlined by the law. Additionally, it ensures that these appointments meet the necessary qualifications according to the policies, manuals, and regulations of the reporting entities. If it is not possible to meet the minimum percentage required by the law and its regulations, entities must provide and explain the reasons for non-compliance; however, this does not exempt them from fulfilling their obligations."

The arguments conclude by stating that the phrase is not illegal: "...In which the banks may also describe the reasons why the composition of their Board of Directors does not comply with the minimum percentage indicated by Law 5 of 2017 and its regulations, published in Official Gazette 28572-B of July 19, 2018," contained in Article 1 of Agreement 008-2019, issued by the Superintendency of Banks, published in Official Gazette 28852-A of September 3, 2019.

### DECISION OF THE COURT

Once the legal procedures have been completed, the Court resolved as follows:

The plaintiff, through the annulment lawsuit filed, requests that the following phrase be declared null and void for being illegal: '...In which the banks may also describe the reasons why the composition of their Board of Directors fails to comply with the minimum percentage indicated by Law 56 of 2017 and its regulations, published in the Official Gazette 28572-B of July 19, 2018,' contained in Article 1 of Agreement 008-2019 of August 13, 2019, issued by the Superintendency of Banks and published in the Official Gazette 28852-A of September 3, 2019.

It is worth noting that the plaintiff argues that Articles 1, 2, and 3 of Law 56 of July 11, 2017, have been violated. These articles refer to the right of women to access and actively participate in decision-making in public and private entities; the minimum number of women that must be appointed to a board of directors, management council, or similar bodies; and the three stages of implementation of the law. In this regard, Law 56 of 2017 establishes a quota of 30% for women on the boards of directors of public entities and certain private entities. The law was regulated by Executive Decree 241-A of July 11, 2018.

The law applies to Central Government institutions, decentralized institutions, state-owned companies, and mixed-capital companies, as well as companies regulated by the Superintendency of Banks, the Superintendency of Insurance and Reinsurance, the Superintendency of the Securities Market (SMV), and the Panamanian Autonomous Cooperative Institute. According to the regulatory decree, the appointment of women should prioritize the candidate of the less represented gender if they have the same qualifications as the candidate of the other gender in terms of experience, merits, competence, and professional performance.

Therefore, the reporting entities must include in their corporate governance regulations good practices for the selection of board members, based on criteria of gender equity, merit, and experience, and in accordance with the rules of each sector. It is important to note that the law does not impose penalties for non-compliance with the quota;

rather, the regulatory decree requires the company to explain the reasons for any non-compliance.

It is important to highlight that Law 56 does not affect the current composition of boards of directors but applies to new appointments, with a requirement to meet a 10% quota by July 2018, 20% by July 2019, and up to 30% by July 2020.

Likewise, Article 2 of Law 56 of July 11, 2017, regulated by Executive Decree 241-A of July 11, 2018, emphasizes the right of women to access and actively participate in decision-making within public and private entities in the country. This article establishes a minimum requirement as follows:

“Article 2. In Central Government institutions, decentralized institutions, public companies, financial intermediaries, and those regulated by them, that have a board of directors, management council, or similar bodies in their organizational structure, at least 30% of the total positions must be held by women...

Paragraph: Boards of directors whose positions are filled by State authorities, and where the appointment of nominal members is restricted by legal mandate to a quota greater than 61%, will be exempted from this rule.’

Thus, exceptions to the application of this rule can be derived from the described content.

Executive Decree 241-A of July 11, 2018, in its Article 1, defines 'financial oversight entities' as the Superintendency of Banks, the Superintendency of the Securities Market, the Superintendency of Insurance and Reinsurance, and the Panamanian Autonomous Cooperative Institute. Regarding the reporting entities in numeral seven, it clarifies that these are those entities in the private sector that are regulated and supervised by financial oversight entities in accordance with current regulations.

