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# Mexico's Financial Ombudsman: A New Mandate for Protecting the Interest of Insureds

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## I Introduction

The deployment of Solvency II principles in Mexico have substantially changed the legal and regulatory landscape for licensed Mexican insurers over the last couple of years. The changes have impacted insurers on various fronts: the revamping of their internal governance structures and procedures; compliance with new capital and reserves calculations; and the relaunching of their reporting and disclosure systems. Changes, however, have not been limited to the structural and solvency framework of insurers, as fundamental developments have also taken place on the consumer protection front.

A more comprehensive consumer protection framework in the realm of financial services started evolving in 2010 with the amendments to the Mexican Constitution that imported class actions into the Mexican legal system and with the amendments to the Law for the Protection of Users of Financial Services (*Ley de Protección y Defensa al Usuario de Servicios Financieros*) (the “Financial Users Law”) which were enacted shortly thereafter. As a result, the enforcement authority of the Commission for the Protection and Defense of Users of Financial Services (*Comisión Nacional para la Protección y Defensa al Usuario de Servicios Financieros*) (“CONDUSEF” or the “Financial Ombudsman”) has continued to be strengthened. This is particularly the case ever since the Financial Reform of 2014 broadened the authority of CONDUSEF through important amendments to the Financial Users Law.

This article provides an overview of the most recent amendments to the consumer protection framework applicable to insurers, the new implementing regulations that touch upon best sales practices and other developments that promise enhancing consumer protection in the Mexican insurance industry even further.

## II Best Sales Practices Regulations

The General Rules on Best Practices, Transparency and Advertising applicable to Insurance Companies (*Disposiciones de Caracter General en Materia de Sanas Prácticas, Transparencia y Publicidad aplicables a Instituciones de Seguros*) (the “Best Practices Regulations”) were published by CONDUSEF on December 23, 2015. The Best Practices Regulations are the result of an intensive consultation process between CONDUSEF, the CNSF and the insurance industry through the Mexican Association of Insurance Institutions (*Asociación Mexicana de Instituciones de Seguros*) (“AMIS”). The Best Practices Regulations contain a catalogue of conducts that CONDUSEF will deem reprehensible and subject to disciplinary action. The types of conducts listed in the Best Practices Regulations address the following issues: (i)

full disclosure/completeness of information; (ii) ban on deceptive practices; (iii) non-discrimination; and (iv) refusals to deal/obligation to sell standardised products. The Best Practices Regulations also contain provisions on telemarketing, advertising and disclosure of information to the public.

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### a. Full disclosure requirements

The Best Practices Regulations seek to improve the sufficiency of the information delivered to insureds, especially in the context of insurance products offered through affinity channels or loan-linked insurance (i.e., life insurance purchased by mortgagors), information which tends to be scant and leaves insureds ill-suited to exercise their rights. Accordingly, pursuant to the Best Practices Regulations, Insurance Companies must deliver contractual conditions,<sup>1</sup> including the terms of payment of the premium and indication of the consequences for failing to pay within the applicable grace period. Also, information must be provided in connection with the terms for automatic renewal, recoveries (*salvamentos*) when applicable, as well as delivery of the insurance policy itself and related brochures. Information relative to the filing and processing of claims and the locations and office hours of Insurance Companies must be included in the contractual documentation and insurer’s webpage.

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### b. Deceptive sales

An important aim of the Best Practices Regulations is to “crack-down” on the deceitful offering of insurance especially in connection with the sale and the cancellation<sup>2</sup> of products. The Best Practices Regulations place emphasis on the clarity of the terms of the insurance products so that they do not induce potential insureds into contracting upon mistaken assumptions. For example, the Best Practices Regulations require that the contractual terms and conditions match both the offer and advertising materials. Using false claims intended to steer customers towards insurance products is also identified as foul practice.

