

REGULATION REFINES FUNDRAISING FOR INVESTMENT PROJECTS IN INFRASTRUCTURE AND RD&I

Our teams of specialists in Capital Markets, Infrastructure and Tax Law present this exclusive material with an analysis of Decree 11,964, regulating the classification of investment projects deemed priorities in the area of infrastructure, for the issuance of securities with tax benefits, including debentures, CRIs (real estate receivable certificates) and FIDC (credit rights investment funds) quotas.

OVERVIEW

On March 26, 2024, securities with tax incentives – intended for project financing – gained an important advance with the issuance of Presidential Decree No. 11,964 ("Decree 11,964"), which regulated the sectors and the main requirements for the issuance of:

- Debentures ("Incentivized Debentures"), FIDC quotas and CRIs, referred to in article 2 of Federal Law No. 12,431/2011, as amended ("Law 12,431") (together, the "Incentivized Securities"), to finance investment projects in infrastructure or research, development and innovation ("RD&I"), with tax benefits for investors; and
- Infrastructure debentures, disciplined by Federal Law No. 14,801/2024 ("Law 14,801"), to finance infrastructure investment projects, with tax benefits for the issuer ("Infrastructure Debentures" and, together with the Incentivized Securities, "Securities with Tax Benefits").

Decree 11,964 will also be useful in defining the sectors eligible for investment by funds regulated through Federal Law No. 11,478, of 2007 (RD&I and Infrastructure Investment Funds, also known as "FIP-PD&I" and "FIP-IE"), which also have tax benefits for their investors and are vehicles suitable for organizing investments, under the terms of CVM regulation, in fixed income, equity and hybrid instruments.

This material complements the study carried out by our Capital Markets, Infrastructure and Tax practice teams, when Law 14,801 was published; please see the following link: [**Client Alert - Federal Law No. 14,801.**](#)

ANALYSIS - PRIORITY SECTORS

Below, a comparison between the sectors eligible under Presidential Decree No. 8,874, of 2016, which was repealed by Decree 11,964.

• Infrastructure in general

COMPARISON BETWEEN PRIORITY SECTORS

SECTORS	DECREE 8,874	DECREE 11,964
Logistics and transport	No specifications.	(i) highways; (ii) railways, including locomotives and wagons; (iii) waterways; (iv) organized ports and port facilities, including private-use terminals, cargo transshipment stations and tourist port facilities; and (v) aerodromes and airport support facilities, except private-use aerodromes.
Urban mobility¹	(i) urban transport systems on rails: monorails, subways and urban trains, and Light Rail Vehicles (locally known as VLT); (ii) acquisition of electric buses, including fuel cells, and hybrids using biofuel or biogas, for the transport system; and (iii) implementation of Bus Rapid Transit – BRT infrastructure.	(i) urban or urban collective public transport infrastructure; (ii) acquisition of public vehicles associated with infrastructure related to item “i”, such as trains, ferries, aeromobiles and cable cars, except buses that do not fall within the provisions of item “iii”; and (iii) acquisition of electric buses, including fuel cells, and hybrids using biofuel or biogas, for urban or urban collective public transport systems.
Energy	Decree 8,874 did not specify generation, transmission and distribution activities, nor did it restrict any type of energy generation. The specifications and restrictions were set forth by the respective ministerial ordinances.	The decree restricts <u>generation</u> activities to those originating from renewable sources. Another novelty of the decree was the express mention of: (i) the energy produced from low-carbon hydrogen (ii) the production of synthetic fuels of low carbon intensity; and (iii) the capture, storage, movement and use of carbon dioxide. These are evident incentives to the production of sustainable energy and its derivations. The decree also provides, as was already stated in the ordinances published by the MME: (i) power transmission and distribution; (ii) natural gas; and (iii) production of biofuels and biogas, but expressly excluded the agricultural phase as an eligible expenditure.
Telecommunications	Decree providing only for telecommunications, which included, according to the existing ministerial ordinances, radio broadcasting.	Decree references telecommunications and radio broadcasting.
Basic sanitation	(i) water supply; (ii) sanitary sewage; (iii) stormwater management and urban drainage; and (iv) urban solid waste management	No specifications.
Irrigation	No specifications.	No specifications.
Education	Education, without any limitations.	Decree references public and gratuitous education.
Healthcare	Healthcare, without any limitations.	Decree references public and gratuitous healthcare.
Public safety and prison system	No specifications.	No specifications.
Urban parks and conservation units	No specifications.	Limited to public parks.
Cultural and sports public equipment	No specifications.	No specifications.
Social housing/urban requalification	Joint provision for social housing and urban requalification.	Social housing limited to projects implemented through public-private partnerships and urban requalification addressed in a separate item, without specifications.
Mining²	Sector not included.	Activity restricted to the transformation of critical minerals for the energy transition. In this context, the use of expenses related to the exploitation and development phase of the corresponding mine is also eligible.
Street lighting	Although Decree 8,874 did not expressly provide for public lighting, projects in this sector were already deemed a priority, under the terms of Decree No. 9,036, of April 20, 2017.	Expressly provided for in Decree 11,964.

