COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Brazil

CAPITAL MARKETS

Contributor

Mattos Filho

Jean Marcel Arakawa

Partner | jarakawa@mattosfilho.com.br

Vanessa Fiusa

Partner | vanessa.fiusa@mattosfilho.com.br

Caio Cossermelli

Partner | caio.cossermelli@mattosfilho.com.br

Henrique Ferreira Antunes

Partner | henrique.antunes@mattosfilho.com.br

This country-specific Q&A provides an overview of capital markets laws and regulations applicable in Brazil.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

BRAZIL
CAPITAL MARKETS

1. Please briefly describe the regulatory framework and landscape of both equity and debt capital market in your jurisdiction, including the major regimes, regulators and authorities.

The regulatory framework and landscape regarding the Brazilian capital market is set forth by the Brazilian Corporate Law, and the Brazilian Capital Markets Law, as well as through specific resolutions set forth by the Securities and Exchange Commission of Brazil ("CVM"), an independent federal agency, responsible for regulating, supervising and sanctioning the local capital market and its participants.

The CVM regulatory framework has been broadly revised in 2022 as to, among other alterations, consolidate the regulations for debt and equity public and restricted offers into CVM Resolution No. 160. In addition to CVM Resolution No. 160, which details the requirements for carrying out public offers in general, the new regulatory framework also encompasses revised regulations on tender offers, set forth by CVM Resolution No. 85.

The Brazilian debt capital market ("DCM") is further regulated through specific legislation, including resolutions issued by the CVM or the National Monetary Council ("CMN"), such as CVM Resolution 60, which sets forth the requirements to issue Real Estate Receivables Certificates ("CRI") and Agribusiness Receivables Certificates ("CRA"). Moreover, certain securities available in the Brazilian DCM are subject to special tax legislation, as is the case with long-term infrastructure bonds, which offer tax benefits and exemptions.

Trading in the Brazilian capital market is carried out by B3 S.A. – Brasil, Bolsa, Balcão ("B3"), which provides trading services in an exchange and OTC environment, encompassing exchanges of securities, commodities, and futures, as well as dealing with the custody and settlement of assets and registry of operations.

For purposes of representation, capital market players, such as investment banks, brokerages, and trades corporations, have jointly established the Brazilian Association of Financial and Capital Markets Entities ("ANBIMA") as a way to concentrate their representation before the regulators. Among ANBIMA's attributions, the entity may analyse certain equity and debt public offers on behalf of CVM, who has delegated some market overseeing responsibilities to ANBIMA as a way to optimize public offerings in Brazil.

2. Please briefly describe the common exemptions for securities offerings without prospectus and/or regulatory registration in your market.

Securities offerings in Brazil are regulated by the CVM, mainly through its Resolution No. 160, which details the requirements for carrying out debt and equity public offers. Under such regulation, which includes some exceptions (safe harbours), all public securities offerings are subject to registration with CVM that should follow an ordinary or an automatic (fast-track) process, depending on its proposed structure.

Some of the most relevant exceptions that do not require registration with the CVM are the following:

- Offering of securities that are issued abroad and admitted for trade in a foreign stock exchange targeting Brazilian professional investors. The settlement of the offer must take place outside of Brazil in a foreign currency through an account held by the investor in a foreign country. Additionally, according to Resolution 160, these securities are prohibited from trading on Brazilian securities markets after their acquisition by the investors
- Offering of a single and indivisible batch of securities intended for a single investor.
- Offering of securities related to compensation plan (e.g. stock option plan).

In general, the ordinary registration process applies to

offering targeting investors in general (i.e. offers aimed at retail investors) and requires the issuer to provide CVM with more extensive documents and information.

Alternatively, certain offerings may follow the automatic registration process, which significantly reduces the volume of information presented to CVM, as well as the timeframe for the offering. The automatic registration does not depend on CVM's prior analysis of the offering, but may, in some cases, be previously analysed by a self-regulatory entity authorized by the CVM, such as ANBIMA.

Exemptions related to the prospectus and other required offering documents may apply, depending on the proposed structure for the offering, such as:

- Non-IPO equity offerings and debt offerings issued by listed companies, exclusively targeting professional investors, such as financial institutions, insurance companies, pensions funds, foreign investors, investment funds, or individuals or legal entities holding investments above BRL 10 million.
- Debt offerings intended exclusively for creditors of issuers undergoing judicial or extrajudicial recovery, under the terms of a court-approved judicial or extrajudicial recovery plan.

3. Please describe the insider trading regulations and describe what a public company would generally do to prevent any violation of such regulations.

The practice of insider trading, that is, the use of privileged information to gain an advantage through the trading of securities, is prohibited under local regulations, mainly by the Brazilian Corporate Law, the Brazilian Capital Markets Law, and CVM Resolution No. 44.

In general, persons who have access to material non-public information (i.e. information that can reasonably influence (i) the quotation of securities; (ii) investment decisions; and/or (iii) the decision of investors to exercise any rights relating to such securities) are restricted from trading with securities issued by the respective public company prior to the disclosure of such information by means of a document known as "material fact" that is filed with CVM.

In addition, the CVM rule also provides express prohibition for controlling shareholders, directors and executives of the public company to trade securities in the following cases:

i. within 15 days prior to the release of the company's financial reports and statements;
ii. when a corporate restructuring is intended;
iii. during the acquisition/sale process of company stock by the company, its controlling shareholders, its subsidiaries, or its affiliates; and
iv. in the context of a public offering, as of the date when the offering is approved, or within 30 days prior to filing the offering for registration, and throughout the duration of the offering.

