

[RBI: Second Amend-
ment To 2017 FEMA
Transfer of Security
Rules Circular](#) 1

[RBI: Fourth Amend-
ment To 2017 FEMA
Transfer of Security
Rules Circular](#) 4

[RBI: Allowance of
non-resident to en-
ter into a foreign
exchange deriva-
tive contract in In-
dia to hedge an
exposure to ex-
change risk](#) 6

[MERC: Order of the
Hon'ble Maharashtra
Electricity Regu-
latory Commission
"MERC"/ "Hon'ble
Commission" case
Nos. 53, 68, 74, 75,
135, 136 and 144 of
2016](#) 8

[CERC: Order of the
Hon'ble Central Elec-
tricity Regulatory
Commission in Suo
Moto Order No. 2/
SM/2017 for Deter-
mination of Forbear-
ance and Floor Price
for the REC frame-
work](#) 10

Reserve Bank of India

Second Amendment To 2017 FEMA Transfer of Security Rules Circular

Reserve Bank of India ("RBI") vide its Circular dated March 3, 2017 ("**Second Amendment To 2017 FEMA Transfer of Security Rules Circular**") has provided for amendments in the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA Transfer of Security Regulations 2000**"). These amendments are to be called the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Second Amendment) Regulations, 2017. The following amendments have been made:

a. Regulation 5(9), has been substituted as follows:

A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity in Pakistan or Bangladesh), not being a Foreign Portfolio Investor or Foreign Institutional Investor or Foreign Venture Capital Investor registered in accordance with Securities and Exchange Board of India ("**SEBI**") guidelines, may contribute foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an Limited Liability Partnership ("**LLP**") under Foreign Direct Investment ("**FDI**"), subject to the terms and conditions as specified in Schedule 9.

b. Schedule 9 of the Regulation 5(9) has been substituted as follows:

The Scheme shall be called Foreign Direct Investment (FDI-LLP) in LLP formed and registered under the Limited Liability Partnership Act, 2008.

i. Eligible Investors:

ii. A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India (other than an entity in Pakistan or Bangladesh)

Supreme Court- 11
Hon'ble Supreme
Court's decision in
the matter of Com-
petition Commission
of India V/s Co-
Ordination Com-
mittee of Artists and
Technicians of W.B.
Film and Television
and Ors.

The Trade Mark 13
Rules, 2017

, not being a Foreign Portfolio Investor or Foreign Institutional Investor or Foreign Venture Capital Investor registered in accordance with SEBI guidelines, may contribute foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an LLP.

ii. Eligible investment

Contribution to the capital of an LLP would be an eligible investment under the scheme. Investment by way of profit share will fall under the category of reinvestment of earnings.

iii. Eligibility of a LLP

FDI in LLPs shall be permitted, subject to the following conditions:

- FDI is permitted under the automatic route in LLPs operating in sectors / activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance conditions. The sectors/activities are specified in the Annex B to Schedule 1 of FEMA Transfer of Security Regulations 2000.
- An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP engaged in sectors in which 100% FDI is allowed under the automatic route and there are no FDI linked performance conditions. Onus shall be on the Indian company/LLP accepting downstream investment to ensure compliance with the above conditions.
- FDI in LLP is subject to the compliance of the conditions of Limited Liability Partnership Act, 2008.
- A company having foreign investment can be converted into an LLP under the automatic route only if it is engaged in a sector where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.

iv. Pricing

- FDI in a LLP either by way of capital contribution or by way of acquisition or transfer of profit shares, would have to be 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 Of Capital Contribution**") and a valuation certificate to that effect shall be issued by the Chartered Accountant or by an



approved valuer from the panel maintained by the Central Government.

