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Refresh

Changing Regulatory Landscape

Newsletter

March - April 2014

In this Issue

The FIPB meeting

Interesting cases recently discussed in the FIPB meetings have been classified below:

- A proposal for the capitalisation of payments made by a foreign collaborator for securing lease of plots of lands for its subsidiary in India was approved by the FIPB.
- A proposal was approved by the FIPB for NR to NR transfer of capital contribution on retirement of one of the existing foreign partners of the LLP. Further, the approval granted also allowed the LLP to undertake additional activities and also for the change in the name of the LLP.
- A post facto approval sought by the investee company for shares issued to its foreign investor against the post incorporation expenses in a computer consulting and audio/video equipments company was rejected by the FIPB.
- A proposal for post facto approval by the Indian company for the allotment of share warrants to the foreign investor was rejected by the FIPB.

Corporate regulations

FDI

FDI in LLPs

The RBI has operationalised guidelines in relation to FDI in LLPs permitted by the government of India under the approval route[1] with retrospective effect from 20 May 2011.

Key provisions of the notification have been summarised below:

Investment route

Direct or indirect foreign investment (regardless of the nature of 'ownership' or 'control' of an Indian company) shall require government/FIPB approval.

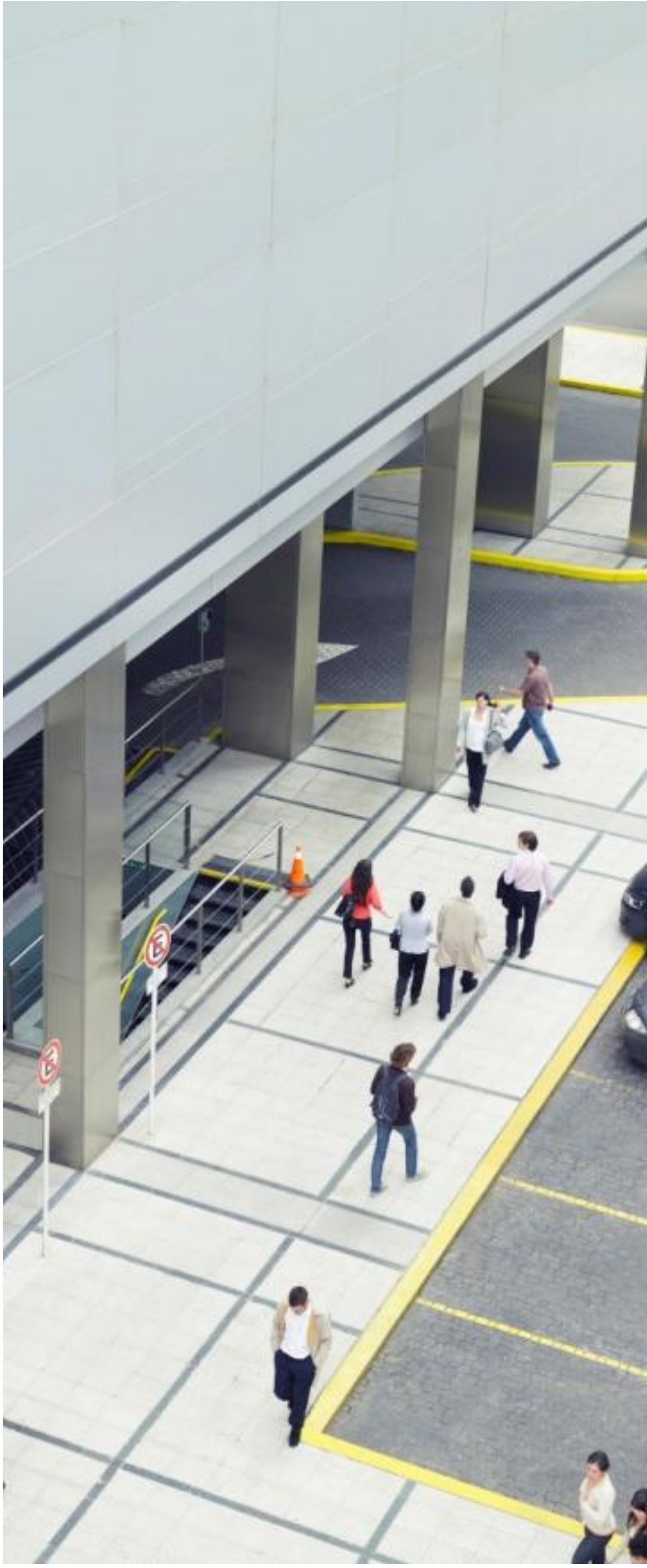
Pricing guidelines

- **Capital contribution or acquisition/transfer of profit shares:** More than or equal to the fair price as worked out with any valuation norm which is internationally accepted or adopted as per market practice (**fair price**)

- **Transfer of capital contribution or profit share:**

  - Transfer from resident to non resident: At consideration more than or equal to the fair price of capital contribution and profit share of LLP

  - Transfer from non resident to resident: At consideration less than or equal to the fair price of capital contribution or profit share of LLP



[1] Press Note 1/2011 dated 20 May 2011

The valuation certificate shall be issued by the chartered accountant or by a practising cost accountant or by an approved valuer from the panel maintained by the central government.

