

# FOREIGN DIRECT INVESTMENTS

## Foreign Investment in India

Foreign Investment in India is governed by the FDI policy announced by the Government of India and the provision of the Foreign Exchange Management Act (FEMA) 1999. Reserve Bank has issued Notification No. FEMA 20/2000-RB dated May 3, 2000, which contains the Regulation in this regard. This notification has been amended from time to time.

### Entry Routes for Investment in India

Foreign Investment is freely permitted in almost all sectors. Under Foreign Direct Investment scheme investments can be made by non-residents in the shares/convertible debentures of an Indian company, under two routes; Automatic Route and Government Route. Under the Automatic Route, the foreign investor or the Indian company does not require any approval from the Reserve Bank or Government of India for the investment. Under the Government Route, prior approval of Government of India, Ministry of Finance, Foreign Investment Promotion Board (FIPB) is required. Entry route for non-resident investors in India as well as sector specific investment limits in India are given as Annexure 2.

### Prohibition on Investment in India

Foreign Investment in any form is prohibited in a company or a partnership firm or a proprietary concern or any entity, whether incorporated or not (such as Trusts) which is engaged or proposes to engage in the following activities

- i. Business of chit fund, or
- ii. Nidhi Company, or
- iii. Agricultural or plantation activities, or
- iv. Real estate business, or construction of farm houses.

### v. Trading in Transferable Development Rights (TDRs)

It is clarified that Real Estate Business does not include development of townships, construction of residential/commercial premises, roads or bridges. It is further clarified that partnership firms/proprietorship concerns having investment as per FEMA regulations are not allowed to engage in Print Media sector.

In addition to the above, investment in the form of FDI is also prohibited in certain sectors such as (Annexure 1):

- i. Retail Trading
- ii. Atomic Energy
- iii. Lottery Business
- iv. Gambling and Betting

Agriculture (excluding Floriculture, Horticulture, Development of seeds, Animal Husbandry, Pisciculture and Cultivation of vegetables, mushrooms etc. under controlled conditions and services related to agro and allied sectors) and Plantation (Other than Tea plantations).

### Eligibility for Investing in India

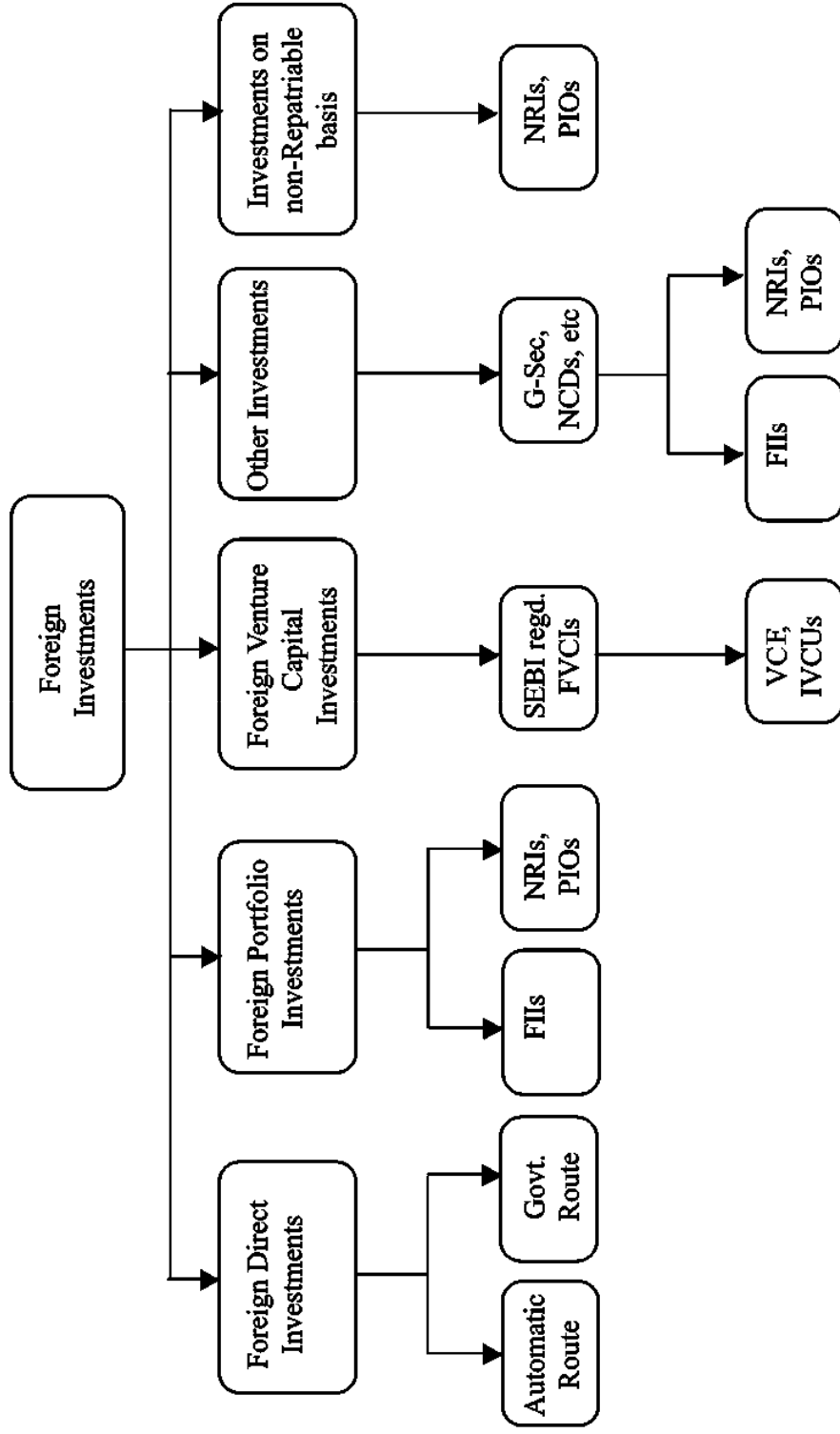
A person resident outside India (other than a citizen of Pakistan or Bangladesh) or an entity incorporated outside India, (other than an entity incorporated in Pakistan or Bangladesh) can invest in India, subject to the FDI policy of the Government of India.

A person who is citizen of Bangladesh or an entity incorporated in Bangladesh can invest in India under the FDI scheme, with prior approval of FIPB.

Overseas corporate Bodies (OCBs) are entities



Part - I  
 Foreign Investments in India-Schematic representation :



established outside India and predominantly owned by NRIs (at least 60% of the paid up capital). Erstwhile OCBs which are incorporated outside India and are not under adverse notice of Reserve Bank can make fresh investments under the FDI as incorporated non-resident entities, with the prior approval of government if the investment is through government route and with the prior approval of Reserve Bank if the investment through automatic route.

#### **Type of Instruments**

Indian companies can issue equity shares/convertible debentures and preference shares subject to pricing guidelines/valuation norms prescribed under FEMA Regulations.

Issue of other types of preference shares such as non-convertible, optionally convertible or partially convertible have to be in accordance with the guidelines applicable for External Commercial Borrowing (ECB). Since these instruments are denominated in rupees, the rupee interest rate will be based on the swap equivalent of LIBOR plus the spread permissible for ECBs of corresponding maturity.

As far as debentures are concerned, only those which are fully and mandatorily convertible into equity, within a specified time would be reckoned as part of equity under the FDI policy.

#### **Investment in Small Scale Industrial Units**

A foreign investor can invest in an Indian company which is a small-scale industrial unit provided it is not engaged in any activity, which is prohibited under the FDI policy. Such investments are subject to a limit of 24% of paid up capital of the Indian company/SSI unit. An SSI Unit can issue equity shares / fully convertible preference shares /fully convertible

debentures more than 24% of its paid up capital if:

- a. It has given up its small scale status,
- b. It is not engaged or does not propose to engage in manufacture of items reserved for small scale sector, and
- c. It complies with the sectoral caps specified in Annexure 2.

It is clarified that the company /SSI Unit would be reckoned as having given up its SSI status, if the investment in plant and machinery exceeds the limits prescribed under the Micro, Small and Medium Enterprises Development Act, 2006.

