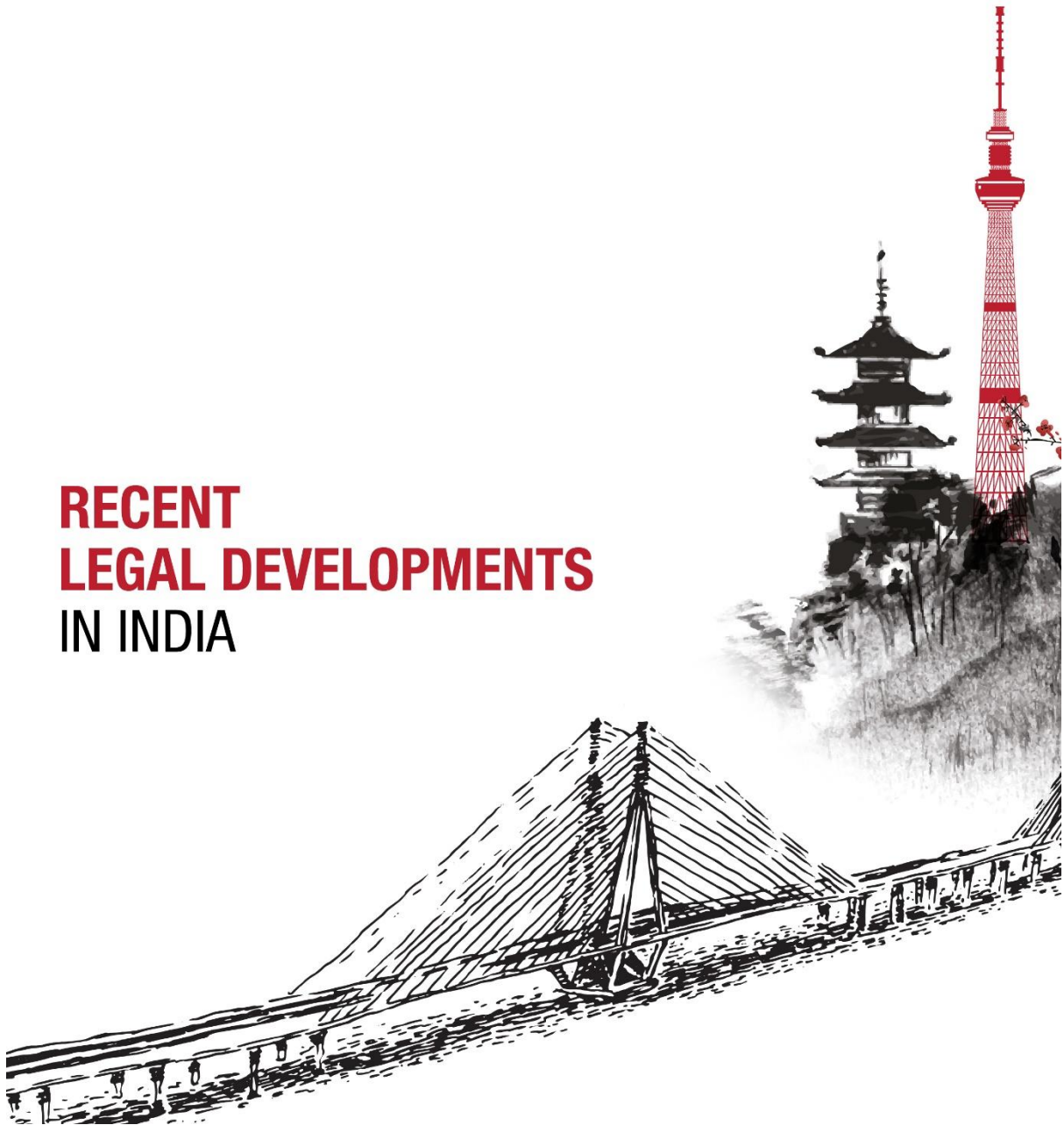


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LEGAL DEVELOPMENTS
IN INDIA**



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Our clients are spread across several industry verticals and geographies. Our clients are typically financial institutions, investment funds, foreign multinationals operating in India, domestic corporations, growing Indian companies, start-ups, social enterprises and not-for-profit entities. These organizations usually look to us for sophisticated corporate & financial transactions and complex litigation & dispute resolution proceedings. We work with clients across various sectors including bio-tech, education, financial services, healthcare, hospitality, infrastructure, manufacturing, micro-finance, real estate & construction, rural services, retail including online retail, technology, travel & tourism, telecom and trading.

