FEMA (FDI, ODI and ECB)

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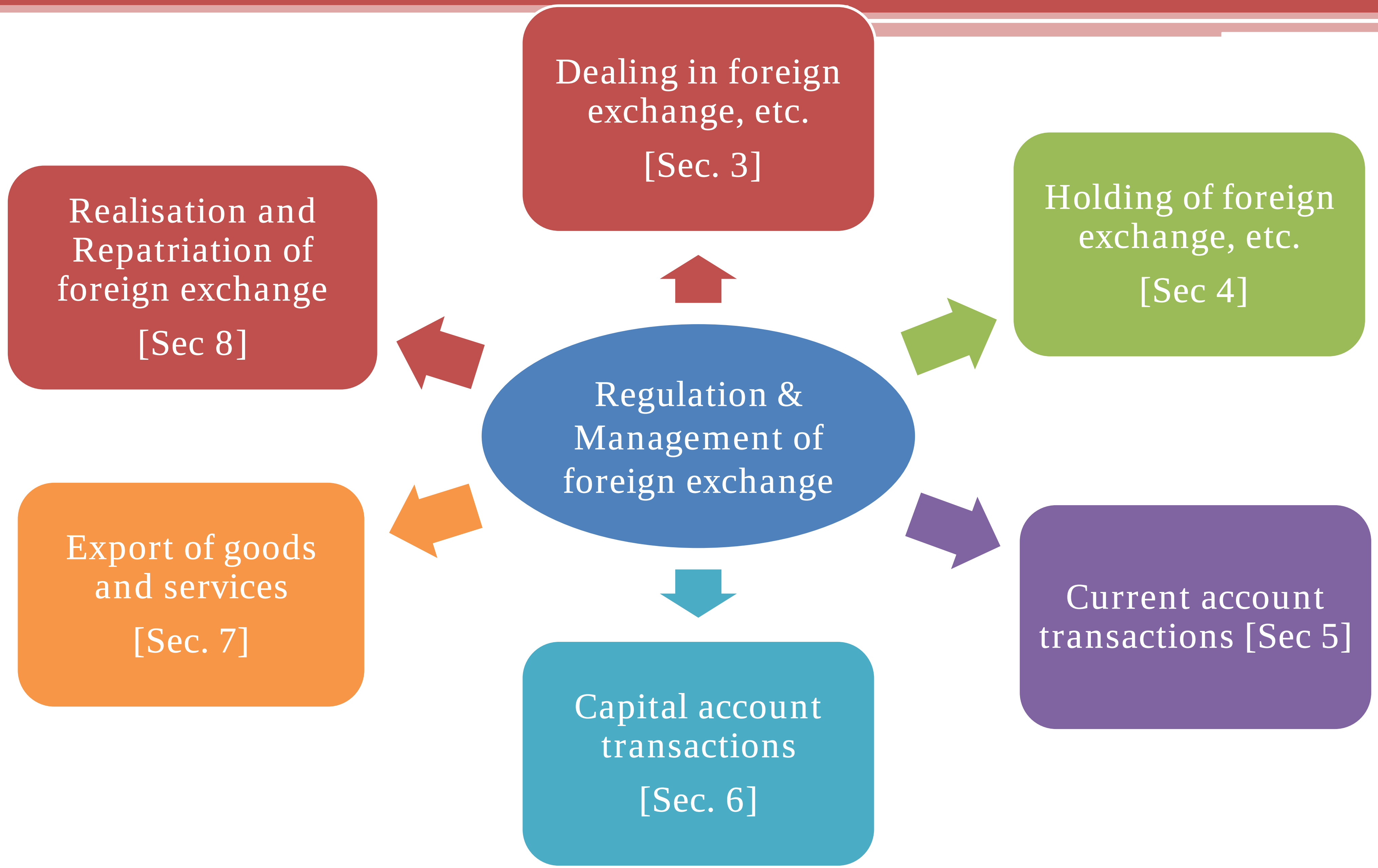
About Us

- Vinod Kothari & Company, Company Secretaries in Practice
  - Based out of Kolkata, Mumbai & Delhi
- We are a team of consultants, advisors & qualified professionals having over 30 years of experience

Our Organization's Credo:

Focus on capabilities; opportunities follow

Overview of regulatory framework of FEMA


Regulation & Management of foreign exchange
Dealing in foreign exchange, etc. [Sec. 3]
Holding of foreign exchange, etc. [Sec 4]
Current account transactions [Sec 5]
Capital account transactions [Sec. 6]
Export of goods and services [Sec. 7]
Realisation and Repatriation of foreign exchange [Sec 8]

Regulation and Management of Foreign Exchange

- Chapter II of FEMA Act, 1999
  - Current account transactions [Sec. 5]
    - Transactions other than capital account transactions;
      - Payments due in connection with foreign trade, services, interest on loans, net income from investments, expenses in connection with foreign travel, education etc.
  - Capital account transactions [Sec. 6]
    - which alters the assets or liabilities, including contingent liabilities,
      - outside India of persons resident in India; or
      - In India of persons resident outside India; and includes

Regulation and Management of Foreign Exchange

- Chapter II of FEMA Act, 1999
  - Capital account transactions [Sec. 6]
    - Section 6 (2) of FEMA Act empowers RBI to specify, in consultation with CG, any class or classes of capital account transactions, involving debt instruments, which are permissible.
    - Section 6(2A) empowers CG to prescribe, in consultation with RBI, any classes of capital account transactions, not involving debt instruments, which are permissible.
    - Section 6 (7) provides that debt instruments would be determined by CG in consultation with RBI.
    - Sub section 3 of Section 6 has been omitted by Finance Act, 2015 w.e.f. October 15, 2019.

Rules v/s Regulations

- Power with Central Government to frame Rules [*Section 46*]
  - restriction on current account transactions;
    - FEM (Current Account Transactions) Rules, 2000.
  - permissible classes of capital account transactions in accordance with sub-section (2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;
    - FEM (Non-Debt Instruments) Rules, 2019.
      - Effective from October 17, 2019.
  - manner of compounding of contravention u/s 15 (1);
    - FEM (Compounding of Proceedings) Rules, 2000.
  - manner of holding an inquiry by AA u/s 16 (1);
  - Form of appeal and fee for filing appeal;
    - u/s 17 – Appeal to Special Director (Appeals)
    - u/s 19 – Appeal to Appellate Tribunal
    - FEM (Adjudication Proceedings and Appeal) Rules, 2000

Rules v/s Regulations

- Power with RBI to frame Regulations [*Section 47*]
  - permissible classes of capital account transactions involving debt instruments determined under sub-section (7) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions;
    - FEM (Debt Instruments) Regulations, 2019.
    - FEM (Mode of payment and reporting of Non Debt Instruments) Regulations, 2019
  - manner of declaration to be furnished in case of export of goods and services;
    - FEM (Export of Goods and Services) Regulations, 2015.
  - period and manner of repatriation of foreign exchange;
    - FEM (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2015.

Rules v/s Regulations

- Power with RBI to frame Regulations [*Section 47*]
  - limit on possession of foreign currency and foreign coins;
    - FEM (Possession and Retention of Foreign Currency) Regulations, 2000.
  - class of persons and limit upto which foreign currency may be held in foreign currency a/c;
    - FEM (Foreign Currency Accounts by Peron Resident Outside India) Regulations, 2015.
  - export, import or holding of currency or currency notes;
    - FEM (Export and Import of Currency) Regulations, 2015

Rules/Regulations under FEMA

- Nature of Transactions
  - FEM(Current Account Transactions) Rules, 2000
  - FEM (Permissible Capital Account Transactions) Regulations, 2000
- Issue of Securities
  - FEM (Debt Instruments) Regulations, 2019 notified on October 17, 2019.
  - FEM (Non – Debt Instruments) Rules, 2019 notified on October 17,2019.
  - FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations 2019 notified on October 17, 2019
    - Foreign Direct Investment
  - FEM (Transfer or Issue of any Foreign Security) Regulations, 2004
    - Overseas Direct Investment
- Borrowing/ Lending/ Guarantee
  - FEM (Borrowing or Lending) Regulations, 2018
  - FEMA (Guarantee) Regulations, 2000

Rules/Regulations under FEMA

- FEM (Guarantee) Regulations, 2000
  - Restriction on obtaining overseas guarantee, except with prior RBI approval;
  - Guarantees which may be given by Authorised dealer;
  - Guarantees which may be given by persons other than Authorised dealer;
    - PRII being an exporting company;
    - Indian Party promoting or setting up JV/ WOS outside India or first generation step down operating company
      - in connection with its business.
    - Agent in India of overseas shipping/ airline company in connection with its obligation or liability owed to any statutory or Government authority in India;
    - Authorised dealer Bank/ PRII in favour of overseas lender or security trustee to secure ECB;
    - PRII may issue corporate guarantee in favor of overseas lessor for financing import through operating lease.

Rules/Regulations under FEMA

- Assets
  - FEM (Acquisition and Transfer of Immoveable Property outside India) Regulations, 2015
  - FEM (Remittance of Assets) Regulations, 2016
  - FEM (Regularisation of Assets held abroad by a person resident in India) Regulations, 2015
- Others
  - FEM (Establishment in India of a Branch Office or Liaison Office or a Project Office or any other Place of Business) Regulations, 2016
  - FEM(Investment in Firm or Proprietary Concern in India) Regulations, 2000
  - FEM (Deposit) Regulations, 2016

Rules/Regulations under FEMA

- FEM (Acquisition and Transfer of Immoveable Property outside India) Regulations, 2015
  - Not applicable to a property;
    - held by PRII who is a national of a foreign State;
    - acquired by PRII on or before July 8, 1947 and continued to be held by him with prior permission of RBI;
  - PRII may acquire in following manner:
    - by way of gift or inheritance;
      - from PROI or
      - from PRII who acquired in pre-independence period (stated above)
    - by way of purchase out of forex held in RFC A/c;
    - jointly with relative who is a PROI
      - provided there is no outflow of funds from India
  - Indian company having overseas offices, may acquire for its business and for residential purposes of its staff.

Rules/Regulations under FEMA

- FEM (Remittance of Assets) Regulations, 2016
  - means remittance outside India representing;
    - a deposit with a bank or a firm or a company;
    - provident fund balance/ superannuation benefits;
    - amount of claim or maturity proceeds of insurance policy;
    - sale proceeds of shares, securities, immoveable property; or any other asset held in India.
  - Permission to an Indian entity to remit funds
    - being contribution towards PF/ superannuation/ pension fund of expatriate staff;
      - who are resident in India but not permanently resident.
  - Permission on remittance of assets on closure/ winding up proceeds of branch office/ liasion office (other than project office)
    - on submission of documents to authorised dealer

Rules/Regulations under FEMA

- FEM (Remittance of Assets) Regulations, 2016 – contd..
  - RBI's prior permission
    - remittance exceeding USD 1 mn per financial year
      - on account of legacy, bequest or inheritance to a citizen of foreign state, resident outside India;
      - by an NRI/ PIO
        - out of balance in NRO accounts;
        - sale proceeds of assets acquired by way of inheritance/ legacy.
    - remittance to a PROI on the ground that hardship will be caused to such person if remittance is not made from India.
  - Remittance shall be subject to applicable tax laws.

Rules/Regulations under FEMA

- FEM (Regularization of Assets held abroad by a person resident in India) Regulations, 2015
  - no PRII shall continue to hold an asset located outside for which a declaration has been made under Section 59 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
    - where the PRII intends to hold the asset,
      - declaration to be submitted to RBI within 180 days from date of declaration for necessary permission;
    - where the PRII does not intend to hold the asset so declared or permission to hold is refused by RBI,
      - asset to be disposed off within 180 days of date making declaration or date of receipt of communication from RBI conveying refusal of permission or within such extended period and
        - bring back the proceeds to India through banking channel.

Rules/Regulations under FEMA

- Others
  - FEM (Establishment in India of a Branch Office or Liaison Office or a Project Office or any other Place of Business) Regulations, 2016
  - FEM(Investment in Firm or Proprietary Concern in India) Regulations, 2000
  - FEM (Deposit) Regulations, 2016

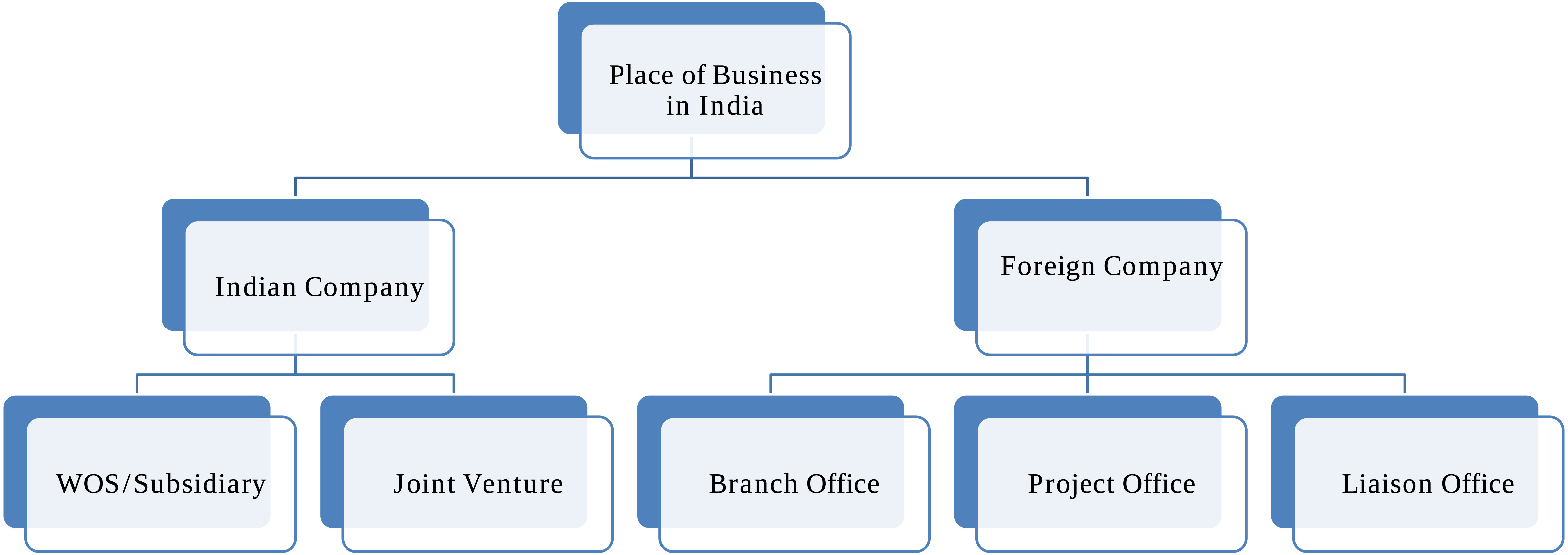
Rules/Regulations under FEMA

- FEM(Investment in Firm or Proprietary Concern in India) Regulations, 2000
  - Investment by PROI subject to RBI approval;
  - NRI/ PIO resident outside India may invest
    - inward remittance through normal banking channels or out of account maintained with AD bank;
    - the firm should not be engaged in any agriculture/ plantation activity or real estate business (dealing in land and immoveable property with a view to earning profit/ income)
    - amount invested shall not be eligible for repatriation outside India
    - the firm or proprietary concern should not be engaged in print media.
    - where investments are made out of NSRS Account, income earned/proceeds of investment shall be credited only to the NSRS Account.

