ALMT Legal
ADVOCATES AND SOLICITORS


news flash
October 2017

## FDI POLICY 2017

The Department of IndustrialPolicy and Promotion ("**DIPP**")recently released the consolidated foreign direct investment ("**FDI**") policy circular ("**FDI Policy**"). The salient provisions ofthe FDI Policy are as follows:

**A.Competent Authority**

Since Foreign Investment Promotion Board of India ("FIPB") has been abolished, the definition of *'Competent Authority'* has been introduced to mean the concerned Administrative Ministry/ Department empowered to grant government approval for foreign investment under the extant FDI Policy and Foreign Exchange Management Regulations. Subsequent changes are made to the FDI Policy to delete the provisions referring to FIPB and redirecting the same to the Competent Authority as set out in the standard operating procedure released by DIPP 29 June 2017 (SOP), listing out, inter alia, the competent sectoral authorities which have been entrusted with the powers of granting FDI approval.

**B.FDI Linked Performance Conditions:**

The FDI Policy resolves the ambiguity pertaining to the term '*FDI Linked Performance Conditions*', as stated in the FDI Policy, more specific to the LLP Sector by defining the term '*FDI Linked Performance Conditions*' to mean sector specific conditions for companies receiving foreign investment.

**C.Fresh Approval of Additional FDI:**

For additional foreign investment up to cumulative amount of Rs. 5,000 crore into the same entity within an approved foreign equity percentage/or into a wholly owned subsidiary, no government approval will be required. However, beyond this amount, prior government approval shall have to be obtained.

**D.Air Transport Services:**

Under the erstwhile FDI Policy, Cargo airlines was specifically included within the definition of Non Scheduled Air Transport Service, however, the new FDI Policy has deleted this reference to Cargo airlines. While the definition of Non Scheduled Air Transport Service appears to be wide enough to include Cargo airlines, it is unclear whether this change will impact the regulation and FDI in Cargo airlines.

**E.FDI in Retail Trading:**

As Per the Press Note 5 (2016 Series) dated 24 June 2016 (PN 5) the local sourcing norms for single brand retail trading were relaxed for a period of 3 years from commencement of business for entities undertaking single brand retail trading of products having '*state-of-art*' and '*cutting-edge*' technology and where local sourcing is not possible. The FDI Policy now sets up a committee under the chairmanship of Secretary, DIPP, with representatives from NITI Aayog concerned administrative ministry and independent technical expert(s) on the subject will examine the claim of applicants on the issue of the products being in the nature of '*state-of-art*' and '*cutting-edge*' technology where local sourcing is not possible and give recommendations for such relaxation.

The erstwhile FDI Policy permitted both the Indian manufacturer and a manufacturer to sell products manufactured in India through wholesale, retail and e-commerce. The FDI Policy has now dispensed off with the provisions in respect of the Indian manufacturer, as a manufacturer would include an Indian manufacturer and the FDI Policy now treats all manufacturers at par in so far as their ability to sell the products in different modes is concerned. Further, it is clarified that a wholesale cash and carry trader can undertake retail trading (i.e Single and Multi Brand Retail Trading), as opposed to carrying out only single brand retail trading in the erstwhile FDI Policy, subject to applicable conditions to both these sectors. Separately, while the FDI Policy prohibits an e-commerce entity from permitting more than 25% of the sales effected through its market place from one vendor or its group companies, it is now clarified that the sales value must be computed on a financial year basis.

**F.Changes to the FDI Policy as per the Reserve Bank of India Regulations**

The FDI Policy also has changes in order to bring the FDI Policy at par with the Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations, 2000 (Notification No. FEMA. 20/2000-RB dated 3rd May 2000) such as inclusion of issue of convertible notes by start-ups, provisions relating to deferred payment relating to issue/transfer of shares and provisions relating pre-incorporation expenses/operative expenses for branch office, liaison office or project office or any other place of business in India.

## ALMT ANALYSIS

The FDI Policy has clarified certain ambiguities which existed under the erstwhile FDI Policy such as calculation of e-commerce sales on financial year basis and setting up of committee for sourcing norms under single brand retail trading. However, certain ambiguities continue to remain under the New FDI Policy. For instance, although a committee has been set up to determine '*state of art*' and '*cutting edge*' technology, these two terms have not yet been defined, resulting in continued ambiguity. Also, while the definition of Indian manufacturer has now been deleted, there is no clarity as to which entity would be classified as manufacturer.

The DIPP has, time and again vide its press notes liberalised various sectors of the FDI Policy keeping in mind the Make in India initiative of the Government. The FDI Policy, has not brought about any substantial changes to the sectors except as already specified in the press notes earlier.

## DISCLAIMER


For further clarification and details on the above, you may write to the Exchange Control team comprising of among others Mr. Vaishakh Kapadia (Partner) at vkapadia@almtlegal.com and Ms. Jenika Solanki (Associate) at jsolanki@almtlegal.com.