CHAPTER 36

Issue of GDRs/ADRs by IT Software/Services Companies Indian companies engaged in information technology software and information technology services (IT software/services) are eligible to offer their non-resident/resident permanent employees (including Indian and overseas working directors) GDRs/ADRs against the issue of ordinary shares, subject to the operational guidelines/conditions issued from time to time by the Government. A software company is a company engaged in the manufacture/production of software and at least 80 per cent of its turnover is from software related activities.Information technology software/services include means companies that deal with such activities as defined in recommendation 19(a) and (b) of the notification issued by the Planning Commission on July 25, 1998. According to recommendation 19(a), IT software means any representation of instructions; data; sound/image, including source code and object code recorded in a machine in readable form and capable of being manipulated or providing interactive features to a user by means of a automatic data processing machine fall under the heading of IT products, but does not include non-IT products. IT service is defined as any service that results from the use of any IT software over a system of IT products for realising value additions. The term IT industry would cover development, production and services related to IT products; the term IT software should replace computer software. According to 19(b), IT products include computer, digital/data communication and digital/data broadcasting products. Such companies are also eligible to offer GDRs to the non-resident/resident permanent employees (including Indian and overseas working directors) of their subsidiary companies, incorporated in India or abroad and engaged in IT Software/Services, against the issue of ordinary shares, subject to the eligibility conditions and operational guidelines/conditionalities announced from time to time by the Government. Similarly, Indian companies registered in India and engaged in the following sectors/areas where 80 per cent of turnover is from these sector/areas of the operation/business of the company in the three previous financial years, are eligible to offer GDRs/ADRs against the issue of ordinary shares to their non-resident/resident permanent employees (including Indian and overseas working directors) and also to their subsidiary companies, incorporated in India or abroad, subject to the eligibility conditions and operational guidelines/conditionalities announced from time to time by the Government: (i) Information Technology (as defined in the recommendation. 19(a) and (b) of Gazette Notification dated 25-7-1999, issued by the Planning Commission) and Entertainment Software, (ii) Pharmaceuticals, (iii) Biotechnology, (iv) Any other activities within the knowledge based sector, as notified by the Government from time to time. These norms would also be available for multi-product diversified companies that do not conform to the criteria of 80 per cent turnover as mentioned above but have an average annual export earning of Rs 100 crore, from the sectors mentioned above, in the three previous financial years.

Operational Guidelines

These relate to (i) automatic route of the RBI to issue GDRs/ADRs to foreign investors, (ii) two-way fungibility of ADRs/GDRs, (ii) disinvestment of shares by Indian companies (iii) automatic route for issue of FCCBs (iv) issue of ADRs/GDRs through automatic route, (v) issue of ADR/GDR linked employee stock options by Indian software/IT companies, and (vi) norms of overseas business acquisition through ADRs/GDRs.

Limited Two-Way Fungibility of ADRs/GDRs The operative guidelines for limited two-day fungibility of ADRs/GDRs under the issue of FCCBs and ordinary shares, through the depository receipt mechanism, are summarised on the next page:

(a) Re-issuance of ADRs/GDRs would be permitted to the extent of ADRs/GDRs that have been redeemed into underlying shares and sold in the domestic market. The arrangement is demand driven, with the process of reconversion emanating from the request for acquisition of domestic shares by a non-resident investor for issue of ADRs/GDRs.

(b) The transaction under the reconversion arrangement would be distinct and separate from FII portfolio investments.

(c) The transaction should be effected through SEBI registered stock brokers who will act as intermediaries between foreign investors and domestic shareholders. A general permission has been conveyed by the RBI, authorising such stock brokers to acquire domestic shares on behalf of overseas investors and for placing with a domestic custodian.

(d) For this purpose, all SEBI registered brokers would be able to act as intermediaries in the two-way fungibility of ADRs/GDRs. The RBI has conveyed general permission for these brokers to buy shares on behalf of overseas investors.

(e) As a secondary market transaction, the acquisition of such shares through the intermediary, on behalf of overseas investors, would fall within the regulatory purview of the SEBI. The custodian would monitor the re-issuance and furnish a certificate to both the RBI and the SEBI to ensure that the sectoral caps are not breached. The RBI would monitor the receipt of certificates from the custodian to this effect. The custodian would submit the certificate on a monthly basis, on the 10th of every month.