Rules/Regulations under FEMA

- FEM (Deposit) Regulations, 2016
  - Acceptance of deposits by authorised dealer from PROI
    - under Non-Resident External Account (NRE) a/c scheme [*Schedule 1*]
    - Under Foreign Currency Non-Resident (Bank) [FCNR(B)] a/c scheme [*Schedule 2*]
    - Under Non Resident Ordinary (NRO) a/c scheme [*Schedule 3*]
    - Special Non-Resident Rupee (SNRR) a/c [*Schedule 4*]
    - Escrow a/c [*Schedule 5*]
  - Acceptance of deposits by other persons
    - Company/ body corporate shall not accept deposits from NRI/ PIO on repatriation basis
      - may renew deposits accepted on repatriation basis [*Schedule 6]*
    - Company/ body corporate/ proprietary concern/ firm may accept deposits from NRI/ PIO on non-repatriation basis [*Schedule 7*]

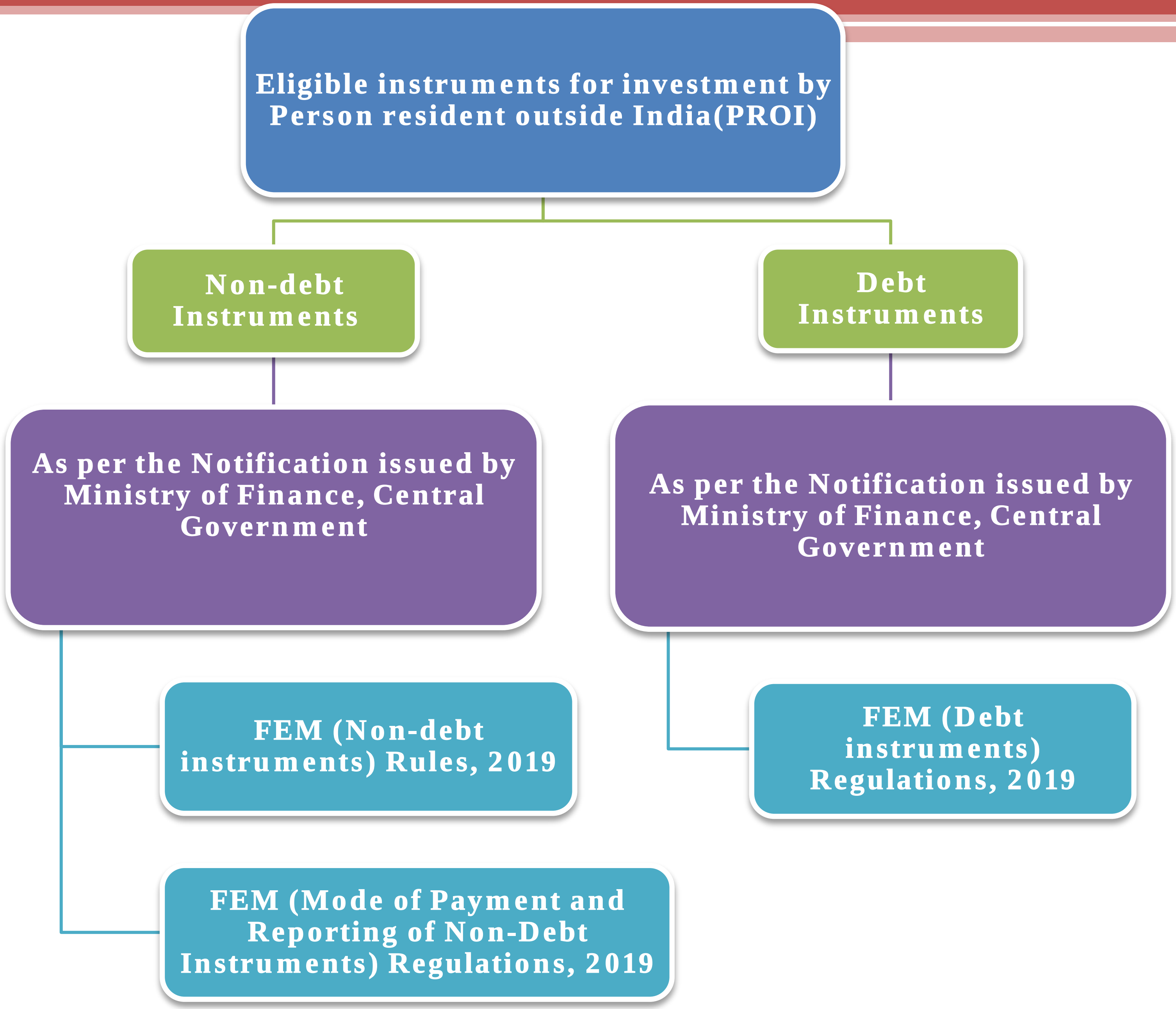
Various modes of entry for any foreign entity in India



Entry route

- FEM (Establishment in India of a Branch Office or Liaison Office or a Project Office or any other Place of Business) Regulations, 2016
  - Branch office
    - any establishment described as such by the company. [*Schedule 1*]
  - Liaison office
    - place of business to act as channel of communication between Head Office and Indian entities. [*Schedule 2*]
      - does not undertake any commercial/ trading/ industrial activity, directly or indirectly.
  - Project office
    - place of business in India to represent interests of a foreign company executing a project in India
      - excludes a liaison office.
  - Site office
    - sub-office of project office established at the site of project
      - excludes liaision office
  - Prior approval of RBI required for each of the above.

Foreign Direct Investment


Eligible instruments for investment by Person resident outside India(PROI)
Non-debt Instruments
Debt Instruments
As per the Notification issued by Ministry of Finance, Central Government
As per the Notification issued by Ministry of Finance, Central Government
FEM (Non-debt instruments) Rules, 2019
FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
FEM (Debt instruments) Regulations, 2019

Debt instruments

Debt instruments

- Government Bonds
- Corporate Bonds
- All tranches of securitisation structure which are not equity tranche.
- Borrowing by Indian Firms through Loans
- Depository receipts whose underlying securities are debt securities.

Non-Debt Instruments

Non-Debt Instruments

- All investments in equity in incorporated entities (public, private, listed and unlisted
- Capital participation in Limited Liability Partnerships (LLPs)
- All instruments of investment as recognized in the FDI policy as notified from time to time;
- Investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs)
- Investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest more than fifty per cent in equity;

Non-Debt Instruments

Non-Debt Instruments

- The junior-most layer (i.e. equity tranche) of securitisation structure
- acquisition, sale or dealing directly in immovable property;
- Contribution to trusts
- depository receipts issued against equity instruments.

FDI – An Overview

FEM (Non – Debt Instruments) Rules, 2019

- notified on October 17,2019
- supersedes FEM (Transfer of Issue of security by a person resident outside India) Regulations, 2017
- supersedes FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

- FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
    - notified on October 17, 2019
- Sectors specified v/s Sectors not specified
- Automatic v/s approval route
- Foreign Direct Investment v/s Foreign Portfolio Investment
- Direct investment v/s indirect foreign investment
- Repatriable v/s non-repatriable

Important definitions

- Section 2 (c) defines "*authorised person*" as

  "an authorised dealer , money changer, offshore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities"

- Section 2 (n) defines "*foreign exchange*" as

  "foreign exchange means foreign currency and includes,-

  (i) deposits, credits and balances payable in any foreign currency,

  (ii) drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,

  (iii) drafts, travelers cheques, letters of credit or bills of exchange, drawn by banks, institutions or persons outside India, but payable in any foreign currency;"

Important definitions – contd…

- Section 2 (v) defines "*person resident in India*" as

"(i) a person residing in India for more than one hundred and eighty two days during the course of the preceding financial year but does not include –

(A) a person who has gone out of India or who stays outside India, in either case –

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period

(B) a person who has come to or stays in India, in either case, otherwise than –

(a) for or on taking up employment in India, or

(b) for carrying on outside India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period

(ii) any person or body corporate registered or incorporated in India;

(iii) an office, branch or agency in India owned or controlled by a PROI,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India"

Important definitions – contd…

- Section 2 (y) defines "*repatriate to India*" as

  "bringing to India the realized foreign exchange and-

  (i) The selling of such foreign exchange to an authorised person in India in exchange for rupees, or

  (ii) The holding of realized amount in an account with an authorised person in India to the extent notified by the Reserve Bank,

  and includes use of the realized amount for discharge of a debt or liability denominated in foreign exchange and the expression repatriation shall be construed accordingly;"

- 'Investment on repatriation basis' means an investment, the sale/ maturity proceeds of which are, net of taxes, eligible to be repatriated out of India, and the expression 'Investment on non repatriation basis', shall be construed accordingly;

Equity Instruments under Non-Debt Instrument Rules

- Equity shares
  - issued as per Companies Act, 2013
  - includes partly paid up shares
    - 25% payment upfront, full payment in 12 months
- Preference shares
  - fully, compulsorily and mandatorily convertible into equity
- Convertible debentures
  - fully, compulsorily and mandatorily convertible into equity
- Share warrants
  - issued as per SEBI Regulations
  - 25% payment upfront, full payment within 18 months
- Formerly regarded as Capital Instruments under TISPRO Regulations, 2017.

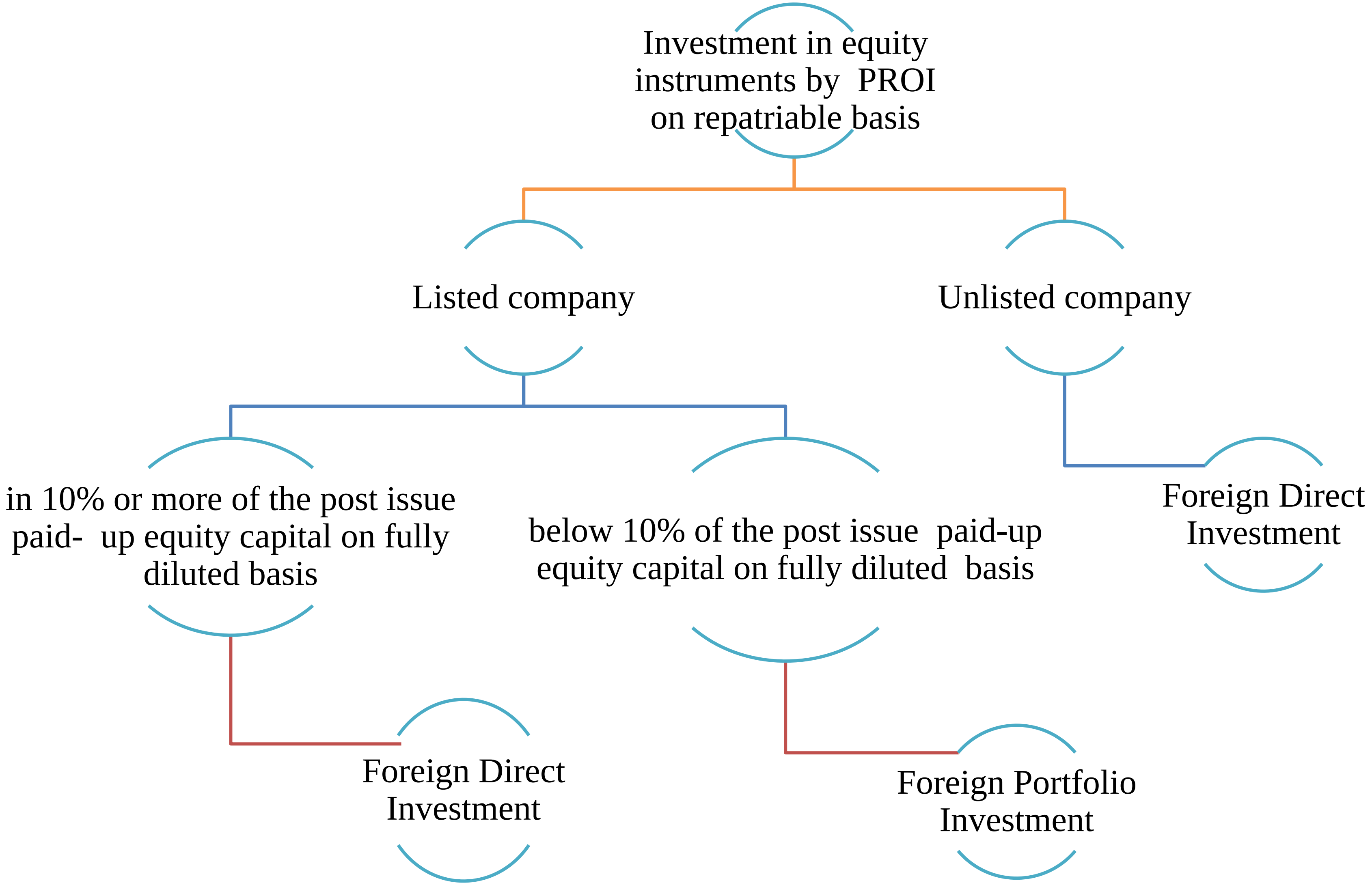
Relevant Definitions

- Foreign Investment
  - means any investment in equity instruments of an Indian company or to the capital of an LLP
    - made by a PROI
      - on a repatriable basis
      - Explanation: If a declaration is made by persons as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a person resident outside India, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.
  - PROI may hold foreign investment either as FDI or FPI
- Foreign Direct Investment (FDI)
  - Investment by PROI through equity instruments
    - in unlisted Indian company
    - in listed Indian company
      - in 10% or more of the post issue paid-up equity capital on a fully diluted basis (if all possible sources of conversion are exercised).
        - existing investment falling below 10% of the post issue paid-up equity capital on a fully diluted basis, it shall continue to be treated as FDI

