

OVERSEAS DIRECT INVESTMENT

CA Vinod Jain

B.Com (H), LLB, FCA, FCS, FCMA, DISA (ICAI)

INMACS

vinodjain@inmacs.com | vinodjain@vinodjainca.com

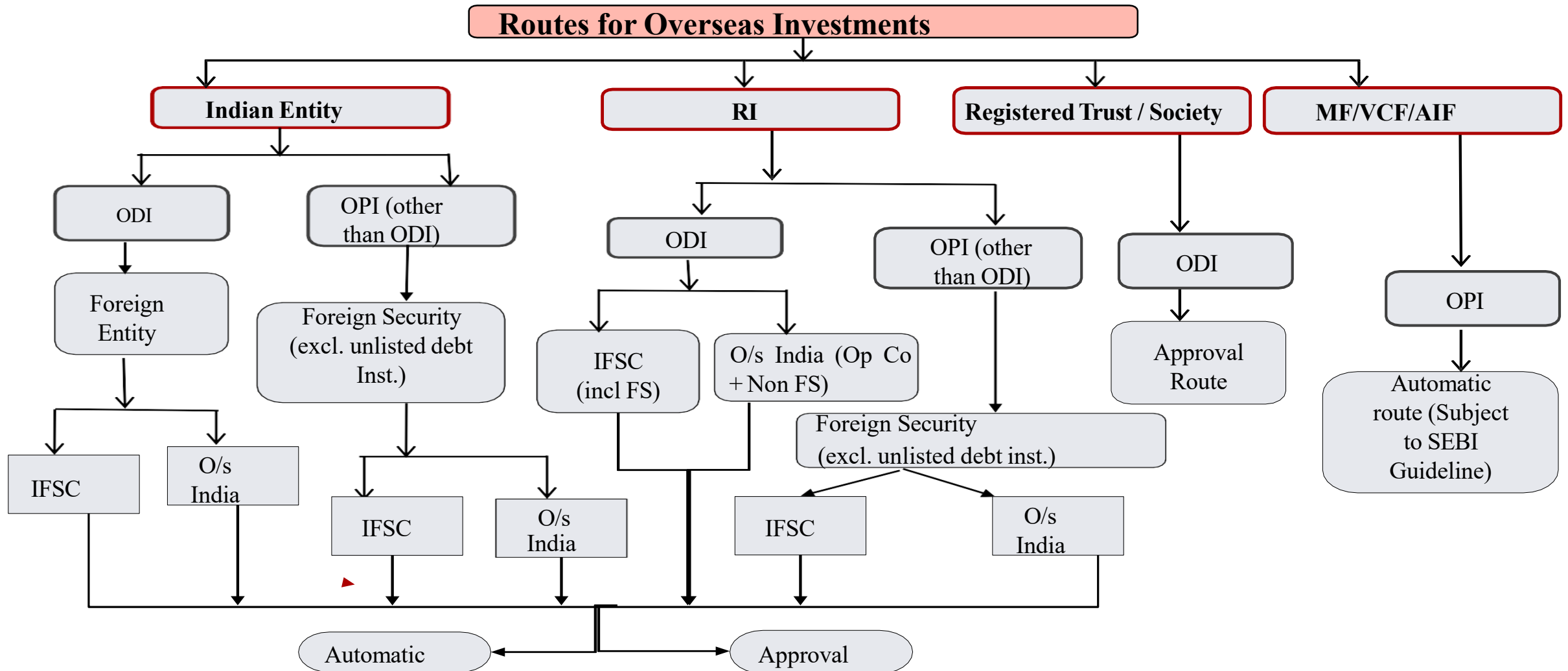
+91 98 110 40004

503, Chiranjiv Towers, 43, Nehru Place, New Delhi – 110019
Global Business Square, Building No. 32, Sector 44, Gurugram

OVERSEAS INVESTMENT – RULES & REGULATIONS

- Overseas Investment Rules dated 22nd August 2022 issued by Ministry of Finance
- Overseas Investment Regulations dated 22nd August 2022 issued by RBI
- Overseas Investment Direction dated 22nd August 2022 issued by RBI
- Master Direction - Overseas Investment (Updated as on November 28, 2025)
- Master Direction – Reporting under Foreign Exchange Management Act, 1999 (Updated as on December 03, 2025)
- Master Direction - Liberalised Remittance Scheme (LRS) (Updated as on September 06, 2024)
- Master Direction on Immovable Property (updated as on 01st September 2022)

ROUTES FOR OVERSEAS INVESTMENTS




DEFINITION - OVERSEAS DIRECT INVESTMENT (ODI)

ODI means investment by way of

- acquisition of **unlisted equity capital of a foreign entity**, *or*
- subscription as a part of the memorandum of association of a foreign entity, *or*
- investment in ten per cent, or more of the paid-up equity capital of a **listed foreign entity** or
- investment with control where investment is less than ten per cent. of the paid-up equity capital of a **listed foreign entity**.

