

Hyderabad Branch of SIRC of The Institute of Chartered Accountants of India

Foreign Direct Investments in India - FEMA

Webinar Presented by:
Mr. Paresh P. Shah

P.P. Shah & Associates
Chartered Accountants
Email: ppshahandassociates@gmail.com



Overview

- FEMA Practice (History of FDI, Rationale & Current Status)
- Key definitions
- Foreign Exchange Management (Non Debt-Instruments) Rules, 2019
- Schematic Representation for Inbound Investment & Schedules for Foreign Investment
- Regulations for Inbound Investments
- Schedule 1 - Prohibited Sectors
- Schedule 1 (FDI) – Automatic Route, conditions & sectoral policies
- FDI Approval Route
- Transfer of Equity instruments
- Reporting requirements
- Downstream Investments
- Schedule 4 – Investments by NRIs / OCIs on non-repatriation basis
- Schedule 6 – Investment in LLP
- Schedule 7 – Investment by Foreign Venture Capital Investors (FVCI)
- Schedule 8 – Investment Vehicles (Alternate Investment Funds (AIF))
- FDI Policy – Practical Issues
- FDI Policy – Select sectors
- Acquisition & Transfer of Immovable Properties



Abbreviations

Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules),
Authorised Dealer (AD),
Capital Account transaction (CAP),
Current Account Transaction (CAT),
Foreign Exchange (FE),
Government of India (GOI) ,
Notification No. (Notf.),
Person Resident Outside India (PROI),
Person Resident in India (PRII),
Reserve Bank of India (RBI),
Non-repatriable basis (NRB)
Repatriable basis (RB)
Subject to (SBT)

Evolution of FDI

Pre 1991 – FDI policy put severe restrictions on foreign investment. Limiting foreign equity share up to 40 %

Post 1991 – FDI allowed in 35 sectors up to 51%

Post 1996 – Up to 50%/51%/74%/100% allowed in 111 sectors. FIPB was constituted

Post 2000 – Up to 100% permitted in all sectors except for a small negative list. Insurance & Defence sectors were opened up

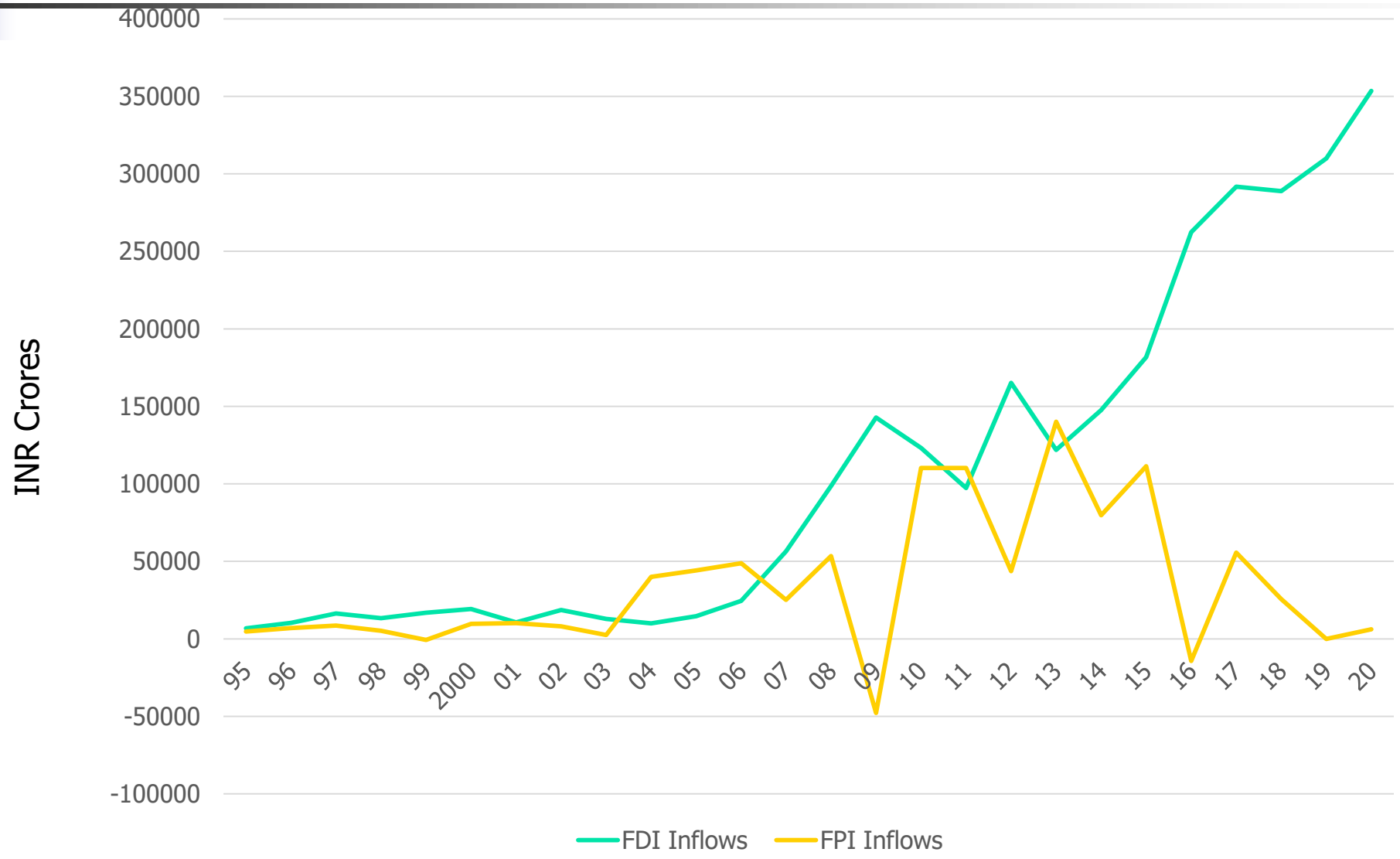
Post 2014 – Consolidated FDI policy 2016, Make in India. FIPB was abolished in 2017 & new SOP issued for Govt approval. Application to be done on Foreign Investment Facilitation Portal (fifp.gov.in)



Recent FDI announcements

- In May 2020, private equity (PE) firm Vista Equity Partners announced investment of Rs 11,367 crore (US\$ 1.61 billion) in Jio Platforms for a 2.32 per cent stake.
- In May 2020, PE firm Silver Lake announced investment of Rs 5,655.75 crore (US\$ 802.35 million) into Jio Platforms for 1.15 per cent stake.
- In April 2020, Facebook, Inc. announced an investment of Rs 43,574 crore (US\$ 5.70 billion) into Jio Platforms for 9.99 per cent stake.
- In January 2020, Amazon India announced investment of US\$ 1 billion for digitising small and medium businesses and creating one million jobs by 2025.
- In January 2020, Mastercard announced its plans to invest up to US\$ 1 billion in India over the next five years to double its research and development effort in the Indian market.
- In October 2019, French oil and gas giant, Total S.A., acquired 37.4 per cent stake in Adani Gas Ltd for Rs 5,662 crore (US\$ 810 million), making it the largest FDI in India's city gas distribution (CGD) sector.
- In August 2019, Reliance Industries (RIL) announced one of India's biggest FDI deals with Saudi Aramco to buy a 20 per cent stake in Reliance's oil-to-chemicals (OTC) business at an enterprise value of US\$ 75 billion.

FDI & FPI Inflows (1995 to 2020)

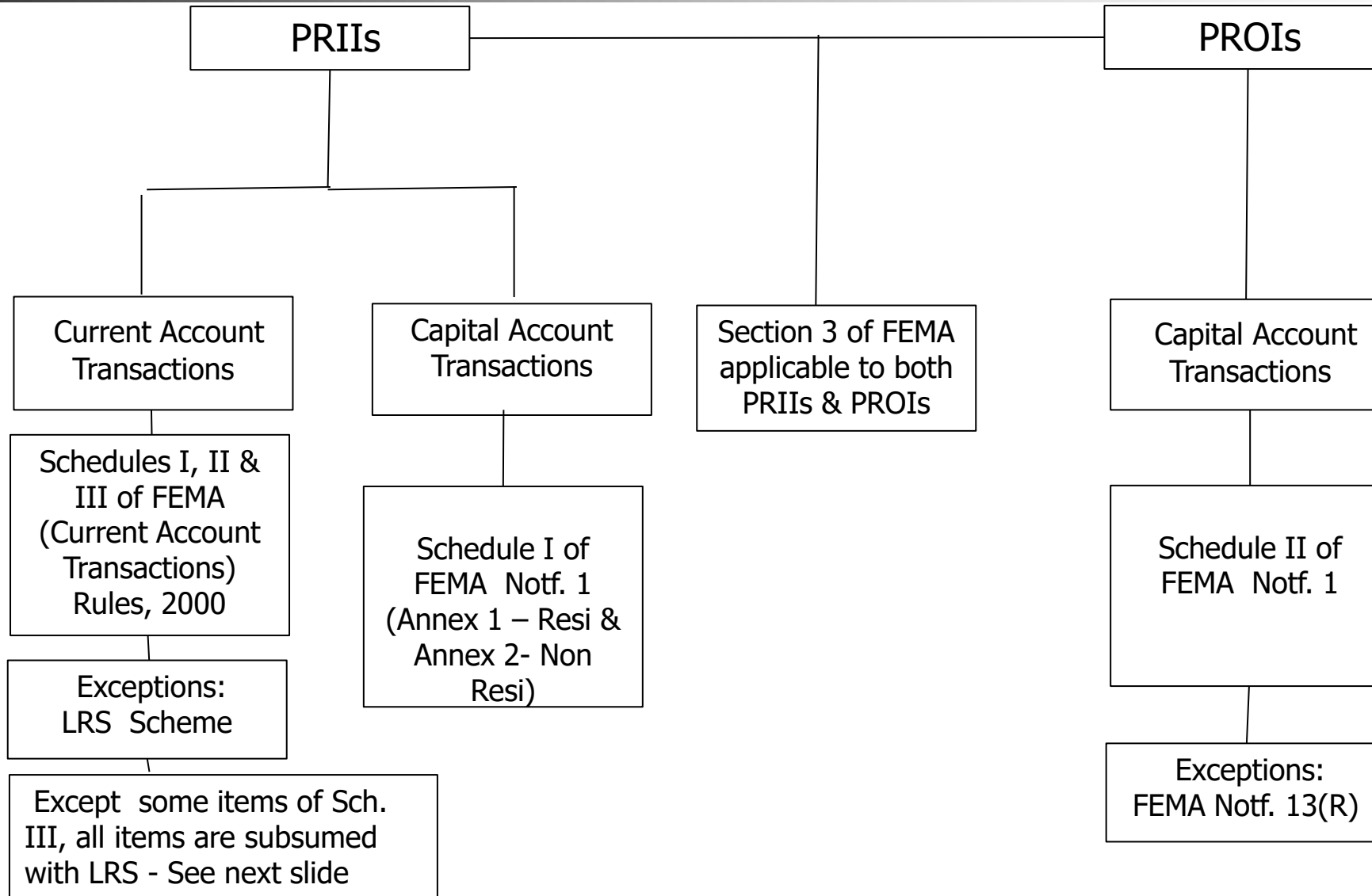




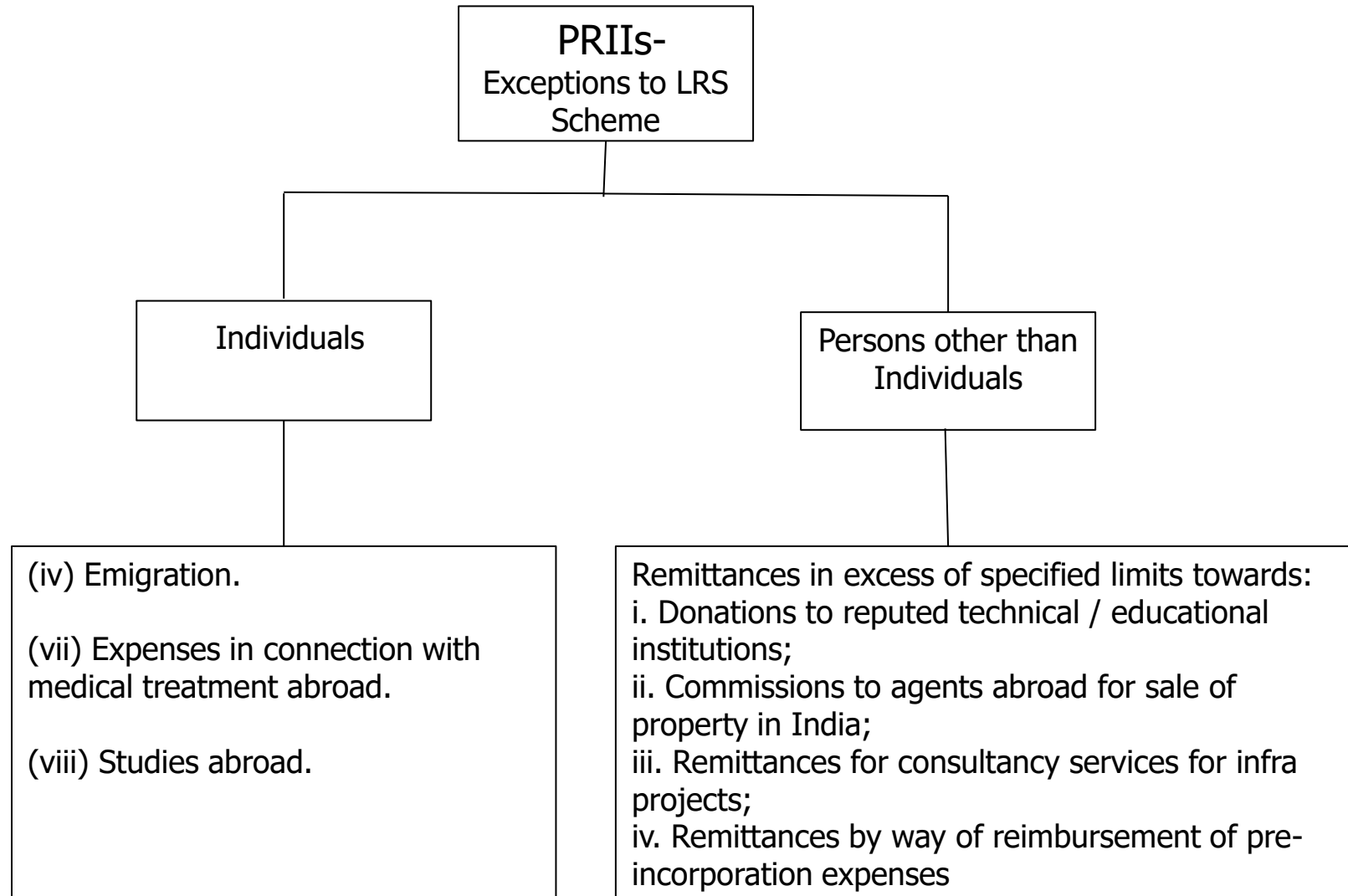
Foreign Direct Investment in India

- Regulatory & Legal Framework
Industrial Development (Regulation) Act, 1951 & FEMA 1999
- Overall Policy of Government, mainly focusses on
 - Public Sector
 - Compulsory Licensing
 - Erstwhile Small Scale Sector – Micro, Small & Medium Enterprises (Development) Act, 2006.
 - Locational Restrictions
- Priorities –FDI and Portfolio
- Prohibitions.
- Consolidated FDI policy, Sector Specific Guidelines (Sch. 1 Foreign Exchange Management (Non-debt Instruments) Rules, 2019), Automatic route & Procedures
- FEMA provides for Rules/ modes of investment, manner of receipts, Valuations and reporting procedures.

