Major Reforms in Foreign Direct Investment Policy

November 13, 2015

In brief

With a view to boost the ease of doing business in India and to further promote 'Make in India' and 'Startup India' initiatives, the Government published a Press Note on November 10, 2015 outlining significant reforms in the Foreign Direct Investment ('FDI') Policy. The reforms are aimed at attracting more foreign investments through further easing, rationalising and simplifying the process of foreign investments in the country and putting more FDI proposals under the automatic route.

In detail

The reforms[1] have a multi-pronged effect:

1. Sectoral reforms including construction development, retail trading, wholesale cash & carry, defence, broadcasting, banking and plantation sectors
2. Significant ease in establishing / investing in Limited Liability Partnerships ('LLPs') in India as well as downstream investment by such LLPs
3. Bringing investments by NRI-owned and controlled entities outside India on par with NRI investments
4. Boosting e-commerce, including allowing e-commerce for manufacturing entities as well as for single brand retail trading entities
5. A slew of rationalisation measures, including allowing swap of shares without prior approval, enhancement of the limit for Foreign Investment Promotion Board ('FIPB') from INR 30 billion to INR 50 billion.

The Department of Industrial Policy and Promotion ('DIPP') has been advised to consolidate all FDI-related instructions contained in various notifications and press notes and prepare a consolidated booklet for easy reference by investors.

The reforms in FDI Policy are summarised below:

Sector-Specific Reforms:

Construction Development Sector

Conditions for Receipt of FDI:

- Condition of minimum area to be developed in case of construction development projects of floor area of 20,000 sq.mts. is now deleted.
- Condition of minimum capitalization of USD 5 million to be brought in within six months of commencement of business is also now deleted.

Leasing of Property:

- Earning of rent/ income on lease of property, not amounting to transfer (as defined in the Press Note), will not be regarded as real estate business that is prohibited from receiving FDI under the FDI Policy.

Completed Projects:

- 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres.

Conditions *vis-a-vis* Exit / Transfer

- Foreign investors will be permitted to exit and repatriate foreign investment before the completion of project under automatic route subject to a lock-in-period of three years. Each phase

[1] http://dipp.gov.in/English/policies/fdi_review_10112015.pdf

of the construction development project to be considered as a separate project for the purposes of FDI policy.

- The lock-in period would be calculated with reference to each tranche of foreign investment.
- Transfer of stake from one non-resident to another non-resident, without repatriation of investment, will not be subject to any lock-in period. Further, such transfer would not require prior government approval under FDI Policy.
- Condition of lock-in period will not apply to hotels, tourist resorts, hospitals, Special Economic Zones (SEZs), educational institutions, old age homes and investment by NRIs.
- In any case, exit is permitted at any time if project or trunk infrastructure is completed before the lock-in period.
- Consequent to foreign investment, transfer of ownership and/ or control of the investee company from residents to non-residents is also permitted. However, transfer of immovable property or part thereof is not permitted during the lock-in-period of three years.

Defence Sector

Requirement of Prior Approval:

- ***Up to 49%***: Foreign investment up to 49% will be under automatic route. Portfolio investment and investment by FVCIs will be allowed up to permitted automatic route level of 49%.
- ***Above 49%***: Proposals for foreign investment in excess of 49% will be considered by the FIPB (compare with Cabinet Committee on Security as per the earlier regulation).

Change in Foreign Ownership Pattern:

- In case of infusion of fresh foreign investment within the permitted automatic route level resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, Government approval will be required.

Broadcasting Sector

Broadcasting Carriage Services:

- FDI up to 100% now permissible in broadcasting carriage services outlined in FDI Policy, *viz.*, teleports, Direct-To-Home, Cable Networks, Mobile TV and Headend-In-The-Sky - FDI up to 49% permissible under automatic route and above 49% under Government approval route.

Broadcasting Content Services:

- FDI up to 49% permissible under Government route in case of terrestrial broadcasting FM (FM radio), up-linking of 'news and current affairs' TV channels.
- FDI up to 100% permissible under automatic route in case of up-linking of non-news and current affairs TV channels and down-linking of TV channels.

Banking–Private Sector

- Full fungibility of foreign investment has been introduced - FIIs/FPIs/QFIs, following due procedure, can now invest up to sectoral limit of 74%, provided that there is no change of control and management of the investee company.

Plantation Sector

- It has been decided to open up Coffee, Rubber, Cardamom, Palm Oil tree and Olive Oil tree plantation sectors to foreign investment (compare with tea plantations only as per the earlier regulation).
- FDI in plantation sector (including tea) will be permissible up to 100% under automatic route.