Failure to comply with obligations and restrictions mentioned above may result in administrative and criminal liabilities, whereas most cases are prosecuted and settled administratively, by CVM.

Public companies generally adopt additional policies and mechanism to further prevent violations of insider trading, in addition to abiding by more thorough regulation depending on its business purpose, listing segment, among other factors. Common examples include:

- adopting "Material Act or Fact Disclosure Policy" and "Securities' Trading Policy", particularly for companies listed in the Novo Mercado, to which any person shall enter into, by signing "deeds of accession", prior to having access to privileged information;
- informing the relevant parties, with notice, about the periods in which trading is prohibited;
- implementing internal control systems and procedures to ensure segregation of activities and restricted communication (Chinese wall);
- effectively segregating activities within the company and restricting communication between its departments;
- effectively implementing internal integrity and audit mechanisms and procedures to encourage whistleblowing; and
- effectively complying with codes of ethics and conduct, with assessment by acknowledged experts.

4. What are the key remedies available to shareholders of public companies / debt securities holders in your market?

In Brazil, remedies available to shareholders are mostly related to their right of seeking damages for certain breaches of obligations by controlling shareholders or the management, as well as withdrawing from the company upon the occurrence of certain corporate

transactions. The key remedies available are summarized below:

a) Voting Rights and Conflict of Interests

All shareholders are legally required to vote in the company's best interest in corporate deliberations. As such, in the event a shareholder votes in a manner to deliberately harm the company or other shareholders, or seeking personal advantages at the cost of harming them, it shall be deemed as an abuse of its voting rights.

The shareholder shall be held liable for damages resulting from its abusive voting, even in the event such vote was overruled by the majority of shareholders.

The same applies for shareholder who vote in deliberations in which they have conflicting interests to those of the company. However, if a situation of conflict of interest is confirmed, the relevant shareholder's vote shall be deemed void, and the shareholder shall reimburse the company for any undue profit obtain as a result of it conflicted voting.

b) Controlling Shareholders' Liability

In addition to the liability opposable to shareholders generally, as described above, the controlling shareholder of a company shall be held liable for damages resulting from an abuse of its voting rights.

Abuse of voting rights by a majority shareholder include, but are not limited to:

i. Steer the company to carry out activities no encompassed or related to its corporate purpose;
ii. Promote corporate changes (e.g. termination, conversion, issuance of shares) that may deliberately harm its minority shareholders, members of the management or employees;
iii. Deliberately elect an unsuitable person for the company's management;
iv. Guide the management to perform illegal actions or approve irregular financial statements provided by the management, seeking personal gains.

c) Management Liability

Members of a company's management may be held liable for their actions in violation of the applicable legislation, the company's bylaws or fiduciary duties. As such, the company or shareholders representing at least 5% of the capital stock may seek compensation and damages, in favour of the company, within a civil complaint.

Without prejudice to the above, any shareholder or third-party who are directly affected by a manager's actions in breach of its duties and responsibilities, may individually seek legal compensation, by means of a civil liability action against such manager.

It should be noted, however, that a manager may not be held liable for actions carried out in accordance with the applicable legislation and company rules, nor for actions or omissions from other members of the management.

d) Withdrawal Rights

In addition to the remedies above, which involve civil litigation, a shareholder's interests may also be preserved by its right of liquidating its equity and withdrawing from the company in the event certain corporate transactions are approved, such as, for example:

i. Amendment to a company's bylaws to determine that any disputed shall be settled by arbitration (except if the company becomes legally required to do so);
ii. Issuance of new classes of preferred shares or changes to the rights attributed to existing ones;
iii. Alteration to the company's corporate purpose;
iv. Conversion, merger, consolidations, spin-off or liquidation of the company.

It should be noted that, unlike other jurisdictions, the Brazilian regulatory framework does not provide any claim structures similar to class actions in corporate law. However, as of mid-2023, the local government is promoting a general review of the Brazilian Corporate Law, which, if approved, could result in the establishment of additional remedies for shareholders, including a liability claims structure similar to class actions.

5. Please describe the expected outlook in fund raising activities (equity and debt) in your market in 2023.

Throughout 2022, fund raising activities concerning equity and debt issuances were significantly reduced in Brazil. That scenario was closely related to the presidential election, held in October 2022, and the political and economic uncertainties related thereto. Furthermore, persistent raises to interest rates, both in Brazil and abroad, culminated in increasing investments on public bonds, in detriment of private equity or debt.

As of 2023, on the other hand, the Brazilian market has

experienced more stability, with an expected outlook of reduced inflation and interest rates, which could lead to a market recovery. As such, an increasing amount of equity and debt fund raising activities have been carried out in Brazil, benefiting from the broadly revised regulatory framework for public offerings. As of June 2023, there have been 5 equity offerings (the same number of equity offerings throughout 2022), representing investments of approximately BRL 8.5 billion, and 208 debt offerings (considering debentures, CRI and CRA offerings), representing investments of approximately BRL 92.7 billion.

A relevant amount of power bidding processes is expected to take place in 2023, causing analysts to predict that energy companies may lead the market to a new wave of public offerings, seeking to raise the funds required to implement such projects. Sanitation and infrastructure projects are also expected to trigger more equity and debt offerings in the upcoming months.

