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EDITORIAL

FINANCE BILL 2012 – MAJOR ISSUES AND CHALLENGES


CA Vinod Jain*

The Finance Bill 2012 was presented in the Lok Sabha recently and is under consideration of the Parliament. A very heated debate is happening on several new provisions and issues arising there from.

Vodafone Controversy

The Govt. wanted to tax the capital Gain on sale of telecom business of HUTCH in India to Vodafone by transfer of share holding in a holding company outside India. The Vodafone case, based on the current law has already been upheld in favour of Vodafone by the Hon'ble Supreme Court and even the review petition has been rejected.

There are proposals to make clarificatory amendments with retrospective effective from 1.4.1962 in various sections of the Income Tax Act to establish that source country has taxation right on the gains derived of offshore transactions where the value is attributable to the underlying assets situated in that country. Validation clause is also being introduced to ensure pursuing the Vodafone case once the Bill is passed.

The retrospective amendment is being questioned by number of tax analysts and foreign investors. They are alleging that rules of the game should not be amended retrospectively. In our view, **the Government of India is fully justified in ensuring that the income earned in India or valuation increase of business or assets in India is taxed in India as income and / or capital gain and any device or methodology or structure designed to defeat or circumvent the basic intent of law cannot be supported at macro level.** It is clear that Hutch made a substantial gain from sale of its telecom business to Vodafone. In such a situation the government is seeking payment of tax on actual capital gain as the real purpose of the transaction was transfer of telecom business in India.

In case the laws are being interpreted or misinterpreted in a manner so as to defeat the very objective or intent of the tax legislation, the government is fully justified in bringing out a retrospective amendment.

Anti avoidance laws

The General Anti Avoidance rule (GAAR), domestic transfer pricing, amendment in section 68 seeking source of the source and taxation of the share premium, where it is not supported by fair value are amendments in the right direction, to plug the various loop holes in the tax laws.

In a large number of developed countries, the interpretation of tax statue is being done on the basis of the intent and object of the legislator.India can consider the laws relating to interpretation of tax statutes to be modified appropriately to address this basic concern of the government.

Corruption a Serious Concern

The honest tax payers are seriously concerned about the genuenity of interpretation and harassment at the assessment level due to wide spread corruption.

It is suggested that the personal interaction between the assessee and the tax officials can be reduced to the large extent and for reviews, scrutiny and assessment greater use of electronic mode may be resoted to. The persons initiating such communication from the department should be unknown to the assessee and should be at substantial distance. In case of dissatisfaction at the end of the assessee, the draft assessment order itself should be subject to judicial scrutiny and right of being heard by a panel. The proceeding of this panel can be fully recorded and only reasoned order can be given, which are transparent and subject to public / media scrutiny.

It is very important to nail down the corruption in the tax department, in case we want fair treatment from the assessee and with the assessee. It is also important to ensure that the tax rate is further cut, at the higher bracket, so as to ensure almost full compliance by India Inc. We must also appreciate a positive amendment to reduce penalty in case of disclosure of undisclosed income at the time of search. This will pave the way for reducing corruption. In fact we need to achieve, at the earliest the position that personal privacy of assessee is not disturbed by survey, search and raids.

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LATEST IN FINANCE

1.0 BRICS COUNTRIES INK PACT TO TRADE IN LOCAL CURRENCIES

A major outcome of the fourth BRICS summit was the signing of an agreement on providing credit facility in local currencies. This would seek to reduce the demand for fully convertible currencies for trade transactions among BRICS countries - Brazil, Russia, India, China and South Africa.

Prime Minister Manmohan Singh has said that all the nations have agreed to examine in greater detail a proposal to set up a BRICS-led South-South Development Bank, funded and managed by the BRICS and other developing countries. He also said that the five BRICS countries had directed their respective finance ministers to set up a joint working group for an in-depth analysis of the proposal. The issues such as easier business visas must be prioritised. As large trading countries, BRICS have a strong interest in removing barriers to trade and investment flows and avoiding protectionist measures.

2.0 DEBIT CARDS BASED ON RUPAY PLATFORM LAUNCHED

State Bank of India (SBI), Bank of Baroda, Bank of India, and Union Bank of India formally launched debit cards based on the indigenously developed RuPay payment platform.

