

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

CA Pradip Modi

FDI Regulations for Investment/Deposit in Non-Corporate entities

including

Partnership and LLP

Power to make rules.

46. (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for,—

- (a) the imposition of reasonable restrictions on current account transactions under section 5;
- (aa) *the instruments which are determined to be debt instruments under sub-section (7) of section 6;*
- (ab) *the permissible classes of capital account transactions in accordance with sub-section (2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;*

Power to make regulations.

47. (1) The Reserve Bank may, by notification, make regulations to carry out the provisions of this Act and the rules made thereunder.

(2) Without prejudice to the generality of the foregoing power, such regulations may provide for,—

- ⁴⁵ [(a) the permissible classes of capital account transactions involving debt instruments determined under sub-section (7) of section 6, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of such capital account transactions under section 6;]

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(3) All regulations made by the Reserve Bank before the date on which the provisions of this section are notified under section 6 and section 47 of this Act on capital account transactions, the regulation making power in respect of which now vests with the Central Government, shall continue to be valid, until amended or rescinded by the Central Government.

FOREIGN EXCHANGE MANAGEMENT (NON-DEBT INSTRUMENTS) RULES, 2019

(Abolishing FEM (TRANSFER OR ISSUE OF SECURITY BY A PERSON RESIDENT OUTSIDE INDIA) REGULATIONS, 2017 (**TISPRO**) NOTIFICATION NO.FEMA.20(R)/2017-RB/GSR 1374(E), DATED 7-11-2017

AND

FEM (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA) REGULATIONS, 2018)

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Section - 2, Foreign Exchange Management Act, 1999

Definitions.

2. In this Act, unless the context otherwise requires,—

- (e) "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6

FOREIGN EXCHANGE MANAGEMENT (NON-DEBT INSTRUMENTS) RULES, 2019

Rules

Definitions

2. In these rules, unless the context otherwise requires:—

- (a) "Act" means the Foreign Exchange Management Act, 1999 (42 of 1999);
- (b) "asset reconstruction company" means a company registered with the Reserve Bank under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (c) "authorised bank" shall have the meaning assigned to it in the Foreign Exchange Management (Deposit) Regulations, 2016;
- (d) "authorised dealer" includes a person authorised under sub-section (1) of section 10 of the Act;
- (e) 'convertible note' means an instrument issued by a startup company acknowledging receipt of money initially as debt, repayable at the option of the holder, or which is convertible into such number of equity shares of that company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per other terms and conditions agreed and indicated in the instrument;
- (f) "debt instruments" means all instruments other than non-debt instruments defined in clause (ai) of this rule;

- (g) "depository receipt" means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible securities issued or transferred to that foreign depository and deposited with a domestic custodian and includes 'global depository receipt' as defined in the Companies Act, 2013 (18 of 2013);
- (h) "domestic custodian" means a custodian of securities registered with the Securities and Exchange Board of India in accordance with the SEBI (Custodian of Securities) Regulations, 1996;
- (i) "domestic depository" means a custodian of securities registered with the Securities and Exchange Board of India and authorised by the issuing entity to issue Indian depository receipts;
- (j) "ESOP" means 'Employees' stock option' as defined under the Companies Act, 2013 and issued under the regulations by the Securities and Exchange Board of India;
- (k) "equity instruments" means equity shares, convertible debentures, preference shares and share warrants issued by an Indian company;

Explanation:—

- (i) Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid. "Convertible debentures" means fully, compulsorily and mandatorily convertible debentures. "Preference shares" means fully, compulsorily and mandatorily convertible preference shares. Share Warrants are those issued by an Indian company in accordance with the regulations by the Securities and Exchange Board of India. Equity instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.
- (ii) Partly paid shares that have been issued to a person resident outside India shall be fully called-up within twelve months of such issue or as may be specified by the Reserve Bank from time to time. Twenty- five per cent of the total consideration amount (including share premium, if any) shall be received upfront.
- (iii) In case of share warrants, at least twenty-five per cent of the consideration shall be received upfront and the balance amount within eighteen months of the issuance of share warrants.
- (l) "escrow account" means an escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;
- (m) "FDI linked performance conditions" means the sector specific conditions specified in Schedule I of these rules for companies receiving foreign investment;
- (n) "FVCI" means a Foreign Venture Capital Investor incorporated and established outside India and registered with the Securities and Exchange

Board of India under the Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000;

- (o) "foreign central bank" means an institution or organisation or body corporate established in a country outside India and entrusted with the responsibility of carrying out central bank functions under the law for the time being in force in that country;
- (p) "FCNR (B) account" means a Foreign Currency Non-Resident (Bank) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;
- (q) "FCCB" or "Foreign Currency Convertible Bond" means a bond issued under the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993;
- (r) "FDI" or "Foreign Direct Investment" means investment through **equity instruments** by a person resident outside India in an unlisted Indian company; or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company;

