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New corporate governance rules in Chile

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Legal advice to corporate clients, particularly listed companies, has been altered during 2010 by the application of new rules on corporate governance that entered into force on January 1.

As background, in May 2007 the Organization for Economic Co-operation and Development (OECD) formally invited Chile to become a member of this organisation. In order to comply with the corporate governance international standards recommended by the OECD, Chile amended several internal laws, including corporate governance rules set forth in the Securities Market Act and in the Corporations Act. These amendments were passed as Act No. 20,382 (The Act).

Chile already had strong corporate governance policies, with a long tradition of corporations' regulation. The new rules, however, served its purpose of updating some corporate governance issues, but also casted some confusion on the interpretation of certain rules.

The main aspects of the new rules are the following.

Transactions with related entities

The Act established a set of separate rules applicable to listed corporations regarding transactions with related entities. Before, the same rules were applicable to both closely held and listed corporations. According to the new regulation, transactions between a listed corporation and its related entities (including affiliates, directors, officers and other entities in which directors and officers have a proprietary interest, among others), may be carried on only if the following requirements are met.

(i) The purpose of the transaction must contribute to the benefit of the company. Under the previous rules, a transaction not

prejudicial to the corporation (a neutral transaction) would suffice.

(ii) The price, terms and conditions of the transaction must be similar to those prevailing on the market when the transaction was approved.

(iii) The operation must be revised by the directors committee (discussed below), which must prepare a report to be read in the board meeting summoned to approve the transaction. This rule already existed in the Corporations Act, but now the composition of such committee was changed.

(iv) The operation must be approved by the board of directors. This requirement existed under the amended Corporations Act; however, as a new rule, directors must inform about any interest in the transaction and may not participate in the voting of its approval. It should be noted that, before the Act was passed, it was common that directors provided this information and abstained from voting voluntarily.

(v) In case the majority of the board were required to abstain from the decision making process, the transaction may only be conducted if approved by the unanimity of the remaining members of the board or by two thirds of the shareholders meeting. In this last case, an independent evaluator must be appointed.

(vi) The resolutions of the board must be informed in the following shareholders' meeting, just as it was required before the Act was passed.

The Act allowed boards of listed corporations to determine that certain operations be exempted from the foregoing requirements in cases of transactions involving low amounts, habitual transactions according to the purpose of the company or transactions entered into with fully owned (95% or more) subsidiaries.

Independent directors

Prior to the amendments introduced by the Act, the Corporations Act, stated that certain listed corporations were required to have a directors committee with a majority of inde-

pendent directors. Independent directors were defined as those elected without the votes of the controlling shareholder.

However, there was no requirement for corporations to have independent directors and, therefore, the directors committee could be formed exclusively by directors appointed by the controlling shareholder. Most of listed corporations in Chile have a shareholder with controlling capabilities. The directors committee has a number of audit duties, including the revision of related entities transactions.

The new rules enacted on these regards, state that listed corporations which meet certain patrimony and property dispersion thresholds must have at least one independent director, which must be a member of the directors committee.

The concept of independent director also was amended. Now a director is considered independent if he or she does not have certain liaisons with the company, or with its directors or officers, related entities or its controlling shareholders.

If these requirements are met, the director would be considered independent even if he or she is elected only with the votes of the controlling shareholder. Considering that the independent director may be re-elected on that capacity with the votes of the controlling shareholder, the legal community has widely criticized the new rule, second guessing the real independence that some directors will really have.

In sum, these new rules, together with other amendments that impose new obligations and liabilities on corporations, their board members and officers anticipate a new advanced corporate culture in Chile, where close monitoring compliance with these obligations will be the standard practice.

Banking and finance

| Recommended firms | |
|-------------------|--|
| Tier 1 | Carey y Cía Claro y Cía Philippi Yrarrázaval Pulido & Brunner |
| Tier 2 | Barros & Errázuriz Guerrero Olivos Novoa y Errázuriz Morales & Besa |
| Tier 3 | Cariola Díez Pérez-Cotapos & Cía Larraín y Asociados Noguera Larraín & Dulanto Prieto y Cía |
| Tier 4 | Baker & McKenzie Bofill Mir & Alvarez Hinzpeter Jana Urenda Rencoret Orrego y Dörr |

Mergers and acquisitions

| Recommended firms | |
|-------------------|--|
| Tier 1 | Barros & Errázuriz Carey y Cía Claro y Cía |
| Tier 2 | Cariola Díez Pérez-Cotapos & Cía Philippi Yrarrázaval Pulido & Brunner Prieto y Cía |
| Tier 3 | Bofill Mir & Alvarez Hinzpeter Jana Guerrero Olivos Novoa y Errázuriz Larraín y Asociados Morales & Besa Noguera Larraín & Dulanto |
| Tier 4 | Alessandri & Compañía Baker & McKenzie |

The earthquake that struck Chile last February shortened the length of the Earth's day by 1.26 microseconds, not to mention the devastation it caused to the city of Concepción and communities along the coast. The destruction of crucial bridges between Santiago and the effected region made immediate emergency response impossible. Also complicating the relief effort was the transition of power that took place just a week after the quake.

