

## Ensuring Legal Compliance: A Foreign Investor's Guide to India

### Introduction

The Indian economy has attracted significant global investment due to its phenomenal growth rate, increasing number of consumers, and continuing efforts to liberalise. However, considerably more attention needs to be given to regulatory compliance, as well as to the procedural requirements associated with investing in India than with any other developing nation. Understanding FDI guidelines will ensure successful **investment in India**.

### Understanding the FDI Policy Framework

The Government of India sets all rules for FDI via the Foreign Exchange Management Act (FEMA); it is the responsibility of the Department for Promotion of Industry and Internal Trade, part of the Ministry of Commerce and Industry (DPIIT) to establish these policies. In addition to providing guidelines for FDI in the various sectors, the policy has also been developed to clarify the various stages and pathways that an investor may need to take to secure an investment.

### Sectorial Cap Compliance

In India, each sector has set **Foreign Direct Investment** (FDI) caps that limit the number of foreign ownership percentages allowed. While many sectors allow for 100% FDI under the automatic route, some strategic sectors, such as defence, insurance, banking, and broadcasting, have limits and/or other prescribed conditions. Many restrictions exist for real estate, print media, and multi-brand retail industries, too. It is the responsibility of the investor to ensure that its proposed capital structure complies with all sectorial caps, and that the sector has any performance-linked conditions or minimum capitalisation requirements that must be met.

### Selection of Entry Structure

Foreign investors must select an appropriate structure for entering the Indian marketplace. The most common are wholly owned subsidiary, joint venture, liaison office, branch office, and project office. Each has its own unique benefits, disadvantages, and compliance requirements. Wholly owned subsidiaries may provide maximum operational flexibility; joint ventures can provide local market knowledge; liaison offices can only perform representative functions and cannot create revenue; and branch and project offices serve limited purposes as stated within their respective mandates. The structure selected will have significant implications for taxation, profit repatriation, and regulatory compliance.

### Corporate Registration and Documentation

When foreign investors have established the entry strategy, they must complete the corporate registration requirements with the Ministry of Corporate Affairs, including obtaining a Director Identification Number (DIN) for each director, obtaining Digital Signature Certificates (DSC), getting a name approval and formal incorporation by submitting the SPICe+ form. The Reserve Bank of India (RBI) must be notified of foreign companies that will be registered in India through the Foreign Liabilities and Assets (FLA) return system. Additionally, the Memorandum and Articles of Association and any relevant shareholder or board resolutions must comply with the Companies Act of 2013.

### Licenses and Approvals

In addition to completing the basic steps for incorporating a foreign-based company, foreign investors must apply for the required licenses and approvals based on the specific industry in which they intend to operate in India. Examples, environment clearances, industry-specific licenses or permits, Import-Export Codes (IEC), Goods and Services Tax (GST) registrations, Professional Tax registrations, and any necessary approvals from state/territorial governments. In many cases, the nature of the business activities that a foreign investor is planning to engage in may require the investor to obtain specialized licenses or approvals from various sectorial regulators, including the Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority (IRDAI), or the Telecom Regulatory Authority of India (TRAI).

### **Tax Registration and Planning**

As a tax resident of India, foreign investors are required to apply for and obtain both a Permanent Account Number (PAN) and Tax Deduction and Collection Account Number (TAN) from the Income Tax Department of India. Knowledge of India's Income Tax Structure is needed to develop an efficient tax strategy. Examples of the types of taxation included in the Indian tax system include Corporate Income Tax, Goods and Service Tax, Withholding Taxes, and Transfer Pricing. Foreign investors should ensure that when conducting business in India, they take advantage of India's Double Taxation Avoidance Agreements (DTAAs) that exist with many other countries to minimize their tax liabilities when operating in India. Foreign investors should evaluate the possibility that their compliances under Special Economic Zones and other Government Schemes may result in tax incentives or exemptions.

### **Intellectual Property Protection**

Foreign investors need to protect their stock in trade as well as their intellectual property rights (IPR) while doing business in India and bringing their proprietary technologies, brands, and processes to India. It is necessary for foreign investors to file their trademarks, patents, copyrights, and designs with the relevant Indian authorities. Any agreement for technology transfer, licensing, or know-how must comply with all applicable Indian Laws and Foreign Direct Investment regulations. When structuring IPR transactions, foreign investors should assess the arm's length price of the transaction to ensure compliance with the arm's length standard and reduce the risk of disputes related to Transfer Pricing.

### **Employment and Labour Compliance**

India's labour laws have different levels of complexity across states, and compliance with these laws is an important factor to consider when hiring employees in India. Foreign investors need to know what the minimum wage laws are as well as what the laws regarding the provident fund, employee state insurance, gratuity, bonus payments and workplace safety are in India, as well as all the different regulations that apply to those areas. The total number of labour codes in India is in the process of being reduced, so foreign investors should take care to monitor new labour codes as they are put into place in each state in India. Foreign investors also need to understand how to find and hire talent in India, as well as how to employ expatriates, and the regulations regarding obtaining a visa to work in India.

### **Foreign Exchange Management**

Every foreign investment that comes into India must be compliant with the regulations stipulated by FEMA (Foreign Exchange Management Act) regarding the payment of inward remittances, pricing guidelines, reporting requirements, and the repatriation of profits and dividends. Investments must also be made through normal banking channels, and specific documentation must be submitted to the Reserve Bank of India (RBI). Foreign investors should adhere to the pricing guidelines, including the guidelines related to issues and transfers of shares, in order to avoid complications with regulatory

agencies. Foreign investors should establish adequate systems to meet FEMA compliance and have periodic reports prepared.

### **Exit Strategy and Dispute Resolution**

Identifying the exit methods before making an investment creates strategic options. Before entering into a foreign investment, where investors must follow India's regulatory framework for share transfer; buy back of equity, reducing paid up capital; wind up procedures and other associates documents; Foreign Investors should also understand the plethora of options available to dispute resolution in India; i.e. Civil Courts, or Arbitration and Tribunals. **International arbitration** clauses are frequently used by investors, and these types of clauses will be enforced in India under the Indian Arbitration and Conciliation Act.

### **Conclusion**

So while there are excellent opportunities for making a foreign investment, a well-structured legal and regulatory environment are necessary for success. To ensure investors make a wise, informed decision relative to their investments, it is highly recommended to utilize a qualified professional with legal and financial expertise related to India to assist investors through the complexities of the Indian marketplace and to create the foundation for the long-term success of their investments.