The RuPay branded debit cards will be accepted at all 91,000 ATMs and over six lakh point of sale (POS) terminals in the country. In due course, these cards would be accepted on Internet and also at ATMs/ point of sale (POS) terminals abroad.

3.0 RBI CLAMPS DOWN ON GOLD LOANS BY NBFCs

The Reserve Bank of India (RBI) has directed NBFCs (Non-Banking Financial Companies) not to give loans exceeding 60 per cent of the value of the gold jewellery pledged with them.

NBFCs (Non-Banking Financial Companies) primarily engaged in lending against gold jewellery have been asked not to grant any advance against bullion/primary gold and gold coins.

RBI (Reserve Bank of India) said NBFCs (Non-Banking Financial Companies) primarily engaged in lending against gold jewellery (such loans comprising 50 per cent or more of their financial assets) will be required to maintain a minimum Tier-l capital of 12 per cent by April 1, 2014.

4.0 INTEREST RATES ON SMALL SAVINGS SCHEMES HIKED BY UP TO 0.5%

Small Savings Interest Rates

PARTICULARS	Current Rate	Rates w.e.f. 1.4.2012
Savings Deposit	4.0	4.0
1-yr Time deposit	7.7	8.2
2-yr Time deposit	7.8	8.3
3-yr Time deposit	8.0	8.4
5-yr Time deposit	8.3	8.5
5-yr Recurring deposit	8.0	8.4
5-yr Sr citizen scheme	9.0	9.3
5-yr Monthly income Scheme	8.2	8.5
5-yr NSC	8.4	8.6
10-yr NSC	8.7	8.9
PPF	8.6	8.8

5.0 RBI REVISES INTEREST RATES ON PUBLIC PROVIDENT FUND SCHEME AND SENIOR CITIZENS SAVINGS SCHEME

SCHEME	Rate of interest w.e.f. 1.12.2011	Rate of interest w.e.f. 1.4.2012
5 year SCSS, 2004	9.0% p.a	9.3% p.a
PPF, 1968	8.6% p.a	8.8% p.a

6.0 RBI CUTS CRR BY 75 BPS

The Reserve Bank of India (RBI) reduced the cash reserve ratio (CRR) by 75 basis points. This will infuse ₹48,000-crore liquidity into the system.

Changes in CRR since 2010	
February 15, 2010	5.50%
March 2, 2010	5.75%
April 26, 2010	6.00%
January 30, 2012	5.50%
March 30, 2012	4.75%

7.0 NATCO PHARMA BAGS COMPULSORY LICENSE TO SELL BAYER'S CANCER DRUG "NEXAVAR"

The government has allowed a local drug maker to make and sell a patented cancer drug at a fraction of the price charged by Germany's Bayer AG, setting a precedent for more such efforts by Indian firms and heightening the global pharmaceutical industry's anxiety over the use of the controversial compulsory licensing provision.

Ruled compulsory licensing which is allowing a generic drug maker to make and sell a low cost version of a patented drug in India under certain conditions, without the consent of the patent holder, by paying royalty.

8.0 AUSTRALIA IMPOSES MINING TAX

Australia's parliament passed laws for a new 30 percent tax on iron ore and coal mine profits after a bruising two-year battle with mining companies.

9.0 CHEQUES & DRAFTS TO BE VALID ONLY FOR 3 MONTHS

With effect from April 1 2012, all cheques and bank drafts will be valid only for three months.

10.0 NHAI LAND ACQUISITION COST INCREASES

The National Highway Authority of India (NHAI) has said that the land acquisition cost to build one km of road has increased from ₹ 85 lakh to ₹ 1.25 crore in the current year. Land rates across the country have increased.

DIRECT TAXATION

1.0 SOME IMPORTANT JUDGMENTS

SECTION 9

- **The Delhi ITAT bench** held that payment received by assessee, an insurance broking firm of UK, from Indian Insurance Companies for advising them about selection of reinsurer in international market cannot be treated as fees for technical services.

