

## FEMA UPDATE

### FOREIGN INVESTMENT IN INDIA - GUIDELINES FOR CALCULATION OF TOTAL FOREIGN INVESTMENT IN INDIAN COMPANIES, TRANSFER OF OWNERSHIP AND CONTROL OF INDIAN COMPANIES AND DOWNSTREAM INVESTMENT BY INDIAN COMPANIES

New guidelines for calculation of total foreign investments in Indian Companies, transfer of ownership and control of Indian Companies and downstream investments by Indian Companies have been issued.

Any investments made before 13.02.2009 are kept outside the preview of these guidelines.

For the investments made after 13.02.2009, Indian companies shall be required to intimate, within 90 days from the date of this circular, through an AD Category I bank to the concerned Regional Office of the Reserve Bank, in whose jurisdiction the Registered Office of the company is located, detailed position where the issue/transfer of shares or downstream investment is not in conformity with the regulatory framework now being prescribed. Reserve Bank shall consider treating such cases as compliant with these guidelines within a period of six months or such extended time as considered appropriate by RBI in consultation with Government of India.

Texts of circular and detailed guidelines have been reported as below:

#### A.P. (DIR SERIES 2013-14) CIRCULAR NO.01, DATED 4-7-2013

Attention of Authorised Dealer Category - I (AD Category-I) banks is invited to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 notified by the Reserve Bank vide [Notification No. FEMA 20/2000-RB dated 3rd May 2000](#), as amended from time to time.

2. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India had, vide Press Notes 2 and 3 (2009 series) dated February 13, 2009, issued guidelines for calculation of total foreign investment, i.e., direct and indirect foreign investment in Indian companies and for establishment of Indian companies/ transfer of ownership or control of Indian companies from resident Indian citizens to non-resident entities, in sectors with caps. Further, DIPP, vide their Press Note 2(2012 series) dated July 31, 2012, had made certain other changes. The Consolidated FDI Policy Circular 1 of 2013 dated April 5, 2013, available at [www.dipp.gov.in](http://www.dipp.gov.in) comprehensively incorporates the contents of the Press Notes.

3. (i) The regulatory framework comprises:

- (A) definitions;
- (B) concept of direct and indirect foreign investment;
- (C) method of calculation of total foreign investment;
- (D) guidelines for establishment of Indian companies and transfer of ownership or control of Indian companies, from resident Indian citizens and Indian companies to non-resident entities, in sectors with caps;
- (E) downstream investment by an Indian company which is not owned and/or controlled

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by resident entity /ies.

These guidelines, summarised in the Annex, shall come into force from the date(s) mentioned in the [Notification No.FEMA.278/2013-RB dated June 07, 2013](#) and notified vide G.S.R.393(E) dated June 21, 2013.

(ii) Any foreign investment already made in accordance with the guidelines in existence prior to February 13, 2009 would not require any modification to conform to these guidelines. All other investments, after the said date, would come under the ambit of these new guidelines.

(iii) As regards investments made between February 13, 2009 and the date of publication of the FEMA notification, Indian companies shall be required to intimate, within 90 days from the date of this circular, through an AD Category I bank to the concerned Regional Office of the Reserve Bank, in whose jurisdiction the Registered Office of the company is located, detailed position where the issue/transfer of shares or downstream investment is not in conformity with the regulatory framework now being prescribed. Reserve Bank shall consider treating such cases as compliant with these guidelines within a period of six months or such extended time as considered appropriate by RBI in consultation with Government of India.

4. AD Category - I banks may bring the contents of the circular to the notice of their customers/constituents concerned.

5. As stated above, Reserve Bank has since amended the Regulations and notified vide Notification No. FEMA.278/2013-RB dated June 07, 2013 and notified vide G.S.R.393(E) dated June 21, 2013.

