THE Corporate Governance Review

Eleventh Edition

Editor

Willem J L Calkoen

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THE CORPORATE GOVERNANCE REVIEW

ELEVENTH EDITION

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards,

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while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
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March 2021

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Chapter 4

BRAZIL

Marcelo Viveiros de Moura and Marcos Saldanha Proença[1]

I OVERVIEW OF GOVERNANCE REGIME

The corporate governance regime applicable to Brazilian listed companies is established by the Brazilian Corporation Law,[2] rulings issued by the Brazilian Securities Commission (the CVM Rulings) and the listing rules issued by the Brazilian Stock Exchange (B3)[3] to each of its listing segments.

Of the CVM Rulings, it is important to highlight following:

a Ruling No. 480, published at the end of 2009, which created the reference form, a document containing very detailed information about a company that must be updated at least once a year;

b Ruling No. 481 (published simultaneously with Ruling No. 480), which sets forth the mandatory information that must be disclosed by listed companies on an ordinary and extraordinary basis; and

c Ruling No. 586/2017, which establishes the obligation for listed companies to disclose annually Brazilian Corporate Governance Code: Listed Companies Information,[4] whereby companies shall indicate, in relation to each recommendation of the Corporate Governance Code, whether the company was compliant and, if not, provide an explanation for the non-compliance (i.e., a comply or explain approach).

Of the B3 listing segments, the Novo Mercado has the highest standards of corporate governance rules, followed by Level 2 and Level 1. Furthermore, the BOVESPA MAIS is an organised over-the-counter market managed by B3 and was created as a way for small and medium-sized companies to access the capital markets. It falls under the authority of the CVM, a federal independent agency reporting to the Ministry of Finance that supervises and enforces listed companies' compliance with the Corporation Law and the rules issued by the CVM. This enforcement can result in the imposition of fines and restrictions on companies and their administrators.

B3 is responsible for supervising compliance with its listing rules and has the authority to impose on companies and their administrators contractual fines and other sanctions, such as suspension and exclusion from trading in shares in the B3 environment.

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1 Marcelo Viveiros de Moura is a partner and Marcos Saldanha Proença is a counsel at Pinheiro Neto Advogados.

2 Federal Law No. 6,404, of 15 December 1976, as amended.

3 B3 SA – Brasil, Bolsa, Balcão.

4 The Brazilian Corporate Governance Code: Listed Companies Information must be disclosed within seven months of the end of each fiscal year.

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Most Brazilian listed companies do not have widely held stock but, in the past few years, there has been a trend for the CVM to stimulate the participation of minority shareholders in the governance of companies through the creation of a mechanism that enables all the shareholders to cast their votes electronically prior to any shareholders' meeting. In addition, as a response to the covid-19 pandemic, the CVM also published Ruling 622/2020, which regulates the digital and virtual shareholders meetings that were widely adopted by Brazilian listed companies in 2020, making it possible, and easier, for a higher number of shareholders to attend and participate in meetings.

As a result of the progressive reduction of the basic rate of interest each year since October 2016, when it was reduced from 14.25 per cent to 14 per cent per year, investors who used to invest in fixed-income products have been migrating to equity investments, so as not to suffer a reduction in the return on their investments.[5] The basic rate of interest in Brazil reached its lowest rate to date in January 2021, at 2 per cent per year.

Furthermore, in 2020, there has been a boom in the Brazilian capital markets, with 27 initial public offerings (the most since 2007), and most of the new listed companies were listed in the Novo Mercado segment.

A trend seen in 2020, and that is likely to increase, is a focus by listed companies on the disclosure of environmental, social and governance (ESG) matters. The CVM has issued a draft Ruling on ESG, seeking comments from the market, which is expected to be published in 2021. The Ruling sets out the level of information about ESG matters that listed companies must disclose to the CVM and the market.

II CORPORATE LEADERSHIP

i Board structure and practices

Brazilian listed companies are managed by a board of directors[6] and by an executive office. Companies can also create a fiscal board, which has the nature of a supervisory body rather than a managerial body.

