

WIRC OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

SEMINAR ON FEMA

Foreign Direct Investment

Presented by:
Mr. Paresh P. Shah



Overview

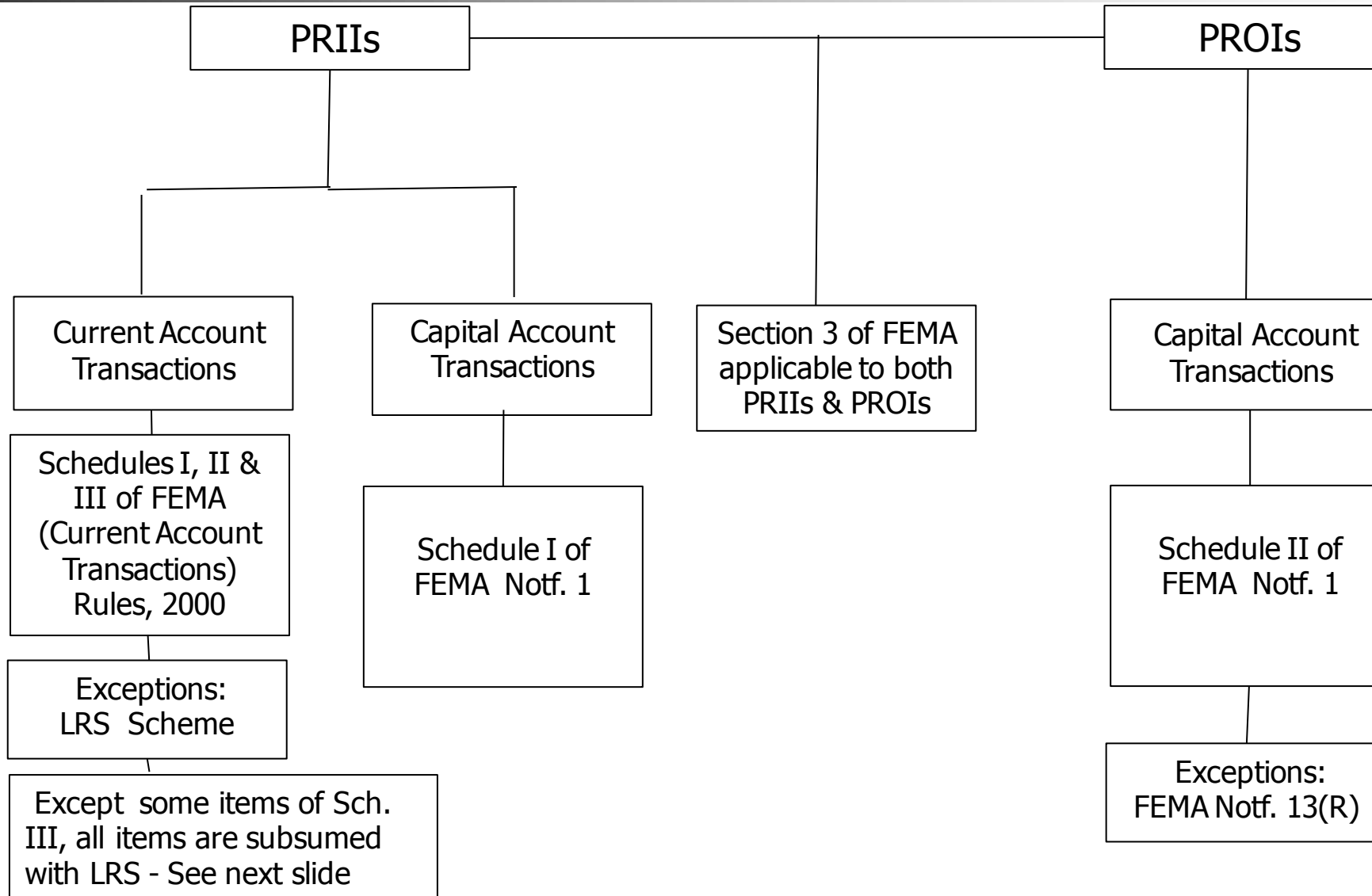
- FEMA Practice
- FEMA Ntf. 20(R)
- Regulation 5 – Permission for Investment by PROI
- Regulation 10 – Transfer of Shares
- Regulation 13 – Reporting requirements
- Regulation 14 – Downstream Investments
- Regulation 15 – Prohibited activities
- Schedule 1 (FDI) – Automatic Route & conditions
- FDI Policy – Practical Issues
- FDI Policy – Select sectors
- Schedule 4 – Investments by NRIs / OCIs on non-repatriation basis
- Schedule 6 – Investment in LLP
- Schedule 7 – Investment by Foreign Venture Capital Investors (FVCI)
- Alternate Investment Funds (AIF)



