Overseas Direct Investment by Residents under FEMA

V. Ramachandran
Company Secretary, Wipro Limited

March 26, 2011

Views expressed are views of the presenter and not of Wipro Ltd
Investment in India Vs Investment Overseas

• Investment by Non residents in India- also called Foreign Direct Investment (FDI)
  – [FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000]

• Investment made by Residents outside India also called Overseas Direct Investment (ODI)
  – [FEMA (Transfer or Issue of any Foreign Security) Regulations, 2000]

[combined Master Circular on Direct Investment by Residents in JV/WOS abroad]
Basics of ODI

• ODI is Direct Investment outside India - by contribution to Capital or purchase of shares, of foreign entity, either by market purchase or private placement but excluding Portfolio Investment [cl 2(e)]

• Who can Invest ?-
  – Indian Companies (ownership not relevant)
  – Registered Partnership firms
  – Resident Individuals
  – Registered Trusts/ Societies
  – Any other entity notified by RBI [ cl 2(k)]
Other forms of Investment Overseas

• Setting up of branch overseas
  – No equity investment
  – Extension of the Head office
  – No separate entity
  – Liabilities could be passed on to Indian Company
  – Subject to local country laws
    • Countries in Middle East generally prohibit setting branches, prefer JV with a local partner

  – Current Account Transactions under FEMA

Regulations: FEMA (Export of Goods and Services), Regulations, 2000/ Master Cir on Export of Goods and Services
Type and Nature of Investment (ODI)

- Investment in a Wholly Owned subsidiary (WOS) or JV (other than WOS) outside India [cl 2(k)]
  - Investment as Loans/ Debt
  - Investment as Equity/ Preference shares
  - Investment as Guarantees to WOS/ JVs

*(Loan/ Equity and Guarantee Called Financial Commitment)*
Type and Nature of Investment (ODI contd)

• Separate Entity (WOS/ JV)
  – Liability stays with WOS/ JV
  – Independence of objects clause of Holding company
  – Meets local law requirements in certain countries prohibiting branch set up

• Financial Commitment by Indian Party

  AUTOMATIC ROUTE (para B 1 of Master Circular)
  – Upto 400 % of Net worth of Indian entity

  [400% limits not applicable for Investment from EEFC account or ADR/ GDR proceeds]

  (400% on standalone basis and not consolidated for the Group as per last audited B/S of Indian Party)
Prohibited/ Restricted Investments

• Restrictions under FEMA

– No Investment in Real Estate or banking business without RBI approval
– Investment in Pakistan not permitted (similar to restrictions on FDI - no Pakistani Citizen can hold any shares in an Indian Company)
– Indian Party should not be in RBI’s caution list / list of defaulters
– Indian Party should have filed all APRs for all its WOS / JV
– Indian Party should have routed all transactions through one Authorised Dealer (banker) (branches may be different for various WOS/ JVs)
Prohibited/ Restricted Investments (contd..)

– No Investment in Financial Services Sector without Regulator’s approval (example Insurance with IRDA approval, banking with RBI approval) plus RBI’s approval

– No Investment in WOS/ JVs for Commodities Trading without Forward Markets Commission’s approval

– Other Investments not falling under Automatic Route will fall under Approval Route requiring prior approval of RBI [para B7 of Master Circular]
Source of Investment [B3 (i)]

- Open Market Purchase of Forex from rupee balances
- Capitalisation of Export receipts
- ECB borrowing
- EEFC (Export Earner’s Foreign Currency a/c)
- Share Swap (with FIPB approval)
- Issue proceeds of ADR/ GDR abroad
- ADR/ GDR swap in overseas acquisition
- Export of Plant and machinery
- Others (to give details) like IP, etc

*400% limits do not apply to proceeds of ADR/ GDR and investment from EEFC account*
### Other Laws relating to Overseas Investment

<table>
<thead>
<tr>
<th>SECTIONS</th>
<th>APPLICABILITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 292 of Companies Act</td>
<td>Investments to be approved by Board in a Board meeting</td>
</tr>
<tr>
<td>372A</td>
<td>Investments in other corporates to be approved by unanimous Board Resolution with exceptions like 100% subsidiaries etc</td>
</tr>
<tr>
<td></td>
<td>More than 60% of net worth or &gt; 100% of Reserves (whichever is higher) to be with shareholder’s approval by Special Resolution</td>
</tr>
<tr>
<td></td>
<td>(includes both investment as well as loans given)</td>
</tr>
<tr>
<td>Overseas Laws</td>
<td>Local Corporate laws- merger and squeeze out rights (90%), 100% direct acquisition etc</td>
</tr>
<tr>
<td>Competition/ Anti Trust laws</td>
<td>In India and overseas</td>
</tr>
<tr>
<td>Clause 36 and 49 of Listing Agreement</td>
<td>Intimation to stock exchanges/ Corporate Governance</td>
</tr>
</tbody>
</table>
Procedure for Overseas Investment through Acquisitions

