

## *“New investment instruments in energy and infrastructure projects: Fibras E”*

During his third government report, President Enrique Peña Nieto announced the implementation of a new investment instrument for the development of energy and infrastructure projects which he called “Fibra E”.

It was implemented through amendments to the General Provisions Applicable to Securities Issuers and other Participants in the Securities Market (“Single Circular for Issuers”) and to the Tax Omnibus Bill for 2015 (Resolución Miscelánea Fiscal) (“RMF 2015”), without amending the Income Tax Law (Ley del Impuesto Sobre la Renta) (“LISR”).

On September 29, 2015 amendments to the RMF 2015 issued by the Ministry of Finance and Public Credit were published in the Official Federal Gazette (Diario Oficial de la Federación) (“DOF”), which establishes the rules that will be applicable to this new type of instrument, entering into force on October 1, 2015.

Additionally, yesterday the resolution amending the Single Circular for Issuers was published in the DOF, which enters into force today and with which the regulation of the Fibras E will be defined.

Their regulation is based on what is established in the LISR<sup>1</sup> for the fideicomisos de inversión en bienes raíces (“Fibras”), a concept similar to the real estate investment trusts or “REITs” created in the United States in order to promote investment in the real estate sector.

With the Fibra E it is sought, as with the master limited partnerships or “MLPs” in the United States, to promote development of the energy and infrastructure sector by the granting of certain tax benefits to those trusts that comply with the rules set forth in the RMF 2015.

The Single Circular for Issuers defines the energy and infrastructure investment trust notes as those notes issued by energy and infrastructure investment trusts that are created in accordance with the applicable tax provisions, whose funds from their issuance are invested directly or indirectly in energy or infrastructure companies, projects or assets.

The form in which the Fibra E will be structured will be very similar to the Fibras. An issuing trust will be created, which will issue the notes and make them available, through brokers, to the public investor, and with the product of the issuance it will acquire projects, assets or stock of entities engaged in activities in the oil and gas, power and infrastructure sectors.

### **I. Rules established in the Single Circular for Issuers applicable to the Fibras E.**

In the Single Circular for Issuers, various provisions are established related to: (i) the powers of the general note holders meeting; (ii) the rights of the note holders; (iii) the composition of a technical committee and its authority; (iv) the composition of the assets of the Fibra E; (v) management of the trust assets; and (vi) the issuance of series of notes that grant limited voting rights.

<sup>1</sup> Articles 187 and 188 of the LISR.

### **I.1 General note holders meeting.**

The Single Circular for Issuers establishes that the general note holders meeting shall meet following a call by the trustee or common representative at least 10 days in advance through the securities markets where the notes are listed, in order to discuss and vote on:

- a) Changes to the investment strategy of the assets of the Fibra E;
- b) The loan contracting policies, which shall provide the debt limits; and
- c) The removal and substitution of the assets manager of the Fibra E for any of the reasons established in the trust agreement or in the management agreement, with the favorable vote of at least 66% of the outstanding trust notes.

In all cases the trust agreement must contain at least the following reasons for removal of the assets manager of the Fibra E:

- i) Not meeting the obligation of reporting on its management;
  - ii) Fraud, negligence or serious fault in its actions;
  - iii) Failure to make the agreed distributions; and
  - iv) Serious violations of contractual or legal obligations.
- d) Any increase in the schemes of considerations and commissions provided for the manager of the assets or for the members of the technical committee;
- e) Amendments to the trust purposes or its early termination; and
- f) Extend the issuance that will be done, regarding its amount or the number of certificates.

### **I.2 Note holder rights.**

The holders of the notes will have at least the following rights:

- a) To judicially oppose the resolutions of the general note holders meetings when individually or as group they represent 20% or more of the number of outstanding notes, and provided they have not attended the meeting or have voted against such resolution;
- b) To file liability actions against the asset manager of the trust for failure to meet its obligations, when individually or as a group they represent 15% or more of the number of outstanding notes;
- c) To designate one member of the technical committee for each 10% held, individually or as a group, of the total number of outstanding notes, except in those cases in which schemes are agreed that grant the trust assets manager, the settlor or related persons the right to designate all of the members of the technical committee.

