

**Sociedad Anónima Promotora de Inversión:
A new kind of company doing business in México.**

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A new Securities Law (*Ley del Mercado de Valores*) (the “New LMV”) was published on December 30, 2005 in the Official Gazette of the Federation. The New LMV became effective on June 28, 2006.¹

Among other things, the New LMV creates a legal framework for new, non-listed corporations called *sociedades anónimas promotoras de inversión* (“SAPIs”). (Investment Promotion Corporations).

The new legal framework exempts SAPIs from certain obligations under the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*) (the “LGSM”). Under the LGSM, shareholders of traditional Mexican corporations (*sociedades anónimas-hereinafter* “SA”) have more limited rights than those granted under the New LMV.

SAPIs are not subject to the surveillance of the National Banking and Securities Commission (CNBV).² So, strictly speaking, this new kind of company may not be regulated by securities law. Moreover, as mentioned above, SAPIs are not listed.

The purpose of this new legislation governing privately-held companies is to apply some of the best practices of corporate governance to non listed companies; to grant certain statutory exceptions to entities incorporating under the LGSM; and to offer greater incentives for investment.

In this paper, I will describe the most significant differences between the SA, under the LGSM, and SAPIs, under the New LMV. I will focus on the three most critical aspects of each entity structure: Characteristics, Corporate Governance and Capital Structure.

I. Characteristics

A. Legal Form.

SAPIs are Mexican corporations. They have two options for purposes of formation. They can be incorporated as a SA under the LGSM, and then voluntarily submit themselves to the legal regime of SAPIs, as set forth under the New LMV. In the alternative, they can be incorporated as an SAPI from the start.³

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¹ The New LMV replaced entirely the Old LMV, which had been in effect since 1975.

² Article 10, New LMV.

³ Article 12 New LMV.

B. Rights.

The Shareholders of both a SA and a SAPI have essentially two kinds of rights: economic rights and corporate rights.⁴

a. Economic Rights

The main economic right of a shareholder of either a SA or a SAPI is the right to get a dividend.⁵

Under the LGSM, generally speaking, a shareholder of a SA has the right to receive dividends in proportion to the amount of the legal capital contributed.⁶ The only exception to this principle is for preferred stocks. Preferred shareholders have rights to a higher dividend, but have limited voting rights.⁷

Under the New LMV, the By-Laws may create different classes of shares, each one with different rights.⁸ The right to a higher dividend or a different way to calculate it can co-exist with full voting rights.

b. Corporate Right.

The main corporate right of a shareholder is the right to vote and participate in the shareholders' meetings.⁹

The shares of a SA must give the shareholders the right to vote. There is only one exception, which are the limited voting shares. Even owners of limited voting shares, however, must have the right to vote in certain matters, as set forth under law, at the extraordinary shareholders meeting. The LGSM provides for six instances in which such shareholders have a statutory right to vote: (i) where the corporate duration will be altered or made perpetual; (ii) premature dissolution; (iii) change in the purpose; (iv) change of nationality; (v) conversion; and (vi) merger of the company.¹⁰

The SAPIs, on the other hand, are allowed to issue shares with rights to vote on any matter. SAPIs may also issue shares with limited votes on certain matters. Finally, SAPIs can issue shares with no right to vote on any matter. Under the New LMV, all these classes of shares can be defined and set forth in the Bylaws.¹¹

⁴ **BARRERA GRAF**, Jorge. Instituciones de Derecho Mercantil. 1st ed. México, Porrúa, 1989 p. 521; **RODRIGUEZ RODRIGUEZ**, Joaquín. Tratado de Sociedades Mercantiles. 7 ed. México, Porrúa, 2001. p. 365.

⁵ **BARRERA GRAF**, Jorge. *supra* n. 4. p. 525; **MANTILLA MOLINA**, Roberto. Derecho Mercantil. 22nd ed. México, Porrúa, 1982. p. 337; **RODRIGUEZ RODRIGUEZ**, *supra* n. 4. p. 367.

⁶ Article 16 LGSM.

⁷ **SALINAS MARTÍNEZ**, Arturo. Sobre la Pretendida Ilícitud de las Acciones Preferentes DE Voto Limitado no Totalmente Participantes. At Estudios Jurídicos en Memoria de Roberto M. Mantilla Molina. México, Porrúa, 1984. p. 702.

⁸ Article 13, III, New LMV.

⁹ **BARRERA GRAF**, Jorge. *supra* n. 4. p. 536; **RODRIGUEZ RODRIGUEZ**, *supra* n. 4. p. 384.

¹⁰ Article 113 LGSM.

