Public Offerings of Securities: Mexican Law Issues

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Available at: https://digitalrepository.unm.edu/usmexlj/vol9/iss1/15
INTRODUCTION

During the past several years, significant regulatory developments have occurred in the area of security offerings. Mexican regulators, the Mexican securities industry, and the stock exchange are all trying to establish a system that is consistent with international trends (e.g., Internet trading). While efforts to make the needed changes are present, it is difficult to implement a uniform system due to rapidly changing technology.

PUBLIC AND PRIVATE OFFERINGS

Unlike in the United States, Mexican law does not distinguish between public and private offerings. Mexican securities law includes a broad definition of what a public offering entails. Essentially, it is any offer of securities to undetermined persons or an offer made through mass means of communication. Since this definition of securities is so broad, most security transactions fall within the meaning, with the exception of one or two private equity funds. Current Mexican tax laws state that the Mexican withholding tax rate on interest payments made on registered debt securities is lower than the rate applicable to non-registered securities. In order to achieve lower tax rates, it is common practice for strictly private placement type debt securities, to be registered with the Mexican regulator. In practice the distinction in Mexico is less relevant than it is in the U.S. and other legal systems.

DISCLOSURE

Another issue that is relevant to cross border securities offerings is disclosure. In past years, disclosure has been a major focus for Mexican regulators and the industry. The requirements and prospectus for disclosure are important concepts that are essential to understanding disclosure. In 1993, the Mexican Commission issued Circular 11-29, which establishes the specific requirements for a Mexican company to issue debt or equity securities. Then, the securities are registered with the Commission and the Mexican Stock Exchange. Circular 11-29 specifies

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1. Circular 11-29, issued by the National Banking and Securities Commission in 1993, requires that securities issuers disclose in their prospectus information on their officers and directors.
2. The Mexican Stock Exchange [Bolsa Mexicana de Valores (BMV) or Bolsa] is a private institution, legally incorporated as a limited company with variable capital that operates under a concession from the Ministry of Finance and Public Credit and is governed by the Securities Market Act. Its shareholders consist exclusively of authorized brokerage firms, each of which owns a single share.
obligations as well as provides a detailed outline of what the prospectus should include. The extreme detail of the Circular is an effort to standardize the information disseminated to the public.

**LETTERS OF LIABILITY**

Circular 11-29 requires the use of legal opinions and responsibility or liability letters from the participants in a public offering. This is a new innovation in this area of the law and has created some controversy. The majority of the board of directors of a public company, the statutory auditors or comisarios, the officers of the company, the Mexican underwriter, and the Mexican counsel to the issuer, are all required to provide responsive letters. These letters are created to ask for approval of the contents of the prospectus. The language used in the letter is identical to the language in the U.S. statute affirming that there is no material omission, misstatement, or any misleading statement in the prospectus itself. This is done to heighten the responsibility of those participating in the transaction. Requiring responsive letters has created some controversy, especially within the accounting firms in Mexico where the comisario role in the public offering process has increased. However, it is a significant step in heightening the awareness and the importance of information in the Mexican market.

Another element of disclosure process is the disclosure of relevant corporate information by Mexican public companies. Circular 11-28 of the Mexican National Banking and Securities Commission requires Mexican listed issuers to publish relevant information to the market promptly. The definition of relevant or material information is broad. It is any act, fact, or occurrence that may influence the price of a publicly traded security. The Mexican listed issuers have an obligation to reveal information to the stock exchange, the Securities Commission, and the public through an electronic disclosure mechanism called “Emisnet”, which is managed by the Mexican Stock Exchange. Issuers have the ability to defer disclosure of relevant information only to the extent that it refers to acts that have not been consummated or acts that have not influenced the price of the securities. If issuers decide to defer the information, they are required to keep a record of all the persons to whom such information is revealed and requires them to sign confidentiality obligations. This is done to avoid insider-trading issues. The Circular of relevant information has been successful. The Mexican issuers have learned to disclose information. For example, the recent Grupo Televisa’s acquisition of Grupo Acir was duly disclosed to the market in time.

