

**PRESENTATION
ON
UPDATES – INBOUND & OUTBOUND INVESTMENTS
AND EXTERNAL COMMERCIAL BORROWINGS**

FOR

**HYDERABAD CHAPTER - ICSI
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STRUCTURE OF PRESENTATION

- Overview of Foreign Investment Framework
- FDI in certain Key Sectors
- FDI IN Limited Liability Partnership (LLP)
- Highlights of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017
- Outbound Investments (ODI) – Regulatory Framework
- External Commercial Borrowings (ECB – Regulatory Framework



**OVERVIEW
OF
FOREIGN INVESTMENT
FRAMEWORK**

FDI POLICY

- Foreign Investments is regulated by Govt.'s FDI policy
- Intent and objective is to promote FDI to supplement domestic capital, technology and skills for accelerated economic growth
- Transparent, predictable and easily comprehensible policy framework
- FDI guidelines administered by Ministry of Commerce and Industry

REGULATION OF FDI POLICY

- FDI is regulated by :-
 - DIPP (Department of Industrial Policy & Promotion)
 - SIA (Secretariat of Industrial Approvals)
[FIPB (Foreign Investment Promotion Board) abolished in May 2017]
- Administrative and compliance aspects monitored by RBI (Reserve Bank of India)

AUTOMATIC ROUTE & GOVERNMENT ROUTE

- **Automatic Route** means the entry route through which investment by a person resident outside India does not require the prior approval of RBI or Government.
- In the case of Foreign Portfolio Investment, foreign investment limit up to 49% of paid up capital on a fully diluted basis or the sectoral cap limits whichever is lower, will not require Government approval
- **Government Route** means the entry route through which investment by a person resident outside India requires prior Government approval. Foreign investment received under this route shall be in accordance with the conditions stipulated by the Government in its approval.
- There are only 11 sectors, where prior Government approval is required

GOVT ROUTE

- DIPP has notified Standard Operating Procedure (SOP) for processing FDI proposals which require Govt. approval (No. 1/8/2016-FC-1 dated 29.6.2017)
- Online application to be filed on the portal www.fifp.gov.in (Foreign Investment Facilitation portal which is a revamped version of the erstwhile FIPB portal)
- If application is digitally signed by applicant, no need to submit physical application. If not, then applicant to submit physical application to DIPP within 5 days.
- Applications for approval of foreign investments shall be processed in a time bound manner as outlined in the SOP.
- The SOP stipulates the competent authorities who are entrusted with the responsibility for granting approval for foreign investments.
- The SOP also stipulates time limits with respect to the approval process.

COMPETENT AUTHORITIES FOR APPROVAL UNDER GOVT ROUTE – PARA 4.1 OF FDI POLICY

SR NO.	Activity / Sector	Administrative Ministry / Department
1	Mining	Ministry of Mines
2a	Items requiring Industrial Licence under I(D&R) Act and /or Arms Act for which powers are delegated to DIPP by Home Ministry	Department of Defence Production, Ministry of Defence
2b	Manufacturing of Small Arms and Ammunitions under Arms Act	Ministry of Home Affairs
3 & 4	Broadcasting and Print Media	Ministry of Information & Broadcasting
5	Civil Aviation	Ministry of Civil Aviation
6	Satellites	Department of Space
7	Telecommunications	Department of Telecommunications
8 & 9	Private Security Agencies And Applications involving investments from <i>Countries of Concern</i> (which presently include Pakistan and Bangladesh), requiring security clearance as per the extant FEMA 20, FDI Policy and security guidelines, amended from time to time	** as per PN 1/2018 DIPP for countries of concern and for Private Security Agencies Nodal Administrative Ministries / Depts. (earlier Ministry of Home Affairs)

COMPETENT AUTHORITIES FOR APPROVAL UNDER GOVT ROUTE – (Continued)

SR NO.	Activity / Sector	Administrative Ministry / Department
10, 11, 12 & 13	Trading (Single Brand, Multi Brand and Food Product retail trading); FDI proposals by NRI's / EOU requiring Govt approval; Issue of shares for import of capital goods/machinery and Issue of shares for Pre-operative / incorporation expenses	Department of Industrial Policy & Promotion (DIPP)
14	Financial Services activity not regulated by any Financial Service regulator or where part is regulated or where is doubt	Department of Economic Affairs
15	Investment in Core Investment Company or an Indian company engaged only in investing in capital of other company	
16	Banking (Public and Private)	Department of Financial Services
17	Pharmaceuticals	Department of Pharmaceuticals
Note	Where there is doubt about Administrative authority	DIPP shall identify the Administrative Ministry/Dept

APPROVAL UNDER GOVT ROUTE – TIME LIMITS UNDER SOP

Sr No.	Action Points	Time Period	Cumulative Time Period
1	Dissemination of proposal to administrative ministry / dept. by DIPP	2 days	
2	Submission of signed physical copy by applicant, if needed	5 days	7 days
3	Initial scrutiny of the proposal and documents attached therewith, and seeking relevant additional information/documents from the applicant	1 week	2 weeks
4	Submission of clarification by DIPP on specific issues of FDI policy	2 weeks	4 weeks
5	Time limit for Submission of Comments by Consulted Ministry/ Department/ RBI/ Any Other Stakeholder	4 weeks	8 weeks
6	Time limit for submission of Comments by Ministry of Home Affairs on proposals requiring security clearance	6 weeks	8 weeks
7	Time limit for security clearance, if required - If not required	2 weeks/ Nil	10 weeks / 8 weeks
Note	a) Additional time limit for rejection cases or where additional conditions not provided in FDI Policy are proposed to be imposed b) Time taken by applicant to remove deficiencies / clarification to be excluded.	2 weeks	

PROHIBITED SECTORS

FDI is prohibited in the following sectors :-

- (a) Lottery Business including Government /private lottery, online lotteries, etc.
- (b) Gambling and Betting including casinos etc.
- (c) Chit funds
- (d) Nidhi company
- (e) Trading in Transferable Development Rights (TDRs)
- (f) Real Estate Business or Construction of Farm Houses
- (g) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- (h) Activities / sectors not open to private sector investment e.g. Atomic Energy and Railway Transport (other than Paras dealing with Railway Infrastructure).

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 IN CERTAIN KEY SECTORS

E-Commerce (Para 5.2.15.2)

Conceptual Framework

- E-commerce is defined as “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.
- Marketplace based 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.

FDI Cap for e-commerce sector

- FDI in B2B e commerce – 100% through automatic route (not permitted in B2C)
- FDI in Marketplace based model of e-commerce – 100% (not permitted in inventory based model of e-commerce)

E-Commerce (Continued)

Significant Prescribed Conditions :-

- 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 fulfillment, 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.
- 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
- In marketplace model 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.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warrantee/ 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 of Consolidated FDI policy will apply for B2B e-commerce

Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalities, sale of services through e-commerce will be under automatic route.

Single Brand Retail (Para 5.2.15.3)

FDI – Automatic route up to 100% (earlier above 49% through approval route)

** Press Note No. 1/2018

Conditions to be fulfilled :-

- Products to be sold should be of a “Single Brand” only.
- Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India.
- “Single Brand” product-retail trading would cover only products which are branded during manufacturing.
- Brand need not be owned by Non Resident, but there should be a legally tenable agreement, evidence of which should be furnished to RBI / FIPB as the case may be
- Compulsory sourcing of 30% of value of goods from Indian MSE sector if Non resident holding is 51% or more
- Application for approval should be product specific. Any additional product under the brand will require fresh approval.
- Single brand retail trading entity would be allowed to set off incremental sourcing of goods from India for global operations for the initial 5 years** (PN 1/2018)

Multi Brand Retail (Para 5.2.15.4)

FDI in Multi Brand up to 51% and only through approval route is subject to following conditions :-

- Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded.
- Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million.
- At least 50% of total FDI brought in the first tranche of US \$ 100 million shall be invested in 'backend infrastructure' within three years of the first tranche of FDI
- At least 30% of the value of procurement of manufactured/ processed products purchased shall be sourced from Indian 'small and medium industries' which have a total investment in plant & machinery not exceeding US \$ 2.00 million
- Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category

Multi Brand Retail (Para 5.2.15.4) contd

- The sourcing requirement would have to be met, in the first instance, as an average of five years" total value of the manufactured/ processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis.
- Self Certification by the companies to ensure compliance. Accordingly, investors shall maintain accounts duly certified by statutory auditors.
- Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities
- Govt has the first right to procure agricultural products
- Retail trading in any form, by means of e-commerce would not be permissible for companies with FDI, engaged in Multi Brand retail.
- FDI policy with respect to Multi Brand retail is an enabling policy and states / union territories have to finally adopt the same.

