

_ CVM punishes controlling shareholder and managers for wrongdoings in company's management

In a recent decision, CVM decided on the liability of the controlling shareholder and the managers of a financial institution for accounting fraud in the financial statements, undue personal pecuniary advantages (due to their positions held at the company), non-compliance with fiduciary duties, unjustified transfers of funds to affiliates and abuse of control power.

The sanctioning procedure was originated by the analysis of a material fact disclosed by the company in 2010, which mentioned controlling shareholder's decision to contribute R\$2.5 billion through an agreement entered into by the Credit Guarantee Fund (Fundo Garantidor de Crédito - "FGC"). According to the material fact, the contribution intended to restore the balance of assets and operational liquidity of the company, due to the existence of accounting inconsistencies in the financial statements with significant equity loss.

In 2011, the Brazilian Central Bank discovered that the financial institution had accounting irregularities and sent a memorandum on that to the CVM mentioning that the company's board of directors members, officers, audit council (Conselho Fiscal) and audit committee (Comitê de Auditoria) were allegedly engaged in acts related to irregular accounting procedures related to the registration of assets and revenues in the company's financial statements.

At the same time, the management of the company carried on internal and external audits and found that the financial impact of the irregularities was approximately R\$ 4.3 billion. Therefore, based on the evidence produced by the Brazilian Central Bank and

by the audits, CVM's Superintendence of Sanction Procedures (SPS) considered the company's officers liable for breaching their duties due to the accounting fraud, and the members of the board of directors and of the audit committee liable for failing to properly oversee the company's officers, internal controls and its corporate governance structure.

The controlling shareholder was considered liable for abuse of control power due to the use of company resources for the fulfillment of his own obligations, approving the payment of variable compensation to individuals within the control group and company managers, without respecting the limits established by the general shareholders' meeting.

The company's management was also accused of (i) receiving personal advantage without approval at the general shareholders' meeting, (ii) omitting this information in the company's reference form, (iii) favoring affiliated companies, (iv) withdrawing funds without supporting documentation and (v) ceasing to prepare consolidated financial statements.

In addition, the financial institution itself was responsible for providing untrue information about its financial situation in the prospectus it released for its IPO.

In reviewing the case, CVM reporting Director accepted most of SPS charges, condemning the financial institution, 8 former officers, 3 members of the audit committee and of the audit council and 5 former members of the board of directors of the company. The only exception was the acquittal of the

company's business development officer from the undue personal pecuniary advantage charge due to lack of proof thereof.

Pursuant to the principle of punishment individualization, in calculating the fines, CVM reporting Director took into consideration (i) reiterated practice of criminal conduct; (ii) occurrence of losses caused to investors; (iii) damage to the image of the securities market; (iv) the advantage received by the violator; (v) the expressiveness of the damage caused to the company; (vi) the perpetration of the infringement through fraud; (vii) the relevance of each manager in the wrongdoings in which he took part; and (viii) their respective position duties to the company.

The total amount of the fines applied was R\$52.97 million, of which R\$38.136 million was attributed solely to the controlling shareholder. Beside the fines, CVM also imposed a temporary prohibition from exercising corporate activities in publicly-held companies to 4 officers of the bank.

According to CVM reporting Director, the abuse of the controlling shareholder's power of control was effectively proven, since the controlling shareholder ordered the bank's management to implement a policy of variable compensation which was in violation of applicable law and harmful to the financial institution in violation to the provisions of article 117, caput, of Law 6,404/76.

Among the individuals, the chief financial officer received the highest punishment. His fine was set in the total amount of R\$3.067 million in fines and he was prohibited from exercising corporate activities in publicly-held companies for 12 years.

CVM REPORTING DIRECTOR ALSO CLARIFIED THAT "THE FACT THAT THE MANAGERS HAD BEEN INSTRUCTED BY THE CONTROLLING SHAREHOLDER TO DIVERT THE PAYMENTS, DO NOT EXEMPT THEM FROM THE CHARGES - AS ARGUED BY THE DEFENSE - BECAUSE THE MANAGER DOES NOT ACT ON BEHALF OF THE CONTROLLING SHAREHOLDER NOR ON BEHALF OF THE SHAREHOLDER THAT APPOINTED HIM/HER, SINCE THEY ARE NOT THEIR REPRESENTATIVES, BUT, RATHER, THEY ARE THE PERSONIFICATION OF THE COMPANY'S BODIES AND AS SUCH THEY SHALL EXCLUSIVELY REPRESENT THE COMPANY'S INTERESTS, WHICH MEANS THE INTERESTS OF ALL OF ITS SHAREHOLDERS".