Note:— In case an existing investment by a person resident outside India in equity instruments of a listed Indian company falls to a level below ten percent, of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI;

Explanation: — Fully diluted basis means the total number of shares that would be outstanding if all possible sources of conversion are exercised;

- (s) "**foreign investment**" means **any investment** made by a person resident outside India on a **repatriable basis** in equity instruments of an Indian company or **to the capital of a LLP**;

Explanation: — If a declaration is made by a person as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment;

Note:- A person resident outside India may hold foreign investment either as FDI or as FPI in any particular Indian company;

- (t) "**foreign portfolio investment**" means any investment made by a person resident outside India through equity instruments where such investment is less than ten percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than ten percent of the paid-up value of each series of equity instrument of a listed Indian company;
- (u) "**FPI**" or "Foreign Portfolio Investor" means a person registered in accordance with the provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014;
- (v) "government approval" means the approval from the erstwhile Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion,

Government of India and/ or the erstwhile Foreign Investment Promotion Board (FIPB) and/ or any of the ministry/ department of the Government of India, as the case may be;

- (w) "group company" means two or more enterprises which, directly or indirectly, are in a position to (i) exercise twenty-six per cent, or more of voting rights in other enterprise; or (ii) appoint more than fifty per cent of members of Board of Directors in the other enterprise;
- (x) "hybrid securities" means hybrid instruments such as optionally or partially convertible preference shares or debentures and other such instruments as specified by the Central Government from time to time, which can be issued by an Indian company or trust to a person resident outside India;
- (y) "Indian company" means a company incorporated in India;
- (z) "IDR" or "Indian Depository Receipts (IDRs)" means any instrument in the form of a depository receipt created by a domestic depository in India and authorised by a company incorporated outside India making an issue of such depository receipts;
 - (aa) "Indian entity" shall mean an Indian company or a LLP ;
 - (ab) "investing company" means an Indian company holding only investments in other Indian company/ies directly or indirectly, other than for trading of such holdings or securities;
 - (ac) "investment" means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;

Explanation:—

- (i) Investment shall include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in India;
- (ii) for the purpose of LLP, investment shall mean capital contribution or acquisition or transfer of profit shares;
 - (ad) "investment on repatriation basis" means an investment, sale or maturity proceeds of which are net of taxes, eligible to be repatriated out of India, and the expression "investment on non-repatriation basis", shall be construed accordingly;
 - (ae) "investment vehicle" means an entity registered and regulated under the regulations framed by the Securities and Exchange Board of India or any other authority designated for that purpose and shall include, namely:—
 - (i) Real Estate Investment Trusts (REITs) governed by the Securities and Exchange Board of India (REITs) Regulations, 2014;
 - (ii) Infrastructure Investment Trusts (InvIts) governed by the Securities and Exchange Board of India (InvIts) Regulations, 2014

(iii) Alternative Investment Funds (AIFs) governed by the Securities and Exchange Board of India (AIFs) Regulations, 2012 ;

¹ [***]

(af) "LLP" means a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008 (6 of 2009);

(ag) "listed Indian company" means an Indian company which has any of its equity instruments or debt instruments listed on a recognised stock exchange in India and the expression "unlisted Indian company" shall be construed accordingly;

(ah) "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing, :—

(i) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(ii) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure;

(ai) "non-debt instruments" means the following instruments; namely :—

(i) all investments in equity instruments in incorporated entities: public, private, listed and unlisted;

(ii) capital participation in LLP;

(iii) all instruments of investment recognised in the FDI policy notified from time to time;

(iv) investment in units of Alternative Investment Funds (AIFs), Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InvIts);

(v) investment in units of mutual funds or Exchange-Traded Fund (ETFs) which invest more than fifty per cent in equity;

(vi) junior-most layer (i.e. equity tranche) of securitisation structure;

(vii) acquisition, sale or dealing directly in immovable property;

(viii) contribution to trusts; and

(ix) depository receipts issued against equity instruments;

(aj) "NRI" or "Non-Resident Indian" means an individual resident outside India who is a citizen of India;

(ak) "OCI" or "Overseas Citizen of India" means an individual resident outside India who is registered as an Overseas Citizen of India

Cardholder under section 7A of the Citizenship Act, 1955 (57 of 1955);

- (al) "resident Indian citizen" means an individual who is a person resident in India and is a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 ;
- (am) "sectoral cap" means the maximum investment including both foreign investment on a repatriation basis by persons resident outside India in equity²[***] instruments of a company or the capital of a LLP, as the case may be, and indirect foreign investment, unless provided otherwise. This shall be the composite limit for the Indian investee entity.