DEFINITION - CONTROL

“control” means

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

DEFINITION – OVERSEAS PORTFOLIO INVESTMENT

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

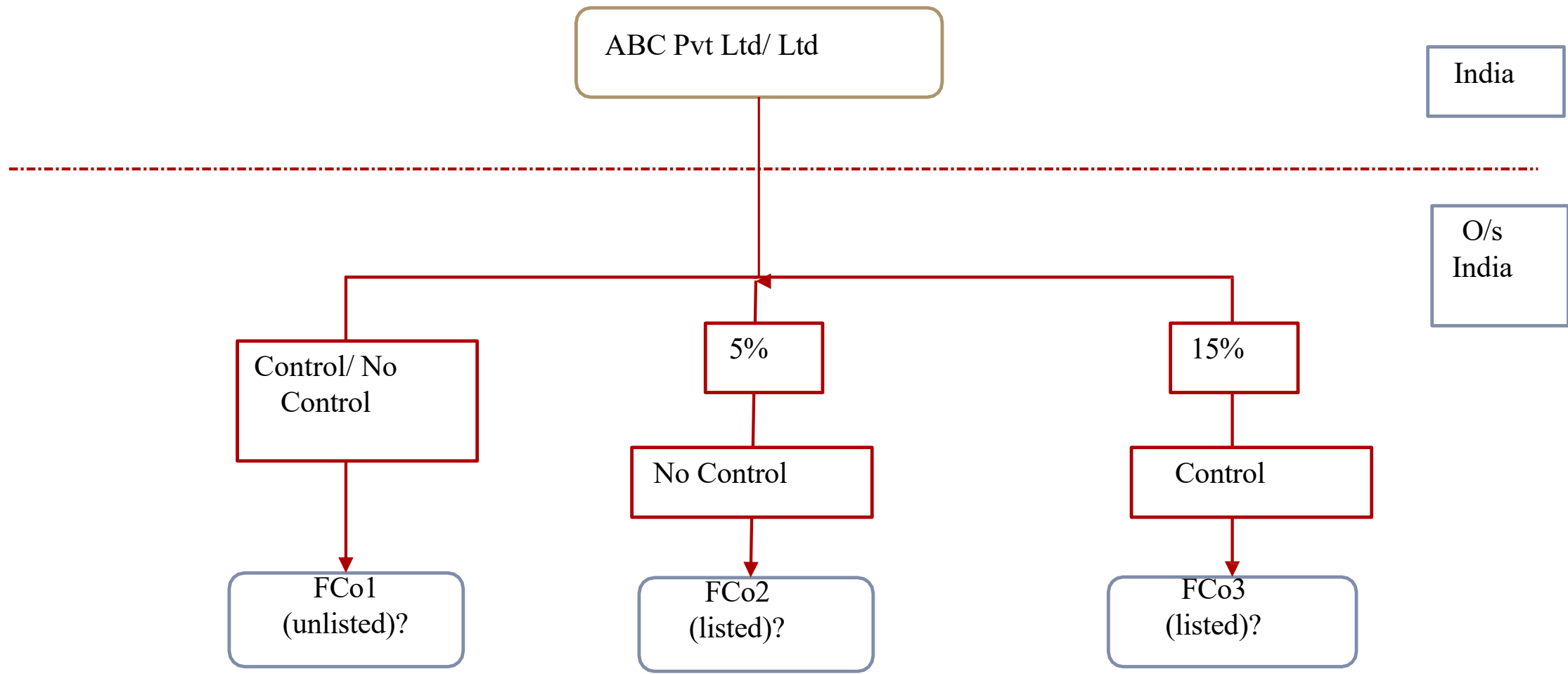
Observation/ Poser:

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

OPI – Overseas Portfolio Investment

PRI – Person Resident in India

ODI OR OPI ?



India

O/s
India

DEFINITION - NETWORTH

Erstwhile Notification No. FEMA 120 New FEMA Rules

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

DEBT V/S NON-DEBT INSTRUMENTS

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

Debt Instruments	[RBI]
Government Bonds	
Corporate Bonds	
All tranches of securitisation structure which are not equity tranche	
Borrowings by Indian firms through loans	
Depository receipts whose underlying securities are debt securities	

Non-Debt Instruments	[CG]
All investments in equity in incorporated entities (public, private, listed and unlisted)	
Capital participation in Limited Liability Partnerships (LLPs)	
All instruments of investment as recognised in the FDI policy as notified from time to time	
Investment in units of Alternative Investment Funds (AIFs) and Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InVITs)	
Investment in units of mutual funds and Exchange-Traded Fund (ETFs) which invest > 50% in equity	
The junior-most layer (i.e. equity tranche) of securitisation structure	
Acquisition, sale or dealing directly in immovable property	
Contribution to trusts	
Depository receipts issued against equity instruments	