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**A. Foreign Direct Investment –
Notifications by DIPP¹ and RBI²**

1. RBI

RBI makes the following amendment to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (Notification No. FEMA.20/2000-RB, dated 3rd May, 2000)

Insertion of Regulation 10A

“10A. In case of transfer of shares between a resident buyer and a non-resident seller or vice-versa, not more than twenty five per cent of the total consideration can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement. For this purpose, if so agreed between the buyer and the seller, an escrow arrangement may be made between the buyer and the seller for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the transfer agreement or if the total consideration is paid by the buyer to the seller, the seller may furnish an indemnity for an amount not more than twenty five per cent of the total consideration for a period not exceeding eighteen months from the date of the payment of the full consideration:

Provided the total consideration finally paid for the shares must be compliant with the applicable pricing guidelines.”

Refinancing of Project Loans

The Reserve Bank of India has allowed NBFCs³ to refinance any existing infrastructure and other project loans by

way of take-out financing, without it being considered as restructuring. However, such loans should be standard in the books of the existing lenders, and should have not been restructured in the past. Such loans should be substantially taken over (more than 50% of the outstanding loan by value) from the existing financing lenders, the central bank said, adding that the repayment period should be fixed by taking into account the life cycle of the project and cash flows from the project.

For existing project loans where the aggregate exposure of all institutional lenders is minimum INR 1,000 crore, NBFCs may refinance such loans by way of full or partial take-out financing and fix a longer repayment period, and the same would not be considered as restructuring in the books of the existing as well as taking over lenders, the RBI said. It added that for the NBFC to avail of this facility, the project should have started commercial operation after achieving date of commencement of commercial operation (DCCO) and boards of the existing and new lenders should be satisfied with the viability of the project.

Further, the total repayment period should not exceed 85% of the initial economic life of the project / concession period in the case of PPP projects, RBI explained. In case of partial take-out, a significant amount of the loan (a minimum 25% of the outstanding loan by value) should be taken over by a new set of lenders from the existing financing lenders and the promoters should bring in additional equity, if required, so as to

¹ Department of Industrial Policy and Promotion or DIPP is the nodal government authority having the primary responsibility to promote foreign direct investment in India.

² Reserve Bank of India or RBI is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.

³ A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 1956 engaged in the business of loans and advances, acquisition of

shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property.

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reduce the debt to make the current debt-equity ratio and debt service coverage ratio (DSCR) of the project loan acceptable to the NBFCs. A lender who has extended only working capital finance for a project may be treated as 'new lender' for taking over a part of the project term loan as required under the guidelines, it said, adding that the facility will be available only once during the life of the existing project loans.

The full text of the notification is available at:

<https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NT417CDC81049C9374AFE961591EE7751A8C7.PDF>

2. Securities and Exchange Board of India (SEBI)

Investor Protection Fund (IPF) of Depositories

SEBI (Depositories and Participants) (Amendment) Regulations, 2012 require every depository to establish and maintain an Investor Protection Fund (IPF). Pursuant to the aforesaid committee recommendations, the SEBI (Depositories and Participants) Regulations were amended mandating the depositories to credit five per cent or such percentage as may be specified by the Board, of its profits from depository operations every year to the IPF. Based on recommendations of DSRC and Expert Committee on Clearing Corporations, the attached guidelines are being issued with regard to IPF of the Depositories.

SEBI has issued a circular dated June 10, 2016 for prescribing KYC norms for subscribers of Offshore Derivative Instruments (hereinafter referred to as

"ODIs"), transferability of ODIs and has also modified the reporting format.

