# FDI / ODI, An Expert Analysis

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# Inbound Investments FEMA Provisions

# Presentation Outline

- **Basic Framework**
- **Schedule I: FDI Scheme**
- **Schedule 2: FII Scheme under PIS**
- **Schedule 3: Portfolio Investment Scheme for NRI**
- **Schedule 4: Investment Scheme for NRI (Non-repatriable)**
- **Schedule 5: Investment Scheme for securities other than shares / convertible debentures**
- **Schedule 6: Investment Scheme for Foreign Venture Capital Investors**
- **Schedule 7 : Indian Depository Receipts**
- **Schedule 8 : Investment by Qualified Foreign Investors**

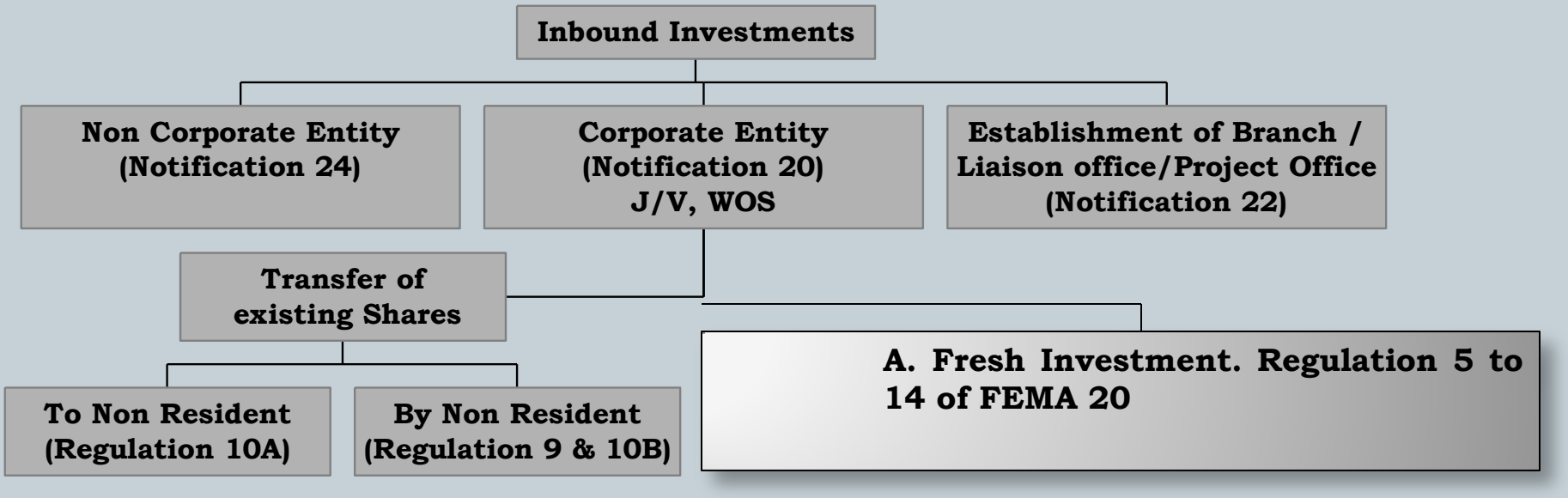
# Basic Framework

# Basic Framework …

- Under FEMA:- Golden Rule for transaction under two categories –
  - Current Account Transactions
  - Capital Account Transactions

- Inbound & Outbound investments are Capital Account Transactions

  - Notification No. 1 'FEM Permissible Capital Account Transactions Regulations, 2000' divides these transactions in two parts-
  - **Schedule I -** Capital account transactions by a person resident in India
    - Outbound Investments – Notification No. 120
    - Establishment of Branch/ LO/ Project Office Outside Indian – Notification No.22
  - **Schedule II** - Capital account transactions by person resident outside India
    - Inbound Investments
      - Investment in Corporate entities – Notification No. 20
      - Investment in Non Corporate entities – Notification No. 24




# Overview of Inbound Investments

# Schedule 1

## Foreign Direct Investment Scheme

# FDI Scheme…

- Strategic Investments through JV/WOS
- Capital
  - Equity, Mandatorily and Fully Convertible Preference Shares/Debentures
    - New subscription/ transfer of existing instruments
  - For CCPS and CCD Pricing policy to be determined upfront
  - Rate of dividend on Preference shares can not exceed 300 basis points over SBI PLR
- Issue Price
  - Listed company – SEBI guidelines
  - Unlisted company – As per Discounted Cash Flow Method [DCFM]
- Shares / convertible debentures can not be issued to acquire existing shares of an Indian company
- Mode of payment
  - Inward remittance / Debit to NRE / FCNR Account`/ Capitalization of lump sum fee, royalty and ECBs (other than import dues deemed as ECB or Trade Credit)