Reporting requirements: To the regional office of the RBI through authorised dealer banks

Transaction to reported	Due date for reporting
Capital contribution by way of acquisition/transfer of profit shares	Within 30 days of receipt of funds (The RBI shall allot UIN in this regard)
Transfer of capital contribution/profit share	Within 60 days from the date of receipt of funds

Further, the RBI has advised existing LLPs which have already received foreign investment to comply with the applicable reporting requirement from the date of issuance of these instructions.

Source: FEMA Notification No 289/2014 dated 13 March 2014 published vide Official Gazette No 190(E) dated 19 March 2014

FDI in pharmaceuticals sector: Non compete clause permitted only under exceptional circumstances

As per the Press Note 1 (2014 series) released by the DIPP, FDI in pharmaceuticals will continue to remain 100% under the automatic route for greenfield investments and 100% under approval route for brownfield investments subject however to the condition that the 'non-compete' clause will not be allowed, except under special circumstances with FIPB approval.

FDI in insurance sector: Press Note 2 (2014 series)

As per Press Note 2 (2014 series), the DIPP has revised and clarified the scope of 26% FDI limit to include FDI, FII and investments by NRIs in the insurance sector in India. Paragraph 6.2.17.7.1 of the consolidated FDI policy has been replaced with the following set of broadened insurance activities:

FDI in insurance is classified into the following:

- Insurance company
- Insurance brokers
- Third-party administrators
- Surveyors and loss assessors upto 26% (FDI+FII+NRI) under the automatic subject to the existing conditions:

In addition, the following provisions related to the banking private sector in the FDI policy will also be applicable in respect of bank promoted insurance companies. The broadened set of activities has been defined as follows:

Indian insurance company

- Which is formed and registered under the Companies Act, 1956
- In which the aggregate holdings of equity shares by a foreign company either by itself or through its subsidiary companies or its nominees, do not exceed 26% paid-up equity capital of such Indian insurance company
- Whose sole purpose is to carry on life insurance, general insurance or re-insurance business

Insurance broker

As per IRDA (Insurance Brokers) Regulations, 2002, is a person for the time being licensed by the Authority under Regulation 11, who for remuneration arranges insurance contracts with insurance companies and/or reinsurance companies on behalf of his clients.

Third-party administrators

As per IRDA (TPA-Health Services) Regulations, 2001, is a third-party administrator, who for the time being, is licensed by the Authority, and is engaged, for a fee or remuneration, by whatever name called as may be specified in the agreement with an insurance company, for the provision of health services.

Surveyors and loss assessors

Surveyors and loss assessors will be governed by the IRDA Insurance Surveyors and Loss Assessors (Licensing, Professional Requirements and Code of Conduct) Regulations, 2000.

Foreign investment in government dated securities

The RBI has enhanced the foreign investment limit in government dated securities for long-term investors[2] registered with SEBI from 5 billion to 10 billion USD. Further, henceforth fresh investment will be permitted only in government dated securities with maturity of more than one year. For existing investment in T-bills and government dated securities of less than one year, residual maturity will be allowed to taper off on maturity/sale.

The overall limit of 30 billion USD for FIIs, QFIs and long-term investors remains unchanged.

A.P. (DIR Series) Circular No 99 dated 29 January 2014 and No 118 dated 7 April 2014

Foreign investment in corporate debt

The RBI has reduced the foreign investment limit in commercial paper within corporate debt limit for SEBI registered FIIs, QFIs and long-term investors[2] to 2 billion from 3.5 billion USD.

The overall limit of 51 billion USD in corporate debt for FIIs, QFIs and long-term investors[2] remains unchanged.

A.P. (DIR Series) Circular No 104 dated 14 February 2014

FDI into an SSI/MSE and in industrial undertaking manufacturing items reserved for SSI/MSE

With the proliferation of the MSMED Act, the extant provisions pertaining to FDI in SSI unit and in a company which has de-registered its small scale industry status and is not engaged or does not propose to engage in manufacture of items reserved for small scale sector, has since been reviewed. The key changes include:

- A MSE (earlier SSI) which is not engaged in any activity/sector requiring prior approval of government in terms of Annex A to schedule 1 of Foreign Exchange Management (Transfer or Issue of Security By A Person resident Outside India) Regulations, 2000, may issue shares or convertible debentures to a person resident outside India, subject to the sectoral caps, entry routes and the provision of FDI Policy.

- Any Industrial undertaking, with or without FDI, which is not an MSE, and having an industrial license for manufacturing items reserved for manufacture in the MSE sector may issue shares in excess of 24 per cent of its paid up capital with prior approval of FIPB.

