

FEMA Updates – March 2020**Review of FDI Policy in Insurance Sector****Press Note No. 1 (2020Series) dated 21/02/2020 issued by DIPP**

The Government of India has reviewed extant FDI Policy on Insurance Sector and made amendments in Consolidated FDI Policy of 2017. FDI in Insurance companies is allowed up to 49% under automatic. With regards to Intermediaries or Insurance Intermediaries 100% FDI is allowed under automatic route.

Para 5.2.22 of FDI Policy is amended as under:

Sector/ Activity	% Equity/ FDI Cap	Entry Route
5.2.22.1 Insurance Company	49%	Automatic
5.2.22.2 Insurance intermediaries including insurance brokers, reinsurance brokers, insurance consultants, corporate agents, third party administrators, surveyors and loss assessors and such other entities as may be notified by Insurance Regulatory and Development Authority (IRDA) from time to time.	100%	Automatic

The foreign investment in insurance sector shall be subject to following conditions-

- (a) Total foreign holding, including portfolio investments in Insurance Company shall not exceed 49%.
- (b) The foreign investment up to 49% under the automatic route is subject to approval/verification by the IRDA.
- (c) The foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and companies receiving FDI are required to obtain necessary licence/ approval from the IRDA for undertaking insurance and related activities.
- (d) Ownership and control at all the times shall remain in the hands of resident Indian entities as determined by the Department of Financial Services/ IRDA as per rules regulations issued by them from time to time.

- (e) Foreign Portfolio Investment in an Indian Insurance Company shall be governed by the provisions contained in sub-regulation (2), (2A), (3) and (8) of Regulation 5 of FEMA Regulations, 2000 and provisions of Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.
- (f) Any increase in foreign investment in an Indian Insurance Company shall be in accordance with the pricing guidelines specified by RBI under FEMA Regulations.
- (g) The foreign equity investment cap of 100 percent shall apply on the same terms as above to insurance brokers, reinsurance brokers, insurance consultants, corporate agents, third party administrators, surveyors and loss assessors and such other entities as may be notified by IRDA from time to time.
However, the condition of Indian owned and controlled, as specified in Clause (d) above, shall not be applicable to Intermediaries and Insurance Intermediaries and composition of the Board of Directors and key management persons shall be as specified by concerned regulators from time to time.
- (h) The foreign Direct Investment proposals shall be allowed under the automatic route subject to verification by the Authority and the foreign investment in intermediaries or insurance intermediaries shall be governed by the same terms as provided under rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015 as amended from time to time.
However, where an entity like a Bank, whose primary business is outside the insurance area, is allowed by the IRDA to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 percent of their total revenues in any financial year.
- (i) The insurance intermediary having majority foreign shareholding shall undertake the following:
 - i) Be incorporated as a limited company under Companies Act, 2013;
 - ii) At least one from among the Chairman of the Board of Directors or the Chief Executive Officer or the Principal Officer or Managing Director of the Insurance intermediary shall be resident Indian citizen;
 - iii) Shall take prior permission of the authority for repatriating dividend;
 - iv) Shall bring in the latest technological, managerial and other skills;
 - v) Shall not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the authority;

- vi) Shall make disclosures in the formats to be specified by the authority of all payments made to its group or promoter or subsidiary or interconnected or associate entities;
- vii) Composition of the Board of Directors and key management persons shall be as specified by the concerned regulator;
- (j) The provisions of paragraphs (i)(b) and (d) of Annexure 9 relating to "Banking - Private Sector" shall be applicable in respect of bank promoted insurance companies.
- (k) Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investors', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-Resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. G.S.R 115(E), dated 19th February 2015 issued by Department of Financial Services and Regulations issued by Insurance Regulatory and Development Authority of Indian from time to time.

This will take effect from date of FEMA Notification.

(Comments: Government has liberalized FDI Policy in Insurance sector and this will enable foreign Insurance Intermediaries and Insurance Brokerage Companies to invest in Indian Companies).

Analysis of Compounding Orders

Foreign Currency Accounts by person resident in India – FEMA Notification No. 10

Maneesh Pharmaceuticals Limited - CA No. 4965/2019 dated 30/12/2019

Nature of Contravention	Regulation Reference	Amount of Contravention	Period of contravention	Compounding Fee Levied (Rs.)
Use of Foreign Currency Account (FCA) for receiving exports proceeds	Regulation 3 of Notification No. 10.	49,29,53,938	04/12/2012 to 26/02/2015	30,07,724

Facts of Order and Comments

- The company had availed External Commercial Borrowings in 2008 and had opened FCA in Singapore for parking ECB proceeds. The FCA was maintained even after repayment of ECB.
- In 2012, the company use this FCA for receiving advance against exports from one of its buyers.
- In terms of Regulation 3 of FEMA Notification No. 10, save as otherwise provided in the Act, rules or regulations, no person resident in India shall open or hold or maintain a Foreign Currency Account. On application to RBI, FCA can be opened subject to conditions as may be necessary.
- Thus, opening of FCA by an Indian company is not permitted unless it is allowed. The company had opened FCA for parking ECB proceeds and after repayment of ECB the same must have been closed down. However instead of closing FCA, company used the same for receiving export proceeds resulting in contravention of Regulation 3 of FEMA Notification No. 10.