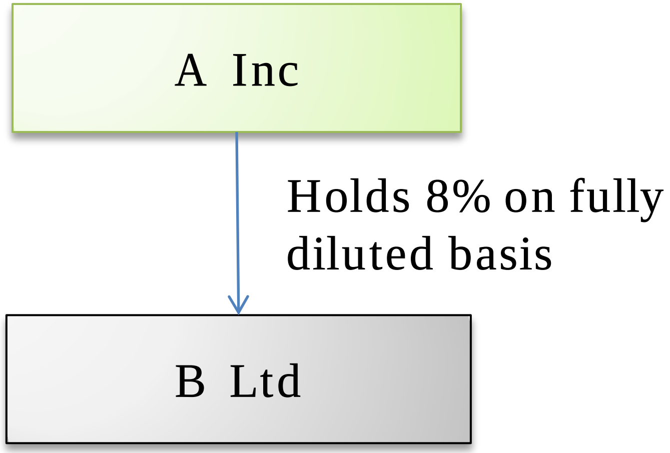
Relevant Definitions

- Foreign Portfolio Investment (FPI)
  - Investment by PROI through equity instruments
    - in listed Indian company
      - is less than 10% of the post issue paid-up equity capital on a fully diluted basis
        - The 10 percent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group as referred in Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014
      - is less than 10 % of the paid up value of each series of equity instruments

FDI v/s FPI


Investment in equity instruments by PROI on repatriable basis
Listed company
Unlisted company
in 10% or more of the post issue paid- up equity capital on fully diluted basis
below 10% of the post issue paid-up equity capital on fully diluted basis
Foreign Direct Investment
Foreign Direct Investment
Foreign Portfolio Investment

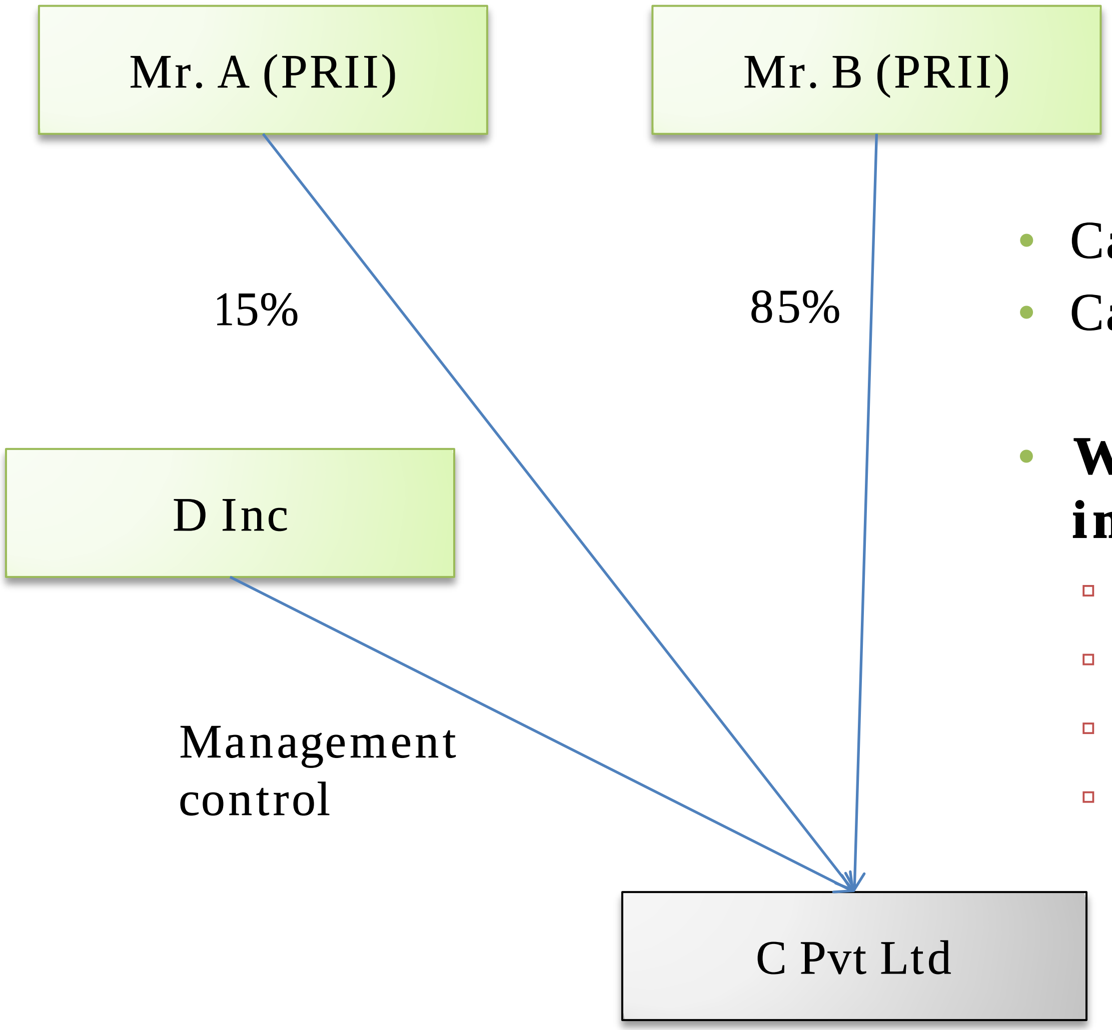
Example 1



- Case 1: A Inc invests on non-repatriation basis.
- Case 2: B Ltd is an unlisted Indian Company.
- Case 3: B Ltd is a Listed Indian Company.

- **Which of the aforesaid in a case of FDI?**
  - **Case 1;**
  - **Case 2;**
  - **Case 3;**
  - **All of above**

Example 2



- Case 1: Mr. A and Mr. B holds in beneficial capacity.
- Case 2: Mr. A holds shares as nominee of D Inc.

- **Which of the aforesaid in a case of foreign investment?**
  - **Case 1;**
  - **Case 2;**
  - **None of above;**
  - **Both cases.**

Direct + **Indirect** = **Total Foreign Investment**

- Indirect foreign investment means Downstream Investment
  - Investment in the equity instruments of another Indian company
    - by an Indian entity or
      - which has received foreign investment; and
        - is not owned and not controlled by resident Indian citizens; or
        - is owned or controlled by persons resident outside India.
    - by an Investment Vehicle
      - whose sponsor or manager or investment manager
        - is not owned and not controlled by resident Indian citizens; or
        - is owned or controlled by persons resident outside India.

Important definitions – contd…

- ‘Ownership of an Indian company’ shall mean
  - beneficial holding of more than 50 percent
    - of the equity instruments of such company.
- ‘Ownership of an LLP’ shall mean
  - contribution of more than 50 percent in its capital and having majority profit share.
- ‘Company owned by resident Indian citizens’ shall mean an Indian company
  - where ownership is vested in resident Indian citizens and/ or
  - Indian companies, which are ultimately owned and controlled by resident Indian citizens.
- An ‘LLP owned by resident Indian citizens’ shall mean an LLP
  - where ownership is vested in resident Indian citizens and/ or
  - Indian entities, which are ultimately owned and controlled by resident Indian citizens.
- ‘Company owned by persons resident outside India’
  - shall mean an Indian company that is owned by persons resident outside India.
- An ‘LLP owned by persons resident outside India’
  - shall mean an LLP that is owned by persons resident outside India.

Important definitions – contd…

- ‘Control’ shall mean
  - the right to appoint majority of the directors or
  - to control the management or policy decisions
    - including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.
- For the purpose of LLP, ‘Control’ shall mean
  - the right to appoint majority of the designated partners,
    - where such designated partners, with specific exclusion to others, have control over all the policies of an LLP.
- ‘Company controlled by persons resident outside India’
  - shall mean an Indian company that is controlled by persons resident outside India.
- An ‘LLP controlled by persons resident outside India’
  - shall mean an LLP that is controlled by persons resident outside India.

Manner of computing indirect foreign investment

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

(A) where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y.

(B) where Company Y has foreign investment of say 75% and:

(I) invests 26% in Company X, the entire 26% investment by Company Y would be treated as indirect foreign investment in Company X;

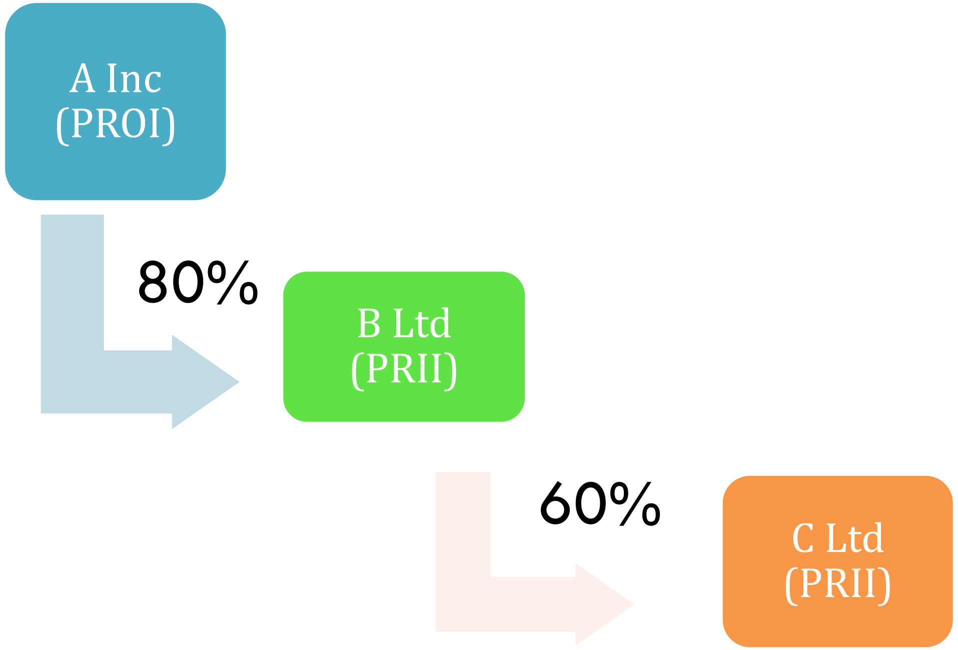
(II) invests 80% in Company X, the indirect foreign investment in Company X would be taken as 80%;

(III) where Company X is a wholly owned subsidiary of Company Y (i.e. Company Y owns 100% shares of Company X), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company X would be computed in the ratio of 75:25 in the total investment of Company Y in Company X.

Illustration 2

Case 1: A Inc hold shares in B ltd (i.e. 80%), what will be extent of indirect foreign investment in C Ltd?

- 80%
- 60%
- 48%
- None of above



Case 2: What will be extent of indirect foreign investment in C Ltd if 100 % is held by B Ltd?

- 80%
- 100%
- None of above

Eligibility for Direct Foreign Investment

Who can invest?

Foreign Investment in India

- PROI in Indian Company under FDI Scheme - Schedule I
- FPI in listed Indian Company on RSE - Schedule II
- NRI/ OCI in listed Indian Company on RSE on repat basis - Schedule III
- NRI/ OCI in an Indian Company/ capital of LLP/ firm/ Proprietary concern, on non -repat basis -Schedule IV
- Investment by other non-resident investors - Schedule V

Who can invest?

Foreign Investment in India

- PROI in LLP - Schedule VI
- FVCI in specified sectors- Schedule VII
- PROI in Investment Vehicle - Schedule VIII
- PROI in depository receipts issued by foreign depositories-Schedule IX
- FPI/ NRI/ OCI in IDRs issued in Indian capital markets - Schedule X

Who cannot invest?

- a person who is citizen of
  - Bangladesh
  - Pakistan
- Entity incorporated in Pakistan or Bangladesh
- Can invest in Indian Company only under Government route
  - in sectors other than defence, space, atomic energy and prohibited sectors (Rule. 6)
    - Lottery, gambling, betting, casino;
      - including foreign technology collaboration in any form.
        - to ensure foreign companies do not maintain their trade interests in India through the trademark or licensing route.
    - chit funds, nidhi company;
    - TDRs, real estate business or construction of farm house;
    - Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes;
    - Activities/ sector not open for private investment
      - Atomic energy, Railways.

