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Ministry of Finance | Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2022

Ministry of Finance (Department of Economic Affairs) on April 12, 2022 vide Notification S.O. 1802(E) notified the Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2022 (**Amendment**) amending the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (**Rules**). The Amendment was issued to bring the Rules in consonance with the modifications in the consolidated FDI Policy, 2020 issued by the government vide Press Note 1 (2022) dated March 14, 2022 which shall come into force from the date of its publication in the Official Gazette.

Key takeaways from the Amendment

- **Increase in the conversion period of convertible notes**

The Amendment has been made with regard to the issue of convertible notes by start-ups. According to the new Amendment, start-ups can now issue convertible notes which are to be converted into equity shares of the company within 10 years from the date of the issue of convertible note. Earlier, the convertible notes had to be converted within 5 years.

- **Broader definition of 'Indian Company'**

As per the Rules, 'Indian Company' means a company incorporated in India. However, the Amendment modified the definition to include a body corporate established or constituted by or under any central or state act. Further, the Amendment also clarified that a reference to 'Company', 'Investee Company', 'Transferor Company' and 'Transferee Company' shall include body corporate as well. However, an Indian company shall not include a society, trust or any entity which is not eligible as an investee as per the FDI Policy.

- **Inclusion of Share Based Employee Benefits**

The Amendment now enables an Indian company to issue 'Share Based Employee Benefits' in addition to employees stock options and sweat equity shares to its employees and directors. Furthermore, the definition of Share Based Employee Benefits has also been inserted.

- **Broader scope of merger or demerger or amalgamation of Indian companies**

The Amendment has widened the scope of this provision whereby the provisions of the said Rules shall now apply to:

- Scheme of merger or amalgamation of two or more Indian companies, or
- A reconstruction by way of demerger or otherwise of an Indian company, or
- A transfer of undertaking of one or more Indian company to another Indian company, or

- Involving division of one or more Indian company

Further, the Amendment also clarifies that the government approval shall not be required for mergers and acquisitions taking place in sectors under the automatic route.

- **Removal of certain activities which were earlier considered as real estate business**

The Rules in Schedule 1 specify the sectors which are prohibited for FDI, which include real estate businesses. In pursuance of the same, the explanation has been substituted by the Amendment and the following activities are exempted from inclusion in real estate business:

- Development of townships
- Construction of residential or commercial premises
- Construction of roads or bridges
- Educational institutions
- Recreational facilities
- City and regional level infrastructure
- Townships
- Real estate broking services and Real Estate Investment Trusts (**REITs**) registered and regulated under the SEBI (REITs) Regulations 2014 and earning rent or income not amounting to transfer

- **Allowing FDI in Life Insurance Corporation of India (LIC)**

As per the earlier Rules, insurance companies regulated by the Insurance Act, 1938 can receive 49% FDI under the automatic route which was not applicable to LIC. The Amendment therefore inserted a new Sub-Clause and as a result LIC can now receive FDI up to 20% through the automatic route.

The Amendment aims to align the existing foreign exchange laws with the modifications issued in the FDI Policy in March 2022. The Amendment has widened the scope in relation of mergers and amalgamations, definition of an Indian company, granting of employee benefits and extension in the conversion period for convertible notes all of which are being highly appreciated by the public in general. However, the Amendment which has generated the most public interest is the insertion of the Sub-Clause F.8.1A which has allowed LIC to receive FDI ahead of its scheduled Initial Public Offer later this year.

SEBI | Stock exchanges to issue SOP under the stock exchange arbitration mechanism

SEBI vide Circular No. SEBI/HO/CFD/SSEP/CIR/P/2022/48 dated April 08, 2022 directed the stock exchanges to put in place a Standard of Operations (**SOP**) for dispute resolution under the stock exchange arbitration mechanism between a listed company and its shareholders or investors.

As per the circular, the stock exchanges shall have the SOP by June 01, 2022 for operationalizing the resolution of all disputes pertaining to or emanating from investor services such as transfer/transmission of shares, Demat/Remat, issue of duplicate shares, transposition of holders, etc. and investor entitlements like corporate benefits, dividend, bonus shares, rights entitlements, credit of securities in the public issue, interest/coupon payments on securities, etc.

The circular further clarifies that the Registrars and Share Transfer Agents offering services to shareholders on behalf of listed companies, shall continue to be subjected to the stock exchange arbitration mechanism.

Further, the stock exchanges shall notify the listed companies in this regard and disseminate the same on their website.

