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# FinTech

Brazil: Law & Practice  
SABZ Advogados

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## Law and Practice

*Contributed by SABZ Advogados*

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**SABZ Advogados** developed SABZTech, which is an initiative to aid the start-up ecosystem in Brazil, to deal with the high demand for legal counselling for start-ups. The goal is to produce and share legal knowledge that is relevant and useful to anyone with a keen interest for innovative businesses, especially in the FinTech sector. The firm aims to contribute to the creation of new business models, using stable and legitimate corporate vehicles, which are able to add value to everyone involved, including investors. The FinTech team is composed of three partners and two associ-

ate lawyers, with expertise in the sector and related practice areas, such as tax, business and banking. SABZ Advogados hosts and participates in important FinTech debates, with focus players, discussing new regulations and practices. The firm's services are premised on the idea of co-operation and mutual support, acknowledging both the FinTech sector's limitations and its unique possibilities. The firm's primary areas of expertise are due diligence, M&A, corporate transactions, tax, insurance, infrastructure, banks, and the real estate market.

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## 1. FinTech Market

### 1.1 Evolution of the FinTech Market

The FinTech market in Brazil achieved its greatest success in the last 12 months. The Brazilian jurisdiction was highly impacted by Resolution No 4.656 of the Brazilian Central Bank (BACEN), published on 26 April 2018. This resolution introduced the regulation for online lenders, which created the business model of a direct credit corporation (SCD) and a partnership of lending between persons (SEP); this regulation brought more stability to the sector.

One of the most common matters discussed in the last presidential election was the opening of the financial system to new players, which especially includes FinTechs.

For the next 12 months the Brazilian market may have to deal with some issues related to the implementation of open banking and the dissemination of blockchain, which will require the especial attention of the regulators.

## 2. FinTech Verticals

### 2.1 Predominant Business Models

Online lenders – for new players, the predominant business models are: (i) SCD and SEP, according to BACEN Resolution No 4.656/2018; and (ii) the correspondent banking structure, by which the FinTech works together with a financial institution registered before BACEN. In this case, the FinTech acts as a platform, or service-provider, and the operations are formalised under the financial institution structure.

Legacy players, if financial institutions, are regulated according to BACEN Resolution No 4.122/2012.

### 2.2 Regulatory Regime

For online lenders, the regulatory regime applicable to industry participants are (i) the regime of SEP and SCD, according to BACEN Resolution No 4.656/2018; (ii) correspondent banking, according to BACEN Resolution No 3.954/2011; and (iii) the general regime, according to BACEN Resolution No 4.122/2012, if it is a regular financial institution.

Robo-advisers have the same regulation of their activities as advisory work executed by individuals and other legal entities, according to CVM Instruction No 592/2017.

### 2.3 Variations Between the Regulation of FinTech and Legacy Players

For online lenders, FinTech regulation provides (i) simpler rules on the incorporation and registration of the company before BACEN; (ii) lower minimum corporate capital requirements; and (iii) strong limitation on the range of activities of the FinTechs.

### 2.4 Regulatory Sandbox

There is no regulatory sandbox in Brazilian jurisdiction.

### 2.5 Jurisdiction of Regulators

In Brazil, it is not possible for more than one regulator to have jurisdiction over industry participants.

### 2.6 Outsourcing of Regulated Functions

If regulated functions are outsourced (which occurs with online lenders that use a correspondent banking structure) the correspondent acts under the guidelines of the financial institution, which assumes full responsibility for the service provided to the clients.

To contract the services of correspondent banking, the parties shall enter into a ‘correspondent banking contract’, which is mandatory and regulated by BACEN Resolution No 3.954/2011.

Outsourcing to a regulated entity may result in lower costs or registration and operation. However, it also results in the limitation of the FinTech’s activities and prices policy.

### 2.7 Significant Enforcement Actions

In the case of online lenders there are some enforcement actions, highlighting the need for operating authorisation by BACEN.

### 2.8 Implications of Additional Regulation

In accordance with Law No 13,709 of 14 August 2018 (Law of Data Protection), the players shall ensure the correct treatment of consumers’ personal data, according to its limits and restriction, which will impact the players of all industry sectors.

### 2.9 Regulation of Social Media and Similar Tools

Social media (and similar tools) are not subject to regulation in the Brazilian jurisdiction.

### 2.10 Review of Industry Participants by Parties Other Than Regulators

Depending on the corporate structure of the industry participant, its activities may be reviewed by auditing firms.