OTHER IMPORTANT DEFINITIONS

- ❖ **Equity capital** means equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments.
- ❖ **Foreign entity** means
 - ❖ an **entity formed or registered or incorporated outside India**,
 - ❖ including International Financial Services Centre that has limited liability:
 - ❖ Provided that the restriction of limited liability shall not apply to an entity with core activity in a strategic sector.
- ❖ **Overseas Investment or OI** means financial commitment and Overseas Portfolio Investment by a person resident in India.

OTHER IMPORTANT DEFINITIONS

❖ Indian entity means—

- a **company** defined under the Companies Act, 2013 (18 of 2013);
- a **body corporate** incorporated by any law for the time being in force;
- a **Limited Liability Partnership** duly formed and incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009); and
- a **partnership firm** registered under the Indian Partnership Act, 1932 (9 of 1932).

❖ **Subsidiary or step down subsidiary** of a foreign entity means an entity in which the foreign entity has control.

OTHER IMPORTANT DEFINITIONS

- ❖ **Financial commitment** means the aggregate amount of investment made by a person resident in India by way of Overseas Direct Investment, debt other than Overseas Portfolio Investment in a foreign entity or entities in which the Overseas Direct Investment is made and shall include the non-fund-based facilities extended by such person to or on behalf of such foreign entity or entities;
- ❖ **Financial service regulator** means a financial service regulator established under any law in force in India and include the Reserve Bank, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority and the Pension Fund Regulatory and Development Authority.

OTHER IMPORTANT DEFINITIONS

- ❖ **Last audited balance sheet** means audited balance sheet as on date not exceeding eighteen months preceding the date of the transaction.
- ❖ **Sweat equity shares** means such equity shares as are issued by an overseas entity to its directors or employees at a discount or for consideration other than cash, for providing their know-how or making available rights like intellectual property rights or value additions, by whatever name called.
- ❖ **Strategic sector** shall include energy and natural resources sectors such as oil, gas, coal, mineral ores, submarine cable system and start-ups and any other sector or sub-sector as deemed necessary by the Central Government.
- ❖ **AD bank** means a person authorised as such under subsection (1) of section 10 of the Act and for the purpose of these rules, shall mean only the domestic branches of such AD Bank.

NON-APPLICABILITY OF OI RULES & REGULATIONS

❖ Foreign Exchange Management (Overseas Investment) Rules or Regulations **will not apply to:**

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

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

BONAFIDE BUSINESS ACTIVITY

- Any investment by PRI o/s India shall be made in foreign entity engaged in bonafide business activity, directly or indirectly through SDS or the SPV.
- Bonafide business activity shall mean any business activity permissible under any law in force in India **and** the host country or host jurisdiction, as the case may be.
- OI or transfer of such investment including swap of securities in an entity formed/ incorporated in Pakistan or other jurisdiction as advised by CG will require prior approval.

Observation/ Poser:

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

PRICING GUIDELINES

- Issue or transfer of equity capital of a foreign entity from PROI or PRI to PRI who is eligible to make such investment or from PRI to PROI shall be subject to a *price arrived on an arm's length basis*.
- AD bank before facilitating a transaction to ensure compliance with ALP taking into consideration the valuation as per *any internationally accepted pricing methodology for valuation*.

Poser:

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

ALP – Arm's Length Price

DISINVESTMENT/ TRANSFER

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

Observation/ Poser:

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

RESTRUCTURING OF FE BALANCE SHEET

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

FE – Foreign Entity

RESTRICTIONS/ PROHIBITIONS FOR ODI

- No person resident in India shall make ODI in a foreign entity engaged in:
 - ✓ **real estate activity**;
 - ✓ **gambling** in any form; and
 - ✓ **dealing with financial products linked to the Indian rupee** without specific approval of the Reserve Bank.

Explanation— For the purposes of this sub-rule, the expression "real estate activity" means **buying and selling of real estate or trading in Transferable Development Rights but does not include the development** of townships, construction of residential or commercial premises, roads or bridges **for selling or leasing**.

Observation/ Poser:

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

PRE-INCORPORATION EXPENSES

- AD may allow remittance up to USD 1,00,000 per foreign entity.
- For Resident Indians – LRS limit applicable.
- PRI may capitalise such expenses [FC: ODI] or recognise as receivables [FC: Debt] or account them as expenses in their books of account.
- However, unless recognised as financial commitment, such expense will not attract provisions of OI Rules/ Regulations.