  Decided Case: Guy Carpenter & Co. Ltd. v/s Assistant Director of Income-tax, International Taxation, Circle 1(2), New Delhi, dated February 24, 2012

- **The Karnataka High Court** held that consideration paid for transfer of right to use software/computer programme is royalty under section 9

  Decided Case: Commissioner of Income-tax, International Taxation v/s Rational Software Corpn. India Ltd., dated February 21, 2012

SECTION 10(23C)

- **The Kerala High Court** held that religious teaching in a seminary is education and seminary is therefore an 'educational institution' entitled for exemption under section 10(23C)(iiiad).

  Decided Case: Commissioner of Income-tax, Thiruvananthapuram v/s St. Mary's Malankara Seminary, dated February 16, 2012

- **The Punjab & Haryana High Court** held that where assessee-society devoted solely for education purposes for last 18 years, it could not be denied exemption under section 10(23C)(vi) on ground that it was making profits.

  Decided Case: Sanatan Dharam Shiksha Samiti v/s Chief Commissioner of Income-tax, Panchkula, dated Oct. 3, 2011

SECTION 80-O

The Madras High Court held that where assessee supplies technical know-how developed by another Indian concern to a foreign company, to be used in foreign country and earns foreign exchange, it would be eligible for deduction under section 80-O.

Decided Case: TVS Berg Ltd.v/s Commissioner of Income-tax, dated December 13, 2011

FINANCIAL INDICATORS

	Current Rate* (in %)	Month Ago (in %)	3 Month Ago (in %)	6 Month Ago (in %)
3 Month LIBOR	0.47	0.48	0.58	0.40
3 Month MIBOR	10.57	10.52	9.79	9.37
SENSEX	17243.84	17503.24	16067.44	16958
NIFTY	5243.60	5333.55	4820.65	5099
CRR	4.75	5.5	6	6
REPO	8.5	8.5	8.5	8.25
REVERSE REPO	7.5	7.5	7.5	7.25
Gold (per 10 gm)	28140	27982	27555	26988
Silver (per kg)	55554	59052	51968	54417
Crude (USD/bbl)	119.88	125.98	113.09	111.73
Rs. vs USD	51.20	49.75	52.22	49.24
Rs. vs Euro	67.16	65.25	66.79	67.17
Rs. vs Yen	63.00	60.35	67.99	63.95
Rs. vs RMB	8.14	7.88	8.27	7.73
Rs. vs Pound	81.50	78.06	80.84	76.57
MCX Aluminium	105.00	108.50	108.80	107.25
MCX Copper	420.55	425.45	397.15	395.40

*As on 10th April 2012 (Sources: Bloomberg, NSE, BSE, RBI)

2.0 SUPREME COURT REJECTS PETITION SEEKING REVIEW OF ORDER ON VODAFONE CASE

The Supreme Court has declined to reconsider its ruling that the tax authorities had no jurisdiction to tax Vodafone's offshore acquisition of its Indian mobile unit.

INDIRECT TAXATION

1.0 RAILWAY FREIGHT GETS THREE-MONTH RELIEF FROM SERVICE TAX

Freight users of Railways have been spared an effective service tax hit of 3.6 per cent for three more months, though there is no such relief for air-conditioned passengers as yet.

CORPORATE AND ECONOMIC LAWS

1.0 PF RATES REDUCED TO 8.25%

The Government has slashed interest rates on provident fund deposits by 1.25 percentage points to 8.25 per cent for 2011-12.

2.0 CCI IMPOSES PENALTY ON 50 LPG CYLINDER MAKERS

The Competition Commission of India (CCI) has imposed penalty on 50 private LPG cylinder manufacturers for collusive bidding against Indian Oil Corporation tender.

3.0 HIGH COURT UPHOLD BENCKISER'S SHARE CAPITAL SELECTIVE REDUCTION

The Delhi High Court has dismissed a plea by Reckitt Benckiser (India) Ltd's shareholder challenging the firm's decision to reduce its share capital on grounds of want of any infirmity in the decision of the firm, noted for products like Dettol and Strepsils.

Petitioner had contended in his pleas that reduction of share capital of the firm was nothing but "forcible acquisition" of shares by public as the stake of the promoter group was not touched for the propose reduction.

The high court had rejected his contentions saying that section 100 of the Companies Act 1956; expressly permit a firm, if authorized by its article of association, to reduce its share capital.