### 2.11 Conjunction of Unregulated and Regulated Products and Services

In some cases, the offering of under-regulated products is permitted by the regulator. Generally, such products are directly or indirectly related to the regulated product.

In general, the industry participant’s services are restricted to the regulated products by force of the regulation itself.

### 3. Robo-advisers

#### 3.1 Requirement for Different Business Models

Robo-advisers' activity is regulated by CVM Instruction No 592/2017, the same one that regulates the activity carried out by individuals and entities in general. The asset class does not interfere in the business model.

#### 3.2 Legacy Players' Implementation of Solutions Introduced by Robo-advisers

Legacy players are using the same legal structure they had previously. According to the CVM regulation, the liabilities remain with the consultant (individual).

#### 3.3 Issues Relating to Best Execution of Customer Trades

The best customer trades must be focused on transparency and independence, in order to permit the client to take its decision based on the best information.

### 4. Online Lenders

#### 4.1 Differences in the Business or Regulation of Loans Provided to Different Entities

There are no significant differences in the business or regulation of loans to individuals, small businesses, and others.

#### 4.2 Underwriting Processes

Industry participants usually use financial analysis on their underwriting processes. The BACEN regulation states that the SEP should use a credit analysis model capable of providing indicators that impartially reflect the risk for potential borrowers and lending and financing operations.

#### 4.3 Sources of Funds for Loans

The main sources are:

- peer-to-peer, regulated by BACEN Resolution No 4.656/2018 – the risk of the default is exclusively on the lender (individuals, legal entities, financial institutions, investment funds, etc);
- lender-raised capital regulated by BACEN Resolution No 4.656/2018 – the risk of the default is exclusively on the lender (FinTech);
- assignment of credits and securitisations.

#### 4.4 Syndication of Loans

In the case of peer-to-peer (SEP), the loans source may be more than one individual or entity.

### 5. Payment Processors

#### 5.1 Payment Processors' Use of Payment Rails

It is possible for payment processors to create and implement new payment rails.

### 6. Fund Administrators

#### 6.1 Regulation of Fund Administrators

The activity of fund administrators is regulated by CVM Instruction No 558/2015. They are regulated independently of their activities.

#### 6.2 Contractual Terms

Fund administrators' performance and accuracy are imposed by the liability regime imposed by CVM Instruction No 558/2015. It is usually reinforced by the fund regulation.

#### 6.3 Fund Administrators as 'Gatekeepers'

In Brazil, fund administrators act as 'gatekeepers'. They have this obligation by force of CVM Instruction No 558/2015.

### 7. Exchanges and Trading Platforms

#### 7.1 Permissible Trading Platforms

Besides the traditional exchanges and trading platforms – such as the stock market, the organised over-the-counter market, and the unorganised over-the-counter market – regulated in Brazil by Law No 6.385/76 and CVM Instruction No 461/2007, the only regulated exchanges and trading platform in Brazil is crowdfunding (CVM Instruction No 558/2017).

#### 7.2 Regulation of Different Asset Classes

The different regulatory regimes do not depend on the asset class.

#### 7.3 Impact of the Emergence of Cryptocurrency Exchanges

The cryptocurrency platform is not yet regulated in Brazil. The emergence of cryptocurrency has not directly changed the regulation, but some regulators have already manifested some positions (eg, CVM) which prohibit the negotiation of cryptocurrency directly by investment fund, according to the Circular Letter 090/2008 CVM/SIN 01/18.

#### 7.4 Listing Standards

For crowdfunding, the main standards required by regulation are related to the company size and operation amount, which are agreed by the industry.

#### 7.5 Order-handling Rules

There are no other relevant handling rules that apply in Brazil.

**7.6 Rise of Peer-to-Peer Trading Platforms**

For peer-to-peer trading platforms, see above **1.1 Evolution of the FinTech Market**.

**7.7 Issues Relating to Best Execution of Customer Trades**

The best execution of customer trades is based on transparency and information, in order to permit the client to know the counterparty and evaluate the deal.

**7.8 Rules of Payment for Order Flow**

There is no regulation permitting or prohibiting payment for order flow in the Brazilian jurisdiction.

**8. High-frequency and Algorithmic Trading****8.1 Creation and Usage Regulations**

There are no creation and usage regulations in the Brazilian jurisdiction.

**8.2 Exchange-like Platform Participants**

There is no regulation of exchange-like platform participants in the Brazilian jurisdiction.

