

FDI – Recent changes in Policy, Sectoral and other developments

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CTC - Intensive study course on FEMA

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Things to watch out for Recent issues

Q & A

Overview of FEMA

- **FEMA 1999**
 - Replaced the draconian Foreign Exchange Regulation Act 1973
 - Appointed date 1 June 2000
- **Aims of FEMA**
 - Facilitate external trade and payments
 - Promotion of foreign exchange markets
- **FEMA Rules / Regulations**
 - Rules notified by the Central Government and
 - Regulations notified by the RBI
 - **Consultation betn. Government and RBI**
- **RBI website (www.rbi.org.in)**
 - A P (Dir Series) - issued from time to time
 - Master Directions – updated now periodically
 - FAQs
- Every Transaction either Current (generally permissible unless prohibited) or Capital Account – (only if and as permitted)

- **Other Statutes:** Many other statutes impact / enshrined in FEMA, e.g.
 - FDI Policy
 - Foreign Trade Policy
 - Sectoral Regulation
 - NBFC, Insurance, SEBI, etc.
 - Companies Act
- Several powers /responsibilities delegated to the **AD / Banker by RBI – their role / concurrence critical but primary responsibility is of constituents and their role is compliance & monitoring**
- Representation by CAs / Lawyers – not a warm welcome

In view of complexities and voluminous content – Always refer, research, debate and than conclude...every time

Inbound investments – Key recent developments

- **End of the Press Note Regime**

- Earlier PNs issued by DIPP / Government were construed to be operational from the date of their issue
- Supreme Court laid down that PNs are not statute and do not become operational till enacted under FEMA
- Fate of FDI policy is similar

- **The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations – TISPRO**

- Substitution of FEMA 20 dt. 3 May 2000 with FEMA 20(R) dt. 7 November 2017
- Significant elaboration and revamp of the provisions as compared to earlier notification but still substance based interpretation warranted
- New RBI Master Directions and FAQs

- **Abolishing of the FIPB in June 2017**

- The work of granting government approval for foreign investment entrusted to the concerned Administrative Ministries/Departments

- **DIPP role**

- DIPP has the responsibility of overseeing the applications filed on the FIFP portal and to forward to the concern Administrative Ministries
- SOPs developed for the same
- FIFP Portal and its FAQ for online filing

- **Late Submission Fees v. Compounding**

- **Online reporting of Forms to RBI**

- E-BiZ
- Foreign Investment Reporting and Management System (FIRMS)

FEMA 20 (R) - Definitions (1 of 4)

Definitions	Particulars
Capital Instruments	<p>The following issued by an Indian Company</p> <ul style="list-style-type: none"> • Equity Shares including partly paid-up (25% upfront and balance within 12 months) • Debentures – fully, compulsorily and mandatorily convertible debentures • Preference Shares - – fully, compulsorily and mandatorily convertible preference shares • Share warrants – as per SEBI regulations and 25% consideration upfront and balance within 18 months • NCRPS / OCPS issued up to 30 April 2007 • OCDs / PCDs issues up to 7 June 2007
Indian Entity	Shall mean an Indian Company or Indian LLP
NRI	NRI means an individual resident outside India who is <u>citizen of India</u>
Overseas Citizen of India	<p>OCI means an <u>Overseas Citizen of India</u>' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955</p> <p><i>Government Notification - PIO card holders scheme discontinued with effect from 9 January 2015 and PIO Card holders deemed to be OCI</i></p>

FEMA 20 (R) - Definitions (2 of 4)

Definitions	Particulars
Foreign Direct Investment' (FDI)	<p>FDI means investment through capital instruments by a PROI</p> <ul style="list-style-type: none"> • in an unlisted Indian company; or • in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company; <p>Note: In case an existing investment by a PROI in capital instruments of a listed Indian company falls to a level below 10 percent of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI.</p> <p>Explanation: Fully diluted basis means the total number of shares that would be outstanding if all possible sources of conversion are exercised</p>
Foreign Investment	<p>Foreign Investment means any investment made by a PROI on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP;</p> <p>Explanation: If a declaration is made by persons as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a PROI, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.</p>
FDI linked performance conditions	<p>Means the sector specific conditions stipulated in regulation 16 of these Regulations for companies receiving foreign investment;</p>

FEMA 20 (R) - Definitions (3 of 4)

Definitions	Particulars
'Foreign Portfolio Investment'	<p>It is any investment made by a PROI in capital instruments where such investment is</p> <ul style="list-style-type: none">(a) less than 10 percent of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company or(b) (b) less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company.
'Foreign Portfolio Investor (FPI)'	<p>FPI is a person registered in accordance with the provisions of Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.</p>

Note: A PROI may hold foreign investment either as Foreign Direct Investment or as Foreign Portfolio Investment in any particular Indian company.