(f) The domestic custodian, who is the intermediary between the overseas depository on the one hand and the Indian company on the other, would have a record of the ADRs/GDRs issued, redeemed and sold in the domestic market.

(g) The domestic custodian would also be required to ascertain the extent of registration in favour of the ADR/GDR holders/non-resident investors, based on the advice of the overseas depository to the domestic custodian, for the underlying shares being transferred in the books of account of the issuing company in the name of the non-resident, on redemption of the ADRs/GDRs.

(h) The custodian is also required to verify with the company secretary/NSDL/CSDL in case the total cap is being breached in case there is a percentage cap on foreign direct investment.

(i) On request by the overseas investor, for acquisition of shares for re-issuance of ADRs/GDRs, the SEBI registered broker would purchase a given number of shares after verifying with the custodian whether there is any 'head room' available.

(j) Head room = Number of ADRs/GDRs originally issued *minus* the number of GDRs/ADRs outstanding further adjusted for ADRs/GDRs redeemed into underlying shares and registered in the name of non-resident investor(s). The domestic custodian would notify the extent to which re-issuance would be permissible: the redemption effected *minus* the underlying shares registered in the name of the non-resident investor, with reference to the original GDR/ADR issue and adjustment on account of sectoral caps/approval limits.

(k) The Indian broker would receive funds through normal banking channels for purchase of shares from the market. The shares would be purchased in the name of the overseas depository on a recognised stock exchange.

(l) Upon acquisition, the Indian broker would place the domestic shares with the custodian; the arrangement would require a revised custodial agreement under which the custodian would be authorised by the company to accept shares from entities other than the company.

(m) The custodian would advise the overseas depository on the custody of domestic shares and that corresponding ADRs/GDRs may be issued to the non-resident investor.

(n) The overseas depository would issue corresponding ADRs/GDRs to the investor.

(o) The domestic custodian, in addition, would have to ensure that the advice issued to the overseas depository is on a first come first serve basis, that is, the first deposit of domestic/underlying shares with a custodian would be eligible for the first re-issuance of ADRs/GDRs to overseas investors.

(p) The custodian would also have to ensure that ordinary shares deposited with it are only to the extent of depletion in the ADR/GDR stock. This can be readily ensured by adopting a system similar to the trigger mechanism adopted for FIIs. Once the trigger mechanism is reached, say at 90 per cent of the depletion in the ADR/GDR stock, each buying transaction of domestic shares would be completed only after the custodian has approved it.

(q) A monthly report about the ADR/GDR transaction under the two-way fungibility arrangement is to be made by the Indian custodian in the prescribed format, to the RBI and the SEBI both

in the hard and soft copy, by the 10th of every month.

(r) The broker has to ensure that each purchase transaction is only against delivery and payment thereof is received in foreign exchange.

(s) The broker would submit the contract note to the Indian custodian of the underlying shares on the day after the day of the purchase so that the custodian can reduce the head room accordingly. Copy of the contract note would also need to be provided by the custodian to the RBI and the SEBI. The broker should also ensure that a separate rupee account is maintained for the purpose of buying shares and effecting two-way fungibility. No forward cover would be available for the amounts lying in the said rupee account. The ADs (authorised dealers) would be permitted to transfer the monies lying in the above account on the request of the broker.

(t) The custodian of the underlying shares and the depositories would coordinate on a daily basis in computing the head room. Further, the company secretary of each individual company would provide details of non-resident investment at weekly intervals to the custodian and the depository. The custodian would monitor the re-issuance and furnish a certificate to both the RBI and the SEBI, to ensure that the sectoral caps are not breached. The RBI would monitor the receipt of certificates from the custodian to this effect.

(u) Re-issuance would be within the already approved/issued limits and would not only effectively mean transfer of ADRs/GDRs from one non-resident to another and accordingly no further approval mechanism is insisted upon.

