

India

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (2017)

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The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

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Schedule 1

RESERVE BANK OF INDIA, (FOREIGN EXCHANGE DEPARTMENT), CENTRAL OFFICE
Mumbai 400 001

Notification No. FEMA 20(R)/2017-RB

November 7, 2017 (Amended up to March 08, 2019) (Amended up to September 24, 2018)

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017

In exercise of the powers conferred by clause (b) of sub-section (3) of section 6 and section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of Notification No. FEMA 20/2000-RB and Notification No. FEMA 24/2000-RB both dated May 3, 2000, as amended from time to time, the Reserve Bank makes the following regulations to regulate investment in India by a Person Resident Outside India, namely:-

1. Short title and commencement

- (1) These Regulations may be called the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.
- (2) They shall come into effect from the date of their publication in the Official Gazette except proviso (ii) to sub-regulation 1 of regulation 10 of these Regulations and proviso (ii) to sub-regulation 2 of regulation 10 of these Regulations which will come into effect from 1 June 2, 2018.

2. Definitions

In these Regulations, unless the context requires otherwise,-

- (i) 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999);
- (ii) 'Asset Reconstruction Company' (ARC) 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 (SARFAESI Act);
- (iii) 'Authorised bank' will have the same meaning as assigned to it in Foreign Exchange Management (Deposit) Regulations, 2016;
- (iv) 'Authorised dealer' includes a person authorised under sub-section (1) of section 10 of the Act;
- (v) 'Capital Instruments' means equity shares, debentures, preference shares and share warrants issued by an Indian company;

Explanation:

a. Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid. The expression '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 issued by the Securities and Exchange Board of India. Capital 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.

b. Partly paid shares that have been issued to a person resident outside India shall be fully called-up within twelve months of such issue. Twenty five percent of the total consideration amount (including share premium, if any), shall be received upfront.

c. In case of share warrants at least twenty five percent of the consideration shall be received upfront and the balance amount within eighteen months of issuance of share warrants.

d. Capital instruments shall include non-convertible/ optionally convertible/ partially convertible preference shares issued as on and up to April 30, 2007 and optionally convertible/ partially convertible debentures issued up to June 7, 2007 till their original maturity. Non-convertible/ optionally convertible/ partially convertible preference shares issued after April 30, 2007 shall be treated as debt and shall conform to External Commercial Borrowings guidelines regulated under Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000.

(vi) 'Convertible Note' means an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument;

(vii) 'Domestic Custodian' means a custodian of securities, an Indian Depository, a Depository Participant, or a bank and having permission from Securities and Exchange Board of India to provide services as custodian;

(viii) '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;

(ix) '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;

(x) 'Employees' stock option' (ESOP) means an ESOP as defined under the Companies Act, 2013 and issued under the regulations issued by the Securities and Exchange Board of India;

(xi) 'Escrow account' means an Escrow account maintained in accordance with Foreign Exchange Management (Deposit) Regulations, 2016;

(xii) 'FDI linked performance conditions' means the sector specific conditions stipulated in regulation 16 of these Regulations for companies receiving foreign investment;

(xiii) 'Foreign Venture Capital Investor' (FVCI) means an investor incorporated and established outside India and registered with Securities and Exchange Board of India under Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations, 2000;

(xiv) 'Foreign Central Bank' means an institution/ organisation/ 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;

(xv) 'FCNR (B) account' means a Foreign Currency Non-Resident (Bank) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;

(xvi) 'Foreign Currency Convertible Bond (FCCB)' means a bond issued under the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993;

(xvii) 'Foreign Direct Investment' (FDI) means investment through capital instruments by a person resident outside India in an unlisted Indian company; or in 10 percent 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 capital instruments of a listed Indian company falls to a level below 10 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

(xviii) 'Foreign Investment' means any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP;

Explanation: If a declaration is made by persons 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 Foreign Direct Investment or as Foreign Portfolio Investment in any particular Indian company.

(xix) 'Foreign Portfolio Investment' means any investment made by a person resident outside India through capital instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company;

Explanation: The 10 percent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group as referred in Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.

(xx) 'Foreign Portfolio Investor (FPI)' means a person registered in accordance with the provisions of Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014.

Explanation: Any Foreign Institutional Investor (FII) or a sub account registered under the Securities Exchange Board of India (Foreign Institutional Investors) Regulations, 1995 and holding a valid certificate of registration from Securities and Exchange Board of India shall be deemed to be a FPI till the expiry of the block of three years from the enactment of the Securities Exchange Board of India (FPI) Regulations, 2014.

(xxi) 'Government approval' means 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;

(xxii) 'Group company' means two or more enterprises which, directly or indirectly, are in a position to (a) exercise 26 percent, or more of voting rights in other enterprise; or (b) appoint more than 50 percent, of members of board of directors in the other enterprise;

(xxiii) 'Indian company' means a company incorporated in India and registered under the Companies Act, 2013;

(xxiv) '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;

(xxv) 'Indian entity' shall mean an Indian company or an LLP;

(xxvi) 'Investing company' means an Indian company holding only investments in other Indian company/ies directly or indirectly, other than for trading of such holdings/ securities;

(xxvii) 'Investment' means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;

Explanation:

(a) This will 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.

(b) For the purpose of LLP, investment shall mean capital contribution or acquisition/ transfer of profit shares.

