FEMA - FDI Policy, Pricing Guidelines, Sector specific regulations, Transfer of Shares, Repatriation of Capital & Investment Income, Reporting & Compliance, Recent trends & developments

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Workshop on FEMA
By NIRC of ICAI

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ACMA, FCS, FCA

Abstract from Lecture delivered by Mr. Justice S H Kapadia, Hon'ble Chief Justice of India on 20th February 2010 at ITAT Conference

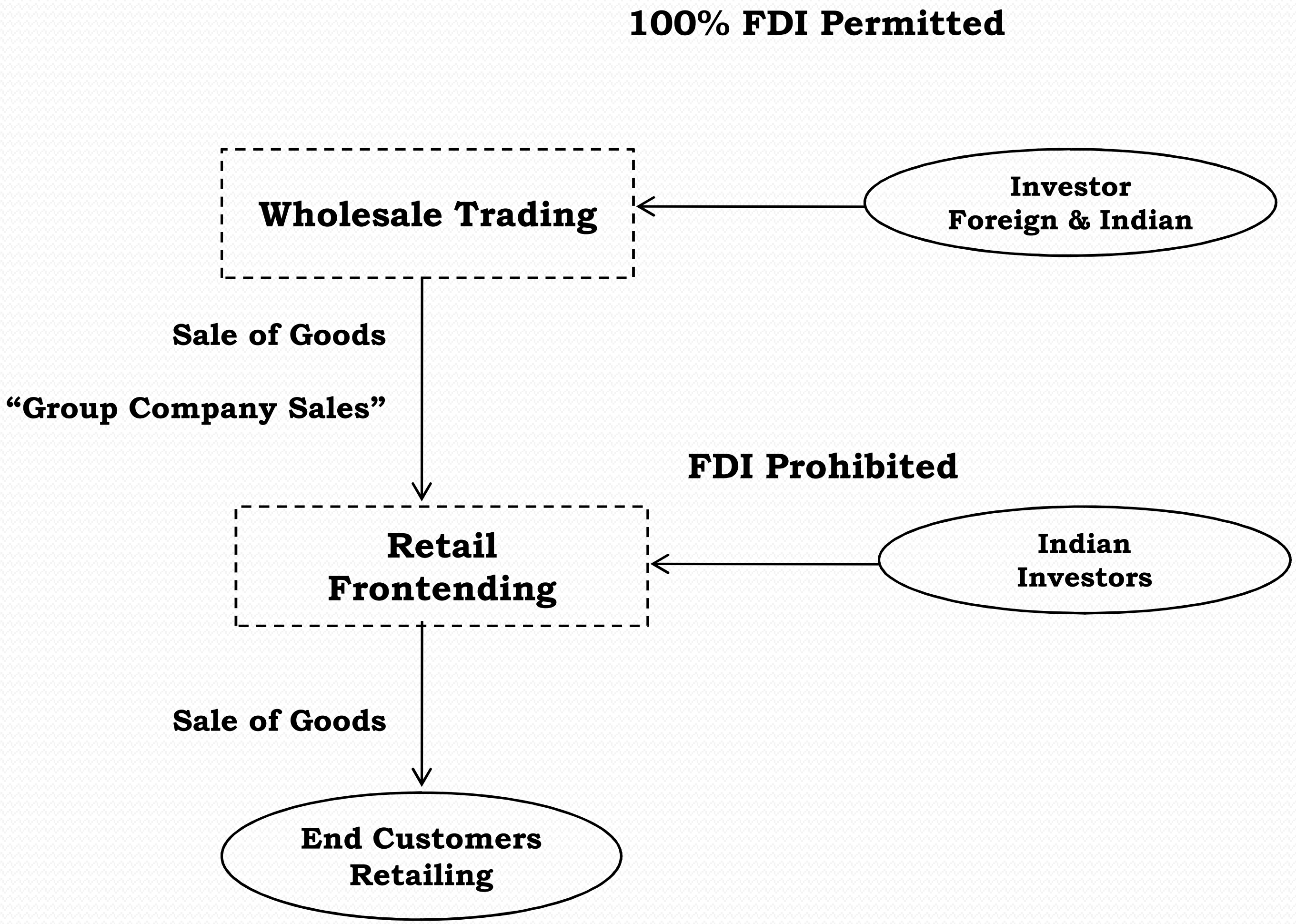
- Start:

  "But friends, let me tell you about whatever I have learnt; in fact I became a judge precisely because I was very keen to have a learning process. I always realized that this is a position where if a judge sits with an open mind and with clarity of thought, he will understand and he will learn in the process and ***I can tell you from experience that each day, in whatever jurisdiction you sit, it's a learning process*** *and there I may say that be judges or members of the Tribunal, we are all enjoying a reflected glory of the advocates who have contributed to a large extent in the development of tax law."*

  End:

  "I always believe that ***instead of going into theories and principles, etc.****, it is better that we* ***share experience in such workshops and seminars****. And last thing I would like to say is, please do not put an and to the efforts here. It is a continuing process."*

Wholesale and Retail Model- Inventory Model

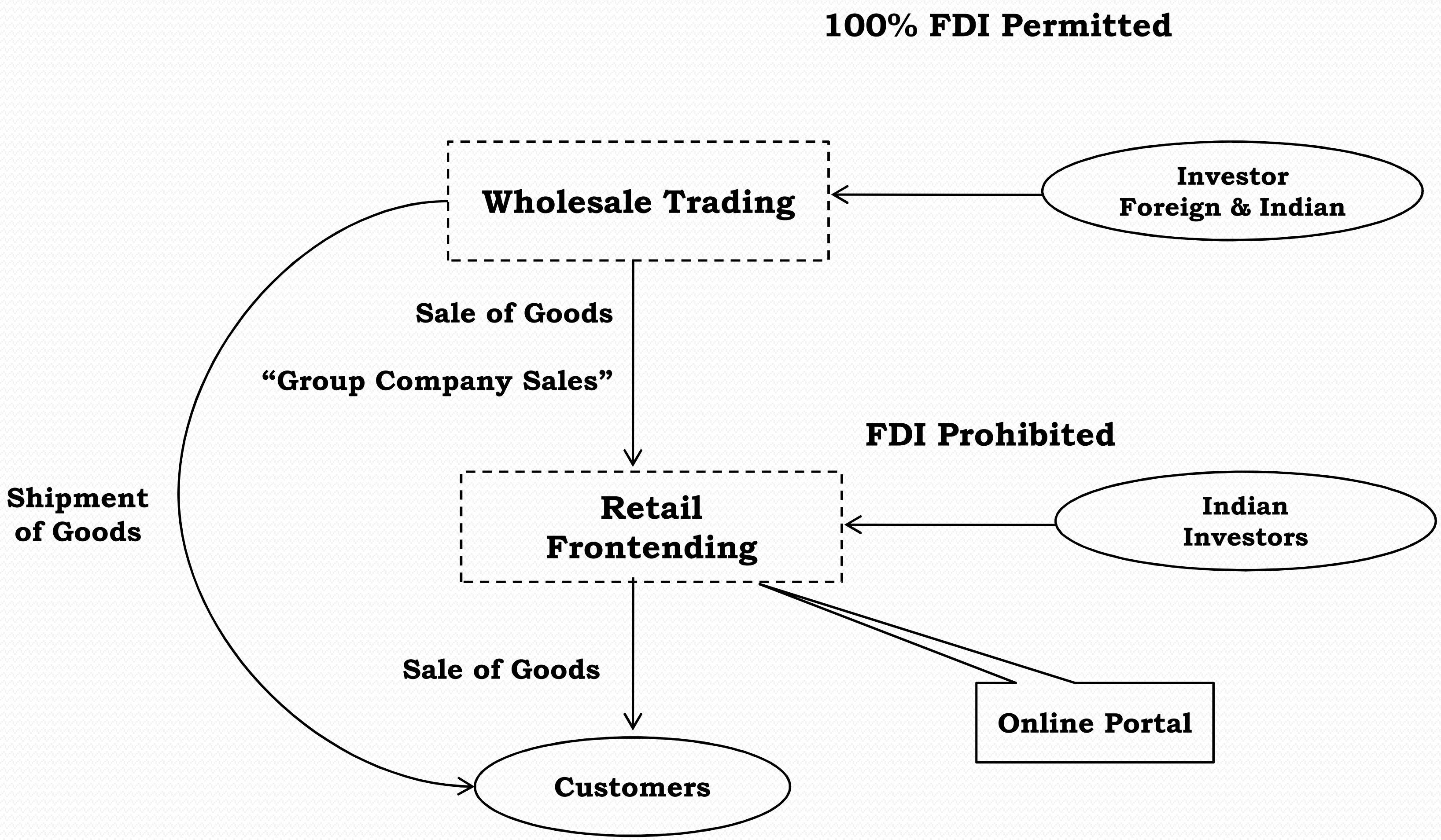


Two models of e-commerce

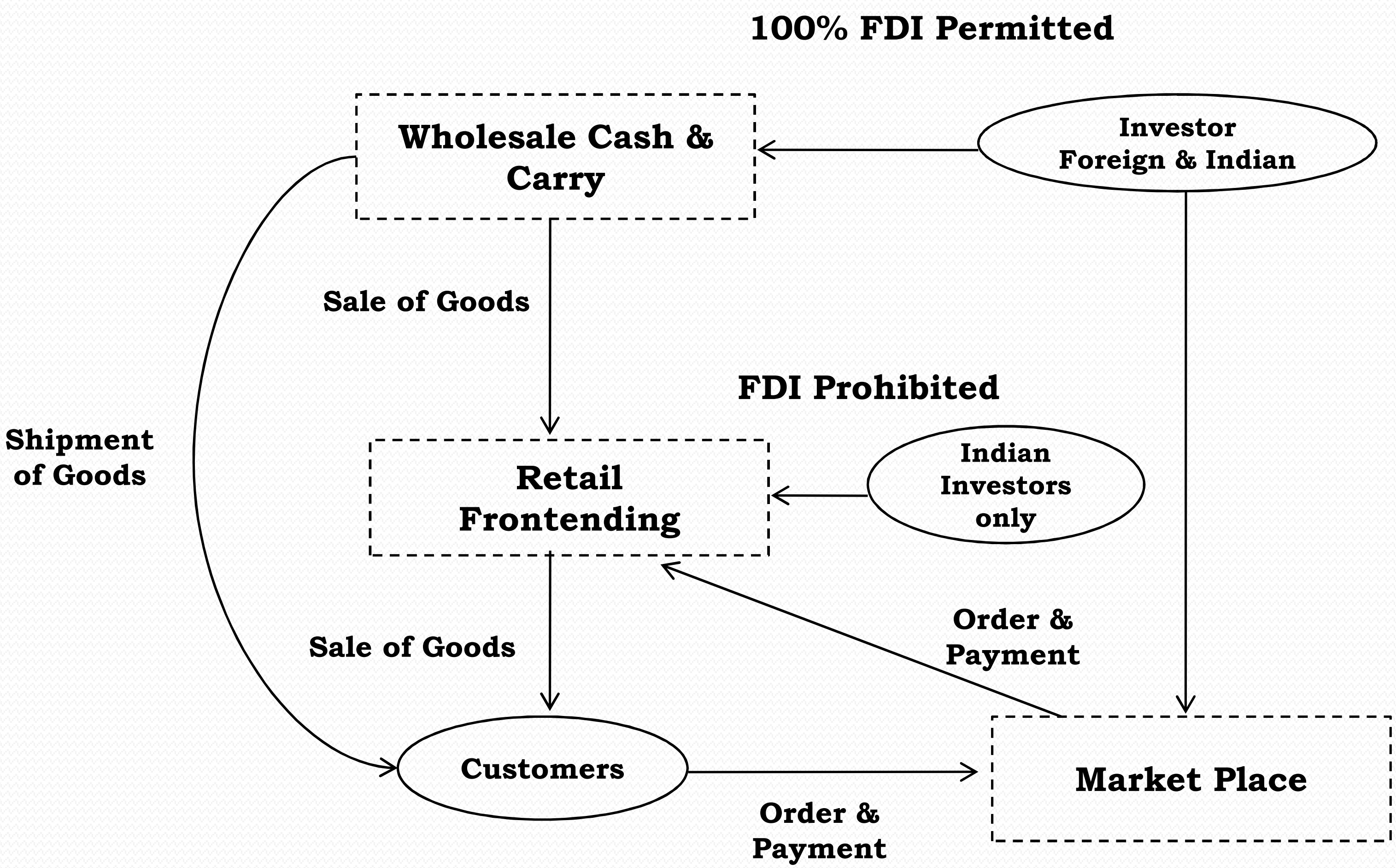
- 'Market Place' model, which works like exchange for buyers and sellers. The Market Place provides a platform for business transactions between buyers and sellers to take place and in return for the services provided, earns commission from sellers of goods/services. Ownership of the inventory in this model vests with the number of enterprises which advertise their products on the website and are ultimate sellers of goods or services. 'Market Place', thus, works as a facilitator of e-commerce.

- 'Inventory Based model': In this model, ownership of goods and services and market place vests with the same entity. This model does not work as a facilitator of e-commerce, being delineated there from, but is engaged in e-commerce directly.

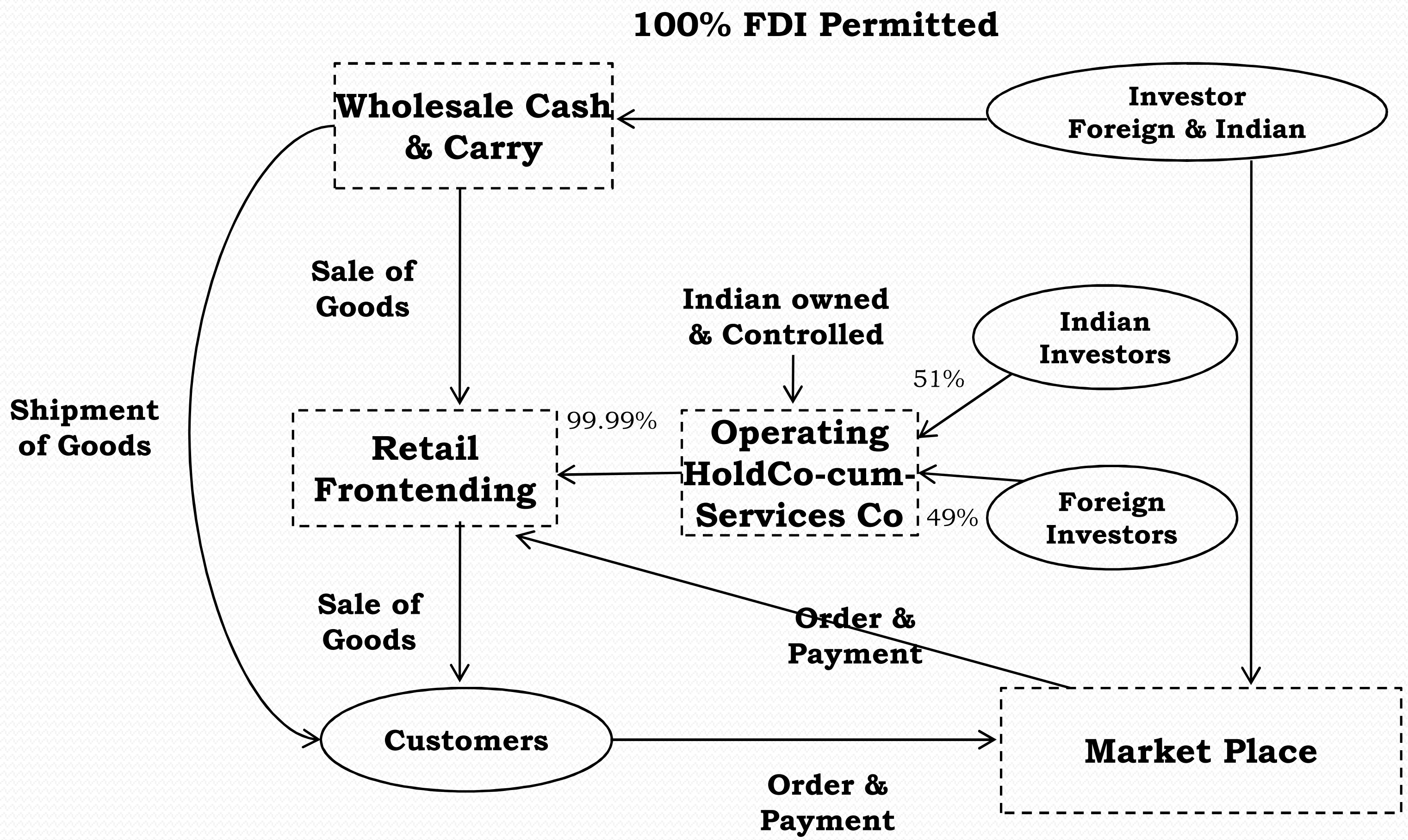
Ecommerce Models – Market Place Model_1



Ecommerce Models – Market Place Model_2



Ecommerce Models – Market Place Model_3



FDI Vs. Portfolio Investment

'**FDI**' means investment by non-resident entity/person resident outside India in the capital of the Indian company under **Schedule 1 of FEMA 20**

Foreign Direct Investment, as distinguished from portfolio investment, has the connotation of establishing a 'lasting interest' in an enterprise that is resident in an economy other than that of the investor.

Portfolio Investment (**FPIs and NRIs**) is characterised by

- Portfolio investment is distinctive because of the nature of the funds raised, the **largely anonymous relationship** between the issuers and holders, and the **degree of trading liquidity** in the instruments
- It covers, but is not limited to securities traded on organized or other financial markets.

Foreign Exchange Management Act, 1999

Sec.1-2	Short title, **Definitions**
Sec. 3-9	Regulation and management of **FOREIGN EXCHANGE**:
3	**Dealing in foreign exchange**
4	**Holding of foreign exchange**
5	**Current account transactions**
6**	**Capital account transactions**
7	**Export of goods and services**
8	**Realisation and repatriation of foreign exchange**
9	**Exemption from realisation and repatriation**
Sec.10-12	**Authorised person**
Sec. 13-15	**Contravention and penalties**, power to **compound contravention**
Sec. 16-35	**Adjudication and appeal**
Sec. 36-38	**Directorate of enforcement**
Sec. 39-45	Miscellaneous
46, 47	**Power to make Rules; Power to make Regulations**
48, 49	**Rules/Regulations laid before Parliament*; Repeal & Savings**

****Control on non-debt capital flows as equity will be exercised by the Government**.

Central Government makes Rules; RBI makes Regulations

•For a total period of thirty days in one or more successive sessions.

