

Mexican FIBRAs: regulatory clarity needed on acquisitions by other FIBRAs

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By *Oscar López Velarde, Regina Albornoz* April 29, 2024



The interest of other FIBRAs in a potential acquisition of the Terrafina real estate investment trust highlights a lack of taxation guidance in such transactions, say Oscar López Velarde and Regina Albornoz of Ritch Mueller

The real estate industry in Mexico is witnessing a remarkable upsurge, primarily fuelled by the nearshoring effect. As international funds seek lucrative investment opportunities, especially in industrial facilities along the Mexican border, a significant trend is emerging: the aggressive pursuit of existing portfolios of Mexican real estate investment trusts, known as FIBRAs. Among these, Terrafina, a FIBRA originally managed by Prudential, stands out as a prime target in a highly competitive bidding process involving major investors, including other FIBRAs.

The potential acquisition of one FIBRA by another is a hot topic, but it also brings a plethora of tax implications to the fore. Several FIBRAs have proposed an exchange offer for existing holders of Terrafina's certificates, which suggests that these FIBRAs could end up owning Terrafina. This situation has stirred up numerous tax-related questions, as the Mexican tax framework does not explicitly address investments carried out by FIBRAs in other FIBRAs or the implications of their potential delisting, a scenario that some acquiring FIBRAs have proposed if they secure a majority of the certificates.

The FIBRA regime in Mexico is designed so that no taxes are levied at the level of the public vehicle itself; instead, taxes are collected through withholding tax. The primary investors in FIBRAs – Mexican and foreign pension plans – are typically exempt from such withholding tax. Additionally, foreign residents and Mexican individuals are exempt from tax on any capital gains from the sale of FIBRA certificates.

However, in the absence of specific regulations, a FIBRA holding certificates issued by another FIBRA could encounter several tax risks, such as the following:

- Mandatory distributions and withholding taxes – the annual taxable income of a subsidiary FIBRA might be subject to a 30% withholding tax rate. This could inadvertently lead to taxation for Mexican and foreign pension plans, which are supposed to be tax exempt. Moreover, this might result in double taxation for other investors, who might face a subsequent withholding tax when the holding FIBRA distributes these amounts.
- Capital gains taxes – Mexican individuals and non-Mexican residents (with the exception of foreign pension plans) might be liable to paying taxes on the capital gains from the sale of certificates issued by the subsidiary FIBRA.

Delisting the FIBRA

A possible solution suggested by many is the delisting of the subsidiary FIBRA. However, delisting a FIBRA or losing its FIBRA status might trigger a taxable transfer of all assets owned by the FIBRA to the certificate holders. The laws and regulations currently do not address this issue, which poses significant practical challenges for implementation.

The delisting of a FIBRA could represent a taxable event for income tax and VAT, a consideration that appears to be overlooked in most public bids aiming to acquire Terrafina.

The transactions and negotiations thus highlight the urgent need for regulatory clarity to navigate the complex tax landscape surrounding the acquisition of FIBRAs by other FIBRAs. Without clear guidelines, investors and the entities involved face a myriad of potential tax complications that could impact the feasibility and attractiveness of such transactions in the burgeoning Mexican real estate market.



Oscar López Velarde

PARTNER Ritch Mueller



Regina Albornoz

LAW CLERK Ritch Mueller
