Chapter

Mexico

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The process of M&A transactions in Mexico involving public companies is primarily regulated by the relatively new Securities Market Law (the 'SML') which came into force in mid-2006. The SML contains a detailed set of rules governing most practical aspects of the process and strives to further develop an efficient and transparent securities market, protect the interests of investors, minimise the systemic risk involved, foster greater competition and regulate the operational and transactional issues involved in such market. In particular, the SML aims to effectively promote the access of medium-sized companies to the securities market, through implementing good corporate governance practices and regulations, and providing adequate protection for minority shareholders, as well as an improved legal framework governing publicly traded companies. It also seeks to: improve the operational framework applicable to the stock exchange, brokerage houses, and institutions for the deposit of securities and other participants; increase sanctions and penalties for those directors and officers who violate the law; and redefine the roles, scope and authority of the financial entities supervising and regulating the securities market.

The new law is expected to foster venture capital financing, increase the number of publicly traded companies, and boost securities activity in the market, as investors will have more certainty as to the financial information revealed, the protection afforded to minority shareholders, and stricter compliance rules imposed upon directors, auditors and individuals participating in the operation of corporation.

Other relevant sources of law and regulation applicable to M&A transactions include the General Law on Business Corporations (GLBC), the Foreign Investment Law (FIL) and its regulations (regarding specific activities), the Federal Economic Competition Law (FCL) and its regulations (applicable only when the transaction exceeds the thresholds established therewith). The Federal Labour Law (FLL) is applicable when there are mergers and asset purchase agreements at hand (substitution of labour liabilities). As default provisions, the Commercial Code (CC), securities and commercial usages and the Federal Civil Code (FCC) may also be applicable in that order.

Moreover, Prospectus rules and Listing Rules made by the NBSC may also be relevant to a securities exchange offer, where the securities to be issued are to be listed, as they may affect the freedom of action of the target.

On the other hand, specific regulations may apply, depending on the type of Target Company in the transaction, i.e. financial institutions or bankrupt companies as target companies, airline industry.

The SML is administered and enforced by three basic federal authorities: the National Banking and Securities Commission (NSBC), the Secretariat of Finance and Public Credit and the Central Bank.

Anti-trust regulation is administered and enforced by the Federal Competition Commission, which is an agency of the Secretariat of Economy. Under said law, M&A is understood to be the merger, acquiring the control or any other action through which corporations, associations, stocks, equity interest, trusts and assets in general are carried out amongst competitors, suppliers, customers or any other economic agents. The Federal Competition Commission shall challenge and sanction those concentrations that have the objective or effect of diminishing, damaging or deterring competition and free access to equal, similar or substantially related goods and services. A pre-merger control procedure is compulsory if certain thresholds are exceeded.

It is important to stress the fact that the law provides for a waiting period, and therefore, the Competition Commission is authorised to order within a ten business day period following the premerger filing, that economic agents refrain from consummating the transaction until the Competition Commission has authorised same. In case no resolution is issued the parties may implement the merger at their own risk as there is no specific sanction for not waiting.

1.2 Are there different rules for different types of public company?

In principle, there are no different rules for different types of public company; however, certain exemptions are provided in the SML when the shares of a publicly held company are sold under certain circumstances. See question 5.1.

1.3 Are there special rules for foreign buyers?

The Foreign investment Law applies to M&A, in the following cases:

a) Participation by foreign investors, in any percentage, in the capital stock of Mexican companies;

b) Investments by Mexican companies in which foreign capital has a majority interest; and

c) Participation by foreign investors in activities and acts contemplated in said law.

Pursuant to the foreign Investment Law certain activities are (1) reserved exclusively for the State (i.e. petroleum and other hydrocarbons); (2) reserved exclusively for Mexicans or Mexican companies with a foreigners' exclusion clause; and (3) subject to

certain percentage restrictions (i.e. insurance companies).

Apart from the foregoing ownership restrictions that may apply to individual companies there are no special rules for foreigners.

1.4 Are there any special sector-related rules?

See question 1.1. and 1.2.