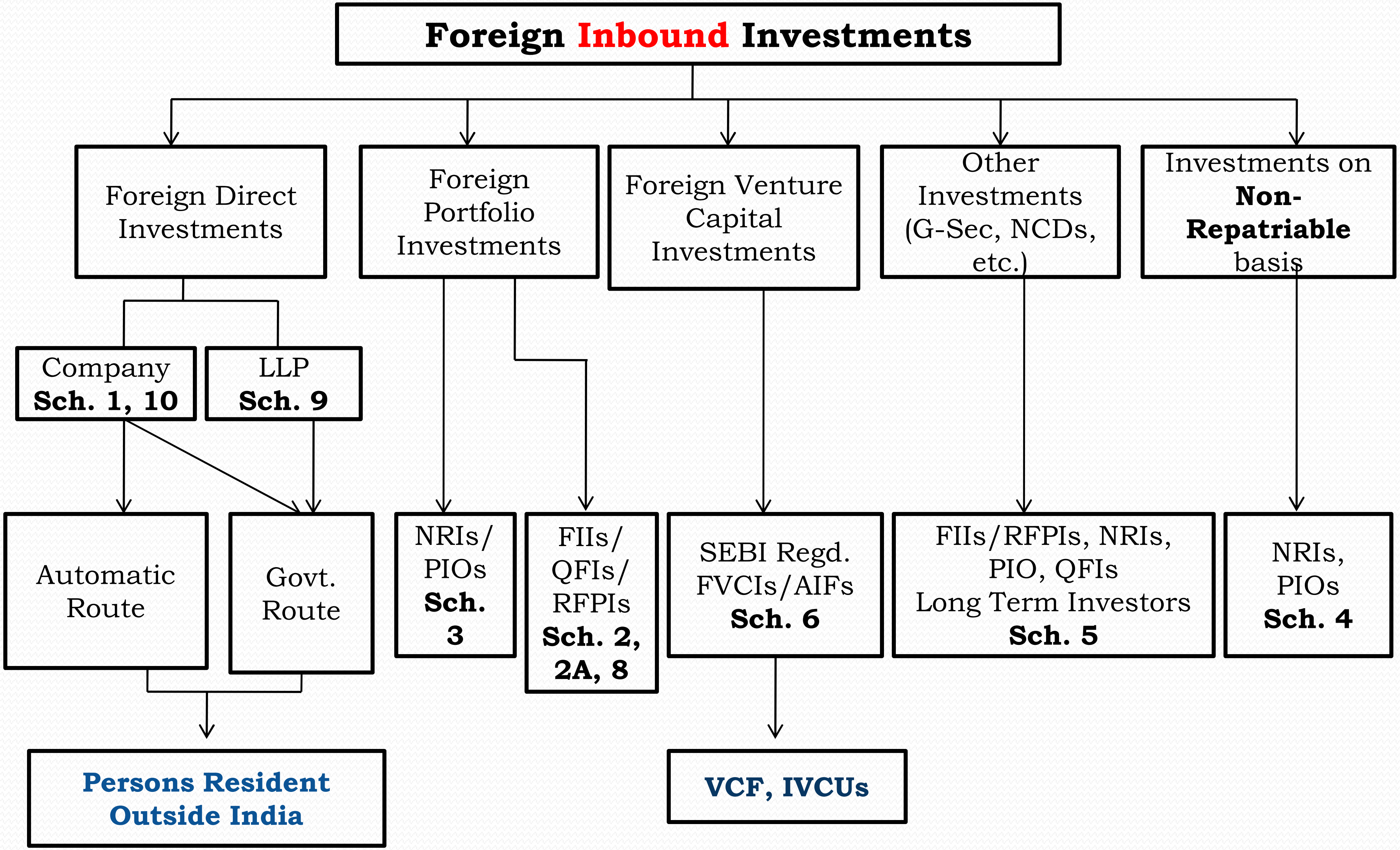
•Both Houses must either agree or disagree.

FEM (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000: 'FEMA 20'

Sch. 1	Foreign Direct Investment ('FDI') Scheme
Sch. 2 & 2A	Purchase/Sale of shares or convertible debentures or warrants of an Indian Company by Registered Foreign Portfolio Investor (RFPI) under Foreign Portfolio Investment (FPIs) Scheme (Registered FIIs under Sch. 2 subsumed with Sch. 2A)
Sch. 3	Purchase/Sale of Shares and/or Convertible Debentures by an NRI on a stock exchange in India on repatriation and/or non-repatriation basis under Portfolio Investment Scheme
Sch. 4	Purchase and Sale of Shares or Convertible Debentures or Warrants] by NRI, on Non-repatriation basis
Sch. 5	Purchase and Sale of Securities other than Shares or Convertible Debentures of an Indian company by a person resident outside India
Sch. 6	Investment in an Indian venture capital undertaking by a registered Foreign Venture Capital Investor
Sch. 7	Indian depository receipts by eligible companies resident outside India
Sch. 8	Scheme for investment by Qualified Foreign Investors in equity shares (Subsumed under Sch. 2A)
Sch.9	Scheme for Acquisition/Transfer by a person resident outside India of capital contribution or profit share of (LLPs)
Sch. 10	Depository Receipts Scheme, 2014 (DRs)

Composite Caps: Foreign investments, direct or indirect, under Schedule 1(FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 8 (QFI), 9 (LLPs) and 10 (DRs) vide PN 8 dated 30 July 2015 by DIPP

Foreign Investment in India- Schematic Representation



Fact Sheet on Foreign Direct Investment (FDI)

From April 2000 to May 2015

Cumulative FDI Flows Into India (2000-2015):			
A. **Total FDI Inflows** (**from April, 2000 to May, 2015**):			
1.	**Cumulative Amount of FDI Inflows (Equity inflows + 'Re-invested earnings' +'Other capital')**	-	**US$ 377,310 Million**
2.	**Cumulative Amount Of FDI Equity Inflows (excluding,** amount remitted through RBI's NRI Schemes)	Rs. **1,280,188** crore	**US$ 255,966 Million**
B. FDI Inflows during Financial Year 2015-16 (For May, 2015):			
1.	**Total FDI Inflows Into India (Equity inflows + 'Re-invested earnings' + 'Other capital')** (as per RBI's Monthly bulletin dated: 10.07.15)	-	**US$ 4,817 million**
2.	**FDI Equity Inflows**	Rs. **24,564** Crore	**US$ 3,850 million**

Year-wise / Route-wise FDI Equity Inflows from January, 2000 to March, 2015…1/2

Calendar Year (January-December)	I Govt. approval Route (FIPB,SIA)	II Automatic Route	III Inflows through acquisition of existing shares Route	IV RBI's- Various NRI's Schemes ^	CUMULATIVE TOTAL (I to IV) INR (US$) Million
2000	63,428 (1,475)	16,975 (394)	20,521 (477)	3,487 (81)	104,410 (2,428)
2001	96,386 (2,142)	32,411 (720)	29,622 (658)	2,292 (51)	160,711 (3,571)
2002	69,580 (1,450)	39,030 (813)	52,623 (1,096)	111 (2)	161,345 (3,361)
2003	42,957 (934)	23,400 (509)	29,284 (637)	-	95,640 (2,079)
2004	48,517 (1,055)	54,221 (1,179)	45,076 (980)	-	147,814 (3,213)
2005	49,672 (1,136)	68,743 (1,558)	74,292 (1,661)	-	192,707 (4,355)
2006	69,684 (1,534)	321,758 (7,121)	112,131 (2,465)	-	503,573 (11,119)
2007	107,873 (2,586)	361,002 (8,889)	186,075 (4,447)	-	654,950 (15,921)
2008	135,588 (3,210)	1,004,681 (23,651)	455,026 (10,234)	-	**1,595,295 (37,094)**

Year-wise / Route-wise FDI Equity Inflows from January, 2000 to March, 2015...2/2

Calendar Year (January-December)	I Govt. approval Route (FIPB,SIA)	II Automatic Route	III Inflows through acquisition of existing shares Route	IV RBI's- Various NRI's Schemes ^	CUMULATIVE TOTAL (I to IV) INR (US$) Million
2009	229,716 (4,680)	919,849 (19,056)	160,233 (3,309)	-	1,309,799 (27,044)
2010	115,966 (2,542)	655,519 (14,353)	188,664 (4,111)	-	960,150 (21,007)
2011	134,782 (2,933)	878,222 (19,053)	586,345 (12,636)		1,599,349 (34,621)
2012	159,557 (2,964)	845,289 (15,825)	211,069 (4,000)	-	1,215,914 (22,789)
2013	78,657 (1,345)	744,183 (12,806)	471,985 (7,887)		1,294,825 (22,038)
2014	**109,979 (1,809)**	**1,226,012 (20,089)**	**417,143 (6,887)**		**1,753,134 (28,785)**
2015 (upto March, 2015)	**32,139 (515)**	**533,483 (8,576)**	**49,365 (793)**		**6,14,987 (9,884)**
Grand Total ^	1,544,481	7,724,778	3,089,454	5,890	12,364,603
(as on 31.03.2015)	(US$ 32,310)	(US$ 154,592)	(US$ 62,279)	(US$ 134)	(US$ 249,315)

Share of Top Investing Countries FDI Equity Inflows (April, 2000-May, 2015)

			Amount Rupees in crores (US$ in million)
Ranks	Country	Cumulative Inflows	%age to total Inflows (in terms of US $)
1.	MAURITIUS	436,319 (89,241)	35 %
2.	SINGAPORE	185,549 (35,089)	14%
3.	U.K.	109,000 (22,265)	9 %
4.	JAPAN	95,265 (18,647)	7 %
5.	NETHERLANDS	80,964 (15,258)	6 %
6.	U.S.A.	70,357 (14,303)	6 %
7.	GERMANY	41,735 (8,155)	3 %
8.	CYPRUS	39,498 (8,066)	3 %
9	FRANCE	23,182 (4,607)	2 %
10.	UAE	15,410 (3,091)	1 %
Total FDI Inflows from all Countries *		1,280,721 (256,088)	-

Sectors Attracting Highest FDI Equity Inflows (April, 2000-May, 2015)

Amount Rupees in crores (US$ in million)			
Ranks	Sector	Cumulative Inflows	% age to total Inflows (In terms of US$)
1.	Services sector includes Financial, Banking, Insurance, Non-Financial / Business, Outsourcing, R&D, Courier, Tech. Testing and Analysis	208,634 (43,202)	17 %
2.	Construction Development: Townships, Housing, Built-Up Infrastructure	113,152 (24,066)	9%
3.	Telecommunications(radio paging, cellular mobile, basic telephone services)	86,412 (17,422)	7 %
4.	Computer Software & Hardware	87,665 (17,291)	7%
5.	Automobile Industry	70,347 (13,390)	5 %
6.	Drugs & Pharmaceuticals	66,292 (13,280)	5 %
7.	Chemicals (Other Than Fertilizers)	50,262 (10,487)	4 %
8.	Power	47,617 (9,712)	4 %
9.	Trading	47,987 (8,724)	3%
10	Metallurgical Industries	41,614 (8,621)	3 %

FDI EQUITY INFLOWS: (April, 2014 to March, 2015)

(Amount **in million**)

A.	**Amount of FDI Equity Inflows Received**	**Rs. 1,891,071 (US$ 30,930)**

B. Share of Top Five Investing Countries in FDI Equity Inflows

Rank s	Country	%age share to total FDI Equity inflows
1.	Mauritius	29 %
2.	Singapore	22 %
3.	Netherlands	11 %
4.	Japan	7 %
5.	U.S.A.	6%

C. Share of Top Five Sectors Attracting Highest FDI Equity Inflows

Rank s	Sector	%age share to total FDI Equity inflows
1.	Services Sector	11 %
1.	Telecommunications	9 %
3.	Trading	9 %
4.	Automobile Industry	8 %
5.	Computer Software & Hardware	7%

Emerging Trends in FDI Inflows into India 1992-2013

Year	FDI Inflows in US $ Billion	% to Global FDI Inflows
1992	1.0	0.2
1995	3.0	0.3
2000	2.5	0.2
2005	5.0	0.5
2010	27.0	2.1
2013	28.0	2.1
Source: World Investment Report, 2014; Geneva		

SPV considerations

- Corporate tax rate
- Taxation of dividend/interest
- Withholding tax on dividend/ interest/ Royalty/ Fees for Technical Services
- Capital gain tax on transfer of investments / shareholding
- Thin Cap rules
- East of access to debt and equity capital
- Black listed Countries
- Treaty network
- Cost of setting up and administration
- Other non-tax considerations like political stability, banking facility etc.
- Cross Border Merger
- Limitation on Benefit Clause (LoB)
- Business connection/ Permanent Establishment Exposure

Mauritius

Netherlands

Singapore

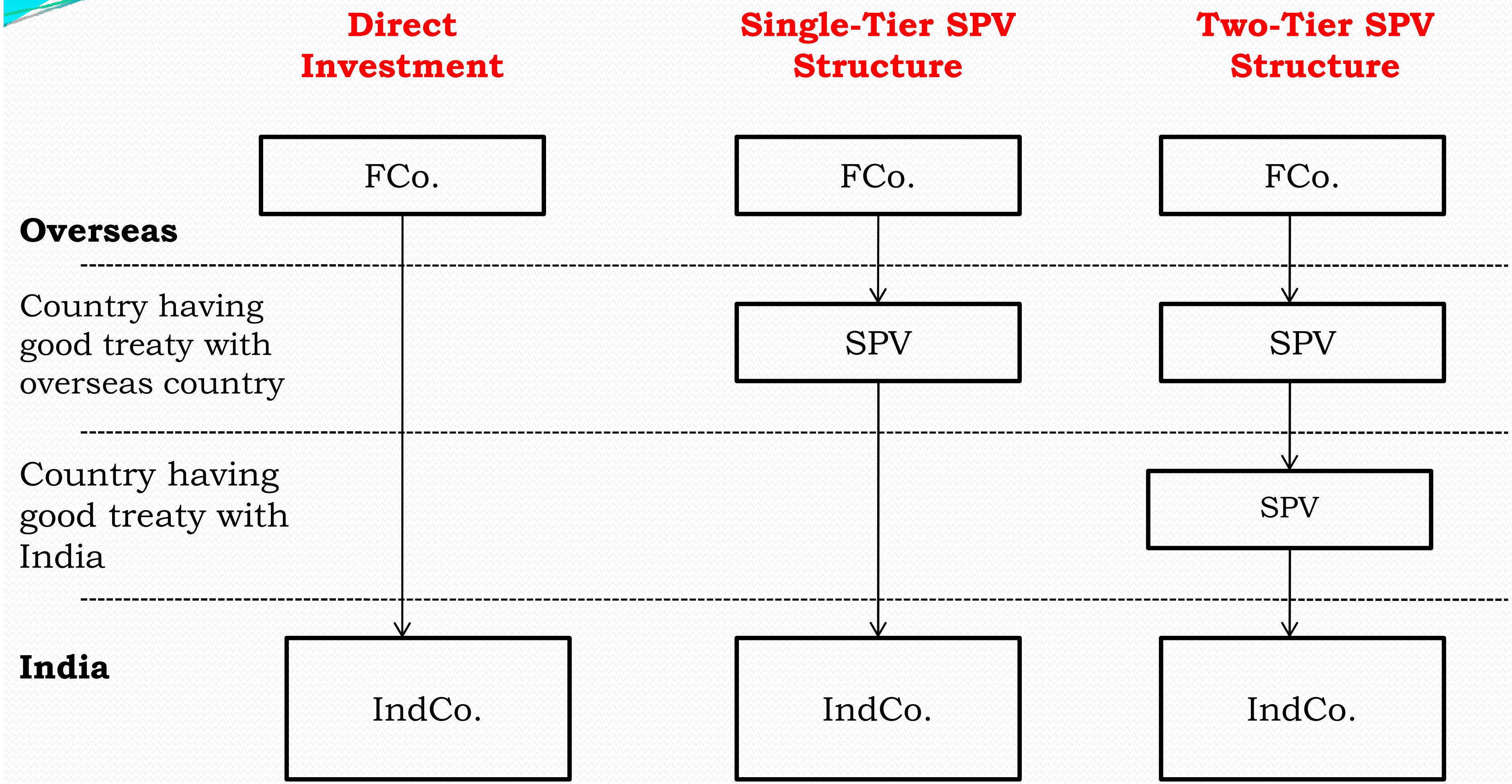
Cyprus?!