(v) In the limited two-day fungibility arrangement, the company is not involved in the process and is demand driven, that is, requests for ADRs/GDRs emanate from overseas investors. Consequently, the expenses involved in the transaction are borne by the investors, which would include payments due to the overseas intermediary/broker, domestic custodians, charges of the overseas and domestic brokers.

(w) The tax provision under Section 115-AC of the Income tax Act, 1961, which is applicable to non-resident investors investing in ADRs/GDRs offered against issue of fresh underlying shares would extend to non-resident investors investing in foreign exchange in ADRs/GDRs issued against existing shares under these guidelines, in terms of the relevant provisions of the Income tax Act, 1961.

To facilitate the two-way fungibility of ADRs/GDRs and in order to ensure easy tracking of the underlying shares released on the conversion of depository receipts, such shares should be mandatorily credited to the separate Depository Receipts (DRs) accounts of each investor. Depositories should ensure to provide the following information to the custodian holding the underlying shares on a regular basis: (i) total number of shares at the beginning of the month, (ii) number of shares credited during the month, (iii) number of shares transferred out of the account (debited) during the month and (iv) balance at the end of the month.

Disinvestment of Shares by Indian Companies The operative guidelines for disinvestment of shares by Indian companies in the overseas market, through issue of ADRs/GDRs, is summarised below.

(i) Disinvestment of holdings, by share holders of Indian companies in the overseas markets, would be allowed through the mechanism of sponsored ADR/GDR issue according to whether they are (a) listed in India, (b) not listed in India but are listed overseas.

(ii) The process of disinvestment would be initiated by Indian companies, whose shares are being offered for disinvestment in the overseas market, by sponsoring ADR/GDR issues against the block of existing shares offered by the shareholders, under the provisions of these guidelines.

(iii) Such a facility would be available pari passu to all categories of shareholders of the company whose shares are being sold in the ADR/GDR market overseas. This would ensure that no class of shareholders gets special dispensation.

(iv) The sponsoring company, whose shareholders propose to divest existing shares in the overseas market through issue of ADRs/GDRs, should give an option to all its shareholders indicating the number of shares to be divested and the mechanism through

which the price would be determined under the ADR/GDR norms. If the shares offered for divestment are more than the pre-specified numbers to be divested, shares should be accepted for divestment in proportion to existing holdings.

(v) The proposal for divestment of the existing shares in the ADR/GDR market would have to be approved by a special resolution of the company whose shares are being divested.

(vi) The proceeds of the ADR/GDR issue raised abroad should be repatriated into India within a period of one month of the closure of the issue.

(vii) Such ADR/GDR issue against existing shares, arising out of the divestment, would also come within the purview of the existing SEBI Takeover Code if the ADRs/GDRs are cancelled and the investors holding underlying shares are to be registered with the company as shareholders.

(viii) Divestment of existing shares of Indian companies in overseas markets for issue of ADRs/GDRs would be reckoned as FDI. Such proposals would require FIPB approval as also other approvals, if any, under the FDI policy.

(ix) Such divestment inducting foreign equity would also need to conform to the FDI sectoral policy and the prescribed sectoral cap, as applicable. Accordingly, the facility would not be available to companies, whose shares are to be divested, are engaged in activities where FDI is not permitted.

(x) Each case would require the approval of FIPB for foreign equity induction through offer of existing shares under the ADR/GDR route.

(xi) Other mandatory approvals such as those under the Companies Act, and so on, as applicable, would have to be obtained by the company prior to the ADR/GDR issue.

(xii) Issue related expenses (covering both fixed expenses like underwriting commissions, lead manager's charges and legal expenses as well as reimbursable expenses) for public issues would be subject to a ceiling of 4 per cent in the case of GDRs and 7 per cent in the case of ADRs and 2 per cent in case of private placements of ADRs/GDRs. Issue expenses beyond the ceiling would need the approval of the RBI. The issue expenses should be passed on to the shareholders participating in the sponsored issue, on a pro rata basis.

(xiii) Shares earmarked for the sponsored ADR/GDR issue may be kept in an escrow account created for this purpose and, in any case, the retention of shares in such escrow account should not exceed three months.

(xiv) If the issues of ADR/GDR are made in more than one tranche, each tranche would have to be treated as a separate transaction.

