Venezuela

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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instrument regulating securities and exchange was the Capital Markets Law (*Ley de Mercado de Capitales)*, which was originally enacted in 1973 and amended in 1975 and in 1998[1] (the "Original Law"). The Original 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 "2010 Law").[3] The 2010 Law was replaced by Presidential Decree, on December 30, 2015, by the Securities Market Decree-Law (*Decreto con Rango, Valor y Fuerza de Ley de Mercado de Valores[4])*, which is currently in force (the "Securities Market Law" or the "Law").

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:

- Persons regulated by the Law:
    - Brokers,
    - Investment Advisors,
    - Stock exchanges and other participants, and
    - Corporations whose shares or other securities are publicly offered ("Issuers");
- Securities that are to be publicly offered;
- Public offers;
- Investor protection; and
- The Superintendence and its functions.

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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 *Official Gazette* Number 6.211 E of 30 December 2015.

The recently enacted Securities Market Law makes a distinction between the treatment applied to Issuers and the general treatment applied to other participants in the capital markets (brokers, investment advisors, stock exchanges, etc.). When establishing the "Common provisions to regulated subjects" under the Law, the first provision is an exception which excludes Issuers, accounting firms and risk assessment companies[5]. In contrast, the 2010 Law's general rules applied to all.

The Securities Market Law defines securities in a broad manner[6] in article 45, 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 corporation, short, medium, or long term, issued *en masse*, which have the same characteristics and grant their holders the same rights within their class. Derivative instruments are also to be considered as securities for the purposes of this law.
> The National Superintendence of Securities, in case of doubt, shall determine which are the securities regulated by this Law."

The Law then defines certain specific types of securities, subject to the Superintendence's controls: bonds (*obligaciones*), commercial papers (*papeles comerciales)*, derivative instruments (*instrumentos derivados)* and participation certificates (*títulos de participación).* Bonds and commercial papers were not defined or ruled in the 2010 Law; the new Securities Market Law returns to the definitions and regulations of the Original Law. The definition of derivatives is similar to that of the 2010 Law; and the definition of participation certificates is new.

A public offer is defined in article 54 of the Securities Market Law as "the offer made to the public, to given sectors or groups by any advertising or broadcasting means, with the finality of subscribing or acquiring securities issued *en masse*". This definition is quite vague, so the same paragraph 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.[7] 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 a habitual manner in Venezuela must have a license as an investment

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5 Securities Market Law, Article 35.

6 This is contrary to the Original 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".

7 Securities Market Law, art 17.

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*,[8] 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 provides that the regulatory 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*[9]*)*. 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.*[10]). 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 are exchange controls in Venezuela, which further regulate and limit the activities of the capital markets actors, both national and international. In addition, in September 2005, the Law Against Illicit Exchanges (*Ley contra los Ilícitos Cambiarios)* was passed, criminalizing foreign exchange transactions

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

9 *Official Gazette* Number 5.999 E of 13 November 2010.

10 *Official Gazette* Number 39.096 of 12 January 2009.

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"[11]). 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*[12], which was replaced by the Exchange Controls Decree-Law of November 2014, and again replaced by another Exchange Controls Decree-Law promulgated on December 30, 2015 (the "Exchange Controls Decree-Law"), which is currently in force and no longer criminalizes foreign exchange transactions outside the regulations, but is very restrictive in many other aspects; for instance, (i) it is forbidden to divulge "false or fraudulent" information regarding the artificially low and very seldom available official exchange rates (and the terms "false or fraudulent" are defined as that which "contradict or distort" the official exchange rates, so it is forbidden to divulge the market exchange rate), and (ii) the prices of goods and services, including but not limited to imports, cannot be established by taking into consideration the market exchange rate.

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 "Exchange Controls Authority"), currently the *Centro Nacional de Comercio Exterior*, created in 2013[13], which in 2014 took over the exchange controls administration, upon the suppression of the *Comisión de Administración de Divisas* 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 kept at the artificially low rate of VEF 2.15 per US dollar.[14] 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. From February 2014 and until March 2016, there was a fixed official exchange rate of VEF 6.30 per USD, and one or more additional variable exchange rates, set by the Exchange Controls Authority. Since March 2016, there are two official exchange rates: a fixed rate called DIPRO of VEF 10 per USD, and a variable official exchange rate called DICOM. The DIPRO rate came into force immediately upon publication of the Exchange Controls Agreement N° 35, entered into between the Venezuelan

11 *Official Gazette* Number 5.975 E of 17 May 2010.

