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NEWSLETTER



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Bill No. 5387/2019: Foreign Capitals and Exchange Law

In Brazilian history foreign capitals and exchange transactions have been subject to strict controls and regulations, mainly to protect Brazilian currency and reserves. Several laws and rules issued by the Central Bank of Brazil over the years have been dealing with foreign capital registration, restrictions to the entry and exit of funds, obligations to denominate and pay in Brazilian currency, foreign trade control regulations, among others.

In more recent years, economic globalization and worldwide foreign capital movements have allowed the increase of Brazilian foreign currency reserves and a more stable balance of payments in Brazil, which created the basis for the development of monetary policies with more flexible foreign capital and exchange transaction controls.

In this scenario, in October 2019, the Government presented Bill No. 5387/2019 with the purpose of modernizing, simplifying, and bringing more efficiency to the Brazilian exchange market. As stated by the Government, the law is aligned with international standards and grounded in the inclusion of Brazilian economy in the international market, the free movement of capitals, and the performance of exchange transactions in a simple, more transparent and less bureaucratic manner.

It is the intention of the authorities to **(i)** modernize the legislation in order to avoid legal uncertainty that could be caused by old rules that did not contemplate recent technological innovations and modern needs of the Brazilian economy; **(ii)** make the Brazilian legislation compatible with the global economy, facilitating foreign trade and flow of resources and investments; and **(iii)** encourage both foreign investments in Brazil and Brazilian investments abroad.

One of the general goals of the Brazilian authorities is to strengthen the process of convertibility of the Brazilian currency and Bill No. 5387 provides for mechanisms to allow the use of the Brazilian currency abroad and in Brazil by international players as a first step towards convertibility. The Government recognizes, however, that this is a gradual process, depending upon several other aspects, such as the confidence in Brazilian economy and Brazil's worldwide commercial and financial presence.

In general, Bill No. 5387/2019 consolidates the matter in one single law and proposes the revocation of several laws, decrees and decree-laws issued in different periods of Brazilian history (some of which in the first half of the 20th century). Especially, Bill No. 5387/2019 proposes the revocation of substantially all provisions (except for tax-related provisions) of Law No. 4131/62, which addresses foreign capitals and exchange controls.

The Bill provides for a one-year period for the law to enter into force, which should be a reasonable period for the Central Bank of Brazil to issue proper regulations to govern the procedures and details on foreign capitals and exchange transactions and to adapt public bodies and supervised entities to the new standards.

Bill No. 5387/2019 is a concise law with only 27 articles, organized in six chapters: **(i)** Initial Provisions; **(ii)** Exchange Market; **(iii)** Brazilian Capitals Abroad and Foreign Capitals in Brazil; **(iv)** Information to Compile Macroeconomic Statistics by the Central Bank of Brazil; **(v)** General Provisions; and **(vi)** Final Provisions.

Chapter I deals with the scope of the law and the concept of residence for the purposes of the law without innovations.

Chapter II presents general rules about exchange transactions, exchange rates, players in the exchange market, and competences of the Central Bank of Brazil as regards the exchange market.

Additionally, it provides that banks can both accept payment orders from abroad and make payment orders to abroad denominated in Reais, using accounts in Reais locally held by foreign entities – subject to regulation and financial supervision in their origin country. For this purpose, banks must obtain information about the foreign entity to fully understand their activity, reputation and quality of the supervision they are subject to, as well as to evaluate their money laundering and terrorism financing internal controls. This rule is intended to increase the convertibility of the Brazilian currency. Of course, the proposed solution has to be regulated in detail to allow the effectiveness of this measure.

Chapter III establishes that foreign capitals will have legal treatment equal to that of national capitals and establishes general principles and rules, leaving room to the regulations to be issued by the Central Bank of Brazil to rule on supervision, remittances and information.

Chapter IV sets forth that the Central Bank of Brazil is allowed to demand information from Brazilian residents that are necessary to compile official macroeconomic statistics. The individual information presented will be subject to confidentiality and will not allow the identification of their holder, consistent with data protection rules.

Chapter V, among other provisions, states that the private offsetting of credits and values between residents and non-residents continues to be forbidden; however, the Central Bank of Brazil may state cases, in which the forbidden offsetting is not configured. This provision was part of Decree-Law No. 9602/1946 and aims at avoiding mere accounting write-offs involving foreign and Brazilian parties without the proper closing of exchange transactions and payment of applicable taxes. The so-called simultaneous exchange transactions are the mechanism to formalize the offsetting, in which the parties do not actually have to send or receive funds, but the Brazilian party has to close symbolic exchange transactions.

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The update of the cases in which the transactions can be denominated in foreign currency is also provided for in Chapter V, which includes a broad item covering situations to be regulated by the National Monetary Council when the denomination in foreign currency may reduce the exchange risk or increase the efficiency of the transaction. Subject to future regulations, this may be a solution to certain markets that operate based on foreign currency and have always had to deal with a possible annulment of the prices denominated or calculated in foreign currency. It is worth mentioning that Bill No. 5387/2019 establishes that the denomination in foreign currency in cases not provided for by law is null and void.

Chapter V also establishes that small-value exchange transactions (up to USD 1,000) can be performed in a sporadic and non-professional manner between individuals. Moreover, persons are allowed to carry up to USD 10,000 in cash to enter and exit Brazil. In other cases, the general rule that exchange transactions must be carried out by local authorized financial entities continues to exist.

At last, Chapter VI restates the penalties provided for in Law No. 13506/2018 to be issued by the Central Bank of Brazil in case of breach against the law and regulations and approves new wordings to existing laws and the above-mentioned revocations. Among the new wordings, the removal of restrictions to use funds held abroad by Brazilian exporters is a positive measure.

As a whole, Bill No. 5387/2019 represents an important and long-demanded update in the Brazilian foreign capitals and exchange rules. If approved (and subject to the regulations to be issued), the new law will simplify foreign trade and foreign investment procedures and will bring about more legal certainty and improvements to the Brazilian exchange market.