

Sociedades Anónimas Promotoras de Inversión
Under the New Mexican Securities Market Law
(Ley del Mercado de Valores)

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Introduction

A new Securities Market Law (*Ley del Mercado de Valores*) (the “New LMV”) was published on December 30, 2005 in the Official Gazette of the Federation. The New LMV will become effective on June 28, 2006, that is, 180 days after its publication in the Official Gazette of the Federation. The New LMV repeals the current Securities Market Law and, among other things, creates a legal framework for new corporations called *sociedades anónimas promotoras de inversión*. The new legal framework exempts *sociedades anónimas promotoras de inversión* from certain obligations under the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*) (the “LGSM”) that have limited the ability to give certain corporate and economical rights to investors/shareholders of Mexican *sociedades anónimas*.

This new legal framework will broaden the rights that may be given to investors/shareholders of *sociedades anónimas promotoras de inversión*, give certainty to investors and induce joint-ventures and investments in the capital stock of *sociedades anónimas promotoras de inversión*.

Investors and current shareholders of Mexican *sociedades anónimas* should review the new legal regime of *sociedades anónimas promotoras de inversión* under the New LMV to analyze and explore alternatives to modify the current legal arrangements they have in place and, in its case, enter into new arrangements by converting a Mexican *sociedad anónima* into a *sociedad anónima promotora de inversión*.

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This Article contains brief highlights of the new legal regime applicable to *sociedades anónimas promotoras de inversión*.¹

1. Definition

Sociedades anónimas promotoras de inversión are Mexican corporations organized as *sociedades anónimas* under the LGSM that voluntarily submit themselves to the legal regime of *sociedades anónimas promotoras de inversión* set forth under the New LMV. *Sociedades anónimas promotoras de inversión* will not be subject to the surveillance of the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (“CNBV”)².

The New LMV exempts *sociedades anónimas promotoras de inversión* from registering their shares (or the securities representing them) with the RNV in the issuance or trading of their shares (or the securities representing them), if a public offering³ is not involved.

2. Registration with or without offering

A *sociedad anónima promotora de inversión* may “go public” and register its shares (or the securities representing them) at the RNV and list them with the Mexican Stock Exchange (*Bolsa Mexicana de Valores, S.A. de C.V.*) (“BMV”) without making a public offering, by filing a registration statement with the CNBV and providing investors a detailed prospectus. If a *sociedad anónima promotora de inversión* decides to “go public” it must (i) have at least one independent director as member of its Board of Directors; (ii) count with a committee formed by members of its Board of Directors, to assist the Board of Directors in the compliance with corporate practices applicable to publicly held corporations; and (iii) change its corporate name to *sociedad anónima promotora de inversión bursátil*, adopt a 3-year plan to gradually

¹ For a complete analysis of the most important differences between the New LMV and the current Securities Market Law see Yves Hayaux-du-Tilly L. & Alberto Balderas F., *New Mexican Securities Market Law*, (Jáuregui, Navarrete y Nader, S.C.), January, 2006.

² Except for *sociedades anónimas promotoras de inversión* that have securities registered at the National Registry of Securities (*Registro Nacional de Valores*) (“RNV”) of the CNBV.

³ Public offering means the offering made within Mexico to the general public through massive means of communication, for the acquisition, sale or transfer of securities, whether or not the price is disclosed.

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adopt the legal regime of a publicly held corporation (the “Transformation Plan”),⁴ and modify its capital structure to adequate it to the regime applicable to publicly held corporations,⁵ in an Extraordinary Shareholders’ Meeting.

Article 85 of the New LMV⁶ and by reference Schedule A of the General Rules to Regulate Issuers and other Participants of the Securities Market (*Disposiciones de Carácter General Aplicables a las Emisoras de Valores y a Otros Participantes del Mercado de Valores*) (the “General Rules”) contain the information and documents that must be included in the registration statement to be filed with the CNBV. Said information and documents include: (i) audited financial statements of the issuer; (ii) a legal opinion of an independent counsel on the legal incorporation and existence of the issuer, the legality of the securities to be offered, the legality and validity of the resolutions taken by the Shareholders’ Meeting and Board of Directors of the issuer approving the public offering of securities and the authority of the persons who act on behalf of the issuer for purposes of the corresponding public offering; and (iii) any other information that the CNBV may deem necessary.

