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Reserve Bank of India

Investment by Foreign Portfolio Investors in Corporate Debt Securities

The following changes were made by the Reserve Bank of India ("**RBI**") to further harmonize norms for Masala Bonds issuance with the External Commercial Borrowings ("**ECB**") guidelines, some of which are:

a) Masala Bonds will not be a part of the limit for FPI investments in corporate bonds, but they will form a part of the ECBs with effect from October 03, 2017.

b) An amount of Rs. 95,00,00,00,000 (Rupees Nine Thousand Five Hundred Crores Only) in each quarter will be available only for investment in infrastructure sector by long term FPIs.

Currently, the limit for investment by FPI in corporate bonds is Rupees Two Lacs Forty- Rs. 24,43,23,00,00,000 (Rupees Four Thousand Three Hundred and Twenty- Three Crores Only). This includes issuance of Rupee denominated bonds overseas (Masala Bonds) by resident entities of Rs. 4,40,01,00,00,000 (Rupees Forty- Four Thousand and One Crore Only) (including pipeline).

Further details can be found in the *Circular dated September 22, 2017.*

Amendments to Master Direction- Reserve Bank of India (Financial Services provided by Banks) Directions, 2016

The Reserve Bank of India ("**RBI**") has made certain amendments to the *Master Direction - Reserve Bank of India (Financial Services provided by Banks) Directions dated May 26, 2016.*

Some of the relevant amendments made are as follows:

A. Para 5(a) (v)

No bank shall:

(a) Hold more than ten per cent (10%) in the equity of a deposit taking Non-Banking Financial Company ("**NBFC**");

Provided that this does not apply to a housing finance company.

(b) Make an investment of more than ten per cent (10%) of the unit capital of a Real Estate Investment Trust/Infrastructure Investment Trust;

(c) Hold more than ten per cent (10%) of the paid-up capital of a company, not being its subsidiary engaged in non-financial services or ten per cent (10%) of the bank's paid up capital and reserves, whichever is lower.

Provided investments in excess of ten per cent (10%) but not exceeding thirty per cent (30%) of the paid-up share capital of such investee company shall be permissible in the following circumstances:

i. the investee company is engaged in non-financial activities permitted for banks in terms of Section 6(1) of the Banking Regulation Act, 1949 or;

ii. the additional acquisition is through restructuring of debt or

to protect the banks' interest on loans/investments made to a company. The bank shall submit a time bound action plan for disposal of such shares within a specified period to RBI.

B. Section 5(b)(i)(d) is being amended to read as under:

The aggregate shareholding of the bank along with shareholdings, if any, by its subsidiaries or joint ventures or other entities directly or indirectly controlled by the bank, is less than twenty per cent (20%) of the investee company's paid up capital.

Explanation: Prior approval of the RBI shall not be required if the investments in the financial services companies are held under the 'Held for Trading' category and are not held beyond ninety (90) days.

C. In Para 5(b), the following is being added as (iii):

(iii) investment of more than ten per cent (10%) of the paid-up capital/ unit capital in a Category I/ Category II Alternative Investment Fund.

D. A new Para 21(c) is being inserted after Para 21(b), which reads as under:

No bank shall become a Professional Clearing Member of the commodity derivatives segment of Securities and Exchange Board of India ("**SEBI**") recognized exchanges unless it satisfies the prudential criteria (as given in Para 21(a) (i) to (iv)) and shall do so subject to the following conditions:

i. The bank shall satisfy the membership criteria of the stock exchanges and comply with the regulatory norms laid down by SEBI and the respective stock exchanges.

ii. The bank shall, with the approval of Board, put in place effective risk control measures, prudential norms on risk exposure in respect of each of its trading members, taking into account their net worth, business turnover, etc.

iii. The bank shall not undertake trading in the derivative segment of the commodity exchange on its own account and shall restrict itself only to clearing and settlement transactions done by the trading members/ clients on the exchange.

iv. The bank shall take exposure on its trading members as per the policy approved by its board.

v. The bank may fulfill pay-in obligations arising out of trades executed by its clients, as clearing member of the exchange subject to the condition that the total exposure which the bank would take on its registered clients should be determined by the Board in relation to the net worth of the bank and should be monitored regularly. However, the bank shall not meet pay-in obligations of any transaction other than what is required in its role as a Professional Clearing Member.

vi. The bank shall ensure strict compliance with various margin requirements as may be prescribed by the Bank's board or the Commodity Exchanges as also the extant RBI guidelines regarding guarantees issued on behalf of commodity brokers.

