

Ciudad de México, a 4 de octubre de 2021.

The Executive Branch files a constitutional counter-reform regarding Energy Sector.

Dear clients and friends,

On September 30th, 2021, the President of the Republic submitted before the Chamber of Deputies, an initiative to amend the Mexican Constitution “Decree by which articles 25, 27 and 28 of the Mexican Constitution are amended” (the “Bill”), such Bill seeks to reverse the Constitutional Reform of December 2013 (“Energy Reform”), mainly in the electricity and mining sector.

The Bill presents a complete change in the electricity sector since it eliminates (on a large scale) the participation of the private sector, mainly by establishing that electricity is a strategic area that corresponds exclusively to the Nation, an activity that will be carried out through the Federal Electricity Commission (“CFE”).

With this modification, the Executive Branch reverts the structural reforms established in 2013, including **(i)** the elimination of competition within the electricity sector, through the endowment (or re-endowment) of CFE with powers for regulation and control over the sector, as well as the determination of tariffs for transportation and distribution, as well as tariffs of electricity for end-users; **(ii)** the elimination of regulatory bodies in energy matters – such as the Energy Regulatory Commission (“CRE”) and the National Hydrocarbons Commission (“CNH”) - and consequently, transferring their functions to the Ministry of Energy (“SENER”); **(iii)** the cancellation of Clean Energy Certificates, and **(iv)** pertaining to the mining sector, the exploitation of lithium and other minerals considered strategic for the Energy Transition are established as a strategic activity reserved to the State.

Additionally, the Initiative contemplates the following modifications:

- (a) CFE changes from a State-Productive Company to a State Agency, which will operate throughout the electricity sector's value chain , absorbing the Subsidiary Productive Companies created in terms of the 2013 constitutional reform, except for *CFE Telecomunicaciones e Internet para Todos*, and subsidiaries CFenergía, CFE International and CFE Capital; within the said absorption, the National Center for Energy Control (“CENACE”) is included.
- (b) The cancellation of the electricity generation permits granted under the Electricity Public Service Law and the Electricity Industry Law, including the electricity purchase agreements executed with the private sector; as well as the automatic dismissal of the Permit applications currently pending before the CRE.

¹ The Initiative considers the elimination of the division of activities in the sector established in the Electricity Industry Law, so that all activities are carried out by the State.

Article 2 of the Electricity Industry Law establishes that “... the electricity industry comprises the activities of generation, transmission, distribution and commercialization of electric energy, the planning and control of the National Electric System, as well as the operation of the Wholesale Electricity Market. ...”. The proposed constitutional amendment will eliminate the division of said activities so that they are concentrated in a single body such as the CFE.

(c) Establish that CFE will provide the 54% of the electric power generation required by the country; consequently, only 46% of the electric power production would be allowed to come from private participation², such participation shall be subject to planning and control of the CFE, so that the energy generated by the private companies will only be purchased by CFE, according to the contractual structures to be set forth by CFE.

(d) Power generation permits as Self-Supply and Independent Power Producers modalities will not be recognized or acquired by the CFE (to form part of the 46% private participation), when they are considered to have been granted in contravention of the applicable laws (fraud of the law)³. Notwithstanding the foregoing, Independent Producers may continue to sell their energy exclusively to CFE, but only with respect to the capacity originally indicated in the permits, not with regards to generation surpluses.

(e) The Energy Transition policies will be applied exclusively by the State, through CFE, at all its levels and attributions.

(f) The figure of Clean Energy Certificates ("CELS") is canceled.⁴

(g) In relation to the exclusive exploitation of lithium and strategic minerals for the energy transition, the Federal Executive proposes that:

- a. No concessions will be granted for the exploitation of lithium and strategic minerals for the energy transition.
- b. The mining concessions granted, for gold, silver, copper and other minerals that are already being explored and/or exploited, will be preserved in all their terms; however, they will not cover the exploitation and production of lithium.
- c. Mining concessions granted previously, in which there is already a history of lithium exploration duly endorsed by the Ministry of Economy, may continue with said exploration activity.

The Bill is the sum of all the attempts made by the current administration to reverse the effects of the Constitutional Reform on Energy Matters of 2013 and its secondary legislation, which seeks to re-establish the state monopoly on electricity sector and providing benefits to the CFE in total detriment to the private sector.

As it is a proposal for Constitutional amendment, it is necessary that it be approved by two-thirds of the Congress (Chamber of Deputies at least 333 Deputies; and Senate, at least 85 Senators) and most of the Local Congresses, so we anticipate that there will be significant opposition from the various political factions.

It is important to point out that to this date it is not possible to take actions to challenge the Bill. However, if it is approved under the proposed terms, we consider that there are sufficient elements to consider the existence of violations of other constitutional provisions and international treaties, opening the door for challenging the Bill through *acciones de inconstitucionalidad* (*unconstitutionality actions*), and by the private sector, through *amparo* lawsuits and/or administrative procedures aimed at protecting the interests of the participants in the sector; as well as the possibility of initiating dispute resolution procedures before international organisms. Once the final version of the Initiative is approved and published, we will be able to analyze and propose possible actions and mechanisms to challenge it.

² The Bill does not establish whether that 46% will be determined with respect to production or installed capacity; It is also not clear as to whether the cancellation covers all the permits granted to private parties, including the import / export permits for electricity.

³ In the Decree which amended the Electricity Industry Law, published in the Official Gazette of the Federation of February 1, 2021, it was established in the Fourth Transitory Article, the faculty of CRE to revoke the self-supply permits granted under the Public Electric Energy Service Law, which have been obtained by carrying out "acts constituting fraud to the law", and should be understood as those schemes in which the Partners related to a Self-Supply Permit, do not have a substantial participation in the Permittee's capital, making a "corporate simulation". To this date, there are several judgments declaring the unconstitutionality of the Decree to reform the LIE, procedures that are in the Review stage before the Specialized Collegiate Courts.

⁴ In the Reform Decree published in the Official Gazette of the Federation of February 1, 2021, the regulation related to the CEL was modified, so that the granting of such certificate was not subject to the ownership of the centrals, nor to the date of start of operation of power plants.

The attorneys of Mañón Quintana will be glad to discuss or address any questions related to the scope of this Bill.

Sincerely,

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