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## Conclusion

To conclude, the changes introduced by CVM Instruction 574/2014 are intended to ease only the means of communication to disseminate material events. All the other rules of CVM Instruction 358/2002 such as the content and moment of disclosure of the material fact are the same and continue to be in full force and effect without any modification. Furthermore, the criteria

of relevance listed in Article 2 of CVM Instruction 358/2002, which defines material events, remain unchanged.

## Notes

- 1 The definition of material events is contained in article 2 of CVM Instr. 358/2002.
- 2 This information is available at [www.internetworldstats.com/stats2.htm#americas](http://www.internetworldstats.com/stats2.htm#americas).
- 3 This information is available at [www.bmfbovespa.com.br/Agencia-Noticias/ListarNoticias.aspx?Idioma=pt-br](http://www.bmfbovespa.com.br/Agencia-Noticias/ListarNoticias.aspx?Idioma=pt-br).

# Proxy and electronic voting/ participation in Brazilian companies – current trends in the local market and regulation

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## Overview and background

Historically, corporate control in Brazil has been concentrated. According to Eizirik,<sup>1</sup> at the end of 1985, out of 456 listed companies in Brazil, 387 (85 per cent) had a controlling shareholder holding more than 50 per cent of the voting shares and 85 (18.5 per cent) had a controlling shareholder holding more than 90 per cent of the voting shares. On average, at that time, the controlling shareholder held 70 per cent of the voting shares in Brazilian listed companies.

Aldrighi and Oliveira,<sup>2</sup> using data from 1997 to 2002, concluded similarly that, in that period, 77.3 per cent of the listed companies in Brazil had a controlling shareholder (or a block of controlling shareholders), holding, on average, 70.7 per cent of the voting shares.

Leal and Carvalhal,<sup>3</sup> analysing 250 listed companies in 1998, 2000 and 2002, found that, in 75 per cent of them, 50 per cent or more of the voting shares were held by the controlling shareholder (or group), who, on average, held 71 per cent of these voting shares. According to this study, in 58.2 per cent of the analysed companies, corporate control was held by one or more members of the same family.

In 1976, when the Brazilian Corporation Law (6,404/76) was enacted, the situation

was no different. And, as one could expect, the levels of corporate control concentration were even higher in closely-held companies and in limited liability companies. Ownership concentration is also a trademark of Brazilian society in politics and other social structures.

In this context, local legislators had no choice but to build the Brazilian Corporation Law around the omnipresence of a controlling shareholder. The Brazilian Corporation Law, on the one hand, is centralised on the role of the controlling shareholder, to whom the law reserved very specific powers and responsibilities and, on the other hand, ensures certain rights of information and participation to minority shareholders.

## Recent developments

In recent years, however, important developments have taken place in local capital markets. A trend of ownership dispersion is already a reality, at least in the so-called Novo Mercado, a special listing segment on the Brazilian stock exchange, with higher standards of corporate governance.

Gorga<sup>4</sup> found that, in 2006/2007, out of 92 companies listed on the Novo Mercado, 65 did not have an unchallengeable controlling shareholder. In these 65 companies, the

shareholder holding the highest number of shares (*Novo Mercado* allows only voting shares) owned, on average, 26.3 per cent of the shares, and the three shareholders with the highest number of shares held, on average, 47.28 per cent of the shares. Out of all 92 companies, the shareholder holding the highest number of shares owned, on average, 36.39 per cent of the shares. Considering those companies with shareholders' agreements, the number of companies without a controlling shareholder or group dropped to 45, where the controlling shareholder or group owner held, on average, 45.25 per cent of the shares.

This recent trend of ownership dispersion, in addition to a certain popularisation of the local capital market and the current stage of development of communication technology, motivated the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários (CVM)) to enact, in 2008, the first-ever regulation of proxy voting in the country.

- Rule (Instrução Normativa) CVM No. 481/09, among other provisions, regulates proxy solicitation within the Brazilian market.
- Rule CVM No. 481/09 authorises, for instance, shareholders holding at least 0.5 per cent of the total shares of the listed company to include a nominee for the board of directors in the management's proxy material. The rule does not require a minimum period of ownership of the shares nor does it impose any duty on the shareholder to disclose his/her intention in regard to the nomination.

The company is required to reimburse the shareholders or group of shareholders conducting the proxy solicitation or nominating a candidate for the costs incurred in the process (with public announcements and delivery of the material), provided that the shareholder or group of shareholders hold at least 0.5 per cent of the total shares, and that either the proposal defended by the shareholder is approved or the nominee is elected. In the case of a defeat of the proposal or of the nomination, the reimbursement is limited to 50 per cent of the expenditure.

In the case where the company makes available an electronic platform to which the proxy material may be uploaded and then accessed by the shareholders, no reimbursement will be due by the company. The CVM expressly stated, during public discussions of the Rule CVM No 481/09, that

its intention was to present incentives for the use of technology by Brazilian companies.

Since 2009, the management of companies such as Renner, Natura, Cetip and Eternit has been offering their shareholders the alternative of casting their votes via proxies granted to representatives hired by the company. In a few other cases – Valid, Brasil Telecom Oi, Tim Participações, Gafisa and Usiminas – minority shareholders have independently organised proxy solicitations. An interesting precedent was in the case of Valid, in 2012, where an institutional investor promoted a proxy solicitation in order to exclude a poison pill provision from the company's bylaws.

