All about FEMA 1999 and goldmine opportunities for CAs to become Global Professional

By

CA. (Dr.) Adukia Rajkumar Satyanarayan

Your Candidate for Central Council Election (ICAI-WIRC) 2021 requesting your FIRST/BEST preference vote to Ballot No. 1 on my credentials and proven record and performance and let us contribute to make India No. 1 economy in world by making contributory services in all levels of economic activities, policy making initiatives through you and ICAI

- **MY MISSION IS TO TRANSFORM CA PROFESSION - MAKE EVERY CITIZEN ECONOMICALLY POWERFUL & INDIA THE MOST POWERFUL NATION OF WORLD!**
- **MY PASSION IS TO MAKE EVERY CA MEMBER & STUDENT SPEAKER & WRITER!**

Author of more than 300 books & Global business, professional growth and motivational coach
Passionate to make anyone Speaker, Writer, Acquiring New Knowledge ,Professional Qualifications , Growth in Business & Promotion As CEO
Member IFAC-PAIB committee 2001-2004; Member IFRS SMEIG London 2018-2020
Ex-director - SBI mutual fund, BOI mutual fund, global mediator and international arbitrator
I Studied up to 4th standard in Chirawa School (Chirawa) Dist- Jhunjhunu, Failed in 5th standard in "Marwadi Vidyalaya" and Restudied 5th standard in Mumbadevi Municipal school
B. Com (Hons), M.Com, FCA, FCS, FCMA, LL.B, LLM(Constitution),Dip CG, MBA, Dip IFRS (UK), DLL&LW, Dip IPR, Dip in Criminology, Ph. D, Mediation ,IP(IBBI), MBF, Dip HRM, Dip Cyber Law
20+ Certificate courses; 75+ Self Development Courses
Student of: MA (Psychology), MA (Economics), PGD CSR, PGD Crime Investigation IBBI (RV)
+++++++++++++++++
Ranks ALL INDIA 1st in Inter CA; 6th in CA Final; 3rd in CMA Final, 5th in Mumbai University +++
Chairman western region ICAI 1997; Council Member ICAI 1998-2016
Mob: 98200 61049; Email: rajkumar@cadrrajkumaradukia.com

By giving your most valuable First/Best Preferential Vote to me,
I vouch you yourself will be the member of the council!

You may read & download my articles from my website: - www.cadrrajkumaradukia.com

Abstract:

In this article we will be discussing about foreign exchange in India, the legislation dealing in the same and sort of the opportunities available for the professional under the field

The famous liberalisation that brought in the year 1991 opens the doors foreign market by, removing border barriers and people can work freely and frequently. It was necessitated to bring a legislation which could treat the foreign exchange as an asset by managing the same instead of controlling it.

It is in this context the enactment of Foreign Exchange Management Act, 1999 comes into picture.

It well settled that the overseas expansion of economic activities creates multiple opportunities for any business. The additional requirement of compliance especially in light of multi rules and regulation concerning different countries creates goldmine for the professional involves in finance, foreign transactions, overseas business etc.

The foreign exchange in India is mainly regulated under the Foreign Exchange Management Act, 1999 consequently bring such goldmine for professional who can serve their expertise in different roles being as

1. Consultant
2. Collaboration facilitator

3. Statutory compliance, reporting
4. Taxation
5. Assistance in compounding and regularising of offences and advisory
6. Regulatory approval in commercial borrowing
7. Legal advise
8. Drafting of agreement related to foreign transaction
9. Compliance of NBFC under FEMA
10. FDI Compliance
11. FDI for start-ups
12. Advisory on requirement by Indian companies in terms of overseas investment in light with FEMA, Foreign Collaborations, Joint Ventures and Acquisitions.
13. FEMA compliance
14. Concurrent audit of foreign exchange dept of bank
15. Assisting overseas citizen and citizen of India in FEMA law compliance
16. Assisting overseas corporation
17. Virtual FEMA compliance assistance
18. Vetting / Drafting of FDI agreements and field study works.
19. Vetting of Counter Guarantee Agreements signed by National & State Governments.
20. Analysis of political and other factors affecting investment decisions of foreign parties.
21. Representation before statutory authorities on behalf of either the domestic or foreign parties wherever permissible.
22. Acting as Arbitrators when dispute arises.
23. Valuation of Tangible and Intangible assets for settlement of trade disputes or initial / Subsequent investments
24. Representation before WTO Dispute Settlement Forum when disputes goes to their Jurisdictions

25. Investigation Services when foreign parties require background verification of the Domestic parties and vice versa when joint ventures occurred.
26. Advising Corporate about Global FDI policies adopted in different countries and Selection of suitable partners for joint ventures
27. Financial Evaluation of FDI proposals on behalf of industries and Government.

