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Reserve Bank of India

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Eighteenth Amendment) Regulations, 2016

The Reserve Bank of India ("RBI") vide its Circular dated December 7, 2016 has provided for amendments in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA Transfer Of Security Regulations 2000**"). FEMA Transfer Of Security Regulations 2000 had in Schedule 1 Annexure B provided for Sectoral cap and the investment routes (automatic or otherwise) on investments by Persons Resident Outside India in certain sectors. RBI has now amended and provided for Foreign investment. The cap for the such investments and conditions for the same are as below-

1. Sector- Agriculture & Animal Husbandry

- Foreign Investment Cap (%) - 100
- Route- Automatic
- Explanation-

The given limits are mentioned for the following activities in Agriculture & Animal Husbandry -

- a. Floriculture, Horticulture and Cultivation of Vegetables & Mushrooms under controlled conditions;
- b. Development and production of seeds and planting material;
- c. Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, Apiculture; and
- d. Services related to agro and allied sectors.



- Other conditions-

The term 'under controlled conditions' would mean-

- a. 'Cultivation under controlled conditions' for the categories of floriculture, horticulture, cultivation of vegetables and mushrooms is the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially.
- b. Control in these parameters may be effected through protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically.

2. Sector- Manufacturing

- Foreign Investment Cap (%) - 100
- Route- Automatic
- Explanation-

A manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce without Government approval. Notwithstanding the foreign investment policy provisions on trading sector, 100% foreign investment under Government approval route is allowed for trading, including through e-commerce, in respect of food products manufactured and/or produced in India. Applications for foreign investment in food products retail trading would be processed in the Department of Industrial Policy & Promotion ("DIPP") before being considered by the Government for approval.

3. Sector- Defence

- Foreign Investment Cap (%) - 100
- Route- Automatic up to 49% , Government route beyond 49% wherever it is likely to result in access to modern technology or for other reasons to be recorded.
- Explanation-

Allowed in Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951; and Manufacturing of small arms and ammunition under the Arms Act, 1959.



- a. Infusion of fresh foreign investment within the permitted automatic route level, in a company not seeking industrial license, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval.
- b. Licence applications will be considered and licences given by the DIPP, Ministry of Commerce & Industry (“**MCI**”), in consultation with Ministry of Defence (“**MOD**”) and Ministry of External Affairs (“**MEA**”).
- c. Foreign investment in the sector is subject to security clearance and guidelines of the MOD.
- d. Investee company should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.

4. Sector- Broadcasting

4.1. Broadcasting Carriage Services

- Foreign Investment Cap (%) - 100
- Route- Automatic
- Explanation-

The above cap is prescribed for-

- a. Teleports (setting up of up-linking Hubs/Teleports);
- b. Direct to Home (“**DTH**”);
- c. Cable Networks (Multi System Operators (“**MSOs**”) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability);
- d. Mobile TV;
- e. Headend-in-the Sky Broadcasting Service (“**HITS**”)

4.2. Cable Networks

- Foreign Investment Cap (%) - 100

- Route- Automatic

- Explanation-

For other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (“LCOs”)

- Other Conditions-

Infusion of fresh foreign investment, beyond 49% in a company not seeking license/ permission from sectoral Ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, would require Government approval.

5. Sector- Civil Aviation

5.1. Airports

5.1.1. Greenfield projects

- Foreign Investment Cap (%) - 100
- Route- Automatic.

5.1.2. Existing projects

- Foreign Investment Cap (%) - 100
- Route- Automatic.

6. Sector- Single Brand Retail trading (SBRT)

- Foreign Investment Cap (%) - 100
- Route- Automatic up to 49%, Government approval required after 49%
- Explanation-
 - a. Application seeking permission of the Government for foreign investment exceeding 49% in a company which proposes to undertake single brand retail trading in India would be made to the Secretariat for Industrial Assistance (“SIA”) in the DIPP. The applications would specifically indicate the product/product categories which are proposed to be sold under a 'Single Brand'. In case of foreign investment up to 49%, the list of products/product categories proposed to be sold except food products would be provided to the RBI.



Applications would be processed in the DIPP, to determine whether the proposed investment satisfies the notified guidelines, before being considered by the Foreign Investment Promotion Board (“**FIPB**”) for Government approval.

- Other conditions-
 - a. Products to be sold should be of a 'Single Brand' only.
 - b. Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
 - c. 'Single Brand' product retail trading would cover only products which are branded during manufacturing.
 - d. A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single brand product retail trading in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the licensing/franchise/sub-license agreement, specifically indicating compliance with the above condition. The requisite evidence should be filed with the RBI for the automatic route and SIA/FIPB for cases involving approval.
 - e. A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single brand product retail trading in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the licensing/franchise/sub-license agreement, specifically indicating compliance with the above condition. The requisite evidence should be filed with the RBI for the automatic route and SIA/FIPB for cases involving approval.



f. In respect of proposals involving foreign investment beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from Micro and Small Medium Enterprises (“**MSMEs**”), village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years’ total value of the goods purchased, beginning 1st April of the year of the commencement of the business i.e. opening of the first store. Thereafter, it would have to be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single brand product retail trading.

g. Subject to the conditions mentioned above, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce.

