REAL ESTATE

PENSION FUNDS: CHANGES IN THE INVESTMENT POLICY OF THE REAL ESTATE SEGMENT

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National Monetary Council (CMN) Resolution No. 4,661/2018 established new rules and restrictions on investment in real estate by pension funds. Published on May 29, the regulation revoked Resolution No. 3.972/2009, prohibited the direct acquisition of real estate by closed-end private pension entities (EFPC), and forced them to sell properties owned directly by them within a period of up to 12 years (or May 28, 2030).

According to Resolution No. 4,661, the new limit for the participation of EFPCs in the real estate segment is 20%, and this participation may only be done through: (i) units of real estate investment funds (FII), (ii) units of investment funds in units of FIIs (FICFII), (iii) real estate receivables certificates (CRIs), or (iv) real estate credit certificates (CCIs). In addition to increasing the percentage limit from 8% to 20%, this new resolution changed the assets of the real estate segment in which EFPCs may invest. Previously, the real estate segment encompassed investments in (i) real estate projects, (ii) rental and income properties, and (iii) other real estate. Although permitted, investment in units of FIIs was classified in the segment of structured investments and analyzed in a segregated manner, in order to comply with the percentage limits.

In addition to prohibiting direct investment in real estate in order to make pension funds more liquid so that they can pay the pensions of their pensioners, the new resolution authorized investment in FICFIIs, CRIs, and CCIs issued by publicly traded companies or CCIs issued by limited companies or privately held corporations, provided that there is co-obligation of a financial institution authorized to operate by the Central Bank (Bacen). All of these changes have been in effect since May 29.

Some issues deserve attention in relation to pension fund investments in the real estate segment. First of all, they were expressly authorized to use assets to pay in units of investment funds. Therefore, an alternative to accommodate the current restriction on direct ownership of real estate and real estate projects is to pay them in via FIIs to be created by EFPCs. A limit of 25% of shareholders' equity on concentration in FIIs and FICFIIs per issuer was set, but this limit does not need to be observed for FIIs that include in their investment portfolio real estate that was originally part of the direct equity of the EFPC. There is also no restriction on whether these FIIs, formed by real estate that previously comprised the investment portfolio of pension funds, act as real estate developers, directly or indirectly, or acquire other real estate, subject to the applicable regulations of the Brazilian Securities and Exchange Commission (CVM) and subject to the review of real estate registration.

Second, as long as EFPCs are not in conformity with the restriction on direct ownership of real estate, the inventory of real estate currently in their portfolios will be taken into account for the purposes of calculating the limit on investments in the real estate segment. In order to adjust to these new limits, pension funds should assess the need to sell these properties or to pay them in via FIIs. It is worth remembering that, although the investment limit in this segment increased from 8% to 20%, the FIIs that were previously accounted for as structured investments are now included in the real estate segment.

Finally, it should be considered that, despite the rather elastic period (12 years) for the sale of properties owned by the EFPCs, it is prudent for these entities to already begin to organize and look into the existence of pending issues that may affect the ownership of these properties via-à-vis third parties or their payment in FIIs. Encumbrances, liens, or other types of restrictions or irregularities, for example, may require prior regularization with the real estate registration offices, municipalities, or the Federal Government Property Board. In addition, it is important to conduct tax planning regarding the legal structure to be adopted in the transfer of the ownership of these properties in order to evaluate the possible incidence of capital gain tax, Tax on Transfer of Real Estate (ITBI), and laudemium.