(xv) The resident shareholders of Indian companies, who offer their shares for conversion to ADRs/GDRs, can receive the sale proceeds in foreign currency. However, the conversion to such ADRs/GDRs should have the approval of the Foreign Investment Promotion Board (FIPB). The sale proceeds are also permitted to be credited to their Exchange Earners Foreign Currency/Resident Foreign Currency (Domestic) [EEFC/RFCD(D)] accounts or to their rupee accounts, at their option. Disinvestment proceeds receivable by residents who have since become non-residents would also be eligible for credit to their foreign currency accounts abroad or any of their accounts in India, at their option.

(xvi) After completing the transactions, the companies would need to furnish all particulars thereof, including the amount raised through ADRs/GDRs, number of ADRs/GDRs issued and the underlying shares offered, percentage of foreign equity level in the Indian company on account of issue of ADRs/GDRs, details of issue parameters, details of repatriation and allother details to the RBI within 30 days of completing such transactions.

(xvii) The tax provision under Section 115-AC of the Income Tax Act, 1961, which is applicable to non-resident investors for ADR/GDR offers against issue of fresh underlying shares, would extend to non-resident investors investing in foreign exchange in ADRs/GDRs issued against disinvested existing shares, in terms of the relevant provisions of the Income tax Act, 1961.

(xviii) Resident shareholders divesting their holdings would be subject to capital gains tax provisions applicable under the Income tax Act, 1961, that is, Section 115-AC applicable

to non-residents would not be extended to them.

In view of the Government's policy to promote the disinvestment programme of PSU shares, ADR/GDR/FCCB proceeds can be used in the first stage of acquisition of shares in the disinvestment process as also in the mandatory stage offer to the public in view of their strategic performance under the SEBI Takeover Code.

Automatic Route for the Issue of FCCBs An Indian company/body corporate created by an Act of the Parliament may issue FCCBs to a person resident outside India upto US dollar 50 millions through the automatic route, subject to the conditions specified below. However, where the issue exceeds 50 million dollars, the RBI's permission would be required to issue FCCBs. Government approval would be necessary if the issue size exceeds 100 million dollars.

(i) The FCCBs to be issued would have to be conform to the FDI policy (including sectoral cap and sectors where FDI is permissible) of the Government of India, as announced from time to time, and the RBI's regulations/directions issued from time to time.

(ii) The issue of FCCBs would be subject to a ceiling of US dollar 50 million in any one financial year.

(iii) Public issue of FCCBs should only be through reputed lead managers in the international capital market. In case of private placement, the placement should be with banks, multilateral and bilateral financial institutions, foreign collaborators or foreign equityholders having a minimum holding of 5 per cent of the paid-up equity capital of the issuing company. Private placement with unrecognised sources is prohibited.

(iv) The maturity of the FCCB should not be less than five years. The call and put option, if any, cannot be exercised prior to five years.

(v) Issue of FCCBs with attached warrants is not permitted.

(vi) The "all in cost" would be 100 basis points less than those prescribed for ECB (external commercial borrowings) schemes (discussed in Section IV). The "all in cost" would include coupon rate, redemption premium, default payments, commitment fees and fronting fees, if any, but would not include issue related expenses such as legal fees and lead manager fees, out of pocket expenses.

(vii) The FCCB proceeds should not be used for investment in the stock market, and may be used for purposes for which FCCB proceeds are permitted to be utilised under ECB schemes.

(viii) In case FCCBs are issued for financing imports/foreign exchange capital expenditure, the proceeds can be retained abroad with the approval of the RBI. In all other cases, the proceeds should be repatriated to India immediately on completion of issue process.

(ix) Issue related expenses should not exceed 4 per cent of issue size and in case of private placement, 2 per cent of the issue size.

(x) The issuing equity should, within 30 days from the date of completion of the issue, furnish a report to the RBI through a designated branch of an authorised dealer giving the following details and documents: (a) the total amount of the FCCBs issued, (b) names of the investors outside India and number of FCCBs issued to each of them and (c) the amount repatriated to India through normal banking channels duly supported by bank certificates.