# FDI Scheme – Two Routes & Compliance Requirements

## FDI in India

### Automatic Route

*General rule*

- Inform RBI within 30 days of inflow in Annexure prescribed
- Issue shares within 180 days of inward remittance and file FC-GPR within 30 days of allotment
- Pricing: FEMA Regulations
  - Unlisted – DCFM Valuation Method
  - Listed – SEBI approved Method

### Prior Permission

*By exception*

- Approval of Foreign Investment Promotion Board (FIPB) needed.
- Subsequent procedures are same as under Automatic route

# FDI Scheme – Prohibited Activities

- Retail Trading (except single branded product retailing)
- Lottery Business
- Gambling and Betting
- Housing and Real Estate business (other than **in townships, housing, built-up infrastructure and construction-development projects**)
- Agriculture (excluding Floriculture, Horticulture, Development of seeds, Animal Husbandry, Pisiculture and Cultivation of vegetables, mushrooms etc. **under controlled conditions** and services related to agro and allied sectors) and Plantations (Other than Tea plantations)
- Business of Chit Fund and Nidhi company
- Manufacturing of cigars, cheroots, cigarillos and cigarettes of tobacco or tobacco substitutes
- Activities/ sectors not opened to private sector investment including **Atomic Energy** and **Railway Transport** (other than Mass Rapid Transport Systems)

# FDI Scheme – Automatic Route

- FDI in a company having Micro, Small or Medium Enterprise (MSME) unit -
  - To be in accordance with S. 11 of MSME Development Act, 2006
  - Requires Industrial License – which is issued subject to few general conditions and specific condition to export minimum of 50% of the new / additional production which is to be achieved within a maximum period of three years
- 24% Cap under Automatic Route
  - Exceptions -
    - MSE status is given up
    - Indian company is not engaged in manufacture of items reserved for MSEs

# FDI Scheme – Automatic Route is not available

- All Activities/ Sectors requiring prior approval of the Government of India e.g.-
  - Petroleum Sector (except for private sector Oil Refining, Natural Gas/LNG Pipelines)
  - Investing companies in Infrastructure & Services Sector
  - Defense and Strategic Industries
  - Atomic Minerals
  - Print Media
  - Broadcasting
  - Postal services
  - Courier Services
  - Establishment and Operation of satellite
  - Tea Sector
  - Asset Reconstruction Companies (ARCs)
  - Commodity Exchanges
  - Credit Information Companies
  - Infrastructure Companies in Securities Market
  - Security Agencies in Private sector
- Where more than 24 per cent foreign equity is proposed to be inducted for manufacture of items reserved for the Micro Small or Medium Enterprises.

# FDI Scheme – Government Approval Route…

- Application to be made to FIPB for any investment which does not qualify for automatic route
- Approval levels –
  - Recommendation of FIPB up to foreign equity inflow of Rs. 1,200 Cr - Minister of Finance
  - Recommendation of FIPB up to foreign equity inflow beyond Rs. 1,200 Cr - CCEA
  - CCEA would also consider any other proposals referred to it by FIPB/ Minister of Finance (in-charge of FIPB)

# Some Specific Sectors

# FDI in Real Estate Development…

- **General Prohibitions**
  - Citizens of Pakistan or Entities incorporated in Pakistan
  - Citizens of Bangladesh or Entities incorporated in Bangladesh require prior approval

- **Activities Prohibited**
  - Real Estate Business
  - Construction of Farm Houses
  - Trading in Transferable Development Rights (TDRs)

# …FDI in Real Estate Development…

- 100% FDI permitted in Township, Housing, Built-Up Infrastructure and Construction Development Projects

- Mandatory Guidelines
  - Minimum Area
    - Development of Serviced Housing Plots- Minimum of 10 Hectares of Land
    - Construction-Development Projects- Minimum built-up Area of 50,000 sq. mts.
    - In case of combination projects, any one of the above condition would suffice
  - Minimum Capitalization
    - For WOS ➔ up to US $ 10 mn.
    - For JV in India ➔ up to US $ 5 mn.
  - Funds would have to be brought in within 6 Months of the commencement of the business
  - At least **50% of the project** must be developed within a period of **5 years from the date of obtaining statutory clearance**

# …FDI in Real Estate Development…

- **Repatriation / Exit Policy**
  - **Original Investment** can not be repatriated before **3 years** from completion of the minimum capitalization
  - **Earlier exit** permitted with **approval from FIPB**
  - Investor will not be allowed to sell **undeveloped plots**
    - **"Undeveloped plots"** will mean where roads, water supply, street lighting, drainage, sewerage, and other conveniences, as applicable under the prescribed regulations, have not been made available
  - Investor is required to provide above infrastructure and obtain completion certificate from the concerned local body/service agency before he is allowed to dispose of serviced housing plots.