Single Brand Retail Trading ('SBRT') Sector

Sourcing Norms

- Sourcing of 30% of the value of goods purchased would be reckoned from the opening of first store instead of from the date of receipt of FDI.
- In case of 'state-of-the-art' and 'cutting-edge technology' segments, the sourcing norms can be relaxed subject to Government approval.

E-commerce

- An entity that has been granted permission to undertake SBRT will be permitted to undertake e-commerce activities.

FDI in Indian Brands

- Certain conditions of the FDI policy, namely, products to be sold under the same brand internationally and investment by non-resident entity/ entities as the brand owner or under legally tenable agreement with the brand owner, will not be made applicable in case of FDI in Indian brands.
- An Indian manufacturer is permitted to sell its own branded products in any manner, i.e., wholesale, retail, including through e-commerce platforms.

  For the purposes of FDI Policy, Indian manufacturer would be the investee company, which is the owner of the Indian brand and which manufactures in India, in terms of value, at least 70% of its products in-house, and sources, at most 30%, from Indian manufacturers.

- Further, Indian brands should be owned and controlled by resident Indian citizens and/ or companies that are owned and controlled by resident Indian citizens.

Duty Free Shops

- 100% FDI is permissible under automatic route in Duty-free Shops located and operated in the Customs bonded areas.

Wholesale Trading / Cash & Carry Wholesale Trading

- It would be permissible for a single entity to undertake activities of both, wholesale trading and SBRT, with the condition that FDI policy conditions on wholesale/ cash & carry and SBRT have to be complied with by both the business arms separately.

Civil Aviation

- Regional Air Transport Service will be eligible for foreign investment up to 49% under automatic route.

- Foreign Equity caps of Non-Scheduled Air Transport Service, and Ground Handling Services have now been increased from 74% to 100%.

Satellites - Establishment and Operation

- Foreign Equity cap for Satellites – establishment and operation has now been increased from 74% to 100%.

Credit Information Companies:

- Foreign Equity cap for Credit Information Companies has now been increased from 74% to 100%.

Agriculture and animal husbandry, and Mining & mineral separation of titanium bearing minerals and ores, its value addition and integrated activities

- Conditions prescribed under FDI Policy in respect of above sectors have been simplified. Details are expected to be published by DIPP separately.

Other reforms

FDI by Companies/ Trusts/ Partnerships Owned & Controlled by Non-Resident Indians (NRIs)

- NRIs have a special dispensation for investment in construction development and civil aviation sectors. Further, investment made by NRIs under Schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations is deemed to be domestic investment at par with investment made by residents.

- This special dispensation for NRIs has now been also extended to companies, trusts and partnership firms, which are incorporated outside India and are owned and controlled by NRIs. Henceforth, such entities owned and controlled by NRIs will be treated at par with NRIs for investment in India.

FDI in Limited Liability Partnerships ('LLPs')

- 100% FDI is now permitted under automatic route in LLPs operating in sectors/ activities where 100% FDI is allowed under automatic route, and there are no FDI-linked performance conditions.

- Further, the terms 'ownership' and 'control' with reference to LLPs have been defined. DIPP is expected to share the details in this regard separately.

- LLPs having foreign investment will be permitted to make downstream investment in another company or LLP in sectors in which 100% FDI is allowed under the automatic route, and there are no FDI-linked performance conditions.

FDI in Companies without Operations

- Government approval would not be required for infusion of foreign investment into an Indian company which does not have any operations, and also does not have any downstream investments for undertaking activities which are under automatic route and without FDI-linked performance conditions, regardless of the amount or extent of foreign investment.

FDI by way of Swap of Shares

- Government approval will not be required for investment in automatic route sectors by way of swap of shares.

Downstream Investment

- For the purposes of FDI policy, the term 'internal accruals' has been defined. DIPP is expected to share the details in this regard in due course.

Establishment and Transfer of Ownership and Control of Indian Companies

- As per the FDI policy establishment and transfer of ownership or control of the Indian company in sectors/ activities with caps requires Government approval. This provision has now been amended to provide that approval of the Government will be required if the company concerned is operating in sectors/ activities which are under Government approval route rather than capped sectors.

Threshold Limit for Approval by FIPB

- The threshold limit for FDI approvals that may be considered by FIPB will be increased from INR 30 billion to INR 50 billion.
- FDI proposals above INR 50 billion will be placed for consideration of Cabinet Committee on Economic Affairs (CCEA).

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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