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Nations Update: Venezuela Mining Law

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NATIONS UPDATE: VENEZUELA

MINING LAW

CVG'S Power To Exploit And Grant Mining Rights In Guayana Repealed.

All decrees containing commissions, assignments and delegations to Corporación Venezolana de Guayana ("CVG") for the exploration, development, and exploitation of gold, diamonds and bauxite alluvium and vein in the Guayana Region, including Decrees Nos. 3,281 and 1,263, were repealed by Presidential Decree No. 1,384.1

By reverting these powers to the Ministry of Energy and Mines (MEM), the Decree put an end to the double authority over mining matters in force since 1991. This positive aspect of the Decree has long been awaited by the mining community, because it affords more legal security to mining rights. With the exception of the agreements already signed by CVG, Venezuela will return to the concessions system. From a legal standpoint, the mining rights received under concessions are more comprehensive than those arising from administrative agreements. For example, the concession grants a property right that may be mortgaged, leased, and even assigned with MEM's authorization. This right can terminate or expire only pursuant to the causes set forth in the law. Also, as a result of Venezuela mining legislation, concessionaires have a series of rights that are automatic and clearly delineated (i.e., soil and water rights, the right to request expropriations, and the like).

Without doubt, the National Government's decision to revert to the MEM powers over gold, diamond and bauxite mining in the Guayana region is legally valid, as the Constitution expressly vests in the National Government such authority with respect to those and all other minerals.

It is worth noting, however, that the extreme sluggishness of the processes for granting mining rights, the lack of transparency, and MEM's excessive bureaucracy, were some of the reasons for assigning and subsequently delegating these powers to the CVG to early in this decade. At that time, and even before, obtaining a concession was a very difficult task that tested the will and determination of most applicants, who often abandoned interesting mining projects in light of the administrative via crucis they had to endure. We know of many concessions that were finally obtained more than nine years after their application, and of others that were not granted until after their applicants had passed away due to natural causes. Due to the circumstances described, systematic and serious mining activities were almost non-existant, leaving the area open for illegal mining.

When CVG assumed the mining powers over Guayana, it was successful in promoting Venezuela mining potential abroad and [expediting and giving transparency] to the granting of rights. Although there were problems, and certain contracts were awarded to persons or entities that were not prepared to develop the areas granted, the CVG attracted

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1. Known as the "Decree" (O.G. No. 36,000 dated July 15, 1996).
major international mining companies and hundreds of contracts were executed in a very brief time. Although many of the said companies decided to postpone their investments in light of Venezuela’s economic, political, and legal climate, it was not the fault of CVG. Moreover, some of the international companies decided to stay and are investing substantially in their projects, setting an example of what can be achieved in Venezuela’s mining sector by companies well prepared in their field.

For 2 or 3 years, Venezuela was the “star” at all international mining seminars and conferences and a center of attraction for mining investments in Latin America. Although that time has passed due to the lack of legal certainty and the recent economic and political circumstances, if the process for designing the country’s mining policy is properly focused and the necessary measures are adopted, we can recover the leading role in this field. The Decree is a step in the right direction, because it restores some legal certainty in the mining sector, but the country’s efforts cannot stop there.

The opening of the oil industry that has been carried out successfully by the MEM and Petróleos de Venezuela, S.A. has helped Venezuela reclaim international confidence and improved the climate for investments.

The large amount of capital and qualified personnel beginning to enter the country to advance these oil projects will definitely help the recovery of the economy. The same could happen in the mining sector, if the rules are made clear and an efficient infrastructure is established.

The Decree’s preamble states the National Government is in the process of defining a mining policy within the guidelines of which the MEM is the governing and administering entity of mining resources. It should be mentioned that the Venezuelan mining sector has been waiting several decades for the adoption of a national mining policy, for the modernization of the current Mining Law, which goes back to 1944, and for a speedy, efficient and [transparent] procedure for obtaining the mining rights. The current Administration has stopped the awarding of mining rights in Guayana, stating that its intention was to put the house in order, conduct an audit of the agreements entered into by CVG (which should have taken 2 or 3 months, but actually took more than a year), and solve the legal problems in the mining sector. More than half of the Administration’s term has gone by and the Government is still defining the mining policy. If almost 3 years are needed to design the policy, how many will be needed to make it official and put it into practice?

Although CVG has lost the power to grant mining rights, authorizations, and permits upon the basis of the former decrees, it has been placed in charge of supervising the performance of the agreements it executed to alert the MEM of any defaults. Although not expressly set forth in the Decree, CVG also continues to be the contracting entity for the State for the administrative agreements into which it entered. Those agreements remain in full force, according to the Decree. This means the CVG will continue to receive mining royalties, to authorize the assignment of rights and the delegation of obligations, and to receive the performance bonds and contractual report under the agreements. Likewise, it has the duty to give notice of defaults to its counterparts to terminate some of these agreements. This being the logical consequence of keeping the agreements executed by CVG in force, we understand that any “proceeding” opened by the MEM in the event non-compliance with said agreements must be consistent with the provisions contained in the agreements for events of default, curing the same and for terminating the agreements. In spite of its powers of assessment and control, the MEM is not a party to the agreements entered
into by the CVG. Wherefore, it must channel these powers through CVG whenever it decides to act in respect of said agreements.

Article 5 of the Decree requires CVG to inform the MEM of any defaults that cause the termination of the agreements it signed. Almost all defaults on mining agreements entered into by the CVG entitle it to terminate them. The agreements provide, however, for a notice of the default prior to termination, and a term within which to remedy the default or prove that there is no default. CVG must comply with these provisions in the event of any default.

The pending applications filed with CVG (which also include those pending before companies created by CVG to manage certain mining areas, such as CVG Ferromintec) will now be treated as applications for traditional concessions. Although this is probably the only feasible solution under current legislation, because MEM can only process concession applications based on the current Mining Law (enacted, we repeat, in 1944), there are problems that must be considered. In some cases the extensions of land offered by CVG far exceed the amount a concessionaire may have under the Mining Law. Likewise, applications to CVG never had to follow the geometric boundaries of the Mining Law. Also, in practice, the applications to CVG did not have to offer special incentives to the National Government, as provided for in the Mining Law. The Decree itself (Article 7) may help solve this problem by its requirement that the ratification of the application be on terms acceptable under the Mining Law. In many cases, the required changes in the application procedure are impossible or so costly that it will actually continue to be impossible.

The Decree nonetheless is welcome because it is a step in the right direction towards providing mining rights that cannot be legally impugned. Now, Venezuela must create a new mining law that: (i) is competitive with those of our neighbors who have benefitted from investments that were originally destined for Venezuela, but did not arrive because of the political, economic and legal crisis; (ii) is permanent, simple, and effective, so that it remains in force for decades and provides the confidence needed for long-term mining investments; (iii) that eliminates the excessive discretionary powers of our officials with respect to mineral resources, preserves crucial mining resources for, and ensures that whoever is technically and financially capable of developing a mine, will obtain the rights it needs quickly; and (iv) that adapts to new mining technologies. The new law should also ensure that contributions due to the State are adjusted and remain consistent with the economic climate. Finally, it must solve the problem of illegal mining in the Guayana region.

The National Government is showing its intention to place the mining sector on the same productive path as the oil industry. Perhaps we should not expect the Government to implement changes quickly, due to the social problem reform will cause for those engaged in illegal mining operations. Nevertheless, the Government's recent actions have been positive, as demonstrated by the exoneration of mining projects from the luxury and wholesale tax. It is now the duty of Congress to finally produce the new mining law Venezuela needs. We hope the legislature assumes its task of developing mining activity that has the potential to bring in enormous income, while protecting our territory from illegal depredation by persons who lack the technology to preserve it. It is not necessary to re-invent the wheel in this matter. Neighboring countries, such as Chile, Argentina, and Peru have passed new mining laws that have brought positive results. We should follow these successful models.

Roberto Mendoza - Caracas (58-2) 276-5111
SALES TAX. AMENDMENT TO THE WHOLESALE SALES TAX LAW.

The long-awaited amendment to the Wholesale Sales Tax Law ("WST Law") has finally become effective.² The main changes included in the amendment are as follows:

1. The tax rate was increased from 12.5 percent to 16.5 percent. In spite of the fact that the amendment became effective on July 26, 1996, the rate of 12.5 percent continued to apply during the month of July.

2. In order to be a WST taxpayer, it is necessary to have sales amounting to more than 8,000 tax units (T.U.) during calendar year 1995, or to estimate sales of such volume during the year closest to start up. The current value of a T.U. is Bs.2,700. Businessmen that have made sales or individuals that have rendered services to corporations, producers, industrialists, builders, manufacturers, distributors and other individuals that are businessmen or providers of independent services, continue to be considered taxpayers under the WST Law.

