Foreign Direct Investments and Indirect Foreign Investments

Seminar on FEMA
WIRC
MUMBAI
29 December 2018

Road Map

- Overview of FEMA
- Regulations
- Important Definitions
- Capital Instruments by an Indian Company
- Modes of Foreign Investment in India by PROI
- Pricing Guidelines
- Taxes and remittance of sale proceeds
- Reporting
- Downstream Investment
- Schedule 1, Schedule 4, Schedule 6 of FEMA
- FDI - Prohibited Sectors / Person
- FDI Linked Performance Conditions
- Chart of Compliance
- KYC
- E-Commerce Sector

Overview of FEMA (1/2)

- **FEMA 1999**
  - Effective from 1 June 2000
  - Replaced Foreign Exchange Regulation Act 1973
- **Aims of FEMA**
  - Facilitate external trade and payments
  - Promotion of foreign exchange markets
- **FEMA Rules / Regulations**
  - Rules notified by the Central Government; and
  - Regulations notified by the RBI
  - **Consultation between Government and RBI**
- **RBI website (www.rbi.org.in)**
  - A P (Dir Series) - issued from time to time (explain AP DIR Circulars)
  - Master Directions – updated now periodically
  - FAQs
- Every Transaction either Current (generally permissible unless prohibited) or Capital Account – (only if and as permitted)

Overview of FEMA (2/2)

- **Other Statutes:** Many other statutes impact / enshrined in FEMA, e.g.
  - FDI Policy
  - Foreign Trade Policy
  - Sectoral Regulation
  - NBFC, Insurance, SEBI,. Companies Act
- Several powers /responsibilities delegated to the Authorised Dealer Bank ('**AD Bank**') **by RBI – their role / concurrence critical but primary responsibility is of constituents and their role is compliance & monitoring**
- Representation by CAs / Lawyers – not a warm welcome

Regulations

- Consolidated FDI Policy
- **Press Notes (‘PNs’)?**
  - Earlier PNs issued by DIPP / Government were construed to be operational from the date of their issue
  - Supreme Court laid down that PNs are not statute and do not become operational till enacted under FEMA
- **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations – TISPRO**
  - Substitution of FEMA 20 dt. 3 May 2000 with FEMA 20(R) dt. 7 November 2017
  - Significant elaboration and revamp of provisions as compared to earlier notification but still substance based interpretation warranted
  - New RBI Master Directions and FAQs
- **Abolishing of the FIPB in June 2017**
  - Work of granting government approval for foreign investment entrusted to the concerned Administrative Ministries/Departments
- **DIPP role**
  - Has the responsibility of overseeing the applications filed on the Foreign Investment Facilitation Portal (‘FIFP’) and to forward to the concern Administrative Ministries
  - Standard Operating Procedures have been developed
  - FIFP and its FAQ for online filing
  - http://www.fifp.gov.in/Default.aspx

Important Definitions (1/4)

- 'Foreign Direct Investment' (FDI) is the investment through capital instruments by a person resident outside India (a) in an unlisted Indian company; or (b) in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.
  - If an existing investment by a PROI in capital instruments of a listed Indian company falls to a level below 10 percent of the post issue paid-up equity capital on a fully diluted basis, the investment will continue to be treated as FDI.
  - Fully diluted basis means the total number of shares that would be outstanding if all possible sources of conversion are exercised.
- Foreign Investment means any investment made by a PROI on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP;
  - Explanation: If a declaration is made by persons as per the provisions of the Companies Act, 2013 about a beneficial interest being held by a PROI, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.
- FDI linked performance conditions mean the sector specific conditions stipulated in regulation 16 of these Regulations for companies receiving foreign investment

Important Definitions (2/4)

- ‘Capital Instruments’ are equity shares, debentures, preference shares and share warrants issued by an Indian company as detailed in Para 4 of the Master Direction:
  - Equity shares including partly-paid up (25% upfront and balance within 1 year);
  - Debentures (Fully, compulsorily and mandatorily convertible to equity shares);
  - Preference shares (Fully, compulsorily and mandatorily convertible to equity shares);
  - Share Warrants
- 'Investment on repatriation basis' is an investment, the sale/ maturity proceeds of which are, net of taxes, eligible to be repatriated and the expression 'Investment on non-repatriation basis', will be construed accordingly
  - Non-repat basis option to remit funds
- ‘Indian entity’ is an Indian company or an LLP
- ‘Resident Indian Citizen’ shall be interpreted in line with the definition of ‘person resident in India’ as per FEMA, 1999, read in conjunction with the Indian Citizenship Act, 1955

Important Definitions (3/4)