Issue of GDRs/ADRs Through Automatic Route With a view to further liberalising the operational guidelines and in particular track record of scrutiny of ADR/GDR proposals (other than FCCBs), the two-stage government approval has been dispensed with in case of expansion of the existing capital base through the issuance of fresh equity shares as underlying shares for ADRs/GDRs. Reckoned as part of FDI, such issues need to conform to the existing FDI policy and only in areas where FDI is permissible. Indian companies are free to access the ADR/GDR market through an automatic route, without the prior approval of the Government, in the following cases:

- In case they raise ADRs/GDRs through a registered stock exchange;
- Private placements of ADRs/GDRs would also be eligible if the issue is lead managed by an investment banker registered with the SEC (USA) or under the Financial Services Act (UK)

or the appropriate regulatory authority in Europe/Singapore/Japan. The track record conditions would not be operative for ADR/GDR issues;

- Issue of ADR/GDR linked employee stock options by Indian Software/IT Companies and
- Issue of ADR/GDRs arising out of business reorganisation/merger/ demerger. GDR/ADR holders are entitled to the same bonus and rights issue of shares as an ordinary shareholder of the company. Similarly, if the ordinary share holders of Company 'A' become entitled to shares of Company 'B' as a consequence of genuine business reorganisation, which is duly approved by the High Court under Sections 391/394 of the Companies Act, then the GDR/ADR holders of Company A would be entitled to the shares of Company B.

In case of all automatic approvals, the mandatory approval requirements under the FDI policy, approvals under the Companies Act, approvals for overseas investments/business acquisition where ADR/GDR proceeds are utilised for such investments and so on would need to be obtained by the company prior to the ADR/GDR issue. The company would need to obtain RBI approval, under the provisions of FEMA, prior to the overseas issue.

Issue related expenses like underwriting commission, lead manager charges, legal expenses and other reimbursable expenses would be subject to a ceiling of 4 per cent in the case of GDRs and 7 per cent in case of ADRs listed on a US exchange. Issue expenses beyond this ceiling would need RBI approval.

Within 30 days of completing such transactions/issues, issuing companies are required to furnish full particulars, including amount of ADR/GDRs issued, number of fresh equity shares issued, percentage of foreign equity level in the company on account of such issues, information regarding whether the issue is under automatic route or with FIPB approval as well as other detailed issue parameters to the Government/RBI.

The company issuing GDRs/ADRs is also permitted by the RBI guidelines in this regard:

(i) To issue shares in the name of the depository or its nominees and to place the shares certificates of the said shares in the physical custody of a custodian in Indian against which the depository would issue GDRs/ADRs outside India;
(ii) To remit dividends through an authorised dealer as and when due, subject to payment of Indian taxes as applicable;
(iii) To issue rights or bonus shares that may accrue in respect of the GDRs/ADRs;
(iv) To incur issue related expenses as approved by the Government India or up to the limits laid down in the relevant guidelines issued by it;
(v) To pay issue related expenses by way of deductions from the issue proceeds as approved by, or up to the limits laid down, in the relevant guidelines issued by the Government;
(vi) To remit and pay for filing, listing, agency or other fees on an ongoing basis with respect to the international stock exchanges where the GDRs/ADRs are listed;
(vii) To maintain a foreign register of members, if so required;
(viii) To open an account abroad to receive the subscription monies in foreign currency;
(ix) To pay any foreign tax in the nature of sales or value added tax with respect to services provided to the issuing company and reimburse any out of pocket expenses;
(x) To repatriate the proceeds of the issue to India for deployment in purposes permitted by the Government. The Indian companies may retain foreign funds abroad raised through ADRs/GDRs for any period to meet their future forex requirements. Pending repatriation or utilisation of issue funds raised, the Indian company may invest the foreign currency funds in
    (a) deposits or certificate of deposits (CDs) or any other product offered by banks that have been rated not less than AA(-) by Standard and Poor/Fitch IBCA, Aa3 or by Moody's;
    (b) treasury bills and other monetary instruments of one year maturity having a minimum rating as in (a) and
    (c) deposits with branches outside India or with an authorised dealer in India.

