

The International Bar Association Company Director Checklist – Republic of Colombia

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Item	Number	Check	Item	Number	Check
Before appointment			Potential liability	16	<input type="checkbox"/>
Items to understand	1	<input type="checkbox"/>	Duration of duties	17	<input type="checkbox"/>
People to meet with	2	<input type="checkbox"/>	Special circumstances		
Documents to review	3	<input type="checkbox"/>	Bankruptcy	18	<input type="checkbox"/>
Ongoing duties			Takeover bids	19	<input type="checkbox"/>
Points for attention	4	<input type="checkbox"/>	Market abuse/insider dealing	20	<input type="checkbox"/>
Legal status of directors	5	<input type="checkbox"/>	Defences		
Parties to which duties are owed	6	<input type="checkbox"/>	Good corporate governance	21	<input type="checkbox"/>
Powers of directors	7	<input type="checkbox"/>	Minutes of board meetings	22	<input type="checkbox"/>
Duty of loyalty	8	<input type="checkbox"/>	Discharge and indemnification	23	<input type="checkbox"/>
Duty of care	9	<input type="checkbox"/>	Insurance	24	<input type="checkbox"/>
Duty to have and maintain skills	10	<input type="checkbox"/>	Resignation	25	<input type="checkbox"/>
Additional duties (confidentiality, etc.)	11	<input type="checkbox"/>	Restructuring of assets	26	<input type="checkbox"/>
Delegation of powers/authority	12	<input type="checkbox"/>	ESG and D&I policies, metrics	27	<input type="checkbox"/>
Conflicts of interest (inc. intragroup dealings)	13	<input type="checkbox"/>			
Compliance with statutory obligations	14	<input type="checkbox"/>			
Disclosure obligations	15	<input type="checkbox"/>			

Introduction

This checklist is intended to serve as a practical guide in the Republic of Colombia to the main duties and obligations for directors of corporations that are securities issuers registered before the Financial Superintendence of Colombia (FSC) or private companies arising from the specific relevant jurisdiction legislation sources, namely:

- Commercial Code (Decree 410 of 1970).
- Law 222 of 1995.
- Law 964 of 2005.

If any specifics of listed public corporations are relevant, see the third column of this checklist below.

Disclaimer

This checklist is informational in character only and is not intended to be comprehensive in all respects or to serve as a substitute for professional advice. In all cases, however, specific legal advice should be sought. This checklist was last updated on March 31st^h, 2022.

DUTIES AND OBLIGATIONS OF THE DIRECTORS			
	Action/issue	Specifics of listed public companies (if relevant)	Comments/notes
Before appointment			
1. Items to understand	<ul style="list-style-type: none"> • The type of corporation in which you are going to serve as director, this is, whether it is a <i>sociedad anónima</i> (“S.A.”) o a <i>sociedad por acciones simplificada</i> (“S.A.S”). • Whether the corporation is a state enterprise or a non state enterprise. • Whether the corporation is a securities issuer or not. • The structure that the board has, this is, whether the board has two or one tier architecture. In Colombia, the most common approach is the one tier board, where the directors assume both strategic and oversight attributions and the executives and legal representatives are not members of the board of directors. • Whether the corporation has a controller shareholder or not. • Whether you have been appointed as and independent director or as a director representing the interest of controlling shareholders. In Colombia the usual corporate arrangement is the close held corporation. Disperse capital corporation are an exception in practice. • Whether you meet the criteria or requisites provided on the regulation, the bylaws and the corporate governance 	<ul style="list-style-type: none"> • 	<p>Prerequisites to accepting an appointment should be:</p> <p>that you have certainty that no fellow administrators or company shareholders are risks for security or money laundering activities;</p> <p>that you have certainty that there are no prohibited relationships between yourself and the company’s other directors;</p> <p>that if you are expected to serve as an independent director you are in fact independent, meaning that you are not (a) an employee or contractor with the company, (b) a controlling shareholder, or an employee or director of such controlling shareholder or any of its affiliates, including its parent company, (c) associated with an entity that maintains relevant economic links to the company; (d) receiving or entitled to receive remuneration from any of the above.</p> <p>☒ that you have not exceeded the prohibited number of board memberships per individual (5); and</p> <p>that adequate corporate governance procedures are in place to ensure you can perform and are protected and that in accordance with the Código País reporting requirements to the Superfinanciera the company has a solid history of compliance or reporting variations.</p>