Entry routes

- Automatic route:
  - No approval required
  - Only reporting
- Government route:
  - Prior approval required
  - Approval to be sought from Competent Authority
- Transfer of control in all sectors where there are conditions will also require government approval

Conditions for Investment

Pre-incorporation/ preoperative expense

- WOS of non-resident entity
  - Engaged in sector under 100% automatic route; and
  - No FDI linked performance conditions
    - means the sector specific conditions stipulated in regulation 16 of these Regulations for companies receiving foreign investment;
- May issue equity instruments
  - Upto 5% of its authorised capital; or
  - USD 500000
  - Whichever is less
- Against Pre-incorporation/ preoperative expenses
  - for expenditure relating to incorporation or necessary for commencement of operations
- Conditions
  - WOS shall report in FC-GPR to RBI
    - Within 30 days from date of issue,
    - But not later than 1 year from date of incorporation

Issue of equity shares in certain cases

- Swap of shares
  - If Indian investee company is engaged in sector under Automatic Route.
- Against Import of capital goods/ machinery/ equipment (excluding second-hand machinery)
- Pre-operative/ pre-incorporation expenses (including payments of rent etc.)

Investment by FPIs – Schedule II

- FPI can purchase/ sell equity instruments of India Company – listed/to be listed on recognized stock exchange
  - Total holding of each FPI/ investor group
    - Less than 10% of total paid-up equity (fully diluted basis); or
    - Less than 10% of paid up value of each series
      - of debentures or preference shares or share warrants.
  - If limit is breached, the investment shall classify as FDI
    - Reporting requirement to be complied.

Investment by FPIs

- Total holding of all FPIs
  - Shall not exceed 24% of
    - paid-up equity capital on a fully diluted basis or
    - paid up value of each series of debentures or preference shares or share warrants.
  - w.e.f.: April 1, 2020 aggregate limit shall be the sectoral caps applicable as laid out in sub-paragraph (b) of paragraph 3 of Schedule I.
    - Aggregate limit may be decreased to a lower limit of 24% or 49% or 74% as deemed fit;
    - With Board resolution and Shareholders' approval (SR) before 31st March, 2020;
    - Once the aggregate limit increased to higher threshold then Indian Company cannot reduce it to lower threshold.

Investment by FPIs

- Total holding of all FPIs
  - The aggregate limit w.r.t Indian Company in a sector where FDI is prohibited shall be 24%.
- Breach of caps
  - The FPIs investing in breach of the prescribed limit shall have the option of divesting their holdings within 5 trading days from the date of settlement of the trades causing the breach.
    - In case the FPI chooses not to divest, then the entire investment in the company by such FPI and its investor group shall be considered as investment under Foreign Direct Investment (FDI) and the FPI and its investor group shall not make further portfolio investment in the company concerned.

Investment by FPIs

- Pricing
  - Through public offer
    - Price of shares not less than what is offered to residents
  - Through private placement
    - Price is as per SEBI guidelines; or
    - Fair value as per any internationally accepted pricing methodology for valuation of shares on arm's length basis
      - certified by SEBI registered Merchant Banker or CA or practicing Cost Accountant.
- May undertake short selling as well as lending and borrowing of securities
  - In the manner provided in Para 1.7 of Annex 2 of MD-FDI
- Investments shall be subject to limits and margin requirements prescribed by SEBI and RBI

Investment by NRI/OCI on Repat basis – Schedule III

- NRI/OCI can purchase/ sell equity instruments of listed Indian company on stock exchange, on repatriation basis:
  - Through a branch designated by AD for the purpose
  - Total holding of any NRI/ OCI
    - Less than 5% of total paid-up equity (fully diluted basis); or
    - Less than 5% of paid up value of each series
      - of debentures or preference shares or share warrants.

Investment by NRI/OCI

- Total holding of all NRI/OCI
  - Shall not exceed 10% of
    - paid-up equity capital on a fully diluted basis or
    - paid up value of each series of debentures or preference shares or share warrants
  - Aggregate limit of 10% may be increased to 24%
    - With shareholders' approval by SR
  - May purchase equity instruments, subject to individual and aggregate limits

Investment on non-repatriation basis – Schedule IV

- Investment can be made into
  - Equity instruments, units, contribution to capital of an LLP
    - Without any limit
  - Convertible notes by Start up
    - means an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument;
  - By NRI, OCI or company, a trust and a partnership firm incorporated outside India, owned and controlled by NRIs or OCIs.

Investment on non-repatriation basis

- Deemed to be domestic investment
  - At par with investment by residents.
  - Investment cannot be made in equity instruments or units of
    - Nidhi company or
    - a company engaged in
      - agricultural/ plantation activities or
      - real estate business or
      - construction of farm houses or
      - dealing in Transfer of Development Rights.
- Investment can be made by contribution to capital
  - of a firm or a proprietary concern
    - Not engaged in
      - plantation activity or
      - print media or
      - real estate business.

FDI in LLP – Schedule VI

- Who can invest
  - PROI
    - Other than citizen of Pakistan or Bangladesh
  - Entity incorporated outside India
    - Other than an entity incorporated in Pakistan or Bangladesh
    - Not being FPI or FVCI
- Invest in which LLP
  - Operating in sectors where
    - 100% FDI permitted under automatic route;
    - No FDI linked performance conditions
    - if both aforesaid conditions met, then
      - such LLP can be converted in to company and vice versa.

FDI in LLP - contd

- Manner of investing
  - Either by capital contribution; or
  - acquisition/ transfer of profit shares
- Pricing requirement
  - Fair value as per any internationally accepted/ adopted as per market practice
    - certified by CA or practicing Cost Accountant or approved valuer from the panel maintained by the CG.
- Pricing for transfer of contribution/ profit share
  - PRII to PROI
    - Consideration not less than fair price of share
  - PROI to PRII
    - Consideration not more than fair price.

Investment by FVCI – Schedule VII

- FVCI may purchase
  - Securities (not listed on a recognised stock exchange at the time of issue) issued by Indian company engaged in
    - Biotechnology
    - IT related to hardware and software development
    - Nanotechnology
    - Seed research and development
    - Research and development of new chemical entities in pharmaceutical sector
    - Dairy industry
    - Poultry industry
    - Production of bio-fuels
    - Hotel-cum-convention centres with seating capacity of more than 3000.
    - Infrastructure sector
      - Meaning as given in Harmonised Master List of Infrastructure.

Investment by FVCI

- FVCI may purchase
  - equity /equity linked instrument/debt instrument by a start up;
  - Units of VCF or Cat I AIF or
  - Units of scheme/ fund set up by a VCF or CAT I AIF.
- Investment in equity instruments to be
  - As per sectoral caps, entry routes and attendant conditions.

FDI in Investment Vehicles – Schedule VIII

- Investment Vehicles
  - AIFs; REITs; INViTs; MFs that invest more than 50% in equity
- Who can invest
  - PROI (including FPI and NRI)
    - Other than citizen of Pakistan or Bangladesh
  - Entity incorporated outside India
    - Other than an entity incorporated in Pakistan or Bangladesh
- May issue units against swap of equity instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such Investment Vehicle
- Sale/ Transfer
  - As per SEBI regulations/ RBI directions.

FDI in Investment Vehicles

- Downstream investment by IV shall be regarded as indirect foreign investment, if
  - Sponsor or the Manager or the Investment Manager
    - is not owned and not controlled by resident Indian citizens; or
    - is owned or controlled by persons resident outside India.
  - Extent of foreign investment in the corpus of the Investment Vehicle will not be a factor;
  - AIF Cat III, with foreign investment, shall make portfolio investment in only those securities or instruments in which a FPI is allowed to invest.

Investment in DRs by PROI – Schedule IX

- Eligible instruments for issue of DRs
  - Any security or unit in which PROI can invest
- Who can issue or transfer
  - A person eligible to issue or transfer eligible instruments to a foreign depository
    - Under DR Scheme, 2014
    - at a price not less than the price applicable to a corresponding mode of issue or transfer of such instruments to domestic investors.
  - Domestic custodian may purchase on behalf of PROI

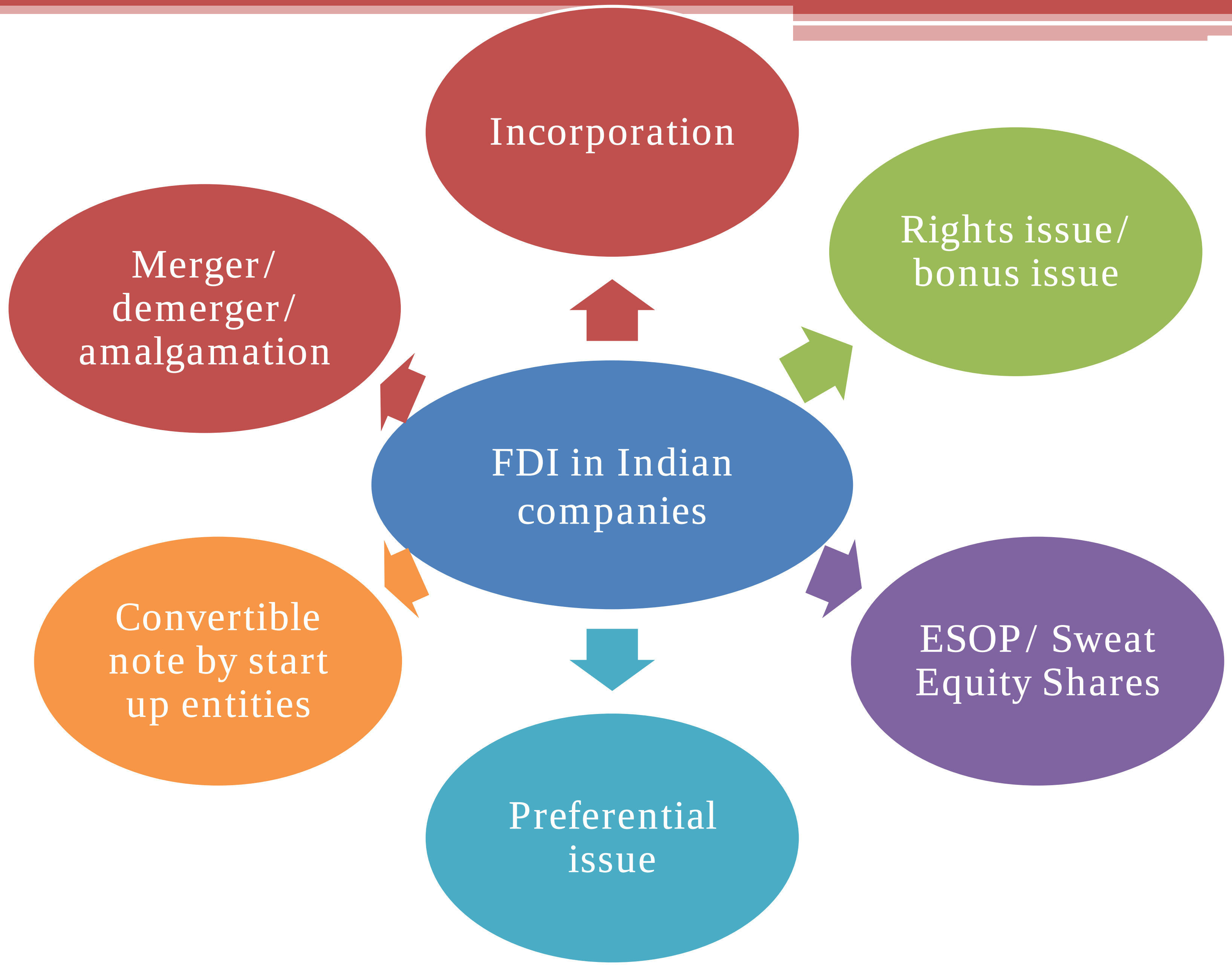
Issue of IDRs – Schedule X

- Who can issue
  - Companies incorporated outside India
    - Through domestic depository
      - To PRII and PROI
- Conditions for issue
  - Issue is in compliance with Rule 13 of Companies (Registration of Foreign Companies) Rules, 2014 and SEBI (ICDR) Regulations, 2009.
- IDR by financial/ banking companies having presence in India
  - Through branch or subsidiary
    - Will require prior approval of sectoral regulator

Issue of IDRs

- Conditions for issue
  - Shall be denominated in Indian Rupees only
  - Proceeds of issue shall be immediately repatriated outside India by companies issuing IDR
- Who can invest
  - FPI or NRI or OCI
- IDR shall not be redeemable into underlying equity shares before expiry of 1 year from date of issue
- Redemption/ convertion shall be in compliance of
  - FEM(Transfer or Issue of any Foreign Security) Regulations, 2004

Modes of Investment



Incorporation
Merger/ demerger/ amalgamation
Rights issue/ bonus issue
FDI in Indian companies
Convertible note by start up entities
ESOP/ Sweat Equity Shares
Preferential issue

Specific conditions in relation to FDI

- Rights issue/ Bonus issue [Rule 7]
  - Sectoral cap
  - Initial acquisition as per Rules
  - Pricing for rights issue
    - Listed company – price determined by company
    - Unlisted company – shall not be less than the price offered to PRII
  - rights issued when shareholder was PRII
    - shall hold equity instruments (other than share warrants) on non-repatriation basis
  - rights renounced by a resident shareholder in favor of PROI
    - shall hold equity instruments (other than share warrants) on non-repatriation basis

Specific conditions in relation to FDI

- ESOP
  - stock options/ sweat equity shares to employees/ directors resident outside India
    - of the company, holding company, JV, WOS, subsidiaries
  - Scheme as per Act, 2013 or SEBI (SBEB) Regulations, 2014
  - Sectoral cap
  - Government approval
    - if investment by PROI in company is under approval route
    - employee is citizen of Bangladesh/ Pakistan
  - employee was PRII at the time of grant
    - shares acquired on exercising shall be held on non-repatriation basis.

