

RESHAPING FIDUCIARY DUTIES IN MEXICO:

A STEP TOWARDS FUNCTIONALITY

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ABSTRACT

Fiduciary duties are a legal response to unfair self-dealing and mismanagement by those in control of a company. In Mexico, the statutory articulation of fiduciary duties is outdated and inadequate; case-law is virtually nonexistent; and scholarship is extremely limited. Mexican financial authorities have recently attempted to modernize fiduciary duties by drafting a proposal for a new Securities Market Law and presenting it to Congress. The proposed legislation introduces sophisticated concepts of fiduciary duty and new rules governing their application. Though the proposed legislation promises to improve the corporate governance of Mexican public companies, it is difficult to predict its myriad implications. This paper offers a qualitative analysis of the potential *functionality* of the rules governing these new fiduciary duties. Rules are *functional* if they can be easily understood and used by the actors that should interact with them, in this case: corporate managers, directors, controlling shareholders, minority shareholders, regulators and the judiciary.

This paper claims that in emerging jurisdictions, functionality of law can be enhanced by drafting rules that offer *reasonable certainty* and *adequate access to enforcement*. Rules offer *reasonable certainty* if actors can easily identify how their behavior could or should be shaped in accordance with legal precepts. Rules offer *adequate access to enforcement* if they provide realistic opportunities to induce the conduct required by law. This study presents a qualitative assessment of the functionality of the proposed fiduciary duty rules based on the criterion of reasonable certainty and an initial approach to adequate access to enforcement.

This research suggests that the proposed fiduciary duties offer *reasonable certainty* to the relevant actors, especially when compared to the existing provisions. For corporate fiduciaries, clear-cut rules (rather than open-ended standards) define specific misbehaviors that would make them liable to the corporation. The proposed rules should help achieve optimal compliance and adequate deterrence and not lead to excessive risk aversion. Corporate fiduciaries can further reduce their risk exposure through contractual limits to negligence liability and safe-harbor measures. For shareholders, the proposed rules would create a better sense of entitlement because they clarify what types of conduct constitute breaches of fiduciary duties and what remedies are available. For enforcers, the proposed legislation would help identify which rules apply to particular disputes.

The initial approach to *adequate access to enforcement* presents recent empirical evidence of limited enforcement of fiduciary duties in Mexico. It raises doubts as to the ability of the proposed rules to create an adequate level of shareholder litigation. Lastly, it opens a number of questions for further research if the proposed legislation is enacted and fails to sufficiently increase enforcement activity.

In sum, this paper suggests that the re-articulation of fiduciary duties is a good starting point to improve their functionality. This improved functionality may, in turn, contribute to reducing the effectiveness gap between corporate law on the books and corporate law in practice. However, such functionality will be conditioned on realistic opportunities to enforce the legislation and compensate shareholders for breaches of fiduciary duties.

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