



# ICLG

The International Comparative Legal Guide to:

## **Mergers & Acquisitions 2018**

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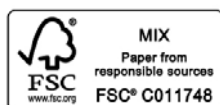
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# Mexico

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## 1 Relevant Authorities and Legislation

### 1.1 What regulates M&A?

In Mexico, the acquisition of public companies is governed by: **(a)** the Securities Market Law (*Ley del Mercado de Valores*) (“**LMV**”), the rules and regulations issued by **(i)** the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) (“**CNBV**”), such as the General Provisions Applicable to Public Companies and Other Participants in the Securities Market (*Disposiciones de Carácter General Aplicables a las Emisoras de Valores y a Otros Participantes del Mercado de Valores*) (the “**Circular**”), **(ii)** the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*), and **(iii)** the Mexican Stock Market (*Bolsa Mexicana de Valores*) (“**BMV**”); and **(b)** the General Law of Business Companies (*Ley General de Sociedades Mercantiles*).

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

There are two kinds of Mexican companies whose shares may be publicly traded in Mexico, that is, **(i)** Publicly Held Companies (*sociedades anónimas bursátiles*) (“**SAB**”) which are ordinary publicly held companies, and **(ii)** Publicly Held Investment Promotion Companies (*sociedades anónimas promotoras de inversión bursátil*) (“**SAPIB**”) which are publicly held companies allowed to “go public” and given a period of time to fully comply with all the requirements set forth to be a SAB under the LMV.

The difference in the rules applicable to SABs and SAPIBs relate to corporate governance obligations, requirements to become public and maintain the company as a public company and the documents required to carry out a public offering.

Mexican companies whose shares are solely traded outside Mexico are not subject to the LMV. Mexican companies that were publicly traded but are no longer publicly traded will not be subject to any securities regulations, irrespective of the number of shareholders they have.

Finally, foreign companies whose intention is to publicly trade securities in Mexico will be subject to the same requirements and regulations applicable to Mexican companies.

### 1.3 Are there special rules for foreign buyers?

LMV and applicable regulations do not restrict or limit in any manner whatsoever the exercise of foreign shareholders rights in a SAB or SAPIB.

Please note that the Mexican Foreign Investment Law (*Ley de Inversión Extranjera*) restricts or limits foreign investment in certain activities, such as national inland transportation services (passengers and cargo) and certain technical and professional services, which are exclusively reserved to Mexican nationals or Mexican companies with a foreign exclusion clause. Other activities subject to foreign investment restrictions or limitations are, among others, domestic air transport, air taxi transport and specialised air transport, radio broadcasting services, local newspaper publishing, and shipping companies dedicated to the commercial exploitation of inshore navigation and coastal fishing.

### 1.4 Are there any special sector-related rules?

As a general rule, a tender offer to acquire a SAB or SAPIB will be subject to **(i)** the prior authorisation from the CNBV and the BMV, and **(ii)** obtaining clearance from the Federal Anti-Trust Commission (if applicable).

If the SAB or SAPIB is a regulated entity, such as a financial entity, the acquisition may be subject to notices or authorisations from the respective regulator.

### 1.5 What are the principal sources of liability?

The principal responsibilities of a bidder in a tender offer are **(i)** obtaining the corresponding authorisation to launch the tender offer, **(ii)** avoiding any act that may be deemed as insider trading or market manipulation, **(iii)** adhering to applicable market practices and customs, and **(iv)** refraining from entering into trading operations outside the tender offer.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

- (i) Acquisition of shares.** A bidder will be required to file an application with the CNBV and the BMV to obtain the corresponding authorisation for launching an acquisition public offer (“**OPA**”) through a tender offer, which may be voluntary or mandatory, depending on certain thresholds imposed by the LMV based on the amount of shares to be acquired from the public. Once the tender offer has been launched, the shareholders of the target are entitled to accept or reject the offer made by the bidder.