Specific conditions in relation to FDI

- Merger or demerger or amalgamation of Indian companies
  - Transferee or new company may issue equity instruments to existing holders of transferor company resident outside India subject to
    - scheme being approved by NCLT
    - Sectoral cap
    - New company or transferee company shall not be engaged in sectors prohibited for receiving foreign investment.

Pricing guidelines, reporting requirements in case of Issue

Pricing Guidelines in case of Issue

- Swap of equity instruments
  - valuation by SEBI registered Merchant Banker; or
  - Investment Banker outside India
- Shares by way of subscription to MOA
  - at face value
    - subject to entry route & sectoral caps.
- Share warrants
  - pricing and price/conversion formula shall be determined upfront.
- Pricing guidelines not applicable for investment in equity instruments by PROI on non-repatriation basis.

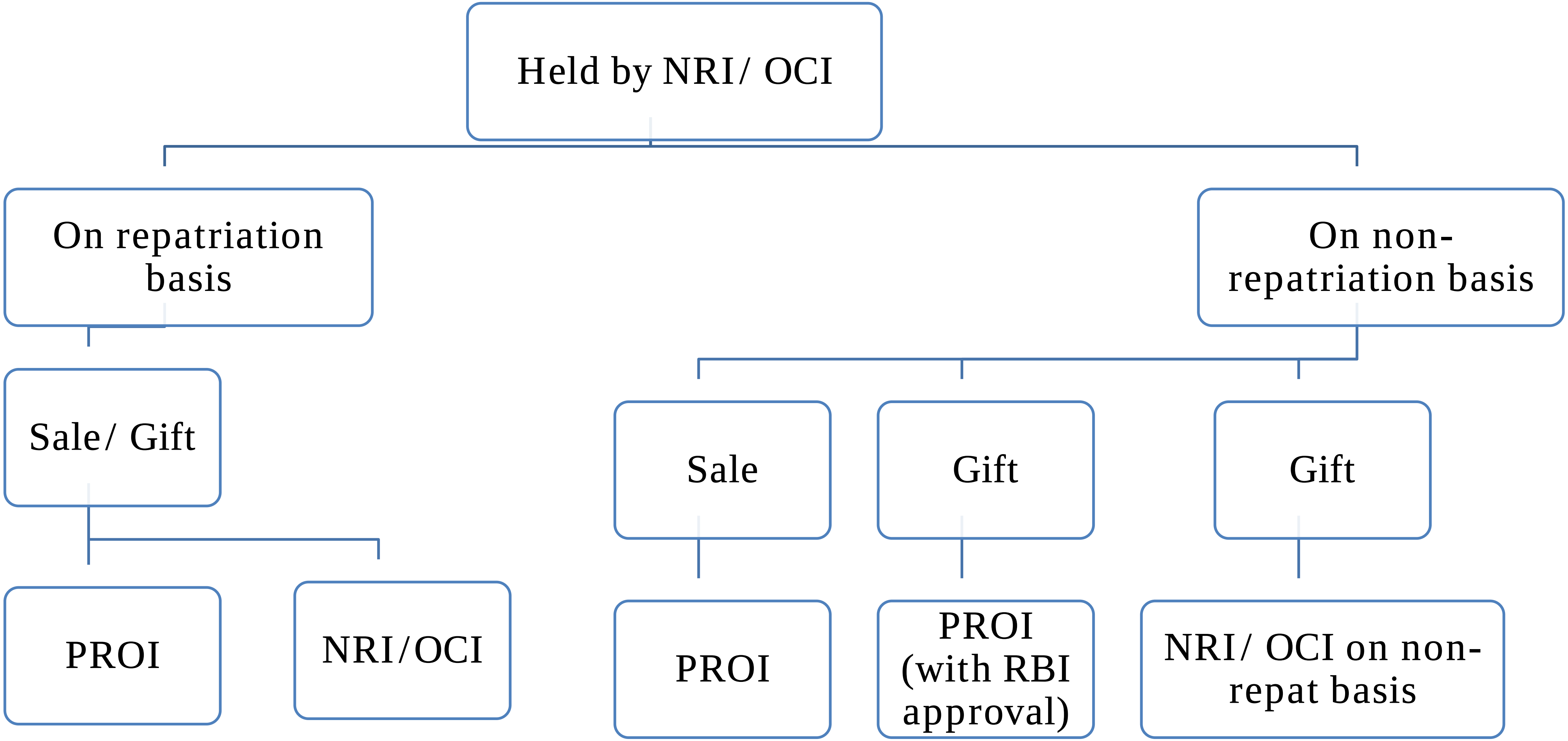
Pricing Guidelines in case of Issue

- Listed company
  - as per SEBI Guidelines
- Unlisted company
  - as per valuation
    - done as per any internationally accepted pricing methodology for valuation on an arm’s length basis;
    - duly certified by
      - Chartered Accountant;
      - SEBI registered Merchant Banker
      - Practising Cost Accountant
- Company going through delisting process
  - as per SEBI (Delisting of Equity Shares) Regulations, 2009.

Modes of transfer, pricing guidelines and reporting requirements

Modes of transfer of equity instruments - PROI

Modes of transfer of equity instruments – NRI/OCI



Modes of transfer of equity instruments - PRII

- Gift to PROI
  - Donee should be eligible to hold security;
  - should not exceed 5% of paid-up capital of Indian company;
    - on cumulative basis by a single person to another single person
  - Sectoral cap;
  - Donor and Donee shall be relatives;
  - Value of security to be transferred together with any security transferred to any PROI as gift during the financial year does not exceed USD 50,000.

Transfer between PRII and PROI

- Amount payable on deferred basis
  - not exceeding 25% of the total consideration can be paid within 18 months from date of the transfer agreement;
  - Can be settled through an escrow arrangement for a period not exceeding 18 months from date of the transfer agreement;
    - PROI may open an escrow account
  - can be indemnified by the seller for a period not exceeding 18 months from the date of the payment of the full consideration,
    - if the total consideration has been paid by the buyer to the seller.

Pledge of equity instruments/ units of IV

Created by	In favour of	To secure	Conditions
Promoter of Indian company	Recognised lender	ECB raised by borrowing company	• Period of pledge to be co-terminus with maturity of ECB • Stat Auditor certification on utilisation of ECB proceeds for permitted end –use • NOC from AD Bank that above conditions are met.
PROI	Bank in India	Credit facilities extended to such Indian company	Subject to the Authorised Dealer bank satisfying itself of the compliance of the conditions stipulated by the Reserve Bank in this regard.
PROI	Overseas Bank	Credit facilities to such person or PROI who is promoter of Indian company or its overseas group company	
PROI	NBFC	Credit facilities extended to Indian company	

Pricing guidelines for Transfer

- **FROM PRII TO PROI, price shall not be less than**
- Listed company
  - as per SEBI Guidelines
    - price at which preferential allotment of shares can be made.
    - in case of a company going through a delisting process;
      - as per the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;
- Unlisted company
  - as per valuation
    - done as per any internationally accepted pricing methodology for valuation on an arm's length basis;
    - duly certified by
      - Chartered Accountant;
      - SEBI registered Merchant Banker
      - Practising Cost Accountant

Pricing guidelines for Transfer

- **FROM PROI to PRII, Price shall not exceed**
- Listed company
  - as per relevant SEBI Guidelines
  - price at which preferential allotment of shares can be made.
    - Date of purchase/ sale shall be relevant date.
- Unlisted company
  - as per valuation
    - done as per any internationally accepted pricing methodology for valuation on an arm's length basis;
    - duly certified by
      - Chartered Accountant;
      - SEBI registered Merchant Banker
      - Practising Cost Accountant

Remittance of sale proceeds

- As per Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019
  - Sale proceeds, net of taxes, may be remitted outside India or
    - Schedule 1 (FDI Scheme)– be credited to NRE/ FCNR(B);
    - Schedule 2 (FPI) -
      - The sale proceeds (net of taxes) of equity instruments and units of domestic mutual fund may be remitted outside India or be credited to foreign currency a/c or SNRR of the FPI.
      - The sale proceeds (net of taxes) of units of investment vehicles other than domestic mutual fund may be remitted outside India
    - Schedule 3 (NRI/ OCI – repat) - credited to NRE (PIS) a/c;
    - Schedule 4 (non-repat) – credited only to NRO a/c.
      - No repatriation outside India

Remittance of sale proceeds

- As per Regulations and Schedule
  - Sale proceeds, net of taxes, may be remitted outside India or
    - Schedule 6 (LLP) - credited to NRE or FCNR(B) account of the person concerned.
    - Schedule 7 (FVCI) – credited to foreign currency account or SNRR account
    - Schedule 8 (Investment vehicle) - credited to the NRE or FCNR(B) account;
    - Schedule 10 (IDRs)- Redemption/conversion of IDRs into underlying equity shares of the issuing company shall be a compliance the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.
- AD Bank may allow remittance to seller who is PROI provided
  - security was held on repatriation basis;
  - security has been sold in compliance with pricing guidelines or RBI approval has been obtained.

Reporting Requirements in case of Transfer

- FC-TRS shall be filed for transfer in following cases:
  - PROI (R) and PROI (NR);
  - PROI (R) and PRII;
  - Transfer of ‘participating interest/ rights’ in oil fields
    - in respect of each Party constituting the Contractor, the undivided share expressed as a percentage of such Party’s participation in the rights and obligations under this Contract
  - Indian company buying back shares
    - in a scheme of merger/ de-merger/ amalgamation of Indian companies approved by NCLT/ competent authority.
- Onus on
  - resident transferor/ transferee
    - consideration payable on deferred basis
      - reporting on receipt of every tranche of payment.
  - PROI (acquiring on non-repatriation basis)
  - PROI
    - in case of sale on recognised stock exchange
- within 60 days of
  - transfer of equity instruments;
  - Receipt/remittance of funds
  - whichever is earlier.

Downstream Investments

Conditions, reporting requirements.

Conditions of Downstream Investments (DI)

- Approval of Board and also shareholder’s agreement, if any.
- Funds for making DI
  - From abroad;
  - Through internal accruals
    - Profits transferred to reserves account after payment of taxes.
  - Not use funds borrowed in domestic markets
- Transfer of equity instruments held by Indian company as DI may be transferred to
  - PROI, subject to reporting specified by RBI;
  - PRII, subject to pricing guidelines adherence;
  - Another FOCC Indian entity.

Reporting in case of DI

- As per Regulations & Consolidated FDI Policy
  - file Form DI within 30 days of such investment on Foreign Investment Facilitation Portal
    - To notify Secretariat for Industrial Assistance, DIPP
    - Within 30 days of investment;
    - In form available on www.fifp.gov.in
  - even if equity instruments have not been allotted
    - along with the modality of investment in new/existing ventures
  - Submit form DI on SMF portal
    - Within 30 days of investment.
- Onus of compliance
  - First level Indian company making DI
- Annual compliance
  - Certificate from statutory auditors;
    - In case of qualified report, information to be reported to regional office of RBI
      - Acknowledgement to be obtained from RBI.
  - Same to be stated in the Director's Report.

DI in case of Indian Banks

- Strategic downstream investment
  - Investment by banking companies incorporated in India
    - In their subsidiaries, JV and associate.
  - Shall be counted as indirect foreign investment.
- DI made by FOCC Indian Bank made under
  - CDR Mechanism/ loan restructuring programme
  - acquisition of shares due to defaults in loans
  - Shall not be regarded as indirect foreign investment.

Other reporting requirements

Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019

Foreign investment in India - Reporting in Single Master Form

- FIRMS was made online in two phases:
  - First phase: Entity master was made available online (i.e 07 June, 2018)
  - Second phase: Implementation of SMF (i.e. 01 Sep, 2018)

- With effect from September 01, 2018, five forms viz., FC-GPR, FC-TRS, LLP-I, LLP-II and CN were being made available for filing in SMF

- With effect from October 23, 2018 the other three forms viz., ESOP, DI, and DRR were made available for filing.

Reporting requirements in case of Issue

Form	Purpose	To be filed with	Timeline
Advance Remittance Form (ARF):	Reporting of amount of consideration received for issue of capital instruments and where such issue is reckoned as Foreign Direct Investment.	Discontinued. Merged with FC-GPR	N.A
Form Foreign Currency-Gross Provisional Return (FC-GPR):	Reporting of equity instruments issued to a person resident outside India and where such issue is reckoned as Foreign Direct Investment. **Issue of 'participating interest/ rights' in oil fields shall be reported Form FC-GPR**	Single Master Form	Within 30 days from date of issue of equity instruments/ participating interest/ rights' in oil fields

Form	Purpose	To be filed with	Timeline
Form Employees' Stock Option (ESOP):	An Indian company issuing employees' stock option to persons resident outside India. Note: All FIRCs and KYC shall be filed as necessary documents along with the form.	On SMF	within 30 days from the date of issue of employees' stock option.
Form Depository Receipt Return (DRR):	Reporting of issue/ transfer of depository receipts (ADR/ GDR) issued in accordance with the Depository Receipt Scheme, 2014 by the Domestic Custodian.	On SMF	within 30 days of close of the issue.
Form LLP (I):	LLP receiving amount of consideration for capital contribution and acquisition of profit shares. Note: All FIRCs and KYC shall be filed as necessary documents along with the form.	On SMF	within 30 days from the date of receipt of the amount of consideration
Form LLP (II):	Disinvestment/ transfer of capital contribution or profit share between a resident and a non-resident (or vice versa)	On SMF	within 60 days from the date of receipt of funds
Form Convertible Notes (CN):	Issue of CN to a PROI by an Indian startup company; or Transfer of CN to or from PROI.	On SMF	within 30 days of such issue/ transfer

Annual Return on Foreign Liabilities and Assets (FLA):

- to be filed by Indian company/ LLP with RBI
  - which has received FDI/ capital contribution in the previous year(s) including the current year;
- On or before July 15, every year;
  - Online on RBI flair portal (https://flair.rbi.org.in/fla/)

Delay in reporting under FEMA

Master Direction on reporting under FEMA

Delay in Reporting

- ✓ The LSF shall be applicable for the transactions undertaken on or after November 7, 2017.
- ✓ The payment of LSF is an option for regularising reporting delays without undergoing the compounding procedure.
- ✓ For calculating the LSF amount, the period of contravention shall be considered proportionately {(approx. rounded off to next higher month ÷ 12) X amount for 1 year}.
- ✓ The date of reporting to the AD bank shall be deemed to be the date of reporting to the Reserve Bank provided the prescribed documentation is complete in all respects.

