

New Compounding Regime under FEMA



Penalties to the Contravention under FEMA

Section 13 of the Act deals with penalties for violating the Act or related rules and regulations

Provisions	Penalty
Breach of the FEMA Act, read with rules and regulations	<u>Amount Quantifiable</u> - upto 3 times of the sum involved <u>Amount non-quantifiable</u> - upto INR 2,00,000 <u>Continuing offense</u> - Penalty may be extended to INR 5,000 for every day
Acquisition of Foreign Exchange, Security, or Property Abroad	<input type="checkbox"/> Up to 3 times the amount involved in the contravention <input type="checkbox"/> Confiscation of the property equivalent, situated in India, the foreign exchange, foreign security or immovable property <input type="checkbox"/> imprisonment for a term which may extend to 5 years and with fine.



Power to the Compound

Section 15 of the Foreign Exchange Management Act, 1999 (**Act**) empower the Reserve Bank of India (**RBI**) and the Director of Enforcement (**ED**) to compound the contraventions committed any person under FEMA.

Recently, the Ministry of Finance introduced the Foreign Exchange (Compounding Proceedings) Rules, 2024 dated 12/09/2024 superseding the earlier Foreign Exchange (Compounding Proceedings) Rules, 2000. These updated Rules aim to enhance the efficiency of the compounding process by explicitly defining offenses eligible for compounding and designating officers authorized to address such contraventions.



What is Compounding?

- ❑ Compounding refers to the process of voluntarily admitting the contravention, pleading guilty, and seeking redressal.
- ❑ It is a voluntary process in which a contravener seeks compounding of an admitted contravention(s).
- ❑ It provides comfort to any person who contravenes any provisions of a law by minimizing transaction costs.

(FAQs on Compounding of Contraventions under FEMA, 1999 dated 01st October 2024)



FEMA

Breach of provisions can be regularized through compounding with the Authority

Companies Act

Not all offences are eligible for compounding.

Only the following offences can be compounded under Section 441-

- ❑ Offence punishable with "fine only"- by NCLT/ RD /any other authorised officer
- ❑ Offences punishable with "fine or imprisonment or both" or "fine or imprisonment," as compounded by the NCLT.

SEBI

SEBI has a Settlement mechanism for securities violations that allows entities to resolve contraventions



Compounding Authorities

Reserve Bank
of India

All contraventions
under FEMA except

Authority to
Officer

Authority to
Officer (RO/ CO)

Director of
Enforcement (**ED**)

Contraventions of
section 3(a)

Authority to
Officer

Section 3(a) prohibits dealing in or transferring any foreign exchange/ foreign security to anyone who is not an authorized person.



RBI Officer Designated ↔ Amount of Offence

RESERVE BANK OF INDIA	
Rank of Officer	Amount of Offence*
Not below the rank of the Assistant General Manager	not exceeding Rs. 60 lakhs
not below the rank of the Deputy General Manager	not exceeding Rs. 2.5 crores
not below the rank of the General Manager	not exceeding Rs. 5 crores.
not below the rank of the Chief General Manager	offences exceeding Rs. 5 crores.



RBI ↔ ***Regional Office***

Contraventions with Foreign Direct Investment Regulatory Framework

FDI Regulations 2000	
Regulations	Provisions
Paragraph 9(1)(A) of Schedule 1	Allotment of shares or convertible debentures post 30 days from the date of receipt of the amount of consideration
Paragraph 9(1)(B) of Schedule 1	Delay in reporting of Form FCGPR
Paragraph 9(2) of Schedule 1	Delay in reporting of FLA Return
Paragraph 8 of Schedule 1	Mode of payment for issuance
Paragraph 5 of Schedule 1	Pricing Guidelines
Regulation 2(ii) read with Regulation 5(1)	Acquisition of immovable property
Paragraph 2 or 3 of Schedule 1	Issue of shares without the approval of RBI or Government, wherever required