#### **Investment in EOU/ FTZs/ EPZs / HTPs and STPs**

An SSI Unit which is an Export Oriented Unit or Unit in Free Trade Zone or in Export Processing Zone or in a Software Technology Park or in an Electronic Hardware Technology Park can Issue shares / convertible debentures/ preference shares exceeding 24% of the paid up capital upto the sectoral caps specified in Annexure-2.

#### **Investment in Asset Reconstruction Companies (ARC)**

Person resident outside India (Other than Foreign Intuitional Investors (*FII*s)), can invest in the equity capital of Asset Reconstruction companies (ARCs) registered with Reserve Bank under the Government Route. Automatic Route is not available for such investments. Such investments have to be strictly in the nature of FDI and investments by FIIs are not permitted. FDI is restricted to 49% of the paid up capital of the ARC.

However, FIIs registered with SEBI can invest

in the Security Receipts (SRs) issued by ARCs registered with Reserve Bank. FIIs can invest upto 49% of each tranche of scheme of SRs, subject to the condition that investment by single FII in each tranche of SRs shall not exceeds 10% of the issue.

#### **Investment in Infrastructure Companies in the Securities Market**

Foreign Investment is permitted in infrastructure companies in securities market namely stock exchanges, depositories and clearing corporations, in compliance with SEBI Regulation and subject to the following conditions:

Foreign Investment upto 49% of the paid up capital, is allowed in these companies with a separate Foreign Direct Investment (FDI) cap of 26% and Foreign Institutional Investment (FII) cap of 23%:

- i. FDI will be allowed with specific prior approval of FIPB; and
- ii. FIIs can invest only through purchase in the secondary market.

#### **Investment in Credit Information Companies**

Foreign investment in Credit Information companies is permitted in compliance with the Credit Information Companies (Regulations) Act, 2005 and subject to the following:

- i. The aggregate Foreign investment in credit information companies is permitted only up to 49 per cent of the paid up capital.
- ii. Foreign Investment upto 49 per cent is allowed only with the prior approval of FIPB and regulatory clearance from RBI.
- iii. Investment by SEBI Registered FIIs is permitted only through purchases in the secondary market to an extent of 24 per cent.

iv. Investment by SEBI Registered FIIs to an extent of 24 per cent should be within the overall limit of 49 per cent for Foreign Investment.

v. No FII can individually hold directly or indirectly more than 10 per cent of the equity.

#### **Investment in Commodity Exchanges**

Foreign Investment in Commodity Exchanges is permitted subject to the following conditions:

- i. There is a composite ceiling of 49 per cent for Foreign Investment, with a FDI limit of 26 per cent and an FII limit of 23 per cent.
- ii. FDI is allowed with specific approval of the government.
- iii. The FII purchases in equity of commodity Exchanges is restricted to the secondary markets only.
- iv. Foreign Investment in Commodity Exchanges is also subject to compliance with the regulations issued, in this regard, by the Forward Market Commission.

#### **Investment in Public Sector Banks**

FDI and portfolio investment in nationalized banks are subject to overall statutory limits of 20 per cent as provided under Section 3(2D) of the Banking Companies (Acquisition & Transfer of Undertakings) Acts, 1970/80. The same ceiling would also apply in respect of such investments in state Bank of India and its associate banks.

#### **Investment from Nepal & Bhutan**

NRIs, resident in Nepal & Bhutan as well as citizens of Nepal and Bhutan are permitted to invest in shares and convertible debentures of Indian companies under FDI scheme on repatriation basis, subject to the condition that the amount of consideration for such investment shall be paid only by way of inward remittance in **free foreign exchange** through normal banking channels.

## **Issue of Rights/Bonus Shares to Acquisition of Shares under Scheme of erstwhile OCBs Amalgamation / Merger**

FEMA provisions allow Indian companies to freely issue Rights /Bonus shares to existing non-resident shares-holders, subject to adherence to sectoral cap, if any. However such issue of bonus / rights shares have to be in accordance with other laws/ statues like the Companies Act 1956, SEBI (Disclosure and Investor Protection) guidelines (in case of listed companies) etc. The price of shares offered on rights basis by the Indian company to Non Resident shareholders shall not be lower than the price at which such shares are offered to resident shareholders.

### **Rights Issue to Erstwhile OCBs**

The price of shares offered on rights basis by the Indian company to non-resident shareholders shall not be lower than the price at which such shares are offered to resident shareholders. OCBs have been de-recognized as a class of investors with effect from September 16, 2003. Therefore companies desiring to issue rights shares to such erstwhile OCBs will have to take specific prior permission from the Reserve Bank. As such, an entitlement of rights shares is not automatically available to OCBs.

However, bonus shares can be issued to erstwhile OCBs.

### **Additional allocation of rights shares by residents to non-residents**

Existing non-resident shares-holders are allowed to apply for issue of additional shares/ preference shares/convertible debenture over and above their rights share entitlements. The invested company can allot the additional rights shares out of unsubscribed portion; subject to the condition that the overall issue of shares to non-residents in the total paid up capital of the company does not exceed the sectoral cap.

Mergers & amalgamations of companies in India are usually governed by an order issued by a competent court on the basis of the scheme submitted by the companies undergoing mergers/ amalgamation. Once the scheme of merger or amalgamation of two or more Indian companies has been approved by a court in India, the transferee company or new company is allowed to issue share to the shareholders of the transferor company resident outside India subject to the condition that:

- i. The percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap.
- ii. The transferor company or the transferee or the new company is not engaged in activities, which are prohibited in terms of FDI policy.

### **Issue of Shares Under Employees Stock Option Scheme (ESOPs)**

Listed Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad who are residents outside India, other than to citizens of Pakistan. Shares under ESOPs can be issued directly or through a Trust subject to the condition that: ii. The scheme has been drawn in terms of relevant regulations issued by the Securities and Exchange Board of India; and ii. The face value of the shares to be allowed under the scheme to the nonresident employees does not exceed 5 percent of the paid-up capital of the issuing company.

Unlisted companies have to follow the provisions of the Companies Act, 1956. The Indian company can issue ESOPs to employees who are resident outside India, other than to citizens of Pakistan. ESOPs can be issued to the citizens of Bangladesh with the prior FIPB approval. The issuing company is required to report the details of such issues to the concerned Regional Office of the Reserve Bank, within 30 days from the date of issue of shares.

#### **Reporting of FDI Reporting of Infow**

An Indian company receiving investment from outside India for issuing shares/convertible debenture/preference shares under the FDI Scheme, should report the details of the amount of consideration to the Reserve Bank not later than 30 days from the date of receipt. The forms can also be downloaded from the Reserve Bank's website [http://www.rbi.org.in/Scripts/BS\\_viewFemaForms.aspx](http://www.rbi.org.in/Scripts/BS_viewFemaForms.aspx).

Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares/convertible debentures, through an AD Category-I Bank, together with a copy /ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which would allot a Unique Identification Number (UIN) for the amount reported.

#### **Time frame within which shares have to be issued**

The equity instruments should be issued within 180 days from the date of receipt of the inward

remittance or by debit to the NRE/FCNR(B) account of the non-resident investor. In case, the equity instruments are not issued within 180 days from the date of receipt of the inward remittance or date of debit to the NRE/FCNR(B) account, the amount of consideration so received should be refunded immediately to the non-resident investor by outward remittance through normal banking channels or by credit to the NRE/FCNR(B) account, as the case may be. Non-compliance with the above provision would be reckoned as a contravention under FEMA and could attract penal provisions. In exceptional cases, refund of the amount of consideration outstanding beyond a period of 180 days from the date of receipt may be considered by the Reserve Bank on the merits of the case.

#### **Reporting of Issue of Shares**

After issue of shares /convertible debentures/ preference shares, the Indian company has to fill Form FC-GPR enclosed in Annexure-6 not later than 30 days from the date of issue. The form can be downloaded from the Reserve Bank's website [http://www.rbi.org.in/Scripts/BS\\_ViewFemaForms.aspx](http://www.rbi.org.in/Scripts/BS_ViewFemaForms.aspx).

Part A of Form FC-GPR has to be duly filled up and signed by the Managing Director/Director/ Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank.