As well, Circular 11-28 requires issuers to reveal to the market, then ratify or deny information (reviewed by third parties) that affects the market price of their securities. There have been instances where misleading information regarding

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3. Circular 11-28 established by the Mexican National Banking and Securities Commission, sets requirements for issuers to disseminate information into the market that affects the market price of their securities.
4. Emisnet is the electronic reporting system of the Mexican Stock Exchange.
5. Televisa is the largest Media company in Mexico and the world’s leading producer and broadcaster of Spanish language television programming.
6. Grupo Acir is Mexico’s major radio group. Grupo Televisa purchased 27.82% Grupo Acir, converting it into Grupo Acir-Radiopolis.
defaults and interest payments has been disseminated by a public Mexican company. The Commission and the boards went to the company and asked them to explain the rumor, which was an interesting development in the law. Another development was the October 2000 announcement by the Mexican press announcing that the Mexican Securities Commission was going to issue new regulations in Circular 11-33. The new regulations were designed to obligate Mexican public companies to publish an annual report in the form of a prospectus, similar to a Form 20-F under U.S. securities law, to keep investors and potential investors informed in an orderly manner regarding the status of the company. Thus regulators focus on disclosure. However, corporate governance still remains a strong point with Mexican regulators.

The acquisition of controlling equity positions of Mexican listed companies is an activity that has rapidly developed and raises concerns. However, the essential issue is the protection of minority public shareholders. There have been several examples in the Mexican press where the controlling equity holders of listed companies crossed and exchanged the major controlling positions, excluding the minority shareholders. The Mexican Commission has since strengthened its policing of acquisitions and requires a tender offer to be conducted in the market, thereby offering the same price and terms and conditions of the purchase, to all shareholders.

This topic generally raises tensions between Mexican security regulators and Mexican tax regulators. Mexican tax laws contemplate an exemption for the payment of capital gains taxes for transactions conducted on the exchange by individuals or by foreign corporations. The Mexican tax regulators are concerned that there will be an abuse of this exemption. On the other hand, the Mexican securities regulators maintain this exemption because it is an asset to market development. Within these transactions, the tension between the Mexican tax regulators and the Mexican security regulators in Mexican law is an important issue.

SECURITIES IN MEXICO

Many foreign companies coming to Mexico want to establish a web site and offer equity or debt securities, which are typically non-Mexican. The companies establish a salesman in Mexico to seek out potential clients. Internet trading is an interesting area of the law because there are no specific regulations regarding this type of trading in Mexico. However, there are some instances that are very specific to the Mexican market. In order to determine what constitutes securities inter-mediation, statutes, and general definitions are utilized. Securities inter-mediation is an effort to contact the company making the demand with an offer of securities. Thus, clients are frequently advised that their propositions on fall within the inter-mediation definition. As well, tensions between concepts under NAFTA and Mexican law arise. Mexican nationals and companies have the right to purchase financial

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7. Circular 11-33 sets forth certain reporting requirements that have to be met. These requirements include the submission to the National Banking and Securities Commission of economic, accounting and legal information.  
8. 20-F is an integrated form used both as a registration statement for purposes of registering securities of qualified foreign private issuers under Section 12 or as an annual report under Section 13(a) or 15(d) of the Securities Exchange Act of 1934.  
services outside of Mexico. Therefore, the foreign company must make their intentions clear. The foreign company undergoes an evaluation to determine whether its proposed actions constitute solicitation or inter-mediation. Then, the company goes to the authorities and discusses the particular case. Finally, Mexican security regulators will acknowledge this international trend, understand their policy decisions, and develop rules that are coherent with a very changing market.

CONCLUSION

In conclusion, Mexican securities law has evolved. However, the process, and the bureaucracy involved in getting a Mexican company to issue and make an equity public offering, is still quite burdensome. While the rules have improved, the ability to gain capital in other markets has stifled and become a point of contention between the industry and the regulators. After the new Fox administration took office in December 2000, the security industry began developing proposals to forge the different elements of the Mexican legal system together with the tremendous changes that the securities field has undergone in the last few years.