FEMA 20 (R) - Definitions (4 of 4)

Definitions	Particulars
Investing Company	'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;'
Investment	<p>Investment' means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;</p> <p>Explanation:</p> <p>(a) This will include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in India.</p> <p>(b) For the purpose of LLP, investment shall mean capital contribution or acquisition/ transfer of profit shares.</p>
Investment on Repatriation Basis	<p>Means an investment, the sale/ maturity proceeds of which are, net of taxes, eligible to be repatriated out of India, and the expression</p> <p>'Investment on non-repatriation basis', shall be construed accordingly</p>

FEMA 20 (R) - Permissions to PROI for Investments

Reg. Schedule	Particulars
5(1) / Schedule 1	<p>PROI can subscribe, purchase or sale of capital instruments of an Indian company subject to terms and conditions of Schedule 1</p> <p>PROI to be other than citizens / entities of Pakistan and Bangladesh whose investment falls under Approval Route and that too for sectors other than defence, space, atomic energy and sectors prohibited for foreign investments</p>
5(2) / 5(3) RFPI and NRI investment in capital instruments on Repatriation basis	Not being discussed today
5(4) / Schedule 4	NRI / OCI on Non-repatriation basis - they can purchase or sell capital instruments of an Indian Company or contribute to capital of a LLP subject to terms and conditions of Schedule 4
5(5) – RFPI and NRI investment in other instruments on repatriation basis	Not being discussed today
5(6) -	PROI other than citizens / entities of Pakistan and Bangladesh can invest as capital contribution or acquire / transfer profit shares of LLP subject to terms and conditions of Schedule 6
5(7) / 5(10)	Not being discussed today

FEMA 20 (R) - Other issues to PROIs by Indian Company

- **Rights Issue / Bonus Issues**

- Permissible subject to same terms of original issues (NR basis if by PROI for shares acquired when Resident)
- Rights issue by listed Indian Company – price as determined by the Indian company
- Rights issue unlisted Indian Company – shall not be at a price which is less than the price offered to PRII
- Additional rights and renunciation of rights by PRII in favor PROI permitted

- **ESOP & Sweat Equity Shares to PROI (other than citizens of Pakistan / Bangladesh)**

- Issue of share under ESOP and Sweat Equity scheme permitted to be issued by an Indian Company to PROI who are employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiary/ subsidiaries
- Scheme as per SEBI Guidelines / Companies Act

- **Merger / Demerger of Indian Company**

- Issue of shares to PROI permitted under merger / demerger / other scheme subject to approval by NCLT
- Entry route, sectoral cap and **attendant conditions to be complied** including Government approval
- Fair valuation as attendant condition!

- **Issue of Bonus NCRPS / NCDs**

- Permitted from General Reserves under scheme of arrangement approved by NCLT subject to sectoral conditions and other compliance

FDI - Start-ups

Meaning	<ul style="list-style-type: none"> • A 'startup company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as such in accordance with notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, and as amended from time to time.
Investment by FVCI	<ul style="list-style-type: none"> • FVCIs can invest in securities issued by startup irrespective of the sectors in which the startup is engaged
FDI through Convertible note	<ul style="list-style-type: none"> • 'Convertible Note' is an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument. • PROI (other than citizens/ entities of Pakistan or Bangladesh) permitted to invest in convertible notes issued by startup up to twenty five lakh rupees or more in a single tranche. • Prior Government approval required if sectors is under Approval Route
Form CN	<ul style="list-style-type: none"> • For Indian Start-ups issuing CNs to PROIs to report to RBI within 30 days from the issue • For transfer of CN between PROI and PRII and to be reported by PRII within 30 days from date of transfer

FEMA 20 (R) - Transfer of capital instruments (1 of 2)