The issuing company should furnish a statement to the RBI within thirty days from the date of closing the issue, providing full particulars of the funds raised/retained abroad.

Issue of ADR/GDR Linked Stock Option Scheme (ESOPS) for Indian Software IT

Companies Indian companies engaged in the IT software/services are entitled to issue ADR/GDR linked stock options to the permanent employees (including Indian and overseas working directors) of the parent company as well as its subsidiary companies incorporated in India/out of India and engaged in IT software and IT services. In addition to IT software and IT services companies, companies in the following knowledge based sectors are also eligible to issue ADR/GDR linked ESOPS with a view to retaining their highly skilled personnel: (i) IT, (ii) Pharmaceuticals, (iii) Biotechnology and (iv) Any of the activities within the knowledge based sector, notified by the Government from time to time. The facility is also available to multi-product, diversified companies that do not conform to the criteria of 80 per cent of their turnover from these sectors in case they fulfil the condition of average annual export earnings of Rs 100 crore from these sectors in the three previous financial years. As an instrument enabling these companies to provide an incentive to retain their highly skilled professionals, its main features are summarised below:

(i) A software company that has already floated ADRs/GDRs or a company that is proposing to float ADRs/GDRs would be entitled to issue ADR/GDR linked stock options to its employees. A software company that proposes to issue GDR/ADR linked stock option to its employees should clearly include such proposals as part of its application for GDRs/ADRs. While approval would be for the total issue size, inclusive of stock options, the GDRs/ADRs earmarked for the employees, upto the specified limit, would be issued by the company as and when an employee exercises his stock option. Accordingly, the company should never exceed the approved level of GDRs/ADRs to be issued. In the case of software companies that have already issued GDRs/ADRs, such companies may seek permission for issue of stock options related to the existing GDR/ADR issue, observing the general parameters of the guidelines.

(ii) The scheme would be available to listed and unlisted Indian software companies that fulfil the performance track record eligibility and other requirements, if any, under, the ADR/GDR guidelines.

(iii) A software company would be defined as a company engaged in manufacture or production of software, where not less than 80 per cent of the company's turnover is from software activities.

The company applying for issue of GDR/ADR linked stock option should submit relevant documents certified by a chartered accountant, establishing that they are a software company conforming to the stipulation indicated above. The relevant documents should also be submitted to the RBI while applying for permission for foreign currency for acquiring GDRs/ADRs, in exercise of the stock option.

(iv) The stock options would be available to non-resident and resident permanent employees (including Indian and overseas working directors) of the company. The stock options would not be available to the promoters and their relatives.

(v) General FEMA permission for resident employees of software companies, under the ADR/GDR linked stock option scheme, would be granted by the RBI. This would entitle resident employees to acquire and/or hold ADR/GDR linked stock options, acquire ADR/GDR on exercise of the option and remit funds upto a limit of $ 50,000 in a block of five years for the acquisition of ADRs/GDRs as well as to retain or continue holding the ADRs/GDRs so acquired. Upon liquidation of their ADR/GDR holding, a resident employees would need to repatriate the proceeds to India unless a general/specific permission for its retention or use abroad is obtained from the RBI.

(vi) Issue of stock options would require a special resolution, as applicable for preferential allotment of shares. The allotment of stock options should be done by a Committee of the Board of Directors of the company. The Committee of Directors should have a minimum of two non-executive members of the Board as its members.

(vii) The issuing company would be entitled to issue options not exceeding 10 per cent of its issued and paid-up equity capital.

(viii) The stock option may be issued at a discount of not more than 10 per cent of the market price at the time of the issue of the stock option.

(ix) While GDRs/ADRs acquired by exercising the stock option would be freely transferable, the stock options themselves would be non-transferable.
(x) Full disclosure should be made of the details of the stock option scheme by the company in the Directors report or in an annexure to the Directors report.
(xi) ADRs/GDRs acquired by exercising the stock option would be eligible for concessional tax treatment under Section 115-AC of the Income tax Act,1961.

Norms for Overseas Business Acquisition Through ADR/GDR Guidelines for overseas business acquisition by Indian companies—engaged in information technology and entertainment software, pharmaceuticals and bio-technology—through ADR/GDR stock swap are briefly discussed below.

