

# ESOP Under FEMA Regulations

In our previous article, we shared applicable provisions on issuance of ESOP to resident employees for both listed and unlisted Companies.

This Article covers ESOP issued to employees working outside India.



## Entry routes for investments in India Under the Foreign Direct Investments (FDI) Scheme

Investments can be made in shares, mandatorily and fully convertible debentures and mandatorily and fully convertible preference shares of an Indian company by non-residents through two routes:

o Automatic Route: Under the Automatic Route, the foreign investor or the Indian company does not require any approval from the Reserve Bank or Government of India for the investment.



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o Government Route: Under the Government Route, the foreign investor or the Indian company should obtain prior approval of the Government of India (Foreign Investment Promotion Board (FIPB), Department of Economic Affairs (DEA) Ministry of Finance or Department of Industrial Policy & Promotion, as the case may be) for the investment.

In case ESOPs are offered to employees working outside India, the FEMA provisions shall additionally apply. Applicable provisions of FEMA (Transfer or issue of security to a person resident outside India) Regulations, 2000 (FDI Regulations) & Consolidated FDI Policy, 2015 issued from time to time are as under:

Definition under FDI Regulations: “2 (iif) “employees” stock option” means the option given to the directors, officers or employees of a company or of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.”

Formerly, the regulations did not cover sweat equity shares and stock options to directors, employees or officers of holding company. RBI vide Notification No. FEMA.344/2015 RB dated June 11, 2015 issued Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Fourth Amendment) Regulations, 2015, and permitted an Indian Company to issue shares under the Employee Stocks Options Scheme.

(xa) “Sweat Equity Shares” means such equity shares as issued by a company to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.”

### **Regulation 8 of FDI Regulations:**

1 (1) An Indian company may issue “employees stock option” and/or “sweat equity shares” to its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India, provided that :

a. The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be.

b. The employees stock option/sweat equity shares issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the sectoral cap applicable to the said company.

c. Issue of employee stock option/sweat equity shares in a company where foreign investment is under the approval route shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.

d. Issue of employees stock option/sweat equity shares under the applicable rules/regulations to an employee/director who is a citizen of Bangladesh/Pakistan shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.



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(2) The Reserve Bank may require the company issuing employees stock option and/or sweat equity shares to submit such reports and at such frequency as it may consider necessary.

**Para 3.5.5 of Consolidated FDI Policy, 2015:**

- (i) Listed Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad, who are resident outside India, other than to the citizens of Pakistan.
- (ii) ESOPs can be issued to citizens of Bangladesh with the prior approval of FIPB. Subject to this, Government approval is not required for issue of ESOPs in sectors under automatic route.

Shares under ESOPs can be issued directly or through a Trust subject to the condition that: (a) The scheme has been drawn in terms of relevant regulations issued by the SEBI.

- (iii) Unlisted companies have to follow the provisions of the Companies Act, as applicable.

**Rule 4. Reporting of ESOPs for allotment of equity shares**

The issuing company is required to report the details of granting of stock options under the scheme to non-resident employees to the Regional Office concerned of the Reserve Bank. This Reporting to be made on plain paper.

The details of issue of shares subsequent to the exercise of such stock options within 30 days from the date of issue of shares in Form FCGPR in format as Annexure-1

**Companies (share capital and debenture) rules, 2014 anyways specifies the limit for issuance of sweat equity shares under rule 8 (4)**

The company cannot issue sweat equity shares for more than fifteen percent of the existing paid up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher. Issuance of sweat equity shares in the Company shall not exceed twenty five percent, of the paid up equity capital of the Company at any time.

**Compliance**

- Scheme to be compliant either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act 2013, as the case may be.



