

February 14, 2017

To,
Chief General Manager,
The Corporate Finance Department,
Securities and Exchanges Board of India,
SEBI Bhavan, Plot No. C4-A,
G-Block, Bandra Kurla Complex,
Bandra (East), Mumbai - 400051

Sub: Request for an interpretive letter under the Securities and Exchanges Board of India (Informal Guidance) Scheme, 2003 in relation to certain provisions of the Securities and Exchanges Board of India (Foreign Portfolio Investors) Regulations, 2014.

Dear Sir/Madam,

We submit this application for seeking informal guidance from the Securities and Exchanges Board of India (**SEBI**) in the form of an interpretive letter under the Securities and Exchanges Board of India (Informal Guidance) Scheme, 2003 (**Scheme**), with respect to the provisions of the Securities and Exchanges Board of India (Foreign Portfolio Regulations), 2014 (**FPI Regulations**) and the Frequently Asked Questions published on the SEBI website to guide market participants on the FPI Regulations dated 30 June 2016 (**FPI FAQs**) relating to creation of an 'encumbrance' on securities held by a foreign portfolio investor with a designated depository participant.

1. Background of the query:

- 1.1 UBS AG is a category II foreign portfolio investor (**FPI**) registered in India, bearing registration number INCHFP024117, incorporated in the jurisdiction of Switzerland, regulated and supervised by the Swiss Financial Market Supervisory Authority (FINMA), having its registered office at Bahnhofstrasse 45, CH-8001 Zurich, Switzerland, and is primarily engaged in the business of investing in securities listed on the Indian stock exchanges on principal basis (**UBS FPI**). In its normal course of business, the UBS FPI may be required to issue certain undertakings to hold on to and not dispose the equity shares of listed companies in India, which are held by it in its capacity as an FPI, for the purpose of availing financing or entering into certain commercial contracts.
- 1.2 The UBS FPI is desirous of making this application under the Scheme in its capacity as an 'acquirer' or 'prospective acquirer' under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**SAST Regulations**). For the sake of clarity, the UBS FPI is not a promoter of any of the listed companies for the purposes of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.
- 1.3 Regulation 32(2)(d) of the FPI Regulations imposes an obligation on the designated depository participant engaged by an FPI to ensure that equity shares held by an FPI are free from all 'encumbrances'. Further, the response to Question No. 47 of the FPI FAQs reiterate this obligation on the designated depository participant to satisfy itself that the equity shares held by an FPI are free from all encumbrances and further stipulates that the designated depository participant may, for this purpose, take all requisite steps including obtaining a declaration from the FPI applicant. It is pertinent to note that while the FPI Regulations lay

down this restriction on FPIs from encumbering the equity shares, the term 'encumbrance' has not been defined in the FPI Regulations.

- 1.4 Chapter - V of the SAST Regulations relating to Disclosure of Shareholding and Control lays down an inclusive definition of the term 'encumbrance', for the specific purpose of this chapter, which definition includes pledges, liens or such other transactions, by whatever name called. This chapter prescribes disclosures to be made to the stock exchanges where the shares of the company are listed (i) by any acquirer of these shares upon acquisition and disposal of shares of such company, beyond the stipulated threshold; and (ii) specifically by a promoter of such company upon creation of any encumbrance by such promoter over the shares held by him in the company. Further, SEBI has provided responses to certain frequently asked questions in relation with the SAST Regulations dated 29 December 2016. As a response to Question No. 72, it is clarified that non disposal undertakings executed by promoters will be covered within the scope of the term 'encumbrance' for the purpose of Regulation 28(3) of the SAST Regulations. While there is clarity with respect to the definition of the term 'encumbrance' from the perspective of the SAST Regulations, we understand this to be specific to Chapter V of the SAST Regulations. The obligation under Regulation 31 of the SAST Regulations to make disclosures upon creation of any encumbrance on shares of any listed company is only on the promoters of the company. We understand that the intention of this disclosure requirement is to ensure transparency with regard to the quantum of the risk of sale or disposal by any third party, of the shares encumbered by promoters, and ultimately to ensure transparency that promoters have skin in the game and that their control over the company is not diluted disproportionately or leveraged by such encumbrances. Further, the Circular issued by SEBI on 14 June 2017 on the subject matter of Recording of Non Disposal Undertaking on the Depository System also under Clause 3 identifies shareholders, primarily promoters, entering into a non disposal undertakings for borrowing funds from various lenders and Clause 5.8 of such circular requires depositories to make suitable provisions for capturing details of the company / promoter if they are part of the non disposal undertaking.
- 1.5 Typically, a non disposal undertaking in relation to securities creates an obligation to hold on to such securities for an identified tenor of time and does not create any third party rights on such securities. It is a restriction from a third party to the extent that the holder of the shares cannot transfer or dispose of the shares or contract any obligations on such shares, for an agreed duration or until the completion of certain actions, which generally gives comfort to such third party that the credit comfort drawn from such holdings will not be diluted. Unlike a pledge, there is neither transfer of constructive possession of the shares through a non disposal undertaking nor is there a right provided to a third party to create an encumbrance or the right of sale in relation to such shares. Execution of a non disposal undertaking does not impact the beneficial or legal ownership of the shares and such ownership remains with the shareholder and the third party does not have the right to encumber or dispose of such shares during the validity of the non disposal undertaking. The execution of a non disposal undertaking does not amount to a lien on the shares and the aim of a non disposal undertaking is generally restricted to ensure that the holder of the shares maintains his shareholding referenced under the non disposal undertaking and does not dispose it of or create other rights or contract obligations with regard to them.