SEBI | Operational guidelines for covenant monitoring with DLT

Securities market regulator SEBI has recently issued a fresh set of operational guidelines (**Guidelines**) for security and covenant monitoring using Distributed Ledger Technology (**DLT**). According to the guidelines, relaxation has been given to the issuers who are unable to record details in the system, meanwhile existing outstanding non-convertible securities issuers have to submit all details in their DLT before September end. The recording of asset details, allotment, listing and payment of interest has been made available in the DLT system with effect from April 01, 2022.

Earlier in August 2021, SEBI had notified specific manner in which the recording of charges by issuers and monitoring by debenture trustees and credit rating agencies are to be carried out, to improve the process of security creation and monitoring of securities.

Key features of the Guidelines

- Validation checks based on parameters identified for each asset type have been added in the system to ensure the uniqueness of the assets of the issuer offered as security.
- Debenture trustees, on a yearly basis, shall reconcile and eliminate duplicate entries for an asset in the system.
- A unique 12-digit alphanumeric asset ID has been allotted to every asset for data exchange and verification across depositories.
- Movable assets, current assets and any other assets of similar nature will be tracked at the portfolio level.
- This system directed by SEBI will be applicable to all issuers proposing to issue non-convertible securities on or after April 01, 2022, and every issuer will have to record the details in the system before activation of ISIN.
- All depositories will be allowed to allot or unfreeze an existing ISIN only after confirming recording of details by issuers as prescribed by SEBI.
- SEBI has provided relaxation till July 01, 2022 for issuers who are unable to record details in the system after explaining to the depositories. ISIN will not be allotted in case of default or non-compliance to the prescribed rules after the date mentioned by the regulator.

- For existing outstanding non-convertible securities, SEBI has directed the issuers to submit the details into the DLT system on or before September 30, 2022.

SEBI | Amendment to debenture trustee norms

SEBI vide Notification dated April 12, 2022 notified amendments with respect to the norms related to security cover, disclosure of credit ratings and due diligence certificate for unsecured debt securities. SEBI has also revised the rules pertaining to trustee norms, issue and listing of non-convertible securities norms and LODR (Listing Obligations and Disclosure Requirements) Rules.

Key features

- The term 'Asset Cover' has been changed to 'Security Cover' in debenture trustee rules and LODR norms as a part of aligning framework and terminology.
- SEBI has amended the rules in relation to maintenance of security cover sufficient to discharge both principal and interest. In accordance with amended rules related to non-convertible securities, SEBI has directed the issuer to ensure that the debt securities are secured by security cover as per the terms of the document or debenture trust deed sufficient to discharge principal and interest.
- The notification also explains the need for disclosure requirement with regard to credit ratings and has introduced the requirement of due diligence certificate for unsecured debt securities in the SEBI (Issue and Listing of Non-Convertible Securities) Rules.
- Details of the credit rating along with latest press release of the credit rating agency declaring validity on the date of issuance and listing, needs to be mentioned in the prospectus.

MCA | Requirement for prior approval from the Government for Nidhi Companies

Ministry of Corporate Affairs (**MCA**) on April 08, 2022, vide its Notification No. G.S.R. 291(E), amended the Companies (Incorporation) Amendment Rules, 2022 (**Amendment**). The Amendment seeks to introduce changes in Rule 12 which specifies the application procedure for the incorporation of companies.

As per the Amendment, if a company is being incorporated as a Nidhi, then a declaration by the Central Government under Section 406 of the Companies Act, 2013 has to be mandatorily obtained by the company before the commencement of its business and should be submitted during the process of its incorporation with the Registrar of Companies.

The Amendment has further substituted the FORM INC-20A dealing with 'Declaration for Commencement of Business' with FORM No. INC-32 and notified that the following declaration shall be added in FORM No. INC-32 (SPICe +):

'Any company shall not commence the business of Nidhi, unless all the required approvals including the declaration to

be issued under section 406 of the Act have been obtained from the Central Government.’

This step is taken to safeguard the interest of the applicants/consumers that are forming part of Nidhi companies.

MCA | Restriction on inspection of particulars of the registers maintained by/for/of members of the company

MCA vide Notification No. G.S.R. 279(E) dated April 06, 2022, issued the Companies (Management and Administration) Amendment Rules, 2022 (**Amendment**) amending the Companies (Management and Administration) Rules, 2014 (**Rules**).