Such designation may only be revoked by the other holders when in turn the appointment of all the members of the technical committee is revoked, in which case the persons substituted may not be appointed for 12 months following the revocation;

d) To ask the common representative to call a general holders meeting, as well as the postponement for one time, for 3 calendar days and without need to issue a new call, of the vote on any matter with respect to which they feel insufficiently informed, when individually or as a group they represent 10% or more of the outstanding notes; and

e) To have at their disposal without charge at least 10 calendar days in advance of the general note holders meeting, at the address indicated on the call, the information and documents related to the points on the agenda.

### **I.3 Technical Committee.**

The Fibras E will have a technical committee, which shall be composed of a maximum of 21 members of which the majority shall be independent. The independence will be determined with respect to the settlor and with respect to the trust asset manager.

The members of the technical committee with a conflict of interest in any matter shall not participate or be present at the discussion and voting of such matter, in the understanding that the quorum needed for the installation of the committee will not be affected.

The technical committee will have the following powers which may not be transferred:

a) Verify the performance of the asset manager of the Fibra E;

b) Review the quarterly report presented by the asset manager of the Fibra E;

c) Request from the asset manager of the Fibra E all the information and documentation necessary to fulfill its duties;

d) Ask the trustee or the common representative to call a general note holders meeting and request the inclusion on the agenda of such meeting the points it considers relevant when it detects serious violations of the obligations of the assets manager of the Fibra E; and

e) If the technical committee establishes committees to assist it in its duties, such committees must be composed exclusively of independent members of the technical committee.

### **I.4 Composition of the trust assets.**

The assets of the Fibras E must at all times be composed of assets, goods or rights fully identified, regardless of the investment vehicle by which they have been contributed to the trust. The technical committee must establish internal methods and controls that ensure updated information with respect to the situation, location and state of the assets conveyed to the trust, and permit the direct and immediate exercise of the rights over such assets.

## **I.5 Management of the trust assets.**

The documents for the issuance shall provide: (i) the terms and conditions to which the manager of the trust assets will be subject in the exercise of its duties; (ii) schemes of considerations, commissions and benefits in protection of the holders' interests; (iii) the liability regime applicable to the manager; (iv) its obligation to deliver to the technical committee, to the common representative and to holders that request it, a quarterly-report of the performance of its duties; and (v) the duty to be diligent, act in good faith and in the best interest of the trust and the holders.

## **I.6 Series of notes that grant limited voting rights.**

If series of notes are issued granting limited voting rights, the obligation shall be established of the issuing trustee to pay preferred distributions to the holders of this series.

## **II. Requirements for an issuing trust to be considered a Fibra E.**

The RMF 2015 establishes certain requirements for a trust to be considered a Fibra E and thereby obtain the tax treatment granted to the Fibras in article 188 of the LISR. Such trusts must comply with the following requirements:

- a) The trust must be created in accordance with Mexican laws;
- b) The trustee must be a Mexican bank or broker;
- c) The primary purpose of the trust must be to invest in stock of Mexican entities residing in Mexico whose activity is related to the sectors of oil and gas, power, infrastructure investment projects in the state of operation or the management of energy and infrastructure investment trusts;
- d) At least 70% of the trust assets must be invested directly in stock of these entities;
- e) At least 90% of its accruable income during the fiscal year must proceed from these activities;
- f) No more than 25% of its non-monetary assets may be invested in new assets, which are those having less than twelve months since their acquisition and start up in Mexico;
- g) The trust notes must be registered in the National Securities Registry; and
- h) The trustee must distribute among the holders at least once a year and no later than March 15th, at least 95% of the taxable earnings.

Fulfilled the above requirements, it will have the same tax treatment applicable to Fibras and therefore: (i) it will be transparent for tax purposes; (ii) it will not have the obligation to make provisional payments of the income tax; (iii) the income tax may be differed; and (iv) certain investors will not be obliged to pay the income tax originated for the sale of the notes.



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The implementation of these types of instruments seeks to create a legal framework that grants certain tax benefits in order to promote investment not only in the real estate sector, but also in the energy and infrastructure sector. Both public and private companies may make use of the Fibras E to develop projects in the operating stage and companies such as Pemex may divest from certain projects and obtain funds to develop new projects.

In the United States, the MLPs related to the energy sector represent approximately 75% of the financing of the energy infrastructure in such country and in Mexico it is expected that 70,000 million dollars in energy and infrastructure trust notes will be issued in the next five years.

*To obtain additional information contact our experts:*

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Sincerely,

***Von Wobeser & Sierra, S.C.***

Mexico City, October 21st, 2015.