



# Initial Public Offerings

# 2018

**Second Edition**

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With contributions by:



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# Mexico

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## Introduction

### Brief history of IPOs in Mexico

Although there are Mexican issuers listed since the 1970s, the most recent history and launching of IPOs as they are currently known occurred in 1990 with the privatisation of Telmex (*Teléfonos de México*). The Telmex IPO was one of the most successful ones, supported by the increasing perception of Mexico leaving the 1980s debt crisis and adopting the free-market policies of President Carlos Salinas de Gortari, which included mass privatisation of state enterprises such as Telmex. From then on, several companies launched their IPOs in the following years, and the Mexican securities market started developing as one of the most significant in Latin America. It was not, however, until approximately 10 years ago, that IPOs in Mexico became more notable and for larger volumes, with a greater level of diversification in their investor base and more market depth. IPOs in ranges close to US\$1.0 billion have been very notable in the last few years, with companies such as Nemark, Cuervo (Becele) and OHL being good examples.

### Why are companies, domestic and foreign, choosing to go public in Mexico?

As in any other country, in Mexico, IPOs are a well-recognised mechanism to access new sources of capital. In addition, companies desiring to fund their business plans and continue their growth strategy experience financing limitations or, even if it is available, financing is offered at high costs. An IPO becomes, then, an alternative to fund their future capacities while they strengthen their corporate governance practices. It has also become a useful exit mechanism for private equity firms that have invested in Mexican companies as well as a practical cash-out scheme for existing shareholders. From the point of view of foreign companies, listing their securities at the Mexican *Sistema Internacional de Cotizaciones* or SIC, expanding their investor base, promoting their brands in jurisdictions other than Mexico and giving the opportunity to Mexican investors to invest in securities listed in other jurisdictions, makes the process worthwhile.

### In your view, are the current regulatory scheme and market practices conducive to going public in Mexico? Why or why not?

The Mexican legal framework has significantly evolved during the last few years to create new instruments and schemes to assist Mexican businesses in going public, such as the so-called Fibras, Fibras E, CKDs, SPACs and Cerpis. During the last two years, the Mexican legal framework has incorporated more instruments than in the 10 years previous. In addition, the Institutional Stock Exchange (*Bolsa Institucional de Valores*) ([www.biva.mx](http://www.biva.mx)) (“BIVA”), a new stock exchange, is about to be launched. At first sight, all these initiatives might be seen as conducive to an increasingly attractive environment to go public; however,

there are some challenges still to be faced. Mexico, historically, when compared to other Latin American economies such as Brazil, has had poor growth in terms of publicly listed companies. It is yet to be seen how BIVA, the new stock exchange, will affect or be able to promote new listings. One of the worst things that could happen is to have two stock exchanges with the same number of listed companies dividing their trading operations. There are theories that conclude that having two stock exchanges may fragment the market and affect the liquidity of the securities. Likewise, there are a number of other long-lasting discussions on a number of issues that still persist. For example, reforms to the Securities Market Law of 1975, later on reflected in the Securities Market Law of 2005, prohibited the offering of instruments bundling voting and limited-voting or non-voting stock, which had been a successful instrument in the market. During the 1990s, several companies successfully launched their respective IPOs of *certificados de participación ordinarios*, or CPOs, representing voting and limited-voting stock, which incentivised family-owned businesses to go public without excessively diluting their voting power, while granting all economic benefits to public investors. The result has been evident. Many family-owned businesses are reluctant to go public with fully voting stock that, at a certain point, will endanger control of the relevant company. The discussions so far have centered in disclosure issues. If there is a good disclosure on the instrument and the kind of rights granted to its holders, regulation should create the conditions for its issuance. There is also still work to do. Mexican regulations still do not provide enough detail as to day-to-day concerns such as the disclosure of information that, if made publicly available, may situate companies at a disadvantage *vis-à-vis* their competitors. Furthermore, the guidelines for the preparation of annual reports require, in certain instances, the disclosure of information that from a competition point of view might be detrimental to certain companies. In addition, although the Mexican Stock Exchange has been very active in promoting the listing of new companies, potential issuers still do not have enough information and knowledge on the benefits and implications of going public. For example, the current Securities Market Law provides for the so-called *Sociedad Anónima Promotora de Inversión Bursátil* or SAPIB, which was created as a pre-IPO or preparatory regime for medium-sized companies that intended to go public. In practice, the concept has not been as successful as it promised to be and a large number of medium-sized companies with the potential to becoming publicly listed companies are still struggling to find their way to grow.

