Venezuela

Luisa Acedo de Lepervanche and Diego Lepervanche
Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía
Caracas, Venezuela

Introduction

Regulatory System

Major changes have affected the capital markets area in Venezuela in recent years. The main legal instrument regulating securities and exchange was the Capital Markets Law (*Ley de Mercado de Capitales)*, which was originally enacted in 1973 and amended in 1975 and in 1998[1] (the "Abrogated Law"). The Abrogated Law was replaced in August 2010 by the Securities Market Law (*Ley del Mercado de Valores[2])*, which was later reprinted to correct "material errors" in November 2010, (the "Securities Market Law"),[3] and is currently in force.

In general, the Securities Market Law allows companies to raise funds from the public by means of issuing and placing securities, under the supervision of the National Superintendence of Securities (*Superintendencia Nacional de Valores*, the "Superintendence"). The Securities Market Law regulates the following:

- The Superintendence and its functions;
- Securities that are to be publicly offered;
- Issuers;
- Brokers;
- Investment advisers; and
- Investor protection.

The Securities Market Law defines securities in a broad manner[4] in article 16, where it states:

> "It will be understood as securities, for the purposes of this law, the financial instruments which represent property or credit rights over the equity of a

1 *Official Gazette* Number 36.565 of 10 October 1998.
2 *Official Gazette* Number 39.489 of 17 August 2010.
3 *Official Gazette* Number 39.546 of 5 November 2010.
4 This is contrary to the Abrogated Law, which defined securities simply as "corporations' shares, obligations and any other securities issued in masse that have the same characteristics and grant their holders the same rights within their class".

> corporation, short, medium, or long term, issued *en masse*, which have the same characteristics and grant their holders the same rights within their class. The National Superintendence of Securities, in cases of doubt, shall determine which are the securities regulated by this Law:
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> ". . . derivative instruments, different types of instruments or securities representing a right of option for the purchase or sale of securities and futures contracts on securities, where the parties agree to buy or sell a given amount of securities at a predetermined price and date, and generally any other type of instrument the value of which is determined and fixed by reference to the value of other assets or group of them."
>
> " …securities which represent property rights, warranties and other rights or contracts on agricultural products and supplies."

A public offer is defined in article 17 of the Securities Market Law as "the offer made to the public, to given sectors or groups by any advertising or broadcasting means". This definition is quite vague, so the same article states that, in case of "doubt regarding the nature of the offering", the Superintendence has the power to decide whether it is a public offer or a private offer.[5]

If there is a public offer, an authorization granted by the Superintendence is needed. The granting of this authorization takes time and is subject to meeting certain legal requirements. An individual or corporation that provides investment advice or brokerage services in Venezuela must have a license as an investment adviser or as a securities broker, as the case may be, issued by the Superintendence.

In June 2010, the National Financial System Organic Law (*Ley Orgánica del Sistema Financiero Nacional*,[6] the "Financial System Law") was enacted and, in December 2010, it was amended in order to correct a "material error". This law created the Superior Organ for the National Financial System (*Órgano Superior del Sistema Financiero Nacional*, Osfin). Osfin's role is to regulate, supervise, control, and coordinate the national financial system, which comprises:

- The banks and other entities that operate in the banking sector;
- The insurers and other entities that operate in the insurance sector; and
- The brokerage houses and other entities that operate in the capital markets sector.

The Financial System Law, which provides for the creation of Osfin, states that, until Osfin is in a position to assume its role, it will be undertaken by the Ministry of Finance. The Financial System Law further provides that the regulatory

5 Securities Market Law, art 17.

6 *Official Gazette* Number 39,447 of 16 June 2010 and amended as published in *Official Gazette* Number 39.578 of 21 December 2010.

agencies for each of those areas, including the Superintendence, shall coexist with and be coordinated by Osfin, which has the power to:

- Issue binding opinions;
- Issue regulations; and
- Establish penalties.

A state-owned stock exchange, the Bicentenary Public Stock Exchange, was created in November 2010 by the Law of the Bicentenary Public Stock Exchange (*Ley de la Bolsa Pública de Valores Bicentenaria*[7]). The Caracas Stock Exchange, a private forum which started operations in 1947, continues its activities, regulated by the General Regulations of the Caracas Stock Exchange (*Reglamento General de la Bolsa de Valores de Caracas, C.A.*[8]). However, even though there are now two active stock exchanges in Venezuela, the Venezuelan stock market is very diminished due to political and economic reasons.

The regulation regarding securities, especially from the point of view of international transactions, has been further complicated because, since February 2003 there has been an exchange control system in force, which further regulates and limits the activities of the capital markets actors, whether national or international. In addition, in September 2005, the Law Against Illicit Exchanges (*Ley contra los Ilícitos Cambiarios)* was passed, criminalizing foreign exchange transactions outside the regulations, and in December 2007 a new Law Against Illicit Exchanges was enacted. The Law Against Illicit Exchanges was modified in February 2008, and a new amendment was approved in May 2010 (the "Illicit Exchanges Law"[9]). The Illicit Exchanges Law was abrogated in February 2014 by the less restrictive Exchange Controls Decree-Law (*Decreto Ley del Régimen Cambiario y sus Ilícitos*,[10] the "Exchange Controls Decree-Law").

Therefore, legally valid access to foreign currency is severely limited in Venezuela, in accordance with the exchange controls regulations, under the administrative office in charge of exchange control matters, the *Centro Nacional de Comercio Exterior* ("Cencoex"), created in 2013[11], which in 2014 took over the exchange controls administration, upon the suppression of the *Comisión de Administración de Divisas* ("Cadivi") by the Exchange Controls Decree-Law.