1.5 What are the principal sources of liability?

Litigation in relation to M&A in Mexico is very rare. There are few specific enforcement actions against bidders in an M&A process. Basically, a bidder risks enforcement action if it fails to comply with the regulations provided for in the SML, being liable for misrepresentations in the offer documentation, dissemination of misleading information, simulation of transactions, distortion of the proper operation of the negotiation systems of the relevant stock exchange, participation in transactions where there is a conflict of interest, contravention of the sound market practices and usages, and insider trading or market manipulation, all of which can give rise to both civil and criminal liabilities.

In particular, bidders may risk enforcement action for making public offerings of unregistered securities without the NBSC's authorisation or private offerings in violation of the SML. Additionally, the SML provides for criminal penalties including imprisonment for those bidders who pay an economic premium or overhead on the offer to a person or group of persons who accept their offer within the context of a hostile take-over, and heavily punishes those bidders who are obliged to launch a public tender offer and do not proceed accordingly. In such a case, the buyers will not be able to exercise any corporate rights deriving from the shares or securities so acquired. In case of an acquisition made outside a mandatory public tender offer which comprises the totality of the shares, the holders of the other series of shares will have full powers and authority to exercise any corporate rights until the mandatory public offer is made.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Public tender offers and friendly tender offers (take-overs) represent alternative means of acquisition under the SML.

Any person or group of persons who intends to bid for 30% or more of a publicly held company's (PHC) shares must submit a tender offer. All offers will be subject to the following conditions:

(1) Be held open for at least 20 business days and 5 additional business days if NSBC decide there are any material changes from the original offer;

(2) Be made for at least 10% of the capital stock of a PHC with bidders willing to take 100% upon completion. If additional securities are available to a bidder who is unwilling to take them, the remaining securities will be pro-rated;

(3) While offers remain open, terms and conditions may be altered as long as the amendments are clear to the bidder. Any changes to original terms after a shareholder has tendered its securities gives the shareholder the right to withdraw their securities;

(4) Be open to all shareholders at the same price;

(5) No premiums are to be paid to any person without formal approval and written consent from the Board of Directors of the PHC, with full disclosure to the public;

(6) The Board of Directors, together with the General Manager, must make a public statement regarding their planned response on any tender offers within 10 days. The board is also prohibited from preventative action against a proposed bid unless it falls within the take-over by laws as described in the new SML; and

(7) False information to the public by market participants is prohibited (what constitutes false information is not currently clarified in the law).

2.2 What advisers do the parties need?

The parties will generally engage financial advisers, accountants, independent legal counsel and public, financial, marketing and corporate communication consultants.

2.3 How long does it take?

See question 2.1. for detailed rules as to the general timetable for a bid.

Additionally, the SML allows the NBSC to extend the 20-day period referred to in question 2.1 above, at any time for an additional minimum 5-day period when more favourable conditions to the offerees are offered before the public tender offer has concluded.

The overall timing is likely to be driven by the regulatory process; in particular, special attention must be paid to the pre-merger filing process described in question 1.1 above.

In a best case scenario, the Federal Competition Commission will issue the corresponding clearance within a 45-day period after having successfully filed the pre-merger notification. Said period may be extended and the clearance could take around 6 months in order to be obtained.

2.4 What are the main hurdles?

The main hurdle, as in many other jurisdictions, is to achieve a sufficient level of target shareholder support. It is easier if the support from the Board of Directors of the company is obtained; however, the SML expressly prohibits the holding or controlling entity and Board members and relevant Directors from carrying out acts or transactions aimed at blocking the process from the moment they become aware of the offer until the conclusion of same.

A practical and very important hurdle might be the financial arrangements needed on the bidder's side prior to launching a public tender offer. This can also be problematic in case of leveraged processes dependant on the target's assets as collateral for any acquisition finance.

Another hurdle is the pre-merger filing process due to a public tender offer (hostile take-over) as obtaining the relevant information of the target may very likely be cumbersome. In many cases, the relevant information is not public and the target is not obliged to disclose it. In light of this, information may only be obtained from public sources.

2.5 How much flexibility is there over deal terms and price?

As stated above, while an offer remains open, terms and conditions may be altered as long as the amendments are clear to the bidder. Any change to original terms, after a shareholder has tendered its securities, gives the bidder the right to withdraw.