12 *Official Gazette* Number 6.126 E of 19 February 2014.

13 *Official Gazette* Number 6.116 E of 29 November 2013.

14 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.

Central Bank and the Ministry of Banking and Finance[15], whereas the DICOM rate had a *vacatio legis* of one month, in order to implement the system for a floating rate. However, the DICOM system has not been implemented and the Venezuelan Central Bank continues to apply the previous variable rate called SIMADI, which the Central Bank and the Exchange Controls Authority have allowed to rise, and has gone from approximately VEF 200 per USD in March 2016, to approximately VEF 650 per USD in October 2016. When implemented, the DICOM structure should 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 Authority to allocate and distribute foreign currency within the SIMADI system, to eventual sellers and buyers, are not clearly defined, so the SIMADI rate is not reached by means of a transparent mechanism of exchange and the public in general has no access to foreign currency at the SIMADI rate. Both the DIPRO rate and the SIMADI rate are published daily by the Central Bank. In all cases, foreign currency at the official exchange rates is only available for very specific matters and requires an authorization issued by the Exchange Controls Authority.

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 in kind 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 2010 reform of the Illicit Exchanges Law, 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 promulgated in 2014, did not forbid currency exchange transactions, so it implicitly permitted the participation of brokers in currency exchange transactions, which may be performed by means of the purchase and sale of bonds. The current Exchange Controls Decree-Law continues to allow such participation[16]. And the Securities Market Law expressly allows brokers to hold and negotiate public bonds, for which a special license is required[17]. However, the attribution of foreign currency under the systems implemented by the Central Bank of Venezuela and the Exchange Controls Authority since 2014 (including the current SIMADI) has been made under opaque and discretionary mechanisms, where no transparent rules for "bidders" apply, and the amounts that have been transacted are completely insufficient for the needs of the Venezuelan economy. At the present time, as explained above, the DIPRO system has yet to be implemented.

[15] *Official Gazette* Number 40.865 E of 9 March 2016.
[16] Exchange Controls Decree-Law, Article 12.
[17] Securities Market Law, article 4.

Legal Sources

Relevant legislation includes:

- The Exchange Controls Decree-Law and the Illicit Exchanges Law;
- The Law of the Bicentenary Public Stock Exchange;
- The Securities Market Law, the 2010 Law and the Abrogated Law;
- The Organic Law of Administrative Procedures;
- The Financial System Law;
- The Authorization Regulations;
- The Economic and Financial Disclosure Rules;
- The Public Offer Rules;
- The Transparency Rules;
- The Rules on Fees;
- The Take-Over Rules;
- The General Regulations of the Caracas Stock Exchange; and
- Exchange Controls Agreement N° 35.

Authorities

The regulatory agency under the Securities Market Law is the Superintendence. Under the Original Law, the regulatory agency was the *Comisión Nacional de Valores* (the "Commission"), replaced by the Superintendence in 2010.

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 distortions in the development of the intermediation activities of the supervised entities".[18]

Although not immediately related to the capital markets area, in view of the exchange control system in force in Venezuela, one must mention the Exchange Controls Authority, Cencoex, as well as the Central Bank of Venezuela, which oversees DIPRO, SIMADI and –when applied– DICOM.

Procedures

The Securities Market Law establishes the National Registry of Securities (*Registro Nacional de Valores)*, as follows:

18 Financial System Law, art 14.5.

> "Of the National Registry of Securities
> Article 104. The National Superintendence of Securities shall manage a registry where all the acts relative to the persons and securities subject to this Law shall be inscribed or recorded, this shall constitute the National Registry of Securities. The National Superintendence of Securities shall dictate the rules for its operation."[19]

Therefore, under the Securities Market Law, securities that are to be publicly offered must be registered, as well as issuers, brokers, investment advisers, stock exchanges, risk-rating agencies, and other entities regulated by the Law.[20] In order to be registered, all of the above must be approved by the Superintendence following procedures that have to be dictated by the Superintendence.

