

CLIENT ALERT

Update on the Chilean Constitutional Process

November 18, 2020

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I. Introduction

In October 2019, civil unrest and public demonstrations extended across Chile. Though it began as a protest against a 30-peso (roughly US\$0.03) hike in the Santiago Metro fare, it rapidly became a widespread manifestation of the discontent of millions, who demanded a deep, structural change to the social, economic, and political framework of the country.

After weeks of unrest, military curfews, and substantial damages to public and private property, almost all political parties signed the “Agreement for the Peace and a New Constitution” (“*Acuerdo por la Paz Social y la Nueva Constitución*”), aiming for peace and social justice by the means of a democratic redrafting of the Chilean Constitution (the “Constitution”).¹

Originally, a referendum asking whether Chileans want a new Constitution and, if so, what kind of drafting mechanism should be put in place (either a “mixed committee,” composed, in equal parts of lawmakers and special appointees elected by popular vote, or a “constitutional convention,” with appointees fully elected by popular vote) was going to be held in April 2020. A subsequent election would have been held in October 2020, to appoint the special appointees, kicking off the drafting process. However, amid the COVID-19 pandemic surge in Chile during March 2020, the Chilean

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¹ The latter was formalized under Law No. 21,200, dated as of December 24, 2019, which establishes the main provisions and rules for the referendum and subsequent constitutional drafting process.

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government declared a national public health emergency, which ultimately resulted in the postponement of the initial referendum to October 2020.

II. Referendum Result, Drafting Mechanism, and Upcoming Process

On October 25, 2020, Chileans voted to replace the Constitution. With historic participation,² almost six million Chileans, which represents 78% of voters, approved drafting a new charter,³ moving forward to replacing the current Constitution issued in 1980 and severely amended in 2005. Likewise, the “constitutional convention” (the “Convention”), a special constituency composed of appointees fully elected by popular vote, was the selected drafting mechanism with 78.99% of the voting preference.⁴

As a result, a subsequent election will be held on April 11, 2021, to select the 155 special appointees that would be part of the Convention. Hence, appointee candidates would have until January 11, 2021, to register for running for such a position.⁵ To secure a fair and inclusive balance in the Convention’s composition, half of those appointees must be women,⁶ as well as a minimum number of seats for representatives from the indigenous peoples will be reserved.⁷ In addition, to avoid potential conflicts of interest, any candidate to the Convention currently occupying a public office⁸ will no longer be able to hold it and will be prevented from occupying any office appointed by popular vote within one year from when the Convention ceases functioning.

Once the candidates of the Convention are elected, the Convention will have nine months (plus another three months, if necessary) to discuss, draft, and present a new Constitution. Note that the Convention shall have no other attributes nor conduct any other business than drafting the new charter under the set of rules previously created.

² Off all persons registered to vote, 50.9% went to the polls, which is the highest voter participation since 1990. Source: Chilean Electoral Service (*Servicio Electoral de Chile – SERVEL*).

³ Please see the official results at the SERVEL site <http://www.servelecciones.cl/>.

⁴ *Id.*

⁵ Appointee candidates must be Chilean citizens, older than 18 years, and not have been convicted of a felony (with an associated punishment in imprisonment of three years and one day or more - *Pena Aflictiva*).

⁶ The gender parity was established by Law No. 21,216, dated March 24, 2020.

⁷ Bulletin No. 13,129-07, currently under Senate discussion. Please note that the current proposal aims to add 23 new appointees from the indigenous people to the Convention, which should also comply with the gender parity aforementioned.

⁸ Such as ministers, region’s and province’s governors, mayors, regional and municipal board members, state secretary and sub secretaries, chiefs of service, Central Bank board members, members of SERVEL, judiciary power members, prosecutors, and General Comptroller members, among many others specified in Article 132 of Law No. 21,200.

Please note that a proposed legislation was recently introduced to Congress to prevent current representatives and senators from being candidates for the Convention.

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With respect to the future content of the Constitution, a special constitutional board was created shortly after the announcement of the constitutional referendum to set the technical and procedural rules for the drafting mechanism, as well as to discuss the minimum substantive provisions of the new Constitution. Such a committee determined that the new Constitution would, at the very least, respect the following principles: (i) Chile shall be a Democratic Republic; (ii) the doctrine of *Res Judicata* shall apply to the Supreme Court's decisions; and (iii) Chile shall adhere to all international treaties previously subscribed and ratified by Congress.⁹

As per the procedural rules and voting mechanism, a two-thirds majority of the members will be required to adopt any resolution of the Convention, as a quorum that cannot be modified by the appointees. Additionally, any dispute that arises from the drafting procedure shall be resolved by the Supreme Court of Chile under a special mechanism set forth in Law No. 21,200. Please note the current Constitution will remain fully in force while the Convention discusses and drafts the new charter.

If the Convention reaches an agreement and presents a new Constitution proposal, a mandatory ratification referendum will be held 60 days after the draft is presented to the President of the Republic.¹⁰ Given the current time frame, this final constitutional referendum should occur during the first semester of 2022. If the Convention does not reach any agreement within the deadline provided, the Convention will be dissolved as a matter of law and the current Constitution would remain in force.

III. Conclusion

Chileans have democratically decided to replace the current Constitution. Starting in April 2021, a special committee composed of appointees fully elected by popular vote will be in charge of discussing and drafting the new charter for a period of nine months, with a one-time three-months extension option, and subject to the procedural and substantive rules discussed herein.

A better assessment of the possible contents of the new Chilean Constitution is more likely to be provided once the appointees are elected. Our team is available to discuss and answer any questions on the matters discussed herein and would be happy to liaise with our extensive network in Chile.

⁹ Also recognized in Law No. 21,200.

¹⁰ Once the President of the Republic receives the proposal, he will issue a supreme decree calling for the mandatory ratification referendum. Note that the ratification referendum cannot be held in January or February or within 60 days prior to or after another election.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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