- In case of transfer of capital contribution or profit share from a resident to a non-resident, the transfer shall be for a consideration equal to or more than the Fair Price Of Capital Contribution. Further, in case of transfer of capital contribution or profit share from a non-resident to resident, the transfer shall be for a consideration which is less than or equal to the Fair Price Of Capital Contribution of an LLP.
- v. Mode of payment
- Payment by an investor towards capital contribution in LLPs shall be made by way of inward remittance through banking channels;
 - by debit to Non Resident External (“**NRE**”) or Foreign Currency Non Resident bank account (“**FCNR (B)**”) of the person concerned, maintained with an Authorized Dealer Category - I bank in accordance with Foreign Exchange Management (Deposit) Regulations, 2016, as amended from time to time.



Fourth Amendment To 2017 FEMA Transfer of Security Rules Circular

RBI vide its Circular dated March 09, 2017 ("**Fourth Amendment To 2017 FEMA Transfer of Security Rules Circular**") has provided for amendments in the FEMA Transfer of Security Regulations 2000. These amendments are to be called the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fourth Amendment) Regulations, 2017. The amendments made are:

a. Sub- Regulation (ii)(E) to be inserted after the existing sub-regulation (ii)(dd) which would contain the following:

(ii) (E) E-commerce:

- i. 'E-commerce' would mean buying and selling of goods and services including digital products over digital & electronic network.
- ii. 'E-commerce entity' would mean a company incorporated under the Companies Act, 1956 or the Companies Act, 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in Section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.
- iii. 'Inventory based model of e-commerce' would mean an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.
- iv. 'Market place model of e-commerce' would mean providing of an information technology platform by an ecommerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

Entry 16.2 in the Schedule 1 would be amended as-

16.2.1 E-commerce

- Sector- Business to Business ("**B2B**") E-commerce activities
- Foreign Investment Cap (%) - 100
- Route- Automatic
- Conditions-

Such companies would engage only in B2B e-commerce and not in retail trading, inter alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well.



16.2.2

- Sector- Market place model of e-commerce
- Foreign Investment Cap (%) - 100
- Route- Automatic

16.2.3 - Other Conditions

In addition, the Fourth Amendment To 2017 FEMA Transfer of Security Rules Circular, provides various other conditions such as FDI is not permitted in inventory based model of e-commerce; an e-commerce entity shall not permit more than 25% of the sales value on financial year basis affected through its marketplace from one vendor or their group companies., Any warranty or guarantee of goods and services sold shall be responsibility of the seller, etc.

16.2.4

Sale of services through e-commerce shall be under automatic route subject to the sector specific conditions, applicable laws/regulations, security and other conditions.



Allowance of non-resident to enter into a foreign exchange derivative contract in India to hedge an exposure to exchange risk

RBI vide its Circular dated March 21, 2017 ("**March 21 circular**") has made amendment in the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 ("**FEMA Derivative Contract Regulations, 2000**").

The March 21 circular provides for non-resident may enter into a foreign exchange derivative contract with an Authorised Dealer ("**AD**") bank in India to hedge an exposure to exchange risk of and on behalf of its Indian subsidiary in respect of the said subsidiary's transactions subject to such terms and conditions as may be stipulated by the RBI from time to time.

- a. Annex 1 to the March 21 circular provides guidelines for the booking derivative contracts to hedge the currency risk arising out of current account transactions of Indian subsidiaries of Multi-National Companies ("**MNC**") states the following:
- b. Purpose:- To provide operational flexibility for booking derivative contracts to hedge the currency risk arising out of current account transactions of Indian subsidiaries of "**MNC**."
- c. User:- Non-resident parent of an Indian subsidiary or its centralised treasury or its regional treasury outside India.
- d. Product:- All Foreign Currency – Indian Rupee ("**FCY-INR**") derivatives, Over the Counter ("**OTC**") as well exchange traded that the Indian subsidiary is eligible to undertake as per FEMA, 1999 and Regulations and Directions issued thereunder.
- e. The March 21 Circular also provides for Operational guidelines, terms and condition for hedging. Some of them are-
 - i. The transactions under this facility will be covered under a tri-partite agreement involving the Indian subsidiary, its non-resident parent / treasury and the AD bank. This agreement will include the exact relationship of the Indian subsidiary or entity with its overseas related entity, relative roles and responsibilities of the parties and the procedure for the transactions, including settlement. The non-resident entity should be incorporated in a country that is member of the Financial Action Task Force ("**FATF**") or member of a FATF-Style Regional body.



