

_ Brazilian Securities and Exchange Commission fines managers for using assets of publicly held company for private purposes

The Administrative Sanctioning Process of the Brazilian Securities and Exchange Commission (“CVM”) No. 19957.010904/2018-18 (RJ2018/8378) aimed to determine the responsibility of (i) the Chairman of the Board of Directors of a publicly held company for using an aircraft owned by the company for private purposes, in breach of the provisions set forth in article 154, Paragraph 2, paragraph “b” of the Brazilian Corporate Law (which prohibits the use of company assets, for personal reasons, without prior authorization from the general shareholders’ meeting or the board of directors); and (ii) the Chief Executive Officer for failing to comply with his duty of diligence (article 153 of the Brazilian Corporate Law) considering that he granted authorization for the aircraft use for personal reasons, as well as did not implement control mechanisms to ensure that the company’s assets and services were only used in accordance with its objectives.

The investigations by the Superintendence of Corporate Relations (*Superintendência de Relações com Empresas – SEP*) began due to news published in the media stating the Chairman of the Board of Directors had traveled with his family in an aircraft owned by the company. The company claimed that the use of the airplane was essential to safeguard the personal safety of its chairman, a measure that would be in line with the company’s interests. Furthermore, it argued that the travel expenses were minimal, and that the approval of the management accounts at the ordinary shareholders’ meeting had already released the company’s managers from their responsibilities regarding this matter. As for the authorization to use the airplane, they informed there

were non-formalized procedures regarding its use and that it was not reasonable to expect the CEO to bear the responsibility to establish internal controls for matters of “minor nature”.

The prosecution, however, understood that neither the use of the company’s airplane was necessary nor the only way to guarantee the safety of the chairman, who could bear the costs of such trip or, at least, reimburse such incurred expenses. In addition, the use of the aircraft was not considered as part of the management’s indirect compensation, therefore could not be considered as a benefit given to the company’s executives. They also recalled that the company had previously informed that there were no formal procedures for the use of the company’s airplanes and that the CEO personally granted authorization for their use, which is why he should be held responsible for the improper use of such assets.

In the vote of the reporting director, President Mr. Marcelo Barbosa, he reinforced the following topics:

- **the approval of the management accounts does not exclude CVM’s punitive right, this only applies to civil claims;**
- the use of the airplane could not be considered as a benefit granted to company’s executives, as it was not part of their indirect compensation;
- a prior specific authorization of the general shareholders’ meeting or of the board of directors

to use the airplane was not proven in the records, according to the provisions of article 154, § 2, item “b” of the Brazilian Corporate Law. In this case there was only an authorization by the CEO;

- no plausible justification was provided for why the company should bear the expenses of the chairman’s trip;
- the low amount involved in the use of the airplane could not rule out the illicit act performed by such managers, under the terms of said article 154, §2, item “b” of the Brazilian Corporate Law;
- the **creation of internal controls** is part of the CEO’ powers, according to the company’s bylaws and **is also essential in order to fulfill the duty of diligence, mainly due to the difficulties inherent in the inspection of the company’s management acts;**
- considering the **highly procedural nature of the duty of diligence**, especially in the inspection field, it is **important that adequate records of internal processes are maintained, and when in need of consultation, such record should show the diligent conduct.** In this case, the procedure described by the company did not provide for requirements, nor did it generate records capable of demonstrating

the convergence of the manager’s act with the best interests of the company, a situation which disfavors the creation of an environment averse to acts in deviation of purpose.

Finally, CVM’s Board, unanimously and following the reporting director’s vote, decided to condemn:

- the chairman to a penalty fine in the amount of R\$400.000,00 for the non-compliance with the provisions of article 154, § 2, item “b”, of the Brazilian Corporate Law, for using the airplane owned by the company for private purposes; and
- the CEO to a penalty of (i) fine in the amount of R\$400.000,00 for the non-compliance with the provisions of article 154, § 2, item “b”, of the Brazilian Corporate Law, for authorizing the use of the referred airplane by the chairman; and (ii) fine in the amount of R\$300.000,00 for the non-compliance with the provisions of article 153 of the Brazilian Corporate Law, for disrespecting the duty of diligence due to the lack of adoption of procedures and caution required in the management of publicly-held companies when making decisions regarding the implementation of controls and allowing the use of the company’s airplanes.