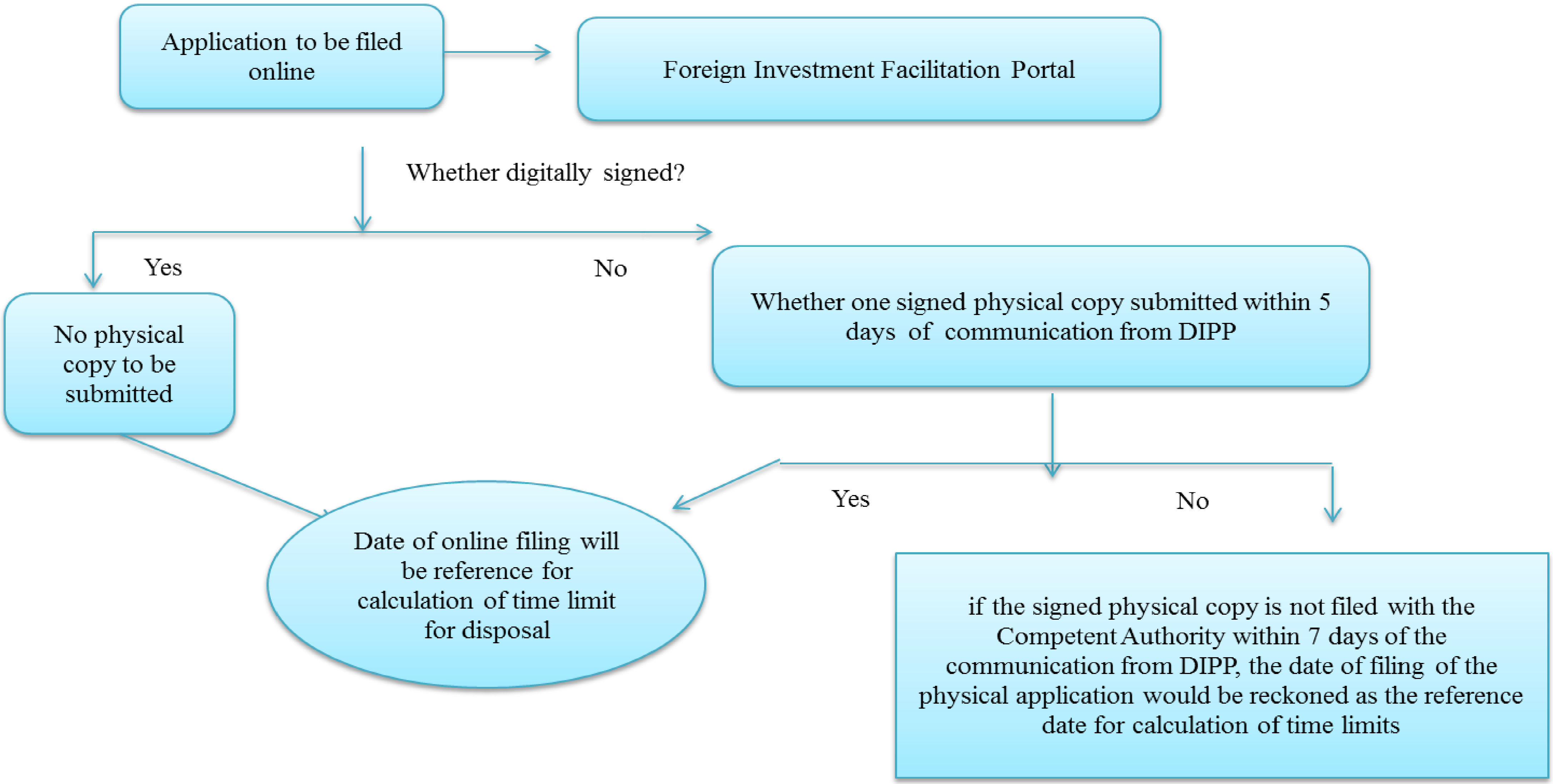
Amount involved in reporting (in INR)	**Late Submission Fee (LSF) as % of amount involved***	**Maximum amount of LSF applicable**
Upto 10 million	0.05%	INR 1 million or 300% of the amount involved, whichever is lower.
More than 10 million	0.15%	INR 10 million or 300% of the the amount involved, whichever is lower.

- The % of LSF will be doubled every twelve months

FDI under Approval Route

Process, competent authorities, timelines

Procedure under Approval Route



Competent Authorities

S. No.	Activity/ sector	Administrative Ministry/ Department
(i)	Mining	Ministry of Mines
(ii)	Defence	
	a) Items requiring Industrial Licence under the Industries (Development & Regulation) Act, 1951, and/or Arms Act, 1959 for which the powers have been delegated by Ministry of Home Affairs to DIPP	Department of Defence Production, Ministry of Defence
	b) Manufacturing of Small Arms and Ammunitions covered under Arms Act 1959	Ministry of Home Affairs
(iii)	Broadcasting	Ministry of Information & Broadcasting
(iv)	Print Media	
(v)	Civil Aviation	Ministry of Civil Aviation

Competent Authorities

(vi)	Satellites	Department of Space
(vii)	Telecommunication	Department of Telecommunications
(viii)	Private Security Agencies	Ministry of Home Affairs
(ix)	Applications involving investments from *Countries of Concern* which presently include Pakistan and Bangladesh, requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time	
(x)	Trading (Single, Multi brand and Food Product Retail Trading)	Department of Industrial Policy & Promotion
(xi)	FDI proposals by Non-Resident Indians (NRIs)/ Export Oriented Units (EOUs) requiring approval of the Government	

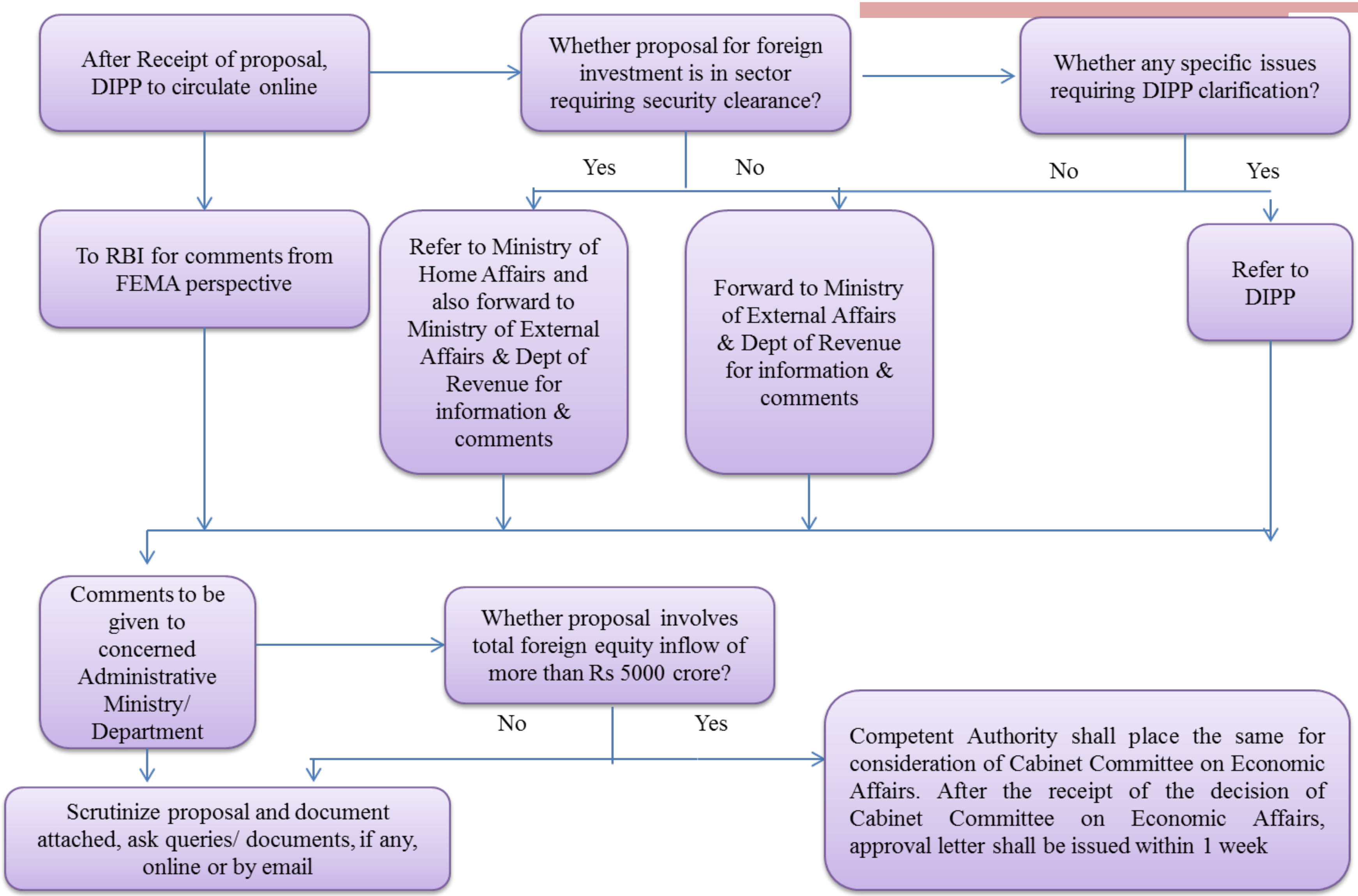
Amended vide P.N. 01/ 2018 (not effective yet)

Investment under automatic route – DPIIT(formerly DIPP)

Cases pertaining to Govt approval route – Nodal Administrative Ministries/ Departments

Proposals requiring security clearance

- Investments in
  - Broadcasting
  - Telecommunication
  - Satellites - establishment and operation
  - Private Security Agencies
  - Defence,
  - Civil Aviation and
  - Mining & mineral separation of titanium bearing minerals and ores, its value addition and integrated activities.
- Investments from Pakistan and Bangladesh;
- Security clearance and comments from Ministry of Home Affairs (MHA)
  - within 6 weeks of online receipt of the proposal
  - If not in position to revert in 6 weeks, will inform concerned administrative Ministry/Department of the expected time frame



Approval/rejection letters will be sent online by the Competent Authority to the applicant, consulted Ministries/Departments and DIPP.

Timelines for approval

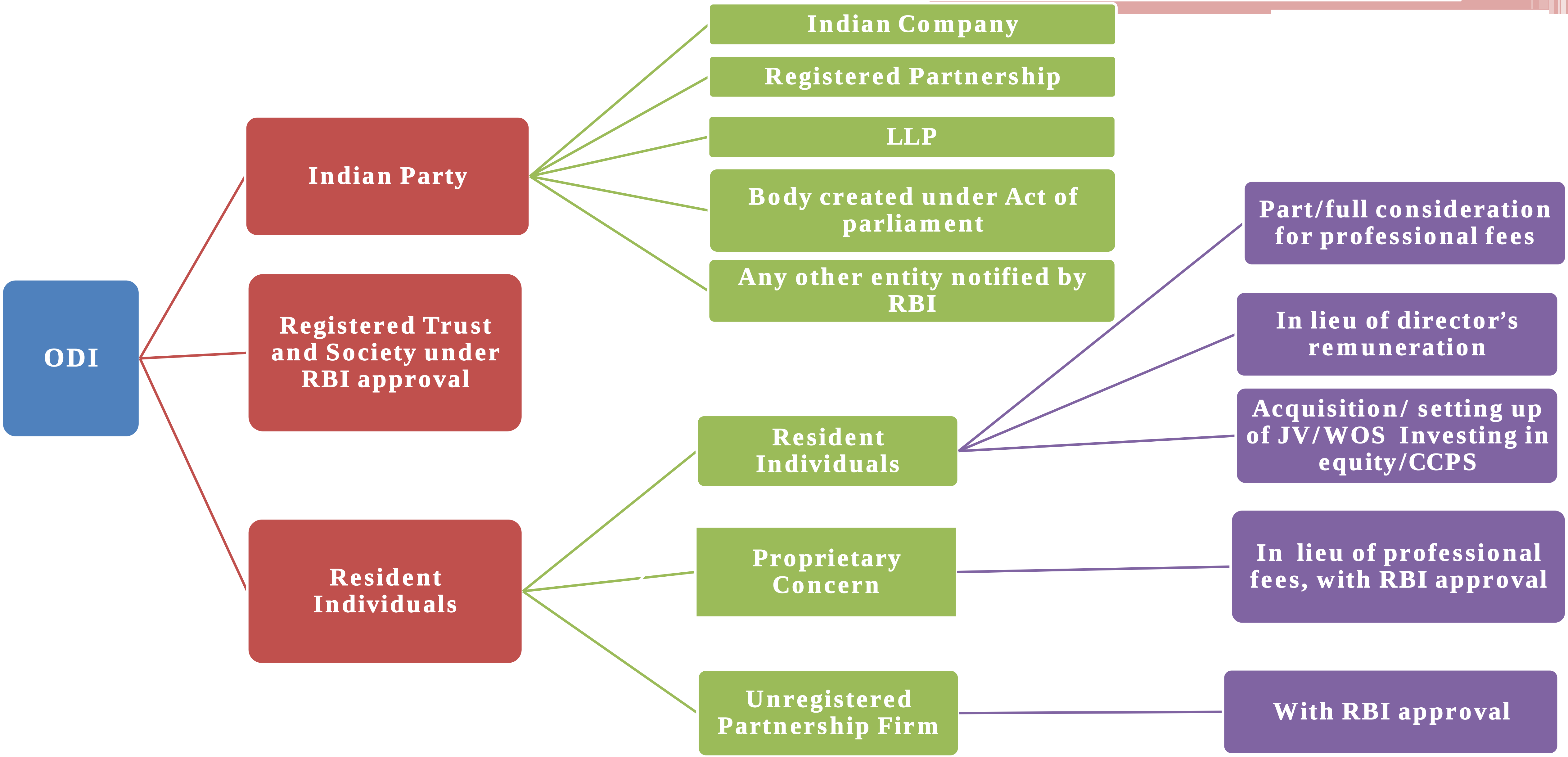
S.No.	Action Points	Time Period	Cum. Time Period
1	Dissemination of Investment Proposal by DIPP to Concerned Ministry/Department	2 days	1 Week
2	Time for submission of signed physical copy of the proposal to the Competent Authority, if needed	5 days	
3	Initial scrutiny of the proposal and documents attached therewith, and seeking relevant additional information/documents from the applicant	1 Week	2 Weeks
4	Submission of clarification by DIPP on specific issues of FDI policy	2 Weeks	4 Weeks
5	Submission of comments by Consulted Ministry/ Department/ RBI/ Any Other Stakeholder	4 Weeks	6 Weeks
6	Submission of Comments by Ministry of Home Affairs on proposals requiring security clearance	6 Weeks	8 Weeks
7	Approval on proposals by Competent Authority for grant of approval	2 Weeks	
	Proposals not requiring security clearance		8 Weeks
	Proposal Requiring security clearance		10 Weeks