In this context, CVM Board decided, unanimously, to follow the Reporting Director's vote, which is subject to appeal with suspensive effect before the National Financial System's Council of Appeals, known as the Central Bank's "Conselhinho".

CVM'S DECISION CAN BE ACCESSED IN PORTUGUESE AT:

http://www.cvm.gov.br/export/sites/cvm/sancionadores/sancionador/anexos/2018/012011_Banco_Panamericanocx.pdf

_ Extended deadline for the submission of report on the Brazilian Corporate Governance Code

The Brazilian Securities and Exchange Commission's ("CVM") extended the deadline for the submission of the report on the Brazilian Corporate Governance Code ("Report") to **October 31st, 2018**.

It is important to note that the extension is exceptional and applicable only for the 2018 fiscal year. The provision set forth in the first paragraph of article 29-A of CVM Instruction 480/09, which provides that the

Report shall be submitted within the first 7 months after the end of each fiscal year, remains valid and in force for subsequent years.

MORE INFORMATION CAN BE ACCESSED IN PORTUGUESE AT:

<http://www.cvm.gov.br/noticias/arquivos/2018/20180314-1.html>

_ CVM confirms its understanding on its jurisdiction to investigate acts related to wholly owned subsidiaries of publicly-held companies, as well as controlling shareholders' duty to abstain from voting on proposals of civil liability claims against themselves

In a recent decision, CVM Board reinforced its understanding that CVM has jurisdiction to analyze acts by wholly-owned subsidiaries of publicly held companies.

In this case, the chief executive officer and the controlling shareholder of an utilities company were charged with alleged infractions related to the right to recover overdue credits owned by the controlling shareholder as a result of construction works executed by the company.

The chief executive officer was accused of omission in the fulfillment of his duties and protecting the company's rights, pursuant to article 155, item II, of Law 6,404/76, for not monitoring the collection of credits that the subsidiary had against the controlling shareholder.

The controlling shareholder was accused of having acted in conflict of interest with the company, violating Article 115, paragraph 1, of Law 6404/76, by voting at the company's Annual General Meeting against the

proposal to file a civil liability claim against itself, as well as for having acted in an abusive manner and against the interests of other shareholders by remaining silent about the expiration date of the subsidiary's credits against itself.

Although the matter was not alleged by the defendants' defenses, the Reporting Director began his vote informing that **CVM has police power in relation to acts committed by wholly-owned subsidiaries of publicly-held companies.**

This understanding is in line with former decisions by the CVM Board, such as, a vote by the Reporting Director himself in a similar case when analyzing the responsibility of managers who concurrently held positions in a publicly held holding company and in its private subsidiary.

In this context, the Reporting Director understood that the company's chief executive officer violated his fiduciary duties for having acted negligently in monitoring the Company's collection of credits against the controlling shareholder. However, the Reporting Director decided to apply only the penalty of warning, since the overdue credits was not a relevant amount.

Another important understanding reinforced by the CVM Board in this case refers to the **controlling shareholder's duty to abstain from voting in case of a conflict of interest, including with regard to the proposal to file of a civil liability claim against itself.**

In his vote, the CVM reporting Director stated that **the controlling shareholder is not required to act against his interests and in favor of the company, because the duty of loyalty expected from him in situations of conflict of interest is the abstention, or, in other words, the controlling shareholder must not be involved with this matter. In these cases, it is particularly relevant that the managers act with diligence and independence.**

In reviewing the case, CVM reporting Director understood that no evidence was provided that the controlling shareholder attempted to prevent or influence the subsidiary's credit collection, since the mere non-payment of the debt is not sufficient to characterize the controlling shareholder's abuse.

In this context, the CVM Board decided unanimously to condemn the CEO to an warning penalty and to acquit the controlling shareholder.

CVM'S DECISION CAN BE ACCESSED IN PORTUGUESE AT:

<http://www.cvm.gov.br/noticias/arquivos/2018/20180226-2.html>