¹¹ Article 13, III, New LMV.

c. Other Rights

i. Preemptive Rights

An existing shareholder of a SA has a statutory right to purchase new shares whenever they are issued to increase the legal capital.¹² Because this right arises by operation of law, an SA may not limit or eliminate preemptive rights in the Bylaws, or in any shareholder actions.¹³

The New LMV leaves all these decisions to the SAPI. In their corporate bylaws, SAPIs may limit preemptive rights or even eliminate them altogether.¹⁴

ii. Shareholders' Agreements.

The LGSM provides that any agreement that limits the rights of the shareholders to freely vote their shares is null and void. The Law has limited the matters that may be negotiated in Shareholders' Agreements of Mexican corporations.

The New LMV permits shareholders of SAPIs to enter into Shareholders' Agreements governing the following matters: (i) non-compete provisions; (ii) option rights (e.g., right of first refusal, tag and drag along rights, call option and put option); (iii) sale and transfer of shares; (iv) exercise of preemptive rights; and (v) vote pooling provisions.¹⁵

iii. Minority Shareholders Rights

The LGSM grants certain rights to minority shareholders.

Most rights granted to SA shareholders require a 33% interest to attach. These include: asking to call a general shareholders meeting;¹⁶ legal opposition to resolutions of general meetings;¹⁷ voting postponement;¹⁸ and civil suits against directors.¹⁹ Legal opposition is the right of shareholders who represent at least 33% of the company to bring a suit before a judge to decide the legality of resolutions taken at a shareholders meeting.

Other rights granted to SA minority shareholders require only a 25% ownership interest by shareholders in order to exercise them. These include opposition to the nomination of a member of the board of directors or the appointment of a statutory examiner ("*Comisario*").²⁰

¹² Article 132 LGSM.

¹³ **BARRERA GRAF**, Jorge. *supra* n. 4. p. 529; **FRISCH PHILIPP**, Walter. *La Sociedad Anónima Mexicana*. 2nd ed. México, Porrúa, 1982. p. 404; **RODRIGUEZ RODRIGUEZ**, *supra* n. 4. p. 647. p. 147. "*Amparo directo*" 94/90. María Eugenia Velderráin Jordán. May 18, 1990. "*Tribunales Colegiados de Circuito*". Second Tribunal Colegiado from 12th Circuit. "*Semanario Judicial de la Federación*". VII, January, 1991.

¹⁴ Article 13, V, New LMV.

¹⁵ Article 16, VI New LMV.

¹⁶ Article 184 LGSM.

¹⁷ Article 201 LGSM.

¹⁸ Article 199 LGSM.

¹⁹ Article 163 LGSM.

²⁰ Article 144 and 171 LGSM.

The New LMV reduces the percentage of ownership interest required to exercise minority rights.

Under the New LMV, 10% of the shareholders can elect a member of the board of directors or designate a statutory examiner. 10% is also sufficient to call for a general shareholders meeting or to request that a vote be postponed. 15% of the shareholders can bring a shareholders derivative suit. 20% can oppose any resolution of general meetings, and have standing to bring their dispute before a judge, as explained above.²¹

These minority rights are not just default rules. SAPIs may not limit or eliminate them in their corporate bylaws. The key difference between the SA rules and the SAPI rules in this regard is that a SAPI shareholder has standing to bring a claim with a lower stake than that required of a SA minority shareholder.

II. Corporate Governance

The former LMV included rules that applied exclusively to publicly-traded companies and their corporate governance. Between 1990 and 2005, the Mexican Congress increasingly amended the former LMV, for these purposes. The CNBV, the regulatory agency with jurisdiction over publicly-traded companies, mentioned above, also promulgated various rules over this period.

In contrast to all this rule-making governing listed companies, Mexico had not significantly addressed corporate governance issues of privately-held companies under legislation or regulation.

The New LMV enforces Corporate Governance for SAPIs even though they are not listed on a public exchange.

Some of the main differences between a SA and a SAPI, for purposes of corporate governance are:

A. Shareholders Meetings

The LGSM provides for two kinds of shareholder meetings for an SA: general and special.²² The general shareholder meeting can be ordinary or extraordinary, depending of the purpose.²³ LGSM rules on special shareholder meetings arise when there are different classes of shares with diverse rights.²⁴

²¹ Article 16 New LMV.

²² **MANTILLA MOLINA**, Roberto. *supra* n. 5. p. 381.

²³ Article 179 LGSM. **MANTILLA MOLINA**, Roberto. *supra* n. 5. p. 381. **SALINAS MARTÍNEZ**, Arturo. Criterio de Distinción entre las Asambleas Ordinarias y Extraordinarias en el Derecho Mexicano. At Cuadernos del Instituto de Investigaciones Jurídicas. Year 1, number 3, September-December, 1986. p. 937.