6. The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

### Annex

#### **Guidelines for calculation of total foreign investment in Indian companies, transfer of ownership and control of Indian companies and downstream investment by Indian companies**

##### **A. Definitions**

##### **1 (i) Ownership and Control**

- (a) Company 'Owned by resident Indian citizens' shall be an Indian company if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens; Company shall be considered 'Controlled' by resident Indian citizens if the residents Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, have the power to appoint a majority of its directors in that company;
- (b) Company 'Owned by non-residents' means an Indian company where more than 50% of the capital in it is beneficially owned by non-residents; Company 'Controlled by 'non-residents' means an Indian company where non-residents have the power to appoint a majority of its directors in that company;

(ii) 'Direct foreign investment' shall mean investment received by an Indian Company from non-resident entities regardless of whether the said investments have been made under Schedule 1, 2, 3, 6 and 8 of the Notification No. FEMA. 20/2000-RB dated May 3, 2000, as amended from time to time;

(iii) 'Downstream investment' means indirect foreign investment, by one Indian company into another Indian company, by way of subscription or acquisition;

(iv) 'Holding Company' would have the same meaning as defined in Companies Act 1956;

(v) 'Indian Company' means a company incorporated in India under the Companies Act, 1956;

(vi) 'Indirect foreign investment' means entire investment in other Indian companies by an Indian

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company (IC), having foreign investment in it provided IC is not 'owned **and** controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens or where the IC is owned **or** controlled by non-residents. However, as an exception, the indirect foreign investment in the 100% owned subsidiaries of operating-cum-investing/investing companies will be limited to the foreign investment in the operating-cum-investing/ investing company.

(vii) 'Investing Company' means an Indian Company holding only investments in other Indian company/ies directly or indirectly, other than for trading of such holdings/securities;

(viii) 'Non-Resident Entity' means 'person resident outside India' (as defined at Section 2(w) of FEMA, 1999);

(ix) 'Resident Entity' means 'person resident in India' (as defined at Section 2(v) of FEMA, 1999), excluding an individual;

(x) 'Resident Indian citizen' shall be interpreted in line with the definition of person resident in India as per FEMA, 1999, read in conjunction with the Indian Citizenship Act, 1955.

(xi) 'Total foreign investment' in an Indian Company would be the sum total of direct and indirect foreign investment.

### **B. Direct and indirect foreign investment in Indian companies - meaning**

2. Investment in Indian companies can be made by both non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise both resident and non-resident investments. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment, i.e. through multi-layered structure.

### **C. Guidelines for calculation of total foreign investment, i.e., direct and indirect foreign investment in an Indian company**

3. (i) Counting of Direct foreign investment: All investments made directly by nonresident entities into the Indian company would be counted towards 'Direct foreign investment'.

(ii) Counting of indirect foreign Investment: The entire indirect foreign investment by the investing company into the other Indian Company would be considered for the purpose of computation of indirect foreign investment. However, as an exception, the indirect foreign investment in the 100% owned subsidiaries of operating-cum-investing/investing companies will be limited to the foreign investment in the operating-cum-investing/ investing company. This exception has been made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company.

(iii) The methodology for calculation of total foreign investment would apply at every stage of investment in Indian companies and thus in each and every Indian company.

(iv) Additional requirements

- (A) The full details about the foreign investment including ownership details etc. in Indian company /ies and information about the control of the company /ies would be furnished by the Company /ies to the Government of India at the time of seeking approval.
- (B) In any sector/activity, where Government approval is required for foreign investment and in cases where there are any *inter-se* agreements between/amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving

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authority. The approving authority will consider such *inter-se* agreements for determining ownership and control when considering the case for approval of foreign investment.

- (C) In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.
- (D) In the I& B and Defence sectors where the sectoral cap is less than 49%, the company would need to be "owned and controlled" by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.
  - (a) For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the Companies Act, 1956. The term "largest Indian shareholder", used in this clause, will include any or a combination of the following:
    - (aa) In the case of an individual shareholder, (aai) The individual shareholder,
    - (aaii) A relative of the shareholder within the meaning of Section 6 of the Companies Act, 1956.
    - (aaiii) A company/ group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest.
    - (ab) In the case of an Indian company,
    - (abi) The Indian company,
    - (abii) A group of Indian companies under the same management and ownership control.
    - (b) For the purpose of this Clause, "Indian company" shall be a company which must have a resident Indian or a relative as defined under Section 6 of the Companies Act, 1956/ HUF, either singly or in combination holding at least 51% of the shares.
    - (c) Provided that, in case of a combination of all or any of the entities mentioned in sub-clauses (aa) and (ab) above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.
- (E) If a declaration is made by persons as per section 187C of the Indian Companies Act about a beneficial interest being held by a non resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

4. The above mentioned policy and methodology would be applicable for determining the total foreign investment in all sectors, except in sectors where it is specified in a statute or a rule there under. The above methodology of determining direct and indirect foreign investment therefore does not apply to the insurance sector which will continue to be governed by the relevant Regulation.

