

NEW FRAMEWORK CREATES INVESTMENT OPPORTUNITIES IN BRAZIL'S AGRIBUSINESS

A Provisional Measure (MP) bringing positive innovations that can foster national and foreign investment in the agribusiness sector was enacted in October. Eagerly expected by the highest performing sector in the Brazilian economy, MP 897 has rules to improve credit instruments and enhance guarantees, including currency hedged receivable certificates.

One of the most significant innovations is that the MP allows debtors to issue Rural Product Notes ("CPR") with monetary adjustment based on exchange rate variation. CPRs embody a promise to deliver products or pay creditors an amount of money obtained through their sale.

Given that CPRs usually serve as underlying or referenced assets for the issuance of Agribusiness Receivables Certificates ("CRAs"), the offering of CRAs to non-Brazilian investors shall become more frequent. CRAs are a crucial capital markets mechanism that has liquidity in local financial markets.

The issuance of foreign currency indexed CRAs is permitted since 2016, but those transactions were very uncommon because the CPRs used as backing for the issuance of CRAs abroad could not be hedged against exchange rate variation. If issued outside Brazil, CRAs can be registered directly with a registration and settlement entity abroad, provided that this entity is (i) authorized in its place of origin; and (ii) supervised by a foreign authority which is signatory of a bilateral information exchange agreement with Brazilian Securities Exchange Commission ("CVM") or of the International Organization of Securities Commissions Multilateral Memorandum of Understanding ("IOSCO MMOU").

Hedged CRAs tend to be issued to non-Brazilian investors, but the MP delegates powers to the Nacional Monetary Council to set additional conditions for the issuance of such certificates, including in favor of Brazilian investors.

SEGREGATION REGIME AND RURAL PROPERTY BANKNOTE

The MP allows the owner of a rural real estate property to allocate the entirety or a portion of it to a special segregation regime, under which the “segregated property” guarantees credit operations with financial institutions.

In addition, it creates the Rural Property Banknote (“Cédula Imobiliária Rural” – “CIR”), a credit note representing (i) the promise to pay the amount arising from a credit operation contracted with a financial institution; and (ii) in case of default, the obligation to transfer to the creditor the segregated property used to secure such credit operation.

The credit secured by the segregated property will fall outside the scope of in-court reorganization, insolvency or bankruptcy procedures. In case of default, the creditor is authorized to immediately claim the transfer of the underlying land before the relevant real estate registry office and then sell it to third parties.

Pursuant to the MP, this structure is not available in case of properties already mortgaged, fiducially assigned or in any other way granted as collateral to other obligations. Moreover, the segregated property linked to a CIR cannot be used to secure new obligations.

The segregation is not enforceable against labor, social security and tax creditors, according to the MP. This exception undermines the effectiveness of the collateral granted and therefore should be excluded during the assessment of the MP by Congress; indeed, amendments to that effect have already been proposed.

BANK CREDIT NOTE AND ELECTRONIC NOTES

The MP also introduced significant changes to rules governing other financing tools widely used in other sectors in Brazil, such as the Bank Credit Note (“CCB”). The MP makes the issuance of CCBs simpler as it in practice eliminates the burdensome procedures and requirements imposed by CVM.

CCBs are issued by individuals or legal entities in favor of a financial institution or equivalent entity and represent a promise to pay in cash under a credit transaction.

Prior to the issuance of the MP and based on existing Brazilian law, CVM had fixed the understanding that a CCB would be considered a security (“valor mobiliário”) if distributed (i) through a public offering; and (ii) without the co-obligation of the financial institution should a default occur. The new regulation restricts the cases in which a CCB may be treated as a security and therefore subject to the capital market, including CVM, rules.

Henceforward, even in situations (i) and (ii) , CCBs are not to be considered securities subject to capital markets law whenever the financial institution holds the credit rights represented by the CCB; guarantees the obligations represented by the CCB; or perform, until the CCB final settlement, the service of monitoring the flow of funds between creditors and debtors and any defaults.

The MP also contains specific provisions expressly admitting the issuance of CCBs in book-entry form, through an entry in an electronic book-keeping system of an entity authorized by the Central Bank.

Brazilian case law has already stated that electronic CCBs can be enforced, but the MP confers enhanced legal certainty to that understanding. For this purpose, the signature of the issuer (and guarantor, if any) can be collected in electronic form, as long as the identification of the signatory is ensured.

The issuance of notes in book-entry form is expressly authorized for other credit notes and certificates, such as Real Estate Credit Notes and the CPR. The MP aligns Brazilian rules to international trends in this regard, aiming to enhance the use of electronic financial assets and securities.

The MP came into force on October 2, 2019; Congress needs to convert it into ordinary law by March 11, 2020, or else it will lose effect; under such circumstances, Congress is to issue a Decree regulating the legal relations arising from it. As of October 31, the MP had received 349 suggestions of amendments to be assessed by Congress until March 11, 2020.

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