OVERVIEW OF SCHEDULES

Schedule I

- ODI by Indian Entity (IE)

Schedule II

- OPI by Indian Entity (IE)

Schedule III

- Overseas Investment by Resident Individual (RI)

Schedule IV

- Overseas Investment by PRI other than IE & RI

Schedule V

- Overseas Investment in IFSC by PRI

SCH I – ODI BY INDIAN ENTITY (IE)

❖ Manner of Making ODI by Indian Entity

- Subscription to Memorandum of Association or
- purchase of equity capital Acquisition through bidding/ tender
- Right issue/ bonus shares
- Capitalization of any realization within a time period
- Swap of securities
- Merger/ Demerger/ Amalgamation or any scheme

SCH I – ODI IN FINANCIAL SERVICES ENTITY

Erstwhile Notification No. FEMA 120

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

New FEMA Rules

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

SCH I – ODI BY INDIAN ENTITY (IE) - POLL

❖ Can Indian Company incorporate Foreign Company for the purpose of trading in foreign securities?

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

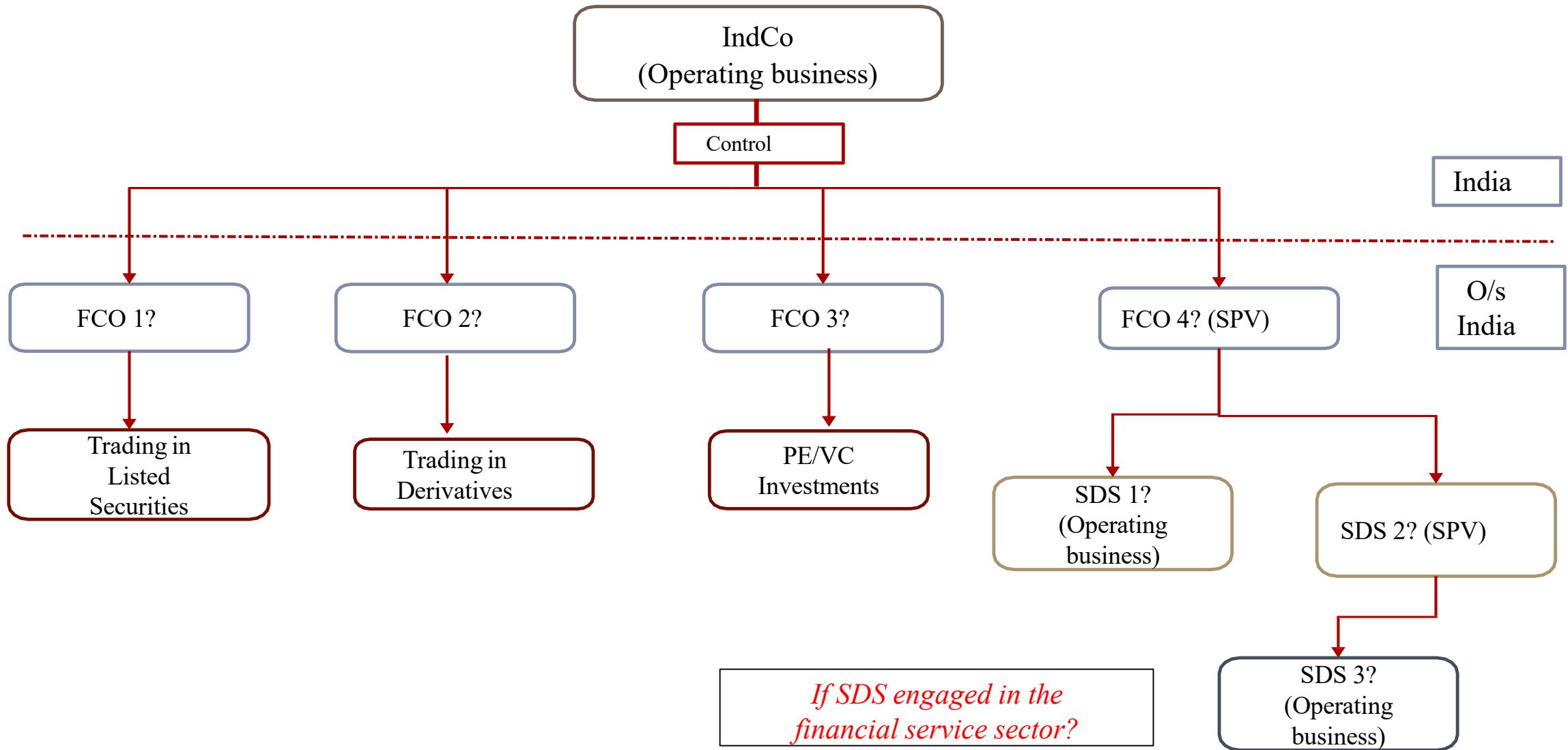
LIMIT FOR FINANCIAL COMMITMENT

- Total financial commitment of IE in all foreign entities **shall not exceed 400% of its net worth** as on the last audited balance sheet.
- Capitalization of retained earnings should not be included in reckoning such limit.
- **Net worth of HoldCo/ SubCo now not permitted to be used for computing net worth.**
- **Instead counted as respective group company's independent FC.**
- Net worth definition aligned to Companies Act definition.
- Limit shall include utilization of the amount raised by ADR/ GDR/ ECB.
- Not applicable to Maharatna, Navratna or Miniratna in strategic sector o/s India.

