

Mexico: The Regulations to the FIL and the Foreign Investments National Registry

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I. Introduction

Almost five years since the Foreign Investment Law (FIL) was issued, the Regulations to the FIL and the Foreign Investments National Registry (Regulations) have been published in the Federal Official Gazette of September 8, 1998, and have been in force since October 7, 1998. This instrument repealed the Regulations to the Law to Promote Mexican Investment and to Regulate Foreign Investment that had been in force since 1989.¹

Going back in time, the FIL currently in effect was published in the Federal Official Gazette on December 27, 1993, amended as per decree on December 24, 1996. Issuance of this statute coincided with the period that the North American Free Trade Agreement (NAFTA) entered into between Canada, the United States, and Mexico came into force. The FIL repealed the former Law to Foster Mexican Investment and to Regulate Foreign Investment that had been in place for almost twenty years, and had incorporated a restrictive legal framework that eventually resulted in an obstacle for the economic development of the country. The former regulations marked the beginning of a new era of opening the country to foreign investment, but in some cases using mechanisms that could be considered in conflict with the provisions of the law then in place.

The FIL achieved the important goal of clearly setting up the path of deregulating foreign investment, and therefore, it consolidated the trade opening policy that Mexico adopted at the end of the past decade.

II. Purpose of the Regulations

In general terms, the Regulations' goal is to generate a complete and specific source of information on the following topics, some of which will be addressed in subsequent sections of this article:

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1. See Regulation to the FIL and the Foreign Investment National Registry, Transitional Art. Second, Official Gazette of the Federation (Sept. 8, 1998) [hereinafter Regulations]. The FIL indicated in its Fourth Transitory Article that the Old Regulations would continue to be applied until the time in which a new instrument was issued, which is now the case with the Regulations. See FIL of the United Mexican States, Official Gazette of the Federation (Dec. 27, 1993) (amended Dec. 24, 1996) [hereinafter FIL].

- (a) To better define legal concepts governed by the FIL, including, among others, what must be understood as foreign investment participation in the capital stock of local companies; confirmation of activities excluded among those subject to foreign investment participation limitations or restrictions; determination of real properties destined to housing and non-housing activities; and series "T" shares that represent the capital contributed in agricultural, grazing, or forest lands;
- (b) To establish in a concise, detailed, and orderly manner the procedures and requirements that must be fulfilled in order to perform any of the activities subject to specific regulation by the FIL that benefits from mechanisms provided for in the instrument that may permit avoidance, under certain conditions, of the remaining restrictions in foreign investment matters, as well as to comply with the obligations provided for in the FIL and the Regulations;
- (c) to regulate the authority and the operation of the competent agencies addressing this subject matter, basically the Foreign Investments National Commission (FINC) and the Foreign Investments National Registry (FINR);² and
- (d) To set forth the general rules concerning periodic notices that must be filed by those persons that are subject to registration with the FINR, to wit: (1) Mexican companies with foreign investment participation, including those in which the foreigners participate through a trust agreement or neutral investment; (2) foreign individuals or entities that normally perform commercial acts in Mexico and branch offices of foreign investors established in Mexico; and (3) trust agreements granting rights to foreign investors vis-à-vis shares or equity parts, real estate, and/or neutral investment.³

III. Activities That Have Specific Limitations for Foreign Investment Participation

The Regulations confirm that the following activities are not reserved for the state to perform, but may rather be performed by private parties, and in the case of foreign investors, they will be able to participate up to the amount allowed in each case. The Regulations now confirm that: (a) transportation, storage, and distribution of natural gas; and (b) electricity generation for self-supply, co-generation, small production, exportation, and emergency purposes are no longer considered as activities reserved to the state pursuant to FIL § 5.⁴ Likewise, the Regulations indicate that the construction, operation, and ownership of pipelines, installations and equipment for the transportation and distribution of natural gas no longer need the FINC to issue a specific ruling enabling investors to hold an equity participation in the respective Mexican companies in excess of forty-nine percent of its capital stock.⁵

On the other hand, the Regulations confirm that the following substances encompass the list of basic petrochemicals that are reserved for the Mexican state exclusively: ethane, propane, butanes, pentanes, hexane, heptane, raw materials for black product, naftas, and

