

CMN STANDARD THAT COMES INTO FORCE IN JANUARY OPENS NEW PERSPECTIVES FOR THE DERIVATIVES MARKET CROSS-BORDER

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AUTHORS

RAFAEL CARRETERO
PARTNER / SÃO PAULO

In line with the process of easing foreign exchange regulations implemented by the Central Bank of Brazil and with the principles of broad freedom to carry out foreign exchange operations, Resolution 4948 of the National Monetary Council (CMN), which will enter into force on January 3, 2022, brings good changes to derivative operations contracted abroad.

The new regulation will revoke CMN Resolution 3.312/05 – an exchange regulation that deals with derivatives – and will be applied to financial institutions as well as to legal entities and natural persons that contract or want to contract derivative transactions with a foreign counterparty. It provides in a simple, broad and objective way that financial institutions and other institutions authorized to operate by the Central Bank of Brazil may carry out derivative transactions abroad, of any modality regularly practiced in the international market.

Currently, the regulation does not support the contracting of *cross-border* derivatives for protection (*hedge*) of the variation of any foreign currency against the Brazilian Real. If a Brazilian company wants to contract a derivative operation to protect itself from the variation of the Brazilian Real against another currency, it has to hire it in Brazil with a Brazilian counterparty (local operation). In order to contract the operation abroad, that company needs to use means outside the country (an investment fund or other group company located abroad, for example).

This is because the wording of CMN Resolution 3.312 brings a subtlety. The regulation allows the contracting of international financial transfers linked to derivatives operations intended to *hedge* commercial or financial rights and obligations subject to parity risks "between foreign currencies". By inserting the expression "between foreign currencies" in its wording, the resolution excluded from its scope the hiring of foreign exchange operations related to derivative transactions contracted between a Brazilian party and another party abroad that had parity with the Brazilian Real as one of its parameters.

CMN Resolution 3.312 establishes derivative transactions contracted between a Brazilian party and a foreign party that can exchange transactions to make payments from one party to the other. In addition to those involving parity between foreign currencies, this includes only transactions intended to *hedge* commercial or financial rights or obligations, subject to the risk of variation in interest rates or commodity prices on the international market. By the current regulation, therefore, only a few types of international derivatives operations can be contracted. In addition, such operations should always have the purpose of *hedging*.

With the enforcement of CMN Resolution 4948, all of this will be revoked. The restrictions on types of operations and the obligation to contract the operation exclusively for protection purposes will end.

The new regulation also amends Article 8 of CMN Resolution No. 3,568, which is one of the pillars of the Brazilian exchange rate system. This article provides that natural persons and legal entities may contract foreign exchange operations of any nature together with an agent authorized to operate in the foreign exchange market, in view of the legality of the transaction, based on the economic rationale and the responsibilities defined in the respective documentation.

CMN Resolution 4,948 inserted a paragraph in such Article 8, establishing that transfers relating to the trading of derivative financial instruments abroad, of any modality regularly practiced on the international market, must be made in authorized banks on the foreign exchange market. With this modification, the regulator makes it clear that the general rule applicable to foreign exchange operations provided for in Article 8 of CMN Resolution No. 4,948 becomes the one that will regulate foreign exchange transactions related to derivative transactions contracted abroad, without the ties of CMN Resolution No. 3,312.

The repeal of CMN Resolution 3,312 ends the requirement to register the derivative operation for the contracting of the exchange operations provided for therein – except for the registration of derivatives linked to loans between residents or domiciled in Brazil and residents or domiciled abroad carried out on the basis of Resolution 2,770. The registration of the derivative transaction, however, will continue to be a condition of the validity of derivative contracts, according to Article 2, §4 of Law 6.385/76.

All these changes brought by CMN Resolution 4,948 open new perspectives for the derivatives market contracted abroad. They can contribute to increasing competition and expanding the supply of sophisticated products to local customers.

