

October 22, 2015

## OWNERSHIP AND CONTROL OF INDIAN INSURANCE COMPANIES WITH FOREIGN INVESTMENT

To Our Clients and Friends:

This client alert is supplemental to our client alert dated March 11, 2015. In the March alert, we had advised that the Indian government had increased the ceiling on foreign investment in an Indian insurance company to 49% of its total outstanding share capital. Of this foreign investment ceiling of 49%, 26% is permitted under the automatic route (*i.e.*, without the prior approval of the Indian government). Foreign investment above 26% and up to 49% requires the prior approval of the Indian government. In addition, we had reported that prior approval of the Insurance Regulatory and Development Authority ("IRDA") is required in all circumstances where there is any change in shareholding of an Indian insurance company. However, the ownership and control of an Indian insurance company must remain in the hands of resident Indians at all times.

The [Indian] Insurance Act, 1938 was also amended in March, 2015 to define "control" to mean the right to appoint a majority of the directors on the board of the company or the power to control the management or policy decisions of a company by virtue of shareholding, management rights, shareholders agreements or voting rights agreements.

On October 19, 2015, the IRDA issued the "Guidelines on Indian Owned and Controlled" Insurance Companies (the "Guidelines") to further clarify the requirements with regard to Indian ownership and control of Indian insurance companies. The Guidelines apply to all Indian insurance companies that receive foreign investment. Indian insurance companies that already have foreign investment must comply with the Guidelines within the next three months.

### Key Highlights

The following are some of the key provisions of the Guidelines:

- Criteria for Control: The Guidelines reiterate that control may be exercised on an Indian insurance company by means of (a) shareholding, (b) management rights, (c) shareholder agreements, (d) voting agreements and (e) any other manner as may be defined by applicable law.
- Management & Policies: The Guidelines mandate that Indian shareholder(s) of Indian insurance companies must have control over the formulation of "significant policies" and the overall management of the company, subject to approval of the Board of Directors (the "Board") constituted in the manner described below.

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- Board: The Indian shareholder(s) must, at all times, have the right to nominate a majority of the directors on the Board, excluding independent directors. If the Chairman of the Board has a casting vote, he or she should be nominated by the Indian shareholder(s). While the Guidelines state that the presence of the majority of the Indian shareholder(s)' nominees on the Board constitutes a valid quorum for a meeting of the Board, they also clarify that a foreign investor's right to require its nominee director's presence for constituting the valid quorum for a Board meeting will not constitute control by the foreign investor.
- Key Management Personnel: The Chief Executive Officer or Managing Director cannot be a nominee of the foreign investor and can only be appointed by the Indian shareholder(s) or the Board (now controlled by the Indian shareholder(s)). While other key management personnel may be nominated by the foreign investor, such appointment will still be subject to the approval of the Board.
- Reporting Requirements: Indian insurance companies with foreign investment are required to amend any existing shareholder agreements to ensure conformity with these Guidelines. Additionally, the Chief Executive Officer or the Chief Compliance Officer of such insurance company is required to file with the IRDA a signed undertaking and a copy of the resolution of the Board of the company confirming that these Guidelines have been complied with by the Company.

Given the requirements of the Guidelines, shareholder and other rights of foreign investors in Indian insurance companies will need to be structured appropriately to ensure that the IRDA does not consider such rights as providing control to the foreign investor.



*Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these issues. For further details, please contact the Gibson Dunn lawyer with whom you usually work or the following lawyers in the firm's Singapore office:*

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