

MEXICO

Ritch Mueller



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Mexican issuers to file new report on the sale of shares between foreign residents

Juan José Paullada and Eric Palacios of Ritch Mueller explain why the new report's due compliance and enforceability still carries complexities

The Tax Administration Service (SAT) has historically struggled when it comes to auditing and assessing share transfers among foreign residents that derive in Mexican source income.

This has been the case considering that, as opposed to what happens when the purchaser is a Mexican resident, in a transfer of shares among foreign residents the purchaser is not required to withhold any tax whatsoever, leaving the responsibility of paying any taxes due from the transaction in the hands of the foreign seller (over which the SAT may have limited visibility and resources to enforce and collect).

In order to mitigate this revenue leakage, the Mexican Congress approved a reform to Article 76 of the Mexican Income Tax Law, establishing that sale transactions among foreign residents that derive in Mexican source income, must be reported by the Mexican issuer within a month following the transaction (the report). As part of the report, companies must disclose the following information:

- Date of the transaction;
- Name, tax identification number and country of residence of the foreign residents; and
- Date in which the income tax due was paid (if any), and the corresponding amount.

If the Mexican issuer fails to file the report, it will be considered as jointly and severally liable for the seller's tax liability. This, following a current trend to relay the surveillance of tax compliance upon taxpayers directly.

It is important to note that the Federal Fiscal Code already provides for joint liability for Mexican companies that register new shareholders in their corporate books and records, if such shareholders fail to prove that the applicable taxes were withheld and paid (if applicable), or if the company fails to prove that it received a copy of a tax report and income tax return

proving payment. However, the applicability of this joint liability was unclear in cases where the purchaser is a foreign resident.

While from a policy perspective this appears to be an adequate measure, there are some practical issues that the report brought for companies that trade their shares in public exchanges, as they are required to include information to which they have limited access (i.e. transaction dates, identities of the parties involved and information on the payment of taxes). Note that the SAT could face the same practical difficulties for purposes of identifying and auditing these transactions, as these are executed among foreign residents that are not registered in Mexico.

In an attempt to address these issues and to clarify the formalities that public companies must follow in order to file the report, on March 9 2022, the SAT amended rule 3.9.18. of the 2022 Administrative Tax Rules, as well as the administrative guidance form number 157/ISR.

Rule 3.9.18 establishes that companies whose shares are registered in the National Securities Registry (the NSR), must file the report "concerning sales that are subject to the annual report referred to under article 49 Bis 2 of the General Provisions applicable to Securities Issuers" (the general provisions).

Article 49 Bis 2, however, does not include a reporting obligation that is intended to reflect the sale of the issuer's shares; rather, it provides a reporting obligation for Mexican public companies to submit to the Banking and Securities Commission (CNBV), upon registration of their securities or on June 30 of each following year, at the latest, disclosing information relative to the name, type of shares, amount and percentage on the issuers' capital stock, of the following 'relevant shareholders':

- Board members and other relevant directors of the issuer who maintain, directly or indirectly, an individual stake greater than 1% of the issuer's capital stock;
- Individuals or companies, trusts or other investment vehicles, who are direct or indirect owners or beneficiaries of 5% or more of the issuer's capital stock;
- The 10 shareholders (individuals or companies), with the greatest direct stake in the company, even when their participation is less than 5% of the capital stock of the issuer (on an individual basis); and
- Any individual or company that directly or indirectly, whether through one or more companies, trusts or other invest-

ment vehicles, owns or is a beneficiary of 1% or more of the capital stock of the issuer.

As per the formalities for filing the report, form 157/ISR establishes that Mexican issuers whose shares are registered in the NSR, must file the report submitting the same information already required under the Mexican Income Tax Law, in the date that is the earlier of (i) the following month in which the stake of a Relevant Shareholder changes; or (ii) in the same date in which the issuer is required to file the annual report established under Article 49 Bis 2 of the general provisions (i.e. June 30 of each year at the latest).

Note that the rule applies exclusively to companies whose shares are registered in the NSR.

While the amendment appeared to have the objective of addressing public companies' concern regarding this reporting obligation, the SAT maintained the same documentation originally required under the Mexican Income Tax Law, although now only in respect to Relevant Shareholders.

In addition, any 'material' variation in the stake of relevant shareholders must be reported within the following month in which the stake of a relevant shareholder changes (even when information to the CNBV has to be filed on an annual basis), which can make the reporting obligation quite burdensome for some public companies.

In summary, although the new rule does waive public companies from having to disclose information on all of their foreign shareholders undertaking in sale transactions with other foreign residents, the report's due compliance and enforceability still carries complexities for both the taxpayers and the SAT. Public companies should seek legal advice in order to adopt appropriate measures to comply with this obligation.

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