6. Sector- Pharmaceuticals

6.1. Greenfield

- Foreign Investment Cap (%) - 100
- Route- Automatic

6.2. Brownfield

- Foreign Investment Cap (%) - 100
- Route- Automatic up to 74%, Government approval required beyond 74%

6.3. Other conditions-

- a. ‘Non-compete’ clause would not be allowed in automatic or government approval route except in special circumstances with the approval of the FIPB.
- b. Government may incorporate appropriate conditions for foreign investment in brownfield cases, at the time of granting approval.



- c. Foreign investment in brownfield pharmaceuticals, under both automatic and government approval routes, is further subject to compliance of following conditions:
 - i. The production level of National List of Essential Medicines (“NLEM”) drugs and/or consumables and their supply to the domestic market at the time of induction of foreign investment, being maintained over the next five years at an absolute quantitative level. The benchmark for this level would be decided with reference to the level of production of NLEM drugs and/or consumables in the three financial years, immediately preceding the year of induction of foreign investment. Of these, the highest level of production in any of these three years would be taken as the level.
 - ii. Research and Development (“R&D”) expenses being maintained in value terms for 5 (five) years at an absolute quantitative level at the time of induction of foreign investment. The benchmark for this level would be decided with reference to the highest level of R&D expenses which has been incurred in any of the three financial years immediately preceding the year of induction of foreign investment.
 - iii. The administrative Ministry will be provided complete information pertaining to the transfer of technology, if any, along with induction of foreign investment into the investee company.
 - iv. The administrative Ministry (s) i.e. Ministry of Health and Family Welfare, Department of Pharmaceuticals or any other regulatory Agency/Development as notified by Central Government from time to time, will monitor the compliance of conditionalities.
- d. Foreign investment up to 100% under the automatic route is permitted for manufacturing of medical devices. The above mentioned conditions will, therefore, not be applicable to greenfield as well as brownfield projects of this industry.
- e. Medical device would mean-
 - i. Any instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including the software, intended by its manufacturer to be used specially for human beings or animals for one or more of the specific purposes of :-



- i) Diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder;
 - ii) diagnosis, monitoring, treatment, alleviation of, or assistance for, any injury or handicap;
 - iii) investigation, replacement or modification or support of the anatomy or of a physiological process;
 - iv) supporting or sustaining life;
 - v) disinfection of medical devices;
 - vi) control of conception; and which does not achieve its primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means;
- ii. an accessory to such an instrument, apparatus, appliance, material or other article;
 - iii. a device which is reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment or system whether used alone or in combination thereof intended to be used for examination and providing information for medical or diagnostic purposes by means of in vitro examination of specimens derived from the human body or animals.



Purchase and sale of securities other than shares or convertible debentures of an Indian company by a person resident outside India

RBI vide its *Circular dated December 27, 2016* has provided for amendment to the schedule 5 of the *FEMA Transfer Of Security Regulations 2000*.

- a. Prior guidelines as per the schedule 5 of the said FEMA Transfer Of Security Regulations 2000 stated that “Eligible Investors”, viz., Securities and Exchange Board of India (“SEBI”) registered Foreign Institutional Investors (“FIIs”), Qualified Foreign Investors (“QFIs”), registered Foreign Portfolio Investors (“FPIs”) and long term investors registered with SEBI, may purchase securities indicated in Schedule 5 on repatriation basis and either directly from the issuer of such securities or through a registered stock broker on a recognised stock exchange in India.
- b. The amendment provides that the Eligible Investors can now purchase nonconvertible debentures/bonds issued by Indian companies either directly from the issuer of such securities or through a registered stock broker on a recognised stock exchange in India.

SEBI

Process for Acquisition of Shares pursuant to Tender-Offers made for Takeovers, Buy Back and Delisting of Securities.

SEBI vide Circular dated December 9, 2016 ("**Current Circular**") has made amendments to Circular dated April 15, 2015 ("**Previous Circular**") which provided Mechanism for acquisition of shares through stock exchange mechanism pursuant to tender-offers for the purpose of takeovers, buy back and delisting of securities.

- a. The Previous Circular provided for shareholders to submit their bids through stock brokers and subsequently, the brokers transferred the shares to the special account of the clearing corporation. Likewise, the consideration payable to shareholders for the shares accepted in the offer were routed through stock brokers. Also, the shares not accepted in the offer were returned to shareholders through the stock brokers.
- b. The Current Circular provided for amendment to the above mechanism. The Current Circular now states that the transfer of shares of shareholders under the tender offers would be made directly to the account maintained by the clearing corporation. After such transfer of securities, the clearing corporation will be allowed to utilize the securities towards the settlement obligations under such offers.
- c. Also consideration for the accepted shares in the tender offer and shares tendered but not accepted under such offer would be credited directly to shareholder's bank and demat accounts respectively.
- d. These amendments would be applicable to all the offers for which Public Announcement is made on or after January 02, 2017.

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Warm Regards,

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