From 2003 until 2009, there was only one official exchange rate, which varied from time to time. However, from 2005 to 2009, the official exchange rate was

7 *Official Gazette* Number 5.999 E of 13 November 2010.
8 *Official Gazette* Number 39.096 of 12 January 2009.
9 *Official Gazette* Number 5.975 E of 17 May 2010.
10 *Official Gazette* Number 6.126 E of 19 February 2014.
11 *Official Gazette* Number 6.116 E of 29 November 2013.

kept at the artificially low rate of VEF 2.15 per US dollar.[12] In January 2010, two official exchange rates were established: VEF 2.6 and VEF 4.3. In January 2011, the official exchange rate was unified at VEF 4.3. And, in February 2013, the official exchange rate was raised to VEF 6.3. At the present time, July 2014, in addition to the official exchange rate of VEF 6.30 per USD, which is a fixed rate, there are two other official exchange rates, which vary from day to day: (i) the Sicad rate, of approximately VEF 10 per USD (which was implemented in early 2013, and applies only to very limited transactions); and (ii) the new Sicad II rate of approximately VEF 50 per USD. The Sicad II rate is the result of a new system for the distribution and allocation of foreign currency, the *Sistema Cambiario Alternativo* (SICAD II), implemented in March 2014 by means of an agreement between the Venezuelan Central Bank and the Ministry of Popular Power for the Economy, Finances and Public Banks, the *Convenio Cambiario N° 27*[13] (the "Sicad II Regulations"). The Sicad II Regulations theoretically allow the sale and purchase of foreign currency for whatever purposes the buyer wishes. In practice, the internal mechanisms used by the exchange controls authorities to allocate and distribute foreign currency within the Sicad II system, to eventual sellers and buyers, are not clearly defined, so — although a great improvement — the Sicad II rate is not reached by means of a transparent mechanism of exchange. Both the Sicad rate and the Sicad II rate are published daily by the Central Bank. In all cases, except for the Sicad II system (which in practice is of limited and discretional access), foreign currency at the official exchange rates is only available for very specific matters and requires an authorization issued by Cencoex.

Until May 2010, an additional way of legally acquiring foreign currency was the parallel market, or "permuta" market, where individuals and corporations were able to acquire a bond denominated in local currency for a price in local currency, exchange such bond for a bond denominated in foreign currency, and sell the latter bond for a price in foreign currency, or vice versa, by means of transactions made through local brokers and their correspondents abroad, with no restrictions as to the amounts to be sold/acquired or to the origin or destination of the funds. The "permuta" market created a very important segment of work for brokers. However, in the last reform of the Illicit Exchanges Law in 2010, the "permuta" market was forbidden, and brokers were not allowed to participate in exchange controls transactions. In a significant change of course, the Exchange Controls Decree-Law and the Sicad II Regulations now permit the participation of brokers in currency exchange transactions, which include the purchase and sale of bonds.

12 In January 2008, there was a change in the currency of Venezuela, by means of which the former bolívar (Bs) was turned into the *bolívar fuerte* (BsF, VEF), by dividing it by 1,000. Therefore, from 2005 to 2008, the rate of exchange was Bs 2,150 per US dollar and, from January 2008 to January 2010, the official exchange rate was of VEF 2.15 per US dollar.

13 *Official Gazette* Number 40.368 of 10 March 2014.

Legal Sources

Relevant legislation includes:

- The Exchange Controls Decree-Law[14] and the Illicit Exchanges Law;[15]
- The Law of the Bicentenary Public Stock Exchange;[16]
- The Securities Market Law and the Abrogated Law;[17]
- The Organic Law of Administrative Procedures;[18]
- The Financial System Law:[19]
- The Authorization Regulations;[20]
- The Economic and Financial Disclosure Rules;[21]
- The Public Offer Rules;[22]
- The Transparency Rules;[23]
- The Rules on Fees;[24]
- The Take-Over Rules;[25]
- The General Regulations of the Caracas Stock Exchange;[26] and
- The Sicad II Regulations.[27]

Authorities

The regulatory agency under the Securities Market Law is the Superintendence. Under the Abrogated Law, the regulatory agency was the *Comisión Nacional de Valores* (the "Commission"), now replaced by the Superintendence.

The Superintendence is "coordinated" by Osfin, under article 14 of the Financial Systems Law, which includes among Osfin's competencies "the coordination of the regulating entities of the National Financial System, in order to avoid

14 *Official Gazette* Number 6.126 E of 19 February 2014.
15 *Official Gazette* Number 5.975 E of 17 May 2010.
16 *Official Gazette* Number 5.999 E of 13 November 2010.
17 *Official Gazette* Number 36.565 of 10 October 1998.
18 *Official Gazette* Number E 2.818 of 1 July 1981.
19 *Official Gazette* Number 39,447 of 16 June 2010, as amended and published in *Official Gazette* Number 39.578 of 21 December 2010.
20 *Official Gazette* Number 39.071 of 2 December 2008.
21 *Official Gazette* Number 39.574 of 15 December 2010.
22 *Official Gazette* Number 39.585 of 3 January 2011.
23 *Official Gazette* Number 36.650 of 26 February 1999.
24 *Official Gazette* Number 39.720 of 25 July 2011.
25 *Official Gazette* Number 37.039 of 19 September 2000.
26 *Official Gazette* Number 39.096 of 12 January 2009.
27 *Official Gazette* Number 40.368 of 10 March 2014.

distortions in the development of the intermediation activities of the supervised entities".[28]

Although not immediately related to the capital markets area, in view of the exchange control in force in Venezuela, one must mention the corresponding administrative authority, Cencoex, as well as the Central Bank of Venezuela, which oversees Sicad and Sicad II.