CIVIL AVIATION

SECTOR (As per Para 5.2.9.2)	% OF EQUITY CAP	ROUTE
<u>AIRPORTS</u> (a) Greenfield Projects (b) Existing Projects	100% 100%	Automatic Automatic (up to 74% and beyond that Approval route till PN 5 dated 24.6.2016)
<u>AIR TRANSPORT SERVICE</u> Scheduled Air Transport Service / Domestic Scheduled Passenger Airline & Regional Air Transport Service	49% FDI & 100% NRI	Automatic and Approval route beyond 49% for FDI ** Policy also applies to Air India (PN 1/2018)
Non Scheduled Air Transport Service & Helicopter service / sea plane services requiring DGCA approval	100%	Automatic
<u>OTHER SERVICES</u> Ground Handling Services; Maintenance & Repair Organisations, flying training Institutes & technical training institutions	100%	Automatic

PHARMA

Sector / Activity (Para 5.2.27)	% of Equity Cap	Entry Route
Greenfield	100%	Automatic
Brownfield	100%	Automatic up to 74% and beyond 74% approval route (Prior to PN 5 / 24.6.2016 – 100% Approval route)
Medical Devices defined in PN 1/2018, but subject to any amendment in Drugs and Cosmetics Act, 1940	100%	Automatic
Other Conditions applicable both for Automatic and Approval route		<ul style="list-style-type: none"> a) Non Compete clause in only special circumstances with the approval of FIPB b) Govt. may incorporate appropriate conditions for FDI in brownfield cases c) Conditions regarding maintenance of production level of Essential Medicines and maintenance of R&D Expenses at an absolute level higher level over PY (5 years for production & 3 years for R&D)

FINANCIAL SERVICES (PARA 5.2.17 to 5.2.26)

- Press Note 6/2016 dated 25.10.2016 expanded the scope of FDI in financial services sector.
- Para 5.2.26 earlier dealing with financial services referred to NBFC, which enumerated 18 categories of services. Now all financial services regulated by RBI, SEBI, IRADA, PFRDA, NHB or any other financial sector regulator as may be notified by the Government are covered in this Para
- FDI for the entire financial services sector coming within the purview of Para 5.2.26 is eligible up to 100% under Automatic Route
- Minimum capitalization norms will be as stipulated by the sectoral regulator under the relevant Act.
- If the particular financial service is not regulated by any of the financial sector regulator, any FDI for such activity will be through approval route. The Central Government in such cases will specify conditions relating to minimum capitalization.

REAL ESTATE BUSINESS (PARA 5.2.10)

- FDI not permitted in entity which engages or proposes to engage in Real Estate business, construction of farm houses and trading in Transferable Development Rights (TDR's).
- Other than above prohibited activities connected to Real Estate, 100% FDI through Automatic Route is allowed.
- Real Estate Business is defined to mean "dealing in land and immovable property with a view to earn profit therefrom"
- Definition of Real Estate does not include development of townships, construction of residential / commercial premises, roads, bridges, recreational facilities, city and regional level infrastructures, townships.
- Earning of Rent / Income from lease of property not amounting to transfer will not amount to real estate business
- Press Note No. 1/18 clarifies that Real Estate Broking is not real estate business and is eligible for 100% FDI through Automatic route.
- Lock in Period of 3 years from the date of FDI in construction / development.
- Lock-in shall not apply in case of Hotels & Tourist Resorts, Hospitals, SEZ's, Educational Institutions, Old Age Homes and investment by NRI's
- Foreign investor permitted to exit after completion of project or development of trunk infrastructure. However, if 3 years completed, exit allowed, even if project is not completed
- Transfer of stake from Non Resident to another Non Resident is allowed.

DEFENCE AND BROADCASTING SECTOR

SUBJECT	REFERENCE	CHANGES EFFECTED
DEFENCE SECTOR (Subject to IDRA, 1951 and Arms & Ammunitions Act, 1959)	Para 5.2.6	Automatic up to 49% and Govt. Route up to 100% wherever it is likely to result in access to modern technology or for other reasons to be recorded. Other conditions stipulated in Para 5.2.6.2 to be fulfilled.
Broadcasting Sector (Teleports, DTH, Cable Networks, mobile TV, Head End in the Sky – Broadcasting Services HITS)	Para 5.2.7	Activity covered under Para 5.2.7.1 – Automatic route up to 100% Infusion of foreign investment beyond 49% in a company not seeking licence / permission from sectoral regulator / ministry resulting in change of ownership to a new foreign investor will require Government approval



FDI IN LLP

Key policy changes – FDI in LLP

- FDI up to 100% is permitted under the automatic route in LLPs operating in sectors or activities where
 - 100 per cent FDI is allowed under the automatic route and
 - there are no FDI-linked performance conditions. (eg. NBFC, Township development, housing)
- FDI in legal profession continues to be prohibited.
- Terms – Ownership and control have been defined
- FDI is subject to compliance of LLP Act, 2008

Definition of Ownership and Control in FDI policy

- **Ownership** : A LLP is considered to be owned by resident Indian citizens if more than 50 per cent of the investment in it is contributed by resident Indian citizens or entities and such resident Indian entities have a majority of the profit share.
- **Control** : The term is defined to include the right to appoint a majority of the directors or to control the management or policy through their shareholding or management rights or otherwise through shareholders' agreement or other voting agreements. Further in case of LLPs '*control*' would mean the right to appoint a majority of the designated partners, where such designated partners have control over all the policies of the LLP.

Downstream Investment by LLP

- LLPs receiving foreign investment would be permitted to make downstream investment in another company or LLP in sectors in which 100 % FDI is permitted under the automatic route and there are no FDI-linked performance conditions. However, the LLP must notify the SIA, DIPP and the FIPB in the prescribed format within 30 days of such investment.
- Issue / transfer / pricing / valuation shall be in accordance with RBI guidelines
- For making downstream investments, LLP having non-resident shareholding should bring in funds from abroad and not leverage funds from domestic market. This restriction does not apply to operating LLP's , which may raise funds from domestic market.
- Downstream investments through internal accruals are however permitted, but these are subject to sectoral caps. Internal accruals have been defined to mean profits transferred to reserve account after payment of taxes.

KEY IMPACTS

- Increase in number of conversions of Private companies into LLP's
- Increase in FDI through foreign investments into LLP format particularly in the small scale and medium scale activities
- A big boost for the LLP format of doing business, which is in line with India's vision to promote "Ease of doing business"

Conversion of company into LLP – LLP Act 2008

- **Section 56 & Schedule III of LLP Act –**
Conversion of private company into LLP
- **Section 57 & Schedule IV of LLP Act –**
Conversion of unlisted public company into LLP
- **Section 58(4) of LLP (relevant extract)**
provides that all tangible (movable or immovable) and intangible property vested in the company, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the company, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed; and the company, shall be deemed to be dissolved and removed from the records of the Registrar of Companies

Schedule III and IV of LLP Act – Main Points

Para 2 of both schedules stipulate following conditions :-

- (a) there is no security interest in its assets subsisting or in force at the time of application; and
- (b) the partners of the limited liability partnership to which it converts comprise all the shareholders of the company and no one else.

Para 7 provides that If any property to which clause (b) of paragraph 6 applies is registered with any authority, the LLP shall, as soon as practicable, after the date of registration, take all necessary steps as required by the relevant authority to notify the authority of the conversion and of the particulars of the limited liability partnership in such form and manner as the authority may determine.

Conversion into LLP – Income tax Act

Section 47(xiiiib) of IT Act provides that any transfer of a capital asset or intangible asset or transfer of any share(s) held in the company as a shareholder as a result of conversion of the company into a LLP in accordance with Section 56 or 57 of the LLP Act shall not be regarded as a transfer within the meaning of Section 45 of the Act.

