

For further information, please do not hesitate to contact us:
Uranga & Asociados
P.O. Box 1101
El Paso, Texas 79946-1101
TEL (347) 537-4929
www.urangayasociados.com

Vehicles for foreign investment in Mexico

Foreign investment in Mexico is ordinarily effected through a corporation, a limited liability company, a branch or a contractual joint venture. With a Mexican entity such as a corporation and limited liability company (LLC), the investors normally limit their liability to the amount of capital they are committed to invest. The capital stock is represented by shares of stock (or ownership or partnership interests, in the case of an LLC). A corporation's shares may have two or more different classes of shares with different values and rights, but the shares that correspond to a single class shall have the same value and rights. Preferred shares have the right to vote only on matters involving material amendments to the constitutive documents, mergers, dissolutions and other key corporate acts; they are, however, preferred in the payment of dividends. An investor in an LLC has only one ownership interest, which represents a specified percentage of the total capital of the company. The management of a Mexican entity may be carried out by a sole manager or by a board of at least two members.

Less frequently used vehicles include the branch (which is as cumbersome to establish as a subsidiary, and the foreign company is liable for its obligations) and the contractual joint venture (which also does not involve establishing a separate legal entity). In addition, both domestic and foreign investors may acquire the debt securities (bonds, certificates of participation, etc.) of Mexican corporations, LLCs and trusts, which in general are not affected by the 1993 law.

Mexican incorporation checklist

Following is a checklist of the steps involved in the incorporation of a Mexican corporation, normally either a *sociedad anónima* ("S.A.") or *sociedad anónima de capital variable* ("S.A. de C.V."), on behalf of a U.S. corporate shareholder (the "U.S. shareholder"), where the Mexican corporation would be a wholly-owned subsidiary of the U.S. shareholder and would not be listed on the Mexican stock exchange:

- 1. Power of attorney.** A bilingual power of attorney must be issued by the U.S. shareholder to its Mexican attorneys, to empower them to take the necessary incorporation steps before Mexican governmental authorities and a Mexican notary. This power of attorney should be signed by an officer of the U.S. shareholder before a notary public in the U.S. and the notary's appointment must be certified by the secretary of state (of the state where the notary was appointed) affixing an "apostille" (an internationally recognized authentication certificate) to the power of attorney. [A Mexican corporation must have at least two shareholders, but initially one of the Mexican lawyers may hold a

nominal share, which would be transferred to an affiliate of the U.S. shareholder after incorporation is complete (see item 9 below).]

2. Name permit. An application must be made to the *Secretaría de Relaciones Exteriores* (Ministry of Foreign Relations) for authorization for the Mexican corporation to use the corporate name chosen for it. The application must indicate three choices for the name, in order of preference.

3. Corporate charter, incorporation minutes. The *Estatutos* (corporate charter/bylaws) of the Mexican corporation must be prepared, along with proposed minutes of the initial meeting of shareholders which will (i) designate the members of the board of directors (or, in the alternative, the sole administrator) of the Mexican company, its principal officers and statutory auditor (*comisario*) and (ii) approve the issuance of powers of attorney to key representatives of the Mexican company for "acts of dominion," "acts of administration," "lawsuits and collections," etc. [The *Estatutos* must contain a clause (the so-called "Calvo clause") to the effect that the Mexican company's foreign shareholders waive any right to seek the protection of their own governments in the event of any dispute regarding the Mexican company.]

4. Foreign investment authorization. If the Mexican company is to engage in a business that is subject to restrictions under the Foreign Investment Law (e.g. banking, oil, telecommunications), an application for authorization must be submitted to (i) the corresponding Ministry or *Secretaría* and (ii) the Foreign Investment Commission, a dependency of the Ministry of Trade and Industrial Development (the *Secretaría de Comercio y Fomento Industrial* or "SECOFI").

5. U.S. shareholder documents. A copy of the corporate charter of the U.S. shareholder must be certified by the secretary of state of its state of incorporation, and an "apostille" certificate must be affixed to the certificate by such secretary of state. [In some circumstances, depending on the policy of the Mexican notary who will formalize the *Estatutos*, a certificate of an officer of the U.S. shareholder, verifying the authority of the officer who signed the power of attorney listed in item 1, must be notarized and the notary's identity verified by the secretary of state's apostille certificate.]