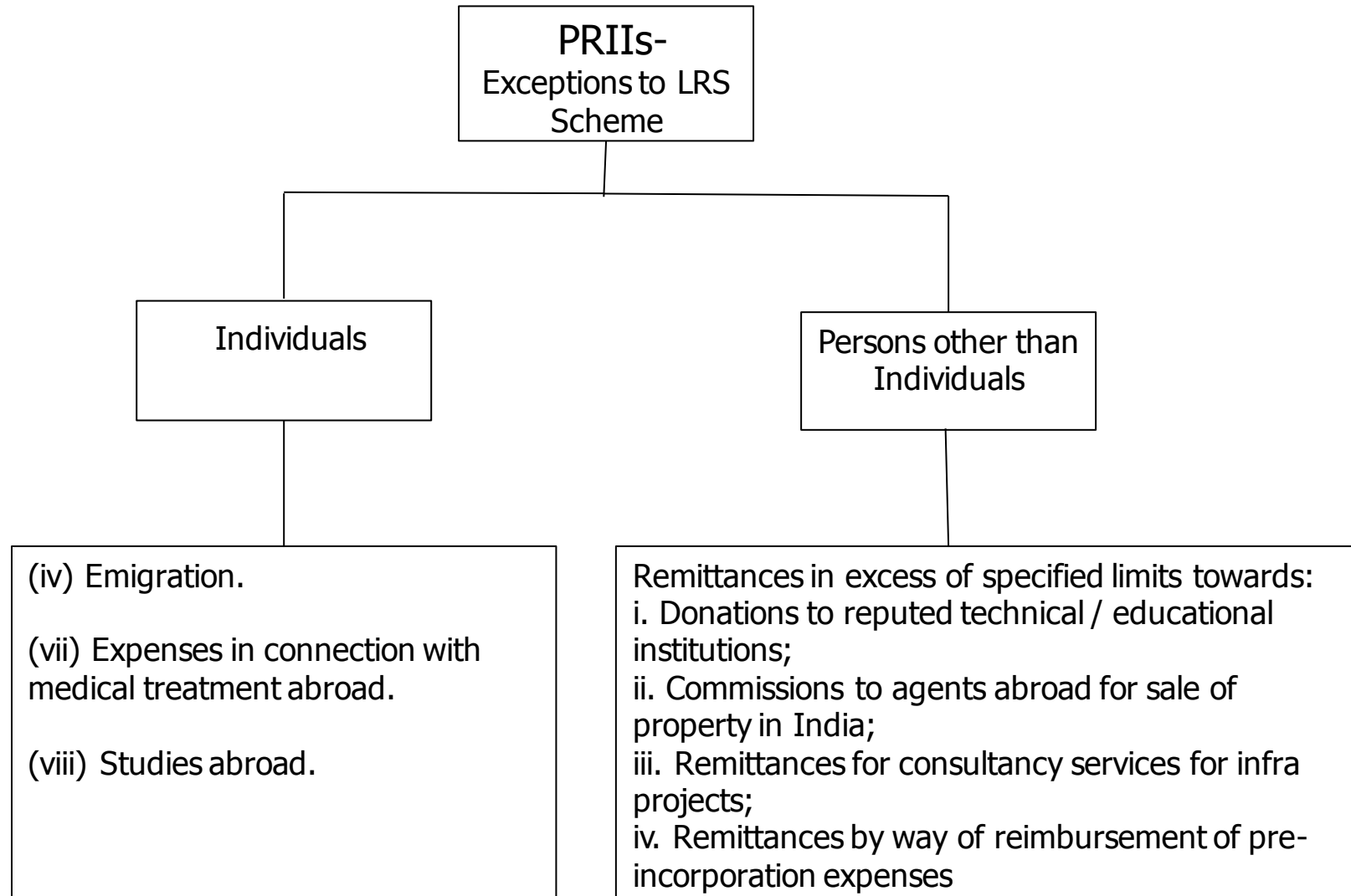
Abbreviations

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

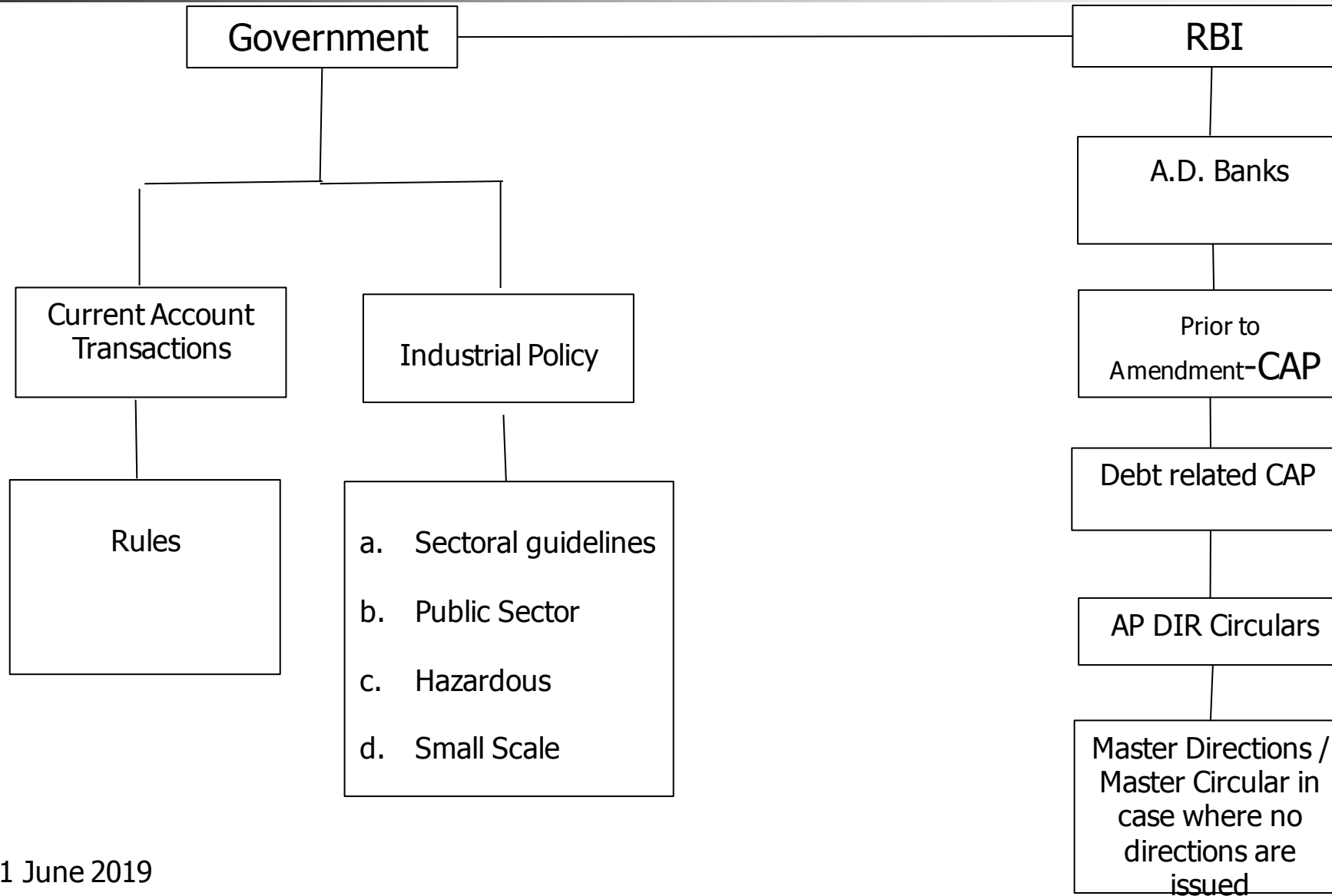
FEMA Practice



FEMA Practice



FEMA Practice



FEMA Practice

	PROI		
	Foreign Citizen	NRI	Other entities
Deposit- Notf.5(R) –Banking Accounts of PROI plus few cases in Notf. 10(R)	[Can open for limited purpose as mentioned in Notf.5(R) & 10(R)]	√ [Notf.5(R)]	√ [Notf.10 (R)]
Branch /Liaison - Notf. 22(R)	NA	NA	Prior approval through AD √ [except citizen of 8 countries]
Project office	NA	NA	Auto Route with conditions except 7 citizens
Immovable property in India- Notf.21(R)	X	√	√ [For branch, office or other place of business for carrying on in India any activity, excluding a liaison office]