[1] New developments expressly provided for in the decree: acquisition of aeromobiles, ferries, cable cars, electric buses (including fuel cells) for urban or urban collective public transport systems, and biofuel or biogas hybrids.

[2] New sector included by the Decree.

CLIENT ALERT**REGULATION REFINES FUNDRAISING FOR INVESTMENT PROJECTS IN INFRASTRUCTURE AND RD&I****• Distributed minigeneration**

Although, since 2022, the Distributed Generation Act (Law no. 14,300, of January 6, 2022), elevates distributed minigeneration projects to the status of priority projects for the purposes of the provisions of article 2, of Law 12,431, the fact is that the absence of a specific ordinance issued by the MME, in practice, prevented the issuance of Incentivized Securities to finance this type of project.

In our view, Decree 11,964 put an end to this period of doubt, by:

- automatically classifying distributed minigeneration projects as eligible, therefore, allowing them to become financeable by Incentivized Securities; and
- clarifying that, due to conflict (article 18), the part of the MME regulation that prevented fundraising via Incentivized Securities, for this type of project, is no longer applicable.

• RD&I

The eligibility of these projects is limited to energy transition, ecological transformation, digital transformation, health industrial complex and aerospace and defense industrial complex, as per a joint act of the Ministry of Finance and the responsible sectoral ministry, to be published. Within each such joint act, it is expected that there will be a specification of the requirements for the respective eligibility of the project, without requiring a ministerial approval.

Depending on this regulation, we anticipate significant fundraising opportunities, especially in “digital transformation” and “health industrial complexes”, due to the breadth of expressions used in the regulation and their applications in business activities.

MAIN ASPECTS OF THE DECREE

ASPECT	DESCRIPTION
Prior ministerial approvals	<p>The priority nature of projects no longer depends on prior approval from the respective ministry, or body of the Executive Branch, with the exception of issuances by subnational entities, which approval will follow a simplified procedure, still to be regulated.</p> <p>However, projects must comply with the ordinances issued by each sectoral Ministry, which will establish criteria and conditions complementary to those established in Decree 11,964. Thus, existing ordinances remain in force in relation to what does not conflict with the decree - for example, the provision for prior ministerial approval.</p>
Cumulative Requirements	<p>Funds raised through Securities with Tax Benefits must be limited to the capital expenditures of investment projects.</p> <p>As there is no legal definition for "capital expenditures" for this purpose, it will be necessary, for cases with expenses of a hybrid nature or more borderline situations, a joint analysis of accounting rules, in particular the definition of the item in the financial statement under which a given expense will be allocated. Thus, for example, expenses with grants, which were included in Decree 8,874, even due to a previous request from the market for clarification purposes, are no longer expressly mentioned in the new decree.</p> <p>In any case, there is a delegation, by Decree 11,964, for the Ministry of Finance to provide for items that are "financeable", so to speak, through Incentivized Debentures or Infrastructure Debentures, which, in practice, gives this Ministry leeway to modify the scope of the instrument.</p> <p>Finally, as explained above, for projects related to the transformation of critical minerals for the energy transition, expenses related to the exploitation and development phase of the mine may be considered as part of the investment projects.</p>
Requirements per project	<p>The infrastructure investment projects to which the resources raised will be allocated must be the object of:</p> <ul style="list-style-type: none"> • concession, permission, authorization, lease or program contract; and • implementation, expansion, recovery, adaptation or modernization actions. <p>The first item does not apply to: (a) projects relating to the transformation of critical minerals for the energy transition; and (b) complementary interventions with the objective of reducing or mitigating greenhouse gas emissions from the project, in accordance with the ordinance to be published. Also because they are not part of the infrastructure category, RD&I projects are not subject to the two requirements indicated above.</p>
Delegation to the RFB (Brazilian IRS)	<p>Decree 11,964 delegated to the Brazilian Federal Revenue Services:</p> <ul style="list-style-type: none"> • monitoring and evaluating tax benefits; and • the duty to regulate the acquisition of Infrastructure Debentures by a related legal entity resident or domiciled abroad, provided that the acquisition be carried out in connection with the issuance and placement abroad of securities related to them.
Statement of business with abuse of form or without substance	<p>The declaration relating to acts or transactions with abuse of form or without substance – which would preclude the granting of tax benefits – must be made in accordance with current legislation on consultations relating to the interpretation of tax and customs legislation.</p>
Foreign Exchange Variation Clause	<p>A very welcome innovation of Law 14,801 was the provision that Infrastructure Debentures can be issued with a foreign exchange variation clause. In practice, this means that these debentures are denominated in Brazilian Reais, but their nominal value may be adjusted according to the fluctuation in the exchange rate between the Real and another selected currency (generally, US dollars), with payment in Reais.</p>
Relevant environmental or social benefits	<p>Projects with relevant environmental or social benefits will have priority in the evaluation, by the CVM, of the registration of the public offering of Securities with Tax Benefits, and, by the sectoral Ministry, in its classification as a priority project, whenever exceptionally required. The relevance of these benefits must be attested in a specific report. However, the rule does not define its requirements, nor whether it will depend on any government assessment, which does not seem to be the case.</p> <p>Another point to analyze is how the priority will be disciplined, in the rule. At the CVM, for example, the registration process for public offers generally follows the chronological order of requests, with responses on the last business day of the regulatory deadline. Therefore, some reduction in this period is to be expected, as a rule, for projects with relevant environmental or social benefits, or other objective criteria published by the CVM through an official notice (<i>carta-circular</i>).</p>
Prohibition on the Cumulativeness of Tax Benefits	<p>Decree 11,964 prohibited the accumulation, for debentures of the same series, of the tax benefits provided for in Incentivized Debentures and Infrastructure Debentures. However, nothing prevents there being a series, based on article 2 of Law 12,431, and another series, or another issuance, for the same investment project, carried out under the terms of Law 14,801.</p>
Transitional period - Existing Ministerial Ordinances	<p>Ordinances issued under Decree No. 8,874 that do not conflict with the provisions of Decree 11,964 remain in force. Projects that obtained classification through ordinances prior to the publication of Decree 11,964, whose terms conflict with the new rules, may issue Incentivized Debentures within 90 days of the date of publication of Decree 11,964.</p>

