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DSK Legal Knowledge Center

Updates on

- Corporate
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CORPORATE

A. External Commercial Borrowings (ECB) Policy - Liberalization

The Reserve Bank of India ("RBI"), vide its circular dated January 2, 2009¹, has modified certain aspects of the ECB policy (to be reviewed in June 2009) in respect of the following:

- (a) the dispensing of the requirement of all-in-cost ceilings until June 30, 2009. Eligible borrowers, proposing to avail of ECB pursuant to the above, may approach the RBI under the Approval Route.

- (b) permission to avail ECB under the Approval Route to Corporates, engaged in the development of integrated township, as defined in Press Note 3 (2002 Series)², subject to fulfillment of certain requirements as stipulated in the circular.
- (c) permission to NBFCs, which are exclusively involved in financing of the infrastructure sector, to avail of ECBs from multilateral / regional financial institutions and Government owned development financial institutions for on-lending to the borrowers in the infrastructure sector under the Approval route. The RBI has prescribed certain conditions based on which applications made shall be considered.

¹ RBI/2008-09/343 A.P. (DIR Series) Circular No. 46 dated January 2, 2009

² Dated January 04, 2002, issued by DIPP, Ministry of Commerce & Industry, Government of India

(d) permission to Corporates, in the hotels, hospitals and software sectors, to avail of ECB up to USD 100 million per financial year, under the Automatic Route, for foreign currency and / or Rupee capital expenditure for permissible end-use. However, the proceeds of the ECBs are not to be used for acquisition of land.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/89675.pdf>

B. Limit increased to Rs. 5 Crores for appointment of Company Secretary.

The Central Government, vide notification dated January 5, 2009³, has passed the Companies (Appointment and Qualifications of Secretary) Amendment Rules, 2009, making it compulsory for a company having a paid-up share capital of not less than Rs. 50,000,000 to have a whole-time secretary. A company having a paid up share capital of Rs. 20,000,000 or more but less than Rs. 50,000,000 may appoint any individual, who possesses the qualification of membership of the Institute of Company Secretaries of India, as a whole-time secretary to perform the duties of a secretary under the Companies Act, 1956.

Companies making such appointments shall be exempted from the requirement of obtaining a certificate from a secretary in whole-time practice under rule 3 of the Companies (Compliance Certificate) Rules, 2001. The said notification will come into force from March 15, 2009.

C. Limited Liability Partnership Act, 2008.

The Central Government passed the Limited Liability Partnership Act, 2008 ("Act") on January 7, 2009, containing the provisions for the formation and regulation of limited liability partnerships and for matters connected therewith. A limited liability partnership is a body corporate having perpetual succession, formed and incorporated under the Act and is a legal entity separate from that of its partners. Any change in the partners of a limited liability partnership will not affect the existence, rights or liabilities of the limited liability partnership.

The Act shall come into force on such date as the Central Government may, by notification, in the Official Gazette, appoint Provided that different dates may be appointed for different provisions of the Act.

³ Notification no. G.S.R. 11 (E)

D. Companies (Issue of Indian Depository Receipts) (Amendment) Rules, 2009

The Central Government, vide notification 19th January, 2009, has made the following rules called the Companies (Issue of Indian Depository Receipts) (Amendment) Rules, 2009 to amend the Companies (Issue of Indian Depository Receipts) Rules, 2004, namely:-

1. In the Companies (Issue of Indian Depository Receipts) Rules, 2004, hereinafter referred to as the principal rules, in rule 3, in sub-rule (i), -
 - (A) the definition of 'Depository' under clause (b) shall be deleted (the term has actually not been used anywhere in the rules) and clauses (c) to (h) shall be renumbered as clauses (b) to (g) respectively.
 - (B) The definition of Overseas Custodian Bank under the renumbered clause (f) has been amended and now, having a place of business in India is not a sine-qua-non for being such an entity for the purposes of the rules and alternatively, an Overseas Custodian Bank can have a custodial arrangement/ agreement with the Domestic Depository registered with SEBI.

2. In the principal rules, in rule 9, -

The following proviso shall be added:-

"Provided that the IDRs issued by an issuing company may be purchased, possessed and transferred by a person other than a person resident in India if such Issuing Company obtains specific approval from Reserve Bank of India in this regard or complies with any policy or guidelines that may be issued by RBI on the subject matter." Earlier, only a person resident in India could deal in the IDRs.

The said notification shall come into force from the date of publication in the Official Gazette.

E. Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in Indian companies

The Department of Industrial Policy and Promotion ("DIPP") has, vide Press Note 2 (2009 Series)⁴, issued the guidelines for the methodology of calculation of all direct and indirect foreign investments in Indian companies. However, the said calculations shall not be used to compute the foreign investment in sectors

⁴ D/o IPP F. No. 12/22/2007-FC dated February 13, 2009

which are governed specifically by any statute(s) or rule(s); hence the methodology is not applicable to calculation of foreign investment in the insurance sector. The Press Note stipulates the following:

- for the purpose of computation of indirect foreign investment, foreign investment in Indian company shall include all types of foreign investment i.e. FDI, investment by FII (holding as on March 31), NRI, ADRs, GDRs, FCCB and convertible preference shares and convertible currency debentures;
- definitions of some key terms including “non resident entity”, “owned”, “controlled” and “largest Indian shareholder”;
- calculation of foreign investment in the investee company when:
 - (a) the investing Indian company is owned and controlled by resident Indian citizens and/or Indian companies which are owned and controlled by resident Indian citizens;
 - (b) the investing company is owned or controlled by non-resident entities; and
 - (c) exception to the above.

