

# **New Framework for Overseas Investments under FEMA**

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# OI Rules & Regulations

Overseas Investment  
Rules dated 22<sup>nd</sup>  
August 2022 issued by  
Ministry of Finance

Overseas Investment  
Regulations dated 22<sup>nd</sup>  
August 2022 issued by  
RBI

Overseas Investment  
Direction dated 22<sup>nd</sup>  
August 2022 issued by  
RBI

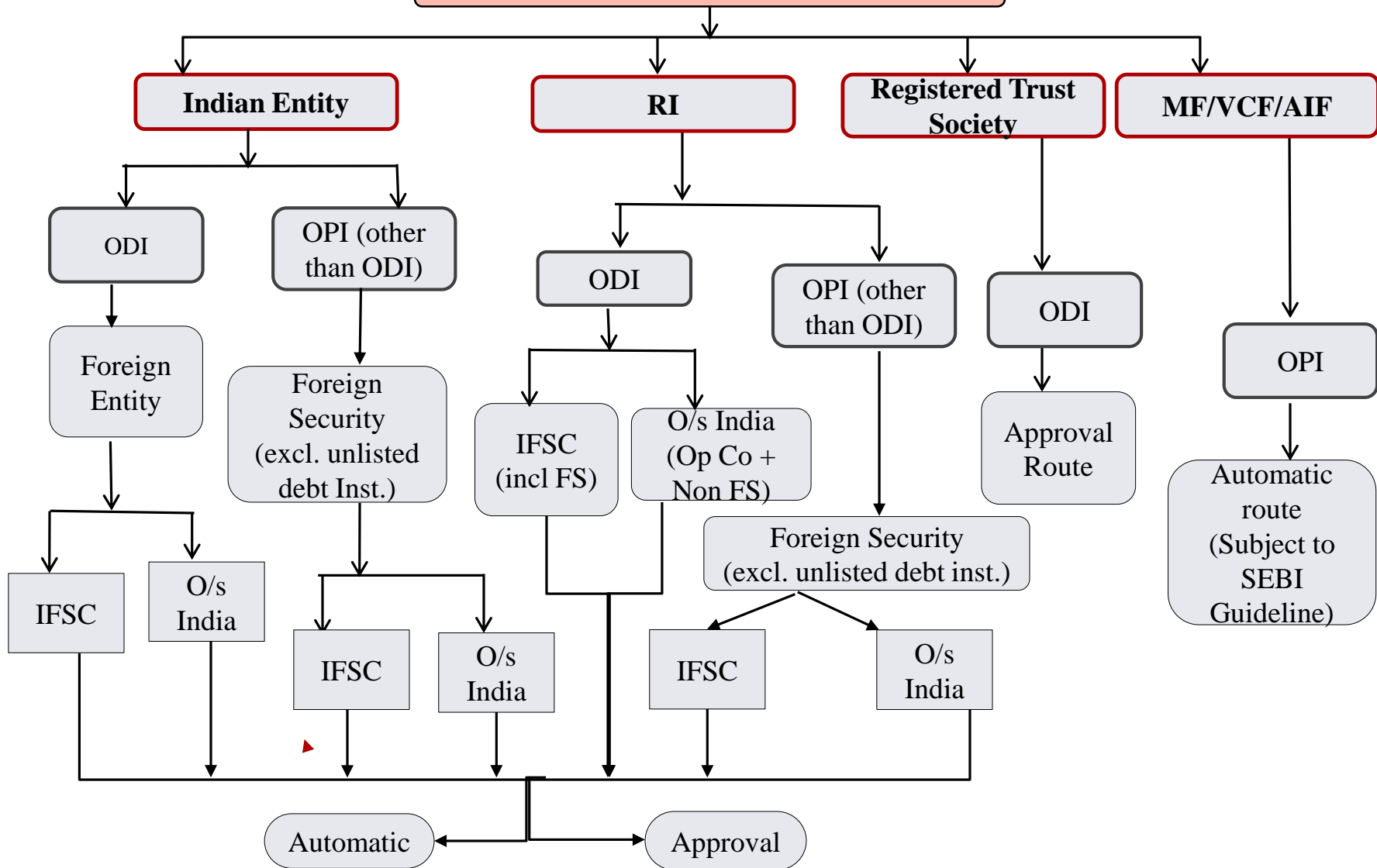
Master Direction on  
Reporting (updated as  
on 12<sup>th</sup> May 2023)

Master Direction on  
LRS (updated as on  
24<sup>th</sup> August 2022)

Master Direction on  
Immovable Property  
(updated as on 01<sup>st</sup>  
September 2022)

# Routes for Overseas Investments

## Routes for Overseas Investments



# Definition of ODI & Control

Erstwhile Notification No. FEMA 120	New FEMA Rules
<p>Direct investment outside India means investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment. Also include Sponsor contribution to AIF.</p>	<p>ODI means investment by way of acquisition of <b>unlisted equity capital of a foreign entity</b>, or subscription as a part of the memorandum of association of a foreign entity, or investment in ten per cent, or more of the paid-up equity capital of a <b>listed foreign entity</b> or investment with control where investment is less than ten per cent. of the paid-up equity capital of a <b>listed foreign entity</b>.</p>

## Definition of Control

- “control” means the right to appoint majority of the directors or to control management or policy decisions exercisable by a person or persons acting individually or in concert, **directly or indirectly**, including *by virtue of their shareholding or management rights or shareholders’ agreements or voting agreements that entitle them to ten per cent. or more of voting rights or in any other manner in the entity;*

# Definition of OPI

## Erstwhile Notification No. FEMA 120

- Portfolio investment not defined.
- PI by listed company permitted.
- For individuals, based on informal guidance, certain criteria to be tested:
  - ✓ Does not subscribe to MoA;
  - ✓ Not a WOS of RI;
  - ✓ RI should be a passive investor;
  - ✓ No other financial commitment;
  - ✓ Generally into listed company.