Conditions – 47(xiiib) of IT Act

(a) all the assets and liabilities of the company immediately before the conversion become the assets and liabilities of the LLP;

(b) all the shareholders of the company immediately before the conversion become the partners of the LLP and their capital contribution and profit sharing ratio in the LLP are in the same proportion as their shareholding in the company on the date of conversion;

(c) the shareholders of the company do not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of share in profit and capital contribution in the LLP

Conditions – 47(xiii b) of IT Act (Contd)

(d) the aggregate of the profit sharing ratio of the shareholders of the company in the LLP shall not be less than 50% at any time during the period of five years from the date of conversion;

(e) the total sales, turnover or gross receipts in the business of the company in any of the three previous years preceding the previous year in which the conversion takes place does not exceed Rs. 60 lakhs; and

(f) no amount is paid, either directly or indirectly, to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion.

Conversion options

If 47(xiii b) conditions cannot be fulfilled for any reason, then the options for conversion into LLP either through Section 56 or Section 57 of LLP Act, if feasible

Tax implications to be analysed in detail.

SUMMARY OF CONVERSION OPTIONS – COMPANY INTO A LLP

	Conversion satisfies conditions of Section 47(xiiib)	Conversion does not satisfy condition of section 47(xiiib), but as per LLP Act	Acquisition of business as a whole by a LLP at book value of undertaking
Whether regarded as a transfer under Section 45	No	Yes	Yes
Whether qualifies to be a slump sale under Section 50B	Not applicable, since not a sale	Not applicable, since it is not a sale	Yes
Whether attracts Capital Gain	No, since it is not a transfer	Yes and subject to Section 50C, if there is immovable property	No, since business as a whole is taken over at book value, including immovable property, if any
Stamp duty on immovable property, if any	Possible opinion is :- Would not apply, since it would be regarded as succession ??	Possible opinion is :- Would not apply, since it would be regarded as succession ??	Stamp duty would be applicable, since it is a sale.

**HIGHLIGHTS OF FOREIGN EXCHANGE
MANAGEMENT (TRANSFER OR ISSUE
OF SECURITY BY A PERSON RESIDENT
OUTSIDE INDIA) REGULATIONS, 2017**

A SNAP SHOT OF THE REGULATIONS

Regulation	What it covers
1	Commencement Notification
2	Definitions
3 & 4	Restriction on making and receiving investment
5	Purchase and Sale of Capital Investments
6	Rights or Bonus Issue
7	ESOP
8	Convertible Notes of a Start Up
9	Merger or Demerger or Amalgamation
10	Transfer of Capital Instruments
11	Pricing Guidelines
12	Taxes & remittance of Sale Proceeds
13	Reporting requirements
14	Downstream Investments
15	Prohibited Sectors
16	Permitted Sectors, entry routes and Sectoral caps for investments

The Commencement Notification

- RBI issues Notification No. **FEMA 20(R)/ 2017-RB** dated 7.11.2017 entitled **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017**, which supercedes Notification No. FEMA 20/2000-RB and Notification No. FEMA 24/2000-RB both dated May 3, 2000 (FEMA, Transfer or Issue of Security by a Person Resident Outside India, Regulations, 2000)
- The regulations came into force on 7th November, 2017, being the date of its publication in the Official Gazette
- Proviso (ii) to sub-regulation 1 of regulation 10 of these Regulations and proviso (ii) to sub-regulation 2 of regulation 10 of these Regulations will come into effect from a date to be notified. (Regulation 10 deals with Transfer of Capital Instruments of an Indian Company by or to a Person Resident Outside India)

The erstwhile 2000 Regulations notified in May 2000 were amended no less than 92 times to give effect to changes in FDI policy framework and also to certain other regulatory changes required to make the regulations effective. The new regulations *inter alia* bring all these changes at one place thus making it a single point of reference, at least for the time being.

IMPORTANT NEW DEFINITIONS

- **Capital Instruments (Regulation 2(v))** - Capital Instruments' means equity shares, debentures, preference shares and share warrants issued by an Indian company. Explanation added to provide for conditions in case of partly paid up shares and Warrants
- **Convertible Note (Regulation 2(vi))** - means 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
- **Foreign Direct Investment (Regulation 2(xvii))** - means investment through capital instruments by a person resident outside India in an unlisted Indian company; or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company;
- **Investment Vehicle (Regulation 2(xxix))** - means an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (Inv Its) governed by SEBI (InvIts) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by SEBI (AIFs) Regulations, 2012
- **Start Up (Regulation Xli)** - means an entity which complies with the conditions laid down in Notification No. G.S.R 180(E) dated February 17, 2016 issued by DIPP, Ministry of Commerce and Industry, Government of India
- **Start Up Company (Regulation Xlii)** means a private company incorporated under the Companies Act, 2013 and recognized as such by DIPP.

Restriction on making and receiving investment

- Regulation 3 - 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 RBI 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.
- Regulation 4 - 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.

Investment by a person resident outside India (Regulation 5)

Schedule No.	Nature of Investment by a Person Resident Outside India (Non Resident)
1	Purchase/ Sale of capital instruments of an Indian company by a Non Resident
2	Purchase/ Sale of capital instruments of a listed Indian company on a recognised stock exchange in India by Foreign Portfolio Investors
3	Purchase/ Sale of Capital Instruments of a listed Indian company on a recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis
4	Purchase or Sale of Capital Instruments or convertible notes of an Indian company or Units or contribution to the capital of an LLP by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on Non-Repatriation basis
5	Purchase and sale of securities other than capital instruments by a Non Resident
6	Investment in a LLP
7	Investment by a Foreign Venture Capital Investor (FVCI)
8	Investment by a Non Resident in an Investment Vehicle
9	Investment in a Depository Receipt (DR) by a Non Resident
10	Issue of Indian Depository Receipts (IDR) by Companies Incorporated outside India

Purchase / Sale of Capital Investments – Schedule I

Key Changes :-

a) A WOS set up by a Non Resident Entity operating in a sector where 100% FDI is allowed through automatic route and where there are no FDI linked Performance conditions may issue capital instruments to such Non resident entity up to 5% of its Authorised Capital or USD 500,000, whichever is less subject to :-

- The Indian company filing within 30 days from the date of issue of capital instruments, but not later than 1 year from incorporation date or such time as RBI or Central Government permits, report the transaction in FCGPR
- The Indian company obtains certificate from its statutory auditors that the amount of pre-incorporation/ pre-operative expenses against which capital instruments have been issued has been utilized for the purpose for which it was received and this should be submitted with the Form FC-GPR.

b) An Indian company may issue equity shares against any funds payable by it to a Non Resident, the remittance of which is permitted under the Act or the rules and regulations framed or directions issued thereunder or does not require prior permission of the Central Government or RBI under the Act or the rules and regulations framed or directions issued thereunder or has been permitted by the RBI under the Act or the rules and regulations framed or directions issued thereunder.

- Provided in case where permission has been granted by 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

Foreign Portfolio Investments – Schedule 2

Limit up to which Foreign Portfolio Investor may invest in capital instruments on a recognized SE	<p>Holding of each FPI or an investor group having meaning as defined in SEBI FPI regulations</p> <p>< 10% of paid up equity on a fully diluted basis or < 10% of paid up value of each series of debentures or preference shares or share warrants issued by an Indian Company AND</p> <p>Total holdings of all FPI's shall be ≤24% of paid up equity on a fully diluted basis or of each series, as the case may be</p>
If investee company seeks to cross the limit of 24%	Then it has to pass Board resolution and also obtain shareholder approval through Special Resolution. However, the maximum limits as per sectoral cap / statutory ceiling would apply
If 10% is exceeded, then the total investment made by FPI will be classified as FDI – then	Reporting requirements as per Regulation 13 with respect to FDI will be applicable to the investee company
Mode of Investment by FPI	<ul style="list-style-type: none"> - Public Offer - Private Placement
Pricing in case of Public Offer	Not less than the price at which the shares are issued to residents
Pricing in case of Private Placement	Not less than the fair price worked out as per internationally accepted pricing methodology for valuation of shares on arms' length basis by a Merchant Banker or CMA or CA
Short selling, lending or borrowing	Is allowed but subject to such conditions as may be stipulated by SEBI and / or RBI

