

Incorporating a Mexican Entity

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Many U.S. companies looking to strengthen their position in the Mexican market will choose to incorporate a Mexican subsidiary sales office. Having a local subsidiary offers many advantages not otherwise available to companies exporting or doing business in Mexico, including:

- Delivering goods and services directly to Mexican customers supported by a Mexican invoices (*factura*)
- Contracting local sales personnel on a full-time basis
- Bidding on government contracts otherwise reserved for Mexican suppliers
- Contracting and developing an in-house network of distributors

Once a U.S. exporter decides to incorporate in Mexico, the next step is to choose the appropriate business entity. Mexican law recognizes the following:

- (1) Limited liability stock corporation or "*sociedad anonima*"
- (2) Limited liability company or "*sociedad de responsabilidad limitada*"
- (3) General partnership or "*sociedad en nombre colectivo*"
- (4) Limited partnership or "*sociedad en comandita simple*"
- (5) Limited partnership with shares or "*sociedad en comandita por acciones*"
- (6) Cooperative association or "*sociedad cooperativa*"

Each of these entities may be organized as a variable capital company (*sociedad de capital variable*).

LIMITED LIABILITY CORPORATIONS

One choice for U.S. companies is to create a limited liability stock corporation or "*sociedad anonima*" with variable capital ("*S.A. de C.V.*"), parallel to a typical closely-held U.S. corporation.

The steps to incorporate an S.A. de C.V. are the following:

- A permit from the Ministry of Foreign Affairs must be obtained for the use of the corporate name. Three names are provided to the Ministry in order of preference, and the name is authorized on that basis. If all three choices are unavailable, a new list must be submitted. The name authorization takes one or two days to process. Once authorized, the interested party has 90 business days to incorporate or the authorization expires.
- Each shareholder must grant a special power of attorney to the individual(s) in Mexico designated to carry out the incorporation tasks (usually the company's Mexican attorney or attorneys). The powers of attorney must be notarized by a local notary public in the United States, and apostilled by the State Secretary of State's office or in accordance with the Hague Convention. Then the power of attorney must be translated into Spanish by an official translator, and notarized by a notary public in Mexico (*notario público*).



- The company's articles of incorporation must be formalized before a Mexican *notario público* and registered in the Public Registry of Commerce that corresponds to the company address. The company's articles and bylaws will generally include:
- a) The name and type of company
 - b) The number of shareholders and their names, nationalities, and percentages of ownership
 - c) The company's corporate address; that is, its principal place of business in Mexico
 - d) The company's specific corporate purpose (a statement of "any lawful business activity" is not acceptable)
 - e) The duration of the company, which may be for an indefinite period of time or a certain number of years
 - f) The type and amount of stock or ownership interests
 - g) Management rules and powers of attorney enjoyed by managers
 - h) Appointment of managers, and designation of individuals who will sign in the company's representation
 - i) Method of dividing profits and losses among partners/shareholders
 - j) Amount of the reserve fund
 - k) Causes for premature dissolution of the company
 - l) Procedure for dissolving the company
 - m) Method for appointing liquidators
 - n) The designation of the examiner, who is responsible for overseeing the company officers' compliance with corporate law. The examiner may be a shareholder but not a company employee or board member. Usually, the company's external auditor in Mexico is the appointed examiner.
 - o) The names of the individuals to receive powers of attorney from the company and the types of power granted. There are three types of general powers of attorney: acts of administration, lawsuits and collections, and acts of dominion. All three powers are granted to the board of directors to be exercised jointly by all of its members. However, powers of attorney for claims and collections, acts of administration, and authority to open and close bank accounts are granted individually to the general manager or to the person who will be handling the company's normal business activities.
 - p) Procedure for transferring shares and increasing and decreasing capital

LIMITED LIABILITY COMPANIES

Another vehicle available under the Company Law is a *sociedad de responsabilidad limitada*, or a limited liability company ("SRL"). An SRL is formed by a minimum of two members and a maximum of fifty. The members' obligations are limited to the payment of their equity contributions, but their interest cannot be represented by negotiable certificates. Unless otherwise agreed, members share in profits and losses in proportion to their ownership interest.

The main reason many U.S. investors choose an SRL is that the company is treated as a partnership for U.S. tax purposes, and the taxation of both the members and the company/partnership in the United States is avoided. Moreover, when filing their U.S. tax returns, the individual members may offset the SRL's gains and losses with their other gains and losses from similar partnerships in the U.S. or abroad.

The procedures for organizing a limited liability company are basically the same as the procedures for a corporation.

BRANCH OFFICES

Under Mexican corporate law, a foreign company may conduct business in Mexico by registering a branch office. Since registered branches are legal entities in Mexico, they may open bank accounts and issue invoices. Branches are considered a permanent establishment in Mexico for tax purposes

A branch office, however, does not have a separate legal existence from the foreign company, which may be liable for acts performed by the branch in Mexico. On the other hand, if a Mexican company is established, it will have limited liability and the foreign parent cannot not be held liable for the acts or omissions of the Mexican subsidiary. In other words, the corporate veil of a Mexican entity cannot be pierced to reach its shareholders' assets.

Branch offices are also rather uncommon in Mexico and may encounter a degree of general resistance in doing business.

OTHER CORPORATE START-UP REGISTRATIONS

Regardless of the chosen vehicle, once the incorporation is complete the new entity must carry out the following actions before becoming operational:

- Obtain a federal taxpayer identification number from the Federal Taxpayers' Registry. This number permits the company to conduct business, open bank accounts, invoice customers, pay employees, and deduct taxes from employees' wages. To obtain a taxpayer number, the company must have a corporate address.
- Enroll in the National Registry of Foreign Investment. Under the Foreign Investment Law (FIL), all foreign firms and Mexican firms with foreign participation must register and file annual reports on the nature of the investment and its results. The FIL also spells out the specific sectors in which foreign investment is restricted or limited. Thus, prior to incorporating in Mexico, U.S. firms are advised to consult with their legal advisor about the FIL regulation of their proposed Mexican activity.
- Obtain an importer's license (prior to importing raw materials, equipment, machinery or any other goods).
- Ensure that foreign shareholders (companies and individuals) in the company notify *Hacienda* that they have acquired shares in a Mexican company.
- Enroll both the company and the workers in Mexico's Social Security Institute (IMSS), Workers' Housing Fund (INFONAVIT), Retirement Savings Fund (SAR), and related institutions.
- Prepare and execute employment agreements or a collective bargaining agreement between the Mexican subsidiary and its Mexican employees, in accordance with Mexican labor law.

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