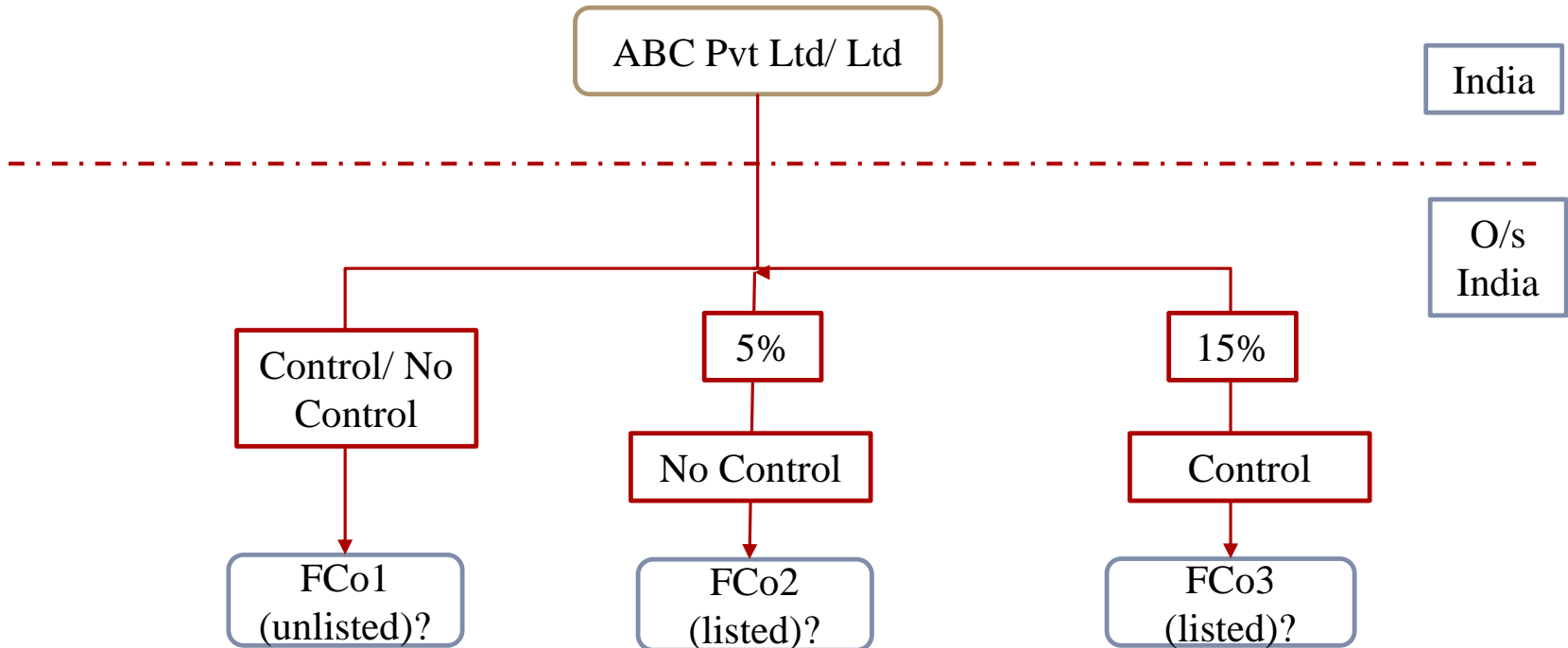
## New FEMA Rules

- OPI means investment, *other than ODI*, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC.
- OPI by PRI in the equity capital of a listed entity, even after its delisting shall continue to be treated as OPI until any further investment is made in the entity.

### Observation/ Poser:

- ❖ Whether portfolio investment permitted anymore in an unlisted company?
- ❖ Whether resident individuals is permitted to make portfolio investments under LRS?
- ❖ What is the meaning of the term ‘foreign securities’?
- ❖ Whether ODI / OPI in derivative products is permitted?

# ODI or OPI?



# Net-worth Definition

## Erstwhile Notification No. FEMA 120

- Net-worth means paid-up share capital & **free reserves**.
- Free reserves not defined.
- As per CA 2013, free reserves are those which are available for distribution as dividend.

## New FEMA Rules

- Net-worth shall have the same meaning as assigned to it in Section 2(57) of the Companies Act, 2013.
- **Definition as per CA 2013**
  - *Net worth means the aggregate value of the paid-up share capital and all reserves created out of the profits, **securities premium account** and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.*

# Debt v/s Non-debt Instruments

## Power to legislate on Capital Account Transactions w.e.f. 15.10.2019

Debt Instruments [RBI]	Non-Debt Instruments [CG]
Government Bonds	All investments in equity in incorporated entities (public, private, listed and unlisted)
Corporate Bonds	Capital participation in Limited Liability Partnerships (LLPs)
All tranches of securitisation structure which are not equity tranche	All instruments of investment as recognised in the FDI policy as notified from time to time
Borrowings by Indian firms through loans	Investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs)
Depository receipts whose underlying securities are debt securities	Investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest > 50% in equity
	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



# Other Important Definitions

- ❖ **Equity capital** means equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments.
- ❖ **Foreign entity** means an **entity formed or registered or incorporated outside India**, including International Financial Services Centre that has limited liability: Provided that the restriction of limited liability shall not apply to an entity with core activity in a strategic sector.
- ❖ **Overseas Investment or OI** means financial commitment and Overseas Portfolio Investment by a person resident in India.
- ❖ **Indian entity means**—
  - a **company** defined under the Companies Act, 2013 (18 of 2013);
  - a **body corporate** incorporated by any law for the time being in force;
  - a **Limited Liability Partnership** duly formed and incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009); and
  - a **partnership firm** registered under the Indian Partnership Act, 1932 ( 9 of 1932).
- ❖ **Subsidiary or step down subsidiary** of a foreign entity means an entity in which the foreign entity has control.

## Other Important Definitions

- ❖ **Financial commitment** means the aggregate amount of investment made by a person resident in India by way of Overseas Direct Investment, debt other than Overseas Portfolio Investment in a foreign entity or entities in which the Overseas Direct Investment is made and shall include the non-fund-based facilities extended by such person to or on behalf of such foreign entity or entities;
- ❖ **Financial service regulator** means a financial service regulator established under any law in force in India and include the Reserve Bank, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority and the Pension Fund Regulatory and Development Authority.
- ❖ **Last audited balance sheet** means audited balance sheet as on date not exceeding eighteen months preceding the date of the transaction.
- ❖ **Sweat equity shares** means such equity shares as are issued by an overseas entity to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights like intellectual property rights or value additions, by whatever name called.
- ❖ **Strategic sector** shall include energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups and any other sector or sub-sector as deemed necessary by the Central Government.
- ❖ **AD bank** means a person authorised as such under subsection (1) of section 10 of the Act and for the purpose of these rules, shall mean only the domestic branches of such AD Bank.

