

LAW & POLICY UPDATE

CORPORATE & COMMERCIAL



Third amendment to FEMA NDI Rules

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The FEMA (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), notified by the Central Government on October 17, 2019, were recently amended further. The Ministry of Finance issued the NDI (Third Amendment) Rules, 2020 (**Third Amendment**) vide its notification dated July 27, 2020. At the outset, third amendment seeks to bring about two major changes in NDI Rules, namely granting powers to the Reserve Bank of India (**RBI**) to administer the NDI Rules and to issue directions or circulars, as it may deem necessary, in this regard and amendment in the entry route and other conditions in relation to air transport services. The major changes have been enlisted below:

- **Powers granted to the RBI**
 - **Insertion of rule 2A:** Under the NDI Rules, the powers granted to the RBI was exercisable in consultation with the Central Government. Under the Third Amendment, by way of insertion of rule 2A, the RBI has been granted exclusive powers to administer the NDI Rules and to interpret and issue directions, circulars, instructions or clarifications, as it may deem fit, for effective implementation of the provisions of the NDI Rules.
 - **Amendment to rule 3 and rule 4:** In alignment with the insertion of rule 2A, consequent changes have been made in rules 3 and 4 of the NDI Rules, whereby the RBI may, on an application made to it, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary; and an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary, without consultation with Central Government.
- **FDI in air transport services**
 - **Removal of dispensation for OCIs:** Under Schedule I of the NDI Rules, FDI by NRIs and OCIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service was allowed under the automatic route up to 100%. However, the Third Amendment seeks to remove the dispensation provided to OCIs, in this regard. Currently, under the Third Amendment, S. No. 9.3 of Schedule I provides that only foreign direct investment by NRIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service, shall be allowed under the automatic route up to 100%. Further, 'Air Operator Certificate' (as opposed to Scheduled Operators' Permit under the NDI Rules) to operate scheduled air transport services (including domestic scheduled passenger airline or regional air transport service) shall be granted to such company or a body corporate which is registered and has its principal place of business within India; whose chairman and at least 2/3rd of its directors are Indian citizens; and whose substantial ownership and effective control is vested in Indian nationals.

- **Changes in other conditions for investment in air transport services:** FDI in air transport services is subject to other specific conditions prescribed in this regard. The Third Amendment seeks to introduce certain changes in S. No. 9.5 of Schedule I of the NDI Rules, which include the following:
 - o **Amendments to 9.5 (c):** Conditions subject to which foreign airlines shall invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital has been amended to include limit of 49% shall include the FDI and FII/FPI investment, the investments made hereunder shall be in compliance with relevant regulations of the Securities and Exchange Board of India (**SEBI**), such as the Issue of Capital and Disclosure Requirements (**ICDR**) Regulations/Substantial Acquisition of Shares and Takeovers (**SAST**) Regulations, as well as other applicable rules and regulations and removal of grant of Scheduled Operators' Permit. However, NRIs, who are Indian Nationals shall not be subject to the limit of aforesaid limit of 49%, in which case foreign investments shall be permitted up to 100% under the automatic route.
 - o **Amendments to 9.5 (d):** Prior to the third amendment, foreign investments in M/s Air India Ltd, including that of foreign airlines were not permitted beyond 49% (directly or indirectly). However, under the Third Amendment, the aforesaid restriction of 49% shall not be applicable in case of any foreign investments by NRIs who Indian Nationals are, in which case, foreign investments shall be permitted up to 100% under the automatic route.
 - o **Insertion of 9.5 (e):** FDI in Civil Aviation shall be subject to the provisions of the Aircraft Rules, 1937, as amended from time to time.
 - o **Other changes:** Any investment by foreign airlines in companies operating in air transport services, including in M/s Air India Ltd, shall be subject to the following:
 - Such investment shall be in the equity of companies operating cargo airlines, helicopter and seaplane services, as per the limits and entry routes prescribed
 - **Conditions specified in 9.5(c):** FDI limits specified in Sr. No. 9.2 (Airports) and 9.3 (Air Transport Services) of the NDI Rules (as amended from time to time, including the Third Amendment) shall be applicable in cases where there is no investment by a foreign airline.

The Third Amendment aims to clearly shift the powers from the Central Government to the RBI to administer the NDI Rules and issue directions and circulars to give effect to the NDI rules. It also restricts the foreign investment by OCIs in air transport services in India up to 49% of their paid up capital and provide clarity on the relevant SEBI regulations to be complied with, in respect of foreign investment in air transport services and combine foreign investments by FII/FPI and FDI to 49% in scheduled and non-scheduled air transport services in India.