- ii. The AD Bank may obtain Know Your Customer (“KYC”)/ Anti Money Laundering (“AMC”) certification, etc.
- f. Annex 2 to the March 21, 2017 dated March 17, 2017 provides for the amendment to the FEMA Derivative Contract Regulations, 2000. These amended regulations are to be called the Foreign Exchange Management (Foreign Exchange Derivative Contracts) (Amendment) Regulations, 2017. The amendment provides for inserting the following in Schedule 2 after existing Para 6 of the FEMA Derivative Contract Regulations, 2000:

“A non-resident may enter into a foreign exchange derivative contract with an Authorised Dealer bank in India to hedge an exposure to exchange risk of and on behalf of its Indian subsidiary in respect of the said subsidiary’s transactions subject to such terms and conditions as may be stipulated by the Reserve Bank from time to time.”



MERC

Order of the Hon'ble Maharashtra Electricity Regulatory Commission ("MERC"/ "Hon'ble Commission") case Nos. 53, 68, 74, 75, 135, 136 and 144 of 2016

- a. The Wind Energy Generators ("**Generators**") in the state of Maharashtra were not receiving payments for the various wind projects for twelve (12) months from Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"), the state distribution licensee with such Generators had entered into Energy Purchase Agreements ("**EPA**") with. The Generators then approached the Hon'ble Maharashtra Electricity Regulatory Commission seeking relief against for the non-payments and seeking the payment of principal amounts together with Delayed Payment Charges ("**DPC**") for the outstanding amounts. The Generators/Petitioners who filed petition against MSEDCL were the following:
- i) Shah Promoters and Developer Pvt. Ltd. – Case No. 53 of 2016
 - ii) Ghatge Patil Industries Ltd. – Case No. 68 of 2016
 - iii) CLP Wind Farms (Khandke) Pvt. Ltd.- Case No. 74 of 2016
 - iv) CLP Wind Farms (India) Pvt. Ltd.- Case No. 75 of 2016
 - v) D. J. Malpani ("**DJM**")- Case No. 135 of 2016
 - vi) Giriraj Enterprises ("**GE**")- Case No. 136 of 2016
 - vii) L. B. Kunjir- Case No. 144 of 2016
- b. The Petitioners in all the above cases mentioned that the EPAs contained standard clauses for payment of the invoices raised within forty five(45) days or sixty (60) days, as the case maybe. Also the EPAs contained clauses for payment of DPC at the rate of 1.25% per month after 45 days in some cases and 2% per annum above the SBI short-term lending rate beyond 60 days above State Bank of India short term lending rates in some others.
- c. MSEDCL had in all the above cases while not denying their liability towards the payments for the invoices raised had argued that timely payments were not made on account of non- payments by the consumers of MSEDCL and certain other liabilities which was resulted in the financial difficulties and affected their cash flows gravely. Also while admitting their liability in relation to payments for over-injected units to DJM and GE in case No. 135 of 2016 and 136 of 2016, MSEDCL stated that the pending payments would be released as per the chronological of the invoices received



and as per the availability of funds considering its difficult financial position.

- c. The Hon'ble Commission held that MSEDCL was liable to make payments to the Petitioners in above cases for the principal amounts of the invoices and DPC and directed MSEDCL to make payments for the principal amounts expeditiously and DPC within 30 days of the order.
- d. The Hon'ble Commission while citing the DOA Regulations, 2014, which is also as per the Distribution Open Access Regulations, 2016 read with the Multi Year Tariff Regulations, 2015 directed MSEDCL to make the overdue payments for over-injected units to DJM and GE in case 135 and 136 of 2016 for FY 2015-16 within a month, along with applicable interest of 1.25% per month of delay.