- ‘Foreign Portfolio Investment’ means any investment made by a person resident outside India through capital instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company;
- Foreign Portfolio Investor (FPI) means a person registered in accordance with the provisions of Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014
- ‘Sectoral cap’ means 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
- Person resident outside India’ means a person who is not a Person resident in India
- Resident Entity’ means ‘Person resident in India’ excluding an individual

Important Definitions (4/4)

- NRI means an individual resident outside India who is citizen of India
- OCI means an Overseas Citizen of India' cardholder within the meaning of section 7 (A) of the Citizenship Act, 1955
  - *Government Notification - PIO card holders scheme discontinued with effect from 9 January 2015 and PIO Card holders deemed to be OCI*
- 'Investing company' means an Indian company holding only investments in other Indian company/ies directly or indirectly, other than for trading of such holdings/ securities
- 'Investment' means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India
  - Explanation:
  - (a) This will include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in India.
  - (b) For the purpose of LLP, investment shall mean capital contribution or acquisition/ transfer of profit shares.

Capital Instruments by an Indian Company (1/2)

- Equity shares
  - Issued in accordance with Companies Act, 2013
  - Includes partly-paid up equity shares (after 8 July 2014)
    - Should be fully paid up within 12 months from the date of issue of partly-paid up shares
    - 25% of consideration should be paid upfront (including premium) and balance within 12 months
    - Time of 12 months not insisted upon where issue size exceeds Rs/ 500 crores and cpmplies with Reg 17 of SEBI (Issue of Capital and Disclosure Requriements), 2009 reg monitoring agency
    - Forfeiture of call money in accordance with Companies Act and Income-tax Act
- Share Warrants
  - Issued in accordance with SEBI (after 8 July 2014)
  - 25% upfront with balance within 18 months
  - Forfeiture of call money in accordance with Companies Act and Income-tax Act

Capital Instruments by an Indian Company (2/2)

- Debentures
  - Fully, Compulsorily and Mandatorily Convertible Debentures
  - Amendment in tenure in accordance with Companies Act, 2013
- Preference Shares
  - Fully, Compulsorily and Mandatorily Convertible Debentures
  - Amendment in tenure in accordance with Companies Act, 2013
  - Non-Convertible / Optionally Convertible Debentures / Preference shares considered as debt and ECB regulations applicable
- Capital instruments issued on or after 30 December 2013 can contain an optionality clause subject to a minimum lock-in 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

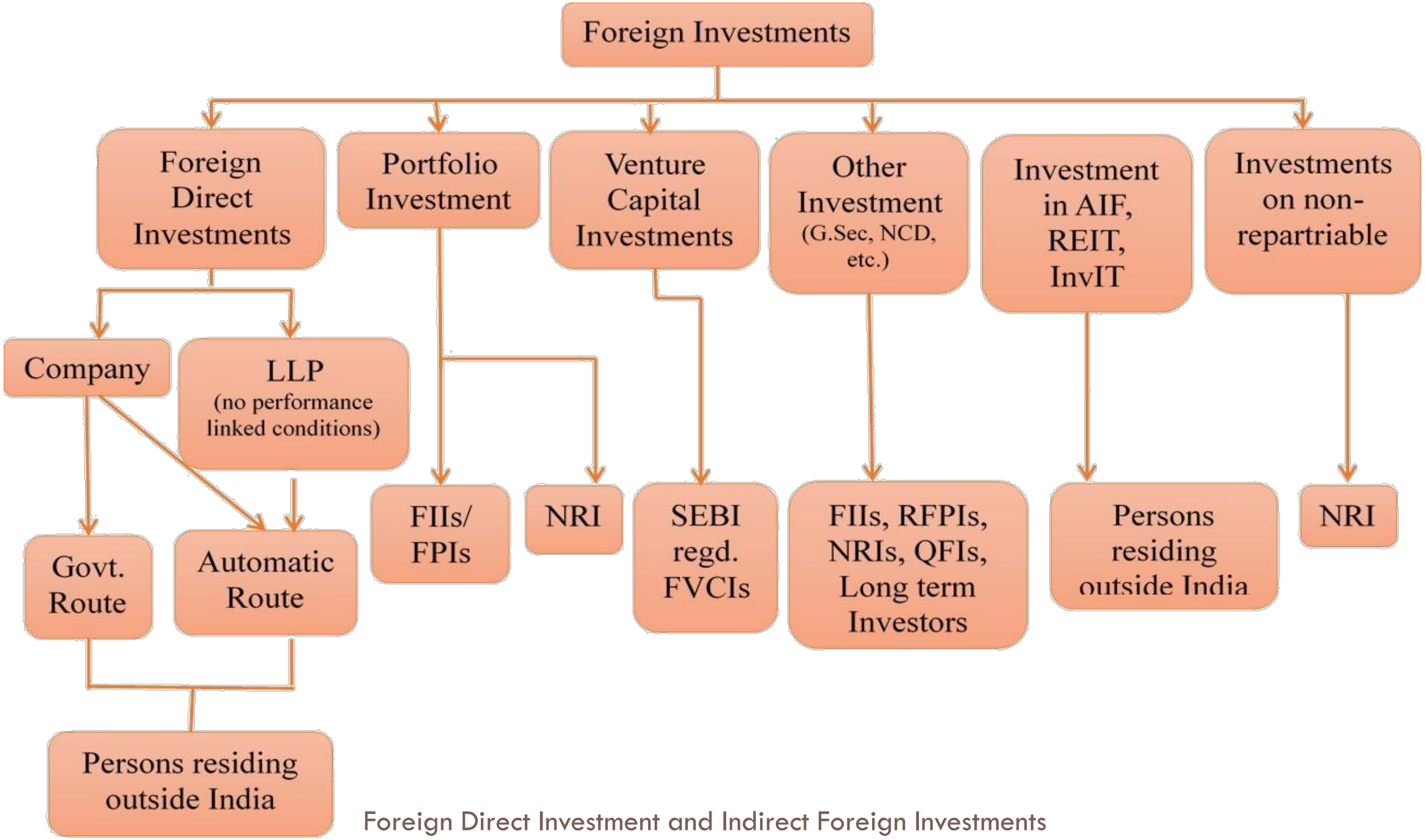
Modes of Foreign Investment in India by PROI (1/2)

