

Central Government notifies key amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019

The Department of Economic Affairs of the Ministry of Finance, *vide* notification dated August 16, 2024 (“**Notification**”) introduced key amendments to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (“**NDI Rules**”). The amendments follow from the union budget announcement to simplify rules and regulations governing foreign direct investment (“**FDI**”) and overseas direct investment (“**ODI**”).

Key amendments under the Notification

1. **Cross-Border Share Swaps:** The Notification has introduced a set of 2 (two) amendments with the aim of simplifying cross-border share swaps and providing for the transfer or issue of equity instruments of an Indian company in exchange for foreign company equity instruments. The accompanying press release notes that these amendments will facilitate the global expansion of Indian companies through mergers, acquisitions, and other strategic initiatives, enabling them to reach new markets and grow their presence worldwide:
 - a) Swaps involving transfer of equity instruments of Indian company: A new rule i.e. Rule 9A has been introduced in the NDI Rules which deals with a swap involving the transfer of equity instruments of an Indian company between a resident and non-resident. The Notification states that such transfer may be effected by way of any of the following 2 (two) swaps: (i) a swap of equity instruments of another Indian company, and (ii) a swap of equity capital of a foreign company in compliance with the Overseas Investments Rules (“**OI Rules**”).
 - b) Swaps involving issuance of equity instruments of Indian company: Previously, Schedule I to the NDI Rules (sub-paragraph (d) of Paragraph 1) allowed for a limited swap structure – i.e. where an Indian company issued equity instruments to a non-resident against swap of equity instruments of another Indian company. The Notification now explicitly permits such issuance to also be effected against swap of equity capital of a foreign company in compliance with the OI Rules.

The Notification also clarifies that if government approval is applicable for the aforesaid transfer or issuance, then such approval is still required to be obtained.
2. **Downstream investments by OCI-owned entities:** Previously, the Department for Promotion of Industry and Internal Trade (“**DPIIT**”) had, by way of Press Note 1 of 2021 issued in March 2021 (“**PN-1**”), clarified that any downstream investments into an Indian investee entity by an Indian entity owned and controlled by NRIs on a non-repatriation basis, would not be considered as indirect foreign investment. Such investments into the investee were therefore treated as if they were investments by a resident, thereby removing the applicability of conditions such as entry route, sectoral caps, pricing guidelines, etc.

The Notification has incorporated the aforesaid exemption contained in PN-1 into the NDI Rules. Further, it

extends the aforesaid treatment to investments by Indian entities owned and controlled by OCIs.

3. **Transfer of equity instruments of an Indian company between non-residents:** Rule 9(1) of the NDI Rules deal with transfer of equity instruments of an Indian company by way of sale or gift by a non-resident (not being an NRI, OCI or OCB) to another non-resident, subject to certain conditions. Prior to the Notification, it was stipulated by way of a proviso that prior government approval will be obtained for any such transfer in case the Indian company is engaged in a sector that requires government approval ("**sector-specific approval**"). The Notification has amended this proviso to state that government approval will be obtained in all cases where government approval is applicable. Therefore, the amendment appears to clarify the need not only for any sector-specific approvals but also for government approvals pursuant to Press Note 3 of 2020 (i.e. where transferee is an entity in a country which shares a land border with India ("**Neighbouring Countries**") or has a beneficial owner which is situated in or is a citizen of such Neighbouring Countries).
4. **FDI in white-label ATMs:** The table in Schedule I to the NDI Rules which details entry routes, sectoral caps, and other conditions for investments in various sectors has also undergone change. Previously, the table in the NDI Rules contained no specific entry for foreign investment in white label ATMs ("**WLAs**") even though the Consolidated FDI Policy of 2020 ("**FDI Policy**") permitted up to 100% FDI under the automatic route subject to compliance with certain conditions. The Notification has now introduced a specific entry for WLAs in the NDI Rules which brings it in line with the FDI Policy. Further, the Notification has included an additional condition for foreign investment in WLAs – i.e. FDI in WLAs would be subject to specific criteria and guidelines issued by the RBI under the Payment and Settlement Systems Act, 2007.
5. **Government approvals for Foreign Portfolio Investor ("**FPI**") investments:** Previously, Schedule I of the NDI Rules incorporated a 'lower of' construct to determine if government approvals were required for FPI investments in Indian companies. Prior to the Notification, it stated that government approval or compliance with the sectoral conditions was not required if the aggregate FPI investments in such company was up to 49% of its paid-up capital or the stipulated sectoral or statutory cap for investments, whichever is lower, if such investment does not result in transfer of ownership or control from residents or to non-residents. With the Notification, the 'lower of' construct has been removed. Accordingly, government approvals and compliance with sector-specific conditions are no longer needed for investments up to the sectoral or statutory cap, if such investment in the Indian company does not result in transfer of ownership or control from residents or to non-residents.
6. **Definitions of 'Control' and 'Startup Company':** The Notification has brought about changes in certain definitions, thereby ensuring alignment with other laws. Pursuant to the Notification, the term 'control' will have the meaning assigned to it under the Companies Act, 2013, thereby ensuring alignment between the Companies Act, 2013 and the NDI Rules. Further, 'control' with respect to a Limited Liability Partnership ("**LLP**") means a right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP. Further, the definition of a 'startup company' has now been updated to refer to private companies incorporated under the Companies Act, 2013, and identified under the DPIIT notification number G.S.R. 127 (E) issued on February 19, 2019.

