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### **Country Report: The Role of Institutional Investors in Promoting Corporate Governance in Mexico**

To provide background for the development of an overview report on Institutional Investors and Corporate Governance in Latin America, the OECD asked consultants and task forces to elaborate country reports on current practices, challenges and prospects for improvement. These country reports are provided to the Roundtable participants as background for the meeting's discussion, and will be made available at <http://www.oecd.org/daf/corporate-affairs/roundtables>.

Mexico's report was elaborated by Jorge Fabre, Chairman of the Center for Excellence in Corporate Governance (<http://www.uas.mx/cegc>).

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**THE ROLE OF INSTITUTIONAL INVESTORS IN  
PROMOTING GOOD CORPORATE GOVERNANCE PRACTICES IN MEXICO  
A DISCUSSION FRAMEWORK FOR COUNTRY WORKSHOPS**

**Introduction; Corporate Governance in Mexico, recent developments**

In recent years there have been a number of major reforms related to corporate governance in Mexico, including the drafting of an early voluntary code of best practice (1999) just updated in 2006, the redrafting of key provisions of the Securities Market Law (including requirements for mandatory audit committees and independent board members), new regulations of the market for corporate control, and regulations issued in 2003 that resulted in an “issuer manual” specifying disclosure guidelines for listed companies that largely meet OECD benchmarks. Efforts to bolster corporate governance practices are viewed as crucial to broadening the investor base in Mexico and attracting portfolio equity capital. The progress that has been made in promoting good corporate governance has been set against a concentrated ownership and control structure of many Mexican firms, weak enforcement of shareholder rights and concerns of reform fatigue.

In efforts to address the problems of poor corporate governance and a weak financial market, a new Securities Market Law was enacted in Mexico in 2006. In addition to encouraging corporate governance, the new Law promotes venture and private capital flows into small and medium-sized companies, through increased transparency, disclosure and better board structures, procedures and clearly defined responsibilities of boards and individual directors. The new law improved Mexico’s ranking in the World Bank’s and IFC’s “Doing Business 2007” report, positioning it in 43<sup>rd</sup> place up from the 62<sup>nd</sup>. Yet owners of the SME’s and family-controlled companies have limited knowledge of how to implement corporate governance principles and procedures. Small and medium-sized enterprises comprise more than 95% of businesses in Mexico and most of them are family-controlled.

The Code of Best Practices was enacted in 1999 by the private sector and in 2006 it was revised. Compliance with the Code is voluntary for listed companies, but since 2003 a policy of “comply or explain” was adopted by the National Securities Commission. The surveys on adherence to the Code have been reported by each listed company since then, and a gradual improvement in corporate governance can be inferred from the positive influence of the Code. However, with the new Securities Market Law in place, the “comply or explain” reporting system will no longer be mandatory.

The Mexican Stock Exchange has an overall market cap equivalent to 35% of Mexico’s Gross Domestic Product (GDP), and 135 domestic listed companies.

## Legal Framework

The major laws and regulations that apply to institutional investors are the Securities Markets Law of July 2006 (Ley del Mercado de Valores, LMV) and the Circular Única of the Comisión Nacional Bancaria y de Valores (CNBV) of December 2006. A 2001 Financial System Stability Assessment (FSSA) by the International Monetary Fund (IMF) found that Mexico was in broad observance with the Objectives and Principles of Securities Regulations promulgated by the International Organization of Securities Commissions (IOSCO). Furthermore, in 2006, the Securities Market Law has been enacted with more detailed responsibilities for publicly traded companies in terms of corporate governance. The responsibilities of the regulator have been strengthened, and the duties of market intermediaries have been clarified.

Reforms in the Securities Market Law have provided minority investors with a number of improved protections under the law. Minorities representing 10 percent of voting and limited voting shares have the right to appoint a board member and his alternate, the right to appoint a comisario, the right to call a shareholders meeting, and the right to delay a vote for three days when they believe that not enough information has been provided. The new Law has increased the right of shareholders to initiate civil lawsuits against members of the board of directors, lowering the percentage of voting to 5 percent, and with 20% they can present legal opposition to resolutions of the Assembly.