FEMA Practice

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

FEMA Practice

	PROI		
	Foreign Citizen	NRI	Other entities
Lending in FE		Close relative in Foreign exchange- Notf.3(R)	ECB
Lending in rupee		Indian co- NCD- Notf.4 Notf.5(R) – against fund held in account	
Lending by way of Deposits		Schedule 6 & 7 of Notf.5(R), Loan from NRO account, Commercial paper	
Portfolio Investment	Notf. 20(R) – schedule 2, 5,8	[Notf. 20(R) - schedule 3 and 5]	Notf. 20(R) – schedule 2, 5,8
FDI	Notf. 20(R) - schedule 1,6,7,8	Notf. 20(R) - schedule 1,4, 6,7	Notf. 20 (R)- schedule 1,6,7,8



FEMA Practice

- Structure the transaction as compliant with conditions of Automatic route
- Permissible transactions of every person either PRII or that of PROI are specific as to General or Specific Approval.
eg. Schedule 1 to 10 of Notf20(R) and Purpose of Notf 20/21/FDI. Purpose of drawal-Specific to use.
- Ability to structure any transaction as Current account transaction
- Interpretation of the provision, intention and philosophy is preferable over the literal meaning.
- A Circular law- Dynamics

FEMA Practice - Revised Notifications & Master Directions

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

FEMA Practice - Revised Notifications & Master Directions

NTF. No.	Subject	Revised NTF. No., if issued	Master Direction, if issued
14	Manner of receipt and payment	FEMA 14(R)_ FEM (Manner of Receipt and Payment) Regn 2016 dt 02.05.2016	-
15	Definition of Currency	FEMA 15(R)/2015_ FEM (Currency) Regn 2015 dt 29.12.2015	-
16	Receipt and payment to person outside India	-	-
17	Transaction in Indian rupees with resident of Nepal and Bhutan	-	-
18	Post Office (Postal Money Orders)	FEMA 18(R)_ FEM (Postal Money Order) Regn 2015 dt 29.12.2015	-
19	Overseas Direct Investment	-	FED No. 15 / 2015-16. Updated up to Jan 04, 2018
20	FDI, PIS	FEMA 20(R)_ (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 dt. 07.11.2017	FED No. 11 / 2017-18. Updated up to March 08, 2019
21	Immovable property in India	FEMA 21(R)/2018_FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 dt. 26.03.2018	FED No. 12 / 2015-16. Updated up to April 11, 2018
22	Branch etc in India	FEMA 22(R)_ FEM (Branch Liaison Project office) Regn 2016 dt 31.03.2016	FED No. 10 / 2015-16. Updated up to March 29, 2019
23	Export of Goods & Services	FEMA 23(R)_ FEM (Export of Goods & Services) Regn 2015 dt 12.01.2016	FED No. 16 / 2015-16. Updated up to January 12, 2018
24	Investment in Firm or Proprietary concern in India	SUBSUMED IN FEMA 20(R) w.e.f. 07.11.2017	-
25	Foreign exchange derivative contracts	-	-

FEMA Practice - Revised Notifications & Master Directions

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

FEMA Practice – Recent issue of Master Directions

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



Foreign Direct Investment in India

- Regulatory & Legal Framework
Industrial Development (Regulation) Act, 1951 & FEMA 1999
- Overall Policy of Government, mainly focusses on
 - Public Sector
 - Compulsory Licensing
 - Erstwhile Small Scale Sector – Micro, Small & Medium Enterprises (Development) Act, 2006.
 - Locational Restrictions
- Prohibitions.
- Consolidated FDI policy, Sector Specific Guidelines (Regn. 16 of FEMA Ntf. 20(R)), Automatic route & Procedures
- FEMA provides for Rules/ modes of investment, manner of receipts, Valuations and reporting procedures.

FEMA 20 (R) – Few Definitions

Definitions	Particulars
Reg 2(v) - Capital Instruments	<ul style="list-style-type: none"> ➤ Equity Shares including partly paid (In case of Partly paid shares 25% consideration upfront & balance in 12 months) ➤ Debentures (Fully, mandatorily & compulsory convertible) ➤ Preference shares (Fully, mandatorily & compulsory convertible ** Differential voting rights shares as to dividend, voting or otherwise is permitted ➤ Share Warrants (As per SEBI regulations 25% consideration upfront and the balance in 18 months) ➤ Non convertible/Optionally convertible/Partially convertible Preference shares issued as on and upto 30th April,2007 ➤ Non convertible/Optionally convertible/Partially convertible Debentures issued as on and upto 7th June 2007 till their original maturity <p>Optionality clauses: Capital instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.</p>
Reg 2(xxv) – Indian Entity	<ul style="list-style-type: none"> ➤ Indian company or LLP

FEMA 20 (R) – Few Definitions

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

FEMA 20 (R) – Few Definitions

Definitions	Particulars
Reg 2 (xix) – Foreign Portfolio Investment	<p>Investment made by a person resident outside India (PROI) in Capital Instruments where such Investment is:</p> <ul style="list-style-type: none">➤ Less than 10% of Post issue paid up Capital on Fully diluted basis of Listed company or➤ Less than 10% of paid up value of each series of capital instruments of a Listed Indian Company
Reg 2(xxxix) – Sectoral Cap	<p>The maximum investment including both foreign investment on a repatriation basis by persons resident outside India in capital instruments of a company or the capital of an LLP, as the case may be, and indirect foreign investment, unless provided otherwise. This shall be the composite limit for the Indian investee entity;</p> <p>Note: a. FCCBs and DRs having underlying of instruments being in the nature of debt shall not be included in the sectoral cap.</p> <p>b. Any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned under the sectoral cap.</p>



Key Changes brought by 20(R)

- Detailed definition of 'capital instruments' has been introduced, listing various modes of investments that non-resident investors can choose from to invest in Indian companies;
- The definition of 'foreign investments' now clarifies that investments made on a non-repatriable basis are to be treated as domestic investments;
- The new definition of 'foreign direct investment' ("**FDI**") also differentiates between foreign investments in Indian companies based on whether the investee company is listed or unlisted. Investments into capital instruments of unlisted companies are to be treated as FDI. However, if the investee company is listed, the investment will be treated as FDI only if the investment constitutes more than 10% of the post issue paid-up equity capital of the company, calculated on a fully diluted basis; and
- Foreign investment in an Indian listed company amounting to less than 10% of the post-issue paid up equity share capital or 10% of the paid-up value in respect of each series of instrument of the company calculated on a fully diluted basis, will be categorised as 'foreign portfolio investment' under FEMA 20(R).