Further, it has been clarified that:

- In the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the first schedule to the Industries (Development and Regulation) Act, 1951, the term micro enterprise has been defined to mean where the investment in plant and machinery does not exceed 25 lakhs INR and small enterprise as an enterprise where the investment in plant and machinery is

[2] Sovereign wealth funds, multilateral agencies, pension/insurance/ endowment funds, foreign central banks

more than 25 lakhs INR but does not exceed 5 crores INR;

- in the case of the enterprises engaged in providing or rendering services, a micro enterprise means where the investment in equipment does not exceed 10 lakh INR; a small enterprise means where the investment in equipment is more than 10 lakh INR but does not exceed 2 crore INR.

Exchange control

ECB

ECB for civil aviation sector

Facility of availing ECB for working capital by the civil aviation sector has been extended till 31 March 2015.

A.P. (DIR Series) Circular No 113 dated 26 March 2014

Import and export of goods and services

Third-party payments for export/import transactions

The RBI vide its circular[3] dated 8 November 2013 had permitted Indian entities to make payments towards the import of goods to a third party and receive payment towards the export of goods and software from a third party subject to certain conditions. These included having the firm's irrevocable order backed by a tripartite agreement.

The RBI has now done away with the requirement of the firm's irrevocable order backed by a tripartite agreement in cases where documentary evidence for circumstances leading to third-party payments and the name of the third party mentioned in the irrevocable order or invoice has been produced to the AD banks.

[3] A.P. (DIR Series) Circular No 70 dated 8 November 2013

In addition to the above liberalisation, the RBI has done away with the present cap of 100,000 USD upto which payment to a third party could be made for the import of goods.

A.P. (DIR Series) Circular No 100 dated 4 February 2014

Merchanting trade transactions: Revised guidelines

The RBI has issued revised guidelines on merchanting trade transactions. Key changes introduced through these guidelines are summarised below:

- Goods should not enter the domestic tariff area and the state of the goods should not transform.
- Compliance with the foreign trade policy needs to be ensured as on the date of shipment (earlier on the date of contract).
- Short-term credit will be available for merchanting trade only to the extent not backed by advance remittance for the export leg.
- Payment for the import leg is now allowed out of the balances in the EEFC account.
- Names of defaulting merchanting traders where outstanding reach 5% of their annual export earnings will be caution-listed.
- Short-term deployment of advance against the export leg may be allowed for the intervening period in an interest bearing account (earlier short-term deployment limited to the purpose of import only was permitted).
- Advance payment for the import leg upto 200,000 USD per transaction beyond advance towards export is now permitted based on commercial judgement of the AD bank (earlier against bank guarantee from international bank of repute).
- Letter of credit to the supplier is permitted against confirmed export order keeping in

view the outlay and completion of the transaction within nine months.

The revised guidelines will come into effect for the merchanting trade transactions initiated after 17 January 2014.

A.P. (DIR Series) Circular No 115 dated 28 March 2014

Compounding of contraventions under FEMA, 1999

The RBI has delegated further powers to compound the following contraventions under FEMA to its regional offices without any limit of the amount of contravention (except for Kochi and Panaji).

- Violation of pricing guidelines for issue of shares
- Issue of ineligible instruments such as non-convertible debentures, partly paid shares, shares with optionality clause, etc
- Issue of shares without approval of RBI or FIPB respectively, wherever required

Further, the RBI has removed the monetary cap of 1,00,00,000 INR to compound following contraventions under FEMA by the Bhopal, Bhubaneshwar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Patna regional offices which can now consider the matter without any limit of the amount of contravention.

- Delay in reporting inward remittance received for the issue of shares
- Delay in filing form FC-GPR after issue of shares
- Delay in issue of shares/refund of share application money beyond 180 days, mode of receipt of funds, etc

A.P. (DIR Series) Circular No 117 dated 4 April 2014

Miscellaneous

Booking of forward contracts

The RBI has enhanced the limit for all resident individuals, firms and companies, who have actual or anticipated foreign exchange exposures to book foreign exchange forward contracts **up to 250,000 from 100,000 USD** on the basis of a simple declaration without any requirement of further documentation.

A.P. (DIR Series) Circular No 119 dated 7 April 2014

Facilities for persons resident outside India

The RBI has clarified that FIIs and other foreign investors can remit funds through any bank of choice for any transaction permitted under FEMA, 1999 which can thereafter be transferred to the AD Category 1 custodian bank through the banking channel.

Further, it is clarified that KYC in respect of the remittance will be a joint responsibility of the bank that has received the remittance as well as the bank that ultimately receives the proceeds of the remittance. Further, the remittance receiving bank is required to issue an FIRC to the bank receiving the proceeds in order to establish the fact that the funds had been remitted in foreign currency.

A.P. (DIR Series) Circular No 96 dated 20 January 2014

RBI reports: Key changes

a) **Reporting issue of shares - Form FC-GPR:** The revised form now captures details of FDI as regards brownfield and greenfield investment, the date of incorporation of investee company, etc.

