

Overseas Direct Investment*

Introduction

Overseas investments by persons resident in India enhance the scale and scope of business operations of Indian entrepreneurs by providing global opportunities for growth. Such ventures through easier access to technology, research and development, a wider global market and reduced cost of capital along with other benefits increase the competitiveness of Indian entities and boost their brand value. These overseas investments are also important drivers of foreign trade and technology transfer thus boosting domestic employment, investment and growth through such interlinkages.

In view of the evolving needs of businesses in India, in an increasingly integrated global market, there is need of Indian corporates to be part of global value chain and in keeping with the spirit of liberalisation and to promote ease of doing business, the Central Government and the Reserve Bank of India have been progressively simplifying the procedures and rationalising the rules and regulations under the Foreign Exchange Management Act, 1999. In this direction, a significant step has been taken with operationalisation of a new Overseas Investment regime. Foreign Exchange Management (Overseas Investment) Rules, 2022 have been notified by the Central Government on August 22, 2022.

Cumulative Amount of Overseas Direct Investment (ODI) (Financial Commitment) (Figures in US\$ mn)				
Period (from April, 2000 to August, 2022)	Equity	Loans	Guarantee Issued	Equity +Loans+ Guarantee Issued
	1,70,943	87,659	3,56,296	6,14,898

Overseas Direct Investment (ODI) means:

- (i) Acquisition of any unlisted equity capital or subscription as a part of the Memorandum of Association of a foreign entity, or
- (ii) Investment in 10% or more of the paid-up equity capital of a listed foreign entity, or
- (iii) Investment with control where investment is less than 10% of the paid-up equity capital of a listed foreign entity.

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Views expressed in the Article are the sole expression of the Author and may not express the views of the Institute.

Regulatory Framework

Overseas Investments Governed Under:

- *Foreign Exchange Management (Overseas Investment) Rules, 2022*
- *Foreign Exchange Management (Overseas Investment) Regulations, 2022*
- *Foreign Exchange Management (Overseas Investment) Directions, 2022*

Foreign Exchange Management (Overseas Investment) Regulations, 2022 have been notified by the Reserve Bank vide Notification No. FEMA 400/2022-RB dated August 22, 2022 in supersession of the Notification No. FEMA 120/2004-RB dated July 07, 2004 [Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004] and Notification No. FEMA 7 (R)/2015-RB dated January 21, 2016 [Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015].

Permission for Overseas Investment

A person resident in India may make or transfer any investment or financial commitment outside India under general permission/automatic route subject to the provisions contained in the Foreign Exchange Management (Overseas Investment) Rules, 2022 and Foreign Exchange Management (Overseas Investment) Regulations, 2022. Accordingly, overseas investment may be made in a foreign entity engaged in a bona fide business activity, directly or through Step Down Subsidiary (SDS) /Special-Purpose Vehicle (SPV).

It may be noted that financial commitment by a person resident in India means the aggregate amount of investment by way of ODI, debt other than Overseas Portfolio Investment (OPI) and non-fund-based facility or facilities extended by it to all foreign entities. An Indian entity may lend or invest in any debt instruments issued by a foreign entity or extend non-fund based commitment to or on behalf of a foreign entity, including overseas SDSs of such Indian entity, subject to the following conditions:

- a. the Indian entity is eligible to make ODI;
- b. the Indian entity has made ODI in the foreign entity;
- c. the Indian entity has acquired control in the foreign entity on or before the date of making such financial commitment.

Further, Subsidiary” / “Step Down Subsidiary (SDS) of a foreign entity means an entity in which the foreign entity has control and the structure of such subsidiary/SDS shall comply with the structural requirements of a foreign entity, i.e., such subsidiary/SDS shall also have limited liability where the foreign entity’s core activity is not in strategic sector. The investee entities of the foreign entity where such foreign entity does not have control (as defined above) shall not be treated as SDSs and therefore need not be reported henceforth.

