November 2017

Highlights of the FEMA (TISPRO) Regulations, 2017

On November 07, 2017, India's central banking regulator, the Reserve Bank of India ("**RBI**"), issued the Foreign Exchange Management (Transfer or Issue Security by a Person Resident Outside India) Regulations, 2017 ("**2017 Regulations**"). The 2017 Regulations consolidate the regulations, compliances and restrictions applicable to foreign investment in India, and supersede previous regulations issued by the RBI under the Foreign Exchange Management Act, 1999 ("**FEMA**").

Summarized below are some of the key changes introduced by the 2017 Regulations to India's foreign investment regime.

- **Clarity on FDI & FPI**: The 2017 Regulations clarify that any foreign investment in the capital of a listed Indian company would constitute Foreign Direct Investment ("**FDI**"), if the investor's stake in the equity capital of the company (on a fully diluted basis) is 10% or more. Such investment would continue to be categorised as FDI, even if the investor's stake subsequently falls below 10%. Investments less than 10% would constitute Foreign Portfolio Investments ("**FPI**").

- **Consolidation of Sectoral Caps and Investment Conditions**: The 2017 Regulations consolidate the changes introduced by the Government of India to India's FDI policy, particularly with respect to sectoral caps and investment conditions applicable to FDI in various sectors.

- **Revised Timeline for Issuance of Capital Instrument**: To align Indian foreign exchange regulations with company law, the 2017 Regulations now require Indian companies to issue capital instruments (equity shares, preference shares, debentures and share warrants) to foreign investors within 60 days of receiving the investment. Companies were previously permitted up to 180 days to issue such instruments.

- **Acquisition of Capital Instruments through Rights Issue**: The 2017 Regulations stipulate several conditions subject to which a foreign investor may subscribe to capital instruments (other than share warrants) of an Indian company through a rights issue. These regulations clarify that such conditions would continue to apply where the securities acquired by the investor are renounced by the person to whom they were first offered.

- **Transfer of Capital Instruments under a Scheme of Arrangement**: Subject to certain conditions, an Indian company is now permitted to issue non-convertible redeemable preference shares or debentures, by way of bonus to foreign shareholders, where a 'Scheme for Arrangement' has been approved by the National Company Law Tribunal (NCLT) or other competent authority.

- **Cure Period for Breach of FPI Caps**: The 2017 Regulations empower the RBI to prescribe a time period within which a foreign portfolio investor may transfer capital instruments of an Indian company to a person resident in India, where the acquisition of such instruments has resulted in a breach of the applicable sectoral cap on FPI. The 2017 Regulations clarify that where the transfer is completed within the prescribed timeline, the original acquisition of such instruments would not be treated as a contravention of FEMA.

- **Coverage of Investment Vehicles**: A foreign investor is now permited to pledge units held by it in an Investment Vehicle such as Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InVIts) and Alternative Investment Funds (AIFs), to secure credit facilities being extended by an Indian bank to such entity.

For more details, please contact km@jsalaw.com

J. Sagar Associates I advocates & solicitors
Ahmedabad | Bengaluru | Chennai | GIFT IFSC | Gurugram | Hyderabad | Mumbai | New Delhi