Why foreign exchange matters?

Obviously, if only everyone in the world could use Indian currency there would be no need for foreign exchange.

Foreign exchange is typically an international marketing term that is used for buying and selling of products and services between countries using different currency. In the language of laymen it refers to foreign currency & is also one of the parameters to see how richer a particular country is.

What is a currency?

In statutory term the currency will include all currency notes, postal notes, postal orders, money orders, cheques, drafts, traveller cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.

With respect to Indian currency it means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under Section 28-A of the Reserve Bank of India Act, 1934.

The definition of Indian currency helps us to understand as to what will constitute as foreign currency. That means any currency which is not an Indian currency.

Hence If an Indian went to foreign country e.g. Australia and offered Indian rupee in exchange of service provided in that country will they accept it?

Likewise a foreigner comes to India starts marketing on Indian street and paid dollars in exchange of Indian good will it valid?

The answer is no.

This leads to the concept of inflow and outflow of foreign exchange. Whenever a person from India goes outside he will need a foreign exchange to spent that means there is an outflow of foreign exchange likewise whenever a person outside India comes in India bring foreign exchange which will be consider as an inflow, which takes us to the concept of a **Foreign Direct Investment**

The foreign direct investment shortly referred to as FDI is a long term investment in foreign country. For instance, a firm named "A" based in Europe and the government of India detected that "A" has technologies that would help the development of the Indian productive chain in the particular industry the company "A" is engaged. Now the government contacted that company to present investment opportunities in India and to facilitate the company's production in the country.

Like this several other companies across the globe have an investment in sectors such as energy, infrastructure, automotive, medical equipment, semiconductors and biotechnology among others.

In the better interest of economy the importance of foreign direct investment cannot be undermined.

This applies to all levels of economies such as the developed economies for instance Norway, Switzerland, Ireland; the emerging one for instance India, Mexico, Russia etc. It has always been beneficial in the sense of creating job opportunities thereby increasing employment rate which further contributes to the overall growth of GDP of respective country.

Background of FEMA

The Foreign Exchange Regulation Act, 1947:

The Foreign Exchange Regulation Act, 1947 (hereinafter referred by FERA 1947) was the outcome of India's fulfilling the obligation as a member of the International Monetary Fund. The act was spread over to about twenty seven sections. The FERA 1947 was enacted thereby restricting the dealing in foreign exchange by person other than authorize dealers except with the previous general/special permission of the Reserve Bank of India.

The Foreign Exchange Regulation Act, 1973:

The enactment of foreign exchange regulation act, 1973 (hereinafter referred to as FERA 1973) leads to the supersession of the foreign exchange regulation act, 1947. The enactment of FERA 1973 became evident in the sense that sufficient experience has been gained till then, in light of that the directorate of enforcement and reserve bank of India were of the view that there is emergent need of regulations among other matters, the entry of foreign capital in the form of branches and concerns with substantial non-resident interest in them, the employment of foreigners in India etc. The central government with intention to act upon such suggestion enacted the FERA 1973. The object was to introduce the changes felt necessary for the effective implementation of Governments policy and removing the difficulties which have been experienced in the working of the Act.

The Foreign Exchange Management Act, 1999:

The prior legislation before the enactment of the foreign exchange management act, 1999 (hereinafter referred to as FEMA 1999) that is the Foreign Exchange Regulation Act, 1973 were more in a position of controlling the foreign exchange transaction whereas the FEMA 1999 seek to manage the foreign exchange. The Act has been explained later in great detail.

The Foreign Exchange Management Act, 1999

With the change in time, it became necessary in the economic as well as financial interest of India to have specific regulation so as to encourage and the same time to have control over it and managing risks thereby.

Keeping the same interest in mind the Government lead for the enactment of the Foreign Exchange Management Act, 1999 (herein after FEMA) replacing its predecessor the Foreign Exchange Regulation Act, 1974, the latter used to treat the violation of law relating to dealing in foreign exchange as the criminal offence whereas the FEMA made with the broader vision of managing the foreign exchange and made the offence as compoundable.

The FEMA 1999 has considerably liberalised provisions in respect of management of foreign exchange.

