

NEW TAX LEGISLATION REQUIRES CAUTION IN TRANSACTIONS SUBJECT TO TRANSFER PRICING RULES

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On January 1, 2008, Law 11.727/2008 will come into force, bringing with it a series of changes in the Brazilian tax system. Among the changes to be introduced by the new legislation are a number of measures intended to stimulate investment in the tourism sector and promote its modernization, reinforce the Brazilian protective tariff system and concentrate the application of the gross revenues taxes PIS/Pasep and COFINS on the production and sale of alcohol.

One of the new provisions changes the definition of "Favorable Tax Jurisdiction", which are better known as tax havens. "The changes in the concept of 'tax haven' made by Law 11.727 mean that Brazilian taxpayers will have to be more careful, since the new concept broadens the application of transfer pricing rules in function of the other party's domicile," affirms Alexandre Seguim, a tax partner with Barbosa, Müssnich & Aragão Advogados.

Currently, under Brazilian tax law any country or dependency that exempts income from taxation or taxes it at a rate of less than 20% is considered to be a Favorable Tax Jurisdiction. In specific situations, countries or dependencies that do not require the shareholders of legal entities to be disclosed can also be considered to be tax havens.

According to Seguim, under the new legislation countries which do not require companies to engage in substantial economic activity in their jurisdiction, or grant tax advantages specifically to companies which do not engage in economic activity (i.e. holding companies) will also come within the definition of a Favorable Tax Jurisdiction. The first consequence of this change will certainly be to increase the list of tax havens established by Brazilian Revenue Service Instruction 188/2002, which currently contains 53 countries.

A more important consequence is that the new legislation will extend the reach of transfer pricing rules to transactions between Brazilian taxpayers and tax haven residents. In Seguim's view, the new definition of Favorable Tax Jurisdiction is very broad and creates uncertainty for taxpayers who enter into international business transactions.

In brief, the legislation will apply to the following type of remittances from Brazil to non-residents: capital gains realized by non-residents by reason of the sale of a direct investment in a Brazilian legal entity made pursuant to Law 4.131, and remittances subject to transfer pricing rules (in general terms, import and export of goods, services and rights).

Seguim believes, however, that the new definition will not apply to non-residents who receive income from investments in the Brazilian financial market or capital gains from sale of an equity interest in a Brazilian legal entity held under the terms of National Monetary Council Resolution 2.689. "In these cases, Law 11.727 did not make any changes," he affirms.



Alexandre Seguim, tax partner with Barbosa, Müssnich & Aragão

BM&A moves to new premises in São Paulo and opens an office in Belo Horizonte

Barbosa, Müssnich & Aragão's São Paulo offices are now located in a new building, JK 1455. The building was constructed on Avenida Presidente Juscelino Kubitschek near Avendia Brigadeiro Faria, in the heart of São Paulo's business center. The new premises allow for the growth of the firm's São Paulo office, as well as providing a more comfortable environment for its professionals and clients.

Barbosa, Müssnich & Aragão has also strengthened its presence in Minas Gerais with the opening of its newest office in the state capital, Belo Horizonte. Otávio Barbi has joined BM&A as partner and will be responsible for the new office. Otávio holds Doctor, Master and Bachelor of Laws degrees from the Federal University of Minas Gerais (UFMG) and specializes in business law. He has also lectured in law in undergraduate and specialization programs.

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THE DEBATE OVER FOREIGN OWNERSHIP OF RURAL PROPERTY

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With the Brazilian government's efforts to increase production of raw material for biofuels, the debate over foreign ownership of rural land has heated up. The matter is currently governed by Law 5.709 of October 7, 1971 and regulations issued under Decree-Law 74.965 of November 26, 1971, which establish limits for the sale or lease of rural land in Brazil to foreign individuals and legal entities.

The constitutionality of article 1 §1 of Law 5.709/1971 came into question when the Federal Constitution of 1988 was adopted. Under art. 1 §1, the same restrictions applicable to foreign individuals and entities also apply to Brazilian entities controlled by foreigners. However, art. 190 of the Federal Constitution of 1980 restricts ownership of rural land only in the case of foreign individuals and entities, without imposing any kind of limitation on Brazilians, whether natural persons or legal entities.

