Lakshmikumaran Sridharan attorneys
SINCE 1985
exceeding expectations

OCTOBER 2025

"Crossing Borders, Building Business: Key FEMA & FDI FAQs for Foreign Investors in India"

1. What are the ways to establish presence in India?

Under extant foreign exchange regulations in India, foreign entities can establish their presence in India either through an entity in the form of a subsidiary / joint venture / limited liability partnership or through a branch office, liaison office and project office.

While setting up presence in the form of an entity provides complete operational freedom, the other modes of setting up presence are for specific purposes.

For instance branch offices can be set up with the approval of the Reserve Bank of India (which is the central bank in India) ("**RBI**") for undertaking a limited set of activities, liaison offices can be set up with the approval of RBI for a limited period for acting mainly as a channel of communication with the parent entity and to engage in networking and marketing opportunities. A project office is for executing a contract-based project in India on behalf of an Indian company, for the duration of the specific project, as it would not be relevant to the proposed activities to be undertaken by the client in India.

2. What is the incorporation process of a limited company in India by a foreign entity?

- Indian companies- whether private or public, limited or unlimited are incorporated by registering with the Registrar of Companies ("**RoC**") in the state where the company's registered office is located.
- All incorporation documents filed with the RoC are publicly accessible for inspection.
- In January 2017, the Ministry of Corporate Affairs introduced the Simplified Proforma for Incorporating Company ("**SPICe**") form to streamline the incorporation process.
- SPICe, is an integrated application, includes application for allotment of Director Identification Number for upto 3 (three) directors, reservation of a name, incorporation of company and appointment of directors of the proposed company.
- As the incorporation process is fully digital, directors must obtain Digital Signature Certificates from

designated authorities before filing the application.

- The constitutional documents of the proposed company, comprising of the memorandum of association ("**MoA**") and the articles of association ("**AOA**"), are required to be filed in electronic form along with the application for incorporation. The MOA defines the company's objectives and authorized share capital. The AOA outlines the rules for company management and the rights of shareholders both among themselves and in relation to the company.

- Within 30 days of incorporation, the company must establish a registered office.

- Verification of the registered office must be filed with the RoC within the same 30 (thirty) days period.

- For incorporating a One Person Company ("**OPC**"), the MoA must include the name of a nominee who will become the member in case of the original member's death or incapacity.

- The name of a OPC must include the suffix **'OPC Limited'**.

3. Can a non-resident be the first shareholder of a company?

Yes, subject to the sector-specific foreign investment policies and applicable limits on non-resident ownership, an Indian company may have its entire share capital held by non-residents. However, the company must still comply with the minimum membership requirements prescribed under the Companies Act, 2013 *(i.e., two for the private limited companies and seven for the public limited companies).* To satisfy this requirement, in case of Indian companies incorporated as wholly-owned subsidiaries of a non-resident entity, 1 (one) share is held by an individual affiliated of the non-resident entity or a group or affiliate entity, as a nominee on behalf of the non-resident entity.

4. How does a foreign entity fund a subsidiary in India?

A subsidiary can be funded through various instruments and methods, including the following:

- Subscribing to equity shares, compulsorily convertible preference shares, or compulsorily convertible debentures.

- External commercial borrowings ("**ECBs**") or foreign currency loans, which can be structured through instruments such as optionally or partially convertible preference shares, optionally convertible debentures, and non-convertible debentures. These forms of funding must comply with foreign exchange regulations, including minimum equity contribution and prescribed debt-equity ratios, as well as eligibility criteria and permitted end-uses.

- Funding may be provided as an advance against future services. However, care must be taken to comply with transfer pricing norms and ensure that such advances do not exceed specified time limits, which could otherwise classify them as ECBs.

5. Who can be appointed as a director of a subsidiary company in India? Can a non-resident be appointed as a director of an Indian company?

- An Indian company can have foreign directors, provided that the terms of appointment of a foreign national as a full-time / managing director of an

Indian company, must be approved by the Central Government if his period of stay in India, prior to being appointed full-time / managing director, is less than 12 (twelve) months. If the directors appointed to a company are not fulltime / managing directors, then no such approval is required. However, note this requirement applies to foreign directors of public limited companies and foreign directors privately held companies are exempt from this requirement.

- An individual may be appointed as a director of an Indian company, provided all other eligibility conditions under the Companies Act, 2013 are met.
- No company can appoint or re-appoint any individual as a director unless the individual has been allotted a DIN.
- An individual is permitted to serve as a director in up to 20 (twenty) companies, with a maximum of 10 (ten) public companies.
- Every company must have at least one director who has resided in India for a minimum of 182 (one hundred and eighty-two) days during the financial year.
- An Indian company can have foreign directors, provided that the terms of appointment of a foreign national as a full-time / managing director of an Indian company, must be approved by the Central Government if his period of stay in India, prior to being appointed full-time / managing director, is less than 12 (twelve) months. If the directors appointed to a company are not fulltime / managing directors, then no such approval is required