Articles 6 and 7 of the decree establish that entities regulated by financial oversight entities must appoint women according to the percentages set in Article 3 of Law 56 of 2017, considering their professional experience, career, and other relevant characteristics as per the entity's policies, manuals, and corporate governance regulations. Article 7 specifies that these entities must select the best-qualified candidates for board positions based on a comparative analysis of the capabilities and experiences of each applicant. Furthermore, reporting entities should aim to prioritize applicant of the less represented gender if they have the same qualifications as applicants of the more represented gender, based on criteria such as professionalism, merit, experience, and in accordance with the rules of each sector.

Therefore, considering the above, additional criteria will be considered for justifying the composition of the boards of directors, and not solely Law 56 of June 11, 2017, thus the alleged violation of the cited regulations is not established.

Articles 3 and 11 (5) of Executive Decree 52 of April 30, 2008, which adopts the Consolidated Text of Decree Law 9 of February 26, 1998, amended by Decree Law 2 of February 22, 2008, known as the Banking Law, have been violated. These articles outline the powers of the Board of Directors, including the authority to establish, within the administrative scope, the interpretation and scope of legal or regulatory provisions related to banking or the concept of general decisions made by the Board of Directors.

Regarding this issue, the phrase 'in which banks may also describe the reasons why the composition of their Board of Directors fails to comply with the minimum percentage indicated by Law No. 56 of 2017 and its regulations' aims to have entities establish policies, manuals, and regulations within corporate governance that explain the

motivated reasons for why the appointment and participation of women on their boards of directors have not met the minimum percentage established in Law 56 of July 11, 2017. Therefore, according to the rules explained in the previous paragraphs, financial oversight entities are required to make appointments of women to their boards of directors in accordance with the percentages established by the law. However, it is important to emphasize that AGREEMENT No. 008-2019 (of August 13, 2019) established the following:

RULE No. 008-2019  
(13<sup>th</sup> August 2019)

"By which Article 11-A is added to Agreement No. 005-2011, updating the provisions on Corporate Governance."

THE BOARD OF DIRECTORS  
in exercise of its legal powers, and

WHEREAS:

Following the enactment of Decree Law No. 2 of February 22, 2008, the Executive Branch developed a consolidated text of Decree Law No. 9 of February 26, 1998, and all its amendments, which was approved by Executive Decree No. 52 of April 30, 2008, hereinafter referred to as the Banking Law.

According to Article 5 (1,2) of the Banking Law, the objectives of the Superintendency of Banks are to ensure the stability and efficiency of the banking system, and to strengthen and promote favorable conditions for the development of the Republic of Panama as an international financial center.

In accordance with Article 11 (5) of the Banking Law, it is the responsibility of the Superintendency to establish, within the administrative scope, the interpretation and scope of legal or regulatory provisions related to banking.

Article 55 of the Banking establishes that banks must comply with the corporate governance rules issued by the Superintendency.

Rule No. 005-2011 of September 20, 2011, updates the provisions on corporate governance and sets guidelines and parameters for banks to be structured within sound and secure banking practices.

Law No. 56 of July 11, 2017, "Which establishes the participation of women on state boards," and Executive Decree No. 241-A of July 11, 2018, "Which regulates Law No. 56 of July 11, 2017," require entities regulated and supervised by financial oversight entities to appoint women to at least 30% of all board positions.

Article 8 of Executive Decree No. 241-A states that financial oversight entities will establish good practices in their corporate governance rules related to the selection of board members for the entities they regulate. This article also indicates that the Superintendency of Banks will conduct follow-ups through compliance questionnaires, where, in the event of non-compliance, the reporting entity must explain the reasons for such non-compliance.

During the working sessions of this Board of Directors, it has been recognized that there is a need and benefit to updating Rule No. 005-2011 to align its provisions with the requirements of Law No. 56 of 2017 and Executive Decree No. 241-A, which regulates it.