2. See Regulations, *supra* note 1, at tits. 6–7.

3. See FIL, *supra* note 1, at art. 32.

4. See Regulations, *supra* note 1, at art. 2-I (a)-(b).

5. See *id.* at art. 2-I(c).

methane.⁶ Other petrochemicals are subject to the general forty-nine percent foreign investment limitation on this area of activities. Finally, the Regulations confirm that Series "T" shares of companies owning farming, livestock, or forestry land, in which foreign investment is limited to forty-nine percent, exclusively represents the capital stock contributed in the form of land or resources to acquire those properties.⁷

The Regulations refer to the existence of rules in the subject matter of foreign investment that are scattered in legal instruments other than the FIL, and that cannot be left out of sight. Therefore, the Regulations provide greater certainty with respect to the legal framework applicable to activities subject to specific restriction, comprised of natural gas,⁸ electric energy public service⁹ and petrochemical.¹⁰ These restrictions define in greater detail the activities that should not be considered restricted or limited to those entities with foreign investment participation.

Additionally, the Regulations now provide that the obligation to obtain a favorable ruling from the FINC when a foreign investor wishes to exceed the forty-nine percent capital stock threshold in a Mexican corporation when its assets exceed the annual FINC limit is only applicable with respect to: (i) the acquisition of shares or equity participation of companies already in existence; and (ii) participation in companies that do not carry out activities subject to foreign investment restrictions or specific limitations by the applicable provisions of the FIL.¹¹ Regarding this subject, the Regulations indicate with greater clarity the requirements and procedures that must be followed in order to secure the respective permits and for the submission of required notices, whether with the Ministry of Commerce and Industrial Promotion (SECOFI) or the Ministry of Foreign Affairs (SRE).

IV. Compliance of Obligations Regarding the FINR

Within the changes to the method of compliance with the obligations imposed by the FIL and the Regulations, the latter contemplate filing with the FINR the "corporate, accounting, financial, employment, production, and other data regarding the activity in each establishment" needed to obtain the yearly renewal of the respective FINR registration certificate. According to the Regulations, these reports must be submitted within the seven months following the closing of each fiscal period according to a calendar of submission dates that varies depending on the first letter of the name of the person or legal entity that must file the report (that is, from A to D, during the month of April; from E to J, during the month of May; from K to P, during the month of June; and from Q to Z, during the month of July of each year).¹²

A new adjustment to the Regulations is the obligation to file "data to determine the value of revenue and expenses" derived from: (1) new contributions or withdrawals that do not affect the capital stock; (2) withholding the last fiscal period earnings or distribution of accumulated retained earnings; or (3) loans outstanding as creditors or debtors (under cer-

6. *See id.* at art. 2-II.

7. *See id.* at art. 2-III.

8. *See id.* at art. 2-I(a)-(c).

9. *See id.* at art. 2-I(b).

10. *See id.* at art. 2-II.

11. *See id.* at art. 3.

12. *See id.* at art. 43.

tain events). Submission of this information to the FINR must be made within the twenty business days following the close of each quarter (that is, from January to March, from April to June, from July to September, and from October to December), and only in the case of revenues or expenses, that on a quarterly basis exceed the equivalent of three thousand times the minimum wage in force in the federal district (currently approximately U.S. \$9,000.00).¹³

The information referred to in the previous paragraph is included in the report that must be submitted to secure the yearly renewal of the FINR registration certificate. The purpose of this new obligation is to render updated data to the agency to determine the existence of possible new investments or exits of funds that are not necessarily reflected in the capital stock of companies.

V. Acquisition of Real Estate and Trust Agreements

With respect to the purchase of real estate within the restricted zone by foreign individuals or legal entities or Mexican entities without a foreign investment restriction clause, the Regulations indicate that the legal regime will vary depending on the specific housing or non-housing purposes for which the real estate is to be used. In order to distinguish between those classifications, the Regulations include a list of specific examples to aid in determining housing or non-housing status.¹⁴

The legal structure under which foreigners may acquire real estate within the restricted zone is a trust agreement. The Regulations now consolidate the specific requirements needed to set up the structure.¹⁵ It is necessary to clarify that a trust agreement allows Mexican companies with foreign investment participation access to housing real estate within the restricted zone, whereas Mexican companies with foreign investment participation may directly acquire non-housing real estate in the restricted zone.¹⁶ The permits granted to create the trust agreements, or other acquisition vehicles, do not release the respective investor of other environmental, zoning, construction, and related licensing and permitting issues at federal, state, and municipal levels of government.

