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## PUBLICATION OF FINANCIAL STATEMENTS OF LARGE COMPANIES

After the end of the fiscal year of 2008, many companies started to wonder on how to apply the new rules established by Law 11.638, of December 28, 2008, that has amended certain provisions of the Corporations Law and extended to large companies the provisions relating to the preparation and disclosure of financial statements ("*Law 11.638*").

In relation to large companies, Law 11.638 established that, even if such companies are not formed as corporations, they are subject to the provisions relating to bookkeeping and preparation of financial statements and mandatory independent auditing by an auditor registered with the Security and Exchange Commission ("*CVM*") established in the Corporations Law.

In this regard, we have been frequently questioned about the classification of companies as "large companies" and the need to publish their financial statements.

Unfortunately, the legislation is not clear on the matter and the statements of the governmental authorities are still conflicting. Notwithstanding, below are some comments that we deem pertinent to the issue.

### 1. Definition of Large Companies

In accordance with Law 11.638, "*the company or the group of companies under common control that have, in the prior fiscal year, total assets exceeding R\$ 240,000,000.00 or annual gross revenues exceeding R\$ 300,000,000.00*" are considered as large companies.

The wording raises doubts on the meaning and scope of the expression "*group of companies under common control*". The expression includes only the relationship between controlling and controlled companies or also between affiliated companies? Should we include, for purposes of definition of the total assets/ gross revenues, the total assets/ gross revenues of companies headquartered abroad or only of those companies with head offices in Brazil?

In our opinion, the expression "*group of companies under common control*" includes all companies of a certain corporate group that are under common control, that is, controlling, controlled and affiliated companies (specifically for affiliated companies, only if the affiliate company is controlled by another company of the group).

Therefore, if company "A", a holding company with head offices in Delaware, USA, controls the companies, with head offices in Brazil, "B" and "C", and the latter controls another company with head offices in Brazil, "D", we understand that the three Brazilian companies ("B", "C" and "D") shall be considered as large companies if, in the prior fiscal year, their total assets, considered together, exceeded R\$ 240,000,000.00 or their annual gross revenues exceeded R\$ 300,000,000.00.

We also believe that the total value of the assets/ gross revenues of companies with head offices abroad is not applicable for purposes of calculation of the value of the total assets/ gross revenues of group of companies under common control. Therefore, in the example above, the total value of the assets/ gross revenues of company "A", with head offices in Delaware, USA, shall not be considered for purposes of definition of Brazilian companies "B", "C" and "D" as large companies.

## 2. Obligation to Publish Financial Statements

Law 11.638 has also raised the question relating to the need to publish the financial statements of large companies that are not corporations.

Although Law 11.638 does not specifically establishes the need to publish the financial statements, and the fact that the Bill that has originated such law expressly excluded such obligation, several jurists consider that the financial statements of large companies need not only to be audited, but also to be published.

Such understanding arises specially from the fact that the Summary of Law 11.638 specifies that the financial statements need to be presented in accordance with the Corporations Law (that, in its article 176, sole paragraph, refers to the mandatory publication).

In view of the above, the National Department of Registry of Commerce ("DNRC") issued Circular no. 099/2008, that, in its item 7, established the publication of financial statements of large companies to be facultative.

On November 16, 2008, however, an injunction was granted in the Claim filed by *Associação Brasileira de Imprensa Oficiais - ABIO* (Brazilian Association of the Official Press) against the Federal Government, to suspend the effects of the item mentioned above and demand the issuance by the DNRC, of a new Circular, establishing the obligation of large limited liability companies to publish their financial statements. Last week the injunction was suspended by the Federal Regional Court.

The Boards of Commerce have not yet issued any formal statement on the procedure for the filing of the minutes of the partners meetings for the approval of financial statements of large limited liability companies. However, due to the scenario of uncertainty and inexistence of a definitive position, Boards of Commerce may deny the filing of such minutes if it is not evidenced that their respective financial statements have not been duly published (through the filing of a copy of the publication).

Although the legislation does not establish any fine or other penalty in case of non presentation by the company/ filing by the Board of Commerce, of minutes of partners meeting for the approval of financial statements of large companies, it should be noted that the companies that do not comply with such requirement may have difficulties in obtaining credit with financial institutions, as well as participating in public bids.

Therefore, and until a final definition on the issue is taken, companies considered as "large" shall evaluate the advantages and disadvantages of publishing their financial statements.