

# Considerations regarding certain obligations for issuers of listed securities, arising from the Emergency Declaration of Force Majeure made by the General Health Council of Mexico

Category: Legal Alerts, Publications, Securities and Capital Markets

written by Adrián Trejo Santiago | April 8, 2020

As a result of the health contingency caused by the coronavirus SARS-CoV-2 (COVID-19), declared as a force majeure health emergency by the General Health Council (*Consejo de Salubridad General*) pursuant to the resolution published in the afternoon edition of the Official Federal Gazette (*Diario Oficial de la Federación*) on March 30, 2020 (the “**Contingency**”) and the measures recommended by the applicable authorities to prevent its spread (the “**Measures**”), issuers of securities listed on the securities exchanges must consider the impact on their obligations, especially those of an in-person, face to face, nature.

## 1. **Meetings**

For the holding of issuers’ annual meetings that must take place during the month of April or, in the case of meetings previously called or that due to their nature are not convenient or possible to postpone (for example, the authorization for the renewal of repurchase funds), we have analyzed the options available to such issuers in light of the Contingency, *on the understanding that each case must be analyzed individually to determine the best option available to an issuer within the framework of the applicable legislation:*

**(a) Force Majeure.** The occurrence of acts of God or force majeure events does not result in the establishment of mechanisms that are not provided for by law and go

beyond the expressly established statutory agreements. The occurrence of acts of God or force majeure events would not result in the Meeting being held by other means than those expressly agreed.

**(b) In-person nature.** Applicable regulation provides that the Meetings have an in-person nature. The possibility that a reunion, held by remote means in real time through digital platforms, be legally considered as a legal Meeting is remote. The foregoing since applicable regulation does not recognize this possibility, so the physical presence of the participants must be deemed as an essential requirement.

Article 178 of the General Law of Business Organizations (*Ley General de Sociedades Mercantiles*) ("**LGSM**") was amended in 1992 to include the possibility for shareholders to adopt unanimous resolutions in lieu of a Meeting in the event that all voting shareholders of a company unanimously agree so in writing. The LGSM has been amended several times, the last time on June 14, 2018, and the legislator has not amended the requirement for Meetings to be held in-person. Likewise, the Securities Market Law (*Ley del Mercado de Valores*) ("**LMV**") published on December 12, 2005, has also been amended on several occasions, the last time on January 9, 2019, and it has not amended the requirement that Meetings must be held in person.

If the legislator had wanted to allow for shareholders' or security holders' Meetings to be held remotely or through technological platforms, as is the case in other countries, such possibility would have been contemplated in the legislative reform of 2019. We can therefore conclude that the only exception to the physical attendance requirement is the one already established by law, which allows shareholders to adopt unanimous resolutions in lieu of a Meeting.

Even if the issuer should take steps in order to argue the legality of a remote reunion, these will not provide certainty to the shareholders and/or security holders of the issuer, since there are few arguments for such reunion to be considered a Meeting. Such reunions that are intended to be considered as Meetings may be easily challenged by any shareholder, security holder or interested third party, and may be challenged by opposition actions filed within 15 days of the reunion by holders of 20% of the securities, or through a nullity claim, which has no statute of

limitations.

The CNBV has the authority to interpret the LMV for administrative purposes. In the event of an opposition or nullity action, the applicable authority to apply the LMV and the LGSM shall be the judge hearing the case.

This situation leads us to propose certain measures that will allow an Issuer to hold a Meeting that complies with the Measures, such as the following:

**i. Relevant information.** The Issuer shall make available to the shareholders and/or security holders, and to the general public, with 15 days in advance or as established in the applicable agreements, all information related to the agenda contained in the applicable call.

**ii. Fewer number of attendees.** To comply with the Measures, the issuer, the shareholders or the common representative must advocate that the least possible number of people attend the Meeting.

It is recommended that the issuer and/or the common representative contact those shareholders and/or security holders who have processed their attendance passes to the relevant Meeting, in order to propose that the greatest possible number of shareholders and/or security holders grant a special power of attorney to one or two persons who will appear at the Meeting on their behalf and exercise the corresponding votes in the manner in which they are expressly instructed to that effect.

**iii. Additional Acts.** Although the Meetings will have a small number of people present, the highest standards of hygiene must be taken at all times and the Measures must be complied with.

Depending on the nature of the Meeting and the matters to be discussed, the presence of a public attester may be requested to attest the holding of the Meeting and the events that take place thereat. The public attester shall assess the importance of the request to determine the possibility of attending the Meeting it under the Measures.

**iv. Compliance with other Applicable Provisions.** It is worth mentioning that it is

not possible to limit the right of any shareholder or security holder to assist and participate at a Meeting, since that would be a violation to the LGSM and the LMV, and therefore, access to the Meeting must be granted to any person who requests it if they have the right to participate therein. However, applicable federal or local provisions that limit the number of persons that may gather in a closed space during the Contingency must be observed. Subject to determining the constitutionality and legality of such Measures, it is recommended that they be observed and that if a greater than permitted number of participants attend, the Meeting be suspended and deferred, since otherwise there would be arguments to seek the nullification of the Meeting for non-compliance with public order regulations.

In the event that the holding of a Meeting is necessary for the continuous operation of a company dedicated to an activity considered as essential pursuant to the Measures and other applicable resolutions made by applicable federal and local authorities, the specific case should be analyzed to determine whether or not the Meeting should be held.

## **2. Board of Directors and/or Technical Committee**

Issuers generally have flexible arrangements - including real-time remote means - for decision-making through their board of directors and/or technical committees. It is relevant that each issuer determine the provisions applicable in this case and, to the extent permitted by its governing documents and applicable regulation, seek to adopt as many decisions as possible that do not concern a Meeting through these corporate bodies.

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