5(1)	1	Susbcribe, purchase or sale of capital instruments	Indian Company	PROI
5(2)	2	Purchase or sale of capital instruments	Listed Indian Company	FPI
5(3)	3	Purchase or sale of capital instruments	Listed Indian Company On recognised stock exchange in India	NRI / OCI on repatriation basis
5(4)	4	Purchase or sale of capital instruments	Indian Company	NRI / OCI on non-repatriation basis
5(4)	4	Purchase or sell units or contribute to the capital	LLP / Firm / Proprietary concern	NRI / OCI on non-repatriation basis
5(5)	5	Purchase or sale of securities other than capital instruments	Indian Company / ARCs / IFCs as per Schedule 5	PROI

Modes of Foreign Investment in India by PROI (2/2)

5(6)	6	Capital Contribution / Acquisition / transfer of profit	LLP	PROI other than Bangladesh / Pakistan
5(7)	7	Securities, units of a VCF	Indian Company / start up. VCF	FVCI
5(8)	8	Units of an Investment Vehicle	Investment Vehicle, as per schedule	PROI other than Bangladesh / Pakistan
5(9)	9	Depository Receipts	As per Schedule	PROI
5(10)	10	Indian Depository Receipts	Companies resident outside India and issued in the Indian Capital Markets	FPI, NRI , OCI

Inbound Investments



Foreign Direct Investment and Indirect Foreign Investments

Acquisition through rights issue or bonus issue

- Investor
  - PROI having investment in an Indian Company
- Investment
  - Capital instruments (other than share warrants) as rights issue or bonus issue
- Points to be noted
  - Offer by I Co under Companies Act, 2013
  - Within sectoral cap applicable to I Co
  - Original Investment as per these Regulations
  - Listed I Co: Price determined by the Company
  - Unlisted I Co: Price not less than the price offered to Persons Resident in India
  - Remittance: Banking channels, NRE / FCNR Account in India
    - Original investment on non-repat, then debit to NRO account allowed
  - Individual PROI acquired original shares as person resident in India – on non-repatriation basis
  - Also applicable to renunciation

Acquisition through ESOP and Sweat Equity

- Investor
  - Employees / Directors of Holding / Wholly Owned Subsidiary / JV of Indian Company
- Investment
  - ESOP / Sweat Equity
- Points to be noted
  - Scheme drawn up under SEBI or Companies (Share Capital and Debentures) Rules, 2014 notified by the Central Government under Companies Act, 2013
  - Within sectoral cap applicable to I Co
  - Approval route shall require prior Government approval
    - Citizen of Bangladesh and Pakistan requires prior Government Approval
  - Individual who exercises option when resident in India will be on non-repatriation basis
  - Example

