

Boletín 63



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# CORPORATE GOVERNANCE

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## *Centro Nacional de Gobierno Corporativo*



## *Con el apoyo internacional de:*



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*Noticias*  
*Centro Nacional de*  
*Gobierno Corporativo*

## *PROGRAMA JUNTAS DIRECTIVAS*

El 6 de octubre de 2005 se dará inicio a el Programa de “Juntas Directivas: Herramientas para el desempeño y el Gobierno Corporativo” que se realizará conjuntamente entre **la Cámara de Comercio de Bogotá, la Universidad de los Andes y Confecámaras**; este programa tendrá como objetivo proporcionar bases conceptuales y habilidades prácticas para un buen desempeño de las labores de los miembros de juntas directivas, a la luz de los principios de Gobierno Corporativo y Gestión efectiva de los negocios. La duración del Programa es de 56 horas, desde el 6 de octubre de 2005 hasta Noviembre de 2005, el costo es de \$3.200.000.



# *Cómo están los bancos colombianos según Latin Finance y M&E*

Latin Finance y M&E realizaron un diagnóstico a 24 bancos latinoamericanos, entre los cuales estuvieron tres bancos colombianos: el BBVA Ganadero, Bancolombia y el Banco de Bogotá. La evaluación versó sobre temas de Ética, Responsabilidad Social, Gobierno Corporativo, Sostenibilidad y Transparencia.

En el capítulo de *ética* se evaluó las normas del código de ética sobre los conflictos de intereses, así como la existencia de comités, procesos o actos disciplinarios que fortalezcan, controlen, evalúen y sancionen los códigos de ética o conducta. Sobre la *Responsabilidad social* se estudió el desarrollo del proceso de reclutamiento, la capacitación, los beneficios para los empleados y las estadísticas de seguridad e higiene. En



el capítulo de *Sostenibilidad* se tuvieron en cuenta variables financieras, de calidad de producto, de entrenamiento, de responsabilidad social, de reputación y de gobierno corporativo.

Sobre *Gobierno Corporativo*, se tuvo en cuenta la conformación de la Junta Directiva, los derechos y deberes de sus miembros, el manejo de la información financiera y las responsabilidades gerenciales. Por último se evaluó la *transparencia*, refiriéndose concretamente al nivel de comunicación de la empresa.

Teniendo en cuenta los resultados obtenidos en el diagnóstico, lo único claro es que nuestra banca no es líder en estos temas. Las organizaciones financieras de otros países latinoamericanos le han apostado a la implementación efectiva de estos conceptos y en el afán de tener una estructura empresarial sólida, han avanzado, por lo cual la competencia es cada vez mayor.

Con respecto a la ética, el BBVA fue el más destacado de Colombia con 80 puntos. Por otra parte Bancolombia y Banco de Bogotá estuvieron en buena posición con respecto al promedio con 64 y 68 puntos respectivamente, Itau de Brasil alcanzó el mayor puntaje con 100 puntos. Silvio Escudero, encargado del diagnóstico por parte M&E expresó en entrevista con este medio que: “Para mejorar este aspecto (ética) las organizaciones nacionales deberían diferenciar el código de ética del código de buen gobierno, para garantizar mayor efectividad en dichas prácticas”.