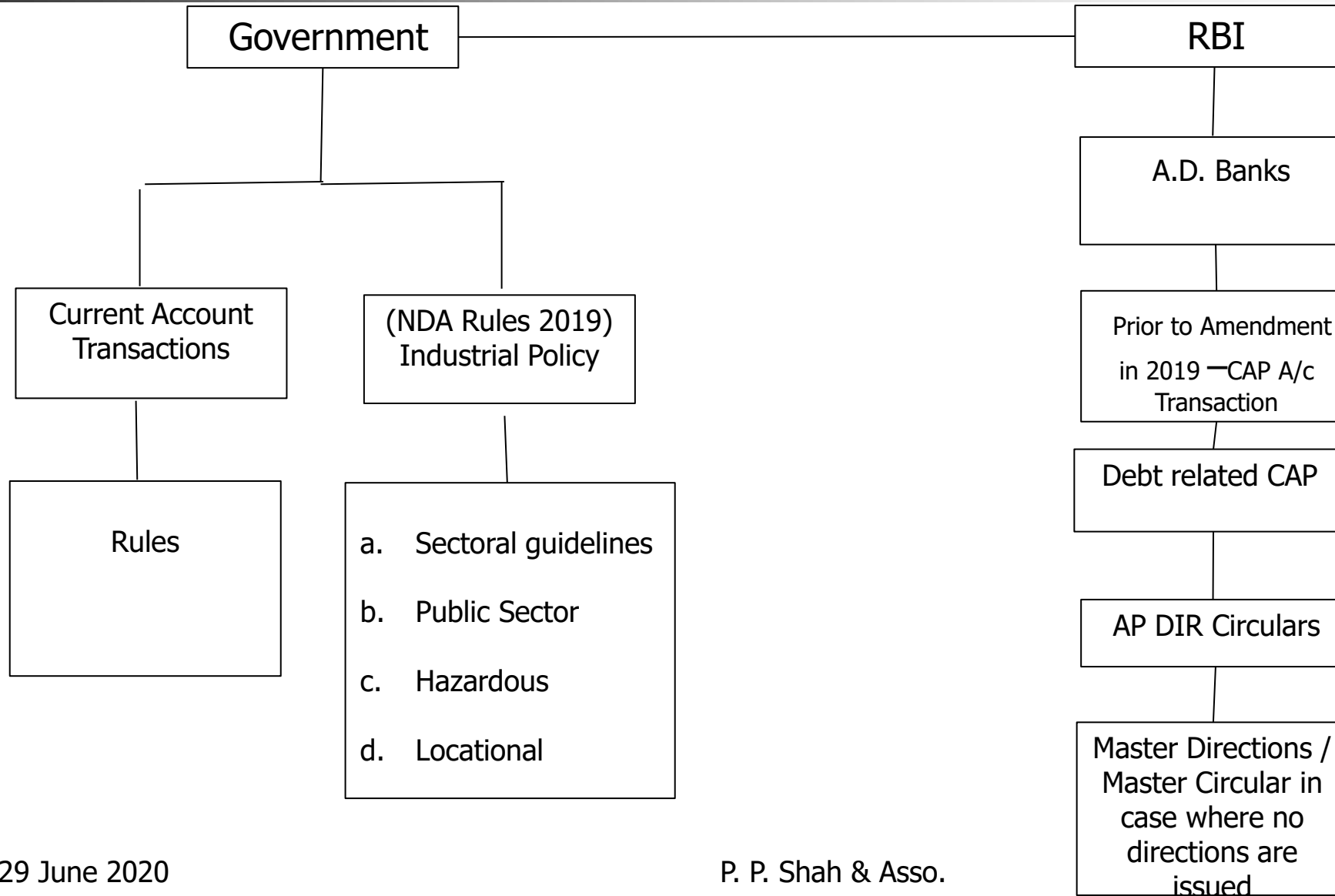
FEMA Practice



FEMA Practice



FEMA Practice



FEMA Practice

	PROI		
	Foreign Citizen	NRI	Other entities
Deposit- Notf.5(R) –Banking Accounts of PROI plus few cases in Notf. 10(R)	[Can open for limited purpose as mentioned in Notf.5(R) & 10(R)]	√ [Notf.5(R)]	√ [Notf.10 (R)]
Branch /Liaison - Notf. 22(R)	NA	NA	Prior approval through AD √ [except citizen of 8 countries]
Project office	NA	NA	Auto Route with conditions except 7 citizens
Immovable property in India- Foreign Exchange Management (Non-debt Instruments) Rules, 2019	X	√	√ [For branch, office or other place of business for carrying on in India any activity, excluding a liaison office]

FEMA Practice

	PROI		
	Foreign Citizen	NRI's	Other entities
Partnership business in India- Notf.24 [Now subsumed under Ntf. 20(R) w.e.f. 07.11.2017, which is substituted by Foreign Exchange Management (Non-debt Instruments) Rules, 2019	X (Prior approval on Repatriation basis)	√ (Auto Route on non repatriation basis, Repatriation - Prior approval)	(Prior approval on repatriation basis)
Borrowings in rupees	Restricted only to rupee borrowings		
Notf 4 [Now subsumed under Notf 3(R) w.e.f 17.12.2018)		<ul style="list-style-type: none"> -From relative SBT End use restrictions.(Reg 8B) -Special provision for housing loan by AD in rupee to non resident and loan against security of shares and immovable property (Reg.8 and 7) -body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin(Regulation 8A) -Loan for acquiring share of Indian co. under ESOP (Reg.7) -loan granted to a non-resident by an authorised dealer, in accordance with Regulation 7 , may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative.(Reg7A) 	

FEMA Practice

	PROI		
	Foreign Citizen	NRIs/ OCI	Other entities
Lending in FE		Close relative in Foreign exchange- Notf.3(R)	ECB
Lending in rupee		Notf.5 – against fund held in account	
Lending by way of Deposits		Schedule 6 & 7 of notf.5(R) , Loan from NRO account, Commercial paper	
Portfolio Investment	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 2,8	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 3 Foreign Exchange Management (Debt Instruments) Regulations, 2019	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 – schedule 2,8 Foreign Exchange Management (Debt Instruments) Regulations, 2019
FDI	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,6,7,8	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,4, 6,7	Foreign Exchange Management (Non-debt Instruments) Rules, 2019 - schedule 1,6,7,8

FEMA Practice

	PRII	
	Individual	Other entities
Current Account transaction		
FE Account	Notification 10(R),RFC,RFC(domestic), EEFC	
Export of goods and service- Notf. 23(R)	√	√
PEM- A.P. Dir cir 32 dt 20/10/03 A.P. Dir cir 118 20/6/2013 & 51 dt 20/09/13	√	√
Branch /Liaison /Project office outside India – FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016. FED No. 14 / 2015-16. Updated up to April 12, 2019	√	√
Overseas Investment – Notf. 120	√	√
	P. P. Shah & Asso.	

FEMA Practice

	PRII	
	Individual	Other entities
Borrowing in Foreign Exchange	Notf.3(R) – From close relative, from bank outside India for execution of turnkey project outside India, foreign currency credit from overseas supplier, Buyer’s credit & ECB	Notf.3 (R) – ECB as per Guidelines as to rate, end use, eligible lenders
Borrowing in rupee	Notf.5(R) – Deposit on non- repatriation basis, Repatriation basis(Public)	Notf.3 (R)– ECB as per Guidelines

FEMA Practice

	PRII	
	Individual	Other entities
Lending in FE	Notf.3 (R)- Out of EEFC for trade related purpose	Notf.3 (R) – to its WOS or JV outside India, to its employee outside India
Lending in rupee	To close relative , loan granted to a non-resident by an authorised dealer, may be repaid by any relative of the borrower in India by crediting the borrower's loan account through the bank account of such relative.	Body corporate registered or incorporated in India may grant rupee loan to its employees who is a non-resident Indian or a Person of Indian Origin -Special provision for housing loan by AD in rupee to non resident and loan against security of shares and immovable property -Loan for acquiring share of Indian co. under ESOP
Immovable property abroad	Notf.7(R)	Notf. 120 for bonafide overseas Business activities
LRS	Any permitted CAT or CAP SBT restrictions & provision	

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
1	Permissible Capital Account Transactions	-	-
2	Issue of Security in India by a branch, office or agency of a PROI	-	-
3	Borrowing and lending in Foreign currency	FEMA.3(R)/2018-RB_FEM (Borrowing and Lending) Regulations, 2018 dt 17.12.2018	FED No. 5 / 2018-19. Updated up to August 08, 2019
4	Borrowing and lending in Rupees	-	FED No. 6 / 2015-16
5	Deposits by NRs	FEMA 5(R)_ FEM (Deposit) Regn. 2016 dt. 01.04.2016	FED No. 14 / 2015-16. Updated up to April 12, 2019
6	Export and Import of foreign currency	FEMA 06(R)/RB 2015_ FEM (Import & Export of Currency) Regn 2015 dt 29.12.2015	
7	Acquisition and transfer of immovable properties outside India	FEMA 7(R)/2015_ FEM (Acquisition and Trnsfr of Immovable Properties outside India) Regn 2015 dt 21.01.2016	FED No. 12 / 2015-16
8	Guarantees	-	-
9	FE realisation, repatriation, surrender	FEMA 09(R)/2015_ FEM (Realisation, repatriation, surrender of FX) Regn 2015 dt 29.12.2015	-
10	Foreign Currency Accounts by a PRII	FEMA 10(R)_ FEM (Foreign Currency Accounts by PRII) Regn 2015 dt 21.01.2016	FED No. 14 / 2015-16. Updated up to April 12, 2019
11	Possession and retention of Foreign currency	FEMA 11(R)_ FEM (Possession and Retention of FC) Regn 2015 dt 29.12.2015	-
12	Insurance	FEMA 12(R)_ FEM (Insurance) Regn 2015 dt 29.12.2015	FED No. 9 / 2015-16. Updated up to Nov 17, 2016
13	Remittance of assets in India	FEMA 13(R)/2016_ FEM (Remittance of Assets) Regn 2016 dt 01.04.2016	FED No. 13 / 2015-16. Updated up to April 28, 2016

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
14	Manner of receipt and payment	FEMA 14(R)_ FEM (Manner of Receipt and Payment) Regn 2016 dt 02.05.2016	-
15	Definition of Currency	FEMA 15(R)/2015_ FEM (Currency) Regn 2015 dt 29.12.2015	-
16	Receipt and payment to person outside India	-	-
17	Transaction in Indian rupees with resident of Nepal and Bhutan	-	-
18	Post Office (Postal Money Orders)	FEMA 18(R)_ FEM (Postal Money Order) Regn 2015 dt 29.12.2015	-
19	Overseas Direct Investment	-	FED No. 15 / 2015-16. Updated up to Jan 04, 2018
20	FDI, PIS	Foreign Exchange Management (Non-debt Instruments) Rules, 2019	FED No. 11 / 2017-18. Updated up to March 08, 2019 (unamended)
21	Immovable property in India	SUBSUMED IN Foreign Exchange Management (Non-debt Instruments) Rules, 2019 w.e.f 17-10-2019	FED No. 12 / 2015-16. Updated up to April 11, 2018 (unamended)
22	Branch etc in India	FEMA 22(R)_ FEM (Branch Liaison Project office) Regn 2016 dt 31.03.2016	FED No. 10 / 2015-16. Updated up to March 29, 2019
23	Export of Goods & Services	FEMA 23(R)_ FEM (Export of Goods & Services) Regn 2015 dt 12.01.2016	FED No. 16 / 2015-16. Updated up to January 12, 2018
24	Investment in Firm or Proprietary concern in India	SUBSUMED IN FEMA 20(R) w.e.f. 07.11.2017 which is substituted by Foreign Exchange Management (Non-debt Instruments) Rules, 2019 w.e.f. 17-10-2019	-
25	Foreign investment in Debt	Foreign Exchange Management (Debt Instruments) Regulations, 2019 w.e.f 17-10-2019	-

FEMA Practice - Revised Notifications & Master Directions

Particulars	Master Direction
Import of Goods & Services	FED No. 17 / 2016-17
Liberalized Remittance Scheme	FED No. 7 / 2015-16. Updated up to June 20, 2018
Compounding of Contraventions	FED No. 4 / 2015-16. Updated up to April 04, 2019
Other Remittance facilities (current account)	FED No. 8 / 2015-16. Updated up to Nov 06, 2018
Reporting under FEMA	FED No. 18 / 2015-16. Updated up to April 04, 2019
Misc Directions that do not figure in other Master Directions (TDS on remittances, repatriation of assets abroad & under LRS, Medical expenses of NRI, Routing of funds to India, SIT - sharing of information, IFSC guidelines, FEMA & Black Money Act)	FED No. 19 / 2015-16. Updated up to Nov 12, 2018
Money Changing Activities	FED No. 3 / 2015-16. Updated up to March 29, 2019
Vostro Accounts by Non-Resident Exchange Houses	FED No. 2 / 2015-16. Updated up to Aug 31, 2018
Money Transfer Service Scheme (MTSS)	FED No.1/2016-17
Gold Monetisation Scheme 2015 dt 22.10.2015 _amended to 21.01.2016	DBR.IBD.No.45/ 23.67.003 / 2015-16

FEMA Practice – Recent issue of Master Directions

- Foreign Exchange Management Act was **enacted in 1999** with 25 original notifications came into force with effect from June 1, 2000.
- Over the years the regulations framed under FEMA have had **over 330+ amendments**.
- Keeping in view the objective of promoting ease of doing business, a need was felt **to consolidate the regulations and rationalise them** in the light of evolving business environment and changing practices in cross-border transactions relating to external trade and payments.
- **17 Master Directions issued on 04 January 2016, 1 Master Direction on FDI issued on 04 January 2018, and 1 Master Direction on ECB issued on 26th March 2019 - Consolidated** relevant A.P (DIR Series) Circulars issued so far
- All master regulations will be **fully updated and placed online**.
- Reserve Bank will issue Master Directions **on all regulatory matters**.
- The **Master Directions to be issued will consolidate instructions on rules and regulations framed by the Reserve Bank under various Acts** including banking issues and foreign exchange transactions.
- The process of issuing Master Directions involves issuing one Master Direction for each subject matter covering all instructions on that subject. **Any change** in the rules, regulation or policy will be communicated during the year **by way of circulars**. The **Master Directions will be updated suitably** and simultaneously whenever there is a change in the rules/regulations or there is a change in the policy.
- All the changes will get reflected in the Master Directions available on the RBI website **along with the dates on which changes are made**.
- **Explanations of rules and regulations** will be issued by way of **Frequently Asked Questions (FAQs)** after issue of the Master Directions **in easy to understand language wherever necessary**.
- The existing set of **Master Circulars** issued on various subjects will **stand withdrawn** with the issue of the Master Direction **on the subject**.



