



## CVM changes its position regarding votes in conflict-of-interests

The Brazilian Securities and Exchange Commission (“CVM”) changed its position on shareholder voting in conflict-of-interest situations after two recent decisions: CVM PAS No. 1957.004392/2020-67, which analyzed the regularity of the procedure for sales of companies controlled by a listed company to its controlling shareholders, and CVM PAS No. 19957.003175/2020-50, which analyzed the legality of votes cast by the controlling shareholders of a listed company in a resolution concerning the company’s capital increase.

Pursuant to Article 115 of Law 6,404/1976, as amended (“Brazilian Corporate Law”), a vote cast by a shareholder with the aim of causing damage to the company or other shareholders, or to obtain, for himself or for others, an advantage to which he/she is not entitled and which results, or may result, in damage to the company or to other shareholders is considered abusive. Paragraph 1 of this article establishes situations in which the shareholder must refrain from exercising his right to vote: approval of the appraisal report of assets with which to contribute to the formation of the share capital; approving your own accounts as an administrator; deliberations that may benefit him in a particular way, or in which he has conflicting interests with the company’s.

Regarding managers, article 156 of the Brazilian Corporate Law forbids the intervention of the manager in a transaction in which he/she has a conflicting interest with the company, as well as in the decision taken by the other managers.

In the recent decision aforementioned, by majority of CVM’s board, the theory of the “material” conflict of interests prevailed, by which it is necessary to analyze the merits of the resolution taken by a shareholder or manager who has conflicting interests with the company to determine whether the vote in question should be annulled, there is no need to be prevented from voting before such verification. Previously, the theory of the “formal” conflict of interests was dominantly adopted by CVM, which prohibits the vote of a shareholder or manager in such situations.

The current position adopted by CVM is based on a systematic interpretation of the Brazilian Corporate Law and in the principle of good faith of the shareholder and/or manager. As the validity control of these votes is therefore *a posteriori*, the new understanding requires the shareholder to justify his vote and demonstrate that the decision was considerate and taken in accordance



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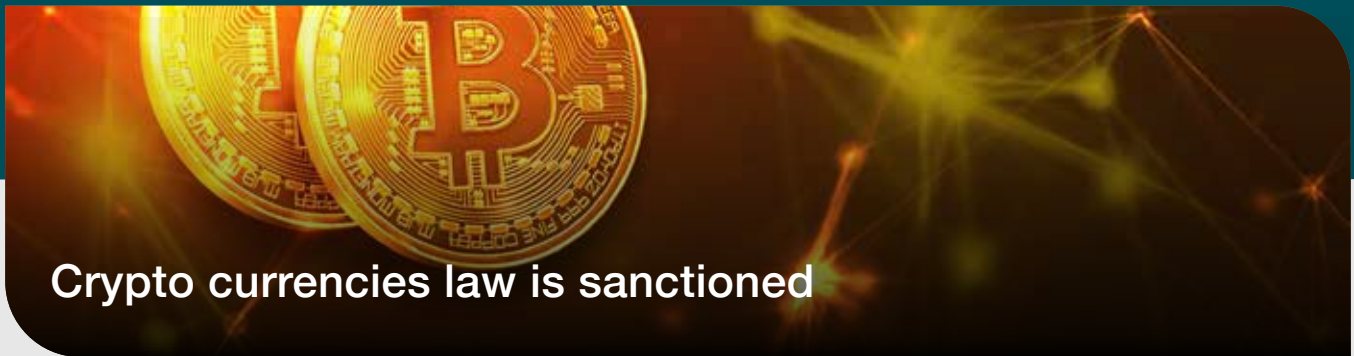
with the company's best interests, under the risk of being declared null and void.

Director Flávia Perlingeiro presented dissenting votes in both proceedings regarding the applicability of the theory of the "material" conflict of interest but highlighted that both theories (material and formal) present insufficiencies and inadequacies for a clear legal treatment of the matter in Brazil.

CVM's president informed, following the decisions mentioned above, that CVM will work on a guidance opinion on the matter. The objective is not to determine which theory is applicable for the interpretation of conflict of interests, but to clarify whether the shareholder with a potential conflict of interest will be able to vote, if duly prepared and with proper justifications.

We contributed on this subject in an article published in the Legislação & Mercado section of Capital Aberto on December 01, 2022, which can be accessed in Portuguese through the link bellow:

<https://legislacaoemercados.capitalaberto.com.br/mudanca-da-cvm-demanda-cuidados-das-companhias/>



## Crypto currencies law is sanctioned

Bill of Law Bill 4401/2021, also known as the legal landmark of crypto currencies, was sanctioned on December 22, 2022 and became Law No. 14.478, which will enter into force in 180 days.

The law considers as a virtual asset a digital representation of values that can be traded or transferred by electronic means and used to make payments or for investment purposes. Traditional currencies, foreign currencies, points, and rewards from rewards programs are excluded from the definition, as well as securities and financial assets that already have specific regulation.