Board of directors

The board of directors is a decision-making body with authority to:

a establish the company's business policy in general;
b elect and dismiss officers;
c set the duties and monitor the day-to-day managerial actions of officers;
d express an opinion on any matters to be submitted to the shareholders; and
e approve the implementation by the executive office of specific matters prescribed by law or under the company by-laws.

The authority of the board of directors established by the Corporation Law cannot be delegated to other bodies.

The Corporation Law provides that a board of directors shall be composed of at least three members, who are not required to be Brazilian residents.

5 According to B3 and XP Investimentos, the number of individuals investing in the stock exchange in 2016 was lower than 600,000, whereas at the end of 2020 the number was more than 3,000,000.

6 Closely held companies are not required to have a board of directors.

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Companies that are currently listed on the Novo Mercado, considering the changes approved in its Listing Rules in 2017, must observe the following rules:

a Until the ordinary shareholders' meeting that approves the financial statements relating to fiscal year 2020, the board must be composed of at least five members, and at least 20 per cent of the members must be considered to be independent.

b As of the ordinary shareholders' meeting that approves the financial statements relating to fiscal year 2020, the board must be composed of at least three members, and at least two or 20 per cent of the members, whichever is greater, must be considered to be independent.

Companies that have been listed on the Novo Mercado after 2 January 2018 must apply the rule set out in point (b), above, from the date of the listing.

In respect of companies currently listed in the Level 2 segment of B3, the board must be composed of at least five members, of which at least 20 per cent must be considered to be independent.

The requirements for appointment to a position on a board of directors are established in the Corporation Law. Generally, a director must be someone with an unblemished reputation who has not been convicted in an administrative or judicial procedure in relation to corporate crimes or irregularities.

The board of directors can create specific committees (e.g., compensation, related-party transactions and audit) to assist in the management of the company. For companies currently listed on the Novo Mercado segment, it will be mandatory to create an audit committee, whether statutory or not, as of the ordinary shareholders' meeting that approves the financial statements relating to fiscal year 2020.

Listed companies must rotate their independent auditor every five years and must wait at least three years before rehiring the same auditor. However, if a listed company has established a statutory audit committee, rotation can occur every 10 years instead of five.

In the event of a tender offer for the acquisition of control of a listed company (a Takeover TO), in principle, the board of directors of the listed company is not under an obligation to make a statement as to whether it agrees with the terms and conditions of the Takeover TO.

However, if the board of directors decides to make a statement on the Takeover TO, the statement must be disclosed to the market and must address issues such as the provision of information about all aspects necessary to allow an informed decision by the investor, especially with regard to the price being offered; and any material changes in the company's financial condition since the date of the most recent financial statements or quarterly reports disclosed to the market.

In respect of companies listed on the Novo Mercado and Level 2 listing segments, the board of directors is required to prepare and disclose a reasoned opinion on the Takeover TO – in favour or against it – and to address the following topics:

a the suitability of and opportunities presented by the Takeover TO;

b the effects of the Takeover TO on the interests of the company;

c the offeror's stated strategic plans for the company; and

d any other point of consideration the board may deem relevant.

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Executive board

The executive board shall be composed of at least two officers. The officers of Brazilian listed companies can be elected and removed at any time by the board of directors.

Up to one-third of the board members may be elected for executive board positions held concurrently. Pursuant to the rules of the Novo Mercado, Level 2 and Level 1 listing segments, the offices of chair of the board of directors and chief executive officer cannot be held by the same individual. However, there are exceptions to the holding of these positions concurrently:

a for companies listed in the Level 2 and Level 1 listing segments, for a maximum of three years from the date that the company's shares start to be traded on the special listing segment; and

b for the companies listed in the Novo Mercado listing segment, in the case of a vacancy for a maximum of one year, within which period the company shall disclose the accumulation of positions owing to the vacancy not later than the business day following its occurrence, and disclose within 60 days of the vacancy the measures taken to end the accumulation of positions.

Among other duties, the executive board represents the company in dealings with third parties. The by-laws may establish that certain managerial decisions should be made in executive board meetings only.