Issue of convertible notes by Start Up Company

- Investment: Convertible Notes ('CNs') by a Startup Company
  - 'Convertible Note' is an instrument issued by a startup company evidencing receipt of money initially as debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company, within a period not exceeding five years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.
  - Wef 10 January 2017 - Rs. 25 lakhs or more in a single tranche
  - A 'startup company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as such in accordance with notification number G.S.R. 180(E) dated February 17, 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, and as amended from time to time.
- Investor: PROI (Other than Entity / Individual of Bangladesh / Pakistan)
- Points to be noted
  - Within sectoral caps, approval routes applicable to I Co
  - Can be purchased on non-repatriation basis
  - Indian Start-ups issuing CNs to PROIs to report to RBI within 30 days from the issue
  - For transfer of CN between PROI and PRII and to be reported by PRII within 3days from date of transfer

Merger / Demerger / Amalgamation of Indian Companies

- N Co can issue capital instruments to shareholders being PROI
  - Scheme to be approved by NCLT
  - Within entry routes, sectoral caps of I Co
    - If not, Government approval
  - Approved Sector
- Issue of Non-Convertible Redeemable Preference Shares or Non-Convertible Redeemable Debentures
  - From general reserves by way of distribution as bonus
  - Scheme to be approved by NCLT
  - WEF 31 December 2013
  - Original investment as per these Regulations
  - As per Companies Act 2013
  - Approved Sector
  - Foreign Exchange Management (Cross Border Merger) Regulations, 2018
  - Case Study Flipkart

Transfer by or to PROI (1/2)

10(1)	PROI (other than NRI, OCI, erstwhile OCB)	PROI	Sale / Gift	None
10(2)	NRI, OCI holding is on repatriation basis	PROI	Sale / Gift	None
10(3)	PROI	PRII	Sale / Gift on RSE	Both
10(4)	PRII, NRI, OCI, as per Sch 4 on NRB	PROI	Sale (entry routes, sectoral caps)	Both / None is as per Sch 4
10(5)	PRII, NRI, OCI, as per Sch 4	PROI	Gift – prior approval of the RBI	-<= 5% of paid-up share capital -<= USD 50,000 per year

Transfer by or to PROI (2/2)

10(6)	NRI, OCI as per Sch 4 on NRB	NRI, OCI on NRB	Gift	None
10(7)	PROI – CIs with optionality clause without assured return	Any	Any	-Pricing Guidelines -Minimum lock-in
10(8)	Erstwhile OCBs	Subject to RBI Guidelines	Subject to RBI Guidelines	Subject to RBI Guidelines
10(9)	PRII / PROI	PROI / PRII	Sale (deferred consideration)	-Amount not exceeding 25% of total consideration -Within a period of 18 months -Can be settled through escrow -Can be indemnified by seller for a period not exceeding 18 months

Pricing Guidelines (1/3)

- Issue of Capital Instruments by I Co to PROI
  - Listed I Co: SEBI Guidelines
  - Unlisted I Co:
    - Method: As per **any Internationally accepted pricing methodology**
    - By: CA or SEBI Registered Merchant Banker
  - In case of Convertible CIs:
    - Price / Conversion Formula shall be determined upfront at the time of issue of the CI
    - Price at the time of conversion should not be lower than the Fair Value worked out at the time of issue of the convertible instruments
- Transfer of Capital Instruments from PRII to PROI shall not be less than:
  - Listed I Co: SEBI Guidelines
  - Unlisted I Co:
    - Method: As per **any Internationally accepted pricing methodology**
    - By: CA or SEBI Registered Merchant Banker or cost accountant

Pricing Guidelines (2/3)

- Transfer of Capital Instruments from PROI to PRII shall not exceed:
  - Listed I Co: SEBI Guidelines
  - Unlisted I Co:
    - Method: As per **<u>any Internationally accepted pricing methodology</u>**
    - By: CA or SEBI Registered Merchant Banker or cost accountant
  - Guiding principle that PROI is not guaranteed any assured exit price at the time of making the investment and shall be at price at the time of sale
- Swap of CIs
  - Valuation by SEBI registered Merchant Banker or an Investment Banker outside India registered with appropriate regulatory authority
- Subscription to MOA
  - At Face Value and subject to entry routes, sectoral caps

Pricing Guidelines (3/3)

- Share Warrants
  - Pricing / Conversion Formula to be determined upfront
  - Price on conversion cannot be less than issue price
- Partly-paid up shares
  - Pricing to be determined upfront
- Investment in a LLP
  - By way of capital contribution or by way of acquisition/ transfer of profit shares should not be less than fair price worked out as per any valuation norm which is internationally accepted
  - Valuation certificate to be issued by CA or Cost Accountant or an approved valuer from the panel maintained by the Central Government
- Transfer of capital contribution / profit share of LLP
  - PRII to PROI: consideration not less than fair price of LLP
  - PRII to PROI: consideration not more than fair price of LLP