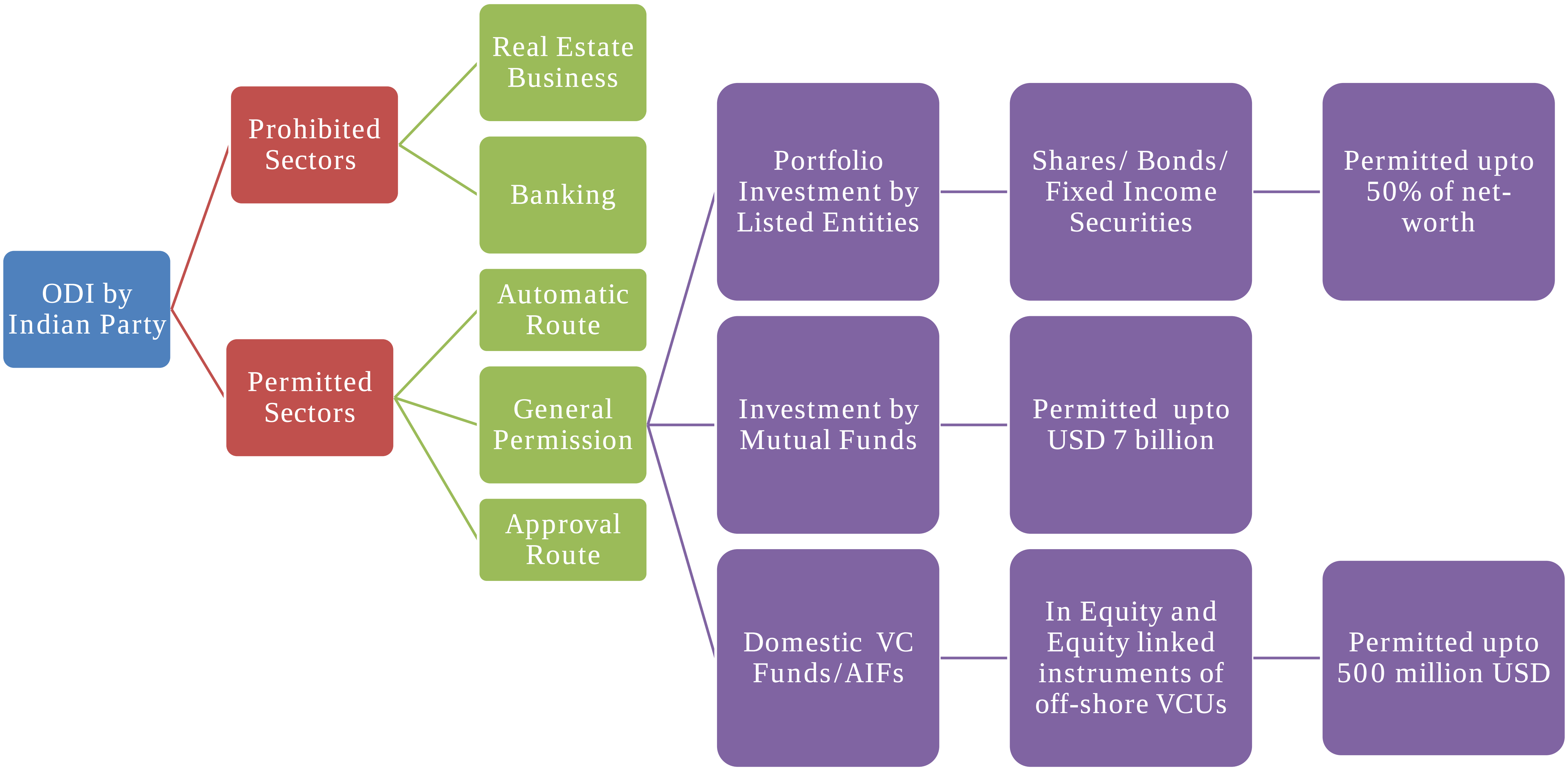
Note:

i. Additional time of 2 weeks will be given to DIPP for consideration of those proposals which are proposed for rejection or where additional conditions which are not provided in the FDI policy are proposed to be imposed by the Competent Authority.

ii. Time limits allocated exclude the time taken by applicants in removing deficiencies in the proposals/supplying additional information as may be required by the Competent Authority.

OVERSEAS DIRECT INVESTMENT


ODI
Indian Party
Registered Trust and Society under RBI approval
Resident Individuals
Indian Company
Registered Partnership
LLP
Body created under Act of parliament
Any other entity notified by RBI
Resident Individuals
Proprietary Concern
Unregistered Partnership Firm
Part/full consideration for professional fees
In lieu of director's remuneration
Acquisition/ setting up of JV/WOS Investing in equity/CCPS
In lieu of professional fees, with RBI approval
With RBI approval


ODI by Indian Party
Prohibited Sectors
Permitted Sectors
Real Estate Business
Banking
Automatic Route
General Permission
Approval Route
Portfolio Investment by Listed Entities
Shares/ Bonds/ Fixed Income Securities
Permitted upto 50% of net-worth
Investment by Mutual Funds
Permitted upto USD 7 billion
Domestic VC Funds/AIFs
In Equity and Equity linked instruments of off-shore VCUs
Permitted upto 500 million USD

- ODI by Resident Individuals
  - Prohibited Sectors
    - Real Estate
    - Banking
    - Financial Services
  - Permitted Sectors
    - Automatic route
      - Acquisition/ setting up of JV/WOS
        - Bonafide Business Activity
        - No step down subsidiary
        - Valuation requirement
        - Other conditions provided in Schedule V
      - In lieu of director’s remuneration
        - Within LRS limit
      - Part/Full Consideration for professional fees
        - Within LRS limit
    - Approval Route
      - Exceeding LRS Limit

Relevant Definitions

- Direct Investment outside India
  - Means investments by way of
    - contribution to the capital or
    - subscription to the MoA of a foreign entity or
    - by way of purchase of existing shares of a foreign entity either
      - by market purchase or
      - by private placement or
      - through stock exchange,
  - excludes
    - Portfolio investments
- Joint Venture
  - Means a foreign entity
    - registered or incorporated in accordance with the laws and regulations of host country
      - In which IP makes direct investment
- Wholly Owned Subsidiaries
  - Means a foreign entity
    - registered or incorporated in accordance with the laws and regulations of host country
      - Whose entire capital is held by IP.

Relevant Definitions

- Indian Party
  - Includes
    - Company incorporated in India
    - Body created under the Act of Parliament
    - Partnership firm
    - LLP
    - Any other entity notified by RBI

When more than one Indian Party make investment in foreign entity

Investment made by IP1 in Foreign Entity + Investment made by IP2 in Foreign Entity + Investment made by IP3 in Foreign Entity = Indian Party

Relevant Definitions

- Financial Commitment
  - Amount of direct investment by way of
    - Contribution to equity/loan
    - 100% of the amount of guarantees
    - 50% of the performance guarantee issued by IP to
      - Overseas JV/WOS
  - Where any FC exceeds USD 1 bn in a financial year
    - Prior approval of RBI will be required
      - Even when total FC is within eligible limit.

Limit on ODI

- Drawal of foreign exchange from AD Bank
  - 400% Net worth as on last audited balance sheet
- EEFC A/c
- ADR/GDR Proceeds.

Total Financial Commitment

- 100% of the amount of equity shares and/ or CCPS;
- 100% of the amount of other preference shares;
- 100% of the amount of loan;
- 100% of the amount of guarantee (other than performance guarantee) issued by the Indian Party;
  - Corporate or personal/ primary or collateral/ guarantee by promoter company in India/ group company/ sister concern or associate company.
  - Within total financial commitment limit of IP.
  - No guarantee to be "open ended".
- 100% of bank guarantee issued by resident bank on behalf of JV/WOS
  - Backed by a counter guarantee/ collateral by IP
- 50% of value of performance guarantee issued to or on behalf of JV/WOS

- Prior approval of RBI required if invocation of PG breach ceiling;

Valuation requirement for ODI in existing entity

- Investment more than USD 5 million
  - By SEBI registered Cat I Merchant Banker; or
  - Investment Banker/ Merchant Banker registered outside India

- In all other cases
  - Chartered Accountant; or
  - Certified Public Accountant.

Pre-Conditions for ODI

- JV/WOS in bona-fide business activity
- IP not on RBI's caution/ defaulter list or under investigation
- IP has submitted APR for all overseas investment.
- All transactions relating to Investment to be routed through same AD Bank
- JV/WOS should not be set up in countries regarded as 'non-cooperative countries and territories' by FATF

ODI in financial service sector

- Can be made only by Indian Party engaged in financial services activities
- Earned net profit during the preceding 3 financial years from financial service activities.
- Registered with regulatory authority in India
- Obtained approval from concerned regulatory authorities
  - both in India and abroad
- fulfilled the prudential norms relating to capital adequacy as prescribed by concerned regulatory authority in India.
- Conditions applicable even for additional investment by an existing JV/WOS or its step down subsidiary.

Loans and Guarantees by IP

- JV/WOS where IP has made contribution to capital by equity/ CCPS
  - Loan or guarantee to or on behalf of JV/WOS
  - Without capital contribution, with RBI approval
    - As per business requirement of IP and
    - Legal requirement of host country
- First generation SDS operating company
  - Corporate guarantee can be extended
- Second or subsequent level SDS
  - IP should indirectly hold 51% or more stake
  - Under RBI approval route.

Roll over of guarantees

- Renewal/ Rollover of an existing/ original guarantee that is part of total FC, shall not be regarded as fresh financial commitment; if
  - the existing / original guarantee was issued in terms of the then extant / prevailing FEMA guidelines;
  - there is no change in the end use of the guarantee, i.e. the facilities availed by the JV / WOS / Step Down Subsidiary;
  - there is no change in any of the terms & conditions, including the amount of the guarantee except the validity period;
  - the reporting of the rolled over guarantee would be done in Form ODI - Part I; and
  - if the IP is under investigation by any investigation / enforcement agency or regulatory body,
    - the concerned agency / body shall be kept informed about the same.
- If conditions not met, RBI approval required.

Creation of Charge

Case	Charge created on	Held in/ of	In favor of	Route
1	Shares	JV/WOS/SDS (irrespective of level)	Domestic/ overseas lender	Automatic
2	Domestic assets	IP (or its group/ sister/associate concern or individual promoter)	Overseas lender to JV/WOS/SDS	Approval (if not as per conditions specified)
3	Overseas assets	JV/WOS/SDS	Domestic lender to IP/ JV/WOS/ SDS	Approval (if not as per conditions specified)

General Conditions for Creation of Charge

- Value of fund based or non fund based is reckoned as financial commitment for IP
  - Total FC remains within limit.
- The overseas lender, should be regulated and supervised as a bank
- No objection' from domestic lender; or
  - In whose favor charge is already created on domestic assets.
- 'No objection' from domestic/ overseas lender
  - In whose favor charge is already created on overseas assets.

Specific conditions for creation of charge on Shares

Case	Charge created on	Held in/ of	In favor of	Route
1.	Shares	JV/WOS/SDS (irrespective of level)	Domestic/ overseas lender	Automatic

Specific conditions for creation of charge on Shares

- Period of charge co-terminus with period of loan/ facility;
- Loan availed by JV/WOS/SDS should be used for its core business activities;
  - No investing back in India in any manner;
- Certificate from Statutory Auditor of IP to be provided to designated AD
  - Loan/ facility availed by JV/WOS/ SDS not utilized for direct/ indirect investments in India.

