



# NEWSLETTER

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## FEMA

### SIGNIFICANT CLARIFICATION/CHANGES IN FDI IN E-COMMERCE

The Department of industrial Policy and Promotion, through Press Note no. 2 of 2018, has sent out significant 'clarifications' on regulation relating to Foreign Direct Investment (FDI) in e-commerce sector.

Just to outline, there are two models of e-commerce activities viz:

1. **Inventory based model** -  
where inventory of goods and services is owned by the e-commerce entity and is sold to the customers

directly. FDI is not permitted in such inventory-based model of e-commerce.

2. **Marketplace based model** -  
where the e-commerce entity provides only information technology platform on a digital and electronic network to act as a facilitator between buyer and seller. 100% FDI is permitted under automatic route under this model, subject to certain conditions.

## FEMA (cont.)

Such marketplace e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce. Such entity would be permitted to enter into transactions with **sellers registered on its platform** on B2B basis.

These e-commerce entities are allowed to render support services to sellers like warehousing, logistics, order fulfilment, call centre, payment collection and such related services.

It was provided that if the e-commerce entity exercises ownership or control over the inventory sought to be sold, it will be regarded as 'inventory-based model'.

- It is now clarified that if **more than 25% of purchases of the seller** are from marketplace entity or its group companies, the inventory will be deemed to have been controlled by the e-commerce entity and in such circumstances, the model will be regarded as 'inventory-based model'.

There was provision that an e-commerce entity will not permit more than 25% of the sale value effected through its platform, in a financial year, from one seller or its group companies.

- This restriction has been rightfully removed.

There was no restriction on equity participation by e-commerce entity into the entity selling goods and services.

- It has now been provided that **any entity having any equity participation** by the e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.

There was provision that e-commerce marketplace entities will not directly or indirectly influence the sale price of goods and services and shall maintain level playing field.

- It has now been clarified and elaborated that Service provided by e-commerce entity or its group companies to the sellers on its platform should be **at arms' length and in a fair and non-discriminatory manner**. Provision of services to any seller on such terms which are not made available to another seller in similar circumstances shall be regarded as unfair and non-discriminatory.
- It has been further clarified that e-commerce entity will not mandate any seller to sell any product **exclusively** on its platform only.

## FEMA (cont.)

The above changes are applicable with effect from **1<sup>st</sup> February 2019**. These are significant clarifications/changes for the companies who are engaged in providing e-commerce platform and having Foreign equity participation.

These companies will have to take a close look and review their current business model to ensure that they continue to remain within the parameters of regulations framed under this policy.

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## OTHER ALLIED LAW

### BANNING OF UNREGULATED DEPOSIT SCHEME 2019

India has faced many frauds in recent times wherein the hard-earned savings of the poor and the middle class has been siphoned off by scrupulous people by enticing the depositors into unauthorised and uncertain schemes assuring high returns. The regulatory framework for non-banking entities raising deposits from the public is scattered and governed by various central and state acts. Despite various acts and regulations fraud have been perpetrated and people have lost their hard-earned savings. To tackle such menace of illegal activity of collecting deposits, the Government of India has

promulgated the Banning of Unregulated Deposit Scheme Ordinance 2019.

The ordinance imposes a comprehensive if not complete ban on soliciting and taking of deposit schemes by the non-banking sector and nails the bud at its inception by making the solicitation and acceptance of such deposit taking as a punishable offence with heavy penalty and also imprisonment. The ordinance also provides precedence for payments to such depositors before other unsecured debts and government dues. It also provides for attachment of property in such cases for the benefit of depositors.

# OTHER ALLIED LAW *(cont.)*

## Salient Features:

### 1. What is a Deposit?

Deposit means an amount of money received as advance or loan or any other form by the deposit taker. It may be for a specific period or on demand. The acceptance and payment thereof may be in cash or kind or in the form of service. It may be either interest bearing, against sharing of profits or bonus payment or free of costs. Deposits shall not include the following:

- loan from banks
- loan form public financial institution or NBFC of regional financial institution or insurance company
- amount received from government or statutory authority constituted under an Act of Parliament or State Legislature
- Amount received from Foreign Government, international banks, and other foreign organization subject to provisions of FEMA
- Capital contribution by partners in partnerships or LLP
- In case of individuals – loans from relatives
- In case of firms – loan from partners or their relatives
- Advance against property – moveable or immoveable
- Amount received by an asset reconstruction company
- Certain deposits to political parties
- Periodic payments made by members of self-help groups

- Any other amount collected within such limits and for such purpose as may be prescribed
- Any amount received in the course of, or for the purpose of business and bearing a genuine connection to such business

### 2. What is an unregulated deposit scheme?

A scheme or an arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme as specified in column (3) of the First schedule.

From the above definition three propositions arise

- there has to be a scheme or an arrangement under which deposits are accepted or solicited
- The same should be taken by way of business i.e. one should be in the business of accepting deposit and thereafter investing the same. Normal loans for own business seems not to be covered as unregulated deposit scheme.
- In case a person is in the business of taking loans and is covered by the First schedule, the scheme shall not be an unregulated scheme.