²⁴ Article 195 LGSM.

The New LMV does not regulate shareholder meetings by type of meeting or class of shares. SAPIs, however, are subject to the following special rules regarding shareholder meetings:

1. The limited voting shares will only count in the *quorum* when the shareholder meeting is going to discuss a matter where those shares have a right to vote.²⁵
2. 10% of the shareholders can ask to call to a shareholders general meeting or just ask to have a vote postponed.²⁶

B. Board of Directors.

Under the LGSM, the administration of a SA can be entrusted to one or more directors.²⁷ When there are two or more directors, they will form a board of directors.²⁸

There are no special rules under the LGSM about the composition of the board.

Under the New LMV, all SAPIs must set up a formal Board of Directors.²⁹

SAPIs may adopt the same rules as the mandatory ones governing publicly-traded companies. If they do so, they are not required to have independent directors on their board, however.³⁰

Under the alternative rules set forth in the New LMV, SAPIs must have no more than 21 Board Members. These board members may be shareholders and / or corporate officers, but need not be. The Board of Directors may include at least 25% independent directors.³¹ The Independent Directors will not be major shareholders or officers, of course. Both types of Directors, however, must be approved by the shareholders.

Under the LGSM, the regime of duties and responsibilities for members of the board are not clear.³² The New LMV concepts such as 'duty of diligence,' and 'duty of loyalty,' however, now apply to SAPIs.³³

C. Statutory Examiner ("Comisario").

The LGSM requires the existence of a *Comisario*, who is appointed by the shareholders.³⁴ One of the *Comisario*'s key legal duties is to provide a statement to the stockholders on the accuracy of the financial statements of the corporation.³⁵

²⁵ Article 13, III New LMV.

²⁶ Article 16, III New LMV.

²⁷ Article 142 LGSM.

²⁸ Article 143 LGSM

²⁹ Article 14 New LMV.

³⁰ Article 15 New LMV.

³¹ Articles 15 and 24, New LMV.

³² Articles 157 and 158 New LMV.

³³ Articles 29 to 37 New LMV.

³⁴ Article 91, V LGSM.

³⁵ Article 166 LGSM.

Under the New LMV, the board of directors of a SAPI can establish an Audit Committee and appoint an independent external auditor that will assume the duties of the *Comisario*.³⁶

The freedom to choose to have an Audit Committee, is a way of applying Corporate Governance practices at the board level, instead of depending on the old figure of the *Comisario*, whose power-base was the shareholders.

SAPI shareholders have an option for purposes of the financials. They may adopt the corporate governance rules required of public companies. Doing so requires an affirmative act; they must formally adopt these rules. If they exercise this option, there is no difference, for purposes of corporate governance rules, between public companies and SAPIs, except for the fact that SAPIs are not required at any moment in time to have independent board members.³⁷ In the alternative, SAPI shareholders may opt for the rules set forth under the LGSM with a *Comisario* and without Board Committees.

III. Legal Capital Structure

The legal capital of a SAPI is the same as the one as for a SA. The minimum legal capital is \$50,000.00 (fifty thousand Mexican pesos). Either entity may decide, in its bylaws, to require more legal capital.³⁸ Both entities may, under law, adopt the regime of variable capital.

In both cases the capital invested must be evidenced by shares.³⁹ As was mentioned before, the shares may grant different rights to different classes of holders.

The main difference between a SA and a SAPI, for purposes of legal capital rules, is that under the LGSM, a SA may not repurchase its own shares.⁴⁰ Under the New LMV, by contrast, a SAPI may repurchase its own shares, and keep them as treasury shares. SAPIs may also re-issue shares they have bought back. The law allows the Board to decide all buy-back issues. Shareholders do not have to be consulted for these purposes. Thus, SAPI rights are allocated the same as in a public company in this regard.⁴¹

In summary, the SAPI is a new legal alternative for privately-held companies. All investors, controlling and non-controlling, acquire rights and obligations which allow them to have much more control and transparency than before, while allowing for a better alignment of interests among shareholders. It also creates incentives for founders and / or controlling groups to attract outside private equity, and even lets incoming venture capitalists establish rules to secure their equity.⁴²

³⁶ Article 15 New LMV.

³⁷ Article 15 New LMV. **PODOLSKY**, Sam. *Mexico's Corporate Governance Practices in Non-Listed Companies*. At <http://www.oecd.org/dataoecd/18/9/37329952.pdf>

³⁸ Articles 89 and 1 LGSM and 10, 12 and 13 New LMV.

³⁹ Article 111 LGSM and 13 LMV.

⁴⁰ Article 134 LGSM.

⁴¹ Article 17 New LMV.

⁴² **PODOLSKY**, Sam. *supra*. n. 37.