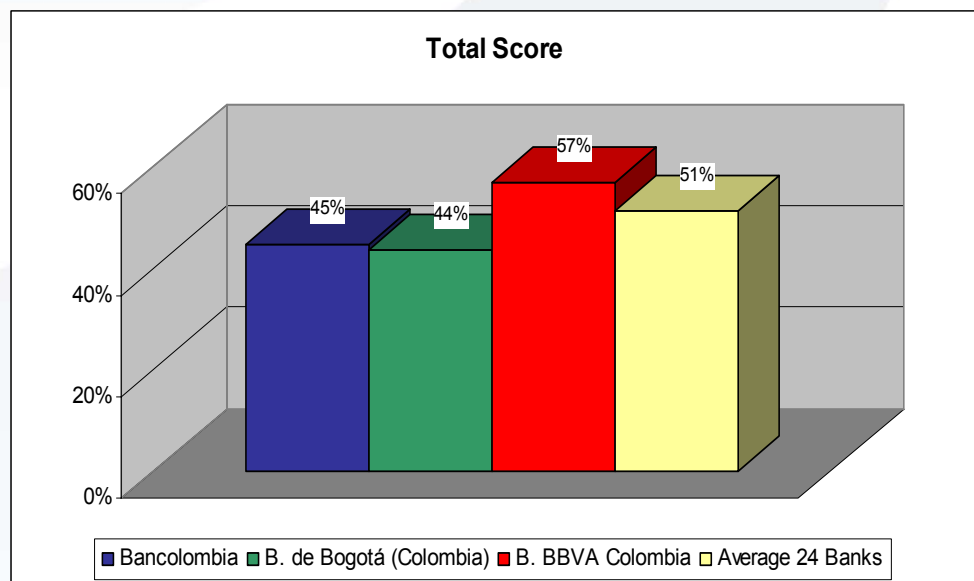
Respecto a la Responsabilidad Social, los bancos colombianos muestran diferencias. En este orden de ideas el BBVA Ganadero fue calificado con 70 puntos, el Banco de Bogotá con 41 y por último Bancolombia con solo 19 puntos, en este capítulo el banco latinoamericano líder es el Santander Chile con 84 puntos. Con respecto a este tema Escudero afirma que “No es de extrañar que los bancos tengan muy buenos programas de entrenamiento para sus empleados así mismo como grandes beneficios para los mismos, sin

embargo si estos no se comunican, no pueden ser valorados por los inversionistas o grupos de interés. Algo que hace de mejor manera el BBVA en Colombia y sin lugar a dudas algo que hacen mucho mejor bancos como Itaú o Santander Chile”.

En el tema de Gobierno Corporativo el banco Santander Chile fue el mejor calificado con 73 puntos, mientras que los bancos colombianos obtuvieron los siguientes resultados: Bancolombia 58 puntos, BBVA Ganadero 42 y Banco de Bogotá tuvo 27, el resultado de Bancolombia según Silvio Escudero “se debe primordialmente a que sus ADR se rigen por el mercado de valores de EEUU y eso los obliga a ser un poco más detallados en su información y manejo”. Y además opina que “Aunque Bancolombia y el BBVA están por encima del promedio debido a sus presiones por parte del mercado americano y de su casa matriz, los bancos tienen un largo camino de mejoras por hacer. Además del fortalecimiento de la legislación de valores en Colombia que permita cumplir estándares internacionales en gobierno corporativo”.

Por último en términos de transparencia, los resultados del diagnóstico arrojaron una calificación de 43 puntos para el Bancolombia, de 38 al BBVA Ganadero y al Banco de Bogotá de 30. El mejor banco calificado fue el Itaú quien alcanzó 90 puntos.

El resultado total del diagnóstico realizado en los bancos colombianos evaluados es:



Al preguntarle a Silvio Escudero que se puede imitar de las experiencias brasileras y chilenas, dijo: “Es claro que el mercado de valores de ambos países es muy

movido y por ejemplo en BOVESPA el índice de gobierno corporativo que se maneja con sus niveles uno y dos permite saber cuales son las empresas que cotizan y están mejor posicionadas según estos niveles. La obligatoriedad no solo de comités de auditoría sino el de remuneración o compensación deberían ser directrices, la independencia de los consejeros o la representación de los accionistas minoritarios son fundamentales”.

El diagnóstico es una radiografía de cómo se están haciendo las cosas hoy, y se convierte en el punto de referencia más actual sobre la situación de los bancos en Latinoamérica.



Para mayor información sobre el diagnóstico contactar a Management & Excellence, SA [info@management-rating.com](mailto:info@management-rating.com) [www.management-rating.com](http://www.management-rating.com)

# *Sources of Corporate Governance rules / practices in Colombia*

(SECOND PART)

**Emilio Ferrero, Gabriela Mancero and Julia Uribe**  
Cavelier Abogados

**15** Who does the board represent and to whom does it owe legal duties?

The board is an administrative body of the company and thus represents the company. The system of electoral quotient for the appointment of its members guarantees that all shareholders are duly represented on the board. The board reports to the general meeting of shareholders, which audits its activities report on an annual basis. Such report is also given to the government agency in charge of supervising the company.

**16** Can an enforcement action against directors be brought on behalf of those to whom duties are owed?

Under Colombia's Code of Commerce, the members of the board, as administrators, are held jointly and severally liable, in an unlimited manner, for damages to the



company, the partners or third parties. Liability of the administrator is assumed in cases of breach of law or contract and for violations of the regime of distribution of profit. By means of a decision of the general meeting of shareholders, shareholders may remove the members of the board and decide to initiate the corresponding liability action. Apart from the action available to shareholders, the board may also be criminally liable if it supplies incorrect data to the authorities, or if it orders, tolerates, makes or conceals falsehood in its financial statements or the notes thereof.

