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NEWSLETTER
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_CVM's new interpretation of access to shareholders lists

In recent decision, the Brazilian Securities and Exchange Commission (CVM) changed its position regarding the access to shareholder lists, which was consolidated since 2009 and also reaffirmed in the Annual Circular Letters issued by the Superintendence of Corporate Relations.

In this case, a shareholder of a publicly-held company ("Company") requested the Company's shareholders list under the justification of a personal interest, since he was a defendant of a lawsuit for the partial dissolution of companies that had a stake in a company merged into the Company, through which he could receive shares of the Company under dispute before the court. With the request, the shareholder intended to confirm whether such shares had been transferred, as well as to enable the court to take all the necessary legal steps that the situation demands.

Pursuant to the CVM's understanding of 2009, the Company rejected the request on the grounds that the justification did not meet the legal requirements of § 1 of art. 100 of Law 6,404 / 1976 ("Corporate Law"), as, in its opinion, it was not clearl the right that would be defended or the personal interest situation of the shareholder to be clarified, nor how the disclosure of the list of shareholders would be necessary to this purpose.

THEREFORE, THE SHAREHOLDER SUBMITTED A CLAIM TO CVM REITERATING HIS REQUEST FOR ACCESS TO THE REFERENCE LIST.

THE REPORTING DIRECTOR CONCLUDED THAT UNDOUBTEDLY THERE ARE REASONABLE GROUNDS FOR THE DELIVERY OF THE DOCUMENT IN QUESTION. IN HIS VIEW "HAVING THE SHAREHOLDER DESCRIBED IN A CONCISE AND COHERENT WAY THE RIGHT TO BE DEFENDED OR THE CLARIFICATION TO BE OBTAINED BY THE CERTIFICATE, THE COMPANY CANNOT DELAY THE PRODUCTION OF EVIDENCE NOR ANALYZE THE CONVENIENCE OR OPPORTUNITY OF THE INFORMATION. THIS JUDGMENT IS MADE BY THE SHAREHOLDER, WHICH SHALL USE THE INFORMATION FOR THE PURPOSES DESIGNATED IN ITS COMPLAINT, UNDERTAKING TO HOLD ANY EVENTUAL SECURITY OF THE DATA, UNDER THE TERMS OF THE APPLICABLE LEGISLATION."

Moreover, the Director Gustavo Borba pointed out that the books of registration and transfer of nominative shares mentioned in art. 100, items I to III, of the Law of S.A., have characteristics of public registry, the reason for which the access rule should be interpreted broadly.

In this sense, the understanding that information could only be provided when it involved "defense of a collective or homogeneous individual right" of company shareholders according to the precedent of 2009 would not be based on the literalness of the article, which expressly guarantees the information to "any person" who seeks clarification on situations of "personal or shareholders' interest or of the securities market".

In addition, it was also reinforced, in the votes of the other Directors of the Collegiate, the understanding that to justify the request based on §1 of art. 100 of the LSA, the applicant would not even have to be a shareholder of the Company, since the law opened this possibility for anyone who shows personal interest.

Therefore, the CVM Collegiate unanimously concluded that the shareholder's request fulfilled all legal requirements and, therefore, granted the shareholder's appeal authorizing access to the Company's shareholder list.

The CVM's decision can be accessed in Portuguese at the CVM website in the links below:

http://www.cvm.gov.br/decisoes/2017/20170509_R1/20170509_D0433.html

http://www.cvm.gov.br/decisoes/2017/20170711_R1/20170711_D0433.html

_ National Financial System's Council of Appeals reverts CVM's decision related to insider trading

In recent decision, the National Financial System's Council of Appeals, known as the Central Bank's Conselhinho ("CRSFN") overturned a CVM's decision regarding the absolution of 20 defendants of use of privileged information in a petrochemical company prior to the disclosure of material fact on the acquisition of such company by Petróleo Brasileiro SA – Petrobrás.

At the time of CVM's trial, on August 21, 2012, the Reporting Director, accompanied by the CVM Collegiate, understood that there had not been enough evidence to charge the defendants with insider trading, and therefore, all the transactions carried out by the defendants were in accordance with the individual trading standard. In addition, it was proven that, at the time of the facts, several research reports and articles were circulated in the market regarding the sale of the company.

However, according to the CRSFN's Reporting Director, CVM's decision was incompatible with previous cases, especially at the time of the facts that there was great effort to prioritize cases of insider trading in the autarchy.

In this sense, this understanding was clear after the information presented by Operation Lava Jato, which proved the use of privileged information by the defendants through negotiations based on acts of corruption between the Odebrecht Group and Petrobras.

Accordingly, the Reporting Director concluded that "THE DECISION-MAKING PROCESS BASED ON CORRUPTION ACTS REPRESENTS THE MOST PRIVILEGED OF THE INFORMATION, SINCE ONLY THOSE ARE DIRECTLY INVOLVED IN THE ACTS OF CORRUPTION AND WITH POWER TO IMPLEMENT SUCH UNLAWFUL ACTS HAVE THE PRIVILEGE TO KNOW WHAT WILL BE DONE".

In this regard, CRSFN unanimously decided to impose a fine of 2 times the gain obtained for one of the defendants, a financial institution, and to enforce the implementation of a compliance department inside the bank, and, by a majority, to apply a fine of 1.5 times to the other defendants.