- (ii) **Merger.** In the case of a merger, an OPA will also be required. The foregoing will not be applicable if the bidder and the target company are publicly held companies, unless a change of control takes place.

It is important to bear in mind that certain formalities are required to be complied with, such as (a) publishing the merger agreement executed between the merging companies in the Official Gazette of the Federation (*Diario Oficial de la Federación*), (b) registering said agreement with the Public Registry of Commerce (*Registro Público de Comercio*), and (c) the expiration of a waiting period in which any interested party may oppose the transaction. As a general rule, such transactions are deemed an acquisition for tax purposes, unless certain requirements are fulfilled in the terms provided by applicable tax laws.

## 2.2 What advisers do the parties need?

The principal advisers generally involved in the acquisition of a SAB include: (i) legal counsel to draft all agreements documenting the transaction, file the necessary applications to secure the necessary authorisations before the CNBV and BMV, and provide legal advice throughout the process to the different parties involved; (ii) tax advisers, who will provide advice and assistance on the tax obligations arising in connection with the acquisition; (iii) investment bankers, who will analyse the transaction from a financial point of view and provide the required economic structure to carry out the transaction; and (iv) a share value appraiser, who will assess the value of the target company's shares to be acquired by the bidder and give a fairness opinion which shall be made public by the Board of Directors of the target 10 business days following the launch of the tender offer.

## 2.3 How long does it take?

Pursuant to the LMV, to acquire shares of a SAB, the bidder must first file an application with the CNBV and the BMV requesting their authorisation to carry out an OPA and register the transaction documents with the National Securities Registry (*Registro Nacional de Valores*). OPAs are categorised as voluntary or mandatory, depending on the percentage of capital stock of the target that a bidder is offering to acquire from the public. A voluntary tender offer implies an intention from the bidder to acquire more than 10% and less than 30% of the capital stock of a target company. In cases where the bidder intends to acquire more than 30% of the capital stock of the target, this offer shall be classed as a mandatory offer.

Upon receiving the authorisation from the CNBV and the BMV to the OPA, and when all transaction documents are approved, the tender offer will be made public for at least 20 business days and for additional periods of five business days, in case material changes to the original terms and conditions of the tender offer arise, which must be previously approved by the CNBV.

The Board of Directors of the SAB or SAPIB must take a public position on the tender offer within 10 business days following the launch of the tender offer and, jointly with the General Manager, disclose to the public their position *vis-à-vis* the tender offer with regard to their shares in the SAB or SAPIB.

Upon expiration of the 20 business days given for the tender offer and no later than three business days following the expiration date of the tender offer, the BMV will settle the tender offer.

The principal influences that may affect the overall timescales are (i) information and documents made by the CNBV and the BMV to authorise the public offer, and (ii) the workloads of said regulators and other governmental bodies or agencies depending on the

economic activity (Foreign Investment Commission, Federal Anti-Trust Commission or other sector-related regulators) from whom certain ancillary requirements, licences, permits or authorisations may be required.

## 2.4 What are the main hurdles?

The main hurdles for the execution of the transaction are (i) not achieving the necessary amount of shares required to obtain control of the target, (ii) a rigid legal framework that does not stimulate competing tender offers, and (iii) not satisfying the conditions required to perfect the tender offer.

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

The bidder shall offer to the target's shareholders a fair price (at least the market price) for the target's shares.

The terms and conditions of the offer may be amended as long as such changes imply better terms and conditions to the target's shareholders or such amendments were contemplated in the offering memorandum.

The LMV prohibits a bidder from making a tender offer that is not open to all shareholders or that is made to shareholders of the target at varying prices.

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

There are no material differences in cases where a bidder offers consideration other than cash. The consideration offered to the target's shareholders must be clearly disclosed in the offering memorandum, and shall include a payment distribution plan.

In fact, the consideration commonly used is a combination of cash and shares from the bidder or any entity controlled by it, or other securities such as bonds or debentures.