## OTHER ALLIED LAW *(cont.)*

3. What is banned?
  - Unregulated Deposit scheme
  - Soliciting or advertise such scheme
  - Accept deposit in such scheme
  - Fraudulent default in case of regulated scheme in payment or return of deposit
  - Fraudulently induce any person to make deposit by making false statement, forecast or promise which is deceptive or misleading
  - A price chit or a money circulation scheme which is banned under the provisions of Price Chits and Money Circulation Scheme (Banning) Act 1978
  
4. What are the advantages to Depositors?
  - Precedence in payments over unsecured debtors and government dues
  - Attachment of property for repayment of deposits
  - Attachment of property of malafide transferees
  
5. What is the punishment to such deposit takers under unregulated scheme?
  
6. Whether any database will be maintained of regulated deposit schemes?

Central government shall maintain and operate an online database for information on deposit taker in India. Deposit taker to apply to central government for including its name in the database.

Offence	Imprisonment in Years	Fine in Rupees
Solicits such unregulated deposit schemes	1 To 5 and	2 lacs to 10 lacs
Accepts such deposits	2 to 7 and	3 lacs to 10 lacs
Fraudulent default in unregulated scheme	3 to 10 and	5 lacs to trice the amount of deposits collected
Fraudulent default in regulated scheme	Up to 7 or	5 lacs to 25 crores or three times the profit made by such fraudulent default
Wrongful inducement in unregulated scheme	1 to 5 and	10 lacs
Repeat offenders	5 to 10 and	10 lacs to 50 crores
In case of persons other than individual	Person in charge at the time offence was committed	Director/manager/secretary/promoter/partner/employee/ officer



## COMPANY LAW

### RECENT IMPORTANT AMENDMENTS IN COMPANIES ACT 2013

#### 1. Reporting of MSMSE by every company (Notification dated 22<sup>nd</sup> January 2019)

##### A) Applicability:

Every Specified company is required to file e-form MSME Form I providing details of all outstanding dues to MSME suppliers in the following manner:

##### 1. Initial Return –

- It needs to be filed within 30 days from the date on which MSME Form 1 is available in MCA site

##### 2. Regular half yearly return-

- For the period April to September – by 31 October
- For the period October to March – by 30 April

**B) Specified Companies** means all companies, who get supplies of goods or services from micro and small enterprises (MSME) and whose payments to MSME suppliers exceed 45 days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of section 9 of the MSME Development Act, 2006.

## COMPANY LAW (cont.)

**Date of Acceptance:** (a) the day of the actual delivery of goods or the rendering of services; or (b) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier.

**Date of Deemed Acceptance:** where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services.

Therefore, Section 15 of the Act, clearly states that the payment to the suppliers shall be made within the date specified in the agreement, and in case there is no agreement then before the appointed date.

However, a maximum period that is allowed under the Act is a period of 45 days from the date of delivery of goods/services.

Further, as per section 16 of the Act if a buyer fails to make the payment within the stipulated date, it will be liable to pay compound interest with monthly rests on the outstanding amount additionally. The interest shall be calculated from the appointed date at three times of the bank rate notified by the RBI. However, in case of any dispute regarding the payment of principal/interest between the supplier and the borrower, reference shall have to be made to the Micro and Small Enterprises Facilitation Council (MSEFC), constituted by the respective statements.

### **C) Details required to be collected from the MSME suppliers before filing the return with MCA**

1. Certificate of Registration (Udyog Aadhar) Issued by the Ministry of Micro Small and Medium Scale Enterprises to the MSME to ensure that the concerned entity is an MSME.
2. Copy of Pan Card of the MSME.

### **D) Details required to be filed about the MSME suppliers while filing the return with MCA**

1. Financial Year in which the Amount is due
2. Total Amount due
3. Date on which the Amount fell due.
4. Reasons of the delay.

### **E) Form Certification by whom:-**

1. Director or
2. Manager or CEO or
3. CEO or
4. Company Secretary

### **F) Relevant Link of Notification**

[http://www.mca.gov.in/Ministry/pdf/MSMESpecifiedCompanies\\_22012019.pdf](http://www.mca.gov.in/Ministry/pdf/MSMESpecifiedCompanies_22012019.pdf)

If the information filed in the Form is incorrect or incomplete, in any material respect, then the Specified Company shall be penalized under section 405 (4) of the Companies Act, 2013.

# COMPANY LAW (cont.)

\*\*\*There is also no requirement of filing a NIL return by such companies, since the notification is applicable only on Specified Companies. (So, even return is not filed due to nil outstanding, it's advisable to keep all the payments made to MSME handy, so whenever notice is received, the same can be supplied immediately).