Investments by NRI's / OCI's in SE – Schedule 3

<p>Limit up to which Non Resident Indian (NRI) or Overseas Citizen of India may invest in capital instruments on a recognized SE</p>	<p>Holding of each NRI or an OCI < = 5% of paid up equity on a fully diluted basis or < = 5% of paid up value of each series of debentures or preference shares or share warrants issued by an Indian Company AND Total holdings of all shareholding of NRI's and OCI's shall be <=10% of paid up equity on a fully diluted basis or of each series, as the case may be</p>
<p>If investee company seeks to cross 10%</p>	<p>Then it has to pass Board resolution and also obtain shareholder approval through Special Resolution. However, the maximum limits up to which NRI's and OCI's put together can invest cannot exceed 24%, even with board resolution and special resolution.</p>
<p>Other conditions</p>	<p>NRI and OCI are allowed to purchase and sell capital instruments. However, consideration for investment shall be through normal banking channels or by debit to NRE account with Authorised Dealer (AD) Such NRE account shall be designated as NRE (PIS) Account and shall be used exclusively for putting through transactions covered in this schedule. Sale proceeds of capital instruments (net of taxes) shall be remitted outside India or credited to NRE (PIS) account of the person concerned.</p>

Investment in Non Repatriation Basis – Schedule 4

Permitted Investments

Following Investments by a NRI or OCI, including a company, a trust, and a partnership firm incorporated outside India and owned and controlled by NRI's or OCI on Non Repatriation basis shall be deemed to be domestic investments at par with investments made by residents :-

- (a) Any capital instrument issued by a company without any limit either on the stock exchange or outside it.
- (b) Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.
- (c) The capital of a Limited Liability Partnership without any limit.
- (d) Capital of a firm or a proprietary concern in India
- (e) Convertible notes issued by a startup company in accordance with these Regulations.

Prohibited Investments

Following investments in capital instruments or units by above mentioned persons on Non Repatriation basis is however prohibited ,

- a) of a Nidhi company or
- b) a company or a firm engaged in agricultural/ plantation activities or real estate business or construction of farm houses or dealing in Transfer of Development Rights.

Schedule 6 – Investment in LLP

- A Non Resident (other than citizen of Pakistan or Bangladesh) other than a Foreign Portfolio Investor (FPI) or FVCI may contribute to capital of LLP operating in sectors where 100% foreign investments is permitted under automatic route and there are no FDI linked performance conditions.
- Investment by way of 'profit share' will fall under the category of reinvestment of earnings
- Investment in LLP is subject to compliance of conditions of LLP Act, 2008
- Inter-se conversion ie. Company to LLP or LLP to company is permitted provided the entity is operating in a sector where 100% foreign investments is permitted under automatic route and there are no FDI linked performance conditions.
- Investment 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 internationally accepted / adopted market practice supported by a valuation certificate from CA or CMA or approved valuer of a panel maintained by Central Government
- In the case of transfer by Non Resident to a Resident, the consideration for such transfer shall not be more than the fair price worked out and supported by a valuation certificate (as aforesaid)

Schedule 7 – Investment by FVCI

1. Subject to conditions as may be laid down by RBI, FVCI may purchase
 - (a) securities, issued by an Indian company engaged in any sector mentioned at para 4 of this Schedule and whose securities are not listed on a recognized stock exchange at the time of issue of the said securities;
 - (b) securities issued by a startup;
 - (c) units of a Venture Capital Fund (VCF) or of a Category I Alternative Investment Fund (Cat-I AIF) or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF.Provided if the investment is in capital instruments, then the sectoral caps, entry routes and attendant conditions shall apply;
2. An FVCI may purchase the securities/ instruments mentioned above either from the issuer of these securities/ instruments or from any person holding these securities/ instruments. The FVCI may invest in securities on a recognized stock exchange subject to the provisions of SEBI (FVCI) Regulations, 2000.
3. The FVCI may acquire, by purchase or otherwise, from, or transfer, by sale or otherwise, to, any person resident in or outside India, any security/ instrument it is allowed to invest in, at a price that is mutually acceptable to the buyer and the seller/ issuer.

The FVCI may also receive the proceeds of the liquidation of VCFs or of Cat-I AIFs or of schemes/ funds set up by the VCFs or Cat-I AIFs

Schedule 7 – Investment by FVCI (Contd.)

4. Sectors in which FVCI is allowed to invest are :-

- (1) Biotechnology
- (2) IT related to hardware and software development
- (3) Nanotechnology
- (4) Seed research and development
- (5) Research and development of new chemical entities in pharmaceutical sector
- (6) Dairy industry
- (7) Poultry industry
- (8) Production of bio-fuels
- (9) Hotel-cum-convention centres with seating capacity of more than three thousand.
- (10) 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.

Rights or Bonus Issue (Regulation 6)

- (1) The offer made by the Indian company is in compliance with the provisions of the Companies Act, 2013;
- (2) Such issue shall not result in a breach of the sectoral cap applicable to the company;
- (3) The shareholding on the basis of which the rights issue or the bonus issue has been made must have been acquired and held as per the provisions of these Regulations;
- (4) In case of a listed Indian company, the rights issue to Non Residents shall be at a price determined by the company;
- (5) In case of an unlisted Indian company, the rights issue to persons resident outside India shall not be at a price less than the price offered to persons resident in India.
- (6) Such investment made through rights issue or bonus issue shall be subject to the conditions as are applicable at the time of such issue.
- (7) The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in NRE/ FCNR(B) account maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

Explanation: The above conditions shall also be applicable in case a person resident outside India makes investment in capital instruments (other than share warrants) issued by an Indian company as a rights issue that are renounced by the person to whom it was offered.

Issue of Shares under ESOP – Regulation 7

An 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:

- (1) The scheme has been drawn either in terms of regulations issued under the Securities and 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;
- (2) The “employee’s stock option”/ “sweat equity shares” so issued under the applicable rules/ regulations are in compliance with the sectoral cap applicable to the said company;
- (3) Issue of “employee’s stock option”/ “sweat equity shares” in a company where investment by a person resident outside India is under the approval route shall require prior Government approval. Issue of “employee’s stock option”/ “sweat equity shares” to a citizen of Bangladesh/ Pakistan shall require prior Government approval.

Provided an individual who is a person resident outside India exercising an option which was issued when he/ she was a person resident in India shall hold the shares so acquired on exercising the option on a non-repatriation basis.

ISSUE OF CONVERTIBLE NOTES BY START UP CO. – REGULATION 8

(1) A Non Resident (other than an individual who is citizen of Pakistan or Bangladesh or an entity which is registered/ incorporated in Pakistan or Bangladesh), may purchase convertible notes issued by an Indian startup company for an amount of Rs. 25 lakhs or more in a single tranche.

(2) A startup company, engaged in a sector where investment by a Non Resident requires Government approval, may issue convertible notes to a person resident outside India only with such approval. Further, issue of equity shares against such convertible notes shall be in compliance with the entry route, sectoral caps, pricing guidelines and other attendant conditions for foreign investment.

(3) A startup company issuing convertible notes to a Non Resident shall receive the amount of consideration by inward remittance through banking channels or by debit to the NRE/ FCNR (B)/ Escrow account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016. Repayment or sale proceeds may be remitted outside India or credited to NRE/ FCNR (B) account maintained by the person concerned in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

(4) A NRI or an OCI may acquire convertible notes on non-repatriation basis in accordance with Schedule 4 of these Regulations.

(5) A Non Resident may acquire or transfer by way of sale, convertible notes, from or to, a person resident in or outside India, provided the transfer takes place in accordance with the entry routes and pricing guidelines as prescribed for capital instruments.

Merger / Demerger / Amalgamation – Regulation 9

(1) Issue of Capital Instruments by Transferee Company

- Scheme is approved by NCLT or competent authority
- Transfer or issue of capital instruments is in compliance with entry routes, sectoral caps or investment limits and other attendant conditions are complied with by the Non resident investor, otherwise transferor or transferee company must obtain necessary Government approval
- Transferor / Transferee Company shall not engage in any sector prohibited for non-resident investment.