### **D. Guidelines for establishment of Indian companies/ transfer of ownership or control of Indian companies, from resident Indian citizens and Indian companies to non-resident entities, in sectors with caps**

5. In sectors/activities with caps, including, *inter-alia*, defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, Government approval/FIPB approval would be required in all cases where:

- (i) An Indian company is being established with foreign investment and is not owned by a resident entity or
- (ii) An Indian company is being established with foreign investment and is not controlled

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- by a resident entity or
- (iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to nonresident entities through amalgamation, merger/demerger, acquisition, etc. or
  - (iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to nonresident entities through amalgamation, merger/demerger, acquisition, etc. or
  - (v) It is clarified that these guidelines will not apply to sectors/activities where there are no foreign investment caps, that is, where 100% foreign investment is permitted under the automatic route.
  - (vi) For the purpose of computation of indirect foreign investment, foreign investment shall include all types of direct foreign investments in the Indian company making downstream investment. For this purpose portfolio investments either by FIIs, NRIs or QFIs holding as on March 31 of the previous year would be taken into account. e.g. for monitoring foreign investment for the financial year 2011-12, investment as on March 31, 2011 would be taken into account. Besides, investments in the form of Foreign Direct Investment, Foreign Venture Capital investment, investments in ADRs/GDRs, Foreign Currency Convertible Bonds (FCCB) will also be taken in account. Thus, regardless of the investments having been made under Schedule 1, 2, 3, 6 and 8 of the Notification No.FEMA. 20/2000-RB dated May 3, 2000, as amended from time to time will be taken into account.

### **E. Downstream investment by an Indian company which is not owned and/or controlled by resident entity/ies**

**6. (i)** Downstream investment by an Indian company, which is not owned and/ or controlled by resident entity/ies, into another Indian company, would be in accordance/compliance with the relevant sectoral conditions on entry route, conditionalities and caps, with regard to the sectors in which the latter Indian company is operating.

**Note:** with effect from 31st day of July 2012 Downstream investment/s made by a banking company, as defined in clause (c) of Section 5 of the Banking Regulation Act, 1949, incorporated in India, which is owned and/or controlled by non-residents/ a non-resident entity/non-resident entities, under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading books, or for acquisition of shares due to defaults in loans, shall not count towards indirect foreign investment. However, their 'strategic downstream investment' shall count towards indirect foreign investment. For this purpose, 'strategic downstream investments' would mean investment by these banking companies in their subsidiaries, joint ventures and associates.

(ii) Downstream investments by Indian companies will be subject to the following conditions:

- (a) Such a company has to notify Secretariat for Industrial Assistance, DIPP and FIPB of its downstream investment in the form available at <http://www.fipbindia.com> within 30 days of such investment, even if capital instruments have not been allotted along with the modality of investment in new/existing ventures (with/without expansion programme);
- (b) downstream investment by way of induction of foreign equity in an existing Indian Company to be duly supported by a resolution of its Board of Directors as also a

