WEBINAR ON FEMA (NDI) RULES, 2019 AND RECENT AMENDMENTS

Webinar Queries

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Applicability

1. **How do these rules apply to any NRIs who live in these countries, say China or HKG?**

   Since, China & HKG are border sharing countries any investment by them into India shall only be via government route.

2. **Where can we find all rules relating NDI and ND?**

   The power to regulate debt instrument comes within the ambit of RBI & the power to regulated equity instruments now comes within the ambit of CG i.e. MOF.

   Link to FEMA (Non-Debt Instruments) Rules, 2019:
   http://egazette.nic.in/WriteReadData/2019/213332.pdf

   Link to FEMA (Debt Instrument) Regulations, 2019:
   http://egazette.nic.in/WriteReadData/2019/213316.pdf

   Link to FEMA (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
   https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11723&Mode=0

3. **Is the term Foreign direct investment and direct foreign investment same?**

   There are two terms direct and indirect foreign investment. Foreign direct investment is defined under Rule 2 (s) of NDI Rules, 2019. Indirect foreign investment is defined under Rule 23(7) (i) of NDI Rules, 2019.

4. **Would this amendment be removed once the pandemic subsides - given the fact that the amendment was bought with the idea to avoid opportunistic acquisitions?**

   It depends upon the Ministry whether to continue with the recent notification or amend/delete the same once pandemic gets end.

5. **What are implications for an Indian Pvt. Ltd company which is already 100% owned by Chinese investors? Would further investment by the same investor be requiring Govt. approval?**

   Since, the amendment is w.e.f 22nd April, 2020, investment made on and after such date in India by border sharing countries shall come within the ambit of government approval.

6. **Considering the words used 'existing or future FDI', does the Policy is to restrict the fresh investment only and whether Government also wishes to cover the secondary sale to PROI? Also, whether Government Approval is required from transfer of equity shares from Resident to Non-Resident?**

   The amendment is effective from 22nd April, 2020 hence any investment in India by land sharing countries shall come within the ambit of government approval. If, the transferee is any person residing in the 7 border sharing countries then prior approval shall be sought.

Beneficial Owner

7. **How will we determine the concept of beneficial owner? Should we solely rely to the declaration received from entities?**

   Beneficial owner is not defined under FEMA NDI Rules, 2019. Where any declaration is made by a PROI of being the beneficial owner, than such declaration shall be given regard irrespective if the investment is held by resident Indian citizen. Hence, the entity will be regarded as beneficial owner and receiving foreign investment from the place where the PROI is situated. Beneficial interest & declaration are two important criteria in determining the beneficial owner.

8. **Where and how should we consider section 89 and 90 of companies act to determine beneficial owner?**

   If we are considering the definition of beneficial owner as provided under Companies Act, 2019 or under PMLA Act, 2002, then we are restricting our self in identifying the natural person holding the beneficial interest in the shares. Hence, here the intention is not to identify the natural person but to see whether the entity receiving investment is from any of the 7 border sharing countries.

9. **How shall we define control w.r.t to the FDI Act?**

   The definition of control is provided under FEMA NDI Rules, 2019. It is defined under rule 23 (7) (d).

Indirect Investments

10. **Regarding indirect investment, in case the investment is not in WOS (suppose investment in C ltd is 90%) and investment in B ltd is 80%, then what would be the indirect investment?**

    Whatever investment made by B ltd into C ltd, in this case 90%, then the same shall be regarded as indirect foreign investment the exception is only in case of WOS.

11. **Why direct vs. portfolio is determined by quantum? In the case of indirect investment, 50% is 50% of equity shares only?**

    Yes, here equity instruments are only taken into consideration. If an FOCC invest in NCDs or preference share the same is not regarded as downstream investment.

Reporting requirements

12. **Is there any other compliance which FOCC need to ensure apart from DI reporting?**

    Yes, intimation needs to be provided to DPIIT on FIFP portal and also the first level company shall obtain a certificate to this effect from its statutory auditor on an annual basis and such compliance of these rules shall be mentioned in the Director's report in the Annual Report of the Indian company.