As a general principle provided for in the SML, it must be stressed out that the tender offer must be open to all shareholders at the same price and no premiums paid to any person without formal approval

and written consent from the Board of Directors of the PHC, with full disclosure to the public.

The NSBC on the other hand, may authorise a public tender offer for a lower percentage than the one indicated in section (2) of question 2.1 above under justified circumstances, taking into consideration the corporate rights of all shareholders and in particular, those of minority shareholders.

The acquisition of securities convertible into common stock or negotiable instruments representing the latter, as well as any derivatives or options which can be exchanged for common stock, will compute in the calculation of the percentages indicated in question 2.1 above.

2.6 What differences are there between offering cash and other consideration?

Under the SML there are no specific differences or regulations between offering cash and other considerations. Nonetheless, if there is a non-cash consideration involved attention should be given to the information required to be disclosed and published and the process for finalising the relevant documentation. If securities are to be offered, the need for filing or supplementing a prospectus, whether preliminary or definitive, may arise and may also be subject to the approval of the NSBC. Said prospectus shall include at least the relevant information regarding the following issues: (i) characteristics of the offering and types of securities, destination of the resources obtained, distribution plan amongst the investors and price and applicable rate; (ii) financial, administrative, economic and legal status of the issuer and of its holding or controlling group, in its case; (iii) risk factors and contingencies; (iv) description of the holding group to which the issuer pertains; (v) equity structure of issuer; and (vi) relevant operations with related parties, amongst other issues.

Any financial adviser would need to review the information disclosed by the bidder in connection with the confirmation of sufficient funds to cover the bid prior to launching the offer.

2.7 Do the same terms have to be offered to all shareholders?

The same terms have to be offered to all shareholders regardless of the existing series of stock, inclusive of those having limited or no voting rights.

2.8 Are there any limits on agreeing terms with employees?

There are no specific limits on agreeing terms with employees; however, any agreements must be disclosed prior to launching the public tender offer.

2.9 What documentation is needed?

Any bidder intending to launch a public tender offer whether friendly or hostile, must file the following documentation and information along with their request for authorisation: (1) an offer document (brochure) containing the information required by the NSBC in line with the secondary regulations issued by it (information concerning the price and definitive amount may be omitted, as well as any other information that may only be accessed to on the day prior to the launching of the public tender offer; (2) in its case, copy of the power of attorney of the legal representative of the bidder and a corporate certificate issued by the Secretary of the Board of said bidder certifying that the authority vested upon the legal representative has not been revoked or limited; (3) copy certified by the Secretary of the Shareholders' or Board of Directors' Meeting Minutes authorising the public tender offer; (4) copy of any prior agreements with other bidders, shareholders or board members of the target related to the said public tender offer; and (5) any other documentation and information that the NSBC may require based on secondary regulations issued by it.

Additionally, it is customary to have a press release confirming the bidder's intention to make an offer, an offer document containing the formal offer with all terms and conditions and financial information on the bidder and target, a form of acceptance, and a circular from the target board to its shareholders.

Also, the target board shall issue an opinion within the 10 following business days after the public tender offer is launched, regarding its views on the price of the bid and any conflicts of interest that any of its members may have in connection with the said bid. Board members must also publicly disclose the decision they have made in regards to any shares held by them personally.

2.10 Are there any special accounting procedures?

Regulations applicable to all accounting procedures are those approved by the NSBC.

Certainly, the offer document must contain a summary of the relevant financial information on the bidder and target including the most recent changes reported in the last balance sheet. If any securities exchange is involved, then the information relating to the prospectus must be reviewed by the accountants and financial advisors.

2.11 What are the key costs?

The key costs involved are the fees of accountants, independent legal counsel, financial and other professional advisors. Financing fees may also be involved in case a third party is funding the offer.

It is important to state that unlike other jurisdictions like the UK, in Mexico there is no "stamp duty".

2.12 What consents are needed?

Basically, the authorisation of the NSBC is needed and in case the thresholds laid out in the Federal Economic Competition Law are exceeded, then a clearance from the Competition Commission will also be needed.

