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# NEWSLETTER & BOLETIN

VON WOBESER Y SIERRA, S.C.

Mexico

## Contents



**Versión en español en el reverso**

## EDITORIAL

PRO BONO WORK

We have the pleasure of informing our clients and friends that this past July, the magazine *Latinlawyer*, in its volume six, recognized Von Wobeser y Sierra, S.C. (VWYS) for its work in the area of pro bono, publishing its name in a list of three firms that, in the judgment of a committee made up of experts in the area, have demonstrated to date the greatest commitment to pro bono activity in all of Latin America, not only with regard to the number of pro bono hours worked, but also to the creation of a structured program applicable to such activity.

The expression *pro bono* comes from the Latin phrase *pro bono publico*, which means "for the public good." In the legal profession we can define pro bono work as the provision of free legal services the principal purpose of which is to help less privileged individuals and the organizations that assist them.

Pro bono work can consist of advice and legal representation; resolution of disputes and mediation; individual representation; corporate advice to non-governmental organizations, community organizations, micro-enterprises and micro-financing institutions; assistance to civil, cultural, educational, and environmental organizations; advice in the development of public policy, and any activity related to the legal services provided by a lawyer.

Pro bono goes beyond not charging for services: it is being sensitive to the problems that surround us; it is demonstrating that we are not unaware of the poverty and social inequality that exists; it is to take a proactive role in improving society.

Conscious of all of the above, VWYS began several years ago the work of sowing and developing a pro bono culture among its members.

We also think it is important to mention that VWYS has recently taken certain formal steps to fulfill such commitment. For one, VWYS signed an agreement for the promotion of pro bono work with the Legal Services Association (Asociación de Servicios Legales, A.C., ASL), subsidiary of the Mexican Bar Association (Barra Mexicana Colegio de Abogados, A.C.). The principal purpose of that agreement is the commitment of the firm to file a quarterly report with the ASL stating the number of pro bono hours worked during that period, as well as a detailed description of the work done and the clients to whom it was provided. We have been fulfilling this obligation since January 1, 2007. In addition, the undersigned participated on the committee that prepared the preliminary draft of the *Declaration of Pro Bono Work for the American Continent*, the purpose of which is precisely the promotion and development of pro bono legal activity throughout Latin America.

We consider that with this work our firm supports access to justice for the least protected in our society, which is a right that everyone should have in a truly democratic country.

Sincerely,

Claus von Wobeser

## CONSTITUTIONAL

NOTE

# AMENDMENT TO ARTICLE 1 PARAGRAPH THREE OF THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES

Article 1 of the Constitution is one of its key articles, where two of the most fundamental rights, equality and liberty, are expressed.

In view of the importance of these rights, on December 4, 2006, a decree was published in the *Official Federal Gazette* amending that article, which establishes the prohibition of all types of discrimination and provides a list of conditions that could cause such discrimination, such as gender, age, social condition, etcetera. The amendment consisted of changing one of its premises from "**different abilities**" to "**disabilities**."

The change should not have much of a cultural impact, but it is important semantically, for which we must recognize it as a worthwhile legislative action.

The concept of "different abilities" began to be used in Mexico to designate euphemistically those persons who suffer some "lack of ability," either physical or mental, which is to say a disability or handicap.

In the beginning, our Constitution took up the concept of "different abilities," with all the cultural good intentions it represents. However, now lawmakers have recognized that this term can be ambiguous and inexact, which is why they have decided to change it.

Furthermore, it is important to mention that the abundant secondary legislation makes reference to the "disabled" (*incapaces*) (or "handicapped" [*discapacitados*]) and never to persons with "different abilities" (*capacidades diferentes*). Thus, we conclude that under principles of logic and legal consistency, the reform is a good decision.

What we cannot lose from view is that the purpose of this paragraph and of the article in general is the prohibition of discrimination, whatever provokes it.

## CONSTITUTIONAL

NOTE

### AMENDMENT TO ARTICLE 73 SECTION XXIX-H OF THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES

Article 73 of the Political Constitution of the United Mexican States sets forth the basic powers of the Congress of the Union, without limiting such powers to those specified.

On December 4, 2006, a decree amending article 73, section XXIX-H of the Political Constitution of the United Mexican States was published in the *Official Federal Gazette*.

In this section, the Administrative Law Courts were given the power "**to impose sanctions on public servants for administrative liability as determined by the law** […]."

The purpose of this amendment is for Congress to issue laws that establish Administrative Law Courts vested with full autonomy to impose sanctions on public servants for administrative liability. In this manner, once the corresponding law is issued, the functions of investigation and penalizing of public servants will be separated and conferred on different authorities. Thus, on the one hand, the investigative and auditing function will be in the hands of internal control bodies of the Ministry of Government Authority in each agency and entity of the Federal Public Administration involved; on the other hand, the imposition of penalties, which power previously also belonged to the internal control bodies, will now be the responsibility of the Administrative Law Courts.

It should be mentioned that the second transitory article of this amendment establishes that this power of the Administrative Law Courts will go into effect with the amendment of the laws governing federal public servant liability, which is to say, when such laws give the power to impose administrative penalties to the Administrative Law Courts.