A.P. (DIR Series) Circular No 102 dated 11 February 2014

b) **Monthly report regarding ECB - Form ECB-2:** The revised form now captures details of financial hedge contracted by companies and details of foreign exchange earnings and expenditure.

A.P. (DIR Series) Circular No 105 dated 17 February 2014

Company law

Operationalisation of the Companies Act 2013 and Companies Rules 2014

Further to the 98 sections earlier notified in September, 2013, the MCA, vide its notification dated 26 March 2014 has made the following sections applicable from 1 April 2014.
(Enclosed as an annexure)

Rules under the Companies Act, 2013

The much awaited Rules under the Companies Act, 2013 have been notified by the Ministry or MCA on 27 March 2014. For now, the Ministry has notified the Rules under the following chapters.

S.no	Chapter no	Chapter title
1	I	The Companies (Specification of definitions details) Rules, 2014
2	II	The Companies (Incorporation) Rules, 2014
3	III	The Companies (Prospectus and Allotment of Securities) Rules, 2014
4	IV	The Companies (Share Capital and Debentures) Rules, 2014
5	VI	The Companies (Registration of Charges) Rules, 2014
6	VII	The Companies (Management and Administration) Rules, 2014
7	VIII	The Companies (Declaration and Payment of Dividend) Rules, 2014
8	IX	The Companies (Accounts) Rules, 2014
9	XI	The Companies (Appointment and Qualification of Directors) Rules, 2014
10	XII	The Companies (Meetings of Board and its Powers) Rules, 2014

Companies 2nd (Removal of Difficulties) Order, 2014

In view of the representations received from various quarters expressing difficulties in having the annual returns certified in accordance with sub- section (2) of section 92 of the Companies Act, 2013 (that is, certification of annual returns of listed companies and companies having prescribed a paid-up capital and turnover), the Ministry has issued the Companies 2nd (Removal of Difficulties) Order, 2014 clarifying that the annual return, filed by a listed company or, by a company having such paid-up capital or turnover as may be prescribed in the Rules under sub-section (2) of section 92, shall be certified by a company secretary in practice in the prescribed form, stating that:

- the annual return discloses the facts correctly and adequately
- that the company has complied with all the provisions of this Act

Nomenclature of various forms prescribed under the provisions of the Companies Act, 2013

In order to facilitate an easier understanding of the e-forms rolled out under the provisions of the Companies Act, 2013 and the Rules made thereunder, the MCA has issued a notification informing that unlike the numbering of various forms under the Companies Act, 1956, the forms under the new Act are mandatorily numbered in the alpha-numeric format.

Each chapter is to be represented by initials as indicated below:

Sr no	Chapter no	Particulars of the chapter	Form no. start with
01	II	Incorporation of the company and matters incidental thereto	INC

Sr no	Chapter no	Particulars of the chapter	Form no. start with
02	III	Prospectus and allotment of securities	PAS
03	IV	Share capital and debentures	SH
04	V	Acceptance of deposit by companies	DPT
05	VI	Charges	CHG
06	VII	Management and administration	MGT
07	VIII	Declaration any payment of dividend	DIV
08	IX	Accounts of companies	AOC
09	X	Audit and auditors	ADT
10	XI	Appointment and qualifications of directors	DIR
11	XII	Meetings of the board and its powers	MBP
12	XIII	Appointment and remuneration of personnel	MR
13	XXI	Companies authorised to register under this Act	URC
14	XXII	Companies incorporated outside India	FC
15	XXIV	Registration offices and fees	GNL
16	XXVI	Nidhis	NDH
17	XXVIII	Special court	MAC
18	XXIX	Memorandum of appeal	ADJ
19	XXIX	Miscellaneous	MSC

Further, the MCA will make available all new forms starting 28 April 2014, issued under the Companies Act, 2013.

Notification of the Companies (CSR Policy) Rules, 2014

The MCA has announced the CSR (Policy) Rules 2014 under section 135 of the new Companies Act, 2013.

In relation to this, Schedule VII of the Act, which enlists areas where CSR activities may be carried out, has also been notified. Various new additions to the draft rules have been made such as spending for the benefit of armed forces veterans, war widows and their dependents, spending on training to promote rural and nationally recognised paralympic and Olympic sports, protection of national heritage sites, setting up of public libraries, etc. Further, activities with respect to the clauses related to the reduction of child mortality and improvisation of maternal health, combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other such diseases, employment enhancing vocational skills, social business projects, etc have been removed.

One major addition in section 135 is the provision of up to 5% of the CSR budget for training and capacity building of employees and implementing partners for CSR.

These Rules shall come into force with effect from 1 April 2014. Additional highlights in this respect include the following:

- Every company (including its holding or subsidiary and foreign company) meeting any ***one*** of the following criteria, that is, a net worth of 500 crore INR, a turnover of 1000 crore INR or a net profit of 5 crore INR during any financial year needs to allocate a certain portion of its budget towards CSR activities – 2% of the average net profits during every block of three years with the first block ending 31 March 2014.

