

Infrastructure Investment Trusts Introduced in India

As the capital market regulator, Security Exchange Board of India (SEBI) actively encourages setting of varied frameworks for investment in infrastructure sector so that lack of structures for financing of infrastructure is not an impediment for the development of the sector. Recently SEBI has made effort to boost investment in the infrastructure sector by issuing a consultation paper on infrastructure investment trusts in India and several financing/refinancing structures globally observed boosting infrastructure sector/ specific sub-sectors including business trust model in Singapore and Hong Kong, Master Limited Partnerships in the USA, various securitization structures, etc. SEBI has received various proposals for such Infrastructure Investment Trusts including bringing Infrastructure Investment Trusts as a Mutual Fund, having a separate set of Regulations for Infrastructure Investment Trust, bringing Infrastructure Investment Trusts under REIT framework, etc. SEBI suggested two ways to launch schemes under Infrastructure Investment Trusts i.e.

- through a mutual fund framework and
- through an independent framework.

As per the first route proposed by SEBI, the sponsor of an Infrastructure Investment Trust shall act as an infrastructure developer or a special purpose vehicle (SPV), and each Infrastructure Investment Trust will need to have a mix of pre-completed projects and projects generating cash flows. There will be an independent engineer, project manager, advisory body and authority. Under this route Infrastructure Investment Trust will have to bundle portfolio of infrastructure projects. The Infrastructure Investment Trust can invest both in projects from its own group companies and those under other developers. Two or more developers can also jointly sponsor the creation of an Infrastructure Investment Trust. An Infrastructure Investment Trust will need to invest at least 65% of net assets of the scheme in equity shares of companies in line with equity-oriented mutual fund schemes. Just like real estate investment trusts (REITs – captured in our last month's newslex), Infrastructure Investment Trusts will be required to distribute at least 90% of their net distributable income after tax to their investors. SEBI proposed that an Infrastructure Investment Trust will have to itself play an active role in development of the underlying projects.

After registration with SEBI, an Infrastructure Investment Trust shall raise funds by issuing units to investors through an initial offer and may subsequently raise further funds through follow-on offers. Infrastructure Investment Trusts shall be allowed to raise funds from both domestic and foreign investors. The scheme of an Infrastructure Investment Trust will be sold to the public by issuing units to investors

through an initial offer, akin to an initial public offering.

Second route proposed by SEBI envisages a separate framework called SEBI (Infrastructure Investment Trusts) Regulations, with a broad structure with various categories depending on the nature of underlying projects, stage of construction, type of investors, etc. under which each Infrastructure Investment Trust could be classified into two categories based on the nature of projects under them. This route proposes that any pooling vehicle formed for the purpose of investment in the infrastructure sector can be included under the new regulations. SEBI consultation paper stipulates that an Infrastructure Investment Trust may apply for registration either as a body to invest in multiple infrastructure projects or as one to invest only in year-old revenue-generating projects. The first category of Infrastructure Investment Trusts can raise funds only from institutional investors with the minimum subscription amount being Rs.5 crore. Under the second route, the Infrastructure Investment Trust may raise funds from any investor with a minimum subscription amount being Rs.10 lakh. In so far as the initial offering of any Infrastructure Investment Trust is concerned, under the second proposal, the size of the proposed projects must be at least Rs.1,000 crore and the minimum issue size for such Infrastructure Investment Trusts must be Rs.250 crore. Some of the advantages of this route are;

- the proposal allows for a broad framework encompassing multiple possible types of structures for investment in infrastructure sector.
- the framework also allows for adding of future new and innovative structures as may be required and
- this proposal also allows for targeting of specific incentives by government/regulators for the infrastructure sector in general or any sector/sub-sector in particular.

In order to discuss the implications, we have to wait for what the new SEBI (Infrastructure Investment Trusts) Regulations contain. However, this regulation alongwith REITs may be a boosting factor in the growth of Indian economy.

Foreign Companies under the New Companies Act 2013

For the foreign entities undertaking business in India, the Companies Act 2013 (New Act) contains provisions to regulate their activities in India. Prima facie, it may appear that these provisions are similar to the ones contained in the Companies Act 1956 (Old Act), however, these provisions are expansive in the New Act. The provisions under the New Act are discussed below:

Merger or amalgamation of company with foreign company

The New Act allows companies incorporated in India to merge with foreign

companies. This provision sets aside the restrictions on cross-border mergers stipulated under the Old Act, which only permits a foreign company to merge with a company incorporated in India.