Reg	Seller	Buyer	Mode
10(1)	PROI (not NRI, OCI & OCBs)	PROI	Sale / Gift
10(2)	NRI / OCI holding on Rep basis		Sale / Gift
10(3)	PROI	PRII	Sale / Gift – sale is subject to pricing guidelines & reporting
10(4)	PRII / NRI & OCI on NR basis	PROI	Sale which is subject to pricing guidelines & reporting
10(5)	PRII / NRI & OCI @ Sch 4 on NR basis	PROI	Gift – with prior RBI approval - 5% and aggregate ceiling of USD 50K qua donor
10(6)	NRI / OCI @ Sch 4 on NR basis	NRI / OCI	Gift
10(7)	PROI holding capital instruments with optionality clause can exit without any assured return subject to minimum lock-in period of one year		
10(8)	Erstwhile OCBs	Subject to RBI guidelines	

FEMA 20 (R) - Transfer of capital instruments (2 of 2)

Reg	Seller	Buyer	Mode
10(9)	Between R and NR		<p>Sale on deferred consideration subject to following</p> <ul style="list-style-type: none">• Amount of deferred consideration not to exceed 25% of the total consideration• Can be paid on deferred basis within a period not exceeding 18 months from date of transfer agreement• Can be settled through Escrow mechanism• Can be indemnified by the seller for a period not exceeding 18 months from the date of the payment of the full consideration if full consideration has been paid by the buyer to the seller <p>Other conditions</p> <ul style="list-style-type: none">• Total consideration to be compliant with pricing guidelines• Variable consideration whether falls within the ambit of deferred consideration mechanics as above?

FEMA 20(R) – Pricing for Issue & Transfer

• Issue - Pricing Guidelines

- Listed Company – SEBI Guidelines including for Delisting
- Unlisted Company – Internationally accepted pricing methodology (IAPM)
- Merchant Banker / CAs / Cost Accountants
- Convertible capital instruments – pricing formula to be decided upfront and conversion price to be at or higher than FMV at the time of issuance

• Transfer – Pricing Guidelines

- PRII to PROI – price not to be less than SEBI guidelines for Listed Company and IAPM for unlisted company as above
- PROI to PRII – price not to exceed SEBI guidelines for listed company and IAPM for unlisted company as above

Note: PROI cannot be guaranteed assured exit price and the exit to be at prevalent price

• Others cases

- Swap of shares – SEBI Registered Merchant Banker / Investment Banker registered with Host Country
- Subscription to MoA / AoA – face value (shall used instead of May)
- Share warrants – pricing / conversion formula to be determined upfront
- Issue of partly paid-up shares permitted as stipulated

• Remittances of sales proceeds

- Payment of applicable taxes
- AD Bank to verify that the security was held on repatriation basis
- Sales is as per guidelines or with prior RBI approval

FEMA 20(R) - Downstream Investments (1 of 3)

- **Concept of ownership**

- Ownership of Indian Company – beneficial holding of more than 50% of the capital instruments for Indian Company
- Ownership of Indian LLP - more than 50% in capital and having majority profit share for LLP
- Indian Company / LLP owned by Residents – ownership is vested in resident Indian citizens / or Indian companies which are ultimate owned and controlled by them
- Indian Company / LLP owned by PROI – Ownership is with PROI

- **Concept of control**

- Control for Indian company: Control shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreements.
- Control of Indian LLPs is right to appoint majority of the designated partners who have control over all policies of LLP (in specific exclusion of others)
- Indian Company / LLP controlled by Residents – control is vested in resident Indian citizens / or Indian companies which are ultimate owned and controlled by them
- Company / LLP owned by PROI – control is with PROI

FEMA 20(R) - Downstream Investments (2 of 3)

- Downstream Investment' is an investment made by an Indian entity which has received foreign investment or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity.
- Indirect Foreign Investment' is **downstream investment received** by an Indian entity from:
 - another Indian entity (IE) which has received foreign investment and **which is not owned and not controlled** by resident Indian citizens or is owned or controlled by persons resident outside India; or
 - an investment vehicle whose sponsor or manager or investment manager is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India.
- Total Foreign Investment' is the sum of foreign investment and indirect foreign investment which will be reckoned on a fully diluted basis
- Indian entity which has received Indirect foreign investment to comply with entry route, sectoral caps, pricing guidelines and other attendant conditions
 - Downstream investment by LLP which is FOC is allowed only in an Indian company where foreign investment up to 100% is permitted under Automatic Route and where there are no FDI linked performance related conditions
- Exceptions (from 31 July 2012) – Downstream investments by Banking company as part of CDR/ loan restructuring / trading books / loan defaults and which are not strategic investments