E. A new Para 22 is being inserted in the Master Direction which reads as under:

"22. Broking services for Commodity Derivatives Segment

(a) No bank shall offer broking services for the commodity derivatives segment of SEBI recognized stock exchanges except through a separate subsidiary set up for the purpose or one of its existing subsidiaries and shall do so subject to the following conditions:

i. The subsidiary shall, with the approval of its Board, put in place effective risk control measures including prudential norms on risk exposure in respect of each of its clients, taking into account their net worth, business turnover, etc.

ii. The subsidiary shall not undertake proprietary positions in the commodity derivatives segments.

iii. The subsidiary shall ensure strict compliance with various margin requirements as may be prescribed by SEBI, its own board or the Commodity Exchanges."

Securities and Exchange Board of India

Participation of Foreign Portfolio Investors ("FPIs") in Commodity Derivatives in International Financial Services Centre ("IFSC")

Securities and Exchange Board of India ("**SEBI**") vide its *Circular dated March 27, 2015* specified that 'Commodity Derivatives' shall be eligible as securities for trading and the stock exchanges operating in IFSC may permit dealing in commodity derivatives.

In this regard the SEBI published its *Circular dated September 26, 2017* permitting FPIs to participate in commodity derivatives contracts traded in stock exchanges located in the IFSC subject to following conditions:-

1. The participation would be limited to the derivatives contracts in non-agricultural commodities only.
2. Contracts would be cash settled on the settlement price determined on overseas exchanges.
3. All the transactions shall be denominated in foreign currency only.

MahaRERA– Rulings

Kamlesh Ailani Vs. Ekta Parksville Homes Pvt. Ltd. dated September 06, 2017

The Maharashtra Real Estate Regulatory Authority (**MahaRERA**), in its single page order helped the buyer get a full refund of the entire booking amount of around Rs. 26,15,000 (Rupees Twenty- Six Lakhs Fifteen Thousand) paid from a developer for failing to handover possession of the flat within the stipulated time.

The relevant portion of the order stated that:

> *"The parties have amicably settled the dispute and have filed their consent terms. The complainants have received full amount and their claim is fully satisfied. Therefore, there remains nothing for adjudication and hence the complaint is disposed off."*

The homebuyer had registered a complaint under Real Estate (Regulation and Development) Act, 2016 ("**RERA**") and wanted his investment to be refunded under Section 18 of the RERA.

Section 18 (1) states as follows:

1) *If the promoter fails to complete or is unable to give possession of an apartment, plot or building, —*

   (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

   (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

It is the first ruling under which the MahaRERA's decision was in favour of the home buyer. The builder has refunded the booking amount and the complainant received the full amount, satisfying their entire claim.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) (AMENDMENT) REGULATIONS, 2017

On September 29, 2017 the Insolvency and Bankruptcy Board of India ("**IBBI**") amended the IBBI (Information Utilities) Regulations, 2017. Some major amendments made to this effect are as follows:

In the principal regulations, in regulation 8, for sub-regulation (2), the following sub regulation shall be substituted, namely: -

"(2) Notwithstanding anything to the contrary contained in sub-regulation (1) -

(a) a person may, directly or indirectly, either by itself or together with persons acting in concert, hold up to fifty-one percent of the paid-up equity share capital or total voting power of an information utility up to three years from the date of its registration; or

(b) an Indian company, (i) which is listed on a recognised Stock Exchange in India, or (ii) where no individual, directly or indirectly, either by himself or together with persons acting in concert, holds more than ten percent of the paid-up equity share capital, may hold up to hundred percent of the paid-up equity share capital or total voting power of an information utility up to three years from the date of its registration.