6. What are the essential requirements for listing a company in the main stock exchange(s) in your market? Please describe the simplified regime (if any) for company seeking a dual-listing in your market.

The main requirements for listing a Brazilian company in B3, the sole stock exchange in Brazil, are as follows:

I. General Requirements for the Company:

a. incorporated as a company *(sociedade por ações)*;
b. bylaws amended to reflect the structure of a public company;
c. management consisting of, at least, a board of directors (including independent members), and of an investor relations officer (including a designated investor relations department);
d. additional corporate governance, compliance and internal control structures, which shall abide by the rules applicable to the chosen listing segment of B3.

II. Documents and Information for Listing:

a. Reference Form *(Formulário de Referência)*, a comprehensive report regarding on aspects related to the business, finance, risks, controlling shareholders (including shareholder agreements), management, compensation, ESG, and human resources;
b. Audited Financial Statements (please refer to item “What financial statements are required for a public equity offering? When do financial statements go stale? Under what accounting standards do the financial statements have to be prepared?”)

The rules above also apply to companies registered and listed in Brazil, who seek to obtain a dual-listing in a foreign market.

In relation to dual-listing by an entity listed abroad, and seeking access to the Brazilian market, the most common structure is through the offering of Brazilian Depositary Receipt (“BDR”). BDRs representing securities listed and traded abroad may be traded in the local stock market, B3, and offered to different type of investors, depending on the BDR level. Some levels of BDRs requires the registration of the foreign entity as a foreign issuer before the CVM and thus the documents and information on item II above is required in addition to certain continuing obligations after the listing.

7. Are weighted voting rights in listed companies allowed in your market? What special rights are allowed to be reserved (if any) to certain shareholders after a company goes public?

As of 2021, weighted voting rights, or dual-class stock structures (“DCS”), have been introduced to Brazilian corporations, which may now issue different classes of common shares, carrying grater voting rights.

In Brazil, the applicable DCS structures allow companies to grant voting rights of up to 10 votes per common share, for an initial term limited to 7 years, that may only be extended upon approval by the majority of shareholders representing both regular common stock (DCS not included) and preferred stock.

Additionally, DCS may only be adopted by companies that are:

- Private companies, who have not issued any listed or traded securities;
- Listed companies, provided, however, that the DCS and its respective voting rights are adopted by the company prior to the listing or trading of its securities.

Companies that are already listed may not: (a) adopt DCS structures; (b) issue new classes of common stock with weighted voting rights; or (c) alter the voting rights attributed to issued DCS (expect to decrease voting power per share). As such, after a company goes public,

shareholders may expect to reserve the same voting rights attributed to each class of stock prior to the listing.

Additional restrictions shall apply in relation to a company's listing with B3. B3's Novo Mercado segment, which is currently its second largest listing segment, and one of the most attractive segments, particularly for companies seeking to go public, due to its strict corporate governance rules and benchmark, does not permit the listing of securities issued by companies who have stock with weighted voting rights ("one share, one vote" principle applies).

In relation to DCS restrictions, it should also be noted that weighted voting rights are not considered for purposes of approving matters such as management compensation and transactions with related parties, in which cases each common share shall carry one vote, regardless of its class. Additionally, it should be noted that the Brazilian market does not allow for shares of the same class to carry disproportionate voting rights or no voting rights at all.

For more information on special voting structures in Brazil please refer to the question "What are the key remedies available to shareholders of public companies / debt securities holders in your market?".

8. Is listing of SPAC allowed in your market? If so, please briefly describe the relevant regulations for SPAC listing.

According to CVM Resolution 160, listing of a SPAC is allowed in Brazil, subject to certain restrictions.

The IPO of a SPAC can only be carried out in accordance with the ordinary registration regime, by which there is prior analysis by the CVM to obtain registration, and the target audience of the offering can only be made up of professional and qualified investors.

Trading of SPAC shares on the secondary market is exclusive between qualified investors, until six months after the completion of the De-SPAC transaction.

Regarding the governance structure of the SPACs, which is not yet fully regulated in Brazil, the main current discussions relate to:

- election of the majority of members of the board of directors guaranteed by the adoption of plural voting or, alternatively, by (i) regulation in a shareholders' agreement, or (ii) family & friends anchoring, in order to guarantee the influence of the founder shareholders;
- issuance of different classes of common shares (DCS) to the (i) founders, carrying weighted voting rights, subject to transfer restrictions, in order to guarantee the influence of the founders, (ii) IPO investors, with common shares voluntarily convertible into preferred shares, in order to guarantee additional benefits for them;
- listing of SPAC with B3 in its simplified governance segments, which allow dual-class stock structures, as well as preferred shares, considering that other B3 segments do not allow listing of non-common shares;
- implementing policies and mechanisms concerning (i) conflicts of interest and related parties; (ii) the objective criteria for determining the management compensation (including variable); and (iii) the basic guidelines for hiring service providers; in all cases, to avoid conflicts of interest and decisions motivated only by the economic interest of the sponsor; and
- presenting the recent financial statements, considering the date of incorporation of SPAC close to the IPO (for more information, please refer to item "What financial statements are required for a public equity offering? When do financial statements go stale? Under what accounting standards do the financial statements have to be prepared?").

Finally, it is important to emphasize that discussions about SPACs in Brazil are recent, so that the existing regulation is yet incipient. The strategy that is usually adopted is to adapt the regulations applicable to traditional structures to the reality of SPACs, according to applicability.