It provides

1. Free Transactions on Current Account subject to reasonable restrictions that may be imposed
2. Capital Account Transactions. Realization of Export Proceeds

3. Dealings in Foreign Exchange through Authorized Person (e.g. Authorized Dealer/Money Changer/Off-shore banking unit
4. Adjudication of Offences – Appeal Provisions including Special Director (Appeals) and Appellate Tribunal for Forfeited Property & High Court

The parliament enacted Foreign Exchange Management Act, 1999 on 27th December 1999 which official came into force on 1st day of June 2000. The legislations, rules and regulations, governing Foreign Exchange Management are as under:

Composition of the act as under:

- 7 Chapters divided into 49 sections of which 12 sections cover operational part andΠ the rest deals with contravention, penalties, adjudication, appeals, enforcement directorate, etc.
- CHAPTER I – Preliminary (Section 1&2)
- CHAPTER II- Regulation and Management of Foreign Exchange (Section 3 –9)
- CHAPTER III – Authorised Person (Section 10 –12)
- CHAPTER IV – Contravention and Penalties (Section 13-15)
- CHAPTER V – Adjudication and Appeal (Section 16- 35)
- CHAPTER VI – Directorate of Enforcement (Section 36-38)
- CHAPTER VII- Miscellaneous (Section 39 – 49)
- Rules made by Ministry of Finance under Section 46 of FEMA (Subordinate or delegated Legislations)
- Regulations made by RBI under Section 47 of FEMA (Subordinate or delegated Legislations)
- Master Direction issued by RBI on every yearΠ Foreign Direct Investment policy issued by Department for Promotion of Industry and Internal Trade (DPIIT).
- Notifications and Circulars issued by Reserve Bank of India.

Rules made under FEMA 1999:

1. The Foreign Exchange (Authentication of Documents) Rules, 2000

2. The Foreign Exchange Management (Adjudication and Proceedings appeals) Rules, 2000

3. The Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000

4. The Foreign Exchange (Compounding Proceedings) Rules 2000

5. The Foreign Exchange Management (Current Account Transactions) Rules 2000

6. The Foreign Exchange Management (Non-debts Instruments) Rules 2019

The Regulations made under FEMA 1999:

1. The Foreign Exchange Management (Permissible capital account transactions) regulations, 2000
2. The Foreign Exchange Management (Foreign exchange derivative contracts) regulations, 2000
3. The Foreign Exchange Management (Investment in firm, proprietary concerns in India) regulations, 2000
4. The Foreign Exchange Management (Issue of security in India by a branch, agency, office of Person Resident Outside India) Regulations, 2000
5. The Foreign Exchange Management (Transfer or issue of foreign security) Regulations, 2000
6. The Foreign Exchange Management (Crystallization of inoperative foreign currency deposits) Regulations, 2014
7. The Foreign Exchange Management (Export and import currency) regulations, 2015
8. The Foreign Exchange Management (Export of goods and services) Regulations, 2015

9. The Foreign Exchange Management (Insurance) Regulations, 2015
10. The Foreign Exchange Management (Foreign currency account by a Person Resident In India) Regulations, 2015
11. The Foreign Exchange Management (International financial services centres) Regulations, 2015
12. The Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015
13. The Foreign Exchange Management (Possession and retention of foreign currency) Regulations, 2015
14. The Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015
15. The Foreign Exchange Management (Regularisation of assets held abroad by the Person Resident Inside India) Regulations, 2015
16. The Foreign Exchange Management (Remittance of assets) Regulations, 2016
17. The Foreign Exchange Management (Deposit) Regulations, 2016
18. The Foreign Exchange Management (Manner of receipt and payment) Regulations, 2016
19. The Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016
20. The Foreign Exchange Management (Borrowing and lending) Regulations, 2018
21. The Foreign Exchange Management (Cross border merger) Regulations, 2018
22. The Foreign Exchange Management (Mode of Payment and Reporting of Non Debt Instruments) Regulations, 2019
23. The Foreign Exchange Management (Debt Instruments) Regulations, 2019

Significant provision under FEMA 1999:

Authorised person / Dealer: The act under "Section 2 (c) defines "Authorised person" as an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of Section 10 to deal in foreign exchange or foreign securities"

It should be noted that the reserve bank has been conferred with the power to revoke such authorisation so granted under subsection (1) of section (10) on the where circumstances where it became just in the public interest or the authorised person failed to act in conformity with conditions on the basis of which authorisation has granted in first place.

The Foreign Exchange Dealers' Association of India (FEDAI) https://www.fedai.org.in/

Set up in 1958 FEDAI, is an Association of banks dealing in foreign exchanges in India (typically called Authorised Dealers - ADs) as a self regulatory body and is incorporated under Section 25 of The Companies Act, 1956.

