Recent Amendments to the Government of India's Foreign Investment Outlook

In the current tumultuous market scenario where the Indian stock markets and the value of the rupee have plunged to new depths, the Government of India through the Ministry of Commerce & Industry (**"GOI"**) and the Reserve Bank of India (**"RBI"**) have recently proclaimed measures aimed at increasing / conserving forex. The GOI has issued three press notes on August 22 2013 for further liberalizing the foreign direct investment (**"FDI"**) in India and the RBI has issued two notifications on August 14 2013 for curbing foreign exchange outflows from India. The salient features of these changes are summarised hereinbelow:

1. Amendment to the definition of "Control":

The GOI has issued press note no. 4 of 2013 dated August 22 2013 (**"Press Note 4 of 2013"**) amending the definition of "Control" for calculating the total FDI (direct and indirect) in Indian companies. Under the amended definition "Control" now implies the ability to control a company not just through the right to appoint majority directors in a company but also by way of management or policy decisions through shareholding or voting rights or management rights or shareholders agreement. Thus, the amended definition of "Control" now includes crucial factors by which a company may be controlled.

2. Review of FDI policy on the Multi Brand Retail Trading Sector

In continuation of its policy of opening up the retail sector for foreign investment, the GOI has issued a press note no. 5 of 2013 dated August 22 2013 (**"Press Note 5 of 2013"**).

The GOI has clarified concerns on its policy on multi brand retail trading as follows:

1. By Press Note 5 of 2013, the GOI has clarified that 50 per cent investment will be restricted only to the first tranche of $100 million i.e. the mandatory initial investment amount, over and above which, for subsequent investments, the retailer may exercise discretion on whether or not investment into back-end infrastructure may be carried out.
2. On the 30 per cent sourcing norm, the GOI has revised the limit of investment for SMEs, to a total investment not exceeding US $ 2 million in plant and machinery from the earlier US $ 1 million to be

eligible for sourcing of 'manufactured and processed' products. Further, the GOI has also clarified that such reckoning would be at the time of first engagement and thereafter even if any of such firms cross the US $ 2 million limit at a later stage, it would still qualify as a "small industry".
3. The GOI has given wide powers to State Governments to decide the cities in which retail sales outlets may be set up.

3.FDI in various Sectors in India:

As per the GOI's Press Note 6 of 2013 dated August 22 2013 (**"Press Note 6 of 2013"**) the FDI caps and approval routes in the following sectors in India stand amended as follows:

Sr. No.	**Sector**	**Revised Cap and Route**
1.	Petroleum and Natural Gas	49% - Automatic Route
2.	Defence	Upto 26% - Government Route Above 26% - Approval of Cabinet Committee of Security
3.	Courier Services	100% - Automatic Route
4.	Telecom Services	Upto 49% - Automatic Route Above 49% - Government Route
5.	Single brand retail trading	Upto 49% - Automatic Route Above 49% - Government Route
6.	Asset Reconstruction Companies	Upto 49% (FDI + FII) - Automatic Route Above 49% (FDI + FII) - Government Route
7.	Commodity Exchanges	Upto 49% (FDI upto - 26%+ FII upto - 23%) - Automatic Route
8.	Credit Information Companies	Upto 74% (FDI + FII) - Automatic Route
9.	Infrastructure company in securities market	49% (FDI upto - 26% + FII upto - 23%) - Automatic Route
10.	Power Exchanges	49% (FDI upto - 26% + FII upto - 23%) - Automatic Route

An Indian company having received FDI upto 49% under the automatic route is now required to execute an agreement to that effect with the concerned foreign party and submit a copy of the agreement to the RBI.

4. Liberalized Remittance Scheme

The RBI has issued a notification dated August 14 2013 curtailing the existing limit under the liberalized remittance scheme by over 60% from US

$ 200,000 per financial year to US $ 75,000 per financial year with effect from August 14 2013. All the authorised dealer banks are permitted to remit up to US $ 75,000 per financial year, for any permitted current or capital account transactions or a combination of both. However, resident individuals are not allowed to acquire an immovable property, directly or indirectly, outside India. Resident individuals have now been allowed to set up joint ventures / wholly owned subsidiaries outside India for bonafide business activities within the limit of US $ 75,000 with effect from August 5, 2013 subject to applicable regulations of the Foreign Exchange Management Act 1999.

The RBI has pursuant to a circular dated September 4 2013 also provided further clarifications as follows:

1. Liberalized remittance scheme can be used to acquire shares of both listed and unlisted overseas company.
2. The following remittances can be made over and above the annual limit of US$75000:
    - A resident individual may make remittances for meeting expenses for medical treatment abroad up to the estimate from a doctor in India or hospital/ doctor abroad under general permission i.e. without any RBI approval.
    - A resident individual may make remittances up to US $25,000 for maintenance expenses of a patient going abroad for medical treatment or check-up abroad or for accompanying as attendant to a patient going abroad for medical treatment/ check-up without any RBI approval.
    - A resident individual may make remittances for studies up to the estimates from the institutions abroad or US $100,000/- whichever is higher without any RBI approval.
3. The notification dated August 14 2013 is effective from August 5 2013.
4. Resident individuals are permitted to make remittances for acquiring immovable property within the annual limit of US$ 75000 for already contracted cases, i.e. only for those contracts which were entered into on or before the date of the prior circular, i.e., August 14, 2013, subject to satisfaction of the genuineness of the transactions by the AD bank. Such cases should be immediately reported post facto to the RBI by the A D Banks.

5. Overseas Direct Investments

The RBI has issued another notification dated August 14 2013 reducing the existing limits for overseas direct investment ("ODI") by Indian companies in joint ventures or wholly owned subsidiaries abroad under the Automatic Route from 400 per cent of its net worth to 100 per cent of its net worth with effect from August 14 2013.Accordingly, AD banks may allow ODI under the Automatic Route up to 100 per cent of the net worth of the company, as on the date of the last audited balance sheet. Select companies such as Navaratna Public Sector Undertakings (PSUs), ONGC Videsh Limited and Oil India Limited stand exempted.

The RBI has pursuant to a circular dated September 4 2013 provided further clarifications as follows:

1. All the financial commitments made on or before August 14, 2013 in compliance with the earlier limit of 400% of the networth of the

Indian Party under the automatic route will continue to be allowed.

2. The limit of financial commitments for an Indian Party (presently 100% of its net worth) shall not apply to the financial commitments funded out of Exchange Earners' Foreign Currency account of the Indian Party or out of funds raised by way of ADRs / GDRs by the Indian Party.
3. RBI has decided to retain the limit of 400% of the net worth of the Indian Party for the financial commitments funded by way of eligible External Commercial Borrowing(**"ECB"**) raised by the Indian Party as per the ECB guidelines.
4. In case of an already contracted/committed financial commitment for an existing joint venture or wholly owned subsidiaries,the earlier limit of 400%, under the automatic route, would apply. The onus of ensuring the veracity/authenticity of the contract/commitment before permitting remittances will lie with the designated AD bank. Such cases should be immediately reported post facto to RBI by the AD Bank.
5. An Indian Party, making fresh financial commitment in an existing overseas joint ventures or wholly owned subsidiariesof another Indian Party (either by way of transfer of existing stake or by way of fresh contribution), shall qualify for 100% limit.
6. All applications received by the RBI and/or an AD bank on or before August 14, 2013 would be examined and dealt with by the RBI and/or an AD bank under the earlier guidelines only, i.e., guidelines prior to August 14, 2013.

- Kailash Lad (Associate Partner) & Ankit Mehta (Senior Associate)