The by-laws will establish the number of officers permitted, the manner of their replacement, their term of office, and the assignments and powers of each officer. Officers will perform their duties separately, according to their assignments and powers, but in keeping with other officers, and will not be held liable for any obligations assumed on behalf of the company as regards routine acts necessary for the company's management.

If the by-laws are silent or if no resolution has been adopted by the board of directors to prescribe the officers' duties, any officer may represent the company and take the actions necessary for its routine operations.

Compensation of members of the board of directors and executive board

The shareholders' meeting shall prescribe the aggregate or individual compensation of the members of the board of directors and executive board, including benefits of any kind and representation allowances, taking into consideration their responsibilities, the time devoted to their duties, their skills and professional standing, and the market value of their services. If the shareholders' meeting approves the aggregate compensation to be paid to the company's directors and officers, it will fall under the authority of the board of directors to approve the allocation of the compensation between the company's directors and officers.

If the company's by-laws set forth a compulsory dividend equal to or above 25 per cent of the net profits, it may establish a share in the company's profits to the benefit of the company's directors and officers, provided that the total amount thereof does not exceed the annual compensation of the directors and officers, or one-tenth of the profits, whichever is the lower. Nevertheless, directors and officers shall be entitled to a share in the profits only in a financial year for which the compulsory dividend is paid to the shareholders.

Detailed information about the compensation paid to a company's directors and officers, including, but not limited to, the breakdown of the compensation (e.g., fixed and

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variable compensation), and the minimum, lowest and average compensation paid, must be disclosed in the company's reference form. In addition, the companies listed in the Novo Mercado segment must have and must disclose their compensation policies.

Fiscal board

The fiscal board is a supervisory body responsible for supervising a company's directors and officers and providing information in this respect to the shareholders.

The fiscal board is a compulsory body, but need not operate on a standing basis. A non-permanent fiscal board must be instated at the request of shareholders representing at least 10 per cent of the voting stock or 5 per cent of the non-voting stock.

The fiscal board is composed of three to five members and a like number of deputies. The conditions for election and impairment of fiscal board members (who must be Brazilian residents) are prescribed by law.

The fiscal board has the authority to, among other things:

a monitor the actions of the company's officers and directors and verify their compliance with their legal and statutory duties;

b review and give an opinion on the board of directors' annual report;

c review and give an opinion on proposals by management to the shareholders' meeting relating to changes in capital, the issuance of debentures or warrants, investment plans or capital budgets, dividend distributions and certain corporate reorganisations;

d report any error, fraud or criminal act, and suggest measures useful to the company to any officer or member of another administrative body, and, if these fail to take any necessary steps, to act to protect the corporation's interest and report to the shareholders' meeting;

e review the balance sheet and other financial statements prepared periodically by the company; and

f examine the financial statements for the fiscal year and give an opinion about them.

The fiscal board's authorities can be neither delegated nor attributed to any other body of the company.

ii Directors

The board of directors is a decision-making body of the company but the daily routine of administration of the company shall fall to the executive board. All the members of the board of directors, including the outside or independent members, must receive in advance of the meetings of the board of directors information about the matters that will be discussed and put to the vote.

Brazilian legislation does not expressly state that the directors have the right to visit the company's facilities and its subsidiaries, or that the directors should have free access to the lower management of the company. However, considering that among the duties provided for the board of directors in the Corporation Law, it is established that the board of directors shall 'supervise the performance of the officers, examine the books and records of the company at any time, request information on contracts signed or about to be signed, and take all other necessary action', it is expected that the directors shall have free access to the company, its subsidiaries and its lower management.

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Pursuant to the Corporation Law, the directors have the following duties and obligations:

a a duty of diligence, employing the same care and diligence that every diligent and honest person employs in his or her own business;

b to act within the scope of their duties without misuse of power, refraining from the performance of gratuitous or non-authorised acts and from the receipt of personal advantage by reason of the performance of their duties;

c even if elected by a certain group or class of shareholders, they have the same duty to the company as everyone else, and must not, even in the defence of the interests of those who elected them, fail to fulfil these duties;

d a duty of loyalty;

e to act without conflict of interest, not intervening in any transaction in which they have an interest that conflicts with that of the company; and

f a duty of information.