# FDI in Real Estate Development - Issues

- Whether FDI can be made in a company which has Compliant and Non-Compliant Projects, provided FDI is used for Compliant Projects commencing post FDI coming into the company?

- Whether it is only the minimum capitalization of $10 million or $5 million as the case may be, that is locked in for three years?

- Whether there should be no restriction on the transfer of shares made by one non resident to another even if the transfer is before the expiry of three years from the minimum capitalization?

# FDI in Real Estate Development - Issues

- Whether the 50,000 square meter minimum built up area criteria would include basements, terraces, etc. not taken into consideration for the purposes of floor area ratio and FSI calculation?

- Whether FDI can be used for Compliant Projects at the advanced stage of development, say when 40-50% work is completed?

- Whether it is possible to lease the property instead of sale by the FDI Compliant Company?

# Construction sector for NRIs

- **100% investment permitted under Automatic Route in following:**
  - Township, Housing, Built up infrastructure, Construction and development projects
  - Development of serviced plots
  - Commercial premises including business centers and offices
  - Development of townships
  - City and regional level urban infrastructure facilities, including both roads and bridges
  - **Investment in manufacture of building materials**
  - **Investment in participatory ventures in (a) to (e) above**
  - **Investment in housing finance institutions which is also opened to FDI as NBFC.**
- No restriction on the size of plot/ constructed area
- No stipulation for minimum capitalization or lock in

# FDI In Trading Activities in India

- Investments in a Trading Company under Automatic Route
  - Wholesale / Cash and Carry Trading
    - WT to group companies **<u>not to exceed 25% of total turnover</u>**
    - Full records such as name & kind of the entity, registration details, amount of sale, etc. should be maintained
  - Trading for Exports
  - Power Trading
  - B2B E-commerce activities
- Investments in a Trading Company under FIPB Route
  - Items sourced from MSE Sector
  - Test Marketing of items for which company has approval for manufacture
  - Single Brand product trading up to 100%
  - Multi Brand Retail trading up to 51%

# NBFC Sector – 18 Specified Activities

- Following activities can only be undertaken by RBI registered Non Banking Finance Companies-
  - Merchant banking
  - Underwriting
  - Portfolio Management Services
  - Investment Advisory Services
  - Financial Consultancy
  - Stock Broking
  - Asset Management
  - Venture Capital
  - Custodial Services
  - Factoring
  - Credit Rating Agencies / Credit Information Companies
  - Leasing & Finance
  - Housing Finance
  - Fore Broking
  - Credit Card business
  - Money changing business
  - Micro credit
  - Rural credit.
  - Commodity Exchanges

# NBFC Sector

| Minimum Capitalization Norms | |
|---|---|
| **Fund based NBFC** | **Non-Fund based NBFC** |
| FDI up to 51% - US$ 0.5 million to be brought in upfront.<br><br>FDI above 51% to 75% - US$ 5 million to be brought in upfront.<br><br>FDI above 75% to 100% - US$ 50 million, of which US$ 7.5 million to be brought in upfront and balance in 24 months. | Minimum US$ 0.5 million |

# Down Stream Investment

- Ownership and Control
- Owned by Resident Indian Citizen
- Owned by Non Resident
- Calculation of Direct Foreign Investment
- Calculation of InDirect Foreign Investment

# Policy on Downstream Investments

- **Guidelines for calculation of total foreign investment, i.e., direct and indirect foreign investment in an Indian company.**
- (i) Counting of Direct foreign investment:
- (ii) Counting of indirect foreign Investment:
- It is clarified that these guidelines will not apply to sectors/activities where there are no foreign investment caps, that is, where100% foreign investment is permitted under the automatic route.

# Policy on Downstream Investments

**Conditions for Downstream investments:**

- For computation of indirect foreign investment all types of direct foreign investments in the Indian company making downstream investment. :-FIIs, NRIs or QFIs , Foreign Venture Capital investment, investments in ADRs/GDRs, Foreign Currency Convertible Bonds (FCCB) will also be taken in account. Thus, regardless of the investments having been made under Schedule 1, 2, 3, 6 and 8 of the Notification No.FEMA. 20/2000-RB dated May 3, 2000, as amended from time to time will be taken into account.