6. Certified translation. Item(s) 5 must be translated into Spanish by a licensed Mexican translator (*perito*).

7. Notarization. All of the foregoing items must be delivered to a Mexican notary, who should "protocolize" the act of incorporation by recording the *Estatutos* and minutes of the initial shareholders' meeting (the incorporation act or *Acta Constitutiva*) in his notarial books, and issue to the attorneys a certified copy of the incorporation act.

8. Tax ID number. To be able to open checking accounts, sign leases, etc., a certified copy of the incorporation act must be taken to the Ministry of Finance and Public Credit (the *Secretaría de Hacienda y Crédito Público* or "Hacienda"), which should issue a tax ID number for the Mexican company (its *Registro Federal de Causantes* or "R.F.C.")

number). The application for the R.F.C. must be signed by someone empowered by the Mexican company to do so (see item 3 above). The RFC must be obtained from the regional office of Hacienda where the Mexican company has its domicile, or a filing must be made at such office, if obtained elsewhere.

9. Transfer of nominal share. The nominal share of the Mexican company should be transferred to an affiliate of the U.S. shareholder, and the small transfer tax thereon must be paid. A tax return therefor should be filed with Hacienda by the party paying the transfer tax.

10. Registration of foreign investment. The Mexican company must be registered with the Foreign Investment Commission, and its foreign shareholders must be registered with the National Registry of Foreign Investments.

11. Filing with public registry. The incorporation act must be filed with the Public Registry of Commerce for the domicile of the Mexican company.

Post-incorporation registrations

1. Social Security. The Mexican company must be registered with the Mexican Social Security Institute (the *Instituto Mexicano de Seguro Social* or "IMSS") upon hiring its first employee. To obtain such registration, the company must deliver a copy of its incorporation act to an office of the IMSS, which will provide an application form to be completed by the company, whereupon the IMSS will issue an employee identification card naming the company as the employer. Each time the company hires or terminates an employee, it must give notice thereof to the IMSS within 15 days thereafter.

2. INFONAVIT and SAR. The company must also be registered with the National Institute for the Workers' Housing Fund ("INFONAVIT") and the Retirement Savings System ("SAR"). Registration forms may be obtained from the bank where the company maintains its checking account. Each bank has its own customized forms for this purpose. The bank gives the company an ID number in this connection, and every two weeks the company is required to deposit funds in segregated accounts with the bank to cover the amounts due to INFONAVIT and the SAR, which are equal to 5% and 2%, respectively, of the amount of the gross salary of the respective employee.

3. Chamber of Commerce. Under Article 5 of the Law of Chambers of Industry and Commerce, every industrial or commercial company is required to join a chamber of commerce responsible for the company's category of activities. The Mexican Supreme Court has declared this requirement to be unconstitutional, but the law has not yet been amended to conform to the court decision, and so it is still advisable for any company to register with the corresponding chamber in the month following that in which the company begins operating.

Miscellaneous issues

1. **Tax structuring.** The client may need a determination as to whether the foreign tax credit for Mexican income taxes paid by the Mexican company can be utilized effectively by the United States incorporating entity or individual, depending on the tax status of the incorporating entity (e.g., S corporation) or individual. This analysis affects the decision of whether to form the Mexican company as a stock corporation (S.A. de C.V.), limited liability company (S.de R.L. de C.V.) or other type of legal entity.

2. **Check-the-box.** If a limited liability company is formed, an SS-4 form needs to be filed in the United States to obtain an Employer Identification Number (EIN) on behalf of the Mexican company. The EIN is needed to complete IRS Form 8832 entitled *Election of Entity Classification*, which is the "check-the-box" form. The election for "partnership" classification needs to be filed within 75 days of the date of organization.

3. **Services company.** The client may want to consider forming a Mexican services company to provide administrative and labor services to an operating company in Mexico. Considerations include efficiency of business operations, centralizing functions, liability under the labor law and profit sharing. The shareholders (or "socios" of a limited liability company) of the operating company and those of the services company should not be the same in order to minimize the risk that the companies will be considered to be "de facto" the same. For the same reason, it is advisable that the services company provide services to more than one entity, if possible.

4. **Import registration.** The *Padron de Importadores* is a mandatory registration with Hacienda which is required of all companies importing into Mexico. This is a requirement separate from an import permit. In order to fill out the form, the RFC number is required. The form is processed in Mexico City by mail and it takes about 12 days to receive the registration number.

For further information, please do not hesitate to contact us:

Uranga & Asociados

P.O. Box 1101

El Paso, Texas 79946-1101

TEL (347) 537-4929

www.urangayasociados.com