In fact, in defining Brazilian business entities, art. 171 of the Federal Constitution of 1988 makes no reference to holdings in Brazilian entities' capital, unlike Law 5.709/1971. For this reason, some believe that art. 1 §1 of the Law ceased to have effect when the Federal Constitution of 1988 came into force.

This reasoning was not affected by the revocation of art. 171 of the Constitution by Constitutional Amendment nº. 6 of 1995, since the later revocation of a legal provision that itself had revocatory effect does not revive the rules revoked by the legal provision.

In fact, when consulted by the Ministry of Agriculture, Supply and Agrarian Reform, the federal Advocate-General's Office issued opinion GQ 22 of December 17, 1998, concluding that art. 1 §1 of Law 5.709/1971 was revoked by reason of its clear conflict with art. 171 of the Federal Constitution, adopted in 1988.

Although Opinion GQ 22 is restricted to the proceeding for which it was requested, a number of Brazilian courts have adopted the same interpretation, concluding that the restrictions on acquisition of rural property by Brazilian entities controlled by foreigners no longer apply, and ordering the registration of purchases of land by foreign-controlled Brazilian entities.

On the other side of the question are those who seek to increase control of foreign acquisition of rural property, even through Brazilian entities. Recently, the president of the National Institute of Colonization and Agrarian Reform (INCRA) expressed concern over the emphasis given in the press to the government's apparent lack of control over acquisition of land in the Amazon. It also seems that the Federal Advocate-General's Office is preparing a new opinion with a different interpretation of the matter. In parallel, Bill 2.289/2007 is making its way through the Brazilian Congress. The Bill seeks to restrict the purchase of Brazilian land by foreigners, revoking Law 5.709/1971, on the grounds that the current legislation is ineffective and does not give the government sufficient instruments to monitor rural property that is in the hands of foreign owners.

On Bill 2.289/2007's way through the legislative process, two other bills (Bill 2.376/2007 and Bill 3.483/2008) have been appended, both containing proposals to amend Law 5.709/1971 to limit acquisition of rural land by Brazilian entities under foreign control. One of the Bills deals specifically with the purchase of land used to grow crops for energy production. It is clear that legal debate on the issue of foreign ownership of land is growing, with much speculation on how the Brazilian legislator will decide to act.

ANVISA ISSUES REGULATIONS ON FOREIGN INVESTMENT IN THE AREA OF FAMILY PLANNING

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With the growth of the Brazilian economy as a whole, and particularly Brazil's investment grade rating, achieved in April 2007, the number of foreign investors interested in putting money into the country in the most diverse sectors of the economy is increasing.

Foreign investment brings a multitude of benefits to the country. The opening and expansion of business offices and companies favors economic development, increases the number of jobs and promotes the transfer of new technologies, the training of local workers and regional development.

At the same time, foreign investment in certain areas is restricted. Under Brazilian law, for example, there are restrictions on foreign ownership of shipping companies that engage in cabotage (art. 178, Federal Constitution), newspaper and broadcasting companies (art. 222, Federal Constitution), mining and hydro energy companies (art. 176, Federal Constitution), railroad cargo transportation companies (art. 22 (VII) and art. 178, Federal Constitution) and companies engaged in health services, among others.

In the case of health services companies, although article 199 §3 of the Constitution prohibits the "participation, either direct or indirect, of foreign companies or foreign capital in health services", the same provision adds "except in the cases provided for by law."

Thus, although the Constitution does contemplate the possibility of foreign investment in the health sector in the "cases provided for by law", for many years only Law 8.080/1990 dealt with this exception. Law 8.080/1990 limits foreign participation in the health sector to donations from international entities associated with the United Nations, from technical cooperation entities and from loan and financing institutions. In other words, foreign investors who wished to establish a private business in the Brazilian health services sector were not permitted to do so.

In 1996, Federal Law 9.263 opened up the possibility of direct and indirect foreign investment in "family planning" actions and research, provided the investment was approved by the agency responsible for administration of the Health System at the national level.

However, little changed after Federal Law 9.263 came into force, since the legislation did not establish the procedure for obtaining authorization, leaving this task instead to the National Public Health Agency (*Agência Nacional de Vigilância Sanitária* – ANVISA).

