
Corporate Governance Standards:

Significant Differences between Mexican Practices and NYSE Listing Standards

I. Introduction.

Under Section 303A.11 of the New York Stock Exchange (“NYSE”) Listed Company Manual, foreign private issuers with securities listed on the NYSE must disclose to the NYSE any significant way in which their corporate governance practices differ from those required of U.S. companies under NYSE listing standards. These listing standards mainly deal with disclosure and corporate governance (the “Standards”). The NYSE may issue a public reprimand letter to any listed company failing to satisfy the Standards. All domestic U.S. listed companies must disclose to the NYSE all significant deviations from the practices set forth by the Standards as described above.

In order to assist NYSE listed Mexican issuers in complying with the new requirement, this memorandum describes the significant differences between the corporate governance requirements in Mexico and those applicable to U.S. companies under the Standards. Needless to say, every Mexican issuer will need to examine its own corporate governance practices, not only those mandated by Mexican law, but also those reflected in its own organizational documents and in resolutions of its board of directors, shareholders and other corporate bodies. This memorandum does not address those individual differences but rather attempts to identify areas common to all Mexican companies and identify where they may differ from the Standards. Generally, the Standards do not require disclosure pursuant to Section 303A.11 of the NYSE Listed Company Manual unless otherwise noted in this memo. Each CEO of a listed company must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any significant non-compliance with the Standards.

For purposes of presenting such differences, this memorandum has been organized by corporate bodies and any differences applicable to each body are set forth under the relevant section.

II. General Shareholders’ Meeting.

Shareholder Approval of Equity Compensation Plans.

The Standards require that listed U.S. companies’ shareholders be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions. Mexican law does not specifically provide for the approval process of equity compensation plans; however, if the implementation of such equity compensation plans involves a capital increase, then such capital increase must be approved by the shareholders before becoming effective.

III. Board of Directors.

A. Management of the Company.

The Standards require that the board of directors of listed U.S. companies comprise a majority of independent directors. No director qualifies as “independent” unless the board of directors affirmatively determines and discloses that the director has no material relationship with the listed company (either directly or indirectly). Additionally, there are certain tests to determine the independence character of the directors.

Mexican law provides that a board of any listed company must be composed by a minimum of five and a maximum of twenty directors, of which at least twenty-five percent should be independent directors. No disclosure regarding the absence of material relationships with the listed company is required from the board of directors of Mexican listed companies. Additionally, the criteria to determine the independence of the directors is not set forth in Mexican securities laws, but rather in the Recommended Corporate Practices Code (“RCP Code”), as described in Section V hereof. Such independence criteria do not vary significantly from the Standards.

B. Frequency of Meetings.

The Standards require that the non-management directors of each listed U.S. company meet at regularly scheduled executive sessions without management, empowering non-management directors to serve as a more effective check on management. If the group of non-management directors includes some directors who are not independent, however, listed companies should schedule an executive session including only independent directors at least once a year.

Mexican securities laws provide that the board of directors shall meet at least every three months. However, it does not provide for non-management executive meetings, or meetings of independent directors.

C. Nominating/Corporate Governance Committee.

The Standards require that listed U.S. companies have a nominating/corporate governance committee composed entirely of independent directors. The committee must also have a written charter that addresses both the committee’s purpose and responsibilities and an annual performance evaluation of the committee. Minimally, the committee’s purpose and responsibilities must be to identify individuals qualified to become board members, consistent with criteria approved by the board; to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; to develop and recommend to the board a set of corporate governance principles applicable to the corporation; and to oversee the evaluation of the board and management.

Mexican securities laws set forth the ability of the board of directors to constitute one or more intermediate corporate bodies; however, it only sets forth specific provisions with respect to an audit committee. Therefore, the formation of a nominating/corporate governance committee is not mandatory. Notwithstanding the foregoing, the RCP suggests maintaining one or more committees to assist the board of directors in the following areas: evaluation and compensation, audit, and finance and planning.

D. Compensation Committee.

The Standards require that listed U.S. companies have a compensation committee composed entirely of independent directors. The committee must also have a written charter that addresses both the committee’s purpose and responsibilities and an annual performance evaluation of the

committee. Minimally, the committee's purpose and responsibilities include, in addition to other compensation matters, to prepare a compensation committee report on executive compensation as required by the SEC; the review and approval of corporate goals and objectives relevant to CEO compensation; evaluation of the CEO's performance in light of those goals and objectives; and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation.

As described in III (C) above, the audit committee is the only committee required under Mexican laws applicable to listed companies.

E. Code of Business Conduct and Ethics.

The Standards require that listed U.S. companies adopt and disclose a code of business conduct and ethics for directors, officers, and employees, and promptly disclose any waivers of the code for directors or executive officers. Each company may determine its own policies, but all listed U.S. companies should address conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of company assets, compliance with laws, rules and regulations including insider trading laws, and reporting of illegal or unethical behavior.

Mexican law does not impose listed companies the obligation to adopt a code of business conduct and ethics, or any related internal code.

IV. Audit and Financial Information.

A. Audit Committee.

The Standards require that the audit committee of all listed companies, including foreign private issuers, satisfy the requirements of Rule 10A-3 of the Exchange Act, also printed in Section 301 of the Sarbanes-Oxley Act. Foreign private issuers must comply with these new standards by July 31, 2005. Therefore, all listed companies on the NYSE must comply with the Standards with respect to the audit committee, which include the following general concepts:

- (a) every member of the audit committee shall be an independent director¹;
- (b) the audit committee shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee;
- (c) the audit committee shall establish procedures for the handling of complaints received by the issuer, and certain concerns regarding accounting or auditing matters; and
- (d) the audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary, to carry out its duties.

