

COMPOUNDING UNDER FEMA

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Scheme of Presentation

- Brief overview FEMA
- Enforcement under FEMA
- Adjudication and Appeal under FEMA
- Compounding under FEMA
 - Meaning
 - Authorities
 - Procedure
 - Application
 - Practical aspects



Enforcement under FEMA

- Section 36
- Section 37

- Officers of Enforcement
 - Directors of enforcement
 - Special Directorate of Enforcement
 - Additional Director of Enforcement
 - Deputy Directors of Enforcement
 - Deputy Legal Adviser
 - Assistant Director of Enforcement
 - Assistant Legal Adviser

Adjudicating authority

- Following has been appointed as the Adjudicating Authority under FEMA [under section 16 of the Act vide S.O 535(E), dated 1-6-2000 to hold an enquiry under Section 13 of the Act].
 - Directors of Enforcement
 - Special Directorate of Enforcement
 - Additional Director of Enforcement
 - Deputy Directors of Enforcement

Contd...

- Director of Enforcement have the jurisdiction over the cases involving an amount exceeding Rs. one crore
- Special Director of Enforcement I, II and III have the jurisdiction over the cases involving amount exceeding Rs.one crore [jurisdiction over specified zones]
- Additional Director have the jurisdiction over the cases involving amount of Rs.75 lakhs but not over 1 crore.
- Deputy Director's jurisdiction is on the cases in which amount involved does not exceed Rs. 75 Lakhs.
- Under Section 6(3)(g) and 7(1)(a) is Commissioner of Customs and Central Excise.

**Appeal against Order
passed by
Adjudicating
Authority**

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graph LR; A[Appeal against Order passed by Adjudicating Authority] --> B[Special Director (Appeals)]; A --> C[Appellate Tribunal];
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**Special Director
(Appeals)**

Appellate Tribunal

Special Director (Appeals)

- Adjudicating authority being Assistant Director of Enforcement or a Deputy Director of enforcement

Appellate Tribunal

- Adjudicating authority not being Assistant Director /Deputy Director of enforcement

Special Director (Appeals)

Appellate Tribunal

High Court

Compliance and Contravention



Compliance

- Compliance means compliance of Foreign Exchange Management Act (FEMA), 1999 and rules/ regulations/ notification/ orders/ directions/ circulars issued there under
- There are three stages of Compliance under FEMA :
 - Before undertaking the Transaction
 - While undertaking the transaction and
 - After undertaking the transaction

Contravention of Offence

- Contravention is a breach of the provisions of the Foreign Exchange Management Act (FEMA), 1999 and rules/ regulations/ notification/ orders/ directions/ circulars issued there under.
- Method to deal with Contravention
 - Compounding
 - Adjudication
 - Appeal

Compounding and Regulations



Compounding

- Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal.
- The Reserve Bank is empowered to compound any contraventions as defined under section 13 of FEMA, 1999 except the contravention under section 3(a), for a specified sum after offering an opportunity of personal hearing to the contravener.
- It is a voluntary process in which an individual or a corporate seeks compounding of an admitted contravention.
- It provides comfort to any person who contravenes any provisions of FEMA, 1999 [except section 3(a) of the Act] by minimizing transaction costs.
- Willful, *malafide* and fraudulent transactions are, however, viewed seriously, which will not be compounded by the Reserve Bank.

Regulatory

- Section 13 read with Section 15 of FEMA, 1999
- Foreign Exchange (Compounding Proceedings) Rules, 2000
- Master Circular on Compounding of Contraventions under FEMA, 1999

Section 15

- In terms of Section 13(1) , Chapter IV of FEMA 1999, if any person contravenes any provision of FEMA, 1999, or any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty
- **The provisions of Section 15 of FEMA, 1999 permit compounding of contraventions and empower the Compounding Authority to compound any contravention on an application made by the person committing such contravention.**

Foreign Exchange (Compounding Proceedings) Rules, 2000

- In terms of rule 4 of the Foreign Exchange (Compounding Proceedings) Rules, 2000, the powers to compound the contraventions have been prescribed for compounding authorities with regard to the sum involved in such contravention and no contravention shall be compounded unless the amount involved in the contravention is quantifiable.

