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SUMMARY

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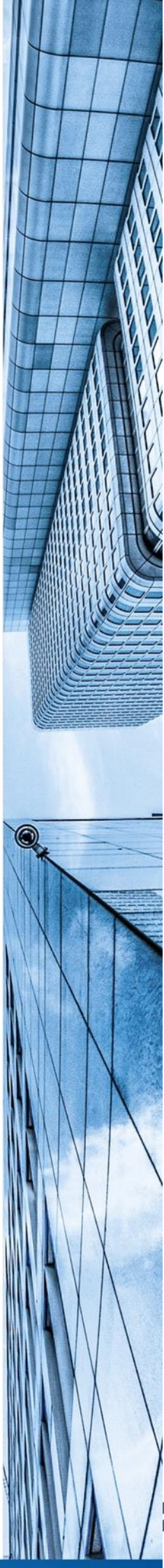

CMN REGULATES THE CONCEPTS OF "INVESTMENT ENTITY" AND "CREDIT RIGHTS" APPLICABLE TO THE TAXATION OF INVESTMENT FUNDS

On December 26, 2023, the National Monetary Council (CMN) published CMN Resolution 5,111/2023, which regulates the concepts of "investment entity" and "credit rights" for the purposes of articles 19 and 23 of Law 14,754/2023 and article 3, §7, of Law 11,312/2006 (included by Law 14,754/2023).

Law 14,754/2023 contains rules on the taxation of investments in investment funds in Brazil, as well as the income obtained by individuals residing in Brazil from financial investments, controlled entities and trusts located abroad.

The referred Law establishes the "General Regime" on taxation of investment funds, according to which the earnings from investments in investment funds (open or closed) are subject to income withholding tax on the following dates: (i) the last business day of May and November each year (a mechanism colloquially called "share eating"); or (ii) the dates of distribution of earnings, or amortization or redemption of the shares in the investment fund, whichever occurs first.

Nevertheless, the Equity Investment Funds (FIPs), Exchange Traded Funds (ETFs), with the exception of Fixed-Income ETFs, and Receivables Investment Funds (FIDCs), which are classified as "investment entities" are excluded from the "General Regime", and instead are subject to the "Specific Regime of Funds not Subject to Periodic Taxation", which are instead subject to the other requirements in Section III of Law 14,754/2023.[1]

For the purpose of that exclusion, the CMN was delegated with authority to define "investment entities" and "credit rights" (in this latter case, for the purpose of classifying a given fund as a FIDC).

According to CMN Resolution 5,111/2023, investment funds in Brazil that have a professional management structure, represented by agents or service providers with powers to make investment and divestment decisions discretionarily, for the purpose of obtaining a return from appreciation of the capital invested, earnings generated or both, are classified as "investment entities". In this regard, the CMN established the following requirements to be classified as "investment entities":

(i) receive money from one or more investors to invest in one or more assets;

(ii) be managed discretionarily by professional agents or service providers duly authorized to engage in this activity (when required by the legislation); and

(iii) establish in their bylaws and other constitutive documents the strategies to be implemented for generation of returns to the investors, consisting of one or more of the following strategies: (iii.1) investment and divestment of assets that compose the fund's portfolio, observing the strategy, market conditions, and when applicable, the time frame

[1] The Equity Investment Funds (FIAs) are also subject to the "Specific Regime of Funds not Subject to Periodic Taxation", regardless of being classified as "investment entities".

established therein, so as to maximize the return to the investors; (iii.2) investment in and maintenance of the assets that compose the portfolio, according to the investment policy, until liquidation of those assets by means of payment or any other form of trading those assets or until liquidation of the fund, seeking a return in the form of appreciation of the capital or generation of earnings, or both; or (iii.3) investment in and maintenance of the assets that compose the portfolio, without defined time frame for liquidation or divestment, seeking appreciation of the capital invested and realization of a return by means of redemption or amortization of the shares of the fund or mechanisms that assure the trading of the shares in the secondary market.

As examples, CMN Resolution 5,111/2023 indicates that the following funds will not be classified as "investment entities": (i) those that have an investment committee or other deliberative governance body in which the majority investors (individuals) or the people indicated thereby decide on the composition of the fund's portfolio; (ii) that control legal entities that have been controlled, directly or indirectly, by the fund's majority investors in the 5 years before the investment by the fund; (iii) whose majority investors are administrators of companies in the fund's portfolio; or (iv) where the majority investors can determine or veto investment and divestment decisions.

On the other hand, the same Resolution mentions the following characteristics that do not necessarily disfigure the nature of an "investment entity": (i) existence of consultative governance bodies with participation of the investors, or other means of advice from and oversight by the investors, as well as an investment committee or other deliberative governance body that does not fit in item "(i)" of the previous paragraph; (ii) existence of a voting agreement among the fund's investors, provided that the agent or service provider maintains discretionary power to make decisions related to the composition of the fund's portfolio; (iii) existence of minority participation in the fund, directly or indirectly, by an agent, service provider or individual who takes part in the professional management structure, for the purpose of aligning interests with the investors; (iv) existence of direct or indirect participation as an investor in a FIDC, by the assignor, originator, portfolio manager, specialized consultant or any other service provider of the fund; or (v) existence of an investment policy that specifies the acquisition of assets from a single issuer, assignor, debtor or originator, irrespective of the limits of concentration or diversification.

Additionally, CMN Resolution 5,111/2023 establishes the concept of "credit rights" referred to in art. 19 of Law 14,754/2023. According to that legal provision, for the purpose of taxation, funds that have a portfolio composed at least 67% by credit rights are considered to be FIDCs.

In this context, the following will be deemed "credit rights": (i) rights and documents representative of credits; (ii) securities representative of credits; (iii) certificates of receivables and other instruments representative of securitization operations that are not based on non-standardized credit rights; and (iv) by equivalence, the shares of FIDCs that satisfy the referred provision.

However, CMN Resolution 5,111/2023 makes exception for the following instruments from the fiscal concept of "credit rights": (i) public bonds issued by the federal, state, municipal and Federal District governments; (ii) bonds or co-obligation instruments issued by financial institutions; (iii) repo transactions involving the assets mentioned in items "(i)" and "(ii)"; (iv) shares of classes of

investment funds that preponderantly invest in the assets referred to in items "(i)", "(ii)" and "(iii)"; (v) debentures that are not convertible or without the right to participate in the profits generated by public distribution; and (vi) publicly distributed commercial notes. Such instruments, if they integrate the portfolio of a given FIDC, cannot be deemed "credit rights" for the purpose of reaching the minimum percentage stated in the referred art. 19 of Law 14,754/2023.

CMN Resolution 5,111/2023 took effect on the date of its publication (December 26, 2023).

More information, as well as the full text of the Resolution, can be found at the website to the Central Bank of Brazil (www.bcb.gov.br).