

Regulatory connect

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Regulatory Developments



Preface

The Government of India has been introducing various reforms with an attempt to streamline the regulatory framework to enhance the ease of doing business in India. The government has recently cleared the air around e-commerce in India and has defined the market place and inventory model for the same. This is a clear indication of the government's commitment to bring in clarity wherever required to make India the preferred destination for foreign investment.

On the other hand, the Reserve Bank of India (RBI) has been concentrating on updating regulations under the FEMA. The External Commercial Borrowings (ECB) policy guidelines have been substantially realigned to accommodate the needs of the infrastructure sector. The end-use restrictions have been liberalised and the list of overseas lenders has been expanded. Further, the norms of setting up Liaison Offices (LO), Branch Offices (BO) and Project Offices (PO) in India have been liberalised by doing away with the requirement of obtaining prior approval of RBI except in certain specified sensitive sectors.

The Government of India appears to be headed in the right direction in attracting investments into the country and constantly having investors tuned in to watch reforms that are being rolled out at a steady pace.

Amendments to the FDI policy/ FEMA - Press Notes/Notifications/ Circulars/Press Releases



Press Notes issued by the Department of Industrial Policy and Promotion (DIPP)

Review of FDI policy on Insurance and Pension Sector

The DIPP vide issue of Press Note 1 of 2016 and Press Note 2 of 2016, has liberalised its FDI policy in the Insurance and Pension Sector respectively by allowing FDI up to 49 per cent under automatic route.

Hitherto, FDI up to 26 per cent was allowed under automatic route and FDI beyond 26 per cent up to 49 per cent required government approval.

Giving effect to the above, RBI has also vide issue of its circular amended FEMA 20/2000 thereby enhancing the foreign investment limit in the insurance sector.

Press Note 1 and 2 dated 23 March 2016 issued by the DIPP & A.P. (DIR Series) Circular No.58 dated 31 March 2016

FDI on e-commerce

100 per cent FDI is permitted under the automatic route in B2B e-commerce. FDI is not permitted in B2C e-commerce except in certain circumstances.

In order to provide clarity on the extant FDI policy pertaining to e-commerce, DIPP has issued Press Note 3 of 2016 wherein it has formulated guidelines for FDI in e-commerce. In the context of FDI, the Press Note defines both the marketplace based model and inventory based model of e-commerce.

The Press Note clarifies that 100 per cent FDI is permitted under the automatic route in marketplace model of e-commerce subject to conditions. Key highlights of the Press Note have been discussed in the KPMG Flash News which is available on: <http://www.kpmg.com/IN/en/services/Tax/FlashNews/KPMG-Flash-News-Guidelines-for-Foreign-Direct-Investment-on-e-commerce-1.pdf>

Press Note 3 dated 29 March 2016 issued by the DIPP

Amendment to Overseas Direct Investment (ODI) policy

Submission of the Annual Performance Report (APR)

In order to provide greater capability to Authorised Dealer Banks (AD Banks) to track submission of APRs and also improve the compliance level in relation to submission of APRs by the Indian Party (IP)/Resident Individuals (RI), RBI has taken following measures:

- Online OID application has been suitably modified to enable the nodal office of the AD Bank to view the outstanding position of all the APRs pertaining to an applicant. Accordingly, an AD Bank, before undertaking/facilitating any ODI related transaction would be required to check with its nodal office and confirm that all APRs in respect of all the JV/ WOS of the applicant have been submitted;
- In case of RIs, certification of APRs by the Statutory Auditor or Chartered Accountant need not be insisted upon. Self-certification would be accepted;
- In case multiple IPs/RIs have invested in the same overseas JV/WOS, the obligation to submit an APR shall lie with the IP/ RI having maximum stake in the JV/WOS. Alternatively, the IPs/ RIs holding a stake in the overseas JV/WOS may mutually agree to assign the responsibility for APR submission to a designated entity who may acknowledge its obligation to submit the same by furnishing an appropriate undertaking to the AD Bank;
- An IP/RI shall submit APR in Form ODI Part II to the AD Bank every year, in respect of each JV/WOS outside India and other reports or documents by 31 December each year or as may be specified by the RBI from time to time. The APR shall be based on the latest audited annual accounts of the JV/WOS unless specifically exempted by RBI.

