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## LEGAL OPINION FOR COLOMBIA

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To: Professor Robert Eccles  
From: Felipe Pinilla

### Setting the legal landscape

**1.-Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.**

1.1. Colombian law distinguishes two classes of private law: the commercial law, compiled in the Commercial Code, applicable to trade actions i.e., all the cases where there intervenes an intermediary: to buy, to resell, banking, to lease, to sublease, etc. and the civil law, compiled in the Civil Code, applicable to those actions corresponding to the domestic life: to buy a home, inheritance regulations, parental duties, philanthropy, etc.

#### The Commercial Code

- Joint Stock Company (Sociedad Anónima – SA)
- Simplified Joint Stock Company (Sociedad Anónima Simplificada)
- Limited Liability Company (Sociedad de Responsabilidad Limitada)
- Limited Partnership with shares (Sociedad en Comandita por Acciones)
- Limited Partnership (Sociedad en Comandita Simple)
- Single Corporation (Empresa Unipersonal)
- General Partnership (Sociedad Colectiva)

#### The Civil Code

- Civil Partnership (Sociedad Civil), for-profit legal entity only entitled to display civil actions
- Foundation (Fundaciones): non-profit legal entity with public purposes.
- Associations (Corporaciones): non-profit legal entity with private purposes.

In both regulations, the legal entity has obligations only to its shareholders and its primary duty is to shareholders over all other stakeholders:

- Commercial Code, article 98 by defining the term “Corporation”, includes as an essential item its unique objective which is “to share the profits obtained by its activity”

- Since 1995, the Civil Code's definition of "civil corporation" was derogated and since then, it is legally comprehended by the above cited article 98 of the Commercial Code.

Interests of persons who are not shareholders do not have anything to do with the legal regulations related to corporations; it simply means that those interests imply other special purpose and non-profit legal entities under the legal categories of Foundations or Associations:

- a. For employees, the trade unions or labor associations (Sindicatos de Trabajadores);
- b. For suppliers, the different categories of businessmen's associations
- c. For Creditors, the Banking Association,
- d. For Clients, the Consumers National Association
- e. For Local Communities, the local community associations;
- f. For the local Governments, the cities association;
- g. For the Environment, the different private associations to protect the environment.

- 1.2. The *CODE OF BEST CORPORATE PRACTICES 2014* or *COUNTRY CODE* issued by the Financial Superintendency in its General Order # 28 in September 30, 2014 contains only very timid approaches related to stakeholders in the form of simple **recommendations** to both *security issuers* and financial entities.

## Regulatory framework

### **2.-To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?**

Colombian legal tradition belongs to the typical civil law system. Written and codified law is the upmost relevant issue and we do not have the system of judicial precedent; the fact that law 57 of 1887, article states that "three judicial decisions in a same sense shall to be held as probable doctrine" does not mean a mixed system.

Our Civil Code is based on the Chilean Civil Code and the Napoleonic Civil Code as well as our Commercial Code and we consider our private right system as one with deep roots in Roman law.

### **3.-Are corporate/securities laws regulated federally/nationally, provincially or both?**

Corporate laws are nationally regulated, principally by the Commercial Code contained in Decree 410 of 1.971 and in a very secondary way, by the Civil Code, contained in Law 153 of 1.887;

Security laws are also nationally regulated by a Code named “Organic Statute for the Financial System” contained in Decree 663 of 1.993 (Estatuto Orgánico del Sistema Financiero). These laws are made by a bicameral national and popularly elected Congress.

#### **4.-Who are the government corporate/securities regulators and what are their respective powers (in summary only)?**

The government corporate regulator is the “Corporations Superintendency” (Superintendencia de Sociedades), whose chief is directly named by the President of the Republic with the following basic powers:

- To exercise supervision, control, and vigilance over all the companies and corporations *different* from those which manage or invest resources of the public;
- To control and to punish wrongdoings of the directors or managers of the companies with regard to the shareholders;
- To control and to punish misconducts in the reporting duties;
- To verify that the operations of the companies are authorized by their bylaws;
- To summon the General Shareholders´ meeting if at least 10% of the shares ask to do so;
- To determine the rules for reporting.