Functions of the same are as follows:

- Guidelines and Rules for Forex Business.
- Training of Bank Personnel in the areas of Foreign Exchange Business.
- Accreditation of Forex Brokers
- Advising/Assisting member banks in settling issues/matters in their dealings.
- Represent member banks on Government/Reserve Bank of India/Other Bodies.
- Announcement of daily and periodical rates to member banks.

FEDAI plays a catalytic role for smooth functioning of the markets through closer co-ordination with the RBI, other organizations like FIMMDA, the Forex Association of India and various market participants.

Transaction under FEMA 1999

The FEMA 1999 contains two categories of transaction that is capital account transaction or a current account transaction for applicability of relevant regulation thereon.

The **golden rule** is:

all current account transactions are permitted unless otherwise prohibited

 # all capital account transactions are prohibited unless otherwise permitted

A. CAPITAL ACCOUNT TRANSACTIONS:

Section 2 (e) defines the Capital Account Transaction as transaction altering assets and liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions under subsection (3) of section 6 of the act.

- Section 6(4): All capital account transactions are prohibited unless specifically permitted.

The Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 came into existence to deal with the classes of permissible capital account transactions and limit of permissible transactions.

Permissible capital account transactions

1. For persons resident in India
2. For person resident outside India

Category I - Permissible capital account transactions for persons resident in India

Presented below is the list of capital account transactions which are specifically permitted for the person's resident inside India:

(a) Investment by a person resident in India in foreign securities

(b) Foreign currency loans raised in India and abroad by a person resident in India

(c) Transfer of immovable property outside India by a person resident in India

(d) Guarantees issued by a person resident in India in favour of a person resident outside India

(e) Export, import and holding of currency/currency notes

(f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India

(g) Maintenance of foreign currency accounts in India and outside India by a person resident in India

(h) Taking out of insurance policy by a person resident in India from an insurance company outside India

(i) Loans and overdrafts by a person resident in India to a person resident outside India

(j) Remittance outside India of capital assets of a person resident in India

(k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India

<u>Category 2: Permissible capital account transactions for persons resident outside India</u>

(a) Investment in India by a person resident outside India,

(b) Acquisition and transfer of immovable property in India by a person resident outside India

(c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India

(d) Import and export of currency/currency notes into/from India by a person resident outside India

(e) Deposits between a person resident in India and a person resident outside India

(f) Foreign currency accounts in India of a person resident outside India

(g) Remittance outside India of capital assets in India of a person resident outside India.

Current Account Transaction

Section 2(j) refers to transaction other than capital account transaction that will include payment due with respect to foreign trade, ongoing business, services, short-term banking and credit facilities in the business, payments due as interest on loans and as net income from investments, remittances for living expenses of parents, spouse and children residing abroad, and expenses of foreign travel, education and medical care of parents, spouse and children etc.

The definition of current account transaction is inclusive and any expenditure which is not covered under capital account transaction will be current account transaction even if the transaction is not specified above.

All the current account transactions are free from restrictions, unless specifically restricted by Central Government as per section 6(4) of the FEMA 1999 and Foreign Exchange Management (Current Account Transactions) Rules, 2000.

There are certain transactions that are

- Totally prohibited Schedule I of the Foreign Exchange Management (Current Account Transactions) Rules, 2000

- Permitted subject to the prior approval of concerned Ministry Permitted, subject to the prior approval of concerned Ministry, Central Government Schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000
- Permitted subject to prior approval of the RBI Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000

Compliance under FEMA:

1. **Annual Return on Foreign Liabilities and Assets:**

   An Indian company which has received FDI or an LLP which has received investment by way of capital contribution in the previous year(s) including the current year shall submit form FLA to the Reserve Bank on or before the 15th day of July of each year.

   Explanation: Year for this purpose shall be reckoned as April to March.

   The FLA return can be filed through a web-portal interface https://flair.rbi.org.in provided by RBI to the reporting entities for submitting "User Registration Form". The successful registration on web-portal will enable users to generate RBI-provided login-name and password for using FLA submission gateway and would include system-driven validation checks on submitted data. The User Manual and FAQs present on the web-portal can be used for further guidance to file the FLA return.

2. **Annual Performance Report**

   This report is to be submitted by a Resident individual who has made an Overseas Direct Investment (ODI). It is to be provided in Form ODI Part II to the AD (Authorised Dealer) bank regarding Joint Venture or Wholly Owned Subsidiaries outside India on or before 31st December every year.

