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CVM Resolution 44 and the new presumptions on inside trading

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On September 1, 2021, new insider trading rules issued by Brazil's securities and exchange commission, the CVM (Comissão de Valores Mobiliários), came into effect. CVM Resolution 44 replaces Instruction 358, and deals with disclosure of information on material facts, trading in securities while material facts are undisclosed, and disclosure of information on securities trading.

The main changes introduced by Resolution 44 involve presumptions on the use, access to, and knowledge of the importance of inside information, along with prohibitions against insider trading prior to the disclosure of financial information.

According to the CVM, the new Resolution's objective is to align the CVM's regulations with the Commission's decisions, and to clarify the rules on presumptions in cases of insider trading by specifying the content of each presumption, and to whom and in which circumstances each presumption applies.

According to the new rules, (i) any person who trades in securities while in possession of material undisclosed information is presumed to make use of that information; (ii) a member of management who leaves the company and is in possession of inside information is presumed to make use of that information in trading in securities issued by the company in the three months following the date of leaving; (iii) controlling shareholders, members of management, members of the fiscal council and the company itself are presumed to have access to all undisclosed material information; and (iv) all the above persons, together with all persons that have a commercial or professional relationship with the company, or a relationship of trust, are presumed to know that undisclosed material information to which they have access is inside information.

These presumptions can be applied individually or collectively, and they are relative in nature, which means that convincing evidence can reverse the presumption.

In addition, Resolution 44 establishes a strict rule against trading by controlling shareholders, officers, members of the board, and members of the fiscal council in the 15 days preceding disclosure of quarterly or annual financial information, regardless of whether they have had access to the content of the information. In this, the Resolution reflects existing practice by the CVM's specialist branches.

At the same time, Resolution 44 makes the criteria for individual investment and divestment plans more flexible, which allows the presumptions and prohibitions against trading to be set aside.

Since Resolution 44 applies only to events occurring after it came into effect, there are still no precedents that could indicate how the Commissioners will interpret the new rules. In any event, to avoid potential problems, members of management and controlling shareholders of listed companies should take a more conservative approach and be alert to the possible existence of inside information when trading in securities issued by their companies.

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