Specific conditions for creation of charge on Domestic Assets

Case	Charge created on	Held in/ of	In favor of	Route
2.	Domestic Assets	IP (or its group/ sister/associate concern or individual promoter)	Overseas lender to JV/WOS/ SDS	Approval (if not as per conditions specified)

Specific conditions for creation of charge on Domestic Assets

- Domestic assets, on which charge is being created, are not securitized.
- Period of charge co-terminus with period of loan/ facility;
- Loan availed by JV/WOS/SDS should be used for its core business activities;
  - No investing back in India in any manner;
- Certificate from Statutory Auditor of IP to be provided to designated AD;
  - Loan/ facility availed by JV/WOS/ SDS not utilized for direct/ indirect investments in India.

Specific conditions for creation of charge on Domestic Assets

- Overseas lender to undertake that they shall transfer the domestic assets by way of sale to a resident only;
  - In the event of enforcement of charge.
- On invocation of charge, resulting remittance exceeds prescribed limit of FC of IP (prevailed at the time of creation of charge)
  - Shall require RBI approval.

Specific conditions for creation of charge on Overseas Assets

Case	Charge created on	Held in/ of	In favor of	Route
1.	Overseas assets	JV/WOS/SDS	Domestic lender to IP/ JV/WOS/ SDS	Approval (if not as per conditions specified)

Specific conditions for creation of charge on Overseas Assets

- Overseas assets, on which charge is being created, are not securitized.
- Period of charge co-terminus with period of loan/ facility;
- Loan availed by JV/WOS/SDS should be used for its core business activities;
  - No investing back in India in any manner;
- Certificate from Statutory Auditor of IP to be provided to designated AD;
  - Loan/ facility availed by JV/WOS/ SDS not utilized for direct/ indirect investments in India.
- On invocation of charge resulting in domestic lender to acquire overseas assets
  - Prior approval of RBI required.

ODI by registered trust/ society

- Engaged in manufacturing/ educational sector/ set up hospitals in India
- Trust/ Society is registered
- Trust deed/ Society's MOA permits overseas investment
- Trust/ Society in existence for atleast 3 years
- Trust/ Society not under adverse notice of any Regulatory/ Enforcement agency
- AD Bank is satisfied that Trust/Society is KYC compliant and into bona fide activity.

Sale of Shares of JV/ WOS

- Sale does not result in write off of investments
  - Amount repatriated may be less than original investment, if;
    - JV/WOS is listed on overseas stock exchange;
    - IP is listed on stock exchange and has a net worth of atleast Rs. 100 crore;
    - IP is unlisted and investment in JV/WOS does not exceed USD 10 million;
    - IP is listed on stock exchange and has a net worth of less than Rs. 100 crore and investment in JV/WOS does not exceed USD 10 million
  - Sale to be effected on stock exchange if shares of JV/WOS are listed;
  - If JV/WOS unlisted, shares divested by private arrangement, the price shall be atleast fair value determined by CA/CPA;
  - IP shall not have any outstanding due by way of dividend, technical know-how fees, royalty, consultancy, export proceeds or other entitlements
  - JV/WOS was in operation for 1 full year and APR together with audited accounts filed with RBI
- If not as aforesaid, RBI approval is required

Restructuring of B/s of JV/WOS by Listed IP

- Who can do?
  - Listed IP having WOS or JV (atleast 51% stake)
- What can be written off?
  - Capital (equity/preference);
  - other receivables
    - loans, royalty, technical know how, management fees
- To what extent?
  - 25% of equity investment in JV/WOS
- Submission to AD Bank
  - Certified copy of B/S showing the loss in overseas JV/WOS
  - Projection for next 5 years indicating benefit accruing to IP consequent to such write off/ restructuring.
- To be reported to RBI
  - Within 30 days of WO/ restructuring.

Restructuring of B/S of JV/WOS by Unlisted IP

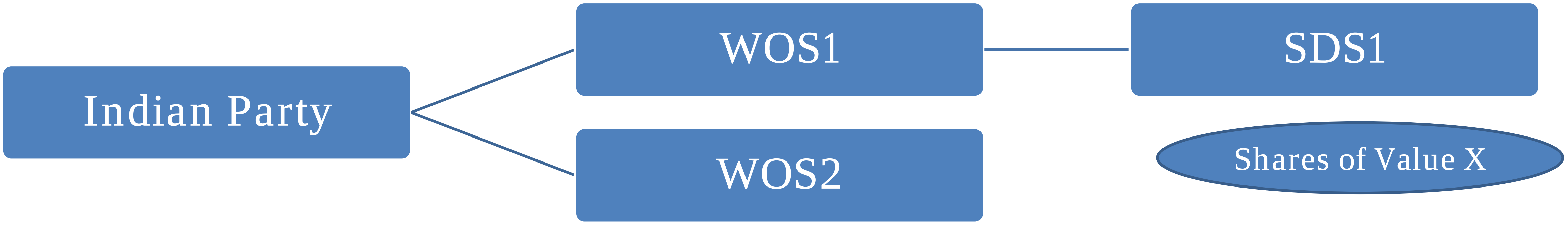
- Who can do?
  - Unlisted IP having WOS or JV (atleast 51% stake)

- What can be written off?
  - Capital (equity/preference);
  - other receivables
    - loans, royalty, technical know how, management fees

- To what extent?
  - 25% of equity investment in JV/WOS

- Under approval of RBI

Example



- Transaction1
  - Reduction of capital by value x by WOS1
- Transaction 2
  - Subscription by IP to shares of WOS2
- Transaction 3
  - Transfer of shares of SS1 by WOS1 to WOS2
- **Reporting requirements?**

Obligations of Indian Party

- On remittance
  - Filing Form ODI– Part I with AD Bank
    - Application for allotment of Unique Identification Number (UIN) and reporting of Remittances / Transactions
  - Obtain UIN from RBI and quote in all communications
  - Receive share certificate/ proof of investment
    - Within 6 months, or such further period as RBI may permit
    - Annually
  - Filing Form ODI – Part II with AD Bank
    - Annual Performance Report
      - every year by December 31st as long as the JV / WOS is in existence.

Obligations of Indian Party

- On receipt of amounts
  - Dividend, royalty, technical fees etc
    - Repatriate within 60 days, or such further period as RBI may permit

- On Disinvestment
  - Filing Form ODI – Part III with AD Bank
    - Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of overseas JV / WOS;
    - Following cases, documents should be submitted to the RBI for prior approval.
      - Sale/ Transfer of the shares of the overseas JV/ WOS to another eligible resident or non-resident;
      - Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of IP;
      - Buy back of shares by the overseas JV/ WOS of the IP / RI.
  - Repatriate amounts within 90 days of date of sale
    - Proof of receipt to be provided to RBI

Obligations of Indian Party

- On making portfolio investment
  - By AIF/ VCF
  - By Mutual Funds (monthly reporting)

- On ESOP granted to employees of Indian Party by foreign company
  - Annual ESOP Reporting – Statement of shares allotted

- On ESOP repurchased by foreign company
  - Annual ESOP Reporting – Statement of shares repurchased

External Commercial Borrowings

What are ECBs

- What are ECBs
  - Commercial Loans
  - Raised by
    - Eligible borrowers
  - From
    - Recognised Lenders
  - For
    - Permitted end use
  - As per
    - Prescribed parameters
      - Minimum average maturity
      - All in cost ceiling

What are ECBs

- Currency
  - Any freely convertible currency or INR
    - Change of currency of ECB
      - From one freely convertible to another as well as INR
        - Permitted

Forms of ECBs

- loans including bank loans;
- floating/ fixed rate notes/ bonds/
- debentures (other than fully and compulsorily convertible instruments);
- Trade credits beyond 3 years;
- FCCBs;
- FCEBs and
- Financial Lease
- Plain vanilla Rupee denominated bonds issued overseas (RDBs), which can be either placed privately or listed on exchanges as per host country regulations

□

Forms of ECBs

- Loans
  - Including bank loans
  - Securitized instruments
    - NCDs, NCRPS, OCRPS, fixed rate bonds etc.
    - Investment made by FPIs in NCDs shall not be regarded ECB
      - Governed by Schedule 5 of FEM (TISPRO) Reg, 2017
  - Buyers' credit
    - loans for payment of imports into India arranged by the importer from overseas bank or financial institution
  - Suppliers' credit
    - Credit granted by overseas supplier
- Financial Lease
  - Leasing company (lessor) buys the asset from seller and leases it to lessee
    - that transfers substantially all the risks and rewards incident to ownership of an asset.

Forms of ECBs

- FCCB
  - Bonds denominated in foreign currency
    - Principal and interest payable in foreign currency
  - Convertible into shares of borrowing entity
    - Either in whole or part.

- FCEB
  - Bonds denominated in foreign currency
    - Principal and interest payable in foreign currency
  - Exchangeable into equity share of offered company
    - Either in whole or part.
    - Only under approval route

- **Foreign Currency denominated ECBs**:

  As per the erstwhile provisions, ECB was divided into:
  - Track I Foreign Currency ECBs
  - Track II Foreign Currency ECBs
  - Track III Rupee denominated ECBs

  However, the recent amendment dated 31st July, 2019 has merged track I and II as foreign currency denominated ECBs. These ECBs have forex hedging risk due to foreign currency difference.

- **INR denominated ECBs:**

  These are Indian Rupees denominated ECBs and do not have hedging risk.

Recognized Lenders

- The lender should be resident of FATF or IOSCO compliant country, including on transfer of ECBs.
- Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;
- Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/debentures listed abroad; and
- Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for FCY ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks will not be allowed.

Eligible Borrowers

- It includes all entities eligible to receive FDI
- Additionally the following can also borrow under this framework
  - Port trusts;
  - Units in SEZ;
  - SIDBI;
  - Exim Bank;
  - Registered entities engaged in micro-finance activities viz., registered not for profit companies, registered societies/trusts/cooperatives and non-government organisations(Permitted only to raise ECB)

Minimum Average Maturity Period (MAMP)

Generally MAMP for ECBs shall be **3 YEARS.** However, different criteria of MAMP is provided for some companies:

Raised by (Borrower)	Raised from (Lender)	Raised upto/for	MAMP
Manufacturing companies	Eligible Lender	Upto 50 million or its equivalent per FY	1 year
Eligible borrower	Foreign equity holder	a) General corporate purposes b) Repayment of rupee loans	5 years
Eligible borrower	Eligible Lender except foreign branches/ overseas subsidiaries of Indian banks	a) Working capital purposes or general corporate purposes b) Repayment of rupee loans availed domestically for purposes other than capital expenditure	10 years
NBFCs	Eligible Lender except foreign branches/ overseas subsidiaries of Indian banks	On lending for working capital purposes or general corporate purposes	7 years
NBFCs	Eligible Lender except foreign branches/ overseas subsidiaries of Indian banks	On leading for repayment of rupee loans availed domestically for purposes other than capital expenditure	10 years

Relaxation granted in End-use restrictions

Particulars	ECBs availed from	By	Permitted End-use	MAMP
Erstwhile Provision	Foreign Equity Holder	Eligible Borrower	• Working capital purposes • General corporate purposes or, • Repayment of Rupee loans	5 Years
Amended Provision	Recognised Lenders	Eligible Borrower	• Working capital purposes and, • General corporate purposes	10 Years
	Recognised Lenders	NBFCs	On-lending for: • Working Capital purposes and, • General Corporate Purpose	10 Years

	Recognised Lenders	Eligible Borrowers including NBFC's	• Repayment of Rupee loans availed domestically for capital expenditure and • On-lending for above purpose by NBFC's	7 Years
	Recognised Lenders	Eligible Borrowers including NBFC's	• Repayment of Rupee loans availed domestically for purposes other than capital expenditure and, • On-lending for above purpose by NBFC's	10 Years
ECBs will be permitted to be raised for above purposes from recognised lenders **except foreign branches/ overseas subsidiaries of Indian Banks and subject to Para 2.2 of the Master Direction dealing with limit and leverage.**				

Further, Eligible Corporate Borrowers are now permitted to avail ECB for repayment of Rupee loans availed domestically for capital expenditure in manufacturing and infrastructure sector if classified as Special Mention Account (SMA-2) or Non-Performing Assets (NPA), under any one time settlement with lenders.

Limit

Eligible borrowers can raise ECB upto USD 750 Million or equivalent per FY under automatic route

All in cost ceiling

- The All-in cost is every cost involved in a transaction.
- All-in cost
  - Includes
    - Rate of interest
    - Other fees
    - Expenses
    - Charges
    - Guarantee fees
    - Export Credit Agency (ECA) charges

    whether paid in foreign currency or INR
  - Does not include
    - Commitment fees
    - Withholding tax payable in INR
- The all-in-cost ceiling per annum
  - Benchmark rate plus 450 bps spread

All in cost – contd..

- For ECBs raised in foreign exchange, the maximum spread over the **benchmark of 6-month LIBOR or applicable benchmark for the respective currency will be 450 basis points per annum** or as prescribed by the Reserve Bank in consultation with the Government of India.

- For ECBs raised in Indian Rupees, the maximum spread will be **450 basis points per annum over the prevailing yield of the Government of India securities** of corresponding maturity or as prescribed by the Reserve Bank in consultation with the Government of India.

End use prescriptions

The negative list, for which the ECB proceeds cannot be utilized, would include the following:

a) Real estate activities.
b) Investment in capital market.
c) Equity investment.
d) Repayment of Rupee loans

except in case of ECB from foreign equity holder.

On-lending to entities engaged in above activities.

Refer other resources

- FEMA: Click here
- Companies Act: Click here
- SEBI: Click here
- RBI: Click here