The Petitioners in the above cases were represented by Eternity legal at the Hon'ble Commission in case Nos. 53, 68, 74, 75, 135, 136 and 144 of 2016.



Order of the Hon'ble Central Electricity Regulatory Commission in Suo Moto Order No. 2/SM/2017 for Determination of Forbearance and Floor Price for the REC framework to be applicable from 1st April 2017

- a. Many Renewable Energy Certificate (“REC”) were expiring on March 31, 2017, therefore many stakeholders/REC project developers had requested to extend the validity of RECs that were expiring. The stakeholders further suggested the duration of extension from the range between two (2) to twelve (12) years.
- b. CERC earlier had extended the validity of RECs which were expiring in Financial Year (“FY”) 2014-2015 by a period of three (3) years vide Third amendment to Terms and Condition for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations (“REC Regulations, 2010”).
- c. The number of REC that were expiring during FY 2017-2018 were approximately 23,35,111 (Twenty Three Lac Thirty Five Thousand One Hundred and Eleven).
- d. CERC while considering that since the REC project developers had made huge investments on the basis of REC Regulations 2010 and the expiry of validation of RECs would have led them to suffer huge losses, in exercise of Power to Relax provisions under Regulation 15 of REC Regulations 2010 *extended the validity of RECs which were expiring in the next six months up to March 31, 2018. That is, the RECs expiring between March 31, 2017 and September 30, 2017 shall now remain valid up to March 31, 2018.*



Hon'ble Supreme Court's decision in the matter of *Competition Commission of India V/s Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.*

- a. In the State of West Bengal, M/S Hart Video ("**Hart Video**") had been allotted the rights to telecast the Hindi T.V. serial, Mahabharata, dubbed into Bengali language for which it got into an agreement with 'Channel 10' and 'CTVN+'. Two associations, Eastern India Motion Picture Association ("**EIMPA**") and Committee of Artists and Technicians of West Bengal Film and Television Investors ("**Co-ordination Committee**") opposed screening of serials originally from another language dubbed into Bengali which according possessed a threat to the artists and technicians of West Bengal, and thereby they threatened both the T.V. Channels of non-cooperation via letters.
- b. Hart Video thereby filed a complaint with Competition Commission of India ("**CCI**") of the collusion by EIMPA and Co-ordination Committee ("**Associations**") as two T.V. Channels decided to not telecast the serial on account of the threat issued by the Associations of non-co-operation with the T.V. Channels telecasting the show. CCI directed the Director General ("**DG**") to investigate the claim.
- c. In his report, the DG concluded that restricting the screening of the dubbed version of the serial to be violation of provisions of Section 3(3)(b) of the Competition Act, 2002 which is reproduced below-

"3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(b) limits or controls production, supply, markets, technical development, investment or provision of services;"



- d. The majority of CCI agreed to the DG whereas one learned member disagreed as he cited that the DG had defined the relevant market improper in his findings and that the associations were acting in the circle of 'Trade Unions' and not for economic purpose. The learned member therefore stated that there is no scope of violation of anti-competitive activities by the associations.
- e. The Coordination Committee appealed to Competition Appellate Tribunal ("COMPAT"). The COMPAT disagreed to the DG and approved the learned member's statements. Therefore the appeal was allowed, and so the CCI appealed the order of COMPAT to the Hon'ble Supreme Court of India ("SC").
- f. Interestingly, the SC held that the COMPAT erred in the opinion of definition of 'market' referred to as the 'relevant market'. The SC defined the relevant market here as the whole film and television industry. The SC also held that the associations were working for the economic interests of its members, they are to be enterprises. The SC held that the acts of the associations in hindering the screening of the serial to be an anti-competitive as it quoted:

"42) When the lenses of the reasoning process are duly adjusted with their focus on their picture, the picture gets sharpened and haziness disappears. One can clearly view that prohibition on the exhibition of dubbed serial on the television prevented the competing parties in pursuing their commercial activities. Thus, the CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice."



