Corporate Finance/M&A - Mexico

Launching mandatory tender offers

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Mandatory tender offers in Mexico are primarily regulated by Articles 95 and following of the Securities Market Law and its corresponding general provisions, applicable to listed companies and other participants in the securities market and issued by the National Banking and Securities Commission (CNBV).

Prospectus and CNBV authorisation

Mandatory and voluntary tender offers are subject to prior authorisation by the CNBV. Along with the request for authorisation, which can be filed using a pre-drafted form, the offeror must submit, among other things:

- a preliminary prospectus for the offer containing its general terms and conditions (although it does not yet have to state definitive prices and amounts);
- a copy of the official document evidencing the power of attorney of the legal representative or attorney-in-fact of the offeror. If the offeror is a legal person, written confirmation must be submitted by the secretary of the company's board of directors that the legal representative or attorney-in-fact has sufficient power to launch the offer in the name of the company;
- an authenticated copy of the minutes of the shareholders' meeting or board resolution in which it was decided to launch the offer;
- copies of all previous agreements with other acquirers, shareholders or board members of the issuing company that might be related to the offer; and
- a draft of the intermediation contract between the offeror and the intermediary through which the offer will be made.

The prospectus can establish that the consideration offered for the shares will be cash or securities. If securities are offered as consideration, the prospectus must further state the type of securities to be offered in exchange, as well as the procedure to be used to determine their value.

The final version of the published prospectus must be signed by the offeror's legal representative and contain the following affirmation:

"*The undersigned declares under oath not to have any knowledge of relevant information which was omitted from or misstated in this prospectus regarding the public tender offer nor has he knowledge of the fact that this prospectus contains information that might mislead the public.*"

Obligation to launch tender offer

Anyone directly or indirectly holding 30% or more of a public company's ordinary shares (which are registered with the National Securities Registry) is obliged to launch a public tender offer. The offer will be extended to all series of shares (including shares with restricted voting rights or even those without voting rights) in equal terms and must remain open for 20 business days. Tendered shares will be sold *pro rata* at the expiration date.

The offeror may change the conditions of its offer during the respective offer period only if the changes are made in favour of the offerees or if it has reserved such right in the

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corresponding prospectus. Offerees that accepted the offer before the changes may withdraw their acceptance without consequence.

The offeror is expressly forbidden to pay or provide any kind of benefit to one or more offerees that would imply any sort of premium over the offered share price. Any violation of the corresponding provision may be penalised with a prison term of two to six years. The same penalty applies to those that accept and receive the aforementioned premium. An exception applies for consideration derived from agreements in connection with the offer that stipulate positive or negative covenants in favour of the offeror or the issuer. If such agreements were approved by the board of the company and previously made public, the consideration will not be considered a premium subject to the aforementioned limitations and penalties.

Scope of mandatory tender offer

If the offeror seeks to acquire a significant interest that is not a controlling interest, the mandatory tender offer must be made for the percentage of shares equivalent to the percentage sought by the offeror, but for no less than 10% of the issuer's stock. If the offeror seeks to obtain a controlling interest in the issuer, the offer must be for 100% of the issuer's stock. If the offer results in the acquisition of 100% of the shares of the company, it should be borne in mind that under Mexican corporate law, a company must always have at least two partners, shareholders or members.

The Securities Market Law defines 'control' as the ability of a person or group of persons to:

- directly or indirectly impose decisions on the shareholders' meeting or equivalent bodies of another company or to appoint or remove the majority of another company's directors and officers;
- vote more than 50% of the issuer's stock; or
- direct the management and principal policies of another company, whether by shareholder position, contract or other means.

In certain cases, the CNBV may allow for a mandatory tender offer to be made for a lower percentage, taking into consideration the rights of all shareholders – particularly minority shareholders. In any case, the corresponding request for authorisation must be attached to the minutes that contain the approval of the company's board of directors.

If a mandatory tender offer is launched for less than 100% of the issuer's stock, and at the expiration date less than 12% of the stock remains held by the general public, the Securities Market Law obliges the offeror to broaden its offer or launch a second tender offer within 30 calendar days. In both cases, the terms and conditions of the initial offer will apply.

Obligations under mandatory tender offer

Facing a public tender offer, the issuer and its subsidiaries, including its board members and managers, must refrain from undertaking any acts that would disadvantage the company in order to impede or hinder the process of the offer. Any violations of the corresponding provision of the Securities Market Law may be subject to fines of 10,000 to 100,000 days' minimum salary (currently around Ps64). This prohibition does not apply to anti-takeover measures that the company may have previously adopted and established in its bylaws.

Within 10 days of the launch of the mandatory tender offer, the issuer's board members must elaborate and publish an opinion on the conditions of the offer and any conflicts of interest that they may have with respect to the offer. This opinion may be issued by an independent expert hired by the issuer. Additionally, the issuer's board members and general managers must disclose whether they will accept or decline the offer for the shares which they hold themselves. If the board members fail to publish the opinion, they may be subject to fines of 200 to 10,000 days' minimum salary.

If the issuer has a subsidiary (ie, holds at least 30% of the shares of another company) whose shares are publicly traded and where the subsidiary represents more than 50% of the issuer's consolidated assets, the offeror must extend the tender offer to the subsidiary.

Tender offer exemptions

The CNBV may allow exemptions from the obligation to launch a mandatory tender offer in the following cases:

- acquisitions of stock at market price which result in a redistribution of ordinary shares among members of the same group of persons, provided that the acquirers have been shareholders of the issuer for more than five years and the group that retains control as a result of the acquisition had a material interest in the issuer during that period;

- capital reductions in which the interest of the respective person or group of persons results in 30% or more of the issuer's stock;
- where an issuer's status as a going concern is compromised and the relevant shares are acquired as a result of a capital increase or a corporate restructuring, provided that the board of directors has approved the corresponding transaction;
- foreclosure of security interests in favour of financial entities, including trustees;
- certain acquisitions obtained by inheritance or donation; and
- transactions that are consistent with the protection of minority rights, as determined by the Governance Committee of the CNBV.

Consequences of violations

Those that do not comply with the legal obligation to launch a mandatory tender offer or that obtain a controlling interest in a public company in violation of the law may not exercise corporate or membership rights derived from the shares acquired. All resolutions adopted while voting the respective shares will be considered void. If all of the voting stock of the issuer has been acquired, the holders of the shares of the remaining series will have full voting rights until the required offer is launched.

All acquisitions in violation of the law will be deemed null and void. The acquirers will be liable to the other shareholders for all damages and losses incurred due to non-compliance. Additionally, they will be subject to a fine of 10,000 to 100,000 days' minimum salary.

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