

## **DRAFT - Foreign Exchange Management (Overseas Investment) Regulations, 2021**

### **1. Short Title and Commencement**

- (i) These regulations may be called the Foreign Exchange Management (Overseas Investment) Regulations, 2021.
- (ii) They shall come into force from the date of their publication in the Official Gazette.

### **2. Definitions**

In these regulations, unless the context requires otherwise:

- (i) 'Act' means the Foreign Exchange Management Act, 1999 (42 of 1999).
- (ii) "Authorised Dealer Category-I bank (AD bank)", "Control", "Disinvestment", "EEFC Account", "Financial Commitment", "Foreign Entity", "Host Country/jurisdiction", "Indian Entity", "Last Audited Balance Sheet", "Overseas Direct Investment (ODI)", "Overseas Investment", "Overseas Portfolio Investment (OPI)", "Resident Individual", "RFC Account", and "Step Down Subsidiary (SDS)" shall have the meaning assigned to them respectively in 'The Rules'.
- (iii) "The Rules" mean Foreign Exchange Management (Non-Debt Instruments – Overseas Investment) Rules, 2021.
- (iv) The words and expressions used but not defined in these regulations shall have the same meanings respectively assigned to them in the Act or the rules.

### **3. Conditions for undertaking financial commitment by modes other than equity capital**

(1) The Indian entity is eligible to make ODI, has made ODI by investment in equity capital in the foreign entity and has also acquired control in such foreign entity in terms of the conditions as contained in 'The Rules' and these regulations on or before the date of making any financial commitment by modes other than equity capital in such foreign entity.

(2) The Indian entity may lend or invest in any debt instruments issued by a foreign entity or extend non-fund based commitments to or on behalf of a foreign entity including its SDS within the financial commitment limit as specified in Schedule I.

(3) In addition to investment in equity capital in the foreign entity, which is reckoned as ODI, the following shall be reckoned towards the financial commitment limit specified in Schedule I viz.,

- (i) **Financial commitment by way of Debt:** An Indian entity may lend or invest in any debt instruments issued by a foreign entity subject to such loans duly backed by a loan agreement and the rate of interest shall be charged on an arm's length basis;  
Explanation: the expression arm's length means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest."

- (ii) **Financial commitment by way of Guarantee**

- (a) The following guarantees may be issued to or on behalf of the foreign entity or its step down operating subsidiary in which the Indian entity has acquired control through the foreign entity:

- (i) Corporate/ performance guarantees by such Indian entity
- (ii) Corporate/performance guarantee by a group company of such Indian entity in India, being a holding company (which holds at least 51% stake in the Indian entity) or a subsidiary company (in which the Indian entity holds at least 51% stake) or a promotor group company, which is a body corporate
- (iii) Personal guarantee by the resident individual promoters of such Indian entity.
- (iv) Bank guarantee, which is backed by a counter-guarantee/collateral by the Indian entity, and issued, by an AD bank

- (b) Where the guarantee is extended by a group company as above, it shall be counted towards the utilisation of its financial commitment limit independently and in case of a resident individual promoter, the same shall be counted towards the financial commitment limit of the Indian entity.

Provided where financial commitment is made as above by a group company, any fund-based exposure to or from the Indian entity shall be deducted from the 'Net Worth' of such group company for computing its financial commitment limit.

- (c) Where the guarantee is extended as above by a promoter, which is a body corporate or an individual, the Indian entity shall be a part of the 'promoter group' as defined in 'the

Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000', as amended from time to time.

- (d) No guarantee shall be "open-ended".
- (e) The guarantee, to the extent of the amount invoked, shall cease to be a part of the non-fund based commitments but will be considered as lending.
- (f) Where a guarantee has been extended jointly by two or more Indian entities to a foreign entity, 100% of the amount of such guarantee shall be reckoned towards the individual limits of each of such Indian entities.

(iii) **Financial commitment by way of Pledge/ Charge:** An Indian entity, which has made ODI by way of investment in equity capital in a foreign entity, may:

(a) pledge the equity capital of the foreign entity in which it has made ODI or of its SDS outside India [held directly by the Indian entity in a foreign entity and indirectly in SDS] in favour of an AD bank or a public financial institution in India or an overseas lender, for availing fund based and/or non-fund based facilities for itself or any foreign entity in which it has made ODI or for its SDSs outside India and also in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself.