Case: Chandra bhan Gandhi Vs Reckitt Benckiser (India) Ltd.

CAPITAL MARKET AND COMMODITIES

1.0 SEBI UNVEILS NORMS FOR AIFs

The Securities and Exchange Board of India (SEBI) has come out with the rules for Alternative Investment Funds (AIFs). The said rules will be applicable for all pooled investment vehicles other than family trusts and holding companies among others.

The regulator has also said these funds should not have more than 1,000 investors and the minimum investment amount should not be less than ₹ 1 crore. The Securities and Exchange Board of India (SEBI) has also mandated that sponsors should contribute at least 2.5% of the initial corpus. Moreover, Alternative investment funds (AIFs) cannot invest more than 25% of the investible funds in one company.

2.0 REGISTRATION MANDATORY FOR REALTY AND HEDGE FUNDS: SEBI

The Securities and Exchange Board of India (SEBI) has unveiled rules for regulating private pool of capital to increase systemic stability, while making it mandatory for real estate funds and hedge funds to register with the regulator. The regulator has classified all types of funds into three categories: venture capital, private equity and hedge funds.

While the first two categories of funds have to be close-ended with a minimum tenure of three years and are barred from engaging in leverage, hedge funds are allowed to be open-ended or close-ended and can engage in leverage.

3.0 SEBI ISSUES NORMS FOR EXIT OF NON-OPERATIONAL STOCK EXCHANGES

The Securities and Exchange Board of India (SEBI) has said that a stock exchange without any trading at its own platform or where the annual trading is less than ₹ 1000 crores, may apply for voluntary de-recognition and exit. If the stock exchange eligible for voluntary de-recognition is not able to achieve a turnover of ₹ 1000 crores on continuous basis or does not apply for voluntary de-recognition and exit within a

period of two years from the date of notification, The Securities and Exchange Board of India (SEBI) shall proceed with the compulsory de-recognition and exit of such stock exchange. The Board also decided that the stock exchanges may be permitted to exit subject to certain conditions such as payment of statutory dues to the Securities and Exchange Board of India (SEBI) / Government contribution of certain percentage of assets of the exchange towards Investor Protection and Education Fund etc.

Reference: PR No. 40/2012, dated 2-4-2012

4.0 BSE'S SME EXCHANGE GOES LIVE

The Bombay stock exchange's platform for Small and Medium Enterprises (SMEs) became operational.

5.0 NCDEX BANS FRESH POSITIONS IN GUAR SEED, GUM CONTRACTS

Alarmed by the 120% rise in the prices of guar gum futures in the last one month, despite falling trading volumes, the National Commodity and Derivatives Exchange (NCDEX) has barred traders from taking fresh positions in all existing contracts of guar gum and guar seeds for this season.

TELECOM

1.0 TRAI CONSULTAION PAPER ON ISSUES RELATED TO ADVERTISEMENTS IN TV CHANNELS

The Telecom Regulatory Authority of India (TRAI) has released a consultation paper on "Issues Related to Advertisements in TV channels" vide press release number 64/2012 dated 16 March 2012. The salient features of the proposal include:

1. Prescribing upper limit for duration of advertisements on clock hour basis.
2. Different maximum limits for duration of advertisements.
3. Scheduling advertisement breaks.
4. Defining time gaps between constructive advertisement breaks, etc.

The full text of the consultation paper is available on TRAI`s website: www.trai.gov.in.

NBFC

1.0 RBI ISSUES NORMS FOR NON-RECKONING FIXED DEPOSITS WITH BANKS AS FINANCIAL ASSETS

The Reserve Bank of India (RBI) has issued the following norms for Non-Reckoning Fixed Deposits with Banks as Financial Assets:

- It is clarified, that the Reserve Bank of India (RBI) issues a Certificate of Registration for the specific purpose of conducting Non Banking Financial Institutions (NBFI) activities. Investments in fixed deposits cannot be treated as financial assets and receipt of interest income on fixed deposits with banks cannot be treated as income from financial assets as these are not covered under the activities mentioned in the definition of "financial Institution" in Section 45I(c) of the RBI Act 1934. Besides, bank deposits constitute near money and can be used only for temporary parking of idle funds, and/or in the above cases, till commencement of Non Banking Financial Institutions (NBFI) business.
- In addition, the Non Banking Financial Corporation (NBFC) which is in receipt of a Certificate of Registration from the Bank must necessarily commence Non Banking Financial Corporation (NBFC) business within six months of obtaining Certificate of Registration failing which the Certificate of Registration will stand withdrawn automatically.