6. How foreign investment is regulated in India?

- Foreign investment in India is primarily regulated by: (a) Foreign Exchange Management Act, 1999 ("**FEMA**") and Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**") promulgated thereunder; (b) the Master Direction on Foreign Investment consolidating the various notifications and circulars issued by the Reserve Bank along with other regulations. The mode of payment of foreign investment and reporting is governed by Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.
- Sector-specific foreign investment policies are issued by the Department for Promotion of Industry and Internal Trade ("**DPIIT**") through Press Notes, which are incorporated into the NDI Rules.
- The Reserve Bank of India ("**RBI**") administers the NDI Rules and issues directions, circulars, and clarifications for their implementation.
- DPIIT, under the Ministry of Commerce and Industry, is responsible for formulating and updating the FDI Policy, including issuing Press Notes and coordinating with other ministries.

7. What are the different routes through which a foreign investor (other than NRI or PIO) may invest in India?

At present (subject to prescribed caps or conditions), a foreign investor may invest in India through three routes, namely:

- Foreign direct investment, either under the automatic route or the approval route.

- Investment under the Portfolio Investment Scheme as a Registered Foreign Portfolio Investor subject to prior registration with Securities Exchange Board of India ("**SEBI**") in terms of the SEBI (Foreign Portfolio Investors) Regulations, 2019.

- Investment as a foreign venture capital investment, subject to prior registration with SEBI.

8. What are the different instruments available for investment in India under the FDI Policy?

FDI in India can be done by way of primary or secondary investments.

- **Primary Issuance:** An Indian company may issue permissible capital instruments under the FDI Policy to a non-resident investor. The permissible capital instruments are equity shares, fully, compulsorily and mandatorily convertible preference shares; fully, compulsorily and mandatorily convertible debentures; or share warrants.

- **Secondary Transfer:** Acquisition by way of transfer of existing permissible capital instruments: Non-resident investors can also invest in Indian companies by purchasing/acquiring existing permissible capital instruments from Indian shareholders or from other non-resident shareholders in the following manner:

  a. **Non-resident to resident and vice versa:** By way of gift or sale under private arrangement or sale on a recognised stock exchange (as per SEBI guidelines). Such transfers must comply with the prescribed sectoral caps, pricing guidelines, reporting requirements, minimum capitalization (where applicable), etc.

  b. **Non-resident to non- resident:** By way of sale or gift. government approval is not required for such transfers in sectors under the automatic route. However, approval is mandatory for transfers in sectors governed by the approval route.

  c. **Swap of capital instruments:** A non-resident may acquire capital instruments of an Indian company by way of a swap of capital instruments subject to certain valuation requirements being met. No approval, of the government will be required for swap of capital instruments where the Indian company is engaged in a sector where FDI is permitted without government approval.

9. What are the restrictions on the neighbouring countries to invest in India?

Under the press note 3 of 2023 ("**PN 3**"), the Government of India has mandated that any foreign investment by or from an entity of any country sharing land borders with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, requires prior approval from the Indian government. Further any subsequent changes in beneficial ownership (by way of direct or indirect transfers) of any existing or future foreign direct investment that would result in such beneficial ownership falling within the purview of aforesaid restriction would require prior approval from GOI. While the PN 3, or the extant foreign exchange laws do not provide any definition of the term 'beneficial ownership', however in practice and according to the undertakings sought by various authorized dealer banks (the "**AD Banks**"), a threshold of 10% ownership is commonly used to determine beneficial ownership under PN 3.

10. Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the capital instruments of an Indian entity?

Instrument / Mode of Acquisition	Applicable Pricing Norms
By way of issuance of equity instruments of the listed Indian company on a private placement basis	The price of capital instruments issued to a non-resident must not be less than the price determined in accordance with relevant SEBI guidelines.
By way of issuance of equity instruments of the unlisted Indian company on a private placement basis	The price of capital instruments issued to a non-resident must not be less than the fair valuation of capital instruments done by a SEBI registered merchant banker or a chartered accountant or a practising cost accountant as per any internationally accepted pricing methodology for valuation on an arm's length basis.
By way of subscribing to equity shares of newly incorporated company	Non-residents (including NRIs) can make investments in an Indian company at face value by way of subscription to its Memorandum of Association, so long as they are subject to entry route and sectoral cap compliance under FEMA along with the applicable provisions of the (Indian) Companies Act, 2013.
By way of right issue	By way of rights issue, existing non-resident shareholder can make investments in case of capital instruments of an unlisted company, at a price which is not less than the price at which the offer on rights basis is made to the resident shareholders.
Issuance of partly paid shares	Pricing of partly paid equity shares is to be determined upfront in accordance with the pricing norms discussed above. Further, 25% (twenty-five per cent) of the total consideration amount (including share premium, if any) must be received upfront. The balance consideration is required to be paid within a period of 12 (twelve) months.
Convertible capital instruments (for e.g., compulsorily and mandatorily convertible preference shares)	The price/conversion of convertible capital instruments can be determined upfront or be based on a conversion formula, which must be fixed upfront. At the time of conversion, the price must not fall below the fair value determined at the time of issuance. This valuation must follow an internationally accepted pricing methodology on an arm's length basis for unlisted companies and comply with the SEBI (Issue Capital and Disclosure Requirement) Regulations, 2018 for listed companies.