Other consents may be required from regulatory agencies depending on the specific sector.

2.13 What levels of approval or acceptance are needed?

Any public offering is subject to the NBSC's authorisation and must be carried out within the Mexican Stock Exchange if the securities are listed in said exchange.

The bid may be subject to both the bidder's and target's shareholders or board approvals.

See question 2.1.

2.14 When is the consideration settled?

Consideration will be settled pursuant to the terms of the public tender offer previously approved by the NSBC.

3 Friendly or Hostile

3.1 Is there a choice?

No, any person or group of persons who intends to bid for 30% or more of a PHC's shares must submit a public tender offer.

3.2 How relevant is the target board?

The target board must issue an opinion expressing its views on the price and conditions of the offer and any decisions its members have made in connection with the stock held by them. However, the target board is prevented from carrying out any action intended to unduly block or frustrate the offer process.

In reality, the target board's opinion is quite relevant, particularly prior to the bid as it may play a determinant role in the shareholder's decision process. The target board's opinion can convince the shareholders not to undertake any further due diligence or negotiations, therefore, deciding the outcome of the offer.

3.3 Does the choice affect process?

See question 3.1.

4 Information

4.1 What information is available to a buyer?

In a public tender offer information of the target is likely to be restricted and therefore, the only available information would be the one publicly available. This is one of the main hurdles bidders are confronted with, which can have a magnified impact as it is discussed in connection with anti-trust pre-merger filings.

However, a bidder may approach the target board to put pressure and require information. In any case, the target board may be subject to certain restrictions even if it has agreed, in principle, to the offer. The target board may be subject to disclosing information to any other bona fide bidders, for instance.

4.2 Is negotiation confidential?

The confidentiality of the negotiation will ultimately depend on the bidder's and the target's pre-bid arrangements. Typically, most offers are kept confidential until the precise moment when they need to be announced to the shareholders and to the public.

4.3 What will become public?

See question 4.2.

4.4 What if the information is wrong or changes?

The SML provides no specific protection for the bidder in case the information is wrong, misleading, inaccurate or changes. This is a risk that a bidder must undertake in a process of this nature.

If the information is wrong or changes, the bidder may have civil and commercial legal actions against the target or its board claiming damages and losses. Also, the bidder may pull out of the offer if it has included provisions affording that possibility.

Other legal actions may be filed against auditors and other advisors who have rendered the relevant information.

It should be stressed out that if the bid has already been launched it will be virtually impossible for the bidder to pull out.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Shares can be bought outside the offer process in the following cases: (1) acquisitions made at market price deriving from the re-distribution of common stock amongst the members of a same group of people, regardless if said group disappears or not, if and when said persons have been shareholders for more than 5 years in the company, and the group of people having the control of the company has had a relevant percentage of the capital stock during such period; (2) equity reductions resulting in a reduction of 30% or more, of the common stock held by a person or a group of people; (3) when the viability of the target is at stake and the stock is acquired as a consequence of equity increases or corporate restructurings such as mergers, spin-offs, asset purchase agreements, amongst others; (4) foreclosure of security interests over stock created in favour of a financial institution; (5) acquisitions deriving from donations, legacies or inheritance amongst certain family relatives; and (6) operations consistent with the protection of minority shareholders' interests, subject to the NSBC's authorisation.

5.2 What are the disclosure triggers?

There are no specific triggering events under the SML. Disclosure will ultimately depend on the terms and conditions of the offer.

5.3 What are the limitations?

See question 5.2.

6 Deal Protection

6.1 Are break fees available?

Break up fees are generally allowed in Mexico as a deal protection device. Breakup fees imply fixed payments paid by one merger partner to another pursuant to specified conditions resulting in a planned merger failing.