# Non-applicability of OI Rules & Regulations

- ❖ Foreign Exchange Management (Overseas Investment) Rules or Regulations **will not apply to:**
  - any **investment made outside India by a financial institution in an IFSC;**
  - acquisition or transfer of any investment outside India made,—
    - ✓ out of **Resident Foreign Currency Account;** or
    - ✓ out of **foreign currency resources held outside India** by a person who is employed in India for a specific duration irrespective of length thereof or for a specific job or assignment, duration of which does not exceed three years; or
    - ✓ in accordance with **6(4) of FEMA.**

Explanation.— For the purposes of this rule, the expression “financial institution” shall have the same meaning as assigned to it in the International Financial Services Centres Authority Act, 2019 (50 of 2019).

# Bonafide Business Activity

Erstwhile Notification No. FEMA 120	New FEMA Rules
<ul style="list-style-type: none"><li>The direct investment is made in an overseas JV/WOS engaged in <b>bonafide business activity</b>.</li></ul>	<ul style="list-style-type: none"><li>Any investment by PRI o/s India shall be made in foreign entity engaged in bonafide business activity, directly or indirectly through SDS or the SPV.</li><li><b>Bonafide business activity shall mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be.</b></li><li>OI or transfer of such investment including swap of securities in an entity formed/ incorporated in Pakistan or other jurisdiction as advised by CG will require prior approval.</li></ul>

## Observation/ Poser:

- ❖ Whether investment in a foreign company trading in crypto-currencies permitted?

# Pricing Guidelines

Erstwhile Notification No. FEMA 120	New FEMA Rules
<p>(a) For the purposes of investment in an existing company o/s India, the valuation of shares of the company outside India shall be made, -</p> <p>(i) where the investment &gt; USD 5 million - Cat I Merchant Banker or an Investment Banker/Merchant Banker outside India; In all other cases – CA/ CPA.</p> <p>(b) In case where consideration is to be paid fully or partly by issue of the Indian party's shares - valuation of shares of the company outside India needs to be carried out by a Cat I Merchant Banker or an Investment Banker/Merchant Banker outside India.</p> <ul style="list-style-type: none"><li>• In case of disinvestment – CA/ CPA</li></ul>	<ul style="list-style-type: none"><li>• Issue or transfer of equity capital of a foreign entity from PROI or PRI to PRI who is eligible to make such investment or from PRI to PROI shall be subject to a <i>price arrived on an arm's length basis</i>.</li><li>• AD bank before facilitating a transaction to ensure compliance with ALP taking into consideration the valuation as per <i>any internationally accepted pricing methodology for valuation</i>.</li></ul>

## Poser:

- ❖ Whether CA/ CPA can do valuation in all cases now? Validity Period of report?
- ❖ Concept of price v/s pricing - What if there is any deviation from ALP price? Eg: ALP 100 & shares are issued at 80

# Disinvestment/ Transfer

## Erstwhile Notification No. FEMA 120

- For transfer other than write-off certain conditions were required to be satisfied such as:
  - ✓ Pricing guidelines;
  - ✓ No o/s dues by way of dividend, *technical know-how fees, royalty, consultancy, commission or other entitlements and/or export proceeds*;
  - ✓ *1 year of operation* & APR submission;
  - ✓ IP not under investigation.
- In case of a write-off, apart from the above condition, certain limits were provided for eligibility. In other cases, RBI approval was required.

## New FEMA Rules

- Where the disinvestment by a person resident in India pertains to ODI–
  - ✓ the transferor, in case of full disinvestment other than by way of liquidation, shall not have any dues outstanding for receipt, which *such transferor is entitled to receive from the foreign entity as an investor in equity capital and debt*;
  - ✓ the transferor, in case of any disinvestment, must have stayed invested for at least **one year from the date of making ODI:...**

### Observation/ Poser:

- ❖ Disinvestment permitted in case o/s dues is in the nature of trade transaction?
- ❖ Whether write-off allowed now without any limit or without eligibility criteria?

# Restructuring of FE Balance Sheet

## Erstwhile Notification No. FEMA 120

- **Listed Indian party** who had set up WOS or holding > 51% stake in overseas JV was permitted to write-off capital & other receivables **up to 25% of equity investment** under **automatic route**.
- Docs such as certified copy of BS evidencing loss + projection for next 5 years indicating benefit to Indian party pursuant to restructuring was required to be furnished.
- **Unlisted Indian party** who had set up WOS or holding > 51% stake in overseas JV was permitted to write-off capital & other receivables **up to 25% of equity investment** under **approval route**.

## New FEMA Rules

- Permitted if FE **incurs losses for the 2 PYs** as evidenced by audited BS.
- Compliance with reporting, documentation, and diminution in the total value of o/s dues after restructuring not exceed the proportionate amount of accumulated loss
- **Certification of diminution value** at arms' length required if – OF investment amount > USD 10 million or amount of diminution > 20% of total o/s dues.
- Certificate should be **dated < 6 months** before the date of transaction.

# Restrictions/ Prohibitions for ODI

Erstwhile Notification No. FEMA 120	New FEMA Rules
<ul style="list-style-type: none"><li>• Direct investment in a foreign entity engaged in real estate business or banking business not permitted.</li></ul>	<ul style="list-style-type: none"><li>• No person resident in India shall make ODI in a foreign entity engaged in:<ul style="list-style-type: none"><li>✓ <b>real estate activity</b>;</li><li>✓ <b>gambling</b> in any form; and</li><li>✓ <b>dealing with financial products linked to the Indian rupee</b> without specific approval of the Reserve Bank.</li></ul></li></ul> <p><i>Explanation</i>– For the purposes of this sub-rule, the expression "real estate activity" <b>means buying and selling of real estate or trading in Transferable Development Rights but does not include the development</b> of townships, construction of residential or commercial premises, roads or bridges <b>for selling or leasing</b>.</p>

## Observation/ Poser:

- ❖ Whether ODI in Fco engaged in buying & leasing of property permitted?