The Law in Article 28 has defined the obligations of the board of directors and from Article 30 to 40 defined the fiduciary and loyalty duties of directors. The role of comisario (statutory auditor) has been erased and substituted by the role of board of directors and independent auditor. Duties have been also defined for committees of corporate practices and audit functions. Also duties have been also defined for CEO. (LMV 2006).

Currently, boards of directors must have at least 25% of independent members, and the committees have to be chaired by independent directors. The board has a defined role that includes setting the strategy and internal-control guidelines, identifying opportunities for generating value, monitoring the management, approving financial statements, remuneration packages for key managers, and approving relevant and/or related party transactions. Directors now have defined duties of diligence and loyalty with specific liabilities if they fail to exercise them. Independent directors may not include management or employees, persons with significant influence on decision-making power, shareholders, major suppliers or customers, and relatives by blood or affinity to the fourth degree of any of the prior categories. Shareholders maintaining control of the corporation will respond for the damages caused, when they approve or reject transactions in the shareholders' meeting that produce notoriously injurious effects for the corporation, in violation of the opinion or resolution of the board.

The Law creates a new legal model for corporations: the sociedades anónimas promotoras de inversión (SAPI's), which is exempted <sup>1</sup>from certain obligations provided under the General Law of Business Corporations (Ley General de Sociedades Mercantiles) (the "LGSM") that have limited the ability to give certain corporate and economic rights to investors/shareholders of the widely common Mexican sociedades anónimas (SAs) by making invalid some shareholders agreements and thus making SAs difficult for new/external investors. This new legal framework will broaden the rights that may be given to investors/shareholders of SAPIs, give certainty to investors and induce joint-ventures and investments in the capital stock of said corporations. The overall objective was the creation of an investment-friendly corporation in order to attract external investment to the highly ownership-concentrated company scope in Mexico and therefore

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1. ***Sociedades Anónimas Promotoras de Inversión Under the New Mexican Securities Market Law (Ley del Mercado de Valores)***, Yves Hayaux-du-Tilly L. and Alberto Balderas F. 2006.

incentive stock-dispersion as well as foster listings in the stock market. A SAPI may “go public” and register its shares (or the securities representing them) at the Securities National Registry (RNV) and list them with the Mexican Stock Exchange (Bolsa Mexicana de Valores, BMV) without making a public offering, by filing a registration statement with the CNBV and providing investors a detailed prospectus. If a SAPI decides to “go public” it must (i) have at least one independent director as member of its board of directors; (ii) create a committee formed by some of its own directors in order to assist the board in the gradual implementation of corporate practices applicable to listed companies; and (iii) change its corporate name to sociedad anónima promotora de inversión bursátil (SAPIb) in order to adopt a 3-year plan to gradually implement the legal regime of a publicly held corporation (the “Transformation Plan”), and modify its capital structure to adequate it to the regime applicable to publicly held corporations, in an Extraordinary Shareholders’ Meeting.

### **Background of Institutional Investors in Mexico**

The types of institutional investors (IIs)<sup>2</sup> in the Mexican Financial Market include foreign and domestic pension funds; mutual funds; private equity firms; insurance companies; banks and brokerage houses. The kind of investment strategies that IIs tend to employ most commonly are minority stakes acquired in the market. They tend to be passive shareholders investing in listed companies.

The total amount of assets managed by institutional investors in Mexico is USD \$236 billion. The largest institutional investors in Mexico are the pension funds and the mutual funds, with a combined USD \$137 billion in assets under management, that amount to 15.8 % of GDP as of January 2007. In equity or equity indexes, pension and mutual funds have USD \$18 billion invested as of January 2007. USD \$119 billion are invested in fixed income instruments. Most of the portfolios are in debt, so instead of making corporate governance an indispensable consideration while reviewing investee companies, the fund’s manager or the fund’s board mainly focus on the rating the credit rating agencies have given to that debt.

