

# NEWSLETTER No. 121

OCTOBER 2024



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# SUMMARY

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## **CVM ISSUES RESOLUTION ON INVESTMENT FUNDS IN AGRIBUSINESS PRODUCTION CHAINS (FIAGRO)**

On September 30, 2024, the Brazilian Securities and Exchange Commission (CVM) issued CVM Resolution no. 214/2024, which adds Normative Annex VI and Supplements O, P and Q to CVM Resolution no. 175/2022, containing specific rules on Investment Funds in Agribusiness Production Chains ("FIAGRO").

FIAGRO was established by Law no. 14.130/2021 and initially regulated, on a transitional basis, by CVM Resolution no. 39/2021. After a trial period and discussions with the market within the scope of Public Consultation SDM no. 03/2023, CVM proceeded with the definitive regulation of FIAGRO.

### Application of the regulation

In line with the provisions of the transitional regulations of CVM Resolution no. 39/2021, FIAGRO may have to comply, in addition to the rules specific to this type of fund, with rules relating to another category of investment fund, on a subsidiary basis.

In this regard, if a class of FIAGRO shares has an investment policy that makes it possible to invest more than 50% of its net equity in assets that are also the subject of another category of fund, it must subsidiarily observe the rules applicable to the respective category (insofar as they do not conflict with the specific provisions of Normative Annex VI, referring to FIAGROs). During the transitional regime of CVM Resolution no. 39/2021, the investment of more than 1/3 of FIAGRO's net equity in assets from another category was sufficient to give rise to the need for subsidiary compliance with the rules applicable to the category in question.

### Portfolio of permitted assets

In order for FIAGRO to participate in agribusiness production chains, its investment portfolio must be made up of the following assets: (i) rights in rem over rural real estate; (ii) stakes in companies that carry out activities that are part of agribusiness production chains; (iii) financial assets, credit securities and securities issued by natural and legal persons that are part of agribusiness production chains; (iv) agribusiness credit rights and real estate credit rights relating to rural real estate; (v) agribusiness receivables certificates - CRA and other securitization securities issued with backing in agribusiness credit rights and real estate receivables certificates - CRI and other securitization securities issued with backing in credit rights relating to rural real estate; (vi) receivables certificates and other securitization securities issued with backing in financial assets issued by natural or legal persons who are part of agribusiness production chains; (vii) quotas of classes that invest more than 50% of their net equity in the assets referred to in items "(i)" to "(vi)" above, which includes investments in quotas of other FIAGRO, but is not limited to this category of funds; (viii) agribusiness carbon credits; and (ix) decarbonization credits - CBIO.

### Agribusiness carbon credits

It is worth highlighting the possibility of FIAGRO, including those aimed at the general public (“retail”), trading carbon credits. In this sense, the new rule defines carbon credits, for the purposes of FIAGRO, as securities representing an effective reduction in the emission or removal of greenhouse gases from the atmosphere, as established by specific legislation and regulations, generated in the context of the activities of agribusiness production chains.

If FIAGRO’s investment policy allows for the trading of carbon credits, the fund’s regulations must clearly detail how the administrator will control the ownership of carbon credits, which can be done in two ways: the administrator can choose to hire a specialized service provider to carry out this function, or it can directly assume responsibility for exercising this control.

On the other hand, the manager is responsible for establishing the methodologies that will be accepted for certifying the effective reduction or removal of greenhouse gases in the projects that give rise to the credits considered eligible for the asset portfolio. Thus, the manager must select and define the technical criteria and procedures that will be used to validate the results obtained by the projects, ensuring that they are in line with the standards required for certification and meet the normative and regulatory requirements applicable to the process.

FIAGRO is also allowed to issue carbon credits from the rural properties in its portfolio.

### Rural properties

CVM Resolution no. 214/2024 expanded the concept of rural property previously provided for in the transitional rules of CVM Resolution no. 39/2021.

Under the terms of the new rule, rural properties are those that: (i) have a Rural Property Registration Certificate (CCIR); (ii) even if located on the urban perimeter, are intended for the exploitation of agribusiness production chain activities and are registered with the General Property Registry (RGI); and (iii) have a deposit of non-tidal water, natural or artificial, for use in fish farming or aquaculture activities.

### Restricted classes

In addition, CVM Resolution no. 214/2024 allows the regulation of restricted classes of FIAGRO (i.e., those intended exclusively for qualified or professional investors, as defined in CVM Resolution no. 30/2021), provide for: (i) exemption from preparing an appraisal report for the payment of quotas in assets, without prejudice to the approval of the shareholders’ meeting as to the value attributed to the asset; (ii) the establishment of deadlines for the conversion of quotas and for the payment of redemptions other than those provided for in the regulations, with the establishment of a maximum conversion and payment deadline being permitted; and (iii) the provision for the existence of additional charges to those listed in CVM Resolution no. 175/2022.