FEMA 20(R) - Downstream Investments (2 of 3)

• Computation Methodology

- Apply at every stage of investments
- All types of foreign investment included except by NRIs / OCIs on NR basis under schedule 4
- Portfolio investment – 31 March of previous year
- FOCC – Downstream FDI – (a) if foreign ownership is less than 100% then downstream investment is full investment made by the FOCC / FOCL (b) if downstream investment is in a WOS, then it is the foreign investment in the FOCC/ FOCL
- Indirect foreign investment permitted in and by LLP permitted in sectors where foreign investment is allowed 100% under Automatic Route and there are no FDI linked performance conditions

• Conditions for downstream investments

- Investment from funds received outside India and / or internal accruals
- Leveraging funds from domestic market is not permitted
- Reporting obligation to RBI and DIPP / FIFP portal
- Reporting by Statutory Auditor of the Indian Investor Company at the first level
- **Transfer of capital instruments by FOCC of downstream Investee Indian Entity**
 - Sale to PROI - reporting in Form FC-TRS **but no pricing guidelines**
 - Sale to PRII –**subject to pricing guidelines**
 - Sale to another FOCC – **no reporting and no pricing guidelines**

FEMA 20(R) - Sectoral aspects

• Prohibited Sectors

- Part of Regulation 15 as compared to erstwhile Schedule 1 of FEMA 20
- Lottery – Online / Private (foreign technology / brand collaboration also prohibited)
- Gambling & Betting including Casinos
- Chit Funds
- Nidhi Companies
- Trading in TDRs
- Real Estate Business or construction of Farm Houses
- Manufacturing Cigars, etc.
- Activities reserved for PSUs – Atomic Energy and Railways

• Entry Routes

- Automatic Route – no prior RBI or Government approval
- Government Route – prior approval from the Government warranted and subject to additional conditions imposed therein
- Investments by RFPI
 - Aggregate Foreign Portfolio Investments of up to 49% of the paid-up capital on a fully diluted basis or the sectoral cap whichever is lower permitted without sectoral cap or government approval requirement if there is no transfer of ownership or control to PROI
- Sectoral caps part of Regulations 16 as compared to Schedule 1 of FEMA 20

FEMA 20(R) – Sectoral aspects

- **Sectoral Policy**

- Sectoral caps and government approval requirement indicated against each sector in the schedule
- All other sectors / activities under Automatic Route (except Financial Services Sectors)
- Minimum capitalization to include premium received by the company (credit for same also in transfer / sales price)
- Approval route for investing companies not registered with RBI as NBFC or CIC

Note: CIC under approval route but registered NBFCs automatic route

- Indian company with no operations and no downstream investment – automatic route only if activities undertaken are under automatic route and with no FDI linked performance conditions and government approval to be obtained if activities proposed to be commenced fall under approval route
- PROI making foreign investments specifies particular audit-firm having international network then audit to be carried out as joint auditor wherein one of the auditor is not part of the same network

FEMA 20(R) – Sectoral caps (Sr. No. as in Reg. 16)

Automatic Route with / without conditions

1. Agriculture (Floriculture / Horticulture) & Animal Husbandry - 100%
2. Plantation - 100%
3. Mining – 100%
4. Petroleum & Natural Gas (100% for exploration and 49% for refining by PSUs)
5. Manufacturing - 100% #
10. Construction Development: Townships, Housing, Built-up infrastructure
11. Industrial Park
12. Satellites – Establishment and Operations
15. Trading – Four parts - C&C + WT / E-commerce / SBRT / Duty Free Shops #
17. Railway infrastructure

Partly Automatic Route & Partly under Government Route with / without conditions

6. Defence - 49% Automatic Route and beyond that up to 100% under Approval route
7. Broadcasting - 100% under Automatic Route or 49% under Approval Route as per activity
8. Print Media - 100% under Automatic Route or 49% under Approval Route as per activity
9. Civil Aviation - 100% under Automatic Route except Air Transport Services @ 49% under Approval Route for PROI other than NRIs / OCIs)
14. Telecom - 49% Automatic Route and beyond that up to 100% under Approval route
16. Pharma – Automatic Route is Greenfield upto 100% and Brownfield upto 74%
17. Financial Services – 20%/ 49% / 74% / 100% automatic as well as approval route