9. Please describe the potential prospectus liabilities in your market.

Pursuant to CVM Resolution 160, the prospectus for public offerings must provide sufficient and accurate information so that potential investors may objectively understand the offering. Non-compliance, in whole or in part, with these aspects, may be subject to questioning by the CVM, by the self-regulatory entities (ANBIMA and B3) and, also, by investors.

In practice, as a result, the company and its management are likely to face administrative liability, to be examined by CVM and B3. Such entities may conduct thorough investigations and, when the misconduct warrants it, promote administrative proceedings

processes, from which the following sanctions may result:

- written warning;
- financial penalties (fines);
- temporary disqualification of individuals, for up to 20 years, to be members of the management of public companies;
- suspension of authorization or registration to carry out activities in the capital market;
- temporary disqualification, for up to 20 years, to carry out activities in the capital market;
- temporary ban, for up to 20 years, from practicing certain activities or operations in the capital market; and
- temporary ban, for up to 10 years, from performing certain operation in the capital market.

In Brazil, although civil and criminal liability are possible, capital markets claims are mostly restricted to the administrative sphere, and it is uncommon for claims to be taken to court. Moreover, most administrative proceedings are settled by the defendant upon the execution of terms of commitment with the CVM.

10. Please describe the key minority shareholder protection mechanisms in your market.

The Brazilian Corporate Law determines certain essential shareholders' rights, including special mechanism that seek to protect minority shareholders, such as:

i. Mandatory Dividends.

To ensure the receipt of profits by minority shareholders, Brazilian Corporate Law determines the payment mandatory dividends. As such, unless otherwise provided in the bylaws, shareholders are entitled to receive dividends corresponding to 50% of the company's adjusted net income for each fiscal year, and changes to the minimum dividend amount are subject to prior approval by the majority of voting shares.

Additional dividend rights may be carried by preferred stock, whereas, in Brazil, public companies must offer certain advantages to such shareholders.

ii. Subscription Rights.

Shareholders are legally entitled to subscribe to new shares (or convertible securities) issued by the company, on a pro-rata basis to their equity, before such securities are offered to third-parties, as a way to protect them from dilution. A shareholder shall have 30 days to exercise its subscriptions rights, after which the securities may be acquired in the secondary market.

It should be noted, however, that public companies may issue securities under its previously approved authorized capital stock, in which case the subscriptions rights may not be granted, or the subscription period of 30 days may be reduced.

iii. Withdrawal and Tag Along Rights.

To protect the minority shareholder from substantial changes in the company's structure or against the reduction in the rights guaranteed by their shares, certain shareholders' resolutions may trigger the right of withdrawal, under which opposing shareholders may liquidate their equity, thus withdrawing from the company. Unless otherwise provided in the bylaws or in specific scenarios, withdrawing shareholders shall be reimbursed by the book value of their shares.

Additionally, in relation to public companies, tag along rights are granted in the event of direct or indirect change of control. As such, the new controlling shareholder is required to carry out a tender offer to acquire the shares of the remaining shareholders, for at least 80% of the price paid to the to the shareholders who sold the controlling block. For most listed companies, the price offered for the tag along shall be equal to that paid per share for the acquisition of control.

Furthermore, as most shareholders' resolutions are approved by a simple majority, including in relation to the appointment of the members of the board of directors, the applicable legislation provides for some mechanisms to guarantee the effective participation of minority shareholders in the decision-making process of a company, particularly in relation to the appointment of the management, such as:

i. Multiple Voting, under which the number of votes for each share will be multiplied by the number of positions to be filled at the board of directors, so that minority shareholders, jointly representing at least 10% of the voting shares, may concentrate their votes on one or more candidates.
ii. Separate Voting, under which minority shareholders, jointly representing at least 15% of the voting shares, are entitled to separately appoint one member of the board, and its substitute, without the participation of the controlling shareholder.

The Brazilian Corporate Law also grants minority shareholders with rights to participate in the company's remaining assets upon dissolution or winding-up, and

rights to inspect the company and its management. Additionally, it is common for public companies to provide additional protection mechanics in their bylaws, for purposes of corporate governance and market value.

11. What are the common types of transactions involving public companies that would require regulatory scrutiny and/or disclosure?

The most common transactions of public companies to trigger the need for disclosure are those that constitute material facts, i.e., any acts, facts or decisions that may significantly influence: (i) the trading price of securities issued by the company; (ii) investors' decision to buy, sell or hold securities issued by the company; or (iii) in the decision of investors to exercise any rights inherent to the condition of holder of securities issued by the company.

Additionally, certain transactions carried out by public companies are subject to a more thorough regulatory review, in order to certify they do not entail an abuse of voting rights or a breach of fiduciary duties. Examples of such transactions include (a) merger or consolidation concerning a public company or its assets; and (b) transactions that may benefit or relate to the controlling shareholder of a public company due to potential conflicts of interests.

Companies may be exceptionally exempt from disclosing certain material facts, if the controlling shareholder or the company's management understand that such disclosure may jeopardize the company's legitimate interest.