During the shareholders' meetings season of 2012, out of 130 companies listed in the *Novo Mercado*, 14 made available to its shareholders the possibility of granting a proxy to a company's representative. At least eight of these 14 companies also made available to their shareholders the possibility of granting the proxies electronically. Only two offered their shareholders the alternative of casting their votes electronically. And one company, besides holding the meeting at its headquarters (as required by the Brazilian Corporation Law), also transmitted the meeting by video conference to a branch located in a different city, thereby permitting shareholders to attend either location.

### Amendments and adjustments

Despite representing an excellent and timely initiative from the CVM and, although apparently sufficient for the current level of development of the local capital market, Rule CVM No 481/09 can still be improved upon, in order to become equivalent to international regulations on the subject. The desirable adjustments include:

- (i) the regulation of the shareholders' right to include proposals other than nominees for the board of directors in the proxy material; and
- (ii) the regulation of electronic voting and electronic participation.

The CVM refused to regulate shareholders' proposals using the (not convincing) argument that the Brazilian Corporation Law already grants shareholders the right to ask management to call a shareholders' meeting or call one by himself/herself if management does not do so (section 123).

Regarding electronic voting and participation, the Brazilian Corporation Law

was amended in 2011 (sections 100, 121 and 127) to expressly ensure the shareholders' right to vote and participate in shareholders' meetings electronically (not being physically present at the meeting). The specific regulation was to be enacted by the CVM, but this has not yet been done.

The Brazilian Corporation Law still requires all shareholder meetings to be held at the headquarters of the company (section 124), but now considers a shareholder who votes or participates electronically as being present at the meeting (section 127).

Electronic access and certification is already largely used in Brazil for multiple purposes, ranging from banking services to electronic fiscal submissions and to the electronic filing of lawsuits. In this context, it makes sense to immediately implement a regulation that stimulates and provides guidance on the use of electronic means for shareholders' voting and participation in shareholders' meetings of Brazilian companies.

### Impact of new technology

Regulations in the majority of developed markets have already been adjusted to accommodate new technologies and social habits during the last decade.

Based on foreign legislation and taking into account the specificities of the Brazilian market, a rule regulating electronic voting and participation (which could be built through an amendment to Rule CVM No 481/09), should, firstly, make clear whether electronic voting and electronic participation are a shareholder's right or a mere option at the discretion of the management (or of the bylaws). From the wording of section 121, one cannot be sure whether the law simply allows companies to implement electronic mechanisms for voting and participation or actually obliges the companies to do so, once the CVM regulates the subject. The second interpretation seems more accurate and consistent with the goal of the new provisions and the actual level of development of the related technologies.

Moreover, the new regulation could defer the implementation of the obligation imposed on companies to provide electronic means to shareholders, based on the size of the company, number of shareholders, level of ownership dispersion, and the cost of implementing the electronic platforms for voting and for participating (technology for electronic voting is already reasonably cheap

and accessible, which it is not necessarily the case for electronic participation at present).

As it consists of a right granted by law to shareholders, there would be no sense for the new regulation to require a minimum of share ownership in order to require the company to make the electronic means available. The electronic means to be provided should be neutral, meaning that there should be no difference for shareholders to vote/participate electronically than to be physically present at the location of the meeting. The same electronic means should also permit the identification of shareholders and of the content of their votes.

Companies should have a policy with instructions on the procedures for voting and participating electronically through the company's platform. Any announcement calling a meeting should state whether the company will provide electronic means to facilitate voting and the participation of the shareholders, and instructions in this regard (or where to find detailed instructions).

The CVM started a public discussion about the matter in 2012, and this was followed more recently by a few public manifestations from investors' associations. However, there is no short-term prospect of a new regulation concerning electronic voting and participation.

### Conclusion

This is not ideal for the Brazilian market. The local capital market would certainly benefit from an enhancement of the regulation on proxy voting (regulating, for instance, the inclusion of shareholders' proposals in the management proxy material) and the enactment, by the CVM, of a regulation concerning electronic voting and participation, as this is already in place in several of the global developed markets.

### Notes

- <sup>1</sup> In collaboration with Tiago Molina Ferreira (tiago.ferreira@lhm.com.br).
- 1 EIZIRIK, Nelson, *O mito do controle gerencial. alguns dados empíricos*, in *RDM*, n. 66, 1987, 103.
- 2 ALDRIGHI, Dante, OLIVEIRA, Alessandro Vinícius Marques de, *The influence of ownership and control structures on the firm performance: evidence from Brazil*, 2007, available at [www.ssrn.com](http://www.ssrn.com).
- 3 LEAL, Ricardo P. C., CARVALHAL DA SILVA, Andre, *Corporate governance and value in Brazil (and in Chile)*, 2005, disponível em [www.ssrn.com](http://www.ssrn.com).
- 4 GORGA, Erica, *Changing the paradigm of stock ownership from concentrates towards dispersed ownership? Evidence from Brazil and consequences for emerging countries*, in *Nw. j. int'l. & bus.*, n. 29, 2009, 439.