The following documents have to be submitted along with part A:

- i. A certificate from the Company Secretary of the company certifying that
  - a. All the requirements of the Companies Act, 1956 have been complied with;
  - b. Terms and conditions of the

Government approval, if any, have been complied with;

c. The company is eligible to issue shares under these Regulation; and

d. The company has all original certificates issued by authorized dealers in India evidencing receipt of amount of consideration.

ii. A certificate from Statutory Auditors or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

The report of receipt of consideration as well as FC-GPR has to be submitted to the concerned Regional Office of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

Part B of FC-GPR should be filed on an annual basis by the Indian company directly with the Reserve Bank.

This is an annual return to be submitted by 31st of July every year, pertaining to all investments by way of direct/portfolio investments/ re-invested earnings/others in the Indian company made during the previous years (i.e. The information in Part B submitted by 31st July, 2008 will pertain to all the investments made in the previous years up to March 31, 2008). The details of the investments to be reported would include all foreign investments made into the company which is outstanding on the balance sheet date. The details of overseas investment in the company both under direct/ portfolio investment may be separately indicated.

Issue of bonus/rights shares or stock options to persons resident outside India directly or on amalgamation/merger with an existing Indian

company, as well as issue of shares on conversion of ECB/ royalty/lump sum technical know-how fee/import of capital goods by SEZs has to be reported in Form FC-GPR.

### **Issue Price**

Price of shares issued to persons resident outside India under the FDI scheme, shall be on the basis of SEBI guidelines in case of listed companies. In case of unlisted companies, valuation of shares has to be done by a Chartered Accountant in accordance with the guidelines issued by the erstwhile Controller of Capital Issues.

### **Foreign Currency Account**

Indian companies, which are eligible to issue shares to persons resident outside India under the FDI Scheme will be allowed to retain the shares subscription amount in a foreign currency account, with the prior approval of RBI.

### **Transfer of Shares and convertible debentures**

i. Foreign investors can also invest in Indian companies by purchasing / acquiring existing shares from Indian shareholders or from other non-resident shareholders. General permission has been granted to non-residents / NRIs for acquisition of shares by way of transfer subject to the following: -

- a) A person resident outside India (Other than NRI and OCB) may transfer by way of sale or gift the shares or convertible debentures to any person resident outside India (including NRIs)
- b) NRIs and erstwhile OCBs may transfer by way of sale or gift the shares or convertible debentures held by them to another NRI.

In both the above cases, if the transferee has previous ventures tie-up in India through investment / technical collaboration / trade mark agreement in the same field in which the Indian company, whose shares are being transferred, is engaged, he has to obtain prior permission of SIA/FIPB to acquire the shares. This restriction is, however, not applicable to the transfer of shares to international financial institutions (i.e. ADB, IFC, CDC, DEG) and transfer of shares to Indian company engaged in Information Technology Sector.

- c) A person resident outside India can transfer any security to a person resident in India by way of gift.
- d) A person resident outside India can sell the shares and convertible debentures of an Indian company on a Recognized Stock Exchange in India through a registered broker.
- e) A person resident in India can transfer by way of sale, shares / convertible debentures (including transfer of subscriber's shares), of an Indian company in sectors other than financial service sector (i.e. Banks, NBFC, Insurance, ARCs and infrastructure companies in the securities market viz. Stock Exchanges, Clearing Corporations and Depositories) under private arrangement to a person resident outside India, subject to the guidelines.
- f) General permission is also available for transfer of shares / convertible

debentures, by way of sale under private arrangement by a person resident outside India to a person resident in India, subject to the guidelines.

g) The above General Permission also covers transfer by a resident to a non-resident of shares / convertible debentures of an Indian company, engaged in an activity earlier covered under the Government Route but now falling under Automatic Route of RBI, as well as transfer of shares by a non-resident to an Indian company under buy-back and / or capital reduction scheme of the company. However, this General Permission is not available for transfer of shares / debentures of an entity engaged in any activity in the financial service sector (i.e. Banks, NBFCs, ARCs, Insurance and infrastructure providers in the securities market such as Stock Exchanges, Clearing Corporations, etc.) (ii). Reporting of transfer of shares between residents and non-residents and vice versa is to be done in Form FC-TRS. This Form needs to be submitted to the AD Category – I bank, which will forward the same to its link office. The link office will consolidate the Forms and submit a report to the Reserve Bank. (iii). AD Category – I banks have been given general permission to open Escrow account and Special account by nonresident corporate for open offers / exit offers and delisting of shares. The relevant SEBI (SAST) Regulations or any other applicable SEBI Regulations / provisions of the Companies Act, 1956 will be applicable.

**Prior permission of RBI in Certain cases for transfer of shares / convertible debentures**

(i). A person resident in India, who intends to transfer any security, by way of gift to a person resident outside India, has to obtain prior approval from Reserve Bank. While forwarding applications to Reserve Bank for approval for transfer of shares by way of gift, the prescribed documents may be enclosed. Reserve Bank considers the following factors processing such applications:

- a) The transferee (donee) is eligible to hold such security under Schedules 1, 4 and 5 of Notification No. FEMA 20/2000-RB dated 3rd May 2000, as amended from time to time.
  - b) The gift does not exceed 5 per cent of the paid-up capital of the Indian company / each series of debentures/each mutual fund scheme.
  - c) The applicable sectoral cap limit in the Indian company is not breached.
  - d) The transferor (donor) and the transferee (donee) are close relatives as defined in Section 6 of the Companies Act, 1956, as amended from time to time.
  - e) The value of security to be transferred together with any security already transferred by the transferor, as gift, to any person residing outside India does not exceed the rupee equivalent of USD 25,000 during a calendar year.
  - f) Such other conditions as stipulated by Reserve Bank in public interest from time to time.
- (ii). The following instances of transfer of

by way of sale requires RBI approval:

- i Transfer of shares or convertible debentures of an Indian company engaged in financial sector (i.e. Banks, NBFCs, Asset Reconstruction Companies, Insurance and Infrastructure providers in the securities market such as Stock Exchanges, Clearing Corporations, etc.)
- ii Transactions which attract the provisions of SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1997.
- iii The following instances of transfer of shares from residents to non-residents by way of sale or otherwise requires Government approval followed by permission from RBI:
  - a. Transfer of shares of companies engaged in sectors falling under the Government Approval Route.
  - b. Transfer of shares resulting in foreign investments in the Indian company, breaching the sectoral cap applicable.

**Conversion of ECB / Lumpsum Fee / Royalty / Import of capital goods by SEZs into Equity**

- (i). Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) into shares / preference shares, subject to the following conditions and Reporting requirements.
- a. The activity of the company is covered under the Automatic Route for FDI or the company has obtained Government approval for Foreign equity in the company.

- b. The foreign equity after conversion of ECB into equity is within the sectoral cap, if any.
  - c. Pricing of shares is as per SEBI regulations or erstwhile CCI guidelines in the case of listed or unlisted companies respectively.
  - d. Compliance with the requirements prescribed under any other statute and regulation in force.
- (ii). The conversion facility is available for ECBs availed under the Automatic or Approval Route. This would also be applicable to ECBs, due for payment or not, as well as secured / unsecured loans availed from non-resident collaborators. General permission is also available for issue of shares/preference against lump-sum technical know-how fee, royalty, under automatic route or SIA / FIPB route, subject pricing guidelines of SEBI / CCI and compliance with applicable tax laws.
- (iii). Units in Special Economic Zones (SEZs) are permitted to issue equity shares to non-residents against import of capital goods subject to the valuation done by a Committee consisting of Development Commissioner and the appropriate Customs officials.

(iv). **Reporting**

Details of issue of shares against conversion of ECB has to be reported to the concerned Regional Office of the Reserve Bank, as indicated below:

- a. In case of full conversion of ECB into equity, the company shall report the conversion in form FC-GPR to the concerned Regional Office of the Reserve Bank as well as in from ECB-2 to the Department

of Statistical and information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai-400 051, within seven working days from the close of month to which it relates. The words “ECB wholly converted to equity” shall be clearly indicated on top of the ECB-2 form. Once reported, filing of form ECB-2 in the subsequent months is not necessary.