Directors shall not be held personally liable for the obligations assumed on behalf of the company as a result of a regular act of management. However, directors shall be held liable in civil lawsuits for losses that they cause owing to acts of negligence or fraudulent intent and in violation of the law or the company's by-laws.

Note that the directors shall not be liable for unlawful acts performed by other directors, unless they are involved with these directors or they neglect to perceive them, or if, having knowledge of them, they fail to act to prevent their performance. However, directors are held jointly liable for decisions made by the board of directors.

In this particular, we note that each member of the board of directors is personally liable for any act of omission or negligence of the board, and a dissident director shall express his or her disagreement regarding the resolutions taken through the clear and written register in the minutes of the meeting of the competent administration body, to release himself or herself from any eventual civil liability. Any director who agrees with the performance of acts that violate the law or the company's by-laws shall be held jointly liable for the losses resulting from that act.

The members of the board of directors are elected by the shareholders, who can dismiss them at any time. The shareholders representing at least one-tenth of the voting capital may request that a multiple voting procedure be adopted to entitle each share to as many votes as there are board members, and to give each shareholder the right to vote cumulatively for only one candidate or to distribute his or her votes between several candidates.

The term of office of the directors must be defined in the by-laws but cannot exceed three years, although re-election is permitted. In the case of companies listed in the Novo Mercado, Level 2, Level 1 and BOVESPA MAIS listing segments, the term of office cannot exceed two years, although again re-election is permitted.

The requirements for appointment to occupy a position on the board of directors are established in the Corporation Law. In general, a director must be someone with unblemished reputation and who has not been convicted in an administrative or judicial procedure in relation to corporate crimes or irregularities. Furthermore, unless waived in a shareholders' meeting, individuals who hold positions in companies that may be regarded as market competitors of the company, or who have any interests that conflict with those of the company, cannot be elected as a board member.

As regards conflicts of interest, a director shall not take part in any corporate transaction in which he or she has an interest that conflicts with an interest of the company, or take part

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in the decisions made by the other directors on the matter. He or she shall disclose his or her disqualification to the other directors, and shall cause the nature and extent of his or her interest to be recorded in the minutes of the meeting of the board of directors.

Notwithstanding compliance with the conflict of interest provision, a director may only contract with the company at arm's length. Any business contracted in any other way is voidable, and the director concerned shall be compelled to transfer to the company all benefits that he or she obtains through that business.

III DISCLOSURE

The Corporation Law has adopted the principle of full disclosure when it comes to acts or facts concerning a company that may be considered relevant. The disclosure of material events is a duty of the company's investor relations officer, who may be held personally liable for damage arising as a result of non-disclosure.

CVM Ruling No. 358/2002, which sets forth the general disclosure rules for listed companies, defines 'material event' broadly as a decision:

a arising from a controlling shareholder, a general shareholders' meeting or a management body of a publicly held corporation, or any other act or event of a policy, management, technical, business, economic or financial nature in connection with its business that could considerably influence the trading price of the securities issued by or relating to the company;

b by investors to buy, sell or keep those securities; and

c by investors to exercise any rights they have as holders of securities issued by or relating to the company.

The companies listed in the Novo Mercado segment are required to disclose their material facts in Portuguese and English, concurrently.

CVM Rulings Nos. 480/2009 and 481/2009 set forth the main rules regarding the disclosure of information by publicly held companies and the presentation of documents and information before meetings are held. The listed companies are required to update at least once a year, or in a shorter period upon the occurrence of certain events, the reference form, which, in essence, compiles corporate, contractual, financial or economic, governance and human resources information about the company.