VI. Incorporation of Companies

Regarding the incorporation of an SRE company and the corporate name permit that is required, the Regulations indicate that name will be granted as long as the respective name has not been reserved by another company, that is, another party previously requested the same name and has already received the SRE permit.¹⁷

Nonetheless, the reservation will have a duration of ninety business days from the date when the permit is received, at the end of which the creation of the company must be formalized in an instrument granted before a notary public. Otherwise, the reservation will be deemed to be terminated.¹⁸ On the other hand, once the permit issued by the SRE is granted, a six-month term begins in which notification of the incorporation of the company or the change of the corporate name must occur.¹⁹

13. See *id.* at art. 38-II.

14. See *id.* at art. 5.

15. See *id.* at art. 11.

16. See FIL, *supra* note 1, at art. 10.

17. See Regulations, *supra* note 1, at art. 13.

The Regulations also provide procedures for filing notices regarding the modification of the foreign investment exclusion clause, permitting foreign investment (the “Calvo Clause,” or the agreement foreseen in article 14 of the Regulations);²⁰ and related to the liquidation, merger or spin-off of companies.²¹ Notice of modification of the foreign investment exclusion clause must include a copy of the public instrument containing the amendment to the by-laws and statement regarding company ownership of real estate in the restricted zone and its uses.

As part of the administrative simplification effort, the notices referred to in this section of the Regulations may be secured through the Ministry of Finance and Public Credit (SHCP), when, according to the applicable tax regulations, notices must be filed with the Tax Payers’ Federal Registry. The SHCP must deliver the respective information to the SRE within three months of the date on which it receives the data from the interested party. The fourth paragraph of article 18 is the only provision of the Regulations that did not come into force twenty business days after the publication of the Regulations because it will not come into effect within six months after publication.

An important point regarding this title of the Regulations is that, as opposed to the old Regulations, the new Regulations do not indicate the need to establish a series of shares in the capital stock of Mexican companies. In this area, it is necessary to apply the provisions of the special legal instruments to each subject matter (for example, financial institutions, agrarian matters or telecommunications).

VII. Neutral Investment

According to the FIL, neutral investment is a mechanism that allows the inclusion of foreign investment in areas subject to limitations, and it may be performed through instruments issued by trustee agents, special series of shares, or international financial entities for development.²² The role that the Regulations include for this mechanism is functional, insofar as they simply set forth the requirements to obtain approvals from the FINC and the rules to observe in each one of the referred mechanisms.

VIII. FINC and FINR

With respect to the legal framework of the FINC, the Regulations’ goal is to clarify its authority and to set forth the guidelines under which an agency must act for the issuance of resolutions.²³ Likewise, regarding the FINR, the agency in charge of receiving notices for any registration transaction involving foreign investment participation under any of the events foreseen by the FIL, the Regulations implement the manner in which the FINR is divided, as well as the way it must respond to applications submitted within its organization. The goal is to promote an expedited and simplified operation of that body.²⁴

18. *See id.* at art.17.

19. *See id.* at arts. 17–18.

20. *See id.* at art. 20.

21. *See id.* at art. 18.

22. *See* FIL, *supra* note 1, at art. 18.

23. *See* Regulations, *supra* note 1, at art. 29.

24. *See id.* at arts. 30–36.

As an administrative simplification innovation, the Regulations indicate that, provided a registration request, notice, or report with the FINR is filed without errors or obvious omissions, and the agency does not require the applicant to correct those errors or omissions within twenty business days following their date of submission, those documents will be deemed properly filed. The copy with the receipt stamp from SECOFI is considered the registration certificate, registration renewal certificate, registration cancellation, or confirmation of notice, depending on the case.²⁵ The FINR will no longer issue official response letters regarding filings made, except when in the form of a request for additional data.

IX. Conclusion

In general terms, the Regulations result in a legal tool that permits a full and complete understanding of the requirements that must be complied with and the guidelines that must be observed in any procedure regarding foreign investment. The Regulations complete and complement the provisions of the FIL, providing additional detail and specifications of the legal concepts governed by the statute. The Regulations accomplish the general goal of adding greater legal certainty to the rules applicable to foreign investors doing business in Mexico.

25. See FIL, *supra* note 1, arts. 34–35.