3. Goods and services exempt from this tax include: (a) hen eggs, chicks and chickens for breeding, reproduction and production of chicken and eggs; (b) unprocessed, refrigerated, frozen, salted or pickled meat; (c) natural vegetable products fit for human consumption and certified seeds in general; (d) vegetable flour; (e) salt for human consumption; (f) non-carbonated water bottled within the country; (g) lard and vegetable oil, whether refined or not; if non-refined, they must be used as raw material in the preparation of edible oil or oil for human consumption; (h) the liquid or concentrated mineral food for livestock destined for the slaughterhouse and for the animals and species referred to in items (a) and (b) above; (i) the inputs and additives to improve the quality of gasoline, such as natural gas, butane, ethane, ethanol, methane, methanol, methyl-ter-butil-ether (MTBE), ethyl-ter-butil-ether (ETBE) and their by-products destined for the aforementioned purpose; (j) farming machinery and equipment in general, necessary for primary agricultural production, and the related spare parts, provided the goods are traded by agricultural product organizations; (k) dental services rendered by certified professionals; and (l) fixed residential telephony services, up to one-thousand (1,000) impulses.

4. The President of the Republic is authorized to grant a total or partial exoneration to taxpayers engaged in mining, oil and agri-industrial activities from this tax on the import and purchase of goods and services during the pre-operative period of such taxpayers, for a term not to exceed 5 years.

5. Television broadcasting services by cable and other technological means, sales of videos and movies, yachts and other recreation and sport vessels included in the Olympic Sports Program are no longer subject to the Luxury Tax.

6. The Tax Administration may authorize the use of systems, machinery or equipment that ensure the inviolability of the tax records in substitution of the invoices set forth in the WST Law, and to establish the characteristics, requirements and specifications that must be met by said systems, machinery and equipment.

² (Law for the Partial Amendment to the Luxury and Wholesale Sales Tax Law, O. G. No. 36,007 of July 25, 1996)
7. The use of tax credits arising from imports or acquisitions of goods and capital, construction contracts and services related to the latter by taxpayers engaged in industrial projects whose development exceeds 12 months will continue suspended until the calendar month in which the company incurs its first tax debit.

José Pedro Barnola - Caracas (58-2) 276-5111 e-mail: jose.pedro.barnola@bakernet.com

TRANSITORY INVOICE ISSUANCE SYSTEM.

Resolution No. 3,146,³ which enables WST taxpayers to use the invoices and equivalent documents acquired before the effective date of Resolution No. 3,061, even if such documents do not meet the requirements set by said Resolution, will continue in force until December 31, 1996. By way of Resolution No. 3,146, effective since its publication, SENIAT intends to postpone the application of Resolution No. 3,061,⁴ compliance of which is mandatory as of August 1, for corporations and as of September 1, for individuals.

Resolution No. 3,146 establishes the following system:

1. Taxpayers who acquired invoices and other documents prior to March 29, from authorized or unauthorized printers may use them until December 31, provided such invoices or other documents meet the requirements set in the Regulations to the WST Law. If any of such requirements is missing, the taxpayer should add it through any mechanical or computerized means. These taxpayers should notify SENIAT of their intention to abide by this system.

2. Taxpayers who have acquired invoices and other documents that meet the requirements set forth in Order No. 187,⁵ may also use them until December 31, 1996.

3. Taxpayers who have not acquired invoices and other documents, but who have issued them by computerized means must comply with the provisions of Resolution No. 3,061 from August 1, or September 1, as the case may be.

4. Taxpayers who have acquired invoices and other documents that do not meet the requirements set in Resolution No. 3,061 after March 29, or have bought them from unauthorized printers cannot use them at any time. If these invoices or documents are used, no tax credits will be generated for the buyers of goods or recipients of services, and further, said use will cause penalties for the taxpayers. Printers who produce these invoices and documents without complying with the provisions of Resolution No. 3,061 will also be penalized.

This system will cause insecurity among taxpayers acquiring goods and services during this period, because they will not be able to determine whether the invoices and other documents received have been authorized by SENIAT. It is therefore advisable to request that the supplier of goods and services provide evidence of the date on which the invoice or document delivered was acquired from the printers.

Maria Gabriela Sosa - Caracas (58-2) 276-5111

OIL OPENING: CONGRESSIONAL AUTHORIZATION.

The Congressional Authorization for Corporaci6n Venezolana del Petr6leo, S.A. ("CVP") to enter into 8 Association Agreements with 14 private oil companies was published in the Official Gazette of June 26, 1996. This final approval completes the process of the so called "Apertura Petrolera."

On July 4, 1995, Congress approved the Conditions pursuant to which Association Agreements should be drafted and the bidding process should take place. The bidding process took place last January and fourteen oil companies (affiliates of Mobil, Veba Oil, Nippon, Pérez Companc, British Petroleum, Amoco, Maxus, The Louisiana Land and Exploration Company, Benton Oil and Gas Company, Norcen Energy Resources Limited, Elf-Aquitaine, Enron Oil and Gas, Inelectra and Conoco) were awarded the bids on 8 areas.

The final Association Agreements, which are identical for the 8 areas to be explored and developed, were presented to Congress in March 1996. After careful scrutiny by the Energy and Mines Commission of Congress, a joint session of Congress approved the agreements on June 19, with some changes in the original drafts that were presented to Congress. Final Congressional Authorization was necessary in order to comply with the specific requirements of Article 5 of the Law that Reserves to the State the Industry and Commerce of Hydrocarbons and, more specifically, with the 23rd Condition of Article 2 of the July 4, 1995 Accord which required that the Agreements return to Congress for final approval.

Execution of the Association Agreements took place on July 10, 1996. Pursuant to the Association Agreements, the participating companies must now establish the control structures required, namely, the Management Company and the Control Committee. The Congressional Authorization, however, added one additional feature to the control structure. It requires that the Chairman of the Control Committee be nominated by the Ministry of Energy and Mines and not by CVP. The companies that entered into those Agreements will now undertake their required 3 to 5 year exploration period.

At the same time, the constitutional and illegality challenges pending in the Supreme Court of Venezuela against the Oil Opening have been put on a fast track by the Court. For details on those actions, please refer to our Legal Reports of January and February 1996.

Elisabeth Eljuri - Caracas (58-2) 276-5111

WHOLESALE SALES TAX EXONERATION.

As mentioned in the Sales Tax Section, the WST Law allows the President, by decree, to grant a total or partial exoneration to oil producing companies from tax on the import and purchase of goods and services during the pre-operative period for a term not exceeding five years. Because oil service companies do not fall within the scope of the potential exoneration, it is likely that the wholesale sales tax liability assumed by oil service companies will be passed on to the oil producing companies as an add on to the cost of the service. Unless the exoneration decree otherwise seeks to resolve this dilemma, the tax will substantially mitigate the value of the exoneration for oil producing companies. Obviously, the decree, when issued, should also deal with a variety of related issues, such as the wholesale sales tax liability of oil producing companies incurred prior to August 1, 1996.
As indicated above, oil service companies, unlike from oil producing companies, will not enjoy exoneration. The same is true of Operators who are not Investors under Association Agreements. Where the Operator acts as agent for the Investors, the latter will be the recipients of the goods and services, and therefore exoneration will apply. But where the Operator purchases goods and services for its own account, the exoneration will not apply. For example, personnel time charged by a related company to an Operator for services rendered by the former to the latter will be subject to the wholesale sales tax at the new rate of 16.5 percent.

Elisabeth Eljuri - Caracas office (58-2) 276-5111

SECURITIES DEPOSITORIES.

Congress is currently discussing a Bill of Law for Securities Depositories ("Bill"). Should the Bill become law, it would represent the first legal framework for securities deposit and custody services in Venezuela. This service is a transcendental activity for capital markets, since it simplifies the transfer of securities deposited among the individuals that actively participate in the market, allows the physical immobility of said securities, minimizes the risk of loss or unlawful actions, and accords legal security in the performance of the agreed transactions.

The Bill defines the depositories as stock corporations whose exclusive purpose is to render deposit, custody, transfer, clearance and liquidation of securities services and other compatible activities determined by the National Securities Commission (CNV). According to the Bill, the CNV shall be the agency responsible for regulating, overseeing and supervising securities depositories. The CNV is empowered to issue general norms regulating the authorization, registration, organization and operation of security depositories. The Bill provides that the CNV must issue norms within the 90 days following the enactment of the Securities Depositories Law.