### **Key elements that could affect future corporate governance developments**

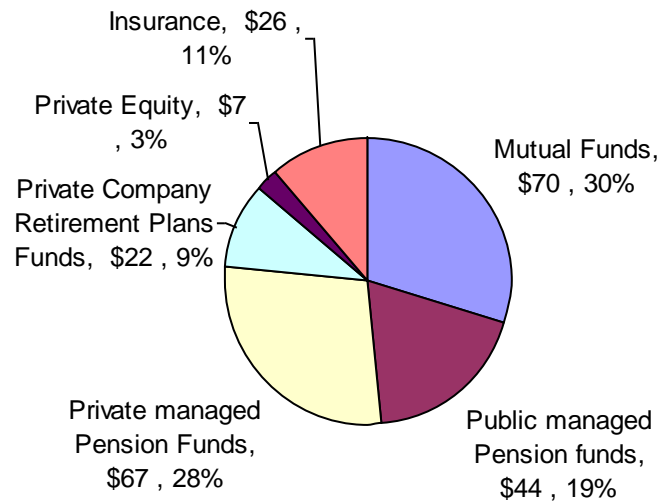
- The amount of savings in the pension system that could be allocated in the near future to the capital markets is a big opportunity for the development of the depth of the Mexican financial markets. However at the moment, relatively few listed companies exist in the Mexican Bolsa. Reforms to the Securities Market Law included stronger corporate governance rules and a new legal vehicle (the Sociedad Anónima Promotora de Inversión or SAPI) designed for privately held medium sized companies that through adherence to stricter corporate governance practices could benefit from better access to finance from private equity and/or public investors, with the future expectation of increasing listings in the Stock Market.
- Issuers of equity float small percentages of their shares in the public markets. Ownership structures for the greater part of listed firms have groups of shareholder control clearly identified.
- Pension funds are not allowed to invest in direct shares; currently their equity investments are limited to share indexes.

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2 . Organizations that invest, including insurance companies, depository institutions, pension funds, investment companies, mutual funds, and endowment funds.

- Pension funds and Mutual funds do not appear to recognize, that they have a fiduciary responsibility for their clients' investments. No one on their behalf is assigned to overview any type of governance or proxy analysis. They are only doing financial analysis (technical and fundamental).
- Foreign assets in the portfolios of pension funds have been gradually increasing due to the lack of investment choices in the Mexican market.

**INSTITUTIONAL INVESTORS IN MEXICO ASSETS UNDER MANAGEMENT (IN USD BILLIONS)**



## **Mutual Funds (Sociedades de Inversión)**

Mutual funds are regulated mainly by the mercantile law, the Securities Market Law, the law of Sociedades de Inversión and the Circular única issued on December 4, 2006.

### **a) Classification of Mutual Funds:**

<b>Debt instruments:</b>	Short term, (one year) Medium term (more than one year less than three years) and Long term (more than three years)
<b>Equity:</b>	Specialized in stocks (at least 80% in stocks) Mostly in stocks (Between 50 and 80% in stocks) Mostly in debt (Between 50 and 80 % in debt) and Specialized in debt (At least 80% in debt)

These mutual funds can also be specialized by sector, indexed, or discretionally if they have a specific investment target.

### **b) Assets under management:**

Mexican mutual funds have 1,508,236 clients and manage for them assets worth USD \$ 70 billion equivalent to 8% of GNP as of January 2007.

There are 31 firms that operate 450 mutual funds. 321 are Debt Instrument with USD \$57 billion and 1,418,712 clients. 129 are Equities with USD \$13 with 89,524 clients.

### **c) Investment regime and ceilings**

These are set forth in Article 4 and 5 of the Circular única:

One mutual fund operator may not acquire more than 40% of the shares of a single issuer, and the portfolio of each of its mutual funds may not be invested in less than 6 issuers. These are risk dispersion measures.