- b. In case of partial conversion of ECB, the company shall report the converted portion in form FC-GPR to the concerned Regional Office as well as in form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words “ECB partially converted to equity” shall be indicated on top of the ECB-2 form. In the subsequent months, the outstanding balance of ECB shall be reported in ECB-2 form to DSIM.

- c. The SEZ unit issuing equity as mentioned in para (iii) above, should report the particulars of the shares issued in the form FC-GPR.

**Remittance of sale proceeds**

AD Category-I bank can allow the remittance of sale proceeds of a security (net of applicable taxes) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC / tax clearance certificate from the Income Tax Department has been produced.

## **Remittance on winding up / liquidation of Companies**

AD Category-I banks have been allowed to remit winding up proceeds of companies in India, which are under liquidation, subject to payment of applicable taxes. Liquidation may be subject to any order issued by the court winding up the company or the official liquidator in case of voluntary winding up; under the provisions of the Companies Act, 1956. AD Category - I banks shall allow the remittance provided the applicant submits:-i No objection or Tax clearance certificate from Income Tax Department for the remittance. ii Auditor's certificate confirming that all liabilities in India have been either fully paid or adequately provided for. iii Auditor's certificate to the effect that the winding up is in accordance with the provisions of the Companies Act, 1956. iv In case of winding up otherwise than by a court, an auditor's certificate to the effect that there is no legal proceedings pending in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

## **Issue of shares by Indian companies under ADR / GDR**

(i). Depository Receipts (DRs) are negotiable securities issued outside India by a Depository Bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as deposit by a Custodian bank in India. DRs are traded in Stock Exchanges in the US, Singapore, Luxembourg, etc. DRs listed and traded in the US markets are known as American Depository Receipts (ADRs) and those

listed and traded elsewhere are known as Global Depository Receipts (GDRs). In the Indian context, DRs are treated as FDI.

(ii). Indian companies can raise foreign currency resources abroad through the issue of ADRs / GDRs, in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipts Mechanism) Scheme, 1993 and guidelines issued by the Government of India there under from time to time.

(iii). A company can issue ADRs/GDRs if it is eligible to issue shares to persons resident outside India under the FDI Scheme. However, an Indian listed company, which is not eligible to raise funds from the Indian Capital Market including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) will not be eligible to issue ADRs / GDRs.

(iv). Unlisted companies, which have not yet accessed the ADR/GDR route for raising capital in the international market would require prior or simultaneous listing in the domestic market, while seeking to issue such instruments. Unlisted companies, which have already issued ADRs / GDRs in the international market, have to list in the domestic market on making profit or within three years of such issue of ADRs / GDRs, whichever is earlier.

(v). ADRs / GDRs are issued on the basis of the ratio worked out by the Indian company in consultation with the Lead Manager to the issue. The proceeds so raised have to be kept abroad till actually required in India. Pending repatriation or utilization of the proceeds, the Indian

company can invest the funds in:

- a) Deposits with or Certificate of Deposit or other instruments offered by banks who have been rated by Standard and Poor, Fitch, IBCA or Moody's, etc. and such rating not being less than the rating stipulated by Reserve Bank from time to time for the purpose, (current rating applicable is AA(-) by Standard and Poor/Fitch IBCA or Aa3 by Moody's);
  - b) Deposits with branch/es of Indian Authorized Dealers outside India; and
  - c) Treasury bills and other monetary instruments with maturity or unexpired maturity of one year or less.
- (vi). There are no end-use restrictions except for a ban on deployment / investment of such funds in Real Estate or the Stock Market. There is no monetary limit upto which an Indian company can raise ADRs / GDRs.
- (vii). The ADR / GDR proceeds can be utilized for first stage acquisition of shares in the disinvestment process of Public Sector Undertakings / Enterprises and also in the mandatory second stage offer to the public in view of their strategic importance.
- (viii). voting right on shares issued under the Scheme shall be as per the provisions of Companies Act, 1956 and in a manner in which restriction on voting rights imposed on ADR/GDR issues shall be consistent with the Company Law provisions. voting right in the case of banking companies will continue to be in terms of the provisions of the Banking

Regulation Act, 1949 as applicable to all shareholders exercising voting rights. (ix). Erstwhile OCBs who are not eligible to invest in India and entities prohibited to buy, sell or deal in securities by SEBI will not be eligible to subscribe to ADRs / GDRs issued by Indian companies. (x). The pricing of ADR / GDR issues should be made at a price not less than the higher of the following two averages: i The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date; ii The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date. The "relevant date" means the date, thirty days prior to the date on which the meeting of the general body of shareholders is held, in terms of section 81(IA) of the Companies Act, 1956, to consider the proposed issues.

#### **Two-way Fungibility Scheme**

A limited Two-way Fungibility scheme has been put in place by the Government of India for ADRs / GDRs. Under this Scheme, a stock broker in India, registered with SEBI, can purchase shares of an Indian company from the market for conversion into ADRs / GDRs based on instructions received from overseas investors. Reinsurance of ADRs / GDRs would be permitted to the extent of ADSs / GDRs which have been redeemed into underlying shares and sold in the Indian market.

### **Sponsored ADR / GDR issue**

An Indian company can also sponsor an issue of ADR / GDR. Under this mechanism, the company offers its resident shareholders a choice to submit their shares back to the company so that on the basis of such shares, ADRs / GDRs can be issued abroad. The proceeds of the ADR / GDR issue is remitted back to India and distributed among the resident investors who had offered their rupee denominated shares for conversion. These proceeds can be kept in Resident Foreign Currency (Domestic) accounts in India by the resident shareholders who have tendered such shares for conversion into ADR / GDR.

### **Reporting of ADR / GDR issues**

The Indian company issuing ADRs / GDRs has to furnish to the Reserve Bank, full details of such issue within 30 days from the date of closing of the issue. The company should also furnish a quarterly return to Reserve Bank within 15 days of the close of the calendar quarter. The quarterly return has to be submitted till the entire amount raised through ADR / GDR mechanism is either repatriated to India or utilized abroad as per the Reserve Bank guidelines.

## **FOREIGN VENTURE CAPITAL INVESTMENT**

### **Investments by Venture Capital Funds**

A SEBI registered Foreign Venture Capital Investor (FVCI) with specific approval from RBI under FEMA Regulations can invest in Indian venture Capital Undertaking (IVCU) or Indian venture Capital Fund (IVCF) or in a Scheme floated by such IVCFs subject to the condition that the VCF should also be registered with SEBI.

An IVCU is defined as a company incorporated in India whose shares are not listed on a recognized stock exchange in India and which is not engaged in an activity under the negative list specified by SEBI. A VCF is defined as 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 which has a dedicated pool of capital raised in a manner specified under the said Regulations and which invests in venture Capital Undertakings in accordance with the said Regulations.

FVCIs can purchase equity/ equity linked instruments/ debt /debt instruments, debentures of and ICU or of a CF through initial public offer or private placement in units of schemes / funds set up by a VCF. At the time of granting approval, RBI permits the FCI to open a foreign currency account or rupee account with a designated branch of an AD Category-I bank.

The purchase / sale of shares, debentures and units can be at a price that is mutually acceptable to the buyer and the seller.

AD Category-I Banks can offer forward cover to FVCIs to the extent of total inward remittance. In case the FvCI has made any remittance by liquidating some investments, original cost of the investments has to be deducted from the eligible cover to arrive at the actual cost that can be offered.

## OTHER INVESTMENTS

### **Purchase of Other Securities by NRIs**

#### **On Non-Repatriation Basis:**

NRIs can purchase shares/ convertible debentures issued by an Indian company on non-repatriation bases without any limit. Amount of consideration for such purchase shall be paid by inward remittance through normal banking channels from abroad or out of funds held in NRE / FCNR / NRO account maintained with the AD category-I bank.

NRI can also, without any limit, purchase on non-repatriation basis dated Government securities, treasury bills, units of domestic mutual funds, units of Money Marker Mutual Funds. Government of India has notified that NRIs are not permitted to make Investments in Small Savings Schemes including PPF. In case of investment on non-repatriation basis, the sale proceeds shall be credited to NRO account. The amount invested under the scheme and the capital appreciation thereon will not be allowed to be repatriated abroad.

