POLICY ON FOREIGN DIRECT INVESTMENT

India has among the most liberal and transparent policies on FDI among the emerging economics FDI up to 100% is allowed under the automatic route in all activities/ sectors expect the following which require prior approval of the government:

1) Manufacture of Cigars & Cigarettes of tobacco and manufactured tobacco substitutes
2) Manufacture of Electronic aerospace and defense equipments: all types
3) Manufacture of items exclusively reserved for Small Scale with more than 24% FDI

PROCEDURE UNDER AUTOMATIC ROUTE

FDI in sectors/ activities to the extent permitted under automatic route does not require any prior approval either by the Government or RBI. The investors are only required to notify the Regional office concerned of RBI within 30 days of receipt of inward remittances and file the required documents with that office within 30 days of issue of shares to foreign investors.

PROCEDURE UNDER GOVERNMENT APPROVAL

FDI in activities not covered under the automatic, requires prior Government approval. Such proposals are considered by the Foreign Investment Promotion Board (FIPB).
Application for all FDI cases, except Non- Resident Indian (NRI) investments. Export Oriented Units (EOUs) and for FDI in retail trading (single branded product) should be submitted to the FIPB unit, Department of Economic Affairs (DEA), Ministry of Finance.

Application for NRI investment, EOU and for FDI in retail trading (single branded product) cases should be submitted to SIA in DIPP.

Application can also be submitted with Indian Missions abroad who forward them to the DEA for further processing.

Application can be made in Form FC-IL, which can be downloaded from http://www.dipp.gov.in Plain paper applications carrying all relevant details are also accepted. No fee is payable.

PROHIBITED SECTORS

The extant policy does not permit FDI in the following cases:

1) Gambling and betting
2) Lottery Business
3) Atomic Energy
4) Retail Trading (except single Branded product retailing)

INVESTMENT IN A FIRM OR A PROPRIETARY CONCERN BY NRIs

A Non- Resident Indian (NRI) or a Person of Indian Origin (PIO) resident outside India may invest by way of contribution to the capital of a firm or a proprietary concern in India or non- repatriation basis provided.

1) Amount is invested by inward remittance or out of NRE/ FCNR/ NRO account maintained with Authorized Dealer (AD).
2) The firm or proprietary concern is not engaged in any agricultural/ plantation or real estate business i.e. dealing in land and immovable property with a view to earning profit or earning income there from.
3) Amount invested shall not be eligible fro repatriation outside India.

NRIs/ PIO may invest in sole proprietorship concerns/ partnership firms with repatriation benefits with the approval of Department of Economics Affairs, Government of India/ RBI

ISSUE AND VALUATION OF SHARES IN CASE OF EXISTING COMPANIES

According to RBI/ Securities and Exchange Board of India's (SEBI) guidelines, in case of listed companies, the issue price shall be either at:

a) The average of the weekly high and low of the closing prices of related shares quoted on the stock exchange during the six months preceding the relevant date, or
b) The average of the weekly high and low of the closing prices of related shares quoted on the stock exchange during the two weeks preceding the relevant date.

The stock exchange referred to is the one at which the highest trading volume in respect of the share of company has been recorded during the preceding six months prior to the relevant date.

The relevant date is the date thirty days prior to the date on which the meeting of the General Body of the shareholder is convened.

In all other cases a company may issue shares as per the RBI regulation in accordance with the guidelines issued by the erstwhile Controller of Capital Issues.

Other relevant guidelines of SEBI/ and RBI, including the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, wherever applicable, would need to be followed.

ISSUE OF RIGHTS/ BONUS SHARES

General permission of the RBI is available to Indian companies to issue right/ bonus shares, subject to certain conditions. Entitlement of right shares is not automatically available to investors who have been allotted such shares as Overseas Corporate Bodies (OCBs). Such issuing companies would have to seek specific permission from RBI. Foreign Exchange

Department, Foreign Investment Division, Central Office, Mumbai for issue of shares on right basis to erstwhile OCBs.

ISSUE OF SHARES UNDER MERGER/ AMALGAMATION

Where a Scheme of merger or amalgamation of two or more Indian companies has been approved by a court in India, the transferee company may issue shares to the shareholders of the transferor company resident outside India, subject to ensuring that the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the percentage specified in the approval granted by the Central Government or the Reserve Bank of India. This entitlement of rights shares is not automatically available to investors who have been allotted such shares as OCBs. For this specific permission from RBI is necessary.

ISSUE OF SHARES UNDER ESOP SCHEME

Under this Scheme a company may issue shares to the employees or employees of its joint venture or wholly owned subsidiary abroad who are resident outside, directly or through a Trust, subject to the condition that the scheme has been drawn in terms of relevant regulations issued by the SEBI and face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5% of the paid-up capital of the issuing company.

TRANSFER OF SHARES/ DEBENTURES

Transfer of shares in the following categories of cases is allowed under automatic route:

a) Transfer of shares from resident to non-resident including acquisition of shares in an existing company subject to sect oral policy on FDI where approval of RBI/ SEBI/ IRDA is required and also subject to prescribed pricing guidelines.

b) Conversion of ECB/ Loan into equity provided the activity of the company is covered under automatic route, the foreign equity after such conversion falls within the sectoral cap and also complies with prescribed pricing guidelines.
c) Cases of increase in foreign equity participation by fresh issue of shares as well as conversion of preference shares into equity capital provided such increase within the sectoral cap in the relevant sectors, are within the automatic route and also comply with prescribed pricing guidelines.