- Definition of net profit has been clarified to mean net profit as per the company's financials prepared in accordance with the provisions of the Act. However, it does not include the following:

  - Any profit from an overseas branch or branch of a company whether operated as a separate company or otherwise

  - Any dividend received from other companies located within India, which are covered under and complying with section 135 of the Act

  However, net profit need not be calculated where the financials are already drawn as per the Companies Act, 1956.

- In case of a foreign company, net profit indicates the net profit of such a company as per the profit and loss account prepared in accordance with section 381, read along with section 198 of the Act.

- The company is to constitute a CSR committee consisting of a minimum of three directors. However, a private company having only two directors on its board may constitute the CSR committee with two directors only.

- Foreign companies will need to constitute the CSR committee comprising of at least two persons-one authorised representative and the second nominated by the foreign company.

- A company that ceases to be covered under the above criteria for three consecutive financial years shall not be required to constitute a CSR committee and comply with aspects such as contribution, reporting etc till it meets the criteria.

- Unlisted public companies or a private company will not require the appointment of an independent director within the CSR committee.

- The board of directors report is to (pertaining to the FY commencing on or after 1 April 2014) include an annual report on CSR in the prescribed format, and specify reasons for not spending the amount, in case of a failure.

- The surplus arising out of CSR not to form a part of the business profits of a company.

- Contribution of any amount directly or indirectly to any political party shall not be considered as a CSR activity.

MCA notifications dated 27 February 2014

Clarification with regard to section 180 of the Companies Act, 2013

- Section 180 of the Companies Act, 2013 deals with borrowings or creation of security, based on an ordinary resolution.

- Based on the representations received by the MCA with regard to the difficulties in implementing this section, it has been clarified that the resolution passed under section 293 of the Companies Act, 1956 prior to 12 September 2013 will be regarded as sufficient compliance of the requirements of section 180 of the Companies Act, 2013 for a period of one year, starting from the date of notification of this section.

General Circular No4/ 2014 dated 25 March 2014

Clarification with regard to the applicability of section 372A(8)(d) of the Companies Act, 1956 will prevail till section 185 of the Companies Act, 2013 is notified

- Following various representations received, the MCA has examined the applicability of section 372A of the Companies Act, 1956 vis-a-vis section 185 of the new Companies Act, 2013.
- While section 372A of the Companies Act, 1956 specifically exempts any loans made, guarantee given, security provided or investments made by a holding company to its wholly owned subsidiary, section 185 of the Companies Act, 2013 prohibits such guarantee given or any security provided by a holding company in respect of any loan taken by its subsidiary company except in the ordinary course of business.
- The MCA has therefore clarified that exemptions as provided under section 372A(8)(d) of the Companies Act, 1956 will be applicable until section 185 of the Companies Act, 2013 is notified provided that the loans are utilised by the subsidiary exclusively for its principal business activities.

General Circular No3/ 2014 dated 14 February 2014

Restrictions on the usage of words such as 'National', 'Bank', 'Exchange', 'Stock Exchange' within the name of companies or LLPs

- No company is allowed to be registered with the word 'national' as part of its title unless it is a government company and the central or the state government(s) has a stake in it.
- Only upon obtaining a 'no objection certificate' from the RBI, can the word 'bank' be allowed to be included within the name of an entity.
- Similarly, only upon obtaining a 'no objection certificate' from the SEBI by the promoters, can the word 'stock exchange' or 'exchange' be allowed to be included within the name of an entity.

General Circular No2/ 2014 dated 11 February 2014

Sectoral regulations

Financial Services

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2014

The SEBI has notified FPI Regulations on 7 January 2014. The FPI Regulations are aimed at replacing the existing FII Regulations and the QFI scheme, hitherto governed by various circulars issued by SEBI.

In light of the above, the RBI has now amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 creating a new class of investor category viz., the RFPI under Schedule 2A which, subsumes the FIIs and QFIs. Key features of the amendments have been reproduced below:

- All investments made by the FII in accordance with the regulations prior to registration as RFPI shall continue to be valid and taken into account for computation of aggregate limit.
- A QFI may continue to buy, sell or otherwise deal in securities for a period of one year from the date of commencement of SEBI FPI Regulations or until it obtains a certificate of registration as a foreign portfolio investor, whichever is earlier.
- The total holding by each RFPI shall be below 10% of the total paid-up equity capital or each series of convertible debentures issued by an Indian company.
- Total holdings of all RFPI put together shall not exceed 24% (or as increased upto the FDI cap after obtaining requisite approvals) of paid-up equity capital or paid-up value of each series of convertible debentures.

- The existing class of investors namely, FIIs and QFIs registered with SEBI shall be eligible to continue their investment in accordance with SEBI guidelines.

Commencement of FPI regime

As per the circular, FPI regime shall commence with effect from 1 June 2014. SEBI shall continue to accept all applications for registration of FIIs and sub accounts till 31 May 2014. From 1 June 2014, DDPs shall accept all applications for registration.

