

## International Financial Products and Services

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This article reviews selected developments in international financial products and services during the year 2012.<sup>1</sup> This year's article focuses on specific jurisdictions in South America and Europe.

### I. Developments in Brazil

#### A. EXCHANGE TRANSACTIONS

By means of Resolution No. 4113 of July 26, 2012,<sup>2</sup> the Brazilian Monetary Council (*Conselho Monetário Nacional* or CMN) approved measures that simplify foreign exchange (fx) transactions of small value and provide more access alternatives and greater reach to the Brazilian fx market. Resolution 4113 allows manual exchange transactions (*operações de câmbio manual*) to be carried out through bank note vending machines (*máquina dispensadora de cédulas*), provided that the clients are duly identified in the manner specified by the Central Bank of Brazil (*Banco Central do Brasil* or Bacen).

Under current regulations, the agents authorized to operate in the fx market (authorized agents) must comply with the rules to perfectly identify their clients and assess the responsibility of the appropriate parties regarding the legality of the operations performed. Each client can purchase and sell foreign currency through a bank note vending machine up to the limit of U.S. \$3,000 (or its equivalent in other foreign currency) for

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1. For developments in 2009, see Walter Stuber, Adriana Maria Gödel Stuber, Jacek Jonak, Francisca Brodrick, Lennaert Posch, Maarten Landkroon, Martin Liebi & Gary P. Silber, *International Financial Products and Services*, 44 INT'L LAW. 273 (2010). For developments in 2008, see Philip J. Henderson, Adriana Maria Gödel Stuber, Philip J. Henderson, Mark Melton, Gregory S. Arnold & Robert L. Brown, *Financial Products and Services*, 43 INT'L LAW. 641 (2009).

2. See Resolução CMN No. 4113, de 30 de Julho de 2012, Diário Oficial da União [D.O.U.] de 30.7.2008 (Braz.).

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each operation.<sup>3</sup> Within this ceiling, the transaction is considered of small value. In any case, the client must be perfectly identified, as explained above, but the authorized agent is waived from the submission of the documentation regarding the underlying legal act to the exchange transaction, as well as from the custody of the client's identification documents.

These measures are in line with the actions adopted by the Brazilian Federal Government to simplify and modernize the exchange market in Brazil, and without sacrificing security, they will enable the creation of a network compatible with tourist centers of various sizes. This will help Brazil expand its capacity to meet the increase in international tourism expected in the sporting events that Brazil will host in the coming years, namely the 2014 World Cup and the 2016 Olympic Games in Rio de Janeiro.

**B. BRAZILIAN REAL ESTATE INVESTMENT FUNDS MAY RETAIN MARKET MAKERS**

The Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários* or CVM) authorized Brazilian Real Estate Investment Funds (*Fundos de Investimento Imobiliário* or FII) to contract market makers (*formadores de mercado*) for their units at the expense of the unit holders. This decision was adopted by means of CVM Instruction No. 528, of October 23, 2012 (CVM Instr. 528/2012),<sup>4</sup> which amended CVM No. 472, of October 31, 2008<sup>5</sup> and which regulates the incorporation, administration, operation, and public offering for distribution of units and information disclosure of the FII and expressly includes the market maker in the list of service providers that can be retained by the FII's administrator in the name of the investment fund.

The FII is an investment vehicle structured as a closely-held fund aimed at developing real estate-related projects (*empreendimentos imobiliários*) such as construction, acquisition of property, and investments in projects that enable the growth of housing and services in both urban and rural areas, for subsequent sale, letting, or leasing.

The acquisition of units of the FII is deemed to be a long-term investment. The role of the market maker is to buy and sell offers daily for a certain number of units of the FII that retained the market maker's services to reduce asset volatility and create liquidity for the trading of these units. Investors are generally more attracted by liquidity because they will have confidence that it is possible to buy and sell such units at any time.

Only legal entities that are duly registered with the managing entities of organized markets may provide services as market makers to the FII. Neither the administrator (*administrador*) nor the manager (*gestor*) of the FII can act as a market maker for the units of the fund. But the contracting of parties that are related to the administrator or the manager as market makers is admitted, provided that it is submitted to the prior approval at the FII Unit Holders' General Meeting. This decision must be made by a majority of votes with each unit entitled to only one vote. The hiring or termination of a service agreement between the FII and the market maker is a material fact (*fato relevante*) and must be disclosed as such.

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3. *Id.*

4. See Instrução CVM No. 528, de 24 de Outubro de 2012, Diário Oficial da União [D.O.U.] de 24.10.2012 (Braz.).

5. See Instrução CVM No. 472, de 31 de Outubro de 2008, Diário Oficial da União [D.O.U.] de 31.10.2008 (Braz.).

The possibility of hiring a market maker does not mean that all FIIs will contract such a service. Even if they do, there is nothing to prevent the unit holders of a FII to review the hiring of the market maker and resolve to terminate the service agreement entered into with the market maker or even replace such market maker, if the cost-benefit ratio is not satisfactory.

The regulation of any FII incorporated after the enactment of CVM Instr. 528/2012 that intends to contract a market maker must expressly contemplate this possibility as well as the remuneration to be paid for such service.

For any existing FII, it is necessary to amend the fund's regulation to provide for the hiring of the market maker, which must be duly approved at the FII Unit Holders' General Meeting by a majority of votes, giving them the opportunity to assess the desirability of contracting this service.

