ALLOTMENT OF SHARES TO A FOREIGN INVESTOR BY AN INDIAN COMPANY

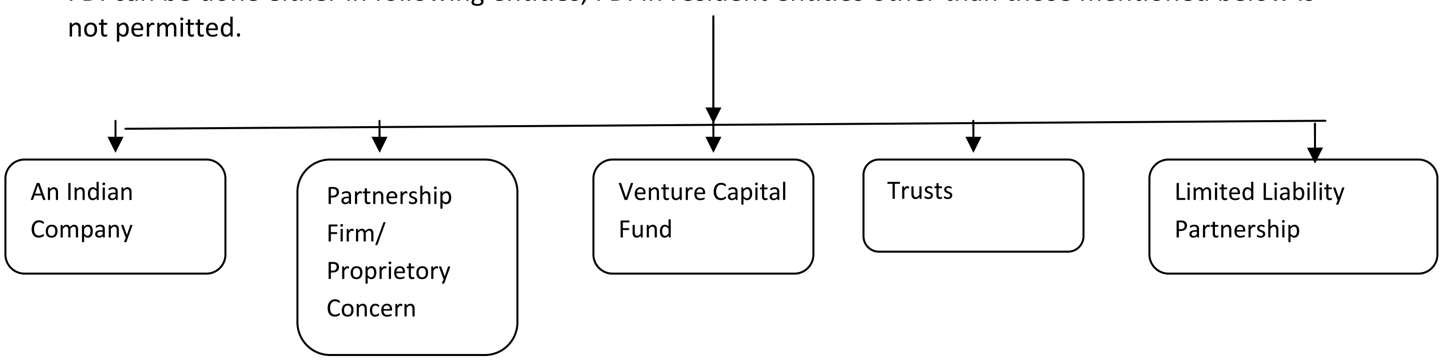
What is Foreign Direct Investment ('FDI') ?

'FDI' means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. FDI can be done by a non resident entity, non-resident person, Foreign Institutional Investor (FII), Foreign Portfolio Investor (FPI), Foreign Venture Capital Investor (FCVI), Qualified Foreign Investor.

For investing in India by a non-resident entity, only those sectors/activities which are not prohibited under the FDI Policy shall be considered. For eg: **FDI** is prohibited in Lottery Business, Gambling and Betting including casinos etc, Chit funds, Nidhi Company, Trading in Transferable Development Rights (TDRs), Real Estate Business or Construction of Farm Houses, Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes, Activities/sectors not open to private sector investment e.g. Atomic Energy and Railway Transport (other than Mass Rapid Transport Systems).

However, the policy has laid down certain restrictions/ limitations for investment proposed to be done by citizens of Bangladesh, Pakistan or an entity incorporated in Bangladesh, Pakistan.

FDI can be done either in following entities, FDI in resident entities other than those mentioned below is not permitted.



FDI in India Entities can be done against issue of Shares

Indian companies can issue securities like equity shares, fully, compulsorily and mandatorily convertible debentures and fully, compulsorily and mandatorily convertible preference shares and these shall be subject to pricing guidelines/valuation norms prescribed under FEMA Regulations.

Warrants and partly paid shares can be issued to person/(s) resident outside India only after approval through the Government route1.

Compliances to be done by an Indian company for allotment of shares to a foreign investor are as detailed below:

1. <u>Determination of Entry Route</u>

Investments can be made by a foreign investor either through the Automatic Route or the Government Route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment. Under the Government Route, prior approval of the Government of India (power delegated to Reserve Bank of India) is required. Proposals for foreign investment under Government route, are considered by Foreign Investment Promotion Board.

2. Determination of Caps on Investments/ Other Sector Specific Conditions

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The cap and other conditions applicable to the sector where investment is proposed to be made should be determined.

3. Convening of Board Meeting to approve issue of Shares

Indian Company shall issue a 7 day notice to convene a meeting of the Board of Directors to consider and approve the issue of shares to the non-resident. The Company shall also approve the Letter of Offer (in case the shares are proposed to be allotted on Rights Basis). In case shares of the Company are proposed to be allotted on Private Placement basis, the Board shall

- approve the Record of Private Placement in Form PAS-5,
- Letter of offer which shall be subject to approval of members in the General Meeting, and
- Notice of General Meeting to be held for approval of Letter of Offer in Form PAS-4 to be issued to the foreign investor.

Further, in case of Private placement, monies received on application shall be kept in a separate bank account in a scheduled bank and shall not be utilized for any purpose other than—

- for adjustment against allotment of securities; or
- for the repayment of monies where the company is unable to allot securities.

Further, in case of issue of shares on Preferential basis, special resolution shall be required to be passed by the shareholders of the company in a General Meeting.

4. Convening of General Meeting (in case of Private Placement & Preferential Allotment)

When General Meeting of the Company is held to issue shares on private placement or preferential allotment basis, the Company shall file necessary e-forms with the Registrar of Companies as mentioned below:

- Form MGT-14 for filing of Special Resolution passed in General Meeting.
- Form MGT-14 for issue of securities (not applicable in case of Private Companies)
- For GNL-2 for filing Form PAS 5 along with Form PAS-4 (Applicable only in case of Private Placement)

5. Receipt of Foreign Remittance

Foreign Investor shall on receipt of Letter of Offer may either accept, decline or renounce the offer. Where the offer is accepted, foreign investor shall proceed with submitting a signed application for subscribing the shares offer. It shall then remit the amount of consideration required to be paid to an Indian Company for issue of shares. There are various modes of payment like inward remittance through normal banking channel, debit to NRE/ FCNR Account, debit to non-interest bearing Escrow account etc.

On receipt of foreign remittance by the Authorised Dealer Bank ('AD Bank') of the Indian Company, process for obtaining the Foreign Inward Remittance Certificate ('FIRC') shall be initiated by the Indian Company.

6. Submission of Advance Reporting Form to RBI

On receipt of foreign investment, the Indian Company shall report the details of the amount of consideration received to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the Advance Reporting Form prescribed by RBI as **Annexure-5** together with copy/ies of the FIRC/s evidencing the receipt of the remittance, KYC report (prescribed by RBI as **Annex-6**) of the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, who will allot a Unique Identification Number (UIN) for the amount reported.

7. Convening of Board Meeting to approve Allotment of Shares

Company shall allot its securities within 60 days (180 days as per FEMA Act, 1999, stricter term shall prevail) from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day.

8. Post Allotment Compliances

a) After allotment of shares, the Indian company shall file Return of Allotment in e-Form PAS-3 with Registrar of Companies within 30 days from the date of allotment.

b) Further, the Company shall submit Form FC-GPR (prescribed by RBI) to Regional Office concerned of the Reserve Bank within 30 days from the date of allotment of shares.

Form FC-GPR shall be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank and following documents shall be submitted along with the form:

i. A certificate from the Company Secretary of the company certifying that:

ii. A certificate from SEBI registered Merchant Banker or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

It is to be noted here that in the current scenario, companies can file various Forms under Foreign Exchange Management Act, 1999 through an online Platform named as eBiz by simply registering themselves on its website www.ebiz.gov.in. The forms in this case shall be required to be digitally signed by the director.

c) Issue of Share Certificate/ Demat of shares by filing of Corporate Action Form.

In case shares are issued in physical Form, Company shall issue the share certificate to the shareholder within 2 months from the date of allotment.

In cases where shares are issued in dematerialized form, Corporate Action Form for credit of shares allotted shall be submitted with concerned Depository & Registrar & Transfer Agent.

d) Updation of Register of Members & Register of share Application & Allotment