Only at the end of 2007 did ANVISA issue Resolution n°. 55, establishing regulations for the grant of authorization to foreign investors who wish to invest in family planning actions in Brazil, which Federal Law 9.263 defines as a "set of actions to regulate fecundity which guarantees equal rights to women, men and couples to constitute, limit or increase their offspring." In short, since Resolution n°. 55 came into effect, it has been possible for foreign investors to invest in the fertilization and assisted reproduction sector.

The Resolution provides for the procedure to be followed in applying for the authorization required by Law 9.263/1996. The application must be made directly to ANVISA by the Brazilian company which will receive the foreign investment, accompanied by proof that the requirements for grant of authorization imposed by the regulations have been met. The requirements are largely technical in nature. To illustrate, some of the documentation that must be submitted with the application is: (i) proof of payment of the fee for grant of authorization, in an amount that depends on the size of the Brazilian company which will benefit from the authorization; (ii) the architectural plans for the clinic or hospital; (iii) a copy of the license issued by the local Health Authority, or a copy of the application for the license; and (iv) information on the person responsible for the technical operations of the establishment.

According to the Resolution, once the requirements have been met, ANVISA will issue a "Certificate of Authorization" to the Brazilian entity receiving the foreign investment. The Certificate is valid for 12 months, and can be renewed for successive periods of 12 months, provided all legal requirements are complied with.

This is, without a doubt, a significant milestone in the family planning sector in Brazil. The adoption of technical criteria for grant of authorization reduces the possibility of political interference in the process since, in theory at least, simply fulfilling the technical criteria will entitle the Brazilian entity to the grant of the authorization.

ANVISA's regulations will likely attract new investors to the market, increasing competition in the sector. With an increase in the offer of products and services, Brazilian businesses can be expected to seek out more advanced technologies to develop family planning in Brazil, bringing more options to patients and increasing patients' chances of success in cases of assisted reproduction.

CHANGES IN TAXATION IN THE ALCOHOL PRODUCTION CHAIN

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One of the big issues in political economics worldwide is the replacement of fossil fuels by new sources of energy. Given the importance of ethanol as an alternative source of energy, Brazil, one of the world's largest producers of this commodity, finds itself at the center of the debate.

Although there is much discussion over the impact of expanding ethanol production on the world economy, particularly on the production of food, the fact is that the ethanol industry has been growing in Brazil, and the sector is now in a process of renewal, with the arrival of new market participants and the beginning of changes in the sector's regulatory framework.

As a consequence of the leading position that Brazil can exercise in the alcohol industry, and the particular features of the sector, purchases and sales of alcohol in Brazil are subject to a special tax treatment, which were recently affected by new tax rules that will have an impact on the product's final price and, consequently, on the final sales price of other fuels, such as "C" gasoline, which contains alcohol.

The main changes are related to ICMS, the state-imposed value-added tax (*Imposto sobre a Circulação de Mercadorias e Serviços* – ICMS) and to the federal taxes on gross revenues, PIS and COFINS (*Programa de Integração Social*– PIS; *Contribuição para o Financiamento da Seguridade Social* – COFINS). In the case of ICMS, alcohol was included in the deemed taxpayer system by ICMS Agreement n°. 110/07 among the federal and the state governments. Under this Agreement, which replaced ICMS Agreement n°. 03/99, the States may suspend or defer ICMS attaching to internal or interstate transactions when the alcohol will be delivered to a fuel distributor. When the fuel is sold, the fuel distributor is responsible for collecting and remitting the suspended or deferred tax to the state where the alcohol originated.

The inclusion of alcohol in the deemed taxpayer system has caused discomfort in the market, and market representatives have pushed to have alcohol removed from the system or to have ICMS Agreement n°. 110/07 come into effect only in January 2009.

Although the ICMS Agreement n°. 110/07 was published in September 2007, only in May 2008, two months before it was to come into effect, did the movement against the Agreement intensify. As a result, the Agreement came into force on July 1st, and the States, influenced by their taxpayers' protests, are still discussing how to apply the rules under the Agreement, particularly with respect to the most polemic issue, interstate sales of alcohol added to gasoline.

The discussion over interstate sales turns on the question of who is entitled to the tax revenue: the importer/producer State, or the State where the purchaser is located? The specialists add that there is also controversy over the double taxation that will inevitably occur when alcohol is bought to be mixed with gasoline: ICMS is first collected when the alcohol is acquired by the refineries, and then again when the alcohol is transported in interstate transactions by the distributors.