#### **On Repatriation Basis:**

A Non-Resident Indian can purchase on repatriation bases, without limit, Government dated securities (other than bearer securities) or treasury bills or units of domestic mutual funds; bonds issued by a public sector undertaking (PSU) in India and shares in Public Sector Enterprises being disinvested by the Government of India, provided the purchase is in accordance with the terms and conditions stipulated in the notice inviting bids.

## FOREIGN

### **Purchase of Other Securities by FIIs**

Foreign Institutional Investors can buy dated Government securities/treasury bills, listed non-convertible debentures/bonds issued by Indian companies and units of domestic mutual funds either directly from the issuer of such securities or through a registered stock broker on a recognized stock exchange in India. Purchase of debt instruments by FIIs are subject to limits notified by SEBI.

### **Investment by Multilateral Development Banks (MDBs)**

A Multilateral Development Bank (MDB), which is specifically permitted by Government of India to float rupee bonds in India, can purchase Government dated securities.

### **Foreign Investment in Tier I and Tier II Instruments Issued by banks in India**

FIIs registered with SEBI and NRIs have been permitted to subscribe to the Perpetual Debt Capital instruments (eligible for inclusion as Tier I capital) and Debt Capital instruments (eligible for inclusion as upper Tier II capital), issued by banks in India, subject to the following conditions.

- a) Investment by all FIIs in Rupee denominated Perpetual Debt instruments (Tier I) should not exceed an aggregate ceiling of 49 per cent of each issue, and investment by individual FII should not exceed the limit of 10 per cent of each issue.
- b) Investments by all NRIs in Rupee denominated perpetual Debt instruments (Tier I) should not exceed an aggregate ceiling of 24 per cent of each issue and investments by a single NRI should not exceed 5 percent of the issue.
- c) Investment by FIIs in Rupee denominated Debt capital instruments (Tier II) shall

be outside the limits stipulated by SEBI for FIIs investment in corporate debt instruments. d) Investment By NRIs in Rupee denominated Debt Capital instruments (Tier II) shall be in accordance with the extant policy for investment by NRIs in other debt instruments. The issuing banks are required to ensure compliance with the conditions stipulated above at the time of issue. They are also required to comply with the guidelines notified by the Department of Banking Operations and Development (DBOD), Reserve Bank of India, from time to time. The issue-wise details of amount raised as perpetual Debt Instruments qualifying for Tier

I capital by the bank from FIIs / NRIs are required to be reported in the prescribed format within 30 days of the issue to the Reserve Bank Rupee denominated.

Investment by FIIs in rupee denominated Upper Tier II Instruments raised in Indian Rupees will be outside the limit prescribed by SEBI for investment by FIIs in these instruments will be subject to a separate ceiling of USD 500 million.

The details of the secondary market sales/ purchase by FIIs and the NRIs in these instruments on the floor of the stock exchange are to be reported by the custodians and designated banks respectively, to the Reserve Bank of India through the soft copy of the LEC Returns.

ANNEXURE-1

**SECTORS/ACTIVITIES PROHIBITED/RESTRICTED  
UNDER FDI POLICY**

<b>(A)</b>	<b>List of activities for which Automatic Route of RBI for investment from person resident outside India is not available.</b>
1	
2	Petroleum Refining (except for private sector oil refining), Natural Gas /LNG Pipelines
3	Investing companies in Infrastructure & Services Sector
4	Defence and Strategic Industries
5	Atomic Minerals
6	Print Media
7	Broadcasting
8	Postal Services
9	Courier Services
10	Establishment & Operation of satellite
11	Tea Sector
12	Development of Integrated Township
<b>(B)</b>	<b>Asset Reconstruction Companies</b>
1 2 3	<b>List of activities or items for which FDI is prohibited.</b>
4 5 6	Retail Trading
	Atomic Energy
	Lottery Business
	Gambling & Betting
	Housing & Real Estate business
	Agriculture ( <b>excluding</b> floriculture, Horticulture, Development of seeds, Animal Husbandry, Pisciculture & Cultivation of vegetables, Mushrooms etc. under controlled conditions & services related to agro & allied sectors) and Plantations ( <b>other than Tea plantations</b> )

## ANNEXURE-2

**SECTORAL CAP ON INVESTMENTS BY  
PERSONS RESIDENT OUTSIDE INDIA**

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
1. 2.	Private sector banking	74%	Subject to guidelines issued by RBI banking from time to time
	Non-Banking Financial Companies	100%	FDI / NRI investments allowed in the following 18 NBFC activities shall be as per the levels indicated below:
			<b>(a) Activities Covered</b>
			1. Merchant Banking
			2. Under writing
			3. Portfolio Management Services
			4. Investment Advisory Services
			5. Financial Consultancy
			6. Stock broking
			7. Asset Management
			8. Venture Capital
			9. Custodial Services
			10. Factoring
			11. Credit Rating Agencies
			12. Leasing & Finance
			13. Housing Finance
			14. Forex broking
			15. Credit Card Business
			16. Money changing Business
			17. Micro credit
			18. Rural credit
			<b>(b) Minimum capitalization norms for fund based NBFCs</b>
			1. For FDI upto 51% US \$ 0.5 million to be brought in upfront.
			2. If the FDI is above 51% & upto 75% US \$ 5 million to be brought upfront.
			3. If the FDI is above 75% and upto 100%, US \$ 50 million out of which \$ 7.5 million to be brought in upfront and the balance in 24 months.

S. No.	Sector	Investments cap	Description of Activity / Items /conditions
			<p><b>(c) Minimum capitalization norms for non fund based activities</b>  Minimum capitalization norm of US \$ 0.5 million is applicable in respect of non-fund based NBFCs with foreign investment.</p>
			<p><b>(d)</b> Foreign investors can set up 100% operating subsidiaries without the condition to disinvest a minimum of 25% of its equity to Indian entities, subject to bringing in US \$ 50 million as at (b) (3) above (without any restriction on number of operating subsidiaries without bringing in additional capital)</p>
			<p><b>(e)</b> Joint Venture operating NBFCs that have 75% or less than 75% foreign investment will also be allowed to set up subsidiaries for undertaking other NBFC activities subject to the subsidiaries also complying with the applicable minimum capital infow i.e. (b) (1) &amp; (b) (2) above.</p>
			<p><b>(f)</b> FDI in the NBFC sector is put on automatic route subject to compliance with guidelines of the RBI .RBI would issue appropriate guidelines in this regard.</p>
3.	Insurance	26%	<p>FDI upto 26% in the Insurance sector is allowed on the automatic route subject to obtaining license from Insurance Regulatory &amp; development authority.</p>
4.	Telecommunication	49%	<p><b>(i)</b> In basic, cellular, Value added Services, and Global Mobile Personal Communication by Satellite, FDI is limited to 49% subject to licensing and security requirements &amp; adherence by the companies (who are investing &amp; the companies in which the investment is being made) to the license condition for foreign equity cap &amp; lock in period for transfer and addition of equity and other license provisions.</p>
			<p><b>(ii)</b> ISP with gateways, radio paging and end-to-end bandwidth, FDI is permitted upto 74% with FDI, beyond 49% requiring Government approval. These services would be subject to licensing and security requirements.</p>
			<p><b>(iii)</b> No equity cap is applicable to manufacturing activities.</p>
			<p><b>(iv) FDI upto 100% is allowed for the following activities in the telecom sector.</b></p>

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
			(a) ISPs not providing gateways (both for satellite and submarine cables)
			(b) Infrastructure Providers providing dark fiber (IP Category 1)
			(c) Electronic Mail, and
			(d) Voice Mail
			<b>The above would be subject to the following conditions:</b>
			(a) FDI upto 100% is allowed subject to the condition that such companies would divest 26% of their equity in favor of Indian Public in 5 years, if these companies are listed in other parts of the world.
			(b) The above services would be subject to licensing and security requirements, wherever required
			(c) Proposal for FDI beyond 49% shall be considered by FIPB on case-to case basis.
5.	(i) Petroleum Refining (private Sector)	100%	FDI permitted upto 100% incase of private Indian companies
	(ii) Petroleum Product Marketing	100%	Subject to the existing sectoral policy and regulatory framework in the oil-marketing sector.
	(iii) Oil Exploration in both small & medium sized field	100%	Subject to and under the policy of Government on private participation in:-
			(a) Exploration of oil and
			(b) the discovered fields of national oil companies.
	(iv) Petroleum product pipelines	100%	Subject to and under the Government Policy & regulations thereof.
6.	Housing and Real Estate	100%	Only the NRIs are allowed to invest in the areas listed below:
			(a) Development of serviced plots and construction of built up residential premises.
			(b) Investment in real estate covering construction of residential and commercial premises including business centers and offices.
			(c) Development of townships.

