

DEMAREST

CLIENT ALERT

CMN RESOLUTION NO. 5,111/2023

Resolution defines investment entity and credit rights

DECEMBER 2023

The National Monetary Council (“CMN”) Resolution No. 5,111, of December 21, 2023, was published and regulates the concept of investment entities under Law No. 14,754/2023 and Law No. 11,312/2006.

WHAT DOES IT REGULATE?



FUNDS NOT SUBJECT TO THE NEW PERIODIC TAXATION: under art. 23 of Law No. 14,754/2023, recently published, Private Equity Investment Funds (“**FIP**”), Exchange-Traded Funds of Variable Income (“**ETF-VI**”), and Credit Rights Investment Funds (“**FIDC**”) will **NOT** be subject to periodic taxation, provided that they qualify as investment entities in compliance with the CMN regulations. Therefore, the investors will be taxed only on distribution or disposal.



FUNDS WITH 0% WITHHOLDING INCOME TAX (WHT) FOR NON-RESIDENT INVESTORS (“NRI”): as established by art. 3, of Law No. 11,312/2006, in the wording of Law No. 14,711/2023, the 0% IRRF rate for investments in FIPs, funds that invest in shares of private equity funds (“**FIG-FIP**”), and Funds for Investments in Emerging Companies (“**FIEE**”) now require that the fund qualifies as an investment entity under the CMN regulations.



CREDIT RIGHTS

CMN Resolution No. 5,111 also defines credit rights for the purposes of forming the FIDCs portfolio, under the terms of Law No. 14,754/2023.

INCLUDES (i) rights, bonds and securities representing credits; **(ii)** receivables certificates; **(iii)** precatory payments; **(iv)** assets received via judicial or extrajudicial procedures involved in the recovery of credit rights, due to expropriation of assets, foreclosure of guarantees, payment in kind, conversion, adjudication, sale of pledged assets, or settlement; and **(v)** FIDCs that invest in the assets described above. **Item “iv” is an important clarification for the alternative investment industry.**

EXCLUDES: (i) government bonds; **(ii)** securities issued or co-obligated by financial institutions (“CDB”, “LF”, “LCA”, “LCI” and “LIG”); **(iii)** repo operations backed by (i) and (ii); **(iv)** quotas of funds that invest predominantly in (i), (ii) and (iii); **(v)** non-convertible or non-profit-sharing debentures subject to public placement; and **(vi)** commercial notes subject to public placement. Debentures and commercial notes will be considered as credit rights when, upon acquisition, the issuer is in judicial or extrajudicial recovery procedure, or a board meeting has been held to ease the rights relating to early maturity or default by the issuer under the terms of the regulations.





FUNDS ARE DEEMED AS INVESTMENT ENTITIES WHEN THEY CUMULATIVELY:

- Raise funds from one or more investors to invest in one or more assets;
- Are independently managed by agents or professional service providers at their own discretion; and
- Formally define, when applicable, strategies to generate returns for the investor, as defined in the resolution under discussion.

FUNDS ARE NOT DEEMED INVESTMENT ENTITIES WHEN:



- They have an investment committee or deliberative governance body whose majority of individual quota holders or nominees decide and send orders to the funds' manager regarding the formation of the fund's portfolio;
- They control legal entities that have been controlled by their majority individual quota holders in the five years prior to the investment by the fund; and
- The majority of individual quota holders manage the fund's investees or can determine/veto investment or divestment decisions.

MAJORITY INDIVIDUAL QUOTA HOLDER = the person who directly or indirectly holds the quotas representing the majority of the fund's assets, considering individuals altogether, as well as their spouses/partners, and relatives up to the 2nd degree.



CLASSIFICATION IS NOT DISREGARDED BY:

(i) the existence of consultative or oversight bodies, an investment committee that does not fit into the above, or a quota holders' agreement, provided that the managing agent or provider holds discretion in decisions regarding the fund's portfolio; **(ii)** the minority participation by the managing agent/provider; **(iii)** the participation of the FIDCs' transferor, originator, managing agent, consultant or provider; or **(iv)** provision in the investment policy regarding the acquisition of assets from a single issuer, transferor, debtor or originator.

INVESTMENT ENTITY QUOTA HOLDER

The management structure can be established at the level of the direct or indirect quota holder classified as a fund in Brazil or as a fund or investment vehicle abroad. It includes companies and contractual arrangements constituted as partnerships, sovereign wealth funds, government bodies, multilateral organizations, development agencies, pension and social security funds, as well as endowments.

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