# Pre-incorporation Expenses

Erstwhile Notification No. FEMA 120	New FEMA Rules
<ul style="list-style-type: none"><li>• Capitalisation of pre-incorporation expenses was permitted.</li><li>• Expenses?</li><li>• Receivables?</li></ul>	<ul style="list-style-type: none"><li>• AD may allow remittance up to USD 1,00,000 per foreign entity.</li><li>• For RI – LRS limit applicable.</li><li>• PRI may capitalise such expenses [FC: ODI] or recognise as receivables [FC: Debt] or account them as expenses in their books of account.</li><li>• However, unless recognised as financial commitment, such expense will not attract provisions of OI Rules/Regulations.</li></ul>

# Overview of Schedules

## Schedule I

- ODI by Indian Entity (IE)

## Schedule II

- OPI by Indian Entity (IE)

## Schedule III

- Overseas Investment by Resident Individual (RI)

## Schedule IV

- Overseas Investment by PRI other than IE & RI

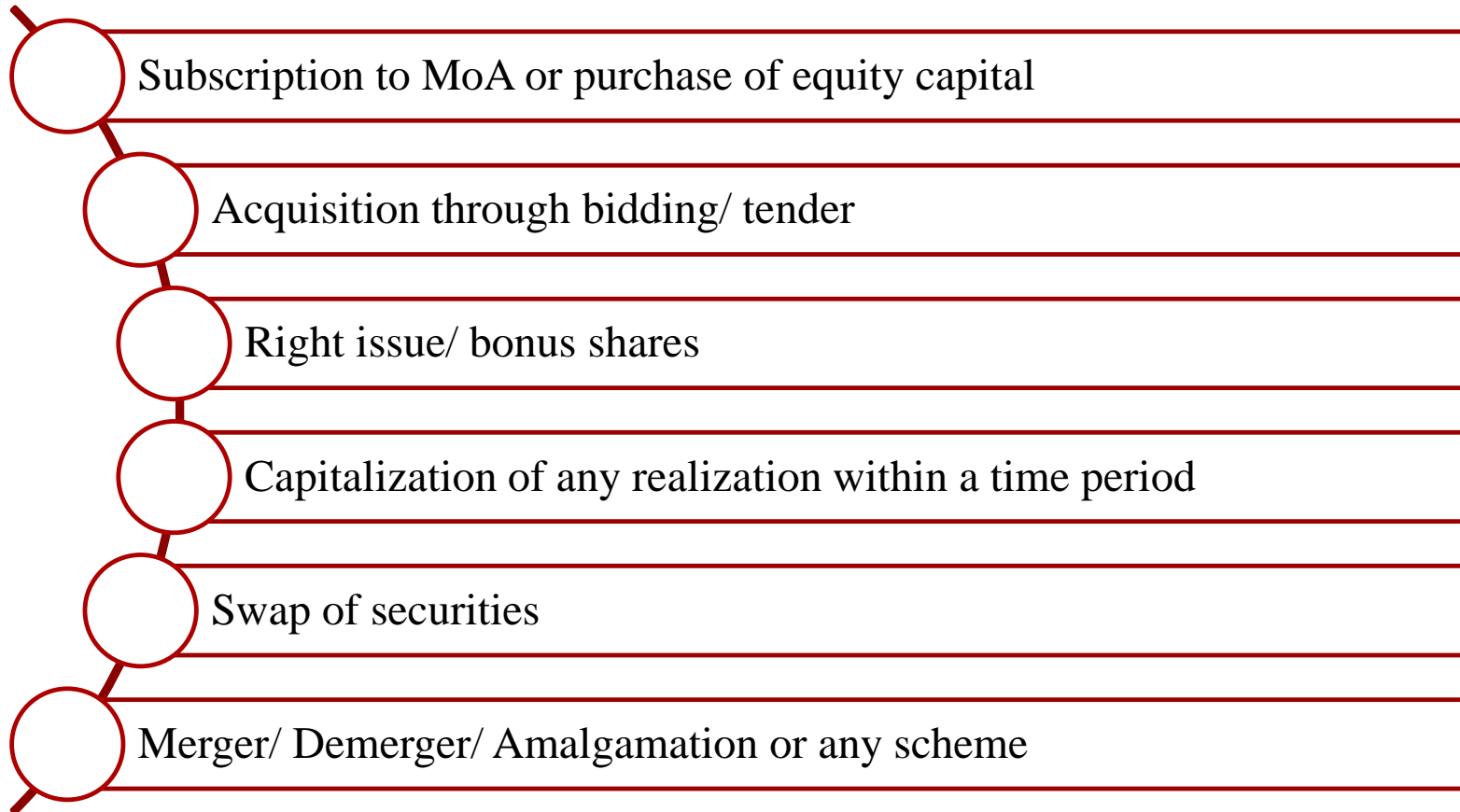
## Schedule V

- Overseas Investment in IFSC by PRI

# Sch I – ODI by Indian Entity (IE)

## ❖ Manner of Making ODI

- IE permitted to make ODI by way of:



# Sch I – ODI by Indian Entity (IE)

## ❖ ODI in Financial Service Activity

### Erstwhile Notification No. FEMA 120

- Indian party engaged in FS activity permitted subject to - 3 PYs NP criteria from FS activity; Registered/ regulated in India; Obtained approval in & o/s India; Fulfilled prudential norms. IP not engaged in FS activity – Not permitted.

### New FEMA Rules

Indian Entity	ODI in Foreign Entity	Subject to FC/ Reporting/ other provisions
Engaged in FS Activity	Engaged in FS Activity	3 Year NP + Regulated/ registered + Approval criteria
	Not engaged in FS Activity	Subject to the guidelines issued by the respective regulator
Not Engaged in FS Activity	Engaged in FS Activity (Exc. Banking/ Ins.)	3 Year NP criteria
	Gen. & Health Ins.	3 Year NP criteria + supporting core activity

# Sch I – ODI by Indian Entity (IE) - Poll

❖ Can IndCo incorporate FCo for the purpose of trading in trading in foreign securities?