Pursuant to the rules, all members, debenture holders, security holders or beneficial owners can inspect the registers and indices maintained by the company and can also take extracts and copy upon payment of a fee. However, the Amendment introduces a few restrictions whereby following particulars of the register or index or return in respect of the members of a company shall not be available for inspection or extraction:

- Address or registered address (in case of a body corporate)
- E-mail ID
- Unique Identification Number
- PAN Number

Details such as e-mail id, address, PAN Number, etc. are highly confidential and personal in nature and prone to misuse. Such a step by MCA towards protecting the privacy of the members and shareholders is being highly appreciated.

MCA | Amendment in the Nidhi Rules, 2014

MCA vide its Notification No. G.S.R. 301(E) notified the Nidhi (Amendment) Rules, 2022 (**Amendment**) amending the Nidhi Rules, 2014 (**Rules**) which is in effect from April 19, 2022. The Amendment has been enforced to curb the rising illegal fundraising activities by non-compliant Nidhi companies and safeguard the interest of the general public.

The changes to the Rules will be applicable to the companies incorporated after the Amendment. Some of the important amendments are summarized below:

Insertion of Rule 3(1)(aa)

Pre-Amendment

- No clear definitions for Registered Office and Branch, no distinctions.

Post-Amendment

- Registered Office excluded from the definition of Branch, depicting a clear distinction.

Substitution in Rule 4(1)

Pre-Amendment

- Minimum paid-up equity share capital of INR 5 lakh

Post-Amendment

- Increased to INR 10 lakh

Insertion of Rule 3A

Pre-Amendment

- Form NDH-4 to be filed to declare itself as a Nidhi Company with few restrictions.
- Applicable to every Nidhi company.
- No such time limit existed.

Post-Amendment

- Entity not in compliance with the provisions of Amendment shall not raise deposits or provide loans to its members.
- The Rule shall not apply to companies incorporated on or after the Amendment.
- The rejection or approval of the application in Form NDH-4 should be made within 45 days by the Government.

Insertion of Rule 3B

Pre-Amendment

- A declaration in NDH-4 to be filed as per Rule 3A within 60 days of completion of a 1 year of incorporation.

Post-Amendment

- A more detailed application process issued.
- Prior approval from the Central Government is necessary for which an application for declaration in Form NDH-4 is to be filed within a period of 120 days of its incorporation, provided it has at least 200 members, net owned funds of at least INR 20 lakh and fulfils the fit and proper criteria.
- In case, a company does not comply with it, then, it shall not be allowed to file Form No. SH-7 and Form PAS-3.

Insertion of Rule 5(5)

Pre-Amendment

- Conditions that a Nidhi shall achieve within 1 year of incorporation (minimum number of members, net owned funds and unencumbered deposits) are applicable to all Nidhi companies.

Post-Amendment

- Not applicable to Nidhi companies incorporated after the commencement of the Amendment.

Substitution in Rule 6(d)

Pre-Amendment

- Restriction to acquire another company by purchase of securities subject to a waiver in case a special resolution and prior approval of regional director is obtained.

Post-Amendment

- Restriction to acquire another company by any manner and in purchasing of securities of other company, depicting a broader view.

Insertion of Rule 6(l)

Pre-Amendment

- No such restriction.

Post-Amendment

- Restriction on raising loans from banks or other financial institutions to advance loans to members.

Insertion of Rule 8(4)

Pre-Amendment

- No such restriction.

Post-Amendment

- Member cannot transfer more than 50% of his shareholding

	during the subsistence of a loan/deposit.
Substitution in Rule 9	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Net owned funds of minimum INR 10 lakh. 	<ul style="list-style-type: none"> Net owned funds of minimum INR 20 lakh limit increased. Within 18 (eighteen) months from commencement
Substitution in Rule 10(3)	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Prior approval of Regional Director necessary to open more than 3 (three) branches. 	<ul style="list-style-type: none"> Application in Form NDH-2 to be filed after the Regional Director's approval for the same, depicting more formalities.
Omission in Rule 10(4) & 10(5)	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Restrictions on opening branch, collection centers, offices, or deposit centers outside the state and without annual filings. 	<ul style="list-style-type: none"> Restriction limited to only opening of branches.
Substitution in Rule 10(6)	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Advertisement to be published in order to close a branch. 	<ul style="list-style-type: none"> More formalities like approval from the Regional Director at least 60 days prior, advertisement as per NDH-5 at least 30 days prior, NDH-2 filing with Registrar and fixing of a notice for 30 days at the branch.
Addition in Rule 14	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Approval of Regional Director for temporary withdrawal of unencumbered term deposit. 	<ul style="list-style-type: none"> Approval of Regional Director shall be applied for by an application in NDH-2 along with fee, depicting more formalities. institutions to advance loans to members.
Substitution in Rule 18	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Nidhi cannot exceed 25%, subject to an equal transfer to general reserve, no default in repayment of matured deposits and compliance with provisions of the Rules. 	<ul style="list-style-type: none"> Additional conditions removed.
Insertion in Rule 20(6)	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Loans available only against gold jeweler. 	<ul style="list-style-type: none"> Term 'or silver' added, providing for loan against silver jewelry.
Changes to the forms in Annexures to Rules	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> NDH-2 for 'Application for extension of time' substituted. 	<ul style="list-style-type: none"> NDH-2 to be filed for 'Application to Regional Director and Intimation to Registrar'

