Consolidated FDI Policy

The Government of India recently issued its Consolidated FDI Policy Circular of 2015 (Circular) updating the Foreign Direct Investment Policy (FDI Policy). The Circular has been in effect from 12 May 2015. The policy framework is embodied in the Circular, which is updated every year, to capture and keep pace with the regulatory changes, effected in the interregnum.

Key amendments/clarifications introduced through this Circular are:

- **Incorporation of new sectors opened for FDI and enhancement in FDI caps**: During the year, railway infrastructure and manufacturing of medical device sectors were opened to receive FDI upto 100 per cent under automatic route.

  Further, sectoral cap for FDI in defence was increased from 26 per cent to 49 per cent under the government approval route and above 49 per cent under the approval of Cabinet Committee on Security (CCS). Also, FDI cap in insurance was increased from 26 per cent to 49 per cent under the government approval route.

  The above mentioned changes have been appropriately captured in the Consolidated FDI Policy.

- **Allowance of optionality clause**: The FDI Policy has been amended to give effect to Reserve Bank of India’s (RBI’s) circular dated 15 July 2014 that allowed Indian Companies to issue equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares with optionality clause, subject to conditions as specified in the Circular. The FDI Policy reiterates the RBI’s stance that foreign investors are not permitted to exit with an ‘assured return’.

- **Depository Receipt Scheme (DR Scheme)**: The FDI Policy incorporates provisions of the Depository Receipt Scheme, 2014 (DR Scheme) issued by the Ministry of Finance vide notification dated 21 October 2014. A person can issue DRs, if it is eligible to issue eligible instruments under Schedule 1, 2, 2A, 3, 5 and 8 of FEMA 20/2000.

  Similarly, form for filing return with the RBI, by the Domestic Custodian who has arranged issue/transfer of Depository receipts, has been revised in accordance with the DR Scheme 2014. Accordingly, Form DRR has been introduced as against the existing Form DR, and has to be filed within 30 days of close of the issue/programme.

- **Transfer of shares and convertible debentures**: It has been clarified that:
  
  - In sectors under the automatic route, government approval is not required for a Non-Resident (NR) to NR transfer of shares in investee company;
  
  - In sector under approval route, government approval is required for NR to NR transfer of shares in investee company; and
  
  - In case a NR investor (including Non-Resident Indian) acquires shares on a stock exchange under the FDI Scheme, the onus of filing Form FC-TRS is placed on the investee company.

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• **Issue of shares against any other funds**: It has been clarified that issue of equity shares against any other funds payable by the investee company, remittance of which does not require prior permission of the Government of India or RBI under Foreign Exchange Management Act, 1999 or any rules/regulations framed or directions issued thereunder is permitted subject to certain conditions.

• **Acquisition of shares under Scheme of Merger/Demerger/Amalgamation**: It has been clarified that Foreign Investment Promotion Board (FIPB) approval shall **not be required** for mergers and acquisitions taking place in **sectors under automatic route**.

• **Reporting of partly paid up shares**: Investee Company issuing partly paid equity shares has to furnish a report not later than 30 days from the date of receipt of each call payment and file a report in Form FC-GPR to the extent they become paid up.

   In case of gift of partly paid shares/warrants, the transferor resident in India also needs to submit, along with other documentation requirements, a declaration from the donee accepting partly paid shares/warrants that it is aware of the liability against pending calls and consequences of arrears thereof.

• **Amendment in Annual Return on Foreign Liabilities and Assets**: Annual reporting requirements, i.e. filing of return on Foreign Liabilities and Assets has undergone changes to encapsulate detailed disclosure of transactions with affiliates outside India where more than 50 per cent of equity participation is by the Indian reporting company.

   Details pertaining to sales, purchases, imports and exports of current and previous year need to be accordingly reported.

• **Authority to grant approvals for cases under government route**: The amended provisions are as under:

   Proposals involving total foreign equity inflow of **and below** INR2,000 crore would be considered by the FIPB; and

   Proposals involving total foreign equity inflow **beyond** INR2,000 crore would be considered by the **Cabinet Committee on Economic Affairs**.

   **However, a recent press release issued by the Press Information Bureau on 6 May 2015**; states that the Cabinet had approved a proposal of the DIPP for **increase in the investment limit to INR3,000 crore**.

• **In addition to the above**, the Circular continues to mention that warrants/partly paid shares can be issued to person(s) resident outside India only after obtaining approval under the government route.

   **However, as per A.P. (DIR Series) Circular No. 3 dated 14 July 2014**, partly paid shares/warrants are recognised as eligible instruments for the purpose of FDI and FPI, subject to compliance with respective schemes. Further, the RBI circular also mentioned that an Indian company whose activity/sector falls under the government route would require a prior approval from the FIPB for issuance of warrants/partly paid shares which implies that an Indian company whose activity/sector falls under the automatic route is permitted to issue warrants/partly paid shares without an approval from the FIPB.