Prior Approval Route: (13.) Private Security Agencies – 49% & # (15) Trading (i) MBRT – 51% & (ii) Under Manufacturing - 100% Retail Trading of Food products manufactured and / or produced in India including through E-commerce

FEMA 20(R) - Investment Schedules

- **Schedule 1** - FDI conditions and modalities
- **Schedule 2**
 - Investments by Foreign Portfolio Investors (FPI) in capital instruments of an Indian Company on Indian Stock Exchange
 - Individual FPI / Group Investor cap to be less than 10% and all FPIs cap at 24% (can be increased to sectoral cap per approval of Board of Directors and General Body Resolution)
 - If Total holding of an FPI increases to 10% or more – total investment is FDI
- **Schedule 3**
 - NRIs / OCIs Investment on Indian Stock Exchange on repatriation basis under PIS
- **Schedule 4**
 - Investment in capital instruments by NRI / OCI / Entities owned and controlled by them on non-repatriation basis
- **Schedule 5**
 - Purchase and sale of securities other than capital instruments by Non-Resident (FPI, NRIs, OCIs, others)
- **Schedule 6**
 - Foreign Investment in an Indian LLP
- **Schedule 7**
 - SEBI Registered Foreign Venture Capital Investors Investment Scheme for stipulated sectors
- **Schedule 8** - Investment by NR in an Investment Vehicle viz. AIF, REIT, Invlts
- **Schedule 9** - Investment in Depository Receipts by NR
- **Schedule 10** - Issue of Indian Depository Receipts

FEMA 20(R) - Schedule 1 (1 of 2)

- **Schedule 1**

- An Indian company to issue capital instrument to PROI subject to entry-routes, sectoral caps and attendant conditions of Regulation 16
- PROI to purchase shares in listed company on stock of exchange of India if
 - PROI has acquired control as SEBI SAST regulations and continues to hold control
 - Consideration can be paid out of dividends by Indian Investee Company
- Issue of capital instruments against pre-incorporation / pre-operative expenses (including rent)
 - 5% of authorized capital or USD 500,000 whichever is lower.
 - Indian company is a **WOS of NR Entity** and is engaged in 100% Auto Route with no FDI linked performance conditions
 - Statutory Auditor Certificate
 - Includes amounts remitted to consultants / attorney / service provider for incorporation or commencement of business
 - Issues – Route not available to Indian JVs or where NR is not an entity or deposits for Rent?

FEMA 20(R) - Schedule 1 (2 of 2)

- **Schedule 1**

- Issue of capital instruments also permitted against
 - Swap of capital instruments
 - import of capital goods / machinery /equipment (excluding second hand machinery)
 - Inward remittance through banking channels
 - NRE / FCNR (B) – NRIs / OCIs
 - any funds payable by Indian company to a PROI, the remittance of which is permitted under FEMA by RBI / Gol or post obtaining all approvals for payments and completion of actions for delay such as compounding

- Time limits for issue of capital instruments
 - Within 60 days from receipt of consideration else refund within 15 days from completion of such 60 days
- Foreign Currency Account
 - The consideration for capital instrument can be deposited in a foreign currency account with AD Bank :
 - There must be impending foreign currency expenditure
 - The account needs to be closed immediately after the requirements are completed or within six months of opening whichever is earlier

FEMA 20 (R) -Schedule 4

- **Eligible Investors**

- NRIs / OCIs including a company, trust, and partnership incorporated outside India and owned and controlled by NRIs / OCIs
- Investment on non-repatriation basis

- **Eligible Investments – Capital Instruments**

- Capital instruments issued by Indian company on or outside the stock exchange
- Units issued by Investment Vehicles
- Capital of LLPs
- Convertible note issued by start-ups
- Not permitted in capital instruments are units of a Nidhi company or a company engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights

- **Other aspects**

- Schedule 4 investment is domestic investment on par with Residents
- Sales proceed not allowed to be repatriated outside India and credited to NRO
- Dividends continue to be repatriable

