Key Changes – Consolidated FDI Policy

August 2017

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Introduction

The Government has released the Consolidated FDI Policy which is effective from 28th August 2017. This consolidated policy subsumes and supersedes all press notes / releases / clarifications / circulars issued by Department of Industrial Policy & Promotion (DIPP). The consolidated policy lays down the general conditions on FDI, procedures for government approval and sector specific conditions on FDI. Larger emphasis has been given to Start-ups and Foreign Venture Capital Investments.

Key Changes

- The erstwhile FDI Policy was silent regarding conversion of an FDI funded Limited Liability Partnership (LLP) into a company and vice versa. The New FDI Policy allows conversion of an FDI funded LLP with certain conditions. Further FDI in LLP is subject to the compliance of the conditions of LLP Act, 2008.
- The erstwhile FDI Policy required notification to Secretariat of Industrial Assistance (SIA), DIPP and Foreign Investment Policy Board (FIPB) of the indirect foreign investment by an eligible Indian entity, into another Indian company/LLP. The New FDI Policy requires such intimation to be made to the Reserve Bank of India (RBI) and the Foreign Investment Facilitation Portal.
- The erstwhile FDI Policy allowed a wholesale / cash & carry trader to undertake single brand retail trading, subject to the conditions. The New FDI Policy, by doing away with the reference of 'single brand', allows wholesale/cash & carry traders to undertake retail trading by way of both single brand retail trading as well as multi brand retail trading, through the same entity, subject to prescribed conditions.
- In respect of single brand retail trading having 'state-of-art' and 'cutting-edge' technology, relaxation has been provided for local sourcing for a period of 3 years from the commencement of business. After the 3rd year, the new FDI Policy stipulates that, in respect of proposals involving foreign investment beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company and subsequently certified by statutory auditors. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year of the commencement of the business i.e. opening of the first store. Thereafter, it would have to be met on an annual basis.
- New FDI Policy further provides that a committee under the chairmanship of Secretary, DIPP, with representatives from NITI Aayog, concerned administrative ministry and independent technical experts on the subject will examine the claim of applicants on the issue of the products being in the nature of 'state-of-art' and 'cutting-edge' technology where local sourcing is not possible and give recommendations for relaxation.

- The erstwhile FDI Policy, the Indian manufacturers having FDI had to manufacture at least 70% of its products in-house. Under the new policy, this requirement has been done away with. However, the local sourcing norms shall continue to apply.
- E-Commerce entities were prohibited from affecting more than 25% of sales through its market place from one vendor or its group companies. The new FDI Policy clarifies that the 25% sale value shall be computed per financial year.
- Under the erstwhile FDI Policy, additional FDI into the same entity within the approved foreign equity percentage/or into a wholly owned subsidiary did not require fresh approval. The New FDI Policy has capped the additional FDI to a cumulative amount of INR 5,000 Crores, beyond which, fresh approval will be required to be sought.
- Presently, FDI is permitted in LLPs operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance conditions. While the Erstwhile FDI Policy was silent on what constituted FDI linked performance conditions, the New FDI Policy has defined FDI linked performance conditions as sector specific conditions for companies receiving foreign investment.

Further changes which have been introduced through standard operating procedures, press notes and amendments to existing regulations are as follows:

- Abolishment of Foreign Investment Promotion Board (FIPB).
- Amendment of FEMA Regulations allowing start-ups to issue convertible notes to foreign investors. Earlier, FDI in start-ups could only be made by foreign venture capital investors by subscribing to equity or equity linked instruments or debt instruments.
- Amendment of FEMA Regulations to restrict ownership and control of an Indian pension fund at all times to resident Indian entities. This is a significant change, as erstwhile policy permitted foreign ownership and control with prior Government approval.
- New policy allows 100% FDI under the automatic route to financial services activities (NBFC's), so long as they are regulated by financial sector regulators, like RBI, SEBI, etc and requirement of minimum capitalisation norms has been eliminated. Earlier norms permitted FDI under automatic route for 18 specific activities, subject to the minimum capitalisation norms. However, financial services which are not regulated, FDI upto 100% is allowed with prior government approval and subject to minimum capitalisation norms.
- New policy permits deferment of purchase consideration up to 25% of the total consideration, in transactions involving share transfers between residents and non-residents, within a period of 18 months from the date of transfer agreement. Alternatively, the buyer and seller may enter into an escrow arrangement for an amount not more than 25% of the total consideration for a period not exceeding 18 months from the date of the transfer agreement.

- There has been liberalisation in FDI Policy in key sectors like Defence, Pharmaceuticals, Broadcasting Carriage Services & Cable Networks and Manufacturing Sector involving retail trading, including e-commerce for food products manufactured or produced in India.
- The current Policy has also eased the rules regarding remittance against issue of shares for pre-incorporation expenses
- The New policy has done away with the requirement of seeking prior approval of the RBI for establishment of Offices in India, if the principal business of the entity establishing the Office is defence, telecom, private security or information and broadcasting, in cases where government approval or license/permission by the concerned ministry/regulator has already been granted.

Conclusion

The intent of these amendments is to facilitate "the ease of doing business" agenda of the Government. Increased investor friendly attitude is a positive step towards increase in foreign direct investments. Though the current consolidated policy sums up all the circulars and press notes, ambiguities continue to exist. Clarifications are expected and all issues will be gradually resolved.

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