3. **Single Master Form:** All the reporting except specifically provided has to be made through the Single Master Form (SMF) available on the FIRMS platform at https://firms.rbi.org.in.

   a. **Reporting of conversion of ECB into equity**

Details of issue of shares against conversion of ECB have to be reported to the Regional Office concerned of the Reserve Bank, as indicated below:

(i) In case of full conversion of ECB into equity, the company shall report the conversion in Form FC-GPR as well as in Form ECB-2 (Part V: Annex III) to the Department of Statistics and Information Management (DSIM), within seven working days from the close of month to which it relates. The words "ECB wholly converted to equity" shall be clearly indicated on top of the Form ECB-2.

Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

(ii) In case of partial conversion of ECB, the company is required to report the converted portion in Form FC-GPR as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity"

Shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

b. Downstream Investment:

Form DI: An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment shall file Form DI with the Reserve Bank within 30 days from the date of allotment of equity instruments

c. Investment by persons resident outside India in units of an Investment Vehicle

An Investment vehicle which has issued its units to a person resident outside India in terms of Schedule VIII of NDI Rules, 2019 shall file Form InVI within 30 days from the date of issue of units.

d. Reporting of ADR/GDR Issues – Form DRR

The domestic custodian shall report the issue/ transfer of sponsored/ unsponsored depository receipts as per DR Scheme 2014 in Form DRR within 30 days of close of the issue/ program.

e. Reporting of ESOPs and sweat equity shares

An Indian company issuing 50employees' stock option (ESOP) to persons resident outside India who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiary/ subsidiaries shall file Form ESOP within 30 days from the date of issue of ESOPs.

f. Reporting requirements of Limited Liability Partnerships

i. Form FDI- LLP (I): A Limited Liability Partnerships (LLPs) receiving amount of consideration for capital contribution and acquisition of profit shares is required to submit a report in Form Foreign Direct Investment-LLP (I) within 30 days from the date of receipt of the amount of consideration. The form shall be accompanied by:

(i) copy/ies of the FIRC/s evidencing the receipt of the remittance

(ii) A KYC report in respect of the foreign investor in the format specified in.

ii. Form FDI- LLP (II): The LLPs shall report disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) within 60 days from the date of receipt of funds in Form Foreign Direct Investment-LLP (II). The onus of reporting shall be on the resident transferor / transferee.

g. Reporting of issue or transfer of Convertible Notes – Form CN

a) A start-up company issuing Convertible Notes (CNs) to a person resident outside India shall file Form CN within 30 days of issue.

b) Transfer of Convertible Notes of a start-up company by way of sale between a person resident in India and a person resident outside India shall be reported by the transferor/transferee, resident in India, in Form CN within 30 days of such transfer.

c) The AD bank shall ensure due diligence with regards to KYC of the foreign investor/ buyer.

h. Foreign Currency-Transfer of Shares (FC-TRS)

1) Form FCTRS is required to be filed for transfer of equity instruments in accordance with NDI Rules, 2019, between:

(i) a person resident outside India holding equity instruments in an Indian company on a repatriable basis and person resident outside India holding equity instruments on a non-repatriable basis; and

(ii) A person resident outside India holding equity instruments in an Indian company on a repatriable basis and a person resident in India,

The onus of reporting is on the resident transferor/ transferee or the person resident outside India holding equity instruments on a non-repatriable basis, as the case may be.

2) Transfer of equity instruments in accordance with NDI Rules, 2019 between a person resident outside India holding equity instruments on a non repatriable basis and person resident in India is not required to be reported in Form FC-TRS.

3) Transfer of equity instruments on a recognized stock exchange by a person resident outside India as prescribed under NDI Rules, 2019 has to be reported by such person in Form FC-TRS.

4) Transfer of equity instruments prescribed in Rule 9(6) of NDI Rules, 2019 viz., payment on deferred basis, shall be reported in Form FC-TRS to the AD bank on receipt of every tranche of payment. The onus of reporting shall be on the resident transferor/ transferee.

5) Transfer of ‘participating interest/ rights’ in oil fields shall be reported in Form FC-TRS.

6) Form FCTRS is required to be filed by the Indian company buying back shares in a scheme of merger/ de-merger/ amalgamation of Indian companies approved by NCLT/ competent authority.

7) The form FCTRS has to be filed with the AD bank within sixty days of transfer of equity instruments or receipt/ remittance of funds whichever is earlier.

i. Reporting of ESOPs and sweat equity shares

An Indian company issuing 50employees’ stock option (ESOP) to persons resident outside India who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiary/ subsidiaries shall file Form ESOP within 30 days from the date of issue of ESOPs.