This action may also be instituted by 50 per cent of the creditors of the company, should the equity not be sufficient to cover the amounts owed.

**17** Do the board's duties include a care/prudence element?

The Code of Commerce makes it mandatory for the administrators to act in good faith, with loyalty and with the diligence inherent to a good businessman. These principles impose on administrators the need for transparent conduct and an approach that goes beyond ordinary diligence, which is highly demanding upon the administrators in regards to the manner in which they conduct the company's matters.

**18** To what extent do the duties of individual members of the board differ (for example, if their skills and experience are different)?

All the members of the board have the same duties,



regardless of their skills and experience.

However, in accordance with Law 964 of 2005 (article 7), considering the social risk entailed in the activities of the securities market, it is required that the individuals managing or administering securities funds, investment funds and investment mutual funds, undertake proficiency examinations for registering with and continuing in the National Registry of Professionals of the Securities Market. Besides, the administrators, directors and auditors of the entities subject to the inspection and supervision of the Superintendency of Securities would have to prove to it that they have a good moral and professional reputation.

**19** To what extent can the board delegate responsibilities to management, a board committee or person?

The board can delegate any of its powers to the CEO (legal representative) of the company. The CEO must report to the board and is bound to comply with the board's instructions.

**20** Is there a minimum number of 'non-executive' and/or 'independent' directors required by law, regulation, or listing requirement? If so, what is the definition of 'non-executive' and/or 'independent' director and how do their responsibilities differ from those of executive directors?

The concept of non-executive directors does not exist in Colombia. Nevertheless, Law 964 of 2005 contains the following provisions in this respect:

- A prohibition upon the administrators of listed



companies as well as for their partners or shareholders, to be administrators or auditors of companies whose stocks or securities are registered at the National Registry of Securities and Issuers, except for stock exchanges, the administrative companies for security negotiation systems or its own commissioning company. Nevertheless, the directors of the home office and its legal representatives may be members of its boards (article 20).

■ A requirement for the boards of securities issuers to comprise at least 25 per cent independent members (article 44).

**21** Do law, regulation, listing rules or practice requires separation (or joining) of the functions of board chairman and CEO? If flexibility on board leadership is allowed by law, regulation and listing rule, what is generally recognized as ‘best practice’ and what is the common practice?

There is no legal restriction for these two functions to be performed by one individual. The only legal restriction or qualitative condition for the members of the board is the prohibition to constitute majorities with individuals linked to each other through marriage, or family relationship within the third degree of consanguinity or second degree of affinity, or first civil, except in family companies. Bill 008 provides that the CEO of a listed company may not act as chairman of the board.

**22** What board committees are mandatory? What board committees are allowed? (Specify for what functions.) Are there mandatory requirements for committee composition (eg ‘independence’)?

The existence of board committees is not mandatory but it may be included in the company's articles of incorporation. In the case of listed companies, Law 964 of 2005 (article 44) requires the existence of an auditing committee to be formed by at least three members of the board, including the independent ones. The chairman of that committee must be an independent member. The statutory auditor must also participate in this committee, with the right to speak but not to vote. His function will be to supervise compliance with the internal audit program, which should take into account the risks of the business and evaluate integrally all the areas of the issuer.

**23** Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

The board must meet at least once a year in order to prepare its activities report to be presented to the general ordinary meeting of shareholders. Apart from the ordinary meeting, the board may meet either regularly, as established in the company's by-laws, or in an extraordinary manner when called by the CEO, the shareholders or a majority of its members.

**24** Is disclosure of board practices required (committee structure, number of meetings, attendance, etc) by law, regulation or listing requirement?

