RBI's FEMA rule: Why Form FC-TRS requirement an impediment to M&A deals

There appears to be an inconsistency: in one instance, the requirements permit the transfer of shares before obtaining AD approval for the FC-TRS, while in another, the FDI Policy mandates that the transfer can only occur after the company receives the AD-approved FC-TRS, observe Bhavik Narsana and Snehal Raut of Khaitan & Co. in this exclusive column.

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Recently, the Reserve Bank of India (RBI) issued certain instructions (RBI Instructions) to authorised dealer banks (AD Bank) under Foreign Exchange Management Act, 1999 (FEMA) in relation to reporting share transfers involving residents and non-residents and other aspects.

Inconsistency between NDI Rules and FDI Policy:

RBI tracks and monitors foreign investments relying on forms such as Form FC-TRS for transfer of shares (FC-TRS). Accordingly, filing of forms and reporting transactions in a timely manner assumes significance from RBI perspective.

One of the issues in the RBI Instructions pertains to the timing or sequencing of transfer of shares between residents and non-residents and the filing of FC-TRS. The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (NDI Rules), and the master directions on reporting (Reporting Directions) under the NDI Rules and Foreign Direct Investment Policy, 2020 (FDI Policy) provides that FC-TRS needs to be filed with the AD Bank within 60 days of transfer of equity instruments or receipt or remittance of funds, whichever is earlier.

However, the FDI Policy provides that when the transfer is on private arrangement basis, on settlement of the transactions, the buyer can approach the investee company to record the transfer of shares along with the certificate in the Form FC-TRS from the AD branch that the remittances have been received by the seller (AD Approved FC-TRS). On receipt of the AD approved FC-TRS, the company may record the transfer in its books. Interestingly, the FDI Policy covers only transfer of shares when shares are held in physical form.

Accordingly, there seems to be some inconsistency whereby in one instance the requirements contemplate transfer of shares before AD Approved FC-TRS and in the other instance, the FDI Policy, requires transfer of shares only after company receives the AD Approved FC-TRS.

Current practice in M&A deals:

We understand that as a practice, after the enactment of the NDI Rules, Indian companies have been recording transfer of shares prior to AD Approved FC-TRS. This practice seems contrary to the requirement under FDI Policy. Therefore, one of the RBI Instructions pertains to contravention in relation to Indian companies taking on record the transfer of shares prior to obtaining AD Approved FC-TRS.

When shares are held in dematerialised form, the seller delivers to the depositary participant the slips for transfer of shares on the same day when buyer remits purchase price to the seller. Accordingly, the shares are transferred immediately. To comply with FDI Policy and RBI Instructions, the buyer will need to receive the AD Approved FC-TRS and then deliver the transfer slips to seller's depository participant.

In the case of shares held in physical form, the seller submits the share transfer form to the company simultaneously with or immediately (ideally, on the same day) on receipt of purchase price and the company holds a board meeting to record transfer of shares and necessary entries are made in register of members to reflect transfer of shares. To comply with the FDI Policy and the RBI Instructions, after paying the purchase price, the buyer will need to wait until receipt of AD Approved FC-TRS and then submit the requisite share transfer documents for company to record transfer of shares.

We understand that practically, it takes a few days particularly when there are multiple transfers and multiple sellers to receive the AD Approved FC-TRS.

Concerns for buyers due to RBI Instructions:

Usually, buyers would like to receive the shares simultaneously with or immediately (ideally, on the same day) on payment of purchase price. The buyer would be disadvantaged if he/she/it does not receive the shares on the same day after paying the purchase price. Additional complications could arise if there is considerable delay in receipt of AD Approved FC-TRS.

The requirement to obtain AD Approved FC-TRS before recording transfers can significantly delay the completion of transactions, affecting business timelines and potentially the valuation of deals. This issue would be highlighted when there is significant discomfort or mistrust between buyer and seller.

To mitigate the risks of delayed transfer of shares after payment of purchase price, the buyer could consider requiring the company's board of directors to pass an in-principle board resolution approving the transaction subject receipt of AD Approved FC-TRS, and then, once the AD Approved FC-TRS is received, the company could pass another resolution to record the transfer of shares and approve the entries to be made in the relevant registers. By passing the in-principle board resolution, the buyer would be assured that except for AD Approved FC-TRS, there are no other issues in relation to the transfer of shares.

Other aspects in RBI Instructions:

In the RBI Instructions, the RBI also clarified that compounding of non-compliances in previous transactions is a voluntary action by applicants and AD Banks should not delay taking on record FC-TRS for the current transaction because of unresolved past issues. Additionally, if applicants are unable to obtain mandatory documents for past transactions, AD Banks should refer such cases to the RBI for guidance, ensuring efficient reporting under FEMA without unnecessary delays.

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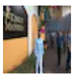

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