The FEMA 1999 made all the criminal offences as civil offences. The chapter IV of the act provides for the provision for penalty with respect to contravention whereby section 13 provides for the imposition of penalty of three times of the sum involved in the contravention. With reference to the enforcement of order by adjudicating authority, the concerned person has to make deposit the penalty amount within ninety days of passing of the order; failure to this he shall be liable for civil imprisonment.

The Director of enforcement or such other officers of directorate of enforcement or officers of the reserve bank of India so authorised have to compound the contravention within one eighty days on an application by the concerned person. Further no proceeding can be initiated or continued with respect to that particular contravention. With respect to compounding provision there is separate rule governing all the provisions related to compounding proceedings, namely t**he Foreign Exchange (compounding proceedings) Rules, 2000**

Compounding application and requirement

The Forms prescribed are given below:

1) **The format of the application**.

Format of Application Form

(To be filled in duplicate and shall be accompanied by certified copy of the Memorandum issued)

1. Name of the applicant (in BLOCK LETTERS)

2. Full address of the applicant (including Phone and Fax Number and email id)

3. Whether the applicant is resident in India or resident outside India [Please refer to Section 2(v) of the Act]

4. Name of the Adjudicating Authority before whom the case is pending

5. Nature of the contravention [according to sub-section (1) of Section 13]

6. Brief facts of the case

7. Details of fee for application of compounding

8. Any other information relevant to the case

I/We declare that the particulars given above are true and correct to the best of my/our knowledge and belief and that I/We am/are willing to accept any direction/order of the Compounding Authority in connection with compounding of my/our case.

Dated:

Name:

(Signature of the Applicant)

2) **The details of irregularities whether relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office/ Liaison Office, as applicable**.

A. Details to be furnished along with application for compounding of contravention relating to Foreign Direct Investment in India

- Name of the applicant
- Date of incorporation
- Income-tax PAN
- Nature of activities under taken (Please give NIC code – 1987 / 2008) Brief particulars about the foreign investor Details of foreign inward remittances received by Applicant Company from date of incorporation till date
- Copies of Balance Sheet during the period of receipt of share application money and allotment of shares
- Nature of contravention and reasons for the contravention

B. Details to be furnished along with application for compounding of contravention relating to External Commercial Borrowing

- Name of the applicant
- Date of incorporation
- Income-tax PAN
- Nature of activities undertaken (Please give NIC code – 1987)
- Brief particulars about the foreign lender
- Is the applicant an eligible borrower?
- Is the lender eligible lender?
- Is the lender an equity holder?
- What is the level of his holding at the time of loan agreement?
- Details of ECB

- Date of Loan agreement
- Amount in Foreign Currency and Indian Rupee
- Rate of interest
- Period of loan
- Repayment particulars
- Details of draw down
- Details of LRN Number- application and receipt
- Details of ECB 2 returns submitted; Period of return: Date of submission
- Details of Utilization of ECB in Foreign Currency and Indian Rupee
- Nature of contravention and reasons for the contravention
- All supporting documents may be submitted

C. Details to be furnished along with application for compounding of contravention relating to Overseas Investment

- Name of the applicant
- Date of incorporation
- Income-tax PAN
- Nature of activities undertaken (Please give NIC code – 1987)
- Name of Overseas entity
- Date of incorporation of overseas entity
- Nature of activities undertaken by overseas entity
- Nature of entity- WOS/JV
- Details of remittance sent- Date of remittance; Amount in FCY and in INR
- Details of other financial Commitment
- Details of UIN applied and received
- Date of receipt of share certificate
- Approval of other regulators if required
- Details of APRs submitted: For the period ended; date of submission
- Nature of contravention and reasons for the contravention

- All supporting documents may be submitted

D. Details to be furnished along with application for compounding of contravention relating to Branch/Liaison Office in India

   - Name of the applicant
   - Date of incorporation
   - Income-tax PAN
   - Nature of activities undertaken (Please give NIC code – 1987)
   - Date of approval for opening of Liaison Office/ Branch Office
   - Validity period of the approval
   - Income and expenditure of the LO/BO
   - Dates of submission of Annual activity Certificates
   - Nature of contravention and reasons for the contravention
   - All supporting documents may be submitted

3) Undertaking that the applicant is not under investigation of any agency such as DOE, CBI, etc. in order to complete the compounding process within the time frame

(On the letterhead of the applicant)

*I/We __________________ (Name of the applicant) hereby confirm/declare that I/we am/are not under any enquiry/investigation/adjudication by any agency such as Directorate of Enforcement, CBI etc as on the date of this application.