Section 234 of the New Act lays down that an Indian company need prior approval of the Reserve Bank of India, and the payment of consideration to the shareholders of the merging company in cash or in Depository Receipts or partly in cash & partly in Depository Receipts.

Compliance

The compliances under the New Act including registration, maintaining books of account and audited accounts are almost similar to the ones prescribed under the Old Act.

Section 2 clause 41 of the New Act mandates that the Financial year shall be the year ending 31st March, however specific exemption is given to subsidiary of foreign company or holding of foreign subsidiary to change the financial year to some other period with the approval of National Company Law Tribunal.

The New Act provides that the foreign companies have an option to form private or public limited companies in India at their choice without any limitation which repeals the provision as stipulated under section 4(7) of the Old Act. Further, Chief Executive Officer and Chief Financial Officer has been defined in the New Act under section 2(51) and are covered in the category of key managerial personnel with wider responsibilities and liabilities. Section 137 of the New Act further mandates the consolidation of financial statement for all companies where a company has one or more subsidiaries whether Indian or foreign.

The New Act, under section 135 also requires every company, which has a net worth of 5 billion rupees (almost \$82 million) or more; or a turnover of 10 billion rupees or more; or net profit of 50 million rupees or more during any financial year, to spend at least 2 percent of its average net profit earned during the three immediately preceding financial years, every year on social welfare programs.

Class action suits

Under the New Act, certain prescribed members or deposit holders have right to file damages against director whether Indian or foreigner, in case of unlawful or fraudulent actions as provided under section 245.

Invitation to Public

Unlike the Old Act which only permitted issue of shares and debentures, the New Act permits the entities incorporated outside India (as companies) to issue prospectus and invite public in India to subscribe to their securities subject to

prescribed conditions. However, like the Old Act, the New Act prescribes penal consequences for non-compliance for the foreign entities. There has been a significant increase in the amount up to which penalty could be levied under the New Act. The New Act also prescribes imprisonment for officers of such foreign companies. Further, the New Act has omitted the safeguards for the persons responsible for issuing the prospectus from being liable to penal consequences arising out of non-disclosure/non-compliance as was stipulated under the Old Act.

Winding Up

The applicability of the 'winding up' provisions is extended to closure of place of business in India for foreign entities. Accordingly, closure of the place of business in India by any foreign company would require a prior approval from a Tribunal.

The aforesaid provisions are related to foreign companies having presence through physical office in India. However, the applicability of these provisions to foreign entities establishing a virtual presence either through electronic mode or through an agent is not clear. It remains unclarified as to what kind of agency relationship in India or what type of virtual presence in would constitute a place of business in India. Even the draft rules released by the Ministry of Corporate affairs have not clarified such issues.

News 10 @ a glance

MCA Clarification with regard to applicability of section 182(3) of the Companies Act, 2013

MCA gave clarification on applicability of Section 182(3) on 10 December that companies contributing any amount or amounts to an "Electoral Trust Company" for contributing to a political party or parties are not required to make disclosures required under section 182(3) of Companies Act 2013 but have to make the disclosures laid down in section 192(3) of the Companies Act, 2013. It will suffice if the Accounts of the company disclose the amount released to an Electoral Trust Company whereas Electoral trust companies will be

required to disclose all amounts received by them from other companies/sources in their Books of Accounts and also disclose the amount or amounts contributed by them to a political party or parties as required by section 182(3) of Companies Act, 2013.

Information is available at [here](#).

MCA Finalizes Rules for NCLT (Salary of Chairperson & Other Members) – to be notified in Official Gazette

The Ministry of Corporate Affairs has finalized some of the Rules leading to the formation of NCLT. The first set of rules will be called the National Company Law Tribunal (Salary, Allowances and other Terms and Conditions of Service of Chairperson and other Members) Rules, 2013, will be published in the Official Gazette of India.

Information available [here](#).

Borrowing and Lending in Rupees – Investments by persons resident outside India in the tax free, secured, redeemable, non-convertible bonds.

RBI amended Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 which imposes restrictions on person resident in India who have borrowed in Rupees from a person resident outside India and permits such resident entities / companies in India, authorized by the

Government of India, to issue tax-free, secured, redeemable, non-convertible bonds in Rupees to persons resident outside India to use such borrowed funds for on lending / re-lending to the infrastructure sector; and for keeping in fixed deposits with banks in India pending utilization by them for permissible end-uses.