(xxviii) 'Investment on repatriation basis' means an investment, the sale/ maturity proceeds of which are, net of taxes, eligible to be repatriated out of India, and the expression 'Investment on nonrepatriation basis', shall be construed accordingly;

(xxix) 'Investment Vehicle' means an entity registered and regulated under relevant regulations framed by Securities and Exchange Board of India or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the Securities and Exchange Board of India (REITs) Regulations, 2014, Infrastructure Investment Trusts (Invlts) governed by the Securities and Exchange Board of India (Invlts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the Securities and Exchange Board of India (AIFs) Regulations, 2012;

(xxx) 'Limited Liability Partnership (LLP)' means a partnership formed and registered under the Limited Liability Partnership Act, 2008;

(xxxi) 'Listed Indian Company' means an Indian company which has any of its capital instruments listed on a recognized stock exchange in India and the expression 'Unlisted Indian Company' shall be construed accordingly;

(xxxii) 'Manufacture', with its grammatical variations, means a change in a non-living physical object or article or thing, (a) 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 (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

(xxxiii) 'NRE account' means a Non-Resident External account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;

(xxxiv) 'NRO account' means a Non-Resident Ordinary account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;

(xxxv) 'Non-Resident Indian (NRI)' means an individual resident outside India who is citizen of India;

(xxxvi) 'Overseas Citizen of India (OCI)' means an individual resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955;

(xxxvii) 'Resident Indian citizen' means an individual who is a person resident in India and is citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955;

(xxxviii) 'Secretariat for Industrial Assistance' means Secretariat for Industrial Assistance in the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India;

(xxxix) 'Sectoral cap' means the maximum investment including both foreign investment on a repatriation basis by persons resident outside India in capital instruments of a company or the capital of an 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:

(a) FCCBs and DRs having underlying of instruments being in the nature of debt shall not be included in the sectoral cap.

(b) 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.

(xl) 'SNRR account' means a Special Non-Resident Rupee account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016;

(xli) 'Startup' means an entity which complies with the conditions laid down in Notification No. G.S.R 180(E) dated February 17, 2016 issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India;

(xlii) 'Startup company' means a private company incorporated under the Companies Act, 2013 and recognised as such in accordance with notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India and complies with the conditions laid down by it;

(xliii) 'Sweat equity shares' means sweat equity shares as defined under the Companies Act, 2013;

(xlv) 'Transferable Development Rights (TDR)' shall have the same meaning as assigned to it in the Regulations made under sub-section (2) of section 6 of the Act;

(xlv) 'Unit' means beneficial interest of an investor in an investment vehicle.

(xlvi) '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 (Venture Capital Fund) Regulations, 1996;

(xlvii) The words and expressions used but not defined in these Regulations shall have the same meanings respectively assigned to them in the Act.

3. Restriction on investment by a person resident outside India

Save as otherwise provided in the Act, or rules or regulations made thereunder, no person resident outside India shall make any investment in India.

Provided that an investment made in accordance with the Act or the rules or the regulations framed thereunder and held on the date of commencement of these Regulations, shall be deemed to have been made under these Regulations and shall accordingly be governed by these Regulations.

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

4. Restriction on receiving investment

Save as otherwise provided in the Act, or rules or regulations made thereunder, an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern shall not receive any investment in India from a person resident outside India or record such investment in its books.

Provided that the Reserve Bank may, on an application made to it and for sufficient reasons, permit an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary.

5. Permission for making investment by a person resident outside India

Unless otherwise specified in these Regulations or the relevant Schedules, any investment made by a person resident outside India shall be subject to the entry routes, sectoral caps or the investment limits, as the case may be, and the attendant conditionalities for such investment as laid down in these Regulations. A person resident outside India may make investment as under:

(1) A person resident outside India may subscribe, purchase or sell capital instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule 1.

Provided that a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan cannot purchase capital instruments without the prior Government approval.

Provided further, a person who is a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/ activities other than defence, space, atomic energy and sectors/ activities prohibited for foreign investment.

Note: Issue/ transfer of 'participating interest/ right' in oil fields by Indian companies to a person resident outside India would be treated as foreign investment and shall comply with the conditions laid down in Schedule 1.

(2) A Foreign Portfolio Investor (FPI) may purchase or sell capital instruments of a listed Indian company on a recognised stock exchange in India in the manner and subject to the terms and conditions specified in Schedule 2.

(3) A Non- Resident Indian or an Overseas Citizen of India may on repatriation basis purchase or sell capital instruments of a listed Indian company on a recognised stock exchange in India, in the manner and subject to the terms and conditions specified in Schedule 3.

(4) A Non- Resident Indian or an Overseas Citizen of India may, on non-repatriation basis, purchase or sell capital instruments of an Indian company or purchase or sell units 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 4.

(5) A person resident outside India, permitted for the purpose by the Reserve Bank in consultation with Central Government, may purchase or sell securities other than capital instruments in the manner and subject to the terms and conditions specified in Schedule 5.

Note: A Foreign Portfolio Investor or a Non-Resident Indian (NRI) or an Overseas Citizen of India (OCI) may trade or invest in all exchange traded derivative contracts approved by Securities and Exchange Board of India from time to time subject to the limits prescribed by Securities and Exchange Board of India and conditions specified in Schedule 5

(6) A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, may invest, either by way of capital contribution or by way of acquisition/ transfer of profit shares of an LLP, in the manner and subject to the terms and conditions as specified in Schedule 6.

(7) A Foreign Venture Capital Investor may make investment in the manner and subject to the terms and conditions specified in Schedule 7.

(8) A person resident outside India, other than a citizen of Bangladesh or Pakistan or an entity incorporated in Bangladesh or Pakistan, may invest in units of an Investment Vehicle, in the manner and subject to the terms and conditions specified in Schedule 8.

(9) A person resident outside India may invest in the Depository Receipts (DRs) issued by foreign depositories against eligible securities in the manner and subject to the terms and conditions as specified in Schedule 9.