SEBI issues Know Your Client (KYC) norms for ODI subscribers

SEBI vide circular dated November 24, 2014 had aligned the applicable eligibility and investment norms of Foreign Portfolio Investors (FPI) regime with norms applicable for subscription through the ODI route. With regards to KYC of ODI subscribers, ODI Issuers shall now be required to identify and verify the beneficial owners in the subscriber entities, who hold in excess of the threshold as defined under Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 i.e. 25 % in case of a company and 15 % in case of partnership firms/ trusts/ unincorporated bodies. ODI issuers shall also be required to identify and verify the person(s) who control the operations, when no beneficial owner is identified based on the aforesaid materiality threshold.

Further, the KYC review shall be done on the basis of the risk criteria as determined by the ODI issuers, as follows: (a) At the time of on-boarding and once every three years for low risk clients. (b) At the time of on-boarding and every year for all other clients.

Full text of the circular is available at:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1465796415786.pdf

3. FDI

The Central Government has released the Consolidated FDI Policy 2016, effective from June 7, 2016.

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Please note below pointers on the major developments in the FDI regime in the last one year:

1. **Permitting FDI in warrants and partly paid equity.**

Prior permission of the government shall not be required for receipt of investments by subscribing to warrants and partly paid up equity shares in sectors where foreign direct investment is allowed under the automatic route.

The issue of preference shares and convertible debentures will have to be fully paid and mandatorily and fully convertible.

The pricing of the partly paid equity shares has to be determined upfront and 25% of the total consideration amount (including share premium, if any), has to be received upfront.

The balance consideration towards fully paid equity shares has to be received within a period of 12 months.

Warrants shall include 'share warrants' issued under Companies Act. However, the new companies act, 2013 does not have provisions on 'share warrants'.

2. **Clarifying that manufacturing sector is generally covered under automatic route**

Part of government's 'Make in India' and 'start-up' initiatives. A manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce without government approval. Sectors where manufacturing is not covered under automatic route

include pharmaceuticals, defense products and petroleum and natural gas.

3. **Swap of shares involving non-residents permitted**

Under the previous FDI policy, government approval was required for investment into a sector by way of swap of shares even in sectors where FDI was permitted under the automatic route. Now, government approval will not be required for investment in sectors permitting foreign investment under the automatic route by way of swap of shares provided the swap is undertaken at a valuation approved by a SEBI registered Merchant Banker or investment banker registered with appropriate authority in the host country.

4. **Press Note 3 of 2016-FDI in ecommerce marketplace permitted under automatic sector**

Marketplace model means providing of an information technology platform ("Marketplace") by an e-commerce entity to facilitate sales between the vendors and sellers. 100% FDI through automatic route is expressly permitted in e-commerce companies operating under the Marketplace.

An e-commerce entity engaged in Marketplace model is prohibited from: (a) having ownership of any inventory; (b) permitting more than 25% of the sales through one vendor or their group companies; (c) directly or indirectly influencing the price of goods or services, and is required to maintain a level playing field.

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The Marketplace entity can provide support services like warehousing, logistics, call centre, order fulfilment, payment collection etc. to sellers. However, warranty/guarantee for goods/services and post sales responsibility including delivery of goods and customer satisfaction shall vest with the sellers.

B2B e-commerce shall be governed by the guidelines on cash and carry wholesale trading under the FDI Policy.

Sale of services through e-commerce platform will be under automatic route subject to other conditions in FDI Policy and applicable law applicable to such service.

5. **Wholesale traders can now do single brand retail trading**

This was not permitted earlier specifically.

6. **Single Brand Retail trading norms relaxed**

30% sourcing requirements for 51% or more foreign owned FDI entities from MSMEs to be met for 5 years from the date of first opening the store (as opposed to the date of receipt of FDI) in sectors involving 'state-of-the-art' and 'cutting-edge technology', this sourcing norm may be relaxed, subject to government approval.

