

The State-Owned Companies Act Under Cross Fire



Em caso de dúvidas sobre os temas discutidos nessa publicação, favor contatar o escritório.

If you have any questions regarding the matters discussed in this publication, please contact the office.

Antonio Araldo Ferraz Dal Pozzo
Sócio Fundador | Founding Partner
araldo@dalpozzo.com.br

Augusto Neves Dal Pozzo
Sócio Fundador | Founding Partner
augusto@dalpozzo.com.br

João Negrini Neto
Sócio | Partner
joao@dalpozzo.com.br

Percival José Bariani Junior
Sócio | Partner | CLO
percival@dalpozzo.com.br

Beatriz Neves Dal Pozzo
Sócia | Partner | CEO
beatriz@dalpozzo.com.br

Luisa Brasil Magnani
Advogada | Lawyer
Autora | Author
lmagnani@dalpozzo.com.br

A presente publicação é produzida pelo corpo técnico do escritório Dal Pozzo Advogados e se destina a fins meramente informativos. Ela não constitui e tampouco deve ser utilizada como aconselhamento advocatício. O texto reflete a opinião pessoal de seus autores.

This text is published by Dal Pozzo Advogados for informational purposes only. It is not intended and it should not be interpreted, or construed, as legal advice. The text expresses the opinion of the authors.

© Dal Pozzo Advogados. All rights reserved 2018.

DALPOZZO
ADVOGADOS

SÃO PAULO
Rua Gomes de Carvalho, 1510 - 9º andar
04547-005 - Vila Olímpia - São Paulo
Office +55 11 3058-7800

BRASÍLIA
SHS Quadra 06 - Conjunto A - Bloco E - Sala 1411
70316-000 - Edifício Brasil 21 - Brasília DF
Office +55 61 3033-1760

dalpozzo.com.br

The State-Owned Companies Statute, created by Law 13303, has barely become effective and already faces the risk of being amended by initiatives in both the Legislative and Judiciary branches. Although it came into force on June 30, 2016, the law prescribed a time-limit of 24 months for companies to comply with the provisions, which expired in July of this year.

One of the main targets is Article 17, which prohibits the appointment of politicians and their relatives to hold positions on Boards of Directors and on Executive Boards of state-owned companies and state-controlled companies.

The provision at issue bans the appointment of political party officials, trade union officials, suppliers of goods and services to the Administration, representatives of regulatory agencies, Ministries, Secretaries and holders of positions in the Legislative Branch, among others, to hold positions on the Board of Directors and Executive Boards.

An amendment passed in July in the Chamber of Deputies (House of Representatives) opened a loophole to make the ban more flexible by removing from the list the appointment of party leaders and people who campaigned for elections, as well as family members of politicians until the third degree of kinship.

The amendment was inserted in the body of Bill no. 621/2016, which regulates Regulatory Agencies, in an opinion that was approved in the Chamber of Deputies (House of Representatives) by the Special Commission in charge of examining the matter. According to federal deputy José Carlos Araújo, author of the amendment, the State-Owned Companies Act is excessively restrictive in its bans. In the rationale for the amendment, it is stated that the law "contains excessively restrictive criteria for the appointment and membership structure of the Boards of Directors and the Executive Board of state-owned companies, state-controlled companies and their subsidiaries, (...) which is not reasonable".





The State-Owned Companies Act Under Cross Fire

According to said federal deputy, the legal provision which prohibits the appointment of relatives to hold positions of directors and officers should be removed from the Act because it is redundant, considering that Precedent No. 13 issued by the Brazilian Supreme Court already prohibits the practice of nepotism within both governmental entities and administrative entities (the so-called “direct” and “indirect” administration), within the scope of the three branches of the federation.

Another initiative that may change the Act is the direct action for the declaration of unconstitutionality No. 5624/DF, filed by the National Federation of the Personnel Associations of the Brazilian Federal Savings Bank (Fenae) and by the National Confederation of Workers of the Financial Sector (Contraf/Cut).

The action in question, which is being processed before the Brazilian Supreme Court and is reported by Justice Ricardo Lewandowski, seeks the declaration of unconstitutionality of the law for alleged formal and material defects. Particularly with regard to the bans on the positions of directors and officers, the claimants consider that the law violates the constitution by establishing discriminatory rules and by “criminalizing political activism” by prohibiting party and union leaders from holding positions on the boards of directors and executive boards of state-owned and state-controlled companies.

While such imbroglios are not solved, the law is in full force, and it is incumbent upon state-owned enterprises to adjust their governance policies to observe the new rules concerning the membership structure of their executive boards and boards of directors.