



Government Publishes Draft of Conditions for Foreign Investment in Indian Insurance Companies

The Insurance (Amendment) Act, 2021 (**“Amendment Act”**) amended the Insurance Act, 1938 (**“Insurance Act”**) with effect from April 1, 2021, to increase the cap on foreign investment in Indian insurance companies (**“IICs”**) from 49% to 74%. The Amendment Act stipulated that foreign investment in IICs would be subject to the manner and conditions, as would be prescribed by the Central Government, in exercise of its powers under Section 114(2)(aaa) of the Insurance Act.

On April 15, 2021, the Ministry of Finance (Department of Financial Services) published a draft of the Indian Insurance Companies (Foreign Investment) (Amendment) Rules, 2021 (**“Draft FI Rules”**) to amend the Indian Insurance Companies (Foreign Investment) Rules, 2015 (**“Foreign Investment Rules”**), proposing several conditions which will apply in the context of foreign investment in IICs.

Key Amendments proposed under the Draft FI Rules:

FDI Increase

In line with the Amendment Act, the Draft FI Rules propose to amend the Foreign Investment Rules to reflect the increase in the foreign investment (which includes foreign direct investment as well as foreign portfolio investment) cap in IICs from 49% to 74% (**“FI Increase”**). Pursuant to the FI Increase, IICs are no longer mandatorily required to be *‘Indian owned and controlled’*. Consequently, the definitions of *‘Control’*, *‘Indian Control of*

an Indian Insurance Company’, and *‘Indian Ownership’* are proposed to be deleted.

The FI Increase will be under the automatic route (i.e. prior approval from the Central Government will not be required). However, any transfer or issuance of shares of an IIC in excess of 1% will continue to require prior approval of the Insurance Regulatory and Development Authority of India (**“IRDAI”**).

‘Total Foreign Investment’

The Draft FI Rules clarify that *‘Total Foreign Investment’* in an IIC, is the sum total of direct and indirect foreign investment by foreign investors, and will be calculated in accordance with the IRDAI (Registration of Indian Insurance Companies) Regulations, 2000 (**“Registration Regulations”**).

Pursuant to Rule 11 of the Registration Regulations, the total foreign investment in an IIC is the aggregate of, (i) the quantum of paid-up equity share capital held by the foreign investors in the IIC; and (ii) the proportion of the paid-up equity share capital held or controlled by such foreign investors (either by itself or through its subsidiary companies) in the Indian promoter or Indian investors of the IIC. This mechanism is subject to certain exceptions, which are also prescribed under Rule 11 of the Registration Regulations.

New Requirements for IICs with foreign investment in relation to residency and citizenship of directors and KMPs

In this Issue

FDI Increase

‘Total Foreign Investment’

New Requirements for IICs with foreign investment in relation to residency and citizenship of directors and KMPs

Board Committees

Resident Indian Citizen

Timeline for compliance

Additional requirements for IICs with foreign investment in excess of 49%

Invitation of Suggestions



Pursuant to the Draft FI Rules, every IIC having foreign investment must ensure that (i) a majority of its board of directors (“**Board**”); (ii) a majority of the key management persons (“**KMPs**”); and (iii) one among the chairperson of the Board, MD and CEO, are Resident Indian Citizens (“**Residency and Citizenship Criteria**”).

As per the IRDAI’s ‘Guidelines on Corporate Governance for insurers in India’ dated 18 May 2015, ‘KMPs’ mean members of the core management team of the IIC, including all whole-time directors/ MD/ CEO and the functional heads one level below the MD/CEO, including the chief financial officer, appointed actuary, chief investment officer, chief risk officer, chief compliance officer and the company secretary.

The Draft FI Rules do not prescribe a minimum threshold percentage of foreign investment for compliance with the Residency and Citizenship Criteria, meaning even an IIC having less than 1% foreign investment must meet the Residency and Citizenship Criteria.