- Notify SIA, DIPP and FIPB of its downstream investment within 30 days of such investment even if equity shares/CCPS/CCD have not been allotted along with the modality of investment in new/existing ventures (with/without expansion programme);

- Downstream investment in an existing Indian Company to be duly supported by a resolution of the Board of Directors and Shareholders Agreement, if any;

- Issue/transfer/pricing/valuation of shares shall be in accordance with applicable SEBI/RBI guidelines;

# Calculation of total Foreign Investment

***Company B making downstream investment in company A:***

***Scenario 1:***

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

***Scenario 2:***

**where Company B has foreign investment of say 75% and:**

**a.** Invests 26% in Company A, the entire 26% investment by Company B would be treated as indirect foreign investment in Company A;

***Scenario 3:***

**b**. Invests 80% in Company A, the indirect foreign investment in Company A would be taken as 80%

***Though, the indirect foreign holding in company A would be taken as 80%, the foreign Company actually controls equivalent to only 60% (75% of 80%) of the capital of Company A.***

# Calculation of total Foreign Investment

***Company B making downstream investment in company A – contd.***

***Scenario 4:***

**c**. where Company A is a wholly owned subsidiary of Company B, then only 75% (75% of 100%) would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity.

The indirect foreign equity in Company A would be computed in the ratio of 75: 25 in the total investment of Company B in Company A.

***Logic - Investment in company A is a mirror image of FDI in company B***

# Schedule 2

## FII Scheme

# FII Scheme…

- On repatriable basis
- Applicable to FIIs registered with SEBI
- Investments in shares / convertible debentures through stock exchange / public offer or private placement
  - Subject to pricing restrictions in case of private placement
- Investment from inward remittance or from accounts maintained in India
- “Deemed FIIs”
  - Domestic AMC / Portfolio Manager registered as FII
    - Practically, not permitted by SEBI

# FII Scheme

- Overall cap of 24% in a company
  - Can be increased to sectoral cap by the company
  - Cap of 10% in a company, per FII/Sub-account

  - A Registered FII may open a FCY Account or Special NRRA

# Schedule 3

## Portfolio Investment Scheme for NRIs For purchase/ sale through Stock Exchanges

# Portfolio Investment by NRI

- Scheme on both repatriable / non repatriable basis
- Investment in Equity / Perpetual Debt Instruments of Banks
- Investment in Equity only through stock exchanges
  - Mutual Funds / IPO not covered
- Through a designated branch of an AD duly approved by RBI
- Non-delivery based transaction is not allowed
- Cap on Investment
  - 5% per NRI
  - 10% NRI investment, per company
    - Can be increased to 24% by the company
- Inward remittance or through NRE / FCNR/ NRO account

# Schedule 4

## Investment in Shares/ Convertible Debentures by NRIs (Non-repatriable)

# Investment by NRI

- Scheme on non-repatriable basis
- Investment in chit fund, nidhi company, agricultural / plantation activities, real estate, construction of farm houses or dealing in TDRs not permitted
- Investment without any limit
- No Reporting to RBI
- No DCF to be worked out
- No yearly reporting
- Transfers not be reported

# Schedule 5

## Investment Scheme for Securities other than shares/ convertible debentures

# Investment other than in shares / convertible debentures…

| Eligible Investors | Eligible Investments | Remarks |
|---|---|---|
| Registered FIIs | ➢ government securities<br>➢ treasury bills<br>➢ listed non-convertible debentures/bonds<br>➢ commercial papers<br>➢ units of domestic mutual funds | Investments are on repatriation basis |
| NRI | ➢ government securities (other than bearer securities)<br>➢ treasury bills<br>➢ units of domestic mutual funds<br>➢ bonds issued by PSUs<br>➢ shares in PSUs being disinvested by the Government of India | Investments are on repatriation basis |

# …Investment other than in shares / convertible debentures

| Eligible Investors | Eligible Investments | Remarks |
|---|---|---|
| NRI | ➢ Government securities (other than bearer securities)<br>➢ Treasury bills<br>➢ Units of Money Market Mutual Funds<br>➢ National Plan / Savings Certificates | Investments are on non-repatriable basis |
| Multilateral Development Bank | ➢ Government securities (The Multilateral Development Bank should have been specifically permitted by the Government of India to float rupee bonds in India) | Prior approval of RBI for repatriation |