- Entering into Term Sheet or Letter of Intent
- Board’s approval subject to Due Diligence
- Completion of Due Diligence
- Signing of Acquisition agreements with Seller
- Clearance from Competition Commission of India (for Targets whose Assets > Rs 250 cr or Turnover > Rs 750 cr) if combined Acquirer/ Target Size exceeds thresholds
- Intimation to Board of Directors
- Announcement to Stock Exchanges preferably during non trading hours
- Announcement to Media

*(joint investment also possible by two or more Indian parties)*
Procedure for Remittance

- Finalise source of finance
- Copy of Board Resolution
- Get Valuation Certificate
  - More than $5mn investment - Merchant banker valuation
  - $5 mn or less - CA valuation
- Form ODI duly certified by statutory auditors for limits, areas of investment etc
- Investment in Financial Sector requires additional certification from auditor/ CA
- Audited Accounts of the Indian Party
- Form A 2 for remittance
- Bank instructions for DD/ Wire Transfer
Post Investment restructuring (to be changed)

– Winding up as per overseas laws
– Setting up step down subsidiary investments
– Merger with another overseas company or with Indian Company (with RBI approval)
– Transfer of Shares in Overseas entity
  • If overseas entity is a listed entity
  • If Indian entity is a listed entity with net worth of Rs 100 cr +
  • If Indian entity is unlisted investment is more than $ 10 mn
  • Sale not to result in write offs
  • Sale at a price determined by Valuer
  • No dues on account of royalty, Export proceeds etc from the WOS/ JV
  • Overseas entity is at least in operation for one year
Restrictions on Guarantees

• Guarantee to overseas WOS/ JV in which Indian Party has equity stake
  – Guarantee to customers
  – Guarantee to third parties
  – Guarantee to banks
• Guarantee cannot be open ended, has to have a finite limits
• Guarantee to have a fixed period
• Guarantee counted alongwith investment for 400% limit
Restrictions on Guarantees (Continued)

• Form ODI to be submitted at par with investments
• Guarantee permitted to be given to WOS/ JV and to first level step down operation subsidiary
• RBI approval required for guarantees to subsidiaries beyond one level operational subsidiary
Other Investments

• Portfolio Investments by Indian Companies

• Investments by Resident Individuals

• Investments by Mutual Funds
General Permission and limits for other Investments

• Investments by Residents
  – Portfolio Investments in listed companies securities not below ‘Investment Grade’ rating
    • Limit upto 50% of net worth

• Investments by Mutual Funds
  – In ADR/ GDRs
  – In shares of listed companies overseas-
    • Primary and secondary market purchase
  – Foreign Debt securities not below Investment Grade rating
  – Money market instruments like T bills etc not below Investment Grade Rating
  – Derivatives for hedging
  – Overseas Govt securities not below Investment Grade Rating
  – Limits for investment in ETFs and Investments by VCs
General Permission and limits for other Investments

• Investments by Resident individuals
  – Shares in overseas entity gifted by non residents
  – Acquisition of shares under a ‘Cash less’ route – no outward remittance
  – Assets inherited outside India
  – Shares of Foreign Company by Indian employees
    • Sale of those shares allowed
    • Repatriation of forex within 90 days
  – In Qualification shares for overseas Directorships
  – Investment in Rights issue from existing investment
  – Esops of WOS/ JV
  – ADR/ GDR Esops of the Indian Companies
    • Limit of $ 50 K in a block of five years
  – In any other investment upto $ 200K in a FY – Permitted Capital and current account transactions- General approval
Post Investment Regulatory filings

• Getting UIN (Unique Identification Number)
• Submitting Share Certificates or similar documents
• Filing Annual Performance Report (Form APR)
• Periodical ODI forms for Follow-on investments
• Intimation of Step Down Investments
• Intimation regarding winding up within 30 days and remittance of sale/liquidation proceeds within 90 days
• Filing form APR every year
  – (CA certified - to be filed within 3 months of final accounts of WOS/ JV being finalised (Forex denominated financials))

(Three sets of accounts in some cases-Indian GAAP under Sec 212, Local GAAP in some countries like Singapore, UK, Mauritius etc and Forex denominated Indian GAAP for APR)
Hedging of Investments

- 100% forex hedging of overseas investment risk permitted
- Cancellation of hedge also possible-
  - 50% of cancelled contracts allowed to be rebooked
- Rebooking possible on maturity of hedge
- Decrease in value of investment- hedging value readjusted for decrease in valuation on rebooking
ADR/ GDR issues- for Issuers

• Covered by FDI Regulations
• Depository Receipts traded overseas against underlying Indian Shares
• Indian Company should be eligible to issue shares in Indian market
• Types of DRs
  – Traded in US markets called ADRs
  – Traded in other markets called GDRs
• Unlisted companies to do simultaneous listing in India and overseas
• Existing companies listing ADR/ GDR overseas required to do Indian listing within 3 years of listing or immediately on making profits- examples- Rediff, WNS etc
• Proceeds of ADR/ GDR not for investment in Real Estate, Agriculture or stock market operations
Thank You