The general rule is that the board must present for approval by the annual ordinary meeting of shareholders a report on activities performed during the previous fiscal year. In the case of listed companies, in accordance with Resolution 932 of 2001, entities, intermediaries and agents



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in charge of managing securitisation processes should disseminate as eventual information, in a truthful, clear and sufficient manner, both to the Superintendency of Securities and to the stock exchanges where their securities are registered as well as to the centralised negotiation systems where those securities are negotiated. Eventual information consists of any relevant fact or operation or any extraordinary or meaningful fact regarding the issuer, its business, the securities registered and/or the offer to the market of those securities. The following are included among others: calls for meetings of the shareholders' or equivalent entities and the decisions adopted by them, relevant decisions of the board or of an equivalent entity, changes in the situation of the control of the issuer, changes in accounting policies, business crisis situations, arrangements with creditors, mandatory liquidations, restructuring processes or events that may lead to change in any manner of the activities of the issuer, its continuity or to the dissolution of the company, meaningful changes in the composition of assets and equity, distribution of dividends, restructuring of liabilities, acquisitions and sales of shares in the same line of business or industry of the issuer, or in another one, cooperation contracts, strategic alliances, joint ventures, among others.

The information should be disseminated as soon as the issuer becomes aware of the respective fact.

The Superintendency of Securities will determine the manner for publishing said information in the National Registry of Securities and Intermediaries, and may ask the issuer to publish that information at its cost in a national



newspaper.

**25** Is there any law, regulation, listing requirement or practice which affects (a) the remuneration of directors, (b) the length of directors' service contracts, (c) loans to directors, (d) other transactions between the company and any director?

Remuneration of the board members is determined by the shareholders' meeting, in accordance with the provisions of the articles of incorporation. There are no legal limitations to the possibility of granting loans to board members, but such limitations may be included in the articles of incorporation if desired. However, for financial institutions and banks there are specific regulations that do not permit loans to the directors and administrators without first accomplishing strict conditions established in the Statute for the Financial System and criminal law.

Regarding the length of directors' service contracts, there is no specific provision. It is usual that the term of their service contracts is the same as the period for which they are appointed, as established in the company's articles of incorporation.

With regard to transactions between the company and any director, the Code of Commerce establishes that administrators must abstain from participating directly or indirectly in competing activities with the company and in any acts that may create a conflict of interests with the company, unless expressly authorised by the shareholders' meeting.

**26** In relation to directors and officers liability insurance, (a) is it permitted and/or common practice, (b) can the company pay the premiums?

Liability insurance is permitted and available through local insurance companies. Although it is not a common practice, it is now becoming more popular among companies. Liability insurance does not cover criminal liability.

**27** Are there any constraints on the company's indemnifying directors in respect of liabilities incurred in their capacity as directors? If not, are such indemnities common?

According to Colombian Code of Commerce, any agreement conducive to exempting the administrators from the responsibilities inherent to their positions or to limiting the amount of the bonds taken for holding their positions will be deemed non-existent. The liability clauses are mandatory and, as such, are not conditioned to private will.

**28** What role do employees play in corporate governance?

Unless employees are also shareholders, directors or officers of the company, they are not usually involved in corporate governance provisions. Nevertheless, if a company introduces a corporate governance code, the company may include an obligation for employees to be bound by such code in their labour contracts.

## Disclosure and transparency

**29** Are the corporate charter (or articles of incorporation) and by-laws of companies publicly available? If so, where?

The deeds of incorporation and by-laws of all Colombian companies are publicly available through the corresponding Notary Public Office. Additionally, such documents are registered at the Chamber of Commerce of the company's domicile, where the public can obtain all corporate information about the company.

**30** What information are companies required to publicly disclose? How often is such disclosure required to be made?

Once a year, corporations are required to disclose to the Chamber of Commerce of their domicile, information about their audited financial statements. Additionally, they must register with that same entity (i) any amendment to the articles of incorporation or by-laws, and (ii) any appointment or removal of administrators. Registration also applies to court orders regarding the attachment of the company's property.

Companies supervised by the Superintendency of



Corporations, by the Superintendency of Banks and by the Superintendency of Securities must also file regular corporate and financial reports.

Additionally, listed companies are bound to supply the market with complete and truthful information regarding their financial statements, business and administrative practices. In particular they must:

- disseminate the operations regarding stocks and other securities, the opportunities and problems corresponding to the evolution of their activities, their organization and development and business projects;
- disclose the personal and professional conditions of the members of the board, the managing council, and internal control entities, and, should they not exist, to the equivalent bodies, as well as to the legal representatives and other executive officers of the issuer, so that it allows them to know their qualifications and experience in regards to the managerial capacity in connection to the matters to be dealt with by them;
- disclose the structure, functions and mechanisms for collecting and supplying information, and the procedures used by the internal control area.
- disclose the type of external audits implemented by the issuer, as well as the frequency of their

implementation, the methodology used and the results obtained.

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