Compounding authority

Persons authorized by the Central Government under sub-section (1) of section 15 of the Act

An officer of the Enforcement Directorate not below the rank of Deputy Director or Deputy Legal Adviser (DLA)

An officer of the Reserve Bank of India not below the rank of the Assistant General Manager

Reserve Bank of India

■ Sum Involved in Contravention

- Rs 10 lakhs and below
- Above Rs.10 lakhs but of below Rs.40 lakhs
- Above Rs 40 lakhs but of below Rs. 1 Crore
- Rs.1 crore or more

■ Authorized Person

- Assistant General Manager of RBI
- Deputy General Manager of RBI
- General Manager of RBI
- Chief General Manager of RBI

Directorate of Enforcement

- | ■ Sum Involved in Contravention | ■ Authorized Person |
|---|--|
| ■ Rs 5 lakhs and below | → Deputy Director |
| ■ Above Rs.5 lakhs but of below Rs.10 lakhs | → Addl. Director of Enforcement Directorate |
| ■ Above Rs 10 lakhs but of below Rs. 50 lakhs | → ■ Special Director |
| ■ Above Rs. 50 lakhs but with below Rs. 1 crore | → Special Director with Legal Adviser of Deputy Enforcement Directorate |
| ■ Rs.1 crore or more | → ■ Director of Enforcement with Special Director of Enforcement Directorate |

Master Circular

- Contains all the Forms
- The Procedure
- The Powers
- Pre requisites

Process of Compounding



Who can Apply

- Any person who contravenes any provision of the FEMA, 1999 [except section 3(a)] or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act or contravenes any condition subject to which an authorization is issued by the Reserve Bank, can apply for compounding to the Reserve Bank.
- Applications seeking compounding of contraventions under section 3(a) of FEMA, 1999 may be submitted to the Directorate of Enforcement.

When to apply

- **On receiving the Notice** : When a person is made aware of the contravention of the provisions of FEMA, 1999 by the Reserve Bank or the Foreign Investment Promotion Board (FIPB) or any other statutory authority.
- **SUO MOTO**: One can also make an application for compounding, suo moto, on becoming aware of the contravention.
- **PROACTIVE : by doing the Due diligence under FEMA**

Procedure for applying for compounding

- The form given in the [Annex](#) to the A.P.(DIR Series) Circular No. 56 dated June 28, 2010 issued by the Reserve Bank of India, can be used for applying for compounding.

Format of Application

- **Format of Application Form**

(See Rule 4 or 5)

(To be filled in duplicate and shall be accompanied by certified copy of the Memorandum issued)

1. Name of the applicant (in BLOCK LETTERS)
2. Full address of the applicant (including Phone and Fax Number and email id)
3. Whether the applicant is resident in India or resident outside India [Please refer to Section 2(v) of the Act]
4. Name of the Adjudicating Authority before whom the case is pending
5. Nature of the contravention [according to sub-section (1) of Section 13]
6. Brief facts of the case
7. Details of fee for application of compounding
8. Any other information relevant to the case

I/We declare that the particulars given above are true and correct to the best of my/our knowledge and belief and that I/We am/are willing to accept any direction/order of the Compounding Authority in connection with compounding of my/our case.

Dated :

Name

(Signature of the Applicant)

Undertaking to be Given

- **UNDERTAKING**

(On the letterhead of the applicant)

- *I/We _____ (Name of the applicant) hereby confirm/declare that I/we am/are not under investigation of any agency such as Directorate of Enforcement, CBI etc.
- OR
- *I/We _____ (Name of the applicant) hereby confirm/declare that I/we am/are or was/were under investigation of any agency such as Directorate of Enforcement, CBI etc. and the details are given in the Annex
- (* Strike out one)
- Signature of the authorised signatory

(ECS) MANDATE FORM

- 1. Name of the Party (Beneficiary) -
- 2. PAN
- 3. Particulars of the Bank Account -
 - Name of the Bank -
 - Name of the Branch -
 - Address:
 - Telephone No:
- Type of Account - SAVINGS / CURRENT
- Account No. -
(as appearing on the cheque book issued by the Bank)
- The 9 Digit MICR Code Number -
(as appearing on the cheque book issued by the Bank)
- IFSC Code -
(as appearing on the cheque book issued by the Bank)
- 4. Checklist for Attachments:
 - Photocopy of PAN Card
 - Photocopy of a cancelled blank cheque
- 5. I/We hereby declare that the particulars given above are correct and complete. If the transaction is delayed or not effected at all for reasons of incomplete or incorrect information, I/We would not hold the user institution responsible.
- Signature of the Authorised Signatory
(Name of the Authorised Signatory)
- Official Stamp
- Date :
- Place :

Fees to be Paid

- The application in the prescribed format along with necessary documents and a demand draft for Rs. 5000/- (Rupees five thousand only) drawn in favour of the “Reserve Bank of India” should be sent to the Reserve Bank of India while sending the request for compounding.

