

- Corporate

## CORPORATE

### A. Clarification regarding: Status of a holder of Global Depository Receipts ("GDRs")

The Ministry of Corporate Affairs ("MCA"), vide circular dated June 16, 2009<sup>1</sup>, has issued certain clarifications stating inter alia, that neither can a holder of a GDR be called a member of the company nor can an Overseas Depository Bank be deemed a member of the GDR issuing company.

### B. Export of Goods and Software – Realization and Repatriation of export Proceeds - Liberalization

The Reserve Bank of India ("RBI"), vide circular dated June 30,

2009<sup>2</sup>, has extended the period of realization and repatriation to India of the amount representing the full export value of goods or software exported from the date of export, for a further period of one year i.e. up to June 30, 2010, subject to review.

For more information please refer to

[http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR70\\_30609.pdf](http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR70_30609.pdf)

### C. External Commercial Borrowings (ECB) Policy

RBI vide circular dated June 30, 2009<sup>3</sup> has modified the ECB policy by permitting

- Corporates, engaged in the development of integrated township to avail of ECB under the Approval route up to December 31, 2009.

<sup>1</sup> General Circular No: 1/2009 (No.17/67/2009 CL-V)

<sup>2</sup> RBI/2008-09/ 516 A.P. (DIR Series) Circular No.70

<sup>3</sup> RBI/2008-09/ 517 A.P. (DIR Series) Circular No.71

- (ii) Non-Banking Finance Companies (“NBFCs”), exclusively involved in financing of the infrastructure sector, to avail of ECBs from identified lenders and subject to certain conditions
- (iii) Special Economic Zone (“SEZ”) developers to avail of ECB under the Approval route for providing infrastructure facilities within the SEZ.

The modifications to the ECB guidelines have come into force on the date of the said circular.

For more information please refer to

[http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR71ECB\\_300609.pdf](http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR71ECB_300609.pdf)

#### D. Ready Forward Contracts

RBI, vide circular dated July 20, 2009<sup>4</sup>, has permitted, in addition to the existing categories of eligible entities<sup>5</sup> allowed to enter into ready forward contracts (repos) in Government securities (dated securities and treasury bills), unlisted companies who have been issued special securities by the Government of India and having gilt accounts with scheduled commercial banks to enter into ready

<sup>4</sup> RBI/2009-10/102 IDMD.DOD.No. 334/ 11.08.36/ 2009-10  
<sup>5</sup> circular IDMD/ PDRS/ 4779/ 10.02.01/ 2004-05\_ dated May 11, 2005  
<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/62943.pdf>

forward contracts, subject to the conditions and restrictions stipulated in the circular dated May 11, 2005<sup>6</sup>, in addition to the restrictions stipulated in the said circular dated July 20, 2009<sup>7</sup>.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/RC1200709.pdf>

#### E. Issue of Indian Depository Receipts (IDRs)

RBI has, vide circular dated July 22, 2009<sup>8</sup>, operationalized the Companies (Issue of Indian Depository Receipts) Rules, 2004 (“IDR Rules”) notified by the Ministry of Corporate Affairs. The said circular further stipulates certain provisions governing issue of IDRs including

- (i) Provisions regarding investment by Persons resident in India / FIIs / NRIs in IDRs; and
- (ii) Procedure for transfer and redemption of IDRs.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR5220709.pdf>

<sup>6</sup> IDMD/ PDRS/ 4779/ 10.02.01/ 2004-05  
<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/62943.pdf>  
<sup>7</sup> RBI/2009-10/102 IDMD.DOD.No. 334/ 11.08.36/ 2009-10  
<sup>8</sup> RBI/2009-10/106 A.P. (DIR Series) Circular No. 05

F. Lending under Consortium Arrangements/Multiple Banking Arrangements

RBI had, vide circular dated September 19, 2008<sup>9</sup> along with subsequent circulars dated December 08, 2008<sup>10</sup>, February 10, 2009<sup>11</sup> and June 24, 2009<sup>12</sup>, issued guidelines governing consortium arrangements/multiple banking arrangements entered into by the banks. RBI has, vide circular dated August 5, 2009<sup>13</sup>, stipulated that the guidelines governing consortium arrangements/multiple banking arrangements entered into by banks in the previously issued circulars mentioned above, shall mutatis mutandis apply to the select all-India Financial Institutions (AIFIs) for sharing of information among the AIFIs and with banks.