### Responsibilities and roles of the manager

In addition to the manager's obligations provided for in the general part of CVM Resolution no. 175/2022, CVM Resolution no. 214/2024 provides the following specific obligations of the FIAGRO manager: (i) in carrying out the investment policy, without prejudice to other duties, ensure that the composition of the portfolio of assets does not alter the tax treatment of the class or of the quota holders, as provided for in the legislation applicable to FIAGRO; (ii) ensure that the land and environmental integrity of the rural property is preserved; (iii) in relation to the portion of the portfolio made up of equity holdings in closed companies and limited companies, observe certain rules applicable to the managers of equity investment funds - FIP, including with regard to effective influence in defining the strategic policy and management of the investee company; (iv) in relation to the portion of the portfolio made up of credit rights, observe certain rules applicable to the managers of credit rights investment funds - FIDC; and (v) in relation to agribusiness carbon credits, verify the existence, integrity and ownership of the assets within the scope of the due diligence for their acquisition.

In addition to the services that the manager may contract in accordance with the general part of CVM Resolution no. 175/2022, the manager may also contract the following services on behalf of FIAGRO, provided that they adhere to the investment policy: (i) specialized consultancy to support and subsidize the activities of analysis, selection, monitoring and evaluation of assets; (ii) specialized company to manage the leases or rentals of rural properties and the exploitation of surface rights, as well as to monitor and follow up on projects and the commercialization of rural properties; and (iii) collection agent to collect and receive credit rights and other overdue and unpaid assets.

### Validity and adaptation

CVM Resolution no. 214/2024 will come into force on 03.03.2025, and FIAGROs that have already been set up and are operating on that date must fully adapt to the provisions of the rule by 30.09.2025.

Further information, as well as the full text of CVM Resolution no. 214/2024, can be found on the CVM website ([www.gov.br/cvm](http://www.gov.br/cvm)).

## **STJ EXEMPTS STOCK OPTIONS FROM INCOME TAX INCIDENCE**

On September 18, 2024, the First Section of the Superior Court of Justice (STJ) published rulings which, by majority, dismissed Special Appeal no. 2.069.644/SP, filed by the National Treasury, as well as upholding Special Appeal no. 2.074.564/SP, filed by taxpayers, in order to establish Repetitive Theme no. 1.226, establishing the legal thesis that (i) in the *Stock Options* regime, Individual Income Tax ("IRPF") is not levied on the actual acquisition of shares from the company granting the purchase option, given that there is no increase in assets in favor of the acquiring option holder, since it is of a mercantile nature; and (ii) IRPF will be levied, however, when the acquirer of shares in the *Stock Options* resells them with a determined capital gain.

In its appeal, the National Treasury argued that *stock options* were remunerative in nature, since the purchase of shares in plans with subsidized amounts would characterize an increase in assets, attracting IRPF taxation. On the other hand, the taxpayers argued that the strictly commercial nature of the *Stock Option* plan would be characterized by: (a) onerousness, since the shares are acquired with the employee's resources; (b) voluntariness, considering that, once the plan has been offered, the participant will only decide in the future whether to join it; and (c) risk, since there is nothing to prevent the subsequent sale of the shares on the financial market at a lower value than the acquisition.

Reporting Justice Sérgio Kukina accepted the taxpayers' argument, considering that there is no increase in assets at the time of the purchase of shares, since "the employee is merely choosing to acquire an asset (share) and subsequently makes the agreed payment for it (expenditure)", so that there would be no "new wealth arising from the exploitation of the holder's assets".

The Reporting Justice also stated that the thesis defended by the National Treasury that "*the employee earns income consisting of the difference calculated between the amount stipulated/paid for the lawsuit and that other corresponding to what was practiced on the financial market at the same moment*" is merely a presumption of economic or financial availability of wealth added to assets.

Justice Maria Thereza de Assis Moura gave a dissenting opinion, specifically regarding the characterization of an increase in assets in the event that the option is exercised for less than the market value of the share. In her dissenting opinion, in this case, the exercise of the option generates an immediate equity variation, regardless of the sale of the security. In this regard, the Justice argued that the difference between the market value of the share and the value stated in the stock option plan would be taxable by the IRPF.

Based on these votes, the First Section of the STJ decided, by a majority, with Justice Maria Thereza de Assis Moura defeated, to set Repetitive Topic 1.226 to the effect that IRPF is not levied on the *Stock Option* regime, when the shares are actually acquired from the company granting the purchase option, given that there is no increase in assets for the benefit of the acquiring option holder. On the other hand, IRPF will be levied if the shares are resold with a capital gain. Justices Gurgel de Faria, Paulo Sérgio Domingues, Teodoro da Silva Santos, Afrânio Vilela and Benedito Gonçalves sided with the Reporting Justice Sérgio Kukina.

More information, as well as the full judgment, can be found on the STJ website ([www.stj.jus.br](http://www.stj.jus.br)).

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