- Yes, but only if they are listed equity stocks
- No, if they are unlisted bonds
- Yes, without any restrictions
- Not a permitted activity

# Sch I – ODI by Indian Entity (IE)

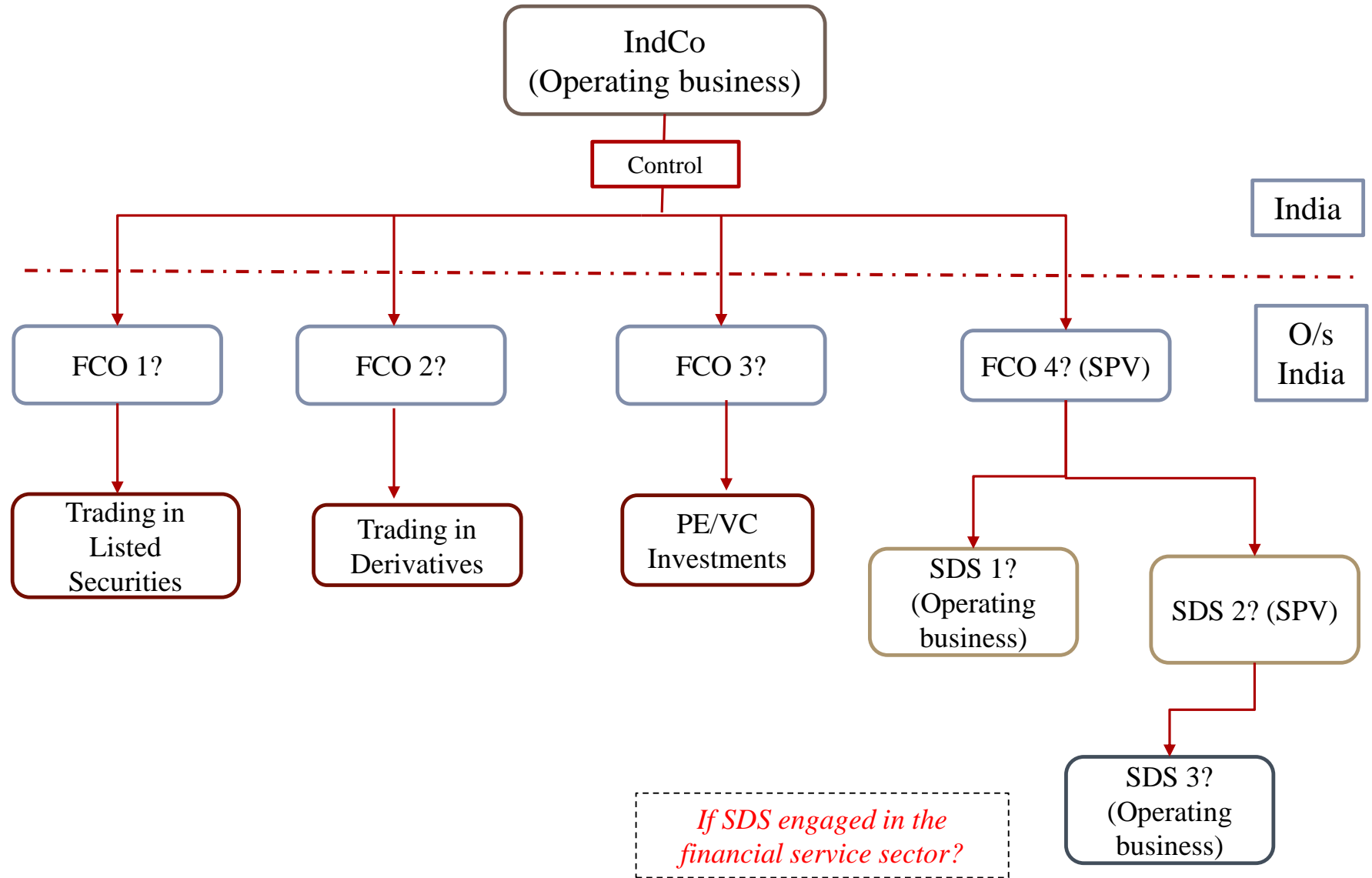
## ❖ Limit for financial commitment

Erstwhile Notification No. FEMA 120	New FEMA Rules
<ul style="list-style-type: none"><li>• Total financial commitment of Indian Party shall not exceed 400% of its net worth as on the last audited balance sheet.</li><li>• Net worth of HoldCo/ SubCo permitted to be used for computing net worth.</li><li>• Net worth definition: paid-up capital + free reserves.</li></ul>	<ul style="list-style-type: none"><li>• Total financial commitment of IE in all foreign entities shall not exceed 400% of its net worth as on the last audited balance sheet.</li><li>• Capitalization of retained earnings should not be included in reckoning such limit.</li><li>• Net worth of HoldCo/ SubCo now not permitted to be used for computing net worth.</li><li>• Instead counted as respective group company's independent FC.</li><li>• Net worth definition aligned to Companies Act definition.</li><li>• Limit shall include utilization of the amount raised by ADR/ GDR/ ECB.</li><li>• Not applicable to Maharatna, Navratna or Miniratna in strategic sector o/s India.</li></ul>

## Sch II – OPI by Indian Entity (IE)

- ❖ An Indian entity may make **OPI which shall not exceed fifty percent of its net worth** as on the date of its last audited balance sheet, in the manner and subject to the conditions laid down in this Schedule.
- ❖ A **listed Indian company may make OPI including by way of reinvestment.**
- ❖ An **unlisted Indian entity may make OPI** only under the following modes:
  - **Right issue/ bonus shares;**
  - **Capitalization** of any realization within a time period;
  - **Swap** of securities;
  - **Merger/ Demerger/ Amalgamation or any scheme.**

