New Rules on Public Tender Offers in Brazil

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On Tuesday, October 29, 2024, the **Brazilian Securities and Exchange Commission (CVM – *Comissão de Valores Mobiliários*)** published **CVM Resolutions 215 and 216**, updating the rules on **public tender offers for shares issued by publicly-held companies** (OPA – *Oferta Pública de Aquisição*) to modernize Brazil's regulatory framework.

In line with the new rules applicable to public offerings for the distribution of securities under CVM Resolution 160 of July 13, 2022, new registration procedures now apply for OPAs:

- ordinary procedure (the deadline for review by the CVM's Securities Registration Superintendence ("SRE") remains unchanged) and
- automatic procedure, without prior review by the CVM, which applies only to optional tender offers (i.e. voluntary takeover bids, takeover bids for the acquisition of control of publicly-held companies, and competing takeover bids) that do not involve an exchange of securities.

Changes have also been made to reflect the experience acquired by the CVM, especially in light of requests for differentiated treatment that it has commonly granted, including (i) splitting the intermediary's functions to allow third parties to guarantee financial settlement of the takeover bid, and (ii) exemptions from an auction to settle the takeover bid where there is low shareholder dispersion or the cost of an auction would be disproportionate to the value of the offer, which the CVM has decided on a case-by-case basis by in the past.

Other important changes include:

Takeover bid by reason of increased shareholding

A takeover bid by reason of an increase in shareholding will become mandatory whenever the acquisition of outstanding shares by the controlling shareholder or a related party the results in a reduction in the total number of outstanding shares of the same class and type to less than 15% (even if, prior to the acquisition of new shares, the percentage of outstanding shares was already less than 15%). However, a takeover bid is not required where the acquisition of shares (a) occurs through a takeover bid or (b) is when carried out directly by the company, of new shares issued by the company.

Valuation Report

Financial parameters can now be used as an alternative to preparing a valuation report. The parameters are: (a) a transaction carried out up to 12 months ago, involving at least 20% of the share capital of the target company which was not between related parties and did not involve other transactions as part of the price paid between the parties; (b) the highest quoted price shares of the class and type contemplated in the tender offer on the stock exchange where there has been the highest volume of trading in the shares in the last 12 months, subject to certain minimum trading volumes; (c) the price fixed by the offeror, in the case of a takeover bid to take the target company private, as long as the number of shares required for the success of the takeover bid represent at least 20% of the target's capital; and (d) the price at which shareholders holding more than 1/3 of the outstanding shares in the target company have undertaken to sell their shares in the takeover bid.

In addition, if an event occurring after disclosure of the OPA price materially affects the valuation of the target company, the offeror must direct the appraiser to update the value of the target company, if an valuation report has been prepared, or engage an appraiser to produce a valuation report, if the report had previously been waived.

No presumption of common interest

The new CVM Resolution 215 expressly removes the presumption that shareholders receiving a tender offer who had expressed their agreement to the tender offer price are considered to be acting in common interest with the Offeror. As a result, those shareholders can now be included in determining whether the levels of acceptance established under the Resolution have been met.

Offer Acceptance for Cancellation of Registration

When the number of outstanding shares of the target company represents less than 5% of its capital, the level of acceptance required to take the company private (which is ordinarily 2/3 of the shares eligible under the OPA) is reduced to a simple majority.

Unification of Tender Offers for Acquisition of Control and Cancellation of Registration

CVM Resolution 215 allows offerors to combine OPAs for acquisition of control and for taking a company private (cancellation of registration as a publicly-traded company) into a single tender offer, provided the offer is conditional on the successful acquisition of control.

Restrictions on making a new takeover bid

The new regulations no longer require the target company and the controlling shareholder and/or persons linked to the controlling shareholder to wait for a year before making a new takeover bid for the same shares. Previously, CVM Resolution 85 imposed a waiting period of one year, unless the terms of the new OPA were extended to the acceptors of the earlier tender offer.

Confidential treatment

Offerors can now request that the CVM give confidential treatment to documents and information submitted in for the Commission's review in an OPA under the ordinary procedure, where disclosure could represent a competitive advantage to third parties or jeopardize the legitimate interests of the offeror, the target company, or third parties.

The CVM's new rules are based on the report made by the CVM at Public Hearing 05/23 and submissions by interested parties, and **come into force on July 1, 2025**, revoking the current regulatory framework applicable to takeover bids, including CVM Resolution 85 of March 31, 2022.

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