FEMA Practice

- Structure the transaction as compliant with conditions of Automatic route
- Permissible transactions of every person either PRII or that of PROI are specific as to General or Specific Approval.
eg. Schedule 1 to 10 of Foreign Exchange Management (Non-debt Instruments) Rules, 2019. Purpose of drawal-specific to use.
- Ability to structure any transaction as Current account transaction
- Interpretation of the provision, intention and philosophy is preferable over the literal meaning.
- A Circular law- Dynamics

FEM (Non-debt Instruments) Rules, 2019 – Few Definitions

Definitions	Particulars
Reg 2(k) - Equity Instruments	<ul style="list-style-type: none"> ➤ Equity Shares including partly paid (In case of Partly paid shares issued to PROI, 25% consideration upfront & balance in 12 months) ➤ Debentures (Fully, mandatorily & compulsory convertible) ➤ Preference shares (Fully, mandatorily & compulsory convertible ** Differential voting rights shares as to dividend, voting or otherwise is permitted ➤ Share Warrants (As per SEBI regulations 25% consideration upfront and the balance in 18 months) <p>Optionality clauses: Equity instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.</p>
Reg 2(aa) – Indian Entity	<ul style="list-style-type: none"> ➤ Indian company or LLP

FEM (Non-debt Instruments) Rules, 2019 – Few Definitions

Definitions	Particulars
Reg 2 (s) – Foreign Investment	<p>Investment made by a person resident outside India (PROI) on repatriable basis in:</p> <ul style="list-style-type: none"> ➤ Equity Instruments of an Indian company ➤ To the Capital of an LLP <p>(Explanation: If beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment) Note: A PROI may hold Foreign Investment as FDI or FPI</p>
Reg 2(r) – Foreign Direct Investment	<p>Investment through Equity Instruments by PROI:</p> <ol style="list-style-type: none"> a. In an Unlisted company, or b. In 10% or more of post issued paid up equity capital on fully diluted basis of Listed Indian Company. <p>(Note: In case an existing investment by a PROI in equity instruments of a listed Indian company falls to a level below 10% of the post issue paid-up equity capital on a fully diluted basis, the investment shall continue to be treated as FDI.)</p>

FEM (Non-debt Instruments) Rules, 2019 – Few Definitions

Definitions	Particulars
Reg 2 (t) – Foreign Portfolio Investment	Investment made by a person resident outside India (PROI) in Equity Instruments where such Investment is: <ul style="list-style-type: none">➤ Less than 10% of Post issue paid up Equity Capital on Fully diluted basis of Listed company or➤ Less than 10% of paid up value of each series of Equity instruments of a Listed Indian Company
Reg 2(am) – Sectoral Cap	The maximum investment including both foreign investment on a repatriation basis by persons resident outside India in equity and debt instruments of a company or the capital of a LLP, as the case may be, and indirect foreign investment, unless provided otherwise. This shall be the composite limit for the Indian investee entity (including equity holding by a PROI resulting from conversion of any debt instrument)
FDI linked performance conditions	FDI linked performance conditions means the sector specific conditions specified in Schedule I of these rules for companies receiving foreign investment

Key Changes brought by FEM (Non-debt Instruments) Rules, 2019

- Substituting Capital instruments with Equity instruments in the Rules, thereby completely leaving out debt instruments (which was a part of FEMA 20(R))
- Subsuming Notf-21(R) – Investment in immovable properties under FEM (Non-debt Instruments) Rules, 2019
- Central Government is now the responsible authority to introduce the Rules pertaining to FEM (Non-debt Instruments) Rules, 2019 as opposed to the RBI being the concerned authority under FEMA Notf 20(R)
- Important changes as per NDI Amendment Rules dt. 22.04.2020:
 - An entity of a country, which shares land border with India or the beneficial owner of an investment into India who is situated in or is a citizen of any such country, can now invest only with the Government approval
 - A citizen of Pakistan or an entity incorporated in Pakistan shall invest only under the Government route, in sectors or activities other than defence, space, atomic energy and such other sectors or activities prohibited for foreign investment
 - in the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction or purview of the above provisos, such subsequent change in beneficial ownership shall also require government approval

Key Changes brought by earlier FEMA Notf 20(R)

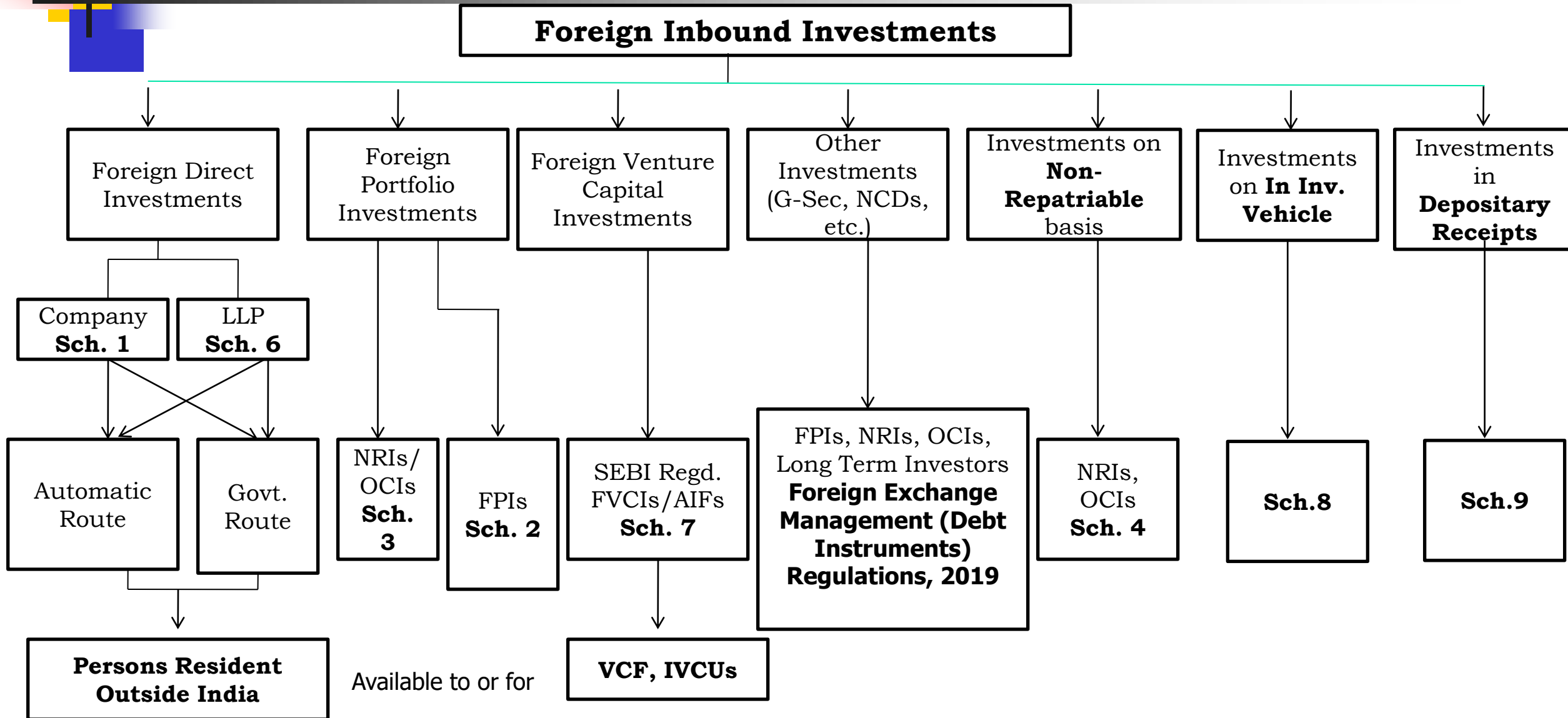
- Detailed definition of 'Capital instruments' has been introduced, listing various modes of investments that non-resident investors can choose from to invest in Indian companies;
- The definition of 'foreign investments' now clarifies that investments made on a non-repatriable basis are to be treated as domestic investments;
- The new definition of 'foreign direct investment' ("**FDI**") also differentiates between foreign investments in Indian companies based on whether the investee company is listed or unlisted. Investments into capital instruments of unlisted companies are to be treated as FDI. However, if the investee company is listed, the investment will be treated as FDI only if the investment constitutes more than 10% of the post issue paid-up equity capital of the company, calculated on a fully diluted basis; and
- Foreign investment in an Indian listed company amounting to less than 10% of the post-issue paid up equity share capital or 10% of the paid-up value in respect of each series of instrument of the company calculated on a fully diluted basis, will be categorised as 'foreign portfolio investment' under FEMA Foreign Exchange Management (Non-debt Instruments) Rules, 2019 .

FEMA FEM (Non-debt Instruments) Rules, 2019

– Schemes for Inbound Investment

Sch. 1	Purchase / Sale of equity instruments of Indian company by PROI (i.e. Foreign Direct Investment ('FDI') Scheme)
Sch. 2	Investments by Foreign Portfolio Investors - Purchase/Sale of equity instruments of listed Indian company on recognised stock exchange in India by Foreign Portfolio Investor (i.e. Portfolio Investment Scheme), investment in units, Cat-III AIF, REITs & InVITs
Sch. 3	Investments by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis - Purchase/Sale of equity instruments of listed Indian company on recognised stock exchange in India (i.e. Portfolio Investment Scheme), investment in units & shares of PSUs
Sch. 4	Investment by NRI or OCI on non-repatriation basis - Purchase or sale of equity instruments of an Indian company or units or contribution to the capital of a LLP; Investment in a firm or proprietary concern
Sch. 5	Investment by other non-resident investors - Permission to other non-resident investors for purchase of securities
Sch. 6	Investment in a Limited Liability Partnership (LLP)
Sch. 7	Investment by a Foreign Venture Capital Investor (FVCI)
Sch. 8	Investment by a person resident outside India in an Investment Vehicle
Sch.9	Investment in Depository receipts by a person resident outside India
Sch. 10	Issue of Indian Depository Receipts (IDRs)

Foreign Investment in India- Schematic Representation



Schedules For Foreign Investments

SCH. NO	PERMISSIBLE INVESTOR	INSTRUMENT	INVESTEES ENTITY	CONDITIONS, IF ANY
1	Non-resident (Excl. Citizen of Bangladesh/Pakistan)	Equity instruments	Indian Company	<ul style="list-style-type: none"> Subject to entry routes, sectoral caps and attendant conditionalities. equity instrument to be issued within 60 days of receipt of consideration (if not the amount must be refunded)
2	FPI	Equity instruments	Listed Indian company	<ul style="list-style-type: none"> Conditions on aggregate FPI investment (24%) and individual FPI investment (10%) of paid-up shares / paid-up value of each series of shares of a single company. In case of breach of individual FPI investment limit the investment will be reclassified as FDI and FC-TRS must be filed in this regard. Subject to limits and margin requirements prescribed by RBI / SEBI
3	NRI / OCI	Equity Instruments (on repatriation basis)	Listed Indian company	<ul style="list-style-type: none"> Conditions on aggregate NRI / OCI investment (10%) and individual NRI / OCI investment (5%) of paid-up equity value paid-up value of each series of debentures or preference share or share warrants of a single Indian company.
4	NRI / OCI	Equity instruments / convertible notes, units or capital contribution to partnership (on non-repatriation basis)	Indian Company, LLP, firm or sole proprietorship	<ul style="list-style-type: none"> Investment is deemed to be domestic investment and treated on par with investment by residents. The investee entity should not be engaged in agricultural/ plantation activity or print media or real estate business.

Schedules For Foreign Investments

SCH. NO	PERMISSIBLE INVESTOR	INSTRUMENTS	INVESTEES	CONDITIONS , IF ANY
5	Other Non-resident Investors (Sovereign Wealth Funds, Pension Funds & Foreign Central Banks) & Eligible Entities as defined by SEBI	Securities & participate in domestic commodity derivative markets	PSU, Indian Company, Investment vehicles, etc	As specified by RBI
6	Non-resident not being FPI / FVCI and not being a citizen / incorporated in Bangladesh / Pakistan)	Capital contribution or acquisition / transfer of profit share	LLP	<ul style="list-style-type: none"> ▪ LLP must operate in sectors/ activities where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions i.e. there should be no sector specific conditions for the foreign investment. ▪ Such an LLP may be converted into a company under automatic route and vice versa

Schedules For Foreign Investments

SCH. NO	PERMISSIBLE INVESTOR	INSTRUMENTS	INVESTEES	CONDITIONS , IF ANY
7	FVCI	Equity or equity linked instruments issued by Indian company (including start-ups) units issued by a SEBI registered venture capital fund or Category-I AIF.	Indian Company / Investment Vehicle	<ul style="list-style-type: none"> Pricing guidelines not to apply for entry and exit of FVCI Investment in Indian companies other than start-ups can only be in the 10 sectors (explained above under 'Investment routes-FVCI')
8	Non-resident (not a citizen / incorporated in Bangladesh / Pakistan)	Units	Investment Vehicle	<ul style="list-style-type: none"> Units may be issued against swap of capital instrument of SPV proposed to be acquired by investment vehicle. Category III-AIF which has received any foreign investment can make investment in only those securities or instruments in which an FPI can invest in as per the SEBI (FPI) Regulations, 2014 (explained above under 'Investment routes-FPI')
9	Non-resident	Depository receipt ("DR") issued by foreign depositories against eligible securities	Foreign Depositories	<ul style="list-style-type: none"> Issuance of DRs must be in compliance with Depository Receipts Scheme, 2014 Aggregate eligible instruments which can be issued / transferred to foreign depositories (along with instruments already held) must not exceed the limit on foreign holding of such eligible instruments under FEMA 1999, rules or regulations framed thereunder.
10	FPI / NRI / OCI	Indian depository receipts ("IDR") denominated in INR	Companies resident outside India (acting through a domestic depository)	<ul style="list-style-type: none"> Issuance of IDRs must be in compliance with Companies (Registration of Foreign Companies) Rules, 2014 and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. IDRs issued by financial / banking companies must be approved by sector regulator(s). Proceeds to be immediately re-patriated abroad by the issuing company.

Schemes for Inbound Investment – FEMA Ntf. Foreign Exchange Management (Non-debt Instruments) Rules, 2019

Schedule No. →	1	2	3	4	6	7	8	9	10
Type of Investor →	PROI (repatriation)	FPI (repatriation)	NRI / OCI (repatriation)	NRI / OCI (non-repatriation)	PROI (repatriation)	FVCI (repatriation)	PROI (repatriation)	PROI (repatriation)	FPI / NRI / OCI (repatriation)
Instrument									
Equity Shares (incl. partly paid-up; 25% consideration up-front & balance within 12 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Share Warrants (25% consideration up-front & balance within 18 months)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Debentures (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Preference Shares (fully, compulsorily and mandatorily convertible)	Y	Y (listed co.)	Y (listed co.)	Y		Y			
Convertible Note				Y		Y			
Units in Investment Vehicle				Y		VCF, Cat-I AIF, Cat-II AIF	Y		
Capital in LLP				Y	Y				
Capital in Firm or proprietorship				Y					
Depository Receipts								Y	
Indian Depository Receipts									Y

Snapshot of FEM (Non-debt Instruments) Rules, 2019

3. Restriction on investment by a person resident outside India

Save as otherwise provided in the Act, or rules or regulations made thereunder, no person resident outside India shall make any investment in India.

Provided that an investment made in accordance with the Act or the rules or the regulations framed thereunder and held on the date of commencement of these Regulations, shall be deemed to have been made under these Regulations and shall accordingly be governed by these Regulations.

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

4. Restriction on receiving investment

Save as otherwise provided in the Act, or rules or regulations made thereunder, an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern shall not receive any investment in India from a person resident outside India or record such investment in its books.

Provided that the Reserve Bank may, on an application made to it and for sufficient reasons, permit an Indian entity or an investment vehicle, or a venture capital fund or a Firm or an Association of Persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary.