S. No.	Sector	Investment cap	Description of Activity / Items / conditions
			(d) City and regional level urban infrastructure facilities including both roads and bridges.
			(e) Investment in manufacture of building material.
			(f) Investment in participatory ventures in (a) to (e) above.
			(g) Investment in housing finance institution which is also opened to FDI as an NBFC.
7.	Coal & lignite		(i) Private Indian companies setting up or operating power projects as well as coal & lignite mines for captive consumption are allowed FDI upto 100%.
			(ii) 100% FDI is allowed for setting up processing plants subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.
			(iii) FDI upto 74% is allowed for exploration or mining of coal or lignite for captive consumption.
			(iv) In all the above cases, FDI is allowed upto 50% under the automatic route subject to the condition that such investment shall not exceed 49% of the equity of a PSU.
8.	venture Capital Fund (vCF) and venture Capital company (vCC)		Offshore Venture Capital Funds / companies are allowed to invest in domestic venture Capital undertaking as well as other companies through automatic route, subject to only SEBI regulations and sector specific caps on FDI.
9.	Trading		Trading is permitted under automatic route with FDI upto 51% provided it is primarily export activities, and the undertaking is an export house/ trading house/ star trading house/ super trading house. However, under the FIPB route:
			(i) 100% FDI is permitted in case of trading companies for the following activities:
			(a) Exports
			(b) Bulk imports with export/ex-bonded warehouses sales;
			(c) Cash and carry wholesale trading

*FOREIGN DIRECT INVESTMENTS*

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
			(d) Other import of goods or services provided at least 75% is for procurement and sale of the same group and not for third party use or onward transfer/distribution/sales.
			(ii) The following kinds of trading are also permitted, subject to provision of EXIM policy.
			(a) Companies for providing after sales services (i.e. not trading per se.)
			(b) Domestic trading of products of Jives is permitted at the wholesale level for such trading companies who wish to market manufactured products on behalf of their joint ventures in which they have equity participation in India.
			(c) Trading of hi tech items/items requiring specialized after sales service
			(d) Trading of items for social sector.
			(e) Trading of hi-tech medical and diagnostic items
			(f) Trading of items sourced from the small scale sector under which, based on technology provided and laid down quality specification, a company can market that item under its brand name.
			(g) Domestic sourcing of products for exports.
			(h) Test marketing of such items for which a company has approval for manufacture provided such test marketing facility will be for a period of two years, and investment in setting up manufacturing facilities commences simultaneously with test marketing.
			(i) FDI upto 100% permitted for e-commerce activities subject to the condition that such companies would divest 26% of their equity in favor of the Indian public in five years, if these companies are listed in other parts of the world. <b>Such companies would engage only in business to business (B2B) e-commerce and not in retail trading.</b>
10.	Power	100%	FDI allowed upto 100% in respect of project relating to electricity generation, transmission and distribution, other than atomic reactor power plants. There is no limit on the project cost and quantum of foreign direct investment.

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
11.	Drugs & Pharmaceuticals	100%	FDI permitted upto 100% for manufacture of drugs and pharmaceuticals provided the activity does not attract compulsory licensing or involve use of recombinant DNA technology and specific cell / tissue targeted formulations. FDI proposals for the manufacture of licensable drugs and pharmaceuticals and bulk drugs produced by recombinant DNA technology and specific cell/tissue targeted formulations will require prior Government approval.
12.	Road and highways, Port and harbors	100%	In project for construction and maintenance of roads, highways, vehicular bridges, toll roads, vehicular tunnels, ports and harbors.
13.	Hotel & Tourism	100%	The term hotels include restaurants, beach resorts and other tourist complexes providing accommodation and/or catering and food facilities to tourists. Tourism related industry include travel agencies, tour operating agencies and tourist transport operating agencies, units providing facilities for cultural, adventure and wild life experience to tourists, surface, air and water transport facilities to tourists, leisure, entertainment, amusement, sports and health units for tourists and Convention/Seminar units and organizations.
			For foreign technology agreements, automatic approval is granted if
			(i) Upto 3% of the capital cost of the project is proposed to be paid for technical and consultancy
			(ii) Upto 3% of the net turnover is payable for franchising and marketing/publicity support fee, and Upto 10% of gross operating profit is payable for management fee, including incentive fee.
14.	Mining	74%	(i) For exploration and mining of diamonds and precious stones FDI is allowed upto 74% under automatic route
		100%	(ii) For exploration and mining of gold and silver and minerals other than diamonds and precious stones, metallurgy and processing FDI is allowed upto 100% under automatic route
			(iii) Press Note 18 (1998 series) dated 14/12/98 would not be applicable for setting up 100% owned subsidiaries in so far as the mining sector is concerned, subject to a declaration from the applicant that he has no existing joint venture for the same area and/or the particular mineral.

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
15.	Advertising	100%	Advertising sector - FDI upto 100% allowed on the automatic route
16.	Films	100%	Film Sector (Film production, exhibition and distribution including related services/products)
			FDI upto 100% allowed on the automatic route with no entry level condition
17.	Airports	74%	Govt. approval required beyond 74%
18.	Mass Rapid Transport Systems	100%	FDI upto 100% is permitted on the automatic route in mass rapid transport system in all metros including associated real estate development
19.	Pollution Control & Management	100%	In both manufacture of pollution control equipment and consultancy for integration of pollution control system is permitted on the automatic route
20.	Special Economic Zones	100%	All manufacturing activities excepts: (i) Arms and ammunition, Explosives and allied items of Defence equipments, Defence aircrafts and warships, (ii) Atomic substances, Narcotics and Psychotropic Substances and hazardous Chemicals, (iii) Distillation and brewing of Alcoholic drinks and (iv) Cigarette/cigars and manufactured tobacco substitutes.
21.	Any other Sector/ Activity	100%	If not included in Annexure (1A)
22.	Air Transport Services (Domestic Airlines) for others	100% for NRIs 49%	No direct or indirect equity participation by foreign airlines is allowed
23.	Townships, housing, built-up infrastructure and construction development projects The sector would include, but not be restricted to, housing, commercial premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure	100%	The investment shall be subject to the following guidelines:

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
			(a) Minimum area to be developed under each project shall be as under: (i) In case of development of serviced housing plots - 10 hectares
			(ii) In case of construction development project - 50,000 sq. mtrs.
			(iii) In case of combination project, any one of the above two conditions.
			(b) The investment shall be subject to the following conditions: (i) Minimum capitalization of US\$ 10 Million for wholly owned subsidiaries and US \$5 Million for joint ventures with Indian partners. The funds would have to be brought in within six months of commencement of business of the Company.
			(ii) Original investment cannot be repatriated before a period of three years from completion of minimum capitalization. However, the investor may be permitted to exit earlier with prior approval of the Government through the FIPB.
			(c) At least 50% of the project must be developed within a period of five years from the date of obtaining all statutory clearances. The investor shall not be permitted to sell undeveloped plots.
			(d) The project shall conform to the norms and standards, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government /Municipal / Local Body concerned.

S. No.	Sector	Investment cap	Description of Activity / Items /conditions
			(e) The investor shall be responsible for obtaining all necessary approvals, including those of the building/ layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules /bye-laws/regulations of the State Government / Municipal/Local Body concerned.
			(f) The State Government / Municipal / Local Body concerned, which approves the building / development plan, shall monitor compliance of the above conditions by the developer.
			<b>Note:</b> For the purpose of these guidelines, “underdeveloped plots” will mean where roads, water supply, street lighting, drainage, sewerage, and other conveniences, as applicable under prescribed regulations, have not been made available. It will be necessary that the investor provides this infrastructure and obtains the completion certificate from the concerned local body/service agency before he would be allowed to dispose of serviced housing plots

## FREQUENTLY ASKED QUESTIONS (FAQs)

### **Q.1. What are the forms in which business can be conducted by a foreign company in India? A.1**

A foreign company planning to set up business operations in India has the following options:

- As an Incorporated entity by incorporating a company under the Companies Act, 1956 through
  - Joint Ventures; or
  - Wholly Owned Subsidiaries
- As an office of a foreign entity through
  - Liaison Office/ Representative Office
    - Project Office
    - Branch Office

Such offices can undertake activities permitted under the foreign exchange management (Establishment in India of branch office or other place of business) regulations, 2000.