- **Investment in Firm / Proprietary Concern**

- Contribution to capital by NRIs/ OCIs on non-repatriation basis
- Prohibited activities - agricultural/ plantation activities or print media / real estate business
- Disinvestment proceeds including capital appreciation not allowed to be repatriated outside India and credited to NRO
- Share of profits should be repatriable

FEMA 20(R) - Schedule 6

- **Foreign investment in LLPs**

- Permitted to all PROI except
 - Citizens / Entities of Pakistan & Bangladesh
 - RFPIs
 - FVCIs
- Only in sectors where 100% foreign investment permitted under Automatic Route and there are no FDI linked performance conditions
- Investment by way of profit shares – reinvestment of earnings
- Conversions permitted – Company into LLP and vice-versa

- **Other aspects**

- Mode of capital contribution through inward remittance or NRE / FCNR (B)
- Transfer – IAPM Pricing and reporting obligations – similar to capital instruments

- **Issues**

- Issue of shares permitted only against inward remittance and not through any other mode?
- Performance linked FDI conditions?
 - Wholesale Trading
 - SBRT
 - Financial services
 - Manufacturing'?

FEMA 20 – Schedule 1 - Key FDI Reporting Requirements

Forms	Particulars
FC-GPR	<ul style="list-style-type: none"> • For intimating to RBI details of issue of capital instruments to PROI • E-filing within 30 days from the date of such issue • Incorporates the erstwhile ARF • RBI allots UIN / Registration
FLA	<ul style="list-style-type: none"> • Annual return on Foreign Liabilities and Assets • Indian company / LLP who has received foreign investments • To be filed on or before 15th day of July 2012
FC-TRS	<ul style="list-style-type: none"> • For transfers between R / PROI-NR basis to PROI and PROI to R including each tranche for Reg. 10(9) cases • Resident party to file within 60 days from receipt / payment of consideration (for stock exchange transfer – PROI) • Transfer to be recorded post AD-Bank approval
Form ESOP	<ul style="list-style-type: none"> • Indian company issuing ESOP to report to RBI within 30 days
Form FDI-LLP (I)	<ul style="list-style-type: none"> • Intimating RBI receipt of capital contribution / profit shares in LLP by PROI within 30 days from the receipt of the consideration
Form FDI – LLP (II)	<ul style="list-style-type: none"> • Disinvestment / Transfer of capital contribution/ profit shares between R & NR or vice versa within 60 days of receipts
Downstream FDI	<ul style="list-style-type: none"> • E-intimation on FIFP portal within 30 days • Form DI to RBI within 30 days of allotment of capital instruments

FEMA 20(R) - Sector specific issues (1 of 5)

Manufacturing

- 'Manufacture', with its grammatical variations, means a change in a non-living physical object or article or thing, (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.
- Very relevant definition as allows Indian Company to do retail sales in all forms for manufactured products / goods
- The above definition is same as that in the Income-tax Act 1961
- Whether processing is manufacturing?
 - Disputes surrounding what is manufacture or processing are not uncommon?
 - Definition of cash and carry wholesale trading / wholesale trading (including sourcing from MSEs) – it includes processing and thereafter sale?
 - Processing is not manufacturing
- Whether definition is FDI linked performance related conditions for LLP?

FEMA 20(R) - Sector specific issues (2 of 5)

E-commerce

- B2B – subject to guidelines for cash & carry wholesale trading
- Issues surrounding Market Place model of e-commerce for goods and services (inventory based model prohibited for both goods / services)
 - E-commerce entity includes foreign company u/s 2(42) of the Companies Act 1961 or its branch, office or agency in India as per FEMA 1999
 - Facilitation model between buyer and seller by provision of information technology platform – digital / electronic (vast ambit such as internet, TVs, internet applications, etc.).
 - Sellers name and address and other details to be displayed on the platform
 - Marketplace entity can provide logistic, warehousing, call-centre. Payment collection and other services to sellers
 - Market place entity cannot exercise ownership control over inventory
 - Market place entity will not permit more than 25 percent of the sales value on financial year basis through its market-place from one vendor / their group companies
 - Customer satisfaction & Warranty of goods / services will be responsibility of the seller
 - Marketplace entity will not directly or indirectly influence the price of the products and maintain a level playing field

FEMA 20(R) - Sector specific issues (3 of 5)

Single Brand Retail Trading - Several liberalizations since last decade to make this sector popular

- From 51% under Approval Route to 100% under Automatic Route
- Eligible Investor - Brand owner to Brand licensor
- Foreign brands to Indian Brands including eligibility conditions of Indian brands relaxed
- Retail trading only through brick-mortar stores to even e-commerce
- Allowing Wholesale Trading Entity to also engage in SBRT
- If FDI is beyond 51%, then 30% sourcing from India norms attracted
 - Preferably from MSMEs, village and cottage industries, artisans and craftsman in all sectors
 - Self-certification by the company followed by certification by the statutory auditors.