RBI ↔ ***Regional Office***

FDI Regulations 2000	
Regulations	Provisions
Regulation 10A (b)(i) read with paragraph 10 of Schedule 1	Pricing for convertible instruments
Regulation 10B(2) read with paragraph 10 of Schedule 1	Transfer of equity shares or convertible instruments
Regulation 4	Receiving investment in India from non-resident or taking on record transfer of shares by investee company
Regulation 14(6)(ii)(a)	Reporting of downstream investment to DIP
Paragraphs 7(1) and Paragraph 6(1) of Schedule 9	FDI in LLP- Mode of payment and reporting compliances
Regulation 10(A)(a)	Transfer of equity instruments as a gift



RBI ↔ ***Regional Office***

FDI Regulations 2017	
Regulations	Provisions
Regulation 13.1(1)	Delay in submission of Form ARF
Regulation 13.1(2)	Delay in reporting of Form FCGPR
Regulation 13.1(3)	Delay in reporting of Form FLA
Paragraph 2 of Schedule 1	Mode of payment
Regulation 11	Pricing guidelines
Regulation 2(v) read with Regulation 5	Permission to a person resident outside India to make investment in an Indian entity
Regulation 16(B)	Issue of shares without the approval of RBI or Government, wherever required
Regulation 13.1(4)	Delay in submission of Form FCTRS



RBI ↔ ***Regional Office***

FDI Regulations 2017	
Regulations	Provisions
Regulation 4	Receiving investment in India from non-resident or taking on record transfer of shares by investee company
Regulation 13.1(11)	Delay in submission of Form DI
Regulation 13.1(7) and (8)	Delay in reporting of FDI in LLP
Regulation 10(5)	Transfer by way of gift



RBI ↔ ***Regional Office***

NDI Rules 2019	
Regulations	Provisions
Rule 2(k) read with Rule 5	Permission to a person resident outside India to invest in an Indian entity
Rule 21	Pricing Guidelines
Paragraph 3(b) of Schedule I	Issue of shares without the approval of RBI or Government, wherever required
Rule 4	Receiving investment in India from non-residents or taking on record transfer of shares by Investee Company
Rule 9(4) and Rule 13(3)	Transfer of equity instruments by way of gift



RBI ↔ ***Regional Office***

NDI Regulation 2019	
Regulations	Provisions
Regulation 3.1(I)(A)	Mode of Payment
Regulation 4(1)	Delay in submission of Form FCGPR
Regulation 4(2)	Delay in submission of Form FLA
Regulation 4(3)	Delay in submission of Form FCTRS
Regulation 4(6) and (7)	Delay in reporting of receipt of FDI by LLP
Regulation 4(11)	Delay in reporting of Downstream investment



RBI ↔ Central Office (New Delhi)

Contraventions with the Regulatory Framework of Establishment of Liaison Office/ Branch Office/ Project Office

Contraventions with the regulatory framework of Deposit.

Contraventions with the regulatory framework of the acquisition of immovable property in/ outside India.



RBI ↔ ***Central Office (Mumbai)***

Contraventions with the Regulatory Framework of –

- Overseas Investment
- External Commercial Borrowing
- Liberalized Remittance Scheme
- Import & Export of Goods & Services

Below listed contraventions with the Regulatory Framework of Foreign Direct Investment-

- a. Delay in reporting of Form ESOP, DRR, InVi, Form CN (Convertible Notes)
- b. Non-compliance with the provisions not specifically stated for the Regional Office

Any other contravention with the provisions of the FEMA Act



Contraventions Compoundable by ED

Contraventions of serious nature viz-

- a. transactions suspected of money laundering
- b. terror funding, or
- c. affecting sovereignty or integrity of the nation

Transactions attracting provisions of Section 37A of the FEMA Act.

(Section 37A deals with the assets held outside India in contravention with the FEMA Act)

Contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order

Transactions involving contravention of Section 3(a) of the FEMA Act.