## CORPORATE

ANALYSIS

### ARTICLE 205 OF THE GENERAL LAW OF COMMERCIAL COMPANIES (LEY GENERAL DE SOCIEDADES MERCANTILES, LGSM)

**The Article**

> For the exercise of the judicial actions referred to in articles 185 and 201, the shareholders will deposit their share certificates with a notary or in a credit institution, which will issue the corresponding certificate to be attached to the claim and any other documents that may be necessary for asserting the corporate rights.
>
> The deposited shares will not be returned until the proceeding is concluded.

**Comments**

The complexity of the problems that can result in the judicial actions referred to in articles 185 and 201 of the LGSM is greater than appears at first glance. These articles are intimately related to article 205 —which we will now review— to such an extent that we dare to suggest that the latter is the necessary complement to article 201, and that article 201 has no base or support without article 205.

For the purposes of our comments on article 205, it should be stated which judicial actions it refers to. Article 185 cannot be understood without the reference it makes to the preceding article, that is article 184, and to the exception that article 185 establishes. Article 184 clearly refers to the right of any minority representing at least 33 percent of the capital stock, to request in writing from the administrator or the board of directors a call for a general shareholders' meeting, which should be understood as ordinary or extraordinary, depending on the matters to be addressed. The same article 184 provides that if the administrator or board of directors or the examiners refuse to make the call, or do not do so within a fifteen-day period, the call may be made by the judicial authority of the domicile of the company, at the request of whoever represents 33 percent of the capital stock. But this request or petition does not necessarily result in a judicial action. However, it is possible that the judicial authority could give notice to the company with the request, and that the company could respond contesting the request, and at that point a judicial dispute would arise.

It should be mentioned that the judicial actions referred to in articles 184 and 185 do not have the same purpose as the actions referred to in article 201. Article 184 does not initially contemplate a judicial conflict. It is a simple petition of shareholders representing at least 33 percent of the capital stock for a meeting to be called to address the matters they indicate in their petition. If the administrative body or the examiners do not grant this petition within the fifteen-day term, the mentioned minority shareholders can exercise their right to make this petition to the judicial authority.

Article 185 refers again to the same petition mentioned in article 184, but now only in relation to the exception that this article 185 establishes, which is that the petition may be made even by the holder of only one share, when no meeting has been held for two consecutive exercises, or when those that have been held have not addressed the matters indicated in article 181. Therefore, the request or petition can only be to call a meeting to address one or more of the matters referred to in article 181. Finally, this article 185 again repeats the final part of article 184, that the call will be made by the competent judge, and determines as the judicial procedure to follow the process established for procedural pleas or motions (*incidentes*) of commercial proceedings.

The case set forth in article 201 is completely different. It is about judicial opposition to the execution of one or more of the resolutions adopted by the general shareholders' meeting. It is an internal conflict of a stock corporation. Notwithstanding the first words of this article, the petitioners are not the shareholders as a whole, but rather any group of shareholders representing at least 33 percent of the capital stock. Therefore, article 205 requires the formation of such a group by means of the deposit of the shares in question with a notary or in a credit institution; those shares must remain in deposit during the entire proceeding, until all the actions and appeals the parties have asserted have been exhausted.

The notary is an official vested by law with full faith and credit, which provides confidence in the existence of the shares deposited in the his/her power; but the notary may not have the organization necessary to ensure the proper, secure, and effective preservation of the shares. For this reason, it could be acceptable that the deposit of the shares be made with a commercial notary (*corredor*), since section VI of article 6 of the Federal Commercial Notary Law (Ley Federal de Correduría) provides that the commercial notary public (*corredor público*) shall "act as a certifying public officer (*fedatario*) in the incorporation, modification, merger, spin-off, dissolution, liquidation and extinction of commercial companies, and in the other actions established in the General Law of Commercial Companies." On the other hand, there is no possibility established for the deposit to be made in any of the institutions for the deposit of securities, such as the S.D. Indeval, S.A. de C.V., which is regulated by the Securities Market Law (Ley del Mercado de Valores), at the request of any person and of shares not quoted on the stock exchange.

Of course, article 271 of the Securities Market Law provides that the centralized service of deposit, safekeeping, administration, compensation, liquidation, and transfer of securities be considered a public service. As such, any person can have access to it; but the shares deposited in any such institution become subject to the provisions established in the mentioned law. Therefore, we consider that the deposit of shares to which this article refers may be carried out before a notary or a commercial notary or a credit institution when the latter is authorized for such deposits by the Bank of Mexico, based on the list of institutions that the Securities Commission provides it with, as has been occurring for some time.

The evidence of the deposit, or the certificate, as the article calls it, logically must contain the name or names of the depositing shareholders, the number of shares that each of them deposits, the description of the certificates that cover the shares, the reason for or purpose of the deposit, and the obligation of the depository to retain the deposit of the shares until the termination of the proceeding. From this it can be seen that the purpose of the deposit is not to constitute an economic guarantee, but rather to ensure the existence and survival of the minority group of shareholders, to which the law confers the power to exercise the rights referred to in the mentioned articles. That is why the final part of this article provides that the deposited shares shall not be returned until the conclusion of the proceeding, because at that moment, with their return, the minority group representing 33 percent of the capital stock is broken up.