Article 86 of the New LMV⁷ specifies the information that must be included in the prospectus. Generally, a prospectus must contain information on the registration, the securities being offered, the issuer and its business, the issuer’s financial history, the distribution, and the use of the proceeds. Additionally, the prospectus must include, among other things, the terms and conditions of the Transformation Plan and the indication that the shares of the *sociedad anónima promotora de inversión bursátil* offered (or the securities representing them) may only be acquired by (i) qualified

⁴ Under Article 19 c) of the New LMV the Transformation Plan is subject to the provisions of the Internal Regulations of the BMV.

⁵ As a general rule the capital stock of publicly held corporations may only be represented by common stock. Notwithstanding the foregoing, *sociedades anónimas promotoras de inversión* who register their shares (or the securities representing them) with the RNV will have the option to issue, with the prior authorization of the CNBV, shares of stock with limited rights (“Preferred Stock”). Such shares may not exceed 25% of the capital stock placed among the public, however, the CNBV may extend the authorization, provided that the Preferred Stock is converted into common stock within 5 (five) years following the corresponding placement. In any event, the By-laws of a *sociedad anónima promotora de inversión bursátil* may include the rights of investors/shareholders listed on paragraphs (i) to (v) of Section 6. herein.

⁶ Article 85 of the New LMV is subject to General Rules to be issued by the CNBV; the CNBV has used its rulemaking authority to create “forms” (really sets of disclosure instructions) for the registration statement and the prospectus.

⁷ Article 86 of the New LMV is also subject to General Rules to be issued by the CNBV.

institutional investors⁸; (ii) institutional investors⁹; or (iii) any investor claiming to have the ability to evaluate the investment.

3. Minority Shareholders' Rights

The New LMV requires *sociedades anónimas promotoras de inversión* to give their minority shareholders a minimum package of corporate rights that exceed the rights given to minority shareholders of Mexican *sociedades anónimas* under the LGSM. The minimum corporate rights that the shareholders of *sociedades anónimas promotoras de inversión* must have are the following:

(a) Shareholders representing 10% of the voting shares (including limited and restricted voting shares) may appoint (i) a member of the Board of Directors, and (ii) if applicable, a statutory examiner. The appointment of Directors of the minority shareholders may only be revoked at a Shareholders' Meeting where the appointment of all Directors of the *sociedad anónima promotoras de inversión* is revoked.

Shareholders representing 10% of the voting shares of *sociedades anónimas promotoras de inversión* may also revoke the Directors they appointed without having to hold a Shareholders' Meeting for such purposes.

(b) Shareholders representing 10% of the paid-in capital stock may call a Shareholders' Meeting and postpone voting at a Shareholders' Meeting up to 3 (three) days, if they consider they do not have sufficient information to adopt resolutions therein;

(c) Shareholders representing at least 15% of the voting shares (including limited and restricted voting shares) may initiate civil liability legal actions against members of the Board of Directors and, if applicable, the statutory examiner, without first holding a Shareholders' Meeting; and

⁸ Under the New LMV, qualified institutional investors are individuals or entities that have assets or a net worth equivalent to an amount set forth by the CNBV.

⁹ Under the New LMV, institutional investors are entities defined as such by federal laws or any financial institution, including financial institutions acting in their capacity as trustees, under trusts considered institutional investors.

(d) Shareholders representing at least 20% of the voting shares (including limited and restricted voting shares) may oppose judicially to resolutions adopted at a Shareholders' Meeting breaching the By-laws of the *sociedad anónima promotora de inversión* or any legal provision.

4. Corporate Governance

(a) Board of Directors

Just like any other Mexican *sociedad anónima*, the Board of Directors of a *sociedad anónima promotora de inversión* has a central role in the management, and bears the ultimate responsibility in conducting the corporation's business. In the organization and duties of their Board of Directors, Mexican *sociedades anónimas promotoras de inversión* may follow the applicable rules of *sociedades anónimas* under the LGSM or voluntarily follow the rules that will govern publicly held corporations under the New LMV.¹⁰

(b) Statutory Examiner

A *sociedad anónima promotora de inversión* may establish an Audit Committee and appoint an independent external auditor that will assume the duties of the statutory examiner (*comisario*).