(2) Issue of Non convertible redeemable preference or debentures as bonus out of general reserves to non-resident shareholders

- original issue is in accordance with these regulations and in compliance of the relevant schedule.
- Issue is in accordance with provisions of CA 2013 and as per scheme approved by NCLT / competent authority
- Indian company shall not engage in any sector prohibited for non-resident investment.

TRANSFER OF CAPITAL INSTRUMENTS (REGULATION 10)

TRANSFER BY	TRANSFER TO	MODE	NATURE OF PERMISSION
Non Resident	Non Resident	Sale / Gift	General
Non Resident	Resident	Gift	General
Non Resident	Resident	Sale (including buy back or capital reduction by indian company)	General (subject to pricing guidelines, documentation and reporting)
Resident	Non Resident	Gift	Prior RBI Permission
Resident	Non Resident	Sale	General (subject to pricing guidelines, documentation and reporting)
Non Resident Indian	Non Resident	Sale	General (earlier RBI Permission)

PRICING GUIDELINES – REGULATION 11

	Circumstances	Pricing Guideline
1	Issue by Indian Company	Listed company – As per SEBI Unlisted – Internationally accepted pricing methodology * Valuation by Cat I Merchant Banker or CA or CMA
2	Transfer from Resident to Non Resident	Listed company – As per SEBI Unlisted – Not less than price as determined by Internationally accepted pricing methodology * Valuation by Cat I Merchant Banker or CA or CMA
3	Transfer from Non Resident to Resident	Listed company – As per SEBI Unlisted – Not more than price as determined by Internationally accepted pricing methodology * Valuation by Cat I Merchant Banker or CA or CMA
4	Swap of capital instruments	Valuation by SEBI registered Merchant Banker or Investment Banker registered abroad with appropriate authority in the host country
5	Subscription to M/A of Indian Company	At face value, subject to entry route and sectoral caps
6	Warrants	Pricing and Price / conversion formula should be determined upfront

REPORTING REQUIREMENTS – REGULATION 13

FORM	Description	Timelines
Advance Remittance Form (ARF)	Reporting of receipt of consideration by Indian company for issue of capital instruments	Within 30 days of receipt of inward remittance
FCGPR	Issue of Capital Instruments to a Non Resident	Within 30 days of issue of capital instruments
FLA	Annual Return of Foreign Liabilities and Assets	July 15 following the close of financial year
FCTRS	Transfer of Capital Instruments between Residents (including Non Residents on Non Repatriation basis) and Non Residents	Onus of reporting on person holding capital instrument - within 60 days of receipt of funds or transfer of capital instruments, whichever is earlier
Form ESOP	Indian Company issuing ESOP to Non Residents	Within 30 days of issue of ESOP
Form DRR	Domestic custodian issuing / transferring Depository Receipts (DR's)	Within 30 days of close of the issue
Form LLP (I)	LLP receiving consideration towards capital contribution or profit share	Within 30 days of receipt of consideration
Form LLP (II)	Disinvestment or transfer of profit share	Within 60 days of receipt of funds

OUTBOUND INVESTMENTS

GOVERNING LAW

- Section 6(3)(a) of FEMA, 1999 read with FEM(Permissible capital Account Transactions), Regulations, 2000
- FEM (Transfer or issue of any Foreign security) Regulations, 2000 popularly referred as (FEMA 120)
- AP(DIR Series) Circulars issued by RBI from time to time
- Master Direction on Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) abroad (issued on January 1, 2016 updated up to January 4, 2018)
- FAQ on Overseas Direct Investment released by RBI (as updated from time to time)
- FAQ on Liberalized Remittance Scheme – Applicable for resident Individuals

IMPORTANT DEFINITIONS

- **“Direct Investment Outside India”** means investments in any of the the following manner :-
 - Contribution to capital of foreign entity or
 - Subscription to M/A of foreign entity or
 - Purchase of existing shares of a foreign entity (Market or private placement or through stock exchange)

But does not include Portfolio investment

- **“Indian Party”** means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932, or a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), making investment in a Joint Venture or Wholly Owned Subsidiary abroad, and includes any other entity in India as may be notified by the Reserve Bank:

Provided that when more than one such company, body or entity make an investment in the foreign entity, all such companies or bodies or entities shall together constitute the "Indian Party"

Important Definitions (Continued)

- "**Joint Venture (JV)**" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian Party makes a direct investment
- "**Wholly Owned Subsidiary (WOS)**" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country, whose entire capital is held by the Indian Party
- "**Financial Commitment**" means the amount of direct investment by way of contribution to equity, loan and 100 per cent of the amount of guarantees and 50 per cent of the performance guarantees issued by an Indian Party to or on behalf of its overseas Joint Venture Company or Wholly Owned Subsidiary
- "**Net Worth**" means paid up capital and free reserves

PROHIBITED INVESTMENTS / FINANCIAL COMMITMENTS

- **Real Estate / Banking** : Indian Parties are prohibited from making investment (or financial commitment) in foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.
- **Financial Products linked to Indian Market** : An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank. Any incidence of such product facilitation would be treated as a contravention of the extant FEMA regulations and would consequently attract action under the relevant provisions of FEMA, 1999.

GENERAL PERMISSION

General permission has been granted to persons residents in India for purchase / acquisition of securities in the following manner:

- (a) out of the funds held in RFC account;
- (b) as bonus shares on existing holding of foreign currency shares; and
- (c) when not permanently resident in India, out of their foreign currency resources outside India.

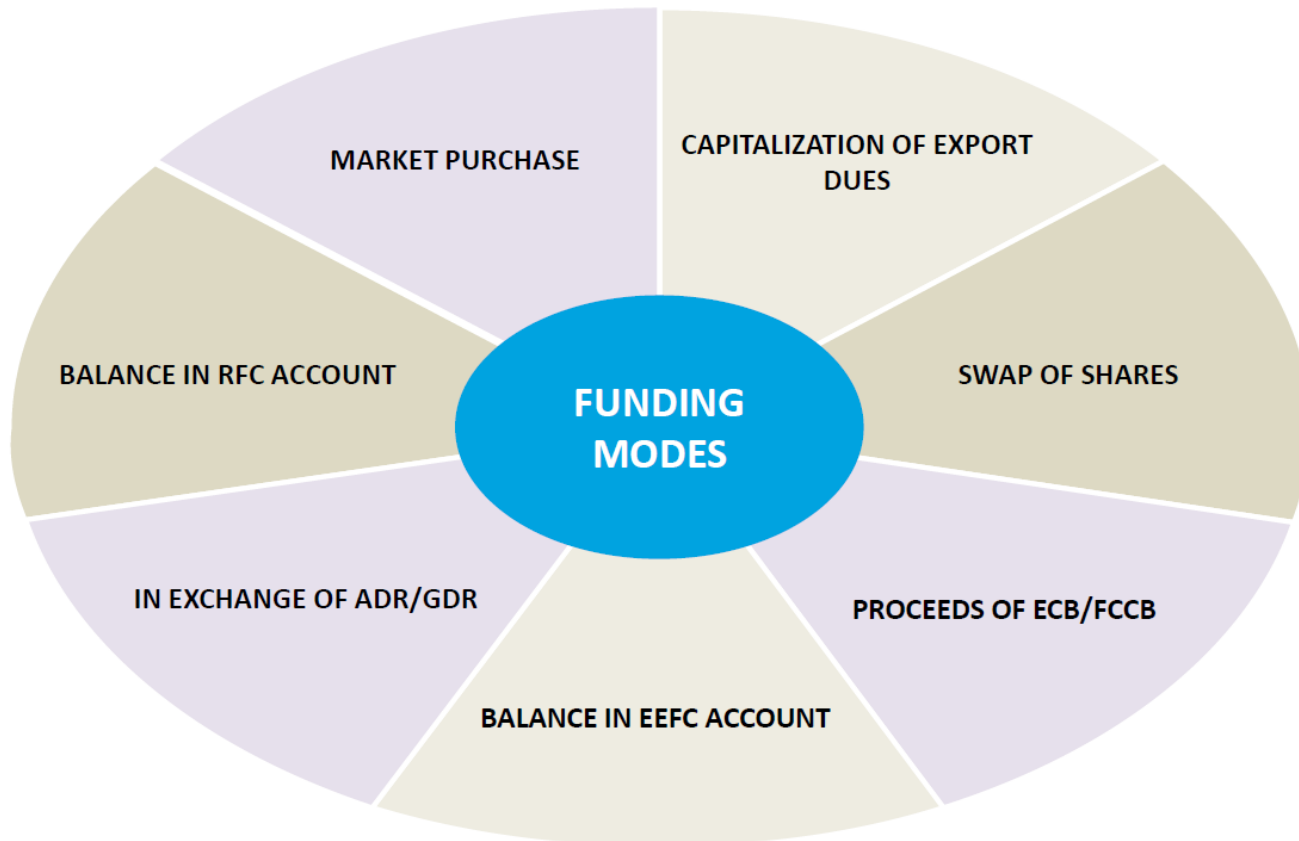
General permission is also available to sell the shares so purchased or acquired.