### **Q. 2. How does a foreign company invest in India? What are the regulations pertaining to issue of shares by Indian companies to foreign collaborators/ investors?**

#### **A. 2 Automatic Route**

FDI up to 100% is allowed under the automatic route in all activities/ sectors except the following which require prior approval of the Government: i. Where provisions of Press Note 1 (2005 Series) issued by the Government of India are attracted. ii. Where more than 24% foreign equity is proposed to be inducted for manufacture of items reserved for the Small Scale sector.

iii. FDI in sectors/activities to the extent permitted under Automatic Route does not require any prior approval either by Government or the Reserve Bank of India.

iv. The investors are only required to notify the Regional Office concerned of the Reserve Bank of India within 30 days of receipt of inward remittances and file the required documents along with form FC-GPR with that Office within 30 days of issue of shares to non-resident investors.

#### **Government Route**

FDI in activities not covered under the automatic route requires prior Government approval and are considered by Investment Promotion Board (FIPB), Ministry of Finance. Application can be made in Form FC-IL, which can be downloaded from <http://www.dipp.gov.in>. Plain paper applications carrying all relevant details are also accepted. No fee is payable.

#### **General Permission of RBI under FEMA**

Indian companies having foreign investment approval through FIPB route do not require any further clearance from Reserve Bank of India for receiving inward remittance and issue of shares to the non-resident investors. The companies are required to notify the concerned Regional Office of the Reserve Bank of India of receipt of inward remittances within 30 days of such receipt and submit form FC-GPR within 30 days of issue of shares to the non-resident investors.

### **Q.3. Which are the sectors where FDI is not allowed in India, under the Automatic Route as well as Government Route?**

**A.3.** FDI is prohibited under Government as well as Automatic Route for the following sectors:

- i) Retail Trading (except single brand product retailing)
- ii) Atomic Energy
- iii) Lottery Business
- iv) Gambling and Betting
- v) Business of Chit Fund
- vi) Nidhi Company
- vii) Agricultural or plantation activities (cf Notification No. FEMA 94/2003-RB dated June 18, 2003).
- viii) Housing and Real Estate business (except development of townships, construction of residential/ commercial premises, roads or bridges to the extent specified in Notification No. FEMA 136/ 2005-RB dated July 19, 2005)
- ix) Trading in Transferable Development Rights (TDRs).

**Q.4. What should be done after investment is made under the Automatic Route or with Government approval?**

**A.4** A two-stage reporting procedure has been introduced for this purpose.

- On receipt of money for investment:
- Within 30 days of receipt of money from the non-resident investor, the Indian company will report to the Regional office of the Reserve Bank of India, under whose jurisdiction its Registered Office is located, containing details such as:
- Name and address of the foreign investor/s
- Date of receipt of funds and their rupee equivalent
- Name and address of the authorized dealer through whom the funds have been received, and
- Details of the Government approval, if any.

Upon issue of shares to non-resident investors:

- Within 30 days from the date of issue of shares, a report in Form FC-GPR, PART A together with the following documents should be filed with the concerned Regional Office of the Reserve Bank of India.
- Certificate from the Company Secretary of the company accepting investment from persons resident outside India certifying that the company has complied with the procedure for issue of shares as laid down under the FDI scheme as indicated in the Notification No. FEMA 20/2000-RB dated 3rd May 2000 as amended from time to time
- The proposal is within the sectoral policy / cap permissible under the automatic route of RBI and it fulfills all the condition laid down for investments under the Automatic route namely
  - a) Non-resident entity/ies (other than individuals) to whom it has issued shares does / do not have any existing joint venture or technology transfer or trade mark agreement in India in the same field.
  - b) The company is not investing in an SSI unit & the investment limit of 24 % has been observed/ requisite approvals have been obtained.
  - c) Shares have been issued on rights basis and the shares are issued to non-residents at a price that is not lower than that at which shares are/were issued to residents.

OR

- d) Shares issued are bonus shares.

OR e) Shares have been issued under a scheme of merger and amalgamation of two or more Indian companies or reconstruction by of demerger or otherwise of an Indian company, duly approved by a court in India.

- Shares have been issued in terms of SIA/FIPB approval No. .... dated...

Certificate from Statutory Auditors or Chartered Accountant indicating the manner of arriving at the price of the shares persons resident outside India.

**Q.5. What are the guidelines for transfer of existing shares from non-residents to residents or residents to nonresidents?**

**A.5 Transfer from Non-Residents to Residents**

The term 'transfer' is defined under FEMA as including "sale, purchase, acquisition, mortgage, pledge, gift, loan or any other form of transfer of right possession or lien". (Section 2 (ze) of FEMA, 1999).

The FEMA Regulations give specific permission covering the following forms of transfer i.e. transfer by way of sale and gift. These permissions are discussed below:

**Transfer by Way of Sale**

A person resident outside India can freely transfer share/convertible debenture by way of sale to a person resident in India as under

- Any person resident outside India

(Other than NRIs/OCBs) can transfer by way of sale the shares/ convertible debentures to any person resident outside India; subject to the condition that the acquirer or transferee does not have any previous venture or tie-up in India in the same field or sector.

- A non-resident Indian (NRI) or an erstwhile Overseas Corporate Body may transfer by way of sale, the shares/ convertible debentures held by him to another NRI only.
- Any person resident outside India may sell share/convertible debenture acquired in accordance with FEMA Regulations on a recognized Stock Exchange in India through a registered broker.

**Transfer by Way of Gift**

A person resident outside India can freely transfer share/convertible debenture by way of gift to a person resident in India as under

- Any person resident outside India, (not being a non-resident Indian or an erstwhile overseas corporate body), can transfer by way of gift the shares/ convertible debentures to any person resident outside India; subject to the condition that the acquirer or transferee does not have any previous venture or tie up in India in the same field or sector.
- A non-resident Indian (NRI) may transfer by way of gift, the shares/ convertible debentures held by him to another NRI only.
- Any person resident outside India may transfer share/ convertible debenture to a person resident in India by way of gift.

**Transfer from Resident to Nonresident**  
**Transfer by Way of Sale-General Permission under Regulation 10 of Notification No. FEMA 20/2000-RB dated May 2000.**

A person resident in India may transfer to a person resident outside India any share/ convertible debenture of an Indian Company whose activities fall under the Automatic Route for FDI subject to the Sectoral Limits, **by way of sale** subject to complying with pricing guidelines, documentation and reporting requirements for such transfers, as may be specified by the Reserve Bank of India from time to time.

This general permission is not available where:

- Indian Company whose shares or convertible debentures are proposed to be transferred is in financial service sector. Financial services sector means service rendered by banking and non-banking companies regulated by the Reserve Bank, Insurance companies regulated by Insurance Regulatory and Development Authority (IRDA) and other companies regulated by any other financial regulator, as the case may be.
- The transfer falls within the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997

**Transfer by Way of Gift**

A person resident in India can transfer by way of gift shares to a person resident outside India in the following ways:

- A person resident in India who proposes to transfer to a person resident outside India [other than erstwhile OCBs] any security **by way of gift**, shall make an application to the Central Office of the Foreign Exchange Department, Reserve Bank of India furnishing the following information, namely:
    - Name and address of the transferor and the proposed transferee
    - Relationship between the transferor and the proposed transferee
    - Reasons for making the gift. The gifts are permissible up to a limit of:
      - (i) 5% of the paid up capital of the Company per donee and
      - (ii) Amount does not exceed USD 25,000 per calendar year for each donor. The valuation of these shares shall be in accordance with pricing guidelines prescribed.
- Q.6. What if the transfer from resident to non-resident does not fall under the above facility?**
- A.6.** In case the transfer does not fit into any of the above, either the transferor (resident) or the transferee (non-resident) can make an application for the Reserve Bank's permission for the transfer. The application has to be accompanied with the following documents;
- A copy of FIPB approval (if required).
  - Consent letter from transferor and transferee clearly indicating the number of shares, name of the investee Company and the price at which the transfer is proposed to be affected.