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Securities and Exchange Board of India (Issue of Sweat Equity) Regulations 2002;  
Section 54(1) of Companies Act 2013 read with Rule 8 of Companies (Share Capital and Debenture) Rules 2014  
SEBI (Share Based Employee Benefits) Regulations, 2000  
Section 62(1) (b) of Companies Act 2013 read with Rule 12 of Companies (Share Capital and Debenture) Rules 2014

*(In our previous article, we have already discussed on various aspects of issuance of ESOP to resident employee for both unlisted company and listed company)*

- Such issue to be complaint with the sectoral cap applicable to the said company.

#### **As stipulated under Consolidated FDI Policy, 2015**

- Prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India will be required to be obtained in a Company where the foreign investment is under the 'Approval Route'.
  - Prior approval of the FIPB will be required if the issue includes issue of shares to an employee/director who is a citizen of Bangladesh/Pakistan.
  - The issuing company will be required to furnish to the Regional Office concerned of the Reserve Bank of India under whose jurisdiction the registered office of the company operates, a return in Form-ESOP within 30 days from the date of issuance of ESOP.

Over and above the regulatory requirements, a company may set down certain criteria subject to which eligible employees will be identified. Most companies offer ESOPs to employees above a particular grade, number of years of service. In case of start-ups, the employees who joined the founders at the early stage of running the company may be offered ESOPs.



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## REPORTING REQUIREMENTS

Particulars	Listed	Unlisted
Granting of ESOP	Reporting to Regional Office of RBI	Reporting to Regional Office of RBI
Exercise of ESOP	<p>Advance reporting to be filed with RBI within 30 days from receipt of amounts</p> <p>Form FC-GPR to be filed within 30 days from allotment of shares to the employees.</p>	<p>Advance reporting to be filed with RBI within 30 days from receipt of amounts</p> <p>Form FC-GPR to be filed within 30 days from allotment of shares to the employees.</p>
Sale of shares granted under ESOP	<p>Form FC-TRS to be filed within 60 days from the date of receipt or payment of the amount of consideration. The onus of submission of the form FC-TRS within the specified time shall be on the transferor / transferee, resident in India.</p> <p>However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank.</p>	<p>Form FC-TRS to be filed within 60 days from the date of receipt or payment of the amount of consideration. The onus of submission of the form FC-TRS within the specified time shall be on the transferor / transferee, resident in India.</p> <p>However, in cases where the NR investor, including an NRI, acquires shares on the stock exchanges under the FDI scheme, the investee company would have to file form FC-TRS with the AD Category-I bank.</p>
	<p>In case the investment is made under Schedule IV: The sale/maturity proceeds (net of applicable taxes) of shares or convertible debentures purchased under this Scheme shall be credited only to NRSR account where the purchase consideration was paid out of funds held in NRSR account and to NRO or NRSR account at the option of the seller where the purchase consideration was paid out of inward remittance or funds held in NRE/FCNR/NRO/NRNR account.</p>	<p>In case the investment is made under Schedule IV: The sale/maturity proceeds (net of applicable taxes) of shares or convertible debentures purchased under this Scheme shall be credited only to NRSR account where the purchase consideration was paid out of funds held in NRSR account and to NRO or NRSR account at the option of the seller where the purchase consideration was paid out of inward remittance or funds held in NRE/FCNR/NRO/NRNR account.</p>



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## Annexure-1

Form ESOP Return to be filed by Indian company who has issued shares under Employees' Stock Options (ESOP) Scheme and/or sweat equity shares. (To be filed by the company through its Authorised Dealer Category – I bank with the Regional Office of the RBI under whose jurisdiction the Registered Office of the company is situated making the declaration as and when shares under Employees' Stock Options Scheme and/or sweat equity shares are issued to the foreign investor)

### I. Details of the Company issuing ESOP/sweat equity shares

Sr No	Particulars	Description
1.	Name of the Company	
2.	Permanent Account Number (PAN)	
3.	Address of the Registered office	
4.	Registration No. given by Registrar of Companies	
5.	Registration No. given by RBI for FDI, if applicable	
6.	Telephone	
7.	Fax	
8.	e-mail	
9.	Business Details	
a)	Description of the main business activity	
b)	NIC Code	
c)	Percentage of FDI allowed as per FDI policy	
d)	State whether FDI is allowed under Automatic Route or Approval route	
e)	FIPB approval, if any	