AGREES:

ARTICLE 1. Article 11-A is added to Rule No. 005-2011:

ARTICLE 11-A. APPOINTMENT OF DIRECTORS OF THE BOARD OF DIRECTORS. In compliance with the provisions established in Law No. 56 of July 11, 2017, and Executive Decree No. 241-A of July 11, 2018, which regulates it, banks must appoint at least thirty percent (30%) women to all positions of directors on the Board of Directors. For this purpose, banks must make the appointments taking in accordance with the stages outlined in Article 3 of Law No. 56 of 2017.

When making these appointments, banks must consider the professional experience, career, merits, and other characteristics specified in their corporate governance policies and manuals.

The Superintendency of Banks will monitor compliance with the provisions of this article using compliance questionnaires; In this regard, banks may also describe the reasons why the composition of their Board of Directors does not meet the minimum percentage indicated by Law No. 56 of 2017 and its regulations. The required information will be submitted annually, in the format and on the date specified by the Superintendency.

The provisions of this article do not apply to branches of foreign banks and to banks with international licenses for which the Superintendency exercises supervision of destination.

ARTICLE 2. VALIDITY. This Rule will begin to apply from its promulgation.

Given in the city of Panama, on the thirteenth (13) day of the month of August of two thousand nineteen (2019)". (The bold is ours)

Therefore, the aforementioned rule clearly states that when making the appointments, the bank must consider the professional experience, trajectory, methods, and other characteristics established in its corporate governance policies and manuals. Consequently, the violation of the rules alleged by the plaintiff has not been established.

From the above, it can be concluded that the percentage of women's participation on the board of directors must be complied with, it is also necessary to verify professional qualifications, experience, and trajectory, in alignment with the organizational rules that guide the structures and relationships of private entities regulated and supervised by financial oversight entities.

Additionally, it is important to highlight that Article 3 of Law 56 of July 11, 2017, specifies that boards of directors formed prior to the law will not be affected by its provisions. As mentioned in previous paragraphs, the law applies only to boards of directors where new appointments are made after its enactment. For this reason, the regulated entity can justify and support the reasons for not meeting the percentage established in the rule without violating any legal provisions on this matter.

In the present case, it is concluded that the charges of illegality brought by the plaintiff have not been proven. Furthermore, under this assumption, after analyzing the evidence provided, the plaintiff has not demonstrated the facts as required in the case under study, thereby violating Article 784 of the Judicial Code, which states the following:



"Article 784: It is the responsibility of the parties to prove the facts or data that constitute the factual assumption of the rules that are favorable to them."

Consequently, the burden of proof falls on the plaintiff, who has failed to reliably substantiate the facts alleged in the complaint within the case file. Therefore, it must be declared that the phrase "... In which the banks may also describe the reasons why the composition of their Board of Directors fails to adjust to the minimum percentage indicated by Law 56 of 2017 and its regulations, published in Official Gazette 28572-B of July 19, 2018.", contained in Article 1 of Rule 008-2019 of August 13, 2019, issued by the Superintendency of Banks, published in Official Gazette 28852-A of September 3, 2019, is not illegal.

#### RESOLVED

Consequently, the Third Court of the Supreme Court, administering justice in the name of the Republic and by authority of the Law, DECLARES THAT IT IS NOT NULL AND VOID, NOR ILLEGAL, the phrase, "... In which the banks may also describe the reasons why the composition of their Board of Directors fails to adjust to the minimum percentage indicated by Law 56 of 2017 and its regulations, published in the Official Gazette 28572-B of July 19, 2018, contained in Article 1 of Agreement 008-2019 of August 13, 2019, issued by the Superintendency of Banks, published in Official Gazette 28852-A of September 3, 2019".

FOR COMMUNICATION,

(Seal of the Judicial Branch of the Republic of Panama)

(Signed)  
EFREN C. TELLO C.  
MAGISTRATE

(Signed)  
CARLOS ALBERTO VASQUEZ REYES  
MAGISTRATE

(Signed)  
CECILIO CEDALISE RIQUELME  
MAGISTRATE