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

The LMV and its regulations expressly require that tender offers must be made to all shareholders in the same terms.

Please see question 2.5 above.

## 2.8 Are there obligations to purchase other classes of target securities?

There is no obligation to purchase other target securities. However, in cases where a bidder intends to achieve control over a target with the intention to delist the same from the market, the regulator could require the bidder to purchase the target's equity convertible securities.

## 2.9 Are there any limits on agreeing terms with employees?

The LMV does not impose any limitations on agreeing benefit plans or employment terms for the employees of the target and its related entities. In cases where the foregoing is agreed before the expiration of the tender offer, the bidder shall disclose the same in the offering memorandum.



## 2.10 What role do employees, pension trustees and other stakeholders play?

Employees from a target, as well as pension trustees and other stakeholders, are not entitled to impose any veto, nor are they required to express an opinion with respect to a tender offer. If such employees, pension trustees or other stakeholders own shares in the target, they will be subject to the rights and obligations imposed upon them by the LMV. Employees, pension trustees and other stakeholders are prevented from disclosing to the bidder any relevant information of the target that may have an influence on the tender offer.

## 2.11 What documentation is needed?

The main documents commonly required to complete this type of transaction will be:

- (i) An application with the CNBV and BMV requesting authorisation to acquire an amount or percentage of shares through an OPA and to launch a tender offer through a regulated market.
- (ii) An offering memorandum explaining the main characteristics of the tender offer, including the offered price, the period of time in which the tender offer will remain open, the relevant facts and information regarding the bidder, among others.
- (iii) An acquisition public offer notice which will inform the public of the most relevant characteristics of the tender offer.
- (iv) A brokerage agreement to be entered by the bidder and a broker dealer or bank through which the acquisition of the shares from the target will be made.
- (v) An independent “fairness” opinion from an expert assessing the value of the shares from the target stating that the offered price is fair.
- (vi) The necessary corporate resolutions or approvals from the bidder for launching an OPA for the shares of a specific target.

## 2.12 Are there any special disclosure requirements?

The LMV provides that the acquisition by any person or group of persons of the beneficial ownership of the shares from the target through an OPA shall have to be disclosed to the public no later than the immediate following day. In this case, the bidder must also inform the terms and conditions of the tender offer, whether it intends to acquire a significant influence over the target or not and any other information that may be deemed relevant for the purpose of the tender offer.

## 2.13 What are the key costs?

The main costs incurred are: (i) professional fees from investment bankers, tax advisers, lawyers and appraisals; (ii) duties payable to the CNBV and fees payable to the BMV for the analysis and authorisation process of the tender offer; and (iii) fees incurred by the bidder to publish the OPA notice in nationwide newspapers and the printing of the offering memorandum, which will be distributed between the shareholders of the target.

## 2.14 What consents are needed?

No consents are required from the target’s corporate bodies to execute the transaction. In the specific case of the Board of Directors of the target, they will only be entitled to issue an opinion over the offered price and how they plan to act in connection with the shares owned by its members.

## 2.15 What levels of approval or acceptance are needed?

No corporate acceptance or approval requirements from the target’s corporate bodies are needed.

To implement an OPA, it is required that the bidder intends to acquire at least 10% or more of the shares from the target. In cases where the bidder is not interested in acquiring such a minimum percentage, an OPA will not be necessary unless control is achieved as a result of such an acquisition.

Notwithstanding the foregoing, the CNBV may authorise tender offers below such a minimum percentage with a prior justified request from the bidder.

In the case of a merger of *sociedades anónimas*, the merging entities must approve such a transaction in an Extraordinary Shareholders’ Meeting with a minimum quorum of 75% of the total shareholders, and resolutions must be validly adopted with, at least, the vote of the majority of shareholders that attended such a meeting. If the by-laws of any of the merging companies provide a higher quorum or approval threshold, such a threshold will be required to approve the transaction.