Charges Levied by Banks for Sending SMS Alerts

Urban Co-operative Banks imposes charges on for Sending SMS Alerts for all types of transactions irrespective of the amounts involving usage of cards at various channels. UCBs are advised to leverage the technology available with them and the telecom service providers to ensure that such charges are levied on all customers on actual usage basis.

External Commercial Borrowings (ECB) by Holding Companies / Core Investment Companies for the project use in Special Purpose Vehicles (SPVs)

RBI decided to permit Holding Companies / Core Investment Companies (CICs) coming under the regulatory framework of the Reserve Bank to raise ECB under the automatic route/approval route, as the case may be, for project use in Special Purpose Vehicles (SPVs) with the following terms and conditions:

- The business activity of the SPV

should be in the infrastructure sector where “infrastructure” is defined as per the extant ECB guidelines;

- The infrastructure project is required to be implemented by the SPV established exclusively for implementing the project;
- The ECB proceeds is utilized either for fresh capital expenditure (capex) or for refinancing of existing Rupee loans (under the approval route) availed of from the domestic banking system for capex as per the extant norms on refinancing;
- The ECB for SPV can be raised up to 3 years after the Commercial Operations Date of the SPV;
- The SPV should give an undertaking that no other method of funding, such as, trade credit (if for import of capital goods), etc. will be utilized for that portion of fresh capital expenditure financed through ECB proceeds;
- The ECB proceeds should be kept in a separate escrow account as per the extant guidelines on parking of ECB proceeds pending utilization for permissible end-uses and use of such proceeds should be strictly monitored by the ADs for permissible uses;
- In case of Holding Companies that come under the Core Investment Company (CIC) regulatory framework of the Reserve Bank, the additional terms and conditions for raising ECB for project use in SPVs will

be as under:a) The ECB availed is within the ceiling of leverage stipulated for CICs, i.e., their outside liabilities including ECB cannot be more than 2.5 times of their adjusted net worth as on the date of the last audited balance sheet;) In case of CICs with asset size below Rupees 100 crore, the ECB availed of should be on fully hedged basis.

Clarification with regard to holding of shares or exercising power in a fiduciary capacity – Holding and Subsidiary relationship under Section 2(87) of the Companies Act, 2013

RBI clarified that the shares held by a company or power exercisable by it in another company in a 'fiduciary capacity' shall not be counted for the purpose of determining the holding-subsidiary relationship in terms of the provision of section 2(87) of the Companies Act, 2013.

Exchange Traded Cash Settled Interest Rate Futures (IRF) on 10-Year Government of India Security

SEBI permitted Stock Exchange to launch physically settled future on 10-year GOI security and in consultation with RBI it has been decided to permit stock exchanges to introduce cash settled Interest Rate Futures on 10-Year Government of India Security Exchanges are permitted to launch contracts on either one or both of these options.

MCA Notification on Exemption from Vessel Sharing Agreements

In exercise of powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the Vessel Sharing Agreements (VSAs) of Liner Shipping Industry from the provisions of Section 3 of the Competition Act, for a period of one year from the date of publication of this notification in the Official Gazette, in respect of carriers of all nationalities operating ships of any nationality from any Indian Port.

Declaration and Undertaking regarding PCC, MCV or equivalent structure by FIIs.

SEBI gave clarification regarding opaque structure that if applicant is required by regulator or any law to hoop fence its assets and liabilities from other funds/sub funds, then applicant won't be treated as having opaque structure where as in 2010 SEBI mandatory to submit declaration and undertaking with regard to opaque structure of Foreign Institutional Investors such as Protected Cell Companies (PCC), Multi Class Share Vehicles (MCV) or equivalent structure.

Simplification of demat account opening process

SEBI has decided by consulting Depositories and Associations of stock brokers and Depository

Participants to simplify and rationalize the demat account opening process and replace the existing Beneficial Owner- Depository Participant Agreements with a common document "Rights and Obligations of the Beneficial Owner and Depository Participant". The Depository Participant shall provide a copy of Rights and Obligations Document to the beneficial owner and shall take an acknowledgement of the same. They shall ensure that any clause in any voluntary document neither dilutes the responsibility of the depository participant nor it shall be in conflict with any of the clauses in this Document, Rules, Bye-laws, Regulations, Notices, Guidelines and Circulars issued by SEBI and the Depositories from time to time. Any such clause introduced in the existing as well as new documents shall stand null and void.