

## \_ inapplicability of the right of first refusal to minority shareholders in the sale of a wholly owned subsidiary

In a recent decision by CVM, the applicability of the right of first refusal to Petrobras' minority shareholders, in view of the sale of BR Distribuidora's shares, Petrobras' wholly-owned subsidiary as set forth in article 253 of Law No. 6.404/1976 ("Corporation Law"), was discussed.

CVM decided, by majority of the votes, that the right of first refusal of Petrobras' minority shareholders is not applicable in the sale of shares issued by BR Distribuidora, which consolidates the restrictive understanding that the right of first refusal only applies when selling a company that became a wholly-owned subsidiary as a result of a merger of shares.

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DIFFERENTLY FROM THE CASES PREVIOUSLY EXAMINED BY CVM ON THIS MATTER, BR DISTRIBUIDORA BECAME PETROBRAS' WHOLLY-OWNED SUBSIDIARY AS A RESULT OF ITS DELISTING PROCESS, IN WHICH SHARES ISSUED BY PETROBRAS WERE OFFERED TO THE SHAREHOLDERS OF BR DISTRIBUIDORA IN EXCHANGE FOR THEIR BR DISTRIBUIDORA SHARES.

This understanding is based on two main concepts (i) a merger of shares is approved by the majority of shareholders in a Shareholder's Meeting; however, its approval binds all shareholders, including those who voted against or did not take part in the vote and (ii) the shareholders of the merging company have no right of first refusal in the capital increase that results from the merger; therefore, their ownership interest in the company is diluted.

## \_ CVM punishes officers and controlling shareholders for failure in the disclosure of information and unfair trade practices

CVM recently decided on Administrative Proceeding No. RJ2012/13605, regarding the liability of (i) the investors relation officer ("Diretor de Relações com Investidores – DRI") of a publicly held company, for failure in the disclosure of information; and (ii) officers, controlling shareholders and a future new shareholder for unfair trade practices in the capital market.

In this case, a share subscription agreement was executed by the controlling shareholders and the future new shareholder, in which it was agreed the company could request the future new shareholder to subscribe preferred shares. Additionally, to comply with the agreement, the controlling shareholders and the future new shareholder executed a stock loan agreement.

Regarding the claim of failure in the disclosure of information, the company's DRI did not update the company's reference form after a capital increase that was part of the transaction.

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ADDITIONALLY, ON THE TOPIC OF UNFAIR TRADE PRACTICES, CVM UNDERSTOOD THAT THE CHRONOLOGY OF THE TRANSACTION EXECUTION STEPS AND DISCLOSURE GRANTED A PRIVILEGED POSITION TO THE FUTURE NEW SHAREHOLDER IN COMPARISON TO THE OTHER SHAREHOLDERS. THIS LED THE NEW SHAREHOLDER TO A SIGNIFICANT ADVANTAGE IN THE PERFORMANCE OF THE TRANSACTION, BECAUSE IT WAS INFORMED ABOUT THE INTENTION TO INCREASE THE CAPITAL STOCK SIGNIFICANTLY PRIOR TO THE MARKET.

In this context, CVM applied the following penalties: (i) to the new shareholder, a 5-year prohibition to act in any transaction within the securities and exchange market and an individual fine in the amount of R\$500 thousand for unfair trade practices; (ii) to the DRI, a temporary prohibition from exercising corporate activities in publicly-held companies for unfair trade practices and an individual fine in the amount of R\$500 thousand due to the lack of updating the reference form; (iii) to the controlling shareholders, an individual fine of R\$300 thousand for concurring in unfair trade practices; and (iv) to the other officers, an individual fine of R\$200 thousand for concurring in unfair trade practices.

#### CVM new rules on equity investment funds (Fundos de Investimento em Participações – FIPs)

On August 30, 2016, CVM Instruction No. 578 was edited, which amends the rules on the incorporation, functioning and administration of Equity Investment Funds (FIPs) in Brazil. FIPs and Mutual Investment Funds In Emerging Companies (Fundos Mútuos de Investimento em Empresas Emergentes) which are already registered shall adapt themselves to the new rules within 12 months.

CVM INSTRUCTION NO. 578/2016 IS AVAILABLE IN PORTUGUESE AT:

<http://www.cvm.gov.br/export/sites/cvm/legislacao/inst/anexos/500/inst578.pdf>

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