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REVIEW OF THE EXISTING FOREIGN DIRECT INVESTMENT POLICY ON WARRANTS AND PARTLY PAID SHARES

The Department of Industrial Policy and Promotion, Government of India vide press note 9 dated September 16, 2015 ("**Press Note**") amended the definition of 'capital' and also added paragraph 3.3.3 in the Consolidated Foreign Direct Investment Policy Circular of 2015 ("**FDI Policy**"). This amendment would now make it possible for persons resident outside India to acquire warrants and partly paid shares.[1]

Prior to this Press Note, the FDI Policy had provided though a note appended to the definition of 'capital' that warrants and partly paid shares could be issued to persons resident outside India only after approval through the government route. With this amendment, prior permission of the government shall not be required for receipt of investments by subscribing to warrants and partly paid up equity shares in sectors where foreign direct investment is allowed under the automatic route. However, the issue of preference shares and convertible debentures will have to be fully paid and mandatorily and fully convertible.

The issue of share warrants and partly paid up equity shares shall however continue to be subject to the conditions stipulated by the Reserve Bank of India.[2] Accordingly, the pricing of the partly paid equity shares has to be determined upfront and 25% of the total consideration amount (including share premium, if any), has to be received upfront. The balance consideration towards fully paid equity shares has to be received within a period of 12 months. The time period for receipt of the balance consideration within 12 months is not required to be complied with in case of a listed entity where the issue size exceeds rupees five hundred crore and the issuer complies with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 regarding monitoring agency. Similarly, in case of an unlisted Indian company, the balance consideration amount can be received after 12 months where the issue size exceeds INR 500 crores (Indian Rupees five hundred crores). However, the investee company also has to appoint a monitoring agency on the same lines as required in case of a listed Indian company under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

1. Press Note 9 by the Department of Industrial Policy and Promotion, Government of India: http://dipp.nic.in/English/acts_rules/Press_Notes/pn9_2015.pdf (Retrieved on September 16, 2015)

2. RBI circular no. RBI/2014-15/123 A.P. (DIR Series) Circular No.3 dated July 14, 2014: https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/03NPR30714FS.pdf (Retrieved on September 19, 2015)

The reporting of issue or transfer of partly paid shares has to be made in form FC-GPR and form FC-TRS respectively, to the extent the equity shares are called up. As for the warrants, the pricing and conversion formula shall be determined upfront and 25% of the consideration amount shall also be received upfront. The balance consideration towards fully paid up equity shares shall be received within a period of 18 (eighteen) months. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such warrants, in accordance with the regulations made under Foreign Exchange Management Act, 1999 and the pricing guidelines stipulated by Reserve Bank of India from time to time. However, there are no special or additional restrictions on transfer of these instruments.

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This decision was under consideration with the Department of Industrial Policy and Promotion for sometime now as evidenced by the footnote to the definition of "capital" under the FDI Policy. This amendment to the FDI Policy could aid alternative structuring of foreign investments by way of issuance of these instruments and is another step towards promotion of foreign investment into India that would boost the inflow of investments and serve as a catalyst to encourage FDI. However, the company issuing warrants or paid-up shares needs to ensure that FDI sectoral caps are not breached even after the shares get warrants or fully paid-up get converted into fully paid equity shares.

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