	<p>agreements to be appointed and act as director.</p> <ul style="list-style-type: none">• In case you have been appointed to be director on a S.A you should verify:<ul style="list-style-type: none">* Not been appointed as board member in more that 5 board of directors of S.A.* Whether your appointment forms within the board a decision majority with other directors who are linked to each other by marriage or by other family relationships. The foregoing, unless the corporation is a family controlled corporation.• Whether you have been appointed as a director on the board of directors of another corporation that competes in the same relevant market with the corporation in which you will be appointed.• The frequency in which the board hold its meetings and the time required from the director to perform their duties regarding the corporation.• The authority that exerts the surveillance and regulation over the corporation.• Thoroughly review the list of shareholders and members of the board of directors of the corporation, the legal representative and the corporation's		
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	<p>statutory auditor (<i>revisor fiscal</i>).</p> <ul style="list-style-type: none"> • The activities of the corporation, its customers and suppliers, its sources and uses of cash flows and areas of operation inside and outside Colombia. • Whether the corporation constitutes a going concern and whether the corporation is in insolvency zone or has applied for an insolvency procedure. • The requirements arising to the directors and the board from risk management systems that the corporation has in place (e.g. antimony laundering system). 		
2. People to meet with	<ul style="list-style-type: none"> • The legal representative of the corporation. • The statutory auditor (<i>revisor fiscal</i>) of the corporation. • The compliance officer of the corporation • The remaining directors. 		
3. Documents to review	<ul style="list-style-type: none"> • Corporation bylaws. • Corporate governance code. • Latest financial statements with their complementary notes. 		

	<ul style="list-style-type: none"> • The last statutory auditor's report. • The last managers report. • The latest material information released to markets (in case the corporation is a security issuer). • The latest minute of the General Shareholders' meeting • The latest minute of the board of directors' meeting. • News or public information regarding the corporation and its operations. 		
Ongoing duties			
4. Points for attention	<ul style="list-style-type: none"> • The information that has been provided to you by the company, and the quality of such information; • The information that you have obtained from independent sources, and how it compares with the information provided by the company; • Review disclosures of OFAC and similar watch lists and be alert to red flags, particularly foreign exchange transactions • Inadequate internal controls – for example, does the board function effectively, are reporting procedures adequate, are each of the directors and the company's shareholders 		

	<p>sufficiently informed about the company's operations and financial status, and are concerns dealt with in a timely and effective manner?</p> <ul style="list-style-type: none"> • Are directors designated as "independent" truly independent? • Are all required committees formed and operational, such as the audit committee? Do they have the requisite component of independent directors? • Have there been any actions brought to the board for approval regarding potentially prohibited transactions between a director and the company? • Are there blanket authorization to conduct operation intercompany or with affiliates? Which terms are authorised for such operations? • How the company conducts its relationships with competitors? 		
<p>5. Legal status of directors</p>	<p>Directors are deemed "corporate administrators" and, as such, will be jointly and severally liable for damages caused by fraud or negligence to the company, the partners or third parties. Those directors who have not been aware of the action or omission or have voted against it will not be subject to said responsibility, as long as they do not execute it. In cases of non-compliance or excess of their functions, violation of the law or the bylaws, the fault of the administrator will</p>		

	<p>be presumed. In the same way, fault will be presumed when the administrators have proposed or executed the decision on the distribution of profits in contravention of the provisions of article 151 of the Commercial Code and other regulations on the matter. In these cases, the administrator will be responsible for the sums not distributed or distributed in excess and for the damages that may arise. The clauses of the bylaws aiming to absolve the administrators to limit their liability will be considered without effect.</p>		
<p>6. Parties to which duties are owed</p>	<p>Directors must act in good faith, with loyalty and with the due diligence of a good businessman. Their actions will be carried out in the interest of the company, taking into account the interests of their associates. In carrying out their duties, directors must:</p> <ul style="list-style-type: none"> • Make efforts leading to the proper development of the corporate purpose. • Ensure strict compliance with legal or bylaws provisions. • Ensure that the proper performance of the functions entrusted to the statutory auditor is allowed. • Save and protect the commercial and industrial secret or confidential information of the corporation. • Refrain from improperly using privileged information. • Give equitable treatment 		

	<p>to all shareholders and respect the exercise of the right of inspection of all of them.</p> <ul style="list-style-type: none"> • Refrain from participating, in personal or third-party interests, directly or through an intermediary, in activities that imply competition with the corporation or in acts with respect to which there is a conflict of interest, unless expressly authorized by the shareholders. • In these cases, the administrator will provide the corresponding corporate body with all the information that is relevant for making the decision. The vote of the administrator, if he is a shareholder, must be excluded from the respective decision. In any case, the authorization of the shareholders' meeting may only be granted when the act does not harm the interests of the corporation. 		
<p>7. Powers of the board of directors</p>	<p>Regarding S.A., the Board of Directors has powers to decide and to order the performance of any act or contract included within the corporate purpose and to make the necessary determinations in order for the company to fulfill its purposes.</p> <p>In the case of the SAS, the powers of the Board of Directors will be those explicitly provided for in the bylaws.</p>		
<p>8. Duty of loyalty</p>	<p>As a general rule, Colombia imposes to the board of directors the duty of loyalty. This duty has been understood by the regulators and the judiciary as the straight and positive act that allows the administrator to fully and satisfactorily carry out the corporate purpose</p>		