Procedure for Making Overseas Investment

1	The person intending to make any financial commitment shall fill up the Form FC duly supported by the requisite documents and approach the designated Authorised Dealer (AD) bank for making the investment/remittance.
2	In respect of any case under the approval route, the applicant shall approach their designated AD bank who shall forward the proposal to the Reserve Bank after due scrutiny and with its specific recommendations. The application for overseas investment under the approval route would continue to be submitted to the Reserve Bank in physical/electronic form through email as hitherto, in addition to the online reporting.
3	The designated AD bank before forwarding the proposal shall submit the relevant sections of the Form FC in the online OID application and the transaction number generated by the application shall be mentioned in their reference.
4	The following documents shall be submitted along with the proposal: ➤ Background and brief details of the transaction. ➤ Reason(s) for seeking approval mentioning the extant FEMA provisions. ➤ Observations of the designated AD bank with respect to the following: • Prima facie viability of the foreign entity; • Benefits which may accrue to India through such investment; • Financial position and business track record of the Indian entity and the foreign entity; • Any other material observation.
5	Recommendations of the designated AD bank with confirmation that the applicant's board resolution or resolution from an equivalent body, as applicable, for the proposed transaction(s) is in place.
6	Diagrammatic representation of the organisational structure indicating all the subsidiaries of the Indian entity horizontally and vertically with their stake (direct and indirect) and status (whether operating company or SPV).
7	Valuation certificate for the foreign entity (if applicable).
8	Other relevant documents properly numbered, indexed and flagged.
9	The proposal shall be submitted to the Reserve Bank of India.

Approval from the Reserve Bank

Financial commitment by an Indian entity, exceeding USD 1 (one) billion (or its equivalent) in a financial year shall require prior approval of the Reserve Bank even when the total financial commitment of the Indian entity is within the eligible limit under the automatic route.

It may be noted that Indian entity means a company defined under the Companies Act, 2013 or a body corporate incorporated by any law for the time being in force or a Limited Liability

Partnership formed under the Limited Liability Partnership Act, 2008 or a partnership firm registered under the Indian Partnership Act, 1932.

Limit for Financial Commitment

- (1) The total financial commitment made by an Indian entity in all the foreign entities taken together at the time of undertaking such commitment shall not exceed 400 percent of its net worth as on the date of the last audited balance sheet or as directed by the Reserve Bank, in consultation with Central Government from time to time.
- (2) The total financial commitment shall not include capitalisation of retained earnings for reckoning such limit but shall include–
 - (i) utilisation of the amount raised by the issue of American Depository Receipts or Global Depository Receipts and stock-swap of such receipts; and
 - (ii) utilisation of the proceeds from External Commercial Borrowings to the extent the corresponding pledge or creation of charge on assets to raise such borrowings has not already been reckoned towards the above limit:

It may be noted that the financial commitment made by Maharatna or Navratna or Miniratna or subsidiaries of such public sector undertakings in foreign entities outside India engaged in strategic sectors shall not be subject to the limits laid down above.

Conclusion

The new Rules, Regulations and Directions pertaining to Overseas Investments issued by Central Government and Reserve Bank of India respectively simplifies the existing framework for overseas investment by persons resident in India to cover wider economic activity and significantly reduces the need for seeking specific approvals as well as reduce the compliance burden and associated compliance costs. The revised regulatory framework for overseas investment provides for simplification of the existing framework for overseas investment and has been aligned with the current business and economic dynamics. Clarity on Overseas Direct Investment and Overseas Portfolio Investment has been brought in and various overseas investment related transactions that were earlier under approval route are now under automatic route, significantly enhancing "Ease of Doing Business".

Source:

1. <https://pib.gov.in/PressReleasePage.aspx?PRID=1853679>
2. <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12381&Mode=0>
3. Overseas Direct Investment Data Fact Sheet August 2022 issued by Department of Economic Affairs, published date 22nd September, 2022
4. <https://dea.gov.in/sites/default/files/August%20factsheet.pdf>