Instrument / Mode of Acquisition	Applicable Pricing Norms
Transfer from resident to non-resident:	The price of the capital instruments of an Indian company transferred by a resident in India to a non-resident shall not be less than: a. the price of capital instruments calculated as per any internationally accepted pricing methodology for valuation of capital instruments on an arm's length basis duly certified by a chartered accountant or a SEBI registered merchant banker or a practicing cost or chartered accountant, in case of an unlisted Indian company. b. the price worked out in accordance with applicable SEBI guidelines in case of a listed Indian company
Transfer from non-resident to resident:	Transfer of capital instruments by a non-resident to a resident must not be undertaken at a price which is more than the minimum price at which the transfer of capital instruments can be made from a resident to a non-resident (as enumerated above).

11. What is the position under the extant foreign exchange regulations in connection with the deferred consideration?

Under the applicable extant foreign exchange control regulations, a foreign investor is permitted to defer the investment amount without obtaining prior approval from the Reserve Bank of India, provided the deferred amount must not exceed 25% of the total consideration and must be paid within 18 months from the execution date of the transaction document. This deferred payment arrangement for downstream investment is also available in the case of foreign owned or controlled companies (FOCCs) as long as they meet the prescribed pricing norms and sector caps under the NDI Rules.

12. What are the applicable downstream regulations in India?

A foreign investor can invest in an Indian entity by acquiring equity instruments or capital, either directly or indirectly through another Indian entity. The indirect investment by a foreign investor through an Indian entity (where it has made foreign direct investment and the foreign investor owns or controls such Indian company) into the equity instruments of another Indian entity is known as downstream investment and such Indian entity in short is referred to as an "**FOCC**". Any investments by a FOCC should strictly adhere to entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign direct investments.

13. What is the pricing, reporting and deferred consideration norms applicable for downstream investment by a foreign owned and controlled Indian company (FOCC)?

As per Rule 23(1) of the NDI Rules, indirect foreign investment shall adhere to the pricing norms under the NDI Rules as applicable for foreign direct investment. Set out below is a brief snapshot of the pricing, reporting and deferred consideration norms applicable for downstream investment by the FOCC. Note that in certain areas where there is ambiguity, especially transfer between a FOCC In such cases, it is advisable to ascertain approval or clarification from the relevant Authorised Dealer (AD) bank, to ensure compliance and avoid regulatory hurdles

Seller/ Investor	Buyer/ Investee entity	Applicable pricing guidelines	Reporting requirements	Whether deferred consideration is permitted?
FOCC	Resident	Applicable	No Reporting	Yes
FOCC	Non-Resident	Not applicable	Form FC-TRS	Yes
Resident	FOCC	Applicable	Form DI	Yes
Non-resident	FOCC	Applicable*	Form FC -TRS/ Form DI	Yes
FOCC	FOCC	Not applicable	No reporting	Yes

** There is still some ambiguity re applicability of pricing guidelines where FOCC is the transferee, and a non-resident is the transferor. In such case, the position of the concerned AD Bank should be obtained before effecting the transfer. In absence of clarity, AD Banks take a position that the pricing norms shall apply in such case.*

14. What are the ECB norms in India?

Foreign investment in partially, optionally, or non-convertible preference shares, bonds, or debentures is treated as an ECB and is therefore subject to the applicable ECB regulations. The Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and Master Direction- External Commercial Borrowings, Trade Credits and Structured Obligations, 2019 (collectively "**ECB Norms**"). The key considerations with respect to ECB Norms include the minimum average maturity period, starting from 1 (one) year for manufacturing companies to 10 (ten) years for non-banking financial corporation on-lending for general corporate purposes, all-in-cost ceiling, permitted end-uses and restrictions.

15. What are the applicable reporting requirements to the RBI in case of "primary issuance" or "secondary transfer" of shares?

The RBI issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, which stipulates the mode of payment and attendant conditions for investment in India by a foreign investor. Presently, Reporting of Foreign investments is required to be done through the Single Master Form ("**SMF**") available on the Foreign Investment Reporting and Management System ("**FIRMS**") portal. Set out below is the brief snapshot of the relevant forms and responsible party to undertake the compliance:

Relevant transaction	Relevant form	Responsible party and relevant timeline
Reporting of issuance of equity instruments	Form FC-GPR	The Indian company issuing equity instruments; Within 30 days from the date of issue.
Reporting of transfer of equity instruments between an Indian resident and a foreign investor	Form FC-TRS	The resident transferor/ transferee; within 60 days of the transfer of equity instruments or receipt/remittance of funds, whichever is earlier.
Downstream investments by a FOCC	Form DI	FOCC has the responsibility to file the Form DI; within 30 days from the date of allotment of share to the FOCC.