For more information please refer to

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/ILCA050809.pdf>

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<sup>9</sup> DBOD.No.BP.BC.46/08.12.001/2008-09

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/287063.pdf>

<sup>10</sup> DBOD.No.BP.BC.94/08.12.001/2008-09

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/88815.pdf>

<sup>11</sup> DBOD No.BP.BC.110/08.12.001/2008-09

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/DOC%20379%20Circular%20DBOD.pdf>

<sup>12</sup> DBS.CO.FrMC.BC.No.8/23.04.001/2008-09

<http://rbidocs.rbi.org.in/rdocs/notification/PDFs/DBSBC240609.pdf>

<sup>13</sup> RBI/2009-2010/116 DBOD. No. FID. FIC.5/01.02.00/2009-10

G. Deferment of payment of consideration by a non-resident to a resident for sale of shares of an Indian company

The Reserve Bank of India ("RBI") has recently refused to grant approval for the sale of shares of an Indian company by a resident ("Seller") to a non-resident ("Purchaser"), where the Purchaser was proposing to pay a part of the consideration on a deferred basis after the completion of the purchase of shares. While the RBI did not specify the reasons for refusing its approval, it is learnt that the RBI was of the view that the granting of time by the Seller to the Purchaser to pay the consideration, after the sale of shares has been completed, would amount to grant of "credit facility" by the Seller to the Purchaser. This is despite the fact that the RBI had granted approval in the past for such sale of shares in some cases, if the amount to be received by the resident on the date of the transfer of shares from the non-resident was in excess of the amount that the resident would be entitled to receive as per the CCI Guidelines.

Transaction-

The Seller had proposed to sell shares of an Indian company to the Purchaser. A part of the consideration ("First Tranche Amount") for the sale of shares was being paid on the date on which the shares were to be transferred by the Seller to the Purchaser. The

balance consideration was payable by the Purchaser to the Seller, based on the achievement/fulfillment of certain milestones.

The First Tranche Amount was higher than the consideration that the Seller would be entitled to receive as per the guidelines issued by the erstwhile Controller of Capital Issues (“CCI Guidelines”).

#### RBI Guidelines-

The RBI has issued guidelines vide notification dated April 22, 2009<sup>14</sup> (“Guidelines”) that stated, inter alia, that 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. In case such approval is granted, the same should be reported in form FC-TRS within 60 days from the date of receipt of the full and final amount of consideration.

#### Analysis-

It is not uncommon for such transactions to have an “earn out” mechanism where the seller receives a part of the consideration (as deferred consideration) upon the achievement or fulfillment of certain milestones. In the past, the “earn out” mechanism has been implemented after obtaining the prior approval of the RBI.

As discussed above, the guidelines issued by the RBI contemplate that shares may be transferred by a resident to a non-resident where the payment of consideration is deferred, subject to obtaining the prior approval of the RBI.

If the RBI views the deferring of the payment of consideration as granting of “credit facility” and therefore refuses to grant approval for such a transaction, then the provisions in the RBI Guidelines relating to payment of consideration on a deferred basis would be defeated and rendered inoperative.

While the RBI may grant/refuse approval on a case to case basis, depending on the facts and circumstances of each case, the uncertainty as to whether the RBI would grant approval for transactions where the payment of consideration by a non-resident to a resident is deferred has to be considered while structuring transactions. While examining alternate structures, the parties would have to consider the legal and commercial risks and measures to safeguard their interests.

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<sup>14</sup> A. P. (DIR Series) Circular No.63

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

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