(10) A Foreign Portfolio Investor or Non- Resident Indian or an Overseas Citizen of India 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 10.

6. Acquisition through a rights issue or a bonus issue

A person resident outside India and having investment in an Indian company may make investment in capital instruments (other than share warrants) issued by such company as a rights issue or a bonus issue provided that:

1. The offer made by the Indian company is in compliance with the provisions of the Companies Act, 2013;
2. Such issue shall not result in a breach of the sectoral cap applicable to the company;
3. The shareholding on the basis of which the rights issue or the bonus issue has been made must have been acquired and held as per the provisions of these Regulations;
4. In case of a listed Indian company, the rights issue to persons resident outside India shall be at a price determined by the company;
5. In case of an unlisted Indian company, the rights issue to persons resident outside India shall not be at a price less than the price offered to persons resident in India.
6. Such investment made through rights issue or bonus issue shall be subject to the conditions as are applicable at the time of such issue.
7. The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Note: Where the original investment has been made on a non-repatriation basis, the amount of consideration may also be paid by debit to the NRO account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016

Provided an individual who is a person resident outside India exercising a right which was issued when he/ she was a person resident in India shall hold the capital instruments (other than share warrants) so acquired on exercising the option on a non-repatriation basis.

Explanation: The above conditions shall also be applicable in case a person resident outside India makes investment in capital instruments (other than share warrants) issued by an Indian company as a rights issue that are renounced by the person to whom it was offered.

7. Issue of shares under Employees Stock Options Scheme to persons resident outside India

An Indian company may issue “employees’ stock option” and/ or “sweat equity shares” to its employees/ directors or employees/ directors of its holding company or joint venture or wholly owned overseas subsidiary/ subsidiaries who are resident outside India, provided that:

1. The scheme has been drawn either in terms of regulations issued under the Securities and Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be;
2. The “employee’s stock option”/ “sweat equity shares” so issued under the applicable rules/ regulations are in compliance with the sectoral cap applicable to the said company;

3. Issue of “employee’s stock option”/ “sweat equity shares” in a company where investment by a person resident outside India is under the approval route shall require prior Government approval. Issue of “employee’s stock option”/ “sweat equity shares” to a citizen of Bangladesh/ Pakistan shall require prior Government approval.

Provided an individual who is a person resident outside India exercising an option which was issued when he/ she was a person resident in India shall hold the shares so acquired on exercising the option on a non-repatriation basis.

8. Issue of Convertible Notes by an Indian startup company

1. A person resident outside India (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/ incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of twenty five lakh rupees or more in a single tranche.

2. A startup company, engaged in a sector where investment by a person resident outside India requires Government approval, may issue convertible notes to a person resident outside India only with such approval. Further, issue of equity shares against such convertible notes shall be in compliance with the entry route, sectoral caps, pricing guidelines and other attendant conditions for foreign investment.

3. A startup company issuing convertible notes to a person resident outside India shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE/ FCNR (B)/ Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016. Repayment or sale proceeds may be remitted outside India or credited to NRE/ FCNR (B) account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

4. A NRI or an OCI may acquire convertible notes on non-repatriation basis in accordance with Schedule 4 of these Regulations.

5. A person resident outside India may acquire or transfer by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with the entry routes and pricing guidelines as prescribed for capital instruments.

9. Merger or demerger or amalgamation of Indian companies

(1) Where a Scheme of merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger or otherwise of an Indian company, has been approved by National Company Law Tribunal (NCLT)/ Competent Authority, the transferee company or the new company, as the case may be, may issue capital instruments to the existing holders of the transferor company resident outside India, subject to the following conditions, namely:

(a) The transfer or issue is in compliance with the entry routes, sectoral caps or investment limits, as the case may be, and the attendant conditionalities of investment by a person resident outside India;

Provided that where the percentage is likely to breach the Sectoral caps or the attendant conditionalities, the transferor company or the transferee or new company may obtain necessary approvals from the Central Government.

(b) The transferor company or the transferee company or the new company shall not engage in any sector prohibited for investment by a person resident outside India; and

(2) Where a Scheme of Arrangement for an Indian company has been approved by National Company Law Tribunal (NCLT)/ Competent Authority, the Indian company may issue non-convertible redeemable preference shares or non-convertible redeemable debentures out of its general reserves by way of distribution as bonus to the shareholders resident outside India, subject to the following conditions, namely:

a. the original investment made in the Indian company by a person resident outside India is in accordance with these Regulations and the conditions specified in the relevant Schedule;

b. the said issue is in accordance with the provisions of the Companies Act, 2013 and the terms and conditions, if any, stipulated in the scheme approved by National Company Law Tribunal (NCLT)/ Competent Authority have been complied with;

c. the Indian company shall not engage in any activity/ sector in which investment by a person resident outside India is prohibited.

10. Transfer of capital instruments of an Indian company by or to a person resident outside India

A person resident outside India holding capital instruments of an Indian company or units in accordance with these Regulations or a person resident in India, may transfer such capital instruments or units so held by him in compliance with the conditions, if any, specified in the respective Schedules of these Regulations and subject to the terms and conditions specified hereunder;

(1) A person resident outside India, not being a non-resident Indian or an overseas citizen of India or an erstwhile overseas corporate body may transfer by way of sale or gift the capital instruments of an Indian company or units held by him to any person resident outside India;

Explanation: It shall also include transfer of capital instruments of an Indian company pursuant to liquidation, merger, de-merger and amalgamation of entities/ companies incorporated or registered outside India

Provided that

(i) prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval.