(Section 3(a) deals with or transfers any foreign exchange or foreign security to any person not being an authorized person)



ED Officer Designated ↔ ***Amount of Offence***

DIRECTOR OF ENFORCEMENT	
Rank of Officer	Amount of Offence
not below the rank of the Deputy Director	not exceeding Rs. 5 lakhs
not below the rank of the Additional Director	more than Rs. 5 lakhs but less than Rs. 10 lakhs
not below the rank of the Special Director	more than Rs. 10 lakhs but less than Rs. 50 lakhs
not below the rank of the Special Director along with the Deputy Legal Adviser	more than Rs. 50 lakhs but less than Rs. 1 crore
not below the rank of the Director of Enforcement along with the Special Director	more than Rs. 1 crore.



Who can file Compounding Application

Any person who contravenes any provision of the FEMA, 1999 read with any rule, regulation, notification, directions or order issued.

(FAQs on Compounding of Contraventions under FEMA, 1999 dated 01st October 2024)

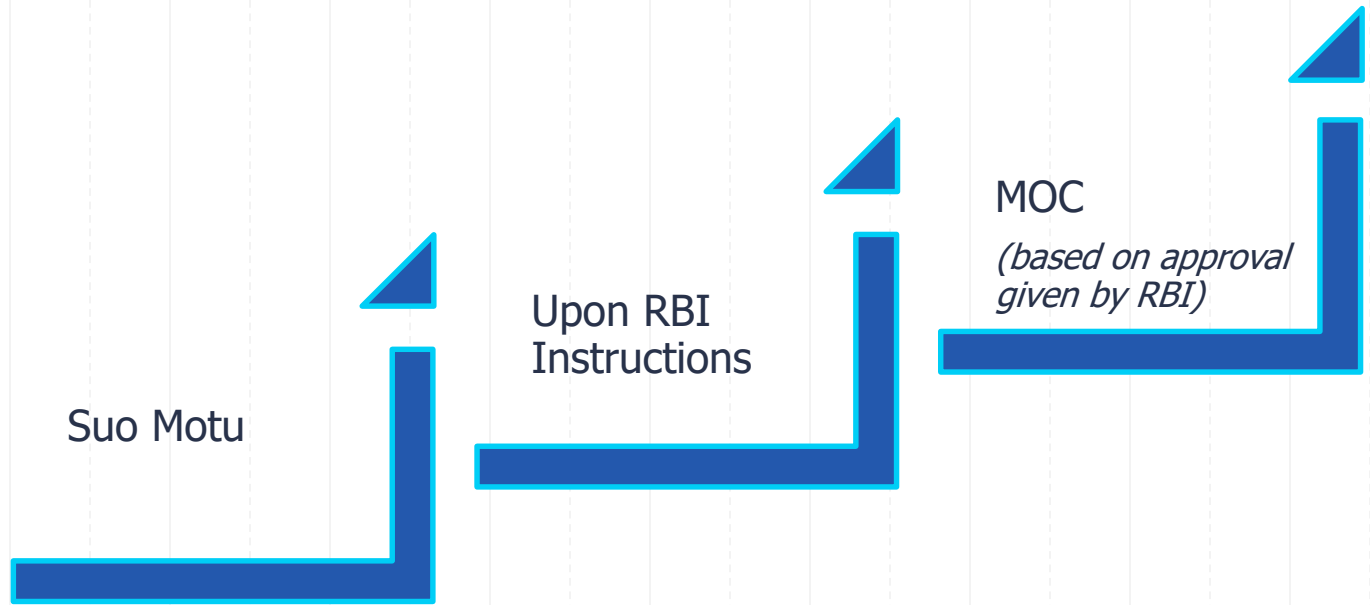
Whether the director is also required to file application?

Section 42 of the Act states that

- every person in charge of the conduct of the company
- at the time of contravention
- shall be deemed guilty
- is liable to be proceeded against and punished accordingly



When to file?





Process of Compounding

Submission of compounding application by the Applicant, physically or through PRAVAAH Portal, along with payment of compounding fees



Submission of additional documents and reply to queries, if any sought by RBI



Issue of letter confirming the facts of the contraventions along with opportunity of personal hearing



Confirmation of the facts and opting or opting out the personal hearing



Issuance of Compounding order, within 180 days from the date of submission of application



Payment of compounding penalty



Points to keep in mind

Implementing corrective measures to rectify the default in compliance with legal provisions and obtaining necessary approvals



Points to keep in mind

Preparing and submitting the application to the appropriate RBI office.



