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Foreign investment in India - Rationalisation

The Foreign Exchange Management Act, 1999 (FEMA) governs foreign investment into India. One of the key regulations under FEMA, which deals with foreign investment into India, is FEMA Notification No. 20[1]. The Reserve Bank of India (RBI) has revised FEMA 20 and the key highlights of the revised notification are as follows:

Issue of Capital Instruments

- Equity instruments, i.e., equity shares (including partly paid up shares), debentures, preference shares and share warrants have now been clubbed under one definition of "Capital Instruments."
- Foreign Direct Investment, has been defined to mean investment through capital instruments by a person resident outside India in an unlisted Indian company, or in 10% or more in a listed Indian company.
- Foreign Portfolio Investment (FPI) means any investment made by a person resident outside India, where such investment is less than 10% of the post issue paid-up share capital on a fully diluted basis of a listed Indian company.
- Under the erstwhile regulation, general permission was available to issue **shares** upon merger/ demerger/ amalgamation, subject to prescribed conditions. Under the revised regulation, Indian companies can now issue any capital instrument pursuant to merger/ demerger/ amalgamation, subject to prescribed conditions.
- The timeline of issue of Capital Instruments has been aligned with the Companies Act, 2013. The period was 180 days under the erstwhile regulations. In case of non-issuance of capital instruments within 60 days, money will be required to be refunded within 15 days.
- It has been clarified that foreign investment has to be calculated under a fully diluted basis, i.e., the total number of shares that would be outstanding if all possible sources of conversion are exercised.
- For computation of limits applicable to FPI (i.e. less than 10%), investment by investor group (i.e. the same set of ultimate beneficial owners investing through multiple entities) to be considered.

Transfer of Capital Instruments

- The following transfers have now been permitted under the automatic route
  - Transfer by non-resident of India (NRI) or OCI to person resident outside India by way of sale or gift subject to prescribed conditions;
  - Transfer from person resident outside India to another person resident outside India pursuant to liquidation, merger, demerger, amalgamation of foreign companies.

NRI

Consequent changes made in various regulations in relation to investment under Schedule 4 (NRI on non-repatriation basis) considered as investment by resident.

Other key highlights

- Foreign investment in Commodities Spot Exchange has been permitted up to 49% under the automatic route.
- The definition of "Downstream Investment" has been amended to include investment by Limited Liability Partnership (LLP)/ Investment Vehicle in downstream Indian company or LLP.
- RBI permitted to prescribe late payment fee for delay in reporting to it.

[1] Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000

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