# Sch I vs Sch II – ODI vs OPI ?





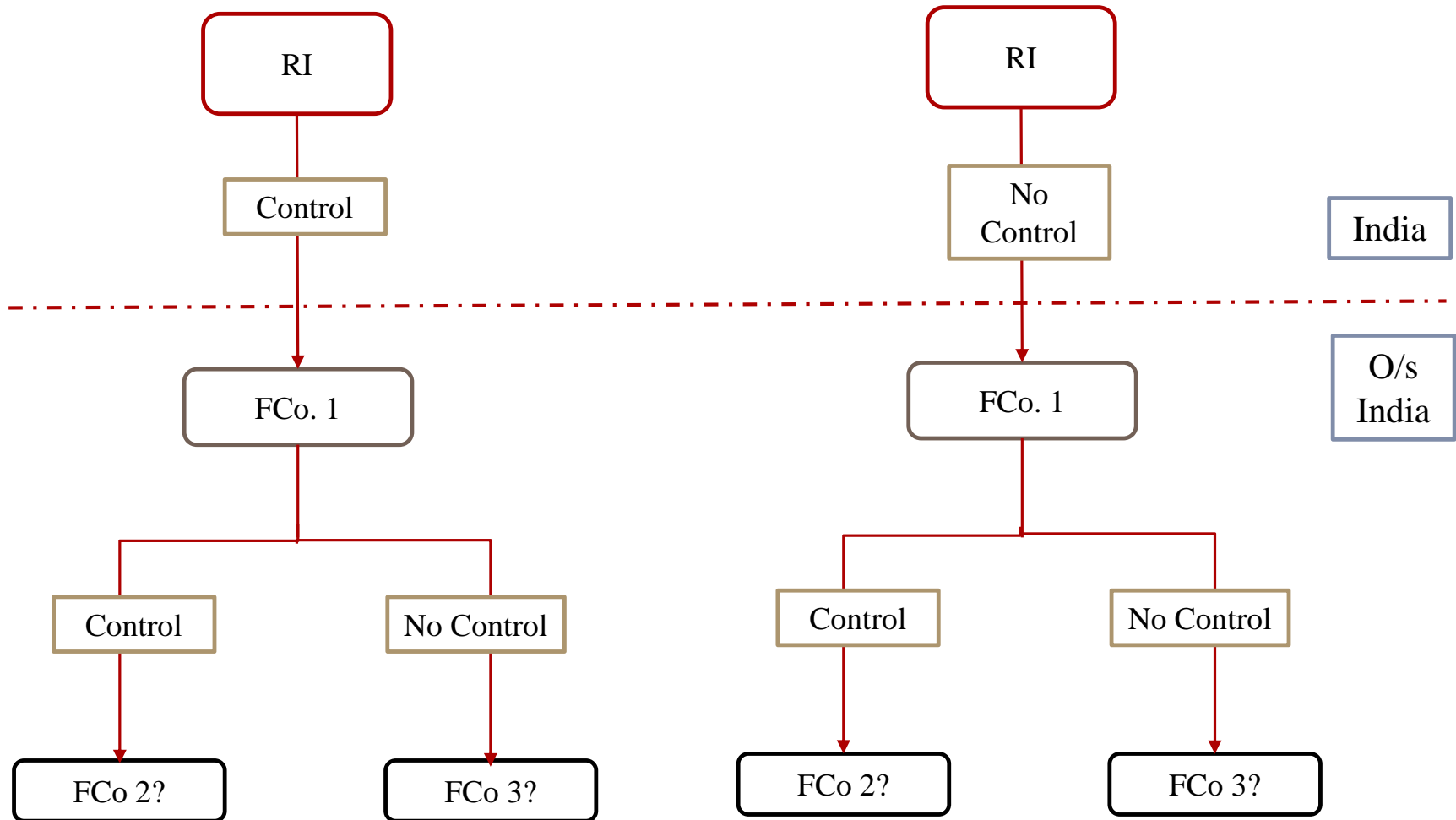
## Sch III – Overseas Investment by RI

- ❖ RI is permitted to make ODI or OPI subject to LRS limit in the following manner:
  - ODI in an operating foreign entity not engaged in FS activity and which does not have a subsidiary or step down subsidiary where RI has control in foreign entity. *‘Subsidiary’ or ‘step down subsidiary’ of a foreign entity means an entity in which the foreign entity has control;*
  - OPI including reinvestment;
  - ODI or OPI by way of:

Capitalization of any amount due within time period	Bonus shares or rights issue	Swap on account of merger/ demerger/ amalgamation/ liquidation	Gift
Inheritance	Sweat Equity Shares	Minimum Qualification Shares	ESOP Scheme

- ❖ ODI allowed if FE carries FS activity or has SDS in case of in red + blue mark.
- ❖ Holding < 10% shall be considered as OPI in case blue mark items.

# Sch III – Overseas Investment by RI



## Sch III – Overseas Investment by RI

### ❖ Acquisition by way of gift or inheritance:

Modes	Transferor	Transferee	Limits
Inheritance	PROI	PRI	Without any limits
Inheritance	PRI	PRI	Without any limits
Gift	PRI Relative	PRI	Without any limits
Gift	PROI	PRI	Without any limits

### ❖ Acquisition under ESOP Plan/ Scheme

Who can Receive	Limits
RI who is an employee/ director of the office in India or BO of an overseas company or Subco in India of an overseas entity or an Indian entity in which overseas entity has direct/ indirect equity	<ul style="list-style-type: none"> <li>• Acquisition without any limits</li> <li>• Remittance under LRS limit</li> </ul>

# Financial Commitment by IE – Other than equity

- ❖ The Indian entity **may lend or invest in any debt instrument** issued by a foreign entity or extend the non-fund-based commitment to or on behalf of a foreign entity including overseas SDS **within the financial commitment limit** subject to the following conditions:
  - Indian entity is **eligible to make ODI**;
  - Indian entity **has made ODI** in the foreign entity;
  - Indian entity **has acquired control** in the such foreign entity at the time of making such financial commitment.
- ❖ Lending and investing in debt instruments subject to the condition that such **loans are duly backed by a loan agreement where the rate of interest is charged at ALP.**
- ❖ Financial Commitment by way of guarantee as well as by way of pledge or charge permitted subject to the terms & conditions if any provided under the Overseas Investment Regulations issued by RBI.
- ❖ **In the new ODI Regulations, approval for issuance of corporate guarantees to or on behalf of 2<sup>nd</sup> or subsequent SDS has been dispensed with.**

# Financial Commitment - Guarantee

- ❖ Following guarantees may be issued to or on behalf of FE or any SDS in which IE has acquired control:
  - Corp/ Performance guarantee by IE;
  - Corp/ performance guarantee by a group company of such Indian entity in India, being a holding company or a subsidiary company or a promoter group company, which is a body corporate;
  - Personal guarantee by the RI promoter of such IE;
  - Bank guarantee, which is backed by a counter-guarantee or collateral by IE or its group company, and issued, by a bank in India.
- ❖ Guarantee extended by group Co – Utilisation of FC limit of such group co.
- ❖ Guarantee extended by RI– Utilisation of FC limit of IE
- ❖ No guarantee shall be open-ended
- ❖ Amount invoked - cease to be a part of the non-fund based commitment but be considered as lending
- ❖ Joint Guarantee – 100% amount towards individual limit; Perf. Guarantee – 50%
- ❖ Rollover of Guarantee – Not a fresh FC if amt does not exceed original guarantee
- ❖ Remittance towards invocation of guarantee – Not fresh FC.