Snapshot of Notification 20(R)

3. Restriction on investment by a person resident outside India

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

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

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

4. Restriction on receiving investment

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

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



Regulations for Inbound Investment – FEMA Ntf. 20(R) (Contd)

- 5. Permission for making investment by a person resident outside India [Sch. 1 to 10].**
- 6. Acquisition through a rights issue or a bonus issue.**
- 7. Issue of shares under Employees Stock Options Scheme to persons resident outside India.**
- 8. Issue of Convertible Notes by an Indian startup company.**
- 9. Merger or demerger or amalgamation of Indian companies.**
- 10. Transfer of capital instruments of an Indian company by or to a person resident outside India.**
- 11. Pricing Guidelines.**
- 12. Taxes and Remittance of sale proceeds.**
- 13. Reporting requirements.**
- 14. Downstream Investment.**
- 15. Prohibited activities for investment by a person resident outside India.**
- 16. Permitted sectors, entry routes and sectoral caps for total foreign investment.**

Permission for Investment to PROI- Regulation 5

Reg/Schedule	Particulars
5(1) – Schedule 1	<p>A PROI may subscribe, purchase or sell capital instruments of an Indian company as per terms and conditions specified in Schedule 1.</p> <p>Prior Government Approval required for Investment by a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan</p> <p>Citizen of Pakistan or an entity incorporated in Pakistan cannot invest, in defence, space, atomic energy and sectors prohibited for foreign investment.</p>
5(2) – Schedule 2	<p>Purchase/Sale of capital instruments of Listed Indian company on stock exchange by FPI.</p>
5(3) – Schedule 3	<p>Purchase/Sale of capital instruments of Listed Indian company on stock exchange by NRI/OCI on repatriation basis</p>
5(4) – Schedule 4	<p>Purchase/Sale of capital instruments or convertible notes of Indian company or units or contribution to capital of LLP or firm or proprietary concern by NRI/OCI on Non repatriation basis</p>



Permission for Investment to PROI- Regulation 5

Reg/Schedule	Particulars
5(5) – Schedule 5	Purchase/Sale of securities other than capital instruments by PROI
5(6) – Schedule 6	Investment in LLP
5(7) – Schedule 7	Investment by Foreign Venture Capital Investor
5(8) – Schedule 8	Investment by PROI in Investment vehicles
5(9) – Schedule 9	Investment in Depository Receipts by PROI
5(10) – Schedule 10	Issue of Indian Depository Receipts

Transfer of Shares – Regulation 10

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

Transfer of Shares – Regulation 10

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

Reporting – Regulation 13

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

Reporting – Regulation 13

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

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



Downstream Investment – Regulation 14

- **Downstream Investment** means Investment by an Indian Entity or Investment vehicle in the capital instruments of another entity which is considered as indirect foreign investment for the investee Indian

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

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

Company/LLP controlled by resident Indian citizen is called 'Company controlled by Resident Citizens'

Company/LLP controlled by PROI is called 'Company controlled by PROI'



Downstream Investment – Regulation 14

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

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

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

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

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

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



Downstream Investment – Calculation Guidelines

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

- Methodology for calculation will apply at each stage of Investment

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

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

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



Conditions for Downstream Investment

Downstream foreign investment is subject to the following conditions:

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

Reporting requirements - Downstream Investment

In terms of reporting, downstream investments are required to be reported by way of Form DI within 30 days of investment, irrespective of whether securities have been allotted. The table below provides the reporting requirement in terms of downstream investments by the Indirect Foreign Investor:

SELLER	BUYER	PRICING GUIDELINES	REPORTING
FOCC	Resident	Yes	No reporting
Resident	FOCC	Yes	Form DI
FOCC	Non-resident	Yes	Form FC-TRS
Non-resident	FOCC	Yes	Form-FC-TRS
FOCC	FOCC	No	No reporting
Resident	Non-resident	Yes	Form FC-TRS
Non-resident	Resident	Yes	Form FC-TRS
Non-resident	Non-resident	No	No reporting
Non-resident	NRI/OCI under Schedule 4 of FEMA 20 (R)	Yes	Form FC-TRS
NRI/OCI under Schedule 4 of FEMA 20 (R)	Non-resident	Yes	Form FC-TRS
NRI/OCI under Schedule 4 of FEMA 20 (R)	Resident	No	No reporting

*FOCC – Company owned and controlled by PROI



Prohibited Activities – Regulation 15

Lottery Business including Govt/Pvt/Online lottery

- Gambling & Betting, including casinos
- Chit Funds
(The Registrar of Chits/Authorised officer, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians and Overseas Citizens of India who shall be eligible to subscribe, through banking channel and on non- repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the RBI)
- Nidhi Company
- Trading in Transferable Development Rights
- Real Estate Business/Construction of Farmhouse
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations
- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities

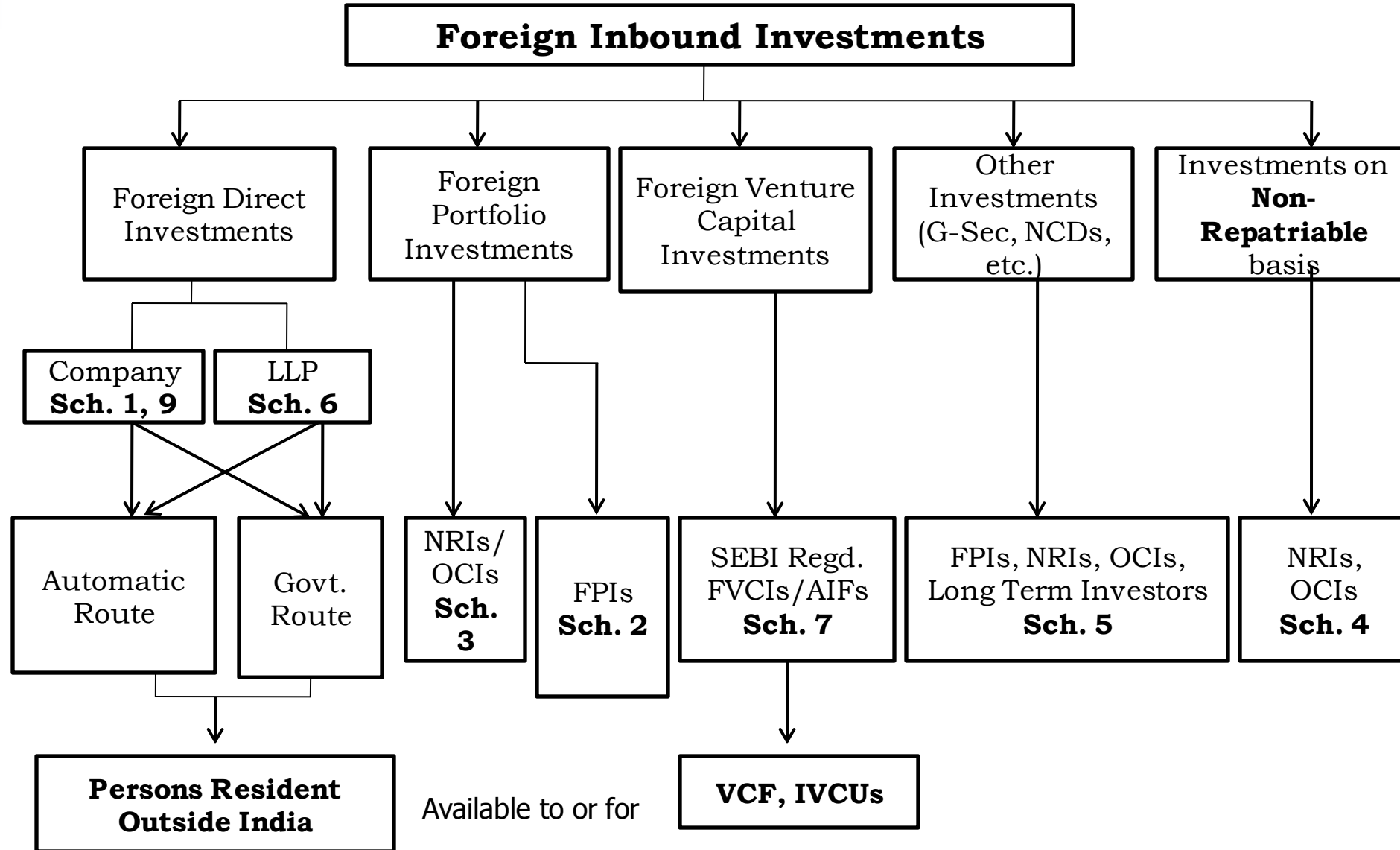
FEMA NTF. 20(R) – Schemes for Inbound Investment (NEW)

Sch. 1	Purchase / Sale of capital instruments of Indian company by PROI (i.e. Foreign Direct Investment ('FDI') Scheme)
Sch. 2	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Foreign Portfolio Investor (i.e. Portfolio Investment Scheme)
Sch. 3	Purchase/Sale of capital instruments of listed Indian company on recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis (i.e. Portfolio Investment Scheme)
Sch. 4	Purchase/Sale of capital instruments or convertible notes of an Indian company or Units or contribution to capital of an LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on non-repatriation basis
Sch. 5	Purchase and Sale of Securities other than capital instruments by a person resident outside India
Sch. 6	Investment in a Limited Liability Partnership (LLP)
Sch. 7	Investment by a Foreign Venture Capital Investor (FVCI)
Sch. 8	Investment by a person resident outside India in an Investment Vehicle
Sch.9	Investment in Depository receipts by a person resident outside India
Sch. 10	Issue of Indian Depository Receipts (IDRs)

FEMA NTF. 20 (OLD) – Schemes for Inbound Investment

Sch. 1	Foreign Direct Investment ('FDI') Scheme
Sch. 2 & 2A	Purchase/Sale of shares or convertible debentures or warrants of an Indian Company by Registered Foreign Portfolio Investor (RFPI) under Foreign Portfolio Investment (FPIs) Scheme (Registered FIIs under Sch. 2 subsumed with Sch. 2A)
Sch. 3	Acquisition of Securities or Units by a Non-Resident Indian (NRI) on a Stock Exchange in India on Repatriation basis under the Portfolio Investment Scheme
Sch. 4	Acquisition of Securities or units by a Non-Resident Indian (NRI), on Non-Repatriation basis
Sch. 5	Purchase and Sale of Securities other than Shares or Convertible Debentures of an Indian company by a person resident outside India
Sch. 6	Investment by a registered Foreign Venture Capital Investor
Sch. 7	Indian depository receipts by eligible companies resident outside India
Sch. 8	Scheme for investment by Qualified Foreign Investors in equity shares (Subsumed under Sch. 2A)
Sch.9	Scheme for Acquisition/Transfer by a person resident outside India of capital contribution or profit share of (LLPs)
Sch. 10	Depository Receipts Scheme, 2014 (DRs)
Sch. 11	Investment by a person resident outside India in an Investment Vehicle
Composite Caps: Foreign investments, direct or indirect, under Schedule 1(FDI), 2 (FII), 2A (FPI), 3 (NRI), 6 (FVCI), 8 (QFI), 9 (LLPs) and 10 (DRs) vide PN 8 dated 30 July 2015 by DIPP	

Foreign Investment in India- Schematic Representation



Schedules For Foreign Investments

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

Schedules For Foreign Investments

SCH. NO	PERMISSIBLE INVESTOR	INSTRUMENTS	INVESTEES	CONDITIONS , IF ANY
5	Non-resident	Securities other than capital instruments e.g. units of domestic mutual funds, securities receipt of ARC, bonds of PSUs etc.	PSU, Indian Company, Investment vehicles,etc	<p><u>FPIs (on repatriation basis) inter alia:</u></p> <ul style="list-style-type: none"> ▪ NCDs and commercial papers issued by Indian company. ▪ Units of domestic mutual fund ▪ G-secs, SRs issues by ARCs, rupee denominated and credit enhanced bonds <p><u>NRI / OCI (repatriation basis) inter alia:</u></p> <ul style="list-style-type: none"> ▪ G-secs, bonds of PSUs, bonds of infrastructure debt funds. ▪ Listed NCDs / redeemable preference shares. <p><u>NRI / OCI on non-repatriation basis, inter alia:</u></p> <ul style="list-style-type: none"> ▪ Treasury bills, units of domestic mutual fund, authorised chit funds. ▪ Listed NCDs / redeemable preference shares <p><u>Foreign Central bank/Multilateral Development Bank</u></p> <ul style="list-style-type: none"> ▪ G-Secs, Treasury Bills Subject to Conditions stipulated by RBI
6	Non-resident not being FPI / FVCI and not being a citizen / incorporated in Bangladesh / Pakistan)	Capital contribution or acquisition / transfer of profit share	LLP	<ul style="list-style-type: none"> ▪ LLP must operate in sectors/ activities where foreign investment up to 100% is permitted under automatic route and there are no FDI linked performance conditions i.e. there should be no sector specific conditions for the foreign investment. ▪ Such an LLP may be converted into a company under automatic route and vice versa

