

NEWSLETTER No. 89

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SUMMARY

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On January 24, 2022, the Brazilian Securities Commission (CVM) disclosed the minutes of the meeting of the Board of CVM which ruled on the appeal filed by BTG Pactual Serviços Financeiros S.A. DTVM, in the position of administrator of the Maxi Renda Fundo de Investimento Imobiliário (“Fund”), against the decision by the Superintendency of Supervision of Securitization (SSE) in the sense that the earnings of the Fund could only be distributed to the investors when there was accounting profit (in the year or accumulated from previous years) (Ref.: SEI Proceeding no. 19957.006102/2020-10).

In this case, the appellant had been distributing to the Fund’s investors, under title of earnings, amounts calculated based on the cash basis accounting regime, even when those amounts exceeded those recognized from an accounting standpoint as profits for the year and/or accrued profits.

By means of the practice adopted, the “excess” amount distributed increased the rubric accrued losses of the Fund in recurring form. Hence, in the interpretation of the SSE, those amounts could not be classified as earnings, but rather should be classified as amortization of the capital invested.

In contrast, in the interpretation of the Fund’s administrator, Article 10, sole paragraph, of Law 8,668/1993 required that the profit of the Fund be ascertained according to the cash basis regime, based on expenses and revenues that are part of the Fund’s cash flow during a determined interval.

Likewise, it would be mandatory to distribute to the investors 95% of the profits obtained by the Fund, so that its administrator could not fail to promote that distribution based on the cash accounting regime, under risk of exposing the Fund to disqualification of a fiscal nature.

In a vote cast after a request for further time to examine the case record, the director Fernando Galdi highlighted that Article 10, sole paragraph, of Law 8,668/1993 employs imprecise terminology when referring to “profits obtained, ascertained according to the cash accounting regime, based on a semiannual balance sheet or trial balance sheet.” That imprecision led to the issuance of CVM/SIN/SNC Official Circular 1/2014, with the objective of providing guidance to the administrators of real estate investment funds (FIIIs) regarding this aspect.

Further according to him, the CVM had adopted the concept of “net realized profit for the year,” already used by Law 6,404/1976, in the interpretation of the referred provision of Law 8,668/1993.

Therefore, accompanying the vote of Director Fernando Galdi, the Board partially granted the appeal, to recognize that if the amount distributed by the a FII is greater than the amount of profit for the year, plus accrued profits (and/or earnings reserve) from previous years, the amount distributed in excess of the referred sum must be treated for accounting purposes as amortization of shares in the Fund or return of capital.

On January 27, 2022, the CVM issued a note in which it stated that “the referred decision involved a specific case. Nevertheless, the interpretation expressed can be applied to other real estate investment funds that have similar characteristics to that of the fund in the case analyzed.”

Notwithstanding this situation, the Fund’s administrator formulated a request for staying effect prior to a request for reconsideration. On January 31, 2022, the CVM Board granted the requested stay period, to suspend the effects of its decision pending further debate.

More information, along with the full content of the decision of the CVM Board in SEI Proceeding 19957.006102/2020-10, can be found at the CVM’s website (www.gov.br/cvm).

CVM FORGOES REGISTRATION OF INDIVIDUAL NONRESIDENT INVESTORS

On February 7, 2022, the Brazilian Securities Commission (CVM) issued Resolution 64/2022, which altered CVM Resolution 13/2020 (“[CVM Resolution 13](#)”), regarding the registration of the transactions and disclosure of information of nonresident investors in Brazil (“[Resolution](#)”).

The reform promoted by the Resolution had the objective of facilitating access of nonresident investors to the Brazilian securities market, in conformity with National Monetary Council (CMN) Resolution 4,852/2020 and CVM Resolution 13, which began the simplification of this process.

The following alterations caused by the Resolution for this objective stand out:

- (i) forgoing of specific registration of individual nonresident investors with the CVM, only requiring that their data be reported by their representatives in an electronic system made available by the CVM before the start of transactions in the country;
- (ii) permission for the intermediary institution through which nonresident investors carry out transactions in the Brazilian securities market to act as the representative in the country; and

- (iii) limitation of the requirement to send periodic information – monthly and semiannually – by the representatives of nonresident investors only for those registered with the CVM.

The Resolution also altered the requirements for recognition of collective investment entities, requiring them to be located, directly or indirectly, in a jurisdiction that is not classified by the Financial Action Group against Money Laundering and Financing of Terrorism (FATF) or other international organisms to whose rules or recommendations the CVM is bound as non-cooperative, high risk or detainer of strategic deficiencies in combating and preventing the financing of terrorism or financing the proliferation of weapons of mass destruction.

Previously, the CVM recognized those collective investment entities that were not classified by the FATF.

The Resolution will take effect on May 2, 2022.

More information, as well as the full content of the Resolution, can be found at the CVM's website (www.gov.br/cvm).

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