

RBI Notification permitting options

RBI, vide the Circular dated 9th January 2013 has legitimized inclusion of options/right to exit in the Investment Agreements subject to certain conditions. The relevant para of the Circular is reproduced below:

“It has now been decided that optionality clauses may henceforth be allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) Scheme. The optionality clause will oblige the buy-back of securities from the investor at the price prevailing/value determined at the time of exercise of the optionality so as to enable the investor to exit without any assured return.”

The conditions, prescribed by the RBI are summarized hereunder:

1. There is a minimum lock-in period of 1 (one) year or a minimum lock-in period as prescribed under FDI Regulations, whichever is higher (“Lock-in Period”). The Lock-in Period shall be effective from the date of allotment of such shares or convertible debentures.
2. The non-resident investor exercising option/right shall be eligible to exit without any ‘assured return’ as under:
 - 2.1 In case of a listed companies, the non-resident investor shall be eligible to exit at the market price prevailing at the recognised stock exchanges; and
 - 2.2 In case of unlisted company, the non-resident investor shall be eligible to exit from the investment in equity shares of the investee company at a price not exceeding that arrived at on the basis of Return on Equity (“RoE”) as per the ‘latest audited balance sheet’.
 - 2.3 Any agreement permitting return linked to equity, as above, shall not be treated as violation of FDI policy/FEMA Regulations.

Investments in Compulsorily Convertible Debentures (CCDs) and Compulsorily Convertible Preference Shares (CCPS) of an investee company may be transferred at a price worked out as per any internationally accepted pricing methodology at the time of exit duly certified by a Chartered Accountant or a SEBI registered Merchant Banker. The guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at the price prevailing at the time of exit, subject to Lock-in Period, as applicable.