-(sourcing norms / Con'td)

- To met in the first instance as an average of 5 years total value of goods purchase beginning 1 April of the year of the commencement of the business and thereafter on annual basis
- Offset for incremental sourcing from India for global operations during initial 5 years beginning 1 April of the year of opening the first store
- Sourcing norms not applicable up to three years of commencement of business (opening of first store) for entities undertaking SBRT of products having state-of-art and cutting edge technology
 - Such proposal to be examined by a committee of Secretary DIPP as chairman, representative from Niti Ayog / other administrative Ministry and Independent technical experts

FEMA 20(R) - Sector specific issues (4 of 5)

Construction Development: Townships, Housing, Built-up infrastructure

- Each phase of construction – separate project
 - Exit of NR simplified – (i) lock in of three years qua each tranche of foreign investment (ii) NR to NR not subject to any lock-in
-
- Foreign investment up to 100 percent under automatic route is permitted in completed projects for operating and managing townships, malls/ shopping complexes and business centres. Consequent to such foreign investment, transfer of ownership and/ or control of the investee company from persons resident in India to persons resident outside India is also permitted. However, there would be a lock-in-period of three years, calculated with reference to each tranche of foreign investment and transfer of immovable property or part thereof is not permitted during this period.
 - Transfer", in relation to this sector, includes,-
 - a. the sale, exchange or relinquishment of the asset; or
 - b. the extinguishment of any rights therein; or
 - c. the compulsory acquisition thereof under any law; or
 - d. any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
 - e. any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.

FEMA 20(R) - Sector specific issues (5 of 5)

Real Estate Business

- Earning of rent income on lease of the property, not amounting to transfer will not amount to real estate business.
- Transfer in relation to real estate includes,
 - (i) the sale, exchange or relinquishment of the asset; or
 - (ii) the extinguishment of any rights therein; or
 - (iii) the compulsory acquisition thereof under any law; or
 - (iv) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
 - (v) any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Issues

- Is leasing of property a permissible activity? Impacts NRI investment on NR basis as well?
- Operation and management of property v. leasing of property?

FEMA 20(R) - Sector specific issues (5 of 5)

Pharma - Greenfield – 100% Automatic Route and Brownfield 100% (74% under Automatic Route and beyond that under Government Route)

- Non-compete clause not permitted
- Production level of NLEM drugs / consumables being maintained over next 5 years at an absolute quantitative levels (benchmark with highest level in three financial year immediately preceding the foreign investment)
- R&D expenses being maintained over next 5 years at an absolute quantitative levels at the time of induction of foreign investment
- Complete information to be provided for transfer of technology, if any, to be provided to the administrative ministry.
- Medical devices manufacturing excluded from aforementioned conditions – products include diagnostics, investigation, disinfection, supporting / sustaining life, control of conception, etc.

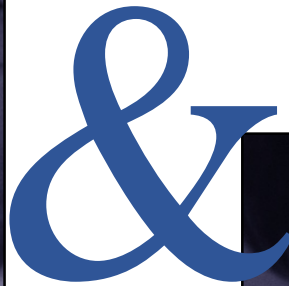
FEMA 20(R) - Things to watch out for

- **Sectoral liberalization**
 - **Restating the liberalized FDI policy for Investment in FS Sector**
 - **Pharma**
 - **Real Estate**
 - **Sourcing norms wherever applicable**
 - **E-commerce platform**
- **Liberalized downstream investment norms especially if sectors are under Automatic Route**
- **More robust reporting mechanism to RBI**
- **Teething issues at the FIFP portal**
- **Public participation in evaluation of the FDI policy**
- **Liberalization of pricing norms**
- **LLPs be allowed to be permitted to invest in all sectors on par with companies**

Q&A



Questions



Answers

THANK YOU ALL FOR YOUR ATTENTION !

CA Shabbir Motorwala

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