## **II. Developments in Luxembourg**

The Alternative Investment Fund Managers Directive (AIFMD or Directive), which came into force on July 21, 2011, forms part of a European program to extend regulation and oversight to actors and activities that embed significant risk.<sup>6</sup> Among such actors are managers of alternative investment funds (AIFs). AIFs comprise, for the most part, hedge funds, private equity funds, and real estate funds, but have been defined broadly so as to include in principle all funds not regulated under the directive governing undertakings for collective investments in transferable securities (UCITS, i.e. retail funds with a passport for distribution throughout the European Union).

The AIFMD will significantly change the legal framework for asset managers wishing to manage AIFs and market them to investors. First, all managers of AIFs managed or marketed within the European Union, including those which are domiciled offshore, will need to register and comply with the relevant provisions of the Directive, including strict authorization requirements, operating conditions, organizational rules, and transparency requirements. Second, managers domiciled in the European Union will benefit from a passport beginning in July 2013 that will allow them to market EU AIFs they manage to professional investors across the European Union. Non-EU managers and funds will only be able to benefit from the passport after a transitional period lasting at least until 2015. Between 2013 and 2018, they will be allowed to market the AIFs they manage in the European Union by using national private placement rules, subject to complying with a certain number of provisions of the Directive, such as transparency requirements and cooperation agreements to be entered into between the relevant authorities of the manager and the home state authority of the AIF.

The deadline for transposing the AIFMD into national law is July 22, 2013.<sup>7</sup> As was the case for the implementation of the UCITS Directive into national law, Luxembourg is keen to become one of the first jurisdictions to implement the AIFMD. Luxembourg is expected to pass implementing legislation early in 2013.

By creating a harmonized European framework, the AIFMD will permit Luxembourg to stretch its pan-European distribution approach alongside the UCITS model and to

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6. Commission Directive 2011/61/EU, 2011 O.J. (174) 1 (EU).

7. *Id.*

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offer alternative asset managers attractive structuring opportunities. By granting a passport for the marketing of AIFs to professional investors within the European Union, the AIFMD also offers Luxembourg an opportunity to become a pan-European and global distribution platform for alternative investment funds. Luxembourg already offers a legal and tax framework for alternative investment activities through investment structuring opportunities and its double tax treaty network. In terms of regulated investment vehicles, in addition to the Investment Company in Risk Capital (SICAR) governed by the 2004 Law and the Part II funds of the 2010 Law applicable to non-UCITS structures, the specific legal regime for Specialized Investment Funds (SIFs) created in 2007 has bolstered the alternative sector, facilitating the design of investment structures for institutional and professional investors in the private equity, real estate, and hedge fund sectors. At the end of 2012, the non-UCITS sector (Part II funds and SIFs) represented €468.95 billion of assets under management. The 1,472 SIFs accounted for more than half of this amount with €267.36 billion of assets under management.<sup>8</sup>

The AIFMD includes several requirements that will apply at the level of the AIF, such as: (1) the appointment of a depositary or of a central administration agent; (2) compliance with transparency rules by issuing a placement memorandum or issue document; (3) producing an annual report; and (4) appropriate reporting to the authorities and the investors.<sup>9</sup> Unlike for funds of other jurisdictions, these requirements will not significantly impact Luxembourg UCIs, SICARs or SIFs,<sup>10</sup> as they are already subject to similar requirements under Luxembourg regulations.

Several requirements in the Directive are UCITS-inspired and give Luxembourg a possibility to leverage on its strong UCITS position. In particular, the operational requirements imposed by the AIFMD on AIFM are similar to those applicable to existing UCITS management companies and service providers, notably in terms of substance and operating conditions. Because UCITS management companies shall not be required, in order to be authorized as AIFM, to provide information already provided when applying for authorization under the UCITS regime, they can easily develop their business in the alternative sector. As for risk management, adjustments rather than onerous changes are required to ensure compliance with the requirements of the AIFMD.

Third country managers will benefit from the passport only after a transitional period of two years. Between 2013 and 2018, they will be allowed to market the AIFs they manage in the EU by using national private placement rules of EU Member States. But private placements are subject to certain conditions, in particular the existence of cooperation agreements between the host country of distribution and the home state of the AIF. The European Securities and Market Authority (ESMA) intends to centrally negotiate multilateral cooperation agreements. This raises the question of whether ESMA will be in a position to finalize such agreements for 2013. In this regard, Luxembourg already benefits from a network of memoranda of understanding and cooperation agreements with asset manager jurisdictions, such as the United States, Hong Kong, Switzerland, the Channel Islands, and Singapore. Finally, under the AIFMD, once the passport becomes

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8. *Commission de Surveillance du Secteur Financier*, CSSF NEWSLETTER (CSSF, Luxembourg), Nov. 8, 2012, at 11.

9. *Id.*

10. Especially AIFs, whose legal form permits internal management, that decide to remain internally managed and which therefore become the AIFM according to the Directive.

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available, non-EU managers will be regulated by a “Member State of reference” in addition to their home regulators. But non-EU managers may face significant uncertainties regarding which EU Member State will be their Member State of reference, as the designation of the Member State of reference depends on a certain number of complex criteria provided by the Directive.

AIFM-licensed Luxembourg management companies in these circumstances represent an opportunity for non-EU managers to create AIFM managing several AIFs for the purpose of benefiting from the AIFM passport in 2013 instead of 2015, and therefore using Luxembourg as a gateway to Europe. This will allow the management company, i.e. the AIFM, to delegate the portfolio management to a non-AIFM, including third party managers, subject to the conditions of the Directive. Luxembourg can provide alternative managers with an attractive location to develop their activities. The AIFMD offers Luxembourg an opportunity to leverage its UCITS and existing product regulation. The draft Luxembourg bill implementing the AIFMD includes an alternative package of other legislative initiatives, including the possibility to structure AIFs in the form of a limited partnership that might suit the needs of Anglo-Saxon asset managers and investors.

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