Public companies are also required to disclose transactions relating to:

- trading of company shares that, individually or jointly, represent 5%, 10%, 15%, and so on, of the total amount of a certain type or class of shares must be informed, by the investor, to the company and subsequently disclosed to the market; and
- transactions between related parties that

1. exceed the lowest of the following amounts:
    a. fifty million reais; or
    b. 1% of the total assets of the company; and
2. at management's discretion, are lower than the parameters of item (i) beside, considering:
    a. the characteristics of the transaction;
    b. the nature of the related party's relationship with the company; and
    c. the nature and extent of the related party's interest in the transaction; except as otherwise provided in the applicable regulation

12. Please describe the scope of related parties and introduce any special regulatory approval and disclosure mechanism in place for related parties' transactions.

The applicable regulation defines "related party" as a person or entity related to the company, such as family relations, entities that are part of the same conglomerate, controlling shareholders and subsidiaries of the company, among others.

Related parties' transactions may require special approval by the company's management, in line with the adopted corporate governance structure. For public companies, it is common that related parties' transactions are subject to approval of the board of director (and sometimes the audit committee), and that the company's management periodically reviews the transactions to ensure their compliance with the applicable rules. If a transaction with a related party comprises amounts exceeding the equivalent of 50% of a public company's assets, it shall require prior approval by the shareholders' general meeting.

Additionally, companies are required to implement mechanism to prevent conflicts of interest, as well as to ensure the transactions have establish fair and commutative conditions. As such, the relevant individuals within the company (e.g. controlling shareholder or its appointed managers) may not take part in negotiating or approving the transactions. Furthermore, within the scope of its annual report, the company must disclose the mechanism implemented to prevent conflicts of interest, as well as demonstrate how the conditions for the related parties' transactions are deemed equitable.

Except when otherwise determined by the applicable regulation, transactions carried out with related parties shall be disclosed as follows:

i. *Formulário de Referência*: annual report filing for public companies, in which they shall detail relevant related parties' transactions, as well as related policies.
ii. Financial Statements: disclosure of related parties' transactions pursuant to the

applicable legislation and accounting regulation;
iii. Special Disclosure: form detailing relevant related parties' transactions, to be filed with the CVM 7 business days, for transactions that reach the applicable thresholds (transactions amounting to R$ 50,000,000.00 or 1% of the company's total assets, either in a single transaction or in various ones carried out within 12 months).

13. What are the key continuing obligations of a substantial shareholder and controlling shareholder of a listed company?

Controlling shareholders of listed companies in Brazil are subject to key obligations concerning (a) disclosure; (b) trading restriction; and (c) conflict of interest, as summarized below:

a. Disclosure Obligations

i. Material Facts: communicate any material act or fact of which they are aware to the investor relations officer, who shall promote its disclosure;
ii. Material Transaction: notify the company of transactions through which the equity interest directly or indirectly held by controlling shareholder exceeds, either as an increase or a decrease, the thresholds of 5%, 10%, 15%, and so on, of a type or class of shares of the company;
iii. Monthly Trading: provide the company with a monthly report detailing direct or indirect ownership of its securities.

b.Trading Restrictions: controlling shareholders are generally prevented from trading the company's securities as follows:

i. prior to the disclosure of a material fact;
ii. within 15 days prior to the release of the company's financial reports and statements;
iii. when a corporate restructuring is intended;
iv. during the acquisition/sale process of company stock by the company, its controlling shareholders, its subsidiaries, or its affiliates;
v. in the context of a public offering, as of the date when the offering is approved, or within 30 days prior to filing the offering for registration, and throughout the duration of the offering

c. Conflict of Interest: controlling shareholders have a duty to avoid conflict of interests and, as such:

i. may not take part in any corporate transaction in which they have conflicting interests with those of the company;
ii. must disclose any conflict and may only enter into agreements with the company under reasonable, "arms' length" conditions, as would be applied to third parties.

As for substantial shareholders, key obligations include (a) disclosure of material facts or material transactions, as described above; (b) trading restriction in the event they become aware of material information prior to its disclosure to the market; and (c) avoidance of conflict of interest, as summarized above.

14. What corporate actions or transactions require shareholders' approval?

The Brazilian Corporate Law and the resolutions set forth by CVM, determine that certain corporate actions and transactions require prior approval by the shareholders. Additional rules may apply based on the corporate governance policies adopted by a company, particularly in relation to listed companies.

Common transactions that require shareholders' approval, pursuant to the applicable regulation, are as follows:

- Approval of the annual financial statements and allocation of profits;
- Amendment to the bylaws (including changes of address, business purpose, shareholders' rights, management attributions, among others);
- Changes to the company's capital stock (including capital injection, capital decrease, securities issuance, among others), provided, however, that public companies may attribute the board of directors with the authority to issue securities within the limits of the authorised capital;
- Election or dismissal of members of the board of directors, the fiscal council, or the audit committee;
- Approval of equity compensation plans, such as stock options, restricted stock, among others;
- Transactions (including with related parties) with a value that exceeds the equivalent to 50% of the company's assets;
- Application for the registration of the company as a public company, before CVM;

- Application for the listing of the company and trading of its securities in a stock market;
- Conversion, incorporation, merger, spin-off, winding-up or liquidation of the company;
- Authorise the management to file for bankruptcy or corporate reorganisation.

15. Under what circumstances a mandatory tender offer would be triggered? Is there any exemption commonly relied upon?

In Brazil, mandatory tender offers consist of a protection mechanism for minority shareholders, seeking to guarantee their tag along rights are observed, and may be triggered in the event of:

- Change of control, upon the direct or indirect acquisition of control of a public company;
- Acquisition of shares by the controlling shareholder, in the event it directly or indirectly representants more than 33% of the free float for that class of stock; and
- Delisting of a company from the stock exchange, or its conversion into a private company upon the cancellation of its registration with CVM.