I/We further undertake to inform to the Compounding Authority / Reserve Bank of India immediately, in writing, if any enquiry/investigation/adjudication proceedings are initiated by any agency against me/us at any time hereafter but on or before the date of issuance of the compounding order in respect of the compounding application filed by me/us.’

OR

*I/We ________________ (Name of the applicant) hereby confirm/declare that I/we am/are or was/were under enquiry/investigation/adjudication by any agency such as Directorate of Enforcement, CBI etc. and the details are given in the Annex.

I/We further undertake and confirm that no appeal has been filed by me/us under section 17 or section 19 of FEMA, 1999.

(* Strike out one)

Signature of the authorised signatory

4) **Mandate and details of their bank account (Annex IV): In case the application has to be returned for any reason, the application fees of Rs.5000/- received along with the application fees is also returned. To expedite the refund of compounding fees in such cases, it has been decided to credit the same to the applicant's account through NEFT requiring the obtaining of a mandate**.

MANDATE FORM

1. Name of the Party (Beneficiary) -
2. PAN -
3. Particulars of the Bank Account -
    a. Name of the Bank –
    b. Name of the Branch –
       Address:
       Telephone No:
    c. Type of Account - SAVINGS / CURRENT
    d. Account No. - (as appearing on the cheque book issued by the Bank)
    e. The 9 Digit MICR Code Number - (as appearing on the cheque book issued by the Bank)
    f. IFSC Code - (as appearing on the cheque book issued by the Bank)

4. Checklist for Attachments:

   Photocopy of PAN Card

   Photocopy of a cancelled blank cheque

5. I/We hereby declare that the particulars given above are correct and complete. If the transaction is delayed or not effected at all for reasons of incomplete or incorrect information, I/We would not hold the user institution responsible.

Signature of the Authorised Signatory

(Name of the Authorised Signatory)

Official Stamp

Date:

Place:

Authorities governing the enforcement of FEMA:

- Foreign Exchange Department of Reserve Bank of India (RBI) – www.fema.rbi.org.in
- Directorate of Enforcement, Department of Revenue, Ministry of Finance- http://directorateofenforcement.gov.in
- Capital Markets Division, Department of Economic Affairs, Ministry of Finance – http://finmin.nic.in/theministry/deptecoaffairs/
- Foreign Trade Division, Department of Economic Affairs, Ministry of Finance – http://finmin.nic.in/theministry/deptecoaffairs/

RULES AND REGULATIONS WITH RESPECT TO DEBT AND NON-DEBT INSTRUMENTS

The Ministry of Finance, on October 15, 2019, notified Sections 139, 143 and 144 of the Finance Act, 2015 which had proposed certain amendments to Section 6 *(Capital Account Transaction*), Section 46 (*Power of Central Government to make rules*) and Section 47 (*Power of RBI to make regulations*) respectively, of the Foreign Exchange Management Act, 1999**.**

These amendments have, *inter alia*, resulted in a power shift from the RBI to the Central Government, enhancing the latter's involvement in the foreign exchange transactions. A bifurcation of instruments into debt instruments and non-debt instruments has been introduced and while the RBI (*in consultation with the Central Government*) is assigned the responsibility to draft regulations for debt instruments, the Central Government (*in consultation with the RBI*) is entrusted with the power to frame rules for non-debt instruments.

Earlier we just had one regulation for foreign investment that is The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 commonly called as TISPRO Regulation 2017 which provided how the person resident outside India can make investment, in what manner the remittance can happened. There has been split between two that is rule and regulation governing non-debts instruments and regulation governing debt instruments.

1. The FEM (Non-debt Instruments) Rules, 2019
2. The FEM (Mode of payment and Reporting of Non-debt instruments) Regulations, 2019
3. The FEM (Debt Instruments) Regulations, 2019

The Central Government notified the Foreign Exchange Management (*Non-Debt Instruments*) Rules, 2019 on October 17, 2019 superseding the erstwhile Foreign Exchange Management (*Transfer of Issue of Security by a Person Resident outside India)* Regulations, 2017 and the Foreign Exchange Management (*Acquisition and Transfer of Immovable Property in India*) Regulations, 2018

THE FOREIGN EXCHANGE MANAGEMENT (NON-DEBTS INSTRUMENT) RULES, 2019

- **Key changes in the definitions**:

- **Debt and Non-Debt Instruments**: The NDI Rules provide for an exhaustive list of instruments as 'non-debt instruments' and defines 'debt instruments' as all instruments falling outside the category of non-debt instruments. This needs to be read along with the list of debt instruments and non-debt instruments notified by the Central Government through m/o Finance, dept of revenue on October 16, 2019.