### **d) The Role of Mutual Funds in Promoting Good Governance**

Mutual funds in Mexico can influence and promote good governance in their investee companies but so far little efforts have been made by them to be perceived as effective agents of good governance. According to the Mexican Association of Securities Intermediaries (AMIB), mutual funds can influence good governance on the level of supporting the development of public policy and regulation on corporate governance. Since only minority positions are bought by them, they are not different from other minority shareholders.

According to the AMIB, the key risks and main corporate governance problems have to do with the reluctance of companies to have adequate disclosure and transparency, even though the regulatory framework has advanced considerably; as well as family business issues. Currently fund managers are considering corporate governance risks and opportunities before investing, but they are not actively exercising ownership rights. There is a closer consideration of governance issues by mutual funds than by pension funds and by foreign mutual funds than by domestic ones.

According to the AMIB, to improve the contribution of mutual funds to bettering corporate governance practice, they should develop standards of good governance practice that funds should seek their investees to follow and also improve the dialogue between the mutual funds and their investee companies.

Mutual funds have not been active and effective monitors of corporate activities mainly due to the limited monitoring capabilities, given large portfolios, limited staff, and limited ability to engage in active management activities; and the need or desire to maintain liquid portfolios, which results in the acquisition of small blocks without significant voting power; but mostly by the prevailing institutional culture of "passivity".

### Pension Funds (Siefores, Infonavit and Private Plans)

#### a) Classification

**The Pension System in Mexico has the following types of funds:**

1. The public system for retirement created individual retirement accounts in 1997 managed by private pension fund companies known as AFORES. The system has two components: Retirement funds managed by private pension funds administrators (SIEFORES) and the housing funds managed by the Federal Institute of Social Housing (INFONAVIT).

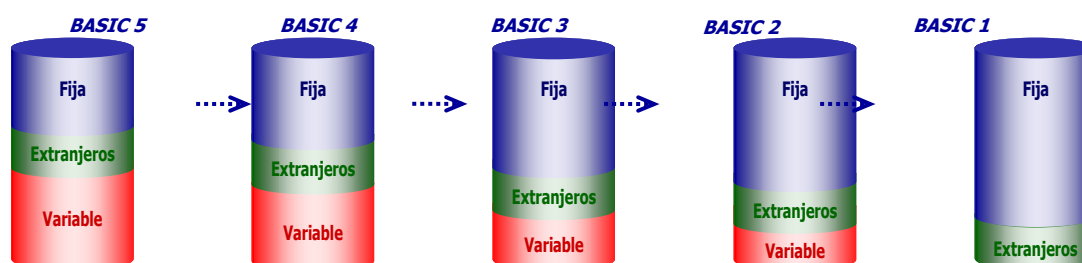
Retirement accounts managed by the private pension system currently are concentrated in two types of SIEFORES funds: Basic 1 (Allowed to invest only in fixed income instruments) and Basic 2 (Allowed to invest in fixed income and up to 15% in variable income instruments, although this ceiling will be lifted in early 2008 to up to 30%).

#### ***New Investment Regime for 2008:***

According to Circular 15-19 of the CONSAR -the Pension Funds' regulator- issued on July 2007, three new SIEFORES with different investment regimes could be established within each pension fund. However, direct investments in stocks will still not be permitted and the SIEFORES will only invest in equity through indexes. New stock indexes, (IOSCO and EU member countries), will also be available in the Stock Exchange.

New and wider limits for Value at Risk (VaR) and Variable Income Instruments (equity) are established for the new SIEFORES in accordance with the higher risk-return preference of younger workers. The current 15% limit for investing in variable income instruments will change depending of the worker's age, as explains the next table provided by the CONSAR:

Age	18 to 26	27 to 36	37 to 45	46 to 55	56 to
Structured Instruments	10%	7.5%	5%	1%	0%
Variable	30%	25%	20%	15%	0%
REITS*	10%	10%	5%	5%	0%
VaR	2%	1.6%	1.3%	1%	0.6%



\*(REITS or FIBRAS in Spanish are Real Estate Investment Trusts or Fideicomisos Inmobiliarios de Bienes Raíces).