Luxembourg

Tax Havens- BVI/ Cayman Islands

UAE

Holding Structures – Inbound



Tax in efficient
- Dividend withholding tax
- Interest Income tax
- Capital gains on exit

Tax efficient and flexibility in fund movement

Thin Capitalisation

GAAR/ LoB/ POEM/ BEPS

- Optimal Structure from tax and funding perspective
- Regulatory Issues

FDI Policy

- 'FDI' means investment by non-resident entity/person resident outside India in the capital of the Indian company under **Schedule 1 of FEMA 20**
- Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, Government of India (DIPP) issues **Circular on Consolidated FDI Policy** which was last updated on May 12, 2015
- RBI Master Circular on **Foreign Investments in India dated 01 July 2015 (updated on 16 July 2015)**
- **RBI FAQs** - Foreign Investments in India **10.02.2015**
- **FIPB Review books** 2011-2013; 2010; 2009; 2008
- **FDI inflows -** FIPB/SIA; Acquisition of Existing Shares; & Automatic Route of RBI: Website of **DIPP.nic.in**
- In case of any **conflict between FDI Circular and FEMA Regulations**, the relevant FEMA Notification will prevail. The procedural instructions are issued by the Reserve Bank of India vide A.P.Dir. (Series) circulars

Options For Foreign Entity/Person for business activities in India

Company Section 25 companies	√ **Subject to Foreign Contribution Regulation Act, 2010**
Limited Liability Partnership	√ **(Sch. 9 of FEMA 20)**
Venture Capital Fund (VCF)/ AIFs	√
Trusts (other than VCF/ AIFs)	X
Other Entities e.g. HUF, AOPs	X
Liaison Office/Representative Office/Project Office / Branch Office to undertake specified activities	√ (**Body incorporated outside India** including a firm or other association of individuals**;** **Other than Individual)**
Partnership Firm / Proprietary Firm	
❖ **By NRI and PIO:**	
▪ On **non-repatriation basis**: (Not engaged in any agricultural/plantation or real estate business /print media sector)	√
▪ On **repatriation basis**	**Subject to prior permission** of RBI **in consultation with the Government of India**. Generally not permitted by FIPB
❖ **Other than NRIs/PIO:**	**Subject to prior approval** of RBI **in consultation with the Government of India**. Generally not permitted by FIPB

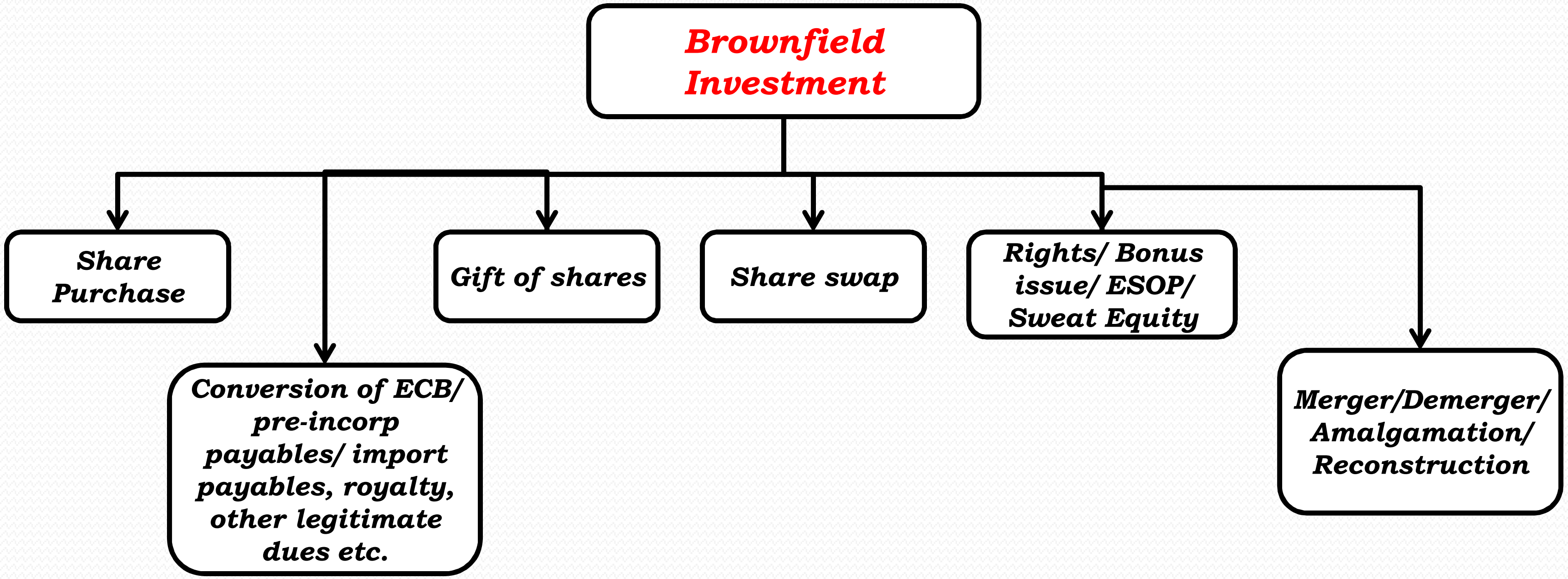
Foreign Direct Investment into an Indian company

Kinds of Investment

- **Automatic Route** – no prior approval from the RBI/ Government
- **Approval Route** – prior approval of the FIPB required (no separate RBI approval)

Mode of Investment

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



Foreign Investment Promotion Board (FIPB)

- **An inter-ministerial body** constituted by the Government of India under Department of Economic Affairs (DEA), Ministry of Finance only for FDI proposals falling under Schedule 1 of FEMA 20: **Headed by the Finance Minister**

Permanent Members

- Secretary, **Department of Economic Affairs**, Ministry of Finance – as **Chairperson Compulsory Presence**
- Secretary, **Department of Industrial Policy & Promotion,** Ministry of Commerce & Industry
- Secretary, **Department of Commerce**, Ministry of Commerce & Industry
- Secretary, Economic Relations, **Ministry of External Affairs**
- Secretary, **Ministry of Overseas Indian Affairs**

Permanently Co-opted Members

- Secretary, **Ministry of Small, Medium and Micro enterprises**
- Secretary, **Department of Revenue**

Generally other ministries/departments are represented by Senior Officials upto the level of Joint Secretary.

FIPB/ DIPP

Threshold limit

- **FIPB**: Proposals with total **foreign equity (FDI) inflow** of and **below Rs. 2000 crore**
- **CCEA**: Proposals with total foreign equity(FDI) inflow of more than Rs. 2000 crore (in one or more tranches) **except those sectors that are under Automatic Route**
- Proposals which may be **referred to it by the FIPB**/ **the Minister of Finance** (in-charge of FIPB)

- Department of Industrial Policy & Promotion (**DIPP**), Ministry of Commerce **for Single/Multi brand Retail, 100% EOUs and NRIs proposals**

CASES WHICH DO NOT REQUIRE FRESH APPROVAL

Bringing in additional foreign investment**:**

- Entities the activities of which had earlier required prior approval of FIPB/CCEA and which had, accordingly, earlier obtained prior approval of FIPB/CCEA for their initial foreign investment but **subsequently such activities/sectors have been placed under automatic route**

- Entities the activities of which had sectoral caps earlier and who had, accordingly, earlier obtained prior approval of FIPB/CCEA for their initial foreign investment but subsequently such **caps were removed/increased and the activities placed under the automatic route**; provided that such additional investment along with the initial/original investment does not exceed the sectoral caps

Who can invest under FDI?

A **person resident outside India** or a **entity** incorporated outside India (including **foreign citizens/ Individuals/ NRIs**)	
A **citizen of Pakistan** or an entity **incorporated in Pakistan**	**Under the Government route – other than defence, space & atomic energy, other prohibited sectors**
A citizen of **Bangladesh** or an entity incorporated in Bangladesh	**Under the Government route**
NRIs resident in **Nepal and Bhutan** as well as citizens of Nepal and Bhutan	On repatriation basis, if remittance received in **free foreign exchange** through normal banking channels
Erstwhile OCBs	Derecognized w.e.f. September 16, 2003
Unincorporated entity outside India	**Not allowed** to invest in India

Types of instruments: 'Capital'

Equity shares	
Fully, compulsorily & mandatorily convertible **Preference Shares**	
Fully, compulsorily & mandatorily convertible **Debentures**	
Differential voting rights shares as to dividend, voting or otherwise	**Permitted**
Non-convertible, optionally convertible or partially convertible instruments considered as debt	▪ To comply with **ECB norms**
Warrants: Upfront 25% of consideration; Conversion in 18 months ▪Upfront pricing/ conversion formula	
▪**Partly paid 'Equity Shares' only:** Upfront 25% of consideration including premium; Full payment in 12 months; NA **Listed Indian company**: **issue size exceeds rupees five hundred crore** and the issuer complies with Regulation 17 of the SEBI (Issue of Capital and Disclosure Requirements(ICDR)) Regulations regarding monitoring agency. **Listed Indian company**: **issue size exceeds rupees five hundred crore** and the issuer complies with Regulation 17 of the SEBI (Issue of Capital and Disclosure Requirements(ICDR)) Regulations regarding monitoring agency.	
Optionality clauses: **Buy-back of securities at the price prevailing/value determined at the time of exercise of the optionality so as to enable the investor to exit without any assured return. Minimum lock-in period of one year.**	

Issue of Non convertible/ redeemable bonus preference shares or debentures

To non-resident shareholders, including the depositories that act as trustees for the ADR/GDR holders, by way of distribution as bonus **from its general reserves under a Scheme of Arrangement** approved by a Court in India under the provisions of the Companies Act, as applicable, subject to **no-objection from the Income Tax Authorities**.

FEMA & Valuation

FDI
Issue of shares

Listed Company

Market Price as per SEBI Preferential Allotment

Only Certification by SEBI registered Merchant Banker/ Chartered Accountant

Unlisted Company

Internationally accepted pricing Methodology for valuation of shares on arm's length basis

Valuation & Certification by SEBI registered Merchant Banker/ Chartered Accountant

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

Transfer of shares from Resident to Non-Resident

Price of shares shall not be less than the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis

Transfer of shares from Non-Resident to Resident

Price of shares shall not be more than the fair value worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis

Convertible instruments:
Based on conversion formula which has to be determined / fixed upfront. Price at the time of conversion should not be less than the fair value worked out, at the time of issuance of these instruments.

NRIs on non-repatriation basis under Schedule 4 of FEMA 20: No express provision for valuation

Pricing not applicable for transfers between two Non-Residents

SEZs against import of capital goods into *equity shares*: Committee of Development Commissioner

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

FDI in India - Revised pricing guidelines

Pricing guidelines in respect of transfer/issue of shares and for exit from investment in equity shares **with or without** **optionality clauses** of listed/unlisted Indian companies have since been reviewed so as to provide greater freedom and flexibility to the parties concerned under the FDI framework. The new pricing guidelines shall be as under:

(i) In case of listed companies

(a) The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures shall be as per the **SEBI guidelines**;

(b) The pricing guidelines for **FDI instruments with optionality clauses** shall continue to be in accordance with A.P. (DIR Series) Circular No. 86 dated January 9, 2014, i.e., the non-resident investor shall be eligible to exit at the market price prevailing on the recognised stock exchanges subject to lock-in period as stipulated, **without any assured return**.

(ii) In case of unlisted companies

The issue and transfer of **shares including compulsorily convertible preference shares and compulsorily convertible debentures with or without optionality clauses shall be at a price** worked out as per any **internationally accepted pricing methodology on arm's length basis.** Thus, the guiding principle will be that the **non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement** and shall exit at a fair price computed as above at the time of exit subject to lock-in period requirement as applicable in terms of A.P. (DIR Series) Circular No. 86 dated January 9, 2014.

An Indian company taking on record in its books any **transfer** of its shares or convertible debenture by way of sale from a **resident to a non-resident** and a **non-resident to a resident** shall **disclose in its balance sheet for the financial year**, in which the transaction took place, the **details of valuation** of share or convertible debentures, the **pricing methodology adopted** for the same as well as the **agency that has given/certified the valuation.**

Circular No. 4 dated July 15, 2014

Valuation Methods - Indicative

Asset Approach	Income Approach	Market Approach
• Net Asset Value • Liquidation Value	• Yield/ PECV • DCF	• Market Price • Comparable Companies Multiples • Comparable Transaction

Other Methods

- Price of Recent Investment method (PORI)
- Sum of the parts valuation
- Weighted Average Method
- Any other method accepted by RBI, **SEBI or Income Tax**
- Any other method(s) that valuer may deem fit (with justification)

When to Use Various Valuation Methodologies-

Reference: 'Merger Acquisitions and Other Restructuring Activities' by Donald De Pamphilis - 6th Edition 2012

Discounted Cash Flow • The firm is **publicly traded or private with identifiable cash flows** • A start-up has some history to **facilitate cash-flow forecasts** • An analyst has a **long-term time horizon** • An analyst has **confidence in forecasting the firm's cash flows** • Current or near-term earnings or cash flows are negative but are expected to turn **positive in the future** • A **firm's competitive advantage is expected to be sustainable** • The magnitude and timing of cash flows vary significantly
Comparable Companies • There are **many firms exhibiting similar growth, return, and risk characteristics** • An analyst has a **short-term time horizon** • Prior, current, or near-term **earnings or cash flows are positive** • An analyst has confidence that the markets are, on average, right • **Sufficient information to predict cash flows is lacking** • Firms are cyclical. For P/E ratios, use normalized earnings (i.e., earnings averaged throughout the business cycle) • Growth rate differences among firms are large.
Comparable Transactions • **Recent transactions of similar firms exist** • An analyst has a short-term time horizon • An analyst has confidence the markets are, on average, right • Sufficient information to predict cash flows is lacking
Same or Comparable Industry • Firms within the **same industry or comparable industry** are substantially similar in terms of profitability, growth, and risk • An analyst has confidence the markets are, on average, right • Sufficient information to predict cash flows is lacking

When to Use Various Valuation Methodologies-

Reference: 'Merger Acquisitions and Other Restructuring Activities' by Donald De Pamphilis - 6th Edition 2012

Replacement Cost • An analyst wants to know the current cost of replicating a firm's assets • The firm's assets are easily identifiable, tangible, and separable • The firm's **earnings or cash flows** are **negative**
Tangible Book Value • The firms' assets are highly liquid • The firm is a financial services or product distribution business • The firm's **earnings and cash flows** are **negative**
Breakup Value • **The sum of the value of the businesses or product lines comprising a firm are believed to exceed its value as a going concer**n
Liquidation Value • An analyst wants to know asset values if the assets were liquidated today • **Assets are separable, tangible, and marketable** • Firms are bankrupt or subject to substantial financial distress • An orderly liquidation is possible
Real Options (Contingent Claims) • Additional value can be created if management has a viable option to expand, delay, or abandon an investment • Assets not currently generating cash flows have the potential to do so • The markets have not valued the management decision-making flexibility associated with the option • Assets have characteristics most resembling financial options • The asset owner has some degree of exclusivity (**e.g., a patent**)

ISSUE OF INSTRUMENTS

<table>
<tr><th colspan="3">Issue of Right Shares – equity, preference & debentures</th></tr>
<tr><td rowspan="2">Pricing of Right issue</td><td>Listed</td><td>Price as determined under SEBI</td></tr>
<tr><td>Unlisted</td><td>Not less than price at which the offer on right basis is made to resident shareholders</td></tr>
<tr><td colspan="2">Additional allocation of rights share by residents to non-residents</td><td>Subject to sectoral cap</td></tr>
<tr><th colspan="3">Issue of Bonus Shares</th></tr>
<tr><td colspan="3">❖ Subject to sectoral cap, Companies Act & SEBI</td></tr>
<tr><th colspan="3">Acquisition of shares under Scheme of Merger/ Demerger/Amalgamation/Reconstruction of two or more Indian companies</th></tr>
<tr><td colspan="3">❖ Subject to sectoral cap
❖ Not engaged in prohibited activities</td></tr>
<tr><th colspan="3">Issue of shares under ESOP/Sweat equity</th></tr>
<tr><td>Listed</td><td colspan="2">Face value does not exceed 5 per cent of paid-up capital</td></tr>
<tr><td>Unlisted</td><td colspan="2">Follow provisions of Companies Act 2013</td></tr>
</table>

Issue of shares under 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 approval of the Foreign Investment Promotion Board (FIPB) of Government of India.

d) Issue of "employee's stock option"/ "sweat equity shares" under the applicable rules/regulations to an employee/director who is a citizen of **Bangladesh/Pakistan** shall require prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India.

Mode of payment

(i) **Inward remittance** through normal banking channels

(ii) Debit to **NRE / FCNR** account of a person concerned maintained with an AD category I bank

(iii) **Conversion** of royalty / lump sum / technical knowhow fee/ Legitimate due for payment or conversion of ECB, shall be treated as consideration for issue of shares

(iv) **Conversion** of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB

(v) 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

Conversion of shares other than cash…1/3

Transaction	Nature of permission	Conditions to be fulfilled
Conversion of ECB due for payment or not into shares /convertible debentures	General permission	• Activity covered under Automatic Route, or obtained FIPB approval • Post conversion equity within the sectoral cap • Pricing Guidelines adhered to
Against lump sum technical know-how fee, royalty into equity / preference shares	General permission	• Subject to entry route, sectoral cap & Pricing Guidelines • Compliance with applicable tax laws
Share Swap - shares	FIPB approval	• Irrespective of the amount, valuation of shares to be made by a Merchant Banker registered with SEBI or an Investment Banker outside India registered with appropriate regulatory authority in the host country • FIPB approval for Indian leg of FDI

Conversion of shares other than cash …2/3

Import of capital goods/machinery/equipment (excluding second hand) into *equity shares*	❖ Import in accordance with Exim Policy ❖ Independent valuation by third party entity, preferably by an independent valuer from the country of import along with documents/certificates issued by the customs authorities towards assessment of the fair-value of such imports ❖ Beneficial ownership and identity of the Importer Company as well as overseas entity ❖ Conversions into FDI being done **within 180 days from date of shipment of goods** ❖ **Second-hand machinery excluded from the purview of this provision**
Pre-operative/pre-incorporation expenses (including payments of rent etc.) into *equity shares* **Current Account Rules:** Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses	❖ **FIRC** for remittance for expenditure incurred ❖ Verification and certification by **statutory auditor** ❖ **Payments made directly to company**. Payments made through third parties citing the absence of a bank account or similar such reasons not allowed ❖ Capitalization **within 180 days**
Under the Government/FIPB route	» **Special resolution** of the company; and subject to **pricing guidelines** and appropriate tax clearance

FDI - Issue of equity shares under the FDI Scheme against Legitimate Dues …. 3/3

Issue of **equity shares** against any other funds (Legitimate Dues) payable by the investee company, remittance of which does not require prior permission of the Government of India or Reserve Bank of India under FEMA, 1999 or any rules/ regulations framed or directions issued thereunder, provided that:

i. The equity shares shall be issued in accordance with the extant FDI guidelines on sectoral caps, pricing guidelines etc. as amended by Reserve bank of India, from time to time;
   Explanation: Issue of shares/convertible debentures that require Government approval in terms of paragraph 3 of Schedule 1 of FEMA 20 or **import dues deemed as ECB or trade credit or payable against import of second hand machinery shall continue to be dealt in accordance with extant guidelines**;

ii. The issue of equity shares under this provision shall be **subject to tax laws** as applicable to the funds payable and the conversion to equity should be net of applicable taxes.