Such tender offers must abide by the rules of the Brazilian Corporate Law, the CVM, and the B3, including in relation to the tag along rights (which vary from 80% to 100% of the acquisition price per share), and in relation to the formal procedures and requirements applicable to tender offers.

In certain circumstances, the tender offer obligation may be waived, particularly if the offer is triggered by a company's decision to go private, or the applicable requirements may be attenuated, such as the engaging of financial advisors or the drafting of special audited financial statements. It should be noted that exemptions to the mandatory tender offer are most common in relation to public companies that are not listed, or whose equity is significantly concentrated with the controlling shareholders.

16. Are public companies required to engage any independent directors? What are the specific requirements for a director to be considered as "independent"?

Under the applicable regulation, the board of directors of public companies shall include independent members corresponding to a minimum of 20% of the total amount of directors. Such requirement is only binding to public companies that are also issuers of listed securities (such as shares or depository receipts).

Additionally, for public companies, at least members 20% (or 2, for certain listed companies) of the members of the board of directors shall be independent.

To be considered as an independent member of the board, a director must report any potential conflict of interest, as well as meet certain criteria established by CVM, such as (a) business relations with the company, its subsidiaries, its controlling shareholders and its management, and other entities related to the company, including voting rights or rights arising from a shareholders' agreement concerning the aforementioned entities, decision-making rights with the company or entities related thereto, material influence over the company, among others; and (b) personal or family relations with the company's controlling shareholders, their spouse, issue, or other individuals, up to the 2nd degree of kinship.

A member of the board of directors may not be considered "independent" in case it is:

i. a controlling shareholder of the company;
ii. subject to a shareholders' agreement which binds any voting rights in board meetings;
iii. related, including by marriage, to the company's controlling shareholders, a member of the company's management, or a member of the company's controlling shareholders management, up to the 2nd degree of kinship; or
iv. an employee or member of the management of the company or of its controlling shareholder, either currently or within the previous 3 years.

17. What financial statements are required for a public equity offering? When do financial statements go stale? Under what accounting standards do the financial statements have to be prepared?

For public equity offerings in Brazil, a company must disclose financial statements prepared pursuant to the standard issued by the International Accounting Standards Board – IASB, in accordance with the Brazilian Corporate Law and with the CVM resolutions. Such financial statements must also be audited by an independent auditor registered with the CVM.

The financial information required for carrying out an offering consists of:

- audited financial statements for the last three fiscal years;
- most recent quarterly financial information, with limited review by the auditors (applicable in relation to the first three quarters of the current fiscal year, provided that more than forty-five days have elapsed since the end of each quarter).

Additionally, the following voluntary financial statements shall be prepared for the offering depending on the specific case:

- combined financial statements, as they represent a single set of financial statements of entities that are under common control; and
- pro forma financial statements, which are recommended in case of material corporate change.

The applicable regulation for registering public offerings, as recently revised, does not impose a blackout period, upon which the financial statements would go stale. However, companies seeking to register an offer within 16 days prior to releasing its quarterly results, my opt to disclose flash numbers, consisting of accounting or operational information referring to the period covered by the imminent disclosure.

18. Please describe the key environmental, social, and governance (ESG) and sustainability requirements in your market. What are they key recent changes or potential changes?

Following the international trend, the ESG theme spread in the market and started to be demanded by investors. As of 2023, public companies are required to disclose a series of ESG aspects in their annual report filing (Formulário de Referência), with the purpose of promoting these practices in the Brazilian market, in addition to standardizing and facilitating comparability of such information by investors. The model adopted was the "practice or explain", in which companies are not punished if they do not adopt a practice, however, need to explain the reason for not adopting it.

Below are some examples of the key new information required:

Management and Fiscal Council:

- total number of members, gathered by self-reported identity of gender, colour or race;
- specific objectives of the company regarding gender, colour or racial diversity;
- channels set up so that critical issues related to ESG and compliance issues and practices come to the attention of the board of directors; and
- indicators linked to ESG issues for the composition of remuneration.

Human Resources:

- number of employees, total and by groups, based on the activity performed, geographic location and diversity indicators, which, within each hierarchical level of the company, cover self-declared identity of gender, colour or race;
- income ratio considering the highest salary paid by the company (including to any members of the management), divided by the average salary paid by the company (considering all salaries paid, except for the lowest one).

Business:

- compliance with legal and regulatory obligations related to environmental and social issues;
- disclosure of annual report or ESG information document, pointing out:
- methodology;
- whether it is audited or reviewed by an independent entity;
- materiality matrix and key ESG performance indicators (including material indicators) are considered; and
- whether the Sustainable Development Objectives (SDOs) and material SDOs are considered; and
- the recommendations of the Task Force on Financial Disclosures Related to Climate Change (TCFD) are considered.
- whether inventories of greenhouse gas emissions are carried out and the scope;
- opportunities inserted in the company's business plan related to ESG issues; and
- entry of risk factors on social, environmental, and climate (including physical and transitional risks) issues.

Integrity and Political Contributions:

- number of cases confirmed in the last three fiscal years of deviations, fraud, irregularities and illegal acts committed against public administration and corrective measures

adopted; and
- direct or indirect financial contributions made by society to politicians and political parties.