The Trade Mark Rules, 2017

The Draft of the Trademark (Amendment) Rules, 2015 proposing amendment to Trade Marks Rules, 2002 (“**2002 Rules**”) was issued by Ministry of Commerce and Industry on November 19, 2015. These Rules have now come into force as of March 6, 2017 and are notified as the Trade Marks Rules, 2017 (“**2017 Rules**”). The following are the important and notable amendments in the 2017 Rules-

a. Fees- Rule 10

- i. For the first time the terms ‘Small Enterprise’ and ‘Start-up’ have been defined.

Small Enterprise according to the 2017 Rules would mean:

- the enterprise engaged in the manufacture or production of goods, where the investment in plant and machinery does not exceed the limit of Rs. 10,00,00,000 (Rupees Ten Crores) and;
- in case of an enterprise engaged in providing or rendering of services, where the investment in equipment is not more than the limit of Rs. 5,00,00,000 (Rupees Five Crores) In case of foreign enterprise.
- In case of foreign enterprise, an enterprise which fulfills the aforementioned criteria is eligible to be an applicant in the small enterprise category.

A Start-up according to the 2017 Rules would mean:

- an entity in India recognised as a startup by the competent authority under Startup India initiative;
- in case of a foreign entity, an entity fulfilling the criteria for turnover and period of incorporation / registration as per Startup India Initiative and submitting declaration to that effect.
- An entity will be considered as a Start-up if incorporated or registered in India, not prior to five (5) years, with annual turnover not exceeding Rs. 25,00,00,000 (Rupees Twenty Five Crores) in any preceding financial year and working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

However, if any entity formed by splitting up or through reconstruction, of a business already in existence, it will not be considered as a start-up.

Further, an entity shall cease to be a Start-up if its turnover for the previous financial years has exceeded Rs. 25,00,00,000 (Rupees Twenty Five Crores) or it has completed five (5) years from the date of incorporation/ registration. A Start-up needs to obtain certification from the Inter-Ministerial Board.

The small enterprises and start-ups have been prescribed lower fees as mentioned in the table-

Application for Registration of trademark in one or more classes-	Fees (in Rs.)	
	For Physical filing	For E-filing
When Application made by Small Enterprise or a start-up	5,000	4,500
Others	10,000	9,000
On application u/s 34 for expedited process of an Application for registration of trade mark		
When Application made by Small Enterprise or a start-up	Not Allowed	20,000
Others	Not Allowed	40,000

ii. The fees for all the applications have now been hiked considerably. Schedule 1 of the Rules 2017 has provided for the fees to be paid for various applications, opposition, registration, renewal, expedited processing, etc. The revised fee schedule has been provided in the Schedule 1 of the 2017 Rules. The notable changes are laid down in

	Fees (in Rs.)	
	For Physical filing	For E-filing
For Notice of opposition or counter-statement in answer to a notice of opposition (Fee is for each class opposed or counter statement filed)	3,000	2,700
For renewal of registration of a trade mark under section 25 for each class	10,000	9,000

the table below-

	Fees (in Rs.)	
	For Physical filing	For E-filing
On application under section 45 to register a subsequent proprietor in case of assignment or transfer for each trade mark	10,000	9,000
Request for including a trade mark in the list of well-known trade marks (applicable fee for one mark)	Not Allowed	1,00,000

b. Forms- Rule 11

The total number of forms have now been brought down to just 8 from the previous count of 74 under the 2002 Rules. The Forms and the use of forms has been laid down in the Schedule 2 of 2017 Rules. Schedule 3 of the 2017 Rules contain the format of each form. The list of forms is given below-

- **TM-A-** Application for registration of a trademark, application for registration of collective marks, etc.
- **TM-M-** Request for amendment in trademark application, seeking grounds of decision, etc.
- **TM-R-** Application for renewal of trademark, request for renewal with surcharge, etc.
- **TM-C-** Application for Search certificate request
- **TM-O-** On a notice of opposition under section 64, 66 or 73, etc.
- **TM-P-** Request to replace subsequent proprietor as a registered proprietor, Request to amend details of registered proprietors or registered users, etc.
- **TM-U-** Application for recordal of registered users, request for amendment in details of registered user, etc.
- **TM-G-** Application for registration of a Trademark Agent, Request for continuation as a Trademark Agent, etc.

c. Address of Service- Rule 17

The 2017 Rules have now provided for compulsory furnishing of a valid postal address *and a valid e-mail* id of each applicant or opponent for servicing of documents by the Trade Mark Registry.