This provision can be criticized because it does not clearly distinguish between the nature and consequences of the actions referred to in articles 185 and 201. Article 185, including its reference to article 184, refers to the petition to the judicial authority to call a general shareholders' meeting, and therefore, once the call is made, the petition of the minority is satisfied, whether or not the meeting is held. Thus the minority shareholders' shares can be returned to them without any problem. In contrast, in the case of article 201, an internal judicial conflict is contemplated between two

bodies of the company, the general shareholders' meeting and a group representing 33 percent of the capital, which constitutes a body, although temporary, of control of legality. Therefore, this article 205 orders that the deposit of the minority shares must be maintained until the conclusion of the proceeding, including all its procedural motions (*incidentes*).

The opposing party, that is the defendant, would have to be the general shareholders' meeting, since the origin of the dispute is the opposition of the minority group to one or more resolutions of the general meeting of its shareholders.

Here we have a peculiar situation that must be considered, since there is no legal basis for maintaining that the two parties have legal capacity, and nevertheless the law is giving them what is usually referred to as procedural capacity or capacity to appear in court as a party. We will limit ourselves to simply mentioning the problem, since it exceeds the purpose and limits of our comments. In fact, eminent experts on legal proceedings have discussed this issue, among whom Eduardo Pallares mentions, in his *Diccionario de Derecho Procesal Civil*, Carnelutti, Chiovenda, and Goldschmidt. However, it seems to us interesting to mention what, according to Pallares, is Goldschmidt's opinion that the concept of party is formal in nature, and that it is unrelated to the substantive legal relationship that is discussed in the proceeding.

Article 201 establishes how opposition to the resolutions of the meetings shall be processed. This is done in the final part of article 185, which says: "The point will be decided following the process established for the procedural motions (*incidentes*) of commercial proceedings." That is what the law calls in other articles summary proceeding. It does not seem to us that this proceeding is the correct one.

Article 7 of the LGSM refers to the summary proceeding to require the formation of a commercial company before a notary; article 9 also refers to the summary proceeding by which creditors of a company may oppose the reduction of corporate capital. Article 22 also refers to the summary proceeding by which any shareholder or creditor can enforce the obligation imposed on the administrators to create a legal reserve fund. But the truth is that the summary proceeding, or the summary action, does not exist in commercial procedural law, that is in the Commerce Code. This governs only the ordinary commercial proceeding and the executory commercial proceeding. But the clarification is made in the final part of article 185 of the LGSM, regarding the petition of the minority representing 33 percent of the capital stock to call a general ordinary shareholders' meeting, which provides: "The point will be decided following the procedure established for the procedural motions (*incidentes*) of commercial proceedings. The procedure is found in articles 1349 to 1357 of the Commerce Code (Chapter XXVIII, Procedural Motions [*De los incidentes*]), and the last of these articles establishes that the provisions of this chapter will be applicable to the procedural motions (*incidentes*) that arise in executory proceedings (*juicios ejecutivos*) and any other special commercial proceedings that do not have a specific procedure indicated for them."

It can be seen that all the cases in which the law establishes what is called summary proceeding are special cases with clear facts or situations, involving little evidence. Thus, if the company is not incorporated before a notary (article 7), that fact is evident, since it is a legal requirement and no one can legally object. If the company reduces its capital (article 9), no one can deny that this reduces its solvency and the creditors can oppose it until their credits are paid or guaranteed. If no legal reserve fund has been formed (article 22), that is an obvious fact in relation to which any shareholder or creditor can demand that the administrators do so in the incorrectly named summary proceeding.

Finally, and with respect to article 185, in relation with 184, it would be absurd for the shareholders representing 33 percent of the capital stock to have to follow a proceeding in order to be conceded their petition to call a shareholders' meeting.

In conclusion, it seems to us that it can be accepted that the so-called summary proceeding by law is an exceptional proceeding only applicable to matters specifically established in the law, in articles 7, 9, and 22, but that this proceeding cannot be applicable to the processing of judicial actions against the resolutions of the general shareholders' meetings established in article 201, and in this respect there is only one route, the ordinary commercial proceeding.

When section III of article 201 requires that in the claim the infringed bylaws clause or legal provision be specified, in fact the lawmaker considers that the action that must always be exercised is the nullity action. Thus in this case, the minority representing 33 percent of the capital stock becomes exclusively a controlling organ of the legality of the resolutions of the meetings.

Licenciado Manuel Lizardi A.

**CORPORATE**

ANALYSIS

# COMMENTS ON CORPORATE GOVERNANCE

The phenomenon of globalization has revolutionized the manner in which Mexican companies do business, and one of the aspects in which this has been increasingly manifested is the administration and oversight of companies. Thus, corporate governance has become a topic of great importance in the business community of our country.

Corporate governance is defined as "…the system under which companies are managed and controlled." [1] Thus, corporate governance involves the relations existing among the controlling shareholders, the minority shareholders, the administrators, and third parties interested in the performance of a company.

In 1999, the Organization for Economic Cooperation and Development (OECD) issued the "OECD Principles of Corporate Governance," which were revised in 2004. Several countries have recognized these principles as guidelines for establishing their own principles on corporate governance, based on the laws of each country and its corporate reality.