Regulations for Inbound Investment – FEM (Non-debt Instruments) Rules, 2019 (Contd)

Chapter	Rule	Provision
II	5	Permission for making investment by a person resident outside India
III	6	Investments by person resident outside India
III	7	Acquisition through rights issue or bonus issue
	7A	Acquisition after renunciation of rights
	8	Issue of Employees Stock Options and sweat equity shares to persons resident outside Indi
	9	Transfer of equity instruments of an Indian company by or to a person resident outside India
IV	10 - 11	Investment by Foreign Portfolio Investor(FPI) & Transfer of equity instruments by FPI
V	12-13	Investment by NRI or OCI & Transfer of equity instruments by NRI or OCI

Regulations for Inbound Investment – FEM (Non-debt Instruments) Rules, 2019 (Contd)

Chapter	Regulation	Provision
VI	14-15	Investment in securities by other non-resident investors & Transfer of securities by other non-resident investors
VII	16-17	Investment by Foreign Venture Capital Investor(FVCI) & Transfer of equity instruments of an Indian company by or to a FVCI
VIII	18	Issue of Convertible Notes by an Indian startup company
	19	Merger or demerger or amalgamation of Indian companies
	20	Reporting requirements
	21	Pricing guidelines
	22	Taxes and remittances of sale proceeds
	23	Downstream investment
IX	24 - 33	Acquisition And Transfer Of Immovable Property In India

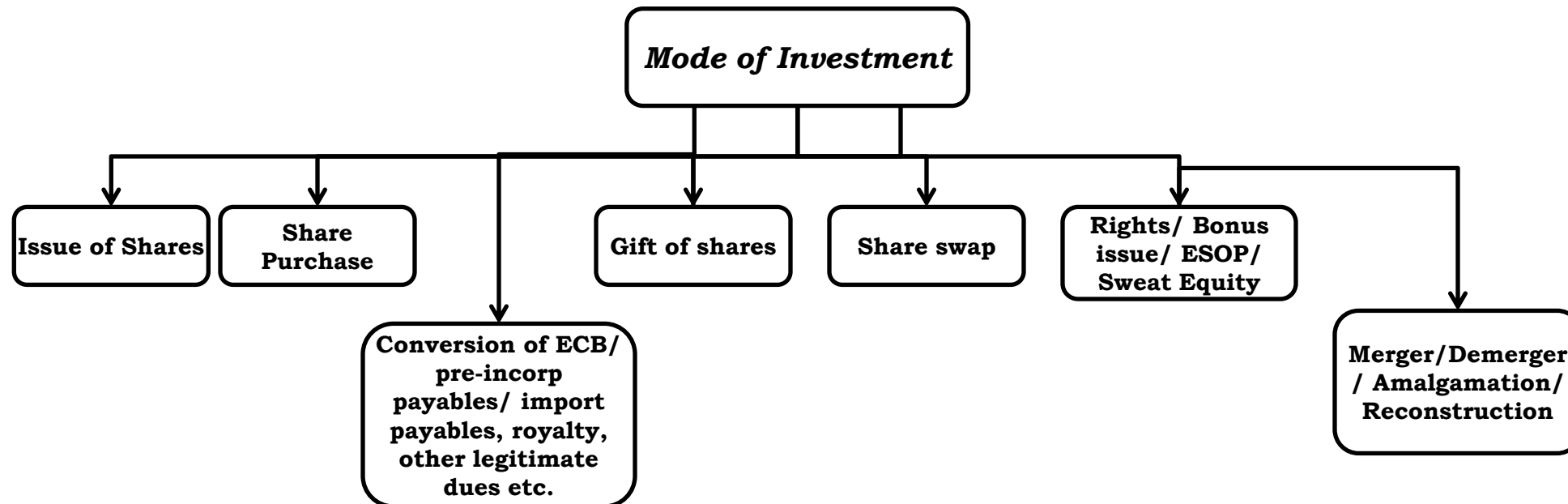
Foreign Direct Investment into an Indian company – Schedule I under Rule 6

Routes of Investment

- **Automatic Route** – no prior approval from the RBI/ Government
- **Approval Route** – prior approval of the concerned Administrative Ministries / Departments is required (FIPB abolished w.e.f. 05.06.2017)

Mode of Investment: Issue/Transfer of shares

- **Greenfield**: Setting up a new JV/ WOS (**fresh issue** of shares)
- **Brownfield**: Relating to existing investments/ business activities





Prohibited Activities – Schedule 1 under Rule 6

- Lottery Business including Govt/Pvt/Online lottery
- Gambling & Betting, including casinos
- Chit Funds
- Nidhi Company
- Trading in Transferable Development Rights
- Real Estate Business/Construction of Farmhouse
(real estate business shall not include development of townships, construction of residential or commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014). However does not include Horticulture & Green house activities
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations
- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities



Automatic Route of Investment to PROI – Sch. 1

- Main Conditions of issue of Shares (Rule 6, Schedule 1, FEMA Foreign Exchange Management (Non-debt Instruments) Rules, 2019) (Schedule 6, FEMA Foreign Exchange Management (Non-debt Instruments) Rules, 2019) .
- Sectors
- Conditionalities
- Eligible Persons:
 - PROI other than citizen of Pakistan, entities of Pakistan.
 - Bangladesh Citizens & entities only with prior approval of FIPB.
- Under Schedule 1, a PROI may purchase equity instruments of a listed Indian company on a stock exchange in India provided that the PROI making the investment has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control
- A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100% foreign investment is allowed in the automatic route and there are no FDI linked performance conditions, may issue equity instruments to the said non-resident entity against pre-incorporation/ preoperative expenses incurred by the said non-resident entity up to a limit of five percent of its authorised capital or USD 500,000 whichever is less subject to filing of Form FC-GPR and utilization certificate of statutory auditor

Automatic Route of Investment to PROI – Sch. 1 (con't)

- An Indian company may issue equity instruments to a PROI, if the Indian investee company is engaged in an automatic route sector, against:
 - (a) Swap of equity instruments; or
 - (b) Import of capital goods/ machinery/ equipment (excluding second-hand machinery); or
 - (c) Pre-operative/ pre-incorporation expenses (including payments of rent etc.).However, Government approval shall be obtained if the Indian investee company is engaged in a sector under Government route.

- An Indian company may issue equity shares against any funds payable by it to a person resident outside India, provided such remittance:
 - is permitted under the Act or the rules and regulations, or
 - does not require prior permission of the Central Government or the RBI, or
 - has been permitted by the RBI

In case where permission has been granted by the RBI for making remittance, the Indian company may issue equity shares against such remittance provided all regulatory actions with respect to the delay or contravention under FEMA or the rules or the regulations framed thereunder have been completed



Approval Route of Investment to PROI

- For FDI not eligible under the Automatic route / in sectors requiring prior government approval, the work of granting approval for foreign investment under the extant FDI Policy and FEMA Regulations, has been entrusted to the concerned Administrative Ministries / Departments after abolition of FIPB w.e.f. 05.06.2017
- The eleven notified sectors/activities requiring government approval are Mining, Defence/cases relating to FDI in small arms, Broadcasting, Print media, Civil Aviation, Satellites, Telecom, Private Security Agencies, Trading(Single, Multi brand and Food Products), Financial services not regulated or regulated by more than one regulator/ Banking Public and Private (as per FDI Policy) and Pharmaceuticals.
- The Department of Industrial Policy and Promotion, Ministry of Commerce & Industry has been given the responsibility of overseeing the applications filed on the **Foreign Investment Facilitation Portal (fifp.gov.in)** and to forward the same to the concerned Administrative Ministry.
- A Standard Operating Procedure (SOP) developed by DIPP in consultation with the concerned Administrative Ministries is being followed for processing of the FDI applications. Approval letters in Standard Format will be uploaded on the Portal itself for the benefit of the Investors.



Criteria for Govt Approval

The aspects are considered to approve FDI under Govt Route:

- Foreign exchange inflow to be brought in
- Job Opportunities
- Innovation & Technology Development
- Enhancement of methods to be used for Agriculture
- Reputation of the investor



Issue of Shares- Other modes

- Issue of Bonus Shares allowed.
- Issue of Right Shares
 - In case of unlisted companies, price offered to PROI can not be lower than that offered to PRII.
 - Additional Shares allowed within FDI Ceiling.
 - PROI who has acquired a right from a PRII who has renounced it may acquire equity instruments (other than share warrants) against the said rights as per pricing guidelines specified under rule 21 of the NDI Rules.
- Amalgamation / Demerger
 - Amalgamating/ transferee company can issue shares if it is engaged in eligible sector and observes sectoral caps or investment limits, as the case may be, and the attendant conditionalities of investment by a PROI.
 - Reports the transaction to RBI within 30 days of such NCLT order of amalgamation with percentage of capital held by PROI in transferor, transferee or new company before or after the transfer.



Issue of Shares - Other modes – ESOP / Sweat Equity

Indian company may issue “employees’ stock option” and/or “sweat equity shares” to **its employees/directors or employees/directors of its holding company or joint venture or wholly owned overseas subsidiary/subsidiaries who are resident outside India**, provided that :

- a) The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the **Companies (Share Capital and Debentures) Rules, 2014** notified by the Central Government under the Companies Act 2013, as the case may be.
- b) The “employee’s stock option”/ “sweat equity shares” issued to non-resident employees/directors under the applicable rules/regulations are in compliance with the **sectoral cap** applicable to the said company.
- c) Issue of “employee’s stock option”/ “sweat equity shares” in a company where foreign investment is under the **approval route** shall require prior Government approval.
- d) Issue of “employee’s stock option”/ “sweat equity shares” to a citizen of **Bangladesh/Pakistan** shall require prior Government approval.



Issue of Convertible Notes by Indian Startup company

A PROI (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered or incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of twenty five lakh rupees or more in a single tranche.

A startup company, engaged in a sector where investment by a person resident outside India requires Government approval, may issue convertible notes to a person resident outside India only with such approval. Further, issue of equity shares against such convertible notes shall be in compliance with the entry route, sectoral caps, pricing guidelines and other attendant conditions for foreign investment.

A NRI or an OCI may acquire convertible notes on non-repatriation basis in accordance with Schedule IV of the NDI rules.

A PROI may acquire or transfer by way of sale, convertible notes, from or to, a PRII or PROI, provided the transfer takes place in accordance with the entry routes and pricing guidelines as prescribed for capital instruments.

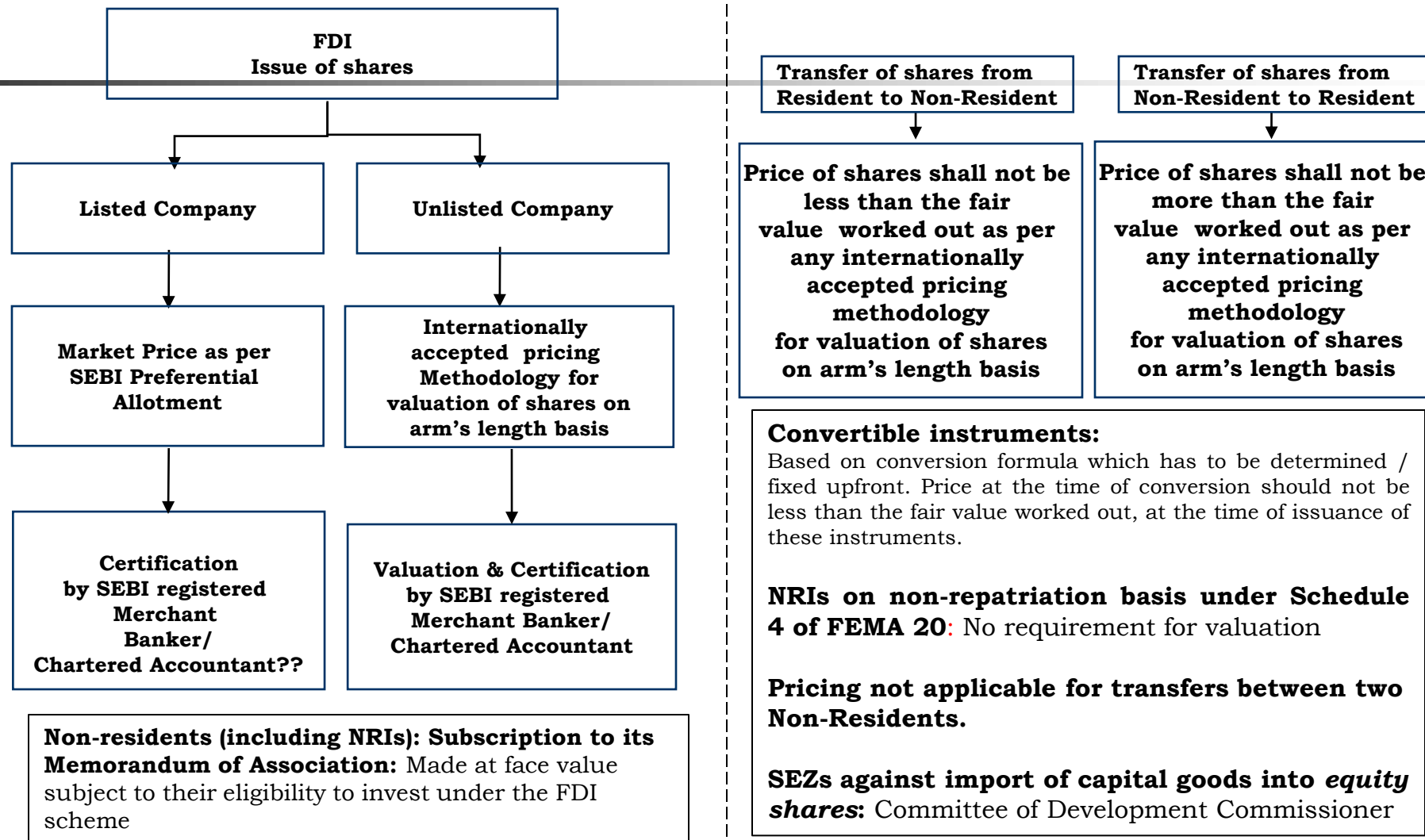


Mode of Payment

- **Inward** remittance through normal banking channels
- Debit to **NRE / FCNR** account of a person concerned maintained with an AD category I bank
- **Conversion** of royalty / lump sum / technical knowhow fee/ legitimate due for payment or conversion of ECB / import payables, etc shall be treated as consideration for issue of shares provided such remittance:
 - is permitted under the Act or the rules and regulations, or
 - does not require prior permission of the Central Government or the RBI, or
 - has been permitted by the RBI

In case where permission has been granted by the RBI for making remittance, the Indian company may issue equity shares against such remittance provided all regulatory actions with respect to the delay or contravention under FEMA or the rules or the regulations framed thereunder have been completed
- Debit to non-interest bearing **Escrow account** in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration

FEMA & Valuation



Non-residents (including NRIs): Subscription to its Memorandum of Association: Made at face value subject to their eligibility to invest under the FDI scheme

Preferential Allotment Pricing Guideline under SEBI (ICDR) Regulations 2009:
“Price not less than the higher of Avg. weekly high and low closing price over a trailing six month period, or a trailing two week period, from the "relevant date of transaction.” “Relevant Date” means date thirty days prior to the date of GM of shareholders



Other important conditions in FDI Policy

- **Caps in Investments:**

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 caps in various sector(s) are detailed in the Consolidated FDI Policy and in Schedule I of the NDI Rules

- **Entry conditions:**

Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc. and are specified in the Consolidated FDI Policy

- **Other conditions:**

Besides the entry conditions on foreign investment, the investment/investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations.

