

LEGAL PERSPECTIVE ON AN ANNUAL BOARD “STATEMENT OF SIGNIFICANT AUDIENCES AND MATERIALITY” – PERU

This memorandum has been prepared and submitted upon request of and following the research template provided by Professor Robert Eccles with the purpose of assisting on the analysis of the viability of an annual board “Statement of Significant Audiences and Materiality”. The information contained in this summary is based solely on the laws and regulations of the Republic of Peru and does not consider the laws and regulations of any other jurisdiction.

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.

Peruvian corporate governance is principally regulated by the General Corporations Act – *Ley General de Sociedades* – (hereinafter, the “LGS”). However there are several other regulations and legislative sources which –under certain circumstances and in specific matters– become applicable to regulate companies’ particular activities. Additionally, according to the LGS, companies’ duties are not owed to their shareholders but to themselves. This comes as a consequence of the so called separate legal personality, independent from that inherent to the companies’ stockholders. The abovementioned circumstance is the reason why the LGS includes specific provisions limiting shareholder’s interests when these oppose to the company’s corporate purpose. We will elaborate on this on our following responses.

Regulatory Framework

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

Peru belongs to the legal tradition known as Civil Law. This means that the Peruvian legal system has predominance of written sources of law, such as codes and regulations. However, certain areas of law practice have experienced considerable influence from Common Law in the past two (2) decades. An example of this is the commercial practice in Mergers and Acquisitions. In the past decades, commercial activities in Peru have grown considerably, leading the markets along with their participants to interact more intensively. This situation –emphasized by the globalization– raised the need to adopt agreements from countries such as USA or the UK. These agreements were more suitable for this new type of transactions. It is so that nowadays in Peru, Share Purchase Agreements have basically the same structure and contain very similar obligations among parties as under a Common Law system.

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

Peru is a unitary state. This means that laws in force are applicable nationally. Hence, corporate/securities laws have national effectiveness.

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

In principle, from a corporate law perspective, companies are not under direct supervision of government authorities. However there are a number of circumstances by which they will be put under the scope of government regulators. In the case of the securities market, the regulator is the Superintendence of the Securities Market – *Superintendencia del Mercado de Valores*–, (hereinafter, the “SMV”). According to article 3 of the Organization and Duties Regulation of the SMV, the SMV has the power to: (i) dictate laws regulating matters on the securities market,

products market and basket funds (*fondos colectivos*), (ii) supervise the compliance of its legislation by listed companies, (iii) promote and study the capital markets, the products market and basket funds and (iv) supervise the compliance of the international assurance standards by authorized assurance companies in charge of auditing the financial statements of the companies under the SMV's supervision.

5. Does the jurisdiction have a stock exchange?

Currently Peru has one (1) stock exchange: Lima Stock Exchange – *Bolsa de Valores de Lima*– (hereinafter, the “BVL”). Since 2011, joined efforts of the Santiago Stock Exchange, the Colombia Stock Exchange and the BVL have resulted on an agreement of market integration known as the Integrated Latin American Market –*Mercado Integrado Latino Americano*– (hereinafter, the “MILA”). Such initiative aims to promote the growth of the trading activity of the member countries, providing an efficient and competitive infrastructure, better and greater exposure of their markets and better products’ offer and opportunities for local and foreign investors. On December 2014, the entry of the Mexican Stock Exchange to the MILA was made official.

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

The concepts of “limited liability” and “separate legal personality” do exist under Peruvian Law.

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?

Peruvian legislation does not require today nor has it required in the past such type of recognition for companies’ incorporations. However it is understood under Peruvian legislation that for companies to take account of potential social or environmental impacts, the current liability regime applicable in cases of torts serves as an efficient first barrier to stakeholders. On the other hand, issuers in the Peruvian securities market are required to file an offering memorandum before the SMV in case of a public offer of securities. Such offering memorandum must include: (a) information related to its corporate governance and (b) a declaration from company officers assuring the company’s future and current eligibility towards potential investors.

8. Do any stock exchange have responsible investment index, and is participation voluntary? (See e.g. FTSE4, Dow Jones Sustainability Index, the Johannesburg Stock Exchange’s Socially Responsible Investment Index.)

No. The BVL does not have any index of such kind.