Circular No.31 dated September 17, 2014

Escrow Account

For open offers / exit offers and delisting of shares	**AD Category – I banks can open Escrow account and Special account of non-resident corporate**
Non-interest bearing Escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/or provide **Escrow facilities for keeping securities to facilitate FDI transactions**	Permitted to open and maintain, **without prior approval of RBI**
Escrow accounts for securities by SEBI authorised Depository Participants	Permitted to open and maintain, **without RBI approval**
Fund or non-fund based facilities	**Not permitted**
Issue of fresh shares to the non-residents	**Applicable**
Transfer of shares from/to the non-residents	**Applicable**
Validity of Escrow Account	**Maximum 6 months**
Terms of Escrow account	Shall be laid down strictly in **Escrow agreement, Share purchase agreement, conditions of issue of shares**

Prohibited Sectors 1/2

Under Schedule 1 of FEMA 20 (FDI)

FDI is prohibited in:

(a) **Lottery Business**, including Government/private lottery, online lotteries, etc.

(b) **Gambling and Betting**, including casinos etc.

(c) Chit funds

(d) Nidhi company

(e) Trading in Transferable Development Rights (TDRs)

(f) Real Estate Business or Construction of Farm Houses

(g) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of **tobacco or of tobacco substitutes**

(h) Activities/sectors not open to private sector investment e.g. (I) **Atomic Energy** and (II) *Railway operations (other than permitted activities mentioned in entry 18 of Annex B of FDI Policy).*

Explanation to Regulation 5(7A) of FEMA 20

No class of investors under Schedule 1 (FDI), 2 (FII), 2A (FPI), 3 (NRI), 4 (NRI on non-repatriation), 6 (FVCI) and 8 (QFI) of FEMA 20 shall make investment, directly or indirectly, in any security issued by any company engaged or proposes to **engage in prohibited sector under FEMA 1**.

Prohibited Sectors 2/2

Under FEMA 1 Foreign investment in any form is prohibited in a company or a partnership firm or a proprietary concern or any entity, whether incorporated or not (such as, Trusts) which is engaged or proposes to engage in the following activities6:

(a) Business of chit fund, or

(b) Nidhi company, or

(c) Agricultural or plantation activities, or

(d) Real estate business, or construction of farm houses, or

(e) Trading in Transferable Development Rights (TDRs).

- "**Real estate business**" will have the same meaning as provided in FEMA Notification No.1/2000- RB dated May 03, 2000 read with RBI Master Circular i.e. **dealing in land and immovable property with a view to earning profit or earning income 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.

NRIs are eligible to subscribe to the chit funds on non- repatriation basis

a. The Registrar of Chits or an officer authorised by the State Government in accordance with the provisions of the Chit Fund Act in consultation with the State Government concerned, may permit any chit fund to accept subscription from Non-Resident Indians on non-repatriation basis;
b. The subscription to the chit funds shall be brought in through normal banking channel, including through an account maintained with a bank in India.

Categories

1. **FDI upto 100% under <u>Automatic Route</u> – Subject to conditions**
2. **FDI upto specified sectoral cap under Automatic Route**
3. **FDI upto 100% under Government Approval Route**
4. **FDI upto specified sectoral cap under Government Approval Route**
5. **FDI upto specified sectoral cap under Automatic Route; thereafter under Government Approval Route**

Sectors with FDI upto 100% under Automatic Route – Subject to conditions

Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores

Non-Scheduled Air Transport Service (100% for **NRIs**)

Manufacturing

Maintenance and Repair organizations; flying training institutes; and technical **training institutions**

Coal and Lignite
(1) Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and
(2) Setting up coal processing plants like washeries

Ground Handling Services subject to sectoral regulations and security clearance (100% for **NRIs**)

Courier services

Petroleum & Natural Gas: Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector

Civil Aviation-Airports-Greenfield projects

Helicopter services/ seaplane services requiring DGCA approval

Scheduled Air Transport Service/Domestic Scheduled Passenger Airline (100% for **NRIs**)

Pharmaceuticals: Greenfield

Industrial Parks – new and existing

Construction Development: Townships, Housing, Built-up infrastructure

Foreign investment in NBFC is allowed under the automatic route in only the following activities:

(i) Merchant Banking , (ii) Under Writing, (iii) Portfolio Management Services, (iv) Investment Advisory Services, (v) Financial Consultancy, (vi) Stock Broking, (vii) Asset Management, (viii) Venture Capital, (ix) Custodian Services, (x) Factoring, (xi) Credit Rating Agencies, (xii) Leasing & Finance, (xiii) Housing Finance, (xiv) Forex Broking, (xv) Credit Card Business, (xvi) Money Changing Business, (xvii) Micro Credit, (xviii) Rural Credit,

Non-Fund Based activities:
(a)Investment Advisory Services, (b) Financial Consultancy,(c) Forex Broking, (d)Money Changing Business, (e)Credit Rating Agencies

Sectors with FDI upto 100% under Automatic Route – Subject to conditions

Agriculture & Animal Husbandry

(a) Floriculture, Horticulture, Apiculture and Cultivation of Vegetables & Mushrooms under controlled conditions;

(b) Development and production of Seeds and planting material;

(c)Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture, under controlled conditions; and

(d)services related to agro and allied sectors

Besides the above, FDI is not allowed in any other agricultural sector/activity.

Cash & Carry Wholesale Trading/ Wholesale Trading (including sourcing from MSEs)

WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture. **Group company' means two or more enterprises which, directly or indirectly, are in position to:** (i) exercise twenty-six per cent, or more of voting rights in other enterprise; or (ii) appoint more than fifty per cent, of members of board of directors in the other enterprise.

Railways Infrastructure:

(i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signalling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/ sidings including electrified railway lines and connectivities to main railway line and (x) Mass Rapid Transport Systems.

E-commerce activities: Only in Business to Business (**B2B**) e-commerce and not in retail trading.

Sectors with FDI upto specified sectoral cap under Automatic Route

49%

- **Petroleum refining** by the Public Sector Undertakings (**PSU**), without any disinvestment or dilution of domestic equity in the existing PSUs
- **Cable Networks** [Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs)]
- **Commodity Exchange**
- **Power Exchanges** registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010
- Infrastructure companies in Securities Markets, namely, **stock exchanges, depositories and clearing corporations**, in compliance with SEBI Regulations

49% (100% for NRIs)

- **Scheduled Air Transport Service**/Domestic Scheduled Passenger Airline

74%

Credit Information Companies

Sectors with FDI upto 100% under Government Approval Route

Mining and mineral separation of titanium bearing minerals & ores, its value addition and integrated activities

Up-linking of Non-'News & Current Affairs' TV Channels/Down-linking of TV Channels

Print Media: Publication of **facsimile edition of foreign newspapers:** from the owner of the original foreign newspapers

Print Media: Publishing/printing of **Scientific and Technical Magazines/ specialty journals/ periodicals**

Pharmaceuticals: Brownfield
(i)'**Non-compete' clause** would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board.
(ii) The prospective investor and the prospective investee are required to provide a **certificate** along with the FIPB application.
(iii)Government may **incorporate appropriate conditions** for FDI in brownfield cases, at the time of granting approval.

Foreign investment in **other financial services**, other than those indicated in FDI Policy, would require prior approval of the Government.

Tea Plantation
Tea sector including tea plantations
Besides the above, FDI is not allowed in any other plantation sector/activity.

100% for NRIs →

- Foreign airlines in the capital of Indian companies, operating scheduled and non-scheduled air transport services

Sectors with FDI upto specified sectoral cap under Government Approval Route

26%

- Publishing of **Newspaper and periodicals** dealing with **news and current affairs**
- Publication of **Indian editions of foreign magazines** dealing with **news and current affairs**
- **Up-linking of 'News & Current Affairs' TV Channels**
- Terrestrial Broadcasting FM (**FM Radio**), subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations

49% (100% for NRIs)

- Foreign airlines in the capital of Indian companies, operating scheduled and non-scheduled air transport services

49%

Private Security Agencies

20%

Banking- Public Sector including State Bank of India and its associate Banks

Government route Up to 49%. Above 49% to Cabinet Committee on Security (CCS) on case to case basis, wherever it is likely to result in access to modern and 'state-of-art' technology in the country.

49% (Portfolio investment by FPIs/FIIs/NRIs/QFIs/ and investment by FVCIs up to 24%)

Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951

74%

Satellites – Establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO

51%

Multi Brand Retail Trading

Sectors with Partial Automatic Route; thereafter under Government Approval Route

Automatic up to 49%
Government route beyond 49% and up to 74%

→ (1) **Teleports** (setting up of up-linking HUBs/Teleports)
(2) **Direct to Home (DTH)**
(3) **Cable Networks** (Multi System Operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability)
(4) **Mobile TV**
(5) Headend-in-the Sky Broadcasting Service **(HITS)**

74% (100% for NRIs)
Automatic up to 49%
Government route beyond 49% and up to 74%

→
- **Non-Scheduled Air Transport Service**
- **Ground Handling** Services subject to sectoral regulations and security clearance

100%
Automatic Up to 49%
Government route beyond 49%

→ **Single Brand product retail trading**

100% of paid-up capital of ARC
Automatic Up to 49%
Government route beyond 49%

→ **Asset Reconstruction Company** (ARC)

74% (including investment by FII/FPI/QFI upto 49%)

Automatic up to 49%
Government route beyond 49% and up to 74%

→ **Banking -Private sector**

100%
Automatic up to 49%
Above 49% Government

→ **Telecom Services**
(including Telecom Infrastructure Providers Category-I)

All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, United Access Services, Unified license (Access services), Unified License, National/ International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP licences, Voice Mail/ Audiotex/ UMS, Resale of IPLC, Mobile Number Portability services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.

Automatic up to 26%
Government route beyond 26% and up to 49%

→ **Insurance**
(i) Insurance Company
(ii) Insurance Brokers
(iii) Third party Administrators
(iv) Surveyors and Loss Assessors
(v) Other insurance Intermediaries appointed under the provision of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)
Pension Sector

100%
Automatic up to 74%
Government route beyond 74%

→ **Civil Aviation-Airports-Existing projects**

Clarification on FDI Policy on Single Brand Retail Trading

- **Issue**
- Can the brand owner or non-resident entity/entities undertake single brand retail trading of the specific brand through **more than one company in India**?
- **Clarification/Comment**
- A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the company for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. Such non-resident entity or entities can undertake single brand retail trading business **through one or more wholly owned subsidiaries or joint ventures**.

- **Issue**
- Does the FDI policy on single brand retail trading apply to **Indian brands** seeking foreign investment?
- **Clarification/Comment**
- It is clarified that FDI policy on single brand retail trading as contained in para 6.2.16.3 of Consolidated FDI Policy Circular of 2015 **equally applies to Indian brands**.

FDI in India – Review of FDI policy – Sector Specific conditions- Railway Infrastructure

Department of Industrial Policy and Promotion (DIPP) has now **permitted 100% FDI** in **railway Infrastructure sector under automatic route** subject to conditions.

Accordingly, it has been decided to permit FDI in the following activities of the Railway Transport sector:

"**Construction, operation and maintenance** of the following: (i) Suburban corridor projects through PPP, (ii) High speed train projects, (iii) Dedicated freight lines, (iv) Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities, (v) Railway Electrification, (vi) Signaling systems, (vii) Freight terminals, (viii) Passenger terminals, (ix) Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (x) Mass Rapid Transport Systems.

Further, **FDI beyond 49 of the equity of the investee company in sensitive areas from security point of view will be brought before the Cabinet Committee on Security (CCS) for consideration on a case to case basis**."

Circular No.47 dated December 8, 2014

FDI in India – Review of FDI policy –Sector Specific conditions- Defence

Department of Industrial Policy and Promotion (DIPP) has **now provided a list of defence items** as finalised by Department of Defence Production, Ministry of Defence and has clarified that **items not in the list would not require industrial license for defence purposes. Dual use items, having military as well as civilian applications, other than those specially mentioned in the list, would also not require Industrial License** from Defence angle. Department of Defence Production, Ministry of Defence, has finalised the 'Security Manual for Licensed Defence Industry'.

In **Defence sector**, portfolio investment by **FPIs/FIIs/NRIs/QFIs** and investments by **FVCIs** together will **not exceed 24%** of the total equity of the investee/joint venture company. **Portfolio investments will be under automatic route**.

The **listed investee** company engaged in defence sector, in accordance with the guidance provided by the Press Note 7 (2014 Series), shall immediately **allocate limits for portfolio investment for RFPI (including QFI and FII), NRI (not exceeding 10%) and FVCI within the default portfolio investment limit of 24% being permitted now and approach Reserve Bank**, Central Office, Foreign Investment Division, Mumbai so that allocated limits can be monitored by the Reserve Bank.

Circular No. 46 dated December 8, 2014

FDI in Insurance sector

FDI in Insurance sector shall be permitted **up to 49%** subject to the revised conditions specified in the Press Note 3 (2015 Series) dated March 2, 2015. Also, a new activity viz. "**Other Insurance Intermediaries** appointed under the provisions of Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)" has been included within the definition of 'Insurance'.

3. Besides, the salient changes over the existing regime include:

(a) Foreign investment in Indian insurance company shall be limited **up to forty-nine percent** of the paid up equity capital;

(b) Foreign direct investment **up to 26 percent shall be under automatic route** and **beyond 26 percent and up to 49 percent shall be with Government approval**;

(c) Foreign investment in the sector is **subject** to compliance of the provisions of the **Insurance Act, 1938** and the condition that companies bringing in FDI shall obtain necessary **license from the Insurance Regulatory & Development Authority** of India for undertaking insurance activities.

(d) An Indian insurance company shall ensure that its **ownership and control remains at all times in the hands of resident Indian entities**;

(e) Foreign portfolio investment in an Indian insurance company shall be governed by the provisions of Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 and provisions of the Securities Exchange Board of India (Foreign Portfolio Investors) Regulations.

(f) Any increase of foreign investment of an Indian insurance company shall be in accordance with the **pricing guidelines** specified by Reserve Bank of India under the Foreign Exchange Management Act, 1999.

(g) **Terms 'Control', 'Equity Share Capital', 'Foreign Direct Investment' (FDI), 'Foreign Investors', 'Foreign Portfolio Investment', 'Indian Insurance Company', 'Indian Company', 'Indian Control of an Indian Insurance Company', 'Indian Ownership', 'Non-resident Entity', 'Public Financial Institution', 'Resident Indian Citizen', 'Total Foreign Investment' will have the same meaning as provided in Notification No. G.S.R 115 (E), dated 19th February, 2015**.

Circular No.94 dated April 08, 2015

FDI in India – Review of FDI policy –Sector Specific conditions- Construction Development

FDI policy for Construction Development sector has since been reviewed. Accordingly, effective December 3, 2014 100% FDI under automatic route shall be permitted in construction development sector subject to the conditions specified in the Press Note 10 (2014 Series) dated December 3, 2014.

Circular No. 60 dated January 22, 2015

Townships, housing, built-up infrastructure and construction-development projects….1/4

(A) Minimum area to be developed under **each project** would be as under:
i. In case of **development of serviced plots**, **no minimum land** area requirement.
ii. In case of **construction-development projects**, a minimum **floor area of 20,000 sq. meter**.

(B) Investee company will be required to bring minimum **FDI of US$ 5 million within six months of commencement of the project**. The commencement of the project will be the **date of approval of the building plan/lay out plan by the relevant statutory authority**. Subsequent tranches of FDI can be brought till the **period of ten years from the commencement of the project or before the completion of project**, whichever expires earlier.

(C) (i) The investor will be permitted to **exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage**.
(ii) The **Government may**, in view of facts and circumstances of a case, **permit repatriation of FDI or transfer of stake by one non-resident investor to another non-resident investor**, **before the completion of project**. These proposals will be considered by FIPB on case to case basis inter-alia with specific reference to Note (i).

(D) The project shall **conform to the norms and standards**, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, bye-laws, rules, and other regulations of the State Government/ Municipal/Local Body concerned.

(E) The Indian investee company will be **permitted to sell only developed plots**. For the purposes of this policy "developed plots" will mean plots **where trunk infrastructure** i.e. roads, water supply, street lighting, drainage and sewerage, **have been made available**.

(F) The **Indian investee company shall be responsible for obtaining all necessary approvals**, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under applicable rules/byelaws/ regulations of the State Government/Municipal/Local Body concerned.

(G) The **State Government/Municipal/Local Body concerned**, which approves the building/ development plans, will **monitor compliance** of the above conditions by the developer.

Townships, housing, built-up infrastructure and construction-development projects....2/4

Note:

(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**" will have the same meaning as provided in FEMA Notification No.1/2000- RB dated May 03, 2000 read with RBI Master Circular i.e. dealing in land and immovable property with a view to earning profit or earning income therefrom 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.

(ii) The conditions at **(A) to (C)** above, will **not apply** to **Hotels & Tourist resorts**; **Hospitals; Special Economic Zones (SEZs); Educational Institutions, Old Age Homes and Investment by NRIs**.

(iii) The conditions at **(A) and (B) above, will also not apply** to investee/joint venture companies which **commit at least 30 percent of the total project cost for low cost affordable housing**.

(iv) An Indian company, which is the recipient of FDI, shall procure a certificate from an architect empanelled by any Authority, authorized to sanction building plan to the effect that the minimum floor area requirement has been fulfilled.

(v) **'Floor area'** will be defined as per the local laws/regulations of the respective State governments/Union territories.

(vi) **Completion of the project will be determined as per the local** bye-laws/rules and other regulations of State Governments.

(vii) Project using **at least 40% of the FAR/FSI for dwelling unit of floor area of not more than 140 square meter will be considered as Affordable Housing Project** for the purpose of FDI policy in Construction Development Sector. Out of the total FAR/FSI reserved for Affordable Housing, at least one-fourth should be for houses of floor area of not more than 60 square meter.

(viii) It is clarified that **100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/shopping complexes and business centres**.