FEMA

1.0 RBI RATIONALISES OVERSEAS DIRECT INVESTMENTS BY INDIAN PARTY

- **Creation of charge on immovable / movable property and other financial assets**

  It has been decided that proposals from the Indian party for creation of charge in the form of pledge / mortgage / hypothecation on the immovable / movable property and other financial assets of the Indian Party and their group companies may be considered by the Reserve Bank of India (RBI) under the

approval route within the overall limit fixed (presently 400%) for financial commitment subject to submission of a 'No Objection' by the Indian Party and their Group companies from their Indian lenders.

- **Reckoning bank guarantee issued on behalf of JV / WOS for computation of Financial Commitment**

  It has been decided that the bank guarantee issued by a resident bank on behalf of an overseas JV / WOS of the Indian party, which is backed by a counter guarantee / collateral by the Indian party, shall be reckoned for computation of the financial commitment of the Indian Party and reported accordingly.

- **Issuance of personal guarantee by the direct / indirect individual promoters of the Indian Party**

  It has been decided that issuance of personal guarantee by the promoters of the Indian Party as presently allowed under the General Permission shall also be extended to the indirect resident individual promoters of the Indian party with same stipulations as in the case of personal guarantee by the direct promoters.

- **Financial Commitment without equity contribution to JV / WOS**

  It has now been decided that the proposals from the Indian party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank of India (RBI) under the approval route. AD banks may forward the proposals from their constituents after ensuring that the laws of the host country permit incorporation of a company without equity participation by the Indian party.

- **Submission of Annual Performance Report**

  Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian party based on the un-audited annual accounts of the JV / WOS provided:

  a. The Statutory Auditors of the Indian party certifies that 'The un-audited annual accounts of the JV / WOS reflect the true and fair picture of the affairs of the JV / WOS' and

  b. That the un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian party.

- **Compulsorily Convertible Preference Shares (CCPS)**

  It has been decided that Compulsorily Convertible Preference Shares shall be treated at par with equity shares and the Indian party is allowed to undertake financial commitment based on the exposure to JV by way of CCPS.

Reference: A.P. (DIR Series) / 96 dated March 28 2012,

2.0 FOREIGN VCs CAN INVEST IN MARKET VIA THIRD PARTIES

The Reserve Bank (RBI) has allowed foreign venture capital investors to invest in securities through private arrangements or purchase from a third party.

RBI (Reserve Bank of India) in a circular released that it has now been decided to allow foreign venture capital investors to invest in eligible securities (equity, equity-linked instruments, debt and debt instruments, debentures of a domestic venture capital undertaking or VC (Venture Capital) funds, units of schemes/funds set up by a VC fund) by way of private arrangements or purchase from a third party also.

3.0 RBI LIBERALISES OVERSEAS INVESTMENTS BY RESIDENT INDIVIDUALS

Henceforth, remittance shall be allowed from resident individuals for acquiring the qualification shares for holding the post of a Director in the overseas company to the extent prescribed as per the law of the host country where the company is located. The limit of remittance for acquiring such qualification shares shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

- **Acquiring shares of a foreign company towards professional services rendered or in lieu of Director's remuneration**

  It has been decided to grant General Permission to the resident individuals to

acquire shares of a foreign entity in part / full consideration of professional services rendered to the foreign company or in lieu of Director's remuneration. The limit of acquiring such shares in terms of value shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

- **Acquiring shares in a foreign company through ESOP Scheme**

  It has now been decided that resident employees or Directors may be permitted to accept shares offered under an Employee Stock Option Plan (ESOP) Scheme globally, on uniform basis, in a foreign company irrespective of the percentage of the direct or indirect equity stake in the Indian company subject to:

  i. The shares under the Employee Stock Option Plan (ESOP) Scheme are offered by the issuing company globally on a uniform basis, and

  ii. An Annual Return is submitted by the Indian company to the Reserve Bank of India (RBI) through the AD Category - I bank giving details of remittances / beneficiaries, etc.