INVESTMENT ROUTES – AUTOMATIC / APPROVAL

AUTOMATIC ROUTE	APPROVAL ROUTE
<p>Overseas JV/WOS to be engaged in bonafide business activity except real estate and banking</p> <ul style="list-style-type: none">• Investment in Financial Sector should comply with additional conditions• Indian party not on RBI's Exporters' Caution List/list of defaulters/under investigation by an Authority such as ED, SEBI etc.• Overall ceiling of financial commitment in all JV/WOS is 400% of net worth as on last audited Balance Sheet, with ceiling of USD 1 billion in a financial year• Submission of Form Annual Performance Report in respect of all its overseas investment	<ul style="list-style-type: none">• Cases not covered under Automatic route• Specific application to RBI with necessary documents in Form ODI through the AD (Category I Bank) along with prescribed supporting and documents <p>RBI would inter alia consider the following factors:</p> <ul style="list-style-type: none">• Prima facie viability of JV/WOS outside India• Contribution to external trade and other benefits which will accrue to India through such investment• Financial position and business track record of the Indian party and foreign entity• Expertise and experience of the Indian party in the same or related line of activity of the JV/WOS outside India

MODE OF FUNDING

Modes of Funding Overseas Direct Investment



FINANCIAL COMMITMENT

Financial Commitment means the amount of direct investments outside India by an Indian party

- 100% - By way of contribution to equity shares or equity linked instruments of the JV/ WOS abroad ;
- 100% - By way of subscribing to other preference shares
- 100% -as loans to its JV/WOS abroad;
- 100% of the amount of corporate guarantee issued on behalf of its overseas JV/WOS;
- 50% of the amount of performance guarantee issued on behalf of its overseas JV/ WOS;
- Bank guarantee/standby letter of credit issued by a resident bank on behalf of an overseas JV/WOS of the Indian party, which is backed by a counter guarantee/ collateral by the Indian party; and
- Guarantee given on behalf of the first step down subsidiary

FINANCIAL SERVICES

- An Indian Party seeking to make investment (or financial commitment) in an entity outside India, which is engaged in the financial sector, should fulfil the following additional conditions:
 - (i) be registered with the regulatory authority in India for conducting the financial sector activities;
 - (ii) has earned net profit during the preceding three financial years from the financial services activities;
 - (iii) has obtained approval from the regulatory authorities concerned both in India and abroad for venturing into such financial sector activity; and
 - (iv) has fulfilled the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.
- Regulated entities in the financial sector making investments (or financial commitment) in any activity overseas are required to comply with the above guidelines.
- Unregulated entities in financial services sector in India may invest in non-financial sector activities subject to compliance with provisions of Regulation 6 of FEMA 120
- Trading in commodities exchanges overseas and setting up JV/WOS for trading in overseas exchanges will be reckoned as financial services activity and require clearance from SEBI

INVESTMENT BY PROPRIETARY CONCERNS & UNREGISTERED FIRMS

Investment by proprietary firm/unregistered partnership firms is allowed under approval route provided:

- Proprietary firm/unregistered partnership firm is recognised Star export House
- Having proven track records i.e. Export outstanding does not exceed 10% of average export realisation of past three years
- AD Bank has satisfied itself about the KYC compliance of the firm and is engaged in the Proposed business and has the turnover indicated
- Exporter has not come under adverse notice of any Government agency like ED, CBI, Income Tax dept etc.
- The amount of investment does not exceed 10% of the average of three years export realisation or 200% of the net owed funds of the firm, whichever is lower

INVESTMENT BY REGISTERED TRUSTS

Investment by Registered Trusts (engaged in manufacturing / education / hospital sector) is allowed under approval route provided:

- i) The Trust should be registered under the Indian Trust Act, 1882;
- ii) The Trust deed permits the proposed investment overseas;
- iii) The proposed investment should be approved by the trustee/s;
- iv) The AD Category – I bank is satisfied that the Trust is KYC compliant and is engaged in a bona fide activity;
- v) The Trust has been in existence at least for a period of three years;
- vi) The Trust has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, Central Bureau of Investigation (CBI), etc.

INVESTMENT BY SOCIETY

Investment by Society (engaged in manufacturing / education / hospital sector) is allowed under approval route provided:

- i) The Society should be registered under the Societies Registration Act, 1860.;
- ii) The Memorandum of Association and rules and regulations permit the Society to make the proposed investment
- iii) The proposed investment should be approved by the governing body / council or a managing / executive committee. ;
- iii) The AD Category – I bank is satisfied that the Society is KYC compliant and is engaged in a bona fide activity;
- v) The Society has been in existence at least for a period of three years;
- vi) The Society has not come under the adverse notice of any Regulatory / Enforcement agency like the Directorate of Enforcement, Central Bureau of Investigation (CBI), etc.

LIBERALISED REMITTANCE SCHEME (LRS)

Salient Features of LRS

- Introduced in February 2004 as step towards liberalisation of foreign exchange facility for resident Individuals
- Available to all Resident individuals (RI) including minors
- Resident Individual can remit overseas up to USD 2.50 lakhs (revised w.e.f 26.5.2015) per FY for any permissible current/capital account transactions or combination of both
- This limit is over and above the permissible current account transaction limit (except gift and donation)
- Resident Individual can acquire shares or any other asset outside India without prior approval of RBI
- Acquisition of immovable property abroad not allowed under this scheme from 14th August, 2013
- Payment for acquisition under ESOP is permitted.

VALUATION

Indian party can make Overseas Direct Investment by acquiring overseas existing companies

- Valuation of shares of overseas entity is required
- Where investment exceeds USD 5 million – Valuation from Category I merchant banker registered with SEBI in India or outside India with appropriate authorities
- Where investment is less than USD 5 million – Valuation from Indian CA or CPA of the overseas country allowed
- In case of investment in WOS by Indian promoter at premium or discount

OBLIGATION OF INDIAN PARTY

- The Indian Party / Resident Individual
 - a) Should receive share certificates or other document evidencing investment within 6 months
 - b) Repatriate to India all dues receivable from the foreign entity like dividend, royalty, fees etc. within 60 days of their falling due or such further period as RBI may allow.
 - c) Submit to RBI (through AD) every year an Annual Performance Report (APR) in Part II of Form ODI in respect of each JV / WOS on or before December 31
- APR so required to be submitted has to be based on annual audited accounts of the JV/WOS unless specifically exempted by RBI.
- Certification of APR by Statutory Auditor or CA need not be insisted upon by AD. The AD may accept self-certification.

POST INVESTMENT CHANGES

- A JV / WOS may
 - a) Diversify its activities
 - b) Step up / Step down subsidiaries
 - c) Alter the shareholding pattern in Overseas Company
- The Indian Party should report to RBI through the AD, the details of such decisions within 30 days of the approval of those decisions by the competent authority of the JV / WOS concerned in terms of local laws of the host country and include the same in the Annual Performance Report (APR - Part II of Form ODI) required to be forwarded to the AD.