## 2.16 When does cash consideration need to be committed and available?

The bidder has no obligation to guarantee payment or confirm that it has the funds to carry out the transaction. Settlement of consideration must be carried out in terms of the BMV’s Regulations.

# 3 Friendly or Hostile

## 3.1 Is there a choice?

The LMV allows friendly and hostile takeovers to take place. In the case of hostile takeovers, the Board of Directors of the target has limited powers to prevent such types of acquisitions since the Board of Directors of the target must maintain its neutrality over the acquisition, and is limited to give its opinion on the fairness of the offered price and inform how they will act with respect to shares owned by its members.

In cases where a bidder acquires the control of a target without complying with the rules applicable to OPAs, the bidder will be prevented from exercising any corporate rights or receiving any dividend distribution derived from the acquired shares.

## 3.2 Are there rules about an approach to the target?

No rules or procedures have been set forth on the way a target needs to be approached before a tender is offered.

## 3.3 How relevant is the target board?

The LMV also requires that, from the date of the tender offer until conclusion of the same, the Board of Directors and the relevant officers of the target shall refrain from taking any action that may hinder the development of a tender offer. In case any of them fail to comply with their duties before the target and cause any economic damage to it, they will be personally liable for the monetary damages and losses caused.

In view of the foregoing, the Board of Directors of the target shall have to conduct itself in a neutral and transparent manner complying,

in all material respects, with their respective duties and disclosing any conflict of interests that may arise in connection with the tender offer or the bidder.

### 3.4 Does the choice affect process?

Please see question 3.1 above.

## 4 Information

### 4.1 What information is available to a buyer?

The buyer will have access to all information that has been publicly disclosed by the target. In this regard, the buyer will have access to the same information available to any investor, which includes, among others, financial statements of the target prepared in accordance with the International Financial Reporting Standards, relevant corporate and legal information, and any other material information which is deemed “relevant” pursuant to applicable regulations.

### 4.2 Is negotiation confidential and is access restricted?

The BMV’s Regulations allow bidders to request confidentiality and non-disclosure measures on the application and information filed with the CNBV and BMV until the OPA has been authorised.

In addition, no restrictions are imposed on the bidder and the target’s shareholders for conducting negotiations between them, provided that all of the target’s shareholders are entitled to the same terms.

### 4.3 When is an announcement required and what will become public?

Those events or information considered as “relevant”, that is, those that influence or may influence the price of listed securities, shall have to be announced immediately after they have notice thereof. The disclosure of the “relevant” events or information previously mentioned need not be disclosed if (i) they are events which may have not yet occurred, (ii) the information is not yet in the mass media, and (iii) there are no unusual movements in the price or volume of operations of the securities.

Immediate notice must also be given for (i) unusual market movements about the price or volume of operation of the target’s securities, or (ii) inexplicable changes to the offer and the demand of the securities attending to their historical movements.

### 4.4 What if the information is wrong or changes?

The LMV prohibits the disclosure of false information and provides penalties on individuals that have participated in the production of such false information. If certain information has proved to be misleading or false causing material damages or loss to a third party, the transmitter of such information will be liable.

In those cases where the information is not accurate, the LMV provides a specific procedure to update the information disclosed to the public in connection with a transaction.

In any of the cases referred to above, if the disclosed information implies a material change to the information taken into account to enter into the transaction, the offer or the acceptance will be deemed null and void.

## 5 Stakebuilding

### 5.1 Can shares be bought outside the offer process?

The bidder and, in relevant cases, related entities, shall be restricted from entering into any transaction outside the OPA that involves the target’s shares. Such restriction will only be enforceable during the time the OPA is held open.

### 5.2 Can derivatives be bought outside the offer process?

If derivatives are negotiated outside the OPA with the intent to give the bidder an option to purchase shares (i.e. call options) then this would not be allowed and the same restriction as described in question 5.1 would apply. However, if the negotiated derivatives are for hedging the eventual purchase of shares (i.e. futures or swaps), this would be allowed.