Reference: A.P. (DIR Series) / 97 dated March 28 2012.

4.0 RBI ISSUES NORMS FOR RAISING AGGREGATE FIIs / NRI LIMITS FOR INVESTMENTS UNDER PIS

The Reserve Bank of India (RBI) has clarified that the Indian company raising the aggregate FII investment limit of 24 per cent to the sectoral cap/ statutory limit, as applicable to the respective Indian company or raising the aggregate NRI investment limit of 10 per cent to 24 per cent, should necessarily intimate the same to the Reserve Bank of India (RBI), immediately, as hitherto, along with a Certificate from the Company Secretary stating that all the relevant provisions of the extant Foreign Exchange Management Act, 1999 regulations and the Foreign Direct Policy, as amended from time to time, have been complied with.

Reference: A.P. (DIR Series) / 94 dated 19 March 2012,

5.0 RBI ISSUES NORMS FOR REVIEW OF ALL-IN-COST CEILING IN ECBs AND TRADE CREDITS

- The Reserve Bank of India (RBI) has issued the following norms for External Commercial Borrowings (ECBs) and trade credits for all-in-cost ceiling.

Average Maturity Period	All-in-cost over 6 month LIBOR
Three years and up to five years	350 bps
More than five years	500 bps

Reference: A.P. (DIR series) / 99 dated 30 March 2012

Maturity Period	All-in-cost over 6 month LIBOR
Upto one year	350 bps
More than one year and Upto three years	350 bps

Reference: A.P. (DIR series) / 100 dated 30 March 2012

- The all-in-cost ceiling is applicable up to September 30, 2012

6.0 RBI NORMS FOR CREDIT TO RESIDENT (EXTERNAL) RUPEE / FOREIGN - CURRENCY NON- RESIDENT (BANK) ACCOUNT

- An individual resident in India may borrow a sum not exceeding USD 250,000/- or its equivalent from her / his close relatives outside India, subject to the conditions mentioned therein.
- The Reserve Bank of India (RBI) may allow repayment of such loans to NRE / Foreign Currency Non-Resident (Bank) [FCNR(B)] account of the lender concerned subject to the condition that the loan to the resident individual was extended by way of inward remittance in foreign exchange through normal banking channels or by debit to the NRE / FCNR(B) account of the lender and the lender is eligible to open NRE / FCNR(B) account within meaning of the Foreign Exchange Management (Deposit) Regulations, 2000 notified vide Notification No. FEMA 5/2000-RB dated May 3, 2000, as amended from time to time.

Reference: A.P. (DIR series) / 95 dated 21 March 2012

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EDITORIAL

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Introduction of Excise and TCS on gold

There is a substantial risk to all investors at these price levels. A major contributor in increase in prices is special demand of gold arising out of Euro Zone crisis, very heavy import of gold by India (in excess of US$ 40 million per annum). The speculative activities in gold and silver derivatives have added fuel to the fire. Gold and silver have been traditionally considered as one of the best and safe investment and a hedge against inflation. However the recent surge in prices is beyond reasonable expectations and calculations.

The recent attempt of the Government to control the activities of gold loan, imposing excise on gold, introduction of tax at source for gold purchases are certain initiatives which are required to be further matured and modified in a manner so that we are able to efficiently and effectively check the risk to Indian economy and Indians arising out of a possible bubble burst. The Indian Government needs to check the gold hoarding and speculative activities in gold and silver to ensure sanctity of the precious metals.

Negative list of services

The Government has imposed service tax on all services subject to a small negative list, which require complete reconsideration and should be deferred pending a debate. Accrual system of imposition of service tax on chartered accountant is completely misplaced.

AUDIT

1.0 AUDIT GUIDELINES FOR CREDIT RATING AGENCIES

The Securities and Exchange Board of India (SEBI), in consultation with the Credit Rating Agencies (CRAs) and also with the other regulators, has decided that CRAs shall follow the applicable requirements pertaining to rating process and methodology and its records, transparency and disclosures, avoidance of conflict of interest, code of conduct, etc, as prescribed in the regulations and circulars issued by SEBI from time to time.

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