THE CHANGING LANDSCAPE FOR SPANISH D&O LIABILITY:

THE REFORM OF THE SPANISH COMPANIES ACT ("LEY DE SOCIEDADES DE CAPITAL") AND THE IMPACT ON BOARD AND SHAREHOLDER LIABILITY

ISSUE

Modifications to the Spanish Companies Act (*Ley de Sociedades de Capital*), published on December 3, 2014, seek to improve corporate governance and transparency of companies' governing bodies, and include new responsibilities for directors, officers, and managers. How do the changes to the law affect the duties and responsibilities of shareholders and boards of directors?

DISCUSSION

For Shareholders:

Shareholders will have greater control and enhanced participation under the Act. This includes:

- Granting the general meeting of shareholders exclusive approval for operations with special relevance (including the acquisition or divestiture of core assets).
- Creating a new modification for those considered limited liability companies (sociedades anominas), that would permit management instructions to be given to the board at the AGM (shareholders meeting). [However, as the amendment does not say anything specific on the liability of directors for the activities carried out in compliance with those instructions, this introduces an element of potential conflict, which will need to be interpreted by the courts.]
- Changing the regimen for challenging corporate agreements for the enhanced protection of minority shareholders, which is intended to prevent abuse.

For Boards of Directors:

The revision will promote the highest levels of competitiveness among boards of directors, which in turn, should generate trust and transparency from domestic and foreign investors and shareholders. It is expected to improve internal controls and corporate responsibility of boards by allowing for:

- Greater specificity in defining and extending the duties of care and loyalty for the board. It is the duty of the administrators to obtain the adequate information they need from a company to fulfill their obligations.
- Regulation of the duty to avoid conflicts of interest.
- The introduction of certain protections, similar to the business judgment rule, such as for purely strategic and business decisions, provided that the director acted in good faith, without personal interest, and with sufficient information in accordance with an appropriate procedure.
- A more precise definition of "de facto director."
- Other revisions related to directors, such as:
  - The breach of duty of loyalty implying an obligation to indemnify the company for the economic damage caused and to return to the company any unjust enrichment obtained.
  - Bringing derivative actions directly, which is facilitated when based on breach of the duty of loyalty. If all or part of the claim is admitted or proven, the company is obliged to reimburse the plaintiff for the expenses incurred.
  - The concept of presumption of guilt being established "when the act is contrary to law or statute."

- Where there is no CEO, the responsibility of the person with "capacity of senior management in the company" is established.
- The natural persons representing corporate directors shall be subject to the same duties as administrators and jointly and severally liable with the corporate person administrator.
- The statute of limitations for a claim for damages is set at four years after the right to bring a claim against directors can be exercised. [This wording is not clear whether the time from which you can exercise the action is when the wrongful act has occurred, or once known or discovered. The interpretation of the court will be necessary on this element of conflict.]

- Changes in the functioning of the board of directors to include:
  - A duty to meet at least once a quarter.
  - Establishment of a list of the powers of the board that cannot be delegated, including the determination of the general policies and strategies of the company.
- Revisions to listed companies, such as:
  - Increasing the range of powers of the board, which cannot be delegated. Of particular interest are those powers relating to the determination of the corporate governance policies of the company and control and risk management.
  - Reducing the share capital needed to exercise the rights of minority shareholders, from 5% to 3%.
  - Limiting the term of office of directors to not exceed four years.
  - Creating a new role called "Coordinating Director" among the non-executives if the role of president and CEO are assumed by the same person.

RATIONALE

The modifications to the Act are designed to strengthen and encourage shareholder participation and minority shareholder rights, address conflicts of interest and abuse of rights, and promote the right to inform shareholders. It also allows for the proper functioning of the board and the independence, participation, and professionalization of directors, along with attempting to improve internal control and risk management in companies and prevent financial crime.

IMPLICATIONS

These changes highlight the need for a robust D&O program to protect corporate executives during this period of change and increased accountability. Marsh assists its clients by working to further enhance existing wordings in policies to address the increased risks facing today's directors and officers.

These reforms are part of a global movement after the recent economic crisis to clarify existing laws, increase stakeholder rights, and increase accountability by corporations and their senior executives. In an effort to assist its clients, Marsh is highlighting these changes, as forewarned is forearmed, so that its clients can take appropriate insurance and risk management steps in light of them.

For questions on potential D&O liability as a result of the new modifications, please contact your Marsh representative or:

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