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UPDATE

ERGO

Analysing developments impacting business

74% FOREIGN INVESTMENT IN INDIAN INSURANCE COMPANIES | INDIAN OWNERSHIP AND CONTROL GUIDELINES FORMALLY WITHDRAWN – A KEY MILESTONE

3 August 2021

The Insurance and Regulatory Development Authority of India (IRDAI) has formally withdrawn its guidelines on Indian ownership and control dated 19 October 2015 (IOC Guidelines), with effect from 30 July 2021. The withdrawal of the IOC Guidelines marks the completion of the removal of the requirement that Indian companies with foreign investment must remain "*Indian owned and controlled*". Prior to this, on 7 July 2021, certain other IRDAI regulations that referred to the IOC Guidelines were amended to remove those references.

With these changes, the IOC Guidelines are no longer in force. Although there is one final step remaining for operationalising the increase in the foreign investment limit for insurance companies to 74%, being the notification of enabling changes to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (Non-Debt Rules), the removal of the IOC Guidelines is perhaps the most critical aspect of the legislative and regulatory changes being implemented to give effect to the increased limit of 74%.

For further background regarding these changes, including the introduction of new governance and solvency requirements for Indian insurance companies with foreign investment, please see our earlier Ergos of 4 February 2021, 21 April 2021 and 24 May 2021.

Summary of the changes

Formal withdrawal of the IOC Guidelines

The requirement that Indian insurance companies must remain under "*Indian ownership and control*" was removed from the Insurance Act, 1938 with effect from 1 April 2021 and from the Indian Insurance Companies (Foreign Investment) Rules, 2015 (Foreign Investment Rules) on 19 May 2021. The IOC Guidelines were issued pursuant to that requirement and the withdrawal of the IOC Guidelines now completes the removal of that requirement.

In particular, the IOC Guidelines prescribed several governance-related restrictions for Indian insurance companies with foreign investment, which are now no longer applicable. For example, the majority of non-independent directors and the CEO/managing director were required to be nominees of the Indian promoter, the presence of a majority number of the Indian promoter's nominees was necessary for quorum purposes, and all significant policies and appointment of key management persons (KMPs) had to be approved at the board-level.

Going forward, the key governance requirements for Indian insurance companies with foreign investment will be the residency requirement for directors and KMPs and the requirement to appoint additional independent directors. Please see our Ergos dated 21 April 2021 and 24 May 2021 for more details in this regard.

Other regulatory changes

Through a gazette notification dated 7 July 2021, the IRDAI has amended the IRDA (Registration of Indian Insurance Companies) Regulations, 2000 to include the new governance and solvency control requirements, which were previously included in the Foreign Investment Rules.

In addition, through this notification, the IRDAI has also amended certain other rules, to correct references to either the "*Indian owned and controlled*" requirement (and replace those with references to the new director/ KMP residency requirements) or the foreign investment limit (e.g., from 49% to 74%).

However, a few conforming changes are still pending. In particular, the IRDAI (Investment by Private Equity Funds in Indian Insurance Companies) Guidelines, 2017 (PE Guidelines), the IRDAI (Listed Indian Insurance Companies) Guidelines, 2016 (Listed Insurers Guidelines) and the Guidelines for Corporate Governance for Insurers in India dated 18 May 2016 (Corporate Governance Guidelines) still contain references to "*Indian owned and controlled*", which, we assume, will also be amended by the IRDAI shortly.

Comment

The complete withdrawal of the IOC Guidelines means that, except to the extent of the new requirements for resident directors and KMPs and additional independent directors, foreign investors now have much more flexibility in structuring governance arrangements in their insurance joint ventures in India. In addition, existing foreign investors will now have the ability to negotiate a "*re-set*" of their governance arrangements with Indian promoters.

These changes mean that investors do not need to wait for formal notification of the increase in the foreign investment limit to 74% in the Non-Debt Rules to amend any existing governance arrangements. However, as regards the ability to actually invest up to the higher limit of 74 %, investors will need to wait until the Non-Debt Rules are amended, a change that hopefully will occur shortly.

- *Khaitan & Co | Insurance Practice*

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