Procedures

The Securities Market Laws establishes the National Securities Registry (*Registro Nacional de Valores),* which is defined as follows:

> "Article 15. National Securities Registry.- The files where shall be inscribed or recorded all the acts relative to the persons and securities subject to this Law constitute the National Registry of Securities. The National Securities Superintendence shall dictate the rules for its operation."[29]

Therefore, under the Securities Market Law, securities that are to be publicly offered must be registered, as well as issuers, brokers,[30] investment advisers, stock exchanges, risk-rating agencies, and other entities regulated by the Law.[31] In order to be registered, all of the above must be approved by the Superintendence following procedures that are dictated by the Superintendence. The Securities Market Law has made major changes to the matters under regulation, including significant issues with regard to brokers and investment advisers, among others. In many cases, the Securities Market Law has provided that the Superintendence must issue further rules (*normas)* to regulate specific matters.

Unfortunately, the Superintendence has not issued the regulations that are needed in order to comply with the terms of the Securities Market Law and, in some cases, such as with investment advisers (see text, below), the magnitude of the changes imposed by the Securities Market Law are such that the previous regulations are no longer applicable; thus, there is a legal vacuum regarding certain procedures. In this chapter, we shall also cover the public take-over bids procedure.

Legal Order and Regulatory Interests

Admission

Market Participants

In General. As expressed above, an individual or corporation that provides investment advice or brokerage services in Venezuela must be licensed by the

28 Financial System Law, art 14.5.

29 Securities Market Law, art 15.

30 Among the changes made by the Securities Market Law is that securities brokers, who were called as such (*corredores de valores),* now are called "authorized securities operators" (*operadores de valores autorizados).*

31 Securities Market Law, art 19.

Superintendence as an investment adviser or as a broker. Issuers of securities that are to be publicly offered must also be registered.

Investment Advisers. Investment advisers are regulated in article 22 of the Securities Market Law as follows:

> "Article 22.- Nationals or foreign persons who have studied securities and their issuers, and who express opinions regarding them whether publicly or privately shall be considered investment advisers. Investment advisers are not allowed to receive, directly or indirectly, funds or securities from its clients, except for their fees.
>
> "Investment advisers must obtain authorization from the National Superintendence of Securities. To that effect, the Superintendence must dictate the regulations regarding the authorization and the activities of the investment advisers."[32]

In general, the wording of the Securities Market Law is deficient. This is very evident in article 22, which regulates investment advisers and makes no distinction between individuals and corporations. The wording "who have studied securities and its issuers" could be taken to mean that only individuals, as opposed to corporations, can be considered investment advisers. However, article 8 of the Securities Market Law, when listing the powers and duties of the Superintendence, provides that it will "dictate the regulations according to which companies incorporated in the Republic, abroad, or individuals dedicated to advising on securities investment may operate within the national territory".[33] Therefore, foreign nationals and corporations incorporated abroad are allowed to be registered as Investment Advisers. There are no exemptions from registration requirements for Investment Advisers already registered in another jurisdiction.

The definition contained in article 22 of the Securities Market Law is very broad, and thus substantially changes the regulations for investment advisers that had been in force in Venezuela. Under the Abrogated Law, investment advisers were required to be licensed by the Commission if their "principal object is to advise the public regarding investment in the capital markets".[34] In addition, article 84 of the Abrogated Law established the following:

> "Persons who intend to habitually perform advisory functions for the acquisition of foreign securities, or serve as a direct or indirect contact with financial intermediaries or public stockbrokers operating abroad, must obtain the respective authorization of the National Commission on Securities, which shall establish the registration regulations for such activities to be carried out in the country."

32 Securities Market Law, art 22.
33 Securities Market Law, art 8(14).
34 Abrogated Law, art 85.

Under the legislation now in force, the Securities Market Law, anyone who provides investment advice in Venezuela, whether publicly or privately, must be licensed by the Superintendence. Indeed, according to the Law, anyone who has studied the subject of securities and its issuers, and expresses an opinion regarding such subjects, must be licensed by the Superintendence. The most important distinction made by the Abrogated Law, that the advice had to be provided "habitually" and that it had to be the "principal object" of the activities of the investment adviser, is no longer valid.

Under the Abrogated Law, the Commission issued the Rules Regarding the Authorization and Registration of Brokers and Investment Advisers (*Normas Relativas a la Autorización y Registro de los Corredores Públicos de Valores y Asesores de Inversión*,[35] the "Authorization Regulations"). The Authorization Regulations complied with the Abrogated Law, and specifically required that the advice should be provided "habitually".

However, in view of the fact that the Superintendence has yet to issue the rules regarding authorizations under the Securities Market Law, the Authorization Regulations should apply only in those matters that do not contradict the Securities Market Law. For instance, according to the Authorization Regulations, individuals who request an authorization must be over 35 years of age, have a graduate title, take and pass an examination administered by the Commission (now the Superintendence), or obtain a waiver from it based upon their qualifications obtained abroad. This does not contradict the Securities Market Law.

The Abrogated Law established indirectly the acceptance of foreign Investment Advisers, since the functions of the Commission included the following text: "Dictate the rules according to which companies domiciled abroad may operate in the national territory . . .".[36] However, the Authorization Regulations contain no provisions for the authorization of legal entities incorporated abroad. It simply states that companies that are not incorporated or domiciled in Venezuela may not be authorized as investment advisors. In the case of corporations, the Authorization Regulations required that such entities had to be in the form of a Venezuelan *sociedad anónima* (limited-liability company), and their exclusive object should be solely to provide investment advice.