Clarification on Press Note 10 of 2014 ...3/4

Sl. No	Issue	Clarification/Comment
1.	Whether FDI can be brought if the **minimum capitalization was not completed within the period of six months of the commencement** of the project?	**No new FDI can be brought in the project if the minimum capitalization of US $ 5 million has not been achieved within six months of commencement of the project. If such minimum capitalization was achieved, FDI can be brought in till the period of 10 years or the completion of the project, whichever is earlier.**
2.	Whether period of **six months** from the commencement of project **means first approval** of the building plan/ layout plan or subsequent approvals also?	Reckoning date would be the commencement of the project which is the date of approval of the building plan/lay out plan by the relevant statutory authority. **Further approvals are just addendum/modification to the first approval.**
3.	Whether **exit** is permitted under automatic route **after completion of three years without completion of project or trunk infrastructure**?	Exit is permitted with **FIPB approval** on case to case basis even before completion of the project or development of trunk infrastructure.
4.	Is the exit in **residential/commercial projects only after completion of project**?	The exit is allowed **automatically after the completion of project**. However, in case of any project if trunk infrastructure, which is clearly defined as development of roads, water supply, street lighting, drainage and sewerage, is developed first, the investor is automatically permitted to exit thereafter.
5.	Whether the **past investments** made as per the earlier FDI policy on the sector will be adversely impacted?	Press Note 10 of 2014 which provides more liberal FDI regime **supersedes the earlier FDI policy** on Construction Development sector contained in the FDI Policy Circular of 2014.
6.	Who will certify the completion of trunk infrastructure?	A certificate from an architect registered with Council of Architecture certifying the completion of development of trunk infrastructure would be sufficient to prove that trunk infrastructure development is complete.

Clarification on Press Note 10 of 2014...4/4

Sl. No	Issue	Clarification/Comment
7.	Whether **exit is permitted on earlier** of the completion of project or after development of trunk infrastructure?	**Exit is permitted on completion of project or after development of trunk infrastructure, whichever is earlier.**
8.	Whether **NR to NR** transfer is under automatic route?	Transfer of stake from one non-resident to another non-resident **before completion** of the project or **before completion of trunk infrastructure** is through the **FIPB route**.
9.	**Definition of Business Centre**	Business centre includes where **multiplicity of businesses of same or different nature are being carried out from a particular building**.
10.	Whether Construction & Development companies with FDI are allowed **to dispose unusable/ idle parcels of land**?	FDI policy mandates exit on the completion of the project or completion of trunk infrastructure. **If the unused land is part of the project and trunk infrastructure has not been developed, then exit can take place with prior approval of FIPB**.
11.	Whether **minimum capitalization** is **company specific or project specific**?	Minimum capitalization condition is **project specific, not company specific**.
12.	Whether foreign investor can **acquire possession of the completed projects in townships, malls, shopping complexes and business centres**?	FDI is permitted in completed projects **for operation and management of townships, malls/ shopping complexes and business centres as long as they do not get into the realm of real estate business**. Definition of "Real Estate Business" for the purposes of FDI policy is as provided in FEMA Notification No. 1/2000-RB dated May 03, 2000 read with RBI Master Circular i.e. dealing in land and immovable property with a view to earning profit or earning income therefrom 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.

Pharmaceutical Brownfield

Conditions in respect of Pharma proposal:

The Company receiving FDI will **continue to produce medicines under the NLEM** for, the domestic tariff areas at the level which would be the **highest quantity of production in the previous three financial years for the next five years**.

The company will also be required **to maintain the R&D expenditure at the maximum level incurred in any of the three financial years** immediately preceding the year of induction of FDI. This **absolute level** should be maintained for the next five years.

The **administrative ministry concerned and the FIPB Secretariat will be provided** complete information pertaining to the **transfer of technology**, if any, along with induction of foreign investment into the investee company.

Other conditions as stipulate in the FDI policy issued by DIPP and regulatory guidelines issued by RBI and any other regulatory bodies should also be met.

Proposal in **Pharmaceutical Sector** are requested to furnish the details of Activity of Investee Company in the **prescribed format.**

The applicant is requested to send the required information in the **proforma annually to National Pharmaceutical Pricing Authority (NPPA)**, YMCA Cultutral Centre Building, 1 Jai Singh Road, New Delhi. Failing to which, it would be constructed as non-compliance of conditionalities.

A 'non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board. **Certificate regarding non-compete clause in prescribed format**

Foreign Direct Investment in Pharmaceuticals sector – Clarification

FDI policy for pharmaceutical sector has since been reviewed and it has now been decided with immediate effect that there would be a special carve out for **medical devices** which was earlier given the same treatment as pharmaceutical sector.

Circular No.70 February 02, 2015

Transfer of shares - includes Buyback, delisting, exit, open offer/substantial acquisition/SEBI SAST, capital reduction scheme …1/2

Transferor	Transferee		
Non-Resident (other than NRI and erstwhile OCB)	**Non-Resident** (including NRIs)	By way of sale or gift **Pricing norms not applicable.**	**Under Automatic Route.** With FIPB approval if sector under approval route.
NRIs	**NRIs**	By way of sale or gift **Pricing norms not applicable.**	**Under Automatic Route**. With FIPB approval if sector under approval route.
Non-Resident	**Person resident in India**	By way of sale or gift **Pricing norms applicable.**	**Under Automatic Route.**

Transfer of shares …2/2

Transferor	Transferee		
NRI and erstwhile OCB	**Non-Resident** **Pricing norms not applicable.**	By way of sale or gift	**Prior permission of RBI.** With FIPB approval if sector under approval route.
Resident	**Non-Resident including NRIs** **Pricing norms applicable.**	Activities falling under **Automatic Route.** With FIPB approval if sector under approval route.	
Transfer of Shares by Resident which requires Government approval: (i) Companies engaged in sector falling under the Government Route. (ii) Transfer of shares resulting in foreign investments in the Indian company, breaching the sectoral cap applicable.			

Non-Resident can **sell shares on a recognized Stock Exchange** in India through a stock broker registered with stock exchange or a merchant banker registered with SEBI.

Form **FC-TRS** within 60 days from the date of receipt of amount of consideration. Onus on transferor / transferee, resident in India.

Acquisition of shares under the FDI scheme by a non-resident on a recognized Stock Exchange

A non resident including NRI may acquire shares of a listed Indian company on the stock exchange through a registered broker under FDI scheme provided that:

i. The **non-resident investor** has already acquired and continues to **hold the control in accordance with SEBI** (Substantial Acquisition of Shares and Takeover) Regulations;
ii. The amount of consideration for transfer of shares to non-resident consequent to purchase on the stock exchange may be paid as below:
   (a) by way of inward remittance through normal banking channels, or
   (b) by way of debit to the NRE/FCNR account of the person concerned maintained with an authorised dealer/bank;
   (c) by debit to non-interest bearing Escrow account (in Indian Rupees) maintained in India with the AD bank in accordance with Foreign Exchange Management (Deposit) Regulations, 2000;
   (d) the consideration amount may **also be paid out of the dividend payable** by Indian investee company, in which the said non-resident holds control as (i) above, provided the right to receive dividend is established and the dividend amount has been credited to specially designated non –interest bearing rupee account for acquisition of shares on the floor of stock exchange.

iii. The **pricing** for subsequent transfer of shares shall be in accordance with the pricing guidelines under FEMA;
iv. The original and resultant investments are in line with the extant FDI policy and FEMA regulations in respect of sectoral cap, entry route, reporting requirement, documentation, etc;

Prior permission of the Reserve Bank

(i) Transfer from residents to non-residents by way of sale: Non-resident acquirer proposes **deferment of payment** of the amount of consideration.

(ii) A person resident in India, who intends to transfer any security, **by way of gift to a person resident outside India**. Gift does **not exceed 5 per cent of the paid-up capital** of the Indian company / each series of debentures / each mutual fund scheme; Sectoral cap limit is not breached; The transferor (donor) and the proposed transferee (donee) are close relatives as defined in Section 6 of the Companies Act, 1956; **Value of security** to be transferred together with any security already transferred by the transferor, as gift, to any person residing outside India does **not exceed** the rupee equivalent of **USD 50,000 per financial year**.

(iii) Transfer of shares from NRI to NR requires the prior approval of the Reserve Bank of India.

(iv) Transfer is at a price which falls outside the pricing guidelines specified by the Reserve Bank

Approval of RBI is not required: Pricing Guidelines not met

Transfer of shares from a Non-Resident to Resident where pricing guidelines under FEMA, 1999 are not met:

- Pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as **IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST, buy back**); and

- **Chartered Accountants Certificate** to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

Transfer of shares from Resident to Non-Resident where pricing guidelines under the FEMA, 1999 are not met:

- Pricing for the transaction is compliant with the specific/explicit, extant and relevant SEBI regulations/guidelines (such as **IPO, Book building, block deals, delisting, exit, open offer/substantial acquisition/SEBI SAST**); and

- **Chartered Accountants Certificate** to the effect that compliance with the relevant SEBI regulations/guidelines as indicated above is attached to the form FC-TRS to be filed with the AD bank.

Disclose in Balance Sheet

- An Indian company taking on record in its books any **transfer of its shares or convertible debenture** by way of sale from a resident to a non-resident and a non-resident to a resident shall **disclose in its balance sheet** for the financial year, in which the transaction took place, the details of valuation of share or convertible debentures, the pricing methodology adopted for the same as well as the agency that has given/certified the valuation.

If Contravened?

- T**o bring the difference form the foreign investor to comply with pricing guidelines and also to apply for compounding for contravention of pricing guidelines?**

Cases requiring FIPB approval … 1/3

- **Investing companies** means an Indian Company holding only investments in other Indian company/ (ies), directly or indirectly, **other than for trading of such holdings/securities** (regardless of its ownership or control) require prior Government/FIPB approval.

- **Core Investment companies** whether requiring registration with RBI or Not: CICs to additionally follow RBI's Regulatory Framework for CICs: i. Having **total assets of not less than Rs. 100 crore**; and ii. **Raises or holds public funds** - public deposits, Commercial Papers, debentures, inter-corporate deposits and bank finance.
- It holds **not less than 90% of its net assets** in the form of **investment in equity shares, preference shares, bonds, debentures, debt or loans in group companies**; Its **investments in the equity shares in group companies** constitutes **not less than 60% of its net assets**; It **does not trade in its investments** in shares, bonds, debentures, debt or loans in group companies except through block sale for the purpose of dilution or disinvestment

- **Indian company which does not have any operations and also does not have any downstream investments:** **Requires prior Government/FIPB approval, regardless of the amount or extent of foreign investment.** This will include **'Dormant Company' under Companies Act 2013.**

- **FDI in Limited Liability Partnerships (LLPs)**

Cases requiring FIPB approval … 2/3

- **A citizen of Bangladesh/ Pakistan** or an **entity incorporated in Bangladesh/ Pakistan**
- **Issue of equity shares against import of capital goods/machinery/equipment** (excluding second-hand machinery)
- **Pre-operative/pre-incorporation expenses (including payments of rent etc.)**.
- **Acquisition of shares under Scheme of Merger/Demerger/ Amalgamation/ Reconstruction** under Scheme u/s 391-394 where **sectoral cap gets attracted and the activities are not under automatic route**.
- **Share Swap between Indian Company and Foreign Company/ Shareholders**: Irrespective of the amount for inward leg of FDI. With die compliance of FEMA 120/ LRS both for Individual & Indian Party
- **Transfer from Non-Resident to Non-Resident even within Group entities/ internal structuring in sectors/ activities under approval route.**
- **Compounding cases before RBI** would need **post facto approval of FIPB** where proper approval or permission from envisaged under FEMA/FDI Policy

Cases requiring FIPB approval … 3/3

- Foreign investment in other **financial services e.g. commodity broking, payment and authorization system for on-line payment related services (on line gateway system), Cash ATM Network, Primary Dealer in India etc.**
- Conversion of **External Commercial Borrowings** (ECB) [i.e. other than import dues deemed as ECB or Trade Credit as per RBI guidelines] and **against lump-sum technical know-how fee, royalty** due for payment/repayment into shares / convertible debentures where foreign equity after conversion of ECB into equity is outside the **sectoral cap and/or activity/ sector is under Approval route**
- Issue of shares for consideration other than **inward remittances in Investee company account**.
- **Money received in third party account, prior to the incorporation of the company or as a process during the incorporation and coming in operation of the company – towards pre-operative/pre-incorporation expenses**

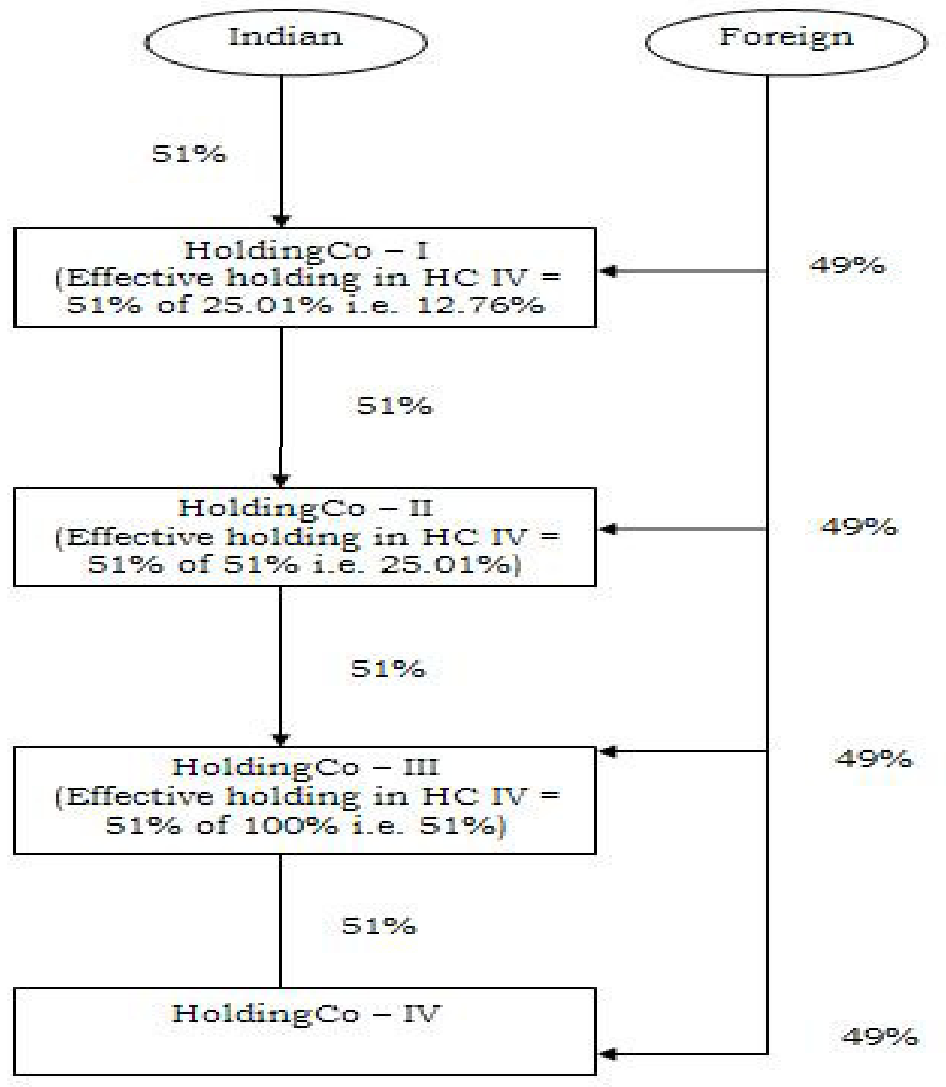
Rejection Cases – Indicative...1/2

- **FIIs/FPIs seeking approval for investment under FDI** exceeding 24% cap (aggregate under FDI and PIS)
- **FDI in unincorporated entities e.g. AoP, HUF, SHGs, Trusts (other than VCF)**
- **Relaxation to pricing guidelines/valuation** norms prescribed **under FEMA Regulations**
- **Issue of shares** against current **accounts payables, Advances received, deemed ECB** (**other than** Conversion of ECB/Lumpsum Fee/Royalty, import of capital goods/machinery/equipment and pre-operative/pre-incorporation expenses etc.**)**
- **Proposal to convert unsecured loan/ ECB into 'Capital grant'**
- **Overseas loan which does not meet the conditions of ECB regulations, no post facto approval (even while subjecting it to compounding) is permissible. The company was advised to unwind the transaction subject to compounding.**

Rejection Cases – Indicative.....2/2

- **Share Swap between Indian Company and Foreign Company/Shareholders** where **foreign shares are to be allotted to Individual residents** (advised to comply with Liberalised remittance Scheme)
- **Relaxation in minimum capitalisation norms for NBFC**
- Construction Development: Townships, Housing, Built-up infrastructure**; Sale of undeveloped land**
- **Relaxation of minimum lock-in-period for Construction Development: Townships, Housing,** Built-up infrastructure
- **Relaxation of Wholesale trading conditions** e.g. sale to entities not holding trade licenses; **25% ceiling of sales to same Group**
- **Issue of sweat equity shares beyond 5% of paid-capital**
- **Transfer of assets / undertaking of Liaison Office/ Branch Office/ Project Office** of a foreign entity to its WoS/ JV/ Others in India – Permitted vide RBI Circular 142 dated 12 June 2014
- Request for **extension of original maturity period of redeemable preference shares** in downstream WoS as such an investment is deemed 'Indirect Foreign Investment' and only 'compulsorily convertible preference shares' are regarded as FDI instrument.