	<ul style="list-style-type: none"> NDH-5 'Format of advertisement to be given while closing branch' introduced.
Changes to the forms in Annexures to Rules	
Pre-Amendment	Post-Amendment
<ul style="list-style-type: none"> Declaration to be filed only by Nidhi company. 	<ul style="list-style-type: none"> Promoters and directors shall also file a declaration in Form NDH-4.

Miscellaneous | Centre plans to douse EV fires with battery policy

Indian Government is planning to launch a detailed policy for Electric Vehicle (EV) batteries, to keep a check on the quality controls for batteries used in EVs. After multiple incidents of electric two-wheeler vehicles catch fire, the speculated central government policy is likely to cover manufacturing standards, performance testing along with testing for heat resistance in EV batteries.

According to the officials, the primary cause of overheating of EV batteries is due the use of imported batteries which are not designed and produced according to the country's requirement, to resolve this Centre for Fire, Explosive and Environment Safety (CFEES) is currently investigating the fire incidents associated with leading electric scooters manufacturers Ola S1Pro and Okinawa Praise Pro.

Any decision by the Government with respect to recalling of EVs from the market, will be taken only after a detailed review of the findings submitted by the CFEES.

Miscellaneous | M&A hit four-year high in March quarter

Recent analysis on the merger and acquisition activity in India shows an enormous growth in deal making against the ongoing global trend, hitting a four-year high mark of USD 30.3 billion in the first quarter of 2022.

The M&A activity in the country grew approximately 29.6% in the first 3 months of the calendar year 2022. While inbound M&As grew by 17.9% to USD 11.6 billion, domestic M&As declined 24.5% to USD 12.1 billion. However, outbound deals increased more than doubled to USD 5 billion, making it the highest first-quarter period since 2010.

The technology sector witnessed the majority of deals in the first quarter totaling to USD 6.6 billion and 21.8 percent market share. Following the trend, healthcare sector also grew four times in value to USD 4.7 billion with 15.5 market share along with the finance sector valuing at USD 4.1 billion.

According to reports, acquisition in technology and healthcare along with availability of private equity and low interest rates were few of the key factors resulting boost in the M&A growth. Whereas the equity capital market activity slope down to 64.3% as a result of the declined ECM offerings. Similarly, IPOs saw a slow start in the first quarter, raising USD 1 billion which is the lowest since 2019.

FEATURED TOPIC | Enforceability of non-compete clauses in employment contracts

A 'Non-Compete' agreement/clause in a contract prohibits any employee from entering into competition with an employer after the employment period is over. In India, such non-compete clause is governed under Section 27 of the Indian Contract Act, 1872 (**Act**), which essentially states that any agreement restraining anyone from exercising a lawful profession, trade, or business of any kind, is void. The non-compete clause is also known as 'Doctrine of Restraint Covenants' or 'Negative Covenants' due to its restrictive nature.

In recent times, Infosys Ltd (**Infosys**), an Indian multinational information technology company that provides business consulting, information technology and outsourcing services, included a non-compete clause in their employment agreement amid the rising rate of attrition in the country's technology market. Under this clause, an Infosys employee cannot work for the same customer he worked with at Infosys during the 12 months period prior to leaving the company. Responding to the same, a Pune-based employee union Nascent Information Technology Employees Senate (**NITES**) has filed a complaint against non-compete clauses in Infosys's employment agreements with its IT and BPO employees.

In this write-up, we have analyzed the legal framework surrounding the non-compete clauses incorporated in employment agreements by a plethora of companies and their enforceability under the Indian laws.