Like other deal protection devices, breakup fees are included in the merger agreement. Broken down into its structural components, a breakup fee clause generally consists of the payment amount and a list of enumerated events that trigger the payment. The payment amount is fixed at either a percentage of the transaction's value or a specific amount of money. The triggering events usually fall into one of three broad categories: (1) the company's breach of any warranties or covenants; (2) shareholder opposition/challenge of the merger; or (3) the acceptance of a third-party bid. The board's exercise of a fiduciary out usually triggers the breakup fee, especially if the board then enters into another merger agreement with a competing bidder. The failure of the company to meet its material warranties and representations often dissolves the merger and also triggers the payment. For instance, a breakup fee may be triggered if one partner pledges to obtain the necessary antitrust or other regulatory approvals but does not. The common factor in

most triggering events is that one party has intentionally reneged on its promises or negligently failed to take steps necessary to consummate the merger.

Break up fees, as a deal protection device is subject to the following conditions: (1) they must be approved in a Special Shareholders' Meeting without the opposition of 5% of the present shareholders; (2) must not exclude one or more shareholders different from the person trying to obtain control, from the economic benefits resulting from the break up fees; (3) do not totally restrict the take over of the company; and (4) do not contravene the regulations provided by the SML in connection with hostile take-over or nullify the equity rights of the acquiring company.

6.2 Can the target agree not to shop the company or its assets?

There are no express provisions preventing the target from agreeing not to shop the company or its assets. A "no-shop" provision should be limited, in principle, to active solicitation as it should not prevent the target from responding to an unsolicited offer.

6.3 Can the target agree to issue shares or sell assets?

There is no express prohibition under the SML; however, such an action could be deemed as frustrating the process.

6.4 What commitments are available to tie up a deal?

Basically, break up fees are the only available commitment.

7 Bidder Protection

7.1 What deal conditions are permitted?

Generally, any deal condition could be admissible if and when it is materially objective and does not depend fully on the bidder's will.

7.2 What control does the bidder have over the target during the process?

Any kind of control would depend on the detailed stipulations agreed amongst bidder and target, which may not extend to events outside target's control or prevision.

7.3 When does control pass to the bidder?

Control will pass unto the bidder once the offer process has been consummated and the stock has been transferred to the bidder.

7.4 How can the bidder get 100% control?

The bidder must offer to acquire 100% of the stock when the bidder intends to obtain control of the company.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

In line with the duties of care and loyalty board members owe to the company and its shareholders, the board of the target would in principle be obliged to tell its shareholders if it gets an offer.

8.2 What can the target do to resist change of control?

See questions 3.2 and 6.1.

8.3 Is it a fair fight?

The Mexican regime governing public tender offers aims at balancing the rights of the target's shareholders and those of the bidder. The regulations and restrictions applicable to the acquisition of target's control tend to make the board's role more relevant and proactive without granting the board a truly influential participation as to the ultimate decision regarding the acceptance or rejection of the offer.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Value is a key factor in determining the success of an acquisition, while corporate, financial, crisis management and marketing communication play crucial roles most of the times.

Like in most jurisdictions, anti-trust clearance represents a decisive factor for the success of any acquisition, especially in dealing with complex multijurisdictional M&As.

9.2 What happens if it fails?

No express regulations are provided under the SML.

10 Updates

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in your country.

The most significant new case is the successfully hostile takeover by Mexican cement giant Cemex SAB of the Australia's Rinker Group Ltd. (cement and construction materials sector), an acquisition that is expected to increase its sales in the U.S. in the second half of 2007 thanks to said acquisition of company leaders.

Rinker is expected to enhance CEMEX's position as one of the world's largest building materials companies, reduce its cash flow volatility and improve its capital structure.

On the telecom's sector, America Móvil continues to add to its already-extensive holdings in Latin America. This year alone, Grupo Carso's mobile arm has already purchased TIM Peru, Smartcom PCS in Chile, and Porthable in Paraguay, and will likely announce further expansion before the end of the year, most likely in Venezuela. This trend is expected to continue, although in the coming years it will play second stage to the consolidation of regional fixed operators.

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Aside from providing our corporate clients with complete legal services, we also help them achieve their business objectives in today's growing globalised business world and within the parameters of the various new multilateral and bilateral trade and investment agreements such as NAFTA, WTO, MEUFTA, MERCOSUR and others.

Today the firm has a professional and administrative staff of over 220. As creative problem-solvers, we help our clients address their changing needs so they can prosper in the Mexican business environment, which itself is continually changing.