- The present /post transfer shareholding pattern of the Indian investee company showing the equity participation by residents and non-residents category-wise.
- Copies of the Reserve Bank of India's approvals/ acknowledged copies of FCGPR evidencing the existing holding of non-residents.
- If the sellers/transferrors are NRIs / OCBs, the copies of the Reserve Bank of India's approvals evidencing the shares held by them on repatriation / non-repatriation basis.
- Open Offer document filed with SEBI if the acquisition of shares by non-resident is under SEBI Takeover Regulations.
- Fair Valuation Certificate from Chartered Accountant indicating the value of shares as per the following guideline.
- In the case of unlisted shares the fair value is worked out as per the erstwhile Controller of Capital Issue/s.
- For listed shares, the price worked out is not less than the higher of average weekly high and low quotations for 6 months and average of daily high and low quotation or two weeks preceding 30 days prior to the date of making application to FIPB.

**Q.7. Are the investments and profits earned in India repatriable?**

**A.7.** All foreign investments are freely repatriable except for the cases where NRIs choose to invest specifically under non-repatriable schemes. Dividends declared on foreign investments can be

Remitted freely through an Authorized Dealer.

**Q.8. What are the guidelines on issue and valuation of shares in case of existing Companies?**

**A.8** • Allotment of shares on preferential basis shall be as per the requirements of the Companies Act, 1956, which will require special resolution in case of a public limited company.

- In case of listed companies, valuation shall be as per the Reserve Bank of India /SEBI guidelines as follows:
  - a) The issue price shall be either at:
    - a) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date or
    - b) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the two weeks preceding the relevant date.
- In case of unlisted companies, valuation shall be done in accordance with the guidelines issued by the erstwhile Controller of Capital Issues.

**Q.9. What are the regulations pertaining to issue of ADRs/GDRs by Indian companies?**

**A.9.** Indian companies are allowed to raise capital in the international market through the issue of ADRs/ GDR. They can issue ADRs/GDRs without obtaining prior approval from RBI

If it is eligible to issue ADRs/GDRs in terms of the Scheme for issue of foreign currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and subsequent guidelines issued by Ministry of Finance, Government of India. After the issue of ADRs/GDRs, the company has to file a return in the Performa given in Annexure 'C' to the RBI Notification No. FEMA.20/ 2000-RB dated May 3, 2000. The company is also required to file a quarterly return in a form specified in Annexure 'D' of the same regulations.

There are no end-use restrictions on GDR/ADR issue proceeds, except for an express ban on investment in real estate stock markets.

**Q. 10. What is meant by Sponsored ADR & Two-way fungibility Scheme of ADR/GDR?**

**A.10. Sponsored ADR/GDR:** An Indian company may sponsor an issue of ADR/ GDR with an overseas depository against shares held by its shareholders at a price to be determined by the Lead Manager. The Operative guidelines for the same have been issued vide A.P. (DIR Series) Circular No.52 dated November 23, 2002.

**Two-way Fungibility Scheme:** Under the limited Two-way fungibility Scheme, a registered broker in India can purchase shares of an Indian company on behalf of a person resident outside India for the purpose of converting the shares so purchased into ADRs/GDRs. The operative guidelines for the same have

Been issued vide A.P. (DIR Series) Circular No.21 dated February 13, 2002. The Scheme provides for purchase and re-conversion of only as many shares into ADRs/GDRs which are equal to or less than the number of shares emerging on surrender of ADRs/ GDRs which have been actually sold in the market. Thus, it is only a limited two-way fungibility wherein the headroom available for fresh purchase of shares from domestic market is restricted to the number of converted shares sold in the domestic market by non-resident investors. So long ADRs/GDRs are quoted at discounts to the value of shares in domestic market; an investor will gain by converting the ADRs/GDRs into underlying shares and selling them in the domestic market. In case of ADRs/ GDRs being quoted at premium, there will be demand for reverse fungibility i.e. purchase of shares domestic market for re-conversion into ADRs/GDRs. The scheme is operationalised through the Custodian of securities and stockbrokers under SEBI.

**Q.11. Can Indian companies issue Foreign Currency Convertible Bonds (FCCBs)?**

**A.11.** FCCBs can be issued by Indian companies in the overseas market in accordance with Scheme for Issue of foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993. The FCCB issue needs to conform to External Commercial Borrowing guidelines, issued by RBI vide Notification No. FEMA 3/2000 dated May 3, 2000 as amended from time to time.

**Q.12. Can I invest through Preference Shares? What are the regulations applicable in case of such investments?**

**A.12.** Foreign investment through preference shares is treated as foreign direct investment. Foreign investment in preference shares is considered as part of share capital and fall outside the External Commercial Borrowing (ECB) guidelines/cap. Preference shares to be treated as foreign direct equity for purpose of sectoral caps on foreign equity, where such caps are prescribed, provided they carry a conversion option. If the preference shares are structured without such conversion option, they would fall outside the foreign direct equity cap.

**Q.13. Can shares be issued against Lump sum Fee, Royalty and ECB?**

**A.13.** Issue of equity shares against lump sum fee, royalty and external commercial borrowings (ECBs) in convertible foreign currency are permitted, subject to meeting all applicable tax liabilities and sector specific guidelines.

**Q.14. Other than issue of shares under Automatic /Government Route, what other general permissions are available under Notification No .FEMA 20 dated 3-5-2000?**

**A.14.** Issue of shares under ESOP by Indian companies to its employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside India directly or through a Trust up to 5% of the paid up capital of the company.

Issue and acquisition of shares by nonresidents after merger or de-merger or amalgamation of Indian companies.

Issue shares or preference shares or convertible debentures on rights basis by an Indian company to a person resident outside India.

**Q.15. Can I invest in unlisted shares issued by a company in India?**

**A.15.** Yes, as per the regulations/guidelines issued by the Reserve Bank of India/ Government of India, investment can be made in unlisted shares of Indian companies.

**Q. 16. Can a foreigner set up a partnership / proprietorship concern in India?**

**A.16.** Only NRIs/PIOs are allowed to set up partnership/proprietorship concerns in India. Even for NRIs/ PIOs investment is allowed on non-repatriation basis.

**Q.17. Can I invest in Rights shares issued by an Indian company at a discount?**

**A.17.** There are no restrictions under FEMA for investment in Rights shares at a discount, provided the rights shares so issued are being offered at the same price to residents and non-residents.

**Q.18. What are the payment parameters for foreign technology transfer under the Automatic Route of Reserve Bank of India? How should royalty be calculated?**

**A.18.** Payments for foreign technology collaboration by Indian companies are allowed under the automatic route subject to the following limits: • Lump sum payments not exceeding

US\$ 2 million.

- Royalty payable being limited to 5 per cent for domestic sales and 8 per cent for exports, without any restriction on the duration of the royalty payments.
- The royalty limits are net of taxes and are calculated according to standard conditions.
- The royalty will be calculated on the basis of the net ex-factory sale price of the product, exclusive of excise duties minus cost of the standard bought-out components and the landed cost of imported components, irrespective of the source of procurement including ocean freight, insurance, custom duties, etc.
- RBI has delegated the powers to ADSs to make payment of royalty under such agreements. The requirement of registration of the agreement with the Regional Office of Reserve Bank of India has been done away with.

**Q.19. What should be done, if Automatic Route of Reserve Bank of India for technology transfer is not available?**

**A.19.** Proposals, which do not satisfy the parameters prescribed for automatic route of RBI, require clearance from Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India.

**Q.20. What are the regulations for Foreign Venture Capital Investment?**

**A.20.** A SEBI registered Foreign Venture Capital Investor with general permission from the Reserve Bank of India can invest in a venture Capital Fund or an Indian venture Capital Undertaking, in the manner and subject to the terms and conditions specified in schedule 6 of RBI Notification No. FEMA 20/2000-RB dated May 3, 2000 as amended from time to time.