According to the rule in article 155 §4 (II) of the Federal Constitution, ICMS revenues should be shared between states in transactions between ICMS taxpayers, and should be paid to the state of origin in sales to non-ICMS taxpayers.

However, neither this interpretation of the Federal Constitution nor the double taxation question has been settled by the States, which guarantees continuing debate over the matter. From our observations over the last few months, it seems that the consumer States did not realize when they negotiated ICMS Agreement no. 110 that they would lose tax revenues and now take the position that the ICMS collected on interstate transactions should be shared between the State of origin and the State of destination.

In the case of PIS and COFINS, the changes are the opposite of those affecting ICMS: Law 11.727 of June 23, 2008 revokes the former system of collecting PIS and COFINS at a single point and replaces it with heavy taxation of all entities in the alcohol production chain, from producer or importer to distributor, at rates that reach 3.75% for PIS and 17.25% for COFINS.

Law 11.727/2008 also establishes an alternative tax collection regime based on the volume of alcohol sold, but the alternative regime appears to depend on a more rigid control of sales made by the entities in the production chain. The market has not yet determined which regime will be more advantageous.

Another change is the increase in the rate applicable to alcohol imports, particularly of fuel alcohol imported by importers which are not distributors. The rate increase is counterbalanced by a lower tax burden on sugar cane producers, which reflects a certain subsidization of the sector and continuing market protectionism for the domestic producer.

It is clear that the Brazilian alcohol industry is in a process of rapid expansion, and changes in taxation of the sector can be expected to continue. Sector participants have begun making their reactions to the changes felt, but the market will still have to wait for future developments, and clarification as to the interpretation of some of the provisions that are still controversial, before the real effects of the changes are known.

SERVICE TAX ON COPYRIGHT ASSIGNMENTS IS UNCONSTITUTIONAL

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Recently, the 18th Civil Chamber of Rio de Janeiro's appeal court, the Tribunal of Justice, unanimously decided that charging the municipal services tax, ISS (*Imposto sobre Serviços*), on amounts received for the assignment of copyright is not only contrary to applicable legislation, but also offends the Constitution. The decision reopens debate on the matter and may lead to new lawsuits.

The discussion over the legality of charging ISS on assignment of copyright turns on the question of whether such assignments effectively constitute the rendering of a service. In one case, the Supreme Federal Tribunal, Brazil's highest court, declared that charging ISS on the lease of movable property (or personal property, in common law terms) was unconstitutional, reasoning that the tax cannot attach when there is no "obligation to do", which is an essential characteristic of the rendering of services (RE 116.121).

Furthermore, the legislation that governs the ISS system (Complementary Law 116/2003) classifies services under items and sub-items, representing the services' nature and type, and it is the services described in the sub-items that are subject to taxation. Since assignment of copyright is not included in the list of sub-

items, there is no legal basis for applying ISS to such transactions.

The municipal tax authorities attempt to justify application of ISS to assignments of copyright by arguing that they fall within the item "services rendered by means of lease, assignment of rights to use, and the like". However, this item serves merely as a kind of index, and does not have legal force sufficient to cause ISS to attach. Furthermore, as a matter of interpretation, if the items in the classification of taxable services had the effect of imposing the tax, the sub-items would have no practical use, contrary to the principle that the legislator never speaks to no purpose.

Lastly, the higher courts have taken the well-settled position that the list of services subject to ISS contained in the governing legislation is exhaustive, and a broader interpretation can only be applied to cover services of the same type as those expressly contemplated in the legislation, but which have a different name, which is not the case where assignment of copyright is concerned.

In this scenario, lawsuits challenging the application of ISS to assignments of copyright on the grounds that the tax is abusive, illegal and unconstitutional have good chances of success.

BRAZILIAN FEDERAL REVENUE SERVICE DECIDES PURCHASES OF OFF-THE-SHELF SOFTWARE FROM FOREIGN SUPPLIERS ARE NOT SUBJECT TO WITHHOLDING TAX AND CIDE.

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Although Brazil's Software Law (Law 9.609/1998) does not expressly refer to the concept, "off-the-shelf" software was recognized by the Supreme Federal Tribunal, Brazil's highest court, in appeal RE 176.626. Legally speaking, then, there are two types of software: custom software, which is developed to meet a specific user's needs, and off-the-shelf software, which is mass produced and placed on the market for purchase by any interested user, in the form of multiple copies.