Details required to be filled in the application form

- Along with the application in the prescribed format, the applicant may also furnish the details as per the Annexes-relating to [Foreign Direct Investment](#), [External Commercial Borrowings](#), [Overseas Direct Investment](#) and [Branch Office / Liaison Office](#), as applicable, (attached to the A.P. (DIR Series) Circular No. 57 dated December 13, 2011 and A.P. (DIR Series) Circular No. 20 dated August 12, 2013) along with an undertaking that they are not under investigation of any agency such as DOE, CBI, etc., a copy of the Memorandum of Association and latest audited balance sheet while applying for compounding of contraventions under FEMA, 1999.

Process of compounding

- A duly completed application (in duplicate) for compounding of a contravention under FEMA, 1999 may be submitted to the Compounding Authority (CA) on being advised of a contravention under FEMA, 1999, **either through a memorandum or suo moto** on being made or on becoming aware of the contravention. The format “Form” of the application is appended to the Foreign Exchange (Compounding Proceedings) Rules, 2000 (Annexed).
- The application for compounding has to be submitted together with relevant facts and supporting documents and a copy of the memorandum, wherever applicable.
- Prescribed fee of Rs.5000/- is payable by way of a demand draft drawn in favour of “Reserve Bank of India” and payable at the centre where the application shall be processed/was processed and the compounding order was issued.
- The application may be submitted with to: *The Compounding Authority, [Cell for Effective implementation of FEMA (CEFA)], Foreign Exchange Department, 3rd floor, Amar Building, Sir P.M. Road, Fort, Mumbai- 400001 or as advised in the memorandum issued by the office of the Reserve Bank.*

The applicant must indicate the following information about the authorized person of the entity who would be handling the complete process of the compounding :

- Name and Designation of the authorised person for the contravener
- Telephone/Fax/Email of the authorized person.
- Details of the contravener e.g. date of incorporation, ownership pattern, activity, transaction etc. may be provided.(In column-6 of the Form (Brief facts of the case).

- The contravener/applicant shall specify the details of the contraventions sought to be compounded in column-5 [according to sub-section (1) of Section 13] explicitly and expressly i.e. the provision of the FEMA, or Rule, Regulation, Direction or order issued in exercise of the powers under the FEMA, or condition subject to which an authorization was issued by the Reserve Bank.
- The contravener/applicant shall also specify / describe in the application the details/facts (e.g. date, amount (in Indian Rupees), parties involved etc.) of the transaction for which the contravention has occurred.
- Incomplete applications shall be liable to rejection by the Reserve Bank and appropriate action for the contravention of the FEMA shall be taken accordingly.
- **The gravity and nature of the contravention would be assessed by the compounding authority on the basis of information/document submitted together with the application.**
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- **Non-submission of relevant information/document during the processing of the compounding application would be considered as willful and intentional suppression of the material fact and the compounding application would be liable for rejection and appropriate action for contravention under the FEMA.**
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- Communications and orders issued under the compounding process shall be served on the authorised person in any of the following manners, which are to say by fax/Courier/Registered Post by sending it to the address/information given in the compounding application.
- The sum for which the contravention is compounded as specified in the order of compounding is payable by way of a demand draft in favour of the “Reserve Bank of India” within fifteen days from the date of the order of compounding of such contravention. The demand draft has to be deposited in the manner as directed in the compounding order.
- On realization of the sum for which contravention is compounded a certificate is issued by the Reserve Bank subject to the specified conditions, if any, in the order.
- Contraventions relating to any transaction where proper approvals or permission from the Government or statutory authority concerned, as the case may be, have not been obtained, such contraventions would not be compounded unless the required approvals are obtained from the authorities concerned.
- On receipt of the application for compounding, the proceedings would be concluded and order issued by the CA within 180 days from the date of the receipt of the application. The order of CA has to be speaking order and an opportunity of being heard is required to be given to the applicant. The application once made cannot be withdrawn.

Pre-requisites for compounding process

In respect of a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under the Compounding Rules, such contraventions would not be compounded. Such contravention would be dealt with under relevant provisions of the FEMA, 1999 for contravention.