Mexico has been no exception, and on the initiative of the Business Coordination Board (Consejo Coordinador Empresarial), the Corporate Best Practices Committee was created, which in 1999 issued the *Corporate Best Practices Code* (hereinafter the "Code"), providing recommendations on better corporate governance.

The Code was revised and updated in November of 2006; in the revision of the Code, experiences acquired by Mexican companies in the implementation of its principles since 1999 and new international developments in corporate governance were both taken into consideration.

Even though it is not mandatory for Mexican companies to follow the Code and the principles contained therein, their implementation is highly recommended, since they provide greater certainty for the shareholders, creditors, and other persons interested in the performance of a company.

[1] Consejo Coordinador Empresarial, *Código de mejores prácticas corporativas*, México, 2006.

According to the Code, good corporate governance should be guided by the following basic principles:

1. Equal treatment and protection of the interests of the shareholders;
2. The recognition of the existence of third parties interested in the performance and permanence of the company, such as clients or creditors of the company;
3. Adequate and responsible issuance and disclosure of information regarding the company, and transparency in its administration;
4. The existence of strategic guides for the company, adequate monitoring of its administration, and fulfillment by the company's administrators of their responsibilities;
5. The identification and control of risk in relation to the company;
6. The declaration of ethical principles and of corporate social responsibility;
7. The prevention of illicit operations and conflicts of interest;
8. The disclosure of unlawful acts and the protection of whistle-blowers;
9. Compliance with the regulations to which the company is subject;
10. The existence of a framework providing certainty and confidence to investors and third parties interested in the performance and permanence of the company.

Among the practices proposed in the Code to ensure the efficient operation of a company's corporate governance are the following:

1. With respect to shareholders' meetings, it is recommended that mechanisms be implemented to allow the shareholders to be duly and opportunely informed of the matters to be addressed and resolved by such a body as well as of the activities engaged in by the other corporate bodies of the company, such as the board of directors and any intermediate bodies there may be;
2. With regard to the board of directors, it is suggested that it be supported by consultative (not executive) intermediate bodies that are responsible for specif-

ic areas, and that the board of directors and the intermediate bodies contemplate the inclusion of independent members;

3. In relation to auditing, an intermediate body is proposed that assists the board of directors to ensure that both the internal and the external audit are carried out with the greatest objectivity and independence possible;

4. It is suggested that a system for evaluating and compensating the general director and high-level officers of the company be established, and that this system be disclosed in the annual report of the company;

5. It is suggested that the company act in a socially responsible manner and that it subject itself to ethical business principles;

6. Regarding finances and evaluation, it is recommended that the board of directors be supported, through an intermediate body, in strategic planning, above all in long-term planning, as well as in the principal investment and financing policies.

The adoption of the principles and practices mentioned above by a company promotes its institutionalization and competitiveness, in addition to providing greater certainty to its shareholders and its clients. Furthermore, a company with solid corporate governance has greater opportunities for access to financing and for attracting investment.

Finally, it should be emphasized that the adoption of the principles of good corporate governance in a company or business group should be implemented gradually, incorporating such principles little by little, based on the size and type of the company and its shareholding structure.

## CIVIL

ANALYSIS

# AMENDMENTS TO ARTICLES 1916 AND 1916 BIS OF THE FEDERAL CIVIL CODE

As happened with the legislation of the Federal District, the crimes of defamation and slander set forth in the Federal Criminal Code have been derogated to the effect that offenses against the honor, image, or reputation of a person, either an individual or an entity, are only penalized by the civil law through the concept of *daño moral*,[1] established by articles 1916 and 1916 BIS of the Federal Civil Code (Codigo Civil Federal, CCF).

For this purpose, this past April 13, a decree was published in the Official Federal Gazette amending the articles in question, making additions to them without changing their prior drafting. Specifically, the amendments have to do with the regulation of the above-mentioned unlawful acts (torts) previously qualified as crimes.

Three final paragraphs were added to article 1916 of the CCF and one to article 1916 BIS. These additions are, respectively, the following:

**Article 1916**

The following conducts will be subject to restitution of moral damages in accordance with this code and, therefore, the conducts described will be considered unlawful acts:

I. Anyone who communicates to one or more persons the imputation to another individual or entity of an act, whether true or false, **specified or unspecified**, that could cause such individual or entity to suffer dishonor, discredit, harm, or expose him/her/it to the disparagement of another;

II. Anyone who attributes to another a specific act considered a crime by the law, if such act did not occur or the person to whom it is attributed is innocent;

[1] Literally "moral damages," which may be understood as similar to pain and suffering or nonpecuniary damages, and which encompasses concepts similar to slander and libel.

III. Anyone who presents slanderous accusations or complaints, such being understood as those in which their author attributes a crime to a specific person, knowing that such person is innocent or that the crime has not been committed;

IV. Anyone who offends the honor or attacks the private life or the **self-image** of a person.

The restitution of moral damages in relation to the above paragraph and subsections contains the obligation to rectify or respond to the information disseminated in the same media source in which it was published and with the same space and same circulation or audience to which the original information was directed, without thereby limiting the provisions of the fifth paragraph of this article.

