



THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT EXECUTIVE PROGRAMME (NEW SYLLABUS)

for

December, 2020 Examination

**ECONOMIC, BUSINESS AND COMMERCIAL
LAWS**

MODULE 2

PAPER 7

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LESSON 5

FOREIGN DIRECT INVESTMENTS – REGULATIONS & FDI POLICY

1. REVIEW OF FOREIGN DIRECT INVESTMENT (FDI) POLICY FOR CURBING OPPORTUNISTIC TAKEOVERS/ACQUISITIONS OF INDIAN COMPANIES

The Government of India vide Press Note No. 3(2020 Series) has reviewed the extant FDI policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic and amended para 3.1.1 of extant FDI policy as contained in Consolidated FDI Policy, 2017 as under:

Revised Position

Para 3.1.1:

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.

2. REVIEW OF FOREIGN DIRECT INVESTMENT (FDI) POLICY IN INSURANCE SECTOR

The Government of India vide Press Note No. 1 (2020 Series) has reviewed the extant FDI Policy on Insurance sector and has made following amendment:

- a. Forty Nine percent (49) of FDI allowed under Automatic Route in Insurance Company.
- b. Hundred percent of FDI allowed under Automatic Route in Intermediaries or Insurance Intermediaries including insurance brokers, re-insurance brokers,

insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time.

- c. No Indian Insurance company shall allow the aggregate holdings by way of total foreign investment in its equity shares by foreign investors, including portfolio investors, to exceed forty-nine percent of the paid up equity capital of such Indian Insurance company.
- d. The foreign investment up to forty-nine percent of the total paid-up equity of the Indian Insurance Company shall be allowed on the automatic route subject to approval/verification by the Insurance Regulatory and Development Authority of India.
- e. Foreign investment in this sector shall be subject to compliance with the provisions of the Insurance Act, 1938 and the condition that Companies receiving FDI shall obtain necessary license /approval from the Insurance Regulatory & Development Authority of India for undertaking insurance and related activities.
- f. An Indian Insurance company shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services/ Insurance Regulatory and Development Authority of India as per the rules/regulation issued by them from time to time.
- g. Any increase in foreign investment in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations.
- h. The foreign equity investment cap of 100 percent shall apply on the same terms as above to insurance brokers, re-insurance brokers, insurance consultants, corporate agents, third party administrator, Surveyors and Loss Assessors and such other entities, as may be notified by the Insurance Regulatory and Development Authority of India from time to time. However, the condition of Indian owned and controlled, as specified in Clause (f) above, shall not be applicable to Intermediaries and Insurance Intermediaries and composition of the Board of Directors and key management persons shall be as specified by the concerned regulators from time to time.
- i. The foreign direct investment proposals shall be allowed under the automatic route subject to verification by the Authority and the foreign investment in intermediaries or insurance intermediaries shall be governed by the same terms as provided under rules 7 and 8 of the Indian Insurance Companies (Foreign Investment) Rules, 2015, as amended from time to time:

Provided that where an entity like a Bank, whose primary business is outside the insurance area, is allowed by the Authority to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from the primary (non-

insurance related) business must remain above 50 per cent of their total revenues in any financial year.

- j. The insurance intermediary that has majority shareholding of foreign investors shall undertake the following:
- be incorporated as a limited company under the provisions of the Companies Act, 2013;
 - at least one from among the Chairman of the Board of Directors or the Chief Executive Officer or Principal Officer or Managing Director of the insurance intermediary shall be a resident Indian citizen;
 - shall take prior permission of the Authority for repatriating dividend;
 - shall bring in the latest technological, managerial and other skills;
 - shall not make payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond what is necessary or permitted by the Authority;
 - shall make disclosures in the formats to be specified by the Authority of all payments made to its group or promoter or subsidiary or interconnected or associate entities;
 - composition of the Board of Directors and key management persons shall be as specified by the concerned regulators.
- k. The certain provisions relating to 'Banking- Private Sector', shall be applicable in respect of bank promoted insurance companies.

3. REVIEW OF FOREIGN DIRECT INVESTMENT (FDI) POLICY IN CIVIL AVIATION SECTOR

The Government of India vide Press Note No. 2 (2020 Series) has reviewed the extant FDI Policy on Civil Aviation sector and has made following amendment:

Airports

Sector/Activity	% of Equity/FDI Cap	Entry Route
(a) Greenfield projects	100%	Automatic
(b) Existing projects	100%	Automatic

Air Transport Services

Sector/Activity	% of Equity/FDI Cap	Entry Route
(1) (a) Scheduled Air Transport Service*/ Domestic Scheduled Passenger Airline (b) Regional Air Transport Service	100%	Automatic up to 49% (Automatic up to 100% for NRIs) Government route beyond 49%
(2) Non-Scheduled Air Transport Services	100%	Automatic
(3) Helicopter services/seaplane services requiring DGCA approval	100%	Automatic

** As per Schedule XI of Aircraft Rules, 1937, Air Operator Certificate to operate Scheduled air transport services (including Domestic Scheduled Passenger Airline or Regional Air Transport Service) may be granted to a company or a body corporate provided that: -*

(a) it is registered and has its principal place of business within India;

(b) the Chairman and at least two-thirds of its Directors are citizens of India; and

(c) its substantial ownership and effective control is vested in Indian nationals.