MORE INFORMATION REGARDING PAS CVM 19957.010904/2018-18 (RJ2018/8378) CAN BE ACCESSED, IN PORTUGUESE, AT THE *LINK* BELOW:

<https://tinyurl.com/yxsvk6pq>

_ Brazilian Securities and Exchange Commission judges proceeding regarding the disclosure of guidance

On August 18, 2020, CVM judged the Administrative Sanctioning Process SEI 19957.011190/2019-38 (RJ2019/9652), established by SEP to ascertain the responsibility of a member of the board of directors for disclosing guidance, which had not yet been disclosed to the market, in breach of article 155, § 1 of the Brazilian Corporate Law and article 8 of CVM Resolution No. 358/2002.

The proceeding originated from investigations carried out by SEP, due to an article published in a newspaper which presented some statements of the director regarding the company's guidance for the year. On the same date of said publication, the company disclosed a material fact confirming the existence of internal documents that foresaw the estimative mentioned by the director and, after being questioned by SEP, the company informed that the director had received a presentation and attended a board of directors' meeting in which said presentation was presented.

The director stated that the disclosure of confidential information was made at a meeting in response to statements issued by an entrepreneur (with no apparent ties to the company), due to his institutional duty.

However, according to the vote of the reporting director, President Mr. Marcelo Barbosa, there is no basis in the information and documents provided in the case which

support the allegations of the director. At that time, the market did not have enough information to create assumptions about said company's guidance.

IN HIS VOTE, MR. BARBOSA REINFORCED THAT GUIDANCE, DUE TO ITS NATURE, HAS THE POTENTIAL TO INFLUENCE IN THE DECISION TO INVEST IN A COMPANY, WHICH IS WHY CVM ESTABLISHES APPROPRIATE RULES AND PROCEDURES FOR THEIR DISCLOSURE AND/OR MODIFICATION, SHOULD THE COMPANIES CHOOSE TO DO SO, IN ORDER TO AVOID INFORMATIONAL ASYMMETRIES.

In this case, it was proved that the guidance disclosed was a confidential and relevant to the market, considering that it was related to the reduction of the company's EBITDA for said year. Therefore, the Company properly disclosed a material fact regarding this matter, on the same day the article was published, which corroborates the reporting director's understanding of breach of the director's duty of confidentiality.

In this sense, CVM's Board decided, unanimously and following the reporting director's vote, to convict the director to a fine of R\$100,000.00, due to the non-compliance with article 155, § 1, of the Brazilian Corporate Law, combined with article 8 of CVM Resolution No. 358/2002.

MORE INFORMATION REGARDING PAS CVM SEI 19957.011190/2019-38 (RJ2019/9652) CAN BE ACCESSED, IN PORTUGUESE, AT THE [LINK](#) BELOW:

<http://www.cvm.gov.br/noticias/arquivos/2020/20200818-3.html>

_ São Paulo's Board of Trade regulates the use of electronic signatures in corporate acts

On August 20, 2020, Resolution No. 01 of the Board of Trade of the State of São Paulo ("Resolution No. 01") was published, which explains the form of presentation and filing of corporate acts which are electronically signed, in line with the provisions of SEI Circular Letter nº 2563/2020/ME also published in August. Pursuant to Resolution No. 01, the following signature classifications will be accepted: (i) qualified electronic signature, which uses an eCPF digital certificate, standard ICP-Brasil; (ii) advanced electronic signature, which shall be associated with the signatory in an

unequivocal way and shall indicate its temporality; and (iii) personal signature. Corporate acts which contain simple electronic signatures shall not be accepted, and, those which do not comply with the levels and parameters presented in Resolution No. 01, will not be eligible for registration either. Finally, while the full digital system is not implemented, all corporate acts may be scanned, signed by the parties or attorneys-in-fact, provided that they have specific powers and the grantor's notarized signature.

FURTHER INFORMATION ON RESOLUTION NO. 01 (IN PORTUGUESE) AND SEI CIRCULAR LETTER NO. 2563/2020/ME (IN ENGLISH) CAN BE ACCESSED THROUGH THE *LINKS* BELOW, RESPECTIVELY:

http://www.institucional.jucesp.sp.gov.br/downloads/deliberacao_%2001_2020_assinatura_19_08.pdf

<https://www.cdoadv.com.br/publicacoes/agosto-2020/>