- requirement of furnishing complete details about the foreign investment including ownership details and details in respect of control of the Indian company(s) to the Government of India at the time of seeking approval;
- in any sector/ activity, where Government approval is required for foreign investment and in cases where there are any inter-se agreements between share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority;
- in all sectors attracting sectoral caps, the balance equity shall be beneficially owned by/ held with / in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens;
- in the information and broadcasting and defense sectors where the sectoral cap is less than 49%, the company would need to be owned and controlled by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens. For this purpose, the equity held by the largest Indian shareholder would have to be at least 51%

of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions;

- if a declaration is made by persons as per section 187C of the Indian Companies Act about a beneficial interest being held by a non resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment;
- the policy on downstream investment would be notified separately;
- any foreign investment already made in accordance with the guidelines in existence prior to issue of the said Press Note would not require any modification to conform to these guidelines. All other investments, past and future would come under the ambit of these new guidelines; and
- the guidelines are effective from the date of issue of the Press Note.

For more information please refer to

<http://siadipp.nic.in/policy/changes.htm>

F. Guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities

The DIPP has, vide Press Note 3 (2009 Series)⁵, issued the guidelines governing transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities. The Press Note stipulates the following:

- in sectors with caps, including, inter alia, defense production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, Government approval/FIPB approval would be required if the transfer of security falls within certain criteria stipulated in the said Press Note;
- definitions of some key terms including “owned”, “controlled” and “non resident entity”;
- foreign investment shall include all types of foreign investments i.e. FDI, investment by FII, NRI, ADRs, GDRs, FCCB and convertible preference shares;
- the said guidelines will not apply to sectors/activities where there are no foreign investment caps i.e where 100% foreign investment is permitted under automatic route; and

⁵ D/o IPP F. No. 12/22/2007-FC dated February 13, 2009

- these guidelines come into effect from the date of issue of the Press Note.

For more information please refer to

<http://siadipp.nic.in/policy/changes.htm>

BANKING AND FINANCE

A. Raising of Short Term foreign currency Borrowings - NBFCs-ND-SI

The RBI, vide its circular dated December 23, 2008⁶, has permitted Systemically Important Non-Deposit taking NBFCs ("NBFCs-ND-SI"), as a temporary measure, to raise foreign currency short term borrowings under the Approval Route subject to certain conditions as stipulated by RBI⁷. NBFCs-ND-SI that have availed short term foreign currency loans are advised to furnish a monthly return within 10 days from the end of the month to which it pertains.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/89305.pdf>

⁶ RBI 2008-09/329 DNBS. PD. CC . No. /132/22.10.72/ 2008 -09 dated December 23, 2008

⁷ RBI Press Release: 2008 -2009/602 dated October 31, 2008
[<http://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/88098.pdf>]

B. Internal assignments in banks by statutory auditors

The RBI, vide its circular dated December 31, 2008⁸, has instructed that the audit firms should not undertake statutory audit assignment while they are associated with internal assignments in a bank during the same year. In case the audit firms are associated with internal assignment, they must relinquish the internal assignment before accepting the statutory audit assignment during the year.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/89627.pdf>

C. Regulation of excessive interest charged by NBFCs

The RBI, vide its circular dated January 2, 2009⁹, has issued certain additional directions in respect of excessive rates of interest charged by NBFCs as follows:

- (a) the board of each NBFC is required to adopt an interest rate model and determine the rate of interest to be charged for loans and advances;

⁸ RBI/2008-09/ 335 Ref.DBS.ARS.No.BC. 02/ 08.91.001/ 2008 -09 dated December 31, 2008

⁹ RBI/2008-09/337 DNBS (PD) C.C. No. 133 /03.10.001/ 2008 -09 dated January 2, 2009

- (b) NBFC to disclose the (i) the rate of interest (annualised rates), (ii) approach for gradations of risk and (iii) rationale for charging different rate of interest to different categories of borrowers;
- (c) the said rationale should be provided to borrowers/customers;
- (d) specified information is required to be published (and updated) on the web-site of the NBFC or in the relevant newspapers.
- (e) All NBFCs are required to acknowledge receipt of the circular to the Regional Office of DNBS.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/89666.pdf>

D. Prudential Guidelines on Restructuring of Advances by Banks

The RBI, vide its circular dated January 2, 2009¹⁰, has made additional provisions to previously issued instructions¹¹ in respect of the followings):

¹⁰ RBI/2008-09/340 DBOD.BP.No.104/21.04.132/2008 -09 dated January 2, 2009

¹¹ RBI/2008-09/143/DBOD.BP.BC.37/21.04.132/ 2008 -09 dated August 27, 2008 [http://rbidocs.rbi.org.in/rdocs/notification/PDFs/86627.pdf] and RBI/2008 09/311.DBOD.BP.BC.93/21.04.132/2008 -09 dated December 8, 2008 [http://rbidocs.rbi.org.in/rdocs/notification/PDFs/88917.pdf]

- (a) treatment of accounts covered under the circular dated December 8, 2008, which were standard accounts on September 1, 2008, as standard accounts on restructuring provided the restructuring is taken up on or before January 31, 2009 and the restructuring package is put in place within a period of 120 days from the date of taking up the restructuring;
- (b) extension of the period for implementation of the restructuring package from 90 days to 120 days in respect of accounts covered under the circular dated August 27, 2008.
- (c) the treatment to be made available to 'standard' and 'sub-standard accounts', covered under circulars dated August 27, 2008 and December 8, 2008 even where full security cover for Working Capital Term Loan ("WCTL") is not available, subject to certain conditions as stipulated in the circular.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/89672.pdf>

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