In contrast, the Securities Market Law expressly accepts foreign Investment Advisers in the article that defines them, which refers to "Nationals or foreign persons who have studied securities and their issuers, and who express opinions regarding them whether publicly or privately". In addition, and similarly to the Abrogated Law, it indicates that the Superintendence shall issue "the regulations according to which companies incorporated in the Republic or abroad . . . may operate within the national territory".[37]

35 *Official Gazette* Number 39.071 of 2 December 2008.
36 Abrogated Law, art 9(8).
37 Securities Market Law, art 8(14).

The Abrogated Law and the Authorization Regulations required that corporations must render their services through individuals who must have been duly authorized as Investment Advisers by the Commission (now the Superintendence); this requirement also is implicit in the wording of the Securities Market Law.

There is a registration fee, which was set by the Superintendence in January 2011, by means of the Regulations Regarding Duties and Contributions, that must be paid by persons under the control of the Superintendence[38] (*Normas Relativas a las Tasas y Contribuciones que deben cancelar las Personas sometidas al Control de esta Superintendencia,* the "Rules on Fees"). Investment advisers who are individuals must pay 100 tributary units[39] and corporations must pay 200 tributary units.[40] The tributary unit changes yearly, in order to adapt to the inflation rate;[41] as of January 2014, it was set at VEF 127.

In addition, investment advisers must pay a "special yearly contribution" to the Superintendence, as established in the Rules on Fees. If the investment adviser is an individual, the special contribution is of 100 tributary units.[42] If the adviser is a corporation, it must pay 1,000 tributary units.[43] The special contribution must be paid upon registration, and then yearly within the first 15 days of January.

There is no established time frame for the Superintendence to register an investment adviser, or even to reply to its request. In view of the recent changes in legislation, and since no new regulations have been issued to comply with the Securities Market Law, it is difficult to estimate how long registration will now require (under the Abrogated Law and the Authorization Regulations, it took many months).

The Organic Law of Administrative Procedures[44] (*Ley Orgánica de Procedimientos Administrativos),* which governs procedures not covered by specific laws or regulations, provides that "the processing and resolution of files" may not exceed four months that, in exceptional cases, may be extended for two additional months".[45] However, in practice, the term is not applied by the Superintendence.

As stated above, with regard to foreign individuals or corporations who wish to register as investment advisers, the Securities Market Law provides that the Superintendence must "dictate the regulations according to which companies

38 *Official Gazette* Number 39.720 of 25 July 2011.
39 Rules on Fees, art 1, para 2(4).
40 Rules on Fees, art 1, para 2(3).
41 In 2010, the official inflation rate was of 27.2 per cent (as indicated by the Central Bank of Venezuela).
42 Rules on Fees, art 1(e).
43 Rules on Fees, art 1(d).
44 *Official Gazette* Number E 2.818 of 1 July 1981.
45 Organic Law of Administrative Procedures, art 60.

incorporated in the Republic, abroad, or individuals dedicated to advising on securities investment may operate within the national territory". The Superintendence has yet to comply and there has been no announcement regarding the regulations to be issued. In practice, the Superintendence's website list of registered investment advisers includes 125 individuals[46] and eight corporations.[47] The Superintendence's Annual Report for 2013 has no record of new investment advisers being admitted; whereas it indicates that the inscriptions of eight investment advisers were cancelled.

Brokers. According to the Securities Market Law, brokers (*corredores públicos de valores*) are now denominated "authorized securities operators" (*operadores de valores autorizados*). Article 20 of the Securities Market Law defines the concept of brokers as follows:

> "Authorized securities operators: Individuals or corporations who habitually or regularly engage in the performance of activities of intermediation with securities in the primary or secondary securities market, or in the raising of funds or securities for investment in securities regulated by this Law, in their own name and their own account, or on account of a third party, or in the name and account of a third party."[48]

The article further states that brokers may adopt the form of corporations and may be shareholding members of a stock exchange. The Abrogated Law did not define brokers; it only established that persons who engaged in brokerage operations, whether within or outside a stock exchange, had to request authorization from the Commission.

According to the Securities Market Law, all brokers (even those who were previously authorized under the Abrogated Law) must request from the Superintendence an authorization to act as such authorized securities operators within 180 days from the entry into force of the Securities Market Law, which may be prorogued for a further 180 days, during which period they may act as "temporary" brokers.[49]

With regard to non-Venezuelan individual or corporate brokers, the Securities Market Law's definition of brokers does not expressly state that they may be foreign. However, when establishing the functions of the Superintendence, it provides that the latter must issue "the regulations according to which individuals or companies incorporated in the Republic or abroad . . . may operate within the national territory".[50] These regulations have yet to be issued.

The Authorization Regulations, issued under the Abrogated Law, required that corporate brokers had to be in the form of a Venezuelan *sociedad anónima*

46 http://www.snv.gob.ve/snv/rnv/adi.php.
47 http://www.snv.gob.ve/snv/rnv/consultaempresasjuridicas.php?tipo_empresa=4.
48 Securities Market Law, art 20.
49 Transitory Provision, Securities Market Law.
50 Securities Market Law, art 8(14).

(limited-liability company) and their exclusive object should have been to act solely as securities intermediaries.[51]

Article 20 of the Securities Market Law also establishes that the Superintendence may dictate the norms that will regulate the brokers, regarding not only the authorization to act as brokers, but also all the activities performed as such, the technical requirements of solvency and liquidity, the financial information, and the transfer of shares of broker corporations.