Finally, it is important to highlight that, recently, the form and content of the Integrated Report was regulated by the CVM, which established that companies adopting such reporting stander should submit it to external review by independent auditors. Public companies may choose to make their sustainability report using the Integrated Report methodology, which represents a gradual advance in Brazilian regulation on the subject, seeking to approach international standards for ESG calculation and reporting.

19. What are the typical offering structures for issuing debt securities in your jurisdiction? Does the holding company issue debt securities directly or indirectly (by setting up a SPV)? What are the main purposes for issuing debt securities indirectly?

The issuing of debt securities in the Brazilian market follows an unified public offering framework, as established by the CVM, which required the offering to be register under an ordinary or an automatic process.

The issuing of debt securities will mostly follow the automatic process, which allows a faster analysis, and requires less elaborate documentation to register offerings. Due to the complex and fast paced nature of debt securities, as well as considering such offerings mostly target professional and qualified investors, the automatic registration process would be preferred.

The carrying out of an offering under the ordinary process is not fairly common, for it would have to be directed to individual investors, thus requiring a more elaborate set of disclosure.

A holding company may directly issue debt securities, which may also be done indirectly through an SPV, depending on the intended structure by the group and an analyses of the tax impacts for each case.

20. Are trust structures adopted for issuing debt securities in your jurisdiction? What are the typical trustee's duties and obligations under the trust structure after the offering?

Trust structures are commonly adopted for issuing debt securities in Brazil and shall only be performed by financial institutions registered for the administration or custody of third parties' assets and previously authorized by the Central Bank of Brazil – BACEN.

The appointment and acceptance of a trustee should be included in the deed of issuance, the term of securitization of credit rights or an equivalent instrument, which must establish the duties and responsibilities of the trustee, its compensation and the conditions for their replacement should a resignation, an intervention an extrajudicial liquidation occur, or they become temporarily unable to fulfill their duties.

The term of the trustee begins as of the date of the applicable instrument of appointment, and its replacement shall only be made through and amendment. The trustee must remain in the exercise of its functions until its replacement by a new trustee.

The trustees have the duty to fulfill their responsibilities with good faith, transparency and loyalty to the holders of the securities, as well as protect their rights and interests, being just as careful and diligent with said securities as any upstanding person would be with their own assets, avoiding at all costs any conflicts of interest. The trustee must also:

- Monitor the regulatory information and disclosure put forth by the issuers, alerting the securities holders of any inconsistences or omissions in an annual report
- Follow up on the performance of securitization companies in the management of separate assets through the information disclosed by the company on the subject
- Provide insight on the sufficiency of the information disclosed in any proposals for changes to conditions of the securities
- Verify the consistency and precision of any types of guarantees, as well as the value of the assets given in guarantee, observing the maintenance of their sufficiency and feasibility in terms of the provisions established in a deed of issuance, term of securitization of credit rights or equivalent instrument
- Request, when considered necessary, an external audit of the issuer or separate equity
- Call, when necessary a meeting of the securities' holders
- Attend the meeting of the holders of the securities in order to provide information, as requested
- Keep the list of the security holders and their updated addresses
- Coordinate the drawing of the debentures to

be redeemed, as set forth by the deed of issuance
- Supervise the compliance of the clauses established in a deed of issuance, term of securitization of credit rights or equivalent instrument
- Verify the procedures adopted by the issuer to ensure the existence and integrity of the securities, financial assets or instruments that back securitization operations
- Verify the procedures adopted by the issuer to ensure the rights on the securities, financial assets or contractual instruments that back securitization operations are not given away or passed on to third parties

21. What are the typical credit enhancement measure (guarantee, letter of credit or keep-well deed) for issuing debt securities? Please describe the factors when considering which credit enhancement structure to adopt.

Credit enhancement measures such as guarantees, letter of credits, and keel-well deeds, are typically used in Brazil as guarantees for issuing debt securities. Such guarantees may be granted unconditionally or conditionally, binding the guarantor to the repayment of the debt in case of default by the issuer.

Potential issuers usually seek guarantee instruments with banks, financial institutions or third parties, as to enhance the creditworthiness of the issuer, as well as to provide more assurance to potential investors and the market. Such guarantees typically consist of letters of credits, which are issued by the guarantor and provide an assurance of payment, which covers the principal and interest payments in schedule. As collateral for issuing letters of credit, the parties often execute fiduciary assignments of the issuer's or its subsidiaries' shares or assets, as a counter guarantee.

Additionally, issuers may also obtain guarantees from parent companies, especially due to the range of instruments which may be adopted, such as fiduciary assignments, personal or collateral guarantees, and others. Parent companies may also be part of Keep-Well Deeds instruments, guaranteeing financial support to the issuer's debt and the fulfilling of the issuer's obligations in an event of default.

Several factors must be taken into consideration when choosing a credit enhancement structure, and it must be noted that most of them rely solely on the issuer's creditworthiness and capacity for fulfilling of their financial obligations.

The nature of the debt should be critical for the decision of the guarantee structure, since debt securities may be issued for specific business sectors or projects. In that sense, the maturity and interest rates are especially important for the deciding on a credit enhancement structure. Market conditions also play a very important role in the decisions, as higher credit protections may be required by banks or financial institutions should the conditions be unfavourable.

