

Notification on Change in or Take Over of the Management of the Business of the Borrower by Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010

In view of announcement in the Monetary Policy Statement, the Reserve Bank of India hereby notifies these guidelines, framed under Section 9(a) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to provide for the proper management of the business of the borrower to enable the Securitisation Company or Reconstruction Company (SC/RC) to realise their dues from the borrowers, by effecting change in or take over of the management of the business of the borrower and related matters.

1. Short Title and Commencement

(a) These guidelines shall be known as "The Change in or Take Over of the Management of the business of the borrower by Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010".

(b) These guidelines shall come into force with effect from April 21, 2010.

Explanation:

For the purpose of these guidelines:

- (i) "change in management" means effecting change by the borrower at the instance of SC/RC in the person who has responsibility for the whole or substantially whole of the management of the business of the borrower and / or other relevant personnel.
- (ii) The term "Takeover of management" means taking over of the responsibility for the management of the business of the borrower with or without effecting change in management personnel of the borrower by the SC/RC.

2. Object of the Guidelines

The objective of these guidelines is to ensure fairness, transparency, non-discrimination and non arbitrariness in the action of Securitisation Companies or Reconstruction Companies and to build in a system of checks and balances while effecting change in or take over of the management of the business of the borrower by the SC/RCs under Section 9(a) of the SARFAESI Act. The SC/RCs shall follow these guidelines while exercising the powers conferred on them under Section 9(a) of the SARFAESI Act, 2002.

3. Powers of SC/RC and Scope of the Guidelines

An SC/RC may resort to change in or take over of the management of the business of the borrower for the purpose of realization of its dues from the borrower subject to the provisions of these guidelines. The SC/RCs resorting to take over of management of the business of the borrower shall do so after complying with the manner of takeover of the management in accordance with the provisions of Section 15 of the SARFAESI Act. On realization of its dues in full, the SC/RC shall restore the management of the business to the borrower as provided in Section 15(4) of the SARFAESI Act.

4. Eligibility conditions to exercise power for change in or take over of management

In the circumstances set forth in paragraph 5

(a) An SC/RC may effect change in or take over the management of the business of the borrower, where the amount due to it from the borrower is not less than 25% of the total assets owned by the borrower; and

(b) Where the borrower is financed by more than one secured creditor (including SC/RC), secured creditors (including SC/RC) holding not less than 75% of the outstanding security receipts agree to such action.

Explanation : 'Total Assets' means total assets as disclosed in its latest audited Balance Sheet immediately preceding the date of taking action.

5. Grounds for effecting change in or takeover of management

Subject to the eligibility conditions set forth in paragraph 4, SC/RC shall be entitled to effect change in management or take over the management of business of the borrower on any of the following grounds :

(a) the borrower makes a willful default in repayment of the amount due under the relevant loan agreement/s;

(b) the SC/RC is satisfied that the management of the business of the borrower is acting in a manner adversely affecting the interest of the creditors (including SC/RC) or is failing to take necessary action to avoid any events which would adversely affect the interest of the creditors;

(c) SC/RC is satisfied that the management of the business of the borrower is not competent to run the business resulting in losses/ non repayment of dues to SC/RC or there is a lack of professional management of the business of the borrower or the key managerial personnel of the business of the borrower have not been appointed for more than one year from the date of such vacancy which would adversely affect the financial health of the business of the borrower or the interests of the SC/RC as a secured creditor;

(d) the borrower has without the prior approval of the secured creditors (including SC/RC), sold, disposed of, charged, encumbered or alienated 10% or more (in aggregate) of its assets secured to the SC/RC

(e) there are reasonable grounds to believe that the borrower would be unable to pay its debts as per terms of repayment accepted by the borrower ;

(f) the borrower has entered into any arrangement or compromise with creditors without the consent of the SC/RC which adversely affects the

interest of the SC/RC or the borrower has committed any act of insolvency;

(g) the borrower discontinues or threatens to discontinue any of its businesses constituting 10% or more of its turnover;

(h) all or a significant part of the assets of the borrower required for or essential for its business or operations are damaged due to the actions of the borrower,

(i) the general nature or scope of the business, operations, management, control or ownership of the business of the borrower are altered to an extent, which in the opinion of the SC/RC, materially affects the ability of the borrower to repay the loan;

(j) the SC/RC is satisfied that serious dispute/s have arisen among the promoters or directors or partners of the business of the borrower, which could materially affect the ability of the borrower to repay the loan;

(k) failure of the borrower to acquire the assets for which the loan has been availed and utilization of the funds borrowed for other than stated purposes or disposal of the financed assets and misuse or misappropriation of the proceeds;

(l) fraudulent transactions by the borrower in respect of the assets secured to the creditor/s.