Circular No CIR/IMD/FIIC/6/2014 dated 28 March 2014

(Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2014 dated 4 February, 2014

SEBI notified the further amendment to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. The salient features of the notification are as follows:

- Substitution of Regulation 26, sub-regulation (7) with the following :

  "(7) An issuer making an initial public offer may obtain grading for such offer from one or more credit rating agencies registered with the board."

- Substitution of the old illustrative format of the statement of assets and liabilities with the new format.

Broadcasting

Distribution of TV channels from broadcasters to distribution platform operators

TRAI had issued a consultation paper on 6 August 2013, proposing to amend the current regulatory framework by demarcating the roles and responsibilities which can be assigned by the broadcasters to their authorised distribution agencies for the distribution of TV channels to various platform operators (viz. cable, DTH, HITS, and IPTV operators). In order to give effect to the said consultation paper, TRAI has notified specific amendments to the existing regulatory framework. Key highlights of the said notification are as under:

- Broadcaster has been defined as an entity having the necessary government permissions in its name.
- Only the broadcaster is to publish its RIO and enter into interconnection agreements with the distribution platform operators.
- The authorised distribution agent (of the broadcaster) cannot do the following:
  - Change the composition of the bouquet formed by the broadcaster while providing it to the distributors of TV channels
  - Bundle bouquet or channels of the broadcaster with those of other broadcasters. However, broadcaster companies belonging to the same group can bundle their channels.

A six-month time-frame is provided for reworking the RIOs, entering into interconnect agreements and thereafter submission with TRAI.

Source: Press Release No 7/2014, dated 10 February 2014

Recommendation paper on migration of FM radio broadcasters from Phase II to Phase III

TRAI has issued its recommendation paper on 20 February 2014, with respect to the migration of FM radio broadcasters from Phase II to Phase III. Key highlights of the said recommendation paper are as under:

- With a view to increase the number of channels in each city, early implementation of recommendations on minimum channel spacing of 400KHz for FM radio broadcast
- Period of permission for existing operators, who migrate from Phase II to Phase III,

should be 15 years from the date of migration

- A cut-off date, for migration to be decided by the MIB. However, such cut-off date should not be later than 31 March 2015.
- Explicit provision to be incorporated, permitting Phase II operators to bid for an additional channel (frequency) in existing cities, where it already has an operational FM channel, subject to conditions
- For calculating the migration fees, cities categorised into three groups, based on the number of channels available for auction in Phase III
- As a relief to the operators, the residual value of Phase II permission calculated on a pro-rata basis, to be deducted from Phase III migration fee

Source: Press Release No 10/2014, dated 20 February 2014

Telecom

TRAI recommends auction of 800 MHz spectrum

TRAI has released its recommendation with respect to the auction of 800 MHz spectrum. A summary of the key recommendations is set out below:

- The entire spectrum available with the DoT in the 800 MHz band should be put for auction.
- The reserve price for the forthcoming auction should be fixed at 80% of the average valuation. The recommended total reserve price for the spectrum under 800 Mhz shall be 2,685 crore INR.
- The DoT should take back the entire spectrum holding in the 800MHz band from the Mahanagar Telephone Nigam Limited. However, Bharat Sanchar Nigam Limited should be allowed to retain one CDMA carrier in all local service areas except in Jammu and Kashmir, Assam and North-East LSAs, where it can retain both carriers.
- A new TSP, which does not have any spectrum holding in the 800MHz band must bid for a minimum of four carriers.
- An existing TSP having some spectrum holding in the 800 MHz band should be permitted to bid for a minimum one block of spectrum.
- Spectrum in the 800MHz band should be auctioned in a block size of 1.25MHz and the carrier reassignment, if required, may be carried out among existing TSPs in the 800MHz band to make at least four contiguous carriers available.

Source: TRAI recommendation paper dated 22 February 2014

Working guidelines for spectrum trading

TRAI vide its recommendations paper *Valuation and Reserve Price of Spectrum* dated 9 September 2013 had recommended spectrum trading in India. In continuation, TRAI has now released working guidelines for spectrum trading in India. Some of the key highlights are set out below:

- Only outright transfer of spectrum permitted under the spectrum trading i.e. ownership of usage right being transferred to the buyer. Spectrum leasing shall not be permitted at this point of time.
- Spectrum trading to not alter the original validity of period of the spectrum assignment
- Trading to not be permitted on a PAN-LSA basis i.e. spectrum cannot be traded only for a part of the LSA
- Seller and buyer required to intimate the licensor regarding the spectrum trade, six weeks prior to the effective date of trade. However, no permission required from the

licensor or government for spectrum trading subject to a lock-in period of two years

- All spectrum bands earmarked for access services by the licensor to be treated as tradable spectrum bands
- Only CMTS/ UASL/ UL (AS)/ UL licences to be eligible for spectrum trading. Whole spectrum, either won in auction or for which full market value has been paid to be eligible for trading.

