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Investment by Irish Regulated fund in Indian Securities

Increasingly Ireland has proven to be the domicile of choice for asset managers seeking to establish investment funds to invest in Indian securities. Historically because of permanent establishment rules in India, these investment funds have been managed by regulated affiliates of Indian asset managers based in countries outside India such as Singapore, Hong Kong, the United States and the United Kingdom. More recently, because of the relaxation of the permanent establishment rules and foreign investment rules in India, we have seen a rise in Indian asset managers seeking to manage Irish investment funds. All are seeking to provide a product that can be marketed easily across the European Union to investors who anticipate further growth in the Indian market as it begins to realise its undoubted potential. India is currently ranked third behind China and Japan as Asia's largest economies. Recent GDP growth projections suggest that India may in the coming years lead the pack.

Interest by foreign investors in India has been growing steadily over the past years and it received huge momentum when Indian Prime Minister Narendra Modi addressed the World Economic Forum in Davos earlier this year. Prime Minister Modi delivered a strong *"Invest in India"* call and highlighted the many reforms and policies

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that his administration have implemented to attract more foreign investments including, abolishing many archaic laws which tied investors seeking to invest in India up in red tape. Key structural changes to the legal and regulatory landscape are designed to encourage investment and include new insolvency laws, significant tax reform and legislation permitting the acquisition of non-performing loans.

Many will already be familiar with the authorisation process for Irish regulated investment funds so the purpose of this note is to provide an overview of the steps involved in the process for foreign investment in India by entities such as Irish investment funds so that they can commence investment once authorised. We would advise that the preparations for the registration work start as early as possible and where possible run in tandem with the Irish investment fund authorisation process.

The registration process is governed by the Foreign Exchange Management Act, 1999 ("**FEMA**"), with a specific focus on the foreign portfolio investor ("**FPI**") route which has been developed by the Securities and Exchange Board of India ("**SEBI**") under the SEBI (Foreign Portfolio Investors) Regulations, 2015 ("**FPI Regulations**").

Is my Fund eligible to register as an FPI?

The FPI applicant must fall under the definition of a "Person" as defined in the FPI Regulations, which includes an individual, company or firm and may register as an FPI on the condition of meeting the following criteria:

- not Indian resident nor a non-resident Indian ("**NRI**");
- resident of a country whose securities market regulator is a signatory to International Organization of Securities Commission's ("**IOSCOs**") Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI;
- a resident of a country whose central bank is a member of Bank for International Settlements - only relevant if the Person seeking FPI registration is a bank;
- not resident in a country identified in the public statement of the Financial Action Task Force ("**FATF**") as a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply or of a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies;
- authorised by its constitutional document to invest on its own behalf or on behalf of its clients;
- legally permitted to invest in securities outside the country of its incorporation or establishment or place of business;
- has sufficient experience, good track record, is professionally competent, financially sound and has a generally good reputation of fairness and integrity; and

- is a fit and proper person based on the criteria specified in Schedule II of SEBI (Intermediaries) Regulations, 2008.

Which Category of FPI is the right fit for my Fund?

The basis for categorisation of the three FPI categories is centered on the risk profile of the investors seeking to register as an FPI, with Category I and II being relatively low risk and Category III being higher risk. Accordingly the standards of know your client ("**KYC**") vary between each category of FPI. An overview of the three FPI categories is set out below and will be useful in deciding how to proceed with your registration application.

- **Category I FPI -** includes Government and Government related investors such as central banks, Governmental agencies, sovereign wealth funds and international or multilateral organisations or agencies;

- **Category II FPI** – includes;

  - *appropriately regulated broad based funds e.g. mutual funds, investment trusts, insurance/reinsurance companies;*
  - appropriately regulated persons e.g. banks, asset management companies, investment managers/ advisors, portfolio managers;
  - broad based funds that are not appropriately regulated but whose investment manager is appropriately regulated, provided that the investment manager of any such broad based fund is itself registered as a Category II FPI and provided that the investment manager undertakes to be responsible and liable for all acts of commission and omission of all its underlying broad based funds and other deeds and things done by such broad based funds under the FPI Regulations;
  - university funds and pension funds; and
  - university related endowments already registered with SEBI as foreign institutional investors ("FIIs") or sub-accounts (under the erstwhile SEBI (Foreign Institutional Investors) Regulations, 1995).

  It is necessary for the Category II FPI to maintain their board based criteria on an ongoing basis. If the criteria is not fulfilled, they will have the option to re-categorize as a Category III FPI or to withdraw its registration. Most Irish investment funds make their registration application based on this category.

- **Category III FPI** - includes all others not eligible under Category I and II e.g. endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.

What are the other requirements to register as an FPI?

SEBI is the relevant regulator but it has conferred powers under the FPI Regulations to the respective Indian custodian/Designated Depository Participant ("**DDP**"), as defined in the FPI Regulations. New FPI applicants make their application to the DPP by completing a designated form which requires the applicant to confirm a number of declarations and make certain undertakings. The DPP will then consider the applicant's eligibility and KYC and may raise comments on the application and request further information and a nominal payment in support of the application.

Should you require further information on the FPI registration process, require introductions to local legal adviser and custodians who can assist you or have any queries in relation to the establishment of investment funds in Ireland generally, please contact any of us listed above or your usual Dillon Eustace contact.

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