Legal Updates

FOREIGN DIRECT INVESTMENTS IN INDIA: TRANSFER OF SHARES BETWEEN RESIDENTS AND NON-RESIDENTS FURTHER LIBERALIZED

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Legal updates

The Reserve bank of India ("**RBI**") has, further to its measures to liberalize and rationalize the procedures and policies governing Foreign Direct Investments ("**FDI**") in India, vide its circular A.P. (DIR Series) Circular No. 43 dated November 4, 2011 ("**Circular**") has liberalized the inter-se transfers between residents and non-residents of India by revoking the requirement of obtaining prior RBI approval in certain cases.

I. BACKGROUND

1. Prior to the issuance of the Circular, the position in relation to any inter-se transfers between a resident and a non-resident of India required prior RBI approval in certain cases. These were:

   (a) the transfer between non-resident and resident of India is not compliant with the pricing guidelines as stipulated by the RBI from time to time; or

   (b) the transfer of shares fell under an investment under the government route of the FDI policy requiring prior approval of the Foreign Investment Promotion Board ("**FIPB**"); or

   (c) the investee company (i.e. the Indian company whose shares are being transferred) is engaged in rendering any financial service; or

   (d) the transfer falls under the purview of the provisions of Securities and Exchange Board (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (now 2011 Regulations) ("**Takeover Regulations**").

2. Further, the transfer of shares from a non-resident to a resident of India which did not conform to the pricing guidelines as stipulated by the RBI from time to time also required prior approval of the RBI.

II. THE AMENDMENT

3. **Transfer of shares from non-resident to resident or *vice-versa* where the pricing guidelines are not met**

   No RBI approval will be necessary if:

   (a) The original and the resultant transfer is in compliance with the FDI policy (including the sectoral caps, capitalization requirements, etc.);

(b) the pricing of the shares has been done in accordance with other application regulation and/or guidelines of Securities and Exchange Board of India ("**SEBI**"); and

(c) a chartered accountant has given a certificate to the effect of compliance with the pricing under the SEBI regulations and/or guidelines and the same has been attached to Form FC-TRS submitted to RBI pursuant to the share transfer.

4. **Transfer requiring prior FIPB approval**

Where a transfer requires prior FIPB approval, no RBI approval will be required if prior FIPB approval has been obtained and the pricing guidelines of the RBI, as amended from time to time, have been complied with.

5. **Transfer that attracts Takeover Regulations**

Where the provisions of Takeover Regulations are attracted, no RBI approval will be required if the pricing guidelines of the RBI and the documentation requirements, as amended from time to time, have been complied with.

6. **Investee company involved in financial sector**

Where the investee company is involved in financial sector, then no RBI approval will be required if:

(a) No objection certificates ("**NOCs**") are obtained from the respective financial sector regulators/ regulators of the investee company *as well as* transferor and transferee entities;

(b) The NOCs are filed with the RBI along with the form FC-TRS; and

(c) The FDI policy and the applicable regulations under the Foreign Exchange Management Act (such as sectoral caps, capitalization requirements, etc.) have been complied with.

III. Impact

The amendment brought by the RBI is indeed a welcomed change for our foreign investors. Earlier, where more than one regulatory authorities, such as RBI and

Legal updates

FIPB, or RBI and SEBI, etc. were involved, a foreign investor was required to make an application seeking approval from all involved regulatory authority. This not only ensures smoother movement with respect to the procedural aspects but also helps in avoiding compliance with conflicting provisions, if any, of the distinct authorities.

Though the intent is to liberalize the procedural requirements and foreign investments in India, RBI has enforced restriction on its own powers to regulate such investments. Any ambiguities in relation to the said amendment will soon be realized and we hope that the RBI resolves them keeping in mind the interest of the Indian economy.

In other words, the net effect of the amendment is to avoid multiplicity of sanctions involved in transfer of shares.