Additional changes include that now the CEO of an AFORE should reside in Mexican territory, have at least 5 years of experience in top finance positions, not have worked in a regulatory agency or political institution for the last 2 years.

2. The pension system for public sector employees was reformed in April 2007 and soon will also have an AFORE owned by the government, and individualized accounts for its clients.
3. Private Retirement Plans designed by companies for their employees. These funds are managed by banks (52%), brokerage houses (29%), Insurance companies (8%), the companies themselves (6%) and others (5%).

#### **b) Assets under management**

The Mexican pension system has 37,445,170 accounts. The total amount in the system for private sector employees as of January 2007 was USD \$111 billion: Whereas USD \$67 billion are managed by private pension funds (SIEFORES) in their Basic 1 or Basic 2 funds, equivalent to 7.8% of GNP, and the remaining USD \$44 billion are managed by the INFONAVIT (Federal Social Housing Institute).

There are 21 private firms (AFORES) that operate 53 pension funds administrators or SIEFORES. Whereas 92.43% of their portfolios are invested in fixed income instruments. 7.57% of the total portfolios are invested in equity indexes. 19.23% is invested in the private sector, 76.17% is invested in the public sector and 4.6% is invested in foreign assets.

Additionally there are 1,652 registered private retirement or pension fund plans designed by companies for their employees as of January 2007. These private pension plans are not part of the Mexican Public System for Retirement and have USD \$22 billion of assets under management (PRIVATE PLANS). 65% of these assets are invested in fixed income instruments and 35% in equity. 52% of the assets are managed by banks, 29% by brokerage firms, 8% by insurance companies 6% by the private companies themselves and 5% by others.

#### **c) Investment regime and ceilings**

SIEFORES can invest up to 15% of their portfolio in variable income instruments, but they can not buy direct shares. They can invest in indexes, sovereign/private bonds. Of bond debt emissions, a SIEFORE can buy up to 20% a single offering. If it's a AAA emission they can buy up to 5% of the same issuer. 3% for AA and 1% for A, and at least 2 rating agencies have to qualify the issue. Up to 20% of the portfolio can be invested in foreign instruments.

#### **d) The Role of Pension Funds in Promoting Good Governance**

The transparency of debt emissions has improved since pension funds absorb parts of them, and they have become very influential in that market. However they feel that further improvement in disclosure and transparency both for issuers and for underwriters is an area of opportunity in Mexico.

AFORES supported the enactment of the new Securities Market Law in 2006, which mainly included tougher corporate governance standards, and they are not active promoters now of corporate governance improvements because they feel that the law took care of that issue with companies. The general perception is that the new law solved that issue. Their perspective is that their lack of interest in actively influencing better governance could be overcome if and when investment ceilings and direct share purchases are allowed.



Pension funds hire the services of custodians to represent them in shareholder meetings of issuers. Custodians vote with the management's proposal unless they receive specific instructions from the pension fund to vote in some other way. Banks, broker-dealers, Operators of Investment Companies and Distribution Companies may provide shareholders of Investment Companies deposit and custody services for their securities.

## **Private Equity Funds**

### **a) Classification**

According to the Mexican Private Equity Association AMEXCAP, private equity in Mexico is represented mainly by foreign funds, and nearly 55% are real estate funds. The housing sector has been growing at an average rate of 15% for the past 5 years in Mexico. Commercial and retail developments have followed the housing boom of the growing middle class. Another private equity investment sector is co-participation with the public sector in national infrastructure projects. The remaining private equity funds (approx. 45%) invest in service industries (mainly financial services and entertainment) and in transformation industries.