Under the stipulations of Decree 663 of 1.993, the government securities regulator is the “Financial Superintendency” (Superintendencia Financiera), its chief is directly named by the President of the Republic with the following basic powers:

- To exercise supervision, control and vigilance over all the entities that manage or invest resources of the public;
- To authorize the operations of the entities and to establish the rules for their investments;
- To determine the terms of the authorized operations and the types of guarantees;
- To establish all the necessary regulations in order to obtain that the entities have adequate levels of capital;
- To forbid operations;
- To determine the rules for reporting;
- To establish the fees for the services of the entities to the public.

The former Stock Exchanges Superintendency has been absorbed by the Financial Superintendency since 2005.

#### **5.-Does the jurisdiction have a stock exchange?**

Yes, the “Colombia Stock Exchange” (Bolsa de Valores de Colombia) which is the result of the merger in 2001 of three different securities exchanges: Bogotá, founded in 1928, Medellín (1961), and Cali (1983).

It is overseen by “Financial Superintendency” and does not have other regulatory or oversight functions than those necessary with regard to its members.

### **Incorporation and listing**

#### **6.-Do the concepts of “limited liability” and “separate legal personality” exist?**

Yes. The first and principal effect of the incorporation is the birth of a new and independent legal person with its own legal personality; with several and well determined exceptions, the principle of “limited liability” operates in all the categories of corporations; these exceptions are:

- In the “General Partnership” the partners are obliged to respond for the debts and duties of the entity only in that event where the amount of the capital is not enough to support the debts originally acquired by the corporation;
- In the “Simplified Joint Stock Company”, the “Limited Liability Company”, the “Limited Partnership”, the “Single Corporation” and the “Civil Partnership”, the exceptions to the principle operates only in the cases of capital insufficiency regarding tax and labor debts;
- There are no exceptions to the limited liability principle for the Joint Stock Company, nor for the Limited Partnership with shares.

#### **7.-Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company’s social or environmental impacts, or to respect its stakeholders?**

Such recognition requirement has never existed in Colombian Law.

**8.-Do any stock exchanges have a responsible investment index and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange's Socially Responsible Investment Index).**

The indexes "Colcap", "Coleqty", "Coltes", "Colsc" and "Colir", which are the ones operating nowadays in the Colombian Stock Exchange do not consider any aspect related to responsible investment.

The ISO certifications are private and completely voluntarily; they are also a distinction and reason for pride, so day after day more and more companies do obtain those certifications, which in all cases include as a precondition to prove certain levels of Corporate Social Responsibility. (Responsabilidad Social Empresarial RSE).

## Directors' Duties

### 9.-To whom are directors' duties generally owed?

Director's duties are first and principally owed to the Corporation and secondarily, to the shareholders and in the last place, to the third parties:

- Commercial Code, article 200: "Directors are jointly and unlimited liable for the damages that they cause with their faults and wrongdoings to the corporation, the shareholders and the third parties."
- Law 222, 1995, article 23: "Directors' Duties: Directors are obliged to act in good faith, with loyalty and with the diligence of a good business man. Their actions should be displayed in the interest of the company, taking into account the shareholders' interests.  
In the fulfillment of their function, directors are obliged: 1.To display all their efforts in order to obtain the adequate development of the corporate purpose .... 6. To treat equitably all the shareholders and to respect the exercise of the inspection right..."
- Law 222, 1995, article 25: "Civil Action for Corporate Responsibility: under the previous condition of the approval of the general shareholders' meeting and even if the matter is not included in the summons's schedule, the Corporation is entitled to initiate the Civil Action for Corporate Responsibility against the Directors. In this case, the call for the general shareholders' meeting can be done by only the 20% of the shares in which the corporation's capital is divided. The decision shall be made by the half plus one of the shares represented in the meeting and if adopted, it involves the directors' removal."

### 10.-What are the duties owed by directors – please state briefly. Please indicate if there are express or implied duties to avoid damage to the company's reputation?

There are only implied duties to avoid damage to the company's reputation: Commercial Code, article 200: "Directors are jointly and unlimited liable for the damages that they cause with their faults and wrongdoings to the corporation, the shareholders and the third parties."