According to the Bill, companies that intend to act as securities depositories must fulfill the following requirements: (i) Be authorized by the CNV to act as securities depositories; (ii) Be organized and domiciled in the Republic of Venezuela; (iii) Have paid-in capital of no less than Bs.300m, subject to increase by the CNV when deemed convenient according to the market conditions; (iv) To be organized with the sole corporate purpose of rendering deposit, custody, transfer, clearance and liquidation of securities and other compatible services determined by the CNV. The CNV may allow security depositories to perform other activities compatible with their nature, by way of general rules, including the duties assigned to the transfer agents, as well as the clearance and liquidation of funds from stock transactions; (v) To have adequate technical capacity, communication system and organization as determined by the CNV; and (vi) To have 2 principal statutory auditors and their respective alternates, experienced in financial and commercial matters.

The Bill provides that only the corporations set forth below may be shareholders of the securities depositories: (i) stock exchanges, securities brokerage companies, banks and financial institutions, and insurance and reinsurance companies, provided they are authorized to operate in the Republic of Venezuela; (ii) issuing entities whose securities are auctioned publicly in Venezuela; and, (iii) multilateral financial agencies.

Only one securities depository may be established in each city where there is a stock exchange. Securities depositories and stock exchanges must enter into operating agree-
ments to regulate the securities transfers, fund clearance and liquidation functions. Said agreements must be approved in advance by the CNV.

Deposit, custody, transfer, clearance and liquidation services rendered by the stock exchanges may only involve securities subject to public auction, whether the said public auction is authorized by the CNV, or because the securities involved are exempt from the authorization system under the Capital Markets Law and other special laws. These securities include those issued by the banks and financial institutions, according to the law governing them and Public Debt bonds. Deposit services shall be made directly by the securities depositories, who may sub-contract the custody services with duly authorized financial institutions.

Only the following may deposit securities with the securities depositories: (i) the Republic of Venezuela, the States and Municipalities; (ii) the Venezuelan Central Bank; (iii) the Deposit Guaranty and Bank Protection Fund; (iv) public securities brokers; (v) securities brokerage companies or offices; (vi) stock exchanges; (vii) banks and financial institutions; (viii) insurance and reinsurance companies; (ix) collective investment entities and their administrative companies; (x) savings banks, cooperative associations and pension funds; and (xi) individuals and corporations set forth in the Internal Regulations of the securities depositories.

Securities depositories must keep separate accounts for each depositor, recording the credits and charges arising from the deposits, acquisitions, and transfers of securities. Transfers shall be made by way of written or electronic orders given directly by the depositors or through the stock exchanges where the transfer operations are carried out. Security depositories must provide each depositor with a statement of account showing the acquisitions and transfers made. These statements must be provided as frequently as required by the CNV.

In principle, the securities deposited in the securities depositories may only be transferred among depositors of the same depository. The CNV, when convenient, may determine the mechanisms and procedures that must be followed for the interrelation and interconnection between the national security depositories the international security depositories, and the stock exchanges.

The information concerning the operations conducted by the depositors with the security depositories is confidential and cannot be furnished to third parties, except in the following cases: (i) to the CNV, when said agency requests this information in exercising its control, supervision and inspection duties; (ii) to depositors issuing entities and stock exchanges for their shareholder members and, (iii) the competent authorities according to law.

Pedro Crisafulli - Caracas office (58-2) 276-5111

CAPITAL MARKETS LAW.

A Bill of Reform of the Capital Markets Law (the “Bill”) is being discussed by Congress, which if enacted, will contribute to the modernization and strengthening of the regulatory framework of capital markets in Venezuela.

The current Capital Markets Laws, which have been in force for more than twenty years, were conceived to provide a legal basis for the initial operation of the capital markets in Venezuela. In time, a reform of the said law has become essential to make it more consistent with the growth and modernization of capital markets.
The Bill maintains the same structure as the current Capital Markets Law, although it introduces some important changes, namely: (i) Besides the duties of regulation, surveillance and supervision of the capital markets in Venezuela, the Bill ascribes to the National Securities Commission ("CNV") the duty to promote said market. (ii) The CNV becomes an [Autonomous Institute] ascribed to the Ministry of Finance. This autonomy of the CNV also includes its financial scope. Besides having the resources from the budget established by the National Government, it shall have resources it collects by virtue of its own activities. The Bill does not clearly provide how CNV will obtain these latter resources. (iii) CNV is granted broad regulatory powers, thus being authorized not only to govern the various institutions contemplated in the Bill, but also to issue regulations that give legal basis to institutes that must be created in the future for the optimal development of the capital markets. (iv) Broad powers are given to the CNV to authorize the public offering of securities abroad and within the national territory. This eliminates the requirement of the prior approval of the National Government through the Ministry of Finance. (v) The modernization of the files of the National Securities Register kept by CNV. (vi) The Bill provides for the elimination of the paper certificates required to issue and transfer securities. The securities will be evidenced by entries made in magnetic, electronic or similar media by the respective transfer agent, or by a centralized securities depository to whom the company makes a transfer of securities. The CNV will be authorized to govern all matters relating to the de-materialization of the securities subject to public offering and the electronic transfers thereof. (vii) Securities listed on stock exchanges cannot be dealt with over-the-counter. In this case, the penalty for default is the absolute void of the transaction. Currently there is no prohibition to over-the-counter deals with securities listed in stock exchanges. (viii) Commercial paper is expressly sanctioned as securities, whose public offering must be oriented towards financing the working capital of issuing companies. (ix) CNV is authorized to govern mutual share participations and other features that would imply for the companies effects similar to those produced by treasury stock. (x) The Bill provides that all stock corporations with stock registered in the National Securities Register must add the phrase *Sociedad Anónima Inscrita de Capital Abierto* (Open Capital Registered Stock Corporation). Therefore, the concept of Authorized Capital Stock Corporations, as conceived in the current Capital Markets Law will disappear because they lack no sense after the system of tax exoneration for them has been eliminated. (xi) The CNV may authorize securities brokerage firms and the Bill expressly sets forth the activities that may be carried out by these partnerships. Currently, the Ministry of Finance is the agency in charge of authorizing the securities brokerage firms. (xii) The Bill contains the following innovations regarding stock exchanges: (a) the obligation to sell a post in said exchanges to all authorized securities brokers who request it; (b) the capacity as execution paper of the liquidation of transactions issued by a stock broker; (c) the inadmissibility of stock brokers who have been sentenced for crimes or offenses against the National Treasury and those typified in the Organic Law on Narcotic and Psychotropic Substances; (d) the possibility of stock exchanges acting as auctioners of real or personal property. (xiii) CNV's powers to issue rules regarding the periodic or occasional information that must be submitted by the entities subject to CNV's control are ratified in the Bill. Also ratified are the powers to set the terms and conditions for accountkeeping through mechanical, computerized and electronic media [in order for these to be legally valid]. (xiv) The Bill protects of minority shareholders by requiring the disclosure of information. Thus, it
obliges corporations whose securities are subject to public offering to report all events or circumstances that may have a bearing on its listed securities. It should be noted that the Bill does not set objective parameters that allow the determination of events or circumstances that require disclosure. When said information is not disclosed, it is deemed privileged. Also, it limits the possibility of using the privileged information available. (xv) It provides the obligation to report to CNV the shareholding of a corporation that has made a public offering when holding reaches 10 percent; (xvi) As to penalties, the most important changes are the following: (a) penalty interest is based on fines not paid or delayed; (b) the fine liquidation forms are deemed execution papers; (c) fines are to be paid in tax units; (d) damages for for tort and negligence are set as penalties subject to monetary fines or physical punishment.

Pedro Crisafulli - Caracas (58-2) 276-5111

PRO-COMPETITION THRESHOLD FOR BUSINESS FIGURES.

Our previous publication indicated that Regulation No. 2 of the Law for the Promotion and Protection of the Exercise of Free Competition,\(^6\) authorized the Office of the Superintendent for the Promotion and Protection of Free Competition ("Superintendent") to establish a threshold for control of economic concentrations. In use of these powers, the Superintendent issued Resolution No. 2,451 of July 11, 1996\(^7\) whereby the following was provided:

1. Regulation No. 2 shall apply solely to economic concentrations involving companies with joint business volumes for sales of more than 120,000 tax units. According to the latest adjustment of the tax unit, which set it at Bs.2,700 (Resolution No. 091 of SENIAT, O.G. No. 36,003 of July 18, 1996), the current threshold for business figures for the application of Regulation No. 2 is Bs. 324m. Because the Organic Tax Code provides that the value of a tax unit shall be adjusted at the beginning of each year, the bolivar amount of this threshold will vary in proportion to the adjustment of the tax units.