(ii) where the person resident outside India is an FPI and the acquisition of capital instruments made under Schedule 2 of these regulations has resulted in a breach of the applicable aggregate FPI limits or sectoral limits, the FPI shall sell such capital instruments to a person resident in India eligible to hold such instruments within the time stipulated by Reserve Bank in consultation with the Central Government. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time limit, shall not be reckoned as a contravention under these Regulations. The guidelines issued by Securities and Exchange Board of India in this regard shall be applicable.

(2) An NRI or an OCI holding capital instruments of an Indian company or units on repatriation basis may transfer the same by way of sale or gift to any person resident outside India;

Provided that

(i) prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval.

(ii) where the acquisition of capital instruments by an NRI or an OCI under the provisions of Schedule 3 of these regulations has resulted in a breach of the applicable aggregate NRI/ OCI limit or sectoral limits, the NRI or the OCI shall sell such capital instruments to a person resident in India eligible to hold such instruments within the time stipulated by Reserve Bank in consultation with the Central Government. The breach of the said aggregate or sectoral limit on account of such acquisition for the period between the acquisition and sale, provided the sale is within the prescribed time, shall not be reckoned as a contravention under these Regulations.

(3) A person resident outside India, holding capital instruments of an Indian company or units in accordance with these Regulations may transfer the same to a person resident in India by way of sale/ gift or may sell the same on a recognised stock exchange in India in the manner prescribed by Securities and Exchange Board of India;

Provided that

(i) the transfer by way of sale shall be in compliance with and subject to the adherence to pricing guidelines, documentation and reporting requirements for such transfers as may be specified by Reserve Bank from time to time;

(ii) where the capital instruments are held by the person resident outside India on a non-repatriable basis, conditions at proviso (i) above shall not apply

(4) A person resident in India holding capital instruments of an Indian company or units, or an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations, holding capital instruments of an Indian company or units on a non-repatriation basis, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps/ investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as may be specified by Reserve Bank from time to time;

Provided the entry routes, sectoral caps/ investment limits, pricing guidelines and other attendant conditions shall not apply in case the transfer is to an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations acquiring such investment on non-repatriation basis.

(5) A person resident in India holding capital instruments or units of an Indian company or an NRI or an OCI an eligible investor under Schedule 4 of these Regulations holding capital instruments or units of an Indian company on a non-repatriation basis may transfer the same to a person resident outside India by way of gift with the prior approval of the Reserve Bank, in the manner prescribed, and subject to the following conditions:

a. The donee is eligible to hold such a security under relevant schedules of these Regulations;

b. The gift does not exceed 5 percent of the paid up capital of the Indian company/ each series of debentures/ each mutual fund scheme;

Explanation: The 5 percent will be on cumulative basis by a single person to another single person

- c. The applicable sectoral cap in the Indian company is not breached;
- d. The donor and the donee shall be 'relatives' within the meaning in section 2(77) of the Companies Act, 2013;
- e. The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD50,000;
- f. Such other conditions as considered necessary in public interest by the Reserve Bank;

(6) An NRI or an OCI or an eligible investor under Schedule 4 of these Regulations holding capital instruments of an Indian company or units on a non-repatriation basis, may transfer the same by way of gift to an NRI or an OCI or an eligible investor under Schedule 4 of these Regulations who shall hold it on a non-repatriable basis;

(7) A person resident outside India holding capital instruments of an Indian company containing an optionality clause in accordance with these Regulations and exercising the option/ right, may exit without any assured return, subject to the pricing guidelines prescribed in these Regulations and a minimum lock-in period of one year or minimum lock-in period as prescribed in these Regulations, whichever is higher;

(8) An erstwhile OCB may transfer capital instruments subject to directions issued by the Reserve Bank from time to time in this regard.

Explanation: 'Overseas Corporate Body (OCB)' means an entity derecognized through Foreign Exchange Management [Withdrawal of General Permission to Overseas Corporate Bodies (OCBs)] Regulations, 2003;

(9) In case of transfer of capital instruments between a person resident in India and a person resident outside India, an amount not exceeding twenty five percent of the total consideration

- a. can be paid by the buyer on a deferred basis within a period not exceeding eighteen months from the date of the transfer agreement; or
- b. can be settled through an escrow arrangement between the buyer and the seller for a period not exceeding eighteen months from the date of the transfer agreement; or
- c. can be indemnified by the seller for a period not exceeding eighteen months from the date of the payment of the full consideration, if the total consideration has been paid by the buyer to the seller.

Provided the total consideration finally paid for the shares shall be compliant with the applicable pricing guidelines.

(10) In case of transfer of capital instruments between a person resident in India and a person resident outside India, a person resident outside India may open an Escrow account in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016. Such Escrow account may be funded by way of inward remittance through banking channels and/ or by way of guarantee issued by an authorized dealer bank, subject to terms and conditions as specified in the Foreign Exchange Management (Guarantees) Regulations, 2000.

(11) The pricing guidelines prescribed in these Regulations shall not be applicable for any transfer by way of sale done in accordance with Securities and Exchange Board of India regulations where the pricing is prescribed by Securities and Exchange Board of India.

(12) The transfer of capital instruments of an Indian company or units of an Investment Vehicle by way of pledge is subject to the following terms and conditions:

(a) Any person being a promoter of a company registered in India (borrowing company), which has raised external commercial borrowing (ECB) in compliance with the Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000 may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the external commercial borrowing (ECB) raised by the borrowing company subject to the following conditions:

- i. the period of such pledge shall be co-terminus with the maturity of the underlying external commercial borrowing;
- ii. in case of invocation of pledge, transfer shall be in accordance with these Regulations and directions issued by the Reserve Bank;
- iii. the Statutory Auditor has certified that the borrowing company will utilise/ has utilised the proceeds of the external commercial borrowing for the permitted enduse/s only;
- iv. no person shall pledge any such share unless a no-objection has been obtained from an Authorised Dealer bank that the above conditions have been complied with.

