Published Changes to FIBRA E Tax Regulations

On 1 April 2016, the Tax Administration Service published changes to the FIBRA E tax regulations. Such changes are in line with previous announcements and may be summarized as follows:

1. Tax-free roll-up. Sponsor may now (a) transfer assets from an OpCo to another OpCo tax-free or (b) spin-off an OpCo tax-free, also in the infrastructure industry (in addition to the O&G and power industries), provided that at least 2% of the shares issued by the relevant OpCo are acquired by a FIBRA E. Sponsor may now also transfer shares issued by an OpCo to another OpCo tax-free, provided that (x) at least 2% of the shares issued by the former are then acquired by a FIBRA E, (y) a private letter ruling from the tax authorities is secured and (z) other requirements are met.

2. Exclusive activity of OpCo. The exclusive activity of an OpCo may now also include (a) treatment, blending, processing, conversion and transportation of oil products, petrochemicals or any other products derived from oil or natural gas, and (b) transportation, storage and distribution of hydrocarbons, even if within a contract or assignment area, provided not under an E&P contract or assignment.

3. Definition of "new assets". New assets are now defined as assets that have been operational in Mexico for less than 12 months. (a) Assets acquired or built to fulfil commitments under, or exercise rights related to, an infrastructure license, provided OpCo has been a licensee for 12 months, and (b) incremental investments made on 12-month operational assets under O&G or power license, may now also not be treated as new assets, provided a private letter ruling from the tax authorities is secured.

4. Rental payments to exempted taxpayers. Rental payments from an OpCo to an exempted taxpayer cannot now be deducted by OpCo.

5. Contributed capital account. FIBRA E should now maintain a contributed capital account ("CUCA") at the FIBRA E level (i.e., not at the OpCo or investor level). CUCA balance should be increased with capital contributions (both in cash and in kind, including where capital gains were deferred) and decreased with capital reimbursements. Distributions of net taxable income (i.e., *resultado fiscal*) by FIBRA E should not decrease CUCA balance. Distributions in excess of net taxable income by FIBRA E should be treated as tax-free capital reimbursements up to the CUCA balance; such distributions should decrease the tax basis of the units issued by the FIBRA E. Distributions in excess of CUCA balance by FIBRA E should be treated as distributions of net taxable income and, thus, subject to 30% withholding (except for Mexican pension funds).

6. Buy-back of units. FIBRA E may now buy-back units, provided that (a) accumulated bought-back units are not greater than 5% of outstanding units, (b) bought-back units are sold within a certain period of time, (c) bought-back units are acquired with proceeds from undistributed FIBRA E earnings and (d) bought-back units and other permitted investments are not greater than 30% of FIBRA E assets.

7. Computation of capital gains by Sponsor. Capital gains derived from the sale of shares issued by an OpCo to a FIBRA E should now be computed as follows: (Fair market value of shares – Book value of underlying assets + Debt related to underlying assets) * (Shares sold / shares issued). It is now clear that such computation should only apply for income tax purposes and, thus, the sale of shares should not be treated as a taxable sale of assets, but as an exempt sale of shares for VAT purposes.

8. Deferral of capital gains. Sponsor may now defer the capital gains derived from the sale of shares issued by an OpCo to a FIBRA E, to the extent such sale is in exchange of units issued by the FIBRA E. Deferral should end at a rate of 15% per fiscal year (updated for inflation) starting in the fiscal year where the shares were sold. Deferral should also end where (a) the Sponsor sells the units issued by FIBRA E, (b) the FIBRA E sells the shares issued by OpCo or (c) the OpCo sells the underlying assets.

9. Exemption of capital gains. It is now clear that non-resident investors should be exempt from tax on the capital gains derived from the secondary-market sale of units issued by a FIBRA E.

10. Computation of capital gains by FIBRA E. Capital gains derived from the sale of shares issued by an OpCo from a FIBRA E to a third-party should now be computed as follows: Fair market value of shares – (Purchase price of shares – Amortized tax shield).

For a red-line version of the FIBRA E tax regulations (in Spanish or English) or for further information, please contact:

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