SCH II – OPI BY INDIAN ENTITY (IE)

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

SCH I VS SCH II – ODI VS OPI ?



SCH III – OVERSEAS INVESTMENT BY RI

❖ RI is permitted to make ODI or OPI subject to LRS limit in the following manner:

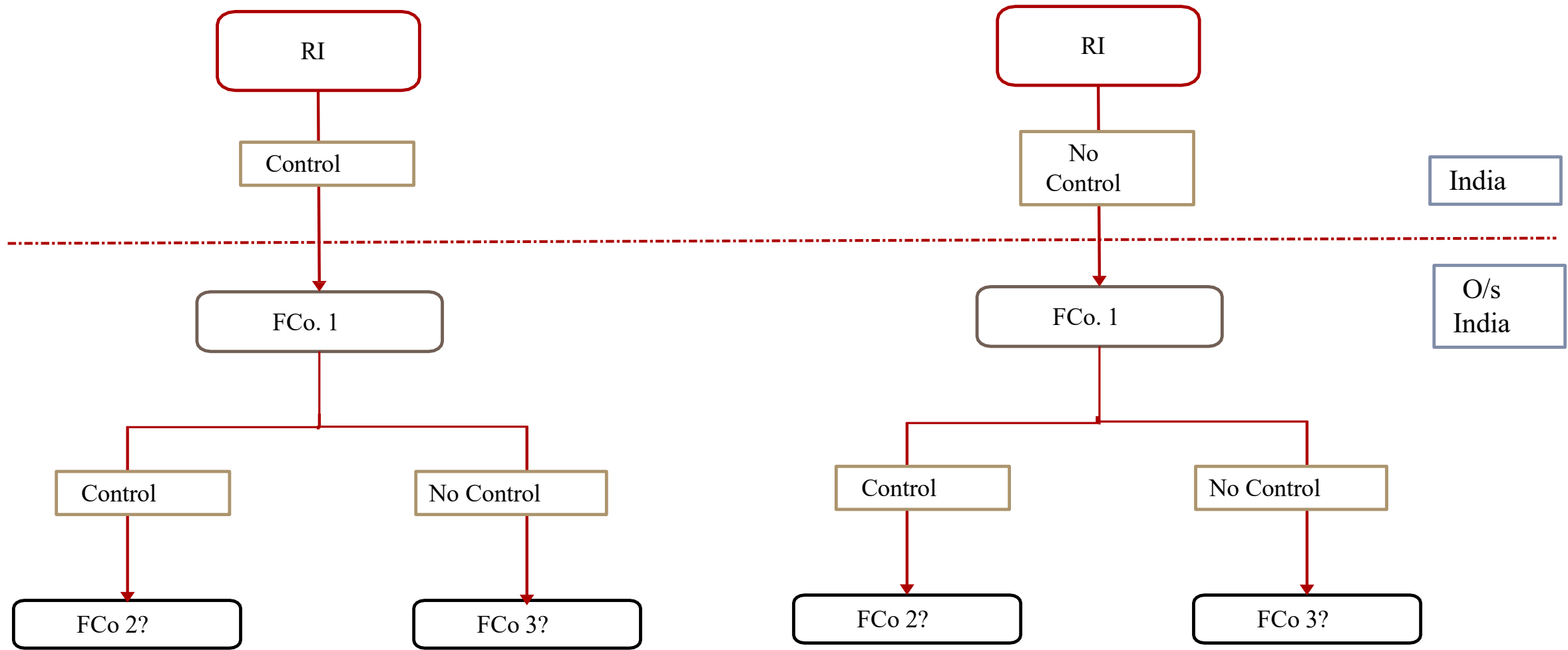
- ODI in an operating foreign entity not engaged in FS activity and which does not have a subsidiary or step down subsidiary where RI has control in foreign entity. *‘Subsidiary’ or ‘step down subsidiary’ of a foreign entity means an entity in which the foreign entity has control;*
- OPI including reinvestment;
- ODI or OPI by way of:

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

❖ ODI allowed if FE carries FS activity or has SDS in case of in red + blue mark.

