

# INCORPORATING IN MEXICO

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## IMPORTANCE OF CHOOSING THE PROPER CORPORATE VEHICLE

Choosing the proper legal framework (or corporate vehicle) to develop a business in Mexico could result in either success or failure to any investment project. There are many factors that come into play and that are indeed essential to any business venture. These factors include the following: 1) easiness and promptness of formation or incorporation; 2) structure and control of management [or administration]; 3) liability and financial risk for the owners; 4) continuance of existence regardless of changes or transfer in ownership rights; 5) form of profit distribution [or losses]; and 6) taxing strategies or advantages.

All of the previous factors should always be considered in choosing any corporate vehicle such as a *sociedad anónima* (business corporation), *sociedad de responsabilidad limitada* ("S" corporation or limited liability company), *sociedad civil* (professional corporation), or a *sociedad en nombre colectivo* (general partnership).

The analysis and assessment of those factors can and should only be made on a case by case basis considering the specific business venture. Therefore, considering that those factors are known and that a *sociedad anónima* has been diligently chosen, we will try to provide along this short article only the basic and general information that is needed in order to begin the incorporation process, as well as the best available options to conduct the incorporation process.

## GENERAL CHARACTERISTICS OF THE BUSINESS CORPORATION (SOCIEDAD ANÓNIMA)

Mexico's General Corporations Act (*Ley General de Sociedades Mercantiles*) requests for a minimum of at least two shareholders to form any type of legal entity. Each initial shareholder or incorporator has to subscribe at least one stock certificate, and must appear before a Mexican Notary Public to sign the incorporation deed in the Notary's Protocol Book (other options are available and will be provided further in this article).

The incorporation deed (called *acta constitutive*) will comprise both the articles of incorporation as well as the corporate bylaws, and will therefore provide specific regulation for governance of the company, management, profit distribution, shareholder voting and preference rights, etc.

The incorporation deed will necessarily have to provide for an immediate form of management: either a Sole Administrator (*administrador único*) or a Board of Directors (*Consejo de Administración*) with a minimum of three people to act as President, Secretary and Treasurer. The incorporator may be able to fill these roles temporarily, or be appointed as a sole administrator instead.

The *sociedad anónima* requires for duly appointed Comptroller (*comisario*) which will permanently oversee and guarantee that all corporate duties are met during the course of life of the company.

A decision must also be made addressing which members of the Board of Directors will be the legal representatives of the corporation (normally at least the President is appointed as such). The legal representatives will then be granted a full power of attorney to act on behalf of the company, with the possibility of limiting such power of attorney for operations not to exceed a certain amount, or in regard to certain specific tasks (i.e. one may require the joint action of two of the representatives for some actions or for transactions of more than a certain amount).

A name must also be chosen and this must not be similar to any existing corporate name registered with the Foreign Affairs Ministry (*Secretaría de Relaciones Exteriores*). A corporate name search must be performed previously in order to verify that there is no similar name already registered and that the incorporation process will be granted. The name may be any word with no meaning in any language, and will always be followed by the abbreviations "S.A. de C.V."

Finally, the company capital must be determined at the time of incorporation (which we suggest to set at a minimum amount of fifty thousand pesos); as well as the number of shares of stock. Since individual shares cannot be divided, the number must be big enough to allow for any transfer or distribution of shares you may encounter in the near future. We normally use 100 shares, but it could also be 1000 or even more.

All these characteristics and governance principals may be changed at any time by a shareholders' meeting in the event there is a need to modify the company's by-laws according to new needs or requirements.

#### **THE PROCESS OF INCORPORATION: GETTING INFORMATION READY**

To begin the incorporation process you and your Mexican counsel will need first-hand the following information:

- Specify a broad general PURPOSE for the company
- Place of business (city)
- Capital stock (usually the minimum)
- Initial contributions or capital stock for each shareholder

- Form of management (sole administrator or board of directors)
- Appointing a comptroller (*comisario*) who will be in charge of overseeing that all corporate obligations are met
- Shareholders' general information including: 1) name; 2) place of birth; 3) date of birth; 4) marital status; 5) place of residence; 6) TIN number (tax identification number); and 7) a copy of each member's ID.

## OPTIONS AVAILABLE FOR INCORPORATING

Getting a corporation formed in Mexico does not necessarily mean that the shareholders have to travel here to get things done. This task can be turned to a third party who can act on your behalf (shareholders) and secure the incorporation from start to end. This could either be your Counsel in Mexico or a duly appointed legal representative. The three options available are as follow:

- 1) Each shareholder appearing directly and personally before the Notary to form the *sociedad anónima*. In this scenario, the shareholders would have to get a business entry form or permit (FM3) to be able to conduct a legal transaction while in Mexico (by signing the corporate deed). This could slow down the incorporation process somehow and will add slight costs for the incorporation. It is until all permits for the shareholders have been secured that the Notary will allow execution (signing) of the corporate deed (*acta constitutiva*);
- 2) Forming the company by a third party and eventually assigning all shares. In this scenario a third party (Mexican citizen) could have the corporation up and running immediately, but you would have to further on hold a general shareholders meeting to assign all stock rights to the foreign investors. This will not stop or slow your venture in any way. It will only increase your costs significantly.
- 3) Forming the company under your names but through legal representatives. In this scenario you could appoint a Mexican party as agent or legal representative of each shareholder. Each shareholder would have to grant a formal power of attorney to specifically form a company and contribute a fixed percentage of the capital stock. This process of incorporation is also fast, and there is a slight increase in costs and fees for powers of attorney to have full binding effects in Mexico. This procedure is the one recommended most by Mexican law firms.

## 1-2-3 STEPS FOR THE INCORPORATION PROCESS

The incorporation process in general carries the following necessary steps: 1) Drafting and execution of the articles of incorporation and corporate bylaws in Spanish language (*acta constitutiva*); 2) Filing for corporate name search and name and company registration before the Foreign Affairs Ministry

(*Secretaría de Relaciones Exteriores*); 3) Preparation and execution of articles of incorporation and corporate bylaws before a Notary Public; 4) Filing of company activities before the Federal Revenue Office (*Hacienda*); and 5) Filing of the *acta constitutiva* before the City's Public Registry of Property and Commerce.

The foregoing are just the essential requirements to incorporate in Mexico. There are many rules and regulations that need to be taken into consideration before running operations. This means making sure that all local, state and federal permits, licenses and authorizations are secure for the specific business activity that the company will engage in.

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