	<p>of the company, avoiding that in situations in which there is a conflict of interest, said administrator unfairly benefits at the expense of the company or its partners. . In this regard, the actions of the administrators must be carried out in the interest of the company, and of the associates, so that in cases where the interests of the associates deviate from the goals of company, the interests of the latter must prevail.</p>		
9. Duty of care	<p>The Colombian law regulates the duty of care using the reference to the diligence of the good businessman. This concept is related to the fact that the actions of the administrators must be executed with the diligence that a professional or a merchant would have on their own affairs, so that their activity must always be timely and careful, verifying that it is in accordance with the law and the bylaws. This duty supposes a greater effort and a higher demand for the administrators in the conduction of the company. It also implies duties such as (i) being sufficiently informed before making decisions, for which the administrator must seek advice and carry out the necessary inquiries and discuss his decisions especially in the collegiate administration bodies; and (ii) course, the duty of surveillance regarding the development and fulfillment of the guidelines and decisions adopted.</p>		
10. Duty to have and maintain skills	<p>There is not an specific duty aiming to have and maintain skills. However, implied in the duty of care, understood as the diligence of a good business man, is the necessity of being able to process all the information submitted to the board of Directors regarding company's operations and to ponder the interests involved on each particular decision</p>		

	while fulfilling the duties discussed on previous sections.		
11. Additional duties (confidentiality, etc.)	Please see section 6.		
12. Delegation of powers/authority	Delegations of powers or authority are allowed in the terms provided on the bylaws.		
13. Conflicts of interest (inc. intragroup dealings)	<p>The current regulation indicates that there is a conflict of interest when the simultaneous satisfaction of two interests is not possible, namely: the one based on the head of the administrator and the company, either because the interest is of the first or of a third party. However, judicial rulings have expanded this definition to adopt a risk approach in which a conflict of interest is considered to exist in all those cases in which the administrator has an interest that may cloud his objective judgment in the course of a given operation, as well as when presented in circumstances that pose a real risk that the manager's judgment will be compromised.</p> <p>The conflict of interest regulation shall be applied on a case by case basis and by ponder the principles provided in the regulation, judicial precedents have determined that, in the following cases, there is a situation of conflict of interest:</p> <p>(i) When a relative of the administrator contracts with the company or has an economic interest in the operation; (ii) When the administrator enters into operations with natural or legal persons with whom he has a dependency relationship (including controlling shareholders); (iii) When the</p>		

	<p>administrator sues the company, even if said demand is attended by the alternate legal representative; (iv) When the administrator celebrates labor settlements in his favor; (v) When the administrator, as legal representative, transfers securities of the company in his favor; (vi) When the directors approve the determination of the adjustment of the rental fee for warehouses owned by said administrators; (vii) When the directors approve their fees if said power has not been expressly delegated to them in the statutes.</p> <p>In case of a potential conflict of interest, the administrator must study each situation in order to determine if he may incur or is developing acts that imply conflict of interest, and if so, he must refrain from acting and if he is acting, he must cease such activities.</p> <p>The doubt regarding the existence of conflict of interest does not exempt the administrator from the obligation to refrain from participating in the respective activities.</p> <p>It should be noted that the prohibition for administrators refers to participation in acts that imply a conflict of interest or competition with the company. In this order of ideas, when the administrator finds himself in a conflict situation, being a member of a collegiate body—as would be the case of the board of directors—to legitimize his action is not enough refrain from intervening in decisions, since the restriction is intended to prevent participation in acts in respect of which there is a situation of conflict, unless expressly authorized by the highest corporate body, but not its intervention in the decision.</p>		
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	<p>In the aforementioned events, the administrator shall inform the general shareholders' meeting about this circumstance, and must also provide all the information that is relevant for it to adopt the decision the shareholders deems pertinent.</p> <p>When adopting the decision, the highest corporate body cannot lose sight of the fact that the welfare of society is the main objective of its work and of its power, which is why the authorization only may be granted when the act under scrutiny does not harm the interests of the company.</p> <p>Therefore, in granting the authorization in required to evaluate, among others, the economic factors, the position of the company in the market and the consequences of the act on the social businesses.</p>		
14. Compliance with statutory obligations	Please see section 6.		
15. Disclosure obligations of listed companies			
16. Potential liability	Please see section 5.		
17. Duration of duties			
Special circumstances			
18. Bankruptcy			

19. Takeover bids			
20. Market abuse/insider dealing			
Defences			
21. Good corporate governance			
22. Minutes of board meetings and publication requirements			
23. Discharge and Indemnification			
24. Insurance			
25. Resignation			
26. Restructuring of assets			
27. ESG and D&I policies, metrics, reports			