

BDR regulation and the new market for foreign shares in Brazil

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Overview

The Brazilian stock market has witnessed a sharp rise in new offerings since 2019. Despite the impacts of the covid-19 crisis in Brazil, there were more equity IPOs in 2020 (25) than in the previous six years combined.¹ Market attention also turned to opportunities in Brazilian Depositary Receipts (BDRs).

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In summary, BDR programs may be either sponsored or unsponsored. Sponsored BDRs have three different levels, with increasing disclosure and issuer registration requirements. Only “Level 3” sponsored BDRs may be publicly offered to the general market.

To date, Brazil's securities commission, the CVM (Comissão de Valores Mobiliários), has registered over 750 BDR programs (619 since 2019), only eight of which, however, were Level 3 sponsored programs with public offerings of BDRs.²

Requirements and regulation

In order to establish a BDR program so that its shares can be traded in Brazil, a non-Brazilian company must be registered with, and supervised by, the regulatory authority in the company's main trading market. **It also needs to register as a reporting company with the CVM, which requires that either:**

- the majority of the company's assets and revenues be abroad; or
- **the main trading market** of that company's shares be located in a jurisdiction where the regulator has entered into cooperation agreements with the CVM or IOSCO and the market is a **recognized market** under CVM rules.

The CVM considers the main trading market to be either:

- the foreign market with the highest trading volume of the company's shares over the preceding 12 months; or
- in the case of a sponsor in an IPO process, the foreign market on which the sponsor applied for listing and obtained the majority of the proceeds from the IPO.

The combination of these rules leaves three routes for raising capital in Brazil using BDRs. The first is the asset-revenue test, which requires that over 50% of assets and revenues be abroad. The second is the seasoned issuer test, which requires that the applicant's shares trade for at least 12 months on an eligible market. Finally, the issuer may pursue the route of simultaneous IPOs – of its shares abroad and BDRs in Brazil.

Since the consolidation of the BDR rules under CVM Resolution 3 of August 2020, there has been intense debate over the complexity of the tests and the reach and subjectivity of some of the definitions included in the regulation.

Some issuers have endured long discussions with the CVM in the context of their Level 3 BDR program registration over whether the jurisdiction where the issuer's shares trade qualifies as a recognized market, considering variables such as the level of transparency of that jurisdiction's corporate laws and to what extent the issuer's corporate documents should be adjusted to Brazilian governance standards.

At the center of the debates is the question of whether Regulation S and Rule 144A offers qualify as public offerings for the purpose of the simultaneous IPOs test. The CVM has insisted that the foreign IPO be directed to the general public and registered with the competent authority in a jurisdiction that meets Brazilian law transparency and governance standards.

In light of these discussions, the CVM has announced that it intends to refine its BDR regulation in 2021, particularly on the eligibility of the issuers.³ The market expects that the securities regulator will also simplify the BDR registration tests, close gaps in the rules and reduce subjectivity in order to increase legal certainty, which may foster the development of BDRs as an inviting alternative for foreign issuers.

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NOTES

¹ Source: CVM

(<http://sistemas.cvm.gov.br/port/redir.asp?subpage=ofertaregistrada>)

² Sources: CVM

(<http://sistemas.cvm.gov.br/port/redir.asp?subpage=programadeDR>) and B3

(http://www.b3.com.br/pt_br/produtos-e-servicos/negociacao/renda-variavel/bdrs/)

³ According to CVM's official regulatory agenda for 2021, published

last December.

**This content is part of the e-book "A Post-Covid World, the ESG Agenda and Other Trends in 2021: Insights for Foreign Investors in Brazil". [Click here to view all the articles.](#)*

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