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### c. Non-discrimination

Non-discrimination principles are enshrined in Article 1 of the Mexican Constitution. In turn, the General Law to Include Disabled Individuals (*Ley General para la Inclusión de Personas con Discapacidad*) contains specific provisions whereby all kinds of discrimination against handicapped persons with respect to life and health insurance is prohibited. The regulations contained in the Unified Insurance and Bonding Regulations (*Circular Única*

*de Seguros y Fianzas* “CUSEF”) provide that Insurance Companies cannot refuse to receive an insurance application in consideration of the proponent's race, religion, sexual orientation or disability and further requires that the analysis of the application must be in compliance with applicable laws.

While the Best Practices Regulations go even further by expanding on the list of the prohibited discriminatory conduct in the contracting of insurance (i.e., age, health situation, marital status, political convictions), they also set forth limited exemptions that insurers can rely upon in order to deny coverage on the basis of the insured's profile: (i) when the insurance coverage is denied as a result of security concerns; or (ii) when the discrimination is expressly allowed in laws and regulations applicable to the underwriting. These exemptions were reflected in the Best Practices Regulations to address the concerns expressed by life and medical expense insurers, who as part of their underwriting process, need to allocate insureds to separate risk pools based on their different risk profiles and to classify and rate the risk.

#### **d. Refusals to deal**

Insurance Companies may not deny the contracting of insurance under the terms and conditions offered or advertised (including the terms and conditions offered or advertised by third parties such as insurance agents and brokers), except as may be warranted by underwriting or risk selection reasons. Moreover, Insurance Companies must commit to offer standardised insurance products within their corresponding authorised lines of business for covering life, accidents, medical expenses, health/dental and automobile liability insurance, in accordance with the terms requested by the CNSF.<sup>3</sup> Insurance Companies offering standardised insurance products must publish the premium prices in the CONDUSEF website and must update them on a monthly basis. The Best Practices Regulations seek Insurance Companies to sell standardised insurance products as they must not include conditions that overburden the contracting of such insurance.

#### **e. Telemarketing requirements**

The Users' Registry (*Registro de Usuarios*) kept by CONDUSEF allows individuals to register in order to block efforts by financial institutions to offer products by calling the registered telephone numbers and e-mail addresses for two years as of the registration. The Best Practices Regulations include specific rules for telemarketing, which require the Insurance Companies to ask the person who receives the call if they can offer a certain product: if the answer is no, the Insurance Company must not contact such person during a period of 12 months.

Telemarketing, either carried out directly by the insurer or through outsourced third parties, also requires full disclosure on the insurance conditions and specific requirements for the sale. This creates a need for sales scripts in much more detail than in the past; the lengthy caveats and the terms and conditions that need to be recited under the new regulations may not be well received by potential customers.

Moreover, the contracting process through telemarketing, as contemplated by the Best Practices Regulations, brought about harsh complaints from the insurance community which claimed that the more onerous procedures would “kill” the distribution channel. For instance, to be valid, telemarketing sales not only require the affirmative confirmation from the customer, but a four number confirmation must be keyed-in by the customer during the call. Thereafter, an SMS message or e-mail with the complete information of the purchased product needs to be received by the potential customer, together with the indication that it can be cancelled within

48 hours following the call at no cost – and providing the means for the cancellation. In addition, the insurance may be cancelled during the first month of the insurance term with the full reimbursement of the paid premium within five days as of the cancellation. The insurance policy must then be delivered within 30 calendar days following the confirmation of the sale.

#### **f. Transparency**

The Best Practices Regulations require the applicable legal provisions mentioned in the application form, the policy and general conditions of the insurance to be available either in a schedule to the conditions or elsewhere in writing or through electronic means.

#### **g. Advertising**

Pursuant to the Best Practices Regulations, Insurance Companies' advertising materials should be clear and include all the requirements that should be met by proponents to have access to the advertised benefits and must include a reference to where contractual details can be consulted. CONDUSEF, with the purpose of promoting fair competition among insurers, has a mandate to curb deceitful advertising materials by requiring complete information to be disclosed and prohibiting insurers from including false comparisons. Vague terms and promotions such as “free insurance” or “insurance at no cost” should be avoided not only in Insurance Companies' advertising but also in the materials distributed by other companies advertising goods and services that include insurance coverages (i.e., car sales, mortgage loans).