The other question that remained to be resolved was whether software was properly classified as an intellectual work subject to copyright, or as an industrial property right. The provisions of the Software Law and the Copyright Law (Law 9.610/1998) lead to the conclusion that software is an intellectual creation protected by copyright.

The question is important because of its tax consequences. Software companies had always taken the position that royalties, which are subject to withholding tax and CIDE when remitted to foreign beneficiaries, are payable only in connection with acquisitions of technology involving industrial property rights.

In a recently-published Ruling, the Federal Revenue's General Taxation Coordination decided that remittances abroad in

payment for off-the-shelf software are no longer subject to withholding tax (*Imposto de Renda Retida na Fonte* – IRRF) or CIDE (*Contribuição de Intervenção do Domínio Econômico*), a federal tax intended to raise funds for development and infrastructure.

The controversy has its origins in two amendments to Law 10.168/2000, which deals with CIDE. The first, introduced by Law 10.332/2001, provides that as of January 1, 2002 CIDE is payable by legal entities that pay royalties of any kind to beneficiaries outside Brazil. The other change, brought about by Law 10.452/2007, establishes that CIDE does not apply to amounts paid under software licensing or distribution agreements unless the agreements involve a transfer of technology. The question that arose, and that has now been decided by the Federal Revenue Service, was whether CIDE, and consequently withholding tax, applied to remittances in payment for off-the-shelf software.

In deciding that remittances in payment for off-the-shelf software are no longer subject to CIDE and withholding tax, based on the provisions of Law 10.452/2007, the federal tax authority has also implicitly decided that such the purchase of off-the-shelf software from foreign suppliers does not involve a transfer of technology.

MEDIATION: UPCOMING CHANGES IN CONFLICT RESOLUTION

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Generally speaking, non-judicial methods of conflict resolution have always been treated with more than a little skepticism by a large part of Brazilian society. In fact, it is fair to say that one of the features of Brazilian legal culture is that many see the robed judge as the only authority which can be entrusted with the power to resolve disputes, engendering a “judgment culture” quite different from many other countries.

Over the last few years, however, this culture has begun to change. The very slow pace and high cost of judicial proceedings, together with the bureaucracy inherent in the judicial courts, have produced a general feeling of crisis and a perception that the idea of the judge as the sole authority capable of “pronouncing the Law” must be abandoned. In this fertile ground the so-called “alternative” dispute resolution mechanisms have taken root, as more functional means of resolving certain types of litigation.

The first significant movement in this trend was the adoption of Law 9.307/1996, the Arbitration Law, which made it possible for persons having legal capacity to submit disputes over disposable rights to arbitration. Still, because of the Brazilian legal community’s characteristic lack of confidence in non-judicial methods of dispute resolution, arbitration only began to take hold in 2001, when the Supreme Federal Tribunal decided that the Arbitration Law was constitutional.

This same context led to Bill 4.287/1998, first proposed in the Brazilian Congress’s House of Representatives, and now in an advanced stage of the legislative process in the form of Bill 94/2002 before the Federal Senate, which will institutionalize and govern mediation as a method for preventing and resolving conflicts through consensus.

Mediation, of course, is a specialized activity performed by a third party who, having been chosen or accepted by the interested parties, assists them in preventing or resolving controversies through consensus.

The Mediation Bill deals with both judicial and extrajudicial mediation, providing that mediation can be either prior or incidental, depending on when the mediation process is initiated. The Bill provides that mediation is permitted with respect to any matter that can be the subject of conciliation, reconciliation, settlement or other type of agreement, and authorizes mediation by either individuals or legal entities.

Mediation will be confidential, unless the parties expressly stipulate otherwise, and can deal with all or only part of a conflict.

In our view, the proposed legislation is boldest in its treatment of incidental mediation. If approved, the Bill will amend the Code of Civil Procedure to make incidental mediation mandatory in cognitive proceedings, which will have significant effects on the daily routine of Brazilian courts.

Without entering into the polemic discussion over whether mediation should be made mandatory for any type of conflict, it is clear that that Bill, if approved, will require attorneys, judges and the parties themselves to adjust to a new non-litigious phase within judicial proceedings.