2. For economic concentrations involving the divisions of several companies, only the joint sales of participating divisions will be considered for purposes of the application of Regulation No. 2.

3. For purposes of calculating the threshold, the volume of business corresponding to the fiscal year immediately preceding the one in which the economic concentration is intended to be carried out shall be taken into account.

Leopoldo Olavarría - Caracas (58-2) 276-5111 e-mail: leopoldo.olavarria@bakernet.com

BIDS. BIDDING LAW AMOUNTS UPDATED.

The Bidding Law of August 10, 1990, provides that the amounts in bolivars established for the various procedures for the selection of contractors may be adjusted accord-

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6. O.G. No. 35,963 of May 2, 1996.
7. O.G. No. 36,000 of July 15, 1996.
ing to the Consumer Price Index issued by the Venezuelan Central Bank. This update must be performed through a decree by the President of the Republic. The President, in exercising these powers, issued Decree No. 1,411 of July 25, 1996, and updated the amounts referred to above as follows:

1. For direct awards amounting to less than Bs.700,000 (formerly Bs.100,000), registration with the National Contractors' Register is not necessary.
2. For the acquisition of goods or engagement of services for a price amounting to more than Bs.70 m (formerly Bs.10m) or construction of works amounting to more than Bs.200m (previously Bs.30m), a general bid shall be called.
3. For the acquisition of goods or engagement of services for an estimated amount of Bs.7m (previously Bs.1m) and up to Bs.70m (previously Bs.10m) or construction of works for an estimated amount of Bs.70m (previously Bs.10m) and up to Bs.200m (previously Bs.30m), a selective bid will be held.
4. For the acquisition of goods or engagement of services up to Bs.7m (previously Bs.1m) or the construction of works up to Bs.70m (previously Bs.10m) a general bidding, selective bidding or direct award can be made.

Leopoldo Ustáriz - Caracas (58-2) 276-5111

FOREIGN TRADE. FOREIGN TRADE BANK FOR PROMOTION OF EXPORTS AND INVESTMENTS.

The Foreign Trade Bank ("Bank"), a mixed capital financial institution, has been created, in the form of an open-stock corporation. The purpose of the Bank is to finance and promote investments and exports and render advice and services to the domestic exporter, all within the policies set forth on foreign trade by the Executive Department. The Bank shall have subscribed capital amounting to the bolivar equivalent of U.S.$200m. Paid-in capital should be equivalent to no less than U.S.$100m dollars at the exchange rate in effect at the date of its incorporation. The Bank's capital and reserves shall consist of an array of hard foreign currencies, as approved by the Venezuelan Central Bank. Capital shall be represented by nominative shares at Bs.100,000 each. Each share confers the right to one vote at the meeting and to proportional dividends. According to the General Bank Law, the Bank's net worth cannot be less than 8 percent of its assets. The Republic, autonomous institutions, State-owned companies, the states, municipalities, multinational legal persons in which the Venezuelan State is a shareholder and any individuals, legal persons or foreign investors determined by the Shareholders' Meeting, can be shareholders of the Bank.

8. O.G. No. 36,008 of July 26, 1996.
The Bank's operations shall include: (i) receiving demand or term deposits, in bolivars or foreign currency; (ii) furnishing funds to banks and credit institutions to finance foreign trade transactions and, especially, domestic exports; and (iii) granting credits or guarantees to domestic exporters and importers from other countries requesting financing to acquire domestic goods or services. It is expressly prohibited to use the Bank's funds to finance oil exports. The financial institutions shall assume all risks arising from the credits granted with funds provided by the Bank. In the operations performed, the Bank shall not be subject to the provisions of public credit. The Bank may conduct bank- or credit-related operations, such as transferring funds, accepting the custody of funds, securities or bonds, and acting as trustee or agent. Moreover, it can administer export incentive programs and conduct the purchase and sale of foreign currency.

The Bank may organize or encourage the organization of export credit insurance companies or reinsurance companies that cover the same, have interest in such companies, and engage or provide them with technical assistance. The Law creates a Fund for the Payment of Political and Extraordinary Contingencies in Exports ("Fund"). Through the Fund, the Republic shall be responsible for the payment of the indemnification for accidents occurring in relation to the insurance of domestic exports, such as political and extraordinary risks. The Fund's equity shall be made up of an initial contribution by the Bank, the Venezuelan Investment Fund (FIV) and the Foreign Trade Institute (ICE), which must have the equivalent of U.S.$8m. This initial contribution shall be complemented by the contributions established in the Budget Law, the premiums paid to the insurance companies issuing the respective policies, profits and revenues obtained by the Fund for the investment of its resources, and other goods that are destined to the Fund.

In relation to the process of incorporation of the Bank, the Law establishes that the net equity of the Export Financing Fund (FINEXPO) shall be capitalized at the Bank. FINEXPO's assets shall be those shown in the last balance sheet presented before the incorporation of the Bank to FINEXPO's Board of Directors. The shares corresponding to said capitalization shall be subscribed to by the ICE. Within 60 days of the Law becoming effective, the FIV's Executive Board and the other persons set forth as possible shareholders in the law shall decide the number and form of payment of the Bank's shares. The Law provides for a Promotion Committee for the incorporation of the Bank, made up by the President of the ICE, who shall preside over the Bank, the President of the FIV and the Vice President of FINEXPO. The Committee has 180 days from the Law's effective date, to incorporate the Bank. The first Shareholders' Meeting must be held within this term. Notice of the meeting shall be published in one of Caracas' major newspapers and the minutes of the meeting in the Official Gazette.

Any matters not set forth in the Law shall be governed by the provisions of the General Law of Banks and Other Financial Institutions and the Commercial Code. The Law creating the Export Financing Fund shall be abrogated 60 days after the Bank's start up.

Leopoldo Ustáriz - Caracas (58-2) 276-5111
HEALTH REGISTRATION. HEALTH REGISTRATION FEES ADJUSTED FOR PRODUCTS FOR HUMAN USE.

Fees payable to the Rafael Rangel National Health Institute for the evaluation and analysis of products for human use (vaccines, medicines, cosmetics and biological products)\(^\text{10}\) The reason for the adjustment is the substantial increase in the Institute’s operating costs and expenses. According to the new fees, the evaluation of pharmaceutical products,\(^\text{11}\) shall cost Bs.310,800, for foodstuff, Bs.132,800, and for alcoholic beverages of less than 20 percent alcoholic content, Bs.372,000.

Leopoldo Ustáriz - Caracas (58-2) 276-5111

OIL ENVIRONMENTAL ASSESSMENT FORMALITY STANDARDS.

The Documentary Requirements for the Environmental Assessment of Mining and Hydrocarbon Exploration and Exploitation Programs and Projects,\(^\text{12}\)

Chapter II of the Rules sets forth the Documentary Requirements for the Environmental Assessment of Mining Activities, the Documentary Requirements to Obtain Permits and Authorizations to Occupy the Land involved in Mining Activities, and the Documentary Requirements to Obtain Authorizations to Affect Renewable Natural Resources during the Mining Exploration Phase.

Chapter III establishes the Documentary Requirements for the Environmental Assessment of the Exploration and Production of Hydrocarbons, the Documentary Requirements to Obtain Approvals and Authorizations to Occupy Land for the Exploration and Production of Hydrocarbons, and the Documentary Requirements to Obtain Authorizations to Affect Renewable Natural Resources for Seismic Survey during the Hydrocarbon Exploration Phase.

As we explained in our Law Report in June, some activities require Environmental Assessment rather than an Environmental Impact Study. Those activities include seismic surveying, which is the first step in Oil Exploration. As an example, the companies operating the blocks subject to bid in the Oil Opening are currently requesting these authorizations to carry out seismic surveys, whether two- or three-dimensional, in conformity with the minimum work program for exploration.

\(^{10}\) Resolution No. SG-201-96, dated June 10, 1996 (O.G. No. 35,995, dated July 8, 1996). This is according to the provisions of the General Foodstuff Regulation, the Pharmacy Practice Law and its Regulation and Decree No. 1,477 of February 27, 1987, regarding cosmetic products.

\(^{11}\) That is, the research and analysis of files and samples to determine their efficiency, safety and quality, in order to obtain an authorization from the health authorities for new pharmaceutical products.

