FEMA Clearance Must for Offering Securities to Cos from Border Nations

Move aimed at preventing Chinese investors from taking control of Indian firms

Our Bureau

New Delhi: Companies will now have to ensure that they have government approval under the Foreign Exchange Management rules before offering securities to any entity from a country that shares a land border with India.

The ministry of corporate affairs (MCA) has notified the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022, reflecting the changes in the foreign direct investment regime.

"No offer or invitation of any securities under this rule shall be made to a body corporate incorporated in or a national of a country which shares a land border with India, unless such body corporate or the national, as the case may be, have obtained government approval under the FEMA (Non-debt Instruments) Rules, 2019," the notification said.

In case companies have offered securities to such entities, they must give a declaration that approval has been given for the transaction and should attach the approval letter along with the private placement offer cum application letter.

In 2020, the government had placed all FDI from border countries under the approval route to curb opportunistic takeovers during the pandemic.

UNDER PROBE

ED and I-T dept are probing many firms with Chinese links suspected of money laundering, tax evasion

The latest move is in line with these changes, which were largely aimed at preventing Chinese investors from taking control of Indian companies.

Law enforcement agencies, such as the Enforcement Directorate and the Department of Income Tax, were probing many firms with Chinese links suspected of money laundering and tax evasion, based on their intelligence inputs.

The move puts the onus of compliance on the recipient of investments.

"The recent notification from the ministry of corporate affairs only aligns the corporate laws with this policy restriction and approval requirement. The notification, however, casts an additional procedural compliance on the Indian investee company by requiring it to furnish the approval along with its private placement related filings," Sandeep Jhunjhunwala, M&A Partner at Nangia Andersen LLP, said.

RELAXATION FOR HOLDING AGM

The MCA has allowed companies to hold annual general meetings via video conference till December 31. The earlier exemption was till the end of June 2022.

In its circular, the MCA has clarified that companies whose AGMs are due in the year 2022 can now conduct such meetings through video conferencing or other audio visual means till December 31.

Disclosure norms on investments from neighbour nations tightened

SHRIMI CHOUDHARY
New Delhi, 6 May

The government has tightened disclosure norms for companies seeking investment from countries with which India shares land borders.

The Ministry of Corporate Affairs (MCA) has amended the rules on issuing a prospectus and allotting shares to ensure companies are compliant with foreign direct investment norms. The move will refine India's current investment approval mechanism.

Under the new norms, the receiving entity (Indian firm) has to specify whether the investment sought is from a border country. The receiving entity has to mention in its application whether the proposed share allotment requires approval under foreign exchange management rules and, if so, whether it has been secured and enclosed.

This is alignment with the tweaked FDI policy of 2020 under the approval route to curb hostile takeovers.

According to it, FDI proposals for any sector from these countries need government approval. Countries that share land borders with India are China, Bangladesh, Pakistan, Bhutan, Nepal, Myanmar, and Afghanistan.

"…. no offer of any securities is to be made to an entity or a national of a country that shares land border with India unless prior approval has been obtained from the Indian government as per the Foreign Exchange Management (Non-debt Instruments) Rules and is submitted along with the private placement offer cum application letter," according to the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022, issued on Thursday.

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The Department for Promotion of Industry and Internal Trade (DPIIT) had in April 2020 restricted investment in India from countries that share land borders with India by making it mandatory to have sovereign approval for that. "The recent notification from the Ministry of Corporate Affairs aligns the corporate laws with this policy restriction and approval requirement. The changes cast an additional procedural compliance on the Indian investee company by requiring it to furnish the approval along with its private placement related filing," said Sandeep Jhunjhunwala, M&A Partner at Nangia Andersen LLP.

A disparity could probably lie where the beneficial owner (and not the investing shareholder) is from a restricted country. At present, there is no reporting mechanism even in the case of transfer of ownership.