In any event, mediation, whether judicial or extrajudicial, prior or incidental, is about to become part of the Brazilian legal system. The philosophy behind mediation, which seeks a consensual resolution to disputes, contrasts with the adversarial nature of judicial proceedings, which often end only when a decision is imposed by the court. In order to take advantage of alternative solutions – often better suited to the peculiar characteristics of certain legal relationships than the traditional lawsuit – old prejudices and dogmas will have to be overcome.

Mediation, of course, is not intended to replace either the judicial courts or arbitration. To the contrary, mediation should be a complementary tool, permitting efficient resolution of disputes between citizens or companies, and it already performs this role in many countries. According to the information presented in the House of Representatives in connection with Bill 4.287/1998, in the United States only 25% of the parties refuse mediation proposed by the court, and agreement is achieved in approximately 65% of mediation cases. In Japan, judicial mediation is extremely effective and is used more than judicial proceedings, the traditional means of resolving conflicts. France has also recently adopted legislation to create mediation linked to judicial proceedings.

All of these developments are strong signs that, following in the footsteps of arbitration, mediation will soon occupy an important role in the resolution of conflicts and become a valuable tool in the administration of justice.

CVM ISSUES NEW RULES TO SPEED UP ENFORCEMENT PROCEEDINGS

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Brazil's Securities and Exchange Commission, the CVM (*Comissão de Valores Mobiliários*), has been implementing a series of measures intended to make its supervision of capital markets more effective. One of these measures is Deliberation 538, adopted in March 2008, which establishes new procedures to be followed in administrative proceedings against parties suspected of violating securities legislation or regulations.

Under Deliberation 538, investigations will now be conducted by the recently-created Enforcement Proceedings Department (*Superintendência de Processos Sancionadores – SPS*), together with the CVM's Federal Prosecutors (*Procuradoria Federal Especializada – PFE*). The SPS's analysts will concentrate on enforcement proceedings and will no longer be involved in other control and inspection work. A team of prosecutors will be created within the PFE to assist the SPS. The objective is to invest in specialization of the teams and ensure that all the legal elements required to support enforcement proceedings are met. Prior to Deliberation 538, enforcement proceedings were conducted by a Commission of Inquiry, chaired by the head of one of the CVM's departments and composed of three members, which included one member from the PFE. None of the CVM's analysts and prosecutors worked exclusively in the area of enforcement proceedings.

According to a statement by the current Head of the Enforcement Proceedings Department, Fábio Galvão, which was published on Bovespa's website, the main advantage in creating a specialized department is the possibility of reducing the length of enforcement proceedings, from investigation to judgment by the Commission. Galvão expects that the length of enforcement proceedings, which currently last two years on average, will be cut in half.

Under the system established by Deliberation 538, the time period for Inquiries continues to be 90 days, which can be extended if good reason for the extension exists. It was proposed that a deadline for inquiries be imposed, or, alternatively, that in the case of very lengthy inquiries, the party under investigation be notified of the existence of the inquiry prior to the expiry of five years from the event subject to investigation, but the CVM accepted neither suggestion, on the grounds that Law 9.784, which governs federal administrative proceedings, provides that inquiries must be kept confidential. This point merits comment. Without challenging the CVM's right to conduct confidential investigations, a better balance would be achieved if, at the same time the CVM has the right to conduct confidential investigations, it also had the obligation to notify the potential accused party of the investigation prior to the expiry of the five-year limitation period. This would prevent situations in which the party under investigation is notified to submit a

defense long after the offending act, when evidence to support a defense may no longer exist. It is interesting to note that the CVM itself recently issued Instruction 463, dealing with persons having political exposure, which provides that documents must be kept for a period of five years, or indefinitely, on notice by the CVM to the party under investigation.

Some of the changes introduced by Deliberation 538 reflect existing practices, such as the provision in art. 13 §1 for doubling the time period for submission of a defense when the accused are represented by different counsel, which the CVM had applied by analogy to art. 191 of the Code of Civil Procedure. Another example is art. 25, which provides that a new legal characterization may be given to the facts described in the accusation. The former rules also contained this provision, but added that the new characterization could be given at any time. In Deliberation 538, the words "at any time" are excluded, confirming that the new characterization can be given only up to the time of judgment at first instance.