(b) create charge by way of mortgage, pledge, hypothecation or any other identical mode on:

- i. its assets in India [including the assets of its group company or associate company, promoter and / or director] in favour of an overseas lender as security for availing of the fund based and/or non-fund based facility for any foreign entity in which it has made ODI or for its SDS outside India; or
- ii. the assets outside India of the foreign entity in which it has made ODI or of its SDS outside India in favour of an AD bank in India or a public financial institution in India as security for availing of the fund based and/or non-fund based facility for itself or any foreign entity in which it has made ODI or for its SDS outside India and also in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself

Provided that:

- (a) The value of the pledge/ charge or the amount of the facility, whichever is less, shall be reckoned towards the financial commitment limit in force at the time of such pledge/ charge provided such facility has not already been reckoned towards the limit specified and excluding cases where the facility has been availed in India by the Indian entity for itself;
- (b) In case the facility is from an overseas lender or such pledge/charge is in favour of an overseas lender, such lender is regulated and supervised as a bank/financial institution as per the laws of the host country or is a multilateral/regional financial institution;
- (c) the creation of such pledge/charge shall be in accordance with the relevant provisions of the Act or any rules or any regulations made thereunder;
- (d) Any other terms and conditions as may be directed by the Reserve Bank from time to time.

Explanation: (i) For this regulation, a public financial institution will have the same meaning as assigned to it under section 2(72) of the Companies Act, 2013, as amended from time to time.

(ii) The 'negative pledge' or 'negative charge' created by an Indian entity or a bid bond guarantee obtained in accordance with these regulations for participation in bidding or tender procedure for the acquisition of a foreign entity shall not be reckoned towards the financial commitment limit.

#### **4. Acquisition/Transfer by way of Deferred Payment**

Where a person resident in India acquires by way of purchase or by way of issuance from a person resident outside India or where a person resident outside India acquires by way of purchase from a person resident in India, the equity capital of a foreign entity, which is reckoned as ODI:

(1) The amount of consideration may be deferred for such period from the date of the agreement as provided in accordance with such agreement subject to the following terms and conditions:

- (i) The foreign securities equivalent to the amount of total consideration shall be transferred or issued, as the case may be, upfront by the seller to the buyer;
- (ii) The full consideration finally paid shall be compliant with the applicable pricing guidelines.

(2) Where full consideration is paid upfront, the buyer may be indemnified by the seller upto such amount subject to such terms and conditions as may be mutually agreed upon and laid down upfront

in the agreement and provided such agreement complies with Foreign Exchange Management (Guarantee) Regulations, as amended from time to time.

**5. Mode of Payment** – The mode of payment by a person resident in India for making overseas investment shall be as under:

- i. Remittance made through banking channels
- ii. Out of funds held in an account maintained in accordance with the FEM (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015
- iii. Swap of securities
- iv. In addition to above, for schedule I of 'The Rules' and Regulation 3(3)(i), the proceeds of American Depository Receipts (ADR)/ Global Depository Receipts (GDR) and ADR/ GDR stock-swap raised in terms of [FEM \(Non-Debt Instruments\) Rules, 2019](#); and External Commercial Borrowings (ECBs) raised in terms of [FEM \(Borrowing and Lending\) Regulations, 2018](#) may be used.

## **6. Obligations of the Person Resident in India**

(1) A person resident in India acquiring equity capital in a foreign entity, which is reckoned as ODI, shall submit to the AD bank share certificate(s) or any other relevant document(s) as per the applicable laws of the host jurisdiction, as an evidence of such investment in the foreign entity within six months from the date of effecting remittance or the date on which the dues to such person resident in India are capitalised or the date on which the amount due was allowed to be capitalised, as the case may be.

(2) A person resident in India, through its designated AD bank, shall obtain a Unique Identification Number (UIN) from the Reserve Bank for the foreign entity in which the Overseas Direct Investment is intended to be made before sending outward remittance or acquisition of equity capital in a foreign entity, whichever is earlier;

(3) A person resident in India making ODI shall designate a branch of an AD bank and route all transactions relating to a particular UIN through such designated branch.

Note: Where more than one person resident in India make financial commitment in the same foreign entity, all such persons shall route all transactions relating to that UIN through the branch of the AD bank designated for that UIN.