Are companies that go public in Mexico more frequently of a particular type or from a particular industry? If so, why?

It has been the case that, during certain periods, specific industry sectors have taken pre-eminence in number of IPOs. During the period 2004–2014, the real estate industry accounted for approximately 30%–40% of the IPOs while the transportation and construction industries accounted for approximately 25%. Generally speaking, the reason for such distribution has been a combination of (i) the appetite of investors at a specific point in time for such industries, (ii) the current and expected growth of such industries, and (iii) the existing legal framework for those particular industries.

In addition, other specific political and economic initiatives have triggered IPO momentum in Mexico in specific industries. The privatisation of the airport system in the 1990s, for example, was implemented through a public bidding process, followed by the IPOs of the three resulting airport holding companies in 2000 and 2006, that made their inaugural listing, two of them on the Mexican Stock Exchange and NYSE, and the other one on the Mexican Stock Exchange and NASDAQ.

As a result of the Mexican energy reform, it is expected that energy-related companies should be active participants in the securities markets in the coming years. The infrastructure sector will definitely be another.

Is there a trend of the number of IPOs in Mexico, to the extent it is discernible?

The sophistication of the Mexican regulatory framework through, among other things, the creation of new equity-like securities or mechanisms such as the CKDs, Fibras, SPACs and Cerpis, has been paving the way for an increased number of IPOs in the country. During the last two years, Mexico has seen a clear trend towards a significant number of IPOs. Political and economic stability, however, will continue to play a significant role in the way in which the Mexican securities market will develop and perform in the future. The Mexican presidential election will be key and will prove how the financial and securities markets will react and develop during 2018 and the following years.

Are there any other noteworthy trends in your jurisdiction?

Public policies will be an important driver. The creation and support of financial education programmes will be key for the development and growth of the securities marketplace in Mexico. Strengthening the financial culture in the country will create knowledge and interest in the new generations for alternative investment opportunities such as equities of Mexican companies. An appropriate tax regime would also incentivise more companies to go public. Continuous discussions on potential tax reforms come and go, but a conclusion and definitive tax reform would definitively create a trend for an increasing number of IPOs in Mexico.

### **The IPO process: steps, timing and parties and market practice**

The main ways to structure an initial public offering (IPO) in Mexico are through: (i) a direct, primary dilutive offering of the company's shares; or (ii) a mixed offering that includes a primary offering and secondary non-dilutive offering (by shareholders selling previously acquired shares). The IPO is documented in share certificates deposited in *S.D. Indeval Institución para el Depósito de Valores, S.A. de C.V.*, which is Mexico's sole deposit institution.

Sometimes, due to certain restrictions on direct foreign investment, the IPOs are also made through the issuance of participation certificates (*certificados de participacion ordinaria*) by a Mexican trust, where the shares of the company are transferred to the issuer trust, although this is becoming less common as full foreign direct investment is permitted in almost all types of economic activity.

The National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) ("CNBV") is the main regulator of the securities market in Mexico.

The traditional stock exchange in Mexico is the Mexican Stock Exchange (*Bolsa Mexicana de Valores*) ([www.bmv.com.mx](http://www.bmv.com.mx)) ("BMV"). However, in the following months, the Institutional Stock Exchange (*Bolsa Institucional de Valores*) ([www.biva.mx](http://www.biva.mx)), a new stock exchange developed by *Central de Corretajes, S.A.P.I. de C.V.*, will start operations in Mexico. Meanwhile, below please find the traditional steps required for listing in the BMV.