The 2010 Law made major changes to the matters under regulation, including significant issues with regard to brokers and investment advisers, among others. The Securities Market Law has again changed regulations, in some cases going back to structures of the Original Law. The 2010 Law provided that the Superintendence had to issue further rules (*normas)* to regulate specific matters; however, with few exceptions, such further rules were not issued.

The Law provides that the Superintendence shall issue the regulations that are needed in order to comply with the terms of the Law, including a 30-day term[21] in order to establish "the requirements and conditions to be complied with by individuals and corporations authorized and registered in the National Registry of Securities to obtain a new authorization and registration to operate in the capital market." The Superintendence has not yet issued such requirements and conditions. Furthermore, in the eight months following the enactment of the Law, the Superintendence has not issued any regulations; 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 habitually in Venezuela must be licensed by the Superintendence as an investment adviser or as a broker. Issuers of securities that are to be publicly offered must also be registered.

19 Securities Market Law, art 15.
20 Securities Market Law, art 3.
21 Securities Market Law, Sixth Transitory Provision.

Among the supervisory faculties of the Superintendence is that it may revoke or suspend the entity's authorization and cancel the inscription "for a justified cause", and by means of a duly motivated decision[22].

As stated above, the Securities Market Law establishes that the Superintendence has a 30-day term to comply with the issuance of "the requirements and conditions to be complied with by individuals and corporations authorized and registered in the National Registry of Securities to obtain a new authorization and registration to operate in the capital market"[23]. The same provision states that after such regulations have been issued, market participants have 180 days to comply. Absent such compliance within the stated period, previously granted authorizations and registrations shall be deemed cancelled.

Investment Advisers. Investment advisers are defined in article 16 of the Securities Market Law as follows: "the individuals and corporations who make studies about securities and their issuers, offering, on a regular basis, advisory services, opinions and assistance, through any means, about opportunities to invest, purchase or sell short, medium or long term securities in the capital markets". Thus, if a person does not provide investment advice habitually, then this person is not an investment adviser. This is a substantial change from the 2010 Law, which eliminated the requirement that advice should be provided on a regular basis. The same article provides that any individual or corporation that provides investment advice in Venezuela on a regular basis must have a license as an investment adviser issued by the Superintendence.

The definition contained in article 16 of the Securities Market Law now indicates that advice must be rendered in a regular basis for an adviser to qualify as such under the Law. This reflects the provisions of the Original Law, which established the following, under article 84:

> "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."

Under the Original 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*,[24] the "Authorization Regulations"). The Authorization Regulations complied with the Original Law, and specifically required that the advice should be provided "habitually".

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[22] Securities Market Law, Art. 98(1).

[23] Securities Market Law, Sixth Transitory Provision.

24 *Official Gazette* Number 39.071 of 2 December 2008.

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 Original 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 . . .".[25] However, the Authorization Regulations, issued under such Original Law, state that companies that are not incorporated or domiciled in Venezuela may not be authorized as investment advisors. This contradiction was unconstitutional, because the Authorization Regulations should have conformed to the Original Law. So the prohibition to authorize, as investment advisors, companies that are not incorporated or domiciled in Venezuela, was invalid. 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, which was a valid requirement, since the Original Law did not dictate otherwise.

Similarly to the Original Law and in contrast with the Authorization Regulations, the 2010 Law expressly accepted foreign investment advisers in the article that defined them, which referred to "Nationals or foreign persons who have studied securities and their issuers, and who express opinions regarding them whether publicly or privately". The new Law has eliminated the reference to whether the persons are "national or foreign". And the new Law does not include, among the Superintendence's functions, the approval of rules or requests for the authorization of entities incorporated abroad. Thus, the prohibition to authorize as investment advisors companies that are not incorporated or domiciled in Venezuela, which was established in the Authorization Regulations, was unconstitutional at the time of issuance, and, as such, invalid, because it contradicted the Original Law, which was in force at the time; it continued to contradict the 2010 Law, which expressly allowed foreign investment advisers. Said unconstitutionality and consequent invalidity persist, even though the new Law contains no such express allowance, nor do the Superintendence's functions include the authorization of foreign investment advisers. However, the Constitutional Chamber of the Supreme Tribunal of Justice has not declared such unconstitutionality and consequent invalidity; so it is up to each judge or arbitrator, when faced with a particular case, to decide whether or not to apply said prohibition. Therefore, we conclude that individuals not domiciled in

25 Original Law, art 9(8).

Venezuela or corporations incorporated in accordance with foreign laws may be deemed not to be eligible to be authorized to perform investment advisory functions in Venezuela.

