ADR/GDR/FCCB Issues

Reserve Bank of India
Exchange Control Department
Central Office
Mumbai 400 001

A.P. (DIR Series) Circular No.52

November 23, 2002

To
All Authorised Dealers in Foreign Exchange

Madam/Dear Sirs,

<u>ADR/GDR/FCCB Issues</u>

Attention of the authorised dealers is invited to A.P.(DIR Series) Circular No.21 dated February 13, 2002 enclosing therewith a copy of the Notification No. FEMA 41/2001-RB dated March 2, 2001. In terms of Regulation 4B of the said Notification, an Indian company may sponsor an issue of ADRs/GDRs with an overseas depository against shares held by its shareholders at a price to be determined by the Lead Manager, subject to compliance with provisions of the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Central Government from time to time.

2. The Operative Guidelines for Disinvestment of shares by the Indian companies in the overseas market through issue of ADRs/GDRs as notified by the Government of India, Ministry of Finance vide Notification No.15/23/99-NRI dated 29th July 2002 are enclosed.

3. Government of India, Ministry of Finance has also issued Press Note No.15/4/2002-NRI on July 8, 2002 (copy enclosed) regarding utilisation of ADR/GDR/FCCB proceeds in the first stage acquisition of shares in the disinvestment process and also in the mandatory second stage offer to the public, in view of their strategic importance.

4. Authorised dealers may bring the contents of this circular to the notice of their constituents concerned.

5. The directions contained in this circular have been issued under Section 10 (4) and Section 11 (1) of the Foreign Exchange Management Act, 1999 (42 of 1999).

Yours faithfully,

Grace Koshie
Chief General Manager

Guidelines for ADR/GDR issues by the Indian Companies - Disinvestment of shares by the Indian companies in the Overseas market through issue of ADRs/GDRs

(i) Divestment by shareholders of their holdings of Indian companies, in the overseas markets would be allowed through the mechanism of Sponsored ADR/GDR issue in respect of:-

  (a) Divestment by shareholders of their holdings of Indian companies listed in India;
  (b) Divestment by shareholders of their holdings of Indian companies not listed in India but which are listed overseas.

(ii) The process of divestment would be initiated by such Indian companies whose shares are being offered for divestment in the overseas market by sponsoring ADR/GDR issues against the block of existing shares offered by the shareholders under the provisions of these guidelines.

(iii) Such a facility would be available pari-passu to all categories of shareholders, of the company whose shares are being sold in the ADR/GDR markets overseas. This would ensure that no class of shareholders gets a special dispensation.

(iv) The sponsoring company, whose shareholders propose to divest existing shares in the overseas market through issue of ADRs/GDRs will give an option to all its shareholders indicating the number of shares to be divested and the mechanism how the price will be determined under the ADR/GDR norms. If the shares offered for divestment are more than the pre-specified number to be divested, shares would be accepted for divestment in proportion to existing holdings.

(v) The proposal for divestment of the existing shares in the ADR/GDR market would have to be approved by a special resolution of the company whose shares are being divested.

(vi) The proceeds of the ADR/GDR issue raised abroad shall be repatriated into India within a period of one month of the closure of the issue.

(vii) Such ADR/GDR issues against existing shares arising out of the divestment would also come within the purview of the existing SEBI Takeover Code if the ADRs/GDRs are cancelled and the underlying shares are to be registered with the company as shareholders.

(viii) Divestment of existing shares of Indian companies in the overseas markets for issue of ADRs/GDRs would be reckoned as FDI. Such proposals would require FIPB approval as also other approvals, if any, under the FDI policy.

(ix) Such divestment inducting foreign equity would also need to conform to the FDI sectoral policy and the prescribed sectoral cap as applicable. Accordingly the facility would not be available where the company whose shares are to be divested is engaged in an activity where FDI is not permitted.

(x) Each case would require the approval of FIPB for foreign equity induction through offer of existing shares under the ADR/GDR route.

(xi) Other mandatory approvals such as those under the Companies Act, etc. as applicable would have to be obtained by the company prior to the ADR/GDR issue.

(xii) The issue related expenses (covering both fixed expenses like underwriting commissions, lead managers charges, legal expenses and reimbursable expenses) for public issue shall be subject to a ceiling of 4% in the case of GDRs and 7% in the case of ADRs and 2% in case of private placements of ADRs/GDRs. Issue expenses beyond the ceiling would need the approval of RBI. The issue expenses shall be passed onto the shareholders participating in the sponsored issue on a pro-rata basis.

(xiii) The shares earmarked for the sponsored ADR/GDR issue may be kept in an escrow account created for this purpose and in any case, the retention of shares in such escrow account shall not exceed 3 months.

(xiv) If the issues of ADR/GDR are made in more than one tranche, each tranche would have to be treated as a separate transaction.

(xv) After completing the transactions, the companies would need to furnish full particulars thereof including amount raised through ADRs/GDRs, number of ADRs/GDRs issued and the underlying shares offered, percentage of foreign equity level in the Indian company on account of issue of ADRs/GDRs, details of issue parameters, details of repatriation, and other details to the Exchange Control Department of the Reserve Bank of India, Central Office, Mumbai within 30 days of completion of such transactions.

(xvi) The tax provision under Section 115 AC of the Income Tax Act 1961, which is applicable to non-resident investors for ADR/GDR offering against issue of fresh underlying shares would extend to non-resident investors investing in foreign exchange in ADRs/GDRs issued against disinvested existing shares, in terms of the relevant provisions of the Income Tax Act, 1961

(xvii) Resident shareholders divesting their holdings will be subject to Capital Gain tax provisions applicable under the Income Tax Act 1961 i.e. Section 115 AC applicable for non-residents would not extend to them.

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F.No.15/4/2002-NRI
Government of India
Ministry of Finance
Department of Economic Affairs
Investment Division

New Delhi,
dated the 08th July, 2002

<u>Press Note</u>

<u>Guidelines for Euro Issues</u>

Government has received some suggestions regarding permitting use of ADR/GDR/FCCB proceeds to acquire shares of PSUs under the disinvestment programme of the Government. As per the current guidelines, there are no enduse restrictions for ADR/GDR/FCCB proceeds other than the existing ban on investment in real estate and stock markets.

2. The suggestion is that in view of the impending large-scale disinvestment of PSU stocks in the near future, Indian bidders would be required to mobilise huge sums of money for purchasing such stocks. The domestic bidders might suffer from two structural

constraints. One relates to the restriction on bank financing to capital market and another relates to exposure limits to borrowers. Therefore, attention has been drawn to the prohibition of end-use of proceeds of ADRs/GDRs/FCCBs/ECBs. The view is that this prohibition not only puts restrictions on Indian bidders in the first stage offer to the Government, but also to fund the second stage of mandatory public offer under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

3. In view of the Government's policy to promote the disinvestment programme of PSU shares, the matter has been reconsidered.

4. In view of the above, a view has been taken that ADR/GDR/FCCB proceeds could be used in the first stage acquisition of shares in the disinvestment process and also in the mandatory second stage offer to the public, in view of their strategic importance.

5. These modifications shall come into effect after the date of issue of these guidelines.

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