(b) Any person resident outside India holding capital instruments in an Indian company or units of an investment vehicle may pledge the capital instruments or units, as the case may be:

- i. in favour of a bank in India to secure the credit facilities being extended to such Indian company for bona fide purposes,
- ii. in favour of an overseas bank to secure the credit facilities being extended to such person or a person resident outside India who is the promoter of such Indian company or the overseas group company of such Indian company,
- iii. in favour of a Non-Banking Financial Company registered with the Reserve Bank to secure the credit facilities being extended to such Indian company for bona fide purposes,
- iv. subject to the Authorised Dealer bank satisfying itself of the compliance of the conditions stipulated by the Reserve Bank in this regard.

(c) In case of invocation of pledge, transfer of capital instruments of an Indian company or units shall be in accordance with entry routes, sectoral caps/ investment limits, pricing guidelines and other attendant conditions at the time of creation of pledge.

11. Pricing Guidelines

Unless otherwise specified in these Regulations or the relevant Schedules, the price of capital instruments of an Indian company -

(1) issued by such company to a person resident outside India shall not be less than:

- a. the price worked out in accordance with the relevant Securities and Exchange Board of India guidelines in case of a listed Indian company or in case of a company going through a delisting process as per the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;

b. the valuation of capital 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 Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

Explanation: in case of convertible capital instruments, the price/ conversion formula of the instrument should be determined upfront at the time of issue of the instrument. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with these Regulations.

(2) transferred from a person resident in India to a person resident outside India shall not be less than:

a. the price worked out in accordance with the relevant Securities and Exchange Board of India guidelines in case of a listed Indian company;

b. the price at which a preferential allotment of shares can be made under the Securities and Exchange Board of India Guidelines, as applicable, in case of a listed Indian company or in case of a company going through a delisting process as per the Securities and Exchange Board of India (Delisting of Equity Shares) regulations, 2009;

c. the valuation of capital 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 Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

(3) transferred by a person resident outside India to a person resident in India shall not exceed:

a. the price worked out in accordance with the relevant Securities and Exchange Board of India guidelines in case of a listed Indian company;

b. the price at which a preferential allotment of shares can be made under the Securities and Exchange Board of India Guidelines, as applicable, in case of a listed Indian company or in case of a company going through a delisting process as per the Securities and Exchange Board of India (Delisting of Equity Shares) regulations, 2009; Provided that the price is determined for such duration as specified in the Securities and Exchange Board of India Guidelines, preceding the relevant date, which shall be the date of purchase or sale of shares;

c. the valuation of capital 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 Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.

Explanation: The guiding principle would be that the person resident outside India is not guaranteed any assured exit price at the time of making such investment/ agreement and shall exit at the price prevailing at the time of exit.

(4) in case of swap of capital instruments, subject to the condition that irrespective of the amount, valuation involved in the swap arrangement will have to be made by a Merchant Banker registered with Securities and Exchange Board of India or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

(5) where shares in an Indian company are issued to a person resident outside India in compliance with the provisions of the Companies Act, 2013, by way of subscription to Memorandum of Association, such investments shall be made at face value subject to entry route and sectoral caps.

(6) in case of share warrants, their pricing and the price/ conversion formula shall be determined upfront.

Provided these pricing guidelines shall not be applicable for investment in capital instruments by a person resident outside India on non-repatriation basis.

12. Taxes and Remittance of sale proceeds

12.1 Taxes

All transaction under these regulations shall be undertaken through banking channels in India and subject to payment of applicable taxes and other duties/ levies in India.

12.2 Remittance of sale proceeds

(1) No remittance of sale proceeds of an Indian security held by a person resident outside India shall be made otherwise than in accordance with these Regulations and the conditions specified in the relevant Schedule.

(2) An authorised dealer may allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India -

Provided -

(i) the security was held by the seller on repatriation basis; and

(ii) either the security has been sold in compliance with the pricing guidelines or the Reserve Bank's approval has been obtained in other cases for sale of the security and remittance of the sale proceeds thereof;

13. Reporting requirements

13.1 The reporting requirement for any Investment in India by a person resident outside India shall be as follows:

(1) Omitted

(2) Form Foreign Currency-Gross Provisional Return (FC-GPR): An Indian company issuing capital instruments to a person resident outside India and where such issue is reckoned as Foreign Direct Investment, for the purpose of these regulations, shall report such issue in Form FC-GPR to the Regional Office concerned of the Reserve Bank under whose jurisdiction the Registered office of the company operates, not later than thirty days from the date of issue of capital instruments. Issue of 'participating interest/ rights' in oil fields shall be reported Form FC-GPR.

(3) Annual Return on Foreign Liabilities and Assets (FLA): An Indian company which has received FDI or an LLP which has received investment by way of capital contribution in the previous year(s) including the current year, should submit form FLA to the Reserve Bank on or before the 15th day of July of each year.

Explanation: Year for this purpose shall be reckoned as April to March.

(4) Form Foreign Currency-Transfer of Shares (FC-TRS):

(a) Form FCTRS shall be filed for transfer of capital instruments in accordance with these Regulations between:

(1) a person resident outside India holding capital instruments in an Indian company on a repatriable basis and person resident outside India holding capital instruments on a non-repatriable basis; and

(2) a person resident outside India holding capital instruments in an Indian company on a repatriable basis and a person resident in India,

The onus of reporting shall be on the resident transferor/ transferee or the person resident outside India holding capital instruments on a non-repatriable basis, as the case may be.