5. Acquisition of Own Shares

Mexican *sociedades anónimas* may not acquire their own shares under the LGSM. The New LMV will permit *sociedades anónimas promotoras de inversión* to purchase their own shares (i) with their equity capital (*capital contable*), in which case, they may maintain said shares; or (ii) with fund from their paid-in-capital (*capital social*), in which case the shares must be cancelled or converted into treasury shares. The foregoing will be subject to the prior authorization of the Board of Directors of the *sociedad anónima promotora de inversión*. The shares acquired by the *sociedad anónima promotora de inversión* may not be voted at any Shareholders' Meeting during the time the *sociedad anónima promotora de inversión* owns said shares.

¹⁰ In case they adopt the rules governing publicly held corporations under the New LMV, *sociedades anónimas promotoras de inversión* will not be required to appoint independent directors as members of their Board of Directors and Committees.

6. Special Regime

The LGSM provides a legal framework on a number of subjects related to the rights of investors/shareholders of *sociedades anónimas* that may not be waived or changed by their shareholders. The New LMV will permit that the By-laws of *sociedades anónimas promotoras de inversión* include rights of investors/shareholders that would not be subject to the provisions of the LGSM (subject to complying with the minimum rights set forth in Section 3. above), on the following subjects: **(i)** restrictions on the transfer of shares; **(ii)** appraisal rights; **(iii)** issuance of limited shares¹¹, non-voting shares, shares without economical rights or with any other kind of corporate rights¹² (different from economical or voting rights); **(iv)** provisions on the distribution of dividends; **(v)** veto rights or special voting requirements; and **(vi)** preemptive rights.

7. Shareholders' Agreements

The LGSM provides that any agreement that limits the rights of the shareholders to freely vote their shares is null and void. The foregoing has limited the matters that may be negotiated in Shareholders' Agreements of Mexican *sociedades anónimas*. The New LMV will permit shareholders of *sociedades anónimas promotoras de inversión* to enter into Shareholders' Agreements that include the following matters: **(i)** non-compete provisions; **(ii)** option rights (*e.g.*, right of first refusal, tag-along rights, call option and put option); **(iii)** sale and transfer of shares; **(iv)** exercise of preemptive rights; and **(v)** pooling vote provisions.

Shareholders' Agreements must be disclosed to the *sociedad anónima promotora de inversión* within 5 (five) business days following their execution. If the shares (or the securities representing them) of the *sociedad anónima promotora de inversión* are registered with the RNV, the Shareholders' Agreement will become effective upon its disclosure to the market through the stock markets and in its annual report filed with the CNBV and the BMV. A copy of the Shareholders' Agreement must also be available at the offices of the *sociedad anónima promotora de inversión*.

¹¹ *Sociedades anónimas promotoras de inversión* may not place simultaneously common stock and Preferred Stock, unless the latter can be converted into common stock within 5 (five) years following the placement. Preferred Stock will only be computed for purposes of determining quorum at a Shareholders' Meeting in which the participation and vote of the Preferred Stock is required.

¹² *Supra* note 5.

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Shareholders' Agreements will only be enforceable against the parties thereto and not against the *sociedad anónima promotora de inversión*, unless there is a prior judicial resolution. Their breach will only give rise to actions against the breaching party under the Shareholders' Agreement and applicable law (*e.g.*, damages, indemnity, loss of profit). Breaches to the Shareholders' Agreement will not affect the validity of resolutions adopted by the shareholders of the *sociedad anónima promotora de inversión* in accordance with its Charter and By-laws.

Should you have any question on the New LMV and its effects, please contact *Michell Nader S.* (5255) 5267-4507; mnader@jnn.com.mx or *Yves Hayaux-du-Tilly L.* (5255)5267-4573; yhayaux@jnn.com.mx.