Although Mexican law only provides that the company shall form an audit committee composed entirely of company directors, of which its chairman and the majority of its members must be independent directors, the Standards require that all listed companies, regardless of their place of

¹ The Securities Exchange Commission may exempt particular relationships when appropriate.

incorporation, comply with such standards with respect to the items set forth above for the audit committee.

Beyond the mandatory requirements for all listed companies, as set forth above, the Standards require that the audit committees of domestic listed companies have a minimum of three members. One member of this committee must also have an accounting or related financial management expertise.

Mexican law does not provide for a minimum or maximum number of persons to form the audit committee; however, the RCP Code recommends a minimum of three and a maximum of seven directors. Applicable provisions are silent with respect to an accounting or related financial management expertise.

B. Main Responsibilities of the Audit Committee.

The Standards require that the audit committee of a listed company has a written charter that addresses the committee's purpose, the duties and responsibilities of the audit committee, and an annual performance evaluation of the audit committee. The audit committee's purpose, at a minimum, must be to prepare an audit committee report as required by the SEC to be included in the company's annual proxy statement and to assist board in the oversight of several matters.

Mexican law does not require an existence of a written charter for the committee. The purpose and responsibilities of the audit committee under Mexican law do not vary significantly from those required by the Standards for U.S. listed companies.

C. Internal Audit.

The Standards require that each listed U.S. company have an internal audit function to provide management and the audit committee with ongoing assessments of the company's risk management processes and system of internal control. Although recommended by the RCP Code, Mexican law does not require listed companies to have an internal audit function, because of the existence of the surveillance committee which typically carries out an internal auditing function within a company.

Under Mexican law, the surveillance committee consists of one or more corporate examiners. The surveillance committee carries out its duties independently from the company's internal auditors. The Standards do not provide for a similar figure. The main authorities and responsibilities of the surveillance committee are to: (i) request monthly financial statements to the board of directors; (ii) perform a study of the operations, documentation, files and evidence to inspect and supervise the company, and prepare and deliver a report thereof; (iii) attend all Board meetings, Shareholders' Meetings, and audit committee meetings with no voting rights; and (iv) generally scrutinize without limitation and at all times the operations of the company.

V. Miscellaneous.

A. Corporate Governance Guidelines.

While the Standards require that listed U.S. companies adopt and disclose corporate governance guidelines including, among others, director qualification standards, director responsibilities and director access to management, Mexican companies are only obligated to disclose their compliance level with the RCP Code. The RCP Code is a non-binding set of recommendations to, among other purposes, improve the corporate governance of Mexican companies. The RCP Code includes provisions regarding the performance of the Board and mechanisms to support the Board's evaluation, compensation, audit, financial and corporate planning functions, as well as

guidelines to disclose information to shareholders and third parties, and the communication between the Board and the shareholders.

B. Disclosure in the Company's Website.

The Standards require that a listed U.S. company's website include its corporate governance guidelines and the charters of its most important committees. Mexican companies shall also disclose in their websites certain corporate information, including all financial reports, relevant legal information, and its compliance level with the RCP Code. Although the disclosure requirements have similar spirits, Mexican companies are not obligated to adopt committee charters and therefore no such charters could be published.

This memorandum is not intended to be exhaustive or fully detailed, and the information contained herein is provided for information purposes only and should not be construed as legal advice on any subject matter. The recipients of this memorandum should not act or refrain from acting on the basis of any content included in this memorandum without seeking the appropriate legal advice on the particular facts and circumstances at issue from an attorney licensed in the relevant jurisdiction.

Please feel free to contact any of us if you have any comments or questions or if we may of any further assistance in connection with this or any other matters.

Best regards.

Laura J. McMahon.
Fulbright & Jaworski L.L.P.
Houston, Texas, U.S.A.
Tel. +1 (713) 651-5658.
lmcmahon@fulbright.com

Jaime A. Treviño.
J.A. Treviño Abogados S.A. de C.V.
Monterrey, N.L. México.
Tel. +52 (81) 8335-4200, Ext. 101.
jtrevino@jatabogados.com

May 2004.

This article was written as a joint effort between J.A. Treviño Abogados S.A. de C.V. and Fulbright & Jaworski L.L.P.

www.jatabogados.com

Disclaimer: J.A. Treviño Abogados S.A. de C.V. (the "Firm") does not necessarily endorse, and is not responsible for, any third-party content expressed in this article. Any article, quote, or any other type of information solely reflect the views and comments of their respective authors. Any article, comment, quote or any other information appearing under the authorship of any person or legal entity other than the Firm, even if related to the Firm, solely represents the opinion, comment or position of such author. The information contained in this article is provided for informational purposes only, and should not be construed as legal advice on any subject matter. The information contained in it is protected as property of the Firm. No recipient of this article, clients or otherwise, should act or refrain from acting on the basis of any content included in the article without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from an attorney licensed in the relevant jurisdiction. This article contains general information and may not be updated nor reflect current legal developments, verdicts or settlements. The Firm expressly disclaims all liability in respect to actions taken or omitted based on any or all of the contents of this article.

© 2004 J.A. Treviño Abogados S.A. de C.V., Monterrey, N.L. Mexico.