The issuance of debts for financing of infrastructure projects, such as energy, steelworks, water, sanitation, are always accompanied by restrictive covenants structures, which determine the operational or financial specifics that should be reached by the issuers at determined phases of the projects. In this regard, specific business sectors are more subject to liabilities than others, being that stronger and tighter credit enhancement guarantees are demanded should the issuer's business fall on under high-risk flags.

22. What are the typical restrictive covenants in the debt securities' terms and conditions, if any, and the purposes of such restrictive covenants? What are the future development trends of such restrictive covenants in your jurisdiction?

In the Brazilian market, restrictive covenants typically follow standard conditions, varying from the transaction, the issuer, or its business. Such covenants are put forth by banks or financial institutions for the protection of investors' interests and safeguard, aiming for the credit quality of the securities to be issued.

The financial covenants impose restrictions based on the issuer's financial performance and results, including measures such as interest coverage ratio, debt-to-equity ratio and specific financial rations which may be established by the bank or financial institutions, depending on the project or purpose to be executed by the issuer. The main goal from financial covenants is to guarantee the financial stability of the debt, as well as measure the issuer's financial status. Covenants may also target the issuer's ability to incur additional debt or issue new securities, imposing specific ratios for the issuer's compliance, such as total debt-to-equity or senior or subordinated debts.

Certain debts may establish operation covenants regarding the issuer's project and its completion. It is a common scenario for infrastructure corporations, as banks or financial institutions typically set forth specific

operation covenants for the structuring of the project, its desired status in specific dates and its completion status and dates.

Covenants may also be attached to events of early maturity, such as the restriction for change of controlling ownership of the issue, the capacity for the issuer to distribute dividends above the legal minimum or the filing for bankruptcy, spin-offs, judicial/extrajudicial restructuring. Furthermore, cross acceleration and cross default provisions may also be determined.

Restrictive covenants in the Brazilian market follow international practice and are also subject to international and national market variations.

In that sense, there has been new restrictive covenants metrics aligned with ESG (Environmental, Social and Governance) metrics, as it has been become demanded by investors. As of recently, the CVM has also obliged the disclosure for carbon emissions, diversity, and inclusion by corporations, being safe to assume such metrics may become more adopted for restrictive covenants. The alignment with international standards and best practices of corporate governance may also be increasingly adopted for restrictive covenants, as it is in the investors' and the market's best interest.

Moreover, it has become fairly common in the Brazilian debt market the establish restrictive covenants targeting child labour exploitation or environmental measures, such as the express prohibition for pollution. In that sense, corruption, money laundering and embezzlement are also typical restrictive covenants.

The debt market in Brazil has been very active as of recently, which pushes for an adaptive regulatory framework and covenant structures. A flexibility and customization of covenants, as to be shaped for each issuer or the specific characteristics of the transaction, may become more common, as it allows for targeted protection and alignment of interests between issuers and investors.

23. In general, who is responsible for any profit/income/withholding taxes related to the payment of debt securities' interests in your jurisdiction?

In Brazil, interests arising from debt securities are subject to income taxes, which are attributable to the investor upon receiving such compensation.

On the other hand, certain securities may be tax-exempt as a way to promote investments in relevant infrastructure projects. As such, infrastructure bonds *(Debêntures Incentivadas)*, as set forth by Law No. 12,431/01, grant tax benefits over the interests received by investors, corresponding to a tax reduction for institutional investors and a tax exemption for individual investors.

24. What are the main listing requirements for listing debt securities in your jurisdiction? What are the continuing obligations of the issuer after the listing?

In Brazil, debt securities may be issued by private or public companies, incorporated as *sociedades por ações*. Private companies may list debt securities exclusively target to certain professional investors, as they are not subject to the regulatory scrutiny and most obligations applicable to public companies (provided, however, that certain obligations, such as auditing financial statements still apply). Public companies, on the other hand, have wider access to investors, as they may issue debt securities offered to professional, qualified, and/or retail investors.

For purposes of "going public", a company shall be registered with the CVM, which requires compliance with regulatory obligations, such as the filing of a comprehensive annual report *(Formulário de Referência)*, submission of audited financial statements, adherence to certain corporate governance policies, full disclosure of the securities owned by the issuer's management, among others. Public companies may be registered under category A, which allows them to issue any securities, or category B, which prevents them from issuing shares or convertible securities, but allows them to issue and list most debt securities. Subsequently, a company shall prepare the required documents for a public offering of debt securities, abiding by the registration process applicable to the offering structure, so that it may list its securities and access investors.

After the listing, all due diligence documents regarding the offering must be accessible for five years, should the CVM require it. Moreover, continuing obligations for companies registered under CVM's category B and listed with B3 are mainly related to the submission of relevant documents or information (e.g. financial statements, minutes to shareholders, debt holders or management meetings, payment of supervision fees, etc.). The disclosure is obligatory for subjects such as general meetings (call notices, documents necessary for the exercise of voting rights, the summary of all decisions taken and PDF copies), any shareholder's notices or material facts, any deed of issuance of debentures and amendments, trustee communications or any filing of plans in connection with a corporate restructure, spin off,

bankruptcy or judicial/extrajudicial restructuring.

Contributors

Jean Marcel Arakawa
Partner
jarakawa@mattosfilho.com.br

Vanessa Fiusa
Partner
vanessa.fiusa@mattosfilho.com.br

Caio Cossermelli
Partner
caio.cossermelli@mattosfilho.com.br

Henrique Ferreira Antunes
Partner
henrique.antunes@mattosfilho.com.br