In addition to the local exchange, the BMV manages the International Trading System (*Sistema Internacional de Cotizaciones*), which is an electronic mechanism that allows the trading of shares of foreign issuers listed on other stock exchanges. This mechanism can be used to trade shares from IPOs carried out abroad.

In order to carry out an IPO in Mexico, registration and authorisation by the CNBV is required for any securities to be publicly offered in Mexico. To trade in the BMV, the

relevant securities must be registered before the National Securities Registry (*Registro Nacional de Valores*) (“RNV”), and other information documents, such as a prospectus, legal opinions, financial statements and stock certificates, must be authorised and publicly disclosed. Trading of securities in the BMV is allowed upon authorisation and registration by the CNBV.

All issuers must file information documents with the CNBV and the BMV. Filings are made electronically through the CNBV and the BMV’s systems (known as STIV and Emisnet, respectively) and only the final filing of authorised documents is made in printed and executed form.

Companies listed in the BMV can be:

- Incorporated as or transformed into a limited liability corporation (*Sociedad Anónima Bursátil*) (“SAB”). This is the most common form for listed companies.
- Incorporated as or transformed into a transitory limited liability corporation created to support new business and ventures (*Sociedad Anónima Promotora de Inversión Bursátil*) (“SAPIB”). SAPIBs are used to support new businesses and raise capital for new ventures and have more flexible listing requirements (see below). SAPIBs must be converted into SABs within two years of listing their shares.

All public companies must adopt minimum corporate governance, comply with minimum size requirements, trading record and minimum marketability requirements set out in the Securities Market Law (*Ley del Mercado de Valores*), the CNBV Regulations (*Disposiciones de carácter general aplicables a las emisoras y a otros participantes del Mercado de Valores* or *Circular Única de Emisoras*) and the Mexican Stock Exchange Regulations (*Reglamento Interior de la Bolsa Mexicana de Valores*), as well as comply with the commercial practices of financial markets.

The timetable for a typical equity offering can range from four to six months and would typically be as follows:

- The parties meet for a kickoff meeting, where they discuss general terms of the deal and structure thereof, including the preparation of a working group list, a working calendar and step plan, (detailing all necessary steps to implement the IPO including any amendments that the company shall implement to its corporate by-laws to adopt the transformation and provide for a poison pill, any reclassification of existing shares, the new corporate governance and committees (audit and corporate practices), etc.).
- Typically, the underwriters meet with the CNBV and the BMV to present and explain the deal and advisers work in parallel in due diligence and in the preparation of the transaction documents.
- Several drafts of the IPO documents are prepared and discussed with the different teams involved in such a process before an initial public filing is done with the CNBV and the BMV.
- The preliminary prospectus is disclosed and underwriters start the roadshow with prospective investors, on which comments from such investors and other parties will be addressed or clarified in the subsequent drafts of the offering documents.
- Depending on the complexity of the deal, the CNBV and the BMV take from two to four weeks to review and comment on the offering documents.
- The parties include in the offering documents acceptable requirements and comments from the CNBV and the BMV, as well as comments and questions from investors, and make a subsequent filing.
- Depending on the feedback from prospective investors, the company together with the underwriters decide whether to continue with the offering or not (go/no-go).

- The CNBV and the BMV authorise the final version of the documents, and after filing final versions, the relevant securities are registered with the RNV.
- Securities are listed and traded on the BMV.

The CNBV takes more time to analyse documents from first-time issuers (such as in the case of IPOs), as they have no background concerning the companies' financial information or market behaviour. The BMV has a new issuers committee that admits or rejects new issuers. Subsequent offerings usually take less time than IPOs.