TRANSFER OF SHARES OF JV WITHOUT WRITE OFF

An Indian Party may transfer by way of sale to another Indian Party which complies with Regulation 6 of FEMA 120 or to a Person Resident Outside India, without any approval of RBI, if

- Sale does not result in write off of investment
- Sale is through the stock exchange
- In case not listed entity, transfer is not happening at prices less than determined by CPA or CA
- No outstanding dues from overseas entity
- Overseas entity is in operation for a period more than one year and the requisite APR form has been filed.
- Indian party is not under investigation by CBI/ED/SEBI/IRDA or any other regulatory authority in India

WRITE OFF

- Write off capital (equity/preference shares) and other receivables such as loans, royalty, technical fee etc is allowed, where amount repatriated after disinvestment is less than the original investment, under **Automatic route** under the following conditions :
 - JV/WOS is listed in the overseas stock exchange
 - Indian Party is listed on a stock exchange in India and has a Net Worth \geq Rs. 100 Crores and where Net Worth is $<$ Rs. 100 Crores, the investment in overseas JV / WOS \leq USD 10 Million
 - Where the Indian Party is an unlisted company, investment / financial commitment \leq USD 10 Million
 - Reporting to RBI through AD to RBI within 30 days in all cases
- Write-off not fulfilling above conditions to be allowed only under the RBI approval route.

EXTERNAL COMMERCIAL BORROWINGS

FRAMEWORK OF ECB REGULATIONS

- ECB policy is regulated by RBI in consultation with Central Government
- Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, amendments made to it from time to time.
- Initial broad framework – A.P. Dir Series Circular No. 5 dated 1.8.2005
- Draft guidelines placed in public domain for wider consultation - 23.9.2015
- Based on responses received and in consultation with Central Government, revised framework was finalised.
- Revised framework governed by circular RBI / 2015 -16 / 255 A.P. (Dir Series) Circular No. 32 dated 30.11.2015
- Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) (Amendment) Regulations, 2015 notified on 2.12.2015

FEATURES OF THE ECB FRAMEWORK

- A more liberal approach, with fewer restrictions on end uses, higher all-in-cost ceiling, etc. for long term foreign currency borrowings as the extended term makes repayments more sustainable and also minimizes roll-over risks for the borrower;
- A more liberal regime for INR denominated ECBs where the currency risk is borne by the lender;
- Expansion of the list of overseas lenders to include long-term lenders, such as, Insurance Companies, Pension Funds, Sovereign Wealth Funds;
- Only a small negative list of end-use restrictions applicable in case of long-term ECB and INR denominated ECB;
- Alignment of the list of infrastructure entities eligible for ECB with the Harmonised List of the Government of India.
- 7 eligible forms of ECB
- The revised ECB framework consists of three tracks

CARVE OUT

Entities raising ECB under extant framework can raise the said loans by March 31, 2016 provided the agreement in respect of the loan is already signed by the date the new framework comes into effect. For raising of ECB under the following carve outs, the borrowers were given time up to March 31, 2016 to sign the loan agreement and obtain the Loan Registration Number (LRN) from the Reserve Bank by this date:

- ECB facility for working capital by airlines companies;
- ECB facility for consistent foreign exchange earners under the USD 10 billion Scheme; and
- ECB facility for low cost affordable housing projects (low cost affordable housing projects as defined in the extant Foreign Direct Investment policy)

ELIGIBLE FORMS OF ECB

- Borrowings raised by permitted resident entities from recognized non – resident entities under the ECB framework can have one of the following forms:
 1. Bank loans;
 2. Securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares / debentures);
 3. Buyers' credit;
 4. Suppliers' credit;
 5. Foreign Currency Convertible Bonds (FCCBs);
 6. Financial Lease; and
 7. Foreign Currency Exchangeable Bonds (FCEBs)
- While 1 to 6 above can be raised both through automatic / approval route, FCEB's can be raised only through approval route.

FCCB AND FCEB

FCCBs are foreign currency denominated instruments which should be issued in accordance with the Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 as amended from time to time.

FCEBs should be issued in accordance with the Issue of Foreign Currency Exchangeable Bonds Scheme, 2008.

- The principal and interest in respect of these bonds are payable in foreign currency and these are convertible into ordinary shares of the issuing company or the offered company, as the case may be, in any manner, either in whole, or in part, on the basis of any equity related warrants attached to debt instruments.
- An Indian company, which is not eligible to raise funds from the Indian securities market, including a company which has been restrained from accessing the securities market by the Securities and Exchange Board of India (SEBI) shall not be eligible to issue FCCBs/FCEBs.

FCCB's are issued by a company to non-residents giving them the option to convert them into shares of the same company at a predetermined price. On the other hand, FCEBs are issued by the investment or holding company of a group to non-residents which are exchangeable for the shares of the specified group company at a predetermined price.

THREE TRACKS – REVISED ECB FRAMEWORK

TRACK I	Medium term foreign currency denominated ECB with Minimum Average Maturity (MAM) of 3/5 years
TRACK II	Long term foreign currency denominated ECB with MAM of 10 years
TRACK III	Indian Rupee denominated ECB with MAM of 3/5 years.

ELIGIBLE BORROWERS IN THE THREE TRACKS

Track I	Track II	Track III
<ul style="list-style-type: none"> i. Companies in manufacturing, and software development sectors. ii. Shipping and airlines companies. iii. Small Industries Development Bank of India (SIDBI). iv. Units in Special Economic Zones (SEZs). v. Export Import Bank of India (Exim Bank) (only under the approval route). vi. Companies infrastructure sector, NBFC-IFC, NBFC-AFC, NBFC- Holding Companies and CIC 	<ul style="list-style-type: none"> i. All entities listed under Track I. ii. Real Estate Investment Trusts (REITs) and iii. Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI). 	<ul style="list-style-type: none"> i. All entities listed under Track II. ii. All Non-Banking Financial Companies (NBFCs). iii. NBFCs-Micro Finance Institutions (NBFCs-MFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and cooperatives, NGOs which are engaged in micro finance activities¹. iv. Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services. v. Developers of Special Economic Zones (SEZs)/ National Manufacturing and Investment Zones (NMIZs). i. Note : Micro Finance activities to be eligible – borrowing relationship with AD Cat 1 and “DD Certificate from AD Cat 1 for fit and proper status”

SOME ISSUES IN ELIGIBLE BORROWERS

- LLP'S not included in the list
- Word “software sector” replaced by “software development”
- Infrastructure companies now to comply with MAM of 10 years.
- Hospital earlier part of service sector, now under “Infrastructure sector”
- Hotels now entirely under “Infrastructure sector”
- SEZ / NMIZ developers earlier under approval route now under automatic route, but can borrow only in INR
- NBFC's/ Micro finance entities – can now borrow only in INR
- Miscellaneous service sector –
 - now includes logistics sector
 - can now borrow only in INR (earlier permitted in forex)

RECOGNIZED LENDERS

TRACK I	TRACK II	TRACK III
<ul style="list-style-type: none">• International banks• International capital markets• Multilateral / Regional Government owned financial institutions• Export Credit Agencies• Suppliers of equipment• Foreign Equity Holders• Overseas Long Term investors viz.<ul style="list-style-type: none">▪ Prudentially regulated financial entities▪ Pension funds▪ Insurance companies▪ Sovereign Wealth Funds▪ Financial institutions in International Financial Service centres in India• Overseas branches / subsidiaries of Indian banks	<ul style="list-style-type: none">• Entities listed under Track I except for overseas branches and subsidiaries of Indian banks	<ul style="list-style-type: none">• Entities listed under Track II, but for overseas branches and subsidiaries of Indian banks• NBFC's – MFI's, other eligible MFI's not for profit companies and NGO's – Overseas Organisations and individuals satisfying prescribed conditions

RECOGNIZED LENDERS (Contd.)

Conditions to be fulfilled :-

- Indian Banks, their overseas branches / subsidiaries subject to prudential norms issued by RBI, Department of Banking Supervision
- Overseas organisations to comply with regulations of host country and such host country adheres to the Financial Action Task Force (FATF) guidelines on anti-money laundering (AML)/ combating the financing of terrorism (CFT.) guidelines and furnish certificate of due diligence from an overseas bank (i) that the lender maintains an account with the bank at least for a period of two years, (ii) that the lending entity is organised as per the local laws and held in good esteem by the business/local community, and (iii) that there is no criminal action pending against it.
- Individual lenders have to obtain a certificate of due diligence from an overseas bank indicating that the lender maintains an account with the bank for at least a period of two years. Other evidence /documents such as audited statement of account and income tax return, which the overseas lender may furnish, need to be certified and forwarded by the overseas bank. Individual lenders from countries which do not adhere to FATF guidelines on AML / CFT are not eligible to extend ECB.