Note: Transfer of capital instruments in accordance with these Regulations by way of sale between a person resident outside India holding capital instruments on a non-repatriable basis and person resident in India is not required to be reported in Form FC-TRS.

(b) Transfer of capital instruments on a recognised stock exchange by a person resident outside India shall be reported by such person in Form FC-TRS to the Authorised Dealer bank.

(c) Transfer of capital instruments prescribed in regulation 10(9), shall be reported in Form FC-TRS to the Authorised Dealer on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/ transferee.

(d) Transfer of 'participating interest/ rights' in oil fields shall be reported Form FC-TRS

The form FCTRS shall be filed with the Authorised Dealer bank within sixty days of transfer of capital instruments or receipt/ remittance of funds whichever is earlier.

(5) Form Employees' Stock Option (ESOP): An Indian company issuing employees' stock option to persons resident outside India who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiary/ subsidiaries shall submit Form-ESOP to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company operates, within 30 days from the date of issue of employees' stock option.

(6) Form Depository Receipt Return (DRR): The Domestic Custodian shall report in Form DRR, to the Reserve Bank, the issue/ transfer of depository receipts issued in accordance with the Depository Receipt Scheme, 2014 within 30 days of close of the issue.

(7) Form LLP (I): A Limited Liability Partnerships (LLP) receiving amount of consideration for capital contribution and acquisition of profit shares shall submit Form LLP (I) to the Regional Office of the Reserve Bank under whose jurisdiction the Registered Office of the Limited Liability Partnership is situated, within 30 days from the date of receipt of the amount of consideration

(8) Form LLP (II): The disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall be reported in Form LLP(II) to the Authorised Dealer Bank within 60 days from the date of receipt of funds.

(9) LEC(FII): The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (FII) the purchase/ transfer of capital instruments by FPIs on the stock exchanges in India.

(10) LEC(NRI): The Authorised Dealer Category I banks shall report to the Reserve Bank in Form LEC (NRI) the purchase/ transfer of capital instruments by Non-Resident Indians or Overseas Citizens of India stock exchanges in India.

(11) 3Downstream Investment:

i. An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of these Regulations, shall notify the Secretariat for Industrial Assistance, DIPP within 30 days of such investment, even if capital instruments have not been allotted, along with the modality of investment in new / existing ventures (with / without expansion programme).

ii. "Form DI: An Indian entity or an investment Vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment for the investee Indian entity in terms of Regulation 14 of these Regulations shall file Form DI with the Reserve Bank within 30 days from the date of allotment of capital instruments."

(12) Form Convertible Notes (CN):

a. The Indian startup company issuing Convertible Notes to a person resident outside India shall report such inflows to the Authorised Dealer bank in Form CN within 30 days of such issue.

b. A person resident in India, who may be a transferor or transferee of Convertible Notes issued by an Indian startup company shall report such transfers to or from a person resident outside India, as the case may be, in Form CN to the Authorised Dealer bank within 30 days of such transfer.

c. The Authorised Dealer bank shall submit consolidated statements to the Reserve Bank.

Provided, the format, periodicity and manner of submission of such reporting shall be as prescribed by Reserve Bank in this regard.

Provided further that unless otherwise specifically stated in these regulations all reporting shall be made through or by an Authorised Dealer bank, as the case may be.

(13)⁴ "Form InVi : An Investment vehicle which has issued its units to a person resident outside India shall file Form InVi with the Reserve Bank within 30 days from the date of issue of units."

13.2 Delays in reporting

The person/ entity responsible for filing the reports provided in regulation 13.1 above shall be liable for payment of late submission fee, as may be decided by the Reserve Bank, in consultation with the Central Government, for any delays in reporting.

14. Downstream Investment

(1) For the purpose of this regulation:

(a) 'Ownership of an Indian company' shall mean beneficial holding of more than 50 percent of the capital instruments of such company. 'Ownership of an LLP' shall mean contribution of more than 50 percent in its capital and having majority profit share.

(b) 'Company owned by resident Indian citizens' shall mean an Indian company where ownership is vested in resident Indian citizens and/ or Indian companies, which are ultimately owned and controlled by resident Indian citizens. An 'LLP owned by resident Indian citizens' shall mean an LLP where ownership is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens.

(c) 'Company owned by persons resident outside India' shall mean an Indian company that is owned by persons resident outside India. An 'LLP owned by persons resident outside India' shall mean an LLP that is owned by persons resident outside India.

(d) 'Control' shall mean the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement. For the purpose of LLP, 'Control' shall mean the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP.

(e) 'Company controlled by resident Indian citizens' means an Indian company, the control of which is vested in resident Indian citizens and/ or Indian companies which are ultimately owned and controlled by resident Indian citizens. An 'LLP controlled by resident Indian citizens' shall mean an LLP, the control of which is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens.

(f) 'Company controlled by persons resident outside India' shall mean an Indian company that is controlled by persons resident outside India. An 'LLP controlled by persons resident outside India' shall mean an LLP that is controlled by persons resident outside India.

(g) 'Downstream Investment' shall mean investment made by an Indian entity or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity:

(h) 'Holding Company' shall have the same meaning as assigned to it under Companies Act, 2013;

(i) 'Indirect Foreign Investment' means downstream investment received by an Indian entity from:

i. another Indian entity (IE) which has received foreign investment and (i) the IE is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India; or

ii. an investment vehicle whose sponsor or manager or investment manager (i) is not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India

Provided no person resident in India other than an Indian entity can receive Indirect Foreign Investment.