It should be noted that the CRSFN determined that the case should be referred to the Federal Public Prosecutor's Office in the State of Paraná, specifically the investigation team of Operation Lava Jato, for eventual analysis of the connection between the use of inside information and the facts under its investigation.

The CRSFN' s decision can be accessed in Portuguese at the Central Bank website in the link below:

http://www.cvm.gov.br/noticias/arquivos/2017/20170704-2.html#aracruz

_ Modification of rules on material information disclosure

On September 12, 2017, CVM Instruction No. 590/2017 was published, which amended CVM Instruction No. 358/2002 and CVM Instruction No. 461/02007.

According to CVM, the amendments are the result of a continuous improvement process. Below we highlight the main innovations:

_ Clarification of the possibility of action by CVM and the entities managing the organized markets regarding the disclosure of material information as a result of sensitive information leakage;

_ New discipline on the disclosure of material information during trading hours, which shall observe the rules on the subject to be issued by the entities managing the organized markets;

_ Exclusion of the obligation of the suspension of trading of the securities issued by the company in Brazil simultaneously to the suspension in other countries in which such securities are also negotiated;

_ Mandatory requirement that directors and members of fiscal councils and any bodies with technical or consultative functions created by statutory provision present and update, when necessary, the list of the persons related to them at the time of the investiture in office or when submitting the documentation for registration as a publicly-held company with CVM;

_ Equalization of the application, redemption and negotiation of quotas of investment funds, whose regulation provides that its portfolio of shares is composed exclusively of shares issued by the company, its subsidiary or its parent company, to those made with securities issued by the company and by its parent companies or subsidiaries (in the latter two cases, provided they are publicly-held companies).

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_ Investment Funds gains popularity in Brazilian market

The use and relevance of funds for participation investments or "FIP" (Fundos de Investimentos em Participações) has been gaining traction and has become one of the most prominent options for capitalizing on investment opportunities in Brazil, since access to third-party capital in the Brazilian financial system is restricted due to high interest rates.

The FIP is constituted in the form of a closed-end investment fund that can acquire shares, debentures and other securities convertible into or exchangeable for shares issued by publicly or privately-held companies, as well as securities representing participation in limited liability companies.

THIS STRUCTURE IS BENEFICIAL FOR BOTH PARTIES. AS, ON THE ONE HAND, THE INVESTED COMPANY'S MANAGEMENT AND STRATEGIC POLICIES ARE IMPROVED AND ENHANCED BY THE FIP, HAVING, THEREFORE, A FINANCIAL AND OPERATIONAL GAIN, WHILE ON THE OTHER HAND, THE FIP MAXIMIZES ITS PROFITS BY SELLING ITS CORPORATE PARTICIPATION AFTER POTENTIAL VALORIZATION OF THE INVESTED COMPANY.

In this sense, the FIP is an experienced investor in professional management of medium or long-term divestment companies. Its remuneration is not tied to the short-term performance of the invested company, but rather, when another investor or buyer sees greater value than was originally paid by the company. Therefore, the investor has total interest in the growth of the invested company, implementing new management models in the company, as well as improved corporate governance rules.

It is important to note that the FIP has effective participation in the decision-making process of the invested company, with effective influence in the definition of its strategic policy and its management.

This participation in the decision-making process of the invested company may occur through: (i) the holding of shares that integrate the respective control block; (ii) by entering into a shareholders' agreement; or (iii) the adoption of another procedure that ensures to the FIP the effective influence in defining the company's strategic policy and management, including the appointment of members of the board of directors.

With regards to its structure, the FIPs are classified in the following categories as to the composition of their portfolios: (i) Seed Capital (Capital Semente); (ii) Emerging Companies (Empresas Emergentes); (iii) Infrastructure (Infraestrutura - FIP-IE); (iv) Intensive Economic Production in Research, Development and Innovation (Produção Econômica Intensiva em Pesquisa, Desenvolvimento e Inovação - FIP-PD & I); and (v) Multi-strategy (Multiestratégia).

The current legislation has flexible rules for the FIP's investors and also provides many investment possibilities. Below we highlight the main rules of the applicable legislation:

_ Investment in limited liability companies by certain categories of FIP, provided their annual gross revenue is below BRL 16 million;

_ Investment in quotas of other FIPs or quotas of stock funds, the latter to comply with the rule of minimum investment limit of 90%;

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_ Investment of up to 20% of its subscribed capital in foreign assets, provided that the legal requirements are met. In case of a Multi-strategy FIP, which is exclusively for professional investors, investment in assets abroad may be up to 100% of its subscribed capital;

_ Minimum requirements of corporate governance practices to be observed by privately-held invested companies, such as to adhere to the arbitration chamber for resolution of corporate conflicts and to audit its financial statements by independent auditors;

_ Maintenance of at least 90% of the portfolio invested in equity interest in publicly-held companies or limited companies;

_ Possibility to issue different classes with distinct financial and economic rights, depending on the profile of the investor;

_ Unconvertible debentures are limited to 33% of the total subscribed capital of the FIP; and

_ Possibility to perform advances for future capital increase, provided that (i) this possibility is expressly provided for in the FIP's regulation; (ii) there is no repentance; and (iii) there is a capital increase in a maximum of 12 months.

Furthermore, one of the major advantages of the FIP is the tax benefit, since the income earned by the FIP is exempt from taxation in Brazil. In this sense, the profits earned by the FIP in the sale of a company, while not amortized to the quotaholders, are not taxable and may be reinvested in new or similar companies.

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