The relevant extract of the FPI Regulations and FPI FAQs referred above have been attached herewith for reference as Annexure A and Annexure B, respectively.

2. Guidance sought:

2.1 In accordance with the provisions of the Scheme, we would like to seek your guidance on the following queries by way of an interpretive letter:

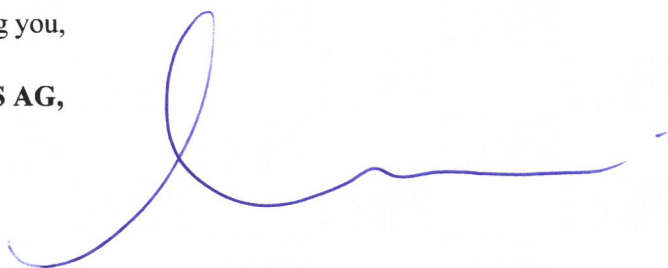
- (a) Whether the term 'encumbrance' used in Regulation 32(2)(d) of the FPI Regulations would include non disposal undertakings in relation to FPIs who are investors in the capacity as 'acquirers' and not 'promoters', given that all existing references and connotations to this term have been made specifically in connection with promoters under the SAST Regulations; and
- (b) Whether FPIs are restricted from executing a non disposal undertakings with third parties, whereby they provide a limited undertaking to not to transfer, dispose or create any encumbrances over the equity shares held by them in listed companies in India with a designated depository participant or any part thereof without creating any rights in favour of any third party on such equity shares.

We have enclosed along with this application, a cheque bearing reference no. 073407, dated 6 February 2018, drawn on Standard Chartered Bank, of INR 25,000 (Rupees Twenty Five Thousand), in favor of Securities and Exchanges Board of India, towards the fee specified under the Scheme.

Should you require any further documentation/information in connection with this application, we would be pleased to assist you with the same.

Thanking you,

For UBS AG,



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ANNEXURE A

Relevant extract of the FPI Regulations

Regulation 32 - Obligations and responsibilities of designated depository participants.

32. (1) All designated depository participants who have been granted approval by the Board shall -

(a) comply with the provisions of these regulations, as far as they may apply, circulars issued thereunder and any other terms and conditions specified by the Board from time to time;

(b) forthwith inform the Board in writing, if any information or particulars previously submitted to the Board are found to be false or misleading, in any material respect;

(c) forthwith inform the Board in writing, if there is any material change in the information previously furnished by him to the Board;

(d) furnish such information, record or documents to the Board and Reserve Bank of India, as may be required, in relation to his activities as a designated depository participant;

(e) ensure that only registered foreign portfolio investors are allowed to invest in securities market;

(f) ensure that foreign portfolio investor does not have opaque structure(s):

Explanation 1.- For the purposes of this clause, "opaque structure" shall mean any structure such as protected cell company, segregated cell company or equivalent, where the details of the ultimate beneficial owners are not accessible or where the beneficial owners are ring fenced from each other or where the beneficial owners are ring fenced with regard to enforcement:

Provided that the foreign portfolio investor satisfying the following criteria shall not be treated as having opaque structure:

(i) the applicant is regulated in its home jurisdiction

(ii) each fund or sub fund in the applicant satisfies broad based criteria, and

(iii) the applicant gives an undertaking to provide information regarding its beneficial owners as and when Board seeks this information.

Explanation 2.- For the purposes of Explanation 1, the definition of ultimate beneficial owner shall be as provided under the Master circular on Anti Money Laundering Standards or Combating the Financing of Terrorism, issued by the Board from time to time.

(g) have adequate systems to ensure that in case of jointly held depository accounts, each of the joint holders meet the requirements specified for foreign portfolio investors and shall perform KYC due diligence for each of the joint holders;

(h) in case of any penalty, pending litigations or proceedings, findings of inspections or investigations for which action may have been taken or is in the process of being taken by any regulator against a designated depository participant, the designated depository participant shall bring such information forthwith, to the attention of the Board, depositories and stock exchanges;

(i) be guided by the relevant circular on Anti-Money Laundering or Combating the Financing of Terrorism specified by the Board from time to time.

(2) The designated depository participant engaged by an applicant seeking registration as foreign portfolio investor shall:- -

- (a) ascertain at the time of granting registration and whenever applicable, whether the applicant forms part of any investor group;
- (b) open a dematerialized account for the applicant only after ensuring compliance with all the requirements under Prevention of Money Laundering Act, 2002 and rules and regulations prescribed thereunder, Financial Action Task Force standards and circulars issued by the Board in this regard, from time to time and shall also ensure that foreign portfolio investors comply with all these requirements on an ongoing basis;
- (c) carry out necessary due diligence and obtain appropriate declarations and undertakings from applicant to ensure that no other depository account is held by any of the concerned applicant as a foreign portfolio investor or as a non resident Indian, before opening a depository account;
- (d) ensure that equity shares held by foreign portfolio investors are free from all encumbrances;
- (e) collect and remit fees to the Board, in the manner as specified in Part A of Second Schedule; and
- (f) in case of change in structure or constitution or direct or indirect change in beneficial ownership reported by the foreign portfolio investor, re-assess the eligibility of such foreign portfolio investor.

ANNEXURE B

Relevant extract of the FPI FAQs

Q 47. How will a DDP ensure that equity shares held by FPIs are free from all encumbrances?

Ans. The DDP shall be required to satisfy itself that the equity shares held by an FPI are free from all encumbrances. For this purpose, the DDP may take all requisite steps including obtaining a declaration from the FPI applicant. *[Ref. Regulation 32(2)(d)]*