- **Foreign Investment into/downstream Investment by eligible Indian entities:**

The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company/LLP, at every stage of investment, including downstream investment are specified in the Consolidated FDI Policy and in Rule 23 of NDI Rules

Transfer of Equity Instruments

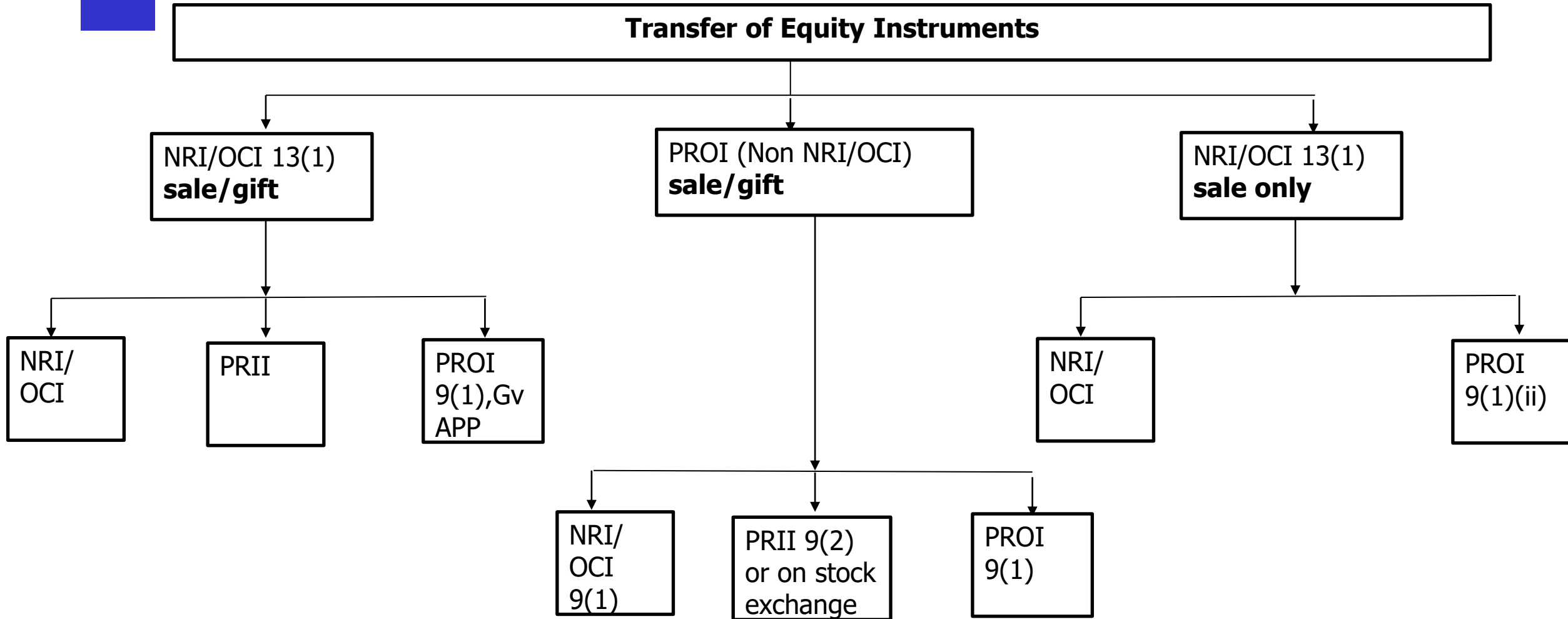
Sub Reg	Transferor	Transferee	Form	Automatic/Approval Route	Conditions
1	PROI (no NRI,OCI)	PROI	Sale/Gift	Automatic	
	FPI	PRII	sale	Automatic	(if sectoral/investment limit is exceeded)
2	NRI/OCI holding on Repatriable basis	PROI	Sale/Gift	Automatic	
3	PROI	PRII/Stock exch	sale/gift	Automatic	subject to the adherence to pricing guidelines, documentation and reporting requirements for such transfers. If non rep then no conditions
4	PRII/NRI/OCI holding on Non Repatriable basis	PROI	sale	Automatic	subject to the adherence to entry routes, sectoral caps/ investment limits, pricing guidelines and documentation and reporting requirements as may be specified by Reserve Bank
5	PRII/OCI/NRI holding on Non Repatriable basis	PROI on Repatriable basis	Gift	Approval	Gift ≤ 5% of paid up cap of Indian co, deb, mf. Donor & Donee relatives. Value of all gifts of donor to be less than 50,000\$
6	NRI/OCI holding on Non Repatriable basis	NRI/OCI on Non Repatriable basis	Gift	Automatic	

- Prior Government Approval be required for any transfer in case the company is engaged in sector which requires government approval
- NRI holding on Non Repatriation basis or under 6(5) and transferring to R is under automatic route and does not require any compliance

Transfer of Equity Instruments

Sub Reg	Conditions
7	PROI holding Equity instruments containing Optionality clause and exercising the option may exit without any assured return subject too pricing guidelines and lock in period of 1 year
8	Erstwhile OCB may transfer Equity instruments subject to Directions issued by RBI (Notification No. FEMA101/2003-RB dated 03.10.2003) (A. P. Dir Circular No.14 of 16.09.2003 and circular No.44 of 08.12.2003)
9	Transfer on deferred basis between a PROI and PRII. Subject to -the amount should not exceed 25% of total consideration -should be settled within 18 months from the date of transfer agreement. -can be settled through escrow account -can be indemnified by the seller for a period of maximum eighteen months from the date of the payment of the full consideration, by the buyer to the seller.
10	In case of Transfer from PRII to PROI, the PROI may open an escrow Account, which may be funded by inward remittance
11	Pricing guidelines shall not be applicable for any transfer by way of sale done in accordance with SEBI regulations where the pricing is prescribed by SEBI.
12	<p><u>Pledge of Shares:</u> Transfer of Equity instruments of an Indian company or units of an Investment Vehicle by way of pledge subject to:</p> <p>a) Promoter may pledge shares of borrowing company for securing ECB subject to: -Period of Pledge is co terminus with Maturity of ECB -In case of invocation of pledge, transfer shall be in accordance with RBI directions -Statutory Auditor certificate for utilization of ECB proceeds for permitted end use only -NOC of AD shall be obtained for Pledge</p> <p>b) PROI may pledge equity instruments of Indian company or units of Investment vehicle subject to: -In favour of an Indian Bank/RBI registered NBFC to secure credit facilities being extended to such Indian company for bona fide purposes -In favour of an overseas bank to secure credit facilities being extended to such person or a PROI who is the promoter of such Indian company or the overseas group company of such Indian company</p>

Transfer of Equity Instruments



Reporting Requirements

Form	Particulars
FCGPR	For Allotment of Equity instruments within 30 days of Issue (Fresh Shares /Partly paid shares/Bonus /Rights Shares /ESOP/ Convertible Debentures / Convertible Preference Shares /Conversion of ECB / Royalty / Lumpsum Technical Know-how Fee / Import of Capital Goods by SEZs /Pre-operative/Pre-incorporation Expenses/Legitimate dues/ Amalgamation/ Merger) Supported by a certificate from the Company Secretary & a SEBI registered Merchant Banker or Chartered Accountant for valuation (Allotment under IPO or QIP under applicable SEBI Regulations need not be reported in FCGPR)
Annual return	Return on Foreign Assets & Liabilities to be filed on or before 15 th July every year
FCTRS	<ul style="list-style-type: none"> • <u>For Transfer of Equity Instruments between</u> <ol style="list-style-type: none"> a) PROI (repatriable basis) & PROI (non repatriable basis) b) PROI(repatriable basis) & PRII <p>The onus of reporting shall be on the resident transferor/ transferee or the PROI holding equity instruments on a non-repatriable basis</p> <ul style="list-style-type: none"> • <u>For Transfer of Equity Instrument by PROI on Stock Exchange</u> • <u>For Transfer of Equity Instruments on deferred Payment basis shall be reported on receipt of every tranche of Payment</u> <p>Form is to be filed within 60 days of transfer of equity instruments or receipt of funds whichever is earlier</p>
ESOP	Indian company issuing ESOP to PROI who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiaries has to file the form within 30 days of issuing stock Option

Reporting Requirements

Form	Particulars
Depository Receipt Return(DRR)	Domestic Custodian shall file the form within 30 days of close to the issue
LLP (I)	Receipt of amount of consideration for capital contribution and acquisition of profit shares shall be reported within 30 days of Receipt
LLP (II)	Disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) shall be reported within 60 days
Downstream Investment(DI)	Indian Entity making Downstream Investment shall submit form DI within 30 days from the date of allotment of equity instrument
Form Convertible Notes (CN)	Indian startup company issuing Convertible Notes to a PROI shall report such inflows in Form CN within 30 days of such issue. Onus of reporting will be on the PRII
Form InVi	An Investment vehicle that has issued units to PROI shall file form InVi within 30 days

- With a view to promoting the ease of reporting of transactions under foreign direct investment (FDI), the RBI, through A.P (DIR Series) Circular No.30 June 07, 2018 ("New Reporting Circular"), has integrated all forms for reporting foreign investment like FC-TRS, FC-GPR, ESOP, DI, Form LLP-I, Form LLP- II, Form DRR, Form InVi into one Single Master Form(SMF)



Downstream Investment – Rule 23

- **Downstream Investment** shall mean investment made by an Indian entity which has total foreign investment in it, or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity

- **Indirect Foreign Investment** means Downstream Investment received by an Indian Entity (IE)
 - From another Indian Entity which has received Foreign Investment(FI) and
 - a) IE is not owned and not controlled by Resident Indian citizens or
 - b) is owned or controlled by PROI
 - An Investment vehicle whose sponsor/manager/Investment manager
 - a) Is not owned and not controlled by resident Indian citizens or
 - b) is owned or controlled by PROI

- **Control** means
 - a) the right to appoint majority of the directors or
 - b) to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.
 - c) In case of LLP, 'Control' shall mean the right to appoint majority of the designated partners, who have exclusive control over all the policies of LLP

“Company controlled by resident Indian citizens” means an Indian company, the control of which is vested in resident Indian citizens and/ or Indian companies which are ultimately owned and controlled by resident Indian citizens

“LLP controlled by resident Indian citizens” shall mean an LLP, the control of which is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens



Downstream Investment – Regulation 23

- **Ownership:**
 - Of an Indian company' shall mean beneficial holding of more than 50 percent of the equity instruments of such company.
 - Of an LLP' shall mean contribution of more than 50 percent in its capital and having majority profit share.

- Company/LLP owned by resident Indian citizens' shall mean where ownership is vested in resident Indian citizens and/ or which are ultimately owned and controlled by resident Indian citizens.

- Company/LLP owned by PROI shall mean ownership with PROI.

- **Total Foreign Investment** means
The total of foreign investment and indirect foreign investment and the same will be reckoned on a fully diluted basis;

- Indian Entities which has received indirect foreign investment shall comply with the entry route, sectoral caps, pricing guidelines and other attendant conditions as applicable for foreign investment.

- Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or controlled by PROI is allowed in an Indian company operating in sectors where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.



Downstream Investment – Calculation Guidelines

- Foreign investment in an Indian company shall include investment under:
 - a. FDI;
 - b. Portfolio investment by FII / FPI (calculated as of March 31 of the previous financial year in which the downstream investment is made);
 - c. NRI investment (Repatriable); (*Share issued as Sweat equity or under employee stock option plans are also not to be considered.
 - d. American Depository Receipt / Global Depository Receipt / Foreign Currency Convertible Bond;
 - e. Investment vehicles;
 - f. Fully, compulsorily and mandatorily convertible preference shares/ debentures / units of an Investment Vehicle.

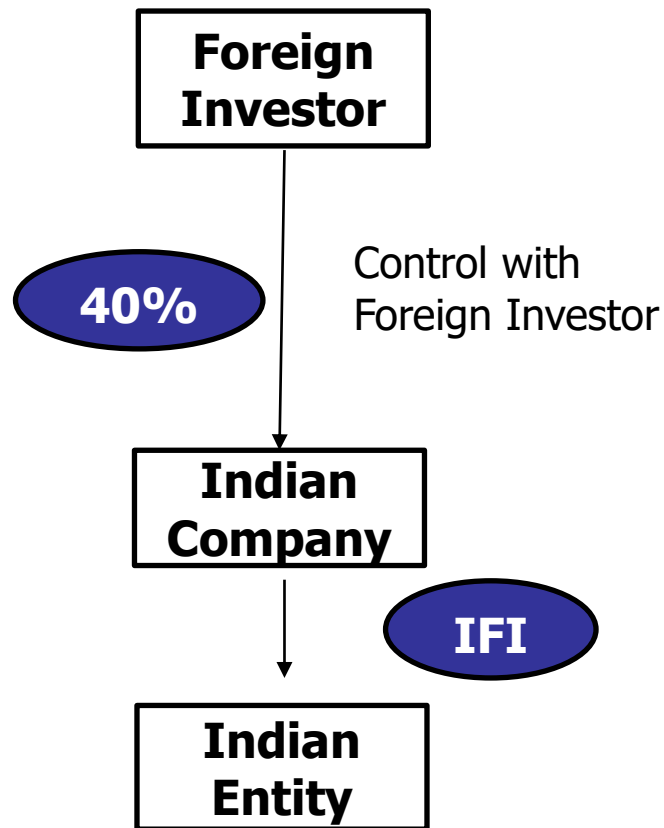
- Methodology for calculation will apply at each stage of Investment

- Total foreign investment shall include direct and indirect foreign investment on a fully diluted basis i.e. conversion of any debt instrument into equity instrument for the calculation

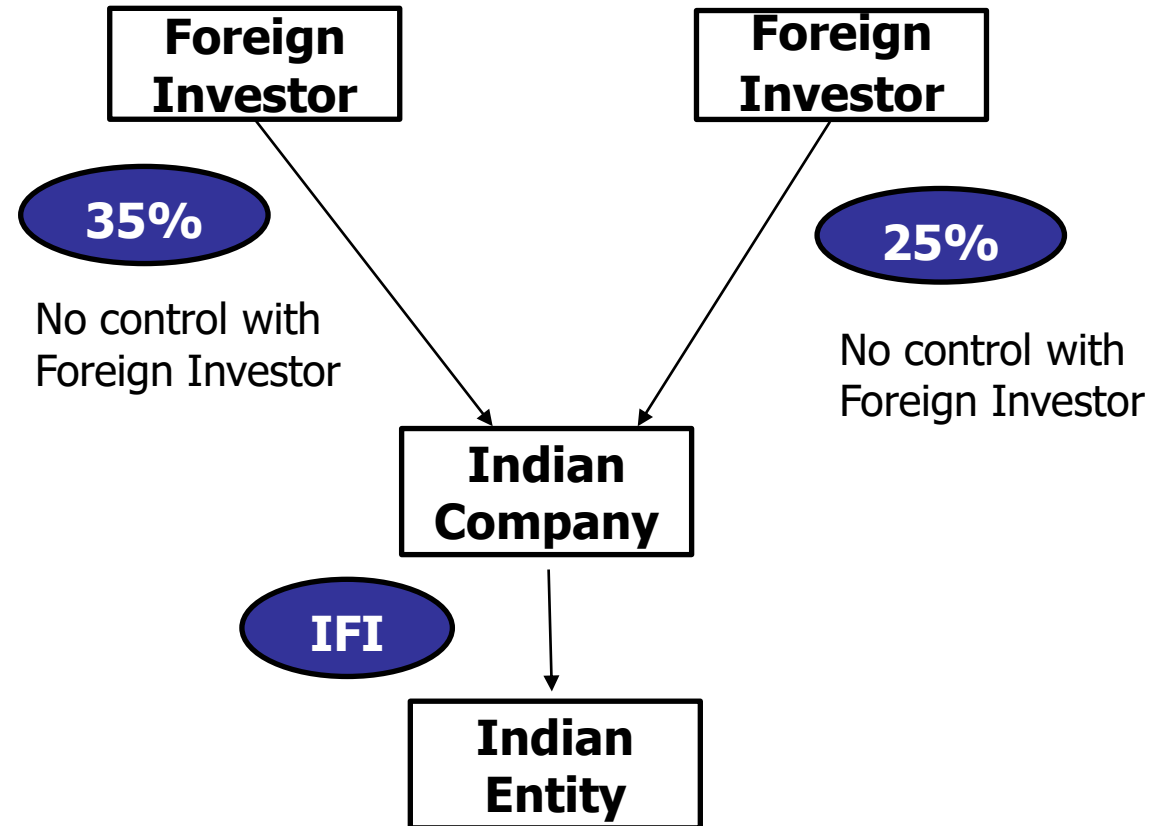
- FCCBs and DRs having underlying of instruments in the nature of debt, shall not be reckoned for total foreign investment;

- **The indirect foreign investment received by a wholly owned subsidiary of an Indian company will be limited to the total foreign investment received by the company making the downstream investment;**

Downstream Investment (Contd)