Other services under Civil Aviation sector

Sector/Activity	% of Equity/FDI Cap	Entry Route
(1) Ground Handling Services subject to sectoral regulations clearance	100%	Automatic
(2) Maintenance organizations; flying training institutes; and technical training institutions.	100%	Automatic

Definitions:

The Civil Aviation sector includes Airports, Scheduled and Non-Scheduled domestic passenger airlines, Helicopter services/Seaplane services, Ground Handling Services, Maintenance and Repair organizations; Flying training institutes; and Technical training institutions.

For the purposes of the Civil Aviation sector:

(i) "Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934;

(ii) "Aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or pertaining thereto; (iii) "Air transport service" means a service for the transport by air of persons, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights;

(iv) "Air Transport Undertaking" means an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward;

(v) "Aircraft component" means any part, the soundness and correct functioning of which, when fitted to an aircraft, is essential to the continued airworthiness or safety of the aircraft and includes any item of equipment;

(vi) "Helicopter" means a heavier-than-air aircraft supported in flight by the reactions of the air on one or more power driven rotors on substantially vertical axis;

(vii) "Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public;

(viii) "Non-Scheduled air transport service" means any service which is not a scheduled air transport service;

(ix) "Seaplane" means an aeroplane capable normally of taking off from and alighting solely on water;

(x) "Ground Handling" means (i) ramp handling, (ii) traffic handling both of which shall include the activities as specified by the Ministry of Civil Aviation through the Aeronautical Information Circulars from time to time, and (iii) any other activity specified by the Central Government to be a part of either ramp handling or traffic handling.

Other Conditions

(a) Air Transport Services would include Domestic Scheduled Passenger Airlines; Non-Scheduled Air Transport Services, helicopter and seaplane services.

(b) Foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services, as per the limits and entry routes mentioned above.

(c) Foreign airlines are also allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions:

(i) It would be made under the Government approval route,

(ii) The 49% limit will subsume FDI and FII/FPI investment,

(iii) The investments so made would need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations,

(iv) All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security view point before deployment and

(v) All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation.

(d) In addition to the above conditions, foreign investment in M/s Air India Ltd. shall be subject to the following conditions:

(i) Foreign investment(s) in M/s Air India Ltd., including that of foreign airline(s) shall not exceed 49% either directly or indirectly except in case of those NRIs, who are Indian Nationals, where foreign investment(s) is permitted up to 100% under automatic route.

(ii) Substantial ownership and effective control of M/s Air India Ltd. shall continue to be vested in Indian Nationals as stipulated in Aircraft Rules, 1937.

(e) FDI in Civil Aviation is subject to provisions of Aircraft Rules, 1937, as amended from time to time.

4. Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2020

In exercise of the powers conferred by Section 47 of the Foreign Exchange Management Act, 1999, the Reserve Bank of India vide Notification No. FEMA. 395 (1)/2020-RB dated June 15, 2020 amended the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019

According to the Amendment, Schedule II (Investments by Foreign Portfolio Investors) & Schedule VIII (Investment by a person resident outside India in an Investment Vehicle) read as under:

Schedule II (Investments by Foreign Portfolio Investors)

A. Mode of payment

(1) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a foreign currency account and/ or a Special Non-Resident Rupee (SNRR) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

(2) Unless otherwise specified in these regulations or the relevant Schedules, the foreign currency account and SNRR account shall be used only and exclusively for transactions under this Schedule.

B. Remittance of sale proceeds

The sale proceeds (net of taxes) of equity instruments and units of REITs, InViTs and domestic mutual fund may be remitted outside India or credited to the foreign currency account or a SNRR account of the FPI.

Schedule VIII (Investment by a person resident outside India in an Investment Vehicle)

A. Mode of payment:

The amount of consideration shall be paid as inward remittance from abroad through banking channels or by way of swap of shares of a Special Purpose Vehicle or out of funds held in NRE or FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Further, for an FPI or FVCI, amount of consideration may be paid out of their SNRR account for trading in units of Investment Vehicle listed or to be listed (primary issuance) on the stock exchanges in India.

B. Remittance of sale/ maturity proceeds:

The sale/ maturity proceeds (net of taxes) of the units may be remitted outside India or may be credited to the NRE or FCNR(B) or SNRR account, as applicable of the person concerned.

LESSON 3

FOREIGN EXCHANGE TRANSACTIONS & COMPLIANCES

Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2020

In exercise of the powers conferred by section 7(3)(1)(a) and section 47(2)(b) of the Foreign Exchange Management Act, 1999, the Reserve Bank of India vide Notification No. FEMA 23(R)/ (3)/2020-RB dated March 31, 2020 amended the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015.

According to the Amendment, Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 read as under:

Regulation 9: Period within which export value of goods/software/ services to be realised:-

(1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided

(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods;

(b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period.

(2) (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in

Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period.

(b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

(c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

Explanation:

For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.
