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NEWSLETTER
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_ General aspects regarding the election of the Board of Directors

The Board of Directors is a collegiate body, mandatory for publicly-held companies, authorized capital companies and mixed-capital companies, and optional for other companies, in accordance with article 138 et seq. of Law No. 6,404 of 1976 ("Brazilian Corporation Law"). It must be composed of, at least, 3 members, elected and dismissible, at any time, by the shareholders' meeting. In this sense, there are 3 types of election that can be adopted, which are: (i) majority voting; (ii) multiple voting; and (iii) separate voting.

The Brazilian Corporation Law does not specifically regulate how the majority voting system should occur. The legal doctrine understands that there are two ways to organize it: "by groups" or "by candidate". In the first form, shareholders vote for a group of candidates corresponding to the number of positions to be filled. In the second form, the shareholders vote directly on the candidates, and, in the end, the candidates with the most votes are elected.

Alternatively to the majority voting system, the Brazilian Corporation Law, in its article 141, stablishes the possibility of the multiple voting procedure. In this case, shareholders representing at least 10% (ten percent) of the voting capital stock (or, in case of publicly-held corporations, according to the percentages provided in CVM Normative Instruction No. 165/1991), may, up to 48 hours before the shareholders' meeting, request the adoption of the multiple voting procedure, which attributes to each share as many votes as there are positions to be occupied.

The multiple voting procedure should not be confused with majority voting "by candidate" system. In the majority voting "by candidate" procedure, each share has one vote per position to be occupied, and the most voted candidates are elected. On the other hand, in the multiple voting procedure, each shareholder has the right to cumulate its votes in a single candidate or to distribute them among several.

It is important to highlight that, whenever the multiple voting procedure is adopted, the dismissal of any elected member will result in the dismissal of all the other members, which will require a new election. In any other situations of vacancy, in the absence of an alternate, the first shareholders' meeting that takes place must deliberate on the new election of the entire board of directors.

Furthermore, the Brazilian Corporation Law provides, in the abovementioned article 141, in its 4th paragraph, exclusively for publicly-held corporations, the possibility of the separate voting procedure. This form is guaranteed exclusively to minority shareholders that prove the ownership uninterrupted of shares, during the 3 months preceding the shareholders' meeting, and may be required by shareholders representing a minimum quorum of 15% of the total voting shares or 10% of the capital stock, when considering preferred shares without voting rights or with restricted voting rights, nevertheless CVM's understanding is that the percentage of 10% also applies to companies that have only issued voting shares. For this purpose, it is possible to consider the shares of a single shareholder or the shares of shareholders acting together.

Finally, whenever the election of the board of directors is cumulatively performed by the multiple voting procedure and the holders of common or preferred shares exercise the right to elect a member separately, the controlling shareholder shall be ensured to the right to elect members of the board of directors in a number equal to the number of those elected by the other shareholders, plus one, regardless of the number of members established in the bylaws.

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_ Brazilian Securities and Exchange Commission convicts the chairman of the board of directors for voting in a conflict-of-interest situation

The Administrative Proceeding CVM SEI 19957.010833/2018-45 was filed by the Superintendence of Relations with Companies ("SEP"), in order to determine the liability of the controlling shareholder of a publicly held company, who was also the chairman of the board of directors, for voting and approving the execution of the dissolution of an agreement with another company in which the defendant was also a shareholder, due to an alleged conflict of interest situation with the company, in violation to articles 156 of the Brazilian Corporation Law.

The accusation originated from a complaint of a shareholder reporting abuses in the approval of said termination by the company's management.

According to article 156 of the Brazilian Corporation Law, managers are prohibited from intervening in any transaction in which they have a conflicting interest with the company, as well as in the deliberation that the other managers take regarding such matter, provided that said manager informs the other of his/her impediment and includes in meeting's minutes the nature and extent of their interest. However, there is disagreement as to the nature of the aforementioned conflict of interest, whether formal (i.e. the impediment must be verified *a priori*) or material (i.e. the impediment must be verified *a posteriori*).

In the analysis of the case, the reporting director Flavia Perlingeiro, understood that the defendant was prevented from voting at the board of directors' meeting, regardless of the examination of the transactions' matter, reinforcing the position historically adopted by CVM, that the nature of the conflict of interests is of formal, although she stressed that such impediment may vary according to the specifics of the case, this means there can be exceptions.

In his defense, the defendant stated that the decision taken at the board of directors meeting was unanimous and that it would have been approved even without his vote, declaring, as well, that there was no damage to the company or the market. The reporting director refuted such arguments since the approval of the matter by the other directors does not rule out the illegality of the defendant's conduct of voting in a situation of conflict of interest, since it does not depend on the result of the deliberation, affirming also that the characterization of the violation of article 156 of the Brazilian Corporation Law does not depend on losses or damages.

Director Alexandre Costa Rangel presented a vote in disagreement with the reporting director's vote as to the nature of the conflict of interest in question, according to his understanding the matter in question constitutes a material conflict. Due to this premise, it would be essential to demonstrate the personal interest and counterpoint of the manager regarding the transaction, in addition to the effective approval at the expense of the company's interests.

Finally, with the vote of the director Alexandre Costa Rangel defeated, CVM's board decided, by majority, to convict the defendant to the payment of a fine of R$ 150,000.00.

MORE INFORMATION REGARDING THE ADMINISTRATIVE PROCEEDING CVM SEI 19957.010833/2018-45
CAN BE ACCESSED IN PORTUGUESE THROUGH THE LINK BELOW:
https://tinyurl.com/357hffnw

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