

Government of India
Ministry of Commerce & Industry
Department of Industrial Policy & Promotion
(FC Section)

Press Note No 2 (2009 Series)

Subject: Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in Indian companies.

Investment in Indian companies can be made both by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise of both resident and non-resident investment. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can be a cascading investment i.e. through multi-layered structure also.

2.0 The method of calculation of total foreign investment in an Indian company including indirect foreign investment through other Indian companies has been detailed out in entry 10 of Press Note 2(2000), Press Note 1(2006), Press Note 3(2007) and entry 24 of Press Note 7 (2008). The methodology for some sectors is also separately contained in either sectoral regulations or rules and regulations under specific statutes. Essentially the present FDI guidelines provide for three different regimes for calculation of Indirect Foreign Equity-

2.1 Proportionate method is used in Telecom/ Broadcasting sectors through Press Note 5 of 2005 (modifying Press Note 2 of 2000), Press Note 1(2006) and Press Note 3(2007)

2.2 Insurance: outlined in IRDA regulations (IRDA (Registration of Indian Insurance Companies) Regulations, 2000) and

2.3 In all other sectors, for an investing company in the infrastructure / service sector attracting equity caps, indirect equity is calculated as was given in Press Note 2 of 2000: *Investing companies in infrastructure/service sectors (entry no. 10). This policy was reiterated by Press Note 4 of 2006(Entry no.18) which was modified by a Press release dated November 13, 2006 and Press Note 7(2008) (entry 24).* According to this, foreign investment in an investing company will not be set off against this cap where the foreign equity in the investing company does not exceed 49% and the Management of the investing company is with Indian owners. FIPB approval is required by Investing Companies for downstream investment.

3.0 Recognising the need to bring in clarity, uniformity, consistency and homogeneity into the exact methodology of calculation across sectors/activities for all direct and indirect foreign investment in Indian companies, Government of India now proposes to issue the following guidelines for calculation of direct and indirect foreign investment.

4.0 **Definitions:**

4.1 For the purpose of computation of indirect Foreign investment, Foreign Investment in Indian company shall include all types of foreign investments i.e. FDI, investment by FIIs(holding as on March 31), NRIs, ADRs, GDRs, Foreign Currency Convertible Bonds (FCCB) and convertible preference shares, convertible Currency Debentures regardless of whether the said investments have been made under Schedule 1, 2, 3 and 6 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations.

4.2 The term 'Resident Indian Citizen' shall be interpreted in line with the definition of 'person resident in India' as per FEMA, 1999, read in conjunction with the Indian Citizenship Act.

4.3 A 'non resident entity' means a 'person resident outside India' as defined under FEMA 1999.

4.4 The term 'Indian Company' means a company registered or incorporated in India as per the Indian Companies Act, 1956.

4.5 'Investing Company' means an Indian Company making equity/preference/CCD investment into another Indian Company.

4.6 Holding Company would have the same meaning as defined in Indian Companies Act 1956.

5.0 Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in an Indian company.

5.1 Counting the Direct Foreign Investment:

5.1.1. All investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.

5.2 Counting of indirect foreign Investment:

5.2.1 The foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are ‘owned **and** controlled’ by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens .

For this purpose, an Indian company may be taken as being:

- “**owned**” by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, if more than 50% of the equity interest in it is beneficially owned by resident Indian citizens and Indian companies, which are owned and controlled ultimately by resident Indian citizens;

and

- “**controlled**” by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, if the resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, have the power to appoint a majority of its directors .

5.2.2 For cases where condition 5.2.1 above is not satisfied or if the investing company is owned **or** controlled by ‘non resident entities’, the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment,

5.2.2.1 Provided that, as an exception, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/ investing company. For the purposes of explanation, it is clarified that this exception is being made since the downstream investment of a 100% owned subsidiary of the

holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company.

