

VENEZUELA: NEW RULES ON COMMERCIAL PAPERS

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This article analyzes the amendments made to the “Rules concerning the issuance, public offer and negotiation of commercial papers” (*Normas relativas a la emisión, oferta pública y negociación de papeles comerciales*)(the “Rules”), which were issued by the *Comisión Nacional de Valores* (“CNV”), and published in the Venezuelan Official Gazette on April 3, 2002.

We shall begin by explaining what the term “commercial papers” means under Venezuelan law. According to the author, Alfredo Morles,² the CNV used an euphemism when establishing that short term bond certificates should be called “commercial papers”. Indeed, Venezuelan Capital Market Law (*Ley de Mercado de Capitales*) defines commercial papers as bonds, representing debts, which are issued by companies in order to sell them by public offer. It also establishes that the lapsing period for these bonds may not be less than 15 days nor more than 360 days. Consequently, it is the opinion of the aforementioned scholar that in Venezuela there exist two types of commercial papers: (i) those that fall within the scope of the Rules (typical commercial papers) and (ii) those that result from the mass issuance of short term bond certificates, which according to financial practice, also receive such name. Because of this, the term “commercial papers” in Venezuela has a particular meaning, which is very different from the one usually given to such term under other systems of law. In fact, this article refers to this very use of the term, since it addresses the amendment to the regulation which makes them “typical”, and not the kind generally known under other foreign laws.

We shall now address the amendment to the Rules.

First, article 4 of the Rules now stipulates that companies that request authorization to issue commercial papers must destinate the resources generated by this issuance to the financing of the activities specified in the offering circular, conditioning the destination of these funds to working capital. The abrogated article required that the companies had to have the capacity to generate original funds destined to comply with the obligations contracted, this being independent of any security which might have accompanied the issuance. Another important difference refers to the securities and guarantees which companies that do not perform financial activities have to grant in order to be authorized to issue commercial papers. Indeed, while the abrogated article required that guarantees and securities

¹ The author wishes to acknowledge the assistance of Ms. Luisa Lepervanche regarding this article.

² Morles Hernández, Alfredo, *Régimen Legal del Mercado de Capitales* (Second Edition), Editorial Texto, C.A. (1999).

needed to apparently evidence reasonable fund availability to comply with the companies' obligations, the new article requires that the referred evidence should be reasonable. Thus, the CNV now has a more discretionary approach to deny the sufficiency of such guarantees and securities.

Second, article 5 of the Rules which refers to the risk qualification was also modified. Indeed, the abrogated article used to mandate that companies seeking authorization should present opinions by two risk qualifying companies, which should be reviewed, at least every six months or, if applicable, when a fact which might affect the issuer's ability to pay arose. These opinions had to be published according to the "Rules related to the authorization of risk qualifying companies and their registration" (*Normas relativas a la autorización de las sociedades calificadoras de riesgo y al registro de las mismas*).³ The Rules now allow the CNV to require only one opinion (based on the market's conditions). Even though the article stipulates the same obligation to review the opinions (based on periodicity and facts related to the issuer's payment ability), as well as the publishing of the new opinions, it now requires an additional obligation: the new information must be included in the offering circular which must be accessible to the public (according to articles 24, literal f, and article 33 of the Rules).

Third, according to article 8 of the abrogated rules the holders of commercial papers had a joint representative, designated provisionally by the Board of Directors of the issuing company and approved by the CNV. This provisional representative would then be substituted by a definitive representative elected by a meeting of commercial papers holders. It went on to stipulate that if such election did not take place the provisional representative would have the powers conferred by law to the definitive representative if the issuing company went into default. The new article, however, eliminates the two different figures of provisional and definitive representative, merging them into one. Indeed, the Rules stipulate that the representative shall be appointed by the Board of Directors and approved by the CNV, and shall remain acting in this capacity until the last series in circulation corresponding to the authorization of issuance commercial papers expire. Evidently, this eliminates the right of the holders to elect their own representative.

Fourth, article 9 of the abrogated rules mandated that a meeting of commercial paper holders should be called by the common representative of the holders whenever an event of default took place with respect to the obligations contracted in relation to the issuance of commercial papers. This did not suffer any radical change. In fact, the Rules keep this obligation, but they add an explanation as to the purpose of the meeting, establishing that it shall take place in order for the common representative to inform the commercial paper holders about the circumstances which have arisen.

³ Published on the Official Gazette on December 2, 1994.

Fifth, article 11 mandated that guarantees should be approved by the CNV for each issuer and each issuance. Now the Rules stipulate that guarantees must be approved, again, for each issuer and each issuance, or series according to the conditions of the offer approved by the CNV.

Sixth, article 13, which refers to bank guarantees, stated that these could be granted: (i) by banks or financial institutions regulated by the General Law of Banks and other Financial Institutions (*Ley General de Bancos y otras Instituciones Financieras*),⁴ or (ii) by financial institutions classified by two well-known international risk qualifying companies, and that should have a minimum risk qualification according to the criteria of the CNV. Now, the Rules changed this last category of grantors, establishing that guarantees could be granted by foreign banks. The new article imposes on such foreign banks the obligation to present a risk qualification made by a company of renowned solvency. The rest of the article remains the same. Basically, it stipulates that the guarantee must cover the totality of the authorized issuance, as well as interests and other expenses. Also, both articles establish that the guarantees granted by several lenders should establish the quota corresponding to each of those, and that an agent for them should be appointed for the execution of the guarantee.

Seventh, article 17, which stated that the denomination and payment of the banking guarantees should be in the same currency of the commercial papers' issuance. This was eliminated.

Eighth, article 24, literal f, (which used to be the same literal of article 25), now stipulates that the issuing company must publish in a nationally distributed newspaper a notice informing about the initiation of the public offer, which should contain, *inter alia*, the place where the public may find the offering circular relative to the issuance. But the important feature is that it adds the obligation to point out the website by means of which this offering circular may be checked by the public.

Finally, article 33 (which used to be article 34) was modified radically. The abrogated article stipulated that in order to obtain the authorization referred to in article 3 of the Rules, an offering circular should be elaborated. This offering circular had to contain the information requested by instructive CNV-i-02. The new article has two important features. First, it eliminates the direct reference to the name of the instructive, changing it for a generic reference to a "corresponding instructive". Second, and more important, it establishes a new requirement to certain companies. Indeed, those companies that are not registered at the National Securities Registry ("*Registro Nacional de Valores*"), or at the Stock Exchange, as well as those that do not apply more than once a year to obtain authorization for the issuance of commercial papers, must present their complete accounting information report for the previous trimester to the authorization request. On the

⁴ This law was abrogated by a Presidential Decree with Force of Law, which was published on the Official Gazette on November 13, 2001. Accordingly, the reference to the abrogated law must be understood as referring to the new decree.

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other hand, those companies which do fall within the above categories are exempt from presenting the report if they have already sent one in compliance with other regulation of the CNV.