

## Shareholder activist strategies in Brazil

PGLaw

Brazil | July 18 2019



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### Shareholder activist strategies

*Strategies*

#### **What common strategies do activist shareholders use to pursue their objectives?**

Activist shareholders normally make joint efforts to appoint members to the board of directors and board of supervisors of companies. Shareholders representing at least 15 per cent of voting capital or preferred shareholders representing at least 10 per cent of the total capital are entitled to appoint one member of the board of directors. Minority shareholders representing at least 10 per cent of the voting capital may appoint a member of the board of supervisors and require cumulative voting in director elections. Appointing members of the board of directors and of the board of supervisors allows them to have easier access to information on the issues to be discussed at the shareholders' meeting and a better oversight of management, since members of the board of directors may request that certain decisions are subject to approval of the General Shareholders' Meeting, members of the board of supervisors have broad powers to obtain information from the company's officers, participate in the General Shareholders' Meeting answering questions of the shareholders and can also provide individual reports to the General Shareholders' Meeting. In addition, activist shareholders often file administrative representations and complaints against management or controlling shareholders' decisions or relevant transactions approved by shareholders meetings with the CVM.

*Processes and guidelines*

#### **What are the general processes and guidelines for shareholders' proposals?**

Shareholders' meetings are divided in two types: the ordinary meeting and the extraordinary one, depending on the matters to be discussed. The ordinary shareholders' meeting is mandatory and should be held up until April of every year, takes place annually and can be held exclusively to discuss the matters proposed restrictively by the law, that is, approval of management accounts and financial statements, election of board members or officers, as applicable, and board of supervisors' members and destination of the net profit and dividends. Extraordinary shareholders' meeting can be held at any time of the year and shareholders can discuss any matters.

After the shareholders' meeting is organised, any shareholder may make a voting proposition regarding any topics of the agenda different from what is proposed by the controlling shareholder or management. Shareholders may not make proposals to include new topics in the agenda of the meeting unless all shareholders attend the meeting, what is virtually impossible in a public company.

The CVM regulated remote voting in shareholders' meetings to increase attendance, particularly of minority shareholders. Such rules are applicable only to public-listed companies. The public company shall mandatorily issue the distance voting ballot on ordinary shareholders' meeting, when the meeting is called to appoint managers, and when an extraordinary shareholders' meeting is called simultaneously with an ordinary shareholders' meeting. Shareholders of public companies can request that proposals are included in the ballot if their shareholding surpasses certain thresholds of the total capital provided by the CVM rule, ranging from 5 per cent to 10 per cent depending on the size of the total capital of the public company.

### **May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?**

Yes, any shareholder may nominate candidates for the election of members of management at a shareholders' meeting. On companies with a board of directors, including all public companies, minority shareholders holding at least 15 per cent of voting capital or preferred shareholders representing at least 10 per cent of the total capital may request a segregated election to appoint one member of the board of directors as a representative of minority shareholders. Regarding the use of the company's proxy by public companies, according to CVM's rules, if the public company makes a proxy public request, shareholders holding at least 0.5 per cent of the share capital may appoint candidates if they notify the company of such intention up to five business days after the company makes public its intention to request a public proxy. If the public company requests a public proxy, it shall bear all costs of the proxy. Also, according to CVM rules, it is mandatory for the company to provide means for shareholders to vote remotely at shareholders' meetings called to discuss almost all cases that involve the election of members of the board of directors, and absolutely all elections of members of the supervisory board.

With regard to general proposals, shareholders of public companies can also request that candidates are included in the ballot if their shareholding surpasses certain thresholds of the total capital provided by the CVM rule, which for the inclusion of candidates only is based on a reduced shareholding threshold of 2.5 per cent to 0.5 per cent depending on the size of the total capital of the company, which is about half of the amounts requested for the inclusion of general proposals in the ballot. To initiate a proxy fight, any shareholder holding at least 0.5 per cent of the share capital may request a list of the addresses of all shareholders. The company cannot charge the shareholder any fees for providing such information. However, if the shareholder wants to start a proxy fight based on such a list and the company does not present a proxy public request, the shareholder must bear the costs of the proxy public request.

### **May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?**

The board of directors must call the shareholders' meeting. Otherwise it is incumbent upon the board of officers. Nevertheless, any shareholder may call a shareholders' meeting if the managers delay the call for more than 60 days of the term provided by the law or by the company's by-laws.

Shareholders owning at least 5 per cent of the voting capital of the company may call a shareholders' meeting

when managers delay the call for more than eight days after they received a notice with justified request for a shareholders' meeting from such shareholders. Such notice shall include the list of proposals to be included in the agenda. If the managers delay the call of a shareholders' meeting to setup a board of supervisors for more than eight days, shareholders owning at least 5 per cent of the voting capital of the company may call a shareholders' meeting.

Shareholders may not act by written consent, except where:

- all shareholders participate through the remote voting system in the public companies that adopt the remote voting system as regulated by CVM; or
- it is possible to gather the consent from shareholders representing 100 per cent of the voting capital of the company, with or without unanimous resolutions, what is more common in private companies.

#### *Litigation*

**What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?**

Brazilian law provides judicial remedies such as:

- action to hold the company responsible for losses caused to stakeholders, including shareholders, by irregularities in the company's registers and books; and
- action to compel the company to show its registries, books and records.

Derivative actions against managers by the company depend on prior approval by the shareholders' meeting. If the company does not file the lawsuit against the managers within three months as of the approval by the shareholders' meeting, any shareholder can file such lawsuit in the name of the company. If the shareholders' meeting does not approve the filing of a lawsuit against the managers, shareholders representing at least 5 per cent of the share capital may file a derivative suit. In addition, controlling shareholders may be liable for abuse of power or conflict of interest.

A widespread way of litigation is filing requests for the CVM to decide at the administrative level on breach of legal and regulatory provisions and regulations by managers and controlling shareholders of public companies. In Brazil, class actions may be filed by the CVM and the public prosecutor office to protect investors in the securities markets, including minority shareholders.

Class actions brought by minority shareholders are uncommon in Brazil. Prosecutor offices can file class actions on behalf of shareholders to obtain indemnification for damages resulting from capital markets investments. However, there has been no record of any successful class action and none of the several prosecutor offices have been engaged on such litigation.