(j) 'Total Foreign Investment' means the total of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis;

(k) 'Strategic downstream investment' means investment by banking companies incorporated in India in their subsidiaries, joint ventures and associates.

(2) Indian entity which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment.

Explanation: Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.

(3) With effect from 31st day of July, 2012, downstream investment/s made under Corporate Debt Restructuring (CDR), or other loan restructuring mechanism, or in trading book, or for acquisition of shares due to defaults in loans, by a banking company, as defined in clause (c) of section 5 of the Banking Regulation Act, 1949, incorporated in India, which is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India, shall not count towards indirect foreign investment. However, their strategic downstream investment shall be counted towards indirect foreign investment for the company in which such investment is being made.

(4) Guidelines for calculating total foreign investment in Indian companies:

(a) Any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned for total foreign investment;

(b) FCCBs and DRs having underlying of instruments in the nature of debt, shall not be reckoned for total foreign investment;

(c) The methodology for calculating total foreign investment would apply at every stage of investment in Indian companies and thus in each and every Indian company;

(d) For the purpose of downstream investment, the portfolio investment held as on March 31 of the previous financial year in the Indian company making the downstream investment shall be considered for computing its total foreign investment;

(e) The indirect foreign investment received by a wholly owned subsidiary of an Indian company will be limited to the total foreign investment received by the company making the downstream investment;

(5) Downstream investment made into Indian companies will be subject to the following conditions:

(a) The downstream investment should have the approval of the Board of Directors as also a Shareholders' Agreement, if any;

(b) For the purpose of downstream investment, the Indian entity making the downstream investment shall bring in requisite funds from abroad and not use funds borrowed in the domestic markets. Downstream investments can be made through internal accruals. For this purpose, internal accruals will mean profits transferred to reserve account after payment of taxes.

Further raising of debt and its utilisation shall be in compliance with the Act, rules or regulations made thereunder.

(c) Capital instrument of an Indian company held by another Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India may be transferred to:

- i. A person resident outside India, subject to reporting requirements in Form FCTRS;
- ii. A person resident in India subject to adherence to pricing guidelines.
- iii. An Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India.

(d) The first level Indian company making downstream investment shall be responsible for ensuring compliance with the provisions of these regulations for the downstream investment made by it at second level and so on and so forth. Such first level company shall obtain a certificate to this effect from its statutory auditor on an annual basis. Such compliance of these regulations shall be mentioned in the Director's report in the Annual Report of the Indian company. In case statutory auditor has given a qualified report, the same shall be immediately brought to the notice of the Regional Office of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the RO.

(e) The provisions at (c) and (d) above shall be construed accordingly for an LLP.

Note: Downstream investment made in accordance with the guidelines in existence prior to February 13, 2009 would not require any modification to conform to these regulations. All other investments, after the said date, would come under the ambit of these regulations. Downstream investments made between February 13, 2009 and June 21, 2013 which is not in conformity with these regulations should have been intimated to the Reserve Bank by October 3, 2013 for treating such cases as compliant with these regulations.

15. Prohibited activities for investment by a person resident outside India

Unless otherwise specifically stated in the Act or the rules or regulations framed thereunder, investment by a person resident outside India is prohibited in:

- (1) Lottery Business including Government/ private lottery, online lotteries
- (2) Gambling and betting including casinos
- (3) Chit funds.

Explanation: The Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians and Overseas Citizens of India who shall be eligible to subscribe, through banking channel and on non- repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time

- (4) Nidhi company
- (5) Trading in Transferable Development Rights (TDRs)
- (6) Real Estate Business or Construction of Farm Houses.

Explanation: For the purpose of this regulation, “real estate business” shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

(7) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes

(8) Activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations

(9) Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities

16. Permitted sectors, entry routes and sectoral caps for total foreign investment

Unless otherwise specified in these Regulations or the relevant Schedules the entry routes and sectoral caps for the total foreign investment in an Indian entity shall be as follows:

A. Entry Routes

1. Automatic Route means the entry route through which investment by a person resident outside India does not require the prior Reserve Bank approval or Government approval.
2. Government Route means the entry route through which investment by a person resident outside India requires prior Government approval. Foreign investment received under this route shall be in accordance with the conditions stipulated by the Government in its approval.
3. Aggregate Foreign Portfolio Investment up to 49 percent of the paid-up capital on a fully diluted basis or the sectoral/ statutory cap, whichever is lower, will not require Government approval or compliance of sectoral conditions as the case may be, if such investment does not result in transfer of ownership and control of the resident Indian company from resident Indian citizens or transfer of ownership or control to persons resident outside India. Other investments by a person resident outside India will be subject to conditions of Government approval and compliance of sectoral conditions as laid down in these regulations.

B. Sectoral Caps

SECTOR-SPECIFIC POLICY FOR TOTAL FOREIGN INVESTMENT

- (1) Sectoral cap for the following sectors/ activities is the limit indicated against each sector. The total foreign investment shall not exceed the sectoral/ statutory cap.
- (2) Foreign investment in the following sectors/ activities is, subject to applicable laws/ regulations, security and other conditionalities
- (3) In sectors/ activities not listed below or not prohibited under regulation 15 of these Regulations, foreign investment is permitted up to 100 percent on the automatic route, subject to applicable laws/ regulations, security and other conditionalities.

Provided foreign investment in financial services other than those indicated under serial number “F” below would require prior Government approval.

(4) Wherever there is a requirement of minimum capitalization, it shall include premium received along with the face value of the capital instrument, only when it is received by the company upon issue of such instruments to the person resident outside India. Amount paid by the transferee during post-issue transfer beyond the issue price of the capital instrument, cannot be taken into account while calculating minimum capitalization requirement.