## Financial Commitment - Pledge

Security by Indian entity	In whose favour	Facility availed	Amount reckoned towards financial commitment
A) Pledge the <b>equity capital of the foreign entity /its SDS</b> outside India.	AD bank or a public financial institution in India or an overseas lender.	Fund/non-fund based facilities for Indian entity.	NIL
		Fund/non-fund based facilities for any foreign entity/its SDSs outside India.	The value of the pledge or the amount of the facility, whichever is less.
	A debenture trustee registered with SEBI in India.	Fund based facilities for Indian entity.	NIL
B) Create charge on <b>its assets</b> (other than A above) <b>in India</b> [inc. assets of its group company or associate company, promoter and / or director].	AD bank or a public financial institution in India or an overseas lender.	Fund/non-fund based facility for any foreign entity/its SDS outside India	The value of charge or the amount of the facility, whichever is less
	Overseas or Indian lender.	fund/non-fund based facilities for Indian entity.	NIL

# Financial Commitment - Pledge

Security by Indian entity	In whose favour	Facility availed	Amount reckoned towards financial commitment
C) Create charge on <b>the assets outside India of the foreign entity/ its SDS</b> outside India.	An AD bank in India or a public financial institution in India.	Fund/non-fund based facility for any foreign entity/its SDS outside India.	The value of the charge or the amount of the facility, whichever is less.
		Fund/non-fund based facility for Indian entity.	NIL
	a debenture trustee registered with SEBI in India.	fund based facilities for Indian entity.	NIL

## Reinvestment - ODI?

Erstwhile Notification No. FEMA 120	New FEMA Rules
<ul style="list-style-type: none"> <li>All dues receivable from the foreign entity, like dividend, royalty, technical fees etc. – Repatriate within 60 days of its falling due.</li> <li>Sale Proceeds – Repatriate within 90 days for Indian party / 60 days for RI from the date of sale.</li> </ul>	<ul style="list-style-type: none"> <li>PRI shall realise &amp; repatriate within 90 days in the following cases:               <ul style="list-style-type: none"> <li>✓ all dues receivable with respect to investment in a such foreign entity;</li> <li>✓ consideration received on transfer/disinvestment;</li> <li>✓ realisable value of assets on account of liquidation.</li> </ul> </li> </ul>

## Reinvestment - LRS?

Erstwhile LRS Master Direction	Updated LRS Master Direction
<ul style="list-style-type: none"> <li>Investor who has remitted funds are LRS are permitted to retain, reinvest the income earned on investment and thus, not required to repatriate funds or income to India.</li> </ul>	<ul style="list-style-type: none"> <li>Income can be retained and reinvested. However, funds or income unless reinvested shall be repatriated and surrendered within a period of 180 days.</li> </ul>



# Obligation of PRI

- ❖ PRI is required to submit the **share certificate or any relevant document** as evidence of investment **within 6 months** from the date of effecting remittance/ date when dues are capitalized etc.
- ❖ PRI to **obtain a Unique Identification Number (UIN)** before sending outward remittance or acquisition of equity capital, whichever is earlier.
- ❖ PRI to **route all transactions** relating to a particular UIN through designated AD. Routing of transactions through the same AD even in a case where > 1 PRI makes the financial commitment.
- ❖ PRI shall **realise & repatriate within 90 days** in the following cases:
  - all dues **receivable with respect to investment in a such foreign entity**;
  - consideration received on **transfer/ disinvestment**;
  - relaisable value of assets on account of **liquidation**.
- ❖ PRI permitted to make remittance towards earnest money deposit or obtain bid bond guarantee for participation in bidding/ tender procedure.

# Reporting Requirement for OI

- ❖ PRI who has made **ODI needs to report** the same in Form FC in case:
  - At the time of **sending outward remittance or making a financial commitment, whichever is earlier;**
  - **Disinvestment** within 30 days of receipt of disinvestment proceeds;
  - **Restructuring** within 30 days of such restructuring.
- ❖ **PRI other than RI making OPI or transferring OPI** to report such investment. Transfer **within 60 days** from the **end of half-year**.
- ❖ In case of OPI by way of ESOP scheme – reporting by Indian counterpart.
- ❖ PRI making ODI required to submit Form APR by end of 31<sup>st</sup> December every year.
  - No reporting is required in cases where PRI is holding < 10% without control and there is no other financial commitment other than by way of equity.
  - Control + not mandatory audit in host country – even then APR based on audited FS
  - In case ODI by 1 or more PRI – the person holding the highest stake may file.
  - Details of set up/ acquisition/ winding up of SDS or alteration in SH pattern of the foreign entity to be reported in Form APR.
- ❖ **Indian entity** who has made ODI required to **submit Form FLA before 15<sup>th</sup> July of every year.**

# Delay in reporting

- ❖ **Delay post date of publication of these rules:** Submission can be made subject to payment of Late Submission Fees (LSF). However, the facility of payment of LSF can be availed within a period of 3 years from the due date of such submission.
- ❖ **Delay - Pre-date of publication of these rules:** Submission can be made subject to payment of Late Submission Fees (LSF). However, the facility of payment of LSF can be availed within a period of 3 years from the date of publication of these regulations in the Official Gazette i.e. 22<sup>nd</sup> August 2022.
- ❖ LSF mechanism/ calculation provided by RBI vide the directions issued in this regard.

## Restriction of Further Investment/ Transfer

- ❖ PRI who has made a financial commitment in a foreign entity **shall not be permitted** to make any further financial commitment, whether fund-based or non-fund-based, directly or indirectly **till any delay in reporting is regularized.**

# Late Submission Fees

- ❖ In case of delay in filing/submitting the requisite form/return/document - Pay the Late Submission Fee (LSF)
- ❖ The LSF for delay in reporting of overseas investment related transactions shall be calculated (per return) as per the following matrix:

Sr. No.	Type of Reporting delays	LSF Amount (INR)
1	Form ODI Part-II/ APR, FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting	7,500/-
2	Form ODI-Part I, Form ODI-Part III, Form FC, or any other return which captures flows or returns which capture reporting of non-fund based transactions or any other transactional reporting	$[7500 + (0.025\% \times A \times n)]$

- ✓ “n” is the number of years of delay in submission rounded-upwards to the nearest month and expressed up to 2 decimal points.
- ✓ “A” is the amount involved in the delayed reporting.
- ❖ Maximum LSF: 100% of amount involved
- ❖ LSF Payment within 30 days