The accurate reproduction of information will not give rise to moral damages, even in cases in which the information reproduced is not correct and could cause dishonor to someone, since this does not constitute a liability for the person who disseminates such information, provided the source of the information is cited.

**Article 1916 BIS**

Under no circumstances will unfavorable opinions expressed by literary, artistic, scientific, or professional critiques be considered offenses to one's honor. Nor shall unfavorable opinions stated in performance of a duty or a right be considered offenses when the manner of doing so or the lack of restraint is not intended to cause offense.

As can be seen, in the four sections of the first paragraph of the amendment of article 1916, conduct that was previously considered to constitute the crimes of libel and slander is now defined as unlawful acts (torts) causing moral damages; this change, however, reflects a lack of legislative skill in the use of concepts such as "unspecified act" (which is extremely vague and will have to be clarified by Mexican case law).

In the second paragraph of the addition to this article, the obligation to redress the harm is expanded to the publication not only of an extract of the decision (at the request of the party and paid for by the defendant) in the media sources that the judge considers appropriate and in which the act generating the harm was disseminated, but also the correction of the disseminated information. Notwithstanding the above, in many cases the correction of the disseminated information is implicit in the extract of the decision published, and therefore the usefulness of this expansion in the redress of the harm is questionable and its applicability should be determined case by case.

Nevertheless, it is the last paragraph added to article 1916 that will generate the most doubts in its application, given that its drafting would seem to permit any person to disseminate information that, regardless of whether it is correct or incorrect, could damage the honor of someone, as long as the source of such information is cited, whatever such source is and regardless of its reliability or whether it is verifiable. Thus, based on the drafting of this paragraph, it would seem that anyone could disseminate incorrect information that affects the honor of another person as long as it is mentioned that the information is obtained from source "x." This addition will most certainly be limited by the courts, since otherwise it will only open the door to an arbitrary handling and dissemination of information from third parties.

With respect to the addition made to article 1916 BIS, it is established that in no case will literary, artistic, historical, scientific, or professional critiques be considered **offenses to one's honor**. However, it is not clear whether the reform establishes that under no circumstances may these critiques cause moral damages, since "honor" is not the only thing protected by the concept of moral damages.

Therefore, in order to avoid causing moral damages, every critique of this type must be done lawfully, which is to say in compliance with rules regarding public order, observing "high standards of conduct" (*las buenas costumbres*) and within the limits on freedom of expression and the press set forth in articles 6 and 7 of the Constitution. In this regard, such critique may not "attack morality, the rights of third parties, provoke any crime, or perturb the public order" and must be presented with respect "for private life, morality, and the public order"; such concepts are extremely open and therefore, in the final analysis, they must be interpreted by the judge hearing the moral damages case in light of the acts proven in the proceeding.

Finally, it is important to mention that the applicability of this reform in Mexican society is quite limited, given that the application of the CCF is uncommon, since civil law matters are of an entirely local nature.

These reforms entered into force on April 14 of this year.

## TAX

ANALYSIS

# RULES ON THE REMISSION OF TAX DEBTS

This past April the following resolution was published in the Official Federal Gazette: "Resolution-JG-SAT-IE-3-2007 issuing the rules for the total or partial remission of tax debts consisting of federal taxes administered by the Tax Administration Service, countervailing duties, adjustments for inflation, and past due charges for both, as well as fines for breach of federal tax obligations other than payment obligations, referred to in transitory article seven of the Federal Revenue Law for Fiscal Year 2007" (hereinafter the "Resolution").

This Resolution indicates that to have access to the remission referred to in transitory article seven of the Federal Revenue Law for Fiscal Year 2007, taxpayers must comply with the requirements established in the article itself and with the rules that are issued by virtue of the Resolution, which are grouped under three main headings:

1. Presentation of requests for remission;
2. Resolution of requests for remission;
3. General provisions.

## 1. PRESENTATION OF REQUESTS FOR REMISSION

a. Before presenting a request for remission, the taxpayer must have an Advanced Electronic Signature;

b. To determine the validity of the remission, the taxpayer will present the request to the appropriate Local Taxpayer Assistance Administration.

### Contents of the Request

*Formal requirements*

The request must include:

i. Name, corporate name, and tax domicile;

ii. Governmental office to which the request is addressed and its purpose;

iii. E-mail address for receiving notices;

iv. Telephone numbers of the taxpayer and those authorized to receive notices;

v. Names, addresses, and federal taxpayer registry numbers of all persons involved in the request, in the case of nonresidents;

vi. Signature of interested debtor in the case of individuals or, in the case of entities, signature of the sole administrator or all of the members of the Board of Directors or of the Chairman of the Board, as applicable;

vii. Manifestation under oath that the person or persons signing the request for remission:

- Is/are not subject to a criminal proceeding for the likely commission of a tax crime;
- Has/have an Advanced Electronic Signature;
- Is/are in compliance with their tax obligations.