The parties commonly involved in an equity public offering in Mexico are the following:

- Issuer & selling shareholders. The company issuing the shares and the shareholders selling shares in the public offering. The issuer is responsible for drafting most of the prospectus content except for certain marketing sections for which the underwriters are primarily responsible.
- Underwriter. Underwriters are Mexican licensed broker-dealers. They structure the deal, have contact with potential investors, build the book and communicate with regulators. The underwriters market the securities and are liable for most of the prospectus content.
- Independent legal adviser. The independent legal adviser issues the legal opinion that states the issuer company is in good standing and in a position to issue the securities and that the transactions documents are valid and binding.
- The independent legal adviser usually collaborates in the drafting of the offering documents and signs the prospectus to assume liability for the relevant legal structure and information. Usually it is the legal adviser that conducts all formal communications and filings with the regulators.
- Independent auditor. The independent auditor reviews the company's financial statements and issues an auditor's opinion of the company's audited financial statements. The independent auditor signs the prospectus and is liable in connection with the financial information contained in the prospectus.
- Underwriters legal adviser. The underwriters hire legal advisers to perform a legal due diligence review of the prospectus and other marketing materials pursuant to the general regulations applicable to brokerage houses (*Disposiciones de carácter general aplicables a las Casas de Bolsa*).
- Other advisors. Depending on the structure and complexity of the deal, the parties may hire additional advisors.

### **Regulatory architecture: overview of the regulators and key regulations**

The CNBV is the main regulator of the securities market in Mexico, and the traditional stock exchange has been the BMV. However, as mentioned above, in the coming months, BIVA will start operations and will be an alternative for listing securities, including those to be offered in an IPO.

The CNBV is in charge of the RNV, which contains a database with relevant information concerning listed securities.

The main legal and regulatory framework is as follows:

- Securities Market Law (*Ley del Mercado de Valores*).
- CNBV Regulations (*Disposiciones de carácter general aplicables a las emisoras y a otros participantes del Mercado de Valores* or *Circular Única de Emisoras*), issued by the CNBV.
- Mexican Stock Exchange Internal Regulations (*Reglamento Interior de la Bolsa Mexicana de Valores*).



- General regulations applicable to brokerage houses (*Disposiciones de carácter general aplicables a las Casas de Bolsa*), issued by the CNBV.

A company applying for a primary offering of its shares must file, among other documents:

- A request for authorisation of the public offering, for registration before the RNV, and for publication of the issuance documents.
- Corporate information (incorporation deed, by-laws and powers of attorney).
- A prospectus.
- Placement notices.
- Opinions (such as the independent counsel's legal opinion and the independent auditor's opinion).
- Financial statements.
- A form of share certificates.
- Agreements (such as an underwriting agreement, a shareholders' agreement, if any, and other relevant agreements).
- Corporate resolutions.

These documents must be filed (along with other relevant documents) simultaneously with the CNBV and the BMV. The main marketing document is the prospectus which shall be published on the website of the BMV and on the issuer's website and, once authorised by the CNBV, printed in hardcopy and available for investors at the issuer's offices.

Once the documents and request for authorisation have been filed, the CNBV will then review and comment on these documents, and finally approve the documents. The Securities Market Law allows marketing of the securities after the relevant documents are made public. This allows the company to sell the relevant securities through the BMV.

Material information (information required to take an informed investment decision) must be disclosed in the prospectus. Generally, a prospectus must contain the following information:

- General information regarding the securities.
- An executive summary of the transaction.
- Risk factors for the investors as a consequence of their investment in the relevant securities.
- The main use of the proceeds to be obtained from the public offering.
- The structure of the company before and after the public offering.
- The distribution plan (securities marketing plan).
- Dilution risks (the risk of investors of being diluted with respect to their percentage of participation in the issuer's equity).
- Detailed information about the issuer company, such as:
  - A description of its businesses.
  - Existing legal actions or claims against the company.
  - Its corporate structure and main shareholders.
  - Financial information for the previous three years (or from the date of incorporation of the entity) concerning the issuer company and its group, as well as any other entity that contributed 10% or more to the issuer company's income or total sales in the previous year. As an exception, the issuer can provide financial statements for the last fiscal year only (provided that the statements are not older than six months) in the following cases: (a) when the issuer is a limited liability corporation created to support new business ventures (*Sociedad Anónima Promotora de Inversión Bursátil*); and/or (b) issuance of a restricted public offer (an offer made to institutional and qualified investors).

