

## \_ Considerations regarding Capitalization of Retained Profits by Companies

Pursuant to articles 194 to 196 of the Law n° 6.404/76 (“Brazilian Corporation Law”), if there is a remaining balance of net profits of the fiscal year after the due legal destination, subject to the provisions of each company’s bylaws, it shall necessarily be (i) allocated to statutory reserves, if applicable; (ii) retained for the execution of the capital budget, if previously approved by the company’s general meeting; or (iii) distributed to shareholders as additional dividend, pursuant to article 202, paragraph 6 of the Brazilian Corporation Law. Profits which were retained in the reserves may be allocated, upon the company’s general meeting’s decision, to the stock capital, except for the unrealized profits and the contingency reserves.

The capitalization of profits provided for in article 169 of the Brazilian Corporation Law corresponds to a type of capital increase with the company’s own resources without increase of its assets. The Brazilian Securities and Exchange Commission (“CVM”) and the legal

doctrine understands that, unlike capital increases upon the issuance of new shares, in which there is an effective inflow of funds to the company’s equity, the capital increase through capitalization of profits constitutes a reallocation of values that already exist in the balance sheet.

Therefore, if new shares are issued as a result of the capitalization of profits, they are conferred only as an update of the shareholder’s interest in the company.

Finally, the legal doctrine states that the company’s management is responsible for proposing the capital increase through capitalization of profits or capitalization of reserves. Such proposal shall be approved in the shareholders general meeting by the absolute majority of votes, excluding blank votes. In case of an authorized capital company, the deliberation may be taken by the board of directors, pursuant to the terms of the company’s bylaws.

## \_ STJ excludes quotaholders of a dissolved company as defendants in an enforcement proceeding

On April 2nd, 2019, the Superior Court of Justice (“STJ”) decided on REsp nº 1.784.032 (“Special Appeal”), filed against a judgment that held quotaholders of a limited liability company (“Company”) as defendants in an enforcement proceeding against the Company.

Originally, the Company was the defendant of an indemnifying motion and, before the court’s decision, with the consequent constitution of an execution instrument, the quotaholders decided to dissolve the Company regularly, in accordance with the procedures provided for in the Brazilian Civil Code regarding the termination of limited liability companies. In the dissolution, the quotaholders did not receive any asset or liabilities of the Company. With the Company conviction, the creditor initiated the enforcement proceeding and, as the Company was extinct, it requested the quotaholders inclusions as defendants.

Considering that the Company was regularly extinct, without proof of fraud, misuse of purpose or property confusion, the quotaholders filed the Special Appeal to reverse the decision which included them as defendants, since the rules regarding civil or procedural succession, applicable at the time of the extinguishment of the legal entity, were not observed by the ordinary instances.

By unanimity of votes of the members of the 3rd Chamber of the STJ, the Reporting Justice excluded the quotaholders as defendants in the enforcement proceeding, according to the following arguments:

- i. within the scope of civil obligations, **“lifting the corporate veil” of the legal entity, which cannot be confused with its extinguishment, is only possible when there is proof of the abusive use of the legal entity**, whether due to misuse of its purpose or demonstration of property confusion;
- ii. the original court, when applying the disregard of the legal entity, admitted the succession of the Company, which was the original defendant of the indemnifying motion, determining the replacement of the Company by its quotaholders, without complying with legal procedures for granting the claimed succession. In addition, the extinguished Company was a typical limited liability company and its liquidation did not result in assets sharing, because there was no net equity, neither assets nor liabilities by the time of the Company termination; and
- iii. the succession by quotaholders was not applicable, since, according to article 1.052 of the Brazilian Civil Code, **after the capital stock is fully paid, quotaholders of limited liability companies are not responsible for the company’s losses. Therefore, once the company is dissolved and the disputing legal entity is extinguished, without the distribution of remaining assets, there is no viability for the claim of redirecting the enforcement of the execution instrument against the company’s former quotaholders.**

ADDITIONAL INFORMATION REGARDING THE SPECIAL APPEAL CAN BE ACCESSED IN PORTUGUESE AT:

<https://tinyurl.com/y2rjvlgh>

## \_ CVM expands the possibility of distant voting by shareholders

On September 3rd, 2019, CVM issued the Normative Ruling No. 614/2019 (“ICVM 614”), which changes a specific matter of the Distant Voting Bulletin (“Bulletin”).

Currently, when filling out the Bulletin, shareholders shall choose between (i) requiring the separate election of members of the board of directors and voting in the candidate of their choice; or (ii) participating in the general election of the members of the board of directors, including through the multiple voting procedure.

According to the new wording of the Bulletin, which will be effective on January 1st, 2020, shareholders may state their voting intention to both situations described above. However, the votes regarding the general election of members of the board of directors shall only be valid if the quorum required for the separate election is not reached, within the terms of article 141, paragraph 4, of the Brazilian Corporation Law.

MORE INFORMATION REGARDING ICVM 614 CAN BE ACCESSED IN PORTUGUESE AT:

<http://www.cvm.gov.br/legislacao/instrucoes/inst614.html>