# Schedule 6

## Investment Scheme for Foreign Venture Capital Investor

# Investment Scheme for FVCI

- FVCI to be registered with SEBI
- Permissible investments:
  - Equity / Equity linked instruments, Debt / Debt instruments, Debentures of an Indian VCU or VCF
  - Through IPO, Private placements, Units of the Fund set up by a VCF
- Inward remittance / Foreign Currency Account / Rupee Account
- FVCI permitted to take forward cover to hedge inward remittance
- Investments at price that is mutually acceptable to buyer and seller

# General Provisions

# General Provisions…

- FII can trade in exchange traded derivative contracts
- NRI can invest in exchange traded derivative contracts
  - Only through rupee funds held in India and on non-repatriation basis
- Acquisition of right shares / convertible debentures and bonus shares permitted – subject to Sectoral caps
- Issue / acquisition of shares in a merger / demerger or any other kind of reconstruction of an Indian company – subject to Sectoral caps
- Issue of shares under ESOPS permissible
  - Trust vehicle can be used
  - Non-resident employees of JV / wholly owned subsidiaries abroad are also covered
- OCBs derecognized from September 16, 2003
- Transfer from NRI to NR requires prior approval of RBI

# Transfer of shares

| Regulation | Transfer | | Mode of Transfer | Remarks |
|---|---|---|---|---|
| | BY | TO | | |
| 9(2)(i) | Non-Resident (Not being a NRI or OCB) | Non-Resident | Sale or Gift | Freely Permissible |
| 9(2)(ii) | NRI + OCB? | NRI | Sale or Gift | |
| 9(2)(iii)(a) | Non-Resident | Resident | Gift | Freely Permissible |
| 10(B)(2) | Non-Resident | Resident | Sale | RBI Circular No. 16 dated October 4, 2004 |
| 9(2)(iii)(b) | Non-Resident | Non-Resident / Resident | Through a recognised Stock Exchange | Freely Permissible |
| 10(A)(a) | Resident | Non-Resident (not being OCB) | Gift | Prior Approval of the RBI required |
| 10(B)(b) | Resident | Non-Resident (not being OCB) | Sale | RBI Circular No. 16 dated October 4, 2004 |

# Pledge of Shares

- Pledge by promoter is possible for raising ECB
- Non Resident Investor can pledge shares of an Indian Company to a bank in India
- Non Resident Investor can pledge shares of an Indian Company to a bank outside India

# Investment in Firm or Proprietary Concern

# Investment in Firms or Proprietary Concern

- Permissible only for NRIs/PIOs
  - PIO not to include citizens of Bangladesh, Pakistan or Sri Lanka
- Restricted Activities
  - Print Media, Agricultural/ Plantation & Dealing in land and immovable property
- Capital invested is not repatriable unless approved by SIA/RBI
  - Window under US $ 1 M can be useful
- Profit/Income freely repatriated

# Branch/Liaison Office Or Project Office

# Establishment Branch or Liaison offices (Notification No 22)…

- **Branch or liaison Office - Prior RBI approval required- Application in Form FNC 1**

- **Permitted activities for a branch in India of a Non Resident**
  - Export/Import of goods.
  - Rendering professional or consultancy services.
  - Carrying out research work, in which the parent company is engaged.
  - Promotional technical or financial collaborations between Indian companies and parent or overseas group company.
  - Representing the parent company in India and acting as buying/selling agent in India.
  - Rendering services in IT and development of software in India.
  - Rendering technical support to the products supplied by parent/group companies.
  - Foreign airline/shipping company.

# Permission / No Permission

- No Permission for Branch
  - Branch / Unit in SEZ
  - Prohibition for Companies from neighboring Countries
  - LO cannot purchase immoveable properties for office work

# ...Establishment Branch or Liaison office (Notification No 22)...

## Permitted activities for a Liaison office in India of a Non resident

- Representing in India the parent company/group company.
- Promoting export import from/to India.
- Promoting technical/financial collaborations between parent/ group companies and companies in India.
- Acting as a communication channel between the parent company and Indian company.

## Remittance of profit of a branch:

- Request to be accompanied by
  - Certified copy of the audited balance sheet and profit and loss account
  - CA's Certificate certifying:
    - The manner of arriving at the remittable profit
    - That the entire remittable profit has been earned from permitted activities, and
    - That the profit does not include any profit on revaluation of the asset of the branch