As to financial reporting, listed companies must disclose their financial statements, with the management report, the independent auditors' report and the opinion of the fiscal board, if installed, at least one month in advance of the ordinary shareholders' meeting.[7]

Listed companies must also disclose the standard form of financial statements (DFP) within the first three months of the end of each fiscal year. The DFP is an electronic form created in the CVM's electronic system that must be completed using information obtained from the annual financial statement.

Listed companies shall also disclose, once a quarter, the quarterly information form, which is also an electronic form and must be completed using the company's quarterly financial information. It must contain the report of the special review issued by the independent auditor.

7 The ordinary shareholders' meeting must be held within four months of the end of each fiscal year.

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In addition to disclosing their financial statements in Portuguese, companies listed in the Novo Mercado and Level 2 listing segments must also disclose them in English.

Regarding one-on-one meetings, companies listed in the Novo Mercado must give a public presentation about the information disclosed in their quarterly earnings results or financial statements within five business days of their release. This public presentation may be conducted face-to-face or via teleconference, videoconference or any other means that enables stakeholders to participate remotely. However, the companies listed in the Level 2 and Level 1 listing segments are required to hold, at least once a year, a public meeting with analysts and other third parties to disclose information about their financial and economic situation, projects and expectations.

IV CORPORATE RESPONSIBILITY

Pursuant to the Corporation Law, all publicly held companies must prepare, once a year within their financial statement, a value-added statement, which could be considered as the balance statement of the company's 'social account'. This statement provides information about the overall wealth produced by the company, the allocation of resources to those areas of the company that contributed to the generation of that wealth (such as employees, financiers, shareholders, the government and others), and the unallocated portion of that wealth. In addition, some companies seek certification from institutes such as the Ethos Institute, the Brazilian Institute of Social and Economic Analysis and the Global Reporting Initiative, but this certification is not mandatory for listed companies.

Another aspect of social accounting is evidenced in the code published by the Brazilian Financial and Capital Markets Association (ANBIMA) regarding public offerings, which sets forth that companies must include in their reference form information about social responsibility and cultural incentives, and about any projects in those areas implemented by the company. Thus, although the ANBIMA code does not require their existence, if the company has any social responsibility policies in place, these should be disclosed in the reference form.

Furthermore, on 7 December 2020, the CVM disclosed a draft Ruling, which shall improve the disclosure of ESG information by listed companies. The main changes that this new Ruling will introduce to listed companies are as follows:

- *a* a greater focus on the risk factors relating to social, environmental and climate risks;
- *b* a requirement for companies to indicate their sustainable development objectives in the context of their business;
- *c* a requirement for companies that do not disclose a sustainability report, or do not adopt key performance indicators for environmental and social matters, to justify the reason for not doing sp (comply or explain approach); and
- *d* a requirement for companies to provide information about diversity in management positions, as well as in the company's employees.

The deadline for submission of comments on the draft Ruling to the CVM is 8 March 2021. The CVM is expected publish the new Ruling before the end of 2021.

An anticorruption law has been in place in Brazil since 29 January 2014, which has introduced administrative and civil liability of legal entities for illicit acts committed in relation to local and foreign public officials. However, there is as yet no whistle-blowing legislation in force in Brazil.

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V SHAREHOLDERS

i Shareholder rights and powers

Each common share shall have the right to one vote in shareholders' meetings, and it is not possible to have shares with multiple voting rights. However, Brazilian companies can issue preferred shares, which can be issued without voting rights (although companies listed in the Novo Mercado segment are required to issue only common shares).

In addition, the Corporation Law sets forth that it is possible to include in a company's by-laws a provision restricting the number of votes by each shareholder. Nevertheless, the companies listed in the Novo Mercado and Level 2 listing segments are not permitted to include in their by-laws any provision restricting the number of votes of shareholders to a percentage below 5 per cent of the stock capital, except in a few cases provided in the listing rules.

In theory, shareholders should not have the ability to influence directors' decision-making. In this regard, a specific article of the Corporation Law sets forth that a director shall use his or her powers to achieve the company objectives and to support its best interests, even if these interests are contrary to those of the shareholder, or group of shareholders, who elected or indicated him or her. Nevertheless, the Corporation Law also contains a provision stating that the votes of directors can be bound by a shareholders' agreement. Therefore, the Corporation Law recognises that directors can receive instructions from shareholders on how to vote in board meetings.