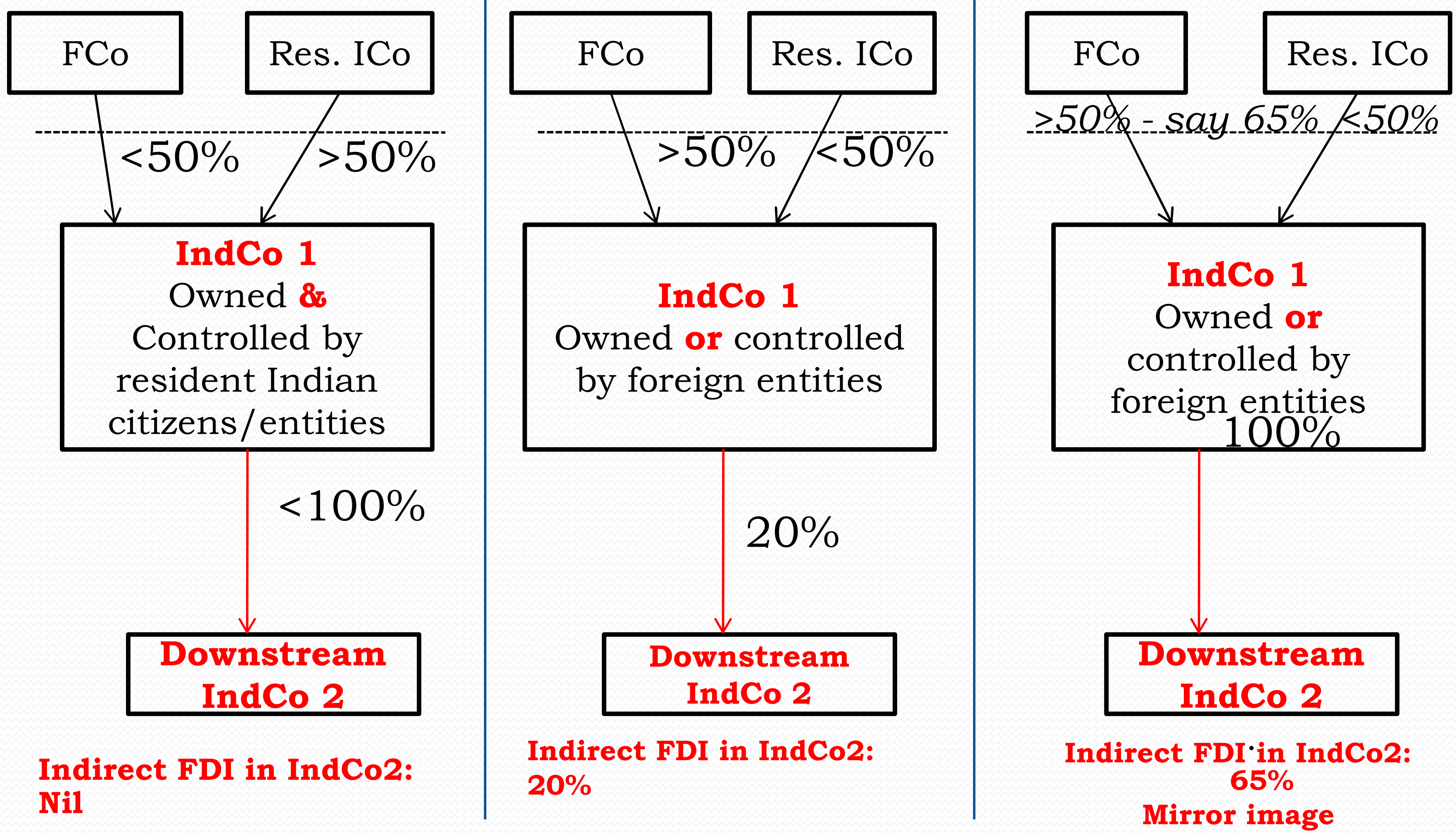
Four layered foreign holding



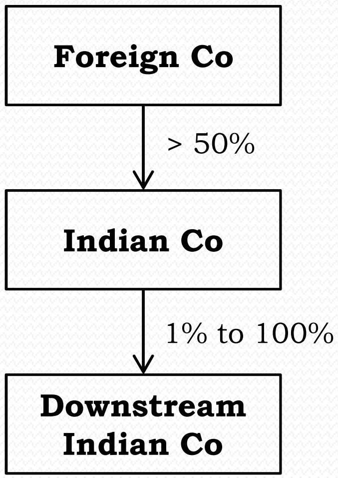
Effective foreign holding in HoldCo-IV through:

HoldingCo IV	**(49% of 100%) Direct**	**49.00%**
HoldingCo III	(49% of 51%) **Indirect**	24.99%
HoldingCo II	(49% of 25.01%) **Indirect**	12.25%
HoldingCo I	(49% of 12.76%) **Indirect**	6.25%
Total effective foreign: Holding in HoldingCo -IV		92.49%

Downstream Indirect FDI



Downstream Investments



- Investment by Foreign 'Owned' and/ or 'Controlled' Indian company into another Indian company
- Covers fresh investment and acquisition of existing shares
- Regarded as **Indirect FDI**
- **Pricing guidelines applicable to Direct FDI will equally apply**
  - Investment/ consideration for transfer > Fair Value
- Compliance: Filing of intimation with SIA, DIPP and FIPB within 30 days from date of investment
- Downstream buy-backs also covered by pricing guidelines
  - Buy-back price < Current Fair Value
- Valuation needs to be done by a Chartered Accountant or SEBI Regd. Merchant Banker
- Anomaly: Downstream investment through acquisition of shares from NR
  - Indian company can record share transfer only on receiving acknowledged Form FC-TRS

Calculation of total foreign investment

- Any non-resident investment in an Indian company is **direct foreign investment**

- Investment by resident Indian entities could have **indirect foreign investment if the Indian investing company has foreign investment in it**.

- Computation of **indirect Foreign investment**: Include Schedule **1** (FDI), **2** (FII holding as on **March 31**), **2A** (FPI holding as on **March 31**), **3** (NRI), **6** (FVCI), **8** (QFI holding as on **March 31**), **9** (LLPs) and **10** (DRs); **other than** Schedule 4 (NRIs on non-repatriation basis).

- Counting of indirect foreign Investment: **If investing company is owned or controlled by 'non resident entities'.**

- For **WoS**, the indirect foreign investment will be limited to the foreign investment in the operating-cum-investing/ investing company – being **mirror image** of the holding company.

Indirect FDI/'Control'

Earlier: A company is considered as **'Controlled' by resident Indian citizens** if the resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, have the power to appoint a **majority of its directors in that company**.

Revised: '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 resident Indian citizens** if **more than 50% of the capital in it is beneficially owned by resident Indian citizens and / or Indian companies**, which are ultimately owned and controlled by resident Indian citizens.

- **Aviation Sector: Substantial ownership and effective control of which is vested in Indian nationals**
- **SEBI: Right of first refusal and tag along rights do not amount to change in CONTROL as per Takeover Regulations**
- **In sector which are not prohibited (e.g. retail), Indian operating companies owned & controlled by Indians, invest downstream into retail businesses, whether multi-brand, single brand or e-commerce.**

Indirect cases:

Prohibited sectors: Not permitted.

RBI Master Circular: The **FDI recipient Indian company at the first level** which is responsible for ensuring compliance with the FDI conditionalities like **no indirect foreign investment in prohibited sector**, entry route, **sectoral cap/conditionalities**, etc. for the **downstream investment made by in the subsidiary companies at second level and so on** and so forth would obtain a certificate to this effect from its statutory auditor on an annual basis as regards status of compliance with the instructions on downstream investment and compliance with FEMA provisions.

Indirect foreign investment via Indian Owned & Controlled Company: Telecom, I&B, Print Media, Single brand retail Trading, Multi Brand Retail Trading, Media, Pharmaceuticals, Construction and development projects/Real estate

Downstream investments by Indian companies will be subject to the following conditions:

(i) Such a company is to **notify SIA, DIPP and FIPB** of its downstream investment in the form available at **http://www.fipbindia.com within 30 days of such investment**, even if capital instruments have not been allotted along with the modality of investment in new/existing ventures (with/without expansion programme);

(ii) Downstream investment by way of induction of foreign equity in an existing Indian Company to be **duly supported by a resolution of the Board of Directors** as also a shareholders agreement, if any;

(iii) Issue/transfer/**pricing/valuation of shares** shall be in accordance with applicable SEBI/RBI guidelines;

(iv) For the purpose of downstream investment, the Indian companies making the downstream investments would have to bring in requisite funds from abroad and **not leverage funds from the domestic market**. This would, however, not preclude downstream companies, with operations, from raising debt in the domestic market. **Downstream investments through internal accruals are permissible.**

Certificate from Statutory Auditor for Downstream Investment

- The **FDI recipient Indian company at the first level** **responsible for ensuring compliance with the FDI conditionalities** like no indirect foreign investment in prohibited sector, entry route, sectoral cap / conditionalities, etc. **for the downstream investment made by in the subsidiary companies at second level and so on and so forth would obtain a certificate to this effect from its** **statutory auditor on an annual basis** as regards status of compliance with the instructions on downstream investment and compliance with FEMA provisions.
- The fact that statutory auditor has certified that the company is in compliance with the regulations as regards downstream investment and other FEMA prescriptions will be duly mentioned in the **Director's report** in the Annual Report of the Indian company.
- In case statutory auditor has given a **qualified report**, the same shall be immediately brought to the notice of the RBI, Foreign Exchange Department (FED), **Regional Office** (RO) of RBI in whose jurisdiction the Registered Office of the company is located and shall also **obtain acknowledgement** from the RO of having intimated it of the qualified auditor report.
- **RO** shall file the **action taken report** to the Chief General Manager-in-Charge, Foreign Exchange Department, **Reserve Bank of India, Central Office**, Central Office Building, Shahid Bhagat Singh Road, Mumbai 400001.

Pledge of shares of company incorporated in India

- Any person being a **promoter of a company registered in India** (borrowing company), which has raised external commercial borrowing, **may pledge the shares of the borrowing company or that of its associate resident companies for the purpose of securing the external commercial borrowing** (**ECB**) raised by the borrowing company

- Shares of an Indian company **held by the non-resident investor** can be **pledged in favour of an Indian bank in India** to secure the **credit facilities being extended to the resident investee company for *bona fide* business purposes**

- Shares of the Indian company **held by the non-resident investor** can be **pledged in favour of an overseas bank** to secure the **credit facilities being extended to the non-resident investor / non-resident promoter** of the Indian company **or its overseas group company.**

- Any person being a **non-resident investor** of a company registered in India and **listed on a recognised stock exchange/s** in India (resident investee company), may pledge the shares of that company, **in favour of a Non-Banking Financial Company in India,** to secure the credit facilities being extended **to that resident investee company for bonafide business purposes**, subject to the AD bank satisfying itself of the compliance of the conditions stipulated by the Reserve Bank, from time to time, in this regard

Overseas Direct Investments by Indian Party – Rationalization / Liberalization…1/3

(i) Creation of charge on shares of JV / WOS / step down subsidiary (SDS) in favour of domestic / overseas lender

In terms of the extant FEMA provisions, creation of charge (pledge) on the shares of an JV / WOS of an Indian party in favour of domestic / overseas lender for the purpose of availing facilities (funded or non-funded) by the Indian party and / or the concerned JV / WOS is **under the automatic route**.

It has been decided that the designated **AD bank may permit** creation of charge / pledge on the shares of the JV / WOS / SDS (irrespective of the level) of an Indian party in favour of a domestic or overseas lender for securing the funded and / or non-funded facility **to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its JV / WOS / SDS (irrespective of the level) under the automatic route** subject to the following:

a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification *ibid* for undertaking financial commitment;
b) Compliance to the provisions under Regulation 18 of the Notification *ibid;*
c) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
d) The loan / facility availed by the JV / WOS / SDS from the domestic / overseas lender shall be **utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever**;
e) A certificate from the **Statutory Auditors'** of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has **not been utilized for direct or indirect investments in India**, is to be obtained and kept by the designated AD;
f) The **invocation of charge resulting into the domestic lender acquiring the shares of the overseas JV / WOS / step down subsidiary shall be governed by the extant FEMA provisions** / regulations issued by the Reserve Bank from time to time;
g) The facilities (funded or non-funded) extended by the domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS shall also be **governed by the prudential norms** and other guidelines issued by the Department of Banking Regulation (DBR, the erstwhile DBOD), Reserve Bank of India from time to time; and
h) The matter relating to the **setting up / acquiring the multi-layered structure of overseas entities** by the Indian party, wherever applicable, is **under the examination of the Reserve Bank** and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

Overseas Direct Investments by Indian Party – Rationalization / Liberalization ...2/3

(ii) Creation of charge on the domestic assets in favour of overseas lenders to the JV / WOS / step down subsidiary

As per the extant FEMA provisions, creation of charge on the domestic assets (movable / immovable / financial / other) of an Indian party (or its group / sister / associate concern including the individual promoter / director) in favour of an overseas lender to the JV / WOS / step down subsidiary (SDS) **requires prior approval of the Reserve Bank**.

It has been decided that the designated **AD bank may permit creation** of charge (by way of pledge, hypothecation, mortgage, or otherwise) **on the domestic assets of an Indian party** (or its group companies / sister concerns / associate concerns including the individual promoters / directors) **in favour of an overseas lender for securing the funded and / or non-funded facility to be availed of by the JV / WOS / SDS (irrespective of the level) of the Indian party under the automatic route** subject to the following:

(a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification *ibid* for undertaking the financial commitment;

(b) Compliance to the provisions under Regulation 18A(1) of the Notification *ibid;*

(c) The domestic assets, on which charge is being created, are not securitized;

(d) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;

(e) **The loan/funds raised overseas by the JV / WOS / SDS shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever**;

(f) A **certificate from the Statutory Auditors'** of the Indian party, to the effect that the loan / funds raised overseas by the JV / WOS / SDS has **not been utilized for direct or indirect investments in India, is to be obtained** and kept by the designated AD;

(g) **The overseas lender undertakes that, in the event of enforcement of charge, they shall transfer the domestic assets by way of sale to a resident only**;

(h) In case of **invocation of charge**, the resultant remittance of the proceeds **exceeding the prescribed limit of the financial commitment** of the Indian party (prevailed at the time of creation of charge) shall require **prior approval of the Reserve Bank**;

(i) Wherever **creation of charge involves pledge of shares of an Indian company, the pledge shall also be governed by the extant FEMA provisions** / regulations issued by the Reserve Bank and the consolidated Foreign Direct Investment (FDI) policy issued by the Government of India from time to time; and

(j) The matter relating to the **setting up / acquiring the multi-layered structure of overseas entities by the Indian party**, wherever applicable, is **under the examination of the Reserve Bank** and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

Overseas Direct Investments by Indian Party – Rationalization / Liberalization …3/3

(iii) Creation of charge on overseas assets in favour of domestic lender

Creation of charge on the overseas assets of JV / WOS / SDS of an Indian party in favour of a domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS requires **prior approval of the Reserve Bank**.

It has been decided that the designated **AD bank may permit creation of charge** (by way of hypothecation, mortgage, or otherwise) **on the overseas assets** (excluding the shares) of the JV / WOS / SDS (irrespective of the level) of an Indian party **in favour of a domestic lender for securing the funded and / or non-funded facility to be availed of by the Indian party or by its group companies / sister concerns / associate concerns or by any of its overseas JV / WOS / SDS (irrespective of the level) under the automatic route** subject to the following:

a) The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification *ibid* for undertaking financial commitment;
b) Compliance to the provisions under Regulation 18A(2) of the Notification *ibid;*
c) The overseas assets, on which charge is being created, are not securitized;
d) The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
e) The loan / facility availed by the JV / WOS / SDS from the domestic lender **shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever**;
f) A **certificate from the Statutory Auditors'** of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has **not been utilized for direct or indirect investments in India**, is to be obtained and kept by the designated AD;
g) The **invocation of charge resulting into the domestic lender acquiring the overseas assets shall require prior approval of the Reserve Bank**; and
h) The matter relating to the setting up / acquiring the **multi-layered structure of overseas entities** by the Indian party, wherever applicable, is **under the examination of the Reserve Bank** and the decision taken in this regard shall be conveyed in due course for necessary compliance at AD / Indian party level.

Circular No.54 dated December 29, 2014

Routing of funds raised abroad to India

It has come to our notice that **some Indian companies are accessing overseas market for debt funds through overseas holding / associate / subsidiary / group companies**. It has also been reported that **such borrowings are raised at rates exceeding the ceiling applicable in terms of extant FEMA regulations and that the funds so raised are routed to the Indian companies which accounts for sole/major operations of the group**. **Different modalities/structures** are resorted to for channeling such funds for Indian operations including investment in rupee bonds floated by the Indian company.

On a review of the matter in light of the existing regulatory framework, it is **clarified** as under:

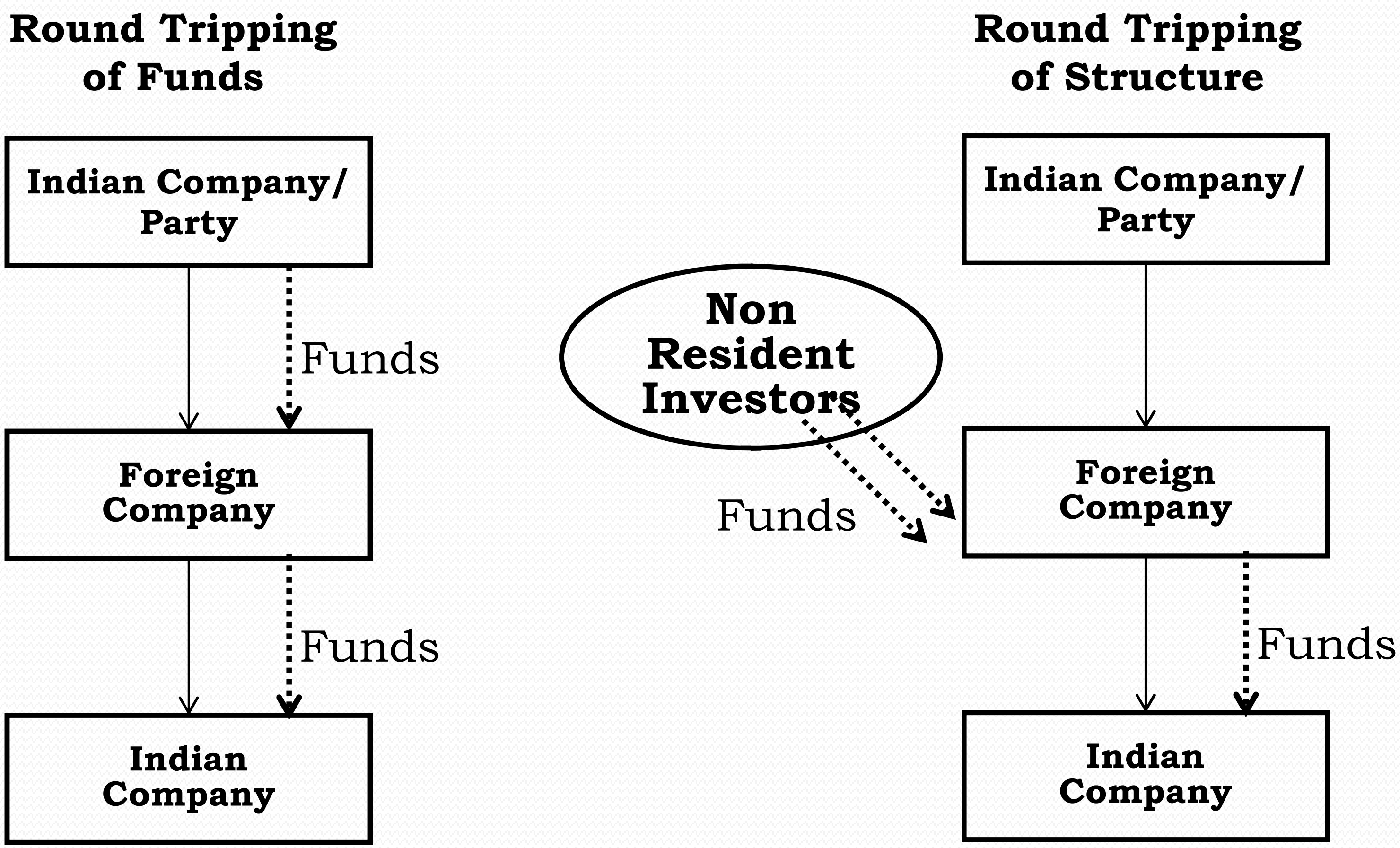
i. **Indian companies or their AD** Category – I banks are **not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for such borrowings by their overseas holding / associate / subsidiary / group companies** except for the purposes explicitly permitted in the relevant Regulations.

ii. Further, funds raised abroad by overseas holding / associate / subsidiary / group companies of Indian companies with support of the Indian companies or their AD Category – I banks as mentioned at (i) above **cannot be used in India unless it conforms to the general or specific permission** granted under the relevant Regulations.

iii. Indian companies or their AD Category – I banks using or establishing structures which contravene the above shall render themselves liable for **penal action** as prescribed under FEMA, 1999.