General permission of the RBI has been granted to non-residents/ NRIs for transfer of shares and convertible debentures of an Indian company as under:

1) A person resident outside India (Other than NRI and OCB) may transfer by way of sale or gift shares or convertible debentures to any person resident outside India (including NRIs); provided transferee has obtained prior permission of SIA/ FIPB, in terms of Press Note No. 1 (2005 Series) to acquire the shares if he has an existing venture or tie-up in India in the same field in which the Indian company whose shares are being transferred is engaged.
2) NRI or OCB may transfer by way of sale or gift the shares or convertible debentures held by him or it to another non-resident Indian; provided transferee has obtained prior permission of Central Government in terms of Press Note No.1 (2005 Series) to acquire the shares if he has an existing venture or tie-up in India in the same field in which the Indian company whose shares are being transferred, is engaged.
3) The person resident outside India may transfer any security to a person resident in India by way of gift.
4) A person resident outside India may sell the shares and convertible debentures of an Indian company on a recognized Stock Exchange in India through a registered broker.

ADR/ GDR

An Indian corporate can raise foreign currency resources abroad through the issue of American Depository Receipts (ADRs) or Global Depository Receipts (GDRs) by issuing its Rupee denominated shares to a person resident outside India being a depository for the purpose of issuing Global Depository Receipts (GDRs) and or American Depository Receipts (ADRs), subject to the conditions that:

b) The ADRs/ GDRs are issued in accordance with the scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Central Government there under from time to time.
c) The Indian company issuing such shares has an approved from the Ministry of Finance, Government of India to issue such ADRs and or GDRs or is eligible to issue ADRs/ GDRs in terms of the relevant scheme in force or notification issued by the Ministry of Finance, and
d) Is not otherwise ineligible to issue shares to person's resident outside India in terms of these Regulations.

There is no limit up to which an Indian company can raise ADRs/ GDRs. However, the Indian company has to be otherwise eligible to raise foreign equity under the extant FDI policy.

There are no end-use restrictions on GDR/ ADR issue proceeds, except for an express ban on investment in real estate and stock markets.

The FCCB issue proceeds need to conform to external commercial borrowing end use requirements. In addition, 25 per cent of the FCCB proceeds can be used for general corporate restructuring.

A company engaged in the manufacture of items covered under Automatic route, whose direct foreign investment after a proposed GDRs/ ADRs/ FCCBs issue is likely to exceed the equity limits under the automatic route, or which is implementing a project falling under Government approval route, would need to obtain prior Government clearance through FIPB before seeking final approval from the Ministry of Finance.

FOREIGN CURRENCY CONVERTIBLE BONDS (FCCB)

FCCBs are issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme 1993, and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part, on the basis of any equity related warrants attached to debt instruments.

The eligibility for issue of Convertible Bonds or Ordinary Shares of Issuing Company is as under:

a) An issuing company desirous of raising foreign funds by issuing Foreign Currency Convertible Bonds or Ordinary shares for equity issues through Global Depositary Receipt
b) Can issue FCCBs up to US$ 50 Million under the Automatic route
c) From US$ 50- 100 Million, the companies have to take RBI approval
d) From US$ 100 Million and above, prior permission of the Department of Economics Affairs is required.

PREFERENCE SHARES

Foreign investment means investment in the capital of an Indian company and capital means equity shares, preferential shares and convertible debentures

- Foreign investment through preference shares is related as Foreign Direct equity for the purposes of sectoral caps on foreign equity, where such caps are prescribed, provided they carry a conversion option. Preference shares structured without such conversion option fall outside the foreign direct equity cap

- Considered as part of the share capital and fall outside the External Commercial Borrowing (ECB) guidelines/ cap

The route, whether Automatic or Government approval depends upon the activity/ sector of the company.
The Duration of conversion shall be as per the maximum limit prescribed under the Companies Act or what has been agreed to in the shareholders agreement, whichever is less.
The dividends rate would not exceed the limit prescribed by the Ministry of Finance.
Issue of preference shares should conform to the guidelines prescribed by the SEBI and RBI and other statutory requirements.

FDI IN SSI UNITS

A small scale unit cannot have more than 24 per cent equity in its paid up capital from any industrial undertaking, either foreign or domestic. If the equity from another company (including foreign equity) exceeds 24 per cent, even if the investment in plant and machinery in the unit does not exceed Rs 10 million, the unit looses its small-scale status and shall require an industrial license to manufacture items reserved for small-scale sector. FDI in such units would require prior Government Approval if the FDI exceeds 24%.

FDI INFLOWS ON ACCOUNT OF IMPORT PAYABLES

FDI inflows are required to be under the following mode:

1) By inward remittances through normal banking channels or
2) By debt to the NRE/ FCNR account of person concerned maintained in an authorized dealer/ authorized bank.

Issue of equity to non-residents against other modes of FDI inflows or in kind is not permissible, except issue of equity shares against lump-sum fee and royalty payable for technology collaborations and external commercial borrowings (ECBs) in convertible foreign currency which are permitted under the automatic route subject to meeting all applicable tax liabilities and sector specific guidelines.

D-19 (GF) & D- 31, South Extension -1, New Delhi-110049, India
email: g.khurana@indialawoffices.com, website: www.indialawoffices.com