



ERGO

Analysing developments impacting business

WINDS OF CHANGE - FEMA NON-DEBT INSTRUMENT RULES

31 July 2020

The Central Government, vide notification dated 17 October 2019 had notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules) in supersession of the Foreign Exchange Management (Transfer and Issue of Security by a Person Resident outside India) Regulations, 2017 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018. This change had led to a shift in rule making power so far as foreign investment in India is concerned.

Now, the Central Government, vide its notification dated 27 July 2020 (NDI Amendment Rules) further amended the NDI Rules. The NDI Amendment Rules have, *inter alia*, removed the requirement of Central Government consultation which was introduced in the NDI Rules and more administrative powers have been given to the Reserve Bank of India (RBI).

Key changes introduced in the NDI Amendment Rules are set out below:

- **Administrative powers to the RBI:** The NDI Amendment Rules have introduced new Rule 2(A) to the NDI Rules to empower the RBI to (i) administer the NDI Rules; and (ii) interpret and issue directions, circulars, instructions and clarifications it deems fit, for effective implementation of the NDI Rules.
- **RBI's approval authority:** When the NDI Rules were notified, the RBI was required to consult the Central Government for approving investments in India by persons resident outside India which were not specifically permitted under the Foreign Exchange Management Act 1999 (FEMA) or rules and regulations made thereunder. The NDI Amendment Rules have now done away with the requirement of consulting the Central Government and the RBI is solely empowered to approve such investments in India. Needless to say, wherever the Government approval is prescribed under the NDI Rules, such approval will still be required to be sought from the Department for Promotion of Industry and Internal Trade (DPIIT) and/ or any of the prescribed ministry/ department of the Government of India and the RBI will not have jurisdiction to grant such approvals.
- **Foreign Investment in air transport services:** In light of the Central Government's proposed strategic disinvestment from Air India Limited (Air India), Press Note 2 of 2020 (Press Note 2/2020) was issued by the DPIIT, Ministry of Commerce and Industry, Government of India on 19 March 2020. The Press Note 2/2020

amended the foreign direct investment policy on civil aviation to permit foreign investment in Air India by non-resident Indians up to 100% under automatic route, provided that substantial ownership and effective control of Air India continues to be vested with Indian nationals.

Further, to align with Schedule XI of Aircraft Rules 1937, Air Operator Certificate to operate scheduled air transport services (including Domestic Scheduled Passenger Airline or Regional Air Transport Service) can also be granted to a body corporate in addition to a company subject to the conditions that (i) it is registered and has its principal place of business within India; (ii) the Chairman and at least two-thirds of its Directors are citizens of India; and (iii) its substantial ownership and effective control is vested in Indian nationals.

The NDI Amendment Rules have notified the changes brought in the air transport services sector under Press Note 2/2020 and the NDI Amendment Rules are now aligned with the Press Note 2/2020.

Comments

The rule making power of the Central Government under FEMA is still intact and the Central Government is empowered to frame rules in relation to non-debt instruments, which includes laying down limits, amongst other restrictions. The changes brought by NDI Amendment Rules only give administrative powers to the RBI to ensure effective implementation of the NDI Rules.

Since the Central Government consultation requirements have been done away with, procuring RBI approvals may become more efficient and in turn reduce overall transaction timelines. We expect to see a notification of the revised master direction for implementation of the NDI Rules.

- Moin Ladha (Partner) and Parag Bhide (Principal Associate)

For any queries please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com