Shortly after taking office, President Sebastián Piñera announced plans to launch a \$10 billion, ten-year bond to partially finance the reconstruction of bridges, roads and the

more than 500 thousand homes levelled in the disaster. The offer will mark Chile's first trip to the international markets in seven years, and would set a benchmark for domestic corporate bonds placed abroad. Correspondingly, state-owned Banco Estado set September 2010 as the month to launch a \$500 million peso-denominated tranche abroad.

Chile's sizeable savings in copper revenues remained relatively untouched during the recent financial crisis and could be drawn on by the government for its immediate emergency response. Piñera's decision to finance the recovery with new debt and tax increases aims to maintain the peso's relative weakness to foreign currencies flowing into the country.

Last January new laws regarding corporate governance came into effect, imposing greater transparency and reporting demands on publically-traded companies. The legislation also gives minority stakeholders a louder voice in corporate administration by allowing them independent directors on the board. Additionally, the government recently created a new environmental ministry and court to address concerns over the destruction caused by years of poorly-regulated industry.

The selection of Piñera, one of Chile's richest men, to lead the nation shows popular approval of the government's pro-private investment policies. But during his campaign the billionaire businessman who held large stakes in Bancard, Lan Airline and Chilevision, among others, promised to divest himself of all conflicting assets before taking office. But Piñera waited until after his inauguration to complete divestures, causing the value of his shares to rise sharply and draw flack from critics. He ultimately decided to retain his interest in Colo-Colo, Chile's most successful football club.

Piñera was not the only member of the government to leave lucrative private-sector jobs or public service. The new president populated his government with engineers, technocrats and lawyers from Chile's top law firms, including three lead attorneys appointed to cabinet positions.

Carey y Cía

While competitors note last year's departure of long-time partner Ricardo Peña was "an unprecedented event" for the long-time leading firm, there is agreement that Carey's structure remains uncompromised. In the words of one rival, "The team is what matters in Carey." The firm saw associates Ana María Muñoz and Macarena Vargas join the government when Piñera took office, and made three new partners in the corporate and financial teams.

Clients particularly praise partner Juan Guillermo Levine's ability to delegate the right staff to fit the transaction at hand. "He's able to form teams to work with him and is able to garner assistance from the appropriate partners," one client explains. Peers identify Jaime Martínez and Diego Peralta as respected counsels among Chile's banking community.

In 2009 Martínez represented Canadian development company EDC in a \$200 million loan to Codelco, the latest in a long stream of credit ensuring Canadian equipment continues to supply Chile's state-owned copper producer.

Leading lawyers

Juan Guillermo Levine
Jaime Martínez
Diego Peralta

Claro y Cía

When comparing Claro to its top-tier neighbour Carey, one rival states simply, "It's a smaller firm, very neat - clearly have a good culture, and you can see that in the professionals." Additionally, when Claro's partners are compared to their counterparts at Carey, the same peer says, "They tend to fight more."

Larraín and partner José María Eyzaguirre advised Cueto Group's acquisition of Sebastian Piñera's share of Lan Airlines as part of the Chilean president's divestiture of several important businesses. The purchase, valued at \$1.23 billion, gives the family-owned business sole control of Lan.

Citigroup provided partner Cristóbal Eyzaguirre important work in the M&A field last year when it sold its 40% stake in Chilean pension fund AFP Habitat to the Chilean Construction Chamber. Eyzaguirre also advised the bank last May when it increased its ownership of Luksic Group-owned LQ Financial Investments, primary shareholder of Banco de Chile.

Partner Rodrigo Ochagavía is mentioned in the market as the most relevant member of the firm in financial transactions. In August 2009 Ochagavía represented Peru's Brescia Group in a successful bid to acquire French cement producer Lafarge's Chilean holdings. The \$555 million transaction marks Brescia's first foray across the southern border. That same month Ochagavía closed the \$340 million loan from IFC and Germany's KfW Bankengruppe to Central Termoeléctrica Andina, a subsidiary of France's Suez Energy.