Brokers are supervised by the Superintendence, which must authorize and supervise their acts as provided in article 8(1) of the Securities Market Law that establishes the latter's functions. Among the supervisory faculties of the Superintendence is that it may revoke or suspend the broker's authorization and cancel the inscription in case of a grave violation of the norms that regulate their activities. The law does not specify what it considers to be a grave violation of the norms. The Securities Market Law provides that brokers may not:

- Perform and register simulated operations;
- Execute operations without a transfer of securities;
- Liquidate its operations outside the official site of the stock exchange; or
- Perform intermediacy operations for the banking and insurance sectors.[52]

The Securities Market Law also establishes that brokers may not deal with national public debt bonds.[53] However, after the Securities Market Law was enacted, the following has happened: (i) the Exchange Controls Decree-Law now permits the participation of brokers in exchange operations;[54] (ii) the Sicad II Regulations expressly indicate that Sicad II operations may be transacted through "institutions authorized to act in the securities markets, in accordance with the Securities Market Law";[55] and (iii) the Superintendence has issued the Instructions for the Participation in the Alternative Exchange of Foreign Currency System (SICAD II) of Authorized Securities Operations[56] and a list of brokers so authorized.[57] Therefore, the relevant provision of the Securities Market Law has been abrogated, and brokers are now allowed to participate in exchange transactions, which include national public debt bonds.

51 Authorization Regulations, art 7.
52 Securities Market Law, art 27.
53 Securities Market Law, art 2.
54 Exchange Controls Decree-Law, art 10.
55 Sicad II Regulations, article 4.
56 *Official Gazette* Number 40.387 of 4 April 2014.
57 *Official Gazette* Number 40.457 of 18 July 2014.

As with investment advisers, there is a registration fee, set by the Rules on Fees. Brokers who are individuals must pay 100 tributary units;[58] corporations must pay 200 tributary units.[59]
In addition, brokers must pay a "special yearly contribution" to the Superintendence, as established in the Regulations Regarding Duties and Contributions. If the broker is an individual, the special contribution is 100 tributary units.[60] If the broker is a corporation, it must pay 1,000 tributary units.[61] The special contribution must be paid upon registration, and then yearly with the first 15 days of January.

As with investment advisers, there is no established time frame for the Superintendence to register a broker, or to reply to a request. No new regulations have been issued to comply with the Securities Market Law in this regard; thus, it is difficult to estimate how long registration will take (under the Abrogated Law and the Authorization Regulations, it took many months). As stated above, there is a time limit (four months, which in exceptional cases may be extended only for two additional months), but this is not applied in practice by the Superintendence.

There has been no announcement regarding the regulations that need to be issued. In practice, the Superintendence's website list of brokers includes 239 individuals[62] and 44 corporations[63] (34 of which are allowed to participate in the Sicad II system). The Superintendence's Annual Report for 2013 has no record of new brokers being admitted, whereas it indicates that the inscriptions of nine brokers were cancelled.[64]

Securities

The definition of securities contained in the Securities Market Law is as follows:

> "It will be understood as securities, for the purposes of this law, the financial instruments which represent property or credit rights over the equity of a corporation, short, medium or long term, issued en masse, which have the same characteristics and grant their holders the same rights within their class. The National Superintendence of Securities, in cases of doubt, shall determine which are the securities regulated by this Law.
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> ". . . derivative instruments, different types of instruments or securities representing a right of option for the purchase or sale of securities and futures contracts on securities, where the parties agree to buy or sell a given amount of securities at a predetermined price and date, and generally any other type

58 Rules on Fees, art 1, para 2(4).
59 Rules on Fees, art 1, para 2(3).
60 Rules on Fees, art 1(e).
61 Rules on Fees, art 1(d).
62 http://www.snv.gob.ve/snv/rnv/cptv.php.
63 http://www.snv.gob.ve/snv/rnv/consultaempresasjuridicas.php?tipo_empresa=2&tipo_empresa1=5.
64 http://www.snv.gob.ve/snv/documentos/ecofinmer/informes%20anuales/infoanual13.pdf.

of instrument whose value is determined and fixed by reference to the value of other assets or group of them.
". . . securities which represent property rights, warranties and other rights or contracts on agricultural products and supplies."[65]

The treatment of securities in the Securities Market Law differs from the same subject in the Abrogated Law. The latter also established a definition of the securities; however, the definition simply stated that "corporations' shares, obligations and any other securities issued en masse that have the same characteristics and grant their holders the same rights within their class" must be considered securities in accordance with such law.[66] The Abrogated Law then went on to regulate each of the most common securities, establishing their legal regime.

In the Securities Market Law, securities are only defined in general terms. There is no explicit mention of bonds, participation certificates, and commercial papers, and no specific provisions apply to them. The Securities Market Law simply states, in very general terms (when establishing the functions of the Superintendence and within the context of authorizing and registering the public offer of securities), that the Superintendence must issue rules regarding securities.[67]

Only with regard to bonds (*obligaciones*) has the Superintendence complied with its obligation to issue rules. In January 2011, the Superintendence issued the Rules Regarding the Public Offer and Placement of Securities and the Publicizing of Issues (*Normas Relativas a la Oferta Pública y Colocación de Valores y a la Publicación de las Emisiones,* the "Public Offer Rules"[68]). The Public Offer Rules contain a chapter dedicated to bonds.