The obligation to disclose a stake in the target will be triggered when (i) an investor has acquired 10% or more of the target’s shares, or (ii) the relevant managers and members of the Board of Directors have acquired any shares in the target.

### 5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

The obligation to disclose a stake in the target will be triggered when (i) an investor has acquired 10% or more of the target’s shares, or (ii) the relevant managers and members of the Board of Directors have acquired any shares in the target. In the case of derivatives intended for hedging, no disclosure is required.

### 5.4 What are the limitations and consequences?

Should bidders or any other related entities enter into transactions outside the OPA that involve the target’s shares, liability for the bidder will arise and fines may be imposed.

## 6 Deal Protection

### 6.1 Are break fees available?

No restrictions are imposed in this regard; however, such fees must be approved by the Board of Directors of the target and disclosed to the public.

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

There is no provision preventing the target from agreeing not to shop the company or its assets, subject to limitations thereto under the Anti-Trust Law and its regulations.

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

The LMV does not restrict, in any manner whatsoever, potential transactions to support a preferred bidder, such as the issuance of shares, the disposition of certain assets or amendments to the corporate documents of the target. Such actions will be the Board’s

responsibility, provided, however, that such a transaction does not cause a material damage or loss to any potential bidder; in which case, the target, and directors or officers involved, could become liable.

#### 6.4 What commitments are available to tie up a deal?

Please see question 6.3 above.

### 7 Bidder Protection

#### 7.1 What deal conditions are permitted and is their invocation restricted?

Any OPA can be subject to any condition, as long as such a condition does not depend fully on the bidder's will.

A bidder will be required to submit an application with the CNBV and the BMV to obtain the corresponding authorisation for launching an OPA, which will be subject to the following conditions:

- (a) **Duration:** the tender offer shall be held open for at least 20 business days and, if required, for an additional period of five business days in the event that there is a material change of the original terms and conditions to the offer, or as determined on a discretionary basis by the CNBV.
- (b) **Number of shares and proportional distribution:** the bidder must indicate the number of shares it is willing to purchase, provided, however, that the solicitation shall be made for at least 10% of the capital stock of the target or more than 30% if the bidder intends to take control. If a person makes an OPA for less than all outstanding equity securities of a public company and a greater number of securities are tendered pursuant thereto, then such a person will only be required to purchase and pay for the percentage of shares offered pursuant to the OPA on a *pro rata* basis, disregarding fractions, according to the number of securities tendered by each shareholder during the period such a tender offer remains open.
- (c) **Withdrawals:** during the time a tender offer remains open, the terms and conditions of the offer may be amended as long as this bidder's rights are disclosed in the offering memorandum or such changes represent better terms and conditions for the target. Any shareholder who has tendered its securities will be entitled to withdraw any such securities if there is a material change to the original terms and conditions of the tender offer.

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

The bidder has no control over the target during the time the tender offer remains open. However, the bidder may subject the OPA to conditions expressly set forth in the offering memorandum. In such cases, in the event that such conditions (e.g. no material changes in the target during the process) are fulfilled, the bidder may revoke the tender offer at any time during the time the tender offer remains open.

#### 7.3 When does control pass to the bidder?

Control passes to the bidder immediately upon settlement of the tender offer through the BMV, which usually occurs within three business days following the expiration date of the tender offer.

#### 7.4 How can the bidder get 100% control?

The bidder will require launching a mandatory OPA to acquire

100% control of the target. In this case, the bidder must launch the OPA with the intention to delist the target. At least 95% of the total shares of the target would be required to cancel the registration of a SAB with the BMV.

Please note that the LMV provides that (i) at least 12% of the total amount of shares shall have to be owned by the public, and (ii) public companies must have at least 100 shareholders to maintain the minimum listing requirements to be considered as a SAB. Mexican law requires that corporations have at least two shareholders.

