

**Buyers cannot necessarily negotiate a low-ball price—the purchase price cannot be lower than “fair value.”** Under a rule in India that affects acquisitions, the purchase price cannot be lower than the “fair valuation” of the shares in accordance with Indian valuation guidelines. Reserve Bank of India regulations provide that the price of unlisted shares transferred by a sale from an Indian resident to a non-resident shall not be less than the fair valuation of the shares as certified by a chartered accountant and in accordance with certain “controller of capital” guidelines.

**In scouting distressed companies, be aware of potential “asset stripping” approvals.** India’s Board for Industrial and Financial Reconstruction (BIFR) must approve the acquisition of what are known as “sick” companies. This designation can apply to a company whose accumulating losses has led to a reduction by more than 50% of its net worth over a specified time period. Thus, consider whether a BIFR approval may be required as part of the acquisition process.

**In a share purchase deal, there are advantages to purchasing shares from an offshore shareholder.** If automatic approval does not apply for the sector under consideration and additional Indian approvals are required for a foreign investment, these would not apply to a foreign investor’s purchase of shares in an Indian company which are already held by an existing foreign shareholder. Moreover, the “fair valuation” determination note above is not required – the requirement applies to a transfer by an Indian resident to a non-resident, not a transfer between two non-residents (one foreign investor to another). For an asset purchase, on the other hand, a foreign investor would need to establish an Indian company to purchase the assets—this would require approval as a new foreign investment if the investment does not otherwise qualify for automatic approval.

**For both share and asset deals, consider investing through an offshore entity.** In addition to avoiding potential foreign investment approvals, such a transfer of shares from one non-resident shareholder to another may later limit capital gains taxes that would apply to the increase in value of the shares. This is an important factor for the many foreign investors who invest in India through an offshore entity in Mauritius, Singapore or another jurisdiction which has favorable tax treaties with India. Without tax treaty benefits, a sale of the shares in a private Indian company would be subject to a tax of more than 20% if the shares are held for more than 1 year and more than 30% if held for less than 1 year. However, using Mauritius as an example, if a US company first establishes a Mauritius company which in turn makes the investment in an Indian company, the Indian tax rate would be reduced to zero on such a gain. Also, if the buyer intends to finance the deal using overseas debt, interest payments on the debt will not be subject to a withholding tax if paid to a Mauritius bank. Such offshore entity considerations are not unique to India—US investors should also evaluate such approval, capital gains and withholding tax factors in structuring their investments in China and many other countries.

**Keep in mind that many Indian privately-held companies are family-owned.** Family ownership is a factor to be taken into account in Indian acquisition planning, though with uncertain impact. While private equity investors have often been forced to settle for a minority equity interest in Indian family-owned companies, in other cases it may be relatively easy to negotiate a 100% purchase of a family-owned company.

## Conclusion and Practical Implications for US Buyers of Indian Companies

Yes, the Indian regulatory environment may still have its challenges, though most US mid-market companies will find that they are able to acquire the stock or assets of Indian companies with limited Indian investment restrictions. Yet, it is important to look beyond the overall foreign investment restrictions in India as well as in other target countries. For example, a US buyer will encounter issues such as stamp duties, the use of offshore entities and “fair value” determinations that may not make the big-picture headlines (or even be among the thoughtful overview comments in Chairman Greenspan’s next book) but are critical in shaping how an acquisition in India will be structured and implemented.

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