Taxes and remittance of sale proceeds

- Taxes
  - Transactions through banking channels
  - Subject to payment of taxes in India
- Remittance of sale proceeds
  - Sale proceeds of an Indian security by a PROI in accordance with FEMA20(R)
  - The security should be held on non-repatriation basis
  - In compliance with pricing guidelines or RBI's approval has been obtained

Reporting (1/2)

- Forms
  - Form FC-GPR: Issue of capital instruments by Indian Companies within 30 days of allotment of capital instruments
  - Form FC-TRS: Transfer of capital instruments within 60 days of payment / receipt of consideration
  - Form LLP-I: FDI in LLP through capital contribution and profit shares within 30 days of receipt of consideration
  - Form LLP-II: Disinvestment/ transfer of capital contribution and profit shares in LLP within 60 days of payment / receipt of consideration
  - Form ESOP: Issue of ESOPs / sweat equity shares/ shares against exercise of ESOP by an Indian company within 30 days of issuing ESOPs
  - Form CN: Issue or transfer of convertible notes by Startup within 30 days of issue of CNs
  - Form DRR: Issue/transfer of Depository Receipts within 30 days of close of issue/program
  - Form DI – Reporting of downstream investment (indirect foreign investment) in a company or LLP E-intimation within 30 days on FIFP and Form DI within 30 days of allotment of capital instruments
  - Form InVi- Reporting of investment by a person resident outside India in an Investment vehicle
- Annual Return on FLA to be filed before 15 July each year
  - To be revised if not audited
- Forms above to be filed on the FIRMS portal as SMF

Reporting (2/2)

- Form LEC(FII) and Form LEC(NRI) are to be filed by the AD Bank
- SMF
  - Form ARF is not required to be filed
  - First register on EMF
  - Shareholding pattern from EMF is shown in SMF
- Filing Forms on SMF
  - Advisable to file Forms at the earliest since if Form is rejected, it cannot be resubmitted
  - Date of filing Form is considered as the date on which the final form is approved
  - Late filing fees is payable even if original form was filed in time but was rejected and final approved form was filed thereafter
  - Best to write to the Bank in advance for their checklist and submit accordingly

Downstream Investment (1/6)

- Total Foreign investment in a company = Direct + Indirect Foreign Investment
  - On a fully diluted basis
- 'Downstream Investment' is investment made by an Indian entity which has received foreign investment or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity.
- 'Indirect Foreign Investment' is downstream investment received by an Indian entity from:

  (a) another Indian Entity ('IE') which has received foreign investment and which is not owned and controlled by Resident Indian Citizens or is owned or controlled by persons resident outside India; or

  (b) an investment vehicle whose sponsor or manager or investment manager is not owned and not controlled by Resident Indian Citizens or is owned or controlled by persons resident outside India

Downstream Investment (2/6)

- Concept of ownership
  - Ownership of an Indian Company – Beneficial holding more than 50% of the CIs
  - Ownership of Indian LLP – more than 50% in capital and having majority profit share for LLP
  - Company owned by Resident Indian Citizens / LLP owned by Resident Indian Citizens – An Indian Company/ LLP where ownership is vested in Resident Indian Citizens and / or Indian Companies, which are ultimately owned and controlled by Resident Indian Citizens
  - Company / LLP owned by PROI – An Indian Company / LLP whose ownership is vested with PROI
- Concept of control
  - Company - Control is the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement
  - LLP - Control is the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP
  - Company / LLP controlled by RICs – An Indian Company / LLP, the control of which is vested in RCIs or Indian companies / entities ultimately controlled by RCIs
  - Company / LLP owned / controlled by PROI – Control is with PROI

Downstream Investment (3/6)

