

Top Tips for Doing Capital Markets Deals in Mexico

by *Practical Law Capital Markets*, with thanks to *Hans P. Goebel C.* and *Carlos R. Ríos Armillas*, Nader, Hayaux y Goebel, S.C.

Practice notes | [Law stated as at 01-Nov-2022](#) | Mexico

A Practice Note setting out top tips from local counsel for doing capital markets deals in Mexico. It highlights issues of which lawyers from outside Mexico should be aware when doing capital markets work in Mexico.

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Capital markets lawyers from outside Mexico may have many reasons to find themselves involved in capital markets deals in Mexico, which is the world's eleventh-largest economy (*Mexico, The World Factbook, 18 July 2022: Economy*) and has the second largest bond market in Latin America (*S&P Dow Jones Indices, Mexico's Bond Market: An Introduction*). This may include advising:

- On a debt offering of a Mexican company where part of the offering will also be sold outside of Mexico.
- A non-Mexican issuer listing their debt in Mexico or placing their debt with Mexican investors through a private placement.
- On an initial public offering (IPO) of a Mexican company where part of the offering will also be sold outside of Mexico.
- On a global follow-on equity offering of a Mexican company.
- A non-Mexican company listing their equity securities on a Mexican stock exchange or otherwise selling securities to Mexican investors.

Mexico has strong connections with the US due to geographic proximity and other ties, and with other Spanish-speaking countries in Latin America and Europe. However, despite these connections breeding familiarity in some ways, there are also differences with these other jurisdictions.

What is considered the best advice to give foreign lawyers can vary by the type of transaction or the industry sector of the deal. This Note outlines top tips that may apply to general debt and equity transactions in Mexico. In addition to general top tips, it covers other points for a foreign lawyer to be aware of in relation to regulatory review and approvals, transaction communications and disclosure requirements, and the legal and regulatory issues that may impact capital markets deals in Brazil. The Note is based mainly on insights shared by Mexican counsel, Hans P. Goebel C. and Carlos R. Ríos Armillas of Nader, Hayaux y Goebel, S.C.

Mexico's Capital Markets: Regulation and Trends

Mexico has two stock exchanges, both of which host foreign and local company securities:

- Bolsa Mexicana de Valores (BMV).
- Bolsa Institucional de Valores (BIVA).

The BMV is the second largest stock exchange in Latin America (*BMV Group: About Us*). Both BMV and BIVA have two main markets for equity and debt, respectively.

Regulation of Mexico's capital markets rests with the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* (CNBV)), which oversees the BMV and BIVA and other capital markets participants such as issuers, underwriters, broker-dealers, and custodians. Key securities regulations include:

- The Securities Market Law (*Ley del Mercado de Valores*).
- General regulations issued by the CNBV.
- Internal regulations issued by BMV.
- Internal regulations issued by BIVA.

There were 143 listed companies on the BMV as at 1 January 2022, and 62 listed companies on BIVA (*The International Capital Markets Review: Mexico, The Law Reviews, 15 November 2021*). Most listed companies come from the financials, consumer discretionary, industrial and consumer staples sectors, with consumer staples being the largest sector in terms of overall market capitalisation. (*Mexico Capital Markets Insights, Duff & Phelps, 28 June 2022*.)

Slow Growth of Equity Markets

The debt markets are more active than the equity markets in Mexico. The Mexican IPO market has been very quiet, with few deals coming to market since 2017. Reasons for the slow growth of the equity markets in Mexico include:

- Conflicting incentives from banking intermediaries in the system. Mexican financial conglomerates have both bank and banking intermediaries' businesses. It is often more commercially convenient for them to make loans to companies through their banks rather than help companies get equity financing through their banking intermediaries.
- Lack of awareness of the equity markets among business professionals and entrepreneurs.
- Perceived risks of listing by non-listed companies. These include the risk of losing control of the company and having to be transparent and disclose more information to investors.
- Perceived high costs of listing and ongoing compliance by companies contemplating listing.
- Lack of retail investor demand in the market.

(*OECD: Equity Market Development in Latin America: Mexico*.)

Due to these factors, some Mexican companies, in particular tech start-ups, are listing outside Mexico (such as in the US) to get higher valuations in those markets. (See *Mexico's unicorns unlikely to IPO locally, says Mexican exchange CEO, Reuters, 19 July 2022*.)