Circular No. 41 dated November 25, 2014

Round Tripping



Round Tripping – Likely Challenges

ODI Regulations

- ODI for bonafide business activities
- Financial services not permitted

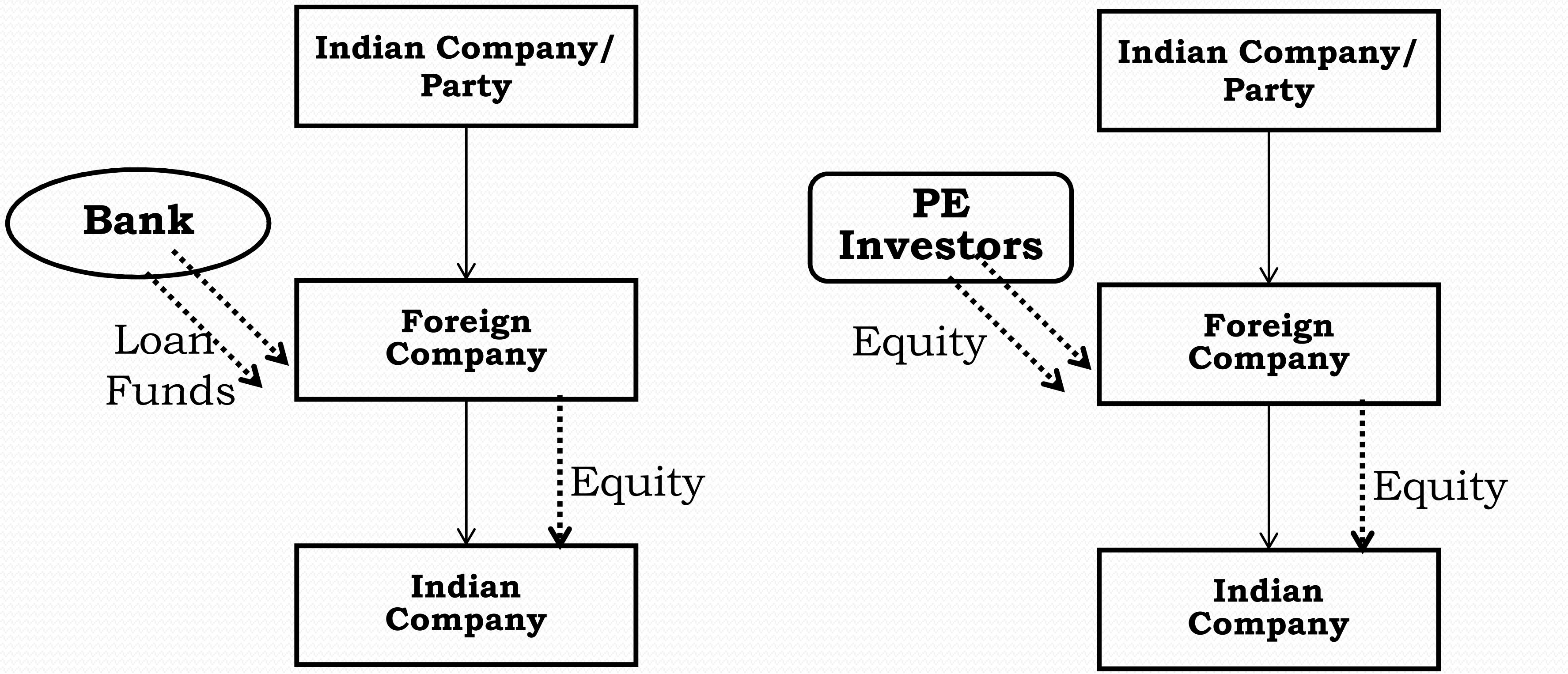
ECB Regulations

- Leveraging overseas for investment into India could amount to Deemed ECB
- End-use restrictions can be violated

FDI Regulations

- Not genuine foreign investor
- Debt funds could be rerouted into India

Round Tripping – Illustrations



Security for External Commercial Borrowings…1/2

2. Under the extant ECB guidelines, the **choice of security to be provided to the overseas lender / supplier for securing ECB is left to the borrower**. With a view to liberalising, expanding the options of securities and consolidating various provisions related to creation of charge over securities for ECB at one place, it has been decided that AD Category-I **banks may allow creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised / raised by the borrower**, subject to satisfying themselves that:

(i) the underlying ECB is in compliance with the extant ECB guidelines,
(ii) there **exists a security clause in the Loan Agreement** requiring the ECB borrower to create charge, in favour of overseas lender / security trustee, on immovable assets / movable assets / financial securities / issuance of corporate and / or personal guarantee, and
(iii) **No objection certificate**, wherever necessary, from the **existing lenders in India** has been obtained.

3. Once aforesaid stipulations are met, the AD Category-I bank may permit creation of charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees, during the currency of the ECB with security co-terminating with underlying ECB, **subject to the following**:

(a) Creation of Charge on immovable assets:

i. Such security shall be **subject to provisions** contained in the Foreign Exchange Management (**Acquisition and Transfer of Immovable Property in India) Regulation**s, 2000.
ii. The permission should **not be construed as a permission to acquire immovable asset (property) in India**, by the overseas lender / security trustee.
iii. In the **event of enforcement / invocation** of the charge, **the immovable asset / property will have to be sold only to a person resident in India** and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

(b) Creation of Charge on Movable Assets

In the event of enforcement / invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. **Encumbered movable assets may also be taken out of the country**.

Security for External Commercial Borrowings…2/2

(c) Creation of Charge over Financial Securities

i. **Pledge of shares of the borrowing company** held by the promoters as well as in domestic associate companies of the borrower will be **permitted**. Pledge on **other financial securities, viz. bonds and debentures, Government Securities, Government Savings Certificates, deposit receipts of securities and units of the Unit Trust of India or of any mutual funds, standing in the name of ECB borrower/promoter, will also be permitted**.

ii. In addition, security interest over **all current and future loan assets and all current assets including cash and cash equivalents, including Rupee accounts of the borrower with AD Category-I banks in India, standing in the name of the borrower/promoter, can be used as security for ECB**. The Rupee accounts of the borrower/promoter can also be in the form of escrow arrangement or debt service reserve account.

iii. In case of **invocation of pledge**, transfer of financial securities shall be in accordance with the **extant FDI/FII policy** including provisions relating to sectoral cap and pricing as applicable read with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

(d) Issue of Corporate or Personal Guarantee

i. A copy of **Board Resolution** for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.

ii. Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.

iii. Such security shall be **subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations**, 2000.

Circular No. 55 dated January 01, 2015

Remittance

- **Sale proceeds of shares** is 'remittance of asset' governed by The Foreign Exchange Management (Remittance of Assets) Regulations 2000 under FEMA.

- Bank can allow remittance of sale proceeds of a security (**net of applicable taxes**) to the seller of shares resident outside India, provided the security has been held on repatriation basis, the sale of security has been made in accordance with the prescribed guidelines and NOC / tax clearance certificate from the Income Tax Department has been produced.

- **Repatriation of Dividend**: Without any restrictions (net of applicable taxes) being Current Account Transactions. The rate of dividend on **convertible preference shares** issued under these Regulations shall **not exceed 300 basis points over the Prime Lending Rate of State Bank of India** prevailing as on the date of the Board meeting of the company in which issue of such shares is recommended.

- **Repatriation of Interest**: Without any restrictions (net of applicable taxes) being Current Account Transactions. Bench mark ceiling applicable for Preference Shares apply to interest as well.

- **Credit of sale proceeds of Foreign Direct Investments in India to NRE / FCNR(B) accounts permitted**

Remittance on winding up/liquidation of Companies

AD Bank have been allowed to **remit winding up proceeds** of companies in India, **which are under liquidation, subject to** payment of applicable taxes.

Liquidation may be subject to **any order issued by the court winding up** the company or the official liquidator in case of **voluntary winding** up under the provisions of the Companies Act, 2013. AD Category – I banks shall allow the remittance provided the applicant submits:

i. **No objection or Tax clearance certificate** from **Income Tax Department** for the remittance.
ii. **Auditor's certificate** confirming that all liabilities in India have been either fully paid or adequately provided for.
iii. Auditor's certificate to the effect that the **winding up** is in accordance with the provisions of the Companies Act, 2013.
iv. In case of winding up otherwise than by a court, an auditor's certificate to the effect that there is **no legal proceedings pending** in any court in India against the applicant or the company under liquidation and there is no legal impediment in permitting the remittance.

Reporting of FDI Inflow

Form	Supporting	Time period	Action by Regional Office concerned	Non-compliance
Advance Reporting Form	❖ **FIRC/s** evidencing receipt of remittance ❖ **KYC report** on non-resident investor	Not later than **30 days** from the date of receipt	Allotment of Unique Identification Number (**UIN**) for the amount reported	❖ **Contravention** under FEMA ❖ Attract **penal provisions**

Reporting of Issue of Fresh Shares /Bonus /Right 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

Form	Supporting	Time period	Action by Regional Office concerned	Non-compliance
Form FC-GPR duly filled up and signed by MD/Director/ Secretary of Company	❖ A **certificate from Company Secretary** ❖ A **certificate from SEBI registered Merchant Banker or Chartered Accountant for valuation.**	Not later than **30 days** from the date of receipt	Taking on record the shareholding pattern	❖ **Contravention** under FEMA ❖ Attract **penal provisions**
Remittance received from entity than foreign investors - KYC and documentation **Reconciliation of shareholding pattern at RBI end (Fresh issue, transfers, reduction, merger, transfers from NR to NR etc.)**				

Reporting of FDI Inflow

- **Time frame for issue of shares**
  - Capital instruments should be **issued within 180 days (subject to Companies Act 2013) from the date of receipt** of the inward remittance or by debit to the NRE/FCNR (B) account
  - Else refunded to non-resident investor

- **Transfer of Shares (From Resident to a Non-resident and viceversa)**
  - File form FC-TRS with RBI through authorised dealer within **60 days** of receipt of consideration
  - Indian company can record transfer only post approval of Form-FC TRS by AD-Bank
  - Onus on transferor / transferee, resident in India

FDI – NIC Codes Reporting under FDI Scheme

Indian companies are required to report the NIC Codes in the **FCGPR and FCTRS** forms as per the **NIC 2008 version**, henceforth.

A **uniform State and District code list** for reporting of details of foreign direct investment by Indian companies in Form FCGPR. The list can be accessed on the RBI website (www.rbi.org.in - FEMA – State and District Code List).

Mapping of Activities/ Sectors by DIPP -
http://dipp.nic.in/English/acts_rules/Press_Notes/Mapping_NIC2008_05January2015.pdf.

Circular No. 6 dated July 18, 2014

FIRC issues

Abstract from **A.P. (DIR Series) Circular No.96 Dated 20th January, 2014**

Note should, however, be taken that KYC in respect of the remitter, wherever required, is a joint responsibility of the bank that has received the remittance as well as the bank that ultimately receives the proceeds of the remittance. While the first bank will be privy to the details of the remitter and the purpose of the remittance, the second bank, will have access to complete information from the recipient's perspective. Besides, the **remittance receiving bank is required to issue FIRC to the bank receiving the proceeds to establish the fact the funds had been remitted in foreign currency.**

Abstract from RBI/2010-11/315-DPSS (CO) EPPD No. 1309 / 04.03.01 / 2010-11 dated December 13, 2010

Credit to NRE account through RTGS / NEFT /NECS / ECS – Issuance of Foreign Inward Remittance Certificate (FIRC):

FIRC should not be issued against remittance for credit to NRE account.

If the proceeds of inward remittance received are remitted in foreign currency itself to the beneficiary's banker, then FIRC is to be issued by the bank which has received the proceeds in foreign exchange, i.e., the bank which converts the foreign currency into rupees is required to issue FIRC.

Foreign Direct Investment – Reporting under FDI Scheme on the e-Biz platform

Reserve Bank of India, under the aegis of the e-Biz project of the Government of India has enabled the filing of the following returns with the Reserve Bank of India viz.

- **Advance Remittance Form (ARF)** - used by the companies to report the foreign direct investment (FDI) inflow to RBI; and
- **FCGPR Form** - which a company submits to RBI for reporting the issue of eligible instruments to the overseas investor against the above mentioned FDI inflow.

The online reporting on the e-Biz platform is **an additional facility** to the Indian companies to undertake their ARF and FCGPR reporting and the **manual system of reporting** as prescribed in terms of A.P. (DIR Series) Circular No. 102 dated February 11, 2014 would continue till further notice.

Circular No. 77 dated February 12, 2015, & 95 dated April 17, 2015

Annual Return of Liabilities & Assets

- A.P. (DIR Series) Circular No. 45 & 133 dated 15 March, 2011 & 20 June 2012, FAQs 18 June 2014
- **By Indian Companies:** Capture statistics relating to Foreign Direct Investment, **both inward and outward**
- **To be filed electronically**
- Submitted by **July 15 of every year** to the RBI, Mumbai
- To be submitted by all Indian companies which have **received FDI and/or made FDI abroad** in the **previous year(s) including the current year**
- **Coverage:**
  - **Methodology for valuation of foreign liabilities and foreign assets**
  - **Nature of activities principal line of business as %, with NIC code (NIC Codes in the FCGPR and FCTRS forms as per the NIC 2008 version)**
  - **Name & country of non-resident investor under FDI**
  - **Financial derivatives, Money market instruments**
  - **Trade credits, loans, Currency & Deposits**
  - **ODI and Portfolio investment overseas**
  - **Contingent foreign liabilities**
  - **Disinvestments in India and Abroad**

- The filled in Excel based FLA return should be forwarded through the **official email id of any authorized person like CFO, Director, Company Secretary** etc. Acknowledgement

Annual Return on Foreign Liabilities & Assets (FLA Return) (1/2)

Due date of filing FLA Return	**July 15** every year
Eligible Companies	**Indian companies which have received FDI and/or made ODI** in the previous year(s) including the current year i.e. who holds foreign Assets or Liabilities in their Balance Sheets as on 31 March
No outstanding investment in respect of inward and outward FDI as on end-March of reporting year	**Ned not submit** FLA Return
If a company has received only share application money and does not have any FDI/ODI outstanding as on end-March of the reporting year	**Need not submit** FLA Return
If the company has not 'received any fresh FDI and/or ODI' in the latest year but the company has outstanding FDI and/or ODI	**Required to submit** FLA Return
Registered Partnership Firms (Registered under Partnership Registration Act) or branches or trustees, having any outward FDI outstanding as on end-March of the reporting year	Required to send a request mail to **get a dummy CIN number** which will enable them to file the Excel based FLA Return

FLA Return (2/2)

Is it required to submit Annual Performance Report (APR) for ODI, where FLA Return has been submitted ?	**Yes**. FLA Return and APR are two different Returns as per different FEMA Notifications
Who is responsible to file FLA Return? From whose mail ID, the FLA Return should be e-mailed?	Filled-in Excel based FLA return should be forwarded through the **official email ID of any authorized person like CFO, Director, Company Secretary etc.**
Format of FLA Return	Updated FLA return to be **downloaded from RBI's website** every year by end of May
Where accounts are not audited before July 15	FLA Return to be submitted based on unaudited (provisional) account
Revisions from the provisional information given by company after accounts get audited	**Revised FLA Return** based on audited accounts can be **filed by September end**
Non-filing of return before due date	**Violation under FEMA**, Penalty or prosecution may be initiated

Schedule 4 of FEMA 20

- **NRIs** may without any limit, purchase **on non-repatriation basis**, shares or convertible debentures of an Indian company issued whether by **public issue or private placement** or **right issue**

- **Other than** chit fund or a nidhi company or is engaged in agricultural/plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights

- By way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO account

- Sale/maturity proceeds (net of applicable taxes) of shares or convertible debentures shall be **credited only to NRO account**

- Investment by NRIs under Schedule 4 of 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***

Depository Receipts Scheme

A new scheme called 'Depository Receipts Scheme, 2014' (DR Scheme, 2014) for investments under ADR/GDR have been notified by the Central Government **effective from December 15, 2014** which provides for **repeal of extant guidelines** for **Foreign Currency Convertible Bonds and Ordinary Shares** (Through Depositary Receipt Mechanism) Scheme, 1993 **except to the extent relating to foreign currency convertible bonds**.

