

THE POWER OF BEING UNDERSTOOD

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Newsflash: Revised FDI Policy for restricting investments into / acquisitions of the Indian Companies / LLPs by neighboring countries due to the current COVID-19 pandemic



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The Government has amended para 3.1.1 of extant Consolidated Foreign Direct Investment (FDI) Policy, 2017 to discourage opportunistic investment in Indian companies by neighboring countries in the midst of the Coronavirus pandemic vide its Press Note No. 3 (2020 Series) dated 17.04.2020.

Present Position

As per para 3.1.1 of extant FDI Policy, a non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, a citizen of Bangladesh or an entity incorporated in Bangladesh can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

Revised Position

Para 3.1.1 (a)

A non-resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the Government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

Para 3.1.1(b)

In the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction/purview of the para 3.1.1(a), such subsequent change in beneficial ownership will also require Government approval.

Analysis

- As per the aforesaid amendment, any investment being made from Bangladesh, China, Pakistan, Nepal, Myanmar, Bhutan and Afghanistan ('Neighboring Countries') or where the beneficial owner of an investment into India is situated in or is a citizen of any of the aforesaid neighboring countries, shall require prior approval of the Government regardless of the sector/activities in which investment is being made. The term investment in Indian company is used instead of Indian entity and the intention can be inferred to cover Indian Company and LLP.
- Government approval will also be required where subsequent changes in beneficial ownership (by way of direct or indirect transfers) of any existing or future FDI would result in such beneficial ownership falling within the restriction/purview of the mentioned sectors in para 3.1.1(a).
- This policy change may also impact foreign entities, which have subsidiaries, group companies or investee companies in India and who are seeking to raise funds in their own offshore jurisdictions, or whose shareholders are looking to sell their stakes, or who are looking to further capitalize their Indian interests.

➤ Whether Neighboring Countries include Hong Kong?

China is one of the Neighboring Countries, however, it is not clear whether the investment coming from Hong Kong, which officially is the Hong Kong Special Administrative Region of the People's Republic of China, may also get impacted by the aforesaid amendment. Though it seems that the intention is also to cover investments from Hong Kong under the government route.

➤ The term Beneficial Ownership

The term beneficial ownership is not defined in above Press Note as well as under FDI policy / FEMA and hence, the reference can be drawn from Companies Act, 2013.

➤ Investment by FPI / NRI on non-repatriation basis

There is no clarity on investment by FPI from aforesaid countries and also, investment by NRIs on non-repatriation basis. Hence, at present, they are outside the ambit of proposed changes / restrictions. Also, Investment by NRIs on non-repatriation basis under Schedule IV is not considered as Foreign Direct Investment and hence, it can be stated that it is outside the purview of aforesaid changes / restrictions.

➤ What about the existing Investment?

It can be stated that no government approval would be required for the investment already made in India from such neighboring countries. However, any additional investment or transfer of beneficial ownership (directly or indirectly) of any existing or future FDI would result in such beneficial ownership falling within the restriction/purview of the mentioned sectors in para 3.1.1(a) would require prior approval of Government.

Note: The above decision has been issued by the Department for Promotion of Industry and Internal Trade (DPIIT) in the Ministry of Commerce & Industry vide Press Note 3 of 2020 dated 17 April 2020. The above decision will take effect from the date of FEMA notification, which would be issued subsequently.

For further information please contact:

RSM Astute Consulting Pvt. Ltd.

13th Floor, Bakhtawar, 229, Nariman Point, Mumbai - 400021.

T: (91-22) 6108 5555 / 6121 4444

F: (91-22) 6108 5556 / 2287 5771

E: emails@rsmindia.in

W: www.rsmindia.in

Offices: Mumbai, New Delhi - NCR, Chennai, Kolkata, Bengaluru, Surat, Hyderabad, Ahmedabad, Pune, Gandhidham and Jaipur.



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This newsflash is general in nature. In this newsflash, we have summarized and provided clarifications about the revised FDI guidelines issued vide Press Note 3 of 2020 dated 17 April 2020. It may be noted that nothing contained in this newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said notification and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this newsflash.

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