The development of the BIVA stock exchange and a new corporate form for medium-sized companies to support new business and ventures (*Sociedad Anónima Promotora de Inversión Bursátil* (SAPIB)) are steps that have been taken to develop the growth of the equity markets, especially among start-ups and smaller companies. (For more on SAPIBs, see *Choose the Most Appropriate Corporate Entity for Going Public*.)

Top Four General Tips

Original Documents May Need to be Filed or Deposited

Certain formalities regarding filings before the CNBV must be followed (for example, filing the original documents with wet-ink signatures). However, the requirement to file original documents was suspended during the COVID-19 pandemic. It remains to be seen whether this will become permanent.

Securities certificates with original wet-ink signatures are also still physically deposited in Indeval, Mexico's central securities depository. In February 2022, Indeval amended its internal regulation to accept electronic securities certificates signed with electronic signatures, which expedited the deposit process.

Likelihood of Delays in Response Times from Regulator

For a public offering of debt or equity securities, the CNBV must issue an official communication authorizing the offering and the registration of the securities with the National Registry of Securities (*Registro Nacional de Valores*).

Due to internal changes and insufficient personnel at the CNBV, problems which have been exacerbated by the pandemic, the authorization process may be delayed. It is advisable to have preliminary conversations with the authorities before making the first filing to discuss the timing of the transaction, so there are no unexpected delays. Generally, the CNBV is open to having informal discussions with potential issuers about the timetable and any other issues that may arise.

Regulator Reviews Transparency of Disclosure including Information in the Media

The CNBV rates the transparency of the information provided by the issuer to its investors under the CNBV regulations. This is an internal rating system, used to help them assess the quality of the disclosure, and is not publicly announced. For an existing issuer, this rating is performed quarterly, granting:

- A green grade to an issuer who reveals 80% to 100% of its information.
- A yellow grade to an issuer who reveals 51% to 79% of its information.
- A red grade to an issuer who has deficient transparency to its investors.

If an issuer has a low grade, the CNBV may refuse to authorize the issuer's proposed issuance of securities.

The CNBV is also concerned about the level of disclosure of first-time issuers. It is common for the CNBV to review publicly available media information about the issuer, including information and opinions in the print press or on the internet. It may ask the issuer to include this information in the risk factors or another part of the disclosure document to ensure that investors have full disclosure about what has been published in the media.

Choose the Most Appropriate Corporate Entity for Going Public

Most private companies are incorporated as a limited liability corporation (*Sociedad Anónima (SA)*). An SA cannot be quoted on the stock exchange, so when a company decides to go public, it needs to consider if it wants to transform into another type of limited liability corporation, a *Sociedad Anónima Bursátil (SAB)* or a *SAPIB*.

The SAPIB was designed to incentivize medium-sized companies to go public as opposed to just larger companies, so its filing and ownership requirements are less burdensome. For example:

- **Reduced financial statement disclosure:** an SAB must provide audited financial statements for the previous three years or from the date of incorporation of the company (if it is a recently incorporated company with less than three years of existence), as well as audited financial statements of any other entity that contributed 10% or more to the issuer company's income or total sales in the previous year.

A SAPIB, on the other hand, must provide financial statements for the previous two years or from the date of incorporation of the company (if it is a recently incorporated company with less than two years of existence).

- **Reduced number of investors:** once an offering is carried out, an SAB must have at least 100 investors. The requirement of a minimum number of investors is waived for an SAPIB.

A company looking to go public should consider if it wishes to avail itself of the reduced requirements of a SAPIB. However, after its registration with the National Registry of Securities, a SAPIB must file before the BMV or BIVA a plan which sets out how the SAPIB will transform into an SAB. The plan's maximum term is ten years, though it can be shorter if the working capital of the SAPIB is over MVX250 million (Mexican Unidad de Inversión).

Regulatory Review and Approval: Points to Note

International counsel may want to be aware of the following issues in relation to regulatory review and approval in a capital markets transaction in Mexico.

Required Regulatory Approvals

For the offering of debt or equity securities to the public:

- The CNBV must issue an official communication authorizing the offering.
- The securities must be registered with the National Registry of Securities.
- The stock exchange on which the securities are listed must issue a favorable opinion.