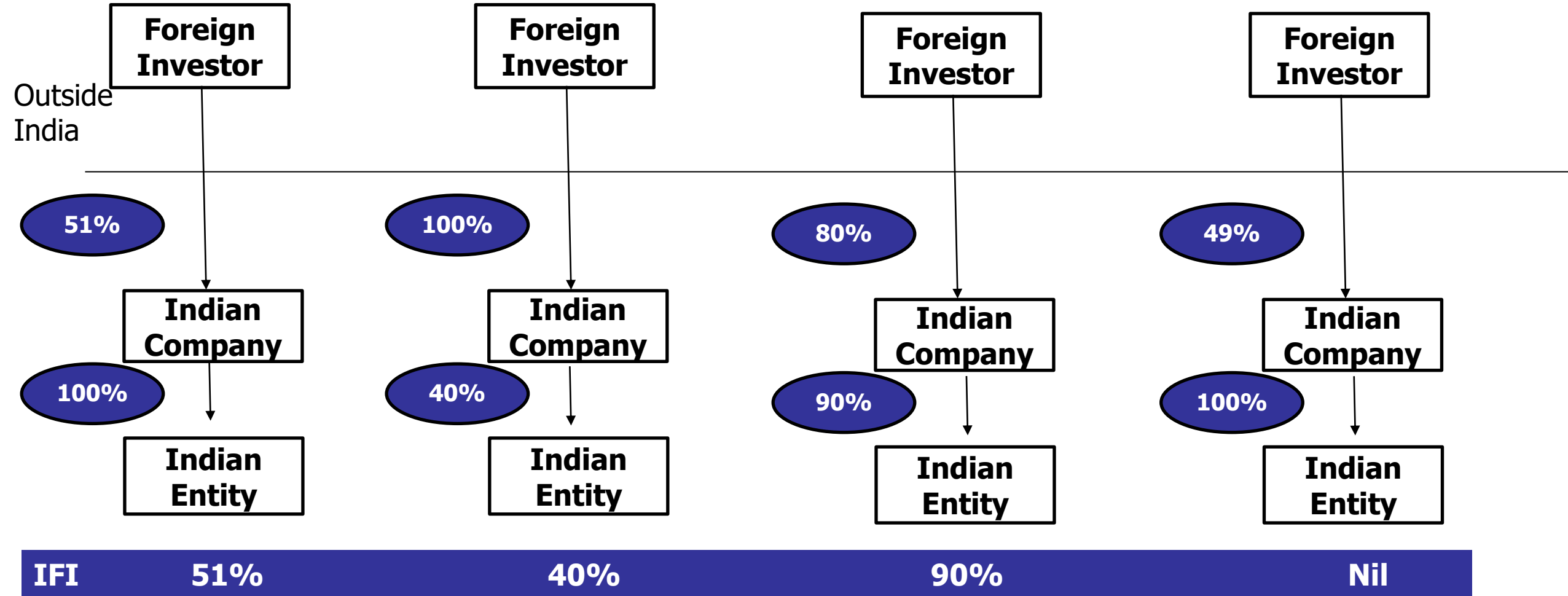
29 June 2020



P. P. Shah & Asso.

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Downstream Investment (Contd)





Conditions for Downstream Investment

Downstream foreign investment is subject to the following conditions:

- Indirect Foreign Investor must notify the RBI and foreign investment facilitation portal within 30 days of the downstream investment, even if the capital instrument has not been allotted.
- Downstream investment must be approved by the Board of Directors as also a shareholders' Agreement, if any.
- The investment must comply with entry route, sectoral caps, pricing guidelines prescribed by RBI and SEBI.
- Downstream investment must be made through inward remittance of funds from abroad and not from funds borrowed from domestic markets. Downstream investments can be made through internal accruals (i.e. profits transferred to reserve account after payment of taxes). This would, however, not preclude downstream companies/LLPs, with operations, from raising debt in the domestic market.
- The Indirect Foreign Investor can transfer the capital instrument acquired by downstream investment to:
 - a. PROI (subject to filing of FC-TRS);
 - b. Indian resident (subject to compliance with Pricing Guidelines);
 - c. Another foreign owned and controlled Indian entity or investment vehicle.
- The onus of compliance with the above-mentioned conditions is on the entity making the downstream investment at each level and a certificate to this effect must be provided by the statutory auditor.

Downstream Investment

An Indian entity or an investment vehicle making downstream investment in another Indian entity which is considered as indirect foreign investment, shall notify the Secretariat for Industrial Assistance, DPIIT within 30 days of such investment, even if equity instruments have not been allotted, along with the modality of investment in new / existing ventures (with / without expansion programme). In terms of reporting, downstream investments are required to be reported by way of Form DI within 30 days from the date of allotment of the equity instruments.

The table below provides the reporting requirement in terms of downstream investments by the Indirect Foreign Investor:

SELLER	BUYER	PRICING GUIDELINES	REPORTING
FOCC (Company owned and controlled by PROI)	Resident	Yes	No reporting
Resident	FOCC	Yes	Form DI
FOCC	Non-resident	Yes	Form FC-TRS
Non-resident	FOCC	Yes	Form-FC-TRS
FOCC	FOCC	No	No reporting
Resident	Non-resident	Yes	Form FC-TRS
Non-resident	Resident	Yes	Form FC-TRS
Non-resident	Non-resident	No	No reporting
Non-resident	NRI/OCI under Schedule 4 of NDA Rules)	Yes	Form FC-TRS
NRI/OCI under Schedule 4 of NDA Rules	Non-resident	Yes	Form FC-TRS
NRI/OCI under Schedule 4 of NDA Rules	Resident	No	No reporting



Investment in NBFCs, CICs and non-operating companies

- Foreign Investment in investing companies not registered as Non-Banking Financial Companies with the Reserve Bank and in core investment companies (CICs), both engaged in the activity of investing in the capital of other Indian entities, shall require prior approval of the Government.
Note: Compliance to these rules by the core investment companies is in addition to the compliance of the regulatory framework prescribed to such companies as NBFCs under the Reserve Bank of India Act, 1934 and regulations framed thereunder.
- Foreign investment in investing companies registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank, shall be under 100% automatic route.
- For undertaking activities which are under automatic route and without FDI linked performance conditions, an Indian company which does not have any operations and also has not made any downstream investment that is treated as indirect foreign investment for the investee entity, may receive investment in its equity instruments from persons resident outside India under automatic route, however, approval of the Government shall be required for such companies for undertaking activities which are under Government route and as and when such a company commences business or makes downstream investment that is treated as indirect foreign investment for the investee entity, it shall have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

Investment by NRIs on non-repatriation basis - Schedule 4 FEM (Non-debt Instruments) Rules, 2019

- NRIs or OCIs, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, may purchase & contribute **on non-repatriation basis**, (i) Any equity instrument issued by a company without any limit either on the stock exchange or outside it (2) Units issued by an investment vehicle without any limit, either on the stock exchange or outside it (3) The capital of a Limited Liability Partnership without any limit (4) Convertible notes issued by a startup company in accordance with the Rules.
- NRIs or OCIs may without limit purchase or sell units of domestic mutual funds on non-repatriation basis which invest more than 50% in equity
- Investment prohibited in chit fund or a nidhi company or company engaged in agricultural / plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights
- Investment should be by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO account
- **Investment by NRIs under Schedule 4 of (erstwhile) FEMA 20 will be deemed to be domestic investment at par with the investment made by residents.** (*Press Note No.7 dated 3rd June, 2015*)
- 'Non-Resident Indian' (NRI) means an individual resident outside India who is a citizen of India or is an 'Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955. 'Persons of Indian Origin' cardholders registered as such under Notification No.26011/4/98 F.I, dated 19.8.2002, issued by the Central Government are deemed to be 'Overseas Citizen of India' cardholders. (*Vide The Citizenship (Amendment) Act 2015 w.e.f. 06 January 2015 read PN7 dated 03 June 2015*)



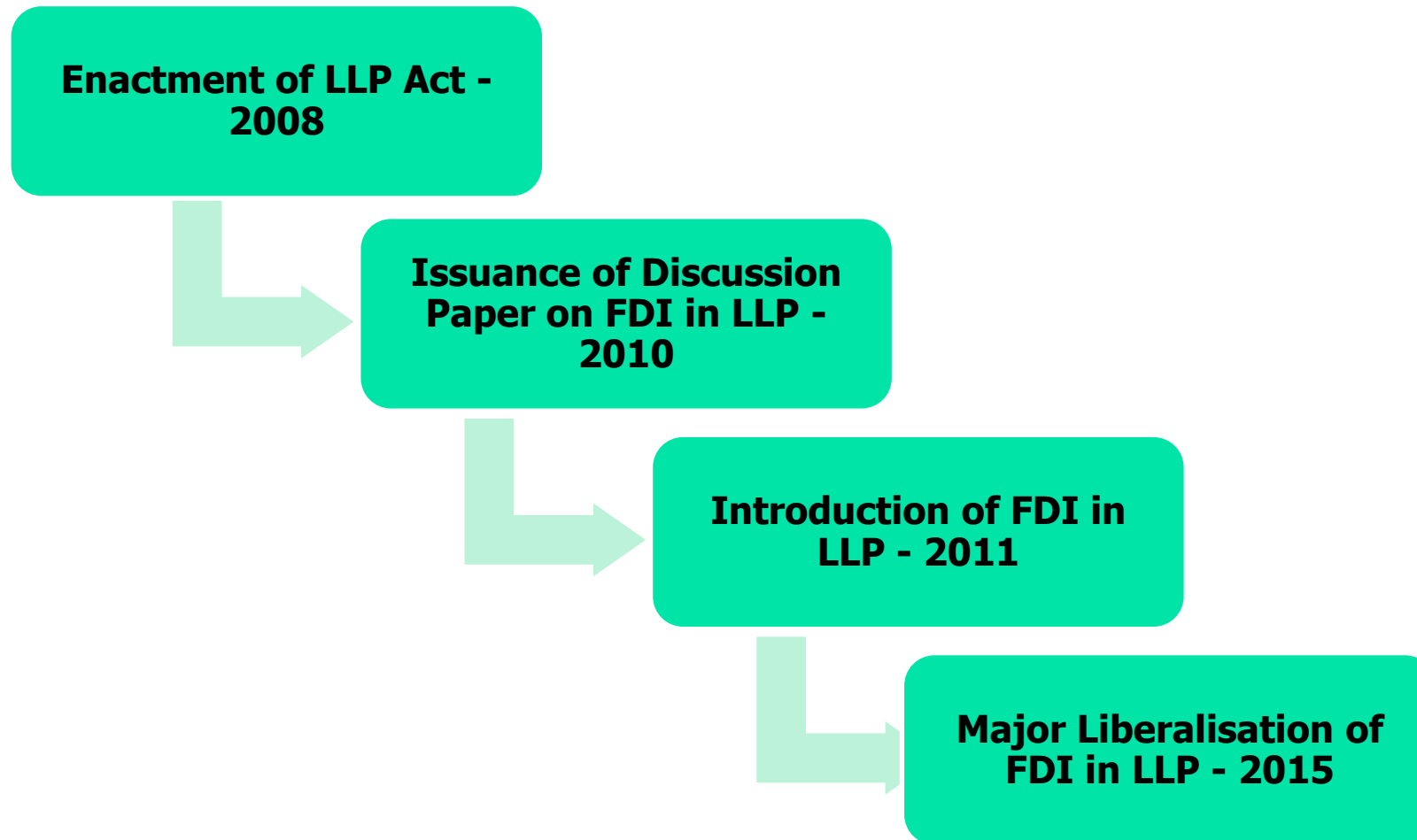
Investment by NRIs on non-repatriation basis - Schedule 4 FEM (Non-debt Instruments) Rules, 2019

- Accordingly, now Overseas NRI Entity will be eligible for investment under Schedule 4 and such investment will be deemed domestic investment at par with investment made by Residents.
- Similarly, under FDI policy/scheme under Schedule 1, Overseas Entity can invest in India with the special dispensation as available to NRIs, e.g. (a) Scheduled Air Transport Services/Domestic Scheduled Passenger Airlines, (b) Regional Air Transport Service, (c) Condition of lock-in period in Construction-development projects. This dispensation is not available for investment by NRIs under Schedule 4.
- The concept of 'owned and controlled by NRIs' has not been defined under Schedule 4 but may be borrowed from Rule 23. 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. A company is considered as 'Owned' by NRIs if more than 50% of the capital in it is beneficially owned by NRIs. A Partnership Firm will be considered as owned by NRIs if more than 50% of the investment in such firm is contributed by NRIs and such NRIs have majority of the profit share.

Investment by NRIs on non-repatriation basis - Schedule 4 FEM (Non-debt Instruments) Rules, 2019

- **Implications for investments made under Schedule 4** as they are deemed domestic investments:–
- Following restrictions which are applicable on investment made by non-residents under Schedule 1 are not applicable:
 - Investment restrictions on sectoral/statutory cap /conditionalities, entry route, pricing guidelines;
 - Reporting requirement (e.g. Advance Remittance Form, FC-GPR, FC-TRS, Form-ESOP, FDI-LLP (I), Form FDI- LLP (II), Annual Return on Foreign Liabilities and Assets, Downstream Investment Reporting), documentation, etc.;
 - Investments under schedule 4 are not counted for direct and indirect foreign investment;
 - Acquisition of Rights Shares/Bonus Shares/Shares after merger, demerger, amalgamation /ESOP/Pledge of shares: Limitations/restrictions contained in FEMA 20 may not apply to investments made under Schedule 4
- However, implications under Section 56(2) of Income-Tax Act, 1961 to be kept in view regarding fair price of shares

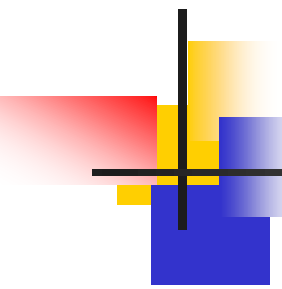
FDI in LLP – Schedule 6 of FEM (Non-Debt Rules), 2019



Investment in Limited Liability Partnerships - Schedule 6 of FEM(Non-debt Instruments) Rules, 2019

➤ **FDI in LLPs:**

- FDI is permitted under the automatic route in LLPs operating in sectors / activities where 100% FDI is allowed through the automatic route and there are no FDI linked performance conditions (such as 'Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects', or 'Retail sector' etc.)
- **Eligible Investment:** Contribution of foreign capital either by way of capital contribution or by way of acquisition / transfer of profit shares in the capital structure of an LLP
- **Downstream Investment:** An Indian company or an LLP, having foreign investment, will be permitted to make downstream investment in another company or LLP engaged in sectors in which 100% FDI is allowed under the automatic route and there are no FDI linked performance conditions.
- A company having foreign investment can be converted into an LLP and vice versa under the automatic route only if it is engaged in a sector where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions



Sectors eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEM (Non-debt Instruments) Rules, 2019

- **FDI in LLPs under automatic route is permitted only in Sectors / activities where 100% FDI is allowed under Automatic route AND there are no FDI linked performance conditions**

- **Sectors which are eligible for investment by LLP meeting these two criteria include:**
 - Agriculture & Animal husbandry activities as specified
 - Plantation activities as specified
 - Manufacturing except food products
 - Airports both greenfield and existing
 - Other services under Civil aviation sector - Maintenance and Repair organizations; flying training institutes and technical training institutions



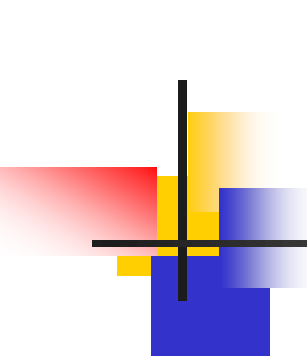
Sectors not eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEM (Non-debt Instruments) Rules, 2019

- **Sectors which are not eligible for investment by LLP i.e. where 100% FDI is allowed under Automatic route but conditionalities are specified. These include:**
 - Mining – coal & lignite
 - Petroleum & Natural gas
 - Broadcasting
 - Non-scheduled Air transport services / Helicopter / seaplane services
 - Construction Development: Townships, Housing, Built-up infrastructure
 - Industrial Parks
 - Trading – Wholesale cash-n-carry, B2B E-commerce
 - Financial Services



Who can invest in Limited Liability Partnerships?