The IRDAI had not previously prescribed any residency or citizenship requirement for the Board or KMPs, under the Guidelines on ‘Indian owned and controlled’ (“**Control Guidelines**”), which were issued on 19 October 2015 in connection with the requirement of IICs to be ‘Indian owned and controlled’. Under the Control Guidelines, a majority of the Board (excluding independent directors) were required to be nominees of the Indian promoter and/or Indian investor. With the removal of the ‘Indian owned and controlled’ requirement, Indian promoters/ investors are no longer required to nominate a majority of the Board. While the Control Guidelines provided that KMPs should be appointed either by the Board or the Indian promoter and/or Indian investor, the Draft FI Rules has no such prescription. However, by virtue of the Draft FI Rules, irrespective of whether the director and/or KMP is a nominee of an Indian promoter/ investor or the foreign investor, an IIC with foreign investment must fulfill the Residency and Citizenship Criteria.

Board Committees

While the Draft FI Rules do not prescribe specific requirements in relation to the composition of the committees of the Board, it is likely that the IRDAI may take a view, that the Board committees should have similar composition as the Board and hence comprise of a majority of Resident Indian Citizens, unless prescribed otherwise by the IRDAI.

Resident Indian Citizen

The Draft FI Rules define ‘Resident Indian Citizen’, with reference to the Government’s policy on foreign direct investment (“**FDI Policy**”), as amended from time to time. As per the present FDI Policy, the term ‘Resident Indian Citizen’ must be interpreted in line with the definition of ‘person resident in India’ under the Foreign Exchange Management Act, 1999 (“**FEMA**”), read in conjunction with the Indian Citizenship Act, 1955 (“**Citizenship Act**”). To qualify as a Resident Indian Citizen, an individual must reside in India for more than 182 days during the course of the preceding financial year, and also be an Indian citizen under the Citizenship Act. It is therefore possible that Persons of Indian Origin (PIOs) and Overseas Citizens of India (OCIs) would remain excluded from the definition of Resident Indian Citizens.

Timeline for compliance

All IICs with foreign investment will be given one year’s time from the notification of the Draft FI Rules to ensure compliance with the Residency and Citizenship Criteria.

Additional requirements for IICs with foreign investment in excess of 49%

Two additional requirements have been proposed for IICs having foreign investment in excess of 49% (“**Additional Requirements**”). These Additional Requirements will apply even when the IIC is only 50% foreign owned (and not necessarily majority foreign owned) and it appears that any approval from the IRDAI for an increase in foreign shareholding beyond 49%, will be subject to compliance with the said requirements.

In this Issue

FDI Increase

‘Total Foreign Investment’

New Requirements for IICs with foreign investment in relation to residency and citizenship of directors and KMPs

Board Committees

Resident Indian Citizen

Timeline for compliance

Additional requirements for IICs with foreign investment in excess of 49%

Invitation of Suggestions



Policy Alert

Retention of Profits: At least 50% of the net profit for the financial year must be retained by the IIC, in its general reserve, if, (A) for such financial year, dividend is paid on equity shares; and (B) at any time during the financial year, the solvency margin of the IIC is less than 1.2 times the control level of solvency of 150%.

Notably, prior permission of the IRDAI is not required to repatriate dividend to foreign investors.

Independent Directors: At least 50% of the Board must consist of independent directors. If however, the chairman of the Board is an independent director, only 1/3rd of the Board will need to consist of independent directors.

Such independent director-chairman could be a Resident Indian Citizen or a non-resident.

Invitation of Suggestions

Suggestions have been invited for a fifteen-day period from 15 April 2021 (i.e. till 30 April 2021), from persons likely to be affected by the Draft FI Rules. Suggestions, if any, may be addressed to: *Under Secretary to the Government of India, Department of Financial Service, Insurance-II Section, Room No. 10, Jeevan Deep Building, 2nd floor, Sansad Marg, New Delhi - 110 001.*

The Draft FI Rules will be taken for publication in the Gazette of India after expiry of the fifteen days' period from April 15, 2021.

In this Issue

FDI Increase

'Total Foreign Investment'

New Requirements for IICs with foreign investment in relation to residency and citizenship of directors and KMPs

Board Committees

Resident Indian Citizen

Timeline for compliance

Additional requirements for IICs with foreign investment in excess of 49%

Invitation of Suggestions

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