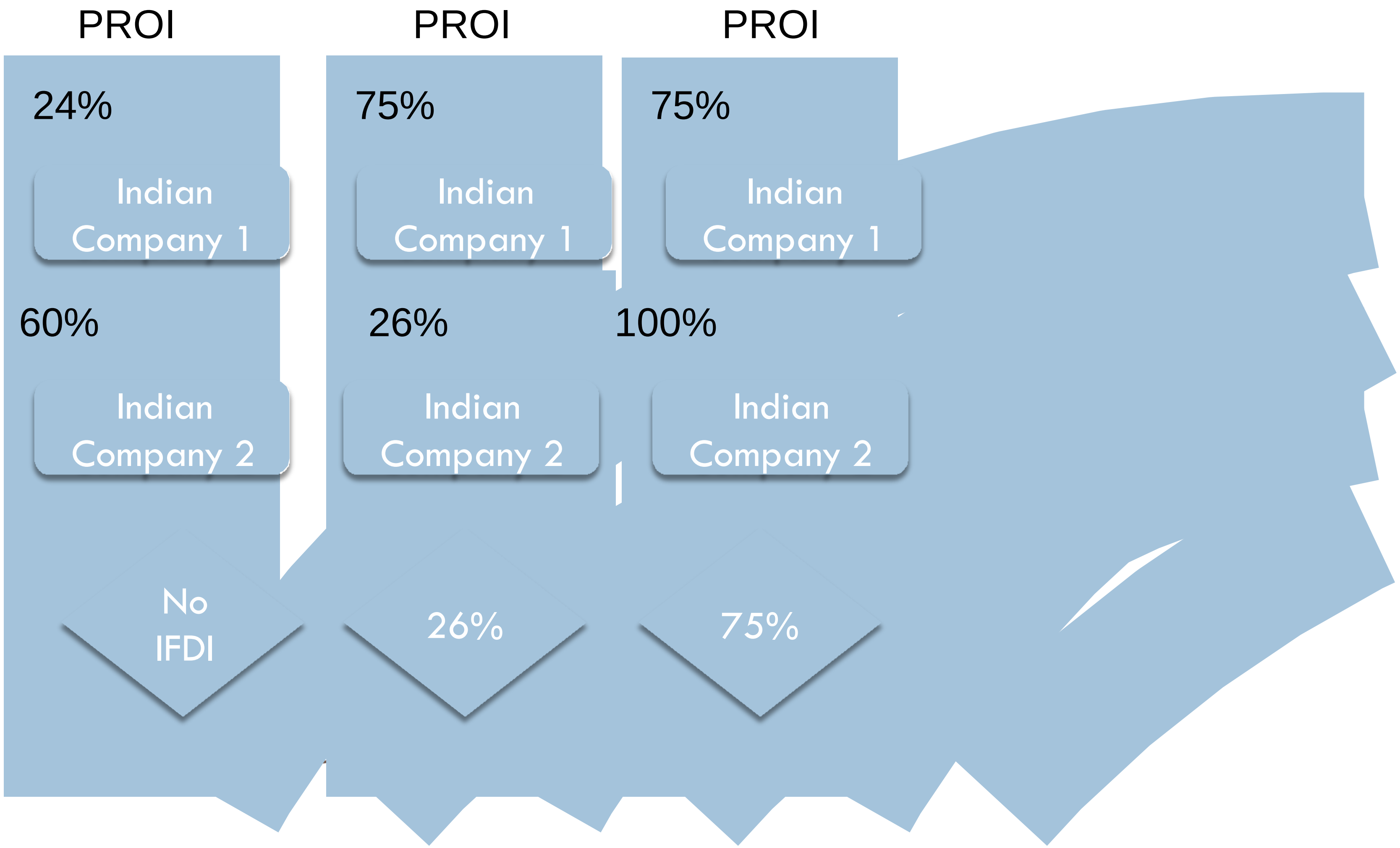
- IE which has received IFDI shall comply with entry routes, sectoral caps, pricing guidelines and others
  - Downstream Investment by LLP which is FOC is allowed in an Indian Company where 100% FDI is allowed under automatic route and where there are no FDI linked performance conditions
    - Exception: wef 31 July 2012, issue of shares to Banking Company as part of CDR / loan restructuring which are not strategic investments shall not be considered as downstream investments
- If the investing company / LLP is owned or controlled by 'non-resident entities', the entire investment by the investing company /LLP into the subject Indian Company / LLP would be considered as indirect foreign investment. Otherwise, indirect foreign investment would be taken as the percentage of downstream investment.
- Downstream investments which are treated as Indirect Foreign Investment for the investee Indian entity can be made through by bringing in requisite funds from abroad or through internal accruals. For this purpose, internal accruals will mean profits transferred to reserve account after payment of taxes.
  - Cannot use funds borrowed from domestic markets

Downstream Investment (4/6)

- Calculated on fully diluted basis
- Instruments in the nature of debt to not be considered
- Methodology to be calculated at every step of investment and in each and every Indian Company
- For WOS, IFDI will be limited to the total foreign investment received by the Company making the downstream investment
- Should have approval of the Board of Directors as also a Shareholders' Agreement, if any
- **Transfer of capital instruments by FOCC of downstream Investee Indian Entity**
  - Sale to PROI - reporting in Form FC-TRS but no pricing guidelines
  - Sale to PRII - subject to pricing guidelines
  - Sale to another FOCC - no reporting and no pricing guidelines

Downstream Investment (5/6)

- Calculation of indirect FDI



Downstream Investment (6/6)