### II. Type of security issued (Tick mark whichever is applicable)

1. Sweat equity shares ( )  
2. Stock Option Scheme ( )  
3. Shares issued against exercise of option ( )

Please provide the details of the security issued in a separate Annex viz. date of issue, names of persons to whom shares are issued, number of shares, issue price, consideration other than cash(if any), in case of options (maturity date, pre-determined issue price etc.) and any other details relevant to the issue.



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**DECLARATION TO BE FILED BY THE AUTHORISED REPRESENTATIVE OF THE INDIAN COMPANY:**  
(Delete whichever is not applicable and authenticate)

We hereby declare that:

1. We comply with the procedure for issue of shares under Employees' Stock Option Scheme/ sweat equity shares as indicated in Notification No. FEMA 20/2000-RB dated 3rd May 2000, as amended from time to time.

2. The investment is within the sectoral cap / statutory ceiling permissible under the Automatic Route of RBI and we fulfill all the conditions laid down for investments under the Automatic Route namely (strike off whichever is not applicable).

- a) Options issued under Employees' Stock Option Scheme  
OR
- b) Shares issued against exercise of option as (a) above  
OR
- c) Sweat Equity Shares issued to non-residents

3. Sweat Equity Shares issued in terms of FIPB approval no ..... dated.....

4. The foreign investment received and reported now will be utilized in compliance with the provision of a Prevention of Money Laundering Act 2002 (PMLA) and Unlawful Activities(Prevention) Act, 1967 (UAPA). We confirm that the investment complies with the provisions of all applicable Rules and Regulations.

5. We enclose the following documents in compliance with Regulation 8 of Notification No. FEMA 20/2000-RB dated May 3, 2000:

(i) A certificate from our Company Secretary certifying that

- a) Sweat equity shares have been issued / the Employees' Stock Option Scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act, 2013, as the case may be
- b) all the requirements of the Companies Act, 2013 have been complied with;
- c) terms and conditions of the Government approval, if any, have been complied with;
- d) the company is eligible to issue shares under these Regulations; and
- e) the company has all original certificates issued by authorised dealers in India evidencing receipt of amount of consideration in accordance with paragraph 8 of Schedule 1 to Notification No. FEMA 20/2000-RB dated May 3, 2000.

(ii) A certificate from SEBI registered Merchant Banker / Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

6. Unique Identification Numbers given for all the remittances received as consideration for issue of shares under Employees' Stock Option Scheme/ Sweat Equity shares by Reserve Bank.

(Signature of the Applicant)\* :  
(Name in Block Letters)  
(Designation of the signatory)

Place:

Date: (\* To be signed by Managing Director/Director/Secretary of the Company)



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**CERTIFICATE TO BE FILED BY THE COMPANY SECRETARY OF THE INDIAN  
COMPANY ACCEPTING THE INVESTMENT:**

In respect of the abovementioned details, we certify the following:

- a) Sweat equity shares have been issued / the Employees' Stock Option Scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under the Companies Act, 2013, as the case may be
- b) all the requirements of the Companies Act, 2013 have been complied with;
- c) terms and conditions of the Government approval, if any, have been complied with;
- d) the company is eligible to issue shares under these Regulations; and e) the company has all original certificates issued by authorised dealers in India evidencing receipt of amount of consideration in accordance with paragraph 8 of Schedule 1 to Notification No. FEMA 20/2000-RB dated May 3, 2000.

**(Name & Signature of the Company Secretary)  
(Seal)**

FOR USE OF THE RESERVE BANK ONLY:

**Regards  
CS Neha Sarpal  
Sr. Executive- Secretarial Cum Legal  
Blueair India-(Unilever Group)  
M:91-7053715771  
E:neha.sarpal91@gmail.com  
neha@corporatesphere.com**



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