- A description of the company’s management structure and policies.
- A description of the company’s main assets and liabilities.
- A description of the responsible parties and individuals that must provide information to the CNBV and the BMV.
- If any report, statistics or other information contained in the prospectus was prepared by an expert, a statement of this expert must be included, indicating that:
  - this information has been included; and
  - the relevant expert consented to the inclusion of the information to the prospectus.

The generally accepted accounting standards in Mexico are the International Financial Reporting Standards (“IFRS”) issued by the International Accounting Standards Board. All financial statements must be audited by an independent auditor in accordance with the International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements issued by the International Auditing and Assurance Standards Board of the International Federation of Accountants. These standards are also applicable to financial statements of issuer companies where subsidiaries perform activities subject to the supervision of Mexican regulators.

Underwriting agreements are typically structured either as:

- Best efforts (*mejores esfuerzos*), where the underwriter(s) agree(s) to use best efforts to secure investors.
- A firm commitment (*en firme*), where the underwriter is responsible for unsold shares.

Firm commitment underwriting agreements are uncommon in Mexico. Greenshoe options (where underwriters receive the right to sell additional shares at the offering price, if demand for the securities exceeds the original amount offered) must be explicitly agreed or the underwriter will not be entitled to offer additional shares.

Stabilisation activities are permitted by the Securities Market Law and do not require a specific agreement. However, they can only be performed with funds obtained from securities sold after exercising a greenshoe option. The common practice is to authorise lead underwriters to enter into sub-placement or placement participation agreements with other broker dealers. Only underwriters can perform stabilisation activities in the BMV. Stabilisation activities can only be performed in the secondary market within 30 days of the offering. The underwriter can only use the funds it obtained from exercising a greenshoe option.

### **Public company responsibilities**

In general terms, public companies have the following ongoing obligations:

- (i) Reporting obligations
- (a) Public companies must provide annual reports. This information updates the prospectus and includes the company’s annual audited financial statements. The annual reports also provide information about the company’s:
  - capital structure;
  - board members that are holders of 1% or more of the company’s shares;
  - investors that hold 5% or more of the company’s shares; and
  - ten principal stockholders.
- (b) Companies must also provide quarterly reports. This information is filed pursuant to certain forms provided by the CNBV and the BMV. These reports include the company’s *pro forma* quarterly financial statements.

- (ii) **Information obligations.** Pursuant to the CNBV Regulations and the Mexican Stock Exchange Internal Regulations, public companies have an obligation to inform investors, within specific time frames, about the following:
- any shareholders' meetings;
  - corporate restructurings;
  - mergers or spin-offs; and
  - any notices addressed to their shareholders.
- (iii) **Disclosure obligations.** Public companies must disclose to the public any information that may affect the price or value of the shares (relevant events). The CNBV Regulations provide an indicative list of such relevant events. To determine if a specific event is relevant to investors, the company must consider if the event:
- is equivalent in value to 5% or more of the company's assets, liabilities or consolidated capital;
  - amounts to 3% or more of the previous year's total sales; and
  - if it is not possible to determine, the company must consider if the event constitutes relevant information for investors to make an investment decision, so as to understand the real situation of the company or what may affect the value of the shares.
- (iv) **Duty of care and duty of loyalty.** The Securities Market Law also imposes a duty of care and a duty of loyalty on members of the board of directors of publicly traded companies.

According to the Securities Market Law, the duty of care consists of acting in good faith and in the company's best interests.

The duty of loyalty consists primarily of maintaining the confidentiality of information received in connection with the performance of duties and abstaining from discussing or voting on matters where a member of the board has a conflict of interest.

The consequence of breaching the duty of care or duty of loyalty may be the obligation to pay losses and liquidated damages notwithstanding any other administrative or criminal actions that may be incurred.