\(^{12}\) Published in Extraordinary Official Gazette No. 5,079, dated July 19, 1996, also known as the “Rules”. These Rules complement Decree No. 1,257, which contains the Rules for Environmental Assessment of Activities Capable of Damaging the Environment, published in Official Gazette No. 35,946, of April 25, 1996.
According to the Rules, to obtain an Authorization to Affect Natural Resources for seismic survey activities, in addition to performing the the Environmental Assessment, the following documents must be presented to the Environment Ministry:

- a written request of the interested party or person authorized by the same. Said request must be prepared in conformity with the Organic Law of Administrative Proceedings;
- a copy of the Authorization for Occupation of the Territory;
- if the interested party is a company, a certified copy of its Articles of Incorporation/By-laws, a copy of the Minutes of the Shareholders Meeting appointing the Board of Directors, and a copy of the Minutes empowering the Directors, when required by the Articles of Incorporation or By-laws;
- a copy of the document in which the owner or holder of the land declares to have no objections to the development of the activities on its land and a copy of the document that evidences said person's rights to the land. If those documents are not obtained, the Sole Paragraph of Article 6 states the authorization should expressly mention that it does not include rights of third parties;
- if movements of land are to be made, an original and modified topography map and a gradient map; and
- any other documents required by current legal regulations governing the relevant activity.

Elizabeth Eljuri - Caracas (58-2) 276-5111

TAX REMISSION LAW.

The period during which taxpayers owing outstanding taxes may enjoy the remission of such taxes, by paying only 65 percent of their amount, expires on September 24. From September 24, to October 24, those benefitting from this remission must pay 70 percent of the taxes they owe to the National Treasury.

For those who seek this benefit for taxes in relation to a Tax Litigation Appeal which has been filed, SENIAT has not yet issued the forms for payments or releases, this is because the Office of the Controller General of the Republic has not issued a decision as to the applicability of the benefit to each case.

Maria Gabriela Sosa - Caracas (58-2) 276-5111
PRIVATIZATION. SALE OF CANTV SHARES.

An agreement concerning a Privatization by Congress of the Republic was recently published in Official Gazette. The agreement approved the sale of 49 percent of the shares owned by the State in Compañía Anónima Nacional Teléfonos de Venezuela (C.A.N.T.V.), to be carried out pursuant to the Privatization Law. Under the provisions of the agreement, the State shall keep at least one Class “B” share in C.A.N.T.V., so it can regulate and control the company’s management to protect the interests of the consumers and the State. The Venezuelan Investment Fund must report at least once per month to the Permanent Finance Commissions of the Senate and Chamber of Deputies on the process of placement of shares. Likewise, due to the common characteristics of the national and international stock exchanges, the Venezuelan Investment Fund must continually supervise the values of the placements at which said shares are being negotiated. This would allow, if necessary, the taking of measures to protect the interests of the Republic.13

Pedro Crisafulli - Caracas (58-2) 276-5111

RESOLUTION AGAINST ECONOMIC CONCENTRATION.

By way of Resolution No. 18-96, of August 6, 1996, the Office of the Pro-Competition Superintendent (the “Superintendency”) determined that Procter & Gamble’s sale of the floor wax Cruz Verde to SC Johnson & Son (“SCJ”) would give SCJ a market control in the water-base floor-wax market, thereby restraining free competition in the relevant market. The Superintendency determined that if the aforementioned transaction were carried out, the abovementioned companies would infringe upon Article 2 of the Pro-Competition Law, which prohibits economic concentrations that restrict free competition or create a dominant position in part or all of a given market. Resolution No. 18 is particularly interesting, because the Superintendency changed the criteria for the evaluation of economic concentrations in mature and declining markets of limited-consumption products, expressed a few months before in Resolution No. 8-96, of March 27, 1996 (Resolution No. 8). In Resolution No. 8, the Superintendency determined that a scheme to acquire market control in the fabric softener market would not have restrictive effects on free competition in the said market, nor would it give rise to a dominant position, because the purchasing company (Unilever Andina) would not be in a position to unilaterally raise the prices of fabric softener. On the other hand, the Superintendency considered that any such attempt on the part of Unilever Andina would result in disproportionate decreases in its sales volumes. The market information provided to the Superintendency with respect to fabric softeners and water-base floor wax is similar in the following respects: (i) the purchasing company would obtain a market-share percentage of more than two-thirds; (ii) the actual sales of the parties in the relevant market have decreased progressively over the immediately preceding years as a result of the loss of purchasing power of the Venezuelan consumer; (iii) floor wax and clothes softeners are considered products of limited use and, (iv) a high percentage of consumers stated they would no longer purchase a given brand of floor wax or clothes softener if the prices of these brands were to increase. Also, over the last few

years several new brands of floor wax have been introduced in Venezuela (Mistolín, MAS and Tapa Amarilla), the manufacturers of those new brands have captured small market-share percentages and lowered the share of the traditional brands (Cruz Verde, Valor, Beautiflor and Klaro). This was accomplished without an investment in advertisement.

Leopoldo Olavarria - Caracas (58-2) 276-5111 e-mail: leopoldo.olavarria@bakernet.com

CONSUMER PROTECTION. SUGGESTED PRICES.

The executive branch derogated Decree No. 985 of December 13, 1995, published in O.G. No. 35.858 of the same date, which created the obligation to fix and mark the Maximum Price ("PM") of certain goods. Decree No. 1,458 was published in the Official Gazette of August 26, 1996. This Decree created the obligation for manufacturers, producers, or importers of goods listed therein to set suggested retail prices for goods ("SRP"). The goods listed in this Decree are: packed or wrapped foodstuffs, personal hygiene products, household cleaning products, automobile tires and batteries, household appliances, textbooks and school supplies for use in secondary schools. For other products, nothing requires the manufacturer, producer or importer to mark the SRP. But, if the SRP is marked, the manufacturer, producer, or importer that fixes them must be fully identified and the SRP should be placed on the products container or wrapper, or on price lists or posters in the public view. The marking of the SRP does not relieve the person who makes the final sale of his/her obligation to mark the maximum sales price to the public ("PVP"), as set forth in the Consumer Protection Law.

The PM should be determined by manufacturers, producers, or importers on an individual basis, without consultation or agreement with other companies in the same line of business. This presents cartelization of prices or other marketing conditions that breach the Law for the Promotion and Protection of Free Competition (the "Pro-Competition Law"). In any event, the SRP should bear a direct relation to the production or importation costs plus a reasonable profit margin. Unlike the PVP, the SRP does not require the seller to refrain from selling at a price higher than the SRP.

The new Decree requires that products marked with the PVP on or before the date of the publication of the Decree (August 16) to be sold to the public below that price until exhausting the stock. In this regard, Decree No. 1,458 is not clear because it states that it will become effective on September 1, 1996, thus creating doubts about whether products marked between August 27 and August 31, can be sold at PM prices.

Decree No.1,458 provides that the penalty for breach of its provisions is according to the Law on Consumer Protection and the Pro-Competition Law. Notwithstanding, it would seem that the PM is not based on the Law on Consumer Protection, because it is not contemplated in that law. Therefore, any penalty imposed for breach of Decree No. 1,458 will be unconstitutional.

Leopoldo Ustdriz - Caracas (58-2) 276-5111
COMPARATIVE ADVERTISING.

Advertising in Venezuela is based on the principle of objective truth and loyalty. These principles are contained in Article 48(1) of the Law on Consumer Protection published in;¹⁴ Article 10 of the Paris Convention for the Protection of Industrial Property;¹⁵ and in Article 17 of the Law on Free Competition.

According to the Law on Consumer Protection, it is forbidden to advertise goods or services as having characteristics, qualities, proofs, results or certifications that cannot be objectively verified. All advertising in Venezuela must abide by this rule. Even though this provision had already been included in the Law on Consumer Protection dated August 5, 1974,¹⁶ it has received very little attention from Venezuelan commentators and, in our opinion, has never been applied by Venezuelan administrative or judicial authorities.

As mentioned before, the governing principle that applies to all factual representations or opinions used in advertisements for goods and services is that of objective truth. In other words, all factual representations or opinions of the characteristics, advantages, qualities, or benefits of any kind of goods or services for purposes of stimulating their sale, use, or consumption, regardless of whether the same are manufactured or rendered by local or foreign, public or private individuals or entities, must be true.

It would seem that Article 48(1) of the Law on Consumer Protection is equally applicable to factual representations and opinions used in advertising. The difference between the two in foreign countries does not seem applicable in Venezuela. Pursuant to such difference, opinions would not be subject to the objective truth principle. It has been stated that under foreign regulations, the reason for the difference lies in the impossibility of verifying the truthfulness of a judgment or opinion and, therefore, it is a matter of taste or opinion. We do not believe, however, that such a differentiation is applicable in Venezuela, because Article 48(1) of the Law on Consumer Protection does not provide any exceptions.

