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DSK Legal Knowledge Center

Updates on

- Corporate

CORPORATE

A. External Commercial Borrowings Policy- Liberalisation

The Reserve Bank of India (“RBI”), vide its circular dated April 20, 2009¹ (“the Circular”), pursuant to A.P. (DIR Series) Circular No. 1 dated July 11, 2008, has as a measure of rationalization, decided to allow AD Category –1 banks (“AD Banks”) to convey ‘no objection’ under the Foreign Exchange Management Act, 1999 (“FEMA”) for issue of corporate guarantee in favour of the overseas lessor, for operating lease in respect of import of aircraft/ aircraft engine/ helicopter.

The ‘no objection’ to the Indian importer for issue of corporate guarantee under FEMA may be conveyed after obtaining –

- Board Resolution for issue of corporate guarantee from the company issuing such guarantees, specifying names of the officials authorised to execute such guarantees on behalf of the company; and
- Ensuring that the period of such corporate guarantee is co-terminus with the lease period.

As per the Circular, the AD Banks may invariably specify that the ‘no objection’ is issued only from the foreign exchange angle under the provisions of FEMA and should not be construed as an approval by any other statutory authority or Government or any other laws / regulations. If further approval or permission is

¹ A.P. (DIR Series) Circular No. 62

required from any other regulatory / statutory authority or Government under the relevant laws / regulations, the applicant should take the approval of the authority concerned before undertaking the transaction. Further, the 'no objection' should not be construed as regularizing or validating any irregularities, contravention or other lapses, if any, under the provisions of FEMA or any other laws or regulations.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIRC200409.pdf>

B. Foreign Direct Investment in India - Transfer of Shares / Preference Shares / Convertible Debentures by way of Sale - Modified Reporting Mechanism

The RBI, vide its circular dated April 22, 2009², with regard to the transfer of shares from resident to non - resident and vice versa, has modified the reporting mechanism as follows:

- the form FC-TRS has been revised;
- the sale consideration in respect of equity instruments purchased by a person resident outside India, remitted into India through normal banking channels, shall be subjected to

a KYC check by the remittance receiving AD Category – I bank ("AD Bank") at the time of receipt of funds;

- in case, the remittance receiving AD Bank is different from the AD Bank handling the transfer transaction, the KYC check is required to be carried out by the remittance receiving AD Bank and the KYC report be submitted by the customer to the AD Bank carrying out the transaction along with the form FC-TRS;
- the form FC-TRS is required to be submitted to the AD Bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the form FC-TRS within the given timeframe would be on the transferor / transferee, resident in India; and
- in case of transfer of equity instruments where the non-resident acquirer proposes deferment of payment of the amount of consideration, prior approval of the RBI would be required. Further, in case approval is granted for a transaction, the same should be reported in form FC-TRS, duly certified by the AD Bank, within 60 days from the date of receipt of the full and final amount of consideration.

These directions have become operative with immediate effect.

² RBI/2008-2009/447 A.P.(DIR Series) Circular No. 63

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/DFCTRS630409.pdf>

C. Foreign investment in Commodity Exchanges³

Government of India has laid the guidelines for foreign investment in Commodity Exchanges vide Press Note 2(2008) dated March 12, 2008 (“Guidelines”). As per the Guidelines, a composite ceiling for foreign investment of 49% is prescribed under approval route, subject to the condition that investment under the Portfolio Investment Scheme will be limited to 23% and that under the FDI Scheme to 26%. The Guidelines further stipulate that no foreign investor/ entity, including persons acting in concert, will hold more than 5% of the equity in these companies. However, some of the existing Commodity Exchanges had foreign investment above the permitted levels, as on the date of issue of the said Press Note and, consequently, such Commodity Exchanges were required to divest foreign equity so as to bring the foreign investment in accordance with Press Note 2(2008). The Commodity Exchanges were permitted to avail of

transition/ complying/ correction time for this purpose, up to June 30, 2009, vide Press Note 8(2008) dated August 19, 2008.

The Government has, vide Press Note 5(2009), decided to allow a further transition / complying /correction time to the existing Commodity Exchanges to September 30, 2009 and the Commodity Exchanges are required to furnish a compliance report to the Department of Industrial Policy & Promotion, Department of Consumer Affairs, Foreign Investment Promotion Board, the Forward Market Commission and Securities Exchange Board of India each, giving the details of the foreign investments and equity structures as on September 30, 2009,. The said Press Note 5 also warns that non-compliance of the conditions of Press Note 2(2008) after September 30, 2009 would be a violation of the Foreign Exchange Management Act, 1999.

For more information please refer to

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

³ Press Note No. 5 (2009)

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