*Substantive requirements*

The request must also:

i. Describe the activities in which the interested party engages;

ii. Indicate the amount of the transaction(s) contemplated in the request;

iii. Mention the business reasons for the transaction contemplated for deduction;

iv. Indicate whether the taxpayer is under investigation by the Ministry of Treasury and Public Credit (Secretaría de Hacienda y Crédito Público) or by state or federal district entities, detailing the periods and the contributions under review;

v. Indicate both debts determined and/or controlled by the tax authorities and any other tax debts, specifying the authority that determined them and their respective tax debt control numbers;

vi. Provide a list of the tax debts whose remission is being requested;

In the case of debts determined by the taxpayer whose declarations have been presented prior

to the date of the request, the total amount of such debts shall be stated for each of the taxes, itemizing the amount of the tax and, if applicable, the fines, surcharges, and adjustments, attaching a copy of the corresponding declaration and/or the bank payment receipt;

In the case of debts corresponding to federal taxes incurred before January 1, 2003, the amounts of which have not been determined, the taxpayer shall determine them, presenting the relevant declarations on official forms and noting "zero" in the "amount to pay" field;

In the case of debts corresponding to federal taxes incurred between January 1, 2003, and December 31, 2005, the amounts of which have not been determined, the taxpayer shall determine them, in the same terms as indicated in the above paragraph;

In the case of countervailing duties or taxes generated from the import or export of merchandise and fines for their breach, incurred in the terms indicated in the two above paragraphs, the omitted taxes and countervailing duties shall be stated, duly adjusted for inflation, fines, and surcharges, from the time they were generated to the presentation of the request.

**2. RESOLUTION OF REQUESTS FOR REMISSION**

The Local Collection Offices will issue the resolution once all the information is in the file.[1]

In the case of a resolution that declares the remission to be valid but that there is still an amount to be paid by the taxpayer, the resolution will become effective once the taxpayer has paid the amount not subject to remission.

**3. GENERAL PROVISIONS**

a. Taxpayers may present their requests until December 31, 2007.

b. The tax authorities will have a term of three months from the date of the request to respond to it.

Finally, it is important to mention that this resolution entered into force on April 4, 2007.

[1] The taxpayer will be personally notified of this resolution.

## TRADE

ANALYSIS

# AMENDMENTS TO THE FOREIGN TRADE LAW PUBLISHED DECEMBER 21, 2006

On December 21, 2006, the decree amending articles 53, 64, 68, 89 D, 93, and 97 and adding the text of article 65 A of the Foreign Trade Law (FTL) was published in the Official Federal Gazette. The purpose of this reform was to harmonize the text of the FTL with the provisions established by the World Trade Organization (WTO) regarding subsidies and countervailing duties.

The origin of the reform is Mexico's attempt to comply with the decision issued by the WTO in the challenge of the antidumping investigation carried out by Mexico against rice coming from the United States of America.

The FTL was in violation of part of the rules established in the antidumping ruling, which is what gave rise to the reform. The most relevant changes are the following:

- Article 53 of the FTL was amended as follows: after receiving the forms used in the investigation, the parties will have a term of 23 business days to present arguments, information and evidence, counting from the date of receipt of the forms, which will be considered received five days after the date on which it is sent to the recipient or transmitted to the competent diplomatic representative of the exporting country;

- The second paragraph of article 64 of the FTL previously established that the Ministry of Economy (Secretaría de Economía, SE) was authorized to determine, in certain cases (when producers did not submit to the investigation, when they did not present the information requested or hindered the investigation, and when they had not made any exports during the investigation period), a countervailing duty based on the margin of price discrimination or of higher subsidies. This article was amended to establish that the margin of price discrimination or of subsidies will be obtained based on the best information derived from the facts known to the SE;

- Article 68 of the FTL saw two changes. The first consists of the elimination of the reviews of the definitive countervailing duties with respect to those

producers for which a price discrimination margin has not been determined. The second change consists of the elimination of its last paragraph which established the requirement of demonstrating that the volume of exports made into Mexico during the review period was representative, in the event that the review of a specific countervailing duty was requested;

- Article 89 D of the FTL provides for the possibility, for those producers whose merchandise is subject to the payment of a definitive countervailing duty and that have not made any exports during their investigation period, of going before the SE to request the initiation of a proceeding for new exporters, in order for the SE to establish the individual price discrimination margins. The reform eliminates the legal requirement of demonstrating that the volume of the exports made during the review period was representative;

- Article 93, section V of the FTL imposed a fine on the importation, once the investigation was initiated, of identical or similar merchandise, in significant volumes and in a relatively short period, when it was considered likely to undermine the reparatory effect of the countervailing duty. This section was eliminated and replaced with article 65 A of the FTL, which will be discussed below;

- Article 97 of the FTL has two amendments. The first consists of permitting interested parties which are subject to the payment of a particular countervailing duty —which could be changed by virtue of the appeal mechanism— to guarantee their payment. The second change reverts to the provisions of the Federal Administrative Court Procedures Law, given that that Law has taken the place of the Federal Tax Code in relation to Administrative Court Proceedings;

- As mentioned previously, section V of article 93 of the FTL was eliminated and replaced with article 65 A, which penalizes price discrimination that causes harm to national production in Mexico. The penalty will consist of the application of a countervailing duty on the merchandise subject to investigation which was imported during the three months prior to the date of application of the precautionary measures, when there is a history of price discrimination or when the importer knows or should have known that the exporter was discriminating, that the harm was due to massive imports of a product subject to price discrimination, and it is determined that it is likely that these imports undermine the reparatory effect of the duty;

  Furthermore, this addition provides for the retroactive imposition of such measures on merchandise imported within a period of up to three months prior to the application of the precautionary measures, in the case of subsidies that cause harm to national production or when it is concluded that there is a harm difficult to repair and when, in order to prevent a recurrence of the harm, it is considered necessary to retroactively apply countervailing duties on those imports.