The shareholders' meeting has exclusive authority to:

a amend the by-laws;
b elect or discharge the company's senior management and fiscal board members;
c receive the annual accounts of the senior management and resolve on the financial statements presented by them;
d suspend the exercise of rights by a shareholder;
e resolve on the appraisal of assets contributed by any shareholder to the company's capital;
f authorise the issuance of participation certificates;
g resolve on the transformation, merger, consolidation, spin-off, winding up and liquidation of the company; elect and dismiss liquidators; and examine the accounts of liquidators; and
h authorise senior managers to admit bankruptcy of the company and to file for debt rehabilitation.

As regards the rights of dissenting shareholders, certain fundamental changes in the company entitle the shareholders who have not voted in favour of the resolution to withdraw, by refund of their shares, in the following circumstances:

a in the event of the creation of preferred shares or an increase of an existing class without maintaining its ratio in relation to the other classes, and change of a preference, a privilege or a condition of redemption or amortisation conferred on one or more classes of preferred shares, or creation of a new and more favoured class;
b the spin-off of the company only triggers the right to withdraw if it results in a change in the corporate purposes – except when the spun-off company is transferred to a corporation with a main line of business that coincides with the line of business of the spun-off company – a reduction in the mandatory dividend or participation in a group of corporations;

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c the reduction of the compulsory dividend in any specific fiscal year, change of corporate purpose and insertion of an arbitration clause in the by-laws;
d the approval of the merger of shares, which entitles shareholders of both companies involved to withdraw; and
e a shareholder who has not voted in favour of the acquisition by the listed company of which he or she is a shareholder of the control of a business corporation is entitled to withdraw if the purchase price exceeds 1.5 times the greatest of:
- the average quotation of the shares on the stock exchange during the 90 days prior to the contracting date;
- the net value of each share or quota, the assets and liabilities having been valued at market prices (liquidation value); and
- the net profit of each share or quota, which may not exceed 15 times the annual net profit per share during the past two fiscal years, monetarily adjusted.

ii Shareholder duties and responsibilities

The controlling shareholder has the duty to use its controlling power to make the company accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the company, those who work for the company and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.

The controlling shareholder shall be liable for any damage caused by acts performed in abuse of its power. The Corporation Law lists some examples of what would be considered an abuse of power, which include, among others:

a guiding a company towards an objective other than in accordance with its stated objectives, or that is harmful to national interests, or induce it to favour another Brazilian or foreign concern to the detriment of the minority shareholders' interests in the profits or assets of the company or of the Brazilian economy; and
b arranging for liquidation of a viable company or for the transformation, merger or division of a company to obtain, for itself or for a third party, any undue advantage to the detriment of the other shareholders, of those working for the company or of investors in the company.

There are no specific duties provided in Brazilian legislation for institutional investors, and there is no code of best practice for shareholders.

iii Shareholder activism

Shareholder activism is not well developed in Brazil. Recent years, however, have seen a growing amount of shareholder activism, especially by some fund managers, but shareholder activism is still not part of the culture of the Brazilian capital markets.

The Brazilian companies most exposed to shareholder activism are those that have issued US depository receipts in the US market. A good example would be Petrobras, the Brazilian oil and gas company, which faced securities class actions filed with the New York courts by US investors owing to losses stemming from money laundering and corruption schemes that have become public knowledge; Petrobras announced in January 2018 that it had signed an agreement to settle the class action in an amount of US$2.95 billion. Owing to this settlement, some minority shareholders have filed lawsuits in Brazil asking for a similar

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indemnification in Brazil, but it is unlikely that they will receive an indemnification from Petrobras in this amount, since the Brazilian legislation and judicial environment do not provide for minority shareholders to receive indemnifications in these proportions.

iv Takeover defences

Shareholder and voting rights plans, and similar measures

The Corporation Law and CVM Ruling No. 361 require as a condition for the effectiveness of the direct or indirect disposal of a controlling interest in a listed company that the acquirer make a mandatory public tender offer (tag-along TO) for the acquisition of all the voting shares that are not part of the controlling block.