**8.3 Requirement to Register as Market Makers When Functioning in a Principal Capacity**

There is no such requirement in the Brazilian jurisdiction.

**8.4 Issues Relating to the Best Execution of Trades**

There is no such issues in the Brazilian jurisdiction.

**8.5 Regulatory Distinction Between Funds and Dealers**

There is no such regulatory distinction in the Brazilian jurisdiction.

**8.6 Rules of Payment for Order Flow**

There are no such rules/regulations in the Brazilian jurisdiction.

**9. Financial Research Platforms****9.1 Registration**

There is no such platform registration in the Brazilian jurisdiction.

**9.2 Regulation of Unverified Information**

There is no regulation of unverified information in the Brazilian jurisdiction.

**9.3 Conversation Curation**

There is no such curation of conversation in the Brazilian jurisdiction that is designed to avoid pump and dump

schemes, the spreading of information or any other type of unacceptable behaviour of any kind.

**9.4 Platform Providers as ‘Gatekeepers’**

There is no regulation relating to platform providers acting as ‘gatekeepers’ in the Brazilian jurisdiction.

**10. InsurTech****10.1 Underwriting Processes**

Participants have been trading information in order to underwrite coverages. The formation of a strong reinsurance coverage is the first step to deal with big risks. Companies normally have internal systems in order to manage such information, mainly in regard to property and/or information about natural phenomena (eg, rain, wind, etc). Regarding the regulatory and litigation status of potential insureds, there is a lot of information in the official database.

In the vehicle insurance sector there are new players using big data to collect information on robbery, accidents ratio, geographical risks, etc. The new online insurance companies are on the edge of developing such big data by the organisation of public information.

There is no specific regulation yet. Consumer protection regulation and the new Law of Data Protection (Law No 13,709 of 14 August 2018) are the main restrictions to be observed.

**10.2 Treatment of Different Types of Insurance**

The Brazilian Regulation Bureau (SUSEP) has organised the system considering a detailed separation of insurance branches. Official statistics have been constructed under such division. In this regard, if there is any combined risk (eg, environmental plus professional liability) SUSEP demands an insurance company to separate the information as if they were absolutely separate. This is the case both in the development of an insurance product and in regard to management of losses.

SUSEP has been trying to learn from the traditional market in order to regulate all and each insurance branch along specific norms which try to ‘teach’ how to build each product in a commoditised fashion. Such organisation has been criticised by the market.

In July 2017 SUSEP created an InsurTech committee. It has not yet created any specific regulation.

**11. RegTech****11.1 Regulation of RegTech Providers**

There is no regulation of RegTech providers in the Brazilian jurisdiction.

### 11.2 Contractual Terms to Assure Performance and Accuracy

There are no such contractual terms in the Brazilian jurisdiction.

### 11.3 RegTech Providers as ‘Gatekeepers’

There is no regulation covering this matter in the Brazilian jurisdiction.

## 12. Blockchain

### 12.1 Use of Blockchain in the Financial Services Industry

Legacy players are now implementing blockchain in the financial services industry. The first relevant deal was the negotiation and execution of a syndicated loan agreement.

### 12.2 Local Regulators’ Approach to Blockchain

There is no regulation yet. The Brazilian government is planning such a regulation in order to match the technology to its existing legislation.

### 12.3 Classification of Blockchain Assets

There is no such classification/regulation in Brazil. However, discussions on the matter are beginning to take place.

### 12.4 Regulation of ‘Issuers’ of Blockchain Assets

There is no regulation of ‘issuers’ of blockchain assets in Brazil.

### 12.5 Regulation of Blockchain Asset-trading Platforms

There is no such regulation in Brazil.

### 12.6 Regulation of Invested Funds

There is no regulation of funds that are invested in blockchain assets in Brazil.

### 12.7 Virtual Currencies

There is no regulation relating to virtual currencies in Brazil.

### 12.8 Impact of Privacy Regulation on Blockchain

Privacy regulation may in some cases be useless in the operations using blockchain, considering the technical issues for deleting information, for example.

## 13. Open Banking

### 13.1 Regulation of Open Banking

There is no such regulation in Brazil.

### 13.2 Concerns Raised by Open Banking

Considering that there is no regulation in Brazil, some banks are implementing tools to its clients which permit access of the information by third parties. The key point in the tools/strategy implemented is the client’s formal authorisation.

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