Turning Downturns into Opportunities: Share Buybacks via Subsidiaries

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In BMA Review 27 (October–December 2008), we discussed how a number of companies, faced with a sharp decline in their share prices, saw the moment as an opportunity to launch share buyback programs. It was a time when Brazil and the world were still reeling from the financial crisis triggered by the collapse of Lehman Brothers and, among other objectives, the buyback programs aimed to signal confidence in the recovery of share value. The focus of our article was whether subsidiaries could acquire shares in their parent companies – a topic that, in 2008, had received little attention from either scholars or the courts.

Nearly 17 years later, we find ourselves in similar circumstances. There is concern in Brazil over rising public spending and political uncertainty, and the country is faced with a range of factors that have contributed to the depreciation of shares in many listed companies.

The regulatory scenario has changed, however, because the rules governing share buybacks have evolved over the intervening period. In September 2015, CVM Instruction 10 was replaced by CVM Instruction 567, which remained in force until May 2022, when it was repealed and replaced by CVM Resolution 77. These regulatory reforms introduced a number of important changes, among them extending the rules to cover transactions involving debentures and derivatives, establishing the situations where buybacks require shareholder approval, and updating the method for determining whether funds are available for buybacks.

One of the most significant changes in terms of transparency was the introduction of new disclosure requirements for listed companies. In particular, companies are now required to report their trading activity on a monthly basis, in a format similar to reports by directors and officers on trades in their company's shares.

The rules that replaced CVM Instruction 10 (which was in force when the 2008 article was published) expressly address the scenario we discussed at that time – namely, the acquisition of shares issued by a listed company by its affiliates and subsidiaries. CVM Resolution 77 now provides (as did its predecessor CVM Resolution 567) that the requirements and restrictions applicable to buybacks by the issuer also apply to purchases made by its affiliates and subsidiaries. Indeed, the CVM emphasized its authority to regulate such transactions in its report on the public consultation that preceded CVM Instruction 567.

The conclusion reached in our 2008 article remains valid: a subsidiary that has available funds of its own may acquire shares issued by its parent company, as long as it complies with the applicable legal requirements, particularly those set out in CVM Resolution 77.

In practice, a significant number of listed companies have opted – whether out of necessity or convenience – to carry out their buyback programs through subsidiaries. This trend highlights how such transactions can represent a strategic opportunity to create value for shareholders during periods of share price depreciation. One point to keep in mind, however, is that shares acquired by a subsidiary or affiliate cannot be cancelled, unlike shares that are bought back directly by issuer. Despite the corporate relationship between with the subsidiary or affiliate, they remain distinct legal entities with separate assets, and a subsidiary (or affiliate) cannot cancel shares issued by another company, even if the issuer is its parent (or affiliate).

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