Rule 2 (ai) Non debts instruments includes

(i) all investments in equity instruments in incorporated entities: public, private, listed and unlisted;

(ii) capital participation in LLP;

(iii) all instruments of investment recognised in the FDI policy notified from time to time;

(iv) investment in units of Alternative Investment Funds (AIFs), Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InvIts);

(v) investment in units of mutual funds or Exchange-Traded Fund (ETFs) which invest more than fifty per cent in equity;

(vi) junior-most layer (i.e. equity tranche) of securitisation structure;

(vii) acquisition, sale or dealing directly in immovable property;

(viii) contribution to trusts; and

(ix) depository receipts issued against equity instruments

- **Equity Instruments**: The NDI Rules replaced the term 'Capital Instruments' in TISPRO with 'Equity Instruments'.

- **Hybrid Securities**: The NDI Rules introduced the concept of Hybrid Securities as optionally or partially convertible preference shares or debentures or any other such Government specified instruments, which can be issued to a person resident outside India.
- **Investment Vehicle**: The definition of Investment Vehicle under TISPRO was amended by the NDI Rules to include mutual funds which invest more than 50% in equity governed by the SEBI (Mutual Funds) Regulations, 1996. The same has been deleted by Amendment Rules and the erstwhile definition of the Investment Vehicle under TISPRO has been restored.
- **E-Commerce**: The NDI Rules has limited the purview of E-Commerce entities to companies incorporated under the Companies Act, 1956 or the Companies Act, 2013, conducting e-commerce business and it no longer includes a foreign company or an office, branch or agency in India, owned or controlled by a person resident outside India, conducting the e-commerce business.
- **Single Brand Retail Sector**: The sectoral cap and entry route for single brand product retail trading for foreign investment is reduced to 49% from 100% under the automatic route. Foreign investment beyond 49% will require government approval

Further, the Amendment Rules notified on 5th December 2019, has inserted a condition that e-commerce marketplace entity with FDI shall have to obtain and maintain a report of statutory auditor by September 30 of every year for the preceding financial year confirming compliance of the e-commerce guidelines. This would ensure compliances of the FDI Policy in the e-commerce sector.

On 19th august 2021 the FEM (Non-debt instruments) (Second Amendment) Rules, 2021 notified that increased the sectoral cap from 49% to 74% for the following sectors/activities:

(a) Insurance Company

(b) Insurance Brokers

(c) Third Party Administrators

(d) Surveyors and Loss Assessors

(e) Other Insurance Intermediaries appointed under the provisions of Insurance Regulatory and Development Authority Act, 1999

Also the Applications for foreign direct investment in private banks having joint venture or subsidiary in insurance sector can be addressed to the Reserve Bank for consideration in consultation with the Insurance Regulatory and Development Authority of India, in order to ensure that the limit of foreign investment applicable for the insurance sector.

THE FOREIGN EXCHANGE MANAGEMENT (DEBT INSTRUMENTS) REGULATIONS, 2019

Regulations 2(d)-Debt Instruments- "debt instruments" means the instruments listed under Schedule I that includes

a) dated Government securities/ treasury bills/ treasury bills/Govt Bonds/ Corporate Bonds/depository receipts whose underlying securities are debt securities
b) non-convertible debentures/ bonds issued by an Indian company;
c) Security Receipts (SRs) issued by Asset Reconstruction Companies/ borrowing by Indian Firms through loan
d) debt instruments issued by banks, eligible for inclusion in regulatory capital

e) investment in units of Mutual Fund or Exchange Traded Funds which invest equal or less than fifty per cent in equity.

f) Credit enhanced bonds/ all tranches of securitisation structure which are not Equity holder

g) Listed Non Convertible Debentures/ Redeemable Preference Shares or debentures issued in terms of Regulation 6 of Debt Regulations

h) Rupee denominated bonds/ units issued by Infrastructure Debt Funds/ Municipal Bonds

i) Securitised debt instruments, including (i) any certificate or instrument issued by a special purpose vehicle (SPV) set up for securitisation of asset/s with banks, Financial Institutions or NBFCs as originator

j) commercial papers issued by an Indian company;