- As per Regulation 5(6) of FEMA Ntf. Foreign Exchange Management (Non-debt Instruments) Rules, 2019 read with Schedule 6, any person resident outside India
- Person includes: Individual, HUF, Company, Firm, AOP or BOI, artificial juridical person and any agency, office or branch owned or controlled by such person
- But under LLP Act, 2008, only Individuals and Body corporates are eligible to become partner in LLP. Body corporate is defined in Section 2(d) of LLP Act to include Indian & Foreign LLPs and Companies incorporated outside India
- Therefore, eligible investors / partners in LLP for FDI are:
 - Individuals, Indian / Foreign Companies and Indian / Foreign LLPs
- However, under Schedule 6 of FEM (Non-debt Instruments) Rules, 2019 , Citizens / Entities of Pakistan & Bangladesh, FPIs and FVCIs are not permitted to invest in LLPs



Investment in Limited Liability Partnerships - Schedule 6 of FEM (Non-debt Instruments), Rules 2019

- **FDI in LLPs – Other aspects:**
 - Capital contribution to LLP to be made by way of inward remittance or debit to NRE / FCNR (B) account (non-cash methods of capital contribution not specifically permitted)
 - Pricing: FDI in a LLP either by way of capital contribution or by way of acquisition / transfer of profit shares, would have to be more than or equal to the fair price as worked out with any valuation norm which is internationally accepted / adopted as per market practice and a valuation certificate to that effect shall be issued by the Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.
 - Transfer: In case of transfer of capital contribution / profit share from a resident to a non-resident, the transfer shall be for a consideration equal to or more than the fair price of capital contribution / profit share of an LLP. Further, in case of transfer of capital contribution / profit share from a non-resident to resident, the transfer shall be for a consideration which is less than or equal to the fair price of the capital contribution / profit share of an LLP.

Investment in Limited Liability Partnerships - Schedule 6 of FEM (Non-debt Instruments), Rules 2019

- **Reporting requirements of FDI in LLPs (on-line):**
 - Receipt of consideration for capital contribution or profit share – Within 30 days
 - Form Foreign Direct Investment – LLP(I)
 - Copies of FIRC
 - KYC report of non-resident investor
 - RBI will allot UIN for each remittance
 - Transfer of capital contribution or profit share between Non-Resident and Resident – Within 60 days in Form Foreign Direct Investment – LLP(II)
 - Annual compliance: Filing of Annual Return on Foreign Liabilities & Assets by 15th July every year



Foreign Venture Capital Investor (FVCI) – Sch 7

- The term FVCI has been defined under SEBI (Foreign Venture Capital Investor) Regulations 2000 to mean: An investor incorporated or established outside India, which proposes to make investments in venture capital fund(s) or venture capital undertakings (VCU) in India and is registered under the FVCI Regulations”
- Key Eligibility Conditions for FVCI
- Has sufficient experience, good track record, professionally competent, financially sound with good reputation
- Has been granted necessary approval by the RBI for making investments in India
- No prior approval of RBI required for investments under schedule 7
- Could be an investment entity, pension fund, mutual fund, endowment fund, charitable institution or any other entity incorporated outside India
- Main objects should permit the fund to carry on the activity of venture capital
- Has not been refused a certificate by SEBI
- Regulated by an appropriate foreign regulatory authority or is an income tax payer; or submits a certificate from its banker of its or its promoter’s track record it is neither a regulated entity nor an income tax payer
- SEBI clarified that DPP may consider granting of FPI registration to FVCI registered entity, subject to conditions - clear segregation of funds/ securities, etc.



FVCI – Investment Criteria

A FVCI registered with SEBI is permitted to make investments in following manner:

- An FVCI can invest all of its funds in a domestic VCF- a registered FVCI is allowed to invest 100% of its funds in a VCF registered under SEBI(Venture Capital Fund) Regulations.
- It has to invest atleast 66.67% of its investible funds in unlisted equity shares or equity linked instruments of Venture Capital Undertakings.
- It can invest only 33.33% of its funds (and not more), by-
 - a)Subscribing to initial public offer of adventure capital undertaking whose shares are proposed to be listed;
 - b)Investing in debt or debt instrument of the VCU* in which FVCI has already made an investment by Equity
 - c)Preferential allotment of equity shares of a listed company subject to lock in period of one year;
 - d)Investment by subscription or purchase in the equity shares or equity-linked securities of a financially weak listed company or industrial listed company.
 - e)Investment by way of subscription or purchase in Special Purpose Vehicles created for the purpose of facilitating or promoting investment in accordance with these regulations.

FVCI have a fixed life cycle. Every FVCI making investments in IVCU or VCF has to mandatorily disclose life cycle of its fund before making any investments. It has to further disclose all its investment strategies to the SEBI before it makes any investment in India.

*VCU- Venture Capital undertaking

FVCI - Schedule 7 of FEM (Non-debt Instruments) Rules, 2019

Eligible Instruments

- Securities issued by an Indian company engaged in specified sectors* and whose shares are not listed at the time of issuance
- Securities issued by a startup irrespective of the sector in which it is engaged
- Units of a VCF or a Cat I AIF or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF

- *Specified Sectors:

Biotechnology, IT related to hardware and software development, Nanotechnology, Seed research and development, Research and development of new chemical entities in pharmaceutical sector, Dairy industry, Poultry industry, Production of bio-fuels, Hotel-cum-convention centres with seating capacity of more than three thousand and Infrastructure sector. The term 'Infrastructure Sector' has the same meaning as given in the Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide Notification F. No. 13/06/2009-INF dated March 27, 2012 as amended/ updated.



Alternate Investment Fund – Brief Overview

“Alternative Investment Fund” means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which,

(i) is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors; and

(ii) is not covered under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 or any other regulations of the Board to regulate fund management activities.

Exemptions:

Family trusts

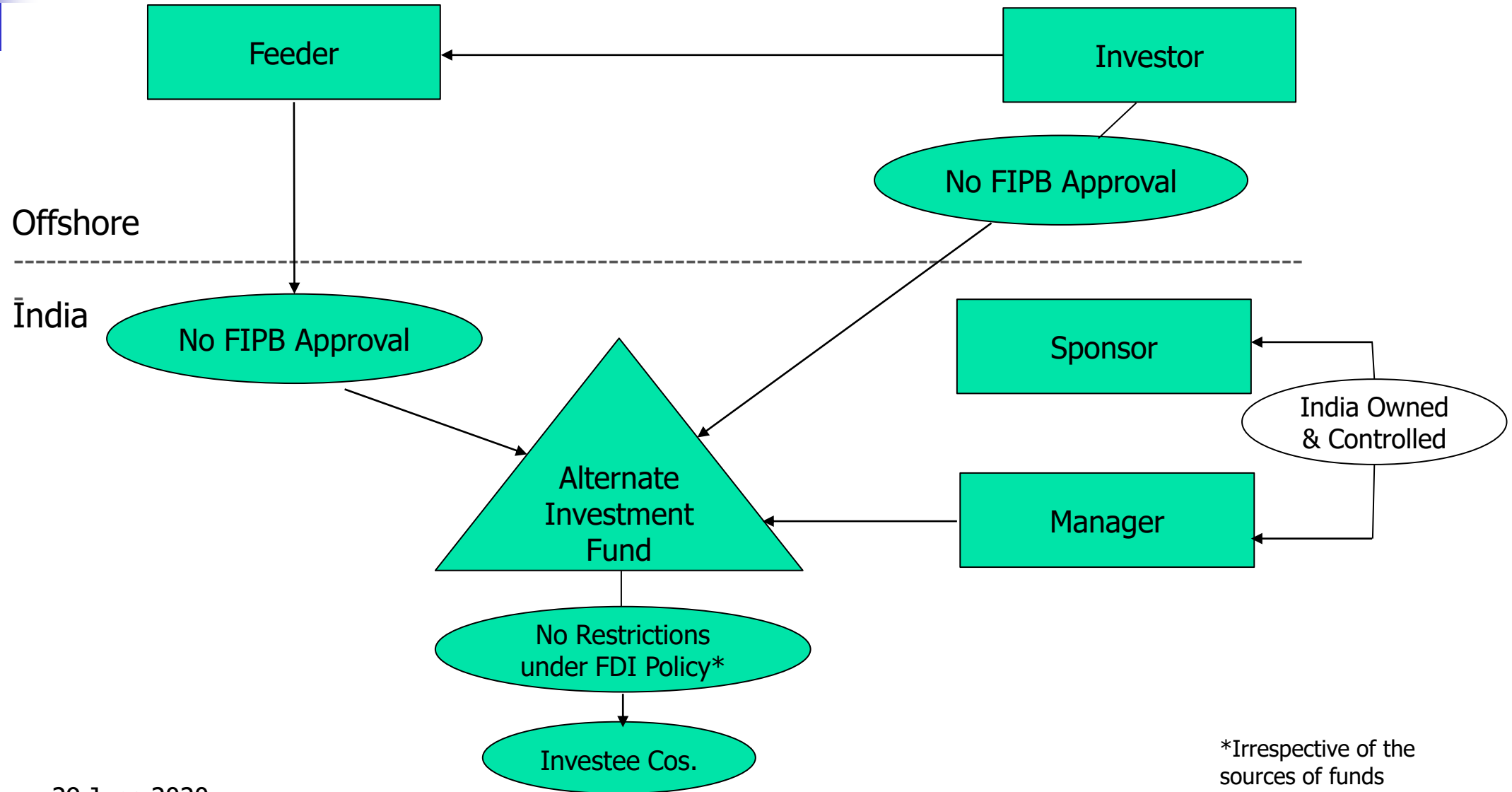
ESOP trusts

Employee welfare trusts

Holding companies

Securitization trusts

Alternate Investment Fund – Brief Overview





Alternate Investment Fund – Brief Overview

- Alternate Investment Fund are divided into 3 categories:
 - i. Category I AIF - Angel Fund, Venture Capital Funds; - SME Funds; - Social Venture Funds; and Infrastructure Funds
 - ii. Category II AIF - Private Equity Funds; Structured Credit Funds; Debt Funds; Real Estate Funds.
 - iii. Category III AIF - Long only Funds; Long-short Funds; Hedge Funds and any other Funds with diverse and complex trading strategies.

- Foreign investments permitted in AIFs (all categories) - NR including investments by NRIs and FPIs; No specific approval required
- Units can be can be pledged to secure credit facilities and / or transferred in any manner or may be redeemed as per SEBI regulations / RBI directions
- **“Control” of the AIF should be in the hands of Sponsors and Managers / Investment Managers**
- Downstream investment not applicable if Sponsor and Manager are Indian owned and controlled
- AIF Cat – III with foreign investment shall make portfolio investments in only those securities or instruments in which FPI is allowed to invest per SEBI (FPI) Regulations
- Schedule 8 permits FPI to invest in units of AIF (all categories) but SEBI permits FPI to only invest in Cat III AIF (not more than 25%)



Practical Issues - FDI Policy

- **100% FDI in LLP under Automatic Route**

- ❑ 100% FDI in LLP is permitted under Automatic Route provided the sectors /activities are falling under Automatic Route and there are no FDI-linked performance conditions.
- ❑ Further, downstream investment by LLPs in Indian Company / LLP under Automatic Route is also permitted provided sectors /activities are falling under automatic route and there are no FDI-linked performance conditions.
- ❑ Definition of Control is introduced – right to appoint majority of Designated Partners where such designated partners, with specific exclusion to others, have control over all the policies of the LLP
- ❑ Definition of Ownership is introduced – percentage of the investments in LLPs

Key issues

- Whether LLP can be capitalized on non-cash basis (against import of goods, services, etc.) in the same way as an Indian Company?
- With control and ownership criteria now defined, whether basis exists to deny FDI to LLP in all sectors / activities even with performance conditions?



Practical Issues - FDI Policy (con't)

- **Acquisition by NRIs on non-repatriation basis as per PN 7 of 2015**
 - NRI definition which includes PIOs amended to include Overseas Citizens of India (OCI) whose ambit is wider than PIOs.
 - NRI Investments under schedule 4 of FEM (Non Debt Instruments) Rule, 2019 deemed to be domestic investment on par with residents

- **Benefits conferred to NRIs by PN 12 of 2015**
 - A Company, Trust and Partnership Firm incorporated outside India and owned and controlled by NRIs
can invest in India with the special dispensation as available to NRIs under the FDI Policy
 - Sectors relevant : Schedule Air Transport (NRI 100%/ FDI 49%); Construction-Development
 - Similar Benefits to investments under schedule 4 of FEM (Non Debt Instruments) Rule, 2019 – Non Repatriation Basis

- **Key Issues**
 - Is this a change in policy to now allow erstwhile OCBs for FDI and other investments in India??
 - How does one determine ownership and control in oversea Trust and Partnership?
 - Is conversion of NRI investment from Repatriable to Non-Repatriable basis possible?



Practical Issues - FDI Policy (con't)

- **Direct & Indirect Foreign Investment (IFI) by Resident Foreign citizens:**
- FEMA rules generally do not apply based on citizenship but applies only when a transaction is between a resident and a non-resident. In case an Indian resident invests in an Indian company, FEM(Non-debt Instruments) Rules, 2019 also does not apply as the provisions are applicable only to PROIs.
- However, when it comes to downstream investments by IC, the regulations make a clear difference between Indian Company (IC) owned and controlled by resident Indian citizens or owned or controlled by non-residents.
- **Key Issues:**
 - If a foreign citizen who is resident in India is making direct investment in an Indian Company (i.e. first level IC), it appears that such a transaction shall not be regulated by FEMA (or FEMA Notification No. Foreign Exchange Management (Non-debt Instruments) Rules, 2019). Is this the intention of the law and regulations?
 - If the IC is considered as Indirect Foreign Investment (as it is not owned and controlled by resident Indian citizen but by foreign citizen resident in India), then it gives rise to a situation where investment in IC is not regulated, whereas downstream investment is regulated. Is that the intention?



Practical Issues - FDI Policy (con't)

- **FDI for earning rent / income on lease of property:**

FEM (Non- Debt) Rules, 2019 clarifies in Paragraph 10.2 relating to FDI in Construction Development that FDI in Real Estate business is not permitted but earning of rent / income on lease of property will not amount to real estate business. It is reproduced for convenience as under:

“(i) It is clarified that FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights (TDRs).

“Real estate business” means dealing in land and immovable property with a view to earning profit there from and does not include development of townships, construction of residential/ commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/ income on lease of the property, not amounting to transfer, will not amount to real estate business.”

- **Key Issues:**

- As against construction and subsequent lease of the property by the FDI recipient Indian Company, if FDI is instead made directly by FDI recipient Indian Company by way of investments in constructed property such as townships / residential / commercial premises, etc. with a view to lease the same in order to earn rent / income, would it be permissible under the FDI guidelines? The economic benefits to the country would be the same as local developers would have exit route of sale of constructed property to PROIs under FDI route.



Practical Issues - FDI Policy (con't)

- **Pricing of Compulsorily Convertible Debentures:**
 - As per the prevalent pricing guidelines of instruments under FDI, the pricing of shares / convertible debentures / preference shares should be decided / determined upfront at the time of issue of the instruments.
 - The price for the convertible instruments can also be a determined based on the conversion formula which has to be determined / fixed upfront, however the price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments, in accordance with the extant FEMA regulations.

- **Key Issues:**
 - If the conversion formula is specified upfront as say e.g. “conversion shall be based on the price / earnings ratio at the time of conversion to be decided by the management subject to minimum issue price of Rs. 50/- per share being the fair value worked out at the time of issuance of these instruments”, would it be in compliance with the pricing guidelines?

 - The price for conversion into shares may be determined based on future profits. Hence till the FCDs are converted into shares, the exact foreign shareholding in the company cannot be determined. How can this be resolved when the Indian company is undertaking downstream investments in order to determine indirect foreign holding?