We do wish to point out that comparative advertising of goods or services is valid and permitted under Venezuelan law, even if based on the disadvantages or risks posed by a competitor's good or service. But, the advertiser must be able to objectively support the statements. Comparative advertising is expressly regulated by Article 48(4) of the Law on Consumer Protection. Also, Article 12 of the Advertising Code of Ethics (National Announcers Association "ANDA" - Venezuelan Federation of Advertising Agencies "FEVAP") of February 25, 1992, provides that comparative advertising may be made by means of explicit or implicit references to the qualities or defects of competitor products. One should bear in mind that advertising, in general, and comparative advertising, in particular, cannot be subliminal, misleading, abusive, disloyal, or distort the facts to confuse the consumer.¹⁷

There are certain doubts as to who would have the legal standing to file a complaint with the Institute for the Defense and Education of Consumers and Users ("INDECU") for breaching of the Law on Consumer Protection. It would seem that the main purpose of this Law is to protect consumers and users. A product manufacturer would, therefore, not be an interested party with legal standing to file a complaint. It is very likely, however, that

¹⁵. Published in Extraordinary O.G. No. 34,880 dated March 30, 1995, ("Paris Convention").
¹⁶. Published in Extraordinary Official Gazette No. 1,680 dated September 2, 1974).
a complaint filed with INDECU may be examined by that institute "ex-officio". This procedure would take at least four months before INDECU could issue a decision, this decision may be subject to judicial appeal. The fee for breach ranges between 20 to 2,000 days of minimum urban salary. The minimum urban salary is Bs.500 per day. INDECU could also order that the infringing party pay for corrective advertising.18

In theory, it is also possible to bring action before the ANDA-FEVAP's Ethics Committee. Such action may only be initiated at the request of an announcer, agency, the media or a guild. It can also be initiated at the request of any government entity or at the Committee's own initiative.19 The suit would be filed for breach of Articles 11 et seq. of the Ethics Code. According to said Code, comparative advertising, as a manifestation of free competition, must be objective and its purpose shall be to inform consumers of the proven advantages of the product vis-a-vis the competition.20 Comparative advertising cannot disparage any competitor's product, deform the image of other products, brands or companies, or damage the reputation or prestige of third parties.21 Comparative advertising is only permitted in cases in which the comparison is based on scientific or statistical research prepared by a third-party research company.22 In no event may there be a negative comparison based on the disadvantages of the product used in the comparison.23 If the Ethics Committee confirms a breach of the Code of Ethics, it may suggest either the correction or withdrawal of the disputed advertisement; privately admonish the announcer, its advertising agency and/or the media; request the relevant governmental agencies or the media to adopt disciplinary measures; and, it may publicly admonish those who fail to comply with the corrective steps suggested.24

In our opinion, the Venezuelan provisions on industrial property do not forbid the use of registered trademarks in comparative advertising,25 provided that their use does not constitute an act of unfair competition. Unfair competition is prohibited by international treaties and national laws. The most important of these international treaties is the Paris Convention. This Convention prohibits all acts of unfair competition, meaning all competition contrary to the honest use of industrial, commercial or industrial material.26 Particularly, the Convention forbids the use of false representations in trade that could discredit the establishment, the products, or the industrial or commercial activities of a competitor. Likewise, it forbids indications or representations that could mislead the public regarding the nature, manufacturing mode, characteristics, or attitude toward the use of the products.27 In turn, the Law on Free Competition forbids trade policies that tend to

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19. Article 28 of ANDAFEVAP Code of Ethics.
20. Article 11.
22. Article 14, sub-paragraph b.
23. Article 14, sub-paragraph b.
26. Article 10, bis (2) of the Paris Convention.
27. Article 10 bis (2) and (3) of the Paris Convention.
eliminate competitors through unfair competition and, especially, misleading or false advertising that hinders or restricts free competition. 28 The Law on Free Competition forbids unfair competition, by promoting products and services through false statements relating to disadvantages or risks of a competitor's product or service. Complaints of any infringement of these provisions must be filed with the Superintendency for the Promotion and Protection of Free Competition ("Superintendency"). These infringements may give rise to the imposition of fines of up to 10 percent of the value of the infringer's sales for the preceding fiscal year this amount may be increased to 20 percent. 29 This procedure requires the filing of evidence and it may take several months before a final decision is issued. The superidency's final decision may be appealed.

In any event, an action for damages arising from unfair competition may be filed, although it may be difficult to calculate damages. This action would be arise in tort, 30 and must be filed within 6 months after the Superindency's final resolution is issued.

Leopoldo Ustáriz - Caracas (58-2) 276-5111

FINANCIAL. SPECIAL COMMENTS ON THE LAW OF COLLECTIVE INVESTMENT ENTITIES.

I. Introduction.

The Collective Investment Entities Law (the "Law") 31 governs Collective Investment Funds and the public offering of their securities. The Law defines Collective Investment Entities as institutions that use the contributions of investors to constitute a common capital or equity to invest in a securities portfolio and in other assets.

According to the Law, Collective Investment Entities may issue investment units, that is, securities such as shares, quotas, participations and other instruments that confer rights upon the investors to the ownership and return of the capital invested by the entities. The National Securities Commission is the agency in charge of authoriting, regulating, controlling, monitoring and supervising the Collective Investment Entities, the public offering of their investment units, and their Management Companies. Collective Investment Entities may directly manage their patrimony or, upon prior authorization by the National Securities Commission, use the services of Management Companies.

According to their specific nature, Collective Investment Entities may invest in any real or personal property, including securities or other instruments issued by private or public corporations they may invest in local or foreign currency and within the national territory or abroad. Furthermore, Collective Investment Entities may invest in risk capital.

28. Article 17(1) of the Law on Free Competition.
29. Article 49 of the Law on Free Competition.
30. Articles 1,185 et seq. of the Civil Code.
31. Published in Official Gazette No. 36,027, became effective on August 22, 1996.
II. Open-End And Closed-End Collective Investment Entities.

Collective Investment Entities may be open-end or closed-end. Mutual Funds are the only type of Collective Investment Entities that must be open-end entities.

A. OPEN-END COLLECTIVE INVESTMENT ENTITIES.

Open-End Collective Investment Companies are subject to the following restrictions and must comply with the following requirements:

1. The investment units cannot be transferred or registered with stock exchanges, and the entity may issue fractions of investment units;
2. The Collective Investment Entity’s capital or patrimony may be increased as a result of contributions made by new investors, and reduced due to the total or partial withdrawal of contributions, without need to call an investors’ meeting;
3. The minimum capital or patrimony to establish this kind of Collective Investment Entity is 50 tax units;
4. The maximum investment holding is 10 percent of the entity’s patrimony. If the investment made by an investor exceeds 10 percent of the capital as a result of withdrawals made by other investors, said investor will not be obliged to reduce its participation in the entity;
5. The entire net returns of the Collective Investment Entity must be distributed to the investors as cash dividends or capitalized and reflected in the value of the investment units.

B. CLOSED-END COLLECTIVE INVESTMENT ENTITIES.

Closed-End Collective Investment Entities are subject to the following limitations and must comply with the following requirements:

1. Investment units must be registered with at least one stock exchange;
2. Increases or reductions in their capital or patrimony must be approved of by the investors’ meeting, which shall be governed by the provisions set forth in the Law, the Commercial Code or the Trust Law.
3. Unless otherwise provided in its by-laws and prospectus, duly approved by the investors’ meeting and approved by the National Securities Commission, Closed-End Collective Investment Entities cannot acquire their own investment units;
4. The minimum capital or patrimony to establish this kind of Collective Investment Company is 100,000 tax units;
5. No investor can hold more than 10 percent of the capital of the Closed-End Collective Investment Entity;
6. It shall distribute among its investors at least 50 percent of its net profits for each fiscal year. If the Collective Investment Entity has an accrued deficit according to its public external auditors, the profits shall be first used to set off the deficit and the remainder shall be distributed. The National Securities Commission may exempt the Entity from this requirement when the Entity submits an investment plan that requires the successive investment of profits for a period not to exceed 5 years.
III. Types Of Collective Investment Entities.

According to their investment objectives, collective investment entities may be organized as mutual funds, collective risk-capital investment entities, or collective real estate investment entities. The regulation of collective risk-capital investment entities and collective real estate investment entities is a novelty, because the capital markets law only contained substantial regulations for mutual funds.