### **b) Assets under management**

According to AMEXCAP in the year 2000 there were only USD \$1 billion in 2007 the industry is represented by 35 registered funds that have a combined total of approx. USD \$7 billion.

### **c) Investment regime and ceilings**

Qualified investors are allowed to participate in private equity funds. Private equity funds tend to have investment strategies where they buy majority stakes through direct negotiations. A recent Deloitte survey of the private equity industry in Mexico<sup>3</sup>, confirms that more than 70% of the funds prefer to buy majority stakes. During the initial phase of investment decision-making, private equity funds (their investment committees) are very active and participative in reviewing governance practices in their target companies. In the implementation phase of the financial operation, funds invested in the service or transformation industries remain active shareholders. However, funds invested in real estate or infrastructure projects are passive shareholders in this phase, and mainly rely on local operators for execution. During the exit-stage both types of private equity funds are active shareholders.

### **d) The Role of Private Equity Funds in Promoting Good Governance**

In general, private equity funds are more aware and involved than other types of institutional investors, in the promotion of better corporate governance in Mexico. They feel they are in a good position to influence better standards among Mexican businesses.

When reviewing investment options, they evaluate management and board. They normally acquire majority stakes and name board members. They actively exercise ownership rights and include them in their investment contracts and shareholder agreements. From their perspective, the main risks they face in governance of Mexican companies are family business issues and shareholder rights when the investee company is not regulated by the new Securities Market Law. One key regulatory issue is that the General Mercantile law dates from 1937 and has not been modified since.

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3. Fondos de Capital Privado, un vistazo al Mercado nacional.  
Deloitte, 2006

Another key issue that has been set forth by AMEXCAP regarding the improved contribution that institutional investors could make in corporate governance in Mexico is that pension funds should be allowed to invest in private equity funds and in direct shares in the near future.

Financial intermediaries seldom promote private equity options among their asset classes for their portfolios. The lack of private equity culture works both ways: businesses tend to have family ownership averse to selling control or even minority stakes, and financial intermediaries (brokers and promoters) have little knowledge of this asset class, or sometimes feel that private equity is a potential competitor for them.

Some barriers for private equity funds are the lack of depth in the market, a short offer of securities and concentrated ownership patterns. Exit strategies for the investment of private equity funds, tend to be through sales to other strategic investors, and very rarely through a public offering, thus one of the major obstacles for the development of this industry is the complexity that a fund faces when exiting their investments.

### **Corporate Governance of II's.**

The Board of Directors of Mutual Funds and Pension Funds must be integrated by a minimum of 5 and a maximum of 15 board members, and at least 33% have to be independent. The board has to have an Audit Committee led by an independent director. Normally other committees that report to the Board of Directors are formed, including the Risk Committee, the Compensation Committee and the Investment Committee. Risk and Investment Committees are also led by independent directors.

The Corporate Governance of Private Equity Funds is different because they are incorporated as private businesses under the Mexican mercantile law, so no specific requirements by financial authorities are set. However most Mexican funds are subsidiaries of international funds that comply with international governance standards. According to the AMEXCAP, self-regulation schemes where funds and their risks are assessed by rating agencies is desired by the industry.

### **Conclusions and Key Recommendations**

As detailed before in this report, corporate governance practices have improved significantly due to the new Securities Market Law. Institutional investors have the idea that the new Law assures standards of compliance in the matter, therefore the need for further actions to change this idea. From the perspective of the Mexican Stock Exchange (BMV), institutional investors must realize that they are shareholders, not only long term passive investors, and thus their focus on the management of the issuer has to increase, and they must become active in the board and shareholder organs of the enterprises when they have larger percentages.

- Pension Funds will change when they are allowed to buy direct equity stakes, currently they mostly concerned about asset allocation in indexes. Without that, there will be no major incentives to distinguish investments in better governed issuers. However, liquidity in the market is a concern. Also the number of issuers in the market is small, and therefore increased equity investments could produce an increase in risk.
- Mutual funds and insurers are passive shareholders in their investments, so one idea from the BMV would be to generate an index or scale generated by the BMV or other organizations that would differentiate companies with better governance. Another recommendation would be that Investment Committees of these II's design investment policies that take corporate governance into account.

