

# Overseas Direct Investment – III

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# No Objection Certificate (NOC) From The Lender Bank/Regulatory Body/Investigative Agency

Any person resident in India who,-

- (i) has an account appearing as a non-performing asset; or
- (ii) is classified as a wilful defaulter by any bank; or
- (iii) is under investigation by a financial service regulator or by investigative agencies in India, namely, the CBI or ED or SFIO,

shall, before making any financial commitment or undertaking disinvestment, obtain a NOC from the lender bank or regulatory body or investigative agency by making an application in writing to such bank or regulatory body or investigative agency concerned:

Provided that where the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within 60 days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.

The NOC issued shall be addressed by the lender bank or regulatory body or investigative agency concerned to the designated AD bank with an endorsement to the applicant.

# Right Issue And Bonus Shares

Any person resident in India who has acquired and continues to hold equity capital of any foreign entity in accordance with the provisions of the Act or the rules or regulations made thereunder–

- may invest in the equity capital issued by such entity as a rights issue; or
- may be granted bonus shares subject to the terms and conditions under these rules.

The person resident in India acquiring the rights may renounce such rights in favor of a person resident in India or a person resident outside India.

The acquisition of equity capital through exercise of such rights shall be reported in Form FC. Where such person does not exercise the rights but renounces such rights in favor of a person resident in India or a person resident outside India, such renouncement shall not require reporting. Further, the acquisition of bonus shares shall not be treated as fresh financial commitment and will not require reporting.

# Acquisition Of A Foreign Entity Through Bidding Or Tender Procedure

(1) AD banks may, on being approached by an eligible person resident in India, allow remittance towards Earnest Money Deposit (EMD) after obtaining Form A2 duly filled in or may issue bid bond guarantee on their behalf in accordance with regulation 9(5) of OI Regulations for participation in bidding or tender procedure for acquisition of a foreign entity. On winning the bid, AD banks may facilitate further remittances to the foreign entity so acquired after obtaining Form FC duly filled in and report such financial commitment.

(2) AD banks, while permitting remittance towards EMD should advise the Indian entity/investor that in case they are not successful in the bid, they shall repatriate the amount remitted in accordance with Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015

(3) In cases where such a person resident in India, after being successful in the bid/tender decides not to proceed further with the investment, AD banks shall ensure the bona fides of transaction while permitting the invocation of bid-bond guarantee or forfeiture of EMD.

# ODI IN STARTUPS

Any ODI in start-ups recognised under the laws of the host country or host jurisdiction as the case may be, shall be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.

Any ODI in startups in accordance with rule 19(2) of OI Rules shall not be made out of funds borrowed from others. The AD bank, before facilitating the transaction, shall obtain necessary certificate in this regard from the statutory auditors/chartered accountant of the Indian entity/investor.

# Mode of Payment

The mode of payment by a person resident in India for making OI shall be in accordance with regulation 8 of the OI Regulations. It is further provided that:

(i) Overseas investment by way of cash is not permitted.

(ii) an Indian entity can make remittances to its office/branch outside India only for the purpose of normal business operations of such branch or office. Accordingly, no remittance shall be made by any Indian entity to its branch/office outside India for making any overseas investment.

(iii) A person resident in India shall not make any payment on behalf of any foreign entity other than by way of financial commitment as permitted under the OI Rules/Regulations.

(iv) Any investment/financial commitment in Nepal and Bhutan shall be done in a manner as provided in Notification No. FEMA 14(R)/2016-RB, namely, FEM (Manner of Receipt and Payment) Regulations, 2016. All dues receivable on investments (or financial commitment) made in freely convertible currencies, as well as their sale/winding up proceeds are required to be repatriated to India in freely convertible currencies only.

# Acquisition Or Transfer By Way Of Deferred Payment

(1) AD bank shall verify the bona fides of the transactions from the underlying agreement/documents in case of deferment of payment of consideration in accordance with regulation 7 of OI Regulations. The period of deferment shall be defined upfront. In case the remittance towards acquisition of equity capital is to be made post subscription to MOA, the period within which such remittance is to be made shall be defined in the underlying agreement/documents/applicable laws else the remittance shall be made on or before acquisition of/setting up of the foreign entity.

