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New Mexican Corporate Structure Sociedad Anomia Promotora de Inversion

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THE new Mexican Securities Market Law (L.M.V.) has created expectations and questions in the Mexican business sector. Among different matters, the L.M.V. has introduced a new legal structure with the purpose of encouraging investment and growth of the Mexican securities market. An interesting innovation is the Sociedad Anónima Promotora de Inversión (SAPI).\(^1\) The SAPI is a regular Sociedad Anónima (limited liability corporation) with a diverse list of exceptions to the provisions of the General Law of Commercial Companies (L.G.S.M.).

The SAPI is intended to create a new culture of investment in Mexico by adopting clear and workable corporate governance. Thereafter, by the issuance of debt it may begin to attract investment through the securities market and, in the future, become a fully registered and tradable corporation before the Mexican Stock Exchange by becoming a Sociedad Anónima Bursátil (fully registered limited liability corporation). This article will address important characteristics of the SAPI.

The current Sociedad Anónima incorporated pursuant to the L.G.S.M. may become a SAPI by holding a General Extraordinary Shareholders Meeting and by amending its bylaws (estatutos) as applicable. The corporate name of this type of corporation shall always be followed by the words “Promotora de Inversión” or its abbreviation “P.I.”\(^2\) The bylaws of the SAPI may establish special provisions different to those contained in the bylaws of a current Sociedad Anónima governed by the L.G.S.M., such as:

(i) Restrictions on transfer of shares, different from those provisions contained in article 130 of the L.G.S.M.\(^3\);

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2. For example, La Lupita, S.A. de C.V. P.I.; La Lupita, S.A. de C.V. Promotora de Inversión.

3. Ley General de Sociedades Mercantiles [L.G.S.M.] [Commercial Corporations Law], as amended, art. 130, Diario Oficial de la Federación [D.O.], 28 de Julio de 2006 (Mex.), available at http://dof.gob.mx/2006/julio/dof_28-07-2006.pdf. “The bylaws may provide that shares may only be transferred with the authorization of
(ii) Causes of exclusion of shareholders or exercise of separation or withdrawal rights, or mechanisms to buy back shares, as well as formulas to determine the price of stock for any of such matters;

(iii) The issuance of four special classes of shares, different from those provided in articles 112 and 113 of the L.G.S.M.:^4

(a) Shares with no voting rights or with voting rights restricted to certain matters only;

(b) Corporate and non-economic rights different from voting rights;

(c) Limited or broadened dividends or other special economic rights, an exception to the provision of article 17 of the L.G.S.M.;^5

(d) Granted voting rights or voting rights requiring the favorable vote of one or more shareholder regarding resolutions from the general shareholders meeting;

(iv) Implemented mechanisms to be followed in case the shareholders do not reach an agreement in connection with specific matters;

(v) Increasing, limiting, or denying preemptive rights contained in article 132 of the L.G.S.M.;^6

the board of directors. The board may deny such authorization, designating a buyer of the shares at the current market price.”

4. *Id.* at arts. 112-13.

Shares shall be of equal value and shall confer equal rights.

Nevertheless, the organizational instrument may provide that the capital be composed of various classes of shares with special rights pertaining to each class, subject in all cases to the provisions of article 17.

Each share shall be entitled to only one vote, but the organizational instrument may provide that one part of the shares shall only have the right to vote in extraordinary assemblies of shareholders held to consider the matters contained in sections I, II, IV, V, VI, and VII of article 182.

Dividends may not be assigned to ordinary shares until shares with limited voting rights have been paid a dividend of five percent. When in a fiscal year there are no dividends or the dividends are less than said five percent, the shortfall shall be paid in subsequent fiscal years with the priority indicated herein.

In the liquidation of the company, shares with limited voting rights shall be repaid before ordinary shares. The organizational instrument may provide for dividends for shares with limited voting rights superior to dividends for ordinary shares.

The holders of shares with limited voting rights shall have the rights which this law confers upon minorities with respect to contesting decisions made in shareholders’ assemblies and reviewing the balance sheet and books of the company.

5. *Id.* art. 17. “Provisions which exclude one or more partners or shareholders from participating in gains shall have no legal effect whatsoever.”

6. *Id.* art. 132.

Shareholders shall have pre-emptive rights to subscribe shares issued in connection with an increase of the capital stock in proportion to the number of their shares. Such right must be exercised within the fifteen days following the publication in the official gazette of the company’s domicile of the resolution of the shareholders’ assembly which approved such increase.
(vi) Authorization limiting the responsibility of directors and relevant executives for damages derived from the actions taken, according to article 33 of the L.M.V.\textsuperscript{7}

I. MANAGEMENT

The SAPI may, at the option of its shareholders, be managed according to the provisions of the L.G.S.M. or by the corporate governance standards provided in the L.M.V. If it chooses the latter, it may be subject to the applicable provisions of the \textit{Sociedades Anónimas Bursátiles}, governed by the L.M.V.,\textsuperscript{8} in which case the requirement of independence for directors will not be mandatory.

II. COMMITTEES

The board of directors, for a better performance of their duties, may create one or more committees; the L.M.V. recommends the creation of the audit and corporate practices committees. For the SAPI, the independence required is optional.

III. SHAREHOLDERS AGREEMENTS

In the SAPI, it is now clear that shareholder agreements can be included in its bylaws. For example:

(a) “Non-compete provisions, limited to time, subject, and location (not to exceed three years)”; 

(b) Put and call options between shareholders; or 

(c) “The obligation to certain shareholders to subscribe and pay for a certain number of shares at a determined price.”\textsuperscript{9}

These types of corporations may purchase their own shares without being bound by the prohibition established in the L.G.S.M. for \textit{Sociedades Anónimas}.\textsuperscript{10}

Finally, it is important to mention that this kind of corporation will not be subject to the supervision of the National Banking and Securities Commission (the Mexican equivalent to the U.S. SEC), except if it registers securities in the National Securities Registry, and that it will not have to publish its financial statements as provided in the L.G.S.M. Furthermore, for the incorporation of a SAPI or transformation from a \textit{Sociedad Anónima} to a SAPI, there is no need for any governmental authorization, except for the authorization of the Ministry of Foreign Affairs, which is a routine procedure.

\textsuperscript{7} L.M.V., \textit{supra} note 1, at art. 33. Broadly, this article refers to the damages caused that do not derive from malicious or illicit actions.

\textsuperscript{8} \textit{Id.} at arts. 22-57.

\textsuperscript{9} \textit{Id.} at art. 16.

\textsuperscript{10} L.G.S.M., \textit{supra} note 3, at art. 134. “It is prohibited for the \textit{Sociedades Anónimas} to purchase their own shares, except for judicial adjudication, in payment of credits of the partnership.”
IV. CONCLUSION

SAPI was designed to create a more protective and flexible vehicle to raise debt and capital; this is accomplished by eliminating technical restrictions that were the sources of ambiguity previously contained in the L.G.S.M.