Provided that the information utility is registered before 30th September, 2018."

In the principal regulations, in regulation 9, after sub-regulation (1), the following sub regulation shall be inserted, namely: -

"(1A) More than half of the directors of an information utility shall be Indian nationals and residents in India."

Supreme Court of India

In the matter of Mobilox Innovations Private Limited Vs Kirusa Software Private Limited

1. Mobilox Innovations Private Limited ("**Mobilox**") appealed against the order of National Company Law Appellate Tribunal, Delhi ("**NCLAT**") before the Hon'ble Supreme Court of India by the way of *Civil Appeal No. 9405 of 2017*. The Hon'ble Supreme Court considered the question that would constitute a 'Dispute' raised by the debtor company which may empower the adjudicating authority to reject the application filed by an operational debtor under Section 8(2) of the Insolvency and Bankruptcy Code, 2016 ("**Code**") for initiation of the Corporate Insolvency Resolution Process ("**CIRP**"). The Hon'ble Supreme Court of India sought to deduce the intent of the legislature in relation to the term 'Dispute' under the Code.

2. Kirusa Software Private Limited ("**Kirusa**") had issued a demand notice for payment of certain dues under Section 8 of Code the on Mobilox as an Operational Creditor. Mobilox issued a reply to the demand notice stating that there exists a dispute between the parties and Kirusa had breached the terms of NDA between the parties, divulged Mobilox's confidential information and approached Mobilox's clients.

3. Kirusa under Section 9 of the Code made an application for the initiation of CIRP to the Adjudicating Authority at Mumbai ("**NCLT**") which rejected the same stating that no CIRP can be initiated on issuance of notice of dispute by Mobilox. Kirusa then approached the NCLAT against the order of NCLT. NCLAT ruled that Mobilox's reply did not establish an existence of 'Dispute' under Section 8 of the Code and thus NCLAT directed the adjudicating authority for consideration of the application of Kirusa for admission as if the application is otherwise complete.

4. The Hon'ble Supreme Court of India while deciding the said Civil Application referred to the meaning of the term 'Dispute' as defined in the 2015 draft of the Code submitted in the Bankruptcy Law Reform Committee ("**2015 Draft**"). Section 5(4) of the 2015 Draft defined 'Dispute' as:

> *"'dispute' means a bona fide suit or arbitration proceeding regarding (a) the existence or the amount of a debt; (b) the quality of a good or service; or (c) the breach of a representation or warranty"*

Whereas Section 5(6) of the Code defines 'Dispute' as:

> *"Dispute includes a suit or arbitration proceedings relating to – (a) the existence or the amount of debt; (b) the quality of goods and service; or (c) the breach of a representation or warranty"*

Thus the Hon'ble Supreme Court of India inferred that since the word 'bona fide' was excluded in the Code, it was difficult to assess whether a dispute exists or not.

5. Hon'ble Supreme Court of India ruling and its analysis:

   a. The Hon'ble Supreme Court of India has provided the conditions to be examined by the adjudicating authority for initiation of the CIRP under section 8(2) of the Code. The conditions are that whether the debt is an operation debt as defined under the Code and exceeds Rs.1,00,000/- (Rupees One Lakh Only). Further it has to be examined whether the debt is due and has not been paid. Thirdly the Hon'ble Supreme Court of India provided for that it has to be considered whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute.

   b. For the third condition, the Hon'ble Supreme Court of India stated that the adjudicating authority must examine whether there is a plausible contention which requires further investigation and that the 'dispute' is not a patently feeble argument or an assertion of fact unsupported by evidence. The Hon'ble Supreme Court of India further stated that the adjudicating authority had to see that there were no spurious claims and stated that:

> *"It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed."*

   c. The Hon'ble Supreme Court of India inferred that the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. The Hon'ble Supreme Court of India set aside NCLAT's order.

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Warm Regards,

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