9. To who are directors duties generally owed?

Regarding the duties owed by the directors, please consider that directors’ duties are owed to the company itself, in the sense that their duties should be always aligned to the company’s needs. However note that directors are liable before shareholders and third parties.

Regardless of the previously mentioned, principle 19 of the Good Corporate Governance Code (according to its definition in our answer to question 25) recommends Peruvian companies to have a minimum of one third (1/3) of independent directors.

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.

The LGS states certain general powers granted to the board, including for example: (i) the approval of general administrative agreements necessary for the ordinary course of the business, (ii) the approval of merger projects, (iii) the duty to inform shareholders on the financial situation of

the company, (iv) the duty to call for a shareholders meeting, if necessary, or for the Annual General Shareholders Meeting, among others.

With regards to express or implied duties to avoid damage to the company's reputation, Peruvian corporate legislation does not regulate duties of such kind for company directors. It could be said though, that there is an implied duty in such direction, based on the fact that directors liability unlimited for: (a) damages caused to the company by acts contrary to the law or to the company's bylaws or (b) damages caused by gross negligence or intentional misconduct.

11. More generally, are directors required or permitted to consider the company's 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 impacts 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))?

Based on the fact that directors liability is unlimited for: (a) damages caused to the company by acts contrary to the law or to the company's bylaws or (b) damages caused by gross negligence or intentional misconduct, we understand that directors must evaluate the referred impacts.

12. If directors are required or permitted to consider impacts on non-shareholders, 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?

Restrictions for this purpose are subject to evaluation by the board considering the duties mentioned in Section 11. No specific details are mentioned in Peruvian law.

13. What are the legal consequences for failing to fulfill 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 actions?

In addition to the legal consequences described in our precedent answer, the LGS contemplates specific actions available for shareholders in case directors fail to fulfill their duties:

- (i) Corporate action –“pretensión social de responsabilidad”–:
According to article 181 of the LGS, companies can initiate judicial actions against directors in case the illegitimate decisions taken by these at the board jeopardize the company, enabling the shareholders meeting to agree on a damages claim against directors.
- (ii) Individual action –“pretension individual de responsabilidad”–:
Additionally, in case any individual shareholder finds itself personally affected by a decision taken by the board, it is empowered by article 182 of the LGS to initiate judicial actions against the board of directors for any damages caused as a consequence of illegitimate decisions taken in such corporate body.

14. Are there any directors' duties that are relevant to the interests of stakeholders?

Along with directors' duties described above, it is worth mentioning the following:

- (i) Relevant to shareholders:
- Presentation of financial information on the firm.
 - Presentation of any relevant event regarding the administration of the firm.
 - Call the Annual General Shareholders Meeting.
 - Approve any merger agreement.
 - Approve dividend distributions.

(ii) Relevant to employees:

- Managers designation.
- Managers removal.
- Relevant decisions concerning human resources.

15. For all of the above, if these exist on your jurisdiction, does the law provide guidance about the role of the supervisory board 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?

Peruvian Corporate Law does not contemplate two-tier board structures. However, the LGS does not limit shareholder's ability to agree upon such board structure.

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.

Generally, companies are not required to disclose neither the impacts that their operations may cause on non-shareholder stakeholders nor the actions taken to address such kind of impacts. Although they are free to do so, they do not have such legal obligation.

However, in the case of supervised corporations (either by the SMV, the SBS or any other regulatory agency), not only reporting obligations result mandatory but also said companies are required to disclose certain information relevant for interested parties.

Examples of this kind of obligations are the following:

(i) "Material Information" ("Hechos de Importancia") (SMV Resolution N° 005-2014):

According to the Material Information Regulation –*Reglamento de Hechos de Importancia*– (hereinafter, the "Material Information Regulation"), issuers listed in the Peruvian Public Registry of the Securities Market (hereinafter, the "RPMV") are obliged to disclose any act, decision, agreement, fact, on-course-negotiation or any information which could reasonably influence (a) the decision of an investor to buy, sell or keep a security; or, (b) the liquidity, price or quotation of issued securities. This "material information" may include acts such as share purchase agreements, board's approval of financial statements, director designations, among others.

(ii) Financial statements disclosure for non-listed companies (Art. 5 Law N° 29720):

According to article 5 of the Issuance Promotion and Capital Markets Reinforcement Act, companies not listed in the RPMV with a certain importance of annual revenues are obligated to file their financial statements to the SMV. After said filing, these financial statements are open to the general public.