13. **What are the reporting requirements as per new NDI Rules?**

    The reporting requirement is separately issued by RBI as FEMA (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019. The reporting requirement remains intact as previous under RBI FEMA TISPRO regulations. All the reporting are required to be done on RBI FIRMS portal.

14. **Any disclosures required in Annual Report or website?**

Only in relation to downstream investment the company shall mention the compliance in the director's report.

Border sharing countries

15. **What would 'situated in those 7 countries' mean?**

The 7 countries are as follows: Pakistan, Afghanistan, China, Bhutan, Nepal, Myanmar & Bangladesh.

16. **Is approval required for allotment of shares on exercise of options by employee in these 7 countries?**

Yes, prior approval of government shall be obtained.

17. **Please clarify if FPIs from countries sharing border with India can invest in India through SEs under Schedule II less than 10 percent without Govt. approval?**

Yes, Since Rule 6(a) doesn't cover investment by FPI. It is separately governed under separate rules and schedule. Till the amendment is bought in the same we cannot extend the applicability.

18. **What would situated in 7 countries mean?**

There is no clarity on the word situated in. Maybe they are referring to entities having registered office in the aforesaid 7 countries.

General Queries

19. **So any NBFC getting investments from China would be under approval route?**

Every entity receiving investment from 7 border sharing countries shall obtain prior government approval before such investment.

20. **Subject to current amendments, for investors in these seven countries, LLP is the better and only option to enter India, as government approval is applicable to companies and not LLP?**

    Yes, the current government approval is required only on investment in companies and not in LLP.

21. **In case of listed Company, if a PROI wishes to make investment into listed entity (less than 10%) by way of private placement or rights issue, then such PROI has to be registered with SEBI as Foreign Portfolio Investor? Whether such investments be considered as FPI or FDI considering the definition mentioned in the Rules?**

    The PROI need not be a SEBI registered FPI. The PROI may subscribe, purchase or sell equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I. Also, investment of less than 10% in equity instrument of the entity shall be considered as foreign portfolio investment.

22. **Is there any way to invest in listed company other than through stock exchange and it will come under foreign portfolio investment?**

    The manner to invest is as a NRI or as a Schedule I investment. Schedule II investment is by registered FPI. Hence, it does not mean entities that are not FPI's cannot invest. Overseas entities that invest in listed Indian entities under Schedule I.

23. **Whether PROI other than FPI is allowed to invest in the debt instruments as per Schedule I of FEMA Debt regulations? If the answer is negative, then such investment shall be construed as ECB?**

    A PROI can invest only as per the list provided under Schedule I of Foreign Exchange Management (Debt Instruments) Regulations, 2019 i.e. w.r.t Purchase and sale of debt instruments by a person resident outside India. However, for construing the same as ECB we shall check the RBI Master Direction on External Commercial Borrowings.

24. **In case of an unlisted Indian company, the rights issue to person's resident outside India shall not be at a price less than the price offered to persons resident in India; Where an Indian Company is a wholly owned subsidiary of foreign entity, whether valuation is required since there are no other shareholders to offer?**

As per Rule 21(2) of FEMA NDI Rules, 2019 w.r.t pricing guidelines:
Unless otherwise prescribed in these rules, the price of equity instruments of an Indian company,-
(a) Issued by such company to a person resident outside India shall not be less than :
(ii) The valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the Securities and Exchange Board of India or a practising Cost Accountant, ***in case of an unlisted Indian Company.***

However, as per RBI User Manual for SMF-FIRMS in case of rights issue, valuation certificate is not required.

25. **What happens if the FDI route has not been followed properly, but the money had been transferred from foreign parental company to India subsidiary already?**

It will regarded as violation of the provision. It needs to be compounded without prior approval it cannot be held as valid.

26. **First FDI i.e. post subscription to MOA could be Right Issue? And that too allotment be made to third party via renunciation of shares.**

If the rights issue are offered to all the shareholder on proportionate basis than it shall be considered as rights issue.

27. **What if the FPI was below 10%, but the holding has increased due to sale in India?**

If the holding has increased beyond 10%, then the investor has the option to reduce it within 5 trading days otherwise, the same shall be categorize as FDI.