5.2.2.2 For the above purpose, an Indian company may be taken as being:

- “**owned**” by ‘non resident entities’, if more than 50% of the equity interest in it is beneficially owned by non-residents
- “**controlled**” by ‘non resident entities’, if non-residents have the power to appoint a majority of its directors

5.2.2.3 Illustration

To illustrate, if the indirect foreign investment is being calculated for Company A which has investment through an investing company B having foreign investment, the following would be the method of calculation:

- (i) where Company B has foreign investment less than 50%- Company A would not be taken as having any indirect foreign investment through Company B.
- (ii) where Company B has foreign investment of say 75% and:
 - a. invests 26% in Company A, the entire 26% investment by Company B would be treated as indirect foreign investment in Company A;
 - b. Invests 80% in Company A, the indirect foreign investment in Company A would be taken as 80%
 - c. where Company A is a wholly owned subsidiary of Company B (i.e. Company B owns 100% shares of Company A), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company A would be computed in the ratio of 75: 25 in the total investment of Company B in Company A.

5.3 The total foreign investment would be the sum total of direct and indirect foreign investment.

5.4 The above methodology of calculation would apply at every stage of investment in Indian Companies and thus to each and every Indian Company.

5.5 Additional conditions:

5.5.1 The full details about the foreign investment including ownership details etc. in Indian company(s) and information about the control of the company(s) would be furnished by the Company(s) to the Government of India at the time of seeking approval.

5.5.2 In any sector/activity, where Government approval is required for foreign investment and in cases where there are any *inter-se* agreements between/amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider for determining ownership and control such *inter-se* agreements when considering the case for granting approval for foreign investment.

5.5.3 In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.

5.5.4 In the I& B and Defense sectors where the sectoral cap is less than 49%, the company would need to be ‘owned **and** controlled’ by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.

5.5.4.1 For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the Companies Act, 1956. The term ‘largest Indian shareholder’, used in this clause, will include any or a combination of the following:

- (i) In the case of an individual shareholder,
 - (a) The individual shareholder,
 - (b) A relative of the shareholder within the meaning of Section 6 of the Companies Act, 1956.
 - (c) A company/ group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest.

- (ii) In the case of an Indian company,
 - (a) The Indian company

- (b) A group of Indian companies under the same management and ownership control.

5.5.4.2 For the purpose of this Clause, “Indian company” shall be a company which must have a resident Indian or a relative as defined under Section 6 of the Companies Act, 1956/ HUF, either singly or in combination holding at least 51% of the shares.

5.5.4.3 Provided that, in case of a combination of all or any of the entities mentioned in Sub-Clauses (i) and (ii) of clause 5.5.4.1 above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.

5.5.5 If a declaration is made by persons as per section 187C of the Indian Companies Act about a beneficial interest being held by a non resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

6.0 The above mentioned policy and the methodology would be applicable for determining the total foreign investment in all sectors, excepting in sectors where it is governed specifically under any statutes or rules thereunder. Thus, for the present purposes this methodology will not be applicable in the Insurance Sector where it will continue to be governed by the relevant Regulation.

7.0 **Policy for downstream investment by investing companies:**

Based on the above methodology for calculation of total foreign investment in Indian companies, the policy on downstream investment-i.e. for only operating companies, operating-cum-investing companies, investing companies and for holding companies without any downstream investment and operations would be notified separately in amendment to Press Note 3 of 1997, Press Note 9 of 1999, entry 10 under Press Note 2 of 2000, entry 18 under Press Note 4 of 2006 as amended by the Press release dated 13th November, 2006, and entry 24 of Press Note 7(2008).

8.0 Any foreign investment already made in accordance with the guidelines in existence prior to issue of this Press Note would not require any modification to

conform with these guidelines. All other investments, past and future, would come under the ambit of these new guidelines.

8.1 Any violation of these guidelines and noncompliance would be a violation under FEMA 1999 and would lead to action under the relevant regulations under the Act.

9.0 Entry 10 under Press Note 2(2000), entry 18 under Press Note 4(2006), as amended by the Press Release dated 13th November 2006 and entry 24 under Press Note 7(2008) stand deleted.

10.0 The relevant entry pertaining to calculation of foreign equity of the applicant company under paragraph 2(c) of Press Note 1 of 2006 and paragraph 2.A.(ii) of Press Note 3 of 2007 stand deleted.

11.0 These guidelines will be effective from the date of issue of this Press Note.

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