# …Establishment Branch or Liaison office (Notification No 22)

- **Project Office – No approval required**
- **Conditions**
  - FC must have secured a contract for a project in India, and
  - The project is funded by inward remittance or bilateral or multilateral International Financing Agency; or
  - Company or entity in India awarding the contract has been granted term loan by a PFI/ Bank in India
  - The project is cleared by an appropriate authority.
- **Remittance of surplus on completion of project**
  - Certified copy of the final audited project account
  - CA's certificate - manner of arriving at the remittable surplus
  - Copy of IT assessment order/documentary evidence for payment of income tax and other applicable taxes, or a CA's certificate stating that sufficient funds have been set aside for meeting all Indian tax liabilities
  - Auditor's certificate - no statutory liabilities of the project are outstanding

# Outbound Investments FEMA Provisions

# Outbound Investments- Presentation Outline

- **Introduction**
- **Direct Investments**
  - By Corporate/Body Corporate/Partnerships- Part-I
  - By Individuals – Part-II
- **Portfolio Investments**
  - By Corporate/Body Corporate/Partnerships/ Individuals- Part-III
- **Other modes of Investment**
  - Investment under US $ 75,000 Scheme
  - Branch Outside India
- **General Provisions**

# Introduction…

**Recent scenario**

- Result of pragmatic RBI policy
- Indian corporate on the hunt for overseas acquisition. Era of Indian Multinationals
- Virtual full convertibility?

**Key driving factors**

- Overseas expansion
- Overseas listing
- Spreading of Risk

# …Introduction

- Relevant Notification - No. 120 titled "Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004."

- Restrictions on Acquisition & Transfer- Reg 3

- General Permission – Regulation 4
  - (a) Purchase out of funds held in RFC account.
  - (b) Bonus shares on the foreign securities held in accordance with FEMA
  - (c) Out of foreign currency resources held outside India- applicable only to persons not permanently resident in India.
  - (d) Sell the foreign security purchased or acquired under clauses (a), (b) or (c).

# Direct Investments Part-I

# Automatic / Approval

- ODI up to 100% of Net Worth (*previously 400%*)
- Approach AD in Form ODI
  - Not on Caution / ED / CIBIL/ Defaulter List
  - Route all transactions through One Branch of AD
- Comply with R. 7 in case of ODI in FSS
- If conditions not satisfied
- Mandatory for ODI by :
  - Sole Prop. / URF
  - Trusts / Societies
- Apply to RBI in Form ODI
- Factors considered
  - Viability of JV/ WOS
  - External Trade Contribution
  - Track record of Parties
  - Experience & Expertise of Indian Party in that line

# Important Terms…

## Direct investment outside India

- **Investment by way of**
  - Contribution to capital or subscription to the Memorandum
  - Market purchase or private placement or through SE
    - **But excludes portfolio investments**.

## Indian Party

- A company / Body Corporate / Registered Partnership
- Any other entity in India notified by RBI.
  - Subject to prior approval - Unregistered Partnerships / Proprietorship firms engaged in Exports & holding status of Star Export House and Registered with DGFT - subject to fulfillment of prescribed conditions (AP Dir Circular No. 29 dated 29.03.2006)
- If more than one entities making direct investment - all together to constitute "Indian party"

| Entity | Auto Route | Approval Route | No Provision |
|---|---|---|---|
| Company – Listed / Unlisted | ✓ | | |
| Reg. Partnership Firm | ✓ | | |
| Individuals | ✓ | | |
| Sole Proprietory | ✓ | ✓ | |
| Trust / Society | | ✓ | |
| LLP | | | ? |
| AOP | | | ? |
| HUF | | | ? |

# Important Terms

## Financial Commitment Outside India

- Direct Investment in to Equity + Loan + 100% of the amount of guarantees issued to or on behalf of JV/WOS.
  - Investment in Equity capital is must if funding through debt is involved
  - No minimum percentage for equity investment
  - Investment in preference shares possible.
  - No method of valuation prescribed

# Mode of Funding Direct Investment…

- Drawal of Foreign
- Capitalization of Exports (unrealized exports beyond prescribed period requires prior approval of Reserve Bank)
- Guarantees (100% of the value to be considered - guarantee not to be open ended)
- Share Swaps
  - Would require FIPB approval for Inbound Leg of the Investment and Valuation is to be done by Merchant Banker

- Proceeds of ADRs/ GDRs
  - ADR/GDR stock swap subject to valuation norms and sectoral cap
- Resources raised through ECB
  - Should be in conformity with the parameters of the guidelines.
- Utilization of FCCB proceeds

# Other Conditions for Direct Investment

- Financial Commitment as on last audited balance sheet not to exceed 100% of the 'Net Worth'
  - Exception:
    - Balance in EEFC account
    - Investment out of proceeds of ADR / GDR issue

  Now Guarantees issued by banks are also included

- Net Worth of holding / 51% Subsidiary may be clubbed subject to certain conditions
    - Net Worth as on last audited balance sheet

- Investment in Real estate or banking business is prohibited.
- Investment in Nepal only in INR. Optional for Bhutan.
- Investment in Pakistan only with RBI approval

# Other Conditions for Direct Investment

- Indian Party is not under
  - Exporters caution list
  - List of defaulters to banking system circulated by RBI
  - Investigation by ED/regulatory or other body
- Transactions to be routed through only one Branch of an AD.
- To Submit Form ODI through AD
- To Submit APR – ODI Part III every year within 3 months from the prescribed date.