Any document or notice of communication would now be sent to the e-mail id provided and this would be considered as service of such document or notice.

d. Statement of User- Rule 25

The 2017 Rules now provide for compulsory filing of an affidavit by an applicant in case of claim of prior use to the date of application. The 2002 Rules didn't provide for such compulsory filing by the applicant. Rule 120 provides for the format of the Affidavit to be filed.

e. Application for a 'Sound Mark' -Representation of trademark- Rule 26

2017 rules now provide for application for registration of a trademark for a sound i.e. a sound mark. For such registration the applicant would have to submit the reproduction of such sound in MP3 format not exceeding thirty (30) seconds length recorded on a medium which allows for easy and clearly audible replaying accompanied with a graphical representation of its notations. The 2002 Rules provided for such application in form of a graphical representation of the notations which was not feasible. The 2017 Rules have provided a greater clarity.

f. Expedited Processing- Rule 34

The 2002 Rules provided for expedited examination of a trade mark application, wherein an after filing the required form and paying the require fees, examination report would be issued expeditiously and the applicant would reply to the same. However after this stage, the application would be processed at normal pace. However the 2017 Rules now provide for an expeditious process even after the issuance of the examination report i.e. the consideration of response to examination, scheduling of show cause hearing, if required, till final disposal of the application would all be dealt with expeditiously. The examination report would be issued expeditiously ordinarily within three (3) months after application for registration.

The required form to be filed for such Expedited Processing would be form TM-M and the fees for the same have been mentioned above. For such expedited processing, e-filing is compulsory and no physical filing is allowed.



g. Notice of opposition- Rule 42

The opposition to any trade mark advertised or re-advertised in the Trademark journal within four (4) months of such trade mark being advertised or re-advertised in the prescribed form TM-O, which would then be served by the Registrar the applicants in three (3) months. However the 2017 Rules now provide that no service of the opposition notice would be made to the applicant in case the applicant has already filed a counter statement to the opposition on the basis of the copy of opposition available in the electronic records.

h. Hearing and decision- Rule 50

After receiving notice of date of hearing, the parties to a proceeding can make a request for adjournment of hearing in the form TM-M along with the prescribed fees at least three (3) days before the date of hearing. The 2017 Rules now *limit the number of adjournments given to a party to two (2)*. Also each adjournment shall not be more than thirty (30) days.

i. Renewal of registration- Rule 57

2017 Rules now provide the time period for application of renewal of a registered trademark as one (1) year prior to the expiration of the last registration of the trademark. The relevant form for the same is TM-R. The period allowed for such application for renewal of a registered trademark was six (6) months prior to the expiration of registration according to the 2002 Rules.

j. Hearings- Rule 115

The 2017 Rules provide for hearing to take place through video-conferencing or through any other audio-visual communication devices. Audio-visual communication devices would mean cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.

k. Determination of Well Known Trademarks by Registrar- Rule 124

2017 Rules have now allowed registration a trademark as a Well Known trademark. A trademark application made under this rule would have to accompanied by a state-



statement of case along with all the evidences and documents relied on by the applicant in support of his claim. The relevant form is TM-M with fees of Rs.1,00,000 (Rupees One Lakh). The registration of such trademark is at the sole discretion of the Registrar of the Trademark. The trademark if granted registration would be included in the list of well-known trademarks. The registered trademark may be removed from the list of well-known marks at any time if the Registrar of the Trademark feels that the trademark is no longer a well known mark or has been erroneously or inadvertently included in the list of well known trademarks.

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Warm Regards,

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