Source: A. P. (DIR Series) Circular No. 61 dated 13 April 2016

Rationalisation and reporting of ODI forms

To capture all data pertaining to the IP undertaking ODI as well as the related transaction, RBI has decided to subsume Form ODI Part II (i.e. Reporting of Remittances) within Form ODI Part I. Accordingly, the rationalised and revised Form ODI would now comprise of five sections (instead of six).

Further, a new reporting format has also been introduced for Venture Capital Fund (VCF)/Alternate Investment Fund (AIF), portfolio investment and overseas investment by mutual funds.

Source: A. P. (DIR Series) Circular No. 62 dated 13 April 2016

Amendments to the ECB policy

ECB: Revised framework

During November 2015, RBI released a revised framework for ECB. The revised framework bifurcated ECB based on foreign currency (FCY) risk profile of each type of ECB i.e. short-term ECB (Track I), long-term ECB (Track II) and ECB denominated in INR (Track III). Further, it also liberalised the end-use restrictions and expanded the list of overseas lenders. The KPMG Flash News in this regard is available at:

<https://www.kpmg.com/IN/en/services/Tax/FlashNews/KPMG-Flash-News-External-Commercial-Borrowings-Policy%E2%80%93Revised-framework-1.pdf>

Further to this, keeping in mind the needs of the infrastructure sector and with an intent to expand the source of funding for this sector, RBI has made certain additional changes to the ECB framework.

Key changes are as follows:

- Companies in the infrastructure sector, Non-Banking Financial Companies – Infrastructure Finance Companies (NBFC-IFCs), NBFCs – Asset Finance Companies (NBFC-AFCs), holding companies and Core Investment Companies (CICs) would now be eligible to raise ECB under Track I with a Minimum Average Maturity (MAM) of five years, subject to 100 per cent hedging. Hitherto, infrastructure companies could raise ECB in foreign currency with a MAM of ten years.
- The AD Category-I banks would be required to verify compliance of the 100 per cent hedging requirement. Further, the borrowers under Track I would be required to have a board approved risk management policy in place.
- 'Exploration, mining and refinery' sectors will be deemed as in the infrastructure sector and can access ECB.
- Companies in the infrastructure sector can utilise the ECB proceeds raised under Track I for the permitted end-uses for this Track. NBFCs-IFCs and NBFCs-AFCs would be allowed to raise ECB only for financing infrastructure. Further, holding companies and CICs would use ECB proceeds only for on-lending to infrastructure Special Purpose Vehicles.
- The individual borrowing limit of USD750 million under the automatic route currently applicable to companies in the infrastructure sector would be applicable to aforesaid companies as well.
- Companies in the infrastructure sector, holding companies and CICs would continue to have the facility of raising ECB under Track II of the ECB framework subject to the prescribed conditions.

Further, RBI has also clarified the ECB framework as follows:

- Designated AD Category-I banks may allow refinancing of existing ECB raised under the previous ECB framework by raising fresh ECB provided the outstanding maturity of the original borrowing is not reduced, the borrower is eligible to raise ECB under the extant framework and all-in-cost of fresh ECB is lower than the existing ECB.
- ECB framework is not applicable for investment in Non-convertible Debentures (NCD) in India made by Registered Foreign Portfolio Investors (RFPI).

- MAM of five years shall apply to Foreign Currency Convertible Bonds (FCCBs)/Foreign Currency Exchangeable Bonds (FCEBs) irrespective of the amount of borrowing. The call and put option, if any, for FCCBs shall not be exercisable prior to five years. Further, provisions regarding delegation of power to AD Bank is not applicable to FCCBs/FCEBs.
- NBFCs coming under the regulatory purview of RBI are eligible to raise ECB. Further, under Track III, NBFCs may utilise ECB proceeds for on-lending for any activities including the infrastructure sector as permitted by the concerned regulatory department of RBI.