In addition to guidelines to rendering services with crypto assets, the following matters of the law stand out:

- provision for appointment, by the Executive Branch, of a body or entity of the federal public administration that will be responsible for the supervision and establishment of parameters for the performance of crypto asset service providers.

- inclusion of a new criminal type of fraud in the Penal Code (Fraud with the use of virtual assets, securities, or financial assets).
- equivalence of the legal entity that offers services related to operations with virtual assets, including intermediation, negotiation or custody to financial institutions, for the purposes of the White-Collar Law (Law No. 7,492/1986)
- inclusion of an aggravating factor for repeated crimes committed through virtual assets in the Money Laundering Law (Law No. 9.613/1998).

Despite representing a milestone for the legislation on the provision of virtual assets and for the regulation of crypto asset service providers in Brazil, specific rules on the matter still depend on the regulation to be issued by the future body or entity appointed for this purpose.

Law No. 14.478 can be accessed in Portuguese through the link below:

<https://www.in.gov.br/en/web/dou/-/lei-n-14.478-de-21-de-dezembro-de-2022-452739729>



## DREI discloses letter regarding publishing of financial statements of large sized companies

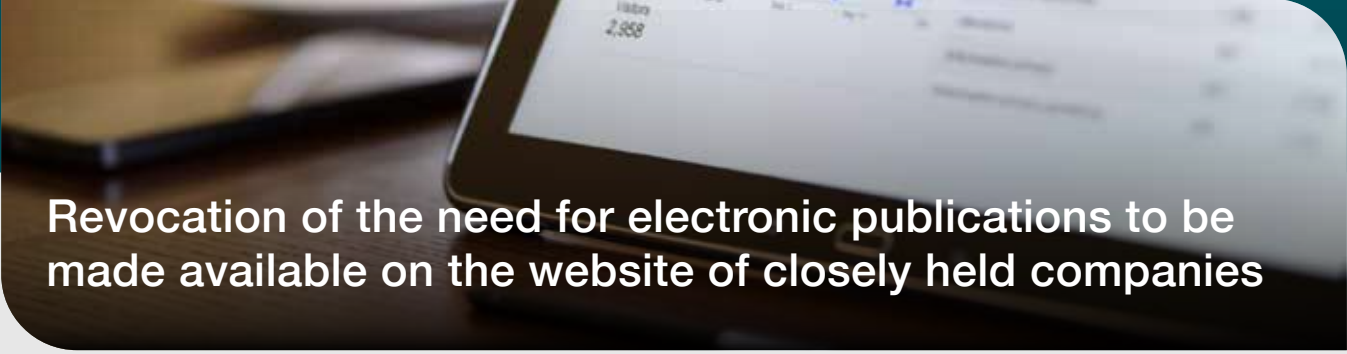
On November 25, 2022, the Brazilian National Department of Business Registration and Integration (“DREI”) published the Letter SEI No. 4742/2022 (“DREI Letter”) regarding the disclosure of legal publications required for large sized limited liability companies or group of companies under common control, understood as those having total assets exceeding 240 million Brazilian Reais in the previous fiscal year or annual gross revenues exceeding 300 million Brazilian Reais .

Law No. 11.638, of December 15, 2007, determines that the provisions of the Brazilian Corporate Law apply to large sized companies regarding bookkeeping and preparation of financial statements and the obligation of an independent audit by an auditor registered with CVM. For this reason, some Boards of Trade considered that these companies would also be obliged to publish their financial statements under the terms set forth in the Brazilian Corporate Law, which was subject of great debate, including in the judicial sphere.

The DREI Official Letter confirms and reiterates that the publication of financial statements by large sized companies is optional and mentions that Boards of Trade shall accept such understanding, so that the filing of corporate acts of such companies are not rejected, under the allegation of non-compliance with the aforementioned publications.

DREI Letter SEI No. 4742/2022 can be accessed in Portuguese through the link below:

[https://www.gov.br/economia/pt-br/assuntos/drei/legislacao/arquivos/oficios-circulares-drei/2022/SEI\\_29794658\\_Oficio\\_Circular\\_4742.pdf](https://www.gov.br/economia/pt-br/assuntos/drei/legislacao/arquivos/oficios-circulares-drei/2022/SEI_29794658_Oficio_Circular_4742.pdf)



## Revocation of the need for electronic publications to be made available on the website of closely held companies

On December 1<sup>st</sup>, 2022, ordinance No. 10,031 of the Ministry of Economy (“Ordinance”), came into force, revoking Paragraph 2 of article 1 of Ordinance No. 12,071/2021, also from the Ministry of Economy, which provided for the obligation of closely held companies with annual gross revenues of up to 78 million Brazilian Reais to disclose publications and other documents on their own website, pursuant to article 294 of the Brazilian Corporate Law.

With the revocation, only the requirement for electronic publications and disclosure of the acts of closely-held companies, as provided for in the Brazilian Corporation Law, with annual gross revenues of up to 78 million Brazilian Reais through the “Central de Balanços do Sistema Público de Escrituração Digital – SPED” is maintained.

The Ordinance can be accessed in Portuguese through the link below:

<http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?idAto=127389>