## 2. Return of Deposits (Notification dated 22<sup>nd</sup> January 2019)

The Ministry of Corporate Affairs issued a Notification prescribing certain amendments in the Companies (Acceptance of Deposits) Rules, 2014 which have been made effective from 22<sup>nd</sup> January, 2019. Pursuant to this amendment - **one time return** and **yearly return** in e-form DPT-3 is required to be filed with ROC giving details of outstanding receipt of money or loan received by a company but not considered as deposits.

The form DPT-3 (i.e. return of deposit) is also required to file for following purpose:

**Particulars not considered as deposit:** Loan of a Private company which is exempted under deposit rules and sections 73, shall be considered for the particulars to be given in form DPT-3. E.g.

1. Loan from Director.
  2. Loan from relatives of directors
  3. Loan from Body Corporates
- And
4. All items to be considered as per item no 15 of the form DPT 3.

### Documents required to be attached in Form DPT-3:

1. Auditor's Certificate
2. Copy of trust Deed
3. Copy of instrument creating charge
4. List of depositors
5. Details of liquid assets
6. Optional attachment, if any

Purpose	For the Period	Applicability	Due Date
One time return for disclosure of details of outstanding money or loan received by a company but not considered as deposit in terms of rule 2(1)(c) of Chapter V	From 1 <sup>st</sup> April, 2014 to 22 <sup>nd</sup> January, 2019	Every company to which these rules apply, except Government Company	21 <sup>st</sup> April, 2019
Annually - Return for disclosures of money or loan received by a company but not considered as deposits in terms of rule 2(1)(c) of Chapter V	Information as on the 31 <sup>st</sup> day of March of that year	Every company to which these rules apply, except Government Company	On or before the 30 <sup>th</sup> day of June, of every year

# COMPANY LAW (cont.)

## Form Certification by whom:

1. Director or
2. Manager or
3. CEO or
4. CFO or
5. Company Secretary

Relevant Link of Notification:

[http://www.mca.gov.in/Ministry/pdf/AcceptanceDepositsAmendmentRule\\_22012019.pdf](http://www.mca.gov.in/Ministry/pdf/AcceptanceDepositsAmendmentRule_22012019.pdf)

## 3. KYC of the Company (Notification dated 21<sup>st</sup> February 2019)

Ministry of Corporate Affairs (MCA) vide notification dated 21<sup>st</sup> February, 2019 has amended the Companies Incorporation Rules, 2014 whereby the Companies are mandatorily required to give **Latitude and Longitude details (Geo – Tagging)** of the Company to the Registrar of Companies. The highlights of the Amendment are as follows:

1. **Filing of Return** - The Companies are required to file a one-time return with MCA in e- Form INC-22A - Active Company Tagging Identities and Verification (ACTIVE)
2. **Applicability** - Every Company incorporated on or before 31 December 2017, except following companies

1. Under the process of striking off/ have been struck off
2. Under the process of liquidation
3. Dissolved
4. Amalgamated

3. **Default in Annual Filing:** Companies which has defaulted in Annual Filing E-Forms (AOC-4 and/or MGT-7) won't be able to file this form. However, the Companies which have not filed the annual filings forms due to management disputes and the same being recorded by Registrar of Companies are the exception to this.

4. **Due date:** The last date of filing is 25 April 2019

## 5. **Details to be provided in the e-form:**

1. Particulars of the Company along with its Regd. Office
2. Latitude and Longitude details (Geo-tagging)
3. E-mail ID of Company and verification by OTP
4. Details of Statutory Auditor/Cost Auditor
5. Details of Directors and their DIN Status
6. Details of Company Secretary/ Chief Financial Officer/Chief Executive officer ☐ Service Request Number of e-Form AOC-4 and MGT-7 filed for financial year 2017-18
7. Photograph of Regd. Office (both Exterior and Interior) along with KMP/Director who is affixing DSC

## COMPANY LAW (cont.)

6. **Filing Fees:** No filing fees if filed before the due date

7. **Consequences of non-filing:** In case if the Company failed to file on or before the due date, the Company will be marked as "ACTIVE-non-compliant" on or after 26 April 2019.

**Barred from filing event based**

**forms:** The Company will not be able to file event based form with ROC viz.,

1. SH-7 (Change in Authorised Capital)
2. PAS-3 (Change in paid-up capital)
3. DIR-12 (Change in Director except cessation)
4. INC-22 (Change in Regd. office)
5. INC-28 (Amalgamation/Demerger)

8. **Change of Status from Active Non – Compliant to Active:** The form is to be filed with the late fees of Rs. 10,000/- (Rupees Ten Thousand only).

9. **Form Certification by whom:**

1. One Director AND
2. Directors or
3. Manager or
4. CEO or
5. CFO or
6. Company Secretary

AND

1. Company Secretary (in whole time practice) or
2. Chartered Accountant (in whole time practice) or
3. Cost Accountant (in whole time practice).

**Note:** Before filing the Active form, the Company is required to ensure that the DIN of all the directors are in approved status and are neither deactivated due to non – filing of DIR-3 KYC nor disqualified u/s 164(2).

**Relevant Link of Notification:**

[http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules\\_21022019.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules_21022019.pdf).

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