Source: A.P. (DIR Series) Circular No.56 dated 30 March 2016

Issuance of Rupee Denominated Bonds overseas (RDBs)

The RBI has modified certain provisions relating to issue of RDBs overseas which are as follows:

- The current limit of USD51 billion for foreign investment in corporate debt has been fixed in Rupee terms at INR2443.23 billion. Issuance of RDBs will be within this aggregate limit of foreign investment in corporate debt;
- Maximum amount which can be borrowed by an entity in a financial year under the automatic route by issuance of these bonds is INR50 billion. Proposals beyond INR50 billion in a financial year would require prior approval of the RBI;
- The criteria for investors and location for issuance of these bonds has also been modified in order to have consistency as regards the eligibility of foreign investors in corporate debt;
- Minimum maturity for RDBs has been reduced to three years;
- Borrowers issuing RDBs overseas should incorporate a clause in the agreement/offer document so as to enable them to obtain the list of primary bond holders and provide the same to the regulatory authorities in India as and when required.

Source: A.P. (DIR Series) Circular No. 60 dated 13 April 2016

In addition to the above, RBI has also issued certain FAQs pertaining to issuance of RDBs. While the FAQs are available on RBI's website, some key takeaways are as follows:

- Indian banks, Limited Liability Partnerships and Partnership firms, etc. are not eligible to issue such bonds.
- Bonds cannot have an optionality clause for prepayment before completing maturity.
- The all-in-cost of such borrowings should be commensurate with prevailing market conditions and should be comparable with the cost at which the borrowing company is able to raise funds domestically.
- The foreign currency-Rupee conversion should be at the market rate on the date of settlement of transactions undertaken for issue and servicing of the bonds, including its redemption.
- ECB Liability-Equity ratio will not be applicable.
- The limit of INR50 billion or its equivalent during a financial year available to be raised through issuance of RDBs is over and above the amount permitted to be raised under the automatic route by an entity eligible to raise ECB.

Other FEMA amendments

Grant of Export Declaration Form (EDF) waiver for export of goods free of cost

The Government of India vide its Notification No. 9/2015-2020 dated 4 June 2015 notified that the status holders shall be entitled to export freely exportable items on a free of cost basis for export promotion subject to an annual limit of INR1 million or 2 per cent of average annual export realisation during preceding three licensing years whichever is lower. Status holder exporters can thus avail EDF waiver, for export of goods free of cost based on the above revised norm.

Prior to this, status holder exporters were entitled to export freely exportable items on a free of cost basis for export promotion subject to an annual limit of INR1 million or 2 per cent of average annual export realisation during preceding three licensing years, whichever is higher.

Source: A.P. (DIR Series) Circular No. 53 dated 3 March 2016

The RBI has revised some of the Regulations related to capital account transactions. In the ensuing paragraphs, we have summarised some of the key changes made in the revised regulations.

Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016

The revised regulations on establishment of LO/BO/PO or any other place of business in India have been liberalised as well as, in some places, tightened up the framework for setting up the same in India. Few of the key changes have been highlighted below:

- Approval for set-up: Powers have been delegated to the AD Category-I banks for grant of approval for establishment of LO/BO/PO in India by foreign entities except in the following cases where RBI approval would still be required:
 - Applicant is a citizen of or is registered/incorporated in Pakistan;
 - Applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening LO/BO / PO in Jammu & Kashmir, North East region and Andaman & Nicobar islands.
 - The principal business of the applicant falls in sectors such as defence, telecom, private security, information and broadcasting. Proposals for opening a project office relating to the defence sector will not require government approval if the said non-resident applicant has been awarded a contract by/entered into an agreement with the Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings.
 - Applicant is a Non-Government Organisation, Non-Profit Organisation, Body/Agency/ Department of a foreign government.

- LO/BO/PO should be opened within six months from the date of the approval letter, else, the approval would be cancelled. However, where the office could not be opened within the stipulated time frame due to reasons beyond the control of the non-resident, the AD Bank may consider granting extension of time for setting up the office by a further period of six months. Any further extension of time shall require prior approval of the RBI.
- Entities engaged in construction and development sectors (excluding infrastructure development companies) and which are Non-Banking Finance Companies are permitted to open a LO for two years only. No further extension would be granted beyond the period of two years and the offices would have to be either closed down or converted to a Joint Venture/Wholly Owned Subsidiary in conformity with extant FDI policy.
- A person from any country other than Pakistan who has been awarded a contract for a project by a government authority/ Public Sector Undertaking may open a bank account with AD Bank without any prior approval from the RBI.
- Powers have been delegated to AD Banks to deal with cases pertaining to transfer of assets of LO/BO/PO to Joint Venture/ Wholly Owned Subsidiary or any other entity.
- A person from Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau opening a LO/BO/PO or any other place of business in India shall register with the concerned State Police Authorities.
- BO/PO are permitted to access fund and/or non-fund based facilities from AD Bank.