Contraventions relating to any transaction where proper approvals or permission from the Government or statutory authority concerned, as the case may be, have not been obtained, such contraventions would not be compounded unless the required approvals are obtained from the authorities concerned.

- Cases of contravention, such as, those having a money laundering angle, national security concern and / or involving serious infringements of the regulatory framework or where the contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order, shall be referred to the Directorate of Enforcement for further investigation and necessary action under FEMA, 1999
- The Reserve Bank generally advises the persons concerned of their choice and option to make an application for compounding as and when such contraventions come to its notice. The facts constituting such contraventions will be brought to the notice of the Directorate of Enforcement in case no application for compounding is made within the time indicated by the Reserve Bank.

Type of contravention

The nature of contravention is ascertained keeping in view, inter alia, the following indicative points :

- a. Whether the contravention is **technical** and / or minor in nature and needs only an administrative cautionary advice;
- b. whether the contravention is **serious** in nature and warrants compounding of the contravention; and
- c. whether the contravention, prima facie, involves money-laundering, national and security concerns involving **serious infringement of the regulatory framework**.

However, the Reserve Bank reserves the right to classify the contraventions as stated above and neither the contravener nor others have any right to classify any contravention as technical suo moto.

- The Reserve Bank makes a scrutiny of the application to verify whether the required details and documents furnished by the applicant are prima-facie in order.
- Applications with incomplete details or where the contravention is not admitted will be returned to the applicant.
- On the admission of applications, the Reserve Bank will examine and decide if the contravention is technical, material or sensitive in nature.

- If technical, the applicant will be issued a cautionary advice. If the contravention is material, it will be compounded by imposing a penalty after giving an opportunity to the contravener to appear before the compounding authority for a personal hearing. If the contravention is sensitive in nature requiring further investigations, the same would be referred to the Directorate of Enforcement (DoE) for further investigation/ action.

Where to make an application

- **Following contraventions are delegated to regional offices of RBI**

- Delay in reporting inward remittance received for issue of shares.
- Delay in filing form FC(GPR) after issue of shares.
- Delay in issue of shares/refund of share application money beyond 180 days, mode of receipt of funds, etc.
- Violation of pricing guidelines for issue of shares.
- Issue of ineligible instruments such as non-convertible debentures, partly paid shares, shares with optionality clause, etc.
- Issue of shares without approval of RBI or FIPB respectively, wherever required.
- Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident.
- Delay in submission of form FC-TRS on transfer of shares from Non-Resident to Resident. Taking on record transfer of shares by investee company, in the absence of certified from FC-TRS.

- **Following contraventions are delegated to FED, CO, Cell at RBI, New Delhi office**

- Contraventions relating to acquisition and transfer of immovable property outside India
- Contraventions relating to acquisition and transfer of immovable property in India
- Contraventions relating to establishment in India of Branch office ,Liaison Office or Project office
- Contraventions falling under Foreign Exchange Management (Deposit) Regulations , 2000

Personal Hearing

- The Compounding Authority passes an order indicating details of the contravention and the provisions of FEMA, 1999 that have been contravened. The sum payable for compounding the contravention is indicated in the compounding order. The contravention is compounded by payment of the penalty imposed.
- The amount should be paid within 15 days from the date of the order by way of a demand draft drawn on "Reserve Bank of India" and payable at the Regional office which has issued the compounding order and at Mumbai if the order is issued by CEFA, Mumbai.

- On realization of the sum for which contravention is compounded, a certificate shall be issued by the Reserve Bank indicating that the applicant has complied with the order passed by the Compounding Authority.
- There cannot be a second adjudication by any authority on the contravention compounded. In terms of FEMA, 1999, where a contravention has been compounded, no proceeding or further proceeding, as the case may be, can be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention compounded.

WHY Compounding



Amount of Penalty

Amount of
contravention
is Quantifiable

- Thrice the sum involved in such contravention

Amount is not
quantifiable

- Two Lakh Rupees

Continuing

- Rs. 5000 per day for every day during which the default continues

Discussion of Compounding Cases



FIPB APPROVAL

- Issuance of shares for other cash
- Warrants and partly paid shares can be issued to person/(s) resident outside India only after approval through the Government route
- FDI will be allowed, through the Government approval route, only in LLPs operating in sectors/activities where 100% FDI is allowed.

- Non Compliance in Foreign Direct Investment in India
- Non Compliance in Overseas Investment
- Non Compliance in External Commercial Borrowings
- Non compliance in Export /import obligations
- Others

Your Experiences

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