The Law defines mutual funds as Collective Investment Entities, whose purpose is to invest in securities pursuant to the risk-distribution principle, without said investments representing a majority participation in the capital stock of the company in which the investment is made or allowing their economic or financial control. Mutual Funds may be open-end or closed-end. Collective Risk-Capital Investment Entities are defined by the Law as those entities whose sole purpose is to make medium- or long-term investments in high-risk entrepreneurial projects. These Collective Risk-Capital Investment Entities can only be closed-end entities. In turn, Collective Real Estate Investment Entities are those whose purposes is to pool resources towards real estate projects. These entities may only operate solely as closed-end companies.

IV. Investment Diversification Principles Applied To Each Type Of Collective Investment Entity.

Following are the mandatory investment diversification principles applied to Collective Investment Entities:

A. MUTUAL FUNDS.

Mutual funds must diversify their investments so as to:
1. not hold shares that represent in the aggregate more than 10 percent of the capital stock of the company in which the investment is made;
2. not hold more than 15 percent of the outstanding debt instruments issued or guaranteed by the company;
3. not invest more than 20 percent of their net worth in securities issued or guaranteed by a company; and
4. not hold securities issued by the same entrepreneurial or financial group as the mutual fund’s management company

B. COLLECTIVE RISK-CAPITAL INVESTMENT ENTITIES.

The National Securities Commission shall issue specific rules for setting the maximum and minimum investment percentages of the various kinds of assets; the minimum number of projects that make up the investment portfolio; types of assets; maximum percentage of the total assets or patrimony that may be invested in one project or investment; term to reach the investment percentages, which in no case shall be more than two years; and; the potential limitations on the acquisition of assets from individuals or corporations directly or indirectly related to the Management Company. Said commission shall also issue rules with regard to liquidity, risk diversification, asset valuation, and the accounting application of capital gains or losses on the collective investment entity's assets.
C. **Collective Real Estate Investment Entities.**

The National Securities Commission shall determine, through specific rules, the maximum and minimum investment percentages that may be held in the entity's net worth; the various real estate assets; the term to reach the investment percentages, which in no case may exceed 2 years; and, any other prohibitions. Likewise, said commission shall set forth the rules regarding the liquidity, risk diversification, asset valuation, and the accounting term for capital gains and losses. Collective Investment Entities cannot acquire real estate from individuals or corporations related to the management company.

Collective real estate investment entities cannot invest more than 25 percent of their assets in bank placements and debt-related and short-term securities.

V. **Collective Investment Entities’ Management Companies.**

Collective Investment Entities may be managed by management companies that have as their sole purpose the management of the Collective Investment Entities' patrimony, whatever their kind, and to represent said entities pursuant to the management agreement entered into for such purpose. Said agreement must be previously approved by the National Securities Commission. Management companies must be authorized by the National Securities Commission to act as such and be registered with the National Securities Register.

Management companies cannot simultaneously work for more than one collective investment entity when the investment objectives and sales plans are similar. Likewise, the management companies cannot invest in the Collective Investment Entities they manage. Moreover, they cannot directly or indirectly deal in securities or assets with the collective investment entities they manage.

VI. **Suspension, Repeal, Intervention And Liquidation.**

The National Securities Commission may suspend or repeal the authorizations granted to Collective Investment Entities and management companies by reasoned resolution, whenever it has evidence that any of them has violated the Law.

Whenever a Collective Investment Entity or its management company is in a situation that could damage their investors, creditors, or the soundess of the financial system, the latter shall appoint one or more qualified persons to intervene in the said entity. This would also apply if in a situation where breach of the Law, Regulations, or specific rules issued by the National Securities Commission is imminent.

In the event of liquidation or bankruptcy of a collective investment entity or management company, the Board of the National Securities Commission, or the persons designated thereby, shall exercise the duties set forth in the Commercial Code for liquidators and trustees.

VII. **Tax Incentive.**

The Law considers Collective Investment Entities as vehicles through which final investors have access to a given investment portfolio to obtain profits. As a result thereof, Article 62 of the Law provides that the net gain of collective investment companies is
exempt from income tax and Entrepreneurial Assets Tax in the case of: (i) Mutual funds; (ii) collective risk-capital entities; (iii) collective real estate investment entities, whose purpose is to invest in the construction of real estate for urban family housing to be leased, as well as housing developments under the Housing Policy Law or special housing programs sponsored by the National Government; and, (iv) collective real estate investment entities whose investment policy is geared to the development, construction, and operation of recreational-tourism projects.

Finally, the Law abrogates Chapter IV, Title II, of the Capital Markets Law that governed mutual funds, and further abrogates Article 154 of the Capital Markets Law that contained a rule for remission that was partially related to mutual funds.

José Alfredo Giral - Caracas (58-2) 276-5111 e-mail: jose.alfredo.giral@bakernet.com

SALES TAX. FOREIGN CURRENCY INVOICES.

Taxpayers conducting transactions that are subject to wholesale tax ("IVM") and involve payments in foreign currency must prepare invoices, including the bolivar equivalent of the price of the transaction on the date the invoice was issued. Therefore, if the payment is received on a date subsequent to the issuance of the bill, a difference could arise between the exchange rate in effect on the two dates, thus altering the taxpayer's taxable basis. In such case, the taxable basis must be adjusted accordingly, by issuing to the purchasers or recipients of the service either debit or credit notes in the amount of the difference. The respective IVM rate must be applied to this difference.

Maria Gabriela Sosa - Caracas (58-2) 276-5111

NEW REGULATION FOR IVM EXEMPTIONS.

The amendment of the Luxury and Wholesale Tax Law (IVM Law) of July 1996, authorizes the President of the Republic to offer taxpayers performing industrial projects that are in their pre-operations stage complete or partial exemption, for periods of up to five years, on imports and capital goods purchases and for services received or rendered. This includes persons engaged in mining, oil and agri-industrial activities. In conformity with the authorization, SENIAT is currently preparing a bill of IVM exemptions ("Bill").

The Bill is extremely flawed. Firstly, the exemptions are only granted for a period of five years from the effective date of the Bill. This implies that taxpayers undertaking industrial activities after the Bill becomes effective will not be entitled to the exemption for the entire period set forth in the IVM Law. This contradicts the IVM Law, which provides that the exemption is to be granted for up to five years, without limitation.

The Bill also contradicts the IVM Law with respect to exemptions for taxpayers in the pre-operations stage of industrial projects. Pursuant to the IVM Law, the exemption is to be granted for imports and local acquisitions of goods and services. Under the Bill, only imports are exempt.
As currently proposed, the Bill also has many gaps which mainly affect the mining and petroleum industries. Preclude these industries from receiving treatment similar to those of industrial activities eligible for exemption. For example, the pre-operations stage in mining and oil production is different than that of other industries in general. It is also unclear whether the exemption will be granted per exploitation zone or globally, even though a taxpayer may be engaged in the exploitation of various zones, each at different operations stages.

*María Gabriela Sosa* - Caracas (58-2) 276-5111

**USE OF METHANOL GAS AS FUEL.**

The Ministry of Energy and Mines ("MEM") recently issued the standards applicable to the importation, installation and maintenance of systems that use natural methanol gas ("NMG") as fuel for use in vehicles with internal combustion engines. The aforementioned standards are to control the import, installation and maintenance of methane! Any components of NMG systems must meet the "COVENIN" standard of "Natural Gas for Vehicles, System Components." Furthermore, companies wishing to import NMG equipment and systems and those who wish to install them must obtain a permit from the MEM. The national companies manufacturing NMG equipment must register with MEM's Registry of Manufacturing Companies and store replacement parts in Venezuela. Mechanisms for the periodic inspection of vehicles using NMG as fuel must also be established. The owners and drivers of these vehicles are entitled to request a user's handbook from the shop installing the systems. The handbook should contain a description of the system, operating instructions, safety norms and a troubleshooting guide. Lastly, companies engaged in any of the activities regulated by the resolution must acquire civil liability insurance indicating the risk. Coverage must include damages to persons and goods which arise from the performance of such activity.

*Margot Huen* - (58-2) 276-5111

**AMENDMENT TO GENERAL CONTRACTING CONDITIONS**

1. The amendment to the General Contracting Conditions for the Contracting of Works was recently published and is mandatory for all agreements entered into by the Republic through its ministries and other agencies of the Central Administration. The main changes are as follows:
   a. The contracting entity cannot agree to change the performance bond to a mortgage security. Under the new conditions, the contracting entity may only agree to substitute the performance bond with a withholding that is to be made on each of the valuations of the performed work, until its aggregate reaches the amount equivalent to the bond.