Other modifications seek guarantee the accused's right to a full defense, such as art. 27, which establishes that session for judgment of proceedings must be called at least 15 days in advance. Another provision gives the accused's counsel the right to speak after the PFE's oral submission at the judgment session (art. 31, sole paragraph).

Another suggestion that the CVM did not adopt in Deliberation 538 is the possibility of submitting a petition for clarification if the decision issued by the Commission contains a material error or is omissive, contradictory or obscure. The CVM did not give reasons for refusing the suggestion, stating only that such cases may be appealed to the National Financial System Appeals Council (*Conselho de Recursos do Sistema Financeiro Nacional – CRSFN*).

To draw a parallel with civil procedure, there can be no question that the proper authority to correct any obscurity, contradiction or omission in a decision is the authority that issued the decision, not the reviewing body. Without the possibility of a petition for clarification, the accused's appeal to the CRSFN is necessarily prejudiced, since it will be based on an incomplete or imprecise decision. In short, it is not possible to prepare a proper appeal, in the full exercise of the constitutional right to two degrees of jurisdiction, when the true meaning and scope of the decision at first instance is unknown.

Despite some deficiencies in Deliberation 538, the CVM has been making significant progress in improving its practices and training its staff to ensure that the Commission's inspection and control powers are exercised effectively and efficiently. Taken as a whole, these changes can only benefit Brazil's capital markets.

BOVESPA MAIS: A NEW LISTING SEGMENT ON THE SÃO PAULO STOCK EXCHANGE

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Bovespa Mais is the new listing segment in Bovespa's organized over-the-counter market. The segment is directed to companies which intend to enter the capital market gradually, using the stock market as a source of funds. Bovespa Mais was inaugurated in February of this year with Nutriplant's IPO, and although the offering did not raise the amount initially expected, it is a landmark and should encourage other companies to access the Brazilian capital market.

The new segment follows the same principles of corporate governance, listing requirements and trading rules as Bovespa's Novo Mercado. The main difference between Bovespa Mais and the Novo Mercado is in the companies listed in each segment. Although there are no prerequisites as to the size or sector of companies entering Bovespa Mais, and no minimum or maximum limits for stock offerings, the segment is intended to attract small- and medium-sized companies that want to establish a track record on the stock market. As in the case of the Novo Mercado, however, companies listed on Bovespa Mais must assume a commitment to maintain the highest level of transparency and information, as well as stringent standards of corporate governance, by signing a Participation Agreement and complying with the obligations contained in the Listing Rules.

Bovespa Mais has no requirement for a minimum number of shares in circulation at the time of listing. However, by the end of the company's 7th year on Bovespa Mais, at least 25% of its shares must be in circulation, or its shares must be traded at least 10 times per month, on at least 25% of the year's trading days. Shares listed on Bovespa Mais are traded through the electronic system Mega Bolsa, by means of calls at scheduled times throughout the day and at close of trading. The frequency of the calls can be changed as the shares gain liquidity.

Some of the more important commitments assumed by companies listed on Bovespa Mais are: (i) to issue only common shares for trading, (ii) not to issue participation certificates (*partes beneficiárias*), (iii) to guarantee tag-along rights to common shareholders in the event of a sale of control, (iv) to make a tender offer for shares in circulation for a minimum price equal to the share's economic value if the company goes private or delists from Bovespa, (v) to adhere to the Market Arbitration Chamber, and (vi) to provide additional information in its reports and financial statements, such as cash flow and the holdings of shareholders which hold more than 5% of the company's capital.

In addition to the requirements mentioned above, to remain on Bovespa a company may not have more than five consecutive years of losses and, simultaneously, a negative net equity in the last three years, or, conversely, a negative net equity in the last five years and, simultaneously, losses in the last three years. If these requirements are not met, the company's listing may be cancelled, and the controlling shareholder will be required to make a tender offer for the shares in circulation.

Bovespa Mais has the potential to generate positive collateral effects, such as diversifying the basis for the country's growth and stimulating entrepreneurship, since it lessens the distance between the initial funding to carry out a project and funding for growth. Bovespa Mais is thus an attractive option for smaller companies and companies without a history on the stock market that wish to enter the stock market gradually, increasing their shareholder base and acquiring a new source of capital. If other companies follow Nutriplant's lead, Bovespa Mais may well achieve its objective of making access to the capital market more democratic.

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