Points to keep in mind

Drafting the application in the prescribed format as per RBI guidelines



Points to keep in mind

Including contact details of the authorized official for further correspondence



Points to keep in mind

Conducting thorough due diligence of past transactions to identify the defaults and seeking regularization for the same.





Points to keep in mind

Ensuring complete and accurate details, as incomplete submissions may be returned by the CEFA Cell.





No Compounding

Offences committed within 3 years of a previously compounded offence will not be entertained

After 3 years, any subsequent contravention will be treated as a first contravention



No Compounding

Non-completion of
Administrative Action



An indicative list of administrative actions-

- ☐ Obtaining requisite approval from RBI/ GOI
- ☐ Unwinding/ reversing the transaction
- ☐ Repatriating the receivables due
- ☐ Compliance with pricing guidelines
- ☐ Compliance with reporting requirements
- ☐ Any other such corrective action as may be required



Non-Compoundable Contraventions

- ✓ Where the amount involved is not quantifiable.
- ✓ Where the provisions of section 37A (*provisions relating to assets held outside India*) of the FEMA are applicable.
- ✓ When the Enforcement Directorate (ED) considers the contravention to involve serious offenses such as money laundering, terrorism financing, or threats to national sovereignty and integrity.
- ✓ Where the Adjudicating Authority has already passed an order imposing penalty under section 13 (*Penalties*) of the FEMA.
- ✓ When the compounding authority believes the contravention requires further investigation by the ED to determine the contravention amount under Section 13 of FEMA.



Discontinuation of Adjudication

Once the contravention is compounded before the adjudication starts, no further inquiry shall be initiated or continued for that contravention against the person involved

Discharge on compounding of contravention

If the contravention is compounded after the complaint under Section 16(3) of FEMA, such compounding shall be brought to the notice of the relevant adjudicating authorities and on such notice, the person against whom the contravention is so compounded shall be discharged

Section 16(3) states no Adjudicating Authority shall conduct an inquiry unless a written complaint is filed by an officer authorized by the Central Government



Personal Hearing

Opting personal hearing is not mandatory



The Applicant may accompany with the legal expert/ consultant



Appearing for personal hearing does not have any bearing on the compounding amount.



Opt for a personal hearing and remains absent due to any reason, then the compounding order will be passed based on available documents



Compounding Penalty

Type of Contravention	Formula														
Reporting/ submission Contraventions under provisions of	Fixed amount: INR 10,000/- (applied once for each regulation/ rule contravened, in a compounding application) +														
i. FDI Regulations	Variable amount														
ii. Borrowing or lending in foreign exchange															
iii. ODI															
iv. Any other reporting contraventions (except those in Row 2 below and of LO/BO/PO)															
	<table><tr><th>Amount of Contravention</th><th>Amount of Penalty</th></tr><tr><td>Less than 10 lakh</td><td>1,000 per year</td></tr><tr><td>10 lakhs or more & below 40 lakhs</td><td>2,500 per year</td></tr><tr><td>40 lakhs or more & below 100 lakhs</td><td>7,000 per year</td></tr><tr><td>1 crore or more & below 10 crore</td><td>50,000 per year</td></tr><tr><td>10 crore or more & below 100 Crore</td><td>100,000 per year</td></tr><tr><td>100 crores and above</td><td>200,000 per year</td></tr></table>	Amount of Contravention	Amount of Penalty	Less than 10 lakh	1,000 per year	10 lakhs or more & below 40 lakhs	2,500 per year	40 lakhs or more & below 100 lakhs	7,000 per year	1 crore or more & below 10 crore	50,000 per year	10 crore or more & below 100 Crore	100,000 per year	100 crores and above	200,000 per year
Amount of Contravention	Amount of Penalty														
Less than 10 lakh	1,000 per year														
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40 lakhs or more & below 100 lakhs	7,000 per year														
1 crore or more & below 10 crore	50,000 per year														
10 crore or more & below 100 Crore	100,000 per year														
100 crores and above	200,000 per year														



