

Amendment in Foreign Direct Investment (FDI)

To curb the opportunistic takeover/acquisition of Indian Companies during Covid-19, Department for Promotion of Industry and Internal Trade under Ministry of Commerce & Industry has amended Foreign Direct Investment (FDI) policy of India vide Press Note No. 3 (2020 Series) dated 15.04.2020.

The revised policy is implemented vide Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2020 dated 22nd April, 2020 issued under file number F. No. 01/05/EM/2019-Part as under.

Rule-6 (Present)	Rule-6 (Revised)
<p>Investments by person resident outside India: – A person resident outside India may make investment as under: -</p> <p>(a) may subscribe, purchase or sell equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I:</p> <p>Provided that a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan cannot purchase equity instruments without the prior government approval:</p> <p>Provided further that a citizen of Pakistan or an entity incorporated in Pakistan cannot invest in defence, space, atomic energy and sectors or activities prohibited for foreign investment even through the government route.</p>	<p>Investments by person resident outside India: – A person resident outside India may make investment as under: -</p> <p>(a) may subscribe, purchase or sell equity instruments of an Indian company in the manner and subject to the terms and conditions specified in Schedule I:</p> <p>“Provided that an entity of a country, which shares land border with India or the beneficial owner of an investment into India who is situated in or is a citizen of any such country, shall invest only with the Government approval:</p> <p>Provided further that, a citizen of Pakistan or an entity incorporated in Pakistan shall invest only under the Government route, in sectors or activities other than defence, space, atomic energy and such other sectors or activities prohibited for foreign investment:</p>

	<p>Provided also that 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 or purview of the above provisos, such subsequent change in beneficial ownership shall also require government approval”.</p>
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Effect of the Notification & Our Comments:

A **non-resident entity** can invest in India under automatic route i.e. without prior and specific approval of Government except in those sectors/activities which are prohibited.

However to curb the opportunistic takeover of Indian companies an entity of a country which shares **land border** with India namely Pakistan, Bangladesh, Afghanistan, Nepal, Bhutan, Myanmar and China, or where the beneficial owner of proposed Investment into India is situated in or citizen of such named country then they can invest only after **prior approval of government** of India, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

As **Hong Kong** is a special administrative region in South China that enjoys a measure of autonomy under a "one country, two systems" policy, therefore it will also be included in the said notification.

Earlier this condition of prior approval before investment was stipulated only for citizen/entity of Bangladesh/Pakistan.

Neither press release nor the amended regulation elaborate the meaning of **beneficial owner** but as Foreign Exchange Management Act (FEMA) is primary governed by **Reserve Bank of India** (RBI), In the **RBI master direction** on “**Know Your Customer (KYC)**” norms defines the term “Beneficial Owner”.

The term "beneficial owner" has been defined as the natural person who ultimately owns or controls a client and/or the person on whose behalf the transaction is being conducted, and includes a person who exercises ultimate effective control over a juridical person.

Form of Business	Applicability
Company	Company whether acting alone or together, or through one or more juridical person which exercises control through ownership or who ultimately has a controlling ownership interest Controlling ownership interest means ownership of/entitlement to more than 25 percent of shares or capital or profits of the juridical person
Partnership Firm	Partnership Firm whether acting alone or together, or through one or more juridical person have ownership of/entitlement to more than 15% of the capital or profits
Unincorporated association or Body of Individuals.	BOI or Unincorporated association whether acting alone or together, or through one or more juridical person have ownership of/entitlement to more than 15% of the property or capital or profits
Trust	The Trust where the trustee, the protector, the beneficiaries with 15% or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.

The notification also covers transfer of ownership **directly** or **indirectly** of any existing or future FDI in an entity in India. This implies even if the transfer is by an entity having **minority shareholding** in the Indian company will be covered in the ambit.

The notification **only** deals with Foreign Direct Investment (FDI) and **not Foreign Portfolio Investment** (FPI), therefore purchase of shares in capital instruments where such investment is **(a)** less than 10 percent of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company or **(b)** less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company will not be covered.

Conclusion

Government's objective is to keep an eye on the FDI transactions with the countries sharing land border with India to alleviate the risk of opportunistic takeover of Indian Companies during the Covid-19 crisis,