Review of Disclosure Documents by Regulator

The CNBV carries out a comprehensive review of the documentation that is filed by an issuer for a capital markets transaction. The CNBV also reviews the information disclosed by the issuer in the media to ensure that the offering documentation contain all the necessary disclosure. It is not uncommon for the regulator to review all the information that is publicly available about the company in the media and ask for it to be incorporated in the offering document. See [Regulator Reviews Transparency of Disclosure including Information in the Media](#).

Qualifying for Recurring Issuer Exemption

If an issuer qualifies as a recurring issuer (*emisor recurrente*) with an offering program (*programa de colocación*) of debt or equity, the authorization process for a securities offering is faster since it uses pre-authorized forms of the offering documentation. These forms must be drafted by the issuer and approved by the CNBV.

To qualify as a recurring issuer, the issuer must comply with the requirements set forth in the Sole Regulation for Issuers (*Circular Única de Emisoras*) issued by the CNBV, including:

- They must have securities registered with the National Registry of Securities with a maturity date of more than one year.
- Compliance with maintenance requirements as set out in the regulation of the stock exchange.
- The issuer, the directors, and relevant officers must not have been sanctioned for serious violations of the Securities Market Law.

Debt Issuance by Private vs Public Companies

The public offer of debt, whether issued by a private or public company, is subject to similar requirements in terms of the approvals required by the regulator. The issuer may have their own internal approvals that are different, depending on whether they are a listed or private company. If the company is a recurrent issuer, and is therefore known to the regulator, this might make the process simpler and quicker, but the formal regulatory approval requirements are still the same for both private and public companies.

SABs and SAPIBs are the only corporate forms permitted for equity listed companies. However, an SA, a SAB, and a SAPIB can issue debt. An SA cannot issue equity to the public unless it converts into a SAB or SAPIB first.

Regulatory Focus on Certain Deal Aspects

The regulator often focuses on the following aspects of the deal:

- Financial information.
- Blackout periods.
- Disclosures related to the financial information.
- Risk factors.

Due to the COVID-19 pandemic, the regulator has been requesting additional risk factors or disclosures related to the impact of the pandemic on the business, the operations, and the issuer's financial situation.

Level of Communications with Regulator

It is common (and advisable) to have continuous communications with the regulator to better understand or respond to the questions or comments that they may have during their review period. Generally, the public officials are open to discussions and reachable during business hours. It is preferable to have these communications to address the comments that the regulator has before having an official communication with them.

Filings with Central Securities Depository

In addition to the filings with the CNBV and the stock exchange, the issuer may need to file documents with Indeval. Indeval is the institution that acts as custodian of all the securities that are traded in Mexico and registered in the National Registry of Securities.

Speed of Deals

Depending on the issuer (for example, if it is a new issuer or is an issuer with litigation or information in the media) or the type of securities to be offered, the authorization process before the regulator may take more time. Additionally, the speed of the deal and the timing of the transaction is determined by market conditions. In Mexico, as much depends on the response times of the regulator, this is a factor that can delay the process, but the speed is similar to what is expected in other jurisdictions.

Communications and Transaction Documents: Points to Note

International counsel should be aware of the following issues in relation to communications, disclosure, and transaction documents.

Financial Statement Requirements in Offer Documents and Exemptions

An offering document for a public offering of debt or equity securities requires:

- Audited financial statements for the previous three years or from the date of incorporation of the company (if it is a recently incorporated company with less than three years of existence).
- Audited financial statements of any other entity that contributed 10% or more to the issuer company's income or total sales in the previous year.

However, the issuer may provide financial statements for the last year or the last two fiscal years only, mainly in the following cases:

- Issuance of debt securities with a term equal to, or less than, one year.
- When the issuer is a SAPIB (see *Choose the Most Appropriate Corporate Entity for Going Public*).
- Restricted public offerings.

Offer Documents to be in Spanish

The offering document must be in Spanish.

All the documents that are filed before the CNBV have to be in Spanish. If any document was drafted in a different language (for example, for an international offering, part of which is being placed in Mexico), a translation of that document has to be filed at the same time as the original document.