The Original 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 is also 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[26] (*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[27] and corporations must pay 200 tributary units.[28] The tributary unit changes yearly, in order to adapt to the inflation rate;[29] as of January 2016, it was set at VEF 177[30].

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.[31] If the adviser is a corporation, it must pay 1,000 tributary units.[32] 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 Original Law and the 2010 Law, and the Authorization Regulations, it took many months).

26 *Official Gazette* Number 39.720 of 25 July 2011.
27 Rules on Fees, art 1, para 2(4).
28 Rules on Fees, art 1, para 2(3).
29 In 2015, the official inflation rate was of 180.9% (as indicated by the Central Bank of Venezuela).
30 In the recent past, although the reason for such yearly adjustment is to prevent the distortions due to inflation, the tax authorities have not increased the value of the tributary unit to adapt it to the inflation rate, thus defeating the purpose of the use of tributary units. In 2016 the value of the tributary unit was increased in 18%, from Bs. 150 to Bs. 177; whereas the rate of inflation recognized by the Central Bank of Venezuela for 2015 was of 180,9%.
31 Rules on Fees, art 1(e).
32 Rules on Fees, art 1(d).

The Organic Law of Administrative Procedures[33] (*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".[34] However, in practice, the term is not applied by the Superintendence.

Brokers. Article 20 of the Securities Market Law defines the concept of brokers (*corredores públicos de valores*) as follows:

> "Individuals or corporations who habitually or regularly engage in the performance of activities of intermediation with securities in the primary or secondary securities market, 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, in a stock exchange or elsewhere."[35]

Since such article includes the words "in a regular or habitual manner", it follows that if a person does not provide brokerage services habitually, then this person is not a securities broker under the Law and does not require the corresponding license.

As stated above, according to the Securities Market Law, all brokers –as well as all other individuals and corporations authorized and registered in the National Registry of Securities– need to obtain a new authorization and registration to operate in the capital market, within 180 days from the entry into force of the regulations that had to be issued by the Superintendence within 30 days from the promulgation of the Securities Market Law.[36]

With regard to non-Venezuelan corporate brokers, the Securities Market Law's definition of brokers does not expressly state that they may be foreign. However, article 11 of this Law provides that corporate brokers incorporated abroad who wish to operate in Venezuela need to obtain express authorization from the Superintendence, who may authorize it with the approval of Osfin. It then indicates that the Superintendence may dictate the relevant regulations. Interestingly, when establishing the functions of the Superintendence, it provides that the latter shall have the following functions and obligations: "to authorize the corporations incorporated abroad who wish to operate within the national territory… by means of a branch".[37]

33 *Official Gazette* Number E 2.818 of 1 July 1981.
34 Organic Law of Administrative Procedures, art 60.
35 Securities Market Law, art 20.
36 Sixth Transitory Provision, Securities Market Law.
37 Securities Market Law, art 98(2).

The Authorization Regulations, issued under the Original Law, required that corporate brokers had to be in the form of a Venezuelan *sociedad anónima* (limited-liability company) and their exclusive object should have been to act solely as securities intermediaries.[38] The requirement of article 98(2), that foreign brokers must be in the form of a branch (and not a subsidiary) seems to contradict this requirement in the case of foreign brokers, since branches are the same entities (under the same corporate form) as the foreign brokers. However, this apparent contradiction may be resolved by requiring that the company that establishes a branch in Venezuela be a limited-liability company.

Article 5 of the Securities Market Law also establishes that the Superintendence shall 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.

The Securities Market Law provides that brokers and stock exchanges may not:

- "Perform and register simulated operations;
- Execute operations without a transfer of securities;
- Any illegitimate of willful misconduct practices leading to the fixing of prices that alter the free play of supply and demand;
- Corporate brokers, stock exchanges and their shareholders may not acquire or keep, directly or indirectly, 20% or more of the equity of other Institutions of the National Financial System".[39]

The same article then provides that the Superintendence may prohibit any other conduct that, in its opinion, may affect the stability of the securities markets, and especially, the investor's.

