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Chile Establishes Criminal Responsibility of Legal Entities

On December 2, 2009, Chilean Law Nr. 20.393 on criminal responsibility of legal entities went into effect through publication in the Official Gazette. Although this law adheres to international standards in this area, it dismisses the more than 100-year-old principle that legal entities (e.g., corporations, limited liability companies, foundations, etc.) are not subject to criminal responsibility – i.e., that they cannot be charged with criminal offenses. With the enactment of this law, companies can now be investigated, charged, prosecuted and convicted for money laundering, financing of terrorist activities and bribery of public officials in Chile or other countries.

This law stems from a bill introduced in Congress as part of the recommendations the Organisation for Economic Co-operation and Development (OECD) made to Chile as a prerequisite for the country to be accepted as a full member of the international organization. In spite of the foregoing, the matter was subject to discussion in Parliament as to whether the punishable activities were worth turning into criminal offenses given their infrequency.

According to the law, legal entities are criminally responsible if the following conditions are met:

1. The offense must be directly and immediately committed by the entity's owners, controlling equity holders, main officers, representatives, managers, administrative personnel or even individuals acting under the direct supervision of any of the aforementioned individuals.

It is important to note that legal entities are subject to criminal responsibility regardless of the liability of the individuals who committed the offense. Entities remain

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criminally responsible even if the charges filed against such individuals are dismissed, provided that there is clear and convincing evidence that the criminal conduct was necessarily committed within the scope of the individuals' activities and duties.

II. The offense must result from the legal entity's failure to perform its administrative and oversight duties. In this respect, the law provides that legal entities may put into practice internal regulations aimed at preventing the above-mentioned crimes. According to the law, entities implementing such regulations before the offense is committed are regarded as having performed their administrative and oversight duties. The establishment of such regulations after the crime is committed but before commencement of trial may be regarded as a mitigating circumstance that reduces the entity's level of guilt, resulting in a diminished punishment.

As to the substance of the regulations, they must include, at minimum, the appointment of a compliance officer and the clear definition of his or her scope of action as well as the establishment of a crime prevention system and details on its oversight and certification. The certification could be obtained from auditing firms, rating companies or any other entity so registered with the Chilean Superintendency of Securities and Insurance. The certifying entities shall assess whether the regulations meet all requirements set forth by the law regarding the company location, size, revenue and organizational complexity.

In practice, the establishment of these special regulations would result in modifications to the entity’s internal regulations, employment agreements and contractor agreements.

III. The offense must be committed in the interest or benefit of the legal entity. That is, the result of the crime must result in a benefit for the company. On the contrary, if the offense benefits only the offending individual, the legal entity shall not incur any criminal responsibility.

With respect to punishment, indicted entities may be sentenced to one or more of the following sanctions:

- Dissolution of the legal entity;
- A temporary or permanent ban on entering into contracts with the Republic of Chile;
- Partial or total loss of tax benefits or prohibition against receiving such benefits for a fixed period of time;
- Fines in the range of approximately US$13,800 to US$1,379,962; and
- Publication of an abstract of the court's decision through the Official Gazette or a newspaper of national circulation.
Any transformation, merger, acquisition, division or voluntary dissolution of the legal entity shall result in the transferral of criminal responsibility to the resulting/surviving entity:

- In the case of transformation, merger or acquisition, the resulting/acquiring entity shall pay the fine.
- In the case of the entity's division, the resulting/surviving parties shall be severally liable for payment of the fine.
- In the case of voluntary dissolution, equity holders shall pay the fine, which shall not exceed their equity participation.
- If the punishment is other than a fine, the judge shall determine which entities/individuals should be punished.

Although many of the non-Chile-based companies with subsidiaries in the country are familiar with laws on criminal responsibility of legal entities, the enactment of Chilean Law Nr. 20.393 highlights the need for these companies to undertake appropriate internal adjustments aimed at shielding themselves against potential acts (mainly bribery) by their officers, directors or employees that may lead to criminal responsibility on the part of the employer/company.

For more information, please contact Cristián Sandoval in Santiago at +56.2.445.74.04.

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