KHAITAN & CO
Advocates since 1911

UPDATE

ERGO

Analysing developments impacting business

FURTHER AMENDMENTS TO FOREIGN EXCHANGE MANAGEMENT (NON-DEBT INSTRUMENTS) RULES

21 December 2020

Introduction:

On 8 December 2020, the Ministry of Finance, Government of India notified the Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2020 (NDI Amendment Rules). The NDI Amendment Rules (i) notified increase in the sectoral cap for foreign direct investment (FDI) in the defence sector to 74%; and (ii) issued certain clarifications on the present policy on investments from countries sharing land borders with India.

We have analysed below the amendments introduced to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules) through NDI Amendment Rules.

Analysis:

- *FDI in defence*: The increase in the sectoral cap and changes to sectoral conditions for FDI in defence had already been introduced through Press Note 4 (2020 Series) dated 17 September 2020 (PN 4) issued by the Department for Promotion of Industry and Internal Trade, Government of India (DPIIT). Our previous update on this development can be read here. The changes announced through PN 4 have now been brought into effect pursuant to the NDI Amendment Rules.

- *FDI from multilateral banks/funds*: The DPIIT, through Press Note 3 (2020 Series) dated 17 April 2020 (PN 3), had introduced certain protectionist measures against investments from countries sharing land borders with India. In view of the PN 3 restrictions, approval of the Government is required for both primary and secondary acquisitions by non-resident entities from or entities whose beneficial owners belong to countries sharing land borders with India. Our previous updates on this development can be read here. The aforesaid requirements were also incorporated in the NDI Rules with effect from 22 April 2020.

  Neither PN 3 nor the NDI Rules, however, specify the nature of investors covered within its ambit or the beneficial ownership thresholds, which led to uncertainty and confusion. Separately, in July 2020, the Government revisited its public procurement policy to notify amendments to the general financial rules, and entities from the neighboring countries, prior to participating in public procurement contracts and supplying goods and/or services to the government, were required to procure a registration with the DPIIT. By amending the general financial rules to impose restrictions on public procurement, the DPIIT is empowered to reject or cancel the registration of a bidding entity without according any reasons.

The NDI Amendment Rules now clarify one aspect that multilateral banks or funds, of which India is a member, shall not be subject to restrictions brought by PN3 irrespective of bordering nations also holding such memberships.

Comments

The changes implemented by NDI Amendment are certainly important. However, the investor community was hoping to have more clarity on aspects like beneficial ownership percentage, type of investments, special treatment for non-sensitive sectors or existing investors, unilateral power to reject or cancel the registration of a bidding entity, etc. These clarifications would certainly reduce the number of applications currently pending for approval with the Government.

- *Moin Ladha (Partner), Parag Bhide (Principal Associate) and Anvita Mishra (Senior Associate)*

For any queries please contact: editors@khaitanco.com

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