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Foreign Investment - Notification of Amendment Rules for Non-Debt Instruments

The Ministry of Finance, Government of India has now issued Foreign Exchange Management (Non-Debt Instruments) (Amendment) Rules, 2019 on 5 December, 2019, thereby, amending certain provisions of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 & notifying specific amendments introduced by Press Notes issued from time to time.

Background:

The Ministry of Finance, Government of India had earlier classified instruments issued under Foreign Exchange Management Act, 1999 (FEMA) as debt and non-debt instruments and had notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 in this regard.

The Ministry of Finance, Government of India has now issued Foreign Exchange Management (Non-Debt Instruments) (Amendment) Rules, 2019 on 5 December, 2019, thereby, amending certain provisions of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules).

The amendment rules are aimed primarily to give effect to the policy amendments introduced vide Press Notes issued earlier by Department for Promotion of Industry and Internal Trade and rectify certain discrepancies in the NDI Rules from the erstwhile Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 (FDI Regulations).

Highlights of Key Amendments:

The below changes shall be deemed to have come into effect from 17 October 2019.

- **Change in Definitions**

- **Investment Vehicle:** Mutual funds are excluded from the definition of investment vehicle. Accordingly, mutual funds which invest more than 50 percent in equity governed by SEBI (Mutual Funds) Regulations 1996, stand omitted;
- **Sectoral Cap:** Debt instruments are excluded from the definition of sectoral cap. Under the revised definition, 'sectoral cap' means maximum investment including both foreign investment on a repatriation basis by a person resident outside India, in equity instruments of a company or the capital of a LLP, as the case may be, and indirect foreign investment, unless provided otherwise.

- **Other Key Amendments**

- A person resident in India holding equity instruments or units of an Indian company may transfer the same to a person resident outside India by way of gift with prior approval of RBI and subject to fulfilment of conditions as prescribed. The earlier reference to holding equity instruments on 'non-repatriation basis' has now been deleted.
- Transfer of equity instruments of an Indian company by FPI shall be in compliance with conditions specified in NDI Rules and SEBI. The specific provision in the NDI Rules as regards transfer by way of sale or gift of equity instruments or units held together with explanation thereto has been removed.

- Convertible capital instruments: It has now been specified that conversion price/ conversion formula for issuance of convertible debentures and preference shares should be determined upfront in compliance with pricing guidelines and should not in any case be lower than the fair value worked out, at the time of issuance of such instrument.

- **Sector specific changes**

The following sector specific amendments introduced by Press Notes issued by Department for Promotion of Industry and Internal Trade, from time to time, are now notified.

The said changes shall come into effect from 5 December 2019.

- **Coal and Lignite:** 100% FDI under automatic route permitted for:

- (i) sale of coal; and
- (ii) coal mining activities including associated processing infrastructure (which would include coal washery, crushing, coal handling, and separation (magnetic and non-magnetic)).

This is subject to provisions of Coal Mines (Special Provisions) Act, 2015 and Mines and Minerals (Development and Regulation) Act, 1957 as amended from time to time, and other relevant Acts on the subject.

- **Manufacturing:** 100 percent FDI under the automatic route permitted in “Contract Manufacturing”.

Under revised framework, *“Manufacturing activities may be either self manufacturing by the investee entity or contract manufacturing in India through a legally tenable contract, whether on Principal to Principal or Principal to Agent basis. Further, a manufacturer is permitted to sell his products manufactured in India through wholesale and/or retail, including through e-commerce, without Government approval.”*

- **Digital Media:** FDI up to 26 percent permitted under government route for uploading/ streaming of news and current affairs through digital media.
- **E-Commerce:** E-commerce marketplace entity with FDI shall have to obtain and maintain a report of statutory auditor by 30th of September every year for the preceding financial year confirming compliance of the e-commerce guidelines.
- **Single Brand Product Retail Trading (SBRT):** 100 percent FDI under automatic route is permitted.

For FDI of more than 51 percent, sourcing of 30 percent of value of goods procured shall be done from India. Further, the local sourcing requirements can be met as an average during the first 5 years, and thereafter on an annual basis towards its India operations. Further, local sourcing requirements can be met as under:

- All procurements made from India by the SBRT entity for that single brand shall be counted towards 30 percent local sourcing, irrespective of whether the goods procured are sold in India or exported;
- Sourcing of goods from India for global operations can now be done directly by the entity undertaking SBRT or its group companies (resident or non-resident); or indirectly by them through a third party under a legally tenable contract. and
- To consider the entire sourcing from India for global operations for meeting the 30 percent local sourcing requirements.

Retail trading through e-commerce can also be undertaken prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail.

- **Investment by Foreign Portfolio Investors (FPI)**

- Aggregate limit of investment by FPI of 24 percent in Indian company may be increased up to sectoral cap/statutory ceiling, as applicable, with the approval of Board of Directors and shareholders of the Indian company by passing special resolution.

Conclusion:

The amendment is aimed to notify the sector specific changes introduced in Press Notes from time to time and to provide further clarification in NDI Rules and align with erstwhile FDI Regulations.

Source: <http://egazette.nic.in/WriteReadData/2019/214520.pdf>



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