Explanation:

- (i) FCCBs and DRs having underlying of instruments being in the nature of debt shall not be included in the sectoral cap;
 - (ii) any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned under the sectoral cap;
 - (an) "startup company" means a private company incorporated under the Companies Act, 2013 and identified under G.S.R. 180(E), dated the 17th February, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry;
 - (ao) "sweat equity shares" means sweat equity shares defined under the Companies Act, 2013;
 - (ap) "transferable development rights (TDR)" shall have the meaning assigned to it in the regulations made under sub-section (2) of section 6 of the Act;
 - (aq) "unit" means a beneficial interest of an investor in an investment vehicle;
 - (ar) "venture capital fund" means a fund established in the form of a trust, a company including a body corporate and registered under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012.
- (2) The words and expressions used but not defined in these rules shall have the same meanings respectively assigned to them in the Act, rules and regulations.

SCHEDULE-I

Purchase or sale of equity instruments of an Indian company by a person resident outside
India

SCHEDULE-II

Investments by Foreign Portfolio Investors

SCHEDULE-III

Investments by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on

SCHEDULE-IV

Investment by NRI or OCI on non-repatriation basis

SCHEDULE-V

Investment by other non-resident investors

SCHEDULE-VI

Investment in a Limited Liability Partnership (LLP)

CHAPTER V

INVESTMENT BY NON-RESIDENT INDIAN OR AN OVERSEAS CITIZEN OF INDIA

Investment by NRI or OCI

12. A NRI or an OCI may make investments as under:- (1) A NRI or an OCI may, on repatriation basis, purchase or sell equity instruments of a listed Indian company and other securities in the manner and subject to the terms and conditions prescribed in Schedule III.

(2) A NRI or an OCI may, on non-repatriation basis, purchase or sell equity instruments of an Indian company or other securities or contribute to the capital of a LLP or a firm or proprietary concern, in the manner and subject to the terms and conditions specified in **Schedule IV**.

Note: A NRI or an OCI may trade or invest in all exchange traded derivative contracts approved by the Securities and Exchange Board of India from time to time subject to the limits specified by Securities and Exchange Board of India and conditions prescribed in Schedule III.

(3) A NRI or an OCI may purchase, hold, or sell Indian Depository Receipts (IDRs) of companies resident outside India and issued in the Indian capital market, in the manner and subject to the terms and conditions specified in Schedule X.

SCHEDULE IV

(See rule 12(2))

Investment by NRI or OCI on non-repatriation basis

A. Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on Non-repatriation basis.

(1) Purchase or sale of equity instruments or convertible notes or units or contribution to the capital of a LLP.

- (a) A Non-resident Indian (NRI) or an Overseas Citizen of India (OCI), including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, may purchase or contribute, as the case may be, on non-repatriation basis the following, namely:—
- (i) a equity instrument issued by a company without any limit either on the stock exchange or outside it;
 - (ii) units issued by an investment vehicle without any limit, either on the stock exchange or outside it;
 - (iii) The capital of a Limited Liability Partnership without any limit;
 - (iv) convertible notes issued by a startup company in accordance with these rules.
- (b) The investment detailed at sub-paragraph (a) of paragraph (1) above shall be deemed to be domestic investment at par with the investment made by residents.

(2) Purchase or sale of units of domestic mutual funds

A Non-resident Indian (NRI) or an Overseas Citizen of India (OCI) may without limit purchase or sell units of domestic mutual funds on non-repatriation basis which invest more than 50% in equity.

(3) Prohibition on purchase of equity instruments of certain companies.

Notwithstanding anything contained in paragraph 1, a NRI or an OCI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, **shall not make any investment, under this Schedule**, in equity instruments or units of a Nidhi company or a company engaged in agricultural or plantation activities or real estate business or construction of farm houses or dealing in transfer of development rights.

Explanation: Real estate business shall have the same meaning as specified in sub-paragraph (b) of paragraph (3) of Schedule 1.

(4) The mode of payment and attendant conditions for remittance of sale or maturity proceeds shall be specified by the Reserve Bank.

B. Investment in a firm or a proprietary concern.

(1) Contribution to capital of a firm or a proprietary concern.

A NRI or an OCI may invest on a non-repatriation basis, by way of contribution to the capital of a firm or a proprietary concern in India provided such firm or proprietary **concern is not engaged in any agricultural or**

**plantation activity or
print media or
real estate business.**

Explanation: Real estate business shall have the same meaning as specified in sub paragraph (b) of paragraph (3) of Schedule I.

Real estate business' means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships;

Explanation: —

(a) Investment in units of Real Estate Investment Trusts (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) regulations 2014 shall also be excluded from the definition of "real estate business".

(b) Earning of rent income on lease of the property, not amounting to transfer, shall not amount to real estate business.

