

NEWSLETTER No. 105

JUNE 2023



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SUMMARY

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3

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3

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On June 14, 2023, Decree 11,563/2023 was published, which attributes authority to the Central Bank of Brazil (BACEN) to regulate virtual asset service providers, as defined in Law 14,478/2022.

Among the aspects under the competence of the BACEN are granting and canceling authorizations for functioning, overseeing corporate transactions, imposing conditions for individuals to hold management positions in virtual asset service providers, and generally supervising their activities and applying penalties, among other matters.

However, the Decree does not alter the competence of the Brazilian Securities Commission (CVM) to supervise and regulate virtual assets classified as “securities” pursuant to Law 6,385/1976.

Decree 11,563/2023 took effect on June 20, 2023.

More Information, including the full text of Decree 11,563/2023, can be found at the “Planalto” portal of the Federal Government’s website (www.gov.br/planalto).

CVM ISSUES NEW RULES APPLICABLE TO BRAZILIAN DEPOSITARY RECEIPTS (BDRs)

On May 11, 2023, the Brazilian Securities Commission (CVM) disclosed Resolutions 182/2023 and 183/2023, which apply to programs to issue Brazilian Depositary Receipts (BDRs).

CVM Resolution 182/2023, which revoked CVM Instruction 332/2000, governs aspects related to the assets underlying BDRs, their characteristics and classifications (in three levels) and the requirements for registration with the CVM of programs to issue them. In turn, CVM Resolution 183/2023 establishes complementary alterations in CVM Resolutions 80/2022 and 160/2022 regarding matters related to registration of foreign issuers of Level II and III BDRs.

The draft documents that gave rise to CVM Resolutions 182/2023 and 183/2023 had been submitted to SDM Public Hearing 03/2021, as described in Newsletter 81 of Moreira Menezes, Martins Advogados (June 2021).

Relevant alterations implemented by CVM Resolution 182/2023

During SDM Public Hearing 03/2021, one of the main alterations proposed was modification of the concept of “publicly traded company or the like”, a characteristic required for foreign entities to issue securities backing BDRs.

According to the proposal contained in the draft in question, foreign issuers of securities serving to underpin BDRs must have the following attributes: (i) own legal personality; (ii) liability of their shareholders limited to the issue price of the shares subscribed or acquired; (iii) admission of the

shares issued for trading in an organized securities market; (iv) maintenance of registration with a local supervisor; (v) delegated administration, with a collegial body as the maximum authority; and (vi) the right of shareholders to vote and receive dividends, possibly limited to some types and classes of shares.

Although many of the participants in the public hearing suggested altering the proposed wording to maintain the concept of “publicly traded company or the like” established in CVM Instruction 332/2000, those suggestions were not accepted by the CVM, so that the concept of foreign issuer of securities to serve as backing for BDRs was that proposed in the draft. According to the Report of SDM Public Hearing 03/2021, the CVM sought to bring greater predictability and legal certainty for issuers by defining the concept of “the like” with specification of the objective elements listed in the items of the new Resolution.

Additionally, CVM Resolution 182/2023 attributes to the depositary entity the burden of demonstrating that the local supervisors of issuers and the markets in which their securities are admitted for trading have the competence to obtain and pass through to the CVM the information identified in the Multilateral Memorandum of Understanding of the International Organization of Securities Commissions (OICV/IOSCO), or another agreement formalized with the CVM.

The draft of the document submitted to SDM Public Hearing 03/2021 maintained the three-level structure of BDR programs (BDR Levels I, II and III), allowing the conversion of one level to another (always “upward” as stressed in draft).

In this context, the CVM had initially proposed that that sponsored Level I and Level II resume only to being a way for BDR issuers to establish a presence in the Brazilian market, not a way to obtain funding. The purpose of obtaining funding by means of access to popular savings would be covered by Level III, which permitted the realization of public offerings for distribution (the first of them necessarily an offering registered with the CVM, while the others could adopt the restricted placement efforts regime).

However, after analyzing the suggestions of the market participants at SDM Public Hearing 03/2021, the possibility of realizing public offerings only for distribution by Level III was reconsidered by the CVM, so that the wording was altered to authorize public offerings of BDRs a Level I (sponsored) and Level II, exclusively for professional investors.

Relevant alterations implemented by CVM Resolution 183/2023

In turn, the draft document of this Resolution submitted to the public hearing contemplated alteration of the rules for foreign issuers to obtain registration. Under CVM Instruction 332/2000, these rules were related to the criteria of location of assets and origin of revenues of issuers (which in the opinion of the CVM could lead to arbitrary and undesirable results).

Against this backdrop, the CVM proposed the possibility of foreign issuers obtaining registration through three possible routes: (i) having a “recognized market” as their main trading market; (ii) having 25% or more of their shares in circulation without interruption and an average daily financial

volume greater than or equal to R\$ 25 million for at least 18 months before the request for registration; or (iii) having headquarters in countries whose local supervisor has entered into a specific bilateral agreement with the CVM for the purposes of trading BDRs, aimed at cooperation, exchange of information and increased effectiveness of oversight and supervisory measures.

After SDM Public Hearing 03/2021, the CVM relaxed the requirement of item (ii) mentioned above, so that in that case the issuers will be required only to have 10% or more of their shares in circulation without interruption and an average daily financial volume greater than or equal to R\$ 10 million for at least 18 months before the request for registration.

Finally, another relevant alteration implemented by CVM Resolutions 182/2023 and 183/2023 is the provision of information by the investment entities classified as foreign issuers.

According to the new rules, those entities now are required to provide Information about: (i) the fees paid to the service providers for overall administration and portfolio management; (ii) a list of the charges that can be imputed to the issuer and the overall maximum limit per financial year; (iii) a list of the providers of services for portfolio management, consulting, treasury, control and processing of assets, booking, custody and market making; (iv) a list with justifications of any changes in the fair value of the investments with a substantial impact on the net equity of the issuer; and (v) composition of the portfolio, indicating the quantity and type of securities contained therein.

CVM Resolutions 182/2023 and 183/2023 took effect on June 1, 2023.

More Information, including the full text of the Resolutions, can be found at the CVM's website (www.gov.br/cvm).