Source: TRAI working guidelines dated 28 January 2014

Electronics policy

Electronics Policy / M-SIPS Scheme

The DeitY has recently [*vide letter No 36(3) /2012-IPHW (Vol-III) dated 19 February 2014*] notified five brownfield EMCs within the states of Haryana, Maharashtra and Madhya Pradesh for eligibility under the M-SIPS. These brownfield EMCs are generic in nature and include all verticals of the ESDM sector.

The list of areas that have been recently notified are tabulated as under:

S.no	State	Brownfield cluster for the M-SIPS Scheme
1	Haryana	Bawal, Tehsil
2		Dharuhera, Sub-tehsil
3	Maharashtra	Mumbai (includes Mumbai city district and Mumbai suburban district)
4		Navi Mumbai (includes Navi Mumbai municipal limits area)
5	Madhya Pradesh	Raisen district

All units within the aforementioned areas, located within industrial estates or areas approved by the state, central, local government or municipal authorities for industrial purposes will be eligible for the M-SIPS benefits in the form of subsidy (calculated as a certain percentage of the capex invested) and reimbursement of excise or CVD on capital equipment.

Perspective

SEZs at crossroads

Introduction

In the month of February, the FM presented the interim budget for 2014-15 (a vote-on-account). Among other things, his speech focussed on the past economic achievements of the government, and how it navigated through turbulent times. While the FM refrained from introducing any major tax legislations and policy measures, importantly, he did outline a vision for providing an impetus to the manufacturing sector which still remains the Achilles heel of the Indian economy.

Not so long ago, the government of India unveiled the SEZ Scheme with a big bang. The Scheme envisaged attracting investments, scaling up exports, generating employment and creating state-of-the-art infrastructure for units set up within these tax free enclaves. In order to facilitate a speedy inflow of investments, among other things, the scheme inter-alia provided a 'single window clearance' to investors, simplification of compliances and procedures, and most importantly fiscal sops for development, operations & maintenance and on export of goods and services from these zones. The underlying thrust of this Scheme was to promote greater economic activity, particularly manufacturing, and also signal the government's commitment to instill confidence among investors by bringing in a stable policy regime.

A good beginning

Post the roll-out of the SEZ Scheme, there were some noteworthy achievements–576 formal approvals were granted for setting up of SEZs. Till date, some 391 SEZs stand notified, out of which 173 have already become operational.

Over the last five to six years, SEZs attracted sizeable investments amounting to 2.8 trillion INR. States which attracted maximum investments included Andhra Pradesh, Maharashtra, Tamil Nadu, Karnataka, Haryana, Gujarat and UP. IT/ ITES SEZs attracted the maximum interest among investors.

There was a remarkable growth in exports from these zones. In FY 2012-13, out of the 173 operational SEZs, total exports were to the tune of 4.76 trillion INR (accounting for 29% of the country's total exports). SEZs have also attracted direct employment of 1.15 million.

Roadblocks

While the SEZ Scheme kick-started well during the initial years, with a large number of investors queuing up for approvals, however, over the years, certain policy and operational challenges started daunting investors. Firstly, aggregating land for setting up SEZs became a huge constraint. Over the years, the situation accentuated further as a result of onerous requirements that were laid down for SEZs. As a result, there was a predominance of IT or ITeS SEZs as compared to manufacturing-based or multi-product SEZs which required larger tract of land. Nonetheless, operational IT or ITeS zones comprised only a fifth of such zones approved by the government so far. Further, concentration of these zones was only in a handful of states, and that too around existing urban agglomerations, leaving the hinterlands virtually untouched. Secondly, hurdles surrounding vacant land as well as contiguity issues raised the degree of complexity involved in meeting the land requirement criteria. Restriction on the utilisation of non-processing areas for commercial as well as social infrastructure, based on the discretion of the investor was an additional dampener, thereby making SEZ investments an unattractive proposition. Moreover, the global economic turbulence further aggravated the situation leading to a slowdown in SEZ investments.

Introduction of MAT and DDT in 2011 completely undermined the scheme and the stability of the SEZ policy regime. The decision to roll out MAT and DDT were initiated at a time when most SEZ projects were under different stages of development. Further, the revised DTC Code and the proposed sunset clause for the grandfathering of tax holiday under the extant tax laws left investors completely perplexed and directionless. As a result, the SEZ Scheme started witnessing a downward trend in investments, including the exit of developers. As on date, many SEZs approved only remain a approval and have not beyond that on ground.

On the exchange control front, there have been several challenges. Under the extant exchange control regulations, SEZ developers are allowed to avail ECB for providing infrastructure facilities within the SEZ. However, the definition of infrastructure varies under the ECB policy and the SEZ laws. As a result, several SEZ developers have not been able to access the ECB window for developing their SEZ. Again, while a branch of a foreign company is permitted to set up a unit in a SEZ, a branch in SEZ is restricted from carrying out any DTA transaction or a transaction with its affiliate within a DTA, and has to operate on a standalone basis. Such restrictions pose challenges on carrying out seamless transactions, which are otherwise permitted under the SEZ laws. Also, earlier, there was no time period prescribed for SEZ units for the realisation of export proceeds. However, the time period for the realisation of export proceeds for SEZ units has now been capped to 12 months.

