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SHARE TRANSFER FORMS TO PROVIDE CLARITY ON FOREIGN INVESTMENT APPROVALS

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The Central government has amended the rules associated with share transfer forms as required to transfer shares of companies under the Companies Act 2013. Based on the amendment, the buyer is required to confirm in the form of a declaration in the share transfer form, that no approval is required under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (the “**NDI Rules**”), or where such approval is required under the NDI Rules, it has been obtained.

Under the NDI Rules, the company is required to ensure that if it is indeed registering a transfer of shares, then it must ensure compliance with foreign investment norms as captured under the Consolidated Foreign Direct Investment Policy of the Government of India as passed from time to time, and the NDI Rules. With this amendment, when a transferee, i.e., a buyer, purchases shares of an Indian company from a transferor (regardless of whether resident or non-resident), the buyer will be required to give a declaration to the Indian company that the buyer does not require any approval from the relevant authorities under the NDI Rules. In the alternative, the buyer is required to confirm, that if an approval is indeed required, then the buyer has obtained the approval.

Comment

It is noteworthy, that this does not apply solely to foreign direct investment, but it also applies to other forms of foreign investments, including non-repatriation basis investment, etc. Separately, this requirement is specifically for share transfer forms that are used to transfer shares of private limited companies as public limited companies require shares to only be transferred while they are in dematerialised form. At some level, this allows target investee companies to place reliance on a declaration from the buyer regarding any approval requirements under the NDI Rules.

It is also noteworthy, that the NDI Rules do not exempt the company from liability when such declaration is provided. Having said that, this does provide the company the ability to ask for information as and when they see fit, and perhaps rely on this confirmation to a certain extent. It is also worth assessing, whether a declaration from a buyer under the share transfer form, could in any way dilute any representations and warranties that may have been obtained by the buyer under the transaction documentation for the said transaction or allow the seller to rely on such declaration given that the share transfer forms are handed over to the company.

- Sameer Sah (Partner), Nikhil Jhunjunwala (Partner), and Rhiti Chattopadhyay (Associate)

For any queries please contact: editors@khaitanco.com

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