



DRAFT LATIN AMERICAN CORPORATE GOVERNANCE ROUNDTABLE SURVEY REPORT ON RELATED PARTY TRANSACTIONS

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Genesis the Project

- December 2009 Latin America Corporate Governance Roundtable Meeting in Santiago
- “Legal / Regulatory and Institutional Framework for Enforcement Issues in Latin America: A Comparison of Argentina, Chile, Colombia, Panama and Peru” identified as priority enforcement issues:
 - ✓ Abuse of Privileged Information and Insider Trading
 - ✓ Oversight of Related Party Transactions

Sources of RPT Review Standards

- Argentina – Executive Order 677/01 as incorporated into the Corporations Law (17,811)
- Brazil – General Fiduciary Duty; CVM Guidelines (Orientation Guideline 35; 2008)
- Chile – New Title XVI of the Corporations Law (2009)
- Colombia – General Fiduciary Duty as Promoted in the Country Code (Código País); Instructions of the Regulator
- Mexico – Corporations and New Capital Markets Law
- Peru – Securities Markets Law

RPT Disclosure

Financial Statements

- IAS 24 or similar in all countries except Colombia
- Colombia – 10% beneficial holder threshold

Material Event Disclosure

- Brazil, Chile, Peru – General rules for disclosure
- Argentina – Transaction with persons with “control or significant participation (35%) over a “significant amount (1% or A\$300,000)
- Colombia – 5% of assets for sales; 1% for guarantees; 10% for loans
- Mexico – 5% of assets, liabilities or capital; 3% of sales

RPTs Requiring Board Approval

- Argentina – Approval reverses burden of proof
- Brazil – No specific threshold; but Orientation Guideline 35 for M&A transactions
- Chile – 1% of Net Assets / UF 20,000 Threshold
- Colombia – No specific threshold; But see Código País
- Mexico – 10% of Assets if Board policy permits
- Peru – 10% Shareholders; 5% of Assets

Committee Review

- Argentina – Audit Committee
- Brazil – Independent Committee (Orientation Guideline 35)
- Chile – Committee of Directors
- Colombia – No requirement (Código País recommends Audit Committee review)
- Mexico – Governance Committee (overseen by Audit Committee)
- Peru – No requirement

RPTs Requiring Shareholder Approval

- Argentina – In absence of Audit Committee and Board Approval
- Brazil – M&A; Fundamental transactions
- Chile – In absence of Committee of Directors and Board Approval
- Colombia – M&A; Fundamental transactions
- Mexico – All Transactions Exceeding 20% of assets*
- Peru –All Transactions exceeding 50% of capital*

* All countries provide in their corporations laws that certain fundamental transactions must be approved by the shareholders' meeting, irrespective of whether they are RPTs

Areas of RPT Concern Reported

- Argentina – Inadequate Disclosure
- Brazil – RPTs in M&A / Corporate Restructurings
- Chile – Intra-Group Transactions
- Colombia – Intra-Group Transactions
- Mexico – Intra-Group Transactions
- Peru – Incomplete Disclosure

Enforcements Powers of the Regulator

- Argentina – Administrative Penalties; Rescission
- Brazil – Administrative Penalties; Delay of shareholders’ meeting; compensation to Investors
- Chile – Administrative Penalties; No rescission
- Colombia – Administrative penalties; “Name and shame”
- Mexico – Administrative penalties
- Peru – Sanctions; Injunctions

Shareholder Enforcement; Remedies

- Argentina – Sanctions; Rescission
- Brazil – 5% of shareholder may sue officers and directors
- Chile – General law of torts
- Colombia – Class actions
- Mexico - 5% of shareholder may sue officers and directors
- Peru – General law of torts

Preliminary Observations

- Financial Statement Disclosure Converging to IAS 24 (ex. Colombia)
- Intra-group transactions of principal concern (ex. Brazil M&A)
- Board primacy in review of RPTs
 - Role of committees varies
- Criteria for which RPTs require review vary significantly
 - Some definitions / thresholds may be dated

Preliminary Observations

- Procedural requirement of Board review vary
 - May be space for supervisory authority guidance
 - Most respondents did not reference national codes of best practice
 - Space for additional voluntary standard setting?
- Powers of Supervisory Authority Differ Significantly
 - Review of adequacy of existing powers may be useful in some countries

Preliminary Observations

- Variance in Private Enforcement
 - Practicality of existing rights of action
 - Adequacy of currently-available remedies
- Jurisprudence / Enforcement Experience Still Limited
- Data lacking:
 - Incidence of RPTs
 - Nature / potential for abuse
 - Private Enforcement experience

Issues for Discussion; Next Steps

- More specific data on the incidence of RPTs and their potential for abuse?
- How widespread is concern among minority shareholders, institutional investors or other stakeholders?
- Are thresholds for RPTs at board level set at appropriate levels?
- Are more specific policies and regulatory requirements needed to address the special considerations related to intra-group transactions?

Issues for Discussion; Next Steps

- What more could or should regulators do to try to ensure fair treatment of shareholders concerning related party transactions?
 - Offer guidance on appropriate procedures for board or shareholder review?
 - Seek amendments to voluntary national corporate governance codes to promote best practices?
 - Review RPTs in certain cases to certifying whether they were undertaken under normal market conditions?
 - Require fairness opinions or provide authority for minority shareholders or independent directors to request such independent assessments?

Issues for Discussion; Next Steps

- Is the legal / regulatory regime governing RPTs more effective when the supervisory authority has the power to pursue compensation for minority shareholders?
- Is this an issue better left to market forces and private actions and remedies?
- Is there positive experience in the region (or elsewhere) with private enforcement remedies and jurisprudence in relation to abusive related party transactions that can be built upon?



Gracias, Obrigado, Thanks