Conclusion

The amendments introduced pursuant to the Notification signify a welcome and much-awaited initiative. They not only remove certain limitations that previously existed under the cross-border investment framework but also bring regulatory clarity to the rules governing FDI and ODI. Particularly, the amendments relating to cross-border share swaps are expected to provide an important push for non-cash strategic transactions undertaken by Indian companies.

Corporate Practice

JSA's corporate practice is centered around transactional and legal advisory services including day-to-day business, regulatory issues, corporate and governance affairs. We have an expert team of attorneys who advise on legal issues concerning inbound and outbound investments, strategic alliances, collaborations and corporate restructurings. We advise clients through all stages of complex and marquee assignments including restructuring, mergers and acquisitions (including those in the public space) to private equity and joint ventures. Our vast clientele includes multinational corporations and large Indian businesses in private, public and joint sector. We work closely with in-house counsel teams, investment banks, consulting and accounting firms along with multilateral agencies and policy making institutions on development of policy and legal frameworks. We provide assistance and counsel to start-ups and venture backed companies by drawing upon our in-depth understanding of how companies are incorporated, financed and grown. With an in-depth understanding of the industry combined with years of expertise, our attorneys provide innovative and constructive solutions to clients in complex transactional engagements. We emphasize teamwork across our wide network of offices across India. This allows us to benefit from the various specialisations available for the ultimate benefit of our clients. We also provide assistance in dealing with diverse corporate governance and compliance issues including FCPA /Anti-Bribery/Anti-Corruption matters and investigations.

This Prism has been prepared by:



Varun Sriram

Partner

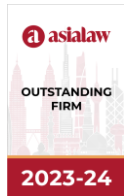


Varsha Srinivasan

Principal Associate



Ranked Among Top 5 Law Firms in India for ESG Practice



19 Practices and 19 Ranked Lawyers



18 Practices and 25 Ranked Lawyers



Employer of Choice 2024

Energy and Resources Law Firm of the Year 2024

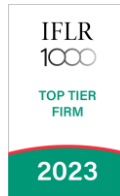
Litigation Law Firm of the Year 2024

Innovative Technologies Law Firm of the Year 2023

Banking & Financial Services Law Firm of the Year 2022



Outstanding Energy and Infrastructure



12 Practices and 42 Ranked Partners
IFLR1000 APAC Rankings 2023

Banking & Finance Team of the Year

Fintech Team of the Year

Restructuring & Insolvency Team of the Year



7 Ranked Practices, 16 Ranked Lawyers

Elite – Band 1 - Corporate/ M&A Practice

3 Band 1 Practices

4 Band 1 Lawyers, 1 Eminent Practitioner



Recognised in World's 100 best competition practices of 2024



Among Top 7 Best Overall Law Firms in India and 11 Ranked Practices

11 winning Deals in IBLJ Deals of the Year

12 A List Lawyers in IBLJ Top 100 Lawyer List



14 Practices and 38 Ranked Lawyers



Ranked #1 The Vahura Best Law Firms to Work Report, 2022

Top 10 Best Law Firms for Women in 2022



7 Practices and 3 Ranked Lawyers

For more details, please contact km@jsalaw.com

www.jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This prism is not an advertisement or any form of solicitation and should not be construed as such. This prism has been prepared for general information purposes only. Nothing in this prism constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this prism disclaim all and any liability to any person who takes any decision based on this publication.