## TRADE

NOTE

# TREATY BETWEEN THE UNITED MEXICAN STATES AND THE REPUBLIC OF PANAMA FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT

On December 19, 2006, the Decree Promulgating the Treaty between the United Mexican States and the Republic of Panama for the Reciprocal Promotion and Protection of Investment was published in the Official Federal Gazette.

This treaty was signed in Mexico City on December 12, 2006, and entered into force on the 14th of the same month and year.

The primary purpose of the Treaty is the promotion, creation, and maintenance of favorable and reciprocal investment among the national companies and/or individuals of the signing parties. Therefore, we can assert that this treaty directly protects investment and, consequently, the economies of both countries.

Under this treaty, "investment" is understood as the act:

1. Whose purpose is the investment of assets;
2. Whose purpose is the obtaining of an economic benefit or other business ends;
3. That is carried out by an investor of one of the contracting parties;
4. That is carried out in the territory of the other contracting party;
5. That is carried out in accordance with the law of the contracting party where the investment is made.

Furthermore, one of the most important clauses of the Treaty is in relation to the right of the parties to be indemnified in the case of expropriation of their investment. It should be emphasized that expropriation must be understood in the broadest sense, as any activity that diminishes the economic benefit resulting from the investment. In this regard, the expropriation and indemnification will be carried out in accordance with the following guidelines:

1. Expropriation:
    a. For causes of public utility and social interest;
    b. On a nondiscriminatory basis;
    c. According to due process of the law;
    d. By the payment of an indemnification;

2. Indemnification:

a. Will be equivalent to the fair market value of the expropriated investment;
b. Will be paid without delay;
c. Will include interest at a reasonable commercial rate from the date of expropriation until the date of payment;
d. Will be fully payable and freely transferable.

Finally, as in the majority of investment protection agreements, this agreement has a dispute resolution method, the arbitral proceeding, subject to the conventions of the International Centre for the Settlement of Investment Disputes (ICSID), the Additional Facility Rules of ICSID, or the Rules of Arbitration of the United Nations Commission on International Trade Law, as applicable.

## ENVIRONMENTAL

NOTE

# COMMENTS ON THE AMENDMENTS TO THE ENVIRONMENTAL LAW OF THE FEDERAL DISTRICT, THE HEALTH LAW FOR THE FEDERAL DISTRICT, AND THE LAW FOR THE FUNCTIONING OF COMMERCIAL ESTABLISHMENTS OF THE FEDERAL DISTRICT

On February 9, 2007, an executive order was published in the Federal Official Gazette amending the Environmental Law of the Federal District, the Health Law for the Federal District, and the Law for the Functioning of Commercial Establishments of the Federal District, with the purpose of preventing negative health effects on the public caused by harmful emissions in commercial establishments.

The amendments became effective as of February 10, 2007.

With the amendment to article 5, paragraph 30 of the Environmental Law of the Federal District, the definition of polluting emissions was expanded, establishing that they shall be understood as the generation or discharge of material or energy, in any amount, physical state, or form, that at the time of being incorporated or accumulated into or acting on live beings, the atmosphere, water, the subsoil, or any other natural element, negatively affects its health, composition, or natural condition.

The purpose of this amendment is to contemplate possible negative effects on the health of individuals that were not previously considered.

Article 55 of the Health Law for the Federal District now requires buildings and facilities that are used as conference centers or for public shows to comply with the maximum limits allowed for audio emissions.

Similarly, article 9 of this law now establishes that the Ministry of Health shall be empowered to prevent or control visual contamination, as well as contamination caused by noise, vibrations, thermal energy, lighting, odors, steam, or any other kind of activity that may damage the health of exposed individuals.

In connection with the Law for the Functioning of Commercial Establishments of the Federal District, owners of commercial establishments are now required to respect maximum limits for audio emissions within their establishments, according to the permitted schedules, which, for restaurants/bars, discotheques, night clubs, and the like, are the following: (i) from 6:00 a.m. to 10:00 p.m., 75 dB (A); (ii) from 10:00 p.m. to 6:00 a.m., 85 dB (A).

Furthermore, the owner must install visible systems whose purpose is to reveal to the clients exposed to noise pollution when these permitted limits have been exceeded; at the required time, the sound and noise volume must be reduced.

It is important to mention that, in addition to any fines that may be applicable, commercial establishments which repeatedly violate these obligations will be closed down by the Delegation, in addition to any fines that may be applicable.

## ENVIRONMENTAL

NOTE

# COMMENTS ON THE AMENDMENTS TO THE GENERAL LAW OF ECOLOGICAL BALANCE AND ENVIRONMENTAL PROTECTION

On February 12, 2007, an executive order was published in the Federal Official Gazette which adds articles 19 and 20 Bis 2 and modifies article 51 of the General Law of Ecological Balance and Environmental Protection (hereinafter the "Law"). These amendments entered into effect on April 11, 2007, with the purpose of establishing new criteria for the drafting and approving of ecological zoning plans.