Certain conditions of the FDI policy requiring products to be sold under the same brand internationally and the investment by the non-resident entity being the brand owner (or through legally binding agreement with the brand owner) have been lifted

7. **Threshold for who will provide approval in case of sectors under government route**

Up to INR 50 Billion to FIPB, above that to Cabinet Commission. The limit was earlier revised from INR 20 Billion to INR 30 Billion last June and then to INR 50 Billion crores vide Press Note 12.

8. **NRI Investment to be at par with resident investment.**

Press Note 7/2015- NRI investments under Schedule 4 of FEMA 20 Regulations shall be deemed to be domestic investment at par with investment by residents.

NRIs now have a special dispensation for investment in construction development and the civil aviation sectors.

This special dispensation for NRIs has also been extended to companies, trusts and partnership firms, which are incorporated outside India and owned and controlled by NRIs. Such entities owned and controlled by NRIs will be treated at par with NRIs for investment in India.

9. **FDI in LLPs**

100 per cent foreign investment is now permitted under the automatic route in LLPs operating in sectors or activities where 100 per cent FDI is allowed under the automatic route and there are no FDI-linked performance conditions.

Test of ownership and control has been laid down for LLPs.

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'Control' would mean the right to appoint a majority of the designated partners, where such designated partners have control over all the policies of the LLP.

LLP is considered to be owned by resident Indian citizens if more than 50 per cent of the investment in it is contributed by resident Indian citizens or entities and such resident Indian entities have a majority of the profit share

10. **FDI in companies that do not have operations**

Indian companies having no operations and which do not have any downstream investment are now permitted to have infusion of foreign investment under the automatic route. However, such companies which intend to do business reserved under the government approval route will have to take the approval of the government prior to such infusion. Further, as and when such a company commences business or makes downstream investments, it will have to comply with the relevant sectoral conditions and caps.

11. **Relaxation in sectoral caps and conditionalities**

Several relaxations have come through in sectoral caps in last year including in sectors like construction, defense, banking broadcasting, plantations, duty free shops, civil aviation, credit information companies, agriculture and mining, satellites, insurance(49%), pension (49%), asset reconstruction(100%).

Other changes in FDI policy 2016

i. The definition of employee stock options has been incorporated to mean the option given to the

directors, officers or employees of a company or of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

This is not aligned with the definition under the Companies Act in the sense that the Companies Act does not include employees/directors/officers of joint venture (joint venture was included within the definition of associate company. Rule 12 did include associate companies but it was removed pursuant to an amendment).

Further, the Act contemplates ESOPs to be given to employees/directors/officers of any subsidiary and not just a WOS. It has however been clarified that ESOPs will be governed by the Companies (Share Capital and Debentures) Rules, 2014.

Also earlier ESOPs could not be issued to residents of Pakistan. Now they can be issued pursuant to FIPB approval.

It has also been clarified that issuance of ESOPs to non-residents in companies falling within approval route will require prior FIPB approval.

ESOPs to non-residents shall have to adhere to the sectoral caps.

ii. The definition of Sweat Equity Shares has been incorporated to

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- mean such equity shares as issued by a company to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called. This is aligned with the definition under the Companies Act. The guidelines with respect to issuance of ESOPs will apply to issuance sweat equity to non-residents.
- iii. The concept of Qualified Foreign Investor has been removed. This is because with effect from June 1, 2014, QFIs have been brought under the FPI regime pursuant to the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.
- iv. The definition of Venture Capital Fund has been revised to state 'Venture Capital Fund' (VCF) means an Alternative Investment Fund which invests primarily in unlisted securities of start-ups, emerging or early-stage venture capital undertakings mainly involved in new products, new services, technology or intellectual property right based activities or a new business model and shall include an angel fund as defined under Chapter III-A of SEBI (AIF) Regulations, 2012. Under the extant policy, VCF was defined to mean a fund established in the form of a trust, a company including a body corporate and registered under Securities and Exchange Board of India (Venture Capital Fund) Regulations, 1996, which (i) has a dedicated pool of capital; (ii) raised in the manner specified under the Regulations; and (iii) invests in accordance with the Regulations.
- v. It has been now stated that FVCIs can invest in any Indian company engaged in any sector in compliance with Schedule 6 of FEMA 20. Earlier FVCIs could only invest in Indian Venture Capital Undertaking under Schedule 6. Further, it has been clarified that FVCIs can also invest in Category I Alternative Investment Funds (which include the VCF).
- vi. It has been stated that a Non-Resident Indian may subscribe to National Pension System governed and administered by Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act. The annuity/ accumulated saving will be repatriable.
- vii. The concept of Investment Vehicle and provisions regarding investments in such vehicles has been incorporated.
- viii. **Paragraph 5.1 Prohibited Sectors**
A clarification has been added that Real estate business' (prohibited sector for FDI) shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.
- ix. **Paragraph 5.2 (b) Permitted Sectors**
In addition to investments made