(2) The part of the payment towards consideration deferred by the person resident in India shall be treated as non-fund based financial commitment by such person and shall be reported accordingly. Subsequent payments towards deferred consideration shall be reported in Form FC as conversion of non-fund based financial commitment to equity. The valuation in accordance with pricing guidelines, wherever applicable, shall be done upfront.

# Overseas Investment by resident individual

Any resident individual may make ODI by way of investment in equity capital or OPI in the manner provided in this Schedule and unless otherwise provided hereunder, shall be subject to the overall ceiling under the LRS of the RBI.

A resident individual may make or hold Overseas Investment by way of,-

- (i) ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or step-down subsidiary where the resident individual has control in the foreign entity;
- (ii) OPI, including by way of reinvestment;

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# Overseas Investment by resident individual

(iii) ODI or OPI, as the case may be, by way of-

(a) Capitalisation, within the time period, if any, specified for realisation under the Act, of any amount due from the foreign entity the remittance of which is permitted under the Act or does not require prior permission of the Central Government or the Reserve Bank;

(b) swap of securities on account of a merger, demerger, amalgamation or liquidation;

(c) acquisition of equity capital through rights issue or allotment of bonus shares;

(d) gift as per the conditions laid down under this Schedule;

(e) inheritance;

(f) acquisition of sweat equity shares;

(g) acquisition of minimum qualification shares issued for holding a management post in a a. foreign entity;

(h) acquisition of shares or interest under ESOP or Employee Benefits Scheme:

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# Overseas Investment by resident individual

Provided that ODI in respect of clauses (e), (f), (g) and (h) may be made in a foreign entity whether or not such foreign entity is engaged in financial services activity or has subsidiary or step-down subsidiary where the resident individual has control:

Provided further that the acquisition of less than ten per cent. of the equity capital, whether listed or unlisted, of a foreign entity without control under clauses (f), (g) and (h), shall be treated as OPI.

Explanation.-- For the purposes of this Schedule, a foreign entity will be considered to be engaged in the business of financial services activity if it undertakes an activity, which if carried out by an entity in India, requires registration with or is regulated by a financial sector regulator in India.

# Overseas Investment by person resident in India other than Indian entity and resident Individual

ODI By Registered Trust Or Society

OI By Mutual Funds Or VCFs Or AIFs

ODI By Domestic Depository

ODI By AD Bank

ODI By Clearing Corporation Or Stock Exchange

# Prohibited ODI

- (1) Unless otherwise provided in the Act or these rules, no person resident in India shall make ODI in a foreign entity engaged in;
- a) real estate activity;
  - b) gambling in any form; and
  - c) dealing with financial products linked to the Indian rupee without specific approval of the Reserve Bank.

Explanation.– For the purposes of this sub-rule, the expression "real estate activity" means buying and selling of real estate or trading in Transferable Development Rights but does not include the development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing.

- (2) Any ODI in start-ups recognised under the laws of the host country or host jurisdiction as the case may be, shall be made by an Indian entity only from the internal accruals whether from the Indian entity or group or associate companies in India and in case of resident individuals, from own funds of such an individual.

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# Prohibited ODI

(3) No person resident in India shall make financial commitment in a foreign entity that has invested or invests into India, at the time of making such financial commitment or at any time thereafter, either directly or indirectly, resulting in a structure with more than two layers of subsidiaries:

Provided that such restriction shall not apply to the following classes of companies mentioned in sub-rule (2) of rule 2 of the Companies (Restriction on Number of Layers) Rules, 2017 as may be amended from time to time, namely:-

- a) a banking company
- b) a non-banking financial company
- c) an insurance company and
- d) a Government company.

# General Permission to Persons Resident in India for Purchase or Acquisition of Foreign Securities

(1) 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 OI Rules, OI Regulations and directions. Accordingly, OI may be made in a foreign entity engaged in a bona fide business activity, directly or through SDS/SPV.

(2) The person intending to make any financial commitment shall fill up the Form FC duly supported by the requisite documents and approach the designated AD bank for making the investment/remittance.

OI rules grant general permission to person resident in India who already hold equity shares of the foreign entity to acquire further shares through rights issue. The OI rules also allow the person resident in India to renounce the shares in favor of a person resident in India or a PROI. And OI rules grant general permission to person resident in India who already hold equity shares of the foreign entity to acquire further shares through bonus issue.

# Further Areas of Exploration

Creation of Private Trust outside India

Structuring of Tax Efficient Overseas Investment

Practical Aspects

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