2. For the contractor to be able to commence the performance of any work with respect to the contracted work, the contractor must: (i) notify the inspector of the work 2 business days in advance; and, (ii) should this term lapse without the inspector resolving the matter, send the request to the immediate supervisor of the inspector within the corresponding federal entity. The inspector must resolve the matter within three business days.

3. The supreme authority of the contracting entity may grant "special administered advances" to be deposited in the Venezuelan Central Bank. These funds may be drawn upon by way of order based upon the duly approved and conformed valuations of the work performed.

4. When payments of valuations or withholdings acknowledged by the contracting entity are not effected within 60 days of the presentation of the demand note by the contractor to the inspecting engineer, interest shall be paid to the contractor based on the net payable amount and in accordance with the period of the delay. Interest is to be calculated using a rate equal to the weighted average of the deposit rates paid on credit transactions of no more than 90 days by the 6 commercial banks with the greatest volume of deposits.

5. Should the contracting entity delay more than 60 days in paying valuations amounting to more than 10 percent of the aggregate amount of the agreement, plus the percentage representing the non-amortized difference, the contractor shall be entitled to suspend the work until the payment is made. In such a case, an automatic extension will be deemed granted for a term equal to the period of suspension of the work. To exercise this right, the contractor must notify the contracting entity of the decision to suspend the work at least 7 days in advance. Should the contractor fail to effectively meet all the obligations set forth in the agreement and the Contracting Conditions, the indemnification, as well as the extension and the suspension of the work, will be unwarranted. If the contractor's allegations are without grounds, the contractor must pay the contracting entity an amount agreed upon in the agreement as a penalty for each day of delay.

6. The indemnities the contracting entity must pay the contractor when the construction work is called off were changed as follows: (i) 16 percent of the value of the work that is not performed, should the rescission take place before the work is started, or if the work has commenced but has a value of less than 30 percent of the original amount of the agreement; (ii) 14 percent of the value of the work that is not performed, should the rescission take place after the work completed amounts to more than 30 percent, but less than 50 percent of the amount of the agreement; (iii) 12 percent of the value of the work that is not performed, should the rescission take place after the value of the work performed amounts to more than 50 percent, but less than 70 percent of the amount of the agreement; (iv) 10 percent of the value of the work that is not performed, should the rescission take place after the value of the work performed exceeds 70 percent, but is less than 90 percent of the amount of the agreement; (v) 8 percent of the value of the work that is not performed, should the rescission take place after the work performed exceeds 90 percent of the amount of the agreement.
7. The contractor must pay interest on any fines or reimbursements that are not paid to the National Treasury within 30 days.

8. The contracting entity must inform the National Contractors' Registry of any contractor defaults that damage the public patrimony. The National Contractor's Registry must be informed in order to apply the legal penalties set forth in the Bidding Law and its Regulation.

Maria Gabriela Zajia - Caracas (58-2) 276-5111

NATIONAL HUMAN RIGHTS COMMISSION.

The permanent National Human Rights Commission was created to advise the Executive Department in all international and domestic human rights matters. The Commission's powers include facilitating cooperation among the various Directorates of the Executive Department, non-governmental organizations and citizens. The Commission examines and recommends measures the Executive Department should take to promote domestic human rights protection and to comply with international obligations arising from the international agreements and treaties.

The Commission shall meet once every month (or at the request of its members) with representatives of the Office of the Attorney General of the Republic, the Federal District's Governor, the National Border's Council and the Ministries of Internal Affairs, Foreign Affairs, Defense, Education, Labor, Justice, and of Family.

José A. Rondón - Caracas (58-2) 276-5111

ANTITRUST AND UNFAIR COMPETITION. COLA WAR.

The so-called "cola war", held mostly in the premises of the Office of the Superintendent of Pro-Competition, was triggered by its filing suit against Coca-Cola on behalf of PepsiCola Panamericana ("Pepsi"), for Coke's alleged breach of the following provisions of the Pro-Competition Law: (i) Article 5, which establishes a general prohibition of acts restraining or affecting free competition; (ii) Article 6, which prohibits acts which prevent or hinder the entry of new competitors into a given market; (iii) Article 7, which prevents third party boycotts; (iv) Article 10, which prohibits horizontal agreements between competitors that involves splitting markets or sharing suppliers; (v) Article 11, which prohibits monopolies; (vi) Article 13, which prohibits the abusive use of monopoly power; and, (vii) Article 17, which prohibits a company from attempting to acquire a monopoly.

Pepsi alleges the creation of a 50/50 joint venture between the two bottling companies, Hit and The Coca Cola Company ("Coca Cola"), restraints free competition in the Venezuelan market for non-alcoholic carbonated beverages. The resulting company, "Embotelladoras Coca-Cola y Hit de Venezuela," was formed by contribution of the following assets: by Coca-Cola, in providing the trademarks "Coca-Cola," "Fanta" and "Sprite," 6 bottling plants (with a combined capacity of 50 million cases per year), 13 deposit/distribution centers, 500 trucks, tow-trucks, forklifts and an undisclosed amount of money; by Embotelladora Hit, the trademarks "Hit," "Chinotto" and "Frescolita" in providing 18 bottling plants, deposit/distribution centers, 4,000 trucks, and other assets.
To avoid breach of the Pro-Competition Law, Coca Cola retained the advisory services of a former Superintendent of Pro-Competition, who suggested that the new joint venture not attempt to displace Pepsi from the market immediately. Following this advice, Embotelladoras Coca-Cola y Hit de Venezuela divested itself of the 6 bottling plants and the assets that made up the distribution infrastructure contributed by Coca-Cola. These assets were transferred in trust to Banco Mercantil. This bank, in its capacity as trustee, received instructions to publicly auction the assets held in trust through its subsidiary, Merinvest. Furthermore, 987,285 cases of bottles/cans and 792 cylinders of cola identified with the “PepsiCola” trademark were transferred to a new company called DDA Industrial. DDA was created to auction these products.

Upon filing the first suit, Pepsi asked the Office of Superintendent to enjoin the auctioning of the stock of cola identified with the “PepsiCola” trademark and to prevent retailers from withdrawing their inventories of “PepsiCola”. To issue the requested injunction (set forth in Article 35, Paragraph 2 of the Pro-Competition Law) the Superintendent required that Pepsi issue a security in the amount of 4 billion bolivars to guarantee any possible damage that could be caused to Coca Cola as a result of the postponement of the auction.

In addition to filing an answer to the suit, Coca Cola asked the Superintendent to retract the injunction on the selling of the stock of PepsiCola. Coca Cola argued that the stock was perishable. The Superintendent lifted the injunction pursuant to the Second Paragraph of Article 35 of the Pro-Competition Law which states that if the precautionary measures issued by the Office of the Superintendent could cause serious damage to the alleged offender, the offender may request the suspension of the effects of the preventive measures. As a requirement for lifting the measures, the Superintendent requested the posting of a bond. The Superintendent agreed to prohibit the withdrawal of the inventories of products identified with the “PepsiCola” trademark to avoid damaging competition in the cola market.

Pepsi later filed a second suit with the Superintendent and its subsidiaries, Embotelladoras Hit de Venezuela, Embotelladoras Coca-Cola y Hit de Venezuela, and DDA Industrial, to reestablish free competition in the market and to dissolve the joint venture between Embotelladoras Coca-Cola and Hit de Venezuela. Although the second suit alleges the breach of the same articles of the Pro-Competition Law as in the previous suit, the second sets forth new allegations based on new information provided by Coca-Cola to the Superintendent. One new allegation is that Coca-Cola and Cisneros have created an artificial market barrier preventing Pepsi’s return to the cola market, because even though it may lease for a period of one month the production and distribution assets held in trust, Coca-Cola will set the sales price of those assets. Pepsi claims that Coca-Cola could stall the establishment of the price or set an extremely high one, in which case the assets would not return to the market. Pepsi also claims natural barriers exist to Pepsi’s prompt return to market. These barriers are the time and cost of building a new production plant, establishing a distribution network, investing in bottles and cans, obtaining permits, and the large investments required for publicity. According to Pepsi’s estimates, if it were to return to the market, it would do so with a smaller participation than Coca-Cola had before its union with Cisneros (9.1 percent).
With the second suit, Pepsi requested that Pro-Competition issue additional precautionary measures, because the previous measures were insufficient. The Superintendent rejected Pepsi's request because, in its opinion, there was little evidence that the measures were insufficient. Pro-competition ordered the joinder of Pepsi's suits and stated it expected to issue a decision by mid-December.

Leopoldo Olavarría - Caracas (58-2) 276-5111 e-mail: leopoldo.olavarria@bakernet.com