Schedules For Foreign Investments

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

Schemes for Inbound Investment – FEMA Ntf. 20(R)

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

Schemes for Inbound Investment – FEMA Ntf. 20(R)

Schedule No. →	5	5	5	5	5
Type of Investor →	FPI (repatriation)	NRI / OCI (repatriation)	NRI / OCI (non-repatriation)	Foreign Central Bank or Multilateral Dev. Bank (repatriation)	Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds, Pension Funds (repatriation)
Govt. securities / Treasury Bills	Y	Y	Y	Y	Y
NCDs of Indian Companies	Y				Y (listed; unlisted in Infrastructure sector)
Commercial Paper of Ind. Co.	Y				Y
Units of domestic Mutual Funds	Y	Y	Y		Y
Security Receipts of ARCs	Y				Y
Perpetual Debt Instruments of banks	Y	Y			Y
NCDs of Infrastructure Finance Companies	Y				Y
Rupee denominated bonds/ units issued by Infrastructure Debt Funds	Y	Y			Y
Credit enhanced bonds	Y				Y
Listed non-convertible/ redeemable preference shares or debentures issued in terms of Regulation 9 of FEMA 20	Y	Y	Y		Y
Security receipts issued by securitization companies	Y				Y
Securitized debt instruments issued by SPV set up by Banks, FIs, NBFCs for securitisation	Y				
Bonds of PSUs		Y			
Shares in Public Sector Enterprises being disinvested by the Central Government		Y			
National Pension Scheme		Y			
National Savings Certificates			Y		
Chit Funds (authorised)			Y		

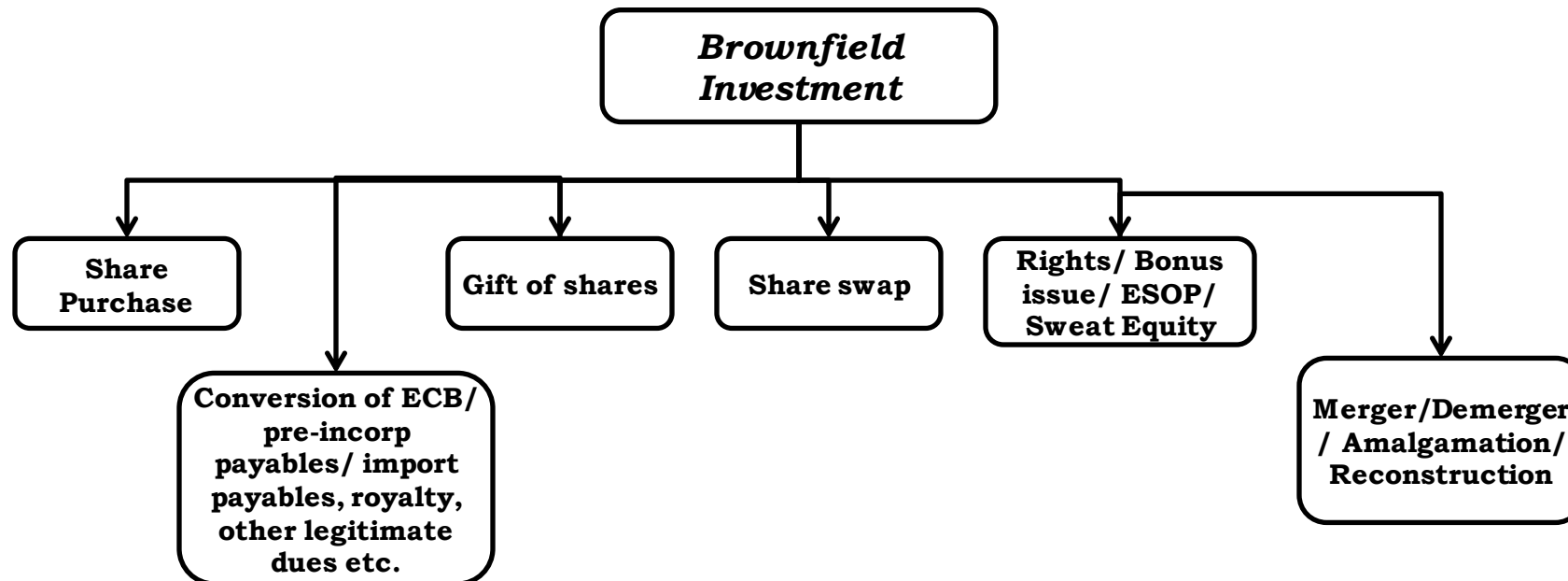
Foreign Direct Investment into an Indian company

Kinds of Investment

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

Mode of Investment

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





Automatic Route of Investment to PROI – Sch. 1

- Main Conditions of issue of Shares (Reg. 5, Schedule 1, Notification No. FEMA 20(R)/2017-RB dated Nov 7, 2017).
 - Sectors
 - Conditionalities
- Eligible Persons:
 - PROI other than citizen of Pakistan, entities of Pakistan.
 - Bangladesh Citizens & entities only with prior approval of FIPB.
- Under Schedule 1, a PROI may purchase capital instruments of a listed Indian company on a stock exchange in India provided that the PROI making the investment has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control
- A wholly owned subsidiary set up in India by a non-resident entity, operating in a sector where 100% foreign investment is allowed in the automatic route and there are no FDI linked performance conditions, may issue capital instruments to the said non-resident entity against pre-incorporation/ preoperative expenses incurred by the said non-resident entity up to a limit of five percent of its authorised capital or USD 500,000 whichever is less subject to filing of Form FC-GPR and utilization certificate of statutory auditor

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

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

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

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



Automatic Route of Investment to PROI

- Eligible Investee Entities:
 - Indian companies
 - Partnership Firm / Proprietorship concern (only for NRI / OCI on non-repatriation basis)
 - Trusts in the form of SEBI regulated Venture Capital Fund
 - Limited Liability Partnerships
 - Investment Vehicles: SEBI registered and regulated Alternative Investment Funds, Real Estate Investment Trusts and Infrastructure Investment Trusts



Approval Route of Investment to PROI

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



Issue of Shares- Other modes

- Issue of Bonus Shares allowed.
- Issue of Right Shares
 - Price offered to PROI can not be lower than that offered to PRII.
 - Additional Shares allowed within FDI Ceiling.
 - Existing OCB allowed with prior approval.
- Amalgamation / Demerger
 - Amalgamating/ transferee company can issue shares if it is engaged in eligible sector and observes FDI ceiling.
 - Reports the transaction to RBI within 30 days of such NCLT order of amalgamation with percentage of capital held by PROI in transferor, transferee or new company before or after the transfer.