The Securities Market Law does explicitly include derivatives in the definition of securities, and gives them the same treatment as the rights of option for purchase or sale of securities and future contracts of securities. It also explicitly includes securities that represent property rights, warranties, and other rights or contracts on agricultural products and supplies. Issuer requirements in order to make a public offer of securities are contained in the Public Offer Rules that were issued under the Securities Market Law.

Article 2 of the Public Offer Rules establishes as its first requirement that the issuer obtain from the Superintendence authorization to make a public offer. Article 4 provides that such authorization and the registration of the issue in the National Securities Registry are prerequisites for making a public offer of securities.

65 Securities Market Law, art 16.
66 Abrogated Law, art 22.
67 Securities Market Law, art 8(2).
68 *Official Gazette* Number 39.585 of 3 January 2011.

Periodic Disclosure

In General. Venezuelan capital markets regulations strictly establish the information that its actors must disclose periodically to the Superintendence. Article 43 of the Securities Market Law establishes that corporations subject to it may notify the Superintendence in advance regarding the following:

- Variations of equity;
- Sale of the main asset;
- Change in the object of the company;
- Merger or transformation of the company; and
- Other actions which the Superintendence may establish.[69]

According to the Rules Regarding the Economic and Financial Information that must be supplied by persons subject to the Control of the National Superintendence of Securities (*Normas Relativas a la Información Económica y Financiera que deben suministrar las Personas sometidas al Control de la Superintendencia Nacional de Valores*, the "Economic and Financial Disclosure Rules"[70]), the actors regulated by the Superintendence are required to provide certain information periodically. The Economic and Financial Disclosure Rules establish the type of information required depending on the subject entity:

- Issuers;
- Collective investments entities and their administrating corporations;
- Brokers; and
- Transfer agents.

Issuers. In accordance with the Economic and Financial Disclosure Rules, within the seven days following the annual ordinary shareholders' meeting, such companies must deliver to the Superintendence the following documents:

- Approved financial statements;
- Internal auditor's report;
- Certified copy of minutes of the shareholders' meeting;
- Information regarding dividends and the remuneration of the board of directors;
- A report from the board of directors that includes the most important variations, new contracts, new activities, litigation, and any other important new fact that may affect the company;

69 Securities Market Law, art 43.
70 *Official Gazette* Number 39.547 of 15 December 2010.

- List of shareholders;
- Report regarding the compliance with the good corporate government principles established by the Superintendence;
- Report on the methods and procedures used to prevent money laundering; and
- Most recent income tax declaration.

In addition, every quarter, within 30 days after the accounting closing, issuers must provide the Superintendence with quarterly financial statements, explaining the most significant variations compared to the same quarter from the earlier year. Issuers also must publish monthly the following information:

- Financial statements, compared to the same month of the previous year and adjusted for inflation; and
- Solvency indicators, working capital indicators, long and short-term debt, and return over equity and return over assets.

Issuers also must inform the Superintendence of any economic or financial fact or legal action that may be important for the estimation of the prices or the circulation of the securities. They must also inform about declared dividends and any transactions between the companies and the board of directors or their principal shareholders, or with companies related to either. Issuers must provide notice, with 30 days' anticipation, of any shareholders' meeting to be convened to decide the dissolution of the company, the extension of its term, its merger to another company, the sale of its main asset, or the change of its object.

In the case of meetings to decide the increase or reduction of capital, the issuer must inform the Superintendence with 15 days' anticipation. Issuers who have been authorized by the Superintendence to issue securities through public offers abroad must provide to the Superintendence the information above, as well as any other information requested by the regulatory institution abroad.

Brokers

Brokers also must provide economic and financial information, periodically, to the Superintendence, in accordance with the Economic and Financial Disclosure Rules. Brokers must provide to the Superintendence, in the first five days of each quarter, operations of their own and related portfolio of the previous quarter, including a report on the date of the operation, the issuer of the securities, the type of operation, the conditions, and the quantity.

Annually, within 15 days from each year's closing, brokers must provide a report of the owners of the securities of the related portfolio. Subsequently, if there is any change, they must inform the Superintendence. Corporate brokers must provide the Superintendence, within the next 15 days after the last monthly closing, the following information:

- Financial statements prepared by a public accountant;
- Report of their own portfolio, mentioning issuers, description of the securities, date of acquisition, date of maturity, value, currency, and exchange rate;
- Report of the related portfolio organized by each of the holders of securities related to the broker, mentioning issuers, description of the securities, date of acquisition, date of maturity, value, currency, and exchange rate;
- Report of the administrated portfolio organized by the clients, mentioning each contract and including the securities included in the contract; and
- Report of the portfolio in custody.

The corporate brokers must celebrate the ordinary shareholders' meeting in 90 days following the annual closing. Within eight days following the shareholders' meeting, such companies must deliver to the Superintendence a certified copy of the minutes of the shareholders' meeting. In addition, the corporate brokers must within 30 days following the shareholders' meeting, deliver the registered certified copy of the minutes.

Within 15 days following the closing of each semester, companies must deliver to the Superintendence a report of the operations done during the last semester. Every quarter, within five days after the accounting closing, brokers must, provide to the Superintendence their portfolio operations and the related portfolio operations, mentioning the date, the issuer, type of operation, conditions, amount, price, and custody.

Within 90 days following the semester closing, corporate brokers must deliver to the Superintendence the approved financial statements, a report on the methods and procedures used to prevent money laundering, and the most recent income tax declaration. Corporate brokers must inform the Superintendence of any economic or financial fact or legal action that may affect them. Additionally, they give notice as to litigation, changes in their statutes, changes in bank loans situations, and changes in the board of directors or relevant personnel.