- Rating agencies should play a significant role in providing information about the governance of companies involved in debt and equity emissions. Further efforts with these agencies should be made, in order to use them as promoters the region for obtaining a stronger focus on good governance from II's. Currently mutual funds and pension funds rely mainly on these ratings for their investment considerations. The unfavorable cost-benefit ratio for mutual and pension funds for analyzing corporate governance is one of the main reasons why they rely on other assessments and supervision entities.
- Further improvements in transparency of voting policies from pension and mutual funds should be encouraged.
- The fund manager should have some liability under regulation for the lack of supervision of corporate governance issues and performance of the investments made by the fund, especially pension funds that deal with retirement of many citizens.
- A CalPers or TIIA/CREF type of Code for Pension Funds should be implemented for AFORES in Mexico. They should report on the degree of compliance and have specific dates or terms for full compliance under a new regulation.

## Participants

Asociación Mexicana de Intermediarios Bursátiles AMIB

Asociación Mexicana de Fondos para el Retiro AMAFORE

Asociación Mexicana de Capital Privado AMEXCAP

Bolsa Mexicana de Valores BMV

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Fondos de Capital Privado, un vistazo al Mercado nacional. Deloitte, 2006

## MEXICO'S INSTITUTIONAL INVESTORS COMPARATIVE TABLE AS OF JANUARY OF 2007

	Investment US billion	Legal & Investment Regime	Shareholder Activism	Corporate Governance Activism
<b>Mutual Funds</b>	<ul style="list-style-type: none"> <li>\$70</li> </ul>	<ul style="list-style-type: none"> <li>May not acquire more than 40% of a single issuer.</li> <li>Portfolio of each of its mutual funds may not be invested in less than 6 issuers.</li> <li>Regulated by the Securities Market Law.</li> </ul>	<ul style="list-style-type: none"> <li>Passive</li> </ul>	<ul style="list-style-type: none"> <li>Little efforts made by them to be effective agents of good governance.</li> <li>Only minority positions are bought.</li> <li>There is reluctance from companies to have adequate disclosure and transparency, as well as family business issues.</li> </ul>
<b>Pension Funds*</b>  Only includes private pension fund management	<ul style="list-style-type: none"> <li>\$89</li> </ul>	<ul style="list-style-type: none"> <li>15% can be invested in variable income, 85% in fixed income.</li> <li>Can only invest in share indexes.</li> <li>Bond emissions, can buy up to 20% of a single offering.</li> <li>Up to 20% of the portfolio can be invested in foreign instruments.</li> <li>Regulated under Pension System Law.</li> </ul>	<ul style="list-style-type: none"> <li>Passive</li> </ul>	<ul style="list-style-type: none"> <li>Transparency of debt emissions has improved since pension funds absorb parts of them.</li> <li>Disclosure and transparency issues are a risk area.</li> <li>They feel that the Securities law took care of the corporate governance of companies.</li> </ul>
<b>Private Equity</b>	<ul style="list-style-type: none"> <li>\$7</li> </ul>	<ul style="list-style-type: none"> <li>Regulated under Mercantile Law.</li> <li>No investment ceilings.</li> <li>Companies they invest in can be regulated by Mercantile Law or by the Securities Market Law.</li> </ul>	<ul style="list-style-type: none"> <li>Active</li> </ul>	<ul style="list-style-type: none"> <li>When reviewing investment options, they evaluate management and board.</li> <li>Normally acquire majority stakes and name board members.</li> <li>Main risks in governance are family business issues and shareholder rights when the investee company is not regulated by the Securities Market Law.</li> <li>Some barriers include lack of depth in the market, short offer of securities and concentrated ownership patterns.</li> </ul>