Issue of Shares - Other modes – ESOP / Sweat Equity

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

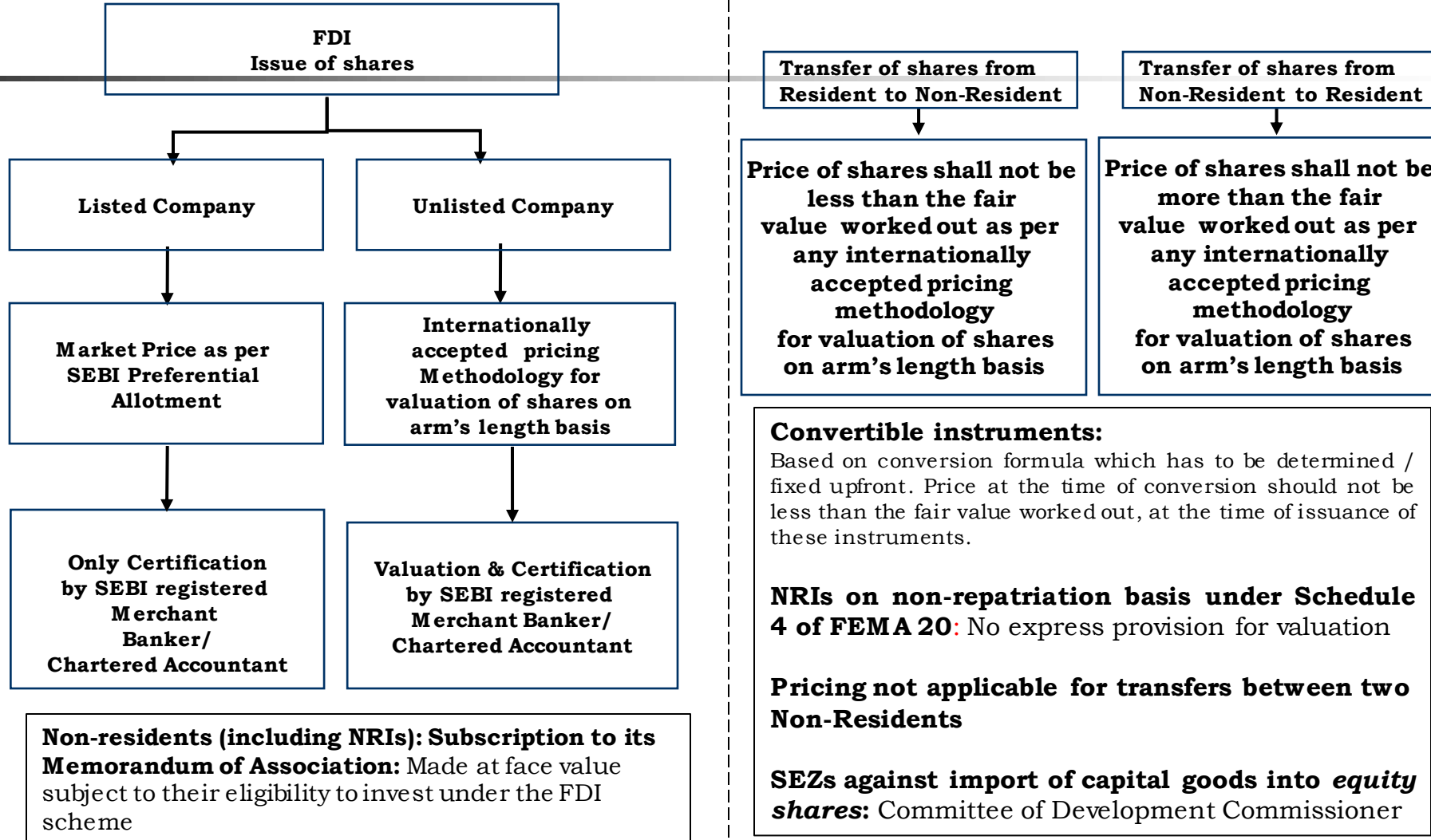
- a) The scheme has been drawn either in terms of regulations issued under the Securities Exchange Board of India Act, 1992 or the **Companies (Share Capital and Debentures) Rules, 2014** notified by the Central Government under the Companies Act 2013, as the case may be.
- b) The “employee’s stock option”/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



Mode of Payment

- (i) **Inward remittance** through normal banking channels
- (ii) Debit to **NRE / FCNR** account of a person concerned maintained with an AD category I bank
- (iii) **Conversion** of royalty / lump sum / technical knowhow fee/ legitimate due for payment or conversion of ECB, shall be treated as consideration for issue of shares
- (iv) **Conversion** of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB
- (v) Debit to non-interest bearing **Escrow account** in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration

FEMA & Valuation



Preferential Allotment Pricing Guideline under SEBI (ICDR) Regulations 2009:

“Price not less than the higher of Avg. weekly high and low closing price over a trailing six month period, or a trailing two week period, from the "relevant date of transaction.” “Relevant Date” means date thirty days prior to the date of GM of shareholders



Other important conditions in FDI Policy

- **Caps in Investments:**

Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The caps in various sector(s) are detailed in the Consolidated FDI Policy and in Regulation 16 of FEMA Ntf.20(R)

- **Entry conditions:**

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

- **Other conditions:**

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

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

The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company/LLP, at every stage of investment, including downstream investment are specified in the Consolidated FDI Policy and in Regulation 14 of FEMA Ntf.20(R)



Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

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



Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

- Accordingly, now Overseas NRI Entity will be eligible for investment under Schedule 4 and such investment will be deemed domestic investment at par with investment made by Residents.
- Similarly, under FDI policy/scheme under Schedule 1, Overseas Entity can invest in India with the special dispensation as available to NRIs, e.g. (a) Scheduled Air Transport Services/Domestic Scheduled Passenger Airlines, (b) Regional Air Transport Service, (c) Condition of lock-in period in Construction-development projects. This dispensation is not available for investment by NRIs under Schedule 3.
- The concept of 'owned and controlled by NRIs' has not been defined under Schedule 4; but may be borrowed from Regulation 14. 'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements. A company is considered as 'Owned' by NRIs if more than 50% of the capital in it is beneficially owned by NRIs. A Partnership Firm will be considered as owned by NRIs if more than 50% of the investment in such firm is contributed by NRIs and such NRIs have majority of the profit share.



Investment by NRIs on non-repatriation basis - Schedule 4 of FEMA Ntf. 20(R)

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



Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

➤ **FDI in LLPs:**

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



Sectors eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEMA Ntf. 20(R)

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

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



Sectors not eligible for investment by Limited Liability Partnerships under Auto route - Schedule 6 of FEMA Ntf. 20(R)

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



Who can invest in Limited Liability Partnerships?