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- Shareholders' Agreement, if any;
- (c) issue/transfer/pricing/valuation of shares shall continue to be in accordance with extant SEBI/RBI guidelines;
- (d) For the purpose of downstream investment, the Indian companies making the downstream investments would have to bring in requisite funds from abroad and not use funds borrowed in the domestic market. This would, however, not preclude downstream operating companies, from raising debt in the domestic market. Downstream investments through internal accruals are permissible by an Indian company engaged only in activity of investing in the capital of another Indian company/ies, subject to the provisions above and as also elaborated below:
- Foreign investment into an Indian company, engaged only in the activity of investing in the capital of other Indian company /ies, will require prior Government/FIPB approval, regardless of the amount or extent of foreign investment. Foreign investment into Non-Banking Finance Companies (NBFCs), carrying on activities approved for FDI, will be subject to the conditions specified in Annex-B of Schedule 1 of FEMA Notification No. 20 dated May 3, 2000 as amended from time to time;
  - Those companies, which are Core Investment Companies (CICs), will have to additionally follow RBI's Regulatory Framework for CICs.
  - For infusion of foreign investment into an Indian company which does not have any operations and also does not have any downstream investments, Government/FIPB approval would be required, regardless of the amount or extent of foreign investment. Further, as and when such a company commences business(s) or makes downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.
- Note:** Foreign investment into other Indian companies would be in accordance/compliance with the relevant sectoral conditions on entry route, conditionalities and caps.
- (e) The FDI recipient Indian company at the first level which is responsible for ensuring compliance with the FDI conditionalities like no indirect foreign investment in prohibited sector, entry route, sectoral cap/conditionalities, etc. for the downstream investment made by in the subsidiary companies at second level and so on and so forth would obtain a certificate to this effect from its statutory auditor on an annual basis as regards status of compliance with the instructions on downstream investment and compliance with FEMA provisions. The fact that statutory auditor has certified that the company is in compliance with the regulations as regards downstream investment and other FEMA prescriptions will be duly mentioned in the Director's report in the Annual Report of the Indian company. In case statutory auditor has given a qualified report, the same shall be immediately brought to the notice of the Reserve Bank of India, Foreign Exchange Department (FED), Regional Office (RO) of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the RO of having intimated it of the qualified auditor report. RO shall file the action taken report to the Chief General Manager-in-Charge, Foreign Exchange Department, Reserve Bank of India, Central Office, Central Office Building, Shahid Bhagat Singh Road, Mumbai 400001.

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### **RISK MANAGEMENT AND INTER-BANK DEALINGS- LIBERALIZATION OF DOCUMENTATION REQUIREMENTS FOR THE RESIDENT ENTITIES IN THE INDIAN FOREX MARKET**

At present in case of contracted exposure, AD bank was required to take a **quarterly certificate** from the statutory auditors of the client/ customer indicating that “ the contracts outstanding at any point of time with all AD Category I banks during the quarter did not exceed the value of the underlying exposures.”

Now these quarterly requirements have been liberalized with the requirements of Annual certification from the statutory auditors in place of quarterly certificate.

Texts of the full circular have been given hereunder.

#### **A.P. (DIR SERIES 2013-14) CIRCULAR NO.02, DATED 4-7-2013**

Attention of Authorized Dealers Category - I (AD Category - I) banks is invited to A.P. (DIR Series) Circular No. 32 dated December 28, 2010 issued on Comprehensive Guidelines on Over the Counter (OTC) Foreign Exchange Derivatives and Overseas Hedging of Commodity Price and Freight Risks. In the annex to this circular, under paragraph (II) sub-paragraph (b) (ii) it has been stated that in the case of contracted exposure, AD Category I banks must obtain "Quarterly certificates from the statutory auditors of the users, that the contracts outstanding at any point of time with all AD Category I banks during the quarter did not exceed the value of the underlying exposures."

**2.** In view of the recommendations of the Technical Committee on Services/Facilities for the Exporters (Chairman: Shri G. Padmanabhan, Executive Director, Reserve Bank of India) regarding rationalization of the documentation process, it has now been decided that AD banks, while offering hedging products under the contracted exposure route to their customers may obtain an annual certificate from the statutory auditors to the effect that the contracts outstanding with all AD category I banks at any time during the year did not exceed the value of the underlying exposures at that time. It is reiterated, however, that the AD bank, while entering into any derivative transaction with a client, shall have to obtain an undertaking from the client to the effect that the contracted exposure against which the derivative transaction is being booked has not been used for any derivative transaction with any other AD bank.

**3.** AD Category - I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

**4.** The directions contained in this circular have been issued under Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions /approvals, if any, required under any other law.

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