NEW BANKING AND TRUST SECRECY REGULATIONS IN MEXICO.

On December 30, 2005 the Mexican Federal Official Gazette published the decree by means of which Article 117 of the Mexican Law Governing Credit Institutions (*Ley de Instituciones de Crédito)* ("CIL") was amended, and Article 118 of the CIL was repealed (the "Decree"). Before the Decree, which came into full force and effect on December 31, 2005, said Articles referred to the banks' obligation to maintain secrecy regarding banking and trust operations, respectively.

The new text of Article 117 of the CIL establishes the confidential nature of the information and documents related to all operations and services provided by credit institutions in Mexico, including trusts, and both civil mandate and commercial agency agreements entered into by banks, in such a manner that the new legal regime applicable to banks' obligation to maintain secrecy regarding both banking and trust operations is now jointly regulated in the new Article 117 of the CIL, for which Article 118 of the CIL was repealed.

Accordingly, credit institutions cannot give in any case news or information concerning deposits, operations, or services, including trusts, and both civil mandate and commercial agency agreements, except to the depositor, debtor, account holder, beneficiary, trust grantor, trust beneficiary, commercial legal principals, their legal representatives, or persons holding sufficient authorization in order to either dispose of the account, or to participate in the corresponding operation or service.

Notwithstanding the foregoing, the new text of Article 117 of the CIL establishes a greater number of exceptions to the banks' obligation to maintain confidential the information and documents regarding their operations, than those contained in the amended and repealed Articles, which constitutes the most relevant aspect of the amendment at bar.

New exceptions to banking and trust secrecy regulations.

Before the Decree entered into full force and effect, banks in Mexico had the obligation to give information regarding the deposits, services or any manner of operation, other than trusts or civil mandate and commercial agency agreements, only when the information was required by (i) the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores)* (the "Commission"), acting within its inspection and oversight duties and with respect to any kind of information and documents; (ii) judicial authorities, by means of a ruling issued in a proceeding in which the incumbent was a party to or accused in the relevant procedure; and (iii)

federal fiscal authorities, through the Commission, and for fiscal purposes only.

As for trusts, and both civil mandate and commercial agency agreements entered into by credit institutions, before the Decree, said institutions only had the obligation to submit information when the same was required by (i) the Commission, or (ii) authorities and courts in judicial proceedings or claims filed by the trust grantor or the trust beneficiary, or the principal in either civil mandate or commercial agency agreements, against the bank, or vice versa.

Pursuant to the new text of Article 117 of the CIL, banking institutions now have the obligation to surrender information regarding all services provided by them, including trusts and both civil mandate and commercial agency agreements, whenever they are so required by judicial authorities by means of a ruling issued in a proceeding in which the incumbent or, as the case may be, the trust grantor, the trust beneficiary, the trustee, or the principal or agent (i.e., the bank) under civil mandate or commercial agency agreements, is party to or accused in the relevant procedure, in the understanding that this information may be required either directly from the credit institution, or through the Commission.

Furthermore, the banks now have the legal obligation to surrender the information required by the following authorities, acting in their respective legal capacities: (i) the Attorney General for the Republic and the Attorney General for Military Justice, as well as the Attorney General or Assistant Attorney General for every State of the Federation and that of the Federal District of Mexico, seeking evidence to prove the commission of a crime and the probable criminal responsibility of the accused; (ii) fiscal authorities for fiscal purposes; (iii) the Ministry of Finance and Public Credit *(Secretaría de Hacienda y Crédito Público)*, to obtain evidence to prosecute for banking crimes; (iv) the Treasurer of the Federation *(Tesorero de la Federación)*, in connection with personal accounts of public officers, their assistants, or private persons who are subject of an investigation; (v) the Superior Auditor of the Federation *(Auditoría Superior de la Federación)* regarding accounts or agreements by which public monies are administered; (vi) the Ministry of the Public Function *(Secretaría de la Función Pública)*, in order to verify the evolution of the patrimony of federal public officers within the verification proceeding established in the Law Governing the Federal Administrative Responsibilities of Public Officials *(Ley Federal de Responsabilidades Administrativas de los Servidores Públicos)*; and (vii) the Federal Electoral Institute *(Instituto Federal Electoral)*.

The foregoing, is without prejudice of the obligation of credit institutions to submit the information that, within their respective scope of activities, is

required from them by Mexico's Central Bank *(Banco de México)*, the Institute for the Protection of Bank Savings *(Instituto para la Proteccion del Ahorro Bancario)*, and the Commission for the Protection and Defense of the Users of Services rendered by Financial Institutions *(Comisión para la Protección y Defensa de los Usuarios de Servicios Financieros)*.

Responsibilities, restriction of access to the information provided by banks, sanctions, and formalities in order to comply with information requirements.

In keeping with the old text of Article 117 of the CIL, the new one maintains the obligation for bank employees and officers to pay damages that may result from a breach of a banking or trust secrecy obligation.

In addition to the foregoing, the new legal text establishes that the information provided by credit institutions in accordance with the same Article, can only be used in the relevant proceeding, under strict confidentiality, even after the public officer who has had access to said information leaves office, and that all public officials who breach this secrecy obligation are subject to the corresponding administrative, civil, or criminal responsibilities that may be applicable.

The current legal text of Article 117 of the CIL also establishes that when the information is required by the Commission, the latter shall determine the time period in which said information must be surrendered, and that the Commission is authorized as well to impose administrative sanctions to the banks that fail to comply with the given period of time and conditions so established by it.

Lastly, the new Article 117 of the CIL empowers the Commission to issue general administrative rules governing the formalities that must be observed by the authorities now authorized to require information from these sources, other than in the case of a judicial authority.

Comments.

In the case of the information concerning trusts and both civil mandate and commercial agency agreements, it is particularly relevant that, under the Decree, the judicial authorities can now require from banks information, even though the bank holding the relevant information is not a party to the proceeding in respect of which said requirement arises, or in a case where said bank is a party to the proceeding, but the lawsuit was not brought by the bank's own client, insofar as under these new rules, in order for the bank to be obliged to render the information it is only a condition that the requirement

therefor is issued in a proceeding to which any of the trust grantor, the trust beneficiary, the trustee, or the principal or agent in either civil mandate or commercial agency agreements, is a party.

Moreover, given the enlargement of cases in which the authorities can now require banking information, the boundaries of the powers vested in them could be shortened by the own judiciary, through legal claims that may be filed by those to whom the information disclosure may affect.

Also, and even though one could argue, on the one hand, that according to the constitutional principle of no retroactive application of the law, in effect in Mexico, the new legal text should only be applied to those operations or services entered into or rendered after the Decree came into full force and effect; on the other hand, it could also be considered that, being the banks' secrecy obligation one that is in effect throughout the time in which the banks hold the information, the application of the Decree in connection with information arising from operations and services entered into and rendered before the Decree came into effect, is not retroactive and, therefore, is in accordance with such constitutional principle.

Furthermore, the legal power with which authorities are vested in order to require information from credit institutions, could also be considered by certain judges or courts as a procedural right of the parties litigating before the judge or court, and thus, be construed as a right that can be used by said parties in proceedings brought before the Decree came into full force and effect, or those initiated after the same but concerning operations or services entered into or rendered before the Decree came into effect, because, according to Mexican case law, the application of procedural laws is not considered to be retroactive.

The resolution of said issues, however, depends on the judges' and courts' criteria, for the Decree Articles leave them unsolved.