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Fifth Edition of the Consolidated FDI Policy Released by DIPP

LexCounsel, Law Offices

C-10, Gulmohar Park
New Delhi 110 049, INDIA.

Tel.:+91.11.4166.2861
Fax:+91.11.4166.2862

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Fifth Edition of the Consolidated FDI Policy Released by DIPP

The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India ("DIPP") on April 10, 2012 released the fifth edition of the consolidated Foreign Direct Investment ("FDI") Policy of India vide circular 1 of 2012.

The circular consolidates the extant FDI policy of India and has accordingly introduced, inter alia, the following revisions to the FDI Policy:

1. FDI in Commodity Exchange – Foreign investment mandate in commodity exchange, which until now required approval from the Foreign Investment Promotion and Board ("FIPB") under the composite cap of 49% for FDI as well as investment by Foreign Institutional Investor ("FIIs") (26% for FDI and 23% for FIIs) has been liberalized. Henceforth, investment by FIIs, in commodity exchanges will not require prior FIPB approval. However, other than FII investment, FIPB approval will still be required for FDI in commodity exchanges.

2. Clarification on "leasing" in relation to Non Banking Finance Companies ("NBFC") – The FDI Policy of India permits 100% investment in NBFC involved in either of the activities prescribed under the FDI Policy which, inter alia, includes 'Leasing & Finance' activities. The new FDI Policy has been revised to provide a clarification that 'Leasing & Finance' activities of NBFC (for the purposes of FDI) would cover only "financial leases" and not "operating leases".

3. Issue of Equity Shares in lieu of Import of Machinery – The FDI Policy of India permits an Indian company to issue its equity shares, with prior FIPB approval and subject to compliance with certain prescribed conditions, in lieu of import of capital goods, machinery or equipment which included second-hand machinery. With a view to restrict import of sub-standard machinery and encourage import of machinery embodying state-of-the-art technology, Indian companies will no longer be permitted to issue equity for import of second-hand machinery.

4. Clarification on Increase in Aggregate Investment by FIIs – In terms of the existing FDI Policy of India, FII may invest in the capital of an Indian company under the Portfolio Investment Scheme, which limits the individual holding and aggregate investment of FII to 10% and 24% of the capital of the company, respectively. The FDI Policy permits the Indian investee company to increase the aggregate holding of FII from 24% to prescribed sectoral cap, by passing a resolution of the Board of Directors and special resolution by the shareholders of such investee company. However, pursuant to a revision in the new FDI Policy, the Indian investee company will also be required to submit a prior intimation with the Reserve Bank of India of such increase in the aggregate limit for investment by FIIs.

5. Investment by Foreign Venture Capital Investors ("FCVIs") – The new FDI Policy has been amended to endorse Reserve Bank of India's ("RBI") recent circular permitting FVCIs to invest in certain eligible securities (equity, equity linked instruments, debt, debt instruments, debentures of an Indian Venture Capital Undertaking or Venture Capital Fund ("VCF") and

units of schemes/funds set up by a VCF) by way of private arrangement or purchase from a third party, subject to stipulated terms and conditions. Securities Exchange Board of India ("SEBI") registered FVCIs have also been allowed to invest in securities on a recognized stock exchange subject to provisions of the SEBI (FVCI) Regulations, 2000.

6. Investment by Qualified Financial Investors ("QFIs") – The FDI policy has further been amended to reflect SEBI's decision to allow QFIs, inter alia, to invest (through SEBI registered depository participants only) in equity shares of listed Indian companies through recognized brokers on recognized stock exchanges in India as well as in companies which offer equity shares to public in India in terms of SEBI's guidelines/regulations.

7. Miscellaneous – Some of the significant amendments to the FDI Policy have been to reflect:

   a. RBI's recent decision to dispense with the requirement of RBI's prior approval for transfer of shares and convertible debentures of the companies engaged in financial services sector;

   b. Government of India's decision to allow up to 100% FDI in single brand retail trading (refer our Newsletter of January 11, 2012); and

   c. Provisions pertaining to FDI in pharmaceutical sector permitting FDI up to 100% (i) under automatic route for greenfield investments; and (ii) prior approval route for brownfield investments, in pharmaceutical sector.

In addition to the aforesaid amendments, DIPP has also announced that the consolidated FDI Policy of India shall henceforth be released on an annual basis and thus the next edition of the consolidated FDI Policy is proposed to be released on March 29, 2013.

By: Dimpy Mohanty, Partner (dmohanty@lexcounsel.in) and Anjali Sheoran, Associate (asheoran@lexcounsel.in)