The tag-along TO must ensure minority shareholders the receipt of at least 80 per cent of the value paid per voting share included in the controlling block. For companies listed on the Novo Mercado listing segment, the amount to be paid in the tag-along TO shall correspond to 100 per cent of the value paid per voting share included in the controlling block.

Another defence to be considered is the use of poison pills, which Brazilian legislation does not prevent companies from putting in place, and they are used in some listed companies. The typical Brazilian poison pill requires the acquirer of an equity interest above a given threshold to make a TO to all shareholders for a punitive price. However, the use of poison pills must be established in the by-laws of the company. As a consequence, only the shareholders' meeting, which has exclusive authority to amend the by-laws, is empowered to put poison pills in place.

The CVM has already pronounced against provisions that penalise or prevent shareholders from voting against the exclusion of poison pills case by case in a definitive manner. Furthermore, the rules of Novo Mercado do not allow companies that want to trade their shares on the Novo Mercado to have poison pills in their by-laws.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

Companies must disclose to all their shareholders, through their websites, as well as on the CVM and B3 websites, certain ordinary and extraordinary reports or information, such as the reference form, financial statements, minutes of the shareholders' meetings and documents necessary for review by shareholders to be able to exercise their voting rights in shareholders' meetings.

It is common practice in listed companies to hold a conference call with investors right after the release of the annual or quarterly financial statement to discuss a company's results. It is also usual for these companies to hold meetings or calls with analysts to discuss the company to enable the analysts to issue their reports on the company. Companies listed in the Novo Mercado segment must give a public presentation about the information disclosed in their quarterly earnings results or financial statements within five business days of their release.

Whenever a company holds a meeting with a specific shareholder to discuss a material fact that has not been disclosed, it is usual to have this shareholder sign a non-disclosure agreement, and the shareholder would be subject to a blackout period during which it would be unable to trade in the company's shares, until the material information is disclosed to the market.

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Call notices for the shareholders' meetings of publicly held companies must be published at least three times, with the first call notice being published, as a general rule, at least 15 days in advance.[8]

Publicly held companies are required to disclose on the same day as the first publication of the call notice the manual of the shareholders' meeting, which contains detailed information about the matters to be discussed and the management proposal for each of the matters that will be voted on.

The supporting documentation for the ordinary shareholders' meeting (e.g., financial statements, management report, independent auditor's report and opinion of the fiscal board) must be disclosed to the shareholders 30 days in advance of the date of the meeting.

In 2015, the CVM enacted a ruling on attendance and distance voting at shareholders' meetings of publicly held companies, whereby shareholders would be able to present proposals of deliberations to be voted on, and to vote on the deliberations of the shareholders' meeting, subject to certain requirements. Implementation of this proxy voting system was mandatory for the major companies listed on B3 as of 2017, and has been mandatory for all listed companies as of 2018.

VI OUTLOOK

We expect that the biggest trends in the next few years in Brazil will be increases in:

a the number of initial public offerings and follow-ons, as a result of the migration of Brazilian investors from fixed income investments to equity investments, which will require Brazilian companies to improve their corporate governance practices to stand out from other companies that will be competing for raising funds through initial public offerings and follow-ons; and

b the relevance of ESG disclosures by Brazilian listed companies.

8 For some specific matters, the call notice must be published 30 days in advance.

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Appendix 1

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Marcelo Viveiros de Moura obtained his LLB degree from the Rio de Janeiro State University Faculty of Law in 1988 and his LLM degree from the University of Cambridge in 1993. He is a partner in the corporate division of Pinheiro Neto in Rio de Janeiro, where he has worked for 35 years. Mr Moura has also worked as a visiting associate at Slaughter and May in London. He specialises in mergers and acquisitions (corporate restructuring), regulatory law in relation to oil and gas, capital markets, insurance, project finance, administrative law, government procurements and contracts.

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