The new criteria establish that the following elements must be taken into account in ecological zoning plans: (i) the necessary balance between human settlements and their environmental conditions; (ii) the environmental impact of new human settlements, communication networks and any other work or activities; (iii) any specific conditions established by the executive orders creating protected natural areas and their respective management programs.

An additional paragraph was added to article 20 Bis 2, establishing how to draft a program for a regional ecological zoning plan and have it approved when it includes a federal Protected Natural Area (ANP) or an ANP under federal jurisdiction. Such programs will be drafted and approved by the Environmental Ministry and the governments of the states or the Federal District and the municipalities in which they are located.

Previously, the establishment of national parks in Mexican marine zones was regulated with the purpose of preserving and protecting the marine ecosystem and regulating the sustainable establishment of aquatic flora and fauna. Furthering this purpose, article 51 was amended in order to include the possibility of establishing biosphere reserves, natural monuments, flora and fauna protection areas, and sanctuaries as alternative forms of ANP's in Mexican marine zones.

## ENVIRONMENTAL

ANALYSIS

# NEW PROVISIONS OF THE GENERAL WILDLIFE LAW REGARDING COASTAL DEVELOPMENT

The General Wildlife Law (Ley General de Vida Silvestre, LGVS) was amended again in February of this year in order to provide better protection of the coastal mangroves. The mangroves are coastal forests that play an important ecological role. They fulfill environmental functions as essential habitat for the sustainability of fishing, the filtration of polluted waters that flow into the sea, and the protection against coastal erosion, minimizing the impact of hurricanes and floods. Today more than half of the original mangrove cover has been lost in Mexico, which is why it has been considered important to take steps to protect it.

The laws applicable to the mangrove in Mexico include, in addition to the LGVS, the Ramsar Convention on Wetlands, the General Law of Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente, LGEEPA), the General Sustainable Forestry Development Law (Ley General de Desarrollo Forestal Sustentable, LGDFS), and certain regulations and official Mexican standards, all focused on the preservation of this resource.

The threat to the integrity of the mangroves comes from a variety of sources, such as port and tourist developments, agricultural and aquaculture activities, and the flow of municipal wastewater into the sea. It must also be kept in mind that although some mangrove cover is found within protected natural areas and other environmentally protected regions, the greater part of the mangroves in Mexico are on privately owned land, much of that in *ejidos* (the communal land system).

In this context, it should be mentioned that before the reform of the LGVS analyzed here, activities and work that affected mangroves were already regulated. In addition to the general principles of conservation of natural resources and sustainable development of the LGEEPA, Article 28, section X of that law already required an environmental impact authorization from the Ministry of the Environment (Secretaría del Medio Ambiente y Recursos Naturales, SEMARNAT) before carrying out work and activities in wetlands, mangroves, lagoons, rivers, lakes, and estuaries connected to the sea. In

order to obtain such an authorization, the interested parties must present an environmental impact assessment.

In addition to the above, since 2003 an official Mexican standard has been in force (NOM-022-SEMARNAT-2003) which establishes specifications for the preservation, conservation, sustainable use, and restoration of the coastal wetlands in mangrove zones, and which imposes significant restrictions on activities in these zones.[1]

Nevertheless, in an attempt to lessen the effect of these restrictions, those interested in coastal development negotiated with SEMARNAT the addition of a section (number 4.43) to the above-mentioned NOM standard, establishing the following:

> The prohibition of work and activities stipulated in numbers 4.4 and 4.22 and the limits established in numbers 4.14 and 4.16 may be lifted provided that in the preventive report or in the environmental impact assessment, whichever is applicable, mitigation measures are established in benefit of the wetlands and the appropriate authorization for change of use of the land is obtained.

The principal purpose of the reforms of the LGVS is to reinforce the restrictions on the development of these coastal areas. The new reform establishes the following:

- The removal, filling, transplanting, cutting, or any work or activity that affects the integrity:
  - Of the hydrologic flow of the mangrove;
  - Of the ecosystem and its zone of influence;
  - Of its natural productivity;
  - Of the natural ability of the ecosystem to withstand tourist developments;
  - Of the nesting, reproduction, sheltering, feeding, and maturing zones; or
  - Of the interactions between the mangrove, the rivers, the dunes, the adjacent maritime zone, and the coral reefs;

  Or that provokes changes in the ecological characteristics and services of the mangrove, is prohibited.
- Work and activities intended to protect, restore, research, or preserve the mangroves are exempt from the prohibition referred to in the above paragraph. (Art. 60 TER.)

Furthermore, a second paragraph was added to article 99, which establishes that "work and activities involving nonextractive use carried out in mangroves shall be subject to the provisions set forth in article 28 of the General Law of Ecological Balance and Environmental Protection."

From the above it can be seen that the result of the reform is that those interested in engaging in activities or work that affects mangroves must, in their environmental impact assessment, include an analysis of each one of the elements mentioned in the new article 66 TER, in order to show that their work will not cause any of the mentioned effects on the mangrove.

[1] Article 31 of the LGEEPA establishes that in the event that there is an official Mexican standard regulating the environmental impact of work or activities, the presentation of a preventive report will be required instead of an environmental impact assessment.

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