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- under Schedule 1 to 10 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations, Schedule 11 (Investment Vehicle) has been included to determine the maximum amount of investments which can be made under a particular sector.
- x. Paragraph dealing with Courier Services sector has been removed. Since Paragraph 5.2 of the FDI policy states that in the sectors/activities not listed below, FDI is permitted up to 100% on the automatic route, subject to applicable laws/regulations; security and other conditionalities, it can be presumed that FDI in Courier services is permitted up to 100% through the automatic route.
- xi. **Paragraph 5.2.13.1 Other Conditions Private Security Agencies**
Certain conditions have been provided for FDI in Private Security Agencies where in 49% FDI is allowed under Approval Route which include that FDI in Private Security Agencies is subject to Private Security Agencies (Regulation) (PSAR) Act, 2005, for the purposes of FDI terms "Private Security Agencies", "Private Security" and "Armoured Car Service" will have the meaning prescribed to these terms under PSAR Act.
- xii. **Paragraph 5.2.21.1 Infrastructure Company in the Securities Market**
Commodity Exchange as a sector has been removed and has been included in Infrastructure Company in the Securities Market sector wherein 49% investment is allowed
- under the Automatic Route and Foreign investment in commodity exchanges will be subject to the guidelines of the Central Government/SEBI from time to time. The condition of 49% (FDI + FII/FPI) [FDI limit of 26 per cent and FII/FPI limit of 23 per cent of the paid-up capital] was removed through Press Note 8 of 2015.
- xiii. **Paragraph 5.2.21.2 Other Conditions Infrastructure Company in the Securities Market**
In addition to the existing condition that FII/FPIs can only invest through purchases in the secondary market, certain other conditions have been added which are as follows:
- No non-resident investor/entity, including persons acting in concert, will hold more than 5% of the equity in commodity exchanges.
 - Foreign investment in commodity exchanges will be subject to the guidelines of the Central Government/SEBI from time to time.
- xiv. **Paragraph 5.2.22.2 (b) Insurance Other Conditions** - The investment up to 49% in the total paid up capital of the Company was subject to verification of IRDA. Along with the word verification the term approval has been added.
- xv. **Paragraph 5.2.22.2 (c) Insurance Other Conditions** - The condition in Press Note 1 of 2016 stated that an insurance company shall ensure that ownership and control remains at all times in the hands of Indian Entities

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referred to in Indian Insurance Companies (Foreign Investment) Rules 2015. However, the conditions have been amended to state that ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services/IRDAI as per the rules/regulation issued by them from time to time.

- xvi. **Paragraph 5.2.24.2 Other Conditions for Power Exchanges Sector** - Other conditions have been prescribed for investments by FII/FPIs and non-resident investors in the power exchanges sector. FII/FPIs can only purchase in secondary market, non-resident entity including persons acting in concert cannot hold more than 5% in a power exchange company etc. FDI limit of 26 per cent and FII/FPI limit of 23 per cent of the paid-up capital were removed through Press Note 8 of 2015.

Full text of the policy is available at: http://dipp.nic.in/English/Policies/FDI_Circular_2016.pdf.

