

Investor Focus



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Key changes in Foreign Exchange laws in India

Overseas Direct Investments – Liberalisation / Rationalisation

Notification No. FEMA 120/RB-2004 dated July 7, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] (the Notification)

To grant more flexibility to overseas Direct Investment , RBI through RBI/2011-12/474 A. P. (DIR Series) Circular No.9 dated 28 March 2012 has decided to further liberalise various provisions / regulations of the Notification as detailed under.

Indian Party

Extant Provision	Revised Provision
Creation of charge on immovable / movable property and other financial assets	
The existing regulations of the Notification do not envisage creation of charge on the movable property and other financial assets of the Indian Party.	It has been decided that proposals from the Indian party for creation of charge in the form of pledge / mortgage / hypothecation on the immovable / movable property and other financial assets of the Indian Party and their group companies <i>may be considered by the Reserve Bank under the approval route</i> within the overall limit fixed (presently 400%) for financial commitment subject to submission of a 'No Objection' by the Indian Party and their Group companies from their Indian lenders.
Reckoning bank guarantee issued on behalf of JV / WOS for computation of Financial Commitment	
Presently, the bank guarantee issued on behalf of JV / WOS is not reckoned for the purpose of computing the financial commitment of the Indian Party to its JV / WOS overseas.	It has been decided that the bank guarantee issued by a resident bank on behalf of an overseas JV / WOS of the Indian party, which is backed by a counter guarantee / collateral by the Indian party, shall be reckoned for computation of the financial commitment of the Indian Party and reported accordingly.

Issuance of personal guarantee by the direct / indirect individual promoters of the Indian Party

Indian entities may offer any form of guarantee - corporate or personal / primary or collateral / guarantee by the promoter company / guarantee by group company, sister concern or associate company in India

It has been decided that issuance of personal guarantee by the promoters of the Indian Party as presently allowed under the General Permission shall also be extended to the *indirect resident individual promoters* of the Indian Party with same stipulations as in the case of personal guarantee by the direct promoters.

Financial Commitment without equity contribution to JV / WOS

Presently, Regulation 6(4) of the Notification ibid prescribes that an Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture / Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian party has made investment by way of contribution to the equity capital of the Joint Venture.

Keeping in view the business requirement of the Indian party, particularly the legal requirement of the host country, it has now been decided that the proposals from the Indian party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route.

Submission of Annual Performance Report

Regulation 15(iii) of the Notification prescribes that Indian party needs to submit to the Reserve Bank through the designated Authorised Dealer bank every year an Annual Performance Report in Form ODI Part III in respect of each Joint Venture or Wholly Owned Subsidiary outside India, set up or acquired by the Indian party, after the finalization of the audited accounts of the Joint Venture / Wholly Owned Subsidiary outside India

Where the law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS, the Annual Performance Report (APR) may be submitted by the Indian party based on the un-audited annual accounts of the JV / WOS provided:

- a. The Statutory Auditors of the Indian party certifies that 'The un-audited annual accounts of the JV / WOS reflect the true and fair picture of the affairs of the JV / WOS' and
- b. That the un-audited annual accounts of the JV / WOS has been adopted and ratified by the Board of the Indian party.

Compulsorily Convertible Preference Shares (CCPS)

The extant provisions of Overseas Direct Investments envisage setting up / acquiring JV / WOS abroad by subscribing / contributing to the equity capital of the JV / WOS. Therefore, contribution to the preference share capital (whether convertible or non-convertible) of the JV / WOS abroad by the Indian party is treated as loan to them.

Keeping in view the nature of the Compulsorily Convertible Preference Shares (CCPS), it has been decided that Compulsorily Convertible Preference Shares shall be treated at par with equity shares and the Indian party is allowed to undertake financial commitment based on the exposure to JV by way of CCPS.

Resident Individuals

Acquiring qualification shares of an overseas company for holding the post of a Director

Regulation 24(1)(a) of the Notification, a person resident in India being an individual may acquire foreign securities as qualification shares issued by a company incorporated outside India for holding the post of a Director in the company provided that:

- (i) the number of shares so acquired shall be the minimum required to be held for holding the post of director and in any case shall not exceed 1 (one) per cent of the paid-up capital of the company, and
- (ii) the consideration for acquisition of such shares does not exceed the ceiling as stipulated by RBI from time to time.

it has been decided to remove the existing cap of 1 (one) per cent on the ceiling for resident individuals to acquire qualification shares for holding the post of a Director in the overseas company.

Remittance is now allowed from resident individuals for acquiring the qualification shares for holding the post of a Director in the overseas company to the extent prescribed as per the law of the host country where the company is located.

The limit of remittance for acquiring such qualification shares shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

Acquiring shares of a foreign company - professional service rendered or in lieu of Director's remuneration

Regulation 20 of the Notification prescribes that a Resident

It has been decided to grant General Permission to the resident

individual may apply to the Reserve Bank for permission to acquire shares in a foreign entity offered as consideration for professional services rendered to the foreign entity and the Reserve Bank may, after taking into account certain factors, grant permission subject to such terms and conditions as are considered necessary

individuals to acquire shares of a foreign entity in part / full consideration of professional services rendered to the foreign company or in lieu of Director's remuneration.

The limit of acquiring such shares in terms of value shall be within the overall ceiling prescribed for the resident individuals under the Liberalized Remittance Scheme (LRS) in force at the time of acquisition.

Acquiring shares in a foreign company through ESOP Scheme

Regulation 22(2) of the Notification grants General permission to a resident individual to purchase equity shares offered by a foreign company under its ESOP Schemes, if he is an employee, or, a Director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company/Special Purpose Vehicle (SPV), is not less than 51 per cent.

It has now been decided that resident employees or Directors may be permitted to accept shares offered under an ESOP Scheme globally, on uniform basis, in a foreign company irrespective of the percentage of the direct or indirect equity stake in the Indian company subject to:

- ❖ the shares under the ESOP Scheme are offered by the issuing company globally on a uniform basis, and
- ❖ an Annual Return is submitted by the Indian company to the Reserve Bank through the AD Category – I bank giving details of remittances / beneficiaries, etc.



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