Practical Issues – Escrow mechanism in FDI transactions

- Escrow mechanism has been permitted to facilitate FDI transactions in cases where parties to the share purchase agreement desire to complete the due diligence process before they finalize the agreement for the same and accordingly, there is a time lag between payment of purchase consideration and the receipt of the shares.
- AD Category – I banks have been given general permission to open and maintain non-interest bearing Escrow account in Indian Rupees in India on behalf of residents and non-residents, towards payment of share purchase consideration. Also, SEBI authorised Depository Participant are permitted to open and maintain, without approval of the Reserve Bank, Escrow account for securities.
- The detailed stipulations relating to opening of Escrow account are specified in Regulation 5(5) read with Schedule 5 of FEMA Ntf. 5(R)
- Regulation 5(5) of FEMA Ntf. 5(R) stipulates that “Resident or non-resident acquirers may, subject to the terms and conditions specified in Schedule 5, open, hold and maintain Escrow Account with Authorised Dealers in India”.
- **Key Issues:**
 - If the FDI transaction involves opening of Escrow account, is there a compulsion to open the same only in India?
 - Can a Cash Escrow account be opened abroad in which the Indian resident is not undertaking any transaction of remittance but it is only going to receive remittance in India as and when the transaction is finally consummated on completion of due diligence procedures?

FDI IN VARIOUS SECTORS



FDI IN E-COMMERCE

- E-commerce means buying and selling of goods and services including digital products over digital & electronic network
- Inventory based Model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and sold to the consumers entity
- Market place based Model of e-commerce means Providing an Information technology platform of an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller
- B2B E-commerce is allowed 100% under Automatic route
- E-commerce entities would only engage in B2B e-commerce and not B2C
- FDI is not permitted in an Inventory based Model of e-commerce



FDI IN E-COMMERCE – PRESS NOTE 2 OF 2018

Additional Conditions

- Digital & Electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles, etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services
- E-commerce entity providing a market place will not exercise ownership over the inventory. Inventory of vendor will be deemed to be controlled by e-commerce market entity if more than 25% of purchases of such vendor are from market place entity or its group entity
- An entity having equity participation by e-commerce market place entity or its group entity or having control on its inventory by market place entity or its group entity will not be permitted to sell its products on platform run by market place entity
- E-commerce entities providing market place will not directly or indirectly influence the sales price of goods or services and shall maintain level playing field. Services on platform should be provided at arm's length and in a Non discriminatory manner. Such services will include but not be limited to fulfilment, logistics, warehousing, advertising, marketing, payments, financing, etc. Cash backs provided by group companies of market place entity to buyers shall be fair. Provision of services to vendor on any such terms which are not available to other vendors in similar circumstances will be deemed discriminatory



FDI IN E-COMMERCE – PRESS NOTE 2 OF 2018

Additional Conditions

- Goods/Services made available for sale electronically on website should clearly provide name, address, and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller
- Payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines issued by RBI in this regard
- Any warranty/guarantee of goods and services will be the responsibility of seller
- E-commerce market place entity will not mandate any seller to sell any product exclusively on its platform
- Furnish certificate along with a report of statutory auditor to RBI confirming compliance by 30th September every year

The Amendment to E-commerce Activity has been issued Vide DIPP press note no 2 (2018 series) dated 26th December 2018. The same is effective from 1st February 2019



FDI in Defence Sector

'Defense Sector'

As per Consolidated FDI Policy, in Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959, FDI is permitted upto 49% in automatic route and upto 100% through Govt. route if it is likely to result in access to modern technology or for other reasons to be recorded.

Licence applications will be considered and licences given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs.

Foreign investment in the sector is subject to security clearance and guidelines of the M/o Defence.

Investee company should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.

Key issues:

- In case of items related to Defense sector but not falling under Industrial Licensing or Arms Act such as electronic components used in defense products as well as in other industries, how will the FDI Policy apply?
- In such cases, will security clearance from M/o Defense still be required?



FDI in Broadcasting & Print Media

- **Broadcasting Sector and Print Media Sector**
- FDI Policy on Broadcasting Sector applies to Broadcasting Carriage Services (such as Cable Networks, DTH, Mobile TV, etc.) FDI is permitted upto 100% under Automatic route. Broadcasting Content Services being FM Radio, Up-linking of 'News & Current Affairs' (FDI is permitted upto 49% under govt route) and 'Non-News & Current Affairs' TV Channels / Downlinking of TV Channels. (FDI is permitted upto 100% under Automatic route)
- FDI Policy on Print Media Sector applies to Publishing of newspaper and periodicals dealing with news and current affairs, Publication of Indian editions of foreign magazines dealing with news and current affairs. FDI is permitted upto 26% under Government Route .
- Publishing/printing of scientific and technical magazines/specialty journals, etc. and Publication of facsimile edition of foreign newspapers, FDI is permitted upto 100% under Government Route.
- Detailed conditions are specified for these sectors. Operational conditions seek to regulate the activities of the journalists through sector-specific laws & guidelines.
- It can be observed that both sectors deal with different methods of dissemination of information which may be News & Current Affairs or non-News & Current Affairs.
- However, Internet-based journalism and online dissemination of information through portals which is rapidly proliferating is not specifically covered under the FDI Policy under the above Sectors
- **Key Issue:** Can an Indian company proposing to engage in collection of news & current affairs, analysis & reporting / publishing of same through internet online portals invite FDI under automatic route? Is this a loop-hole in the law as the intention of the FDI Policy is to regulate foreign investment in sensitive sectors which deal with matters of national interest?



FDI in Manufacturing Sector

- **Definition of 'Manufacture' inserted which is same as under Section 2(29BA) of the Income-tax Act:**

Manufacture with its grammatical variations means a change in a non-living physical object or article or things – (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or (b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure.

Subject to the provisions of the FDI policy, foreign investment in 'manufacturing' sector is under automatic route. Further, a manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce, without Government approval.

Notwithstanding the FDI policy provisions on trading sector, 100% FDI under Government approval route is allowed for retail trading, including through e-commerce, in respect of food products manufactured and/or produced in India.

- **Key issues**

- As the definition of Manufacture is wide in scope and no norms are prescribed for minimum investment or value-addition, etc., this may give rise to interpretation issues.
- Therefore, can reliance be placed on judicial precedents under the Income tax Act to determine the eligibility for FDI under the FDI policy?
- Moreover, the earlier provisions for FDI in sectors reserved for Micro, Small & Medium enterprises is also dropped. It therefore implies that FDI exceeding 24% is now permitted without Govt. approval even in such reserved sectors.



FDI in Single Brand Retail

- **Single Brand Product Retail Trading (SBRT)**
- Existing regulations on SBRT allows 49% FDI under automatic route, and FDI beyond 49% and up to 100% through Government approval route.
- **Conditions:**
 - SL.No.15.3.1.of other conditions under FDI in Single Brand product retail trading specify various conditions



FDI in Single Brand Retail

- **Single Brand Product Retail Trading (SBRT) - changes in Regulation 16.B S.No. 15.3**
- Amendments read as follows (insertions in bold and substitutions/ deletions in strikethrough):-
 - A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, **either** ~~directly or through a legally tenable agreement by~~ with the brand owner for undertaking single brand product retail trading by the brand owner or **through a legally tenable agreement executed between the Indian Entity undertaking single brand retail trading and the brand owner**. ~~The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single brand product retail trading in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the licensing/ franchise/ sub license agreement, specifically indicating compliance with the above condition. The requisite evidence should be filed with the RBI for the automatic route and the Government for cases involving approval. A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake „single brand“ product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner."~~



FDI in Single Brand Retail

- **Single Brand Product Retail Trading (SBRT)**

- **Conditions**
 - Sourcing norms shall not be applicable up to three years from commencement of the business i.e. opening of the first store for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible. Thereafter, in respect of proposals involving foreign investment beyond 51 percent, sourcing of 30 percent of the value of goods purchased, shall be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing shall be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company shall be required to maintain. The procurement requirement is to be met in the first instance as an average of five years total value of goods purchased beginning 1st April of the year of the commencement of the business. Thereafter it shall be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single brand product retail trading.
 - Subject to the conditions mentioned in this Para, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce



FDI IN REAL ESTATE

- The Real Estate sector is one of the critical sectors of the Indian economy on account of its multiplier effect on the economy and economy growth
- Real estate sector in India is expected to reach a market size of US\$ US\$ 1 trillion by 2030 from US\$ 120 billion in 2017 and contribute 13 per cent of the country's GDP by 2025
- In March 2019, Embassy Office Parks, India's first real estate investment trust (REIT) went public.
- According to data released by DIPP, the construction development sector in India has received FDI inflows to the tune of US\$ 24.91 billion in the period April 2000-December 2018.
- Use of External Commercial Borrowings (ECBs) and Foreign Currency Convertible Bonds (FCCBs) for raising funds for investment into real estate has been completely banned
- Also, funding from bank for acquisition of land is restricted from RBI
- Similarly, funding of land and related FSI, like TDR, has been prohibited by way of FDI; however, purchase of TDR for the development of property is permitted
- In short, FDI in Real Estate Business is prohibited, however, it is only permitted to fund the construction and development cost
- According to DIPP, total FDI inflow in construction development sector during 2000 to 2018 has been around US\$ 25 billion which is about 6.09% of total FDI inflows (in terms of US\$)



FDI in Real Estate (con't)

- **Real Estate Sector**
- Each phase of the construction development project to be considered as a separate project subject to the conditions
- Minimum area to be developed and minimum capitalization conditions deleted
- Exits simplified
 - Foreign investor can exit before the completion of project under automatic route subject to a lock-in-period of three years (calculated with reference to each tranche of foreign investment)
 - Transfer of stake from non-resident investor to another non-resident investor not involving repatriation neither subject to lock-in period nor Government approval
- Prohibited Real estate business ambit relaxed to exclude earning of rent /income on lease of the property not amounting to transfer and the term transfer **includes**:
 - Sale, exchange or relinquishment
 - Extinguishment of any rights or compulsory acquisition under law
 - Allowing possession under Section 53A of Transfer or Property Act
 - Any arrangement including transfer of shares which has effect of transferring or enabling enjoyment of immovable property
- **Key Issues:** What types of arrangements qualify under above provisions?

Earlier, such conditionalities did not apply to investment by NRIs. Now, with the removal of this exception, provisions have become more stringent for NRIs. Was this the intention?



FDI in Real Estate (con't)

- Permitted: 100% FDI under automatic route is permitted in construction development projects, which includes development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutes, recreational facilities, city/regional level infrastructure, townships, Real Estate broking, Investment in units of REITS registered with RBI.
- Not Permitted: FDI is not permitted in an entity which is engaged or proposed to be engaged in (i) any Real Estate Business (which is defined and is dealt with below), or (ii) construction of farm houses, or (iii) trading in transferable development rights
- "Transfer", in relation to FDI policy on the sector, includes,—
 - (a) the sale, exchange or relinquishment of the asset ; or
 - (b) the extinguishment of any rights therein; or
 - (c) the compulsory acquisition thereof under any law ; or
 - (d) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
 - (e) any transaction, by acquiring shares in a company or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.



FDI in Real Estate (con't)

- Exit & Lock in Restrictions

An investor is allowed to exit and Repatriate the funds only after:

- i. After 3 years from the date of each tranche of foreign investment, or
 - ii. On the completion of the project; or
 - iii. On the completion / development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage
- Transfer of stake from one non-resident to another non-resident, without repatriation of investment will neither be subject to any lock-in period nor to any government approval.
 - Condition of lock-in period will not apply to Hotels & Tourist Resorts, Hospitals, Special Economic Zones (SEZs), Educational Institutions, Old Age Homes and investment by NRIs or OCIs
- Each phase of project will be considered as a separate project for the purpose of FDI policy
 - 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes and business centres. Transfer of ownership and/or control of the investee company from residents to non-residents is also permitted with a lock-in-period of three years, calculated with reference to each tranche of FDI. Transfer of immovable property or part thereof is not permitted during this period.



FDI in Real Estate (con't)

- Obligation of Indian Investee

- Indian Investee Company is permitted to sell only developed plots, i.e. the plots where trunk infrastructure has been available
- Indian Investee Company is responsible for obtaining all approvals, payment of development and other charges, and compliance with all other requirements as prescribed by local government bodies
- FDI is not permitted in an entity which is engaged or proposes to engage in 'Real Estate Business'. However the earning or rent/income on lease of the property, not amounting to transfer, does not amount to 'Real Estate Business' and hence is permitted

- Major changes in FDI Policy

- There is no minimum area requirement. (Earlier, minimum floor area to be developed under each project was required to be 20,000 sq. meters for construction development projects). Consequently other requirements applicable before like procurement of empanelled architect by the investee company has also been removed
- There is no Minimum capitalization required. Earlier, a minimum capitalization of USD 5 million was required to be brought in within 6 (six) months of the commencement of the project]



FDI IN FINANCIAL SECTOR

- Indian financial services sector comprises of various sub sectors like banks, non-banking financial companies (NBFCs), insurance sector entities and capital market related entities like stock and commodity exchanges, brokers, mutual funds, merchant bankers etc
- **Pre 2016 – FDI in NBFC**
- Foreign investment in NBFC was allowed up to 100% under the automatic route in prescribed 18 activities. Investment in other unspecified financial activities was considered under the approval route.
- Activities classified as Fund based and Non-fund based



FDI IN FINANCIAL SECTOR

- **Revamping Policy for FDI in Other Financial Services**
- In the year 2016, the Foreign investment policy in 'Other Financial Services' was amended to provide that financial services activities regulated by financial sector regulator (viz., Reserve Bank, Securities and Exchange Board of India, Insurance Regulatory and Development Authority, Pension Fund Regulatory and Development Authority, National Housing Bank or any other financial sector regulator as may be notified by the Government of India) can have foreign investment up to 100% under automatic route.
- Such foreign investment was subject to conditionalities, including minimum capitalization norms, as specified by the concerned Regulator/ Government Agency
- FDI in entities engaged in following activities required prior government approval
 - Not regulated by any financial sector regulator
 - Where only part of the financial services activity was regulated
 - Where there was doubt regarding the regulatory oversight, foreign investment up to 100 percent will be allowed under Government approval route subject to conditions including minimum capitalization requirement, as may be decided by the Government
- Policy revamped helped in:
 - Elimination of narrow list of 18 permitted activities
 - All regulated activities permitted to receive FDI
 - Making room for including newer activities
 - Removal for minimum capitalisation conditions - Ease for downstream investment

Acquisition & Transfer of Immovable Property in India – (Rules 24 – 33) (Chapter IX)

A NRI or an OCI may –

- a) acquire immovable property in India other than an agricultural property, plantation, or a farm house by way of purchase, gift from a relative (PRII, NRI, OCI), inheritance from PROI:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of

- (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or
- (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by other mode other than those specifically permitted by this clause`

- b) transfer any immovable property in India to a person resident in India
- c) transfer any immovable property other than agricultural or plantation property or farm house to an NRI or an OCI



Acquisition & Transfer of Immovable Property in India (cont'd)

- A PROI not being an NRI/OCI who is a spouse of an NRI or an OCI may acquire one immovable property (other than agricultural land or farm house or plantation property), jointly with his or her NRI or OCI spouse subject to:
 - i. Consideration for transfer shall be made through banking channel out of inward remittance or funds held in Non resident account
 - ii. The marriage has been registered and subsisted for a continuous period of minimum 2 years immediately preceding the acquisition of such property
 - iii. The non-resident spouse is not otherwise prohibited from such acquisition

- A PROI who has established a branch office or other place of business for carrying on in India any activity may acquire any immovable property in India, which is necessary for or incidental to carrying on such activity subject to:
 - i. the person files with the Reserve Bank a declaration in the Form IPI as specified by the Reserve Bank not later than ninety days from the date of such acquisition
 - ii. all applicable laws, rules, regulations, for the time being in force are duly complied with



Acquisition & Transfer of Immovable Property in India (cont'd)

- A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to certain conditions

- In the event of sale of immovable property other than agricultural land or farm house or plantation property in India by an NRI or an OCI, repatriation of sale proceeds outside India is permitted subject to:
 - (a) The immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition or the provisions of these rules;
 - (b) The amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External Account;
 - (c) In the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.



Acquisition & Transfer of Immovable Property in India (cont'd)

- No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or Democratic People's Republic of Korea (DPRK) without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease not exceeding five years
- The above restriction will not apply to an OCI card holder



Thank You