- ODI by Partnership Firm
  - Partners can hold investments in their name
  - Funding from Firm

# Procedures for Direct Investment

- **File form ODI through designated AD**
  - Enclosures
    - Board Resolution + Last three years' financial statements along with Net worth CA certificate

- **Unique Identification Number**
  - Issued by RBI to each JV/WOS
  - Second and further remittances only after allotment of UIN
  - UIN should be quoted in all future communications and reports
  - It is automatically generated once bank does online filing

- **Valuations**
  - where Investment is **more than US $ 5 (five) Million** or is by way of **Share swap -** by Category I Merchant Banker registered with

  - In all other cases by a Chartered Accountant or a Certified Public Accountant.

# Other Strategic Direct Investments

- Other than JV/WOS route in equity or rated debt instruments
- Conditions:-
  - Overseas Company is listed on a recognized Stock exchange.
- Persons eligible-
  - Listed Indian Companies
    - Up to 50% of their Net worth as on last date of the audited balance sheet
  - Mutual Funds registered in India.
    - Up to the ceiling stipulated by SEBI - Overall ceiling US$ 7 Billion

# Direct Investments in Financial Service Sector…

- Subject to fulfillment of Investment limits & Conditions of Part-I.
- Both Investor/Investee should be in Financial Services Activities.
- Earned Net profit during preceding three financial years from the financial activities.
- Registered with appropriate regulatory authority in India.
- Obtained prior approvals from the concerned regulatory authorities - both in India & abroad for the venture.

Note: Financial Services not defined.

# Direct Investments in Financial Service Sector

- Has fulfilled prudential norms relating to capital adequacy.
  - AP Dir. Circular No. 6 dated 6.09.2006
- Trading/JVS in Commodities Exchanges Overseas reckoned as investment in Financial Services Activities.
- Companies in Financial Service Activities in India and making Investment in Non-financial activities abroad to comply with prudential norms of this regulation.
- Unregulated entities in financial services activities may invest in non-financial sector overseas subject to fulfillment of conditions of Part-I only.

# Acquisition of shares by ADR/ GDR Swaps

- Eligibility
  - Indian Party has already issued ADRs/GDRs which are listed overseas.
  - Investment up to 10 times export earnings of the proceeding financial year.
  - Issue is backed by issue of fresh underlying shares.
  - NR holding to be within the Sectoral Caps.
- Valuation
  - If not listed
    - As recommended by the Investment Bankers.
  - If listed
    - Monthly average of the prices on any SE for past three months proceeding the month of acquisition.
- Form ODG within 30 days of issue

# Other Modes of Direct Investments

- **Investment by way of Capitalization of Dues**
  - Dues on accounts of Export of goods, plant & machinery, royalty, services, etc.
    - Software exporters may receive 25% of export value by way of shares of an overseas startup company without entering in to JV subject to prior RBI approval.

- **Export of goods towards equity**
    - GR / SOFTEX / SDF shall be super scribed as "Export against equity participation in JV / WOS abroad"

- **Acquisition through bidding or tender procedure**
  - Remittance of EMD/subsequent payment- If eligible in Part-I – automatic route

# Transfer of Shares

- **Automatic Route**
  - Transferred to another Indian Party who is eligible to invest
  - JV/WOS is listed on the overseas exchange
  - Indian Promoter is listed and has a net worth of not < 100 Crore
  - Indian promoter is unlisted company and the investment is not more than USD 10 Million

# Transfer of Shares

- **…Automatic route**

- The above disinvestment is subject to following conditions:
  - The disinvestment doesn't result in write off of the investment
  - The sale is effected through a stock exchange where the shares are listed.
  - If not listed, the price is not less than the value certified by a CA or CPA as fair value based on the latest audited financial statements.
  - No outstanding dues from JV/WOS
  - IP is not under Investigation by CBI/ED/SEBI/IRDA etc.
  - Overseas entity is in operation at least for one full year and the APR is submitted to the RBI.
  - Sale proceeds are repatriated immediately and in any case not later than 90 days from date of sale
  - The Indian party submits details of the disinvestment through the designated AD within 30 days of the disinvestment.