The Securities Market Law allows brokers to participate in exchange transactions that include national public debt bonds. Article 4 of the Law provides that brokers need to request a special authorization from the Superintendence for such purpose.

As with investment advisers, there is a registration fee, set by the Rules on Fees. Brokers who are individuals must pay 100 tributary units;[40] corporations must pay 200 tributary units.[41]

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

38 Authorization Regulations, art 7.
39 Securities Market Law, art 15.
40 Rules on Fees, art 1, para 2(4).
41 Rules on Fees, art 1, para 2(3).

tributary units.[42] If the broker is a corporation, it must pay 1,000 tributary units.[43] 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 Original Law, the 2010 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.

The Superintendence's website list of brokers includes 200 individuals[44] and 37 corporations[45]. The Superintendence's Annual Report for 2014 (the 2015 Annual Report has not been published online) records the admission of 13 new brokers, and indicates that the inscriptions of 34 brokers were cancelled.[46]

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. Derivative instruments are also to be considered as securities for the purposes of this law.
> The National Superintendence of Securities, in cases of doubt, shall determine which are the securities regulated by this Law."[47]

The Original Law also established a definition of 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.[48] The Original Law then went on to regulate each of the most common securities, establishing their legal regime. The 2010 Law defined securities in general terms, similar to the definition of the new Law. It had no explicit mention of bonds, participation certificates, and commercial papers, and

42 Rules on Fees, art 1(e).
43 Rules on Fees, art 1(d).
44 http://www.snv.gob.ve/snv/rnv/cptv.php.
45 http://www.snv.gob.ve/snv/rnv/consultaempresasjuridicas.php?tipo_empresa=2&tipo_empresa1=5.
46 http://www.sunaval.gob.ve/snv/documentos/ecofinmer/informes%20anuales/infoanual14.pdf.
47 Securities Market Law, art 46.
48 Original Law, art 22.

no specific provisions of the 2010 Law apply to them. The 2010 Law simply stated, 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.[49]

With regard to bonds (*obligaciones*) the Superintendence did comply 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"[50]). The Public Offer Rules contain a chapter dedicated to bonds.

However, the new Securities Market Law now includes a section on certain specific types of securities, subject to the Superintendence's controls: bonds (*obligaciones*), commercial papers (*papeles comerciales)*, derivative instruments (*instrumentos derivados)* and participation certificates (*títulos de participación*, which are defined and regulated in the new Securities Market Law in terms similar to those of the Original Law. Only derivatives were defined in the 2010 Law.

Issuer requirements in order to make a public offer of securities are contained in detail in the Public Offer Rules that were issued under the 2010 Law. The new Law establishes a few general rules, which are not in contradiction with the provisions of the Public Offer Rules, so the latter continue to apply, with certain adjustments. For instance, the new Law indicates that once the public offer has been authorized by the Superintendence and the securities have been registered in the National Registry of Securities, the Superintendence shall make public such approval and registration by publishing it in its website[51]. In a departure from the previous regulations, the new Law provides that the Superintendence has to answer the request for authorization within the following 20 working days (this term may be extended, by the Superintendence, for another 20 working days), after the petitioner has supplied the requested information[52].

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.

Periodic Disclosure

In General. As expressed above, the recently enacted Securities Market Law makes a distinction between the general treatment of participants in the capital markets, by excluding Issuers from the general rules.

49 2010 Law, art 8(2).
50 *Official Gazette* Number 39.585 of 3 January 2011.
51 Securities Market Law, art 59.
52 Securities Market Law, art. 58.

Article 36 of the Law, which does not apply to Issuers, states that risk assessment companies and public accounting firms that participate in the capital markets must notify the Superintendence in advance regarding shareholders meetings where the following items are to be submitted for approval:

- Sale or transfer of shares;
- Variations of equity;
- Appointment or removal of members of the board of directors or internal auditors
- Sale of the main asset;
- Change in the object of the company;
- Merger or transformation of the company; and
- Other actions that the Superintendence may establish.[53]

In addition, article 37 requires previous acceptance of the Superintendence for three of the above items: (i) sale or transfer of shares, (ii) change in the object; and (iii) merger or transformation of the company.[54]