Type of Contravention	Formula
Reporting contraventions by LO/ BO/ PO	As above, subject to a ceiling of INR 2 lakhs. In case of Project Office, the amount imposed shall be calculated on 10% of total project cost
Submission of AAC/ APR/ FLAR/ Share certificate Non-submission/ delayed submission of- i. APR/ share certificates ii. AAC iii. FCGPR (B) or FLA Returns	INR 10,000 per AAC/ APR/ FCGPR (B) / FLA Return delayed. Delayed/Non receipt of share certificate – INR.10000/- per year, the total amount being subject to ceiling of 300% of the amount invested.



Type of Contravention

Formula

A] Allotment/ Refunds

Non-allotment of shares or allotment/ refund after the stipulated period for Foreign Investment

Fixed amount: INR 30,000/- (applied once for each regulation/ rule contravened, in a compounding application) +

Variable amount

B] Contraventions

(Other than the reporting contraventions mentioned in Para 1(v) above) by LO/ BO/ PO

Period of delay/ non submission, as applicable	%
Less than 1 year	0.30%
1 year & above but less than 2 years	0.35%
2 year & above but less than 3 years	0.40%
3 year & above but less than 4 years	0.45%
4 year & above but less than 5 years	0.50%
5 years or more	0.75%

For project offices, the amount of contravention shall be deemed to be 10% of the cost of project.



Type of Contravention

Formula

Any contravention pertaining to issuance of any guarantee (other than reporting contraventions)

Fixed amount: INR 5,00,000/- (applied once for each regulation/rule contravened, in a compounding application) +

Variable amount

During of contravention	%
Less than 1 year	0.050%
1 year & above but less than 2 years	0.055%
2 year & above but less than 3 years	0.060%
3 year & above but less than 4 years	0.065%
4 year & above but less than 5 years	0.070%
5 years or more	0.075%

In case the contravention includes issue of guarantees for raising loans which are invested back into India, the amount impose may be tripled.



Type of Contravention

Formula

All other non-reporting contraventions **Fixed amount:** INR 50,000/- (applied once for each regulation/ rule contravened, in a compounding application) +

Variable amount

During of contravention	%
Less than 1 year	0.50%
1 year & above but less than 2 years	0.55%
2 year & above but less than 3 years	0.60%
3 year & above but less than 4 years	0.65%
4 year & above but less than 5 years	0.70%
5 years or more	0.75%



While calculating the penalty, some notable conditions are-

- ☐ Total number of days does not exclude Sundays/ Saturdays
- ☐ Days to be rounded off to the next higher month
- ☐ Penalty amount not to exceed 300% of the sum involved

Further, it shall be noted that the amount of penalty can be raised upto 3 times of the sum involved, where the amount is quantifiable.





Factors determining amount of compounding penalty

Undue amount of gain made by the Applicant



Amount of loss caused to the authority/ exchequer as a result of the contravention



The repetitive nature of contravention



Track record of the applicant



Contravener's conduct in undertaking the transaction and in disclosure of full facts in the application



Payment of the Compounding Penalty

Digital payment options like NEFT/RTGS for compounding penalty payments, along with the traditional demand draft

Payment must be completed within 15 days of the compounding order.

Failure to pay within the specified timeframe will render the application void, and FEMA provisions will apply to the contravention.

Upon receipt of the penalty, RBI issues a certificate confirming the completion of the compounding process



Late Submission Fees (LSF)

Opportunity for regularization by way of LSF has been granted only for-

- a. reporting contraventions
- b. committed within the period of 3- years from the due date

The regularization concludes within a period of 30 days, provided all instructions are adhered to.

The new ODI Regulatory Framework 2022 permits contraveners to regularize all reporting contraventions committed within three years from the effective date of the new rules.



Role of AD Bank

Banks act as representatives of the RBI, managing reporting and approval cases on its behalf. After reviewing the applications, Authorized Dealer (AD) Banks forward the approval files to the RBI along with their observations, based on which RBI issues the final instructions.

Do AD Banks have any role in compounding applications?



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Thank You