(4) A person resident in India having ODI in a foreign entity, wherever applicable, shall realise and repatriate to India, all dues receivable from the foreign entity, the amount of consideration received on account of transfer/disinvestment of such ODI and the net realisable value of the assets as certified by the official liquidator on account of the liquidation of the foreign entity as per the laws of the host country within 90 days from the date when such receivable falls due or the date of such transfer/disinvestment or the date of realisation of the value of assets as certified by the official liquidator.

(5) An Indian entity, which is eligible to make ODI, may make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD bank for participation in bidding or tender procedure for the acquisition of a foreign entity provided that in case of an open-ended bid bond guarantee, it shall be converted into a close-ended guarantee not later than three months from the date of award of the contract.

## **7. Reporting**

(1) Unless stated otherwise, all reporting by a person resident in India shall be made through the designated branch of the AD bank as per the format and manner as may be directed by the Reserve Bank from time to time.

(2) The reporting requirements for overseas investment shall be as under:

- (i) **Form FC:** A person resident in India making financial commitment or undertaking disinvestment in a foreign entity shall, in Form FC, report:
  - (a) such financial commitment, whether it is reckoned towards the financial commitment limit or not, at the time of sending outward remittance or making financial commitment, whichever is earlier, and;
  - (b) such disinvestment at the time of disinvestment.
- (ii) **Form OPI:** A person resident in India making any OPI or transferring such investment by way of sale shall report such investment/transfer in Form OPI within 30 days from the end of the half-year in which such investment/ transfer is made as at September/March-end.

- (iii) **Annual Performance Report (APR):** A person resident in India acquiring equity capital in a foreign entity which is reckoned as ODI, shall submit an APR with respect to each foreign entity within six months from the date of the end of the accounting period of the foreign entity concerned.

Provided that such reporting will not be required where financial commitment is made only in equity capital with only one person resident in India having invested in the foreign entity and such person neither exercises control nor holds 10 percent or more of the equity capital of such foreign entity.

Explanation:

- (a) Where there is no accounting period, or the accounting period is more than 12 months as per the laws of the host jurisdiction, the Indian entity shall specify the accounting period, not exceeding 12 months, for APR.
- (b) The APR shall be based on the audited financial statements of the foreign entity. Where the person resident in India does not have 'control' in the foreign entity and the laws of the host jurisdiction does not provide for mandatory auditing of the books of accounts, the APR may be submitted based on unaudited financial statements certified as such by the statutory auditor of the Indian entity or by a chartered accountant where the statutory audit is not applicable.
- (c) In case more than one person resident in India have made ODI in the same foreign entity, the person resident in India holding the highest stake in the foreign entity shall be required to submit APR.
- (iv) **Annual Return on Foreign Liabilities and Assets (FLA):** Indian entity, which has made ODI, shall submit an Annual Return on Foreign Liabilities and Assets in the format and by dates specified by the Reserve Bank from time to time, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank.
- (v) A person resident in India holding equity capital in a foreign entity, which is reckoned as ODI, shall report the setting up /winding up of an SDS or alteration in the shareholding pattern in the overseas entity in the manner as may be directed by the Reserve Bank, within 30 days of the approval of those decisions by the competent authority concerned of such foreign entity in terms of local laws of the host country and shall also include the same in the APR required to be submitted annually.

## 8. Delay in Reporting

In case a person resident in India responsible for filing any reports provided in Regulation 7 above including the corresponding regulations of [Notification FEMA 120/2004-RB](#) or for submitting the evidence of investment as provided in Regulation 6(1) including the corresponding regulations of [Notification FEMA 120/2004-RB](#) has made a delay in such filing or submission, such person shall be liable for payment of Late Submission Fee (LSF) within such period as may be directed but not exceeding three years from the due date of such filing or submission as the case may be or three years from the date of notification of these regulations, whichever is later, at the rates and in the manner as may be directed by the Reserve Bank, from time to time.

## 9. Restriction on further Financial Commitment/Transfer

A person resident in India who has made financial commitment in a foreign entity as per these regulations or under 'The Rules' shall not make any further financial commitment, whether fund-based or non-fund-based, directly or indirectly, towards such foreign entity or transfer such investment till any delay in reporting is regularized.

**(Ajay Kumar Misra)**  
**Chief General Manager-in-charge**