- As per Regulation 5(6) of FEMA Ntf. 20(R) read with Schedule 6, any person resident outside India
- Person includes: Individual, HUF, Company, Firm, AOP or BOI, artificial juridical person and any agency, office or branch owned or controlled by such person
- But under LLP Act, 2008, only Individuals and Body corporates are eligible to become partner in LLP. Body corporate is defined in Section 2(d) of LLP Act to include Indian & Foreign LLPs and Companies incorporated outside India
- Therefore, eligible investors / partners in LLP for FDI are:
 - Individuals, Indian / Foreign Companies and Indian / Foreign LLPs
- However, under Schedule 6 of FEMA Ntf. 20(R), Citizens / Entities of Pakistan & Bangladesh, FPIs, FIIs and FVCIs are not permitted to invest in LLPs



Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

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



Investment in Limited Liability Partnerships - Schedule 6 of FEMA Ntf. 20(R)

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



Foreign Venture Capital Investor (FVCI)

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



FVCI – Investment Criteria

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

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

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

*VCU- Venture Capital undertaking



Taxation on FVCI

- Under Section 90(2) of the Income-tax Act, a non-resident assessee based in a country with which India has a Double Taxation Avoidance Agreement (DTAA), may opt to be taxed either under the IT Act or the DTAA, whichever is more beneficial.
- Under Section 10(23FB) of the IT Act, any income of a registered FVCI is exempt from income tax. The FVCI can carry on business in India through a permanent establishment in India, and yet its entire income would be tax free. On the other hand, if the FVCI opts to be taxed under the DTAA and it has a permanent establishment in India, its Indian income will not be tax free.
- The tax exemption under section 10(23FB) has to be read with section 115U of the IT Act, which confers a pass-through status on SEBI-registered venture funds. Investors in such funds would be liable to tax in respect of the income received by them from the FVCI in the same manner as it would have been, had the investors invested directly in the venture capital undertaking. In other words, income earned by an FVCI by way of dividend, interest or capital gains, upon distribution, would continue to retain the same character in the hands of its investors. Profits made by a private equity fund or venture capital fund should be taxed as business profits and not as capital gains.



FVCI - Schedule 7 of Notification 20(R)

Eligible Instruments

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

- *Specified Sectors:

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



Alternate Investment Fund – Brief Overview

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

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

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

Exemptions:

Family trusts

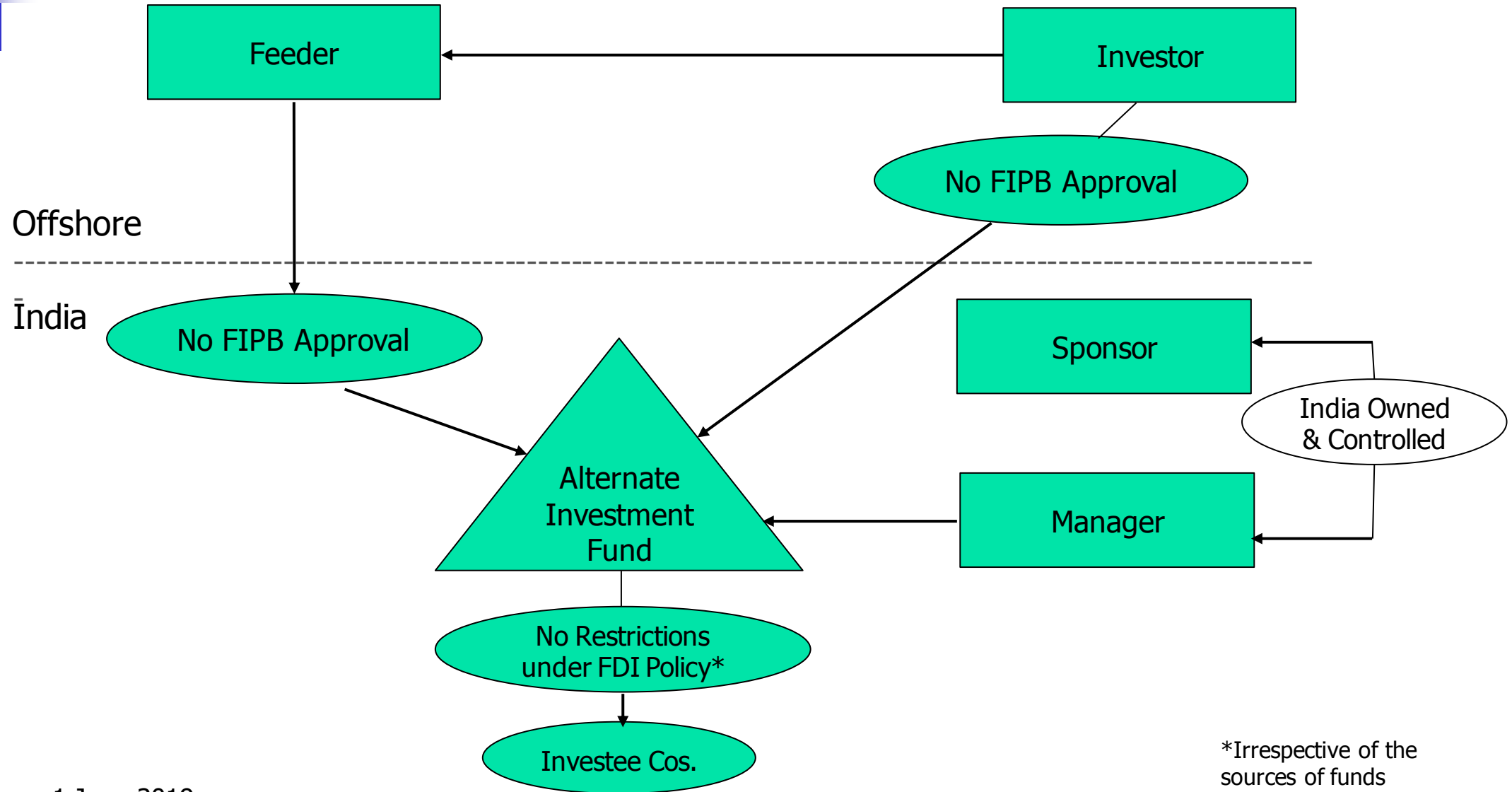
ESOP trusts

Employee welfare trusts

Holding companies

Securitization trusts

Alternate Investment Fund – Brief Overview





Alternate Investment Fund – Brief Overview

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

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



Thank You