# Opening of Foreign Currency Account Abroad for OI

- ❖ An **Indian party may open, hold, and maintain Foreign Currency Account** abroad for the purpose of making OI subject to:
  - **Eligible** for making OI;
  - **Host country regulations stipulate** that the investment into the country is required to be routed through a designated account;
  - Account will be opened, held & maintained as per the **regulation of the host country**;
  - Remittances sent to the account should be **utilized only for making OI**;
  - Any amount received in the account by way of **dividend/ other entitlements** from the subsidiary shall be repatriated to India within 30 days from the date of credit;
  - Indian party to submit the details of debits and credits in the account on yearly basis to the designated AD bank with a certificate from the **Statutory Auditors certifying** that the account was maintained as per the host country laws and the extant FEMA regulations/ provisions as applicable;
  - The account so opened shall be **closed immediately or within 30 days** from the date of disinvestment.

# Case Studies



# Case Study - I

**Facts:** Big Bull Inc., a company incorporated in the USA owns and operates the global investment platform that allows Indian HNIs to invest in stocks & ETFs listed in NASDAQ. Big Bull Inc. offers model portfolios on its platform, however, they don't advise on which models, stock, or ETFs HNIs should invest in. Big Bull Inc. will charge a platform fee to its customers. Further, Big Bull Inc. has incorporated a company in India to provide marketing services. Roar Enterprise Limited, an Indian company is in talks to acquire 25% of the share capital of Big Bull Inc.



**Question:** Whether Roar Enterprise Limited is permitted to acquire shares of Big Bull Inc. under FEMA?

## Case Study - II

**Facts:** Mr. Intelligent Investor, a resident of India who is a follower of Mr. Warren Buffet's investing principles had made portfolio investments into the listed US stocks under LRS of RBI during the year 2015. However, since the financial results of some of the stocks were consistently poor on account of corporate governance issues and thus, Mr. Intelligent Investor sold a few of the stocks as under:

- Sale of A company's shares during the month of January 2022;
- Sale of B company's part shares during the month of July 2022.

Further, he is intending to sell balance shares of company B during the first week of September 2023. Moreover, Mr. Intelligent Investor has not utilized the sale proceeds of company A & B's shares till now since he is unable to find investment opportunities owing to the recession and business slowdown talks in the US.



**Question:** Is there any FEMA violation considering the above fact pattern?



## Case Study - III

**Facts:** Esports Gaming Ltd, a company incorporated in Singapore is engaged in the business activity of Esports such as BGMI, Free Fire, Valorant, Counter Strike, FIFA, etc. Under this business model, Esports Gaming Ltd buys out players from different parts of the world and forms a team that will contest in global multi Esports events. Apart from receiving a monthly salary, players also receive a split in ad revenue, prize money, etc in the agreed %. Gamer Limited, an Indian company intends to acquire 35% of Esports Gaming Ltd. since the founders are esports enthusiasts and also because the Olympic Esports Series event is to be held soon.



**Question:** Whether Gamer Limited is permitted to acquire shares of Esports Gaming Ltd under FEMA?

## Case Study - IV

**Facts:** Mr. Bond, a resident Indian is of the view that the interest rates will fall in the near future which will result in an increase in the prices of bonds. With this investment philosophy, he already invests into bonds of HUDCO, REC, NTPC, SBI that are listed in India. Now he wants to invest abroad with this same philosophy. He plans to take exposure in overseas listed bonds as follows: ;

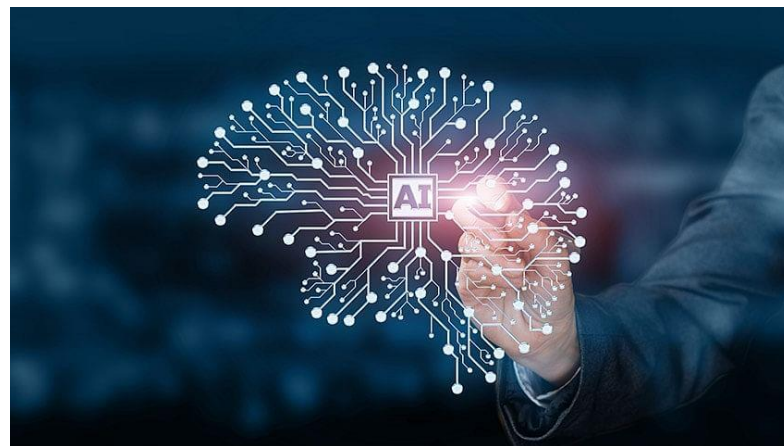
- Bonds issued by Vedanta Resources Finance II PLC, SBI (London Branch), Bank of Baroda (London Branch) listed outside India
- Investments in the listed overseas funds which will in turn invest in above overseas bonds
- Investments in overseas funds (not listed) which will in turn invest in above overseas bonds



**Question:** Whether Mr. Bond is permitted to invest in above capital assets?

## Case Study - V

**Facts:** AI Technology Inc., a company incorporated in the USA is engaged in the new-age technology business of Artificial Intelligence, Machine Learning, etc. It is being claimed as the probable rival of OpenAI's ChatGPT. Algorithms Private Limited, an Indian company engaged in similar kinds of businesses is contemplating investing in an instrument of AI Technology Inc. which gives them the right to acquire shares of AI Technology Inc. in the future. In this arrangement, if there is any equity financing round, the instrument will be automatically converted into shares of AI Technology Inc. However, in case of any liquidity event such as a change of control or IPO, Algorithms Private Limited will receive the cash-out amount and the instrument will stand cancelled.



**Question:** Whether Algorithms Private Limited is permitted to invest in such an instrument issued by AI Technology Inc.?

## Case Study – VI

**Facts:** Mr. A is engaged in the business activity of manufacturing of food & dairy products in India through its Indian company. Indian company of Mr. A makes almost all its export sales to the Gulf region. Now, Mr. A in his individual capacity plans to open an onshore distribution company in Dubai. MOA of onshore LLC would provide for sharing of profits between the shareholders on 80:20 basis with 80% profits attributed to Mr. A. However, the capital contribution would be 49:51% with 49% being that of Mr. A.



**Question:** Is the formation of such an overseas company permitted under FEMA?

# Thank you



## Contact Information



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