Leading lawyers

Cristóbal Eyzaguirre
José María Eyzaguirre
Rodrigo Ochagavía R

Philippi Yrarrázaval Pulido & Brunner

Known for having a well-versed practice in complex and novel transactions in the foreign banking market, rivals say Philippi Yrarrázaval Pulido & Brunner is rapidly developing its litigation, mining and environmental law departments as well. Last year partner Felipe Irrázabal became Chile's federal anti-trust prosecutor, and peers see the move as the most high-ranking attorney to join President Piñera's administration.

When speaking of partner Marcello Armas, one competitor states: "When you have a foreign bank in a transaction you will see Marcelo Armas across the table." In August 2009 Armas assisted several international banks including HSBC and BNP Paribas issuing three-year term loans totalling \$300 million to Chile's state-owned oil company, Enap.

In 2009 the firm structured several debt offerings on the local stock market at an aggregate amount of \$304 million, which Chile's largest electricity transmission company used to finance a moderately-successful tender offer on its \$465 million outstanding loans due this year.

At the end of 2009 a team of attorneys at Philippi worked with Chilean investment firm Larrain Vial in issuing a report to the Ministry of Mining regarding financing small and mid-sized capital mining projects through the local market.

Leading lawyers

Marcello Armas
Alberto Pulido
Andrés Sanfuentes

Barros & Errázuriz

Barros & Errázuriz gained a "competitive advantage" representing Sebastian Piñera in his divestures from business interests, including Bancard, Lan Airlines and leading TV station Chilevision, leading up to (or immediately following) his successful bid for president in 2010. "They have close ties to the government, and that is something you would want to have," one peer states.

The firm holds a solid reputation among rivals for structuring complex investment vehicles. Founding partner Fernando Barros garnered media attention last year structuring a blind trust for Piñera's estimated \$1.5 billion proceeds from the sale of his stake in Lan. The trust is managed by four local administrators.

Several teams of Barros attorneys worked closely with Sullivan & Cromwell recently bringing two important Chilean companies to the European market. Partners José Tomás Errázuriz and Bernardo Simián advised

forestry and pulp processor Inversiones CMPC in issuing \$500 million in dollar-denominated Eurobonds due in 2019. Last year Simián and partner Gonzalo Molina undertook a similar transaction for Colbún, Chile's second largest energy generator, which also raised \$500 million.

The firm found M&A work in the struggling salmon industry with the strategic alliance of two Chilean fish processing companies. Errázuriz and partner Luis Alberto Letelier lead the team that advised both Salmonoil and Pesquera Pacific Star in a merger to join resources that amount to 12% of the Chilean fishmeal and oil market.

Leading lawyers

Fernando Barros
Gonzalo Molina

Guerrero Olivos Novoa y Errázuriz

A large team of Guerrero lawyers assisted steelmaker Cap in a restructuring process that saw Mitsubishi buy a 25% stake in subsidiary Compania Minera del Pacifico for \$924 million. In addition to the share increase, Mitsubishi agreed to finance a \$401 million capital increase for CMP. The transaction took half a year to complete due to the high level of scrutiny by antitrust authorities.

The firm advised three bank card companies in consolidating their databases under one system to be managed by service company EDS, recently acquired by Hewlett-Packard. The \$90 million deal was complicated by the acquisition process and was subject to intense structuring, risk assessment and regulatory approval, owing to the critical nature of the information involved.

In 2009 partners Jorge Delpiano Kraemer, Juan Enrique Allard Serrano and José Miguel Ried Undurraga helped defend low-income retailer La Polar against a hostile takeover by one of its former shareholders. The firm advised the company's board regarding the bid, which was eventually rejected.

Leading lawyers

Jorge Delpiano Kraemer
Roberto Guerrero Valenzuela

Morales & Besa

Competitors characterise partner Guillermo Morales as a competitive practitioner among international financial investors. In one representative transaction Morales advised Eton Park Capital Management in a \$200 million financing to HydroChile, giving the global investment firm an 83% stake in the renewable energy producer.

The firm advised Spain's Ferrovial Group in the divestiture of Cintra Chile, which operates five toll roads in southern Chile. The \$302 million sale to Colombian power company Interconexion Electrica includes options to purchase the remaining 40% at a later date.

Partner Pedro Garcia advised a syndicate of banks led by BBVA, Banco de Chile and BCI in a restructuring of AquaChile, the nation's largest salmon fishery. The \$412 million restructuring aims to help the company emerge from the three-year blight that has crippled the salmon industry in Chile.