### 8 Target Defences

#### 8.1 Does the board of the target have to publicise discussions?

The target's Board of Directors shall be neutral and will be required to take a public position on the tender offer within 10 business days after the tender offer has been launched and, together with the General Manager, publicly state how they are planning to act in connection with the shares they currently own from the target.

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

There is nothing that the target can do to resist change of control. However, the target can carry out the transactions described in question 6.3 above.

#### 8.3 Is it a fair fight?

The applicable rules governing OPAs are set forth under the LMV, which aims to balance the rights of the target's shareholders and those of the bidder.

### 9 Other Useful Facts

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

The principal factors that will most likely influence the outcome of the acquisition process are: (i) the terms and conditions of the tender offer, including price, consideration, intended percentage of shares to be acquired by the bidder and other essential elements on the offer; (ii) the expectations created over the potential acquisition and future management of the target, such as expected fundamentals and financial ratios; or (iii) the overall expectations from the market on the level of strategic acquisition achieved for all entities involved in the transaction.

#### 9.2 What happens if it fails?

No restrictions are imposed on the bidder. A bidder is entitled to subject its tender offer to any condition or term that the same deems convenient, in the understanding that such a condition or term is expressly provided in the offering memorandum and not prevented under applicable law.



## 10 Updates

## 10.1 Please provide a summary of any relevant new law or practices in M&amp;A in your jurisdiction.

As of the third quarter of 2016, the number of Mexican M&A transactions decreased by approximately 13.3%, as compared with the same quarter of 2015. The overall M&A transactions amounted to USD12,270 million, with the real estate and construction sectors being the most dynamic in this year.

The liberalisation of the oil and gas industry in Mexico is still considered an upcoming trend, which could provide a boost to the Mexican M&A market in the following years. The recently enacted regulations have created the foundations for energy-related real estate investment trusts commonly known as “Fibra E”. These vehicles are allowed to invest in qualified energy, electricity and infrastructure assets and the aim is that these will eventually be traded in recognised local and foreign stock markets. Another security currently being offered in the Mexican Stock Market, are Investment Project Certificates or “Cerpis”. These new investment vehicles have been tailored to allow investors to participate in infrastructure projects located in Mexico.

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Yves Hayaux-du-Tilly Laborde graduated as a lawyer from the Universidad Panamericana and has postgraduate degrees from Georgetown University on the American legal system, and in European business from ESSEC in Paris, where he studied as a fellow of the French Government under the future leaders programme.

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Yves participates actively in various professional associations, such as the American Bar Association, International Insurance Law Association (“AIDA”) and International Bar Association. He is currently Vice President of the Mexican Chapter of AIDA and a former President and Vice President of the Mexican branch of AIDA. He is a member of the Presidential Council of AIDA, where he is also a member of the Finance Committee, and is the Vice President of the Chartered Institute of Loss Adjusters. He is also an honorary member of The Commercial Bar.

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Nader, Hayaux & Goebel (NHG) is a market leader in mergers & acquisitions, banking and finance, telecoms, tax, securities and capital markets, structured finance, insurance and reinsurance, project finance, real estate, energy, infrastructure, telecommunications, restructurings and workouts, government procurement and anti-trust law.

NHG has participated in many of the largest and most challenging M&A and finance transactions in Mexico, including capital markets and private equity transactions, leveraged buy-outs, syndicated loans, public-private partnerships, project financings, leaseings and transactions in the insurance sector. We also advise clients on regulatory and government procurement matters.

With 14 partners and approximately 30 associates, we are one of the largest groups of corporate finance experts in the Mexican market. The NHG group has been working together for more than 25 years and has a well-earned reputation for providing high-quality, sophisticated legal advice.

NHG represents leading local and international corporations and financial institutions, as well as Mexican and foreign governments and their agencies.

NHG is also the only Mexican law firm with an office in London and enjoys excellent working relationships with law firms in all major cities around the world.

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- Corporate Tax
- Cybersecurity
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- Family Law
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