(5) 5(a) Foreign Investment in investing companies not registered as Non-Banking Financial Companies with the Reserve Bank and in core investment companies (CICs), both engaged in the activity of investing in the capital of other Indian entities, will require prior Government approval.

Note: Compliance to these Regulations by the core investment companies is in addition to the compliance of the regulatory framework prescribed to such companies as NBFCs under the Reserve Bank of India Act, 1934 and regulations framed thereunder.

(b) Foreign investment in investing companies registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank, will be under 100% automatic route.

(6) For undertaking activities which are under automatic route and without FDI linked performance conditions, an Indian company which does not have any operations and also has not made any downstream investment, may receive investment in its capital instruments from persons resident outside India under automatic route. However, approval of the Government will be required for such companies for undertaking activities which are under Government route. As and when such a company commences business or makes downstream investment, it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

(7) The onus of compliance with the sectoral/ statutory caps on such foreign investment and attendant conditions, if any, shall be on the company receiving foreign investment.

(8) 6Wherever the person resident outside India who has made foreign investment specifies a particular auditor/ audit firm having international network for the audit of the Indian investee company, then audit of such investee company should be carried out as joint audit wherein one of the auditors should not be part of the same network.

[table not included, available:

https://www.rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=11253]

(Shekhar Bhatnagar) Chief General Manager-in-Charge

Schedule 1

[See Regulation 5(1)]

Purchase/ Sale of capital instruments of an Indian company by a person resident outside India

1. Purchase/sale of capital instruments of an Indian company by a person resident outside India

(1) An Indian company may issue capital instruments to a person resident outside India subject to entry routes, sectoral caps and attendant conditionalities specified in Regulation 16;

(2) A person resident outside India may purchase capital instruments of a listed Indian company on a stock exchange in India provided that:

(a) The person resident outside India making the investment has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control; (b) The amount of consideration may be paid as per the mode of payment prescribed in this Schedule or out of the dividend payable by Indian investee company in which the person resident outside India has acquired and continues to hold the control in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 provided the right to receive dividend is established and the dividend amount has been credited to a specially designated non-interest bearing rupee account for acquisition of shares on the recognised stock exchange.

(3) A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100 percent foreign investment is allowed in the automatic route and there are no FDI linked performance conditions, may issue capital instruments to the said non-resident entity against pre-incorporation/ preoperative expenses incurred by the said non-resident entity up to a limit of five percent of its authorised capital or USD 500,000 whichever is less, subject to the following conditions:

(a) Within thirty days from the date of issue of capital instruments but not later than one year from the date of incorporation or such time as Reserve Bank or Central Government permits, the Indian company shall report the transaction in the Form FC-GPR to the Reserve Bank;

(b) A certificate issued by the statutory auditor of the Indian company that the amount of pre-incorporation/ pre-operative expenses against which capital instruments have been issued has been utilized for the purpose for which it was received should be submitted with the Form FC-GPR.

Explanation: Pre-incorporation/ pre-operative expenses shall include amounts remitted to Investee Company's account, to the investor's account in India if it exists, to any consultant, attorney or to any other material/ service provider for expenditure relating to incorporation or necessary for commencement of operations.

(4) 29An Indian company may issue, subject to compliance with the conditions prescribed by the Central Government and/ or the Reserve Bank from time to time, capital instruments to a person resident outside India, if the Indian investee company is engaged in an automatic route sector, against:

a. Swap of capital instruments; or

b. Import of capital goods/ machinery/ equipment (excluding second-hand machinery); or

c. Pre-operative/ pre-incorporation expenses (including payments of rent etc.).

Provided Government approval shall be obtained if the Indian investee company is engaged in a sector under Government route. The applications for approval shall be made in the manner prescribed by the Central Government from time to time.

(5) An Indian company may issue equity shares against any funds payable by it to a person resident outside India, the remittance of which is permitted under the Act or the rules and regulations framed or directions issued thereunder or does not require prior permission of the Central Government or the Reserve Bank under the Act or the rules and regulations framed or directions issued thereunder or has been permitted by the Reserve Bank under the Act or the rules and regulations framed or directions issued thereunder.

Provided in case where permission has been granted by the Reserve Bank for making remittance, the Indian company may issue equity shares against such remittance provided all regulatory actions with respect to the delay or contravention under FEMA or the rules or the regulations framed thereunder have been completed.

(6) Omitted

2. Mode of payment

(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ Escrow account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Explanation: The amount of consideration shall include:

- i. Issue of equity shares by an Indian company against any funds payable by it to the investor
- ii. Swap of capital instruments.

(2) Capital instruments shall be issued to the person resident outside India making such investment within sixty days from the date of receipt of the consideration.

Explanation: In case of partly paid equity shares, the period of 60 days shall be reckoned from the date of receipt of each call payment

(3) Where such capital instruments are not issued within sixty days from the date of receipt of the consideration the same shall be refunded to the person concerned by outward remittance through banking channels or by credit to his NRE/ FCNR(B) accounts, as the case may be within fifteen days from the date of completion of sixty days.

Provided Prior approval of the Reserve Bank shall be required for payment of interest, if any, as laid down in the Companies Act, 2013, for delay in refund of the amount so received.

(4) An Indian company issuing capital instruments under this Schedule may open a foreign currency account with an Authorised Dealer in India in accordance with Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2016.

3. Remittance of sale proceeds

The sale proceeds (net of taxes) of the capital instruments may be remitted outside India or may be credited to the NRE/ FCNR(B) of the person concerned.

[Schedules 2-10 not included]