Explanation A: For the purpose of this paragraph, willful default in repayment of amount due, includes -

(a) non-payment of dues despite adequate cash flow and availability of other resources, or

(b) 'routing of transactions through banks which are not lenders/ consortium members' so as to avoid payment of dues, or

(c) siphoning off funds to the detriment of the defaulting unit, or misrepresentation / falsification of records pertaining to the transactions with the SC/RC

Explanation B: The decision as to whether the borrower is a willful defaulter or not, shall be made by the SC/RC keeping in view the track record of the borrower and not on the basis of an isolated transaction/incident which is not material. The default to be categorized as willful must be intentional, deliberate and calculated.

6. Policy regarding change in or take over of management

(A) Every SC / RC shall frame policy guidelines regarding change in or take over of the management of the business of the borrower, with the approval of its Board of Directors and the borrowers shall be made aware of such policy of the SC/RC.

(B) Such policy shall generally provide for the following:

(i) The change in or take over of the management of the business of the borrower should be done only after the proposal is examined by an Independent Advisory Committee to be appointed by the SC/RC consisting of professionals having technical / finance / legal background who after assessment of the financial position of the borrower, time frame available for recovery of the debt from the borrower, future prospects of the business of the borrower and other relevant aspects shall recommend to the SC/RC that it may resort to change in or take over of the management of the business of the borrower and that such action would be necessary for effective running of the business leading to recovery of its dues;

(ii) The Board of Directors including at least two independent directors of the SC/RC should deliberate on the recommendations of the Independent Advisory Committee and consider the various options available for the recovery of dues before deciding whether under the existing circumstances the change in or take over of the management of the business of the borrower is necessary and the decision shall be specifically included in the minutes.

(iii) The SC/RC shall carry out due diligence exercise and record the details of the exercise, including the findings on the circumstances which had led to default in repayment of the dues by the borrower and why the decision to change in or take over of the management of the business of the borrower has become necessary.

(iv) The SC/RC shall identify suitable personnel / agencies, who can take over the management of the business of the borrower by formulating a plan for operating and managing the business of the borrower effectively, so that the dues of the SC/RC may be realized from the borrower within the time frame.

(v) Such plan will also include procedure to be adopted by the SC/RC at the time of restoration of the management of the business to the borrower in accordance with paragraph 3 above, borrower's rights and liabilities at the time of change in or take over of management by the SC/RC and at the time of restoration of management back to the borrower, rights and liabilities of the new management taking over management of the business of the borrower at the behest of SC/RC. It should be clarified to the new management by the SC/RC that the scope of their role is limited to recovery of dues of the SC/RC by managing the affairs of the business of the borrower in a prudent manner.

Explanation:

To ensure independence of members of Independent Advisory Committee (IAC), such members should not be connected with the affairs of the SC/RC in any manner and should not receive any pecuniary benefit from the SC/RC except for services rendered for acting as member of IAC.

7. Procedure for change in or take over of management

(a) The SC/RC shall give a notice of 60 days to the borrower indicating its intention to effect change in or take over the management of the business of the borrower and calling for objections, if any.

(b) The objections, if any, submitted by the borrower shall be initially considered by the IAC and thereafter the objections along with the recommendations of the IAC shall be submitted to the Board of Directors of the SC/RC. The Board of Directors of SC/RC shall pass a reasoned order within a period of 30 days from the date of expiry of the notice period, indicating the decision of the SC/RC regarding the change in or take over of the management of the business of the borrower, which shall be communicated to the borrower.

8. Reporting

SC/RCs shall report to the Bank all cases where they have taken action to cause change in or take over the management of the business of the borrower for realization of its dues from the borrower in terms of circular DNBS (PD) CC. No. 12 / SCRC / 10.30.000/ 2008-2009 dated September 26, 2008.

9. A Notification DNBS(PD-SC/RC) 7 /CGM(ASR)/2010 dated April 21, 2010 amending paragraph 7(2) of the “The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003” is enclosed.

Yours faithfully

(A.S. Rao)
Chief General Manager In-Charge

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Notification DNBS(PD-SC/RC) No. 7 /CGM (ASR)/-2010 dated April 21, 2010

**The Securitisation Companies and Reconstruction
Companies (Reserve Bank) Guidelines and Directions, 2003**

The Reserve Bank of India, having considered it necessary in the public interest, and being satisfied that, for the purpose of enabling the Reserve Bank to regulate the financial system to the advantage of the country and to prevent the affairs of Securitisation Company or Reconstruction Company from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such Securitisation Company or Reconstruction Company, hereby in exercise of the powers conferred under clause (b) of sub-section (1) of Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, directs that 'The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003' (hereinafter called guidelines) shall stand amended, as follows, namely:-

1. Paragraph 7(2) of the guidelines shall be substituted as under:

“(2) (i) Change or take Over of Management

The Securitisation Company or Reconstruction Company shall take the measures specified in Sections 9(a) of the Act, in accordance with instructions contained in Circular DNBS/PD (SC/RC) No. 17 /26.03.001/2009-10 dated April 21, 2010 as amended from time to time.

(ii) Sale or Lease of a part or whole of the business of the borrower

No Securitisation Company or Reconstruction Company shall take the measures specified in Section 9(b) of the Act, until the Bank issues necessary guidelines in this behalf.

(A. S. Rao)
Chief General Manager In-Charge