- All other cases prior approval from the RBI is required

# Transfer of Shares

- Report to RBI should indicate-
  - Identification No.
  - Name of the Indian company.
  - Name of the country and amount of investment approved.
  - Amount of disinvestment.
  - Date of repatriation of the disinvestment proceeds.
  - Certificate that all documents as above have been obtained.

# Direct Investments – Obligations

- Submit evidence of investment within 6 months from the date of remittance/ capitalization.

- Repatriate all dues within 60 days
  - Dividend, Royalty, Technical Fees etc

- Submit APR
  - Within 30 days from the Statutory Time Limit of Finalization of Audits as per the local laws of the host country.

# Investments abroad by Individuals Part-II

# Investments by Individuals

- Proprietary Concern
  - Prior permission- Form ODI
  - Purpose -acceptance of shares of a company outside India in lieu of professional services.
  - Value of shares accepted not to exceed 50% of the fees receivable from that Company.
  - Indian shareholding by virtue of shares so accepted not to exceed 10 %.
- For Individuals
  - Prior permission. Automatic upto 75000USD
  - Purpose- consideration for professional services.
  - RBI to consider:-
    - Credentials/net worth/nature of profession
    - Fore earnings/Balances in EEFC/RFC Accounts
    - Financial & Business Track Record of IP
    - Potentials for fore inflow
    - Other benefits

# Investment under US $ 75,000 Scheme

- Notified vide Notification No. 110 Dated 5th February, 2004
- Facility is available only to the resident Individuals.
- For permissible capital or current account transactions
- Facility allows to acquire/ hold immovable properties, shares and other assets without RBI approval. Banned post 14/8/2103
- Allows to open, maintain and operate Foreign Currency accounts outside India
- Facility is in addition to other facility like foreign travel, gift, donations, etc.
- Facility is not available for Current Account - Schedule-I transactions or for remittances to Nepal, Bhutan, Pakistan or Mauritius or countries identified by FATF as "non co-operative countries and territories"

# Regulation 20A… Investment by Individual

- Res. Ind. - JV/WOS under LRS (5 Aug 2013)
  - Invst. out of EEFC & RFC also restricted to $75000
  - Res. Ind. can invest alone or with another Res. Ind. or with an 'Indian Party'
    - If 4 Ind. from a Family then limit $75,000 * 4?
  - Every Year?
  - Only Operating Co. no Step down sub allowed
  - Valuation by CA / Merchant Banker – No Method
  - Guarantee to / on behalf of JV /WOS?
  - No W/o is allowed in case of Disinvestments
  - Reporting, etc., as per ODI Reg. applicable

# Other modes of Investment

# Branch Outside India

- Notification No. 10 - Regulation No 7(4A)
  - Activities - pursue the objects of the HO.
  - No prior permission
    - Request to AD for remittance- Traditionally accepts Form OBR of erstwhile ECM
  - Set up expenses
    - higher of
      - 15% of average annual Sales/TO/Income for last two financial years, or
      - 25% of the Net worth
  - Recurring Expenses
    - 10% of average Sales/TO/Income for last two financial years.
  - Activities not to contravene Act, Rules or Regulations.

# Investments other than Direct Investments

# Purchase/acquisition of Foreign Securities By Individuals

- Gift From a Person Resident Outside India (PROI)
- Under ESOP Scheme subject to certain conditions.
  - Remittance irrespective of the method of operationalisation of the scheme
- Inheritance From PRII or PROI
- Purchase by an employee or a director of an Indian office or branch or 51 per cent subsidiary - shares offered by the said foreign company.
  - Minimum qualification / subsequent right shares not to exceed 1%
  - Acquisition by employee/director of Indian Promoter Company not exceeding 5%
  - Entity in knowledge based industry- ESOPs by way of ADRs/GDRs permitted
- Sale - Remittance within 90 days.
- Pledge only with AD in India

# Key Compliance

- **Requirement / Compliances**
- File Form FLA with RBI
- File with Dept of Statistics, RBI
- By 15th July every year

# Other parameters

- DTAA Provisions on Income Streams
- C&M / PoEM of ForCo
- Thin Capitalisation Rules abroad
- CFC / PFIC Rules
- Transfer Pricing & S. 93
  - Guarantee Commission & Loans – Hindalco / Siva

- Accounting
  - Impairment Losses – Novellis / Corus
  - Consolidation of Accounts
- Law
  - Company Law - S. 372A
  - International Legal System & Arbitration Rules

# Thank You