The duties owed by Directors are briefly the following (Law 222, 1.995, article 23):

1. To act in good faith, with loyalty and with the diligence of a good business man;
2. To display all their efforts in order to obtain the adequate development of the corporate purpose;
3. To observe attentively the strict fulfillment of the applicable laws and the bylaws;
4. To observe attentively that everyone permits the adequate fulfillment of the Auditor's duties;
5. To guard and to protect the commercial and industrial secrets of the corporation;
6. To abstain themselves from using privileged information;
7. To treat equitably all the shareholders and to respect the exercise of the inspection right;
8. To abstain themselves and through third parties from participating in activities which imply competition against the corporation or conflict of interests with it;
9. To acquire or trade with shares of the company unless explicit authorization of the general shareholders' meeting;

**11.-More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impact by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006, and in particular, ss.(1(4))**

Directors are required to consider company's impacts on non-shareholders, including affected individuals and communities only in the cases in which such impacts represent a real and material damage which can be valued in economic terms, so that the company could be held liable for a measurable damage.

The same answer applies to occurrence of real and effective damages caused outside the jurisdiction.

Unless an explicit bylaw's disposition, Directors cannot and are not authorized to consider impacts caused by subsidiaries, suppliers or other business partners, whether occurring inside or outside the jurisdiction.

Such is the current interpretation of article 200 of the Commercial Code, which states: "Directors are jointly and unlimited liable for the damages that they cause



with their faults and wrongdoings to the corporation, the shareholders and the third parties.”

Although decision making control or purpose or direction unity between different entities occurs, giving birth to “Entrepreneurial Group” (Law 222, 1995, article 28), every company which is part of the group has its own separate directors and there is no legal possibility to make liable the Directors of the holding entity for acts executed by its subsidiaries.

**12.-If directors are required or permitted to consider impacts on non-shareholders and to what extent do they have discretion in determining how to balance different factors including such impacts? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?**

As explained, directors are required to consider the company’s impacts on non-shareholders, including affected individuals and communities only in the cases in which such impacts represent a real and material damage which can be valued in economic terms, so that the company could be held liable for a measurable damage.

Under this premise, the only balance directors are able to make is double:

- if the impact on non-shareholders causes a damage that the company is due to indemnify and
- if the amount of the indemnification is higher than the gain for the company;

Only if the answer to these two questions is affirmative, are the directors due to hinder the impact and this is the only liability they have in this aspect.

**13.-What are the legal consequences for failing to fulfil any duties described above; and who may take action to initiate them? What defenses are available? Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its action?**

There are three types of legal consequences:



1. Under the provisions of private commercial law, the above-mentioned Civil Action for Corporate Responsibility established by Law 222, 1995, article 25; only shareholders may take action to initiate it and all legal defenses, such as the principle of due process, to controvert evidence and so on, are available
2. Also under the provisions of private civil law, Civil Code, article 2341 which regulates the non-contractual liability, any natural or legal person is entitled to take action in order to obtain the reparation or indemnification of any moral or material damage caused by anyone, including the case of decisions made by directors, which cause the company's misconducts and wrongdoings; there is no legal possibility to make liable a board of directors, collectively considered;
3. Under the stipulations of public law, the public interest action established by article 88 of the Colombian Constitution and by article 9 of Law 472, 1.998, give rise to a route, whereby stakeholders can exert pressure on a company:
  - a. Any natural or legal person is entitled to take action to initiate it when, and only when, the company has violated or is about to violate collective interests;
  - b. The collective interests whose violation by a company and thus, by the decision of its directors, generate a responsibility in the head of them, are the following:
    - i. The healthy environment;
    - ii. The ecological equilibrium;
    - iii. The use and enjoyment of the public space
    - iv. The defense of public assets
    - v. The free economic competition
    - vi. The public safety and the public health
    - vii. The access to public utilities
    - viii. The building and construction of urban developments under the legal stipulations

**14.-Are there any other directors' duties which are relevant to the interests of stakeholders?**

No, there are no other directors' duties relevant to the interests of stakeholders.

**15.-For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures? What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?**

Supervisory boards do not exist in our laws, nor do two tier boards.

Obligations owed by senior management who are not board members are exactly the same as the directors' ones.

## Reporting

**16.-Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.**

Companies are not required to disclose the impacts of their operations on non-shareholders; however it is not forbidden.

Reporting duties of both single companies and entrepreneurial groups are based only on economic and financial aspects as well as on performance.

**17.-Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).**

There is only one mandatory requirement which could be identified with transparency and it is article 446 of the Commercial Code, which states that annually, the board of directors and the senior management have to report to a shareholders' general meeting, "any and every money or assets transfers made in favor of any natural or legal person, whatever the cause or reason of the transfer is."