COMPARATIVE ANALYSIS – INCENTIVIZED DEBENTURES (LAW NO. 12,431/2011) AND INFRASTRUCTURE DEBENTURES (LAW NO. 14,801/2024)

Rules	Incentivized Debentures Law No. 12,431/2011	Infrastructure Debentures Law No. 14,801/2024
Fund borrower (always a corporation, i.e., an S.A.)	(i) SPE; (ii) Concession holder; (iii) Permission/permit holder; (iv) Authorization holder; (v) Lessee; and (vi) Controller of these entities.	
Eligible securities	Debentures, FIDC quotas and CRIs issued until December 31, 2030, observing the requirements set out in the law. There are specific requirements for CRIs and FIDC quotas.	Debentures issued until December 31, 2030, subject to the requirements set out in law.
Eligible Investor	Any investor, subject to applicable taxation.	Any investor, subject to: (i) the applicable taxation; and (ii) the prohibition of acquisition by people linked to the issuer, including those resident or domiciled abroad, as defined by law.
Tax benefit to the issuer	Not applicable.	The borrower may: (i) deduct the interest paid or incurred from the IRPJ and CSLL calculation basis, as permitted by law; and (ii) exclude from the IRPJ and CSLL calculation basis the amount corresponding to 30% of the sum of interest related to the debentures, paid in that fiscal year.
Investor tax regime	<p><u>General Rule</u>: income (including gains) subject to the following IRRF rates:</p> <ol style="list-style-type: none"> <u>0%</u>: individual, non-resident investor ("INR") who invests under the terms of CMN Resolution 4,373 (not located in a tax haven) and sovereign wealth funds (even if located in a tax haven); and <u>15%</u>: legal entity with headquarters in Brazil (definitive taxation), including financial institutions (art. 77, I, of Law No. 8,981/1995). <p>In the case of interest arising from an <u>external loan to raise funds</u> for the implementation of infrastructure projects, subject to registration with the Central Bank of Brazil (BACEN), through the issuance of securities on the <u>international market</u>, IRRF will be levied at the following rates:</p> <ol style="list-style-type: none"> <u>0%</u>: INR (not located in a tax haven and not benefiting from a privileged tax regime); and <u>25%</u>: INR located in a tax haven or beneficiary of a privileged tax regime. 	<p>Taxation will follow the provisions for fixed income instruments with specific changes, except in relation to financial institutions (art. 77, I, of Law No. 8,981/1995), which were excluded from taxation at source.</p> <p>Income (including gains) subject to the following IRRF rates:</p> <ol style="list-style-type: none"> <u>10%</u>: when earned by exempt funds such as FIP, FIC-FIP, FIEE, FIDC, in the redemption, amortization and sale of quotas or in the distribution of revenue; <u>15%</u>: INR 4,373 (not located in a tax haven and not benefiting from a privileged tax regime); <u>22.5% to 15% (regressive)</u>: individuals (definitive taxation) and legal entities based in Brazil (IRPJ advance).
Ministerial approval	<p><u>General Rule</u>: prior ministerial approval is not required, as long as the requirements and conditions of the ordinances of each sectoral ministry are met.</p> <p>Exception: Public services of subnational entities (simplified procedure, to be regulated)</p>	
Allocation of funds	Capital expenditures for investment projects in the infrastructure or RD&I areas, deemed as priorities by Decree 11,964 ("Priority Projects").	
Deadline for reimbursement of costs, expenses or debts	<ul style="list-style-type: none"> ✓ <u>Until February 9, 2025</u>: 24 months ✓ <u>Between February 10, 2025 and February 9, 2026</u>: 36 months ✓ <u>Between February 10, 2026 and February 9, 2027</u>: 48 months ✓ <u>From February 10, 2027</u>: 60 months 	