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, among others.).

The following are examples of mandatory reporting requirements with regard to transparency in charge of Peruvian government authorities:

(i) Risk assessment center:

The SBS operates the SBS Risk Assessment Center¹ containing a list with every direct or indirect credit entered by financial institutions operating in the Peruvian financial system. It includes the respective qualification given by financial entities to its clients according to criteria established in SBS regulations.

(ii) Taxpayers Unique Registry:

The Taxpayers Unique Registry is a registry in charge of the Peruvian Tax Authority (hereinafter, “SUNAT”). All the information regarding this registry (tax debts, ongoing inspection procedures, among others) is not available for the general public. However, individuals may access its web page² and search, by entering the company’s business name, for the company’s taxpayer identification number as well as its current condition regarding its fiscal obligations (i.e. active, inactive, etc.).

(iii) Consumers protection center:

Empowered by article 119 of the Consumers Defense and Protection Code, the Peruvian National Antitrust and Consumers Protection Institution (hereinafter, “Indecopi”), has developed a virtual registry named “Look from whom you’re buying” –“*Mira a quién le compras*”–³, containing information about the sanctions that this government authority has set upon companies that have infringed consumers protection legislation.

(iv) Defaulting maintenance payments debtors:

The Peruvian Judicial Authority operates a virtual registry of defaulting child maintenance debtors which includes personal information of parents who fail to fulfill their court-ordered maintenance obligations towards their children. This registry is called the Defaulting Maintenance Debtors Registry –*Registro de Deudores Alimentarios Morosos*⁴– and it is open to the general public.

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?

Legal reporting obligations will extend to companies’ operations outside Peruvian jurisdiction depending on the type of reporting obligation in each case, and depending on the type of activity carried out by the supervised company. For example, financial institutions under the supervision of the SBS may operate through subsidiaries or branch offices in foreign jurisdictions, being in this case obligated to submit the financial statements of their subsidiaries and/or branch offices to the SBS in order to fulfill the minimum capital requirements. Moreover, reporting obligations applicable to companies listed in the RPMV are in force regardless of the jurisdiction these companies operate in. The fact that these companies are listed in the RPMV makes them participants of the Peruvian securities market; condition itself that triggers potential investors’ need of material information on the issuers.

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?

The opportunity, accuracy and authenticity of these reports are verified by the corresponding regulator in each case. As can be noticed from our answers above, the confidential quality of these reports will vary in each case. It will depend on the nature of the information contained in each case to determine whether such reports will be opened to the general public or classified for exclusive use of the pertinent authority.

¹ <http://www.sbs.gob.pe/usuarios/categoria/reporte-de-central-de-riesgos/1293/c-1293>

² <http://www.sunat.gob.pe/cl-ti-itmrconsruc/jcrS00Alias>

³ <http://www.indecopi.gob.pe/miraaquienlecompras/>

⁴ <https://casillas.pj.gob.pe/redamWeb/index.faces>

With regards to the consequences of non-compliance to reporting obligations, they will be different depending on the type of obligation that is unfulfilled. While certain defaults may involve minor fines, others could derive to punitive actions against the company.

Finally, there is not a Peruvian general government authority tasked with the investigation of misreporting complaints. Such duty falls on each regulator and involves its own supervised companies.

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

In the case of companies obliged to submit financial statements to the SBS or the SMV, it is their obligation to have their financial statements made by independent auditors. In the case of different supervising authorities (i.e. Environmental Authority, Tax Administration, public services regulators, etc.) it corresponds to these along with their respective regulations to assure the compliance of the reporting obligations they set upon supervised companies.

21. Please summarize any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

As noted in our answer to question 16, the Material Information Regulation sets out the issuer's obligation to report to the SMV those acts carried out by the company which imply a certain level of transcendence towards investors' investment decisions. This is probably the most relevant example of regulatory guidance on reporting applicable under Peruvian corporate legislation. In addition, every Peruvian government authority in charge of supervising a commercial activity has its own Unique Text of Administrative Proceedings –*Texto Único de Procedimientos Administrativos*– (hereinafter, the "TUPA"). The TUPA establishes every procedure that can be engaged not only by users of the corresponding commercial activity, but also by the companies involved in such activities when they have to face any kind of proceeding before such administration. In such sense, when it comes to reporting obligations, supervised companies will have a complete guide on how to present the pertinent information to their respective regulator.