All in Cost (AIC) Ceilings

- All-in-cost includes rate of interest, other fees, expenses, charges, guarantee fees whether paid in foreign currency or INR
- All-in-cost will not include commitment fees, pre-payment fees/ charges withholding tax payable in INR
- In the case of fixed rate loans, the swap cost plus spread should be equivalent of the floating rate plus the applicable spread

<i>Track I</i>	<i>Track II</i>	<i>Track III</i>
<ul style="list-style-type: none">• Average maturity of 3-5 years: 300 bps over the 6-month LIBOR• Average maturity of above 5 years: 450 bps over the 6-month LIBOR• Penal interest: Maximum 2% over and above contracted interest rate	<ul style="list-style-type: none">• Maximum spread of 500 bps per annum over the benchmark has been prescribed	<ul style="list-style-type: none">• In line with the market conditions

PERMITTED END USES

Track I

- Capital expenditure in the form of:
 - Import of capital goods (including for services, technical know-how and license fees)
 - Local sourcing of capital goods
 - New projects
 - Modernization/ expansion of existing units
 - Investment in Joint ventures (JV)/ Wholly owned subsidiaries (WOS) overseas
 - Acquisition of shares of PSU under the disinvestment programme
 - Refinancing of existing trade credit raised for import of capital goods
 - Payment of capital goods already shipped/ imported but unpaid
 - Refinancing of existing ECB, provided residual maturity is not reduced

Track I

- SIDBI - only for the purpose of on lending to borrowers in the MSME sector
- Units of SEZs - only for their own requirements
- Shipping and airlines companies - only for import of vessels and aircrafts
- For general corporate purpose (including working capital), provided the ECB is raised from direct/ indirect equity holder, or from a group company, for a minimum average maturity of 5 years
- ECBs under the approval route:
 - Import of second-hand goods as per DGFT guidelines
 - On-lending by Exim Bank

Permitted End-Uses (Continued)

Track II

- Any end-use other than the following:
 - Real estate activities
 - Investing in capital markets
 - Using proceeds for equity investment domestically
 - On-lending to other entities with any of the above objectives
 - Purchase of land
- Holding companies for providing loans to their infrastructure SPVs

Track III

- Any end-use other than the following:
 - Real estate activities
 - Investing in capital market
 - Using proceeds for equity investment domestically
 - On-lending to other entities with any of the above objectives
 - Purchase of land
- SEZs/ NMIZs Developers
 - Only for providing infrastructure facilities within SEZ/ NMIZ
- Specific prescribed end-uses for NBFCs and Micro Finance Institutions (MFI)

LIMITS UNDER AUTOMATIC ROUTE

i. The individual limits of ECB that can be raised by eligible entities under the automatic route per financial year for all the three tracks are set out as under:

- Upto USD 750 million or equivalent for the companies in infrastructure and manufacturing sectors;
- Upto USD 200 million or equivalent for companies in software development sector;
- Upto USD 100 million or equivalent for entities engaged in micro finance activities; and
- Upto 500 million or equivalent for remaining entities.

ii. ECB proposals beyond aforesaid limits will come under the approval route. For computation of individual limits under track III, exchange rate prevailing on the date of agreement should be taken into account.

iii. These limits are separate from the limits allowed under the framework for issuance of Rupee denominated bonds overseas.

CURRENCY OF BORROWING

- ECB can be raised in any freely convertible currency as well as in INR
- For INR-denominated ECB, lenders (other than foreign equity holders) are required to mobilize INR through swaps/ outright sale undertaken through an AD Category I bank in India
- Change of currency from one convertible foreign currency to another convertible foreign currency/ INR is freely permitted
- Rate for conversion into INR:
 - Rate prevailing on the date of agreement for such change or any exchange rate lower than the rate prevailing on the date of agreement
- Change of currency from INR to foreign currency is not permitted

Refinancing of existing ECB

- Raising fresh ECB for part refinance is permissible
 - No reduction in residual maturity of the ECB and
 - Fresh ECB has lower all-in-cost

CONVERSION OF ECB INTO EQUITY

- Conversion is permitted subject to the following conditions : -
 - Activity of borrowing company is covered under the automatic route
 - FIPB approval has been obtained in approval route, if not eligible under automatic route
 - Equity after conversion does not exceed sectoral caps
 - Applicable pricing guidelines have been compiled with
- Exchange rate prevailing on the date of the agreement between the parties for such conversion to be considered
- Lower exchange rate can be taken
- Fair value of equity shares to be calculated on the date of conversion and supported by valuation report from CA or CMA or SEBI registered Category I Merchant Banker

PREPAYMENT OF ECB

- Prepayment of ECB may be allowed by AD Category I banks subject to compliance with the stipulated minimum average maturity as applicable to the contracted loan
- Illustration to calculate minimum average maturity:

USD mn

Particulars	Percentage	Amount	Date	Period in Years	Weighted Average
Drawdown	100%	100.00	01-Apr-2015		
Repayment I	20%	20.00	30-Sep-2019	4.50	90.00
Repayment II	30%	30.00	31-Mar-2020	5.00	150.00
Repayment III	20%	20.00	31-Mar-2021	6.50	130.00
Repayment IV	30%	30.00	31-Mar-2022	7.50	225.00
Total	100%	100.00			595.00
Average Maturity in years			5.95		

ISSUE OF GUARANTEES

- (i) A copy of Board Resolution for the issue of corporate guarantee for the company issuing such guarantee, specifying name of the officials authorised to execute such guarantees on behalf of the company or in individual capacity should be obtained.
- (ii) Specific requests from individuals to issue personal guarantee indicating details of the ECB should be obtained.
- (iii) Such security shall be subject to provisions contained in the Foreign Exchange Management (Guarantees) Regulations, 2000.
- (iv) ECB can be credit enhanced / guaranteed / insured by overseas party / parties only if it / they fulfil/s the criteria of recognised lender under extant ECB guidelines.
- (v) Issuance of guarantee, standby letter of credit, letter of undertaking or letter of comfort by Indian banks, All India Financial Institutions and NBFCs relating to ECB is not permitted.

DEBT EQUITY AND ECB LIABILITY TO EQUITY RATIO

- Borrowing entities to be governed by leverage ratio, if any, prescribed by sectoral or prudential regulator concerned.
- ECB Liability to Equity not $> 4:1$ of the equity contributed by the lender for ECB's under automatic route
- ECB Liability to Equity not $> 7:1$ for ECB's under approval route
- These ECB liability to Equity ratio ceilings not applicable for ECB's raised by an entity up to USD 5 Million or equivalent

Note :

a) the paid-up capital, free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet can be reckoned for the purpose of calculating the 'equity' of the foreign equity holder for the purpose of ECB liability to equity ratio

b) Where there are more than one foreign equity holders in the borrowing company, the portion of the share premium in foreign currency brought in by the lender(s) concerned shall only be considered for calculating the ratio.

PROCEDURE OF RAISING ECB & REPORTING REQUIREMENTS

- For Automatic Route application in Form 83 – one copy to AD and one set to Department of Statistics and Information Management (DSIM), RBI certified by CS / CA.
- For approval route apply in Form ECB to RBI, Central Office through AD.
- Approval cases are considered by Empowered Committee keeping in view the overall guidelines, macroeconomic situation and merits of the specific proposals
- Drawdown of loan is permitted only after receipt of Loan Registration Number (LRN) in case of automatic route and RBI approval in case of approval route.
- Borrowers availing ECB have to submit monthly ECB 2 return through their AD duly certified by CS / CA such that it reaches DSIM within 7 working days of the closure of the month

POWERS DELEGATED TO AD BANK

- Changes/modifications in the drawdown/repayment schedule
- Changes in the currency of borrowing
- Change of the AD Cat I bank
- Changes in the name of the Borrower Company
- Transfer of ECB
- Change in the recognized lender/ lender
- Prepayment of ECB
- Cancellation of LRN
- Change in the end-use of ECB proceeds
- Reduction in amount or all-in-cost of ECB
- Refinancing of existing ECB

Thank You