Regulatory Hotline

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EQUALLY FOREIGN: 50:50 JV ENTITIES TO BE CONSIDERED FOREIGN ENTITIES

Continuing the efforts to revise and streamline the foreign investment policy of the country, the Department of Industrial Policy and Promotion ("DIPP") has proposed to classify a joint venture which has 50%foreign investment as a foreign owned Indian entity. In a formal press note that is expected in this regard, the DIPP seems set to clarify that the foreign investor will be required to divest at least 0.5%of the joint venture in favor of the Indian partner to be re-classified as an Indian owned entity.

The DIPP had, thorough Press Notes 2, 3 and 4 of 2009 ("2009 Press Notes"), issued a series of guidelines[1] redefining the method by which direct and indirect foreign investment is to be calculated. One of the concepts introduced in the 2009 Press Notes is that of ownership and control. An entity would be considered an Indian, if (i) more than 50% of the equity interest is beneficially owned by resident Indian citizens and/or Indian companies, which companies are in turn owned and controlled ultimately by resident Indian citizens; and (ii) if the power to appoint the majority of the directors in the entity (company) are vested with resident Indian citizens and/or Indian companies, which companies are in turn owned and controlled ultimately by resident Indian citizens. However the 2009 Press Notes were silent with respect to a 50:50 joint venture.

If a 50:50 joint venture company is categorized as a foreign owned Indian entity, then under the 2009 Press Notes downstream investments and sectors in which investments are made will be subject to foreign investment restrictions. Conversely, such restrictions are not applicable to an Indian owned entity.

While this announcement is a welcome move to clarify the existing guidelines, the formal text of the Press Note is eagerly awaited. The clarification as announced does seem to leave open the window to indirect foreign participation (of less than 50%in a chain of companies) in sectors such as retail where direct foreign participation is restricted. In the same vein, one may hope for more clarity on other grey areas resulting from the 2009 Press Notes, for e.g., the treatment and intention to cover investment through trusts and partnerships within the purview of the 2009 Press Notes, as well as the backdoor relaxation on indirect foreign participation in restricted sectors as alluded to above.

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1 **Welcome to India: Foreign investments framework overhauled!**

\- **Yamini Dwarkanath & Kartik Ganapathy**

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