Foreign Direct Investment – FEMA Notification No. 20R**A. Qatar Aviation Services India Private Limited - CA No. NDL 498/2019 dated 13/12/2019**

Nature of Contravention	Regulation Reference	Amount of Contravention	Period of contravention	Compounding Fee Levied (Rs.)
Issue of shares to person resident outside India prior to receipt of consideration	Para 2(2) of Schedule 1 of FEMA Notification No. 20R	37,23,441	12 days (04/04/2019 to 16/04/2019)	68,617

Facts of Order and Comments

- The company had issued shares to its non-resident shareholders prior to date of receipt of actual consideration. Shares were issued on 4th April 2019 and amount towards subscription for share capital was received on 16th April 2019.

- As per Para 2(2) of Schedule 1 of FEMA Notification No. 20R, capital instruments shall be issued to person resident outside India within 60 days from date of receipt of consideration.
- Therefore, share application money has to be received prior to allotment of shares. In no case shares can be issued before receiving amount for share application money.

B. Pearson India Education Services Pvt. Ltd. - CA No. 960/2019 dated 10/01/2020

Nature of Contravention	Regulation Reference	Amount of Contravention	Period of contravention	Compounding Fee Levied (Rs.)
Delay in reporting of downstream investment to Secretariat for Industrial Assistance (SIA), DIPP.	Regulation 13.1(11) of FEMA Notification No. 20R	4,000	18/03/2019 to 21/08/2019 – 4 months and 4 days	70

Facts of Order and Comments

- Pearson India Education was subsidiary of Singapore based Company. In March 2019, it acquired two shares of another Indian company. The company had filed form DI for reporting of downstream in August 2019 however, reporting to SIA, DIPP was done in August 2019.
- As per Regulation 13.1(11) of FEMA Notification No. 20R, an Indian company making downstream in another Indian company has to notify to SIA, DIPP within 30 days of such investment (whether or not capital instruments are allotted) and also file Form DI within 30 days from date of allotment.
- Thus, it is obligation of Indian company making downstream investment to notify SIA, DIPP about such investment within 30 days. This reporting is to be done whether or not capital instruments are allotted. A separate reporting in Form DI is to be made within 30 days of allotment of capital instruments.

- Non-reporting of downstream investment to SIA, DIPP is regarded as contravention.

Overseas Direct Investment – FEMA Notification No. 120**A. Vulcan Industrial Engineering Company Limited - CA No. 4984/2019 dated 23/01/2020**

Nature of Contravention	Regulation Reference	Amount of Contravention	Period of contravention	Compounding Fee Levied (Rs.)
Delay in submission of Form ODI for capitalisation of pre-incorporation expenses and other remittances	Regulation 6(2)(vi) of FEMA Notification No. 120	1,08,37,724	2 years and six months to 4 years	1,11,208
Delay in reporting of changes in capital structure	Regulation 13 of FEMA Notification No. 120	86,00,000	25/10/2014 to 01/01/2019	
Delay in submission of Annual Performance Reports (APRs)	Regulation 15(iii) of FEMA Notification No. 120	N.A.	2014 – 2018 (5 APRs)	50,000

Facts of Order and Comments

- The company had made an ODI in JV Company in March 2014. In June 2014 it capitalized in books of JV, pre-incorporation expenses of AUD 15,000 which were initially remitted and later 10 remittances were made towards equity. The company made delay in submission of Form ODI for all the transactions.
- Two of resident Indians had remitted amount in JV for equity capital resulting to change in capital structure. This post investment change in capital structure was reported with delay.
- Also, APRs for 2014-2018 were submitted late.
- All of above three are contraventions of FEMA Notification No. 120.

- As per Reg 6(2)(vi) an Indian Party has to submit Part I of Form ODI with AD Bank for every overseas investment transaction. Since there was delay in filing of Form ODI for reporting of capitalization of pre-incorporation expenses and other remittances the same resulted in contravention of Reg 6(2)(vi).
- In terms of Reg 13, detail of any alteration or change in capital structure of JV/WOS is to be reported within 30 days of such change. Any delay is treated as contravention.
- And as per Reg 15(iii), Indian Party making ODI is obliged to file APR in Part III of Form ODI with AD Bank in respect of each JV/WOS on or before specified date. APRs for 2014 to 2018 were filed late leading to contravention.

B. Gemini Power Hydraulics Private Limited - CA No. 5013/2019 dated 16/01/2020

Nature of Contravention	Regulation Reference	Amount of Contravention	Period of contravention	Compounding Fee Levied (Rs.)
Delay in repatriation of disinvestment proceeds beyond stipulated period of 90 days	Regulation 16(2) of FEMA Notification No. 120	5,14,131	1 month	52,571
Delay in submission of APRs	Regulation 15(iii) of FEMA Notification No. 120	N.A.	2008 – 2017 (9 years)	90,000

Facts of Order and Comments

- The company had set up a WOS in Singapore in 2008. The WOS was closed down and disinvestment was made in September 2017. The disinvestment proceeds were repatriated back in January 2018 i.e. beyond period of 90 days thereby contravening Reg 16(2) of FEMA Notification No. 120.

- As per Regulation 16(2) of FEMA Notification No. 120, sales proceeds of shares/securities shall be repatriated to India immediately on receipt thereof and in any case not later than 90 days from date of sale and documentary evidence to this must be submitted to RBI through AD Bank.
 - Thus, receiving sales/disinvestment proceeds beyond period of 90 days results in contravention.
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