Stakeholder engagement

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

Under Peruvian corporate law, restrictions to the circulation of shareholder proposals eventually involve stakeholder protection. For instance, shareholders face restrictions on the exercise of their economic rights over the company when facing potential risk of default towards third parties. Such is the case, for example, of dividend distribution or legal reserves. It is so that for shareholders to distribute dividends among themselves it is first required to have a profit (art. 230 LGS) and to have duly allocated the legal reserve (art. 229 LGS). Another example of the described condition, is the legal restriction on shareholder's voting rights when the corresponding agreement implicates a conflict of interest for him (art. 133 LGS).

23. 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?

Institutional investors and specially pension funds are required to take under consideration impacts on stakeholders in their investment decisions. Fiduciary duty that fund managers have with the pension funds under their administration give rise to a wide range of restrictions imposed

by the SBS and the SMV (since pension funds are usually invested in the securities market) to their operations.

24. 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?

According to article 121 of the LGS, the company's CEO and directors may address the company's AGM with a say but without any voting rights. Additionally, technicians and professionals at the service of the company may also address the AGM as long as they were enabled for such purposes by the bylaws, the board or the shareholders. As for the second question, any shareholder may raise a question at the AGM as long as it is related to the topics arranged to be discussed during the meeting. In addition, in order for a shareholder to demand discussing an additional topic, it will be necessary that said shareholder holds at least 20% of the shares with voting rights and calls for a new meeting.

Other issues of corporate governance

25. Are there any other laws, policies, code 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, 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?

The following instruments in force in the Peruvian markets serve as guidelines and sustainability principles to commercial operations:

- (i) Equator Principles:
The Equator Principles are a set list of voluntary guidelines adopted by first class banks around the world aiming to manage the social and environmental impacts of project finance. In Peru, the *Banco de Crédito del Perú*, one of the leading banks, has adopted the principles of Equator alongside with worldwide firms such as HSBC, Bank of America, Credit Suisse Grp, BBVA, among others.
- (ii) OECD Guidelines for Multinational Enterprises:
Although Peru is not a current member of the OECD, government authorities are combining efforts in order to acquire plain membership of said organization at our bicentenary in 2021. With such purpose, constant legislative initiatives regarding diverse topics developed by the OECD are being elaborated.
- (iii) Good Corporate Governance Code for Peruvian Corporations (SMV)⁵:
Inspired by the principles of the CAF-Latin American Development Bank and the OECD, the SMV published in 2013 the Good Corporate Governance Code for Peruvian Corporations – *Código de Buenas Prácticas Corporativas para Sociedades Peruanas*– (hereinafter, the "Good Corporate Governance Code") aiming to improve investors perception on Peruvian companies, promote entrepreneurial development and therefore help to generate value in the Peruvian markets. Although the application of the principles contained in this code is only voluntary, the SMV requires listed companies to present a declaration indicating their level of compliance regarding said principles.

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

⁵ http://www.smv.gob.pe/Uploads/CodBGC2013%20_2_.pdf

Principle 19 of the Good Corporate Governance Code strongly recommends company boards to be constituted by at least one third (1/3) of independent directors, in order to assure companies administration a low amount of interference from shareholders' interests.

On the other hand, although Peruvian labor laws do not contemplate a figure by virtue of which trade unions are granted direct participation in corporate bodies such as the board, the Peruvian Labor Authority has interpreted certain ILO opinions and has recently considered that unions' representative may eventually attend board meetings.

27. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

Under Peruvian legislation, there is no law requiring gender, racial/ethnic, religious or other stakeholder representation, or non-discrimination, on companies' boards.

28. 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?

Please refer to our answer to question 11 above.

29. Are you aware of any incoming law or 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.

Currently, a law proposal regarding criminal liability for companies involved in corruption acts is being discussed at the Congress. Such initiative includes direct criminal liability for legal entities involved in corruption acts, along with direct fine and sanction impositions. With the incorporation of this initiative, Peru would act according to the OECD's Anti-bribery Commission's recommendation, and will complete the requirements for its incorporation to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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