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Real Estate Investment Funds in Brazil: Progress, Pressure, and the Path Forward

30.06.2025 5 min read

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In a 2008 article for the BMA Review, we praised CVM Instruction 472, then newly issued, for its role in encouraging the development of Brazilian real estate investment funds (*FIIs – Fundos de Investimento Imobiliário*), the equivalent in Brazil to REITs in the United States. Since then, the market has grown exponentially: from just 14 FIIs in December 2008 to over 1,100 by April 2025, with nearly half listed on Brazil's stock exchange, B3.[1] Today, FIIs count more than 13 million investors, with net assets exceeding BRL 350 billion and around 4 million individual investors.[2]

FII regulation has evolved over the years through a series of adjustments that have allowed for increasingly sophisticated and attractive products. Significant changes were made in 2015, including:

- Authorization for fund administrators to issue new shares without a general meeting or amendment to the fund's by-laws (*regulamentos*);
- Permission to cap voting rights at not less than 10% per investor,[3] if the investor's holding is greater;
- Reduction of the approval threshold for special resolutions in funds with over 100 investors, from an absolute majority to 25% of all shares in the fund, a crucial change for widely-held funds where the previous threshold was often unattainable.

Later, in 2022, CVM Resolution 175 introduced a major overhaul to simplify fund regulation, creating a unified framework with specific annexes for each fund category – Annex III applies to FIIs. The new regulation introduced important changes for FIIs, including:

- Explicit limitation of investor liability to the amount invested in the fund, with procedures for handling negative net asset value;
- Permission to create differentiated share classes for retail investors, with varying target investors, fees, and terms and conditions for investment in the fund and amortization and redemption of fund shares;
- Authorization for FIIs to use the fund's real estate assets to secure fund obligations (and, in the case of exclusive share classes, to secure obligations of the investors themselves);[4]
- Fund manager given authority to decide on the issuance of shares approved under the fund's by-laws, with the possibility of faster issuances, without preemptive rights for existing shareholders;

- A clear prohibition on trading closed-end fund shares (including FIIs) based on material non-public information.

The market is still adjusting to this new regulatory framework, which took effect in October 2023, with a transition period for existing FIIs until June 30, 2025.

All these improvements have significantly contributed to the maturity of the FII market, but there is room to unlock further potential. One area under discussion is the voting threshold for approval of shareholder resolutions. While the 2015 reform was a step in the right direction, many in the market believe that the current 25% threshold remains too high, especially given the traditionally low attendance rates at fund meetings. Encouragingly, the CVM is already studying the issue, and a formal review is expected.

Other challenges are more complex, as they require changes to the governing legislation. They include:

- The prohibition under Law 8.668/1993 and CVM Resolution 175 on FIIs borrowing money to acquire, build, or renovate portfolio properties. FIIs can use leverage in other ways (e.g., by purchasing properties on deferred payment terms and/or advancing future receivables), and since 2024 they can use portfolio assets as collateral. However, they still cannot take out direct loans, which puts them at a disadvantage compared to real estate companies when it comes to financing their operations.
- The legal requirement that the fund administrator, rather than the portfolio manager, be responsible for managing real estate assets, despite the fact that in most cases, the manager is better equipped for the role. In all other fund categories, this responsibility already lies with the portfolio manager.

- The loss of FII tax treatment under Law 9.779/1999 when a developer, builder, or partner (together with its related parties) holds more than 25% of the fund's shares. This creates risks, uncertainties and asymmetries that undermine the FII structure.[5]

The 2015 repeal of the mechanism allowing FIIs to pass dividends directly to investors. The change means that the dividends received by the FII and subsequently distributed to the investors end up being taxed, whereas they would not be taxed if received by individuals or companies directly. A return to the previous model – with an express provision stating that temporary custody of these funds by the FII does not disqualify the pass-through, to avoid challenges by the tax authorities – would help resolve this unequal tax treatment.

Last, 2025 has brought a new wave of tax changes, which go in the opposite direction of the regulatory progress of recent years. These include:

- An attempt to tax real estate transactions by FIIs, by means of the presidential veto[6] of a provision that would have made it clear that Brazil's new dual VAT (currently being phased in) does not apply to FII real estate transactions. The new CBS and IBS are intended to replace existing consumption taxes (PIS, COFINS, ICMS, ISS) that generally do not apply – or apply only minimally – to FII real estate transactions. Happily, the veto was overturned by Congress on June 17, 2025, and consequently CBS and IBS will not apply to FII real estate transactions;

- A new tax rule, RFB Instruction 2257/2025, requiring federal government departments, agencies and mixed-economy enterprises[7] to withhold income tax at source on rent paid to FIIs deemed "equivalent" to legal entities, which goes contrary to prior guidance by the RFB to the effect that declaration by the fund of its status would suffice to avoid withholding. The result is increased risk, uncertainty, and disincentives for FII investment;

- Provisional Measure 1303/2025, which (among other things) changes the taxation of FIIs and puts an end to the income tax exemption applicable to earnings distributed by FIIs to individuals resident in Brazil,[8] who will now be subject to 5% withholding tax. If the Provisional Measure becomes ordinary legislation, the changes will have effect from January 1, 2026.

All of this underscores the importance of regulatory and tax stability in the real estate and investment sectors. Without it, uncertainty and excessive taxation could undermine FIIs, which have proved themselves to be an important part of Brazil's economy.

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NOTES

1. Full list of real estate funds on B3's website. Available at <www.b3.com.br/pt_br/produtos-e-servicos/negociacao/renda-variavel/fundos-de-investimentos/fii/FIIlistados>. Accessed May 23, 2025.

2. Information on the FII market contained in ANBIMA's investment fund bulletin (Boletim de Fundos de Investimento), published on May 8, 2025 and available at <data.anbima.com.br/publicacoes/boletim-de-fundos-de-investimento/fundos-de-investimento-registram-resgate-liquido-de-rdollar-684-bilhoes-em-abril>. Accessed May 23, 2025.

3. Following CVM Resolution 175, this minimum percentage applies only to share classes targeting the public in general; smaller percentages can be fixed for share classes targeting solely qualified or professional investors (restricted classes).

4. Change introduced by CVM Resolution 200/2024.

5. Although Provisional Measure MP 1303/2025 puts an end to the tax exemption applicable to individuals who invest in FIIs, and thus has a negative impact for investment in FIIs, it also repeals article 2 of Law 9779/1999, which provides for the loss of FII tax treatment when the 25% threshold is crossed, which would result in greater legal certainty and eliminate certain asymmetries (if the Provisional Measure becomes ordinary legislation and the repeal of article 2 of

Law 9779/1999 is maintained).

6. Presidential veto of certain provisions of article 26 of Bill PLC 68/2024, which became Complementary Law 214, sanctioned on January 16, 2025.

7. Along with other federal entities and institutions covered by RFB Instruction 1234/2012.

8. Currently, individuals who invest in FIIs that are traded on the stock exchange or over-the-counter market and have at least 100 shareholders are exempt from income tax on earnings paid by the fund. The exemption does not apply to investors who hold 10% or more of the fund or who receive 10% or more of the fund's earnings, or to groups of related investors who hold more than 30% of the fund or receive more than 30% of its earnings.

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