Source: RBI's Notification No. FEMA 22 (R)/2016-RB dated 31 March 2016

Foreign Exchange Management (Deposit) Regulations, 2016

The revised deposit regulations have the following key amendments:

- The definition of Person of Indian Origin (PIO) now includes an Overseas Citizen of India cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955 and has now been aligned as per Press Note 7 dated 3 June 2015 issued by the DIPP.
- Under permissible debits and credits for Non-Resident Ordinary (NRO) accounts, transfers to /from other NRO accounts have been permitted.
- Any person resident outside India having a business interest in India would be allowed to open, hold and maintain a Special Non-Resident Rupee (SNRR) account with an authorised dealer for purposes of its bona fide transactions in rupees in accordance with the requirements laid down under Schedule 4.

Source: RBI's Notification No. FEMA 5 (R)/2016-RB dated 1 April, 2016

Foreign Exchange Management (Remittance of Assets) Regulations, 2016

The revised regulations on remittance of assets have the following key amendments:

- Definition of Non-Resident Indian (NRI) and PIO have been amended to have the same meaning as assigned under the FEM (Deposits) Regulations, 2016.
- For the purpose of remitting amounts from an NRO account, the account holder is required to furnish an undertaking to the AD bank to the effect that the remittance is sought to be made out of the remitter's balances held in the account arising from his/her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account. If such is found to be the case, the account holder will be liable for penal action under FEMA.
- The requirement for submitting a no objection from the Income Tax Authority at the time of remittance of assets of Indian companies under liquidation has been done away with.

Source: RBI's Notification No. FEMA 13 (R)/2016-RB dated 1 April 2016

Acceptance of deposits by Indian companies from a person resident outside India for nomination as a Director

In terms of Regulation 3 of FEM (Deposit) Regulations, 2016 no person resident in India can accept any deposit from or make any deposit with a person resident outside India.

Section 160 of the Companies Act, required a person intending to nominate himself or any other person as a director in an Indian company to place a deposit with such an Indian company.

Given the ambiguity existing in the above, RBI clarified that a person resident outside India keeping deposits with an Indian company in accordance with Section 160 of the Companies Act, 2013 is a current account (payment) transaction and as such, does not require any approval from the RBI. Further, all refunds of such deposits, arising in the event of selection of the person as a director or getting more than 25 per cent votes, shall be treated similarly.

Source: A.P. (DIR Series) Circular No.59 dated 13 April 2016

Companies Act, 2013



Exemption from XBRL filing

The Ministry of Corporate Affairs (MCA) has exempted housing finance companies from filing financial statements with the Registrar in Extensible Business Reporting Language (XBRL).

Hitherto, this exemption was available to companies in banking, insurance, power sector and non-banking financial companies.

Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2016 dated 4 April 2016

Early closure of buy-back offer

In accordance with Companies (Share Capital and Debenture) Rules, 2014, the offer for buy-back shall remain open for a period of not less than fifteen days and not exceeding thirty days from the date of dispatch of letter of offer.

The MCA has recently made an amendment to the above rule. According to the amendment, a proviso has been inserted to rule 17, sub-rule (5), pursuant to which the offer for buy-back may remain open for a period of less than fifteen days, provided all members of the company agree to it.