(c) Transfer in relation to real estate includes,

<i>(i)</i>	<i>the sale, exchange or relinquishment of the asset; or</i>
<i>(ii)</i>	<i>the extinguishment of any rights therein; or</i>
<i>(iii)</i>	<i>the compulsory acquisition thereof under any law; or</i>
<i>(iv)</i>	<i>any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or</i>

(v)	<i>any transaction, by acquiring capital instruments in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.</i>
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"(7) Real estate broking services shall be excluded from the definition of "real estate business" and 100% foreign investment is allowed in real estate broking services under automatic route.

(2) The mode of payment and attendant conditions for remittance of sale or maturity proceeds shall be specified by the Reserve Bank.

Sectors prohibited for FDI.

- (a) Lottery business including Government or private lottery, online lotteries, etc.
- (b) Gambling and betting including casinos, etc.
- (c) Chit funds
- (d) Nidhi company
- (e) Trading in Transferable Development Rights
- (f) Real estate business or construction of farm houses Explanation: For the purpose of this rule, 'real estate business shall not include development of townships, construction of residential or commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.
- (g) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.
- (h) Activities or sectors not open to private sector investment e.g.
- (I) Atomic energy and (II) Railway operations (other than permitted activities mentioned in paragraph (3) of Schedule I) (i) Foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Reg

**Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
(Amended upto June 15, 2020)**

<p>Schedule IV (Investment by NRI or OCI on non-repatriation basis)</p>	<p>1. Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on Non-repatriation basis.</p> <p>A. Mode of Payment</p> <p>The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.</p>
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	<p>B. Sale/ maturity proceeds</p> <p>(1) The sale/ maturity proceeds (net of applicable taxes) of equity instruments or units or disinvestment proceeds of a LLP shall be credited only to the NRO account of the investor, irrespective of the type of account from which the consideration was paid;</p> <p>(2) The amount invested in equity instruments of an Indian company or the consideration for contribution to the capital of a LLP and the capital appreciation thereon shall not be allowed to be repatriated abroad.</p> <p>2. Investment in a firm or a proprietary concern.</p> <p>A. Mode of payment</p> <p>The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.</p> <p>B. Sale/ maturity proceeds</p> <p>(1) The disinvestment proceeds shall be credited only to the NRO account of the person concerned, irrespective of the type of account from which the consideration was paid;</p> <p>(2) The amount invested for contribution to the capital of a firm or a proprietary concern and the capital appreciation thereon shall not be allowed to be repatriated abroad.</p>
<p>Schedule VI</p> <p>(Investment in a Limited Liability Partnership)</p>	<p>A. Mode of payment</p> <p>Payment by an investor towards capital contribution of an LLP shall be made by way of an inward remittance through banking channels or out of funds held in NRE or FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.</p> <p>B. Remittance of disinvestment proceeds</p> <p>The disinvestment proceeds may be remitted outside India or may be credited to NRE or FCNR(B) account of the person concerned.</p>

FEM (DEPOSIT) REGULATIONS, 2016

Regulation - 6, FEM (Deposit) Regulations, 2016

SCHEDULE 7

[See Regulation 6(2)]

Acceptance of deposits by Indian proprietorship concern/firm or company (including non-banking finance company registered with Reserve Bank) on non-repatriation basis from Non-resident Indian (NRI) or a Person of Indian Origin (PIO)

A proprietorship concern or a firm in India and a company incorporated in India (including a non-banking finance company registered with Reserve Bank) may accept deposits on non-repatriation basis from NRIs or PIOs subject to the following conditions:

- (i) In the case of a company, the deposits may be accepted either under private arrangement or under a public deposit scheme.
- (ii) If the deposit accepting company is a non-banking finance company, it should be registered with the Reserve Bank and should have obtained the required credit rating as stipulated under the guidelines issued by Reserve Bank for such companies.
- (iii) The maturity period of deposit shall not exceed 3 years.
- (iv) If the deposit accepting company is a non-banking finance company the rate of interest payable on deposits shall be in conformity with the guidelines/ directions issued by Reserve Bank for such companies. In other cases the rate of interest payable on deposits shall not exceed the ceiling rate prescribed from time to time under the Companies (Acceptance of Deposit) Rules, 2014.
- (v) The amount of deposit shall be received by debit to NRO account only, provided that the amount of the deposit shall not represent inward remittances or transfer of funds from NRE/ FCNR (B) accounts into the NRO account.
- (vi) The proprietorship concern/ firm/ company accepting the deposit should comply with the provisions of any other law, rules, regulations or orders made by Government or any other competent authority, as are applicable to it in regard to acceptance of deposits.
- (vii) The proprietorship concern, firm or company accepting the deposit shall not utilise the amount of deposits for relending (not applicable to a Non-Banking Finance Company) or for undertaking agricultural/ plantation activities or real estate business or for investing in any other concern or firm or company engaged in or proposing to engage in agricultural/ plantation activities or real estate business.
- (viii) The amount of deposits accepted shall not be allowed to be repatriated outside India.