Other Participants

Members or shareholders of a stock exchange must, within 90 days following the semester closing, deliver to the Superintendence financial statements, a report of their operations, and most recent income tax declaration. Brokers who are not members or shareholders of a stock exchange must, within 30 days after the closing of the financial year, deliver to the Superintendence financial statements, a report of their operations, and most recent income tax declaration.

Other participants, such as transfer agents, must disclose information periodically to the Superintendence. Additionally, the Authorization Regulations, issued under the Abrogated Law, provided for the Commission, now the Superintendence, exercise control over investment advisers, such as by:

- Requiring that certain documents be kept by the Investment Adviser or submitted by the Investment Adviser to the Superintendence;[71]
- Requiring that when the investment adviser renders advice in connection with related corporations, the adviser must previously notify the Superintendence, as well as its clients; and
- Requiring that marketing material related to investment advisory services be previously approved by the Superintendence.

Trading Rules

Securities Offerings

As stated above, the Public Offer Rules provide that the indispensable prerequisites needed in order to make a public offer of securities are the Superintendence's authorization to make a public offer and the registration of the issue in the National Securities Registry.

The primary placement can be done by the Issuer or by a placement agent (who must be a broker or have been expressly authorized as placement agent by special laws). The price of the offer must be mentioned in the prospectus and must be maintained during all the placement period.

The issuer must publish in a national journal and in a local journal a notice publicizing the issue, at least five days before the primary placement takes place. In the notice, the issuer must mention the names, addresses, email addresses, and telephone numbers of the placement agents. In addition, within five days after the end of the placement process, the issuer must publish a notice of the end of the process. The notices must be approved by the Superintendence. Once the primary placement ends, the issuer must deliver to the Superintendence the results, with the identification of buyers and the amount acquired.

Article 8 provides that the issuer must indicate the term during which the placement of the issue will take place. That term will begin at the time published in the public notice and may not exceed six months. The Public Offer Rules require that the issuer and the intermediaries who participate in the primary placement must give preference to small and medium investors to purchase the securities, during the first five days following publication, in accordance with the guidelines established by the Superintendence for each case. These features should be included in the prospectus and in any other publications.[72]

Issuers, placement agents, and distributors must follow the rules established in the prospectus and in the contract of primary placement (which must be approved by the Superintendence). Placement agents can celebrate distribution contracts with brokers or with distribution agents. Issuers, placement agents,

71 "Documents" include correspondence, memoranda, books and other registries (of memoranda of instructions of received fees), invoices, and recommendations.

72 Public Offer Rules, art 19.

and distributors must register operations daily, and the information contained in those registries must be delivered to the Superintendence monthly.

The prospectus must be authorized by the Superintendence. Once the securities are registered in the Superintendence, the issuer must provide the Superintendence with the final prospectus in order to begin the public offer. The issuer also must deliver to the Superintendence the placement contracts, common representative contracts, payment agent contract, and custody contract, all notarized. Although the prospectus cannot circulate publicly before the issue is authorized, the issuer can privately deliver it to the agents of placement and distribution. All advertising related to the issue must be authorized by the Superintendence.

Disclosure of Acquisition of Substantial Holdings

Article 18 of the Securities Market Law regulates public take-over bids. Its sole paragraph provides the following with regard to "significant participations", as the law terms it:

> "The person who wishes to acquire in a single or by successive acts a volume of shares listed on a stock exchange that will lead to reaching a significant participation in the capital of a company, or to the ability to control administrative organs thereof, shall make public the information public in the media and within the periods that the National Superintendence of Securities shall determine in the rules that it will dictate to that effect.
>
> "The person who has not made the notifications referred to in this article may not be able to exercise the rights derived from the acquired securities and the agreements adopted with such person's participation shall be null and void without prejudice to the penalties provided in the Law."[73]

The Rules on Public Offers of Acquisition, Interchange, and Take-Over of Companies That Make Public Offer of Their Stock and Other Securities (*Normas sobre Ofertas Públicas de Adquisición, de Intercambio y Toma de Control de Sociedades que hacen Oferta Pública de Acciones y otros Derechos sobre las mismas,*[74] the "Take-Over Rules") were issued by the Commission in 2000, under the Abrogated Law, which had a similar article regarding public take-over bids. The Take-Over Rules include a definition of what is called a "participation [which is] reputed significant", as follows:

> "Any participation in the capital of the company which represents, directly or indirectly, by means of ownership, beneficial interest, control rights over the right to vote, business integration agreements or any other manner, which allows the Initiator to obtain control or to increase its participation in more than 10 per cent."

73 Securities Market Law, art 18.
74 *Official Gazette* Number 37.039 of 19 September 2000.

According to the Take-Over Rules, a person who is initiating a public offer bid may notify the Commission, now the Superintendence, within the procedure established for public offer bids (see text, below). In addition, the Abrogated Law established, under article 122, that persons who directly or indirectly, under whatever title, reached ownership or beneficial rights over more than 10 per cent of any kind of shares of an issuer, needed to notify the Commission within two days from the transaction.

It also established that the administrators of an issuer had to notify the Commission of any acquisition of shares of such issuer made by such administrators, within two days.[75] The Rules Relating to the Transparency of the Capital Markets (*Normas Relativas a la Transparencia de los Mercados Capitales*, the "Transparency Rules"[76]), issued under the Abrogated Law, develop the provisions of article 122 of the Abrogated Law. The Securities Market Law has no equivalent provision but, since the regulations of the Transparency Rules do not contradict the Securities Market Law, they are applicable.