Further, Article 41 imposes the obligation to notify the Superintendence, within 5 working days, of the designation of "directors, presidents, vice-presidents, legal representatives, administration posts, internal and external auditors, area managers or similar posts and secretaries of the board of directors".[55]

With regard to Issuers, the Securities Market Law provides in very general terms that "all legal and financial information", as determined in the rules to be dictated by the Superintendence, must be available to investors and to the Superintendence itself. Such information must be published in the Issuer's website and in that of the Superintendence, as well as in "any other means of publication" established by the latter[56]. The Issuers must "immediately" make public any fact or event that may influence the price of the securities, excepting that which the Superintendence considers privileged information[57].

In addition, the Securities Market Law, within the context of the approval needed for the issuance of securities, provides that if a company is part of an "economic or financial group… it must provide all the necessary information to comply with the provisions of this law and the regulations."[58], stating expressly that this applies

53 Securities Market Law, art 36.
54 Securities Market Law, art. 37.
55 Securities Market Law, art 41.
56 Securities Market Law, art 61.
57 Securities Market Law, art. 61.
58 Securities Market Law, art. 57.

to subsidiaries and related companies "within or outside the country". The Superintendence may request the financial statements or inspect the books of such subsidiaries or related companies, not subject to the Superintendence's control, in which case, the information obtained shall be confidential.

In December 2010, the Superintendence issued 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"[59]). The Economic and Financial Disclosure Rules regulated the 2010 Law, which made no distinction regarding Issuers. So, in accordance with the Economic and Financial Disclosure Rules, all 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;
- List of shareholders;
- Report regarding the compliance with the good corporate government principles established by the Superintendence;
- Report on the methods and procedure**s** used to prevent money laundering; and
- Most recent income tax declaration.

59 *Official Gazette* Number 39.574 of 15 December 2010.

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 Original 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;[60]
- 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

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

- 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.[61]

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 enter into distribution contracts with brokers or with distribution agents. Issuers, placement agents, 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

61 Public Offer Rules, art 19.

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."[62]

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,*[63] the "Take-Over Rules") were issued by the Commission in 2000, under the Original 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."

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 Original 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.

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

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.[64] The Rules Relating to the Transparency of the Capital Markets (*Normas Relativas a la Transparencia de los Mercados Capitales*, the "Transparency Rules"[65]), issued under the Original Law, develop the provisions of article 122 of the Original 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 70 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."[66]

The use of privileged information, in a fraudulent manner, in the securities market in order to obtain an economic benefit is a criminal act, and article 149 of the Securities Market Law provides that it is punished by prison (three months to two years), 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.[67]

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 Original 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".[68]

Issuers are no longer obliged to divulge privileged information, provided that it is qualified as such by the Superintendence, in accordance with the provisions of the new Securities Market Law[69]. Although article 61 of the Securities Market Law keeps the wording of the Original Law and of the 2010 Law, which states that Issuers "must make public… any fact or event that may influence the price of any of the securities issued by it", it adds a text that excludes privileged information

64 Original Law, art 122.
65 *Official Gazette* Number 36.650 of 6 February 1999.
66 Securities Market Law, art 70.
67 Securities Market Law, art 100.
68 Transparency Rules art 1.
69 Securities Market Law, art 61.

qualified as such by the Superintendence. Indeed, the complete text now reads as follows:

> "These societies should make public and notify specifically the National Superintendence of Securities, immediately, of any fact or event that may influence the price of any of the securities issued by it, save that which is considered privileged by the National Superintendence of Securities."

According to 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.[70] 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.[71] These provisions no longer apply to information that is considered privileged by the Superintendence, since they contradict this would contradict article 61 of the Securities Market Law.

According to the Original 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 2010 Law contained no equivalent provision, and the Securities Market Law expressly excludes the obligation to divulge privileged information qualified as such by the Superintendence.

Public Take-Over Bids

In 2000, under the Original Law, the Commission issued the Take-Over Rules. Article 109 of the Original Law stated that the Commission, now the Superintendence, should issue the rules governing the procedure of public take-over bids. The 2010 Law and the new Securities Market Law also contain 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;

70 Transparency Rules, arts 2 and 3.
71 Transparency Rules, art 4.

- 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 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, that is, consideration. 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;[72] 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 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.

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