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NEWSLETTER
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_ CVM holds public hearing regarding insider trading

The Brazilian Securities and Exchange Commission ("CVM") has submitted to public hearing a proposal to reform the current CVM Instruction No. 358/02 ("ICVM 358/02"), in order to improve the wording and consolidate CVM's jurisprudence on insider trading. The draft presented in the Public Hearing Notice SDM 06/20 proposes the following amendments:

- **Relative Presumptions:** In the current wording of article 13 of ICVM 358/02, the literality of the article may be interpreted as an absolute prohibition to trade securities issued by the company before the disclosure of a relevant act or fact by those who, by virtue of their position or function in the company, its controlling company, its subsidiaries or affiliates, have knowledge of the information relating to such relevant act or fact. However, CVM's Board has already consolidated the understanding that these are relative presumptions of (i) existence of relevant information (presumption of relevance), (ii) access to privileged information (presumption of access) and (iii) use of privileged information in negotiations (presumption of use), which may be uncharacterized by evidence to the contrary. In this sense, the new wording of the article would incorporate such presumptions into the normative text;

- **Objective trading prohibition before disclosure of ITR and DFP:** creation of an autonomous and objective prohibition to trade securities issued by the company 15 days prior to the disclosure of the company's quarterly information ("ITR") and annual information ("DFP");

- **Investment/disinvestment plans:** proposal to relax the current rules for investment plans, reducing the minimum period for plans to come into force from six to two months;

- **Disclosure policy:** in line with CVM's compliance costs project, proposal to amend article 16 of ICVM 358/02, to provide that only publicly-held companies registered in category A before CVM, authorized by a market management entity to trade shares on the stock exchange and outstanding shares, would be required to prepare a disclosure policy for relevant acts or facts.

THE PUBLIC HEARING IS OPEN FOR SUGGESTIONS UNTIL NOVEMBER 13TH, 2020. MORE INFORMATION ON THE PUBLIC HEARING MAY BE ACCESSED THROUGH THE LINK BELOW (IN PORTUGUESE ONLY):

http://www.cvm.gov.br/audiencias_publicas/ap_sdm/2020/sdm0620.html

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_ CVM condemns publicly-held company's managers for irregularities in capital increase

On September 29, 2020, the CVM's Board judged PAS CVM nº RJ2016/7929 (SEI Electronic Process nº 19957.007552/2016-43), in which it analyzed the responsibility of two managers of a publicly-held company (the "Defendants"), due to irregularities in a capital increase carried out by the company.

In summary, the Defendants, as members of the company's board of directors, approved the execution of some agreements with their subsidiaries, which provided that the Defendants would grant the company a personal guarantee to their obligations and, in return, they would be remunerated on the guaranteed debt ("Agreements"). In addition, the company would hire an insurance (D&O) in favor of the Defendants to protect them from certain risks arising from the exercise of the position of officer, a position that both also held in the company. If the referred insurance was not contracted, the company itself should keep the Defendants free from possible risks and compensate them regarding labor, tax and social security debts arising from statutory liabilities. Therefore, the Defendants started to hold credits against the company, which were not reflected in the company's financial statements from 2011 to 2015.

Afterwards, the company issued a notice to shareholders informing the approval of a capital increase at a meeting of the board of directors, through the subscription of shares in cash and credits, with the issuance of common and preferred shares. As a result of the capital increase, the other shareholders would be diluted by 91.84%. After a request for clarification to the company, it confirmed that related parties, including the Defendants, would subscribe shares with credits held against the company, as well as that some of these credits were a result from the aforementioned Agreements.

The Reporting Director, Flávia Perlingeiro, pointed out several irregularities that occurred in the capital increase. The first of them, is the violation of Article 156 of Law No. 6,404/1976 ("Brazilian Corporation Law."), which deals with conflict of interest. In this sense, it shall be noted that the Defendants entered into the Agreements with the company not only on behalf of their subsidiaries, but also, in their own name.

In this line, Flávia Perlingeiro mentioned that the Defendants' conflict of interest (*a priori*) would be present. In other words, subject to the provisions of Article 156 of the Brazilian Corporation Law, in addition to being prevented from deliberating on the transaction with themselves and having to reveal the conflict to those who should speak out about it, the Defendants should also have refrained from even participating in the negotiations on the transaction, both as officers of the company, and as directors, which did not happen.

Additionally, SEP also accused the managers for not having reflected the credits arising from the Agreements in the financial statements from 2011 to 2015, representing a concealment of the company's liabilities and of transactions with related parties. According to the Reporting Director's vote, Pronouncement CPC 05 (R1) ("CPC Pronouncement") clarifies that it constitutes a transaction with a related party the transfer of resources, services or obligations between an entity that reports the information and a related party, regardless if there are any charges in return.

CPC Pronouncement also provides that if transactions between related parties occur during the period covered by the financial statements, the nature of their relationship, the information on the transactions, balances, commitments, shall be disclosed in said statements. Thus, the information referring to the Agreements should have been included in explanatory notes to the financial statements, characterizing a violation to the Brazilian Corporation Law and the CPC Pronouncement.

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Finally, the Defendants also failed to comply with Article 157, §4 of the Brazilian Corporate Law combined with Article 3, *caput*, of ICVM 358/02, considering that one of the Defendants, who also held the position of Investor Relations Officer of the company, did not disclose a relevant fact regarding the capital increase, instead only a notice to shareholders was published.

Although a capital increase is not a situation expressly disposed among those considered as a potentially relevant act or fact, under the terms of ICVM 385/02, the list provided in said instruction is exemplary. As already decided by CVM, the list neither exhaust the possibilities of a relevant fact, nor determines a relevant fact, always being necessary to analyze the fact and the company to which it refers.

The Reporting Director also took the opportunity to distinguish a relevant fact from a notice to shareholders, in the first case the disclosure of a relevant fact aims to publicize situations with the potential to influence the decision to buy, hold or sell shares issued by a company. **Therefore, it is a communication aimed at the market in general, covering the entire investing public.** The notice to shareholders, on the other hand, is the title given to communications addressed to the company's shareholders, provided in the Brazilian Corporation Law and CVM regulation. Therefore, **it is a communication with a more restricted scope and audience than those applicable to relevant facts.**

When the capital increase was carried out, the notice to shareholders then released by the company was intended only for its own shareholders, and had no emphasis to the high dilution potential resulting from such transaction. However, precisely due to this dilution, a relevant fact should have been disclosed to provide broad communication to the market.

Therefore, the Reporting Director concluded that the fact that there was no complaint by the other shareholders, investors or creditors, as well as that there was no unusual variation in the trading of the shares issued by the company, when the information was disclosed, does not exempt the Investor Relations Officer for failing to carry out the communication required by ICVM 358/02.

CVM's Board decided to condemn the Defendants, as members of the board of directors and officers of the company (one of them being the Investor Relations Officer - DRI) to pay a fine for failing to comply with Articles 156, 176, §5 and 177, §3 of the Brazilian Corporation Law and the CPC Pronouncement and to give the DRI a warning for not disclosing a relevant fact regarding the capital increase.

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

http://www.cvm.gov.br/noticias/arquivos/2020/20200929-4.html