#### **h. Sanctions**

CONDUSEF has the authority to impose fines on Insurance Companies that violate the conduct standards listed in the Best Practices Regulations. It is worth noting, however, that although the Insurance Companies Law refer that insurance agents and brokers – which continue to be the largest distribution channel in Mexico – should comply with the Best Practices Regulations, they are not subject to the CONDUSEF supervision authority, as they do not fall within the definition of financial institutions. Instead, insurance agents and brokers continue to be supervised by the CNSF. Accordingly, in light of this divergent regulatory framework, Insurance Companies have a further incentive to supervise and monitor the sales practices of insurance agents and brokers through training as well as sign-off protocols with respect to advertising materials prior to launching.

### **III Other regulations**

In 2016, CONDUSEF was conferred the authority to score Insurance Companies through the Financial Companies Bureau as well as to include general information on products, claims and fines so as to provide the public with information for comparing insurers. Such information must also be available on the websites of Insurance Companies. Moreover, starting in 2017, the general conditions of non-negotiable insurance products, in addition to being registered with the CNSF and available on the Insurance Companies' website, will also need to be registered with CONDUSEF and available for consultation in CONDUSEF's webpage. Thus, insurers will be the only institutions of the Mexican financial system that will be required to have their products registered with two different regulators.

## IV Arbitration

Prior to 1999, each regulator of the financial sector in Mexico was in charge of the protection of the interests of financial services users and of the resolution of disputes through mediation and arbitration procedures according to non-uniform laws. With the creation of CONDUSEF, a unified authority and regulatory framework was deployed for receiving complaints against all types of financial institutions and requiring mandatory mediation. Absent a settlement,<sup>4</sup> CONDUSEF has the authority to order the creation of a special outstanding claims reserve (which may be cancelled once six months have elapsed) and to suggest to the parties that they submit the dispute to arbitration. In practice, however, Insurance Companies rarely submit to arbitration as CONDUSEF is perceived as more prone to decide the case in favor of the insured, and from a strategic perspective the insurer will be better off by waiting for the claim brought before the court system.

An interesting development for CONDUSEF arbitration was brought about by the Financial Reform of 2014 which added Chapter III to Section Fifth of the Financial Users Law so as to create the Financial Arbitration System. Insurance Companies may voluntarily decide to register with the Arbitration Public Offering Registry kept by CONDUSEF and submit at least three insurance products thus expressing an advance consent to arbitration with respect to such products, provided that the insured also agrees to arbitration<sup>5</sup> following the conciliation hearing.

To enhance the credibility of the CONDUSEF arbitration, the arbitral awards must be approved by the Specialized Arbitration Committee formed by (i) officers of the CONDUSEF, the CNSF and the Ministry of Finance and Public Credit, (ii) independent members, who must be registered with CONDUSEF ("Independent Arbitrators"),<sup>6,7</sup> or (iii) both, governmental officers of the abovementioned agencies and Independent Arbitrators, at the choice of the Insurance Company. The award may be contested by means of a direct constitutional appeal action (*amparo*).

If the parties do not submit the dispute to arbitration, the insured may request an opinion in writing from CONDUSEF, which will be granted by CONDUSEF if it considers that the claim has grounds. If such opinion sets forth a contractual enforceable, due and payable obligation, it will be deemed a non-negotiable enforceable instrument which may be used in court as the basis for commencing a summary action within a year following the date on which the opinion is issued. Upon issuance of the opinion by the CONDUSEF, the Insurance Company will be required to create a special outstanding claims reserve (*obligaciones pendientes de cumplir*) if the amount set forth in the opinion considering the principal amount and its interest is up to 100,000 investment units (roughly the equivalent of US\$25,000).

## V Collective actions

Following amendments to the Mexican Constitution, the Mexican Congress enacted legislation that entered into force in 2012 and that amended the Mexican Federal Code of Civil Procedures and several other statutes (including the Federal Civil Code and the Consumer Protection Law) to implement an adapted version of the class action system that is prevalent in the United States. Collective actions (*acciones colectivas*) – which is the term used to refer to the Mexican implementation of class actions – must have as basis: (i) rights that are indivisible by their nature, which correspond to an

undetermined or determinable collectivity of people related by legal or factual circumstances; or (ii) rights that are divisible by nature, which correspond individually to the members of a determinable collectivity of people related by the same legal circumstances.