Rules	Incentive Debentures Law No. 12,431/2011	Infrastructure Debentures Law No. 14,801/2024
Sectors	See table above - "Comparison between Priority Sectors".	
Fine in case of non-allocation of funds	Fine of 20% of the amount raised and not allocated to the investment project, to be applied by the RFB on the issuer or transferor, with subsidiary responsibility of the borrower's controller.	Fine of 20% of the amount raised and not allocated to the investment project, to be applied by the RFB on the issuer, with subsidiary responsibility of the borrower's controller.
Fundraising abroad	0% IRRF rate on interest arising from the issuance of bonds abroad, increased to 30% in the case of payments to related parties.	The Decree expressly provides for the possibility of acquiring debentures by a related legal entity resident or domiciled abroad, provided that the acquisition be carried out in connection with the issuance and placement abroad of securities related to them and through regulation to be published, under the terms of the Decree.
Coexistence of the tax benefits of both rules	Prohibition on the cumulation of benefits within the same series of debentures. It is possible, however, for the same project to raise funds through a series of debentures or other Incentivized Securities, with a certain tax benefit, and carry out another series, or even another issuance, for the same investment project, which has another tax benefit, as discussed herein.	

Our Capital Markets, Infrastructure and Tax practices are available to provide additional clarification on this topic.

CAPITAL MARKETS AREA



JOÃO PAULO MINETTO
PARTNER
jminetto@demarest.com.br
+55 11 3356 1626



LETÍCIA WANDERLEY
PARTNER
lwanderley@demarest.com.br
+55 11 3356 1988



LUIZ FELIPE EUSTAQUIO
PARTNER
leustaquio@demarest.com.br
+55 11 3356 2282



MAIARA MADUREIRA MENDES
PARTNER
mamendes@demarest.com.br
+55 11 3356 2250



PAULA MAGALHÃES
PARTNER
pcmagalhaes@demarest.com.br
+55 11 3356 1959



THIAGO GIANTOMASSI
PARTNER
tgiantomassi@demarest.com.br
+55 11 3356 1656

INFRASTRUCTURE AREA



BRUNO AURÉLIO
PARTNER
baurelio@demarest.com.br
+55 11 3356 1853



IZABELLA REIS
PARTNER
ireis@demarest.com.br
+55 11 3356 1872



MARINA FERRAZ AIDAR
PARTNER
mfaidar@demarest.com.br
+55 11 3356 1711



RENAN SONA
PARTNER
rsona@demarest.com.br
+55 11 3356 2089



VÍRGÍNIA MESQUITA
PARTNER
vmesquita@demarest.com.br
+55 11 3356 1761

TAX AREA



ANDRÉ NOVASKI
PARTNER
anovaski@demarest.com.br
+55 11 3356 2003



ANGELA CIGNACHI
PARTNER
acignachi@demarest.com.br
+55 61 3243 1161



CARLOS EDUARDO ORSOLON
PARTNER
ceorsolon@demarest.com.br
+55 11 3356 2186



CHRISTIANO CHAGAS
PARTNER
cchagas@demarest.com.br
+55 11 3356 2004



DOUGLAS MOTA
PARTNER
dmota@demarest.com.br
+55 11 3356 1888



FABIO FLORENTINO
PARTNER
fflorentino@demarest.com.br
+55 11 3356 1848



GISELE BOSSA
PARTNER
gbossa@demarest.com.br
+55 11 3356 1809



KATIA ZAMBRANO
PARTNER
kzambrano@demarest.com.br
+55 11 3356 1545



MARCELLO PEDROSO
PARTNER
mppedroso@demarest.com.br
+55 11 3356 1818



MARCELO ANNUNZIATA
PARTNER
mannunziata@demarest.com.br
+55 11 3356 2187



PRISCILA FARICELLI
PARTNER
pfaricelli@demarest.com.br
+55 11 3356 1716



ROBERTO CASARINI
PARTNER
rcasarini@demarest.com.br
+55 11 3356 2002



THIAGO AMARAL
PARTNER
tamaral@demarest.com.br
+55 11 3356 1571



VICTOR LOPES
PARTNER
vlopes@demarest.com.br
+55 11 3356 1692