- Compliance Obligations
  - First level Indian company making downstream investment to be responsible for ensuring compliance with provisions of these regulations for the downstream investment made by it at second level and so on and so forth
  - Such first level company to obtain a certificate to this effect from its statutory auditor on an annual basis
  - Such compliance of these regulations to be mentioned in the Director's report in the Annual Report of the Indian company
  - In case statutory auditor has given a qualified report, the same needs to be immediately brought to the notice of the Regional Office of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the RO

Schedule 1 to FEMA 20(R) (1/2)

- Purchase / Sale of Capital Instruments of an Indian Company
- Eligible Investors: PROI within entry routes, sectoral caps as specified in Reg 16
  - Entry Routes: Automatic or Government Approval
  - Sectoral Caps and Attendant Conditionality(s) : Sector wise- caps on foreign investment permitted under automatic / approval route; In sectors/ activities not listed in Reg. 15 or 16, foreign investment is permitted up to 100 percent on the automatic route
- PROI may purchase capital instruments of a listed Indian company on a stock exchange in India provided that:
  - PROI making the investment has already acquired control of such company in accordance with SEBI (SAST) Regulations, 2011 and continues to hold such control;
  - Amount of consideration may be paid as per the mode of payment prescribed in this Schedule or out of the dividend payable by Indian investee company to a specific non-interest bearing rupee account for acquisition of shares on RSE
- WOS can issue capital instruments against pre-incorporation / preoperative expenses incurred by NR entity for lower of (a) limit of 5% of authorized capital or (b) USD 500,000:
  - Sector with 100% FDI under Automatic Route and no FDI linked performance conditions;
  - Within 30 days but not later than 1 year from incorporation, subject to RBI, Form FC-GPR
  - Statutory Auditor utilization certification for pre-incorporation / preoperative expenses

Schedule 1 to FEMA 20(R) (2/2)

- I Co may issue CIs to PROI against swap of CIs if I Co is in the automatic route
- I Co may issue equity shares against any funds payable by it to PROI, the remittance of which is permitted under FEMA
- I Co may issue capital instruments to a PROI with prior Government approval against:
  - Swap of capital instruments if I Co is in a sector under Government route;
  - Import of capital goods/ machinery/ equipment (excluding second-hand machinery),
  - Pre-operative/ pre-incorporation expenses (including payments of rent etc.)
    - Subject to conditions specified by the Central Government and RBI from time to time
- Mode of Payment
  - Inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B)/ Escrow account
- Capital instruments to be allotted within 60 days
  - If not, should be refunded in 15 days thereafter
- Remittance of sale proceeds
  - Sale proceeds (net of taxes) of the capital instruments may be remitted outside India or may be credited to the NRE/ FCNR(B)

Schedule 4 to FEMA 20(R) (1/2)

- Investment on Non-Repatriation Basis
- Eligible Investors
  - NRIs/ OCIs including a Company, a trust, a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs
  - Investment on non-repatriation basis
- Eligible Instruments
  - Any Capital Instrument issued by a Company on or outside the Stock Exchange
  - Units issued by an Investment Vehicle on or outside the Stock Exchange
  - Capital of a LLP
  - Convertible Notes issued by Startups
- Investment will be deemed to be a domestic investment at par with investments made by residents
- Not permitted to make investments in capital instruments or units of a Nidhi Company or a company engaged in agricultural / plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights
- Mode of payment: Banking channels, NRE / FCNR / NRO account in India
- Sale proceeds to be credited to NRO Account net of taxes

Schedule 4 to FEMA 20(R) (2/2)

- Investment in Firm / Proprietary concern
  - Not permitted to make investments if firm or proprietary concern is engaged in any agricultural / plantation activities or print media or real estate business
  - Mode of payment: Banking channels, NRE / FCNR / NRO account in India
  - Sale proceeds to be credited to NRO Account net of taxes

Schedule 6 to FEMA 20(R) (1/2)

- Investment in LLP
- Eligible Investors
  - PROI except citizen / entity of Pakistan or Bangladesh)
  - Not being a FPI or FVCI
- Sectors
  - 100% FDI is permitted under automatic route
  - No FDI linked performance conditions
- Investment by way of profit share will be considered as reinvestment of earnings
- Subject to compliance of LLP Act, 2008
- Company having foreign investment where 100% FDI is permitted under automatic route and no FDI linked performance conditions can be converted to LLP and vice-versa under automatic route
- Issue and transfer: At consideration not less than fair price as per any valuation norm internationally accepted with valuation certificate by CA / CMA or approved panel
- Mode of payment: Banking channels, NRE, FCNR Accounts
- Repatriable on sale

FDI – Prohibited Sectors / Persons (1/2)