Liability actions for losses and liquidated damages resulting from a violation of the duty of care or the duty of loyalty may be exercised solely for our benefit and may be brought by us or by holders representing 5% or more of the outstanding shares, and, if applicable, criminal actions may only be brought by the Mexican Ministry of Finance, after consulting with the CNBV.

### **Potential risks, liabilities and pitfalls**

#### Quiet period/misleading information

No offering nor marketing of securities are allowed before a public filing or disclosure of the preliminary prospectus and the other offering documents. Once these are publicly filed with the CNBV and the BMV, and publicly disclosed, the underwriters can:

- Start contacting potential investors freely.
- Reach clients through conference calls.
- Start the roadshow to market the securities (management presentations or meetings).

The publication of a prospectus that either contains misleading information or does not contain all the relevant information of the issuing company is considered to be a distribution of misleading information, which can result in civil, administrative and criminal liability.

### Breach of ongoing reporting obligations

Issuers must comply with the maintenance requirements and reporting obligations mentioned above. The penalties for breaching the continuing obligations range from suspension or cancellation of listed securities to personal liability of the individuals appointed to provide the information.

A very common cause of suspension of a listing by the BMV is the failure to file financial reports (annual or quarterly) of the issuer or the failure to disclose material information in a timely manner. The CNBV has also been actively reviewing whether public issuers are in compliance with accounting standards and if such standards are being applied on a consistent manner by issuers.

### Restrictions on market abuse/insider dealing

Any information in whole or in part that is not public and has, or may have, an impact on the value of specific listed stocks is deemed as “privileged information”.

Any person or persons that have access to privileged information as a result of their position in the issuer, or as an adviser to the issuer, must maintain confidentiality over that privileged information until that information becomes public. The following actions are deemed to constitute insider trading/dealing (*abuso de información privilegiada*) under the Securities Market Law:

- Performing or instructing operations, directly or through another person, on any type of listed securities, where the price of those securities may be influenced by that privileged information.
- Providing privileged information to any other persons, unless those other persons are entitled to that privileged information as a result of their position with the issuer, or with an adviser of the issuer.
- Issuing recommendations on listed securities that may be influenced by that privileged information.

There are several criminal and civil penalties applicable to individuals who perform insider trading/dealing. The criminal penalties range from significant fines to imprisonment. The CNBV has recently begun closer scrutiny of insider trading activity and has publicly sanctioned individuals that have traded on the basis of material non-public information, including people in senior management positions in diverse issuers.

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Mr. Maldonado has over 20 years of experience advising issuers and financial institutions in domestic and international, public and private, debt and equity offerings. During the last 12 months, Mr. Maldonado has represented at least five Mexican companies in establishing bond programmes and in the offerings under such programmes, two companies in their IPOs and another one in a tender offer. Mr. Maldonado has broad experience in securities regulatory matters and advises over 20 stock exchange listed companies on strategic and day-to-day securities matters. Mr. Maldonado advises and/or serves in different positions of the Board of several stock exchange listed companies such as Alfa, Grupo Televisa, Banorte, Grupo Aeroportuario del Centro Norte (OMA), Consorcio Ara, Grupo Famsa, Grupo Simec, Rassini and Volaris.

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Mr. Trad is considered a corporate finance all-rounder with broad experience in complex corporate transactions and structured finance matters. He regularly advises issuers in diverse local and cross-border tender offers, acquisitions, buyouts and joint ventures, advising both buyers and sellers and also institutional investors and private equity investors in different industries, including regulated industries and public companies. Additionally, he has collaborated in a variety of debt and equity issuances in the Mexican market and routinely advises diverse Mexican and foreign banks in lending transactions to Mexican companies.

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Mr. Echave has broad experience representing financial institutions and clients, domestic and international, in lending and corporate finance transactions, including the design and implementation of structured finance schemes. He has represented several companies, financial intermediaries and rating agencies in capital markets transactions, including securitisations, issuances of equity and debt instruments through public and private offerings in Mexico and abroad.

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