

## RECENT LEGAL DEVELOPMENTS IN MEXICO

### **New Mexican Securities Market Regulations Provide for Public Offerings of "Development Capital Certificates" to Finance Acquisitions and Infrastructure Projects.**

On July 22, 2009, the *Comisión Nacional Bancaria y de Valores* (the National Banking and Securities Commission or "CNBV") issued new regulations providing for public offerings of investment trust fund certificates called Development Capital Certificates ("DCCs") to be listed on the *Bolsa Mexicana de Valores* (the Mexican Stock Exchange or "MSE").

Under the new regulations, investment trust funds may be formed to raise capital in public offerings of DCCs on the Mexican Stock Market in order to finance one or more projects or to acquire the shares of one or more companies.

DCCs must have a definite maturity date, and must entitle certificate holders to participate in a portion of the return on the underlying investments or in the proceeds of a sale thereof.

The regulations establish two types of investment trust funds eligible to offer DCCs to the public:

- (i) Trusts established for the purpose of acquiring the equity of a single specified company (which may be either private or publicly traded) or financing a single specified project; and
- (ii) Trusts established for the purpose of acquiring the equity of more than one specified company (in which case target companies may also be either private or publicly-traded) or financing one or more projects.

The main purpose of the new regulations is to create a vehicle to provide for financing and investing in specific projects (especially in infrastructure) as well as private equity-like investments in specific target companies or sectors.

The new regulations establish corporate governance and disclosure requirements similar to those

applicable to publicly traded companies for the investment trust fund, its administrator and the companies and projects in which the trust fund invests. The most significant requirements include the following:

- (i) The trust fund must hold a certificate holders' General Assembly to approve any acquisition or series of concurrent or successive acquisitions made within a 12-month period representing 20% or more of the trust fund's total assets.
- (ii) A Technical Committee will direct and supervise the trust fund's management, with day-to-day operations to be conducted by a Trust Fund Administrator or Investment Committee.
- (iii) At least 25% of the members of the Technical Committee must be independent with respect to the target companies and the Trust Fund Administrator or settlor. The Technical Committee must approve: (a) the trust fund's investment policy or criteria; (b) transactions representing 5% or more of the trust fund's assets; (c) transactions with related parties; and (d) the terms and conditions of the Trust Fund Administrator's mandate.
- (iv) Dissenting votes of any of the Technical Committee's independent members as well as any voting agreements among any of its members must be publicly disclosed, including those arrangements of the Technical Committee members to vote in the same manner as the Trust Fund Administrator.
- (v) Holders of 10% of the trust fund's aggregate outstanding DCCs are entitled to call a certificate holder General Assembly as well as to appoint and remove one member of the Technical Committee, while holders of 20% of the DCCs are entitled to judicially challenge any decision made by the certificate holders' General Assembly.
- (vi) Any voting agreement among holders of DCCs must also be publicly disclosed.
- (vii) In order to register its DCCs and offer them to the public, the trust fund must submit the

following documentation in advance to the CNBV:

- a. An application to register the DCCs at the *Registro Nacional de Valores* (National Securities Registry), including financial information, a draft of the trust agreement, the general terms and conditions of the public offering, the trust fund's investment policy or criteria and a form of DCC certificate; and
  - b. A comprehensive *prospecto de colocación* (public offering prospectus), including disclosure of an investment timeline, risks related to the investments and the trust fund's investment policy or criteria.
- (viii) Trust funds offering DCCs must also file the following periodic reports with the CNBV and the Mexican Stock Exchange:
- a. Audited annual financial statements in accordance with Mexican GAAP for the investment trust fund and, if applicable, any target company representing 10% or more of the trust fund's assets;
  - b. Annual report of the trust fund including disclosure of information on each of the target companies and status of the trust fund's implementation of its business plan and investment timeline;
  - c. Quarterly financial information on the trust fund and, if applicable, on each target company representing 10% or more of the trust fund's assets; and
  - d. Completed questionnaire on the trust fund's level of adherence to a voluntary code of best-practices.
- (ix) Trust funds must also disclose material events (as defined under the securities regulations applicable to publicly traded companies) with respect to the trust fund and all of its target companies.

According to the Mexican Stock Exchange, DCCs will generate a new trading market on the exchange, as has been the case with comparable investment vehicles established on other stock exchanges, such as Special Purpose Acquisition Companies (SPACs) on The New York Stock Exchange; Alternative Investment Vehicles on

Euronext; Income Trusts on the Toronto Stock Exchange; Infrastructure Funds on the Australian Securities Exchange; and the Specialist Fund Market on the London Stock Exchange.

As a result of the new stock market regulations, on August 4, 2009, the *Comisión Nacional del Sistema del Ahorro para el Retiro* or "CONSAR" (National Pension Savings Commission) issued new rules permitting pension funds to invest in DCCs provided they comply with certain conditions, including the following:

- (i) The trust fund's investments must be in infrastructure projects in Mexico;
- (ii) No investments can be made in companies listed on the Mexican Stock Exchange;
- (iii) The DCCs must not provide for additional contributions from existing certificate holders; and
- (iv) Pension fund administrators must combine their investments in DCCs with parallel investments in debt instruments guaranteeing at least the face value of each DCC for the length of its term.

The limit on the amount that may be invested in DCCs will vary depending on the type of pension fund. There are five types of Mexican pension funds classified in order of the most to the least conservative based on the age and risk profile of the relevant workers: *Siefore Básica* (Basic Pension Fund 1), which is not permitted to invest in DCCs; *Siefore Básica 2* (Basic Pension Fund 2), which may invest up to 5% of net assets in DCCs; and *Siefore Básica 3, 4 and 5* (Basic Pension Funds 3, 4 and 5), which may invest up to 10% of net assets in DCCs.

The new rules for pension funds are significant because the total net assets under management in voluntary and compulsory pension systems in Mexico are approximately Ps. 1,039 billion (which is the equivalent of US\$77 billion at Ps. 13.5 pesos per dollar).<sup>1</sup> Thus, pension funds represent an important potential market for investments in DCCs.

<sup>1</sup> Source: CONSAR, data as of July 31, 2009.



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**FOR FURTHER INFORMATION, CONTACT:**

**SANTIAGO CORCUERA-CABEZUT**

**PARTNER**

E-MAIL: [SCORCUERA@CURTIS.COM](mailto:SCORCUERA@CURTIS.COM)

**ANTONIO PRIDA**

**PARTNER**

E-MAIL: [APRIDA@CURTIS.COM](mailto:APRIDA@CURTIS.COM)

**RODRIGO VALVERDE**

**PARTNER**

E-MAIL: [RVALVERDE@CURTIS.COM](mailto:RVALVERDE@CURTIS.COM)

**FELIPE ALONSO**

**ASSOCIATE**

E-MAIL: [FALONSO@CURTIS.COM](mailto:FALONSO@CURTIS.COM)

**CURTIS, MALLET-PREVOST, COLT & MOSLE LLP**

RUBÉN DARÍO 281, PISO 9  
COL. BOSQUE DE CHAPULTEPEC  
MÉXICO, D.F. | 1580  
MÉXICO

TEL: +52 55-5282-1100

FAX: +52 55-5282-0061

**CURTIS, MALLET-PREVOST, COLT & MOSLE LLP**

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