Liability for Disclosure in Offer Documents

The relevant parties involved in the drafting and review of the offering documents must sign the prospectus or offering memorandum. This contains a legend or text stating that the information included in the prospectus or offering memorandum is accurate and is not misleading. Parties who must sign the prospectus or offering memorandum include, among others:

- The issuer's chief executive officer, chief financial officer, and chief legal officer.

- The legal representative of the underwriter(s).
- The external auditor.
- The issuer's counsel.
- The guarantor's representative (if applicable).

The legend or text that each relevant party has to sign varies in breadth depending on the party.

Parties can be held liable under CNBV regulations. Criminal liability may attach under the Mexican Securities Law.

Communications Restrictions

There are certain blackout periods established in the regulation. The blackout period varies depending on the securities to be traded and if the issuer qualifies as a recurring issuer. For example, for a recurring issuer of debt with a maturity date of more than a year, the blackout period is the two-day period before pricing.

Due Diligence Reports and Legal Opinions

Before the submission of the prospectus to the CNBV for approval (before pricing), counsel for each party must finish their due diligence to confirm that all the information disclosed in the offering documents is accurate and up to date. They also participate in the bring-down due diligence call that is held before pricing.

The issuer's counsel must issue a legal opinion (a legal requirement) and an independence letter. It is a legal requirement for the legal opinion to be submitted with each filing to the Commission before authorization of the offering. Once the offering is authorized, the legal opinion is attached to the offering memorandum or prospectus.

The issuer's counsel's opinion is for the regulator. Investors cannot rely on it. Underwriters' counsel typically issues a legal opinion that is private and distributed only to the underwriters.

Execution of Documents

Wet-ink signatures are still required for the prospectus or offering memorandums. There is no need for signatures before a notary.

Legal or Regulatory Issues Impacting Capital Markets Transactions: Points to Note

International counsel should be aware that the following legal or regulatory issues could impact capital markets transactions in Mexico.

Disclosure of Third Party Information in Offer Document and for Due Diligence

To disclose any information that is not the issuer's information, the issuer must have the authorization of the relevant party to include its information in the offering document. Consents are typically sought for the inclusion in the prospectus or offering memorandum of the report of the external auditor, or the opinion letter of the issuer's counsel. The CNBV usually requests authorization letters or consents of the relevant parties (other than the issuer) in which they authorize the inclusion of their information.

If the information is only used for the due diligence, the parties typically execute non-disclosure agreements to secure the confidentiality of the information. The issuer shares all the information that is needed in the due diligence process unless they are constrained to share only certain information. In these cases, they have to request prior authorization from the owner of the information.

Restrictions on Foreign Investment

For equity transactions, the restrictions set forth in the Mexican Foreign Investment Law (*Ley de Inversión Extranjera*) must be considered. There are limits for the participation of foreign investment in companies that carry out activities in certain industries, including weapons manufacturing or ports management.

Exchange Controls

Securities are usually denominated in Mexican pesos or UDIs (*Mexican Unidad de Inversion*). UDI is a unit of funds that reflects the value of Mexican pesos without considering the impact of inflation.

However, there is no restriction or special considerations for holding, clearing, and settling debt securities issued in foreign currencies listed in the stock exchanges. Securities listed in the stock exchanges are cleared in Mexican pesos considering the exchange rate at the clearance date.

Tax Rules that Impact Investors

There are national decrees that grant tax benefits. Each investor should review the tax regime applicable to it.

Bearer vs Registered Securities

All securities should be registered (as opposed to bearer) through the applicable broker dealers with Indeval. Indeval keeps a global security (for debt or equity) which can be individualized if requested by the registered holder.

Required Corporate Approvals

The transaction has to be approved by either:

- The shareholders or the board of directors, as set forth in the issuer's bye-laws.
- The governing body stated in the trust agreement (in case of issuances carried out through trusts).

Benefits if the Issuer is Incorporated in Mexico

There is currently a tax incentive decree for promoting notes to be issued in Mexico by issuers with tax residency in Mexico and registered in the National Registry of Securities. This may allow for a tax benefit on withholding taxes on interest payments if certain requisites are complied with. The decree is indefinite but can be terminated at any time by the President.

Likelihood of Post-Deal Litigation

Post-deal litigation may arise if there is a breach of the issuer's covenants set forth in the prospectus or offering memorandum (for example, covenants relating to incurring indebtedness or not entering into mergers). However, generally, post-deal litigation is rare.

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