Companies (Share Capital and Debentures) Second Amendment Rules, 2016 dated 29 March 2016

Buy back of shares permitted on the basis of limited review financials

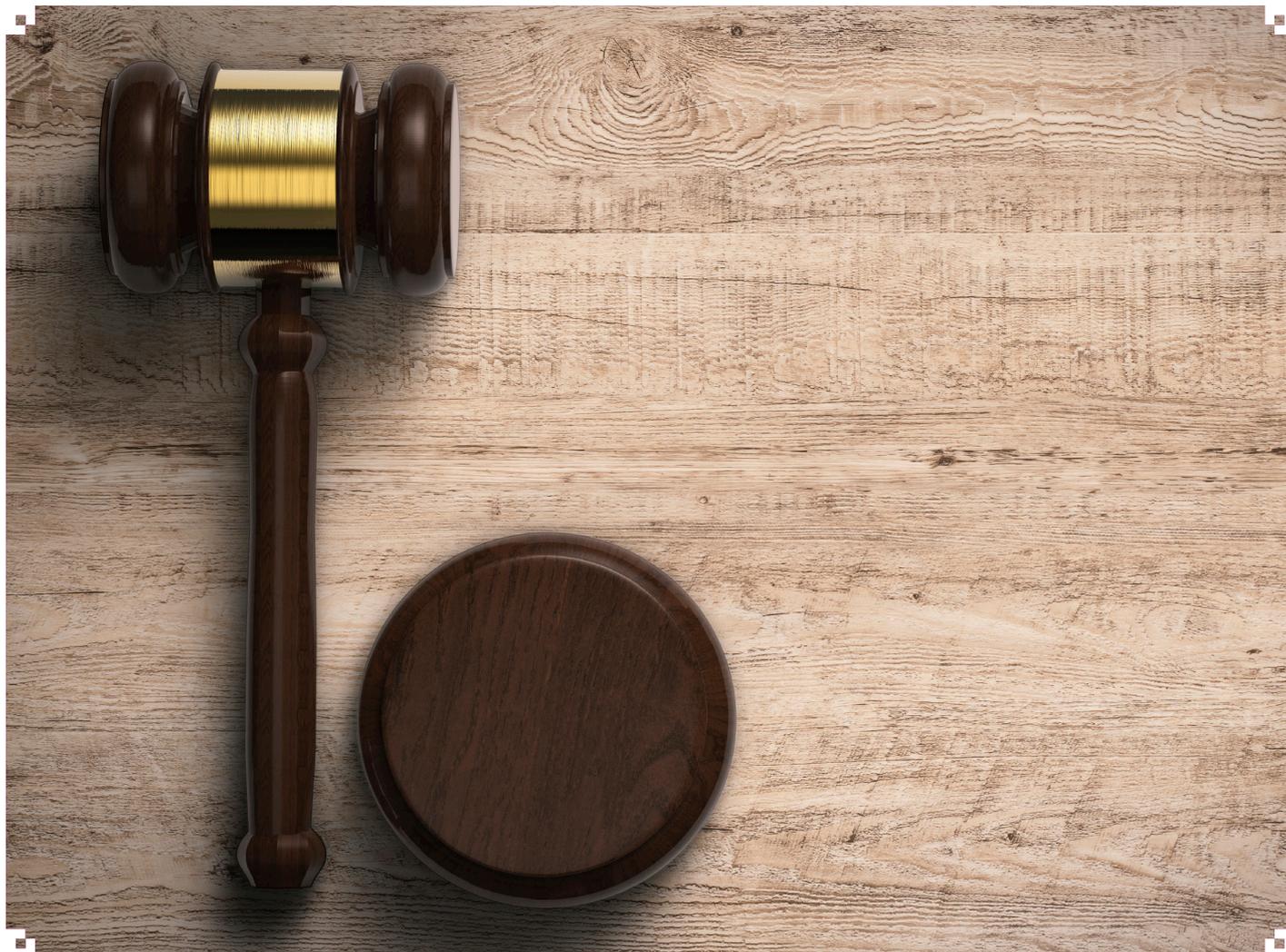
The MCA has amended Companies (Share Capital and Debenture) Rules, 2014, pertaining to buy back of shares and securities by private limited and unlisted public companies.

According to the amendment, in case, the audited financials are more than six months old, the calculation with reference to buy back shall be done on the basis of unaudited accounts not older than six months from the date of offer document which is subjected to limited review by the auditors of the company.

KPMG's News Flash to this effect is available on this link:

<https://portal.ema.kworld.kpmg.com/tax/in/Documents/KPMG-Flash-News-MCA-Notification-1.pdf>

Companies (Share Capital and Debentures) Amendment Rules, 2016 dated 10 March 2016



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