Analysis of the legal framework w.r.t non-compete clause in employment agreements

Section 27 of the Act states that any agreement that restrains anyone from practicing a lawful profession or trade is not enforceable in a court of law. Non-compete clauses are unenforceable yet are commonly used as a deterrent for employees from joining rival companies in their employment agreements despite being aware that their enforceability is highly questionable. There are various judgements surrounding the issue yet unable to give clarity on the issue.

In *Independent News Service Pvt Ltd v. Sucherita Kukreti*¹, it was held that Article 51A of the Constitution of India constitutes a duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievements and thus agreements by which anyone is restrained from exercising a lawful profession should be declared void in accordance with Section 27 of the Act in absolute terms.

A similar view was taken in *Affle Holdings Pte Ltd v. Saurabh Singh & Ors*², wherein it was held that a negative covenant in the employment contract which prohibits carrying on a competing business beyond the tenure of the contract is void and not enforceable. However, the prohibition does not operate during the subsistence of the employment contract.

A slightly liberal view was taken by the Apex Court of India in *Niranjan Shankar Golikari v. Century Spinning Ltd*³, while interpreting Section 27 of the Act, SC clarified that not all non-compete clauses, effective after the termination of the employment agreement are prima facie prohibited unless the contract is excessively harsh or unreasonable or one-sided.

Safeguards and exceptions for employer

Upon reading Section 27 of the Act, it is prima facie that the non-compete clauses as long as it restricts a person from carrying on a lawful profession, trade, or business of any kind would be void, but there are some exceptions to it. It is well-settled that a contract that is in restraint of trade cannot be enforced unless it is reasonable and consistent with the interest of the public. These two principles are the *sine qua non* for a contract which is in restraint of trade. However, Section 27 of the Act, provides for one exception – a person which sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business. The courts have also taken a similar view stating that goodwill and business within local limits affecting the business of the employer were held to be reasonable restrictions and not violative of Section 27 of the Act in *Ozone Spa Pvt Ltd v. Pure Fitness & Ors*⁴.

A common safeguard that is generally used in order to persuade an employee from leaving the employment is a 'Garden Leave' clause which essentially refers the period of time during which an employee stays away from the workplace or works remotely during the notice period. The employee remains on the payroll and is in the process of terminating their employment but is neither permitted to go to work nor to commence any other employment during the gardening leave. It is beneficial to both the employer and the employee as the employer can ensure that the employee's expertise and commercial and trade secrets to which they were privy do not immediately become available to competitors, and the employee is not at a financial disadvantage. However, the same can only be used as a safeguard or a preventive measure and cannot be used in a restrictive or prohibitive manner. The same can be seen in the landmark case, *VFS Global Services Private Ltd v. Suprit Roy*⁵, wherein it was held that any garden leave clause which intends to operate after the contract of employment and restricts the employee to gain employment elsewhere, stands terminated.

Another safeguard that is customarily used by an employer is a 'Non-Solicitation' clause which typically refers to an agreement between an employer and employee that prohibits an employee from utilizing the company's clients,

¹ ((2019) 257 DLT 426)

² (IA No.23684/2014)

³ 1967 AIR 1098)

⁴ (CS(OS) No. 1815/2015).

⁵ (2008 (3) Mh.L.J.)

customers, contact lists, etc. after such employee leaves/exits the company. These, like non-compete clauses/agreements, can also exist to even between independent parties. In *Wipro Ltd v. Beckman Coulter International S.A*⁶, it was held that an agreement between two parties consisting of a non-solicitation clause would mean a covenant that essentially prohibits either party from enticing and/or alluring each other's employees away from their respective employments. It is a restriction cast upon the contracting parties and not on the employees. Therefore, the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Act, as being void.

Conclusion

Not only Section 27 of the Act but also Article 51A of the Constitution of India constitutes a duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievements. Therefore, the non-compete clause presently in order to qualify for being enforceable by law has to ensure that the restriction imposed by the employer is reasonable and not harsh on the employees. Analyzing the judgements stated above along with section 27 of the Act, it can be concluded that the clause can be used as a safeguard procedure but not as an absolute restraint on employment. As a safeguard, it is very crucial to incorporate a 'Severability Clause' which can separate an invalid/illegal provision from the rest of the provisions helping the remainder of the employment agreement to stay intact.

⁶ ((2006) 131 DLT 681)

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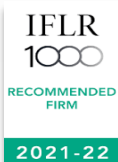


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