For development of infrastructure in the non-processing area of a SEZ, the policy has been somewhat disabled. While the non-processing area (NPA) of an SEZ can be up to 50% of its entire area, the SEZ Scheme does not promote development of residential, commercial or social infrastructure that can be accessed by non-SEZ incumbents – a major investment deterrent . Limiting the utilisation of NPA to SEZ incumbents alone has left several projects undeveloped. Also, given the off-take of the processing area within such zones , it does not make commercial sense for developers to pursue SEZ projects. As a result, in the last few years, several large projects have sought exit from the SEZ Scheme.

The government recently amended the SEZ laws and brought down the minimum land area requirement for different types of SEZs. For IT or ITeS, the land area requirements were done away with, and instead, only a minimum built-up area was prescribed. However, this benefit is only applicable to IT/ITeS and excludes the avenue of IT hardware.

Future outlook

Success stories of SEZs can be witnessed even in neighbouring countries such as China, wherein a limited number of large, self-sustainable, confined enclaves have been created near port facilities in order to boost exports. While India started well on this front, it is yet to walk a great distance towards this initiative. Also, the SEZ success story so far, and the cascading effect on the Indian economy cannot be overlooked. Clearly, one cannot simply let go of SEZs which have been an important engine of growth for India.

SEZs today are clearly at crossroads. If one were to go by statistics, only a small number SEZs are operational in India, and again the concentration is skewed towards IT or ITeS, thereby leaving important sectors such as power, manufacturing and FTWZs virtually untouched. There is huge potential in these sectors. FTWZs can revolutionise India's logistic framework and need to be looked into on high priority. Lastly, manufacturing base of the country is low. There has been no uptick on investment in the manufacturing sector. Despite having basic capabilities, India lags behind in the manufacturing sector. Infrastructural challenges and complex administrative processes have been one of the major impediments in attracting investments in the manufacturing sector There is a clear need for convergence manufacturing sector and SEZs.

Clearly, the onus of stimulating investments in SEZs now lies with the government. The future of SEZs will now be dependent on how the new ruling government rides this elephant.

Kiran Mehra (Senior Manager, Regulatory Services, PwC India)

Annexure

List of Applicable Provisions under Companies Act, 2013:		
CHAPTER I		*PRELIMINARY*
1	Sec 2 [clause (2),(7),(13),(31),(41),(42)(47),(48),(62),(83),(85),explanation (d) of clause (87)]	Definitions
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4	Sec 5	Articles
5	Sec 6	Act to override memorandum, articles etc
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8	Sec 9	Effects of registration
9	Sec 10	Effects of memorandum and articles
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11	Sec 12	Registered office of the company
12	Sec 13	Alteration of memorandum
13	Sec 14 [except second provision to sub-section (1) and sub-section (2)]	Articles of articles
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List of Applicable Provisions under Companies Act, 2013:		
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Glossary

AD	Authorised dealer
CSR	Corporate social responsibility
DEA	Department of Economic Affairs
DeiTY	Department of Electronics and Information Technology
DIPP	Department of Industrial Policy and Promotion
DoC	Department of Commerce
DDT	Dividend distribution tax
DTC	Direct Tax Code
DTH	Direct to home
EMCs	Electronics manufacturing clusters
ESDM	Electronics systems design and manufacturing
FDI	Foreign direct investment
FEMA	Foreign Exchange Management Act
FII Regulations	SEBI Foreign Institutional Investors Regulations, 1995
FIIs	Foreign institutional investors
FIPB	Foreign investment promotion board
FM	Finance Minister
FPI Regulations	SEBI (Foreign Portfolio Investors) Regulations, 2014
FPI	Foreign portfolio investor
FTWZ	Free Trade & Warehousing Zone
FY	Financial year
INR	Indian rupee
IT	Information technology
JV	Joint venture
KYC	Know your clients
LLPs	Limited liability partnership
LSA	Licensed service area
MAT	Minimum alternate tax
MCA/Ministry	Ministry of Corporate Affairs
MIB	Ministry of Information and Broadcasting
MoC	Ministry of Commerce
MRO	Maintenance, repairs and overhaul
MSE	Micro and small enterprises
MSED	Micro, Small and Medium Enterprises Development
M-SIPS	Modified Special Incentives Package Schemes
NBFCs	Non-banking financial companies
NPA	Non-processing area
NRI's	Non-resident Indians
ODI	Overseas direct investments
PIB	Press Information Bureau
QFIs	Qualified foreign investors
RBI	Reserve Bank of India
RD	Regional Director
REITs	Real estate investment trusts
RFPI	Registered foreign portfolio investor
RIO	Reference interconnect offer
SEBI	Securities Exchange Board of India
SEZ	Special economic zone
SSI	Small scale industrial undertakings
TRAI	Telecom Regulatory Authority of India
TSP	Telecom service provider
USD	United States dollar
WOS	Wholly owned subsidiary

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