The 2014 amendments to the Financial Users Law are particularly relevant in the context of collective actions as they grant CONDUSEF the standing to bring collective actions on behalf of financial service customers, including insureds. Standing in collective actions that relate to insurance is not limited to CONDUSEF; the following persons may also pursue a collective action: (a) a legal representative, duly appointed by a group of at least 30 persons; (b) any non-profit civil partnership (*asociación civil sin fines de lucro*) legally formed at least one year prior to the filing of the collective action claim; and (c) the Attorney General of the Republic (*Procurador General de la República*). Regardless of who is the plaintiff, Mexican Federal Courts have exclusive jurisdiction over collective actions.

In general, the development of collective actions in Mexico has been slow but steady. Mexican Courts have been very strict in applying the requirements for certifying collective actions, perhaps to avoid being "sucked" into a very new and complex litigation environment that would be at odds with their overwhelming backlog of cases. On the other hand, there is a growing and evolving plaintiffs' bar; some Mexican law firms keen in developing a plaintiff's practice in collective actions have formed and are using non-profit civil partnerships as a vehicle to gain the required standing.

At the time that this chapter went to press, we are not aware of any collective action filed by CONDUSEF against insurance companies. It is possible that the complexity of the issues that generally surround financial services has served a deterrent for lawyers and courts alike. However, it may just be a matter of time before the collective action claiming rights for financial service customers become commonplace in Mexican courts. It is also possible that CONDUSEF – which has become increasingly active as a result of the developments described in this chapter – decides to champion the interests of the insureds that may be affected by violations to the Best Practices Regulations.

## Endnotes

1. When requested, the complete documentation must be furnished prior to the contracting.
2. Cancellation of insurance must not be denied nor delayed without justified cause and should be available through the same means in which it was contracted.
3. The purpose of standardised insurance is to increase the insurance penetration in C- and D+ economic segments in Mexico. Accordingly, CONDUSEF has become active in overseeing the actual deployment of this "social" effort to promote insurance amongst the less favoured population.
4. CONDUSEF now has the authority to suggest a solution to the dispute during the hearing.
5. If appointed as arbitrator, CONDUSEF may decide the dispute either *ex aqua et bono* or in accordance with law.
6. As of January 2017, according to the information available on CONDUSEF's webpage, no Insurance Company has accepted to register their insurance products with the Arbitration Public Offer Registry and only one Independent Arbitrator for insurance matters has registered.
7. Independent Arbitrators' fees are subject to the scale depending on the amount in dispute are required to be paid by Insurance Companies.

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Leonel Pereznieto is a Partner of Creel, García-Cuellar, Aiza y Enríquez and heads the firm's insurance and reinsurance group.

Leonel's practice brings together a unique insight into Mexican insurance and reinsurance laws and a global outlook driven by a demanding international clientele. His broad expertise in direct insurance – including marine insurance – cuts through contentious, transactional and regulatory aspects, with a particular emphasis on creating structures for innovative product lines and business arrangements for the Mexican market. On the reinsurance front, he represents reinsurers in connection with contentious and contract issues in Mexico and in other Latin American countries as well as global reinsurance brokers on their regional business.

Leonel is admitted to practice in Mexico and New York and is a member of the Insurance Committee of the International Bar Association.

Mr. Pereznieto recently authored the article – “The New Insurance Legal and Regulatory Framework in Mexico: A Year in Retrospect” General chapter for the 2016 edition of ICLG's *International Comparative Legal Guide to: Insurance & Reinsurance*.

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María José has had a close involvement in the development, implementation and compliance of Solvency II Corporate Governance regulations.

Her expertise allows her to combine her deep understanding of the insurance industry with a strong business-oriented perspective providing bespoke solutions.

She received her law degree from Universidad Anáhuac México Norte and graduated with honours in 2005.

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