CNK & Associates LLP

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Press Note on Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/ acquisitions of Indian companies due to the current COVID-19 pandemic

Ministry of Commerce and Industry, the Government of India has announced a new policy by way of Press Note (PN) No. 3(2020 Series) dated 17th April, 2020, amending the norms of investment for Eligible Investor as defined in Consolidated FDI Policy 2017. The said amendment will take effect from date of FEMA notification as stated in the said PN.

Pursuant to the said amendment, the Government has narrowed the scope of investment for eligible investors in order to curb opportunistic take over or acquisition by the foreign investors. This is done specifically due to meltdown caused by COVID-19 pandemic, especially after China's central bank recently increased holding in Housing Development Finance Corporation (HDFC) to a little over 1%.

The intent of the given press release is that all fresh investment from China will now require prior approval of the Indian Government, and this approval would also apply to transactions, where the beneficial owner of the investment, (whether directly or indirectly) is from China.

Newspaper reports suggest that this move is similar to restrictions on investments implemented by the US, Germany, Italy, Spain and Australia.

The change in the FDI policy is summarized as under:

Earlier Position	Position after the Press Note
A non-resident entity/ investor could invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, the citizen or an entity incorporated in Bangladesh / Pakistan could invest only under the Government Approval route, with additional restriction on Pakistani citizen or an entity incorporated in Pakistan, where the investment in defense, space, atomic energy and other restricted sectors is completely prohibited.	a. The Government has under the revised position extended the restriction of foreign investment from entities of the countries with which India shares land border (such as Pakistan, Bangladesh, China, Nepal, Myanmar, Bhutan and Afghanistan) or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, the investment in India can only be made under the Government approval route. b. Further, in the event of transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership* falling within restriction as stated in (a) above, the said transfer will also require Government approval.

*Beneficial ownership has not been defined under FEMA and one hopes that appropriate clarification is issued.

It is unclear whether the said restriction extends to citizens of Sri Lanka with which India does not share land border but is a neighboring country. Similarly, whether investment from Hong Kong is also restricted and would require prior government approval is not clear.

The policy does not require prior approval of investments already made from these restricted countries. However, any fresh investment in India from these restricted countries including China would require prior approval. Similarly, the PN does not require prior approval on transfer of existing or future FDI in India except where the said transfer directly or indirectly results in the beneficial ownership belonging to an investor from these restrictive countries

This PN appears to only introduce condition of Government approval for FDI investment and not Foreign Portfolio Investments (FPI) [investments in capital markets (public stocks)].

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