Coverage The norms extend to Indian companies engaged in (i) information technology and entertainment software, (ii) pharmaceuticals, (iii) bio-technology and (iv) any other activity within the knowledge based sector, notified by the Government from time to time, for the acquisition of overseas companies in their respective areas of business. Indian companies in the sectors/areas specified above are defined as those registered in India and earning 80 per cent of their turnover from these areas of their operation/business in the three previous financial years. In the case of multi-product diversified companies not conforming to the 80 per cent criteria, the norms would be applicable if they have an average annual export earnings of atleast Rs 100 crore in these sectors/areas in the three previous financial years.

Limit for Acquisition Overseas business acquisition by the specified Indian companies would be governed by the following guidelines:

Under the Automatic Route The financial limit for automatic overseas business acquisition, without reference either to the Government or the RBI, on a back to back basis, that is, through stock swap is as follows: (i) US dollar 100 million or (ii) Up to 10 times the export earnings of the investing company during the preceding year, as reflected in the audited balance sheet of the company. For category (ii), if any other facility has been availed by the investing company for overseas investment through any other window, including item (i) above, during the financial year, the same would be adjusted and the entitlement would be for the balance amount. The value limits indicated above would be the annual limit (financial year) for each company for one or more acquisitions. Other criteria for qualifying for automatic route would continue to apply.

Not Governed by the Automatic Route In cases not covered by the automatic route, the specified Indian company would send the proposal to the RBI for consideration by the Special Composite Committee for Overseas Investment through ADR/GDR Stock Swap. The criteria for automatic approval and other norms contained in the guidelines, including the mandatory requirement of conforming to the FDI policy, existing ADR/GDR listing abroad and reporting requirement etc, would continue to be operative:
(i) The existing foreign equity, including on account of any existing ADR/GDR offering, and the proposed ADR/GDR issue/stock swap in the expanded capital bases is within the limit operative for the RBIs automatic approval for FDI in the software sector. No FIPB approval would be required in such cases even if the ADRs/GDRs are not issued in cash.
(ii) The proposed ADR/GDR stock swap for the purposes of acquisition of a business abroad is by way of expansion in the capital base or, to be precise, by way of issue of fresh underlying shares.
(iii) The present ADR/GDR guidelines provides for redemption of the ADRs/GDRs into the underlying rupee denominated shares of the Indian company, sale in the domestic market and full repatriation of sale proceeds, subject to payment of prescribed tax. The same provision would extend to ADR/GDR holders of the acquired company. Reconversion of the underlying shares into ADRs/GDRs is not permissible.
(iv) The proposal would have to conform to the following valuation norms:
(a) The valuation of the transaction and of the overseas company should be as per the

recommendation of an investment banker;

(b) In the case of a listed overseas company, the valuation should be based on the current market capitalisation of the overseas company (based on the monthly average trading on the overseas exchange, for three months preceding the month in which the acquisition would take place) and the premium, if any, as per the recommendations of the investment banker in the due diligence reports;

(c) In the case of an unlisted overseas company, the valuation would be based on the recommendations of the investment banker.

(v) The proposal should in conformity with all provisions of the Companies Act, 1956.

(vi) Companies are required to report full details of the transaction, including value of the transaction/acquisition cost, foreign equity level in the Indian software company on account of issue of ADRs/GDRs, as detailed below.

After completing the transactions/acquisitions, Indian companies should furnish full particulars thereof, including amount of ADRs/GDRs issued, percentage of foreign equity level in Indian company on account of such issue, name/s of the overseas company/ies acquired, cost of acquisition, percentage of holding of Indian company in the foreign company, details of its line of activity, country of location and so on, together with relevant documents like valuation report by the investment banker to the Government and RBI, within 30 days of completion of such transactions. On receipt of these particulars, the RBI would issue specific identification numbers for each overseas company acquired and the Indian companies would have to comply with the existing requirement regarding submission of Annual Performance Reports, repatriation of entitlements from the overseas concerns and so on.

(vii) Compliance with RBI regulations.

(viii) Other clearances, as applicable, should be obtained by the company.