❖ Holding < 10% shall be considered as OPI in case blue mark items.

SCH III – OVERSEAS INVESTMENT BY RI



SCH III – OVERSEAS INVESTMENT BY RI

❖ Acquisition by way of gift or inheritance:

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

❖ Acquisition under ESOP Plan/ Scheme

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

FINANCIAL COMMITMENT BY IE – OTHER THAN EQUITY

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

FINANCIAL COMMITMENT - GUARANTEE

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

FINANCIAL COMMITMENT - PLEDGE

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

FINANCIAL COMMITMENT - PLEDGE

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

REINVESTMENT - ODI?

- PRI shall realise & repatriate within 90 days in the following cases:
 - ✓ all dues receivable with respect to investment in a such foreign entity;
 - ✓ consideration received on transfer/ disinvestment;
 - ✓ realisable value of assets on account of liquidation.

REINVESTMENT - LRS?

Income can be retained and reinvested.

However, funds or income unless reinvested shall be repatriated and surrendered within a period of 180 days.

Amount kept in Fixed Deposits or in other bank deposits, shall not be treated as investment.

OBLIGATION OF PRI

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

REPORTING REQUIREMENT FOR OI

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

DELAY IN REPORTING

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

RESTRICTION OF FURTHER INVESTMENT/ TRANSFER

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

LATE SUBMISSION FEES

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

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

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

OPENING OF FOREIGN CURRENCY ACCOUNT ABROAD FOR OVERSEAS INVESTMENT (OI)

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

CASE STUDIES



CASE STUDY - I

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



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

CASE STUDY - II

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

- Sale of A company's shares during the month of January 2025;
- Sale of B company's part shares during the month of July 2025.



Further, he is intending to sell balance shares of company B during the first week of December 2025. Moreover, Mr. Intelligent Investor has not utilized the sale proceeds of company A & B's shares till now since he is unable to find investment opportunities owing to the recession and business slowdown talks in the US.

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

CASE STUDY - III

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



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

CASE STUDY - IV

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

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



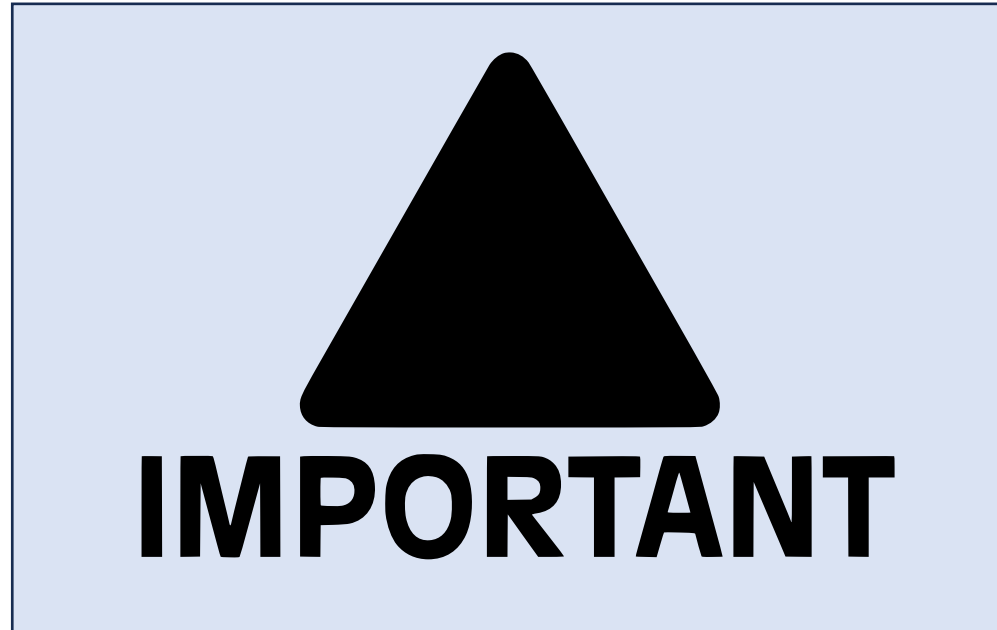
Question: Whether Mr. Bond is permitted to invest in above capital assets?

CASE STUDY - VI

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



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



OTHER IMPORTANT MATTERS &
SIGNIFICANT CHANGES

SIGNIFICANT CHANGES

- Enhance Clarity of definitions
- Concepts Redefined
- New Concept of Strategic Sector
- Dispensing of Approvals:
 - ❖ Deferred Payment Consideration.
 - ❖ Investment or Disinvestment by persons resident in India under investigation by any investigative agency or any regulatory body (CBI,ED,SEBI,SFIO,DRI) earlier prohibited to make Overseas Investment, Now only **NOC needed from the agency concerned.**
 - ❖ Issuance of corporate guarantee on behalf of second or subsequent level of Step-Down Subsidiary (SDS)
 - ❖ Write off an account of disinvestment.
- Introduction of concept of Late Submission Fee for reporting delays Rs. 7500+0.025% of amount of cash flow /commitments per year (even old documents – LSF apply for 3 years).