- Sectors
  - Lottery Business including Government/private lottery, online lotteries
  - Gambling and betting including casinos
  - Chit funds (except for investment made by NRIs and OCIs on non-repatriation)
  - Nidhi company
  - Trading in Transferable Development Rights (TDRs)
  - Real Estate Business or Construction of Farm Houses
    'Real estate business' shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014
  - 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

FDI – Prohibited Sectors / Persons (2/2)

- Persons
  - Any investment by a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan requires prior Government approval
  - A person who is a citizen of Pakistan or an entity incorporated in Pakistan can, only with the prior Government approval, invest in sectors/ activities other than defence, space, atomic energy and sectors/ activities prohibited for foreign investment

Sector specific conditions on FDI

- For certain sectors, FDI permission and sectoral caps, minimum capitalisation norms and other conditions specified
- Where not specified, 100% FDI is permitted under auotmatic route, subject to applicable laws/regulations; security and other conditionalities
- Requirement of minimum capitalization- Includes share premium with face value when received by the company upon issue of shares to non-resident investor. Amount paid during post-issue transfer of shares beyond the issue price of the share, cannot be taken into account while calculating minimum capitalization requirement
- Sectoral cap i.e. the maximum amount which can be invested by foreign investors in an entity, unless provided otherwise, is composite and includes all types of foreign investments, direct and indirect
- FCCBs and DRs having underlying of instruments which can be issued under Schedule 5, being in the nature of debt, shall not be treated as foreign investment. However, any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned as foreign investment under the composite cap.

Chart of compliance for allotment of capital instruments by an Indian Company

- Step 1: Board Meeting and EGM for approval of private placement to non-resident Investor under Companies Act
- Step 2 : Receipt of funds
- Step 3: Writing to the AD Bank for FIRC and KYC
- Step 4: Writing to the AD Bank for their requirements for Form FC-GPR filing
- Step 5 : Allotment of capital instruments within 60 days from date of receipt of funds
- Step 5: Form FC-FPR
  - Within 30 days of allotment of shares
- Step 6: RBI Registration Letter
  - On approval, RBI gives RBI Registration Letter
- Process starts 30 days before receipt of funds as per Companies Act
- Process is completed only on receipt of RBI Registration Letter

KYC

- KYC could be time-consuming and hence it is suggested that the Remitter Bank and the Recipient Bank be informed in advance to file Form ARF within 30 days of receipt of funds
- KYC to be provided as a Swift Message from the Overseas Remitting Bank to Indian Bank
- KYC should include Registered Name of the Investor;
- Unique Identification Number (Passport Number, Social Security number etc);
- Permanent Address;
- Name of Overseas Remitting Bank;
- Non-Resident Investor's Bank Account Number;
- Period of Banking Relationship with the Non-Resident Investor
- Need to work closely with the Banks to ensure timely submission

E-Commerce Sector (1/3)

- Press Note 2 (2018 Series)
- Issued on 26 December 2018
- E-commerce:
  - 'E-commerce' means buying and selling of goods and services including digital products over digital & electronic network.
  - 'E-commerce entity' means a company incorporated under the Companies Act, 1956 or the Companies Act, 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in Section 2 (v) (iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.
  - 'Inventory based model of e-commerce' means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.
  - 'Market place model of e-commerce' means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller."
- B2B E-commerce 100% under Automatic Route
  - Such companies would engage only in Business to Business (B2B) e-commerce and not in retail trading, inter alia implying that existing restrictions on FDI in domestic trading would be applicable to e-commerce as well
- FDI in Market place model of e-commerce is 100% under Automatic Route
- FDI is not permitted in Inventory based model of e-commerce

E-Commerce Sector (2/3)

- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services.
- E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.
- **An e-commerce entity will not permit more than 25% of the sales value on financial year basis affected through its marketplace from one vendor or their group companies.**
- Goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- Payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- Any warranty /guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.
- Guidelines on cash and carry wholesale trading as given in para 5.2.15.1.2 in Consoldiated FDI Policy Circular 2017 shall apply to B2B e-commerce activities.

E-Commerce Sector (3/3)

- Amendments:
- **<u>An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce market place entity or its group companies will not be permitted to sell its products on the platform run by such marketplace entity</u>**
- Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.
- E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.
- The above decision will take effect from 1 February2019
- Amazon, Flipkart?

Sources

Department of Industrial Policy and Promotion
Ministry of Commerce and Industry
Government of India

Department of Revenue, Ministry of Finance, Government of India

Queries

YOUR QUESTIONS PLEASE !!!

Thank you!!!

Isha Sekhri

Chartered Accountant