There is no voluntary initiative or trend toward voluntary reporting with regard to transparency to observe in Colombia.

**18.-Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?**

The above mentioned general reporting duty relate to "any and every money or assets transfers made in favor of any natural or legal person, whatever the cause or reason of the transfer is" refers to inside as well as to outside the jurisdiction.

**19.-Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?**

These financial reports are to be verified and certified by the auditor of the company. Only Joint Stock Companies and branches of foreign companies are obliged to have an auditor as well as every company with assets valued in USD 1.133.650 and/or with incomes of more than USD 680.000.

These financial reports can be accessed only by the authorities and the shareholders; only companies with more than USD 7.450.000 of assets and/or of incomes are obliged to send the reports to the Superintendency of Companies and in this case, any person has access to the reports.

Failing to report or misrepresentation have pecuniary penalties and, in case of recidivism, the administrative removal of the directors.

**20.-What is the external assurance regime for reporting on a company's impact on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance. Please summarize.**

Since there is no obligation for reporting on impacts on stakeholders, there is no external assurance regime for reporting on a company's impact on stakeholders.

We do not observe a practice which involves voluntary reporting on this matter.

### Stakeholder engagement

**21.-Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?**

No, there are not. Shareholder are free to propose anything related to the company.

**22.-Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is the legal duty that pension funds owe with regard to investment decisions in this regard? How does the legal duty of the fund align with term and**

**contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?**

The “Basic Juridical Order # 100” of the Financial Superintendency which regulates the admissible investments and its conditions with regard to the financial institutions, institutional investors, and pension funds does not require to consider such impacts. It does not forbid the company to take them into account when making investment’s decisions.

**23.-Can non-shareholders address companies’ annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company’s AGM?**

Unless the majority of the AGM decides to the contrary, non-shareholders cannot address it.

Any and every shareholder is entitled to raise a question at a company’s AGM.

**Other issues of corporate governance**

**24.-Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”) etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?**

There are no other laws, policies, or codes with regard to this topic. Actually, Colombia is negotiating to enter into the OECD.

The Financial Superintendency issued the General Order # 28 in September 30, 2014 which contains the *CODE OF BEST CORPORATE PRACTICES 2014* or *COUNTRY CODE*; notwithstanding with the nature of the document, an Order, it contains only **recommendations** to both *security issuers* and financial entities.

The code identifies five (5) major Corporate Governance areas, and within them, thirty three (33) concrete measures on key governance aspects and proposes up to one hundred and forty-eight (148) Corporate Governance **recommendations**. The Corporate Governance areas featured by the Country Code are:  
I. Shareholder Rights and Equal Treatment.

- II. General Assembly of Shareholders.
- III. Board of Directors.
- IV. Control Architecture.
- V. Financial and Non-Financial Transparency and Information.

The relevant statements of this document are the following:

- It defines the term **Stakeholders**: “These are all the persons that are related to the issuer of securities, and therefore, have an interest in it. Among them are the public at large, the shareholders, the employees, the clients and users, the economic and tax authorities, and the official supervisor”.
- It recommends to insert in the bylaws of the entity a certain function for the board of directors:
  - o “Supervising the financial and non-financial information that the corporation must disclose to the public periodically, within the framework of its information and communication policies, and because it is an issuing company”.
  - o Ensure that the shareholders and the market in general have a complete, truthful, and timely access to the information that corporation must disclose”.
  - o “Sustainability - Corporate social responsibility policies; relationships with stakeholders, community, the environment, etc”.
- It recommends taking into account that “the issuer’s leading tool for contact with its stakeholders and with the market at large is the disclosure of financial and non-financial information. Such information intends to provide those groups with an adequate understanding of the issuers’ progress and situation, and sufficient facts to take informed decisions”.
- It recommends taking into account that “transparency has become a fundamental Corporate Governance principle; one that company shareholders, the market at large, diverse stakeholders, and concerned third parties demand”.

**25.-Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?**

No, there are not any.

**26.-Are there any laws requiring gender, racial/ethnic, religious or other stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?**

No, there are not any.

**27.-In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?**

No, there is no any legal route whereby a parent company can be held liable with regard to the impacts that one of its subsidiaries has had on stakeholders groups.

There are no serious proposals to impose such a responsibility.

**28.-Are you aware of any incoming law proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.**

Nowadays there are no incoming law proposals that are relevant to issues raised in this questionnaire.