The salient features of the new scheme are:

- The securities in which a person resident outside India is **allowed to invest under Schedule 1, 2, 2A, 3, 5 and 8** of Notification No. FEMA 20/2000-RB dated 3rd May 2000 shall be eligible securities for issue of Depository Receipts in terms of DR Scheme 2014;
- A person will be eligible to issue or transfer eligible securities to a foreign depository for the purpose of issuance of depository receipts as provided in DR Scheme 2014.
- The aggregate of eligible securities which may be issued or transferred to foreign depositories, along with eligible securities already held by persons resident outside India, shall **not exceed the limit on foreign holding** of such eligible securities under the extant FEMA regulations, as amended from time to time.
- The eligible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts **at a price less than the price applicable to a corresponding mode of issue** of such securities to domestic investors under FEMA, 1999.
- It is to be noted that if the issuance of the depository receipts adds to the capital of a company, the issue of shares and utilisation of the proceeds shall have to comply with the relevant conditions laid down in the Regulations framed and Directions issued under FEMA, 1999.

Circular No. 61 dated January 22, 2015

Depository Receipts Scheme, 2014
(with effect from 15th December, 2014)

Pricing

The permissible securities shall **not be issued** to a foreign depository for the purpose of issuing depository receipts **at a price less than the price** applicable to a corresponding mode of issue of such securities **to domestic investors** under the applicable laws.

Explanation 1: A company **listed or proposed to be listed** on a recognised stock exchange shall **not issue equity shares on preferential allotment** to a foreign depository for the purpose of issue of depository receipts **at a price less than the price applicable to preferential allotment of equity shares of the same class to investors under the ICDR**.

Explanation 2: Likewise, where a listed company makes a **qualified institutional placement** of permissible securities to a foreign depository for the purpose of issue of depository receipts, the **minimum pricing norms for such placement as applicable under the ICDR shall be complied with**.

FPIs & NRIs

FPIs	
Individual holding	**Below10%** of the capital
Aggregate limit for FIIs	**24%** of the capital
Aggregate limit of **24%** can be **increased to the sectoral cap/statutory ceiling**	❖ **Special Resolution** of Shareholders ❖ **Prior intimation to RBI** ❖ **Certificate from the Company Secretary stating compliance of FEMA and FDI Policy**
Aggregate under **FDI and Portfolio Investment Scheme**	**within the above caps**
IPOs only	**Permitted**

NRIs	
NRIs through designated ADs	up to **5 %** of the paid- up capital
Aggregate limit of 10% can be **raised to 24 per cent**	❖ **Special Resolution** of Shareholders ❖ **Prior intimation to RBI** ❖ **Certificate from the Company Secretary stating compliance of FEMA and FDI Policy**
Shares purchased under **Portfolio Investment Scheme cannot be transferred by way of sale under private arrangement**	**Except** NRIs can transfer shares acquired under PIS to **close relatives**

New Scheme Registered Foreign Portfolio Investor (RFPI)..1/3

- RFPI regime shall commence with effect from June 01, 2014.
- **Existing portfolio investor class**, namely, **FII** and **QFI** registered with SEBI shall be **subsumed under RFPI.**
- **Purchase and sell shares and convertible debentures** of Indian company through registered broker **on recognized stock exchanges** in India as well as purchases shares and convertible debentures which are **offered to public** in terms of relevant SEBI guidelines/regulations.
- **RFPI may sell** shares or convertible debentures so acquired
  a) in **open offer** in accordance with the SEBI (**Substantial Acquisition** of Shares and Takeovers) Regulations, 2011; or
  b) in an **open offer** in accordance with the SEBI (**Delisting** of Equity shares) Regulations, 2009; or
  c) **through buyback of shares** by a listed Indian company in accordance with the SEBI (Buyback of securities) Regulations, 1998.
- **RFPI may also acquire** shares or convertible debentures
  a) in **any bid** for, or acquisition of, securities in response to an offer for disinvestment of shares made by the Central Government or any State Government; or
  b) in any transaction in securities pursuant to an agreement entered into with merchant banker in the process of market making or subscribing to unsubscribed portion of the issue in accordance with Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.
- The **individual and aggregate investment limits** for the RFPIs shall be below **10% (per cent) or 24% (per cent) respectively** of the total paid-up equity capital or 10% (per cent) or 24% (per cent) respectively of the paid-up value of each series of convertible debentures issued by an Indian company. Further, where there is composite sectoral cap under FDI policy, these limits for RFPI investment shall also be within such overall FDI sectoral caps;
- RFPI shall be eligible to open a **Special Non-Resident Rupee (SNRR) account** and a foreign currency account with Authorised Dealer bank and to transfer sums from foreign currency account to SNRR account at the prevailing market rate for making genuine investments in securities. The Authorised Dealer bank may transfer repatriable proceeds (after payment of applicable taxes) from SNRR account to foreign currency account;

New Scheme Registered Foreign Portfolio Investor (RFPI)..2/3

- RFPI shall be eligible to **invest in government securities and corporate debt** subject to limits specified by the RBI and SEBI from time to time;
- The investment by RFPI will be made subject to the SEBI (FPI) Regulations 2014, modified by SEBI/Government of India from time to time;
- RFPI shall be permitted to trade in all exchange traded derivative contracts on the stock exchanges in India subject to the position limits as specified by SEBI from time to time;
- RFPI may offer cash or foreign sovereign securities with AAA rating or corporate bonds or domestic Government Securities, as collateral to the recognized Stock Exchanges for their transactions in the cash as well as derivative segment of the market.

The existing class of investors namely, Foreign Institutional Investor (FII) and Qualified Foreign Investor (QFI) registered with SEBI shall be eligible to continue their investment in accordance with SEBI guidelines.

Foreign Portfolio Investors registered under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, as Foreign Institutional Investor for the purposes of section 115D.

1. Interest income is taxable at **20%** (5% in select cases)
2. Short term capital gains (STCG) on sale of listed equity shares or units of an equity oriented fund, subjected to Securities Transaction Tax (STT), are taxable at **15%**.
3. STCG arising on transfer of other Securities is taxable at **30%** (in absence of Section 115AD, this rate for a foreign entity would have been 40%).
4. Long term capital gains arising on transfer of unlisted securities or listed securities that are sold off the stock exchange are taxable at **10%** (in absence of Section 115AD, the rate of tax for gains for a non-resident from sale of shares of a private company could be as high as 20%).

New Scheme Registered Foreign Portfolio Investor (RFPI)..3/3

	Category I FPI	Category II FPI	Category III FPI
Eligible Foreign Portfolio Investors	Government and Government-related investors such as central banks, Governmental agencies, sovereign wealth funds or international and multilateral organizations or agencies	(i) Appropriately regulated broad based funds; (ii) Appropriately regulated persons; (iii) Broad-based funds that are not appropriately regulated[3]; (iv) University funds and pension funds; and (v) University related endowments already registered with SEBI as FIIs or sub-accounts	Includes all eligible FPIs who are not eligible under Category I and II, such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.
Whether offshore derivative instruments (ODIs) can be issued or otherwise dealt with?	Yes. To be eligible to subscribe to ODI positions, the subscriber should be regulated by an IOSCO member regulator or in case of banks subscribing to ODIs, such bank should be regulated by a BIS member regulator. The Circular clarifies that 'opaque' structures (i.e. PCCs / SPCs or other ring-fenced structural alternatives) would not be eligible for subscription to ODIs.	Yes. (However, unregulated broad-based funds which are classified as Category-II by virtue of their investment manager being appropriately regulated, are not permitted to issue, subscribe or otherwise deal in ODIs)	No.

FDI in Limited Liability Partnership

Limited Liability Partnerships (LLPs)

- **FDI in LLPs**:
  - **Prior approval from FIPB**
  - Sectors/activities where **100% FDI allowed**
  - **No FDI-linked performance related conditions** (such as 'Non Banking Finance Companies' or 'Development of Townships, Housing, Built-up infrastructure and Construction-development projects', or 'Retail sector' etc.)
  - Only by way of **cash consideration**
  - **Indian company having FDI (direct or indirect irrespective of % of such foreign investment)**, permitted to make downstream investment in LLP only if both the company as well as the LLP is operating in **sectors where 100% FDI allowed**, through automatic route
  - Designated Partner – Resident in India under LLP Act and FEMA

- **Restrictions to LLPs with FDI**:
  - Not in agricultural/plantation activity, print media or real estate business
  - Not eligible to make any downstream investment
  - Not permitted to avail ECBs
  - RFPIs/FIIs/QFIs and FVCIs not permitted to invest in LLPs

- **Conversion** of a company with FDI, into an LLP, allowed only if above stipulations are met and with the **prior approval of FIPB**

FDI in an LLP

FDI in an 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 (hereinafter referred to as "fair price of capital contribution/profit share of an LLP") and a valuation certificate to that effect shall be issued by a **Chartered Accountant** or by a **practicing Cost Accountant** or by **an approved valuer** from the panel maintained by the Central Government.

Form FOREIGN DIRECT INVESTMENT-LLP-(II)

Declaration regarding transfer of capital contribution/profit shares of an Limited Liability Partnership from resident to non- resident / non-resident to resident

Certificate indicating fair value of shares from the **Chartered Accountant/Cost Accountant/ approved valuer** from the panel maintained by the Central Government.

LLP

Reporting Requirements

- **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
  - Form Foreign Direct Investment – LLP(II)
- **Non-Resident to Non-Resident** transfer
  - FIPB approval required
  - No specific reporting specified

e-FIPB___Revised filing procedure

Once the e-filing of the application is completed, the application needs to file/courier only **SINGLE copy of the printed version** of the online application, along with the duly authenticated copy of the documents attached with the application.

Global Reach -Apply from anywhere in the world! Access your status from anywhere in the world! Transact while on a move!

E-communication - communication between the applicant, FIPS and other ministries/ departments is online.

Quicker communication- All the correspondence including updates/ decisions are communicated through SMS/emails

Quicker processing- FIPS forwards the application online to the concerned ministries for processing, queries are raised online eliminating physical delivery and loss of time due to postal delays.

Less Paperwork - Single signed copy only needed (for record) instead of present multiple sets of the application.

SMS/email alert- Regular alerts are sent to the applicants related to the queries raised by the administrative ministries, inclusion of the proposal in the scheduled FIPS meeting and decisions.

Time saving- E-correspondence between applicant and ministries and also between ministries themselves avoids delays adding to speed and efficiency.

Transparency and security: all transactions and correspondences are recorded online and are secure.

Query module- Any doubts? A user can raise a query online which shall be replied by the relevant ministry.

Three divisions of Foreign Exchange Department shifted to FED CO Cell at New Delhi

Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to the Press Release dated June 17, 2014 which mentions the **shifting of three divisions of Foreign Investment Division (FID) viz. Liaison/Branch/Project Office (LO/BO/PO) Division, Non Resident Foreign Account Division (NRFAD) and Immovable Property (IP) Division to New Delhi with effect from July 15, 2014**. The address for correspondence for the three divisions is FED, CO Cell, Foreign Exchange Department, Reserve Bank of India, New Delhi Regional Office, 6, Parliament Street, New Delhi - 110 001, India.

2. Attention is also invited to A.P (DIR Series) Circular No 106 dated February 18, 2014 in terms of which AD - Category I banks are required to furnish on a monthly basis, a statement on the number of applicants and total amount remitted from NRO account, as per proforma annexed, to the Chief General Manager-in-Charge, Foreign Exchange Department, Foreign Investments Division (NRFAD), Reserve Bank of India, Central Office, Mumbai-400001 within 7 days of the end of the reporting month.

3. Attention is also invited to Para 5(ii) and Para 5(iii) of A.P (DIR Series) Circular No 24 dated December 30, 2009 in terms of which A.D Category-I banks are required to report (i) the **extension of validity of the Liaison Offices to the Regional Office concerned as well as to the Central Office, and (ii) closure of the Liaison Offices to the concerned Regional Office and closure of Branch Offices to the Central Office**.

4. It is advised that **all cases pertaining to these three divisions and the monthly statements as per circulars ibid/reporting for extension or closure of LOs/BOs shall be sent to the FED CO Cell at the address mentioned above**. Reporting, by email, for NRFAD shall continue at the same email address.

Circular No.23 dated September 2, 2014

Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) - Compounding of Contraventions under FEMA, 1999…1/2

To **delegate further powers to Regional Offices** **(Consolidated)** as under:

Sr. No.	FEMA Regulation	Brief Description of Contravention
1	Paragraph 9(1)(A) of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Delay** in reporting **inward remittance received for issue of shares**.
2	Paragraph 9(1)(B) of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Delay in filing form FC(GPR)** after issue of shares.
3	Paragraph 8 of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Delay in issue of shares/refund of share application money beyond 180 days**, mode of receipt of funds, etc.
4	Paragraph 5 of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Violation of pricing guidelines** for issue of shares.
5	Regulation 2(ii) read with Regulation 5(1) of **FEMA 20**/2000-RB dated May 3, 2000	**Issue of ineligible instruments** such as non-convertible debentures, partly paid shares, shares with optionality clause, etc.
6	Paragraph 2 or 3 of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	Issue of shares **without approval of RBI or FIPB** respectively, wherever required.
7	Regulation 10A (b)(i) read with paragraph 10 of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Delay in submission of form FC-TRS** on transfer of shares from Resident to Non-Resident.
8	Regulation 10B (2) read with paragraph 10 of Schedule I to **FEMA 20**/2000-RB dated May 3, 2000	**Delay in submission of form FC-TRS** on transfer of shares from Non-Resident to Resident.
9	Regulation 4 of **FEMA 20**/2000-RB dated May 3, 2000	Taking on record transfer of shares by investee company, **in the absence of certified from FC- TRS**.

Foreign Exchange (Compounding Proceedings) Rules, 2000 (the Rules) - Compounding of Contraventions under FEMA, 1999 …2/2

The work of **three divisions of Foreign Investment Division** (FID) viz. **Liaison/ Branch/ Project office(LO/ BO/ PO) division, Non Resident Foreign Account Division** (NRFAD) and Immovable Property (IP) Division has been transferred to FED, CO Cell, Reserve Bank of India, 6, Sansad Marg, New Delhi- 110001 with effect from July 15, 2014. Accordingly, the officers attached to the FED, CO Cell, New Delhi office are now authorised to compound the **contraventions** as under:

Sr. No.	FEMA Notification	Brief Description of Contravention
1	FEMA 7/2000-RB, dated 3-5-2000	Contraventions relating to acquisition and transfer of immovable property outside India
2	FEMA 21/2000-RB, dated 3-5-2000	Contraventions relating to acquisition and transfer of immovable property in India
3	FEMA 22/2000-RB, dated 3-5-2000	Contraventions relating to establishment in India of Branch office, Liaison Office or project office
4	FEMA 5/2000-RB, dated 3-5-2000	Contraventions falling under Foreign Exchange Management (Deposit) Regulations, 2000

The powers to compound the contraventions have been delegated to **all Regional Offices (except Kochi and Panaji)** and **FED, CO Cell, New Delhi respectively without any limit on the amount of contraventio**n. Kochi and Panaji Regional offices can compound the above contraventions for amount of contravention below Rupees one hundred lakh (Rs.1,00,00,000/-). The contraventions of Rupees one hundred lakh (Rs.1,00,00,000/-) or more under the jurisdiction of Panaji and Kochi Regional Offices and all other contraventions of FEMA will continue to be compounded at Cell for Effective Implementation of FEMA (CEFA), Mumbai, as hitherto.

Accordingly, applications for compounding the e contraventions e, up to the amount of contravention stated therein may be submitted by the concerned entities to the respective Regional Offices under whose jurisdiction they fall or to FED, CO Cell, New Delhi respectively. For **all other** contraventions, applications may continue to be submitted to CEFA, Foreign Exchange Department, 5th floor, Amar Building, Sir P.M.Road, Fort, Mumbai 400001.

International Transactions for Transfer Pricing - Explanation (i) to 92B(1)…

"(c) **Capital financing**, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

"(e) a transaction of **business restructuring or reorganisation**, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date"

Form No. 3CEB

International transactions of purchase or sale of marketable securities, issue and buyback of **equity shares, optionally convertible/ partially convertible/ compulsorily convertible debentures/ preference shares**

Income tax provisions

56(2)(vii)	An **individual or a Hindu undivided family receives any shares and securities** (other than from exempted categories)	Without consideration or a consideration which is less than fair market value – **Fair value is book value/break-up value**
56(2)(vii)(a)	A **firm or a company** not being a company in which the public are substantially interested, **receives shares** of a company not being a company in which the public are substantially interested (other than in a scheme of merger, demerger etc.)	Without consideration or a consideration which is less than fair market value – **Fair value is book value/break-up value**
56(2)(vii)(b)	**A company**, not being a company in which the public are substantially interested, receives from any person **being a resident**, any consideration for **issue of shares** that exceeds the fair market value of the shares (other than by a venture capital undertaking from a venture capital company or a venture capital fund)	Without consideration or a consideration which is less than fair market value – **Fair value is book value/break-up value Or value as per DCF method**; **OR** Based on the value of its assets, **including intangible assets** being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature

Always Ask What. . . ?

- What are the **details of the foreign investor**?
- What is the **nature of the target entity**?
- What **sector** is the target entity in?
- What are the **principal and ancillary activities**?
- What is the **route** that is proposed to be adopted?
- **Nature and timing of investment**?
- Is the **aggregate foreign shareholding** in the target entity?
- Is the **nature of the instrument**? Equity shares, convertible debentures, preference shares, derivatives? Listed or unlisted company?
- Is there a **minimum capitalization** requirement – NBFC, Construction Development, Multi Brand Retailing?
- Are the **lock in requirements** or other restrictions on exit / repatriation?
- **Pricing/Valuation guidelines** are applicable?
- **Regulatory approvals** are needed?
- **Post-facto filings** are applicable?
- For primary, **time period for allotment – Companies Act 2013**?
- **Structure in India and Overseas – round tripping issues**?
- **Tax issues** – both in India and Overseas; Section 56(2)(vii)

Disclaimer

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Thank You

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