PERMISSION FOR MAKING OVERSEAS INVESTMENT

- Foreign entity to be engaged in a genuine (bonafide) business.
- Investment can be directly in the foreign entity or through SDS or SPV.
- Indian entity/Resident individual
 - ❖ Make application in from FC giving details contained therein.
 - ❖ Attach require documents.
 - ❖ Approach Authorised Dealer Bank.
 - ❖ Incase of Approval Route Foreign Investment –AD will forward application to RBI with its recommendations.

OVERSEAS INVESTMENT APPROVAL ROUTE

- Form FC
- Background and brief details of the Transaction
- Provision under which Approval Sought
- AD bank to make observation on:
 - ❖ Prima Facie viability of foreign entity
 - ❖ Benefits which may accrue to India
 - ❖ Financial position & Business track record of India entity and foreign entity
 - ❖ Any other material aspect
- Confirm Board of Directors approval of Investor
- Indian Entity Corporate Structure Details including SDS with operation details (Status)
- Valuation certificate for foreign entity (incase of existing company acquisition)
- Other documents relevant for the proposed investment

OVERSEAS INVESTMENT APPROVAL ROUTE

- Government Approval Route
 - ❖ Investment in Pakistan
 - ❖ Investment in Strategic Sector – as defined
 - ❖ Investment in other Specific Geography, as may be notified by Central Govt.
- Reserve Bank Approval Route
 - ❖ Financial commitment of US \$ 1 Billion or more in a financial year
 - ❖ Investment beyond eligible limits.

NO OBJECTION CERTIFICATE

- Resident person making investment or undertaking disinvestment of financial commitment
- NOC from lender bank
 - ❖ Investor having any account classified as Non-Performing Asset(NPA); or
 - ❖ Investor Declared Willful Defaulter
- NOC from Financial Sector Regulator
 - ❖ If under investigation by a financial sector regulator e.g. SEBI,RBI,IRDA,.....
- NOC from Respective Investigating Agency
 - ❖ If under investigation by an Investigating Agency e.g. CBI,ED,SFIO,.....
- No NOC required for existing financial commitment including guarantee obligations

RIGHT ISSUE AND BONUS ISSUE OF SHARES

- Right Issue of Shares
 - Permitted ODI in terms of Rules and Regulation and limits
 - No reporting required if right issue entitlement renounced
- Bonus Issue of Shares
 - Not treated as afresh or additional financial commitment

ACQUISITION OF FOREIGN ENTITY

- Bidding or Tender Procedure
 - ❖ Earnest money deposit permitted
 - ❖ Bid Bond Guarantee by AD Bank
 - ❖ After winning tender or bid additional remittance permitted – Form FC to be submitted with necessary documents.
 - ❖ EMD to repatriate to India in case of un-successful bid.
 - ❖ After being successful – If Investor do not wish to proceed-EMD or Bid Bond Guarantee may be forfeited - AD Bank to examine Bonafide of transaction
- Debt –Acquisition funding several alternative structures
 - ❖ International banks or lender loans
 - ❖ Equity funding secured by :
 - Future cash flows
 - Monetisation of assets
 - ❖ Corporate Guarantee
 - ❖ Trust Structure

ODI IN START-UPS

- Not permitted out of borrowed funds
- Statutory Auditors/CA of Indian Investor to certify

ODI-ACQUISITION OR TRANSFER BY WAY OF DEFERRED PAYMENT

- AD bank to verify bonafide of transactions
 - ❖ Underlying agreement
 - ❖ Related documents including proposal details
 - ❖ Period of deferment to define upfront
 - ❖ Deferred consideration to treat as financial commitment – Report in Form FC (Deferred amount treated as Non-Fund based commitment)
 - ❖ Valuation in accordance with pricing guidelines

MODE OF PAYMENT – ODI

- Indian entity can open a foreign currency account abroad for making ODI investment or Remit through Normal Banking Channels.
- Cash Payment Not Permitted
- No remittance by Branch office or Project office outside India
- No payment to third parties on behalf of foreign entity except as permitted by RBI
- Remittance only towards Financial Commitment - Equity or Debt or Non-Fund based commitments (guarantees) and disinvestment
- Nepal/Bhutan-investment in freely convertible foreign currency only
- Swap of Shares- Valuation by Merchant Banker-ODI compliance on both legs of transaction

