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July 11, 2011 New Delhi, India

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Recommended by:

Government to Relax FDI Lock-In Condition in Education Infrastructure

The Department of Industrial Policy and Promotion, Ministry of Finance ("DIPP") has proposed doing away with the requirement of three (3) years' lock-in on repatriation of FDI received in 'Development of Townships, Housing, Built-up Infrastructure and Construction Development Projects' ("Construction Projects"), if the project is for creation of education infrastructure.

The FDI policy of India allows upto 100% FDI in Construction Projects, subject to fulfillment of certain conditions inter alia related to minimum area and minimum capitalization requirements for each project. In addition, the FDI policy specifies that, irrespective of nature of the project, the foreign investment cannot be repatriated out of India before completion of the three (3) years lock-in period.

Upon acceptance of the DIPP's recommendation, investors investing in education related Construction Projects would have the liberty to repatriate out of India their investment deployed in Construction Projects related to education institutes at any point of time. However, the project and the investment would still need to comply with the other prescribed conditions, primarily related to minimum area and minimum capitalization.

Dimpy Mohanty, Partner, LexCounsel, Law Offices says "the relaxation currently proposed by the DIPP may still not help in attracting foreign investments in construction of educational institutes, as the other requirements related to minimum area (of built up 50,000 square meters) and minimum capitalization (of up to USD 10 million) continue to render the investment unviable. Educational institutes, even in the higher education space, ordinarily do not require such an extent of built-up facilities, and it can also be quite a task for the institutes so established to gainfully deploy the capital received", adds Dimpy.

Policy on Device Drivers – An Indian Initiative

India is expected to soon introduce one of the first policies in the world on device drivers concerning procurement of computers and peripherals for e-Governance projects.

The Ministry of Communications and Information Technology ("MCIT"), Government of India has invited public review and comments to the proposed policy on device drivers for procurement of hardware for e-Governance projects, uploaded on the website of the Department of Information Technology, MCIT.

The policy, as drafted, requires that the computers and peripherals used in all e-Governance projects shall be capable of working with open source software. It accordingly requires the original equipment manufacturers and vendors supplying computers and peripherals to the MCIT to specifically guarantee that the computers and drivers for peripherals are capable of running on all general purpose operating systems, including windows operating system (from Microsoft) and GNU/Linux operating system. The policy proposes further conditions for Linux operating systems.

The initiative of the MCIT is apparently to facilitate implementation of e-Governance projects in a manner that is technology-neutral, cost effective, interoperable and vendor-neutral.

The policy is available for public review and comments till July 25, 2011. The feedback received from the public and stakeholders will be considered to evolve the final policy of the MCIT on the subject, to be notified in due course thereafter. The draft policy however stipulates that, upon notification, the policy would apply to all new e-Governance projects as well as to augmentation of existing projects.

The policy is likely to face opposition from a series of multinational and other equipment manufacturers who have to modify and make their equipment work on open source operating systems and software.

Clarification on New Data Privacy Rules Expected Soon

The Government is expected to soon clarify the scope and applicability of the recently introduced Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("Rules") with specific reference to the outsourcing sector.

The Rules, issued under the Information Technology Act, 2000 ("Act"), define sensitive personal data and information and lay down the guidelines for collection, disclosure, transfer and security of such information by the body corporate and persons collecting such information. The Rules, benchmarked by the industry as stringent, prescribe for written consent of the concerned persons to be obtained for collection of their sensitive data and information, as also entitle such persons to withdraw their consent earlier given. Violation of the Rules can attract liability towards payment of fine and compensation to the person affected by the body corporate involved as also imprisonment of the person in charge of the body corporate.

Following notification of the Rules, concerns have been raised by stakeholders and experts in the outsourcing sector whether they would apply to personal data sent by entities based outside of India to their outsourcing service providers in India. Applicability of the Rules to such transfer of information would inevitably require the foreign entities to align their data collection, privacy and disclosure norms with the provisions of the Rules.

The Government has hinted at issuing a clarification that the Rules do not apply to data outsourced to India. A formal clarification by the Government in this regard is still awaited.

Guidelines for Infrastructure Debt Funds ("IDFs") Released

The Finance Minister has recently released the guidelines for setting up of IDFs with a view to accelerate and enhance the flow of long term debt in infrastructure projects. For the purposes of attracting off-shore funds, withholding tax on interest payments on borrowings by IDFs may be reduced from 20% to 5%. In addition, income of the IDFs has also been exempted from levy of income tax.

Based on consultations with potential investors, infrastructure companies, regulators and experts, the following broad structure has emerged for IDFs:

- An IDF may be set up either as a Trust or as a Company to be registered in India and regulated by one of the financial regulators.

- A Trust based IDF would ordinarily be in the form of a mutual fund that would issue units and be governed and regulated by the Securities and Exchange Board of India while a Company based IDF would ordinarily be in the form of a non-banking financial company that would issue bonds and be governed and regulated by the Reserve Bank of India.

- Investors would primarily be domestic and off-shore institutional investors, especially Insurance and Pension Funds who have long term resources. Banks and financial institutions would only be allowed to invest as sponsors of an IDF.

- A Trust based IDF can be launched either as a close-ended scheme maturing after a period of more than 5 years or as an interval scheme with a lock-in period of 5 years. A Trust based IDF would have minimum 5 investors with each investor holding not more than 50% of net assets of the scheme and minimum investment would be Rs. 10 million with Rs. 1 million as minimum size of the unit.

- A Trust based IDF would raise resources through issue of rupee denominated units with maturity period of minimum a 5 years, which would be listed on a recognized stock exchange and tradable among equivalent (domestic vs. foreign) investors.

A Company based IDF would raise resources through issue of either rupee or dollar denominated bonds with a maturity period of minimum 5 years, which would be tradable among equivalent (domestic vs. foreign) investors.