

Regulatory Hotline

June 02, 2015

CHANGES PROPOSED TO FOREIGN INVESTMENT NORMS FOR NRIS

- Cabinet approved amendment of definition of NRIs to include OCI cardholders and PIO cardholders for FDI purposes.
- It further approved the treatment of investment made by NRIs on non-repatriable basis to be domestic investment.
- Changes are likely boost investments by NRIs in Indian companies and immovable property in India.
- Ambiguity as to whether restrictions on NRI investments in agricultural activities, real estate business, chit fund etc., would be relaxed.

The Union Cabinet, on May 21, 2015, gave its approval for amending the definition of Non-Resident Indians (“NRIs”) in the Foreign Direct Investment (“FDI”) Policy and to clarify that investments made by NRIs on non-repatriable basis shall be treated at par with domestic investments.¹ The amendments, once carried out, are expected to boost investments by NRIs across sectors.

CLASSIFICATION AS A ‘NON RESIDENT INDIAN’ OR NRI

Background: Currently, from the perspective of exchange control regulations governing FDI, the term ‘NRIs’ refers to a non-resident individual who is a citizen of India or is a person of Indian origin (“PIO”). The term PIO covers individuals who held an Indian passport in the past or who are children or grandchildren of an individual who was a citizen of India (after the Constitution of India came into force) or who is a spouse of an Indian citizen or a PIO.

In January 2015, the Citizenship Act, 1955 was amended replacing the concept of registration as a PIO cardholder with the concept of registration as an Overseas Citizen of India (“OCI”) cardholder. The category of individuals entitled to apply for registration as a OCI cardholder are more or less similar compared to those who were entitled to apply for registration as a PIO cardholder, except to the extent that there are some additional conditions in case of spouses.²

Proposed change: In line with the amendment to the Citizenship Act, 1955, the definition of ‘NRIs’ (from the perspective of exchange control regulations governing FDI) is proposed to be modified to cover non-residents who are either Indian citizens or OCI cardholders. Individuals who have registered as a PIO cardholders under the erstwhile Issuance of PIO Card Scheme, 2002 are also deemed to be OCI cardholders.

The proposed change would bring in consistency between exchange control regulations and the Citizenship Act, thereby bridging disconnect currently existing between the two laws. The change in definition is expected to apply to a broad range of transaction by NRIs, particularly, investment in Indian companies, partnerships and proprietary concerns, lending to Indian companies in INR and acquisition of immovable property in India. Also, the amendment may curb the current practice of foreign citizens marrying Indian citizens and becoming PIOs, merely for being able to acquire immovable property in India and thereafter, applying for divorce.

INVESTMENT BY NRIS ON NON-REPATRIATION BASIS TO BE TREATED AS DOMESTIC INVESTMENT

Currently, under the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 (“TISPRO Regulations”), investment by NRIs on non-repatriation basis is dealt with separately under Schedule 4. However, there has been some ambiguity on whether such investment by NRIs is subject to sectoral caps, pricing guidelines, cap on coupon rate (in case of CCDs), etc., which are applicable in case of regular FDI investment in India by non-residents, including NRIs (on repatriable basis) as per Schedule 1 of the TISPRO Regulations. The proposed amendment states that investments made under Schedule 4 would be treated as domestic investment. Consequently, it brings clarity that the restrictions mentioned above would not be applicable in case of NRIs investing on non-repatriation basis.

Scope of applicability: As NRI investment on non-repatriation basis under Schedule 4 of TISPRO Regulations is currently allowed only in shares, CCDs and CCPS issued by Indian companies, it is not clear whether investments in other entities on non-repatriation basis, for example, investment in AIFs (which are typically set up as trusts and not as companies), investment in LLPs, etc., are also intended to be covered. Relaxation of restrictions on NRI investment in AIFs (under the automatic route) has been keenly awaited and if clarified, could prove be a major boost for AIFs in India. Further, under Schedule 4, considering that NRI investment on non-repatriation basis is currently prohibited in companies engaged in agricultural activities, real estate business, chit fund, etc., it is not clear whether these prohibitions would be relaxed. If relaxed, it could boost NRI investment significantly.

Receipt & grant of gift of shares by NRIs: Existing limitations on gift of shares by a resident to a NRI, or by a NRI to any non-resident other than a NRI, may continue to apply in respect of shares acquired under Schedule 4 of TISPRO

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Computing foreign investment in an Indian company: In determining whether an Indian company is a foreign owned company (with 50% or more shareholding held by non-residents), it appears that investment by NRIs on non-repatriation basis may not be included. Therefore, from the perspective of downstream investment in companies engaged in sectors subject to sectoral caps or specific conditions / approval in case of foreign investment, existing limitations may not apply in case of investment by NRIs.

Relaxation of other limitations: It appears that limitations under the TISPRO Regulations on investments by non-residents in general, for example, limitations with respect to acquisition of right shares or bonus shares, acquiring employee stock options, different modes of transfer of securities, pledge of securities, etc., may not apply to investment by NRIs on non-repatriable basis.

The amendments discussed above are aimed at bringing certainty in treatment of NRI investments. It remains to be seen how the fine print of the final amendments deals with the aspects mentioned above. If they comprehensively deal with the detailed implications of the treatment of NRI investment (on non-repatriable basis) as domestic investments, it could accelerate investment by Indians residing around the globe in Indian businesses.

– Prashant Prakhar, T.P. Janani & Kishore Joshi
You can direct your queries or comments to the authors

¹ Press Information Bureau, *Review of Foreign Direct Investment (FDI) Policy on investments by Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs)*, 21-May-2015 available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=121914> (accessed on May 26, 2015)

² An individual can apply for being registered as an OCI cardholder if he / she is:
a) a major who is a citizen of another country, and
i. who was a citizen of India at or after the commencement of the constitution;
ii. who was eligible to become a citizen of India at the commencement of the constitution;
iii. who belonged to a territory that became part of India after independence; or
iv. who is a child or a grandchild or a great grandchild of an individual falling within the above categories.
b) a minor child or spouse of any individual who is a citizen of India or a is an OCI falling within the categories mentioned above;
However, in case of individual applying for OCI cardholder registration as a spouse of a citizen of OCI cardholder, their marriage should have subsisted for a continuous period of at least two years immediately prior to the application and grant of registration is subject to prior security clearance as prescribed.

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