Leading lawyers

Pedro García
Guillermo Morales

Cariola Díez Pérez-Cotapos

Partner Francisco Javier Illanes is mentioned by peers as the firm's leading financial lawyer. Last year Illanes and partner Sergio Díez's legal team locally represented Norwegian financial group DnB Nor in refinancing the world's largest farmed salmon producer. Marine Harvest was granted a facility by a consortium of Norwegian and Dutch banks to refinance \$752 million in debt, a sign of confidence in the company's operations in Chile, among others.

The firm also helped negotiate a sale of copper producer Xstrata's interest in the El Morro project to Barrick Gold for \$465 million. Though the sale was agreed to in principle, minority stake holder New Gold exercised its right of first refusal, transferring the share along with its 30% stake to Gold Corp for \$513 million. The act has spawned a court battle between Barrick, New Gold and Xstrata.

On the seller's side partner Sergio Díez and a team of Cariola attorneys represented Chevron in the \$12 million sale of all assets and interests in Chile to Petrobras. The lubricant business, still branded by its former name of Texaco, will now operate as Lubrax, ending Texaco's 50-year history in the country.

Leading lawyers

Sergio Díez
Francisco Javier Illanes

Other ranked firms

Alessandri & Compañía is described by rivals as an IP-focused firm with a roster of foreign corporations it represents in small transactions. Partner Fernando Jamarne is singled out by peers for his experience as general counsel for JPMorgan Chase's Chile branch.

In September 2009 Jamarne represented long-time client Samsonite locally as it

emerged from Chapter 11 bankruptcy newly structured as an LLC, and acted for the luggage retailer locally in a \$340 million international financing.

Leading lawyers: Felipe Cousiño and Fernando Jamarne.

“They have a large franchise and they leverage a lot on the franchise,” is how one rival explains **Baker & McKenzie’s** persistence in the Chilean market. Last year the franchise brought local work for Anglo-Australian mining company Rio Tinto. Partner Leon Larraín advised packaging subsidiary Alcan in a takeover by Australia’s Amcor for \$1.95 billion globally. Peers describe partner Larraín as a solid presence in the M&A market for over 20 years.

Recent experience shows the firm active with local corporations and investment groups as well. In November 2009 partner Jaime Munro negotiated three credit agreements for Inversiones Quinchamali, a financial group of the Paulmann family. A total of \$220 million was raised to purchase Peruvian investor Grupo Wong’s stake in Chilean retailer Cencosud.

Leading lawyers: Leon Larraín and Antonio V Ortúzar Jr

In addition to the solid reputation of its litigation practice, **Bofill Mir & Alvarez Hinzpeter Jana** is noted by competitors for having a presence in small to mid-sized transactions, often on the side of Chilean nationals. Last year, partner Rodrigo Hinzpeter Kirberg joined President Piñera’s cabinet as minister of the interior.

Peers select partner Octavio Bofill as the firm’s star transactional lawyer. Chilean telecom and cable service provider Telefónica del Sur kept Bofill quite active recently with several small bond placements and financings, culminating in Telsur’s sale by Quiñenco to GTD Group for \$147 million.

Leading lawyers: Alejandro Alvarez and Octavio Bofill

The lawyers of **Urenda Rencoret Orrego y Dörr** earn high esteem from peers for their talent while the firm is regaining ground in the corporate field. In one recent transaction partner Pablo Bauer and a team advised Energía Renovable Andes in financing four small-scale hydroelectric projects in the province of Bío Bío providing a total of 15MW of power. The Hydroventura project’s classification as non-conventional renewable energy holds a privileged place in Chile’s electricity market legislation.

Two Urenda clients that are the envy of peers are IFC and Minera Escondida, Chile’s largest privately-owned copper mine. Last May, Bauer advised Escondida and its controlling company BHP Billiton when IFC sold its 2.5% stake to a Japanese consortium

led by Mitsubishi. The reported \$537 million sale marks a milestone for the operation’s development.

Leading lawyers: Pablo Bauer

Other notable firms

The young law firm of **Aninat Schwencke & Cía** is gaining traction in Chile’s legal market with some innovative clients, and have found their share of some of the more traditional ones. In 2009 the firm offered local counsel to Royal Bank of Scotland as security agent for Samsonite’s bankruptcy and subsequent debt restructuring.

One influential recent client of the firm is Austral Capital, a local private-venture fund supporting science and tech start-ups around Latin America. In 2009 the barely one-year-old company, with financial backing from the Chilean government, launched several investments in the biotech field. Partner Juan Pablo Schwenke advised Austral in a \$3 million loan to Bio Architecture Labs, a US research company in the biofuels and renewable chemicals markets.

Leading lawyers: Luis Alberto Aninat and Juan Pablo Schwencke.