B. Relevant MCA Circulars, Notifications etc.

The Ministry of Corporate Affairs (MCA) has issued a notification for constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from 1st June, 2016. Hon'ble Justice S.J. Mukhopadhaya, Judge (Retd.), Supreme Court of India has joined as the Chairperson of the NCLAT and Hon'ble Justice M.M.Kumar, Judge (Retd.) has joined as the President of the NCLT.

With the constitution of the NCLT, the Company Law Board constituted under the Companies Act, 1956 stands dissolved.

Initially, NCLT will have eleven Benches, two at New Delhi and one each at Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai.

C. Infrastructure Sector Updates

Union Cabinet grants ex-post facto approval to the MOU between India and Japan for low-carbon thermal power development in India

The Union Cabinet granted ex-post facto approval to the memorandum of understanding (MOU) between India and Japan on 25 May 2016, aimed at promoting sustainable and low-carbon thermal power development in India.

According to the press release by the Ministry of Power, "the signing of the MOU will help India to address issues and barriers in promoting sustainable, stable and low-carbon thermal power development that have been identified through the preceding Pre-Primary Study and the on-going cooperation towards Energy Efficient Renovation & Modernization as well as new power development, by means of diagnostic activities to support Renovation and Modernization (R&M) materialization and implementation, knowledge and technology exchange activities to support Clean Coal Technology (CCT) for thermal power plants such as Ultra Super Critical (USC) and other environmental technologies, all of which will be conducive to overall power development for India."

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Following are the activities contemplated to be undertaken in terms of the proposal:

- i. Update on the current and future policy trends in Indian power sector with wide coverage from R&M and Life Extension (LE) to new power development in India and consideration of the identified barriers to find out those which could be addressed through mutual collaboration by the Central Electricity Authority (CEA) and Japan Coal Energy Centre (JCOAL).
- ii. Identification of issues regarding both existing and upcoming facilities including operation and maintenance issues.
- iii. Implementation of full-fledged diagnosis and/or other available and effective measures including Residual Life Assessment (RLA) and Conditional Assessment (CA) study with priorities on, but not limited to the target power stations under the Pre-Primary Study and the Cooperation.
- iv. Consideration of possibilities for acquisition of carbon credits with bilateral/multilateral offset schemes.
- v. Implementation of an annual workshop in India and CCT Transfer Programme in Japan for bilateral knowledge exchange and holding of annual joint meeting to discuss issues already arisen or may arise in the course of implementation of the proposal.

D. Insurance Regulatory Updates

IRDAI (Insurance e-commerce) Regulations, 2016 - Draft Regulation

As part of the IRDA's developmental mandate, the Authority is facilitating the promotion of e-commerce in insurance space which will lower the cost of transacting insurance business and bring higher efficiencies and greater reach. E-commerce is seen as an effective medium to increase insurance penetration and bring financial inclusion in a cost-efficient manner. As a result the Authority proposes to issue draft regulations on insurance e-commerce.

Some of the salient features of the draft regulations are as under:

- i. Introduction of an Insurance Self-Network Platform which is a technology platform is proposed.
- ii. Define participants who can set up the Insurance Self-Network Platform.
- iii. The Platform used by an insurance agent would be treated as that of an Insurer and the insurer shall be responsible for complying with the requirements spelt out in the regulations.
- iv. The Insurance Self-Network Platform will undertake Insurance e-commerce activities in India such as selling and servicing of insurance products.
- v. The draft regulations lay down the procedure for grant of permission for establishing an Insurance Self-Network Platform.

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- vi. The draft regulations also stipulate internal monitoring, review and evaluation of systems & controls.
- vii. The participant shall ensure compliance to information security management system standard of the International Organization for Standardization or the International Electro-technical Commission.
- viii. The draft regulations propose a code of conduct for the Insurance Self-Network Platform and its obligations.

The salient features of the draft regulations can be accessed at https://www.irdai.gov.in/ADMIN/CMS/cms/frnGeneral_Layout.aspx?page=PageNo2871

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