OBLIGATION OF PERSON RESIDENT IN INDIA

- To submit evidence of investment to Authorised Dealer (Bank) within 6 months of repatriation
 - ❖ Evidence including allotment or transfer of security or copy of share certificates or securities issued
 - ❖ Evidence to be retained by AD
 - ❖ AD to satisfy about bonafide of documents so received
- Form FC to submit to AD Bank for obtaining UIN or on before making investment
- Annual Performance Report duly certified by a Statutory Auditor in case of Corporate Investor and by any CA in case of Investment by Resident Indian (Individual)

RESIDENT INDIVIDUALS INVESTMENT

- Resident Indian (RI) making overseas investment with acquisition of control (more than 10% equity and /or other criteria) has same obligations of ODI Compliance and submission of Form FC and all other supporting documents.
- RI investment can be made only within limit for Liberalised Remittance Scheme (LRS)
- Acquisition of shares /investment by way of inheritance or gift not within LRS limit
 - ❖ No reporting under LRS in such cases required.

RESTRICTION AND PROHIBITION – ODI

- No outward remittance/further financial commitment until delay in reporting regularized in respect of earlier ODI
- No investment in countries/jurisdictions prohibited by Central Government
- No investment in prohibited sectors
 - ❖ Banking
 - ❖ Real Estate Business
 - ❖ Lottery or Gambling
- Financial products linked to Indian Rupee (include non deliverable trade involving foreign currency – INR exchange rates)

OVERSEAS INVESTMENT BY RESIDENT

- Investment in India by foreign entity having ODI from India
- Financial commitments by a person resident in India in a foreign entity that has
- Invested or invest in India at the time of making financial commitment or at any time thereafter
 - ❖ Either directly or
 - ❖ Indirectlyresulting into a structure with more than two layers of subsidiaries in India is not permitted
- No further layer or subsidiaries shall be added to any structure having two or more layers of subsidiaries after notification of FEM (Overseas Investment) Directions, Rules and Regulations
- **Subsidiaries for above purpose shall include all entities in which investor foreign entity has control(including 10% or more stake in the entity)**

OVERSEAS INVESTMENT BY RESIDENT INDIVIDUALS

- Resident individual (single or in association with other RI or Indian Entity) are permitted to make overseas investment.
- Where ODI investment made without control that subsequently acquire or set up a subsidiary-such RI shall not acquire control in foreign entity
- 10% or more investment to be reckoned as ODI - also in case of investment (whether listed or unlisted) by way of
 - ❖ Capitalisation
 - ❖ Swap of securities
 - ❖ Right/Bonus
 - ❖ Gift
 - ❖ Inheritance
 - ❖ Any other manner

OVERSEAS INVESTMENT BY RESIDENT INDIVIDUALS

- All investment below 10% of paid up capital or stock of foreign entity - which do not lead to control – shall be reckoned as Overseas Portfolio Investment (OPI)
- In case of swap of securities-both the legs of investment to comply FEMA Regulations
 - ❖ Non confirming portion to disinvest within 6 months
- Resident individual can not transfer any foreign investment by way of gift to persons resident outside india
- Shares / interest in Foreign Entities acquired on behalf of employees, in terms of ESOP / Employee Benefit Scheme - AD bank may allow remittance through a SPV/SDS
- OPI investment form OPI to be submitted
- ODI investment form FC to be submitted

OVERSEAS INVESTMENT BY A PERSON RESIDENT IN INDIA- OTHER THAN RESIDENT INDIAN OR INDIAN ENTITY (OPI)

- Mutual Funds within overall limit of 7 Billion US \$
- VC and AIF - within overall limit of 1.5 Billion US \$
- SEBI may permit investment by Mutual Funds up to 1 Billion US \$ cumulatively
- Branch of Indian Banks (AD) outside India-during normal course of Banking business may acquire foreign equity/security –No ODI control

CREATION OF PRIVATE TRUST (OUTSIDE INDIA)

- Selection of jurisdiction
- Settlor-a relative resident outside India
- Trustee Company or
- Atleast 2 individuals resident outside India
- Beneficiary-Resident in India (one or more member of family)
- Trust can own assets, investment outside India
- Corporate Structure
- Funding from outside India
 - ❖ Equity
 - ❖ Debt
- Unrelated to indian entity or Resident Indian Income Tax Return disclosure
 - ❖ Beneficial interest
 - ❖ Signatory
- Full freedom to invest or disinvest
- POEM to manage
- Black Money Law-Benami Law not to violate



CA Vinod Jain

B.Com (H), LLB, FCA, FCS, FCMA, DISA (ICAI)

INMACS

vinodjain@inmacs.com | vinodjain@vinodjainca.com

+91 98 110 40004

503, Chiranjiv Towers, 43, Nehru Place, New Delhi – 110019
Global Business Square, Building No. 32, Sector 44, Gurugram