Privileged Information

Article 38 of the Securities Market Law defines privileged information as follows:

> "Privileged information is that information which is not accessible or available to the public, of a precise character, and which if made public, influences or may influence, in an appreciable manner, the trading of securities. It is not privileged information, that information which may be developed by third parties independently, or which is available to the public otherwise."[77]

The use of privileged information in the securities market in order to obtain an economic benefit is a criminal act, and article 52 of the Securities Market Law provides that it is punished by prison (three months to two years), fines, and disqualification. The Securities Market Law also states that the employees of the Superintendence should not divulge data or confidential or privileged information, under the penalties established above and dismissal.[78]

The wording of the Securities Market Law's definition of privileged information stresses that it influences or may influence trading in an appreciable manner. The law does not specify further. However, the Transparency Rules, which were issued under the Abrogated Law, explain that the terms that "may influence in an appreciative manner the trading of securities" are to be understood as referring to "any fact or event of any nature, such as legal or economic, financial, managerial, technological, natural events, which in the opinion of the issuing company affects or may affect it".[79]

75 Abrogated Law, art 122.
76 *Official Gazette* Number 36.650 of 6 February 1999.
77 Securities Market Law, art 38.
78 Securities Market Law, art 11.
79 Transparency Rules art 1.

Issuers are obliged to divulge privileged information in accordance with the provisions of the Securities Market Law[80] and the Transparency Rules. Issuers must prepare and deliver "immediately" to the Commission, now the Superintendence, a report with a succinct summary of the information, including economic, financial, and other details which are "indispensable" for the market to reach a reasonable criterion about the facts, events, or situation provided.[81] Such report must then be delivered "immediately" to at least three national or international news agencies (which provide national coverage), one of which must provide "real time" information.[82]

According to the Abrogated Law, if the issuer considered that the immediate disclosure of the information could be damaging to its legitimate interests or to the interests of the holders of securities issued by the issuer, it should provide the information to the Commission, requesting that the matter remain confidential. If the Commission did not answer within two days, the issuer had to make the information public. This provision was further developed in article 20 of the Transparency Rules, which indicated that it must be a reasoned request which must explain with clarity the motivations of fact or law. The Securities Market Law contains no equivalent provision.

Public Take-Over Bids

In 2000, under the Abrogated Law, the Commission issued the Take-Over Rules. Article 109 of the Abrogated Law stated that the Commission, now the Superintendence, should issue the rules governing the procedure of public take-over bids. The Securities Market Law also contains a similar provision, so the Take-Over Rules continue to apply. The aim sought by the Take-Over Rules, as established in article 2, is to:

- Provide a transparent procedure, in order to prevent erratic fluctuations and deviations in the value of shares and other securities;
- Allow the orderly participation, in conditions of equality, of all shareholders;
- Permit bids by other interested parties, who may wish to equal or improve the offers' conditions; and
- Promote the supply of the information required by the existing shareholders, regarding their decision on whether or not to sell.

The Take-Over Rules cover public offers of acquisition (*Ofertas Públicas de Adquisición*, OPA), exchange public offers (*Ofertas Públicas de Intercambio*, OPI), and public take-over offers (*Ofertas Públicas de Toma de Control*, OPTC).

In the first two cases, the initiator of the offer does not have and seeks to own a "significant participation" (to obtain control or to increase its participation in

80 Securities Market Law, art 38.
81 Transparency Rules, arts 2 and 3.
82 Transparency Rules, art 4.

more than 10 per cent of the capital) with the proviso that the procedure "does not have the effects of a takeover". The difference between OPA (acquisition) and OPI (exchange) regards compensation. In the first case, it is the payment of money; in the second, it is the transfer of securities.
A take-over offer (OPTC) is the procedure whereby the initiator seeks to acquire or to complete (by the transfer of money and/or securities) a controlling majority, or to increase its existing share participation by a percentage equivalent to a significant participation. The Take-Over Rules also apply to shareholders who wish to increase their participation by more than 10 per cent or by any percentage, if in a takeover situation, and majority shareholders who wish to increase their participation.

Regarding sellers, the Take-Over Rules apply also to shareholders who offer publicly to sell to the best bidder a significant participation or the majority control (more than 50 per cent or the effective control of the decisions of the shareholders' meeting). The Take-Over Rules establish the common procedure to be complied with, briefly summarized as follows:

- The initiator must file a report before the Superintendence, stating the information relevant to the offer. The duration of the offer must be set by the initiator, within a limit of no less than 20 and no more than 30 stock market working days;
- The Superintendence will then accept or deny the authorization for the release of the report;
- The target company must then consign its observations, including a report from its board of directors, with these observations released to the public, after notifying the Superintendence;
- Any person, including the shareholders of the company involved, may present a competing offer, thus becoming an initiator;
- Initial offers may be modified, subject to the Superintendence's approval of the release of the modified report;
- Offers may be revoked simply by previously notifying the Superintendence provided the revocation is made before the offer becomes effective, with the Superintendence having to approve revocation if made afterwards;
- Acceptance of the offer must be notified to its initiator;[83] and
- The payment due must be made in a stock exchange within five stock market working days following the closing of the offer.

Additionally, certain formalities apply to each of the different types of public offer, such as, in case of take-overs, the filing of a special report with detailed information (including future plans). There also is a simplified procedure that

83 The acceptance also may be revoked, but only in certain cases.

applies if the initiator already owns at least two-thirds of the shares and offers to acquire total control of the company, the offer is limited to 10 per cent of the shares, and the company concerned proceeds to a plan of acquisition of treasury shares.